

## CHAPTER TWO

# TAX AVOIDANCE

This file contains Chapter 2

### ***Taxation of Non-Residents and Foreign Domiciliaries***

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## **2.1 Tax avoidance: Introduction**

Tax avoidance is as old as taxation itself;<sup>1</sup> but the topic has taken prominence in recent decades, with extensive attention from parliament and the media.<sup>2</sup>

The subject impinges on many aspects of this book, but it is best to consider it as a topic of its own. This chapter considers general aspects, and the following considers targeted anti-avoidance rules (TAARs).

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1 For examples from 1798 and 1920, see “Tax Avoidance in 1798” <https://www.kessler.co.uk/wp-content/uploads/2013/06/Tax-avoidance-criticism-in-1798.pdf> and “Vestey: Royal Commission debate”

[https://www.kessler.co.uk/wp-content/uploads/2017/11/Vestey\\_Royal\\_Commission\\_debate.pdf](https://www.kessler.co.uk/wp-content/uploads/2017/11/Vestey_Royal_Commission_debate.pdf)

2 It is interesting to speculate why that has been the case. I think the reasons lie in politics and sociology rather than tax law or practice. The Public Accounts Committee, and some effective pressure groups, have clearly contributed but given the pressure on the front page, why has their work received so enthusiastic a reception? The 2008 financial crisis and climate of austerity may be a factor.

## 2.2 Avoidance/mitigation, evasion

I first discuss the complicated, emotionally charged, and in practice constantly abused term “tax avoidance”.

### 2.2.1 Terminology

It is helpful to begin with a fourfold categorisation:

- (1) *Tax evasion*: Conduct which constitutes a criminal offence (fraud on HMRC or similar offences). This typically involves dishonest submission of an incorrect tax return. Dishonesty is essential to these offences.<sup>3</sup>
- (2) *Honest misdeclaration*: The submission of an incorrect tax return without dishonesty. Those involved may be culpable (eg careless) but not dishonest.
- (3) *Tax avoidance*: Arrangements that reduce tax liability in a manner contrary to the intention of parliament (I come later to consider this concept in more detail).
- (4) *Tax mitigation*: Conduct which reduces tax liabilities without “tax avoidance” (not contrary to the intention of parliament).

The distinctions between these concepts (especially avoidance/evasion and avoidance/mitigation distinctions) are now commonplace. They may appear obvious. They are taught to every student. No sensible debate is possible without them. However, the concepts and their terminology have only emerged after a gradual process of development and even now the terminology is not always adopted. It is essential to bear this in mind on reading sources on this subject.<sup>4</sup>

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3 See 124.8 (Fraudulent tax offences). Although there are now offences which do not require dishonesty, see 123.10 (Offshore tax offences), I would not characterise these offences as evasion

4 eg the 1920 Royal Commission on the Income Tax Cmd. 615 discussed evasion, honest misdeclaration and avoidance in a chapter headed “The Prevention of Evasion”, in which the words “avoidance” and “evasion” were used quite indiscriminately, see para 625. It is an interesting question whether the absence of terminology hampered discussion of the issues or whether the lack of discussion or interest led to the absence of suitable terminology. I suggest the latter: in the 1920s, criminal prosecution for tax evasion was rare, and only in blatant cases. Thus the avoidance/evasion distinction was not relevant. Likewise, tax avoidance (in the modern sense) was still in its infancy, so the avoidance/mitigation distinction also had

### 2.2.2 Avoidance/evasion distinction

An avoidance/evasion distinction very similar to the present was recognised very early (and was surely self-evident at any time) but at first there was no terminology, or at least no commonly agreed terminology, to express it. In 1860 Turner LJ suggested evasion/contravention (where evasion stood for the *lawful* side of the divide).<sup>5</sup> In 1900 the distinction was noted as two meanings of the word “evade”.<sup>6</sup> It is possible that the current use of the words avoidance/evasion in the modern sense originated in the USA where it was established by the 1920s.<sup>7</sup> But by 1936, at least, knowledgeable writers in the UK adopted the same terminology, and castigated those who did not:

In referring to these devices, those who took part in the debates on the new [ToA] provisions in the House of Commons repeatedly used the word “evasion.” Even the spokesmen of the Government at times allowed themselves this indulgence. The Financial Secretary to the Treasury (for example) described [s.18 FA 1936, transfer of assets] as a “Clause for the prevention of tax evasion”, while the Attorney-General, dealing with the same clause, spoke of “marginal cases in which there may be some element other than tax evasion”. Private members, and on at least one occasion the Financial Secretary, spoke of

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little relevance.

- 5 *Fisher v Brierly* (1860) 1 de G F&J 643 at p.663. It is a pity that this use of *contravention* did not catch on because it is more transparent than *evasion*.
- 6 *Bullivant v AG* [1901] AC 196 at p.207:  
 “The word ‘evade’ is ambiguous. ... there are two ways of construing the word ‘evade’: one is, that a person may go to a solicitor and ask him how to keep out of an Act of Parliament – how to do something which does not bring him within the scope of it. That is evading in one sense, but there is nothing illegal in it. The other is, when he goes to his solicitor and says, ‘Tell me how to escape from the consequences of the Act of Parliament, although I am brought within it’. That is an act of quite a different character.”
- 7 It is found in the scholarly Sears, *Minimising Taxes* (1922), and can be traced to Oliver Wendell Holmes in *Bullen v Wisconsin* (1916) 240 US 625 at p.630. It is regarded as basic in Hartman, *Tax Avoidance* (1930) which cites two textbook definitions in similar terms. Perhaps the practice of tax avoidance began earlier in the USA; the first published work on the subject in England was Moore, *The Saving of Income Tax Surtax and Death Duties* (1935), the publication of which led to the enactment of the ToA provisions.

“guilt” and “innocence” as though the House were discussing the suppression of crime.<sup>8</sup>

There can be no question of any real confusion of thought, but the confusion of language is none the less to be deprecated. The new provisions have nothing to do with “evasion”; they are concerned solely with legal avoidance.<sup>9</sup>

The distinction is accepted internationally:

72. The terms “tax evasion” and “tax avoidance” have not always been used precisely or with a uniform meaning. Strictly speaking, tax evasion is considered to consist of wilful and conscious non-compliance with the laws of a taxing jurisdiction. Tax evasion is an action by which a taxpayer tries to escape legal obligations by fraudulent or other illegal means. The illegal conduct might involve simply failing to report income or fabricating deductions, or it may involve highly sophisticated tax planning that is premised on false or intentionally deceptive

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8 Official Reports, 15<sup>th</sup> June 1936, col. 676, 704, 692.

9 Stein & Marks, *Tax avoidance: An interpretation of the provisions of the Finance Act, 1936, relating to transfers of assets, companies’ sur-tax, children’s settlements* (1936) p.1. Jacques Stein (1887–1973) was a significant figure in his day, see <http://www.encyclopedia.com/religion/encyclopedias-almanacs-transcripts-and-maps/stein-leonard>.

Similarly, the 1955 Royal Commission Cmd. 9474 para 1016:

“It is usual to draw a distinction between tax avoidance and tax evasion. The latter denotes all those activities which are responsible for a person not paying the tax that the existing law charges upon his income. *Ex hypothesi* he is in the wrong, though his wrongdoing may range from the making of a deliberately fraudulent return to a mere failure to make his return or to pay his tax at the proper time. By tax avoidance, on the other hand, is understood some act by which a person so arranges his affairs that he is liable to pay less tax than he would have paid but for the arrangement. Thus the situation which he brings about is one in which he is legally in the right, except so far as some special rule may be introduced that puts him in the wrong.”

Note that “evasion” is used here (unlike present usage) to describe dishonest criminal evasion and honest mis-declaration. Lord Templeman used this (by then old-fashioned) terminology in *IRC v Challenge Corporation* [1986] STC 548: “Tax evasion occurs when the commissioner is not informed of all the facts relevant to an assessment of tax. Innocent evasion may lead to a re-assessment. Fraudulent evasion may lead to a criminal prosecution as well as re-assessment.” It does aid clarity if the term “evasion” is restricted to what Lord Templeman termed “fraudulent evasion”.

representations to the tax authorities. ...<sup>10</sup>

73. Tax avoidance, in contrast, involves the attempt to reduce the amount of taxes otherwise owed by employing legal means. However, the borderline between evasion and avoidance in specific cases may be difficult to define. For one thing, the criminal laws of countries differ, so that behaviour that is criminal under the laws of one country may not be criminal under the laws of another. In addition, the definitions of civil and criminal tax fraud may overlap, so that it is within administrative discretion whether or not to pursue a criminal fraud case in a specific instance. In reality, there is a continuum of behaviour, ranging from criminal fraud on one extreme, to civil fraud, to tax avoidance that is not fraudulent but which runs afoul of judicial or statutory anti-avoidance rules and therefore does not succeed in minimizing tax according to law, and finally to tax-planning behaviour which is successful in legal tax reduction. ...<sup>11</sup>

Avoidance/evasion distinctions are found outside tax, though the terminology may differ. Accountants for instance distinguish “creative accounting” (also known as aggressive accounting), which is legal; and accounting fraud, which is criminal.<sup>12</sup>

### 2.2.3 Avoidance/evasion terms misused

There are contexts where the reader will see evasion/avoidance terminology misused (evasion being used for avoidance or vice versa).

The first is historical: in law reports and elsewhere, at least up to the 1970s. In *Hawker v Compton* (1922):<sup>13</sup>

... it is perfectly open for persons to evade this particular tax if they can

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10 The text muddies the waters here by adding: “In a broader sense, tax evasion may encompass a reckless or negligent failure to pay taxes legally due, even if there is no deliberate concealment of income or relevant information.” But this is not common usage, and is better regarded as incorrect usage.

11 United Nations, Note on the Revision of the Manual for Negotiation of Bilateral Tax Treaties 2011 (footnotes omitted).

12 See Jones (ed) *Creative Accounting, Fraud and International Accounting Scandals* (2011).

13 8 TC 306 at p.314.; the tax involved was income tax of occupiers of farmland; the tax would be reduced if the land was farmed in partnership, and the issue was whether a partnership existed. So this was not what one would call a case of avoidance in modern terminology.

do so legally. I again say I do not use the word “evade” with any dishonourable suggestion about it. If certain documents are drawn up, and the result of those documents is that persons are not liable to a particular duty, so much the better for them.

The word “evade” continued to be used to refer to lawful tax planning (not necessarily avoidance in the modern sense)<sup>14</sup> until the 1970’s.<sup>15</sup> At that time UK economists were giving increasing attention to the subject of tax avoidance and evasion<sup>16</sup> and perhaps their work had an effect on legal usage.

The second context is in post-1970 writing of those not knowledgeable about tax, including lawyers<sup>17</sup> (non-tax lawyers) and politicians.<sup>18</sup> When writing for non-tax lawyers, it may be helpful to use the expressions “legal avoidance”<sup>19</sup> and “illegal evasion”, or better, “fraudulent evasion” to make the meaning clearer.

Outside the UK, the older terminology may still be found.<sup>20</sup>

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14 Examples include: *Coutts v IRC* [1964] 1 AC 1393 at p.1420; *Jamieson v IRC* (1963) 41 TC 43 at p.70; *Cory v IRC* [1965] AC 1088 at p.1107; *Greenberg v IRC* (1971) 47 TC 240 at p.271: “Parliament attempted to prevent this and other methods of tax evasion by provisions in the FA 1960”.

15 Note that this is purely a semantic and not a substantive point that is being made here. The old usage does not reflect the view that the evasion/avoidance distinction is unreal or unclear or that one can shade into the other. The legal distinction between the two is tolerably clear since evasion involves dishonesty, a tolerably well defined and understood concept. The IEA *Tax Avoidision* (1979) coined the term “avoidision” to mean avoidance/evasion. The book noted the lack of *economic* distinction between the two concepts; the economic similarity was the justification for the new coinage. The book also noted the blurring of a moral distinction between the two concepts either because avoidance was seen by some as immoral or because evasion was seen by some as not immoral; the book did not suggest a lack of a legal distinction which was unquestioned then and still should be now.)

16 IEA, *Tax Avoidision* (1979) p.1,

17 For example, see *R v Charlton* [1996] STC 1418 at p.1421.

18 Eg The Progress Tackle Tax Avoidance Charter: “HMRC HAS GOT TO GET A GRIP ... 4. Get tough on tax avoiders by mounting more prosecutions.” See <http://www.progressonline.org.uk/campaigns/tackle-tax-avoidance>

19 “Legal avoidance” is a standard term in recent double tax conventions.

20 The avoidance/evasion distinction in UK terminology is not adopted in EU law, which has a distinct technical terminology.

Similarly, s.482 United States Internal Revenue Code refers to allocation of income that “is necessary to prevent evasion of taxes” but the intended concept is one of

Lastly, the distinction may be deliberately muddled for polemical effect:

in practice tax evasion and avoidance are too often conflated ... For example, users of disguised remuneration schemes were troubled when the schemes were called “illegal” by the Chancellor of the Exchequer and the Financial Secretary to the Treasury. HMRC has not claimed that these schemes are illegal; rather that they are not effective, ... in reducing an individual’s tax liabilities.<sup>21</sup>

It is sometimes hard to tell whether the misuse is deliberate or accidental. But as Alldridge observes, those who wish to equate avoidance and evasion should pay attention to where this may lead.<sup>22</sup>

See too 124.10 (Offshore tax offences),

#### 2.2.4 Validity of tax avoidance

There is no *universal* rule that tax avoidance is ineffective. In *Hurstwood Properties v Rossendale BC*:<sup>23</sup>

We emphasise that this conclusion is not founded on the fact that the defendant’s only motive in granting the lease was to avoid paying business rates, although that was undoubtedly so. If the leases entered into by the defendants had the effect that they were not liable for business rates, their motive for granting the leases is irrelevant.

Similarly, the *Ramsay* doctrine (whatever it is) is not a “broad spectrum antibiotic which killed off all tax avoidance schemes”.<sup>24</sup>

But the rules which do exist are numerous and sufficient to ensure that

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avoidance.

