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Assessing the quality of services provided by UK tax practitioners

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Abstract

This paper focuses on the work of UK tax practitioners. We divide the work of the practitioner into two forms—compliance and planning/avoidance work—and define how the quality of each can be evaluated. We consider the economic forces operating in the tax services market and their likely impact on the tax practitioner's choice of the quality level to which he or she works, aiming to show whether market forces alone may sufficiently protect the public from poor quality tax work and considering whether regulation may be of net benefit to society (UK tax practitioners currently are not regulated).

Keywords: quality assessment, reputation, regulation

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1. INTRODUCTION

This paper focuses on the work of the tax practitioner operating in the current UK market for tax services. Our aim is to show how the work of the tax practitioner can be categorised and how its quality can be evaluated. By examining the economic forces within which tax practitioners operate, we aim to show whether market forces alone can be expected to be sufficient to protect the public from poor quality tax work. Having established that there is likely to be some market failure at least in certain sections of the market, we seek to consider whether regulation is likely to be of net benefit to society and whether the increasing complexity of tax legislation and recent events make regulation more or less likely. In particular, the recent cases of Starbucks, Amazon, Google and Facebook have highlighted the issue of tax advice, with doubts being cast on the ethical considerations of those responsible for steering corporations towards certain courses of action designed to minimise tax. This issue is relevant in the context of more intense interest in the relationship of tax authorities and tax practitioners generally, often spoken of in terms of increasing the quality of tax work (see, for example, the study published by the Organisation for Economic Co-operation and Development (OECD, 2008) on tax intermediaries and HM Revenue & Customs' (HMRC, 2009) consultation paper on tax agents) and the wider issue of quality in terms of services provided by tax authorities (see Tuck, Lamb and Hoskin, 2011). The specific issue of how to assess, evaluate or measure the quality of the service a tax practitioner provides has not been considered in the light of this.

The work done to date on taxation services has been mostly carried out in the USA, and has concentrated on particular aspects. Erard (1993) summarises such work into focal studies on certain features of tax practice interlaced with econometric research. The focal studies have considered variously: the role played by tax practitioners in reducing taxpayer uncertainty (Scotchmer, 1989a, 1989b and Beck, Davis and Jung, 1991); the effect of tax practitioners in reducing the time and anxiety associated with tax return preparation and audit (Reinganum and Wilde, 1991); the usefulness of tax practitioners in uncovering ways to reduce tax liabilities (Slemrod, 1989); and the ability of tax practitioners to exploit legal uncertainties to reduce taxpayer penalties for non-compliance (Klepper, Mazur and Nagin, 1991). The econometric research has concentrated on identifying the kind of taxpayers who seek assistance and on whether employing tax practitioners improves or worsens compliance with tax laws (for example, Slemrod and Sorum, 1984; Long and Caudill, 1987; Collins, Milliron and Toy, 1988; Slemrod, 1989; Klepper et al., 1991; Dubin, Graetz, Udell and Wilde, 1992). The conclusions are that level of income, age, marginal tax rate and complexity of completion of the tax return encourage taxpayers to employ tax practitioners. Additionally, married taxpayers, self-employed taxpayers and taxpayers with many forms and schedules to complete are also likely to seek assistance. Taxpayers with high levels of education or significant tax knowledge tend to prepare their own returns.

Klepper et al. (1991) advance a formal model which jointly addresses the decision to engage a preparer and the compliance outcomes conditional on the preparation mode. The principal focus of their model is to fo

that, for Australian taxpayers, there are three ideal types—a “creative aggressive tax planning type”, a type who engaged in the “cautious minimisation of tax” and (the most popular), a “low risk, no fuss” practitioner. However, when taxpayers’

