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The April 2019 Loan Charge

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Introduction

The loan charge was enacted in Finance (No. 2) Act 2017 to deal with legacy cases of disguised remuneration ("DR") loans. The clauses appeared uncontentious when before the Public Bill Committee. The debate lasted 15 minutes, with contributions from only the Paymaster General and Financial Secretary to the Treasury (Mel Stride) and the Shadow Treasury Minister (Anneliese Dodds). There was no division.[1] The yield from the loan charge was expected to be £3.2 billion over five years.[2]

Two-and-a-half years on, the loan charge has become politically contentious. The Loan Charge Action Group ("LCAG") has been formed to raise awareness of the loan charge.[3] The LCAG has established The Loan Charge Litigation Trust to pursue a judicial review of the loan charge.[4]

The House of Lords Economic Affairs Committee's report on *The Powers of HMRC* has criticised the loan charge and recommended "that the loan charge legislation is amended, to exclude from the charge, loans made in years where taxpayers disclosed their participation in these schemes to HMRC or which would otherwise have been 'closed'."[5] The Loan Charge All-Party Parliamentary Group (the "APPG") was formed and has held an inquiry into the loan charge. The APPG's report, published in April 2019, made recommendations including that (i) there be an independent review into the Loan Charge led by an experienced tax judge; (ii) an immediate policy change ahead of the review to remove closed years from the scope of the loan charge; and (iii) a return of taxpayers' statutory rights to defend against HMRC's enquiries into any open years (which would presumably mean repeal of the loan charge, with any enforcement being under pre-existing law).[6]

The APPG's report notes that they had been informed of "as many as six possible suicides of people facing the Loan Charge, and that the APPG had been sent confirmation of three of these."[7] The report criticises Mel Stride for failing to

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[1] Finance Bill Deb 19 October 2017, 99.

[2] HM Treasury, *Section 95 of the Finance Act 2019* (2019) at 3.72. This would appear to include, from the tax information and impact note, settlements in anticipation of the loan charge and the extension of disguised remuneration to the self-employed and the removal of the company deduction: Available at: *https://www.gov.uk/government/publications/disguised-remuneration-further-update/disguised-remuneration-further-update.*

[3] Available at: *https://www.hmrcloancharge.info/*

[4] Available at: *https://www.hmrcloancharge.info/judicial-review/*

[5] Economic Affairs Committee, *The Powers of HMRC* (HL 242, 2017) at 78.

[6] APPG, *Loan Charge Enquiry: Final Report* at ''Summary and key recommendations''.

[7] APPG, fn.6, at 255.

acknowledge these suicides when the issue had been raised in the House of Commons.[8] However HMRC has subsequently referred itself to the police and the Independent Office for Police Conduct (which investigates serious complaints involving HMRC), following the suicide of an individual facing the loan charge.[9]

Finance (No. 3) Bill 2017-19 was amended at report stage,[10] to include a new clause (now section 95 of Finance Act 2019) which required the Chancellor of the Exchequer to review the effects of the changes made by sections 80 (Offshore matters or transfers: income tax and capital gains tax) and 81 (Offshore matters or transfers: inheritance tax) of Finance Act 2019, and compare them with the time limits for the loan charge. The report has provided a broader review, and justification, of the loan charge by the Treasury. Subsequently (following a debate which was suspended due to a leak in the roof of the chamber[11] and resumed some days later[12]) the House of Commons has passed a motion, broadly reflecting the recommendations of the APPG's report, resolving that:

> "this House expresses its serious concern at the 2019 Loan Charge which applies from 5 April 2019; expresses deep concern and regret about the effect of the mental and emotional impact on people facing the Loan Charge; is further concerned about suicides of people facing the Loan Charge and the identified suicide risk, which was reported to HMRC; believes that the Loan Charge is fundamentally unfair and undermines the principle of the rule of law by overriding statutory taxpayer protections; expresses disappointment at the lack of notice served by HMRC and the delays in communication with those now facing the Loan Charge, which has further increased anxiety of individuals and families; is concerned about the nature and accuracy of the information circulated by HMRC with regard to the Loan Charge; further regrets the inadequate impact assessment originally conducted; understands that many individuals have received miscalculated settlement information; calls for an immediate suspension of the Loan Charge for a period of six months and for all related settlements to be put on hold; and further calls for an independent inquiry into the Loan Charge to be conducted by a party that is not connected with either the Government or HMRC."[13]

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[8] APPG, fn.6, at 261.

[9] E. Agyemang, "HMRC reports itself to police watchdog over taxpayer's suicide" *Financial Times*, 31 March, 2019.

[10] HC Deb 8 January 2019, 99.

[11] HC Deb 4 April 2019, vol 657, 1287.

[12] HC Deb 11 April 2019, vol 685, 553.

[13] HC Deb 4 April 2019, vol 657, 1287.

However, despite the Commons resolution, the government indicated that it will not change its policy, except by expanding its one-to-one support for vulnerable customers.[14]

This note first reviews the DR schemes that the loan charge targets. It then discusses the nature of the loan charge and whether it can be said to be a retrospective tax. The note then assesses the impact of the loan charge, considering whether the loan charge might create a liability where none existed before: either because the DR schemes were successful at avoiding tax or because HMRC is out-of-time to raise an assessment. The note concludes by considering what may be learnt from a similar experience in Australia in the late 1990s, where the Australian Taxation Office (ATO) sought to raise assessments against taxpayers who had been mis-sold a tax avoidance scheme.

Background: the schemes

DR schemes came in many varieties, but generally involved an employer making payments into an employee benefit trust, with the employee then receiving loans from the employee benefit trust.[15] Finance Act 2011 introduced Part 7A into ITEPA to target such arrangements going forward.[16] Some taxpayers sought to circumvent this charge with schemes which were "more contrived and aggressive than those that existed before 2011 but often also take the form of a loan or debt."[17] In the Public Bill Committee debate of the loan charge clauses Mel Stride stated that "since 2011 the tax avoidance industry has created and sold more than 70 new and different schemes aimed at sidestepping the 2011 legislation."[18] Apparently more than half of the DR loans now outstanding were taken out after the changes introduced in FA 2011.[19] HMRC has stated that the loan charge will apply in total to more than 250 different types of scheme.[20] HMRC data shows that "around 50,000 individuals have made use of DR schemes. This represents around 0.1% of the taxpayer population and less than 2.5% of an estimated population of 2 million freelancers in the UK."[21] In contrast, the LCAG estimates that closer to 100,000 individuals will be affected by the loan charge.[22]

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[14] HC Deb 11 April 2019, vol 685, 568.

