REAL TIME INFORMATION

JOINT R3/HMRC NOTE

Introduction

Concerns have been raised about the operation of RTI in formal insolvency proceedings and the problems that may arise as a consequence of the disruption which accompanies such proceedings. Currently the RTI regime makes no special provisions where a business enters a formal insolvency process although for the main part it is expected that IPs should be able to conform to RTI requirements.

It is accepted however that there will be some anomalies and there has been an ongoing dialogue on the subject between R3 and HMRC, and this joint note has been issued to explain the current position to R3 members. Further information will be provided in due course in the light of further discussions.

Real Time Information – what is it?

Real Time Information (‘RTI’) is a new system for reporting PAYE, NI and other details to HM Revenue & Customs (‘HMRC’). RTI requires employers to report payroll information on or before making a payment to an employee, as opposed to once at the end of each tax year. These reports (usually in a format known as a Full Payment Submission “FPS”) must be made online using payroll software in most cases and will be vital to the new Universal Credit system, which automatically adjusts welfare payments according to the individuals’ income. RTI commenced on 6 April 2013.

Further details can be found on HMRC’s website at http://www.hmrc.gov.uk/payerti/index.htm

Relaxation for small businesses

HMRC recognises that some small employers who pay employees weekly, fortnightly or more frequently, but only process their payroll monthly may need longer to adapt to reporting PAYE information in real time. HMRC has therefore agreed a relaxation of reporting arrangements for small businesses, for a short transitional period.

Until 5 October 2013, employers with fewer than 50 employees, who find it difficult to report every payment to employees at the time of payment, may send information to HMRC by the date of their regular payroll run but no later than the end of the tax month in which the payments are made. (A tax month always ends on the 5th of a calendar month).

Penalties

Penalties may be levied on employers who fail to comply with their tax obligations. There are broadly three types of penalty:

- Penalties for late returns

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There will be no late-filing penalties if an RTI return is late or is not filed at all during 2013/14. A penalty will arise if an employer has not made their final FPS by 19 May 2014. The new suite of penalties will apply for 2014/15 onwards and these will be applied automatically and in-year.

- Penalties for inaccurate returns

As now, penalties may be levied for inaccurate returns. The law provides that employers will not be penalised for inaccurate returns where they can show that they have taken reasonable care to provide the correct information. More details on these penalties and how they are applied can be found in the Compliance Handbook (CH80000 onwards) on the HMRC website.

- Penalties for late payments.

Employers who pay their PAYE late are already potentially subject to a late payment penalty on a risk-assessed basis and this will continue in 2013/14. For 2014/15 onwards, HMRC will start applying these penalties automatically in-year.

For more information see http://www.hmrc.gov.uk/news/payerti-payments.htm

RTI and Insolvency Proceedings

In broad terms under UK law there are two types of insolvency procedure: those under the control of the Insolvency Practitioner (IP) and those where the debtor remains in control, albeit the case of a voluntary arrangement the procedure is under the supervision of an IP. It is anticipated that most of the problems identified in this paper will relate to IP controlled proceedings; administration, liquidation, provisional liquidation, administrative receivership and bankruptcy. It is unlikely that an IP acting as a supervisor of a voluntary arrangement will have responsibility for the payroll of the debtor and the consequent requirement to meet the demands of RTI. IPs may, however, consider it prudent to remind the debtor of the requirement to comply with RTI and the consequences of not doing so.

Potential issues

The potential issues which have been identified to date and discussed with HMRC are set out below.

Post appointment trading

In some cases employee records will permit IPs to continue to operate the insolvent’s RTI system. In many other cases the IP may find that the business records are such that proper compliance with RTI (reporting accurate payroll information on or before making payments to employees) is impractical. In some cases key staff may have left, and in others records may be either poor or lacking completely. In other cases, an IP will be presented with a situation where the IT suppliers have either withdrawn supply or its cost is prohibitive and it will therefore be impossible to access the existing payroll system. The IP may nevertheless need to make timely relevant payments to employees to preserve the business with a view to its sale and a better return to creditors.

HMRC takes the view that, where an IP does not have access to the insolvent’s records and systems for reasons beyond his control such as that the records are insufficient for some reason to produce
accurate brought forward information, this is likely to fall within the ‘reasonable excuse / care’ provision for penalty purposes such that neither a late filing nor inaccurate penalty would arise.

It is suggested that IPs should let HMRC know immediately when it becomes apparent that the records are poor or incomplete, rather than waiting for the submission of the first return.

