

Clause 1 and Schedule 1: Joint and several liability of company directors etc

Summary

1. This clause and Schedule introduce a new regime giving HM Revenue & Customs (HMRC) a 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 some or all of the tax liability will be lost to HMRC.

Details of the clause

2. Subsection (1) introduces Schedule 1.
3. Subsection (2) provides that any tax liability which relates to a period ending before the Act is passed, or otherwise relating to an act or failure occurring before that date is excluded from the scope of the new regime.
4. Subsection (3) defines how a tax liability relates to a period.
5. Subsection (4) provides that a penalty to which Paragraph 4 of Schedule 1 refers does not include any such penalty where the determination to impose it was made, or proceedings were begun in the Tribunal to charge it were begun, before the day the Act was passed.

Schedule 1

6. Paragraph 1 outlines the scope and purpose of the Schedule and provides some definitions.
7. Paragraphs 2(2) to 2(7) detail the conditions which must apply, in the opinion of an officer authorised for that task, before HMRC may issue a joint and several liability notice in cases of tax avoidance or evasion. They are:
 - That the company has engaged in tax avoidance or evasion (Condition A);
 - The company has entered into an insolvency procedure as defined in

- Paragraph 8, or there is a serious risk it is going to do so (Condition B);
- That the person to whom a notice is issued was responsible for, or helped plan or implement, the avoidance or evasion, or received a benefit knowing it came from the avoidance or evasion (Condition C);
 - That there is or is likely to be a liability due to HMRC as a result of the avoidance or evasion (Condition D); and
 - That it is a serious possibility some or all of that liability will not be paid (Condition E).
8. Paragraphs 2(8) and 2(9) detail the information a notice must contain.
 9. Paragraph 2(10) provides that, when HMRC has issued a notice to a person before the amount of a liability is established, they must issue a further notice showing the amount of the liability once it is known.
 10. Paragraph 2(11) details information which a notice under paragraph 2(10) must contain.
 11. Paragraphs 2(12) and 2(13) provide that the recipient of a notice is jointly and severally liable for the company's liabilities to HMRC arising from the tax avoidance or evasion and detail how the amount of that liability is to be determined.
 12. Paragraphs 3(1) to 3(6) detail the conditions which must apply in the opinion of an authorised officer, before HMRC may issue a joint and several liability notice in a case of repeated insolvency. The notice cannot be issued more than two years after HMRC first became aware of the facts. The conditions are:
 - That during the five years prior to the notice, the person has had a relevant connection to at least two companies which have become subject to an insolvency procedure and which had outstanding amounts due to HMRC when they did so. These are the 'old companies' (Condition A);
 - That the person has a 'relevant connection' to another company (the 'new company') during that five-year period, which is carrying on a trade similar to at least two of the old companies (Condition B);
 - At least one of the old companies has an amount outstanding due to HMRC when the notice is issued (Condition C); and
 - That amount is at least £10,000, and represents at least 50% of the total amount due to creditors (Condition D).
 13. Paragraph 3(2) provides that HMRC may only issue a notice under Paragraph 3 within two years of the day they had sufficient facts to conclude the relevant conditions for issuing such a notice were met.

14. Paragraph 3(7) provides that the person receiving the notice is jointly and severally liable for any amounts due to HMRC from the new company when the notice is issued or which arise during a period of five years from the issue of the notice.
15. Paragraph 3(8) provides that the person is also jointly and severally liable for any amounts to still due to HMRC from the old companies.
16. Paragraph 3(9) ensures that Paragraph 9 applies to sub-paragraphs (7) and (8) so that they interact appropriately with the penalties detailed in that paragraph.
17. Paragraph 3(10) defines 'relevant connection'. In respect of the old companies, a person has a relevant connection if he is a director, shadow director or participator in the company. In respect of the new company, the person also has a relevant connection if he has any role in running the company and its affairs, directly or indirectly.
18. Paragraphs 3(11) and 3(12) detail the information a notice must contain and how the amount of any joint and several liability is to be determined.
19. Paragraph 4 provides for the Treasury to vary the Condition D limits of £10,000 and 50% in paragraph 3 by means of a statutory instrument, subject to the negative resolution procedure.
20. Paragraphs 5(1) to 5(6) detail the conditions which must apply in the opinion of an authorised officer, before HMRC can issue a joint and several liability notice when a company has been involved in promoting or facilitating tax avoidance or evasion. They are:
 - That a penalty has been charged (or proceedings have been commenced before the Tribunal to charge a penalty) to the company under the rules for: disclosing tax avoidance schemes (Disclosure of Tax Avoidance Schemes and Disclosure of Avoidance Schemes, VAT and Other Indirect Taxes); promoters of tax avoidance (POTAS); enablers of tax avoidance; and enablers of offshore tax evasion (Condition A);
 - That the company has entered into an insolvency procedure as defined in Paragraph 8, or there is a serious risk it is going to do so (Condition B);
 - That the person was a director or shadow director of, or participator in, the company when the act or omission giving rise to the penalty occurred or penalty proceedings began before the Tribunal (Condition C); and
 - There is a serious possibility the penalty will be wholly or partly unpaid (Condition D).
21. Paragraph 5(7) and Paragraph 5(8) detail what information a notice under Paragraph 5(1) must contain.

