Direct taxation of persons who receive distributions of surplus assets in the liquidation of Australian companies occurs under either the deemed dividends or capital gains regimes. Section 47 of the Income Tax Assessment Act 1936 (Cth) has deemed dividends for income taxation for over 80 years and the regime contains many anomalies. High Court judgments have attributed a questionable ‘character’ to liquidation distributions, as a response to the Act’s exclusion of (once) tax-free, ‘capital’ amounts. Division 7A applies to liquidation distributions in quite limited circumstances. The Income Tax Assessment Act 1997 (Cth) capital gains regime better reflects the general law nature of liquidation surpluses and does so with fewer fictions. The main effect of GST on corporate insolvency, by contrast, concerns debt recovery. Positions of the Australian Taxation Office (‘the ATO’) and other creditors must be equalised when debts are released subsequent to the payment of imputation tax credits by the ATO. Stamp duty is not payable on commencement of liquidation in any Australian jurisdiction. However, only South Australia exempts distributions of dutiable property made by liquidators to the shareholders of liquidating companies.

1. INTRODUCTION

1.1 Who is a ‘Liquidator’ under the Corporations Act?

‘Liquidators’ are largely undefined in the Corporations Act 2001 (Cth), though the functions of liquidators are extensively described in Parts 5.4 to 5.6\(^1\) of the Act and liquidators’ qualifications are set out

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* Barrister, Victorian Bar; Associate Professor, Faculty of Law, Monash University.
\(^1\) Specifically, ch 5 pts 5.4, 5.4A, 5.4B, 5.5, 5.6.
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in Part 9.2. The ‘Small Business Guide’ in Part 1.5 contains the following statement of a liquidator’s tasks. Matters of taxation significance mostly relate to the penultimate dot point.

12.4 Liquidators

A liquidator is appointed to administer the winding-up of a company. The liquidator’s main functions are:

- to take possession of the company’s assets; and
- to determine debts owed by the company and pay the company’s creditors; and
- to distribute to shareholders any assets of the company left after paying creditors (any distribution to shareholders is made according to the rights attaching to their shares); and
- finally, to have the company deregistered.

1.2 Who is the ‘Liquidator’ under the Income Tax Assessment Acts?

A ‘liquidator’, in terms of s 6(1) of the Income Tax Assessment Act 1936 (Cth) (‘the ITAA36’) and s 136(1) of the Fringe Benefits Tax Assessment Act 1986 (Cth), ‘means the person who, whether or not appointed as liquidator, is the person required by law to carry out the winding-up of a company.’ The term is undefined in the Income Tax Assessment Act 1997 (Cth) (‘the ITAA97’).

1.3 Effect of Winding-Up

All dispositions of a company’s property are invalidated from the time of the making of a winding-up order, or from the time of the
passage of a competent corporate winding-up resolution. Directors’ powers are suspended and control of the company passes to the liquidator, who collects and sells the company’s assets, exercises statutory powers, and divides the proceeds between creditors and others according to the terms of a statutory formula.\(^5\)

Liquidation of a corporation radically affects the competence of its members. Corporate membership rights cannot be varied and shareholdings cannot be transferred once liquidation commences.\(^6\) Since the directors’ ability to declare dividends is one of the powers suspended from the time of liquidation, members cannot receive dividends on their shares in liquidating companies.\(^7\) Gower remarks that:

\[\text{[O]nce a company goes into liquidation, the distinction between shareholders and creditors becomes more than usually difficult to draw; the members’ interests will, in effect, have become purely financial interests deferred to those of the creditors.}\(^8\)

Some of these propositions have been restated in tax litigation. Liquidators, for example, were said (see Glenville Pastoral Co Pty Ltd v Federal Commissioner of Taxation)\(^9\) to be incompetent to capitalise, de-capitalise or otherwise change the tax status of a company’s financial accounts, in the absence of a corresponding statutory power. The majority in Commissioner of Taxation (NSW) v Stevenson\(^10\) denied that liquidators could distribute any profits made before or during the liquidation to shareholders as ‘dividends’.\(^11\) More expansively, liquidators have been said to have no power to

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\(^5\) See Corporations Act 2001 (Cth) s 477 (powers in a winding-up in insolvency or by the court), s 506 (additional powers in a voluntary winding-up), pt 5.6 div 6 (statutory ranking of claims).

\(^6\) Corporations Act 2001 (Cth) s 468(1).

\(^7\) Corporations Act 2001 (Cth) s 471A(1).

\(^8\) L. Gower, Gower’s Principles of Modern Company Law (6th ed, 1997) 834.


\(^10\) (1937) 59 CLR 80, 101 (Rich, Dixon and McTiernan JJ).

\(^11\) Apart from what is deemed by statute. See n 35, below.
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distinguish between income and capital ‘for any purpose’: their task is only to realise and distribute the assets of companies to which they are appointed.\(^{12}\)

1.4 Sources and Character of Liquidation Surpluses

Surpluses distributed can be debited by liquidators to company financial accounts, including the following:\(^{13}\)

- paid-up share capital accounts;\(^{14}\)
- share premium accounts;\(^{15}\)
- pre-CGT capital gains accounts;\(^{16}\)
- post-CGT capital gains accounts;\(^{17}\)
- retained pre-liquidation earnings (after tax) accounts;\(^{18}\) and
- retained liquidation earnings (after tax) accounts.\(^{19}\)

Distributions sourced from these six accounts are taxable in an ascending degree. Payments out of ‘untainted’, paid-up share capital accounts are usually tax-exempt. On the other hand, payments

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\(^{12}\) See *Inland Revenue Commissioners v Burrell* [1924] 2 KB 52, 68 (Atkin J).

\(^{13}\) Pursuant to the principle in *Archer Brothers Pty Ltd v Federal Commissioner of Taxation* (1953) 90 CLR 140, discussed in the text accompanying n 21, below.

\(^{14}\) See *Federal Commissioner of Taxation v Brewing Investments Ltd* (2000) 100 FCR 437 (paid-up capital of subsidiaries); *Archer Brothers Pty Ltd v Federal Commissioner of Taxation* (1953) 90 CLR 140 (replacement of paid-up capital).

\(^{15}\) Not after 1 July 1998, when this account was included in share capital: see *Company Law Review Act 1998* (Cth) sch 5.

\(^{16}\) See *Gibb v Federal Commissioner of Taxation* (1966) 118 CLR 628; *Case 40* (1957) 7 CTBR (NS).

\(^{17}\) See now ITAA36 s 44(1A).


\(^{19}\) See *Archer Brothers Pty Ltd v Federal Commissioner of Taxation* (1953) 90 CLR 140.
comprised of retained liquidation earnings are potentially taxable as both ‘deemed dividends’ and ‘capital gains’ in the hands of shareholders to whom they are distributed.

