This file contains Contents in Brief, Introduction and Chapters 1 and 2; for the full text, see https://www.privateclienttax.co.uk/

CONTENTS AT A GLANCE

The chapters are organised thematically as follows:

INTRODUCTION AND WHAT'S NEW

1.1 Abolition of domicile and scope of this book

2025 is a year that will be remembered in tax history. It announced a set of reforms:

(1) For IHT:
   (a) Long-term residence replaces domicile
   (b) Excluded property in trusts depends on the settlor's LTR from time to time

(2) For IT/CGT:
   (a) FIG relief replaces the remittance basis
   (b) Transitional rules include the Temporary Remittance Facility, 2025 rebasing, and a new definition of remittance (for pre-2025 unremitted income)

One might summarise this package as the abolition of domicile as a tax concept, or the abolition of non-dom tax reliefs;[1] though as usual, the short label does not fully describe the details of the reforms.

This is the most important change in UK taxation since the introduction of CGT/CT in 1965, VAT in 1973, and CTT in 1974, and very few readers will have firsthand memory of any of those. So it is the biggest change in our working lifetime. It will take some years to work out its consequences.

Territorial rules (now based on residence, situs and source) are best addressed as part of a general discussion: in taxation, as in life, everything is connected. Even a preliminary sketch needs more time than is available in the month between the publication of the finance bill in its final form, and the start of the tax year when this book is published; the discussion of the new law will go online over the course of the year.

The new title of this work reflects this change and this approach.

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1 See App. 8.1 (Domicile: Introduction).

1.2 Co-authorship

This book has always benefited from comments and contributions from readers and discussions with my colleagues in chambers. It has now grown beyond my ability to maintain it all. The following chapters are now in the good hands of junior members of Old Square Tax Chambers:

Chapter: Topic	**Responsible author**
35: Travel expenses: employment income	Rebecca Sheldon
46: National Insurance Contributions	Mary Ashley

These names will be familiar to readers: Rebecca as the moderator of the online edition of this work; Mary as co-author of my *Taxation of Charities*.

If any readers are attracted to the challenge of "adopting" a chapter or section from this book please contact the author.

1.3 A statute-focussed approach

I set out statutory and other material verbatim:

> ... in the end we must always return to the words of the statute[2]

Returning to the verbatim text, it is surprising how often one finds that the words do not say what one expects.

This is not just a common law approach. Richard Hyland tells this story of his class at Université Paris II Panthéon-Assas:[3]

> Mme Gobert asked simply: *L'article 2 du Code civil, qu'est-ce qu'il dit?* Article 2 of the Civil Code, what does it say?
> My classmates were some of the best private law students in France. This was a question to which they knew the answer. One of them explained that article 2 provides for the nonretroactivity of the law. Mme Gobert looked at the student without smiling. Then she repeated the question. *L'article 2 du Code civil, qu'est-ce qu'il dit?* A different student mentioned Paul Roubier's suggestion that a new law may be applied to *les situations juridique en cours*. Again she repeated the question. *L'article 2 du Code civil, qu'est-ce qu'il dit?* Another student tried, and then another, each new voice attempting yet a more refined

2 *RFC 2012 Plc v AG* [2017] UKSC 45 (the *Rangers* case) at [11]; see 90.5.2 (A judicial gloss).

3 Hyland. *Gifts: A study in comparative law*, 1st ed (1989) p.xvi.

statement of the concepts involved. After each comment she responded in the same way. It was my first French law class, so I did not know what to think. It seemed like a Zen-like version of the Socratic method. The French students were terrified. This was material they thought they knew, and yet they could not guess what was on her mind. Finally, one of the students had the presence of mind simply to read the code provision aloud. Mme Gobert's eyes lit up. *Mais bien sûr!* she responded *C'est ça qu'il dit!*

1.4 The year 2024/25 in review

2024/25 saw the final decision in the statutory residence test case (*A Taxpayer v HMRC*), with a welcome decision of the Court of Appeal. The 3 CoA unallowable purpose cases (*BlackRock, Kwik-Fit and JTI)* are now final, the SC having refused permission to appeal).

Delay in the FTT continues to be an issue. In 2023 the Judicial Conduct Investigations Office said:

> A nominated judge found that Mr Justice Sweeting had not issued a judgment in a timely manner and failed to immediately recognise the consequences of his actions. The judgment was not issued until 14 months after the initial hearing.
> Mr Justice Sweeting apologised and acknowledged that the judgment should have been completed earlier. In mitigation he cited his busy sitting schedule and personal matters.
> The lord chief justice and the lord chancellor took into consideration the mitigating circumstances in this case and agreed to issue Mr Justice Sweeting with formal advice.

The reader may think the JCIO is absolutely right. But the message has not reached the FTT. I have not done a full survey - though someone should - but note that in 2025, Judge Geraint Williams brought out *two* decisions more than *eighteen* months after the hearings,[4] without any adverse comment that I have noticed. If the problem is acknowledged, the solution seems attainable. There should be a target date for judgements (from 3 weeks for simple cases to 6 weeks for the most complex) and scheduling of hearings which allows judges to achieve it; and if there have to be years of delay, which of course there should not be, it would be

4 *Lloyds Asset Leasing Ltd v HMRC* [2025] UKFTT 57 (TC) decision 20 Jan 2025, hearing dates 5-26 May 2023; *HMRC v Asset House Piccadilly Ltd* decision 12 February 2025, hearing dates 12-16 June 2023.

better to defer the hearing than to extend the period between hearing and judgment.

1.4.1 *Simplification/complification*

Office of Tax Simplification (now abolished) stated in 2017:

> The UK tax code is widely cited as being the longest in the world".[5]

This claim had been made at least since 2010.[6] In recent years Parliament added:[7]

Finance Act(s)	**Pages**		
2012	703 (a record)	2019	337
2013	648	2020	217 [8]
2014	668	2021	428
2015	597 (2 Finance Acts)	2022	225
2016	662	2023	416 (2 Finance Acts)
2017	829 (2 Finance Acts)	2024	337
2018	196	2025	296

The OTS estimated HMRC guidance at 90,000 pages in 2018;[9] whatever

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5 It is hard to empirically assess the claim that the UK has the longest tax code in the world, and OTS made no attempt to do so. But if any readers are aware of other serious contenders for that title, I would be interested to hear.

6 For older references see the Introduction to the 2016/17 edition of this work.

7 Finance Act page counts are a rough proxy for the ever growing complexity of the UK tax system, but not an altogether bad one. A (slightly) better proxy would also consider secondary legislation and HMRC guidance; and, perhaps, case law; then the page counts would multiply the Finance Act numbers set out here tenfold.
For a discussion of the multidimensional concept of tax complexity, see Tran-Nam and Evans, "Towards the Development of a Tax System Complexity Index" (2014) Fiscal Studies Vol 35 p.341.
OTS have published two (somewhat simplistic) discussions of tax complexity:
Length of Tax Legislation as a Measure of Complexity (Apr 2012)
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/193496/ots_length_legislation_paper.pdf
OTS Complexity Index (2012)
http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/193493/ots_complexity_index_methodology_paper.pdf

8 The unusually short length of the FA 2020 is due to the December 2019 election.

9 OTS, "Guidance for taxpayers: a vision for the future" (2018) para 1.21. These pages have assuredly not been printed or counted. Quantification raises methodological issues which deserve a short essay to itself. We have reached the stage where the amount of HMRC guidance is impossible to quantify: the words are

the true figure, it will have grown considerably since then. This guidance was "not comprehensive" - something of an understatement; but according to the OTS "real life cannot be reduced to a neat description in a few (!) pages of writing".[10]

It is easier to *talk* of simplification. In the ill-fated "mini" budget of October 2022:

> the government will embed tax simplification into the institutions of government ... and set a mandate to HM Treasury and HMRC to focus on simplifying the tax code.[11]

The reader may think that satirists better identify the reality:

> We will further complicate the UK tax system so that large companies can no longer find loopholes.[12]

Furnished holiday letting relief has gone. This will be a simplification, as is the abolition of the remittance basis.

1.5 The future

The 2024 budget announced two more radical reforms from 2026/27:

(1) Abolition of 100% Business/Agricultural property relief

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uncountable. Within the limits of guesswork, and assuming 500 words per page (single spacing), the figure of 90,000 pages seems to me to be on the low side. There are 150 HMRC Manuals, just for a start.

Perhaps the focus of enquiry should be whether HMRC guidance is too short, because 90,000 pages would not be sufficient to do justice to the topic. The legislation, measured by pages of the Orange & Yellow tax handbooks, can be counted and amounts to 23,374 pages in 2025/26 (that does not include DTAs, which would be another 3,000 pages). The Tax Cases reports, which began in 1875, and ceased publishing in 2014, reached 82 volumes and did not cover VAT.

10 Para 1.24.

11 HM Treasury, "The Growth Plan 2022".
https://www.gov.uk/government/publications/the-growth-plan-2022-documents
The emphasis, or one might say, rhetoric, of simplification has fluctuated. OOTLAR 2008 had 45 references to simplification. OOTLAR 2021 had none. The "Growth Plan 2022" had 15.
In (I think) 2013 the government came up with the slogan "Creating a simpler, fairer tax system", which OTS adopted; it imagines away a troubling reality in which simplicity and fairness are competing values which require hard choices.
https://www.gov.uk/government/policies/creating-a-simpler-fairer-tax-system

12 Official Monster Raving Loony Party Manifesto 2017
https://www.loonyparty.com/2017-general-election-manicfesto

(2) Pension IHT reform

There is also a review into the settlement code, transfer of asset code and s.86/s.87 TCGA, starting with a call for evidence.[13] Anything could happen, and at this stage it is pointless to speculate.

We face a continued period of change and uncertainty, in politics, economics, law and taxation, and will continue to live in fiscally exciting times.

1.6 Thanks ...and request for help

I am very grateful to my colleagues in chambers, especially Robert Venables KC, Philip Simpson KC and Rory Mullen KC, for discussions on many aspects of tax. Yijia Liu as research assistant resolved many puzzles. I owe a great debt to Jane Hunt and Ruth Shaw who work committedly on this text throughout the year.

Comments from my readers and clients continue to be of the greatest value and interest. I am very grateful to all who commented, and in particular to John Barnett and Sam Dewes (who commented on a variety of topics), and Mark Pearce (cryptoassets). In order not to be defeated by the size of this work, readers' help is needed more than ever. If anyone would like to offer to write or revise a section - or chapter - of this book please get in touch.

The pleasure in writing this book consists in the interest of the questions which it raises, and the success which it may have achieved in answering them. On the basis of what is known at 1 April 2025, the printed book seeks to state the law for 2025/26. The online version aims to cover some subsequent developments.

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13 https://www.gov.uk/government/calls-for-evidence/personal-tax-offshore-anti-avoidance-legislation/personal-tax-offshore-anti-avoidance-legislation

OBTAINING FURTHER ADVICE - AND DISCLAIMER

Further advice

If you want advice on which you are legally entitled to rely you can obtain it - but not from this work.

In particular, you may instruct the author to advise. I enjoy writing, but spend most of my time giving independent specialist professional advice in private client matters, especially areas covered in this work. For further details see *https://www.kessler.co.uk*

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PCT Online is moderated by Rebecca Sheldon, a member of Tax Chambers, 15 Old Square, Lincoln's Inn.

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The professional bodies issue the *Professional Conduct in Relation to Taxation* with a disclaimer. The Forward provides:

> While all reasonable care has been taken in the preparation of this document, the PCRT Bodies do not owe any duty of care and as a result cannot be held responsible for any loss or damage caused by any reliance on this document. This document is not a substitute for appropriate legal advice.

When that appeared in 2011 it seemed extraordinary. But nowadays no professional body issues any statement or guidance without a disclaimer.[1] Similarly, and *a fortiori*, the views expressed in this book are put forward for consideration only and are not to be relied upon. Neither the author nor the publisher accept responsibility for any loss to any person arising as a result of any action or omission in reliance on this work. But could anyone have thought that a claim might arise in absence of this disclaimer?

A note to the lay reader

This book is not intended as a self-help guide, and is addressed to tax practitioners. In earlier editions I said: "... but it is readable for a lay person." I think that is still true, though the text is more daunting than when I first wrote those words, because the law has become more complicated. However, initiation in these matters must often be by the taxpayer. If you wish to research this subject in depth, and so take more control of your own tax affairs, read on. But for implementation you will need to find professionals to advise you. Self-help guides extol "the benefit of bypassing expensive lawyers"; but the bypass may prove the more expensive route in the long run.

Edition history

1st 2001	8th 2009	15th 2016	22nd 2023
2nd 2003	9th 2010	16th 2017	23rd 2024
3rd 2004	10th 2011	17th 2018	24th 2025
4th 2005	11th 2012	18th 2019	
5th 2006	12th 2013	19th 2020	
6th 2007	13th 2014	20th 2021	
7th 2008	14th 2015	21st 2022	

This book was called *Taxation of Foreign Domiciliaries* for 9 editions; it changed to *Taxation of Non-Residents and Foreign Domiciliaries* from the 10th to the 23rd edition and to *Kessler on Private Client Taxation* from the 24th edition.[2]

1 For instance, the Law Society likewise issue a disclaimer for their Practice Notes: The standard form is: "While care has been taken to ensure that they are accurate, up to date and useful, the Law Society will not accept any legal liability in relation to them."

2 The text of earlier editions is available on *www.privateclienttax.co.uk*

CHAPTER ONE

MOBILE INDIVIDUALS: TAX POLICY

1.1 Scope of chapter

The topics of this chapter are:

(1) Policy arguments for a lighter tax regime for a class of Mobile Individuals
(2) How that class may be determined
(3) The merits of the 2025 reforms
(4) The state of UK tax reform, and prospects for the future

The 2024/25 edition of this chapter contained a history of domicile tax reform, and an assessment of the reforms of 2008 and 2017. I omit that now as it is of historical interest only.

1.2 Mobile/established: terminology

In this chapter I coin the following terms:

"Mobile Individuals" means some class of mobile (or "footlose") individuals who are less connected with, or settled in, the UK than

Established Residents.

"Established Residents" are UK residents with sufficient UK links that they do not qualify as Mobile Individuals.

"Mobile-individual relief" is some relief for UK resident Mobile Individuals (which is not available to Established Residents)

I write these with initial capitals to reflect the technical nature of my terminology.

The UK has provided some form of Mobile-individual relief since 1914. Before 2025 the distinction between Mobile Individuals and Established Residents in my sense was determined by reference to domicile (supplemented by 7-year, 12-year and 15-year residence tests). The Mobile-individual reliefs were the IT/CGT remittance basis and protected-trust reliefs (informally known as non-dom reliefs).

