



Practice Statement No. 16

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SUBJECT :	Fiji Revenue and Customs Authority: Liabilities and Obligations of Representatives
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CONFIDENTIALITY STATUS:	May be released to public
LEGISLATIVE REFERENCES:	Tax Administration Decree - s41 & 42 Income Tax Act – s2, 41, 41A, 41B, 41C, 93 & 107 Companies Act – s2, 220,221, 311, 312, Part VI Bankruptcy Act – s 2
PRACTICE CO-ORDINATOR:	National Manager Debt Management Services, Lodgment Enforcement & Amendments

INDEX	
Introduction	2
Legislative Basis	2
Definition of Insolvent or Liquidated	4
Application of Section to Private Companies	4
Application of Section to Public Companies	5
Who All are Liable?	5

INTRODUCTION

1. This statement sets out the practice of the Taxation Division in relation to the personal liability and obligations of representatives for any duties or obligations imposed by tax laws including payment of taxes including unpaid taxes when a company becomes insolvent or liquidated.
2. It is used with the authority of the Chief Executive Officer of the Fiji Revenue and Customs Authority, who is Commissioner of Inland Revenue or authorized Tax Officer.

LEGISLATIVE BASIS

3. Section 41 & 42 of the Tax Administration Decree (Decree 50 of 2009).

Division VII - Representatives

Liabilities and Obligations of Representatives

- 41.— (1) *In this section "representative" means -*
- (a) in the case of an individual under a legal disability, the guardian curator, tutor, or other legal representative who receives or is entitled to receive income on behalf, or for the benefit of the individual;*
 - (b) in the case of a company, the chief executive officer, authorised officer, managing director, company secretary, treasurer, or a resident director of, or a person with a controlling interest in, the company;*
 - (c) in the case of a partnership, a resident partner in the partnership;*
 - (d) in the case of a trust, a trustee of the trust;*
 - (e) in the case of an association or body of persons other than a partnership or company, an individual responsible for accounting for the receipt or payment of monies or funds on behalf of the association or body;*
 - (f) in the case of the Government or a local authority in Fiji, an individual responsible for accounting for the receipt or payment of monies or funds on behalf of the Government or local authority;*
 - (g) in the case of a foreign government, political subdivision of a foreign government, or public international organisation, an individual responsible for accounting for the receipt or payment of monies or funds in Fiji on behalf of the government, political subdivision of the government, or organisation;*
 - (h) in the case of a non-resident person, a person controlling the person's affairs in Fiji, including a manager of any business of such person in Fiji;*
 - (i) in the case of a person to whom section 26 applies, the person treated by that section as the liquidator in relation to the person; or*
 - (j) in the case of any person (including a person referred to in paragraphs (a) to (i)), an agent or representative of the person as provided for under a tax law or specified by the CEO, by notice in writing, to the person.*

- (2) *Every representative of a taxpayer is responsible for performing any duties or obligations imposed by a tax law on that taxpayer, including the payment of tax.*
- (3) *A representative making a payment of tax on behalf of a taxpayer is treated as acting under the authority of the taxpayer and is hereby indemnified in respect of the payment.*
- (4) *Subject to subsection (5), any tax that, by virtue of subsection (2), is payable by a representative of a taxpayer is recoverable from the representative only to the extent of any assets of the taxpayer that are in the possession or under the control of the representative.*
- (5) *Every representative is personally liable for the payment of any tax due by the representative in that capacity if, while the amount remains unpaid, the representative -*
 - (a) *alienates, charges, or disposes of any monies received or accrued in respect of which the tax is payable; or*
 - (b) *disposes of or parts with any monies or funds belonging to the taxpayer that are in the possession of the representative or which come to the representative after the tax is payable, if such tax could legally have been paid from or out of such monies or funds.*
- (6) *Nothing in subsection (5) prevents a representative paying an amount on behalf of a taxpayer that has priority over the tax payable by the taxpayer.*
- (7) *If there are two or more representatives of a taxpayer, the duties or obligations referred to in this section apply jointly and severally to the representatives but may be discharged by any of them.*
- (8) *Nothing in this section relieves a taxpayer from performing any duties or obligations imposed on the taxpayer under a tax law that the representative of the taxpayer has failed to perform.*
- (9) *A representative is not to be held personally responsible under subsection (5) if he or she has no knowledge of, or was not aware of the existence of the tax due.*

