

Bankruptcy and Insolvency

The information contained in this bulletin will be useful if you are one of the following:

- a trustee in bankruptcy
- a monitor
- a receiver
- a secured creditor
- a landlord, or
- an agent for any person who conducts business in Ontario.

This bulletin outlines your responsibilities and describes the Ministry of Revenue's policies and procedures related to insolvency and liquidation proceedings.

The federal *Bankruptcy and Insolvency Act* (BIA) and *Companies' Creditors Arrangements Act* (CCAA) are administered by the Office of the Superintendent of Bankruptcy (OSB) and the Courts respectively. Once passed, amendments to the CCAA will affect the administration of CCAA files and bring them under the control of the OSB. The Ontario Ministry of Revenue (ministry) established the Bankruptcy and Insolvency Unit (BIU) to represent the ministry in all insolvency proceedings where provincial taxes are outstanding.

Trustees in Bankruptcy

A trustee in bankruptcy (trustee) is responsible for administering the affairs of the bankrupt estate. This involves, inter alia, preparing an inventory of existing assets, releasing assets to the secured creditors, gathering and liquidating existing assets, reviewing claims to the assets, and paying dividends to creditors in accordance with the scheme of distribution in Section 136 of the BIA.

Trustees are required to collect and remit the applicable retail sales tax (RST) on the sale of the bankrupt's assets and/or during their operation of the bankrupt's business. Unless trustees obtain a properly completed Purchase Exemption Certificate (PEC) from the purchaser, they must collect and remit the applicable RST. Refer to **RST Guide 204 - Purchase Exemption Certificates** for more information.

Where a bankruptcy occurs mid-month, both the pre-bankruptcy and post-bankruptcy return(s), if any, should be forwarded to the BIU for processing. The existing RST Vendor Permit number should be used. If a trustee operates the bankrupt's business, the bankrupt's RST Vendor Permit number should be used for filing all post-bankruptcy RST returns and remittances, until the estate has been finalized.

The BIU will file a consolidated proof of claim for all tax arrears owing under each of the statutes administered by the ministry, including the *Retail Sales Tax Act* (RSTA). Where a personal or real property lien has been registered under the personal property or real property registration systems, the ministry will file its proof of claim as a secured creditor.

In a bankruptcy and for proceedings under the CCAA, the ministry lien takes priority to subsequently registered security interests, with the exception of a valid Purchase Money Security Interest.

In the event that a trustee intends to disclaim its interest in any property (real or personal) belonging to a bankrupt business, the ministry requires written confirmation from the trustee, together with documentation to confirm the property's fair market value. This usually takes the form of an independent appraisal.

Proposals (BIA and Plans of Arrangement (CCAA))

The BIU examines all Proposals and Plans filed under the BIA and CCAA to determine their merits and how the ministry will vote its claim. There may be occasions when the ministry will ask for an adjournment to obtain further documentation and information prior to voting.

The ministry has a secured claim for any Personal Property Security Act and Real Property liens registered for any proceedings under the BIA or the CCAA provided the lien was registered before the respective Notice of Intention, Proposal or Initial Order was filed.

Receivers and Secured Creditors

Receivers are required to collect and remit the applicable RST on the sale of the debtor's assets. Unless receivers obtain a valid PEC from the purchaser, they must collect and remit the applicable RST, using the debtor's existing RST Vendor Permit number. Refer to **RST Guide 204 - Purchase Exemption Certificates** for more information.

A claim for RST collected or collectable plus penalties and interest accrued after January 1, 1998 takes full priority over all security interests, whether or not the security interest was acquired before that date. All security interests are affected, including, but not limited to, an interest created by, or arising from any of the following:

- a debenture
- a mortgage
- a lien
- a pledge
- a charge, deemed or actual trust, or
- an assignment or encumbrance.

Notices

Under subsection 22(5) of the RSTA, an assignee, liquidator, receiver, receiver-manager, secured creditor, or agent of the creditor, who takes control or possession of a vendor's property, must obtain a Clearance Certificate from the ministry before distributing such property or the proceeds from the realization of the property. Failure to obtain this certificate will result in the personal liability of such person for the amount owing by that vendor to the ministry.

