

Taxing Times: Dealing With a More Litigious HMRC

In a radical attempt to support the national economy through the rigours of the pandemic, the Government imposed a temporary restriction on creditors – including HM Revenue & Customs – being able to present winding-up petitions against limited companies. This restriction was imposed for the vast majority of the pandemic (1 March 2020 to 31 March 2022). However, following the lifting of this restriction in April 2022, the rate of petitions presented by HMRC increased rapidly and this has remained at an elevated level since, with statistics for January – August 2023 showing an increase of 351 compared to the same period in 2022.

This rise has widely been perceived by the accountancy and insolvency professions as indicative of a far less tolerant, perhaps less reasonable attitude towards businesses facing a challenging economic environment. Recent figures show that around 60% of all winding-up petitions are currently presented by HMRC. But if we really are seeing a deliberate effort by HMRC to penalise many more defaulting businesses with the ultimate sanction of compulsory liquidation, what possible factors are driving this new hard-line approach?

Post-Pandemic – The Depleted Public Purse

Suffice to say, the raft of supportive measures introduced by the Government during the pandemic came, of course, at an astronomical cost to the tax-payer. The estimated £400bn bill will most certainly have resulted in a sharp focus on recouping monies to restore funds in the public purse, with the rise in HMRC petitions perhaps indicating a stronger drive to initiate liquidation proceedings that may eventually yield a dividend.

As a result, there now seems to be a reduced appetite for allowing businesses a certain breathing space to address their tax affairs (despite, ironically, the introduction of the breathing space moratorium for individuals in financial distress by the Government in 2020) and a concerted effort to target all defaulters that meet the court's minimum criteria for a winding-up petition.

An incentive to petition

The recent resumption of preferential creditor status for HMRC has surely made petitioning a more appealing option. Whilst the Enterprise Act of 2002 led to the department being relegated to the level of an unsecured creditor, 2020's Finance Act effectively reversed that position and, once again, HMRC's claims for unpaid VAT, PAYE and NIC now take priority over the claims of the majority of other creditors. As an aside, despite this legislation being implemented in December 2020, it was very much conceived and drafted pre-pandemic so one may surmise that the Government had its eyes on a larger slice of the insolvency pie even before shelling out fortunes in Covid-related giveaways. If a liquidator is able to make a distribution, there is now a rather small queue in the line ahead of HMRC when it comes to the order of payment.

For obvious reasons, this was bound to lend impetus to more prolific HMRC petitioning. There is, after all, a greater justification for funding the costs of winding-up proceedings where there's a greater chance of receiving a financial return sufficient to cover those costs, as well as full or partial payment of any unpaid taxes.

Open to discussion?

So, in such a climate, is it still worthwhile for company directors to approach HMRC over mounting tax arrears or should they simply wait for the inevitable court papers? Previously, it was possible for those with payment problems to negotiate with individual HMRC inspectors and reach a mutually-acceptable agreement. This is no longer the case, and the ability to arrive at a compromise through reasonable, one-to-one discussions appears to be a thing of the past.

However, the more formal Time to Pay agreement still remains an available option, the first step being an open discussion with a HMRC inspector about the company's present difficulties. Directors should keep in mind that agreements will generally only extend to a maximum of twelve months. Also, importantly, when considering the affordability of payments, they must take into account the ongoing requirement to pay all future tax payments during this period, otherwise any Time to Pay agreement will fail and a winding-up petition may well be the end result.

To make a compelling case for an agreement, directors would need to provide details and evidence of any extenuating circumstances that have caused problems with making payment. In the event that any particular tax liabilities are disputed, they must be prepared to provide a robust argument accompanied by all relevant calculations. Clearly, HMRC will scrutinise any offer of payment carefully and will need to see proof that the proposed instalments are realistic. They will also seek assurances that similar issues with payment will not be repeated in the future. If Time to Pay proposals are refused, directors may still be able to negotiate another form of settlement, and, again, the onus will be on them to assure HMRC that payment can be made within an agreed timeframe.

When Assurance Alone Isn't Enough...

In certain cases, HMRC may insist that a defaulting business pays a security bond, based on either an estimate of future liabilities over a specified period or current arrears, depending on the tax concerned. Any company or sole trader failing to provide this security while continuing to make or receive taxable supplies, will be committing a criminal offence and liable to pay a fine of up to £20,000.

BRI - Assistance Always On Hand

Any business struggling to manage its tax affairs is strongly advised to seek the advice of a professional insolvency practitioner. Our highly experienced and approachable staff at BRI may well be able to suggest recovery strategies that will free-up the necessary funds to meet any outstanding demands for payment in full. If that isn't feasible, we can also provide invaluable assistance to businesses wishing to prepare proposals for a Time to Pay agreement or settlement.

Regardless of the recent increase in petitions, HMRC are still open to discussion, however, they will expect accurate, up-to-date information and candid communication as regards the business' financial situation in order to make their decision. Our decades of experience in helping clients with their tax difficulties mean that we're ideally placed to assist with such matters by providing expert, pragmatic advice that will, hopefully, prevent the dreaded service of a HMRC winding-up petition.

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