Loan Charge Action Group

Briefing Document to Loan Charge Review

Loan Charge Executive Summary

The government has continually denied any link between IR35 and contractor loan arrangements. IR35 was, and remains, a very subjective and poorly defined area of tax law which directly led to these "IR35 compliant" employment solutions.

Did 50,000+ people and small businesses really set out 'to aggressively avoid tax'? The people who signed up are experts in their own professional fields, not tax law. They engaged tax professionals and became customers of existing loan arrangements who ensured "ongoing legal compliance."

HMRC knew about these arrangements since the 1990s and only started to have a problem with them once they had become established in the mainstream.

- It was identified by a National Audit Office report in 2012 that HMRC needed to do more to tackle mass marketed arrangements, HMRC didn't do anything except introduce DOTAS
- DOTAS didn't result in an automatic enquiry being opened by HMRC or a warning given to the end user– this resulted in tacit approval. Promoters used DOTAS registration to position their arrangements as fully registered and legally compliant
- HMRC always said "these arrangements do not work." It would be far more honest and fairer to say that, in reality, HMRC "did not want them to work."

The returns to the end user were certainly not "too good to be true" when tax and promoter fees are taken into account. Any benefit is eliminated, or even reversed, by the Loan Charge.

- Employers and end clients got a flexible nimble workforce for a cut price (no Employers NI)
- Accountants and promoters took their administration and referral fees
- The end user was never the 'winner' in this. Even less so when the Loan Charge is applied

The punitive impact of the Loan Charge:

- Doesn't impact promoters as the government won't or can't pursue a retrospective law
- It glosses over HMRC's failings and allows them to continue
- End users have 20 years of loans calculated as if they were income in a single tax year
- Blackstone's Theory: Many individuals who used loan arrangements have not even been contacted by HMRC and will therefore not be impacted, whilst those who have been fully transparent with their tax affairs will be ruined by the Loan Charge.
- Otherwise thriving small businesses with many employees, driven into insolvency

The term "Disguised Remuneration" is aimed to contrive support for HMRC. However, the 'D' in DOTAS stands for 'Disclosure' – the very opposite of disguising anything.

Rangers was an inconvenient win for HMRC. They didn't issue Follower Notices as employers no longer existed or they were out of time, so they needed the Loan Charge to transfer liability to end users.

The Loan Charge goes against the rule of law in re-opening tax years that would otherwise be considered closed. It was designed to remove taxpayer rights and protections. Is it even full and final? HMRC will decide in the future that loans are actually loans and demand inheritance tax too.

What does LCAG want to see change

- Suspension of all Loan Charge activity, APN and debt collection during the review.
- The Loan Charge to take effect only from the date of Royal Assent of the 2017 Finance Act.
- HMRC to review their working practices how they deal with contractor and small businesses.
- A rigorous, well communicated and well-constructed approach to regulating arrangements and tax advice – including a rethink of DOTAS

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1 IR35 and the Birth of Contractor Loans

The government has continually and somewhat disingenuously denied any link between IR35 and the employment arrangements that are now subject to the Loan Charge. It is patently clear however, that the poorly drafted and applied IR35 legislation directly led to accountants, tax professionals and promoters developing these “IR35 compliant” employment solutions for the freelancer community. IR35 gave arrangement providers a perfect business opportunity to offer clarity and certainty to freelancers in the backdrop of employment legislation that was unclear and easily misinterpreted.

1.1 What were IR35’s stated aims?

Introduced in 1999, IR35 aimed to tax those contractors and self-employed that HMRC deemed to be engaged in the same capacity as an equivalent permanent employee. For tax purposes, anyone caught within IR35 was deemed to be an employee.

IR35 significantly blurred the line between those that worked for themselves and those that worked in an employee/employer relationship. IR35’s sole purpose was to apply Employer’s NI Contributions to any earnings. Regrettably, that NI concern appears to be the only consideration recognised by HMRC when distinguishing between an employee and the self-employed contractor. Tellingly the benefits that NI covers were not considered by HMRC.

1.2 What was the reality?

Quite justifiably the self-employed do not consider themselves to be employees and whether intended or not, IR35 alienated them. The self-employed are heavily compromised on both sides as they do not receive any of the considerable benefits enjoyed by employees (sick pay, holiday pay, training, pension, maternity/paternity pay, etc). Yet they carry significant financial risks and overheads along with the complete sacrifice of career progression and job security. Put simply, the self-employed relinquish benefits for freedom and control, and they provide a set of skills which they market on a fixed term basis.

The additional Employers NI contributions that HMRC believed was due is somewhat of a zero-sum game. If the NI goes up, the end client either looks to bring in someone cheaper or they cut the hours as the budget will likely not change. It is an assault on individuality and freedom of working by attempting to corral everyone into an inflexible, permanent employee trap.

Despite many attempts to “fix” IR35, successive governments have only succeeded in making it worse. Over the years many MPs have voiced their disapproval of IR35 including the ex-Chancellor Philip Hammond MP and the current Chancellor Sajid Javid. Regrettably once in government they have done nothing.

There appears to be an element of the “sunk costs” myth when it comes to IR35 policy. No Government wants to bite the bullet and undertake the challenge of overhauling the tax code as this will result in the considerable compliance effort being written off. Instead they stumble on with occasional, meaningless policy tweaks that fundamentally fail to address the profound issues with the policy and instead inevitably make things worse. The failure of CEST both generally and in the Courts is a potent reminder of this.

