

## CHAPTER TWO

# TAX AVOIDANCE

### 2.1 Tax avoidance: Introduction

Tax avoidance is as old as taxation itself;<sup>1</sup> but the topic has taken prominence over the last decade, 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 and in a chapter of its own.

### 2.2 Avoidance/mitigation, evasion

I turn to 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 normally involves dishonest submission of an incorrect tax return. Dishonesty is essential to the offence.
- (2) *Honest misdeclaration*: The submission of an incorrect tax return

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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.

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>3</sup>

### 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>4</sup> In 1900 the distinction was noted as two meanings of the word “evade”.<sup>5</sup> It is possible that the

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3 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 then still in its infancy so the avoidance/mitigation distinction also had little relevance.

4 *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*.

5 *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

current use of the words avoidance/evasion in the modern sense originated in the USA where it was established by the 1920s.<sup>6</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”,<sup>7</sup> while the Attorney-General, dealing with the same clause, spoke of “marginal cases in which there may be some element other than tax evasion”.<sup>8</sup> Private members, and on at least one occasion the Financial Secretary,<sup>9</sup> spoke of “guilt” and “innocence” as though the House were discussing the suppression of crime.

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>10</sup>

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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.”

- 6 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.
- 7 Official Reports, 15<sup>th</sup> June 1936, col. 676.
- 8 *Ibid.* col. 704.
- 9 *Ibid.* vol. 692.
- 10 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, and a foremost expert on taxation, according to <http://www.encyclopedia.com/religion/encyclopedias-almanacs-transcripts-and-maps/stein-leonard>. Similarly, the 1955 Royal Commission Cmd. 9474 para 1016:

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 representations to the tax authorities. ...<sup>11</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,

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“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 terms “fraudulent evasion”.

- 11 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.

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>12</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>13</sup>

A discussion of criminal evasion is outside the scope of this book.

### 2.2.3 Avoidance/evasion terms misused

There are three 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.<sup>14</sup> It took a long time for the current usage to become fully established.

The second context is in the writing of those not knowledgeable about

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12 United Nations Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries) 2016 (footnotes omitted).

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

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”. This usage seems to have stopped in the 1970s; at this time UK economists were giving increasing attention to the subject of tax avoidance and evasion (*Tax Avoidance*, p.1, IEA 1979) and perhaps their work had an effect on legal usage. Note that this is purely a semantic and not a substantive point that is being made here. The old usage certainly 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 term “avoidance” used in the IEA publication referred to was coined as a convenient term 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.)

tax, including lawyers<sup>15</sup> (non-tax lawyers) and politicians.<sup>16</sup> When writing for non-tax lawyers, it may be helpful to use the expressions “legal avoidance”<sup>17</sup> and “illegal evasion”, to make the meaning clearer.

Thirdly, 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>18</sup>

It is sometimes hard to tell whether the misuse is deliberate or accidental.

### 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

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

The avoidance/evasion distinction in UK terminology is not adopted in EU law, which has a distinct technical terminology: see 73.3 (EU-law terminology); 73.15.2 (Abuse/avoidance/evasion: 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 avoidance.

16 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>

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

18 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>

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>19</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 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>20</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>21</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>22</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

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

20 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>

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

22 This feeds on a very ancient trope concerning lawyers.

for Business Taxation, (the “**OUCBT paper**”).<sup>23</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*

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>24</sup>

These are important distinctions 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>25</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 that effective avoidance tends to cause.

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>26</sup>

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23 “Tax avoidance” (2012)

[http://eureka.sbs.ox.ac.uk/4428/2/TA\\_3\\_12\\_12.pdf](http://eureka.sbs.ox.ac.uk/4428/2/TA_3_12_12.pdf)(I omit some footnotes here).

24 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.

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

26 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



**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>27</sup> charity giving.<sup>28</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 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.

Examples are:

- (1) Advancing or delaying
  - (a) disposals for CGT purposes or
  - (b) payment of income (eg by dividends or bonus)
  - (c) pension contributions for IT purposes  
in anticipation of changes of rates or going non-resident
- (2) Transfer of family assets or business to a spouse to equalise income
- (3) Transfer to a company to reduce tax rates
- (4) Lifetime giving to avoid IHT
- (5) Going non-resident

The term “tax mitigation” could be used to cover uncontroversial tax planning and ordinary tax planning.

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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.

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

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

**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 the legislation is to stop avoidance or reflects a change in policy. Examples are:

- (1) Transfer of assets abroad (counteracted by ToA code)
- (2) The scheme in *Furniss v Dawson* (counteracted by s.137 TCGA)
- (3) Temporary non-residence (counteracted by TNR rules); but one might place that at the upper reaches of the ordinary tax planning spectrum

**Tax abuse** Tax avoidance with aggravating features (typically, self-cancelling steps) that make it (more) unreasonable.<sup>29</sup> As this is at the top of the spectrum, it is easy to find clear examples: take the schemes in: *Ramsay, Fitzwilliam, Astall, Mayes, UBS*.

Thus 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

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<sup>29</sup> 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; see 73.15.2 (Abuse/avoidance/evasion: Terminology); similarly in OECD discussion; see 71.6 (OECD-concept abuse). However we are not concerned with that usage here.

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 not arrange for 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, are likely to bore or bewilder most 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>30</sup>

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30 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>

For this distinction, see 38.15 (Avoidance/mitigation distinction) to 38.48 (Tax avoidance: Critique).

The tax avoidance/tax abuse distinction was established in 2013: it marks the point at which the GAAR is intended<sup>31</sup> to bite:

The Government agrees with the Report's recommendation to introduce a rule which is targeted at artificial and abusive arrangements (those that the Report refers to as "egregious", "very aggressive" or "highly abusive contrived and artificial"). It accepts the Report's conclusion that introducing a "broad spectrum" general anti-avoidance rule would not be beneficial for the UK tax system. ... the GAAR should not affect what the Report describes as "the centre ground of tax planning".<sup>32</sup>

There has not been much judicial discussion (the issue has not arisen for decision) but a passage in *Furniss v Dawson* recognises 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 made. 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>33</sup>

The uncontroversial/ordinary tax planning distinction is not relevant in tax law, but it is relevant to the public debate on morality.

## 2.5 Tax avoidance and morality

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31 The statutory definition (perhaps unavoidably) allows some scope for mission creep. Section 207(2) FA 2013 provides for the purposes of the GAAR:

"Tax arrangements are "abusive" if they ... cannot reasonably be regarded as a reasonable course of action..."

It is significant that the GAAR is called a general anti-*abuse* rule, not a general anti-*avoidance* rule. The extent to which HMRC or the Courts will focus the GAAR on this target remains to be seen. See 23.6.7 (Sale of company: GAARable?)

32 HMRC consultation document "A General Anti-Abuse Rule" (2012) para 2.1.

33 [1984] AC 474 at p.518.

### 2.5.1 *Morality and taxation*

This is intended to be a practical work. The relationship between morality and law (or tax-morality and tax law) is another book. But attitudes to the (im)morality of tax avoidance do have practical consequences for tax: it affects judicial attitudes and decisions; it was a driver for the enactment of the GAAR and will play an important role in its interpretation.

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 immoral should be proscribed by law.

### 2.5.2 *Judicial view in the past*

Older cases uniformly regard tax avoidance as morally neutral. 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>34</sup>

In 1922:

it is perfectly open for persons to evade<sup>35</sup> this particular tax if they can 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>36</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

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34 *Simms v Registrar of Probates* [1900] AC 323 at p.333.

35 Nowadays one would use the word “avoid” here; but the modern terminology had not developed at this point; see 38.7.2 (Avoidance/evasion distinction).

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

*nor incurs blame.*<sup>37</sup>

During the second world war, judicial opinion changed:

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 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>38</sup>

And again:

The [ToA] Section<sup>39</sup> is a penal one and its consequences whatever they may be, are intended to be an effective deterrent which will put a stop to practices which the Legislature considers to be against the public interest. For years a battle of manoeuvre has been waged between the Legislature and those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow subjects. In that battle the Legislature has often been worsted by the skill, determination and resourcefulness of its opponents ... It would not shock us in the least to find that the Legislature has determined to put an end to the struggle by imposing the severest of penalties. It scarcely lies in the mouth of the taxpayer who plays with fire to complain of burnt fingers.<sup>40</sup>

*Howard de Walden* expresses an ethos which (along with the military metaphor) should be attributable to the wartime background; “as we are

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37 *IRC v Fisher's Executors* 10 TC 302 at p.340. If yet another example is needed, which I doubt, see *Levene v IRC* 13 TC 486 at p.501-502.

38 *Latilla v IRC* 25 TC 107 at p. 117.

