Funding the Future

The need for a change in jurisprudence

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Also from today's Guardian, by Polly Toynbee:

The Treasury is drawing up a new code of conduct for bank tax affairs. It will oblige any bank operating in the UK to obey not just the letter but the spirit of the law. No more arrangements designed just to avoid tax. No more providing the funds and advice for clients to set up elaborate tax avoidance. No artificial offshore devices, rotating money through countries purely for tax purposes.

But here's the catch: the code is voluntary, and so far no bank has agreed to sign. Instead banks have called in lawyers who cite the 1936 Duke of Westminster's judgment that gives anyone the right to minimise their tax. (He had made a fancy tax-free arrangement for paying his gardener.) On their very high horse, bankers proclaim it's against Magna Carta principles: they say the code gives arbitrary discretion to tax collectors to decide what is an artificial device. They want nothing to do with the spirit of the law, only statutes. That way they can hire the best brains to ferret out loopholes to keep one step ahead of Revenue & Customs. If they won't sign voluntarily, they know there is a problem because you can't legislate the "spirit" of a law. However, you could have a general anti-avoidance principle for all, such as the Australians use. Twice MPs tried to introduce one as a private member's bill, but the government rejected it.

I suspect it's fairly obvious Polly and I have discussed this: I'm pleased she called. And she has clearly done much of her own reading and thinking about bank reactions to all this stuff — as well as those of the tax institutes that cal themselves â€šÃ„Ã²representative bodies â€šÃ„Ã² and are anything but — unless representing UKIP counts in the case of the ACCA.

There is no doubt — putting the Duke in his grave is critical to the future of tax in this country. I discussed many of the issues involved when righting about the need for a Code of Conduct for taxation in 2007, here. Most of all I argued then for a significant change in the jurisprudence of tax. Many think this is based on common law. That is wrong. As I noted in that study:

The legal systems of the world vary considerably, as do the jurisprudential systems that they use. These two possibilities do, however, accord with the broad categorisation of determining obligations in accordance with the principles of either equity or law. For these purposes “equity” is the name given to the set of legal principles which supplement strict rules of law where their application would operate harshly. The intention is to achieve "natural justice." In contrast the "law" refers to laws enacted by Parliament or established by "common law”, the latter being based on precedents set by judges when they decide cases.

It has been commonplace for tax to be charged in accordance with “law”. For example, it was decided in a legal opinion given in the House of Lords in the United Kingdom in 1869[1] that:

If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute what is called an equitable construction, certainly such a construction is not admissible in a taxing statute.

This principle remains enshrined in most British tax law (in particular)and appears to heavily influence taxation thinking in general. This decision has implicit within it the following assumptions:

* That the right to hold property is sacrosanct and that taxation violates that property right. As such tax may only be charged when specifically sanctioned irrespective of the equity of the resulting payment, or absence of payment of taxation;

* The letter of the law can be determined without reference to the intent of those who created it or the context which gave rise to it, even if the circumstance in which it is used was not envisioned by those who did created it;

* That it is equitable as a result that some will, or will not, fall out of the charge to tax on the basis of the strict interpretation of the meaning of words which could not have been envisaged by those who passed them into law and whether or not (as is explicitly noted in the legal opinion, above) the resulting charge to tax is equitable or just.

The alternative approach to legal interpretation with regard to taxation is purposive. It may be summarised by an Australian law of 1901*[2] on legal interpretation which said:*

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

In this context interpretation â€šÃ„Ã²looks though' the strict structure of the words in the law to determine their just and equitable meaning, and uses that meaning in deciding upon the application of the law.

The United Nations Universal Declaration of Human Rights is based upon principles. It is concerned with justice and the equitable treatment of all people. In that context a purposive or equitable approach to the interpretation of law is essential if miscarriages of justice contrary to the spirit of equity, noted to be possible in the UK legal decision of 1869, are to be avoided.

Equitable construction of the law is, therefore considered an essential element of any set of principles for taxation that recognise the rights of the citizen and the mutuality of obligation inherent in the relationship between the citizen and State, and between states.

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[1] *Partington v. Attorney-General* (1869), L.R. 4 E. & I. App. 100, *per* Lord Cairns at p. 122.

[2] *Section 15 AA of the Acts Interpretation Act, 1901 downloaded 4 December 2006 from http://www.austlii.edu.au/au/legis/cth/consol_act/aia1901230/s15aa.html*

I stand by that.

But the profession will hate it. They want certainty. We need principles to ensure tax is fair. And unfortunately their interpretation of fair and that of society at large just don't seem to match. Which is why their objection to a GAntiP can be safely ignored.