Director Personal Liability for PAYG, SGC (and GST?) Last Minute Advice for Accountants for July 1st

For Accountants and Lawyers who try to stay across all current and future changes to legislation, including details, the coming year is going to be an incredibly busy time.

There is already a fair bit going on, with more clients on Single Touch Payroll (STP) and new tax rates due on July 1st. However, if you rarely deal with clients who are seeking insolvency advice (or maybe should be), you need to know about the plans to get tougher on the penalties related to superannuation guarantee charge (SGC), PAYG withholding tax and potentially GST.

Simply put, if your client runs a business as a corporate entity and has not kept up with their basic payroll and tax obligations, they will potentially be left bearing the bulk of the blame and some real personal financial risks. It's important to inform yourself of legislative changes that have already happened, and those that may be coming next. And there may be a few risks for you to watch out for.

What are changes to legislation you should be aware of to better assist your clients?

Significant legislative changes already implemented include the following:

- The introduction of STP to now most employers enables the ATO to more accurately track what PAYG and Super may be accruing, regardless of whether BAS & IAS are being lodged or not.
- On April 1st 2019 the 3 month reporting rule for potential liability exposure for SGC was amended; Directors must now report their SGC obligations by the due date—within 1 month and 28 days after the end of the respective quarter—to avoid personal liability.
- The ATO now has additional power to pursue criminal penalties for serious breaches of employer SGC obligations, including potential imprisonment for both individual employers and/or Directors.

Potential legislative changes proposed by the government include the following:

- The ATO may soon have additional power to estimate GST liabilities in cases where a BAS has not been lodged and make Directors personally liable for those debts.
- The ATO may soon have the ability to withhold refunds from taxpayers if the taxpayer's lodgement or payment obligations have not been met.

How are things likely to get tougher on clients?

Existing Director Penalty provisions capture only unpaid PAYG and Superannuation Guarantee liabilities, not unpaid GST. But things may change. On the 13th of February this year the government introduced the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019, a package of measures that could have a serious impact on the way business is done, forcing Directors to keep a closer eye on their internal affairs. While that bill has lapsed prior to the recent election it is not unlikely it will be reintroduced in some form - so it is important you keep an eye out.

If the government's proposed bill had passed, Directors of companies that accrue a GST liability could have been held personally responsible for their company's GST debt. These harsher measures were announced as part of a suite of changes designed to address concerns surrounding fraudulent behaviour—AKA 'phoenix' activity—and its impact on the recovery of tax revenue.

It is worth noting the proposals of how liability could be incurred or avoided:

- If a Director did not lodge their Business Activity Statement (BAS) within 3 months of the due date, they would incur an automatic personal liability for their company's unpaid GST debt, as well as its PAYG debts (the "Lockdown" provisions).

- When a Director did lodge the relevant BAS within the 3 month window, but doesn't pay the relevant amount owing, and subsequently receives a Director Penalty Notice, they will only be able to avoid personal liability for the company tax debts by payment of the debt or by placing the company into liquidation or administration within 21 days of the issuing of the Director Penalty Notice by the Australian Taxation Office (ATO).

So what advice should you give to your client?

To make sure your client's business conduct is ticking all the important (and incoming) boxes, it's crucial to make sure that their company's GST affairs are in proper (legal) order.

All professionals know the inability to meet a lodgement deadline or to pay a liability raised by any BAS or SGC should always be taken seriously. Especially since it may soon be the Directors of companies—AKA your clients—who carry the weight of bad business decisions on their individual shoulders.

What about the Adviser?

There are risks to the Accountant and other professional advisers if they abet non-compliant behaviour and these risks are likely to expand.

If you are assisting to manage your clients' STP obligations, are you sure your engagement letter protects you if your client is not fully complying with tax and employment legislation? You may want to direct clients to review the procedures and controls that are currently in place in their businesses, to ensure that they are complying with all the most recent PAYG and SGC lodgement requirements.

What should you do for your clients to protect them?

To stay ahead of the game, your clients need to seek early expert advice to do with the following:

- personal and business structures
- how their personal assets are held and by whom
- who should be appointed as Director of their entities that control a business or assets.

It is important you advise your client on how essential it is to set up appropriate structures prior to incurring debt. Then taking early action when signs of financial stress first arise is a critical element to avoiding total failure in future, not only professionally, but personally, too.

What change should you be expecting?

Advisers such as Lawyers and Accountants are increasingly potential targets for actions where advice or service is inadequate to Directors of a failed business. Increasing availability of litigation funding may increase this risk.

Directors who don't play fair, and do not meet their obligations risk further scrutiny and struggling businesses will have less scope to avoid facing their obligations sooner.

The ATO, and political leaders, talk of their desire to crack down on unscrupulous Directors and their advisers. Growth in litigation funding, ASIC, ATO and FEGS funding and increased Liquidator recovery powers will all enhance Liquidators' capacity to pursue those accused of phoenix activity and other negligent or improper conduct.

Contact an Insolve expert today on 1300 669 914 or at info@insolve.com.au

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