21 House of Lords Economic Affairs Committee “HMRC: Treating Taxpayers Fairly” (2018) para 23, 24.

<https://publications.parliament.uk/pa/ld201719/ldselect/ldeconaf/242/242.pdf>

The report recommended “Clearer distinctions are needed in the Government’s approach and rhetoric towards tax avoidance.” But the Government rejected the recommendation, so this debate will continue: HMRC, “The Powers of HMRC: Treating Taxpayers Fairly (House of Lords Paper 242) Government Response” p.2 <https://www.parliament.uk/documents/lords-committees/economic-affairs/Govt%20HMRC%20Powers%20report%2022%20Jan%202019%20.pdf>

22 Alldridge, *Criminal Justice and Taxation* (1<sup>st</sup> ed, 2017) p.34 (Blurring the line between avoidance and evasion).

23 [2021] UKSC 16 at [51].

24 *MacNiven v Westmoreland Investments* [2001] UKHL 6 at [49], often cited.

successful avoidance is rare. Have there been any recent cases where a tax avoidance scheme has been upheld, and if so, how many? An answer to this must depend on what one means by avoidance. Examples at or near the abusive end of the spectrum are not recent cases:



Case	Topic	See para
<i>HMRC v Mayes</i> [2011] EWCA CIV 407	Secondhand insurance policies	-
<i>HMRC v D'arcy</i> [2007] EWHC 163 (Ch)	Manufactured dividends	-
<i>Davies v Hicks</i> [2005] EWHC 847 (Ch)	Share pooling/matching	56.11.4

Few would expect the same outcome if these schemes were re-litigated now (though the question is moot, as that will never happen).

Non-abuse examples of where avoidance is still possible, if they constitute avoidance, are:

Example	See para
Going non-resident	6.42
Use of protected trusts	91.1

## 2.3 Politics of tax avoidance

The topic is political, so I begin with a politician (David Cameron):

Of course there is a difference between tax evasion and tax avoidance. Evasion is illegal. It can and should be subject to the full force of the criminal law.

But what about tax avoidance? Now of course there's nothing wrong with sensible tax planning and there are some things that governments want people to do that reduce tax bills, such as investing in a pension, a start up business or giving money to a charity. But there are some forms of avoidance that have become so aggressive that I think it is right to say these raise ethical issues, and it is time to call for more responsibility and for governments to act accordingly.

In the UK we've already committed hundreds of millions (?) into this effort, but acting alone has its limits. Clamp down in one country and the travelling caravan of lawyers, accountants and financial gurus will just move on elsewhere. ...

I believe in low taxes, that is why my government is cutting the top rate of income tax, we've cut corporation tax. [*Delete - political*].<sup>25</sup>

Individuals and businesses must pay their fair share. And businesses who think they can carry on dodging that fair share, or that they can keep on selling to the UK and setting up ever more complex tax

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25 This side note is included in the version of the speech published online; one wonders what happened when the speech was delivered.

arrangements abroad to squeeze their tax bills right down, well they need to wake up and smell the coffee, because the public who buy from them have had enough.<sup>26</sup>

All the main tropes of the political debate are in this passage:

- (1) Everyone should pay a “fair share” of tax.
- (2) Some taxpayers fail to do so due to tax avoidance.
- (3) Tax avoidance is unethical, immoral or anti-social.
- (4) Acknowledgement of the avoidance/evasion distinction;<sup>27</sup> but it does not contradict point (3). In the words of Margaret Hodge: “We’re not accusing you of being illegal, we’re accusing you of being immoral.”
- (5) Disparaging references to tax advisers.<sup>28</sup>

On the political left, the same points are made, but more stridently, and, of course, without Cameron’s approval of low taxes.

## 2.4 Need for analysis

This chapter draws on a paper published by the Oxford University Centre for Business Taxation, (the “**OUCBT paper**”).<sup>29</sup> The OUCBT paper says:

The question is how to tackle the problems. This requires a clear analysis of their cause and differentiation between different causes. Labelling a whole range of quite different behaviours as “avoidance” without further differentiation is unhelpful. ...

Differentiation requires terminology. As there is no agreed terminology, it is best not to use any terms at all without some explanation of what is meant.

### 2.4.1 Categorisation of avoidance

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26 David Cameron speech to World Economic Forum in Davos, 2013

<https://www.gov.uk/government/speeches/prime-minister-david-camerons-speech-to-the-world-economic-forum-in-davos>

27 I suspect newspaper libel readers (rightly) insert this if a journalist overlooks it.

28 This feeds on a very ancient trope concerning lawyers. Of course this is not limited to tax. Contemporary attacks on lawyers have focussed on those working in immigration law (“lefty lawyers”)

29 “Tax avoidance” (2012)

[https://wayback.archive-it.org/org-467/20200808011125/http://eureka.sbs.ox.ac.uk/4428/2/TA\\_3\\_12\\_12.pdf](https://wayback.archive-it.org/org-467/20200808011125/http://eureka.sbs.ox.ac.uk/4428/2/TA_3_12_12.pdf) (I omit some footnotes here).

If one is to identify the correct response to the problems of avoidance, one must distinguish:

- (1) **Ineffective avoidance** (no tax saving if the law is correctly applied)
- (2) **Effective avoidance** (tax saved by avoidance)
- (3) **Non-avoidance** (little tax paid but not due to avoidance)<sup>30</sup>

These distinctions matter because:

- (1) Ineffective avoidance may be countered by enforcement of the law.
- (2) Effective avoidance can only be countered by changes in tax law.
- (3) In cases of non-avoidance:
  - (a) It may be no change in tax law is appropriate.<sup>31</sup>
  - (b) If change is needed, the change is one of policy as well as of tax law; and the matter should be considered without the haste and moral outrage associated with avoidance.

If one wishes to assess emotional and moral responses to avoidance, and actual or theoretical anti-avoidance rules, we need further vocabulary to discuss the range of tax-motivated behaviour.

We might cover the terrain in four categories:<sup>32</sup>

**Uncontroversial tax planning** Taking advantage of a tax relief in a manner *everyone* would accept as reasonable and indeed desirable. As this is at the bottom of the spectrum, it is easy to find clear examples: for instance, pension contributions, and moderate<sup>33</sup> charity giving.<sup>34</sup> This is so even if, as is usually the case, care is needed in order to use or to maximise the relief, for instance, limiting contributions each year to

30 The OUCBT paper adopts the somewhat unhelpful labels “categories A, B, and C”. It is difficult to find short labels which neatly sum up the concepts: “Ineffective avoidance” is not ideal as this is not really “avoidance” at all.

31 It may be that a change in public expectation or knowledge is desirable.

32 There are many ways to slice this cake. Lord Walker proposed seven types of tax avoidance (a riff on Empson’s *Seven Types of Ambiguity*): “Ramsay 25 years on” [2004] LQR 120. Contrast Barnett, “A baker’s dozen” *Taxation Magazine*, 2 August 2012. But one must resist the temptation to taxonomy for its own sake. Classification is (or should be) purposive: a useful taxonomy must draw *useful* distinctions: it should identify categories which call for different responses, and only those.

33 In the debate on the Budget 2012, some said that giving more than £50k or 25% of income was excessive.

34 These are the examples which Cameron called “sensible tax planning” in the quote at the start of this chapter.

below the cap for the relief, or limiting benefits within the permitted limits for gift aid.

**“Ordinary” tax planning** Using tax legislation in a way which *some* politicians and commentators do not like, but where the planning is ordinary in the sense that many people have done and continue to do it; it is obvious and foreseeable; the point probably came to the mind of those responsible for the legislation, or should have done, or there is no reason to think that parliament would have done anything different if it had considered the point. “Ordinary” tax planning is not contrary to the “intention of parliament” as that construct is normally understood.

I write the word “ordinary” with scare quotation marks, to indicate the vague, evaluative and disputable nature of the expression.

I regard the following as examples of “ordinary” tax planning (but other views have been expressed):

<b>“Ordinary” planning</b>	<b>But for other views see</b>
Advancing/delaying:	
(a) disposals for CGT purposes	56.9.7
(b) payment of income (eg dividends or bonus)	2.5.9
(c) pension contributions for IT purposes in anticipation of tax rate changes/becoming resident/non-resident	
Inter-spouse transfer to equalise income	2.5.9
Transfer to a company to reduce tax rates	
Lifetime giving to avoid IHT	
Going non-resident (unless the planning involves further steps)	

The term “tax mitigation” could be used as a synonym of “ordinary” tax planning, but it covers uncontroversial tax planning and “ordinary” tax planning: anything short of avoidance.

Occasionally one sees the epithet “vanilla” tax planning, paraphrased as “such as any High Street Solicitor would recommend to any client.”<sup>35</sup>

The cases have concerned applications to set aside transactions for mistake. In *Hartogs v Sequent (Schweiz) AG*<sup>36</sup> the planning involved a

35 *PBC v JMA* [2018] EWCOP 19 at [54]. The planning in this case was a lifetime gift (to a trust) which was intended to be a PET (!).

36 [2019] EWHC 1915 at [25]. The facts were (more or less) the same in *Abadir v Credit Suisse Trust* [2021] EWHC 2573 (Ch), where the planning was “not an artificial form of avoidance against which public policy would militate against setting

(supposedly) non UK domiciled settlor transferring funds to a trust, which acquired a company, which acquired a UK residence and classic cars. The settlor described this as a “normal and standard approach to estate-planning for someone in his position” and the judge agreed: “this was not a controversial tax planning scheme”.

**Tax avoidance** Something legal but contrary to the intention of parliament in the sense that had parliament thought about it, it would probably prevent the tax advantage. Examples are likely to have been counteracted by subsequent legislation; though it may be a matter of judgement whether:

- (1) The planning was avoidance, stopped by legislation.
- (2) The planning was “ordinary” and the legislation reflected a change in policy.

Some examples (beginning with clear avoidance, concluding with what might be regarded as the top end of the “ordinary” planning spectrum):

Avoidance	Counteracted by	See
Transfer of assets abroad	ToA code	48.1
Share-for-share relief	CGT reorganisation TAAR	58.3; 58.6
Temporary non-residence	TNR rules	11.2

**Tax abuse** Tax avoidance with aggravating features (typically, self-cancelling steps) that make it (more) unreasonable.<sup>37</sup> As this is at the top of the spectrum, it is easy to find clear examples, eg:

*Ramsay*

*Fitzwilliam v IRC*<sup>38</sup>

*Astall*

*Mayes*

*UBS*

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aside the transfer”.

37 The epithet commonly used is “egregious” or “aggressive”. That does not clarify anything but it neatly expresses the point.

For completeness: In technical EU-law terminology the term “abuse” is used in a different sense; similarly in OECD discussion; see 107.7 (OECD-concept abuse).

However we are not concerned with that usage here.

38 For this case, see 98.9 (Trust appoints to B, B gives to new trust).

*The Rangers case*<sup>39</sup>

This terminology raises three distinctions:

- (1) Uncontroversial/"ordinary" tax planning
- (2) Tax planning/avoidance
- (3) Tax avoidance/abuse

Before considering whether these distinctions have, or should have, different consequences, it is important to note three difficulties which they entail:

- (1) *Demarcation problems* Except at the extreme ends of the spectrum, the demarcation problem is intractable: the classification of specific examples (if it actually had to be decided) would give rise to endless disagreement (and has done so in the context of tax motive defences). There are two reasons for this:
  - (a) The distinctions rely on:
    - (i) imponderable hypothetical questions (what would parliament have done if it had noticed the issue?)
    - (ii) vague constructs ("intention of parliament" and "spirit of the legislation")
    - (iii) identifying tax policy (there may be no clear policy, or it may fluctuate)
  - (b) The four distinct categories attempt to impose an order on tax motivated behaviour which exhibits a scale of unreasonableness, without distinct divisions. It might be better to mark out a sliding scale from 1 to 10, recognising finer distinctions, but that would not help for practical purposes. It is often the case that experience is a continuum on which the law seeks to impose bipolar categories, but the difficulty in doing so here is greater than usual because the distinction is more imponderable.
- (2) *Tax-law knowledge problems* Except for the extreme ends of the spectrum, (a small part of the field) a serious discussion of where any particular arrangement should be classified, or graded, can only be carried out by someone who understands the tax background. Few non-practitioners have much understanding. Journalists in the UK do

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39 *RFC 2012 Plc (formerly Rangers Football Club) v AG* [2017] UKSC 45 at [2]: "an aggressive tax avoidance scheme".

not allow their work to be reviewed by someone who understands tax. Politicians are characterised by grandstanding and soundbites. Pressure groups grind their axes. The details, important to those within the profession, tend to bore or bewilder people outside it.

- (3) *Factual knowledge problems* If discussing particular instances, one needs to know the facts, which are not usually in the public domain.

#### 2.4.2 Why distinctions matter

The distinctions I have drawn are not entirely satisfactory, but it is hard to think of better.

The “ordinary” tax planning/tax avoidance dividing line is established in tax law at least since *Willoughby* (1997). It marks the point where:

- (1) Tax motive provisions begin to bite
- (2) Extra-statutory concessions cease to apply
- (3) HMRC Manuals cease to bind HMRC<sup>40</sup>

For this distinction, see 3.20 (Avoidance/mitigation distinction) to 3.27 (Tax avoidance: Critique).

The tax avoidance/tax abuse distinction was established in 2013: it marks the point at which the GAAR is intended to bite.<sup>41</sup> It may also mark the point where a Court might refuse discretionary remedies such as setting aside for mistake.

There has not been much judicial discussion but a passage in *Furniss v Dawson* anticipated something like a tax avoidance/abuse distinction:

The scheme [in *Furniss*] has none of the extravagances of certain tax avoidance schemes which have recently engaged the attention of the courts, where the taxpayer who has been fortunate enough to realise a capital profit has gone out into the street and, with the aid of astute advisers, manufactured out of a string of artificial transactions a supposed loss in order to counteract the profit which he has already

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40 HMRC Guidance Manuals introduction: “Subject to [limited specified] qualifications readers may assume the [HMRC Manual] guidance applies in the normal case; but where HMRC considers that there is, or may have been, avoidance of tax the guidance will not necessarily apply.”

<http://www.hmrc.gov.uk/manuals/advisory.htm>

41 It is significant that the GAAR is called a general anti-*abuse* rule, not a general anti-*avoidance* rule, in contrast to the two devolved GAARs. See 3.26 (The GAAR).

made.<sup>42</sup> The scheme before your Lordships is a simple and honest scheme which merely seeks to defer payment of tax until the taxpayer has received into his hands the gain which he has made.<sup>43</sup>

The arrangement in *Furniss* was, in modern terms, avoidance but not abuse.

## 2.5 Attitudes to tax avoidance

### 2.5.1 Morality and taxation

This is intended to be a practical work. But attitudes to tax avoidance do of course have practical consequences for tax: it affects judicial attitudes and decisions; it was a driver for the enactment of the GAAR and other legislation.

