

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 ATO 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 ATO.

Date of effect: 2 March 2011

Key legislation: Divisions 268 and 269 in Schedule 1 to the *Taxation Administration Act 1953* (TAA).

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. It also deals with disclosure to other parties when dealing with parallel liabilities.

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 268 and 269 in Schedule 1 to the TAA provide that directors can incur penalties equal to their company's unremitted PAYG withholding liabilities or unpaid estimates of those liabilities.
3. Prior to 1 July 2010, the Commissioner had specific powers to enter into payment agreements with companies under section 222ALA in Division 8 of the *Income Tax Assessment Act 1936* (ITAA 1936). That section (as well as the whole of Division 8) has been repealed. From 1 July 2010, any payment arrangements must be made under the TAA. However, 222ALA payment agreements made before 1 July 2010 will continue in effect. Although they will now be arrangements under section 255-15 in Schedule 1 to the TAA, directors can also still be held personally liable for any unpaid instalments of a defaulted payment agreement which was made under former section 222ALA of the ITAA 1936.
4. Directors are also under a duty (pursuant to 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 when the company was trading while insolvent and which were not able to be recovered through the liquidation.
5. Further, section 588FGA of the *Corporations Act* provides that if a company's payment in respect of a remittance provision liability is held to be a void 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.

6. Where the company commits a taxation 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 TAA. 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

7. Where a director incurs a director penalty (pursuant to section 269-20 in Schedule 1 to the TAA) the Commissioner will endeavour to issue a director penalty notice (DPN) under section 269-25 in Schedule 1 to the TAA in respect of that penalty as soon as practicable after the penalty is incurred. Under subsection 269-25(1) the Commissioner must not commence proceedings to recover a penalty until 21 days after he gives to the director a DPN stating what the Commissioner thinks is the unpaid amount and explaining why the penalty has been incurred and how it may be remitted. Under subsection 269-25(4), a DPN is taken to be given at the time the Commissioner leaves or posts it. 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.
8. Before commencing (or continuing) recovery action in respect of a DPN, the Commissioner will evaluate any defence alleged by the director pursuant to section 269-35 in Schedule 1 to the TAA. If, after considering all relevant documentation and evidence provided by the director, it is apparent that the director could satisfy the court that they have a valid defence, the Commissioner will not initiate (or continue) recovery proceedings in respect of those penalties.
9. 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.

Disclosure to parallel debtors

10. From time to time, the Commissioner may be approached by a former director of a company with a request to provide information about our 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 (under section 269-45 in Schedule 1 to the TAA) against the former director. Alternatively, a former director may be

encouraged to pay an amount of outstanding penalty in the knowledge that other identified persons have not paid and that he or she can pursue a right of indemnity against those persons.

11. Division 355 of Schedule 1 to the TAA contains confidentiality provisions that apply to protected information (information obtained or generated by the ATO under or for the purposes of a taxation law). The Commissioner or any other taxation officer is prohibited from disclosing protected information except in circumstances set out in exceptions in Division 355. The exception in section 355-50 allows (but does not compel) disclosure by a tax officer in performing their duties as a taxation officer.
12. A disclosure in performing duties as a taxation officer includes a disclosure made for the purpose of administering any taxation law, which would include a disclosure made to ensure the collection and recovery of a tax liability. Section 355-50 also expressly provides that protected information about one entity may lawfully be disclosed to another entity if the disclosure is made for the purpose of enabling the entity receiving the information to understand or comply with its obligations under a taxation law.
13. Lawful disclosures for the purposes just described could extend to the disclosure of protected information about a company to a director (including a former director) of that company, including:
 - (i) the amount of the outstanding liability
 - (ii) the action the Commissioner 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.

Disclosure for the purpose of satisfying the curiosity of a person (that is, a disclosure solely for that person's, rather than the Commissioner's, purposes) is not sufficiently connected with the administration of relevant tax laws to bring the disclosure within the performance of an ATO employee's duties.

14. 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.

Insolvent trading

15. 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 support a liquidator in their pursuit of directors in certain insolvent trading cases (see paragraph 4 above) where there is a significant amount of tax involved, and where there is a potential for recovering that amount by initiating action against the directors (see also Chapter 30 'Indemnities for trustees and liquidators'.)

TERMS USED

Parallel liability – in the context of this chapter, refers to liabilities where payment or application of an amount towards discharging one liability will reduce each liability to which it relates by the same amount, and /or that fulfillment of one debtor's liability discharges other debtors of the same liability by the same amount. In particular, they include:

- a company's liabilities to withhold and remit amounts required under Part 2-5 in Schedule 1 to the TAA (including a judgment for such a liability)
- a company's liabilities to pay estimates made by the Commissioner under Division 268 in Schedule 1 to the TAA in respect to the preceding liabilities
- DPN liabilities under Division 269 in Schedule 1 to the TAA in relation to the preceding liabilities (the underlying liabilities) and/or a director penalty liability for contravention of a payment agreement under the former section 222ALA of the ITAA 1936 which is based on the 'underlying liability' (including any judgment for such a liability).

The general interest charges in respect of each of these 'parallel liabilities' (where they apply) are also parallel liabilities.

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

- (i) prior to 1 July 2000
 - deductions made from reportable payments and prescribed payments
 - tax instalment deductions made from payments of salary and wages
 - deductions made from natural resource payments or unattributed payments
 - dividend, interest and royalty withholding taxes
- (ii) on or after 1 July 2000
 - amounts withheld under Divisions 12, 13 and 14 in accordance with subdivision 16-B of Part 2-5 (PAYG withholding) in Schedule 1 to the TAA
 - amounts estimated under Division 268 in Schedule 1 to the TAA.

Underlying liability – refers to the unpaid amount of a company's remittance provision liability.

Void transaction – is a transaction in respect of which the court has made an order under section 588FF of the *Corporations Act 2001*.

Chapter 14 - Archived versions

Version 4 – July 2006 (will link to chapter 14 pdf)

Version 5 – August 2008 (will link to chapter 14 pdf)
