Written evidence submitted by WTT Consulting (FB24)

Report on how the loan charge has impacted its clients

Background

WTT Consulting is a tax advisory firm which has a specialism in matters pertaining to contractors and freelancers. In particular, WTT has been attempting for more than five years to resolve enquiries between HMRC and its clients. We represent over 2000 taxpayers affected by the Loan Charge, have made numerous appearances before the Loan Charge APPG, have offered oral and written evidence to Sir Amyas Morse's review and have appeared before Parliamentary committees to present oral evidence over HMRC's powers.

We have provided evidence as we feel it is important for the Public Bill Committee to understand in order that our suggestions for resolution below, are understood.

WTT became aware of the proposals for the loan charge in early 2016. There was, at that time, a number of elements included in the draft provisions which would have not only been difficult to operate but would have been beyond any reasonable implementation. Nonetheless, such information as was available was relayed to our clients.

There have been a number of subsequent changes both before and after the two reviews of the legislation. It is notable however that the attempts of the draftsman to include the intent of the Morse Review recommendations – accepted by the Government – do not in our opinion capture the full extent of the changes recommended.

WTT has seen a number of communications from HMRC to clients which – in our opinion – present a flawed picture of the loan charge. In particular, the letters and statements from HMRC present a wholly partial view of the legislation.

The initial confusion as to how the legislation would work, the subsequent revisions, the forced revising of some elements and the lack of consistent HMRC message has created, in the minds of our clients, two key impacts.

First, many clients are of the view that the lack of action from HMRC when the schemes targeted by the loan charge were current and the subsequent "deliberately" confusing law, is part of a wider conspiracy to force them to pay sums of tax which are more than they could or should be liable to. This is HMRC Maximising Tax rather than collecting the correct amount of Tax.

Second, the concurrent, but time limited offer of a "settlement" (which is in fact an imposition of HMRC's unsanctioned view of liability, yet to achieve judicial approval), allows HMRC to use the loan charge as a means of coercion. In other words, "settle or pay the loan charge".
There are also elements of the situation that WTT considers have been allowed to gain traction in the absence of clarity from HMRC. For example, the loan charge does not settle the tax position for the year in which loans were received. HMRC has said this in their letters but often as a throwaway line buried several pages into a much longer piece.

In summary, we have controversial, perhaps unique legislation, introduced, removed, reintroduced, reviewed (twice), subject to Parliamentary criticism, amended, defended by HMRC using false statements(?), linked to a situation in which HMRC has clearly failed to undertake their basic function (and have denied).

Almost every client WTT has spoken with since 2016 makes the same points.

1. HMRC had the information and the powers to stop these schemes when they were operating. Why did they wait until significant interest liabilities had accrued before acting?
2. Was this a conspiracy to increase tax take (making HMRC look good) or simple incompetence?
3. Why did HMRC not "go after" the employers and promoters?
4. Why did HMRC allow the employer/promoter to close companies without any action?
5. Why did HMRC allow the people behind the promoter/employer to restart very similar schemes without issuing warnings?
6. Why does HMRC reject all criticism that they have failed to do their job and in doing so has inflated the impact of legislation now?
7. If HMRC had done its job, the loan charge is not needed. It's therefore seen a device to allow HMRC to deflect criticism. How is that justification for the law?
8. Why are senior HMRC officers making false statements, consequently retracted, to Parliament?
9. Why did MPs allow this law to be passed?
10. Does nobody realise the personal cost of the loan charge?

WTT has met many clients face to face, spoken with them in seminars, held webinars and telephone conversations and had thousands of email exchanges.

The overriding messages are that clients are angry and distressed in equal measure.
They are angry that HMRC has failed them. They see (as do many parties including the House of Lords Economic Affairs Committee) that the culpable parties here are promoters/employers and that these have all escaped action.

They are angry that HMRC has briefed MPs that action has been taken against these parties and allowed these MPS to tell Parliament this is the case when in fact NOTHING has been done.

They are angry that such behaviour in other arenas would lead to sanction of the department and the individuals when in fact very senior HMRC officers have been allowed to leave with their record untarnished and often rewarded with knighthoods and similar.

They are angry that HMRC has performed badly or not at all but no account of that action has been accepted or admitted or is taken into account in trying to reach a fair resolution.
Finally, attempts to speak with anybody in HMRC is an exercise in frustration. Whilst we are sure HMRC does not deliberately staff their phone lines with people whose grasp of this area is weak, that is often the outcome.

Once the anger has been expressed, clients will often become extremely distressed.
We have heard what we regard as serious and intended threats of suicide.

We have often spent many, many hours with individual clients trying to bring their emotions and perspective back into balance.

