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Taxing Times: Tax Avoidance, Boon or Bane? [1]

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The recent Times series on tax avoidance has triggered a huge spike in coverage of the tax affairs of the rich and famous.

David Cameron?s condemnation of Jimmy Carr?s tax arrangement as ?morally wrong?, presumably based on newspaper headlines, was arguably unwise, and may well come back to haunt him as open season is declared by the press on Tory donors tax planning arrangements.

Rather ironically, in the same week he welcomed the news of the introduction of a 75% tax for high earners in France;

> *?If the French go ahead with a 75% top rate of tax we will roll out the red carpet and welcome more French businesses to Britain and they will pay taxes in Britain and that will pay for our health service, and our schools and everything else.?*

A more sure-footed Ed Milliband made the following observations when responding to Cameron?s comments.

> *"I'm not in favour of tax avoidance obviously, but I don't think it is for politicians to lecture people about morality.*
>
> *"I think what the politicians need to do is - if the wrong thing is happening - change the law to prevent that tax avoidance happening and I think that is the right course the Government should take.?*

However, the mood music of popular opinion can sometimes be irresistible for politicians. The same Ed Milliband last year pronounced that:

> *?The bankers who took millions while destroying people's savings: greedy, selfish, and immoral; the MPs who fiddled their expenses: greedy, selfish, and immoral; the people who hacked phones at the expense of victims: greedy, selfish and immoral.?*

The next Prime Minister's Questions with the two UK leaders could be quite interesting!

Whilst few will have much sympathy with Jimmy Carr, given his TV antics lampooning tax avoidance, Mr Milliband is right. Individual judgement of personal tax affairs is a matter for tax administrations and not the court of public opinion.

The tax code in the UK is extremely complicated with Tolley?s Tax handbooks now reputedly running to some 11,500 (!) pages of explanation. Given this degree of complexity it is not that surprising some advisers seek to leverage this to reduce their clients tax bills.

The situation is further complicated by successive UK government?s introducing tax incentivised schemes to encourage investments into key industries, such as films and creative media; the subject of the recent controversy, which earn billions for the UK economy, but are often seen as high risk investments.

Of course the difficulty with introducing morality into tax is one man?s tax planning is another man?s ?aggressive? tax avoidance.

When we buy duty free we are avoiding tax, invest in a pension or an ISA we are avoiding tax, accept a benefit in kind rather than cash, we are avoiding tax, run our affairs through a company utilising dividends as opposed to paying income tax and national insurance we are avoiding tax, and so it goes on.

Neither is tax avoidance the privileged domain of big business or high net worth individuals.

Danny Alexander, Chief Secretary to the Treasury recently made an announcement in Parliament, having identified that large scale public service tax avoidance had been uncovered through an HM Treasury Review:

> *?The review has identified over 2,400 off payroll engagements in central Government departments and their arm?s length bodies that were live on the 31 January this year.*
>
> *"That is an unacceptable number of off payroll engagements given the lack of transparency on the tax arrangements of the contracts.*
>
> *"Mr Speaker that lack of transparency cannot continue.*
>
> *"Today each department involved is publishing on their website a list of off payroll appointees who, as of 31 January, were engaged at an annual cost to the department of more than £58,200.*
>
> *"The majority of cases relate to technical specialists ? in fact over 40 per cent relate specifically to IT specialists.?*

It seems that many of these arrangements have been used purely to avoid tax. The unfortunate outcome is that new legislation may be passed which would also hurt the private sector, potentially impacting on employment flexibility and costs, due to public sector transgressions.

The recent HMRC Tax gap analysis coupled with the revelations contained in the HM Treasury review indicate quite clearly that the UK?s issues around tax avoidance are very much homegrown.

Where do we draw the line then between what is acceptable and what is not?

Despite acres of comment on the subject the current system for deciding this is quite sensible and is stacked in favour of the tax collector as opposed to the tax avoider.

Pretty much all of the tax planning schemes that have made the headlines recently are subject to Disclosure of Tax Avoidance schemes (DOTA?s) regulation.

The DOTAS regime allows HMRC to keep up to date with what types of tax avoidance schemes are in circulation. This provides the opportunity to review and if necessary, amend legislation to block any

scheme that the government considers aggressive and unfair.

HMRC can rule schemes offside and the only way a promoter could challenge this would be to go to court, which is risky and expensive. This check and balance is to be further strengthened as a result of the work on a General Anti Abuse Rule or GAAR undertaken by Graham Aaronson QC on behalf of the UK government.

The idea would be to make even clearer what would be offside and to give greater powers to address transgressors. Tools are available to tackle abusive tax avoidance and they are going to be strengthened.

So why is this issue arousing so much public interest?

In a climate of recession and cutbacks everyone wants to feel that all sections of society are making a fair contribution.

But this is where we get into some difficulty; fairness and moral judgement are subjective, they are a matter of personal opinion and are coloured by our personal view of the world.

