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Category	Course title	Author
Management of Taxes	Security Deposits for Direct Taxes	Meg Wilson

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Security Deposits for Direct Taxes

1. Security for payment of PAYE and Class 1 and 1A NIC

With effect from 6 April 2012 HMRC are permitted to require security for payment of PAYE and Class 1 and 1A NICs. The powers can be used in cases of serious non-compliance, where HMRC consider that PAYE and NICs are seriously at risk.

The legislation is included in the *Income Tax (Pay As You Earn) Regulations 2003* (SI 2003/2682), Pt. 4A and the *Social Security (Contributions) Regulations 2001* (SI 2001/1004), Sch. 4, Pt. 3B, reg. 83A.

Where an HMRC officer considers it necessary for the protection of PAYE, Class 1 or 1A NICs, the officer may require security, or further security, for payment from an employer who is in business and does not have a 'time to pay' arrangement in place.

The requirement for security can extend to directors and officers of any company employer (including shadow officers) and members of LLP employers. If more than one person is required to give security, they are jointly and severally liable.

1.1. Notice of requirement

The specific notification requirements are that:

- each person must be told the value of the security, how it is to be given, the date by which it must be given (at least 30 days' notice must be given), the period for which it is required, and the names of any others who are required to give the security; and
- the right to ask for time to pay must be explained, and the effect on the timing explained, and if the request for time is refused, the 30-day limit for the security notice runs from that point.

The employer or related person contributing under the notice may subsequently apply to HMRC for a reduction of the value of the security if circumstances have changed (e.g. because of individual hardship, or because the person is no longer within the category to whom a notice may be issued, or because the number of employees has reduced, either significantly or to nil). If HMRC agrees, it must notify the reduction in value or cancellation of the security notice.

Where an individual succeeds in a hardship application, HMRC may increase the security required from others by issuing a further notice.

1.2. Right of appeal

All recipients of notices are given appeal rights against the notice or any of the requirements in it, or against a refusal to reduce a security requirement or to reduce it to the extent requested.

The appeal must be directed to the person who issued the relevant notice or letter, stating the grounds, and the usual 30-day time limit applies to any appeal. Ultimately, a tribunal is empowered to confirm, reduce or cancel the security imposed or to confirm or vary a decision on a request to reduce the level of security. If the security is confirmed, the appellant has 30 days in which to comply. Procedural rules for appeals are derived from TMA 1970, Pt. V with the necessary modification.

1.3. Case law

In *D-Media Communications Ltd* [2016] TC 05183, the First-tier Tribunal (FTT) decided that while HMRC's decision that the giving of security was necessary for the protection of the revenue was not unreasonable, the amount of security required was excessive. The FTT considered that the calculation of the appropriate amount of security should have taken into account that:

- (1) regard had to be had to the fact that the consequence of a failure to provide the security was that the recipient of the notice would have committed a criminal offence of strict liability; and
- (2) there was nothing which set out what matters were to be considered in setting the amount or value of the security. In particular, although hardship could be a reason for a reduction in security that had already been given, it was difficult to see why it should not be a factor in the initial decision to require security.

For these reasons, the FTT did not consider that adherence to a policy which dictated the amount of the security to be required without having regard to ability to pay was consistent with the scheme of the legislation. The FTT did not consider that the taxpayer company was in a position to provide security for the amounts of the arrears and to require it to do so would simply have had the effect that it would fail to comply and be criminally liable. That would do nothing to protect the revenue. Instead, the FTT decided that security based on a recent four-month period was a reasonable approach and it therefore reduced the amount of security required.

In *School Estates Consultancy Ltd* [2018] TC 06283, the FTT dismissed a taxpayer company's appeal against HMRC's decision to require security for PAYE and NICs.

The amount of security required represented the amount of PAYE and NICs due for a 4-month period. HMRC submitted that they required the security because:

- the company's sole shareholder had been involved in previous businesses that had gone into liquidation with considerable tax liabilities; and
- the company's business was the same type of trade and carried on from the same premises as the failed businesses.

The FTT found that HMRC had correctly taken into account relevant information available to it, such as the company's recent good PAYE and NICs compliance record. The FTT concluded that HMRC's decision to require the security was reasonable as were the requirements regarding the manner in which the security was to be provided.

1.4. Sanctions for failure to pay

For breaches of the security rules (i.e. failures to provide security or further security), the offence created by ITEPA 2003, s. 684(4A) in respect of security for PAYE applies equally for NIC purposes, triggered on the day after the 30th day following the issue of the notice or confirmation.

It seems unlikely to be widely applied, as the person who commits the offence must be summarily convicted (i.e. in the magistrate's, sheriff's or district court), and HMRC does not prosecute many offenders, other than for fraud.

Prior to 12 March 2015 if convicted, the employer or relevant person was liable to a fine of up to £5,000. From 12 March 2015 a fine of any amount can be imposed (due to the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*, s. 85 and the *Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Fines on Summary Conviction) Regulations 2015* (SI 2015/664) removing the upper cap on level 5 fines imposed in the magistrates' courts on summary conviction).

1.5. HMRC factsheet

HMRC give factsheet SS/FS1: *Securities in respect of Pay As You Earn and National Insurance contributions*, where either they tell someone that they may have to give security, or they tell someone they must give security.

2. Security for payment of CIS deductions and corporation tax

The government plan to extend the security deposit system to include construction industry scheme (CIS) deductions and corporation tax. There are already similar security deposit systems for PAYE and Class 1 and 1A NIC (see above), VAT, landfill tax, aggregates levy, climate change levy, insurance premium tax and some gambling taxes.

The extension was consulted on between March and June 2018 and aims to strengthen HMRC's ability to deal effectively with defaulters that pose a serious risk to revenue. The security deposit system is not aimed at those businesses experiencing genuine difficulties in paying the tax they owe. Such businesses should contact HMRC's Business Payment Support Service.

Securities may be required if a taxpayer has a poor compliance record or if for example an individual had a previous business which accrued a tax debt, went into liquidation or administration and the individual then set up a new company. Company directors and officers may be required to provide security for a company.

The detailed rules enabling HMRC to require a security for CIS deductions and corporation tax are to be introduced by secondary legislation, which has not yet been published. The ability to make such regulations is included in Finance Bill 2018-19, cl. 81 as published on 7 November 2018, which inserts s. 70A into FA 2004 (CIS) and para. 88A into Sch. 18 of FA 1998 (corporation tax) and which will come into force from Royal Assent to Finance Bill 2018-19.

As set out in proposed FA 2004, s. 70A and FA 1998, Sch. 18, para. 88A, the regulations must provide that:

- a security can only be required when an HMRC officer considers it necessary for the protection of the revenue; and
- decisions concerning securities (i.e. whether to require one, and the amount, terms and duration) are appealable.

A person can be fined if they fail to comply with a requirement to give security and the failure continues for a specified period.

HMRC intends to make the required regulations to come into effect no earlier than 6 April 2019.