

Agenda Item	14
Report No	RES/41/15

## Public Consideration of Company Debts

### Report by Director of Finance

#### Summary

At the Resources Committee meeting in February, following consideration of a joint report by the Director of Finance and the Head of Corporate Governance, a further report was requested to enable Members to debate whether the write-off of company debts should be considered in public.

This report advises Members of the company information available within the public domain and options available for considering debt write off.

#### 1. Background

- 1.1 Consideration of the write-off of individual company and personal debts to the value of £5k or more is currently undertaken in private by Members of the Resources Committee. At the last meeting of the Committee, Members debated whether it would be appropriate for matters relating to the write off of company debts to be considered in public and requested additional information in this regard. No change was proposed for the consideration of personal debt.

#### 2. Non Domestic Rates Liability and Recovery for Company Debts

- 2.1 Non domestic rates liability can be levied against a rateable occupier or a rateable owner. Ratepayers therefore comprise of private individuals and companies. Rates for a full financial year are generally payable by ten monthly instalments, by biannual instalments in August and October or in one single instalment due in September of that year.
- 2.2 Recovery of non domestic rates is restrictive and is set out in legislation. If at the 30th September less than the equivalent of 4 monthly instalments has been paid, the right to pay by instalments is lost and a Final Notice for the full outstanding balance for the year will be issued to the ratepayer. Formal recovery as such cannot commence prior to the end of September. After 30th September a Final Notice as described above will be issued at any time where two monthly instalments are in arrears.
- 2.3 Final Notices issued are required to be paid within 14 days, failing which a Summary Warrant will be applied for at the Sheriff Court with the imposition of a 10% statutory penalty for non-payment. A Warrant so granted will be passed to the Sheriff Officer for enforcement with the addition of collection costs and fees.

- 2.4 Once an account has been passed to the Sheriff Officer they will attempt to engage the debtor into a formal payment arrangement. Where such an arrangement has not been agreed, the Sheriff Officer will take formal recovery action. In order to do so the Sheriff Officer must first serve a charge for payment along with a debt advice information pack to the debtor. The debtor is given 14 days to respond formally to the charge for payment.
- 2.5 Sheriff Officers will adopt the most appropriate method of recovery based on the debtor's circumstances, including bank arrestment, exceptional attachment orders (attachment of goods) or money attachments. It is important to note that in the event that a limited company ceases to trade, directors are generally protected by the "corporate veil" and write off in most cases is the only option. Debts are normally only written off if they are deemed irrecoverable.

### **3. Business Failure and Scale**

- 3.1 While there is a small minority of ratepayers that choose to avoid their statutory obligations to pay non domestic rates, there are many reported reasons why companies fail or find themselves in a position whereby they are unable to pay their rates liability in full or in part. These include product/service saturation; competition; and a breakdown in the supply chain. This list is not exhaustive.
- 3.2 The Council's Non Domestic Rates Team is therefore unable to determine the specific reasons why companies fail and are therefore not in a position to separately identify those that are unable to pay from those that can pay but choose not to do so. Officers are therefore unable to provide Members with reports that separately identify ratepayers into these different categories.
- 3.3 Companies vary in size and have varying numbers of directors. A private company limited by shares for example must have at least one director and indeed many private companies operating in the Highlands operate on that basis. Whereas some others have many more directors and some directors operate more than one company at the same time.
- 3.4 These are important factors that need to be considered by Members when deciding whether to publicly debate company debts proposed for write off.

### **4. Companies House**

- 4.1 An analysis of information available from Companies House shows that information relating to the company, its Directors and financial records are readily available. What however is unavailable is:
- information specific to the occupation of the property in question;
  - the debt history of the company/ Directors;
  - their behaviour and cooperation towards the arrears in question.

Information relating to arrears of non domestic rates is not in the public domain.

<b>Company Information</b>	<b>Available</b>
company name	Yes
company type	Yes
registered office address	Yes
date of incorporation	Yes
country of origin	Yes
the nature of business	Yes
company status (eg. live, dissolved etc.)	Yes
date of last accounts/annual return filed	Yes
date of next accounts/annual return due	Yes
type of accounts (eg. dormant, full etc.)	Yes
previous company names	Yes
Details of Company Director(s) and Secretary	Yes
Balance Outstanding at Property*	No
Payment History*	No
Recovery History*	No
Previous Debt History of Directors*	No

\*in respect of non domestic rates

## 5. Compliance with Legislation

- 5.1 Under the common law, there exists a duty not to disclose any information of a confidential nature to any third party. There are exemptions from this duty of confidence, one of which is if the relevant information is already in the public domain. The Council would not be breaching its common law duty of confidence if it disclosed information which was already publicly available from Companies House, such as details of limited companies like the company name, address of its registered office, and the names of the directors and shareholders.

