

Tax avoidance: it's all a matter of interpreting ...

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Chris Tailby CBE, former head of tax avoidance at HMRC, [wrote a comment](#) on the blog in response to [my report on tax avoidance](#) and evasion for PCS. He said:

Targets for measuring the success of the anti tax avoidance strategy are difficult to devise. Getting the DOTAS regime to work effectively so that aggressive schemes were closed quickly was a key plank of the strategy and we estimated we protected about £14Bn tax since the regime started. DOTAS helped to change the culture of avoidance but there are still fundamental problems in the tax system which make challenge to tax avoidance difficult to succeed.

For example, at the micro level, a win on one case cannot be automatically applied to a similar case. Each case has to be painstakingly prepared for trial using scarce resources then at the door of the Court the appellant withdraws and pays the tax which was always due. But the root of the problem is that we have a tax system which allows avoidance to happen.

Until we have a tax system which is proof against tax avoidance, businesses and individuals will try to avoid tax and the rest of us will have to stump up to cover the shortfall which the avoiders create!

An avoidance-proof system should be the target for HMRC and I would like to see it spend serious money and if necessary buy in more specialist resources into achieving this goal.

I've a lot of time for Chris.

I agree that there are problems in assessing avoidance.

There are fewer problems in assessing evasion though.

And I wholeheartedly agree that we need a system that is proof against avoidance. As I've argued for some time this is possible. As [I wrote in 2007](#):

Having determined principles [for taxation] there is a further vital issue to resolve, relating to how the law of taxation should be interpreted. There are two options. Interpretation can be based upon the principles inherent in legislation or the strict construction of legislation.

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 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 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 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 „looks 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.

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

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 persist in the belief that this is the direction in which we should move. This basis of legal interpretation and a General Anti-Avoidance Principle will undermine the whole basis of tax avoidance.

What are we waiting for?