ICAEW REPRESENTATION 143/17
TAX REPRESENTATION

FINANCE (No.2) BILL 2017-19, CLAUSES 11-12 AND SCHEDULES 1-2

EMPLOYMENT / TRADING INCOME RECEIVED THROUGH THIRD PARTIES, ALIAS DISGUISED REMUNERATION

Text of submission by ICAEW Tax Faculty on 22 December 2017 to House of Commons Public Bill Committee in response to invitation dated 14 December 2017 to "have your say"

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EMPLOYMENT / TRADING INCOME RECEIVED THROUGH THIRD PARTIES, ALIAS DISGUISED REMUNERATION

Foreword

On 22 December 2017, ICAEW Tax Faculty submitted to the Public Bill Committee Clerk a briefing for MPs on three of the four topics covered in Schedules 1 and 2, the text of which is reproduced below. This briefing was accompanied by three Appendices expanding on our comments; these are reproduced below in Appendix A, Appendix B and Appendix C.

Text of submission

WHO WE ARE

1. Please see Appendix 1.

EXECUTIVE SUMMARY

2. We recommend that:
   A. the new disguised remuneration (DR) close company gateway (CCG) (in paras 2-8 of Sch 1) should be dropped because it will result in unintended employment tax charges on non-employment related commercial transactions and other benign arrangements outside of HMRC's stated target;
   B. on the information requirements for those liable to the loan charge (in paras 9-11 of Sch 1 and in Sch 2), greater reasonable excuse protection from penalties is needed for employees and traders where the information cannot be obtained despite the contractor having tried their best; and
   C. the proposal to transfer the PAYE liability on the loan charge to employees in certain circumstances (in para 12 of Sch 1) needs further consideration in terms of its wider implications.

A CLOSE COMPANY GATEWAY (CCG) (paragraphs 2 to 8 of Sch 1)

The measure

3. This measure creates a new way to tax as employment income benefits from certain arrangements involving third parties derived by close company shareholders as shareholders and not as directors/employees. The charge will arise by creating a new gateway (the CCG) into the disguised remuneration legislation in Part 7A of ITEPA 2003. For more information on the measure see Appendix 2.

Our concerns

4. We are concerned that the charge will apply more widely than intended. The CCG relegates employment to a minor consideration – all that is needed is for the individual to have been an employee or director at some point in the three years before a 'relevant transaction'. This is not the point at which the taxpayer receives any benefit – that may not happen until 20 or more years after the 'relevant transaction', but given this criteria the CCG may be satisfied which would give rise to a tax charge.

5. We believe that this will result in unintended employment tax charges on commercial transactions and other benign arrangements outside of HMRC's stated target.

6. One prime example of collateral damage is the newly legislated protected trust regime for deemed domiciliaries introduced in F(No2)A 2017 after 2 years of consultation involving both HMT and HMRC.

7. For certain non-domiciliaries settling family companies, the CCG has the potential to trigger a life-changing UK tax charge in scenarios where it is clear that Parliament does not wish to levy tax.

8. What is more, that tax charge would be an employment income tax charge (even in scenarios where it is absolutely clear there has been no avoidance of employment income) and so take on the special territoriality rules that apply to that charge.

9. In the example that we provided to HMRC[1] previously, the CCG could operate to impose an employment tax charge in scenarios where there has been no avoidance of employment income tax and the individual has had no links to the UK for 20 years. Worse still is that this result is arbitrary in the sense that a taxpayer in an identical scenario who serendipitously ceases to be employed at a later date could fall outside the CCG entirely.

10. Levying a UK tax charge on an individual who has been non-UK resident for 20 years is a significant expansion in the scope of UK taxation and we are concerned that this has not been appreciated. There appears to be no underlying principle upon which the UK should be asserting a right to tax. There may be Human Rights implications as a consequence. We have not even considered enforceability.

11. Clearly something is very wrong if the CCG can generate such inappropriate results.

12. At the time of writing a query has been submitted to an ICAEW sub-committee querying whether a commercial arrangement involving an LLP and a partner's company will be within the scope of the CCG. We are currently investigating but this illustrates another aspect of the collateral damage which does not seem to have been considered.

