

Tax risk, legal risk, tax avoidance and rules of thumb

Published: January 13, 2026, 12:04 am

I [wrote a blog in Saturday](#) which read as follows (to save you the time of going to read it):

I was asked yesterday by a pretty experienced tax journalist how I defined the difference between tax planning and tax avoidance.

“That”, I said “is easy. It’s getting legal opinion.”

What did I mean? Simply that if you are tax planning then you either reduce your tax risk (which happens by getting things right, rather than taking the risk of getting them wrong) or at the very least you arrange your affairs in ways that you know will not create tax risk for you. There are obvious examples: paying money into a pension, for example does not create tax risk, and nor does putting money into an ISA within allowed limits.

Tax avoidance, on the other hand always, and without exception, increases your tax risk. That is because you are doing something about which there is uncertainty. in that case, many tax advisers would suggest that you got a tax barrister’s opinion to confirm that your action was legal, as defence against any counterclaim from HMRC. Examples might be claiming allowance for expenses where it is not certain that these are due in law, or using an offshore structure when the motive could be questioned. In all such cases the taxpayer’s risk is increased by undertaking the transaction. That is what tax avoidance involves.

NB: I’m grateful [to tax barrister David Quentin](#) for this incredibly powerful, and simple, insight into the difference between the two categories of behaviour.

I was both amused and bemused by the reactions to this blog.

First of all, let me reiterate that I think that the arguments on risk that David Quentin has made are right: indeed, it is very hard for me to see how anyone could object to them, yet object they have. The almost inevitable claims about the legality of tax avoidance have arisen in response as if this is a foregone conclusion when we know

that in a great many cases tax arrangements are deliberately created to exploit positions of uncertainty in tax law and that no one can know whether or not legality can be assured in these cases. That is, of course, why a barrister's opinion is sought but let me clear so as to what the purpose of that opinion is for those who do not know. It is not to eliminate the doubt about the law that clearly exists, and is being exploited, because a barrister cannot do that; only a court can. The barrister's opinion is there simply to prevent the risk of tax penalties being paid if the scheme is later found to be outside the law. It is an insurance policy, not an opinion that the barrister provides. That fact only reinforces what I am saying.

It also reinforces the fact that I'm distinguishing tax risk from legal risk, although most commentators appear to be completely unaware of the difference. Tax risk is a much broader concept than the legal risk. [As tax barrister Jolyon Maugham put it in a blog](#) when discussing risk relating to submission of a tax return that includes tax avoidance :

Now, one of three things can happen: first, the tax return might not get checked; second, the tax return might get checked and HMRC might agree that the Big Idea works; third, the tax return might get checked and HMRC might decide that the Big Idea doesn't work (and the courts might agree).

It is immediately obvious that tax risk is bigger than legal risk, although few who have commented would appear to realise that. This isn't the place to discuss every aspect of tax risk, which does of course start with a decision on the part of the taxpayer as to whether they wish to even try to comply with the law, or not, which is, of course, akin to the decision to tax evade, or not. What would, I should have thought, have been obvious to most commentators is that a great many decisions taken with regard to tax long before complex questions of legality arise.

There is, as noted, first of all the decision as to whether the taxpayer is concerned with legality at all: since HMRC admit that more than 40% of self-employed tax returns do, on average over the last few years, significantly understate income it is very obvious that for many people this is either a matter of indifference, or a decision consciously taken.