1.3 Why has it caused so many problems?

It could be argued that IR35 failed because it was an attempt to define in law the working style of an individual rather than rely on the contractual agreement in place between the individual and their engager. As previously highlighted, whilst commonalities do exist, a self-employed person's engagement is often profoundly different to that of an employee. The situation was bad from the outset of IR35, but the situation has been left to slowly fester because HMRC/HMT fail to see the wider benefit to the economy of the freelancer market and instead focus only on the expectations of a very modest increase in Employer's NI Contribution.

1.4 Contractor fear through IR35 uncertainty

IR35 was, and remains, a very subjective and poorly defined area of tax law. Consequently, the average contractor lives in fear of an HMRC investigation due to the potential impact of being deemed to have not correctly complied with the policy.

Furthermore, it is evident from recent court records that HMRC themselves are not at all clear on the application of IR35 either. However, this lack of understanding or misinterpretation of the legislation does not result in any personal or financial consequences for HMRC. They simply sweep it behind them and try again with their taxpayer funded legal team. A conspicuous waste of public finances. Notwithstanding the fact that HMRC use this same team to force settlement before they even get to court. How many taxpayers have been coerced into paying tax that isn't due simply because HMRC has the ammunition to break people before they get their day in court?

2 Proliferation of Contractor Loans

The Terms of Reference associated with the Loan Charge review quite understandably poses several questions, but they appear very prescriptive and they oversimplify what is a complex issue that has been allowed to build up over two decades. Conveniently for HMRC/HMT the questions pre-conceive the notion that it was a tax avoidance motive that was the primary driver for why contractors and small businesses entered into these arrangements. The reality is very different, and HMRC/HMT know this full well. Without any doubt it was the individual's endeavour to maintain compliance in the wake of the very poorly drafted and implemented IR35 policy that is at the heart of this, and the subsequent misleading advice from those in positions of authority paved the way for use of these arrangements to proliferate.

2.1 Why did people start using loans?

Did 50,000+ people and small businesses really set out 'to aggressively avoid tax' or intentionally enter into an arrangement that they thought was not legitimate? No. They were motivated by anxiety. They were overwhelmed by the sheer volume of information in the tax code and wanted to reduce the risk of becoming embroiled in unnecessary and unwarranted IR35 investigations. So, they followed professional advice and purchased solutions to delegate the responsibility and administrative burden of operating a limited company.

There is an assumed degree of financial knowledge on HMT and HMRC's behalf in their rhetoric. The people who signed up range from all walks of life, business people, consultants, nurses, doctors, teachers and many others who are experts in their own professional fields not tax law. Most have no interest in tax law either. They concentrate on undertaking the work they are qualified to do and are good at, and quite understandably engage qualified tax professional to handle matters that concern their tax status.

The British tax code is currently more than 17,000 pages. It has more than trebled in size since 1997. On your own it would be impossible to digest such a glut of information, and yet we are often told that ignorance of the rules is no defence. Clearly there must be a point where it just becomes impossible to keep abreast of the tax code.

There is a quantum leap between being a PAYE employee and trying to run a business as a contractor. Working as an employee you can leave almost all tax matters to your employer's payroll department as they will calculate and deduct the relevant tax through PAYE. Running your own business requires being responsible for all your tax affairs. On your own you can fall into a thousand tax traps very easily even whilst engaging qualified tax professionals. Without engaging them you would be virtually helpless.

For this very reason those affected did not look to set up their own processes, they would not have had the knowledge. They became customers of established arrangements that were managed by people who were specialists in accountancy and taxation, and who had teams that ensured "ongoing compliance" was provided for users which in turn gave "peace of mind."

Those arrangements were mass marketed and promoted by big companies over many years. The assertion that arrangement users were out to "beat the system" is risible. They were out to work as best they could and comply with the law in the simplest way possible.

Treasury and HMRC have continually sought to demonise users of these arrangement and misrepresent the reality of the situation as well as people's intent. These HMRC tactics have directly led to the mental breakdown of thousands and regrettably six suicides have been directly attributable (and evidenced) to the Loan Charge and the behaviour of HMRC/HMT. It has also been extensively reported that there has been widespread degradation in normal healthy family relationships resulting in relationship break-ups for many. This is despite the official HMRC impact assessment, which claimed that the Loan Charge "would have no effect on family stability". When one considers that no-one has broken any law, is this fair? Is this justifiable? Is this what parliament intended?!

2.2 HMRC's Knowledge

HMRC have known about these arrangements since the 1990s and did little to challenge them. In fact, they only started to have a problem with them once they had become established in the mainstream and many contractors started to use them, precipitated by the inception of IR35.

It took them significantly longer to start challenging them in any meaningful way. Occasionally they took arrangements through the courts but their argument that a loan was income was **always** rejected.

It was acknowledged by a National Audit Office report in 2012[1] that HMRC needed to do more to tackle these mass marketed arrangements. Meanwhile more and more arrangements were set up and they became commonplace.

Loan arrangements became increasingly popular and were rarely challenged, giving an appearance of tacit acceptance by HMRC. HMRC allowed users to carry on using these arrangements for many years and made little or no effort to address their widespread use.

The inconsistency of HMRC's actions were also noted, where a taxpayer would use the same arrangement year after year, but enquiries were opened only on some of the years whilst others were successfully signed off and left unchallenged. There is a distinct and concerning haphazardness and disorganisation to the administration of enquiries during this time.

In the cases where enquiries have been opened those were dismissed as routine by both HMRC and accountants. Users were told that HMRC would be in touch if there was any problem. HMRC rarely did. In most cases enquiries have been languishing in the void for many years. Indeed, we have on record that HMRC opened enquiries 13 years ago into an individual's tax returns, and no further communication has ever been received by the individual.