39 See 34.2 (Construction of ToA provisions).

40 *Howard de Walden v IRC* 25 TC 121 at p.124.

at war, the ordinary mode of construing legislation has been suspended”.<sup>41</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>42</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>43</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>44</sup>

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 voluntary contributions. To demand more in the name of morals is mere cant.<sup>45</sup>

Oliver Wendell Holmes is often quoted for his extra-judicial comment “I

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

42 *Re Kirkwood* [1965] Ch 286 at p.327.

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

44 *IRC v Burmah Oil* 54 TC 200 at p.220; followed in 1988 in *Craven v White* 62 TC 1 at p.196.

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

like to pay taxes. With them I buy civilization.”<sup>46</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>47</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>48</sup>

### 2.5.3 *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*

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

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46 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.”

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

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



- (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 would or 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>49</sup>

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<sup>49</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 as previously understood in order to do so; see [2015] UKUT 152 (TCC). The law was

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 short, 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 also cannot logically criticise HMRC for seeking egregious over-taxation, where the law requires, though can criticise them 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>50</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 rather than losing it; however, in addition to the unfairness for its victims, it has an intangible cost in that it brings the UK tax system into disrepute.

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later amended; See 40.3.5 (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”.

<sup>50</sup> For an example of this line of reasoning in use, see the *Ayrshire Pullman* quote below.

But there it is.

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

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>51</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 the election to allocate gains and losses around a group, in 2009.<sup>52</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>53</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>54</sup>

... in principle, it would be efficient to tax relatively mobile activities at a lower rate in order to avoid deterring mobile activities while allowing a higher rate to be supported on less mobile activities.<sup>55</sup> Avoidance behaviours are one way that de facto lower rates on more mobile income are achieved. ... In this case, there may even be benefits to the UK from avoidance opportunities if the lower tax rates achieved on mobile

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51 See 40.3.5 (Partial surrender trap).

52 Section 171A TCGA.

53 For an example, see *Fisher v HMRC* [2014] UKFTT 805 (TC).

54 IFS, *Green Budget 2013* p.290 <http://www.ifs.org.uk/budgets/gb2013/gb2013.pdf>

55 Footnote original: See Mirrlees et al., *Tax by Design: The Mirrlees Review* (2011) <https://www.ifs.org.uk/publications/5353> at p.12.

activities – for example, through profit shifting – mean that more real activity is in the UK than would otherwise be the case.<sup>56</sup>

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

#### 2.5.4 *Practitioner/judicial views today*

The above sets out a powerful 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. When that changed, 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>57</sup>

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56 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.

57 David Williams "Developing the Concept of Tax Governance" (February 2007) <http://webcache.googleusercontent.com/search?q=cache:gn5Xu4GPUIMJ:www.i>

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

There was unanimous disapproval, indeed distaste, for egregious tax avoidance schemes.<sup>58</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>59</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>60</sup>

This may be consistent with recent comments of the Supreme Court. In 2014:

Since the seminal decision of the House of Lords in *Ramsay v IRC*<sup>61</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>62</sup>

“Social evil” represents the top end of judicial rhetoric in recent times,<sup>63</sup>

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*brarian.net/navon/paper/Tax\_and\_Corporate\_Social\_Responsibility.pdf%3Fpaperid%3D8404118+&cd=7&hl=en&ct=clnk&gl=uk*

58 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).

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

60 *IRC v Fitzwilliam* 67 TC 614 at p.756. Lord Templeman's claim that his attitude is held in common with his predecessors is untenable. But it is held in common with his successors.

61 54 TC 101.

62 *Futter v HMRC* 81 TC 912 Supreme Court at [135] (emphasis added).

63 Though “social evil” differs from evil as “social justice” differs from justice.

though the scope of the critique also depends on the word “artificial”, which may mean little or much.<sup>64</sup>

And again in 2015, but more moderately expressed:

[Tax avoidance] gives rise to social costs which are significant and increasingly controversial.<sup>65</sup>

This comment, or its implication, has not been enthusiastically adopted. 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>66</sup> In the Guernsey Court, 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>67</sup>

This is not to say that there is current judicial unanimity, or that the pendulum may not continue to swing. 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>68</sup>

### 2.5.5 *Impact of the GAAR*

Has the GAAR altered the position? GAAR guidance provides:

B2.1 The GAAR Study Group Report was based on the premise that the levying of tax is the principal mechanism by which the state pays for the services and facilities that it provides for its citizens, and that all taxpayers should pay their fair share. This same premise underlies the GAAR.

It therefore rejects the approach taken by the Courts in a number of old cases<sup>69</sup> to the effect that taxpayers are free to use their ingenuity to reduce their tax bills by any lawful means, however contrived those

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64 *Nourse v Heritage Trustees* (15th January 2015) at [15] and [71] accessible [www.kessler.co.uk](http://www.kessler.co.uk).

65 *Pendragon v HMRC* [2015] STC 1825 at [5].

66 [2015] STC 788 at [59](3) and [65].

67 See 38.17.2 (“Artificial”/“devices”).

68 See ? (Use of company: Avoidance rules).

69 The phrase “a number of old cases” is a tendentious way of referring to judicial authorities to that effect from the earliest times until at least 1983; see 2.3.2 (Judicial view in the past). But GAAR guidance is not a neutral document: it is written by HMRC and adopts an HMRC perspective.

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:

- [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.<sup>70</sup>

HMRC say that the GAAR has changed this:

[The above quote] epitomises the approach which Parliament has rejected in enacting the GAAR legislation. Taxation is not to be treated as a game<sup>71</sup> where taxpayers can indulge in any ingenious scheme in order to eliminate or reduce their tax liability.<sup>72</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. *Ayrshire* 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. It also continues to be the case that HMRC enforce egregious over-taxation when the rules work in their favour.

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70 *Ayrshire Pullman Motor Services v IRC* 14 TC 754 at p.763.

71 The game metaphor begs an essay to itself. 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 seek to identify 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 general law very much resemble games. 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 8 (The game game).

72 HMRC, "GAAR Guidance" (2017)

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

### 2.5.6 *Codes of practice/regulators*

PCRT Help Sheet B: Tax Advice 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>73</sup>

I take this as a rough paraphrase of the GAAR. 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.

A more literal reading might take this as prohibiting advice on avoidance 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>74</sup> If that is the correct reading, the PCRT does not apply to lawyers, because SRA/Bar codes of conduct have priority.

SRA jumped to HMRC's beat, in a document entitled "Tax avoidance - your duties":

In the House of Lords case of *Ayrshire Pullman v CIR*, Lord Clyde said that "No man in this country is under the smallest obligation, moral or other, so as to arrange his legal relations to his business or to his

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73 See ? (Status of PCRT).

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 presumably the spur for CIOT Help Sheet B.

74 That view is not wholeheartedly accepted, or understood, by the general public or by HMRC, and a whole book 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).



property as to enable the Inland Revenue to put the largest possible shovel into his stores." That approach has been rejected by Parliament by bringing in the [GAAR].<sup>75</sup>

This is not correct.<sup>76</sup>

GAAR is clearly explained in HMRC guidance.

This is certainly not correct. It seems unlikely that the author read and understood the guidance (admittedly not an easy task).

Similarly, the widespread assumption that "tax avoidance is legal" no longer applies.

This is not correct.<sup>77</sup>

While contemporary tax debate is characterised by misinformation and shallow thinking,<sup>78</sup> perhaps inevitably so, it is dispiriting to see the same applies to the SRA.<sup>79</sup>

The Charity Commission has made the same points as the SRA.<sup>80</sup> I guess that a circular went round from HMRC to regulators, with draft text, and the regulators complied without consultation or comment from tax practitioners.

These issues could be properly examined in the context of disciplinary proceedings - but I doubt if it will ever happen in practice.

### *2.5.7 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

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<sup>75</sup> <https://www.sra.org.uk/solicitors/code-of-conduct/guidance/warning-notices/Tax-avoidance---your-duties--Warning-notice.page> (September 2017).

<sup>76</sup> See 2.3.5 (Impact of the GAAR).

<sup>77</sup> Unless "avoidance" is intended to mean abuse within the scope of the GAAR.

<sup>78</sup> See App 12.1 (Nature of parliamentary debate).

<sup>79</sup> See Blackwell, "Conduct unbecoming: Solicitors, the SRA and Tax Avoidance" [2019] BTR 31 concluding that some aspects of the SRA position are "simply wrong".

<sup>80</sup> "Charity tax reliefs: guidance on Charity Commission policy" (2015): "The GAAR makes it clear (!) that taxation is not to be treated as a game where taxpayers can indulge in any contrived or inventive scheme in order to eliminate or reduce their tax liability."

<https://www.gov.uk/government/publications/charity-tax-reliefs-guidance-on-charity-commission-policy/charity-tax-reliefs-guidance-on-charity-commission-policy>.

level. That is, 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 scale. But Mervyn King, then Governor of the Bank of England, is reported to have criticised Goldman Sachs for it.<sup>81</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>82</sup> but one might infer that they disapproved none the less for that.

