

HMRC has a published policy that sets out its approach to debt enforcement which says that they will “take an understanding and supportive approach.”

However can a UK business assume HMRC will support it if it is struggling to meet its tax liabilities? The simple answer is no.

This might, on the face of it, appear to go against HMRC’s message, however it is important to remember that, as the UK’s revenue authority, HMRC’s primary function is to collect taxes. HMRC does not exist to “prop up” a business that is not ultimately viable by allowing tax debts to continue to accumulate that are unlikely to be paid. When taxes fall due, they are payable in full. However, in the right circumstances and with the right approach, HMRC support can be obtained.

This alert considers the approach that HMRC takes towards tax collection and explains the practical steps that business owners can and should be taking.

When Will HMRC Support a Business?

The answer to this question very much depends on the shape of the business and its finances.

HMRC’s policy documents make it clear that it intends to work with businesses to find a solution where a business has “temporary cash flow issues” or “temporary financial set backs” but as the language itself indicates, HMRC will only support a viable business with short-term remediable cash difficulties – it is not there to “bank roll” the business.

It is critical for a business that has accumulated tax debts to determine the overall financial health of the company in order to assess how (and if so, the appropriate extent to which) HMRC might be able to support the business moving forwards and, if not, what other options (such as restructuring the business) are available to protect the business, directors and interests of creditors.

Given that HMRC will also look at the overall financial position of the business, owners will need to consider the cost of repaying any COVID-19 borrowings and other bank debt and creditors alongside accumulated or expected tax liabilities. How much is owed and when is payment due? Can arrangements be put in place with other creditors to defer payment or spread out the cost.

Does the business have access to additional finance? HMRC will not consider their position in isolation; it will want to understand the financial position of the business as a whole in order to assess its long-term viability.

For directors, they should also be mindful of their directors’ duties when trying to restructure (even informally) debt repayments, to avoid potential personal liability if the business runs into financial difficulties in the future, and by engaging the company’s professional advisors to assist, this may reduce personal risk.

HMRC’s approach is to support viable businesses where it can – but the emphasis here is very much on viability.

Key Considerations for UK Businesses

1. Do not assume that HMRC will agree a plan to manage tax payments.
2. Consider cash flow and finance options and come up with a viable plan for the business as a whole.
3. If HMRC decided not support the business (e.g. did not agree a TTP agreement), what effect might that have on the business’ cash flow?
4. Can the business afford to pay accumulated or future tax liabilities without HMRC support?
5. Take advice from professionals who can assist in negotiations with creditors, HMRC and lenders.
6. Be mindful of directors’ duties and ensure those are taken into account when making decisions about the future of the business.
7. Engage with HMRC early and candidly.



When Will HMRC Not Support Businesses?

If, having assessed the overall financial health of the company, it appears there is little chance for the business to recover, HMRC is unlikely to agree a repayment plan with the business in relation to its tax debts and will seek to enforce payment as liabilities become due and payable. If the business fails to pay amounts due and continues to accrue tax debts, HMRC will consider winding up the company.

In this situation, it is imperative that directors take advice on their position and act in accordance with their duties as directors to protect the business, its creditors and, ultimately, themselves from personal liability.

HMRC is also likely to commence enforcement where businesses are unwilling to engage with HMRC, whether to discuss a repayment plan or by ignoring HMRC's attempts to contact the business. It is vital, even for viable businesses, to engage with HMRC as soon, and as transparently, as possible.

What Can a Business With Accumulated Tax Liabilities Expect to Happen?

If relevant businesses do not themselves contact HMRC, they will be contacted by HMRC by phone, post or text message to discuss their position and, if appropriate, agree a way to proceed. Businesses should respond to any communication from HMRC as soon, and as fully, as possible. A failure to respond or engage increases the risk that HMRC will think that a business is unable, or simply refusing to pay its tax debts. This will increase the risk of greater investigation and intervention, and, ultimately, of enforcement action being taken.

