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Taxation of Non-Residents and Foreign Domiciliaries
20th Edition (2021/22) by James Kessler QC

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INTRODUCTION AND WHAT'S NEW

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1.1 *Scope of this book*

There are three themes to this book:

(1) Taxation of foreign domiciliaries
(2) Taxation of non-residents on UK assets
(3) Taxation of UK residents on foreign assets

To attempt to cover these topics comprehensively is ambitious, perhaps quixotic. This book is in danger of bursting, because one cannot address the first topic without the second and third, and these territorial issues can only be fully understood in a wider context: in taxation, as in life, everything is connected. Thus what started as a short book on foreign domiciliaries has become a work which seeks to address all territorial limits to UK taxation, and extends to other topics which often arise in this context, such as tax avoidance, and disclosure and compliance.

1.2 *A statute-focussed approach*

I set out statutory and other material verbatim:

> ... in the end one must always return to the words of the statute itself, for it is those words which must be construed.[1]

Returning to the verbatim text, it is surprising how often one finds that the words do not say what one expects.

This is not just a common law approach. Richard Hyland tells this story of his class at Université Paris II Panthéon-Assas:[2]

> Mme Gobert asked simply: *L'article 2 du Code civil, qu'est-ce qu'il*

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1 *Ransom v Higgs* 50 TC 1 at p.32.
2 Hyland. *Gifts: A study in comparative law*, 1st ed (1989) p.xvi.

> *dit?* Article 2 of the Civil Code, what does it say?
> My classmates were some of the best private law students in France. This was a question to which they knew the answer. One of the explained that article 2 provides for the nonretroactivity of the law. Mme Gobert looked at the student without smiling. Then she repeated the question. *L'article 2 du Code civil, qu'est-ce qu'il dit?* A different student mentioned Paul Roubier's suggestion that a new law may be applied to *les situations juridique en cours.* Again she repeated the question. *L'article 2 du Code civil, qu'est-ce qu'il dit?* Another student tried, and then another, each new voice attempting yet a more refined statement of the concepts involved. After each comment she responded in the same way. It was my first French law class, so I did no know what to think. It seemed like a Zen-like version of the Socratic method. The French students were terrified. This was material they thought they knew, and yet they could not guess what was on her mind. Finally, one of the students had the presence of mind simply to read the code provision aloud. Mme Gobert's eyes lit up. *Mais bien sûr!* she responded *C'est ça qu'il dit!*

1.3 *The year 2020/21 in review*

OTS stated in 2017:

> The UK tax code is widely cited as being the longest in the world".[3]

This claim had been made at least since 2010.[4] In recent years Parliament added:[5]

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3 It is hard to empirically assess the claim that the UK has the longest tax code in the world, and OTS makes no attempt to do so. But if any readers ae aware of other serious contenders for that title, I would be interested to hear.

4 For older references see the Introduction to the 2016/17 edition of this work.

5 Finance Act page counts are a rough proxy for the ever growing complexity of the UK tax system, but not an altogether bad one. A (slightly) better proxy would also consider secondary legislation and HMRC guidance; and, perhaps, case law; then the page counts would multiply the Finance Act numbers set out here tenfold.
For a discussion of the multidimensional concept of tax complexity, see Tran-Nam and Evans, "Towards the Development of a Tax System Complexity Index" (2014) Fiscal Studies Vol 35 p.341.
OTS have published two (somewhat simplistic) discussions of tax complexity:
Length of Tax Legislation as a Measure of Complexity (Apr 2012)
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/193496/ots_length_legislation_paper.pdf
OTS Complexity Index (2012)

Finance Act(s)	**Pages**		
2012	703 (a record)	2017	813 (a new record)[6]
2013	648	2018	196
2014	663	2019	328
2015	562 (2 Finance Acts)	2020	186[7]
2016	649	2021	374

OTS estimated HMRC guidance at 90,000 pages in 2018;[8] whatever the true figure, it has no doubt grown since then. This guidance was "not comprehensive" - something of an understatement; but according to the OTS "real life cannot be reduced to a neat description in a few (?) pages of writing".[9]

OTS has not achieved any perceptible improvement, at least in relation to the topics covered in this book.[10]

It is easier to *talk* of simplification:

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http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/193493/ots_complexity_index_methodology_paper.pdf

6 This is the combined length of the two FAs 2017.

7 The unusually short length of the FA 2020 is due to the December 2019 election.

8 OTS, "Guidance for taxpayers: a vision for the future" (2018) para 1.21. These pages have assuredly not been printed or counted. Quantification raises methodological issues which deserve a short essay to itself. We have reached the stage where even the amount of HMRC guidance is impossible to quantify: the words are uncountable. Within the limits of guesswork, and assuming 500 words per page (single spacing), the figure of 90,000 pages seems to me to be on the low side. There are 150 HMRC Manuals, just for a start.

Perhaps the focus of enquiry should be whether HMRC guidance is too short, because 90,000 pages would not be sufficient to do justice to the topic. The legislation, measured by pages of the Orange & Yellow tax handbooks, can be counted and amounts to some 20,000 pages in 2020/21 (that does not include DTAs, which would be another 3,000 pages). The Tax Cases are some 80 volumes and do not cover VAT.

9 Para 1.24.

10 See eg IFS, "OTS: Looking Back and Looking Forward" TLRC Discussion Paper No. 11 (2014) tactfully referring to "insufficient buy-in to the simplification process by HMRC, HM Treasury and government". But this view is not held by OTS: see Sherwood, Evans and Tran-Nam "The Office of Tax Simplification - The Way Forward?" [2017] BTR 249.

http://www.ifs.org.uk/uploads/publications/TLRC/TLRC_OTS_DP_11.pdf

In (I think) 2013 the government came up with the slogan "Creating a simpler, fairer tax system" under which OTS now operates; which imagines away a troubling reality in which simplicity and fairness are competing values which require hard choices.

https://www.gov.uk/government/policies/creating-a-simpler-fairer-tax-system

> Our system remains too complicated ... We will therefore simplify the tax system.[11]

The reader may think that satirists better identify the reality:

> We will further complicate the UK tax system so that large companies can no longer find loopholes.[12]

The task of dealing with the effect of Brexit has begun: a decade will not suffice for this, and this area of law will continue to be a state of flux for the foreseeable future.

Scotland continues its fiscal drift from the UK, with Northern Ireland and Wales following.

FA 2021 changes relevant to this work include:

- SDLT charge for non-residents
- Hold-over relief rules on gifts to foreign-controlled companies

The Fifth Anti-Money Laundering Directive has taken effect.

The courts have decided too many cases to list; of particular interest are:

- *Embiricos v HMRC* on closure notices in domicile appeals
- A clutch of ToA cases: *Fisher, Rialas, Davies, Hoey*

The BEPS multilateral instrument has come into force and the number of DTAs which incorporate its terms gradually increases. OECD has noted, I think correctly:

> International tax issues have never been as high on the political agenda as they are today.

The project to make trust taxation "simpler, fairer and more transparent", announced in Budget 2018 and gently mocked in the last 3 editions of this work, has been formally abandoned.

The growth in complexity is matched by a decline in HMRC efficiency. The House of Lords Economic Affairs Committee records:

> in compliance and enquiry cases, the behaviour of some HMRC staff falls well below the standard set in the Charter. HMRC needs to have

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11 Conservative party manifesto 2017 p.14 *https://s3.eu-west-2.amazonaws.com/manifesto2017/Manifesto2017.pdf* Perhaps the mask has been put aside. OOTLAR 2008 had 45 references to simplification, but OOTLAR 2021 has none.

12 Official Monster Raving Loony Party Manifesto 2017 *https://www.loonyparty.com/2017-general-election-manicfesto*

> better systems in place to identify and address any problem behaviours as a matter of urgency.[13]

1.4 *Judicial delay*

The most worrying development to those who care about the administration of justice is the delay in resolving tax disputes. Recent ToA cases are not atypical:

Case	Assessment years	Decision	Tribunal	FTT delay[14]	Total delay[15]
Rialas	2005/6, 2006/7	2019	FTT	13 months	14 years
Fisher	2000/01 - 2007/08	2020	UT	20 months	21 years
Davies	2003/04	2020	UT	10 months	17 years

The causes of delay are many, but the reader may think that the delay between Tribunal hearing and judgment is particularly grievous - and unnecessary.[16] We need to return to first principles:

> The delay of justice is a denial of justice. Magna Carta will have none of it. "To no one will we deny or delay right or justice". All through the years men have protested at the law's delay and counted it as a grievous wrong, hard to bear. Shakespeare ranks it among the whips and scorns of time.[17] Dickens tells how it exhausts finances, patience, courage, hope.[18] To put right this wrong, we will in this court do all in our power to enforce expedition.[19]

In *Rolled Steel Ltd. v British Steel Corporation* a judge delayed giving judgment for eight months:

> ... long delays in delivering judgment can cause disquiet and suspicion

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13 HL Economic Affairs Committee "The Powers of HMRC: Treating Taxpayers Fairly" (2018) para 157. *https://publications.parliament.uk/pa/ld201719/ldselect/ldeconaf/242/242.pdf* Also see *Pokorowski v HMRC* [2019] UKFTT 0086 (TC). The taxpayer lost his job, was evicted from his home, and his belongings were thrown into the street and lost. He then failed to submit his tax return on time. The Tribunal said that "HMRC's decision to pursue Mr Pokorowski for penalties in the circumstances of this appeal is a scandal."

14 Time from commencement of hearing until judgment.

15 But these cases are not final.

16 In *Rialas* the FTT took 13 months to write a judgement, but the UT took 10 days.

17 Hamlet, Act III, sc. 1.

18 Bleak House, chap. 1.

19 Lord Denning in *Allen v. Sir Alfred McAlpine & Sons* [1968] 2 QB 229.

> amongst litigants who lose - and those who win may feel they have been deprived of justice far too long. Delays of this length should not occur unless there are compelling reasons why they should; and, if there are such reasons, it would be prudent of a judge to refer to them briefly.[20]

The current Master of the Rolls has the same view as Lord Denning:

> On any analysis, in my judgment, the delay in this case [22 months] was inexcusable. The unwritten rule applicable to both the Business and Property Courts and the Court of Appeal is that judgments should be delivered within 3 months of the hearing.[21]

On that basis one might perhaps hope to see improvements.

1.5 *The future*

The Registration of Overseas Entities Act (promised for 2021, but now, who knows?) will set up a beneficial ownership register of overseas entities that own UK property.

2023 is to see a rise in CT from 19% to 25% and a return of the complexities of small profits relief.

We face an extended period of change and uncertainty, in politics, economics, public health, law and taxation, and will continue to live in fiscally exciting times.

1.6 *Thanks ...and request for help*

I am very grateful to my colleagues in chambers, especially Robert Venables QC, Philip Simpson QC and Rory Mullen QC, for discussions on many aspects of tax. Abhaya Ganashree as research assistant resolved many puzzles. I owe a great debt to Jane Hunt and Ruth Shaw who work committedly on this text throughout the year.

Comments from readers and professional clients continue to be of the greatest value and interest to the author.

The pleasure in writing this book consists in the interest of the questions

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20 [1986] 1 Ch 246. In *Goose v Wilson Sandford* [1998] Lexis Citation 2577 a delay of 15 months was criticised in such terms that the judge at fault resigned: "Conduct like this weakens public confidence in the whole judicial process. Left unchecked it would be ultimately subversive of the rule of law. Delays on this scale cannot and will not be tolerated. A situation like this must never occur again."

21 *Bank St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ 408 at [78]. The judgment took 13 days from the end of the hearing.

which it raises, and the success which it may have achieved in answering them. On the basis of what is known at 30 April 2021, it seeks to state the law for 2021/22.

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OBTAINING FURTHER ADVICE - AND DISCLAIMER

Further advice

If you want advice on which you are legally entitled to rely you can obtain it - but not from this work.

In particular, you may instruct the author to advise. I enjoy writing, but spend most of my time giving independent specialist professional advice in private client matters, especially areas covered in this work. For further details see *https://www.kessler.co.uk*

TFD Online

TFD Online is an online version of this book and more. It can be used:
(1) to search the text of this book or to access it online.
(2) to see if the book has been updated
(3) to correct or contribute to the book

TFD Online is moderated by Ross Birkbeck, a member of Tax Chambers, 15 Old Square, Lincoln's Inn.

TFD Online is accessible on *https://www.foreigndomiciliaries.co.uk* An authorisation code for a 3 week trial period is in the inside cover of volume 1.

Disclaimer

The Professional Bodies issue the *Professional Conduct in Relation to Taxation* with a disclaimer:

> While every care has been taken in the preparation of this guidance[1] the PCRT Bodies do not undertake a duty of care or otherwise (?) for any loss or damage occasioned by reliance on this guidance. Practical guidance cannot and should not be taken to substitute appropriate legal advice.[2]

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1 PCRT is not in fact guidance: it is mandatory.

2 *Professional Conduct in Relation to Taxation* (2019), Forward. *https://www.tax.org.uk/professional-standards/professional-rules/professional-conduct-relation-taxation*

When that appeared in 2011 it seemed extraordinary. But nowadays no professional body issues guidance without a disclaimer.[3] Similarly, and *a fortiori*, the views expressed in this book are put forward for consideration only and are not to be relied upon. Neither the author nor the publisher accept responsibility for any loss to any person arising as a result of any action or omission in reliance on this work. But could anyone have thought that a claim might arise in absence of this disclaimer?

A note to the lay reader

This book is not intended as a self-help guide, and is addressed to tax practitioners. In earlier editions I said: "... but it is readable for a lay person." I think that is still true, though the text is more daunting than when I first wrote those words, because the law has become much more complicated. However, initiation in these matters must often be by the taxpayer. If you wish to research this subject in depth, and so take more control of your own tax affairs, read on. But for implementation you will need to find professionals to advise you. Self-help guides extol "the benefit of bypassing expensive lawyers"; but the bypass may prove the more expensive route in the long run.

Edition history

1st 2001	8th 2009	15th 2016
2nd 2003	9th 2010	16th 2017
3rd 2004	10th 2011	17th 2018
4th 2005	11th 2012	18th 2019
5th 2006	12th 2013	19th 2020
6th 2007	13th 2014	
7th 2008	14th 2015	

This book was called *Taxation of Foreign Domiciliaries* for 9 editions; it

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The second sentence is an improvement on the common form that guidance on legal issues "does not constitute legal advice"; that seems an idiosyncratic use of the word "advice".

3 For instance, the Law Society likewise issue a disclaimer for their Practice Notes: The standard form is: "While care has been taken to ensure that they are accurate, up to date and useful, the Law Society will not accept any legal liability in relation to them."

changed to *Taxation of Non-Residents and Foreign Domiciliaries* in the 10th edition.

CHAPTER ONE

FOREIGN DOMICILE: TAX POLICY

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1.1 Introduction

The topics of this chapter are:

(1) Policy arguments for and against a lighter tax regime for foreign domiciliaries (or some similar class of footloose individuals)[1]

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1 For discussion on policy issues, see STEP, "Residence and Domicile: Response to Background Paper" (2003) *https://www.kessler.co.uk/wp-content/uploads/2013/07/Domicile_reform_STEP_response.pdf*
CIOT, "Reviewing the Residence and Domicile Rules" (2003) *http://www.tax.org.uk/Resources/CIOT/Migrated%20Resources/j-l/j-jenkins-esq.pdf*
CIOT, "PBRN18 (Residence & Domicile Review)" (2007) *https://www.kessler.co.uk/wp-content/uploads/2018/12/PBRN18ResAndDomReview-final201107.pdf*

(2) A brief history of domicile tax reform
(3) An assessment of the reforms of
    (a) 2008
    (b) 2017/18
(4) State of UK tax reform, and prospects for the future

1.2 Tax competition

All UK residents may choose where to reside, but foreign domiciled individuals are in general less securely attached to the UK. Tax competition arguments claim that if their tax burden was as great as that of a UK domiciliary, fewer would choose to live in the UK, and overall the UK economy would lose:
(1) directly, from tax paid by foreign domiciliaries (including VAT); and
(2) indirectly, from UK investment and expenditure which is more likely to be made by UK residents.[2]

Similarly, UK firms competing in the global market for talent and expertise will find recruitment easier if the tax regime for foreign employees is lighter. Some potential employees would not choose, or could not afford, to come if the UK tried to tax them as it does its own domiciliaries.

In a nutshell: the argument is that the UK economy benefits from foreign domiciliary reliefs.

1.2.1 *Tax competition: Analysis*

Tax competition raises a number of sub-issues, in particular:
(1) To assess the existence and importance of tax competition
(2) What the UK should do in the light of tax competition
(3) What international agreements might do to regulate tax competition

The first question is essentially one of fact; the second is a question of domestic politics. The third is a matter of foreign politics.

In principle there are many low-tax or preferential tax regimes where wealthy individuals may choose to reside.[3] Switzerland, for instance, has

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2 Except to the extent that tax makes investment by UK resident foreign domiciliaries difficult, as to which, see 18.23 (Investment relief: Critique).

3 In 2017, Italy introduced a fixed levy in lieu of tax on foreign income of new residents: art.24-bis [Italy] *Testo unico delle imposte sui redditi*; as there is no further tax on remittance, this is much more favourable than the UK system. Daniel Simon also singled out Spain, Portugal and France: Tax Journal (21 July 2017).

a lump sum taxation regime for non-Swiss citizens, specifically targeted for this purpose and more favourable than the UK remittance basis.[4] Ireland retains the pre-2008 remittance basis.

In assessing the existence and strength of international tax competition several points must be borne in mind.

Effective low tax may be achieved in other countries by relaxing legal provisions at administrative level, in a non-transparent way.

One-paragraph summaries of a country's tax system are bound to be misleading.

The terms of statutory tax law are only one aspect of tax competition. Compliance costs are important. The quality of tax administration is important. An OECD study identifies six desiderata: a developed legal system, confidentiality, impartiality, proportionality, responsiveness (meaning a CRM for large companies, and at least answering correspondence from lesser taxpayers) and competence. They add:

> Frequent changes in legislation, particularly where there has been an absence of consultation, can have an adverse impact on the taxpayers and their advisers trust in the tax system.[5]

But there are others: can a tax authority subject an individual to an expensive and intrusive tax investigation without evidence that tax returns were wrong? Certainty is very important.[6] Perception matters as much as reality. Rates of tax on UK source income may matter more than the rules for foreign domiciliaries. By many of these measures, the UK competes poorly.

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4 See 8.5.4 (Swiss forfait taxpayer). This was at one time politically controversial; it was abolished in Zurich in 2009 and 5 other cantons followed suit. But in a referendum in 2014, the regime was supported by 59% of voters, on a 49% turnout; see Sigg and Luongo, "The Swiss lump-sum taxation regime: after the storm comes the calm?" [2015] JITTCP 169; *http://www.swissinfo.ch/eng/bloomberg/swiss-say-foreign-millionaires-are-still-welcome-after-tax-vote/41144174*
So I expect that Swiss tax law is now stable. In the 2014/15 edition of this work I added "and probably more stable than the UK" and that proved to be correct!

5 "Engaging with High Net Worth Individuals on Tax Compliance" (2009) para 208 and 243; see *http://www.oecd.org/ctp/aggressive/engagingwithhighnetworthindividualsontaxcompliance.htm*

6 See 2.8 (The Rule of Law).

1.2.2 *Other tax competition*

The debate about international tax competition is long standing.[7] Tax competition arises in many areas of taxation, and affects different types of income in different ways.

In areas where investment by non-residents is (more or less) completely mobile, tax competition has driven UK tax rates down to zero. Examples include:

(1) Interest arising to non-residents on UK bank deposits (and other cases where there is no withholding tax on interest)
(2) Trading income arising to non-residents from investment management
(3) IHT on UK funds held by foreign domiciliaries[8]

In the case of very mobile sources of income, such as interest on bank deposits and trading income from asset management, any UK tax charge would only cause the non-resident investor to move the investments to a different jurisdiction with a resultant loss in economic activity and profits in the UK.

In the corporate field, tax competition has reduced the rate of CT, though not of course to zero or near it. Tax competition may not be the only factor which contributed to the reduction in CT rates, but if HM Treasury is to be believed, it is one of the important factors. In the 2017 spring budget:

> 3.11 The UK is one of the most open economies in the world, and a highly competitive business tax regime remains a key factor in retaining that position. The UK's corporate tax rate is the lowest in the G20.[9]

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7 See the evidence of Lord Vestey to the 1920 Royal Commission, *https://www.kessler.co.uk/wp-content/uploads/2013/07/Vestey_Royal_Commission_evidence_and_ensuing_debate.pdf*

8 See 71.3 (Non-settled UK funds). Another example from the field of shipping:
"The location of ownership, flagging (registration) and management activities is very 'footloose', since it can easily be transferred from one country to another. This makes it vital to have regard to the fiscal regimes in other countries if we want to maintain a successful shipping industry in the UK. The modern armoury in the battle for success invariably includes a virtually tax-exempt fiscal regime." (Independent Enquiry into a Tonnage Tax, Lord Alexander, HM Treasury 1999.)
Another example is the exemptions for major sports events; see s.48 FA 2014. These events would not be held in the UK in the absence of tax exemption.

9 *https://www.gov.uk/government/publications/spring-budget-2017-documents*
This is the latest in a line of similar statements, traced in the 2016/17 edition of this work para 1.2.2, but I omit that here as it has diminishing contemporary significance.

But headline rates are only part of the story, and if one looks deeper, a different (and more complex) picture emerges, having regard to other major changes to corporate taxation:

(1) reduced capital allowances[10]
(2) increase in taxation of dividends in 2016 (though perhaps this is less relevant to tax competition, as it does not apply to non-residents)

The proposed increase in CT rates announced in the 2021 budget is a reversal of this trend, which surprised everyone who expected consistency in tax policy. The explanation may partly be that the government were constrained by promises not to raise the rates of IT or VAT. And as Paul Johnson pointed out, a rise in corporation tax is politically attractive because it is not obvious who ends up paying the bill.

1.2.3 *Tax competition within UK*

Devolution raises the issue of tax competition within the UK. Debate has focused on the possibility that Scotland and Northern Ireland may compete in the corporate field, by a lower corporation tax rate than England:

> a lower headline rate of corporation tax could encourage greater investment by Scottish and UK firms in both physical and human capital and in research and development within Scotland.
> At the same time, it could make the country more attractive as a location for multi-national investment. It could also act as an important signal to global companies and investors as to Scotland's ambition to be a location for competitive business.[11]

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10 See Pomerleau, "What We Can Learn from the UK's Corporate Tax Cuts" (2017) *https://taxfoundation.org/can-learn-uks-corporate-tax-cuts/*

11 "Devolution of tax powers to the Scottish Parliament - Commons Library Standard Note" (2012, 2013) *http://www.parliament.uk/briefing-papers/SN05984*
The consultation paper does not consider the possibility that England might match the Scottish lower rate and does not address the question of what constitutes a Scottish company for the purpose of the lower rate. The most recent version of this paper is "Devolution of tax powers to the Scottish Parliament - recent developments" (2016) https://commonslibrary.parliament.uk/research-briefings/sn07077/
Likewise in Northern Ireland: The Corporation Tax (Northern Ireland) Act 2015; House of Commons Briefing paper No 7078, "Corporation tax in Northern Ireland" (2017)
http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN07078#fullreport
HMRC, "Draft guidance on the NI CT regime"

Similar issues apply to taxation of individuals. SNP initially backed the 50p rate of tax across the UK but decided not to do it in Scotland alone, as that was likely to cost money.[12] In 2018, CIOT said:

> The decision to freeze the higher rate threshold is unlikely to result in a rush to legitimately avoid paying higher rates of Scottish tax – for example by relocating to other parts of the UK or choosing to incorporate a business in order to benefit from lower rates of UK corporation and dividend tax.
> But they do lend themselves to a growing perception that Scotland is taking a different tax tack to the rest of the country, particularly as the UK income tax regime moves in the opposite direction.[13]

But Scots rates continue to drift above rUK rates, and for some individuals with homes in Scotland and rUK, it can be finely balanced whether they are Scottish taxpayers or not: a small change in lifestyle may make the difference. In computing the loss to Scotland of a taxpayer moving jurisdiction, one must bear in mind that the loss to Revenue Scotland is not the (relatively small) difference between the Scots and the rUK rates; it is the whole of the tax paid by that individual (which is credited to rUK, not to Scotland).[14]

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/677832/NI_CTregime-draft_guidance.pdf
Wales would also like to join in:
"If Northern Ireland is allowed to cut corporation tax, it would be outrageous if Welsh politicians did not have the option of doing the same"
Gerald Holtham, chair of the Holtham Commission for Wales (Cited in the Scottish consultation paper).
So in due course we may have no shortage of corporation tax competition within the UK.

12 The Scottish Government, unlike HMRC, publish the background analysis: "The impact of an increase in the additional rate of income tax from 45p to 50p Scotland" (2016) *http://www.gov.scot/Resource/0049/00497818.pdf*
2018 saw the Scots higher/additional rates nudge up to 41%/46%, but an increase to 50% was still rejected for this reason: Scottish Government, "The Role of Income Tax in Scotland's Budget" at p.23 *http://www.gov.scot/Resource/0052/00527052.pdf*

13 CIOT press release 9 Jan 2019 *https://www.tax.org.uk/media-centre/press-releases/press-release-chartered-institute-taxation-comments-scottish-budget*

14 Except so far as Scotland may benefit from an increased grant, under the Barnett formula.

Similar considerations apply in Wales.[15]

Competition in the foreign domicile field is therefore only one aspect of wider topic.

1.2.4 *Attitudes to tax competition*

Most though not all commentators would accept that tax competition is an important consideration in framing UK taxation.

Tax competition offers advantages to countries which compete successfully and disadvantages to those who do not. In many areas government have accepted the challenge of competition, and sometimes with enthusiasm:

> The [investment manager] exemption enables non-residents to appoint UK-based investment managers without the risk of UK taxation and is one of the key components of the UK's continuing attraction for investment managers.[16]

Those opposed to the consequences of this line of argument deride it as:
(1) a "race to the bottom"[17]; and
(2) "harmful" tax competition

It is correct that tax competition should logically drive tax rates on the mobile sources of income of non-residents down to zero, and in some cases that has been the result. Of course tax competition is not the only consideration in forming tax policy.

The expression "harmful tax competition" conceals awkward questions about harmful to whom? "Harm" is not an obvious or self-defining concept. The focus is often on harm to the G7 countries.[18]

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15 See Welsh Parliament Finance Committee, "Impact of variations in national and sub-national income tax" (2020) *https://senedd.wales/laid%20documents/cr-ld13276/cr-ld13276-e.pdf*

16 SP 1/01; see 68.1 (Investment manager exemptions).

17 This metaphor goes back at least to OECD *Harmful Competition* (1998) *https://ntanet.org/NTJ/51/3/ntj-v51n03p601-08-oecd-report-harmful-tax.pdf* The problem is not unique to tax: international regulatory competition may also lead to a "race to the bottom"; but perhaps in areas outside tax it is easier to reach international agreements imposing minimum standards.

