Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle

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Abstract

This article examines tax avoidance in the context of regulatory and legal theory and developing ideas about corporate governance. Words such as "ethics" or "morality" are frequently called upon within the tax avoidance debate, whilst corporate directors argue that they have a "duty" to minimise taxation within the law. "Certainty" is given great weight and importance as an outcome, and this requirement is often thought to demand specific rules rather than a general anti-avoidance principle. This article concludes that the law should give more direction to taxpayers, especially company directors, on the balance of their duties. This cannot be left to morality but, it is argued here, can be best achieved by a legislative general anti-avoidance principle. It is not claimed that this would achieve certainty: rather that certainty is the wrong test of such a principle. Moreover, a legislative anti-avoidance principle would not, and would not be intended to, remove the need for judicial development, since judges will always have a role to play. Rather, a legislative general anti-avoidance principle would provide the overlay needed to give legitimacy to judicial development and offer a framework in which the uncertainty inherent in any system capable of tackling tax avoidance could be fairly managed.

Genesis of this article

THE ideas in this article emerged from an inaugural lecture delivered at the University of Oxford in May 2003.[1] Giving an inaugural lecture is a daunting challenge. The inaugural lecturer must address not only experts in her field, but also, and perhaps even more alarmingly, colleagues working in other areas of law and other disciplines. It was, perhaps, especially foolhardy to pick tax avoidance as a topic for such a lecture, since so much has been written on the subject and such strong views are held. On the other hand, it is an ideal topic to show that tax law is not a technical, numerical subject standing apart from other legal studies but can and should be studied and researched in the same way as any other

* KPMG Professor of Taxation Law at Oxford University. The author thanks all those who commented on her inaugural lecture and all with whom she has discussed this topic, too numerous to mention individually, but who include fellow academics, staff and clients of KPMG and employees of the Inland Revenue. Almost all of them disagree with her on some aspect or another and frequently reject her entire thesis, but she hopes that the discussions have sharpened her arguments, which represent her personal views only. She also thanks Danny Priel, Osita Mba and Sam Freedman for research assistance.

[1] This article is based on aspects of an inaugural lecture delivered on May 12, 2003 at the University of Oxford. An earlier brief summary of the lecture can be found in *The Tax Journal* June 2, 2003 (J. Freedman, "Tax and Corporate Responsibility"). The inaugural lecture explored tax avoidance as part of a wider survey of boundaries in tax law.

legal topic, in addition to being studied from the perspective of other disciplines and in an interdisciplinary way.[2]

The study of tax law requires reference to many other areas of law, for example, here, regulation, criminal law, company law and legal theory. Tax belongs in the legal curriculum.[3] It is hoped here to illustrate this, as well as to add to the debate on tax avoidance.

Introductory summary

In this article it is argued that morality can play only a limited role in defining taxpayer responsibilities and must be backed up by law. The principle derived from the *Duke of Westminster's* case,[4] that taxpayers may organise their affairs so as to pay the least tax possible under the law, is firmly established in the UK taxpayer's psyche and will need legislation to qualify it definitively. The developing pressures on corporate taxpayers as part of the movement for greater corporate social responsibility will have a part to play, since tax-related behaviour may have an impact on reputation. Corporate governance mechanisms will only operate effectively to control taxpayer behaviour, however, within a framework giving clear legal direction. Likewise, although individual tax payers and their advisers may not relish criticism in the press for entering into tax avoidance schemes, the media should not be relied upon to set the boundaries of behaviour: these boundaries should be supplied by the legislature.

The proposal put forward here is that direction should be given by means of a legislative general anti-avoidance principle. It is important to note that it is not claimed that such a provision would provide certainty. Certainty has great significance in commercial law, and, even more so, in criminal law, but there are circumstances in which it should not be the overriding aim and where, in any event, it may be elusive or even undesirable.[5] Previous rejection of a general anti-avoidance provision on the grounds that it would fail to provide certainty might therefore be misplaced: it depends entirely on the role envisaged for such a provision. It is argued here that a legislative provision is needed to provide an overlay to the substantive tax rules; the very overlay that Lord Hoffmann in *MacNiven v Westmoreland*[6] rejected as being beyond the constitutional authority of the courts to impose themselves. This overlay could then be developed by the judges with full constitutional legitimacy. It is not the content of that provision which matters so much as the signposting that will be provided by it: hence it is referred to as a principle and not a rule.[7] With such a legislative provision in place there would be a clear indication from the legislature that the courts were entitled to go further than the ordinary rules of statutory construction permitted in negating artificial tax avoidance schemes which abused the wording of the legislation. Once that overlay had been created, there would be better scope

[2] For further discussion of disciplinary and interdisciplinary approaches to tax law research see M. Lamb, A. Lymer, J. Freedman and S. James, *Taxation—An Interdisciplinary Approach to Research* (OUP, Oxford, 2004).

[3] This is also well illustrated by other articles in this issue, especially that of Professor John Tiley, whose very title makes this point, and of Edwin Simpson, who relies on arguments derived from administrative and constitutional law.

[4] [l936] AC l.

[5] See T. Endicott, *Vagueness in Law* (OUP, Oxford, 2000)—this idea is discussed further below.

[6] [2001] STC 237 at 248.

[7] The meaning of this distinction in this context is discussed further below.

than at present for the judiciary, the revenue authorities and the taxpaying community to manage any uncertainty within a sensible regulatory framework.

Morality, risk and reputation

The duty of the taxpayer

It is inevitable that there will be fundamental tensions between the essential need of governments to raise revenue[8] and the lack of desire of taxpayers to pay for this. Quite apart from differences about the size and role of the state, which are obviously to be decided in the ballot box in a democratic society, each taxpayer will consider that he should pay only his "fair share". What is his fair share may be a matter for argument, but what is clear is that the taxpayer himself is "not the proper person to decide what it should be".[9]

Such evidence as there is suggests that whilst individual citizens do not like taxes, the majority do accept that they are both necessary and inevitable.[10] This does not prevent even that majority from wishing to minimise their tax in legal ways and politicians frequently attempt to utilise the tax system to manage behaviour, providing tax incentives to operate in one way or another, thus exploiting this rational desire. In the case of corporations there is an added dimension: it could be argued that corporations pay their share of tax through payroll taxes, taxes on distributions and other payments to other parties and that there is no need for a further specific tax levied on corporations.[11] In practice, however, corporation tax clearly plays an important role in revenue collection in most tax systems, and corporations are expected by the public and by governments to make a further contribution directly through corporation tax as well as indirectly through the other taxes they pay. Listed corporations will expect to pay the tax required by law. How far they will go in adopting legal avoidance techniques may take account of public opinion, if only because, as we shall see below, there is increasing pressure from various quarters for corporations to demonstrate some level of social responsibility in relation to taxation. Nevertheless, directors may consider that they owe their primary duties to shareholders, some of whom may be based in states other than those in which the corporation is subject to tax. The views of stakeholders on the contribution to be paid to different fiscs may vary. It is clear that some well known companies pay a low rate of tax on their profits by means of various techniques for international and domestic tax planning, carefully designed to fall within the letter of the law.[12] Sometimes this is achieved by what all would agree to be planning or mitigation, and sometimes by complex, artificial methods with no commercial purpose other than tax reduction, which some would consider "aggressive" tax avoidance and which risk being struck down by the courts. Whether this behaviour will be curbed in some way by stakeholder pressure will depend not only upon

[8] One of the most ancient ideas of political theory: "The Treasury is the root of kings" a Hindu maxim from U.N. Ghoshal, *Contributions to the History of the Hindu Revenue System in Calcutta* (University of Calcutta 1929) cited in C. Webber and A. Wildavsky, *A History of Taxation and Expenditure in the Western World* (Simon and Schuster, New York, 1986).

[9] G.S.A. Wheatcroft, "The Attitude of the Legislature and the Courts to Tax Avoidance"(1955) 18 MLR 209 at 213.

[10] See B. Guy Peters, *The Politics of Taxation* (Blackwell, Oxford, 1991) Ch.5.

[11] For a summary of the arguments see J. Tiley, *Revenue Law* (4th ed., Hart Publishing, Oxford, 2000) at p.763.

[12] See for example J. Plender, "Counting the cost of globalisation: how companies keep tax low and stay within the law", *Financial Times* July 21, 2004.

the views of other stakeholders but upon the impact of that pressure on the directors' perceptions of their duties and of risk, and also on the way in which the law frames those duties and permits social norms to be fed into consideration of them.

There is therefore a relationship between morality in the sense of social norms and taxpayer behaviour, but it is a complex one. Morality may in part be shaped by the law.[13]

The case law position

The debate about whether morality has a place in the arena of tax avoidance is nothing new.[14] In an article in the *Modern Law Review* in 1955, Wheatcroft discussed references to morality in the decided cases,[15] but concluded that "whatever may be the personal sympathies of a judge who tries a revenue case, his decision has to be based on purely legal and technical grounds, and Parliament can expect no discretion or elasticity from the courts in enforcing taxation law". Even though case law has been moving away from the strict and literal approach found in some of those early cases to the "new approach" in *Ramsay*,[16] as developed by *Furniss v Dawson*,[17] the latest pronouncements of the House of Lords suggest that the judges do not see themselves as having authority to create a judicial anti-avoidance rule or to impose an overlay upon tax legislation but only to interpret parliamentary intention.[18] This has not been universally accepted and awaits further explanation in the *Barclays Mercantile*[19] case expected to reach the House of Lords shortly and discussed further below. Even in Lord Hoffmann's view, it seems that this power of interpretation extends to correcting badly drawn legislation. In the *Carreras*[20] case it became clear that Jamaica had adopted wording from the UK capital gains legislation to govern their transfer tax in circumstances where the different types of taxation made the consequences for capital gains tax inappropriate for a transfer tax. Lord Hoffmann, leading the Privy Council, was prepared to decide in that case that a restricted interpretation would not result in a rational system of taxation, and therefore it could not have been what was intended by the legislature. The Privy Council therefore applied what looked very like "*Ramsay* principle" reasoning to look at the various steps taken together and treat them as a whole, ignoring a step taken for no commercial purpose. This is a chink in the armour—if the courts can consider whether tax legislation is rational this may take us a long way, but whilst rationality within fairly narrow confines might be something the courts feel happy with considering, morality is a far wider and more amorphous concept and, as discussed in the next section of this article, could not alone sensibly guide judicial decision-making in the tax area.