Common law applicable to the winding-up of a company treats the character of the available assets and accounts of the company as a single mass of assets. Stated by the High Court in Archer Brothers Pty Ltd v Federal Commissioner of Taxation, the general law position is that:

[W]hen a company goes into liquidation the whole of its property, whether that property is of a capital nature or consists of undistributed profits, becomes assets in the hands of the liquidator out of the mass of which he is under a statutory duty to pay the costs, charges and expenses of the winding-up and to distribute the surplus amongst the shareholders … Such distributions are distributions of capital. They are not liable to be assessed to income tax … IRC v Burrell.

Australian statute repealed the ‘capital’, non-assessable character of liquidation distributions and the ratio of Inland Revenue Commissioners v Burrell in 1928. Distributions of ‘income derived by the company (before or after the liquidation)’ were then deemed to be ‘dividends paid to the shareholders by the company out of profits derived by it.’

In Archer Brothers, the High Court also stated a significant principle. The fiscal character of distributions received by company shareholders was equivalent to that of the account or accounts from which the distributions were drawn. ‘By a proper system of book-keeping’, the Court said,

the liquidator, in the same way as the accountant of a private company which is a going concern, could so keep his accounts that

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20 (1953) 90 CLR 140, 151–2.
21 [1924] 2 KB 52 (Court of Appeal).
22 By the insertion of s 16B in the Income Tax Assessment Act 1922 (Cth).
23 See now ITAA36 s 47(1).
these [liquidation] distributions could be made wholly and exclusively out of particular profits and income.\textsuperscript{24}

Appropriation of a distribution to a particular fund, in other words, determines the character of the distributed amount.\textsuperscript{25} The fiscal character of amounts received by companies as ‘contributed capital’, and ‘tax-preferred income’, does not ‘wash out’ in the course of liquidation distributions as it does in dividend distributions made prior to liquidation.\textsuperscript{26}

The Archer Brothers principle imports equitable assumptions associated with the taxation of trusts and partnerships into the regime for taxing liquidation distributions. Probably, the wording of the qualification contained in ITAA36 s 47(1) suggested the doctrinal transposition. ‘[T]o the extent to which [the distributions] represent income derived by the company’, it is provided, shareholders are deemed to be paid ‘dividends’ by way of liquidation distributions. ‘Represent’ is the critical word. It implies that the ‘dividends’ possess and retain the tax character of the fund which was their source. Comparably, in the taxation of trusts, interposition of trustees between the source of trust income and the beneficiaries who receive it does not alter the ‘origins and parentage’ of that income from the form in which it was received by the trustees.\textsuperscript{27} This is conduit, or ‘flow-through’, taxation. In this context, it is facilitated by the ability of liquidators to tax-efficiently appropriate distributions from any

\textsuperscript{24} (1953) 90 CLR 140, 155.
\textsuperscript{25} The view of the Australian Taxation Office (‘the ATO’): see Taxation Determination TD 95/10 [2].
\textsuperscript{26} For example, distributions of pre-CGT capital gains and other tax-exempt amounts paid to the company by the liquidators of subsidiary corporations: see the reasoning in Federal Commissioner of Taxation v Brewing Investments Ltd (2000) 100 FCR 437, 450 (Hill J, with whom Sundberg and Heerey JJ agreed).
\textsuperscript{27} See Baker v Archer-Shee [1927] AC 844, 860–1 (Lord Atkinson), explained in Archer-Shee v Baker (1928) 15 TC 6, 19 (Russell LJ) (Court of Appeal). See also Taxation Review Committee (‘the Asprey Committee’), Full Report (1975) [15.6].
account they please.\(^{28}\) Paid-up share capital or share premium status may exempt distributions which shareholders receive if the same are sourced by liquidators from the corresponding company account.

In *Burrell’s Case*,\(^{29}\) to the contrary of *Archer Brothers*,\(^{30}\) it was decided that the character of liquidation distributions ‘depends entirely on the circumstances in which the [distributions are] made.’ Fiscal character as profits, or capital, did ‘wash out’ in the course of distribution of these sums through the company to its shareholders. Shareholders in *Burrell* were not to be treated as receiving ‘profits’, even though the liquidator drew relevant funds from the company’s profit account. There is no ‘presumption’, said Sargant LJ, that what is income in the hands of the company is also income in the hands of a shareholder. Much of the jurisprudence on s 44(1) of the ITAA36 is to the same effect.\(^{31}\) Nevertheless, when a liquidator debits a distribution to a company’s share capital account, or to an account containing profits made from the disposal of assets acquired before 1985, shareholders will be taken to receive a tax-exempt return of paid-up capital or tax-exempt capital gains.\(^{32}\)

Australia, in common with at least three countries with comparable tax systems, taxes liquidation distributions as both (deemed) income and capital gains.\(^{33}\) ‘Dividend treatment’ and

\(^{28}\) The *Archer Brothers* principle was accepted and explained by the ATO in *Taxation Determination TD 95/10 [2]–[4]* and *Taxation Determination TD 2000/5 [1]–[2]*.

\(^{29}\) [1924] 2 KB 52, 73.

\(^{30}\) (1953) 90 CLR 140.


\(^{32}\) Subject to CGT event C2 applying to the capital proceeds: see discussion in the text accompanying n 86, below.

‘capital gains treatment’ are applied cumulatively in Australia, though current ATO interpretation of the ITAA97 problematically withholds capital gains treatment from liquidation distributions made ‘because of the [same] event’.34

2. THE ‘DIVIDEND APPROACH’ TO LIQUIDATION SURPLUS DISTRIBUTIONS

2.1 ITAA36 Section 47 ‘Distributions by Liquidator’

Company profits distributed by liquidators in the course of winding-up are taxable to shareholders as ‘dividends’ under s 44(1) of the ITAA36. Liquidation distributions as dividends are brought within the scheme of the imputation system.35 The operative provision is ITAA36 s 47(1). Wording will be examined in dissected form.

47 Distributions by Liquidator

(1) Distributions to shareholders of a company by a liquidator in the course of winding-up the company, to the extent to which they represent income derived by the company

distributions made in the liquidation of a ‘taxable Canadian corporation’ which is not a 90 percent subsidiary of its parent. Section 88(2) of the Income Tax Act 1985 (Can) provides that liquidation surpluses from certain accounts are taxable by way of dividend in the hands of shareholders to whom they are distributed: see CCH, Canadian Master Tax Guide (59th ed, 2004) 6380, 6395. New Zealand taxes distributed liquidation surpluses equivalently to dividends, excepting the proportion which represents a return of share capital. The United States of America (‘the USA’) does not accord liquidation surplus distributions ‘dividend treatment’, or make any comparable assimilation. The Internal Revenue Code treats distributions as consideration received by shareholders in exchange for their stock (or shares) in the liquidating corporation. Shareholders are assessed on a consequent capital gain (or loss) made after comparing the amount distributed with the stockholder’s ‘basis’ in the stock: see IRC § 1.331-1 (1994).

