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Directors and Tax Exposures

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Overview

1. Information gathering powers
2. Directors penalty notices
3. *s. 8Y Taxation Administration Act*
4. *s. 21B Crimes Act 1914 (Cth)*
5. *Crimes (Taxation Offences) Act 1980 (Cth)*
6. GST Act
7. NSW State Taxes
8. Foreign tax debts

Information gathering powers

- S.263 & 264

Directors penalty provisions

- 1 July 2010
- Div 269, Sch 1, TAA
- Pre-1 July 2010
- Div 9 & 10, Part IV, 1936 Act

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Directors penalty provisions

- Directors obliged to:
 1. Ensure company withholds & pays amounts; or
 2. Ensure company promptly
 - Voluntary administration; or
 - liquidation
- If not – directors liable for penalty

Directors penalty provisions - policy

- Explanatory Memorandum:

Divisions 9 and 10 of Part IV of the ITAA 1936 introduced a new regime in 1993 to enable the Commissioner to recover certain tax debts earlier and more effectively. The new regime imposes a duty on directors to cause the company to forward amounts withheld from payments to employees and some other creditors to the Commissioner. The duty is enforced by penalties equal to unpaid amounts. The penalty is automatically remitted if the company meets its obligations, or promptly goes into voluntary administration or liquidation.

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Directors penalty provisions - policy

- Explanatory Memorandum:

The penalty regime reflects the public duty on directors to ensure that amounts withheld from payments to third parties are promptly forwarded to the Commissioner. The public duty arises because withheld amounts are similar in nature to amounts held on trust. That is, the directors are in a position of trust and have a duty to protect those monies until they have been forwarded to the Commissioner.

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Directors penalty provisions - policy

- Explanatory Memorandum:

In addition, because the pay as you go (PAYG) withholding rules often give credit to the entity from which an amount has been withheld regardless of whether the withholder has paid the amount to the Commissioner, the Commonwealth is effectively guaranteeing such amounts. Such a guarantee necessitates the imposition of penalties on directors to ensure companies comply with their PAYG withholding obligations and to maintain the integrity of the tax system.

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Directors penalty provisions

DCF of T v Saurig

- Harshness of provisions:

There is a certain hardship in the speed of action which 222AOB(1) calls for because in the case of a company which cannot pay the deduction, the time allowed within which to arrive at an agreement with the Commissioner, appoint an administrator, or commence the winding up of the company is very short. The harshness was no doubt seen as appropriate, because the evils of taxpayers deducting taxation payments from employees' wages and not passing them to the authorities are considerable and perhaps widespread. The evils are not limited to the tax avoided: they extend to the use made of the money, namely either theft or use as working capital, thereby permitting companies to continue to trade which in truth are not capable of continuing to trade lawfully ... An early sign of problems in a company is its living on the false reserves of non-remitted deductions from employees' wages. The harshness is to some extent ameliorated by the fact that the directors cannot be sued until a s222AOE notice is served, and by the time it has been served and a further fourteen days have passed, the director will have had a period sufficient to procure the company to take one of the four steps referred to in s222AOB(1). If one of the steps is taken, the director ceases to be liable. Harsh or not, however, the legislative scheme is in this respect clear.

Directors penalty provisions

- Applies to:
 - PAYG amounts (salary, wages)
 - Non-resident dividend W/T
 - Royalty W/T
 - Interest W/T

Directors penalty provisions – procedure

1. Company fail to remit amount withheld by due date
2. Directors failed to have:
 - a) Amount paid to C of T
 - b) Payment arrangement with C of T
 - c) Administrator appointed
 - d) Begin to wind-up company
3. Amount not remitted is penalty
4. C of T serves a notice on directors. [set out liability]
5. 21 days given to effect one of (2)
6. If give effect within 21 days – penalty remitted

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Directors penalty notices

- S.269-35 – Defence:
 - Need to prove:
 - Illness
 - Some other reason
 - Unreasonable to expect, and did not, take part in management

Directors penalty notices

- Took all reasonable steps
- Or, no such steps should be taken
- Reasonable steps:
 - When & how long, director
 - Whether took part in management
 - ‘all other relevant criteria’

