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The Tiley trilogy and US anti-avoidance law

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Abstract

This article considers an influential set of pieces, written by Professor John Tiley in the mid-to-late 1980s, about US anti-avoidance doctrines

1 INTRODUCTION

John Tiley first came to Cleveland, Ohio, and Case Western Reserve University for the 1985-

trilogy might have been in some respects, this was not an exercise in dispassionate analysis.[15] This was a subject about which John Tiley had very strong views.

The details of US tax law have of course changed since the trilogy was written, and the WUILORJ\ LV WKHUHIRUH QRW D WUXVWZRUWK\ JXLGH
Peter Maw. Some of the legal doctrine John described has changed dramatically. For example, as John was studying and writing, Congress was interring what had been a key principle of American corporate tax law, the *General Utilities* doctrine.[16] Furthermore, most dividends from corporations are now taxed to individuals at preferential rates, another important change that affects the specifics discussed in the trilogy.[17]

The details may have changed, but what John wrote about US anti-avoidance doctrines

by citing an anti-avoidance doctrine, he could avoid the hard work of analysis ² as John put it, µan invocation of doctrines as if they determined the case without explaining how ¶[22] It is easier, that is, to say that the substance of a transaction is *X*, and that the tax results should follow from that characterisation, than to have to interpret difficult revenue statutes (and, for that matter, to explain *why* the substance is *X* and not *Y*). John quoted the legendary Judge Learned Hand,[23] who in 1932 described judicial recourse to F R Q F H S W V O L N H X µ W D [illegible] f [illegible] the pains of reasoning ¶[24] John added:

> It is all too clear from the American authorities that a simple invocation of this doctrine as if it answered the problems presented is an easy a [sic] t

more difficult than in that of general anti-avoidance doctrine.¶[37] Such a doctrine potentially leaves all µacts ¶at the risk of being re-characterised.[38]

Parliament establishes both the substantive rules and the governing tax doctrine.[42] That reduces doctrinal complexity and lessens the need for judicial development of anti-avoidance doctrines.

The form that tax legislation takes in the two countries provides another reason for judicial participation in the US lawmaking process in a way frowned upon in the UK. In - R K Q ¶ V Z R U G V µ The legislation which the courts have to apply contains many provisions of a complexity equal to the worst of the United Kingdom legislation but it is much more prone to introduce relatively woolly concepts and leave matters to the courts to resolve ¶[43] , W Z D V E H F D X V H \ F R Q V H S W V µ Z R R O W 8 6 M X G J H V G H Y H O R S µ O H Y [44] (and sometimes much worse): ¶ Level 7 reasoning comes much more naturally to United States lawyers than to their United Kingdom colleagues not least because they recognise that their statute provides a framework for the judges to develop doctrine, a premise which United Kingdom lawyers do not share. ¶[45]

John may also have overstated the extent to which the US Constitution, which imposes limitations on the national taxing power, contributes to the enactment of fuzzy statutes that invite, or even demand, judicial intervention. In particular, John emphasised the significance of the Sixteenth Amendment to the Constitution, ratified in 1913. Without the Amendment, a tax that reached income from property would (the Supreme Court had held in 1895[48]) be a direct tax that would have to be apportioned among the States on the basis of population.[49] Apportionment would have made the income tax absurd.[50] By H[HPSWLQJ µWD[HV RQ LQFRPHV¶ IURP WKH DSSRUWL made the modern income tax possible ² EXW RQO\ LQVRIDU DV WKH WD[LV Hence the uncertainty, or so John argued.

US courts, John wrote, have to construe legislation

> not only in terms of what Congress intended but also in terms of what the Sixteenth Amendment allowed. The legislation in the early years was broad and many of those broad principles have remained in place. Broad legislation is sensibly construed in a broad way. Issues of form and substance first emerged in this era and the preference for substance over form, being concerned with fact classification rather than re-characterisation, is a natural and correct way to determine the facts of the case.[51]

It is true that Supreme Court cases from the 1920s and 1930s regularly contained GLVFXVVLRQV DV WR ZKHWKHU D SDUWLFXODU LWHP F the Sixteenth Amendment.[52]

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UK.[54] But the Report issued by Graham Aaronson contains little that the author of the Tiley trilogy might have objected to. The recommendations were quite limited in their scope, and intentionally so. The Committee did not recommend anything like the importation of US substance-over-form doctrines, and, in any event, the Committee recommended

The US for years had resisted codification of any general anti-avoidance rule. Although the Internal Revenue Code includes many provisions that contain authority for application of substance-over-form principles, those provisions are targeted at specific transactions.[72] The George W Bush administration did not support codification of a general anti-avoidance rule largely on the ground that doing so would fossilise doctrines that need to be fluid, to be able to adjust quickly to the never-ending imagination of tax planners.

Nevertheless, as part of the healthcare legislation enacted in 2010, popularly and unpopularly known as ϕbamacare ¶