2.3 DOTAS

DOTAS (Disclosure of Tax Avoidance Schemes) was envisioned as a means of controlling tax avoidance arrangements and was introduced in 2004. DOTAS numbers were issued to arrangements that bore specific hallmarks. Some arrangements, that have been deemed as subject to the Loan Charge, (legitimately) weren't issued with DOTAS numbers. There were even cases of individuals contacting HMRC at the time to be told that their arrangement was in order and they were not required to declare anything.

[1] https://www.nao.org.uk/wp-content/uploads/2012/11/1213730.pdf

Promoters used DOTAS registration to their advantage by positioning their arrangements as being fully registered and legally compliant. When people were in DOTAS registered arrangements and no action had ever been communicated or taken, what else were they expected to think? Had HMRC been clearer on what a DOTAS number signified, the acceptance of them by contractors may have been severely impacted.

2.4 Have HMRC always been clear that the arrangements didn't work?

HMRC repeatedly uses the terms "HMRC believes", "HMRC has a view" or "HMRC's opinion" to justify its actions. It is not HMRC's function to hold opinions, only to apply the tax code. These are classic behavioural insight nudging techniques to coerce people into believing they owe tax when they may not. HMRC should hold itself to a higher standard given the power and influence it already has over taxpayers.

HMRC's stated position is that they have always said these arrangements did not work. This raises several crucial questions.

- ***In what way did they communicate this to taxpayers and when?***

  HMRC's Spotlight articles are not read by the people being targeted here – the first mention of contractor loans came from one of these newsletters as late as 2013. Only tax advisors and tax insiders read Spotlight articles. Contractors leave their tax affairs in the hands of these advisors. If the advisor does not pass on that information or make the necessary changes then the contractors will be completely unaware.

  Equally, whispers within HMRC or speeches given to Commons Committees are not law and certainly do not reach the average taxpayer. DOTAS could be interpreted as a vague attempt but once again its purpose wasn't made clear and it was routinely used to provide credibility to the arrangement rather than to dissuade users from signing up.

  Despite personal and company tax returns being made to HMRC, and with notices issued by HMRC acknowledging receipt, no communications were made in respect of these arrangements nor any advisories issued to individuals.

- ***On what basis were they clear arrangements didn't work?***

  The only significant court ruling regarding these arrangements has been the Rangers Case. The final ruling, after all lower courts found against HMRC, was at the Supreme Court in 2017.

  Unusually, the Supreme Court gave judicial leniency and permitted HMRC to change their argument. The premise HMRC had previously based their objections on were not winning the courts over.

  So, in what way could HMRC have, "always have been clear", when until 2017 there was no determination made in law. And when indeed the courts did rule, until the final supreme court ruling in 2017, prior to then all HMRC's objections were dismissed by the courts.

It would be far more honest and fairer to say that HMRC "did not **<u>want them to work</u>**."

2.5 Were arrangements really "Too good to be true"?

We have heard the "too good to be true" phrase so often it is beyond cliché. It is also simply wrong if approached from the perspective of someone not well versed in tax.

A typical scenario was that an individual checked with the promoter or accountant for re-assurances that the arrangement was legal and legitimate; such as the arrangement having been reviewed by a QC, the promoter would claim that the DOTAS number was HMRC approval etc. This, combined with how widespread they were and the take home being broadly in line with that offered via the limited company option, made the use of loan arrangements appear both reasonable and realistic.

Another type of scenario was for agency workers such as nurses and supply teaching staff. They were paid by the agency without even knowing they had entered into such arrangements. Employment agencies managed all their tax affairs, and some were even instructed to use a particular umbrella company as a condition of work.

In some cases, avoidance of tax may have been a motive. But in most cases, when compared with the limited company option that would be the contractor's benchmark, there was little difference; and this is one very clear reason why "too good to be true" is a complete smokescreen. Regardless, tax avoidance was, and still is legal and certainly for most of the 20 years covered by the Loan Charge tax avoidance was not the pejorative term it has been conflated into. It was simply described as tax planning or minimising one's tax liability by legal methods (something all legal dictionaries will detail). Fundamentally there is no requirement to pay more than is legally due and a constitutional principle of English law states that, "everything which is not forbidden is allowed". Without the Rule of Law, we have nothing.

Example

To further understand why the "too good to be true" cliché is meaningless, perhaps it is useful to look at what an individual might actually end up with in their pocket. In the examples below, we take a nominal 'wage' or contract rate of £30,000 and £50,000 per annum – in line with HMRC settlement TTP conditions - and compare the returns of PAYE, self-employment and umbrella loan arrangements.

The examples assume that the individual used loan arrangements for the 4 most popular years that were identified in the March 2019 Loan Charge APPG survey[2].

It is clear from the examples below that there was limited or no potential financial benefit to the end user in using these arrangements. Any benefit is totally eliminated by the Loan Charge.

[2] http://www.loanchargeappg.co.uk/wp-content/uploads/2019/04/Loan-Charge-APPG-Loan-Charge-Inquiry-Survey-Report-March-2019.pdf

Example 1: Nominal 'wage' of £30,000 pa

	Employed				
	2010-11	2011-12	2012-13	2013-14	
Client's Options					
Contract Cost	£ 30,000	£ 30,000	£ 30,000	£ 30,000	
Employer's NI Threshold	£ 5,720	£ 7,072	£ 7,488	£ 7,696	
Employer's NI Rate	£ 0	£ 0	£ 0	£ 0	
Employer's NI	£ 3,108	£ 3,164	£ 3,107	£ 3,078	
Cost to Employer/Client	£ 33,108	£ 33,164	£ 33,107	£ 33,078	
My Options					
Umbrella Fee					
Earnings to Self	£ 30,000	£ 30,000	£ 30,000	£ 30,000	
Less Expenses	£ 2,000	£ 2,000	£ 2,000	£ 2,000	
Net Receipt	£ 28,000	£ 28,000	£ 28,000	£ 28,000	
Total Income Tax	£ 4,705	£ 4,505	£ 4,379	£ 4,112	
Total National Insurance	£ 2,671	£ 2,733	£ 2,689	£ 2,670	
Loans Received					
Take Home	£ 22,624	£ 22,762	£ 22,932	£ 23,218	*a
	Total Take Home (over 4 years)			£ 91,536	