For many tax advisers and taxpayers, the line that is seen to matter is that to be drawn between avoidance and evasion, with only evasion being illegal. All forms of avoidance, be

[13] T. Honoré, formerly Regius Professor of Civil Law, All Souls College, Oxford, "The Dependence of Morality on Law" 13 *Oxford Journal of Legal Studies* 1, discussed further below.

[14] For a discussion of views by economists see The Institute of Economic Affairs, *Tax Avoision* (IEA, London, 1979) where Arthur Seldon argues that the economic distinction between avoidance and evasion is almost non-existent (whilst recognising the legal and moral differences).

[15] For example, *IRC v Fisher's Executors* [1926] AC 395 at p.412 and *Levene v IRC* [1928] AC 217 at p.227.

[16] *WT Ramsay Ltd v IRC* [1982] STC 174.

[17] [1984] STC 153.

[18] Lord Hoffmann in *MacNiven v Westmoreland Investments*, n.6 *supra*.

[19] *Barclays Mercantile Business Finance Ltd v Mawson* [2003] STC 66.

[20] *Stamp Commissioner v Carreras Group Ltd* [2004] UKPC 16.

they described as aggressive, acceptable or unacceptable, are legal and for the adviser the question is whether or not they work technically and can happily be fully disclosed to the authorities. The terminology of acceptable and unacceptable avoidance, tax planning and mitigation as opposed to aggressive avoidance, and so on, has been analysed in detail in the cases and elsewhere, but the elaboration of different types of avoidance using judgmental wording can be unhelpful.[21] As Lord Hoffmann has pointed out, unless the statutory provisions:

> "contain words like 'avoidance' or 'mitigation', I do not think that it helps to introduce them. The fact that steps taken for the avoidance of tax are acceptable or unacceptable is the conclusion at which one arrives by applying the statutory language to the facts of the case. It is not a test for deciding whether it applies or not."[22]

Consequently, throughout this article, unless otherwise specified, tax avoidance is used in its widest sense, comprising all arrangements to reduce, eliminate or defer tax liability that are not illegal.

Beyond the law

The attitude of the judges to the correct development of the case law does not, of course, address the question of whether there is a morality against which taxpayers and their advisers should not offend, regardless of what the legislation or case law states. Recent comments from the tax collection agencies in the UK[23] and elsewhere, from politicians[24] and the media[25] all suggest that there is some kind of overriding moral duty to pay the "right" or "fair" amount of tax and to exercise self-restraint which goes beyond complying with the law. It is worth quoting in detail from the address of the Deputy Chairman of the Inland Revenue at the 2003 Wyman debate on this point.

> "So what does morality in tax mean for business, their advisers and the Revenue

[21] For judicial attempts at definition see especially *Challenge v IRC* [1986] STC 548 and *IRC v Willoughby* [1997] STC 995 at p.1004—"tax avoidance is a course of action designed to conflict with or defeat the evident intention of Parliament" (per Nolan L.J.). The article by James Kessler in this issue contains an account of the development of the terminology and a justification of the distinction between avoidance and mitigation. In the context of his discussion of TA 1988, s.741, where the legislation uses the concept of avoidance, Lord Hoffmann's comment does not, of course, apply.

[22] *MacNiven v Westmoreland* n.6 *supra* at 257. On the dangers of over-simplification of the differences between tax avoidance and tax mitigation, see The Rt. Hon. Lord Walker of Gestingthorpe, *Ramsay 25 Years On: Some Reflections on Tax Avoidance* (2004) 120 LQR 412 at 416.

[23] See, for example, Nick Montagu, the then Chairman of the Inland Revenue (now retired) on the link between taxes and social goods, calling this the "foundation of tax morality", Inland Revenue Press Release, January 9, 2003 and the contribution of Dave Hartnett, Deputy Chairman of the Inland Revenue to the Wyman Debate at the Institute of Chartered Accountants on March 15, 2003 (at *www.inlandrevenue.gov.uk/news/wyman_debate_05_03.htm*). For similar pronouncements from Customs and Excise see for example Chris Tailby, "Combating VAT Avoidance" *The Tax Journal,* December 2, 2002, 6.

[24] For an example, see the exchange between Malcolm Gammie Q.C. and the House of Lords Select Committee on Economic Affairs May 5, 2004, Questions 154 *et seq.* (*www.publications.parliament.uk/pa/ld200304/ldselect/ldeconaf/109/4050506.htm*).

[25] For example, see "Arsenal stars dodge millions in taxes" *The Sunday Times*, July 18, 2004: "The sophisticated tax avoidance plan developed by the accountants is legal but such schemes are widely regarded as unethical".

> Departments? Let me look at business first. What Footsie 250 company does not think about reputation, media coverage, pressure groups and wider stakeholder interest alongside plans to maximise stakeholder value?. . . With increasing numbers of investors taking an interest in the ethical and social policies of companies in which they invest, are we now at a time when corporate responsibility demands a new attitude to tax avoidance? Put differently, is keeping within the black letter of the law enough to be a good corporate citizen? Or does morality matter?
>
> Well, I understand that when a certain newspaper displayed the logos of some mighty companies in the centre of an article suggesting that the Revenue had gone soft on big business a number of chairmen contacted their tax directors early in the morning to find out why their logo was there. That suggests to me that tax reputation matters to them. I am sure it also means that morality in tax matters too."[26]

What is actually being referred to here is reputational risk and rational reaction to external pressures. Morality comes into the picture, but only indirectly, as filtered by what the public, media and in particular powerful stakeholder groups, especially shareholders, think is good corporate behaviour, and then only to the extent that there are mechanisms to translate these views into pressures on corporations. These mechanisms may be legal (such as through directors' duties) or they may be economic (such as share price) or some combination.

References by the revenue authorities to morality actually seem to have backfired in some respects. Whilst many tax practitioners and taxpayers assert that they do believe morality is relevant and that they draw their own lines on what they consider acceptable and what not, calls to go beyond the letter of the law, when couched in terms of contributing to social goods and acting "morally", meet with three main sets of objections.[27] First, there are those who argue that morality cuts both ways and that since the Revenue authorities often apply the letter of the law strictly against the taxpayer, there is no reason why the taxpayer should not act likewise. Secondly, some responses to these calls attempt to engage in a debate about whether actual current government expenditure is a good thing; that is, although the revenue authorities talk about education and health, these taxpayers argue that taxes are also being wasted and spent on more contentious activities such as wars. A slightly more sophisticated version of this argument, although no more convincing, is that funds have more social and economic value in the hands of entrepreneurs than if paid over to the government. The fact is that, as discussed above, this second class of responses involves political discussions to be determined by voters and not individual taxpayers or corporate boards.

A rather more sensible response to the morality card, however, is that taxpayers have a guiding principle that they need only pay what has been determined by Parliament through legislation and that, under the *Duke of Westminster's* case, they may arrange their affairs in such a way as to pay the lowest amount of tax possible, provided they are within the law. By definition, the law does not extend to a moral code not embodied in legislation or case law. This attitude is deeply embedded in our history and politics, and in our law.[28] According to this account, calls on morality, where the law proves inadequate to achieve

[26] Wyman debate, n.23 *supra*.

[27] For two examples of the responses, chosen from many possible such pieces, see P. Martin, "So Does Morality Matter?" *The Tax Journal* July 21, 2003 9; John Davison, "An early Christmas Present for Customs" *The Tax Journal* December 23, 2002 16.

[28] H.H. Monroe, *Intolerable Inquisition? Reflections on the Law of Tax* (Stevens, London, 1981).

what government intends, are unreasonable, unfair and incomprehensible since taxpayers are entitled to be able to rely on the law as it is written. If this does not accord with the intention of Parliament, it is for Parliament to make its intention clearer. The *Duke of Westminster* principle has not been overruled although statutory construction is now more purposive than it was when that case was decided. Directors have a duty to their shareholders to maximise profits and must therefore undertake tax planning within the current state of the statute and case law at least to the same level as their competitors (at home and abroad).[29]

Morality alone, without legal backing, does indeed seem inadequate as a guide to the duty to pay tax. A leading legal philosopher has used tax as an example of an area where morality cannot provide adequate guidance without legal content. Professor Honoré has explained that in complex societies morality is dependent on law.[30] Morality is like an outline from which details are missing. Laws, along with conventions, fill many of these in. In his view, taxation affords a good example of this point:

> "According to most people's moral outlook members of a community should make a contribution to the expense of meeting collective needs. . . .So members of a community have in principle a moral obligation to pay taxes. But this obligation is incomplete or, if one prefers inchoate, apart from law. It has no real content until the amount or rate of tax is fixed by an institutional decision, by law. What amounts to a reasonable contribution is not otherwise determinable, since what is required is a co-ordinated scheme which can be defended as fair not merely in the aggregate amount it raises but in its distribution. Taxpayers cannot settle it for themselves, as people can within limits settle for themselves, say, the proper way of showing respect for the feelings of others. Apart from law no one has a moral obligation to pay any particular amount of tax. An obligation to pay an indeterminate amount is not an effective obligation; it requires only a disposition, not an action. So, apart from law no one has an effective obligation to pay tax."[31]

Honoré admits, of course, that a tax may be open to criticism on grounds of justice, but even so there is no way of fulfilling the obligation to help support the community apart from paying the tax. This is the way in which morality has been given content. He agrees that to do what is legally required is not always to be morally in the clear but his contention is that morality and law intermesh in complex ways. The systems are separate in some ways but interact in others.

