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FEE Tax Day

Simple, fair, coordinated –
tax Utopia in the EU?

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Tax planning - the fine line between tax avoidance and tax evasion

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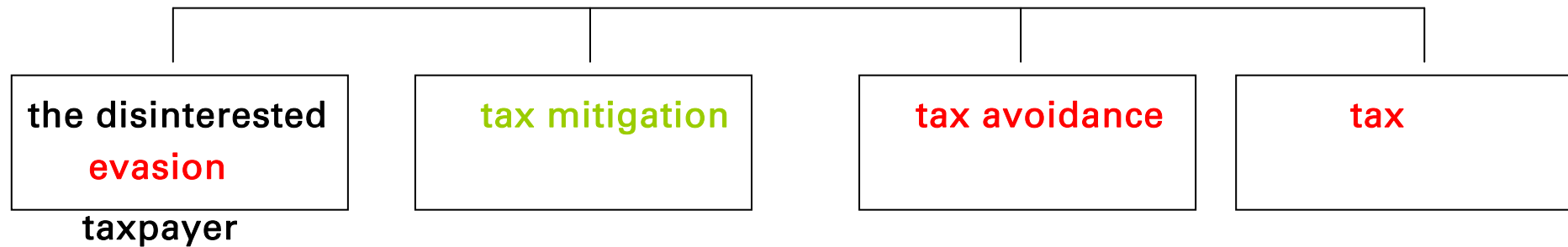


The fine line between tax avoidance and tax evasion

*" The difference between tax evasion
and tax avoidance is the thickness of a
prison wall" (UK Chancellor to the
Exchequer)*



The fine line between tax avoidance and tax evasion





Tax evasion

- Intentional behaviour
- Violation of tax law
- False documents
- Criminal offence/Sanctions
- Includes sham transactions (“simulation”)
- The often incorrect equation of tax evasion and tax avoidance is caused by a linguistic problem
 - ↪ In English “*tax evasion*” = fraud
 - ↪ In French “*évasion fiscale*” = “*tax avoidance*” in English
 - ↪ “*Fraude fiscale*” in French = “*tax evasion*” in English



Tax avoidance/ Tax mitigation

- Tax avoidance scheme: *“ A deal done by very smart people that, absent tax considerations, would be very stupid”* (Prof. Graetz)
- Tax avoidance: transaction formally observing tax statute but frustrating its objective
 - ↳ 3 elements: (1) specific intention to reduce tax liability, (2) no formal violation of statute but against its spirit, (3) artificiality, contrivance, complexity etc. > lack of commercial purpose = objectification of intention
- All schemes that are not tax avoidance are tax mitigation



Different approaches to tax avoidance within the EU

- See the IFA-report 2002 (Zimmer-report) and the Prebble-study 2008
- Reasons
 - ↳ Different legistic approaches: SAARs, GAARs, no GAARs/SAARs, but judicially developed doctrine
 - ↳ Different judicial approaches: interpretation rules, Constitution, role of the judiciary etc.



Is Community Law capable of harmonizing the concept of "*tax avoidance*" and the fight against it?

- Direct taxation is not harmonized. Tax Directives leave right to combat tax evasion and avoidance to MS
- Settled case law: "*In case of fraud or abuse, no recourse to Community law*" = general principle of CL (*Kofoed*)
- MS are allowed to take anti-abuse measures provided that they respect imperatives set by CL (*Kefalas*)
 - ↳ no discrimination/restriction
 - ↳ proportionality



Tax avoidance in ECJ case law

- Notion of “*abuse*” = tax avoidance schemes
- Tax avoidance scheme = wholly artificial arrangement (not reflecting economic reality)
- Wholly artificial arrangement (*Cadbury Schweppes*)
 - ↪ Subjective element: intention to obtain a tax advantage exteriorized by objective circumstances
 - ↪ Objective element: despite formal observance of CL, the objective of the rule of CL is not achieved (act against O & P of CL)
- If not > tax mitigation = tax jurisdiction shopping = legitimate exercise of rights under CL



Some observations on ECJ case law

- Tax avoidance within EU: a narrow concept
- ECJ has further blurred dichotomy between tax evasion and avoidance by introducing explicitly or implicitly civil law concepts like abuse of rights and abuse of law and by improper use of terms tax evasion and avoidance in number of judgments > more rigor needed.
- Key problem = the "*intention*"-test: claiming tax benefit sole/main purpose?
 - ↪ Solved in VAT: main purpose
 - ↪ In direct taxation: confusing case law



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