



<p>PRACTICE STATEMENT No. 16 2nd release</p>
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SUBJECT	RISK & COMPLIANCE DIVISION: DIRECTORS' OF A COMPANY MAYBE PERSONALLY SUED FOR UNPAID TAXES.
DATE OF EFFECT	Applicable to debts arising on or after 1 January, 2004
CONFIDENTIALITY STATUS	May be released to the public
LEGISLATIVE REFERENCES	<i>Income Tax Act</i> Section 2, 41, 74A, 93, 107 <i>Companies Act</i> Section 2, 220, 221, 311, 312, Part VI <i>Bankruptcy Act</i> Section 2
PRACTICE CO-ORDINATOR	National Manager, Debt Management Lodgment Enforcement & Reconciliation.

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INTRODUCTION

1. This statement sets out the practice of the **Risk & Compliance Division** in relation to The personal liability for directors for unpaid Pay-As-You-Earn (PAYE) tax and **Provisional taxes (Contracts for service)** when a company becomes insolvent or liquidated. It is issued with the authority of the Chief Executive Officer of the Fiji Islands Revenue and Customs Authority, who is also Commissioner of Inland Revenue.

LEGISLATIVE BASIS

2. The *Income Tax (Budget Amendment) Act 2004*, passed by Parliament in March 2004, inserted the following provisions into the *Income Tax Act*:

“Directors of a company may be personally sued

74A. Where a company that becomes insolvent or liquidated owes Pay As You Earn or Provisional Tax and all associated penalties, each person who is a director of the company is liable to pay to the Commissioner such tax owed and all the associated penalties.”

3. The *Companies Act* at Section 312 gives the Commissioner some degree of priority for unpaid taxes in liquidation. The use of both section 74A of the *Income Tax Act* and Section 312 of the *Companies Act* should be considered during a legal recovery action. They are not mutually exclusive.
4. Section 41 paragraph (e) of the *Income Tax Act* makes the authorised officer of the company personally liable for acts done by the company:

“(e) the authorised officer shall be answerable for the doing of all such things as are required to be done by the company under this Act, and in case of default shall be liable to the same penalties [and to ensure that the company duly accounts for its tax debts by sale or charging of its assets or otherwise as the case requires]”.

Paragraph 41(e) should also be used for recovery from and prosecution of the authorised officer, in addition to the use of section 74A, even where the authorised officer is also a director liable to action under section 74A.

DEFINITION OF “DIRECTOR”

5. The term “director” is not defined in the *Income Tax Act*. The definition found in section 2 of the *Companies Act* should therefore be used:

“director” includes any person occupying the position of director, by whatever name called;”

6. A “director” for the purposes of section 74A includes de facto directors, shadow directors, nominee directors, alternate directors and persons acting in the capacity of directors even though they do not carry that title.
7. No distinction is made in section 74A between executive and non-executive directors. A person who is legally a director of a company cannot escape liability under section 74A by saying that they are a token local director for the purpose of meeting foreign investment requirements. Under the *Companies Act* and the common law, directors have duties to the company and the public, which they are required to meet.

DEFINITION OF “COMPANY”

8. The term “company” is defined in section 2 of the *Income Tax Act* as:

“includes all bodies or associations, corporate or unincorporated, and any company incorporated by statute or by any charter, and every unit trust;”

This definition takes precedence over the definition of “company” in the *Companies Act*, which is limited to companies incorporated under that Act.

DEFINITION OF “INSOLVENT OR LIQUIDATED”

9. The Commissioner must make a determination as to whether the company is insolvent or liquidated before invoking section 74A.
10. “Insolvent” means that the company cannot pay its debts, which is a ground for the winding up of the company by the Court under paragraph 220(e) of the *Companies Act*. Section 221 of that act provides a definition of “inability to pay debts”; meaning that the debt is at least \$100 and has remained unpaid three weeks after issue of a demand for payment. For example, if a company was unable to pay its tax debt and the conditions of section 221 are met; the Commissioner can apply to the Court to wind up the company.
11. “Liquidated” means a winding up under Part VI of the *Companies Act*, that is, either a winding up by the Court or a member’s voluntary winding up.

TAXES COVERED BY THE SECTION

12. The section is limited to Pay-As-You-Earn (PAYE) tax, contractors 15% provisional tax (payable under the regulations to section 107 published in Legal Notice 70 of 1976) and their associated penalties.

APPLICATION OF SECTION TO PRIVATE COMPANIES

13. The new section 74A was introduced to improve the Commissioner's debt collection powers in event of a company being wound up and being unable to pay its PAYE and **Contractors 15% Provisional Tax**. The winding up may be a result of unfavourable trading conditions, poor management by the directors, or any other factor. Indeed, winding up may be initiated by the Commissioner in pursuit of an unpaid **PAYE debt or 15% Contractors Provisional Tax**.
14. The section will be invoked mainly in relation to closely held private companies, usually family-owned companies with a few shareholders, who may also be the directors. Directors are appointed on the basis of their family connection and are involved in the detailed management of the company. In such cases the directors either enrich themselves at the expense of the unpaid tax, or use it as working capital To delay an inevitable winding up. It is only fair in such cases that the liability for the tax transfer to the directors, who usually have significant private assets from which to Meet the liability.
15. A director will be sued for both unpaid tax that became overdue in the period of their directorship, and tax, which became overdue before their directorship but continued to be overdue during the period of directorship. For example, a company fails to remit PAYE tax of \$100 a month from January to December 2004. X became a director of the company on 1 July 2004. X can be sued for debts of \$1,200, which arose during the period January to December.
16. Once section 74A is invoked to transfer the tax debt from the company to the director, the director will be subject to the full range of debt recovery powers in the Act in respect of that amount of debt.

APPLICATION OF SECTION TO PUBLIC COMPANIES

17. Caution should be taken in invoking section 74A in relation to publicly listed companies. In such companies the directors turn over frequently, and are usually appointed because of their business acumen. They may hold shares in the company but this shareholding is usually of a portfolio nature, and insignificant compared to the total issued capital. They often provide strategic direction and do not get involved in the detailed management of the company. Section 74A should only be used for public companies where there is evidence that the directors knew of the unpaid PAYE liability and took no steps to rectify the situation; and not for those debts which became overdue before the period of their directorship.