[15] HMRC, *Tackling disguised remuneration avoidance schemes overview of changes and technical note* (2016) at Chapter 3.

[16] See D. Cohen, "Finance Act 2011 notes: section 26 and Schedule 2: employment income provided through third parties (the "disguised remuneration" legislation)" [2011] (4) BTR 381.

[17] HMRC, *Tackling disguised remuneration avoidance schemes overview of changes and technical note*, fn.15, at Chapter 3.

[18] Finance Bill Deb 19 October 2017, 99.

[19] HM Treasury, fn.2, at 3.57.

[20] HM Treasury, fn.2, at 3.56.

[21] HM Treasury, fn.2, at 3.13.

[22] APPG, fn.6, at 39.

Reported case law gives us some indication of further details of the schemes. The leading case on DR is *Rangers*,[23] which deals with schemes operating from 2001/02. However, case law gives us earlier examples with *Sempra*[24] and *Dextra*,[25] which show DR schemes involving loans operating since respectively 1995 and 1998. It may be supposed that by 1997 such tax planning technology was fairly well-known, as a book was published on the subject,[26] co-authored by a Queen's Council and a solicitor (the latter was subsequently struck-off and became an actor and entrepreneur in the adult entertainment industry).[27]

Examples of newer variants can be found in two recent decisions of the First Tier Tribunal (Tax Chamber), that also show how promoters of these schemes have failed to comply with their DOTAS obligations. The *Hyrax* scheme, which was operating at least as recently as 2015, involved minimum-wage payments to employees who also received a loan that was never expected to be repaid (and the benefit of which as assigned to an offshore employer-financed retirement benefits scheme).[28] *Curzon Capital* provides an example of a self-employed version of a loan scheme. This involves an employee ceasing employment and becoming a member of a BVI LLP, through which their services are provided to their former employer. The former employer is invoiced by a trading trust, which on-loans the monies to a benefit trust, which in turn loans the money to the former employee.[29] Apparently some DR schemes continue to be marketed.[30]

These schemes all involved little or no income tax and NICs being paid. However, it was not just the employee (or former employee) who benefited. Some benefit will have accrued to the employer, due to lower employer's NIC contributions. Also the scheme may have enabled the employer to pay a lower amount whilst the employee received the same or greater amount (net of taxes)

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[23] *RFC 2012 plc (in liquidation) (formerly Rangers Football Club plc) v Advocate General for Scotland* [2017] UKSC 45, [2017] STC 1556 (*Rangers*). See discussion in D. Small and R. Macleod, "Murray Group Holdings Ltd and Others v HMRC: HMRC's new tactics win the day in the Court of Session" [2016] (1) BTR 27 and M. Blackwell, "RFC 2012 plc (in liquidation) (formerly the Rangers Football Club plc) v Advocate General for Scotland: discerning the goal of the legislation" [2017] BTR 398. Following the decision in *Rangers* there have been two First-Tier Tribunal (Tax Chamber) decisions on broadly similar facts: *OCO Ltd and another v Revenue and Customs Commissioners* [2018] SFTD 123, [2018] SFTD 123 (*OCO Ltd*); *Landid Property Ltd (and others) v Revenue and Customs Commissioners* [2017] UKFTT 692 (TC) (*Landid*).

[24] *Sempra Metals Ltd v Revenue and Customs Commissioners* SpC 698, [2008] STC (SCD) 1062 (Sempra).

[25] *Dextra Accessories Ltd and others v Macdonald (Inspector of Taxes)* [2002] STC (SCD) 413 (SpC) (*Dextra*).

[26] A. Thornhill QC and P. Baxendale-Walker, *The law and taxation of remuneration trusts* (Key Haven 1997).

[27] "Rangers EBT scheme mastermind Paul Baxendale-Walker faces bankruptcy" *The Herald*, 18 April, 2018.

[28] *Hyrax Resourcing Ltd and another company v Revenue and Customs Commissioners*, [2019] UKFTT 175 (TC), para 3.

[29] *Revenue and Customs Commissioners v Curzon Capital Limited* [2019] UKFTT 63 (TC) (Curzon Capital) at 11-16.

[30] HMRC, *Disguised remuneration* (Spotlight 49, 2019).

than before the implementation of the scheme. These benefits to the employer seem to have caused some employers to make staff redundant and then offer to re-engage them under DR schemes: the House of Lords' report gives an example of this being done by one local authority in respect of the employment of a social worker.[31] HMRC claims not to have "seen cases that support the claim of individuals being forced to use a DR scheme." However what they perceive as forced may seem to exclude acting under economic duress, as in the relevant passage they go on to state that "employers cannot dictate what someone puts on their tax return."[32]

It has been suggested that many contractors entered into DR schemes in order to avoid complexities caused by the introduction of IR35.[33] However, as the Treasury observes, the use of umbrella companies does not necessitate the use of "DR arrangements, rather than receiving employment income in the usual way."[34]

The scheme promoter clearly will have made a significant turn on these arrangements: the case law shows them retaining amounts of around 18% in *Curzon Capital*[35] and 12% in *Rangers* style schemes.[36] This cut clearly provides an incentive to them to encourage participation in such schemes, which may have incentivised unscrupulous promoters to down-play the risks.

The Loan Charge

Following a consultation in 2016,[37] the loan charge was introduced in Finance Act (No.2) 2017[38] to tackle the historic use of DR loans. Broadly speaking the loan charge applies, by treating it as a "relevant step" for the purposes of Part 7A of ITEPA, where a loan, or a quasi-loan, has been made to an employee or director and:

- the loan or quasi-loan was made on or after 6 April 1999; and

31 Economic Affairs Committee, fn.5, at 24.
32 HM Treasury, fn.2, at 3.18.
33 APPG, fn.6, at 10-14.
34 HM Treasury, fn.2, at 3.11-3.12.
35 *Curzon Capital*, fn.29, at 11.
36 *OCO Ltd*, fn.23, at 19; *Landid*, fn.23, at 61
37 HMRC, *Tackling disguised remuneration avoidance schemes overview of changes and technical note*, fn.15, at Chapter 5; HMRC, *Tackling disguised remuneration* (2016) at Chapter 4; HMRC, *Tackling disguised remuneration* (2016) at Chapter 6.
38 Finance (No 2) Act 2017 (FA (No 2) 2017) at Sch. 11; see P. Noble, "Finance (No.2) Act 2017 Notes: Section 34 and Schedule 11: employment income provided through third parties; Section 35 and Schedule 12: trading income provided through third parties; Section 36: disguised remuneration schemes: restriction of income tax relief; Section 37: disguised remuneration schemes: restriction of corporation tax relief" [2017] (5) BTR 605.

