



NASTY DIRECTOR'S TRAP REVEALED

In previous newsletters we have covered the topic of Directors Penalty Notices issued to directors by the ATO for unpaid taxes under section 222AOE of the *Income Tax Assessment Act, 1936*. This as we know can make past and current directors personally liable for unremitted taxes.

To avoid being personally liable for the ATO debt, the penalty notice gives the directors 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.

This newsletter will explore another loophole available to the ATO that not everyone will be aware of. That is, the ATO's right to pursue directors personally for moneys the ATO is ordered, by the Court, to repay liquidators as set out in section 588FGA of the *Corporations Act, 2001* ("the Act").

Under s588FGA of the Act, directors are liable to indemnify the Commissioner in respect of any loss or damage resulting from an order that the Commissioner repay to the company moneys paid under a transaction held to be a voidable transaction under s588FF of the Act.

The transactions most likely to be recoverable by a liquidator from the ATO is an Unfair Preference under section 588FA of the Act.

To recover an unfair preference, the liquidator must show that:

1. a transaction was entered into;
2. the transaction was between the company and a creditor;

3. it occurred at a time when the company was insolvent;
4. the transaction gave the creditor an advantage over other creditors; and
5. the creditor suspected or should have suspected that the company was insolvent.

We have seen this scenario unfold and it always turns out nasty. A business was struggling and the ATO had become a considerable creditor for \$100,000. The company however did not have the resources to pay the debt in full so the directors negotiated an instalment plan.

This seemed like the logical thing to do or did it.

As is the case most of the time, an instalment plan is really only a bandaid solution and the directors don't look at the big picture as to why they are in this position in the first place. So the directors tipped \$50,000 of personal funds into the company to cover the initial instalment payments to the ATO as the trading was still poor.

Eventually, the company was forced into liquidation and the liquidator as part of his investigations looked closely at the ATO dealings.

The liquidator found that the company was insolvent during the six months prior to the liquidation and was successful in recovering an unfair preference for \$60,000 from the ATO. The directors are then served with demands under Section 588FGA of the Act for the repayment of \$60,000.

As a result the directors not only lost the \$50,000 they contributed personally to pay the ATO but they also had to repay the ATO the additional \$60,000 under Section 588FGA of the Act.

This meant that the directors had in fact paid out \$110,000, which was more than the ATO were owed in the first place.

Nasty!!!!

As ever we are always happy to entertain your enquiries without obligation.



NEWS WITH CLOUT

Offering Corporate & Personal Solvency Solutions

May 2008

Apart from Formal Insolvency Services at Clouts we also Offer:-

Orchestrating Informal Arrangements with Creditors

Monitoring Businesses in Workout Situations

Conducting Negotiations with Secured & Unsecured Creditors

Business Risk Minimisation Reviews

Forensic Accounting Assignments

Business Valuations

Internal Control Reviews

Small Business Courses

Official Website

www.cloutassociates.com.au

Contact Details

Tel: 02 6652 3288

Fax: 02 6651 9393

Email: admin@cloutassociates.com.au

Clout & Associates Senior Representatives

Morgan Chubb

Email: mjchubb@cloutassociates.com.au

David Morgan

Email: dmorgan@cloutassociates.com.au