	Self Employed				
	2010-11	2011-12	2012-13	2013-14	
Client's Options					
Contract Cost	£ 30,000	£ 30,000	£ 30,000	£ 30,000	
Employer's NI Threshold					
Employer's NI Rate					
Employer's NI					
Cost to Employer/Client	£ 30,000	£ 30,000	£ 30,000	£ 30,000	
My Options					
Umbrella Fee					
Earnings to Self	£ 30,000	£ 30,000	£ 30,000	£ 30,000	
Less Expenses	£ 4,000	£ 4,000	£ 4,000	£ 4,000	*b
Net Receipt	£ 26,000	£ 26,000	£ 26,000	£ 26,000	
Total Income Tax	£ 3,905	£ 3,705	£ 3,579	£ 3,312	
Total National Insurance	£ 2,671	£ 2,733	£ 2,689	£ 2,670	
Loans Received					
Take Home	£ 23,424	£ 23,562	£ 23,732	£ 24,018	*c
	Total Take Home (over 4 years)			£ 94,736	

	Umbrella				
	2010-11	2011-12	2012-13	2013-14	
Client's Options					
Contract Cost	£ 30,000	£ 30,000	£ 30,000	£ 30,000	
Employer's NI Threshold					
Employer's NI Rate					
Employer's NI					
Cost to Employer/Client	£ 30,000	£ 30,000	£ 30,000	£ 30,000	
My Options					
Umbrella Fee	£ 6,000	£ 6,000	£ 6,000	£ 6,000	
Earnings to Self	£ 24,000	£ 24,000	£ 24,000	£ 24,000	
Less Expenses	£ 3,000	£ 3,000	£ 3,000	£ 3,000	*d
Net Receipt	£ 21,000	£ 21,000	£ 21,000	£ 21,000	
Total Income Tax	£ 1,172	£ 1,034	£ 954	£ 737	*e
Total National Insurance	£ 691	£ 573	£ 529	£ 510	*e
Loans Received	£ 11,666	£ 11,354	£ 11,125	£ 10,875	
Take Home	£ 20,000	£ 20,000	£ 20,000	£ 20,000	*f
	Total Take Home (over 4 years)			£ 80,000	
	Loan Charge cost			£ 19,044	*g
	Total Take Home (over 4 years) after Loan Charge			£ 60,956	

Example 2: Nominal 'wage' of £50,000 pa

	Employed				
	2010-11	2011-12	2012-13	2013-14	
Client's Options					
Contract Cost	£ 50,000	£ 50,000	£ 50,000	£ 50,000	
Employer's NI Threshold	£ 5,720	£ 7,072	£ 7,488	£ 7,696	
Employer's NI Rate	£ 0	£ 0	£ 0	£ 0	
Employer's NI	£ 5,668	£ 5,924	£ 5,867	£ 5,838	
Cost to Employer/Client	£ 55,668	£ 55,924	£ 55,867	£ 55,838	
My Options					
Umbrella Fee					
Earnings to Self	£ 50,000	£ 50,000	£ 50,000	£ 50,000	
Less Expenses					
Net Receipt	£ 50,000	£ 50,000	£ 50,000	£ 50,000	
Total Income Tax	£ 9,930	£ 8,505	£ 9,884	£ 9,822	
Total National Insurance	£ 4,260	£ 4,381	£ 4,337	£ 4,215	
Loans Received					
Take Home	£ 35,810	£ 37,114	£ 35,779	£ 35,963	*a
	Total Take Home (over 4 years)			£ 144,666	

	Self Employed				
	2010-11	2011-12	2012-13	2013-14	
Client's Options					
Contract Cost	£ 50,000	£ 50,000	£ 50,000	£ 50,000	
Employer's NI Threshold					
Employer's NI Rate					
Employer's NI					
Cost to Employer/Client	£ 50,000	£ 50,000	£ 50,000	£ 50,000	
My Options					
Umbrella Fee					
Earnings to Self	£ 50,000	£ 50,000	£ 50,000	£ 50,000	
Less Expenses	£ 4,000	£ 4,000	£ 4,000	£ 4,000	*b
Net Receipt	£ 46,000	£ 46,000	£ 46,000	£ 46,000	
Total Income Tax	£ 8,330	£ 7,705	£ 8,284	£ 8,222	
Total National Insurance	£ 4,260	£ 4,381	£ 4,337	£ 4,215	
Loans Received					
Take Home	£ 37,410	£ 37,914	£ 37,379	£ 37,563	*c
	Total Take Home (over 4 years)			£ 150,266	

