

## THE CRIMINALISATION OF TAX LAW

By David Goldberg QC

It is, no doubt, possible to devise an enormous number of ways of raising taxes and many of those ways might seem unimaginable until they have been imagined.

For example, in the UK, some years ago now, we introduced two new taxes, one on insurance premiums and another on landfill, and their introduction was a complete surprise, something of a novelty to us though, I understand, that there were taxes of that kind in other countries.

Taxes of this rather narrow specific kind are, however, relatively unusual and, taking a broad theme, there are, in general, two different ways of raising tax which are relatively widespread: it is possible to tax by reference to turnover and it is possible to tax by reference to profits.

In devising a tax, then, a good starting point is to decide whether it is to be a tax on turnover or a tax on profits.

The next step to take is to decide from whom the tax is going to be collected and, here, practical considerations are going to play a large part.

It is obviously easiest for a political authority to tax those who live within its geographical boundaries and, after them, it is relatively easy to tax those people who do things within the boundaries of the authority even though they don't live there.

It is more difficult for an authority to tax a person who neither lives within the area over which it has power nor does anything in that region: it is, accordingly, inherently unlikely that, for example, a Chinese government will seek to tax Peruvians who live in Peru, never visit China and have nothing in the way of property or business in China.

However, what I have said so far leaves largely unaddressed

what might be called the problem of the visitor: what is a tax system to do about a person who is very clearly based in Country X but does some things in Country Y?

Of course, to a certain extent, if the authority in question decides to tax only what happens within its boundary, the problem of the visitor does not arise in quite such an acute form: it doesn't matter where the person is, but only where he does things and what he does.

Even then, of course, an issue might arise: is the foreigner who is doing things in the territory doing as much as he could or should do in the territory, or has he artificially restricted what he does there?

Let me park that question for the time being and return to my initial theme of what the charge to tax is to be measured by: is it to be measured by reference to gross amounts (as turnover taxes are) or is it to be measured by profits?

In the early days I rather think that most taxes were local turnover taxes.

For example, about 3,500 years ago, in Egypt, the population had to pay 20% of their production of grain to Pharaoh.

If a farmer in Pharaoh's realm grew 100 bushels of wheat he had to hand over 20 to Pharaoh.

The tax was relatively simple and, no doubt, if a person lied to the vizier as to how many bushels of wheat he had grown, that would have been a criminal offence with appropriate and unpleasant sanctions: it has always been illegal – a crime – to lie to a taxing authority; this talk is not about that kind of thing.

What this talk is about is the way in which political authorities are increasingly, and all over the world, imposing heavier and heavier sanctions for errors which may well be entirely innocent and certainly not deliberately dishonest.

My thesis is that the concepts underlying the way in which tax systems work are relatively uncertain and that that inherent

uncertainty makes the sort of sanctions which are now being imposed wholly inappropriate.

A simple turnover tax, like the ancient Egyptian wheat tax, had the merit of being relatively easy to operate, but it also suffered the disadvantage that it might be difficult to pay.

If, to meet the costs of producing 100 bushels, it was necessary to use up 81 bushels of wheat, the farmer would only be left with 19 out of 100 bushels with which to pay the 20 bushels of tax.

That can, of course, be a problem with modern turnover taxes just as with ancient ones and it does not seem very attractive: a tax which means that you may end up poorer after a year's productive work is surely not a particularly good way of raising money.

I suppose that it might be regarded as a way of improving productivity and efficiency, but it is likely to be a very blunt way of achieving that and it could be a way of arousing resentment rather than efficiency.

One of the things that a political authority needs most from a tax system is that it has widespread public acceptance: if the tax system causes resentment, it is unlikely to work well and, eventually, it will have to be rewritten.

So one of the problems of a turnover tax is that it might arouse large scale hostility because it could be difficult to pay; and it surely seems much more sensible for taxpayers to be required to pay tax only when they actually have, or should have, the money to pay it.

