

Gone but not forgotten?

Gary Brothers probes HMRC's ongoing pursuit of 'rogue' company directors by lifting the 'corporate veil'

In what seems like forever ago now, Schedule 13 Finance Act 2020 gave HMRC new powers for them to issue joint and several liability notices to individuals for a company's liabilities, where those amounts were unpaid due to tax avoidance and tax evasion, as well as repeated insolvency and non-payment.

In what was seen as a 'game changer', removing the corporate veil for directors, we have found that a large number of both insolvency practitioners and tax advisors are unaware of the power (mostly through a lack of HMRC use to be fair) or have not seen it actively used by HMRC.

Until recently, HMRC has used those powers rarely and judiciously, seemingly testing the water to see if the notices would stand up to scrutiny and challenge.

However, in recent developments, we understand that HMRC is now satisfied with the scope and extent of this new power, and its robustness to challenge. Certainly, we at Independent Tax are seeing a steady rise in the number of notices being issued, ranging from deliberate penalties charged in company cases transferred to the directors, through to the more extreme cases where the directors are being challenged to be jointly liable for substantial company debts in liquidation.

We expect to see the number of notices continue to escalate following the announcement in the Autumn Budget that the Government is going to increase collaboration between HMRC, Companies House and the Insolvency Service to tackle perceived 'phoenixism' to evade tax.

With apparently 5,000 more 'highly trained' HMRC investigative staff also announced in the Budget, no professional should be unaware of this stringent power available to HMRC.

What is driving this action by HMRC?

According to figures produced by the Insolvency Service, the number of registered company insolvencies in England and Wales is climbing year on year.

During the 2022 calendar year, the total number of company insolvencies was 22,129. In 2023, the total number was 25,163, an increase on average of 250 a month.

The latest provisional figures, published by the Insolvency Service for 2024, show that the total number up until October 2024 was 20,052.

In its most recent commentary, the Insolvency Service stated: "Average monthly numbers so far in 2024 have been similar to 2023, which saw the highest annual number since 1993", before also noting that "the number of company insolvencies remained much higher than those seen during the Covid-19 pandemic and between 2014 and 2019".

These numbers arguably support why HMRC is now being more proactive and aggressive in its use of such notices, as a means of deterring individuals from using insolvency as an escape route from a large tax liability.

What is HMRC's approach?

Where HMRC believes a company or LLP is insolvent or about to become insolvent, meaning a tax liability will not be paid, then a notice may be given to an individual, or several individuals, making them jointly and severally liable for the relevant tax liabilities.

HMRC's specialist Insolvency Teams understandably pay particular attention to cases involving sizable debt, where HMRC is one of the largest creditors.

Only a suitably qualified authorised officer at HMRC is allowed to give approval for notices to be issued.

Once that approval has been granted, a Personal Liability Notice (PLN) usually follows, with an explanation as to why it has been issued. A typical paragraph states: "We are now making you personally liable to pay. This is because we believe that the company is either insolvent or likely to become insolvent."

The PLN does, however, give the opportunity for an appeal to be made within 30 days of the date of the letter. If no appeal is made, HMRC will then pursue all individuals for the amount owed, taking debt recovery action if necessary, against whichever individual has sufficient assets to pay.

What does the legislation say?

Schedule 13 FA 2020 sets out separate conditions applicable for tax avoidance and evasion cases, and repeated insolvency and non-payment cases.

Tax avoidance and evasion cases

In summary, there are five conditions that need to be met, which are whether:

- Condition A – the company entered into tax avoidance arrangements or engaged in tax-evasive conduct.
- Condition B – the company is subject to an insolvency procedure, or there is the serious prospect of the company becoming subject to an insolvency procedure.
- Condition C – the individual was responsible, whether alone or with others, for the company entering into the tax-avoidance arrangements or tax-evasive conduct, at a time when the individual was a director, or shadow director of the company, or participator in it.
- Condition D – there is, or is likely to be, a tax liability attributable to the tax avoidance arrangements or tax evasive conduct.
- Condition E – there is a serious possibility that some or all of the relevant tax liability will not be paid.

Repeated insolvency and non-payment cases

There are four conditions which need to be met, which are:

- Condition A – the individual had a relevant connection to at least two ‘old companies’ within the past five years.
- Condition B – the ‘new company’ is or has been carrying on a similar trade to any two of the old companies.
- Condition C – the individual has had a relevant connection with the new company at any time during the five-year period.
- Condition D – is that at the time the notice is given, the relevant old companies have a tax liability of more than £10,000, which is more than 50% of the total amount of those companies’ liabilities to their unsecured creditors.

The legislation applies to liabilities relating to any period that ends on or after 22 July 2020.

Tips and advice

Having successfully navigated Notices already, we can offer some helpful tips and advice as follows:

1. If the company is already under enquiry and the debt has arisen because of HMRC raising discovery assessments, issuing Closure Notices or even penalty assessments, make sure these are challenged and appealed against at the earliest opportunity, thus avoiding their becoming ‘full and final’.
2. Check the dates for when the liability arose. If the liability arose in any period before 22 July 2020, the legislation does not apply. The legislation only applies to liabilities relating to all periods that end on or after 22 July 2020 (a common mistake by HMRC!).
3. If a PLN is received, make sure an appeal and postponement application is made within the 30-day appeal period, remembering the appeal period starts from the date of the letter, not the date of receipt.
4. The legislation should now form a key consideration when speaking to any insolvency practitioner, especially where a client has had a previous connection to another company which has entered insolvency.

Summary

With more businesses becoming insolvent, especially in areas such as the hospitality sector, even before the increased employer’s national insurance contributions kick in, we can expect to see more PLNs issued by HMRC.

They need to be approached with caution and careful handling because of the potential repercussions.

Independent Tax are ready to give advice having successfully challenged such Notices.

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