

**Bills Committee on Interest on Arrears of Maintenance Bill 2001
Matters Arising from the Meeting of 2 October 2002**

A. Automatic Mechanism for Payment of Interest

At the meeting of 2 October, some Members considered that there should be an automatic mechanism for payment of interest on maintenance arrears as in the case of judgment debts.

Current practice of interest on judgment debts

2. We would first set out the arrangements for interest on judgment debts in District Court Ordinance (“DCO”), Cap.336. Section 50 of DCO reads –

“(1) Judgment debts are to carry simple interest –

(a) at the rate the Court orders; or

(b) in the absence of an order, at the rate the Chief Justice determines by order,

on the total amount of the judgment debt, or on the part that for the time being remains unpaid, from the date of the judgment until payment.

(2) Interest under this section may be calculated at different rates for different periods.”

3. According to the Judiciary, unless otherwise specified, statutory interest on a judgment debt (i.e. interest awarded according to section 50 of DCO) runs from the moment the court pronounces a debt as such. Usually, the requirement of interest in case of late clearance of a judgment debt is not mentioned in the relevant court order. The judgment debtor (“JD”) has the choice of making the payment to the judgment creditor (“JC”) direct, or through legal representative(s), or to the court’s Accounts Office. If a JD pays belatedly at the Accounts Office, staff of the Accounts Office will show him section 50 of DCO and ask for interest in addition to the amount of the outstanding judgment debt.

Proposed application to cases of maintenance arrears

4. Interest on judgment debts is in fact triggered by the court pronouncement of a debt as a judgement debt. In other words, interest on judgment debts is “automatic” only on the court’s affirmation of their status as judgment debts. While interest after judgment is automatic, the action of the court recognizing and affirming the debts as judgment debts is by no means automatic. The JC has to bring the case to the court for a ruling.

5. We have no in-principle objection to the proposal that interest on arrears of maintenance payment should be automatically calculated in cases where the court has issued an order to enforce a maintenance order. This would be in line with the arrangements for judgment debts. However, we do not propose to impose interest on arrears of maintenance payment before such an order is made as it would be out of line with the arrangements for judgment debts.

B. Surcharge for Defaults without Reasonable Excuse

6. At the meeting, Members also considered that, as alternative measure to charging interest the court should have the discretion to impose a surcharge where the maintenance payer had defaulted in payment without reasonable excuse. The levying of surcharge on late maintenance payment could take the form similar to that of surcharge on late tax payment. Alternatively, consideration could be given to setting a ceiling for surcharge, say, at three times of the amount of the maintenance arrears.

7. We agree with the Hong Kong Bar Association that punitive measures are against the philosophy of family law. A surcharge carries the implication that some blameworthy conduct is involved. Research into court cases indicates that conduct is not totally irrelevant in all matrimonial-related cases. That being the case, we are amenable to the idea of imposing surcharge on those maintenance payers who regularly default without reasonable excuse.

8. Hence, we see three ways to carry the matter forward – surcharge, interest and a combination of both.

Surcharge

9. Most maintenance cases involve periodical payments. The recurrent nature of periodical maintenance payments would mean repeated calculations when the period involved is to be a factor in any computation, be it surcharge or interest. Therefore, we are hesitant to recommend a scheme under which surcharge is imposed on the basis of *each and every* default payment given Members’ clear wish for a simple calculation method. Instead, we would recommend a one-off surcharge scheme which is to be applicable to lump sum maintenance payment cases as well.

10. We propose that, unless otherwise directed by the court, a surcharge of a specified percentage should be added to the total amount of arrears in favour of the maintenance payee in a judgement on any application to enforce a maintenance order. A gradual ascending scale of 10%, 20% and 30% will be applicable respectively to arrears cases where the period for the earliest default took place below 6 months, 6 months to below 12 months, and 12 months and above from the day of judgement. The specified percentage will serve as an indicator of the surcharge ceiling. The court will have discretion in deciding whether a surcharge should be imposed, as well as the appropriate amount involved. Once granted, the surcharge payable will be recoverable as a civil debt due to the maintenance payee enforceable through civil proceedings.

Comparison to Surcharge on Late Tax Payments

11. Section 71 of the Inland Revenue Ordinance (“IRO”), Cap.112, sets out the “Provisions regarding payment of tax”. The relevant provisions on the surcharge regime are –

“(5) where any tax is in default, the Commissioner [of Inland Revenue] may in his discretion order that a sum or sums not exceeding 5% in all of the amount in default shall be

added to the tax and recovered therewith.

