Shareholders can be hit with tax bill

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Shareholders will in certain circumstances be held responsible for the tax debt of a company when there is a voluntary winding up, even if they are not involved in the day-to-day management of the company.

Some tax experts have argued the provision in the Tax Administration Act (TAA) that allows the South African Revenue Service (SARS) to hold shareholders liable for the tax debt of a company is inequitable.

Ben Strauss, a tax director at law firm Cliffe Dekker Hofmeyr, said in the firm’s June newsletter that it is unfair to saddle shareholders with the tax debts of a company, simply by virtue of their shareholding.

The TAA, which came into effect in October last year, provided for changes that have raised concerns over the extent of SARS’s powers.

Mr Strauss said that while the shareholders and directors of closely held or private companies are often the same people, there are many instances where the shareholders are merely passive investors and do not necessarily have knowledge about the affairs of the company, particularly its tax affairs.

The act gives SARS the powers to pursue shareholders who benefited from the assets of a company to pay any outstanding tax debts. The powers in section 181 of the act are limited to private companies and only applies if the shareholders received assets from the company within one year of the winding up, and if the tax debt existed at the time when the shareholders received the assets. Mr Strauss said “assets” included cash, shares and dividends.

BDO tax director David Warneke said the act was “potentially draconian” as it throws the net so wide that both guilty and innocent shareholders are caught. He said there are cases where shareholders would “collude” to wind up a company in order to get rid of its tax debt.

“There may be many other reasons why it decides to close shop beside getting out of a tax debt position. It could also be possible that not all shareholders were cognisant of a tax debt at the time of receiving assets and spend the money in good faith, only to have to hear they must pay tax debts later on.” Mr Warneke referred to the statement made by Judge Dennis Davis at a tax conference in Johannesburg at the end of last month that there are a host of sections in the act which could be subject to litigation.

Mr Warneke said taxpayers have the right to privacy and property, and at the same time the state has the right and the need to collect tax in a efficient manner. “The question is whether this provision goes beyond that right. We will not know until it is challenged,” he said.

Mr Warneke also said while it may seem unfair that a shareholder without a direct say in the running of the business can be held liable for tax debt, shareholders benefit from the assets of a company that could have been used to satisfy the debts owed to the state. SARS spokesman Adrian Lackay said the section in question ensured shareholders were in a similar position to the one they would have been in if the company had paid its taxes before making transfers to its shareholders.

Listed companies are excluded as a practical measure and because individual shareholders generally do not have as close a connection to the company or the same degree of influence over it, Mr Lackay said.

Mr Strauss said the liability of shareholders is secondary to the company. “SARS must first try and recover the unpaid tax from the company and may only … recover the unpaid tax from the shareholders