The Lord Morse KCB
House of Lords
London
SW1A 0PW

20th March 2024

Dear Lord Morse,

HMRC's use of s.684 notices – did HMRC tell you about this during your review?

We are writing to you about the use of so-called Section 684 notices, that HMRC are now using to target those who had previously faced the Loan Charge, but were taken out of its reach by the key recommendation of your 2019 review (known as the Morse Review).

HMRC has started issuing waves of these letters, informing the individual that the tax liability, which fell on the deemed employer, has now been transferred to them instead, making them liable for the tax HMRC believes should have been paid by that employer.

HMRC have decided that they are able to do this by using a 'discretion' which is deeply contentious and was never intended for this purpose by Parliament. It is a clear abuse of power and it also undermines a key conclusion of your Review that the Government said it accepted and would implement.

Background - Section 684 of ITEPA 2023

Section 684 of Income Tax (Earnings and Pensions) Act 2003 (ITEPA 2003) is the basis of all the rules that mandate the deduction of tax by employers and agencies when they pay their workers (usually known as Pay As You Earn or PAYE). It has been universally accepted that the agencies involved in the 'disguised remuneration' (DR) schemes caught by the Loan Charge should have operated PAYE (Pay As You Earn) in the first place, according to the relevant legislation and case law. Under the PAYE rules, HMRC have a 'discretion' to collect missing tax from the workers rather than their employers, but they can do so only in certain circumstances. The conditions were not met in these cases.

The section 684 notices (s.684(7A)(b) letters) are based on a power within the rules for HMRC to "switch off" an employer's PAYE obligations when it is appropriate to do so. Typically, the power has been used to allow very short-term employments to operate outside the PAYE system so as to avoid the need for tax to be deducted and only a few weeks later to be repaid to the worker as the worker's annual earnings are so low.

The way that HMRC is using these notices is overriding the normal process of dealing with open tax years and is both deeply controversial and profoundly unfair.

Your key conclusion – removing the Loan Charge pre December 2010

One of the main recommendations of your Review was to limit the retrospective reach of the Loan Charge to 2010, thereby reducing the original twenty-year retrospective impact of the

Loan Charge. However, HMRC are circumnavigating this, by using s.684 notices and issuing them in their thousands.

Your Review report states:

> *"For the twenty-year look-back period of the Loan Charge to be proportionate and justified, taxpayers would need to have acted in a way that was perverse in light of a clear legal position. This was not the case.* ***I therefore conclude that the Loan Charge should not apply to loans entered into by either individuals or employers before 9th December 2010****, being the point at which the law became clear. HMRC should continue being able to settle and investigate cases prior to this point under their* ***normal powers*** *where they have appropriate grounds, and a legal basis, to do so".*

HMRC are now issuing more s.684(7A)(b) letters to individuals for precisely those same years which your Review removed from the Loan Charge.

There is no evidence that HMRC told you of this s.684(7A)(b) power even though they first used it two years before your review. You presumably were also not aware that HMRC would simply pursue people using this method, whilst still denying them their right to go through the normal process – ***and effectively rendering your recommendation meaningless (and by definition, redundant) in all these cases.***

It is clear from the above wording in your review that HMRC's pursuit of cases where an open enquiry was in place was expected to be carried out using **'normal powers'** i.e., with HMRC challenging schemes through the tax tribunal system, effectively placing individuals back in the situation they would have been had the Loan Charge never been implemented and allowing the normal legal process.