18 See Littlewood, "Tax Competition: Harmful to Whom?" in Asif Qureshi and Xuan Gao, eds, Critical Concepts in Law: International Economic Law, Routledge, London (2010) volume VI, 162-234; reprinted from (2004) 26 Michigan Journal of International Law 411-487

Most sober commentators recognise that the UK could not act alone, as if there were no such thing as international tax competition.[19]

Unfortunately, it is always hard to predict what will be the overall economic effect of any reform, and predictions reflect the views and hopes of the partial pundits who make them.[20] Ascertaining the effect of reforms after they are made is scarcely less difficult.

1.2.5 *Tax competition: EU-law*

The freedom of the UK to enter into tax competition against other countries is subject to certain constraints of EU and international law and politics. International fiscal co-operation in this area at present operates only to a limited extent, but it has made some progress in a (non-binding) EU code of conduct on business taxation.[21]

State Aid rules also impose restrictions on UK's freedom to tax and untax.[22]

The EC has expressed disapproval of the remittance basis:

> The Commission does not advocate remittance base taxation, as it may lead to double non-taxation.[23]

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https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1227&context=mjil Avi-Yonah "Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State" [2000] Harvard Law Review p.1573.

19 However at the extreme even this is denied; eg "Tackle Tax Avoidance" a campaign of Progress (which describes itself as a New Labour pressure group):
"There is real fear at the heart of government that if it gets tough on business, businesses will flee the UK. But as the chief executive of Google, Eric Schmidt, himself admitted in an interview: 'Google will continue to invest in the UK no matter what you guys do because the UK is just too important for us.'
http://www.progressonline.org.uk/campaigns/tackle-tax-avoidance/articles/ (accessed 2013).

20 For instance, HMRC estimate that a reduction in the rate of Corporation Tax in Scotland to 12.5% would cost £2.6bn, but the Scottish Parliament say the impact would be positive: "Corporation Tax: Discussion Paper Options for Reform" (2011) p.43, *http://www.scotland.gov.uk/Resource/Doc/919/0120786.pdf*
The reductions in the UK corporation tax rates from 2012 may have been partly motivated by anticipation of Scottish tax competition; if so, this was tactfully not mentioned.

21 *http://ec.europa.eu/taxation_customs/taxation/company_tax/harmful_tax_practices/index_en.htm*

22 See 102.19 (State aid).

23 Kovács (EU Taxation and Customs Commissioner 2004 - 2010) IP/07/445 (2007). More analytically, the remittance basis gives rise to non-taxation, but not to *double*

That did not seem to have had any impact on UK domestic politics. But the issue is ongoing. In 2018 the European Parliament set up a committee on financial crimes, tax evasion and tax avoidance whose remit includes to assess national schemes providing tax privileges for new residents.[24] What (if anything) may result, and how it may impact on the UK post-Brexit, remain unpredictable; though it seems safe to say that nothing will happen soon.

1.2.6 *International tax law reform*

Since tax competition extends beyond the EU, and EU powers in relation to tax are (to say the least) politically controversial, those hoping for a body to curb international tax competition tend to look to OECD.[25] At present this is focussed on corporate rather than personal taxation.

1.3 Fairness

The other consideration in the assessment of foreign domicile taxation is fairness.

1.3.1 *What is fairness*

The starting point for any serious discussion of fairness in tax is terminology from economics rather than law:

(1) "**Horizontal equity**", the view that people who are relevantly equal should pay the same amount of tax.

(2) "**Vertical equity**", the view that people who are relevantly different should pay different amounts of tax, which leads to the (more or less) accepted view that fair taxation should be progressive rather than regressive.

Economists have developed these concepts with considerable

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non-taxation, in the normal sense. Foreign income/gains of a remittance basis taxpayer are potentially subject to tax in the source state, even though unremitted and so effectively untaxed in the UK; see 103.5 (Double non-taxation). There would be double non-taxation to the extent that the source state chooses not to exercise its taxing rights.

24 *http://www.sven-giegold.de/wp-content/uploads/2018/02/adopted-taxe3-mandate-2018-02-08.pdf*

25 Eg Jeffrey Sachs "Stop this race to the bottom on corporate tax" Financial Times, March 28 2011.

sophistication[26] but their limitations are exposed when one tries to apply them in a real life context, such as an assessment of the fairness of the taxation of foreign domiciliaries. The concept of horizontal equity is not so much a definition of fairness as an approach to identifying the issues. In deciding whether one group (foreign domiciliaries, say) is fairly taxed, one needs to identify another group by way of comparison (UK domiciliaries, say) and ask if they are relevantly equal.

1.3.2 *Are non-dom reliefs fair*

In the author's view, domicile is in general a useful and practical measure of UK linkage, and to regard UK and foreign domiciled residents as completely equivalent is facile. Or put the other way, foreign domicile does constitute a significantly weaker UK link than UK domicile. Accordingly conferring a lighter UK tax regime on foreign domiciliaries, such as a remittance basis, is indeed fair. This is especially so bearing in mind that:

(1) Residence alone does not require a very close connection to the UK.[27]
(2) A foreign domiciliary may not have had a fair opportunity to arrange their affairs with UK tax in mind; for instance creating settlements from which they were excluded.
(3) Another consideration is the impracticality (both for taxpayers and HMRC) of untangling ownership of assets, especially in family ownership arrangements which are common in third world countries.

This view is not universally held. Some maintain that any distinction (for IT or CGT) between UK residents based on domicile is unfair. The two are relevantly equal. It is difficult to see how the dispute between the rival views can be judged, or what either side could do or say to convince the other. The concept of fairness is insufficiently precise to resolve the

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26 For a starting point, see Kaplow, "Horizontal Equity: Measures in Search of a Principle" National Tax Journal 42, no. 2 (1989) p.139-55
http://www.ntanet.org/NTJ/42/2/ntj-v42n02p139-54-horizontal-equity-measures-search.pdf
Musgrave "Horizontal Equity Once More" National Tax Journal 43, no. 2 (1990) p.113-23
http://www.ntanet.org/NTJ/43/2/ntj-v43n02p113-22-horizontal-equity-once-more.pdf

27 Though the SRT has mitigated the worst excesses of the pre-2013 (common law) residence test.

dispute. One might say that it comes down to a matter of impression, or politics; which is to say the same thing.

Those who advocate this view most strongly are not tax practitioners, and I think would be surprised to find how little is required to be UK resident: their views are based on a paradigm of a foreign domiciliary who is a very long-term UK resident (at least). Thus the Guardian front page offered the heading:

> "We'll end non-dom status"- Miliband. All who live *permanently* in UK will pay all their tax here.[28]

Similarly, in Ireland, which has similar rules, a Commission on Taxation report argued:

> Equity requires that taxpayers who are in a comparable situation should be afforded the same treatment for tax purposes. Making a distinction between individuals based on their domicile results in a situation where taxpayers who are otherwise in a comparable situation are treated for tax purposes in different ways. This is inequitable. Thus, for example, an individual who, although domiciled outside of Ireland, is a *permanent resident* should be treated the same as any other resident taxpayer. The special treatment afforded to individuals who are resident, but not domiciled, in Ireland whereby they are only taxable in Ireland on foreign source income and capital gains to the extent that the income and gains are remitted to Ireland is inequitable and should be discontinued.[29]

To repeal the remittance basis altogether in order to tax "permanent residents" (however that expression is defined) is to throw out the baby with the bathwater. To restrict the remittance basis to those who are not "permanent residents" requires thought to be given to a definition of the term.

It has to be said that in political debate, depth of analysis is not to be expected; assessment of fairness is visceral, and sensitive ears might detect elements of class or wealth hostility and xenophobia.

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28 Guardian 8 April 2015. Similarly, perhaps, the Labour Manifesto 2015: "we will abolish non-dom status so that all those who make the UK their home pay tax in the same way as the rest of us." But the words "make the UK their home" may mean little or much.

29 [Ireland] Commission on Taxation Report (2009) para 6.2.2 https://www.kpmg.com/IE/en/IssuesAndInsights/ArticlesPublications/Documents/Tax/COT.pdf

1.3.3 *Is a remittance basis fair*

Even if it is accepted that it is fair to tax foreign domiciliaries less than UK domiciliaries, the question of what constitutes a fair reduction is a distinct and more difficult issue. The 2008 reforms accepted the principle of a distinction (which is why they did not go far enough for some commentators) but reduced the extent of the tax reduction by making the remittance basis less attractive.

The remittance basis of taxation is a form of qualified non-taxation. In assessing its fairness it is relevant to compare different groups of foreign domiciliaries:

(1) *Short-term residents* who are:
   (a) wealthy individuals, who can elect for the remittance basis and are able to retain (or spend) significant foreign income/gains abroad, and
   (b) less wealthy individuals for whom the remittance basis offers little or no benefit since they have no foreign income/gains, or cannot afford to retain (or spend) much foreign income/gains abroad.

(2) *Long-term residents*
   (a) ultra-wealthy individuals, who can elect for the remittance basis and are able to retain significant foreign income/gains abroad, and
   (b) less wealthy individuals for whom the remittance basis does not justify paying the remittance basis charge.

The effective rate of tax under the remittance basis approximately declines with income and it can be described as regressive taxation. If one accepts that taxation ought in principle to be progressive, which has always been a broad feature of UK taxation, then there is a sound argument that the remittance basis is unfair.

What effect did the 2008 reforms have in this area? So far as they decreased the attractiveness of the remittance basis by withdrawal of personal reliefs as a cost of the remittance basis they have decreased the unfairness.

So far as they have introduced the remittance basis claim charge, the reforms have targeted the benefit of the remittance basis at a small number of ultra-wealthy individuals. That may make sense under the tax competition argument, but from a fairness point of view it is difficult to justify.

1.4 Domicile as fiscal test: Critique

The domicile concept is not ideally framed to identify the "footloose" individuals, whose UK links are sufficiently less that a lighter tax regime is appropriate on fairness or tax competition arguments. The adhesive quality of a domicile of origin, and the restrictive rules for the acquisition of a domicile of choice, sometimes allow fortunate individuals to enjoy foreign domicile tax treatment, despite very close UK links and only tenuous, historical and fortuitous links to their domicile of origin. To the extent that they do so the current tax system fails on both economic and fairness criteria.

In considering this objection to domicile, however, one should bear in mind that no perfect criteria exists: the question is not whether domicile always produces the right answer, but whether one can do significantly better with other concepts or refinements.

Other concepts are sometimes used:

(1) Long term residence, of which UK tax uses a variety of tests:
   (a) Deemed domicile: 15 years residence
   (b) Remittance basis claim charge: 7 and 12 years residence
   (c) Temporary non-residence: 4 years residence and 5 years absence
   (d) Arriver/leaver rules for residence & OWR: 3 years residence
(2) Citizenship (not much used in UK domestic tax law but used in OECD Model and some IHT DTAs)

These are all alternative ways to make the distinction between UK residents with strong and weaker UK links; whether they would serve better in general than a domicile test seems to me rather doubtful. The 2017 deemed domicile rules take us down this path, but the rules for protected trusts means that common law domicile will continue to be important.

1.5 Non-dom tax reform

It is helpful to distinguish different ways of altering the tax system for foreign domiciliaries:

(1) Alter the definition of domicile for general purposes and so alter the class who qualify for foreign domicile tax treatment. Of course this would have ramifications beyond tax. Those proposing reforms of this kind are not usually motivated by tax – though those objecting to them

may be.[30]

(2) Alter tax laws applying to all foreign domiciliaries.
(3) Alter the definition of foreign domicile for some or all tax purposes.
(4) Identify subclasses of foreign domiciliaries with close UK links so as to tax them more heavily than foreign domiciliaries with less close UK links.

One can of course achieve the same end result by more than one technique. The 2017 deemed domicile changes adopt approaches (3) and (4).

1.6 Non-dom tax reform history

The chequered history reflects the difficulty, or impossibility, of reconciling incompatible policy considerations.[31]

1.6.1 *1974-2002*

The 1974 Finance Bill included a provision (clause 18) that an individual ordinarily resident in the UK for 5 out 6 years should be deemed UK domiciled for IT and CGT purposes. By the time the clause came to be debated, the Labour (Wilson) administration proposed to amend it so that individuals resident for 9 years out of 10 years were deemed UK domiciled.[32] But even after this concession, the clause did not survive to the Finance Act.[33]

The 1988 Consultative Document (Residence in the UK) made radical proposals. The remittance basis would be abolished. Those resident here for less than seven out of 14 years (and, perhaps, who are also not UK domiciled) would qualify for a new "intermediate basis" of taxation. This would require disclosure of worldwide income in order to tax it at an effective rate of 2% or less. This proposal was abandoned.

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30 See 3.7.5 (Domicile of choice: Critique).
31 See too 16.2 (History of remittance basis).
32 Hansard, Finance Bill debate 9 May 1974.
33 For an account of the lobbying behind this, see Barnett, *Inside The Treasury* (1982) p.28–9. For the Parliamentary debate, see HC Deb 13 June 1974 vol 874 cc1842-948 *http://hansard.millbanksystems.com/commons/1974/jun/13/cases-i-and-ii-of-schedule-e#S5CV0874P0_19740613_HOC_311*
It is perhaps relevant to the outcome that the Labour administration was a minority government from 4 March 1974 until the election on 10 October 1974, after which it had a majority of 3 seats.

1.6.2 *2003 - 2008*

In 2002 a newspaper campaign emerged which pressed the Blair administration into action, or at least into the appearance of action. The Budget of April 2003 delivered a "background paper" called "Reviewing the residence and domicile rules as they affect the taxation of individuals".[34] This was a facile document[35] but it may be unfair to criticise its (unnamed) authors. Their instructions may have been to be uncontroversial; by saying nothing, there was nothing in the document to which anyone could object.

Nothing then happened from 2003 to 2008.[36] It is clear that the review of foreign domicile tax did not follow the normal course of consultation, decision and implementation. In the absence of a frank explanation of what went on, it is tempting to speculate. The likely explanation is that the Blair administration wanted to do nothing, but prevaricated to avoid an announcement which would have lead to a furore from those in favour of reform.[37] Blair resigned in June 2007. A change of power led to an unannounced U-turn from that unannounced policy.[38]

1.7 Approach to assessment of reform

The 2003 background paper on domicile recited the principles that taxation of foreign domiciliaries should:

[1] be fair;

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34 *http://webarchive.nationalarchives.gov.uk/20091222074811/http://www.hmrc.gov.uk/budget2003/residence_domicile.pdf*

35 It contained an outline of the law (a rehash of IR20) and one paragraph summaries of the law of 29 other countries (of insufficient detail to be of any use and generally said to be misleading). The paper did not consider any proposals or their possible impact. It (consciously?) ignored every earlier discussion of reform: the Royal Commissions of 1920 and 1955, the 1936 Codification Committee, the 1974 Finance Bill, the 1987 Law Commission Report and the 1988 Consultation Paper.
For an account of the decline in quality of government white and green papers, see Forster, *British Government in Crisis* (2005), p.134.

36 The history is set out in the 9th edition of this work para 1.3.2. The last outing of (by then extremely tired) statement was Hansard 12 July 2007 Col 1605 by which time almost no-one believed it, but by then it was possibly true.

37 See Oborne, *The Rise of Political Lying* (2005).

38 Earlier editions of this work contain a more detailed history of this period, but details seem less important with the passage of time and changes of government.

> [2] support the competitiveness of the UK economy. [I think this just means, benefit the economy: "competitiveness" was just the buzzword of the day. The principal benefit must be to raise revenue, though one might, perhaps, look for other more intangible benefits.]
> [3] be clear and
> [4] be easy to operate.

Although not mentioned, the principles derive from Adam Smith, *The Wealth of Nations* (1776).[39]

It is naive to recite these principles without noting (as Adam Smith did) that they are irreconcilably conflicting and incommensurable values. Mirrlees stated:

> These recommendations may command near-universal support but
> [1] they are not comprehensive, and
> [2] they do not help with the really difficult questions which arise when one objective is traded off against another.[40]

It is a common feature of HMRC papers to ignore point [2], and to claim the mantles of fairness and competitiveness without acknowledging a conflict between them. Thus the HMRC policy paper "Domicile: Income Tax and CGT":

> The government wants to reform the tax treatment of non-doms so that the UK can continue to benefit from the presence of talented foreigners while also addressing unfair tax outcomes.[41]

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39 Smith *The Wealth of Nations* (1776) Book 5 chapter 2.
http://www.bibliomania.com/2/1/65/112/frameset.html
In Scotland, Adam Smith is more highly regarded:
"As with the entire approach the Government takes ... on taxation, these proposals are firmly founded on principles, Scottish (!) principles, that have stood the test of time. Adam Smith in 1776 in his "Inquiry into the nature and causes of the Wealth of Nations", set out four maxims with regard to taxes; the burden proportionate to the ability to pay, certainty, convenience and efficiency of collection."
Swinney (Finance Secretary) "The Scottish Government's Approach to Taxation" (2012)
http://www.scotland.gov.uk/News/Speeches/taxation07062012

40 Mirrlees, *Tax By Design* (2011) p.22
http://www.ifs.org.uk/uploads/mirrleesreview/design/ch2.pdf

41 Feb 2016,
https://www.gov.uk/government/publications/domicile-income-tax-and-capital-gains-tax/domicile-income-tax-and-capital-gains-tax

This is the Janet and John approach to tax reform.

The House of Commons Treasury Committee provide an intelligent approach to assessment of tax reform, identifying 8 criteria:

> The Committee recommends that tax policy should be measured by reference to the following principles. Tax policy should:
> 1. **be fair**. We accept that not all commentators will agree on the detail of what constitutes a fair tax, but a tax system which is considered to be fundamentally unfair will ultimately fail to command consent.
> 2. **support growth and encourage competition**.
> 3. **provide certainty**. In virtually all circumstances the application of the tax rules should be certain. It should not normally be necessary for anyone to resort to the courts in order to resolve how the rules operate in relation to his or her tax affairs. **Certainty about tax requires**
> i. **legal clarity**: Tax legislation should be based on statute and subject to proper democratic scrutiny by parliament.
> ii. **Simplicity**: The tax rules should aim to be simple, understandable and clear in their objectives.
> iii. **Targeting**: It should be clear to taxpayers whether or not they are liable for particular types of charges to tax. When anti-avoidance legislation is passed, due regard should be had to maintaining the simplicity and certainty of the tax system.
> 4. **provide stability**. Changes to the underlying rules should be kept to a minimum and policy shocks should both be avoided. There should be a justifiable economic and/or social basis for any change to the tax rules and this justification should be made public and the underlying policy made clear.
> 5. The Committee also considers that it is important that a person's tax liability should be easy to calculate and straightforward and cheap to collect. To this end, tax policy should be **practicable**.
> 6. The tax system as a whole must be **coherent**. New provisions should complement the existing tax system, not conflict with it.

The Committee acknowledge that these objects are incompatible:

> 85. No tax system is, or can be, static. There will always be trade-offs and difficult decisions; a desire for fairness may increase complexity; a desire for certainty may increase administrative complexity. Nonetheless, the principles we set out, which reflect a surprising degree of convergence within our evidence, give a direction of travel which, in the long run, can both secure consent and improve the performance of the

economy.[42]

I think Adam Smith would be content with that.

1.8 2008 reform: Assessment

The 2008 reforms increased the tax burden on foreign domiciliaries in four main ways:

(1) Remittance basis claim charge for long-term residents
(2) Withdrawal of personal allowances for remittance basis claimants
(3) ITA remittance basis, stricter than the pre-2008 remittance basis
(4) Extension of anti-avoidance provisions to remittance basis taxpayers (in particular, the s.720, s.3 and s.87 remittance bases, and the AIP remittance basis)

1.8.1 *Clear and easy to operate*

It will be evident to anyone who skims this volume that the 2008 rules are a failure by this criteria. The rules are unclear, often difficult and sometimes impossible to operate. In these respects they are unquestionably worse than the pre-2008 rules.

Government policy normally requires an impact assessment.[43] None was carried out in relation to any of the 2008 reforms. Many features of the reforms could not have survived if it had been.

1.8.2 *Benefit to UK economy*

On one side of the account is the gain of more tax paid by foreign domiciliaries. On the other is:

(1) Tax and investment lost from individuals who leave the UK, and those who (because of the reforms) decide not to come.
(2) The loss to the economy that the 2008 rules generally discourage or prevent investment in the UK and use of UK service providers.

In the 2008/09 edition of this work my initial assessment was as follows:

> Overall it seems to me implausible that the reforms will make a positive contribution to the UK economy. One can test the matter this way. If a wealthy individual, a beneficiary of offshore trusts created by himself or his family, asked for advice on the desirability of choosing the UK as a

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42 Treasury "Principles of tax policy" (2011) *http://www.publications.parliament.uk/pa/cm201011/cmselect/cmtreasy/753/753.pdf*

43 http://old.tax.org.uk/ciot_media/themakingoftaxlaw.pdf

> residence, what would one say? Even now the individual could still do worse; and if enough advance planning and restructuring is possible, the problems may be ameliorated, at an administrative cost. Thus tax may still not prevent an individual from coming to the UK if he wants to sufficiently. Also, the old cliché about the tax tail and the commercial dog still holds good. But all this is a far cry from the pre-2008 position, where one would simply respond that the UK was clearly a desirable place to reside.[44]

The 2008 reforms did not in the event greatly reduce the non-dom population, though they may have reduced it slightly.

HMRC offer the following statistics:[45]

Remittance basis claimants[46]

	Total 000's	*Tax paid[47] £billion*	*Rem basis charge payers 000s*	*Tax paid £billion*	*Tax per rem basis payer £100k*
2007-08	no data				
2008-09	48	5.3	5.4	1.9	350
2009-10	46	5.8	5.2	2.1	406
2010-11	49	6.3	5.5	1.9	343
2011-12	49	6.6	5.5	1.8	326
2012-13	48	6.5	5.1	1.8	352
2013-14	53	6.9	5.0	2.1	421
2014-15	55	6.9	5.1	1.1	412

The figures are interesting; but a proper analysis would require a team with both economic and tax expertise, and so far no such analysis has been published.[48] John Barnett summarises some key facts:

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44 Kessler, *Taxation of Non-Residents and Foreign Domiciliaries* (7th ed, 2008), pp. 8

45 HMRC, "Statistics on Non-domiciled Taxpayers in the UK 2007-08 to 2014-15" (August 2017) *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/640897/Statistical_commentary_on_non-domiciled_taxpayers.pdf*

46 Those who fill in SA returns. Those who do not are not counted.

47 IT, CGT and NIC. IHT and VAT and other taxes are not included, though the total amounts may be large.

48 For international studies in this area, see: Kleven et al., "Taxation and Migration: Evidence and Policy Implications" NBER Working Paper No. 25740 (April 2019); Young et al., "Millionaire Migration and Taxation of the Elite: Evidence from Administrative Data" American Sociological Review Vol 81, Issue 3, (2016); Kleven et al., "Migration and Wage Effects of Taxing Top Earners: Evidence from the Foreigners' Tax Scheme in Denmark" The Quarterly Journal of Economics (2014) p.333.

- the non-dom population [including those who do not claim the remittance basis] contributed £9.25bn in income tax, CGT and national insurance contributions in 2014/15
- Each UK resident non-dom paid an average of £105,000 in income tax, CGT and national insurance.
- The average income tax paid by UK resident non-doms was £76,500; the average income tax paid by taxpayers as a whole was £5,430
- UK resident non-doms paid 3.9 per cent of all income tax (£167 billon) yet represented only 0.2 per cent of the taxpaying population (30.7 million)

The statistics omit to look back at how much tax the changes in 2008 (and 2012) were supposed to bring in. One has to dig back to find these[49] but one discovers that the 2008 reforms were supposed to yield nothing in 2008/09, £700 million in 2009/10 and £500 million in 2010/11. It is not clear whether this was just wrong or can somehow be reconciled with the outturn that the yield fell by £1.2 billion in the first year; and remained £400 million down in the second year; and £300 million in the third year. The 2012 changes[50] were similarly supposed to be neutral and then raise money, but revenues subsequently fell.[51]

Subsequent data may in due course allow an answer to the important question whether the 2017 reforms increase or decrease the tax yield.

1.8.3 *Fairness of 2008 reforms*

The FA 2008 contained a wide ranging package of reforms and any short assessment of its merits must be limited to its main features.

The remittance basis claim charge distinguishes between short term and long-term residents, and taxes the latter more heavily, the connecting factor here being the long term residence tests. One cannot categorise those distinctions as unfair.

On the other hand, among long-term foreign domiciliaries, the charge distinguishes between the extremely wealthy (to whom the remittance basis is still attractive) and others (to whom it is not). This offends against the principle of vertical equity, which suggests that people with higher incomes

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49 *http://webarchive.nationalarchives.gov.uk/20100407164623/http://www.hm-treasury.gov.uk/d/bud08_completereport.pdf* - see p.112.

50 *http://webarchive.nationalarchives.gov.uk/20130129110540/http://www.hm-treasury.gov.uk/budget2012_documents.htm* - see p.52.

51 *https://www.tax.org.uk/media-centre/blog/media-and-politics/non-dom-stats-important-what-they-don%E2%80%99t-tell-us-what-they-do*

should pay more tax. That is not fair, it represents a decision to prioritise the economic advantage of tax competition by targeting the remittance basis to the wealthiest. The tax competition consideration conflicts with fairness.

The withdrawal of personal allowances as a quid pro quo of a remittance basis is not unfair (though it comes at a cost in terms of complexity).

Of perhaps greater importance is the other aspects of a package of reforms which affect all foreign domiciliaries, not just long-term residents.

The stricter ITA remittance basis is not unfair, except for the wilder reaches of the relevant person definition[52] and the supposed rule (probably ignored in practice) that the taxable amount remitted may exceed the value of the asset remitted.[53]

The extended 2008 anti-avoidance rules can work unfairly but complete fairness is impossible to achieve in this area.

The transitional rules were another matter but their significance has faded over time.

All in all, the 2008 reform may be given some limited marks for fairness. This is not to say that the pre-2008 rules should be regarded as unfair: the concept of fairness (especially if viewed with some attention to practicality) is so vague that a very wide range of tax policies may all be categorised as "fair".

Some of the hardest hit are long-term UK resident US citizens, who pay
(1) US tax on a citizenship basis and
(2) substantially greater UK tax liabilities under the 2008 regime
with only treaty relief to mitigate double taxation, as far as it goes.