This exemption has enabled Officers to include the names of directors in a confidential report recommending non domestic rates debts for write off. However, any proposal to write off non domestic rates is not discussed with or notified to the respective debtor or registered with Companies House and is not therefore in the public domain.

- 5.2 Section 50A of the Local Government (Scotland) Act 1973 builds on the common law duty of confidence and stipulates that the public *shall* be excluded from a local authority meeting in which confidential information could be disclosed in breach of the obligation of confidence. Confidential information is defined differently under the 1973 Act than under the common law, but it includes “*information the disclosure of which to the public is prohibited by or under any enactment or by the order of a court*”. The Data Protection Act 1998 (“the 1998 Act”) would be classed as an “enactment” for these purposes, and the Council *must not* disclose information in breach of it. There is no local authority discretion which can be exercised.
- 5.3 The Council is a data controller for the purposes of the 1998 Act. This Act imposes a statutory duty on data controllers to process personal data fairly and lawfully and not to disclose it without the data subject’s consent. This duty exists *regardless* of whether or not the information was provided in confidence, or is available elsewhere in the public domain. The Council could face legal challenge if it were to process data in such a way as to publicise the details of individuals without first obtaining their consent.

5.4 Companies are not data subjects under the 1998 Act as they are not living individuals. This means that disclosure of the company name alone may not result in a disclosure of personal data (although it could where the company name is the same as the main director/shareholder). However, the definition of “personal data” in the 1998 Act includes:

*“..data which relate to a living individual who can be identified*

*(a) from those data, or*

*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual’.*

This precludes disclosure of the names of the directors and shareholders, but also **any** information relating to the company from which such individuals can be identified. The fact that the information is available elsewhere does not assist the Council in relation to its data protection obligations: the other public sources and local knowledge make identification of the living individuals behind the company easier to achieve.

5.5 Considering write off information in private enables Members and Officials alike to have in-depth and relevant discussions to fully inform decision making. It should be noted however that should Members decide to discuss company write offs in public, officials will not be permitted to respond to specific questions, whereby to do so would find them in breach of the 1998 Act.

## 6. Options for debating company debt write-off

4 options have been identified and these are:

Option	Summary
1	Debate in public by removing company details and Directors’ names from reports
2	Debate in public using dummy reference numbers to identify individual companies
3	Debate in private and publish decisions using dummy reference numbers
4	Status Quo: Debate in private and do not publish decisions

These are discussed in more detail below together with the implications and risks of each option. Appendix 1 to this report provides a summary of the information that can be made available to the Committee under each of the options set out above together with the associated implications and risks.

The information that is currently available to Committee in confidence and debated in private is detailed in the following table.

Liabe Party	Name(s) of Director(s) if Limited Company	Debt Description	Reason for write-off	Account Reference Number and Financial Year	Amount (£)
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**Against each of the options identified, comparisons include the impact on the information that can be provided, compared to current.**

**Option 1: Debate in public by removing company details and Directors' names from reports**

***Description***

Under this option, Members would receive the following information:

Debt Description	Reason for write-off	Financial Year	Amount (£)
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But compared to the current process, the information that will no longer be reported is:

- Liable party
- Name(s) of Director(s) if Limited Company
- Account Reference number.

***Implications and Risks***

<b><i>Legal</i></b>	Publicly debating and publishing write off information may have a detrimental impact on statutory collection of local taxation, rental income (both commercial and housing) and sundry debts.
<b><i>Risk</i></b>	There is a risk that debating company debts in public may contribute to a stifling of business growth and development within the Highlands, particularly for those individuals that are considering small scale Directorships, eg setting up a guest house, an electrician or painter setting up a company, or a small scale window cleaning company.
<b><i>Resource</i></b>	Currently a single write off report relating to both company and personal irrecoverable debt is prepared by Officers and considered by Members. Any change to this approach will only increase the resource required to prepare and consider such reports. However the Finance Service will aim to absorb this.

