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Is it Time for the Next Seminal Economic Crime Statute? Modernising and Simplifying Tax Evasion Offences in the UK

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Historically, little use was made of the criminal justice system in addressing tax evasion in the UK, with tax authorities preferring to conduct civil investigations, resulting in the imposition of civil penalties. From 1998–2002, the Inland Revenue brought only 263 prosecutions for tax offences,[1] with, at its lowest point in 2001/2, a mere 30 individuals prosecuted.[2] By 2007, His Majesty's Revenue and Customs (HMRC) only prosecuted two in a thousand cases of suspected tax evasion,[3] with the prosecution rate subsequently declining by a further 41 per cent by 2010.[4] Following the financial crisis and public dissatisfaction with responses to high-profile tax evasion scandals, the next decade saw a transformation in the enforcement of tax offences. In particular, a Parliamentary inquiry followed the HSBC (Suisse) scandal, where over 1000 UK account holders were investigated for tax evasion, yet only one individual was prosecuted.[5] Accordingly, HMRC were tasked with increasing the number of prosecutions for tax evasion from 165 in 2010 to 1,165 prosecutions annually by 2014/15, by making sufficient

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[1] *Tackling Fraud against the Inland Revenue: Report by the Comptroller and Auditor General* HC 429 (2002–03) 39.

[2] Inland Revenue, *Report of the Commissioners of Her Majesty's Inland Revenue for the Year Ending 31st March 2002, One-Hundred and Forty-Fourth Report* (Cm 5706, 2002). Customs and Excise typically made greater use of the criminal justice system in addressing tax offences, bringing 127 prosecutions in 1998–9, Lord Grabiner QC, *The Informal Economy* (HM Treasury, March 2000) 34.

[3] *Committee of Public Accounts, HMRC: Tackling the Hidden Economy* HC 712 (2007–08) 6.

[4] *Treasury Committee, Closing the Tax Gap: HMRC's Record at Ensuring Compliance* HC 1371 (2010–12) 11.

[5] *Public Accounts Committee, Oral Evidence: Tax Avoidance and Evasion: HSBC* HC 1095 (2014–15); *Public Accounts Committee, Oral Evidence: Increasing the Effectiveness of Tax Collection: A Stocktake of Progress Since 2010* HC 974 (2014–15).

referrals to the Crown Prosecution Service.[6] In response, the number of tax evasion prosecutions dramatically and steadily increased, from 420 in 2010/11 to 1288 in 2014/15.[7] Following this, 880 individuals were prosecuted from 2015–16,[8] followed by 886 prosecutions from 2016–17,[9] 917 prosecutions from 2017–18,[10] and 691 prosecutions from 2019–20.[11] Primarily owing to the impact of the COVID-19 Pandemic, from 2020, the number of prosecutions for tax evasion declined, with a mere 163 prosecutions from 2020–21 and 215 prosecutions from 2021–22.[12]

Despite this volte-face in tax law enforcement, insufficient attention has been paid by both academics and policy makers to the increasing use of the criminal justice system in combatting tax evasion.[13] Tax evasion offences have been enacted on an ad hoc basis and are comprehensive, separately criminalising the evasion of most types of taxation, as well as many of the underlying behaviours involved. However, to date, there has been little attempt to systematise and rationalise this patchwork of offences, causing duplicity and redundancy. To attempt to remedy the gap in existing literature, this chapter begins by providing a doctrinal analysis of tax evasion offences in the UK, highlighting the expansive scope of statutory

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[6] *HM Treasury, Summer Budget 2015* HC 264 (2015–16) 43.

[7] *National Audit Office, Tackling Tax Fraud: How HMRC Responds to Tax Evasion, The Hidden Economy and Criminal Attacks* HC 610 (2015–16) 33; *HM Revenue and Customs, Annual Report and Accounts 2014–15 (For the year ended 31 March 2015)* HC 18 (2014–15) 16.

[8] *HM Revenue and Customs, Annual Report and Accounts 2015–16 (For the year ended 31 March 2016)* HC 338 (2015–16) 22.

[9] *HM Revenue and Customs, Annual Report and Accounts 2016–17 (For the year ended 31 March 2017)* HC 18 (2016–17) 24.

[10] *HM Revenue and Customs, Annual Report and Accounts 2017–18 (For the year ended 31 March 2018)* HC 1222 (2017–18) 25.

[11] HM Revenue & Customs, *HMRC Quarterly Performance Report: October to December 2020* (HMRC Corporate Report, 4 February 2021) Data Table.

[12] HM Revenue & Customs, *HMRC Quarterly Performance Report: January to March 2022* (HMRC Corporate Report, 18 July 2022) Data Table.

[13] At present, the only comprehensive study is P Alldridge, *Criminal Justice and Taxation* (OUP, 2017).

offences, as well as the overuse of broad common law offences. The second part of this chapter provides an original comparison of the UK legal framework with its more rational US counterpart. This section also contrasts recent efforts to consolidate and modernise the law pertaining to other financial crimes, such as terrorism financing, money laundering, fraud and bribery. Ultimately, this chapter argues that the criminal offences pertaining to tax evasion should be simplified and modernised through the enactment of a contemporary statute, returning doctrinal coherence to this increasingly utilised area of criminal law. In particular, the UK should consider enacting a US-style system of tax evasion offences, which apply to a range of taxes and clearly distinguish culpable actions from omissions.

1. United Kingdom – Tax Evasion Offences

A plethora of offences are used to prosecute conduct associated with the evasion of taxation, from specific offences criminalising the evasion of each type of taxation, to general offences that criminalise the underlying fraudulent conduct. In fact, over 20 offences are used to prosecute tax evasion in the UK.

There are several statutory offences concerning income tax evasion, including an offence of being 'knowingly concerned in the fraudulent evasion of income tax by that or any other person'.[14] As a conduct offence, no loss or gain actually needs to be incurred by HMRC.[15] The offence can be committed by an act or omission,[16] and by single events as well as courses of conduct.[17] The offence captures not only those liable to pay income tax, but also, any person 'knowingly concerned' in the evasion, including professional facilitators and those who otherwise incite or collude in the offence.[18] Additional strict liability offences were enacted to

[14] Enacted as a summary offence in the Finance Act 2000, s 144. The offence is now contained in s 106A of the Taxes Management Act 1970 and is triable either way.

