

# We don't need more threats to prosecute tax cheats to ...

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It would seem that I walked into another minor hornet's nest when tweeting, [and then blogging](#), about Tax Watch UK director George Turner's suggestion that the distinction between tax evasion and tax avoidance should be eliminated in considering how HMRC tackle tax abuse and that, instead, all activity that seeks to reduce a tax liability should be treated as illegal, and so be subject to prosecution on the basis that it is cheating the public revenue.

I have to admit to having a certain feeling of déjà vu here. I spent a great deal of time addressing such issues from 2005 to about 2013. The opening shots were in the Tax Justice Network's first edition of 'Tax Us If You Can' in 2005. This now seems to have disappeared from the Tax Justice Network website after its recent revamp. Next there was the Association for Accountancy and Business Affairs [Tax Code of Conduct](#) that I wrote. After that there was [The Missing Billions](#) for the TUC, and [further reports for the TUC](#), which followed my own involvement in helping draft the UK General Anti-Abuse Rule, after which I [wrote an alternative Bill](#) that was presented to parliament by the late Michael Meacher MP. I have, in other words, done my time working on how to beat tax abuse. And in all these cases I came up with an answer to the problem that George Turner wants to address, which is that there are so-called tax professionals who sell tax schemes that he thinks are abusive.

Several lawyers, from left and right, have contacted me to support the position I have taken with George, which is that removing the distinction between tax avoidance and tax evasion will simply make it much harder to recover tax from those where it would be very hard to prove criminal intent but where it is quite possible to show that the scheme that they used did not work. In other words, if the aim is to change behaviour and not secure prosecutions then the retention of the distinction is vital. That is because if it is removed the cheats would know that the burden of proof required for prosecution would be very much higher than it is for a claim that a scheme does not work, with a civil penalty following on from that, and so would be emboldened by the lack of a category of behaviour called avoidance. I, of course, agree with that.

But there is more to it than this, importance as maximising the chance of recovery is

(and it is paramount). To a very large degree my response to the lawyers who have told me that the line between avoidance and evasion is blurred and so not useful, and is even in jurisprudential terms 'nonsense', is to say 'so what?' Their position is to entirely misunderstand the way in which tax compliance works.

Of course all tax law has to be based in law. And the pedant will say that whatever is not illegal is legal, which is (in summary) the distinction made by the Duke of Westminster case in 1936, on the basis of which so many schemes have been spawned, so much unproductive labour has been spent and so much time wasted. But only a few ever go near that distinction. And that number is, I think, falling significantly in any case. It is glaringly obvious now that the chance that any scheme will fail is high. Giving credit to HMRC where it is due, their victory rate is impressive. And that is to be welcomed.

And the point here is not that prosecution is the aim, because that will never be the case, but that securing compliance is. All tax is ultimately paid voluntarily. The vast majority of people can be persuaded to pay tax either by conviction that they should, or because of a deep sense of law abidingness, or because they are given no choice by reason of it being deducted before they get their income, or because they can be persuaded cheating does not pay. And this can be achieved despite the intense ambiguity of much tax law which leaves the boundaries between honesty, avoidance and even evasion decidedly unclear even in some quite straightforward situations. How is that possible? I would suggest three things can create this environment.

The first would be having a tax authority that goes out of its way to help taxpayers be compliant. We do not have that at present, which is absurd. But we should, for example, have arrangements where a person proposing any course of action can seek guidance on it in advance so that if they do what they suggested they would then they know that they are not abusing the tax system. This, I suggest, would be a lot more constructive than branding people as cheats. I prefer positive to negative action. This requires significant investment in HMRC. So what? Al, tax justice campaigners should be calling for that, and this demand is inherently about justice too.

Second, we need a general anti-avoidance principle in UK tax law. I would, of course, suggest the one I wrote, which is the only one to ever go to Parliament. The intention of that version is clear. If it is apparent that any step in a transaction can only or mainly be explained by its role in reducing the overall tax paid on the transaction as a whole then it is deemed to provide a tax advantage and that step can be ignored when taxing the transaction as a whole. Of course case law has tried to achieve this aim. But I argue statute is required to reinforce it and give HMRC the certainty it needs when acting. This law would, however, primarily be designed to have a deterrent effect.

And then and third, it could be argued that the sale of a scheme intended to promote the inclusion of steps in transactions with the only or main aim of providing a tax advantage would be illegal, and subject to prosecution.