- an amount of the loan or quasi-loan is outstanding immediately before the end of 5 April 2019.[39]

Finance Act (No.2) 2017 also introduced a provision[40] which mirrors the loan charge dealing with the similar DR loans, but for self-employed earnings.

HMRC has consistently been of the opinion that DR schemes, in all their guises, were not effective in reducing liability to tax.[41] However, there are significant disparities between the amount charged under the loan charge and any credible assessment of historic liability. The loan charge is a one-off payment in the 2019-20 tax year, so individuals would not get to use any personal allowances (or fully utilise the basic rate and, since 2011 higher rate, bands) from earlier years and amounts lent before the introduction of the additional rate in 2011 may be subject to tax at that rate. However, in some respects the charge favours the taxpayer. As the amount is payable in the current tax year there are no penalties or interest due. Further, unlike the *Rangers* decision which taxed the entire amount paid by the employer,[42] the loan charge is only on the amount received by the taxpayer, thereby excluding the sizeable cut (often around 16%-18%[43]) retained by the scheme provider.

Thus the loan charge is not motivated by ensuring that the taxpayer pays the correct amount of tax. Rather it seems to be motivated by the exasperation of the government with taxpayers' involvement in DR schemes, resulting in the government wishing to have a quick-fix, which roughly approximates the correct tax and collects it without administrative exertion, "drawing a line under this avoidance once and for all":[44] thereby eliminating the challenges HMRC has faced in identifying and investigating use of DR schemes.[45] The Treasury's exasperation with DR schemes is evident from the March 2019 report, which notes:

> "HMRC has opened tens of thousands of enquiries into these schemes over the last 20 years. As individual schemes have been litigated through the courts, new schemes have been devised with slightly different arrangements requiring fresh litigation."[46]

The wish for a quick and dirty solution to the problem is also evident from the report, which notes:

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[39] FA (No 2) 2017 at para. 1, Sch. 11.
[40] FA (No 2) 2017 at Sch. 12; Noble, fn.38.
[41] HMRC, *Tackling disguised remuneration avoidance schemes overview of changes and technical note*, fn.15, at Chapter 3.
[42] *Rangers*, fn.23. at 1570h.
[43] APPG, fn.6, at 28.
[44] HM Treasury, fn.2, at 3.2.
[45] HM Treasury, fn.2, at 3.27-3.37.
[46] HM Treasury, fn.2, at 3.

> "The decision to introduce the loan charge reflected the fact that individually litigating the hundreds of different and evolving scheme types was not an effective approach to ending this form of avoidance."[47]

and:

> "Some have asked that the charge is restricted only to DR loans entered into after 2011 or 2017. The government believes this would be unfair to ordinary taxpayers as it would mean enquiries for earlier years would continue to have to be pursued through the courts or would allow some people to continue to benefit from highly contrived tax avoidance."[48]

It is unclear why complying with rule of law requirements, by pursuing litigation through the courts, is "unfair to ordinary taxpayers." Rather, as discussed below, conforming to expectations of procedural justice would benefit taxpayers at large by upholding tax morale and fostering a culture of compliance. The policy motivation underpinning this appears similar to that for the introduction of follower notices:[49] an awareness of a huge backlog of cases and a belief that they cannot be resolved simply by ordinary litigation.

HMRC's stated policy is, where possible, to pursue the employers rather than the employees for legacy liabilities from DR schemes. Hence the insolvency of Rangers, rather than HMRC action against the players and other employees of the club. HMRC anticipate that:

> "Around 75% of the overall yield from the charge on DR loans is expected to come from employers and so far [correct as at 31 December 2018], about 85% of the yield from settlements in advance of the charge have come from employers."[50]

Even if HMRC seeks recovery from the employer, it may be possible for the employer to seek recovery from the employee. Whether this is possible will be highly fact specific, depending on whether (i) the employer took reasonable care to comply with the PAYE regulations and the failure to deduct was due to an error made in good faith; or (ii) the employee received relevant payments knowing that the employer wilfully failed to deduct PAYE.[51] Further, in some circumstances, it is not possible to collect the tax from the employer, since:

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[47] HM Treasury, fn.2, at 6.

[48] HM Treasury, fn.2, at 3.85.

[49] See HMRC, *Tackling marketed tax avoidance* (2014) at 1.1.

[50] HM Treasury, fn.2, at 3.

[51] Income Tax (Pay As You Earn) Regulations 2003 (SI 2003 No. 2682), regulation 72. See discussion of relevant case law in Simon's Taxes E4.11136 (Recovery of PAYE tax from an employee).

> "The arrangements used by many contractors mean the employer entity was only created for the purposes of the avoidance scheme. The 'employer' was created offshore and/or has since been dissolved, which means the liability cannot be reasonably collected from the employer. In these cases, HMRC can only collect the tax liability from the individual who benefited from the scheme and received the income without deduction of tax."[52]

HMRC offered taxpayers the opportunity to settle with them prior to the introduction of the loan charge, including arrangements giving the taxpayers time to pay.[53] They have also made clear that no taxpayer will be forced to sell their main home.[54] Under general principles, taxpayers will have until 31 January 2020 to pay amounts they self-assess for under the loan charge.[55]

Retrospective Legislation?

There has been significant criticism of the retrospective effect of the loan charge.[56] HMRC's response is that the loan charge is not retrospective. This section shows that the loan charge is best considered as retrospective legislation and discusses how parliamentary conventions with regard to retrospective legislation were not complied with, although this does not render the legislation unlawful. The section then considers the prospects of a challenge to the legislation as retrospective on the grounds that it infringes Article 1 Protocol 1 ("A1P1") of the European Convention on Human Rights. The following two sections then discuss issues related to retrospectivity: (i) if the DR schemes might be effective, so the loan charge has created a tax liability where none existed before; and (ii) whether the loan charge circumvents time-bars on HMRC raising assessments, thereby disturbing finality, which is a crucial rule of law value.

