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14 March 2014

OFFICIAL RECEIVER'S OFFICE CIRCULAR NO. 6/2014

Prosecution of Insolvency Offences

(I) Background

1. Upon commencement of the new Companies Ordinance (Cap. 622) ("Cap. 622") on 3rd March 2014, the Companies Ordinance (Cap. 32) was re-titled as Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) ("Cap. 32"). This Circular sets out the general principles and guidelines for referral of insolvency related offences to the Official Receiver for investigation under Cap. 622 and Cap. 32, namely :-
 - (a) failure to submit statement of affairs, contrary to S. 190 of Cap. 32.
 - (b) accounting records offences, contrary to S. 373, S. 374, S. 377 and S. 429 of Cap. 622 and S. 274 of Cap. 32; and
 - (c) transitional and savings arrangements for the offences under S. 121 and S. 122 of the Companies Ordinance (Cap. 32) as in force from time to time before 3 March 2014 ("the pre-amended Ordinance").

(II) General Principle

2. The Official Receiver acts under the authority of the Secretary for Justice to lay information in respect of insolvency related offences under the Cap. 32, Cap. 622 and the Bankruptcy Ordinance (Cap. 6).
3. Any referral of insolvency related offences under Cap. 32, Cap. 622 or the pre-amended Ordinance should be addressed directly to the Prosecution and Directors' Disqualification Section of the Official Receiver's Office. Such referral shall be made in accordance with S. 168I(3) of Cap. 32 and R. 2 of the Companies (Reports on Conduct of Directors) Regulation, Cap. 32 sub. leg. J.

4. Release of the liquidator under S. 205 of Cap. 32 will not affect the Official Receiver's prosecution of insolvency related offences. Relevant books and accounting records of the company should however be preserved.

(III) Guidelines for Referral

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

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

- (b) S. 373, S. 374, S. 377 and S. 429 of Cap. 622 and S. 274 of Cap. 32

Cap. 622 introduces new requirements for the keeping of the accounting records and the laying of financial statements and reports which replace the requirements under S. 121 and S. 122 of the pre-amended Ordinance whilst S. 274 of Cap. 32 remains unchanged.

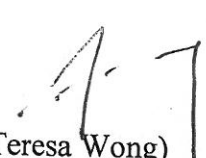
The relevant statutory provisions and offences are set out in **Appendix II**.

- (c) Transitional and Savings Arrangements for S. 121, and S. 122

S. 121 and S. 122 of the pre-amended Ordinance continue to apply in relation to books of account / accounts for a financial year beginning before 3rd March 2014 and ending on or after 3rd March 2014. The relevant statutory provisions and offences under the pre-amended Ordinance are set out in **Appendix III**.

(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 knowledge¹. The same time limitation period applies to the offences under the said S. 121 and S. 122 of the pre-amended Ordinance during the transitional period².
7. Official Receiver's Office Circular No.1/2000 dated 31st July 2000 is cancelled and is superseded by this Circular with immediate effect.


(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) Upon making of a winding-up order or appointment of provisional liquidator, there shall be submitted to the provisional liquidator or liquidator a statement as to the affairs of the company in 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 S/A is to be submitted within 28 days from the date of winding-up order or date of appointment of provisional liquidator (the relevant date)⁵.
2. Persons liable include:
 - (i) The directors or company secretary as at the relevant date are required to submit S/A⁶.
 - (ii) The following persons, subject to the Court's direction:
 - persons who are or have been directors or officers of the company.
 - persons who has taken part in the formation of the company at any time within 1 year before the relevant date.
 - persons who are or have been in the employment of a 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 officers of a company within 1 year before the relevant date⁷.
3. A person required to submit S/A shall be furnished by the provisional liquidator or liquidator with forms and instructions for preparation thereof⁸.
4. Each person who has made or concurred in the making of S/A has a duty to answer questions as may be put to him or give such further information as may be required by the Official Receiver, provisional liquidator or liquidator⁹.

Offence

5. If any person, without reasonable excuse, makes default in complying with the provisions of S. 190 of Cap. 32, he is liable to a fine and for a continued default, to a daily default fine¹⁰.

6. The maximum fine is \$50,000 and the daily default fine is \$300¹¹.

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.
3. S. 373, S. 374 and S. 377 of Cap. 622 are relevant to the offences in respect of the keeping of books of account whilst S. 429 of Cap. 622 is relevant to the offence in respect of laying and sending financial statements and reports.
4. S. 274 of Cap. 32 remains in force.
5. The liquidator may by notice in writing¹² require any contributory to deliver books to which the company is entitled¹³.

