The Loan Charge Scandal: August 2019 Update

Introduction

Over the summer the scandal of the Loan Charge has continued to unravel while at the same time add increasing stress to all those affected. At time of writing we have two deadlines fast approaching.

By the end of August all settlements are meant to have been agreed. This is despite a clear lack of resources, clarity or accuracy on the part of HMRC. People are still waiting months for a response.

By the end of September all "outstanding loans" are due to be reported to HMRC. This is simply an information gathering exercise by HMRC for data they should already have. Most affected individuals have already reported any loans on their Self Assessment tax returns for each year. However, failure to report the current amount of these loans by the end of September 2019 comes with substantial penalties and fines. This is despite HMRC missing all of their own deadlines.

Essential reading for any MP wishing to understand the Loan Charge further should include the excellent letter written to the Chancellor by Teresa Pearce MP (Member of Parliament for Erith and Thamesmead). As a former Inland Revenue officer, Ms Pearce clearly and concisely argues against the injustice of the Loan Charge:

Ms Pearce's letter is a good summary of how HMRC inaction combined with a new retrospective tax (the Loan Charge) has led to a situation that "*every person in the country should be horrified by*". The letter is included in full as an Appendix.

The following points in this document contain the latest information on events that have happened over the summer months, to better inform MPs in their discussions around the Loan Charge.

Key updates

1. *A new First Secretary to the Treasury*

It was hoped that the appointment of Jesse Norman to the position of FST would bring with it a change of attitude or policy – especially given Jesse's fondness for compassionate conservatism and Adam Smith's economic philosophy. Indeed, his keenness to gather information from sources outside HMRC seemed very positive. A meeting with the Loan Charge APPG even happened despite the FST's demand for one with 24 hours' notice. We thank those APPG representatives that re-arranged schedules to make the meeting happen.

However, the change in FST did not result in a change in view, policy or attitude. Very quickly the same cut'n'paste answers were trotted out both in written response on the Government website and orally at Treasury Questions.

It was this hope followed by a quick return to the same old policy that is believed to have contributed to yet another suicide of someone facing the Loan Charge. It is understood that Jesse Norman was personally named in the suicide note left behind.

2. *Let's Settle the Rangers Case Argument*

We have seen responses to MPs from Jesse Norman where the HMRC vs Rangers Football Supreme Court case is cited as providing a sound legal basis for the Loan Charge. Of course, if this were the case the Loan Charge would not actually be needed – HMRC would simply issue Follower Notices to the employers to collect the tax that the judgement in 2017 allowed. This could not happen though as HMRC's inaction meant they were either out of time to do this or the employers had disappeared.

To be clear: The Rangers Supreme Court decision was that a payment into trust was a taxable event, nothing more. The Supreme court victory was somewhat inconvenient for HMRC, as for many years their understanding of tax law was incorrect – and they were now out of time to collect what they claim was owed.

Mr Norman's letters also correctly state that the Supreme Court did not rule on who was liable to pay any tax claimed. The Supreme Court was not asked to rule on this, as HMRC always agreed that it was the employer who was liable and made no efforts to chase the employees.

We include a further, more technical, response to HMRC's reference to the Rangers SC case below. This has been prepared by respected tax accountants WTT Consulting:

We note that you say that HMRC's role is to collect the tax that is due under the law as defined by Parliament. We are pleased that you acknowledge such, although we cannot help but wonder why the HMRC Departmental Plan makes no such mention of this, rather it simple sets out that it's number one objective is to "maximise revenues and bear down on avoidance….." . It is perhaps not difficult to see why management and staff within the department no longer understand its function when it is not reflected in what is essentially the departments business plan. Instead a culture of pursuing tax regardless of legislative backing has been allowed to prevail and indeed encouraged by linking caseworker yield to performance management.

We agree that 'Rangers Football Club' is the lead case in the context of DR which found that the contribution to the trust by the employer was earnings under S.62 ITEPA 2003 and subject to deduction of tax under the PAYE regulations. We would also agree that the decision applies to the vast majority of DR schemes. However what you fail to mention is that where an employer fails to deduct tax under the PAYE regulations, then the employer is liable for the under-assessment under the regulations. The Court did not need to consider who was liable because HMRC did not assess any employee of Rangers to Income Tax on the contribution to the trust, even when the company liquidated. They always maintained that Rangers was liable as the employer and never sought to introduce any other party to the litigation. This rather suggests that HMRC always believed the employer was the liable party and only when they considered how it applied to Contractor Loan Schemes realised they had an inconvenient result.

In light of the above, the simple question is, why did HMRC not issue Follower Notices to any DR scheme or anyone in the labour supply chain who could potentially be liable? Is this not clearly contrary to your claim that HMRC will always pursue the employer first? Instead HMRC has allowed all potential holders of the liability, including many large financial institutions, to walk away and instead target the low hanging fruit which does not have the same resources available to challenge the department.