34 See ITAA97 s 118-20(1).
35 Specifically, ‘distribution’ refers to a ‘frankable distribution’ in ITAA97 s 202-30, which is defined by s 960-120(1) to include ‘a dividend, or something that is taken to be a dividend, under this Act’.
(whether before or during the liquidation) other than income which has been properly applied to replace a loss of paid-up share capital, shall, for the purposes of this Act, be deemed to be dividends paid to the shareholders by the company out of profits derived by it.

2.1.1 Distributions to Shareholders of a Company by a Liquidator in the Course of Winding-Up the Company

Formal and informal liquidations are brought within the scope of the section through additional deeming in s 47(2A). Where the business of a company is, or is in the course of being, discontinued otherwise than by a formal winding-up, and moneys or other property are distributed to shareholders otherwise than as dividends, any company distribution is deemed to be made by a liquidator in the course of a winding-up. However, if dissolution of the company does not occur with three years of the distribution, sub-s (2A) does not apply. Alternative deeming in this event treats the distribution as a dividend paid by the company to its shareholders out of profits.

The territorial reach of s 47(1) is put into question when distributions are made by the liquidators of companies which derive income from non-resident subsidiaries, and in successive liquidations, where companies in liquidation receive distributions in the liquidation of non-resident subsidiaries and associates. The deeming effect of s 47(1) is problematic, as will be seen, in relation to ‘income’ derived from ex-Australian sources. Where the company is a non-resident, ‘income’ should arguably be restricted to income from sources in Australia, in the absence of the taxpayer’s concession.

A further problem arises with the different senses of ‘liquidator’ and ‘liquidation’ in foreign legal systems. Should application of s 47(1) depend on the apparent similarity of foreign legal procedures,

\[\text{\underline{36}}\text{ Inserted in 1967 and overturning the effect of Federal Commissioner of Taxation v Blakely (1951) 82 CLR 388, 405 (Fullagar J, with whom Dixon J agreed).} \]
\[\text{\underline{37}}\text{ ITAA97 s 47(2B).} \]
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and accounting records designed to satisfy different taxation codes? Not only do few tax jurisdictions have the same definition of ‘income’, liquidations occur in different ways in different countries. Characterisation problems comparable to those in the area of conflict of laws can arise with the use of Australian definitions in order to interpret the foreign reach of Australian taxation law.\textsuperscript{38} Perhaps the spread of the new \textit{International Accounting Standards} promulgated in 2005 will supply a contemporary link between foreign jurisdictions and Australian tax requirements.

The High Court in \textit{Parke Davis & Co v Federal Commissioner of Taxation} ignored both problems in holding that the terms of s 47(1) are ‘independent of considerations of locality’ and applied the section to facts which contained a substantial foreign element. Parke Davis was a non-resident company, incorporated in the USA, which received a distribution in the liquidation of a related company, also incorporated in the USA. The dividend included profits with an Australian source. Distributions from a liquidating US subsidiary to Parke Davis were, by the application of s 47(1), found to include a deemed dividend out of profits that Parke Davis had derived. The High Court confirmed that the component of the distribution which had an Australian source was assessable as a dividend paid to Parke Davis under ITAA36 s 44(1). Reasoning to its conclusion, the Court said:

we think that s 47(1) should be treated as having an application which is independent of considerations of locality and the like and as being concerned only with a certain type of transaction; that kind of transaction it brings within the ambit of the provisions of s 44(1) which relate to the assessability of dividends. Accordingly, we think that in this particular case the transaction does fall within s 47(1). It falls within it because the assets which were handed over by the

\textsuperscript{38} See \textit{Government of India v Taylor} [1955] AC 491, 514 (Lord Keith).
liquidator to the parent company included as an unseparated part profits made in the requisite accounting period.  

Arguably, the ‘kind of transaction’ to which s 47(1) referred to necessarily involves a distribution by an official independent of the company liquidated. ‘Liquidators’ in Australia must satisfy this criterion.  

Section 44(1), not s 47(1), would have been more appropriate if it were the company and not the liquidator that was making the relevant distribution.

The ‘plan of liquidation, the agreement, and the resolutions which were passed at Detroit’, detailed in the Parke Davis judgment, include no reference to any ‘liquidator’ of the subsidiary. Distribution in the liquidation of the Colorado company (the subsidiary) to the Michigan company (the parent) occurred, in fact, by way of an ‘agreement’ between the two companies. This is unsurprising in the USA. The Internal Revenue Code describes ‘corporate liquidation’ as proceeding by a ‘plan’ pursuant to which the surplus value of the liquidating corporation’s stock is ‘redeemed’ through a series of ‘distributions’ made by and in the name of the company undergoing liquidation. The judgment in Parke Davis treated this ‘agreement’ as consonant with Australian procedure. Yet note that in Blakely v Federal Commissioner of Taxation, Fullagar J found that the absence of a ‘liquidator’ appointed at the relevant time was one of the reasons that s 47(1) was inapplicable. Arguably the

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39 (1959) 101 CLR 521, 526.
40 See ITAA36 s 6(1) definition: ‘liquidator means the person who, whether or not appointed as liquidator, is the person required by law to carry out the winding-up of a company’.
41 Parke Davis & Co v Federal Commissioner of Taxation (1959) 101 CLR 521, 522–4, 526. The agreement was said to be ‘adopted’ by resolutions of the two companies’ boards of directors.
42 IRC § 331 (1994).
43 (1951) 82 CLR 388, 405 (Dixon J agreeing).
44 Paragraph (b) of ITAA36 s 47(2A), which reversed Blakely after Parke Davis was decided, requires that relevant money be distributed ‘otherwise than by the company’ before receiving ‘dividend treatment’.
assessments in *Parke Davis* should not have been based on s 47(1) but rather on the holding company’s receipt of a standard ‘dividend’ pursuant to s 44(1). *Parke Davis* may have too quickly assumed the factual basis under foreign law for the application of s 47(1).

This ‘unrestricted’ view of s 47(1) was followed by the Full Court of the Federal Court in *Federal Commissioner of Taxation v Brewing Investments Ltd*.45 The ratio of *Parke Davis* was applied to more complicated facts. Brewing Investments was an Australian resident company and the ultimate parent of three, related non-resident companies, which wholly owned each other in a chain. The three non-resident companies were placed in liquidation. Net assets of each were distributed to the next company in the chain. Distributions cascaded to the sum of US$70,238,424 received by Brewing Investments from the company at the top of the chain, in a final distribution which comprised:

- US$38,524,959 (a return of paid-up share capital);
- US$4,359,855 (income reserves); and
- US$27,453,610 (capital profits reserve).