[15] D Salter, 'Some Thoughts on the Fraudulent Evasion of Income Tax' (2002) 6 *British Tax Review* 489, 503.

[16] *Tuck* [2018] EWCA Crim 2529, [11].

[17] *Martin and another* [1998] 2 Cr App R 385 (CA); Although reflected in sentencing, *Khan* [2017] EWCA Crim 703.

[18] DC Ormerod, 'Summary Evasion of Income Tax' [2002] *Crim LR* 3, 14.

criminalise the failure to give notice of chargeability to tax,[19] failure to deliver a return,[20] or the making of an inaccurate return,[21] in relation to offshore income, assets or activities in excess of £25,000 of potential lost tax revenue per year.[22]

The Value Added Tax Act 1994 contains five offences related to the evasion of VAT,[23] including the offence of being knowingly concerned in, or taking steps with a view to, the fraudulent evasion of VAT.[24] The phrases 'knowingly concerned' and 'taking steps with a view to' enable its application to not only those who evade VAT, but also (again) to those who facilitate this offence.[25] Additionally, there is a catch-all offence, which covers conduct that 'must have involved the commission by him of one or more offences under the preceding provisions.'[26] This offence is wide-ranging and is used when the specific offence is not identifiable, but the facts suggest an offence has been committed.[27] Despite laudable aims, the offence seemingly fails to cohere with fundamental principles of criminal law, specifically, the necessity for the specification of the particulars of an offence to enable the defendant to ascertain the nature and extent of the allegations.[28] Nevertheless, the offence has withstood challenges based on Article 7 of the European Convention on Human Rights (ECHR).[29]

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[19] Taxes Management Act 1970, s 106B.

[20] ibid, s 106C.

[21] ibid, s 106D.

[22] ibid, s 106B(1)(b), s 106C(1)(c), s 106D(1)(b), s 106F(2); The Sections 106B, 106C and 106D of the Taxes Management Act 1970 (Specified Threshold Amount) Regulations 2017, SI 2017/988, Reg 3. The offence applies to income tax and capital gains tax, and encompasses all offshore income and gains that are not reportable under the Common Reporting Standard, ibid, Reg 2C.

[23] Value Added Tax Act 1994, s 72(1), s 72(3)(a) & (b), s 72(8), s 72(10), s 72(11).

[24] ibid, s 72(1).

[25] *Binfield* [2019] EWCA Crim 1812; [2020] Lloyd's Rep FC 18.

[26] Value Added Tax Act 1994, s 72(8).

[27] J O'Donnell, 'Vat Investigation' (2007) 57 *VAT Dig* 1, 16.

[28] Alldridge (n 13) 59.

[29] Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4

Several offences pertaining to the evasion of duty, or smuggling offences, are contained in the Customs and Excise Management Act 1979.[30] The primary offence pertaining to the evasion of duty is contained in section 170 and can be committed in two ways. First, it is an offence for an individual to knowingly acquire possession of goods on which duty has been evaded,[31] or goods that are entirely prohibited or restricted,[32] such as drugs,[33] or protected wildlife,[34] as well as being knowingly concerned in activities relating to such goods.[35] Secondly, it is an offence for an individual to be 'knowingly concerned in any fraudulent evasion or attempt at evasion' of any duty, prohibition or restriction on the goods, or any applicable provision in the Act.[36] The second offence is much wider than the first and has been referred to as a 'sweeping up or catch all provision', owing to its ability to criminalise conduct by those outside of the initial smuggling operation.[37]

Other statutory offences criminalise being knowingly concerned in the fraudulent evasion of other taxes, such as stamp duty land tax.[38] Owing to the persistent issues surrounding the attribution of criminal liability to legal entities,[39] corporate offences of failing to prevent the facilitation of UK and foreign tax evasion have also been introduced.[40] The strict liability

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November 1950); *Pattni* [2001] Crim LR 570 (CC).

[30] Customs and Excise Management Act 1979, s 167(1), s 167(3), s 168(1), s 170(1)&(2), s 170B.

[31] ibid, s 170(1)(ii).

[32] ibid, s 170(1)(i), s 170(1)(iii).

[33] See for instance, *Bhegani* [2016] EWCA Crim 2109; *Birks* [2017] EWCA Crim 810; *Jhurry* [2018] EWCA Crim 2799; [2019] 1 Cr App R (S) 40.

[34] See for instance, *Lendrum* [2011] EWCA Crim 228; [2011] 2 Cr App R (S) 69.

[35] Customs and Excise Management Act 1979, s 170(1)(b). Specifically, 'carrying, removing, depositing, harbouring, keeping or concealing or in any manner dealing with any such goods'.

[36] ibid, s 170(2).

[37] *Neal* [1984] 3 All ER 156 (CA); (1983) 77 Cr App R 283, 287.

[38] Finance Act 2003, s 95.

[39] Law Commission, *Corporate Criminal Liability: An Options Paper* (2022).

[40] Criminal Finances Act 2017, ss 45–46.

offences are designed to circumvent the common law's demand for identification of fault with the senior managers of a corporation,[41] by merely requiring proof that a person associated with the corporation facilitated a tax evasion offence.[42] It is a defence for the company to prove that it implemented reasonable prevention procedures.[43] However, the offence has not been prosecuted since its enactment.[44]

Additionally, general offences including fraud and false accounting can apply to fraudulent activities taken in furtherance of tax evasion, including the use of falsified documents or the provision of false information to HMRC.[45] Like tax evasion offences, fraud offences are notoriously expansive in scope.[46] Moreover, tax evasion is a predicate offence for the purposes of the anti-money laundering (AML) framework,[47] meaning that money laundering offences can be used against those who have evaded taxation.[48] When used as an additional, rather than a substitute charge, this is a form of 'uncritical over-criminalisation', whereby tax evaders face additional punishment despite failing to undertake any extra criminal conduct.[49]

Irrespective of these statutory offences, some of the most commonly utilised tax evasion offences are the common law offences of cheating the public revenue and conspiracy to

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[41] *Serious Fraud Office v Barclays Plc* [2018] EWHC 3055 (QB); [2020] 1 Cr App R 28.