It is, of course, possible to ameliorate the problems of a turnover tax by allowing for a system of offsets, rather in the way that a VAT or a GST does; but then the basic simplicity of the tax has been eroded and the offsets do not always make the tax easy to pay.

Because that is so, a tax on profits has, at least until recently, generally been seen as better than a tax on turnover and, at

least until tax rates go above 100%, it is inherently likely that it will be easier for the taxpayer to pay a tax on profits than a tax on turnover.

But at this stage of the design process quite a big problem becomes apparent.

What, exactly, is a profit?

It turns out that it is very difficult to define profit, so difficult, indeed, that lawyers by and large left the field to accountants: if you want to know who made what profit, it is necessary to ask a businessman and the view of businessmen is generally taken to be represented by accountants.

But asking an accountant doesn't always produce the right answer: sometimes accountants increase profits by adding in things that lawyers don't think of as profits, and sometimes they don't take off things, or they add in things, that lawyers believe quite viscerally should be deducted or should not be added in, and there are, accordingly, cases where the accountants and the lawyers disagree and, in those cases, the lawyers usually win.

Disputes of this kind quite often relate to fundamental issues such as whether an item is income or capital: lawyers tend to get quite excited about questions of that kind, but they leave accountants and, very often, economists quite cold: they often regard the capital or income question as irrelevant.

The period to which a receipt or outgoing is to be allocated can also sometimes be a point over which lawyers and accountants disagree, and the issue of period illustrates one of the fundamental problems of computing a profit: the period over which accounts are drawn has a radical effect on the profit which is found to exist with, for example, the result that a single account drawn for a two year period does not necessarily produce the same result as is found by aggregating the results of annual accounts drawn for each of the two years separately; and this is an effect which is particularly acute where long term businesses are concerned.

So, although the basic principle is that the lawyers have left it up to the accountants to determine what the profits of a business are, the lawyers have not altogether left the field and, so far, I have not yet touched on what, in a sense, may be the biggest difference between the way in which lawyers and accountants think about profits.

By and large, accountants do not care about the form a profit takes: an accountant will say that an increase in value can produce a profit, but lawyers do not like that.

In terms of taxes on profits, lawyers say that there can only be a profit when the profit has been realised: the point has been very clearly illustrated here by the relatively recent **Nice Cheer** case.

The concern of the Courts in this context is that tax should only be payable when it is possible to pay it: if the tax system requires payment of tax regardless of whether payment is a practical possibility or not, it is likely to cause economic distortion: decisions will be taken, not in the interests of business, but in order to enable tax to be paid and that is a bad thing; if at all possible tax systems should be designed so that they do not distort decision making.

Anyway, no matter whether it is a good rule or a bad rule, the lawyers have, so far, won the day on the question of whether a profit must be realised or not: unless the relevant legislation says something different, the general rule is that, before a profit can be taxed, it must be realised.

I should perhaps make clear that legislation taxing unrealised profits is not altogether unheard of: taxes on capital gains, for example, often tax notional gains and there is, in some jurisdictions at least, an open question as to whether profits deemed to arise on the cessation of a business can be taxed before they have been realised but, nonetheless, the general rule is as I have stated it.

The underlying idea that tax should only be charged and

be payable when there is money to pay it, was also reflected in other aspects of tax, not just those aspects where accountants and lawyers might clash.

For example, in relation to benefits given to employees there was and, to a certain extent, there is still, a rule that a benefit can only be taxed if it is in money or money's worth.

Now, it is, of course, a commonplace that the basis of all taxation is statute: there is nothing natural about tax at all; it is not like morality, it is not like the rule "thou shalt not murder", a rule which usually exists as a custom quite apart from a statute.

Rules of the thou shalt not murder kind are usually agreed upon by society without the need for a specific legislative rule; they are needed to make society work.

Now it might, no doubt, be possible to make a case that society can only work when tax is paid and it might or might not be possible to secure general agreement that tax is necessary.