That is unfair, but the reason is not that UK unfairly taxes its long-term residents, but that the US imposes US tax on non-resident citizens, so all its non-residents face the burden of double taxation: US tax and tax in their country of residence (subject to limited tax credit relief). In this respect the US is almost unique. The only other country which taxes worldwide income of non-resident citizens is Eritrea.[54]

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52 See 17.7.1 (Company person: Critique); 17.11 (Relevant person rules: Critique).

53 See 17.32.2 (Remittance of derived property).

54 A few countries (i.e. Finland, France, Hungary, Italy, Spain and Turkey) tax on citizenship, but only for a limited duration or in special cases.
Ironically, in 2011 the United States condemned Eritrea at the United Nations for its "diaspora tax".
See Hammer, "Old Habits Die Hard: Should the United States Abolish

1.8.4 *Process of implementation*

The manner in which the FA 2008 was introduced deserves to be recorded.

In January 2008, 26 pages of draft clauses were published whose unwritten message to wealthy non-residents was broadly: *do not come to the UK if possible; if you must, do not invest any money here*. The clauses were officially described as work in progress, but this was unfit for publication.

HMRC[55] presumably agreed. On 27 March the Finance Bill was published, containing 54 pages of legislation. The FB clauses bore almost no resemblance to the January draft. One consequence is that the professional time and clients' money spent considering the old clauses was almost entirely wasted. That certainly cost many £millions. Another consequence was that the profession had nine frantic days to scramble around before the end of the tax year. Because of the absence of sensible transitional reliefs, large amounts of tax depended on decisions and actions taken in those days. Sensible consideration of difficult and important matters was rendered impossible.

On the date of publication the Treasury announced that the Finance Bill was incomplete and amendments covering almost every aspect of the rules[56] were made in the course of progress of the Finance Bill.[57] Thirty pages of amendments duly emerged in mid June – far too late in the Finance Bill timetable to give them any serious consideration. Forty eight

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Citizenship-Based Taxation?" (2016), IBFD *http://www.ibfd.org/IBFD-Tax-Portal/White-Papers?utm_source=linkedin&utm_medium=social-media&utm_campaign=linkedin-discussion-week-9&utm_content=IBFD-Tax-Portal/White-Papers*

55 In this work I use the expression HMRC loosely, to include those in HM Treasury and in Government who share the responsibility for tax reform; it is not easy, or necessary, to identify where tax reform decisions are actually made.

56 Explanatory notes to sch7, para 36 (mixed funds); para 47 (s.87 charge); para 52 (non-resident trusts); para 74 (sch 4C); para 91 (ToA provisions; para 106 (works of art); para 107 (employment related securities).

57 In the 2008/09 edition I said:
"This is a new development in tax legislation. While from time to time inadequately drafted clauses have always been found in Finance Bills, this is as far as I am aware the first time that the Government has had to announce that fact at the time of publication of the Finance Bill."
There are similar examples in the FA 2009 but it has not become a trend.

more Report Stage amendments were published on 26 June. The report stage and third reading (after which no further amendments could be made) were held on 1 and 2 July 2008. Avery Jones notes that "Report Stage amendments are usually a disaster."[58]

As a result, the final legislation poses problems which will occupy practitioners, and (so far as they care about the legislation) HMRC, for many years, but it is also noteworthy that during the first three months of 2008/09 taxpayers could not know what laws governed transactions which they might wish to carry out, or what record keeping would be required of them.

The former editor of *Taxation* is blunt:

> The standard of strategic policy making at the Treasury has been unacceptably poor in recent years, but this must surely have been one of its lowest ebbs ever.[59]

CIOT say:

> when corners are cut, especially under time pressures, there can be serious deficiencies.

and their example to prove the point is the non-domicile rules in the FA 2008.[60]

The House of Lords Economic Affairs Committee comment in measured language:

> Our private sector witnesses would not have used words like "a real shambles" if they did not feel strongly about this. ...
> 176. We recommend that, if they have not already done so, HMT and HMRC should carry out a full review of the reasons why there were so many difficulties in the development of this policy initiative. They should ensure that the lessons are learned so that these problems do not emerge in other initiatives.
> 177. We also recommend that if another policy initiative gets to the point where the legislation cannot be finalised for inclusion in the Finance Bill, that initiative should not be included in the Bill, or, if feasible, the part

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58 See "Taxing Foreign Income from Pitt to the Tax Law Rewrite—The Decline of the Remittance Basis", Avery Jones in *Studies in the History of Tax Law* (Vol 1 2004) *https://www.kessler.co.uk/wp-content/uploads/2013/12/Remittance-basis.pdf*

59 *Taxation* 12 June 2008 Vol 161 No. 4160 p.627 (Malcolm Gunn).

60 The Making of Tax Law, para 3.2, CIOT, June 2010 *http://www.tax.org.uk/resources/CIOT/Documents/2010/09/themakingoftaxlaw.pdf*

> which is not finalised should not be included. We cannot support the approach of the Finance Bill's still being subject to much amendment at the time it is published, particularly when the proposals come into effect from the beginning of the tax year, as in this case. [61]

No review was carried out.

Does it now matter? Readers may think it pointless to cry "foul" in a game which has no referee, and whose result was long ago declared. But I think the story deserves to be recorded as what Lord Howe described as "an object lesson in how not to legislate".[62]

1.9 2017 domicile reform: Assessment

The 2017 reforms[63] contain a wide ranging package of reforms and any short assessment of its merits must be limited to its main features, which are:

(1) 15-year deemed domicile rule for IT/CGT
(2) Formerly domiciled residents rules
(3) Protected trust regime
(4) IHT residential-property regime
(5) Non-resident disregard for s.87 gains

1.9.1 *Political background*

The inspiration for the changes was political. The decision did not much depend on an assessment of the policy arguments analysed in this chapter. The decision should be seen in the context of the 2015 summer budget's adoption of other Labour policies: the increased national living wage[64] and the apprenticeship levy.[65] The Cameron administration sought to occupy

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61 Select Committee on Economic Affairs, 2nd Report of Session 2007–08, The Finance Bill 2008 *http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeconaf/117/117i.pdf*

62 Making Taxes Simpler - The final report of a Working Party chaired by Lord Howe (2008) *https://conservativehome.blogs.com/torydiary/files/making_taxes_simpler.pdf*

63 The reforms should be considered as a package with the supplemental offshore trust reforms which were announced together but deferred until 2018.

64 Labour Manifesto 2015 provided: "We will [raise] the National Minimum Wage to more than £8 an hour by October 2019". *http://www.labour.org.uk/page/-/BritainCanBeBetter-TheLabourPartyManifesto2015.pdf*

65 Labour Manifesto 2015 provided: "[Apprenticeships] will be co-funded ... by employers..."

middle ground left vacant, or perceived vacant, by the Corbyn opposition.

The Government have shown no interest in debate on the policy issues. Since the policy was taken from the Labour manifesto,[66] and continued to be supported by Labour, there was little possibility of a successful lobby against it.

This is not to say that the 2017 reforms are not defensible, on the basis of fairness or otherwise, just that little reasoned debate took place in public, and probably little debate took place in private. The IFS, as usual, shone an intelligent beam into the fog, though I am not sure that anyone took any notice.[67]

Contrast the 2008 reforms where there was at least the appearance of consultation and debate.

Perhaps it would be naive to expect otherwise.

1.9.2 *Clear and easy to operate*

By this criterion the 2017 reforms fail hopelessly.

1.9.3 *Fairness*

A 15-year deemed domicile rule for IT/CGT seems fair. The protected trust regime leaves us short of equality between long term foreign domiciled individuals and UK domiciliaries, but that can itself be defended as fair.

Formerly domiciled residents rules can work harshly, but all workable rules must have hard cases at the borders and the number of truly unfair cases will be very small.

The difficulty in assessing the fairness of the IHT residential-property regime is that IHT (unlike, say, CTT) is a fundamentally unfair and illogical tax. I would have thought it reasonably clear that any advantage does not justify the complexity and oddity of the results from the territorial limits of the tax which now apply.

The non-resident disregard will operates unfairly, and significantly extends the unfairness of a code which was already unfair.

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https://www.slideshare.net/miquimel/2015-04-labourgeneralelectionmanifesto2015britaincanbebetterlabour

66 See 1.3.2 (Are non-dom reliefs fair).

67 IFS, "Unknown quantities: Labour's 'non-dom' proposal" (2015) *http://www.ifs.org.uk/publications/7703*

1.9.4 *Benefit to UK economy*

Perhaps more importantly: Will the reforms benefit the UK economy? The consultation was prefaced with the statement that:

> The government wants to attract talented individuals to live in the UK who will help to contribute to the success of this country by investing here and creating jobs. The long-standing tax rules for individuals who are not domiciled in the UK are an important feature of our internationally competitive tax system, and the government remains committed to that aim.[68]

I wonder how far that was meant to be taken seriously. In 1974, when the Conservatives successfully opposed a similar reform proposed by Labour, Peter Rees (later Conservative Chief Secretary to the Treasury) said:

> I agree with my hon. Friend the Member for Pembroke (Roger Edwards, now Lord Crickhowell), that very little tax will be gained.[69]

But it was, perhaps, a different computation when income tax rates reached 83% or 98%, and without the protected trust regime.

The 2016 policy paper provides:

> The costing has been adjusted to account for behaviour, which includes increased tax planning on offshore income, non-compliance and choosing to become non-UK resident. However, behavioural response for high net worth individuals is difficult to predict.[70]

What is clear is that economic benefit was not a consideration, or at least not a major consideration, behind the reforms. This may also be inferred from the fact that the reforms were announced in the Summer Budget 2015, but no estimate of the tax yield was published until Budget 2016. The budget figures[71] are:

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68 Consultation paper "Reforms to the taxation of non-domiciles" (2015) *https://www.gov.uk/government/consultations/reforms-to-the-taxation-of-non-domiciles/reforms-to-the-taxation-of-non-domiciles*

69 *http://hansard.millbanksystems.com/commons/1974/jun/13/cases-i-and-ii-of-schedule-e#S5CV0874P0_19740613_HOC_311*

70 "Domicile: Income Tax and CGT" (Feb 2016) *https://www.gov.uk/government/publications/domicile-income-tax-and-capital-gains-tax*

71 Budget 2016 (March 2016) Table 2.2 *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/508*

Year	Deemed domicile	IHT residence-property rules
2016-17	0	-5
2017-18	-20	+30
2018-19	+395	+90
2019-20	+310	+60
2020-21	+310	+70

These figures include an estimate of the effect on the yield caused by those who decide to leave the UK rather than become deemed domiciled here. However, there is no account made for:

(1) secondary impacts that the reforms could have, for example, on spending or investment here by those who decide to leave.
(2) those who decide not to come to the UK as a result of the reforms.

The figures are approved by the Office for Budget Responsibility, which, I am told, considered these effects would not be significant.[72] But it seems to me that these omissions render the table invalid, and the reform is likely to cost more than it brings in.

1.10 The promise of stability

There is a long tradition of instability in the UK tax system. In 1981:

> One of the most noticeable characteristics of the British tax system is that it is under continual change.[73]

In 1993:

> The major distinguishing characteristic of the British tax system is its instability. The British tax system changes faster, more frequently, and more radically than any other tax system I have observed.[74]

In 1999:

> The UK tax system is caught in a culture of never-ending change.[75]

The years 2008 - 2013 saw a series of broken promises of stability without

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193/HMT_Budget_2016_Web_Accessible.pdf

72 Clarified with HM Treasury. The figures are (necessarily) based on the then economic forecasts.

73 James & Nobes, *Economics of Taxation* (1st ed., 1981), p.135.

74 Steinmo, *Taxation and Democracy* (1993), p.44.

75 ICAEW TAXGUIDE 4/99 (Towards A Better Tax System) *http://www.icaew.com/en/technical/tax/towards-a-better-tax-system*

any perceptible change of practice.[76] The promises of stability should be regarded as lip-service to the desideratum of stability. The practice, which lies deep in the culture of government, proved immune to such announcements. A true commitment to stability requires HMRC to refrain from making reforms which they would like to make, and when actual proposals come to the table, the interest of reform overcomes the interest of stability. It is easier for politicians to talk about stability than to achieve it. Perhaps HMRC have recognised this, as the 2014, 2015 budgets contained no further promises of stability. The 2017 budget had only a vague reference to "a more stable and certain tax environment", and I doubt if anyone was expected to take that seriously. The 2020 budget makes no reference to stability in taxation.

1.11 State of UK tax reform

In 2010 CIOT expressed itself strongly:

> The way tax law is developed and effected in the UK is deeply flawed.[77]

Two publications shed light on what went wrong with tax legislation in recent years. Demos say:

> The centralisation of [tax policy-making power] is a particular problem because of the lack of institutional accountability of the Treasury on taxation policy and the lack of accountability of chancellors themselves in matters of taxation. ... The concept of checks and balances in tax policy is nonexistent.
>
> ... the current relationship between the Treasury and HMRC was 'very dysfunctional', had 'almost gone as wrong as it could have gone'...
>
> At the moment, pursuing a career only in tax policy is not valued within the Treasury hierarchy. Officials pass through the tax teams rather than making tax policy a career choice. ... High turnover results in a lack of experience in the tax section and little institutional memory...
>
> ... There are traditional areas that are ring-fenced as not for consultation, including tax rates and anti-avoidance measures. ...
>
> ... 'at the moment [anti-avoidance] works like a drive-by shooting. You might hit your objective but you also hit a lot of other people.'
>
> At present, policies are frequently changed without understanding the

76 I set them out the 2016/17 edition of this work para 1.10 (The promise of stability) but omit that here as it has diminishing contemporary significance.

77 Letter from CIOT to George Osborne, 19 May 2010

> impact the policy has initially had in practice.[78]

Re-inforcing the tendency not to consult is an HMRC culture which is profoundly hostile to the tax profession . The Director of the HMRC Tax Avoidance Group 2004-2009 records:

> ... I was never happier than when a new tax avoidance initiative was greeted with howls of protest from the tax avoidance quarter.[79]

In short, preventing avoidance has been a priority that outweighs other considerations, such as certainty, workability and the Rule of Law; or rather obliterates all consideration; and listening to the tax avoidance quarter – which includes the professional bodies and almost any practitioner who said what HMRC did not want to hear – has been ruled out. The professional bodies are regarded by HMRC as a pressure group whose vaunted commitment to fairness, practicality and the Rule of Law is merely a cloak for self-interested whingeing of a featherbedded elite.[80]

That policy has ruled since the 1997 Blair administration, and its consequences can be seen in seeking to state the law, as this book seeks to do, or in seeking to understand the law, as you the reader will do now.

1.11.1 *Tax Consultation Framework*

In 2011 the coalition administration promised a fresh start with The Tax Consultation Framework. The 2015 Cameron administration also committed to this.[81] I am not sure that any subsequent administration has formally committed to it, though it has not been repudiated either.

It provides:

> 2. There are five stages to the development and implementation of tax

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78 Ussher and Walford, *National Treasure* (Demos, 2011) *http://www.demos.co.uk/files/National_treasure_-_web.pdf?1299511925* Demos claims to be Britain's leading cross-party think-tank.

79 Tailby, "Some Reflections on Tax Avoidance" [2011] PCB 41.

80 This may be seen in the context of a more general antagonism to the legal (and other) professions, and dismissal of their ethical pretensions. That is an ancient trope, but took renewed vigour under the Thatcher administration, and has lead to a transfer of regulatory power from the Bar and Law Society to regulation by non-lawyers.

81 HM Treasury: "Tax policy consultation will continue and be strengthened. The government remains committed to consulting on policy as set out in 'The new approach to tax policy making' in 2010." (November 2016). *https://www.gov.uk/government/news/7-things-you-need-to-know-about-the-new-budget-timetable*

policy:
Stage 1 Setting out objectives and identifying options.
Stage 2 Determining the best option and developing a framework for implementation including detailed policy design.
Stage 3 Drafting legislation to effect the proposed change.
Stage 4 Implementing and monitoring the change.
Stage 5 Reviewing and evaluating the change.
3. Where possible, the Government will:
- engage interested parties on changes to tax policy and legislation at each key stage of developing and implementing the policy;
- make clear at what stage (or stages) the engagement is taking place so that its scope is clear;
- carry out at least one formal, written, public consultation in areas of significant reform;
- set out, as the policy develops, its strategy for stakeholder engagement including planned formal consultation periods, informal discussions, working groups and workshops;
- consult, where it can, on the policy design, draft legislation and implementation of anti-avoidance and other revenue protection measures, provided this does not present additional risk to the Exchequer;
- minimise the occasions on which it consults only on a confidential basis. Where confidential consultation has been necessary the Government will be as transparent as possible about its outcome and consult openly if pursuing the policy change further; and
- provide feedback which sets out the Government's response to the views received and makes clear what changes, if any, have been made to the planned approach as a result of those views.

4. At each stage of consultation, the Government will set out clearly:
- the policy objectives and any relevant broader policy context;
- the scope of the consultation, in particular what is already decided and where there is still scope to influence the outcome;
- its current assessment of the impacts of the proposed change and seek to engage with interested parties on this analysis. A final assessment of impacts will be published once the final policy design has been confirmed...

5. Informal consultation will be as transparent as possible, consistent with the need to protect revenue. The best principles of formal consultation will be applied to informal consultation to ensure clarity of scope, impact, accessibility, and meaningful feedback. ... Informal consultation can run alongside formal consultation but will often be most appropriate at the earliest and latest stages of tax policy development to

> identify options and then to fine-tune the detailed legislation and implementation of change.
>
> **Exceptions**
>
> 8. The Government will generally not consult on straightforward rates, allowances and threshold changes, or other minor measures; recognising, however, that even in these cases some level of consultation can often be informative. It may also adopt a different approach for revenue protection or anti-avoidance measures where following this Framework could present a risk to the Exchequer. In other circumstances where the Government decides not to consult during tax policy development it will explain the reasons for that decision.
>
> 9. There will be times when it will be necessary to deviate from this Framework. In these circumstances the Government will be as open as possible about the reasons for such deviations.[82]

Of course tax is not unique in this respect: similar considerations apply to all areas of law reform. The Data Retention and Investigatory Powers Act 2014 was enacted in two working days; and in holding it to be unlawful, the Divisional Court noted in moderate terms:

> legislation enacted in haste is more prone to error.[83]

And again:

> it is widely acknowledged that the [Immigration] Rules have become overly complex and unworkable. They have quadrupled in length in the last ten years. They have been comprehensively criticised for being poorly drafted, including by senior judges. Their structure is confusing and numbering inconsistent. Provisions overlap with identical or near identical wording. The drafting style, often including multiple cross-references, can be impenetrable. The frequency of change fuels complexity.[84]

1.11.2 *Compliance with Framework*

How far has tax reform since 2011 complied with the Framework? That is a broad question; it would need a series of volumes, there has been so much.

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82 *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/89261/tax-consultation-framework.pdf*

83 *R oao Davis v Secretary of State for the Home Department* [2015] EWHC 2092 (Admin) at [121].

84 Law Com No 388, "Simplification of the Immigration Rules: Report" (2020) para 1.1.

In brief, compliance with the Framework's tax reform timetable has been patchy. It is easier to announce good intentions than to abide by them. The culture of "ready, fire, aim" still prevails.

A few examples will illustrate the point.

The ATED regime was introduced in breach of the Framework. The House of Lords Economic Affairs Committee commented:

> ... the Government's response to SDLT avoidance might have been more appropriately designed had it consulted interested parties at the outset as its 'new approach to tax policy making' stipulates. We recommend that the Government adhere to that approach in designing future tax changes.[85]

The 2013 disallowances of debts for IHT were introduced in breach of the Framework. But neither here, nor, as far as I am not aware, in any other case have the Government acknowledged a breach of the Framework or been "as open as possible about the reasons for such deviations."

The 2016 dividend income reforms, a major change (also misdescribed as simplification[86]), were introduced in breach of the Framework. The House of Lords Economic Affairs Committee comment:

> We deeply regret the lack of consultation on the savings [Personal Savings Allowance] and dividend income proposals and repeat the recommendation in our Report on the draft Finance Bill 2014 that the Government should reassert its commitment to the 'new approach' to tax policy making and make sure that, in future, it adheres to it in full except in the most exceptional circumstances.[87]

The Law Society say:

> ... the new approach is (i) not always followed, and (ii) side-stepped by labelling new tax law as anti-avoidance when it is no such thing.
> A case in point is the FA 2014, which introduced changes to the way in which certain members of limited liability partnerships were taxed. When this proposal was first published, it was an anti-avoidance

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85 House of Lords Select Committee on Economic Affairs *The Draft Finance Bill 2013* (March 2013) para 210 *http://www.publications.parliament.uk/pa/ld201213/ldselect/ldeconaf/139/139.pdf*

86 Summer Budget 2015, para 1.186: "the government will reform and simplify the system of dividend taxation...".

87 "The Draft Finance Bill 2016" (2016), para 250 *http://www.publications.parliament.uk/pa/ld201516/ldselect/ldeconaf/108/108.pdf*

> measure. Following initial consultation, the nature of the proposal changed markedly and became more widely applicable to professional partnerships. This was not anti-avoidance legislation but, nevertheless, there was no formal consultation of the kind envisaged by Tax Consultation Framework.[88]

The Tax Professionals Forum note some cases where the framework was followed, and then say:

> In contrast, however, in other cases, consultations have started:
> - part way through the process (such as that on the provisions relating to the transfer of assets abroad and gains made by offshore close companies),
> - without a clear articulation of the policy involved (for example, on IR35 and Controlling Persons), or
> - without any discussion of the policy (for example, the changes to SDLT on properties owned by non-residents through companies, investment funds and others and the cap on income tax reliefs).[89]

The 2017 domicile reforms were announced in 2015, which should have allowed time for thinking and consultation. Two years is an appropriate time scale to introduce major reforms, and at the time it seemed a refreshing break from the pattern of 2008 to see reform enacted on that basis. But two caveats to this welcome development:

(1) A distant deadline allowed the more difficult and serious work to be put off, the matter was concluded in the usual frantic rush, and the end result is disappointing. Still, deferring the some aspects of the offshore tax reforms to 2018, to allow consideration, is encouraging.

(2) The need for time was not accepted by Labour:

> ... why else would the Government have given a grace period for those non-doms affected to get an offshore trust if they do not have one already? ... why else would the Government have actively signposted the changes for non-doms, which has set hares running? It seems to me that those are things that the architect of the measures would do if they were of a mind to completely undermine the measures' effectiveness.[90]

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88 The House of Lords Economic Affairs Committee was also highly critical: see the Committee report "The Draft Finance Bill 2014" (2014).

89 Tax Professionals Forum Second Independent Annual Report (2013).

90 Peter Dowd (Labour Shadow Chief Secretary to the Treasury) Hansard, 19 Oct 2017 *https://hansard.parliament.uk/Commons/2017-10-19/debates/aea0b4b1-dc6c-4153-a24f-09fb6be7d155/FinanceBill(FourthSitting)*

On the other hand, the IHT residence nil-rate band, 10 dense pages of foolish legislation, was slotted into F(no.2)A 2015, precluding debate and consideration, even though the rules only took effect from 2017/18! and even though there had to be a second installment of the legislation in FA 2016.

The 2020 reforms on IHT transfers to trusts were introduced in breach of the framework.[91]

The last part of the Tax Consultation Framework requires post-implementation monitoring and evaluation. This is almost never done.[92] It is interesting to speculate what would happen if it were. Much would depend on the identity of those carrying out the review and, in controversial areas, on their instructions and on their politics.[93]

1.11.3 *Alternatives to Framework*

There is one route and one route only to a good tax system: sound tax policy, devised by those with a sound understanding of the current tax system, carried out by those who have reflected seriously on the issues in the context of the tax system as a whole; a leisurely timetable of consultation and legislative drafting as envisaged in the Tax Consultation Framework and the 10 tax tenets of ICAEW.[94] That is a hard prescription, though CIOT and others continue to bang the drum, and IFS do useful work.[95]

It is tempting to look for easier solutions. Past attempts include the Tax Law Rewrite, which achieved little; and, perhaps, the GAAR.[96] Advocates of the GAAR claimed:

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91 See 75.12.7 (2020 trust rules: Critique).

92 Even in the cases where the FA 2018 required post-implementation reviews, the results were "singularly unilluminating. Most of them merely contains words to the effect of 'this legislation is new and we haven't yet seen how it will work in practice'." See Hubbard, Taxation Magazine, 4 April 2019.

93 See 115.13.5 (12 year limit: Critique).

94 *https://www.icaew.com/en/technical/tax/towards-a-better-tax-system/ten-tenets-of-tax*

95 See Institute for Government, "Better Budgets: Making tax policy better" (Jan 2017) *https://www.instituteforgovernment.org.uk/publications/better-budgets-making-tax-policy-better*

96 I have wondered whether the HMRC Charter might be added to this list, but its object lies in administration rather than substantive tax law. Its subject is "standards of behaviour and values to which HMRC will aspire when dealing with people in the exercise of their functions"; s.16A CRCA 2005.

> Enacting an anti-abuse rule should make it possible, by eliminating the need for a battery of specific anti-avoidance sub-rules, to draft future tax rules more simply and clearly. Also, fewer schemes would be enacted and so there will be less call for specific remedial legislation...In time, once confidence is established in the effectiveness of the anti-abuse rule, it should be possible to initiate a programme to reduce and simplify the existing body of detailed anti-avoidance rules.[97]

I am not sure if anyone seriously believed that, but it has not happened, and it seems unlikely that it will. But it will take several decades to assess whether the GAAR will yield a consistent case law and reasonable predictability of outcome.

1.12 The future

The 2017 reforms may put to an end the lobbying on the domicile issue from the left (also to some extent from beyond that). But that seems unlikely.

In the 2016/17 edition of this work I cited the assessment of Martin Wolf (chief economics commentator at the Financial Times):

> The chancellor has little interest in making the tax system less complex and more coherent.[98]

That still seems to be the case, and the conclusion in earlier editions of this work seems justified by events:

> The complexity and incoherence of the UK tax system will continue to increase for as long as the HMRC view prevails, that simplicity and coherence, while perhaps desirable, have low or nil priority in the context of tax reform;[99] and that the current state of tax and tax reform is good, or if it is not good, nothing can be done to make it better.

