

## **Meeting with Sir Amyas Morse and the Loan Charge Review**

### **Key issues for the review**

27<sup>th</sup> September 2019

#### **1. How and why people entered into schemes affected by the Loan Charge**

- The evidence clearly shows that the main reason the vast majority of people who entered into payroll loan schemes was *not* to avoid tax, which is the basis for the aggressive pursuit by HMRC and indeed the whole punitive approach of the Loan Charge. The reasons were that people were advised that, due to IR35, they were taking a big risk of HMRC objecting to their operating through a limited company and were professionally advised to use an umbrella company instead. Nine out of ten respondents reported that the pitch to them was that the umbrella company was legal. Eight out of ten were told that the arrangements were “HMRC compliant”, and over 60% of people were specifically sold on “IR35 compliance”. At least half of those surveyed said that they perceived their financial gain to be 10% or less of their day rate. This compares to a typical 45% tax rate that HMRC would now apply under the Loan Charge. Reduced admin was also a key driver for many individuals using the schemes, compared with the costs and admin of setting up and running a limited company.<sup>1</sup>
- The overwhelming majority of people sought and followed professional advice. Many sought further reassurances that the schemes were legal and compliant with tax law. They were advised that they were. The way the Treasury and HMRC continually (even, unacceptably, in the introduction to the Terms of Reference of what is supposed to be an independent review) claim that people entered into these schemes as a form of deliberate “aggressive tax avoidance” is simply not supported by the evidence. Instead this is propaganda, a highly prejudiced as well as inaccurate view, to both justify an unfair policy and to demonise those involved, knowing that they would not receive public sympathy from being presented in this way. One of the six suicides reported to HMRC was, according to the family, as a direct result of this demonisation.

#### **2. The background to the Loan Charge and why it was proposed**

- It is vital to look into the background to the Loan Charge and why it was proposed and introduced, including HMRC’s failure to tackle the proliferation of schemes and their failure to communicate concern to individuals (this is clearly shown by evidence including from individuals and advisers, as well as from a leaked internal HMRC email).
- It is troubling how the Treasury and HMRC have claimed that they “were always clear” that these schemes “never worked” and that HMRC took appropriate action at the time, when this is clearly not the case.
- It seems highly likely that the Loan Charge was conceived within HMRC, which then pushed for its introduction, as a way to cover up their own failures and to allow them to seek tax

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<sup>1</sup> Loan Charge Inquiry survey report, March 2019, <http://www.loanchargeappg.co.uk/wp-content/uploads/2019/04/Loan-Charge-APPG-Loan-Charge-Inquiry-Survey-Report-March-2019.pdf>

where they themselves knew they had no power to do so (and have admitted, internally). Further, it appears to be a way to circumvent having to take people through the tax tribunal and court system (this point has been admitted by Sir Jonathan Thompson in a letter to Stephen Lloyd MPs in June 2018<sup>2</sup>). This not something that HMRC, as an operational arm of Government, to administer the tax system, should be doing. It has been reported to the APPG that HMRC have a policy unit, which is troubling, when policy should be made by the Treasury.

- The APPG are clear that any schemes that are unacceptable ways to avoid paying tax should be stopped and legislation brought in to do so, from the point. It is the retrospective nature of the Loan Charge which is fundamentally wrong. This is why any Charge should only apply only from the point it became law.
- It is also notable that there are still companies offering schemes that appear to attempt to avoid paying “normal” amounts of tax. The review must be aware of this and that therefore the Loan Charge, at the same time as retrospectively pursuing people for things that were not illegal at the time, has not succeeded in dealing with the underlying problem. The review should look at this and whilst it is not the main purpose of the review, it may conclude that a wider legislative study is required on how to properly clamp down on schemes that are not viewed as being acceptable.