The Federal Commissioner of Taxation (‘the Commissioner’) conceded that the category of return of paid-up share capital was outside s 47(1) and could not on any basis be ‘income derived by the [distributing] company’. The Commissioner contended that distributions from income reserve accounts along the ownership chain constituted ‘income’ derived by the final company, despite the final company being non-resident and each relevant distribution having a foreign source. For the purpose of assessing this, it was assumed by the Court that companies further down the chain had made (and the accounts contained) ‘income’ profits in the requisite sense. From this it reasoned that application of s 47(1) to distributions made in the liquidation of those companies meant that

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45 (2000) 100 FCR 437 (‘Brewing Investments’).
dividends out of profits were paid to the extent of the ‘income’ proportion of the distributions. Section 47(1) was held to operate at each stage in the cascading series of off-shore liquidations, that is to say. No evidence was received about the conformability of the foreign liquidation procedures to Australian law. We shall examine under the next heading the correctness of the Court’s assumption that the distributions had an ‘income’ nature according to the appropriate tests.

2.1.2 To the Extent That the Distributions Represent Income Derived by the Company

For many years opinion was divided about the meaning of ‘income’ as it appears in ‘to the extent to which it represents income derived by the company’. A body of authority asserted that ‘income’, in context, referred exclusively to ‘income according to ordinary concepts’. In 1987 the matter was put beyond question by the insertion of s 47(1A). ‘Income’ for the purposes of s 47(1) was provided to ‘include’ a reference to an amount included in the company’s assessable income in an accounting period (except a capital gain). ‘Income’ includes net capital gains (the sub-section continues) on the basis that capital losses are not offset and no indexation applies. It follows that, in the liquidation of Australian companies, the senses of both ‘ordinary income’ under the ITAA97 s 6-5 and ‘statutory income’ under the ITAA97 s 6-10 are applicable in determining whether a distribution will ‘represent’ income. Perhaps s 47(1) should always have borne the construction ‘includes

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46 Ibid 452 (Hill J, with whom Sundberg and Heerey JJ agreed).
47 The liquidations were regulated by the laws of the Turks and Caicos Islands, Bermuda and Hong Kong; see ibid 438–40.
an amount included in the company’s assessable income’. This would make it consistent with the original terms of s 16B of the *Income Tax Assessment Act 1922* (Cth). Section 16B used the expression ‘which would have been assessable in the hands of the members or shareholders if distributed to them by a company not in liquidation’ after ‘(whether prior to or during liquidation)’. For some reason the words were omitted when the provision was re-enacted as ITAA36 s 47(1). Plainly Parliament in 1928 had meant to refer to ‘assessable income’ rather than ‘income according to ordinary concepts’. One should bear this in mind when assessing the carefully drafted judgments of celebrated Australian jurists which reached an opposite conclusion.

The sense of ‘income’ applicable to the ex-Australian facts of *Parke Davis* and *Brewing Investments* is not clarified by s 47(1A). Relevant subsidiaries in each case had no ‘assessable income’ in Australia. Windeyer J noted in *Gibb v Federal Commissioner of Taxation* that the ‘statutory fiction’ of s 47(1) did not deem liquidation distributions to be ‘income’.

49 *Gibb* is the most recent pronouncement of the High Court on the matter. ‘Income’ in s 47(1) was said to mean ‘income according to ordinary concepts’. The Full Court of the Federal Court in *Brewing Investments* was pressed with the argument that the Commissioner had not and could not establish that what each of the subsidiaries in the distribution chain received was income in the ‘ordinary concepts’ sense. 50 Nevertheless, a contrary submission for the Commissioner was accepted by Hill J in that case. When s 47(1) deems a liquidation distribution to be a dividend paid out of profits, the submission ran, the deeming includes the consequence that the distribution is ‘income’ for the purposes of the Act. 51 A logical problem, perhaps a *petitio principi*, may exist with this. Section 47(1) deems liquidation distributions to be dividends ‘to the extent to which they represent income’. One

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49 (1966) 118 CLR 628, 639 (Owen J dissenting).
51 Ibid 450.
cannot argue, in reverse, that because a distribution is a dividend it is *therefore* of income. Hill J noted that whilst the successive distributions authority of *Harrowell v Federal Commissioner of Taxation*\(^{52}\) distinguished *Gibb*, there was an important factual concession in *Harrowell* which was not made in *Brewing Investments*.\(^{53}\) Mr Harrowell admitted that the distribution which Glenville Pastoral had received from the related company Killens represented trading profits to its full extent. Application of s 47(1) in *Harrowell* was said to be restricted to the transaction in the chain which included the taxpayer.\(^{54}\) This was the domestic equivalent of what the taxpayer argued, unsuccessfully, in *Brewing Investments*.

2.1.3 Other than Income Which Has Been Properly Applied to Replace a Loss of Paid-Up Share Capital

When distributed liquidation surpluses are applied to the restoration of losses to a company’s paid-up share capital account, they are explicitly not treated as deemed dividends under ITAA36 s 47(1). Surplus income profits distributed by way of a return of paid-up share capital are tax-free. As noted, it is a ‘matter of choice’ under existing law whether liquidation distributions are sourced from profits or contributed capital.\(^{55}\) The High Court in *Archer Brothers Pty Ltd v Federal Commissioner of Taxation*\(^{56}\) stated these principles in connection with the liquidation of a company which had derived income profits after having lost part of paid-up share capital. Underlining the effect of this exemption and the scope of a liquidator’s discretion, the High Court confirmed that the liquidator had made no sufficient distribution for the purposes of (the former) private company undistributed profits tax under Division 7 of the ITAA36. This liability could have been avoided in the liquidator’s discretion had he debited a ‘profit and loss account’, rather than

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\(^{52}\) (1967) 116 CLR 607.  
\(^{53}\) (2000) 100 FCR 437, 449.  
\(^{54}\) (1967) 116 CLR 607, 611.  
\(^{56}\) (1953) 90 CLR 140, 153–4.
reconstituted the company’s share capital account, and had made a distribution to shareholders which would have amounted to a ‘deemed dividend’ under ITAA36 s 47(1).

