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The Tax Profession: Tax Avoidance and the Public Interest

1. Introduction

Professions possess a service ideal orientation (Dillard 2008; Starr 1982; Toren 1975) and play an important role in the 'pursuit of public interest and the common good' (Jennings et al. 1987, 3). This incorporates 'serving the public' or 'protecting the public interest' (Pierce 2007, 7). While there is no agreement on what the 'public interest' means or how to measure it (Baker 2005; Boseman 2007; Canning and O'Dwyer 2001; Dellaportas and Davenport 2008; Sikka et al.1989), salient suggestions include 'the collective well-bring of the community of people and institutions the profession serves' (Institute of Certified Public Accountants 2014) and 'the net benefits derived for…all society' (International Federation of Accountants (IFAC 2012, 1).

However, in practice, professionals have contractual obligations to serve their clients. Several studies assert that earning potential in relation to technical expertise has established the 'servicing of the client [as] the primary duty' (Doyle et al. 2009, 188), and has placed profession's ethical duties as a secondary consideration (Doyle 2015; Doyle et al. 2009; Shafer and Simmons 2008; Stuebs and Wilkinson 2010, 2014). Accordingly, practices 'may foster a reduction in the level of ethical behaviour as advisers strive to obtain and retain clients' (Doyle et al. 2009, 182). This illustrates the difficulty of being a professional with explicit covenant to serve the public interest in situations where there are considerable economic incentives to prioritise economic private interests (Canning and O' Dwyer 2001; Carrington et al. 2013; Parker 1994; Spence and Carter 2014; Suddaby et al. 2009).

Taxation is a vital resource for governments to achieve their public service agenda (ActionAid 2011; HM Revenue and Customs (HMRC) 2015; Isbister 1968) and is perceived as a significant cost by corporations (Freedman et al. 2009; Shafer and Simmons 2008; Sikka 2010). Tax avoidance and its adverse impact on public interest have come into sharp focus in recent years (Christensen and Murphy 2004; Dowling 2014; Freedman et al. 2009; Hasseldine and Morris 2013; Payne and Raiborn 2015). It erodes tax bases globally, leading to serious threats to tax revenues, tax sovereignty and tax fairness (OECD 2013) and reduces overall revenue intake for governments which could be used to facilitate public services and thereby promote the public interest (Keightley and Sherlock 2012). Fiscal pressures world-wide have directed attention to billions of euro of tax avoided annually by multinationals such as Apple, Google, Amazon, Facebook and Starbucks, and media reports in the United Kingdom (UK) have focused predominantly on the immorality of their actions (Independent 2016b; The Telegraph 2012). This has been reinforced by regulatory and political commentary which is similarly critical of certain tax arrangements (OECD 2008, 2013; The Financial Times 2016; The Guardian 2017; UK Committee of Public Accounts (UK PAC) 2013). Historically, the focus of attention has been on users of these tax avoidance schemes; however recent reports have highlighted a number of notable criticisms of the role of tax professionals (Financial Reporting Council (FRC) 2013a, 2015a; OECD 2008; UK PAC 2013; US Senate Permanent Subcommittee of Investigations 2003).

Stakeholder theory is one of several theories proposed by Frecknall-Hughes and Kirchler (2015) to examine tax practices and the tax profession. We adopt this theory by reviewing key UK stakeholder expectations in relation to public interest. Given the expansiveness of the term 'public interest', we have selected to analyse the public interest dimension of tax avoidance. The paper applies the stakeholder framework introduced by Mitchell et al (1997), focusing on identification and salience of stakeholders with reference to power, urgency and legitimacy.

We examine the high profile UK case of MG Rover (MGR). The MGR case was selected as it was the first ruling whereby the FRC, the independent regulator for the accounting profession in the UK, criticised the profession for failing to provide clarity with regard to acting in the public interest. The case highlights differing views with regard to the profession's duty of care and public interest duty. It presses the profession to address this ambiguity. Taking some issues raised in the case and examining expectations of other key stakeholders, we review codes of conduct and guidance documents within the UK tax profession and Big Four professional firms to understand how stakeholders' concerns regarding tax avoidance and the public interest are addressed by the profession.

The paper is based on documentary research. Documents analysed include the FRC tribunal and appeal report on Deloitte and Touche (Deloitte) in respect of the MGR case, the Department for Business Innovation and Skills report on MGR, the UK tax profession and the Big Four firms' codes of conduct, tax principles and guidance documents, UK PAC reports and media reports. For context, we also refer to newspaper articles, pertinent regulation and regulatory rulings, sourced from newspaper archives and pertinent webpages.

Findings highlight heightened awareness of stakeholder perspectives within the UK tax profession and significant progress in responding to public interest responsibilities. The paper reports a shift in focus whereby the stakeholder concept is increasingly embedded within professional guidance. Mitchell et al.'s (1997) stakeholder salience model is used to identify influential stakeholders and analyse the pressures applied by them. The use of this model as a lens to interpret the tax profession's response to public interest, in respect of the tax avoidance issue, is a key contribution.

The paper is structured as follows. Section 2 details literature regarding the role of the tax profession, tax avoidance and its ethical dimension. Section 3 reviews the theoretical framing, namely stakeholder theory. Section 4 analyses the MGR case. Section 5 examines codes of conduct and key principles of professional tax bodies and large professional firms. Finally, Section 6 discusses the profession's response and reports conclusions.

2. Literature Review

This section provides some detail of relevant literature. First, some key extant literature charting the role of the tax profession is outlined. This is followed by a brief examination of tax avoidance. Ethical matters concerning the tax profession and tax avoidance are then explored. Together, these provide context for the paper.