Liability for Tax Payable by a Company in Financial Difficulties

42. — (1) *In this Section -*

"arrangement" means any contract, agreement, plan, or understanding whether expressed or implied and whether or not enforceable in legal proceedings;

"associate", in relation to a person, means any other person who acts or is likely to act in accordance with the wishes of the first-mentioned person as a result of any connection between the persons or common ownership or control, and the first-mentioned person is an associate of the second-mentioned person; and

"controlling shareholder", in relation to a company, means a person with a controlling interest in the company;

(2) *If a company that becomes insolvent or is liquidated owes an amount of VAT,GTT,STT or withholding tax or any other such tax withheld for which it is liable to account each person who was a director of the company at the time it became insolvent or was*

- liquidated is personally liable for such amount.*
- (3) If an arrangement has been entered into with the intention or effect of rendering a company unable to satisfy a current or future tax liability under a tax law, every person who was a director or controlling shareholder of the company at the time the arrangement was entered into is jointly and severally liable for the tax liability of the company (including any penalty, in respect of the liability).*
- (4) A director of a company is not liable under subsection (3) for the tax liability of the company if the CEO is satisfied that the director derived no financial or other benefit from the arrangement and -*
- (a) the director has on becoming aware of the arrangement, formally recorded with the company his or her dissent and notified the CEO, in writing, of the arrangement; or*
- (b) the director satisfies the CEO that, at the time the arrangement was entered into -*
- (i) the director was not involved in the executive management of the company; and*
- (ii) the director had no knowledge of, and could not reasonably have been expected to know of the arrangement.*

DEFINITION OF "INSOLVENT OR LIQUIDATED"

4. The Commissioner must make a determination as to whether the company is insolvent or liquidated before invoking section 42.
5. "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.**
6. "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.

APPLICATION OF SECTION TO PRIVATE COMPANIES

7. This section was introduced to improve the Commissioner's debt collection powers generally and in the event of a company being wound up and being unable to pay its tax dues.
8. The winding up may be a result of unfavorable 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 tax debt
9. 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.

10. 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 of 2004.
11. Once section 41 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

12. Caution should be taken in invoking section 41 in relation to publicly listed companies. In such companies there is frequent turnover of directors 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.
13. Section 41 will be used for public companies where there is evidence that the directors knew of the unpaid tax liability and took no steps to rectify the situation; and not for those debts which became overdue before the period of their directorship.

WHO ALL ARE LIABLE?

14. All the representatives are jointly and severally liable but maybe discharged by any one of the representatives. Refer the table below for liable representatives:

	Taxpayer Type	Representatives
1.	Individual under legal disability	<ul style="list-style-type: none"> • Guardian • Curator • Tutor • Legal Representative who receives income on behalf of the taxpayer
2.	Company	<ul style="list-style-type: none"> • Chief Executive Officer • Authorised Officer • Managing Director • Company Secretary • Treasurer • Resident Director(s) • The person with controlling interest
3.	Partnership	<ul style="list-style-type: none"> • Resident Partner(s)
4.	Trust	<ul style="list-style-type: none"> • Trustee(s)
5.	Associations (other than Partnership and Company)	<ul style="list-style-type: none"> • Individual responsible for accounting
6.	Government or Local Authority	<ul style="list-style-type: none"> • Individual responsible for accounting

7.	Foreign Government Political Subdivision of a Foreign Government Public International Organization	<ul style="list-style-type: none"> Individual responsible for accounting for the receipt or payment of monies or funds in Fiji
8.	Non-Resident Person	<ul style="list-style-type: none"> Person controlling the person's affairs in Fiji, including a manager of any business of such person in Fiji
9.	Liquidation Cases	<ul style="list-style-type: none"> Liquidators
10.	In the case of any person (including a person referred to in paragraphs (1) to (9))	<ul style="list-style-type: none"> Agent or representative of the person as provided for under a tax law or specified by the CEO, by notice in writing