It does not follow from Archer Brothers that liquidation surpluses must be treated as the replacement of the loss of paid-up share capital whenever such a loss appears. Liquidators’ powers are limited, as the High Court majority acknowledged in Glenville Pastoral Co Ltd (in liq) v Federal Commissioner of Taxation.\textsuperscript{57} Liquidators cannot capitalise profits. Only the company’s directors, or its members in a general meeting, whilst the company is a going concern, can restore the company’s paid-up share capital account.\textsuperscript{58} The past tense of the exception in s 47(1) implies as much. ‘Income’ referred to ‘has been applied’ rather than ‘is applied’ to replace a loss of paid-up capital. The paid-up share capital exemption is therefore restricted to an application of profits which takes place before the commencement of liquidation.

\textit{Glenville Pastoral Co Ltd (in liq) v Federal Commissioner of Taxation}\textsuperscript{59} involved the High Court in a reconsideration and restatement of the views it gave some 10 years before in Archer Brothers.\textsuperscript{60} Glenville Pastoral was a company in liquidation with a deficiency in its paid-up share capital account. Glenville Pastoral received income distributions in the liquidation of Killens, a related company, both before and after its own liquidation, and proceeded to distribute these sums to its shareholders. However, the Commissioner refused to recognise the liquidation distribution as an ITAA s 47(1) deemed dividend which satisfied the company’s obligation to make a sufficient distribution for the purposes of (the former) undistributed profits tax. Whilst there was a deficiency in the paid-up share capital account, the Commissioner argued, the

\textsuperscript{57} (1963) 109 CLR 199, 206–9.
\textsuperscript{58} Subject to specific provisions in the company constitution: see ibid 206.
\textsuperscript{59} (1963) 109 CLR 199.
\textsuperscript{60} (1953) 90 CLR 140.
distribution _pro tanto_ must be treated as a restoration of the paid-up share capital loss. The High Court examined this proposition in stages. Whilst the company was a going concern, the Court observed, profits could be distributed even though a loss of paid-up share capital had not been restored. Alternatively, profits of a company with a loss of paid-up share capital could be credited to a reserve and then capitalised by a resolution of the directors or the company in a general meeting. Capitalised profits are not thereafter distributable, whilst the company is a going concern, unless there is a properly authorised reduction of capital. The exemption in s 47(1) applicable to ‘income which has been properly applied to replace a loss of paid-up share capital’, the High Court concluded, refers to replacements of paid-up share capital whilst the company is a going concern. Distributions of sums sourced from the (restored) paid-up share capital account are exempt from ‘dividend treatment’. In this way, the paid-up share capital exemption was found to apply to a liquidator’s distribution of profits capitalised by the company prior to his appointment.

The principle in _Archer Brothers_ seems contrary to the decision in _Glenville Pastoral_. However, as the Court in _Glenville_ stressed, the principle does not extend to what is now known as ‘share capital tainting’.\(^{61}\) That is, the principle does not justify a liquidator in applying income that a company derives in or before a liquidation to the restoration of the paid-up share capital account, which is then used as the source of tax-free distributions. Liquidators can simply choose between varieties of potential sources for liquidation surplus distributions.\(^{62}\) Such sources, it has been said, must be clearly enough identified to support equitable tracing relief. Mixture of funds must

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\(^{61}\) See former ITAA36 pt IIIAA div 7B, further discussed in the text accompanying nn 64–65, below.

\(^{62}\) _Glenville Pastoral Co Ltd (in liq) v Federal Commissioner of Taxation_ (1963) 109 CLR 199, 208. See also discussion of ‘tracing’ income sources in surplus distributions in _Taxation Determination TD 95/10 [3]_.

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be avoided, even if ‘separate’ or clearly designated accounts are not maintained.\textsuperscript{63}

A small excursus will be made. Both \textit{Australian Taxation Law}\textsuperscript{64} and the Review of Business Taxation\textsuperscript{65} note the relevance of the power which allows companies to capitalise their profits, conferred by Part 2H.4 of the \textit{Corporations Act 2001} (Cth). Potential is said to exist for companies to ‘disguise their profits as capital amounts’ which will receive more favourable tax treatment upon distribution to shareholders. ‘Debt and equity rules’ now discourage this practice.\textsuperscript{66} This is an unlikely abuse. The s 47(1) replacement of share capital exemption from ‘dividend treatment’ is limited to profits capitalised in order to replace a loss of paid-up share capital. Profits capitalised for any other reason are not relevant. Companies have long been able to capitalise their profits through the issue of bonus shares.\textsuperscript{67}

\textbf{2.1.4 Shall, for the Purposes of This Act, Be Deemed to Be Dividends Paid to the Shareholders by the Company Out of Profits Derived by It}

The central fiction of ITAA36 s 47(1) deems liquidation surpluses with a capital nature at general law to be ‘dividends’. Those ‘dividends’ are also given the characteristic of being ‘paid to the shareholders by the company out of profits derived by it’, which coordinates with the requirements of the ITAA36 s 44(1). ‘Deemed dividends’ are brought within a shareholder’s assessable income in this way.\textsuperscript{68} By reason of ‘out of profits’ deeming, the ‘character’ of liquidation surplus distributions to be established by the

\textsuperscript{63} \textit{Taxation Determination TD 95/10} [4].

\textsuperscript{64} Robin Woellner et al, \textit{Australian Taxation Law} (17\textsuperscript{th} ed, 2007) [22-570].

\textsuperscript{65} See Review of Business Taxation, above n 55, [429].

\textsuperscript{66} ITAA97 div 974, replacing div 7B of pt IIIAA of the ITAA36: see Woellner et al, above n 64, [22-570].

\textsuperscript{67} See LexisNexis, \textit{Ford’s Principles of Corporations Law} ¶18.240.

\textsuperscript{68} See also \textit{Corporations Act 2001} (Cth) s 254T.
Commissioner is confined to the (still problematic) question of whether distributions ‘represent income derived by the company’.

Section 44(1), unlike s 47(1), deals with the geographical considerations of residence and source. Resident shareholders are assessed on dividends paid to them by the company out of profits derived from any source. Non-resident shareholders, by contrast, are assessed on dividends paid to them out of profits derived from sources in Australia. As the High Court confirmed in *Parke Davis & Co v Federal Commissioner of Taxation*, the link between ITAA ss 47(1) and 44(1) is not affected by s 47(1)’s omission of geographical considerations. The words of s 47(1) are ‘explicit’ and must be understood in the light of s 44(1), the Court directed:

> take the terms of s 47(1): you have only to identify the transaction and find that there is a distribution to shareholders of the company and that the transaction fits that description; then, subject to its being in the course of a winding up, it must, for the purposes of the Act, be deemed to be dividends paid to the shareholders by the company. That, in my view, brings them immediately within the terms of s 44(1)(b). Perhaps you do insert a fiction into s 44(1)(b) but, when you have done that, you treat it as reality. And, for the purposes of s 44(1)(b), you proceed to do the tracing of the source of that imputed dividend to the profits from which it comes. That, no doubt, sets an extremely difficult task in some circumstances, but it is a task of accounting and not of law. Difficult as it may be, it cannot disturb the meaning of the two sections stated in combination …

‘Difficulty’ in locating the liquidating company’s profit source was largely avoided by agreement between that company and its liquidating subsidiary in *Parke Davis*. Profits of the Australian business were apportioned in fixed money sums. But the matter is

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69 Discussed in the text accompanying n 23, above. See the *obiter* of Fullagar J (dissenting on a different point) in *Federal Commissioner of Taxation v Uther* (1965) 112 CLR 630, 637–9.