Even if a business cannot pay straight away, it is better for a business to get in touch with HMRC to discuss its position, than ignore any correspondence. HMRC may be able to offer a short term deferral (i.e. nothing would need to be paid for a set period of time, and no further action to collect the tax debt would be taken until that time has lapsed) and will also explore other options with the business, such as the PAYG scheme. A company's professional advisors will also be able to assist with negotiations and ensure that all relevant information is provided to HMRC to give the business the best chance of agreeing a repayment plan.

Early engagement with HMRC is crucial. If a business does not respond to initial correspondence from HMRC, HMRC is likely to escalate matters to the next stage, which is likely to result in officers attending the business' premises to make further enquiries about the financial position of the company, to make sure the company is aware of the tax debt and to discuss options.

If a business fails to engage with HMRC, or has been unable to convince them of its plans to return to long-term profitability, HMRC may consider starting debt collection proceedings. These could include presenting a winding up petition, taking control of goods, summary warrants or court action. Although HMRC has stressed that insolvency proceedings will only be used as a last resort, if a business is deliberately non-compliant, or continues to accrue debt with no realistic prospect of being able to settle existing debts, it is likely to face a petition.

While HMRC will take a "cautious approach" to collecting debts, it is clear that a business should proactively and candidly engage with HMRC (and should do so as soon as possible) to protect itself against what could be avoidable recovery proceedings. Again, being mindful of and acting in accordance with directors' duties will also be important.



HMRC's Attitude Towards Company Voluntary Arrangements (CVAs) and Restructuring Plans (RPs)

Since December 2020, HMRC has been a preferential creditor in insolvency proceedings in respect of certain tax debts. This change will be felt most keenly if a company proposes a CVA, because a CVA cannot vary the rights of a preferential creditor without their consent. Accordingly, unless HMRC agrees otherwise, the company will have to pay HMRC in full.

This has also led to situations where a restructuring has failed, because HMRC has not exercised its power to vote.

However, HMRC have recently advised that it will be more proactive in using its voting right to support a restructuring-provided that it does not think that the proposal could do, or should, do better!

Conversely, although a CVA cannot vary the rights of HMRC, an RP can, and has been used to 'cram down' a restructuring plan on HMRC that voted against it.

Early engagement is key because without HMRC support (perhaps through a time to pay agreement) a CVA may be unviable.

What Is Time to Pay?

In circumstances where a taxpayer is unable to meet its tax liabilities immediately, HMRC has a discretion to allow the taxpayer to pay tax after the due date, over an agreed period, and without incurring late payment penalties. This is known as "Time to Pay" (TTP). The primary purpose of TTP is to assist HMRC to collect taxes due efficiently and effectively. It is worth emphasising that there is no right for taxpayers to be granted TTP. It is also important to understand that HMRC is obliged to agree and operate any TTP arrangements in a particular way and in accordance with its published guidance.

HMRC recognises that in certain circumstances, outside of the control of businesses, a tax deadline can lead to commercial difficulties. TTP is intended to allow viable businesses, which genuinely cannot pay tax on the date it is due, to pay it over a realistic period of time. Most arrangements will last for a period of months and will involve regular monthly payments. They rarely exceed 12 months (and so will only do so in exceptional circumstances).

Who Is Eligible for TTP?

There are no fixed rules. The same principles should be applied to all taxpayers, with each case being considered on its merits and the level of risk to the Exchequer (that is, of non-payment of tax). As a result, any TTP arrangement should be agreed “on a case-by-case basis and ... tailored to individual circumstances and liabilities.”

Generally, larger tax liabilities, requests for longer TTP periods and a questionable compliance record are likely to attract greater due diligence, information requests and investigation by HMRC. The business’ previous compliance record is likely to be especially important in relation to the success or otherwise of obtaining TTP.

