118

# Technical Bulletin

**Issue No 118. July 2017**

**Information issued by the Technical Committees of the Association of Business Recovery Professionals to members, associates and new professionals**

## Contents

## 118.1 HMRC Assignment of VAT

- There will be occasions when an office holder will be required to vacate office prior to the receipt of the final VAT refund. HMRC have agreed that an office holder can assign the VAT refund and have agreed a form of wording for the assignment and the accompanying notice for use with respect to England and Wales companies.

Members will be aware that as a result of Regulation 9 of the VAT Regulations, which treats an insolvency practitioner (IP) as the taxable person only for the duration of their office, HMRC has been unable to make repayments of VAT once an IP has vacated office. HMRC are aware that this can sometimes cause practical problems for IPs who are unable to delay the vacation of office pending receipt of an expected VAT refund, for example in an Administration which automatically comes to an end (unless extended) after a period of 12 months, or where, pre 6 April 2017, a final meeting had been convened in a liquidation or bankruptcy.

In order to facilitate the IP vacating office HMRC has agreed that an office holder can assign the VAT refund to a third party prior to vacating office. R3 and HMRC have agreed a form of wording to be used, with an accompanying notice. The Notice of Assignment should be submitted in duplicate, one copy to be endorsed by HMRC to confirm receipt and then returned to the assignee. Only one copy of the actual Deed should be submitted. This Deed can be used for repayment claims made on either a VAT 426 or a VAT return. Copies of the Deed and Notice may be found on the R3 website https://www.r3.org.uk/what-we-do/publications/professional/hmrc-assignment-of-vat.

Members are advised that the current wording of the assignment applies to England and Wales companies only (Section 8 states that it is covered by the laws of England and Wales). We understand that HMRC are considering a suitable form of wording for an assignment in respect of Scotland and Northern Ireland companies.

Members are advised that such an assignment should not be used routinely when closing an insolvency case and only where considered absolutely necessary. Care should therefore be taken to ensure that final VAT returns continue to be submitted in good time to HMRC. There will however be occasions where, due to circumstances outside of the office holder's control, the VAT refund is not received prior to closure of a case. In these exceptional circumstances the assignment may be completed and submitted to HMRC, prior to the office holder vacating office.

Office holders are advised that HMC would only honour an assignment if there are no other post-appointment debts owed by the company to HMRC. Office holders should therefore ensure that all post-appointment VAT and other taxes have been declared and paid to HMRC before entering into such an assignment. If there are outstanding liabilities any repayment claim would be set off against such liabilities under the provisions of Section 130 of the Finance Act 2008.

## 118.2 Change of address for submission of VAT 426 claims

- HMRC have notified R3 that with immediate effect the address for submitting VAT 426 forms has changed. Members are requested to use the new address as shown below.

With immediate effect, the HMRC address for submission of VAT 426 claims has been changed to the address below.

HM Revenue and Customs
Birmingham DRT
VAT 426 Processing only
DMB490
BX5 5AB

Any VAT 426 claims that have been sent to the old Woolwich address will be redirected to the Birmingham office.

Steps have been taken to update the address on the VAT 426 form itself and the Insolvency VAT Public Notice 700/56 will be updated with the new address in due course.

## 118.3 Updated Creditor Guides to office holder fees

- In light of changes introduced by the Insolvency (England and Wales) Rules 2016 R3 have produced up-dated Creditor Guides to office holder fees for administrations, liquidations, bankruptcy and voluntary arrangements.

The updated guides may be found on the R3 website https://www.r3.org.uk/what-we-do/publications/professional/fees

## 118.4 HMRC Members' Voluntary Liquidation (MVL) Processing team

- As part of HMRC's planned re-organisation their MVL processing team has moved from Worthing to Edinburgh.

HMRC's Member Voluntary Liquidation (MVL) Team's work has moved from EIS Worthing to EIS Edinburgh. The contact address is:

Enforcement and Insolvency Service
MVL Team
Elgin House
20 Haymarket Yards
Edinburgh
EH12 5WT

The MVL advice line number is 0300 322 7815 with increased opening hours Monday to Friday 09:00 to 17:00.

The MVL email address remains as eisw.mvl.team@hmrc.gsi.gov.uk.

