

Tax justice and the 'loan charge' - or why HMRC is fail...

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I did a live discussion on the Jeremy Vine Show on BBC Radio 2 today on what is called 'the loan charge'.

A background to this issue from the [Chartered Institute of Tax is here](#).

The [latest from the government on it is here](#).

The essence of this issue is relatively simple, if what follows from it is not. From soon after IR35 rules for limited companies came into play from 1999 onwards there have been attempts to get around those rules. A common one was for a company ('the employer') to make a payment to an offshore trust which in turn lent fund to the person they engaged ('the employee'). The loan was designed to never be repayable. Because, however, receipt of a loan is not the same as receipt of income it was claimed that the arrangement made the receipt by the employee not taxable.

In practice the scheme was widely marketed and it is thought more than 50,000 people were paid using such arrangements.

I have to be clear, I think all of those people should have had concerns about what they were entering into. Some, I have no doubt, were deliberately tax avoiding. And it was really not hard to find out that from December 2004 the government had said all attempts to avoid PAYE and NIC would be retrospectively blocked. In addition, since 2010 it can reasonably be argued the loan charge was outlawed. Despite that there are people still selling such arrangements.

As a result, and in frustration (not least at the failure of their own attempts to clarify some of the law in the so-called Rangers FC tax case to that time) HMRC secured legislation in 2016 that said unless loans were repaid by April 2019 then the whole outstanding loan due by the employee would become subject to income tax on that date as if income was received then and was taxable at a person's then highest rate of tax - which did as a result give rise to a charge likely to be much higher in many cases than that at which any tax was avoided.

There was a massive backlash from those involved.

Let me stress, for those on high incomes who were able to take advice on their own account and who used these schemes I have no sympathy: they should have known the risks that they were taking. They have a price to pay, and need to sort out the consequences with their advisers in a claim, if they so wish.

But there are a great many who are involved who were not highly paid who were effectively given little choice but use these arrangements if they wanted to work in the modern gig economy. They were told this was the way the job was paid. What is more, many of them did not see the benefit of the tax avoided: the purveyor of the scheme or the employer did. And they were also told the scheme was legal and all arrangements such as tax returns would be done for them as a part of it. These people took these assurances on trust and accepted them. Many of them are now being asked for tens of thousands of tax on incomes they never enjoyed and are being told HMRC will now not take more than 50% of their disposable incomes, but will do so for life until the sum is paid.

So what is the right, and what is the wrong here? First, I beg anyone not to go near a scheme. But I also suspect a majority of those on lower pay impacted by the loan scheme had no idea they were going near schemes. They were, to be blunt, misled.

So, second, I think all who sold these schemes are liable for them, and I think their professional bodies should be saying so. And what is more, they should be arranging collective arrangements for those involved to be sued: this is what a professional body acting in the public interest, as they are charged to do, should be doing. If not, question has to be asked as to their purpose.

But third, HMRC has an enormous responsibility here. There are a number of reasons for this.

The first is that anyone involved in tax who has not been regulated by a professional body has, for a long time, supposedly been regulated by HMRC, although there is no real indication that for any effective purpose they have ever taken this responsibility seriously. In that case much of the regulatory failure in these cases may well fall at HMRC's door.

Second, HMRC's claim that it is the taxpayer's responsibility to know the law and it is clear that they have taken advice and been misdirected is callously indifferent to the facts of life. I use the word callously with care.

Third, HMRC were grossly negligent in taking any effective action against these schemes for many years when they had all the information they required to do so.

Fourth, HMRC's interpretation of Sir Amyas Morse's review is similarly utterly indifferent

to the situation people found themselves in. Morse tried to find some balance - and HMRC have chosen to ignore it.

I condemn tax abuse. I always have. And I always will.

I have condemned those selling tax abuse for a very long time - since before the 13+ year life of this blog. And again, I always will.

But what I have also always argued for is a tax authority that seeks to collect the right amount of tax due at the right time and at the right place. That is what tax compliance is.

And what we now know is that the payments made into these trust arrangements by the employers should have been subject to PAYE and NIC charges at the time the payments into the trusts by those employers - who undoubtedly knowingly partook of these schemes for their own gain - were made. This is what the [Rangers FC tax case finally proved in 2017](#). In other words, the tax abuse was always by the employer and not by the employee.

HMRC went to great public expense to prove that case. I think the finding was right.

But the simple fact is that in the loan charge cases HMRC are explicitly ignoring this decision and are seeking to make people who were in effect, using the so-called [Ramsay principle](#) very clearly employees and therefore without any primary liability for settling the taxes due on their pay, liable for what they did not owe.

Bluntly this is disingenuous on the part of HMRC . That is the indestructible interpretation. And it means that in my opinion the fact now is that HMRC should go against the employers and drop the cases against the employees - unless they themselves subscribed to such arrangements for a range of clients with their own intent to avoid tax.

And if the employer is no longer able to pay there should be no right to recover from the employee.

Nothing else seems legally appropriate.

What is more though, whenever HMRC can identify a professional person engaged anywhere in the creation or supply of these schemes they should refer them to a relevant professional body to ensure that they are duly penalised - with all publicity being given. And those bodies should not be lenient: by default I suggest the penalty should be loss of professional status and fines commensurate with the losses they caused innocent clients to suffer, to be used to support those clients now.

In addition, where HMRC should have identified a purveyor of these schemes who should have been regulated by them in any way and who was not so regulated then all

claims against those they sold tax products to should be waived, automatically.

I stress, none of this would apply to those where there was no employer: anyone using such a scheme was in that case responsible for their own choices. But in employer/employee arrangements - where it is now clear that the liability for all tax owing should always have rested with the employer - this strikes me as the only fair outcome in these cases. And I have to say I think Sir Amyas Morse got his advice to the government seriously wrong as a result: as a matter of fact his conclusions look to be based on an inappropriate interpretation of the law, based on any reasonable extrapolation of the Rangers decision.

Comments are welcome on this, of course. But please don't say I have gone soft on tax abuse. My logic is clear, and I have noted it. What I am seeking is tax justice, a competent and fair tax authority and the appropriate apportionment of blame and liability for actual abuse, and it is abundantly clear that in most cases where the loan charge applies the outcome is a long way from delivering any of those things. I want an end to tax abuse, and its sale. But I also want a fair tax authority that itself respects the law, which I am not convinced is the case here. And I believe justice must be equitable, and in many of these cases that is far from the case. Tax justice is a broad concept and requires that it is seen to be done. The loan charge does not deliver tax justice in most cases. It's important to say so.

NB: For those not familiar with this blog typos come as part of the deal: the above was written on 45 minutes on a train and they're a consequence of speed in pursuit of timeliness.