[42] Criminal Finances Act 2017, s 45(1), s 46(1).

[43] ibid, s 45(2), s 46(3).

[44] HM Revenue & Customs, *Number of Live Corporate Criminal Offences Investigations* (HMRC FOI Release, updated 30 June 2022).

[45] Fraud Act 2006, ss 2–3; Theft Act 1968, s 17. See for instance, *Backhouse v HM Revenue & Customs Prosecution Office* [2012] EWCA Civ 1000; [2013] Lloyd's Rep FC 1.

[46] See, eg, D Ormerod, 'The Fraud Act 2006 – Criminalising Lying?' [2007] *Crim LR* 193, 196.

[47] Proceeds of Crime Act 2002, ss 327–329, s 340.

[48] See for instance, *K* [2007] EWCA Crim 491; [2007] 1 WLR 2262; *William and William and William* [2013] EWCA Crim 1262; [2015] Lloyd's Rep FC 704.

[49] V Mitsilegas and N Vavoula, 'The Evolving EU Anti-Money Laundering Regime: Challenges for Fundamental Rights and the Rule of Law' (2016) 23 *Maastricht Journal of European and Comparative Law* 261, 267. This was recognised by the Supreme Court in *GH* [2015] UKSC 24; [2015] 1 WLR 2126, [48].

defraud.[50] The offence of cheating the public revenue is long established,[51] and, unlike other common law cheats,[52] survived abolition upon the enactment of the Theft Act 1968.[53] It is widely used owing to the broad scope of the offence, encompassing the evasion of most taxes, through a wide range of acts and omissions,[54] both by the individual concerned and any facilitators.[55] As cheating can be a 'conduct offence', there is no need to prove any resultant loss.[56] In essence, 'cheating can include any form of fraudulent conduct which results in diverting money from the revenue'.[57] As a common law offence, the maximum penalty is an unlimited fine or life imprisonment.[58] The breadth of the offence and its lack of certainty has led to allegations that the cheating offence is incompatible with the ECHR.[59] Many commentators have called for the abolition of the offence,[60] or for placing it on a statutory basis.[61]

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[50] TaxWatch, *Equality before the Law? HMRC's Use of Criminal Prosecutions for Tax Fraud and other Revenue Crimes. A Comparison with Benefits Fraud* (TaxWatch, 2021).

[51] G McBain, 'Modernising the Common Law Offence of Cheating the Public Revenue' (2015) 8(1) *Journal of Politics and Law* 40, 76.

[52] ibid, 40; see also D Ormerod, 'Cheating the Public Revenue' [1998] *Crim LR* 627, 628.

[53] The offence was expressly preserved in the Theft Act 1968, s 32(1)(a), despite the recommendation of the Criminal Law Revision Committee in its *Eighth Report: Theft and Related Offences* (Cmnd 2977, 1966).

[54] *Mavji* [1987] 1 WLR 1388, 1392 (CA).

[55] See for instance, *Whitson-Dew and Richards* [2019] EWCA Crim 2131; [2020] 1 Cr App R (S) 56; *Charlton* [1996] STC 1418 (CA).

[56] *Hunt* [1994] Crim LR 747, 748 (CA). If the offence is charged as a 'result offence', the prosecution may need to demonstrate loss, see *Lunn* [2017] EWCA Crim 34, [24].

[57] *Less, The Times* (30 March 1993).

[58] JH Howard, 'Cheating the Public Revenue' [2010] *Tax Journal* 16, 16.

[59] Specifically, Article 7. See, eg, G Virgo, 'Cheating the Public Revenue: Fictions and Human Rights' (2002) 61 *CLJ* 47. Yet challenges brought on this basis have been unsuccessful, *R. v Pattni* [2001] Crim LR 570.

[60] Ormerod (n 52) 645.

[61] McBain (n 51) 76; G Virgo, 'Cheating the Public Revenue' (2000) 59(1) *CLJ* 42, 45.

Conspiracy to defraud also survived the abolition of other common law conspiracies, which were replaced by statutory offences.[62] There are said to be two forms or variants of the common law offence, specifically, 'agreeing dishonestly to prejudice another's economic interests' or 'agreeing to mislead a person with intent to cause him to act contrary to his duty'.[63] The offence is useful in tax evasion cases involving misrepresentation, falsification and/or concealment by several defendants,[64] or for prosecuting the facilitators of tax fraud schemes.[65] The offence is extraordinarily broad in nature, lacking any requirement to prove an intent to deceive,[66] or an intent to cause loss to the victim, or even any ill-motive; merely requiring a demonstration that the victim's, in this case HMRC's, interests have been set back in some way.[67] Indeed, the offence has been labelled 'one of the most controversial offences',[68] and has been subject to repeated calls for abolition from academics,[69] and from the Law Commission.[70]

Breadth, Overlap and Redundancy

The preceding section showed considerable overlap between the statutory and common law offences. Indeed, upon the enactment of the income tax evasion offence, it was explicitly

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[62] Criminal Law Act 1977, s 1, s 5(2).

[63] *Evans* [2014] 1 WLR 2817, [36], quoting D Ormerod and DH Williams, *Smith's Law of Theft*, 9th edn (OUP, 2007), [5.12].

[64] See, eg *Bache* [2014] EWCA Crim 2464; *Bobrovas* [2014] EWCA Crim 752; *Hodges, Lineker and Stacey* [2006] EWCA Crim 2706.

[65] See for instance, *Hughes* (16 August 2018, unreported), Southwark Crown Court.

[66] *Scott v Metropolitan Police Commissioner* [1974] 3 WLR 741 (HL).

[67] *Wai Yu-Tsang v The Queen* [1992] 1 AC 269, 276–7 (PC); *Allsop* (1977) 64 Cr App R 29 (CA).

[68] D Ormerod and K Laird, 'Ivey v Genting Casinos – Much Ado about Nothing?' (2018) 9 *UK Supreme Court Yearbook* 380, 393.