The topic of the relationship between morality and taxation should be seen as part of a wider discussion of the relationship between morality and law. Without entering into these deep waters, it should generally be accepted that not everything which is disapproved of should be proscribed by law.

### 2.5.2 Judicial view in the past

Older cases uniformly took a neutral attitude to tax avoidance. In 1900:

Bundey J. recognises to the full both the legal *and the moral* right of every man to dispose of his property if he can in a way which does not expose it to be taxed under the existing system of taxation.<sup>44</sup>

In 1922:

it is perfectly open for persons to evade<sup>45</sup> this particular tax if they can

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<sup>42</sup> [Author's footnote] At least two of these schemes were litigated, so preserving in the law reports examples of "extravagant" schemes with "a string of artificial transactions":

*Ramsay v HMRC* 54 TC 101; see [App. App. 2.11](#) (s.132 TCGA definition)

*Eilbeck v Rawling* 54 TC 101; see 98.12.1 (Transfer: A's trust to B's trust)

Needless to say, the schemes failed to generate an allowable loss even without recourse to the *Ramsay* principle.

<sup>43</sup> [1984] AC 474 at p.518.

<sup>44</sup> *Simms v Registrar of Probates* [1900] AC 323 at p.333.

<sup>45</sup> Nowadays one would use the word "avoid" here; but the modern terminology had not developed at this point; see 2.2.2 (Avoidance/evasion distinction).



do so legally. I again say I do not use the word “evade” with any dishonourable suggestion about it. If certain documents are drawn up, and the result of those documents is that persons are not liable to a particular duty, so much the better for them.<sup>46</sup>

In 1926:

the highest authorities have always recognised that the subject is entitled so to arrange his affairs as not to attract taxes imposed by the Crown, so far as he can do so within the law, and that he may legitimately claim the advantage of any express terms or of any omissions that he can find in his favour in taxing Acts. In so doing, he neither comes under liability *nor incurs blame*.<sup>47</sup>

During the second world war, judicial opinion changed. The most familiar passage to that effect comes in 1941:

It scarcely lies in the mouth of the taxpayer who plays with fire to complain of burnt fingers.<sup>48</sup>

This expresses an ethos appropriate to the wartime background; “as we are at war, the ordinary mode of construing legislation has been suspended”.<sup>49</sup>

In 1943:

of recent years much ingenuity has been expended in certain quarters in attempting to devise methods of disposition of income by which those who were prepared to adopt them might enjoy the benefits of residence in this country while receiving the equivalent of such income, without sharing in the appropriate burden of British taxation. Judicial dicta may be cited which point out that, however elaborate and artificial such methods may be, those who adopt them are “entitled” to do so. There is, of course, no doubt that they are within their legal rights, but that is no reason why their efforts, or those of the professional gentlemen who assist them in the matter, should be regarded as a commendable exercise

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46 *Hawker v Compton* 8 TC 306 at p.30.

47 *IRC v Fisher's Executors* 10 TC 302 at p.340. If more examples are needed, which I doubt, see *Levene v IRC* 13 TC 486 at p.501-502; and the well known passage from *Ayrshire Pullman Motor Services v IRC* (1929) set out at 2.5.7 (Impact of the GAAR).

48 *Howard de Walden v IRC* 25 TC 121 at p.124. For the full passage, see 48.2.2 (ToA provisions: Penal).

49 Darling J, cited in Foxton, “*R v Halliday* in Retrospect” [2003] LQR 455.

of ingenuity or as a discharge of the duties of good citizenship. On the contrary, one result of such methods, if they succeed, is, of course, to increase pro tanto the load of tax on the shoulders of the great body of good citizens who do not desire, or do not know how, to adopt these manoeuvres.<sup>50</sup>

After the war, the old orthodoxy returned. In 1965:

The fact that a settlement is drawn with a view to avoiding particular charging provisions is *neither reprehensible, nor* a proper ground for inclination to a conclusion that it ought to come within those or some other charging provisions. ... If any moral criticism could be levelled at them, then the consciences of the judges of the Chancery Division, in the exercise of their discretionary jurisdiction under the Variation of Trusts Act 1958, would be in a sorry state.<sup>51</sup>

Lord Diplock expressed the traditional view in 1964:

Tax law no more lies within the field of morals than does a crossword puzzle.<sup>52</sup>

Likewise in 1982:

the fact that the purpose of the scheme was tax avoidance does not carry any implication that it was in any way reprehensible or other than perfectly honest *and respectable*.<sup>53</sup>

### 2.5.3 Attitudes outside UK

Without attempting a full survey, which would require a team of experts, it appears that the same view was held throughout the common law world. In America in 1947:

Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not

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<sup>50</sup> *Latilla v IRC* 25 TC 107 at p. 117.

<sup>51</sup> *Re Kirkwood* [1965] Ch 286 at p.327.

<sup>52</sup> Diplock, "The Courts as Legislators" Address to The Holdsworth Club (1965) <https://www.kessler.co.uk/wp-content/uploads/2012/05/CourtsAsLegislators.pdf>

<sup>53</sup> *IRC v Burmah Oil* 54 TC 200 at p.220; followed in 1988 in *Craven v White* 62 TC 1 at p.196.

voluntary contributions. To demand more in the name of morals is mere cant.<sup>54</sup>

Oliver Wendell Holmes is often quoted for his extra-judicial comment “I like to pay taxes. With them I buy civilization.”<sup>55</sup> But those who quote that tend to quote selectively. The same judge said:

The only purpose of the vendor here was to escape taxation... The fact that it is desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you may intentionally go as close to it as you can if you do not pass it.<sup>56</sup>

In Australia in 1995:

The obligation to pay [income tax] is a legal one. Some politicians try to treat it as a moral obligation. But it is not. The citizen is bound to pay no more tax than the statute requires him to pay according to the relevant state of his affairs.

Consistently with this view, it has long been a principle of the law of income taxation that the citizen may so arrange his affairs as to render him less liable to pay tax than would be the case if his affairs were cast in some different form. .. This is sometimes expressed as a right to avoid tax.<sup>57</sup>

#### 2.5.4 *Pro-avoidance rationale*

The following points can be made in favour of the traditional view, that tax avoidance is morally neutral:

##### (1) *Difficulties of “right” amount of tax*

The tax system is full of anomalies, artificial, arbitrary, and not based on any consistent principles. One might say there is generally no “right” amount of tax except in the sense of what is due by statute.

##### (2) *Difficulty of applying moral principles*

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54 *Commissioner v Newman*, 159 F2d 848 (1947). The case concerned the taxation of settlor-interested trusts.

55 In *Ensign Tankers v Stokes* [1992] STC 226 at p.235 the apophthegm is paraphrased, with, perhaps, a change of nuance: “taxation is the price which we pay for civilisation.”

56 *Superior Oil Co v Mississippi* 280 US 390.

57 Sir Garfield Barwick (Chief Justice of Australia 1964–81), *A Radical Tory* (1995) at p.229.

This is perhaps another way of putting point (1): The view that taxation is governed by moral principles distinct from the rules of black letter tax law either:

- (a) requires one to enter into the intractable distinction of tax avoidance/abuse; or
- (b) spreads the net very wide, far wider than any practitioner is likely to accept (and still requires one to enter into the intractable distinction of uncontroversial/"ordinary" tax planning).

In practice, public debate does not engage with black letter tax law and it is difficult to envisage that it ever could. Ethics is a practical subject. It only works if the entities called "right" and "wrong" are reasonably distinguishable and of a more or less permanent nature. If standards are so vague, or so difficult to apply in actual cases, that we cannot see how we could act on them, we become sceptical. That suggests that morality has little if any role to play.

### (3) *Egregious over-taxation*

I coin the expression "**egregious over-taxation**" to refer to situations where HMRC take advantage of anomalies in their favour in a manner which is unfair and contrary to the intention of Parliament (as that expression is understood in a tax avoidance context). It is the opposite of tax avoidance. Three distinct sub-issues arise here:

- (a) Does egregious over-taxation arise in practice
- (b) Is it proper for HMRC to seek egregious over-taxation
- (c) What light does that shed on the issue of tax avoidance morality

Issue (a) is a question of fact, to which the short answer is, yes. Of course the Courts generally try to construe statutes to prevent egregious over-taxation, just as they try to prevent avoidance; but sometimes they do not achieve this. For instance, the unfortunate Mr Lobler fell into the trap of a partial surrender of life policies:

He made no profit or gain as that term is commonly or commercially understood and yet he becomes liable to pay tax which exhausts his life savings and may bankrupt him. That is an outrageously unfair result.... This is legislation which does not seek to tax real or commercial gains. Thus it makes no sense to say that the legislation must be construed to apply to transactions by reference to their commercial substance....No overriding principle can be extracted from the legislation....

Thus with heavy hearts we dismiss the appeal.<sup>58</sup>

There are then four possible moral approaches:

<b>View</b>	<b>Tax avoidance</b>	<b>Egregious over-taxation</b>
1	Wrong	Right
2	Right	Wrong
3	Wrong	Wrong
4	Right	Right

One might perhaps adopt view 1, that tax avoidance is wrong but egregious over-taxation is right, in other words, fairness should apply in favour of HMRC but not the taxpayer; but no-one has had the temerity to advocate that.

One might perhaps adopt view 2, that tax avoidance is right, but HMRC should be bound by a further requirement of fairness; but few if any advocate that either.

So if sauce for the goose is sauce for the gander, we are limited to views 3 or 4.

View 3 is possible, but it is not supported by HMRC. Those who support the view that tax should be governed by rules rather than discretion cannot logically criticise HMRC for seeking egregious over-taxation, where the law requires, though one could criticise HMRC for not seeking to change the law promptly after unfairness has been identified (and, if appropriate, publish an ESC to operate in the meantime).

So we fall back on view 4, thus this consideration supports the view that there is nothing wrong in avoidance.<sup>59</sup>

One might wish that HMRC were as concerned about egregious over-taxation as they are about its flipside, avoidance (egregious or otherwise). Of course, egregious over-taxation is different in that it brings in revenue

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<sup>58</sup> *Lobler v HMRC* [2013] UKFTT 141 (TC). In order to avoid the unfairness the Upper Tribunal allowed the appeal, though it had to rewrite the law of rectification in order to do so; see [2015] UKUT 152 (TCC). The law was later amended; see 69.3.5 (Partial surrender trap). But that does not affect the point being made here.

For another example, see *Hunters Property v HMRC* [2018] UKFTT 96 (TC), where EIS relief was unfairly lost, because a group company was member of a guarantee company which was “merely a vehicle for holding client funds and had no intrinsic value of its own”. For another example, see 89.48 (Capital contribution).

<sup>59</sup> For an example of this line of reasoning in use, the well known passage from *Ayrshire Pullman Motor Services v IRC* (1929) set out at 2.5.7 (Impact of the GAAR).

rather than losing it. However, it imposes the cost of professional fees for better advised taxpayers who avoid it, and an intangible cost in that it brings the UK tax system into disrepute, even if one is indifferent to the unfairness for its victims. But there it is.

(4) *Tax avoidance sometimes leads to fair result*

This relates to point (3): There are cases where tax avoidance avoids egregious over-taxation. An example is the use of multiple policies to avoid the tax trap of partial surrender.<sup>60</sup>

Parliament sometimes admits this, by enacting a new relief to allow directly what had previously been achieved by avoidance. Examples are:

- (a) Nil rate band discretionary trusts, which allowed transferable nil rate bands before the IHT relief was enacted in 2007.
- (b) CGT group relief to obtain loss relief. A company about to realise a gain on an asset would formerly transfer it to a group company that had realised an allowable loss. Alternatively, a company which had realised a gain might acquire from a group company an asset which was to be sold at a loss. That would allow the loss to be set against the gain before the introduction of group loss elections, in 2009.<sup>61</sup>

Offshore trusts mitigate the economically deleterious lock-in effect of CGT by deferring tax until gains are received.

Tax avoidance (if it be such) sometimes permits a business to continue which would otherwise be destroyed by taxation.<sup>62</sup>

Related to this is the use of tax avoidance for political/economic ends. High tax rates may be mitigated by avoidance, achieving a pragmatic compromise between incompatible political viewpoints, or allowing a public perception which is different from the reality. IFS say:<sup>63</sup>

... there may even be benefits to the UK from avoidance opportunities if the lower tax rates achieved on mobile activities – for example, through profit shifting – mean that more real activity is in the UK than

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60 See 69.3.5 (Partial surrender trap).

61 Section 171A TCGA.

62 For an example, see *Fisher v HMRC* [2021] EWCA Civ 1438.

63 IFS, *Green Budget 2013* p.290

[https://ifs.org.uk/sites/default/files/output\\_url\\_files/gb2013.pdf](https://ifs.org.uk/sites/default/files/output_url_files/gb2013.pdf)

would otherwise be the case.<sup>64</sup>

This fudge has its costs, including the inefficiencies that arise from tax planning, fiscal instability and public cynicism; but it happens.

#### 2.5.5 *Practitioner/judicial views today*

The above sets out the intellectual case in favour of the view that avoidance, like Lord Diplock's crossword, is morally neutral. It was formerly generally accepted, and has never been refuted. But the argument has been found less convincing, or unconvincing, I think for two reasons:

- (1) The traditional view was formed in earlier times when there was tax avoidance but little (if any) activity in the category of tax abuse. After that began to change, I think in the 1970's, the view became far reaching, and so might be regarded more skeptically.
- (2) The argument requires an understanding of the tax system as it actually is. Politicians and other non-tax practitioners entered into the debate without that knowledge.

Whatever the reason, the argument has become perceived as less cogent. By 2007:

For many directors, the objection to arrangements that are in their view 'too' artificial may be framed largely in terms of business ethics. Other directors, equally determined to behave in an ethical way, may consider that the degree of artificiality is not an ethical issue provided no attempt is made to misrepresent the facts or to hide them from the tax authorities....

At one time such a view would perhaps have been more widely held than now. At the present time it represents one end of a range of views in a debate where probably most commentators would hold that within the compass of what is legal there is some behaviour that is acceptable and some that is not...<sup>65</sup>

In 2011, Aaronson's GAAR study reported the views of taxpayer representative bodies:

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64 Footnote original: There is an academic literature on the costs and possible benefits of tax planning. See for example, D. Dharmapala, "What problems and opportunities are created by tax havens?", *Oxford Review of Economic Policy*, 2008, 24, 661–79.

