Hardman Lecture 2003

Honesty is the best policy

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Ladies and Gentlemen,

INTRODUCTION

An Event with its own Conventions

1.1 I feel extremely honoured to have been asked to present this the 11th Hardman Lecture before such an audience. Indeed, when I look at the list of distinguished members of the tax profession who have given previous lectures it is difficult not to feel a sense of being rather impertinent. The Hardman Lecture has become an established event in the calendar of the tax profession and, like all such events, it has developed its own traditions.

Departures from the Conventions

1.2 I am going to depart from those traditions in three ways.

1.3 First, I shall be making, but not immediately, a rather shocking personal confession. That has certainly not been the practice of previous speakers.

1.4 Secondly, previous speakers have started the Lecture with their reminiscences of, or reflections on, Philip Hardman the co-founder of the Tax Faculty who gave his name to these lectures. That is not because I shall have nothing to say about Philip but because he exemplified qualities which are central to the concerns of my lecture and to which I shall refer later.

1.5 Thirdly, many of you will be aware that it is the normal pattern of these lectures that they provide the subject matter for the Faculty's other major public event, the Wyman Debate. So you may think that I am getting things back to front when I explain that it was this Summer's Wyman Debate that prompted me to speak on tonight's topic "Honesty is the Best Policy".

The 2003 Wyman Debate

1.6 Those who attended the Wyman Debate will know that two distinguished members of the Faculty, Michael Sherry and Robert Maas, spoke for the Motion which was opposed by the Deputy Chairman of the Board of Inland Revenue, David Hartnett, who is sitting on the top table tonight and the Director of Tax Practice of Her Majesty's Customs & Excise. On that night I had the bizarre experience of supporting the Revenue's position against the members of my own profession. But then the motion itself was bizarre. It was that "this house believes that tax is not a moral issue – it's purely a matter of law".

1.7 I must say that when I heard that that Motion was to be debated I wondered whether even its proposer and seconder would be able to vote for it.

1.8 The expropriation of assets by the state not a moral issue? Compliance by the Queen's subjects with such an important and difficult legal duty as that to make complete and accurate returns not a moral issue? Surely any thinking man would see that it was; how much more, must those who are members of an institute which imposes 65 pages of ethical guidelines specifically on the practice of taxation, acknowledge that morality is fundamental to their work.

1.9 In proposing the Motion, however, Michael Sherry quickly resolved the conundrum. He didn't think that taxation wasn't a moral issue he just didn't agree that a particular moral rule existed for which he expected the Revenue speakers to contend. Like all good debaters faced with proposing an unwinnable motion he quickly substituted a debate on an eminently winnable topic, whether tax avoidance is morally acceptable. In doing so he stated, tellingly, that:-

> "What we do have general agreement on is the rule of law which is something we all think is a good idea."

1.10 David Hartnett pounced on Michael's ploy and tried one of his own. He tried to convert support for the opposition to

the motion into support for the assertion that there is a specific moral rule that tax avoidance is wrongful. He said:

> "Michael Sherry let the cat out of the bag in proposing tonight's motion – what we are really here for is to agree violently that tax evasion – involving considerable dishonesty – is immoral. Where some of us will disagree, is whether the black letter of the law is sufficient to help us determine what is acceptable tax avoidance or is there something we might call tax morality (rather like corporate governance and professional standards) that should have a part to play in determining whether schemes of tax avoidance, entered into honestly and in line with the letter of, or hole in, the law are acceptable".

A MORAL CONSENSUS

Three Moral Principals

2.1 Now why have I regurgitated these details of a past debate? Because they demonstrated to me that whilst the two sides of the tax industry were busy debating the existence or non-existence of a moral rule forbidding tax avoidance, a matter on which there will never be general agreement, they were both taking for granted a shared acceptance of moral standards of conduct which are actually fundamental to the health of our tax system.

2.2 Both government officials and the members of the various professions who are, in the main, the providers of tax services in the UK recognise in their tax activities the fundamental duty of obeying the law.

