

Members' Voluntary Liquidation and HMRC

Introduction

The last few months have seen discussion within the profession about HMRC's stance regarding statutory interest in Members' Voluntary Liquidations (MVLs). In particular there has been a suggestion that there has been a change of policy by HMRC in expecting payment of interest at 8% (15% in Scotland). HMRC regrets any potential misunderstandings arising from particular cases but emphasises there has been no change of policy. HMRC should be (and always should have been) treated as every other creditor. This note sets out HMRC's position on MVLs, explaining the background and pointing out the legislation placing requirements upon IPs. Also included is an explanation of the various areas within HMRC that IPs can expect to hear from during the course of an MVL.

Background

It is axiomatic that before signing a declaration of solvency a company's directors should take the advice of a diligent IP. HMRC expects that advice will make it clear to the directors that provision must be made to pay not only all the company's debts in full but also interest at the official rate (commonly referred to as "statutory interest"). HMRC's view is that it is also reasonable to expect an IP to explain that the directors should make provision for paying future debts (which are provable debts) and that interest will be due on those too. Where adequate provision is not made for paying all of a company's debts, with interest, then a consequence is clearly insolvency and the conversion of an MVL to CVL.

Future Debts

An MVL commences on the day the resolution for voluntary winding up is passed. A creditor may prove for all debts: (i) due up to the date the MVL commences and (ii) which become due after that date, if they relate to the final period of trading ending upon the day of the commencement of the MVL. It is quite possible there will be a Corporation Tax (CT) liability which will need to be calculated in respect of the abridged final period of trading and a return filed within the timeframe laid out in statute. Until the return is filed the liability is a future debt and HMRC will prove for it. IPs should also note that if a return is not filed by the statutory deadline HMRC will require the immediate filing of the outstanding return and if necessary issue an assessment in respect of the outstanding liability.

HMRC expects directors and IPs to make provision for paying such future debts in appropriate cases. When the return is filed HMRC will let liquidators have a revised proof.

Discounting Future Debts

England and Wales

If a proved and admitted future debt has not become payable by the time for payment of a dividend there is a mechanism set out in legislation for ascertaining its value. The amount of the admitted debt is reduced at the rate of 5% per annum for the period beginning with the date upon which the MVL commenced and ending with the date upon which the dividend is paid. The relevant legislation is at Rule 14.44 of the Insolvency (England and Wales) Rules 2016 (Rule 11.13 of the 1986 Rules in England & Wales).

In the event that payment of a dividend is made after the date for payment then the debt ceases to be a future debt and no discounting should apply. If a proved and admitted future debt becomes payable before the dividend is paid, it ceases to be a future debt and rule 14.44 would not be applicable.

Scotland

Similar provisions apply in Scotland. Rule 4.16E of the Insolvency (Scotland) Rules 1986 provides that: “...*(2) if a debt does not depend on a contingency but would not be payable but for the liquidation until after the date of commencement of the winding up, the amount of the claim shall be calculated as if the debt were payable on the date of commencement of winding up but subject to the deduction of interest at the rate specified in paragraph (4) from that date until the date for payment of the debt.....*
(4) The rate of interest referred to in paragraph (2) shall be whichever is the greater of—(a) the prescribed rate at the date of commencement of winding up; and (b) the rate applicable to that debt apart from the liquidation.”

Northern Ireland

Rule 11.13 of the Insolvency Rules (Northern Ireland) 1991 provides for discounting a future debt.

Statutory Interest

The requirement to pay statutory interest is firmly rooted in the declaration of solvency sworn by a company's directors. The declaration makes clear reference to: “...*interest at the official rate*” which rate is defined in legislation as 8% (or 15% in Scotland). HMRC's expectation is that directors understand the import of the declaration of solvency and that IPs fully apply all the appropriate provisions in insolvency legislation. We explain below how HMRC intends treating cases where there has been misunderstandings about the requirements of the legislation.