But securing agreement on the nature and extent of a tax without there being in existence a legislative body capable of enacting a statute is likely to be impossible; and that is why it can be stated categorically that, if there is no statute, there cannot be a liability to tax.

There can, of course, even without a statute, be situations in which a practical obligation to pay money to another person arises: I have in mind the sort of case in which a local warlord demands a tribute from people who live in his territory and threatens to burn down their homes if they don't pay it, the sort of thing that happens in the film the Magnificent Seven.

I think we would say that cases like that involve extortion rather than taxation: the difference between the two forms of exaction depends on the existence of a statute

But it is also fair to say that the line between extortion and taxation can be quite a thin one: after all, might it not be said that the demand of a local warlord is a form of statute?

The reason that the warlord's demand is not a statute is, of course, that he usually does not have the political authority to make a statute, but that is the only reason that his rules are not statutes; he does, after all, have the practical authority to make rules.

Looking at the matter the other way round, it might be equally fair to say that a state's ability to exact tax can only be effective when there is a degree of extortion used by the state: for example, in a doubtful case, the tax man often collects tax by threatening adverse consequences to the citizen who does not pay up.

In other words, taxation always involves a mix of law and extortion, but we hope, on the whole, that the law prevails.

I think the narrative so far has revealed five points.

First, once a decision has been taken to tax profits rather than turnover, it becomes necessary to determine what is a profit.

Secondly, the determination of what is a profit requires the application of a mix of accounting and legal principles.

Thirdly, the perceived need to tax only when there is a practical possibility of paying the tax means that there is a boundary around the nature of a profit.

Fourthly, even a fairly elementary tax system, a system which just taxes profits, is, because of the first three points, quite elaborate.

And, fifthly, no matter how carefully a charge to tax is set down in words in a statute, the words will need some interpretation and probably expansion.

For example, all those rules I have outlined which define the meaning of the word profit are not to be found expressly set out in the statute: they come from judicial explanation of the meaning of the word "profits"; the mere use of the word profit brings with it, by implication, a host of limitations.

Now just pausing here, the way in which a tax system needs to be elaborated through decisions explaining the words used in the Taxing Act itself means that it is quite a delicate thing.

It may be, or appear to be, simple, but it is not dealing with basic rules like thou shalt not murder or thou shalt not steal.

And this means that tax law is an example of the sort of law which should undoubtedly be dealt with as a civil matter: it is too elaborate, too delicate to be dealt with as a criminal matter; it may be possible to misunderstand tax law and to get it wrong but to talk of a failure to get it right as a breach of the law is, in cases where there has been no dishonesty about the facts, a misuse of language.

Ahh! But those limitations on the meaning of “profits” are attractive to those who do not want to pay tax: if we do this instead of that, what happens may be a commercial profit but not a taxable profit because we have put ourselves beyond the boundary of what is taxable.

And the attraction encourages planners to look for ways of not paying tax: it is, after all, a given that nobody really wants to pay their own tax bill.

Of course, quite a lot of us think it is right that others pay tax but, if we are honest, the thought does not apply with quite the same rigour to our own position: if we can escape from tax without taking too much risk, we will all try to do that.

How is a political authority to respond to that?

Again, speaking broadly, there are four forms of response which could be adopted.

The first form of response is to do nothing: the situation can be accepted.

The ability to mitigate tax by moving value from one side of the profit boundary to the other seldom has adverse consequences on a budgetary scale; indeed, it may have beneficial consequences because a possible view is that economies work better when taxes are avoidable.

But, on the other hand, the ability to choose whether to pay tax or not can be seen as socially divisive and so unacceptable, adding to the gap between rich and poor.



The second response is to leave the tax system broadly as it is, but add a GAAR: that is, more or less, the response adopted in, for example, Australia, Hong Kong and, I believe, Germany.

The third response is to say that any attempt to mitigate tax is a crime.

But a little thought shows this is not going to work or, at least, ought not to work.

Most crimes involve doing things which the doer knows are wrong, wrong in a moral sense, wrong because they involve a lie, a deliberate failure to tell the truth.