In the UK the words retrospective and retroactive are often used interchangeably. However, in Canada there is a clearer distinction.[57] It has been suggested in this *Review* that it would be better to follow the Canadian approach and:

> "restrict retroactive to statutes that alter or do something to the past (Latin: *retroagere* meaning to lead back, to reverse); and use retrospective for statutes that recognise past transactions but alter

For discussion in relation to the loan charge, see E. Agyemang, "Employees could be on the hook for employers' loan charge debt" *Financial Times*, 24 April, 2019.

52 HM Treasury, fn.2, at 3.23.

53 HM Treasury, fn.2, at 6.

54 HM Treasury, fn.2, at 6.

55 HM Treasury, fn.2, at 3.78.

56 Economic Affairs Committee, fn.5, at 77; APPG, fn.6, at 84.

57 C.S.B., "Retroactive or retrospective? A note on terminology" [2006] (1) BTR 15; G.T. Loomer, 'Taxing out of time: parliamentary supremacy and retroactive tax legislation' [2006] (1) BTR 64.

the consequences of them in the future without changing the past (Latin: *retrospicere* meaning to look back)."[58]

The loan charge is clearly not retroactive in the Canadian sense, in that it does not alter something in the past: it received royal assent on 16 November 2017 and alters liability in the present (2019–20) tax year. Whether it is retrospective, in the Canadian sense, depends on what we regard as the relevant (past) transaction.

The government's position is that the relevant transaction is the fact that the loans are outstanding on 5 April 2019 (so after the enactment).[59] They also argue it is not retrospective because it does not alter the time limit for assessment, or the tax treatment of any historic transaction or the tax position of any previous year.[60] It has further been argued by the government that the loan charge is not retrospective because there was a liability already, as the DR schemes were not effective.[61]

However, that is a very artificial interpretation of the charge, since it applies to any loan or quasi-loan was made on or after 6 April 1999. Accordingly, the making of the loan should be seen as either the relevant transaction, or (at the very least) part of the relevant transaction. Indeed, it seems somewhat unnatural to regard a loan being outstanding as a transaction, rather than simply a state of affairs.[62] Viewing the loan charge in its context, as a charge to income tax, reinforces the view that the relevant transaction is the making of the loan: especially when seen from HMRC's perspective that repayment was to be in the never-never,[63] since from an economic perspective income comes from the receipt of the loan. Hence, following the Canadian definition, the loan charge would indeed be retrospective.

However retrospective legislation is not uncommon, in a fiscal context, in the UK. Although there is a presumption against retrospectivity, that can be displaced by the clear words of Parliament.[64] Historically the Surtax and parts of the Income Tax (which used a three years' average) were structurally retrospective.[65] There is a long history of retrospective legislation in the UK, especially in the context of tax avoidance, since 1937.[66] In 1950 there was even retrospective legislation introduced to specifically target high-profile tax avoidance by two prominent businessmen, although the legislation was expressed in general terms.[67]

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[58] C.S.B., fn.57.
[59] HM Treasury, fn.2, at p4, 2.15, 3.82–3.95.
[60] HM Treasury, fn.2, at p4, 2.15, 3.82-3.95.
[61] HC Deb 11 April 2019, vol 685, 566.
[62] If there is something extra, such as the continual compounding of interest to the principal, perhaps this can lead to a loan being outstanding being regarded as a transaction.
[63] HM Treasury, fn.2, at p3, 3.20, 3.70.
[64] *R (on the application of Rowe and others) v Revenue and Customs Commissioners* [2017] EWCA Civ 2105, [2018] STC 462 (*Rowe*) at 486j.
[65] E. Fletcher, "Retrospective Fiscal Legislation" [1959] BTR 412 at 416.
[66] Fletcher, fn.65, at 417-426.
[67] Fletcher, fn.65, at 421.

In more recent times, when legislating retrospectively, governments have tended to follow the "Rees Rules".[68] These follow the principles enunciated by the then backbench MP, Peter Rees, in the Standing Committee debate on Finance Bill 1978. He suggested that it was acceptable:

> "to give a warning in the House of Commons by some recognised method — either by an answer to a Parliamentary Question or by some statement — and to legislate in the subsequent Finance Bill back to the date of that warning."

where the following conditions were met:

> "first, the warning must be precise in form. A mere general suggestion that there are vague schemes of tax avoidance that must be counted should not suffice. Secondly, the problem at which the warning has been directed should immediately be referred to a committee which I understand exists... to devise the precise legislative measures which should then be introduced. Thirdly, if the committee can hit on an appropriate legislative provision, the draft clause... should immediately be published in advance of the Finance Bill so that those who are likely to be in the field of fire will have a second clear intimation of what to expect. Fourthly, such a clause must, without fail, be introduced in the following Finance Bill."[69]

It seems in the case of the loan charge,[70] the government regard the relevant warning[71] to be the written statement issued by Dawn Primarolo, then Paymaster General, in December 2004 in which she stated:

> "experience has taught us that we are not always able to anticipate the ingenuity and inventiveness of the avoidance industry. Nor should we have to. Our objective is clear and the time has come to close this activity down permanently.
>
> I am therefore giving notice of our intention to deal with any arrangements that emerge in future designed to frustrate our intention that employers and employees should pay the proper amount of tax and NICs on the rewards of employment. Where we become aware of arrangements which attempt to frustrate this

[68] For a full discussion see A. Seely, *Retrospective taxation* (Commons Briefing papers SN04369, 2012) and *Retrospective taxation* (Commons Briefing papers SN6361, 2013).
[69] SC Deb (A) 6 June 1978, 719.
[70] Although they do not specifically address the Rees Rules as they do not consider the loan charge to be retrospective legislation.
[71] HM Treasury, fn.2, at 3.38.

> intention we will introduce legislation to close them down, where necessary from today."[72]

Clearly this is a somewhat general warning, so perhaps not in conformity with the first principle of the Rees Rules. Although a similarly general warning was given, and subsequently acted upon, by Neville Chamberlain in 1936 in relation to transactions whereby income was transferred to persons abroad.[73] Most significantly, in the case of the loan charge, the government has not acted with the haste implied by the final three principles: we can infer that it has known of DR schemes for well-over a decade before seeking to implement the loan charge. Also the loan charge is not retrospective to the date of the Primarolo statement (2 December 2004) but to 6 April 1999. However the Rees Rules are only a convention, so failure to comply with them does not render the loan charge illegal.