HMRC are well aware the use of discretion in these cases is deeply controversial

HMRC themselves knew that the transfer of tax liability in these cases would be controversial. As exposed by a response to a Freedom of Information request they had to apply to their own internal (HMRC) Contentious Issues Panel (CIP) stating *"To our knowledge, this discretion has not previously been used to remove a PAYE liability which has arguably already arisen".* They also state *"It is highly likely we will be challenged on our use of the discretion in contractor loans cases".*

Another Freedom of Information Request **has revealed that HMRC decided to override these concerns.** The Contentious Issues Panel – which is of course just an internal HMRC group – approved the decision to do this. Parliament was not consulted about this controversial decision and MPs simply found out when HMRC started issuing them. HMRC did not even consult with the Government - they merely informed the Financial Secretary to the Treasury afterwards (and even then, wondered if they needed to bother, stating "David and Penny are wondering if this is something to inform FSTs office?"). This is another abuse of the whole Parliamentary process by HMRC and another glaring example of their profound lack of accountability.

HMRC has sat on these cases – again, for up to twenty years - and suddenly, completely out of the blue, people are receiving letters informing them that an HMRC officer has used their 'discretion' to transfer an unpayable liability from the employer to them. They have just thirty days from the date on the letter in order to make a representation against it. HMRC confirm that the s.684 notices have no right of appeal and that all individuals can do is to write back to HMRC saying they do not believe the notice has been correctly applied and to explain why (which is a technical matter based on HMRC's use of the discretion to forgive the employer or agency's previous non-compliance with the PAYE rules).

If an individual does not challenge the notice within the wholly unreasonable thirty-day limit, the employer's tax liability, which is likely to be a life-changing amount, is transferred to them and tax demands will then follow. Even if the individual does challenge the notice, the only way they can then overturn it is via Judicial Review, which is completely out of the question for most people, with a very significant cost involved and the need for legal representation. A judicial review must also be brought within a constrictive three-month period from the date of HMRC's letter, which is wholly unreasonable and disproportionately unfair – as it has taken HMRC often in excess of fifteen years to reach this point.

A recent Freedom of Information request has found that HMRC have already issued 3,000 of these s.684 notices, landing on the doormats of already vulnerable people, in the usual brown envelopes feared by those caught up in this never-ending nightmare and causing yet another urgent mental health crisis.

As the notice cannot be appealed – and cannot be taken to tax tribunal – it allows HMRC to issue tax demands based on its own estimates of what they think should have been paid at the time (rather than a legally proven tax bill). It is like another Loan Charge situation – simply issuing a s.684 to everybody and not conducting appropriate, focused investigation into each individual case. Those without tax firms assisting them will have no way to try to defend themselves and HMRC knows this only too well.

If HMRC had intended to use s.684 notices in this way, the Loan Charge was never needed

The enormous irony here is that HMRC's cynical use of this 'discretion' means that the Loan Charge was never needed in the first place, which also means HMRC have misled Parliament – and Ministers – as well as yourself during the Review.

There is now nothing to stop HMRC issuing s.684 notices to every single person facing the Loan Charge who has open tax years going back many years (the majority of people). The alarming reality of HMRC giving itself this discretion is that s.684 notices can be technically used against any underlying tax 'debt' for any time that an employer has failed to operate PAYE correctly, going back to 1944. This is sinister, disturbing and clearly not what the discretion was ever intended to be used for.

If HMRC issue s.684 notices to all those with open years, there will be countless bankruptcies, innumerable breakdowns and a real and very serious risk of yet more suicides.

We have previously written to you regarding new information that came to light since your review and unfortunately you have declined to respond to us on three separate occasions.

We now have three further questions for you Lord Morse, which we would be most grateful for you to answer.

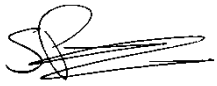
1. Did HMRC or the Treasury make you aware of this s.684 'discretion'?

2. Did HMRC tell you that they would be using this 'discretion' for anyone who had an open tax year enquiry regardless of for how long in the past therefore rendering your review meaningless as your recommendations were going to be overridden?

3. Are you prepared to speak out regarding this unfair situation as by calling upon this 'discretion' it is clearly not using the 'normal powers' that you referred to in your review?

We look forward to your response and hope you will at least clarify the crucial point, as to whether HMRC briefed you about s.684 notices and their potential use for this purpose.

Yours sincerely



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On behalf of the Loan Charge Action Group