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Johnston Carmichael LLP response to HM Revenue & Customs invitation to comment on “Protecting your taxes in insolvency”

Background

Johnston Carmichael LLP is the largest independent accountancy firm in Scotland. We have one of the most respected restructuring teams in Scotland who regularly act for HMRC, lenders and other creditors on insolvency assignments. The head of our restructuring team, Donald McNaught, is the current chair of the ICAS Insolvency Committee. ICAS are the main regulator of insolvency practitioners in Scotland.

Summary

We have considered the proposals in light of our own experience of dealing with corporate insolvency and feedback we have received from lenders.

We have answered the questions as they have been asked but have made further comments where we thought it may be of benefit to you or to expand on our answer.

Response to individual questions

Q.1 The Government is committed to increasing the priority of certain tax debts in insolvency. Should they be ranked as a secondary preferential creditor, an ordinary preferential creditor, or protected in some other way in the event of an insolvency?

This change will have two main impacts on creditors; 1) unsecured creditors such as trade creditors will almost certainly receive no dividend outwith a prescribed part and 2) floating charge creditors will lose an equivalent sum in most cases where their current recoveries are just sufficient to cover their secured debt or where they are suffering a shortfall.

We agree that HMRC should be protected however the main offenders we witness have tax debts that have accrued over many months and there should be more done to address that earlier.

Q.2 Would any of the taxes included in this measure pose any particular challenges to insolvency office holders when they process HMRC claims?

No.

These claims would be adjudicated anyway. What is proposed is simply a change in priority.

Q.3 Do you foresee additional administrative burdens falling upon individuals, businesses or insolvency practitioners as a result of this measure? If any, how might they be lessened?

Yes, but not significant. Assuming a prescribed part would currently be available anyway in cases where a distribution to preferential HMRC claims is now envisaged, HMRC claims would need to be adjudicated on. It will however include another category of creditor with preferential status who could be required to approve costs in administration appointments. It will also require HMRC claims to be adjudicated in a receivership appointment which is not currently the case.

Q.4 Do you consider the objectives of any type of formal insolvency procedure will be adversely affected by this measure? If so, please evidence or explain why. Please suggest how we could mitigate this.

We expect lenders to lose appetite for lending to SME's and this may undermine the ability to achieve the first statutory objective of an administration appointment (saving the company) or successfully concluding a CVA, where either of them may be reliant on external funding.

Q.5 Are there any transitional issues that we need to take into consideration in implementing this measure?

This measure should not be retrospectively applied to existing insolvency appointments as it could undermine historical distributions.

Q.6 In your view, are there any other considerations, or other potential impacts that HMRC should take into account in implementing this measure?

Our main concern surrounds the impact this may have on lenders who have floating charges. We think that more engagement at an earlier stage combined with taking security, could reduce HMRC losses without unsettling the lending community. The lending community are already assessing the negative impact this will have on their security and this will reduce their appetite for lending to SME's.

Q.7 Do you have any comments on the assessment of equality or other impacts?

No.

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