

Illegal phoenixing bill passes: directors now accountable for GST liabilities



Trent Devine, Jirsch Sutherland Partner

The illegal phoenixing bill has been passed, with a key part of the legislation being directors are now personally liable for their company's GST liabilities. The Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019 extends the director penalty regime to goods and services tax, luxury car tax (LCT) and wine equalisation tax (WET).

Jirsch Sutherland Partner Trent Devine says this means from April 1 2020, the ATO can now hold directors personally liable for their company's GST liabilities.

"This is in addition to their being liable for two other tax debts: PAYG and the SGC, although the latest changes don't apply to retrospective amounts," he says. "The upshot is that from April 1, directors who fail to lodge their BAS on time may find themselves personally liable. Further, the ATO can make estimates of the company's tax liabilities and recover that amount where they have reasonable grounds to suspect the taxpayer is involved in illegal phoenix activity. This is a further piercing of the corporate veil to make directors liable for the debts of the company."

Devine explains the ATO cannot collect these types of penalties without first serving a DPN [Director Penalty Notice] giving the director 21 days to pay or to place the company into liquidation or voluntary administration. "However, a 'lockdown DPN' will apply in relation to the GST and other taxes if the return is not lodged within three months of the due date," he says. "That means an appointment of a liquidator or administrator will not remit the director's penalty."

The penalty will apply to directors who resign, in relation to the tax periods prior to their resignations, where there are amounts outstanding, Devine says. "Being a company director has significant personal exposure. Often personal funds are required to be injected for start-up costs, and personal guarantees are needed for loans from financiers, for credit terms and for leases. It is increasingly difficult to separate the individual from the company."

Personal exposure

Usually, a major concern for a company director if a company fails is a liquidator attacking a director personally for trading while insolvent. But Devine says directors now have much greater personal exposure to be worried about before that eventuates.

“The corporate veil is pierced much earlier so it is imperative for directors to be aware of their obligations, particularly the lodgement of returns on time, or at least within three months of the due date,” he says. “There is no need for directors to add to their personal exposure by including the tax office. And if they lodge on time and can’t pay, they may be served with a DPN, so it’s important to seek professional advice immediately.”

The illegal phoenixing legislation was passed by both houses of Parliament on February 5, 2020 and given Royal Assent on February 17. It will enable the Australian Securities and Investments Commission (ASIC) and insolvency specialists to take increased action to combat illegal phoenix activity, with new criminal offences and civil penalty provisions for company directors that fail to prevent the company from making creditor-defeating dispositions.

According to the ATO’s draft Practical Compliance Guideline (PCG 2019/D4), an estimate of an unpaid net amount will generally not be made unless the taxpayer fails to engage with the Tax Office or refuses to co-operate in establishing the overdue and unpaid amount. “The ability to make an estimate reduces the scope of phoenix operators and other non-compliant entities to escape their obligations,” the ATO said.

It also allows ASIC to make orders to recover property disposed of or benefits received under a voidable creditor-defeating disposition.

In addition, the new law enables the ATO to retain tax refunds where a taxpayer has failed to lodge a return or provide other information to the Commissioner that may affect the amount of a refund, and it will prevent the inappropriate backdating of director resignations or resigning to be a director of a company if doing so would leave the company without a director.

The Act’s effectiveness will be reviewed after five years.