

Tax Avoidance

By Rebecca Murray

Reviewed by

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Tax Avoidance, by Rebecca Murray, (London: Sweet & Maxwell, 2012), 360pp., hardback, £165, ISBN: 978-1-84703-774-9.

Simon McKie reviews Rebecca Murray's new book on tax avoidance and finds it an ambitious book with much good material but one which would be improved by more comprehensive coverage and a better structure.

How very difficult it is to write well for practitioners on tax avoidance. One's efforts must be practically useful yet the subject requires the discussion of some of the most fundamental concepts of our tax system, requiring a level of abstraction which will test the patience of many busy practitioners. Anti-avoidance legislation is immensely complicated and is usually, deliberately, widely drafted so it is the most difficult tax legislation to write about with precision, accuracy and concision. A book which examines general concepts and specific anti-avoidance legislation must move between extremes of abstraction and of detail. The relevant case law is conceptually confused and mutually contradictory and the writer must explain it without imposing on it a conceptual coherence it does not have and yet without adding to its contradictions or confusing his readers.

To write a clear, comprehensive and useful practitioner's tax on tax avoidance, therefore, would be a major achievement. Rebecca Murray has not entirely achieved it but she has written a stimulating, if uneven book, which could form the basis of a successful treatment in a future edition. She has useful things to say on all of the topics with which she deals. Her discussions of the *Ramsay* Principle, of Sham and of Abuse are peppered with insights. For example, her discussion of Sham and Mislabelling in Ch.8 makes the distinction between the two clear and is illustrated with a concise summary and discussion of *Redcats (Brands) Ltd v HMRC*.¹ Her chapters on the specific anti-avoidance legislation in respect of Transfers of Assets Abroad, Transactions in Land, Transfer of Income Streams, Sales of Occupation Income and Transactions in Securities are useful summaries of the relevant legislation. They engage with difficult areas where many tax authors content themselves with simply repeating the words of the legislation. She is willing to state her opinions forcefully and they are often convincing. It is refreshing that she has not succumbed to the spin surrounding the proposal for a General Anti-Avoidance Rule, commenting that Mr Aaronson has called it a General Anti-Abuse Rule merely for presentational reasons.

So why is it that the book is not a wholly satisfactory practitioner's text but rather a starting point from which such a text could be written?

First, there is the book's coverage. Her stated intention is to "focus on avoidance of tax by individuals rather than by companies, and in particular on avoidance of Income Tax" but a practitioner seeking a comprehensive treatment of anti-avoidance legislation, even one limited to the income taxation of individuals, will not find it here. After her Introduction, she discusses the five areas of specific anti-avoidance legislation which I have listed above and which are found, with others, in ITA 2007 Pt 13 and then in the second half of the book's four topics, which are not concerned with specific pieces of legislation. Three are general topics: the *Ramsay* Principle, Sham and Abuse. The fourth is the odd man out, being a discussion of the concept of a trade in a tax avoidance context.

It is not clear on what principle the five areas of legislation for detailed consideration have been selected. Of course, defining what is anti-avoidance legislation is not always easy. Does one confine it to legislation which includes a test for its application which depends upon either conferring a tax advantage or having a purpose of doing so? Or does one include other legislation which does not contain such a test but which is expressly introduced to counter particular avoidance techniques? The principle of selection needs to be stated so as to alert the reader to the areas which they can expect to be covered in the book.

¹ *Redcats (Brands) Ltd v HMRC* (2006) UK VAT Decision 19648.

In the choice of more general topics, it seems a strange decision to choose the Abuse doctrine which is primarily, although not exclusively, relevant to Value Added Tax and yet to deal only obliquely with the concepts of a “tax advantage” and “main purpose” which are of central importance in so many anti-avoidance rules.

Secondly, the structure of the book is also rather peculiar. One would expect the general concepts to be dealt with first so as to give a basis for approaching the specific legislation whereas, as we have seen, the general topics follow the detailed consideration of specific anti-avoidance legislation.

Thirdly, the book does not always give ordered treatments of key concepts. It refers extensively, for example, to purposive construction of tax legislation but does not properly define what that difficult phrase means. There is much material relevant to determining its meaning scattered around the book, but the question is nowhere given a single ordered consideration. Similarly, there are many references to the intention of Parliament in enacting legislation and there are passages in which the authoress seems to suggest that Parliament’s intention may be easily determined. For example, on p.5 she says:

“The intention of the legislature is self-evident in relation to ‘anti-avoidance’ legislation, that is, legislation enacted specifically to prevent a tax advantage being obtained in prescribed circumstances.”

In fact the intention of Parliament, a legal fiction, is a difficult concept. What common intention is there amongst 650 members of Parliament voting on a Finance Bill, none of whom are likely to have read it in its entirety and many of whom will have only the sketchiest idea of its effect?

Fourthly, just as the book does not seem to be in a logically structured order, so the structure of the exposition of particular topics sometimes obscures the book’s arguments. In discussing the nature of the legal concept of a Sham, for example, the authoress states, at p.215, that Sham does not require an intention to deceive, but she does not give an authority for that statement. She repeats the statement, without authority, on p.217 where she gives the passage from Lord Diplock’s judgment in *Snook v London and West Riding Investments Ltd*² which suggests the opposite. It is only when one arrives at p.221 that the authority for her view appears in the form of a passage from the Supreme Court’s decision in *Autoclenz Limited v Belcher and Others*.³

Similarly, in the Introduction, she commences a discussion of the *Ramsay* Principle without explaining what it is or that the case gave its name to a principle developed in a long line of succeeding cases. In the detailed discussion of the *Ramsay* Principle in Ch.7, there are seven pages of discussion of the Principle before one is given the facts of the case.

Finally, the book has not been well edited. There are numerous sentences, the meaning of which is unclear, which should not have escaped the editor, and the provision of authorities is erratic.

In spite of these criticisms, there is much good material in this book and the authoress shows an ambition, in her willingness to engage with difficult conceptual areas, which is greater than that of many authors of better structured and edited works. When the GAAR is enacted, a new edition of the book will be required and the authoress promises, in her introduction, a full discussion of the GAAR in that edition.

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² *Snook v London and West Riding Investments Ltd* [1967] 2 Q.B. 786; [1967] 2 W.L.R. 1020.

³ *Autoclenz Ltd v Belcher* [2011] UKSC 41; [2011] 4 All E.R. 745.