Disguised remuneration: independent loan charge review

Employment Tax

31 March 2020

The CIOT has met HMRC to discuss the draft Finance Bill legislation regarding the government's changes to the disguised remuneration loan charge following Sir Amyas Morse's report.

Following the government's response of 20 December 2019 to Sir Amyas Morse's independent review, HMRC published on 20 January 2020 and 27 February 2020 draft legislation making changes to the loan charge. The draft legislation and other supporting documents can be found at https://tinyurl.com/tumj226. The legislation will be included in the Finance Bill.

Draft legislation – 20 January

The draft legislation published on 20 January provides that the loan charge will now apply only to loans outstanding at 5 April 2019 that were made on, or after, 9 December 2010. Furthermore, the loan charge will not apply to loans outstanding at 5 April 2019 that were made before 6 April 2016 where the avoidance scheme use was disclosed to HMRC and HMRC did not act (for example, by opening an enquiry).

The legislation also introduces changes to allow taxpayers subject to the loan charge to elect to spread their outstanding loan balance evenly across three tax years (2018/19, 2019/20 and 2020/21) and provides for no interest to be charged on persons subject to the loan charge on any income tax and capital gains tax liabilities due in respect of 2018/19 and outstanding between 1 February 2020 and 30 September 2020, or in respect of 2019/20 prior to 31 January 2021, provided that certain conditions are met (i.e. that the tax is settled by 30 September or a time to pay arrangement is agreed by then).

The CIOT met with HMRC on 20 February to discuss the draft legislation published on 20 January 2020. The main area of concern was the draft legislation in respect of

post 9 December 2010 years where an ‘adequate disclosure’ has been made. In particular, we were concerned with the meaning of ‘reasonably disclosed’ and what would be regarded as sufficient information. We considered that this could be a high bar to pass, especially given the standard discovery assessment rules relating to ‘sufficient information’. It was suggested that HMRC need to apply the test on sufficient information differently in relation to the loan charge, given the circumstances relating to the loan charge changes. Taxpayers should be given the benefit of the doubt, otherwise few are likely to pass this test of reasonable disclosure. HMRC were, therefore, urged to take a practical approach in relation to what is a ‘reasonable disclosure’ and consider all the circumstances.

In addition, it was suggested that para 1B(1)(b) is amended from ‘a tax return made by A for a qualifying tax year contained a reasonable disclosure of the loan or quasi-loan’ to ‘a reasonable disclosure of the loan or quasi-loan was made for a qualifying year’, to allow HMRC to take account of all disclosures and not just those by the taxpayer now subject to the loan charge.

We also raised the following concerns:

- Taxpayers that had done nothing were in a better position as a result of the loan charge changes, as they now had until 30 September to submit their return, omitting years that are now outside the scope of the loan charge, and could pay the tax due (or agree time to pay, etc.) interest free.
- While taxpayers that had agreed voluntary settlements will be able to obtain refunds for years now outside of the loan charge, they will have to wait until the Finance Bill gets Royal Assent at the earliest.
- Taxpayers that had followed HMRC’s advice and repaid their loans in order to avoid paying the loan charge would be in the worst position of all, as it appears that they will not be able to have their payments refunded to them without incurring a disguised remuneration tax charge.

HMRC were urged to raise with ministers the implications of this difference in treatment of the above populations which we felt was against the spirit of the proposals by Sir Amyas Morse.

Draft legislation – 27 February

The draft legislation published on 27 February provides for the government’s commitment that HMRC will repay voluntary restitution that has been paid by

individuals and employers since the loan charge was announced in March 2016, for years that would no longer be subject to the loan charge because the year was unprotected.

The legislation requires HMRC to establish a scheme to repay or waive all, or part, of an amount of voluntary restitution paid or due to be paid under an agreement made between 16 March 2016 and 11 March 2020 in respect of disguised remuneration loans or quasi-loans. The voluntary restitution must have been paid, or be due to be paid, in respect of a loan or quasi-loan for unprotected years that would no longer be subject to the loan charge. The legislation also enables HMRC to set out conditions that will apply to any applications for a repayment or waiver.

The draft legislation clarifies the changes to the loan charge and does appear to address some of the concerns raised in relation to refunds, etc. In particular, it appears that repayment of tax for a voluntary restitution year where the loan was written off will not attract an income tax charge under ITEPA 2003 Part 7A, as the amount of income for the voluntary restitution year will still attract relief under ITEPA 2003 s 554Z5.

At the same time, HMRC published a draft scheme document which sets out the eligibility criteria for claiming a refund, the claims process and how refunds will be calculated. This also provides for review requests where an applicant disagrees with HMRC’s repayment decision, although it does not appear to make provision for an appeal to the Tax Tribunals. Detailed guidance on the claims process and how refunds will be calculated will be published by HMRC before the Finance Bill receives Royal Assent. Those who want to claim a refund should await this further guidance before taking any action. Refunds can only be issued after the Finance Bill has received Royal Assent.