13. The CCG is incredibly widely drafted and is designed to be very wide. Such width in the drafting works fine for the existing gateway into the DR legislation as that gateway is anchored by the need for there to be employment income tax avoidance. This is a natural and intuitive boundary.

14. The CCG has no such boundary. It is so broad that it spills out across a huge range of transactions. It will need to be considered in any commercial transaction involving sale/purchase of a private company, any succession arrangements involving trusts. Indeed, any transaction involving a close company will need to be measured against the CCG. Even if the CCG does not apply, the administrative task of making sure that it does not apply will have to be undertaken. This is because the risk of getting it wrong could be a life-changing and unexpected tax liability. We note that there is no advance clearance service.

15. This is a significant burden to place on the majority of UK companies (i.e. private, family owned businesses). And yet no mention or reference is made to this in the impact assessment[2].

Our recommendation

[1] ICAEW REP 113/17

[2] https://www.gov.uk/government/publications/disguised-remuneration-further-update/disguised-remuneration-further-update

16. We recommend that a better way of taxing value extracted from close companies should be devised and that this measure should be dropped from the Finance Bill .

Suggested amendment

17. Bill page 45, line 1 to page 53, line 20
    Delete all of paras 2 to 8.

B INFORMATION REQUIREMENTS: PENALTIES REASONABLE EXCUSE (paras 9-11 of Sch 1 and all of Sch 2)

The measure

18. Contractors whether employed or self employed who are within the scope of the loan charge will be required to provide to HMRC between 6 April 2019 and 30 September 2019 specified information about the loans that they received. For more information on the measure see Appendix 2.

Our concerns

19. Many contractors will be unable to provide the necessary information to HMRC. If the information is more than six years old they may legitimately have disposed of the information. One can expect contractors to ask for bank statements which should give at least some clues as to how much money was borrowed, but banks routinely destroy information after six years as well.

A solution

20. The one party that ought to have the information from which to determine the size of the loans to employees is HMRC as the loans should have been declared on forms P11D. Even where umbrella companies who ran the DR schemes were offshore, they were generally registered for PAYE and so would have submitted forms P11D. This will always give an accurate figure provided that there have been no subsequent movements on the loan account (and there generally will not have been).

Our recommendations

21. We should welcome clarification as to how HMRC proposes to:
    - alert contractors in good time to their responsibilities (including the need to contact banks if they have lost the information), and
    - deal with cases where the information is simply not available from any source, including themselves (ie HMRC).

22. We should also welcome a ministerial assurance that the contractor will not be liable to a penalty for not providing the specified particulars in cases where:
    - the loan is over six years old, and
    - the contractor can show that he has asked his bank for statements for the relevant period but the bank is unable to provide them, and
    - where the contractor is/was an employee, HMRC is unable to supply the information.

C TRANSFERRING THE PAYE LIABILITY ON THE LOAN CHARGE TO EMPLOYEES (para 12 of Sch 1)

The measure

23. This measure transfers the PAYE liability on the loan charge to the employee when the loan charge applies. This replaces the normal rule that where someone is employed by an offshore employer but is working for another party in the UK, the liability for PAYE rests with the UK party. For more information on the measure see Appendix 2.

Our concerns

24. It is not at all obvious why employees should be made responsible for the failure of employers to pay over the tax at the appropriate time – something that the employers can still correct.

25. Whilst in many cases contractors were well aware of what they were signing up for, in many other cases DR arrangements were missold to contractors, many of whom did not realise that the Isle of Man and Channel Islands, where most of the offshore employers were located, are offshore and outside HMRC's jurisdiction.

26. Bearing in mind that most of those for whom the contractors were working were large companies or public sector bodies, HMRC would be likely to collect significantly more money by pursuing them, especially in cases, as envisaged in the government's policy documents, where contractors will be unable to pay without selling their family home or becoming insolvent which is likely to create significant distress.

