

## **Sins of the fathers**

*Graham Webber provides an update on disguised remuneration schemes and the tax authority's attitude to them*

For any readers who have followed the articles I have contributed to this magazine over the past few years, I'm sorry to say that this one will revisit some of those areas.

Despite the passage of time and the cases going to Tribunal and beyond, it must be said that clarity and resolution remain as far away as ever for contractors alleged to have used 'disguised remuneration' (DR) schemes. In fact if anything, we have seen the situation worsen in some areas.

First, there seems to be a campaign within HMRC to punish the users of some schemes that were promoted by some well-known figures whom HMRC has been unable to stop.

Second, all attempts at brokering a resolution which would see a fair(er) answer for many clients, have been ignored or rejected. There is, however, a way forward.

Third, the long tails of the DR schemes, the alleged loans, have fallen into the hands of parties who have no scruples about adding salt to wounds and seek to collect on them.

Action to resolve the above situations lies within the power of HMRC. For reasons unknown, other than a dogmatic refusal to depart from the litigation and settlements strategy ('LSS'), in these circumstances – when they have in others – we are met with silence or denial.

Let's examine how we got to where we are and what could be done with a little flexibility.

There are some 'families' of DR schemes that were used extensively from around 2002 onwards. These family schemes adapted and evolved according to changes in law but behind them were a small group of individuals.

Some of these promoters have fallen foul of insolvency or trust law or company law and have been at least sidelined and kept away from new schemes. Unfortunately some of them have not. Some are still active in designing schemes and in particular structures that claim to avoid the loan charge. (We've not seen one that actually can do that.)

Some of these promoters have been subject to legal action from HMRC. None of it has resulted in any significant victory for the agency.

It does, however, appear that HMRC, perhaps because they have a lot of information about this handful of promoters, have concentrated their efforts on the users of the products. In other words the individual contractors. As a strategy to force the promoter out of business, this is a flawed policy.

### **The wrong targets**

The effectiveness of most of the schemes have been ended by legislation. The Tribunals are working through the others and whilst we consider HMRC to be chasing the wrong targets for the tax allegedly due, it's not great publicity for a scheme, to be in litigation!

Further, most schemes in litigation or early or late stages of enquiry, closed a while ago. Even if contractors wanted to, they would be unable to use them.

HMRC rightly turned to legislation that targets promoters and purveyors of schemes. There is an issue with how swiftly this legislation can be applied and in many cases, action is too late as the schemes have closed and the promoters moved on. We should however applaud the attempt even if there is a way to go.

HMRC policy here however seems to be that the schemes were 'bad', the promoters were 'bad' people selling 'bad' products, but that a failure to act in time can be remedied by taking no prisoners among those who used the schemes (sometimes unwittingly). With respect, this is action against the wrong target.

### **Stop chasing and start agreeing?**

It is acknowledged I think by most players in this area that HMRC was slow off the mark. Individual enquiries, certainly pre-2010, were not a high percentage of users of schemes. Even later when the schemes evolved and diversified, it took a while for enquiries to arrive and, in some instances, have never arrived.

One of the tenets of taxation is that all taxpayers should be treated equally. Clearly, one taxpayer with an enquiry and one who does not have an enquiry and is now out of time to receive one, is unfair. If the ratio between those groups was say 95/5, then the good fortune of the 5 might be reasonable situation given the numbers involved. We suspect, however, that the ratio for the period from 2002 to 2010 was perhaps 70/30 at best.

In this case, is the presence of 30 taxpayers with favourable treatment through lack of HMRC enquiry, fair? I don't know. But I do think that this was a key motivation for the loan charge and the dogged unreasonable pursuit of those who were in the 70 group.

The loan charge is a truly horrendous piece of policy and legislation. It crosses tax borders, time barriers and pillars of UK and international tax that have been established for centuries. It was bullied through a Parliament who had their eye on a

General Election and arguably its more egregious effects were carefully hidden in Committee. It has been reviewed – twice – and significantly amended but remains in place.

