
CREDIT ISSUES

WOODGATE & CO.

Chartered Accountant

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DIRECTOR PENALTY NOTICES

Director's personal liability

Directors' penalty notices are issued by the Australian Taxation Office ("ATO") pursuant to Section 222 AOE of the *Income Tax Assessment Act* 1936 (Cth.) ("ITAA") to recover from directors taxation debts owed by companies principally under PAYG withholdings. On receipt of a director notice, the directors have one of four alternatives:

- (a) to pay the outstanding tax;
- (b) to enter into a repayment programme with the ATO. This requires the agreement of the Commissioner, within the 14 day time frame;
- (c) to appoint a Voluntary Administrator under Part 5.3A of the Corporations Act; or,
- (d) to commence the winding up of the company, within the meaning of the Corporations Act.

Otherwise the directors will become personally liable for the amount of the debt detailed in the notice. If the company does not comply with the provisions of a payment programme,

then the directors become personally liable for the amount of the unpaid debt.

Directors should be aware that because a Receiver and Manager or Managing Controller has been appointed by a secured creditor, or a Provisional Liquidator has been appointed, they are not relieved of the need to deal with the notice.

Defences

Section 222AOJ of the ITAA provides the following defences:

- (a) the directors did not take part in the management of the company because of illness or some other good reason;
- (b) the directors took all reasonable steps to ensure that tax was paid or that one of the other options was adopted; or,
- (c) there was nothing the directors could have done.

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The material contained in this newsletter is merely general commentary and the comments and information do not represent a legal or professional service. Advice should be sought from Woodgate & Co. in relation to the circumstances of each matter before acting in this area.

Invalid director penalty notice?

In *Ross Forsyth v Deputy Commissioner of Taxation* a director tried to escape the effect of the directors' penalty notice regime. In this case, three notices had been issued.

The director argued that each notice was invalid. The first notice was said to be invalid because it only detailed debts covering two months, when in fact the overall debts owed to the ATO were considerably more. The director argued that because of that misstatement he was induced to attempt to arrange a repayment programme rather than cause the company to enter liquidation or administration. Subsequently, the company failed to comply with the payment arrangement. The director argued that the second and third notices were tainted by the error said to exist in the first notice. The director also argued that there was insufficient evidence that the notices had been served by post in the manner required by the ITAA.

Service of director penalty notices

Section 222AOF of the ITAA states if it appears from Australian Securities and Investments Commission ("ASIC") documents that a person is, or has been within the last seven days, a director of the company, the ATO may give the person a notice under Section 222AOE by leaving it at, or sending it to, an address that appears to be, or have been within the last seven days, the person's place of residence or business. There is no requirement for personal service of director penalty notices.

Section 29 of the *Acts Interpretation Act 1901* (Cth) states that where the expression "send" is used, then the service is deemed to be effected by properly addressing, pre-paying and posting the documents as a letter and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post.

The Court of Appeal of the Supreme Court of New South Wales quoted the High Court of Australia in *Deputy Commissioner of Taxation v Woodhams* that a director penalty notice has two purposes:

- to inform the recipient of the company's liability under the remittance provision, as then known to the ATO; and,
- to inform the recipient of the alternatives available, which will result in remission of the penalty, the object being to encourage the recipient director to take such steps as are necessary to bring about the result that one or other of those alternatives is followed.

The Court noted that the ATO's procedure for the issuing of directors' penalty notices was to obtain extracts from ASIC records to determine the addresses of directors. An officer of the ATO would place the director penalty notice in an envelope addressed to that director's address, affix a stamp and then personally place the envelope in a public mail box. The Court held that the evidence of the officer of the ATO was that the notices had been posted in accordance with the ATO procedure. The Court found that this provided clear evidence of complying with Section 222AOF. It was not necessary to the ATO to provide a detailed confirmation that each step had been

strictly complied with. Therefore, the director was unable to escape personal liability.

Change of address

When directors change their home or business addresses, they should be aware of the requirements of Section 205B(4) of the *Corporations Act 2001* (Cth), under which they are obliged to lodge with ASIC notice of any change in the address of a director, within 28 days after the change. The notice must be in the prescribed form, which is a Form 484. Because the ATO uses ASIC records to determine where to post director penalty notices, directors should not delay in notifying ASIC of a change of address. We are aware of several instances of director penalty notices being sent to directors' former addresses and not being brought to their attention, until after the notices had expired. In one case, the director penalty notice was for approximately \$199,000 and the director subsequently filed for bankruptcy.

To ensure that ASIC has the correct residential address perform an ASIC search and lodge any amendments on a Form 484.

Conclusion

If PAYG withholdings and other taxes are not being paid when they fall due, directors should take immediate advice so that remedial action can be taken.

Even if directors avoid personal liability arising from director penalty notices, they may still face personal liabilities under the provisions of the *Corporations Act* for trading whilst insolvent.

Woodgate & Co. can assist directors to determine the appropriate remedial action and implement those remedies. We can provide expertise to deal with operational, financial and insolvency issues and assist in minimising a director's personal exposure.

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