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Special Issue: The Rule of Law, Morality, and Retrospective Legislation: Income Tax Law from Perspectives of Normative Jurisprudence, papers by John Prebble and co-authors. This issue is a companion to **VUW Legal Research Papers Series volume 1 no. 5, Nov 14, 2011**, Special Issue: Ectopia, Fictions, and Autopoiesis: Income Tax Law from Perspectives of Analytical Jurisprudence, papers by John Prebble and co-authors.

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John Prebble, Victoria University of Wellington, Monash University, Institut für Österreichisches und Internationales Steuerrecht, Wirtschaftsuniversität Wien

Criminal Law, Tax Evasion, Shams, and Tax Avoidance: Part II – Criminal Law Consequences of Categories of Evasion and Avoidance

John Prebble, Victoria University of Wellington, Monash University, Institut für Österreichisches und Internationales Steuerrecht, Wirtschaftsuniversität Wien

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"Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law?"

Saint Louis University Law Journal, Vol. 55

Sanford E. Sarasohn Memorial Conference on Critical Issues in International and Comparative Taxation, 2010

Victoria University of Wellington Legal Research Paper No. 8/2012

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As part of systems of tax law, general anti-avoidance rules frustrate transactions that contrive to avoid tax. Avoidance transactions adhere to the strict letter of the law while flouting or exploiting its policy. Statutory general anti-avoidance rules are found in many countries in Europe and in the British Commonwealth, apart from the United Kingdom itself, but judge-made substance-over-form rules in the United States and the United Kingdom sometimes have a similar effect. Much of the force of these rules comes from their imprecision, imprecision that, arguably, breaches the principles of the rule of law.

The authors take a comparative approach that examines statutory general-anti-avoidance rules from a number of jurisdictions. They compare these rules with the principles of the rule of law as those principles are currently understood and they compare the typical form of a general anti avoidance rule with the forms of several rules of criminal law that notoriously breach the rule of law. They thus compare the operation of general anti-avoidance rules with (a) the requirements of the doctrine of the rule of law as adumbrated by Dicey, Rawls, Hayek, Raz, and, notably, Fuller and (b) with the general offence rules of the Nazi criminal code of the Free City of Danzig, with Article 386 of the Criminal Code of the Qing Dynasty of China, and with the crime of corruption of public morals, an offence in effect created by the United Kingdom House of Lords in 1962 in *Shaw v Director of Public Prosecutions*.

Concluding that a general anti-avoidance rule breaches at least the principle of certainty of law the authors turn to a consideration of whether there is anything in the nature the

activity of tax avoidance that might justify such a breach even though, for instance, the law treats serious criminals as entitled to the benefits of the rule of law. The authors advance the hypotheses that the activity of tax avoidance is of a nature that relies for its success on the formality of the law and relies in a sense on the rule of law itself. In effect, it corrupts the rule of law by exploiting it. If tax avoidance is in this manner an attack on the rule of law a legislature may be justified in responding by enacting a general anti-avoidance rule.

"The Morality of Tax Avoidance"

Creighton Law Review, Vol. 43, No. 3, pp. 693-745, 2010

Victoria University of Wellington Legal Research Paper No. 9/2012

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If "tax avoidance" means "contriving legal transactions that reduce tax in ways that are contrary to legislative policy", then "evasion" is illegal reduction and "mitigation" is unexceptionable reduction. Apparently, tax avoidance may occur endogenously, within the existing economic framework of a business or an estate plan, or exogenously, by resort to an independent tax shelter. The distinction is apparent, but not real. (a) Whether an arrangement amounts to avoidance and, if so, (b) whether the avoidance is moral are fundamentally the same questions in all contexts, including estate planning. Judges sometimes claim that tax avoidance is moral. That claim appears to be based on the distinction that avoidance is legal whereas evasion is illegal. A legal/illegal test cannot determine questions of morality. Others who aver that tax avoidance is moral base their claims on four assumptions: that taxpayers have a moral right to their pre-tax income; that avoidance is a victimless activity; that the immorality of evasion is derived solely from its illegality (and therefore that avoidance, which has the same factual matrix, is moral); and that morality is wholly independent of the law. These assumptions are mistaken. Evasion is immoral in a deep sense, not simply as *malum prohibitum*. Since evasion and avoidance share their essential elements, and are separated only by a legal difference, it follows that avoidance is also immoral. Public opinion can test this conclusion, albeit imperfectly. The approach is deontological, focusing on actions, not on agents, and comparative, drawing on cases from several jurisdictions.