S. 373 of Cap. 622 – Company must keep accounting records

1. A company must keep accounting records that comply with S. 373(2) and S. 373(3)¹⁴ of Cap. 622.
2. S. 373(2) and S. 373(3) of Cap. 622 state that the accounting records:-
 - (i) must be sufficient :-
 - (a) to show and explain the company's transactions;
 - (b) to disclose with reasonable accuracy, at any time, the company's financial position and financial performance; and
 - (c) to enable the directors to ensure that the financial statements comply with this Ordinance¹⁵.
 - (ii) must contain the daily entries of all sums of money received and expended by the company, the matters in respect of which the receipt and expenditure takes place and a record of the company's assets and liabilities¹⁶.
3. If S. 373(1) of Cap. 622 does not apply in relation to a subsidiary undertaking of a company, the company must take all reasonable steps to secure that the subsidiary undertaking keeps accounting records that are sufficient to enable the company's directors to ensure that any financial statements required to be prepared complies with Cap. 622¹⁷.

Offence

4. A director of a company who fails to take all reasonable steps to secure compliance with S. 373(1) or S. 373(4) of Cap. 622 commits an offence and is liable to a fine of \$300,000¹⁸.
5. A director of a company who wilfully fails to take all reasonable steps to secure compliance with S. 373(1) or S. 373(4) of Cap. 622 commits an offence and is liable to a fine of \$300,000 and to imprisonment for 12 months¹⁹.

Statutory Defence

6. If a person is charged with an offence under S. 373(5) of Cap. 622 (i.e. a director fails to take all reasonable steps to secure compliance with S. 373(1) or S. 373(4) of Cap. 622), it is a defence to establish that the person had reasonable grounds to believe, and did believe, that a competent and reliable person :-
 - (i) was charged with the duty of ensuring that S. 373(1) or S. 373(4) of Cap. 622 (as the case may be) was complied with; and
 - (ii) was in a position to discharge that duty²⁰.
7. It is for the defence to prove on a balance of probability that he falls within the statutory defence.

S. 374 of Cap. 622 – Places in which accounting records to be kept

1. A company's accounting records :-
 - (i) must be kept at its registered office or any other place that the directors think fit; and
 - (ii) must be open to inspection by the directors at all times without charge²¹.
2. If a company's accounting records are kept at a place outside Hong Kong, the accounts and returns with respect to the business dealt with in those records :-
 - (i) must be sent to, and kept at, a place in Hong Kong; and
 - (ii) must be open to inspection by the directors at all times without charge²².
3. Those accounts and returns :-
 - (i) must disclose with reasonable accuracy the financial position of the business in question at intervals of not more than 6 months; and
 - (ii) must be sufficient to enable the directors to ensure that any financial statements required to be prepared are complied with Cap. 622²³.

Offence

4. A director of a company who fails to take all reasonable steps to secure compliance with S. 374(1), S. 374(2) or S. 374(3) of Cap. 622 commits an offence and is liable to a fine of \$300,000²⁴.
5. A director of a company who wilfully fails to take all reasonable steps to secure compliance with S. 374(1), S. 374(2) or S. 374(3) of Cap. 622 commits an offence and is liable to a fine of \$300,000 and to imprisonment for 12 months²⁵.

Statutory Defence

6. If a person is charged with an offence under S. 374(4) of Cap. 622 (i.e. a director fails to take all reasonable steps to secure compliance with S. 374(1), S. 374(2) or S. 374(3) of Cap. 622), it is a defence to establish that the person had reasonable grounds to believe, and did believe, that a competent and reliable person :-
 - (i) was charged with the duty of ensuring that S. 374(1), S. 374(2) or S. 374(3) of Cap. 622 (as the case may be) was complied with; and
 - (ii) was in a position to discharge that duty²⁶.
7. It is for the defence to prove on a balance of probability that he falls within the statutory defence.

S. 377 of Cap. 622 – Period for which the accounting records to be preserved

1. Applies to the accounting records, or accounts and returns that are required to be kept under S. 373(1) or S. 374(2)²⁷ of Cap. 622.
2. The company must preserve the records, or the accounts and returns, for 7 years after the end of the financial year to which the last entry made or matter recorded in the records, or the accounts and returns, relates²⁸.

Offence

3. A director who fails to take all reasonable steps to secure compliance with S. 377(2) of Cap. 622 commits an offence and is liable to a fine of \$300,000²⁹.
4. A director who willfully fails to take all reasonable steps to secure compliance with S. 377(2) of Cap. 622 commits an offence and is liable to a fine of \$300,000 and to imprisonment for 12 months³⁰.

