

Tax and morality – UK style

By Peter Vaines,
Squire Sanders (UK) LLP,
London



The UK press is full of indignation about the tax affairs of various high profile individuals. This has spawned a debate about tax avoidance, tax evasion, and morality – and a call for people to pay “the right amount of tax”.

I daresay this debate will be replicated in many other countries. Regrettably the issues have become confused which is a matter of concern for the professionals in the private and public sector, because there are some fundamental principles involved here.

The raising of taxes is obviously extremely important and it is a matter of great sensitivity to taxpayers. Where taxes are perceived to be unfair there will be consequences – not perhaps immediately because it takes time for injustice to get to boiling point, but eventually the people will speak. In the UK, we only have to think about the Poll Tax to see how loudly the people will speak when they perceive an injustice in the field of taxation. More significant (and proverbial) was the foolishness behind the duty on tea introduced in 1773 which led to the Boston Tea Party. Things are more sophisticated now (or so we think), but the basic principle remains the same – it pays to think about the consequences before you impose a tax and not get carried away with some personal dogma.

Of course nobody likes paying tax, but everybody appreciates that taxes need to be paid and as long as the system is broadly fair, people will abide by it and pay their taxes regularly. This has been the position in Britain for a long time which is why HMRC has been regarded so highly. Nobody would ever dream of trying to bribe one of Her Majesty's Inspectors of Taxes, still less expect that they would succeed. The esteem in which HMRC officials are held means that the tax system has a much better chance of working – and it does. But HMRC need to take care to protect their reputation because in recent years they have allowed a decline to occur – and positive action is required to restore their reputation and integrity.

A necessary consequence of a tax system which tries to be fair and accommodate to widely differing circumstances is the provision of numerous reliefs and allowances. In the present climate, seeds of discontent have been stirred up, causing those who are entitled to such reliefs and allowances to be resented by those who do not qualify for them. One of the least satisfactory features of the recent debates in the UK is that the government has deliberately introduced tax reliefs to achieve some commercial or social purpose, but anybody who uses those reliefs because they have the money to do so, is subject to public (and political) vilification.

This has led to the blurring of the distinction between avoidance and evasion, with politicians referring to both as morally repugnant. This is to say the least, unwise. Some people seek to reduce their taxes by carefully arranging their affairs lawfully. Others who try to get out of paying tax by being dishonest are simply fraudulent and the full force of the criminal law should be applied to them. That is why the difference between the two concepts has been described as the thickness of a prison wall. I do not think it is an overstatement to say that the clear distinction between these concepts is the foundation to a civilised society – it is simply the operation of the rule of law. To allow the rule of law to be undermined by political point scoring is irredeemably foolish.

However deep our distaste for artificial tax schemes, the promoters usually strive vigorously to obey the law. However those who use falsehoods and concealment to achieve their purpose are not seeking to obey the law and should be rightly condemned and pursued. We need to understand the difference – which is of fundamental importance. If lawful conduct is not going to be distinguished from unlawful conduct, we are not safe in our beds.

Of course there are grey areas where there is uncertainty about whether the law applies to a particular transaction and whether there has been any dishonesty. That is what the Courts are for, and they are very good at making such judgments without fear or favour.

Morality is a more difficult question. It has been said many times that there is no morality, or indeed any equity, in tax and this means either that you cannot be made to pay tax because of some high sounding moral principle or that you cannot be relieved from paying tax for the same reason. Your liability depends upon the law, not on some ill-defined moral code, which varies from person to person. However, although your tax liability has nothing to do with morality, your conduct certainly does and taxpayers conducting their tax affairs in a moral and honourable fashion – by which I mean a full disclosure to HMRC of all material facts relating to their tax affairs, is something which should be encouraged. Anything less will lead to dishonesty and ultimately to anarchy.