2.1 The Role of the Tax Profession

Tax professionals comprise a ‘diverse group of individuals, business structures and professional groups who provide a range of tax services for their clients’ (Devos 2012, 5). These clients comprise both individuals and organisations. Two main categories of service are provided: the first relating to tax compliance work whereby practitioners deal with tax returns to a tax authority on behalf of a tax payer; the second pertaining to tax planning whereby practitioners attempt to devise ways to reduce the tax payer’s liability (Frecknall-Hughes and Moizer 2015). Tax planning in a corporate setting can take place through the actions of both in-house tax professionals and those employed by taxation, accounting and legal firms (Frecknall-Hughes and Kirchler 2015; Mulligan and Oats 2016). There is a lack of uniformity over the provision of taxation services and professional regulation and guidance is somewhat disjointed. (Frecknall-Hughes and Kirchler 2015). Given the fragmented nature of the profession, an examination of all tax professionals is outside the scope of the paper. The paper focuses solely on professionals who provide advice on tax practices and who are bound by codes of conduct of the professional bodies with whom they maintain professional association.

The role of the tax professional is increasingly complex, ‘often ambiguous, plural and dynamic’ (Currie et al 2015, 1292). Tax professionals act as ‘independent advisers of their clients’, ‘unpaid employees of the tax administration’, ‘intermediaries between the tax administration and their clients’, ‘tax advisers’, managers of their own practice and ‘influencers on the tax system’ (Frecknall-Hughes and Kirchler 2015, 292). Therefore, the tax profession has significant potential to influence both tax authorities and consumers in an advisory and compliance capacity and plays an important role in the design and operation of the overall tax system (Currie et al. 2015; Jackson and Milliron 1989).

Tax professionals ‘control both what and how information is reported’ and ‘play a critically important public interest role’ (Stuebs and Wilkinson 2014, 29). They must ‘provide socially valuable knowledge in a competent and socially responsible way’ (Neu 1991, 295) to both direct and indirect beneficiaries (Middlehurst and Kennie 1997; Pierce 2007; Robinson 2009). Tax professionals’ in-depth knowledge of the tax system and their technical competence enable them to devise intricate tax minimising avoidance strategies (Donohoe et al. 2014; Frecknall-Hughes et al 2016; Hite 2003; Jackson and Milliron 1989) and the lucrative business of designing and implementing elaborate, complex avoidance schemes has flourished. While, at micro level, these tax avoidance schemes are very beneficial to direct consumers, the tax profession does not address their macro level impact.

In accordance with professional designation, tax professionals are required to have due regard to five key fundamental principles: integrity, objectivity and independence, professional competence and due care, confidentiality and professional behaviour (IFAC 2016). The tax profession believes the tax professional's duty is to present the facts of the law to the client and to let the client decide what path to choose (Doyle, 2015). Raby (1966) asserts that the tax professional 'has no moral right to substitute his own scale of values for the client's scale of values' (716). Similarly, Stainer et al. (1997) contend that the morality of tax planning should be left to the tax payer and not to the tax professional 'because of the subjectivity of what is or is not moral' (216). This does not take into consideration the influence tax professionals have on tax payers' approaches to tax matters or their public interest responsibilities (Hite 2003).

In influencing and shaping tax policy and in devising complex tax schemes, increasing scrutiny is questioning how the profession balances private versus societal interest (Sikka and Hampton 2005; Stuebs and Wilkinson 2010, 2014).

2.2 Tax Avoidance

There is no clear definition of tax avoidance and 'the application of one word to a range of activities and behaviours oversimplifies the concept and has led to confusion' (Chartered Institute of Taxation (CIOT) 2015, 20). The distinction between tax avoidance and evasion is based on the fact that tax evasion is undisputedly illegal. Hasseldine and Morris (2013, 5) state that tax evasion involves an intention to be 'deceitful, fraudulent and/or corrupt' and that unsuccessful tax avoidance practices should not be considered evasion if there is no intention to be deceitful. A spectrum of activities fall under the tax avoidance umbrella where at one end, tax arrangements avail of reliefs that are clearly allowable under legislation, whereas arrangements at the other end 'use the law in complex ways and are characterized by exploitation of loopholes, a high degree of artificiality and legal and/or financial 'engineering', and whilst they comply with the letter of the law, they breach its spirit' (Frecknall-Hughes and Kirchler 2015, 297). The latter is known as aggressive tax avoidance.

The European Commission (2014) defines aggressive tax avoidance as 'taking advantage of the technicalities of a tax system or of mismatches between two or more tax systems for the purpose of reducing tax liability' (2). A significant number of activities fall beneath this 'tax avoidance' umbrella.[1]

The legislature's role in relation to tax avoidance cannot be ignored although opinion differs as to its significance. Some argue that the primary responsibility rests with the legislature (Freedman 2004; Lord Houghton 1979; Hansen et al. 1992). Freedman (2009) acknowledges a moral obligation to pay tax but asserts that 'morality does not answer the question of how much tax is due. The law is required to give that obligation content' (2009, 9). She contends that it is the responsibility of the legislature to criticise certain tax avoidance schemes and set the boundaries of behaviour. Lord Houghton (1979) asserts that it is not the individual who is responsible for 'abuses' and 'loopholes' in the law but that it is 'a problem of legislative draftsmanship, nothing more and nothing less' (100). While this may in part be true, it fails to recognise the global environment in which we now live. While one country may implement comprehensive legislation to block artificial transactions in its own jurisdiction, it cannot prevent, for example, artificial transactions created in another tax domain that avail of tax arbitrage.

2.3 The Ethical Dimension of Tax Avoidance

In practice, tax avoidance schemes have been very successful because skilled tax professionals operate within legal boundaries; however, their appreciation of ethical boundaries is not as clear-cut. Ethical debate focuses on aggressive tax avoidance and the role of the tax profession in devising and promoting such schemes. The tax profession is accused of creating an 'unlevel playing field' (Neron 2015, 109) as these schemes typically benefit only a very small segment of society and undermine the integrity of the tax system.

Doyle et al. (2009) reports that tax professionals are more concerned with reputational damage in relation to tax avoidance schemes than any resulting ethical aspects. As a cohort therefore, tax professionals appear more concerned with servicing private (client and self) interest rather than public interest. This view is supported by Shafer and Simmons (2008), Sikka and Hampton (2005) and Doyle (2015) who suggests that 'some tax advisers have abandoned concern for the

[1] Tax avoidance incorporate transfer (mis)pricing, referring to trade between related parties at prices meant to manipulate markets or to deceive tax authorities; tax shelters, investments that allow a reduction in tax liability; tax havens, moving tax residency/citizenship to low tax/no tax jurisdictions; and tax inversion, the practice of relocating an organisation's legal domicile to a lower-tax jurisdiction *(de jure)* while retaining material operations in its higher-tax country of origin *(de facto)*.

public interest or social welfare in favour of commercialism and client advocacy' and 'do not believe strongly in the value of ethical or socially responsible corporate behaviour' (183).

