



Précis Paper

Director Penalty Notices

A discussion about Director Penalty Notices, and the recent decision in *Deputy Commissioner of Taxation v Paul Tannous* [2016] NSWSC 1654

Discussion Includes

- Director Penalty Notice (DPN) regime
- Key facts
- The reasonable steps defence
- The 'giving' of a notice
- Defective notices
- Evidentiary certificates & hearsay
- Takeaway

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Director Penalty Regime

1. In this edition of BenchTV, Joanne Little (Barrister, 3 St James' Hall, Sydney) and Andrew Johnston (Principal Lawyer, Australian Taxation Office, Sydney) discuss the Director Penalty regime, and the recent decision in *Deputy Commissioner of Taxation v Paul Tannous* [2016] NSWSC 1654.

Director Penalty regime

2. When a company pays an employee's salary, it withholds a certain component in respect of the taxation obligations of that employee.
3. When tax time comes around, income tax is assessed, and the employee is entitled to a credit equal to the amount withheld from them by the employer and will either become liable to pay for any shortfall in income tax, or will receive a return.
4. An obvious problem occurs when the company does not remit the withholding amounts. In these circumstances, the Director Penalty regime comes into play. This was the case in the matter of *Deputy Commissioner of Taxation v Paul Tannous* [2016].
5. Essentially what the taxation legislation sets up is a parallel debt obligation as between the company and its directors. So if the company has not paid its withholding tax amount by the time it is due, the director will become liable for a penalty in the exact same quantum as the withholding tax amount.
6. Usually, the withholding amount can be remitted in three ways:
 - the amount is paid by the company
 - the company goes in administration
 - the company begins to be wound up
7. A Director Penalty Notice (DPN) *must* be given prior to proceedings being initiated, in accordance with s 269-25 of the *Taxation Administration Act 1953* (Cth). A director has 21 days from the date the notice is 'given' to them to achieve remission of any director penalties stated on the DPN. Once the 21 days has elapsed, the Deputy Commissioner may initiate proceedings against the director for the director penalty amount.
8. The director penalty debt automatically crystallises upon the failure to pay the withholding amount by the relevant due date – that is, the giving of the DPN is simply a prerequisite to be able to initiate proceedings to recover the director penalty amount outstanding. So the notice itself does not create liability.

Key facts

9. At the beginning of 2016, Joanne was briefed by the Tax Office in the matter of *Deputy Commissioner of Taxation v Paul Tannous* [2016] NSWSC 1654.
10. Mr Tannous was a sole director of a company called iGroup Australia. iGroup failed to remit amounts in respect of 11 different periods of withholding, equating to approximately \$630,000. Mr Tannous was a sole director at all material times.
11. The ATO posted two DPNs to Mr Tannous. There was no dispute as to whether Mr Tannous had received the first DPN; he alleged, however, that he had not received the second DPN. There was evidence that the second DPN was returned to the ATO some months after it was posted.

The reasonable steps defence

12. A tricky aspect of this case was that the pleaded defence was a reasonable steps defence. It proved tricky because Mr Tannous had at the last minute changed the basis upon which he planned to defend the claim.
13. For a director to rely upon the reasonable steps defence, he/she must satisfy the court that he/she has taken *all reasonable steps* to ensure that the company paid the withholding amount, caused an administrator to be appointed or begun to be wound up. Each of the three alternatives must be addressed and it is necessary to show that *all reasonable steps* were taken throughout the *entire period* that the company came under the obligation to pay the withholding amounts. The threshold required to be met for this defence is very high.
14. The reasonable step pleaded by Mr Tannous was that he had, after receiving the DPN, entered into an agreement to sell the company because he had concerns that the company was trading whilst insolvent. It was a term of that agreement that he could not put the company in administration, or wind it up.
15. The ATO submitted in response that Mr Tannous could not satisfy the requirements of the reasonable steps defence because:
 - all of the conduct that Mr Tannous relied upon was post-dated the giving of the DPN and consequently, did not address any steps taken during the *entire period* from when the Company came under the obligation to pay the withholding amounts

- it is not a reasonable step to enter into administration/winding up when trading in insolvency (i.e. a person cannot justify a breach of their taxation obligations on the basis of a breach of the *Corporations Act*)

All of this was argued in written submissions.

16. At hearing, this defence was conceded by Mr Tannous, and all of a sudden the ATO was faced with a very different case, which was based upon an argument that the ATO's:
 - notice had not been 'given' for the purposes of the Act
 - notice was defective
 - evidentiary certificates were hearsay
17. Joanne decided not bother to challenge the new defence on the basis that it was not pleaded originally for two reasons, the main one being that director penalty liability crystallises at the point of non-payment of withholding amount. It does not crystallise upon the giving of the notice/non-receipt of the notice/21 days after the notice etc. It was on this basis that Joanne was able to respond to the new defence the very same day.

The 'giving' of a notice

18. One of the new issues raised at the hearing related to the means of the giving of the DPN, pursuant to s 269-25 of Schedule 1 to the *Taxation Administration Act 1953* (Cth). The issue arose in the context of one of the DPNs having been returned to sender (the ATO) some months after it had been posted.
19. The taxation legislation prescribes that a DPN is given when it is posted. It expressly excludes the presumption of delivery under s 29 of the *Acts Interpretation Act*. S 29 of the *Acts Interpretation Act* provides a presumption as to delivery, whereas the taxation legislation prescribes when a DPN is taken to be given.
20. Mr Tannous argued that s 269-25 of Schedule 1 to the *Taxation Administration Act* simply displaced the presumption of s 29 of the *Acts Interpretation Act 1901* (Cth), and accordingly, it was a presumption that could be overcome by evidence. He argued that the return to sender envelope was such evidence, and therefore had the effect of rebutting the presumption that the DPN was given.
21. The case of *Cases like and Deputy Commissioner of Taxation v Meredith* [2007] decided that the *Taxation Administration Act's* meaning of 'given' is something very separate from that which is presumed given (in the sense of being delivered) under the *Acts Interpretation Act*, such that a DPN is taken to be given at the time of posting.