*The Bump Plan* In 2013 a minor political furore arose after David Heaton 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>83</sup> The point was not just political hot air: Heaton had to leave the GAAR panel following criticism from David Gauke (Exchequer Secretary to the Treasury).

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

82 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 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 58.6.8 (Postpone disposal: GAAR).

83 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.

*Income sharing by spouses* I think practitioners were surprised that HMRC found this unacceptable in their (ultimately unsuccessful) attack in *Jones v Garnett*. But exactly 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, though legal, cannot but be regarded as anti-social.<sup>84</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>85</sup> ...

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84 Government of India, *Report of the Taxation Enquiry Commission (1953-54)*, Vol II para 5. For policy issues here, see 86.1 (Non-dom/non-resident spouse).

85 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.

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 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>86</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.

### 2.5.8 *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, fuelled by hatred for those who support and connive with these 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, hatred and aggression.<sup>87</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 recent example arose on the donation of the archive of Tony Benn to the Nation, under the acceptance in lieu scheme, which one might have thought entirely

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<sup>86</sup> 6 June 2013

<sup>87</sup> This is a danger to which any discussion of morality is subject: see Taylor, *A Secular Age* (2007) chapter 18.

innocuous.<sup>88</sup>

### 2.5.9 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 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 so often accompanied by amnesia.

## 2.6 Tax gap

Another thread in public debate is a vast estimate of the amounts involved. HMRC publish annual figures called the “tax gap”, said to be £35 billion, or 5.6% of tax liabilities, in 2017/18.<sup>89</sup>

Broken down, the HMRC figures are:

Amount £bn	Cause	Comment
6.4	Failure to take reasonable care	
6.2	Legal interpretation <sup>90</sup>	
5.3	Evasion	Excluding hidden economy
4.9	Criminal attacks	
3.9	Non-payment	Tax written off as uncollectible
3.4	[Non-careless] error	
3.0	Hidden economy	Income source undeclared/understated
1.8	Avoidance	

88 Reported by the Telegraph (4 Mar 2019) under the heading “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.

89 HMRC, “Measuring tax gaps 2019 edition, Tax gap estimates for 2017-18” (2019) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/820979/Measuring\\_tax\\_gaps\\_2019\\_edition.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/820979/Measuring_tax_gaps_2019_edition.pdf)

90 In HMRC terminology, a tax loss arises from “legal interpretation” when a taxpayer disagrees with HMRC on an issue of tax law (excluding avoidance).

34.9      Total

Statistics are only as useful and reliable as the definitions on which they are based. Most of these categories are vague and subjective, 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 currency and influence policy.<sup>91</sup>

The combination of disparate categories makes the total tax gap figure meaningless, but perhaps that is intended only for headline purposes.

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>92</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 small a part tax avoidance plays in the tax gap figures, 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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91 For a critique of the methodology, see Oxford University Centre for Business Taxation "The Tax Gap for Corporation Tax", (2012) [http://eureka.sbs.ox.ac.uk/4428/4/TaxGap\\_3\\_12\\_12.pdf](http://eureka.sbs.ox.ac.uk/4428/4/TaxGap_3_12_12.pdf).

The HMRC paper itself notes that "There are many sources of potential error and uncertainty in these estimated tax gaps."

92 IFS, *Green Budget 2013* p.297 <http://www.ifs.org.uk/budgets/gb2013/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>93</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 borne by employees,<sup>94</sup> though not all.

## 2.7 The Rule of Law

### 2.7.1 What is “the Rule of Law”

There is a consensus on the Rule of Law. It is a constitutional principle.<sup>95</sup> It is one of four fundamental British values<sup>96</sup> and one of the six values on

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93 IFS, *Green Budget 2013* p.290 <http://www.ifs.org.uk/budgets/gb2013/gb2013.pdf> (footnotes omitted).

94 ETPF Policy Paper 1 “Who bears the burden of corporate income taxation?” (2015) <http://www.etpf.org/papers/PP001CorpTax.pdf>

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>

95 Section 1 Constitutional Reform Act 2005.

96 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,

which the EU is founded.<sup>97</sup>

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: the 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>98</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 the paper by Craig, “The Rule of Law” prepared for the House of Lords Constitution Committee.<sup>99</sup>

There is a consensus that the Rule of Law includes at least the following minimum requirements.<sup>100</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.

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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)

97 Article 2 TEU provides: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights...”

98 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##)

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

100 This may be referred to as a thin, formal, procedural or narrow understanding of the Rule of Law.



It follows that tax must be imposed by parliament through legislation. Craig continues:

*The Rule of Law and Guiding Conduct*

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>101</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.

Although not the 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.

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

The Rule of Law is something to boast of,<sup>102</sup> and a feature which makes the UK an attractive place in which 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.

Laws in the UK are:

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101 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. This can only be done through legislation and not vague notions of fairness.”

102 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).

- 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>103</sup>

If only! Rule of Law principles are challenged, or breached, in various aspects of taxation;<sup>104</sup> and the conflict in the context of tax avoidance is particularly deep. Anti-avoidance is facilitated by techniques which breach the Rule of Law:

- (1) Administrative discretion
- (2) Vague legislation
- (3) Retrospective legislation

It is desirable to recognise that:

- (1) There is a trade-off between two policy aims, the Rule of Law and the combat of avoidance, rather than to fudge the matter by saying, or pretending, that these techniques are consistent with the Rule of Law.
- (2) There is nothing in the idea of government by majority to show that the majority will always respect the Rule of Law.

Then one can face the choice 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:

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

104 See for instance the problems raised by *Lobler* 2.3.2 (Judicial views).

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>105</sup>

The cure could be worse than the disease. In contemporary UK debate it is rare to find a statement in such strong terms. An exception comes from the Joint Committee on Statutory Instruments, discussing this provision:

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>106</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>107</sup>

But this example also illustrates the weakness of the Rule of Law in the

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105 *Ransom v Higgs* 50 TC 1 at p.94. A similar spirit informed the decision in *Vestey v HMRC* in 1979; see 35.2 (Charge on transferor).

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

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

UK:

- (1) Regulation 21, whose validity is in doubt, remains in the legislation.<sup>108</sup>
- (2) Identical wording is found in:
  - (a) reg 23 International Tax Compliance Regulations 2015<sup>109</sup>
  - (b) The residence-property TAAR

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>110</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 and 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>111</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>112</sup>

### 2.7.3 *Breach of Rule of Law: Consequences*

Craig says:

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

109 The argument that reg. 23 is ultra vires is weaker than for reg. 21, 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 104.35 (CRS TAAR). Perhaps the argument is still tenable. Perhaps reg 23 will be read purposefully and somewhat restrictively.

110 Though it is difficult to assess the validity of such a broad generalisation and the statement seems more debatable under the Trump administration.

111 For an example, see 7.17 (Tie-breaker: mutual agreement).

112 Speech to OECD International Tax Conference, June 2015, as reported <https://www.bna.com/beps-troublegloves-off-b17179928708/>

... the consequences of breach of the rule of law in the sense considered in this section. 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. The courts may well interpret such a statute narrowly, in favour of the individual in such circumstances. They might also read it down pursuant to the Human Rights Act 1998, if the particular statute would otherwise infringe rights derived from the European Convention on Human Rights. If the courts felt unable to read it down, they could issue a declaration of incompatibility under the HRA, and the matter would be sent back to Parliament for reconsideration. The courts therefore have considerable interpretive techniques at their disposal to ensure that legislation that fails to meet the requirements of the rule of law set out above is construed narrowly in favour of the individual. This does not alter the fact that UK courts have not traditionally exerted power to invalidate an Act of Parliament on such grounds.

In relation to secondary legislation (statutory instruments) the courts could in theory 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 very clear or direct authority in the authorising act of parliament) but in practice as far as I know it has never happened.

In other words, the Rule of Law lacks full justiciability. Perhaps confusingly, or ironically, the Rule of Law is not in the strict sense a rule of law. But however deeply, inchoately, and inconsistently, the Rule of Law still to some extent affects tax policy and case law outcomes.

#### 2.7.4 *Tax: Rule of Law compliance*

As the Rule of Law is a set of principles, this issue raises a set of almost impossibly broad questions.

In earlier editions<sup>113</sup> of this book, I said:

The UK tax system is largely<sup>114</sup> based on the rule of law rather than informal practice and discretion.

By the 13th edition (2014) I qualified the boast:

However, that is less the case than formerly, due to:

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113 See Kessler, *Taxation of Non-Residents and Foreign Domiciliaries* (3<sup>rd</sup> ed., 2004).