### 3. The way the Loan Charge was introduced and legislated

- There was grossly inadequate parliamentary scrutiny of the Loan Charge, which is one of the key reasons the Loan Charge has been such a disaster. The proposal was discussed only briefly in Finance Bill Committee and it is clear there was wholly inadequate scrutiny for a policy with such profound implications for tax law (and for the rule of law) and tens of thousands of individuals. As rightly identified by the House of Lords Economic Affairs Committee, this exposes the inadequate process of Parliamentary scrutiny of Finance Bills, something that Parliament must address.
- It seems very likely from both their comments at the time, and especially from the several inaccurate comments made, that Ministers may well not have understood the Loan Charge as a policy when it was introduced – neither in terms of the reality of the background, the fact it overrides normal taxpayer protections and the timescales within which HMRC may pursue people. The APPG had a meeting with the former Chancellor of the Exchequer in January 2019 and he refused to accept the fact that people with only closed years are caught by the Loan Charge. For such a statement to be made by the person who brought in this policy, showing such a basic lack of understanding of it, is deeply troubling.
- It is clear from comments made by successive Ministers that they have been wholly reliant on HMRC briefings and narrative, and have taken this at face value. They have failed in their duty to scrutinise HMRC and challenge questionable advice.
- All in all, the Loan Charge is a **spectacular example of bad policy making** – a deeply ethically and legally questionable policy has been pushed through with no proper scrutiny nor presentation of its reality and its inevitable impact. This warrants a further and more thorough investigation in itself.

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<sup>2</sup> Letter from Sir Jonathan Thompson to Stephen Lloyd MP, 27<sup>th</sup> June 2018, referenced on page 35 of the Loan Charge Inquiry report <http://www.loanchargeappg.co.uk/wp-content/uploads/2019/05/Loan-Charge-Inquiry-Report-April-2019-FINAL.pdf>

#### 4. The role of promoters and why the Government is pursuing only scheme users

- The review must look into how it can be right for the Government to say that they cannot retrospectively pursue promoters as they did not break the law, yet are pursuing those who bought into the schemes that they were promoting.
- The review must look at the claims made by promoters, including in writing, that schemes were not only legal, “QC approved” and also “HMRC compliant” (this relates directly also to point 1 and why people entered into schemes).
- The review must also look at the role of promoter’s fees. As well as, the fact that much of the money that might otherwise have been paid in tax, under other alternative working arrangements, was paid to promoters, who profited substantially from schemes, when users benefited much more modestly and in some cases not at all, compared to operating their own limited company. (This also relates to point 1 and counters the misleading impression given by HMRC and the Treasury that individuals benefited hugely from using these schemes).

#### 5. HMRC and Treasury misinformation

- Perhaps the most shocking part of what has become known as the ‘Loan Charge Scandal’ is the deliberate and cynical way that HMRC and the Treasury have continually issued misleading statements to give a false impression about the Loan Charge – both as a policy and to play down or cover up its inevitable impact. This was covered in our Loan Charge Inquiry report. The main points identified were:
  - A deliberately false impression given about HMRC’s pursuit of promoters, answering questions (orally and in writing) about this by referring to prosecutions that have nothing to do with loan schemes or the Loan Charge policy.
  - A cynical attempt to wrongly reassure MPs and journalists by deliberately downplaying the impact of the Loan Charge through the regular repetition of the lines that HMRC “don’t want to” and “won’t force anyone to”, go bankrupt or to sell their homes. HMRC know full well that not only are both these things the inevitable outcome of the policy (indeed the impact assessment at least acknowledged that some insolvencies were inevitable) but also they know that people have sold their homes already. We have been sent a number of cases where people have already sold their family home – cases that will also be sent to the review.
  - A chronic misrepresentation of the law, that the Loan Charge represents “tax that was always due” when the reality is that this has not been legally tested by a court. And, indeed the Loan Charge denies citizens their right to defend themselves in court against such a claim. There has been a constant and deliberate misrepresentation of the outcome of the Rangers case, *when the reality is the Loan Charge had been conceived of before the case was concluded.*
- Mary Aiston, Director of Counter-Avoidance of HMRC, wrote a letter to City AM, published on Friday, 20<sup>th</sup> September, that repeated some of the same misleading propaganda, making the same discredited claims, despite the independent review having commenced. For HMRC to be engaging in such propaganda, whilst the review is ongoing, is grossly unacceptable but alas typical of the way senior HMRC officers have behaved throughout with regard to the Loan Charge.
- **This chronic and clearly deliberate misinformation must be investigated as part of the review and also, as we stated in our Loan Charge Inquiry report, it should also be investigated properly in terms of officer conduct relating to the Civil Service Code.**

