



Take on Board

Transcript – Caitlin Murdock

Helga Svendsen 0:00

Today on the Take On Board Podcast, I'm speaking to Caitlin Murdock about how directors can become personally liable for company tax debts, and how recent legislative changes have broadened the scope of director liability. So Caitlin, could you introduce yourself to the take on board community?

Caitlin Murdock 0:19

Thanks, Helga. Yeah, yes. So my name is Caitlin and I'm a lawyer in Brisbane. I originally grew up on a farm just outside Geelong actually. So all my family's still in Geelong and in Melbourne now, so they're suffering a bit with the lockdown and covid. So after school in Geelong, I then moved to Queensland to go to university. I studied a Bachelor of Arts and a Bachelor of Laws at Bond University. And then I moved to Brisbane to take on my first role as a lawyer. And I've been pretty much working in tax ever since of works in all facets of tax from corporate tax to international tax, indirect tax, which includes your GST, stamp duty, land tax. And now I'm actually more focusing on what we refer to as tax controversy, which is where you have your tax payer who has a dispute potentially with the ATO, and we help that tax payer through their audit process, objecting to any adverse assessments, and then the worst case scenario helping them through the litigious process in the courts.

Helga Svendsen 1:28

Fantastic. Okay. There is plenty of stuff that we can pick through in the conversation today. But before we get to that, in fact, I don't always date my podcasts but we are in a particular time this year. So this is today's the 20th of October, which means also that we are coming up to the grand final this weekend, and I've just heard that you're from Geelong so for those that are not from Australia, the Australian Football League Grand Final is this weekend. It's in Brisbane for the first time ever because of covid issues in Melbourne, which is where it's been held. I don't know forever and Geelong is playing Richmond so Caitlin (a) Are you going? (b) if not where you're watching it? and (c) who you're supporting?

Okay, my answers to these questions might shock you so a I'm not going I'm fortunate enough actually to be going on a little holiday this weekend.

Oh my god holiday it sounds wildly exotic to those of us from Melbourne

Caitlin Murdock 2:29

Talking about it with my family back in Victoria because I feel so guilty but I'm going to Townsville and then Magnetic Island whether they have a TV showing the AFL I'm not sure but hopefully I can watch the game. Secondly, or thirdly I'm not sure which the order of your questions but I actually go for West Coast.

Helga Svendsen 2:48

Oh my goodness, that is not what I expected having been raised in Geelong. My goodness. We will get onto tax issues in a minute. But how does a Geelong girl end up barracking for West Coast?

Caitlin Murdock 2:59

Well, truth be told us I'm born in I was born in Subiaco. All my family is originally from from WA, so...

Helga Svendsen 3:06

Okay, that explains it. Right. Fair enough, then. Okay. Well, now that we've got, you know, the big issues and of course, by the time people get to listen to this, the grand final will have been weeks ago. But anyway, now that we've got the big issues out of the way. In fact, I don't even think I've formally said Welcome to the Take On Board Podcast. So welcome to the Take On Board Podcast. Caitlin, great to have you here.

Caitlin Murdock 3:28

Thanks, Helga. It's good to be here.

Helga Svendsen 3:30

So today, we're talking about how directors can become personally liable for company text, it's and some recent changes that are broaden the scope for direct liability. So let's start with the framework. What are the obligations of directors in relation to tax debt? It's and then maybe if you can tell us about the recent changes that have broadened the scope.

Caitlin Murdock 3:54

Okay, so, before the legislative changes were implemented in April this year, so 2020, the company directors could really only be personally liable for two types of tax debts of their companies. Those were PAYG withholding tax and for the superannuation guarantee charge. So essentially, how the provisions operated was that if a company had not launched or remitted their PAYG withholding liability by its due date, or had they not paid superannuation into their super fund by the relevant date, the company might be imposed upon by the ATO with a superannuation guarantee charge. And if that's not paid by the company, the ATO has the power to then issue directors personally with what's called a director penalty notice. So when a director would get one of those, they would only then have 21 days to either ensure that the company paid the tax liability, or then the obligation would be on The director to pay themselves from their personal assets. So that was the position up until April this year. And then from the first of April, the tax office or the Commissioner of tax, as a result of legislative changes, now has the ability to do the same thing in by issuing director penalty notices to directors, but now for in addition to PAYG, and the superannuation guarantee charge to any outstanding GST liabilities. So this is potentially huge for directors, because often the GST liabilities can be much bigger, depending on what type of company you are. So directors may be on the hook for for much, much more.