114 For one exception, see 12.24 (Forward tax agreements).

- (1) wide, complex, or vague anti-avoidance provisions mitigated by informal practice, HMRC guidance, HMRC discretion or oversight.
- (2) retrospective legislation.<sup>115</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>116</sup>

In 2015 the Law Society makes 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 following examples draw on the lists of these bodies supplemented by my own:

- (1) The absence of a right to appeal so obligations are determined by HMRC discretion:
  - (a) The Banking Code of Practice on Taxation; there is no right of appeal against HMRC determination of a breach of the code.
  - (b) Follower notices: there is no right of appeal against the issue of such a notice on a number of important grounds.
- (2) Retrospective taxation.
- (3) Uncertainty in tax law. Sometimes this may be deliberate. For instance, Jim Harra, Director General, Business Tax at HMRC applauds the uncertainty of the GAAR:

It will also create an additional level of uncertainty for the promoters

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115 Kessler, *Taxation of Non-Residents and Foreign Domiciliaries* (13th Edn., 2014) Vol 1 para 2.4 (The Rule of Law).

116 Response to OTS competitiveness review (May 2014)  
<http://www.citysolicitors.org.uk/attachments/article/105/20140605%20Response%20to%20Office%20of%20Tax%20Simplification%E2%80%99s%20Competitiveness%20review%20-%20initial%20thoughts%20and%20call%20for%20evidence'.pdf>

and users of schemes. I believe that that will be a deterrent.<sup>117</sup>

- (4) Anti-avoidance legislation drafted widely and then cut down by HMRC concession mislabeled as guidance. Examples include:
- (a) s.30 FA 2014 (avoidance by transfer of corporate profits)
  - (b) The capital-loss TAAR<sup>118</sup> and the same is true of most TAARs, which are standard in new legislation.

## 2.8 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>119</sup>

### 2.8.1 *Meaning of retrospective*

It seems to me that retrospectivity is best considered as a matter of degree, not a matter of black/white. Legislation not retrospective in form may be retrospective in effect, in that (deliberately or otherwise) 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 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

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

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

118 See 67.21 (Capital-loss TAAR).

119 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).

is not retrospective.<sup>120</sup>

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

### 2.8.2 *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:

- (1) Retrospective reversal of avoidance schemes; for examples see:
  - (a) 48.22 (DT relief for partnership)
  - (b) s.23 FA 2012 (loan relationships)
- (2) Provisions retrospective in effect:
  - (a) Pre-owned assets (2004)<sup>121</sup>
  - (b) IHT treatment of former Accumulation & Maintenance trusts (2006)
  - (c) Aspects of the ITA remittance rules (2008)<sup>122</sup>
  - (d) The extended time limits for offshore matters

### 2.8.3 *Retrospective legislation: Protocol*

In Budget 2011, the coalition Government published a statement (grandly labelled a “protocol”) on retrospective legislation. 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

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120 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)

121 See 89.39.2 (Retrospectivity).

122 See 1.8.3 (Fairness of 2008 reforms).



exceptional.<sup>123</sup>

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

#### 2.8.4 *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>124</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>125</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.

#### 2.8.5 *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.

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123 [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)

124 See *R oao Huitson v HMRC* [2011] STC 1860; *R oao APVCO 19 Ltd v HM Treasury* [2015] EWCA Civ 648.

125 *R oao APVCO 19 Ltd v HM Treasury* [2015] EWCA Civ 648 at [58].

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 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 a major factor in picking on some arrangements may be the amount of money involved.

#### 2.8.6 *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 serious concern about the quality of tax legislation procedures.

#### 2.8.7 *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>126</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) to end the practice of retrospective anti-avoidance legislation; wholly retrospective legislation should no longer be necessary.

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

But effectively retrospective legislation, in the form of unfair commencement rules, will no doubt continue.

## 2.9 TAAR/unallowable purpose test

### 2.9.1 TAAR terminology

TAAR stands for “targeted anti-avoidance rule”. It is used to describe unallowable purpose tests in specific UK tax codes<sup>127</sup> (as opposed to the GAAR, which is an unallowable purpose test which applies throughout taxation).

As far as I know, the term “TAAR” was coined by HMRC and first used in a press release of 5 December 2005. The term “unallowable purpose” was first used by Parliamentary Counsel in 1996, in the context of loan relationships.<sup>128</sup>

Before then the term used was motive (or purpose) test. Those labels remain in use primarily for older TAARs, such as the ToA motive defence.

“TAAR” is best regarded as a technical term, detached from its literal meaning, so IFS can say without obvious irony that:

TAARs need to be well targeted ... costs can outweigh the ... lost revenues when a poorly targeted TAAR is compared with a well-targeted TAAR.<sup>129</sup>

“TAAR” is a tendentious, approbative term; who could object to *targeted* anti-avoidance? Parliamentary Counsel rightly do not use it in statutory drafting. “Unallowable purpose test” is more transparent, but clumsy. An appropriate term might be “specific anti-avoidance rule” (SAAR) but that is not in common use. So slightly reluctantly, I use “TAAR” in its technical sense in this work.

### 2.9.2 Types of TAAR

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127 TAAR may also refer to the wider anti-avoidance rule of which an unallowable purpose test forms part; but I here focus only on the unallowable purpose test.

128 See Para 13 sch 9 FA 1996, now s.441 CTA 2009.

129 The same report refers later to a “wide-ranging TAAR”. IFS, “Countering Tax Avoidance in the UK” TLRC discussion paper 7 (2009), para 8.18 <http://www.ifs.org.uk/comms/dp7.pdf>.

The number of TAARs is very large.<sup>130</sup> Although there is a variation of wording, TAARs share a common framework or frameworks. I would distinguish three types of TAAR, depending on the nature of the unallowable purpose test, and coin the following terminology to describe them:

<b>Style of TAAR</b>	<b>Unallowable purpose expressed as</b>
Avoidance-purpose TAAR	Tax avoidance (in its strict sense)
Tax-advantage TAAR	Obtaining a tax advantage
Application/effect TAAR	Avoiding application/effect of specified rules

A tax-advantage style TAAR is very wide, if one understands “tax advantage” to include cases where there is no element of tax avoidance.

An application/effect style TAAR may be wider still. The Joint Committee on Statutory Instruments said this wording is too wide and vague.<sup>131</sup> But no-one has taken any notice of that. It continues to be a common form (perhaps it will become the most common form) for new TAARs.

Cases on one TAAR can shed light on others, though one must allow for differences of context and wording. The most litigated is the TiS purpose test, though in recent years there have been more cases on the loan relationships TAAR. Instances where cases on one TAAR have been cited in cases on another TAAR include:

- (1) ToA cases cited in TiS cases (& vice versa)<sup>132</sup>
- (2) Pre-2010 TiS cases may be relevant to the current IT TiS code

Here is a table of TAARs discussed in this book:

<b>Topic</b>	<b>Type of TAAR</b>	<b>Para</b>	<b>Test</b>	<b>Reason -able<sup>134</sup></b>	<b>Commercial<sup>133</sup></b>	<b>Date</b>
ToA	Tax avoidance	38.1	Transfer/assoc ops	Y	Y	1936/2005
TiS (CT)	Tax advantage	–	Transactions in		Y	1960

130 Unallowable Purpose Tests Draft Guidance p.7 gave the number as “over 200” in 2009. The number increases with every Finance Act. For the Draft Guidance, see 38.1 (Motive defence: Introduction).

131 See 2.5.2 (Rule of Law v. other values).

132 In *Willoughby* in the Court of Appeal, *Brebner*, a TiS case, was cited in the context of the ToA motive defence.

133 Commercial test included; see 38.5 (“Commercial”: undefined sense).

134 “Reasonable to assume” wording included; see 38.11 (Reasonable to conclude/assume).

TiS (IT)	Tax advantage	54.9	securities		2010
SDLT group relief	Tax avoidance	38.41.3	Transaction	Y	2005
Capital loss	Tax advantage	58.18	Arrangements		2007
Mixed fund	Tax advantage	15.10	Arrangements		2008
s.3 TCGA	Tax avoidance	66.18	Arrangements		2012
GAAR	Tax advantage	– <sup>135</sup>	Arrangements	Y	2013
DIMF	Application	52.10	Arrangements		2015
Carried interest	Application	52.18	Arrangements		2015
CRS	Application	104.35	Arrangements		2015
Country reporting	Application	2.5.2	Arrangements		2016
Land-dealing	Tax advantage	17.3	Arrangement		2016
Transactions in land	Tax advantage	17.14	Arrangement		2016
Royalties	Effect	24.6.6	Arrangements		2016
Winding up	Tax advantage	23.6.4	Winding-up	Y	2016
Residence-property	Effect	88.13	Arrangements		2017
Profit Fragmentation	Tax advantage	39.14	Arrangements	Y	2019
Land-rich company	Tax advantage	59.14	Arrangements		2019

This is not a full list, but it is evident that the number of TAARs has exploded since about 2012; though unannounced, and not much discussed, this constitutes a major change in tax policy.