2.3 What is more, I think from experience that I can say that underlying that moral law is an even more fundamental agreement: an acceptance that it is wrong to be dishonest and to tell lies in one's professional life as much as in your personal life. In my experience this consensus exists throughout tax practice both amongst Revenue officials and in the tax profession.

2.4 I think we can also add another rule which is generally accepted. That the great powers and resources of

Government impose on its officials a duty not to use those powers and resources oppressively or tyrannically.

2.5 So whilst we have been spending our time somewhat unprofitably debating the morality of tax avoidance there has actually been, almost unnoticed, a consensus about the fundamental moral laws which really do underlie our tax practice. That is:-

- The duty on all to tell the truth and to be honest;
- The duty on all to obey the law;
- The duty on Government to refrain from acting oppressively or tyrannically in taxation matters.

FIVE OBSERVATIONS ON THE MORAL CONSENSUS

3.1 Now I would make five observations about this moral consensus.

Real Consensus Not Lip Service

3.2 First, these principles are not matters of mere empty profession. There is a real consensus which actually influences peoples' behaviour. I have been practising since the 1970s and I have *never* sat in a meeting in which a UK professional has suggested presenting false information on a return or making a statement in correspondence with a Revenue authority which is deliberately untrue or misleading.

3.3 Now, before you dismiss me as being hopelessly naïve I am perfectly well aware that tax evasion takes place and I am willing to believe that a substantial amount of revenue is lost to the Government through tax evasion.

3.4 Tax evaders, however, have to work in secret not only from the Revenue but also from professional tax experts. In this country, if a tax evader wishes to obtain the advice of the professionally qualified they will have to deal with a person whose behaviour would be unequivocally condemned by his fellows were they to know about it. They will therefore have to rely on the advice of those who can only act in secret and in isolation in a murky world where only a criminal minority go.

3.5 I have always thought that the wisest thing that Oscar Wilde said was that "Hypocrisy is the respect which vice pays to virtue". Vice only pays that respect in a culture which generally respects virtue.

A Rare Consensus

3.6 Which brings me to my second point. This consensus which we take for granted is actually a pretty remarkable thing. In the context of history, of geography and even to some extent of the larger business world it is most peculiar.

Historically Rare

3.7 When the Income Tax was first introduced in 1799 the first forecast of receipts was £10,000,000. It actually yielded just £6,000,000. The "Black Economy" was two thirds of the size of the "White Economy". In a paper published in the Economic Journal in June 1999 Jim Thompson of the LSE estimated that tax evasion now accounts for about 15% of GDP. Only three weeks ago, however, in a parliamentary answer the Financial Secretary to the Treasury[1] admitted that there was no reliable measure of the total tax and other duties lost to tax evasion and quoted, with approval, the statement in the Grabiner Report that:

> "By its nature, the size of the informal economy is hard to measure. Most estimates are based on analysing high-level economic aggregates, such as labour market statistics or income and expenditure surveys, and calculate the result as a percentage of GDP. However there is research which suggests that these estimates tend to be exaggerated".

3.8 Whatever the current size of the black economy it is a minority activity in modern Britain in contrast to the position at the birth of Income Tax.

Geographically Rare

3.9 Not only is the moral consensus which persists in UK tax practice unusual historically, it is also unusual geographically. It is not just the countries of Eastern Europe which have emerged from the horrors of

[1] Hansard Thursday, 30 October 2003 (para 135, charges 382)

communism or one party states in the Third World where tax evasion is practiced widely by businessmen and professionals. In many of our EU partners anecdotal evidence suggests that not only is tax evasion common but it is accepted that professional advisers will be engaged in facilitating it. I said earlier that I had never sat in a meeting with a UK professional who openly advocated the provision of incorrect information to the Inland Revenue. I have had meetings with professional advisers from several EU countries, of high reputation in their own countries, who seemed unable to grasp the simple fact that tax could not be avoided simply because it was possible to ensure that information was kept from the relevant Revenue authority and whose constantly repeated question was "why do the Revenue have to be told".