65 David Williams "Developing the Concept of Tax Governance" (2007)

There was unanimous disapproval, indeed distaste, for egregious tax avoidance schemes.<sup>66</sup>

Of course tax practitioners do not all share the same view. But I think it is the case that they are mostly drawn to the view that opprobrium should only attach at the top end of the scale, in cases of tax abuse, in which case the GAAR has more or less rendered the issue academic; or if any opprobrium attaches to tax motivated behaviours lower down the scale, the amount of opprobrium should vary according to the scale.

This might be consistent with Lord Templeman's views in tax abuse cases, which were expressed trenchantly (some would say, stridently<sup>67</sup>):

In common with my predecessors I regard tax-avoidance schemes *of the kind invented and implemented in the present case* as no better than attempts to cheat the Revenue.<sup>68</sup>

In the Supreme Court in 2014:

Since the seminal decision of the House of Lords in *Ramsay v IRC*<sup>69</sup> there has been an increasingly strong and general recognition that artificial tax avoidance is a social evil which puts an unfair burden on the shoulders of those who do not adopt such measures.<sup>70</sup>

“Social evil” represents the top end of judicial rhetoric in recent times,<sup>71</sup> though the scope of the critique depends on the word “artificial”, which may mean little or much.

And again in 2015, but more moderately expressed:

[Tax avoidance] gives rise to social costs which are significant and

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66 Aaronson, *GAAR Study* (2011)

[http://webarchive.nationalarchives.gov.uk/20130321041222/http://www.hm-treasury.gov.uk/d/gaar\\_final\\_report\\_111111.pdf](http://webarchive.nationalarchives.gov.uk/20130321041222/http://www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf)

67 Lord Neuberger referred tactfully to Lord Templeman's “characteristically colourful language”; *Evans (R, oao) v Attorney General* [2015] UKSC 21 at [53].

68 *IRC v Fitzwilliam* (1993) 67 TC 614 at p.756. Lord Templeman's claim that his attitude was held in common with his predecessors is untenable. It was not even held in common with his contemporaries. But it is held in common with his successors. In this respect, Lord Templeman was ahead of his time.

69 (1982) 54 TC 101.

70 *Futter v HMRC* [2013] UKSC 26 at [135].

71 But perhaps “social evil” differs from evil as “social justice” differs from justice.



increasingly controversial.<sup>72</sup>

Since the 1970's there has been no judicial unanimity, and that is still the case today. So the pendulum seems to swing erratically. In a rating avoidance case in 2019:

Views may differ as to whether the purpose for which the SPVs were used was socially reprehensible.<sup>73</sup>

### 2.5.6 Avoidance: Discretionary remedies

In *Altus Group v Baker Tilly* negligent accountants argued it was contrary to public policy to award damages for their failure to advise or implement an avoidance scheme. The argument was summarily rejected.<sup>74</sup>

Where courts grant discretionary remedies, the question arises whether tax avoidance is a reason to refuse the remedy (“avoidance-based reasoning”). This issue may arise in discretionary remedies such as: setting aside a gift for mistake, rectification, variation of trusts, and remedies for unfair prejudice to minority shareholders.

The idea was first tentatively raised in *Futter v HMRC*:<sup>75</sup>

In some cases of artificial tax avoidance the court might think it right to refuse relief, either on the ground that such claimants, acting on supposedly expert advice, must be taken to have accepted the risk that the scheme would prove ineffective, or on the ground that discretionary relief should be refused on grounds of public policy. ... But it is unnecessary to consider that further on these appeals.

In Guernsey, the Courts have rejected the idea. Thus when an ill-advised gift to an EBT was set aside for mistake, the fact that the individual was seeking to avoid UK tax was not a reason for the Guernsey Court to refuse relief.<sup>76</sup> It may be that UK tax avoidance is regarded with less hostility in

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<sup>72</sup> *Pendragon v HMRC* [2015] UKSC 37 at [5].

<sup>73</sup> *Hurstwood Properties v Rossendale BC* [2019] EWCA Civ 364. The decision was reversed on appeal but without comment on this point. For other aspects of this case see 75.17.4 (Companies: Situs planning).

<sup>74</sup> [2015] EWHC 12 (Ch) at [59](3) and [65].

<sup>75</sup> [2013] UKSC 26 at [135].

<sup>76</sup> *Whittaker v Concept Fiduciaries* (Guernsey 15/2017).

See too *Nourse v Heritage Trustees* (Guernsey) 15 Jan 2015) at [15] and [71] accessible <https://www.kessler.co.uk/tfd-archive>

foreign jurisdictions, and especially tax haven jurisdictions. Foreign courts may also be more sympathetic than UK courts to taxpayers facing unfair or penal anti-avoidance rules.<sup>77</sup>

In practice, there has not yet been a case in the UK where a discretionary relief was actually refused on the grounds of avoidance, though there have been some where this has been mooted.<sup>78</sup> I do not attempt to discuss all the cases where this point has been discussed, but only to assess (if one can) which way the wind is blowing.

*Estera Trust (Jersey) v Singh*<sup>79</sup> was an unfair prejudice case. The unfairly prejudiced shareholder was a non-resident trust. The Court ordered the company (“the defendant co”) to purchase the trust’s shares. Unfortunately that would be a distribution for tax purposes, and subject to IT at the dividend trust rate. The trust proposed a different arrangement:

- (1) The trust transferred the shares to a newly created company wholly owned by the trust (“Newco”)
- (2) The defendant co purchased its shares from Newco

This would avoid the IT charge.<sup>80</sup> The Court refused to order this arrangement for a variety of reasons, but one of them was that:

the scheme ... could be regarded as aggressive tax avoidance, even though relatively unsophisticated in comparison with other notified avoidance schemes. The Court should not without very good reason order reluctant parties to enter into a scheme that could be held to be improper (in the sense that I have identified).<sup>81</sup>

A tax practitioner may be surprised that this simple arrangement could be regarded as “aggressive”; for as the Court acknowledged, it is “perfectly common” for Jersey trusts to own companies that hold trust assets. But practitioners should remember that these issues are not decided by tax practitioners. Perhaps mere use of non-resident trusts for UK resident

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<sup>77</sup> See App 15.5.1 (Critique of s.87 regime).

<sup>78</sup> See *Bhaur v Equity First Trustees* [2021] EWHC 2581 (Ch) at [118] - [119]; Herbert, “Equitable mistake and artificial tax avoidance” [2022] PCB 59.

<sup>79</sup> [2019] EWHC 2039 (Ch).

<sup>80</sup> The case was not a tax case, and does not give much tax analysis. For completeness: the transfer at step (1) would in principle give rise to a trust gain but presumably that did not matter on the facts of the case.

<sup>81</sup> [2019] EWHC 2039 (Ch) at [26].

beneficiaries is sufficient?

The problem with avoidance-based refusals of discretionary remedies is of course how uncertain and subjective the concept of avoidance actually is.<sup>82</sup> For that reason, avoidance-based reasoning, if it applies at all, ought to be limited to clear and egregious cases and in practice it has not been applied to “vanilla tax planning” involving offshore trusts and companies.<sup>83</sup> In the light of the GAAR, such cases are not likely to happen after 2013, though pre-2013 avoidance cases will continue to occupy the Courts for a little longer.

### 2.5.7 Impact of the GAAR

Has the GAAR altered the position? GAAR guidance provides:

B2.1 The GAAR ... rejects the approach taken by the Courts in a number of old cases<sup>84</sup> to the effect that taxpayers are free to use their ingenuity to reduce their tax bills by any lawful means, however contrived those means might be and however far the tax consequences might differ from the real economic position.

HMRC cite one of the best known dicta in taxation. In *Ayrshire Pullman Motor Services v IRC*:<sup>85</sup>

- [1] No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel into his stores.
- [2] The Inland Revenue is not slow - and quite rightly - to take every advantage which is open to it under the taxing Statutes for the purpose of depleting the taxpayer's pocket.
- [3] And the taxpayer is in like manner entitled to be astute to prevent, so far as he honestly can, the depletion of his means by the Revenue.

HMRC say that the GAAR has changed this:

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82 See 3.27.1 (Avoidance: coherent concept?).

83 See 2.4.1 (Categorisation of avoidance).

84 The phrase “a number of old cases” is a tendentious way to refer to judicial unanimity from the earliest times until the 1980s; see 2.5.2 (Judicial view in the past). But GAAR guidance is not a neutral document: it is written by HMRC and adopts an HMRC perspective.

85 (1929) 14 TC 754 at p.763.

[The above quote] epitomises the approach which Parliament has rejected in enacting the GAAR legislation.<sup>86</sup>

At the abuse end of the spectrum, the GAAR now applies, so the rules have indeed changed. This impinges on the avoidance-morality debate insofar as the debate only concerns successful avoidance, ie avoidance not caught by the GAAR. But nothing else has changed. *Ayshire* itself was *not* an abuse case (the issue was whether the taxpayer's children had entered into a valid partnership) and the decision would not have been affected by the GAAR.

Proposition [1] of the quote is still correct. It also continues to be the case that HMRC enforce egregious over-taxation when the rules work in their favour,<sup>87</sup> and it is unlikely that they intended to cast doubt on proposition [2]. And proposition [3] is still broadly correct, though now qualified in cases which pass the high threshold of abuse.

The above paragraph is reading the text closely and in the manner of a lawyer. It is it is a matter of speculation as to what thoughts were actually in the mind of the author of the GAAR guidance. I think we are in the territory of mood music here.

The rhetoric continues:

Taxation is not to be treated as a game where taxpayers can indulge in any ingenious scheme in order to eliminate or reduce their tax liability.

The game metaphor begs an essay to itself.<sup>88</sup>

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86 HMRC, "GAAR Guidance" (2017)

<https://www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules>

87 See 2.5.4 (Pro-avoidance rationale) under the heading: Egregious over-taxation.

88 What, in fact, is a game? It is an elastic concept which can be analogised in different ways. What is it in the notion of game which HMRC would characterise as significantly different from tax? Is it a notion of non-seriousness? Or an adversarial approach? Or a notion of a rule-based activity? Or arbitrary rules? In the latter three respects, tax law and non-tax law very much resemble games.

Perhaps the thinking is that games are morally neutral, whereas tax avoidance is held to be morally obnoxious. If this is the point, it is significant that a moral based argument needs to present itself in non-moral terminology. But elsewhere, "fair play" and "playing by the rules" are understood positively, and even claimed as defining features of the English national character.

These problems suggest that it would help clarity of thinking not to use the word "game": a stale and failed metaphor. See Midgley, *Heart and Mind* (1981) chapter

### 2.5.8 Codes of practice/regulators

PCRT provides:

Members must not create, encourage or promote tax planning arrangements or structures that

- i) set out to achieve results that are contrary to the clear intention of Parliament in enacting relevant legislation and/or
- ii) are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation.<sup>89</sup>

I take this as a rough paraphrase of the GAAR. In earlier editions of this work I criticised this, saying:

But as no-one would *sensibly* advise clients to enter into avoidance schemes which do not work, because of the GAAR or otherwise, it is (more or less) meaningless exhortation.

But this overlooks that the code does serve a purpose in providing a sanction for members of professional organisations who foolishly or cynically advise clients to enter into avoidance schemes which are hopeless or worse than hopeless.

A more literal reading might take this as prohibiting advice on avoidance

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8 (The game game).

However the game metaphor seems to be irresistible, in rhetoric if not in sober thought. For a recent example, see *Clark v HMRC* [2020] EWCA Civ 204 at [114]: “Both grounds seem to me to be examples of tax litigation as a board game, with large prizes for the winners. People who pay tax in the usual way are entitled to feel aggrieved when elaborate avoidance schemes ... succeed.”

89 PCRT, Helpsheet B: Tax Advice. Para (ii) is otiose, but it does not matter.

In 2015 HMRC called on the professional bodies

“to take on a greater lead and responsibility in setting and enforcing clear professional standards around the facilitation and promotion of avoidance to protect the reputation of the tax and accountancy profession and to act for the greater public good.”

See “Tackling tax evasion and avoidance” (the juxtaposition is significant) (2015) para 3.19.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/413931/Tax\\_evasion\\_FINAL\\_\\_with\\_covers\\_and\\_right\\_sig\\_.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/413931/Tax_evasion_FINAL__with_covers_and_right_sig_.pdf)

This was the spur for PCRT Helpsheet B.

The same wording is found in HMRC Standard for Agents para 3.3; see 119.1.2 (HMRC standard for agents).

arrangements which *do* work. There are conflicting normative visions of the lawyer's role, raising the basic question: can a good lawyer be a good person? For legal practitioners, client autonomy is a fundamental value, and the client is in all cases entitled to be told what the law is. That is an aspect of the Rule of Law.<sup>90</sup> So far as that may be what it means, the PCRT does not apply to lawyers, because SRA/Bar codes of conduct have priority.<sup>91</sup> SRA say:<sup>92</sup>

When advising a client on avoidance of tax schemes you should make clear that any avoidance arrangements the client enters into might deliver tax outcomes that were never envisaged or intended by Parliament and may be challenged. You should be clear as to the legal implications, the costs and penalties of non-compliance should the arrangement fail.

You should also consider your own position in facilitating such an arrangement. Should the arrangement be found to be abusive, your conduct may be called into question. To be involved in such arrangements is likely to reflect badly on you and to damage public confidence in those delivering legal services. You will leave yourself open to the risk of disciplinary proceedings as well as committing a criminal offence. Where you believe, as a consequence of your client's instructions, you are at risk then you should advise your client you cannot comply with their instructions and unless they change instructions you should terminate your retainer.

SRA refer to PCRT and say:

Where you consider that a scheme is likely to be found to be abusive, you can advise a client to this effect. Where a scheme can reasonably be argued not to be abusive, you can advise a client to this effect, facilitate the scheme where so instructed by a client properly advised as to the

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90 That view is not wholeheartedly accepted, or understood, by the general public or by HMRC, and a whole chapter would be needed to discuss this topic. For an introduction, see Windsor, "The Ethics of Government Legal Advisers" in Feldman (ed) *Law in Politics, Politics in Law* (2015).

