ICAEW
REPRESENTATION 17/20

HMRC DEBTS: PRIORITY ON INSOLVENCY (FINANCE BILL 2019-21, CLAUSES 95 & 96)

Issued 20 April 2020

Text of ICAEW briefing for MPs on clauses 95 and 96: HMRC debts: priority on insolvency and regulations in Finance Bill 2019-21 published by government on 19 March 2019.

This briefing submitted on 20 April 2020 has been prepared by ICAEW Tax Faculty and ICAEW Business Law.

Internationally recognised as a source of expertise, the Tax Faculty is a leading authority on taxation and is the voice of tax for ICAEW. It is responsible for making all submissions to the tax authorities on behalf of ICAEW, drawing upon the knowledge and experience of ICAEW's membership. The Tax Faculty's work is directly supported by over 130 active members, many of them well-known names in the tax world, who work across the complete spectrum of tax, both in practice and in business.

ICAEW Business Law includes an Insolvency Committee. ICAEW is the largest single insolvency regulator in the UK. We licence approximately 800 of some 1,550 UK insolvency practitioners as a recognised professional body.

ICAEW is a world-leading professional body established under a Royal Charter to serve the public interest. In pursuit of its vision of a world of strong economies, ICAEW works with governments, regulators and businesses and it leads, connects, supports and regulates more than 150,000 chartered accountant members in over 160 countries. ICAEW members work in all types of private and public organisations, including public practice firms, and are trained to provide clarity and rigour and apply the highest professional, technical and ethical standards.

ICAEW Chartered Accountants' Hall Moorgate Place London EC2R 6EA UK
T +44 (0)20 7920 8100 **icaew.com**

TEXT OF BRIEFING FOR MPS ON THE FINANCE BILL BY ICAEW

EXECUTIVE SUMMARY

1. We recommend that clauses 95 and 96 are withdrawn.
2. The measure is at odds with government efforts to foster an enterprise culture in the UK in recent years, for example in the Enterprise Act 2002. It can be expected to deter lending and have other adverse consequences and costs that have not been sufficiently considered.
3. Added to that, reintroducing HMRC preference seems to be pulling in the opposite direction from the taxpayer support being provided by government at the current time to help businesses survive. Why would government seek to claw back relatively small amounts under this measure in a way that deters enterprise? We suggest that Government thinks ahead to when the nation will need those businesses that survive the pandemic and new businesses to prosper.
4. We outlined our concerns about the measure and the consultation process in our consultation response ICAEW REP 53/19. Our concerns are widely shared by other industry bodies.
5. If the clauses are not withdrawn, we should welcome an assurance that VAT liabilities that businesses can choose to defer payment of until up to 31 March 2021 as a result of coronavirus in accordance with HMRC's guidance will be excluded from the scope of the new measures.

THE MEASURE

6. Clause 95 gives HMRC priority in insolvency proceedings in the recovery of VAT, PAYE income tax, employee NIC, construction industry scheme deductions, student loan deductions and certain other debts owed to HMRC by making HMRC a secondary preferential creditor.
7. HMRC will remain an unsecured non-preferential creditor for taxes levied directly on businesses, such as corporation tax and employer NIC.
8. Clause 96 provides HM Treasury with the power to specify a relevant deduction for the purposes of insolvency provisions and a period in relation to which VAT must be referable or the relevant deduction owed.
9. Clauses 95 and 96 are interlinked and intended to operate together.
10. The measures come into effect for insolvency proceedings on or after 1 December 2020.

OUR MAJOR CONCERNS

11. Clause 95 does not take into account the impact that a change of this kind will have on the lending sector and enterprise more generally.
12. In particular, it will reduce access to finance in the UK by making lending on a "floating charge" basis much riskier.
13. This restriction on access to finance will make it harder to rescue businesses. An increase in business failure will reduce what can be repaid out of insolvency procedures to creditors across the economy – including the Government.
14. Compounding this problem is the fact that, with more money going back to HMRC in insolvency procedures, less will be going back to trade creditors, pension schemes, and consumers. Poor returns from insolvency procedures can jeopardise the health of other businesses and trigger further insolvencies. This measure will increase the chance of this happening.

15. Again, reduced chances of business rescue and an increased knock-on effect from each insolvency means fewer thriving businesses – and fewer tax receipts for the Government.
16. Further, Government recognised the risks of introducing preference for particular creditors (in this case, consumers making cash deposits) in its response of December 2018 to a Law Commission report on consumers and insolvency.
17. In our consultation response ICAEW REP 53/19 we listed nine powers that HMRC already has that are not available to other unsecured creditors, which in practice put HMRC in a strong position. Examples include crown set-off and the ability to demand security, send in enforcement officers without a court order to seize assets, recover amounts from bank accounts and impose personal liability on directors for NIC. We suggest that it would be preferable for HMRC to exercise its existing powers to the full as appropriate on a case-by-case basis rather than seek to have preference over all assets at the expense of other creditors.
18. In short, this measure will undermine confidence in trading, lending, and investing in the UK economy.
19. It will not help make the UK a good place to do business.
20. Delaying commencement to 1 December does not help much as lenders etc need to plan for beyond that.

OUR RECOMMENDATION

21. We urge Government to withdraw the two clauses.
22. If it does not do so, then we believe that Government should seek to minimise the damage that will be caused and would be happy to engage in discussions as to how that might be done.

DETAILED CONCERN AND RECOMMENDATION

23. HMRC has announced temporary changes to VAT payments due between 20 March 2020 and 30 June 2020 to help businesses manage their cash flow during the current pandemic. These changes allow VAT registered traders to choose to defer their VAT payments as a result of coronavirus (COVID-19) so long as they pay the VAT due on or before 31 March 2021. We welcome this relaxation.
24. If clauses 95 and 96 are not withdrawn, we should welcome confirmation that HM Treasury will use its regulation-making powers in clause 96 to exclude such deferred VAT liabilities from the measures being legislated in clause 95.

FURTHER INFORMATION

As part of our Royal Charter, we have a duty to inform policy in the public interest.