At the other extreme, and probably much more commonplace, are the sorts of clients who I used to seek to serve who are, when it comes to tax, decidedly risk averse. They seek a tax risk profile that avoids any confrontation with HMRC. I stress, there are more reasons than legal risk for doing that. Firstly, there is the issue of doing 'the right thing'. Despite the impression given by many tax accountants and lawyers, vast numbers of people want to not just be compliant with the law, but be very clearly operating well within it. But this is not the only reason for seeking to be legally compliant, although for some it is undoubtedly enough in itself. Others adopt this course of action for entirely rational reasons because it reduces the risk of the cost of tax investigation, the stress associated with that (which is usually very high) and the uncertainty that it will give rise to, particularly if they are running a business where

their efforts on much better concentrated on making profit than avoiding tax (if only most accountants realised it, but don't because they have no idea how to make money for their clients). In this case these decisions are not about legal risk, because in truth a great many tax investigations do not come down to matters of law, they resolve around matters of fact. Of course, the law provides a framework for interpretation of those facts, but when the law is well known a tax risk profile is determined by other factors, including, for example, how facts are presented. This is an issue that often relates to the quality of books, records, and other documentation a is, that e to support a claim that the taxpayer makes. To pretend that law is the only factor in these situations relating to tax risk is just wrong.

And then, between these extremes there are those who are willing to take rate tax risk. But, even then, as Jolyon Maugham points out, the risks taken into account in these situations are far from being purely of a legal nature. The probability of being investigated will, implicitly, become part of any such equation, and there will be, like it or not, implicit odds assumed on whether or not HMRC will have the resources and willingness to pursue an argument, whether they think it right or wrong. Way down the line there will be legal risk, and for that, there will be, of course, the assurance that the barrister's opinion might provide that at the very least the cost will only be the tax that was always due plus some interest.

In other words, to presume that decisions relating to tax avoidance relate very largely to legality is wrong. Legal risk comes way down the line when it comes to appraisal of these issues. The other factors are much more significant. But, what is also true, is that in making those earlier decisions the complexity of the issues being considered means that the vast majority of people will not apply what economists may consider a rational thought process, weighting each factor with its own individual risk and valuation. That would, anyway, in practice be impossible: valuations will not be known relating to each aspect of the decision, and risk factors cannot be allocated with the precision required for such decision-making. As a consequence heuristic reasoning will be used. And there will never be, [as Daniel Kahneman would argue](#), a backstop of 'slow thinking' to support this process. Instead [as Gerd Gigerenzer would argue](#), there are just heuristics. These are the rules of thumb that we use to make critical decisions when information overload would otherwise prevent us taking any action at all.

And that is what I offered to the journalist when I discussed this issue with them last Friday. When asked what was the difference between tax planning and tax avoidance I offered a heuristic logic that in my opinion works. As I've noted above, when it comes to tax avoidance the vast majority of people do not seek a barrister's opinions to reassure themselves on the state of the law. If you really think that Chris Moyles read the barrister's opinion on whether he was or was not trading in second-hand cars, I suspect you are mistaken. The reason for securing that opinion was as an insurance policy against risk. The risk that he was taking was created by deliberate exploitation of uncertainty in the law.

There is no such risk in tax planning: when a person tax plans they operate so clearly within the parameters of the law that the prospect of legal challenges is so small as to be completely capable of being ignored. In that case the heuristic logic that I presented was entirely sound and works in at least 99% of cases, or more. In that case it passes a fitness for purpose test, and that is why I offered it. What is more, it precisely encapsulates that risk exists in tax avoidance and has a cost, both of which are key characteristics of it.

Arguments such as 'tax avoidance is legal' do not pass this test. It is only tax planning that does definitely comply with that legality test: it exists in the space that is unambiguously within the law. Tax avoidance does not do that: it explicitly exists in the space where the law is unknown. The requirement to get counsel's opinion simply confirms that this uncertainty exists.

But I stress that when saying this I am not saying as a result that obtaining counsel's opinion confirms the existence of tax avoidance. That is not what I said.

Nor am I saying that the absence of counsel's opinion says that tax avoidance is not taking place: not everyone buys an insurance policy even when they can foresee the risk.

But, if you want to tell the difference between tax planning and tax avoidance, which is what I was asked, then the advice of a prudent person that tax counsel's opinion may be needed is sure indication of its existence and as a heuristic that works remarkably well.