After 2025, the distinction the distinction between Mobile Individuals and Established Residents is determined by Qualifying New Resident status, in short, 10-year absence followed by no more than four year's residence, and the Mobile-individual relief is FIG relief[1].

1.3 Tax competition

All UK residents may choose where to reside, but some are less securely attached to the UK than others. Tax competition arguments claim that if their tax burden was as great as established residents, fewer would choose to live in the UK, and overall the UK economy would lose:

(1) directly, from tax paid by them (including VAT and SDLT); and
(2) indirectly, from UK investment and expenditure which is more likely to be made by UK residents.[2]

Similarly, UK firms competing in the global market for talent and expertise will find recruitment easier if the tax regime for foreign employees is lighter. Some potential employees would not choose, or could not afford, to come if the UK tried to tax them on worldwide income.

In a nutshell: the argument is that the UK economy benefits from some Mobile-individual Relief.

1.3.1 *Tax competition: Analysis*

Tax competition raises a number of sub-issues:

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1 In this chapter I use the term "FIG relief" to include OWR.

2 Except to the extent that tax makes UK investment unattractive.

(1) To assess the existence and amount of tax competition
(2) What the UK should do in the light of that tax competition
(3) What international agreements might do to regulate tax competition

The first question is essentially one of fact; the second is a question of domestic politics. The third is a matter of foreign politics.

The debate about international tax competition is long standing.[3] All countries, of course, grapple with the same issues.[4]

1.3.2 *Extent of tax competition*

It seems clear that there is plenty of tax competition for wealthy mobile individuals: there are many low-tax or preferential tax regimes in Europe where they may choose to reside,[5] even without looking any further.

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3 See the evidence of Lord Vestey to the 1920 Royal Commission, *https://www.kessler.co.uk/wp-content/uploads/2013/07/Vestey_Royal_Commission_evidence_and_ensuing_debate.pdf*

4 See eg New Zealand Inland Revenue "Tax, foreign investment and productivity" *https://taxpolicy.ird.govt.nz/publications/2022/2022-other-draft-ltib* (2022)

5 Switzerland, for instance, has a lump sum taxation regime for non-Swiss citizens, specifically targeted for this purpose and more favourable than the UK remittance basis; see 7.5.4 (Swiss forfait taxpayer). This was at one time politically controversial; it was abolished in Zurich in 2009 and 5 other cantons followed suit. But in a referendum in 2014, the regime was supported by 59% of voters, on a 49% turnout; see Sigg and Luongo, "The Swiss lump-sum taxation regime: after the storm comes the calm?" [2015] JITTCP 169
http://www.swissinfo.ch/eng/bloomberg/swiss-say-foreign-millionaires-are-still-welcome-after-tax-vote/41144174
So I expect that Swiss tax law is now stable. In the 2014/15 edition of this work I added "and probably more stable than the UK" and that proved to be correct!
In 2017, Italy introduced a *forfait* regime for new residents: art.24-bis [Italy] *Testo unico delle imposte sui redditi*.
In 2024, Macfarlanes comment:

> ... other regimes have been created (most notably by Italy and Greece) which are based on the UK rules but are significantly more generous. As a result, wealthy individuals probably now have greater choice than they have ever had if they want to take advantage of a time limited but tax advantaged status. Some attractive inpatriate regimes (such as the Portuguese regime) have come and gone but overall, the number of international competitors to the UK has grown.

https://www.macfarlanes.com/what-we-think/in-depth/2024/non-uk-domiciliary-regime-an-analysis/?utm_source=vuture&utm_medium=email&utm_campaign=11%20march%202024-passle%20emails%20(ongoing)
Ireland retains the pre-2008 remittance basis, but I understand that Irish Capital Acquisitions Tax makes Ireland unattractive

In assessing the existence and amount of international tax competition several points must be borne in mind.

Effective low tax may be achieved in other countries by relaxing legal provisions at administrative level, in a non-transparent way.

One-paragraph summaries of a country's tax system are bound to be misleading.

The terms of statutory tax law are only one aspect of tax competition. Compliance costs are important. The quality of tax administration is important. An OECD study identifies six desiderata: a developed legal system, confidentiality, impartiality, proportionality, responsiveness (meaning a CRM for large companies, and at least answering correspondence from lesser taxpayers) and competence. They add:

> Frequent changes in legislation, particularly where there has been an absence of consultation, can have an adverse impact on the taxpayers and their advisers trust in the tax system.[6]

But there are others: can a tax authority subject an individual to an expensive and intrusive tax investigation without evidence that tax returns were wrong? Certainty is very important.[7] When individuals make decisions of where to live, perception matters as much as reality. Rates of tax on UK source income may matter more than FIG relief. By some of these measures, the UK competes poorly.

1.4 Other tax competition

Tax competition arises in many areas of taxation, and affects different types of income in different ways.

In areas where investment by non-residents is (more or less) completely mobile, tax competition has driven UK tax rates down to zero. Examples include:[8]

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6 "Engaging with High Net Worth Individuals on Tax Compliance" (2009) para 208 and 243; see *http://www.oecd.org/ctp/aggressive/engagingwithhighnetworthindividualsontaxcompliance.htm*

7 See 2.9 (The Rule of Law).

8 Another example from the field of shipping:

> "The location of ownership, flagging (registration) and management activities is very 'footloose', since it can easily be transferred from one country to another. This makes it vital to have regard to the fiscal regimes in other countries if we want to maintain a successful shipping industry in the UK. The modern armoury in the

Topic: Relief	**See para**
Income Tax	
Interest: Reliefs for non–residents	25.24; 45.1
IME: Non-residents trading in investments	72.1
IHT	
UK funds: IHT relief for non LTRs	77.8
FOTRA securities: IHT relief for non-residents	77.9, 77.15

In the case of very mobile sources of income, such as interest on bank deposits and trading income from asset management, any UK tax charge would only cause non-resident investors to move the investments to a different jurisdiction with a resultant loss in economic activity and profits in the UK.

In the corporate field, tax competition reduced the rate of CT, before 2023, though not of course to zero or near it. Tax competition may not have been the only factor which contributed to the historic reduction in CT rates, but if HM Treasury is to be believed, it was an important factor. In the 2017 spring budget:

> 3.11 The UK is one of the most open economies in the world, and a highly competitive business tax regime remains a key factor in retaining that position. The UK's corporate tax rate is the lowest in the G20.[9]

The increase in CT rates announced in the 2021 budget with effect from 2023 is a reversal of this trend, which surprised everyone who expected consistency in tax policy. The explanation may be that the government

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battle for success invariably includes a virtually tax-exempt fiscal regime." (Independent Enquiry into a Tonnage Tax, Lord Alexander, HM Treasury 1999.)
Another example is the exemptions for major sports events; see s.48 FA 2014. These events would not be held in the UK in the absence of tax exemption.

9 *https://www.gov.uk/government/publications/spring-budget-2017-documents*
This was the latest in a line of similar statements, traced in the 2016/17 edition of this work para 1.2.2, but I omit that here as it has little contemporary significance.
Reductions in UK corporation tax rates from 2012 may have been partly motivated by anticipation of Scottish tax competition; but if so, this was tactfully not mentioned.
But of course, headline rates are only part of the story. If one looks deeper, a different (and more complex) picture emerges, having regard to other major changes to corporate taxation:

(1) Reduced capital allowances (subsequently increased); see Pomerleau, "What We Can Learn from the UK's Corporate Tax Cuts" (2017) *https://taxfoundation.org/can-learn-uks-corporate-tax-cuts/*
(2) Increases in taxation of dividends in 2016, and again in 2023 (though dividend tax is less relevant to tax competition, as it does not apply to non-residents)

were constrained by promises not to raise the rates of IT or VAT. And as Paul Johnson has pointed out, a rise in corporation tax is politically attractive because it is not obvious who bears the burden of the tax. What the vagaries of CT rates illustrate is that tax competition is only one factor in determining tax policy.

1.4.1 *Tax competition within UK*

Devolution raises the issue of tax competition within the UK.

The possibility was once mooted that Scotland may compete in the corporate field, by a lower corporation tax rate than England:

> a lower headline rate of corporation tax could encourage greater investment by Scottish and UK firms in both physical and human capital and in research and development within Scotland.
> At the same time, it could make the country more attractive as a location for multi-national investment. It could also act as an important signal to global companies and investors as to Scotland's ambition to be a location for competitive business.[10]

Similar issues apply to taxation of individuals.[11] Competition in the field

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10 "Devolution of tax powers to the Scottish Parliament - Commons Library Standard Note" (2012, 2013)
The consultation paper does not consider the possibility that England might match the Scottish lower rate and does not address the question of what constitutes a Scottish company for the purpose of the lower rate. The most recent version of this paper is "Devolution of tax powers to the Scottish Parliament - recent developments" (2016)
https://commonslibrary.parliament.uk/research-briefings/sn07077/
Likewise in Northern Ireland: The Corporation Tax (Northern Ireland) Act 2015; House of Commons Briefing paper No 7078, "Corporation tax in Northern Ireland" (2017)
http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07078#fullreport
HMRC, "Draft guidance on the NI CT regime"
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/677832/NI_CTregime-draft_guidance.pdf
Wales would also like to join in:
> "If Northern Ireland is allowed to cut corporation tax, it would be outrageous if Welsh politicians did not have the option of doing the same."

Gerald Holtham, chair of the Holtham Commission for Wales (Cited in the Scottish consultation paper).
So in the future there might be no shortage of corporation tax competition within the UK.

11 See 43.3.4 (IT competition within UK).

of new UK residents is therefore only one aspect of a wider topic.

1.4.2 *Attitudes to tax competition*

Most sober commentators accept that tax competition is an important consideration in framing UK taxation. The UK could not act alone, as if there were no such thing as international tax competition.[12]

Tax competition offers advantages to countries which compete successfully and disadvantages to those who do not. In some areas government have accepted the challenge of competition, and sometimes with enthusiasm:

> The [investment manager] exemption enables non-residents to appoint UK-based investment managers without the risk of UK taxation and is one of the key components of the UK's continuing attraction for investment managers.[13]

Those opposed to the consequences of this line of argument deride it as:
(1) a "race to the bottom"[14]; and
(2) "harmful" tax competition

It is correct that if tax competition were the only policy consideration, it should logically drive tax rates on the mobile sources of income of non-residents down to zero; and in some cases that has been the result. Of course tax competition is not the only consideration in forming tax policy.

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12 However at the extreme this is denied; eg "Tackle Tax Avoidance" a piece by Margaret Hodge (2013):

> "There is real fear at the heart of government that if it gets tough on business, businesses will flee the UK. But as the chief executive of Google, Eric Schmidt, himself admitted in an interview: 'Google will continue to invest in the UK no matter what you guys do because the UK is just too important for us.'

https://archive.progressivebritain.org/2013/05/30/tackling-tax-avoidance-2/

13 SP 1/01; see 72.1 (Investment manager exemptions). The point is restated in HMRC "Expanding the Investment Transactions List for the Investment Management Exemption and other fund tax regimes" section 1 (2022)
https://www.gov.uk/government/consultations/expanding-the-investment-transactions-list-for-the-investment-management-exemption-and-other-fund-tax-regimes

14 This metaphor goes back at least to OECD *Harmful Competition* (1998)
https://www.oecd.org/ctp/harmful/1904176.pdf
The problem is not unique to tax: international regulatory competition may also lead to a "race to the bottom"; but perhaps in areas outside tax it is easier to reach international agreements imposing minimum standards.

The expression "harmful tax competition" conceals awkward questions about harmful to whom? "Harm" is not an obvious or self-defining concept. The focus is often on harm to the G7 countries.[15]

Unfortunately, it is usually hard and sometimes impossible to predict the economic effects of any reform, even approximately; and predictions reflect the views and hopes of the partial pundits who make them.[16] Ascertaining the effect of reforms after they are made is scarcely less difficult. As a significant number of non-doms work in senior roles in banking or finance,[17] one might infer that non-dom reliefs did (until 2025) contribute to the UK's success in these industries, but it is difficult to prove or disprove.

1.4.3 *Tax competition: International law*

International tax competition against other countries is subject to certain constraints of international law and politics. International fiscal co-operation in this area at present operates only to a limited extent. It made some progress in a (non-binding) EU code of conduct on business taxation,[18] but that is now defunct as far as the UK is concerned.

State Aid rules also impose restrictions on UK's freedom to tax and untax.

Tax competition extends beyond the EU, and those hoping for a body to

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15 See Littlewood, "Tax Competition: Harmful to Whom?" in Asif Qureshi and Xuan Gao, eds, Critical Concepts in Law: International Economic Law, Routledge, London (2010) volume VI, 162-234; reprinted from (2004) 26 Michigan Journal of International Law 411-487
https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1227&context=mjil
Avi-Yonah "Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State" [2000] Harvard Law Review p.1573.

16 For instance, HMRC estimate that a reduction in the rate of Corporation Tax in Scotland to 12.5% would cost £2.6bn, but the Scottish Parliament say the impact would be positive: "Corporation Tax: Discussion Paper Options for Reform" (2011) p.43,
https://webarchive.nrscotland.gov.uk/3000/https://www.gov.scot/Resource/Doc/919/0120786.pdf

17 A CAGE Warwick Policy Briefing, "The UK's 'non-doms': Who are they, what do they do, and where do they live?" (2022) records that around 22% of bankers in the top 1% (income above £125,000) are non-doms.
https://warwick.ac.uk/fac/soc/economics/research/centres/cage/manage/publications/bn36.2022.pdf

18 *https://taxation-customs.ec.europa.eu/harmful-tax-competition_en*

curb international tax competition tend to look to OECD.[19] At present this is focussed on corporate rather than personal taxation. There seems little prospect of that changing.

1.5 Mobility tests

1.5.1 *Domicile test*

The domicile concept was not ideally framed to identify the Mobile Individuals whose UK links are sufficiently less that a lighter IT/CGT regime is appropriate on fairness or tax competition arguments.

(1) The adhesive quality of a domicile of origin, and the restrictive rules for the acquisition of a domicile of choice, sometimes allow fortunate individuals to enjoy foreign domicile tax treatment, despite close UK links and only tenuous, historical and fortuitous links to their domicile of origin.
(2) The test depends on intention, which allows the possibility of mistaken or false claims.[20]
(3) Domicile disputes are expensive to conduct, because they require a wide investigation of facts.

To the extent that those points apply, non-dom reliefs fail on both economic and fairness criteria.

In considering these objections to domicile, however, one should bear in mind that there are no perfect criteria of what we are seeking to ascertain, which is "footlooseness", or "UK links". The question is not whether domicile always produced the right answer, but whether one can do significantly better with other concepts such as QNR.

