

Institution: University of Oxford
Unit of Assessment: 20 - Law
Title of case study: Tackling Tax Avoidance: Designing a General Anti-avoidance / Anti-abuse Provision for the UK
1. Summary of the impact <p>Judith Freedman's research on tax law and policy helped shape anti-avoidance provisions of the Finance Act 2013. Freedman had proposed a statutory <i>general anti-avoidance principle</i> combined with a statutorily created <i>administrative framework</i> to limit the exercise of discretion by revenue authorities, thus reducing manipulation whilst achieving reasonable certainty in UK tax law. This research directly informed debates among tax professionals, officials and the public. The 2011 Aaronson study group (of which Freedman was a member), commissioned by the Exchequer Secretary, produced proposals embodying her approach. The government acted on these proposals in the Finance Act 2013, introducing into UK law an overriding statutory principle, to which other tax legislation is subject, together with an administrative framework (the General Anti-Abuse Rule (GAAR) Advisory Panel) in which consensus around the concept of tax avoidance can be pursued between the taxpaying community and revenue authorities. The new anti-avoidance approach informed via Freedman's research is now law throughout the UK, affecting every taxpayer.</p>
2. Underpinning research <p>Judith Freedman, CBE, Pinsent Masons Professor of Taxation Law, gave her inaugural lecture in Oxford in 2003 on 'Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle', before an invited audience of academics, practitioners and policy makers. The research on which this was based [R1] was prompted by public concern about alleged tax avoidance and other 'unacceptable' behaviour by large corporations, and by the response of tax administrations in the UK and elsewhere in attempting to deal with this as a matter of corporate social responsibility, by bringing 'tax law into the boardroom'. Freedman's research drew on her experience working on previous proposals from the Tax Law Review Committee of the Institute for Fiscal Studies, and new research conducted by her in Oxford since her appointment in 2001.</p> <p>In her lecture and published articles arising from this research [R2, R3] Freedman analysed the literature on tax avoidance and the developing case law and also, more widely, the jurisprudence on parliamentary intention and legislative drafting, and consideration of the relationship between detail in legislation and certainty. Influenced by the work of her Oxford colleagues Professors T. Endicott, J. Waldron, and D. McBarnett and by J. and V. Braithwaite on statutory interpretation, 'principles' and forms of regulation, and by her own study of case law, statutory drafting, and general anti-avoidance provisions in several jurisdictions, Freedman showed that immense precision and detail are not needed to maintain adequate certainty and to deliver the rule of law in taxation. Building on this analysis, Freedman proposed a move towards <i>principles-based</i> drafting of UK tax legislation and, in particular, towards a <i>general anti-avoidance principle</i> or 'GANTIP'. This idea, now of wide currency, was introduced in her paper [R1]. It differed from previous proposals for anti-avoidance rules in UK tax law in that it did not involve detailed rules and was based on a general overriding substantive legal principle, using objective factors or characteristics to target certain types of transaction, rather than a motive-based test or a rule of pure interpretation, such as that developed in the case law [R4]. Her research also investigated the role of morality in the tax avoidance debate, and considered the possible use of new approaches to compliance as expounded by the Braithwaite model of 'responsive regulation' [R1, R3].</p> <p>Freedman's research further proposed the provision of an administrative framework by the legislature to ensure balances and checks on the exercise of discretion by the revenue authorities</p>

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and to facilitate a debate between taxpayers and revenue authorities so that, in practice, a reasonable degree of certainty could be achieved. Subsequent work [R5] by Freedman explored the use of language in statutory drafting and considered further the need to change the way tax legislation is drafted more generally. The decisions of the Court of Justice in the EU (CJ) and the possible emergence of a European abuse of law principle, together with the role of the CJ in the transplantation of ideas and concepts in this area were also considered [R6].

Freedman's research was unusual in its range, combining analysis of developments in black letter law with consideration of concepts and ideas arising from literature in legal theory, regulation, constitutional law, comparative law and corporate social responsibility. Drawing on several methods and speaking to several audiences, the research was able to make theoretical and practical progress on critical issues.

3. References to the research

[R1] J. Freedman, 'Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle' [2004] *British Tax Review* 332 (peer reviewed) An earlier version for professionals is J. Freedman, 'Tax and Corporate Responsibility' (2003) 37774 *The Tax Journal* at the request of the then editor.