### 2.9.3 *Disentangling issues*

Discussion of (say) a tax advantage TAARs can logically be split into a number of distinct issues:

- (1) Is there a tax advantage (with a sub-issue, the meaning of tax advantage)
- (2) Is there a purpose to obtain a tax advantage (with sub-issues as to the meaning of purpose and how to ascertain purpose)
- (3) Is that a “main” purpose

But in practice discussion easily segues from one to the other.

### 2.9.4 *Effect of TAAR*

If the conditions of a TAAR are met, the consequence may be:

- (1) As specified in the TAAR:
  - (a) Disapply a specified relief
  - (b) Apply specified anti-avoidance rules

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<sup>135</sup> I do not discuss the GAAR as a discrete topic in this book, but GAAR guidance is discussed in many contexts.

- (2) Counteraction (details unspecified)
- (3) Disregard effect of arrangements

Here is a table of consequences of the TAARs discussed in this book:

Topic	Type of TAAR	Para	Consequences	Date
ToA	Tax avoidance	38.1	Apply ToA rules	1936/2005
TiS (CT)	Tax advantage	–	Counteraction	1960
TiS (IT)	Tax advantage	54.9	Counteraction	2010
SDLT group relief	Tax avoidance	38.41.3	Disapply group relief	2005
Capital loss	Tax advantage	58.18	Disapply loss relief	2007
Mixed fund	Tax advantage	15.10	Just and reasonable	2008
s.3 TCGA	Tax avoidance	66.18	Apply s.3 rules	2012
GAAR	Tax advantage	– <sup>136</sup>	Counteraction	2013
DIMF	Application	52.10	Disregard arrangement	2015
Carried interest	Application	52.18	Disregard arrangement	2015
Country reporting	Application	2.5.2	Disregard arrangement	2016
Land-dealing	Tax advantage	17.3	Counteraction	2016
TiL	Tax advantage	17.14	Counteraction	2016
Royalties	Effect	24.6.6	Disregard arrangement	2016
Winding up	Tax advantage	23.6.4	Apply winding-up rule	2016
Residence-property	Effect	88.13	Disregard arrangement	2017
Profit Fragmentation	Tax advantage	39.14	Apply profit fragment'n rules	2019
Land-rich company	Tax advantage	59.14	Counteraction	2019

The approach of disregarding the arrangement is novel, and problematic. What does one regard and what does one disregard? It will probably be interpreted in a similar manner to a just and reasonable counteraction.

## 2.10 “Main” purpose

TAARs generally refer to main purpose.<sup>137</sup>

I consider “purpose” elsewhere,<sup>138</sup> but here consider “main purpose”.

In *Travel Document Service & Ladbroke Group International v HMRC*:

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<sup>136</sup> I do not discuss the GAAR as a discrete topic in this book, but GAAR guidance is discussed in many contexts.

<sup>137</sup> The ToA motive defence is an exception here (omitting the word *main*); see 38.4 (Enactment history).

The CT TiS TAAR refers to *object* (not *purpose*) but the meaning is the same: see 38.13 (Foresight and purpose).

<sup>138</sup> See the discussion beginning at 38.10 (Identify and classify purpose).

I do not accept that, as was submitted by [counsel for HMRC], “main”, as used in paragraph 13(4) of schedule 9 of FA 1996, means “more than trivial”. A “main” purpose will always be a “more than trivial” one, but the converse is not the case. A purpose can be “more than trivial” without being a “main” purpose. “Main” has a connotation of importance.<sup>139</sup>

HMRC formerly argued that:

any purpose which is more than incidental is prima facie a main purpose.<sup>140</sup>

But that is no longer tenable.

One sometimes sees the phrase “more than mere icing on the cake”<sup>141</sup> but that stale metaphor does not help much, if at all.

## 2.11 “Tax advantage”

The expression “tax advantage” is used in (what I call) tax-advantage style TAARs. It is always defined. There is no single standard definition, but the definitions generally adopt common form wording, with minor variations, so it is helpful to consider the definitions together as a single topic.

I here discuss what I call the IT/CGT, GAAR and IHT definitions.<sup>142</sup>

### 2.11.1 *Tax advantage: IT/CGT definition*

The expression “tax advantage” was first used in the TiS purpose test in 1960.<sup>143</sup> That definition survives in the current CT version of the rules and elsewhere. I set out s.732(1) CTA 2010 as an example of this form:

In this Part “corporation tax advantage” means—

139 [2018] EWCA Civ 549 at [48]. This was said in relation to the main purpose test in the loan relationship rules, but the comment applies generally in TAARs.

140 HMRC Discussion Document “Simplifying Unallowable Purpose Tests” (2009) para 10140

[https://webarchive.nationalarchives.gov.uk/20100513000206tf\\_/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?\\_nfpb=true&\\_pageLabel=pageLibrary\\_ConsultationDocuments&id=HMCE\\_PROD1\\_02974&propertyType=document&columns=1](https://webarchive.nationalarchives.gov.uk/20100513000206tf_/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&id=HMCE_PROD1_02974&propertyType=document&columns=1).

141 *IRC v Sema Group Pension Scheme* 74 TC 593.

142 TiS has a slightly non-standard definition: see 54.12.1 (“Income tax advantage”).

143 Section 43(4)(g) FA 1960.

- (a) a relief from corporation tax or increased relief from corporation tax,
- (b) a repayment of corporation tax or increased repayment of corporation tax,
- (c) the avoidance or reduction of a charge to corporation tax or an assessment to corporation tax, or
- (d) the avoidance of a possible assessment to corporation tax.

I refer to this as the “**standard IT/CGT definition**” of tax advantage.

The actual tax referred to varies from place to place but in other respects this definition is standard.

The drafter sometimes adds a provision that:

it does not matter whether the avoidance or reduction is effected—

- (a) by receipts accruing in such a way that the recipient does not pay or bear income tax on them, or
- (b) by a deduction in calculating profits or gains.

This also derives from the original 1960 provision. It is hard to see what it adds, and it probably adds nothing.<sup>144</sup> But as the precedent is there it has often been followed.

### 2.11.2 *Tax advantage: GAAR definition*

Section 208 FA 2013 provides:

A “tax advantage” includes—

- (a) relief or increased relief from tax,<sup>145</sup>

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144 This is (almost) self-evident, but if authority is needed, see *HMRC v Hyrax Resourcing Ltd* [2019] UKFTT 175 (TC) at [185]: “I would say that those additional words are unnecessary as that meaning is implicit in the first part of the definition ...”.

145 In the GAAR definition itself, the word “tax” is of course widely defined. Section 206(3) FA 2013 provides:

“The general anti-abuse rule applies to the following taxes—

- (a) income tax,
- (b) corporation tax, including any amount chargeable as if it were corporation tax or treated as if it were corporation tax,
- (c) capital gains tax,
- (d) petroleum revenue tax,
- (da) diverted profits tax,
- (e) inheritance tax,
- (f) stamp duty land tax, and



- (b) repayment or increased repayment of tax,
- (c) avoidance or reduction of a charge to tax or an assessment to tax,
- (d) avoidance of a possible assessment to tax,
- (e) deferral of a payment of tax or advancement of a repayment of tax, and
- (f) avoidance of an obligation to deduct or account for tax.

I refer to this as the “**GAAR definition**” of tax advantage.

The GAAR definition is wider than the standard IT/CGT definition in three respects:

- (1) It has become an inclusive definition. But since it is so widely defined, it is not easy to think of anything which is a tax advantage which does not fall within paras (a) to (f).
- (2) Paras (e) and (f) are added.

Post-2013 TAARs often adopt the GAAR definition, either by reference or repeating it verbatim, (though generally with a narrower definition of “tax”).

### 2.11.3 *Tax advantage: IHT definition*

Section 162A(8) IHTA defines tax advantage:

In this section ...

“tax advantage” means—

- (a) the avoidance or reduction of a charge to tax, or
- (b) the avoidance of a possible determination in respect of tax.

I refer to this as the “**standard IHT definition**”.

This based on the standard IT/CGT definition of tax advantage, adapted as appropriate for IHT.

### 2.11.4 *Tax advantage: Comparators*

The context of each TAAR is important, but some general comments can be made.

The GAAR guidance provides:

The concept of a ‘tax advantage’ is common in UK tax legislation. The language suggests that in deciding whether an advantage arises the

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- (g) annual tax on enveloped dwellings.”

actual tax position should be compared with another tax position. The appropriate comparison or alternative tax position will depend on the facts, but will usually derive from the arrangements that would have occurred without the abusive tax purpose (which may include no arrangement at all).