V769s, dividend payments and any correspondence on MVLs which previously would have been sent to EIS Worthing should be sent to the EIS Edinburgh address.

### Clarification on MVL closure clearance requests

HMRC would like to remind IPs that the corporation tax office and the MVL team provide separate clearance confirmations on all MVLs. The MVL team issues integrated insolvency claims encompassing all HMRC debts and provides debt clearance confirmation following payment of all these debts. The MVL team also give clearance that PAYE and VAT matters have been finalised.

BTOPs remain responsible for anything relating to corporation tax (CL) returns/assessing. IPs should therefore also seek final clearance from BTOPs that all pre and post MVL CT assessing issues have been resolved. The MVL team is unable to provide this clearance.

The CT Central helpline is 0300 200 3410

Or the contact address is:

HMRC: Corporation tax office
Corporation Tax Services
HM Revenue and Customs
BX9 1AX

To clarify some confusion, the MVL team has been issuing ‘interim’ claims when amounts and/or returns remain outstanding for any tax types. These may be in a nil amount but the interim claim (or claims) will advise what information/returns are still required before any final monetary debt can be established. It will also indicate any currently known outstanding tax to enable early interim payment by the IP whilst the final position is established.

Since 1 December 2014 the MVL team has not given separate tax type clearance and will only be issuing a final claim letter when all matters have been fully resolved and all debts due have been paid. The nil final claim letter will include a confirmation of clearance.

IPs are also reminded that the following forms should be sent directly to the relevant office and do not need to come via the MVL team:

i. V7 deregistration request must be sent separately to Grimsby Deregistration Unit: Imperial House, 77 Victoria Street, Grimsby, DN31 1NH.

ii. VAT 427 Queries: These are dealt with by the VAT 427 team: HMRC Corporate Treasury, vat 2 Unit 2, DMB 612, BX5 5AB who can be contacted on 0300 583936. The MVL team are unable to forward any correspondence or raise any queries relating to VAT 427s on your behalf.

iii. V100 to VAT Controller, VAT Central Unit, BX5 5AT.

iv. V193 to VAT Controller, VAT Central Unit, BX5 5AT.

v. Any RTI and Corporation Tax returns should continue to be sent to the appropriate processing office or filed on line if possible.

## 118.5 SIP 6 Decision Making in Insolvency Procedures

- A new interim SIP 6 for England and Wales 'Decision Making in Insolvency Procedures' has been issued by JIC effective from 6 April 2017. The SIP applies to all office holders in all forms of insolvency proceedings when obtaining a formal decision of the creditors via a deemed consent process or a qualifying decision procedure. The SIP also applies when assisting directors in their obtaining a decision of the creditors for the voluntary winding up of a company.

As members were previously alerted in R3 Technical Alert email 13 March 2017, the Joint Insolvency Committee ('JIC') has released a brand new interim Statement of Insolvency Practice ('SIP') 6. Copies of all SIPs are available on the R3 website at https://www.r3.org.uk/what-we-do/publications/professional/statements-of-insolvency-practice

The new SIP 6 is entitled 'Decision Making in Insolvency Procedures' and replaces current SIPs 8, 10 and 12 in England and Wales only. The equivalent SIPs in Scotland and Northern Ireland will remain in force. SIPs 8, 10 and 12 are withdrawn from 6 April 2017 in respect of all appointments in England and Wales other than in respect of Limited Liability Partnerships and certain other special insolvency regimes (see the Deregulation Act 2015 and Small Business, Enterprise and Employment Act 2015 (Consequential Amendments) (Savings) Regulations 2017 and the Insolvency (England and Wales) Rules 2016 (Consequential Amendments and Savings) Rules 2017. The new SIP came into force 6 April 2017 to coincide with the commencement of the Insolvency (England and Wales) Rules 2016 and it reflects the standards that will be expected of insolvency practitioners under the new legislation.

The new SIP 6 has only been approved by the JIC on an interim basis due to time constraints not allowing for the customary full public consultation to take place. It was considered in this instance that insolvency practitioners should continue to have an appropriate framework to work within upon commencement of the new Rules and the existing SIPs (8, 10 and 12) were not deemed to be adequate expressions of expected standards, in some cases they conflicted with the incoming provisions. It is expected that the JIC will conduct a full consultation regarding the interim SIP 6 with a view to issuing a version of the SIP in its final form in December 2017.