This may be via a cold examination of facts, financial equations or analysis: it may be via encouraging a view that they are important to their families: it is very often an exercise in rebuilding their confidence and showing that they are not at fault for the situation.

This emotional phase is real and urgent. WTT has literally talked people out of suicide attempts.

Sadly, we have been unable to help all those for whom this stage was too much. We have assisted, pro bono, the families of those who have committed suicide because they felt guilty of tax evasion, certain that they would be imprisoned and certain they would never again provide for their families.

The anger and distress are, in our view, driven by uncertainty over what the legislation was meant to achieve, other than to hide HMRC's blushes; why some parties have been "allowed" to get away with it and have had no HMRC counteraction: the outright falsehoods told by HMRC to Parliament: the inevitability of insolvency, shame and failure of their whole career: the helplessness as HMRC seem to be protected by H M Treasury and immune to criticism: the stubborn failure of HMRC to consider any view except their own: the HMRC campaign to frustrate the only route available to taxpayers – access to Tribunal.

The emotional toll upon WTT's staff should not be ignored. Our staff are professionally trained in tax or law. We are not counsellors and have had no special training which would help in dealing with the more emotional exchanges. Our staff have often been left in some distress following discussions with clients and have required support.

In overall summary, the loan charge has been the single most pernicious piece of legislation visited upon a group of taxpayers in the memory of WTT's Directors (which encompasses over 40 years of working in tax). Many clients feel it is unjust and unfair and it certainly breaches recommendations from successive Treasury Select Committees and other Parliamentary Committees. It has been delivered, revised and redelivered in a manner that falls short of the Morse Review recommendations. Many clients are certain that its real motive is to prevent HMRC from being examined.

It has sparked anger and extreme distress. It has led to family breakdown, ill health, insolvency and worse. It will continue to do so unless removed from the statute book or better still used as a platform for a fair and final resolution to all matters.

Why is this important and why we have included this in our submission

WTT feels that the Public Bill Committee understands the above client experience before considering why it remains essential that a reasonable final position, closing enquiries and drawing a line is necessary.

To date, WTT has advanced four technical agreements to HMRC to the above, saving thousands of hours of legal time and costs. These arguments have all been supported by commercial justifications showing that HMRC will collect more tax revenue via a settlement than they otherwise would through litigation and the Loan Charge combined.

All four proposals have been rejected. HMRC has not demonstrated any willingness to find a negotiated resolution, instead preferring to advance legislation which seems to be for the sole purpose of extracting more from individuals.

Substantive review of the Loan Charge amendments in their current form

Despite the above, it is assumed that the Loan Charge will progress substantively in its existing form. WTT therefore suggests that the Public Bills committee should be directed to the following flaws contained within the legislation in advance of the set of amendments reaching Royal Assent.

As detailed above, the loan charge legislation has suffered the unique embarrassment of being reviewed not once, but twice, by bodies outside Parliamentary control. First HMRC was forced into a review after allegations were made that the retrospective nature of the law was unfair and punitive. Their conclusion – that the legislation achieved its policy purpose even though that policy unravelled when senior HMRC officers were questioned in Committee – was widely disbelieved.

A second review by Sir Amyas Morse was commissioned and reported on 20th December 2019. All but one of central recommendations were accepted by Government and are the driving force behind the amendments to Schedules 11 & 12 F(No2)A 2017.

Clause 14 says that loan charges cannot arise on loans made prior to 9th December 2010. This was the date that the legislation on disguised remuneration came into being. The claim here is that HMRC's view "became clear" on that date. This is untrue. The House of Lords Economic Affairs Committee examining the Finance Bill 2011 concluded that the legislation here was beyond the comprehension of the ordinary taxpayer, HMRC and many "expert" advisers.

It was not until July 2017 when the Supreme Court decided the "Rangers" case, that it could be said the meaning of the legislation became clear. (Perversely that decision actually negates Part 7A ITEPA and almost all of the legislation).

There is therefore a very good case that the loan charge should NOT apply before that Rangers decision in July 2017.

Clause 15 enables the loans allegedly liable to the loan charge to be divided into three equal parts and added to taxable income in 2018/19, 2019/20 and 2020/21. This is of limited use to those who are unable to pay the loan charge and who will elect for bankruptcy instead.

The operation of this spreading clause in relation to Sch 12 (loans to self employed persons being spread in a similar manner) creates a hugely complex situation as almost ALL the schemes using an alleged "self employed" component have ceased and all those businesses terminated.

There is a case to argue that the self employment claimed would be found to be inappropriate if the facts were examined. Arguably this leads to Sch 12 becoming superfluous and instead all instances allegedly captured by the loan charge should be within Sch 11, i.e. employment.