Perhaps the safest prediction is continued publication of new reports lamenting the existing state of tax legislation and seeking improvement. For the most recent, see Institute for Government, "Overcoming the

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97 Aaronson, *GAAR Study* (2011) para 1.7 *http://webarchive.nationalarchives.gov.uk/20130321041222/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf*

98 Financial Times 9 July 2015.

99 Thus the OTS has no role in the development of new tax law.

barriers to tax reform" (Apr 2020).[100]

100 *https://www.instituteforgovernment.org.uk/publications/overcoming-barriers-tax-reform* See too House of Lords Select Committee on the Constitution, "The Legislative Process: Preparing Legislation for Parliament" *https://publications.parliament.uk/pa/ld201719/ldselect/ldconst/27/27.pdf* (2017) For Finance Bill procedures, see House of Commons Briefing Paper 813, "The Budget and the annual Finance Bill" *https://commonslibrary.parliament.uk/research-briefings/sn04680*

CHAPTER TWO

TAX AVOIDANCE

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2.1 Tax avoidance: Introduction

Tax avoidance is as old as taxation itself;[1] but the topic has taken

1 For examples from 1798 and 1920, see "Tax Avoidance in 1798" *https://www.kessler.co.uk/wp-content/uploads/2013/06/Tax-avoidance-criticism-in-1798.pdf* and "Vestey: Royal Commission debate" *https://www.kessler.co.uk/wp-content/uploads/2017/11/Vestey_Royal_Commission*

prominence over the last decade, with extensive attention from parliament and the media.[2]

The subject impinges on many aspects of this book, but it is best to consider it as a topic and in a chapter of its own.

2.2 Avoidance/mitigation, evasion

I first discuss the complicated, emotionally charged, and in practice constantly abused term "tax avoidance."

2.2.1 *Terminology*

It is helpful to begin with a fourfold categorisation:

(1) *Tax evasion*: Conduct which constitutes a criminal offence (fraud on HMRC or similar offences). This normally involves dishonest submission of an incorrect tax return. Dishonesty is essential to the offence.

(2) *Honest misdeclaration*: The submission of an incorrect tax return without dishonesty. Those involved may be culpable (eg careless) but not dishonest.

(3) *Tax avoidance*: Arrangements that reduce tax liability in a manner contrary to the intention of parliament (I come later to consider this concept in more detail).

(4) *Tax mitigation*: Conduct which reduces tax liabilities without "tax avoidance" (not contrary to the intention of parliament).

The distinctions between these concepts (especially avoidance/evasion and avoidance/mitigation distinctions) are now commonplace. They may appear obvious. They are taught to every student. No sensible debate is possible without them. However, the concepts and their terminology have only emerged after a gradual process of development and even now the terminology is not always adopted. It is essential to bear this in mind on reading sources on this subject.[3]

_debate.pdf

2 It is interesting to speculate why that has been the case. I think the reasons lie in politics and sociology rather than tax law or practice. The Public Accounts Committee, and some effective pressure groups, have clearly contributed but given the pressure on the front page, why has their work received so enthusiastic a reception? The 2008 financial crisis and climate of austerity may be a factor.

3 eg the 1920 Royal Commission on the Income Tax Cmd. 615 discussed evasion, honest misdeclaration and avoidance in a chapter headed "The Prevention of Evasion", in which the words "avoidance" and "evasion" were used quite

2.2.2 *Avoidance/evasion distinction*

An avoidance/evasion distinction very similar to the present was recognised very early (and was surely self-evident at any time) but at first there was no terminology, or at least no commonly agreed terminology, to express it. In 1860 Turner LJ suggested evasion/contravention (where evasion stood for the *lawful* side of the divide).[4] In 1900 the distinction was noted as two meanings of the word "evade".[5] It is possible that the current use of the words avoidance/evasion in the modern sense originated in the USA where it was established by the 1920s.[6] But by 1936, at least, knowledgeable writers in the UK adopted the same terminology, and castigated those who did not:

> In referring to these devices, those who took part in the debates on the new [ToA] provisions in the House of Commons repeatedly used the word "evasion." Even the spokesmen of the Government at times allowed themselves this indulgence. The Financial Secretary to the Treasury (for example) described [s.18 FA 1936, transfer of assets] as

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indiscriminately, see para 625. It is an interesting question whether the absence of terminology hampered discussion of the issues or whether the lack of discussion or interest led to the absence of suitable terminology. I suggest the latter: in the 1920s, criminal prosecution for tax evasion was rare, and only in blatant cases. Thus the avoidance/evasion distinction was not relevant. Likewise, tax avoidance (in the modern sense) was then still in its infancy so the avoidance/mitigation distinction also had little relevance.

4 *Fisher v Brierly* (1860) 1 de G F&J 643 at p.663. It is a pity that this use of *contravention* did not catch on because it is more transparent than *evasion*.

5 *Bullivant v AG* [1901] AC 196 at p.207:
"The word 'evade' is ambiguous. ... there are two ways of construing the word 'evade': one is, that a person may go to a solicitor and ask him how to keep out of an Act of Parliament – how to do something which does not bring him within the scope of it. That is evading in one sense, but there is nothing illegal in it. The other is, when he goes to his solicitor and says, 'Tell me how to escape from the consequences of the Act of Parliament, although I am brought within it'. That is an act of quite a different character."

6 It is found in the scholarly Sears, *Minimising Taxes* (1922), and can be traced to Oliver Wendell Holmes in *Bullen v Wisconsin* (1916) 240 US 625 at p.630. It is regarded as basic in Hartman, *Tax Avoidance* (1930) which cites two textbook definitions in similar terms. Perhaps the practice of tax avoidance began earlier in the USA; the first published work on the subject in England was Moore, *The Saving of Income Tax Surtax and Death Duties* (1935), the publication of which lead to the enactment of the ToA provisions.

> a "Clause for the prevention of tax evasion",[7] while the Attorney-General, dealing with the same clause, spoke of "marginal cases in which there may be some element other than tax evasion".[8] Private members, and on at least one occasion the Financial Secretary,[9] spoke of "guilt" and "innocence" as though the House were discussing the suppression of crime.
>
> There can be no question of any real confusion of thought, but the confusion of language is none the less to be deprecated. The new provisions have nothing to do with "evasion"; they are concerned solely with legal avoidance.[10]

The distinction is accepted internationally:

> 72. The terms "tax evasion" and "tax avoidance" have not always been used precisely or with a uniform meaning. Strictly speaking, tax evasion is considered to consist of wilful and conscious non-compliance with the laws of a taxing jurisdiction. Tax evasion is an action by which a

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7 Official Reports, 15th June 1936, col. 676.

8 *Ibid*. col. 704.

9 *Ibid*. vol. 692.

10 Stein & Marks, *Tax avoidance: An interpretation of the provisions of the Finance Act, 1936, relating to transfers of assets, companies' sur-tax, children's settlements* (1936) p.1. Jacques Stein (1887–1973) was a significant figure in his day, and a foremost expert on taxation, according to *http://www.encyclopedia.com/religion/encyclopedias-almanacs-transcripts-and-maps/stein-leonard*.

Similarly, the 1955 Royal Commission Cmd. 9474 para 1016:

> "It is usual to draw a distinction between tax avoidance and tax evasion. The latter denotes all those activities which are responsible for a person not paying the tax that the existing law charges upon his income. *Ex hypothesi* he is in the wrong, though his wrongdoing may range from the making of a deliberately fraudulent return to a mere failure to make his return or to pay his tax at the proper time. By tax avoidance, on the other hand, is understood some act by which a person so arranges his affairs that he is liable to pay less tax than he would have paid but for the arrangement. Thus the situation which he brings about is one in which he is legally in the right, except so far as some special rule may be introduced that puts him in the wrong."

Note that "evasion" is used here (unlike present usage) to describe dishonest criminal evasion and honest mis-declaration. Lord Templeman used this (by then old-fashioned) terminology in *IRC v Challenge Corporation* [1986] STC 548: "Tax evasion occurs when the commissioner is not informed of all the facts relevant to an assessment of tax. Innocent evasion may lead to a re-assessment. Fraudulent evasion may lead to a criminal prosecution as well as re-assessment." It does aid clarity if the term "evasion" is restricted to what Lord Templeman terms "fraudulent evasion".

> taxpayer tries to escape legal obligations by fraudulent or other illegal means. The illegal conduct might involve simply failing to report income or fabricating deductions, or it may involve highly sophisticated tax planning that is premised on false or intentionally deceptive representations to the tax authorities. ...[11]
>
> 73. Tax avoidance, in contrast, involves the attempt to reduce the amount of taxes otherwise owed by employing legal means. However, the borderline between evasion and avoidance in specific cases may be difficult to define. For one thing, the criminal laws of countries differ, so that behaviour that is criminal under the laws of one country may not be criminal under the laws of another. In addition, the definitions of civil and criminal tax fraud may overlap, so that it is within administrative discretion whether or not to pursue a criminal fraud case in a specific instance. In reality, there is a continuum of behaviour, ranging from criminal fraud on one extreme, to civil fraud, to tax avoidance that is not fraudulent but which runs afoul of judicial or statutory anti-avoidance rules and therefore does not succeed in minimizing tax according to law, and finally to tax-planning behaviour which is successful in legal tax reduction. ...[12]

Avoidance/evasion distinctions are found outside tax, though the terminology may differ. Accountants for instance distinguish "creative accounting" (also known as aggressive accounting), which is legal; and accounting fraud, which is criminal.[13]

A discussion of criminal evasion is outside the scope of this book.

2.2.3 *Avoidance/evasion terms misused*

There are three contexts where the reader will see evasion/avoidance terminology misused (evasion being used for avoidance or vice versa).

The first is historical: in law reports and elsewhere, at least up to the 1970s.[14] It took a long time for the current usage to become fully

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11 The text muddies the waters here by adding: "In a broader sense, tax evasion may encompass a reckless or negligent failure to pay taxes legally due, even if there is no deliberate concealment of income or relevant information." But this is not common usage, and is better regarded as incorrect usage.

12 United Nations Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries) 2016 (footnotes omitted).

13 See Jones (ed) *Creative Accounting, Fraud and International Accounting Scandals* (2011).

14 Examples include: *Coutts v IRC* [1964] 1 AC 1393 at p.1420; *Jamieson v IRC* (1963) 41 TC 43 at p.70; *Cory v IRC* [1965] AC 1088 at p.1107; *Greenberg v IRC* (1971)

established.

The second context is in the writing of those not knowledgeable about tax, including lawyers[15] (non-tax lawyers) and politicians.[16] When writing for non-tax lawyers, it may be helpful to use the expressions "legal avoidance"[17] and "illegal evasion", to make the meaning clearer.

Thirdly, the distinction may be deliberately muddled for polemical effect:

> in practice tax evasion and avoidance are too often conflated ... For example, users of disguised remuneration schemes were troubled when the schemes were called "illegal" by the Chancellor of the Exchequer and the Financial Secretary to the Treasury. HMRC has not claimed that these schemes are illegal; rather that they are not effective, ... in reducing an individual's tax liabilities.[18]

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47 TC 240 at p.271: "Parliament attempted to prevent this and other methods of tax evasion by provisions in the FA 1960". This usage seems to have stopped in the 1970s; at this time UK economists were giving increasing attention to the subject of tax avoidance and evasion (*Tax Avoision*, p.1, IEA 1979) and perhaps their work had an effect on legal usage. Note that this is purely a semantic and not a substantive point that is being made here. The old usage certainly does not reflect the view that the evasion/avoidance distinction is unreal or unclear or that one can shade into the other. The legal distinction between the two is tolerably clear since evasion involves dishonesty, a tolerably well defined and understood concept. The term "avoision" used in the IEA publication referred to was coined as a convenient term to mean avoidance/evasion. The book noted the lack of *economic* distinction between the two concepts; the economic similarity was the justification for the new coinage. (The book also noted the blurring of a moral distinction between the two concepts either because avoidance was seen by some as immoral or because evasion was seen by some as not immoral; the book did not suggest a lack of a legal distinction which was unquestioned then and still should be now.)

15 For example, see *R v Charlton* [1996] STC 1418 at p.1421.
The avoidance/evasion distinction in UK terminology is not adopted in EU law, which has a distinct technical terminology: see 102.3 (EU-law terminology); 102.15.2 (Abuse/avoidance/evasion: Terminology).
Similarly, s.482 United States Internal Revenue Code refers to allocation of income that "is necessary to prevent evasion of taxes" but the intended concept is one of avoidance.

16 Eg The Progress Tackle Tax Avoidance Charter: "HMRC HAS GOT TO GET A GRIP … 4. Get tough on tax avoiders by mounting more prosecutions." See *http://www.progressonline.org.uk/campaigns/tackle-tax-avoidance*

17 "Legal avoidance" is a standard term in recent double tax conventions.

18 House of Lords Economic Affairs Committee "HMRC: Treating Taxpayers Fairly" (2018) para 23, 24.
https://publications.parliament.uk/pa/ld201719/ldselect/ldeconaf/242/242.pdf
The report recommended "Clearer distinctions are needed in the Government's

It is sometimes hard to tell whether the misuse is deliberate or accidental.

2.3 Politics of tax avoidance

The topic is political, so I begin with a politician (David Cameron):

> Of course there is a difference between tax evasion and tax avoidance. Evasion is illegal. It can and should be subject to the full force of the criminal law.
> But what about tax avoidance? Now of course there's nothing wrong with sensible tax planning and there are some things that governments want people to do that reduce tax bills, such as investing in a pension, a start up business or giving money to a charity. But there are some forms of avoidance that have become so aggressive that I think it is right to say these raise ethical issues, and it is time to call for more responsibility and for governments to act accordingly.
> In the UK we've already committed hundreds of millions (?) into this effort, but acting alone has its limits. Clamp down in one country and the travelling caravan of lawyers, accountants and financial gurus will just move on elsewhere. ...
> I believe in low taxes, that is why my government is cutting the top rate of income tax, we've cut corporation tax. [*Delete - political*].[19]
> Individuals and businesses must pay their fair share. And businesses who think they can carry on dodging that fair share, or that they can keep on selling to the UK and setting up ever more complex tax arrangements abroad to squeeze their tax bills right down, well they need to wake up and smell the coffee, because the public who buy from them have had enough.[20]

All the main tropes of the political debate are in this passage:
(1) Everyone should pay a "fair share" of tax.
(2) Some taxpayers fail to do so due to tax avoidance.

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approach and rhetoric towards tax avoidance." But the Government rejected the recommendation, so this debate will continue: HMRC, "The Powers of HMRC: Treating Taxpayers Fairly (House of Lords Paper 242) Government Response" p.2 *https://www.parliament.uk/documents/lords-committees/economic-affairs/Govt%20HMRC%20Powers%20report%2022%20Jan%202019%20.pdf*

19 This side note is included in the version of the speech published online; one wonders what happened when the speech was delivered.

20 David Cameron speech to World Economic Forum in Davos, 2013 *https://www.gov.uk/government/speeches/prime-minister-david-camerons-speech-to-the-world-economic-forum-in-davos*

(3) Tax avoidance is unethical, immoral or anti-social.
(4) Acknowledgement of the avoidance/evasion distinction;[21] but it does not contradict point (3). In the words of Margaret Hodge: "We're not accusing you of being illegal, we're accusing you of being immoral."
(5) Disparaging references to tax advisers.[22]

On the political left, the same points are made, but more stridently, and, of course, without Cameron's approval of low taxes.

2.4 Need for analysis

This chapter draws on a paper published by the Oxford University Centre for Business Taxation, (the **"OUCBT paper"**).[23] The OUCBT paper says:

> The question is how to tackle the problems. This requires a clear analysis of their cause and differentiation between different causes. Labelling a whole range of quite different behaviours as "avoidance" without further differentiation is unhelpful. ...

Differentiation requires terminology. As there is no agreed terminology, it is best not to use any terms at all without some explanation of what is meant.

2.4.1 *Categorisation of avoidance*

If one is to identify the correct response to the problems of avoidance, one must distinguish:
(1) **Ineffective avoidance** (no tax saving if the law is correctly applied)
(2) **Effective avoidance** (tax saved by avoidance)
(3) **Non-avoidance** (little tax paid but not due to avoidance)[24]

These are important distinctions because:
(1) Ineffective avoidance may be countered by enforcement of the law.
(2) Effective avoidance can only be countered by changes in tax law.
(3) In cases of non-avoidance:

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21 I suspect newspaper libel readers (rightly) insert this if a journalist overlooks it.
22 This feeds on a very ancient trope concerning lawyers.
23 "Tax avoidance" (2012) *http://eureka.sbs.ox.ac.uk/4428/2/TA_3_12_12.pdf* (I omit some footnotes here).
24 The OUCBT paper adopts the somewhat unhelpful labels "categories A, B, and C". It is difficult to find short labels which neatly sum up the concepts: "Ineffective avoidance" is not ideal as this is not really "avoidance" at all.

(a) It may be no change in tax law is appropriate.[25]
(b) If change is needed, the change is one of policy as well as of tax law; and the matter should be considered without the haste and moral outrage that effective avoidance tends to cause.

If one wishes to assess emotional and moral responses to avoidance, and actual or theoretical anti-avoidance rules, we need further vocabulary to discuss the range of tax-motivated behaviour.

We might cover the terrain in four categories:[26]

Uncontroversial tax planning Taking advantage of a tax relief in a manner *everyone* would accept as reasonable and indeed desirable. As this is at the bottom of the spectrum, it is easy to find clear examples: for instance, pension contributions, and moderate[27] charity giving.[28] This is so even if, as is usually the case, care is needed in order to use or to maximise the relief, for instance, limiting contributions each year to below the cap for the relief, or limiting benefits within the permitted limits for gift aid.

Ordinary tax planning Using tax legislation in a way which *some* politicians and commentators do not like, but where the planning is ordinary in the sense that many people have done and continue to do it; it is obvious and foreseeable; the point probably came to the mind of those responsible for the legislation, or should have done, or there is no reason to think that parliament would have done anything different if it had considered the point. Ordinary tax planning is not contrary to the "intention of parliament" as that construct is normally understood.

Examples are:

(1) Advancing or delaying
    (a) disposals for CGT purposes or

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25 It may be that a change in public expectation or knowledge is desirable.

26 There are many ways to slice this cake. Lord Walker proposed seven types of tax avoidance (a riff on Empson's *Seven Types of Ambiguity*): "Ramsay 25 years on" [2004] LQR 120. Contrast Barnett, "A baker's dozen" Taxation Magazine, 2 August 2012. But one must resist the temptation to taxonomy for its own sake. Classification is (or should be) purposive: a useful taxonomy must draw *useful* distinctions: it should identify categories which call for different responses, and only those.

27 In the debate on the Budget 2012, some said that giving more than £50k or 25% of income was excessive.

28 These are the examples which Cameron called "sensible tax planning" in the quote at the start of this chapter.

(b) payment of income (eg by dividends or bonus)
(c) pension contributions for IT purposes
in anticipation of changes of rates or going non-resident
(2) Transfer of family assets or business to a spouse to equalise income
(3) Transfer to a company to reduce tax rates
(4) Lifetime giving to avoid IHT
(5) Going non-resident

The term "tax mitigation" could be used to cover uncontroversial tax planning and ordinary tax planning.

Tax avoidance Something legal but contrary to the intention of parliament in the sense that had parliament thought about it, it would probably prevent the tax advantage. Examples are likely to have been counteracted by subsequent legislation (though it may be a matter of judgement whether the legislation is to stop avoidance or reflects a change in policy. Examples are:
(1) Transfer of assets abroad (counteracted by ToA code)
(2) The scheme in *Furniss v Dawson* (counteracted by s.137 TCGA)
(3) Temporary non-residence (counteracted by TNR rules); but one might place that at the upper reaches of the ordinary tax planning spectrum

Tax abuse Tax avoidance with aggravating features (typically, self-cancelling steps) that make it (more) unreasonable.[29] As this is at the top of the spectrum, it is easy to find clear examples: take the schemes in: *Ramsay*, *Fitzwilliam*, *Astall*, *Mayes*, *UBS*.

Thus this terminology raises three distinctions:
(1) Uncontroversial/ordinary tax planning
(2) Tax planning/avoidance
(3) Tax avoidance/abuse

Before considering whether these distinctions have, or should have, different consequences, it is important to note three difficulties which they entail:

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29 The epithet commonly used is "egregious" or "aggressive". That does not clarify anything but it neatly expresses the point.
For completeness: In technical EU-law terminology the term "abuse" is used in a different sense; see 102.15.2 (Abuse/avoidance/evasion: Terminology); similarly in OECD discussion; see 104.7 (OECD-concept abuse). However we are not concerned with that usage here.

(1) *Demarcation problems* Except at the extreme ends of the spectrum, the demarcation problem is intractable: the classification of specific examples (if it actually had to be decided) would give rise to endless disagreement (and has done so in the context of tax motive defences). There are two reasons for this:
   (a) The distinctions rely on:
      (i) imponderable hypothetical questions (what would parliament have done if it had noticed the issue?)
      (ii) vague constructs ("intention of parliament" and "spirit of the legislation")
      (iii) identifying tax policy (there may be no clear policy, or it may fluctuate)
   (b) The four distinct categories attempt to impose an order on tax motivated behaviour which exhibits a scale of unreasonableness, without distinct divisions. It might be better to mark out a sliding scale from 1 to 10, recognising finer distinctions, but that would not help for practical purposes. It is often the case that experience is a continuum on which the law seeks to impose bipolar categories, but the difficulty in doing so here is greater than usual because the distinction is more imponderable.

(2) *Tax-law knowledge problems* Except for the extreme ends of the spectrum, (a small part of the field) a serious discussion of where any particular arrangement should be classified, or graded, can only be carried out by someone who understands the tax background. Few non-practitioners have much understanding. Journalists in the UK do not arrange for their work to be reviewed by someone who understands tax. Politicians are characterised by grandstanding and soundbites. Pressure groups grind their axes. The details, important to those within the profession, are likely to bore or bewilder most people outside it.

(3) *Factual knowledge problems* If discussing particular instancies, one needs to know the facts, which are not usually in the public domain.

2.4.2 *Why distinctions matter*

The distinctions I have drawn are not entirely satisfactory, but it is hard to think of better.

The ordinary tax planning/tax avoidance dividing line is established in tax law at least since *Willoughby* (1997). It marks the point where:

(1) Tax motive provisions begin to bite

(2) Extra-statutory concessions cease to apply
(3) HMRC Manuals cease to bind HMRC[30]

For this distinction, see 38.15 (Avoidance/mitigation distinction) to 38.48 (Tax avoidance: Critique).

The tax avoidance/tax abuse distinction was established in 2013: it marks the point at which the GAAR is intended[31] to bite:

> The Government agrees with the Report's recommendation to introduce a rule which is targeted at artificial and abusive arrangements (those that the Report refers to as "egregious", "very aggressive" or "highly abusive contrived and artificial"). It accepts the Report's conclusion that introducing a "broad spectrum" general anti-avoidance rule would not be beneficial for the UK tax system. ... the GAAR should not affect what the Report describes as "the centre ground of tax planning".[32]

There has not been much judicial discussion (the issue has not arisen for decision) but a passage in *Furniss v Dawson* recognises something like a tax avoidance/abuse distinction:

> The scheme [in *Furniss*] has none of the extravagances of certain tax avoidance schemes which have recently engaged the attention of the courts, where the taxpayer who has been fortunate enough to realise a capital profit has gone out into the street and, with the aid of astute advisers, manufactured out of a string of artificial transactions a supposed loss in order to counteract the profit which he has already made. The scheme before your Lordships is a simple and honest scheme which merely seeks to defer payment of tax until the taxpayer has received into his hands the gain which he has made.[33]

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30 HMRC Guidance Manuals introduction: "Subject to [limited specified] qualifications readers may assume the [HMRC Manual] guidance applies in the normal case; but where HMRC considers that there is, or may have been, avoidance of tax the guidance will not necessarily apply."
http://www.hmrc.gov.uk/manuals/advisory.htm

31 The statutory definition (perhaps unavoidably) allows some scope for mission creep. Section 207(2) FA 2013 provides for the purposes of the GAAR:
"Tax arrangements are "abusive" if they ... cannot reasonably be regarded as a reasonable course of action...".
It is significant that the GAAR is called a general anti-*abuse* rule, not a general anti-*avoidance* rule. The extent to which HMRC or the Courts will focus the GAAR on this target remains to be seen. See 23.6.7 (Sale of company: GAARable?)

32 HMRC consultation document "A General Anti-Abuse Rule" (2012) para 2.1.

33 [1984] AC 474 at p.518.

The uncontroversial/ordinary tax planning distinction is not relevant in tax law, but it is relevant to the public debate on morality.

2.5 Tax avoidance and morality

2.5.1 *Morality and taxation*

This is intended to be a practical work. The relationship between morality and law (or tax-morality and tax law) is another book. But attitudes to the (im)morality of tax avoidance do have practical consequences for tax: it affects judicial attitudes and decisions; it was a driver for the enactment of the GAAR and will play an important role in its interpretation.

The topic of the relationship between morality and taxation should be seen as part of a wider discussion of the relationship between morality and law. Without entering into these deep waters, it should generally be accepted that not everything which is immoral should be proscribed by law.

2.5.2 *Judicial view in the past*

Older cases uniformly regard tax avoidance as morally neutral. In 1900:

> Bundey J. recognises to the full both the legal *and the moral* right of every man to dispose of his property if he can in a way which does not expose it to be taxed under the existing system of taxation.[34]

In 1922:

> it is perfectly open for persons to evade[35] this particular tax if they can do so legally. I again say I do not use the word "evade" with any dishonourable suggestion about it. If certain documents are drawn up, and the result of those documents is that persons are not liable to a particular duty, so much the better for them.[36]

In 1926:

> the highest authorities have always recognised that the subject is entitled so to arrange his affairs as not to attract taxes imposed by the Crown, so far as he can do so within the law, and that he may legitimately claim the advantage of any express terms or of any omissions that he can find

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34 *Simms v Registrar of Probates* [1900] AC 323 at p.333.

35 Nowadays one would use the word "avoid" here; but the modern terminology had not developed at this point; see 2.2.2 (Avoidance/evasion distinction).

36 *Hawker v Compton* 8 TC 306 at p.30.

> in his favour in taxing Acts. In so doing, he neither comes under liability *nor incurs blame*.[37]

During the second world war, judicial opinion changed:

> of recent years much ingenuity has been expended in certain quarters in attempting to devise methods of disposition of income by which those who were prepared to adopt them might enjoy the benefits of residence in this country while receiving the equivalent of such income, without sharing in the appropriate burden of British taxation. Judicial dicta may be cited which point out that, however elaborate and artificial such methods may be, those who adopt them are "entitled" to do so. There is, of course, no doubt that they are within their legal rights, but that is no reason why their efforts, or those of the professional gentlemen who assist them in the matter, should be regarded as a commendable exercise of ingenuity or as a discharge of the duties of good citizenship. On the contrary, one result of such methods, if they succeed, is, of course, to increase pro tanto the load of tax on the shoulders of the great body of good citizens who do not desire, or do not know how, to adopt these manoeuvres.[38]

And again:

> The [ToA] Section[39] is a penal one and its consequences whatever they may be, are intended to be an effective deterrent which will put a stop to practices which the Legislature considers to be against the public interest. For years a battle of manoeuvre has been waged between the Legislature and those who are minded to throw the burden of taxation off their own shoulders on to those of their fellow subjects. In that battle the Legislature has often been worsted by the skill, determination and resourcefulness of its opponents ... It would not shock us in the least to find that the Legislature has determined to put an end to the struggle by imposing the severest of penalties. It scarcely lies in the mouth of the taxpayer who plays with fire to complain of burnt fingers.[40]

Howard de Walden expresses an ethos which (along with the military metaphor) should be attributable to the wartime background; "as we are

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37 *IRC v Fisher's Executors* 10 TC 302 at p.340. If yet another example is needed, which I doubt, see *Levene v IRC* 13 TC 486 at p.501-502.