	Umbrella				
	2010-11	2011-12	2012-13	2013-14	
Client's Options					
Contract Cost	£ 50,000	£ 50,000	£ 50,000	£ 50,000	
Employer's NI Threshold					
Employer's NI Rate					
Employer's NI					
Cost to Employer/Client	£ 50,000	£ 50,000	£ 50,000	£ 50,000	
My Options					
Umbrella Fee	£ 10,000	£ 10,000	£ 10,000	£ 10,000	
Earnings to Self	£ 40,000	£ 40,000	£ 40,000	£ 40,000	
Less Expenses	£ 3,000	£ 3,000	£ 3,000	£ 3,000	*d
Net Receipt	£ 37,000	£ 37,000	£ 37,000	£ 37,000	
Total Income Tax	£ 1,172	£ 1,034	£ 954	£ 737	*e
Total National Insurance	£ 752	£ 723	£ 679	£ 681	*e
Loans Received	£ 27,666	£ 27,354	£ 27,125	£ 26,875	
Take Home	£ 37,000	£ 37,000	£ 37,000	£ 37,000	*f
	Total Take Home (over 4 years)			£ 148,000	
	Loan Charge cost			£ 43,608	*h
	Total Take Home (over 4 years) after Loan Charge			£ 104,392	

*a - Take home pay is gross income minus tax and NI
*b - Expenses are deductible for tax
*c - Take home is gross income minus tax and NI calculated after expenses have been offset
*d - Expenses incurred but cannot be offset
*e - Income tax and NI is paid out of fee paid to umbrella
*f - Take home is gross income minus umbrella fee and expenses incurred
*g - Loan Charge based on additional tax paid in 2019/20 with income as £30,000 salary plus loans added
*h - Loan Charge based on additional tax paid in 2019/20 with income as £50,000 salary plus loans added

2.6 Loan Arrangement Key players and Their Roles

Contractors have skills in their field and they are generally smart and educated people. They are not however tax professionals or well versed in tax legislation. They may know the basics within a small area that relate to their immediate situation but outside of this they will usually pay for professional advice.

Employers and End Clients

There is a significantly higher cost to the employer or end client in having a large PAYE workforce, since they must pay Employer's National Insurance, amongst other costs. This has been a factor in many employers moving to an outsourced solution and using a contractor workforce. A contract workforce is more nimble, flexible and focussed and therefore cheaper for the end client not least as they can conclude contracts at very short notice.

The move towards contractors and those using umbrella arrangements was particularly prevalent during the public sector austerity drive by bodies such as the NHS.

Accountants

When IR35 was introduced, accountants (who had been running regular Limited Company accounts) suddenly found themselves with a new set of problems. Their clients, the contractors, were now required to know where they stood in a tax environment that had suddenly turned from stable and predictable to complex and very vague.

Some accountants decided to set up their own umbrella companies using the loan arrangements that had previously only been seen in more niche use cases.

Some accountants were approached by promoters of mass marketed solutions and were rewarded with kickbacks for signing people up to arrangements that they were marketing.

Either way, these arrangements were pushed and were backed up with all the information and legal opinion that gave them an appearance of being a safe, compliant and a certain solution to the problem that was being faced.

Promoters

With the introduction of IR35, and contractors facing uncertainty over it, arrangement promoters saw that as a gap in the market and employed legal teams to produce arrangements that were legal and followed tax reporting guidelines. They worked closely with accountants and gave them incentives to sign up as many clients as possible. Arrangements were marketed as IR35 compliant, fully legal and QC approved, and if the arrangement was DOTAS registered, it was marketed as "HMRC approved".

QCs

Favourable Queen's Counsel opinion, to a contractor, would be considered an impeccable seal of approval. Most arrangements either employed QCs or relied on their opinions to give expert tax guidance to provide re-assurance to those who were considering signing up.

3 The Loan Charge's Impact

3.1 Who does the Loan Charge hold to account?

It doesn't hold the Promoters to account

There are some who suggest that HMRC should chase the creators and promoters for money or prosecute them in some way. It is simply a legal dead end though – the promoters did nothing wrong and most are now time barred from taking action in any case.

"It is true that the promotion of a tax avoidance arrangement is not a crime; it is not illegal... ...However, the Committee has expressed a proper concern in respect of the promoters. The difficulty is that in law it is hard retrospectively to go after these people."
Jesse Norman, Lords Economic Affairs Committee, Tuesday 16 July 2019

The irony of being unable to pursue promoters because that would require a retrospective law is not lost on people impacted by the Loan Charge.

It doesn't hold the Accountants or Employers / End Clients to account

For many of the same reasons cited above, the accountants or employers / end clients cannot be held to account either. Even if they could be chased, the three years notice given by the Treasury acted as an early warning to those running the arrangements and allowed them either to pack up or move beyond reach – and whilst HMRC are keen on bringing liquidated small businesses back to life to claim tax under the Loan Charge, they are less willing to do so for these companies.

It doesn't hold HMRC to account

HMRC should only be the administrator of the tax system; however, they now have such powers that they behave as a judge, jury and executioner. They are aware of every change in tax law as they have a symbiotic relationship with the Treasury; they both need each other to deliver. The degree of power and influence wielded by HMRC continues to hamper taxpayer safeguards and fair tax collection.

HMRC are possibly justifying the Loan Charge to themselves to hide the above disturbing development. The Loan Charge allows HMRC to ignore their longstanding and ongoing issues with administering the tax code. The Loan Charge imposes a tax on otherwise legally unreachable monies – in many cases a life ruining financial penalty.

HMRC already has significant and generous powers to investigate and ensure tax compliance. Taxpayers should have faith that those legal safeguards will be respected which they have not been. The only sympathy we, as contractors and business owners, have with HMRC is that the Tax Code is now virtually unfathomable and unworkable for either party.

It only holds the End User to account

The end users have no power or resources to challenge primary legislation. They have the least tax knowledge. They are highly dependent on trusting people who are supposed to be on their side and help them navigate the most complex law. Yet all the burden and all the stress fall on them.

The Loan Charge combines all loans received up to 20 years ago and calculates as if they were income in a single tax year. This means that most individuals will also pay tax at a much higher rate than they would have at the time they received the loans. This clearly is punitive; the end user is being punished.

