

Collection Manual

Liquidation of Companies and other Company Law issues

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1. Introduction

In the majority of cases one or a combination of the standard enforcement methods will usually be successful in securing payment of an outstanding tax debt. However, in certain cases the caseworkers will need to consider alternative possibilities to secure payment. Apart from enforcement action other possibilities to help secure the tax debt might also be used – such as:

- (a) ensure a tax clearance certificate does not issue, where appropriate, or
- (b) increase the rate of RCT deducted from a subcontractors payment from either 0% or 20% to 35%, where there is serious compliance issues.

- 1.1 Where the tax debt cannot be brought under control more direct action will be required. In the case of a company this will usually mean the liquidation of the company needs to be considered.

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2. What is Liquidation?

- 2.1 Liquidation (or winding-up) is a process under Company Law that results in the company ceasing to exist. A company can decide to go into voluntary liquidation in which case the company arranges voluntarily to enter liquidation. Where a third party (an unpaid creditor) wishes to pursue liquidation of an insolvent company, as its debt is not being addressed, application must be made to the High Court for a decision on whether a liquidator should be appointed to the company. The liquidator's job is to realise the assets of the company and to pay the creditors (including Revenue) from the proceeds of any assets in the company. Where there are insufficient funds to pay all the creditors, the funds available are distributed to creditors in a particular order of preference. ([see Paragraph 10](#))
- 2.2 The liquidator is obliged, under Company Law, to report to the Office of the Director of Corporate Enforcement on how the affairs of the company were conducted by the directors. In some cases, this can result in individuals being restricted or disqualified from acting as company directors in future.
- 2.3 The end result of liquidating a company means the company is removed from the Companies Register and ceases to have a legal existence.

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4. Procedure for Liquidation

- 4.1 The general procedure consists of the service of a demand for payment on the company and if the demand is not paid then an application may be made to the High Court for the appointment of a liquidator. Following the enactment of the Companies Act 2014 the minimum amount for a demand is €10,000 for one creditor or €20,000 for two or more creditors. This demand is known as a Section 570 letter (after the relevant provision in the Companies Act 2014) and must be signed by the Collector-General. The company has twenty one days to pay the liability set out in the Section 570 letter, failing which, the Revenue Solicitor's Office can apply to the High Court for the appointment of a liquidator (but see also Paragraph 8 below regarding provisional liquidator).

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6. Relevant Contracts Tax (RCT) in Liquidation, Receivership or Examinership

- 6.1 Tax law provides no exemption from the operation of RCT in the case of liquidation, receivership or examinership. Revenue takes the view that all aspects of RCT law , including deduction by the principal contractor and offset by Revenue of RCT against outstanding taxes, must be applied as normal, notwithstanding the fact that a liquidator, receiver or examiner has been appointed to the subcontracting company.
- 6.2 As such, any RCT deducted from a company in liquidation, receivership or examinership and remitted to Revenue will be offset against outstanding taxes in the order statutorily provided for, with any balance being repaid to the liquidator, receiver or examiner.
- 6.3 Revenue does, however, distinguish between RCT deducted on foot of a contract entered into by a company prior to receivership or liquidation and new contracts entered into by the receiver/liquidator (in his capacity as receiver/liquidator of the company) should the receiver/liquidator continue to trade the business. In such cases, if the contract which gave rise to the RCT deduction was entered into by the liquidator/receiver following their appointment, the RCT deducted should be offset only against liabilities of the post-appointment period, with any balance being repaid to the liquidator/receiver. If it is not clear whether the relevant contract was entered pre- or post- appointment, the

receiver/liquidator should be asked to clarify the position. The tax number of the subcontractor shown on the RCT Deduction Card might be informative in this situation.

- 6.5 It should be noted that where a company successfully exits examinership and tax has been written off in line with the Court-approved scheme of arrangement, these taxes cannot be subsequently written back in for the purposes of offset.
- 6.6 Any queries on specific cases should be directed by email to:
George Clancy
Collector-General's Division
Insolvency Unit:
geclancy@revenue.ie or telephone 061-488029.