38 *Latilla v IRC* 25 TC 107 at p. 117.

39 See 45.2 (Construction of ToA provisions).

40 *Howard de Walden v IRC* 25 TC 121at p.124.

at war, the ordinary mode of construing legislation has been suspended".[41]

After the war, the old orthodoxy returned. In 1965:

> The fact that a settlement is drawn with a view to avoiding particular charging provisions is *neither reprehensible, nor* a proper ground for inclination to a conclusion that it ought to come within those or some other charging provisions. ... If any moral criticism could be levelled at them, then the consciences of the judges of the Chancery Division, in the exercise of their discretionary jurisdiction under the Variation of Trusts Act 1958, would be in a sorry state.[42]

Lord Diplock expressed the traditional view in 1964:

> Tax law no more lies within the field of morals than does a crossword puzzle.[43]

Likewise in 1982:

> the fact that the purpose of the scheme was tax avoidance does not carry any implication that it was in any way reprehensible or other than perfectly honest *and respectable*.[44]

Without attempting a full survey, which would require a team of experts, it appears that the same view was held throughout the common law world. In America in 1947:

> Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands: taxes are enforced exactions, not voluntary contributions. To demand more in the name of morals is mere cant.[45]

Oliver Wendell Holmes is often quoted for his extra-judicial comment "I like to pay taxes. With them I buy civilization."[46] But those who quote

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41 Darling J, cited in Foxton, "*R v Halliday* in Retrospect" [2003] LQR 455.

42 *Re Kirkwood* [1965] Ch 286 at p.327.

43 Diplock, "The Courts as Legislators" Address to The Holdsworth Club (1965) *https://www.kessler.co.uk/wp-content/uploads/2012/05/CourtsAsLegistlators.pdf*

44 *IRC v Burmah Oil* 54 TC 200 at p.220; followed in 1988 in *Craven v White* 62 TC 1 at p.196.

45 *Commissioner v Newman*, 159 F2d 848 (1947). The case concerned the taxation of settlor-interested trusts.

46 In *Ensign Tankers v Stokes* [1992] STC 226 at p.235 the apophthegm is paraphrased, with, perhaps, a change of nuance: "taxation is the price which we pay for

that tend to quote selectively. The same judge said:

> The only purpose of the vendor here was to escape taxation... The fact that it is desired to evade the law, as it is called, is immaterial, because the very meaning of a line in the law is that you may intentionally go as close to it as you can if you do not pass it.[47]

In Australia in 1995:

> The obligation to pay [income tax] is a legal one. Some politicians try to treat it as a moral obligation. But it is not. The citizen is bound to pay no more tax than the statute requires him to pay according to the relevant state of his affairs.
> Consistently with this view, it has long been a principle of the law of income taxation that the citizen may so arrange his affairs as to render him less liable to pay tax than would be the case if his affairs were cast in some different form. .. This is sometimes expressed as a right to avoid tax.[48]

2.5.3 *Pro-avoidance rationale*

The following points can be made in favour of the traditional view, that tax avoidance is morally neutral:

(1) *Difficulties of "right" amount of tax*
The tax system is full of anomalies, artificial, arbitrary, and not based on any consistent principles. One might say there is generally no "right" amount of tax except in the sense of what is due by statute.

(2) *Difficulty of applying moral principles*
This is perhaps another way of putting point (1): The view that taxation is governed by moral principles distinct from the rules of black letter tax law either:

(a) requires one to enter into the intractable distinction of tax avoidance/abuse; or
(b) spreads the net very wide, far wider than any practitioner is likely to accept (and still requires one to enter into the intractable distinction of uncontroversial/ordinary tax planning).

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civilisation."

47 *Superior Oil Co v. Mississippi* 280 US 390.

48 Sir Garfield Barwick (Chief Justice of Australia 1964–81), *A Radical Tory* (1995) at p.229.

In practice, public debate does not engage with black letter tax law and it is difficult to envisage that it ever would or could. Ethics is a practical subject. It only works if the entities called "right" and "wrong" are reasonably distinguishable and of a more or less permanent nature. If standards are so vague, or so difficult to apply in actual cases, that we cannot see how we could act on them, we become sceptical. That suggests that morality has little if any role to play.

(3) *Egregious over-taxation*

I coin the expression **"egregious over-taxation"** to refer to situations where HMRC take advantage of anomalies in their favour in a manner which is unfair and contrary to the intention of Parliament (as that expression is understood in a tax avoidance context). It is the opposite of tax avoidance. Three distinct sub-issues arise here:

(a) Does egregious over-taxation arise in practice
(b) Is it proper for HMRC to seek egregious over-taxation
(c) What light does that shed on the issue of tax avoidance morality

Issue (a) is a question of fact, to which the short answer is, yes. Of course the Courts generally try to construe statutes to prevent egregious over-taxation, just as they try to prevent avoidance; but sometimes they do not achieve this. For instance, the unfortunate Mr Lobler fell into the trap of a partial surrender of life policies:

> He made no profit or gain as that term is commonly or commercially understood and yet he becomes liable to pay tax which exhausts his life savings and may bankrupt him. That is an outrageously unfair result....
> This is legislation which does not seek to tax real or commercial gains. Thus it makes no sense to say that the legislation must be construed to apply to transactions by reference to their commercial substance….No overriding principle can be extracted from the legislation....
> Thus with heavy hearts we dismiss the appeal.[49]

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49 *Lobler v HMRC* [2013] UKFTT 141 (TC). In order to avoid the unfairness the Upper Tribunal allowed the appeal, though it had to rewrite the law of rectification as previously understood in order to do so; see [2015] UKUT 152 (TCC). The law was later amended; See 62.3.5 (Partial surrender trap). But that does not affect the point being made here.
For another example, see *Hunters Property v HMRC* [2018] UKFTT 96 (TC), where EIS relief was unfairly lost, because a group company was member of a guarantee company which was "merely a vehicle for holding client funds and had no intrinsic value of its own".

There are then four possible moral approaches:

View	Tax avoidance	Egregious over-taxation
1	Wrong	Right
2	Right	Wrong
3	Wrong	Wrong
4	Right	Right

One might perhaps adopt view 1, that tax avoidance is wrong but egregious over-taxation is right, in short, fairness should apply in favour of HMRC but not the taxpayer; but no-one has had the temerity to advocate that.

One might perhaps adopt view 2, that tax avoidance is right, but HMRC should be bound by a further requirement of fairness; but few if any advocate that either.

So if sauce for the goose is sauce for the gander, we are limited to views 3 or 4.

View 3 is possible, but it is not supported by HMRC. Those who support the view that tax should be governed by rules rather than discretion also cannot logically criticise HMRC for seeking egregious over-taxation, where the law requires, though can criticise them for not seeking to change the law promptly after unfairness has been identified (and, if appropriate, publish an ESC to operate in the meantime).

So we fall back on view 4, thus this consideration supports the view that there is nothing wrong in avoidance.[50]

One might wish that HMRC were as concerned about egregious over-taxation as they are about its flipside, avoidance, (egregious or otherwise). Of course, egregious over-taxation is different in that it brings in revenue rather than losing it; however, in addition to the unfairness for its victims, it has an intangible cost in that it brings the UK tax system into disrepute. But there it is.

(4) *Tax avoidance sometimes leads to fair results*

This relates to point (3): There are cases where tax avoidance avoids egregious over-taxation. An example is the use of multiple policies to avoid the tax trap of partial surrender.[51]

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50 For an example of this line of reasoning in use, see the *Ayrshire Pullman* quote below.

51 See 62.3.5 (Partial surrender trap).

Parliament sometimes admits this, by enacting a new relief to allow directly what had previously been achieved by avoidance. Examples are:

(a) Nil rate band discretionary trusts, which allowed transferable nil rate bands before the IHT relief was enacted in 2007.

(b) CGT group relief to obtain loss relief. A company about to realise a gain on an asset would formerly transfer it to a group company that had realised an allowable loss. Alternatively, a company which had realised a gain might acquire from a group company an asset which was to be sold at a loss. That would allow the loss to be set against the gain before the introduction of the election to allocate gains and losses around a group, in 2009.[52]

Offshore trusts mitigate the economically deleterious lock-in effect of CGT by deferring tax until gains are received.

Tax avoidance (if it be such) sometimes permits a business to continue which would otherwise be destroyed by taxation.[53]

Related to this is the use of tax avoidance for political/economic ends. High tax rates may be mitigated by avoidance, achieving a pragmatic compromise between incompatible political viewpoints, or allowing a public perception which is different from the reality. IFS say:[54]

> ... in principle, it would be efficient to tax relatively mobile activities at a lower rate in order to avoid deterring mobile activities while allowing a higher rate to be supported on less mobile activities.[55] Avoidance behaviours are one way that de facto lower rates on more mobile income are achieved. ... In this case, there may even be benefits to the UK from avoidance opportunities if the lower tax rates achieved on mobile activities – for example, through profit shifting – mean that more real activity is in the UK than would otherwise be the case.[56]

This fudge has its costs, including the inefficiencies that arise from tax planning, fiscal instability and public cynicism; but it happens.

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52 Section 171A TCGA.

53 For an example, see *Fisher v HMRC* [2014] UKFTT 805 (TC).

54 IFS, *Green Budget 2013* p.290 *http://www.ifs.org.uk/budgets/gb2013/gb2013.pdf*

55 Footnote original: See Mirrlees et al., *Tax by Design: The Mirrlees Review* (2011) *https://www.ifs.org.uk/publications/5353* at p.12.

56 Footnote original: There is an academic literature on the costs and possible benefits of tax planning. See for example, D. Dharmapala, "What problems and opportunities are created by tax havens?", Oxford Review of Economic Policy, 2008, 24, 661–79.

2.5.4 *Practitioner/judicial views today*

The above sets out a powerful intellectual case in favour of the view that avoidance, like Lord Diplock's crossword, is morally neutral. It was formerly generally accepted, and has never been refuted. But the argument has been found less convincing, or unconvincing, I think for two reasons:

(1) The traditional view was formed in earlier times when there was tax avoidance but little (if any) activity in the category of tax abuse. When that changed, I think in the 1970's, the view became far reaching, and so might be regarded more skeptically.

(2) The argument requires an understanding of the tax system as it actually is. Politicians and other non-tax practitioners entered into the debate without that knowledge.

Whatever the reason, the argument has become perceived as less cogent. By 2007:

> For many directors, the objection to arrangements that are in their view 'too' artificial may be framed largely in terms of business ethics. Other directors, equally determined to behave in an ethical way, may consider that the degree of artificiality is not an ethical issue provided no attempt is made to misrepresent the facts or to hide them from the tax authorities....
>
> At one time such a view would perhaps have been more widely held than now. At the present time it represents one end of a range of views in a debate where probably most commentators would hold that within the compass of what is legal there is some behaviour that is acceptable and some that is not...[57]

In 2011, Aaronson's GAAR study reported the views of taxpayer representative bodies:

> There was unanimous disapproval, indeed distaste, for egregious tax avoidance schemes.[58]

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57 David Williams "Developing the Concept of Tax Governance" (February 2007) *http://webcache.googleusercontent.com/search?q=cache:gn5Xu4GPUIMJ:www.ibrarian.net/navon/paper/Tax_and_Corporate_Social_Responsibility.pdf%3Fpaperid%3D8404118+&cd=7&hl=en&ct=clnk&gl=uk*

58 Aaronson, *GAAR Study* (2011) *http://webarchive.nationalarchives.gov.uk/20130321041222/http:/www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf*

Of course tax practitioners do not all share the same view. But I think it is the case that they are mostly drawn to the view that opprobrium should only attach at the top end of the scale, in cases of tax abuse, in which case the GAAR has more or less rendered the issue academic; or if any opprobrium attaches to tax motivated behaviours lower down the scale, the amount of opprobrium should vary according to the scale.

This might be consistent with Lord Templeman's views in tax abuse cases, which were expressed trenchantly (some would say, stridently[59]):

> In common with my predecessors I regard tax-avoidance schemes *of the kind invented and implemented in the present case* as no better than attempts to cheat the Revenue.[60]

This may be consistent with recent comments of the Supreme Court. In 2014:

> Since the seminal decision of the House of Lords in *Ramsay v IRC*[61] there has been an increasingly strong and general recognition that *artificial* tax avoidance is a social evil which puts an unfair burden on the shoulders of those who do not adopt such measures.[62]

"Social evil" represents the top end of judicial rhetoric in recent times;[63] though the scope of the critique also depends on the word "artificial", which may mean little or much.[64]

And again in 2015, but more moderately expressed:

> [Tax avoidance] gives rise to social costs which are significant and increasingly controversial.[65]

There is no current judicial unanimity, and the pendulum may swing erratically. In a rating avoidance case in 2019:

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59 Lord Neuberger referred more tactfully to Lord Templeman's "characteristically colourful language"; *R oao Evans v Attorney General* [2015] UKSC 21 at [53].

60 *IRC v Fitzwilliam* 67 TC 614 at p.756. Lord Templeman's claim that his attitude is held in common with his predecessors is untenable. But it is held in common with his successors.

61 54 TC 101.

62 *Futter v HMRC* 81 TC 912 Supreme Court at [135] (emphasis added).

63 Though "social evil" differs from evil as "social justice" differs from justice.

64 *Nourse v Heritage Trustees* (15th January 2015) at [15] and [71] accessible *www.kessler.co.uk*.

65 *Pendragon v HMRC* [2015] STC 1825 at [5].

> Views may differ as to whether the purpose for which the SPVs were used was socially reprehensible.[66]

2.5.5 *Avoidance: Discretionary remedies*

In *Altus Group v Baker Tilly* negligent accountants argued it was contrary to public policy to award damages for their failure to advise or implement an avoidance scheme. The argument was summarily rejected.[67]

Where courts grant discretionary remedies, the question arises whether a tax avoidance scheme context is a reason to refuse the remedy. Examples of discretionary remedies include: setting aside a gift for mistake, rectification, applications under the Variation of Trusts Act 1958, and remedies for unfair prejudice to minority shareholders.

Estera Trust (Jersey) v Singh was an unfair prejudice case. The minority shareholder was a non-resident trust. The Court ordered the company ("the defendant co") to purchase the trust shares. Unfortunately that would be a distribution for tax purposes, and subject to IT at the dividend trust rate. The trust proposed a different arrangement:

(1) The trust transferred the shares to a newly created company wholly owned by the trust ("Newco")
(2) The defendant co purchased its shares from Newco

This would avoid the IT charge.[68] The Court refused to order this arrangement for a variety of reasons, but one of them was that:

> the scheme ... could be regarded as aggressive tax avoidance, even though relatively unsophisticated in comparison with other notified avoidance schemes. The Court should not without very good reason order reluctant parties to enter into a scheme that could be held to be improper (in the sense that I have identified).[69]

A tax practitioner may be surprised that this simple arrangement could be regarded as "aggressive"; for as the Court acknowledged, it is "perfectly common" for Jersey trusts to own companies that hold trust assets. But practitioners should remember that these issues are not decided by tax practitioners.

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66 See 72.17.4 (Companies: Situs planning).

67 [2015] STC 788 at [59](3) and [65].

68 The case was not a tax case, and does not give much tax analysis. For completeness: the transfer at step (1) would in principle give rise to a trust gain but presumably that did not matter on the facts of the case.

69 [2019] EWHC 2039 (Ch) at [26].

In Guernsey, an ill-advised gift to an EBT was set aside for mistake. The fact that the individual was seeking to avoid UK tax was not a reason for the Guernsey Court to refuse relief.[70] But UK tax avoidance may be regarded with less hostility in foreign jurisdictions, and especially in tax haven jurisdictions. Foreign courts may also be more sympathetic than UK courts to taxpayers facing unfair or penal anti-avoidance rules.[71]

2.5.6 *Impact of the GAAR*

Has the GAAR altered the position? GAAR guidance provides:

> B2.1 The GAAR Study Group Report was based on the premise that the levying of tax is the principal mechanism by which the state pays for the services and facilities that it provides for its citizens, and that all taxpayers should pay their fair share. This same premise underlies the GAAR.
>
> It therefore rejects the approach taken by the Courts in a number of old cases[72] to the effect that taxpayers are free to use their ingenuity to reduce their tax bills by any lawful means, however contrived those means might be and however far the tax consequences might differ from the real economic position.

HMRC cite one of the best known dicta in taxation:

> [1] No man in this country is under the smallest obligation, moral or other, so to arrange his legal relations to his business or to his property as to enable the Inland Revenue to put the largest possible shovel into his stores.
>
> [2] The Inland Revenue is not slow - and quite rightly - to take every advantage which is open to it under the taxing Statutes for the purpose of depleting the taxpayer's pocket.
>
> [3] And the taxpayer is in like manner entitled to be astute to prevent, so far as he honestly can, the depletion of his means by the Revenue.[73]

HMRC say that the GAAR has changed this:

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70 *Whittaker v Concept Fiduciaries* (Guernsey judgment 15/2017).

71 See App 12.5.1 (Critique of s.87 regime).

72 The phrase "a number of old cases" is a tendentious way of referring to judicial authorities to that effect from the earliest times until at least 1983; see 2.5.2 (Judicial view in the past). But GAAR guidance is not a neutral document: it is written by HMRC and adopts an HMRC perspective.

73 *Ayrshire Pullman Motor Services v IRC* 14 TC 754 at p.763.

> [The above quote] epitomises the approach which Parliament has rejected in enacting the GAAR legislation.[74]

At the abuse end of the spectrum, the GAAR now applies, so the rules have indeed changed. This impinges on the avoidance-morality debate insofar as the debate only concerns successful avoidance, ie avoidance not caught by the GAAR. But nothing else has changed. *Ayshire* itself was *not* an abuse case (the issue was whether the taxpayer's children had entered into a valid partnership) and the decision would not have been affected by the GAAR. Proposition [1] of the quote is still correct. It also continues to be the case that HMRC enforce egregious over-taxation when the rules work in their favour, and it is unlikely that they intended to cast doubt on proposition [2]. And proposition [3] is still broadly correct, though now qualified in more extreme cases of abuse.

The above paragraph is reading the text closely and in the manner of a lawyer. It is it is a matter of speculation as to what thoughts were actually in the mind of the author of the GAAR guidance. I think we are in the territory of mood music here.

The rhetoric continues:

> Taxation is not to be treated as a game where taxpayers can indulge in any ingenious scheme in order to eliminate or reduce their tax liability.

The game metaphor begs an essay to itself.[75]

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74 HMRC, "GAAR Guidance" (2017) *https://www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules*

75 What, in fact, is a game? It is an elastic concept which can be analogised in different ways. What is it in the notion of game which HMRC would characterise as significantly different from tax? Is it a notion of non-seriousness? Or an adversarial approach? Or a notion of a rule-based activity? Or arbitrary rules? In the latter three respects, tax law and general law very much resemble games.
Perhaps the thinking is that games are morally neutral, whereas tax avoidance is held up as morally obnoxious. If this is the point, it is significant that a moral based argument needs to present itself in non-moral terminology.
These problems suggest that it would help clarity of thinking not to use the word "game": a stale and failed metaphor. See Midgley, *Heart and Mind* (1981) chapter 8 (The game game).
However the game metaphor seems to be irresistible, in rhetoric if not in sober thought. For a recent judicial example, see *Clark v HMRC* [2020] EWCA Civ 204 at [114]: "Both grounds seem to me to be examples of tax litigation as a board game, with large prizes for the winners. People who pay tax in the usual way are entitled to feel aggrieved when elaborate avoidance schemes ... succeed."

2.5.7 *Codes of practice/regulators*

PCRT provides:

> Members must not create, encourage or promote tax planning arrangements or structures that
> i) set out to achieve results that are contrary to the clear intention of Parliament in enacting relevant legislation and/or
> ii) are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation.[76]

I take this as a rough paraphrase of the GAAR. But as no-one would sensibly advise clients to enter into avoidance schemes which do not work, because of the GAAR or otherwise, it is (more or less) meaningless exhortation.

A more literal reading might take this as prohibiting advice on avoidance arrangements which *do* work. There are conflicting normative visions of the lawyer's role, raising the basic question: can a good lawyer be a good person? For legal practitioners, client autonomy is a fundamental value, and the client is in all cases entitled to be told what the law is. That is an aspect of the Rule of Law.[77] So this part of the PCRT does not apply to lawyers, because SRA/Bar codes of conduct have priority.[78]

SRA jumped to HMRC's beat, in a document entitled "Tax avoidance - your duties":

> In the House of Lords case of *Ayrshire Pullman v CIR*, Lord Clyde said that "No man in this country is under the smallest obligation, moral or other, so as to arrange his legal relations to his business or to his

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76 PCRT, Helpsheet B: Tax Advice. Para (ii) is otiose, but it does not matter.
In 2015 HMRC called on the professional bodies "to take on a greater lead and responsibility in setting and enforcing clear professional standards around the facilitation and promotion of avoidance to protect the reputation of the tax and accountancy profession and to act for the greater public good." See "Tackling tax evasion and avoidance" (the juxtaposition is significant) (2015) para 3.19.
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/413931/Tax_evasion_FINAL__with_covers_and_right_sig_.pdf
This was presumably the spur for PCRT Helpsheet B.

77 That view is not wholeheartedly accepted, or understood, by the general public or by HMRC, and a whole book would be needed to discuss this topic. For an introduction, see Windsor, "The Ethics of Government Legal Advisers" in Feldman (ed) *Law in Politics, Politics in Law* (2015).

78 See 116.1.1 (Status of PCRT).

> property as to enable the Inland Revenue to put the largest possible shovel into his stores." That approach has been rejected by Parliament by bringing in the [GAAR].[79]

This is not correct.[80]

> GAAR is clearly explained in HMRC guidance.

This is certainly not correct. It seems unlikely that the author read and understood the guidance (admittedly not an easy task).

> Similarly, the widespread assumption that "tax avoidance is legal" no longer applies.

This is not correct.[81]

While public tax debate is characterised by misinformation and shallow thinking,[82] perhaps inevitably so, it is dispiriting to see the same applies to the SRA.[83]

The Charity Commission has made the same points as the SRA.[84] I guess that HMRC sent a a circular to regulators, with draft text, and the regulators complied without consultation or comment from tax practitioners.

These issues could be properly examined in the context of disciplinary proceedings - but I doubt if it will ever happen in practice.

2.5.8 *Views of non-tax practitioners*

Outside the tax profession, the concept of what is unacceptable/immoral is not restricted to tax abuse, but extends to the ordinary tax planning level. That is, some very ordinary tax planning has come under fire. Practitioners might dismiss the views of those who know nothing about

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79 *https://www.sra.org.uk/solicitors/code-of-conduct/guidance/warning-notices/Tax-avoidance---your-duties--Warning-notice.page* (September 2017).

80 See 2.5.6 (Impact of the GAAR).

81 Unless "avoidance" is intended to mean abuse within the scope of the GAAR.

82 See App 13.1 (Nature of parliamentary debate).

83 See Blackwell, "Conduct unbefitting: Solicitors, the SRA and Tax Avoidance" [2019] BTR 31 concluding that some aspects of the SRA position are "simply wrong".

84 "Charity tax reliefs: guidance on Charity Commission policy" (2015): "The GAAR makes it clear (!) that taxation is not to be treated as a game where taxpayers can indulge in any contrived or inventive scheme in order to eliminate or reduce their tax liability."
https://www.gov.uk/government/publications/charity-tax-reliefs-guidance-on-charity-commission-policy/charity-tax-reliefs-guidance-on-charity-commission-policy

tax as unworthy of consideration. I give four examples from those whose views carry some weight.

Deferring bonus in order to take advantage of announced reduction in tax rates: This arose in 2013/14 when top rates fell from 50% to 45%. Practitioner-readers are likely to agree that this is ordinary tax planning near the bottom end of the scale. But Mervyn King, then Governor of the Bank of England, is reported to have criticised Goldman Sachs for it.[85] The House of Lords select committee noted that the GAAR will not apply to the deferral of bonuses from one tax year to another,[86] but one might infer that they disapproved none the less for that.

The Bump Plan In 2013 a minor political furore arose after David Heaton was secretly filmed, suggesting bonus payments to pregnant employees; if made during the relevant period this would increase the amount of statutory maternity pay. I do not think practitioners would regard that as on the abusive side of the line (though there are many points which need to be made to properly understand the legal and moral analysis, none of which were heard in the public debate).[87] The point was not just political hot air: Heaton had to leave the GAAR panel following criticism from David Gauke (Exchequer Secretary to the Treasury).

Income sharing by spouses I think practitioners were surprised that HMRC found this unacceptable in their (ultimately unsuccessful) attack in *Jones v Garnett*. But exactly the same planning has been criticised in India:

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85 Financial Times, 15 Jan 2013. King is co-author of the excellent (but now sadly out of date) *British Tax System* (5th ed, 1990).

86 Select Committee on Economic Affairs Report on The Draft Finance Bill 2013 *http://www.publications.parliament.uk/pa/ld201213/ldselect/ldeconaf/139/139.pdf* The Select Committee said this was because that "the issue is one concerning the structure of the tax system rather than avoidance involving manipulation of loopholes in the legislation." More analytically, the reason is that these are not examples of tax abuse (in my sense, which I take to be the same as the definition of "abusive" in the GAAR).
The GAAR guidance makes this point; see 53.8.8 (Postpone disposal: GAAR).

87 In particular: (1) This planning does not give rise to a tax advantage, but to a benefit advantage for the employer; it could not be counteracted by the GAAR. (2) Not every payment to an employee is earnings so it is possible for planning of this kind to fail on the facts. (3) The privacy aspects of secret filming, and the ease with which short clips may misrepresent nuanced positions, seem particularly worrying.
For the background, see Johnson, "Tax, Lies and Hypocrisy" (CCH Tax News , Issue 133 25 September 2013); for the law, see the Statutory Maternity Pay (General) Regulations 1986.