Statutory Defence

5. If a person is charged with an offence under S. 377(3) of Cap. 622 (i.e. a director fails to take all reasonable steps to secure compliance with S. 377(2) of Cap. 622), it is a defence to establish that the person had reasonable grounds to believe, and did believe, that a competent and reliable person :-

- (i) was charged with the duty of ensuring that S. 377(2) of Cap. 622 was complied with; and
 - (ii) was in a position to discharge that duty³¹.
6. It is for the defence to prove on a balance of probability that he falls within the statutory defence.

S. 429 of Cap. 622 – Laying of financial statements before company in general meeting

1. Directors must, in respect of each financial year, lay before the company in annual general meeting, or in any other general meeting directed by the Court, a copy of the reporting documents for the financial year within the period specified in S. 431 of Cap. 622 and subject to the exceptions set out in S. 612 of Cap. 622³².

Offence

2. A director of a company who fails to take all reasonable steps to secure compliance with S. 429(1) of Cap. 622 commits an offence and is liable to a fine of \$300,000³³.
3. A director of a company who wilfully fails to take all reasonable steps to secure compliance with S. 429(1) of Cap. 622 commits an offence and is liable to a fine of \$300,000 and to imprisonment for 12 months³⁴.

Statutory Defence

4. If a person is charged with an offence under S. 429(3) of Cap. 622 (i.e. a director fails to take all reasonable steps to secure compliance with S. 429(1) of Cap. 622) it is a defence to establish that the person had reasonable grounds to believe, and did believe, that a competent and reliable person :-
 - (i) was charged with the duty of ensuring that S. 429(1) of Cap. 622 was complied with; and
 - (ii) was in a position to discharge that duty.

It is not a defence to establish that the financial statements or report was not in fact prepared as required by Cap. 622³⁵.

5. It is for the defence to prove on a balance of probability that he falls within the statutory defence.

S. 274 of Cap. 32

1. Officers of a company are required to keep proper books of account of the company throughout 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, whichever is the shorter³⁶.

2. Commencement of winding-up means date of presentation of the petition for winding-up, or date of resolution that the company be wound up voluntarily³⁷.
3. (i) Proper books of account shall be deemed not to have been kept if there have not been kept such books or accounts as are necessary, to exhibit and explain the transactions and financial position of the trade or business of the company, including books containing entries from day to day in sufficient detail of all cash received and cash paid, and, where the trade or business has involved dealings in goods, statements of annual stocktakings and (except in the case of goods sold by way of ordinary retail trade) of all goods sold and purchased, showing the goods and the buyers and sellers thereof in sufficient detail to enable those goods and those buyers and sellers to be identified³⁸.
(ii) The test is whether such books are kept as are necessary to exhibit and explain the transactions and financial position of the trade or business of the company at all times and at any time and be such as to enable one to say at any point of time where in a financial sense the company is.
4. Persons liable include
 - (i) Persons who may be liable under S. 274 of Cap. 32 include every officer who is in default³⁶.
 - (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 default³⁹.
 - (iii) The words "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

5. If where a company is wound up it is shown that proper books of account were not kept by the company throughout the period of 2 years immediately preceding the commencement of the winding-up, every officer who is in default shall be guilty of an offence and liable to imprisonment and a fine³⁶.
6. The maximum punishment on summary conviction is a fine of \$50,000 and 6 months imprisonment¹¹.

Statutory Defence

7. 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 excusable³⁶.
8. It is for the defence to prove on a balance of probability that he falls within the statutory defence.

S. 121 of the pre-amended Ordinance

1. Every company shall cause to be kept proper books of account with respect to:-
 - (i) all sums of money received and expended by the company and the matters to which the receipts and expenditure relate;
 - (ii) all sales and purchases of goods by the company;
 - (iii) the assets and liabilities of the company⁴⁰.
2. Proper books of account shall not be deemed to be kept if there are not kept such books as are necessary to give a true and fair view of the state of the company's affairs and to explain its transactions⁴¹.
3. Any books of account which a company is required by S. 121 of the pre-amended Ordinance to keep shall be preserved by it for 7 years from the end of the financial year to which the last entry made or matter recorded therein relates⁴².
4. Directors⁴³ are required to take all reasonable steps to secure compliance with the requirement of S. 121 of the pre-amended Ordinance by the company⁴⁴.

Offence

5. If a director fails to take all reasonable steps to secure compliance with the requirement of S. 121 of the pre-amended Ordinance by the company, or has by his own willful act been the cause of any default by the company, he shall be liable to imprisonment and a fine⁴⁴.
6. The maximum punishment on summary conviction is a fine of \$300,000 and 12 months imprisonment¹¹.

