

## Corporate Governance Alert

# Personal liability of directors for unpaid company taxes widened

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The personal liability of directors for unpaid company taxes under the *Tax Administration Act*, has been widened to include unpaid superannuation guarantee charges.

### Expanded director penalty regime

Where a company is required to remit an amount in respect of Pay As You Go Withholding (**PAYGW**) withheld from employees' wages; an alienated personal services payment received; a non-cash benefit provided; or an estimate under Division 268 of the *Tax Administration Act*, directors have a duty to ensure that the company:

- meets its obligations to remit amounts deducted or pay estimated liabilities;
- goes into voluntary administration; or
- begins to be wound up.

If the due date passes and the company has not undertaken one of these options for the remittance of the deductions or amounts withheld, the directors of the company may each be personally liable to pay a penalty in an amount equal to the unpaid amount of the company's liability or estimate.

The ATO can now also make an estimate of a company's superannuation guarantee charge (**SCG**) liability and director's personal liability has been widened to include unpaid SGC liabilities and estimates.

Significantly, under the amendments, where 3 months has passed after the due date for the company liability and

the liability remains unpaid and unreported, the director remains personally liable even though they may have complied with their duties as set out above.

The widening of the director penalty regime is intended to motivate directors to make certain that a company reports and satisfies its tax liabilities promptly.

### Service of the notice

While a director is automatically personally liable once the due date has passed and the PAYGW and SGC remains unpaid, the Commissioner may only commence proceedings to recover a director penalty 21 days after giving a director penalty notice to the director.

Under the amendments, if a director has given the ATO an address for their registered tax agent, then the ATO may now serve a director penalty notice upon a director by leaving a copy of the notice at, or posting a copy to, the address of the director's registered tax agent. A director will then have 21 days to ensure that the company pays the tax liability, before the director will be deemed personally liable for the company's tax liability and the ATO can take action against the director personally.

### Extension of 'no-liability' period for incoming directors

New incoming directors have historically been able to utilise a limited 'no-liability' period of 14 days to undertake tax due diligence. During this limited 'no-liability period', a new incoming director could resign (if necessary) to avoid any personal liability for amounts that had accrued prior to their appointment as a director of the company.

This limited 'no-liability' period has now been extended to 30 days. If the company has a relevant tax liability, a

new incoming director will need to be able to demonstrate that they had resigned from the company within 30 days of being appointed, or ensure that the company's affairs are in order. If this cannot be demonstrated, then the new incoming director may be personally liable for these amounts that had accrued prior to being appointed a director of the company.

In relation to an unreported liability, the 3 month period is counted from the date that the director was appointed a director of the company, rather than 3 months after the liability arose.

## Defences

Directors have defences available to them in relation to the ATO recovering a penalty. In practice these defences can be difficult to establish. The defences are:

1. **(personal/illness)** - due to illness or a similar good reason, it would have been unreasonable to expect the director to take part, and the person did not take part, in the management of the company at any time when the director was under a duty to comply with their obligations; and
2. **(reasonable steps)** - the director had taken all reasonable steps to ensure that the directors had complied with their obligations or there were no reasonable steps that could have been taken in the circumstances.

In addition, a defence is available to a director in respect of an unpaid superannuation guarantee charge, where the company applied the superannuation law to the circumstances in a way that was reasonably arguable, and took reasonable care in doing so. This is intended to apply where a company reasonably thought a worker was a contractor and not an employee, and so would not be eligible for superannuation payments.

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## Other amendments

The amendments also introduce a new way of imposing liability in respect of PAYGW non-compliance tax.

Where a director is personally entitled to PAYGW credits in respect of the director's personal tax affairs, the ATO will now have the discretion to reduce this entitlement where the company has unpaid PAYGW amounts from payments made by the company to that director.

This will extend to former directors where there are applicable unpaid taxes by the company which are attributable to the period of their directorship. This will also apply to a director's associates, which may include their family members.

## Risk management

Directors can be personally liable for certain unpaid company taxes. They should manage their exposure by:

- conducting tax due diligence before and immediately following their appointment to the company's board;
- ensuring that the company's liabilities are reported on time;
- being aware of the due dates for the payment of tax liabilities; and
- implementing governance processes and a system of certification and assurance to demonstrate that they have taken all reasonable steps to ensure that the company pays its tax liabilities on time.

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