> While tax evasion is universally condemned, there is a disposition in certain quarters to regard tax avoidance as a permissible course of action. We are unable to endorse this view. The mere fact that the income-tax law is not violated does not mean that the procedure which results in tax avoidance is justified. We might take as an illustration the act of introducing, without adequate consideration, one's wife ... as partner in a business of which the assessee himself is a partner. It is an attempt to fraction income and reduce tax liability under a provision of law meant to apply to genuine partnerships. Conduct of this nature, though legal, cannot but be regarded as anti-social.[88]

Gift of company to political party A donor who owns a suitable company might arrange that:

(1) The donor gives the company to the political party.
(2) The political party extracts the funds by way of dividend.

The gift at stage (1) qualifies for CGT hold-over relief; and the distribution at stage (2) would not be taxable, assuming the party is a company for tax purposes.

It seems that Labour arranged this in 2013, giving rise to a fit of indignation, or purported indignation, from the Tories. An open letter from George Osborne to Ed Milliband provided:

> ... the Labour Party has gone to great lengths to help your biggest donor, ... avoid paying tax on a political donation. ...
> The Labour Party registered a donation of shares in JML worth £1.65 million in January 2013, from Mr John Mills. By making a donation in shares rather than as a single cash dividend, it has been reported that Mr Mills managed to avoid a potential tax charge of £724,710.[89] ...
> As leader of the Labour Party, and given your previous statements on tax avoidance, such actions by your party appear to be directly at odds with your public statements.
> Most importantly, will you now pass the amount of tax that has been avoided to the Exchequer? As you say, this is money that is needed to fund vital public services such as the health service and our schools.[90]

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88 Government of India, *Report of the Taxation Enquiry Commission* (1953-54), Vol II para 5. For policy issues here, see 89.1 (Non-dom/non-resident spouse).

89 This figure is wrong: it represents a tax rate of 44%. The effective rate of tax should have been 36.11% = £600k tax. Perhaps it is a typo. Perhaps it is irony. Perhaps no-one is intended to take the letter so seriously as to check the figures. If this is an indication of the tax advice given to Mr Osborne, it is rather worrying.

90 6 June 2013

What is one to make of this? I think any practitioner, or anyone who understood the tax background, would regard this as in the category of "sensible tax planning" or, perhaps, ordinary tax planning; in either case, well short of avoidance and opprobrium. The letter could be seen as just an example of debased political debate, meaningless playground insults whose object is just to knock the opposition. It could be taken as a case where ordinary tax planning is regarded as immoral. However, it may be regarded as an illustration of the difficulties which arise if one regards taxation as governed by moral principles distinct from black letter tax law. The letter might then be regarded as a rather subtle contribution to the political/moral debate. Perhaps there are elements of each of these.

2.5.9 *Context of discussion*

It is possible to discuss tax-morality in a lofty, disinterested and high-minded way. What is the good life? What would Aristotle say?

But in practice discussion is invested with flaming indignation, fuelled by hatred for those who support and connive with these injustices. This is fed by a sense of superiority that we are not like these instruments and accomplices of evil. The result is moral panic, contempt, hatred and aggression.[91] There is a great and easily mobilised hostility to anything that can be represented as avoidance. The remedies proposed become ever more penal and more discretionary.

The debate sometimes suffers from profound bad faith or hypocrisy. Politicians accuse others of tax-immorality in order to attack their opponents. Or journalists do so to sell papers. A recent example arose when the archive of Tony Benn was transferred to the British Library, under the acceptance in lieu scheme, which one might have thought entirely innocuous.[92]

2.5.10 *Conclusion*

In short, there is widespread disagreement about the starting point, not to mention finish line, when it comes to the concept of avoidance or on issues of morality in connection with tax avoidance. This should not be

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91 This is a danger to which any discussion of morality is subject: see Taylor, *A Secular Age* (2007) chapter 18.

92 Reported by the Telegraph (4 Mar 2019) under the heading "Tories praise Tony Benn's financial planning as donation of his archive knocks £210,000 off family's tax bill". The article shows some signs of a libel readers scrutiny, as it falls just short of an allegation of hypocrisy.

a surprise, since the same applies to many contemporary moral issues, for instance, assisted suicide. There is no tribunal to adjudicate arguments on morality, except the court of public opinion, which, as Ibsen observed, is an extremely mutable thing. But disapproval of avoidance, however understood, is now the norm. That that represents a major change of attitude is now forgotten. Changes in morality are generally accompanied by amnesia.

2.6 Tax gap

Another thread in public debate is a vast estimate of the amounts involved. HMRC publish annual figures, with great fanfare, and a catchy title, the "tax gap".[93] This is said to be £35 billion, or 5.6% of tax liabilities, in 2017/18.[94]

Broken down, the HMRC figures are:

Amount £bn	**Cause**	**Comment**
6.4	Failure to take reasonable care	
6.2	Legal interpretation[95]	
5.3	Evasion	Excluding hidden economy
4.9	Criminal attacks	
3.9	Non-payment	Tax written off as uncollectible
3.4	[Non-careless] error	
3.0	Hidden economy	Income source undeclared/understated
1.8	Avoidance	
34.9	Total	

Statistics are only as useful and reliable as the definitions on which they are based. Most of these categories are vague and subjective, and assessment of the figures is, to say the least, challenging. I think a certain amount of scepticism is in order. There is a danger that spurious statistics may gain currency and influence policy.[96]

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93 I think this tabloid friendly term originated in the US, where IRS have been measuring the Federal Tax Gap since at least 1993: *https://www.irs.gov/statistics/irs-the-tax-gap*

94 HMRC, "Measuring tax gaps 2019 edition, Tax gap estimates for 2017-18" (2019) *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/820979/Measuring_tax_gaps_2019_edition.pdf*

95 In HMRC terminology, a tax loss arises from "legal interpretation" when a taxpayer or tribunal disagrees with HMRC on an issue of tax law (excluding avoidance). The concept is so arbitrary and subjective that it can fairly be described as ludicrous.

96 For a critique of the methodology, see Oxford University Centre for Business Taxation "The Tax Gap for Corporation Tax", (2012)

The combination of disparate categories makes the total tax gap figure meaningless, but perhaps that is intended only for headline purposes.

IFS say:

> we don't know how much corporate tax is lost to the UK as a result of tax avoidance. This is partly because there is no accepted definition of exactly what constitutes 'avoidance' and partly because we lack full information about the activities of firms.[97]

Of course, the fact that an amount is unknown and unknowable does not mean that it is small or unimportant. I wonder if time spent guessing at figures is productive. It is however striking how small a part tax avoidance plays in the tax gap figures, compared to the attention it receives.

The IFS report continues:

> Importantly, even if we knew that information and could calculate the tax lost to avoidance, it would not be right to assume that, were all avoidance opportunities to be completely removed, the UK would be able to collect that full amount. We would expect higher taxes to feed through, at least to some degree, to lower investment and changes in prices such that genuine UK profits may be lower. To the extent that the corporate tax affects prices or wages, or the location of firms' activities (and therefore jobs), there may also be lower receipts from income taxes or VAT.

This is true for all taxes, but particularly for corporation tax:

> First, corporation tax is a particularly distortionary form of taxation that can work to reduce investment. This is especially the case for internationally mobile investments because firms will consider tax when choosing where to locate real activities...
> Second, the ultimate incidence of corporate tax always lies with households and is borne either by the owners of capital (in the form of lower dividends), by workers (in the form of lower wages) or by consumers (in the form of higher prices). We do not know with any

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http://eureka.sbs.ox.ac.uk/4428/4/TaxGap_3_12_12.pdf
The HMRC paper itself acknowledges at p.3 that "there are many sources of uncertainty and potential error". But this is forgotten in the figures provided, which present a spurious precision.
For the practical relevance of the data, see Mirrlees Review, *Dimensions in Tax Design* (2010), p.1132.

97 IFS, *Green Budget 2013* p.297 *http://www.ifs.org.uk/budgets/gb2013/gb2013.pdf*

> precision who is made worse off as the result of the corporation tax. However, estimates suggest that, because capital tends to be much more mobile than workers or consumers, a significant share of the burden of corporate tax tends to be shifted to domestic factors – and specifically labour. In other words, there is reason to believe that at least a part, and in some cases a large part, of the corporation tax that companies are subject to is ultimately passed on to workers in the form of lower wages.[98]

There is a certain irony in the second point, given the left's enthusiasm for corporation tax; I think most economists agree that the burden of corporation tax is generally borne by employees,[99] though not all.

2.7 Avoidance legislation 1955 critique

In 1955 the Royal Commission said:[100]

> We are disturbed by the criticism that much of the anti-avoidance legislation is obscurely worded and drawn more widely than its purpose requires. ... We doubt if many lawyers could expound with confidence the effect of the 26 sections that make up Part XVIII of the [ITA 1952]. [The Royal Commission quoted the ToA definition of "power to enjoy" to illustrate the point, and continued:] It appears to us that, if the legislation in this field has to be expressed in this way, there is a danger that our system is becoming delusive. For, while it presents the form of statutory control of the subject by Parliament, it means that in substance the assessment of the individual affected and the charge of tax upon him is not determined by law but by the decision of the [Revenue] who deal with his case. ... we thank that, now that the main lines of this legislation are to be regarded as fully developed and the administration of them has had time to settle down, the opportunity should be taken in the course of the next few years to conduct an expert review of the enactments as a whole...The purpose of the review would be (a) to enquire to what extent, if any, the relevant legislation may have been shown, in the light

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98 IFS, *Green Budget 2013* p.290 *http://www.ifs.org.uk/budgets/gb2013/gb2013.pdf* (footnotes omitted).

99 ETPF Policy Paper 1 "Who bears the burden of corporate income taxation?" (2015) *http://www.etpf.org/papers/PP001CorpTax.pdf*
European Economic and Social Committee, "The Role of Taxes on Investment to Increase Jobs in the EU – An Assessment of Recent Policy Developments in the Field of Corporate Taxes" (2019) *https://www.eesc.europa.eu/sites/default/files/files/qe-03-19-343-en-n.pdf*

100 Cmd. 9474 para 1029

> of experience, to have been drawn too widely for its purpose,[101] (b) to recommend any modifications of the legislation that will make it shorter, briefer, and more precise.

Here are 4 critiques which have become familiar: obscurity, imprecision, provisions drawn too widely ("overkill"), and discretionary application. With hindsight, we see that anti-avoidance legislation was then in its infancy. The 26 sections complained of covered the settlor-interested trust code, ToA and transfer of income streams, with a concision which today one could not dream of.

Nowadays these critiques may be framed in terms of the Rule of Law.

2.8 The Rule of Law

2.8.1 *What is "the Rule of Law"*

There is a consensus on the Rule of Law. It is a constitutional principle.[102] It is one of four fundamental British values.[103] It is also one of the six values on which the EU is founded[104] though perhaps that matters less after Brexit.

There is no consensus on the meaning of the expression. It is an emotionally charged label for a set of principles, or sub-principles, the content of which is contested. This may not be a bad thing: consensus on the importance of the Rule of Law is only possible because of dissensus as to its meaning. There is a certain irony in that the principle which forbids vague legislation is itself difficult to pin down. But the same is true of other cherished political virtues, such as democracy. A discussion

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101 The decision in *Vestey* subsequently addressed one of the concerns at (a).

102 Section 1 Constitutional Reform Act 2005.

103 The other three are democracy, liberty and tolerance, according to the Government "*Prevent* Strategy", Cm 8092 (2011), para 6.58 where opposition to these values is the definition of "extremism". The point is repeated in the Government "Counter-Extremism Strategy" Cm 9148 (2015): "Extremism is the vocal or active opposition to our fundamental values, including democracy, the rule of law, individual liberty and the mutual respect and tolerance of different faiths and beliefs."
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97976/prevent-strategy-review.pdf
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/470088/51859_Cm9148_Accessible.pdf

104 Article 2 TEU provides: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights..."

needs a book to itself;[105] but as the term is used in different ways, it is best not to use it without some explanation of how it should be, or may be, understood. This section draws on a paper by Craig, "The Rule of Law" prepared for the House of Lords Constitution Committee.[106]

There is a consensus that the Rule of Law includes at least the following minimum requirements.[107]

Craig says:

> *The Rule of Law and Lawful Authority*
> A core idea of the rule of law to which all would subscribe is that the government must be able to point to some basis for its action that is regarded as valid by the relevant legal system. Thus in the UK such action would commonly have its foundation in statute, the prerogative or in common law power.

It follows that tax should be imposed by parliament through legislation.

Craig continues:

> *The Rule of Law and Guiding Conduct*
> A further important aspect of the rule of law is that the laws thus promulgated should be capable of guiding ones conduct in order that one can plan ones life.
> It is from this general precept that Raz deduced a number of more specific attributes that laws should have in order that they could be said to comply with the rule of law. All are related to the idea of enabling individuals to be able to plan their lives. The 'list' includes the following
> (1) laws should be prospective, not retrospective;
> (2) they should be relatively stable;
> (3) particular laws should be guided by open, general and clear rules;[108]

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105 Raz, *The Authority of Law* (2nd ed., 2009), ch. 11 ("The Rule of Law and its Virtue"); Tamanaha, *On the Rule of Law* (1st ed, 2004); Pech, "The Rule of Law as a Constitutional Principle of the EU" (2009) *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1463242*
For the Rule of Law in a tax context, see Freedman & Vella,"HMRC's Management of the UK Tax System: The Boundaries of Legitimate Discretion" Legal Research paper No 73/2012 (2012) *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2174946##*

106 *http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15115.htm*

107 This may be referred to as a thin, formal, procedural or narrow understanding of the Rule of Law.

108 The OUCBT paper spells out an implication of this: "The rule of law requires that taxpayers are able to determine the tax consequences of their actions in advance."

(4) there should be an independent judiciary;
(5) there should be access to the courts;
(6) the discretion which law enforcement agencies possess should not be allowed to undermine the purposes of the relevant legal rules.

I think these are best regarded as distinct principles, albeit with one underlying rationale.

Although not standard usage, in this work I write *Rule of Law* with initial capitals. It is not exactly a technical expression, that suggests a precision of meaning; but the capitals do indicate that it carries considerable intellectual baggage.

2.8.2 *Rule of Law v. other values*

The Rule of Law is something to boast of,[109] and a feature which makes the UK an attractive place to reside, invest or litigate. The Judicial Office boast:

> The Rule of Law represents the cornerstone of liberty and democracy, and is one of the main reasons that the UK attracts global businesses and investors.
> Laws in the UK are:
> - public (so that everyone knows what they say)
> - certain (so that everyone knows where they stand)
> - prospective rather than retrospective (so that they cannot be broken before they exist)[110]

The reality may not match the rhetoric. There is nothing in the idea of government by majority to show that the majority will respect the Rule of Law. Rule of Law principles are challenged, or breached, in various aspects of taxation,[111]but the conflict in the context of tax avoidance is particularly deep. Anti-avoidance is facilitated and indeed characterised by features which breach the Rule of Law:

(1) Legislation which is:
(a) obscure

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109 The boast is an old one. See Blackstone's *Commentaries on the Laws of England* (1765) vol 2 chap 37: "a country like this, which boasts of being governed in all respects by law and not by will"; and contrast John Adams "A government of laws, and not of men" (1780).

110 "English Law, UK Courts and UK Legal Services after Brexit The View beyond 2019".

111 See for instance the problems raised by *Lobler* at 2.5.2 (Judicial views).

(b) vague
(c) retrospective

(2) Administrative discretion, which falls into two types:
(a) expressly conferred
(b) a consequence, unavoidable but no doubt sometimes intended and welcomed, of obscure or vague legislation

(3) Soft tax law, ie rules (which may be described or misdescribed as guidance or statements of practice) laid down by HMRC without authority of Parliament. This is typically combined with administrative discretion, both because the terms of guidance in practice are generally vague, but more fundamentally, because HMRC are not usually bound by their guidance and may withdraw retrospectively.

(4) Overkill is not (or at least, not necessarily) a breach of the Rule of Law. However in practice it is generally accompanied by administrative relaxation, which breaches Rule of Law principles because it is not laid down by Parliament, and because it confers HMRC discretion.

It is desirable to recognise that there is a *trade-off* between conflicting policy aims, the Rule of Law and the combat of avoidance, rather than to fudge the matter by saying, or pretending, that these matters are consistent with the Rule of Law. Indeed there is a set of trade-offs, because the Rule of Law is a set of rules. For instance, if a TAAR has a clearance procedure, then the ability of taxpayers to plan with confidence is increased, which supports aspect of the Rule of Law; but HMRC discretion is also increased, which breaches another aspect.

Then one can face the choices aware of the consequences of one choice or another. Craig says:

> ... the rule of law in the above sense is only one virtue of a legal system, and may have to be sacrificed to attain other desired ends. We may feel that the rule of law virtues of having clear, general laws should be sacrificed if the best or only way to achieve a desired goal is to have more discretionary, open-textured legal provisions. This may be so where it is not possible to lay down in advance in the enabling legislation clear rules in sufficient detail to cover all eventualities. Modifications to the rule of law in this manner are not somehow forbidden or proscribed. Given that it is only one virtue of a legal system it should not prevent the attainment of other virtues valued by that system.

In 1974, Lord Simon put the Rule of Law above the need to combat tax avoidance:

> Disagreeable as it may seem that some taxpayers should escape what might appear to be their fair share of the general burden of national expenditure, it would be far more disagreeable to substitute the rule of caprice for that of law.[112]

The cure could be worse than the disease. In contemporary debate it is rare to find a statement in such strong terms. An exception comes from the Joint Committee on Statutory Instruments, discussing this provision:

> If—
>
> (a) a person enters into any arrangements; and
>
> (b) the main purpose, or one of the main purposes, of the person in entering into the arrangements is to avoid any obligation under these Regulations,
>
> these Regulations are to have effect as if the arrangements had not been entered into.[113]

The Committee said:

> ... people who are satisfied that the terms of the regulations do not apply to them will be at constant risk of HMRC initially concluding that they have attempted to avoid the regulations and that the regulations therefore apply anyway – that being the default position in the absence of an appeal. It is unclear that such a result, which breaches the principle of certainty, would be within the contemplation of enabling powers that do not contain express provision for the type of anti-avoidance provision used.
>
> The fact that Parliament has, notably in Part 5 of the Finance Act 2013, [the GAAR] enacted anti-avoidance provisions which are similarly imprecise or discretionary is irrelevant to the security of such provisions in subordinate legislation, in the absence of express enabling powers.
>
> The Committee accordingly reports regulation 21 for a doubt as to whether it is *intra vires*.[114]

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112 *Ransom v Higgs* 50 TC 1 at p.94. A similar spirit informed the decision in *Vestey v HMRC* in 1979; see 46.2 (Charge on transferor).

113 Reg 21 The Taxes (Base Erosion and Profit Shifting) (Country-by-Country Reporting) Regulations 2016.

114 *http://www.publications.parliament.uk/pa/cm201516/cmselect/cmstatin/461-ix/46103.htm#inst01*
The Committee report was published after the provision came into force.

But this example also illustrates the weakness of the Rule of Law in the UK:

(1) Regulation 21, whose validity is in doubt, remains in the legislation.
(2) Identical wording is found in:
    (a) reg 23 International Tax Compliance Regulations 2015[115]
    (b) The residence-property TAAR

Tax avoidance is an issue of international tax as well as domestic tax, and in the US, the Rule of Law is, perhaps, more highly valued.[116] Bob Stack (US Treasury Deputy Assistant Secretary for International Tax Affairs) criticised OECD BEPS reforms, and UK diverted profits tax, for breaching Rule of Law/international tax law principles:

> Rather than producing administrable rules, the BEPS negotiators seemed to be opting instead for giving wide discretion to tax officials.[117] This brought into question the whole international tax system. Do the international tax rules even matter anymore?" Do we really need a standard setter to say, 'Tax administrators can use the pornography test to catch tax avoidance. We know it when we see it. And we will get you if we want to'?...
>
> [Diverted Profits Tax] ... took us further down the road in which a taxpayer is at the mercy of whatever a tax auditor decides is the right amount to pay. What made this particularly perturbing was that these measures emanated not from the usual suspects such as India, China, Brazil and South Africa, but from strong traditional residence countries [UK and Australia] that happened to be two of our closest friends.[118]

2.8.3 *Breach of Rule of Law*

Craig says:

> The fact that a law is vague or unclear, and that it therefore provides

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115 The argument that reg. 23 is ultra vires is weaker than for reg. 21, because unlike the position for the 2016 regulations, CRS authorises and requires "rules to prevent ... practices intended to circumvent the reporting and due diligence procedures". See 121.34 (CRS TAAR). Perhaps the argument is still tenable. Perhaps reg 23 will be read purposefully and somewhat restrictively.

116 Though it is difficult to assess the validity of such a broad generalisation and the statement became more doubtful under the former Trump administration.

117 Stack probably had in mind the PPT; see 104.8 (Principal purpose test). For another example, see 8.18 (Tie-breaker: mutual agreement).

118 Speech to OECD International Tax Conference, 2015, as reported *https://www.bna.com/beps-troublegloves-off-b17179928708/*

> little by way of real guidance for those affected by it, will not lead to a statute being invalidated in the UK.

In relation to secondary legislation (statutory instruments) a court could strike down provisions on the grounds of breach of the Rule of Law (which might be said to be ultra vires, in the absence of very clear or direct authority in the authorising act of parliament). In relation to primary legislation, a court could issue a statement of incompatibility. But in a tax context this has not happened.

In other words, the Rule of Law lacks full justiciability. Perhaps ironically, the Rule of Law is not in the strict sense a rule of law. To adopt Dworkin's distinction, it is a principle and not a rule. As such it may encourage a court to interpret a statute more narrowly, in favour of the individual. In this way, however deeply, inchoately, and inconsistently, Rule of Law considerations do to some extent affect case law outcomes[119] and perhaps, tax policy (though I am less sure about that.)

2.8.4 *Is tax Rule of Law compliant*

In earlier editions of this work, I said:

> The UK tax system is largely based on the rule of law rather than informal practice and discretion.

By 2014, as TAARs and other anti-avoidance were multiplying, I qualified the boast, saying: "that is less the case than formerly".[120]

In 2014 the City of London Law Society said:

> 2.4 ... tax policymakers are insufficiently conscious of the importance of the rule of law – that is, the constitutional right of a citizen to determine the law applicable to him at any given date. Related to this is a similar problem of lack of respect for legislation as the only proper source of law, and over-reliance on guidance.[121]

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119 In the context of rules which would prevent access to a Court, the Rule of Law affects outcomes more directly; see for example *Haworth v HMRC* [2019] EWCA Civ 747 at [66].

120 Kessler, *Taxation of Non-Residents and Foreign Domiciliaries* (13th ed., 2014) para 2.4 (The Rule of Law).

121 Response to OTS competitiveness review (2014) *http://www.citysolicitors.org.uk/attachments/article/105/20140605%20Response%20to%20Office%20of%20Tax%20Simplification%E2%80%99s%20'Competitiveness%20review%20-%20initial%20thoughts%20and%20call%20for%20evidence'.pdf*

In 2015 the Law Society made the same point:

> ... in recent years, there has been a tendency on the part of government to allow the rule of law in taxation to risk being eroded in the interests of making the executive more effective, in particular in seeking to combat avoidance...

The question "is tax Rule of Law compliant" seems meaningful but it oversimplifies the issue(s). As the Rule of Law is a set of rules, it is not one question but a set of questions. In relation to each of the rules, the question is not *whether* tax is Rule of Law compliant but *to what extent*. To answer that question fully, one would test every rule of tax law against each of the principles of the Rule of Law set out above. As tax is vast, discussion must be selective and impressionistic.

In the broadest outline, then, to what extent is it the case that:

Taxpayers are able to determine the tax consequences of their actions in advance? Increasingly not, obscurity, vagueness and overkill are rife, mitigated by HMRC guidance or concession mislabeled as guidance.[122] Most supporters of the GAAR deny or downplay its uncertainty, but, significantly, Jim Harra, Director General, Business Tax at HMRC applauded it:

> It will also create an additional level of uncertainty for the promoters and users of schemes. I believe that that will be a deterrent.[123]

Is tax imposed by Parliament or HMRC? Increasingly the latter.

Is there a right of appeal to a Court? Not quite always.[124]

Is tax law retrospective? Sometimes, but I do not detect a trend towards increasing retrospectivity.

Is tax law stable? No, though this has always been the case.

No-one appears to have taken any notice of the Law Society's lobbying.

122 Examples include: (1) s.30 FA 2014 (avoidance by transfer of corporate profits); (2) TAARs, which have become standard in new legislation, especially those of the tax-advantage type. See for instance, 61.21 (Capital-loss TAAR).

123 Hansard, Public Accounts - Minutes of Evidence (6 December 2012) *http://www.publications.parliament.uk/pa/cm201213/cmselect/cmpubacc/788/121206.htm*

124 For instance: (1) The Banking Code of Practice on Taxation; there is no right of appeal against HMRC determination of a breach of the code. (2) Follower notices: there is no right of appeal against the issue of such a notice on a number of important grounds.

Breaking down the issues under these separate heads illustrates what a disparate group of principles fall within the concept of the Rule of Law. I doubt whether "the Rule of Law" is a helpful label in the context of tax law. It conflates disparate issues and so confuses discussion. While it gives a critique gravitas - the Rule of Law is a powerful slogan - it lies at a level well above the pragmatism that is said to characterise an Anglo-Saxon approach to large philosophical, political and economic issues.

However that may be, we are not, for the most part, as disturbed about these problems as was the Royal Commission in 1955. Should we be? Discuss.

2.9 Retrospective tax legislation

There is general agreement that the Rule of Law includes a prohibition of retrospective legislation.

Although a sub-topic of the Rule of Law, the topic deserves a separate discussion. A full discussion requires a book to itself.[125]

2.9.1 *Meaning of retrospective*

It seems to me that retrospectivity is best considered as a matter of degree, not a matter of yes/no, either/or. Legislation not retrospective in form may be retrospective in effect, if it operates by reference to arrangements carried out in the past, and/or lacks fair and appropriate transitional provisions. In assessing whether (or, better, the extent to which) a provision is retrospective, one should have regard to the object of the prohibition on retrospective legislation, which is that a person should be reasonably able to plan their affairs on the basis of what the law says. In this sense, legislation backdated to the date of an announcement of a proposed change in the law is not retrospective, or at least not objectionably so.

On this analysis, to determine whether a provision is retrospective is an evaluative exercise. So those defending legislation can and generally do contend, with varying degrees of plausibility, that the relevant provision

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125 For an illuminating discussion of the policy issues in a US context, see Shaviro, *When Rules Change* (1st ed, 2000). UK taxpayers may on this point look with envy to the USA, where a norm opposing retrospective legislation is "strongly rooted in popular sentiment, legislative practice, and perhaps even the Constitution as the courts are likely to interpret it" (p.104).

is not retrospective.[126]

The issue does not usually arise in a justiciable context. We are in the realm of politics, not law.