With reference to ethical philosophy, the renowned deontologist, Immanuel Kant, contends that individuals should act out of a sense of duty to do the right thing and that 'duty is the necessity of an action executed from respect for law' (Kant 1785, 16). Aggressive avoidance schemes not only abuse the law, they set out to deceive by creating a series of artificial transactions such that it is difficult to reach a proper understanding of the truth. In addition, Kant's Categorical Imperative states that no maxim should be observed if one would not will it to be applied universally. If a maxim that permitted aggressive tax avoidance was universalised, it would significantly reduce the tax base and create an inability to fund an adequate level of welfare for society. It would cause an unequal distribution of resources as the wealthy are the primary beneficiaries of avoidance schemes. Stiglitz (2012) argues that growing inequality between rich and poor in society threatens democracy and ultimately leads to social unrest. In time, government would be forced to introduce new taxes to recoup the tax revenues foregone and ultimately tax payers could end up paying similar or increased taxes. The maxim of universal use of tax avoidance schemes would become self-defeating. Applying Kantian ethics, therefore, no rational man would will this to be a universal principle.

Confidence in government's ability to utilise tax revenue effectively is crucial in the ethical debate. Not only should the tax system be fair but taxes collected must be used effectively to increase overall public welfare. There is no universal consensus on how a truly just taxation system should be structured; however, if there is an over-riding perception that the system is unjust, there will be an ever increasing problem with citizens breaking the tax laws and feeling morally justified in their actions (Jones 2014; The Guardian 2012a). The government may be sending out a confusing message whereby it suggests that government incentivised tax avoidance schemes are good, while artificial schemes designed by tax professionals are bad. Society may have difficulty appreciating the difference.

3. Stakeholder theory

We draw on stakeholder theory to frame our analysis. Stakeholder theory suggests an implicit social contract between society and organisations (Anshen 1970; Donaldson 1982; Freeman 1984) in which the 'right to operate…is viewed as contingent upon upholding legitimacy' (Shankman 1999, 323). The theory extends roles and responsibilities beyond profit maximization to include interests and claims of non-shareholding stakeholder groups (Mitchell et al. 1997). It rejects the so-called 'separation thesis' that is often associated with shareholder theory in which 'business' concerns are considered separate from 'ethical' concerns (Freeman et al. 2004; Harris and Freeman 2008).

According to Freeman's now classic definition, a stakeholder is 'any group or individual who can affect or is affected by the achievement of an organization's objectives' (Freeman 1984, 46). Stakeholders have 'a stake' in an organisation and have something 'at risk'. Freeman (1984) identifies both primary and secondary stakeholders: primary stakeholders have a formal or contractual relationship with the organisation and secondary stakeholders do not. They include individuals or groups who may have an interest in or be affected by the organisation and its agents, typically shareholders, creditors, employees, customers, suppliers, public interest groups, governmental bodies, and the community. Stakeholder theory is based on Kantian notions of duty (see Section 2.3), such that each individual stakeholder or stakeholder grouping has a right to be treated appropriately as an end in itself and not solely as a means to an end (Shankman 1999, Donaldson 1982). The long-term success of the organisation requires stakeholders' support and management must deal with stakeholder expectations and balance conflicts among them.

Within limited time and resources available, decisions may only respond to the most pressing demands of one or two influential stakeholder groups, ignoring requests from other groups. Mitchell et al. (1997) asserts that stakeholder groups are not of equal importance, differing in the power they possess, the urgency of their demands and the legitimacy of their claims. They suggest that power refers to 'a relationship among social actors in which one social actor, A, can get another social actor, B, to do something that B would not have otherwise done' (869). They incorporate Etziono's (1964) categorisations of power and posit that power is likely to result from three contextual dimensions: normative power - from symbolic influences such as laws and other requirements, coercive power - from force or threat, and utilitarian power - from dependence on certain factors because an entity sometimes has to behave against its own will

in order to achieve resources. In turn, the urgency dimension relates 'the degree to which stakeholder claims call for immediate attention' (Mitchell et al. 1997, 867). It encompasses both 'time sensitivity' - the degree to which managerial delay in attending to the claim or relationship is unacceptable to the stakeholder, and 'criticality' - 'the importance of the claim or the relationship to the stakeholder' (Mitchell et al. 1997, 869). The third dimension, legitimacy of claims, encompasses Suchman's (1995) definition which suggests a 'generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed systems of norms, values, beliefs, and definitions' (574).
Mitchell et al. (1997) propose that the cumulative combination of the three attributes impacts the salience of a stakeholder group and elaborate further regarding attribute combinations. Their framework refers to definitive stakeholders who possess all three attributes - power, legitimacy, and urgency - and accordingly are the most salient stakeholders. Stakeholders who demonstrate only two such attributes are referred to as expectant stakeholders and are less salient. Mitchell et al. (1997) refer to dominant, dangerous and dependent stakeholders in this regard. Dominant stakeholders exhibit power and legitimacy (but not urgency); dangerous stakeholders uphold power and urgency (but not legitimacy); and dependent stakeholders demonstrate urgency and legitimacy (but not power). The model also refers to latent stakeholders who possess only one of the three attributes and who maintain the lowest levels of salience.