70 (1959) 101 CLR 521, 533.

71 Ibid.
TAXATION ASPECTS OF INSOLVENCY

not always so straightforward. A legal question also arises about the source of the dividend. Does this depend on where the underlying profit is made, or the locality of the share (which is fixed by the locus of the registry upon which the shareholder is registered)? Without much justification the Court found that s 44 referred to the locus of the underlying profit rather than the share which was its medium, taking an implicit tracing approach.

Imputation credits possessed by a company at the commencement of its liquidation may be wasted if and to the extent that liquidators cannot distribute liquidation surpluses by way of ‘frankable distributions’.\(^72\) Whilst the principle in Archer Brothers Pty Ltd v Federal Commissioner of Taxation\(^73\) may allow liquidators to distribute non-taxable amounts debited to such funds as a company’s paid-up share capital account, franking credits cannot be allocated to the relevant distributions under ITAA97 s 202-30. This section provides that ‘distributions and non-share dividends’ are frankable unless otherwise specified. Section 960-120 defines ‘distribution’, in relation to a company, to be ‘a dividend or something that is taken to be a dividend under this Act.’ ‘Frankable distribution’ in this way includes a deemed dividend under ITAA36 s 47(1), but not the surplus components referred to above as ‘paid-up share capital’, ‘share premiums’ or ‘pre-CGT capital gains’.\(^74\)

Imputation credits supply at least two brakes on liquidators’ tax-efficient sourcing of liquidation surplus distributions. The first is the need to avoid wasting a company’s franking credits by not sourcing entire distributions to unfrankable capital accounts. An unused balance in a company’s franking account disappears without a trace if and when the company is deregistered at the conclusion of the liquidation process. Shareholders in retirement or with low marginal

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\(^72\) Defined in ITAA97 s 202-30.

\(^73\) (1953) 90 CLR 140.

\(^74\) See nn 14–16, above.
tax rates may prefer to receive the benefit of franking credits rather than tax-exempt distributions.

Second, corporate tax entities (including liquidating companies) are discouraged by ITAA97 subdiv 204-D from attempting to tax-efficiently stream franked distributions in a way which gives rise to a greater ‘imputation benefit’ to some rather than other members of a company.\(^75\) Where a greater imputation tax benefit is enjoyed by a ‘favoured member’ rather than a ‘disadvantaged member’, the Commissioner has power to make a determination under s 204-30(3) that the company franking account is (additionally) debited in respect of the disadvantaged member or no imputation credit arises in respect of the favoured member, or both.\(^76\)

### 2.2 The ‘Dividend Approach’ to Liquidation Surplus Distributions: ITAA Division 7A and Private Company Distributions

Division 7A is a regime designed to ensure that payments and loans made by private companies to shareholders or their associates are assessed as dividends, to the extent that those companies contain realised or unrealised profits.\(^77\) Division 7A is an integrity measure. Private companies are precluded from making tax-free distributions of profits to their shareholders (or associates). Payments or loans treated as dividends are not frankable,\(^78\) but are debited to a company’s franking account as though they had been franked.\(^79\)

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\(^75\) ‘Imputation benefit’ is defined in ITAA97 s 204-30(6).

\(^76\) Alternatively or in addition, franking credits may be denied to members of entities effectively owned by non-resident and tax-exempt persons: see ITAA97 s 204-30(3)(a), (b), (c).

\(^77\) See Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 1997, 12139 (Chris Miles, Parliamentary Secretary to the Prime Minister).

\(^78\) See ITAA97 s 202-45.

\(^79\) See ITAA97 s 205-30 table item 8.
Some threatening features of Division 7A will soon be qualified. Amendments to Division 7A introduced in 2007 significantly lessen the Division’s severity.\(^80\) Automatic debiting of a private company’s franking account will cease when a deemed dividend arises. The Commissioner will be given a discretion to disregard the operation of Division 7A, or allow dividends to be franked, where taxpayers make honest mistakes or inadvertent omissions.\(^81\) The older and less effective ITAA36 s 108 will be repealed.

Division 7A is directed to loans and payments made to shareholders by functioning private companies and not by insolvency administrators. Section 109NA provides that a distribution or loan made by a liquidator in the course of winding-up a company is not a ‘payment’ or ‘loan’ to which the Division applies.

Loans and other distributions are sometimes made by private companies to their shareholders pending the commencement of formal liquidation. Relevant amounts usually represent proceeds from the realisation of company assets.\(^82\) Such loans will only become deemed dividends under Division 7A if they are not repaid before the completion of liquidation.\(^83\) In this, a small concession is made to the shareholders of liquidating companies. Whilst other loans and payments subject to the Division trigger deemed dividends at the end of the taxation year in which they were made, loans made by liquidators are not deemed to be dividends until the end of the year that follows.\(^84\)

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\(^81\) See proposed s 109RB of the ITAA36.
\(^82\) Discussed in Explanatory Memorandum, Taxation Laws Amendment Bill (No 7) 1997 (Cth) [8.56].
\(^83\) See ITAA36 ss 109D(1A), 109NA, confirmed by ATO ID 2003/459.
\(^84\) See ITAA36 s 109D(1A).
3. THE ‘CAPITAL GAINS APPROACH’ TO LIQUIDATION DISTRIBUTIONS: ITAA PARTS 3.1 AND 3.3

Capital gains and losses under Part 3.1 of the ITAA97 are triggered by the occurrence of ‘CGT events’ when liquidating companies make final or interim distributions or when liquidating companies are deregistered under the Corporations Act 2001 (Cth).

3.1 CGT Event C2

The Commissioner’s view in Taxation Determination TD 2001/27 is that, for the purposes of CGT event C2, ‘the full amount’ of a liquidator’s final distribution on the winding-up of a company is capital proceeds from the ending of the shareholders’ shares in the company.

104-25 Cancellation, surrender and similar endings: CGT event C2

(1) CGT event C2 happens if your ownership of an intangible CGT asset ends by the asset:
   (a) being redeemed or cancelled; or
   (b) being released, discharged or satisfied; or
   (c) expiring; or
   (d) being abandoned, surrendered or forfeited; or
   (e) if the asset is an option — being exercised; or
   (f) if the asset is a convertible interest — being converted.