7. Other Creditors seeking Liquidation

- 7.1 In some instances another creditor may petition the High Court to appoint a liquidator to a company. Where this happens and there is an outstanding tax debt, Insolvency Unit will contact the caseworker to discuss whether or not the petition should be supported by Revenue. In some cases the original petitioner may subsequently withdraw his/her petition, in which case Revenue can decide whether or not it wishes to pursue the liquidation.

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8. Provisional Liquidator

- 8.1 For serious cases where urgent action is needed, it may be possible to get the High Court to agree to appoint a provisional liquidator (this avoids the need for the Section 570 letter and the 21 days response period). Appointment of a provisional liquidator needs to be considered where there are significant outstanding liabilities and information becomes available to suggest that assets are being removed from the company in advance of closing down or that creditors are being disadvantaged in some other way. If no other enforcement option is suitable, seeking the appointment of a provisional liquidator may be appropriate.

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9. Struck off Companies/Dissolved Companies

9.1 In certain circumstances, (usually for failing to lodge company returns to the CRO), a company can be “struck off” the Company Register and “dissolved”. In general, the fact that the company is struck off should not be a factor in deciding whether or not to pursue liquidation. If the case meets the appropriate circumstances, , liquidation should be pursued.

- If it is not already known that the company has been dissolved, this will become apparent from examination of the Companies Office database where the status of the company will be described as “dissolved”.
- In the case of a “struck off” company the same procedures, i.e. service of Section 570 letter etc. as outlined at [Paragraph 4](#) above, should be applied subject to the following:
 - (1) Indicate in the proposal accompanying Section 570 letter that the company is dissolved.
 - (2) When referring the documentation to the RSO and Insolvency Unit advise that the company is dissolved.
- When applying to the Court for the appointment of a liquidator, the RSO will first ask the Court to re-instate the company to the Companies Register.
- A liquidator can have a dissolved company re-instated in the CRO on the date of the Liquidation hearing.

9.2 Struck Off and Dissolved Companies with Outstanding Debt (no longer trading)

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9.3 Struck off and Dissolved Companies with Outstanding Debt (that continue to trade).

- Determining whether or not the Principals/Shareholders of a dissolved company continue to trade may involve contact with such Principals/Shareholders and/or their agent. In some instances, an outdoor visit may be appropriate.
- In the event that they are continuing to trade, a letter outlining the position of those trading without limited liability can be issued to the individuals involved
- One of the key issues is whether or not the Directors/Principals of the company intend to have it restored to the Register of Companies
- The most notable consequences of the company being struck off are that –
 - (1) The principals are trading without the benefit of limited liability.
 - (2) The assets of the company belong to the State while the company stands struck off and they are trading as Sole Traders or in Partnerships (if they are registered as such by the Districts as agreed by Local Management) with consequent tax implications

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10. Revenue Preferential Status

10.1 As previously indicated, if there are insufficient assets to pay all the creditors, the funds realised by the liquidator are distributed in a preordained order as set out in Company Law. Revenue enjoys a preferential status (i.e. ranks ahead of other creditors) for certain tax debts. The general order of distribution in liquidation is as follows:

- (1) Fixed charge holders from the proceeds of the asset over which they have a charge and limited to the amount of the proceeds if the loan exceeds it (where there are fixed charges on an asset, e.g. a mortgage on a specific property)
- (2) Costs of petitioner (rank before liquidator fees if no fixed or [floating charge*](#))
- (3) Liquidator fees/costs
- (4) Total of all employee's share of PRSI deducted and not paid for all periods prior to liquidation (this is generally known as Revenue's 'super preferential' status).

- (5) Preferential Creditors to include Department of Enterprise Trade & Innovation, 12 months rates and certain tax debts as follows (generally known as Revenue's 'preferential' status):
- (a) Assessed Taxes: Corporation Tax, Income Tax, Capital Gains Tax. Any single year maximum of amounts assessed or assessable (plus interest) on the company up to the tax year-end prior to the date of liquidation. In practice Revenue will choose the year with the largest liability;
 - (b) all VAT for which the company is liable in relation to those taxable periods, which ended within twelve months of the date of liquidation including interest on same;
 - (c) all PAYE/PRSI amounts due in respect of the twelve months prior to liquidation plus interest on the PAYE element only;
 - (d) all RCT amounts due in respect of deductions made on payments to subcontractors during the twelve months prior to liquidation. (Also refer to Relevant Contracts Tax Manual [Part 18.02.07 paragraph 5](#))
- (6) Floating charge holder
- (7) Non-preferential debts (this includes tax debts that are not covered by any of the prior categories).