Graham Aaronson QC in his study on tax avoidance made the following observation:

> *?My approach to taxation, tax avoidance and the question of whether a GAAR would be beneficial for the UK is based on the premise that the levying of tax is the principal means by which the state pays for the services and facilities which it provides for its citizens. ?*

But should there be any limits on what the State demands and does the citizen have any right to order their affairs to pay the tax legally due and no more? When framing an answer to that question how many people appreciate for example that the top 1% by income already pay more than a quarter of all income tax in the UK, and the top 10% pay over 50% of all income tax collected. In contrast the bottom 10% by income pay just 0.5%.

The answer to those questions will probably be quite different according your world view and on which end of the political spectrum you sit. I would suggest that it may be affected too by whether you, or someone else, is paying the tax.

One view is as described by Simon Jenkins in the Guardian [3] :

> *?Modern tax theory is rooted in more than revenue raising. It adheres to fairness, redistribution and incentive. For most people, paying taxes defines their citizenship. Whether or not avoiders are in the same class as "benefit cheats" is moot: most cheats have legal "sickies" as most film companies have brass plates in the Caymans. What is surely beyond dispute is that refusing to pay taxes in a shared community is anti-social, unfair and infuriating.?*

But Ryan Bourne, writing for the Centre for Policy Studies, expresses a different point of view [4]:

> *?Those who argue the tax avoiders are immoral are talking about a particular form of tax avoidance: stuff that other people do which they, personally, disapprove of. We thus risk every case being discussed to death by the social conscience of the middle-class commentariat, who impose their interpretation of morality on everyone else. Rather than impersonal rules, they desire personal public vilification depending on how they feel about a particular issue. Ultimately, this is the politics of envy being endorsed by the PM."*

> *"Finally, the most disappointing aspect of this debate is the underlying assumption that the state is moral and keeping your own money legally is immoral. Is it moral, as we found out recently, that the*

> *Was it moral to plunder the pension-funds of hardworking individuals? Where was the ?fairness? in piling huge debts onto future generations? What was the ?fairness? dimension of the massive extension of state surveillance? More generally, the principle of any taxation by coercion (let alone avoiding legally) is morally wobbly- it amounts to confiscation to meet the priorities of those who feel their values and principles are morally superior to your own.?*

Clearly some trenchant and polarising views in play.

A still relevant article I wrote some time ago commenting on this area entitled ?A Taxing Fundamentalism? can be found here [5].

I have previously written [6] on the place of morality in business although this also works for tax: ?Moral judgment without a transcending benchmark is simply a matter of opinion, and opinion fuelled by anger is rarely rational.?

Recently we have seen an increase in tax disputes generated by HMRC, probably in response to greater demands from a cash strapped HM Treasury.

Figures obtained by Pinsent Masons showed that the number of cases heard by the First-tier tax tribunals reached a record high of 3,400 in the last three months of 2011.

Overall, the number of new cases heard in 2011 was 20% higher than in 2010, at 11,000. In addition, the number of unheard cases rose from 16,700 at the end of 2010 to 22,100 at the end of 2011.

The downside of this approach being that international investment is likely to be deterred if the tax system is not seen as certain, simple and fair, or the tax authorities too aggressive.

But what of Jersey?s role in all of this?

Our position is clear and straightforward. We have a reputation for being a high quality and well run finance centre. We want to attract only business which supports this proposition.

The tax avoidance schemes that have recently hit the news are designed, marketed, promoted and approved in the UK, their only connection with Jersey being one of an administrative function.

Think of the analogy of a warehouse, lots of packages come into the warehouse, which the shipper certifies are compliant with health and safety regulation with respect to the contents. The warehouse checks the paperwork and accepts the shipment on the basis of this certification. It cannot open and examine every package or crate it receives, and wouldn?t have the knowledge to form an accurate judgment in any event.

Jersey is in this position. We will only accommodate legally planned schemes which are HMRC approved, if they are challenged by HMRC and deemed to be offside; that is illegal, we will not house them. We are not in a position to make this judgment on our own nor should we.

Our obligation is to make sure the ?certification? is sound and that we offer a safe, secure and legal hosting facility. Remember too through our tax information exchange agreement with the UK, HMRC can request and obtain any information relevant to tax matters on any UK taxpayer with business in Jersey.

Tax planning schemes are a relatively minor part of what we do in Jersey. £200bn of the funds we manage relate to mostly pension funds where we are supporting the drive to provide a better retirement for ordinary working people.

A further £155bn relates to the safekeeping of cash in a place that is trusted and secure on behalf expatriates working all over the world.

Most of this value is placed wholesale into the City of London and supports the UK banking system and Stock Exchanges to the tune of several hundred billions of pounds at any point in time.

The Times series on tax avoidance is to be welcomed, it has certainly stirred up considerable debate on an important subject. The editorial leader describes the complex system of British tax reliefs as ?byzantine? and calls for ?lower? and ?simpler? taxes.

Chancellor Osborne, the IOD, the Taxpayers Alliance [7] and the Adam Smith Institute have all argued that what Britain really needs is a simpler tax system ? a system where fair, flat tax rates broaden the base of tax collection, a system that provides generous allowances to the low income groups who need them, and a system that removes incentives for complex tax avoidance schemes.

It is this sort of informed debate and intelligent legislative development that can provide greater clarity and certainty for all parties and which we welcome as a positive way to develop the business of international finance.

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