[69] See, eg, ATH Smith, 'Conspiracy to Defraud' [1988] *Crim LR* 508; JC Smith, 'Conspiracy to Defraud: Some Comments on the Law Commission's Report' [1995] *Crim LR* 209.

[70] Law Commission, *Fraud* (LC No 276, 2002) 57. Earlier reports recommended the retention of the offence, 'until ways can be found of preserving its practical advantages' *Criminal Law: Conspiracy to Defraud* (LC No 228, 1994) 63; *Criminal Law: Report on Conspiracy and Criminal Law Reform* (LC No 76, 1976) 43.

recognised that the offence would do little more than place cheating on a statutory basis for the purposes of income tax.[71] Additionally, for a significant period, the cheating offence was used to address all VAT frauds, notwithstanding the existence of statutory offences. This was due to HMRC's position that VAT frauds did not encompass economic activity (which would be subject to VAT) for the purposes of withholding repayments from fraudsters. The denial of economic activity, and thus liability to pay VAT, was also thought to prevent the use of the section 72 offence in such circumstances.[72] While case law later restored the ability of prosecutors to charge the VAT evasion offence in cases concerning carousel and missing trader frauds,[73] it also illustrates the duplicity and redundancy of the statutory offence while the cheating offence is retained. While codification of the criminal law is a worthwhile endeavour,[74] this implies that the common law offence will be abolished or, at least, that its use will be restricted. However, many years after the enactment of these offences, cheating the public revenue is still the preferred charge.[75]

This is problematic considering the especially expansive scope of common law tax evasion offences, which have a detrimental impact on legal certainty, fair labelling, and the wider Rule of Law. The ambiguous contours of the common law offences are further obscured by the mens rea element of such offences, dishonesty, or, more accurately, the test for its determination.

Dishonesty

[71] Inland Revenue, *Tax Bulletin – Issue 49* (Inland Revenue, 2000).

[72] *Hashash* [2006] EWCA Crim 2518; [2008] STC 1158, [3]–[5].

[73] ibid, [29]–[33].

[74] Law Commission, *Codification of the Criminal Law: A Report to the Law Commission* (LC No 143, 1985); See more recently, E Steiner, 'Challenging (Again) the Undemocratic Form of the Common Law: Codification as a Method of Making the Law Accessible to Citizens' (2020) 31(1) *King's Law Journal* 27.

[75] In *Rimmington*, Lord Bingham stated that 'good practice and respect for the primacy of statute (…) require that conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason for doing otherwise.' [2005] UKHL 63; [2006] 1 AC 459, [30]. However, courts will 'be slow to interfere' *DS* [2017] EWCA Crim 1410; [2018] 1 WLR 5609, [48].

The actus reus of common law tax evasion offences is so extraordinarily broad – being satisfied by any form of fraudulent conduct or agreement[76] – that the fault element of dishonesty is often the 'only live issue at trial'.[77] Moreover, even though some of the statutory offences may be narrower in scope, often the actus reus of the offence is usually predetermined or admitted, leaving the trial to focus on dishonesty.[78] As such, 'the notion of dishonesty is central to considerations of criminality in tax non-compliance'.[79] Nonetheless, the failure to clearly define dishonesty in English Law has itself long been regarded as problematic.

In *Feely*,[80] it was determined that dishonesty is an ordinary word, which should not be defined judicially, but rather, should be regarded as a question of fact to be determined by the jury. Accordingly, in contrast to the traditional approach taken to the interpretation and application of criminal offences in English Law, the dishonesty test does not provide a legal definition of the term for the jury to apply to the defendant's conduct; rather, it asks them to characterise his conduct, in effect, making a moral judgement as to whether it is sufficiently reprehensible to warrant criminalisation.[81] The *Ghosh* test was the accepted test for dishonesty for 35 years.[82] In *Ghosh,* Lord Lane CJ stated that the test to be applied is as follows:

1. Was the defendant's conduct dishonest according to the ordinary standards of reasonable and honest people?

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[76] *Less, The Times* (30 March 1993), *Scott v Metropolitan Police Commissioner* [1974] 3 WLR 741 (HL).

[77] Ormerod (n 52) 630; Law Com 276 (n 7070) 86.

[78] P Kiernan and G Scanlon, 'Fraud and the Law Commission: The Future of Dishonesty' (2003) 24 *Company Lawyer* 4, 6.

[79] S Bourton, 'Revisiting Dishonesty – The New Strict Liability Offence for Offshore Tax Evaders' in C Monaghan and N Monaghan (eds), *Financial Crime and Corporate Misconduct: A Critical Evaluation of Fraud Legislation* (The Law of Financial Crime Series, Routledge, 2018).

[80] *Feely* [1973] QB 530 (CA).

[81] Law Commission, *Legislating the Criminal Code: Fraud and Deception: A Consultation Paper* (LC No 155, 1999), [5.11].

[82] *Ghosh* [1982] QB 1053 (CA).

2. If it was so dishonest, did the defendant himself realise that what he was doing was by those standards dishonest?[83]

The *Ghosh* test was subject to intense and widespread criticism from academics,[84] and senior judges.[85] Many feared that diverse perceptions of dishonesty would lead to inconsistent outcomes,[86] as well as longer and more difficult trials, with the ambiguity meaning that it was logical for a defendant to 'take his chance with the jury'.[87] The second limb of the *Ghosh* test was also perceived to be problematic because it allowed the defendant to advance something akin to mistake of law as a defence.[88] Accordingly, in *Ivey*, the Supreme Court held that the second limb 'does not correctly represent the law and that directions based upon it ought no longer to be given'.[89] Instead, the Court held that the test for dishonesty should involve a subjective assessment of the individual's knowledge or beliefs as to the facts, followed by an application of the objective standards of ordinary decent people in light of this assessment. The defendant's own perceptions of the honesty of his conduct are irrelevant. *Ivey* was itself a civil case but, in *Barton*,[90] the Court of Criminal Appeal held that the correct test of dishonesty in English criminal law was now that established in *Ivey*.[91]

While the decision has been welcomed by many who support the eradication of the subjective limb,[92] the decision to replace *Ghosh* with *Ivey* does not resolve the issues inherent in the test

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[83] ibid, 1064 per Lord Lane CJ.