Recommendation

27. We recommend that further consideration should be given to the wider implications of this measure.

Possible amendment

28. Bill page 59, line 33 to page 60, line 3

    Delete all of para 12

APPENDIX 1

ICAEW TAX FACULTY – WHO WE ARE

ICAEW Tax Faculty is internationally recognised as a source of expertise and is a leading authority on taxation. It is responsible for making submissions to tax authorities on behalf of ICAEW and does this with support from over 130 volunteers, many of whom are well-known names in the tax world.

ICAEW is a world-leading professional accountancy body. We operate under a Royal Charter, working in the public interest. ICAEW's regulation of its members, in particular its responsibilities in respect of auditors, is overseen by the UK Financial Reporting Council. We provide leadership and practical support to over 147,000 member chartered accountants in more than 160 countries, working with governments, regulators and industry in order to ensure that the highest standards are maintained.

ICAEW members operate across a wide range of areas in business, practice and the public sector. They provide financial expertise and guidance based on the highest professional, technical and ethical standards. They are trained to provide clarity and apply rigour, and so help create long-term sustainable economic value ICAEW is a world-leading professional accountancy body.

APPENDIX 2

SUMMARY OF THE MEASURE

Clauses 11 & 12 and Schedules 1 & 2 are part of a package of proposals announced at Budget 2016 to tackle existing and prevent future use of disguised remuneration (DR) avoidance schemes. Such schemes are (in broad terms) arrangements where employment and trading earnings are routed via a third party and not taxed as earnings.

This legislation will augment sections 554A-554Z21 (Part 7A) ITEPA 2003 'Employment income provided through third parties' which was originally legislated in Finance Act 2011 (FA 2011). It adds to the suite of measures announced at Budget 2016 and legislated in FA 2016, FA 2017 and F(No.2)A 2017.

In broad terms, the legislation in the current Finance Bill relating to employees (clause 11 and Sch 1) and the self employed (clause 12 and Sch 2) has four main objectives:

- *Para 1 of Sch 1*: To put beyond doubt that **charges on contributions to DR schemes** can apply under the DR legislation at Part 7A ITEPA regardless of whether such contributions should previously have been taxed as employment income – for detail, see HMRC's technical notes published on 22 November 2017 and 1 December 2017;
- *Paras 2-8 of Sch 1*: To introduce a '**close company gateway'** intended to put beyond doubt when Part 7A applies to the remuneration of owners of close companies – see technical notes published on 13 September 2017 and 1 December;
- *Paras 10-11 of Sch 1 for employees and Sch 2 for the self employed*: To impose an **information requirement** on those subject to the loan charge to provide HMRC with specified particulars before 1 October 2019 – see technical notes published on 13 September and 1 December; and
- *Para 12 of Sch 1*: To amend s689 ITEPA 2003 (which governs from whom HMRC can collect PAYE where there is a non-UK employer) to enable the **collection of the tax liability** from employees of non-UK employers and from employees who provided services to a UK end client where the non-UK employer is unable to meet the liability or no longer exists – see technical notes published on 13 September and 1 December.

For NIC, the 1 December technical paper links to a draft NIC draft statutory instrument and draft primary legislation to remove NIC liability in prescribed circumstances.

The measure in para 1 of Sch 1 came into force from November 2017 and the other provisions commence in April 2018.

APPENDIX A

Disguised remuneration close company gateway: amplification of our concerns

Who we are

1. Please see Appendix 1.

Executive summary

2. We recommend that the new disguised remuneration (DR) close company gateway (CCG) (in paras 2-8 of Sch 1) should be dropped because it will result in unintended employment tax charges on non-employment related commercial transactions and other benign arrangements outside of HMRC's stated target.

Summary of measure

3. In order to come within the scope of the existing DR legislation, it is necessary to come through the gateway at s554A ITEPA 2003. The CCG is designed as an additional gateway into the DR legislation to operate alongside the existing gateway.

4. HMRC's consultation document of 10 August 2016 explains the rationale behind the CCG:

   "…some schemes try to avoid being caught by Part 7A by claiming that the disguised remuneration received by an employee or director of a close company is not in connection with their employment. The government considers that these schemes are ineffective. In order to put beyond doubt that these schemes do not work, another gateway will be added to Part 7A specifically for close companies.".