1.5.2 *Residence tests*

Various long term residence concepts have sometimes been used:

Rules to supplement domicile test, abolished in 2025
Deemed domicile: 15 years residence
Remittance basis claim charge: 7 and 12 years residence
Pre-2025 rules still in effect
Temporary non-residence: 4 years residence and 5 years absence
Arriver/leaver rules for residence: 3 years non-residence

19 Eg Jeffrey Sachs "Stop this race to the bottom on corporate tax" Financial Times, March 28 2011.
20 Such claims were not uncommon; see App. 8.24.1 (Change of HMRC practice).

Post 2025 rules

10 years non-residence and up to:
(a) 4 years residence (FIG relief)
(b) 10 years residence (LTR)

These are ways to distinguish between UK residents with stronger or weaker UK links.

Citizenship/nationality is not much used in tax, and is unsuitable as a sole or principal test of taxability,[21] though it might be used to supplement other tests.

Until 2025, residence-based concepts were used to modify or supplement a domicile test rather than to wholly replace it. FA 2025 has abandoned domicile as a test and replaced it with a test based exclusively for residence.

1.6 Fairness and Mobile-individual Relief

The other consideration in the assessment of mobile individual taxation is fairness.

The starting point for any serious discussion of fairness in tax is terminology from economics:

Term	**Meaning**
Horizontal equity	Those relevantly equal should pay the same amount of tax
Vertical equity	Those relevantly different should pay different amounts of tax

It is considerations of vertical equity which have lead to the (more or less) accepted view that fair taxation should be progressive rather than regressive.

Economists have developed the concepts of horizontal/vertical equity with considerable sophistication[22] but their limitations are exposed when one tries to apply them in a real life context, such as an assessment of the fairness of the former remittance basis or FIG relief. The concepts are not so much a definition of fairness as an approach to identifying the issues.

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21 See App 20.5 (When citizenship matters for UK tax).

22 For a starting point, see Kaplow, "Horizontal Equity: Measures in Search of a Principle" National Tax Journal 42, no. 2 (1989) p.139-55
https://www.nber.org/system/files/working_papers/w1679/w1679.pdf
Musgrave "Horizontal Equity Once More" National Tax Journal 43, no. 2 (1990) p.113-23
https://www.journals.uchicago.edu/doi/abs/10.1086/NTJ41788830?journalCode=ntj

In deciding whether FIG relief is fair, one needs to ask if qualifying new residents and other UK residents relevantly equal. The answer is not self-evident.

1.7 Assessment of reform: Metrics

The House of Commons Treasury Committee offer a sensible approach to assessment of tax reform, identifying 8 criteria:

> The Committee recommends that tax policy should be measured by reference to the following principles. Tax policy should:
> 1. **be fair**. We accept that not all commentators will agree on the detail of what constitutes a fair tax, but a tax system which is considered to be fundamentally unfair will ultimately fail to command consent.
> 2. **support growth and encourage competition**.
> 3. **provide certainty**. In virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs. **Certainty about tax requires**
> i. **legal clarity**: Tax legislation should be based on statute and subject to proper democratic scrutiny by parliament.
> ii. **Simplicity**: The tax rules should aim to be simple, understandable and clear in their objectives.
> iii. **Targeting**: It should be clear to taxpayers whether or not they are liable for particular types of charges to tax. When anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system.
> 4. **provide stability**. Changes to the underlying rules should be kept to a minimum and policy shocks should both be avoided. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
> 5. The Committee also considers that it is important that a person's tax liability should be easy to calculate and straightforward and cheap to collect. To this end, tax policy should be **practicable**.
> 6. The tax system as a whole must be **coherent**. New provisions should complement the existing tax system, not conflict with it.

The Committee acknowledge that these objects are incompatible:

> 85. ... There will always be trade-offs and difficult decisions; a desire for fairness may increase complexity; a desire for certainty may increase administrative complexity. Nonetheless, the principles we set out, which reflect a surprising degree of convergence within our evidence, give a

> direction of travel which, in the long run, can both secure consent and improve the performance of the economy.[23]

1.8 2025 reform: Assessment

The FA 2025 contained a package of reforms and any short assessment of its merits must be limited to its main features, which are:

Inheritance Tax

Long-term residence replaces domicile

Excluded property in trusts depends on settlor's LTR from time to time

Income tax/CGT

FIG relief replaces the remittance basis

The Temporary Remittance Facility

A new definition of remittance (for pre-2025 unremitted income)

1.8.1 *Political background*

The inspiration for the changes was political. It was made under the Tory Sunak administration, in the Spring Budget of 6 March 2024, and confirmed in the Autumn Budget of 30 October 2024 by Labour, following the election.

The original decision should be seen in the context of a history of the Tories adoption of Labour policies: the increased national living wage,[24] the apprenticeship levy,[25] and the 2017 non-dom reforms.

Accordingly there was no debate on the policy issues. Since the policy was supported by Labour, there was no opposition to it.

This is not to say that the 2017 reforms are not defensible, on the basis of fairness or otherwise, just that little reasoned debate took place in public, and probably limited debate took place in private.

1.8.2 *Clear and easy to operate*

The 2025 rules are a success by this criteria. They are unquestionably

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23 Treasury "Principles of tax policy" (2011) *http://www.publications.parliament.uk/pa/cm201011/cmselect/cmtreasy/753/753.pdf*

24 Labour Manifesto 2015 provided: "We will [raise] the National Minimum Wage to more than £8 an hour by October 2019". *https://manifesto.deryn.co.uk/wp-content/uploads/2021/04/BritainCanBeBetter-TheLabourPartyManifesto2015.pdf*

25 Labour Manifesto 2015 provided: "[Apprenticeships] will be co-funded ... by employers..." *https://www.slideshare.net/miquimel/2015-04-labourgeneralelectionmanifesto2015britaincanbebetterlabour*

clearer than the pre-2025 rules. The test of residence is clearer than domicile.

The are some shadows in this sunny picture.

(1) The problems of the remittance basis, exacerbated by the botched reforms of 2008 and 2017, will remain for a generation: it will continue to apply to pre-2025 unremitted income/gains, only partly mitigated by the TRF. These problems are worsened by the 2025 amendments to the definition of remittance, which the reader may think were quite unnecessary, given the transitional nature of the new rules. After a decade or two the issue will gradually fade into insignificance.
(2) The individual has to compute the income/gains in order to claim FIG relief; in this respect the remittance basis was simpler, as unremitted income/gains did not have to be computed.
(3) The abolition of protected trusts (certainly a simplification) means that attention will need to be given to the ToA and CGT s.3 motive defences, and reliefs such as SSE, which may not have mattered for protected trusts. Simplicity is not simple to achieve..

1.8.3 *Economic benefit: Non-dom relief*

On one side of the account is the gain of more tax paid by those who formerly qualified for the remittance basis and protected-trust relief (non-dom reliefs). On the other is tax and investment lost from individuals who leave the UK, and those who (because of these reforms) decide not to come.

The gain from abolishing the non-dom reliefs was discussed in two papers (together, "the Warwick Paper"):

- Reforming the non-dom regime: revenue estimates
- Taxation and Migration by the Super-Rich[26]

Key questions here are:

(1) The **"emigration response"**: how many would leave if non-dom reliefs were abolished

26 *https://warwick.ac.uk/fac/soc/economics/research/centres/cage/manage/publications/bn38.2022.pdf*
https://warwick.ac.uk/fac/soc/economics/research/workingpapers/2022/twerp_1427_-_advani.pdf
Both by Arun Advani, David Burgherr and Andy Summers, two economists and a lawyer, and published 2022. The two papers need to be read together.

(2) The **“immigration response”**: how many would chose not to come

The Warwick Paper concluded, contrary to the generally- and long-accepted view, that the emigration and immigration responses would be small. The Paper gives figures for the tax yield which would increase if the reliefs were abolished:

> After accounting for this limited migration response, including the loss of existing tax paid by non-doms who leave, the additional tax that would be received is £3.23 billion. The net additional revenue to government, after also accounting for the loss of the remittance basis charge receipts, is £3.16 billion. Based on the upper bound for the expected migration effects, we can rule out increases in receipts of below £2.4 billion.
> These findings allow us to rule out the concern – previously raised by Labour and Conservative politicians alike – that abolishing the non-dom regime would ‘cost Britain money’. ... Objections to restriction or removal of the remittance basis cannot therefore be based on their fiscal effects.

I discussed the paper in the 2024/25 edition of this work[27] and omit that now as it is of historic interest. It is important to note that even if one accepts the authors predictions - and there is room for doubt - they are not relevant to the reforms actually carried out in 2025, because these reforms differed in important ways from those contemplated in the Warwick paper:

(1) FIG relief: the paper floated the possibility of a short term residence relief to replace the former remittance basis, but did not evaluate their cost
(2) The paper did not consider IHT: in practice the imposition of IHT on trusts made prior to becoming LTR will increase the migration response, in the author’s view, very considerably.

Given the likely migration response, it does not seem likely to the author that the reforms will bring in any additional revenue.

What proportion of IHT strictly due will be properly paid on the death of non-resident LTRs, or on settlements made by non-resident LTRs?

1.8.4 *Economic benefit: FIG relief*

On one side of the account is the gain of more tax paid by new residents who come because of the relief. On the other is the loss of tax from those

27 Para 1.6 (Warwick/LSE paper)

who would come anyway. The pre-2025 remittance regime was targeted at the wealthiest. FIG relief is less targeted, because:

(1) The individual does not have to be wealthy to qualify, just to have enough foreign income to justify the loss of the personal allowance (and then, only if there individual has UK income to use against it)
(2) The relief applies to anyone who has been away 10 years, even if UK domiciled or a formerly-domiciled resident, who would not have qualified for the former non-dom reliefs.

Some will be attracted to the UK by the FIG regime, but how many? How much tax and investment will they bring to the UK? Will they stay after four years when the regime stops? or after 10 years when they would become LTRs? The answers at present can only be speculative. We will know a little more in a decade, when figures for the early years of the FIG regime are available and academics have studied them.

Macfarlanes say:[28]

> we would anticipate that individuals who are planning a major exit from a business within that four-year period will be attracted to the UK. In this sense, the regime is better than Italy, because in Italy there can be significant problems with disposals of major private company shareholdings in the first five years of residence.

1.8.5 *Is FIG relief fair*

If one accepts that taxation ought in principle to be progressive, which has long been a broad feature of UK taxation, then it is difficult to claim that FIG relief is fair. The domicile Technical Note, significantly, makes only one reference to fairness:

> The government is committed to addressing unfairness in the tax system, so that everyone <u>who is long-term resident in the UK</u> pays their taxes here

It is interesting to compare the 1988 Consultative Document (Residence in the UK) which proposed that the remittance basis would be abolished, and those resident here for less than seven out of 14 years (and, perhaps, also not UK domiciled) would qualify for a new "intermediate basis" of taxation. A drawback of that proposal was that it would require disclosure

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28 *https://www.macfarlanes.com/what-we-think/in-depth/2024/non-uk-domiciliary-regime-an-analysis* (2024)

of worldwide income in order to tax it at an effective rate of 2% or less. FIG relief opts for practicality over fairness.

The difficulty in assessing the fairness of the IHT reforms is that IHT (unlike its predecessor, CTT) is a fundamentally unfair and illogical tax, particularly in its treatment of trusts.[29] But subject to that caveat, the IHT reforms may be regarded as fair.

The TRF is not fair. It is a mechanism for bringing in money sooner, at a cost of reducing later receipts.

To those who lobbied successfully against domicile, one might say: be careful what to wish for! To the extent that UK domiciled individuals who have worked abroad return to their home in any event, the FIG relief fails on economic and fairness criteria. Just as there were non-doms, or alleged non-doms, who did not "deserve" the relief, there will be "undeserving" qualifying new residents who do not "deserve" FIG relief.

But again, the question is not whether the 2025 rules always produce the right answer, but whether one can do significantly better with other rules or refinements.

1.8.6 *FA 2025 enactment process*

The manner in which the FA 2025 was introduced deserves to be recorded. 46 amendments were made at Report Stage. Avery Jones notes that "Report Stage amendments are usually a disaster."[30] But it was not as bad as 2008, which Lord Howe described as "an object lesson in how not to legislate."[31]

Perhaps it would be naive to expect otherwise.

1.9 The promise of stability

No tax system is, or can be, entirely static. But there is a long tradition of instability in the UK tax system. In 1981:

> One of the most noticeable characteristics of the British tax system is that

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29 See Kessler, "The Quest for Fair Inheritance Taxation of Trusts" (2015) *https://www.kessler.co.uk/wp-content/uploads/2014/08/Kessler-The-Quest-for-Fair-Inheritance-Taxation-of-Trusts.pdf*

30 See "Taxing Foreign Income from Pitt to the Tax Law Rewrite—The Decline of the Remittance Basis", Avery Jones in *Studies in the History of Tax Law* (Vol 1 2004) *https://www.kessler.co.uk/wp-content/uploads/2013/12/Remittance-basis.pdf*

31 Making Taxes Simpler - The final report of a Working Party chaired by Lord Howe (2008) *https://conservativehome.blogs.com/torydiary/files/making_taxes_simpler.pdf*

> it is under continual change.[32]

In 1993:

> The major distinguishing characteristic of the British tax system is its instability. The British tax system changes faster, more frequently, and more radically than any other tax system I have observed.[33]

In 1999:

> The UK tax system is caught in a culture of never-ending change.[34]

The years 2008 - 2013 saw a series of broken promises of stability without any perceptible change of practice.[35] The promises of stability should be regarded as lip-service to the desideratum of stability. The practice, which lies deep in the culture of government, proved immune to such announcements. A true commitment to stability requires HMRC to refrain from making reforms which they would like to make, and when actual proposals come to the table, the interest of reform overcomes the interest of stability. It is easier for politicians to talk about stability than to achieve it. Perhaps HMRC recognised this, as the 2014, 2015 budgets contained no further promises of stability. The 2017 budget had a vague reference to "a more stable and certain tax environment", but I doubt if anyone was expected to take that seriously. Subsequent budgets have made no reference to stability in taxation; and everything changed again in 2025.

1.9.1 *Will the FIG regime be stable?*

The law will no doubt be amended a few times in the next few years, as issues emerge. After that, will the new law be stable? It seems unlikely. A government in need of funds might:
(1) Cut the qualifying period from 4 to 2 or 3 years
(2) Impose a FIG relief claim charge comparable to the remittance basis claim charge

That is especially likely if, as I would guess, the published figures

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32 James & Nobes, *Economics of Taxation* (1st ed., 1981), p.135.
33 Steinmo, *Taxation and Democracy* (1993), p.44.
34 ICAEW TAXGUIDE 4/99 (Towards A Better Tax System) *https://www.icaew.com/-/media/corporate/files/technical/tax/tax-faculty/taxguides/pre-2017/taxguide-0499.ashx*
35 I set them out the 2016/17 edition of this work para 1.10 (The promise of stability) but omit that here as it has diminishing contemporary significance.

underestimate the cost of FIG relief. There is something to be said, for instance, to restricting FIG relief to non-UK citizens, or those who have been UK citizens for less than 4 years.

