BULLETIN

INSOLVENCY UPDATE FROM JOHN D TRAVERS & COMPANY

Winter 2015/2016

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Watch Your Tax!

Members' Voluntary (solvent) Liquidations (MVLs) may not be as tax effective as they used to be from 6 April 2016.

From that date H M Revenue & Customs (HMRC) is implementing a new Targeted Anti-Avoidance Rule aimed at what it feels is an area of abuse of the MVL process, which will have the effect in some circumstances of treating distributions of capital as income and attracting tax as such, rather than under the Capital Gains Tax (CGT) rules.

The main area HMRC is currently targeting is where:

- An individual who is a shareholder in a private company receives a distribution from that company in respect of shares in an MVL;
- Within a period of two years after the winding up the shareholder continues to be involved in a similar trade or activity; and
- The arrangements have a main purpose, or one of the main purposes of obtaining a tax advantage.

This provision will relate to all distributions made in a winding up on or after 6 April 2016. It is the date of distribution that is relevant therefore, and not the date of liquidation.

HMRC has also indicated that it has other targets in its sights, specifically:

"Moneyboxing" – where companies have retained profits in excess of the company's commercial needs with a view to the shareholders receiving those profits as capital rather than income when the company is liquidated.

"Special Purpose Companies" - where the operations of a business are divided among separate companies, each set up to run a single project. On completion of each project, the company is liquidated and the profits are paid to the shareholders as capital rather than income.

"Timing of distribution in such cases is now critical," says John Travers. "Even if the company is already in liquidation now, and the shareholder distribution is made on or after 6 April 2016, shareholders will be at risk if these criteria apply."

Insolvency Fees

Since 1 October 2015, where an Insolvency Practitioner is seeking approval of his fees on a time costs basis in a formal insolvency process, he is required to provide an estimate of his fees and expenses at the outset of the procedure. This estimate, if approved by creditors will serve as a cap on his fees and if he subsequently wishes to charge more, he must seek further approval from the creditors.

Are Delinquent Directors Now Safe?

In December 2015 it was announced that the no-win-no-fee reforms applying to other legal proceedings since April 2013, will be applied to insolvency proceedings, from April 2016.

This came after long, hard campaigning by the insolvency profession to maintain the "LASPO" exemption previously granted in insolvency proceedings.

The exemption was removed as part of the government's priority of addressing the high costs of litigation in England and Wales. There will be a post implementation review between April 2016 and April 2018, although this will most likely take place towards the end of that period.

"This is very disappointing news for creditors of insolvent companies," said John Travers. "Up to now, we have been able to take action against delinquent directors and other parties to recover funds through the courts, without the risk of incurring expensive legal fees or adverse costs awards in the event that we were unsuccessful. We won't be able to do that after April, so it looks like opportunities for recovery where funds are tight may be lost."

There are alternative courses of action open to insolvency practitioners in some circumstances, but it is likely that these will be far more costly .

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More Red Tape in the Bin!

With effect from 1 October 2015, The restriction prohibiting Liquidators and Trustees in Bankruptcy from exercising certain powers without the sanction of creditors, the court or the Secretary of State for Business, Innovation & Skills was lifted, thus removing another layer of red tape from insolvency proceedings.

Are Pre-Packs Illegal?

In reality, no they are not. But you could be forgiven for believing that they are.

Following the recommendations of regulatory expert, Theresa Graham in the summer of 2014, the insolvency profession and creditor organisations have developed a new code of conduct to apply to pre-pack sales of businesses by administrators to connected parties, which came into effect on 1 November 2015.

A new Statement of Insolvency Practice (SIP) 16 was issued in October 2015 and a Prep-Pack Pool consisting of a group of professionals with extensive business experience has been established to review proposed pre-pack sales to connected parties.

The new SIP 16 appears in full on our website at www.johndtravers.co.uk. Simply enter "SIP 16" in the search field and follow the trail. To "SIP 16 01 November 2015". This SIP contains inter alia new rigid marketing requirements.

In addition, insolvency practitioners are required to advise connected party purchasers of the existence of the pre-pack pool and the fact that it is recommended that they put details of their proposed purchase to it, together with a detailed business plan demonstrating the viability of the new company. The Pool charges a fee of £800 plus VAT for this review.

The review is not intended to be a discussion forum. A panel member will review the proposal and simply give his views. Putting the proposal to the pre pack pool is wholly voluntary.

So if the process is voluntary, why not ignore it?

John Travers says, "The fact that putting a proposal to the Pre-Pack Pool is a voluntary process should not persuade potential purchasers to treat it lightly. The Small Business Enterprise and Employment Act 2015 contains a provision enabling government to implement new legislation governing connected party pre-packs, within five years of 26 May 2015, if the objectives of the current new regime to bring greater transparency to the process are not achieved."