It is appropriate to step back and to remember that none of this is new. The relationship between the citizen and the taxman has played an important part in the development of the constitutional law in the UK. Magna Carta in 1215 had something to say about it but it was in the 17th century that things really started to happen. In *Bates Case* 1606, a merchant refused to pay a duty on the import of currants contending that it was contrary to the statute of Edward III; in 1627 the defendants in the *Five Knights* case were imprisoned for refusing to pay a forced loan and in 1637, in the celebrated *Ship Money* case, John Hampden refused to pay his taxes on the grounds of no taxation without representation. This discontent culminated in the *Bill of Rights* in 1688 which declared that “levying money for or to the use of the Crown by pretence or prerogative without the consent of Parliament” was illegal.

The essential point here is that if the state wants to take away the property of the citizen, it cannot do so otherwise than as the law provides. It was wrong in 1688 for the Crown to levy taxes on a whim – and it is no more legitimate now for a politician (or more likely some anonymous official) to levy taxes because he thinks “that is the right amount of tax”. The right amount of tax is the amount determined by the law, subject to adjudication and appeal to the Courts – not the personal view of a politician or civil servant against which there can be no appeal. That is tyranny. We do not live in a society where a tax official can knock on my door and say he rather likes the look of my car and can I hand over the keys because he thinks that would be right. There are some societies like that – but the UK is not yet one of them.

The development of a purposive legal interpretation in tax law has created considerable uncertainty. It is perhaps little more than construing the law on the basis of substance and not form, and such an approach is peculiarly relevant when considering complex tax issues. However it needs boundaries – and must not be arbitrary; it is important that the citizen has adequate protection. We are perilously close to allowing tax liabilities to be determined by looking at the result of one course of action (giving rise to one tax effect) and comparing it with another course of action (giving rise to a different tax effect). To give a modern example, I may want to go to Paris. I can go by air or by train (each journey would take about the same time) but if I go by air I pay airline passenger tax – so I go by train to avoid the tax. The result of my journey is the same. I start at home and I end up in Paris so should I pay the airline passenger tax that I have sought to avoid by going by train? This is obviously absurd but these are exactly the arguments which are being used to justify a tax charge when none exists under the law.

Even if the decision is to be made by the Courts, the basis upon which the decision should be made before the citizen is deprived of his property, should be certain. Otherwise we are on a slippery slope. Today it is the citizen’s property; tomorrow it will be his liberty and the danger is greater if the law is so broad it can accept any interpretation the state may choose to adopt. This is not fanciful. We have seen in other countries that tax can be used as an excuse for confiscation of assets and to put citizens in prison in pursuit of commercial or political ends.

We have come a long way from the 17th century when Seldon criticised the early equitable principles with his famous expression that “Equity varies with the length of the Chancellor’s foot”, an elegant description of subjective and arbitrary exercise of power giving the citizen neither access to, or any confidence in, the rule of law – and certainly no possibility of any appeal. So the “right amount of tax” cannot be the amount that Mr Cameron or Mr Miliband think is the right figure. Skilled politicians they may be, but their personal views do not represent the law, or usurp the authority of the Courts. It is for these reasons that I feel we are on a dangerous path and the development of a General Anti Avoidance Rule does little to ameliorate the danger.

Unfortunately the whole issue has become debased by political sound bites and the rights and wrongs have been completely overridden by the amounts involved. All that seems to matter is the size of the figures. We need to do better than that, and we need our leaders not to pander to the absurdity which says that people must pay more tax – other people of course, not me. If somebody earns a large sum of money, they should pay a large amount of tax – but even if they pay maximum tax on every penny they earn, the media (and the politicians) are not satisfied. They want more – for no good reason other than because the person is rich. The entrepreneur who has worked day and night, putting everything he has on the line to create 1,000 jobs – and paid tax on every penny he has received – is regarded as some kind of low life who is fair game for any amount of ignorant criticism. We risk a serious erosion to our economic well being if we treat so unfairly those who create our wealth. Such an approach is hugely damaging to our society (let alone our economy) and it is to their discredit that politicians cannot resist the headlines they get by encouraging it. Let us hope that this is just a phase like adolescence which gives way to wiser counsels in due course.

Peter Varley