insolvency newsletter

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1. Regulatory Update

1.1 IP BANKING ISSUES

Static balance cases and the IP Banking fee
The IP Banking section of The Insolvency Service sent a letter to all IPs in June 2005 enclosing a list of 'static balances', i.e. open voluntary or compulsory liquidations or bankruptcies where there had been no movement through the ISA estate account since 1 April 2004. IPs are reminded that they should respond to this letter and advise IP Banking of any cases on this list that they have actually closed, providing a copy of the final receipts and payments account in respect of closed compulsory liquidations and bankruptcies. In addition, IP Banking have indicated that if there are any cases on this list with a £nil balance that should have been closed before 1 April 2004 and in respect of which no subsequent realisations have been received, or were due, then they will consider rebating the quarterly banking fees charged to the estate if they are approached by the IP.

Change of banking provider from Bank of England to NatWest
Following IP Banking's change in banking provider from the Bank of England to NatWest, IPs are reminded to ensure that any BACS or standing order credits currently paid direct into the ISA account at the Bank of England, for example from pension companies or the bankrupt, are amended so that they are paid into the ISA account at NatWest. The Bank of England has indicated that with effect from 1 January 2006 they will no longer process such receipts and will instead return them to the originating bank, i.e. the bank of the pension company or bankrupt making the payment.

IPs are also reminded that they should no longer use Bank of England paying-in slips. In addition, IP Banking consider that it is safer for IPs to physically pay monies in at a NatWest branch than to send them by post them to their offices in Birmingham.

Interest bearing accounts
IPs are reminded that where they close an estate account at the ISA in respect of a members' or creditors' voluntary liquidation, but then subsequently reopen the account to receive further funds, then that reopened account is not automatically interest bearing. The IP must specifically request that the reopened account is made interest bearing.

1.2 MONITORING CHECKLISTS

IPs are reminded that the checklists used by the insolvency compliance officers when examining cases during monitoring visits can be downloaded at www.accaglobal.com/professionalstandards/insolvency . It is important to remember that these checklists are aides-memoire only, and that other issues may be examined or considered by compliance officers in the particular circumstances of a case of a monitoring visit.

1.3 INSOLVENCY SERVICE LEVY

The Insolvency Service has indicated that it proposes to increase the levy it charges the Recognised Professional Bodies to £150 per IP per annum for 2006 and to £200 for 2007. The necessary Statutory Instrument was expected to be prepared and laid before Parliament by the end of the year to give effect to this intention. As in previous years ACCA will pass this cost on to the IPs it licences in full, and it is likely that an invoice for the 2006 levy will be issued to IPs in March 2006.

This is a substantial increase in percentage terms from the current level of £100 and The Insolvency Service has provided the following background to it.

'On 1 April 2004 a new financial regime was implemented for the Insolvency Service following the coming into force of the Enterprise Act 2002. This included a new fee regime that was intended to be

simpler, fairer and more transparent and to match income to costs in line with the Treasury Fees and Charges Guide. A formal evaluation of the new financial regime will be undertaken and reported on by April 2007 but there is a requirement under the Treasury Fees and Charges Guide to review fee levels annually. There were no fee changes made on 1 April 2005 but costing information now shows that there should be an adjustment to a number of fees from 1 April 2006 including those relating to IP regulation.

The fees charged by The Insolvency Service relate to three functions, case administration, banking and IP regulation. There can be no cross-subsidisation across functions but it can exist within a function. When setting the fees for IP regulation for 1 April 2004 The Service relied on assumptions about numbers of IPs and volumes of IVAs and on time previously recorded by staff carrying out the regulation function. A change in these assumptions and an analysis of time recording since 1 April 2004 means that fees need to be amended as the costs of the IP authorisation and monitoring function and the regulation of the RPBs have been higher than originally expected.

The analysis of cost and time recording shows that the RPB levy should be about £200 per IP. This would be a significant increase and our intention is to apply it in two steps, £50 now with another, similar increase in April 2007.'

Any questions regarding the levy should be directed to Insolvency Practitioner Policy Section of The Insolvency Service.