If that happens, the answer to the question may be quite different!

Disqualified Directors Beware!

In the past, directors of insolvent companies who had been disqualified from acting as directors were not liable to any financial penalty by reason of the disqualification alone. However, the law has changed with effect from 1 October 2015.

Directors who are disqualified in the future could now face the prospect of the Insolvency Service seeking to obtain a Compensation Order or Undertaking against or from them, in respect of any unfit conduct that has occurred since the date the legislation changed. Action to recover these penalties is required to take place within two years of the date a Disqualification Order or Undertaking is made or given.

A further change to the legislation extends the time within which the insolvency Service must commence disqualification proceedings. Formerly, action had to be commenced within two years of the commencement of the insolvency proceedings. This has now been extended to three years.

John Travers said, “Clearly it is going to be a while before the effects of this legislation will be seen. Directors will only face a financial penalty in respect of their actions from 1 October 2015 onwards. However, any director who is acting in any way other than he should be right now may be liable in the future.”

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Bankruptcy and Winding up Petitions

The current approach to amending the law seems to be to create a new statutory instrument, making amendments to certain sections of existing legislation. At least that is what has happened in the case of the Insolvency Act (Amendment) Order 2015.

For some time there had been speculation that the minimum level of debt for creditors to issue a bankruptcy or winding up petition would be increased from £750 (a limit set in December 1986, when the current Insolvency Act was implemented). Finally, this Order did just that… or did it?

The Order amends section 267(4) Insolvency Act 1986 by replacing the definition of the “bankruptcy level” of £750 with a figure of £5,000. So that is clear enough. A creditor who is owed less than £5,000 cannot petition for the bankruptcy of an individual.

However there is no corresponding amendment to section 123(1)(a) Insolvency Act 1986, the relevant section for winding up petitions. The minimum level of debt to issue a winding up petition against a company therefore remains at £750. Can that be right? Well, it’s the law, so it must be.

Directors of Hairdresser -Turned-Insolvency Business Disqualified for Ten Years

Two directors of an Insolvency Practitioner business in Chesterfield, Derbyshire have been disqualified from being directly or indirectly involved in the promotion, formation or management of a company for a period of ten years.

Information from the Insolvency Service reveals that Baker Donald Limited originally traded as hairdressers. It moved into giving insolvency advice to troubled businesses and individuals in 2012, referring cases to a firm of insolvency practitioners before employing its own licensed insolvency practitioner.

Following investigation, the Secretary of State for Business, Innovation & Skills issued a public interest winding up petition against the company and it was wound up by the court on 17 April 2014.

The Insolvency Service investigation unearthed numerous instances of improper conduct including: failure to segregate monies owed to clients, third parties or the company; failure to maintain adequate accounting records, which were inconsistent with accounts filed, failure to maintain adequate records to support the charging of significant fees and the issue of misleading marketing material.

Neither of the directors was a licensed insolvency practitioner and their disqualification terms commenced in December 2015 and January 2016, respectively.

NEWS ROUND UP

New Rules for Old!

New Insolvency Rules are to be introduced in October 2016 .

These will be a whole new set of rules, replacing the current ones introduced in 1986 and subjected to numerous amendments.

Currently the new rules, which are still in draft form, consist of 387 pages, including six pages of definitions and 10 Schedules and are intended to consolidate existing rules and amendments, modernise and simplify language and reduce red tape.

Office Holder Actions

Administrators' powers to bring claims have now been more closely aligned to those of liquidators. Administrators may now pursue claims for fraudulent and wrongful trading.

Liquidators and Administrators can now also assign actions for fraudulent and wrongful trading, transactions at an undervalue, preferences and extortionate credit transactions. The proceeds of such assignments do not fall within net property and are therefore not available for the benefit of floating chargeholders.

HMRC Rated Worst Debt Collectors

In a league table published by Citizens Advice, HMRC are bottom of the relegation zone, having been voted worst organisation for debt collection. Among a number of other concerns, advisers highlighted major difficulties taxpayers had making contact with anyone at HMRC to help with their enquiries.

Business Distress at an All-time Low

According to insolvency trade body R3, business distress is at its lowest ever with just 17% of businesses reporting key indicators of distress. This represents a substantial fall on the previous record low of 24% during the period April to September 2015

Our Services

Corporate Recovery

Members' Voluntary Liquidations

Creditors' Voluntary Liquidations

Compulsory Liquidations

Administrations

Company Voluntary

Arrangements

Administrative Receiverships

Law of Property Act Receiverships

Partnership Voluntary Arrangements

Business Advice

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Bankruptcy

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