Not paying tax because your profits have been lawfully calculated in a certain way is not at all the same thing.

Surely, that should not be criminal?

What wrong has been done by trying to use the law to pay less tax?

Could we even begin to give a name to that crime?

What name would we give it?

It is wrong to say that a tax scheme which doesn't work is a breach of the law: it is just something which doesn't work as it was hoped it would.

To call that a crime would be a very large step indeed.

The fourth response is to add more and more rules in an endeavour to be more and more prescriptive, and that is what has been done here in the United Kingdom.

But this kind of response brings with it a particular danger.

The addition of rules involves the use of words, many many words; and the more complicated the situation which the rule is supposed to cover, the more words are necessary to deal with it.

The words need to appear to lay down rules: if you do this there will be a tax.

But, in addition to laying down rules, the words are also creating more and more boundaries.

If there is a rule that says there will be tax on x, it immediately

raises the question “Is there tax on y?” and, quite often, it will be found that the rule as expressed does not appear to impose tax on y.

Once upon a time – I do not speak of a time long long ago, but of a time well within my working lifetime – the Courts which are, after all, the decision makers in these situations would, at least in the UK and in Hong Kong, say “the literal words of the statute do not provide for there to be tax on y, therefore there is no tax on y”.

But about 40 years ago, adopting a fashion which had started in the USA in the 1930’s, UK and Hong Kong Courts started to interpret legislation purposively: they did not continue, as they once had, to ask and answer the question “what do the words used by the legislature mean when they are interpreted literally?” and they began to ask and answer the question “what did the legislature intend these words to mean?”.

Indeed, recent cases suggest that the Courts are no longer asking themselves what the legislature intended the words to mean but have gone even further and asked and answered the question “what would the legislature have intended the position to be if they had thought about this situation which they quite obviously have not?”.

There is scope for a good deal of argument as to whether the Courts have overstepped a theoretical dividing line between declaring the law on the one hand and making the law on the other.

But debate of this kind is arid and fruitless.

It is inevitable that, under more or less any system that can be devised, the declarer of the law will have to take creative decisions: in a sense, that is exactly what Courts were doing when they decided that profits meant realised profits; and it is worth noting that the decisions on that point were not, originally, decisions about tax but decisions about

company law and whether companies could pay dividends or not.

The point is that law works in a fairly holistic way: those of us who practice in the field of tax can sometimes feel that we are victims of a changing climate, but we do need to recognise that, whatever we think or do not think about physical climate change, legal climate change affects the whole range of the law and not just tax.

A particular problem with tax, though, is that, in the UK at least, the statute has grown to an enormous length containing a host of rules designed to deal with different situations; and it changes at least once and sometimes two or even three times in a year.

As a result, the system has lost a single coherent theme: it is full of different rules for different situations and, to a very large extent, it taxes different types of person differently so that, for example, individuals are now taxed quite differently from companies.

Two other features have then been superimposed on this fractured structure.

First, there is an increasing belief, to a large extent adopted by the Courts, that tax is a natural thing which is, accordingly, to be everywhere and not just where the statute says it is.

The idea that there is a limit, or a boundary, beyond which tax is not to be found has, to a very large extent, disappeared from judicial thinking.

The second complicating feature is the wish of legislators to digitalise tax.

The idea is that we are just to report numbers on a computer – quarterly, perhaps, rather than just annually – and the computer will tell us how much tax to pay.

The problem with this idea is that it is based on the thought that working out a tax computation is as simple as adding 2 and 2 to make 4.

However, the real problem with a tax system is not the arithmetic, but discovering the numbers which have to be added together (or, in some cases, subtracted or divided).

The issue of what numbers are to appear in the computation requires, at the very least, an element of judgment and the judgment becomes more and more difficult as the legislation grows in length,

I think that the Hong Kong tax system has, to a large extent, so far avoided the dangers of prolixity and digitalisation, but the trend towards both those features is worldwide and cannot be avoided in Hong Kong, especially because the region thrives on trade which involves it in other tax systems.

