

The tax avoidance v tax evasion debate has no place in ...

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I was interviewed by a journalist yesterday who wanted to know why I was not worried about the erosion in the distinction between tax avoidance, which they suggested to be legal, and tax evasion, which they suggested to be illegal. This is, of course, often presented as if it is fact.

As I explained though, this is only one logic of UK law and appears to have its origins in a ruling given in the House of Lords in the United Kingdom in 1869 (*Partington v. Attorney-General* (1869), L.R. 4 E. & I. App. 100, per Lord Cairns at p. 122) that said:

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.

On the basis of this and other such rulings UK tax law was for a long time given a legal construction i.e. the form of words used to impose a tax charge was paramount. This, however, grossly simplifies modern tax jurisprudence and there have been substantial changes in modern tax law, and yet for the purposes of the argument that the journalist put to me the above 1869 opinion remains true: the difference between tax avoidance and evasion is based on a strict interpretation of what the law says and avoiders are wholly within their rights if they can find a way around that legal construction. When it comes to the morality of tax law this is the construct of law the defenders of tax law use.

I made three points. The first is that this is not the way tax law actually is now. The General Anti-Abuse Rule (and much else besides) makes that very clear. In other words, those who make this claim that the law must be paramount are basing their argument on law that no longer exists.

Second, it is a moral judgement to base your argument on a law that no longer exists: in other words those who are saying morality must be kept out of tax law are doing exactly what they condemn.

And third, this legal basis of interpretation of law is not, anyway, the only basis for interpretation of law we have in the UK: we have a whole model of equitable interpretation of law that is purposive in intent and so seeks to (broadly speaking) look at the conduct of the person to whom the law is being applied and interpret the application of law in that context. This forms the basis for the new concept of the abuse of tax law, where the intention of the taxpayer to cheat the system is what matters. This has a long legal tradition all of its own, of course, and is entirely legal as a result: it just does not produce the result that the tax avoiders want and so they ignore it. But, once again, that is moral judgement on their part and to claim otherwise is just wrong.

Which is why the old divide between avoidance and evasion is disappearing. Legally and ethically it is now recognised to have no use. It is inconsistent with modern tax law. It contravenes the morality of society that underpins our concept of equity. As such it has no place in modern tax debate and it's immoral to use it.