If the intention is to punish then, by definition, it is setting out to damage the financial and mental health of those deemed guilty by HMRC. It is a paradox in which there was no law broken, there is no recourse, but we are guilty regardless.

The matter of punishment when it comes to the Loan Charge is also at odds with Blackstone's theory. It "*is better that ten guilty persons escape than that one innocent suffers.*" Many individuals who used loan arrangements have not even been contacted by HMRC and will therefore not be impacted, whilst those who *have* been fully transparent with their tax affairs will be ruined by the Loan Charge. In other words, those that have been honest and declared everything will be punished the hardest.

3.2 The "Fair share" Argument

It is routinely heard from HMT and HMRC that the Loan Charge is about people paying their fair share of tax. HMRC have a duty to treat all taxpayers fairly and equally, so stating that a percentage of taxpayers have not used a loan arrangement is totally irrelevant.

"A question whether something is fair was answered by saying what is unfair. This is a common HMRC and government tactic… …they avoided saying what was fair for some taxpayers by inverting the argument into what might be unfair for the totality of other taxpayers. That misses the point that fairness has a dimension which is taxpayer-centric."
Baroness Noakes, The Powers of HMRC Debate, House of Lords. 29th April 2019

This is an attempt to create an emotive argument and not a legal one. Tax is not about collecting a "fair share" from anyone. The role of HMRC is to collect tax due under law – that is all.

Those caught by Loan Charge will have to pay much MORE tax than if they had operated through a Limited Company or been employed. All this without any of the benefits of employment. In some cases, the Loan Charge amounts to an 80% tax rate.

3.3 "Disguised Remuneration" term

HMRC and the Treasury repeatedly use the term "disguised remuneration" in their correspondence. This term has no meaning in tax law and was created by HMRC's Behaviour Insights Team specifically to nudge people into thinking that something untoward has occurred with the use of these loan arrangements.

Many individuals using such arrangements will also have reported their loans on their Self-Assessment forms under a DOTAS registration number. Needless to mention: the 'D' in DOTAS stands for 'Disclosure' – the very opposite of disguising anything.

Regardless of whether individuals knew they were in a tax avoidance arrangement; tax avoidance is legal. HMT and HMRC have tried to give a public perception that someone avoiding tax is a criminal by conflating tax avoidance with tax evasion (including the former Chancellor, Philip Hammond, at the Treasury Select Committee). This is aimed at generating a response from the public to contrive support for HMRC in pursuing measures that are beyond what the law ordinarily allows. It is very dangerous

to conflate legal, and therefore allowable activities, with illegal ones. The clear difference needs to be re-established for the sake of the victims and the courts.

3.4 "The Rangers case" is why the Loan Charge was needed

HMRC have always had powers to address issues in tax returns. What stopped them? We believe the law stopped them. The Supreme Court didn't deliver the result HMRC had hoped for. The Loan Charge was envisioned in 2016, slightly before the verdict, in anticipation of a result which was ultimately inconvenient for HMRC.

In 2017 the Supreme Court failed to supply HMRC with a legal mechanism that allowed them to collect all the historical tax they believed was due. Loans were loans, and no tax was due on them. HMRC then found themselves out of time to open enquiries into individuals' historical tax returns. The Loan Charge was needed, to subvert and circumvent that ruling.

After the Rangers ruling, HMRC had the power to issue Follower Notices to collect tax from similar arrangements. Even with these new powers, HMRC failed to do that as the employers were either no longer in existence or they were already out of time. For those that they could have targeted it appears that they simply did not exercise the option. Perhaps they were waiting for an alternative mechanism. The Loan Charge legislation, which had already been drafted when the Rangers case was settled, was then amended to enable transfer of liability to the end user.

Sir Jon Thompson has explicitly written in a letter to MPs that "*the Loan Charge has enabled us to settle cases without the need for litigation*". This is a direct and arrogant reference to the fact they can bully an individual into settling because the consequences for that individual of not settling will be much worse through the Loan Charge.

Or as HMRC might put it "We win, or we win".

3.5 Taxpayer Certainty

Taxpayers should be entitled to certainty in their affairs and the Taxes Management Act prescribes statutory time limits for exactly this reason. The Loan Charge was designed specifically to remove those rights and protections. It violates accepted notions of fairness and breaks the constitutional convention against retrospective or retroactive legislation, imposing tax charges in cases where taxpayers already had legal certainty that none were due.

The Loan Charge flouts the Rule of Law by enabling enquiries into tax years that would otherwise be considered immutable. It is the direct cause of the levels of anxiety, depression and suicidal thoughts that have been observed in a large percentage of victims. A high level of certainty is a basic human need to sustain good mental health.

This review should look at why existing enquiry powers and time limits have not been sufficient to remedy the use of such loan arrangements. Why have promoters been allowed to liquidate and disappear, sometimes multiple times under different names, without HMRC even bringing a single civil or criminal case against them to court to pursue the tax they claim is due?

3.6 The Loan Charge isn't "Full and Final"

Given the punitive manner in which the Loan Charge is calculated, the taxpayer could be forgiven in thinking that paying it is the end of the matter and your accounts would be settled for those years. This, of course of not the case.

Inheritance Tax

When it suits HMRC, loans are indeed loans. Despite one HMRC department treating the sums as income and issuing a charge on that basis, another department claim that the same monies are in fact a loan subject to Inheritance Tax. This is surely double taxation, which the Treasury has said would not be applied.

This highlights what some tax experts have warned – that HMRC will interpret matters in a way that suits them regardless of the facts in law.