3.1 Stakeholders and the tax profession

Given the reliance society places on the services of professionals, a similar social contract is assumed, whereby professionals have an inherent societal responsibility, which presents a 'challenge…to promote a different way of doing business that integrates considerations of ethics and society' (Freeman et al. 2006, 4). An application of Freeman's work suggests that tax payers - both individuals and organisations - who engage the services of tax professionals are primary stakeholders as they maintain a formal and contractual relationship with tax professionals as agents. A significant number of other groups also have both an interest in and/or are impacted by the work of the tax profession. Salient secondary stakeholders comprise government and its relevant agencies, the media and wider society[2]. While the stakeholder

[2] We acknowledge the existence of additional stakeholders e.g. financial community, global bodies. However, for the purpose of the paper we analyse only the most significant UK stakeholders in relation to recent criticism of the UK tax profession.

framework established by Mitchell et al (1997) has been applied extensively to examine an organisation's relationship with different stakeholders (Parent and Deephouse 2007; Mainardes et al. 2012; Brower and Mahajan 2013), it has rarely been applied to examine a profession (Baskerville-Morley 2014). This paper applies the framework to review the relationship between key stakeholders and the tax profession in respect of tax avoidance and public interests.

Tax payers

Tax payers - individuals and organisations - seek to maximise wealth and focus on the correct preparation of tax returns, limiting tax liability and avoiding potential tax investigations, penalties and negative publicity (Donohoe et al. 2014; Doyle et al. 2009; Frecknall-Hughes and Kirchler 2015; Freedman et al. 2009; Onu and Oats 2016). Tax payers engage in tax avoidance to minimise tax payments but seek to avoid adverse regulatory and reputational consequences. They focus on their own private interests and seek tax professionals to promote such interests rather than the wider public interest. Tax payers and tax professionals have a symbiotic relationship: tax payers require tax compliance while tax professionals require tax clients for economic survival. With reference to Mitchell et al.'s (1997) framework, tax payers are definitive stakeholders. They possess coercive power and can cease contracts with tax professionals if they believe their interests are not being met. They maintain urgency as their tax affairs are critical to them and must be dealt with within stringent time frames. The contractual relationship also determines legitimacy, whereby tax professionals have responsibility to fulfil contractual obligations.

Government

Government, including its political representatives, represents the system which acts on behalf of wider society. It promotes tax compliance such that an appropriate and fair amount is payable by all tax payers. However, a contradiction is also present to the extent that government facilitates some tax avoidance by multinational corporations in order to attract inward investment into the UK, while at the same time condemning it on moral grounds (Jones 2014; The Guardian 2012a). In recent years, government agencies and politicians have been vocal on the subject of tax professionals and tax avoidance (The Financial Times 2016; The Guardian 2012b, 2013b, 2017). Government authorities, including legislature and revenue authorities, have focused on increased compliance and transparency by tax payers and tax professionals.

In 2015, the HMRC/HM Treasury encouraged the tax profession, ‘to act for the greater public good’ (HMRC/HM Treasury 2015, 18) and set clear standards that address tax avoidance. In addition, the Government has increased its legislative powers. Mandatory disclosure for certain transactions giving rise to tax advantage, including tax avoidance schemes (Finance Act 2004), and requirements for large companies to publish their tax strategy through their websites have been established (HMRC 2016a).[3] The legislature has also introduced General Anti-Avoidance Rules (GAAR) (Finance Act 2013) which seek to eliminate some strategic tax-motivated decisions (Waerzeggers and Hillier 2016). Further measures are also likely, including suitable sanctions (HMRC 2016b) ‘for falling short of the standards required’ (House of Lords 2013, 26) and the establishment of a code of conduct for all tax advisers including those who may not be registered members of professional bodies (UK PAC 2013).

Government institutions exhibit a strong combination of stakeholder attributes. HMRC/ HM Treasury**,** charged with responsibility for tax collections, customs and public spending, are definitive stakeholders as they exhibit all three attributes - power, urgency and legitimacy. They possess normative, coercive and utilitarian power to the extent that they can mandate the tax profession to act within specific parameters through laws and regulations. They maintain urgency in that they deal with tax matters in a timely manner and also present legitimacy, requiring the profession to operate within legal and regulatory boundaries. In turn, UK PAC is a dominant stakeholder. It is responsible for overseeing government expenditure and, in this role, establishes legitimacy as stakeholder. It also exhibits utilitarian power to influence the tax profession to behave in a manner against its own will.

FRC regulatory authority

The FRC is the independent regulator for the accounting profession in the UK. It oversees ‘regulatory activities of the…professional accountancy bodies’ (FRC 2017) and provides guidance for member professional bodies in relation to a wide variety of matters, including codes, standards and stewardship. The FRC actively promotes public interest responsibilities and operates ‘independent enforcement arrangements for public interest cases’ (FRC 2017). The FRC acts as a dominant stakeholder. It has both legitimacy and power, demonstrating

[3] The Australian Government is developing a similar mandatory code for large entities operating within its jurisdiction to publicly disclose detailed tax information (Australian Government 2016).

normative, coercive and utilitarian power to the extent that it can direct the tax profession to act within specific parameters through regulation and sanctions.

The media

The media has the capacity to provide pertinent information to, and influence the views of, other stakeholders. In recent years, UK media has been critical of those involved in tax avoidance schemes (The Guardian 2013a; The Telegraph 2012) and has increased focus on the issue of public interest concerning aggressive tax avoidance. UK media is a latent stakeholder; it exhibits utilitarian power whereby it publicly criticises the profession for not acting in the public interest.

Society

Society represents the collective interests of civilians and organisations. These interests may be varied and dispersed and comprise a multitude of stakeholder sets e.g. individuals, corporations, the employed, the unemployed, customers, suppliers, non-governmental organisations (NGOs)[4]. At micro level, each stakeholder set may have different attitudes, expectations and self-interests concerning taxation and the tax profession e.g. the employed may prioritise lower income taxes, the unemployed may prioritise greater social welfare funded by the taxation system, corporations may prioritise lower corporation taxes, NGOs seek tax policies which minimise ‘economic distortions’ (PwC 2017a). At macro level, society as a collective anticipates that the tax system represents public rather than private interests (Isbister 1968) and a tax profession that promotes such a system. The effective operation of this system usually hinges on compliance with laws and regulations. Society may be regarded as a latent stakeholder; it demonstrates legitimacy as it bears risk if the profession promotes aggressive tax avoidance to the extent that collective societal interests are adversely impacted.