When a receivership occurs mid-month, both the pre-receivership and post-receivership return(s) and payment should be forwarded to the BIU for processing. The debtor's existing RST Vendor Permit number should be used. If a receiver/manager/secured creditor continues to operate the business, the debtor's existing RST Vendor Permit should be used to file all post-receivership returns and remittances, until the receivership has been finalized and the assets have been sold.

Trustees and Receivers (BIA) and Monitors (CCAA) should forward all Notices of First Creditor Meetings and insolvency correspondence for the Ministry of Revenue to the following address:

Ministry of Revenue
Revenue Collections Branch
Bankruptcy and Insolvency Unit
6th Floor, 33 King Street West
Oshawa, ON L1H 8H5

Trustees should add the Ministry of Revenue to the supplementary mailing lists for all filings where debtors may have tax accounts with the ministry for retail sales tax, corporation tax, employer health tax, motor fuel tax, or tobacco tax, regardless of whether or not there is an outstanding balance. Please include the ministry account numbers, if known.

Landlords in Possession

Pursuant to the *Commercial Tenancies Act* (CTA) a landlord in Ontario has the right to either terminate the lease or distraint on the tenant's goods where the tenant is in default. The RSTA gives the ministry a priority over the landlord's lien. Given the confidential nature of the tax debtor's account, the ministry is constrained on releasing certain taxpayer information. The landlord or agent may, prior to proceeding, fax the BIU at 905-436-4524 a request that the ministry file an updated PPSA lien to determine the amount owing to the ministry.

In the event that a landlord or agent has seized a tenant's assets and the tenant is indebted to the ministry under the RSTA, the landlord or agent will be deemed to hold the assets or proceeds in trust for the ministry. At that point, the landlord or agent is legally entitled to obtain information regarding the client's RST outstanding balance. The landlord or agent must forward a letter, preferable via fax, to the nearest Ontario Ministry of Revenue Tax Office stating the following:

1. the landlord/agent has taken possession of the taxpayer's assets
2. the name and address of the landlord who took possession
3. the name and address of any agent involved
4. legal name of the tenant and Vendor Permit number, if available
5. tenant's address
6. date of possession, and
7. a copy of the Notice of Distraint.

Upon receipt of the above information and documentation, the ministry will advise the landlord or agent of the amount of the deemed trust claim.

Under subsection 22(3) of the RSTA, the ministry is deemed to be the beneficial owner of the tenant's property to the extent of the tenant's RST debt. If the landlord intends to sell the goods of a tenant under distraint, the landlord is required to remit the RST owing to the ministry out of the proceeds of the sale, in priority to all security interests including the distraint/ possessory lien for rental arrears, and obtain a Section 22 Clearance Certificate. Failure to remit these funds and obtain a Section 22 Clearance Certificate will result in the landlord and/or agent being personally liable for the amount of RST owing by the tenant under the RSTA.

The ministry may accept the net proceeds from the sale of the vendor's assets to the extent of the tenant's unpaid RST debt, provided the seller has obtained fair market value for those assets. Landlords in this situation will be allowed to retain their reasonable costs and expenses incurred in taking possession and in selling the goods. If the tenant's goods are distributed or sold for less than the fair market value, the ministry may hold the landlord/agent liable for the full RST trust claim.

Licensed Establishments

All liquor licence transfers and applications must be directed to the Alcohol and Gaming Commission of Ontario under the *Liquor Licence Act* of Ontario.

Director's Liability

Under section 43 of the RSTA, in the event that a corporation fails to collect or remit the applicable RST, the directors of the corporation may be held jointly and severally liable with the corporation for the tax owing and any related interest or penalties. Such liability arises where a director does not exercise the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances. The ministry may collect the RST owing from directors using the prescribed remedies under the RSTA, including warrants of execution, garnishments, and liens on real and personal property.

For further information, please contact the Revenue Collections Branch, Bankruptcy and Insolvency Unit toll free at 1 888 584-6363 or forward a letter to:

Ministry of Revenue
Revenue Collections Branch
Bankruptcy and Insolvency Unit
6th Floor, 33 King Street West
Oshawa, ON L1H 8H5

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