Retrospective tax legislation has been challenged on the basis that it infringes A1P1, which provides:

> "(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> (2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Perhaps the best arguments for the taxpayer could be made on the basis that the loan charge is not "deemed necessary" by the UK government, as they have been consistently clear that they regard the taxpayers as liable under existing law.[74] However Strasbourg jurisprudence suggests A1P1 is very unlikely to protect taxpayers who are affected by retrospective legislation targeted at artificial tax avoidance.[75]

Any domestic challenge under the Human Rights Act 1998, such as potentially may be contemplated by the LCAG, is likely to face some difficulties. It is possible following the Court of Appeal decision in *Rowe* that A1P1 is engaged.[76] But even if it is engaged it is most likely that the interference is suitably provided by law and is a proportionate one in all the circumstances. In *Huitson*[77] the Court of Appeal

[72] HC Deb 2 December 2004, WS40.

[73] Fletcher, fn.65, at 417-418.

[74] For example, see the comments of Mel Stride at HC Deb 11 April 2019, vol 685, 566 or see HM Treasury, fn.2, at 3.

[75] P. Baker, "Retrospective tax legislation and the European Convention on Human Rights" [2005] BTR 1.

[76] *Rowe*, fn.64, at 501-507.

[77] *R (on the application of Huitson) v Revenue and Customs Commissioners* [2011] EWCA Civ 893, [2011] STC 1860 (*Huitson*).

considered whether retrospective legislation in Finance Act 2008 infringed A1P1. Mummery L.J. considered that Kenneth Parker J. had been correct[78] in identifying and applying:

> "the 'fair balance' principle: in securing the payment of taxes a national authority must strike a fair balance between the general interests of the community and the protection of the individual's fundamental rights, including the right to possessions in art 1. In that balancing exercise the national authority has a margin of appreciation under the Convention and a discretionary area of judgment under domestic law. The area of appreciation and judgment is wide in matters of social and economic policy."[79]

In reaching this view Kenneth Parker J. had placed reliance on the general scheme of the legislation, including in *Huitson* that residence is the connecting factor entitling a state to impose tax, leading to the corollary that an individual who enjoys benefits provided to residents has a reasonable expectation of being taxed.[80] In the case of the loan charge, the fact that individuals received, as a consequence of their employment or trade, money they never expected pay back, might be thought to give rise to a similar expectation to be liable to income tax. In *Huitson*, assessing the "fair balance", Kenneth Parker J. placed reliance on the fact that:

> "HMRC never accepted the interpretation of the legislation relied on by those who asserted the efficacy of the scheme. HMRC challenged those assertions. Further, HMRC had never undertaken not to bring proceedings. They had never suggested that no legislation would be enacted, or that any such legislation would only have prospective effect."[81]

Similarly, in the case of the loan charge, HMRC claim to never have accepted that the DR schemes were effective.[82] In this context it should be noted, however, that the Primarolo statement suggests that any legislation would have retrospective effect only from the date of that statement, December 2004, not April 1999.

In *Huitson* whether the schemes were effective (discussed in respect of the loan charge in the next section), was also a factor taken into account in assessing whether the taxpayer had a legitimate expectation and so whether a fair balance

[78] *Huitson*, fn.77, at 1871g.
[79] *Huitson*, fn.77, at 1867-1868.
[80] *Huitson*, fn.77, at 1868e.
[81] *Huitson*, fn.77, at 1868g.
[82] For example, see the comments of Mel Stride at HC Deb 11 April 2019, vol 685, 566 or see HM Treasury, fn.2, at 3.

was struck.[83] However it was held that any legitimate expectation also necessitated taking account of the overall scheme of the legislation, so in *Huitson*, even if the scheme was effective, a fair balance had been struck by the retrospective legislation.[84] It may be thought the same reasoning may apply with regard to the loan charge.

HMRC having failed to conduct prior test litigation, HMRC's delay in taking action and the lack of pre-legislation impact assessment on taxpayers[85] were also rejected as grounds of appeal by the taxpayer in *Huitson*. Thus whilst similar criticisms have been made in respect of the loan charge,[86] they are unlikely to provide the basis for a successful challenge under A1P1.

Did the DR schemes work?

The APPG's Final Report suggests that HMRC and the Treasury have "misrepresented" the reality of the legal position of the Loan Charge and that:

> "the outcomes of court cases have been misrepresented, deliberately, to give the false impression that they are the legal justification for the Loan Charge, when they manifestly are not."[87]

In one sense it is true that the *Rangers* decision does not mean that DR loans are themselves taxable. The decision states that it is not the payment to the employee, but the payment by the employer as renumeration, which is the taxable event.[88] But in *Rangers* style schemes for the loan to be made, the trustee will need to have been put in-funds, hence there is likely to be a payment by the employer that attracts liability. In taxing the loan, the loan charge is something of a makeshift solution to effecting this charge.

The APPG report seems to suggest that there are good arguments that there is potentially no tax charge associated with DR schemes, in support of which it cites the Special Commissioners' decisions in *Sempra*[89] and in *Dextra*.[90]However both these decisions were specifically stated to be wrongly decided by the Supreme Court in *Rangers*.[91]

For schemes where HMRC consider the principles laid down, or the reasoning given, in the ruling in *Rangers* would if applied to the relevant DR scheme deny

[83] *Huitson*, fn.77, at 1871-1873.
[84] *Huitson*, fn.77, at 1872c, 1873j.
[85] *Huitson*, fn.77, at 1874-1877.
[86] LCAAP Group, fn.6.
[87] APPG, fn.6, at 31.
[88] *Rangers*, fn.23. at 1570h.
[89] *Sempra*, fn.24.
[90] *Dextra*, fn.25.
[91] *Rangers*, fn.23, at 1576b.

the asserted tax advantage, then HMRC could potentially issue a follower notice.[92] Indeed it is understood that in many cases where the *Rangers* decision is relevant HMRC have issued follower notices.[93] There appear to be some cases where HMRC considers *Rangers* to be relevant, but this is disputed by the taxpayer:

