

# **S. 343 Protecting Your ARD**

The District Court Application Process to  
Extend Your ARD and Save the Audit Exemption

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## Background

Companies Act 2014 maintains the same filing requirements as the old regime, namely a company's ARD could be a maximum of 9 months after its year end and it then had 28 days to file its annual return. If the company electronically files its annual return then it had a further 28 days to file.

What has changed is the CRO's ability accept late returns under the waiver scheme. The waiver scheme allowed the CRO a level of discretion for companies that had missed their ARD. If the reason presented was sufficiently serious CRO would allow the return to be deemed to be returned in time.

The new Act has removed any facility for the CRO to invoke the waiver scheme. Anyone that now files late is either deemed to be late and must pay the late filing penalties and have their financial statements audited for 2 years or they must apply to the District Court to extend their annual return date.

## Process

When a company opts to avail of the District Court option, a Notice of Application and Affidavit must be drafted. See Appendices A and B.

The application to extend the Annual Return Date can be a straight forward process provided all of the relevant steps are followed and the appropriate professionals are engaged. In a normal 'S 343 appeal' the process is as follows:

1. The company has missed its annual return date.
2. The directors engage a service provider to prepare the Notice of Application and Affidavit.
3. The affidavit must be sworn in front of a practicing solicitor.
4. The Notice of Application is lodged with the District Court and the Affidavit is lodged with the CRO. It must be lodged with the CRO 21 days before the appeal is set to be heard and the CRO have right to object within this timeframe.
5. The appeal is heard by a District Court judge and it can either be granted or rejected.
6. If granted the company is given a once off extension that allows it to file the annual return that otherwise would have been late. All late filing fees and any audit requirements that were imposed due to late filing of that annual return are also waived. If the previous annual return was filed late then the audit requirement will still apply.
7. The court order is filed with the CRO as soon as possible and the annual return is then filed before the new ARD.

As per above, it is not an overly complicated process. However, there are some key points to note.

## **District Court**

The appeal must be heard in the District Court of the registered office of the company at the time of the appeal. There is no prohibition on the company changing registered office in the weeks preceding the appeal.

## **Annual Returns Eligible**

Section 343 clearly states that only annual returns falling on or after the date of commencement of the Companies Act 2014 are eligible to avail of the application process. In spite of this, many applications were successfully granted for ARDs preceding 1 June 2015 prior to 17 May 2016. However, CRO have now clarified that they will object to any such appeal as of 17 May 2016. It is thought that the lack of objection in the period to 17 May has allowed many of the historical late filing companies to get up to date. While companies may still apply, an objection letter from CRO would seem to lessen the chances of a successful application.

## **Reason for being late**

Under the old Act, the waiver scheme suggested that the only acceptable reasons for late filing were force majeure type events – this might include a death or serious illness. Not for profit charities were allowed to file late and companies that had incurred a verifiable postal delay could also seek to avail of the waiver scheme.

From our experience to date it is clear that there have been many reasons put before the District Court as to why the companies had missed their annual return. They ranged from the death of a director to a clerical error made by the accountant in the submission of the return. We are not aware of any applications that have failed (however the number and success rate of the applications made has not been published).

In their e-zine issued on 17 May 2016, CRO clarified their position on acceptable reasons for a company missing its ARD. They note that they will object if the affidavit does not clearly demonstrate why it was not possible for the annual return to be delivered on time. See extract below:

*'The Registrar reserves the right to object to any application in the District Court for such an Order where, in the opinion of the Registrar, the reasons provided in the Affidavit and the supporting facts do not explain or verify why it was NOT POSSIBLE to deliver the annual return to the CRO within the time permitted by sections 343(2) or 343(3), Companies Act 2014, and are therefore not sufficient to warrant setting aside the company's legal obligations under the Act.'*

Our interpretation of this clarification is that companies will now have to be very clear in setting out the facts surrounding the non-delivery of the annual return on time to the CRO. Whether the CRO objects or not, it is at the discretion of the District Judge on the day of the appeal to grant the extension or not. To date we are not aware of any objections being made by the CRO but the expectation is that this will change in the future.

## **Representation**

There is precedent for companies representing themselves in the Irish court system, however, in a number of instances where the directors have elected to represent the company in court (for S 343 appeals) the judges have adjourned the appeal until such time as they obtain legal representation. This would imply that the safest and most efficient way to successfully appeal is to engage representation from the outset.

## **Filing**

When the order has been granted, it must be lodged with the CRO as soon as possible. This order grants an extension to file the annual return and sets out the date by which the financial statements must be filed. An application cannot be made again for that ARD but the same company can apply in a subsequent year (although technically allowable this may present a difficulty for judges if companies are perceived to be 'repeat offenders').

Once the order is filed, the accounts and B1 must then be filed within the specified timeframe. This can be as much as 8 weeks after the court date but the applicant should check as each application can be different.

A B1 must be filed with a filing fee of €40 (€20 if filed electronically). The order must be received before an electronic B1 can be filed.

## FAQS

### Frequently Asked Questions

**Q: Can the company directors represent it in court?**

A: Technically there is precedent on other matters but our only experience of director representation in relation to S 343 appeals has been of the directors being asked to obtain legal representation.