In situations where there is more than one alternative arrangement that might have been adopted if the taxpayer had not adopted an abusive arrangement, then the appropriate comparison would be the transaction that the taxpayer would most likely have carried out.<sup>146</sup> This might not be the arrangement that would give rise to the greatest tax liability.<sup>147</sup>

The loss-TAAR guidance<sup>148</sup> proposes a test to help identify the main purpose:

... it will be relevant to draw a comparison in order to consider whether, in the absence of the tax considerations:

- [1] the transaction giving rise to the advantage would have taken place at all;
- [2] if so,
  - [a] whether the tax advantage would have been of the same amount,<sup>149</sup> and
  - [b] whether the transaction would have been made under the same terms and conditions.

I refer to this as a “**but-for**” test. It is not a decisive test.

Where the taxpayer passes the but-for test, ie the same arrangements would be made even without the tax advantage, it is likely that tax is not

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146 Footnote original: This follows the approach adopted by Lord Hoffmann in the Hong Kong case *IRC v Tai Hing Cotton Mill* (CACV 343/2005): “[The Commissioner] would not be entitled, as the more alarmist submissions of counsel for the taxpayer suggested, to make an assessment on the hypothesis that the taxpayer had entered into an alternative transaction which attracted the highest rate of tax. That would not be a reasonable exercise of power. But she may adopt the hypothesis which the evidence suggests was most likely to have been the transaction if the taxpayer had not been able to secure the tax benefit.”

147 HMRC “GAAR Guidance” (2015) para C2.5  
<https://www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules>

148 See 63.19 (Capital-loss TAAR).

149 Para [a] is not well expressed. It seems to ask whether in the absence of the tax considerations the tax advantage would have been of the same amount. It is not clear what point is being made here. But the rest of the paragraph makes sense.

a main purpose. But tax *might* still be a main purpose. A person may have two main purposes, P1 (non-tax) and P2 (tax) either of which may be sufficient to cause the arrangements.

Where the taxpayer fails the but-for test, ie the same arrangements would *not* have been made but-for the tax advantage, it is likely that tax is a main purpose. A person may have two purposes, P1 (non-tax) and P2 (tax), where P1 is the main purpose (but not sufficient to trigger the arrangements). P2 is just enough, the straw that breaks the camel's back, but not a main purpose in itself. But that scenario seems somewhat implausible.

Elsewhere in the loss-TAAR guidance, HMRC say:

So to determine whether or not the TAAR applies all the circumstances surrounding the arrangements have to be taken into account, considering:

- the overall economic objective of the arrangements,
- whether that objective is one that the participants might be expected to have, and which is genuinely being sought, and
- whether that objective is being fulfilled in a straightforward way, or additional, complex or costly steps have been inserted.

### 2.11.5 *Loan relationship guidance*

The guidance on the loan relationship unallowable purpose test is lengthy, but worth setting out in full.

Section 441 CTA 2009 provides:

(1) This section applies if in any accounting period a loan relationship of a company has an unallowable purpose.

(2) The company may not bring into account for that period for the purposes of this Part so much of any credit in respect of exchange gains from that relationship as on a just and reasonable apportionment is attributable to the unallowable purpose.

(3) The company may not bring into account for that period for the purposes of this Part so much of any debit in respect of that relationship as on a just and reasonable apportionment is attributable to the unallowable purpose.

(3A) If—

- (a) a credit brought into account for that period for the purposes of this Part by the company would (in the absence of this section) be reduced, and

- (b) the reduction represents an amount which, if it did not reduce a credit, would be brought into account as a debit in respect of that relationship,  
subsection (3) applies to the amount of the reduction as if it were an amount that would (in the absence of this section) be brought into account as a debit.
- (4) An amount which would be brought into account for the purposes of this Part as respects any matter apart from this section is treated for the purposes of section 464(1) (amounts brought into account under this Part excluded from being otherwise brought into account) as if it were so brought into account.
- (5) Accordingly, that amount is not to be brought into account for corporation tax purposes as respects that matter either under this Part or otherwise.<sup>150</sup>

Section 442 CTA 2009 provides:

- (1) For the purposes of section 441 a loan relationship of a company has an unallowable purpose in an accounting period if, at times during that period, the purposes for which the company—
  - (a) is a party to the relationship, or
  - (b) enters into transactions which are related transactions by reference to it,include a purpose (“the unallowable purpose”) which is not amongst the business or other commercial purposes of the company.
- (1A) In subsection (1)(b) “related transaction”, in relation to a loan relationship, includes anything which equates in substance to a disposal or acquisition of the kind mentioned in section 304(1) (as read with section 304(2)).
- (2) If a company is not within the charge to corporation tax in respect of a part of its activities, for the purposes of this section the business and other commercial purposes of the company do not include the purposes of that part.
- (3) Subsection (4) applies if a tax avoidance purpose is one of the purposes for which a company—
  - (a) is a party to a loan relationship at any time, or
  - (b) enters into a transaction which is a related transaction by reference to a loan relationship of the company.
- (4) For the purposes of subsection (1) the tax avoidance purpose is only

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<sup>150</sup> Also see s.455B CTA 2009.

regarded as a business or other commercial purpose of the company if it is not—

- (a) the main purpose for which the company is a party to the loan relationship or, as the case may be, enters into the related transaction, or
  - (b) one of the main purposes for which it is or does so.
- (5) The references in subsections (3) and (4) to a tax avoidance purpose are references to any purpose which consists of securing a tax advantage for the company or any other person.

The CF Manual provides:

**CFM38150 Example** [Aug 2017]

**Example of unallowable purpose**

A company borrows £50 million from a finance company at arm's length. The company becomes insolvent and disposes of all its assets. This leaves it with an outstanding debt of £40 million. The company is not liquidated and interest continues to accrue on the debt.

The finance company either does not accrue the interest receivable or it accrues the interest and then writes it off as a bad debt. The company accrues the interest and makes a deficit on which group relief claims are made.

The company has no activity which is within the charge to corporation tax (CTA09/S442(2)). The purpose of the loan relationship is therefore specifically excluded from being a business or commercial purpose and it is an unallowable purpose.

In addition, although the loan relationship was originally bona fide, its continued existence is not commercial. The test of unallowable purpose given by CTA09/S442(1) & (2) is the purpose of the loan relationship in the accounting period. The only purpose of the loan relationship in the current accounting period is to generate group relief, securing a tax advantage for another group company (CTA09/S442(5)).

The debits relating to the loan relationship should be disallowed.

**CFM38160 Application** [Aug 2017]

**Applying the unallowable purposes rule**

... It can be seen that those comments were primarily concerned with the tax avoidance purpose test in CTA09/S442(3) & (4), although brief reference is made to S430(3) in the last two sentences of the second paragraph.

HMRC officers should not apply the provision without reference to Anti Avoidance Group or Business International, see CFM38200.

You will note from the Economic Secretary's comments that SS441-442

- will normally apply where UK branches of overseas companies borrow for overseas activities outside the UK tax net,
- will not normally apply where a company borrows to acquire shares in companies, whether in the United Kingdom or overseas, or to pay dividends, provided that the borrowings are not structured in an artificial way. And a similar view is taken as regards borrowings, whether from a third party or intra group, to acquire other business assets whether located in the United Kingdom or overseas. This approach is not affected by

the substantial shareholdings rules, and

- will not normally apply where a company is choosing between different ways of arranging its commercial affairs, if it chooses the course that gives a favourable tax outcome, provided that tax avoidance is not the object, or one of the main objects, of the arrangements.

**CFM38170 Application: Hansard Report [Aug 2017]**

**Applying the unallowable purposes rule: Economic Secretary's comments**

'The Government are aware of concerns that have been raised by my hon. Friends and by others regarding the particular anti-avoidance provisions in paragraph 13. This paragraph was amended significantly in Standing Committee but, because of the concerns that my hon. Friends and others have raised, I take the opportunity to allay some of the fears that have been expressed about the anti-avoidance rules.

Paragraph 13 of the schedule disallows tax deductions to the extent that tax avoidance is the main motive behind a loan relationship. We have been told of concerns that this could be interpreted as preventing companies from getting tax relief for legitimate financing arrangements. I am happy to offer a reassurance that this is not the intention of the legislation. The paragraph denies tax deductions on loans that are for the purpose of activities outside the charge to corporation tax. Among other things, this will ensure that United Kingdom branches of overseas companies do not get tax relief for borrowings that are for overseas activities outside the United Kingdom tax net.

We have been asked whether financing - which, for example, is to acquire shares in companies, whether in the United Kingdom or overseas, or is to pay dividends - would be affected by the paragraph. In general terms, the answer is no, but the paragraph might bite if the financing were structured in an artificial way.

It has been suggested that structuring a company's legitimate activities to attract a tax relief could bring financing within this paragraph - some have gone so far as to suggest that the paragraph might deny any tax deduction for borrowing costs. These suggestions are clearly a nonsense. A large part of what the new rules are about is ensuring that companies get tax relief for the cost of their borrowing.