5. In a nutshell, the existing gateway requires the avoidance arrangement in question to be "…concerned with the provision of, rewards or recognition or loans in connection with A's employment…". In the case of close companies, where the shareholders and the directors tend to be one and the same, HMRC are of the opinion that some taxpayers are trying to game the system by claiming that benefits derived from certain arrangements are the result of their status as shareholders and not as directors/employees. Consequently, they are arguing that the existing gateway does not apply.

Our concerns

6. We continue to have serious concerns about the CCG[3]. They can be summarised broadly as follows:

   a. We do not think HMRC has accurately identified the problem.
   b. The CCG is therefore fundamentally the wrong tool to combat this avoidance activity.
   c. In trying to re-purpose this tool, the collateral damage we have identified is almost inevitable.
   d. HMRC themselves acknowledge the collateral damage and this is evidenced by their (failed) attempts to refine the CCG so as to minimise that collateral damage.

7. We consider each point in further detail below.

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[3] ICAEW REP 18/17 in response to the draft clauses published on 6 December 2016. The CCG was subsequently dropped from the Finance Bill published in March 2017 to allow for further consultation; and ICAEW REP 113/17 in response to the revised draft clauses published on 13 September 2017.

8. For the avoidance of doubt, we would like to reiterate that if HMRC are identifying egregious avoidance activity then we absolutely agree that it should be tackled. Our objection is not to stamping out egregious avoidance; it is to the use of unsuitable tools which have a wider impact on commercial and benign arrangements when other less intrusive solutions are available.

Has HMRC accurately identified the problem?

9. As set out above, the rationale for the CCG is as follows:
   "…some schemes try to avoid being caught by Part 7A by claiming that the disguised remuneration received by an employee or director of a close company is not in connection with their employment. The government considers that these schemes are ineffective. In order to put beyond doubt that these schemes do not work another gateway will be added to Part 7A specifically for close companies.". [Our underline]

10. We consider this statement to be the root cause of the difficulties with the CCG as we do not think that the targeted avoidance activity is in fact employment income tax avoidance.

11. This is because:
   - The drafting of the CCG relegates employment to almost minor consideration – it is in no way material to the gateway except that the individual must have been an employee (or director) at some point in the 3 years before the "relevant transaction" (which is not the point at which the taxpayer receives any benefit – that may not happen until 20 years later but could still be within the CCG);

   - The amounts involved are clearly far in excess of what would constitute reasonable remuneration for any employment – if the value of (or a significant percentage/proportion thereof) a close company is decanted into a trust (or other 3rd party) then almost de facto it cannot be said to be due to the avoidance of employment income tax;

   - If it were pure employment income tax avoidance then HMRC would have less difficulty in applying the current version of Part 7A. Or put another way, it is precisely because the avoidance is not of employment income tax that it is difficult to show that it is; and,

   - While our requests for examples of the targeted avoidance activities have gone unanswered, based on our own experience and understanding we consider that the types of arrangements HMRC has in mind to be about the extraction of value from close companies rather than employment income (see also our further comments below re the recent GAAR Opinion).

Is the CCG the right tool?

12. Part 7A is an effective employment income anti-avoidance tool but we consider it ill-suited to being refashioned in this manner to deal with other types of avoidance. And this is why the CCG will cause collateral damage to commercial transactions and to other benign arrangements outside of HMRC's stated target.

13. In order to capture what we call "extraction of value avoidance", the CCG has been drafted so that employment income tax avoidance is no longer a requirement (as mentioned indirectly above vis-à-vis the employment requirement). This in turn generates the anomalous result that Part 7A could be engaged and an employment income tax charge triggered even where it can be demonstrated that there is no employment income tax avoidance.

14. While this may not sound like a bad result given that there is some underlying avoidance activity, this result is not achieved without unintended consequences. Decoupling the CCG from the requirement that there be employment income tax avoidance means that the CCG is incredibly wide and could cause all sorts of collateral damage and capture all sorts of commercial transactions and benign arrangements. This is why it was originally dropped from the March 2017 Finance Bill.

