

Is it time to make tax avoidance illegal?

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I wrote this tweet yesterday:

<https://twitter.com/richardjmurphy/status/1619727432067719168?s=61&t=67I-gjSikyXtEuOwqcrChA>

Saying this, it is important to note that tax avoidance is quite hard to define, but then, so too is protest. And, come to that, so too is intent.

However, at least in the case of tax avoidance if there was the desire to criminalise it most prosecutions would take place after the event. In other words intention could be imputed from the actions that took place. This, then, would be easier to prove than the intention to protest, which is nonetheless becoming an offence.

So what is tax avoidance? There is at present no precise definition. What it definitely is not is claiming a tax relief or allowance that is definitely provided for in law, presuming that the circumstances for making the claim, also prescribed in law, are met. So, for example, claiming tax relief on a pension contribution within permitted limits is an action undoubtedly intended to reduce a tax bill, but the law specifically permits that the reduction takes place so it cannot be claimed that this is tax avoidance. Anything that is definitely legal cannot be undertaken as if it was an abuse of the law.

Likewise, anything that is specifically illegal with regard to tax, such as not declaring income, or specifically claiming an expense to which a person knows they are not entitled, is quite clearly not tax avoidance because we know that such actions are properly described as tax evasion.

As a result, tax avoidance is the activity that takes place within the grey space between being tax compliant, where a person specifically seeks to comply with tax law, and tax evasion, where they specifically seek to break that law.

The way in which tax avoidance is usually identified is, in that case, by questioning why an additional step, or additional steps, are inserted into a transaction which seem commercially unnecessary but where a tax advantage arises as a result.

As an example, a shareholding in a UK company could be owned by an offshore company, itself owned by an offshore trust, where the offshore trust is apparently set up for the benefit of a person who is not directly involved in the activity of the UK company in question despite which they are related to and might actually hold funds for the person who it would seem commercially appropriate should own the shares, which shares in the UK company that appropriate person could, as a matter of fact, hold in their own name.

It may be that every single step in this transaction is legal given the circumstances of the people in question, but viewed as a whole the insertion of the unnecessary steps of creating an offshore company and trust and the resulting apparent diversion of ownership all have the appearance of tax avoidance because they seem to have the intention of providing a tax advantage that was otherwise unavailable to the person who has the commercial reason for owning the shares.

In the UK's general anti-abuse rule for taxation purposes, with the creation of which I was involved because I sat on the Treasury committee which advised on the rules for its operation, there is what is called a double reasonableness test. All that demands is that a reasonable person might reasonably think that a step might have been added into a transaction for the purpose of securing a tax advantage and tax abuse is deemed to have taken place.

That rule has been used sparingly, and mainly in cases where the abuse has been glaringly obvious. It has, however, delivered the advantage of reducing glaringly obvious abuse.

The obvious question to ask now is whether criminal sanctions could be applied in cases where such steps have been taken. In other words, where a person has clearly set out to abuse tax law, should they be subject to criminal sanction? If not, why not? Why should abuse of the law not be illegal? An answer to this question is now needed. Tax abuse has too high a cost to society for the issue to be avoided for any longer.

And for those worried that injustice might result, the taxpayer would always be able to offer the defence that the apparently unnecessary step was commercially required. But the onus of proof would be on them, and the number of commercial reasons for going offshore (for example) are very small. They exist, but the taxpayer would have to be very confident of their case before undertaking such a step. And that would be the whole point of such a law: it would work by stopping further abuse happening in the vast majority of cases by making the risk from doing it far too high.