**Q: How long does the process take?**

A: Once the company agrees to go ahead with the appeal the paperwork can be provided within 5 working days or less. It must then be signed and sworn. There is a 21 day notice period for CRO. A court date can generally be obtained within 4-5 weeks (this can vary) of making the application in Dublin with certain courts around the country allocating specific dates, e.g. the third Wednesday of every month. From start to finish it should not take any more than 8 weeks.

**Q. My company is strike off listed – can I make an application?**

A. Technically the answer to this question is yes however, it is unlikely that any companies with ARDs after 1 June 2015 are currently strike off listed. But assuming it is, yes the company can apply for the extension and once the papers are lodged with CRO it may prevent the company from being struck off in advance of the court date. There are no guarantees in relation to this though.

**Q. Which court will the appeal be heard in?**

A. It will be heard in the District Court in which the registered office is. The registered office can be changed in advance of the application.

**Q. What happens if the appeal is successful?**

A. The court order granting the extension is lodged with the CRO and the financial statements, B1 and appropriate fee must be lodged before the date granted by the Court.

**Q. What happens if the appeal is unsuccessful?**

A. The company will be being late filing and must file its annual return and audited financial statements along with any penalties arising.

## APPENDIX A

### NOTICE OF APPLICATION FOR ORDER EXTENDING THE TIME IN WHICH ANNUAL RETURN MAY BE DELIVERED TO THE REGISTRAR OF COMPANIES

District Court Area of

District No.

..... Applicant

..... Registrar of Companies ..... Respondent

TAKE NOTICE that the above-named applicant company (the "company"), whose registered number is ..... will apply to the District Court sitting at ..... on the ..... day of ..... 20 ..... at ..... a.m./p.m. under section 343(5) of the Companies Act 2014 for an order extending the time for the purposes of \*section 343(2) \*section 343(3) of the Companies Act 2014 in which the annual return of the company in relation to the period ..... may be delivered to the Registrar of Companies.

1. The registered office of the company is situated at ..... in the court \*(area and) district aforesaid.

2. The company's annual return date is .....

3. If an order is made extending time, the annual return which is the subject of this application is intended to be made up to .....

4. No previous order has been made by the District Court under section 343(5) of the Act in respect of the company as respects the period mentioned at 3 above.

\*5. The company will apply to the Court to allow a period longer than 28 days after the date on which an order under section 343(5) of the Act is made for delivery of a certified copy of the order to the Registrar, being a period of .....

Dated this ..... day of ..... 20 .....

Signed

Applicant/solicitor for the Applicant

To District Court Clerk

District Court Office

At .....

To the Registrar of Companies

At .....

## APPENDIX B

HIGH

### ANNUAL RETURN MAY BE DELIVERED TO THE REGISTRAR OF COMPANIES

District Court Area of

District No.

..... Applicant

..... Registrar of Companies ..... Respondent

I, ..... of ..... , a \*director \*secretary of the applicant company, aged eighteen years and upwards MAKE OATH and say as follows:

1. I beg to refer to the contents of the notice of application herein. The statements of fact contained in the said notice of application which are within my own knowledge are true. I honestly believe that the information contained in the said notice of application which is not within my own knowledge is true.

2. \*I beg to refer to a print of the company's annual return in the form for the time being prescribed by the Registrar of Companies covering the period ..... to ..... \*and to a copy of the company's financial statements up to ..... upon which marked "A" I have signed my name prior to the swearing hereof.] or \*[It has not been possible to date to prepare the company's annual return covering the period ..... to ..... because (set out reasons)]

3. The reasons why the annual return was not delivered to the Registrar of Companies within the time permitted by section 343(2) or section 343(3) of the Companies Act 2014 are (set out reasons and verify any facts relied on). \*It would additionally be just to make an order extending time for delivery of the company's annual return because (set out reasons and verify any facts relied on).

\*4. (Where the applicant will apply to the Court to allow a period longer than 28 days after the date on which an order is made for delivery of a certified copy of the order to the Registrar) The reasons why a longer period than 28 days should be allowed for delivery of a certified copy of the order to the Registrar are (set out reasons and verify any facts relied on);

\*5. I beg to refer to the entire sequence of correspondence between the applicant and the Registrar concerning this application, upon which pinned together and marked "B" I have signed my name prior to the swearing hereof.

6. I accordingly request an order in the terms set out in the notice of application.

SWORN before me [name in capitals] at ..... in the County of ..... on the .... day of ..... 20 ....., by the said .....

\*[who is personally known to me],

\*[who is identified to me by ..... who is personally known to me]

\*[whose identity has been established to me before the taking of this affidavit by the production to me of

†passport no. .... issued on the ..... day of ..... by the authorities of ..... , which is an authority recognised by the Irish Government,

†national identity card no. .... issued on the ..... day of ..... by the authorities of .....



which is an EU Member State, the Swiss Confederation or a Contracting Party to the EEA Agreement

† Aliens Passport no. .... issued on the ..... day of ..... by the authorities of ..... which is an authority recognised by the Irish Government

† refugee travel document no. .... issued on the ..... day of ..... by the Minister for Justice and Equality

† travel document (other than refugee travel document) ..... issued on the ..... day of ..... by the Minister for Justice and Equality]

.....

Deponent

.....

\*Commissioner for Oaths/ \*Practising Solicitor

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