***A floating charge refers to a charge where the collateral provided is an asset that changes from time to time, e.g. stock or raw materials.**

- 10.2 When a financial institution loans money to a company, (e.g. by allowing an overdraft), it generally tries to secure the debt by way of fixed charge on the assets of the company. In this way, if the company runs into financial difficulties and has to be liquidated, the financial institution is more likely to be paid. When considering the possibility of liquidation, it is important to establish the amount of any fixed charges held against the company assets, as they would reduce the amount available for other creditors (including Revenue). However, it may be the case that liquidation is still considered necessary, e.g. due to the tax debt increasing out of control.

11. Fraudulent/Negligent Directors

- 11.1 A liquidator has certain obligations under Company Law to report to the Office of the Director of Corporate Enforcement (ODCE) on how the affairs of the company were conducted by the Directors. In some instances this can result in individuals being restricted or disqualified from acting as company directors in future. In extreme cases a Director may be made personally liable for some of the debts of the company.

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- 11.3 Section 567 of the Companies Act 2014 provides that the Directors of a company can be examined by the High Court to see if restriction or other action against the Directors is warranted, even where a company is not in liquidation. Section 567 also stipulates two pre-conditions that must be met in order for such an examination to take place:
- (1) Revenue must show that the company is unable to pay its debts - the following examples would all help establish an inability to pay debts:
 - ‘Nulla Bona’ - where Revenue obtained a judgment against the company and the sheriff does not succeed in seizure of goods on foot of a “fifa” order, which is then returned marked Nulla Bona
 - Evidence of cheques being dishonoured or direct debits being cancelled and
 - Statements or admissions made by or on behalf of the officers of the company
 - (2) The court must also be satisfied that ‘insufficiency of assets’ is the reason for company not being wound up (liquidated). A statement to this effect in the Affidavit grounding the Section 567 application would suffice to meet this precondition.

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12. Members Voluntary Liquidation

- 12.1 A Members Voluntary Liquidation (MVL) is where the company has made a full inquiry into its affairs and having done so, has formed the opinion that the company will be able to pay its debts in full within 12 months from the commencement of the winding up date as may be specified in the declaration (Section 580 (2) Companies Act, 2014.) Accordingly, all outstanding returns & taxes, (including interest), are submitted to Revenue by the liquidator prior to the calling of a final meeting.
- 12.2 A Declaration of Solvency is filed with the Companies Registration Office (CRO). This lists the company’s assets/liabilities and states the overall surplus in the company.
- 12.3 As per Section 578 of the Companies Act 2014, Sections 579 to 584 of Companies Act 2014 apply to Members Voluntary Liquidation.

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13. Other Company Law provisions

There are certain other situations provided for in Company Law that caseworkers might encounter when dealing with tax debts due from companies. These are not enforcement options as such, but it is important that caseworkers are aware of them and the possible implications for collection of the tax debt. The three situations are Examinership, Receivership and a compromise with creditors under Section 450 or 453 of the Companies Act 2014.

Examinership

Examinership allows companies which are experiencing financial difficulties to seek the protection of the High Court from creditors for a limited period of time (up to a maximum of 100 days). This allows the company breathing space from its creditors and time to put forward proposals to deal with the debts. Insolvency Unit deals with such cases once there is a formal application to the court to appoint an Examiner.

The implications of the appointment of an Examiner are:

- debts may not be executed against the company (therefore all Revenue enforcement activity has to be suspended while an Examiner is in place)
- a Receiver may not be appointed
- no security may be enforced against the company
- the company may not be liquidated (wound up).

A decision on whether or not to seek the appointment of an Examiner is a matter for the company itself.

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The court may agree to appoint an Examiner if it considers that this would be likely to facilitate the survival of the company (either in whole or in part) as a going concern. Where an Examiner is appointed, in order to stop the tax debt continuing to increase, Revenue usually requests the court to direct the Examiner to pay current tax debts while the company is in Examinership.