> "Many scheme promoters – those who put together DR schemes and sell them to individuals for a fee – claim that their arrangements are unique and that, as a result, the *Rangers* decision does not apply to their scheme. This forces HMRC into protracted litigation with each individual scheme. HMRC has found that promoters often seek to delay progress at every opportunity, through a variety of methods, adding many years to an already lengthy process. HMRC has also faced challenges in obtaining information about schemes where they involve offshore arrangements."[94]

However, as already noted at the outset, there are over 250 different types of DR scheme to which the loan charge applies. HMRC have conceded that the ruling in *Rangers* is not relevant to many DR schemes in their justification of the loan charge, stating:

> "There are also some schemes which were designed to deliberately circumvent the anti-avoidance legislation enacted in 2011 and where the *Rangers* decision is not directly applicable. These schemes are newer and often even more contrived than previous arrangements. HMRC has always maintained that these schemes were ineffective, but they would have to be litigated separately."[95]

To justify these schemes as being ineffective, HMRC refer to how the "GAAR Panel has considered eight different DR schemes, and found each of them to be abusive and therefore liable to counteraction under GAAR."[96] However, the GAAR applies only to arrangements entered into on or after 17 July 2013.[97] Hence these GAAR panel decisions do not justify the loan charge applying to loans made as far back as 6 April 1999. Also, the courts only need to "take into account"[98] the views of the GAAR panel: their opinions are not law. Further, it needs to be remembered that HMRC can cherry pick which cases they apply the GAAR to and so which cases go before the GAAR panel: hence these eight cases are not a random selection of

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[92] Finance Act 2014 (FA 2014) s 204-205; see discussion in H. Gething, "Finance Act 2014 notes: sections 199-218 and Schedules 30-31: follower notices; Sections 219-229 and Schedule 32: accelerated payment notices" [2014] (4) BTR 445. Recently the Court of Appeal has clarified the standard in *Haworth v Revenue and Customs Commissioners* [2019] EWCA Civ 747.

[93] HM Treasury, fn.2, at 3.50.

[94] HM Treasury, fn.2, at 3.54.

[95] HM Treasury, fn.2, at 3.54-3.55.

[96] HM Treasury, fn.2, at 3.59.

[97] Finance Act 2013 (FA 2013) s 215.

[98] FA 2013 s 211(2)(b).

the 250 or so DR schemes. It is possible that some DR schemes are effective despite the GAAR.

Although many DR schemes are unlikely to have worked, that is not to say the taxpayers did not believe they were effective, or have a legitimate reason to believe this. For example, in *Curzon Capital* we are told that there was a note of consultation with a well-known QC dated 17 May 2011 which included the phrase "overall the structure is a very neat and cleverly worked variant on what I have seen previously, in my opinion it would, if operated as set out in this note, provide the anticipated results."[99] The enquiries into DR schemes have found evidence of mis-selling, in that "[p]rofessional advisers reassured users that arrangements were HMRC compliant and QC approved",[100] and that:

> "Many witnesses said they had joined these schemes without being aware of HMRC's attitude towards them. They were assured by their employers or promoters of the schemes that they were effective (sometimes with legal opinions) and that HMRC knew about the schemes and approved them. HMRC did not do enough to counter this misinformation. It used its "Spotlight" online guidance publications to make known its views, but this is little read."[101]

It is perhaps noteworthy that a well-known advisor, involved in the promotion of DR schemes, was found by the Court of Appeal to have been negligent in not advising a client of the "significant risk"[102] that a "very aggressive tax avoidance scheme"[103] would not work (although the scheme in that case was an employee benefit trust scheme which as not a loan scheme).

As shown by the Australian experience,[104] which is discussed in the final section, it is probably unreasonable to expect many taxpayers to know something is dubious when it has the ostensible blessing of one of Her Majesty's counsel learned in the law.

Was HMRC out of time?

To some, perhaps, time limits may seem purely procedural and unimportant technicalities that should be disregarded or dispensed with in order to obtain a substantively fair result. However, by guaranteeing finality, even in respect of an otherwise substantively incorrect outcome, time limits represent an important

[99] *Curzon Capital*, fn.29, at 10.
[100] APPG, fn.6, at 24.
[101] Economic Affairs Committee, fn.5, at 60.
[102] *Barker v Baxendale Walker Solicitors (a firm)* [2017] EWCA Civ 2056, [2018] STC 310 (*Baxendale Walker Solicitors*) at 333f.
[103] *Baxendale Walker Solicitors*, fn.102, at 332d.
[104] For the use of QC's opinions to market tax schemes in Australia, see: Senate Economics References Committee, *Inquiry into Mass Marketed Tax Effective Schemes and Investor Protection: Interim Report* (Parliament of the Commonwealth of Australia, March 2001) at paras 4.54-4.55.

part of the rule of law value of certainty.[105] Speaking extra-judicially Lord Dyson has noted:

> "I doubt whether it is controversial that, although the fundamental aim of any system of justice in a modern democracy is that parties should have their disputes determined fairly and so far as possible correctly, there must be finality at some point. Of course, it hardly needs any longer to be stated that access to justice is a fundamental right both at common law and under the European Convention on Human Rights. But the question arises: when is enough enough? How much time should be allowed to a claimant from the date when his cause of action arises before it becomes too late for him to start proceedings?...
>
> Any answer to these questions should attempt to strike a fair balance between the interests of claimant and defendant. It is now realised that the State also has an interest in ensuring that litigation is conducted in a responsible and proportionate manner."[106]

Under the self-assessment regime for income tax, subject to certain exceptions, a "taxpayer's self-assessment is the final determination of his taxable income and chargeable gains for a particular year of assessment."[107] One exception is where HMRC opens an enquiry[108] and then amends the assessment.[109] Any such enquiry must be opened within 12 months of the filing date, assuming the return was submitted in time.[110] Once an enquiry is opened there is no fixed maximum period for it to last, although a taxpayer may apply to the tribunal for a direction requiring HMRC to issue a closure notice.[111] Also HMRC may potentially issue a discovery assessment,[112] subject to the relevant conditions being satisfied.[113] The ordinary time limit for making a discovery assessment is four years after the end of the year of assessment to which it relates.[114] This is

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105 Regarding the importance of finality in achieving certainty, see: Lord Neuberger, 'The Role of the Judge' (Singapore Panel on Judicial Ethics and Dilemmas on the Bench, 19 August 2016) at 9 and Lord Dyson, 'Time to call it a day' (Edinburgh University, 14 October 2011).