The main feature of the market for tax services in the UK is therefore the lack of any professional monopoly and the fragmented nature of professional regulation. In addition, there is no statutory definition of the words 'accountant' or 'tax practitioner' and so anyone can set up in business as an accountant or tax practitioner without having to satisfy any legal requirements.[6] This is in contrast, for example, to the highly regulated position in Australia, where registration as a tax agent has been a nationwide requirement since 1943 (Fisher, 2010). Many other countries, including New Zealand, operate in the same way as the UK, but there is a general trend towards regulation. In the USA, since 1 January 2011, there has been mandatory federal registration of tax intermediaries, together with a range of compliance checks (related to good standing) and, for intermediaries not licensed by certain professional bodies, competency tests and requirements regarding continuing education are also currently being rolled out (Treasury Department, 2011).[7]

It is evident thus far that the fragmentation of the tax profession and its lack of monopoly, as observed in many countries in the 1990s by Thuronyi and Vanistendael (1996, pp. 160–163), still remain. As Frecknall-Hughes and McKerchar (2013, p. 424) comment:

> The paucity of academic literature on this subject is somewhat surprising, given the almost universal acknowledgement that tax practitioners have increasingly become key players in modern tax administrations seeking to maximise taxpayer compliance.

Increases in the volume and complexity of tax law, especially in the UK (see Aitken, 2010), mean that tax practitioners will necessarily be used by both individual and corporate taxpayers. As long ago as the mid-1990s, evidence from HMRC's Independent Adjudicator (Green, 1995, pp. 1; 19–20 and 47) focused attention on the poor quality of the advice given by some tax practitioners, but there has been increased concern in recent years rather about the nature of tax advice provided, especially in terms of ethics (Shafer and Simmons, 2008), with a number of firms in the USA being investigated for the marketing of tax shelters which facilitate aggressive tax avoidance (Herman, 2004; Johnston, 2004; Scannell, 2005). Companies and their senior executives are frequently alleged to use 'tax havens' or tax shelters for the purpose of avoiding their tax obligations (Godar, O'Connor and Taylor, 2005; Dyreng, Hanlon and Maydew, 2007; Wilson, 2009; Dyreng, Hanlon and Maydew, 2010; Sikka, 2010). The KPMG tax shelter fraud case in the USA points to the involvement of tax professionals in such activities (Sikka and Hampton, 2005; Sikka, 2010), and the 2012 cases of Starbucks, Amazon, Google and Facebook,

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the Association of Taxation Technicians, the Association of Chartered Certified Accountants, the Institute of Chartered Accountants in England and Wales, the Institute of Chartered Accountants of Scotland, the Institute of Indirect Taxation and the Society of Trust and Estate Practitioners. The Institute of Indirect Taxation has recently merged with the CIOT. There is also the Worshipful Company of Tax Advisers. In the public sector, there is, of course, HMRC. The 2009 HMRC report, *Modernising Powers, Deterrents and Safeguards. Working with Tax Agents: A Consultation Document*, in Ch. 5 looks more closely at different definitions for different types of tax professionals. See also Devos, 2012, p. 5.

[6] The HMRC 2009 consultation document, *Modernising Powers, Deterrents and Safeguards. Working with Tax Agents: A Consultation Document*, does suggest, in Ch. 5, some form of registration for the 12,000 estimated tax practitioners who are currently unregulated by any professional body.

[7] Registration of paid preparers has been a requirement in Oregon since 1973, in California since 1997, and in Maryland since 2008 (McKerchar, Bloomquist and Leviner, 2008, pp. 402–411).

buildings, the distinction between the two may, in practice, be blurred. In addition, there will inevitably be areas of tax reporting where the amounts to be entered in the tax returns are subject to some uncertainty and hence to a process of negotiation with the tax authorities. Such negotiations can be considered to be a legitimate part of the tax process, because it is normal for some uncertainty to arise in particular circumstances. Typically, this will cover areas where values have to be agreed and may be the subject of differing professional opinions, such as determining the value of private company shares with no stock market price, or the value of real estate.

3.2 Tax planning/avoidance work

This second category involves a definite and deliberate manipulation of the taxpayer's affairs to reduce the amount of tax payable. For example, in the UK, inheritance tax may be charged on an individual's death where the value of assets in the estate, or given prior to death, exceeds certain exempt bands. In order to provide some relief,

> HMRC[8] to put the largest possible shovel into his stores. HMRC is not slow ... to take advantage which is open to it under the taxing statutes for the purpose of depleting the taxpayer's pocket. And the taxpayer is, in like manner, entitled to be astute to prevent, so far as he honestly can, the depletion of his means by the Revenue.

