DIRECTOR PENALTY NOTICE REGIME EXTENDED

Date: 21 February 2020

Australia Tax Alert

From 1 April 2020, company directors will be personally liable for any unpaid GST, luxury car tax (LCT) and wine equalisation tax (WET), in addition to the pay as you go withholding (PAYGW) and superannuation guarantee contributions (SGC) debts already captured under the current Director Penalty Notice (DPN) regime.

We have set out below the most frequently asked questions.

HOW WILL IT WORK?

Company directors are under an obligation to ensure that the companies they run pay the above tax debts or, if that is not possible, to promptly appoint a voluntary administrator / liquidator to the company.

EXAMPLE

Assume ABC Pty Ltd lodges a GST return for the quarter ending 30 June 2020 (Initial Date) and has a liability of AUD100,000. This is due to be paid by 28 July 2020 (Due Date). The company does not have the means to pay.

From the Initial Date, the directors have an obligation to ensure the company's debt is paid or, if that is not possible, to promptly appoint a voluntary administrator / liquidator.

From the end of the Due Date, if the company has not paid (and an administrator / liquidator has not been appointed), DPNs can be issued. The amount of the penalty is the unpaid tax liability of the company (i.e. AUD100,000 in this example) and becomes personally recoverable from the director 21 days after the DPN is issued. If there a multiple directors, each has this exposure.

If GST returns have not been lodged, the Commissioner can issue a DPN based on an estimate of the unpaid tax.

CAN THE PENALTY BE REMITTED?

It depends. Generally speaking, the penalty can be remitted where the director complies with the obligation either before the DPN is issued or within 21 days of the notice being issued. However, there are some circumstances where the Commissioner has no discretion to remit the penalty and it is "locked down" in whole or part. An example of this would be if the company failed to lodge a GST return for more than three months after the Due Date.

ARE THERE ANY DEFENCES?

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Yes. It may be a defence if the director was ill or, for some other good reason, can demonstrate they took no part in the management of the company at the relevant time. A further defence may be that the company had a "reasonably arguable position" (RAP) and had taken reasonable care to comply with its tax obligations up to the time the DPN was issued. The best evidence of there being a RAP is a legal opinion confirming that such a position exists.

WHAT HAPPENS IF THE COMPANY PAYS THE OVERDUE DEBT?

If the company pays the overdue debt, the director penalties will be reduced by the same amount.

WHAT HAPPENS IF A DIRECTOR PAYS THE PENALTY?

If a director pays the penalty, this will be applied towards the debt owed by the company (and should also in turn reduce the penalties for any other directors). The director has a statutory right of indemnity against the company.

WHAT IS THE IMPACT ON DIRECTORS?

Personal liability means that individual directors face the possibility of bankruptcy and the loss of their personal assets, in the event of their company failing to meet its obligations. Tax credits can be offset against a DPN liability, so that if a director is due for a tax refund, that money can be used to reduce or settle the DPN debt.

ARE NEW DIRECTORS LIABLE?

Yes. New directors can be held personally liable 30 days after their appointment where historical liabilities remain unpaid after the Due Date.

ARE FORMER DIRECTORS LIABLE?

Yes. If a director resigns after the Initial Date, but prior to the Due Date, they remain liable for the penalty. A director retiring on 20 July 2020 would not avoid the AUD100,000 penalty in the above example.

WHAT SHOULD DIRECTORS DO TO MITIGATE THE RISK?

- Directors considering an appointment to an existing company should undertake due diligence to confirm all returns have been lodged on time and there are no outstanding tax liabilities.
- Directors already appointed to existing companies should check that there are robust compliance systems in place – particularly for material / abnormal transactions.
- For material transactions where no GST is payable (e.g. the sale of a business or property as a GST-free going concern) it would be prudent to ensure that a RAP opinion is on file to act as a defence. In some

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cases, obtaining a GST private ruling from the ATO confirming that the transaction is GST-free will provide the certainty required about the status of the transaction.

- Directors should ensure they have D&O insurance in place which can cover tax related liabilities.

WHAT SHOULD YOU DO IF YOU RECEIVE A DPN?

You should obtain immediate advice if you receive a DPN. Given the strict time limits, failure to take prompt action may mean that a director is not entitled to remission of the penalty.

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