## Option 2: Debate in public using dummy reference numbers to identify individual companies

### **Description**

Under this option, Members would receive the following information in public :

Dummy Reference Number	Debt Description	Reason for write-off	Financial Year	Amount (£)
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This option would provide Members with a confidential supplementary report (printed in the private papers) that would enable the published dummy reference number to be cross-referenced to details of individual companies and Directors.

But compared to the current process, the information that will no longer be reported in public is:

- Liable party
- Name(s) of Director(s) if Limited Company
- Account Reference number

### **Implications and Risks**

<b>Legal</b>	Publicly debating and publishing write off information may have a detrimental impact on collection of local taxation, rental income (both commercial and housing) and sundry debts.  Should Members decide to implement this option, there is an inherent risk that a data security breach may occur. Breaches of the data protection act can be referred to the Information Commissioner who has the power to impose financial penalties. Directors of companies may also seek to recover compensation.
<b>Risk</b>	There is a risk that debating company debts in public may increase the fear of failure and therefore contribute to a stifling of business growth and development within the Highlands. This may be particularly applicable to those individuals that are considering small scale Directorships, eg setting up a guest house, an electrician or painter establishing a company, or a small scale window cleaning company.
<b>Resource</b>	Currently a single write off report relating to both company and personal irrecoverable debt is prepared by officers and considered by Members. Any change to this approach will only increase the resource required to prepare and consider such reports. However the Finance Service will aim to absorb this.

### **Option 3: Debate in private and publish decisions using dummy reference numbers**

#### ***Description***

Under this option, Members would not debate any information in the public domain. Members would however continue to receive the same information as is currently available in private with the addition of a dummy reference number. The dummy reference number would be used to publish the Committee's decisions.

Dummy Ref Number	Liabile party	Name(s) of Director(s) if Limited Company	Debt Description	Reason for write-off	A/c Ref Number and Financial Year	Amount (£)
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#### ***Implications and Risks***

<b><i>Legal</i></b>	Publishing write off information may have a detrimental impact on statutory collection of local taxation, rental income (both commercial and housing) and sundry debts.
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### **Option 4: Status Quo: Debate in private and do not publish decisions**

#### ***Description***

The status quo provides for private debate and does not involve publishing decisions. Members will continue to receive the same information in private as is currently provided.

#### ***Implications and Risks***

The implications and risks identified for each of the other options do not apply to this option.

#### **Recommendation**

Members are invited to:

- consider the content of this report including the legal, risk, resource and rural implications of debating debt write-off information in the public domain;
- agree the option that is to be followed for considering the write off of company debts.

Designation: Director of Finance

Date: 14 May 2015

Authors: Sheila McKandie, Benefits and Welfare Manager and Brian Murison, Revenues Manager

**Summary of Options for considering company debt write offs**

<b>Option</b>	<b>Summary</b>
<b>1</b>	Debate in public by removing company details and Directors' names from reports
<b>2</b>	Debate in public using dummy reference numbers to identify individual companies
<b>3</b>	Debate in private and publish decisions using dummy reference numbers
<b>4</b>	Status Quo: Debate in private and do not publish decisions

## Information, Risks and Implications

The table below sets out the information that will be made available for debate in the public domain and highlights the associated risks and implications for each Option.

Information that will be made available in the public domain								Implications (and are discussed in detail within the report)				
Option	Dummy Ref Number	Liable Party	Name(s) of Director(s) if Limited Company	Debt Description	Reason for write-off	Account Reference Number and Financial Year	Amount (£)	Legal	Risk	Resource	Rural	Data Security Breach
1	Yes	No	No	Yes	No	Financial Year only	Yes	Yes	Yes	Yes	No	No
2	Yes	No <sup>1</sup>	No <sup>1</sup>	Yes	No <sup>1</sup>	Financial Year only	Yes	Yes	Yes	Yes	No	Probable
3	Yes	No <sup>1</sup>	No <sup>1</sup>	No <sup>1</sup>	No <sup>1</sup>	Financial Year only	Yes	Yes	Yes	No	No	No
4	No <sup>1</sup>	No <sup>1</sup>	No <sup>1</sup>	No <sup>1</sup>	No <sup>1</sup>	No <sup>1</sup>	No <sup>1</sup>	No	No	No	No	No

1 = only available in private