

News with Clout

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The ATO Wins On Director's Penalty Notices

A company of which the taxpayer was a director withheld amounts on account of tax from the salary entitlements of its employees but failed to remit those amounts to the Commissioner of Taxation. The Commissioner subsequently gave notice by way of a Director Penalty Notice ("DPN") to the director of the company. The Commissioner was required to take this action at least fourteen (14) days before commencing proceedings against the director personally to recover the amount of the DPN.

You will recall the DPN issued to directors by the ATO for unpaid taxes under section 222AOE of the *Income Tax Assessment Act, 1936* can make past and current directors personally liable for unremitted taxes.

To avoid becoming personally liable for the ATO debt, the DPN gives the director one of four options, those being:-

1. Pay the debt in full;
2. Go into liquidation;
3. Enter into voluntary administration; or
4. Do a deal to pay the outstanding debt via instalments.

By failing to implement any of the above or by defaulting under a repayment plan afterwards, the current and in certain circumstances past directors can be made personally liable for the outstanding debt.

By way of defence, the director stated that she had not received the DPN and therefore was not liable. In the judgment delivered on 27 October 2006 the District Court of New South Wales found on the balance of probabilities that the DPN had not been delivered and dismissed the Commissioner's claim.

The Commissioner appealed to the New South Wales Court of Appeal. In a judgment delivered on 10 December 2007, the Court of Appeal overturned the District Court's decision.

Before the Court of Appeal's decision, the Commissioner accepted that a DPN, sent to a director by ordinary prepaid post was "given" to the intended recipient at the time the DPN would have been delivered in the ordinary course of post and that the director had fourteen (14) days after the date of delivery in the ordinary course of post to cause the company to comply with the DPN and achieve remission of the penalties.

The Commissioner now accepts the decision of the Court of Appeal that a DPN sent by post to the director's address (as found on the ASIC's data base) will be "given" to the intended recipient at the time the DPN is **posted**.

Accordingly, where compliance with the DPN does occur within the fourteen (14) days after the DPN is posted to the director, the Commissioner will regard penalties claimed in the DPN as being recoverable from that director.

Your clients must now, more than ever, strictly comply with the fourteen (14) day time period set out in a DPN to avoid personal liability for the outstanding debt (*DC of T v Meredith*)

It is also critical that the directors of a company who are at risk of receiving a DPN ensure that they receive mail sent to the address listed on the ASIC register. If they are not receiving the mail because they have moved, or the address details are not correct, then that may result in the DPN not being received by the director, and render the director liable for the full amount of the debt recorded on the DPN.