106 Lord Dyson, fn.105, at 3-4.

107 *Tower MCashback LLP 1 and another v Revenue and Customs Commissioners* [2010] EWCA Civ 32, [2010] STC 809 at 812.

108 Taxes Management Act 1970 (TMA 1970) s 9A.

109 TMA 1970 at ss 9C, 28A.

110 TMA 1970 s 9A(2)(a).

111 TMA 1970 s 28A(4). There does seem to be some confusion by taxpayers as to the mechanism for obtaining a closure notice. The APPG report suggests some wrote to HMRC rather than the tribunal: APPG, fn.6, at 255. Taxpayers' failure to understand the process of self-assessment may explain some of their frustration.

112 TMA 1970 s 29.

113 TMA 1970 s 29. See *Langham (Inspector of Taxes) v Veltema* [2004] EWCA Civ 193, [2004] STC 544; *Sanderson v Revenue and Customs Commissioners* [2016] STC 638, [2016] EWCA Civ 19; *Tooth v Revenue and Customs Commissioners* (*Tooth*) [2018] UKUT 38 (TCC), [2018] STC 824.

114 TMA 1970 s 34.

extended to six years in the case of carelessness[115] and twenty years in the case of a loss of income tax brought about deliberately.[116] In this context deliberately has been held to mean "tantamount to fraud."[117] Finance Act 2019 introduced an extended time limits of 12 years for loss of tax involving an offshore matter or offshore transfer,[118] but that amendment is not retrospective as it does not re-open any closed years.[119] These time limits apply, with necessary modifications, where HMRC seeks recovery against an employer in respect of PAYE.[120]

By looking back into tax years up to 20 years ago, in striking the balance between the "venerable principle of tax law to the general effect that there is a public interest in taxpayers paying the correct amount of tax"[121] and the taxpayer's interest in finality, the loan charge effectively treats all taxpayers involved in DR schemes as being on a par with those having engaged in conduct "tantamount to fraud". As a matter of law, Parliament can do this. But as a matter of policy this seems disproportionate, especially in the case of those taxpayers who are more victims than fraudsters. Its disproportionate nature is emphasised by how relatively little revenue yield appears to be gained by looking so far back, to April 1999. Apparently more than half of the DR loans now outstanding were taken out after the changes introduced in FA 2011[122] and only 1% of loans were taken out before 2003.[123]

For the reasons discussed in the next section, it would be better policy if HMRC fostered procedural legitimacy in the tax system by applying existing law within normal time limits to collect historic tax liabilities and repealed the loan charge. That would indeed seem to strike a better balance between the public interest in taxpayers paying the correct amount of tax and the desirability of finality for individual taxpayers.

Whether any taxpayer falls within the conditions for a disclosure assessment will be highly fact specific, as will the issue of whether the ordinary time limit applies, or that for careless or deliberate conduct. HMRC's claim that in over half of DR cases a DOTAS disclosure has not been made,[124] suggests that some disclosure assessments may be possible. In many other cases HMRC will still have enquiries open.

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[115] TMA 1970 s 36(1).
[116] TMA 1970 s 36(1A).
[117] *Tooth* fn.113 at 841c, 842b.
[118] TMA 1970 s 36A.
[119] TMA 1970 s 36A; see HM Treasury, fn.2, at 2.12.
[120] Income Tax (Pay As You Earn) Regulations 2003 (SI 2003 No. 2682), regulation 80(5).
[121] Lord Walker in *Tower MCashback LLP 1 and another v Revenue and Customs Commissioners* [2011] UKSC 19, [2011] STC 1143, approvingly citing Henderson J. in *Tower MCashback LLP 1 and another v Revenue and Customs Commissioners* [2008] EWHC 2387 (Ch), [2008] STC 3366.
[122] HM Treasury, fn.2, at 3.57.
[123] HM Treasury, fn.2, at 3.73.
[124] HM Treasury, fn.2, at p3 ("History of tackling DR and rationale for the loan charge").

Conclusion: Learning from the Australian experience

There are strong parallels between the loan charge and mass-marketed tax avoidance in Australia in the 1990s. There was an enquiry by the Senate Economics References Committee[125] before which the ATO reported:

> "that it had taken action on 231 schemes involving 57,667 participants and claimed deductions totalling $4.3 billion. An additional 45 schemes involving 8,425 participants and totalling $555 million were also under examination. The potential risk to the revenue is about 40 per cent of the overall claimed deductions of approximately $4.8 billion."[126]

Before a crackdown by the ATO in 1998, it was found the ATO had engaged in limited action with regard to the avoidance and sent mixed signals to taxpayers.[127] Many participants believed they had acted with due diligence, relying on the opinions of an eminent barrister, Robert O'Connor QC.[128] There were concerns that the ATO was acting retrospectively.[129] There were threats of suicide, including anecdotal evidence of some suicide.[130] A "great deal of political, professional and taxpayer resources were directed at resisting"[131] the ATO action, with "fighting funds and lobbying groups set up to represent scheme investor's interests".[132] However, in Australia the ATO acted more promptly than HMRC seems to have done, within 12 to 18 months they denied deductions in up to 90% of cases and the maximum delay before denying deductions seems to have been six years.[133]

The matter was largely resolved when, in February 2002, the ATO:

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[125] Senate Economics References Committee, *Inquiry into Mass Marketed Tax Effective Schemes and Investor Protection: Interim Report*, fn.104; Senate Economics References Committee, *Inquiry into Mass Marketed Tax Effective Schemes and Investor Protection: Second Report* (Parliament of the Commonwealth of Australia, August 2001); Senate Economics References Committee, *Inquiry into Mass Marketed Tax Effective Schemes and Investor Protection: Final Report* (Parliament of the Commonwealth of Australia, February 2002).
[126] Senate Economics References Committee, *Inquiry into Mass Marketed Tax Effective Schemes and Investor Protection: Interim Report*, fn.104, at para 2.1.
[127] Senate Economics References Committee, *Inquiry into Mass Marketed Tax Effective Schemes and Investor Protection: Interim Report*, fn.104, at para 4.19.
[128] Senate Economics References Committee, *Inquiry into Mass Marketed Tax Effective Schemes and Investor Protection: Interim Report*, fn.104, at paras 4.54-4.55.
[129] Senate Economics References Committee, *Inquiry into Mass Marketed Tax Effective Schemes and Investor Protection: Interim Report*, fn.104, at para 4.64.
[130] Senate Economics References Committee, *Inquiry into Mass Marketed Tax Effective Schemes and Investor Protection: Interim Report*, fn.104, at para 2.11.
[131] L. Fullarton, *Heat, Dust, and Taxes* (ibidem 2015) at 78.
[132] K. Murphy, "Procedural justice and tax compliance" (2003) 38(3) Australian Journal of Social Issues (Australian Council of Social Service) at 395.
[133] Senate Economics References Committee, *Inquiry into Mass Marketed Tax Effective Schemes and Investor Protection: Interim Report*, fn.104 at para 2.15.