22. Paragraph 5(9) provides that, when HMRC has issued a notice to a person before the amount of the penalty is established, it must issue a further notice showing the amount of the penalty once it is known.
23. Paragraph 5(10) details further information required in a notice under Paragraph 5(9).
24. Paragraphs 5(11) and 5(12) provide that the recipient of a notice is jointly and severally liable for the company's liability to the specified penalty and detail how that liability is to be determined.
25. Paragraphs 6, 7 & 8 provide definitions of 'tax avoidance arrangements', 'tax evasive conduct' and 'insolvency procedure' respectively.
26. Paragraph 9 ensures that where the liability for certain penalties charged on the company has been transferred to a company officer, any payment of the penalty the officer has made pursuant to any other relevant provision is excluded from any joint and several liability notice. This paragraph does not apply to notices issued under Paragraph 5 because the relevant penalties mentioned in that paragraph when charged to a company cannot be transferred to directors or office holders.
27. Paragraphs 10(1) and (2) provide that if HMRC concludes a notice is no longer needed to protect the revenue, for example because it no longer believes there is a risk of insolvency, or that a notice was not validly issued, it must withdraw it and notify the individual accordingly.
28. Paragraph 10(3) provides that HMRC may withdraw a notice, by notifying the individual accordingly, where it concludes this is appropriate in a case falling outside of Paragraph 10(2).
29. Paragraph 10(4) allows HMRC to vary the amount shown in a notice up or down.
30. Paragraphs 10(5) and 10(6) provide that when HMRC withdraws a notice under 10(1) or 10(3), the notice has no effect. The withdrawal of a notice because it is no longer considered necessary for the protection of the revenue does not give the person who received it the right to recover from HMRC any amount already paid under the notice.
31. Paragraph 11 provides for a person receiving a joint and several liability notice which shows an amount due to HMRC on its face to request HMRC to review the decision to issue it. The request must be made to HMRC within 30 days of the issue of the notice, unless HMRC agrees a longer period or is satisfied the person had a reasonable excuse for making their request for a review late.
32. Paragraph 12 provides details of the review process and requires HMRC to provide its conclusion of the review within 45 days, unless the parties agree to a longer period.
33. Paragraph 13 provides a right of appeal against a joint and several liability notice. Unless HMRC agrees a longer period or the Tribunal gives permission, the appeal must be made within 30 days of when the notice was issued or, if HMRC has carried

out a review under Paragraph 11, within 30 days of the date on which HMRC issued the notice communicating its conclusions.

34. Paragraph 14(1) sets out how the Tribunal should dispose of an appeal made to it.
35. Paragraph 14(2) provides that a person making an appeal under Paragraph 13 cannot appeal against the existence or amount of a liability shown in a joint and several liability notice issued to him. It is open to the company to make such appeals, subject to the rules pertaining to such appeals, and the individual may join or make such an appeal under Paragraph 15.
36. Paragraph 14(3) provides that where an appeal is successful on the basis that a notice is no longer necessary for protection of the revenue (for example, because there is no longer a serious possibility that the company will commence an insolvency procedure), the success of the appeal does not give the individual a right to recover any amount paid to HMRC under the notice.
37. Paragraph 15 allows an individual who receives such a notice to join himself to any appeal made by a company which is in an insolvency procedure against a tax liability which is the subject of the notice, or to make such an appeal if the company does not make one, or makes one and then withdraws before it is complete. If the company has not made an appeal but the individual wishes to, the appeal must be made during the 30 day period starting on the date on which the notice is given.
38. Paragraph 16 allows a recipient of a joint and several liability notice where a company has facilitated tax avoidance or evasion, to be a party to penalty proceedings before the Tribunal where such proceedings are commenced.
39. Paragraph 17 provides that when a joint and several liability notice is given to a person at a time when the company with which he is connected no longer exists, the joint and several liability is only with those individuals who receive such notices, and not with the company.
40. Paragraph 18 explains how the Schedule is to be interpreted when it is applied to Limited Liability partnerships. When the relevant conditions apply, HMRC may issue joint and several liability notices to members or shadow members of such partnerships.
41. Paragraph 19 defines terms used in this Schedule.

Background note

42. This clause and Schedule have been introduced to allow HMRC to recover tax and other liabilities generated through tax avoidance or evasion, or through repeated insolvencies where there are outstanding tax liabilities. It is designed to change the behaviour of those who misuse company insolvency to retain the proceeds of their tax avoidance or evasion, or from the facilitation of avoidance or evasion by other persons. The new regime allows HMRC to issue notices to directors and others connected to a company, making them jointly and severally liable for any amounts

that become due to HMRC as a result of the avoidance, evasion, facilitation of avoidance or evasion or repeated insolvencies. Safeguards are provided in the form of a right of appeal against a notice and notices can only be issued by an officer authorised for the purpose.

43. The power under paragraph 3 will not be used in respect of those such as 'turnaround specialists' whose relevant connection with companies is part of a genuine attempt to save the company from failing. 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.
44. The regime will be effective from Royal Assent of Finance Bill 2019-20.
45. If you have any questions about this change, or comments on the legislation, please contact Peter Woodham on 03000 586533 (email: peter.woodham@hmrc.gov.uk).