In the context of taxation, the legislature must set out the total amount of tax to be paid by the community, and the way in which liability is to be allocated. Some gaps in the legislation might be decided by judicial intervention by relying on constitutional type principles such as rejection of retrospectivity and issues of interpretation such as the meaning of profit or trading.[32] This might even extend to assuming a Parliamentary intention to be rational within the confines of the framework of a piece of legislation as in *Carreras*.[33] But the UK judges have declined to create law which imposes taxation simply

[29] On the accuracy of this view of directors' duties see the section on corporate responsibility below.
[30] T. Honoré, n.13 *supra*.
[31] Honoré *ibid*. at p.5.
[32] See Simpson in his article in this issue. His argument is that the judges can and should go further than they do.
[33] See n.20 *supra*.

because in their view taxed should be levied on some basis of fairness (unless the statutory language permits such a construction). In addition the UK has no Constitution or General Taxes Act which sets out tax principles upon which the judges can build, such as ability to pay and progressiveness (unlike, for example, Spain).[34] In any event, if the judges were to fill the gaps by reference to fairness this would be a form of recognition which would immediately be embodied in the law, so that the requirement would no longer be to behave morally, going beyond the law, but would have become legally binding.

The only other source by which general principles or "morality" can enter the equation is through the application of social norms by taxpayers to decide whether to enter tax-related schemes. This is bound to fail as a systemic way of preventing avoidance because taxation is a topic where there will be genuine moral disagreement, which cannot be resolved by appeal to generally agreed values.[35] The only moral norm commanding a sufficiently wide agreement is that citizens should pay their share of the tax lawfully collected by governments, but, even discounting personal views on what is fair, what is their "fair" share takes us back to a consideration of what Parliament has said it should be. In the case of directors or trustees, moreover, the exercise of personal morality going beyond what the law requires might conflict with their duties to their beneficiaries or stakeholders under the law, so the only question is one of how to interpret what the law does require. To ensure an adequate process for controlling this question of interpretation and thus of tax avoidance, a political consensus has to be reached and needs to be translated into law either by legislation or by judicial interpretation of legislation. This could be achieved by a legislative instruction about the approach to interpretation in a general anti-avoidance provision.

Corporate social responsibility

It has been shown that simply talking about morality does not progress the debate about taxpayer duties very far because, once we step beyond legal duty, the responsibility to pay any given amount of tax is too inchoate to be a widely accepted moral duty. It might be argued, however, that extra-legal morality could be enforced by some mechanism other than the law if a consensus about taxpaying duty could be built. One possible mechanism in the case of corporate taxpayers could be corporate social responsibility.

It seems that corporate responsibility is beginning to have a role to play in controlling taxpayer behaviour and introducing aspects of "morality" into taxpaying considerations, indirectly at least, but that the ideas behind this movement and the enforcement mechanisms remain too broad and lacking in focus and general agreement to be effective. Backing for corporate social responsibility may be derived in part from clarification of directors' duties, reporting requirements and codes of corporate governance, but this still gives very little real guidance and a legislative general anti-avoidance provision is the framework within which corporate responsibility dynamics could really operate effectively and fairly.

Until recently, tax had appeared as an issue surprisingly little in the formal corporate

[34] On Spain see M.T. Soler Roch, "The Reform of a Tax Code: The Experience of the Spanish General Tax Act" [2004] BTR 234.

[35] And this is precisely why Raz argues (contrary to Dworkin) that these community values are not part of the law unless they become so by legislation or judicial decision: J. Raz, "Legal Principles and the Limits of Law" (1971–1972) 81 *Yale Law Journal* 823.

social responsibility debates, but this is changing in the United States following the Enron and WorldCom cases which have led to the *Sarbanes-Oxley Act* 2002.[36] The new internal reporting requirements under section 404 of that Act require management to assess its internal controls and the independent auditors to report on this assessment. This includes internal controls related to tax accounts when they are significant to financial reporting and will comprise all risks relating to tax[37] so will need to include examination of schemes entered into for tax avoidance and mitigation purposes. In the UK, the structures for reporting and accountability are continually being enhanced by corporate governance codes and by developments such as the Operating and Financial Review which is about to become a requirement for UK quoted companies.[38] These exercises in internal control will at the very least require managers to consider tax more closely than they have in the past and it is likely that tax strategies will need to become more formally defined. This extended scrutiny will in itself tighten control over tax departments and ensure that they are required to justify tax avoidance schemes within an overall corporate strategy. These developments do not themselves determine that strategy, but it is likely to be a strategy built on risk assessment. In assessing risk, and in particular reputational risk, the attitude of stakeholders will be taken into account, so that any swing of public opinion against tax avoidance—current social norms or morality—*could* have an impact in this indirect way, but the motivation is purely economic. As Power has stated,

> ". . .the current interest in Corporate Social Responsibility (CSR) can be argued to be a defensive strategy: CSR is simply subsumed within reputation risk management."[39]

Previous failure to develop taxpaying as part of the corporate social responsibility debate to date may be in part ascribed to negative attitudes to taxpaying by stakeholders generally. It is more obviously attractive to mobilise support for expenditure by a company to help preserve the environment than to assert that companies should pay their taxes in full in order to make a general contribution to government coffers. This reflects the point made above that tax will be an issue about which there will be much genuine moral disagreement. This is not to suggest that everyone will agree on environmental issues, but there will be much clearer groupings of views than on whether engaging in a certain scheme is acceptable or not. There may be stronger support, however, for more focused tax issues such as ensuring that a reasonable level of tax is paid in developing countries where resources and labour are based, although a failure to pay any significant level of tax at all in the UK and other developed countries may also come under fire as government spending

[36] On tax in this connection see especially the *Report of the Investigation of Enron Corporation and Related Entities Regarding Federal Tax and Compensation Issues and Policy Recommendations*, prepared by the Staff of the Joint Committee on Taxation at the request of Senators Baucus and Grassley of the Senate Committee on Finance (JCS-3–03, US Senate, February 2003). This has contributed to the pressure in the US for legislation to combat tax shelters and the Sarbanes-Oxley Act of 2002 has imposed some limits on the provision of tax advice for publicly held audit clients as well as the reporting requirements referred to here.

[37] For example see *Ernst & Young Tax Services*, November 2003.

[38] Although the DTI's consultation paper on the *Draft Regulations on the Operating and Financial Review and Directors' Report* (May 2004) makes no direct mention of taxation, there is little doubt that tax issues would fall within the purview of such a report in some cases, since large companies will be required to report on all factors relevant to the understanding of the business and this includes reporting on risk, including tax risk.

[39] M. Power, *The Risk Management of Everything*, 6th P.D. Leake Lecture (Centre for Business Performance, ICAEW, 2004).

is squeezed and especially if higher personal taxes are portrayed as being necessary as a result of lower tax take from companies.[40] Various recent developments suggest moves to put tax on the corporate governance agenda. The Tax Justice Network[41] promoted in the UK by War on Want calls for, *inter alia*, public disclosure of turnover and tax paid for all significant business entities with a break down by tax jurisdiction. The Global Reporting Initiative (GRI)[42] and the Publish What You Pay campaign[43] seek to enhance transparency about the contribution made to different jurisdictions, especially developing countries, by tax payments. The latter campaign has been picked up by the UK government which has launched a voluntary Extractive Industries Transparency Initiative.[44] These movements are in their infancy, but combined with increased reporting under wider corporate governance initiatives as outlined above, could start to make corporate boards think about tax paying as more than a straightforward cost to be kept as low as possible in all circumstances. Instead, the contribution made to the fiscs could be seen as a positive point for corporate reports.[45]

In the past, pronouncements from the UK Government on corporate social responsibility have sometimes been couched in terms of tax breaks for rewarding good corporate behaviour, which may give the wrong message in terms of taxpaying itself being good behaviour.[46] The idea that taxpaying should be connected with good citizenship has to be treated carefully, as discussed above, otherwise some will attempt to argue against paying on the basis of the way in which revenues are spent. Properly harnessed with proposed company law developments, presenting taxpaying as a corporate governance issue could have a role to play, however and if the issue is in part one of directors' duties, these duties must be understood in the context of modern company law.

The proposed Company Law Bill which has emerged from the Company Law Review in the UK is intended to ensure that regard has to be paid by directors to the long term as well as the short term.[47] This is not intended to change the law but the Government intends to clarify the responsibilities of directors by making statutory provisions setting out their duties.[48] The draft bill requires directors to promote the success of the company for the benefit of its members and, in deciding what would be most likely to promote that

[40] See the criticisms in J. Plender and M. Simons, "A big squeeze for governments: how transfer pricing threatens global tax revenues" *Financial Time*s July 22, 2004.

[41] *www.taxjustice.net/e/about/index.php*.

[42] *www.globalreporting.org/*. Started in 1997, GRI became independent in 2002, and is an official collaborating centre of the United Nations Environment Programme (UNEP) and works in cooperation with UN Secretary-General Kofi Annan's Global Compact. UK organisations using the guidelines in whole or in part include Allied Domecq, Anglo American plc, AstraZeneca, ICI, Barclays and Johnson Matthey to name but some examples.

[43] *www.publishwhatyoupay.org/*. This campaign was launched by George Soros and calls for the mandatory disclosure of payments made by oil, gas and mining companies to governments for the extraction of natural resources.

[44] This is designed to ensure that transparency comes from both private and state oil companies and has the support of oil companies including Shell as well as the World Bank.

[45] See Shell's 2003 report "With the co-operation of the Nigerian Government, we have been reporting the taxes and royalties paid by Shell-run operations in Nigeria since 2002 (approximately $1.8 billion in 2003) and will continue to do so".

[46] See for example Stephen Timms, "Corporate Social Responsibility, speech delivered June 25 2002" (*www.dti.gov.uk/ministers/archived/timms250602.html*).

[47] What the Company Law Review Committee call "Enlightened Shareholder Value".

