



TAX LIABILITIES GET PERSONAL FOR DIRECTORS

As a result of changes to the law, directors of companies can now be held personally liable for a company's tax liabilities.

The change has been justified by the need to eradicate so-called "phoenix activity", where directors knowingly allow a company to incur debts before putting it into liquidation and then continuing to operate the same business as a new entity with a clean slate.

The *Tax Laws Amendment (2012 Measures No 2)* Act 2012 creates a greater obligation upon directors to ensure companies remit the pay-as-you-go (PAYG) withheld amounts, as well as superannuation guarantee charges (SGC), within the statutory timeframe. The main component of the new laws concerns a director's inability to achieve remission of a penalty in certain circumstances. Beginning on June 30 2012, if the PAYG withheld amount is unreported and unpaid three months after the due date, the ATO can issue a director a penalty notice in which the only option for the director is to pay the full debt.

Once the three month period has passed, placing the company into voluntary administration or liquidation does not absolve the director of responsibility for the unpaid debt. Newly appointed directors have three months from the date of their appointment, as opposed to the date the debt was due.

Another significant consequence of the new tax law is that the director penalty regime applies to unpaid SGC. Each quarter, a superannuation guarantee statement is to be lodged with the ATO and an SGC will apply to an employer who fails to make the minimum superannuation contribution by the due date for the quarter. The SGC includes the unpaid amount, interest on the unpaid amount and an administrative charge. The employer is required to assess the amount due and pay it by the 28th day of the second month following the end of the quarter. If the employer fails to make the payment, the new laws provide that personal liability will apply from the lodgement day. Additionally, the ATO has the power to estimate the unpaid SGC, which is then deemed to have been payable on the lodgement day.

The liability can also extend to family members and associates of the director who were either

partly responsible for the non-compliance or were treated "more favourably" than other employees as a result of the non-payment. There are tests to be applied by the ATO in determining if an associate is liable, including that the associate knew or could reasonably have known that the company had failed to make payments and did not take "reasonable steps" to influence the director to deal with the issue. The spouses of directors who work together with them in small businesses are also now exposed to liability and need to be aware of their increased risks, even if they are not directors of the company.

Why the change?

The explanatory memorandum to the legislation justifies the amendments on the basis that there is significant phoenix activity in Australia, posing "a significant threat to employee entitlements, government revenue and the economy as a whole".

While it is questionable whether the evidence supports this extreme proposition, the policy message is that the protections that have traditionally been extended to individual shareholders and directors of a company are becoming less and less available. This trend seems likely to continue. Those who do misuse the system to create and take advantage of phoenix companies will undoubtedly get their just desserts. However, for those who through no fault of their own are caught in an insolvent or distressed corporate situation, these amendments can only make it harder to trade out of difficulties or restructure the businesses.

How to stay out of trouble

The surest way to keep out of trouble is to get all outstanding returns up to date and ensure that payments are made on time. Once this is done, you should make sure that all returns are lodged within three months of the due date, unless you are planning to place the company into administration or are winding up the company within that three month period. The main message, however, is that directors must remain actively involved in their businesses and ensure that all statutory obligations are complied with and cash flows are sufficient to meet these obligations. **mb**

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