[84] See, eg, E Griew, 'Dishonesty: Objections to Feely and Ghosh' [1985] *Crim LR* 341; JR Spencer, 'Dishonesty: What the Jury Thinks the Defendant Thought the Jury Would Have Thought' [1982] *CLJ* 222.

[85] Ormerod and Laird (n 68) 386, citing *Starglade Properties Ltd v Nash* [2010] EWCA Civ 1314; [2011] Lloyd's Rep FC 102 and *Cornelius* [2012] EWCA Crim 500.

[86] Law Com 155 (n 81) 60–65.

[87] Griew (n 84) 343.

[88] Spencer (n 84) 224.

[89] *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2017] UKSC 67; [2018] AC 391, [74].

[90] *Barton* [2020] EWCA Crim 575; [2020] 2 Cr App R 7.

[91] ibid, [84].

[92] See, eg, M Galli, 'Oh my Ghosh: Supreme Court Redefines Test for Dishonesty in Ivey v Genting Casinos' (2018) 29(2) *Entertainment Law Review* 55.

of dishonesty. As Ormerod and Laird note, the sustained objections to *Ghosh* were primarily focused on the objective, rather than subjective, limb.[93] However, this has since become its 'most prominent feature',[94] exacerbating the issues identified above. *Ivey* has compounded concerns surrounding legal certainty, particularly considering the sheer breadth of many dishonesty offences.[95] This is because, divergent interpretations of dishonesty will not only prevent the defendant from being able to determine whether any one jury would characterise his conduct as dishonest in advance, but also, *Ivey* ensures that he no longer even has to appreciate his conduct would be so characterised.[96] In this respect, the subjective limb served an important function in the criminal law, providing increased legal certainty,[97] and narrowing the scope of application of some of the widest offences.[98] The *Ghosh* test was defended on this basis by the Law Commission.[99]

The issues surrounding dishonesty are exacerbated in the tax evasion context where dishonesty is used as a positive element of the offence, forming the key determinant of both its nature and definition.[100] Ormerod persuasively argues the failure to define dishonesty is exacerbated in 'specialised cases', where juries, in the absence of relevant experience, fail to understand or appreciate the context in which the conduct is undertaken, preventing them from accurately determining the defendant's honesty.[101] Tax evasion is an example of such a specialised case, as it often involves complex and contrived tax arrangements, which are unfamiliar to many

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[93] D Ormerod and K Laird, 'The Future of Dishonesty – Some Practical Considerations' (2020) 6 *Archbold Review* 8, 9.

[94] ibid.

[95] GR Sullivan, AP Simester, 'Judging Dishonesty' (2020) 136 *LQR* 523, 526.

[96] ibid.

[97] The *Ghosh* test was considered to meet the requirements of Article 7 of the ECHR, *Pattni* [2001] Crim LR 570.

[98] 'The Court may have inadvertently broadened a number of criminal offences that were already stretching the limits of what can legitimately be criminalised', Ormerod and Laird (n 68) 394.

[99] Law Com 276 (n 70) 43.

[100] Contrary to the recommendations of the Law Commission, which believed that dishonesty should act as a negative element of an offence, negating, rather than establishing, liability, ibid, 41.

[101] Ormerod (n 52) 635.

jurors.[102] Many will be unable to determine whether a defendant is to be regarded as dishonest using their own standards, let alone the abstract standards of 'ordinary decent people'. Moreover, the jury is prohibited from hearing any evidence pertaining to the meaning of dishonesty in particular contexts,[103] including evidence of common market practice,[104] and regulatory attitudes to the conduct in question.[105] These concerns are further exacerbated when tax has been evaded through the concealment of income, assets or activities offshore; as well as being complicated and unfamiliar to most jurors, the activities involved will be hidden, inhibiting the collection of evidence.[106]

Accordingly, the role of dishonesty within these offences creates a lack of certainty for individuals, who should be able to foresee in advance the legal consequence of a certain course of action, as well as for prosecutors, who must decide whether to charge a defendant according to the prosecution's prospects of success.[107] Additionally, the test is likely to hinder prosecutions for tax evasion, as a tax authority with discretion to select appropriate response to criminality is likely to be cautious, imposing cost-effective civil penalties, rather than a costly and uncertain prosecution, in all save for the most straightforward cases.[108] This was demonstrated following the introduction of prosecutorial targets in 2010, which led HMRC to 'focus on less complex cases', particularly 'lower-value cases', with prosecutions being

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[102] J Freedman, 'Tax and Corporate Responsibility' (2003) 695(2) *Tax Journal* 1, 3.

[103] K Campbell, 'The Test of Dishonesty in R v Ghosh' (1984) 43 *CLJ* 349, 358.

[104] This was formerly only relevant to the second question of *Ghosh*, see *Hayes* [2015] EWCA Crim 1944; [2016] 1 Cr App R (S) 63; Common market practice might be considered when ascertaining the defendant's subjective beliefs as part of the *Ivey* test, see *Hussein v FCA* [2018] UKUT 186 (TCC); [2018] Lloyd's Rep FC 574; Z Leggett, 'The New Test for Dishonesty in Criminal Law – Lessons from the Courts of Equity?' (2020) 84(1) *Journal of Criminal Law* 37, 47.

[105] *Hayes* [2015] EWCA Crim 1944; [2016] 1 Cr App R (S) 63, [19].

[106] Fisher discusses these issues in relation to the HSBC scandal in J Fisher, 'HSBC, Tax Evasion and Criminal Prosecution' (2015) 1253 *Tax Journal* 6.

[107] M Wasik, 'Mens Rea, Motive and the Problem of Dishonesty in the Law of Theft' [1979] *Crim LR* 543, 552.