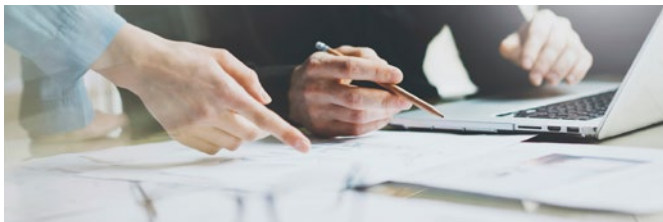
Where a business has a good record, and has made tax payments on time, HMRC is more likely to consider a request for TTP to be genuine. In contrast, a poor record, previous late payments and repeat applications will result in closer scrutiny. Even if COVID-19 has had a role to play, HMRC is likely to view previous payment problems as symptomatic of deeper problems and will be less likely to agree TTP.

Making a successful application for TTP depends on the business being able to show it is:

- In genuine difficulty;
- Unable to pay its tax on the due date; but (crucially)
- Able to pay if HMRC allowed more time – this necessitates not only proving that it has (or will have) the means to meet the scheduled TTP payments, but also that it can meet any other tax liabilities that will (or may) become due during the TTP period.

HMRC will seek to make the TTP period as short as possible. Importantly, where a business’ ability to pay improves during the TTP period, it has an obligation to contact HMRC to increase its payments and clear the debt more quickly.

Briefly put, the business must be ready to engage and be fully prepared to explain, and provide evidence for, the situation in which it finds itself. It should be willing to enter into reasonable negotiations with HMRC in relation to the terms and conditions of the TTP arrangement, including in relation to the amount covered and the overall time period involved.



Business Viability – Cannot Pay or Will Not Pay?

TTP is only available to viable businesses. Before agreeing to TTP, HMRC will try to understand why a business cannot pay and, just as importantly, what it is doing to address this in the future. HMRC will assess whether the business’ plans (whether to reduce costs or increase sales) are realistic in the context of the size of the tax debt relative to the business’ turnover. This will be the benchmark against which any TTP agreement will be monitored.

Critically, the TTP arrangement must be reasonable. Neither the business nor HMRC will want to enter a TTP arrangement that commits the business to a repayment schedule that it cannot afford, such that it results in further default. Equally important, to HMRC at least, is that the business does not request a period that is longer than absolutely necessary to clear the debt. In deciding whether a business is eligible for a TTP arrangement, HMRC will draw a distinction between:

- **Eligible “cannot pay” businesses** – That is, those that want to make the payment but currently do not have the means to do so, or, although they do, making that payment could force them out of business (because other liabilities could not be met). HMRC will expect businesses to have explored accessing new or increased borrowing facilities before approaching HMRC for a TTP arrangement, including taking full advantage of the various government lending and other support schemes. It should be noted that wanting to pay, however genuinely held, is not enough: a business that cannot pay, or cannot satisfy HMRC that it has a realistic plan to ensure it can afford its future liabilities, will be refused TTP.
- **Ineligible “will not pay” businesses** – That is, those that can, but will not, pay the tax. HMRC will refuse TTP and is likely to take swift enforcement action in such cases.

HMRC will be looking to the business to prove that it is eligible for TTP. Therefore, when preparing to apply, the business should be ready to provide HMRC with as much information as is relevant to support the submission. This will ideally include providing:

- **Detailed financial information** – This should include recent management accounts and (even more importantly) future budgets and cash flow expectations.
- **Details of the steps the business has taken to seek support from other stakeholders** – This might include outlining discussions the business has had concerning new or additional financial support from existing or new lenders, current shareholders, management and any other forms of support (e.g. extending credit or relaxing payment terms) from other creditors and suppliers.

HMRC will consider the position in the round including whether the business has explored all practical steps to take full advantage of the government support schemes. For example, for businesses that have taken out a “bounce back loan”, there are a number of options available to a business to manage repayment of that loan under the Pay as You Grow (PAYG) scheme. HMRC will expect a business to have “drawn on the full range of financial support and opportunities available to them to keep up to date with their tax repayments.” In the right circumstances, borrowing further finance via the extended Recovery Loan Scheme may be appropriate.