We believe that if you push HMRC on this point you may start to understand the real reason the Loan Charge is required rather than the superficial one that have been offered to date.

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3. "Disguised" Remuneration

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

As has been discussed on numerous previous occasions, the majority of individuals reported their loans on their tax returns under a DOTAS registration number. Needless to mention: the 'D' in DOTAS stands for 'Declaration' – the very opposite of disguising anything.

4. Repayment of Loans

Jesse Norman's recent responses to MPs have variously referenced that loans subject to the Loan Charge are "highly unlikely to be repaid" or there was "no credit assessment or expected payment from the beneficiary".

All these statements are incorrect. They are also irrelevant.

Most arrangements were based on commercial loan terms and included a plan for the loans to be repaid and many LCAG members have discharged their liabilities. The Loan Charge ignores all of this and HMRC is now claiming tax is due on loans that were repaid and settled many years ago. How is this fair to those who have met their contractual requirements and do not actually have any outstanding loans?

Credit assessments were also routinely undertaken by the trustees prior to allowing individuals to enter into agreements with them. There is extensive evidence of this.

Even the Rangers Supreme Court case declared that the loans in question were "not a sham" - I.e. that they were genuine loans that had been correctly executed. HMRC has no authority to question the terms and conditions of any commercial loan. Under current rules, only the FCA is a conduct regulator for commercial loan contracts within the UK.

5. Misinformation

Over the past couple of years there have been several attempts by the Treasury and HMRC to smear those affected by the Loan Charge legislation.

It is interesting that Jesse Norman can only refer to the Treasury report from March 2019 in response to this – a report that was very clearly written by HMRC on the Treasury's behalf. Mr Norman ignores the plethora of evidence collected by the Loan Charge APPG that shows HMRC and the Treasury have been less than honest in discussions around the Loan Charge. The APPG report took evidence from multiple and diverse experts, witnesses and victims; HMRC and the then FST were also invited to give evidence but they declined.

6. Negative Campaigning

The new FST has continued this by suggesting LCAG has been badly serving their members through misinformation and complaining about 'negative campaigning'.

The Loan Charge Action Group was founded to fight against the unjust, unfair and retrospective Loan Charge. HMRC are not used to having their authority challenged, preferring instead that their 'customers' accept their statements as fact. Our campaign is founded on restoring the rule of law that has been broken by Treasury and HMRC; our aim is to do this using facts, logical argument and the rule of law itself. This is not negative campaigning, anything but. LCAG are fighting for people's lives and livelihoods against a Government department with very deep pockets. It seems absurd and churlish for the FST or HMRC to claim to be any sort of victim here.

7. *HMRC claim that they are acting fairly*

HMRC have made repeated claims that they will arrange suitable repayment options, not make people bankrupt or force them to sell their homes.

The Loan Charge APPG recently published a report that HMRC are not living up to these promises:

http://www.loanchargeappg.co.uk/wp-content/uploads/2019/06/Loan-Charge-APPG-document-on-HMRC-conduct-June-2019.pdf

The report highlights evidence of HMRC doing exactly what they have committed not to do.

We have further seen instances of HMRC demanding up to £17,000 per month from an individual under a Time to Pay (TTP) arrangement. People impacted by the Loan Charge are just normal people trying to earn a living – they are not film stars or celebrities. How can anyone at HMRC think that such a demand is reasonable?

Indeed, the FST said to the House of Lords Economic Affairs Committee that those affected would be given as long as needed to pay. Nothing could be further from the truth. There is extensive evidence that TTP request are being routinely rejected as affordable payments would take the individual too long to pay. The FST's statements and defence of HMRC are routinely in stark contrast to the policies pursued on the ground.

8. *New Measures*

On 18th July, following his disastrous appearance in front of the House of Lords Economic Affairs Committee, Jesse Norman wrote to MPs regarding 'New Measures'. These measures were:

1. *To publish guidance on double taxation in relation to the Loan Charge*
2. *To take a collaborative approach working with the Chartered Institute of Taxation, Institute of Chartered Accountants of England and Wales, among others.*
3. *Not to apply the Loan Charge to "investigated and closed" years*
4. *Additional flexibility for individuals settling who are in genuine hardship*

The Treasury or HMRC are yet to publish any details around these new measures. This includes a clarification of Jesse Norman's misleading use of the term "closed". It should also be noted that HMRC are also including Inheritance Tax as part of settlement offers, on top of Income Tax and NIC – what is this, if not double taxation?

A delay of 6 weeks in providing this detail is simply unacceptable given how close various deadlines are, leading to further mental stress and anguish for individuals.

