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Sole Traders and Partnerships

Downloaded Information Pack

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Directors

Overview

- A company director has a large number of statutory duties. In particular a director must ensure that the assets of the company are safeguarded and be aware of the financial position of the company.
- This latter duty is often perceived as the most onerous but it is also one of the most important for a number of reasons.
- Failure to keep proper books and records is in itself an offence under the Companies Act and can have far reaching effects particularly if the company fails and enters into some form of insolvency. Being unaware that the company was or is insolvent is not an excuse and directors should therefore ensure that there is a proper accounting system capable of providing regular and accurate management information upon which informed decisions can be made.
- Failure to comply with these duties could subsequently lead to charges of wrongful trading or possible disqualification proceedings.

Definition of “director”

Before looking at the possible charges which can be brought, it is important to define who is a director in law.

- i. Section 251 of the Insolvency Act 1986 (“IA86”) defines a director in two ways namely:-
- ii. “any person occupying the position of director, by whatever name called” and introduces the concept of a “shadow director” who is defined as “a person in accordance with whose directions or instructions the directors of the company are accustomed to act (but so that a person is not deemed a shadow director by reason only that the directors act on advice given by him in a professional capacity”.
- iii. The onus is therefore on control. Hence anyone who makes significant commercial and financial decisions and has the authority to have them carried out is a shadow director. These may include shareholders, associates of the directors or managers of the business.
- iv. Accountants and solicitors are exempt as they provide advice and do not actually direct the company’s affairs.
- v. Case law also refers to the concept of a de facto director who is defined as anyone who is held out to be a director by the company and claims and purports to be a director although never actually or validly appointed as such.

Wrongful Trading

The concept of wrongful trading was introduced by the IA86 to widen the circumstances in which directors could be held personally liable for the company’s debts.

The Act states that wrongful trading applies in relation to a person if -

- i. the company has gone into insolvent liquidation,
- ii. at some time before the commencement of the winding up of the company, that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, and
- iii. that person was a director of the company at that time.



- In other words once the directors were aware or should have been aware (i.e. if the accounting records indicated that the company was trading at a loss) that the company could no longer pay all its liabilities they should do everything possible to avoid any further losses being incurred which in practice will often mean ceasing to trade.
- If this is not done then the liquidator can apply for the directors (as defined above) to be ordered by the Court to pay sums personally as a contribution to the company's assets.
- The Court will not make a declaration of personal liability if it is satisfied that the directors took every step to minimise the potential losses to creditors.

Disqualification

A disqualification order can be made by the court on the application of the DTI in respect of a director up to a maximum of 15 years.

The grounds for disqualification are as follows:-

- i. conviction for an indictable offence in connection with the promotion, formation or management or liquidation of a company
- ii. persistent default in complying with the provisions of The Companies Act in respect of the failure to file returns, accounts or other documents which are required to be filed at Companies House
- iii. fraud in connection with the winding up of a company
- iv. unfitness to be concerned in the management of a company.

To be more specific disqualification may/will occur as a result of:-

- i. wrongful trading
- ii. fraud
- iii. preferences
- iv. transactions at undervalue
- v. excessive directors' remuneration
- vi. non-payment of Crown Debts
- vii. deposits taken on goods/services not supplied
- viii. gross incompetence of the directors
- ix. re-use of insolvent company's name
- x. extortionate credit transactions
- xi. misfeasance
- xii. failure to keep proper accounting records

A report is required to be submitted to the DTI by a liquidator, administrator or receiver within six months of appointment. All directors including shadow directors are included.