The new SIP reflects the changes in the creditor approval regime, only retaining some of the provisions pertaining to meeting information the officeholder is obliged to provide to creditors and recognising that in most instances a physical meeting of creditors will not be used to obtain a decision from creditors.

## 118.6 SIP 15 Reporting and providing information on their functions to committees and commissioners

- A revised SIP 15 came into effect from 1 March 2017 for cases started on or after that date. The SIP also applies to IPs providing advice or assistance to directors in connection with the appointment of a liquidator in a CVL. The SIP applies UK wide.

As members were previously alerted in R3 Technical Alert email 1 February 2017, the Joint Insolvency Committee ('JIC') has released a revised SIP 15. The SIP, entitled Reporting and providing information on their functions to committees and commissioners, requires information to be provided to creditors prior to them considering nomination to a committee.

SIP 15 requires office holders to ensure that those considering nomination to committees and those who are elected to committees are provided with sufficient information for them to consider nomination and to be able to carry out their duties and functions. Office holders are also required to advise creditors in writing how they may access suitable information on the role of the committee prior to any election of committee members.

While IPs are able to make information available to creditors in their own style, R3 has produced a guide, in conjunction with the RPBs, to assist IPs in fulfilling the requirements imposed by SIP 15.

The guide will provide creditors with:

- An understanding of the role of the Committee in insolvency proceedings
- Information on how Committees are formed; and
- Guidance on what might be expected for them should they choose to serve as a Committee member.

This will enable creditors to make an informed decision as to whether they wish to seek to form a Committee or to nominate themselves to serve on a Committee. The guide may be found on the R3 website here https://www.r3.org.uk/liquidation_/creditors__committees_and_commissioners__a_guide_for_creditors

## 118.7 Standard Financial Statement

- MAS launched the Standard Financial Statement on 1 March 2017. This is intended to be a universal financial assessment tool used primarily by debt advice providers and creditors (or their agents). The Standard Financial Statement (SFS) will replace the Common Financial Statement (and any other financial statements such as the Common Financial Statement and Stepchange guidelines that are currently in use) after a transitional period. The IVA Protocol already makes reference to the SFS as one of the means of assessing income and expenditure.

The Money Advice Service (MAS) is an independent body which has a statutory responsibility under the Financial Services Act 2012 to improve the quality, consistency and availability of debt advice services across the UK. The Standard Financial Statement (SFS) was developed by MAS to provide consistency across the sector when assessing a debtor's income and expenditure. The aim is that the SFS will provide a single set of income and expenditure categories with spending guidelines to be used across the industry, making it easier and quicker to reach and record a decision when making an affordability assessment in respect of repayment amounts. In a move away from current spending guidelines the SFS includes a savings category which is intended to assist debtors to build financial resilience while repaying their debts, helping them to withstand unexpected costs and give them a solid financial footing once they are debt free.

In order to gain access to the SFS, related materials and guidance IPs must apply for a membership code which can be accessed via the SFS website https://sfs.moneyadviceservice.org.uk/en/what-is-the-standard-financial-statement

There is no fee for applying for a membership code. As mentioned previously all other financial statements currently in use will be phased out over the coming 12 months so that all debtors will be assessed using the same tool regardless of whom they approach for debt advice.

## 118.8 The Disqualified Directors Compensation Orders (Fees) (England and Wales) Order 2016

- The Disqualified Directors Compensation Orders (Fees) (England and Wales) Order 2016 (SI 2016/1047) came into force 30 November 2016 and prescribes the fees deductible by the Secretary of State (SoS) before making a distribution of a payment to creditors following the making of a compensation order or undertaking under ss15A and 15B of the Company Director Disqualification Act 1986.

The order prescribes the fees to be charged by the Secretary of State (SoS) for making a distribution of funds if the case required a compensation order or undertaking to be made in accordance with 15A or 15B of CDDA 1986. The fee will be determined by the hourly rate of the Insolvency Service staff dealing with the fee distribution, together with any necessary disbursements or expenses properly incurred. The net sum payable is then divided equally between the total number of creditors specified in the compensation order or undertaking. In Scotland the equivalent is the Disqualified Directors Compensation Order (Fess)(Scotland) Order 2016.