1.4 MONITORING SEMINARS

After the success of the monitoring workshops in 2005, the Monitoring Unit proposes to run a number of small-scale half day seminars throughout the country in 2006. The seminars will be for no more than 10 insolvency practitioners at a time and will be an opportunity for the Monitoring Unit to provide practitioners with information on regulatory issues, for practitioners to provide feedback to the Monitoring Unit, and to raise issues and share concerns, both with the Monitoring Unit and their fellow practitioners. Further details regarding the timing and location of these seminars will be provided in the New Year, but in the meantime if there are any matters that practitioners would particularly like to see covered by the Monitoring Unit please e-mail Gareth Limb at g.limb@accaglobal.com.

1.5 MILEAGE – SIP 9 – CATEGORY 1 OR CATEGORY 2

SIP 9 (version 4) sets out the guidelines to be followed by insolvency practitioners when seeking to recover costs incurred by the practitioner and/or staff engaged in the administration of an insolvent estate. Practitioners are reminded that approval is not required for the drawing of necessary disbursements, but that not all costs properly charged in connection with insolvency assignments may necessarily be regarded as disbursements.

There is no clear statutory definition to differentiate between disbursements and remuneration. Consequently, a best practice approach is adopted whereby only those costs that clearly meet the definition of disbursements, where there is specific expenditure relating to the administration of an insolvent estate and referable to payment to an independent third party, are treated as disbursements recoverable without approval.

Until recently the Monitoring Unit has treated reimbursement of mileage expenses as a category 2 disbursement requiring specific approval from creditors or members, as appropriate. The approach now being adopted by the Monitoring Unit is for mileage reclaimed at the HM Revenue and Customs rate of 40p per mile or less to be treated as a category 1 disbursement, i.e. recoverable without authority.

Mileage reclaimed at a higher rate, however, is to be treated as a category 2 disbursement requiring approval.

Practitioners are reminded that, where mileage is reclaimed as a category 2 disbursement, information should be provided to show how the recharge rate has been calculated. Practitioners should also note that the premise of the above approach is that the insolvent estate will be charged with the same amount that has been repaid to settle the disbursement claim of, for example, the practitioner's staff. In any circumstances where it is intended to repay a lower rate to reimburse a claim for mileage than the rate to be charged to the insolvent estate the difference between the two rates will amount to a category 2 disbursement for which the relevant sanction must be obtained. Full details of the practitioner's recharging policy together with an explanation of how the rates have been arrived at will have to be disclosed to those responsible for approving the repayment from the insolvent estate.

1.6 REMITTING FUNDS TO THE INSOLVENCY SERVICES ACCOUNT

Regulations 5 (compulsory winding up) and 20 (bankruptcy) of the Insolvency Regulations 1994 require an office holder to pay all money received by him or her in the course of carrying out his or her functions as such without any deduction into the Insolvency Services Account (ISA) once every 14 days or forthwith if £5,000 or more has been received. The Regulations refer to money actually received by the office holder – this has led to the Meeting of Monitors (where the monitors of all authorising bodies meet to discuss monitoring issues) considering the practice of agents retaining funds following the realisation of assets on behalf of insolvency practitioners and remitting monies to practitioners on a periodic basis. The monitors, after consultation with The Insolvency Service, have agreed the following guidelines for insolvency practitioners.

Where agents are recovering a large number of small book debts and small amounts due under monthly income payments orders/agreements on behalf of an office holder it would be unreasonable to expect agents to remit the funds to the insolvency practitioner immediately after they receive the monies. It is acceptable for the insolvency practitioner to adopt a commercial approach and accept quarterly remittances of funds from agents. The insolvency practitioner should then pay the funds into the ISA in accordance with Regulations 5 and 20.

Accepting less frequent remittances from the insolvency practitioner's agents (say six-monthly) is not acceptable as less frequent accounting to the ISA is not considered to be sufficient. Further, where an agent has realised a large book debt or received a one off payment, such as the proceeds from the sale of property, the funds should be remitted immediately to the insolvency practitioner. In such circumstances a delayed remittance will never be acceptable.

