



FIELD COURT TAX CHAMBERS

Security for tax¹

The recent case of Horder shows how tough the security for tax provisions can be

This may seem to be a subject of limited interest – but like any potential disaster, it is really serious when it arises. The reason why it is so important is because of the almost unbelievable penalties which can arise as a result of security for tax being demanded by HMRC.

These issues have been canvassed before, but they deserve to be highlighted again having regard to the recent Upper Tribunal case of *Horder v HMRC* [2023] UKUT 206 (TCC).

But first a brief recap.

HMRC is entitled to seek security from a taxpayer if they consider that it is necessary for the protection of the public revenue. This power arises under VATA 1994 Sch 11 para 4 and reg 97N of the PAYE Regulations (SI 2003/2682). It is likely to arise where the taxpayer has failed to comply with his tax obligations in the past or there is reason to believe that he might fail to do so in the future.

As far as VAT is concerned, it is a criminal offence to continue to make taxable supplies if you have not provided the security demanded by HMRC. This means that you must cease to trade if you want to avoid committing a criminal offence.

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

However draconian this may seem, it is generous compared with the rules for PAYE and NICs. Regulations 97M – 97X of the PAYE regulations provide that where an officer of HMRC considers it necessary for the protection of the public revenue he may require the company, or any of the directors, to provide security for payment of PAYE in the future. The failure to provide the security demanded by HMRC is a strict liability criminal offence under ITEPA 2003 s 684(4A).

You don't get out of this penalty by ceasing to trade. Not paying the amount of security demanded by HMRC is the offence and carries an unlimited fine.

This is very serious indeed for the directors of a company which finds itself in financial difficulty because the demand for security can be made to the directors personally – and they will be criminally liable if they fail to pay up.

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There is a right of appeal against a security notice for PAYE and NIC. This is provided by reg 97V but as it is a strict liability offence there are very limited grounds on which to appeal. Fault, intention, ignorance, etc. – none of this matters.

The harshness of the provisions has attracted some sympathy from the courts and they have shown some imagination in limiting their scope. One example is *FMC Ltd v HMRC* TC 8182 where the judge held that HMRC cannot impose any level of security they wish. If the quantum is excessive the decision as a whole can be unreasonable and susceptible to a successful challenge. Accordingly, he considered that the right to challenge an HMRC notice for the provision of security encompasses both the decision to require security and the amount of the security demanded.

However the more recent case of *Horder* shows how brutal these provisions can be, and how they can affect a professional adviser. Mr Horder was an accountant who acted as a director (unpaid) of a company of one of his clients. (Not an unfamiliar scenario). He accepted that he was ‘a patsy’; the client was a shadow director and took all the relevant decisions – but unfortunately that did not include paying the PAYE in respect of the employees.

In due course, HMRC sought security for PAYE from Mr Horder, and following various warnings that failure to pay was a criminal offence, the Crown Prosecution Service commenced criminal proceedings against him in the magistrates court.

He did appeal to the FTT against the notice to provide the security, but there was a problem with the timing and his permission to appeal was refused.

Obviously this is catastrophic for Mr Horder as a professional accountant, and one can only hope that some resolution is found.

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