"Legislation with Retrospective Effect, with Particular Reference to Tax Loopholes and Avoidance"

New Zealand Universities Law Review, Vol. 22, pp. 17-49, 2006

Victoria University of Wellington Legal Research Paper No. 10/2012

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When on the rare occasion retrospective legislation enters the statute book it is denounced from all angles as being illegal, unconstitutional, undemocratic, and contrary to natural justice and to the rule of law. The article considers the criticisms levelled at retrospective legislation, paying particular attention to legislation designed to frustrate tax avoidance.

"Retrospective Legislation: Reliance, the Public Interest, Principles of Interpretation and the Special Case of Anti-Avoidance Legislation"

New Zealand Universities Law Review, Vol. 22, pp. 271-299, 2006

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Retrospective legislation is generally thought of as undesirable as it erodes the reliability of the law in the eyes of the citizen and therefore breaches the criterion known as the "reliance principle". There is little unanimity between legal scholars as to why reliance is important. This article argues that its importance varies according to the context of the legislation in question. The reliance principle may be modified, or even defeated in some contexts by the weight of public interest.

"Criminal Law, Tax Evasion, Shams, and Tax Avoidance: Part I – Tax Evasion and General Doctrines of Criminal Law" □

New Zealand Journal of Taxation Law and Policy, Vol. 2, pp. 3-16, 1996

Victoria University of Wellington Legal Research Paper No. 12/2012

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Tax evasion is where a taxpayer declares a smaller income in his or her return, by mistake or by fraud. Evasion can be either innocent or fraudulent. Innocent evasion may lead to reassessment, fraudulent may lead to criminal prosecution as well as reassessment. Evasion is addressed in the Tax Administration Act 1994; and serious cases can be penalised under the Crimes Act 1961 section 229A(b). Avoidance is where taxpayers construct their affairs so as to minimise tax or maximise deductions. The Income Tax Act 1994 sets out a statutory anti-avoidance rule. Some cases of tax avoidance may also amount to evasion.

"Criminal Law, Tax Evasion, Shams, and Tax Avoidance: Part II – Criminal Law Consequences of Categories of Evasion and Avoidance" □

New Zealand Journal of Taxation Law and Policy, Vol. 2, pp. 59-74, 1996

Victoria University of Wellington Legal Research Paper No. 13/2012

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Tax evasion can occur by taxpayers failing to disclose income or by creating sham transactions. Whether a taxpayer's returns are evasive may depend on his state of mind. In *Snook v. London West Riding Investments* [1967] 1 All ER 518, 528-529 a sham was defined as acts done or documents executed which are intended to give the appearance of creating legal rights and obligations. Shams are used to hide tax evasion and other kinds of fraud. Transactions may be genuine and not shams, but still be impugned. Reasons include mislabelling, context, the affect of related transactions, and the arguments of logic.

A taxpayer may be guilty of tax evasion, and of an offence under section 229A of the Crimes Act 1961 if he knowingly undertakes a scheme that is void for tax purposes by virtue of section BB 9 of the Income Tax Act, if he fails to disclose the scheme to the Commissioner, or if he under-declares his income because he returns it on the basis that the scheme is effectual, although it is in fact void. That is, in some circumstances, a scheme may amount to both avoidance and evasion.

Solicitation of Abstracts

The Victoria University of Wellington was founded in 1899 to mark the Diamond Jubilee of the reign of Queen Victoria of Great Britain and of the then British Empire. Law teaching started in 1900. The Law Faculty was formally constituted in 1907. The first dean was Richard Maclaurin (1870-1920), an eminent scholar of both law and mathematics. Maclaurin went on to lead the Massachusetts Institute of Technology as President in its formative years. Early professors included Sir John Salmond (1862-1924), still one of the Common Law's leading scholars. His texts on jurisprudence and torts have gone through many editions and remain in print.

Alumni include Sir Robin Cooke (1926-2006), one of the leading judges of the British Commonwealth. As Baron Cooke of Thorndon, he sat on over 100 appeals to the Judicial Committee of the House of Lords, one of very few Commonwealth judges ever appointed to do so.

Since 1996 the **Law School** has occupied the Old Government Building in central Wellington. Designed by William Clayton and opened in 1876 to house New Zealand's then civil service, the building is a particularly fine example of Italianate neo-Renaissance style. Unusually among large colonial official buildings of the time it is constructed of wood, apart from chimneys and vaults.

The School is close to New Zealand's Parliament, courts, and the headquarters of government departments. Throughout Victoria's history, our law teachers have contributed actively to policy formation and to law reform. As a result, in addition to many scholarly articles and books, the Victoria SSRN pages include a number of official reports.

Victoria graduates approximately 230 LLB and LLB(Hons) students each year, and about 60 LLM students. The faculty has an increasing number of doctoral students. Ordinarily there are ten to twelve students engaged in PhD research.

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