Collateral damage

15. One prime example of collateral damage is the newly legislated protected trust regime for deemed domiciliaries introduced in F(No2)A 2017 after 2 years of consultation involving both HMT and HMRC.

16. For certain non-domiciliaries settling family companies, the CCG has the potential to trigger a life changing UK tax charge in scenarios where it is clear that Parliament does not wish to levy tax.

17. What is more, that tax charge would be an employment income tax charge (even in scenarios where it is absolutely clear there has been no avoidance of employment income tax) and so take on the special territoriality rules that apply to that charge.

18. In the example we provided to HMRC[4] previously, the CCG could operate to impose an employment tax charge in scenarios where there has been no avoidance of employment income tax and the individual has had no links to the UK for 20 years. Worse still is that this result is arbitrary in the sense that a taxpayer in an identical scenario who serendipitously ceases to be employed at a later date could fall outside the CCG entirely.

19. Levying a UK tax charge on an individual who has been non-UK resident for 20 years is a significant expansion in the scope of UK taxation and we are concerned that this has not been appreciated. There appears to be no underlying principle upon which the UK should be asserting a right to tax. There may be Human Rights implications as a consequence. We have not even considered enforceability.

20. Clearly something is very wrong if the CCG can generate such inappropriate results.

21. At the time of writing a query has been submitted to an ICAEW sub-committee querying whether a commercial arrangement involving an LLP and a partner's company will be within the scope of the CCG. We are currently investigating but this illustrates another aspect of the collateral damage which does not seem to have been considered.

22. The CCG is incredibly widely drafted and is designed to be very wide. Such width in the drafting works fine for the existing gateway in the DR legislation as that gateway is anchored by the need for there to be employment income tax avoidance. This is a natural and intuitive boundary.

23. The CCG has no such boundary. It is so broad that it spills out across a huge range of transactions. It will need to be considered in any commercial transaction involving sale/purchase of a private company, any succession arrangements involving trusts; basically any transaction involving a close company will need to be measured against the CCG. Even if the CCG does not apply, the administrative task of making sure it does not apply will have to be undertaken. This is because the risk of getting it wrong could be a life changing and unexpected tax liability. We note that there is no advance clearance service.

24. This is a significant burden to place on the majority of UK companies (i.e. private, family owned businesses). And yet no mention or reference is made to this in the impact assessment[5].

HMRC attempts to minimise collateral damage

25. The current version of the CCG is the third version. While we do welcome HMRC's responding to stakeholder feedback, we are disappointed that HMRC are persisting in trying to make the

[4] ICAEW REP 113/17

[5] https://www.gov.uk/government/publications/disguised-remuneration-further-update/disguised-remuneration-further-update

CCG work rather than considering alternatives (see below). As outlined above, we think the CCG is fundamentally flawed and cannot tackle the targeted activity without collateral damage.

26. The main changes from the original draft legislation are:

    a. The Inclusion of a motive test; and,
    b. The restriction of the employment test to the 3 years before a "relevant transaction".

27. As regards the motive test, the wording is sufficiently vague as to offer little comfort to taxpayers (especially in cases where the downside risk is a life changing tax charge).

28. We would also add that motive tests are not a panacea. What society considers to constitute tax avoidance is a moving target and some of these arrangements will last 100+ years. Whether a transaction which is considered acceptable in today's society comes to be viewed as tax avoidance 40 years hence cannot be measured. It therefore poses a material risk as unwinding these arrangements is not always easy or indeed possible. Taxpayers may find themselves trapped.

Recommendations

29. We recommend that the CCG is dropped entirely from the Finance Bill

30. Quite aside from it being the wrong approach, the consequential collateral damage and the administrative burden on business, one of HMRC's stated difficulties with the current gateway is that it requires fact finding in each individual case and so is resource intensive. It would therefore be more attractive for HMRC to have a bright-line principle test that can be applied across the body of avoiders.

