

## Exploring HMRC's response to their consultation on tax abuse and insolvency

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**Restructuring & Insolvency analysis:** As the government aims to tackle those who deliberately abuse the insolvency regime in trying to avoid or evade their tax liabilities, Frances Coulson, senior partner and head of insolvency and litigation at Moon Beever Solicitors, says HMRC's approach follows an 'increasing trend towards more draconian anti-abuse regimes'.

### Original news

HMRC's response to tax abuse and insolvency consultation published, [LNB News 09/11/2018 82](#)

*HMRC has published the responses to its consultation on tax abuse and insolvency on 7 November 2018. This confirmed the government will include legislation in the Finance Bill 2020 to make directors and other persons involved in tax avoidance, evasion or phoenixism jointly and severally liable for company tax liabilities where there is a risk that the company may deliberately enter insolvency.*

### What is the consultation about?

HMRC sought views on how to tackle what they accepted was a small minority of taxpayers who 'abuse the insolvency regime to try to avoid or evade their tax liabilities'. The consultation ran from 11 April to 20 June 2018 and a number of responses were received from practitioners and businesses including other involuntary creditors, as well as R3 and the Insolvency Lawyers' Association (ILA).

In its 2017 Autumn Budget and 2018 Spring Statement, the government announced that it would explore ways to tackle those who deliberately abuse the insolvency regime in trying to avoid or evade their tax liabilities, including through the use of phoenixism. HMRC sought views on how best to tackle the abuse they identified, through legislative change, operational change or other actions. However, draft legislation was produced very quickly and appears to be the predestined route.

HMRC trumpeted the £175bn in additional compliance revenue it reports as collecting 'as a result of its actions to tackle tax evasion, tax avoidance and non-compliance—helping the UK to achieve one of the lowest tax gaps in the world'.

However, this consultation specifically highlights intentional misuse of limited liability and the insolvency regime by directors 'company dumping' as a way of avoiding tax liabilities.

The consultation recognised that office-holders had a number of actions they could take to recover assets from the director or shareholder and/or to impose personal liability on them for the company's debts pursuant to the [Insolvency Act 1986](#). However, in HMRC's view, the pursuit of these proceedings would be:

- expensive
- reliant on the provision of information to the office-holder and/or HMRC
- subject to litigation risk
- dependent on the office-holders' appetite for such litigation

HMRC notes: 'As a result, even if proceedings are instigated they often end up in a "commercial" or discounted settlement being reached.'

They particularly cited their dislike of commercial settlements in litigation, setting out three case examples. This rather superficial analysis seems to ignore the fact that sometimes the funds are simply not available to pay in full, as they may have been spent or be located in inaccessible jurisdictions.

The scale of the problem is not assessed in the consultation and the HMRC view ignores a number of facts, such as the fact that there is also a cost to HMRC action whether by accelerated payment notices, or assessments or

penalties which stand to be challenged. HMRC are gearing up their staffing levels. It also ignores the difficulties of tax collection in foreign jurisdictions—which is usually involved with the more sophisticated wrongdoers—and which can be improved upon by office-holders pursuing funds under the collective regime.

### **What was the government's preferred approach to tackling the abuse?**

HMRC has come down firmly in favour of legislation rather than operational or 'other' measures, allowing them to make directors and potentially others jointly and severally liable with the company in insolvency where there is tax evasion or avoidance or phoenixism. There was a suggestion that the liability transfer to the director, but respondents generally felt that joint and several liability was preferred.

HMRC do now appear to concede that this administrative decision as to director guilt should be challengeable by the taxpayer in tribunal, which was not necessarily envisaged initially. Where a judgment is effectively being made as to a person's dishonest intent, it would be invidious if no judicial safety net was available, albeit the expense of this may rule out the challenge for many, as the legislation effectively reverses the burden of proof so that the taxpayer has to challenge HMRC's determination that he is dishonest.

### **What consequences do you think this will have for restructuring and insolvency professionals?**

There will be uncertainty in a number of areas. Along with a number of other measures for direct action by HMRC, the office-holder may be unsighted as to action by HMRC, which may render his own actions and investigations too risky or valueless in terms of recovery. This in itself may deter practitioners from undertaking the speculative investigations and actions that are an integral part of the balance between encouraging entrepreneurialism and recovering from those who overstep the boundaries. It may of course, in a broader sense, increase work because it may—coupled with the surprise announcement in the Budget 2018 about reintroducing crown preference (a retrograde step in terms of economic success)—have a tightening effect on credit.

### **How does this relate to other developments in this area of law?**

It follows an increasing trend towards more draconian anti-abuse regimes and increasing administrative decision-making.

### **What are the likely timescales for implementation of the recommendations?**

The measures appear to be intended for the Finance Bill 2019-2020 and will therefore most likely come into force by April 2020. Budget measures are more difficult to defeat especially as the House of Lords, usually such an effective balancing forum (who have been fairly critical of such measures), effectively have very limited ability to stem the changes. It signals a real intent to get these changes through. Legislative windows are few and far between in insolvency, given—as in all areas—government time taken up with Brexit.

*Frances Coulson is a regular speaker in the UK and abroad on debt, insolvency and practice management. Coulson chairs the R3 Fraud Group, is a member of the Councils of R3, InsolEurope and the Restructuring & Insolvency consulting editorial board.*

*Interviewed by Kate Beaumont.*

*The views expressed by our Legal Analysis interviewees are not necessarily those of the proprietor.*

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