Not Universal in UK Business Practice

3.10 Even in other areas of economic life in this country regard for truth telling and for honesty is not universal as many who have been involved in the sale and purchase of property or in disputes in the family courts will testify.

Recognising The Value Of The Moral Consensus

Once Lost, Difficult to Restore

3.11 Thirdly, we need to recognise that the moral consensus which does rule in tax practice in this country is something which is rare and very valuable. I was in Hungary recently for the first time and the English language Hungarian newspapers were discussing soberly the difficulty of creating an honest civil service, business and professional culture in a country where, for many years under the communist government, corruption was an accepted part of everyday life. It takes decades to create a culture in which individuals are confident that other people will accept and follow simple rules of honesty in their day-to-day commercial lives. As soon as one person thinks that others are breaching the rule they will be tempted to breach it themselves. Once that confidence is lost it is enormously difficult to restore it. The surest way of losing it is to create a system so overbearing that it is only by stepping outside it entirely through lying that the individual is able to make it tolerable.

3.12 It may appear to be a paradox, but a healthy taxation culture generates a healthy tax avoidance industry because tax avoidance, in contrast to tax evasion, depends upon a respect for the law. People do not like having their property expropriated by the Government. In a healthy tax culture they will try to avoid it in accordance with the law. In an unhealthy tax culture they will seek to evade it. A healthy tax culture has a thriving tax avoidance industry, an unhealthy tax culture, a thriving tax evasion industry.

Moral Indignation Generates Excessive Heat

3.13 Fourthly, just because both sides of tax practice feel that they conform to correct ethical behaviour in their business life the failings of the other side have a capacity to generate excessive emotional heat. Over the last year it has been clear, for example, that the Revenue authorities have decided to raise the tempo of the debate about the morality of tax avoidance. I see nothing wrong with that, in moderation; it is an interesting and important debate. What was disturbing was the intemperance of the language used. I attended a lunch of a professional body in January at which the Chairman of the Board of the Inland Revenue, who is sitting next to me today, gave an address. I hope he will not mind my saying that I was taken aback when he implied that there was a moral equivalence between tax avoidance, an activity from which a majority of his audience derived at least some part of their incomes, and tax evasion, a serious criminal offence.

3.14 In the Customs & Excise Report for 2002, Customs & Excise are described as "committed to identifying and penalising those who continue to engage in fraud, and abusive tax avoidance…". One hopes that the writer was merely carried away by his own exuberance. It cannot be appropriate for public officials to consider that their task is to penalise those who undertake a legal activity which, if we ignore the pejorative adjective, is widely accepted and practiced by members of respectable professional bodies; not least by members of the Institute of Chartered Accountants in England and Wales, a body which is established by Royal Charter and which has a system of ethical rules enforced by disciplinary procedures.

3.15 Similarly, when I was Chairman of the Tax Faculty I had the pleasure of being the host of the Hardman Lecture given by my distinguished predecessor as lecturer David Goldberg. David gave a rollicking and amusing speech of great underlying seriousness expressing concern at what he saw as abuses of Revenue power. I do not think that it is too strong to say that it aroused a sense of outrage in the members of the Revenue authorities who were in the audience that night. A sense with which I could sympathise to some extent because the speech so obviously delighted the many tax practitioners in the audience who dealt with Revenue officials on a day to day basis.

3.16 It is natural to feel strongly about the practice of taxation. It does raise fundamental moral issues about the duty to obey the law, about the duty to tell the truth, about the duty to refrain from abusing Governmental power. We have to guard, however, against indulging a sort of quasi-party feeling; the tax practitioner outraged by every Revenue action, the Revenue official outraged by every way in which the taxpayer frustrates his desire to raise more tax.

3.17 It is here that I turn to the qualities of Phillip Hardman. After Peter Wyman, Phillip was the most influential person in bringing the Tax Faculty into being. I did not know him personally for when I joined the Tax Faculty Committee, a few months after the Faculty was founded, he had already been admitted to hospital with what proved to be a terminal illness. His influence, however, was everywhere.