91 See 119.1.1 (Status of PCRT).

92 SRA, "Tax avoidance your duties" (2019)

<https://www.sra.org.uk/solicitors/guidance/tax-avoidance-duties/>

The original version (2017) was criticised in earlier editions of this work, see the 2023/24 ed, para 2.5.8 (Codes of practice/regulators). But the guidance was substantially rewritten in 2019, and the earlier version is now of historic interest only.

risks, and litigate on behalf of a client as to the legality of the scheme where you can do so in a manner consistent with your duty to the Court. It is for the relevant courts and tribunals to adjudicate on the legality of tax avoidance schemes. However, where schemes are found to be abusive, or where there is no finding but schemes contain indicators of abuse (such as, but not limited to, misleading conduct or the indicators set out in the GAAR or PCRT), and solicitors have facilitated such schemes, whether by providing supportive advice which advocates the use of such schemes, or does not sufficiently highlight the associated risks or otherwise, we will see this, on the face of things, as evidence of breach of the SRA Principles and are likely to investigate. If a solicitor gives advice to the effect that a scheme is likely to be found to be abusive and takes no steps to give effect to such a scheme, it is unlikely that enforcement action would be taken.

In practice there have been disciplinary proceedings<sup>93</sup> and further cases are pending. They tend for obvious reasons to be extreme cases where the question of what is abusive does not arise.

#### 2.5.9 Views of non-tax practitioners

Outside the tax profession, the concept of what is unacceptable/immoral is not restricted to tax abuse, but extends to the “ordinary” tax planning level. Indeed, some very “ordinary” tax planning has come under fire. Practitioners might dismiss the views of those who know nothing about tax as unworthy of consideration. I give four examples from those whose views carry some weight.

*Deferring bonus in order to take advantage of announced reduction in tax rates:* This arose in 2013/14 when top rates fell from 50% to 45%. Practitioner-readers are likely to agree that this is “ordinary” tax planning near the bottom end of the spectrum. But Mervyn King, then Governor of the Bank of England, is reported to have criticised Goldman Sachs for it.<sup>94</sup> The House of Lords select committee noted that the GAAR will not apply to the deferral of bonuses from one tax year to another,<sup>95</sup> but one might

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93 See *Solicitors Regulation Authority v Chan* [2015] EWHC 2659 (Admin).

94 Financial Times, 15 Jan 2013. King is co-author of the excellent (now out of date) *British Tax System* (5<sup>th</sup> ed, 1990).

95 Select Committee on Economic Affairs Report on The Draft Finance Bill 2013 <http://www.publications.parliament.uk/pa/ld201213/ldselect/ldeconaf/139/139.pdf>  
The Select Committee said this was because that “the issue is one concerning the

infer that they disapproved none the less for that.

*The Bump Plan* In 2013 a now-forgotten political furore arose after a tax practitioner was secretly filmed, suggesting bonus payments to pregnant employees; if made during the relevant period this would increase the amount of statutory maternity pay. I do not think practitioners would regard that as on the abusive side of the line (though there are many points which need to be made to properly understand the legal and moral analysis, none of which were heard in the public debate).<sup>96</sup> Perhaps the point was just political hot air but the practitioner involved had to leave the GAAR panel.

*Income transfer between spouses* I think practitioners were surprised that HMRC found this unacceptable in their (ultimately unsuccessful) attack in *Jones v Garnett*.

To digress: It is interesting to note that the same planning has been criticised in India:

While tax evasion is universally condemned, there is a disposition in certain quarters to regard tax avoidance as a permissible course of action. We are unable to endorse this view. The mere fact that the income-tax law is not violated does not mean that the procedure which results in tax avoidance is justified. We might take as an illustration the act of introducing, without adequate consideration, one's wife ... as partner in a business of which the assessee himself is a partner. It is an attempt to fraction income and reduce tax liability under a provision of law meant to apply to genuine partnerships. Conduct of this nature,

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structure of the tax system rather than avoidance involving manipulation of loopholes in the legislation.” More analytically, the reason is that these are not examples of tax abuse (in my sense, which I take to be the same as the definition of “abusive” in the GAAR).

The GAAR guidance makes this point; see 56.9.8 (Postpone disposal: GAAR).

96 In particular: (1) This planning does not give rise to a tax advantage, but to a benefit advantage for the employer; it could not be counteracted by the GAAR. (2) Not every payment to an employee is earnings so it is possible for planning of this kind to fail on the facts. (3) The privacy aspects of secret filming, and the ease with which short clips may misrepresent nuanced positions, seem particularly worrying.

For the background, see Johnson, “Tax, Lies and Hypocrisy” (CCH Tax News, Issue 133 25 September 2013); for the law, see the Statutory Maternity Pay (General) Regulations 1986.



though legal, cannot but be regarded as anti-social.<sup>97</sup>

Different jurisdictions will approach the intractable issues of taxation of families in different ways. I would not go so far as to say that international comparisons are never helpful, but valid comparisons would require a good understanding of both tax systems, which would generally need a team rather than a single author. Isolated quotes are likely to mislead. In the UK, at least, Parliament has decided that income sharing and other inter-spouse transfers are acceptable tax planning, subject to quite limited exceptions.<sup>98</sup>

*Gift of company to political party* A donor who owns a suitable company might arrange that:

- (1) The donor gives the company to the political party.
- (2) The political party extracts the funds by way of dividend.

The gift at stage (1) qualifies for CGT hold-over relief; and the distribution at stage (2) would not be taxable, assuming the party is a company for tax purposes.

It seems that Labour arranged this in 2013, giving rise to a fit of indignation, or purported indignation, from the Tories. An open letter from George Osborne to Ed Milliband provided:

... the Labour Party has gone to great lengths to help your biggest donor, ... avoid paying tax on a political donation. ...

The Labour Party registered a donation of shares in JML worth £1.65 million in January 2013, from Mr John Mills. By making a donation in shares rather than as a single cash dividend, it has been reported that Mr Mills managed to avoid a potential tax charge of £724,710.<sup>99</sup> ...

As leader of the Labour Party, and given your previous statements on tax avoidance, such actions by your party appear to be directly at odds with your public statements.

Most importantly, will you now pass the amount of tax that has been

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97 Government of India, *Report of the Taxation Enquiry Commission* (1953-54), Vol II para 5.

98 See 92.1 (Non-dom/non-resident spouse).

99 This figure is wrong: it represents a tax rate of 44%. The effective rate of tax should have been 36.11% = £600k tax. Perhaps it is a typo. Perhaps it is irony. Perhaps no-one is intended to take the letter so seriously as to check the figures. If this is an indication of the tax advice given to Mr Osborne, it is rather worrying.

avoided to the Exchequer? As you say, this is money that is needed to fund vital public services such as the health service and our schools.<sup>100</sup>

What is one to make of this? I think any practitioner, or anyone who understood the tax background, would regard this as in the category of “sensible tax planning” or, perhaps, “ordinary” tax planning; in either case, well short of avoidance and opprobrium. The letter could be seen as just an example of debased political debate, meaningless playground insults whose object is just to knock the opposition. It could be taken as a case where “ordinary” tax planning is regarded as immoral. However, it may be regarded as an illustration of the difficulties which arise if one regards taxation as governed by moral principles distinct from black letter tax law. The letter might then be regarded as a rather subtle contribution to the political/moral debate. Perhaps there are elements of each of these.

#### 2.5.10 *Context of discussion*

It is possible to discuss tax-morality in a lofty, disinterested and high-minded way. What is the good life? What would Aristotle say?

But in practice discussion is invested with flaming indignation, hatred for those who benefit from or support perceived injustices. This is fed by a sense of superiority that we are not like these instruments and accomplices of evil. The result is moral panic, contempt and aggression.<sup>101</sup> There is a great and easily mobilised hostility to anything that can be represented as avoidance. The remedies proposed become ever more penal and more discretionary.

The debate sometimes suffers from profound bad faith or hypocrisy. Politicians accuse others of tax-immorality in order to attack their opponents. Or journalists do so to sell papers. A example is when the archive of Tony Benn was transferred to the British Library, under the acceptance in lieu scheme, which one might have thought as innocuous as any transaction could possibly be.<sup>102</sup>

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<sup>100</sup> 6 June 2013

<sup>101</sup> This is a danger to which any discussion of morality is subject: see Taylor, *A Secular Age* (2007) chapter 18.

<sup>102</sup> Reported by the Telegraph (4 Mar 2019) under the snide headline “Tories praise Tony Benn’s financial planning as donation of his archive knocks £210,000 off family’s tax bill”. The article shows some signs of a libel readers scrutiny, as it falls just short of an allegation of hypocrisy.

In 2021, it emerged that:

- (1) Tony & Cheri Blair had (in 2017) incorporated a company (the purchaser).
- (2) The purchaser acquired a BVI property company (holding office accommodation) from an unconnected non-resident company.
- (3) The purchaser liquidated the BVI company and so acquired the land, which was subsequently used for a trading business of Cheri Blair.

The (suggested) avoidance here was that SDLT was not payable, which it could have been if the purchaser had acquired the land directly rather than the BVI company!<sup>103</sup> Of course any practitioner would understand that:

- The choice between a company purchase and an asset purchase is one which Parliament has allowed, is not avoidance, and is so commonplace that no-one would have expected the matter to be dealt by a company purchase.
- The fact that this was a *BVI* company was irrelevant to the SDLT saving, as (more or less) the same saving would have applied to a purchase of a UK property company.<sup>104</sup>

“Move along, nothing to see here” - but that does not sell news or promote party politics.

### 2.5.11 Conclusion

In short, there is widespread disagreement about the starting point, not to mention finish line, when it comes to the concept of avoidance or on issues of morality in connection with tax avoidance. This should not be a surprise, since the same applies to many contemporary moral issues, for

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103 The Guardian, 5 Oct 2021 “Tony and Cherie Blair bought property via offshore firm and saved £300,000 in tax”.

104 In the case of a UK company the SDLT saving would have been slightly reduced by SDRT at the rate of 0.5%.

For a complete tax analysis further points need to be made.

There was also a tax downside to the arrangement as the purchaser acquired the historic acquisition cost of the BVI company; though that too could be avoided by an onward sale of the UK company rather than its asset.

Even the acquisition of the property by the BVI company should not be regarded as avoidance: Non-residents will (almost) always acquire non-residential investment property through a company - again from a UK tax viewpoint it makes no difference whether it is a BVI company or established elsewhere.

instance, assisted suicide. There is no tribunal to adjudicate arguments on morality, except the court of public opinion, which, as Ibsen observed, is an extremely mutable thing. But disapproval of avoidance, however understood, is now the norm. That that represents a major change of attitude is now forgotten. Changes in morality are accompanied by amnesia.

## 2.6 Tax Gap

Another thread in public debate is a vast estimate of the amounts involved. HMRC publish annual figures, with a catchy title, the “tax gap”.<sup>105</sup> This is said to be £35 billion, or 5% of tax liabilities, in 2021/22.<sup>106</sup>

Broken down, the HMRC figures are:

Amount £bn	Behaviour	Explanation
10.7	Failure to take reasonable care	
4.1	Criminal attacks	
4.7	Evasion	Excluding hidden economy
4.1	Legal interpretation	Taxpayer/tribunal disagree with HMRC on tax law (excluding avoidance) <sup>107</sup>
3.3	Non-payment	Tax written off as uncollectible
2.1	Hidden economy	Income undeclared/understated
5.4	[Non-careless] error	
<u>1.4</u>	Avoidance	
<u>35.8</u>	<u>Total</u>	

Statistics are only as useful and reliable as the definitions on which they are based. Most of these categories are vague, and assessment of the figures is, to say the least, challenging. I think a certain amount of scepticism is in order. There is a danger that spurious statistics may gain

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<sup>105</sup> I think this tabloid term originated in the US, where IRS have been measuring the Federal Tax Gap since at least 1993:

<https://www.irs.gov/statistics/irs-the-tax-gap>

<sup>106</sup> HMRC, “Measuring tax gaps 2023 edition, table 7.1

<https://www.gov.uk/government/statistics/measuring-tax-gaps>

<sup>107</sup> The concept is so arbitrary and subjective that it can fairly be described as ludicrous. CIOT rightly ask why it should be part of the tax gap at all.

currency and influence policy.<sup>108</sup>

The combination of disparate categories makes the total “tax gap” figure meaningless, but perhaps it is intended only for headline purposes. I write it with scare quotation marks.

IFS say:

we don’t know how much corporate tax is lost to the UK as a result of tax avoidance. This is partly because there is no accepted definition of exactly what constitutes ‘avoidance’ and partly because we lack full information about the activities of firms.<sup>109</sup>

Of course, the fact that an amount is unknown and unknowable does not mean that it is small or unimportant. I wonder if time spent guessing at figures is productive. It is however striking how tiny a part tax avoidance plays in the “tax gap” figures, 0.2% in percentage terms, compared to the attention it receives.

The IFS report continues:

Importantly, even if we knew that information and could calculate the tax lost to avoidance, it would not be right to assume that, were all avoidance opportunities to be completely removed, the UK would be able to collect that full amount. We would expect higher taxes to feed through, at least to some degree, to lower investment and changes in prices such that genuine UK profits may be lower. To the extent that the corporate tax affects prices or wages, or the location of firms’ activities (and therefore jobs), there may also be lower receipts from income taxes or VAT.

This is true for all taxes, but particularly for corporation tax:

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108 For a critique of the methodology, see Oxford University Centre for Business Taxation “The Tax Gap for Corporation Tax”, (2012)

[https://wayback.archive-it.org/org-467/20200808011019/http://eureka.sbs.ox.ac.uk/4428/4/TaxGap\\_3\\_12\\_12.pdf](https://wayback.archive-it.org/org-467/20200808011019/http://eureka.sbs.ox.ac.uk/4428/4/TaxGap_3_12_12.pdf)

The HMRC paper itself acknowledges at B3 that “there are sources of uncertainty and potential error”. (Formerly this read “many sources” but the *many* has been deleted.) The caveat is forgotten in the figures provided, which present a spurious precision, and in public discussion.

For the practical relevance of the data, see Mirrlees Review, *Dimensions in Tax Design* (2010), p.1132.

109 IFS, *Green Budget 2013* p.297

[https://ifs.org.uk/sites/default/files/output\\_url\\_files/gb2013.pdf](https://ifs.org.uk/sites/default/files/output_url_files/gb2013.pdf)

First, corporation tax is a particularly distortionary form of taxation that can work to reduce investment. This is especially the case for internationally mobile investments because firms will consider tax when choosing where to locate real activities...