This was supported by the comments of Lord Tomlin in 1935 in *IRC v Duke of Westminster* [1936] AC 1, at 19–20:

> Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax.

These comments are well known and often cited in support of avoidance activities as legitimate. Case law seems to support this in other ways. For example, in the case of *Hurlingham Estates Ltd v Wilde & Partners* [1997] STC 627, it was inherently suggested (at 628) that a solicitor owed a duty to his client to structure a transaction so as to avoid a tax charge. A similar view initially prevailed in the long-running case of *Mehjoo v Harben Barker* [2014] EWCA Civ 358. Mr Mehjoo had sued his long-standing accountants, Harben Barker, for failing to recommend the use of an offshore tax avoidance scheme, the Bearer Warrant Scheme (BWS) (since banned by HMRC), which Mr Mehjoo's non-UK domiciled status would, *prima facie*, have allowed him to use to avoid capital gains tax on the disposal of a company. However, in the 2014 Court of Appeal judgment, which overturned earlier judgments, Lord Justice Patten placed great significance on the fact that Mr Mehjoo had "accepted in evidence that he would not have gone ahead with the BWS if he had been advised that there was a substantial risk of it being challenged by HMRC" (Rayney, 2014); and on the fact that under the terms of its engagement letter, Harben Barker was only obliged to provide limited tax planning advice. This case decision reflects the increasingly less benign climate for tax avoidance work, which has been demonstrated through a series of cases, perhaps notably beginning with *Ramsay (WT) Ltd v CIR* [1982] AC 300, with legal success sometimes going to the taxpayer, but at others to HMRC. Significant developments over recent years have been: a deliberate shift in terminology, such that tax avoidance has been categorised variously as 'aggressive', 'unacceptable', 'abusive', 'illegitimate' and 'illegal'—the latter two seeming particularly at odds if avoidance is legal (see Wyman, 1997; Frecknall-Hughes, 2007); the development of DOTAS (see earlier) and attempts to introduce some kind of general anti-avoidance rule (now operationalised as a general anti-abuse rule from 2013 (see Aaronson, 2011); and the specific categorising of avoidance as unethical or immoral. For instance, the UK Chancellor of the Exchequer in his 2012 Budget speech referred to avoidance as being "morally repugnant" (Krouse and Baker, 2012). In its published guidance on the General Anti-Abuse Rule (GAAR) (HMRC, 2013), HMRC specifically highlights at Section B 2.1 a movement away from past case law, in that the GAAR:

> ... [t]herefore rejects the approach taken by the Courts in a number of old cases to the effect that taxpayers are free to use their ingenuity to reduce their tax bills by any lawful means, however contrived those means might be

[8] At this date, 'HMRC' would refer to 'Her Majesty's Revenue Commissioners'.

the eventual size of the tax liability given the size of the transaction, or the amount of profit or gain that the client has made multip

when one self-interested party must rely upon the representations of another self-interested party, since the assumption of self-interest implies that each party will take advantage of any situation which could increase his or her welfare (Simunic and Stein, 1987a, 1987b).

A good example of what can happen in such a market is the used car market of Akerlof (1970). A vendor wishes to sell a used car of a particular level of quality. A customer wishes to buy the used car, but is unable to discern its quality before purchase. Hence the maximum amount that the customer should pay is the market price for a car of average quality. This will be so, because any statements by the vendor about the true quality of the car will not be believed by the customer, because the customer has no way of verifying the vendor's representations. The rationale behind the customer's attitude is that the vendor knows not only that price and quality are related, but also that the customer cannot observe the true quality of the car. Therefore, the customer will reason that it is in the vendor's interest to report that the quality of the car is high, whether it is or not.