[R2] J. Freedman, 'Converging Tracks? Recent Developments in Canadian and UK Approaches to Tax Avoidance' (2005) 53 *Canadian Tax Journal*, 1038 (peer reviewed).

[R3] J. Freedman, 'The Tax Avoidance Culture: Who is Responsible? Governmental Influences and Corporate Social Responsibility' in Jane Holder and Colm O'Cinneide (eds), *Current Legal Problems 2006* (OUP 2007), 319-357. (Invited lecture and chapter in a peer reviewed annual).

[R4] J. Freedman, 'Interpreting Tax Statutes: Tax Avoidance and the Intention of Parliament' (2007) 123 *Law Quarterly Review* 53 (peer reviewed).

[R5] J. Freedman, 'Improving (Not Perfecting) Tax Legislation: Rules and Principles Revisited' (2010) *British Tax Review* 717. (Special edition of the British Tax Review based on a conference organised with Professor Philip Baker QC).

[R6] J. Freedman, 'The Anatomy of Tax Avoidance Counteraction: Abuse of Law in a Tax Context at Member State and European Union Level' in *Prohibition of Abuse of Law: A New General Principle of EU Law* Stefan Vogenauer and Rita de la Feria (eds), Hart Publishing, 2011.

Research Grants:

ESRC Large Grant, 2008-12: J. Freedman, Co-Investigator; Principal Investigator Professor M. Devereux of the Oxford University Centre for Business Taxation (OUCBT). Tax avoidance and tax administration formed one strand of the ESRC work programme and the work in [R5] and [R6]; all other research was Freedman's alone. Conference support was provided by a grant, from the Aaronson Group, and by the Allan Myers Fund held in partnership by the University of Oxford and the University of Melbourne.

4. Details of the impact

Tax avoidance causes loss of revenue and can reduce public confidence in the tax system. Detailed legislative provisions attempting to curb avoidance often fail. Though struggling with such problems, professionals and administrators in the British tax community were sceptical about the value of an anti-avoidance *rule*, and rejected that approach in 1998. Freedman's research, published in leading academic outlets and widely disseminated in practitioner journals and presentations to professionals, showed that an anti-avoidance norm need not be rule-based [R1, R5]. Her principle-based alternative kept anti-avoidance on the public agenda even when such rules had lost favour, and demonstrated that there is an effective and coherent alternative.

Freedman showed the possibility and feasibility of a substantive, overriding legislative *principle* which was based not on a motive test but on listed objective characteristics, and was accompanied by administrative arrangements encouraging debate between the tax community and the revenue authorities. Freedman's research and role in these debates led to an invitation to serve on the Aaronson study group appointed to advise the Exchequer Secretary. She disseminated her research and the work of the group through a major conference she organised under the auspices of the Oxford University Centre for Business Taxation (OUCBT) in February 2012, in London. The 270 attendees included academics, tax professionals and key officials. The proposals of the Aaronson study group informed legislation in the Finance Act 2013 which now reflects ideas set out in Freedman's work.

Engagement with policy-makers and tax practitioners has been central to Freedman's research. A prominent financial journalist has said of Freedman, 'Your willingness to engage with journalists, policy makers and others, including NGOs - is very important in shaping the debate. You'd definitely be one of the most influential commentators in the field and I do quite often draw on articles you have written.' [C9] Working with professionals, as with the Aaronson study group, enabled a timely exchange of knowledge in tax law and policy. The key findings, here, were Freedman's explanation of *why* rule-based regulation is likely to fail, and *how* a principle-based alternative could be constructed. She went on to address concerns among policy makers and lawyers about the potential for uncertainty in tax law and explained how that could be managed by relying on objective characteristics of transactions and through an appropriate administrative framework to control revenue discretion. The specific influence of Freedman's work on this process has been acknowledged even by those who had been critical of the OUCBT, including a noted tax campaigner in a 'Tax Research UK' blog-post, who wrote, 'It took a long time, a lot of lobbying and some luck to get a general anti-avoidance rule (or General Anti-Abuse Rule as it now is) onto any government's agenda in the UK. Judith Freedman at the Oxford Centre for Business Taxation worked on that call.' [C4]