More MPs than not have voted for it to be repealed. This was ignored. Committees in Parliament have called for it to be reduced in scope and effect. They have been ignored. Reports of taxpayers committing suicide over the threat of the charge are now accepted but have made no difference.

If HMRC intended (as they have told Parliament) for the loan charge to “draw a line under” DR schemes, this tool has proven to be blunt. If the intention was to reverse the 70/30 ratio seen in the early years, that was ended when the last review from Lord Morse recommended that it apply only from December 2010.

We have also seen since the loan charge arrived, HMRC take steps against promoters. We’ve seen naming and shaming of umbrellas, we’ve seen promoter penalties and we’ve seen stop notices used. All of these we applaud and suggest that if these had been around in say 2005, a lot of time would have been saved.

The loan charge appears therefore to have failed in its claimed primary purpose. I do though understand that a fair amount of political capital has been invested and that abandoning the charge would be seen as unacceptable. It’s also a fact that some taxpayers have paid this charge. Consequently, removing it from the statute book would create a repayment for them. Such repayments are not without precedent but are difficult administratively and politically.

Why not then use the loan charge as a tool to bring a proper end to what must be tens of thousands of enquiries stretching back 20 years?

There is little doubt that the majority of contractors who used these schemes were – or should have been – employees. There is little doubt that they could – and should – have expected the employer to take care of PAYE. Indeed, many schemes explicitly promised this.

Accepting that HMRC is reluctant to introduce retrospective PAYE rules (although not so reluctant where retrospection can impact individuals), but acknowledging that the loan charge is ‘retroactive’, why not make an assumption that a PAYE assessment (Reg 80) can be made which would collect at least the basic rate of tax from the employer? That basic rate tax could then be deemed to be a credit against the loan charge.

The result is arguably fairer than what we see now. It would perhaps avoid litigation that may be destined for another decade. It is – crucially – fairer than asking employees to meet their employers’ liability.

**Long tails keep wagging – but should be docked**

The schemes targeted by the loan charge, in the main, claimed that loans were made to employees. While I would say that this is, like all generalities, false, there is a degree of acceptance that many of the schemes claimed to create long lasting legal obligations.

Some of these obligations have fallen into unfriendly hands and demands have been made for repayment. So an individual has perhaps open enquiries, discovery assessments, loan charge demands, APNS and now is being chased for a sum that he/she never imagined would be repayable.

These demands for repayment cause genuine distress. We suggest that it is not only unfair for such amounts to be demanded but also easily fixable.

HMRC could, in conjunction with whatever other departments may be involved, introduce laws that would prevent loans which have been subject to the loan charge (see above), being demanded by whomever claims to own them. Not only is this an incentive for individuals to settle via the loan charge, it also removes a very real threat which is causing harm.

It also has the advantage of 'fitting' the tax analysis. HMRC's position is that payments made under these schemes are 'income'. Usually employment income but not always. It would be very strange if money paid and taxed as 'income' to an individual, could also be demanded by a party who claims some sort of ownership. Blocking the repayment demands, fits the tax analysis. Allowing the demands to be made, creates possibilities for the tax analysis to be challenged.

A simple step that can make a huge difference.

### **The next generation**

It would be correct to say that many who used the contractor payroll schemes did so without appreciating the consequences at the time or later. Many clients used these for a short period and stepped away once the truth became obvious to them. Others did not, believing that what they were told by 'experts' could be relied upon. A small percentage may have absolutely understood that this was tax avoidance – not illegal – and were willing to take a risk. It is, however, a small percentage and not as HMRC PR would have it, the majority.

They have learnt their lesson. The world has moved on. Attitudes and behaviours of even ten years ago are now seen as unacceptable. While the law should be agnostic to such changes, there is inevitably mission creep here.

Now though is the time when a little flexibility, applied to a relatively small population of workers who are crucial to the economy, can make a huge difference. Reputations can be enhanced, costs avoided, personal anxieties relieved and clients can breathe again and move on.

Paying for the sins of earlier generations or actions will always be the case. Most would be happy to pay a reasonable amount in order to bury those sins and move on with a new attitude.

It's time.

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