



FIELD COURT TAX CHAMBERS

Security for PAYE¹

The recent decision in D-Media Communications highlights some really serious issues

The power of HMRC to require security for PAYE and NIC is truly awesome. The principle is fair enough and we have seen it in the context of VAT for many years. Under VATA 1994 Sch 11(4), HMRC is entitled to seek security from the taxpayer if it thinks it is necessary for the protection of the revenue; for example, if the taxpayer has failed to comply with his VAT obligations or HMRC has reason to believe that he might fail to do so. This is really serious because it is a criminal offence to continue to make taxable supplies if you have not provided the security demanded by HMRC.

Of course, if a person is unable to pay his current VAT liabilities, he is hardly going to be able to pay a security representing a few months' VAT liabilities in advance. Therefore, to avoid criminal liability, he must cease to trade.

The PAYE rules for security are more recent – and are much worse. Regulation 97N of the PAYE Regulations (SI 2003/2682) provides that where an officer of HMRC considers it necessary for the protection of the revenue, he may require the company, or the directors, to provide security for payment of PAYE in the future. The failure to provide security is a strict liability criminal offence, which the tribunal explained is punishable by a fine of *unlimited* amount. (I am not joking). Ceasing to trade does not help; the criminal offence applies if you fail to pay the money. There is virtually no defence to a strict liability offence.

Fortunately, and unlike the position for VAT, there is a right of appeal against a security notice for PAYE and NICs. The tribunal is entitled to form its own view and to confirm, set aside or vary the security notice.

Having regard to the enormity of the consequences – with directors facing criminal liability and an unlimited fine for failing to provide the necessary security when the company is up to their ears in debt and has no access to funds – it is no surprise that this has ended up in court: *D-Media Communications Limited v HMRC* [2016] UKFTT 439 (reported in *Tax Journal*, 15 July 2016).

The tribunal noted that the recipient of a notice to provide security will be criminally liable merely for the failure to provide the security. If that person simply does not have the funds, the inevitable consequence of the issue of a security notice will be that a criminal offence will be committed. No doubt influenced by the harshness of this rule, the tribunal suggested that hardship should be a factor in the decision of HMRC to require security.

The tribunal said that a policy which dictates the amount of security to be required, without regard to the ability to pay, is inconsistent with the legislation. If the taxpayer cannot pay, and HMRC know they cannot pay, to require the taxpayer to provide security – which it would

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inevitably fail to do and be criminally liable – can do nothing to protect the revenue and cannot have been the purpose of parliament in making these regulations. Accordingly, the tribunal reduced the amount of the security to manageable proportions.

To make a person criminally liable for non-payment of tax is bad enough. However, to make them criminally liable for non-payment of a liability which has not yet arisen, just because HMRC are worried about it, is a very serious power indeed. It clearly deserves some control by the courts – and this case shows how badly such control is needed.

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