- (5A) where on the expiry of a period of 6 months from the date when any tax is deemed to be in default, where such date was before or after 1 August 1984, there remains unpaid any amount of the aggregate of –
- (a) the tax deemed to be in default; and
 - (b) any sum added thereto under subsection (5),
- the Commissioner may order that a sum or sums not exceeding 10% in all of the unpaid amount shall be added to the unpaid amount and recovered therewith.”

12. We noted that the Commissioner of Inland Revenue is provided with discretionary power to order payment of additional sum in cases where any tax is deemed to be in default. We do not consider it appropriate to empower maintenance payees in similar way –

- The basis on which the surcharge is to be levied is different. Computation of the amount of tax to be paid is based on a prescribed percentage of the taxable income, the meaning of which is also clearly defined in IRO. On the other hand, maintenance is decided by the court having regard to a number of factors in section 7 of the Matrimonial Proceedings and Property Ordinance (Cap.192). The court also has the discretion to vary or to discharge the amount of maintenance.
- The Commissioner is acting as an agent in tax collection. He is not the actual beneficiary. On the other hand, the payee is. We can envisage disputes arising from whether there has actually been arrears, whether additional sum should be paid, etc. There could be no argument where a judgement has been pronounced by the court.

13. The additional sum to be paid for late payment of tax amounts to 5% in the first instance, and 15.5% (10% on the total amount unpaid) after 6 months. The ceiling of a 15.5% surcharge seems to be a common one in the legislation, although in some cases the surcharge in the first instance is 10%, e.g. in an employer’s failure to make financial contribution under the Occupational Safety and Health Council

Ordinance, Cap.398.

14. We consider a 5% a ceiling as too low in that for over two decades, the lowest interest rate on judgement debts is 6%. A 10% ceiling is more equitable and in line with the latest trend in judgement rates (8.125% since July 2002). Hence we propose to pitch the surcharge ceiling in the first instance at 10%.

15. In proposing a time scale of 6-month intervals in the computation surcharge, we have taken note of the fact that for a smooth-running case, the period from the institution of proceedings to the hearing date is about three months. As we propose to count the period of default from the first instance this occurred to the day of judgement, most cases would likely trigger the second point in the surcharge scale.

16. In comparison, the proposed surcharge percentages seem to be on the high side when compared against existing ones in the law. We consider that this is acceptable because of the blameworthy conduct of the maintenance payer. The court has discretion to exonerate those payers who have defaulted in payment with reasonable excuse from the payment of surcharge.

Interest

17. We have reviewed our proposal on calculation of interest on maintenance arrears in Section A of our note entitled “Bills Committee on Interest on Arrears of Maintenance Bill 2001 – Matters Arising from the 2nd Meeting on 23 September 2002”. We do not see a simpler calculation methodology that would be a fair representation of a calculation of interest. In the light of Members’ clear wish for a simpler calculation method, we are prepared to withdraw our proposal of interest on maintenance arrears in preference for a surcharge regime.

Combination of interest and surcharge

18. As some members have considered the calculation of interest to be difficult to manage, a regime involving an interest arrangement would

run into the same problem. That being the case, we do not propose to pursue the concept of a combination of interest and surcharge for certain maintenance arrears cases.

C. Involvement of Legal Aid and Social Welfare Departments

Legal Aid Department

19. There are four professional officers, 11 law clerks and six clerical officers in the Enforcement Unit of Legal Aid Department (“LAD”) and the staff cost involved is \$650,805 per month. According to records as at end of September 2002, the Unit handled 2 997 cases in that month, of which 852 cases (28.43%) relate to enforcement of maintenance payment. The staff cost involved is about \$185,000 (28.43% of the total staff cost).

Social Welfare Department

20. Staff in two streams of services in the Social Welfare Department is involved – family services and social security services. The involvement of social workers of family services centres (“FSC”) and integrated family service centres (“IFSC”) is confined to the provision of counselling and co-ordination of information to support divorcees and their children for application to LAD for arrangement of legal actions in case they fail to receive maintenance payment. As regards social security services, all divorcees who have not received maintenance payment or whose ex-spouses have defaulted in payment are required to file claims for maintenance or to seek assistance to enforce maintenance order as a condition to receive Comprehensive Social Security Assistance (“CSSA”). The involvement of the staff of Social Security Field Units in the enforcement of maintenance payment is confined to the completion of a referral form to LAD to initiate legal proceedings. The aforesaid duties, being part and parcel of the services provided by FSCs/IFSCs and the CSSA application procedure, constitute only a very small part of the duties of the staffs concerned and the cost involved is negligible.

Home Affairs Bureau
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