

What should directors do to ensure company tax compliance

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- PAYG was withheld from its employees and officers and not paid to the Commissioner of Taxation as required.
- A director must prove that they took steps which were reasonable, having regard to the circumstances that the director, acting reasonably, knew or should have known.
- In this case judgment was entered against director.

***Roche v Deputy Commissioner of Taxation [2015] WASCA 196* is a recent decision of a senior Australian court which demonstrates what a director may be required to do to discharge personal obligations for company taxes.**

The law

Division 269 of schedule 1 to the *Taxation Administration Act 1953* (Act) imposes duties on directors of a company to cause the company to comply with its obligations to pay on or before the due date:

1. PAYG in accordance with sub-division 16-B and division 268 of schedule 1 of the Act; and
2. The superannuation guarantee charge (SGC) in accordance with Part 3 of the *Superannuation Guarantee (Administration) Act 1992*.

Section 269-15(2) of schedule 1 to the Act provides that a director ceases to have that duty on the day the company complies with its obligation to pay, on the day an administrator is appointed to the company, or on the day the company is wound up.

Section 269-20 of schedule 1 to the Act makes a director personally liable for the amount unpaid by a company, if the director fails to carry out that duty.

Section 269-35 of schedule 1 to the Act provides various defences to a penalty personally imposed on a director.

The facts

Roche was a director of Fuel Tank & Pipe Pty Ltd (FTP). During various periods between 1 June 2011 and 28 February 2013, FTP withheld PAYG from its employees and officers but did not pay those amounts to the Commissioner of Taxation as it was required under sub-division 16-B in schedule 1 of the Act.

On 2 August 2013, Roche was issued a director penalty notice pursuant to section 269-25 of schedule 1 of the Act, requiring payment of the amount unpaid by FTP.

On 23 August 2013, an administrator was appointed to FTP. On 24 September 2013, FTP was wound up.

On 7 November 2013, the Commissioner of Taxation commenced proceedings against Roche to recover the penalty and sought summary judgment.

Judgment was entered against Roche.

Roche appealed and his main argument against the claim was that he took all reasonable steps to ensure the directors caused FTP to comply with its obligations (s 269-35(2) of schedule 1 to the Act).

All reasonable steps

Roche argued that from 2011 he was attending university and did not attend FTP premises or review its affairs on a day-to-day basis, however:

The court held that the evidence that Roche submitted objectively fell short of what he needed to establish the defence.

- he regularly discussed FTP's affairs with his father (who was general manager of FTP from 2006 to 2012)
- he had periodic meetings with his father and FTP's financial controller every three months or so, during which he was given FTP cash flow projections, explanations of outstanding liabilities, expected expenses and expected revenues.

Roche argued that based on what he was advised at those meetings, it appeared FTP would have enough funds to pay all its liabilities. On that basis, Roche did not attempt to stop FTP from trading. Roche argued he took all reasonable steps to ensure FTP complied with its obligations to pay PAYG and SGC.

Roche argued that in early 2013, he was advised by his father and the financial controller that FTP would need an equity injection to meet cost overruns. A proposed sale of shares in FTP to raise capital failed to materialise, and subsequently FTP stopped trading and an administrator was appointed.

Decision

The defence would succeed if Roche took all reasonable steps to ensure FTP paid all the required PAYG.

A director must prove that he or she took steps which were reasonable, having regard to the circumstances that the director, acting reasonably, knew or should have known.

The court held that the evidence that Roche submitted objectively fell short of what he needed to establish the defence. The court came to this conclusion on the basis of the following findings:

- Roche did not say what information he was given at the periodic meetings which allowed him to conclude that FTP could pay all of its liabilities.
- Roche was not provided with any information at those meetings about what PAYG was owed to the Commissioner under sub-division 16-B or whether FTP's obligations to the Commissioner were being satisfied.
- Roche did not suggest he was misled or inadequately informed during those meetings, meaning if he was adequately informed, he would have been aware that FTP was failing to meet its obligations to the Commissioner.
- If Roche was actually unaware of FTP's position, it was because he made no effort to ascertain FTP's true position. If the periodic meetings were insufficient to determine what was owed to the Commissioner, then he had to proactively seek that information.
- Roche was required to ascertain what FTP's obligations were in relation to remittance of PAYG from employee wages and salary, and to ensure a system was in place to comply with those obligations.
- It was uncertain whether Roche had ever made any enquiries about compliance.

- There was no suggestion that Roche did not have access to FTP books or records to check for himself.
- There was no evidence Roche received any information or assurances that could have formed the basis of a reasonable belief that FTP satisfied its obligations to the Commissioner in relation to remittance of PAYG.

Conclusion

This case demonstrates that to succeed in defending a penalty claim against a director under division 269 of schedule 1 to the Act, on the grounds that the director took all reasonable steps to ensure the company was compliant with its obligations, a director needs to prove that:

- a. they have made enquiries as to the matters referred to above, including in particular as to the payment, and the ability to continue payment, of all PAYG and SGC obligations; and
- b. they have reached the conclusion that payments have been made and would continue to be made, on the basis of a reasonable belief.

Without this, directors are at real risk of personal liability, quite apart from any other duties relating to insolvent trading. ▀

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