Why you shouldn’t delay an MVL

It’s not unusual to leave financial matters until the last possible moment before the end of the financial year but this strategy can create issues, especially if you’re considering a Members’ Voluntary Liquidation.

Members Voluntary Liquidations (MVLs) are an option available to a solvent company whereby its members can liquidate the company’s assets and wind up its affairs. This may be for several reasons such as the company has ceased operations and the directors/members no longer have a use for it; shareholders want to access the company’s equity in a tax-effective manner; or the ongoing compliance costs of lodging reports with the Australian Securities and Investments Commission are too high. (Even if companies stop operating, they are still a registered company and need to lodge documentation with ASIC and the Australian Taxation Office and pay an annual registration fee.)

Delaying an MVL could see shareholders waiting for the ATO to clear an MVL backlog. MVLs do tend to take longer than, say applying to deregister a company, so it’s always advisable to start the process as soon as the decision is made to avoid delays. MVLs also tend to cost more than applying for deregistration, although the potential tax savings generally outweigh this downside.

How MVLs differ to CVLs

MVLs differ to a Creditors’ Voluntary Liquidation (CVL) as they involve a company that is still solvent, while a CVL involves the closure of a company that is insolvent – although this process is still undertaken voluntarily. Once an MVL is finalised, the proceeds of the sale go to the shareholders; with a CVL, the cash realised from the sale of assets is returned to creditors.

Both MVLs and CVLs are voluntarily undertaken by directors who hold shareholder and creditor meetings to explain the company’s financial position and seek the relevant resolution that allows for the winding up of the company.

While some MVLs are very straightforward and don’t require an insolvency specialist, Jirsch Sutherland is experiencing an increase in the number of enquiries about them and has recently taken on several.

Lloyd Kerr, Jirsch Sutherland Partner

Jirsch Sutherland Partner Lloyd Kerr says he is often asked to step in when a well-meaning amateur has got the paperwork wrong. “We’re currently dealing with a group of MVLs – all property matters – which were set up pre-1974 before capital gains tax came in,” he says. “It’s important to understand the rules around them because tax considerations can be disastrous if errors are made.”

One of the tax benefits if that a shareholder may be able to access various capital gains tax concessions, such as the 50 per cent discount. Kerr says MVLs are very tax effective at returning assets and dividends to shareholders. “They are often useful in situations where control has passed through inheritance and that control has been diluted,” he says. “It enables an independent person to handle any distributions.”

MVLs have strict reporting requirements, especially around the agreeing of fees before an MVL is undertaken. “Prior to a determination being made regarding fees for an insolvency specialist or accountant to undertake an MVL, a report must be prepared for shareholders to enable them to assess if the fees are reasonable,” says Kerr. “This is still required even if there’s just one shareholder.”

Key timings for MVLs include:

- Pre-appointment in MVL remuneration report to be issued to shareholders
- Initial notice: to be issued within 10 business days if there are any creditors
- Report to creditors: to be issued and lodged with ASIC within 3 months of appointment, if there are creditors

Accurate valuation required

Calculating the accurate valuation of assets is critical to ensure compliance with MVL eligibility criteria. If the valuation results in an incorrect declaration of insolvency, it can have consequences for the directors as well as the company.

Kerr adds because of the consequences of an incorrect valuation, it’s important to seek the

advice of an insolvency specialist. “If directors make false declarations, they could be liable for a fine,” he says. “Penalties include disqualification as a director for up to 15 years or even a prison sentence if a deliberate fraud is discovered.”