

The Duke of Westminster is dead: long live the Duke of ...

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[Ben Saunders, writing in Taxation](#) yesterday put forward an idea on the right to tax avoid that is, in an area where it's hard to genuinely difficult to use the term, really quite radical.

Ben's argument revolves around the well known, and somewhat cliched ruling of Lord Tomlin in the UK's Duke of Westminster tax case of 1936, [in which he said](#):

Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow tax-payers may be of his ingenuity, he cannot be compelled to pay an increased tax.

This has, since the day after it was first published, [been used as the excuse of every aggressive tax avoider ever since](#).

Ben's argument is that in doing so they have misread the judgement in context, which is (and with, as Ben admits, a little editing to make it of useful length):

'It is said that in Revenue cases, there is a doctrine that the court may ignore the legal position and regard what is called "the substance of the matter". This supposed doctrine seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled and the supposed doctrine given its quietus the better it will be for all concerned, for the doctrine seems to involve substituting "the uncertain and crooked cord of discretion" for "the golden and straight mete wand of the law".

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ordered his affairs that the amount of tax sought from him is not legally claimable.'

Read in this context, as Ben puts it:

That last sentence is crucial in the context of the first paragraph: Tomlin is not proposing a doctrine of the right for taxpayers to artificially reduce their tax liability; he is denying the right of the Revenue to artificially maximise the burden of tax on an individual.

That's the radical bit. And candidly I have some sympathy with what he is saying: I have fought cases with HMRC in my career where they tried to impose tax burden where one could not exist and I'll always argue that's wrong.

It's when Ben tries to contextualise this insight that things go wrong for him. His argument is:

Freedom of speech is valued by us all. But, as with most freedoms, there are always people who are willing to test them to their limit. That is why, for instance, there is much discussion about the rights to offend and to not be offended.

And the analogy he draws is:

If there is a tax equivalent of the right to offend, it is the right to tax avoidance.

And then suggests:

Tomlin does not suggest the right to avoid tax but suggests the non-right to not have tax avoided.

My point in exploring the analogy is the comparison with the risk posed to the freedom of speech by laws introduced, which target those who exploit the non-right of others not to be offended. If we are not careful in how we address the advocates of the right to avoid tax, we risk losing much more. Or rather, we risk gifting the state an opportunity to create a right it has never had, one that is as open to abuse as a right to avoid: the right to interpret 'the substance of the matter' as it chooses.

So, whilst at a stroke Ben Saunders seeks to remove the right to avoid, saying it does not have a legal basis based on this precedent (and I buy that argument: I think it's right), he does at the same time suggest there is an absolute limit on the opportunity for the Revenue to tackle that abuse because the concept of substance has no legal basis. And there he is wrong.

His error is, I think, in his portrayal of the right to not be abused as a non-right. I suspect he means by non-right that it's a negative right: at least I hope so. But I think he is wrong in that respect for at least three reasons.

First, Tomlin's view on substance has long been dismissed: substance is recognised as vital now, as is purposive interpretation. To rely on Tomlin as a reliable source on this issue is to ignore a massive body of precedent firmly established since then that makes clear that Tomlin's view on this can now be quite firmly viewed as little more than historical anecdote.

Second, we've also now realised that the right to freedom of speech is a conditional right. In other words, the right to not be offended is not a non-right (or inverse), as Saunders argues, but is instead a fully fledged and independent right with its own capacity to be enforced. That is why we have laws on discrimination, incitement, and so on, many with criminal sanction properly attached to them. The idea that the right to not be offended is a negative is now simply wrong: what we have is a prevailing view that the right to free speech is constrained by an absolute obligation not to offend on a wide range of issues.

And so, thirdly, to suggest the state does not have a right to interpret the substance of the matter as it chooses is just wrong. The very essence of the modern right of the state to tackle tax avoidance - a right that will be partly implicit in the government's proposed General Anti-Abuse Rule and which should be implicit in a general anti-avoidance principle, if only we had one - is that this right to tackle the substance of the transaction undertaken as opposed to the form in which it dressed up is at the core of the state's duty to all who are resident within it to tax each and everyone of them appropriately and in accordance with the will of parliament. People have the right to expect that in a democracy, and nothing less will do. This is, in effect, it's duty to uphold free speech: it can be seen here as the duty to ensure that the tax system is not abused so that some free-ride it.

In that case, Ben's argument is wrong: the state does have the right (subject to legislation to be introduced and to appeal to a court) to challenge the form of any transaction and to substitute its substance if that is necessary to achieve a fair taxation outcome.

And read in this way Tomlin is right: the taxpayer never had the right to abuse in that way in the first place, and Tomlin's Westminster ruling seems to say just that. And that changes this debate, for the better.