Pausing in the analysis here, it can be seen that tax systems have fairly flexible foundations, which have had a complex framework erected on them while the administrators and, to a large extent, the courts, have endeavoured to maintain the position that tax is elementary in conception, straightforward to apply and (though the courts have not got involved in this aspect yet) simple enough that it can be digitalised.

Now that picture is, even viewed entirely domestically, a fake painting.

But it becomes even more apparent that it is a forgery when international elements come into play, so let me return to the question I parked earlier.

What happens when a business based in Country A does things in Country B?

How much tax is Country B going to charge the business?

The answer has, of course, primarily to be found in the domestic law of Country B.

But the amount of tax which Country B can charge will or, at least, may be affected by Double Tax Treaties.

And there may be a further complication because Country A may analyse situations differently from the way in which Country B sees them.

To take a well-known example, Country B may regard a business to be paying interest, for which a deduction is available in Country B, to Country A.

But Country A may disregard the receipt of the interest, with the result that there may be tax relief in Country B for the payment of the interest, without there being any corresponding tax charge in Country A.

And, on top of that, a business based in Country A may be able to arrange its affairs so that it is not doing business in (but only with) Country B; or it might be able to limit what it does in Country B just by doing some things at home; or it might be able to limit what it does in Country B by splitting its activities so that they take place partly in Country A, partly in Country B and partly in Country X.

None of this is particularly new.

We tend, of course, to think that, in the day of the internet, we are doing things faster better and more flexibly than we have done them before.

However, the internet works at the same speed as the telegraph; it may be more widely available than the telegraph was or, indeed, is, but it isn't faster.

It has, for generations, been possible to divide businesses between countries and to arrange matters so that transactions were "with" rather than "in" a territory.

Nonetheless, recent activities of global companies have caused considerable excitement not, I think, so much originally with administrators, but with politicians.

It has been discovered that, by using very traditional techniques, the Googles and Amazons of the world have been able to mitigate taxes in European countries – and, no doubt, elsewhere – without picking up (under its current legislation – Mr. Trump may be about to change this) tax charges in the USA.

And suddenly traditional tax planning has become

unacceptable to many and a rather unattractive triumvirate has been let loose on the tax world.

First, there are the politicians who say: this company or that company is not paying very much tax and that must be the fault of the administrator.

It is, to the politicians, self-evident, that, if not very much tax is being collected from a multinational, the administrator has not been trying hard enough.

No thought has been given to the question of what the rules say: indeed, no thought has been given to whether there are or are not rules; the only thing that has been seized on is that what seems like not very much tax has been paid and that is, so it is said, unfair.

Secondly, the politicians have then encouraged their constituents to join in the belief that the tax system is working unfairly and against them; and the result has been a form of populism which demands an increasing tightening of the tax system: quite obviously, goes the populist mantra, anyone who is not paying the fair amount of tax must be made to pay it regardless of what the rules say.

There is no thought given to the possibility that a world without rules as to how much tax is to be paid would be infinitely worse than a world with rules, even if they are rules people don't like.

After all, without rules, we should be living in a world in which all tax – including the tax to be paid by those crying out for this system – would be obtained by extortion, not principle.

There does not appear, anywhere in the world, to be a politician who understands the need for rules let alone a politician who is willing to speak in favour of the rules themselves, rules which have a relatively proven track record and which allow tax to be computed fairly sensibly.

And thirdly, and on top of this ill thought out political

maelstrom there has been added the OECD Action Plan to deal with Base Erosion and Profit Shifting (“BEPS”).

These proposals, which have, in large measure, been adopted by the United Kingdom, are intended to stop multinational businesses from exploiting certain, but not all, of the benefits, available to them because of the fact that they are multinational.

The BEPS proposals seem to me to be largely irrational and unsoundly based, political rather than in accordance with the proper principles of taxation.

