Funding the Future

The moral economy of the tax avoidance industry

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I was asked to write some observations on the subject of accountants and morality yesterday as part of research being undertaken for a forthcoming bool. I am sure I am one of a number of commentators asked the same questions, and no doubt the book will be a while in coming so I thought I would share my answers here to fuel debate in the meantime.

1. Do tax professionals feel an obligation to serve pubic interest when advising their clients? If so, how do they define public interest?

According to the combined tax professional bodies' statement on the conduct of tax practitioners[i] **there are five principles to which such persons should adhere. Four relatesolely to their relationship with their client and the fifth, and last, says:**

[A member must] comply with relevant laws and regulations and avoid any action that discredits the profession

The clarifying notes add remarkably little to understanding except to make clear that this means a tax adviser should have nothing to do with illegal acts i.e. tax evasion or to abuse charitable purpose for tax reasons.

This guidance may be considered the optimal standard to which professional accountants might aspire. In it the public interest is not defined, or is seen as coinciding with that of the practitioner, their professional body and their fee-paying client. Adam Smith's maxim of self-interest happening, by fortunate coincidence, to maximise general well being would appear to have been adopted by these bodies as the guiding principle of the public interest, which these bodies seem to think might only be over-ridden when required by statute in the form of anti-money laundering regulations (para 2.18).

It is reasonable to assume as a result that most accountants have an under-formed or absent sense of what the pubic interest may be.

2. Do the relevant professional associations provide useful guidelines to their members on how to balance their duty to the public against their duty to their clients?

The only guidance ion this issue is that noted above by the joint professional tax institutes and bodies that represent tax practitioners. This mentions the public interest just three times, all in the context of anti-money laundering regulation, about which they say:

While this is a mandatory regime, it also gives a structure for the assessment of the public interest in a tax context, including which of the following should take precedence, in a particular set of circumstances:

- *The public interest in reporting knowledge or suspicions of criminal activity to the authorities; or*

- *The public interest in clients receiving advice in confidence.*

The advice provided is that "Treasury approved guidance" is followed. In other words, an entirely legalistic approach is adopted and the possibility that any other issue, such as ethical concern, needs to be taken into account when deciding on an appropriate course of action is not referred to at any point.

It can be reasonably concluded that the tax profession's approach is wholly commercial: that which is within the law may be undertaken by a tax practitioner without ethical concerns being considered so long as 'that will not bring him or his professional body into disrepute' i.e. if confidentiality can be maintained no other issue need be considered beyond bare legality.

This means that in effect professional associations provide no useful guidelines to their members on how to balance their duty to the public against their duty to their clients.

3. Has the general anti-avoidance rule provided a useful guide to tax professionals?

I have a conflict of interests on this issue. As an author of the General Anti-Abuse Rule as a consequence of being a member of the committee that drafted it, as well as being one of the fiercest critics of that committee's work, I may not be wholly objective on the GAAR.

In my opinion the GAAR does not provide useful guidance to tax professionals on the boundaries of the activities that they should undertake. This is because the GAAR relies upon what is called a "double reasonableness" test to determine what may, or may not be acceptable practice.

This "double reasonableness" test requires HMRC to be able to show that the arrangements entered into 'cannot reasonably be regarded as a reasonable course of action'. However, as a supposed taxpayer safeguard a panel of experts drawn from the

tax profession is required to advise HMRC as to whether this this test has been passed or not, and it was deliberately stated by the GAAR's principle author, Graham Aaronson QC, that this was intended to be a 'high hurdle'. So far it has been an insurmountable one: to date the General Anti-Abuse Rule does not appear to have been used. This is hardly surprising since the standard of reasonable conduct that must be met is that of a tax profession that defines reasonable conduct as anything that is not illegal, and by definition, any tax avoidance meets that criterion.

In other words, the General Anti-Abuse Rule the UK currently has was designed to permit the tax avoidance that we currently suffer, whilst providing a veneer of action that supposedly tackles it, without there ever being risk that the action could achieve this supposed objective.

This is an open secret amongst the tax profession, in which case the General Anti-Abuse Rule is wholly ineffective as a useful guide to conduct for tax professionals.

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http://www.tax.org.uk/Resources/CIOT/Documents/2014/02/Professional%20Conduct%20in%20Relation%20to%20Taxation%20190214%20final.pdf