Directors penalty notices

- Defences
 - *Fitzgerald v DFC of T*
 - *Canty v DFC of T*
 - *DFC of T v Blaikie*
 - *DFC of T v Saurig*

Directors penalty notices

- Valid notice
- S.269-25(2)
 1. C of T provide unpaid amount
 2. State amount liable to pay & due to obligation
 3. Explain circumstances of remission

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Directors penalty notices

- How notice may be given
- Timing
 - *DC of T v Meredith*
 - *Soong v DC of T*
- S.269-25(1) – 21 days – no proceedings

Estoppel – directors penalty notices

DC of T v Winters

- Director penalty notice issued
- Director deposed that ATO officer said time for compliance could be extended
- Issue – whether ATO officer created a ‘legitimate expectation’;
- ATO sought summary judgement

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Estoppel – directors penalty notices

DC of T v Winters

- Held:

‘Estoppel of the kind the defendants seek to rely on here precludes a party who has induced another party to rely on a promise and thereby act to that second party’s detriment from resiling from its promise unless the detriment is avoided.’

- Held:

‘Here the defendants set up a case that they were induced not to appoint an administrator during the 14 day period by the plaintiff’s conduct so that the plaintiff cannot now take advantage of that failure.’

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Estoppel – directors penalty notices

DC of T v Winters

'It may be accepted as a matter of general principle that estoppel will not prevent the exercise of a statutory obligation It is however by no means clear that the principle extends to the circumstances here so as to prevent the defendants' favour they simply seek to preclude the plaintiff from relying on the consequences of their failure to take steps to avoid the effect of the penalty notices within 14 days of their receipt; that is in the light of an administrator being effectively appointed on 17 June. In the circumstances, the considerations being those that I have outlined, the applications for summary judgment should be dismissed and the defendants should have leave to defend.'

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Estoppel – directors penalty notices

- Court held:
 1. ‘legitimate expectation’ – extension of time for compliance
 2. If Commr not gives permission – would have stopped trading

Estimate of tax liability

- Div 268, Sch 1, TAA
- 2010 / 2011 & later tax years
- Director penalty provisions may be estimated

Estimate of tax liability

- Commr make reasonable estimate
- Factors Commr considers relevant
- Taxpayer may depose against
- Commr can commence proceedings on estimate

s. 8Y – Taxation Administration Act

- Corporation does or omits to do something
- Constituting a ‘taxation offence’
- Person ‘... *concerned in, or takes part in, the management ...*’
- Deemed to have committed the offence

s. 8Y – Taxation Administration Act

- Management – not necessarily an ‘officer’
- Ss. 8Y(3) – officer deemed to be in management (unless contrary intention)

s. 8Y – Taxation Administration Act

- Officer includes:
 1. Director / secretary
 2. Receiver / manager
 3. Administrator
 4. Administrator under DOCA
 5. Liquidator under voluntary wind-up
 6. Trustee (administering a compromise)

s. 8Y – Taxation Administration Act

- Ss. 8Y(2) - defence
 1. Did not aid, abet, counsel or procure act / omission; **and**
 2. Not directly / indirectly, knowingly concerned, or party to act / omission
- Onus on defendant [balance of probabilities]

s. 8Y – Taxation Administration Act

Buist v FC of T

- Defendant director / public officer
- Company failed to lodge – 1974 to 1986
- Notices served on accountants
- Employee of firm – brought to attention
- Defendant assured all in order

s. 8Y – Taxation Administration Act

Buist v FC of T

- Held – defendant acted recklessly
- Defendant did not care if complied with
- Therefore – constitute knowledge & constructively knowingly concerned in offence

s. 8Y – Taxation Administration Act

Buist v FC of T

'In my opinion this is not a case of the appellant merely failing to make an inquiry which, had it been made, must have shown that the returns would not be prepared in sufficient time to comply with the Commissioner's requirements. On the contrary, it could be said that he acted recklessly in the sense referred to in R. v. Glennan (supra), that is that he did not care whether this would be done or not. He knew that final notices had been issued requiring the lodgment of returns for a number of companies for a number of years and he simply left the matter in the hands of his accountants without following it up.'