For example, one area in which they will operate is in relation to lending where it may, as I mentioned earlier, be possible under pre BEPS rules for a business operating in Country A and in Country B to obtain tax relief in Country B for certain payments (usually interest) which are not then taxed in Country A.

Under the new post BEPS rules, the business will not be allowed relief in Country B unless there is tax in Country A on the matching receipt.

But what is the rationale for this rule?

Before BEPS the tax systems of Country A and of Country B were each operating as they were intended to operate; Country A did not tax the relevant receipt, as it intended, and Country B gave relief for the relevant payment, just as it intended.

Why does Country B care about what is happening in Country A?

And, if it does care that there are differences between the way it imposes tax and the way Country A imposes tax, why is its concern limited to certain forms of difference but not others?

I do not have answers to these questions, but I shall make two over-arching comments about the BEPS proposals.

First, they appear to be a move towards a globally consistent method of taxation, a move which is out of accord with the

general political mood represented by, for example, Mr. Trump and Brexit which indicate an increasing wish for individual countries to do things individually rather than globally.

It is odd that a populist inspired proposal should adopt what is undoubtedly an anti-populist global form.

Secondly, the BEPS proposals represent a move to a form of dishonesty in taxation, dishonesty not of taxpayers but of lawmakers.

Most taxes affected by the BEPS proposals are, supposedly, taxes on profits.

But rules like the BEPS anti hybrid rules which I have been describing, which deny deductions in certain cases for what are, undoubtedly, proper commercial expenses, move the tax system towards the taxation of turnover.

And BEPS is not the only move towards taxing turnover rather than profit: some countries are beginning to cap the deductions available for interest payments much more generally than BEPS does, again moving their systems away from the taxation of profits, and we here in the UK have imposed a diverted profits tax which is, yet again, a move away from taxing profits; indeed, it taxes non profits.

As I said at the beginning of this talk, taxes on turnover are, of course, a form of taxation which is well known but, if we are going to change our systems from the taxation of profits to the taxation of turnover, we need to say so openly: just as taxpayers need to be honest in their dealings with the taxation authorities, so do taxation authorities have to be open and transparent with their taxpayers; they must not be, as it seems to me they are, sly and stealthy.

The other aspect of BEPS is designed to ensure that multi-national enterprises are booking an adequate amount of profit in each jurisdiction.

I believe that this is an aspect of BEPS which the Mainland finds particularly attractive and it means that all businesses



operating in Hong Kong need to be particularly careful in structuring their dealings with affiliates on the Mainland.

But, it is again, a move towards turnover taxes and it is, again necessary to ask why changes are necessary?

What, after all, is wrong with the long standing method of determining where profits arise by a mix of, first, ascertaining exactly what earns a profit and where the work which earns it is done and, secondly, the application of well known transfer pricing rules?

The answer given by proponents of BEPS seems to be that the well known rules can be difficult to apply (in particular, the arm's length test can lead to much scope for argument) and quite often, so it is said, produce an unfair answer.

However, it seems to me that the traditional rules produce a coherent answer which accords with commercial reality.

BEPS, on the other hand, is likely to produce a wholly artificial result based on the belief that each country in a multinational chain must get a fair amount of tax.

For my own part, I have no doubt that the pre BEPS system of taxation is better organised and more principled than the post BEPS system.

Nonetheless, we are undoubtedly living in a world in which many people, including politicians, believe that there are problems with both domestic and international methods of taxation.

The perception that this is so is so pervasive and so strong that it has invaded, like a poisonous bacillus, the culture of multinationals themselves.

The result is that, instead of demanding the application of principled known and certain rules, many large business organisations, including especially banks, have (albeit with some brave exceptions), supinely accepted the proposition that there is a moral and social ethos which must be obeyed, requiring them to make sure that, regardless of what the rules say, they pay a fair amount of tax in every jurisdiction.

Indeed, in the UK we have some quite bizarre rules designed to enforce this over-riding ethos.

For example, banks are supposed to sign up to a code of conduct which precludes them from avoiding tax.