2.9.2 *Retrospective legislation: Extent*

It is perhaps only a slight exaggeration to say that retrospective tax legislation has become a matter of routine, having been applied in particular to a somewhat arbitrary selection of tax avoidance schemes. Examples include:

Topic	**Date**	**See para**
Retrospective reversal of avoidance schemes:		
DT relief for partnership	1987	82.24
s.23 FA 2012 (loan relationships)	2012	*Not discussed*
Provisions retrospective in effect:		
Pre-owned assets	2004	80.39.2
IHT: former Accumulation & Maintenance trusts	2006	*Not discussed*
Aspects of the ITA remittance rules	2008	1.8.3
Disallowance of debts for IHT	2013	76.35.2

Generally, I think the norm requiring commencement rules to avoid retrospective effect has weakened since about 2000, perhaps in line with changed attitudes to tax avoidance.

2.9.3 *Retrospective legislation: Protocol*

In Budget 2011, the coalition Government published a statement on retrospective legislation, grandly entitled a "Protocol" with a capital P. The most important part provides:

> The Government has made clear its aim to strike the right balance between
> [1] restoring the UK tax system's reputation for predictability, stability and simplicity (!) and
> [2] preserving its ability to protect the Exchequer by making changes where necessary.
> In particular, changes to tax legislation where the change takes effect from a date earlier than the date of announcement will be wholly

126 See for instance HM Treasury, "Section 95 of the Finance Act 2019: report on time limits and the charge on disguised remuneration loans" (March 2019) *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/789160/DR_loan_charge_review_web.pdf*

exceptional.[127]

The attempt to formulate the principles behind a decision to enact retrospective legislation is to be applauded. But the sanction (if any) for ignoring the protocol is political only.

The 2011 statement does not purport to bind future governments. The Cameron administration (2015 - 2016) did not resile from it, but the extent to which the current or subsequent administrations will follow it remains to be seen. The protocol has perhaps shifted political debate from whether or not legislation is justified to debate on whether or not legislation is retrospective, but it is doubtful whether it has had much if any effect on the outcome.

2.9.4 *Retrospective legislation*: *Validity*

The Rule of Law is not justiciable as such and so neither is the restriction on retrospective legislation. Human Rights challenges have not been successful.[128] The protocol has not changed this. That is self-evident, but if authority is needed:

> The Protocol was an extra-statutory announcement or promise made by the government. As such, it operated: in the realm of politics, not of the courts, and the question whether the government should be held to such a promise is a political rather than a legal matter... The sovereignty of Parliament cannot be confined by extra-statutory promises like the Protocol.[129]

I think this is as it should be: the content of legislation is in principle a matter for parliament and not for the courts.

2.9.5 *Retrospective legislation*: *Politics*

Various reasons have been given to justify retrospective legislation.

One is that it concerns an avoidance scheme which will fail (or so the Government believe). If that is true, the legislation is unnecessary; if not (and it is generally debatable) it is not a good reason.

Another is that it concerns an abusive avoidance scheme (however that

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127 *http://webarchive.nationalarchives.gov.uk/20130129110402/http://cdn.hm-treasury.gov.uk/2011budget_taxavoidance.pdf*

128 See *R oao Huitson v HMRC* [2011] STC 1860; *R oao APVCO 19 Ltd v HM Treasury* [2015] EWCA Civ 648; *Zeeman v HMRC* [2020] EWHC 794 (Admin).

129 *R oao APVCO 19 Ltd v HM Treasury* [2015] EWCA Civ 648 at [58].

flexible term may be understood). Whether that justifies retrospective legislation is ultimately a political question on which views differ depending on how much one values the Rule of Law. It is arbitrary and unfair in that a few particular schemes are retrospectively stopped and others – no less elaborate, artificial and abusive – are not. Pragmatists (to whom the Rule of Law is of little interest) should bear in mind that retrospective legislation increases the "legal risk", a measure under which the UK falls low on international surveys, and the lowering of the UK's reputation in that regard has a significant albeit intangible cost. I suspect major factors in picking on some arrangements may include salience, politics, and the amount of money involved.

2.9.6 *Retrospective relieving legislation*

Retrospective legislation has also become common to provide relief for unintended charges under(what the need for retrospective legislation shows to be) ill thought out legislation. The policy issues are different here. So far as retrospective legislation favours the taxpayer, most would regard it as unobjectionable on Rule of Law grounds; even to the Rule of Law purist, it is less objectionable than the alternative of extra-statutory concession. But the need for it on a regular basis should cause concern about the quality of the tax legislation process.

2.9.7 *Retrospective legislation*: *Future*

How often will retrospective legislation be used in the future? What advice can anyone give to taxpayers seeking to know their position? Prior to the enactment of the GAAR, I said:

> Much depends on the politics of the day, but I guess that retrospective legislation will continue to be a rare response; a popular scheme carried out by many taxpayers and involving larger sums is certainly more at risk than others.[130]

The compatibility of the GAAR with the Rule of Law is open to debate, on the grounds of vagueness in particular. But one positive consequence may be (and should be) at least to restrict the practice of retrospective anti-avoidance legislation; wholly retrospective legislation should less often be necessary. But effectively retrospective legislation, in the form of unfair commencement rules, will no doubt continue.

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130 Kessler, *Taxation of Non-Residents and Foreign Domiciliaries* (7th ed., 2008), Vol.1

2.10 TAAR/unallowable purpose test

2.10.1 *TAAR terminology*

TAAR stands for "targeted anti-avoidance rule". It is used to describe unallowable purpose tests in specific UK tax codes[131] (as opposed to the GAAR, which is an unallowable purpose test which applies throughout taxation).

As far as I know, the term "TAAR" was coined by HMRC and first used in a press release of 5 December 2005. The term "unallowable purpose" was first used by Parliamentary Counsel in 1996, in the context of loan relationships.[132]

Before then the term used was motive (or purpose) test. Those labels remain in use primarily for older TAARs, such as the ToA motive defence.

"TAAR" is best regarded as a technical term, detached from its literal meaning. So IFS can say without obvious irony that:

> TAARs need to be well targeted ... costs can outweigh the ... lost revenues when a poorly targeted TAAR is compared with a well-targeted TAAR.[133]

"TAAR" is a tendentious, approbative term; who could object to *targeted* anti-avoidance? Parliamentary Counsel rightly do not use it in statutory drafting. "Unallowable purpose test" is more transparent, but clumsy. An appropriate term might be "specific anti-avoidance rule" (SAAR) but that is not in common use. So slightly reluctantly, I use "TAAR" in its technical sense in this work.

2.10.2 *Types of TAAR*

The number of TAARs is very large.[134] Although there is a variation of wording, TAARs share a common framework or frameworks. I would

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131 TAAR may also refer to the wider anti-avoidance rule of which an unallowable purpose test forms part; but I here focus only on the unallowable purpose test.

132 See Para 13 sch 9 FA 1996, now s.441 CTA 2009.

133 The same report refers later to a "wide-ranging TAAR". IFS, "Countering Tax Avoidance in the UK" TLRC discussion paper 7 (2009), para 8.18 *http://www.ifs.org.uk/comms/dp7.pdf*

134 Unallowable Purpose Tests Draft Guidance p.7 gave the number as "over 200" in 2009. The number increases with every Finance Act. For the Draft Guidance, see 49.1 (Motive defence: Introduction).

distinguish three types of TAAR, depending on the nature of the unallowable purpose test, and coin the following terminology to describe them:

Unallowable purpose expressed as	**Type of TAAR (my term)**
Tax avoidance (in strict sense)	Avoidance-purpose TAAR
Obtaining a tax advantage	Tax-advantage TAAR
Avoiding application/effect of specified rules	Application/effect TAAR

A tax-advantage style TAAR is very wide, if one understands "tax advantage" to include cases where there is no element of tax avoidance.

An application/effect style TAAR may be wider still. The Joint Committee on Statutory Instruments said this wording is too wide and vague.[135] But no-one has taken any notice of that. It continues to be a common form (perhaps it will become the most common form) for new TAARs.

TAAR wording sometimes includes a commerciality test.[136] It sometimes includes "reasonable to assume/conclude" wording.[137] Here is a table of TAARs discussed in this book identifying these features:

Topic	**Type of TAAR**	**Para**	**Test**	**Reasonable**	**Commercial**	**Date**
ToA	Tax avoidance	49.1	Transfer/assoc ops	Y	Y	1936/2005
TiS (CT)	Tax advantage	– [138]	Transactions in securities		Y	1960
CGT reorganisations	Tax avoidance	– [139]	Arrangement		Y	1977
Loan relationships	Tax advantage	2.12.5	Transaction	Y		1996
SDLT group relief	Tax avoidance	49.40.3	Transaction		Y	2005
Capital loss	Tax advantage	53.24	Arrangements			2007
Mixed fund	Tax advantage	19.10	Arrangements			2008
TiS (IT)	Tax advantage	52.9	Transaction in securities			2010
s.3 TCGA	Tax avoidance	60.18	Arrangements			2012
Remittance investment relief	avoidance	18.7	Arrangements			2012
Sales relief	Tax avoidance	18.40.6	Arrangement			2012
GAAR	Tax advantage	– [140]	Arrangements	Y		2013
IHTdeduction of debt	Tax advantage	76.37	Discharge of liability		Y	2013
DIMF	Application	69.12	Arrangements			2015
Carried interest	Application	69.21	Arrangements			2015

135 See 2.8.2 (Rule of Law v. other values).

136 Commercial test included; see 5.2 (Commercial).

137 "Reasonable to assume" wording included; see App. 2.21 (Reasonable-to-assume).

138 Section 734 CTA 2010, not discussed in this work, but too important to omit here.

139 Section 137 TCGA, not discussed in this work, but too important to omit here.

140 I do not discuss the GAAR as a discrete topic in this book, but GAAR guidance is discussed in many contexts.

CRS	Application	121.34	Arrangements		2015
Country reporting	Application	2.8.2	Arrangements		2016
Land-dealing	Tax advantage	21.4	Arrangement		2016
Transactions in land	Tax advantage	21.15	Arrangement		2016
Royalty deemed source	Effect	31.8.6	Arrangements		2016
Royalty withholding tax	Effect	31.11.2	Arrangements		2016
Winding up	Tax advantage	29.6.4	Winding-up	Y	2016
Hybrids	Tax avoidance	87.23	Arrangements		2016
Residence-property	Effect	78.17	Arrangements		2017
Profit fragmentation	Tax advantage	50.16	Arrangements	Y	2019
Land-rich company	Tax advantage	54.14.1	Arrangements		2019
Offshore IP receipts	Tax advantage	31.34	Arrangements		2020

This is not a full list, but it is evident that the number of TAARs has exploded since about 2012; though unannounced, and not much discussed, this constituted a major change in tax policy.

Cases (and guidance) on one TAAR can shed light on others, though one must allow for differences of context and wording. The most litigated is the TiS purpose test, though in recent years there have been more cases on the loan relationship TAAR. Instances where cases on one TAAR have been cited in cases on another TAAR include:

(1) ToA cases cited in TiS cases (& vice versa)[141]
(2) Pre-2010 TiS cases may be relevant to the current IT TiS code

2.10.3 *Disentangling issues*

Discussion of (say) a tax advantage TAAR can logically be split into a number of distinct issues:

(1) Is there a tax advantage (with a sub-issue, the meaning of tax advantage)
(2) Is there a purpose to obtain a tax advantage (with sub-issues as to the meaning of purpose and how to ascertain purpose)
(3) Is that a "main" purpose

But in practice discussion easily segues from one to the other.

2.10.4 *Consequence of TAAR*

If the unallowable purpose condition of a TAAR is met, the consequence may be as follows:

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141 In *Willoughby* in the Court of Appeal, *Brebner*, a TiS case, was cited in the context of the ToA motive defence.

Consequence of TAAR	**My terminology**
Precisely specified in the TAAR:	
(1) Disapply a specified relief	
(2) Apply specified anti-avoidance rules	
Counteraction (details unspecified)	Counteraction-style TAAR
Disregard effect of arrangements	Disregard-style TAAR

Here is a table of consequences of TAARs discussed in this book:

Topic	**Type of TAAR**	**Para**	**Consequence**	**Date**
ToA	Tax avoidance	49.1	Apply ToA rules	1936
TiS (CT)	Tax advantage	–	Counteraction	1960
CGT reorganisations	Tax avoidance	–	Disapply reorganisation relief	1977
TiS (IT)	Tax advantage	52.9	Counteraction	1960/2010
Loan relationships	Tax advantage	2.12.5	Credit/debit disallowed	1996
SDLT group relief	Tax avoidance	49.40.3	Disapply group relief	2005
Capital loss	Tax advantage	53.24	Disapply loss relief	2007
Mixed fund	Tax advantage	19.10	Just and reasonable	2008
s.3 TCGA	Tax avoidance	60.18	Apply s.3 rules	2012
Remittance investment relief	Tax avoidance	14.7	Disapply relief	2012
Sales relief	Tax avoidance	18.40.6	Disapply sales relief	2012
GAAR	Tax advantage	– [142]	Counteraction	2013
IHTdeduction of debt	Tax advantage	76.37	Disallow debt	2013
DIMF	Application	69.12	Disregard arrangement	2015
Carried interest	Application	69.21	Disregard arrangement	2015
CRS	Application	121.34	Disregard arrangement	2015
Country reporting	Application	2.8.2	Disregard arrangement	2016
Land-dealing	Tax advantage	21.4	Counteraction	2016
Transactions in land	Tax advantage	21.15	Counteraction	2016
Royalty deemed source	Effect	31.8.6	Disregard arrangement	2016
Royalty withholding tax	Effect	31.11.2	Disregard arrangement	2016
Winding up	Tax advantage	29.6.4	Apply winding-up rule	2016
Hybrids	Tax avoidance	87.23	Counteraction	2016
IHT Residence-property	Effect	78.17	Disregard arrangement	2017
Profit fragmentation	Tax advantage	50.16	Apply profit fragment'n code	2019
Land-rich company	Tax advantage	54.14.1	Counteraction	2019
Offshore IP receipt	Tax advantage	31.34	Counteraction	2020

The disregard-style TAAR approach is novel and problematic. What does one regard and what does one disregard? For one set of examples, see 78.17 (Sch A1 TAAR).

142 I do not discuss the GAAR as a discrete topic in this book, but GAAR guidance is discussed in many contexts.

2.11 "Main" purpose

TAARs generally refer to main purpose.[143]

I consider "purpose" elsewhere,[144] but here consider "main purpose".

In *Travel Document Service & Ladbroke Group International v HMRC*:

> I do not accept that, as was submitted by [counsel for HMRC], "main", as used in paragraph 13(4) of schedule 9 of FA 1996, means "more than trivial". A "main" purpose will always be a "more than trivial" one, but the converse is not the case. A purpose can be "more than trivial" without being a "main" purpose. "Main" has a connotation of importance.[145]

HMRC formerly argued that:

> any purpose which is more than incidental is prima facie a main purpose.[146]

But that is no longer tenable.

One sometimes sees the phrase "more than mere icing on the cake"[147] but that stale metaphor does not help much, if at all.

2.12 "Tax advantage"

2.12.1 *Tax advantage: Definitions*

The expression "tax advantage" was first used in TAARs but it is now found elsewhere:

Topic	**See para**
Tax-advantage style TAARs	2.10.2
Penalties	120.11.1
DOTAS	*Not discussed*

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143 The ToA motive defence is an exception here (omitting the word *main*); see 49.4 (Enactment history).
The CT TiS TAAR refers to *object* (not *purpose*) but the meaning is the same: see 49.11.1 (Purpose: Terminology).

144 See the discussion beginning at 49.9 (Identify and classify purpose).

145 [2018] EWCA Civ 549 at [48]. This was said in relation to the main purpose test in the loan relationship rules, but the comment applies generally in TAARs.

146 HMRC Discussion Document "Simplifying Unallowable Purpose Tests" (2009) para 10140 *https://webarchive.nationalarchives.gov.uk/20100513000206tf_/http://customs.hmrc.gov.uk/channelsPortalWebApp/channelsPortalWebApp.portal?_nfpb=true&_pageLabel=pageLibrary_ConsultationDocuments&id=HMCE_PROD1_029748&propertyType=document&columns=1*.

147 *IRC v Sema Group Pension Scheme* 74 TC 593.

It is always defined. There is no single standard definition, but the definitions generally adopt common form wording, with minor variations, so it is helpful to consider the definitions together as a single topic.

The expression was first used in the TiS purpose test in 1960.[148] That definition survives in the current CT version of the rules and elsewhere.

I discuss here the following definitions:[149]

Definition (my terminology)	**Reference**
IT/CGT definition	*Many*
GAAR definition	s.208 FA 2013
CT definition	s.1139(2) CTA 2010
IHT definition	s.162A(8) IHTA

IT/CGT definition[150]	**GAAR definition**	**IHT definition**	**CT definition**
"corporation tax advantage" means—	A "tax advantage" includes—	"tax advantage" means—	"Tax advantage" means—
(a) a relief from corporation tax or increased relief from corporation tax,	(a) relief or increased relief from tax,[151]		(a) a relief from tax or increased relief from tax,
(b) a repayment of corporation tax or increased repayment of corporation tax,	b) repayment or increased repayment of tax,		(b) a repayment of tax or increased repayment of tax,

148 Section 43(4)(g) FA 1960.

149 TiS has a slightly non-standard definition: see 52.12.1 ("Income tax advantage").

150 I set out s.732(1) CTA 2010 as an example of this form. The actual tax referred to varies from place to place, but in other respects this definition is standard.

151 In the GAAR definition itself, the word "tax" is of course widely defined. Section 206(3) FA 2013 provides:

"The general anti-abuse rule applies to the following taxes—

(a) income tax,

(b) corporation tax, including any amount chargeable as if it were corporation tax or treated as if it were corporation tax,

(c) capital gains tax,

(d) petroleum revenue tax,

(da) diverted profits tax,

(e) inheritance tax,

(f) stamp duty land tax, and

(g) annual tax on enveloped dwellings."

(c) the avoidance or reduction of a charge to corporation tax or an assessment to corporation tax, or	(c) avoidance or reduction of a charge to tax or an assessment to tax,	(a) the avoidance or reduction of a charge to tax, or	(c) the avoidance or reduction of a charge to tax or an assessment to tax,
(d) the avoidance of a possible assessment to corporation tax.	(d) avoidance of a possible assessment to tax,	(b) the avoidance of a possible determination in respect of tax.	(d) the avoidance of a possible assessment to tax,
	(e) deferral of a payment of tax or advancement of a repayment of tax, and		
	(f) avoidance of an obligation to deduct or account for tax.[152]		
			(da) the avoidance or reduction of a charge or assessment to a charge under Part 9A of TIOPA 2010 (controlled foreign companies),
			(e) the avoidance or reduction of a charge or assessment to the bank levy under Schedule 19 to FA 2011 (the bank levy), or
			(f) the avoidance or reduction of a charge to diverted profits tax.

The drafter sometimes adds a provision that:

> it does not matter whether the avoidance or reduction is effected—

152 I think para (f) is referring to withholding tax.

(a) by receipts accruing in such a way that the recipient does not pay or bear income tax[153] on them, or
(b) by a deduction in calculating profits or gains.

This also derives from the original 1960 provision. It is hard to see what it adds, and it probably adds nothing.[154] But as the precedent is there it has often been followed.

The GAAR definition is slightly wider than the standard IT/CGT definition:

(1) It has become an inclusive definition. But since it is so widely defined, it is not easy to think of anything which is a tax advantage which does not fall within paras (a) to (f).
(2) Paras (e) and (f) are added.

Post-2013 TAARs often adopt the GAAR definition, either by reference or repeating it verbatim, (though generally with a narrower definition of "tax").

The standard IHT definition is based on the standard IT/CGT definition of tax advantage, adapted as appropriate for IHT.

2.12.2 *Tax advantage: Comparators*

The context of each TAAR is important, but some general comments can be made.

The GAAR guidance provides:

> The concept of a 'tax advantage' is common in UK tax legislation. The language suggests that in deciding whether an advantage arises the actual tax position should be compared with another tax position.
> The appropriate comparison or alternative tax position will depend on the facts, but will usually derive from the arrangements that would have occurred without the abusive tax purpose (which may include no arrangement at all).
> In situations where there is more than one alternative arrangement that might have been adopted if the taxpayer had not adopted an abusive arrangement, then the appropriate comparison would be the transaction

153 See App.2.5 (Bear tax by deduction or otherwise).

154 This is (almost) self-evident, but if authority is needed, see *HMRC v Hyrax Resourcing Ltd* [2019] UKFTT 175 (TC) at [185]: "I would say that those additional words are unnecessary as that meaning is implicit in the first part of the definition ...".

> that the taxpayer would most likely have carried out.[155] This might not be the arrangement that would give rise to the greatest tax liability.[156]

The loss-TAAR guidance[157] proposes a test to help identify the main purpose:

> ... it will be relevant to draw a comparison in order to consider whether, in the absence of the tax considerations:
> [1] the transaction giving rise to the advantage would have taken place at all;
> [2] if so,
> [a] whether the tax advantage would have been of the same amount;[158] and
> [b] whether the transaction would have been made under the same terms and conditions.

I refer to this as a "**but-for**" test. It is not a decisive test.

Where the taxpayer passes the but-for test, ie the same arrangements would be made even without the tax advantage, it is likely that tax is not a main purpose. But tax *might* still be a main purpose. A person may have two main purposes, P1 (non-tax) and P2 (tax) either of which may be sufficient to cause the arrangements.

Where the taxpayer fails the but-for test, ie the same arrangements would *not* have been made but-for the tax advantage, it is likely that tax is a main purpose. A person may have two purposes, P1 (non-tax) and P2 (tax), where P1 is the main purpose (but not sufficient to trigger the arrangements). P2 is just enough, the straw that breaks the camel's back,

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155 Footnote original: This follows the approach adopted by Lord Hoffmann in the Hong Kong case *IRC v Tai Hing Cotton Mill* (CACV 343/2005): "[The Commissioner] would not be entitled, as the more alarmist submissions of counsel for the taxpayer suggested, to make an assessment on the hypothesis that the taxpayer had entered into an alternative transaction which attracted the highest rate of tax. That would not be a reasonable exercise of power. But she may adopt the hypothesis which the evidence suggests was most likely to have been the transaction if the taxpayer had not been able to secure the tax benefit."

156 HMRC "GAAR Guidance" (2015) para C2.5 *https://www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules*

157 See 63.19 (Capital-loss TAAR).

158 Para [a] is not well expressed. It seems to ask whether in the absence of the tax considerations the tax advantage would have been of the same amount. It is not clear what point is being made here. But the rest of the paragraph makes sense.

but not a main purpose in itself. But that scenario seems somewhat implausible.

Elsewhere in the loss-TAAR guidance, HMRC say:

> So to determine whether or not the TAAR applies all the circumstances surrounding the arrangements have to be taken into account, considering:
> - the overall economic objective of the arrangements,
> - whether that objective is one that the participants might be expected to have, and which is genuinely being sought, and
> - whether that objective is being fulfilled in a straightforward way, or additional, complex or costly steps have been inserted.

2.12.3 *Loan relationship TAAR guidance*

The guidance on the loan relationship unallowable purpose test is lengthy, but worth setting out in full.

Section 441 CTA 2009 provides the rle:

> (1) This section applies if in any accounting period a loan relationship of a company has an unallowable purpose.
> (2) The company may not bring into account for that period for the purposes of this Part so much of any credit in respect of exchange gains from that relationship as on a just and reasonable apportionment is attributable to the unallowable purpose.
> (3) The company may not bring into account for that period for the purposes of this Part so much of any debit in respect of that relationship as on a just and reasonable apportionment is attributable to the unallowable purpose.
> (3A) If—
> (a) a credit brought into account for that period for the purposes of this Part by the company would (in the absence of this section) be reduced, and
> (b) the reduction represents an amount which, if it did not reduce a credit, would be brought into account as a debit in respect of that relationship,
>
> subsection (3) applies to the amount of the reduction as if it were an amount that would (in the absence of this section) be brought into account as a debit.
> (4) An amount which would be brought into account for the purposes of this Part as respects any matter apart from this section is treated for the purposes of section 464(1) (amounts brought into account under this Part excluded from being otherwise brought into account) as if it were so brought into account.

(5) Accordingly, that amount is not to be brought into account for corporation tax purposes as respects that matter either under this Part or otherwise.[159]

Section 442 CTA 2009 defines "unallowable purpose":

(1) For the purposes of section 441 a loan relationship of a company has an unallowable purpose in an accounting period if, at times during that period, the purposes for which the company—

(a) is a party to the relationship, or

(b) enters into transactions which are related transactions[160] by reference to it,

include a purpose ("the unallowable purpose") which is not amongst the business or other commercial purposes of the company.

(2) If a company is not within the charge to corporation tax in respect of a part of its activities, for the purposes of this section the business and other commercial purposes of the company do not include the purposes of that part.

(3) Subsection (4) applies if a tax avoidance purpose is one of the purposes for which a company—

(a) is a party to a loan relationship at any time, or

(b) enters into a transaction which is a related transaction by reference to a loan relationship of the company.

(4) For the purposes of subsection (1) the tax avoidance purpose is only regarded as a business or other commercial purpose of the company if it is not—

(a) the main purpose for which the company is a party to the loan relationship or, as the case may be, enters into the related transaction, or

(b) one of the main purposes for which it is or does so.

(5) The references in subsections (3) and (4) to a tax avoidance purpose are references to any purpose which consists of securing a tax advantage[161] for the company or any other person.

This sets out two tests:

(1) a purpose which is not a business/commercial purpose of the company

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159 Also see s.455B CTA 2009.

160 Defined s.42(1A) CTA 2009: "In subsection (1)(b) "related transaction", in relation to a loan relationship, includes anything which equates in substance to a disposal or acquisition of the kind mentioned in section 304(1) (as read with section 304(2))."

161 "Tax advantage" has the CT definition: see s.476(1) CTA 2009. It is confusing to use the term "tax avoidance" and define it to mean tax advantage, as the two concepts are usually used with quite distinct meanings. But there it is.

