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9 February 2017

OFFICIAL RECEIVER'S OFFICE CIRCULAR NO. 5/2017

Prosecution of Insolvency Offences – Supplemental to ORO Circular No. 6 of 2014

(I) Background

1. Official Receiver's Office Circular No. 6/2014 dated 14 March 2014 on "Prosecution of Insolvency Offences" ("ORO Circular No. 6/2014") sets out the general principles and guidelines for referral of insolvency related offences under certain provisions of the Companies Ordinance (Cap. 622) ("Cap. 622") and the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) ("Cap. 32") to the Official Receiver for investigation.
2. By the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Ordinance 2016 (Commencement) Notice 2016, the Secretary for Financial Services and the Treasury appointed 13 February 2017 as the day for which the Companies (Winding Up and Miscellaneous Provisions) (Amendment) Ordinance 2016 (14 of 2016) ("CWUMP(A)O") (except Division 7 of Part 8) comes into operation ("commencement date").
3. The CWUMP(A)O makes amendments to certain provisions of Cap. 32, including S. 190 and S. 274. As from the commencement date, the amended provisions would apply subject to the transitional and savings provisions in Schedule 26 of Cap. 32 (as inserted by CWUMP(A)O). This Circular sets out the general principles and guidelines for referral of insolvency related offences under the amended S.190 and S. 274 to the Official Receiver for investigation. For cases where the pre-amended provision in S. 190 or S. 274 as in force immediately before the commencement of CWUMP(A)O continues to apply or to have effect by virtue of Schedule 26 of Cap. 32, reference should continue to be made to the general principles and guidelines set out in ORO Circular No. 6/2014.

(II) General Principle

4. The general principles set out under "(II) General Principle" in ORO Circular No. 6/2014 are also applicable.

(III) Guidelines for Referral

5. (a) S. 190 of Cap. 32

The relevant statutory provisions and offences are set out in **Appendix I**.

By the transitional and savings provisions under S. 5 of Schedule 26 to Cap. 32, if the petition for the winding up of a company has been presented before the commencement date, then in relation to the winding up and the appointment of a provisional liquidator in connection with the petition, the pre-amended provision in S. 190 and some relevant provisions will continue to apply. For such cases, please refer to the guidelines for referral set out in ORO Circular No. 6/2014.

(b) S. 274 of Cap. 32

The relevant statutory provisions and offences are set out in **Appendix II**.

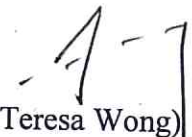
By the transitional and savings provisions under S. 31 of Schedule 26 to Cap. 32, the pre-amended S. 274 will continue to have effect in accordance with the provisions under S. 31(3) of Schedule 26 to Cap. 32 if the winding up of a company commences before the expiry of a period of 2-year beginning on the 1st day of the company's first financial year that begins on or after the commencement date of CWUMP(A)O¹. For such cases, please refer to the guidelines for referral set out in ORO Circular No. 6/2014.

(IV) Limitation period

6. Information must be laid within 3 years after the commission of the offence and within 12 months after the date on which supporting evidence came to the Official Receiver's knowledge².

(V) Effective Date

7. This Circular takes effect on 13 February 2017 and supplements ORO Circular No. 6/2014.


(Ms Teresa Wong)
Official Receiver

To all insolvency practitioners
via (1) The Hong Kong Institute of Certified Public Accountants
(2) The Hong Kong Institute of Chartered Secretaries
(3) The Law Society of Hong Kong

The requirement to submit Statement of Affairs to provisional liquidator / liquidator

1. The relevant statutory provision is set out in S. 190 of Cap. 32. The section provides that:
 - (i) Where the court has made a winding-up order or appointed a provisional liquidator before the making of a winding-up order, there must, unless the court thinks fit to order otherwise and so orders, be made and submitted to the provisional liquidator or liquidator a statement as to the affairs of the company in the prescribed form³ (“S/A”) showing the particulars of its assets, debts and liabilities, the names, addresses and occupations of its creditors, the securities held by them respectively, the dates when the securities were respectively given, and such other information as the provisional liquidator or liquidator may require⁴.
 - (ii) The provisional liquidator or liquidator may, subject to the direction of the court, require any of the persons mentioned in paragraph 2(ii) below who has not made, submitted and verified the S/A to make and submit to the provisional liquidator or liquidator a supplementary affidavit stating that the person concurs in the S/A (“supplementary affidavit”) ⁵. A supplementary affidavit may be qualified in respect of matters dealt with in the S/A, where the maker of the affidavit is not in agreement with the maker of the S/A, considers the S/A to be erroneous or misleading, or is without the direct knowledge necessary for concurring in the S/A⁶.
 - (iii) The S/A and the supplementary affidavit must be submitted to the provisional liquidator or liquidator within 28 days from the date of winding-up order or date of appointment of provisional liquidator (“the relevant date”) or within such extended time as the provisional liquidator or liquidator or the court may for special reasons appoint⁷.
2. Persons liable to make, submit and verify the S/A include:
 - (i) One or more of the persons who are at the relevant date the directors of the company and the person who is at the relevant date the company secretary of the company⁸; or
 - (ii) The following persons (as the provisional liquidator or liquidator, subject to the Court’s direction, may require):
 - persons who are or have been directors or officers of the company.
 - persons who have taken part in the formation of the company at any time within 1 year before the relevant date.
 - persons who are in the employment of the company, or have been in the employment of the company within 1 year before the

relevant date, and are in the opinion of the provisional liquidator or liquidator capable of giving the information required.