The code of conduct is in no way statutory but, if a bank does not sign up to it, there is a statutory rule that its name can be published as an organisation that has not signed up to the document it is not obliged to sign up to.

The combination of public perception and corporate acceptance has given administrators the opportunity to increase the complexity of the technical rules so that, in the UK, for example, we do not have only the thousands of pages of technical rules which I have mentioned but also a host of TAARS, one or two RAARS (which stands for regime anti avoidance rules), and, roaming above and around them all, a GAAR.

Moreover, a lot of this complexity has been encouraged and even asked for by special interest groups which have successfully lobbied for particular provisions which may be suitable and sensible for them but which are inconvenient for the general body of taxpayers.

The complexity is so great that it can take a very long time to determine that a computation is right.

And, enforcement of the complexity has been made easier for the revenue authorities by a radical change in the penalty rules, so that quite innocent errors can create liability for a significant, albeit civil, penalty.

The reality of the increasing complexity of tax systems is to be contrasted with the populist belief that tax is really really simple.

That belief is widely divergent from anything which can be called real, no matter how we define reality; but, nonetheless, a result of it is that, in the popular view, any business which has not paid the “fair” amount of tax must have cheated; and that will particularly be the case if, for example, the business

structure involves the use of companies in tax havens like Panama or the Cayman Islands.

Now, of course, the use of tax haven companies is not a sign of criminality but the perception, that it is, is spreading and is compounded by some European jurisdictions which treat tax investigations as if they were criminal in nature and carry them out by means of armed raids.

It will, of course, be appreciated that in most, if not all, cases where a fair amount of tax has, in the public view, not been paid, what has happened will have been placed, in a full, open and transparent way, before the relevant authorities, so that there will have been no form of dishonesty whatever and the only issue will be how the law applies to what was done.

In other words nothing which could, on any sensible use of the word, be described as “criminal” will have happened.

But the widespread belief that not paying the fair amount of tax involves a criminal act has allowed taxing authorities to introduce new criminal sanctions for particular acts or failures by taxpayers, sanctions which are only socially acceptable because of the broad misconceptions about tax and the false belief that they will affect the few but not the many.

In the UK, towards the end of last year, we introduced criminal offences for the fraudulent evasion of income tax, for assisting in the evasion of tax, for failing to give notice of liability for tax and for failing to deliver a tax return.

The first of these was already an offence, and the second was probably an offence in any event, but the other two seem to be new: there is, however, a further offence of making an inaccurate return in relation to offshore assets and this offence seems particularly obnoxious.

The first four offences I have mentioned will usually involve something which can be seen as dishonesty: there will usually have been a deliberate lie or a wilful failure to do something which the defendant will know, or should know, that he should have done.

The fifth offence of making an inaccurate return can, however be triggered by an honest mistake; any mistake creates the offence, though the defendant has the opportunity to defend the prosecution by showing that he took reasonable care.

However, unlike the usual situation in criminal cases, the defendant must prove he is innocent.

There is also presently a proposal that those who “enable tax avoidance” may be liable to civil penalties for doing that if the schemes they enabled turn out not to work.

The proposal is of particular interest to advisers because they will be classed as enablers of tax avoidance schemes if they gave any advice intended to make the scheme work.

It is, of course, possible to take the view that none of this matters very much: after all, we all know that none of us are going to be criminal; it is highly unlikely that we shall ever face a charge under provisions like these.

But there is here a criminal offence of making an innocent error.

Is that right?

It marks a shift towards the proposition that it is criminal to make a computation of liability with which the relevant taxing authority does not agree.

Of course, the increasing trend towards the criminalisation of tax is a function of behavioural economics, though I believe it represents a serious misuse of these theories.

The idea is that the threat posed by criminal sanctions will push taxpayers to pay their taxes on time without doing anything in an endeavour to mitigate them.

But I rather suspect that the threats will be resented and that the criminalisation of tax will produce a tendency towards greater criminality rather than less: after all, if the sanction for error is severe, the wish to cover it up will inevitably be greater than it will be if there is no sanction.