## 118.9 SoS fees and third party funds – Mohammed Safier v Wendy Wardell and David Standish, the OR

- In the case of Mohammed Safier it has been held that Secretary of State (SoS) fees are not payable on third party funds paid into the ISA in a bankruptcy.

**Background to the case:**

A bankruptcy order was made against Mohammed Safier on 20 June 2013, following a petition presented by a creditor 18 February 2013. He had bankruptcy assets which had vested in the Trustee, the main one being a property estimated to be worth £200,000. None of the bankruptcy assets were realised however, with third party funds being provided by his brother to settle the bankruptcy debts and avoid possession proceedings being continued by the trustee in respect of the property. The debtor applied for an annulment 18 July 2016 under s282(1)(b) IA 1986 on the grounds that since the making of the bankruptcy order all of the bankruptcy debts and expenses had been paid or secured to the satisfaction of the court.

The fact that the bankruptcy debts and expenses had been paid in full was not in dispute, the dispute centred around the extent of the expenses to be paid by Mr Safier. On 15 October 2013 the Court ordered the suspension of Mr Safier's discharge from bankruptcy.

The Trustee contended that the SoS fee was not payable on the funds provided by the brother, as they were third party funds however the OR disagreed. The case was concerned with the SoS administration fee (B2) not the OR's administration fee (B1).

B1 The Official Receiver's administration fee: For the performance by the OR of his general duties as OR on the making of a bankruptcy order there shall be a fee payable of £1,625.

B2 The Secretary of State's (SoS) administration fee applicable to bankruptcy orders made on or after 6 April 2010. For the performance of the SoS's general duties under the insolvency legislation in relation to the administration of the estate of each bankrupt, there shall be payable a fee calculated in accordance with the following scale as a percentage of chargeable receipts relating to the bankruptcy (but ignoring that part of the chargeable receipts which exceeds the bankruptcy ceiling) at the rate of:

0% of the first £2,000
100% of the next £1,700
75% of the next £1,500
15% of the next £396,000
1% of the remainder, subject to a maximum of £80,000

It was noted that this fee regime was abolished by the Insolvency Proceedings (Fees) Order 2016 (SI 2016/692). For bankruptcy petitions presented after this date a set fee of £6,000 is charged, therefore this case is most relevant to bankruptcies where the petition was presented before 21 July 2016.

## Outcome

The judge (without objection from either the Trustees or the OR) ordered that the bankruptcy be annulled and the petition dismissed.

Reference was made to the Dear IP issued in October 1997 where the IS gave guidance in relation to the payment of third party funds into the ISA. The judge referred to the fact that the guidance did not distinguish between the position where there are other assets belonging to the debtor and the position where there are none. The Guidance suggested that third party funds do not form part of the bankrupt's estate. The judge inferred therefore that the moneys received from the third party were not received in the course of the trustee's functions as trustee and this would be the position whether there were assets in the estate or not. He stated that it followed that if the Guidance was correct the third party monies were not payable into the ISA and there was no fee payable. The Judge stated that 'the receipt of third party funds is not part of the Trustee's function and the moneys are not payable into the ISA account. It follows that no fee is payable in respect of them'.

## How should insolvency practitioners deal with third party funds following this case?

The case provides clarity to insolvency practitioners. Third party funds should not be paid into the ISA. Previously the practice has been established of third party funds being paid into the ISA with a request that the SoS fee not be applied. In Dear IP 72 'Payment of the SoS administration fee on monies paid into the ISA' the Insolvency Service advised that they would no longer be posting receipts without applying the SoS fee when the 'non SoS fee' box is ticked on the bank giro credit slip. All monies paid into the ISA account would attract the SoS administration fee. IPs requesting that the SoS fee not be applied will be asked to provide a full explanation as to why the funds should not attract the SoS fee. Should the IS determine that SoS fees should not be applied the fee deducted will be rebatted. Insolvency practitioners are advised therefore that all funds paid into the ISA will attract the SoS fee.

## 118.10 Payment of statutory interest to HMRC

- Insolvency practitioners are reminded that HMRC should be treated the same as any other creditor when making payment of statutory interest on proved debts. Statutory interest should be paid at 8% rather than 2.75% late payment of Corporation tax rate.

