

Director liability for company tax – going behind the veil of incorporation?

Prior to 2002 HMRC was a preferential creditor in insolvency proceedings which meant that it ranked ahead of other creditors. Crown preference was abolished with the introduction of the Enterprise Act 2002 and the Crown now ranks alongside other unsecured creditors. That said, HMRC have always had the power to hold directors personally responsible for PAYE, NIC and VAT liabilities where evidence shows the company's failure to pay was deliberate or the result of neglect or fraud.

In 2015, the government implemented measures which provided HMRC with the power to access tax debtors' bank accounts to recover unpaid tax debts in certain situations. This move received wide spread criticism as it was perceived as elevating HMRC to preferential status again by providing a power to recover debts that is not available to other unsecured creditors.

In 2016, the government introduced The Compensation Orders (Disqualified Directors) Proceedings (England and Wales) Rules 2016. This legislation provides the Insolvency Service with powers to pursue directors for compensation following the insolvency of a Company, over and above any action the Liquidator or Administrator may have taken on behalf of the Company.

Now the government has published proposals via a consultation paper to make directors (and possibly shareholders) liable for tax debts when a company becomes insolvent. The proposed powers do not only deal with wilfully evaded tax liabilities but also covers instances where the Company has taken advantage of legal loopholes to undertake tax planning measures.

The proposals look to tackle those who own or manage companies and cause them to engage in "tax avoidance, evasion or repeated non-payment of taxes" before using an insolvency process so that the company avoids paying the tax. The proposals also recommend extending the powers to cover all company taxes and making those deemed responsible for non-payment jointly and severally liable for the debts.

Whilst appearing to be a logical extension of powers already available in respect of directors, these proposals would set a dangerous precedent by including shareholders as doing so immediately removes the corporate veil that protects shareholders from falling liable for company debts. The proposals also look to treat tax avoidance, which includes legal tax planning as the same as tax evasion which is a criminal offence. Critics of the proposals highlight that tax avoidance that takes advantage of loopholes in legislation is not a criminal offence. Any new powers given to HMRC should only be applicable where tax evasion has occurred.

Should the government go ahead with the proposals it will be seen as another attempt by HMRC to reverse the effect of changes in the Enterprise Act that removed Crown preference. A more equitable solution must be that any recoveries made from directors (and or shareholders) goes into the pot available to all creditors.

Please note that should your clients require any confidential advice regarding this or any other insolvency matter they are welcome to contact one of our Partners. 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.

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