3.18 Previous Hardman Lectures have, almost without exception, recalled his favourite phrase “It’s a national disgrace!” prompted by some unfairness or foolishness in tax legislation or Revenue practice. But those who knew Philip Hardman from the Revenue side had the most immense respect for him. I think that is because he patently was not a man who simply scored party points in a mock battle between the tax authorities and the taxpayer. He had a passion for the morality of taxation which was not a mere excuse to enjoy an easy sense of moral superiority. Because of that he earned the respect of everybody in the world of tax.

Identifying the honest option may be difficult and painful

3.19 Which brings me to my fifth point about the moral consensus and to my own personal confession. Anybody who presumes to talk of morality faces the accusation that he claims superior virtue to his peers. I make no such claim. I find that identifying the correct option in a complex situation requires both careful reflection and vigilance against one's natural tendency to prefer the option which advances one's own interests. If one takes the moral duties of honesty and obedience to the law seriously they require serious thought.

3.20 Before one of the Inland Revenue members of the audience makes a note to investigate my tax returns I should hasten to add that I do not mean I find it difficult to distinguish between having £1,000 of interest income and £10,000. But I find that the practice of taxation, both on the side of the Revenue authorities and on the side of the taxpayer and his advisers, often presents moral temptations and problems which repay careful consideration.

CHALLENGES TO HONESTY AND TEMPTATIONS TO DISHONESTY

4.1 So for the next few minutes I am going to consider a few of the areas where it seems to me the Revenue authorities are presented with ethical challenges to honesty or temptations to dishonesty and, lest they think that I am being one-sided, I shall then look at some of the areas where the tax profession itself needs to think more clearly about whether it's practice is entirely honest.

The Revenue Authorities

Misleading Public Statements

4.2 Turning to the Revenue authorities first I think that those of us that regularly comment on new tax legislation are dismayed by the increasing liberty with the truth which is taken in Revenue press releases and other public documents. We understand that civil servants are subject to political pressures to present legislative changes positively and that those pressures have increased enormously in recent years. Major developments in public life often show themselves in the emergence of new clichés and it now

seems impossible to open a newspaper or to listen to a news bulletin without references to "spin". But it is the job of public servants to resist the pressure from politicians to make untrue or misleading statements.

4.3 When the consultation document on what has become Stamp Duty Land Tax was released in November of last year it stated that the purposes of changing from Stamp Duty on conveyances and transfers of interests in land to Stamp Duty Land Tax were "fairness, e-business and modernisation". In fact a wholly new tax was introduced which was in no way required to deal with the introduction of e-conveyancing, which could not fairly be described as a modernisation of Stamp Duty and which will result in the raising of considerable additional revenues; a fact which was not mentioned in the document. In my view, the document went beyond merely adopting a positive slant in explaining the proposed changes and was seriously misleading.

4.4 In the case of *Mansworth v Jelley*[2] the Revenue contended for a view of the application of the Capital Gains Tax market value rule to options which was rejected by the Special Commissioners, the High Court and the Court of Appeal, all of which found for the taxpayer. The view contended for by the Revenue had its supporters in the technical press but was certainly not generally accepted. The effect of the decision was reversed for the future by Finance Act 2003 Section 158. In the Budget Day press release announcing that change the Inland Revenue stated:

> "The provision reverses the Court of Appeal decision in the recent case of *Mansworth v Jelley*. It restores the method of computation of chargeable gains to that which was generally thought to apply before the judgment"[3].

4.5 This was simply untrue. Before the Court of Appeal's decision both the Special Commissioners and the High Court had both found in the taxpayer's favour. It was not even true before the Special Commissioners' decision. An honest explanation would have been to say that "the legislation

[2] *Mansworth (Inspector of Taxes) v Jelley* [2002] EWCA Civ 1829
[3] Inland Revenue press release 9th April 2003 Rev BN 31

contains a loophole which we wish to correct. Before the case of *Mansworth v Jelley* was heard it was unclear whether the loophole existed or not. The case of *Mansworth v Jelley* has put it beyond doubt that it does and so we have decided to change the relevant legislation".