Second, the ultimate incidence of corporate tax always lies with households and is borne either by the owners of capital (in the form of lower dividends), by workers (in the form of lower wages) or by consumers (in the form of higher prices). We do not know with any precision who is made worse off as the result of the corporation tax. However, estimates suggest that, because capital tends to be much more mobile than workers or consumers, a significant share of the burden of corporate tax tends to be shifted to domestic factors – and specifically labour. In other words, there is reason to believe that at least a part, and in some cases a large part, of the corporation tax that companies are subject to is ultimately passed on to workers in the form of lower wages.<sup>110</sup>

There is a certain irony in the second point, given the left's enthusiasm for corporation tax; I think most economists agree that the burden of corporation tax is generally borne by employees,<sup>111</sup> though not all. But all that matters in politics is that no-one *realises* who pays it.

## 2.7 Avoidance legislation 1955 critique

In 1955 the Royal Commission said:<sup>112</sup>

We are disturbed by the criticism that much of the anti-avoidance legislation is obscurely worded and drawn more widely than its purpose requires. ... We doubt if many lawyers could expound with confidence the effect of the 26 sections that make up Part XVIII of the [ITA 1952]. [The Royal Commission quoted the ToA definition of “power to enjoy” to illustrate the point, and continued:] It appears to us that, if the legislation in this field has to be expressed in this way, there is a danger

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110 IFS, *Green Budget 2013* p.290

[https://ifs.org.uk/sites/default/files/output\\_url\\_files/gb2013.pdf](https://ifs.org.uk/sites/default/files/output_url_files/gb2013.pdf)(footnotes omitted).

111 ETPF Policy Paper 1 “Who bears the burden of corporate income taxation?” (2015) European Economic and Social Committee, “The Role of Taxes on Investment to Increase Jobs in the EU – An Assessment of Recent Policy Developments in the Field of Corporate Taxes” (2019)

<https://www.eesc.europa.eu/sites/default/files/files/qe-03-19-343-en-n.pdf>

112 Cmd. 9474 para 1029

that our system is becoming delusive. For, while it presents the form of statutory control of the subject by Parliament, it means that in substance the assessment of the individual affected and the charge of tax upon him is not determined by law but by the decision of the [Revenue] ... we think that, now that the main lines of this legislation are to be regarded as fully developed<sup>113</sup> and the administration of them has had time to settle down, the opportunity should be taken in the course of the next few years to conduct an expert review of the enactments as a whole... The purpose of the review would be (a) to enquire to what extent, if any, the relevant legislation may have been shown, in the light of experience, to have been drawn too widely for its purpose,<sup>114</sup> (b) to recommend any modifications of the legislation that will make it shorter, briefer, and more precise.

Here are 4 critiques which have become familiar: obscurity, imprecision, provisions drawn too widely (“overkill”), and discretionary application.

Nowadays these critiques may be framed in terms of the Rule of Law.

## 2.8 The Rule of Law

### 2.8.1 What is “the Rule of Law”

There is a consensus on the Rule of Law. It is a constitutional principle.<sup>115</sup> It is one of four fundamental British values.<sup>116</sup>

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113 With hindsight, we see that anti-avoidance legislation was then in its infancy. The 26 sections complained of covered the settlor-interested trust code, ToA and transfer of income streams, with a concision which today one could not dream of.

114 The decision in *Vestey* subsequently addressed one of the concerns at (a).

115 Section 1 Constitutional Reform Act 2005.

116 The other three are democracy, liberty and tolerance, according to the Government “Prevent Strategy”, Cm 8092 (2011), para 6.58 where opposition to these values is the definition of “extremism”. The point is repeated in the Government “Counter-Extremism Strategy” Cm 9148 (2015): “Extremism is the vocal or active opposition to our fundamental values, including democracy, the rule of law, individual liberty and the mutual respect and tolerance of different faiths and beliefs.”

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/97976/prevent-strategy-review.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97976/prevent-strategy-review.pdf)

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/470088/51859\\_Cm9148\\_Accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/470088/51859_Cm9148_Accessible.pdf)

It is also one of the six values on which the EU is founded: Article 2 TEU provides: “The Union is founded on the values of respect for human dignity, freedom,

There is no consensus on the meaning of the expression. It is an emotionally charged label for a set of principles, or sub-principles, the content of which is contested. This may not be a bad thing: consensus on the importance of the Rule of Law is only possible because of dissensus as to its meaning. There is a certain irony in that the principle which forbids vague legislation is itself difficult to pin down. But the same is true of other cherished political virtues, such as democracy. A discussion needs a book to itself;<sup>117</sup> but as the term is used in different ways, it is best not to use it without some explanation of how it should be, or may be, understood. This section draws on a paper by Craig, “The Rule of Law” prepared for the House of Lords Constitution Committee.<sup>118</sup>

There is a consensus that the Rule of Law includes at least the following minimum requirements.<sup>119</sup>

Craig says:

*The Rule of Law and Lawful Authority*

A core idea of the rule of law to which all would subscribe is that the government must be able to point to some basis for its action that is regarded as valid by the relevant legal system. Thus in the UK such action would commonly have its foundation in statute, the prerogative or in common law power.

It follows that tax should be imposed by parliament through legislation.

Craig continues:

*The Rule of Law and Guiding Conduct*

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democracy, equality, the rule of law and respect for human rights...” But perhaps that matters less in the UK after Brexit.

117 Raz, *The Authority of Law* (2nd ed., 2009), ch. 11 (“The Rule of Law and its Virtue”); Tamanaha, *On the Rule of Law* (1<sup>st</sup> ed, 2004); Pech, “The Rule of Law as a Constitutional Principle of the EU” (2009)

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1463242](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1463242)

For the Rule of Law in a tax context, see Freedman & Vella, “HMRC’s Management of the UK Tax System: The Boundaries of Legitimate Discretion” Legal Research paper No 73/2012 (2012)

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2174946##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2174946##)

118 <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15115.htm>

119 This may be referred to as a thin, formal, procedural or narrow understanding of the Rule of Law. Some add Human Rights to the list. I would have thought Human Rights is conceptually at least best regarded as a separate matter from Rule of Law; though ultimately Rule of Law is a term which one might define as one wishes.



A further important aspect of the rule of law is that the laws thus promulgated should be capable of guiding ones conduct in order that one can plan ones life.

It is from this general precept that Raz deduced a number of more specific attributes that laws should have in order that they could be said to comply with the rule of law. All are related to the idea of enabling individuals to be able to plan their lives. The 'list' includes the following

- (1) laws should be prospective, not retrospective;
- (2) they should be relatively stable;
- (3) particular laws should be guided by open, general and clear rules;<sup>120</sup>
- (4) there should be an independent judiciary;
- (5) there should be access to the courts;
- (6) the discretion which law enforcement agencies possess should not be allowed to undermine the purposes of the relevant legal rules.

I think these are best regarded as distinct principles, albeit with one underlying rationale.

Although not standard usage, in this work I write *Rule of Law* with initial capitals. It is not exactly a technical expression, that suggests a precision of meaning; but the capitals do indicate that it carries considerable intellectual baggage. It may also be helpful sometimes to specify which aspect (or sub-rule) of the Rule of Law is in point; eg one might refer to Rule of Law/certainty.

### 2.8.2 *Rule of Law v. other values*

The Rule of Law is something to boast of,<sup>121</sup> and a feature which makes the UK an attractive place to reside, invest or litigate. The Judicial Office boast:

The Rule of Law represents the cornerstone of liberty and democracy, and is one of the main reasons that the UK attracts global businesses and investors.

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120 The OUCBT paper spells out an implication of this: "The rule of law requires that taxpayers are able to determine the tax consequences of their actions in advance."

121 The boast is an old one. See Blackstone's *Commentaries on the Laws of England* (1765) vol 2 chap 37: "a country like this, which boasts of being governed in all respects by law and not by will"; and contrast John Adams "A government of laws, and not of men" (1780).

Laws in the UK are:

- public (so that everyone knows what they say)
- certain (so that everyone knows where they stand)
- prospective rather than retrospective (so that they cannot be broken before they exist)<sup>122</sup>

The reality may not match the rhetoric. There is nothing in the idea of government by majority to show that the majority will respect the Rule of Law. Rule of Law principles are challenged, or breached, in various aspects of taxation,<sup>123</sup> but the conflict in the context of tax avoidance is particularly deep. Anti-avoidance is facilitated and indeed characterised by features which breach the Rule of Law:

- (1) Legislation which is:
  - (a) obscure
  - (b) vague
  - (c) retrospective
- (2) Administrative discretion, which falls into two types:
  - (a) expressly conferred
  - (b) a consequence, unavoidable but no doubt sometimes intended and welcomed, of obscure or vague legislation
- (3) Soft tax law, ie rules (which may be described or misdescribed as guidance or statements of practice) laid down by HMRC without authority of Parliament. This is typically combined with administrative discretion, both because the terms of guidance in practice are generally vague, but more fundamentally, because HMRC are not usually bound by their guidance and may withdraw retrospectively.
- (4) Overkill is not (or at least, not necessarily) a breach of the Rule of Law. However in practice it is generally accompanied by administrative relaxation, which breaches Rule of Law principles because it is not laid down by Parliament, and because it confers HMRC discretion.

It is desirable to recognise that there is a *trade-off* between conflicting policy aims, the Rule of Law and the combat of avoidance, rather than to

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122 “English Law, UK Courts and UK Legal Services after Brexit The View beyond 2019”.

123 See for instance the problems raised by *Lobler* at 2.5.2 (Judicial views).

fudge the matter by saying, or pretending, that these matters are consistent with the Rule of Law. Indeed there is a set of trade-offs, because the Rule of Law is a set of rules. For instance, if a TAAR has a clearance procedure, then the ability of taxpayers to plan with confidence is increased, which supports one aspect of the Rule of Law; but HMRC discretion is also increased, which breaches another aspect.

Then one can face the choices aware of the consequences of one choice or another. Craig says:

... the rule of law in the above sense is only one virtue of a legal system, and may have to be sacrificed to attain other desired ends. We may feel that the rule of law virtues of having clear, general laws should be sacrificed if the best or only way to achieve a desired goal is to have more discretionary, open-textured legal provisions. This may be so where it is not possible to lay down in advance in the enabling legislation clear rules in sufficient detail to cover all eventualities. Modifications to the rule of law in this manner are not somehow forbidden or proscribed. Given that it is only one virtue of a legal system it should not prevent the attainment of other virtues valued by that system.

In 1974, Lord Simon put the Rule of Law above the need to combat tax avoidance:

Disagreeable as it may seem that some taxpayers should escape what might appear to be their fair share of the general burden of national expenditure, it would be far more disagreeable to substitute the rule of caprice for that of law.<sup>124</sup>

The cure could be worse than the disease.<sup>125</sup> In contemporary debate it is rare to find a statement in such strong terms. An exception comes from the Joint Committee on Statutory Instruments, discussing an arrangement-disregard TAAR in the following form:

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124 *Ransom v Higgs* 50 TC 1 at p.94. A similar spirit informed the decision in *Vestey v HMRC* in 1979; see 49.2 (Charge on transferor).

125 Nietzsche puts the point poetically: “Wer mit Ungeheuern kämpft, mag zusehn, dass er nicht dabei zum Ungeheuer wird. Und wenn du lange in einen Abgrund blickst, blickt der Abgrund auch in dich hinein.” (He who fights monsters should be careful lest he become a monster. And if you gaze into an abyss, the abyss will also gaze into you).

If—

- (a) a person enters into any arrangements; and
- (b) the main purpose, or one of the main purposes, of the person in entering into the arrangements is to avoid any obligation under these Regulations,

these Regulations are to have effect as if the arrangements had not been entered into.<sup>126</sup>

The Committee said:

... people who are satisfied that the terms of the regulations do not apply to them will be at constant risk of HMRC initially concluding that they have attempted to avoid the regulations and that the regulations therefore apply anyway – that being the default position in the absence of an appeal. It is unclear that such a result, which breaches the principle of certainty, would be within the contemplation of enabling powers that do not contain express provision for the type of anti-avoidance provision used.

The fact that Parliament has, notably in Part 5 of the Finance Act 2013, [the GAAR] enacted anti-avoidance provisions which are similarly imprecise or discretionary is irrelevant to the security of such provisions in subordinate legislation, in the absence of express enabling powers. The Committee accordingly reports regulation 21 for a doubt as to whether it is *intra vires*.<sup>127</sup>

But this view did not commend itself to legislators. The regulation which they criticised as possibly *ultra vires* remains in the legislation. Identical wording (where the same criticisms might be made) is found in other regulations.<sup>128</sup> The wording is now common in primary legislation (where

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126 Reg 21 The Taxes (Base Erosion and Profit Shifting) (Country-by-Country Reporting) Regulations 2016.

127 <http://www.publications.parliament.uk/pa/cm201516/cmselect/cmstatin/461-ix/46103.htm#inst01>

The Committee report was published after the provision came into force.

128 Reg 23 International Tax Compliance Regulations 2015. The argument that reg. 23 is *ultra vires* is weaker than in the case of the regulation considered by the Joint Committee, because unlike the position for the 2016 regulations, CRS authorises and requires “rules to prevent ... practices intended to circumvent the reporting and due diligence procedures”. See 125.35 (CRS TAAR). Perhaps the argument is still tenable. Perhaps reg 23 will be read purposefully and somewhat restrictively.

the ultra vires objection does not arise, but the Rule of Law/certainty objection is the same).

Tax avoidance is an issue of international tax as well as domestic tax, and in the US, the Rule of Law is, perhaps, more highly valued.<sup>129</sup> Bob Stack (US Treasury Deputy Assistant Secretary for International Tax Affairs) criticised OECD BEPS reforms, and UK diverted profits tax, for breaching Rule of Law/international tax law principles:

Rather than producing administrable rules, the BEPS negotiators seemed to be opting instead for giving wide discretion to tax officials.<sup>130</sup> This brought into question the whole international tax system. Do the international tax rules even matter anymore?" Do we really need a standard setter to say, 'Tax administrators can use the pornography test to catch tax avoidance. We know it when we see it. And we will get you if we want to'?...  
[Diverted Profits Tax] ... took us further down the road in which a taxpayer is at the mercy of whatever a tax auditor decides is the right amount to pay. What made this particularly perturbing was that these measures emanated not from the usual suspects such as India, China, Brazil and South Africa, but from strong traditional residence countries [UK and Australia] that happened to be two of our closest friends.<sup>131</sup>

### 2.8.3 Breach of Rule of Law

Craig says:

The fact that a law is vague or unclear, and that it therefore provides little by way of real guidance for those affected by it, will not lead to a statute being invalidated in the UK.