If funds are not to be remitted by agents immediately upon receipt, then insolvency practitioners must have an identifiable policy setting out the time scales to be adopted for the remittance of funds to them by their agents. Decisions regarding the frequency for remittance of the funds should be made on a case by case basis, such that each case is decided on its own merits. Practitioners should also review the arrangements agreed with their agents to ensure that, where appropriate, funds are being remitted no less often that on a strictly quarterly basis and that there has been no significant or one off realisation requiring immediate remittance.

1.7 TIME RECORDING IN FIXED FEE IVAS

Regulation 13(1) of The Insolvency Practitioners Regulations 2005, which came into force on 1 April 2005, requires an insolvency practitioner to maintain records for each case in which he or she acts as the

office holder. The records must contain, as a minimum and as is applicable to each appointment, the information specified in Schedule 3 to the Regulations. Schedule 3, paragraph 15 requires all insolvency practitioners to maintain records detailing the amount of time spent on each case by the office holder and any other persons who are assisting in the administration of the case.

Following the implementation of the 2005 Regulations The Insolvency Service has explained the rationale for including the requirement to maintain time records pursuant to paragraph 15 of Schedule 3. The requirement to maintain time recording information as part of the records for each case is not directly related to the approval of the office holder's remuneration. Whilst time recording information is commonly used to determine the amount of remuneration that an insolvency practitioner is entitled to be paid the requirement to maintain time records was introduced to ensure transparency and openness regarding office holders' fees for all types of insolvency proceedings. Consequently, the obligation to keep time records applies whether or not the office holder is to be remunerated on the basis of time properly spent in undertaking the administration of each case.

Practitioners are reminded that The Insolvency (Amendment) Regulations 2005 inserted into The Insolvency Regulations 1994 a new regulation, 36A, dealing with the provision of information about time spent on a case to a specified group of persons. With effect from 1 April 2005 insolvency practitioners are required, following a request from any creditor, any director or contributory in corporate insolvencies and an insolvent individual to provide, for specified periods, the total number of hours spent on the case by the office holder and any staff working on the case, the average hourly rate for each grade of staff and the number of hours spent by each grade of staff. Such information must be provided free of charge and within 28 days of the receipt of the request. Where the insolvency practitioner has vacated office the obligation to provide this information only arises where requests are made within two years from the date that the practitioner vacated office. Further, the obligation only arises in cases where the insolvency practitioner was appointed on or after 1 April 2005.

It is becoming increasingly common for office holders in voluntary arrangements to be remunerated on a fixed fee basis. The requirements of Regulation 13(1) of The Insolvency Practitioners Regulations 2005 and Regulation 36A of The Insolvency Regulations 1994, as amended, are not negated by any agreement between the insolvent and the arrangement creditors for the office holder to be paid a fixed fee for acting as nominee or supervisor. Practitioners should ensure, therefore, that where they act as the office holder in voluntary arrangements they maintain proper time records in compliance with Regulation 13 and are able to provide information regarding the time spent on a case together with details of the relevant charge out rates in accordance with their obligations under Regulation 36A. Practitioners are also reminded that Regulation 13(5) requires case records to be preserved until the later of the sixth anniversary of the office holder's release or discharge and the sixth anniversary of the expiration or cessation of any security or caution.

NB The Insolvency Service has now identified that it did not have the necessary powers to include voluntary arrangements within the ambit of Regulation 36A. Consequently, Regulation 36A does not currently apply to voluntary arrangements, such that supervisors are not compelled to provide the information set out in the Regulation to creditors should they receive such a request. ACCA understands that The Insolvency Service will be introducing a further statutory instrument in 2006 to remedy this problem. Details will be provided via the Insolvency Service's web-site and Dear IP in due course. IPs are, of course, still required to maintain time records in order to comply with Regulation 13 of the Insolvency Practitioner Regulations 2005.

2. Technical Update

2.1 RELIEF FOR THE INDEBTED – AN ALTERNATIVE TO BANKRUPTCY

The Insolvency Service has concluded its consultation on its proposals for introducing a new debt relief procedure for debtors with few assets and low levels of debts.