The advantage of this suggestion over George Turner's proposal should I hope, be apparent. First, HNRC keeps all its existing opportunities to tackle tax abuse, which his proposal would deny them.

Second, existing legislation on avoidance need not be abandoned.

Third, the test I propose has legal precedent already; courts would have no difficulty with it.

Fourth, the test is a common sense one constructed in plain English. Anyone should be able to sense if an arrangement includes artificial steps to secure a tax advantage, or not.

And the test for prosecuting tax professionals is on a clear, statutory, and objective, basis, where the chance of winning is much higher than by seeking to prove the common law concept of cheating.

So I don't buy the argument for getting rid of the concept of tax avoidance. I don't even buy the argument that this is necessary because the term tax avoidance is ambiguous, because anyone who knows tax law knows that a great deal of it is.

I do instead promote the idea that the job of tax justice is to come up with practical innovations that support the chance of effective tax recovery from all who fail to be tax compliant. Reducing the number of available tools, and reducing the range of unacceptable behaviours as George Turner suggests, will not achieve that. I doubt that what he proposes could even be legislated with any ease. On the other hand, promoting legislation that provides objective tests that flag unacceptable behaviour would change behaviour will achieve that aim. And I reiterate, that change in behaviour and not prosecution is the real goal. George Turner's proposal is misguided.

I rest my case.

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## As example of the Bill I

3	Meaning of "tax avoidance"	nce:
(1)	Arrangements represent "tax avoidance" if, having regard to all the circumstances, it would be reasonable to conclude that tax is not paid— (a) by the right person, or (b) at the right time, or (c) in the right place, or (d) under the charging provisions of the right tax, or (e) at all when it would appear right that it was due, or (f) in any combination of the circumstances noted in (a) to (e).	15
(2)	In subsection (1) an arrangement is considered "right" when the economic substance of that arrangement giving rise to a potential charge to tax under any one or more of the taxes referred to in section 1(3) of this Act accords with the form in which that arrangement is declared for assessment for taxation purposes whether in the United Kingdom or elsewhere, with non-declaration of a potential charge to tax on the economic substance of a transaction in the United Kingdom as a result of the form adopted for its completion being considered a tax declaration for the purposes of this section.	25
(3)	For the purposes of subsection (2) the economic substance of an arrangement does not accord with the economic form in which that arrangement is declared for taxation purposes if having regard to all the circumstances— (a) one or more of the parties to the arrangement cannot reasonably have been included as a party to it without the securing of a tax advantage having been an objective; (b) the contractual form of the arrangement cannot reasonably have been adopted without the securing of a tax advantage having been an objective; (c) the location in which the arrangement is recorded as having occurred cannot reasonably have been decided upon without the securing of a tax advantage having been an objective; (d) the timing of the arrangement cannot reasonably have been decided upon without the securing of a tax advantage having been an objective; (e) the arrangement has as one or more of its objectives the declaration of a transaction for assessment under the provisions of one of the taxes referred to in section 1(3), or none of them, when declaration under the provisions of another of those taxes would seem more appropriate.	30
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## This is how a tax advantage was defined:

4 Meaning of “tax advantage”

(1) A “tax advantage” may be considered to have arisen for the purposes of this Act if—

- (a) the arrangement results in an amount of income, profits or gains for tax purposes that is significantly less than the amount for economic purposes,
- (b) the arrangement results in deductions or losses of an amount for tax purposes that is significantly greater than the amount for economic purposes,
- (c) the arrangement results in a claim for the repayment or crediting of tax (including foreign tax) that has not been, and is unlikely to be, paid,
- (d) the arrangements involve a transaction or agreement the consideration for which is an amount or value significantly different from market value or which otherwise contains non-commercial terms,
- (e) the arrangement results in an amount of income, profits or gains for tax purposes being assessed for tax purposes upon a person who appears to have less economic claim upon that income, profit or gain than another person who would have greater taxation liability due upon it if they were assessed to that income, profit or gain for tax purposes,
- (f) the arrangement results in an amount of income, profit or gain being subject to a tax other than that which the economic substance of the arrangement would suggest appropriate with less tax being due as a result,
- (g) the arrangement results in an amount of income, profit or gain being subject to tax assessment in a jurisdiction other than the United Kingdom when the economic substance of the arrangement would suggest that inappropriate whether or not more or less tax is due in that other place or not,

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(h) the arrangement results in a lower rate of tax being applied to the income, profit or gain than might otherwise have been the case,

(i) the arrangement results in tax being paid later than might otherwise have been the case,

(j) any combination of the circumstances referred to in paragraphs (a) to (i).