In summary, analysis highlights considerable focus among secondary stakeholders with reference to ‘public interest’. An application of Mitchell et al.’s (1997) framework identifies the two most influential stakeholder groupings: the tax client and HMRC/HM Treasury. The

[4] NGOs largely represent civil society and are independent, not-for-profit organisations. Their work encompasses ‘social, ecological and economic issues, often related to sustainable development’. In recent years, tax reform and the ‘fairness of domestic and international tax rules has been a significant area of focus’ (PwC 2017a).

manner in these two stakeholders exert their influence at a point in time determines which stakeholder is most salient and takes precedence. FRC and UK PAC both exhibit dominant stakeholder attributes. Meanwhile, media and society each maintain only one attribute and may be regarded as latent stakeholders.

4. MG Rover (MGR) and Project Aircraft

The following reviews the FRC disciplinary tribunal against Deloitte in the high profile UK MGR case. The case is unique because it is the first time the FRC has criticised the profession for providing inadequate guidance on acting in the public interest. No similar investigation or disciplinary action has been taken by the FRC in relation to high profile tax avoidance schemes of Google, Amazon, Apple and Starbucks, despite the fact that these multinational corporations were investigated by public oversight governmental bodies.[5] In fact, the FRC has not fined or disciplined any accountancy firm for promoting tax avoidance schemes (Independent 2016a, Sikka 2016).

In 2000, BMW sold MGR for £10 to a company owned by four individuals who subsequently became known as the Phoenix Four. As part of the agreement, BMW provided interest free loans of £427 million to the new company, Phoenix Venture Holdings (PVH). The takeover was supported by both the unions and the general public and 'there was a perception that the Phoenix Consortium were acting for the public good' (Department for Business, Innovation and Skills 2009, 26). Despite the company incurring annual losses, the Phoenix Four extracted 'unreasonably large, financial rewards totalling tens of millions of pounds' (FRC 2015a, 8). Within a period of five years, the company collapsed. An investigation by the FRC (2013) found that Deloitte had advised on very complex schemes to extract funds for the Phoenix Four and avoid millions of pounds in tax. The proceedings concerned two schemes where Deloitte provided advice: Project Platinum and Project Aircraft. This paper focuses on Deloitte's role in Project Aircraft as this scheme involves tax avoidance.

In 2002, Barclays approached a tax partner at Deloitte to suggest a scheme that 'would turn its tax losses to account' (FRC 2015a, 13). It involved moving tax losses from MGR to a finance leasing company that it would acquire from Barclays. With Barclays supplying the finance

[5] Google, Amazon and Starbucks were investigated by the UK PAC (2012). Apple was investigated by the US Senate Permanent Sub-Committee of Investigation (2013).

(approximately £121 million), PVH acquired the finance leasing company, subsequently renamed Phoenix Venture Leasing (PVL). PVL leased two Boeing Aircraft to the Thomson Group and utilised the tax losses transferred from MGR. The tax benefit was to be divided between PVH, Barclays and Thomson. The MGR board did not approve this transaction, had no involvement in the leasing company PVL and did not benefit in any way from the movement of its tax losses. Previously, when BMW owned MGR, it had been 'fully compensated for tax losses it surrendered' (Department for Business, Innovation and Skills 2009, 306). By utilising the tax losses, the holding company, PVH, benefited by £10.6 million. Deloitte's fee for Project Aircraft was £2.262 million. Subsequent to this transaction, £7.7 million was transferred to a Guernsey Trust, of which the Phoenix Four were the main beneficiaries (Department for Business, Innovation and Skills 2009).

In 2012, the FRC filed a case against both Deloitte and the leading partner involved with MGR, Mr Maghsoud Einollahi. One of the key allegations was that Deloitte and Mr Einollahi had 'failed adequately to consider the public interest before accepting or continuing their engagement in relation to Project Aircraft' (FRC 2013a, 3) and had shown 'persistent and deliberate disregard of the fundamental principles and statements of the Institute of Chartered Accountants in England and Wales' (ICAEW) code of ethics' (FRC 2013b) The FRC asserted that Deloitte and Mr Einollahi

> should have considered whether Project Aircraft itself was in the public interest, their assessment should have been recorded in writing, when it became apparent to them that the assets [tax losses] of MGR were going to be used to benefit the Phoenix Four or might be, they should have declined to continue their engagement (FRC 2013, 25).

The tribunal found that Deloitte and Mr Einollahi 'placed their own interest ahead of that of the public and compromised their own objectivity' (FRC 2013a, 34). It highlighted that Mr Einollahi was aware that MGR was a public interest company when, in a letter to HMRC, it looked for a favourable tax ruling on public interest grounds. The letter stated: 'Rover currently employs in the region of 1,400 people directly and it is estimated that between 24,000 and 35,000 jobs in the West Midlands indirectly depend on the successful transformation of Rover' (12). The FRC contended that it was important to consider the public interest 'because of the concern of inter alia the Government, employees, other employers, particularly in the West Midlands, creditors and the general public about the continuation of the large scale car manufacturing in the West Midlands' (33). One of the arguments put forward as a defence was that 'the only duty that a member owes is to his client' and 'that the public interest is not a matter that needs to concern him' (10). The FRC however did not accept this argument and stated that 'this failure to consider the public interest is an undoubted failure to comply with the need for high standards of professional work' (34). Deloitte was fined £14 million and Mr Einollahi was excluded from the accounting profession for a period of three years with a fine of £250,000.

Deloitte and Mr Einollahi filed an appeal on the grounds that 'the decision of the Disciplinary Tribunal was perverse or wrong in law' and there was 'serious procedural or other irregularity in the proceedings' (FRC 2015a, 16). Deloitte argued that the charge of failing to take account of public interest was unfounded and was not involved in discussions about who should benefit from MGR's tax losses. The findings in relation to Project Aircraft were dismissed. The appeal tribunal found that Deloitte was not involved in the decision on whether MGR should benefit from its tax losses. It affirmed the assertion that the profession should act in the public interest but acknowledged 'a lack of clarity in how accountants should discharge these responsibilities' (FRC 2015b). The fines were reduced to £3 million and £175,000 respectively and the three-year ban for Mr Einollahi was overturned. In response, the Chief Executive of ICAEW stated:

> the FRC sought to rely on the preamble to the Ethical Guide to professional ethics, as it was then known, which talks about acting in the public interest. But we don't think that using the public interest alone as the basis for charges is tenable – we have certainly never used it as such in bringing charges against our members (Izza 2015, 24).