[48] DTI website (*www.dti.gov.uk/cld/review.htm*).

success, to take into account all the material factors that it is "practicable in the circumstances for [the directors] to identify". These factors expressly include the need to maintain a reputation of high standards of business conduct.

In this way, morality may feed into decisions about tax strategy and the belief that there is a duty to minimise tax at all costs might begin to be modified. As can be seen from the wording of the draft bill, however, the proposed statement of directors' duties imposes only a duty to take reputation into account and then only when practicable. It has to be balanced by the directors with other matters such as, no doubt, profits. To the extent that a tax avoidance scheme is legal it will continue to be the case that directors will have a clear duty to organise the company's affairs in the least costly way in terms of tax, to set against this, rather less clear, consideration of reputation. What is more, if any tax avoidance in which they engage is legal, it will be hard for them to assess what the reputational effects of entering into it might be, if its consequence is to reduce the company's tax rate substantially and this is then publicised. This again argues for clear legislative signposting in the form of a general anti-avoidance provision rather than leaving the matter to public opinion and the media.

In Australia, the Australian Tax Office (ATO) has for some time played the corporate governance card. In June 2003 it issued a booklet entitled *Large business and tax compliance*, which raised the role of boards of directors and good governance in relation to taxation. This was followed up in January 2004 by a letter from the Commissioner of Taxation sent to all listed companies focusing on the importance of identifying tax risk. Having been asked to give practical advice to boards on how to achieve this, he provided a list of questions for boards to address to their tax advisers, covering issues such as the likelihood of success, the likelihood of dispute with the ATO and the costs involved should there be an investigation, whether the advice is based on the actual transaction or an expectation of how it will be implemented and how appropriate it would be to be upfront with the ATO in identifying the issues before or when lodging the tax return in the interests of managing any risk.

This advice, couched in terms of risk levels and corporate governance, is of considerably more practical assistance to companies than broad comments about morality. It does not help to define what will or will not succeed, nor discuss reputational issues, and thus does not help with the central problem discussed here of whether Boards should look beyond the law, but, subject to that central problem, it does provide a mechanism for Boards to use in considering concrete schemes put before them and weighing the costs and benefits and chances of success and, to this extent, this approach is to be welcomed. Of course in Australia there is a general anti-avoidance rule[49]: this letter indicates that such a rule is not the end of the regulatory conversation[50] but a valuable backdrop.[51]

Culture of Artificiality

The artificiality and complexity of the tax system is often cited as a reason for the

[49] For a discussion of which, see the article by Orow in this issue. For the ATO booklet see *www.ato.gov.au*.

[50] On regulatory conversations see J. Black, *Rules and Regulators* (Clarendon Press, Oxford, 1997).

[51] Orow in this issue argues that the Australian general anti-avoidance provision inhibits financial innovation but as a deterrent it is clearly successful: see Tiley in this issue. Anecdotal evidence gathered by the author from various conversations with tax advisers suggests that the Australian legislation has changed the mind-set of tax planners. The author does not seek to judge at this point whether the

frequency of tax avoidance. To some extent complexity is unavoidable when the tax system has to attach itself to complex underlying legal and economic circumstances. We might think that we should tax on a basis approaching something as near to reality as possible but, as Lord Hoffmann has pointed out, there are dangers in talking about reality in this context.[52] As he states, "Something may be real for one purpose but not for another." This may not sound very helpful in practical terms but it takes us to a central problem of dealing with tax avoidance. The tax system is not founded purely on *economic reality*, even if we were to know what that was. It has to be about *legal reality*—(when is there a disposal of land, when and whether expenditure is incurred, and when and whether a payment is made?)—because that is the only practical and operable way to construct a tax system. What we decide to tax may be something quite artificial; income, for example, is an artificial construct. In the business context it bears some relation to the accounting concept of profit but how real is that? Accounting profit is based on a set of standards designed to give a true and fair view of the profits, but it is one view, seen from one perspective: just one other version of "reality".[53] We could decide to use an entirely different tax base if we wished, and many have argued we should.

Legal reality may often be trying to reflect some sort of commercial or economic reality but it will not achieve this in every case. This does not mean that the legal distinctions created are unreasonable and that taxpayers relying upon them are acting reprehensibly, since the entire system is based on legal distinctions and needs to be in order to operate. Sometimes this seems to operate in favour of the Revenue and sometimes the taxpayer, but since it is the foundation of the tax system, it cannot be eliminated. Artificiality alone cannot be said to be a hallmark of avoidance when so much about tax is artificial.

Sometimes, moreover, governments use tax systems to try to achieve multiple objectives—macro- and micro-economic and social management. Arguably this overloads the system and it certainly creates its own complexities. It is entirely predictable that incentives created through the tax system with one group in mind will be used by others if they find a way to do so. The government has invited a response to its tax incentives and taxpayers are merely taking up the invitation. If tax avoidance is a course of action designed to conflict with or defeat the evident intention of Parliament,[54] situations in which Parliament has deliberately devised a tax incentive but failed to delineate its beneficiaries with care cannot be dealt with by a simple principle of statutory interpretation, since Parliament clearly does intend to create a tax advantage.[55]

Many examples could be given but the one referred to here is that of small businesses. It epitomises the way in which poor policy-making can create a chain of events which indicates to ordinary taxpayers that the tax system is artificial and is there to be manipulated and why the government reaction to that activity, which is to clamp down on it, is met by anger which will then lead to further avoidance activity as taxpayers come to believe that they have been unfairly treated. Giving companies with small profits a nil rate

Australian provision has achieved a good balance between freedom to act commercially and control of extreme types of tax avoidance. To achieve a balance may need continued interaction between the regulators and regulated.

[52] *Westmoreland v MacNiven* n.6 *supra* at p.251.

[53] As G. MacDonald has stated, "Profit is an abstraction; it is not something given in nature": G. MacDonald, "Matching Accounting and Taxable Profits" [1995] BTR 484.

[54] *Willoughby* n.21 *supra*.

[55] This is at the heart of the dilemma in *Barclays Mercantile Business Finance Ltd v Mawson* [2003] STC 66, discussed further below.

of corporation tax not available to unincorporated firms[56] has, entirely predictably, led to a rush to incorporate. Government argues that those who have done this are not only the entrepreneurs that they wished to encourage but others who are simply taking advantage of the tax incentive, "often as a result of marketed tax-avoidance schemes".[57] Maybe, but why not? It is impossible to distinguish entrepreneurs from other small business owners *ab initio* by any objective criteria and the legislation does not attempt to do so, so there is no sign in the legislation at all that the government intended to restrict these benefits to any particular group of incorporators. The introduction of differential rates *unnecessarily* exacerbated the *necessary* distinctions between tax treatment of different legal forms in an area where the legal rules often do not reflect economic reality.[58] Combined with differences between the tax treatment of earned income and dividend income this led to the Exchequer losing large amounts of money as a result of this poorly thought out tax policy. Attempts to counter some of its effects include the use of settlements provisions[59] and now the introduction of the non-corporate distribution rate in the Finance Act 2004, adding another eight pages of complexity to the Taxes Act. The small business taxation system is further convoluted by the so-called IR 35 provisions[60] which seek to deny certain taxpayers who have set up personal service companies some of the benefits of incorporation. In each case the government action taken to counter the tax advantages it has itself created has been couched in terms of preventing abuse and unacceptable avoidance. Yet those who have used the tax advantages so created are left bemused. They have often been advised by accountants to act as they have done. It is true that they do not require incorporation for any commercial reason and that their behaviour is tax driven. But they have been told that this is the way to set up a business in a tax efficient way and if they find it odd, they simply believe this is one of the mysterious things about the way the tax system works. In any event they often perceive themselves to be entrepreneurs, even if they are not the growth businesses the government has in mind. Their angry reaction to being told they are behaving in an unacceptable way and will be deprived of the tax benefits can be seen in the press and on websites.[61]

What message are such people being given by the tax system? Are they to think of tax in terms of economic reality, fairness and rationality when it at first appears that incorporation will legitimately save tax and they then find that some of those benefits have been negated in a complex way that will probably cost them considerable amounts in professional fees? The law has real substance here because it has consequences in terms of rights and obligations. A company is a legal person, not a fiction. So the business owner

[56] FA 2002, and before that a reduced rate of 10 per cent from 2000.

[57] *Financial Statement* 2004, [2004] STI 655 at para.5.93.

[58] For further detail on the make up of the small business sector in the UK and generally on this area see J. Freedman, "Small Business Taxation: Policy Issues and the UK" in N. Warren (ed) *Taxing Small Business* (Australian Tax Research Foundation, Sydney, 2003).

[59] "Businesses, Individuals and the Settlements Legislation" *Inland Revenue Tax Bulletin* Issue 64 April 2003. This led to an angry response from a combination of tax representative bodies CIOT, ICAEW, ICAS, ACCA, ATT, FSB and Working Together, *Section 660A: Commentary on Tax Bulletin Article,* September 2003 (*www.tax.org.uk*). A test case has now been heard by the Special Commissioners and the result is awaited at the time of writing this article.

[60] FA 2000, s.60 and Sched.12 and see J. Freedman, "Personal Service Companies—'the wrong kind of enterprise'" [2001] BTR 1.

[61] For example see the site of the Professional Contractors Group, which has been at the forefront in attacking IR35 and the settlements actions (*www.pcg.org.uk/*).

who has set up a company has become a director and possibly an employee. His initial actions may have been tax driven but he now has a business which is different in terms of legal, though maybe not economic, substance from an unincorporated business. Right from the start he has been given a signal that it is necessary to take account of taxation when making commercial decisions and that the rules can change. The culture of artificiality is established and so it continues. For example he may find it is efficient to lease rather than buy assets as a result of the tax incentives built into the leasing industry. The Inland Revenue may even bless some complex methods of dealing with problems presented by the tax system which would otherwise prevent commercially valuable activity.[62] In the light of this, it is not surprising that business owners will soon come to believe that it is perfectly natural to do artificial things for tax purposes and that this impression permeates right up the scale to large companies whose directors, used to tax impacting on all their decisions, consider it fair game to take tax into consideration in all planning and then to go on to undertake tax driven activities.

