Rt. Hon. Rishi Sunak MP
Chancellor of the Exchequer
HM Treasury
1 Horse Guards Road
London
SW1A 2HQ

Cc: The Rt Hon Lucy Frazer QC MP, Financial Secretary to the Treasury
Jim Harra, First Permanent Secretary and Chief Executive, HMRC

9th December 2021

Dear Chancellor,

We, a group of independent tax professionals, are writing to you to recommend a solution to the problem of historic disguised remuneration (DR) schemes that have caused HMRC to pursue hundreds of thousands of contractors and freelancers for outstanding taxes believed to be due. While we recognise and support HMRC's efforts to tackle promoters of tax avoidance schemes, and the need for a longer-term solution to the growing problem of mass-marketed schemes being used in future, we have yet to see any successful attempt to resolve this particular problem.

Unfortunately, the situation between HMRC and affected taxpayers seems to have reached an impasse – a view which is supported by evidence from the Low Incomes Tax Reform Group (LITRG). We concur with the views expressed by the LITRG in their Budget Representation thata fresh approach is called for, since affected taxpayers simply cannot afford to pay the taxes HMRCare demanding of them. The taxes being demanded often involve life-changing sums, typically multiples of their current annual earnings (if indeed they are still earning). This has resulted in serious financial hardship, often with devastating consequences for affected taxpayers' lives and livelihoods. Sadly, this has led to a number of suicides, and there are frequent reports of others who are suicidal.

We therefore believe that it would be pointless for HMRC to continue pursuing these individuals for the taxes believed to be due from them. Not only would it cause yet further hardship and misery for those affected, but the current deadlock between HMRC and affected individuals, and HMRC's continued pursuit of them, would only continue to generate negative publicity for both HMRC and the Government, particularly in light of recent Freedom of Information Act (FOIA) disclosures. Clearly, this is neither in HMRC's nor the Government's interests, and for the Government and HMRC to continue along this path is self-defeating and unsustainable.

What we recommend instead is that the Government work with HMRC to introduce a **"Disguised Remuneration" (DR) settlement opportunity**, as they did for the (now closed) Employee Benefit Trust Settlement Opportunity (ERTSO), but on different terms. Any DR settlement opportunity should promptly resolve open enquiries and encourage affected taxpayers to settle unprotected years on individually negotiated terms, thus ensuring finality for affected taxpayers. It should also be affordable, easy to understand, and ensure that where an individual had tried in the past to be compliant, they are given credit as appropriate. In this vein, we would recommend that HMRC consider making proportionate adjustments to sums being demanded

from affected taxpayers who have already settled with HMRC on a less generous basis, or who are continuing to do so.

The proposed settlement opportunity would not be intended for individuals who knowingly took a risk with a tax avoidance scheme, but for contractors and freelancers - gig economy workers - many of whom were either inadvertently dragged into these schemes or who were inadequately advised of the risks. These people are now facing unaffordable and often life-changing tax bills. We do not think the Government or HMRC could possibly have intended for the tax system to penalise this group of people so heavily. These people are the lifeblood of our economy, and many of them have also missed out on Coronavirus Job Retention Scheme (CJRS) and Self-Employed Income Support Scheme (SEISS) support.

The case for a "Disguised Remuneration" settlement opportunity

There are four reasons why we think that a "Disguised Remuneration" settlement opportunity would be a sensible way forward.

1. Agencies should have operated PAYE

The first of these reasons is that the agencies involved in these DR schemes should have operated PAYE in the first place, according to the relevant legislation and case law. More specifically, HMRC could have (and should have) used the agency provisions of section 44 ITEPA 2003 to collect the PAYE income tax that was legally due from the agencies, rather than simply resort to applying the Loan Charge in the first instance. HMRC cannot use section 684(7A) ITEPA to disapply the PAYE Regulations after the relevant PAYE liability has been incurred (as the case of *Stephen Hoey v The Commissioners for HM Revenue and Customs [2021] UKUT 82 (TCC)* shows). Despite this ruling, a Freedom of Information Act request has revealed that HMRC did in fact do precisely that in relation to contractor loan schemes, despite apparently being aware of the risks of doing so, and also despite the fact that the Upper Tribunal in *Hoey* was clear that, in its opinion (not a decision), not only was a credit for the PAYE due to Mr Hoey, but that HMRC's interpretation of the power in section 684(7A) ibid, was wrong. Had HMRC enforced the agency provisions of section 44 ITEPA 2003, not only would HMRC have likely raised more revenue than the sums involved in the Loan Charge and related demands, but also the individual users would have had a PAYE credit to fully offset their income tax liability (whether under the Loan Charge or otherwise), and the entire Loan Charge debacle could have been avoided.