[108] HM Revenue & Customs, *HMRC's Criminal Investigation Policy* (HMRC Guidance, 2021).

undertaken for tax losses as small as £250.[109] The difficulties inherent in the dishonesty test are also at least implicitly recognised by the introduction of a strict liability offshore tax evasion offence.[110]

The failure to clearly define dishonesty and to propound a suitable test for its determination has thus had a detrimental impact on prosecutions for tax evasion offences. Nevertheless, dishonesty fulfils an important role in the delineation of tax offences, by excluding conduct from the scope of the offence, which is either not morally blameworthy, or insufficiently blameworthy for the purposes of criminalisation, as well as activities the defendant genuinely believes he has a right to lawfully undertake.[111] In this respect, the test arguably implements justice over consistency.[112] This is particularly important in a tax evasion context where the sheer breadth of the offences means that dishonesty is the only element that distinguishes a failed tax avoidance scheme, or even a simple mistake, from a serious criminal offence.[113] It is of vital importance to the Rule of Law that such distinctions are made, for those who attempt to act within the boundaries of the law should be treated differently from those who do not.[114] In this respect, the dishonesty criterion more accurately captures the meaning attributed to tax evasion, as it permits an examination of the accused's motive, or, his knowledge, intentions

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[109] *National Audit Office* (n 7) 33.

[110] Taxes Management Act 1970, s 106B, s 106C, s 106D. S Bourton, 'Revisiting Dishonesty – The New Strict Liability Offence for Offshore Tax Evaders' in C Monaghan and N Monaghan (eds), *Financial Crime and Corporate Misconduct: A Critical Evaluation of Fraud Legislation* (The Law of Financial Crime Series, Routledge, 2018).

[111] Law Com 155 (n 81) 7.40.

[112] R Tur, 'Dishonesty and the Jury' in AP Griffiths (ed), *Philosophy and Practice* (CUP, 1985) 83.

[113] Honest mistakes are highly likely considering the complexity and length of the UK's tax code. 'At more than ten million words it is the world's longest.' D Frisby and A Oury, 'Budget Revolution' (2020) 185(4736) *Taxation* 8, 8.

[114] P Alldridge, 'Tax Avoidance, Tax Evasion, Money Laundering and the Problem of "Offshore"' in S Rose-Ackerman and P Lagunes (eds), *Greed, Corruption and the Modern State* (Essays in Political Economy, Edward Elgar, 2015) 332.

and beliefs.[115] This is essential, as it is these aspects of the accused's state of mind which are pivotal in transforming a simple failure to notify, or a failure to correctly declare a tax liability, into an act or omission warranting a criminal response. Accordingly, dishonesty may be the most appropriate form of mens rea for UK tax evasion offences and its application should not be avoided through the enactment of strict liability offences. However, the preceding analysis demonstrates that if dishonesty is to be retained, it should be defined subjectively for the purposes of tax offences, as formerly required by the *Ghosh* test. This argument is also supported by analysing the scope and operation of US tax evasion offences, including the positive impact of clearly defining the mens rea element of wilfulness.

2. United States – Tax Evasion Offences

The US is a country the UK often looks to for inspiration regarding optimal law and enforcement practice, especially for the purposes of combatting financial crime.[116] This section argues that the UK could gain significant insights from the logical US framework of tax evasion offences. This is because, in contrast to the UK, US tax evasion offences centre on the underlying conduct giving rise to the offence, as opposed to the type of tax involved. In this respect, the US has been able to enact a 'complete criminal code' of tax offences, obviating the need to rely on other general white-collar offences, and enabling different labels and sanctions

[115] Wasik notes that accepting motive as relevant to the consideration of criminal liability underscores much of the criticism of Ghosh (n 107) 550. However, Jiang states 'motive is irrelevant qua motive; the relevance of motive is always traceable to intention and belief (…) It is the intention, not its motivating force, that matters in the sight of the law'. Z Jiang, 'Unifying and Defining 'Dishonesty' in the Law of Trusts' (2020) 26(5) *T&T* 429, 437. Nevertheless, these concepts are inextricably connected, with someone's motive, or their reason for doing something, informing their knowledge and intention. The dishonesty test enables juries to consider all these aspects of a defendant's state of mind.

[116] For instance, the UK introduced Deferred Prosecution Agreements (DPAs) owing to the US use of this enforcement tool, Ministry of Justice, *Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements* (Cm 8348, 2012) 19.

to be attached to different categories of offending.[117] Importantly, the US clearly differentiates between culpable actions and omissions in respect of tax crimes.

The 'capstone' of the US criminal sanctions regime[118] is the felony offence under §7201 of the Internal Revenue Code (IRC) of wilfully attempting in any manner to evade or defeat any tax imposed by the IRC, or the payment thereof.[119] The offence has been used to combat the evasion of income tax, including tax on illicit income,[120] but is also applicable to the evasion of other taxes, such as excise, estate and gift taxes.[121] The offence can be committed in two ways, namely, an attempt to evade or defeat the assessment of tax, or an attempt to evade or defeat the payment of tax.[122] The first form of the offence requires proof of a tax deficiency, an affirmative act constituting evasion or attempted evasion of assessment, and wilfulness.[123] The second has similar elements, but does not require proof of a tax deficiency, instead requiring proof that a tax has been assessed, is due and owed by the taxpayer.[124] Both iterations of the offence apply to 'any person', expanding the application of the offence to those who are not personally responsible for the payment,[125] including officers and shareholders of corporations that have evaded taxation,[126] as well as professional facilitators, such as attorneys

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[117] G Szott Moohr, 'Tax Evasion as White Collar Fraud' (2009) 9 *Houston Business and Tax Law Journal* 208, 209; The offences were 'calculated to induce prompt and forthright fulfillment of every duty under the income tax law and to provide a penalty suitable to every degree of delinquency.' *Spies v United States* 317 US 492, 497 (1943).

[118] L Brown, A Jamali, 'Tax Violations' (2014) 51 *American Criminal Law Review* 1751, 1759.

[119] 26 USC § 7201.

[120] *James v United States*, 366 US 213 (1961).

[121] I Comisky, L Feld and S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 1] (Thomson Reuters, 2020) § 2.03[7].

[122] MA Turner, 'Build an Awareness of Unlawful Tax Evasion to Ensure Avoidance' (2008) 81 *Practical Tax Strategies* 230, 233.

[123] *Sansone v United States*, 380 US 343, 351 (1965).

[124] Comisky et al (n 121) § 2.03[4].

[125] ibid, § 2.03[5].

