

Conflicts of interest facing taxation practitioners: the impact on ethical decision making

By

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Abstract

Professional, private sector tax practitioners are subject to conflicts within their role, as they owe duties simultaneously to different parties. Their primary duty will be owed to their clients (Hammer 1996; Jackson and Milliron 1989), but duty is also owed to taxpayers, the wider public, and revenue authorities (the government, as intermediaries in the tax system (Brody and Masselli 1996; Duncan et al. 1989; Yetmar and Eastman 2000)), the firm for which they work, their profession and themselves (Newmark and Karim 2002). In this paper we explore how tax practitioners might manage these conflicting duties, especially in terms of the potential effects on their ethical decision making processes. Is there, for instance, a ‘trade off’ whereby different ethical weightings are given to different duties?

The primacy of tax practitioners’ duties to their clients in terms of ethical judgment is established in case law decisions, for example, the 1997 UK case of *Hurlingham Estates v Wilde & Partners*, which implies that practitioners have a duty to give advice on how tax might be avoided,¹ though the Court of Appeal decision in the 2017 case of *Barker v Baxendale Walker* suggests that where artificial or aggressive avoidance is advised, then practitioners should make clear to their clients that challenges from Her Majesty’s Revenue & Customs (HMRC) are likely (Brown 2018), otherwise they may be accused of professional negligence. The latest code of professional conduct issued by the Chartered Institute of Taxation in the UK (2016), embodies this stance, stating (p. 26, Section 4.27) that “[a] member does not have to advise on or recommend tax planning which he does not consider to be appropriate or otherwise does not align with his own business principles and ethics”. Interestingly, the code (p. 25, Section 4.15) specifically highlights HMRC’s rejection (HMRC 2013, Section B2.1), of “old cases”² allowing taxpayers “to use their ingenuity to reduce their tax bills by any lawful means”. The rejection of case law by an HMRC guidance document, which technically does not have statutory force, is an attempt to foster behaviour that HMRC would regard as ethical.³

However, Shafer and Simmons (2008) have suggested, for instance, that some tax practitioners do not believe strongly in the value of ethical or socially responsible corporate behaviour, and have abandoned concern for the public interest or social welfare in favour of commercialism and client advocacy (see also Stuebs and Wilkinson 2010). Edwards et al. (2018, 47–8) also express the concern that “since tax avoidance involves entirely legal behavior, even when a particularly nefarious avoidance scheme is discovered, the participants typically avoid any form of criminal punishment”. Similar concerns are voiced by Sikka

¹Unless an engagement letter sets out otherwise, as in the case of *Mehjoo v Harben Barker (a firm) & Anor [2014] EWCA Civ 358*.

²Undoubtedly referring to the cases of *Ayrshire Pullman Motor Services and Ritchie v CIR* and *IRC v Duke of Westminster*, in 1929 and 1936 respectively.

³The 2013 US case of *Thomas v Bridges* shows that the *Ayrshire Pullman* and *Westminster* principles are still alive and kicking, as all parties agree that what had been done in this case had been done purely to avoid tax.

(2018), citing recent specific instances of cases involving the Big Four accountancy firms. On the other hand practitioners operating within a tax practice context may be driven by their professional obligations to their clients and their colleagues, or may feel more responsibility to consider these parties. Marshall et al. (1998, 1226) query the role of tax practitioners in areas that go beyond the obligation to serve a client taxpayer's interest, questioning whether tax practitioners have a collective or civic allegiance to the tax system and the community at large. Possibly tax practitioners are gatekeepers who prevent misconduct (Boatwright 2007, 614) and as intermediaries help taxpayers deal with revenue authorities (Frecknall-Hughes and Kirchler 2015). If such responsibilities exist, how should they be balanced against tax practitioners' ethical obligation to provide their clients with the best advice? The fact that there have been frequent calls for individuals and firms to pay their 'fair share' of tax, or to behave differently in some way, certainly suggests that the law is not fully embodying what is seen as required for ethical behaviour. Calls for different behaviour, however, mean that taxpayers and their advisers are being asked to view tax law through a particular moral lens and interpret it accordingly. Moreover, tax practitioners work often as members of professional firms, so have a duty to their colleagues and/or employees and to their own personal sense of duty.

In this paper we explore the different duties perceived as owed by private tax practitioners to different parties, to see whether this may result in some kind of 'averaging out' in terms of their ethical decision making processes or in a focus purely on legal compliance, as a kind of 'lowest common denominator'.

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