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Once appointed, the Examiner is allowed up to a maximum of 100 days to examine the financial affairs of the company and report to the court on whether in his/her opinion:

- the company is capable of survival as a going concern
- an attempt to continue the whole or any part of the undertaking of the company would be likely to be more advantageous to the members as a whole and the creditors as a whole than a wind up of the company.

Following receipt of the Examiner's report, the court may make any order it deems applicable. Where the court considers that the company can be saved, the Examiner is directed to formulate a rescue plan (scheme of arrangement). The Examiner must then put the plan to meetings of members and creditors and report back to the court.

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The rescue plan (which must have been approved by at least one class of shareholders at the creditors meeting organised by the examiner) is then presented to the court, and, if approved, is binding on all creditors, including Revenue.

The court invariably seeks Revenue's views on the proposals being formulated by the Examiner. In addition Revenue, along with other creditors, is entitled to vote on whether or not to accept the proposals being put forward. Revenue's position will depend on the circumstances of the case (e.g. previous tax collection history, whether there will be a change of directors etc.).

When the scheme of arrangement is formally agreed by the courts, concluding the period of the Examinership, Insolvency Unit will, by the next working day, notify the relevant Debt Management Unit by e-mail or phone.

In many instances there will usually be a time period post Examinership during which the arrears (or more usually, some of the arrears) have to be paid. Insolvency Unit will attend to this immediately on conclusion of the period of Examinership.

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13.2 Receivership

- (a) Before a financial institution lends money to a company, it will usually look for security to protect its interests. This will often take the form of a debenture, but, particularly in the case of non-corporates, is incorporated in the loan agreement. A debenture is a company bond guaranteeing certain company assets as collateral against the amount owed. The debenture can contain a 'fixed' charge (where the collateral provided is a specifically named asset, usually property) and/or a 'floating' charge (where the collateral provided is an asset that changes from time to time, usually stock or raw materials). If a debenture holder becomes concerned about the solvency of the company it can invoke the terms of the debenture and appoint a person, known as a Receiver, to take control of the assets covered in the debenture and to sell those assets to recover the outstanding debt.
- (b) A Receiver can only liquidate the assets covered in the agreement. The primary duty of the Receiver is to the lender that appointed him/her (note that this is different from a liquidator who must act in the interest of all creditors). The precise action of the Receiver will depend on the nature of the agreement but the situation will often arise that the entity will continue trading while the Receiver is involved in the operation of the entity to realise and dispose of the assets covered by the agreement.
- (c) There are certain obligations on Receivers in relation to payment of the company's outstanding tax debts (and Revenue enjoys a preferential position in certain instances) but this will depend on whether the debenture is based on a fixed charge or a floating charge. The Receiver is also responsible for payment of current tax liabilities if s/he decides to run the business for a period. In some instances the entity may be able to continue trading even after the Receiver has realised the debenture assets and left the entity. In any event, however, the appointment of a Receiver will usually have a significant impact on the operation of an entity and where it has outstanding tax liabilities, concerns arise that these tax debts may not be recovered.

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13.3 Compromise with creditors under Section 450 or 453 of the Companies Act 2014

- (a) Where a company is in financial difficulties it may seek to get agreement with creditors on a compromise or arrangement whereby only part of the outstanding debts of the company would be paid (e.g. 50c per € of debt). This is usually referred

to as a compromise with creditors under Section 450 or 453 of the Companies Act 2014.

- (b) Caseworkers should not delay pursuit of outstanding tax debts while a company is formulating any such Section 450 or 453 proposals. The company can be advised that if it wishes to put forward proposals Revenue would be prepared to consider them but that they are unlikely to be accepted if they do not provide for full payment of the tax debt.
- (c) Under Section 453 of the Companies Act 2014 any arrangement agreed between a company and the majority (i.e. three-fourths or more by value) of the creditors would be binding if passed by a special resolution. However a creditor or member may, within three weeks from the completion of the arrangement, appeal to the court against it and the court may then decide to amend, vary or confirm the arrangement.
- (d) Section 450 provides that a company can apply to the court in order to get a court direction for a meeting of creditors to discuss and vote on the proposal. This will usually arise for example if the company believes that a majority of the creditors will support the proposal.

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