This is not an attempt to white-wash tax avoidance activity. Of course many taxpayers realise that the schemes they enter into have been engineered and may be entered into solely for tax purposes. But if this seems to be perfectly natural and reasonable commercial activity to them, it is at least in part because they have become used to the need to take artificial steps simply to achieve sensible taxation in some cases and once this has begun it may be hard to draw the line as to where to stop.

Certainty

Much of the discussion of tax avoidance centres on the need to draw boundaries to differentiate types of behaviour; evasion and avoidance; tax avoidance and tax mitigation. It is the contention here that it needs to be considered to what extent, and in what circumstances, the failure to draw bright lines results in a real problem and when it may be not only inevitable but perhaps even helpful to steer away from any attempt to define the line categorically.[63] In some cases we may need to shift the focus away from trying to create clear lines, which may in any event be an impossibility,[64] towards how we enable decisions to be made in individual cases fairly and within a legitimate and non-arbitrary framework. Proposals put forward in the past for a general anti-avoidance rule have failed because it could not be shown that they would produce certainty. Similarly, general anti-avoidance provisions in other jurisdictions have been criticised for uncertainty.[65] Perhaps the proposals were being subjected to the wrong test.

Sometimes it is supposed that if, and to the extent that, the law fails to draw a clear line

[62] For example, see a letter from Lord Sainsbury to the *Financial Times* on July 7, 2004 on the problems presented to academic spin-outs by FA 2003. He writes that the Inland Revenue has approved models which can be used to "deliver the commercial aims of spin-outs without producing an early tax charge". This is presumably considered to be helpful tax planning rather than tax avoidance. Here the activity of the tax advisers to create a scheme designed to help a certain group escape from a tax charge by Parliament is applauded by government. At times such activity is essential to help the tax system operate due to its complexity and multiple objectives.

[63] See Kessler in this issue who decided that the concept of tax avoidance in s.741 is not too vague or subjective to be operational, "although there are some borderline cases where tax avoidance remains at present a matter of opinion".

[64] And which we do not have at present.

[65] See Orow in this issue, for example.

or is indeterminate, this a deficit in the rule of law. It is agreed here that we do need to have strict rules about what constitutes criminal evasion, even if this means the rules are under-inclusive. Here, what Endicott calls the "rule of law benefits" outweigh the need to catch behaviour at the boundaries. When criminal penalties and even imprisonment are at stake, the taxpayer needs to know whether the law has been broken and tax administrators should not have unfettered discretion to prosecute.[66] When it comes to the distinction between tax avoidance which will ultimately be successful and thus acceptable (on Lord Hoffman's *ex post* test) on the one hand, and unacceptable avoidance on the other, however, it is contended that the measure of "certainty" achieved by formalism is not desirable since this leads to "creative compliance". That is, the production of ever more detailed rules simply encourages avoidance, or creative compliance, as McBarnet has called it, by the manipulation of those rules, using the rules themselves as signposts as to how to achieve the effective avoidance.[67] Some uncertainty at the borderline is a price worth paying to prevent this, and may even be desirable, provided that there is a way for the broadly compliant majority[68] to establish how their behaviour will be treated and the decision on this will be made in a legitimate and non-arbitrary way.

This leads to the conclusion that, as Avery Jones[69] and Braithwaite[70] amongst others have argued, what is needed is fewer detailed rules, backed up by principles in accordance with which the rules can be interpreted in a purposive way.[71] Further, as propounded by Weisbach, some of these principles need to have fuzzy borders.[72] Avery Jones and Braithwaite consider that their prescriptions ultimately will increase certainty, but this is not the case made for a general anti-avoidance principle (GANTIP[73]): rather it is argued that here, as in other areas of law, lack of certainty is not a defect, since certainty is not the aim of the exercise. It is not as though we have achieved certainty now with our detailed rules and it is hard to point to any jurisdiction which has done so. A GANTIP would not make this more difficult to deal with but easier, not through increased precision but by providing an opportunity to create a sensible regulatory framework for the discussion of what is acceptable and creating an improved climate of understanding without becoming burdened by the futile attempt to draw a boundary. This approach would accept that, as in other areas of law,[74] principles are needed which might at times override literal

[66] T. Endicott, "Law is Necessarily Vague" (2001) 7 *Legal Theory* 379–383.

[67] D. McBarnet and C. Whelan, "The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control" (1991) 54 MLR 848.

[68] It is important not to make life more difficult for the compliant, but to concentrate regulatory resources on the non-compliant. If the uncertainty at the borderline affects those who wish to comply it will be unacceptable but if it simply makes it difficult for those who wish to manipulate the rules then it may be acceptable. On the need to focus on the non-compliant, see V. Braithwaite, "Dancing with the Tax Authorities: Motivational Postures and Non-Compliant Actions" in V. Braithwaite (ed) *Taxing Democracy* (Hants, Ashgate, 2003).

[69] J. F. Avery Jones, "Tax Law: Rules or Principles?" (1996) BTR 580.

[70] J. Braithwaite, "Making Tax Law More Certain: A Theory" (2003) 31 *Australian Business Law Review* 72.

[71] The difference between rules and principles is not only the level of detail—see the discussion below.

[72] D. Weisbach, "Formalism in the Tax Law" (1999) 66 *University of Chicago Law Review* 860.

[73] This ugly acronym is used because GAAP is already established in an accounting context and GAAR refers to a rule from which GANTIP is to be distinguished.

[74] Weisbach, n.72 *supra* at p.885 gives the example of the duty of good faith in contract law. In the UK there are many areas of commercial law which rely upon "fuzzy" concepts but which are applied by the courts to govern rights and duties (see for example s.214 Insolvency Act 1986 "a reasonably diligent"

interpretation of language. This could go further than statutory interpretation under our current judicial rule if only because the exercise would have statutory legitimacy. It could also assist in reducing the number of detailed rules and thus the complexity of the tax system. This might have an eventual side effect of improving certainty, but that is not the primary purpose of the exercise. The need for clear boundaries at different points is now discussed in more detail.

Evasion

How do these arguments apply to the current position on tax evasion and avoidance in the UK? It has been uncontroversial in the past to describe the boundary between evasion and avoidance as a straightforward one, with evasion being illegal and avoidance being legal. In the past few years there has been a concern in the tax community that in Tiley's words, tax evasion has developed frayed edges[75] and that the revenue authorities are encouraging this development.[76]

It is understandable that the revenue authorities, concerned by criticism that they are not doing enough to combat revenue loss, are arguing that failed avoidance schemes could become evasion, but this is unhelpful in relation to the complaint majority without giving any teeth to the fight against the non-compliant.[77] Of course,

> "if an 'avoidance' scheme relies on misrepresentation . . . or concealment of the full facts, then avoidance is a misnomer; the scheme would be more accurately described as fraud"[78]

Some recent pronouncements from the Inland Revenue, and more so from Customs and Excise, however, seem to be trying to go further than this.[79] For example, the Chairman of Customs and Excise has written that:

> "It may be that as the legal principles of avoidance become defined in case law, a business which implements an avoidance scheme which has been held by the courts to be avoidance could be embarking on a course of conduct which amounts to evasion."[80]

The common thread in all cases of evasion is concealment,[81] but not all evasion is criminal.

director). As Kessler points out in his article in this issue, tax law also contains a large number of fuzzy boundaries such as capital/income, trading/non-trading. Many specific tax provisions apply motive tests to which exemptions and reliefs are subject. A GANTIP which needed to be applied to the facts of a given case would give the judges problems, as these fuzzy concepts do, but not problems they could not manage, provided they had the statutory framework now missing.

[75] Tiley, n.11 *supra* at p.85.

[76] Such blurring by the revenue authorities for deterrent purposes has also been noted in other jurisdictions: G. Cooper, "Analyzing Corporate Tax Evasion" (1994) 50 *Tax Law Review* 33 n.34.

[77] On the importance of focusing regulatory strategy at the non-compliant, see V. Braithwaite, n.68 *supra*.

[78] J. Gribbon (then Director of the IR Compliance Division) "A Sterile Activity" *The Tax Journal* September 22, 1997.

[79] Sir Nicholas Montagu, "Revenue goes after the big tax dodgers" *The Sunday Times* December 29, 2002. (Inland Revenue Chairman stated, "Some large companies are exploring forms of avoidance that *they may think* legal but we think illegal").

[80] R. Broadbent, "VAT Compliance in the 21st Century" [2003] BTR 122 at 128.

[81] Introduction, to *Report of Committee on Enforcement Powers of the Revenue Departments* (Keith Committee) Cmnd.8822 (HMSO 1983).

As Salter has noted,[82] when the offence of fraudulent evasion of income tax was introduced in 2000, the word fraudulent was considered a necessary addition to evasion to make clear the need for dishonest intent. Whether innocent or dishonest, evasion will lead to re-assessment for tax purposes but only dishonesty should result in criminal prosecution.[83] Whether the prosecution is for fraudulent evasion or cheating the public revenue, dishonesty must be proved. Some reassurance is available, since the Paymaster General has stated in Parliament that "a failed scheme whose details are not hidden from the Revenue amounts not to tax evasion but to tax planning".[84] The Inland Revenue has indicated that there should be no criminal offence where there is no trace of any concealment of the true facts of arrangements for which there is a "respectable technical case".[85] The problem is, who is to decide whether there is a respectable technical case? The complexity of the tax system is such that there may well be reasonable different views on whether a scheme will work. How definite must advisers be that there is a reasonable case? *Barclays Mercantile Business Finance Ltd v Mawson*,[86] was decided against the taxpayers by the Special Commissioners of Taxes and a very experienced High Court Judge but the decision was reversed by an equally experienced Court of Appeal. How should a company director or even a tax adviser decide whether there is a respectable technical case in these circumstances?[87]

There have been some high profile cases where individuals, including tax professionals, have been successfully prosecuted for what they claimed were unsuccessful avoidance rather than evasion schemes.[88] If avoidance shades into fraud, the consequences of stepping over the line here are very great indeed. It is right that the Inland Revenue should seek to combat tax fraud but taxpayers need to know what will be considered dishonest. Juries who have to decide these issues need to know what the norms of disclosure are and how to assess whether there was a respectable technical case.[89] This is not something to be left to fuzzy principles, either from the point of view of the taxpayer, nor the revenue authorities if they wish to be sure to secure convictions.