Under the new procedure, individuals who meet set criteria, which will include conditions as to their liabilities, assets and income will be eligible to apply for a debt relief order. The order will provide relief from enforcement of the debts covered; discharge from those debts will come after twelve months.

The final conditions governing the new order will be set out in regulations, but the Service's recommendation will be that the debt limit governing the right to apply for the new order should be set initially at £15,000, subject to periodic review. Secured creditors will retain their security and their interests will be unaffected. The assessment of eligibility for the scheme will take into account gross assets and liabilities (subject to allowances for items used in the debtor's employment or trade). Eligibility will be subject to an asset limit of £300 (initially).

There will also be a cap set on the amount of surplus income that a debtor will be allowed to have without having to make repayments towards settlement of his debts. Again, this cap will be set down in regulations and is likely to be put at £50 pm initially. A common financial statement will be introduced for the purpose of determining surplus income; R3 is advising on its drafting.

There will be a range of safeguards against abuse by debtors. Where a debtor makes a misleading statement in order to obtain a debt relief order, the order will be revoked. Where the misrepresentation is deliberate, the debtor will be subject to prosecution or a bankruptcy restrictions order. A debtor who receives a windfall or an increase in income will be required to disclose it to the official receiver – failure to do so will result in the order being revoked and the debtor being subjected to prosecution.

The Government will now proceed to introduce the new procedure via secondary legislation.

2.2 COMPANY LAW REFORM

The Company Law Reform Bill was published in November and is likely to become law by Spring 2006.

The Bill inserts a new section 174A into the Insolvency Act 1986 with the effect of reversing the House of Lords decision in Leyland Daf. The new section states that the expenses of a winding up in England and Wales are to be paid out of the company's assets in priority to the company's unsecured debts and to the claims of floating charge holders. Regulations will provide a mechanism for the charge holder to agree the quantum of general liquidation expenses recoverable by the liquidator. The Insolvency Service has invited comments on how this mechanism should work in practice – comments should be sent to policy.unit@insolvency.gsi.gov.uk

The Bill also introduces a new measure to allow companies and their auditors to enter into liability limitation agreements. Such agreements, which will have to be agreed to by the company on one of three prescribed bases, will have the effect of limiting the liability of the auditor to the client company for negligent work. While the focus of attention in this matter has been on the introduction of the basis of proportionate liability for the auditor, the clauses are worded in such a way as to provide for a wider basis of liability limitation to be agreed between the two sides.

2.3 VAT ON NOMINEE'S AND SUPERVISOR'S FEES

Following the decision of The VAT and Duties Tribunal (decision number 17880) regarding Debt Management Associates Ltd, in which it was decided that VAT is not chargeable on fees for work undertaken by debt management companies, and Business Brief 30/03, issued by HM Revenue and Customs, there appears to be some confusion amongst insolvency practitioners as to whether or not fees incurred for acting as nominee or supervisor in voluntary arrangements are exempt from VAT. Consequently, there have been instances where practitioners who are VAT registered have not charged VAT when invoicing for their fees as officeholder in voluntary arrangements.

Practitioners should note that neither the Tribunal's decision nor the relevant provisions in the Business Brief apply to the activities of insolvency practitioners when taking appointments in voluntary arrangements. Practitioners who are VAT registered must, therefore, charge VAT at the standard rate on both nominee's and supervisor's fees in all circumstances. Practitioners should also refer to the November 2005 quarterly newsletter produced by HM Revenue and Customs' National Insolvency Unit in which further clarification is given.

2.4 STATISTICS

The third quarter 2005 statistics show a rise of 14.2% in company liquidations as compared to the corresponding quarter of 2004. Compulsory liquidations rose by 35.7% and CVLs by 1%. Receiverships fell by 16.3% but administrations rose by 47.3% as against the same period last year – the eighth successive quarterly rise.

As regards individual insolvency, bankruptcies rose by 30.9% and IVAs by 95% over the third quarter of 2004.