On the other hand, there will be pressure to increase the qualifying period. Macfarlanes say:[36]

> ... the four-year period is really very short, especially when looked at in the international context. ... the Italian and Greek regimes are each available for 15 years, a French inbound regime lasts for eight years and the Spanish “Beckham” law lasts five years.
>
> A four year period is significantly less attractive. Such a short period could also be said to encourage what might be termed “fiscal nomadism”. Individuals who choose to benefit from the regime are likely to leave a limited footprint in the UK. After all, why would they purchase a property, or invest in the UK, if they only choose to be in the UK for four years?

That is not comparing like with like. FIG exemption while it lasts is more generous than a remittance basis, is uncapped, and does not incur a significant flat tax payment. The length of the Exempt Period is only part of the picture.

1.9.2 *Will the IHT regime be stable?*

Probably not.

Short summary descriptions of foreign tax laws are bound to mislead. Nevertheless the following quote is of interest as it illustrates how foreign jurisdictions have, unsurprisingly, struggled with the policy issues of using residence as a connecting factor for IHT:[37]

> Last year, [2017] Japanese inheritance tax rules were amended such that, where a foreign national had lived in Japan for 10 years (in the aggregate) out of the last 15, died outside of Japan, the foreigner national’s heirs would be subject to Japanese inheritance tax on such foreign national’s assets located both in Japan and elsewhere (a similar rule also applies for gift tax purposes).
>
> The above rule resulted in a situation where the heirs of a foreign national who had left Japan would potentially be subject to Japanese

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36 *https://www.macfarlanes.com/what-we-think/in-depth/2024/non-uk-domiciliary-regime-an-analysis* (March 2024)

37 *https://www.notaio-busani.it/it-IT/INTERNATIONAL---JAPAN--Disastrous-Japanese-inheritance-tax-IHT-amendment-to-be-repealed.aspx*

inheritance tax on the foreign national's worldwide assets for up to five years after such foreign national had left Japan. The fact that Japanese inheritance tax could "follow" a foreign national for up to five years after such person had left Japan caused great concern among Japan's expatriate community, and threatened to derail the Japanese government's efforts at attracting successful foreign talent to live and work in Japan.

In this year's tax reform, [2018] the Japanese government indicates that it will abolish the above rule applying to foreign nationals, subject to a certain anti-avoidance countermeasures in the context of gift tax... This change to the inheritance tax provisions should aid Japan in its efforts to show Japan to be an attractive location for successful foreign executives to reside long term.

1.10 State of UK tax reform

In 2010 CIOT expressed itself strongly:

> The way tax law is developed and effected in the UK is deeply flawed.[38]

Two publications shed light on what went wrong with tax legislation in recent years. Demos say:

> The centralisation of [tax policy-making power] is a particular problem because of the lack of institutional accountability of the Treasury on taxation policy and the lack of accountability of chancellors themselves in matters of taxation. ... The concept of checks and balances in tax policy is nonexistent.
>
> ... the current relationship between the Treasury and HMRC was 'very dysfunctional', had 'almost gone as wrong as it could have gone'...
>
> At the moment, pursuing a career only in tax policy is not valued within the Treasury hierarchy. Officials pass through the tax teams rather than making tax policy a career choice. ... High turnover results in a lack of experience in the tax section and little institutional memory...
>
> ... There are traditional areas that are ring-fenced as not for consultation, including tax rates and anti-avoidance measures. ...
>
> ... 'at the moment [anti-avoidance] works like a drive-by shooting. You might hit your objective but you also hit a lot of other people.'
>
> At present, policies are frequently changed without understanding the impact the policy has initially had in practice.[39]

38 Letter from CIOT to George Osborne, 19 May 2010

39 Ussher and Walford, *National Treasure* (Demos, 2011) *https://demos.co.uk/wp-content/uploads/2011/03/National_treasure_-_web.pdf*

Re-inforcing the tendency not to consult is an HMRC culture which is hostile to the tax profession . The Director of the HMRC Tax Avoidance Group 2004-2009 records:

> ... I was never happier than when a new tax avoidance initiative was greeted with howls of protest from the tax avoidance quarter.[40]

In short, preventing avoidance has been a priority that outweighs other considerations, such as certainty, workability and the Rule of Law; or rather obliterates all consideration; and listening to the tax avoidance quarter – which includes the professional bodies and almost any practitioner who said what HMRC did not want to hear – has been ruled out. The professional bodies are regarded by HMRC as a pressure group whose vaunted commitment to fairness, practicality and the Rule of Law is merely a cloak for self-interested whingeing of a featherbedded elite.[41]

That policy has ruled since the 1997 Blair administration, and its consequences can be seen in seeking to state the law, as this book seeks to do, or in seeking to understand the law, as you the reader will do now.

1.10.1 *Tax Consultation Framework*

In 2011 the coalition administration promised a fresh start with the Tax Consultation Framework. The 2015 Cameron administration also committed to this.[42] I am not aware that any subsequent administration has formally committed to it, though it has not been repudiated either.

The Tax Consultation Framework provides:

> 2. There are five stages to the development and implementation of tax policy:
> Stage 1 Setting out objectives and identifying options.

Demos claims to be Britain's leading cross-party think-tank.

40 Tailby, "Some Reflections on Tax Avoidance" [2011] PCB 41.

41 This may be seen in the context of a more general antagonism to the legal (and other) professions, and dismissal of their ethical pretensions. That is an ancient trope, but took renewed vigour under the Thatcher administration, and has lead to a transfer of regulatory power from the Bar and Law Society to regulation by non-lawyers.

42 HM Treasury: "Tax policy consultation will continue and be strengthened. The government remains committed to consulting on policy as set out in 'The new approach to tax policy making' in 2010." (2016). *https://www.gov.uk/government/news/7-things-you-need-to-know-about-the-new-budget-timetable*

Stage 2 Determining the best option and developing a framework for implementation including detailed policy design.
Stage 3 Drafting legislation to effect the proposed change.
Stage 4 Implementing and monitoring the change.
Stage 5 Reviewing and evaluating the change.
3. Where possible, the Government will:

- engage interested parties on changes to tax policy and legislation at each key stage of developing and implementing the policy;
- make clear at what stage (or stages) the engagement is taking place so that its scope is clear;
- carry out at least one formal, written, public consultation in areas of significant reform;
- set out, as the policy develops, its strategy for stakeholder engagement including planned formal consultation periods, informal discussions, working groups and workshops;
- consult, where it can, on the policy design, draft legislation and implementation of anti-avoidance and other revenue protection measures, provided this does not present additional risk to the Exchequer;
- minimise the occasions on which it consults only on a confidential basis. Where confidential consultation has been necessary the Government will be as transparent as possible about its outcome and consult openly if pursuing the policy change further; and
- provide feedback which sets out the Government's response to the views received and makes clear what changes, if any, have been made to the planned approach as a result of those views.

4. At each stage of consultation, the Government will set out clearly:

- the policy objectives and any relevant broader policy context;
- the scope of the consultation, in particular what is already decided and where there is still scope to influence the outcome;
- its current assessment of the impacts of the proposed change and seek to engage with interested parties on this analysis. A final assessment of impacts will be published once the final policy design has been confirmed...

5. Informal consultation will be as transparent as possible, consistent with the need to protect revenue. The best principles of formal consultation will be applied to informal consultation to ensure clarity of scope, impact, accessibility, and meaningful feedback. ... Informal consultation can run alongside formal consultation but will often be most appropriate at the earliest and latest stages of tax policy development to identify options and then to fine-tune the detailed legislation and implementation of change.

> **Exceptions**
> 8. The Government will generally not consult on straightforward rates, allowances and threshold changes, or other minor measures; recognising, however, that even in these cases some level of consultation can often be informative. It may also adopt a different approach for revenue protection or anti-avoidance measures where following this Framework could present a risk to the Exchequer. In other circumstances where the Government decides not to consult during tax policy development it will explain the reasons for that decision.
> 9. There will be times when it will be necessary to deviate from this Framework. In these circumstances the Government will be as open as possible about the reasons for such deviations.[43]

Of course tax is not unique in this respect: similar considerations apply to all areas of law reform. The Data Retention and Investigatory Powers Act 2014 was enacted in two working days; and in holding it to be unlawful, the Divisional Court noted in moderate terms:

> legislation enacted in haste is more prone to error.[44]

And again:

> it is widely acknowledged that the [Immigration] Rules have become overly complex and unworkable. They have quadrupled in length in the last ten years. They have been comprehensively criticised for being poorly drafted, including by senior judges. Their structure is confusing and numbering inconsistent. Provisions overlap with identical or near identical wording. The drafting style, often including multiple cross-references, can be impenetrable. The frequency of change fuels complexity.[45]

1.10.2 *Compliance with Framework*

How far has tax reform since 2011 complied with the Framework? That is a broad question; it would need a series of volumes, there has been so much.

In brief, compliance with the Framework's tax reform timetable has been patchy. It is easier to announce good intentions than to abide by them. The

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43 *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/89261/tax-consultation-framework.pdf*

44 *Davis (R, oao) v Secretary of State* [2015] EWHC 2092 (Admin) at [121].

45 Law Com No 388, "Simplification of the Immigration Rules: Report" (2020) para 1.1.

culture of "ready, fire, aim" still prevails.

A few examples will illustrate the point.

The ATED regime was introduced in breach of the Framework. The House of Lords Economic Affairs Committee commented:

> ... the Government's response to SDLT avoidance might have been more appropriately designed had it consulted interested parties at the outset as its 'new approach to tax policy making' stipulates. We recommend that the Government adhere to that approach in designing future tax changes.[46]

The 2016 dividend income reforms, a major change (also misdescribed as simplification[47]), were introduced in breach of the Framework. The House of Lords Economic Affairs Committee comment:

> We deeply regret the lack of consultation on the savings [Personal Savings Allowance] and dividend income proposals and repeat the recommendation in our Report on the draft Finance Bill 2014 that the Government should reassert its commitment to the 'new approach' to tax policy making and make sure that, in future, it adheres to it in full except in the most exceptional circumstances.[48]

The Law Society say:

> ... the new approach is (i) not always followed, and (ii) side-stepped by labelling new tax law as anti-avoidance when it is no such thing.
> A case in point is the FA 2014, which introduced changes to the way in which certain members of limited liability partnerships were taxed. When this proposal was first published, it was an anti-avoidance measure. Following initial consultation, the nature of the proposal changed markedly and became more widely applicable to professional partnerships. This was not anti-avoidance legislation but, nevertheless, there was no formal consultation of the kind envisaged by Tax Consultation Framework.[49]

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46 House of Lords Select Committee on Economic Affairs *The Draft Finance Bill 2013* (March 2013) para 210
http://www.publications.parliament.uk/pa/ld201213/ldselect/ldeconaf/139/139.pdf

47 Summer Budget 2015, para 1.186: "the government will reform and simplify the system of dividend taxation...".

48 "The Draft Finance Bill 2016" (2016), para 250.
http://www.publications.parliament.uk/pa/ld201516/ldselect/ldeconaf/108/108.pdf

49 The House of Lords Economic Affairs Committee was also critical: see the Committee report "The Draft Finance Bill 2014" (2014).

The Tax Professionals Forum note some cases where the framework was followed, and then say:

> In contrast, however, in other cases, consultations have started:
> - part way through the process (such as that on the provisions relating to the transfer of assets abroad and gains made by offshore close companies),
> - without a clear articulation of the policy involved (for example, on IR35 and Controlling Persons), or
> - without any discussion of the policy (for example, the changes to SDLT on properties owned by non-residents through companies, investment funds and others and the cap on income tax reliefs).[50]

The 2017 domicile reforms were announced in 2015, which should have allowed time for thinking and consultation. Two years is an appropriate time scale to introduce major reforms, and at the time it seemed a refreshing break from the pattern of 2008 to see reform enacted on that basis. But two caveats to this welcome development:

(1) A distant deadline allowed the more difficult and serious work to be put off, the matter was concluded in the usual frantic rush, and the end result is disappointing. Still, deferring some aspects of the offshore tax reforms to 2018, to allow consideration, is encouraging.

(2) The need for time was not accepted by Labour:

> ... why else would the Government have given a grace period for those non-doms affected to get an offshore trust if they do not have one already? ... why else would the Government have actively signposted the changes for non-doms, which has set hares running? It seems to me that those are things that the architect of the measures would do if they were of a mind to completely undermine the measures' effectiveness.[51]

On the other hand, the IHT residence nil-rate band, 10 pages of dense, foolish legislation, was slotted into F(no.2)A 2015, precluding debate and consideration, even though the rules only took effect from 2017/18! and even though there had to be a second installment of the legislation in FA 2016.

The last part of the Tax Consultation Framework requires post-

50 Tax Professionals Forum Second Independent Annual Report (2013).

51 Peter Dowd (Labour Shadow Chief Secretary to the Treasury) Hansard, 19 Oct 2017 *https://hansard.parliament.uk/Commons/2017-10-19/debates/aea0b4b1-dc6c-4153-a24f-09fb6be7d155/FinanceBill(FourthSitting)*

implementation monitoring and evaluation. This is almost never done.[52] It is interesting to speculate what would happen if it were. Much would depend on the identity of those carrying out the review and, in controversial areas, on their instructions and on their politics.[53]

Does anyone think that the 2025 reforms will be stable?

1.10.3 *Alternatives to Framework*

There is one route and one route only to a good tax system: sound tax policy, devised by those with a sound understanding of the current tax system, carried out by those who have reflected seriously on the issues in the context of the tax system as a whole; a leisurely timetable of consultation and legislative drafting as envisaged in the Tax Consultation Framework and the 10 tax tenets of ICAEW.[54] That is a hard prescription, though CIOT and others continue to bang the drum, and IFS do useful work.[55]

It is tempting to look for easier solutions. Past attempts include the Tax Law Rewrite, which achieved little; and, perhaps, the GAAR.[56] Advocates of the GAAR claimed:

> Enacting an anti-abuse rule should make it possible, by eliminating the need for a battery of specific anti-avoidance sub-rules, to draft future tax rules more simply and clearly. Also, fewer schemes would be enacted

52 Even in the cases where the FA 2018 required post-implementation reviews, the results were "singularly unilluminating. Most of them merely contains words to the effect of 'this legislation is new and we haven't yet seen how it will work in practice'." See Hubbard, Taxation Magazine, 4 April 2019.