[126] See, eg, *United States v Irwin*, 593 F2d 138 (1st Cir. 1979).

and accountants.[127] However, in such cases, the offence of aiding and assisting tax fraud is more likely to be used,[128] as it does not require proof of a tax deficiency.[129]

For evasion of assessment cases, although the prosecution must demonstrate a tax deficiency, it is not compelled to demonstrate the exact amount of any deficiency.[130] Such an endeavour is viewed as unnecessary in the course of imposing criminal penalties, as opposed to recovering evaded taxation.[131] Accordingly, both direct and indirect methods of proof can be used to demonstrate a tax deficiency.[132] The direct method of proof refers to the use of specific items to demonstrate the deficiency, whereas indirect methods involve the use of circumstantial evidence to demonstrate inaccurate reporting of, or a failure to report, income.[133] Although the amount need not be precisely determined, the majority of circuit courts have held that the amount of the deficiency must be 'substantial'.[134] This is a 'relative term' that must be interpreted with regard to the context and circumstances of the case.[135] The statutory requirement of 'an attempt in any manner' requires an affirmative act to evade or defeat a tax, as opposed to an omission or 'passive neglect'.[136] Indeed, it is this element of the offence that differentiates it from the misdemeanor offences contained in §7203.[137] As such, the simple

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[127] See, eg, *United States v Helmsley*, 941 F2d 71 (2d Cir. 1991).

[128] 26 USC § 7206(2).

[129] *Hull v United States,* 324 F.2d 817, 823 (5th Cir 1963); *United States v Chon*, 713 F3d 812, 820-21 (5th Cir 2013).

[130] SD Shimick, 'Heisenberg's Uncertainty: An Analysis of Criminal Tax Pretextual Prosecutions in the Context of Breaking Bad's Notorious Anti-Hero' (2014) 50 *Tulsa Law Review* 43, 54.

[131] *United States v Johnson*, 319 US 503, 517 (1943).

[132] Shimick (n 130) 59.

[133] L Brown, A Jamali, 'Tax Violations' (2014) 51 *Am Crim L Rev* 1751, 1761.

[134] Shimick notes that the Supreme Court has declined to address the issue, despite the circuit court split (n 130) 54.

[135] IRS, *Internal Revenue Manual: 9.1.3.3.2.2.1 26 USC §7201 – Additional Tax Due and Owing* (24 February 2010).

[136] *Spies v United States* 317 US 492, 499 (1943).

[137] ibid, 499.

failure to file a tax return does not fall within the scope of the section, that is, unless it is accompanied by an affirmative act, including the concealment of income or the making of a false statement to the IRS.[138]

In contrast, §7203 provides for four misdemeanor offences of wilfully failing to 'pay any estimated tax or tax', to 'make a return', 'keep any records', 'or supply any information'.[139] The offences should not be used when an affirmative attempt to evade can be demonstrated.[140] Failing to file a return is the most heavily utilised offence under section §7203.[141] The offence requires proof that the defendant '(1) was required to file a return, (2) failed to file a return, and (3) acted wilfully in failing to file.'[142] The first element is usually satisfied by demonstrating that the defendant's taxable income exceeded the minimum amount required to file.[143] There is no need to prove a tax deficiency, although this may be helpful in determining wilfullness.[144] The second element of the offence is satisfied either by a complete failure to file, or the filing of a document that contains so little information that it is incapable of being labelled a tax return.[145] The final element, wilfullness, has the same meaning as for other tax evasion offences, specifically, a 'voluntary intentional violation of a known legal duty'.[146] However, it is important to note that, under this form of the offence, the duty is to file a return.[147] As such, wilfullness does not require an intent to evade taxation, but rather a

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[138] The traditional list of affirmative acts is outlined in *Spies v United States* 317 US 492, 495 (1943). This type of evasion is known as a 'Spies evasion', Comisky et al, above n 121, at § 2.03[2]. See also, *United States v Copeland*, 786 F2d 768, 770 (7th Cir. 1985).

[139] 26 USC § 7203.

[140] Department of Justice, *Criminal Tax Manual* (29 June 2022), § 10.02.

[141] ibid, § 10.03; Comisky et al (n 121) §2.09[1].

[142] *United States v Hassebrock*, 663 F3d 906, 919 (7th Cir 2011).

[143] See, 26 USC § 6012. This is unnecessary for corporations, 26 USC § 6012(2).

[144] Comisky et al (n 121) § 2.09[1].

[145] *United States v Marston*, 517 F3d 996, 1001 (8th Cir 2008).

[146] *United States v Bishop*, 412 US 346, 361 (1973).

[147] 26 USC § 7203; *United States v Smukler*, 986 F3d 229, 241 (3rd Cir 2021).

'voluntary, purposeful, deliberate, and intentional, as distinguished from accidental, inadvertent, or negligent' failure to act.[148]

Other US offences criminalise tax perjury,[149] aiding and assisting tax fraud,[150] attempting to interfere with the administration of Internal Revenue Laws,[151] delivering or disclosing fraudulent returns, statements, or other documents,[152] and unlawfully recovering property following its lawful seizure by the IRS.[153] Additionally, general offences, such as conspiracy,[154] mail and wire fraud,[155] may be used to address tax evasion. However, use of these offences is restricted by enforcement policies. Such charges will only be brought when there is a 'large fraud loss or a substantial pattern of conduct and there is a significant benefit to bringing the charges instead of or in addition to Title 26 violations.'[156] This is in contrast to the UK, which has not provided official guidance, leaving the courts to prevent over-criminalisation; In *R v GH,* the Supreme Court held that 'it would be bad practice for the prosecution to add additional counts of [money laundering] unless there is a proper public purpose in doing so'.[157] However, this is entirely at the court's discretion.[158]

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[148] IRS, *Internal Revenue Manual: 9.1.3.3.4.1.3 26 USC §7203 – Willfulness* (15 May 2008).

[149] 26 USC § 7206(1).

[150] 26 USC § 7206(2).

[151] 26 USC § 7212(a).

[152] 26 USC § 7207.

[153] 26 USC § 7212(b).

[154] 18 USC § 371. *United States v Klein,* 247 F2d 908, 921 (2nd Cir 1957).