CLSOs - Contractor Loan Settlement Opportunity

The first Contractor Loan Settlement Opportunity (CLSO1), concluded in 2015, allowed the taxpayer to settle on a broadly similar "voluntary" terms to those we have now. Except in these cases HMRC accepted that **closed years were closed**. As one would expect, people ignored those closed years and only settled their open years. Many people settled under CLSO1 terms thought they could move on with their life.

The Loan Charge and current settlement opportunity (CLSO2) now targets closed years as well – years put beyond reach under tax law. People who had reached a full and final settlement back then are coming under scrutiny yet again and will be forced to agree to yet another "voluntary" settlement. Someone with closed years may opt to settle, yet again, just to get things over and done with as they see no way out.

Paying the Loan Charge doesn't close underlying enquiries

Despite having to deal with a huge tax bill in paying the Loan Charge, it does not close any open years that a taxpayer has. HMRC has been clear that they will continue to pursue litigation for individual arrangements and potentially come back for more money later. How can this be considered fair and proportionate? And how could the Loan Charge be considered "full and final"?

3.7 Impact on Small Businesses

Much of the focus of the Loan Charge is around the 50,000+ individuals that will be directly impacted. There is very little mention of the many small businesses and limited companies that were encouraged to enter into loan arrangements and consequently there is little mention of the wider impact that the loan charge will have on these businesses.

LCAG conducted a survey of its membership and found that 66% of companies impacted by the Loan Charge are either liquidating or have been liquidated. The remaining 34% are still trading and all of those are now in distress. It is a scandal that HMRC are destroying small companies.

The survey also found that HMRC are either preventing small companies completing liquidation, or resurrecting them after liquidation, in order to pierce the corporate veil. They achieve this through

threat of extensive legal costs, forcing a transfer of debt to the owners / ex-owners and a bullying regime by their own appointed liquidators.

The survey also identified that the average settlement figure for an impacted small business is over £200,000 and nothing at all like the figure £13,000 that HMRC have claimed.

Knock on Effects

We have many examples of this amongst LCAG members, including a company that is currently employing 15 people. The Loan Charge will make the owner of this company bankrupt, causing the business to close and resulting in redundancy for all 15 staff. There is a huge personal impact here along with the loss of revenue to the Exchequer from taxes and future benefits to be paid to those made unemployed.

Tax Recovery from The Employer

HMRC have never published a breakdown of these "employers" when they tout that 75% of Loan Charge income will come from employers. You can be assured the greatest percentage of the employers impacted will be small businesses and limited companies. HMRC's statement attempts to suggest that they are primarily targeting big companies. The real impact is on the freelancer using a limited company or a small family business who entered into arrangements under the advice of their accountant or tax advisor.

If, and where, a big employer is targeted the provisions in PAYE mean that the employer then is required to recoup the money from the employee. The reality is it is the employee who pays every time but HMRC try to conceal this fact for PR purposes.

The removal of Limited Company Protections

There are many cases where companies have been resurrected after liquidation – companies that are otherwise closed are now subject to the loan charge. The directors of these companies are now being pursued personally for company contingent debt, which should have been written off during the liquidation process. This situation contradicts and circumnavigates the normal protections in law and in limited liability; it is simply not good for business or for UK PLC.

Companies are being prevented from closure, liquidators are not being allowed to do their job and HMRC is deliberately refusing to allow closure so that when they have modified the law to extend the six year statutory period, those companies will be subject to further retrospective legislation.

Many small businesses have had enquiries opened, in some cases many years ago, but with absolutely no action taken by HMRC other than possibly the issuance of Reg80 protective assessments. These enquires are prevented from running to a natural conclusion, they are either stale (as in the majority of cases) or will be wrapped up and superseded by the Loan Charge legislation. This does not allow for the normal tribunal hearing process which is unaffordable in any case for all but the super wealthy.

These matters will result in massive and damaging company insolvency. It is a ticking timebomb in relation to small business which have had enquiries open for an extraordinary amount of time. This punitive and wholly disproportionate legislation subverts the normal proceedings where a company has a right of appeal and a day in court.

Limited liability is a key business driver for undertaking the risk of running a business; knowing that the normal protections, as defined in the Companies Act, exist to safeguard the directors in the event of a claim against the company. It is a vital protection and is firmly embedded in statute. The Loan Charge legislation rides rough-shod over this.

3.8 Settlement and Time To Pay

Anyone involved in settlement, and therefore in the shadow of the Loan Charge is being given a choice between two options: settle now or pay the Loan Charge.

There are many factors in settlement that only serve to increase mental anguish for the taxpayer.

HMRC's own response times can only be described as uncaring, lethargic and chaotic. In many case responses have been months or years, not days or weeks. We are nearing the deadline for loan balances to be declared and HMRC appear to have finalised a little over 10% of the settlements they estimated to the Treasury. Every deadline so far has come and gone for HMRC and they still cannot meet their own targets. The position that this puts people in is simply not acceptable.

"Voluntary Settlement" contracts are worded in such a manner that the individual must agree to terms that are particularly one-sided - it attempts to push all responsibility, blame and guilt onto the individual and remove any future course of redress. The right to review or annul the settlement agreement if there are any future legislative changes is removed, giving unfair advantage to HMRC.

A core competency of HMRC should be the ability to provide calculations that are verifiable and accurate; yet routinely figures are rough guesses (due to records not going back 20 years) or are erroneously calculated, and interest is added or deducted on a whim. It was even noted that settlement calculations sent to thousands of taxpayers were wrong due to something as basic as accounting for a leap year. Any unrepresented taxpayer may not be able to spot those errors and just pay – they either assume they are right, or they fear contesting HMRC.