53 See 127.16.5 (12 year limit: Critique).

54 *https://www.icaew.com/en/technical/tax/towards-a-better-tax-system/ten-tenets-of-tax*

55 See Institute for Government, "Overcoming the barriers to tax reform" (2020). *https://www.instituteforgovernment.org.uk/publications/overcoming-barriers-tax-reform*
See too House of Lords Select Committee on the Constitution, "The Legislative Process: Preparing Legislation for Parliament"
https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/27/27.pdf (2017)
For Finance Bill procedures, see House of Commons Briefing Paper 813, "The Budget and the annual Finance Bill"
https://commonslibrary.parliament.uk/research-briefings/sn04680

56 I have wondered whether the HMRC Charter might be added to this list, but its object lies in administration rather than substantive tax law. Its subject is "standards of behaviour and values to which HMRC will aspire when dealing with people in the exercise of their functions"; s.16A CRCA 2005.

> and so there will be less call for specific remedial legislation...In time, once confidence is established in the effectiveness of the anti-abuse rule, it should be possible to initiate a programme to reduce and simplify the existing body of detailed anti-avoidance rules.[57]

I am not sure if anyone seriously believed that, but it has not happened, and it is unlikely that it will. But it will take several decades to assess whether the GAAR will yield a consistent case law and reasonable predictability of outcome.

57 Aaronson, *GAAR Study* (2011) para 1.7 *http://webarchive.nationalarchives.gov.uk/20130321041222/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf*

CHAPTER TWO

TAX AVOIDANCE

2.1 Tax avoidance: Introduction

Tax avoidance is as old as taxation itself;[1] but the topic has taken prominence in recent decades, with extensive attention from parliament

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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*

and the media.[2]

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

2.2 Avoidance/mitigation, evasion

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

2.2.1 *Terminology*

It is helpful to begin with a fourfold categorisation:

(1) *Tax evasion*: Conduct which constitutes a criminal offence (fraud on HMRC or similar offences). This typically involves dishonest submission of an incorrect tax return. Dishonesty is essential to these offences.[3]

(2) *Honest misdeclaration*: The submission of an incorrect tax return without dishonesty. Those involved may be culpable (eg careless) but not dishonest.

(3) *Tax avoidance*: Arrangements that reduce tax liability in a manner contrary to the intention of parliament (I come later to consider this concept in more detail).

(4) *Tax mitigation*: Conduct which reduces tax liabilities without "tax avoidance" (not contrary to the intention of parliament).

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

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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.

3 See 133.8 (Fraudulent tax offences). Although there are now offences which do not require dishonesty, see 133.10 (Offshore tax offences), I would not characterise these offences as evasion

4 eg the 1920 Royal Commission on the Income Tax Cmd. 615 discussed evasion,

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).[5] In 1900 the distinction was noted as two meanings of the word "evade".[6] It is possible that the current use of the words avoidance/evasion in the modern sense originated in the USA where it was established by the 1920s.[7] 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

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

5 *Fisher v Brierly* (1860) 1 de G F&J 643 at p.663. It is a pity that this use of *contravention* did not catch on because it is more transparent than *evasion*.

6 *Bullivant v AG* [1901] AC 196 at p.207:
"The word 'evade' is ambiguous. ... there are two ways of construing the word 'evade': one is, that a person may go to a solicitor and ask him how to keep out of an Act of Parliament – how to do something which does not bring him within the scope of it. That is evading in one sense, but there is nothing illegal in it. The other is, when he goes to his solicitor and says, 'Tell me how to escape from the consequences of the Act of Parliament, although I am brought within it'. That is an act of quite a different character."

7 It is found in the scholarly Sears, *Minimising Taxes* (1922), and can be traced to Oliver Wendell Holmes in *Bullen v Wisconsin* (1916) 240 US 625 at p.630. It is regarded as basic in Hartman, *Tax Avoidance* (1930) which cites two textbook definitions in similar terms. Perhaps the practice of tax avoidance began earlier in the USA; the first published work on the subject in England was Moore, *The Saving of Income Tax Surtax and Death Duties* (1935), the publication of which lead to the enactment of the ToA provisions.

> Treasury (for example) described [s.18 FA 1936, transfer of assets] as a "Clause for the prevention of tax evasion", while the Attorney-General, dealing with the same clause, spoke of "marginal cases in which there may be some element other than tax evasion". Private members, and on at least one occasion the Financial Secretary, spoke of "guilt" and "innocence" as though the House were discussing the suppression of crime.[8]
>
> 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.[9]

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

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8 Official Reports, 15th June 1936, col. 676, 704, 692.

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

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

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

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

> 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. ...[10]
> 73. Tax avoidance, in contrast, involves the attempt to reduce the amount of taxes otherwise owed by employing legal means. However, the borderline between evasion and avoidance in specific cases may be difficult to define. For one thing, the criminal laws of countries differ, so that behaviour that is criminal under the laws of one country may not be criminal under the laws of another. In addition, the definitions of civil and criminal tax fraud may overlap, so that it is within administrative discretion whether or not to pursue a criminal fraud case in a specific instance. In reality, there is a continuum of behaviour, ranging from criminal fraud on one extreme, to civil fraud, to tax avoidance that is not fraudulent but which runs afoul of judicial or statutory anti-avoidance rules and therefore does not succeed in minimizing tax according to law, and finally to tax-planning behaviour which is successful in legal tax reduction. ...[11]

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.[12]

2.2.3 *Avoidance/evasion terms misused*

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

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

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

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

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

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

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

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

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

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

Outside the UK, the older terminology may still be found.[20]

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

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

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

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

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

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

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

20 The avoidance/evasion distinction in UK terminology is not adopted in EU law, which has a distinct technical terminology.
Similarly, s.482 United States Internal Revenue Code refers to allocation of income that "is necessary to prevent evasion of taxes" but the intended concept is one of avoidance.

> 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.[21]

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

See too 133.10 (Offshore tax offences),

2.3 Validity of tax avoidance

There is no *universal* rule that tax avoidance is ineffective. In *Hurstwood Properties v Rossendale BC*:[23]

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

Similarly,the *Ramsay* doctrine (whatever it is) is not a "broad spectrum antibiotic which killed off all tax avoidance schemes".[24]

But the rules which do exist are numerous and sufficient to ensure that successful avoidance is rare. Have there been any recent cases where a tax avoidance scheme has been upheld, and if so, how many? An answer to this must depend on what one means by avoidance. Examples at or near the abusive end of the spectrum are:

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21 House of Lords Economic Affairs Committee "HMRC: Treating Taxpayers Fairly" (2018) para 23, 24.
https://publications.parliament.uk/pa/ld201719/ldselect/ldeconaf/242/242.pdf
The report recommended "Clearer distinctions are needed in the Government's approach and rhetoric towards tax avoidance." But the Government rejected the recommendation, so this debate will continue: HMRC, "The Powers of HMRC: Treating Taxpayers Fairly (House of Lords Paper 242) Government Response" p.2
https://www.parliament.uk/documents/lords-committees/economic-affairs/Govt%20HMRC%20Powers%20report%2022%20Jan%202019%20.pdf

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

23 [2021] UKSC 16 at [51].

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

Case	**Topic**	**See para**
Davies v Hicks [2005] EWHC 847 (Ch)	Share pooling/matching	56.12.4
HMRC v D'arcy [2007] EWHC 163 (Ch)	Manufactured dividends	-
Burton v HMRC [2009] UKFTT 203	Flip-flop scheme	62.2
HMRC v Mayes [2011] EWCA CIV 407	Secondhand insurance policy	-
McLaughlin v HMRC [2012] UKFTT 174	Remittance basis scheme	91.12
Bowring v HMRC [2015] UKUT 550	Flip-flop scheme	61.8
Ano (No.1) v HMRC [2019] UKFTT 406	Pre-entry losses	-
Elborne v HMRC [2025] UKUT 59	Home loan scheme	-

GCH Corporation v HMRC[25] may be another example - but it is not yet final.

It might be possible to add to this list, but it would still be a very short one. Some of these cases - *Mayes* for instance - should be regarded as good wins for the taxpayer, and unlikely to be decided the same way if argued today (which of course will not happen). Others would be caught by the GAAR.

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

Example	**See para**
Going non-resident	4.40
Pre-arrival planning	11.2

2.4 Politics of tax avoidance

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

> Of course there is a difference between tax evasion and tax avoidance. Evasion is illegal. It can and should be subject to the full force of the criminal law.
>
> But what about tax avoidance? Now of course there's nothing wrong with sensible tax planning and there are some things that governments want people to do that reduce tax bills, such as investing in a pension, a start up business or giving money to a charity. But there are some forms of avoidance that have become so aggressive that I think it is right to say these raise ethical issues, and it is time to call for more responsibility and for governments to act accordingly.
>
> In the UK we've already committed hundreds of millions (?) into this effort, but acting alone has its limits. Clamp down in one country and the travelling caravan of lawyers, accountants and financial gurus will

25 [2024] UKFTT 922 (TC).

> 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*].[26]
> 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.[27]

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;[28] 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.[29]

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

2.5 Need for analysis

This chapter draws on a paper published by the Oxford University Centre for Business Taxation, (the **"OUCBT paper"**).[30] 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. ...

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

27 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*

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

29 This feeds on a very ancient trope concerning lawyers. Of course this is not limited to tax. In the UK, attacks on lawyers have focussed on those working in immigration law ("lefty lawyers").

30 "Tax avoidance" (2012) *https://wayback.archive-it.org/org-467/20200808011125/http://eureka.sbs.ox.ac.uk/4428/2/TA_3_12_12.pdf* (I omit some footnotes here).

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.

2.5.1 *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)[31]

These distinctions matter because:
(1) Ineffective avoidance may be countered by enforcement of the law.
(2) Effective avoidance can only be countered by changes in tax law.
(3) In cases of non-avoidance:
    (a) It may be no change in tax law is appropriate.[32]
    (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 outrage associated with avoidance.

If one wishes to assess emotional and moral responses to avoidance, and actual or theoretical anti-avoidance rules, we need further vocabulary to discuss the range of tax-motivated behaviour.
We might cover the terrain in four categories:[33]

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[34] charity giving.[35] This is

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31 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.

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

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

34 In the debate on the Budget 2012, some said that giving more than £50k or 25% of

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.

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

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

"Ordinary" planning	**But for other views see**
Advancing/delaying:	
(a) disposals for CGT purposes	56.10.7
(b) payment of income (eg dividends or bonus)	2.6.9
(c) pension contributions for IT purposes	
in anticipation of tax rate changes/becoming resident/non-resident	
Inter-spouse transfer to equalise income	2.6.9
Transfer to a company to reduce tax rates	
Lifetime giving to avoid IHT	
Going non-resident (unless the planning involves further steps)	

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

Occasionally one sees the epithet "vanilla" tax planning, paraphrased as "such as any High Street Solicitor would recommend to any client."[36] The cases have concerned applications to set aside transactions for

income was excessive.

35 These are the examples which Cameron called "sensible tax planning" in the quote at the start of this chapter.

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

mistake. In *Hartogs v Sequent (Schweiz) AG*[37] the planning involved a (supposedly) non UK domiciled settlor transferring funds to a trust, which acquired a company, which acquired a UK residence and classic cars. The settlor described this as a "normal and standard approach to estate-planning for someone in his position" and the judge agreed: "this was not a controversial tax planning scheme".

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

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

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

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

Tax abuse Tax avoidance with aggravating features (typically, self-cancelling steps) that make it (more) unreasonable.[38] As this is at the top of the spectrum, it is easy to find clear examples, eg:
Ramsay
Fitzwilliam v IRC[39]
Astall
Mayes

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37 [2019] EWHC 1915 at [25]. The facts were (more or less) the same in *Abadir v Credit Suisse Trust* [2021] EWHC 2573 (Ch), where the planning was "not an artificial form of avoidance against which public policy would militate against setting aside the transfer".

38 The epithet commonly used is "egregious" or "aggressive". That does not clarify anything but it neatly expresses the point.
For completeness: In technical EU-law terminology the term "abuse" is used in a different sense; similarly in OECD discussion; see 114.7 (OECD-concept abuse). However we are not concerned with that usage here.

39 For this case, see 105.9 (Trust appoints to B, B gives to new trust).

UBS
The Rangers case[40]

This terminology raises three distinctions:
(1) Uncontroversial/”ordinary” tax planning
(2) Tax planning/avoidance
(3) Tax avoidance/abuse

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

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

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

Politicians are characterised by grandstanding and soundbites. Pressure groups grind their axes. The details, important to those within the profession, tend to bore or bewilder people outside it.

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

2.5.2 *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[41]

For this distinction, see 3.21 (Avoidance/mitigation distinction) to 3.27 (Tax avoidance: Critique).

The *tax avoidance/tax abuse distinction* was established in 2013: it marks the point at which the GAAR is intended to bite.[42] It may also mark the point where a Court might refuse discretionary remedies such as setting aside for mistake.

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

> The scheme [in *Furniss*] has none of the extravagances of certain tax avoidance schemes which have recently engaged the attention of the courts, where the taxpayer who has been fortunate enough to realise a capital profit has gone out into the street and, with the aid of astute advisers, manufactured out of a string of artificial transactions a supposed loss in order to counteract the profit which he has already made.[43] The scheme before your Lordships is a simple and honest

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41 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

42 It is significant that the GAAR is called a general anti-*abuse* rule, not a general anti-*avoidance* rule, in contrast to the two devolved GAARs. See 3.29 (The GAAR).

43 [Author's footnote] At least two of these schemes were litigated, so preserving in the law reports examples of "extravagent" schemes with "a string of artificial transactions":

> scheme which merely seeks to defer payment of tax until the taxpayer has received into his hands the gain which he has made.[44]

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

2.6 Attitudes to tax avoidance

2.6.1 *Morality and taxation*

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

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

2.6.2 *Judicial view in the past*

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

> Bundey J. recognises to the full both the legal *and the moral* right of every man to dispose of his property if he can in a way which does not expose it to be taxed under the existing system of taxation.[45]

In 1922:

> it is perfectly open for persons to evade[46] 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.[47]

Ramsay v HMRC 54 TC 101; see App. 4.5 (s.132 TCGA definition)
Eilbeck v Rawling 54 TC 101; see 105.12.1 (Transfer: A's trust to B's trust)
Needless to say, the schemes failed to generate an allowable loss even without recourse to the *Ramsay* principle.

44 [1984] AC 474 at p.518.

