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BUSINESS ADVISORS & INSOLVENCY SERVICES

DIRECTOR PENALTY NOTICES

INTRODUCTION

Directors can become personally liable for their company's unpaid and unreported Pay As You Go (PAYG) withholding tax, goods and services (GST) tax, or superannuation obligations.

From June 2012, directors must lodge their BAS and superannuation statements within three months of the due date, or face automatic personal liability for their company's unpaid PAYG tax and superannuation obligations. Even if the Australian Taxation Office (ATO) is notified of a company's failure to pay PAYG tax, GST tax, or superannuation before the three-month period expires, the director cannot escape the new personal liability for the unpaid debts.

A director used to be able to place their company into liquidation to avoid being personally liable, but now with the lockdown DPN, the three-month reporting period is the key factor determining whether or not personal liability can be avoided.In other words, lodgement and reporting to the ATO is now more important than payment.

THE LAW

The *Income Tax Assessment Act 1997* (ITAA) requires companies to withhold a proportion of employees' wages to meet the latter's tax liabilities to the ATO. The tax that is deducted is known as Pay As You Go (PAYG) withholding tax and was formerly known as Group Tax. Companies must lodge their PAYG withholding tax obligations with their monthly or quarterly Business Activity Statements (BAS), which are generally due 21 days after the end of the monthly or quarterly reporting period.

The *Goods and Services Tax Act 1999* requires companies to pay the GST tax liabilities to the ATO. Companies must lodge their monthly or quarterly Business Activity Statements (BAS), which are generally due 21 days after the end of the monthly or quarterly reporting period.

The *Superannuation Guarantee (Administration) Act 1992* (SGA Act) requires employers to pay their employees' superannuation quarterly, currently 9.5 per cent of an employee's normal wages. Employees are entitled to nominate their preferred superannuation funds.

If a company fails to pay the employee's superannuation obligation to the nominated superannuation fund, it is required to report the breach of the SGA Act and lodge a form called the Superannuation Guarantee Charge Statement, to the ATO. This Statement must be lodged no later than one month and 28 days after the end of the quarter.

DIRECTOR PENALTY NOTICE

If the ATO attempts to recover the company's unpaid debt from a director, the ATO will issue a director penalty notice (DPN) that will list the following options available to a director for discharging their personal liability.

For unpaid tax and superannuation reported within three months of the due date, a director must within 21 days:

- Pay the debt or
- Appoint an administrator or liquidator.

For unpaid amounts that were **not** reported within three months of the due date, the only available option is for the directors to pay the unpaid tax or superannuation debt.

If the director fails to act within the 21 days, the ATO can initiate bankruptcy proceedings. Again, it's important to note that under the new lockdown DPN, if the company fails to lodge its BAS and superannuation statements within three months of their due date, the director will be personally liable even if the director puts the company into administration or liquidation.

TIP: When you resign as a director, make sure the company has at least lodged its BAS an SGC statements.

DEFENCES

A director is not liable for a Director Penalty Notice (DPN) when they can establish that:

- Because of illness (theirs or someone else's) or some other good reason, the director was not involved in the management of the company and it was reasonable for that director not to be involved; or
- The director took all reasonable steps (if such steps were available) to ensure that:
  - The company met its obligation to pay
  - An administrator of the company was appointed (if not a lockdown DPN) **or**
  - They began to wind up the company (if not a lockdown DPN)

In practice, the "for some other good reason" defence is hard to establish.

NEW DIRECTORS

Newly appointed directors have a 30-day grace period before they automatically become liable for the company's unpaid debts for:

- Outstanding PAYG withholding liabilities;
- Outstanding GST liabilities; and
- Outstanding SGC liabilities.

To avoid personal liability, the new director must, within the 30 days, ensure the company:

- Pays the amounts outstanding
- Goes into voluntary administration or
- Goes into liquidation

TIP: As a newly appointed director of a company, you can also be held personally liable for the entire tax payable if an existing ATO instalment plan for unpaid and accrued tax fails. So it's important to check for this before you agree to be a director.

PURPOSE OF A DIRECTORS PENALTY NOTICE (DPN)

The DPN regime is designed to:

- Prevent phoenix activity (i.e. companies that avoid their financial obligations through liquidation and set up a new company)
- Protect employee entitlements by deterring directors from using amounts withheld for purposes other than paying them to the ATO or superannuation funds
- Discourage companies repeatedly defaulting on payment arrangements;
- Reduce the number of companies experiencing escalating debt with no signs of the ability to meet their obligations and
- Deter companies avoiding contact with the ATO

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DO YOU NEED HELP?

We invite you to give us a call, all initial discussions are free of cost or obligation. Talk to our in-house liquidators, bankruptcy trustees, lawyers or accountants about your circumstances and options.

We have offices in Sydney, Melbourne and Byron Bay together with affiliated offices in each capital city. Our nationwide network lets us service our clients' needs throughout Australia.

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