Indeed, a better understanding of behavioural economics

than that presently in use by revenue authorities would be to reward, and so to encourage, what is seen as good fiscal behaviour by a system of benefits for compliance.

Unfortunately authorities seem to be too narrowly focussed to see that.

A further problem is that the wish to see tax digitalised is likely to increase the pressure for errors to be automatically criminal, since computers are unlikely to be able to test motives and intention.

The push towards criminalisation seems to me to be indefensible when tax systems are so complex.

The dangers are increased by the possibility that a professional adviser can be sanctioned for doing his job and advising.

Again, is that right?

Is it principled?

Provisions of this kind limit – and are intended to limit – the ability to get advice in relation to tax; and they are accompanied by other provisions which are, in certain cases, designed to discourage appeals against revenue decisions.

I do not think that this increasing criminalisation of tax has yet spread to the expanding economies of Asia with whose businesses our businesses need to compete.

But it is part of a worldwide movement, encouraged by most politicians and by ill informed public opinion, which has departed from reality and believes that tax is so simple that any error, or indeed, any failure to pay the so called fair amount of tax must be the result of a crime.

The movement is populist: it is part of a growing tendency to make omissions rather than acts criminal, a tendency which can be seen, not only in tax, but also, in an equally unattractive way, in relation to corporate governance, a tendency which demonstrates how law is so often holistic; and it is dangerous.

Tax is not simple, but complicated: it requires the making of judgments by practitioners which can often be finely balanced.

The attack on the ability to obtain advice about tax avoidance is an attack on the rule of law itself.

The underlying foundation of the rule of law is the acceptance that there are rules which need to be enforced: tax is an example of the type of rule which must be enforced if the rule of law itself is to be upheld.

Of course, people who say that they do not have to pay tax may be unpopular in the way that people who say that others must pay tax can also be unpopular.

But our society needs to recognise that it is essential for both kinds of unpopularity to exist.

The current unpopularity of those not believed to be paying a fair amount of tax means that they are an easy target and there has, accordingly, been very little adverse comment about the way tax law has been and is being criminalised.

But there is a danger of contagion here: after all, if it is acceptable to limit the ability to get advice on tax, why is it not acceptable to limit the ability of guilty people to get advice about their criminal defence?

The democratic UK which, in large measure, gave the concept of the rule of law to the modern world, has, in its approach to tax avoidance, taken a dangerous step.

In the past, lawyers had to fight against monarchs and dictators for the right to defend their clients.

I have spent my career largely in the belief that I would not be tested in that way, that I should not have to risk my freedom to defend what I know to be right.

Yet, not so long ago, lawyers in the USA were fighting a government order, while the government believed that they should not have the right to do that.

Those lawyers are fighting for a cause which receives large scale acceptance among liberals and so, in that fight, the lawyers are seen as doing the brave and honourable thing.

The argument that tax law has to be defended – that the

rules matter more than the sentiment, more than so called morality or social responsibility – appears unglamorous and does not get liberal support.

And yet; and yet.

It is actually far, far, more important that the unglamorous and unpopular fight for the sanctity of tax rules which have been democratically enacted is supported than that popular liberal causes are cheered: it is at the point at which the defence of the rule of law is receiving the least public support that it needs the strongest effort from those who understand the importance of rules.

Nobody in the public domain is clamouring for tax rules to be defended.

But if we do not defend them, what liberal bastion will fall next?

And do not say “oh – that is different; attacking tax avoiders is a good thing, let us applaud it”.

It is to the sound of applause like that that the rule of law dies and democracies become dictatorships.

The protection conferred by the requirement that rules must be enacted by Parliament is, God knows, little enough, but it is better than nothing: it is the only thing which divides a society governed by the rule of law from one which is governed by things.

Those of us who advise on tax, we stand on the weakest part of the wall which protects freedom: every day, a forrester in the dry thickets of the Taxes Act, I go proudly to work to defend it; I hope you will join me.