Legislation

It is worth summarising the relevant provisions in force at the time of writing.

- Declaration of solvency

England & Wales, and Scotland

Section 89 Insolvency Act 1986 makes it clear a declaration by directors is to be to the effect that the company is able to pay its debts in full with interest at the official rate over the full course of the period stated.

Northern Ireland

Article 75 of the Insolvency (Northern Ireland) Order 1989 mirrors the requirements of section 89 Insolvency Act 1986.

- Proving future and contingent debts

England and Wales

Chapter 2 of the 2016 Insolvency Rules covers creditors' claims in administration, winding up and bankruptcy. Rule 14.2 provides that debts which are present or future, certain or contingent are all provable.

Scotland

Rule 4.16E of the 1986 Scottish Rules provides for a creditor to claim a future debt.

Northern Ireland

Rule 4.100 of the Insolvency Rules (Northern Ireland) 1991 allows that a creditor may prove for a debt of which payment was not yet due on the date when the company went into liquidation.

- Discounting future debts

England and Wales

Rule 14.44 allows for a dividend to be discounted if it is in respect of an admitted debt payable on a date after the date of declaration of a dividend.

Scotland

Rule 4.16E of the 1986 Scottish Rules provides for discounting a claim for a future debt

Northern Ireland

Rule 11.13 of the Insolvency Rules (Northern Ireland) 1991 44 allows for a dividend to be discounted if it is in respect of an admitted debt payable on a date after the date of declaration of a dividend.

- Statutory interest

England & Wales, and Scotland

Section 89 Insolvency Act 1986 mentions interest at "*the official rate*" and includes a reference to section 251 of the same Act. Section 251 itself directs the reader to section 189(4) which in turn points to section 17 of the Judgments Act 1838. It is from that section the rate of 8% is derived. (In Scotland section 189(5) Insolvency Act 1986 points to Rule 4.66(2)(b) Insolvency (Scotland) Rules 1986 which sets out the rate of 15% to be applied in Scotland.) Where a sum has been discounted under Rule 14.44 interest should be paid on the discounted amount. Where the due date for payment has passed before a dividend is paid and so the full amount of the debt is payable Rule 14.44 does not apply and interest should be paid on the full amount. In all cases interest is payable from the date of liquidation.

Northern Ireland

Article 160(4) of the Insolvency (Northern Ireland) Order 1989 makes provision about the rate of interest in Northern Ireland.

HMRC's position

HMRC accepts some IPs may have been under the impression that interest is payable at a rate less than 8% (or 15%). Notwithstanding any potential misunderstanding HMRC expects IPs to be familiar with and apply all relevant provisions of insolvency legislation, paying interest to all creditors at the appropriate rate.

- In MVLs where a liquidator has not been released HMRC expects IPs to comply fully with all the requirements of the relevant insolvency legislation;
- HMRC has no specific plans to review cases where a distribution has been made and the liquidator has been released.
- In MVLs IPs can help by early and open dialogue with HMRC where the IP is not in agreement with the amount of HMRC's debt claimed.
- In an MVL where directors have breached their duties to the company and the company becomes insolvent HMRC looks to the IP to investigate and make a recovery.

Contact with HMRC

- Claims

HMRC's claim in an MVL will be submitted by a team in Edinburgh:

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

Email: eisw.mvl.team@hmrc.gsi.gov.uk

MVL advice Line: 0300 322 7815 (Monday to Friday 09.00 to 17.00)

- Clearance requests

With the exception of CT the Edinburgh MVL Team will provide clearance confirmation following payment of HMRC's claim plus statutory interest.

- CT clearance

Business Tax Operations (BTOps) is responsible for final clearance that all CT assessing issues (both pre- and post-MVL) are resolved.

CT clearance will be provided by BTOps:

Corporation Tax Services
HM Revenue and Customs
BX9 1AX

CT Central helpline: 0300 200 3410