Joint and several liability of company directors: draft Finance Bill

Management of taxes

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This draft legislation would introduce a new regime giving HMRC the power to issue notices to make directors of companies, together with shadow directors and certain others connected to a company, jointly and severally liable for the company's tax liabilities. HMRC can issue such notices only when the liability arises or is expected to arise from tax avoidance, tax evasion, repeated insolvency or a penalty for facilitating avoidance or evasion; and where the company begins insolvency proceedings, or is expected to do so, so that there is a risk that some or all of the tax liability will be lost to HMRC.

The CIOT sent comments to HMRC on two earlier drafts of this legislation (in August 2018 and March 2019) which were shared with us on a confidential basis. At that time, we raised significant concerns about the breadth of the legislation, as drafted, since we considered that it could apply more widely than to genuine phoenixism and tax avoidance and evasion arrangements using insolvency, because there is no linkage between the liquidation event and the evasion or avoidance arrangement. In our view, the legislation should not apply if it can be demonstrated that insolvency is not caused by the tax evasion or avoidance arrangement.

Some of these concerns have been addressed in the draft Finance Bill legislation published in July, but others have not. HMRC say they will use guidance to explain when the measure will apply, and when it does not, to try to reduce uncertainty over its application. This is helpful, but in our view is not a substitute for clearly targeted legislation which we would have preferred. For example, a let-out in the legislation where the insolvency procedure is caused by bona fide commercial circumstances and is not part of a scheme to avoid payment of tax would have been more helpful.

HMRC have noted concerns previously raised that the inclusion of ‘participators’ (as defined by Corporation Tax Act 2010 s 454) in the definition of individuals who have a ‘relevant connection’ with the old and new companies in repeated insolvency and non-payment cases may be too broad. They state in their explanatory note that: ‘When a person falls within paragraph 3 solely by virtue of being a “participator” in the company, HMRC will not issue a notice to that person under that paragraph where they are satisfied the person acted in good faith, having no influence over the company’s affairs.’

Whilst we welcome this statement, we believe that greater certainty would have been provided if the tightening of the definition had been included in the legislation itself. Furthermore, the requirement for the participator to have ‘no influence over the company’s affairs’ appears to be quite restrictive. It might in practice be difficult to prove that a person, even an employee shareholder or loan creditor, has no influence at all over a company’s affairs.

Our full comments on the draft legislation can be found on the CIOT website.