

## ATO RECEIVABLES POLICY

### PART B The Collection of Taxation Debts

# Chapter 14 PERSONAL LIABILITIES OF COMPANY DIRECTORS

*The policy in this chapter is to be followed by Tax Office staff. We have made every effort to ensure it is technically accurate, but in the interests of clarity it has been written in "plain English" and should not be read or interpreted like legislation. If you feel that something in the chapter is wrong or misleading, please advise the Tax Office.*

**Date of effect:** 24 July 2008 (This version replaces the 2006 version.)

**Key legislation:** *Income Tax Assessment Act 1936*

## PURPOSE

1. This chapter deals with the Commissioner's approach towards recovery of the personal liabilities that company directors may incur in relation to their company's liabilities under the remittance provisions.

## INTRODUCTION

2. In a number of different ways, company directors can incur a personal liability related to a tax liability owed by their company. Divisions 8 and 9 of Part VI of the *Income Tax Assessment Act 1936* (ITAA 1936) provide that directors can incur penalties equal to their company's unpaid remittance provision liabilities, unpaid estimates of those liabilities, or the unpaid instalments of a defaulted payment agreement under section 222ALA of that Act.
3. Directors are also under a duty (per section 588G of the *Corporations Act 2001*) to prevent the company incurring debts while it is insolvent. Where they fail in that duty, directors can be ordered to compensate creditors for the debts that were accrued while the company was trading insolvently and which were not able to be recovered through the liquidation.
4. Furthermore, section 588FGA of the *Corporations Act 2001* provides that if a company's payment in respect of a remittance provision liability is held to be a voidable transaction, directors are liable to indemnify the Commissioner in respect of any loss or damage resulting from an order requiring the Commissioner to return that payment to the liquidated company.
5. Where the company commits an offence (such as failing to comply with its obligations to furnish a return or other information) the directors may also be liable to prosecution under section 8Y of the *Taxation Administration Act 1953*. Where the offence has resulted in a loss to the Commonwealth, a person convicted of an offence could be ordered to make reparation under section 21B of the *Crimes Act 1914*.

## **POLICY**

### **Director penalties**

6. Where a director incurs a director penalty (pursuant to sections 222AOC, 222AOD, 222APC or 222APD of the ITAA 1936) the Commissioner will endeavour to issue a director penalty notice (DPN) in respect of that penalty as soon as practicable after the penalty is incurred. This is consistent with the primary object of the director penalty provisions which is to induce directors to either cause the company to pay the outstanding liabilities, or to have the company quickly brought under some form of external administration so as to protect the interests of all creditors. The Commissioner also recognises that the prompt dispatch of DPNs can encourage directors to address a company's financial difficulties before they become insurmountable.
7. Before commencing recovery action in respect of director penalties, the Commissioner will evaluate any defence alleged by the director pursuant to sections 222AOJ, 222API or 222AQD of the ITAA 1936. If, after considering all relevant documentation and evidence provided by the director, it is apparent that the director could satisfy the Court that he or she has a valid defence, the Commissioner will not initiate recovery proceedings in respect of those penalties.
8. Where an indebted company has multiple directors, the director penalties owed by the directors are likely to be parallel liabilities, such that the Commissioner may commence action against any or all of the directors in an attempt to recover an amount equivalent to the underlying liability of the company. Before determining which director(s) to pursue, the Commissioner will have regard to a number of factors, including each director's capacity to pay and the relative merits of any defences that may be available to them.

### **Insolvent trading**

9. The Commissioner will look to support the activities of a liquidator or administrator in appropriate actions against directors where there is a view that the action of directors has adversely affected the revenue. In particular, the Commissioner will encourage a liquidator to pursue directors in appropriate cases of insolvent trading where there is a significant amount of tax involved, and where there is a potential for recovering that amount by initiating action against a third party.

### **Disclosure to parallel debtors**

10. The Tax Office is responsible for ensuring that the release of taxpayer information is in accordance with the disclosure provisions of the ITAA 1936. Section 16 of that Act allows disclosure by an officer if it is in the performance of the officer's duties. In this situation, information may be disclosed if it ensures or encourages compliance with the Act (for example, where provision of the information promotes payment of a director penalty). The officer must be satisfied that the former director is *not* seeking information for a purpose which is wholly unrelated to the recovery of the amounts.
11. From time to time, the Commissioner may be approached by a former director of a company with a request to provide information about the Commissioner's negotiations with, or actions against, the company or against other directors or former directors who share a parallel liability. It is accepted that it is possible that the disclosure of information to a former director can facilitate collection of unremitted amounts. For example, a former director may be encouraged to pay an outstanding amount of penalty when they see that other parallel debtors have paid

amounts toward the penalty and have rights of indemnity (per section 222AOI of the ITAA 1936) against the former director.

12. The sort of information that might be disclosed could include:
  - (i) the amount of the outstanding liability
  - (ii) the action the Tax Office is taking against the particular persons to recover all or part of that liability, and
  - (iii) the identity of the persons who have already paid part of the liability.
13. Even where a penalty has been paid in full, disclosure to a former director that specifically identified persons have a right of indemnity against them could also be made where the disclosure makes it clear to the former director that they have not escaped liability by failing to make a payment directly to the Commissioner.
14. It should be noted, however, that the Commissioner is not obliged to disclose information in the situations outlined above, and would only do so when satisfied that the disclosure would aid in the recovery of unremitted amounts or assist the former directors to understand their rights and liabilities.

### **Disclosure to the insolvency practitioner**

15. In addition to possibly indemnifying the insolvency practitioner for costs incurred in pursuing the directors (see Chapter 30 'Indemnities for trustees and liquidators'), the Commissioner may also respond favourably to requests from a liquidator or administrator for information about the company's taxation affairs.

### **TERMS USED**

Parallel liability – refers to liabilities which, pursuant to sections 222AHA, 222AJB, 222AOH, 222APG and 222AQB of the *Taxation Administration Act 1953*, are owed with something akin to joint and several liability by the company and its directors.

Remittance provisions – refers to various legislative provisions requiring an entity to remit:

- (i) prior to 1 July 2000,
  - deductions made from reportable payments
  - tax instalment deductions made from payments of salary and wages
  - deductions from prescribed payments
  - deductions made from natural resource payments or unattributed payments, and
  - dividend, interest and royalty withholding taxes.
- (ii) on or after 1 July 2000,
  - amounts withheld under the pay as you go withholding system, as detailed at subdivision 16-B of the *Taxation Administration Act 1953*.

Underlying liability – refers to the unpaid amount of a company's remittance provision liability, an amount which forms the basis for the director penalties.

Voidable transaction – is a transaction that may be regarded as void if it is determined that it is an insolvent transaction within the meaning of section 588FE of the *Corporations Act 2001*.

**Chapter 14 - Archived version**

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