

For discussion on
9 May 2008

**Bills Committee on
Mandatory Provident Fund Schemes (Amendment) (No.2) Bill 2007**

Recovery of Arrears

Purpose

At the meeting of the Bills Committee on the Mandatory Provident Fund Schemes (Amendment) (No.2) Bill 2007 held on 24 April 2008, the Mandatory Provident Fund Schemes Authority (“MPFA”) was requested by Members to prepare a paper setting out the procedures and the timeframe under which the MPFA would take actions to apply for liquidation of an employer company which had persistently failed to settle the outstanding mandatory contributions. This paper sets out the MPFA’s response.

MPFA’s response

2. The information requested is set out at the **Annex**.

Mandatory Provident Fund Schemes Authority
May 2008

Procedures and timeframe under which the MPFA would take actions to apply for liquidation of an employer company

Once the MPFA is aware that an employer fails to make employer and employee mandatory contributions in full by the contribution day, it will issue a payment notice on the employer requiring the employer concerned to pay the arrears and the surcharge within the payment period of 14 days.

2. The MPFA will be notified by the trustee within 10 days after the end of the payment period if the employer concerned has failed to pay the arrears and/or the surcharge within the payment period set out in the payment notice. The MPFA will then conduct an investigation and urge the employer to settle the arrears.

3. The MPFA will take civil action on behalf of the employee against the defaulting employer after it has completed an investigation and obtained the necessary evidence if the employer fails to settle the arrears.

4. The MPFA will follow up the court judgment to ensure that the employer pays the arrears and surcharge to the MPFA. If the employer fails to pay such arrears and surcharge in accordance with the court judgment, the MPFA will first remind and urge the employer to make the payment as soon as possible.

5. In case of non-receipt of payment, the MPFA will make all necessary enquiries to ascertain the financial position and business operations of the employer so that the appropriate enforcement strategy can be adopted. This step would include interviewing employees, conducting search with relevant government departments, obtaining information from other relevant parties such as the banks and other creditors of the employer in order to ascertain the financial status and available assets of the employer.

6. Depending on the facts and circumstances of the case, the MPFA (i.e. the judgment creditor) will then take one or more of the

following actions to enforce a court judgment against the defaulting employer (i.e. the judgment debtor) for recovery of the arrears and surcharge (i.e. the judgment debt):

- to take bailiff action (to seize assets of the employer and to sell so much of them as may be sufficient to satisfy the judgment debt);
- to obtain a charging order (to impose a charge over certain property such as land or securities of the employer in order to secure the payment of the judgment debt); or
- to take garnishee proceedings (to attach a debt due by a third party such as a bank to the defaulting employer so that the third party will pay directly to the MPFA the debt due from him to the employer).

7. Each of these actions, which might be taken successively, will take some time to effect.

(a) In the case of taking bailiff action, the timing of the bailiff action is at the bailiff's discretion and may take at least one to two months for the bailiff action to be executed under normal circumstances. The MPFA will be notified of the result around seven days upon the execution.

(b) For garnishee orders and charging orders, it will take approximately two months for the whole process to complete as there are a series of court procedures involved. The timing of certain procedures is at the court's discretion. With the removal of 30-day settlement period, it is expected that the time required for a normal default contribution case to complete the whole recovery procedure will be on average around 6 months.

8. The MPFA may also consider serving a statutory demand as a basis for a subsequent winding-up petition against the defaulting employer in order to exert pressure on it to pay the arrears and surcharge. Under the Companies Ordinance, a winding up petition may be served if the debt remains unpaid three weeks after the service of a statutory demand.

9. As Members are aware, a successful winding up petition will have the effect of terminating the business of the employer (i.e. existing employees becoming unemployed) without necessarily being successful in recovering funds to satisfy the judgment debt. Therefore, the MPFA will pursue winding up petition as a measure of last resort only after other recovery actions as set out above have been unsuccessful. Given the adverse impact of the winding up order on the existing employees, it is imperative to carefully and prudently assess the situation before making a winding up petition. Generally, a number of factors, primarily the interests of the former and existing employees of the defaulting employer, and the seriousness of the case, would be taken into account. The time required to be taken for completing the assessment process could vary depending on the facts and circumstances of the case.

10. To increase the deterrent effect against the employer who fails to repay the outstanding contributions, we have proposed in the Mandatory Provident Fund Schemes (Amendment) (No.2) Bill 2007 to empower the court to order the employer to pay the default contributions after a criminal trial and to create a new offence against non-compliance of the court order.

Mandatory Provident Fund Schemes Authority
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