One specific point has been put to me by my hon. Friend the Member for Gloucester - that is, borrowing by a finance leasing company to acquire assets where this is more tax efficient than the lessee investing in the asset direct. Again, I am happy to offer a reassurance. Where a company is choosing between different ways of arranging its commercial affairs, it is acceptable for it to choose the course that gives a favourable tax outcome. Where paragraph 13 will come into play is where tax avoidance is the object, or one of the main objects, of the exercise.

Companies that enter into schemes with the primary aim of avoiding tax will inevitably be aware of that. The transactions we are aiming at are not ones which companies stumble into inadvertently. As one top tax adviser said recently, companies will know when they are into serious tax avoidance; apart from anything else, they are likely to be paying fat fees for clever tax advice and there will commonly be wads of documentation.

The last thing I want to do, however, is set out a list of so-called acceptable or unacceptable activities. Borrowing for commercial purposes can be structured in a highly artificial way in order to avoid tax. If we said that borrowing for certain types of activity would always be okay, tax advisers would quickly take advantage and devise artificial

financial arrangements simply to avoid tax. Provided that companies are funding commercial activities or investments in a commercial way, they should have nothing to fear. If they opt for artificial, tax-driven arrangements, they may find themselves caught. It is clear that a balance must be struck between meeting the concerns that have been raised and weakening the provision in those instances where it needs to apply, but I can assure my hon. Friends that we shall keep the matter under review.’ (Hansard 28 March 1996 Finance Bill Report Stage, Columns 1192-1193.)

**CFM38180 Transactions Not Normally Within ‘Unallowable Purposes’ [Aug 2017]  
When CTA09/SS441-442 will not normally apply**

SS441-442 will not normally apply to loan relationship debits:

- simply because a company is able to obtain relief for the same expenditure or loss on the borrowing to which the debits relate in more than one jurisdiction. However, SS441-442 would apply where the structure that has been adopted has one or more non-commercial features (so that the loan relationship can be said to have an unallowable purpose) and/or where, taking account of the overall position of the company or group, relief for interest and other finance costs might otherwise be available more than once in the UK in respect of the true economic costs of the borrowing;
- that relate to a borrowing from an exempt body (such as a pension fund), even if that exempt body is connected with the borrower, provided the arrangements are commercial;
- that relate to a straightforward borrowing by a UK plc in order to fund a repurchase of its shares provided that there are no attempts to structure the arrangement in such a way as to provide a tax advantage for any other person and/or the amount borrowed (the level of gearing up) is dictated by market forces and hence is at arm’s length;
- that relate to a third party borrowing undertaken by one group member, that fulfils the commercial borrowing requirements of the group, which it on-lends interest-free (or at a rate not exceeding the costs of the third party borrowing) to other UK-resident group members. In such circumstances, SS441-442 would not apply, provided that the group gets one and only one deduction in the UK for the costs associated with the true economic cost of the borrowing. For example, SS441-442 will not normally apply where intra-group interest-free loans are made primarily to enable borrowings to be matched with assets within the meaning of CTA09/S317; or
- where a loan relationship debit in one group company is matched by an equal and opposite loan relationship credit, which is fully taxed, in another group company for the same loan relationship and the funding is not then utilised to secure a tax advantage. On the other hand, SS441-442 are potentially in point if the main or one of the main purposes of the intra-group funding is to achieve a tax advantage for the group as a whole, in that the loan relationship credit on the intra- group funding is in some way shielded from tax. An example of the loan relationship credit being shielded would be the soaking up of otherwise stranded surplus expenses of management etc. Where the loan relationships involve cross-border transactions, thin capitalisation and transfer pricing legislation as well as the provisions of the Double Taxation Treaties may be applicable.

**CFM38190 Transactions Normally Within ‘Unallowable Purposes’ [Aug 2017]  
When CTA09/SS441-442 will normally apply**

SS441-442 would normally apply to loan relationship debits:

- which, subject to the comments at CFM38180 (fourth and fifth bullets), relate to the write-off of loans where the purpose of the loans was not amongst the business or other commercial purposes of a company. An example of a loan of this nature would be an interest-free loan made by a company, whose business consists in operating a widgets retail outlet, which had lent the money to a football club supported by one of the directors of the company for the purpose of providing financial support to the football club. Furthermore, if the company borrowed to make the loan to the football club, then SS441-442 would normally also apply to disallow the loan relationship debits relating to the interest or other finance costs on that borrowing. If, however, the purpose of the loan included a commercial or other business purpose such as advertising, then this would be taken into account in arriving at the amount attributable to the unallowable purpose on a just and reasonable basis (S441(1)-(3));
- which, subject to the comments at CFM38180 (fourth and fifth bullets), relate to a borrowing the proceeds of which are used in such a way that the company cannot or does not expect to make an overall pre-tax profit. An example would be where a company borrows at interest and on-lends at a rate of interest that is less than the rate of interest on the borrowings; or
- where a company or a group of companies enters into one or more transactions or arrangements which have the main purpose or one of the main purposes of securing loan relationship debits for repayments of loan principal, in addition to payments of interest, on the true economic commercial borrowing to the company or group. An example of this would be where one group company undertakes a borrowing of £20 million at 8.4% for 5 years from a third party and at the same time a second group company pays that third party £13 million for preference shares of £20 million in the first group company to be delivered 5 years later. The effect of this is that, economically, the group borrows £7 million on an amortising basis at 8.4% but for tax purposes the group claims relief as loan relationship debits for both the interest of £1.4 million on the group amortised borrowing of £7 million and the repayment of the £7 million loan principal. In such circumstances SS429-430 are likely to apply to disallow the amounts equivalent to repayments of principal.

### 2.11.6 *Tax advantage: Case law*

The GAAR guidance above is soundly based on TiS case law. The leading case is *IRC v Parker*:

The paragraph, as I understand it, presupposes a situation in which

- [1] an assessment to tax, or increased tax, either is made or may possibly be made,
- [2] that the taxpayer is in a position to resist the assessment by saying that *the way in which he received what it is sought to tax prevents him from being taxed on it;*
- [3] and that the Crown is in a position to reply that if he had received what it is sought to tax *in another way* he would have had to bear



tax.

In other words, there must be a contrast as regards the “receipts” between

[a] the actual case where these accrue in a non-taxable way with

[b] a possible accruer in a taxable way,

and unless this contrast exists, the existence of the advantage is not established.<sup>151</sup>

In the following discussion:

- (a) The actual case, where the receipt accrues in a non-taxable way, is the **“actual receipt”**
- (b) The “possible accruer in a taxable way” is the **“comparator”**, (sometimes called the “hypothetical receipt”)

The comparator need not be received as a result of the same kind of transaction as did the actual receipt. *IRC v Cleary*<sup>152</sup> concerned a share sale: the shareholder sold shares to a company for cash. The actual receipt of the proceeds of sale was not income-taxable. The comparator was a possible dividend from the company (which would have been income-taxable). So there was a “tax advantage”.<sup>153</sup> A dividend and a sale are different types of transaction. The dividend would reduce the company’s assets available for distribution (unlike the actual sale). That did not matter. So in short, the question was whether the company can pay a dividend to the shareholder equal to the amount which the shareholder received tax-free.

The comparator must involve receipt of the same asset as the actual receipt. *Anysz v IRC*<sup>154</sup> concerned a share for share exchange: the shareholder transferred shares in A Ltd to another company (B Ltd) in exchange for an issue of shares in B Ltd. B Ltd could have declared a cash dividend, but cash was not a valid comparator to the actual receipt of B Ltd shares. However A Ltd could have:

- (1) bought B Ltd shares, and
- (2) distributed them to the shareholder by dividend in specie.

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151 43 TC 396 at 441 (emphasis added).

152 44 TC 399 at p.423. For TiS aspects of this case, see 54.10.1 (Sale of close co to close co).

153 At that time the standard IT/CGT definition applied to both IT and CT TiS codes.

154 53 TC 601.

That was a valid comparator. Hence the shareholder obtained a “tax advantage”.

### 2.11.7 *Tax advantage/avoidance compared*

On a natural reading, “tax advantage” in the standard sense is wider than tax avoidance. Tax advantage includes a relief from or repayment of tax, as well as the avoidance or reduction of a charge to tax. The concept thus includes both tax avoidance and mitigation.

In *Marwood Homes v IRC*:

Taking steps to obtain relief under s 242 [ICTA 1988] following payment of a dividend outside a group election is clearly within the spirit of the ACT code in the tax legislation. But the fact that a transaction has been carried out to achieve a benefit conferred by a statutory provision will not of itself exclude the application of [the TiS rules]. This follows from the definition of tax advantage in [what is now s.732 CTA 2010] which covers both everyday tax planning and transactions, such as traditional dividend stripping, which fall more obviously within the mischief that [the TiS code] was introduced to counteract. The only safeguards available to the taxpayer are the clearance procedures and the escape clause [motive defence]. It cannot therefore avail *Marwood* to rest its case on the simple proposition that the dividends ... were directly within the spirit of s 242.<sup>155</sup>

That concerns the meaning of “tax advantage” in the TiS code, where special principles of construction apply.<sup>156</sup>

The same approach was taken in the context of DOTAS.<sup>157</sup>

Nevertheless, the context of some TAARs may show otherwise. HMRC guidance on TAARs often adopts an avoidance test.<sup>158</sup>

## 2.12 Naming and shaming

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

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155 [1999] STC (SCD) 44 at [20].