Sch 12 (and its amendments) should be in play ONLY where self employment is a proven fact. Otherwise all cases should be deemed to be within Sch 11 – employment.

Clause 16 has the capacity to fill the tax Tribunals for years to come. It seeks to remove the threat of a loan charge where "a reasonable disclosure of the loan" had been made and HMRC had failed to take action (open an enquiry).

Further, the exemption HMRC has in sub para (2) of the clause is an attempt to cover for errors they have made in previous years.

In most instances of schemes using an "employer/employee" arrangement, the obligation to deduct tax falls upon the employer. Part 7A recognises this and seeks to raise assessments against such parties. Consequently, if HMRC were aware of the schemes within four years of their operation (which they were by granting them UK PAYE Scheme references), they had power to take action to recover tax. In the majority of instances, they did not.

Now HMRC seeks to say that such failure is not a reason why they should not be able to pursue an individual employee.

In effect an employee is being punished for the errors of HMRC and their employer. This is unacceptable.

ALL exemptions that allow HMRC to take action against employees where they had the opportunity but failed to take it of action against employers, should be removed.

Structural flaws and consequences

The amendments suggested above seek to restore what WTT would consider to be the intent behind the Morse Review but which HMRC seem determined to row back from. There are however two structural flaws in the entire process here that can be addressed and corrected and in turn this leads to an opportunity to achieve a fair resolution.
First, the loan charge was advertised as a policy instrument to discourage the use of disguised remuneration schemes "in the future".

Why then was it retrospective to April 1999 and even post amendment to December 2010?

If the purpose was to "discourage," penalising taxpayers for previous use of what they were all assured was a legal and "compliant" structure is perverse and owes more to semantics than truth.

Aside from this flaw, the loan charge DOES NOT settle the tax HMRC claims is due on the use of disguised remuneration schemes in the past.

It is an additional Tax or as HMRC say “a new tax on a new source”.

The funds creating the loans are very definitely not a “new source”. The funds flow from money that they earned for their promoter/employer by serving hours at the end client. Until the decision in Rangers, almost every client we have would have claimed that they earned their money, but it was paid to them in two instalments, carrying different labels. Only when Rangers brought into being the concept of “re-directed income” was HMRC able to claim that the two instalments were both seen as “employment income”.

The source of the funds is not “new” but the tax being applied to that money very much is. In effect, the loan charge is a “new tax on an already taxable source”.

Not only that, a source that HMRC had a range of tools the application of which at the right time would have led to their being able to collect the tax due. For reasons that HMRC has never explained, they failed to take such action.

Seeking to now charge money that passed through the hands of employers – on the employees – is acting contrary to the intent and purpose of the main body of the Taxes Acts and in particular the PAYE rules which HMRC has battled through Tribunals for over 60 years.

Not so much a wilful ignoring of decades of HMRC policy and action as a deliberate ploy to avoid examination of their performance and to visit the cost upon those who knew no better.

Secondly, paying the loan charge is NOT settlement of outstanding enquiries. It is simply a pre-payment of tax that HMRC claim remains outstanding for the years in which the schemes were used. This fact allowed many of the firms who sold the schemes (and who have ALL – WITHOUT EXCEPTION AND CLAIMS TO THE CONTRARY – escaped any HMRC assessment) to sell “solutions” to the loan charge that seek to prevent it arising.
Despite the fact that paying the loan charge DOES NOT bring to an end what might be an enquiry 15 or more years in progress, the tone and content of many HMRC publications encourage – some may say “force” – taxpayers into actions that deny them the protections of the Taxes Acts.

HMRC publications suggested and still suggest that unless an informal settlement is agreed with HMRC (on their terms with no mitigation of interest or acknowledgement of the reasons why such schemes started and were allowed to continue without challenge from the agency) then the loan charge will apply. In many cases, this is simply false.

Summary

Many clients have genuinely become ill as a result of the loan charge, its flawed policy and haphazard application which, when combined with its use as a blunt instrument to force compliance, becomes an all consuming and constant source of worry, stress and frankly, fear.

If HMRC had intended to create a weapon whose indiscriminate use could achieve a near 100% increased tax take, they have succeeded.

Is this however how the tax system is meant to work?

Does HMRC prefer being feared to be being respected? Is the tax covenant between Government and taxpayer threatened by the loan charge and in particular the manner in which it is applied and used?

Could and should Parliament correct their error in voting for the loan charge (reviewed twice, amended and reduced in power as it is) to be removed or modified so that it can be used for a fair and decent settlement that will also restore some faith in the tax process?

June 2020