22. So as long as the Deputy Commissioner can satisfy the court that the DPN has been put in an envelope with sufficient postage and sent by post to the relevant address, the DPN is taken to be 'given' at that time for the purposes of the taxation legislation. Prior to *Meredith*, it was accepted that a DPN was given when it was delivered to the relevant address. .
23. The decision in *Meredith* changed all of this so that the period of compliance would start on the date of posting. Whilst the decision in *Soong v Deputy Commissioner of Taxation* [2011] considered that *Meredith* was wrongly decided, the legislative changes in response to the *Soong* decision, essentially brought us to the current regime whereby the legislation now states that as soon as a DPN is posted, it is taken to be 'given'.
24. In this case, the court found that s 269-25 is not a deeming provision/presumption – *it prescribes the giving*. So as long as the elements of posting are satisfied, the DPN is taken to be given at that time.
25. The court expressly found that the cases dealing with s 29 of the *Acts Interpretation Act* had no bearing on the interpretation of the 'giving' provisions of the *Taxation Administration Act* for the purposes of DPNs.
26. *Commissioner of Taxation v Paul Tannous* [2016] has since been applied in *Deputy Commissioner of Taxation v Caudle* [2017].

Defective notices

27. Another issue raised was the alleged defectiveness of the substance of the notices. How this issue was ultimately decided came down to the meaning of the words 'the company begins to be wound up' used in the legislation. (Remember: 'the company begins to be wound up' is one of three ways in which a penalty can be remitted.)
28. The *Taxation Administration Act* prescribes that the notice must describe accurately the circumstances in which the penalty will be remitted. Counsel for the defence argued that the wording in the DPN "*...is being wound up*" was not consistent with the wording used in the legislation "*the company begins to be wound up*".
29. So argument ensued as to the difference between the words 'begins' and 'being'. It was the ATO's submission that there is no discernible difference, and that therefore the notice had no defects because of the use of that word. The Court agreed with the ATO's submissions noting that 'being' wound up includes the very first step in the process, i.e. when the company 'begins' to be wound up. Such that the wording used in the DPN was of no material difference in meaning or concept from that used in the legislation .

Evidentiary certificates & hearsay

30. The taxation legislation provides some evidentiary advantages to the Deputy Commissioner of Taxation in that he/she has the benefit of being able to produce evidentiary certificates, which are prima facie evidence of the matters that are stated therein.
31. The certificate will generally state the quantum of the debt, and the fact that the individual is liable. As prima facie evidence, it is not conclusive evidence, but it still tends to allow a quick resolution of these issues once a hearing starts.
32. Mr Tannous argued that the certificates were hearsay evidence, saying that irrespective of what the taxation legislation prescribes, the certificates were still subject to the *Evidence Act*.
33. Once proceedings had been initiated, the defendant became entitled to a credit, such that the amount provided as being outstanding in the original evidentiary certificates, which were initially annexed to the relevant affidavits, were updated by a later produced evidentiary certificate.
34. The defence argued that the second evidentiary certificate constituted a previous "representation" by the DCT as to the amount owing by the defendant and thus the evidentiary certificates consisted of "hearsay representations" and were inadmissible unless they fell under the business records exception of the *Evidence Act*.
35. The Court considered this argument had no foundation; noting the evidentiary certificates signed by the DCT were valid under the legislation and carried statutory force as to the matters to which they related under s255-45 of Schedule 1 to the *Taxation Administration Act*. The Court noted that the DCT also gets the benefit under statute that every statement of claim is also prima facie evidence.
36. .

Takeaway

37. As much as the Deputy Commissioner has on its side experience and legal expertise in running these types of matters, the evidentiary advantages afforded it, and now a comprehensive body of law upon which to rely, it must still remain agile to the arguments (sometimes very creative, as was the case in this matter) that can put by its opponents.

BIOGRAPHY

Joanne Little

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Joanne was admitted in 2002 and was called to the bar in 2010 . She initially worked as a solicitor in the litigation and finance department at Allens Arthur Robinson between 2002 and 2005 . Joanne then worked as an associate from 2005 to 2007 at Freshfields Bruckhaus Deringer, Amsterdam and Paris in the finance department. On returning to Sydney, Joanne joined St.George Bank Limited as the Lawyer for Special Projects, followed by Legal Product Counsel for Westpac Banking Corporation.

Andrew Johnston

Principal Lawyer, Australian Taxation Office, Sydney

Andrew graduated in 2001 with Honours from the University of Technology and was admitted into practice in 2003. He has since obtained a Master of Taxation in 2006 and a Master of Dispute Resolution in 2011. Andrew is a seasonal lecturer at Charles Sturt University teaching both Administrative and Tort Law and is the author of the 2017 published text ATO Disputes – a single point of reference for tax disputes with the ATO.

BIBLIOGRAPHY

Focus Case

Deputy Commissioner of Taxation v Paul Tannous [2016] NSWSC 1654

Judgment Link

[*Deputy Commissioner of Taxation v Paul Tannous* \[2016\] NSWSC 1654](#)

Cases

Soong v Deputy Commissioner of Taxation [2011] NSWCA 26

Deputy Commissioner of Taxation v Meredith [2007] NSWCA 354

Deputy Commissioner of Taxation v Caudle; Commonwealth of Australia v Caudle & Anor [2017] ACTSC 216

Legislation

Taxation Administration Act 1953 (Cth)

Acts Interpretation Act 1901 (Cth)

Evidence Act 1995 (Cth)