



26th September 2012

“DIRECTORS OF COMPANIES OR TRUSTEE COMPANIES BEWARE”

New Directors Penalty Regime – Please read carefully

Companies are often used as a vehicle by clients to conduct their businesses and have historically speaking, provided a level of protection for the director’s personal assets. The level of protection afforded to Company directors has been known as the “Corporate Veil” and would often protect directors from claims in relation to debts incurred by the Company in the normal course of conducting its trading activities.

As the company is considered to be a separate legal entity; in the event, where the business is no longer viable and the Company faced with prospect of insolvency, the directors would ordinarily enjoy a level of protection in relation to outstanding Company debts at the time. *There are of course exceptions to the rule, such as where a director provides a personal guarantee or the company trades whilst insolvent.*

Previously if a company was placed in liquidation and there were outstanding debts to the ATO for PAYG withholding tax or superannuation, the directors were not personally responsible for such debts. *That has all changed...*

What are the changes?

The new director’s penalty regime was introduced in late June 2012. What it essentially means is that if PAYG withholding tax and superannuation are not paid when due or at the very least reported to the ATO within the prescribed period of time, the directors will become personally liable as soon as the ATO issues a Directors’ Penalty Notice.

Once the director is served with a Directors’ Penalty Notice as provided under the new rules, the director is unable to avoid personal liability even if he was to appoint an External Administrator to the Company.

In effect what this means is that

“ Where three months have lapsed after the due day for the Company’s liability and the liability remains unpaid and unreported, the director is personally liable and can no longer achieve remission of the penalty even if he was to appoint a liquidator or an administrator subsequent to that date ”

The new directors’ penalty regime poses a serious risk for existing directors, as well as for those considering becoming a director of an existing entity or those who are often described as “silent” or non-participating directors.

For new directors, the three-month period counts from when they become a director of a company, rather than three months after a debt arose

The solution - What you should do

The new rules are no doubt a very robust tool for the ATO to obtain their PAYG or collect superannuation on behalf of employees. The clear message from the ATO is that if you lodge and pay your PAYG and superannuation on time, the directors have little to fear. However we all know that when cashflow becomes tight, many clients see the ATO as an entity that can wait for their money. That is no longer the case.

Our advice to clients is as follows:

- Prepare & lodge your Business Activity Statements on time. This way you are not exposed to the New Directors’ Penalty Regime & reduce the risk of becoming personally liable for the Company’s PAYG Withholding (& superannuation) liabilities. Even if the Company is unable to pay the outstanding liability to the ATO, it is far more prudent to lodge the BAS, and then enter into a payment plan with the ATO, rather than delay lodging the BAS and face the risk of becoming personally exposed for the Company’s obligations.
- Please note that if our office prepares and lodges the BAS on behalf of your Company you must provide our office all the necessary documentation at least two (2) weeks prior to the ATO due date for lodgement. If the documentation is received at a later stage, we may not be able to complete and submit your Business Activity Statement(s) on time.
 - If you or a bookkeeper prepares & lodges the BAS’s, then the message is the same – prepare and lodge the BAS by the due date.
 - In relation to the Company’s obligations to pay superannuation contributions for employees (including directors) you must pay it by the due date. Normally that’s 28 days after the quarter ends. Failure to do so by the due date may well result in the directors becoming personally liable for the Company’s Superannuation Obligations.

These changes are a clear sign that the ATO have increasing powers to recover outstanding PAYG and superannuation. We cannot stress enough the severe financial ramifications of these changes to company directors. The once “protected” directors are now potentially exposed to substantial taxation & superannuation liabilities.

Please note that whilst these laws became effective on the 29th June 2012, they do apply to outstanding PAYG and superannuation liabilities accrued prior to this date.

If you are aware of any outstanding lodgements of BAS's which at present have been outstanding for more than three (3) months past the due date, we urge you to attend to lodgement and payment of same as a matter of urgency. In the alternative, please contact our office immediately to discuss this matter.

Important Notice for those engaging contractors

As you may recall, earlier in the year you received a letter from our office outlining the risks associated with engaging contractors that could be deemed to be employees for Superannuation purposes.

Many of our clients have adopted our advice and have restructured the way they engage contractors. For those clients that have not, the new directors' penalty regime introduces a great risk of personal exposure for the Company's Superannuation liabilities.

If a contractor is deemed to be an employee, and hence the Company should have paid PAYG and superannuation on their behalf, under the new rules, the director can be held personally liable for the Company's failure to remit such amounts to the ATO and the relevant superannuation fund. Such exposure may amount to a very substantial amount depending on the number of subcontractors/employees and the length of their employment.

As always we urge any client to contact our office if they need further information on the above.

Yours truly,
Vantage – Tax & Business Services

Disclaimer

The material and contents provided in this publication are informative in nature only. It is not intended to be advice and you should not act specifically on the basis of this information alone. If expert assistance is required, professional advice should be obtained.