4.6 If it were true that our judges make as many decisions reversing the previously universal understanding of tax legislation as the Inland Revenue claim, we would have a judiciary which was either extraordinarily subtle or spectacularly incompetent.

4.7 Of course many professionals merely shrug their shoulders at such public pronouncements and say to themselves that the Revenue must be subject to their political masters and therefore must put a positive spin on every change however misleading that spin may be. I do not think that is satisfactory. Public servants should not acquiesce in the provision of untruthful public information. To do so undermines respect for honesty in public and professional life.

Double Standards: Artificial Tax Collection and Avoidance

4.8 I think another area of concern to practitioners is the double standard applied by the Revenue to artificial tax collection as opposed to artificial tax avoidance. There has been considerable controversy recently over the Revenue's application of the settlement provisions of Part XV of the Income and Corporation Taxes Act 1988. Those provisions deem the income of a settlement to be that of the settlor where the settlor or his spouse retains an interest in the settlement. "Settlement" and "settlor" for this purpose are extremely widely defined. Recently the Inland Revenue have applied this legislation to treat as settlements many companies the shares of which are held by married couples where it appears that one spouse may contribute far more in work or expertise than the other to the business of the company.

4.9 Professional opinion is divided as to whether the Inland Revenue are technically right in their assertions. The major professional bodies are united in saying that they are not. I have to say that I have always advised clients that there is a

risk that the Revenue's position is correct. It is quite clear, however, that the sort of husband and wife companies which the Revenue have recently been attempting to assess under this legislation were never its intended target as can be seen from the comments of the then Financial Secretary to the Treasury, Norman Lamont, when the legislation was debated in the 1989 Finance Bill Committee. The experience of tax professionals, although this is disputed by the Inland Revenue, has been that until recently only a handful of inspectors raised this point. The general Revenue practice was not to raise it in relation to ordinary husband and wife companies.

4.10 Then the Revenue's practice changed applying these esoteric provisions to ordinary family companies and the owners of those companies received asessments assessing tax not only in respect of current years but also of past years.

4.11 The Revenue has been quick to criticise what it has characterised as abusive tax avoidance schemes by which it means strategies which take advantage of legislation which, because of its inadequate drafting, allows transactions to escape a tax charge which one might have expected Parliament to subject to tax. Here we have an artificial tax collection scheme by the Inland Revenue. To many practitioners it seems dishonest to run a campaign to establish that artificial tax avoidance is immoral whilst at the same time collecting tax under a literalist interpretation which was plainly not within the intention of the sponsoring minister and Government department in enacting the legislation in the first place.

The Abuse of Overwhelming Resources

4.12 The Settlements legislation issue also illustrates another area which is of concern to practitioners. The Revenue's abuse of their overwhelming resources and financial muscle.

4.13 Even under the Revenue's interpretation of the settlement legislation, it will only apply where the contribution of one spouse far exceeds the other. So to determine the question of its application, even under the Revenue's interpretation, it is necessary to determine and consider the respective contributions to the business of the two spouses. That is not

something which can be done from an examination of a set of published company accounts.

4.14 Nonetheless, members of the Chartered Institute of Taxation have reported that their clients have received letters from Inspectors stating that they have examined the company accounts, noting that dividends have been paid to both spouses, asserting that the settlement legislation applies and concluding by stating an intention to raise an assessment for back taxes and interest amounting to several thousand pounds. That has been a terrible shock to many couples running small family businesses who in some circumstances will not have heard of settlements let alone the settlements legislation of Part XV of the Income and Corporation Taxes Act 1988. Such letters have been followed by further letters offering to settle the enquiry for a smaller amount in order to achieve a quick resolution. Not surprisingly, some taxpayers have opted to settle regardless of the merits of the Revenue's assertions because appealing to the Special Commissioners is prohibitively expensive and risky. That is surely not honest tax collection.

The Tax Profession

4.15 I would say to the members of the Revenue authorities in the audience that I have not been through these examples simply to be rude to the Faculty's guests or to make them feel uncomfortable. What I have set out is the way the Inland Revenue's behaviour looks from the tax practitioner's side of the fence. I am aware, however, that looking from your side of the fence the behaviour of the profession may also appear somewhat imperfect. I think as a profession it is useful to reflect from time to time on the challenges to our own honesty.