The test for dishonesty depends on a combination of findings of fact about what the defendant knew and believed and an application of the current standards of ordinary decent people.[90] Ashworth[91] suggests that this test of dishonesty *generally* derogates from

[82] D. Salter, "Some Thoughts on Fraudulent Evasion of Income Tax" [2002] BTR 489.
[83] Lord Templeman in *Challenge v IRC* [1986] STC 548 at 554.
[84] HC Debs, Standing Committee H, June 29, 2000, cols.1012–3, cited in Salter n.82 *supra*.
[85] *Inland Revenue Tax Bulletin* 2000 p.782, cited in Salter, *ibid*.
[86] n.19 *supra*.
[87] Another example of disagreement between different levels of the judiciary comes from *Debenhams Retail Plc v Comrs of C&E* [2004] EWHC 1540 where the High Court overturned the Special Commissioners. The latter thought that the scheme relied upon artifice, the former that it merely sought to procure that retailers are treated as receiving no more than they truly receive. The Customs and Excise Press notice issued after they lost the High Court case depicts this as an unfair avoidance scheme stating that ordinary taxpayers will not understand why they should pay their fair share towards public services when big household names do not (despite the finding of the High Court Judge): C&E News Release 29/04. We may need to wait years for the case to reach the ECJ for a final decision.
[88] See for example the much criticised *R. v Charlton* [1996] STC 1418.
[89] See the account by R. Venables Q.C. of what he argues was a very unsatisfactory handling of the *Charlton* case in this respect : "Tax Avoidance: A Practitioner's Viewpoint" in A. Shipwright (ed) *Tax Avoidance and the Law* (Key Haven Publications PLC, London, 1997), 33.
[90] A. Arlidge *et al*., Arlidge & Parry on Fraud—(Sweet and Maxwell, London, 1996 and supplements) discussing *Ghosh* [1982] QB 1053.
[91] A. Ashworth, *Principles of Criminal Law* (3rd ed. OUP, Oxford, 1999) at 396.

the principle of maximum certainty in the criminal law. He acknowledges that juries may recognise dishonesty easily in some situations, but suggests it is far more difficult in situations with which a jury or magistrates are unfamiliar. Juries are unlikely to be familiar with complex tax schemes. Here, imprecision may lean in favour of the defendant by applying the standards of ordinary people, since polls show mixed attitudes to tax evasion.[92] On the other hand, complex schemes undertaken by wealthy individuals and corporate firms may be seen differently by juries from their own activities. There is a strong argument for providing a jury with more assistance than it currently has if it is to be able to take an informed view about the circumstances necessary for dishonesty in complex tax scheme cases.

A central problem is what level of disclosure is necessary to ensure honesty. As the Tax Law Review Committee has pointed out,[93] engagement in an avoidance scheme can encourage taxpayers to be economical with the truth. It is in the interests of would-be avoiders to maintain secrecy as long as possible because official knowledge may be followed by legislative action. At what point does this behaviour become concealment? Is presentation of the relevant information amid a large volume of detail adequate or must the points at issue be spelt out to the Inland Revenue and highlighted for them?

In the lecture on which this paper was based, this author argued for strengthened disclosure rules to help with this problem.[94] If those rules were breached, the argument was, this would give juries guidance on intent. The disclosure rules introduced in the 2004 Finance Act have been very heavily criticised for being drawn too widely and for a number of other aspects[95] but they do achieve this aim in part. They provide a mechanism for early disclosure for those arrangements caught by the descriptions in the regulations. For those who do not disclose when they should have done so there will not only be penalties but, maybe more importantly, there will be a question raised about their honesty in pursuing the scheme. Clients will need to ask questions of their advisers which they may not have done without the provisions. Advisers and taxpayers may actually feel protected by the mechanism: if they disclose fully under this provision it will be hard for the revenue authorities to argue fraud or dishonestly on the grounds of secrecy. The main problem with the provisions is their conceptual confusion of the disclosure function at the evasion/avoidance border, which did need strengthening, with the definitional function at the avoidance/mitigation border. The direct tax provisions, and some of the indirect ones, require disclosure only where there is a tax advantage (as defined) and, in the case of the direct tax provisions, the arrangements are covered only if the main benefit or one of the main benefits is the obtaining of that advantage. These requirements were supposed to act as filters to prevent the Inland Revenue from being swamped with disclosures, but in fact they confuse the issue by introducing concepts that are hard to interpret and use the

[92] Arlidge *et al.* n.90 *supra*. at 1–015. If the majority think it is morally acceptable to accept payment in cash to evade taxation, does this become the standard to be applied? The authors of this text argue that if the majority of people think small scale tax evasion is not dishonest (as polls suggest may be the case) then most juries will agree and then, according to *Ghosh,* this will not be dishonest.

[93] Tax Law Review Committee, *Tax Avoidance* (IFS, London, 1997) para.1.24.

[94] Based on the disclosure provisions in the US—see E. Nijenhuis, D. Chung and M. Kulikov, "The New Disclosure and Listing Regulations for Tax Shelters" *Tax Notes* November 18, 2002 involving disclosure of objectively defined categories of transactions.

[95] For a full account of the provisions, see Fraser in this issue. There is a general feeling that discussions with the Inland Revenue and the consequent changes to the regulations have resulted in much improvement, however—S. Edge, "Half-Term Report" *The Tax Journal* July 26, 2004, 9.

language of tax avoidance. The intent is not to distinguish avoidance and mitigation; the fact that the disclosure provisions applies does not mean that the scheme would necessarily fail. But the use of this avoidance language is unhelpful and might give scope to those operating at the edges of the tax planning industry to get around the disclosure provisions, whilst the compliant will not wish to take the risk and so will disclose whether they consider these requirements are truly satisfied or not. Despite these criticisms, the disclosure provisions may be found to be helpful in clarifying the scope of evasion and reducing the attempts of the revenue authorities to blur this boundary.

The avoidance/mitigation border

The line between evasion and avoidance may not be straightforward but it is considerably more so than that between different types of avoidance. The attempt to divide acceptable avoidance, tax planning or mitigation on the one hand, and unacceptable avoidance on the other, in any general sense has been argued already here to be unhelpful. The judicial law has not developed in such a way as to indicate clearly to taxpayers what will or will not be acceptable. The problem should not be exaggerated—it arises only at the boundaries. But at those boundaries, activities which utilise the strict wording of the legislation to achieve a tax saving may or may not succeed. At one point the case law might have been thought to invoke a general principle which overrode the detailed rules: the so-called *Ramsay* principle which looked at whether a transaction forming part of a pre-ordained, circular or self-cancelling transaction was undertaken for no commercial purpose other than obtaining the tax advantage in question.[96] If so, the scheme could be looked at as a whole and the legislation might then not apply to achieve the effect the taxpayer was hoping for. The *Ramsay* principle subsisted alongside, and did not overrule, the *Duke of Westminster* principle that every taxpayer is entitled to arrange his affairs so that the tax attaching to them is less than it otherwise would be. Principles have the potential to conflict and need to be weighed against each other.

In *MacNiven v Westmoreland*,[97] however, Lord Hoffmann stated that the so-called *Ramsay* principle looked like an overriding legal principle superimposed upon the whole of revenue law without regard to the language or the purpose of any particular provision. This sort of principle, said Hoffmann, was one the courts had no constitutional authority to impose. According to his Lordship, there can be only one principle of construction—*the*

[96] *WT Ramsay Ltd v IRC* n.16 *supra* per Lord Wilberforce "[The principle of *IRC v Duke of Westminster*] must not be overstated or over extended. While obliging the Court to accept documents or transactions, found to be genuine, as such, it does not compel the Court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded; to do so is not to prefer form to substance, or substance to form". See also the formulation by Lord Brightman in *Furniss v Dawson*, [1984] STC 153 "First, there must be a pre-ordained series of transactions or, if one likes, one simple composite transaction. This composite transaction may or may not include the achievement of a legitimate commercial (*i.e.* business) end . . . Secondly, there must be steps inserted which have no commercial (business) purpose apart from the avoidance of liability to tax—not 'no business effect'. If those two ingredients exist, the inserted steps are to be disregarded for fiscal purposes. The Court must then look at the end result. Precisely how the end result will be taxed will depend on the terms of the taxing statute sought to be applied". It is not the objective of this article to discuss this case law in detail: for such a discussion see Tiley in this issue.

[97] n.6 *supra*.

ascertainment of what Parliament meant by using the language of the statute.[98] In place of the *Ramsay* principle, Lord Hoffmann put forward his own approach to statutory construction. In his view *some* legislation can be construed in its commercial context. Other statutes refer to purely legal concepts and then cannot transcend their juristic meaning. How do we know which rule applies to a given word in a statute? Hoffmann's answer is that a legal concept is one of which a commercial man would say, if asked what it meant, "you had better ask a lawyer"! Lord Hoffmann is far too wise to believe that his test gives certainty. His restatement in *Westmoreland* appears to have left much open for future development, although within apparently narrow confines, and he himself was subsequently prepared to assume that a statute was concerned with the characterisation of the entirety of a transaction rather than the individual steps as a matter of construction of the language "in its context" in the *Carreras* case,[99] showing that even he does not believe that the *Ramsay* approach is dead.

