

## The tax authorities can turn to directors to collect unpaid professional withholding tax and VAT

If your company does not pay the withheld professional withholding tax on the personnel's wages or the VAT received from its clients, it makes a fault. As a director of your company you are also liable. This means that the tax authorities can also turn to you to collect their money. Following a recent judgment of the Court of Cassation, it becomes even easier for the tax authorities. Therefore beware.

### Legal provisions

Since 2006 the law explicitly provides that company directors are jointly and severally liable for the payment of the professional withholding tax and VAT. This means that in case a company does not comply with its obligations, the director can be appealed to. In this way, the tax authorities have an additional security, they can turn to an extra person to pay the fiscal debts.

### Which directors?

All directors having the daily management of a legal body fall within scope. This goes for companies and not for profit organizations, both local or foreign.

### When is the director liable?

In order to be able to turn to the director, a double condition should be fulfilled: (1) in the first place the company or not for profit organization has neglected to comply with the fiscal obligations (paying professional withholding tax and/or VAT) and (2) this negligence of the company is due to the director himself.

The burden of proof lies with the tax authorities. They should demonstrate that the director made a fault. The law makes it easy for the tax authorities. The tax authorities can use a *refutable presumption* that repeatedly non-payment of the professional withholding tax or VAT implies that the director made a fault.

There is *repeatedly* non-payment when there are at least two or three overdue debts within a one year period.

In this case the burden of proof is shifted. If the director wants to avoid his liability, he should demonstrate that the repeatedly non-payment is not his fault, but that e.g. the fault lies with somebody else.

### Through the courts

If the receiver (this is the officer collecting the fiscal debts) wants to make a director of a legal body liable, he should give him the opportunity to regularise the negligence or to demonstrate that he did not commit any fault. Afterwards he can claim the fiscal debt with the director. He cannot do this directly. He should pass by the courts, who will examine the case and decide accordingly.

### What is the legal base of this liability?

Discussion occurred on the legal base of this liability. Is the liability of a director a civil liability? If so, the pressure on the receiver increases significantly. The tax authorities should then not demonstrate that the director committed a fault (1), but also that damage occurred (2) and that there is a causality between the fault and the damage (3). The damage consist out of the fact that the company didn't pay or can't pay anymore. This would mean that the receiver should demonstrate that the fault of the director is the reason that the professional withholding tax wasn't paid.

The highest Belgian Court, the Court of Cassation (Hof van Cassatie) thinks otherwise. This shows from of recent judgment. It concerns a fiscal liability, implying that the director is jointly held with the company for the payment of the professional withholding tax due.

Consequences of this judgment. It becomes easier for the tax authorities to turn to a director for the unpaid professional withholding tax and VAT. The receiver can address to the director, even if the company still has the possibility to pay (a part of) the tax debt, or without demonstrating that there is a causality between the fault and the damage.

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