4.16 I do not have in mind accountants who become involved in out-and-out evasion. As I say, there is no doubt that such behaviour meets with universal disapproval in the profession just as does that of the small number of Revenue officials who have been successfully prosecuted for criminally abusing their position.

4.17 There are areas of tax practice, however, which present challenges even to those who accept fully the demands of the law and of honesty. I think that those challenges present

themselves more forcefully in relation to matters of disclosure and in particular in relation to those areas of tax legislation where motive or intention is a key component of the tax charge.

4.18 Interestingly in this year's Wyman debate, when Davud Hartnett presented examples of unacceptable tax avoidance, without exception the examples seemed to involve not tax avoidance but rather a conspiracy to provide misleading information to the Revenue. If on examination the tax strategies involved in those examples turned out to be ineffective as a matter of law I have no doubt that the taxpayer would have made a negligent return within the Taxes Management Act 1970 Section 95 and may well have committed the crime of conspiracy to cheat the public revenue.

Inadequate Disclosure?

4.19 But it is not flagrant dishonesty of that sort which I have in mind. What constitutes a negligent return within Section 95, and the equivalent provisions for other taxes, is extremely unclear. There is really no useful case law on the matter. The result has been, I think, that practice varies between simply putting on the tax return details of those transactions which, on the taxpayer's view of the operation of the law, he is required to give or to give by way of additional information no more than brief details of the transactions which the taxpayer considers escape a charge to tax.

4.20 Now I take a different view. It seems to me that tax planning is about planning transactions which within the law enable a person to minimise his tax liabilities. If that planning works it works on the basis of what has actually happened, not on the basis that what has actually happened will not be discovered by the Revenue. It is in the client's interest to set out that information in sufficient detail and in a logically ordered fashion to allow the inspector to see what has happened and to see why the tax advantage contended for has accrued. That, in my experience, normally requires considerably more detailed disclosure than it is common practice to make.

4.21 As I have said, that is particularly so where one is dealing with areas of the law to which intention and motive are relevant.

Motive Tests

4.22 For example the provisions of Income and Corporation Taxes Act 1988 Section 739, concerning transfers of assets abroad, will not apply if the taxpayer can show that the avoidance of tax was not the purpose or one of the purposes for which the transfer was effected and that the transfer was a bona fide commercial transaction which was not designed for the purpose of avoiding tax. This requires a taxpayer to be honest about the state of his mind at the time that he makes the transfer.

4.23 I know that the Inland Revenue very much dislikes such motive provisions because it feels that it is placed in the position of proving what is going on in a person's mind.

4.24 Actually the burden of proof under Section 739 falls on the taxpayer and the difficulty in proving motivation is easily exaggerated as motivation is often to be inferred from behaviour without difficulty. Nonetheless, I have some sympathy with the Revenue's dislike of motivation provisions. They present a temptation to the adviser. Take the example of taxpayers who have established an offshore trust or company. How many advisers are tempted to interrupt their client's narrative of the relevant facts to tell him how Section 739 operates before asking him for an account of his motivation in making the offshore transfer?

4.25 Such leading questioning in a client conference is unethical conduct for a barrister but the ethical guidelines of this ICAEW and of the Chartered Institute of Taxation do not deal with leading questions directly. They do however impose a general duty on members to:

> "ensure that information [the member puts] before the authorities is sufficient to allow the relevant official to make the decision required"

The Ramsey Principal and Preordination

4.26 The principle in the case of *W.T. Ramsey v CIR*[4] is almost always of relevance in tax planning transactions. The nature of that principle was of course extensively reinterpreted in the House of Lords in *Westmoreland*[5] with the result that the extent to which the previous case law formulations of the principle continue to apply is now unclear. Whatever the principle's exact extent, the question of whether a series of transactions which include steps introduced for tax planning purposes are preordained in the sense of being practically certain to proceed to their conclusion once the first step has been taken continues to be relevant to the application of the principle.