Due to the sums involved long Time To Pay (TTP) agreements are usually required in settlement. Sometimes these TTP agreements stretch over many years in duration, leading to a lifetime of punishment for the person concerned. We have extensive evidence of HMRC requesting ridiculous monthly payments that are often far more than the individual's income – this is despite HMRC having information of current income. Being faced with bills that are entirely unaffordable and punitive considerably worsens the stress and anxiety that this situation has caused for taxpayers.

As part of the coercion strategy under settlement HMRC say they won't pursue tax on promoter fees. This is not a concession by HMRC - this would be tax on money that the individuals NEVER had. It is a baseless menace to coerce more people into settlement.

Presumably to further increase the mental impact whilst negotiating settlement, HMRC routinely set arbitrary deadlines – sometimes just days after the offer is posted by HMRC.

3.9 Mental Health

According to an LCAG survey, the majority of now affected taxpayers were not aware of Loan Charge until late 2018. They have been either informed by a generic letter from HMRC, by their promoters or through recent newspaper and media articles. Under those circumstances, and now realising that they would be facing to pay tax up to 20 years in the past, everyone's first response was a state of shock

and then an attempt to understand the circumstances. After the initial surprise, many of the affected started to feel anxiety and have panic attacks, and some are unable to cope with the fear of losing a lifetime of savings.

As time passed they experienced altered cognitive functioning, diminished ability to concentrate and preoccupation with thoughts on how to resolve the issue with Loan Charge. This resulted in low energy and severe difficulties focussing on mundane daily tasks. Emotionally it triggered unstable mood changes, anger, despair, depression, resentment and apathy. In their eyes there was simply no way out of the state they had been put in.

Fear was the next state of mind. How to keep on supporting family? How to avoid losing their home? If they were retired or close to retirement, they will have seen their retirement plans vanished into the thin air by Government fiat. Those on low incomes will lose their legitimate entitlement to claim benefits by having loans artificially declared as income in one financial year.

Families have already broken down and divorces have already happened due to the stress of this situation, despite HMRC's briefing notes claiming there would be no effect on family stability[3]

Suicidal thoughts could become the norm. Unfortunately, there are six known cases of suicides linked directly to the Loan Charge. Suicide notes have been left behind blaming their final decision on the Loan Charge and the Financial Secretary to the Treasury. As the payment deadline approaches, more and more will be considering these grim options. According to the Loan Charge APPG Inquiry Report from April 2019[4], approximately 40% of the surveyed people had suicidal thoughts after learning they were affected by the Loan Charge.

3.10 It doesn't draw a line under anything. The situation is still ongoing.

Loan arrangements are still readily available today, and many arrangements can be found via a quick internet search. The promoters have in no way been discouraged from offering these arrangements, and HMRC's much lauded DOTAS rules are no deterrent.

With IR35 changes in the public sector, many public sector workers were declared en-masse to be within IR35. Thousands of teachers, NHS nurses and doctors have been persuaded to use "IR35 compliant" loan arrangements. This has happened since the date of Royal Assent of the Finance (no 2) Act 2017 and is still happening today. The effect of the Loan Charge on the NHS and public sector will be devastating. Yet still HMRC have done nothing to stop these arrangements proliferating.

The planned roll out of IR35 changes into the private sector in 2020 will undoubtedly trigger another wave of "compliant" solutions from unscrupulous promoters.

The contrived nature of the Loan Charge also ironically means that any loans received AFTER April 2019 won't be captured.

Unfortunately, HMRC have not learned their previous lessons.

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[3] https://www.gov.uk/government/publications/disguised-remuneration-further-update/disguised-remuneration-further-update

[4] http://www.loanchargeappg.co.uk/wp-content/uploads/2019/05/Loan-Charge-Inquiry-Report-April-2019-FINAL.pdf

4 What LCAG wants from the review

4.1. Suspension of all Loan Charge activity, APN and debt collection during the review.

4.2. For the review to be independently constructed, staffed and completed – without any interference from Treasury or HMRC – with sufficient time afforded for that to happen.

4.3. The use of the word "directly" in the review needs removing or clarification as to its purpose. It has no legal meaning and its use is interpreted differently even by experts in this field.

4.4. For Sir Amyas Morse to meet and listen to the stories of victims and their families. The devastation of those impacted on the ground cannot be dismissed as a proportionate response by the drone pilots following an uncaring policy within HMT and HMRC.

4.5. To ask that a follow up meeting is arranged with Sir Amyas to address any points he may discover during the review.

4.6. The Loan Charge to take effect only from the date of Royal Assent of the 2017 Finance Act. This would avoid the disastrous consequences of the retrospective element of this ill-considered policy and would give clarity and certainty from this point onwards regarding loan arrangements. The retrospective element of the policy is by far the most abhorrent aspect of this legislation both within Westminster and amongst the victims of its effect.

4.7. Determine why existing enquiry powers and time limits have not been sufficient to remedy the use of such loan arrangements. Why have promoters been allowed to liquidate and disappear, sometimes multiple times under different names, without HMRC even bringing a single civil or criminal case against them to court to pursue the tax they claim is due?

4.8. For people and businesses to be able to plan and adapt going forward when they understand the rules. They cannot plan or adapt to changes which have been made and retrospectively enacted.

4.9. HMRC should be required to review their working practices and how they deal with contractor and freelance individuals and companies. The evidence and history leading to the Loan Charge shows it is much needed.

4.10. A rigorous, well communicated and well-constructed approach to regulating arrangements and tax advice given would be welcomed all round. DOTAS can only be considered as a failure and its failure has led to HMRC trying to save face via the Loan Charge regardless of consequences on quite innocent victims and their families.