



## **DIRECTORS' PERSONAL LIABILITY – FOR A COMPANY'S FAILURE TO PAY TAXES**

In this harsh economic climate, it is possible that the level of tax compliance by companies may fall below average. Some companies may find it easier to keep tax dollars in their possession longer than usual as they contend with financial problems, such as difficulties with cash flow, low levels of sales and income, alongside increasing cost of operations and the unavailability of affordable credit.

Many persons would readily appreciate that a company found guilty of non-payment of taxes will be liable for the crime. Not as many persons appreciate that the directors of the company at the time (when the taxes were due but not paid) may also be personally liable. The penalties that delinquent directors may face include imprisonment and payment of a fine (which is sometimes double or treble the amount of taxes owing). Convicted directors may also be barred from holding the position of director or manager of regulated institutions on the basis that they do not meet the "fit and proper" person criteria.

Legislation governing payment of income tax, National Insurance Fund contributions, National Housing Trust contributions, Education tax and H.E.A.R.T. contributions all require that the company appoint a responsible officer for the purpose of ensuring that the company's obligations under the law are carried out. If no appointment is made, the managing director or person in charge of the company's affairs shall be deemed to be the responsible officer. The responsible officer should also ensure that payments are made within the deadlines stipulated by the law. The responsible officer shall be personally liable (along with the company) for any failure or neglect to carry out his or her duties.

However, if he or she is able to prove that he or she was prevented from carrying out his or her duty because of being overruled or otherwise prevented by the board of directors, the directors shall be personally liable (jointly and separately) for the unpaid taxes or contributions and any penalties due. Directors may defend themselves against a claim of this nature by proving that "there were bona fide reasons for overruling the responsible officer or preventing payment and that the payment could not have been made in the circumstances; or that the particular director was neither a party to the decision of the board to overrule the responsible officer nor a party to any action by the board or any other director to prevent payment."

The legislation governing National Insurance Fund contributions, National Housing Trust contributions and H.E.A.R.T. contributions generally provide that directors are personally liable (jointly and separately) if the directors knew or ought to have known of the failure to pay over the outstanding contributions. The responsibility imposed by these provisions are more far reaching than the liability created where a responsible officer is prevented by directors from making the payment. A director may be liable if he is simply aware of the failure or neglect or did not exercise all due diligence to prevent the commission of the offence, whether or not he took any active steps in preventing the payment.

The General Consumption Tax Act imposes liability for failure to collect and pay over GCT on directors involved in the management of the business, as well as other managers (who are not directors). Therefore, non-executive directors are not liable for non-payment of GCT. This is to be contrasted with the other laws (discussed above) which impose liability on all directors, both executive and non-executive. Where a company fails to pay over GCT collected or fails to collect GCT as it ought, the managing director, manager or other officer concerned in the management of the company shall be deemed liable. The defences available to these managers are that the offence was committed without his knowledge, consent or connivance, or that he exercised all due diligence to prevent the commission of the offence.

While directors may try to ensure that they are indemnified by their companies for liabilities which the directors may face for their struggling companies' failure to pay taxes in a timely manner, in some cases this remedy will not be adequate because of the long term effect it may have on directors' reputations and professional careers.

Andrea Scarlett-Lozer is an Associate at Myers Fletcher & Gordon and a member of the firm's Commercial and Intellectual Property Departments; Andrea may be contacted at [andrea.scarlett@mfg.com.jm](mailto:andrea.scarlett@mfg.com.jm) or through [www.myersfletcher.com](http://www.myersfletcher.com)