In relation to secondary legislation (statutory instruments) a court could strike down provisions on the grounds of breach of the Rule of Law (which might be said to be ultra vires, in the absence of clear authority in the authorising act of parliament). In relation to primary legislation, a court could issue a statement of incompatibility. But in a tax context this has not happened.

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129 Though it is difficult to assess the validity of such a broad generalisation and the statement became more doubtful under the former Trump administration.

130 Stack probably had in mind the PPT; see 107.8 (Principal purpose test). For another example, see 9.18 (Tie-breaker: mutual agreement).

131 Speech to OECD International Tax Conference, 2015.

In other words, the Rule of Law lacks full justiciability. Perhaps ironically, the Rule of Law is not in the strict sense a rule of law. To adopt Dworkin's distinction, it is a principle and not a rule. As such it may encourage a court to interpret a statute more narrowly, in favour of the individual. In this way, however deeply, inchoately, and inconsistently, Rule of Law considerations do to some extent affect case law outcomes<sup>132</sup> and perhaps, tax policy (though I am less sure about that.)

#### 2.8.4 *Is tax Rule of Law compliant*

In earlier editions of this work, I said:

The UK tax system is largely based on the rule of law rather than informal practice and discretion.

By 2014, as TAARs and other anti-avoidance were multiplying, I qualified the boast, saying: “that is less the case than formerly”.<sup>133</sup>

In 2014 the City of London Law Society said:

2.4 ... tax policymakers are insufficiently conscious of the importance of the rule of law – that is, the constitutional right of a citizen to determine the law applicable to him at any given date. Related to this is a similar problem of lack of respect for legislation as the only proper source of law, and over-reliance on guidance.<sup>134</sup>

In 2015 the Law Society made the same point:

... in recent years, there has been a tendency on the part of government to allow the rule of law in taxation to risk being eroded in the interests of making the executive more effective, in particular in seeking to combat avoidance...

The question “is tax Rule of Law compliant” seems meaningful but as the Rule of Law is a set of rules, it is not one question but a set of questions. In relation to each of the rules, the question is not *whether* tax is Rule of

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132 In the context of rules which would prevent access to a Court, the Rule of Law affects outcomes more directly; see for example *Haworth v HMRC* [2019] EWCA Civ 747 at [66].

133 Kessler, *Taxation of Non-Residents and Foreign Domiciliaries* (13th ed., 2014) para 2.4 (The Rule of Law).

134 Response to OTS competitiveness review (2014)  
No-one appears to have taken any notice of the Law Society's lobbying.

Law compliant but *to what extent*. To answer that question fully, one would test every rule of tax law against each of the principles of the Rule of Law set out above. As tax is vast, discussion must be selective and impressionistic.<sup>135</sup>

In the broadest outline, then, to what extent is it the case that:

*Taxpayers are able to determine the tax consequences of their actions in advance?* Increasingly not, obscurity, vagueness and overkill are rife, mitigated by HMRC guidance or concession mislabeled as guidance.<sup>136</sup> Most supporters of the GAAR deny or downplay its uncertainty, but, significantly, Jim Harra, Director General, Business Tax at HMRC applauded it:

It will also create an additional level of uncertainty for the promoters and users of schemes. I believe that that will be a deterrent.<sup>137</sup>

Even the Supreme Court have said something similar. In *Hurstwood Properties v Rossendale BC*:<sup>138</sup>

The value of legal certainty does not extend to construing legislation in a way which will guarantee the effectiveness of transactions undertaken solely to avoid the liability which the legislation seeks to impose.

But we return to a conventional view in *HMRC v Fisher*:<sup>139</sup>

At some points [HMRC] seemed to be suggesting that this degree of uncertainty about when and to whom the charge applied was a positive virtue of the drafting. The provision was, he said, designed to discourage people from moving assets abroad with a tax avoidance

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135 For the question of Rule of Law compliance in a general (non-tax) context, see the Justice report, “The State We’re in: Addressing Threats & Challenges to the Rule of Law” (2023)

<https://justice.org.uk/the-uks-longstanding-commitment-to-the-rule-of-law-is-under-grave-threat-according-to-landmark-report-from-justice/>

136 Examples include: (1) s.30 FA 2014 (avoidance by transfer of corporate profits); (2) TAARs, which have become standard in new legislation, especially those of the tax-advantage type. See for instance, 65.21 (Capital-loss TAAR).

137 Hansard, Public Accounts - Minutes of Evidence (6 December 2012)

<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/788/121206.htm>

138 [2021] UKSC 16 at [61].

139 [2023] UKSC 44 at [76].

purpose. The problem with having a bright line is that people devise a way round it. The penal provision works better to achieve its aim if taxpayers are unable to know whether they would be caught or not. HMRC could then assess them to tax on the income of the overseas person, leaving the taxpayer to try to convince HMRC or the tribunal on appeal that they were not transferors. That is, in my judgment, an improper argument for HMRC to run. It has a flavour of the same unconstitutional approach to the enforcement of these provisions that was so strongly deprecated in *Vestey*. I agree with [the taxpayer's] submission in response when he said that the law cannot be left in some unclear state "just to scare people".

*Is tax imposed by Parliament or HMRC?* Increasingly the latter.

*Is there a right of appeal to a Court?* Not quite always.<sup>140</sup>

*Is tax law retrospective?* Sometimes, though I do not detect a trend towards increasing retrospectivity.

*Is tax law stable?* No, though it never has been.

Breaking down the issues under these separate heads illustrates what a disparate group of principles fall within the concept of the Rule of Law. I doubt whether "the Rule of Law" is a helpful label in the context of tax law. It conflates disparate issues and so confuses discussion.<sup>141</sup> While it gives a critique gravitas - the Rule of Law is a powerful slogan - it lies at a level well above the pragmatism that is said to characterise an Anglo-Saxon approach to large philosophical, political and economic issues.

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140 For instance: (1) The Code of Practice on Taxation for Banks; there is no right of appeal against HMRC determination of a breach of the code. (2) Follower notices: there is no right of appeal against the issue of such a notice on a number of important grounds.

141 The point is not limited the context of tax. For instance, a summary of the Justice report "The State We're In: Addressing Threats & Challenges to the Rule of Law" (2023) provides:

"... the UK's reputation for upholding the rule of law is under grave threat. In practice we see a palpable reduction in access to justice; inadequate progress in tackling inequalities; a disregard for judicial oversight and independence, including verbal attacks on the profession; and an overall deterioration of the quality of our law-making."

Five distinct matters are mentioned here, and the reader may agree that each is a cause of concern. But does it help to consider them as one item under the rubric of the Rule of Law? They have nothing much in common.



However that may be, we are not, for the most part, as disturbed about these problems as was the Royal Commission in 1955. Should we be? Discuss.

## 2.9 Retrospective tax legislation

There is general agreement that the Rule of Law includes a prohibition of retrospective legislation.

Although a sub-topic of the Rule of Law, the topic deserves a separate discussion. A full discussion requires a book to itself.<sup>142</sup>

### 2.9.1 *Meaning of retrospective*

It seems to me that retrospectivity is best considered as a matter of degree, not a matter of yes/no, either/or. Legislation not retrospective in form may be retrospective in effect, if it operates by reference to arrangements carried out in the past, and/or lacks fair and appropriate transitional provisions. In assessing whether (or, better, the extent to which) a provision is retrospective, one should have regard to the object of the prohibition on retrospective legislation, which is that a person should be reasonably able to plan their affairs on the basis of what the law says. In this sense, legislation backdated to the date of an announcement of a proposed change in the law is not retrospective, or at least not objectionably so.

On this analysis, to determine whether a provision is retrospective is an evaluative exercise. So those defending legislation can and generally do contend, with varying degrees of plausibility, that the relevant provision is not retrospective.<sup>143</sup>

The issue does not usually arise in a justiciable context. We are in the realm of politics, not law.

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142 For an illuminating discussion of the policy issues in a US context, see Shaviro, *When Rules Change* (1<sup>st</sup> ed, 2000). UK taxpayers may on this point look with envy to the USA, where a norm opposing retrospective legislation is “strongly rooted in popular sentiment, legislative practice, and perhaps even the Constitution as the courts are likely to interpret it” (p.104).

143 See for instance HM Treasury, “Section 95 of the Finance Act 2019: report on time limits and the charge on disguised remuneration loans” (March 2019) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/789160/DR\\_loan\\_charge\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/789160/DR_loan_charge_review_web.pdf)

### 2.9.2 *Retrospective legislation: Extent*

It is perhaps only a slight exaggeration to say that retrospective tax legislation has become a matter of routine, having been applied in particular to a somewhat arbitrary selection of tax avoidance schemes. Examples include:

Topic	Date	See para
<i>Retrospective reversal of avoidance schemes:</i>		
DT relief for partnership	1987	84.25
s.23 FA 2012 (loan relationships)	2012	<i>Not discussed</i>
<i>Provisions retrospective in effect:</i>		
Pre-owned assets	2004	82.39.2
IHT: former Accumulation & Maintenance trusts	2006	<i>Not discussed</i>
Aspects of the ITA remittance rules	2008	1.9.3
Disallowance of debts for IHT	2013	79.36.2

Generally, I think the norm requiring commencement rules to avoid retrospective effect has weakened since about 2000, perhaps in line with changed attitudes to tax avoidance.

### 2.9.3 *Retrospective legislation: Protocol*

In Budget 2011, the coalition Government published a statement on retrospective legislation, grandly entitled a “Protocol” with a capital P. The most important part provides:

The Government has made clear its aim to strike the right balance between

[1] restoring the UK tax system’s reputation for predictability, stability and simplicity (!) and

[2] preserving its ability to protect the Exchequer by making changes where necessary.

In particular, changes to tax legislation where the change takes effect from a date earlier than the date of announcement will be wholly exceptional.<sup>144</sup>

The attempt to formulate the principles behind a decision to enact retrospective legislation is to be applauded. But the sanction (if any) for

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<sup>144</sup> [http://webarchive.nationalarchives.gov.uk/20130129110402/http://cdn.hm-treasury.gov.uk/2011budget\\_taxavoidance.pdf](http://webarchive.nationalarchives.gov.uk/20130129110402/http://cdn.hm-treasury.gov.uk/2011budget_taxavoidance.pdf)

ignoring the protocol is political only.

The 2011 statement does not purport to bind future governments. The Cameron administration (2015 - 2016) did not resile from it, but the extent to which the current or subsequent administrations will follow it remains to be seen. The protocol has perhaps shifted political debate from whether or not legislation is justified to debate on whether or not legislation is retrospective, but it is doubtful whether it has had much if any effect on the outcome.

#### 2.9.4 *Retrospective legislation: Validity*

The Rule of Law is not justiciable as such and so neither is the restriction on retrospective legislation. Human Rights challenges have not been successful.<sup>145</sup> The protocol has not changed this. That is self-evident, but if authority is needed:

The Protocol was an extra-statutory announcement or promise made by the government. As such, it operated: in the realm of politics, not of the courts, and the question whether the government should be held to such a promise is a political rather than a legal matter... The sovereignty of Parliament cannot be confined by extra-statutory promises like the Protocol.<sup>146</sup>

I think this is as it should be: the content of legislation is in principle a matter for parliament and not for the courts.

#### 2.9.5 *Retrospective legislation: Politics*

Various reasons have been given to justify retrospective legislation.

One is that it concerns an avoidance scheme which will fail (or so the Government believe). If that is true, the legislation is unnecessary; if not (and it is generally debatable) it is not a good reason.

Another is that it concerns an abusive avoidance scheme (however that flexible term may be understood). Whether that justifies retrospective legislation is ultimately a political question on which views differ depending on how much one values the Rule of Law. It is arbitrary and unfair in that a few particular schemes are retrospectively stopped and

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<sup>145</sup> See *Huitson (R, oao) v HMRC* [2011] STC 1860; *APVCO 19 Ltd (R, oao) v HM Treasury* [2015] EWCA Civ 648; *Zeeman v HMRC* [2020] EWHC 794 (Admin).

<sup>146</sup> *APVCO 19 Ltd (R, oao) v HM Treasury* [2015] EWCA Civ 648 at [58].

others – no less elaborate, artificial and abusive – are not. Pragmatists (to whom the Rule of Law is of little interest) should bear in mind that retrospective legislation increases the “legal risk”, a measure under which the UK falls low on international surveys, and the lowering of the UK’s reputation in that regard has a significant albeit intangible cost. I suspect major factors in picking on some arrangements may include salience, politics, and the amount of money involved.

#### 2.9.6 *Retrospective relieving legislation*

Retrospective legislation has also become common to provide relief for unintended charges under (what the need for retrospective legislation shows to be) ill thought out legislation. The policy issues are different here. So far as retrospective legislation favours the taxpayer, most would regard it as unobjectionable on Rule of Law grounds; even to the Rule of Law purist, it is less objectionable than the alternative of extra-statutory concession. But the need for it on a regular basis should cause concern about the quality of the tax legislation process.

#### 2.9.7 *Retrospective legislation: Future*

How often will retrospective legislation be used in the future? What advice can anyone give to taxpayers seeking to know their position? Prior to the enactment of the GAAR, I said:

Much depends on the politics of the day, but I guess that retrospective legislation will continue to be a rare response; a popular scheme carried out by many taxpayers and involving larger sums is certainly more at risk than others.<sup>147</sup>

The compatibility of the GAAR with the Rule of Law is open to debate, on the grounds of vagueness in particular. But one positive consequence may be (and should be) at least to restrict the practice of retrospective anti-avoidance legislation; wholly retrospective legislation should less often be necessary. But effectively retrospective legislation, in the form of unfair commencement rules, will no doubt continue.

### 2.10 Naming and shaming

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147 Kessler, *Taxation of Non-Residents and Foreign Domiciliaries* (7<sup>th</sup> ed., 2008), Vol.1

“Naming and shaming”: The alliteration is irresistible, and for some reason sounds more reputable than just “shaming”, which is what this topic is about.

The expression covers a variety of arrangements. I distinguish between statutory shaming, discussed elsewhere,<sup>148</sup> and media shaming, discussed here.

The OUCBT paper provides:

... searching for individual or corporate villains will not assist in remedying the underlying problems...

Even if public naming and shaming influences a few taxpayers in the public eye to impose their own voluntary constraints, it will not necessarily affect the worst avoiders, and may even encourage some non-compliance from those who feel that “everyone is at it”. Only understanding the flaws in the tax system and working on serious changes can give long-term results....