Under the Insolvency legislation, where there is a surplus remaining after the payment of debts proved in a winding up, the surplus shall first be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the company went into liquidation (s189 IA 86).

All interest under this section ranks equally, whether or not the debts on which it is payable rank equally.

The rate of interest payable under this section in respect of any debt is the greater of:

a) The rate specified in section 17 of the Judgements Act 1838 on the day on which the company went into liquidation (currently 8% in England, Wales and Northern Ireland and 15% for Scotland), and

b) The rate applicable to that debt apart from the winding up.

We have been made aware by members that previously they were under the impression that HMRC were unable to accept statutory interest at 8% on the basis that they had no mechanism for dealing with such interest. The generally accepted practice has therefore arisen of paying interest to HMRC at the rate of 2.75%, being the interest charged under Corporation Tax legislation.

We have been made aware recently by members that HMRC are reminding IPs that interest should be paid at the rate of 8% rather than 2.75%. This appears to have arisen following the HMRC MVL team moving from Worthing to Edinburgh and the team becoming aware of the accepted historical practice. HMRC advise that there has been no change in policy, interest on HMRC debt in an insolvency has always been due at 8% and members are reminded of this obligation when making provision for interest in an MVL and other insolvency cases where statutory interest falls due.

## 118.11 Recordings of creditor meetings – giving notice to attendees that a virtual meeting is to be recorded

- Following concerns raised by members as to how to evidence proceedings in virtual meetings consideration has been given as to whether office holders can record virtual meetings and if they do so, what matters should be considered and what notice should be given to attendees.

It is considered that office holders are permitted to record a virtual meeting to provide clear evidence of the proceedings of the meeting. Provided each attendee gives consent (which can be inferred, depending on the circumstances), recording the creditor meeting is permissible under the Regulation of Investigatory Powers Act 2000. However, as a person’s image is personal data, the recording would qualify as a processing of personal data. We have therefore included language in the suggested notice below that addresses this.

Consent can be inferred depending on the circumstances. The example usually cited for this is a pre-recorded message that is often played by call centres, which states that calls are recorded for training and monitoring purposes. It is possible that joining a meeting, having had prior notice that it will be recorded, could constitute inferred consent to such recording. However, as a matter of good practice, we would suggest reading out similar wording to that shown below at the start of each meeting and also including the wording in the actual notice of the virtual meeting to supplement the information required by Rule 15.5 of the Insolvency (England and Wales) Rules 2016.

'All virtual meetings of creditors will be recorded (video and/or audio) in order to establish and maintain records of the existence of relevant facts, or decisions that are taken at such meeting. By attending a meeting you consent to being recorded, including possible recordings of your facial image. Where any recording of a meeting also entails the processing of personal data, such personal data shall be treated in accordance with the Data Protection Act 1998'.

## 118.12 Court proceedings in bankruptcy

- In light of changes introduced by the Insolvency (England and Wales) Rules 2016 proceedings initiated by a trustee will be an originating application and will attract Fee 3.5 in the sum of £280.

Under the new adjudicator system for bankruptcy debtors no longer open proceedings in the court by filing their petition. When a bankruptcy order is made therefore it no longer has a local court reference. This has led to a number of queries from members asking which court to use if they wish to submit proceedings and what fees this should attract. Under the new adjudicator system on receiving an application for bankruptcy the Adjudicator opens a bankruptcy file. Where a bankruptcy file has been opened all documents subsequently filed with the Court are placed upon the bankruptcy file. When an order is made the bankruptcy file is passed to the Official Receiver. If a Court application is subsequently made the Court is not required to open and maintain a file under the Insolvency Act or Rules but are required to place all documents upon the bankruptcy file.

An application by the trustee is going to be an originating application. Under the Civil Proceedings Fees Order 2008, Fee 3.5 is payable 'on an application under the Insolvency Act 1986 other than one brought by petition and where no other fee is specified'. The fee is currently £280. The fee is not specified as payable where the application is made in existing proceedings.

The local court with reference to the debtor's home address should be used.

Association of Business Recovery Professionals

8th Floor, 120 Aldersgate Street, London EC1A 4JQ
Tel 020 7566 4200 Fax 020 7566 4224
email: association@r3.org.uk

*Key sponsorship partners*
IRS
Willis Towers Watson
CREDEBT