   …

   (3) You make a capital gain if the capital proceeds from the ending are more than the asset’s cost base …

Members receive liquidation surplus distributions, on this view, in exchange for and proportionately to the value of their shares. The High Court in Commissioner of Taxation (NSW) v Stevenson was concerned with the voluntary liquidation of a company which possessed accumulated profits. In this context, the majority stated a principle that ‘the excess of [the company’s] assets over its external
liabilities is distributed amongst the shareholders in “extinguishment” of their shares:

The shareholders, in other words, as contributories receive nothing but the ultimate capital value of the intangible property constituted by their shares ... The shareholder simply receives his proper proportion of a total net fund without distinction in respect of the source of its components and he receives it in replacement of his share.85

Deregistration is the specific occurrence which triggers CGT event C2. ‘Shares’ in a company are an ‘intangible CGT asset’ which ‘ends’, when the intangible chose is ‘released, discharged or satisfied’ by the shareholder and is ‘cancelled’ by operation of law.86 Companies and their shares both cease to exist on deregistration. CGT event C2 occurs in a compulsory liquidation when the deregistering act occurs, or an earlier court order is made.87 The equivalent time in voluntary liquidations occurs when ASIC determines to deregister a company upon expiration of the

85 (1937) 59 CLR 80, 99.
87 Deregistration in compulsory liquidations occurs under the Corporations Act 2001 (Cth) as follows:
   (1) reconstruction and amalgamation — court order that the Australian Securities and Investments Commission (‘ASIC’) deregister (ss 413(1)(d), 601AC(1)(a));
   (2) release of liquidator and court orders deregistration (ss 481(5)(b), 601AC(1)(b));
   (3) ASIC deregisters company following three months after the return for the final meeting was lodged by the liquidator (ss 509(5), 601AC(2));
   (4) court order made before end of three month period for ASIC deregistration;
   (5) ASIC deregisters on application by director, member or liquidator (s 601AA(4)); and
   (6) ASIC initiated deregistration (s 601AB(3)).
See Taxation Determination TD 2000/7.
appropriate period. At these times, for the purposes of s 104-25(3), a final distribution will be treated as the capital proceeds which a taxpayer receives from the ending of an intangible CGT asset. Liquidators’ ‘final distributions’ precede their company’s deregistration. Value distributed is a regular step in liquidation procedure prior to deregistration, rather than ‘capital proceeds from the ending’ of the shares.

3.2 CGT Event G1

Before a liquidating company is deregistered, liquidators may distribute surplus proceeds which are not deemed to be dividends pursuant to ITAA36 s 47(1). Possibly there has been a partial return of paid-up share capital. Or the balance of a pre-CGT capital gains account may be distributed. CGT event G1, in these cases, introduces an interim capital gains charge equal to the amount by which the distribution exceeds the shareholders’ cost base in their shares. Alternatively, CGT event G1 ‘steps down’ shareholders’ cost bases for their shares by the amount of distributions received. The wording of CGT event G1 expresses this a little obliquely. CGT event E4 in a similar way brings incidental capital distributions to tax when made by the trustees of trusts. Apart from ITAA36 s 47(1) ‘deemed dividends’, any payment received from the liquidator in respect of a share appears to be within the scope of this event, including from each of the accounts outlined above.

104-135 Capital payment for shares: CGT event G1

(1) CGT event G1 happens if:

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88 Deregistration in voluntary liquidations is conducted by ASIC under s 601AA(4) of the Corporations Act 2001 (Cth) two months after publication of notice of an application to deregister a company under s 601AA(1); see Taxation Determination TD 2000/7.

89 In the text accompanying nn 14–19. However, consistently with ITAA97 s 116-50, ITAA97 ss 104-35A, 104-35B exclude (the unlikely) non-deductible refunds or compensation from what a shareholder is taken to receive. Pre-CGT capital gains are excluded from CGT event G1 by s 104-135(5).
TAXATION ASPECTS OF INSOLVENCY

(a) a company makes a payment to you in respect of a share you own in the company (except for CGT events A1 or C2 happening in relation to the share); and

(b) some or all of the payment (the non-assessable part) is not a dividend, or an amount that is taken to be a dividend under section 47 of the *Income tax Assessment Act 1936*.

The main exception to CGT event G1 is s 104-35(6), a simplifying measure designed to postpone assessment of proximate interim payments to final payments. A liquidator’s payment in respect of the shareholders’ shares will be disregarded for CGT event G1 purposes if the company is dissolved within 18 months of when the payment was made. Instead, the payment is then treated as part of the capital proceeds that the shareholder receives upon cancellation of the share pursuant to CGT event C2. A difficulty with this is that shareholders cannot know at the time of lodging their tax returns for the year of income in which interim distributions were received whether the company will be deregistered within 18 months of the receipt. This only affects shareholders who have made a taxable gain at the time of receiving the interim distribution, and not those whose cost bases are reduced. *Taxation Determination TD 2001/27* advises affected shareholders that they need only treat CGT event G1 as applicable if the liquidator advises in writing that the company will not cease to exist within 18 months. That is, in the absence of the liquidator’s written advice, a shareholder may assume that a company will cease to exist within 18 months and can safely ignore CGT event G1. Amendment of the shareholders’ tax assessments will be made if the company does not cease to exist within 18 months of a tax liability being incurred by the liquidator’s interim payment.
3.3 CGT Event G3

Capital *losses* are the exclusive subject of CGT event G3.\(^{90}\) Losses that shareholders make on their shares can be crystallised through this event prior to the conclusion of a liquidator’s administration. If a liquidator makes a written declaration that he or she has reasonable grounds to believe that there is no likelihood the shareholders in the company (or shareholders of the relevant class) will receive any further distribution in the winding-up of the company, *capital losses* can be claimed equal to the reduced cost bases that shareholders have in their shares.\(^{91}\) Notably, the loss is the final loss on the shares which can be claimed. All subsequent recovery will be a capital gain in its entirety. Section 104-145(4) provides that cost bases and reduced cost bases of shares the subject of the election are reduced to nil just after the liquidator’s declaration is made.\(^{92}\)

Shareholders cannot transfer their shares after a liquidation commences, as noted above.\(^{93}\) Alternative means of shareholders crystallising, or ‘closing out’ their share losses before the conclusion of a liquidation may involve other, more artificial, loss-recognition transactions. Shareholders might, for example, declare a trust over their shares in the liquidating company, and claim a capital loss pursuant to CGT event E1, because ‘capital proceeds’ are less than the ‘reduced cost base’ of the shares pursuant to the market value substitution rule in s 116-30(1). Uncommercial devices, such as these, might involve steps liable to be disregarded by ITAA36 Part IVA.\(^{94}\)

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\(^{90}\) ITAA97 s 104-45.