In the 6 months to September 2005, 165 people were made subject to bankruptcy restriction orders or undertakings for periods of between 2 and 11 years. In addition, the DTI has issued directions to take proceedings against another 313 bankrupts and Official Receivers are working on another 600 reports. The Insolvency Service reports that the most common allegations made in support of applications are i) contributing to the bankruptcy by gambling or extravagance, ii) incurring debts with no reasonable prospect of being able to meet the liability and iii) entering into transactions to prefer friends or relatives ahead of other creditors or at a value less then the true value.

3. Legislation

INSOLVENT PARTNERSHIPS (AMENDMENT) ORDER 2005 (SI 2005/1516)

The Order provides that the rules on administration in s8 and Schedule B1 of the Insolvency Act shall apply to insolvent partnerships, with specified modifications.

The Order took effect as from 1 July 2005.

PENSION PROTECTION FUND (INSOLVENT PARTNERSHIPS) (AMENDMENT OF INSOLVENCY EVENTS) ORDER 2005 (SI 2005/2893).

This Order amends s121(4) of the Pensions Act 2004 (insolvency events triggering involvement of the Pensions Protection Fund) in consequence of the foregoing SI. The amendment provides that an insolvency event can occur where an insolvent partnership enters into administration under schedule B1 of the Insolvency Act 1986.

The amendment came into force on 10 November 2005.

SIMILARITY OF COMPANY NAME FOR 'PHOENIX' PURPOSES

Revenue and Customs Commissioners v Walsh ([2005] EWHC 1304 (Ch))

For the purpose of deciding whether or not a company name was so similar to a prohibited name under s216 of the Insolvency Act 1986 as to suggest an association between the two companies, the test to be applied was whether the similarity between the two names was such that it was probable that members of the public, in comparing the two names, would associated the two with each other.

Whether there would probably be an association between the two names was to be assessed by the likely impact on a reasonable person, having regard to the way that the titles of the companies were likely to be used, the sort of customers who would use the companies and the context in which they would do so.

In the case in question, the defendant's company, SG & T Walsh Co Ltd went into insolvent liquidation on 13 June 1994. He became a director of another company, Walsh Construction Ltd, on 17 February 1994. The Revenue Commissioners alleged that the defendant, having been a director of a company which had gone into insolvent liquidation within the previous five years, had contravened s216 by being a director of company which was known by a prohibited name and was therefore personally liable for the debts of the insolvent company. The Commissioners argued that both companies claimed to be building and civil engineering contractors, had traded from the same address using the same phone and fax numbers, had both carried out work for the same customer, the defendant's wide was the secretary of both companies, and the companies had used similar letterheads.

It was held that the fact that the two companies carried out the same type of business and had the same address and contact numbers were likely to cause a new customer to think that the two companies were closely associated. The defendant was therefore liable under s217.

DISSOLUTION FOLLOWING ADMINISTRATION WITH ASSETS

Re GHE Realisations Ltd ([2005] EWHC 2400 (Ch))

The Companies court has issued directions to an administrator who intended to realise the company's remaining assets with a view to paying off preferential creditors in full and making distributions to unsecured creditors without first putting the company into voluntary liquidation. The plan thereafter was to exit from administration to dissolution under para 84 (1) of Schedule B1 to the Insolvency Act 1986

The Court acknowledged that the Act gave no express guidance as to what the court needed to take into account under para 65(3) in considering whether to give permission for a distribution to be made. The court held however that what needed to be considered was the need to ensure that the proposed distribution was in the best interests of the creditors as a whole.

The court then considered whether it could permit the company to exit to dissolution under para 84(1). Such transfer is dependent on whether the administrator 'thinks that the company has no property which permits a distribution to be made to creditors'. The court held that the correct interpretation of this wording is that the administrator, having already made a distribution, had to think that the company had no further property which might permit a distribution. Whether the company had previously had assets

which were distributable was immaterial, as was whether those assets had been distributed. If prior distribution of the available assets precluded the giving of a notice to the Registrar of Companies under para 84(1), that would also preclude the giving of a para 83(3) notice (on moving from administration to CVL) and so would limit the exit routes open to the administrator.

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