

# The DOCA Saved the Company. Why Was the ATO Still Pursuing the Director Personally?

Author: Jimmy Gill & Patrick Huang

When a company enters voluntary administration and successfully negotiates a Deed of Company Arrangement (**DOCA**), directors may assume that the company's tax debts have been dealt with as part of the restructuring.

However, a DOCA does not automatically resolve a director's personal exposure to the Australian Taxation Office (ATO).

We recently acted in a matter that demonstrated exactly why this distinction matters.

The company had accumulated significant tax liabilities, which included unpaid PAYG withholding and GST. It had also fallen behind with its required Business Activity Statement (**BAS**) lodgements. Following the issue of a statutory demand, the ATO commenced winding-up proceedings against the company.

The company subsequently entered voluntary administration and, following negotiations with creditors, including the ATO, executed a DOCA, which provided a viable pathway forward for the business to continue operating.

However, while the company was being restructured, the ATO simultaneously pursued the company's director personally for director penalties arising from unpaid PAYG withholding and GST liabilities.

The director's immediate reaction was one we hear regularly: *"If there is a DOCA in place, why am I still being sued personally?"*

The answer highlights an important issue that many directors overlook.

## The Company's Liability and the Director's Liability Are Not the Same

One of the fundamental principles of company law is that a company has a separate legal personality from its shareholders and directors. As a general rule, liabilities incurred by the company remain liabilities of the company and are not recoverable against directors personally.

However, there are important exceptions.

One of these is the Director Penalty Notice (**DPN**) regime, under which directors can become personally liable for unpaid PAYG withholding, GST and superannuation guarantee charge (SGC) liabilities of the company.

The DPN regime is being used by the ATO more frequently. According to the Tax Ombudsman, in the 2024-25 financial year, the ATO issued more than 84,000 DPNs to directors of approximately 64,000 companies, a 136% increase over the prior financial year.

Thus, a director's personal exposure does not automatically disappear merely because a company enters administration or implements a DOCA. In our matter, the company's BAS obligations had not been lodged within the required timeframes, meaning that the director was exposed to a "lockdown" DPN. Once a lockdown DPN arises, the director penalty generally cannot be remitted merely because the company subsequently enters voluntary administration or executes a DOCA.

The DPN regime does provide a limited number of statutory defences, which were not made out in the director's circumstances.

As a result, the ATO was able to continue recovery action against a director, even where the company has entered into the DOCA.

## The important distinction: company debt and director penalties are parallel liabilities

Although the company's tax debt and the director penalty are separate liabilities, they are 'parallel' liabilities. A payment of the underlying PAYG withholding and GST liabilities by the company reduces the director penalties owed by the director.

This meant that the director's ultimate exposure would be affected by the extent to which the company satisfied its liabilities through the DOCA.

The key question was no longer:

*"Can the ATO continue suing the director?"*

Instead, the more important question became:

*"How will payments made under the DOCA be allocated by the ATO?"*

## Why the ATO's payment allocation practices matter

Many companies experiencing financial difficulty owe multiple taxation liabilities. These might include income tax, GST, PAYG withholding, SGC, interest charges and other tax-related obligations.

Where the ATO receives payments from a company, the way those payments are allocated can significantly influence a director's personal exposure.

In our matter, an important consideration was the ATO's payment allocation practices under PS LA 2011/20 - where PAYG withholding and GST liabilities form part of the relevant activity statement debts, those allocation rules may result in dividends from an insolvency administration being applied against those liabilities before certain penalties and interest amounts.

To the extent dividends are applied against liabilities that are also subject to director penalties, the corresponding director penalties are reduced.

This created an important pathway for the director.

While the ATO was entitled to continue pursuing the director, successful compliance with the DOCA created a pathway by which the director's personal exposure could progressively reduce over time.

The practical significance was substantial: the amount ultimately recoverable from the director could be affected by the amount the company paid to the ATO through the DOCA and how those payments were allocated.

## What directors should consider when negotiating a DOCA

This interaction between company restructuring and personal director liability is an important consideration when assessing a DOCA.

A director facing DPN recovery action should consider several issues before determining the best course of action.

### First, establish the director's existing DPN exposure.

Identify the relevant notices, the liabilities to which they relate, and whether the penalties are lockdown or non-lockdown penalties.

### Second, assess whether a statutory defence is available.

The circumstances surrounding the company's failure to meet its tax obligations may be relevant to whether a defence can be established.

### Third, understand the company's underlying tax liabilities.

The PAYG withholding and GST amounts giving rise to the director penalties need to be identified and reconciled.

### Fourth, assess the expected return to the ATO under the proposed DOCA.

The anticipated dividend and the timing of payments may materially affect the director's position.

### Finally, understand how the ATO is likely to allocate those payments.

The application of PS LA 2011/20 should be considered carefully, particularly where payments may be applied against liabilities that also give rise to director penalties.

These considerations can influence both the company's restructuring strategy and the director's approach to personal recovery proceedings.

## The key takeaway: analyse the company's position and the director's position together

The central lesson from this matter is that a successful company restructuring can have important consequences for a director's personal tax exposure.

A DOCA does not automatically eliminate DPN liability. A director may remain personally exposed to ATO recovery action, particularly where a lockdown DPN has been issued.

In the right circumstances, successful implementation of a DOCA can create a pathway for reducing, and potentially eliminating, personal DPN exposure through the operation of the ATO's payment allocation practices.

For directors facing ATO recovery action, timing matters. The interaction between restructuring options, DPN exposure and the ATO's administrative practices can materially affect the outcome.

Early advice is important. Understanding the director's personal exposure alongside the company's restructuring options can materially influence the strategy, the negotiations and the eventual outcome.