31. The CCG does not even improve this position as it will not reduce the work required from HMRC – the motive test will require fact finding in each individual case as well; it simply swaps one type of fact finding for another. Thus, in making avoidance activity easier to stamp out we would suggest that the CCG also fails.

32. We would add for completeness that those taking an aggressive approach to the existing DR legislation will no doubt continue to do so with the CCG. Thus the compliant majority are potentially punished while the aggressive minority are no closer to being deterred.

33. The CCG does not measure up to our *Ten Tenets for a Better Tax System* (summarized in Appendix 1), in particular Tenet 5: Properly targeted.

Alternative approach

34. We believe that what HMRC is trying to combat is avoidance activity involving the extraction of value from close companies. This is reinforced by the recent GAAR Opinion[6] issued on 17 November 2017. This is exactly the type of arrangement we believe that the CCG is designed to combat. The title of the Opinion itself reinforces the point: "Extraction of cash through trust interests". This is not about employment income tax avoidance.

35. As the Opinion illustrates, the CCG may not even be required in this case as the GAAR has fulfilled the role given to it by Parliament, i.e. combatting abusive arrangements.

36. Even if it is felt necessary to add yet more pages to the tax code, there already exists an extensive suite of anti-avoidance legislation designed to combat extraction of value. We would be more than happy to assist HMRC in amending and supplementing this legislation to deal with the targeted avoidance. We expect that this could be done with more subtlety than in adopting the CCG.

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[6] https://www.gov.uk/government/publications/gaar-advisory-panel-opinion-of-17-november-2017-extraction-of-cash-or-equivalent-through-trust-interests

Suggested amendment

37. Bill page 45, line 1 to page 53, line 20

    Delete all of paras 2 to 8.

APPENDIX B

Loan charge information requirements: amplification of our concerns

Who we are

1. Please see Appendix 1.

Executive summary

2. We recommend that on the information requirements for those liable to the loan charge (in paras 9-11 of Sch 1 and in Sch 2), greater reasonable excuse protection from penalties is needed for employees and traders where the information cannot be obtained despite the contractor having tried their best:

Summary of measure

3. Contractors whether employees (or ex-employees) or self employed who are within the scope of the loan charge (or if applicable their personal representatives) will be required to provide to HMRC between 6 April 2019 and 30 September 2019 specified information about the loans that they received.

Our concerns

4. We are concerned that many contractors will be unable to provide the necessary information to HMRC – they are not always the kind of people who keep that sort of information, and in many cases the information will be more than six years old and so legitimately destroyed (six years is the period for which HMRC normally expects people to keep records – this covers all loans taken out since 1999). One can expect contractors to ask for bank statements which should give at least some clues as to how much money was borrowed, but banks routinely destroy information after six years as well.

5. The one party that ought to have the information from which to determine the size of the loans to employees is HMRC as the loans should have been declared on forms P11D – even where umbrella companies who ran the DR schemes were offshore, they were generally registered for PAYE and so would have submitted forms P11D. This will always give an accurate figure provided that there have been no subsequent movements on the loan account (and there generally will not have been).

6. This is of particular importance when it comes to penalties. Under new paragraph 35F someone who fails to do this is liable to an initial penalty of £300 and further daily penalties of up to £5,400. There are the normal 'reasonable excuse' provisions but these are specifically dis-applied where reliance is placed on another person (eg HMRC) to do something (eg provide a copy P11D) under para 35H(2)(b) 'unless the first person [i.e. the contractor] took reasonable care to avoid the failure [to give HMRC the information]'.

7. We would hope that the tribunals would cancel penalties imposed by HMRC in these circumstances but it would be preferable if penalties were not levied in the first place.

8. In addition, HMRC needs to be proactive in alerting contractors in good time to their responsibilities – for example by way of articles in the national and trade press, webinars, social media, and via organisations that represent contractors, businesses and advisers.

Our recommendations

9. We should welcome clarification as to how HMRC proposes to:
    - alert contractors in good time to their responsibilities (including the need to contact banks if they have lost the information), and

- deal with cases where the information is simply not available from any source, including themselves (ie HMRC).

