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ATO expands personal liability for directors

There are two often quoted adages - 'in this world nothing can be said to be certain, except death and taxes' and 'change is the only constant'. The Commissioner of Taxation is certainly keeping these phrases alive - changes in taxation, particularly in an insolvency context, have been the norm in recent years.

While there has been a great deal of discussion already on changes to the ATO's collection powers, recent events have shown just how far-reaching these powers can be.

While the concept of the 'director penalty' has always existed, to actually enforce personal liability against a director, the Commissioner had to issue a Director Penalty Notice ('DPN') giving 21 days for a director to take action to avoid personal liability. If the company paid the debt or chose a formal insolvency appointment, personal liability was avoided.

Level 3, 431 King William Street, ADELAIDE SA 5000
t. 08 7202 1800
e. info@cliftonhall.com.au
w. www.cliftonhall.com.au

Changes to the Director Penalty regime came into effect on 30 June 2012 to reduce the scope for fraudulent phoenix activity or to escape liabilities and payments of employee entitlements.

The key elements of the reform are:

- Directors' penalties now include unpaid superannuation guarantee as well as unpaid PAYG;
- **Directors can no longer discharge or extinguish a director penalty by placing a company into administration or liquidation** when PAYG or superannuation guarantee remains **unpaid and unreported** three months after the due date; and,
- In some cases, directors and associates will not be able to access PAYG credits in their own tax returns where a company has not paid the ATO.

These amendments **were retrospective** - so any **unpaid and unreported** (for more than 3 months) PAYG liability outstanding at 29 June 2012 will automatically result in a director penalty that cannot be extinguished by placing the company into administration or liquidation.

And with a further sting in the tail, we have recently seen the ATO issuing a DPN **after a company was placed into liquidation**. This of course seems inconsistent with the explanatory memorandum on the law changes, the stated policy objectives and the intention of the taxation legislation - but it ishappening, particularly for companies already on the ATO's radar.

The effect of this is that with the company already in liquidation and with no means to pay, the director is automatically personally liable for the PAYG and super debts older than 3 months.

Other important changes to the law include:

- That new directors are not liable until 30 days after they become a director (up from 14 days); and,
- In addition to estimating unpaid PAYG withholding liabilities, the Commissioner can estimate unpaid superannuation guarantee charge.

As always, the key has been to ensure lodgements are made on time and that a business can pay these obligations. Non-payment of statutory obligations has always been a key indicator of insolvency in our review process - and now it may come with significant personal liability for directors.

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