Helga Svendsen 5:49

Okay, so PAYG, which, again, for those not in Australia, or maybe even for those in Australia pay as you go tax. So the those provisional payments, that's the word Thank you. And super was always part of it. And what's been added to it, too, is GST, which could be significant, which is on top of those previous ones that also could have been significant. Okay, so can you can you give us some maybe recent case examples that demonstrate how this works in practice?

Caitlin Murdock 6:21

Okay, sure. So just with the GST, because it's so new, we haven't seen any cases come through yet. Which is a good thing.

Helga Svendsen 6:29

Of course, you know, the idea is that you don't see cases coming through, it's always better if people are complying with it, you can talk us through it, but there might have been just be questions about it.

Caitlin Murdock 6:37

Yeah. So with the GST we haven't seen anything go through the courts. But it's analogous to the PAYG and the super circumstances. So typically, what we see is we might see a client come in with, they've been issued with a director penalty. Notice, unfortunately, once you've got one of these, it can often be too late. So what you really need to do is, as a director, you need to make sure that you're across the company's tax liabilities from day one of becoming a director, because you have positive obligations to obviously ensure that your company's solvent, and if it is struggling to meet its tax obligations, you then have a positive duty to either try and enter into a payment arrangement with the A to alternatively, start taking steps to have an administrator appointed or the company wound up. Because if you fail to do that, and then a DPN, or director penalty notice is issued, you have 21 days to basically respond. And there are some defenses available, if you have not taken the steps to wind up the company or you haven't caused the company to pay its tax. However, these defenses very, very rarely succeed actually in court. So a director can say something like, what we see is they were ill, or for some family reason they weren't able to take part in the management of the company. However, the courts and the ATO take a very narrow approach to this. And they say, often, all your illness wasn't enough. We've seen directors who have said, Oh, I was ill, and I had someone else manage the financial affairs of the company. And the CEO said, No, that's not good enough. You went ill perhaps for the entire time, you know that obligation arose. Or you were ill, but we need an expert to say how ill you were and we don't think it's enough. It's quite harsh of a regime and you're better, much better off avoiding it in the first place. And then seeing yourself having to respond to one of these.

Helga Svendsen 8:53

As you say, the idea is to avoid a director, penalty notice, what's your advice to directors in being able to assure themselves that super has been paid, the GST has been paid, that that all the taxes that they need to pay have been paid.

Caitlin Murdock 9:08

So I'll start off with the position from a new director or someone just joining or have recently joined a company. So they have 30 days to appraise themselves of the company situation before they can come within this regime and be on the hook. One of the things I would say to a new director is upon joining or even prior to joining, I would want them to be given financial information of the company if they didn't have the financial acumen themselves. probably say an expert, an accountant or lawyer about the state of the company. The next thing once they actually a member or a director of the company, I would be advising them to if they can get access to that that company's ATO portal or have access to the tax agency. For the company, if there's an external tax agent, and find out that information,

Helga Svendsen 10:04

It's a great point to about, even before you join the board, it can be part of the due diligence for an organization. Everything from getting the certificate of currency for your insurances, through to assurance around taxes.

Caitlin Murdock 10:18

I have a real life example of that, I think I think it's a bit of a war story or a horror story for the listeners, just so they know what can happen. We had a client who wanted to become a director of a company, and did due diligence and did engage a very big accounting firm to undertake the due diligence and but their due diligence was limited to the information the company could provide them. And it actually turned out that the people within the company provided falsified financial documents.

So the director joining saw these and said, Okay, well, this company looks good. I'm going to join, he joined, and shortly after the company actually was insolvent. Hmm. And the it was required to be liquidated. So there were two directors, him and another person. And we saw the new director being pursued solely for the debts of the company, because the other director didn't have any assets in his personal name. So what we were able, we had a success story, we were able to get the director off the hook. But that was after lots of stress. I think the point, the point is, you really need to be sure of what you're getting into and do all the right things in terms of so that's how he was able to actually avoid that liability is because he showed that he took positive steps to understand the company's financials.

