

TROUBLE ON THE HORIZON

In June 2013 we penned a newsletter titled *"We are on the Road to Nowhere"* which focussed on the significant rise in non-payment of taxation obligations in the SME sector and the flow-on effect this was having on our economy.

Fast forward to 2015 and we can see the position is only getting worse. The engine room of our economy is in strife.

ATO arrears growing

The ATO's most recent Annual Report discloses that collectable debt is increasing, up from \$14bn in 2011 to \$19.5bn in 2014. Not only is the debt to the ATO increasing but the ageing of the debt is getting older as well. Alarming nearly 21% of the debt is over 2 years old and of major concern is that SME's account for over 62% of ATO collectable debt.

Clearly our engine room is in trouble and for those hiding a tax debt things are about to get a whole lot worse. The mining boom is now a memory of the past and government coffers are not looking good. Of the \$336bn tax revenue budgeted for collection in the 2013/14 year the ATO only managed to collect \$321bn. It is therefore understandable that taxpayers who have not been paying their taxes will be called to account.

Small Business to be an area of focus

The ATO has said **"small businesses continue to account for the majority of all collectable debt and are a specific area of focus"**.

In 2014 the ATO wound up 1333 companies. This year to 31 August alone we have seen over 2,500 applications to wind up issued by the ATO. Clearly the collection pendulum has swung.

Be warned the holiday is over

The increased winding up activity shows the ATO is cracking down on all unpaid taxes owing, including GST, PAYG and superannuation.

The non-payment of taxes has been a common theme in our newsletters since the introduction of the new tax regime. We have found the ATO is commonly the largest unsecured creditor when a business becomes insolvent and is often referred to as the largest unofficial non-bank financier!

The reason for this in our opinion has been the ATO's **"soft"** collection policy given the challenges facing the economy in the years following the GFC. However, faced with dwindling revenues and increased non-compliance by certain taxpayers, the ATO has been charged with recovering the billions of dollars outstanding in unpaid taxes.

The days of hiding are over and repayment programs will no longer be entered into lightly by the ATO. The ATO have indicated they are still keen to work with taxpayers who can demonstrate their difficulties are short term and their business viable. For those who cannot meet these prerequisites recovery action should be expected.

Remember an application to wind up a company is the last resort and various notices and demands are issued before this dramatic and final step is taken. However with this change in attitude from the ATO if any demand from the ATO is received it should not be disregarded. Action needs to be taken post haste as the ATO will move swiftly to issue proceedings unless the debt is repaid.

Automatic Liability for Directors

In 2012 with the introduction of the **"lock down"** provisions the liability attaching to directors for unpaid taxes changed significantly.

Should a company have a PAYG or a SGC debt that is:

- Unpaid;
- Unreported; and
- 3 months overdue

the directors are **automatically personally liable** for the debt. In these circumstances the ATO is not required to issue a Director Penalty Notice in order for the director to be liable.

With the introduction of the "lock down" provisions it is vitally important for companies to submit their returns to the ATO on time, even if they are not able to pay the amount due.

Providing the returns are lodged on time, in order for the director to be personally liable for the company's unpaid PAYG/SGC obligations the ATO is required to issue a Director Penalty Notice. Providing that the director has within 21 days:

- paid the debt; or
- appointed liquidators or voluntary administrators to the company;

they **will not be personally liable**. If no action is taken however, at the expiration of the 21 days the director becomes personally liable. The debt can only be discharged by payment in full by either the director or the company.

Remember the 21 day timeframe of the DPN is not flexible and personal liability is automatic unless one of the above options is in place within the 21 day window of opportunity.

Advisors should familiarise themselves with these demands as we have unfortunately seen incidences where the advisor has not understood the importance of the documentation only to find their inaction has resulted in a personal liability to their client.

Further, recent experience has shown us that once an Application for Winding up a Company or a DPN has been issued the ATO is very reluctant to accept a repayment proposal. The ATO have taken the view that the taxpayer has had long enough to get their affairs in order and taking action after proceedings are issued is too late.

So act early or feel the full brunt of the ATO's power.

What does this mean for your clients?

For taxpayers who have a debt outstanding to the ATO

- Time is up – seek advice now or face liquidation or bankruptcy if they leave it to the ATO to find them!

For professional advisors

- Be aware of increased collection activity by the ATO.
- Encourage clients to seek advice sooner rather than later from a reputable insolvency/turnaround professional.
- Exercise caution when advising clients to ensure you are not seen to be facilitating Phoenix arrangements. (In June of this year more than 100 ATO Officers as part of a joint ATO, Federal and State police operation into fraudulent phoenix activity took part in **unannounced** raids into more than a dozen Sydney law firms, accounting practices and liquidators' offices).
- Be aware of the ATO demands, don't let them get caught up in your in-tray as you could end up being sued by your client for not telling them what these demands/notices mean.
Be aware of the ATO demands, don't, let them get

For creditors

- Be aware there may be sudden appointments of insolvency practitioners to businesses which previously exhibited no signs of insolvency. Often we are finding through the non-payment of taxes it has enabled the business to pay other creditors so the usual signs of a customer in trouble may not be evident.

By acting early Liquidation or Bankruptcy may be avoided. Seeking professional advice at the outset saves a lot of worry, heartache and leaves the door open for a arrangement to be put in place, if appropriate.



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