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s. 8Y – Taxation Administration Act

Buist v FC of T

‘in my view the appellant has failed to prove that he was not knowingly concerned or was not a knowing participant in the omission to take all steps necessary to ensure that the returns were received by the Commissioner’

s. 8Y – Taxation Administration Act

- Need actual or constructive knowledge
- What if not brought to attention?
- No obligation to make enquiries?

s. 21B Crimes Act 1914 (Cth)

- Reparation order if convicted of offence
- Need conviction of 'federal offence'
- In addition to penalty:
 1. Reparation to Cth / public authority
 2. Reparation to person because of offence

s. 21B Crimes Act 1914 (Cth)

Gould v FC of T

- Two pre-conditions
 1. Conviction of offence
 2. Offence caused loss or expense

s. 21B Crimes Act 1914 (Cth)

- Nature of reparation orders – Inwood v R:

Compensation orders were not introduced into our law to enable the convicted to buy themselves out of the penalties for crime. Compensation orders were introduced into our law as a convenient and rapid means of avoiding the expense of resort to civil litigation when the criminal clearly has means which would enable compensation to be paid.

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s. 21B Crimes Act 1914 (Cth)

Vlahov v FC of T

- s. 8Y & s. 21B
- Not only punishment – also reparation:

‘There is nothing in the section which expressly limits the liability of a company officer to punishment alone, and it is not necessary to find any such term by way of implication. If such an officer is, in the particular circumstances of a case, deemed to have committed an offence, he may, of course, be convicted accordingly. Once that has been done, as it seems to me, the provisions of s 8Y(1) of the Taxation Administration Act will have taken effect and the court may punish the officer accordingly.’

s. 21B Crimes Act 1914 (Cth)

Vlahov v FC of T

- One conviction (even if no penalty) – s. 21B

‘Section 21B of the Crimes Act operates where a person is convicted of an offence against the law of the Commonwealth, whether or not any penalty is imposed upon the person so convicted. Once an officer of a company is convicted by virtue of the provisions of s 8Y(1) of the Taxation Administration Act, he fulfils the condition prescribed in s 21B of the Crimes Act and the court may order him to make reparation in respect of any loss or expense referred to in that section.’

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s. 21B Crimes Act 1914 (Cth)

Vlahov v FC of T

- But Court has discretion:

'...the Court has a discretion whether or not to make an order under s 21B of the Crimes Act and, in the exercise of that discretion, may have regard to matters personal to the offender ...'

- May look at personal circumstances

'... the exercise of that discretion, the court may have regard to the personal circumstances and means of the offender'

s. 21B Crimes Act 1914 (Cth)

Vlahov v FC of T

'It is clear that the amount of the reparation orders (namely \$20,136.33 in the case of Chertsey Pty Ltd and \$111,802.73 in the case of Timeworth Pty Ltd) far exceeded what the appellant could reasonably be expected to pay.

Notwithstanding the comment in Mark Bradburn which I have set out above, each case must be dealt with on its merits and the financial position of the appellant, which I have described above, precludes any reasonable prospect of his being able to pay any part of the reparation ordered within a reasonable period. Even fixing a much-reduced figure of reparation would not result in achieving payment within a reasonable period.'

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s. 21B Crimes Act 1914 (Cth)

- Reparation – discretion of court
- Means of accused relevant [c.f. *R v Oodd*]
- Reparation orders **not** alternative to civil remedies [c.f. *Gould v FC of T*]
- Unlike civil proceedings – look at personal attributes
- Reparation order can be made even if amounts can't be recovered under civil proceedings

Crimes (Taxation Offences) Act 1980 (Cth)

- Evasion of tax – co or trust unable to pay tax
- Shifting assets?
- Criminal penalties
 - Taxpayer
 - Advisers
 - 3rd parties

Crimes (Taxation Offences) Act 1980 (Cth)

- Concerned with:
 - Stripping assets (trust or company) before tax due or pending (on past transactions) collected
 - Schemes – tax liability falls – not intended to have sufficient assets to meet liability
- Stripping assets

Crimes (Taxation Offences) Act 1980 (Cth)

- Deals with:
 - Current tax liabilities
 - Future tax liabilities
[provided **does** become liability]
- ‘... *aids, abets, counsels or procures ...*’