In such a market consisting of imperfectly informed consumers in which producers have no chance to build a reputation, two factors will conspire to reduce the availability of high quality goods: moral hazard and adverse selection. If the quality of a purchase cannot be pre-determined, then both high and low quality products will eventually sell for the same price, as it is impossible for the buyer to distinguish between them before purchase. The producer's choice of quality cannot therefore have any influence on his or her sales volume. Accordingly, moral hazard will arise because sellers can maximise profits by supplying only poor quality, low cost products, since the returns from producing good quality accrue generally to all sellers regardless of the quality that an individual seller produces. Adverse selection will arise from the fact that sellers of the cheapest, low quality products will drive from the market any seller who for whatever reason wishes to supply higher quality products. Consequently, the average quality of goods on sale will be reduced and the size of the market will shrink (Akerlof, 1970).

In most markets where product quality cannot be determined in advance, it is at least possible for consumers to judge product quality after consumption, even if only imperfectly. In these markets a reputational effect occurs (Rogerson, 1983). The higher quality firm will attract more customers, because customers who have consumed the firm's product are less dissatisfied than the average customer and so fewer leave than on average. Word of mouth advertising also ensures that the higher quality firm attracts new customers. In such a market, product quality will reach an equilibrium level and not fall to the lowest level.

resulting erosion of the price. Klein and Leffler argue against entry by other producers by suggesting that high quality firms will invest in non-salvageable firm

the information it has in order to grade the quality of the tax services provided by individual practices. Unfortunately for prospective clients there is no publicly available feedback because of the position of confidentiality and impartiality maintained by HMRC. The only public data available is the 'well known' fact that most HMRC District Offices maintain a 'black list' of questionable tax advisers, although names have never been disclosed. Such evidence as there is of tax scandals is not necessarily an indicator of a less than satisfactory service, because it would rather be a case of negligence which would give rise to concern—and cases of negligence are invariably settled out of court on the advice of the insurance company providing the professional indemnity insurance. In most instances, tax cases reach the Courts purely because statute is not clear (for example, *Pepper v Hart* (1992) on benefits in kind and *Glaxo Group Ltd* (1996) on transfer pricing issues): there is nothing inherently scandalous in the work of the tax practice. Hence for many tax practices, the only evidence on reputation that new clients can use is the professional body to which members of the tax practice are affiliated. As indicated in Section 2, the problem is the plethora of professional bodies involved, augmented by the body of former HMRC employees who have transferred to private practice, who will have obtained internal HMRC qualifications. To our knowledge, no work has been done on how individual professional bodies are perceived by clients and whether in particular the use of the name 'chartered' produces any additional cachet, although most professional bodies have the word 'chartered' in their name.

As far as the reputation of an individual firm is concerned, given the unobservability of the quality of its service as a tax practice, it is likely that potential clients will make use of indirect measures, based on what they can observe, and hearsay evidence from others, something that has long been acknowledged (see, for example, Carey, 1955). From this perspective, how a tax practice is viewed is not determined primarily by the quality of its tax work, but rather how the firm is viewed more generally, that is, by its reputation in the financial community. Reputation has been defined as follows:

> Reputation is the estimation of the consistency over time of an attribute of an entity. This estim

services offered by an accounting firm will tend to influence each other. This will be especially true of the Big Four accountancy firms which typically offer a range of services all contributing to a generic reputation, rather than to a specific one for a particular type of service. Hence a potential client may well judge the likely quality of taxation services on the basis of the firm's overall brand image for quality service and/or value for money.

5. WAYS OF IMPROVING THE QUALITY OF THE SERVICE PROVIDED BY TAX PRACTITIONERS

taxpayers that some taxpayers reduce their tax burdens by the use of clever tax avoidance schemes, as this will mean that the 'lost' tax has to be collected from them or that HMRC has to introduce complicated rules to nullify the avoidance scheme, thus increasing administrative costs. Hence, high quality tax advice can be seen as being detrimental to the well-being of the majority of the population. However, if the term 'public interest' is used more narrowly to relate to the consumers of the services of taxation practitioners, that is, existing and potential clients, then it means providing a service on which taxpayers can rely to mini

taxpayer, further increasing the value of the regulated practitioner's services to the client and thus the total industry profitability (Ayres et al., 1989).