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

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

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

In 1926:

> the highest authorities have always recognised that the subject is entitled so to arrange his affairs as not to attract taxes imposed by the Crown, so far as he can do so within the law, and that he may legitimately claim the advantage of any express terms or of any omissions that he can find in his favour in taxing Acts. In so doing, he neither comes under liability *nor incurs blame*.[48]

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

> It scarcely lies in the mouth of the taxpayer who plays with fire to complain of burnt fingers.[49]

This expresses an ethos appropriate to the wartime background; "as we are at war, the ordinary mode of construing legislation has been suspended".[50] In 1943:

> of recent years much ingenuity has been expended in certain quarters in attempting to devise methods of disposition of income by which those who were prepared to adopt them might enjoy the benefits of residence in this country while receiving the equivalent of such income, without sharing in the appropriate burden of British taxation. Judicial dicta may be cited which point out that, however elaborate and artificial such methods may be, those who adopt them are "entitled" to do so. There is, of course, no doubt that they are within their legal rights, but that is no reason why their efforts, or those of the professional gentlemen who assist them in the matter, should be regarded as a commendable exercise 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.[51]

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

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48 *IRC v Fisher's Executors* 10 TC 302 at p.340. If more examples are needed, which I doubt, see *Levene v IRC* 13 TC 486 at p.501-502; and the well known passage from *Ayrshire Pullman Motor Services v IRC* (1929) set out at 2.6.7 (Impact of the GAAR).

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

50 Darling J, cited in Foxton, "*R v Halliday* in Retrospect" [2003] LQR 455.

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

> 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.[52]

Lord Diplock expressed the traditional view in 1964:

> Tax law no more lies within the field of morals than does a crossword puzzle.[53]

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*.[54]

2.6.3 *Attitudes outside UK*

Without attempting a full survey, which would require a team of experts, if it could be done at all, 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.[55]

Oliver Wendell Holmes is often quoted for his extra-judicial comment "I like to pay taxes. With them I buy civilization."[56] But those who quote

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

53 Diplock, "The Courts as Legislators" Address to The Holdsworth Club (1965) *https://www.kessler.co.uk/wp-content/uploads/2012/05/CourtsAsLegistlators.pdf*

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

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

56 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."

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.[57]

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.[58]

2.6.4 *Pro-avoidance rationale*

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

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

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

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

In practice, public debate does not engage with black letter tax law and it

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57 *Superior Oil Co v Mississippi* 280 US 390.
58 Sir Garfield Barwick (Chief Justice of Australia 1964–81), *A Radical Tory* (1995) at p.229.

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

(3) *Egregious over-taxation*

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

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

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

> He made no profit or gain as that term is commonly or commercially understood and yet he becomes liable to pay tax which exhausts his life savings and may bankrupt him. That is an outrageously unfair result....
> This is legislation which does not seek to tax real or commercial gains. Thus it makes no sense to say that the legislation must be construed to apply to transactions by reference to their commercial substance….No overriding principle can be extracted from the legislation....
> Thus with heavy hearts we dismiss the appeal.[59]

There are then four possible moral approaches:

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59 *Lobler v HMRC* [2013] UKFTT 141 (TC). In order to avoid the unfairness the Upper Tribunal allowed the appeal, though it had to rewrite the law of rectification in order to do so; see [2015] UKUT 152 (TCC). The law was later amended; see 70.3.5 (Partial surrender trap). But that does not affect the point being made here.
For another example, see *Hunters Property v HMRC* [2018] UKFTT 96 (TC), where EIS relief was unfairly lost, because a group company was member of a guarantee company which was "merely a vehicle for holding client funds and had no intrinsic value of its own". For another example, see 93.63 (Capital contribution).

View	Tax avoidance	Egregious over-taxation
1	Wrong	Right
2	Right	Wrong
3	Wrong	Wrong
4	Right	Right

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

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

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

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

So we fall back on view 4, thus this consideration supports the view that there is nothing wrong in avoidance.[60]

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

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

This relates to point (3): There are cases where tax avoidance avoids egregious over-taxation. An example is the use of multiple policies to avoid the tax trap of partial surrender.[61]

Parliament sometimes admits this, by enacting a new relief to allow

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60 For an example of this line of reasoning in use, the well known passage from *Ayrshire Pullman Motor Services v IRC* (1929) set out at 2.6.7 (Impact of the GAAR).

61 See 70.3.5 (Partial surrender trap).

directly what had previously been achieved by avoidance. Examples are:

(a) Nil-rate band discretionary trusts, which allowed transferable nil-rate bands before the IHT relief was enacted in 2007.
(b) CGT group relief to obtain loss relief. A company about to realise a gain on an asset would formerly transfer it to a group company that had realised an allowable loss. Alternatively, a company which had realised a gain might acquire from a group company an asset which was to be sold at a loss. That would allow the loss to be set against the gain before the introduction of group loss elections, in 2009.[62]

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.[63]

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:[64]

> ... there may even be benefits to the UK from avoidance opportunities if the lower tax rates achieved on mobile activities – for example, through profit shifting – mean that more real activity is in the UK than would otherwise be the case.[65]

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

2.6.5 *Practitioner/judicial views today*

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

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62 Section 171A TCGA.

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

64 IFS, *Green Budget 2013* p.290 *https://ifs.org.uk/sites/default/files/output_url_files/gb2013.pdf*

65 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.

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

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

> For many directors, the objection to arrangements that are in their view 'too' artificial may be framed largely in terms of business ethics. Other directors, equally determined to behave in an ethical way, may consider that the degree of artificiality is not an ethical issue provided no attempt is made to misrepresent the facts or to hide them from the tax authorities....
> At one time such a view would perhaps have been more widely held than now. At the present time it represents one end of a range of views in a debate where probably most commentators would hold that within the compass of what is legal there is some behaviour that is acceptable and some that is not...[66]

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

> There was unanimous disapproval, indeed distaste, for egregious tax avoidance schemes.[67]

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[68]):

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

67 Aaronson, *GAAR Study* (2011) *http://webarchive.nationalarchives.gov.uk/20130321041222/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf*

68 Lord Neuberger referred tactfully to Lord Templeman's "characteristically colourful

> 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.[69]

In the Supreme Court in 2014:

> Since the seminal decision of the House of Lords in *Ramsay v IRC*[70] 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.[71]

"Social evil" represents the top end of judicial rhetoric in recent times;[72] though the scope of the critique depends on the word "artificial", which may mean little or much.

And again in 2015, but more moderately expressed:

> [Tax avoidance] gives rise to social costs which are significant and increasingly controversial.[73]

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

> Views may differ as to whether the purpose for which the SPVs were used was socially reprehensible.[74]

In *Purkiss v Kennedy*[75] a company carried out an EBT loan scheme, in good faith, but the scheme failed following the *Rangers* case. The company was liable for PAYE and insolvent.

The scheme transactions could be set aside under s.423 Insolvency Act 1986, as they were not made for full consideration, but s.423(3) provides:

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language"; *Evans (R, oao) v Attorney General* [2015] UKSC 21 at [53].

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

70 (1982) 54 TC 101.

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

72 But perhaps "social evil" differs from evil as "social justice" differs from justice.

73 *Pendragon v HMRC* [2015] UKSC 37 at [5].

74 *Hurstwood Properties v Rossendale BC* [2019] EWCA Civ 364. The decision was reversed on appeal but without comment on this point. For other aspects of this case see 78.17.4 (Companies: Situs planning).

75 [2025] EWCA Civ 268.

> In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose
> (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or
> (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.

HMRC argued that para (b) was met, as the purpose of the avoidance scheme was to prejudice the interests of HMRC. This was rejected:[76]

> The present case, [HMRC] argued, involved "unacceptable tax avoidance" rather than "tax mitigation": the Company, he said, sought to "disguise" payments of remuneration to its employees in a "wholly artificial" arrangement.
> I have not, however, been persuaded that it is relevant to distinguish between "tax mitigation" and "unacceptable tax avoidance" in the context of the Liquidator's primary case. That case, if well-founded, would surely affect both. The purpose is the same in both cases: namely to prevent a liability to tax from arising. The difference between the two is not the purpose, but the means by which that purpose is put into effect. Were it correct that preventing a liability to a person arising could constitute "prejudicing the interests of a person [who is making, or may at some time make, a claim] in relation to the claim which he is making or may make" (within the meaning of section 423(3)(b)), that could apply to "tax mitigation" of a commonplace kind. Suppose, for example, that, someone paying higher rate tax made a gift to a child who was at university in part because the recipient, having no other income, would not be liable for tax on returns from the property. On the Liquidator's primary case, the donor would have entered into the transaction "for the purpose … of prejudicing the interests of [HMRC as 'a person who is making, or may at some time make, a claim against him'] in relation to the claim which he is making or may make" since HMRC would have been denied tax which would otherwise have become due.
> Parliament is, I think, unlikely to have intended section 423 to extend to such "tax mitigation"...
> Nor, crucially, do the terms of section 423 appear to me to support the Liquidator's primary case... the Company's purpose was that HMRC would have no claim which it could make and not to prejudice a claim

76 at [27] - [31]; for another aspect of this case, see 2.6.12 (Mitigation is "acceptable"),

> which it was making at the time of the Transaction or might make in the future ... Where a person succeeds in preventing a tax liability from arising, there will simply not be a person who "is making or may make" a claim with "interests" to be prejudiced.

The pendulum has not swung as far as that.

2.6.6 *Avoidance: Discretionary remedies*

In *Altus Group v Baker Tilly* negligent accountants argued it was contrary to public policy to award damages for their failure to advise or implement an avoidance scheme. The argument was summarily rejected.[77]

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

The idea was first tentatively raised in *Futter v HMRC*:[78]

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

In Guernsey, the Courts have rejected the idea. Thus when an ill-advised gift to an EBT was set aside for mistake, the fact that the individual was seeking to avoid UK tax was not a reason for the Guernsey Court to refuse relief.[79] It may be that UK tax avoidance is regarded with less hostility in foreign jurisdictions, and especially tax haven jurisdictions. Foreign courts may also be more sympathetic than UK courts to taxpayers facing unfair or penal anti-avoidance rules.[80]

In practice, there has not yet been a case in the UK where a discretionary relief was actually refused on the grounds of avoidance, though have been

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77 [2015] EWHC 12 (Ch) at [59](3) and [65].

78 [2013] UKSC 26 at [135].

79 *Whittaker v Concept Fiduciaries* (Guernsey 15/2017).
See too *Nourse v Heritage Trustees* (Guernsey) 15 Jan 2015) at [15] and [71] accessible *https://privateclienttax.co.uk/index.php/Case_Law_archive*

80 See App 19.5.1 (Critique of s.87 regime).

some where this has been mooted.[81] I do not attempt to discuss all the cases where this point has been discussed, but only to assess (if one can) which way the wind is blowing.

Estera Trust (Jersey) v Singh[82] was an unfair prejudice case. The unfairly prejudiced shareholder was a non-resident trust. The Court ordered the company ("the defendant co") to purchase the trust's shares. Unfortunately that would be a distribution for tax purposes, and subject to IT at the dividend trust rate. The trust proposed a different arrangement:

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

This would avoid the IT charge.[83] The Court refused to order this arrangement for a variety of reasons, but one of them was that:

> the scheme ... could be regarded as aggressive tax avoidance, even though relatively unsophisticated in comparison with other notified avoidance schemes. The Court should not without very good reason order reluctant parties to enter into a scheme that could be held to be improper (in the sense that I have identified).[84]

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

The problem with avoidance-based refusals of discretionary remedies is of course how uncertain and subjective the concept of avoidance actually is.[85] For that reason, avoidance-based reasoning, if it applies at all, ought to be limited to clear and egregious cases and in practice it has not been applied to "vanilla tax planning" involving offshore trusts and

81 See *Bhaur v Equity First Trustees* [2021] EWHC 2581 (Ch) at [118] - [119]; Herbert, "Equitable mistake and artificial tax avoidance" [2022] PCB 59.

82 [2019] EWHC 2039 (Ch).

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

84 [2019] EWHC 2039 (Ch) at [26].

85 See 3.27.1 (Avoidance: coherent concept?).

companies.[86] In the light of the GAAR, such cases are not likely to happen after 2013, though pre-2013 avoidance cases will continue to occupy the Courts for a little longer.

2.6.7 *Impact of the GAAR*

Has the GAAR altered the position? GAAR guidance (2021) provides:

> B2.1 The GAAR ... rejects the approach taken by the Courts in a number of old cases[87] to the effect that taxpayers are free to use their ingenuity to reduce their tax bills by any lawful means, however contrived those means might be and however far the tax consequences might differ from the real economic position.

HMRC cite one of the best known dicta in taxation. In *Ayrshire Pullman Motor Services v IRC*:[88]

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

HMRC say that the GAAR has changed this:

> [The above quote] illustrates the approach which Parliament has rejected in enacting the GAAR legislation.[89]

At the abuse end of the spectrum, the GAAR now applies, so the rules have indeed changed. This impinges on the avoidance-morality debate insofar as the debate only concerns successful avoidance, ie avoidance not caught by the GAAR. But nothing else has changed. *Ayshire* itself was

86 See 2.5.1 (Categorisation of avoidance).
87 The phrase "a number of old cases" is a tendentious way to refer to judicial unanimity from the earliest times until the 1980s; see 2.6.2 (Judicial view in the past). But GAAR guidance is not a neutral document: it is written by HMRC and adopts an HMRC perspective.
88 (1929) 14 TC 754 at p.763.
89 HMRC, "GAAR Guidance" (2021) *https://www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules*

not an abuse case (the issue was whether the taxpayer's children had entered into a valid partnership) and the decision would not have been affected by the GAAR.

Proposition [1] of the quote is still correct. It also continues to be the case that HMRC enforce egregious over-taxation when the rules work in their favour,[90] and it is unlikely that they intended to cast doubt on proposition [2]. And proposition [3] is still broadly correct, though now qualified in cases which pass the high threshold of abuse.

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

The rhetoric continues:

> Taxation is not to be treated as a game where taxpayers can indulge in inventive schemes in order to eliminate or reduce their tax liability.

The game metaphor begs an essay to itself.[91]

2.6.8 *Codes of practice/regulators*

PCRT provides:

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

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90 See 2.6.4 (Pro-avoidance rationale) under the heading: Egregious over-taxation.