Crimes (Taxation Offences) Act 1980 (Cth)

- S7 →
 - Arrangement / transaction
 - Directly / indirectly, aids / abet (etc)
 - Act or omission
 - Knowledge or belief that company / trust
 - Unable or likely be unable
 - [having regard to other debts]
 - To pay income tax

[NO NEED FOR SPECIFIC PURPOSE]

Crimes (Taxation Offences) Act 1980 (Cth)

- ss. 6(1) →
 - Deals with third parties
 - [NEED PURPOSE]
- ss. 6(2) → future income tax

Crimes (Taxation Offences) Act 1980 (Cth)

- ss. 5(1) →
 - Arrangement / transaction
 - Intention to secure company / trustee
[need not be a party to transaction]
 - Unable / will be likely to be unable
[having regard to other debts]
 - To pay income tax
[NEED PURPOSE]
- ss. 5(2) → future income tax

Crimes (Taxation Offences) Act 1980 (Cth)

- ss. 7(3) - defences
 1. Company or trustee:
 - a) Payment arrangement with creditor
 - b) Transaction involving payments to creditors
 2. Intention:
 - a) Securing carrying on of business
 - b) Obtain financial advantage for co / trustee

Crimes (Taxation Offences) Act 1980 (Cth)

- ss. 5 & 6
 - Require specific purpose

- ss. 7
 - No purpose **but** knowledge / belief

Crimes (Taxation Offences) Act 1980 (Cth)

- Criminal offence
- 10 years imprisonment
- Fine of up to \$100,000
- Burden of proof
- s. 9 – prosecution at any time

GST Act

- Ss. 444-15(1), Sch 1, TAA

NSW State Taxes

- Stamp duties
- Land tax
- Payroll tax
- Div 2, Part 7, TAA 1996
 - allow recovery from director or former director

NSW State Taxes

- s. 47B(1) TAA
 - Corporation fails to pay
 - Notice of assessment
 - CC of T may serve a ‘compliance notice’
 - Director; or
 - Former director at time corporation first became liable to pay tax (or any part)

NSW State Taxes

- Former director liable still liable after resignation
- Former director not liable if liability arises after resignation
- Director liable even if liability pre-date appointment

NSW State Taxes

- Director / former director – jointly severally liable
- If non-compliance with ‘compliance notice’
- If no ‘rectification’

NSW State Taxes

- Need 'compliance notice'
 1. Served
 2. Advise 'assessment amount';
 3. 'Rectification' in period (≤ 21 days)
 4. Failure to 'rectify' will cause liability

NSW State Taxes

- ‘Rectification’
 1. Payment
 2. CC of T makes arrangement with company for payment
 3. Board of Review waives or defers payment
 4. Administrator appointed – Part 5.3A Corporations Act
 5. Company begins to be wound up under Corporations Act

NSW State Taxes

- If director / former director pays
 - Indemnification from company
 - Contribution from others

[as if jointly guaranteed]

NSW State Taxes

- s. 47E TAA – defences
 1. All ‘reasonable steps’ possible to ensure rectification
 2. Unable – ‘illness or some other similar good reason’ to rectify

Foreign Tax Debts

- Not director issue
- General law:

General Investment Trust Ltd v Borax Consolidated Ltd

‘Whilst it is the duty of an English Court to enforce an English taxing Act, it is no part of its duty to enforce the taxing Act of another country;’

Foreign Tax Debts

- Div 263, Sch 1 of TAA
- s263-5 TAA:
 - Subdiv applies if agreement
 - Containing article re assistance in collection of taxes
 - Commr to remit to foreign territory

Foreign Tax Debts

- Commissioner may:
 - Collect foreign revenue's tax debt
 - Take action to conserve asset

Foreign Tax Debts

- Foreign government makes a claim
- Must be provision in ITA
- C of T enter claim into register
- When entered – debt to Cth
- GIC accrues
- C of T collect in ordinary way

Foreign Tax Debts

- Div 263 of TAA not considered yet
- Outstanding issues:
 - Challenging validity of debt?
 - Proof of debt?
 - What if challenge successful?