

Tax avoidance versus Tax Evasion...

What is happening in the tax world, and just why there is a debate about this subject at all is that more and more business activity is being treated as tax avoidance, where it has not in the past. This, to my mind at least, is pushing the upper end of the tax avoidance spectrum into the domain of tax evasion territory.

If tax avoidance and tax evasion were really the same thing, as the Honourable Mr Shearer and the Honourable Mr Norman believe, then anyone who has done what our good doctor friends Penny & Hooper have done, had better watch out. To explain, what they did was transfer their orthopaedic surgical practices to a company (ie Mr Penny did so for his practice and likewise Mr Hooper did so with his practice).

They each separately put themselves on a salary that was only a small proportion of the income that they had previously earned in their practices. The income from their surgical practices was still taxed, it was just taxed at different rates, these being mixed and matched across the ultimate recipients of the income.

In transferring their practices to these companies, Messrs Penny & Hooper were exercising a "choice" to use a corporate form. In determining to put themselves on relative low salaries, they exercised another "choice". This was in the context of there being nothing in tax law that either expressly prescribed that they put themselves on a higher salary or that what they were doing was not right.

In short, Messrs Penny & Hooper thought they were doing something that was perfectly legitimate. There was no "deceit", "fraud" or behaviour that was "wilfully misleading" (you can pick and choose which of these terms grabs you; these are the elements involved in tax evasion, as that term presently is understood). Nevertheless, Messrs Shearer and Norman in saying that tax avoidance and tax evasion are the same thing, would appear to believe that participants in a Penny & Hooper type arrangement are equally as culpable as fraudsters (eg in a tax sense, this means someone who creates false invoices, so as to claim bogus GST back or simply does not account for income, as in the black market). Is it really the case, that people in the Penny & Hooper circumstance are to be treated in the same way as these black marketeers? We are talking about people who thought there was nothing wrong in what they were doing and that they were making "legitimate" choices, penning the Honourable Mr Dunne's description of "legitimate" tax avoidance – what he meant I suspect is that there was no element of deceit, fraud or wilfully misleading behaviour, hence nothing illegitimate.

It would be easy, on this basis to conclude that tax evasion (involving deceit etc) and tax avoidance (no deceit) are quite different. But if the result is the same (ie no tax paid, and I suspect this is the point that the Honourable Messrs Shearer and Norman had in mind) then should they be different? So, here are some views on that. If this is beyond your level of interest on this point, then of course skip onto the next topic.

There are countless instances where the result of doing something is the same regardless of the intention underlying it. The tragic hunting accidents in the last couple of years are perhaps a good case in point. In each case, the knowing element of pulling the trigger resulted in a death. In each case there was nothing sinister in their intent. Nor was there thought to be anything wrong with hunting or for that matter possessing a rifle. In each case, I expect (one exception being the use of spotlights) there was nothing untoward about the choices made by the hunters in entering the bush and stalking their prey etc. But in each case, the hunters made a tragic mistake.

The same analogies occur to me in the realm of tax avoidance. There is the "knowing" element in entering into arrangements. There is behaviour that is analogous with "hunting", this being taking steps to reduce one's tax bill and there is the same result where a mistake is made. But just as is the case in the tragic hunting accidents,

what is missing is the essential ingredient of "intent to do a wrong". This is what distinguishes tax avoidance from tax evasion and why they are necessarily different.

For these concepts to be the same, to my mind, there would need to be an intention on the part of a tax avoider "to do a wrong". But how can such an intention possibly be established where tax avoidance itself is uncertain? Ask any tax practitioner whether an arrangement is tax avoidance. The answer you will get (excepting upper end of the spectrum type arrangements) is "maybe" or "there is an on balance risk" etc, ie it is such an uncertain area that, in many instances, no conservatively minded tax advisers can tell you whether an arrangement is tax avoidance. Perhaps what could be said is that where a direct comparison can be made between a proposed arrangement and one that has gone before and which has earlier and publicly been found to be tax avoidance, then the degree of recklessness in following suit and "trying one's luck" warrants criminal attention. But to my mind it ends there – tax avoidance and tax evasion are not the same and should not be treated as such regardless of corresponding outcomes.