

## VATman and robbin

Ever thought it would be a cunning plan to delay paying VAT to HM Revenue and Customs to free up some working capital when times are hard? Think again...

A recent case involved the liquidators of a company alleging that a former director, in breach of his fiduciary duties to the company, caused the company not to pay VAT in the months before it went into liquidation.

Provisions in the Insolvency Act 1986 allow parties other than an insolvent company itself to litigate certain claims against its officers or former officers and any person who has been concerned, or has taken part, in the promotion, formation or management of the company, including claims for breach of fiduciary or other duties to the company. Only loss sustained by the insolvent company may be recovered.

The director argued that any loss that resulted from any breach of duty on his part was a loss to the company's creditors (and, in particular, HM Revenue and Customs) and not a loss to the company itself.

The High Court found that, by not paying VAT, the company carried on trade that it could not have undertaken otherwise. That trading increased the overall net deficit on the company's balance sheet. The increase in that net deficit could, in principle, represent a loss to the company and be (wholly or partly) recoverable from the director under the Insolvency Act. The failure to pay VAT was a breach of fiduciary duty, so it was possible for the liquidator to obtain a court order requiring the director to contribute personally in compensation for the breach.

If you are tempted to delay paying tax to free up working capital, don't - you could be personally liable if trading whilst insolvent.

While on the subject of VAT, don't forget that on the 1 January 2010:

- the standard rate of VAT reverted to 17.5%; and
- new VAT rules for EU cross-border supplies of services became effective. If you supply or receive cross-border services, services into the UK that were not liable to UK VAT before that date could now become liable and services out of the UK could cease to be liable to UK VAT. You will now need to report services supplied to and taxed in other member states, and not just goods in your EC sales lists as before. Seek advice from your tax adviser or go to the HMRC Guidance at [www.hmrc.gov.uk/vat/ec-sales-lists](http://www.hmrc.gov.uk/vat/ec-sales-lists).

If you are facing problems with meeting tax liability, remember the HM Revenue and Customs Business Payment Support Service, which was extended for a further year by the Chancellor in December 2009. This covers

most taxes and duties including Income Tax, Corporation Tax, VAT, PAYE and National Insurance. To qualify, the tax payer must be:

- in genuine difficulty;
- unable to pay their tax on time; and
- likely to be able to pay if HM Revenue & Customs allowed them more time.

Businesses already making use of the BPSS should ensure that they have a business plan showing a return of their activity to a firmer financial footing before seeking to rollover an existing deferment of tax payments. This is because the BPSS is available only to viable businesses, and continued cash-flow problems may lead the BPSS to question the sustainability of the business.

While HMRC have been helpful they are taking a tougher line, and will not extend such help on multiple occasions. Again, seek advice from your tax adviser or find out more from [www.hmrc.gov.uk/pbr2008/business-payment](http://www.hmrc.gov.uk/pbr2008/business-payment).

If you have any questions on issues raised in this article or director's duties and liabilities generally, please call a member of the Corporate Commercial Practice Group at Thomas Eggar on 0870 160 1300.

Caroline Armitage, Vice Chair, Chamber's Tax Finance & Legal Committee.

**The information contained on these web pages is for general guidance only and is in no way a substitute for seeking professional advice on your specific circumstances.**