The means by which UK taxation services can be regulated to ensure quality are various and have been considered by Green (1995, p. 45), although she makes no distinction between compliance and avoidance work, as we make here. The suggestions cover providing improved information about tax advisers, voluntary schemes or codes of practice without legal force, codes of practice with legal force, licensing, self-regulation, and legislation and registration. Green's preferred model is one involving registration of tax practitioners (dependent on a suitable level of technical knowledge and/or experience certified by existing professional bodies), professional indemnity insurance, a minimum level of ongoing continual professional education, and a regulatory body in the form of a National Taxation Council. The role of the National Taxation Council would be like that of the independent National Tax Practitioners' Board, in Australia, which aimed primarily to deal with complaints against practitioners and make an annual report to Parliament. As HMRC already reviews a substantial number of tax computations, the Council could ask for HMRC involvement to identify any practitioners who fell short of current standards, since it is from this source that the impulsion to look at regulation has in part stemmed, and continues to do so. As has been mentioned previously, the HMRC 2009 consultation document, *Modernising Powers, Deterrents and Safeguards. Working with Tax Agents: A Consultation Document*, does suggest, in Chapter 5, some form of registration for the 12,000 estimated tax practitioners who are currently unregulated by any professional body. Hence this idea continues to resonate. In addition, HMRC (2010) has recently published draft legislation as part of its consultation on tax agents, designed to address deliberate wrongdoing by tax agents. Its independent adjudicator in the past has condemned the quality of advice given by tax agents (see, for example, the Third Annual Report from HMRC's independent adjudicator (Bunn, 1996)).

However, perhaps a simpler approach to improving the performance of UK tax practitioners would be to make the tax adviser responsible at law for his or her submission to HMRC (perhaps jointly with the tax client), with a legal penalty imposed if submissions were proved to be incorrect. Penalties could be a percentage of any additional tax due, and might be graded, according to the severity of the errors. be sev4tscheik could 6.8197 4osed if6.8634 g5eisider(pideTet Its3ula)7to

6. SUMMARY AND IMPLICATIONS

In this paper we have considered the role of the tax practitioner in the UK tax services market and the existing forces that determine the standard of care to which the practitioner works. We noted the fragmented nature of professional regulation with the many professional bodies and also drew attention to the lack of statutory definition of the words 'accountant' and 'tax adviser'. Hence anyone can call themselves either an accountant or a tax adviser with no requirement that they have shown that they are capable of fulfilling that role, either by virtue of experience or examination performance. In the UK, unlike in other countries such as the USA, there are no penalties imposed by the tax authorities for poor performance on the part of the tax practitioner. Any penalties are imposed on the taxpayer, who has to resort to suing the tax practitioner in the Courts for negligence in order to recoup some of his or her losses.

We have also categorised the work of the tax practitioner into two kinds: compliance work where the tax practitioner is essentially reporting what has already taken place with the aim of minimising the taxpayer's liability to tax, given what has already occurred, and planning/avoidance work where the tax practitioner aims to (re)structure the client's affairs with the aim of so organising them that the tax payable in the future is reduced. We showed that, where the tax practitioner provided avoidance advice as well as the compliance service, it would be difficult sometimes to evaluate whether apparent poor performance on the part of the tax practitioner was due to sub-standard compliance work or speculative tax avoidance schemes which ultimately proved not to work in law. Even for purely tax compliance work, it is not easy for individual clients to evaluate the service provided by the tax practitioner, since they have no benchmark against which to assess him or her as they would not know what a 'good' practitioner would have done in similar circumstances. The only feedback is the amount of queries and general aggravation that they receive from HMRC. It is known that HMRC has its own list of poor tax advisers, but details are not released to the outside world.

We adapted the model of Simunic and Stein from the audit context to show how reputation could work as a way of ensuring that the tax practitioner would work to a particular level of quality. However, the problem that we identified was how the prospective client might learn of the reputamp -1.15J0 -1.153 uthepractitioner n

responsible at law for his/her submission to HMRC (perhaps jointly with the tax client), with a penalty applying if anything were incorrect, might be a relatively easy

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