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ATO resumes pursuit of unpaid taxes following easing of COVID-19 restrictions

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The ATO has recently confirmed the recommencement of debt recovery actions with the easing of COVID-19 restrictions, and it appears that enforcement action by the ATO will ramp up significantly in 2022.

Director Penalty Notices (**DPNs**) act as a mechanism for debt collection by the ATO and can make a director personally liable for the company's tax debts if no action is taken.

This article will provide an overview of the DPN regime and outline the options available to you if you receive a DPN.

Key Takeaways

- under the DPN regime, the Commissioner of Taxation is empowered to take action against directors of a company to recoup outstanding taxation debts
- at a high level, a DPN acts as a formal notification to a company director warning that certain tax-related liabilities are payable, even in circumstances where the company is placed into liquidation or administration
- in certain circumstances a DPN can still be issued by the ATO even if an administrator or liquidator has been appointed to a company

The DPN Regime

The ATO may utilise a DPN where a company has outstanding tax liabilities including:

- Goods and services tax (GST):;
- Super guarantee charge (SGC); and
- Pay as you go (PAYG) liabilities.

Where a company fails to comply with its tax obligations, directors are at risk of enforcement proceedings being brought against them, which can ultimately result in serious financial consequences such as bankruptcy. In order to bring such enforcement proceedings the Commissioner must first issues a DPN and allow the director 21 days to respond to the DPN.

Types of DPNs

There are two types of DPNs that directors need to be aware of: lockdown DPNs and non-lockdown DPNs.

Lockdown DPNs are issued to company directors when lodgment of business activity statements (BAS), superannuation guarantee statements and/or instalment activity statements has failed to occur within three months of their lodgment due date.

If a company director receives a lockdown DPN, the penalty will not be remitted until the company pays the penalty in full.

Non-lockdown DPNs are issued when lodgment of the above statements has occurred within three months of their lodgment due date, yet PAYG withholding and/or SGC debt remains outstanding. In these circumstances, a director must:

- Pay the debt, or;
- Place the company into voluntary administration or liquidation within 21 days.

The successful completion of one of these actions may absolve a director of personal liability.

In the event that 21 days elapse without payment of the debt or voluntary administration of the company, the ATO is permitted to commence legal proceedings against the director in order to recoup the penalty.

The ATO is also authorised the recover the penalty by way of withholding a personal income tax refund or imposing a garnishee notice.

Defences available to directors

A director has three defences against proceedings to recover a director penalty:

- Inability to comply with the director's obligations due to illness or some other good reason;
- The director took all reasonable steps to ensure compliance with its obligations, or there were no reasonable steps that could have been taken;
- In the case of an unpaid SGC liability, the company applied the Superannuation Guarantee (Administration) Act 1992 (Cth) in a particular way that was "reasonably arguable".

Personal liability of new directors

New directors can be held liable for director penalties in respect of a company's unpaid obligations if those obligations remain unsatisfied 30 days after the director started. For the purposes of the regime, new directors are individuals appointed as directors following the due date in respect of the unpaid obligation.

Liability of resigned directors

Resignation as a company director following the initial date fails to prevent the director being held liable. In the event that you no longer act as director, liability is not absolved for penalties equal to the net GST, unpaid PAYG withholding and SGC liabilities that were due:

- Prior to the date of resignation;
- Following resignation when:
  - The first withholding event in the reporting period took place after your resignation (for net GST and PAYG withholding);
  - The charge became payable (for SGC liabilities).

Other considerations for company directors

As highlighted above, time is of the essence once a company director receives a DPN. Accordingly, it is vital that company directors seek immediate advice to familiarize themselves with the options available.

Importantly, placing a company into voluntary administration or liquidation may not act as a way of extinguishing SGC or PAYG liability.

Steps to avoiding personal liability

In order to protect themselves, company directors must endeavour to improve their knowledge of their company's GST and tax reporting practices, and ensure robust compliance mechanisms have been implemented.

In particular, new directors are encouraged undertake due diligence of any outstanding tax liabilities for their company as well as ensuring the adequacy of internal processes for the timely remittance of tax.

Please contact Chris Kintis if you would like to discuss this article further or if you have received a Directors Penalty Notice.