\(^{91}\) ITAA97 s 104-45(1), (2), (3).

\(^{92}\) ITAA97 s 104-45(4).

\(^{93}\) In the text accompanying n 6.

Terms of ameliorative CGT event G3 must be closely observed. Contemplated acts and defined roles cannot be approximated. Any likelihood of further distribution has been determined to be inconsistent with the necessary declaration by the liquidator under s 104-145(1).  

In 2002, the voluntary administrator of Pasminco Ltd (subject to deed of company arrangement) wrote to the company’s shareholders and declared his ‘belief’ that the shareholders could expect no further return in order that they might obtain a ‘tax write-off’ for the cost of their shares. Shareholders sought a confirmatory class ruling. In the event, the administrator was said not to be a person who could make the necessary declaration for the purposes of CGT event G3. Only liquidators, the ruling stated, could declare shares worthless. Officials like administrators have been said to be mainly concerned with maximising the chances of corporate survival, and not the performance of a liquidator’s function of distributing a company’s assets prior to dissolution. Nevertheless, 2005 amendments to the ITAA97 have inserted ‘or administrator’ after ‘the liquidator’ in the relevant part of s 104-145(1).

CGT event G3 has been accessed successfully on occasions. In the liquidations of HIH Ltd and One.Tel Ltd, for example, the liquidators were confirmed to be sufficiently able to declare shares worthless and to advance the capital loss claims of those companies’ shareholders.

4. GST ISSUES IN CORPORATE INSOLVENCY

4.1 Definitions

A corporation in liquidation, receivership or disabled in other specified ways is an ‘incapacitated entity’ under the A New Tax

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95 See Taxation Determination TD 2000/52.
97 See ibid [18], [23].
98 See Taxation Determination TD 2002/3 (HIH Ltd) and Taxation Determination TD 2002/17 (One.Tel Ltd).
A ‘liquidator’, ‘receiver’ and certain other nominated insolvency administrators are defined as ‘representatives’ in the same provisions. GST Act Division 147 contains a body of obligations imposed on persons appointed to be the representatives of incapacitated entities.

4.2 Registration of the Representatives of Incapacitated Entities

GST Act s 147-5 requires representatives to register for GST if the incapacitated corporation is registered or required to be registered. This is regardless of whether the representative is carrying on an enterprise, and the size of the representative’s annual turnover threshold.

4.3 Nature of Adjustments

Creditors of an incapacitated entity which pays less than the full amount of its debts may write off the remainder of any amounts owed to them. An incapacitated entity which accounts on an accruals basis will have previously received input tax credits on the assumption that the entity would pay its debts in full. GST bad debt increasing adjustments will be due in these circumstances. Less commonly, bad debt decreasing adjustments may be due where an incapacitated entity pays an unexpected dividend, subsequent to paying an increasing adjustment to the ATO. Adjustments in the insolvency of incapacitated entities affect the measure of recovery enjoyed by other unsecured creditors vis-à-vis the ATO.

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99 See s 195-1.
100 Section 23-5 of the GST Act, in terms, overridden by s 147-5(2).
101 See GST Bulletin GSTB 2003/1.
102 See the ‘Bad debt increasing adjustment formula’ in GST Bulletin GSTB 2003/1 [3].
103 See the ‘Bad debt decreasing adjustment formula’ explained in ibid [6].
4.4 When Adjustments Arise and ‘Equalization Payments’ to the ATO

Increasing adjustments usually arise when a final dividend is paid by an incapacitated entity. This is the time when creditors’ claims are usually written off. However, the amount of any interim dividends paid to unsecured creditors including the ATO may need to be reviewed in the light of subsequent events. Where a representative pays interim dividends to unsecured creditors, those payments are based on the admitted claims of creditors. Interim dividends paid to the ATO will be based on the ATO’s admitted claim, without taking account of any bad debt increasing adjustments arising as a consequence of the remainder of the debts being written off. Adjustment as between creditors must be made. Interim dividends, in effect, have been overpaid to non-ATO creditors which did not take into account all the bad debt increasing adjustments which later became necessary. A *circulis inextricabilis* results. The ATO suggests that the representative, at the time of final distribution, should reserve sufficient funds for making ‘equalization payments’ to the ATO.¹⁰⁴

4.5 Liability of the Representatives of Incapacitated Entities

Representatives, in consequence of being registered, are personally liable for any GST due from a business carried on by an incapacitated entity after the time of their appointment.¹⁰⁵ This seems harsh. Increasing adjustments for which representatives may be liable usually relate to pre-appointment acquisitions. To mitigate this position, the GST Act provides a means whereby representatives can

¹⁰⁴ See ibid [4]–[5].
¹⁰⁵ See GST Act s 147-5.
escape personal liability if they notify the ATO of impending adjustments and their amounts.\textsuperscript{106}

5. STAMP DUTY CONSEQUENCES OF INSOLVENCY DISTRIBUTIONS

The \textit{Duties Act 2000} (Vic) does not impose duty on a transfer of dutiable property which occurs by reason of the appointment of a liquidator.\textsuperscript{107} Commencement of an insolvency administration does not create a liability to duty or stamp duty in any Australian jurisdiction. Steps taken in the course of administrations, however, are not similarly exempted. \textit{In specie} or other distributions by liquidators are liable to duty at normal rates. New South Wales, Tasmania and the Australian Capital Territory have comparable regimes.\textsuperscript{108} Non-rewrite jurisdictions, with the exception of South Australia, have provisions to a similar effect.\textsuperscript{109} Queensland has more targeted exemptions.\textsuperscript{110}

\begin{footnotesize}
\begin{enumerate}
\item Procedure in GST Act s 147-20.
\item See \textit{Duties Act 2000} (Vic) s 148(a)(i).
\item See \textit{Duties Act 1997} (NSW) s 65(1)(b); \textit{Duties Act 2001} (Tas) s 72(1)(b)(ii); \textit{Duties Act 1999} (ACT) s 71.
\item See \textit{Stamp Act 1921} (WA) s 75(3)(f) (exemption for conveyances for less than full consideration ‘not otherwise within subsection’); \textit{Stamp Duty Act 1978} (NT) s 6. Cf \textit{Stamp Duties Act 1923} (SA) ss 71E(2)(b) (no duty on appointment of liquidator), 71(5)(b) (exemption for transfer of property of a company by a liquidator to a shareholder in the company).
\item See \textit{Duties Act 2001} (Qld) s 37 (exemptions for transactions involving ‘Queensland business assets’).
\end{enumerate}
\end{footnotesize}