## 6. HMRC treatment of and behaviour towards people facing the Loan Charge

- HMRC and the Treasury have repeatedly stated that HMRC have a helpful and sympathetic approach to the collection of the Loan Charge and to settlement negotiations. Hundreds of cases expose that reality that this is simply not the case and, worse still, HMRC are behaving in an unreasonable, aggressive and at times 'bullying' manner (something that is also reported in hundreds of cases).
- We have identified a number of key themes in taxpayers' interactions with HMRC.
  - i. Clearly and wholly unaffordable Time To Pay (TTP) offers
  - ii. Aggressive communication
  - iii. Threats of Bankruptcy
  - iv. Communications arriving at a time of maximum stress and distress
  - v. Offering unregulated financial advice
  - vi. Unreasonable delays in HMRC's responses
  - vii. Inconsistencies in HMRC calculations between the settlement contract and the calculation appendices
  - viii. Punitive rate of interest on Time to Pay of 4.25%
  - ix. Unreasonable contractual terms for settlement
- The evidence gives the impression that the Loan Charge is a part of a 'maximum revenue' seeking strategy aligned with a punishment strategy (with the Loan Charge being the threat sought to be used to force people into settlements and Time To Pay agreements that are unreasonable and unaffordable) against those who HMRC (not a court) have a view as being "tax avoiders".
- HMRC tell people who are worried to contact them. This is the advice they give in every press release and to MPs to tell their constituents. But, they are absolutely not being reasonable with those people who heed their advice and disclose everything to HMRC. The evidence shows that this 'advice' is in fact a cynical way to persuade people to contact them, disclose everything (information that HMRC may or may not be aware of, and may not have any powers to compel people to provide information about) and then offer them unethically unreasonable 'settlement' offers, whilst threatening people with the Loan Charge.
- The inescapable conclusion from the very considerable amount of evidence we have been sent (and are sharing with the review) is that there is a total disconnect between what HMRC say, both publicly and privately to parliamentarians, and the reality as experienced by taxpayers. And, that therefore HMRC have attempted a wholesale misrepresentation of their treatment of people facing the Loan Charge to MPs.
- A case in point is that HMRC are attempting to enforce Inheritance Tax on the release of loan obligations from a trust structure even though they also want to charge income tax on the basis that the loan was no different to income in the past tax years.
- HMRC are behaving unethically by, at the same time, arguing that loans are income and that loans are loans, using whichever contradictory position suits them at the time; claiming that the Loan Charge isn't retrospective because it's about "outstanding loans" yet at the same time claiming that these loans were "always income". The arrangements (as HMRC know) cannot be both at the same time, so this is devious and dishonest.

- HMRC claim to have always been clear about the arrangements being against the spirit of the law, but when asked by a taxpayer what the “spirit of the law”, as HMRC see it, requires them to pay, HMRC require months to respond. HMRC make demands of taxpayers in terms of response times that they themselves are totally unable to achieve. They demand records from taxpayers to which they have no legal right to receive, but when the taxpayer asks for information on whether other parties may have already settled the tax (very pertinent in the circumstances), HMRC cite taxpayer confidentiality. When asked to supply PAYE records from up to 20 years prior, HMRC state that they are not legally required to keep such old records – yet HMRC expect taxpayers to retain, and produce, these records well beyond the statutory requirements. This is clear case of double standards – unfair and unethical.
- Six suicides have been reported to the Loan Charge APPG. These reports will be shared with Sir Amyas. The review should address why, when HMRC’s Chief Executive, Sir Jonathan Thompson, and Ministers were informed about the serious suicide risk in summer 2018, that they continued to ignore this and have instead focused on trying to persuade MPs of their discredited case for the policy. There are serious question marks about this and whether they are culpable, having known about the clear suicide risk, yet wilfully continuing. This despite being told of the concern and being asked, by over 210 MPs, to pause and review the policy.
- All in all, the picture is an organisation that is out of control and focused solely on an objective of maximising revenue collected, by whatever means necessary. Not, on behaving fairly to taxpayers or on collecting the correct amount of tax.