Helga Svendsen 11:53

Right. Okay. So there's a couple of things I want to fish into there. So I'll be more than a couple. But so because he had taken the steps and been provided information and assured himself on the information that has been provided, he could avoid the liability for it because the information was falsified. Correct. Okay. And the other thing I heard in there, which I wanted to ask you about as well was the liability for these debts can be, I guess, unevenly distributed amongst directors. So if you've got five directors and the tax liability is \$50,000, or the superannuation liabilities? \$50,000. Don't assume I think what I heard in there is don't assume, oh, well, my portion of that is \$10,000.

Caitlin Murdock 12:36

That's absolutely right. So under the law, the liabilities joint and several, but whoever it is, chasing the money, whether it's the ATO or a liquidator, they ultimately don't care where the money comes from, as long as they get it. So if there's, say, one director in Australia and one director offshore, they might just pursue the Australian resident director because it's easier. Yeah. So it is it is a big risk,

Helga Svendsen 13:02

Actually. And can I check something in very practical terms, this issuing of the director penalty notice? Where does it go?

Caitlin Murdock 13:10

That's a very good point that I also wanted to say something on. So directors need to be really careful about what ASIC has in the records, the penalty notice can go to the directors personal address, it can go to the company, and it can actually now since April, go to the tax agent. One problem that we see directors have is if they don't keep their details up to date, with ASIC, the ATO will potentially send the notice to the wrong address. And it is not a defense to say that you didn't get it. So you are just on the hook for the liability, regardless of whether you even know about it.

Helga Svendsen 13:56

Okay, so yeah, keep it. So that's interesting, the ASIC details up to date, which I am sure for people who have been directors of organizations for a significant period of time, if they go back to their ASIC records, it may well be where they were when they were appointed, as opposed to where they are right now. So in that way, I guess it's a useful thing that the tax agents are also now part of that regime in terms of I was going to say serving the director penalty notice. I don't know if it's formally serving or not, but providing that to directors so that at least they get hold of it. So these changes were made in April. Can you talk us through why some of these changes were introduced?

Caitlin Murdock 14:36

Yeah, absolutely. So these changes are actually part of the federal government's combating of illegal Phoenix's activity. So the government has been concerned about what we call Phoenixing and that's where you have a company who does certain work and they were particularly concerned about property development companies and in that industry, so you would they were concerned about activity where the company would incur liabilities and also make money but they would not be paying their liabilities such as Super and GST, all sorts and paying creditors. And then that company would wind itself up or liquidate and then transfer its assets into a new company, and to start operating from that new company and leaving the liabilities behind, because the directors were personally liable for things like the GST. Yeah, I think it was the 2018-19 federal budget, they announced a whole raft of measures to combat this activity and make directors more accountable. So that's where the change to include GST into the director penalty regime came from. And it's also why when purchases by new units, for example, that the purchaser is now required to withhold the GST. They don't seem to trust the sellers to actually remit the GST to the ATO.

Helga Svendsen 16:08

Yeah, that makes perfect sense, I think. And is there, you know, for directors who are thinking do diligence of the organizations that they're on aren't indeed, even if they're already on these boards? Is there particular industries that I mean, every director should be doing due diligence, every director should be looking at these things, but it's their industries in particular, where this is a problem?

Caitlin Murdock 16:29

Well, obviously, companies that have employees are going to be will need to be very careful about how they're complying with their superannuation obligations. I mean, we've seen a lot of things in the news over the last 12 months or 18 months about companies who haven't paid their employees. Right. And so we have seen, I'd say most of the issues we have seen in our law firm in the tax controversy area have to do with super. Yeah, so definitely companies that have any kind of employees, that they really need to be careful companies that have probably, what I would say is a high GST turnover, they those companies who say report monthly with GST need to be really careful, because they don't they want to make sure every month the GST is being remitted. Because if it's not, you know, each month, you may have the potential for the liability to arise and the directors to become personally liable, liable. Conversely, the type of entities that might not need to worry so much, anyone who's out there on their directors of not for profit companies who are income tax exempt, they might not need to worry so much depending on their particular circumstances, or companies that obviously don't have any employees or don't make enough turnover to actually require to, to be required to be registered for GST.

Helga Svendsen 18:02

So it's a bit of a catch all question, really, is there anything that we haven't touched on that we should have?

