

# MVL VS VOLUNTARY STRIKE OFF.

## WHEN TO BRING IN THE EXPERTS

At Moorfields we get asked why go to the expense of a Members' Voluntary Liquidation ("MVL") when a voluntary strike off achieves the same as a winding up, but only costs £10. The fact is the two processes are not equivalent, although they do both lead to a company being dissolved.

A voluntary strike off is suitable for a dormant company with no assets or liabilities and which has not traded in the last three months. The Directors file a Form DS01 at Companies House, and, if nobody objects, the company will be struck off three months later. However, if there are any creditors or employees they must receive a copy of the Form DS01 and they may object to the company being dissolved.

If there are any assets or liabilities then a formal winding-up, via an MVL, is the way to have a company dissolved. In an MVL the liquidator has the powers to deal with assets and liabilities which are in the Insolvency Act 1986 and are not available to the Directors in a voluntary strike off. The advantages of an MVL are:

- Repay capital to shareholders.
- Crystallise liabilities - any creditors not claiming within set period are barred from claiming against the company.
- Closes tax accounts.

### Capital

Normally a live company must maintain its capital and can only pay dividends to shareholders from realised profits; therefore it cannot transfer all its assets to its shareholders.

### MVL

In an MVL the Liquidator will ensure that any expenses and liabilities of the company are paid. He will then distribute all surplus assets to the shareholders. Following which the company is dissolved. Any distribution made by the liquidator can be considered final.
A distribution from an MVL is treated as a capital distribution and should be included in the shareholders' capital gains calculations for taxation purposes.

### Voluntary Strike Off

Under the voluntary strike off process the rules on maintaining capital continue to apply and any distributions of the capital of the company are illegal. Despite the illegality some directors do transfer all of a company's assets to the shareholders and then apply for a voluntary strike off. A distribution is income in the hands of the shareholders unless it is made "in respect of share capital in a winding up", when it is treated as a capital payment. A voluntary strike off is not a winding up, therefore any distribution made in preparation for a voluntary strike off would be income to the shareholder. For individual shareholders the tax liability on an income distribution may be higher than if the receipt were to be treated as a capital payment.

Previously HMRC have agreed to treat a distribution in preparation for a voluntary strike off as if it was made in a winding up, and to tax it as a capital payment (Extra-statutory Concession C16). This concession is to be enacted into legislation from 1 March 2012. However, the legislation will impose a limit of £25,000 on distributions which are to be treated as equivalent to distributions in a formal winding up.

Irrespective of any changes to the tax legislation the company has a right to reclaim an illegal distribution. On dissolution this right is an asset of the company which, under the bona vacantia rules, passes to the Crown.



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The Treasury Solicitor may reclaim the money from the shareholders. He has agreed not to chase for repayment of such illegal dividends. However this does not excuse the fact that the Directors would have breached the Companies Act 2006. This breach of legislation may be avoided by putting the company into MVL and allowing the Liquidator to make the distribution.

If an unknown creditor is discovered and gets the company restored to the register, the shareholders will have to repay the dividend to restored company which will be used to pay the creditor.

As an alternative, prior to applying for a voluntary strike off, a private company may reduce its share capital. The company's surplus assets can then legally be distributed. But this would be treated as a dividend and taxed as income in the hands of the shareholders. For individual shareholders this could be less advantageous than a capital distribution from an MVL. Also, should the company have any unknown liabilities that were not taken into account at the time that of the capital reduction, the subsequent distribution may be reclaimed from the shareholders.

## Liabilities

Both MVL and voluntary strike off should only be used for solvent companies. That is companies that are able to pay all their debts. However, despite the best efforts of directors, companies may have unrecorded liabilities which have arisen from long forgotten transactions or guarantees. For example many companies have received asbestosis claims long after they have ceased trading.

### MVL

In an MVL the liquidator will advertise notice to all creditors requiring them to prove their claims in the liquidation.

Any creditors who do not claim within the prescribed period are not entitled to disturb any distributions made by the liquidator. This means that any unknown creditor who attempts to bring a claim against the company after the liquidator has distributed assets to the shareholders has no rights against the shareholders. A distribution from an MVL can be treated as final, which is not always the case when applying for a voluntary strike off.

### Voluntary Strike Off

If any claim is received by a company after the directors have applied for a voluntary strike off then the creditor may object to the strike off, and Companies House may reject the application (the directors have a duty to withdraw the strike off application if the company is no longer solvent as a result of the claim).

As explained above, if the company had an obligation to pay the creditor at the time that any distribution was made to shareholders, then such a distribution may be deemed to have been illegal, and could clawed back from shareholders.

If the claim comes to light after company has been dissolved creditor may be able to have company restored to the register up to six years later and pursue its claim against the shareholders. Therefore any distribution received from a company which has not been formally wound up should not be considered final until six years after the company has been dissolved.

## Corporation Tax

Under Corporation Tax Self Assessment a company has to file a tax return within 12 months of the end of each accounting period. HMRC have 12 months to raise an enquiry into the return. If they do not raise an enquiry then the assessment is considered final.

Because a tax return cannot be filed until the tax period has ended (ie a second period has begun), and it is not considered final until 12 months have elapsed (by which time a third tax period has begun), a company is always playing catch up with its corporation tax affairs.

### MVL

Unlike the directors of a live company, a liquidator is able to estimate the income a company will receive up to the end of a tax period and submit a tax return based on this estimate before the end of the period. Furthermore, HMRC will explicitly confirm that they will not open an enquiry (subject to their right to open a discovery enquiry if the information provided is incorrect) and will agree to the company being dissolved. Therefore in an MVL the corporation tax position can be agreed and the final tax liability settled before the company is dissolved.

### Voluntary Strike Off

Before applying for a voluntary strike off the directors must ensure that the corporation tax of a company is as up to date as possible. This means that tax returns for all prior periods should be filed before applying for the strike off. If there were any transactions in these periods which could give rise to an enquiry then consideration should be given to waiting for the time to expire for HMRC to raise an enquiry. We have also heard of occasions when HMRC require the directors and shareholders to give a personal guarantee in respect of Corporation Tax before agreeing not to object to a voluntary strike off.

## CAN WE HELP?

If you would like to discuss how Moorfields can assist in placing your company into MVL, or any of the issues raised above, please contact:

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