It is important to recognise in relation to late filing penalties that, in order for the reasonable excuse provision to apply, the employer must remedy that failure without unreasonable delay after the excuse ends.

In addition, when making initial announcements to employees they should be urged to keep copies of payslips and other relevant employee information, and contact the DWP directly if they are concerned that their records may not be in order.

To operate the post appointment payroll it is common practice to apply for a new Employer PAYE Reference. In these circumstances, the company in insolvency will be treated as a ‘new employer’ for the purposes of the late filing penalty easement that will apply from April 2014. It is proposed that such new employers will have 30 days from the date of their first payment to an employee to file their first RTI return. The secondary legislation including this provision will be published for consultation later in the year.

**Pre appointment HMRC Claim**

IPs may need to provide information to HMRC on deductions made from employee payments and paid over during the year in order for HMRC to be able to calculate its claim in the proceedings. In some cases the information provided by the insolvent’s existing RTI system will be reliable and HMRC will lodge their claim in the usual way. Where the information is incorrect but the RTI system is available a correcting return may be made. Where the insolvent’s RTI system is not available the information may be forwarded using for instance the HMRC software to send the information relevant PAYE office. However as an IP’s duties are confined to maximising returns for creditors and not incurring unnecessary costs, a correcting return will normally be made by an IP where any payments from the Estate are to be made to unsecured creditors or there will be a payment to unsecured creditors from the prescribed part i.e. funds will or may be payable to HMRC in its status as an unsecured creditor.

In any case, an IP is likely to be unwilling to certify the accuracy of the information derived from pre-appointment records. This is a particular problem where the insolvent continues to trade and the IP has to rely on brought forward figures for calculating tax and National Insurance. HMRC has indicated that an inaccurate return penalty is unlikely for a post appointment return using incorrect pre appointment figures. This is because this would generally not constitute failure by the company post appointment to take reasonable care, but nevertheless HMRC will consider every case on its own merits.

Where it is considered necessary, for example to establish a more accurate figure for dividend purposes later in the proceedings, it is possible to update the earlier year returns. However, in many cases it may not be commercially worthwhile for the IP to agree the unsecured claim exactly. In these cases the position is unaltered and HMRC are still able to agree a final figure based on estimated figures. However where employee information is readily available then HMRC would
expect this information to be submitted under the IPs RTI system to ensure Universal Credits for the employee are accounted for.

**Pre-appointment compliance failures**

There may be some cases where payments have been made before the insolvency but returns have not been submitted. In such cases, whether or not the insolvent continues to trade under the aegis of the IP, and provided the information is readily available, it will help HMRC if the returns can be submitted as soon as the circumstances of the case permit. This will help HMRC to help employees by making sure that the information on them is accurate. HMRC acknowledges that there is no positive obligation on IPs to submit pre-appointment information, and where information is not readily available HMRC does not expect IPs to go to extensive efforts to recreate it, unless there is to be a distribution to creditors – see above. In such circumstances there may be a penalty on the company which will be included in HMRC’s unsecured claim in the insolvency. Or where there is evidence of inaccurate returns prior to insolvency HMRC may charge penalties as part of its unsecured claim, particularly if the inaccuracies were deliberate as such penalties can be transferred to directors personally in certain circumstances.

In some instances the payroll may have been run and returns submitted but wages will not have been paid. Current procedure is sometimes to arrange for the payroll to be rolled back and then run the P35. Under RTI it is possible to submit an amending return in these circumstances. However, as noted above an IP will usually only amend such returns if it is anticipated that there will be funds for unsecured creditors.

**Distributions to Employees**

Distributions may be made to employees many years after the opening of the insolvency proceedings and the company has long since ceased to operate its payroll. These employee claims primarily consist of arrears of wages and accrued holiday pay. When such dividends are paid, tax at basic rate and National Insurance are deducted from the dividend and paid to HMRC. HMRC accepts that there would be inherent challenges in many instances in making such distributions using the RTI system. For the time being HMRC has agreed that IPs should continue to pay deductions made to them using the existing system, but HMRC are aware this issue needs to be properly addressed and will be publishing guidance to IPs on the necessary revised process in due course.

**Central contact point at HMRC**

It is recognised that IPs may have specific queries regarding the operation of RTI which are not dealt with in this note or on HMRC’s website. In these circumstances the IP should continue to work with the relevant HMRC caseworker to resolve these problems. However if the problem concerns a more general policy matter relating specifically to insolvency the problem should be referred to R3 who will seek advice from the HMRC policy team. The findings will be published when the problem has been resolved.

30 May 2013