Even if that were to have an effect on one taxpayer it would not tackle the underlying issues.

No-one has taken any notice of that!

Media shaming is at present common for various purposes (more than one may be present at the same time):

- (1) In marketing: To sell newspapers with exposures of celebrities who have been involved in tax avoidance schemes.<sup>149</sup>
- (2) In politics: To knock the opposition by alleging that politicians, or other party supporters, are guilty of tax avoidance. In this respect, anything goes and some stories have been farcical. For instance, Peter Mandelson was berated for taking a loan from a UK company<sup>150</sup> and Ed Miliband was accused of avoiding tax by means of a deed of variation.<sup>151</sup> The allegations are so off-target as to cast doubt the good faith of those who make them and newspapers which uncritically

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148 See 123.53 (Public list of defaulters).

149 Typically film schemes, as the names of members of the LLPs concerned are in the public domain.

150 <http://www.theguardian.com/politics/2015/jan/27/peter-mandelson-400000-pound-tax-free-loan> The Guardian later amended its website to concede that the loan had been wrongly described as tax-free.

151 Leading to a gibe in the Spring 2015 budget announcing a policy review of deeds of variation. The Guardian rightly asked: what came first – the policy or the joke?

promote them.

- (3) As a scandalisation technique, to promote the view that avoidance is immoral; often combined with juxtaposition of avoidance and evasion and the suggestion that there is little or no difference.

When these allegations are made it is impossible to defend oneself.

So public debate is not uninformed but misinformed. It is a yeasty mingling of dimly understood facts with vague but deep impressions, and images, half real, half fantastic. It has more than its fair share of misunderstanding and jejune polemics.

In these circumstances, media shaming may easily lead away from the Rule of Law. In 2012, Starbucks paid £20m to HMRC following a threat to occupy its cafes.<sup>152</sup> If one calls that payment “taxation” at all, it was certainly not taxation imposed by law. A hostile commentator would call this taxation by mob rule. Google and Amazon, who do not have public premises vulnerable to the same threat, have not had to pay similar sums. Perhaps the point was understood, as the campaign was not repeated.

The reader may agree with the journalist Rachel Cooke:

I’m not saying that shame doesn’t have its place ... We should want others to think well of us. But ... it can be a terrifyingly blunt instrument, a cudgel not a scalpel. Wield it too enthusiastically, and the collateral damage is likely to be both grave and enduring.

## 2.11 EU tax haven blacklist

### 2.11.1 “Non-cooperative jurisdictions”

EU publish a list of “non-cooperative jurisdictions for tax purposes”. The current list is set out in Annex 1 of 2020/C 64/03. This provides a list of 12 tax havens, and the reasons they are on the list:

#### 1. American Samoa

American Samoa does not apply any automatic exchange of financial information, has not signed and ratified, including through the jurisdiction they are dependent on, the OECD Multilateral Convention on Mutual Administrative Assistance as amended, did not commit to apply the BEPS minimum standards and did not commit to addressing these issues.

#### 2. Cayman Islands

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<sup>152</sup> Ironically, the post-tax cost of the payment would have been diminished as it should in principle be deductible in computing taxable profits.

Cayman Islands does not have appropriate measures in place relating to economic substance in the area of collective investment vehicles.

### **3. Fiji**

Fiji is not a member of the Global Forum on transparency and exchange of information for tax purposes ('Global Forum'), has not signed and ratified the OECD Multilateral Convention on Mutual Administrative Assistance as amended, has harmful preferential tax regimes, has not become a member of the Inclusive Framework on BEPS or implemented OECD anti-BEPS minimum standard, and has not resolved these issues yet.

### **4. Guam**

Guam does not apply any automatic exchange of financial information, has not signed and ratified, including through the jurisdiction they are dependent on, the OECD Multilateral Convention on Mutual Administrative Assistance as amended, did not commit to apply the BEPS minimum standards and did not commit to addressing these issues.

### **5. Oman**

Oman does not apply any automatic exchange of financial information, has not signed and ratified the OECD Multilateral Convention on Mutual Administrative Assistance as amended, and has not resolved these issues yet.

### **6. Palau**

Palau does not apply any automatic exchange of financial information, has not signed and ratified the OECD Multilateral Convention on Mutual Administrative Assistance as amended, and has not resolved these issues yet.

### **7. Panama**

Panama does not have a rating of at least 'Largely Compliant' by the Global Forum on Transparency and Exchange of Information for Tax Purposes for Exchange of Information on Request and has not resolved this issue yet.

### **8. Samoa**

Samoa has a harmful preferential tax regime and has not committed to addressing this issue.

Furthermore, Samoa committed to comply with criterion 3.1 by the end of 2018 but has not resolved this issue yet.

### **9. Seychelles**

Seychelles has harmful preferential tax regimes and has not resolved these issues yet.

### **10. Trinidad and Tobago**

Trinidad and Tobago does not apply any automatic exchange of financial information, has a 'Non-Compliant' rating by the Global Forum on Transparency and Exchange of Information for Tax Purposes for Exchange of Information on Request, has not signed and ratified the OECD Multilateral Convention on Mutual Administrative Assistance as amended, has harmful preferential tax regimes, and has not resolved these issues yet.

### **11. US Virgin Islands**

US Virgin Islands does not apply any automatic exchange of financial information, has not signed and ratified, including through the jurisdiction they are dependent on, the OECD Multilateral Convention on Mutual Administrative Assistance as amended, has harmful preferential tax regimes, did not commit to apply the BEPS minimum standards and did not commit to addressing these issues.

### **12. Vanuatu**

Vanuatu does not have a rating of at least 'Largely Compliant' by the Global Forum on Transparency and Exchange of Information for Tax Purposes for Exchange of Information on Request, facilitates offshore structures and arrangements aimed at attracting profits without real economic substance and has not resolved these issues yet.

The 2020 list is limited in number; from a UK perspective the only significant entry is Cayman, and I doubt if it will stay there very long. The immediate significance of being on this list is relatively small,<sup>153</sup> but it seems to have had some success in encouraging change.

Scotland will not make a coronavirus-related grant to a company with a parent/subsidiary in these jurisdictions.<sup>154</sup> Clearly, there will not be many, if any, grants refused as a result of that particular provision, though it may form part of a more general trend.

How will this approach of ostracism/penalisation of tax havens develop in the future? This is a question of international politics, not law.

## 2.12 Avoidance: Multinationals

Much attention has been given to multinational companies. The Public Accounts Committee looked at Starbucks, Amazon and Google. The verdict was guilty.<sup>155</sup>

It is not possible to comment sensibly on the taxation of a multi-national group without knowing the relevant facts, which are not usually in the public domain. The claim that these companies have avoided UK corporation tax is often based on the size of their UK sales or UK staff, set against the corporation tax actually paid. But all well-informed commentators know that corporation tax is not a tax on sales, or the size of an establishment, and large sales/staff does not mean large profits. The

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153 See Thornton, "The Cayman Islands and the EU 'blacklist' Tax Journal, 6 Mar 2020.

154 Para 16 sch 4 Coronavirus (Scotland) (No.2) Act 2020.

155 Or was it? "We were not convinced that their actions, in using the letter of tax laws both nationally and internationally to immorally minimise their tax obligations, are defensible." Public Accounts Committee 19<sup>th</sup> report 2012, para 12. If the convoluted wording was intended to reflect a note of caution, it was lost in the public debate. But perhaps the obfuscation is just the dialect of politics. The PAC returned to this theme in Ninth Report of Session 2013–14 "Tax Avoidance–Google". A PAC hearing is not, perhaps, well suited to ascertaining the facts; it is not possible to ascertain from this whether the complaint of the PAC is that Google have been conducting successful or unsuccessful tax avoidance.



OUCBT paper provides:

Starbucks and Facebook ... have been criticized for not paying tax where they are making sales, but sales are not the basis for the corporation tax, so this alone is no cause for criticism of the companies concerned. We could argue that the tax base should change, but unless and until that occurs, the fact that there is a high turnover but no taxable profit is not in itself an indicator that the taxpayer is behaving in an unreasonable way.

Likewise the fact that relatively little CT is paid proves nothing. The OUCBT paper provides:

The fact that there is little or no tax payable is not, however, conclusive evidence that there is effective or ineffective avoidance. In some of these cases, these companies are simply operating in accordance with incentives created by the international tax system and by domestic governments trying to attract economic activity into their jurisdictions. This the governments may do for non-tax reasons, or because this activity gives rise to forms of taxes other than those which are not being collected. ...

The IFS say:

A low corporate tax bill is not in itself therefore evidence of tax avoidance. Even if income appears high, there may be genuinely low UK taxable profits if a firm has relatively high current expenditures or can offset the effects of large investment expenditures or losses. The UK tax bill can also be appropriately relatively low compared with declared income if that income is the result of genuinely non-UK activities.

HMRC make the same point:

Globalisation means that multinationals have the opportunity to structure their business to take advantage of beneficial tax rules in different countries. Provided that this results in profits being taxed in line with where genuine economic activity is carried on, this does not amount to tax avoidance. ... In broad terms, companies are required to pay corporation tax in the country where they carry on the economic activity that generates their profits, not where their customers are located.<sup>156</sup>

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156 HMRC, "Taxing the profits of multinational businesses" Issue Briefing (2012)  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/89](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/89)

Unusually, the facts are known in relation to Apple as a result of US congressional hearings (I suspect, better conducted than the UK equivalent). These have been well analysed by Antony Ting.<sup>157</sup> In short, there is no reason to think that Apple have avoided *UK* tax. The group has avoided Irish/US tax by Irish/US hybrid entities; and, perhaps, it has reduced Irish tax by informal transfer pricing agreements with the Irish Revenue.

### 2.12.1 *Transfer pricing*

It is often said that multinationals engage in avoidance through transfer pricing. For instance, Christian Aid say:

There is debate about the extent to which companies engage in trade mispricing (artificially suppressing the income they earn from activities such as resource extraction, to reduce payments to government), but few would doubt that it has a significant impact on the incomes of governments in the global South.<sup>158</sup>

Transfer pricing is not strictly avoidance. It is in principle in the category of ineffective avoidance:

We may well question whether the transfer pricing rules are adequate, ... but these are considerations relating to tax policy reform and not to tax avoidance.

The fundamental problem is not terminology, but that the facts needed to assess these claims are not in the public domain. Robert Maas says:

The Public Accounts Committee believes that Starbucks overpays for its coffee. I am not an expert on the economics of coffee, but I am a bit puzzled that the PAC members consider themselves sufficiently knowledgeable in this area to be able to pass judgment (sorry, to express scepticism).

The committee thinks that a 16.67% margin to a company that sources and buys coffee throughout the world, exercises quality control and works with local farmers, is excessive. Personally, I do not but then I

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*030/profits-multinationals.pdf*

157 Ting, “iTax—Apple’s International Tax Structure and the Double Non-Taxation Issue” [2014] BTR 40. See 90.1 (Hybrid entities).

158 Christian Aid, “Tax for the common good (2014)

don't have any expertise in coffee.

The PAC also believes that the rate of interest on the inter-company loan from the US company (4.9%) is excessive, "at a higher rate than any similar loan we have seen". I do not know what similar loans the committee has seen, ie a loan to a loss-making business with little asset backing. I must say it looks modest to me...<sup>159</sup>

If transfer pricing is conducted with the consent of the tax authority concerned, it is not avoidance, though it may be unfair tax competition. The EC are currently pursuing state aid rules; it will be interesting to see what results.

### 2.12.2 GAAR

The GAAR guidance provides:

Many of the established rules of international taxation are set out in double taxation treaties. These cover, for example,

- [1] the attribution of profits to branches or between group companies of multi-national enterprises, and
- [2] the allocation of taxing rights to the different states where such enterprises operate.

The fact that arrangements benefit from these rules does not mean that the arrangements amount to abuse, and so the GAAR cannot be applied to them. Accordingly, many cases of the sort which generated a great deal of media and parliamentary debate in the months leading up to the enactment of the GAAR cannot be dealt with by the GAAR.<sup>160</sup>

In my terminology, these issues are non-avoidance, and in some cases, tax avoidance, but not tax abuse.

But where there is abuse, one country's domestic GAAR cannot resolve the issue. Apple's planning, for instance, turned on a hybrid entity:

- (1) transparent under Irish tax law, and so not paying tax on its profits in Ireland;
- (2) opaque in US tax law, and so not paying tax on its profits in the US.

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<sup>159</sup> Maas, *Taxation Magazine*, 27 February 2013.

<sup>160</sup> HMRC, "GAAR Guidance" (2017) para B5.2

<https://www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules>

The House of Lords Select Committee made the same point

CIOT say:

As in much of the BEPS project, this is not a case of tax avoidance as previously understood; there can be no avoidance where there is no intent to tax in the first place.<sup>161</sup>

If avoidance is action contrary to the intention of a Parliament, then this kind of planning may properly be described as tax avoidance if it is the case that:

- (1) The intention of Oireachtas is that the entity's income should be taxed in the US, and
- (2) The intention of US Congress is that the entity's income should be taxed in Ireland.

One might refer to it as international tax avoidance (though there is of course no such tax as “international tax”). The tax advantage is not contrary to the tax policy of either country in isolation; it is the result of a gap between the two.<sup>162</sup> In this case, the gap may in fact be intentional, in that both Ireland and the US deliberately chose to facilitate the planning;<sup>163</sup> in which case the planning should not be called avoidance at all.

Whatever the terminology, CIOT are right to say that the tools to deal with multinational planning/avoidance will not be the same as those used for domestic tax avoidance. It is an international problem which only international consensus can resolve. Hence the OECD BEPS project and Pillar 1 & 2.

We should never lose sight of the fact that public debates about tax avoidance are simultaneously fiscal, moral and political debates, raising issues of equality, redistribution, class, and tax competition; and sensitive ears may also detect elements of xenophobia.

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161 CIOT, “BEPS Action 2: Neutralise the effects of hybrid mismatch arrangements (Recommendations for domestic laws) Response by CIOT (May 2014) <https://www.oecd.org/ctp/aggressive/comments-action-2-hybrid-mismatch-arrangements.pdf>

162 See de Boer & Nouwen (eds) *The EU's struggle with Mismatches and Aggressive Tax Planning* (2013), para 3.5.2 (General anti-abuse rule).

163 Ting, “Old wine in a new bottle: Ireland's revised definition of corporate residence and the war on BEPS” [2014] BTR 237.