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Ref: ARY:dt

2 May 2012

General Manager
Business Tax Division
The Treasury
Langton Crescent
PARKES ACT 2600

By Email: *sbtr@treasury.gov.au*

Dear Sir

SUBMISSION ON PROPOSED (REVISED) LEGISLATIVE AMENDMENTS TO DIRECTOR PENALTY REGIME

We refer to your Exposure Draft in relation to the proposed amendments to the director penalty regime and are pleased to be provided with the opportunity to make this further submission in relation to the various proposals.

By way of background, Pitcher Partners is an accounting and business advisory firm operating in the middle market, whose clients include small to medium public companies and privately owned businesses. Pitcher Partners is an association of independent Australian accounting firms located in Melbourne, Sydney, Perth, Adelaide and Brisbane. Nationally, this independent association has over 80 Partners and 800 staff. Pitcher Partners is also an independent member of Baker Tilly International.

Most Pitcher Partners offices have specialist insolvency divisions whose partners are members of the Insolvency Practitioners Association.

1 INSUFFICIENT TIME FOR PUBLIC SUBMISSIONS

We note that the further amended Exposure Draft was released late on Wednesday 18 April 2012 with the closing date for submissions on Wednesday 2 May 2012. We note this provides only nine business days for the lodging of submissions.

Having regard to:

1.1 the extensive period of time that this set of proposals has been under discussion; and

1.2 what we consider to be significant further proposed amendments with respect to the removal of the ability for company directors to place companies into either administration or liquidation in order to avoid personal liability,

we consider the stipulated timeline for public submission to be far too short. We recommend an extension of this time frame in order for further consultation with the business community. This is particularly the case given the concerns that we set out below in relation to the ramifications of the proposed amendments and the fact that they have, until now, been proposed predominantly as a means of countering fraudulent phoenix activity.

2 SUBMISSION

As outlined in the Exposure Draft, we note that the proposed amendments to the *Taxation Administration Act 1953* as set out in the most recent release, contains three broad changes, as follows:

- extending the director penalty regime to allow directors to be made personally liable for their company's unpaid superannuation guarantee amounts;
- ensuring that directors cannot discharge their director penalties by placing their company into administration or liquidation when unpaid Pay As You Go (PAYG) withholding or superannuation guarantee amounts remains unpaid three months after their due date; and
- in some instances, making directors and their associates liable to pay PAYG withholding non-compliance tax (effectively reducing credit entitlements) where the company has failed to pay amounts withheld to the Commissioner.

In relation to the first proposed amendment, we refer to our earlier submission wherein, in broad terms, we did not oppose the proposed amendments but commented that we did not believe that it would have a significant deterrent effect on those who may be engaged in fraudulent phoenix activity. We do not propose to make further submissions on this point.

In relation to the third broad category under the proposed amendments, we again refer to our previous submission wherein we broadly supported the proposed amendments, but again queried their relevance and effectiveness with respect to overcoming fraudulent phoenix activity.

We however note that based on the literal wording in the Exposure Draft, the second broad category of the proposed amendments appears to seek to amend the law so that that directors cannot discharge their director penalties by placing the company into administration or liquidation, where certain taxes remain unpaid three months after their due date.

We note that this represents a fresh or additional power that is now being proposed.

For the reasons set out below, we cannot support this new further proposed amendment and, moreover, consider that extensive further public consultation should be facilitated. In particular, we note the following:

- We understand that the Senate Committee referred the draft legislation back to Treasury and the ATO for a further 'rework' in order to ensure that the new legislation appropriately protected 'innocent company directors'. Whilst some protective measures have now been included, this new proposed amendment would appear to have little or nothing to do with the protection of such 'innocent directors' and, indeed, represents a material amendment to the proposed legislation.

- It has always been made clear from the various press releases and explanatory memoranda that the primary purpose of this proposed legislation is to seek to overcome fraudulent phoenix behaviour. We agree that fraudulent phoenix transactions represent a significant cost to the Australian business community and all efforts should be made to eliminate, or materially reduce, their impact. We also note and agree that the ATO is commonly the largest creditor who suffers loss and damage from fraudulent phoenix activity.

  The proposed legislation and particularly the proposed amendments which would see a director's personal liability crystallised or 'locked down' three months after non-payment on its due date, is likely to have a far greater impact on the ATO's revenue collection than if it is about overcoming fraudulent phoenix activity. If such legislation is proposed, its purpose should be fully disclosed and quantified and a proper public debate facilitated.

- Moreover, it is clear from the ATO's own practice statements[1], and also the explanatory memorandum to the Bill[2] that the objective of the director penalty regime is to ensure that directors cause their company to meet certain tax obligations *or* <u>promptly put the company into liquidation or voluntary administration</u>.

  The ATO's practice statements[3] also notes that one of the more significant difficulties confronting the ATO is its inability to 'stop supply' like other trade creditors may. By way of illustration, it is comparatively easy for a trade creditor who may be supplying steel to a manufacturing business, to simply cease supplying and thereby ensuring that their debt does not continue to escalate. This is one of the ATO's stated reasons as to why they will have a liquidator appointed to a taxpayer rather than grant extended indulgences. We understand the ATO's disadvantageous position in this regard.

  In the context of this background we do not accept that this proposed amendment will assist in overcoming phoenix transactions. It will however provide a positive incentive for directors to meet their taxation obligations, ahead of other creditors. This has not been the stated objective of the proposed amendments.

- It follows from the above that the proposed draft amendments will not solely have an effect on the directors of company taxpayers. The proposed amendments

[1] Paragraph 39PS LA 2011/18 and Paragraph 12 of PS LA 2011/16.
[2] Chapter 1 at paragraph 1.5.
[3] Paragraph 2 of PS LA 2011/6.

would, in our view, have a significant and material effect on other taxpayers. Specifically, the proposed amendment would represent a significant positive incentive for a corporate taxpayer to pay the ATO's debt ahead of other ordinary creditors who may also have debts outstanding for more than 90 days. We consider that this represents a potentially unfair legislative advantage which would be granted to the ATO and to the detriment of other creditors. The ATO already has extensive legislative weapons (and resources to enforce them) not available to other creditors.

This concludes our submission. We would be pleased to answer any queries you may have and in this regard, our contact details are set our below:

Yours faithfully
PITCHER PARTNERS

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