An important point to note is that HMRC will expect future tax liabilities to be paid when they arise and that will also need to be factored into the submission.

Early engagement, followed by regular and transparent communications, with HMRC by the business will be imperative, especially in situations where the facts and particular circumstances are not straightforward.

Monitoring, Review and Enforcement

Even if a TTP arrangement is in place, businesses should be aware that HMRC will actively monitor and review the agreement to ensure compliance. HMRC will be looking to confirm that:

- The agreed payments are being made as agreed on time
- Other tax liabilities are being met
- Tax administration and compliance obligations are being satisfied (i.e. computations and returns are being submitted)

At the same time, HMRC is likely to be using the data it collects to identify any change in the business' ability to pay the tax due.

Nonetheless, once it agrees to it, HMRC is bound by a TTP agreement and businesses should take a degree of comfort from the fact that, provided they continue to abide by the terms and conditions of TTP, HMRC cannot seek to unilaterally accelerate recovery of the tax debt.

That said, HMRC will assert its right to withdraw from (i.e. cancel) a TTP arrangement in the following specific circumstances:

- New facts come to light that mean TTP is no longer appropriate or available in the circumstances, or mean recovery of the tax due is at increased risk
- The business has misled or lied to HMRC
- The business defaults on the terms or conditions of the arrangement

In cases where HMRC believes a business is in breach of a TTP agreement, its first course of action will be to contact the business by issuing a reminder letter. In cases where an instalment payment has been missed, the reminder letter will set out the amount of tax that is now overdue, demand immediate payment and explain that failing to comply will mean the TTP arrangement will be cancelled.

If the business fails to respond, HMRC will issue a cancellation letter. At that point, the TTP arrangement falls away and HMRC will demand full payment of all tax amounts overdue. The chance of agreeing a new TTP arrangement at that point is remote and, if the tax is not paid, HMRC will initiate enforcement proceedings utilising all and any of the (growing number of) powers at its disposal.

Time to Pay?

TTP is a valuable formal procedure that will protect viable, compliant businesses facing genuine difficulties in meeting their tax liabilities on time. The protection a TTP arrangement affords can provide a business with critical time to plan for recovery without tax liabilities weighing on its cash flow.

However, it is also important to appreciate that TTP merely defers the point at which the tax is payable; the liability does not go away and will instead simply fall due under the TTP schedule. In addition, new tax liabilities and compliance obligations will continue to arise.

Entering into a formal arrangement with HMRC for the payment of overdue tax provides certainty, but also brings additional compliance obligations and opens the business to greater scrutiny from HMRC. A TTP arrangement should not be sought lightly and, once it is obtained and agreed, a business must make every effort to comply with its terms and conditions. It is crucially important that businesses do not overpromise under TTP, continue to monitor their own compliance and promptly communicate any change in circumstance that could affect the agreement (positively or negatively) to HMRC.

HMRC examines requests for TTP carefully and will be monitoring a business' compliance with an agreement equally as carefully. It is worth remembering that the primary purpose of HMRC is to collect taxes due and protect the Exchequer. In appropriate cases, HMRC uses TTP as a tool to help it achieve that aim. However, where there is a breach of a TTP agreement, HMRC will not shy away from exercising its enforcement powers to recover the tax owed.

Contacts



John Alderton

Partner
M +44 788 505 8896
E john.alderton@squirepb.com



Monika Lorenzo-Perez

Partner
M +44 778 572 0439
E monika.lorenzo-perez@squirepb.com



Charlotte Moller

Partner
M +44 788 180 4970
E charlotte.moller@squirepb.com



Chris Roberts

Partner, Manchester
T +44 773 647 9569
E chris.roberts@squirepb.com



Devinder Singh

Partner
M +44 772 139 9625
E devinder.singh@squirepb.com



Mark Simpson

Partner
T +44 113 284 7046
E mark.simpson@squirepb.com



Rachael Markham

Professional Support Lawyer
M +44 754 511 0781
E rachael.markham@squirepb.com