He asserted that application of the five fundamental principles (see Section 2.1) was sufficient when considering the public interest. Subsequently, ICAEW issued draft guidance notes on the public interest responsibilities for accountants for consultation (see section 5.1).

An examination of the profession's response in relation to issues identified in the MGR case follows. This comprises a review of tax profession's codes of conduct and guidance documents in the UK and within Big Four professional firms. It assesses the profession's response to stakeholder concerns with reference to public interest and tax avoidance.

5. Codes of Conduct: addressing Stakeholder Concerns

A code of ethics is a 'written, distinct, and formal document which consists of moral standards used to guide employee and/or corporate behaviour' (Schwartz 2004, 324) and establishes rules and procedures that 'can apply like a roadmap in dealing with legal, ethical and moral dilemmas' (Barth 2003, 8). A code of ethics cannot prescribe the answer for every ambiguous situation but should provide guidance by outlining principles to be applied and should be a first step in assisting professionals to consider the impact actions would have on all stakeholders. Laczniak and Murphy (1991) contend that 'each organization has certain areas that are particularly likely to encounter ethical abuse, and these concerns are one on which the code should focus' (260). In the taxation business, tax avoidance and its potential adverse impact on public interest is one such area.

5.1 UK Professional Bodies

The initial MGR tribunal case highlighted ambiguity in relation to acting in the public interest, an ambiguity that ICAEW was called to address. While its code of ethics is based on the IFAC Code of Ethics issued in 2009 [6](ICAEW 2011, para1.14) and states that members 'have a responsibility to take into consideration the public interest' (ICAEW 2011, para 1.2), it provides no guidance on what this means in practice. ICAEW (2012) attempted to address this lack of clarity and drafted a public interest framework document. The framework sets out seven main areas for consideration when 'justifying or challenging the justification of an action as being in the public interest' (1). The key issues to be considered are: Credentials for invoking the public interest; A public interest matter; The relevant public; The relevant public's wants; Constraints to wants; Aggregation and Decision; and Implementation. A list of questions to assist in the decision making process is provided in respect of each issue. While the framework highlights matters for consideration, it does not provide any guidance on the direction members should take and therefore, the practical application of this document is questionable.

In 2015, the UK government applied further pressure on the UK profession to act, challenging

> regulatory bodies who police professional standards to take on a greater lead and responsibility in setting and enforcing clear professional standards around the facilitation and promotion of avoidance to protect the reputation of the tax and accountancy profession and to act for the greater public good (HMRC/HM Treasury 2015, 18).

In response, Frank Haskew, Head of ICAEW Tax Faculty, stated 'we are keen to work with government to ensure that the code continues to be fit for purpose and retains public and political confidence' (Haskew, 2015). Within the year, CIOT, in conjunction with ICAEW and several other bodies (Institute of Chartered Accountants of Scotland, Association of Tax Technicians, Association of Accounting Technicians, Association of Chartered Certified Accountants, Society of Trust and Estate Practitioners), updated its code of conduct titled

[6] The IFAC Code of Ethics was subsequently revised in 2016 (IFAC 2016).

Professional Conduct in Relation to Taxation (PCRT) to address the issue of tax avoidance. The PCRT acknowledges public concern regarding aggressive tax avoidance behaviour, highlighting that ‘transactions based on advice which are centred around nontax objectives are less likely to attract scrutiny or criticism from stakeholders and are much more likely to withstand challenge by HMRC’ (CIOT 2015). The 2015 code stops short of telling its members not to engage in aggressive tax avoidance and states ‘ultimately it is the client’s decision as to what planning is appropriate having received advice and taking into account their own broader commercial objectives and ethical stance’ (CIOT 2015).

A more recent PCRT update ‘is a specific response to the public concerns and the Government’s challenge to the profession’ (CIOT 2016, 3). The revised code was drafted after consultation with the co-author bodies while also ‘ensuring that the HMRC was consulted on this revision as it is a key stakeholder’ (3) and has moved from expressing the HMRC/HM Treasury view on tax avoidance to detailing the tax profession’s view. It now explicitly forbids the creation, encouragement or promotion of

> tax planning arrangements or structures that i) set out to achieve results that are contrary to the clear intention of Parliament in enacting relevant legislation and/or ii) are highly artificial or highly contrived and seek to exploit shortcomings within the relevant legislation (CIOT 2016, 13).

The PCRT refers to ‘clear intention of Parliament’ (CIOT 2016, 13), thereby placing responsibility on the legislature to ensure clarity in communicating its intention. In addition, where a member holds a reasonable belief that HMRC is incorrect in its interpretation of the law, the code recommends the client be informed of this fact and ‘advised of the risks and likely costs that might be incurred in order to determine any dispute’ (CIOT 2016, 14). ICAEW appear reluctant to discipline members with regard to uncertain interpretation of legislation. Duncan Wiggetts, ICAEW’s Executive Director of Professional Standards stated: ‘We will only investigate a member if HMRC complains to us that a scheme has breached Standard 4 [tax avoidance], or if the conduct of the member was questioned by the Tribunal’ (Biebuyck, 2016). The Financial Secretary to HM Treasury, Jane Ellison, expressed her gratitude for the profession’s commitment to responsible tax planning but stated, ‘we will need to keep the PCRT under review to check the extent to which the revised principles are having the impact we are all seeking’ (Ellison, 2016).