10. We should also welcome a ministerial assurance that the contractor will not be liable to a penalty for not providing the specified particulars in cases where:
    - the loan is over six years old, and
    - the contractor can show that he has asked his bank for statements for the relevant period but the bank is unable to provide them, and
    - where the contractor is/was an employee, HMRC is unable to supply the information.

APPENDIX C

Loan charge: transfer of PAYE liability to employees: amplification of our concerns

Who we are

1. Please see Appendix 1.

Executive summary

2. We recommend that the wider implications of the proposal to transfer the PAYE liability on the loan charge to employees in certain circumstances (in para 12 of Sch 1) need further consideration.

Summary of measure

3. This disapplies the provisions in section 689 ITEPA 2003 as far as the 2019 loan charge is concerned. Section 689 specifies that where someone is employed by an offshore employer but is working for another party in the UK, that party in the UK is responsible for operating PAYE.

Our concerns

4. There are apparently some 40,000 contractors who were paid partly by loans, and we estimate that the vast majority of these were employed. With employed contractor loans s689 will almost always apply – these schemes had offshore employers (in reality umbrella companies) and were not aimed at people working outside the UK. Thus the onshore 'employer' was responsible for operating PAYE at the time that the loans were made (following the *Rangers* case this is inevitable, but that case was decided this year and no-one knew it at the time), but the employee is responsible for paying the loan charge where the onshore employer has not paid the PAYE. Under the PAYE Regulations, to the extent that the employer is responsible for paying the tax, the employee cannot be.

5. We question whether this measure is appropriate. HMRC's technical note says that it is the employee who has gained from the use of the scheme not the employer, and will doubtless also argue that there is no evidence that the onshore employers knew about the avoidance, so they should not be disturbed. The people who would have paid the offshore umbrellas would have been agencies, not the onshore employers. Also, contractors ought to have known that there was something suspicious about systems with offshore companies paying in loans. However:

   a) We believe that this measure could be interpreted as the government letting big business and the public sector off the hook for debts that they should have paid.

   b) It is arguable that the onshore employers should have made checks on their supply chains instead of washing their hands of all responsibility. HMRC expects agencies nowadays to know what is going on in their supply chain as a counter-avoidance measure to prevent people being paid as self-employed when they should not be, and the public sector to check that contractors with personal service companies are operating IR35 when they should be (in the latter case until April 2017 this year when public sector bodies were themselves made responsible for operating it). There are also onerous requirements on large companies to check that their supply chains do not include slave labour. Why not this as well?

   c) Where financial services are involved normal government policy is to target the intermediaries who sell these schemes, and rightly so. There is a very robust regime in the world of pensions and investments to protect citizens from mis-selling, which deals

with similarly large quantities of cash, so why not here? We do not believe that all contractors knew what they were doing (although some undoubtedly did): many people do not realise that the Channel Islands and the Isle of Man, where most of the offshore employers were located, are in fact offshore, and the long-standing expectation of employees – which mirrors the law on this subject – is that it is up to employers to get their tax deductions right on payments to them.

d) It is not at all obvious why employees should be made responsible for the failure of employers to pay over the tax at the appropriate time – something that the employers can still correct. Employers may or may not have rights to recover the money from employees, or indeed the agencies that paid the money over to these offshore umbrellas, but the law should be allowed to take its course on this.

e) Bearing in mind that most of the onshore employers were large companies or public sector bodies, HMRC would be likely to get significantly more money by pursuing them. As stated in the government's policy documents, many contractors will be unable to pay at all and others will be unable to pay without selling their family homes and others may become insolvent; there is likely to be significant distress here.

f) Bearing in mind also that HMRC is proposing not to make the employees liable for NIC, it is hard to see why they are letting the employers off the hook for this as well – particularly employer NIC which should certainly be their responsibility.

Recommendation

6. We recommend that further consideration should be given to the wider implications of this measure.

Possible amendment

7. Bill page 59, line 33 to page 60, line 3
   Delete all of para 12