

## Tax schemes back in the hot seat

**MPs have demanded action against lawyers and advisers who facilitate tax evasion**

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The government promised HMRC greater funding for tax-evasion investigations

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Tax wars have broken out again between politicians and professional advisers over the murky legal distinctions between avoidance and evasion.

Dame Margaret Hodge, the former Labour minister and ex-chairwoman of the Commons public accounts committee, this week unleashed the latest volley in her long-running campaign for a crackdown on accountants and lawyers who allegedly facilitate unlawful behaviour by their wealthy clients.

In a paper produced by a cross-party parliamentary group on anti-corruption and responsible tax, Dame Margaret let them have both barrels. “The way that the law is currently set out,” the MP for Barking in east London said, “means that it is virtually impossible to prosecute these enablers of failed tax-avoidance schemes, even when a criminal offence has been committed.”

She said that “without documentary evidence to demonstrate their dishonesty, [lawyers and accountants] can insist they believed their schemes would work and plead innocence”.

The group called for “a few simple legislative changes” so that “the enablers of aggressive tax avoidance can more easily be prosecuted”. One tweak, say the parliamentarians, would be the creation of an updated “threshold test” to prosecute those who enable aggressive tax-avoidance schemes.

That would remove the requirement for dishonest intent, which is required in all criminal fraud cases, and replace it with a “double-reasonableness” test, which is used for penalising enablers under the civil law regime. The MPs also want a tougher regime of fines for lawyers and accountants who fall foul of the rules.

Predictably, lawyers have given the demands a lukewarm response. “Such a dramatic change in law is likely to cause confusion, but is unlikely to achieve the desired results,” says David Sleight, a partner at Kingsley Napley.

He says that tax evasion is already “by definition” a criminal offence while tax avoidance is not — and the 2004 Disclosure of Tax Avoidance Schemes regime exists to identify potentially unlawful mechanisms.

“The whole process is predicated on there being grey areas that will need to be interpreted by HMRC, or ultimately a tax tribunal,” Sleight says. “The overwhelmed criminal justice system is not the place to be resolving whether these

Harry Travers, a partner at BCL Solicitors, is also concerned about the proposals. He argues that removing the requirement to prove dishonesty from the offence of common law cheat, or conspiracy to cheat, “would be a huge step with far-reaching consequences possibly in other areas of the criminal law”.

Lawyers say that even the whiff of a criminal investigation can severely damage careers. “But the idea that one can be guilty of tax fraud or cheating without being

dishonest is fundamentally misconceived,” Travers says. “The need for the prosecution to prove dishonesty is a crucial safeguard for an accused, and should not be removed.”

Experts have predicted “chaos” in the backlogged courts if the “double-reasonableness” test is imposed.

“It would be hugely difficult for a jury to apply it,” Travers argues. “If the Crown are going to prove tax fraud, they should have to prove dishonesty. Anything else is a knee-jerk reaction, which could cause serious injustice.”

Kate Ison, a partner at Bryan Cave Leighton Paisner, offers an olive branch to the politicians, saying that lawyers should “welcome efforts to change the behaviour of the very small minority of advisers and promoters who market and enable aggressive and abusive schemes, which fall clearly outside the spirit of the law”.

However, Ison claims that the MPs’ proposals will do little to improve HMRC’s record for bringing investigations and prosecutions of offences under the Criminal Finances Act.

Ison says that the lack of prosecutions brought by the taxman and the Crown Prosecution Service “are far more likely to result from a severe lack of resource than a lack of powers”.

Lawyers agree that the HMRC already has considerable power to launch criminal investigations into individuals, corporations and advisers.

Prior to the outbreak of the Covid-19 pandemic, Ison says, “the government had announced that it would invest significant sums for HMRC to recruit more personnel for its compliance work, and to tackle cases of tax fraud and avoidance. This would seem to be a more effective way of improving HMRC’s record for clamping down on facilitation of tax evasion or avoidance by tax advisers.”

Sleight says that despite many measures, the taxman's prosecution rate "has been woeful — no new law is going to change this without a significant shift in terms of culture and resourcing".

HMRC resourcing is a problem also for Jeff Millington, a qualified tax inspector at the law firm Withers. He says that many experienced staff at the revenue have left through compulsory redundancy. Although officials "would argue that they are pumping money into off-shore tax evasion investigations, they are actually dumbing down the staff. And their prosecution record is not that great — they need to spend more resources on training."

Ultimately, says Peter Binning, of the firm Corker Binning, "parliamentarians should resist the urge to tinker . . . potentially causing real injustice to tax payers and their advisers by introducing a blanket criminal offence".

<https://www.thetimes.co.uk/edition/law/tax-schemes-back-in-the-hot-seat-vkcgpgmmd>