(2) Subsection (1) is not to be read as limiting in any way the cases in which tax arrangements might be giving rise to a tax advantage.

(3) A tax advantage may, without limitation, be indicated to have arisen by the existence of—

- (a) relief or increased relief from tax,
- (b) repayment or increased repayment of tax,
- (c) avoidance or a reduction of a charge to tax or an assessment to tax,
- (d) avoidance of a possible assessment to tax,
- (e) a deferral of a payment of tax or an advancement of a repayment of tax,
- (f) avoidance of an obligation to deduct or account for tax, and
- (g) the passing of an obligation to make declaration of a liability to be assessed to tax to another party.

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## And this was the remedy:

5 Counteracting the tax advantages

(1) If tax arrangements meeting the definition of section 2(1) of this Act are identified then the tax advantages arising from the arrangements are to be counteracted on a just and reasonable basis.

(2) The counteraction may be made in respect of each or any tax to which the general anti-tax avoidance principle applies.

(3) An officer of Revenue and Customs must make, on a just and reasonable basis, such consequential adjustments in respect of any tax to which the general anti-avoidance rule applies as are appropriate.

(4) These consequential adjustments—

- (a) may be made in respect of any period, and
- (b) may affect any person (whether or not a party to the arrangements) so long as they are connected to the party that has enjoyed the benefit of a tax advantage, such connection being as defined in section 993 of the Income Tax Act 2007.

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Prosecution could have been made. But I am much more interested in behaviour and that is what I think George Turner's proposal fails to understand.

The Bill also included this requirement:

7 Application for clearance of transactions	
(1) A person may provide the Commissioners for Her Majesty's Revenue and Customs with particulars of a transaction or transactions effected or to be effected by the person in order to obtain a notification about them under this section.	20
(2) If the Commissioners consider that the particulars, or any further information provided under this subsection, are insufficient for the purposes of this section, they must notify the person what further information they require for those purposes within 30 days of receiving the particulars or further information.	
(3) If any such further information is not provided within 30 days from the notification, or such further time as the Commissioners allow, they need not proceed further under this section.	25
(4) The Commissioners must notify the person whether they are satisfied that the transaction or transactions, as described in the particulars, were or will be such that they ought not to be counteracted under the provisions of section 5 of this Act.	30
(5) The notification must be given within 30 days of receipt of the particulars, or, if subsection (2) applies, of all further information required but subject to the conditions of subsection (6) having been met.	
(6) The person making application for a notification under this section shall— (a) specify the amount of tax that they estimate might be due as a result of making the arrangement, (b) specify whether that arrangement shall continue during the two year period following its commencement, and (c) pay a fee in respect of the notification to be supplied under section (4) prior to that notification being supplied of not less than— (i) £1,000, or (ii) 5 per cent of the estimated tax due as a result of making the arrangement, whichever shall be the greater, such charge to be subject to Value Added Tax and to be due whether or not the requested notification can be supplied or not.	35
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(7) HMRC shall have power to substitute such other sum that they think appropriate for those sums notified under subsections (6)(a) and (b) if they think those estimates unrealistic.	
(8) If HMRC makes use of the powers in subsection (6)(d) they shall notify the person within thirty days of their intent to do so and provide their estimate of the tax that might be due under the arrangement with reasons stated, with the person having thirty days thereafter to appeal against the same or let their application lapse.	5
(9) HMRC may publish their notifications issued under this section so long as the taxpayer's identity is anonymised.	10
8 Effect of clearance notification under section 7	
(1) This section applies if the Commissioners for Her Majesty's Revenue and Customs notify a person under section 7 that they are satisfied that a transaction or transactions, as described in the particulars provided under that section, were or will be such that no counteraction of section 5 of this Act ought to be taken in respect of the transaction or transactions.	15
(2) No such action may then be taken in respect of the transaction or transactions.	
(3) But the notification does not prevent such action being taken in respect of transactions including not only the ones to which the notification relates but also others.	
(4) The notification is void if the particulars and any further information given under section 7 about the transaction or transactions do not fully and accurately disclose all facts and considerations which are material for the purposes of that section.	20

Not clause 8(4). Full disclosure is required. This is the real required direction of travel. Threats are not.