Following on from *MacNiven*, in *Barclays Mercantile v Mawson*,[100] the Court of Appeal has cast some doubts on Lord Hoffmann's restatement. Here, the Court of Appeal held that a tax scheme was effective even though it involved circular movements of money and would not have been undertaken had it not been for the tax benefits. The issue was whether expenditure was incurred on a pipeline so as to enable a finance company within the Barclays group to claim capital allowances. The Irish Gas Board, which already owned the pipeline, sold it to the finance company but then leased it back again. The Irish Gas Board did not get its hands on the money for very long because that had to be deposited as security for the rental payments with a company which had a relationship with Barclays. The scheme worked technically because there was a genuine legal sale of the pipe-line on arm's length terms and, said the Court of Appeal, no artificially inserted steps with no business purpose. There was a business purpose to the payment for the plant: the acquisition of the pipeline. The fact that the only reason for acquiring the plant was for a UK company to obtain capital allowances did not detract from the genuineness of the business purpose.

In the High Court,[101] Mr Justice Park had not considered this transaction to be standard commercial finance leasing, though he accepted that those devising the scheme would not have seen it as standing apart from the general run of their long standing finance leasing business and he did not regard this as "some sort of unappealing tax avoidance scheme". The Court of Appeal, on the other hand, thought that the tax advantage obtained was a normal and accepted part of the finance leasing trade, given that the availability of capital allowances provides the bed-rock of that trade. Within this culture of artificiality, how should directors and tax advisers know whether they are being "carried away" as Park J. suggested?[102] If these eminent judges disagree, it is hard to argue that company directors and tax managers should know whether or not these transactions will be "acceptable" or effective. On what basis are they to decide?

The fact is that the capital allowances legislation is quite deliberately *not* based on economic reality so that government cannot complain when the leasing industry uses the

[98] *ibid.* at p.248. This echoes Lord Steyn in *McGuckian* [1997] STC 908 at 916, "The new *Ramsay* principle was not invented on a juristic basis independent of statute".
[99] n.20 *supra*.
[100] [2003] STC 66.
[101] [2002] STC 1068.
[102] *ibid*. at p.1099.

regime to the full, absent any indication in the legislation that it should not have the advantage of capital allowances in these circumstances. This takes us back to the test of construing legislation according to its parliamentary intention, which is apparently the only one we may apply. In this context, Lord Hoffmann has explained that even where statutory language is to be construed in its commercial sense it is not possible to disregard a transaction simply because it was entered into solely for tax reasons.[103] It was submitted to the Court of Appeal in the *Barclays Mercantile* case that once a statutory concept had been held to be "commercial" in the sense used by Lord Hoffmann it would be possible to undertake a free-ranging inquiry into a scheme without the constraints of the previous case law. This does not seem to have been Lord Hoffmann's intention and he engaged in an extensive discussion of the previous cases in *MacNiven*. Lord Justice Carnwath in *Barclays Mercantile* rejected the idea that the previous cases could be ignored and reasserted the *Ramsay* principle, not as a pure rule of statutory interpretation in the normal sense, because it involves "reconstituting" the facts, but perhaps as "statutory interpretation in the broader sense".[104]

The tax community eagerly awaits the next instalment when the *Barclays* case reaches the House of Lords but, whatever formulation is delivered, it seems that a central tenet will be the ascertainment of the intention of Parliament. Since this will almost always be in situations which Parliament did not have in mind when passing the legislation in question the key question is how far the court can go in "reconstituting" the facts and making assumptions about what a rational Parliament would have intended had it considered the issue. The case law has not give certainty in answering that question. Judges are used to evolving law but in a tax context in particular because of the historical background and because of the political content they will feel very constrained. No statutory clause could give certainty either: Parliament cannot address every permutation specifically so gaps will remain. But what Parliament could do, and the courts cannot, is to provide a GANTIP which would *permit* assumptions to be made to fill in the gaps in some situations. Once having been given that permission legislatively, the courts could develop an anti-avoidance strategy which would be based on statutory interpretation in a broader sense. This could legitimately go beyond ordinary statutory interpretation, since the GANTIP would give permission, within limits, so to do. Statutory general anti-avoidance provisions usually introduce purpose tests and concepts of tax avoidance or tax benefit.[105] These concepts are no easier to interpret when contained in a statute than when deriving from case law. But at least when they are contained in statute the concepts are legitimately introduced and the development of them may proceed.

Ingenious though it may be, Lord Hoffmann's restatement of the judicial approach to tax avoidance is not only short on predictive qualities but also, paradoxically for a rule which purports to be returning to constitutionality as one of statutory construction, potentially more unfettered than the *Ramsay* principle with its fairly precisely drawn

[103] n.6 *supra* at p.256.
[104] n.19 *supra* at p.91.
[105] For example, the Australian, Canadian and New Zealand provisions—see Tax Law Review Committee n.93 *supra*, Appendix 1.

perimeters.[106] This restatement has been widely attacked.[107] The history of the tax avoidance cases in the UK courts has been a chequered one. Principles have been developed, qualified and possibly dashed to the ground. *MacNiven* may be qualified to make it more workable in the *Barclays Mercantile* case but, if left to the courts, it looks likely that there will continue to be movement back and forth without any progressive development of a principle which can sensibly manage tax avoidance activity. This situation, coupled with the new disclosure provisions in the Finance Act 2004, which could produce information about many schemes to the Revenue authorities, could have two possible consequences. First we could see much more specific anti-avoidance legislation to counteract these schemes which the courts are not striking down. Secondly, either in addition or as an alternative, it may be that there will once again be calls for a statutory general anti-avoidance rule, despite the fact that this idea failed to win support from taxpayers, professionals or the Inland Revenue last time it was mooted.

The need for a statutory anti-avoidance principle

Rules and principles

Some would suggest that the only way forward is more specific anti-avoidance legislation. The arguments for this are legitimacy and certainty. Yet certainty will not be achieved in this way. It is self-evident that increased specific provision results in complexity—what the US literature calls *hyperlexis*[108]—and the problem of creative compliance.[109] This produces more litigation and more uncertainty. These observations result in the conclusion that what we need is not more precise and detailed avoidance provisions but a principles or standards approach. Variants of this idea have been suggested by Surrey, Avery Jones, Braithwaite, Weisbach and others.[110] Some of these writers claim that this approach would result in greater certainty as well as reduced complexity but the claim here is only that the volume of legislation could be reduced and that a more sensible framework for managing tax avoidance could be produced by this route.

There is much jurisprudence on the meaning of principles as opposed to rules and some legal philosophers would deny that there is any logical difference between the two.[111] For our purposes here the distinction has a valuable role to play provided it is not made to carry

[106] It is of course these perimeters which threaten to emasculate the *Ramsay* principle since case law formulations, like statute, can be subject to creative compliance; consequently the judges have repeatedly emphasised that the limits of the principle are not yet known.

[107] For example, by Lord Templeman "Tax and the Taxpayer" (2001) 117 LQR 575, by Lord Millett in the Hong Kong case of *Collector of Stamp Revenue v Arrowtown Assets Ltd*, FACV 4 of 2003, December 4, 2003 and by the Court of Appeal in *Barclays Mercantile,* n.19 *supra.*

[108] B. Manning, "Hyperlexis: Our National Disease" (1977) 71 *Northwestern University Law Review* 767; W. Schwidetzky, "Hyperlexis and the Loophole" (1996) 49 *Oklahoma Law Review* 403.

[109] McBarnet n.67 *supra*.

[110] S. Surrey, "Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail" (1969) 34 *Law and Contemporary Problems* 673, cited in Weisbach n.72 *supra* n.4; Braithwaite, n.70 *supra*; J. Braithwaite, "Rules and Principles: A Theory of Legal Certainty" (2002) *Australian Journal of Legal Philosophy* 47; J. Avery Jones n.69 *supra*.

[111] The distinction drawn by R. Dworkin, initially in "The Model of Rules" (1967) 35 *University of Chicago Law Review* 25, has in any event changed over the years. There is not space here to cite even a small proportion of the literature but a key debate has taken place between Dworkin and J. Raz, n.35 *supra*. For a comprehensive rejection of principles as defined by Dworkin see A. Marmor, *Positive Law and Objective Values* (OUP, Oxford, 2001).

too great a weight of meaning. In particular, the concept of principles is not used here to connote any notion of moral content since it has already been explained that it is not possible for the courts to decide issues of taxation on the basis of morality, without the morality being given legal content.[112] In addition, the principle argued for here is a statutory principle, not one derived from case law, although some principles may be derived from case law.[113] Braithwaite, looking for the common ground between the various writers rather than the distinctions, defines rules as specific prescriptions, whilst principles are unspecific or vague prescriptions.[114] There is debate over whether this is a qualitative difference, or just one of degree. A Dworkonian principle is qualitatively different from a rule: rules are all or nothing, but principles can be weighed against each other. Others have pointed out, however, that rules too may have weight in that one rule may form an exception from another. The term principle is used here, as by Braithwaite, to indicate a provision which is broader than a detailed rule and thus can be used as a guide to interpret the rule.[115] In this context, the legislative principle would be a method of signposting; a Parliamentary indication that it was its intention that certain types of gap in its rule making should be filled by judicial decision based on the principles set out.

Ideally, any such general anti-avoidance principle or GANTIP would be accompanied by other gap-filling principles, as suggested by Avery Jones[116] and found in other European tax systems.[117] In addition, as in those other systems, more liberal use of explanatory memoranda or other descriptive material would be permitted than is the case now in the UK to back up this new approach to tax legislation.[118] Expressing the general intention of the legislature in the case of tax legislation is not going to be easy. Prebble has argued that income tax is not based in *a priori* principle but is a compromise.[119] In many cases the aim is simply to raise revenue. But just because the whole of tax law could not be based on high-level principles does not mean that some such principles could not be agreed and it might be an exceptionally good exercise for Parliament and its advisers to at least contemplate whether this was the case. A requirement for a preamble which could be used by judges for the purpose of interpretation might go a long way to clarify parliamentary intention, for example where tax law is being used to provide incentives, as we have seen in connection with the *Barclays* case. Such a requirement might induce more governmental and Parliamentary reflection on the harmful culture of artificiality described above.

