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July 2009 Newsletter

>> COMPANY DIRECTORS AND TAX DEBTS

Company Directors Can Sometimes Be Required To Pay Tax Debts...

Before 1993 the Australian Taxation Office was a priority creditor in liquidations for certain company taxes. This advantage was removed in 1993 and the ATO became a normal creditor in respect of tax debts. To compensate for the loss of priority, the ATO was given the right to sue directors in relation to PAYG tax.

It is important first to consider who the directors of the company are. A director is not just a person appointed by the shareholders to carry out that role. A person is also a director even though they are not formally appointed but act in that role, or if the directors of the company act in accordance with their instructions or wishes.

If outstanding deducted taxes (amounts deducted under the PAYG provisions) are payable, the ATO can make the directors liable for a penalty in the same amount as the unpaid taxes. Each director will become separately liable for the full amount of the penalty.

GST is not a tax that the directors can become responsible for. If a director fails to cause the company to pay its tax or take action that is permitted under the legislation, they automatically become liable for the penalty.

To make the penalty collectable, the ATO must issue a notice. The penalty cannot be collected from a person until the end of fourteen days after the notice has been given.

The fourteen days is a strict time period and cannot be extended.

It is during these fourteen days that the directors can take action to avoid liability.

The penalty will be remitted if, at the end of fourteen days after the notice is given:

- the liability has been discharged; or
- an agreement relating to the liability is in force; or
- the company is under administration; or
- the company is being wound up.

Director penalty notices do not have to be served in the same way as legal proceedings. The ATO only needs to give notice by leaving it at, or sending it by post to, an address that appears from the ASIC or ATO documents to be, or to have been, within the last seven days the person's place of residence or business. As a director, it is therefore critical to keep up to date, details of one's address because it is possible that a notice could be served and the director would not know.

The four options set out above each have their difficulties. For example, it would generally take longer than fourteen days to wind up a company. Agreements between tax payers and the ATO may take longer than fourteen days to negotiate and execute, especially since the director may not even be aware that this option exists until they receive the notice and the option is stated in the notice.

>> LEGAL TERMS

'Contribution', 'Subrogation' and 'Assignment' are terms often seen when there is a guarantee.

Contribution

Contribution arises when there are two or more guarantors. In this situation the guarantors are to share the burden pro rata. If one of the guarantors pays out a guarantee that guarantor can sue his or her co guarantors for their share. It also sometimes happens that a creditor will obtain a judgment against one guarantor but not others. In those circumstances a guarantor that has a judgment against him can sue the other guarantors for contribution.

Subrogation

Subrogation is a right that can arise in some circumstances when there are guarantees. For example a guarantor who pays out a debt is then entitled, because of the law of Subrogation, to exercise all of the rights of the creditor against the debtor. The right is limited to the amount paid.

Assignment

An Assignment is an agreement that assigns, or gives to another, the right that someone has. If there is an Assignment it can allow the person who has the benefit of the Assignment to pursue another party for the whole of the debt and costs. This is different to Subrogation because in Subrogation the right is limited to what has actually been paid.

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>> REAL PROPERTY ACT

Changes to the Real Property Act Aimed to Protect Property Owners Against Fraud

The Real Property Act has been amended to provide that before lodging a mortgage for registration, the mortgagee must take steps to ensure that the person who executed the mortgage as mortgagor or borrower, is the same person who is or is to become, the registered proprietor of the land that is security for the payment of the debt to which the mortgage relates.

A written record of steps taken must be kept by the mortgagee for seven years.

The Registrar General can require questions to be answered about the steps taken to ensure that the person signing the mortgage is the same person as the borrower and also can require that the documents be produced for inspection.

These are important changes that should help protect consumers when dealing with land.

>> SPANISH CONNECTION

Jackson Lalic Becomes A Member of the Spanish Chamber of Commerce ...

Jackson Lalic Lawyers has become a Small Business Member of the Spanish Chamber of Commerce. As a member, Jackson Lalic Lawyers will be able to assist its clients in doing business in Spain, most especially in the green building technology area. We will also be available to Spanish companies to assist them in Australia.

>> COMPANY DIRECTORS AND TAX DEBTS cont.

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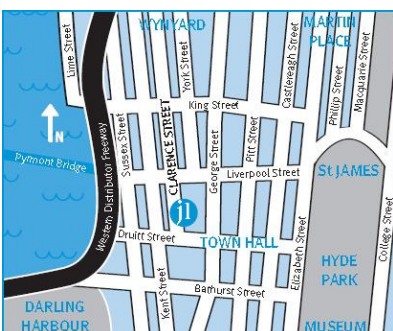
One of the risks is for new directors. The liability may attach to directors appointed after the due date for payment of the tax. They may agree to be appointed as a director with no knowledge of the outstanding tax, and fourteen days later be personally liable for tax debts that were incurred and became payable well before their appointment. New directors have fourteen days to make the company comply with one of the provisions set out above or they too may well become liable. Simply resigning within the fourteen days does not remove the liability.

It sometimes happens that directors cannot do one of the four things that are set out above, to remit the potential liability. If the directors penalty notice expires after fourteen days, there are still defences available.

The defences fall into two categories:

1. That illness or some other good reason stopped the director from taking part in the management of the company. Positive proof of the inability to act would have to be provided.
2. That the director took all reasonable steps to make the directors comply with the notice, or that there were no steps that the person could have taken. This defence usually arises when a minority director cannot take action because the co-directors block their actions. Directors of single director companies would have a hard time relying on this defence.

This potential liability highlights the risks associated with being a company director and the need to keep records constantly updated so that they are correct.



The articles contained in this newsletter are in the nature of general comment only. The articles are neither intended nor should be taken to be, advice in respect of any particular matter. Advice should be sought in relation to particular circumstances.

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