91 What, in fact, is a game? It is an elastic concept which can be analogised in different ways. What is it in the notion of game which HMRC would characterise as significantly different from tax? Is it a notion of non-seriousness? Or an adversarial approach? Or a notion of a rule-based activity? Or arbitrary rules? In the latter three respects, tax law and non-tax law very much resemble games.
Perhaps the thinking is that games are morally neutral, whereas tax avoidance is held to be morally obnoxious. If this is the point, it is significant that a moral based argument needs to present itself in non-moral terminology. But elsewhere, "fair play" and "playing by the rules" are understood positively, and even claimed as defining features of the English national character.
These problems suggest that it would help clarity of thinking not to use the word "game": a stale and failed metaphor. See Midgley, *Heart and Mind* (1981) chapter 8 (The game game).
However the game metaphor seems to be irresistible, in rhetoric if not in sober thought. For a recent example, see *Clark v HMRC* [2020] EWCA Civ 204 at [114]: "Both grounds seem to me to be examples of tax litigation as a board game, with large prizes for the winners. People who pay tax in the usual way are entitled to feel aggrieved when elaborate avoidance schemes ... succeed."

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.[92]

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

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

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

A more literal reading might take this as prohibiting advice on avoidance 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.[93] So far as that may be what it means, the PCRT does not apply to lawyers, because SRA/Bar codes of conduct have priority.[94] SRA say:[95]

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

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92 PCRT, Helpsheet B: Tax Advice. Para (ii) is otiose, but it does not matter.
The same wording is found in HMRC Standard for Agents para 3.3; see 128.1.2 (HMRC standard for agents).

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

94 See 128.1.1 (Status of PCRT).

95 SRA, "Tax avoidance your duties" (2019)
https://www.sra.org.uk/solicitors/guidance/tax-avoidance-duties/
The original version (2017) was criticised in earlier editions of this work, see the 2023/24 ed, para 2.5.8 (Codes of practice/regulators). But the guidance was substantially rewritten in 2019, and the earlier version is now of historic interest only.

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

SRA refer to PCRT and say:

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

In practice there have been disciplinary proceedings[96] and further cases are pending. They tend for obvious reasons to be extreme cases where the question of what is abusive does not arise.

2.6.9 *Views of non-tax practitioners*

Outside the tax profession, the concept of what is unacceptable/immoral is not restricted to tax abuse, but extends to the "ordinary" tax planning

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

level. Indeed, some very "ordinary" tax planning has come under fire. Practitioners might dismiss the views of those who know nothing about tax as unworthy of consideration. I give four examples from those whose views carry some weight.

Deferring bonus in order to take advantage of announced reduction in tax rates: This arose in 2013/14 when top rates fell from 50% to 45%. Practitioner-readers are likely to agree that this is "ordinary" tax planning near the bottom end of the spectrum. But Mervyn King, then Governor of the Bank of England, is reported to have criticised Goldman Sachs for it.[97] The House of Lords select committee noted that the GAAR will not apply to the deferral of bonuses from one tax year to another,[98] but one might infer that they disapproved none the less for that.

The Bump Plan In 2013 a now-forgotten political furore arose after a tax practitioner was secretly filmed, suggesting bonus payments to pregnant employees; if made during the relevant period this would increase the amount of statutory maternity pay. I do not think practitioners would regard that as on the abusive side of the line (though there are many points which need to be made to properly understand the legal and moral analysis, none of which were heard in the public debate).[99] Perhaps the point was just political hot air but the practitioner involved had to leave the GAAR panel.

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

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

98 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 56.10.8 (Postpone disposal: GAAR).

99 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.

in *Jones v Garnett*.

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

> While tax evasion is universally condemned, there is a disposition in certain quarters to regard tax avoidance as a permissible course of action. We are unable to endorse this view. The mere fact that the income-tax law is not violated does not mean that the procedure which results in tax avoidance is justified. We might take as an illustration the act of introducing, without adequate consideration, one's wife ... as partner in a business of which the assessee himself is a partner. It is an attempt to fraction income and reduce tax liability under a provision of law meant to apply to genuine partnerships. Conduct of this nature, though legal, cannot but be regarded as anti-social.[100]

Different jurisdictions will approach the intractable issues of taxation of families in different ways. I would not go so far as to say that international comparisons are never helpful, but valid comparisons would require a good understanding of both tax systems, which would generally need a team rather than a single author. Isolated quotes are likely to mislead. In the UK, at least, Parliament has decided that income sharing and other inter-spouse transfers are acceptable tax planning, subject to quite limited exceptions.[101]

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. ...

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

101 See 99.1 (Non-dom/non-resident spouse).

> 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.[102] ...
> 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.[103]

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.

2.6.10 *Context of discussion*

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

But in practice discussion is invested with flaming indignation, hatred for those who benefit from or support perceived injustices. This is fed by a sense of superiority that we are not like these instruments and accomplices of evil. The result is moral panic, contempt and aggression.[104] 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.

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102 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.

103 6 June 2013

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

The debate sometimes suffers from profound bad faith or hypocrisy. Politicians accuse others of tax-immorality in order to attack their opponents. Or journalists do so to sell papers. A example is when the archive of Tony Benn was transferred to the British Library, under the acceptance in lieu scheme, which one might have thought as innocuous as any transaction could possibly be.[105]

In 2021, it emerged that:

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

The (suggested) avoidance here was that SDLT was not payable, which it could have been if the purchaser had acquired the land directly rather than the BVI company![106] Of course any practitioner would understand that:

- The choice between a company purchase and an asset purchase is one which Parliament has allowed, is not avoidance, and is so commonplace that no-one would have expected the matter to be dealt by a company purchase.
- The fact that this was a *BVI* company was irrelevant to the SDLT saving, as (more or less) the same saving would have applied to a purchase of a UK property company.[107]

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

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

107 In the case of a UK company the SDLT saving would have been slightly reduced by SDRT at the rate of 0.5%.
For a complete tax analysis further points need to be made.
There was also a tax downside to the arrangement as the purchaser acquired the historic acquisition cost of the BVI company; though that too could be avoided by an onward sale of the UK company rather than its asset.
Even the acquisition of the property by the BVI company should not be regarded as avoidance: Non-residents will (almost) always acquire non-residential investment property through a company - again from a UK tax viewpoint it makes no difference whether it is a BVI company or established elsewhere.

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

2.6.11 *Conclusion*

In short, there is widespread disagreement about the starting point, not to mention finish line, when it comes to the concept of avoidance or on issues of morality in connection with tax avoidance. This should not be a surprise, since the same applies to many contemporary moral issues, for instance, assisted suicide. There is no tribunal to adjudicate arguments on morality, except the court of public opinion, which, as Ibsen observed, is an extremely mutable thing. But disapproval of avoidance, however understood, is now the norm. That that represents a major change of attitude is now forgotten. Changes in morality are accompanied by amnesia.

2.6.12 *Mitigation is "acceptable"*

While avoidance, however defined, may have ceased to be morally acceptable, it continues to be the case that mitigation remains acceptable. In *Purkiss v Kennedy*:[108]

> "tax mitigation" of the kind to which Lord Goff referred in *Ensign Tankers* is not generally considered to be objectionable.

The quotes cited in support of this proposition are the old favourites:
IRC v Duke of Westminster:[109] "Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be".
IRC v Brebner:[110] "no commercial man in his senses is going to carry out a commercial transaction except upon the footing of paying the smallest amount of tax that he can".

It seems somewhat churlish to point out that these quotes are cited out of

108 [2024] EWHC 1081 (Ch).

109 19 TC 490 at p.520; Lord Atkin, dissenting, but not on this point, said the same at p.511. For other aspects of this notorious case, see App 10.8.1 (IRC v Duke of Westminster).

110 For *Brebner,* see 3.13 (Purpose inferred from choice). The third case cited somewhat more recent: *Hill v Spread Trustee* [2006] EWCA Civ 542, at [87], "Section 423 does not prevent a person from acting on legitimate tax avoidance advice"; the tax avoidance (actually, mitigation) concerned a gift to an accumulation & maintenance settlement.

context. These were avoidance cases, on their facts, not mitigation, and the avoidance/mitigation had not at that time been invented. It is, readers may think, "creative" to resuscitate these dicta to support the proposition that tax mitigation is acceptable; but the common law system allows room for creativity, and all that matters is that they were so cited. However that may be, the Court's attitude that mitigation is acceptable is well established and unlikely to change.

2.7 Tax Gap

Another thread in public debate is a vast estimate of the amounts involved. HMRC publish annual figures, with a catchy title, the "tax gap".[111] This is said to be £35 billion, or 5% of tax liabilities, in 2021/22.[112]

Broken down, the HMRC figures are:

Amount £bn	**Behaviour**	**Explanation**
10.7	Failure to take reasonable care	
4.1	Criminal attacks	
4.7	Evasion	Excluding hidden economy
4.1	Legal interpretation	Taxpayer/tribunal disagree with HMRC on tax law (excluding avoidance)[113]
3.3	Non-payment	Tax written off as uncollectible
2.1	Hidden economy	Income undeclared/understated
5.4	[Non-careless] error	
1.4	Avoidance	
35.8	Total	

Statistics are only as useful and reliable as the definitions on which they are based. Most of these categories are vague, and assessment of the figures is, to say the least, challenging. I think a certain amount of scepticism is in order. There is a danger that spurious statistics may gain currency and influence policy.[114]

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111 I think this tabloid term originated in the US, where IRS have been measuring the Federal Tax Gap since at least 1993: *https://www.irs.gov/statistics/irs-the-tax-gap*

112 HMRC, "Measuring tax gaps 2023 edition, table 7.1 *https://www.gov.uk/government/statistics/measuring-tax-gaps*

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

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

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

IFS say:

> we don't know how much corporate tax is lost to the UK as a result of tax avoidance. This is partly because there is no accepted definition of exactly what constitutes 'avoidance' and partly because we lack full information about the activities of firms.[115]

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

The IFS report continues:

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

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

> 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...

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https://wayback.archive-it.org/org-467/20200808011019/http://eureka.sbs.ox.ac.uk/4428/4/TaxGap_3_12_12.pdf

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

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

115 IFS, *Green Budget 2013* p.297
https://ifs.org.uk/sites/default/files/output_url_files/gb2013.pdf

> 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.[116]

There is a certain irony in the second point, given the left's enthusiasm for corporation tax; I think most economists agree that the burden of corporation tax is generally borne by employees,[117] though not all. But all that matters in politics is that no-one *realises* who pays it.

2.8 Avoidance legislation 1955 critique

In 1955 the Royal Commission said:[118]

> We are disturbed by the criticism that much of the anti-avoidance legislation is obscurely worded and drawn more widely than its purpose requires. ... We doubt if many lawyers could expound with confidence the effect of the 26 sections that make up Part XVIII of the [ITA 1952]. [The Royal Commission quoted the ToA definition of "power to enjoy" to illustrate the point, and continued:] It appears to us that, if the legislation in this field has to be expressed in this way, there is a danger that our system is becoming delusive. For, while it presents the form of statutory control of the subject by Parliament, it means that in substance the assessment of the individual affected and the charge of tax upon him is not determined by law but by the decision of the [Revenue] ... we think that, now that the main lines of this legislation are to be regarded

116 IFS, *Green Budget 2013* p.290 *https://ifs.org.uk/sites/default/files/output_url_files/gb2013.pdf* (footnotes omitted).

117 ETPF Policy Paper 1 "Who bears the burden of corporate income taxation?" (2015) European Economic and Social Committee, "The Role of Taxes on Investment to Increase Jobs in the EU – An Assessment of Recent Policy Developments in the Field of Corporate Taxes" (2019) *https://www.eesc.europa.eu/sites/default/files/files/qe-03-19-343-en-n.pdf*

118 Cmd. 9474 para 1029

> as fully developed[119] and the administration of them has had time to settle down, the opportunity should be taken in the course of the next few years to conduct an expert review of the enactments as a whole... The purpose of the review would be (a) to enquire to what extent, if any, the relevant legislation may have been shown, in the light of experience, to have been drawn too widely for its purpose,[120] (b) to recommend any modifications of the legislation that will make it shorter, briefer, and more precise.

Here are 4 critiques which have become familiar: obscurity, imprecision, provisions drawn too widely ("overkill"), and discretionary application. Nowadays these critiques may be framed in terms of the Rule of Law.

2.9 The Rule of Law

2.9.1 *What is "the Rule of Law"*

There is a consensus on the Rule of Law. It is a constitutional principle.[121] It is one of four fundamental British values.[122]

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

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

121 Section 1 Constitutional Reform Act 2005.

122 The other three are democracy, liberty and tolerance, according to the Government "*Prevent* Strategy", Cm 8092 (2011), para 6.58 where opposition to these values is the definition of "extremism". The point is repeated in the Government "Counter-Extremism Strategy" Cm 9148 (2015): "Extremism is the vocal or active opposition to our fundamental values, including democracy, the rule of law, individual liberty and the mutual respect and tolerance of different faiths and beliefs."
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97976/prevent-strategy-review.pdf
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/470088/51859_Cm9148_Accessible.pdf
The new 2024 definition of extremism does not refer expressly to the Rule of Law, though it does refer to "fundamental rights and freedoms" ("in particular those rights and freedoms listed in Schedule 1 to the Human Rights Act 1998") which perhaps covers similar territory.
https://www.gov.uk/government/publications/new-definition-of-extremism-2024/new-definition-of-extremism-2024?utm_source=substack&utm_medium=email#fn:5
The Rule of Law is also one of the six values on which the EU is founded (the others are respect for human dignity, freedom, democracy, equality, and respect for human rights); see Article 2 TEU. But that matters less in the UK after Brexit.

There is no consensus on the meaning of the expression. It is an emotionally charged label for a set of principles, or sub-principles, the content of which is contested. This may not be a bad thing: consensus on the importance of the Rule of Law is only possible because of dissensus as to its meaning. There is a certain irony in that the principle which forbids vague legislation is itself difficult to pin down. But the same is true of other cherished political virtues, such as democracy. A discussion needs a book to itself;[123] but as the term is used in different ways, it is best not to use it without some explanation of how it should be, or may be, understood. This section draws on a paper by Craig, "The Rule of Law" prepared for the House of Lords Constitution Committee.[124]

There is a consensus that the Rule of Law includes at least the following minimum requirements.[125]

Craig says:

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

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

Craig continues:

> *The Rule of Law and Guiding Conduct*
> 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.

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123 Raz, *The Authority of Law* (2nd ed., 2009), ch. 11 ("The Rule of Law and its Virtue"); Tamanaha, *On the Rule of Law* (1st 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
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##

124 *http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15115.htm*

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

> 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;[126]
> (4) there should be an independent judiciary;
> (5) there should be access to the courts;
> (6) the discretion which law enforcement agencies possess should not be allowed to undermine the purposes of the relevant legal rules.

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

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

2.9.2 *Rule of Law v. other values*

The Rule of Law is something to boast of,[127] and a feature which makes the UK an attractive place to reside, invest or litigate. The Judicial Office boast:

> The Rule of Law represents the cornerstone of liberty and democracy, and is one of the main reasons that the UK attracts global businesses and investors.
> Laws in the UK are:
> - public (so that everyone knows what they say)
> - certain (so that everyone knows where they stand)
> - prospective rather than retrospective (so that they cannot be broken

126 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."