On that basis, we feel that a DR settlement opportunity should include terms reflecting the fact that agencies should have paid the required PAYE and NICs, and should also recognise the fact that HMRC failed in their duty to collect it when they could and should have done. As the Loan Charge APPG has previously suggested, due to the circumstances surrounding the use of the schemes now subject to the Loan Charge, the tax burden should not fall solely on the individual users of these schemes, but also on the employers/agencies and also – ideally and appropriately - the operators/promoters of the schemes, with HMRC accepting lower sums as an acknowledgement of their own failures to collect PAYE from the agencies.

2. DR schemes were mis-sold to affected taxpayers

The second of these reasons is that the vast majority of affected taxpayers were genuine victims of mis-selling, rather than deliberate tax avoiders. While we acknowledge and appreciate the difficulty in distinguishing between the two groups, there is plenty of evidence to suggest that mis-selling occurred on a sufficiently widespread scale to the point where, in our view, HMRC and the Government should be able justify automatically admitting any taxpayer who considers him/herself to have relied on a promoter's statements in good faith, or to have been inadvertently caught up in one of these schemes, as a suitable candidate for the settlement opportunity. (The widespread nature of the mis-selling is evidenced in part by an APPG survey (May 2021) which shows that the promoters or scheme operators either made claims along the lines of 'tax law compliant' 'QC approved' that turned out to be hollow or false, or otherwise failed to mention or adequately draw the taxpayer's attention to the potential risk of challenge by HMRC (and even where mentioned, representations were made to the effect that this would all be dealt with by the scheme operator). In this vein, we would also recommend that HMRC not insist that the taxpayer candidate provide written proof of mis-selling, since many of those affected will no longer have the paperwork to prove that they were victims of mis-selling. Although we acknowledge that the risk of claims made by taxpayers with tax avoidance as their main motive cannot be completely ruled out, we feel that the benefits of a DR settlement opportunity would far outweigh any risk of claims of that nature.

Therefore, as emphasised above, we strongly recommend that the sum to be levied in this settlement opportunity be genuinely affordable (and significantly lower than any other settlement opportunities). In practice, this would mean HMRC collecting only a proportion of the tax that HMRC believed is due. This proportion should also reflect the reality that the vast majority of affected taxpayers were genuine victims of mis-selling, rather than deliberate tax avoiders. The settlement opportunity should also accept that, whilst the individuals concerned would have paid some more tax had they structured their arrangements differently, there is clearly significant fault on the part of (a) scheme promoters/operators, who recommended these schemes and (b) HMRC, for failing to collect PAYE from employers, failing to properly shut down these schemes and failing to adequately warn people not to use them at a time when such a warning was needed, rather than after the fact. Rather than the current patently unjust situation in which scheme users are the only ones being punished and are being asked to contribute sums many simply cannot pay (and many more cannot do so without selling their home or remortgaging, raiding their pension etc. or borrowing money) a fair and final resolution along these lines would acknowledge that the whole situation was a mess and fault should not be attributed– nor tax bills charged- only to those who used these schemes and in good faith.

In addition, unlike previous settlement opportunities, we strongly recommend that HMRC and the Government **not** insist that people admit fault or make a declaration of guilt as a precondition for using the settlement opportunity. When so many people were mis-sold these arrangements (with some having been effectively coerced into using them as a condition of engagement, and others having no knowledge of the fact that they were being "sold" anything at all), we feel that it is wrong to force people to give a false admission that they are deliberate tax avoiders. Many taxpayers who would otherwise have been suitable candidates for previous settlement opportunities were in the end unable to settle with HMRC, as making such a declaration could or would have negatively affected their job prospects, as some sectors would not engage or employ

anyone who admitted to deliberate tax avoidance. We therefore strongly recommend that HMRC and the Government consider this recommendation seriously and accept the reality that the proliferation and mis-selling of DR schemes was the fault of several parties other than the taxpayers to whom these schemes were sold, and that the settlement opportunity reflect that reality as part of a fair and final resolution.