## **7. HMRC Administrative Failure**

- As well as the wholly unacceptable way HMRC have been treating people, the review must look at the administrative chaos that exists within HMRC related to this policy and HMRC’s profound failure to deal with cases properly and within reasonable timescales.
- HMRC are clearly struggling to cope with the volume and the complexity of settlement requests despite having had 20 years to investigate and understand the structure of these arrangements and the application of the tax law to them. HMRC have also had three years notice of the specific Loan Charge deadlines in which to set up the settlement processes.
- Many of the settlement offers contain errors. And, due to the legislative backdrop, taxpayers have no real right to challenge calculations and figures other than to ask HMRC to make changes. HMRC, meanwhile, hold the threat of the Loan Charge over them.
- HMRC have taken a wholly unacceptable length of time to deal with people’s correspondence and settlement offers. We have been sent cases where people have been waiting for months or even more than a year. After which, some have been given ludicrously short timescales in which to respond and make life-changing decisions. HMRC have sent letters which are dated differently to the date of the post mark. In some cases, people have been asked to respond to a letter by a date which is earlier than the date the letter was sent or arrived.
- It is clear that HMRC are not achieving anything like the number of settlements they told Parliamentarians they would achieve. They are refusing to answer Freedom of Information requests on this – yet another example of how they are evading scrutiny and seeking to cover up their own failures, whilst ruthlessly and unfairly pursuing individuals.

## **8. How the Loan Charge overrides statutory taxpayer protections and undermines the rule of law**

- Taxpayers, as well as HMRC, have a right to regard tax affairs as closed after the periods of time set out in Taxes Management Act 1970. The Loan Charge clearly overrides this, but only

in HMRC's favour. There is no reasonable argument why HMRC should be able to go back 20 years where they did not act in time and without any proof that the extended time limits (which are applicable only in cases of tax evasion) should be applied. The taxpayer has no recourse to a tribunal or court to show that the 20 year limits are being wrongly applied.

- Loans are being brought into charge for tax, for which the underlying tax position is still disputed. HMRC have a view of the tax law which is at odds with much of the tax profession and has not yet been tested in court. There are arguments that the tax is not due from the employee in the arrangements. There is no reason at all why HMRC should be allowed to impose their view of the tax law with the taxpayer denied any right to take any disagreement to an independent party for adjudication. This is one of the most basic principles of the Rule of Law – that disputes are settled through access to an independent party.
- The most egregious thing about the Loan Charge legislation is that in one fell swoop it takes away the basic right of a citizen to defend themselves in court, against claims made by the state and instead makes HMRC judge, jury and executioner. Those who have open years should be allowed to defend themselves in a tax tribunal, under the law as it applied over the time period in which those actions were taken and with the ability for a court to hear the case and all the necessary evidence.
- With regard to closed tax years, this is the most outrageous part of the legislation, legally. HMRC signed off many tax years as acceptable, either by not opening an enquiry or opening one and then closing it. These taxpayers had certainty under the law as it was at the time and this awful legislation has taken it away. This is an affront to natural justice and undermines the Rule of Law.
- The Loan Charge is clearly retrospective/retroactive by any sensible definition and it's clear that HMRC's and the Treasury's tactic has simply been to keep saying it isn't to try to make it appear true. The overwhelming view of tax professionals is that the Loan Charge is, by some measure, either outright retrospective or has a retroactive impact on taxpayers.

## **9. HMRC presumption that the review will not change the Loan Charge and its ongoing pursuit of individuals**

- HMRC, and the Treasury, appear to be presuming that the Loan Charge review will not change anything. This is sinister and is leading people to believe that they and the Treasury have already determined its outcome by narrowly defining the terms of reference and supplying the staff for the review.
- Despite the review now taking place and settlement discussions being on hold, HMRC continue to pursue people ruthlessly for APNs related to loan schemes. This is disgraceful when these are clearly directly related to the issue under review. There must be a complete halt to all HMRC activity and communication during the period of the review and up until the Government announces how it will implement the findings of the review.
- This must include a suspension of the Loan Charge as currently individuals have no certainty as to whether or not the Loan Charge will still be payable in January 2020 following the review. The threat of it continues to hang over people, despite the policy being reviewed, which undermines the review itself and allows HMRC to continue their unacceptable and aggressive behaviour towards individuals.

Loan Charge APPG (made up of 169 Parliamentarians of all parties)  
27<sup>th</sup> September 2019