127 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).

before they exist)[128]

The reality may not match the rhetoric. There is nothing in the idea of government by majority to show that the majority will respect the Rule of Law. Rule of Law principles are challenged, or breached, in various aspects of taxation,[129] but the conflict in the context of tax avoidance is particularly deep. Anti-avoidance is facilitated and indeed characterised by features which breach the Rule of Law:

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

It is desirable to recognise that there is a *trade-off* between conflicting policy aims, the Rule of Law and the combat of avoidance, rather than to fudge the matter by saying, or pretending, that these matters are consistent with the Rule of Law. Indeed there is a set of trade-offs, because the Rule of Law is a set of rules. For instance, if a TAAR has a clearance procedure, then the ability of taxpayers to plan with confidence is increased, which supports one aspect of the Rule of Law; but HMRC

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

129 See for instance the problems raised by *Lobler* at 2.6.2 (Judicial views).

discretion is also increased, which breaches another aspect.

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

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

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

> Disagreeable as it may seem that some taxpayers should escape what might appear to be their fair share of the general burden of national expenditure, it would be far more disagreeable to substitute the rule of caprice for that of law.[130]

The cure could be worse than the disease.[131] In contemporary debate it is rare to find a statement in such strong terms. An exception comes from the Joint Committee on Statutory Instruments, discussing a TAAR in the following form:

> 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

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130 *Ransom v Higgs* 50 TC 1 at p.94. A similar spirit informed the decision in *Vestey v HMRC* in 1979; see 49.3 (Charge on transferor).

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

entered into.[132]

In my terminology, this is a conscious-compliance TAAR.[133]

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 [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*.[134]

The objection that the Committee identified was uncertainty. As the Committee note, the same objection could be made to the GAAR and indeed to all TAARs. But no-one took any notice. The regulation which the Committee criticised remains in the legislation. Identical wording (where the same criticisms might be made) is found in other regulations.[135]

It seems to me that there is a more fundamental objection to conscious-compliance wording which does not apply to other types of TAAR. The object of the rule of law is that the law should be capable of guiding ones conduct in order that one can plan ones life. Here we have a rule which says that one *cannot* have regard to the law to plan one's conduct (or at

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

133 See 3.2.1 (Types of unallowable purpose).

134 *http://www.publications.parliament.uk/pa/cm201516/cmselect/cmstatin/461-ix/46103.htm#inst01*

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

135 Reg 23 International Tax Compliance Regulations 2015 is another example. The argument that reg. 23 is ultra vires is weaker than in the case of the regulation considered by the Joint Committee, because unlike the position for the 2016 regulations, CRS authorises and requires "rules to prevent ... practices intended to circumvent the reporting and due diligence procedures". See 136.35 (CRS TAAR). Perhaps the argument is still tenable. Perhaps reg 23 will be read purposefully and somewhat restrictively.

least one should not, or at least there is a penalty if one does).

However that may be, conscious-compliance wording is now common in primary legislation (where ultra vires issues do not arise, but the Rule of Law issues are the same).

In practice the issue may be resolved by HMRC not enforcing a strict application of the rule, but this always raises the risk that HMRC may change their practice, even retrospectively.[136]

2.9.3 *International aspects*

Tax avoidance and Rule of Law are issues of international tax as well as domestic tax, and in the US, the Rule of Law is, perhaps, more highly valued.[137] Bob Stack (US Treasury Deputy Assistant Secretary for International Tax Affairs) criticised OECD BEPS reforms, and UK diverted profits tax, for breaching Rule of Law/international tax law principles:

> Rather than producing administrable rules, the BEPS negotiators seemed to be opting instead for giving wide discretion to tax officials.[138] 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.[139]

2.9.4 *Breach of Rule of Law*

Craig says:

> The fact that a law is vague or unclear, and that it therefore provides little by way of real guidance for those affected by it, will not lead to a

136 See 88.10 (Salaried member TAAR).

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

138 Stack probably had in mind the PPT; see 114.8 (Principal purpose test). For another example, see 7.18 (Tie-breaker: mutual agreement).

139 Speech to OECD International Tax Conference, 2015.

statute being invalidated in the UK.

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

In other words, the Rule of Law lacks full justiciability. Perhaps ironically, the Rule of Law is not in the strict sense a rule of law. To adopt Dworkin's distinction, it is a principle and not a rule. As such it may encourage a court to interpret a statute more narrowly, in favour of the individual. In this way, however deeply, inchoately, and inconsistently, Rule of Law considerations do to some extent affect case law outcomes[140] and perhaps, tax policy (though I am less sure about that.)

2.9.5 *Is tax Rule of Law compliant*

In earlier editions of this work, I said:

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

By 2014, as TAARs and other anti-avoidance were multiplying, I qualified the boast, saying: "that is less the case than formerly".[141]

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.[142]

In 2015 the Law Society made the same point:

> ... in recent years, there has been a tendency on the part of government

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

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

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

> to allow the rule of law in taxation to risk being eroded in the interests of making the executive more effective, in particular in seeking to combat avoidance...

The question "is tax Rule of Law compliant" seems meaningful but as the Rule of Law is a set of rules, it is not one question but a set of questions. In relation to each of the rules, the question is not *whether* tax is Rule of Law compliant but *to what extent*. To answer that question fully, one would test every rule of tax law against each of the principles of the Rule of Law set out above. As tax is vast, discussion must be selective and impressionistic.[143]

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

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

> It will also create an additional level of uncertainty for the promoters and users of schemes. I believe that that will be a deterrent.[144]

Even the Supreme Court have said something similar. In *Hurstwood Properties v Rossendale BC*:[145]

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

But we return to a conventional view in *HMRC v Fisher*:[146]

> At some points [HMRC] seemed to be suggesting that this degree of uncertainty about when and to whom the charge applied was a positive

143 For the question of Rule of Law compliance in a general (non-tax) context, see the Justice report, "The State We're in: Addressing Threats & Challenges to the Rule of Law" (2023) *https://justice.org.uk/the-uks-longstanding-commitment-to-the-rule-of-law-is-under-grave-threat-according-to-landmark-report-from-justice/*

144 Hansard, Public Accounts - Minutes of Evidence (6 December 2012) *http://www.publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/788/121206.htm*

145 [2021] UKSC 16 at [61].

146 [2023] UKSC 44 at [76].

> virtue of the drafting. The provision was, he said, designed to discourage people from moving assets abroad with a tax avoidance purpose. The problem with having a bright line is that people devise a way round it. The penal provision works better to achieve its aim if taxpayers are unable to know whether they would be caught or not. HMRC could then assess them to tax on the income of the overseas person, leaving the taxpayer to try to convince HMRC or the tribunal on appeal that they were not transferors. That is, in my judgment, an improper argument for HMRC to run.... I agree with [the taxpayer's] submission in response when he said that the law cannot be left in some unclear state "just to scare people".

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

Is there a right of appeal to a Court? Not quite always.[147]

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

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

Breaking down the issues under these separate heads illustrates what a disparate group of principles fall within the concept of the Rule of Law. I doubt whether "the Rule of Law" is a helpful label in the context of tax law. It conflates disparate issues and so confuses discussion.[148] While it gives a critique gravitas - the Rule of Law is a powerful slogan - it lies at a level well above the pragmatism that is said to characterise an Anglo-Saxon approach to large philosophical, political and economic issues.

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

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

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

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

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

Discuss.

2.10 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.[149]

2.10.1 *Meaning of retrospective*

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

On this analysis, to determine whether a provision is retrospective is an evaluative exercise. So those defending legislation can and generally do contend, with varying degrees of plausibility, that the relevant provision is not retrospective.[150]

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

2.10.2 *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

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149 For an illuminating discussion of the policy issues in a US context, see Shaviro, *When Rules Change* (1st 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).

150 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*

particular to a somewhat arbitrary selection of tax avoidance schemes. Examples include:

Topic	**Date**	**See para**
Retrospective reversal of avoidance schemes:		
DT relief for partnership	1987	86.24
s.23 FA 2012 (loan relationships)	2012	*Not discussed*
Provisions retrospective in effect:		
Pre-owned assets	2004	85.38.2
IHT: former Accumulation & Maintenance trusts	2006	*Not discussed*
Disallowance of debts for IHT	2013	82.36.2

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

2.10.3 *Retrospective legislation: Protocol*

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

> The Government has made clear its aim to strike the right balance between
> [1] restoring the UK tax system's reputation for predictability, stability and simplicity (!) and
> [2] preserving its ability to protect the Exchequer by making changes where necessary.
> In particular, changes to tax legislation where the change takes effect from a date earlier than the date of announcement will be wholly exceptional.[151]

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

151 *http://webarchive.nationalarchives.gov.uk/20130129110402/http://cdn.hm-treasury.gov.uk/2011budget_taxavoidance.pdf*

retrospective, but it is doubtful whether it has had much if any effect on the outcome.

2.10.4 *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.[152] 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.[153]

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

2.10.5 *Retrospective legislation*: *Politics*

Various reasons have been given to justify retrospective legislation.

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

Another is that it concerns an abusive avoidance scheme (however that flexible term may be understood). Whether that justifies retrospective legislation is ultimately a political question on which views differ depending on how much one values the Rule of Law. It is arbitrary and unfair in that a few particular schemes are retrospectively stopped and others – no less elaborate, artificial and abusive – are not. Pragmatists (to whom the Rule of Law is of little interest) should bear in mind that retrospective legislation increases the "legal risk", a measure under which the UK falls low on international surveys, and the lowering of the UK's reputation in that regard has a significant albeit intangible cost. I suspect major factors in picking on some arrangements may include salience, politics, and the amount of money involved.

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

153 *APVCO 19 Ltd (R, oao) v HM Treasury* [2015] EWCA Civ 648 at [58].

2.10.6 *Retrospective relieving legislation*

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

2.10.7 *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.[154]

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

2.11 Naming and shaming

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

The expression covers a variety of arrangements. I distinguish between statutory shaming, discussed elsewhere,[155] and media shaming, discussed here.

The OUCBT paper provides:

> ... searching for individual or corporate villains will not assist in

154 Kessler, *Taxation of Non-Residents and Foreign Domiciliaries* (7th ed., 2008), Vol.1

155 See 132.53 (Public list of defaulters).

> remedying the underlying problems...
> Even if public naming and shaming influences a few taxpayers in the public eye to impose their own voluntary constraints, it will not necessarily affect the worst avoiders, and may even encourage some non-compliance from those who feel that "everyone is at it". Only understanding the flaws in the tax system and working on serious changes can give long-term results....
> Even if that were to have an effect on one taxpayer it would not tackle the underlying issues.

No-one has taken any notice of that!

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

(1) In marketing: To sell newspapers with exposures of celebrities who have been involved in tax avoidance schemes.[156]

(2) In politics: To knock the opposition by alleging that politicians, or other party supporters, are guilty of tax avoidance. In this respect, anything goes and some stories have been farcical. For instance, Peter Mandelson was berated for taking a loan from a UK company[157] and Ed Miliband was accused of avoiding tax by means of a deed of variation.[158] 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, media shaming may easily lead away from the

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

157 *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.

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

Rule of Law. In 2012, Starbucks paid £20m to HMRC following a threat to occupy its cafes.[159] If one calls that payment "taxation" at all, it was certainly not taxation imposed by law. A hostile commentator would call this taxation by mob rule. Google and Amazon, who do not have public premises vulnerable to the same threat, have not had to pay similar sums. Perhaps the point was understood, as the campaign was not repeated.

The reader may agree with the journalist Rachel Cooke:

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

2.12 EU tax haven blacklist

2.12.1 *"Non-cooperative jurisdictions"*

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

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

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

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

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

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

5. Oman

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

6. Palau

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

7. Panama

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

8. Samoa

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

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

9. Seychelles

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

10. Trinidad and Tobago

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

11. US Virgin Islands

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

12. Vanuatu

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

The 2020 list is limited in number; from a UK perspective the only significant entry is Cayman, and I doubt if it will stay there very long. The immediate significance of being on this list is relatively small,[160] but it seems to have had some success in encouraging change.

Scotland will not make a coronavirus-related grant to a company with a

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

parent/subsidiary in these jurisdictions.[161] Clearly, there will not be many, if any, grants refused as a result of that particular provision, though it may form part of a more general trend.

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

2.13 Avoidance by multinationals

The taxation of multinational companies is outside the scope of this work, but it cannot be ignored when discussion tax avoidance, as so much attention has been given to them.

The Public Accounts Committee looked at Starbucks, Amazon and Google. The verdict was guilty.[162]

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

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

162 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 19th report 2012, para 12. If the convoluted wording was intended to reflect a note of caution, it was lost in the public debate. But perhaps the obfuscation is just the dialect of politics.
The PAC returned to this theme in Ninth Report of Session 2013–14 "Tax Avoidance–Google". A PAC hearing is not, perhaps, well suited to ascertaining the facts; it is not possible to ascertain from this whether the complaint of the PAC is that Google have been conducting successful or unsuccessful tax avoidance.

> 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.[163]

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.[164] In short, there is no reason to think that Apple have avoided *UK* tax. The group has avoided Irish/US tax by Irish/US hybrid entities; and, perhaps, it has reduced Irish tax by informal transfer pricing agreements with the Irish Revenue.

2.13.1 *Transfer pricing*

It is often said that multinationals engage in avoidance through transfer

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163 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*

164 Ting, "iTax—Apple's International Tax Structure and the Double Non-Taxation Issue" [2014] BTR 40. See 94.1 (Hybrid entities).

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.[165]

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

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

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

> The Public Accounts Committee believes that Starbucks overpays for its coffee. I am not an expert on the economics of coffee, but I am a bit puzzled that the PAC members consider themselves sufficiently knowledgeable in this area to be able to pass judgment (sorry, to express scepticism).
> The committee thinks that a 16.67% margin to a company that sources and buys coffee throughout the world, exercises quality control and works with local farmers, is excessive. Personally, I do not but then I 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...[166]

If transfer pricing is conducted with the consent of the tax authority concerned, it is not avoidance, though it may be unfair tax competition.

2.13.2 *GAAR*

The GAAR guidance (2021) provides:

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

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165 Christian Aid, "Tax for the common good (2014)

166 Maas, Taxation Magazine, 27 February 2013.

> [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.[167]

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

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

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

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.[168]

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

167 HMRC, "GAAR Guidance" (2021) 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

168 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

contrary to the tax policy of either country in isolation; it is the result of a gap between the two.[169] In this case, the gap may in fact be intentional, in that both Ireland and the US deliberately chose to facilitate the planning;[170] in which case the planning should not be called avoidance at all.

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

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

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

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