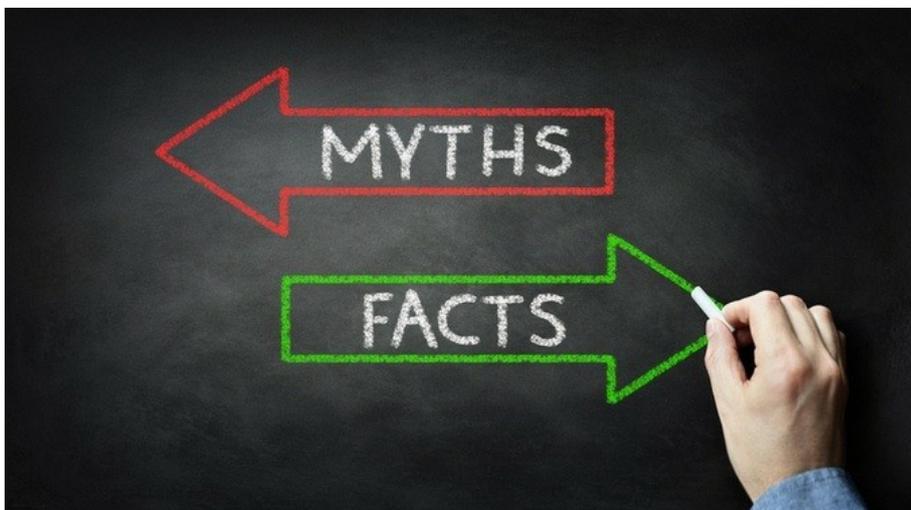


HMRC has misled Treasury on Loan Charge, warns leading UK tax barrister



The Treasury has been misled by HMRC officials about [Loan Charge](#), the controversial policy [expected to yield the taxman approximately £800m](#) from individual taxpayers through retrospective tax bills.

This is according to leading tax barrister [Keith Gordon](#), of Temple Tax Chambers, who has written to the Financial Secretary to the Treasury Mel Stride, warning of the legislation's inconsistency with legal principles, and of HMRC's failures which have led to its creation.

In [his letter to Stride, shared with ContractorCalculator](#), Gordon comments: 'Contrary to the present wishes of over 100 non-Government MPs, the Loan Charge legislation was enacted so as to drive a coach and horses through any concept of fairness and balance.'

Elsewhere he adds: 'It is my view that no-one can safely rely on the veracity or accuracy of any statement uttered by HMRC on the mere basis that the statement is being made by a public servant.'

Gordon concludes by urging Government, in its [review of the Loan Charge](#), to engage with independent sources of policy advice beyond HMRC, many of whom have called for the legislation's retrospective aspect to be withdrawn. Any failure to do so, claims Gordon, would render the review 'fatally flawed', adding: 'HMRC themselves cannot and should not be trusted, particularly on this topic'.

How HMRC's incompetence resulted in the Loan Charge

Both HMRC and the Treasury have falsely described the Loan Charge as a means of tackling "unlawful" arrangements. However, as Gordon sets out, it is in fact HMRC that is failing to comply with legal principles through the creation of the Loan Charge:

1. All tax disputes - including those involving avoidance - are governed by the statutory provisions that fairly strike a balance between "the right amount of tax" and taxpayers' entitlement to finality
2. If investigatory time limits are missed by HMRC then the law dictates that the tax is and should be written-off
3. There is no reason why the arrangements targeted by the Loan Charge should be any different.

Gordon adds that the risk of HMRC missing a time limit should have been completely eradicated by the implementation of the Disclosure of Tax Avoidance Schemes (DOTAS) rules. Since 2004, DOTAS has required that individuals notify HMRC of their use of schemes by including a DOTAS number within their tax return, or else risk a penalty.

HMRC claims that the inclusion of a DOTAS number will result in an inquiry. However, as acknowledged by former HMRC officer Ray McCann [when providing evidence to a Treasury Sub-Committee](#), HMRC failed to open inquiries “on a number of occasions” where a DOTAS number had been provided.

Gordon argues that this, alongside HMRC’s failure to make clear its opposition to such arrangements until 2016, gave many participants the false sense of HMRC approval, encouraging many to remain within such arrangements and others to join them.

As a result, HMRC estimates that roughly 50,000 individual taxpayers will be affected by the Loan Charge when it is implemented, though some commentators have suggested that this figure could be as high as 100,000.

How HMRC has misled the Treasury on the Loan Charge

Summarising the Loan Charge in response to evidence [provided by HMRC officials to a Treasury Sub-Committee](#) last month, Gordon noted: “HMRC took its eye off the ball and has devised a system that gives them a second bite of the cherry. Taxpayers were left in the dark. It was not their fault, but HMRC is going to punish them retrospectively in any event.”

Given the potentially devastating impact of the legislation, it’s unsurprising that HMRC felt inclined to distort the facts and figures to justify its own existence. The taxman’s lies have so far gone uncontested by the Treasury and Government, with Gordon noting that both Stride and Chancellor of the Exchequer Philip Hammond have spoken publicly using briefing notes that falsely describe the schemes in question as “unlawful” and “evasion”.

As a result, the Chancellor branded use of such schemes “illegal tax avoidance” on live television, a comment he later retracted. Assuming the briefing notes were provided by HMRC, it heads up a list of further ways in which the taxman has misled the Treasury, as observed by Gordon. These include:

- [Gordon’s analysis of HMRC’s justifications](#) for the Loan Charge, showing that it doesn’t withstand scrutiny
- Evidence of [attempts by HMRC officials to deflect questions](#) from Parliamentary Committees on the matter
- HMRC’s decision to go on the offensive seeking to justify the Loan Charge within days of the Report Stage of the Finance Bill.

‘In the course of my daily work, I routinely see HMRC saying whatever suits them with no real care as to the accuracy of their assertions’, Gordon adds.

HMRC’s application of IR35 increased loan scheme use

HMRC officials have attributed the use of loan schemes to perceived non-compliance with IR35. HMRC’s IR35 lead Jim Harra recently told a Parliamentary Committee that the Loan Charge applies to engagements entered into as long ago as 1999, to coincide with an uptake in scheme use following IR35’s introduction.

Far from a means of circumventing IR35, Gordon instead argues that the need to “avoid the aggravation of a misconceived IR35 enquiry” will have been the main motive for most, adding: “It is of little comfort that HMRC has such a low success rate in IR35 challenges, because the mere fact of an investigation is a misery in its own right.”

ContractorCalculator CEO Dave Chaplin agrees, adding that, in addition to HMRC’s often misguided pursuit of taxpayers, the draconian nature of IR35 is to blame for much of the uptake of loan schemes:

“The main reason people turned to these schemes was due to the unfairness of IR35, which sought to deduct the ‘deemed employer’s’ National Insurance (NI) bill from the contractor, even though it was avoided by the hiring firm. And the rules refused to confer any employment rights despite the contractor being classed as an employee for tax purposes.

“This kind of aggressive tax policy, where the self-employed end up paying higher taxes than employees, but without any rights, encourages tax avoidance. It has happened with IR35, which Government has answered to with even more aggressive policy. With that in mind, the signs for April 2020, when hundreds of thousands of contractors seek ways to avoid the unfair Off-Payroll tax, look ominous.”

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