Caitlin Murdock 18:09

Yes, earlier, I, one thing that I wanted to flag for your listeners is that if you are thinking about becoming a director, or even if you are already a director of a company, it's really important that you look at your own personal financial situation, and have a think about whether you might need to engage in some asset protection strategies to make sure that you're perhaps limiting the amount of assets in your personal name or the amount of equity that you have, that could be available in the event that the worst happened and you pursued for the entire tax debt of a company or if there was an issue with insolvent trading, and the liquidator came after you, personally. So that's definitely one thing I think all directors should be aware of, especially when the company is what we call high risk. There can be a lot of different types of companies, but we say it with perhaps construction companies where the if say, an employee or someone within the company had an accident on site or

something like that happened, you just want to make sure that any potential claim against you is limited, at least financially if you can. One really critical thing for directors to be aware of is that ignorance of the law is not an excuse to a number of things. So if you can, if you get a director penalty notice, just say that I'm a non executive director, so that was the role of the treasurer or whoever, when the CFO that's not good enough, every single person who sits on the board will be accountable. So that's one thing to keep in mind. And it's also we've seen directors, try argue that they didn't know about the tax affairs of their company. And not only does that fail in defending the tax it, it also will potentially get that director in a bit of hot water with ASIC. We've seen ASIC then go after directors for their breaches of their statutory duty to take reasonable care and diligence. And I was reading a statistic that said, ASIC have actually been successful in over 80% of their cases against directors for the breach of the duty of care. So that's, I think, highlights that ASIC are incredibly serious about directors complying with their duties. And then they publicly say that there's no position on a company board for directors who don't take an active management role in the company.

Helga Svendsen 20:56

Yeah, interesting, which is interesting, that you know, that line, noses in fingers out kind of line between governance and operational, it sounds like in this area, maybe have your fingers in a little bit, just so you can absolutely assure yourself that the company is doing what it needs to do, because it's your obligation and your liability, that you can't pass on to somebody else.

Caitlin Murdock 21:20

Yeah, that's right. And then I should say, it is permissible, of course, for directors to go seek external advice of their own. Because tax is complicated. And not everybody can be across the intricacies of the tax legislation. So directors can seek advice from it can be from a qualified person within their company, or it can be externally. But the important thing to remember, when that happens, is you can't just get the advice and say, Yep, I've got the advice, no problem. Need to make an independent assessment of what's raised in the advice. And if you don't understand it, you need to inform yourself, or ask further questions to make sure that you do understand it, and that you can take on take on that advice.

Helga Svendsen 22:06

Yeah, so interrogate it and satisfy yourself, not just go, Oh, great. I've got a piece of paper that says it's all fine. Therefore, it's all fine.

Oh, Caitlin, this is all been. You know, it's such good advice for an area that is not only important, but has or can have some pretty serious consequence for directors. so incredibly useful advice for

people. What are the main points you want people to take away from the conversation that we've had today?

Caitlin Murdock 22:38

So a couple of things. Firstly, if you're becoming a director, or you're already a director, and haven't done this yet, just make sure that you're up to date with the tax compliance of the company, and its broader financial position. Secondly, make sure that your personal details and the company details within the ASIC Database are up to date. You can just find that out from a company search. And it's pretty easy to change if it's not right. Thirdly, look at your own financial position and think about whether if you have significant assets in your own name, think about whether you want to move some of that around to the extent you can to ensure that you if the worst happened, you're protected, personally. And it just if you're not sure about any, anything within the company, just ask questions and seek advice from people with the relevant experience.

Helga Svendsen 23:43

And is there a resource you would like to share with the take on board community?

Caitlin Murdock 23:48

Well, if anyone wants to actually raid the provisions around the director, penalty regime, it's pretty dry, but it's contained in the tax administration act and schedule one. So that's in Division 269. If you don't want to read about it, read the actual legislative provisions, but want to read about it. I've got an article on my LinkedIn page, which I can give you the details. And if you have any questions, you can contact me, I've had a lot of queries come through and I try my best to answer them in a timely way.

Helga Svendsen 24:23

We'll make sure we put a link to your LinkedIn. And if we can actually don't know if we can directly link to an article that's on your LinkedIn page where we will if we can, and if we can't, we'll just link to your LinkedIn page and put your contact details in there as well. Okay, terrific. Fantastic. Thank you so much for sharing your wisdom about this topic today. I know it'll be of huge value to the take on board community. So thank you for joining us here today.

Caitlin Murdock 24:47

Thanks. Hello. Thank you for having me.