
CREDIT ISSUES

WOODGATE & CO.

Turnaround & Insolvency

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NEW POWERS TO COLLECT SUPERANNUATION GUARANTEE CHARGE

Introduction

The recent Supreme Court of Victoria decision of *Deputy Commissioner of Taxation v Samuel Peregrine Lawson* [2017] VSC 789 highlights the problems for directors who fail to comply with director penalty notices (“DPN”) issued by the Deputy Commissioner of Taxation (“ATO”). This article also discusses the Treasury Laws Amendment (Taxation and Superannuation Guarantee Integrity Measures) Bill 2018 (“the Bill”), which seeks to increase the ATO’s enforcement powers to collect unpaid superannuation guarantee charges (“SGC”).

Background

The objective of the DPN regime is to ensure that a company pays its debts to the ATO or is promptly placed into voluntary administration or liquidation. The ATO may issue DPNs to directors for unpaid PAYG withholdings and SGC, but not GST.

The ATO’s amended claim against Mr Samuel Peregrine Lawson (“the Defendant”) was for \$554,168, being unpaid SGC for four non-sequential quarters between 1 July 2013 to 31 March 2015, plus interest and costs.

The Defendant was the sole director of Regent Personnel Pty Ltd (In

Liquidation) (“the Company”). Records from the Australian Securities and Investments Commission (“ASIC”) confirmed the Defendant was the sole director of the Company from 1997.

The Defendant asserted that due to mental illness and for other good reason, he could not and/or did not take part in the management of the Company. Further, from mid-2012 the Defendant engaged others to assist in managing the affairs of the Company on his behalf. He only attended the company’s office to sign documents as required. This included signing blank SGC forms. The ATO submitted that this was a fundamental dereliction of his responsibilities as a director.

Two DPNs were issued to the Defendant by the ATO. The first DPN was for \$522,302, the second was for \$31,866. The Defendant claimed that he did not receive the second DPN.

Statutory Framework

Division 269 of Schedule 1 of the *Taxation Administration Act 1953* (Cth) (“TAA”) requires directors to ensure that the company:

- (a) pays its taxation and SGC obligations; or,
- (b) is promptly placed into voluntary administration; or,

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(c) is wound up.

Those duties are enforced by the ATO's powers to issue DPNs.

When a DPN is served

The ATO is unable to commence legal proceedings to recover a director penalty, until it has first issued a DPN. The DPN must set out:

- (a) what is owed by the company;
- (b) that the person served with the DPN is liable to pay, by way of penalty, an amount equal to the unpaid amount; and,
- (c) the circumstances in which the penalty will be remitted.

Since June 2012 notice is taken to have been given to the director at the time the ATO leaves or posts the DPN to the director, not when the DPN is received by the director. The ATO may remit the penalty if, within 21 days from the posting of the DPN, the company is placed into voluntary administration or liquidation, or if the company pays the debt.

If a director pays a DPN, there is a right of contribution from the other directors.

Historically DPNs have been used by the ATO to collect outstanding PAYG withholdings (or group tax). The latest figures available from the Inspector-General of Taxation stated that the ATO issued approximately 28,000 DPNs during the three years ended on 30 June 2014.

Limited defences

A director is not liable to pay a penalty if it was unreasonable to expect that director to take part in the management of the company, due to illness or some other good reason. Alternatively, a director is not liable where he or she took reasonable steps to ensure that the

company's ATO obligations were discharged or that the company was placed in external administration, before the DPN expired.

As noted in *Deputy Commissioner of Taxation v Stenner* (2003) 53 ATR 316 at 320 it is difficult for a director to escape liability because of non-participation in the management of the company. A director has to show that he or she took no part in the management of the company, and did not do so for some good reason. A director bears the burden of proof to show that one of the defences applies.

Defendant's arguments

The Defendant asserted that he had not received the second DPN and that he had never lived at the address recorded on ATO records. However, the Defendant's tax agent recorded that address as the Defendant's address for two years. This highlights the importance for directors and company secretaries of keeping both ASIC and the ATO informed as to their current residential address.

The Defendant also gave evidence that his mental health was such that he was unable to manage the Company. A psychologist gave evidence stating that the Defendant was suffering from depression, at the time he was treated in October 2017. However, the psychologist conceded that he could not give evidence as to the Defendant's mental state between 2013 to 2015. Further, the psychologist could not provide persuasive evidence to show that the Defendant's mental health caused such a disability that he had not actually participated in the management of the company during the relevant period.

The ATO noted that by attending four meetings with representatives of the ATO and by signing documents that

resulted in the winding up of the Company, the Defendant had participated in the management of the Company.

Judgment

The Court noted that the Defendant's failure to participate in the management of the Company was due to him believing that others were doing so. However, this was not a good reason for not participating in the management of the Company.

The Court held that the second DPN was properly given, noting that the ATO was not required to post a DPN to the director's address as recorded by ASIC. The ATO was entitled to post a DPN to an address listed on a director's tax return.

The Court held that the Defendant was liable for the two DPNs.

The Bill

The purpose of the Bill is to increase employers' compliance with their SGC obligations. This is apparently necessary because the ATO's annual report for the year ended 30 June 2017 disclosed that it raised SGC assessments totalling \$702M, including penalties and interest, but only collected \$380M of SGC, a collection rate of 54%. Further, the total SGC debt as at 30 June 2017 was \$1.3B.

Existing legislation provides that from 1 July 2018 all employers with 20 or more staff will be required to electronically report to the ATO payments such as wages, PAYG withholding and employer superannuation contributions, at the time they are made. From 1 July 2019 the Bill will require all employers to report those payments to the ATO.

The Bill proposes two new powers for the ATO to collect SGC, being:

1. an education direction power; and,
2. a payment direction power.

The proposed education direction power allows the ATO to issue education directions to directors. An education direction requires a director to complete an approved course on SGC within a specified timeframe and then provide the ATO proof of completion. Such a direction is likely to be issued where the ATO believes the failure to comply with SGC obligations is due to a lack of knowledge or understanding by the director of their obligations. Such courses may be run by the ATO or a nominated entity. The consequences of failing to comply with an education direction include administrative penalties and up to 12 months imprisonment, for a third or subsequent offence.

The proposed payment direction power will require an employer to ensure that the unpaid SGC is paid to the ATO within a specified timeframe. This will operate in conjunction with existing tax collection and recovery rules. The failure to comply with a payment direction carries a maximum penalty of \$10,500, 12 months' imprisonment, or both. This is a strict liability offence. It is intended that the ATO will only issue payment directions for serious contraventions of obligations to pay SGC by employers whose actions are consistent with ongoing and intentional disregard of those obligations. Directors will have a defence for failure to comply with a payment direction, where they are able to prove that they took all reasonable steps to comply with the payment direction within the specified timeframe as set out in that payment direction, and had taken all reasonable steps to comply with their SGC obligation, prior to the payment direction being issued. The defence ensures that a director who has genuinely attempted to comply with a payment direction will not be subject to criminal charges for their failure to comply.

If the Bill is passed, it will apply to failures to comply with SGC obligations that occur on or after 1 July 2018. However, this will also include failures to make SGC payments due prior to 1 July

2018 where those debts are still payable as at 1 July 2018.

Conclusions

Care needs to be taken by directors of companies to ensure that their companies comply with their SGC and tax obligations, particularly given that

they can be held personally liable if the ATO opts to issue DPNs. Additionally, the ATO's powers to recover SGC will increase, if the Bill passes through Parliament.

If you require assistance with regard to your tax and SGC obligations, do not hesitate to contact Giles Woodgate or Richard Rowley, at Woodgate & Co.

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