- persons who are or have been within 1 year before the relevant date officers of or in the employment of a company, which is, or within 1 year before the relevant date was, an officer of the company to which the S/A relates⁹.
3. If the provisional liquidator or liquidator has required a person to make, submit and verify S/A, the provisional liquidator or liquidator must furnish the person with forms and instructions for preparation thereof¹⁰.
 4. After a S/A or supplementary affidavit has been submitted to the provisional liquidator or liquidator, it is the duty of each person who has made the S/A or supplementary affidavit, if and when required, to attend on the Official Receiver, provisional liquidator or liquidator and answer all questions put to the person and give all further information required of the person, by the Official Receiver, provisional liquidator or liquidator in relation to the S/A or supplementary affidavit¹¹.

Offence

5. If any person, without reasonable excuse, makes default in complying with the requirements of S. 190 of Cap. 32, the person is liable to a fine and for a continued default, to a daily default fine¹².
6. The maximum fine is \$50,000 and the daily default fine is \$300¹³.
7. "Reasonable excuse"

There is no authority on what constitutes a reasonable excuse under S. 190(5) of Cap. 32. A common sense approach is that a person cannot be compelled to prepare S/A if the materials for completing the same is not available. In other words, if a meaningful S/A cannot be made out relying on accounting records available, it may be considered as a reasonable excuse.

Accounting records offences

1. Where it is not appropriate to prosecute under S. 190 of Cap. 32 (e.g. no sufficient book / record is kept for preparing a meaningful S/A), the liquidator can consider whether there is any accounting records offence.
2. The relevant statutory provisions in relation to accounting records offences are contained in S. 373, S. 374, S. 377 and S. 429 of Cap. 622. For such offences, please refer to the guidelines set out in ORO Circular No. 6/2014.
3. The relevant statutory provision in Cap. 32 in relation to accounting records offence is set out in S. 274 of Cap. 32.
4. The liquidator may by notice in writing¹⁴ require any contributory to deliver books to which the company is entitled¹⁵.

S. 274 of Cap. 32

5. Under S.274(1) of Cap. 32, officers of a company are required to keep accounting records that comply with S. 373(2) and S. 373(3) of Cap. 622 for any part of the shorter of the period of 2 years immediately preceding the commencement of the winding-up, or the period between the incorporation of the company and the commencement of the winding up¹⁶.
6. Generally, commencement of winding-up means the date of presentation of the petition for winding-up, the date of resolution that the company be wound up voluntarily, or the date of delivery of winding up statement¹⁷.
7. Please refer to paragraph 2 under the heading “**S. 373 of Cap. 622 – Company must keep accounting records**” in Appendix II of ORO Circular No. 6/2014 for the requirements under S. 373(2) and S. 373(3) of Cap. 622.
8. Persons liable include
 - (i) Persons who may be liable under S. 274 of Cap. 32 include every officer who is in default¹⁶.
 - (ii) “Officer who is in default” means any officer of the company, or any person in accordance with whose directions or instructions the directors of the company are accustomed to act, who knowingly and willfully authorizes or permits the default¹⁸.
 - (iii) In the context of S.274, an accused who had “knowingly and willfully . . . authorizes or permits the default” means the accused knew the thing not

done was not done and in the free exercise of his will authorized or permitted the non-doing of it.

Offence

9. Under S.274(1) of Cap. 32, if where a company is wound up it is shown that accounting records that comply with S. 373(2) and (3) of Cap. 622 were not kept by the company for any part of the shorter of the period of 2 years immediately preceding the commencement of the winding-up, or the period between the incorporation of the company and the commencement of the winding up, every officer who is in default is guilty of an offence and liable to imprisonment and a fine¹⁶.
10. The maximum punishment on summary conviction is a fine of \$50,000 and 6 months imprisonment¹³.

Statutory Defence

11. If a person is charged with an offence under S. 274(1) of Cap. 32, it is a defence if the officer shows that he acted honestly and that in the circumstances in which the business of the company was carried on the default was excusable¹⁶.
12. It is for the defence to prove on a balance of probability that he falls within the statutory defence.

1 S. 31(2) of Schedule 26 to Cap. 32
2 S. 351A(1) of Cap. 32
3 Form 23 in the Companies (Winding-up) Rules (Cap. 32H)
4 S. 190(1) of Cap. 32
5 S. 190(2A) of Cap. 32
6 S. 190(2B) of Cap. 32
7 S. 190(3) of Cap. 32
8 S. 190(2) of Cap. 32
9 S. 190(2)(a) to (d) of Cap. 32
10 R. 39(3) of the Companies (Winding-up) Rules (Cap. 32H)
11 R. 41 of the Companies (Winding-up) Rules (Cap. 32H)
12 S. 190(5) of Cap. 32
13 S. 351(1A) and Twelfth Schedule of Cap. 32
Schedule 8 to the Criminal Procedure Ordinance (Cap. 221)
14 Form 41 in the Companies (Winding-up) Rules (Cap. 32H)
15 S. 211 of Cap. 32
R. 67 of the Companies (Winding-up) Rules (Cap. 32H)
16 S. 274 (1) of Cap. 32
17 S. 184, S.209B(a)(i), S.228A(5)(a) and S.230 of Cap. 32
18 S. 351(2) of Cap. 32