9. *The Loan Charge Calculation*

It has been difficult to verify how the Loan Charge will be calculated. Currently it is not clear whether National Insurance Contributions are payable on loan balances or just income tax but, as usual, no definitive answer has been given. How are people to plan if HMRC can't provide clear and unambiguous information?

10. *The "Fair share" Argument*

It is routinely heard from FSTs and HMRC alike that this is about people paying their fair share of tax. This is an attempt at an emotive argument and not a legal one. Tax is not about extracting a "fair share" from anyone. The role of HMRC is to collect an exact and finite amount of tax, as defined in law, based on individual circumstances and regardless of profession.

Those who fall foul of the 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.

HMRC's indifference and inaction for decades also means that there is no recourse to claim back any promoter deductions that could have offset this.

Jesse Norman and HMRC are also threatening that they will claim tax due on amounts charged as fees by the promoters if people do not agree to settle now. 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.

The Solution

The obvious and fair solution remains an immediate suspension and independent review of the Loan Charge. This review would show the punitive and retrospective nature of the Loan Charge.

The Loan Charge Action Group continues to press that the Loan Charge should only take effect 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.

Loan Charge Action Group
August 2019

Appendix: Letter from Teresa Pearce to The Chancellor of the Exchequer.

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Member of Parliament for Erith and Thamesmead

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The Rt Hon Sajid Javid MP
Chancellor of the Exchequer
HM Treasury
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SW1A 2HQ

Our Ref: TPM/ZA51827

16 August 2019

Dear Chancellor

RE: 2019 Loan Charge

I wrote to the previous Chancellor to state my concerns about the Loan Charge legislation, and I am now taking the opportunity to write to you to restate them.

I have met constituents who are impacted by the Loan Charge, and I am seriously worried about several aspects of this legislation and the policy that is behind it.

As a member of the Loan Charge APPG and a former Inland Revenue officer, I took a keen interest in the Loan Charge APPG Inquiry. I was shocked at some of the testimony of the expert witnesses, who described how HMRC now conduct themselves. The Inland Revenue, of which I was part, always sought to collect the right tax at the right time. It has always been a key protection in the self-assessment system that HMRC have a limited time, specified in law, to raise enquiries.

HMRC have failed to raise assessments against taxpayers who informed HMRC in their returns that they were partaking in these legal arrangements. In this respect, HMRC have failed tax-payers who acted in good faith.

Taxpayers must be able to trust that a tax return that has been submitted in full, and has been accepted by HMRC, is closed once the appropriate enquiry windows have passed. This is a key part of our tax system, which is now based on self-assessment.

If HMRC can reach back up to twenty years to tax years where no tax evasion is alleged, then this is something that every person in the country should be horrified by. Who has records of what occurred twenty years ago? The requirement to keep financial records only extends to seven years and, after this time, most financial advice is to dispose of

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records provided no tax enquiry has been opened.

This brings me to the retrospective aspect of the Loan Charge legislation. For some years, the Treasury and HMRC insisted that the Loan Charge was not retrospective, based on a literal interpretation of the legislation. This is disingenuous. Jesse Norman MP, the Financial Secretary to the Treasury, has recently conceded that the Loan Charge is retroactive. Quite frankly, this is purely semantic hair splitting.

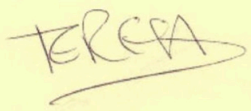
The Loan Charge is a blunt instrument being used to threaten taxpayers, who continue to dispute the tax that HMRC say they owe. The normal process, whereby a tax dispute is first discussed with the tax-payer, or their agent, and then sent to tribunal if agreement cannot be reached, is being subverted. If taxpayers refuse to concede to HMRC's opinions, then the Loan Charge kicks in automatically. This is akin to a penalty for seeking justice.

Finally, I would like to address HMRC's conduct throughout this affair. I have read the evidence sent to the APPG and I am appalled at how HMRC are treating taxpayers. Even if one were to accept that HMRC's settlement terms are fair, it is clear that HMRC are utterly failing to process settlement requests in a professional and efficient manner. This is adding an intolerable additional stress on families who are already facing life-changing unexpected tax bills. You will be aware that it's been widely reported that there have been cases of suicide. In these cases the families have asserted that the Loan Charge pressure from HMRC was a major contributing factor.

I believe that HMRC are failing to conduct themselves in accordance with their code of practice, and this needs urgent investigation.

I urge you to announce an immediate pause to the Loan Charge, to settlement discussions and to any settlement agreements which are now in place. This will allow time for an independent and trusted third party to conduct an urgent review of the entire policy and to make recommendations. This must be announced immediately. Any delay to this announcement risks more loss of life.

Yours sincerely,



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