(2) tax advantage

This differs in part from standard TAAR wording. But the guidance is still relevant for other TAARs. The CF Manual provides:

CFM38150 Example [Nov 2019]
Example of unallowable purpose
A company borrows £50 million from a finance company at arm's length. The company becomes insolvent and disposes of all its assets. This leaves it with an outstanding debt of £40 million. The company is not liquidated and interest continues to accrue on the debt.
The finance company either does not accrue the interest receivable or it accrues the interest and then writes it off as a bad debt. The company accrues the interest and makes a deficit on which group relief claims are made.
The company has no activity which is within the charge to corporation tax (CTA09/S442(2)). The purpose of the loan relationship is therefore specifically excluded from being a business or commercial purpose and it is an unallowable purpose.
In addition, although the loan relationship was originally bona fide, its continued existence is not commercial. The test of unallowable purpose given by CTA09/S442(1) & (2) is the purpose of the loan relationship in the accounting period. The only purpose of the loan relationship in the current accounting period is to generate group relief, securing a tax advantage for another group company (CTA09/S442(5)).
The debits relating to the loan relationship should be disallowed.
CFM38160 Application [Nov 2019]
Applying the unallowable purposes rule
... You will note from the Economic Secretary's comments that SS441-442
- will normally apply where UK branches of overseas companies borrow for overseas activities outside the UK tax net,
- will not normally apply where a company borrows to acquire shares in companies, whether in the United Kingdom or overseas, or to pay dividends, provided that the borrowings are not structured in an artificial way. And a similar view is taken as regards borrowings, whether from a third party or intra group, to acquire other business assets whether located in the United Kingdom or overseas. This approach is not affected by the substantial shareholdings rules, and
- will not normally apply where a company is choosing between different ways of arranging its commercial affairs, if it chooses the course that gives a favourable tax outcome, provided that tax avoidance is not the object, or one of the main objects, of the arrangements.

CFM38170 Application: Hansard Report [Nov 2019]
Applying the unallowable purposes rule: Economic Secretary's comments
'The Government are aware of concerns that have been raised by my hon. Friends and by others regarding the particular anti-avoidance provisions in paragraph 13 [now s.441/442]. This paragraph was amended significantly in Standing Committee but, because of the concerns that my hon. Friends and others have raised, I take the opportunity to allay some of the fears that have been expressed about the anti-avoidance rules.
Paragraph 13 of the schedule disallows tax deductions to the extent that tax avoidance is

the main motive behind a loan relationship. We have been told of concerns that this could be interpreted as preventing companies from getting tax relief for legitimate financing arrangements. I am happy to offer a reassurance that this is not the intention of the legislation. The paragraph denies tax deductions on loans that are for the purpose of activities outside the charge to corporation tax. Among other things, this will ensure that United Kingdom branches of overseas companies do not get tax relief for borrowings that are for overseas activities outside the United Kingdom tax net.

We have been asked whether financing - which, for example, is to acquire shares in companies, whether in the United Kingdom or overseas, or is to pay dividends - would be affected by the paragraph. In general terms, the answer is no, but the paragraph might bite if the financing were structured in an artificial way.

It has been suggested that structuring a company's legitimate activities to attract a tax relief could bring financing within this paragraph - some have gone so far as to suggest that the paragraph might deny any tax deduction for borrowing costs. These suggestions are clearly a nonsense.[162] A large part of what the new rules are about is ensuring that companies get tax relief for the cost of their borrowing.

One specific point has been put to me by my hon. Friend the Member for Gloucester - that is, borrowing by a finance leasing company to acquire assets where this is more tax efficient than the lessee investing in the asset direct. Again, I am happy to offer a reassurance. Where a company is choosing between different ways of arranging its commercial affairs, it is acceptable for it to choose the course that gives a favourable tax outcome. Where paragraph 13 will come into play is where tax avoidance is the object, or one of the main objects, of the exercise.

Companies that enter into schemes with the primary aim of avoiding tax will inevitably be aware of that. The transactions we are aiming at are not ones which companies stumble into inadvertently. As one top tax adviser said recently, companies will know when they are into serious tax avoidance; apart from anything else, they are likely to be paying fat fees for clever tax advice and there will commonly be wads of documentation.

The last thing I want to do, however, is set out a list of so-called acceptable or unacceptable activities. Borrowing for commercial purposes can be structured in a highly artificial way in order to avoid tax. If we said that borrowing for certain types of activity would always be okay, tax advisers would quickly take advantage and devise artificial financial arrangements simply to avoid tax. Provided that companies are funding commercial activities or investments in a commercial way, they should have nothing to fear. If they opt for artificial, tax-driven arrangements, they may find themselves caught.

It is clear that a balance must be struck between meeting the concerns that have been raised and weakening the provision in those instances where it needs to apply, but I can assure my hon. Friends that we shall keep the matter under review.' (Hansard 28 March 1996 Finance Bill Report Stage, Columns 1192-1193.)

The reader may think that is rather shallow.

CFM38180 Transactions Not Normally Within 'Unallowable Purposes' [Nov 2019]
When CTA09/SS441-442 will not normally apply
S441-442 will not normally apply to loan relationship debits:

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162 Author's footnote: The reader may not agree.

- simply because a company is able to obtain relief for the same expenditure or loss on the borrowing to which the debits relate in more than one jurisdiction. However, S441-442 would apply where the structure that has been adopted has one or more non-commercial features (so that the loan relationship can be said to have an unallowable purpose) and/or where, taking account of the overall position of the company or group, relief for interest and other finance costs might otherwise be available more than once in the UK in respect of the true economic costs of the borrowing;
- that relate to a borrowing from an exempt body (such as a pension fund), even if that exempt body is connected with the borrower, provided the arrangements are commercial;
- that relate to a straightforward borrowing by a UK plc in order to fund a repurchase of its shares provided that there are no attempts to structure the arrangement in such a way as to provide a tax advantage for any other person and/or the amount borrowed (the level of gearing up) is dictated by market forces and hence is at arm's length;
- that relate to a third party borrowing undertaken by one group member, that fulfils the commercial borrowing requirements of the group, which it on-lends interest-free (or at a rate not exceeding the costs of the third party borrowing) to other UK-resident group members. In such circumstances, S441-442 would not apply, provided that the group gets one and only one deduction in the UK for the costs associated with the true economic cost of the borrowing. For example, S441-442 will not normally apply where intra-group interest-free loans are made primarily to enable borrowings to be matched with assets within the meaning of CTA09/S317; or
- where a loan relationship debit in one group company is matched by an equal and opposite loan relationship credit, which is fully taxed, in another group company for the same loan relationship and the funding is not then utilised to secure a tax advantage. On the other hand, S441-442 are potentially in point if the main or one of the main purposes of the intra-group funding is to achieve a tax advantage for the group as a whole, in that the loan relationship credit on the intra- group funding is in some way shielded from tax. An example of the loan relationship credit being shielded would be the soaking up of otherwise stranded surplus expenses of management etc. Where the loan relationships involve cross-border transactions, thin capitalisation and transfer pricing legislation as well as the provisions of the Double Taxation Treaties may be applicable.

CFM38190 Transactions Normally Within 'Unallowable Purposes' [Nov 2019]

When CTA09/SS441-442 will normally apply

SS441-442 would normally apply to loan relationship debits:

- which, subject to the comments at CFM38180 (fourth and fifth bullets), relate to the write-off of loans where the purpose of the loans was not amongst the business or other commercial purposes of a company. An example of a loan of this nature would be an interest-free loan made by a company, whose business consists in operating a widgets retail outlet, which had lent the money to a football club supported by one of the directors of the company for the purpose of providing financial support to the football club. Furthermore, if the company borrowed to make the loan to the football club, then SS441-442 would normally also apply to disallow the loan relationship debits relating to the interest or other finance costs on that borrowing. If, however, the purpose of the loan included a commercial or other business purpose such as advertising, then this would be taken into account in arriving at the amount attributable to the unallowable purpose on a just and reasonable basis (S441(1)-(3));

- which, subject to the comments at CFM38180 (fourth and fifth bullets), relate to a borrowing the proceeds of which are used in such a way that the company cannot or does not expect to make an overall pre-tax profit. An example would be where a company borrows at interest and on- lends at a rate of interest that is less than the rate of interest on the borrowings; or
- where a company or a group of companies enters into one or more transactions or arrangements which have the main purpose or one of the main purposes of securing loan relationship debits for repayments of loan principal, in addition to payments of interest, on the true economic commercial borrowing to the company or group. An example of this would be where one group company undertakes a borrowing of £20 million at 8.4% for 5 years from a third party and at the same time a second group company pays that third party £13 million for preference shares of £20 million in the first group company to be delivered 5 years later. The effect of this is that, economically, the group borrows £7 million on an amortising basis at 8.4% but for tax purposes the group claims relief as loan relationship debits for both the interest of £1.4 million on the group amortised borrowing of £7 million and the repayment of the £7 million loan principal. In such circumstances SS429-430 are likely to apply to disallow the amounts equivalent to repayments of principal.

2.12.4 *Tax advantage: Case law*

The TAAR guidance above is soundly based on TiS case law. The leading case is *IRC v Parker*:

> The paragraph, as I understand it, presupposes a situation in which
> [1] an assessment to tax, or increased tax, either is made or may possibly be made,
> [2] that the taxpayer is in a position to resist the assessment by saying that *the way in which he received what it is sought to tax* prevents him from being taxed on it;
> [3] and that the Crown is in a position to reply that if he had received what it is sought to tax *in another way* he would have had to bear tax.
>
> In other words, there must be a contrast as regards the "receipts" between
> [a] the actual case where these accrue in a non-taxable way with
> [b] a possible accruer in a taxable way,
> and unless this contrast exists, the existence of the advantage is not established.[163]

In the following discussion:

(a) The actual case, where the receipt accrues in a non-taxable way, is the "**actual receipt**"

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163 43 TC 396 at 441 (emphasis added).

(b) The "possible accruer in a taxable way" is the "**comparator**", (sometimes called the "hypothetical receipt")

The comparator need not be received as a result of the same kind of transaction as did the actual receipt. *IRC v Cleary*[164] concerned a share sale: the shareholder sold shares to a company for cash. The actual receipt of the proceeds of sale was not income-taxable. The comparator was a possible dividend from the company (which would have been income-taxable). So there was a "tax advantage".[165] A dividend and a sale are different types of transaction. The dividend would reduce the company's assets available for distribution (unlike the actual sale). That did not matter. So in short, the question was whether the company can pay a dividend to the shareholder equal to the amount which the shareholder received tax-free.

The comparator must involve receipt of the same asset as the actual receipt. *Anysz v IRC*[166] concerned a share for share exchange: the shareholder transferred shares in A Ltd to another company (B Ltd) in exchange for an issue of shares in B Ltd. B Ltd could have declared a cash dividend, but cash was not a valid comparator to the actual receipt of B Ltd shares. However A Ltd could have:

(1) bought B Ltd shares, and
(2) distributed them to the shareholder by dividend in specie.

That was a valid comparator. Hence the shareholder obtained a "tax advantage".

2.12.5 *Tax advantage/avoidance compared*

On a natural reading,"tax advantage" in the standard sense is wider than tax avoidance. Tax advantage includes a relief from or repayment of tax, as well as the avoidance or reduction of a charge to tax. The concept thus includes both tax avoidance and mitigation.

In *Marwood Homes v IRC*:

> Taking steps to obtain relief under s 242 [ICTA 1988] following payment of a dividend outside a group election is clearly within the spirit of the ACT code in the tax legislation. But the fact that a

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164 44 TC 399 at p.423. For TiS aspects of this case, see 52.10.1 (Sale of close co to close co).

165 At that time the standard IT/CGT definition applied to both IT and CT TiS codes.

166 53 TC 601.

> transaction has been carried out to achieve a benefit conferred by a statutory provision will not of itself exclude the application of [the TiS rules]. This follows from the definition of tax advantage in [what is now s.732 CTA 2010] which covers both everyday tax planning and transactions, such as traditional dividend stripping, which fall more obviously within the mischief that [the TiS code] was introduced to counteract. The only safeguards available to the taxpayer are the clearance procedures and the escape clause [motive defence]. It cannot therefore avail Marwood to rest its case on the simple proposition that the dividends ... were directly within the spirit of s 242.[167]

That concerns the meaning of "tax advantage" in the TiS code, where special principles of construction apply.[168]

The same approach was taken in the context of DOTAS.[169]

Nevertheless, the context of some TAARs may show otherwise. HMRC guidance on TAARs often adopts an avoidance test.[170]

2.13 Naming and shaming

"Naming and shaming": The alliteration is irresistible, and for some reason sounds more reputable than just "shaming", which is what this topic is about.

The expression covers a variety of arrangements. I distinguish between statutory shaming, discussed elsewhere,[171] and media shaming, discussed here.

The OUCBT paper provides:

> ... searching for individual or corporate villains will not assist in remedying the underlying problems...
> Even if public naming and shaming influences a few taxpayers in the public eye to impose their own voluntary constraints, it will not necessarily affect the worst avoiders, and may even encourage some non-compliance from those who feel that "everyone is at it". Only understanding the flaws in the tax system and working on serious changes can give long-term results....

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167 [1999] STC (SCD) 44 at [20].

168 See 52.1.1 (Construction of TiS code).

169 *HMRC v Hyrax Resourcing Ltd* [2019] UKFTT 175 (TC) at [151] - [161]. But the arrangement in that case did constitute tax avoidance in the strict sense, so the issue did not need to be decided.

170 See 61.21.5 ("Genuine" loss and the TAAR).

171 See 120.52 (Public list of defaulters).

> Even if that were to have an effect on one taxpayer it would not tackle the underlying issues.

No-one has taken any notice of that!

Media shaming is at present common for various purposes (more than one may be present at the same time):

(1) In marketing: To sell newspapers with exposures of celebrities who have been involved in tax avoidance schemes.[172]

(2) In politics: To knock the opposition by alleging that politicians, or other party supporters, are guilty of tax avoidance. In this respect, anything goes and some stories have been farcical. For instance, Peter Mandelson was berated for taking a loan from a UK company[173] and Ed Miliband was accused of avoiding tax by means of a deed of variation.[174] The allegations are so off-target as to cast doubt the good faith of those who make them and newspapers which uncritically promote them.

(3) As a scandalisation technique, to promote the view that avoidance is immoral; often combined with juxtaposition of avoidance and evasion and the suggestion that there is little or no difference.

When these allegations are made it is impossible to defend oneself.

So public debate is not uninformed but misinformed. It is a yeasty mingling of dimly understood facts with vague but deep impressions, and images, half real, half fantastic. It has more than its fair share of misunderstanding and jejune polemics.

In these circumstances, media shaming may easily lead away from the Rule of Law. In 2012, Starbucks paid £20m to HMRC following a threat to occupy its cafes.[175] If one calls that payment "taxation" at all, it was certainly not taxation imposed by law. A hostile commentator would call this taxation by mob rule. Google and Amazon, who do not have public premises vulnerable to the same threat, have not had to pay similar sums.

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172 Typically film schemes, as the names of members of the LLPs concerned are in the public domain.

173 *http://www.theguardian.com/politics/2015/jan/27/peter-mandelson-400000-pound-tax-free-loan* The Guardian later amended its website to concede that the loan had been wrongly described as tax-free.

174 Leading to a gibe in the Spring 2015 budget announcing a policy review of deeds of variation. The Guardian rightly asked: what came first – the policy or the joke?

175 Ironically, the post-tax cost of the payment would have been diminished as it should in principle be deductible in computing taxable profits.

Perhaps the point was understood, as the campaign was not repeated.

2.14 EU tax haven blacklist

2.14.1 *"Non-cooperative jurisdictions"*

EU publish a list of "non-cooperative jurisdictions for tax purposes". The current list is set out in Annex 1 of 2020/C 64/03. This provides a list of 12 tax havens, and the reasons they are on the list:

1. American Samoa
American Samoa does not apply any automatic exchange of financial information, has not signed and ratified, including through the jurisdiction they are dependent on, the OECD Multilateral Convention on Mutual Administrative Assistance as amended, did not commit to apply the BEPS minimum standards and did not commit to addressing these issues.

2. Cayman Islands
Cayman Islands does not have appropriate measures in place relating to economic substance in the area of collective investment vehicles.

3. Fiji
Fiji is not a member of the Global Forum on transparency and exchange of information for tax purposes ('Global Forum'), has not signed and ratified the OECD Multilateral Convention on Mutual Administrative Assistance as amended, has harmful preferential tax regimes, has not become a member of the Inclusive Framework on BEPS or implemented OECD anti-BEPS minimum standard, and has not resolved these issues yet.

4. Guam
Guam does not apply any automatic exchange of financial information, has not signed and ratified, including through the jurisdiction they are dependent on, the OECD Multilateral Convention on Mutual Administrative Assistance as amended, did not commit to apply the BEPS minimum standards and did not commit to addressing these issues.

5. Oman
Oman does not apply any automatic exchange of financial information, has not signed and ratified the OECD Multilateral Convention on Mutual Administrative Assistance as amended, and has not resolved these issues yet.

6. Palau
Palau does not apply any automatic exchange of financial information, has not signed and ratified the OECD Multilateral Convention on Mutual Administrative Assistance as amended, and has not resolved these issues yet.

7. Panama
Panama does not have a rating of at least 'Largely Compliant' by the Global Forum on Transparency and Exchange of Information for Tax Purposes for Exchange of Information on Request and has not resolved this issue yet.

8. Samoa
Samoa has a harmful preferential tax regime and has not committed to addressing this issue.
Furthermore, Samoa committed to comply with criterion 3.1 by the end of 2018 but has not resolved this issue yet.

9. Seychelles
Seychelles has harmful preferential tax regimes and has not resolved these issues yet.
10. Trinidad and Tobago
Trinidad and Tobago does not apply any automatic exchange of financial information, has a 'Non-Compliant' rating by the Global Forum on Transparency and Exchange of Information for Tax Purposes for Exchange of Information on Request, has not signed and ratified the OECD Multilateral Convention on Mutual Administrative Assistance as amended, has harmful preferential tax regimes, and has not resolved these issues yet.
11. US Virgin Islands
US Virgin Islands does not apply any automatic exchange of financial information, has not signed and ratified, including through the jurisdiction they are dependent on, the OECD Multilateral Convention on Mutual Administrative Assistance as amended, has harmful preferential tax regimes, did not commit to apply the BEPS minimum standards and did not commit to addressing these issues.
12. Vanuatu
Vanuatu does not have a rating of at least 'Largely Compliant' by the Global Forum on Transparency and Exchange of Information for Tax Purposes for Exchange of Information on Request, facilitates offshore structures and arrangements aimed at attracting profits without real economic substance and has not resolved these issues yet.

The 2020 list is limited in number; from a UK perspective the only significant entry is Cayman, and I doubt if it will stay there very long. The immediate significance of being on this list is relatively small,[176] but it seems to have had some success in encouraging change.

Scotland will not make a coronavirus-related grant to a company with a parent/subsidiary in these jurisdictions.[177] Clearly, there will not be many, if any, grants refused as a result of that particular provision, though it may form part of a more general trend.

How will this approach of ostracism/penalisation of tax havens develop in the future? This is a question of international politics, not law.

2.15 Avoidance: Multinationals

Much attention has been given to multinational companies. The Public Accounts Committee looked at Starbucks, Amazon and Google. The verdict was guilty.[178]

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176 See Thornton, "The Cayman Islands and the EU 'blacklist' Tax Journal, 6 Mar 2020.

177 Para 16 sch 4 Coronavirus (Scotland) (No.2) Act 2020.

178 Or was it? "We were not convinced that their actions, in using the letter of tax laws both nationally and internationally to immorally minimise their tax obligations, are defensible." Public Accounts Committee 19th report 2012, para 12. If the convoluted wording was intended to reflect a note of caution, it was lost in the public debate. But perhaps the obfuscation is just the dialect of politics.

It is not possible to comment sensibly on the taxation of a multi-national group without knowing the relevant facts, which are not usually in the public domain. The claim that these companies have avoided UK corporation tax is often based on the size of their UK sales or UK staff, set against the corporation tax actually paid. But all well-informed commentators know that corporation tax is not a tax on sales, or the size of an establishment, and large sales/staff does not mean large profits. The OUCBT paper provides:

> Starbucks and Facebook ... have been criticized for not paying tax where they are making sales, but sales are not the basis for the corporation tax, so this alone is no cause for criticism of the companies concerned. We could argue that the tax base should change, but unless and until that occurs, the fact that there is a high turnover but no taxable profit is not in itself an indicator that the taxpayer is behaving in an unreasonable way.

Likewise the fact that relatively little CT is paid proves nothing. The OUCBT paper provides:

> The fact that there is little or no tax payable is not, however, conclusive evidence that there is effective or ineffective avoidance. In some of these cases, these companies are simply operating in accordance with incentives created by the international tax system and by domestic governments trying to attract economic activity into their jurisdictions. This the governments may do for non-tax reasons, or because this activity gives rise to forms of taxes other than those which are not being collected. ...

The IFS say:

> A low corporate tax bill is not in itself therefore evidence of tax avoidance. Even if income appears high, there may be genuinely low UK taxable profits if a firm has relatively high current expenditures or can offset the effects of large investment expenditures or losses. The UK tax bill can also be appropriately relatively low compared with declared income if that income is the result of genuinely non-UK activities.

HMRC make the same point:

> The PAC returned to this theme in Ninth Report of Session 2013–14 "Tax Avoidance–Google". A PAC hearing is not, perhaps, well suited to ascertaining the facts; it is not possible to ascertain from this whether the complaint of the PAC is that Google have been conducting successful or unsuccessful tax avoidance.

> Globalisation means that multinationals have the opportunity to structure their business to take advantage of beneficial tax rules in different countries. Provided that this results in profits being taxed in line with where genuine economic activity is carried on, this does not amount to tax avoidance. ... In broad terms, companies are required to pay corporation tax in the country where they carry on the economic activity that generates their profits, not where their customers are located.[179]

Unusually, the facts are known in relation to Apple as a result of US congressional hearings (I suspect, better conducted than the UK equivalent). These have been well analysed by Antony Ting.[180] In short, there is no reason to think that Apple have avoided *UK* tax. The group has avoided Irish/US tax by Irish/US hybrid entities; and, perhaps, it has reduced Irish tax by informal transfer pricing agreements with the Irish Revenue.

2.15.1 *Transfer pricing*

It is often said that multinationals engage in avoidance through transfer pricing. For instance, Christian Aid say:

> There is debate about the extent to which companies engage in trade mispricing (artificially suppressing the income they earn from activities such as resource extraction, to reduce payments to government), but few would doubt that it has a significant impact on the incomes of governments in the global South.[181]

Transfer pricing is not strictly avoidance. It is in principle in the category of ineffective avoidance:

> We may well question whether the transfer pricing rules are adequate, ... but these are considerations relating to tax policy reform and not to tax avoidance.

The fundamental problem is not terminology, but that the facts needed to assess these claims are not in the public domain. Robert Maas says:

> The Public Accounts Committee believes that Starbucks overpays for its

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179 HMRC, "Taxing the profits of multinational businesses" Issue Briefing (2012) *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/89030/profits-multinationals.pdf*

180 Ting, "iTax—Apple's International Tax Structure and the Double Non-Taxation Issue" [2014] BTR 40. See 87.1 (Hybrid entities).

181 Christian Aid, "Tax for the common good (2014) *http://www.christianaid.org.uk/images/Tax-Morality-Report-J2951.pdf*

> coffee. I am not an expert on the economics of coffee, but I am a bit puzzled that the PAC members consider themselves sufficiently knowledgeable in this area to be able to pass judgment (sorry, to express scepticism).
> The committee thinks that a 16.67% margin to a company that sources and buys coffee throughout the world, exercises quality control and works with local farmers, is excessive. Personally, I do not but then I don't have any expertise in coffee.
> The PAC also believes that the rate of interest on the inter-company loan from the US company (4.9%) is excessive, "at a higher rate than any similar loan we have seen". I do not know what similar loans the committee has seen, ie a loan to a loss-making business with little asset backing. I must say it looks modest to me...[182]

If transfer pricing is conducted with the consent of the tax authority concerned, it is not avoidance, though it may be unfair tax competition. The EC are currently pursuing state aid rules;[183] it will be interesting to see what results.

2.15.2 *GAAR*

The GAAR guidance provides:

> Many of the established rules of international taxation are set out in double taxation treaties. These cover, for example,
> [1] the attribution of profits to branches or between group companies of multi-national enterprises, and
> [2] the allocation of taxing rights to the different states where such enterprises operate.
> The fact that arrangements benefit from these rules does not mean that the arrangements amount to abuse, and so the GAAR cannot be applied to them. Accordingly, many cases of the sort which generated a great deal of media and parliamentary debate in the months leading up to the enactment of the GAAR cannot be dealt with by the GAAR.[184]

In my terminology, these issues are non-avoidance, and in some cases, tax avoidance, but not tax abuse.

But where there is abuse, one country's domestic GAAR cannot resolve

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182 Maas, Taxation Magazine, 27 February 2013.

183 See 102.19 (State Aid).

184 HMRC, "GAAR Guidance" (2017) para B5.2 *https://www.gov.uk/government/publications/tax-avoidance-general-anti-abuse-rules* The House of Lords Select Committee made the same point.

the issue. Apple's planning, for instance, turned on a hybrid entity:
(1) transparent under Irish tax law, and so not paying tax on its profits in Ireland;
(2) opaque in US tax law, and so not paying tax on its profits in the US.

CIOT say:

> As in much of the BEPS project, this is not a case of tax avoidance as previously understood; there can be no avoidance where there is no intent to tax in the first place.[185]

If avoidance is action contrary to the intention of a Parliament, then this kind of planning may properly be described as tax avoidance if it is the case that:
(1) The intention of Oireachtas is that the entity's income should be taxed in the US, and
(2) The intention of US Congress is that the entity's income should be taxed in Ireland.

One might refer to it as international tax avoidance (though there is of course no such tax as "international tax"). The tax advantage is not contrary to the tax policy of either country in isolation; it is the result of a gap between the two.[186] In this case, the gap may in fact be intentional, in that both Ireland and the US deliberately chose to facilitate the planning;[187] in which case the planning should not be called avoidance at all.

Whatever the terminology, CIOT are right to say that the tools to deal with multinational planning/avoidance will not be the same as those used for domestic tax avoidance. It is an international problem which only international consensus can resolve. Hence the OECD BEPS project.

We should never lose sight of the fact that public debates about tax avoidance are simultaneously fiscal, moral and political debates, raising issues of equality, redistribution, class, and tax competition; and sensitive ears may also detect elements of xenophobia.

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185 CIOT, "BEPS Action 2: Neutralise the effects of hybrid mismatch arrangements (Recommendations for domestic laws) Response by CIOT (May 2014) *https://www.oecd.org/ctp/aggressive/comments-action-2-hybrid-mismatch-arrangements.pdf*

186 See de Boer & Nouwen (eds) *The EU's struggle with Mismatches and Aggressive Tax Planning* (2013), para 3.5.2 (General anti-abuse rule).

187 Ting, "Old wine in a new bottle: Ireland's revised definition of corporate residence and the war on BEPS" [2014] BTR 237.