

Parliamentary Joint Committee on Corporations and Financial Services

Inquiry into Corporate Insolvency in Australia

ANSWERS TO QUESTIONS ON NOTICE

Australian Taxation Office

January 2023

Agency: Australian Taxation Office
Question No:
Topic: Personal and corporate insolvency overlap
Reference: Written (22 December 2022)
Senator/MP: Senator Deborah O'Neill

Question:

How does the ATO handle situations where corporate and personal insolvencies are intertwined, for example, where a small business owner has provided guarantees for loans to a small business that may be subject to insolvency?

Answer:

Generally, the ATO does not have visibility in respect of personal guarantees given by directors of corporate entities, as these are confidential agreements between the director and the creditor.

While the Commissioner of Taxation (the Commissioner) may pursue an unpaid tax debt from a corporate entity or a tax debt from an individual who is also a director of the corporate entity, generally the tax debt will not relate to the same liability.

The only exception is where a director has been issued with what is commonly referred to as a 'lockdown' director penalty notice (DPN). A lockdown DPN is issued in cases where not only has the director failed to cause the company to discharge its tax and superannuation obligations, but he or she has also failed to cause the company to lodge its withholding tax activity statements within three months of the due date, and/or failed to report its superannuation guarantee charge (SGC) by the due date for the SGC statement. If a company is then placed into liquidation or administration or a Small Business Restructuring Practitioner is appointed, a lockdown DPN still cannot be remitted and the debt must be paid in full.

Practice Statement Law Administration PS LA 2011/18 includes the Commissioner's approach towards the recovery of personal liabilities that company directors may incur in relation to a lockdown DPN.

Where a director does not propose or adhere to an acceptable proposal to pay a lockdown DPN tax debt, the Commissioner may commence legal recovery proceedings. If the debt remains unpaid at the conclusion of those proceedings, in appropriate circumstances the Commissioner will take bankruptcy action against the director.

Practice Statement Law Administration PS LA 2011/16 includes the factors and considerations the ATO will take into account when deciding whether to take bankruptcy action against an individual.