156 See 54.1.1 (Construction of TiS code).

157 *HMRC v Hyrax Resourcing Ltd* [2019] UKFTT 175 (TC) at [151] - [161]. But the arrangement in that case did constitute tax avoidance in the strict sense, so the issue did not need to be decided.

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topic is about.

The expression covers a variety of arrangements.

### 2.12.1 *Statutory naming & shaming*

Statutory “naming and shaming” was introduced by s.94 FA 2009. This provides:

- (1) The Commissioners may publish information about any person if—
  - (a) in consequence of an investigation conducted by the Commissioners, one or more relevant tax penalties<sup>159</sup> is found to have been incurred by the person, and
  - (b) the potential lost revenue<sup>160</sup> in relation to the penalty (or the aggregate of the potential lost revenue in relation to each of the penalties) exceeds £25,000.
- (4) The information that may be published is—
  - (a) the person's name (including any trading name, previous name or pseudonym),
  - (b) the person's address (or registered office),
  - (c) the nature of any business carried on by the person,
  - (d) the amount of the penalty or penalties and the potential lost revenue in relation to the penalty (or the aggregate of the potential lost revenue in relation to each of the penalties),
  - (e) the periods or times to which the inaccuracy, failure or action giving rise to the penalty (or any of the penalties) relates, and
  - (f) any such other information as the Commissioners consider it

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159 Defined s.94(2) FA 2009: “A “relevant tax penalty” is—

- (a) a penalty under paragraph 1 of Schedule 24 to FA 2007 (inaccuracy in taxpayer's document) in respect of a deliberate inaccuracy on the part of the person,
- (b) a penalty under paragraph 1A of that Schedule (inaccuracy in taxpayer's document attributable to deliberate supply of false information or deliberate withholding of information by person),
- (c) a penalty under paragraph 1 of Schedule 41 to FA 2008 (failure to notify) in respect of a deliberate failure on the part of the person, or
- (d) a penalty under paragraph 2 (unauthorised VAT invoice), 3 (putting product to use attracting higher duty etc) or 4 (handling goods subject to unpaid excise duty) of that Schedule in respect of deliberate action by the person.”

160 Defined s.94(3) FA 2009: ““Potential lost revenue”, in relation to a penalty, has the meaning given by—

- (a) paragraphs 5 to 8 of Schedule 24 to FA 2007, or
- (b) paragraphs 7 to 11 of Schedule 41 to FA 2008, in relation to the inaccuracy, failure or action to which the penalty relates.”

appropriate to publish in order to make clear the person's identity.

(4A) Subsection (4B) applies where a person who is a body corporate or a partnership has incurred—

- (a) a penalty under paragraph 1 of Schedule 24 to FA 2007 in respect of a deliberate inaccuracy which involves an offshore matter or an offshore transfer (within the meaning of paragraph 4A of that Schedule), or
- (b) a penalty under paragraph 1 of Schedule 41 to FA 2008 in respect of a deliberate failure which involves an offshore matter or an offshore transfer (within the meaning of paragraph 6A of that Schedule).

(4B) The Commissioners may publish the information mentioned in subsection (4) in respect of any individual who—

- (a) controls the body corporate or the partnership (within the meaning of section 1124 of CTA 2010) [strict-sense control], and
- (b) has obtained a tax advantage<sup>161</sup> as a result of the inaccuracy or failure.

(4C) Subsection (4D) applies where one or more trustees of a settlement have incurred—

- (a) a penalty under paragraph 1 of Schedule 24 to FA 2007 in respect of a deliberate inaccuracy which involves an offshore matter or an offshore transfer (within the meaning of paragraph 4A of that Schedule), or
- (b) a penalty under paragraph 1 of Schedule 41 to FA 2008 in respect of a deliberate failure which involves an offshore matter or an offshore transfer (within the meaning of paragraph 6A of that Schedule).

(4D) The Commissioners may publish the information mentioned in subsection (4) in respect of any trustee who is an individual and who has obtained a tax advantage as a result of the inaccuracy or failure....

(6) Before publishing any information about a person under subsection (1) the Commissioners—

- (a) must inform the person that they are considering doing so, and
- (b) afford the person reasonable opportunity to make representations about whether it should be published.

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161 The GAAR definition of tax advantage applies; see s.94(16) FA 2009: "In this section ... "tax advantage" has the meaning given by section 208 of FA 2013."

(6A) Before publishing any information about an individual under subsection (4B) or (4D), the Commissioners—

- (a) must inform the individual that they are considering doing so, and
- (b) afford the individual reasonable opportunity to make representations about whether it should be published.

(7) No information may be published before the day when the penalty becomes final (or the latest day when any of the penalties becomes final).

(8) No information may be published for the first time after the end of the period of one year beginning with that day (or that latest day).

(9) No information may be published (or continue to be published) after the end of the period of one year beginning with the day on which it is first published.

(10) No information may be published if the amount of the penalty is reduced under—

- (a) paragraph 10 of Schedule 24 to FA 2007,
- (aa) paragraph 10A of that Schedule to the full extent permitted following an unprompted disclosure,
- (b) paragraph 13 of Schedule 41 to FA 2008, (reductions for disclosure) to the full extent permitted, or
- (c) paragraph 13A of that Schedule to the full extent permitted following an unprompted disclosure.

(11) For the purposes of this section, a penalty becomes final—

- (a) if it has been assessed, when the time for any appeal or further appeal relating to it expires or, if later, any appeal or final appeal relating to it is finally determined, or
- (b) if a contract is made between the Commissioners and the person under which the Commissioners undertake not to assess the penalty or (if it has been assessed) not to take proceedings to recover it, at the time when the contract is made.

We have seen the usual mission creep. The House of Lords say:

Naming and shaming provisions have subsequently been introduced to allow HMRC to publish the names of large corporations whose behaviour is consistently uncooperative and of promoters and participants in failed avoidance schemes.

114. The extension of the naming sanction to taxpayers and promoters whose behaviour is legal, but of which HMRC disapproves, blurs an important boundary between those who break the law and those who do not.

115. We recommend that naming and shaming provisions should be restricted to those who have broken the law.<sup>162</sup>

But no-one has taken any notice of that.

### 2.12.2 *Media naming/shaming*

The greatest concern is unregulated shaming in the media.

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!

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>163</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. Thus in 2015 Mandelson was berated for taking a loan from a UK company.<sup>164</sup> Ed Miliband was accused of avoiding tax by means of a deed of

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162 House of Lords Economic Affairs Committee “HMRC: Treating Taxpayers Fairly” (2018)

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

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

164 <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.

variation.<sup>165</sup> The allegations are so off-target as to cast doubt the good faith of those who make them and newspapers which uncritically 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, public shaming may quickly lead away from the Rule of Law. Starbucks paid £20m following a threat to occupy its cafes.<sup>166</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.

### **2.13 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>167</sup>

It is not possible to comment sensibly on the taxation of any multinational group without knowing the relevant facts, which are not usually in the public domain. The claim that these companies have avoided UK

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

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

167 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 I think 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.

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 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>168</sup>

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>169</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 companies; and, perhaps, it has reduced Irish tax by informal transfer pricing agreements with the Irish Revenue.

### 2.13.1 *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>170</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

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168 HMRC, “Taxing the profits of multinational businesses” Issue Briefing (2012) [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/89030/profits-multinationals.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/89030/profits-multinationals.pdf)

169 Ting, “iTax—Apple’s International Tax Structure and the Double Non-Taxation Issue” [2014] BTR 40. See 99.1 (Hybrid entities).

170 Christian Aid, “Tax for the common good (2014) <http://www.christianaid.org.uk/images/Tax-Morality-Report-J2951.pdf>

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 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>171</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;<sup>172</sup> it will be interesting to see what results.

### 2.13.2 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>173</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

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171 Maas, *Taxation Magazine*, 27 February 2013.

172 See 73.19 (State Aid).

173 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

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.

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>174</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>175</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>176</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.

We should never lose sight of the fact that public debates about tax avoidance are simultaneously fiscal, moral and political debates, raising

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174 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>

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

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

issues of equality, redistribution, class, and tax competition; and sensitive ears may also detect elements of xenophobia.

*This file contains Chapter 2, Taxation of Non-Residents and Foreign Domiciliaries by James Kessler QC (chapter version date: 4.9.19)*

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