"put forward a final settlement offer in which culpability penalties and interest on scheme related tax debts would be abolished for those investors who had been the victims of aggressive marketing and bad advice. As part of the deal, investors were given a two year interest free period in which to repay their debts."[134]

This offer was "highly successful for the ATO, with 87 percent of investors agreeing to take up the offer."[135] Before this, many investors were resisting the ATO's demands, believing that they had done nothing wrong,[136] yet the ATO was implying they were "tax cheats"[137] and treating them in a "callous and unsympathetic"[138] manner. As at January 2002, so just before the change in policy, less than half of scheme investors had agreed to settle.[139]

Kristina Murphy's research into this instance of mass-marketed tax avoidance in Australia, shows how procedural legitimacy increases trust in the tax authority, which in turn reduces resistance and makes taxpayers more likely to follow the tax authority's directions and decisions.[140] The research, based on both in-depth interviews[141] and a survey of 2,292 taxpayers accused of tax avoidance the results of which are analysed using structural equation modelling,[142] discusses how a policy based on threats and coercion by the ATO led to resistance, as it generated a perception of unfair treatment and lack of procedural justice, undermining trust in the ATO.[143] Because most Australian's take a pride in being "honest taxpayers", when the ATO was responsive to them and gave them the benefit of the doubt, treating them as victims rather than "tax cheats" this fostered trust and thereby increased compliance.[144]

Similarly Valerie Braithwaite has identified two types of defiance in the tax context. Dismissive defiance is a call for freedom, with the message to authority being "You have no right to expect subservience from me"[145] and a "call for the state to look the other way and accept the individual's right to use ingenuity to circumvent the tax law."[146] Conversely, resistant defiance signals "dissatisfaction

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[134] Murphy, "Procedural justice and tax compliance", fn.132, at 394; see also V. Braithwaite, *Defiance in Taxation and Governance* (Edward Elgar Publishing 2009) at 193-194.
[135] Murphy, "Procedural justice and tax compliance", fn.132, at 394.
[136] K. Murphy, "The role of trust in nurturing compliance: A study of accused tax avoiders" (2004) 28(2) Law and human behaviour 187 at 192.
[137] Murphy, "Procedural justice and tax compliance", fn.132, at 391.
[138] Murphy, "Procedural justice and tax compliance", fn.132, at 390.
[139] Murphy, "The role of trust in nurturing compliance: A study of accused tax avoiders", fn.136, at 192.
[140] Murphy, "Procedural justice and tax compliance", fn.132; Murphy, "The role of trust in nurturing compliance: A study of accused tax avoiders", fn.136.
[141] Murphy, "Procedural justice and tax compliance", fn.132.
[142] Murphy, "The role of trust in nurturing compliance: A study of accused tax avoiders", fn.136.
[143] Murphy, "Procedural justice and tax compliance", fn.132, at 397.
[144] Murphy, "Procedural justice and tax compliance", fn.132, at 394.
[145] Braithwaite, fn.134, at 1.
[146] Braithwaite, fn.134, at 7.

with the form the constraints are taking"[147] the message to authority being "if you were reasonable and fair in the way you exercised your authority I would not resist you,"[148] such as "when taxpayers organise a protest against a tax that they regard as unfairly high or unfairly levied, with the expectation that the government will heed their concerns and be responsive to their discontent."[149] It is this latter form of defiance, resistant defiance, that seems generally present in the opposition to the loan charge and to have been present with regard to mass-marketed tax avoidance in Australia. Braithwaite shows that, by the ATO demonstrating integrity, including most importantly through procedural justice, it can change the taxpayer's frame of engagement with the tax authority and foster compliance where there is resistant defiance.[150]

In the case of the loan charge, the greatest perception of procedural unfairness comes from its retrospective effect.[151] To improve taxpayer compliance and settlement, following the findings of Murphy and Braithwaite, it would be much better for the loan charge to be repealed and historic liabilities collected under pre-existing law, with recourse to the courts if necessary. In many cases the suggested approach would mean that time limits would likely bar the collection of tax otherwise due. However, considerations of procedural justice and the rule of law value of finality should be balanced against the public interest in taxpayers paying the correct amount of tax: with the appropriate balance being struck by the presently existing structure of time limits. Jurisprudential considerations might been to lead to a similar result. Loomer has observed, in this *Review* how:

> "Raz and Fuller, have argued that a fundamental tenet of the rule of law is that law should be prospective, open and clear, such that subjects of the law can comply with and rely upon the law.[152] Clearly, it is impossible for subjects to comply with or rely upon laws which are unannounced and retroactive. This impossibility of reliance is of particular concern in revenue law, where honest self-assessment and reporting are critical. The unfettered use of retroactive tax measures may undermine the integrity of a tax system because taxpayers who have no confidence in the system's stability may be less inclined to comply with existing rules."[153]

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[147] Braithwaite, fn.134, at 1.
[148] Braithwaite, fn.134, at 2.
[149] Braithwaite, fn.134, at 7.
[150] Braithwaite, fn.134, at Chapter 6.
[151] APPG, fn.6, at 116-117; Economic Affairs Committee, fn.5, at 75-78.
[152] J. Raz, "The Rule of Law and its Virtue" in *The Authority of Law* (OUP, New York, 1979) at 210-29; .F. Fuller, *The Morality of Law* (revised ed., Yale University Press, New Haven, 1969) at 33-39, 53… (Footnote from quoted text).
[153] Loomer, fn.55, at 89-90.

Thus as a matter of law the loan charge is within the compliance of Parliament and is legal. But as a matter of policy it seems disproportionate, especially in the case of those taxpayers who are more victims than fraudsters.