Certainty the wrong test

A general anti-avoidance principle in tax in the UK has not so far been accepted. A major objection has been that such a principle would undermine certainty. Some of the authors discussed here have responded, not unconvincingly, that a system of rules interpreted in accordance with principles could increase certainty. It may be, however, in any event, that certainty is not the right test at the successful/unsuccessful avoidance boundary as

[112] This is not, therefore, a true Dworkonian view of principles but is closer to that taken by Raz (Raz n.35 *supra* 849).
[113] Raz, *ibid.* 852.
[114] Braithwaite (2002) n.110 *supra*, 47–52.
[115] Raz n.35 *supra* 839.
[116] Avery Jones n.69 *supra*. See also L. Beighton, "Simplification of Tax Legislation" [1996] BTR 601.
[117] For example in Spain, see Soler Roch n.34 *supra*.
[118] Going beyond the limited extension of such use in *Pepper v Hart* [1993] AC 593.
[119] J. Prebble, "Principles and Purpose or Precise and Detailed?" [1998] BTR 112.

opposed to the avoidance/evasion boundary, at least if criminal penalties are not involved at the former boundary.[120] What should take priority is producing a practical system with a fair test which is workable for the compliant majority but not as susceptible to manipulation as would be an entirely certain test, even assuming such a test could be devised.

The Inland Revenue's proposal for a general anti-avoidance rule (GAAR) in 1998,[121] which built on a proposal from the Tax Law Review Committee (TLRC) in 1997,[122] was rejected in some degree for lack of certainty. The TLRC produced a draft clause based on the "evident intention" of Parliament and containing a purpose test as any GAAR or GANTIP would need to do. It also argued that a statutory GAAR would provide a framework in which sensible consequences of the application of the GAAR could be specified in a way that cannot happen with a judicial rule and that proper administrative procedures, such as a clearance mechanism, could be put in place to protect taxpayers. The Inland Revenue's own proposal tipped the balance away from the careful one constructed by the TLRC, both by redefining the GAAR and by expressing scepticism about clearances. The proposal was abandoned after negative responses from the tax community and when the TLRC could not support the Revenue's proposal.[123]

Commenting on the proposals, Philip Gillett, Taxation Controller of ICI, whilst keen to stop the "extreme scheme merchants" thought that unacceptable avoidance was a matter for the courts to determine, "in accordance with the social and political mores of the time".[124] Once again, this raises difficult jurisprudential questions of where these mores are to be found. At a practical level, the immediate problem is that the UK courts have not shown themselves willing to evolve a general anti-avoidance principle in a coherent and linear fashion. The majority of judges do not accept that they may do so legitimately and certainly not on the basis of social and political mores. The place for a sensible debate about acceptability and social norms, and how to incorporate them into law, is not in the courts but in Parliament.

Troup, by contrast, objected to the proposed GAAR as shifting responsibility for determination of tax liability away from Parliament and in practice to the Revenue, since it required a body other than Parliament to consider what Parliament would have intended had it considered an issue, which by definition it had not done. In his view a GAAR can never achieve certainty so must always be wrong in principle.[125] It is for this reason that it may be preferable to talk about a GANTIP, to make clear that certainty is not the claim.

A GANTIP would be drawn up in wide terms and not attempt to define the type of

[120] See the discussion of certainty above and contrast New Zealand where the *Tax Administration Act* 1994 imposes penalties for taking an abusive tax position (one which is based on an unacceptable interpretation of the law) or an unacceptable interpretation (one which, if viewed objectively, fails to meet the standard of being about as likely as not to be correct). Whilst it is understandable that the authorities wish to create a downside and deterrent to tax avoidance activity, here the fuzziness around these concepts may represent a deficit in the law. There is extensive revenue guidance available—whether this is an adequate substitute for clear legislative guidance in these circumstances is for discussion. (Thanks to Shelley Griffiths of University of Otago for this information.)

[121] Inland Revenue, *A General Anti-avoidance Rule for Direct Taxes: Consultative Document* (London, 1998).

[122] n.93 *supra*. The author was a member of the TLRC which agreed this report, although she did not work directly on this project as a researcher or writer.

[123] TLRC, *Response to Inland Revenue* (IFS, London, 1999).

[124] P. Gillett [1999] BTR 1.

[125] E. Troup [1999] BTR 5. He accepted, though, that principles must be subject to pragmatism.

transaction that would be struck down in a detailed way. One of the problems with the TLRC illustrative provision and the Inland Revenue's own version was that they became too detailed and the debate quickly focused on the precise wording rather than deciding on the object of the exercise. The TLRC provision attempted to replicate the *Ramsay* rule in some respects with a concept of steps that was unnecessarily complex. It is notable that the Australian GAAR does not attempt this level of detail or precision and has met with some success.[126] It contains a purpose test and *indicia* of purpose are listed.[127] As Orow explains, one suggestion for an improvement of the Australian GAAR coming from the Ralph Committee was to propose a clause clarifying that the rule should be exercised in a manner consistent with and supportive of the tax policy principles embodied in other provisions of tax law, such as the availability of an election.[128] A UK GANTIP might contain a purpose test and a direction to consider what Parliament would have intended within the scheme of the legislation had it considered the scheme before it. This, coupled with use of background papers and improved preambles and statements from Parliament about the rationale of legislation would give guidance to the courts in going beyond the wording of the legislation but always within the rationale of the legislation. Troup says that to look beyond what Parliament actually intended raises constitutional issues but this is the very point of the GANTIP. If we are currently facing a crisis of legitimacy and if the courts cannot or will not counteract the literal meaning of a statute by reference to an overriding legal principle they have created themselves, only a statutory GANTIP could remove this constitutional objection. Under a GANTIP, Parliament gives express permission for its intention to be constructed (within the overall scheme of the legislation) where there is scheme which is carried out for the purpose of obtaining a tax benefit. This is not removing responsibility from Parliament but ensures that Parliamentary will can be carried forward in a practical way and without undue delay. The GANTIP would not permit the Revenue or courts to go beyond what could be justifiably discerned or established *would have been* the intent of Parliament[129] but would provide a legitimate framework in which the courts could operate to work out what Parliament would have intended.

GANTIP: altering norms and a framework for development

By expressly qualifying the current governing principle (that a taxpayer is always free to order his or her affairs so as to reduce the tax payable provided he keeps within the letter of the law, construed according to some level of purposive construction) a statutory GANTIP could begin to alter norms of behaviour and provide the necessary legal backing to the notions of morality now gathering around the corporate social responsibility debate.[130] This would assist taxpayers wishing to be compliant to read the signals as required by Parliament and company directors to balance their duties to shareholders and to contribute to revenues.

There will be no deficit in the rule of law if the area of uncertainty is one that does not

[126] See Tiley in this issue. The legislation has been extensively criticised in Australia and see Orow in this issue but it would be a reasonable starting point for a feasibility study as it does appear to have altered the mindset of practitioners in that jurisdiction.

[127] For the provisions see TLRC n.*supra*, Appendix 1 (Pt IVA).

[128] Orow in this issue at p.420.

[129] This is the formulation of the TLRC but with the words in italics added by the author: TLRC n.93 *supra*, para.5.12.

[130] Weisbach n.72 *supra*, 886. This has not been achieved by the new disclosure rules because they have a different, and possibly somewhat confused, function.

affect day-to-day transactions and is governed not by arbitrariness[131] but rather by procedures that attract the support of the compliant members of the tax community. By being associated with appropriate mechanisms such as clearances and codes of guidance, a statutory GANTIP could provide a legitimating framework to enable inevitable uncertainty to be managed. It would facilitate a debate around the meaning of the difficult concept of tax avoidance which could be pursued between the taxpaying community and revenue authorities in agreeing the guidelines,[132] although ultimately it would be for the courts to develop the GANTIP. We have seen excellent co-operation between the taxpaying community and revenue authorities in formulating the 2004 disclosure rules and a similar process could result from a GANTIP. This is what Black has called the development of an interpretative community and the adoption of a conversational model of regulation.[133] The advantage to the taxpayers, as well as their reputations and a climate of understanding, would be that those who were not "amoral calculators" could, by working with government and non-governmental organisations, get a competitive advantage over those who were, by participating in the formation of the codes or guidance.[134] The advantage to the revenue authorities would be the voluntary compliance of the majority within an area of understanding, leaving them free to tackle the extreme cases.

Conclusion

This suggestion for a broad GANTIP is likely to be greeted by a horrified response as unworkable and contrary to the rule of law but it has been argued here that whilst the boundary between evasion and avoidance should be strengthened, with the revenue authorities resisting the temptation to blur it, the area of tax avoidance would be best dealt with by a broad principle. This principle should provide a counterbalance to the principle in the Duke of Westminster's case and to that of profit maximisation. It should provide legal content to the corporate social responsibility concerns about tax avoidance which cannot be supported by morality alone.

The current approach to tax avoidance cases may suit those devising schemes at present: many cases have been decided in favour of the taxpayer recently. It is quite unclear where the *MacNiven* approach will take us, though, so no one can be secure that the present position will last. The new disclosure rules may flush out some information and act as a minor deterrent for a while and they may also provide a protective mechanism for some who consider their activities to be within the bounds of what is acceptable. But if the new disclosure provisions do produce significant information for the revenue authorities about new schemes, further legislation of some kind is to be expected. The question of a general anti-avoidance provision needs revisiting and should not be dismissed simply because it was rejected previously. The wrong tests were applied then. A GANTIP should be considered and judged as a legitimating and regulatory device and not an exercise in precision rule-making.

[131] Endicott, n.5 *supra*, 203.
[132] As suggested by J. Waldron, "Vagueness in Law and Language: Some Philosophical Issues" (1994) 82 *California Law Review* 509.
[133] Black, *Rules and Regulators* n.50 *supra*.
[134] Braithwaite (2002) n.110 *supra*, 81.