4.27 Where transactions are undertaken by a taxpayer on the advice of a tax adviser deliberately to obtain a tax advantage which would not have been undertaken were the tax advantage not in prospect, the question of preordination must at least be considered before one can arrive at a final conclusion on the tax consequences of the transactions. Yet how many tax returns will disclose the fact that the transactions reported in them have been planned at previous meetings between the taxpayer and his adviser?

4.28 It seems to me that a return which does not do so may not be negligent within Section 95 but is certainly not entirely honest.

Morality Marries Prudence

4.29 I also think that this is one of those happy occasions when the demands of morality and of practical prudence combine.

4.30 Most serious tax planning has some element of uncertainty as to its result. Tax legislation is too complex and tax case law too contradictory for that not to be the case. Considering whether to undertake tax planning steps therefore requires a client and his adviser to balance the advantages of their success against the costs of their failure. In the event of their failure, if a client turns out to have made a negligent return under Section 95 he may receive a penalty equal and additional to the tax underpaid. If there is any practical risk of such a penalty being exacted it seems highly unlikely that

[4] *W.T. Ramsey v CIR HC* [1981] STC 174
[5] *Westmorelanr Investments Limited v MacNiven HL* [2001] STC 237

the balance of risk and reward will favour implementing the strategy. Just because the scope of negligent disclosure in Section 95 is uncertain one cannot exclude the risk of a tax geared penalty unless one makes the fullest disclosure of all relevant matters.

4.31 Which brings me to my final area where the duty of honesty raises difficult temptations for tax practitioners.

Honesty In Disclosing Tax Risk to Client

4.32 Clients dislike being told that the law is uncertain. They expect their advisers to know how the law will apply to them. In tax planning, however, there is virtually never a certain result. When an adviser recommends a tax planning strategy to his client he needs to be entirely objective about the risks of the strategy failing and to present those risks clearly to his client so that the client can make an informed decision. I am sure we all try to do that. There have been many times, however, when clients who have come to me with a strategy suggested to them by another adviser, have said that they have been told that that strategy is certain to work.

Both Sides Have Areas of Challenge

4.33 So I think that both from the side of the Revenue authorities and the practitioner there are areas of practice where being honest in our work requires difficult areas of judgment and a real resistance to temptation even for those who would be outraged to think of themselves as tempted to dishonesty.

WHAT SHOULD WE DO?

5.1 I said at the start that I was going to break from the Hardman traditions in three ways. Actually there is a fourth way in which I am going to break with those traditions. Previous speakers, typically, have presented at the end of their speech some concrete, procedural step to effect an improvement in the matters which they have discussed. Perhaps the most influential of those was Leonard Beighton's lecture in 1995 "The Finance Bill Process: Scope for Reform". In due course it led to Tim Smith introducing at committee stage an amendment which became Finance Act 1995 Section 160 which in turn led to the Inland Revenue's

consultation document on tax simplification and so to the establishment of the Tax Law Rewrite Project.

5.2 I have no immediate practical step of that sort to recommend. I do not want to recommend changes to the Institute's ethical guidelines or the setting up of a joint ethical committee between the professional bodies and the Inland Revenue and God forbid that we should have some new legislative imposition restricting our freedom of behaviour still further. I would rather like a more precise statutory definition of neglect for the purposes of Section 95 but I shall not be recommending that it in this speech.

5.3 It seems to me that a culture of honesty is not something which is best preserved by more written rules or committee structures. What we need is to appreciate the real moral consensus which operates in the tax profession, to understand how difficult it is to achieve that consensus in any culture and to value it. In order to preserve it we need occasionally to raise our heads from our desks to discuss openly the areas where we find being honest difficult. Both sides of the tax industry in the UK, the professionals and Government servants, need to sympathetically understand the concerns of the other side. We need to approach these questions without rancorous heat but with the generous warmth of engagement which Phillip Hardman brought to such matters. Tonight, ladies and gentlemen, I have attempted to make my contribution to that discussion.

20 November 2003