

THINKING OF NOT PAYING THE PAYE?

Two recent cases have highlighted the dangers of Directors not properly accounting for PAYE and NIC to HMRC.

Income Tax (PAYE) Regulations 2003/2682 regulation 72 allows the liability for unpaid PAYE to be transferred from the employer to the employee if the employer wilfully and deliberately fails to deduct PAYE and the employee knew this when he/she received the income.

In the first case, a Director had incurred an overdrawn loan account which could not be cleared by way of a dividend due to insufficient profits. Acting upon professional advice, the loan account was discharged by way of salary. His accountants made the accounting entries to offset the loan account by way of his net salary and the liability for PAYE was accrued in the management accounts.

The company was subsequently unable to pay the liability to HMRC and upon liquidation, HMRC transferred the liability to the Director.

The matter went to Tribunal at which the Director argued that regulation 72 only applies if there is a failure to deduct PAYE, not a failure to pay. On a split decision, the Tribunal agreed with the Director on the grounds that he had acted upon professional advice and that there was no wilful or deliberate failure to deduct PAYE. By way of contrast, the second case found that two Directors were liable for PAYE in respect of payments made to them.

Once again, due to a lack of profits, the two Directors changed from dividends to salary but continued to take round sum amounts which they had previously been accustomed to. The company subsequently entered into administration.

The Tribunal concluded that it must have been clear to the Directors that, at the time the payments were made to them, the funds did not exist to discharge the ongoing PAYE liability. Whilst the relevant entries for gross salary and PAYE were entered into the company's payroll records each month, the actual payments to the Directors did not reconcile with HMRC's payroll calculations.

It does seem strange that given the similarities of the cases, the two Tribunals came to differing conclusions. It would seem that in the first case, the Tribunal was swayed by the provision of professional advice and the Director's honest belief that the PAYE system had been operated correctly.

Whilst stating the obvious, the best way for Directors to avoid potential liability is to ensure that there are sufficient funds to discharge the company's PAYE liability before withdrawing substantial funds.

Please note that should your clients require any confidential advice regarding any insolvency matter they are welcome to contact Ian, John or Robert. An initial consultation is provided free of charge and without obligation. Also, if you or any of your colleagues require any clarification regarding insolvency law or procedure, please do not hesitate to contact us.