3. Scheme users under the Eclipse Settlement Opportunity have thus far been treated more favourably than DR scheme users

The third of these reasons is that the recent Eclipse Settlement Opportunity suggests that HMRC have been willing to accept less tax (in the form of clawed-back reliefs) in exchange for not pursuing affected taxpayers for what would have been significant "dry" income tax charges. In that sense, our proposal is asking for something similar, except that the quid pro quo would be for HMRC to accept an individually negotiated percentage of the tax believed to be due on outstanding loan balance in exchange for not pursuing affected taxpayers either for tax under the Loan Charge or for the full tax which HMRC believed to be due. Although these taxes are not technically "dry" tax charges, the underlying principle is the same as that of the Eclipse settlements, in the sense that affected taxpayers simply do not have the cash to pay the full tax believed to be due; and for HMRC to insist otherwise would result in even more bankruptcies and undue financial hardships– something that HMRC was keen to avoid in relation to the Eclipse scheme users. Furthermore, if HMRC was willing and able to grant a settlement opportunity of this nature to Eclipse scheme users who knowingly entered into a tax avoidance scheme, then all the more reason why we would strongly encourage HMRC to consider a settlement opportunity as outlined above for DR scheme users who did not knowingly enter into a tax avoidance scheme.

We therefore believe that there is considerable merit in implementing a settlement opportunity for DR scheme users, particularly as we understand that HMRC are currently considering implementing settlement opportunities for Baxendale Walker Corporate Remuneration Trusts and enterprise zone relief schemes in the coming months.

4. Lack of closure and finality with the Loan Charge

The fourth and final reason why we think a settlement opportunity should be considered is that paying the Loan Charge (or settling to avoid it) does not resolve the underlying tax dispute, and thus does not give the taxpayer any sense of closure or finality. This is not only unfair, but also cruel; as it means that affected taxpayers, even after they have paid HMRC life-changing sums, know that HMRC is entitled to make subsequent demands. For this reason, we strongly recommend that the settlement opportunity involve closure of all outstanding related tax enquiries and related Accelerated Payment Notices, and should include wording to confirm that, in accepting this settlement opportunity, HMRC undertakes to close the matter once and for all, without further recourse to the affected taxpayer – thus ensuring finality for the taxpayer. In particular, if settlement is reached, the subsequent release or writing-off of all such loans and any liability to pay interest on them should not then be treated as a chargeable "relevant step", or the taxable value of any such relevant step should be reduced to nil.

Request for legislation to protect affected individuals from "loan" repayment demands

Many creditors of record have been seeking to enforce repayment of what they believe to be outstanding loans due from affected taxpayers. Because the "loans" are treated as earnings for tax purposes, and an enforceable debt claim for contract law purposes, it puts affected taxpayers in the worst of both worlds.

For this reason, in addition to the settlement opportunity described above, we strongly recommend that the Government consider implementing legislation to protect affected taxpayers from such "loan" repayment demands by the creditor of record where the "loan" in question is also subject to tax as earnings. In this vein, we draw your attention to the remarks made by the Chartered Institute of Taxation (CIOT) in their 30 September 2021 Budget Representation.

Recommendations for HMRC and the Government to consider

To implement a settlement opportunity of this nature, we recommend that HMRC engage with the Loan Charge Action Group (LCAG) and others, including the LITRG and CIOT, to find a solution that would be acceptable both to HMRC and to taxpayers facing the Loan Charge, with the discussions supported by the Chartered Institute of Taxation (CIOT) and the Institute of Chartered Accountants in England and Wales (ICAEW) as necessary to ensure that both sides listen to each other.

Finally, in addition to considering the proposals in this letter, we would also recommend that the Government work with HMRC to consider implementing the proposals put forward by the CIOT in their 30 September 2021 Budget Representation to introduce legislation to stop the assignment and/or enforcement of loans made pursuant to the Loan Charge.

We would be grateful if you could give this matter urgent attention.

Yours sincerely,

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