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ASIC Targets Growing Companies In Audit Crackdown

ASIC is in the midst of a concerted campaign targeting private companies that have outgrown the reporting exemptions.

ASIC requires companies to prepare and lodge a financial report and a directors' report each financial year, and have the accounts audited unless the company is exempt. Most small companies are exempt from the compliance requirements as are small foreign owned companies in certain circumstances.

Utilising data from the Australian Taxation Office (ATO), ASIC is contacting companies that have moved beyond or not complied with the exemption and are now in breach of their reporting requirements.

If your company has never had to lodge financial reports with ASIC in the past, it's very easy to breach the rules without realising it. The reporting requirements are hard and fast and ASIC is not overly sympathetic to "oops" as a reason for a breach.

What is a small company?

Small companies are exempt if they satisfy at least two of the following:

- The consolidated gross revenue for the financial year for the company and any entities the company controls is less than $25 million
- The value of consolidated gross assets at the end of the financial year of the company and any entities it controls is less than $12.5 million, and
- The company and any entities it controls have fewer than 50 employees (full time equivalent) at the end of the financial year.

No longer a small company? Then you are a large company and are required to lodge audited financial statements. Will the auditor want to audit the previous year's figures when we were still a small company? Yes.

This exemption is for companies not controlled by a foreign entity or disclosing entities.
Failure to lodge annual accounts with ASIC may result in penalties and potentially the company being deregistered.

The rules for foreign controlled companies

Small companies controlled by a foreign company may also be exempt in some circumstances.

For small companies that are not part of a large consolidated group, the directors must resolve to rely on relief provided by ASIC and lodge this resolution (form 384). Timing is everything to be eligible for this exemption, if the right form is not lodged between the period starting 3 months prior to the start of the financial year relief is first applied and ending 4 months after the end of the relevant financial year, the exemption is unlikely to apply.

ASIC warns that, "in most cases, relief is not granted for financial reports that were due in the past".

Foreign companies that fail to lodge the appropriate financials and are not exempt may be deregistered.

Again, if you have a requirement to lodge financial statements with ASIC, they must be audited.

If you are uncertain about the requirements for your company, please contact us and we'll work with you to ensure your company is compliant.

Super Guarantee – What Happens When You Get It Wrong

The ATO receives around 20,000 reports each year from people who believe their employer has either not paid or underpaid compulsory superannuation guarantee (SG). In 2015-16 the ATO investigated 21,000 cases raising $670 million in SG and penalties.

The ATO's own risk assessments suggest that between 11% and 20% of employers could be non-compliant with their SG obligations and that non-compliance is "endemic, especially in small businesses and industries where a large number of cash transactions and contracting arrangements occur."

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Celebrity chefs are the latest in a line of employers to publicly fall foul of the rules - one for allegedly inventing details on employee payslips and another for miscalculating wages. But what happens if your business gets SG compliance wrong? Under the superannuation guarantee legislation, every Australian employer has an obligation to pay 9.5% Superannuation Guarantee Levy for their employees unless the employee falls within a specific exemption. SG is calculated on Ordinary Times Earnings – which is salary and wages including things like commissions, shift loadings and allowances, but not overtime payments.

Employers that fail to make their superannuation guarantee payments **on time** need to pay the SG charge (SGC) and lodge a Superannuation Guarantee Statement. The SGC applies even if you pay the outstanding SG soon after the deadline.

The SGC is particularly painful for employers because it is comprised of:

- The employee's superannuation guarantee shortfall amount – so, all of the superannuation guarantee owing
- Interest of 10% per annum, and
- An administration fee of $20 for each employee with a shortfall per quarter.

Unlike normal superannuation guarantee contributions, SGC amounts are not deductible, even if you pay the outstanding amount. That is, if you pay SG late, you can no longer deduct the SG amount even if you bring the payment up to date.

And, the calculation for SGC is different to how you calculate SG. The SGC is calculated using the employee's salary or wages rather than their ordinary time earnings. An employee's salary and wages may be higher than their ordinary time earnings particularly if you have workers who are paid for overtime.

Under the quarterly superannuation guarantee, the interest component will be calculated on an employer's quarterly shortfall amount from the first day of the relevant quarter to the date when the superannuation guarantee charge would be payable.

The penalties imposed on the employer for failing to meet SG obligations on time might seem harsh, but they have been designed that way on purpose. This is really money that belongs to the employee and should be sitting in their superannuation fund earning further income to support the employee in their retirement.

Directors are personally liable for unpaid SG

Where attempts have failed to recover superannuation guarantee from the employer, the directors of a company automatically become personally liable for a penalty equal to the unpaid amount. Directors who receive penalty notices need to take action to deal with this – speaking with a legal adviser or accountant is a good starting point.

If you are uncertain about your SG obligations or would like a compliance audit of this and other key risk areas of your business, give us a call.

Director's fees: What and How To Pay Them

The issue of Director's fees often comes up – should we pay directors, how to pay, and if we do pay fees how should they be paid? We answer the common questions for private companies.

Can you pay a Director?

Directors who work in the company, executive directors, would generally have an agreed executive remuneration structure that takes into account their service including attending Board meetings (so, generally no extra fees for service outside of the agreed remuneration structure).

For non-executive directors, companies can only pay Director's fees if the company constitution allows for it or a resolution is passed to make the payments. The resolution to pay directors fees must be made and documented prior to the fees being paid.

These fees are in addition to any agreed expenses such as travel expenses to attend board meetings or in connection with the company's business.

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Fees paid to directors are subject to disclosure requirements. Special rules exist for listed entities, not for profits, APRA-regulated financial institutions and specific advice should be sought for the management of director fees by these entities.

Tax deductibility of director's fees

Fees paid to Board members are tax deductible to the company in the year they are paid or intended to be paid. Many Boards pass a resolution to pay Director's fees just prior to the end of the financial year to claim the tax deduction in that same year.

The fees do not necessarily have to be paid prior to the end of the financial year but the Board must have definitely committed to paying them and then the fees paid as soon as practicable.

Tax on director's fees

Assuming the directors fees are being paid through an individual contractual arrangement (i.e. the contract is with Mr Smith to act as a director, not with Smith Pty Ltd to provide 'someone' as a director, and that happens to be Mr Smith), then the directors fees are treated like salary and wages for the purposes of PAYG withholding.

PAYG is required to be withheld from the gross directors fees, reported on the IAS or BAS that is used to report the salary and wages and related PAYG W for that period, and should be remitted to the ATO.

Director's fees fall within the definition of Ordinary Times Earnings, and superannuation guarantee applies.

Director fees are required to be reported on a payment summary, and are generally reported at item 2 of an individual's tax return. If they are not reported on payment summaries, it could result in errors in the PAYG withholding annual report, and queries from the ATO regarding the payments.

While the ATO may recognise that there can be a difference in the provision of services by and payments to directors (e.g. the contract may be for ongoing director services and attendance at quarterly board meetings, with payments of director fees to be made once a quarter, not monthly), the PAYG W and superannuation contributions are still subject to reporting and payment by the standard deadlines that apply for all other employees.

The directors fee should also be included in any workers compensation calculation and would generally be captured for payroll tax purposes as well.

Can Director's fees be paid as super contributions?

Yes, assuming the proper process has been followed (e.g., effective salary sacrifice arrangement has been entered into before the fees have been earned), fees can be paid to the Director's superannuation fund as a reportable employer contribution to utilise preferential tax rates. This assumes the director is within their contribution limits.

Quote of the month

"Coming together is a beginning; keeping together is progress; working together is success."
Henry Ford

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