On foot of criticism in the MGR appeal case in December 2015, ICAEW entered a consultation process with the FRC and other Consultative Committee of Accountancy Bodies'[7] members. Following consultation throughout 2016, the ICAEW issued recent guidance on public interest responsibilities that provides clarity on its code of ethics (ICAEW, 2017). The guidance states the best way to address the profession's public interest responsibility is to comply with the five fundamental principles (see Section 2.1). It recognises its members cannot operate 'in an ethical vacuum' and that there is an 'obligation to apply the spirit, and not just the letter, of the code, bearing in mind reasonable and informed public perception' (ICAEW 2017, 5). Measures by ICAEW to further the public interest agenda include the establishment of 'an infrastructure of training, development, monitoring and enforcement' (ICAEW 2017, 4). The guidance declares that public interest 'is an important, though abstract notion associated with the public benefit, rather than matters in which the public is interested' (ICAEW 2017, 4). Where practitioners are unclear about their public interest duty, stakeholder concerns must be considered: 'Who could reasonably be thought of as a stakeholder with a legitimate interest in the member's work and what are these interests?' 'How will these interests be taken into consideration…?' (ICAEW 2017, 6). Public perception should also be considered 'where there is significant public interest in or reliance on the outputs' (7). In respect of tax avoidance, the guidance states that responsibility to public interest requires members to consider the guidelines set out in the PCRT.

5.2 Big Four Accountancy Firms

The Big Four refers to the four biggest accountancy firms in the world: PwC, Deloitte, KPMG and EY. They provide a wide range of accounting, consultancy and taxation services. The codes of conduct of these four large firms provide an indication of the ranking in importance of public interest versus commercialism when guiding staff.

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[7] The Consultative Committee of Accountancy Bodies (CCAB) is an umbrella group of five chartered professional accounting bodies, which provides a representative and common voice for the accountancy profession. The member bodies are ICAEW, Association of Chartered Certified Accountants, Chartered Institute of Public Finance and Accountancy, Chartered Accountants Ireland and Institute of Chartered Accountants in Scotland.

UK PAC (2015) criticised the Big Four firms for their role in marketing tax avoidance schemes and specifically PwC for the promotion of these schemes on an industrial scale. It suggested 'the fact that PwC's promotion of these schemes is permitted by its own code of conduct is clear evidence that Government needs to take a more active role in regulating the tax industry' (UK PAC 2015, 3). While this observation referred to the 2005 tax code of conduct, its most recent tax code (2015) does not explicitly address aggressive tax avoidance either, despite being the only one of the Big Four firms with a separate tax code of conduct. PwC's Global Tax Code of Conduct (2015) does state that advice should be 'supported by a credible basis in tax law' and 'no tax advice relies for its effectiveness on any tax authority having less than the relevant facts'. Stakeholder interest should also be a factor, with consideration of the 'consequences arising from the way stakeholders might view a particular course of action'. The code acknowledges that 'it is not always clear where lines should be drawn' but does little to clarify where these ethical boundaries lie (PwC 2015).

Deloitte operates several codes of conduct throughout Europe, although none of the codes addresses tax avoidance. In answer to questioning by UK PAC (2013), Deloitte stated that it files 'a tax return claiming a tax position if one has a more than 50% view that it will succeed' (Q73). The UK PAC hearing and FRC's initial harsh penalties in the MGR tribunal in 2013 would likely have had some bearing on Deloitte drafting further guidance the following year. Deloitte (2014a) published tax advisory principles that state its tax services are governed by the codes of conduct of CIOT and ICAEW. Its guides employees to 'only engage in tax planning that has commercial or economic substance' and 'not promote artificial tax planning structures' (Deloitte 2014a, 4). It promotes tax arrangements where there is a 'high degree of confidence' that the advice 'would prevail in the Courts' (4). Deloitte also published a series of 'Responsible Tax' guidance documents for its corporate clients stating 'tax is a noisy subject right now-in public, in politics, in the press' (2013, 1). The guidance recognises 'a new breed of stakeholders' (2014b, 8), and recommends that companies, identify 'key internal and external stakeholders, who they are, what they want and how best to deliver it' (Deloitte 2014b, 2). Deloitte's (2017) recent UK code also affirms the firm's desire be proactive in shaping the overall public interest debate.

KPMG has one global code for all its employees, which makes no reference to tax avoidance (KPMG 2012). However, KPMG UK recognised that a 'defensive approach to stakeholder engagement and communications around tax and tax policy was not working' (KPMG 2017a) and initiated a 'Responsible Tax for the Common Good' programme to invite stakeholders to contribute to the tax debate. This has now become a global initiative and 'invites the full range of stakeholders, including tax payers, academia, media, government, global bodies, politicians, NGOs and tax professionals, to inform thinking on what responsible tax behaviour looks like in a global context' (KPMG 2017a). It outlines 'Principles for a Responsible Tax Practice' in a separate guidance document (KPMG 2017b). One of the key principles states that it will not 'advise clients to enter into transactions with the purpose of securing a tax advantage clearly and unambiguously contrary to the relevant legislation and shall not assist them to implement such transactions' (KPMG 2017b).

EY's (2017) recently updated code provided an opportunity to address it public interest responsibilities. However, with the exception of one additional sentence, no change was made to the 2015 code (even the CEO statement remains the same). It states its member firms actively work with regulators 'to ensure that these rules and standards meet continuously changing needs of the market' (EY 2017, 7). It refers to 'building a better working world' for its people, clients and community but does not address the HMRC's request to provide clear guidance on tax avoidance. In relation to public interest, EY recognises it will 'coordinate, as appropriate, with other members of our profession in matters of public interest' (2017, 7). What this means in practice is open to interpretation.

The review highlights that when HMRC/HM Treasury, definitive stakeholders, and FRC, a dominant stakeholder, have applied pressure and exerted power, the tax profession has responded. Both CIOT and ICAEW amended their guidance documents to provide more clarity on tax avoidance and the public interest. The Big Four response has been mixed: Deloitte and KPMG have issued new guidance on responsible tax practices; however, PwC and EY have chosen not to amend their guidance.

6. Discussion and Conclusions

Discussion

The MGR case supports growing literature which highlights the tax profession's reluctance to address the ethics of devising and promoting tax avoidance schemes. Deloitte's argument in the MGR case, that the profession's only responsibility is to the client, can no longer hold. The case has acted as a catalyst for change, placing increased emphasis on the profession's public interest responsibilities. In addressing FRC criticism, the profession did not attempt to define public interest, but focused instead on adopting a stakeholder approach, emphasising the need to take account of legitimate stakeholder interests and guiding how these interests should be addressed (ICAEW 2017).

