

Company officers listed as risk persons (2/4/19)

A company officer that is legally recognised as a risk person (RP) faces certain business restrictions (a ban on, or a longer time limit for, receiving specified services from the Enterprise Registry). This legal status affects the company's day-to-day operations and may form the basis for a business suspension order. This article explores some case-law findings concerned with RP status.

The legal concept of RP

The rules on RP status were adopted in tax law to restrict the operations of any entity acting as middleman in money laundering and tax fraud schemes, and to ensure that any company officer carries out their responsibilities as a good and diligent master.

Section 1(31) of the Taxes and Duties Act lays down five criteria for identifying such persons and keeping them out of the commercial environment by temporarily restricting their power to act for entities:

1. the person agreed to sit on the board with no intention of doing business;
2. the person's declared residence is a risk address;
3. the circumstances that call for suspending the entity's business arose during the person's term of office;
4. the person incurred overdue tax payments exceeding €7,000;
5. the entity incurred overdue tax payments exceeding €15,000 during the person's term of office.

The maximum period of RP status is three years, except for condition (b), which will apply for so long as the address fits the definition of a risk address.

If a person notifies the State Revenue Service (SRS) of any steps the person has taken to remove the basis for an RP listing, the SRS has one working day to decide about delisting. This does not, however, apply to condition (a) because the fact that a person has become a fictitious officer cannot be put right.

Actual circumstances apply

The rules on RP status came into force in 2014. While applying the criteria should be based on the actual circumstances that existed when the rules came into force, the case law finds that those circumstances might have set in before, and continue after, the effective date of the rules.

In one case, for example, a person objected to being recognised as RP because outstanding tax payments fell due before 2014. The court found the tax arrears had accumulated over a long period up to September 2014, when the person was found to meet the criteria. The court dismissed the person's objections and said the rule had so-called false retrospective force, which is nothing unusual or unacceptable in a country that adheres to the rule of law.

The time limit for making a decision

The SRS should make a decision to add the person to the RP list within five working days after establishing the person meets an RP condition. The case law finds, however, that the time limit for issuing a decision may depend on various circumstances involving the institution's internal operating issues such as data

flows and assessments, or staffing sufficiency. Accordingly, overrunning this time limit neither gives the person any legitimate expectation of escaping RP status nor prevents the institution from making a decision at a later date.

And the time limit for issuing a decision to add the person to the RP list should not be automatically linked to the date a decision was made to suspend the entity's business.

Two or more conditions may apply at the same time

If a person meets two or more conditions at the same time, the SRS has the power to mention this in their decision as a basis for imposing RP status. If one condition disappears but another stays, the SRS has no basis for delisting the person.