In 2010, the Coalition Government agreed to reflect the Liberal Democrats' views by considering an anti-avoidance measure. HMRC and HMT held a series of workshops, one of which Freedman was invited to address (written up in *The Tax Journal*, 27th Sept. 2010). The Exchequer Secretary appointed Graham Aaronson QC to set up a study group to advise the Government on the introduction of a GAAR, and at Aaronson's request, Freedman was appointed as one of only two academic members of that group, to contribute her knowledge and analysis of GAARs in overseas jurisdictions. The 2011 Aaronson Report, though his alone, reflected the research and views of the Group [C5, C8]. Aaronson has said of Freedman, 'You were one of the keyest of key members of the study group, and you had a great influence on my thinking.' [C8]

The Report advocated a moderate and targeted anti-abuse principle. Though referring to it as a GAAR (since that is the acronym familiar in other jurisdictions) the new proposal is in substance a principle: 'an overriding statutory principle to which other tax legislation is subject' [C5, para 5.4], echoing Freedman's proposal in [R4, at 75] and in [R1 at 356]: 'This is not to say that the specific statute is to be ignored; rather that it will be modified by the GAAR explicitly subjecting it to an overriding principle or principles.' Similarly, Aaronson's proposal for a statutory advisory panel adopts the idea set out in [R1 at 457] for an overarching administrative framework.

Following the publication of draft anti-avoidance legislation in the Finance Bill, Freedman gave evidence to the House of Lords Select Committee on Economic Affairs which scrutinised the Finance Bill (HL Paper 139). An anti-avoidance measure, largely as proposed by Aaronson and influenced by Freedman's work, was consequently enacted in the Finance Act 2013, sections 206-215 and Schedule 43 and is now in force [C6]. It has a broad overarching effect on all tax law and, thus, liabilities in the UK, and is attracting notice as a potential solution to similar problems elsewhere, including taxes within the jurisdiction of the Scottish Parliament. A Scottish official wrote, "Your 2007 article 'Interpreting Tax Statutes: Tax Avoidance and the Intention of Parliament' was very thought provoking and I think I would benefit if I were able to discuss your ideas further. We do not see the GAAR as the only part of the answer to tax avoidance. That is why we are looking at a range of options, including the principles-based drafting." [C7]

Judith Freedman's research on tax avoidance influenced debate among tax professionals, the public, and government officials; its leading ideas shaped anti-avoidance provisions of the Finance Act 2013. These provisions affect tax liabilities and tax policy throughout the UK.

5. Sources to corroborate the impact

[C1] Financial Times, 'Burden of clampdown is just too taxing for all' (27 June 2005).

[C2] TUC, *Touch Stone Pamphlet No 1: 'The Missing Billions'* <http://www.tuc.org.uk/touchstone/missingbillions/1missingbillions.pdf> (at p 39 and fn 59), and TUC, 'For A General Anti-Avoidance Principle' (November 2010) (footnote 3).

[C3] House of Commons, Briefing Papers *Tax avoidance: a General Anti-Avoidance Rule (GAAR) – background history*, available at <http://www.parliament.uk/briefing-papers/SN02956> *Tax Avoidance: A General Anti-Abuse Rule* available at <http://www.parliament.uk/briefing-papers/SN06265>.

[C4] Richard Murphy, *Tax Research UK blog* <http://www.taxresearch.org.uk/Blog/2013/03/13/19590/>

[C5] The GAAR Study Group, *Report by Graham Aaronson QC* (2011) http://webarchive.nationalarchives.gov.uk/20130321041222/http://www.hm-treasury.gov.uk/d/gaar_final_report_111111.pdf

[C6] Finance Act 2013, ss 206-215, Schedule 43, and published Guidance Notes.

[C7] Email on file from a Scottish Government tax official. Confirms that the Scottish Government is interested in Freedman's research as a response to similar problems in devolved taxation.

[C8] Email on file from author of the GAAR Report. Confirms the key role that Freedman's research had on the development of the Report and its recommendations.

[C9] Email on file from a Financial Times taxation correspondent. Confirms that Freedman's research in this area is used by journalists and that her engagement with the media is valuable to them.