

ATO “Notice of Intention to Commence Debt Collection” What happens next?

Your company has received a notice of intention to commence debt collection from the Australian Taxation Office (“ATO”)... what happens next?

The ATO has a number of options available in order to collect outstanding tax debts, from referring the matter to an external debt collection agency to applying to Court to wind-up (liquidate) the company.

The most aggressive forms of debt collection engaged in by the ATO include:

Garnishee Notice

A garnishee notice is a notice issued by the ATO to the company’s bank or trade creditors requiring the bank or trade creditors to pay monies owed or held for the company’s benefit directly to the ATO. When a garnishee notice is issued to a bank, it normally freezes the bank account for a period of time such that only funds can be paid into the account and the only withdrawals allowable will be transfers to the ATO pursuant to the garnishee notice.

Obviously, garnishee notices can have severe consequences to a company’s cash flow and interrupt day to day business operations.

Statutory Demand

A statutory demand is a demand issued under the Corporations Act 2001 to either pay the debt outstanding debt or apply to Court to set-aside the statutory demand within 21 days, failing which a presumption of insolvency arises which can be relied upon to wind up the company in insolvency (i.e. have a liquidator appointed).

It is not possible to extend the 21-day time limit for compliance with a statutory demand. Once the statutory demand has expired, the ATO has 3 months to apply to Court to wind up the company.

A statutory demand issued by the ATO is served by the ATO sending the demand to the company’s registered office as listed on the ASIC register, so it is important to ensure that the company’s details on the ASIC register are up to date and that mail at the registered office is regularly checked and opened.

Winding up Application

If a company chooses to ignore a statutory demand and/or the 21-day time limit expires without action being taken, the ATO can apply to Court to wind up the company.

Often companies submit an application for a payment arrangement to the ATO in response to a statutory demand. However, it is not uncommon for the ATO to reject the application for a payment arrangement and shortly thereafter apply to Court to wind-up the company.

Director Penalty Notice

A director penalty notice is a mechanism used by the ATO to make directors personally liable for company PAYG and Superannuation Guarantee Charge (“SGC”) debts. There are two types of director penalty notices:

- **Lock down / Unavoidable:** If a company has failed to report and pay its PAYG and SGC obligations for a period exceeding 3 months the directors will be unable to avoid personal liability unless the company pays the outstanding amounts.

- **Avoidable:** if the company has been reporting its PAYG and SGC obligations on time but has failed to pay these debts, then the directors have an opportunity to avoid personal liability for these debts by placing the company in voluntary administration or liquidation within 21 days of the date of the Director Penalty Notice (note the 21-day time period begins on the date of the notice not the date the notice is received).

It is important to note that a Director Penalty Notice will be sent to the director's address as listed on the ASIC register. So, it is important to ensure the ASIC register is kept up to date with a current address for each and every director.

Also, director penalty notices can be issued to previous directors for liabilities incurred by the company during the period of the director's directorship. Critically, new directors should query whether a company has any PAYG or SGC liabilities prior to agreeing to be a director because an incoming director only has a 3-month period in which to cause the company to bring its PAYG and SGC obligations up to date, failing which the new director will not be able to avoid a Director Penalty Notice on the basis that he/she was not a director at the time the liability was incurred.

What next?

ATO debt accumulates for a number of reasons, it might be that the company is suffering from a short-term cash flow problem but more often the accumulation of ATO debt is an indication of underlying issues. Early intervention means that there are more options available to the company in relation to seeking finance, restructuring the business and negotiating with the ATO. The company's accountant and lawyer together are best equipped to assist the company to navigate through financial hardship and negotiations not only with the ATO but other stakeholders.

Of course, prevention is always better than a cure so, remember these 4 golden rules for dealing the ATO:

1. Don't use the ATO as a bank!
2. Ensure all obligations are reported on time.
3. Be proactive. As soon as a company or its directors realise that the company will be unable to pay its ATO debts on time, contact the ATO and propose a payment arrangement.
4. Don't ignore correspondence from the ATO. All of the debt collection tools discussed above have strict time limits that cannot be extended.

For further information contact Murfett Legal by telephone on +61 8 9388 3100, via our website at www.murfett.com.au or email one of the following directors:

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