Several other stakeholders (HMRC, UK PAC, media and politicians) have also applied pressure on the tax profession to address its public interest responsibilities (see Section 3.1). Led by CIOT, the UK tax profession updated its code of conduct to provide comprehensive guidance in relation to aggressive tax avoidance. The recently published PCRT emphasises the need to be 'trusted by society at large as well as by clients and other stakeholders' (CIOT 2016, 10). It is the first time CIOT has actively discouraged members from creating or promoting highly artificial or highly contrived tax structures.

Response from the Big Four firms has been varied. Deloitte and KPMG acknowledge a wider responsibility to stakeholders and society (Deloitte 2013b, KPMG 2017b). While neither has a separate tax code or address tax avoidance in their codes, both state in their guidance documents that they will not advise on transactions contrary to the intention of legislation (Deloitte 2014a, KPMG 2017b). Deloitte (2014a) also explicitly states its tax services are governed by the PCRT and ICAEW codes and acknowledges the need to consider public interest. In addition, both KPMG and Deloitte's guiding 'Responsible Tax' principles expand stakeholder focus beyond tax payers and tax authorities. KPMG (2017a) has also been to the forefront in bringing stakeholders together to discuss tax practices while recognising a previous defensive attitude to stakeholder engagement.

PwC does not expressly address tax avoidance in either its code of conduct or its tax codes. PwC's tax code advocates transparency with tax authorities and its recent code of conduct recognises the need to demonstrate 'responsible behaviour in more areas and be accountable to an ever wider array of stakeholders' (PwC 2017b, 1). EY has done little to address stakeholder concerns about tax avoidance and is also vague in relation to duties to the promote the public interest, making bland statements of commitment 'to doing its part in building a better working world' (EY 2015). Notably, EY advises Google, Apple, Facebook and Amazon on tax affairs (Independent 2016b), all companies that have been publicly criticised for aggressive tax avoidance schemes. In 2012, EY reported the largest percentage of revenues arising from tax advisory services in the UK, with PwC being largest tax advisory firm (UK PAC 2013). The failure of EY and PwC to address tax avoidance might suggest that they consider their tax clients are the most salient stakeholder grouping.

Increasing focus on the role of the tax profession and tax avoidance implies the tax profession can no longer avoid its duties to public interest. The paper highlights the profession has traditionally prioritised tax payers and private interests. The stakeholder salience model (Mitchell et al. 1997) suggests this may be attributed to the definitive combination of power, urgency and legitimacy that tax payers exhibit. However, it is apparent that recent developments have led to a change in the profession's consideration of other stakeholders. While government has traditionally demonstrated legitimacy and utilitarian power with reference to tax avoidance, it has not until recently displayed such levels of urgency and coercive power. Its criticism of the profession and pending legislative changes have re-positioned HMRC/HM Treasury's importance as key definitive stakeholders. Other stakeholders have also influenced change. UK PAC and FRC, dominant stakeholders, have by way of its public oversight investigations, contributed to this change. Media debate has similarly brought the public interest dimension of tax avoidance to the fore and has demonstrated its utilitarian power. However, findings suggest that society has not played a significant role in influencing the tax profession. While society as stakeholder exhibits legitimacy, the dispersed and varied nature of this stakeholder grouping may explain its lack of influence.

In relation to Mitchell et al's (1997) framework, findings suggest that the most influential groups are the definitive stakeholders, comprising tax payers and HMRC/HM Treasury. Since 2015, increased power has been applied by HMRC/HM Treasury and has resulted in tangible changes by UK professional tax bodies. While firms are also altering their approach to tax avoidance, some are slow to embrace change. This may be explained by the fact that the tax payer is perceived by some firms as the more powerful of the two definitive stakeholders.

Conclusions

A number of conclusions are highlighted. First, there has been notable progress in addressing public interest responsibilities in the profession's guidance documents. Nonetheless, the concept of 'public interest' remains vague and undefined, and may mean different things to different stakeholders. To address this issue, the profession has selected to focus on stakeholder perspectives and has shifted to a more inclusive consideration of key stakeholders. Mitchell et al.'s (1997) framework helps to identify the salience of key stakeholders. It is now apparent that the previous predominant attitude that the sole duty of tax professionals to act in the client's interest (House of Lords 2013; ICAEW 2017; Stuebs and Wilkinson 2010) is changing. CIOT

(2017) acknowledges that 'public interest concerns about behaviours in relation to tax planning have evolved significantly in recent years and the PCRT has continued to evolve to reflect the fundamental professional obligations' (CIOT 2017, 3). Going forward, education and training both within professional practice firms and within professional tax bodies with emphasis on a stakeholder approach can help to further address the imbalance regarding private versus public interest (ICAEW 2017).

Second, the MGR case highlights that the FRC was unable to effectively sanction members for failure to consider the public interest. Indeed, it is unclear what sanctions the profession would consider suitable for a breach of the updated PCRT (CIOT 2016) relating to aggressive tax avoidance and it would appear that ICAEW will not actively seek to investigate a breach of standard 4, waiting instead for the HMRC to initiate a complaint (Biebuyck, 2016). This indicates a reluctance by the profession to enforce this standard.

Third, the paper examines the tax profession's normative approach to dealing with public interest in relation to tax avoidance. The use of the stakeholder salience model to interpret the tax profession's response to public interest, in respect of the tax avoidance issue, is a key contribution. It would also be useful to examine actual practices of tax professionals. Further research could survey members to establish how they apply the guidance and codes in practice. Finally, the UK experience highlights a shift in role from self-serving 'commercialism' focused on serving the narrow private interests of tax payer clients, to a broader professionalism focused on serving public interest and a range of stakeholders. Stakeholders demonstrating power, urgency and legitimacy have been most influential in this shift. This reinforces the fact that the profession's motivation for change has not been driven by ethical considerations but rather stakeholder salience.

Compliance with Ethical Standards

Conflict of Interest: Author A declares that he/she has no conflict of interest. Author B declares that he/she has no conflict of interest.

Ethical approval: This article does not contain any studies with human participants or animals performed by any of the authors.

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