Statutory Defence

7. If a person is charged with an offence under S. 121 of the pre-amended Ordinance, it is a defence if the Director had reasonable ground to believe and did believe that a competent and reliable person was charged with the duty of seeing that those requirements were complied with and was in a position to discharge that duty⁴⁵.
8. It is for the defence to prove on a balance of probability that he falls within the statutory defence.

S. 122 of the pre-amended Ordinance

1. The directors of every company shall lay before the company at its annual general meeting (“AGM”) a profit and loss account⁴⁶ for the period, in the case of 1st account, since the date of incorporation of the company, and in other cases, since the preceding account. The account shall be made up to a date falling not more than 6 months before the date of AGM⁴⁷.
2. The directors shall cause to be made out in every calendar year and to be laid before the company at its AGM a balance sheet as at the date to which the profit and loss account is made up⁴⁸.

Offence

3. If the director of a company fails to take all reasonable steps to comply with S. 122 of the pre-amended Ordinance, he shall in respect of each offence be liable to imprisonment and a fine⁴⁹.
4. The maximum punishment on summary conviction is a fine of \$300,000 and 12 months imprisonment¹¹.

Statutory Defence

5. If a person is charged with an offence under S. 122 of the pre-amended Ordinance, it is a defence if the director had reasonable ground to believe that a competent and reliable person was charged with the duty of seeing that S. 122 of the pre-amended Ordinance was complied with and was in a position to discharge that duty⁵⁰.
6. It is for the defence to prove on a balance of probability that he falls within the statutory defence.

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- 1 S. 900 of Cap. 622
 - 2 S. 916 of Cap. 622
 - 3 Form 23 in the Companies (Winding-up) Rules (Cap. 32)
 - 4 S. 190(1) of Cap. 32
 - 5 S. 190(3) of Cap. 32
 - 6 S. 190(2) of Cap. 32
 - 7 S. 190(2)(a) to (d) of Cap. 32
 - 8 R. 39 of the Companies (Winding-up) Rules (Cap. 32)
 - 9 R. 41 of the Companies (Winding-up) Rules (Cap. 32)
 - 10 S. 190 (5) of Cap. 32
 - 11 S. 351(1A) and Twelfth Schedule of Cap. 32
Schedule 8 to the Criminal Procedure Ordinance (Cap. 221)
 - 12 Form 41 in the Companies (Winding-up) Rules (Cap. 32)
 - 13 S. 211 of Cap. 32
R. 67 of the Companies (Winding-up) Rules (Cap. 32)
 - 14 S. 373(1) of Cap. 622
 - 15 S. 373(2) of Cap. 622
 - 16 S. 373(3) of Cap. 622
 - 17 S. 373(4) of Cap. 622
 - 18 S. 373(5) of Cap. 622
 - 19 S. 373(6) of Cap. 622
 - 20 S. 373(7) of Cap. 622
 - 21 S. 374(1) of Cap. 622
 - 22 S. 374(2) of Cap. 622
 - 23 S. 374(3) of Cap. 622
 - 24 S. 374(4) of Cap. 622
 - 25 S. 374(5) of Cap. 622
 - 26 S. 374(6) of Cap. 622
 - 27 S. 377(1) of Cap. 622
 - 28 S. 377(2) of Cap. 622
 - 29 S. 377(3) of Cap. 622
 - 30 S. 377(4) of Cap. 622
 - 31 S. 377(5) of Cap. 622
 - 32 S. 429(1) & (2) of Cap. 622
 - 33 S. 429(3) of Cap. 622
 - 34 S. 429(4) of Cap. 622
 - 35 S. 429(5) of Cap. 622
 - 36 S. 274 (1) of Cap. 32
 - 37 S. 184 of Cap. 32
 - 38 S. 274(2) of Cap. 32
 - 39 S. 351(2) of Cap. 32
 - 40 S. 121(1) of the pre-amended Ordinance
 - 41 S. 121(2) of the pre-amended Ordinance
 - 42 S. 121(3A) of the pre-amended Ordinance
 - 43 S. 2 of Cap. 32
 - 44 S. 121(4) of the pre-amended Ordinance
 - 45 S. 121(4) Proviso (a) of the pre-amended Ordinance
 - 46 S. 122(1) of the pre-amended Ordinance
 - 47 S. 122(1) and (1A) of the pre-amended Ordinance
 - 48 S. 122(2) of the pre-amended Ordinance
 - 49 S. 122(3) of the pre-amended Ordinance
 - 50 S. 122(3) Proviso (a) of the pre-amended Ordinance