[155] 18 USC §§ 1341 and 1343. *Pasquantino v United States*, 544 US 349, 125 S.Ct. 1766 (2005); *Fountain v United States,* 357 F3d 250, 256 (2nd Cir 2004).

[156] Department of Justice, *Justice Manual* (June 2020), § 6-4.210.

[157] Including, where the conduct involved 'some added criminality' or it was impossible to prosecute the defendant for the predicate offence, *GH* [2015] UKSC 24; [2015] 1 WLR 2126, [48].

[158] ibid; see also AM Maugeri, 'Self-laundering the Proceeds of Tax Evasion in Comparative Law: Between Effectiveness and Safeguards' (2018) 9(1) *NJECL* 83, 102.

The US has not enacted a specific statutory offence pertaining to the corporate facilitators of tax crimes. This is because the US is able to attribute criminal liability to corporations through the 'Respondeat Superior' doctrine, which attributes criminal liability to a corporation based on the acts of its employees.[159] As such, the Respondeat Superior doctrine provides for a much wider basis of corporate criminal liability than the Identification doctrine in the UK and has proved far more successful in addressing the corporate facilitators of tax crimes.[160] For instance, the US has reached a plethora of Deferred Prosecution Agreements and Non-Prosecution Agreements (DPAs/NPAs) with numerous corporations for their facilitation of the use of fraudulent tax shelters.[161] The US has also concluded a significant number of DPAs/NPAs with foreign banks for their facilitation of tax evasion by US citizens through offshore accounts.[162] For instance, the US reached NPAs with 80 Swiss banks through the Swiss Bank Program, imposing over $1.36billion in penalties for their facilitation of tax evasion by US citizens.[163]

Wilfulness

[159] N Ryder, '"Too Scared to Prosecute and Too Scared to Jail?" A Critical and Comparative Analysis of Enforcement of Financial Crime Legislation against Corporations in the USA and the UK' (2018) 82(3) *Journal of Criminal Law* 245, 249.

[160] ibid, 262; R Luskin, 'Caring about Corporate "Due Care": Why Criminal *Respondeat Superior* Liability Outreaches its Justification' (2020) 57(2) *American Criminal Law Review* 303, 313.

[161] See, eg, the DPAs and NPAs reached with KPMG, Ernst and Young LLP and Deutsche Bank. See, Comisky et al (n 121) § 1.08.

[162] See, eg, Department of Justice, *Mizrahi-Tefahot Bank Ltd Admits its Employees Helped US Taxpayers Conceal Income and Assets* (Department of Justice Press Release 19-215, 12 March 2019).

[163] Department of Justice, *Justice Department Announces Final Swiss Bank Program Category 2 Resolution with HSZH Verwaltungs AG* (Department of Justice Press Release 16-093, 27 January 2016).

Most US tax evasion offences require proof of wilfulness.[164] Indeed, wilfulness has acted as the mens rea element of US tax evasion offences since 1919.[165] The inclusion of this form of mens rea is intended to effect the Congressional intention of constructing 'penalties that separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers'.[166] In *United States v Murdock*, the Supreme Court held that wilfulness not only requires an act 'which is intentional, or knowing, or voluntary, as distinguished from accidental', but also, 'an act done with a bad purpose' or an 'evil motive'.[167] In *United States v Bishop*, the Supreme Court explained that the term wilfully should be afforded an identical interpretation for both the misdemeanour and felony offences, clarifying that the term wilfully refers to a 'voluntary, intentional violation of a known legal duty'.[168] In *United States v Pomponio*, the Court reiterated this definition, but declined to recognise improper motive as a necessary component of wilfulness.[169] After *Pomponio*, circuit courts differed on their interpretation of the knowledge component of wilfulness, with most applying a subjective standard of evaluation, but with others requiring that a defendant's claims to lack knowledge had to be objectively reasonable.[170]

This conflict was resolved in *Cheek v United States*, which confirmed the application of the higher subjective standard,[171] while also holding that constitutional objections to taxation will not negate wilfulness.[172] As a result, individuals are not considered to have acted wilfully if

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[164] *Cheek v United States*, 498 U.S. 192, 201 (1991); *United States v Trevino,* 419 F.3d 896, 901 (9th Cir. 2005); *United States v Bishop*, 412 US 346, 360-361 (1973).

[165] J Stein, 'Criminal Liability for Willful Evasion of an Uncertain Tax' (1981) 81(6) *Columbia Law Review* 1348, 1355.

[166] *United States v Bishop*, 412 US 346, 361 (1973); ibid.

[167] *United States v Murdock,* 290 US 389, 394-5 (1933).

[168] *United States v Bishop*, 412 US 346, 360-361 (1973).

[169] *United States v Pomponio*, 429 US 10, 12 (1976).

[170] NA Mirkay III, 'The Supreme Court's Decision in Cheek: Does It Encourage Willful Tax Evasion?' (1991) 56(4) *Missouri Law Review* 1119, 1131.

[171] *Cheek v United States*, 498 US 192, 200 (1991).

[172] ibid, 206.

they misunderstand the meaning or application of tax laws in good faith.[173] This includes misunderstandings based on advice given by a professional, providing that the advice was sought and relied on in good faith, and that all material facts were disclosed.[174]

Additionally, the uncertainty of the law in question may prevent a finding of wilfulness,[175] for uncertainty prevents a defendant from possessing the requisite intent to violate the tax laws.[176] Circuit courts are split as to whether uncertainty negates wilfulness absolutely, or whether the defendant must rely on the uncertainty.[177] Some US courts have held that uncertainty is a legal inquiry to be resolved by the court by looking at the relevant authorities,[178] while others have held that uncertainty is also factual inquiry to be resolved by the jury through the ascertainment of its impact on the defendant's mental state.[179] Several circuits have held that the law must be unknowable, rather than simply unknown.[180] Alternatively, this could be perceived as part of a 'vagueness defence', grounded on a violation of the due process clause of the Fifth Amendment, which requires fair warning of criminalisation and bears similarities to Article 7 of the ECHR.[181] Effectively, constitutional challenges in the US centre on the application of wilfulness to unclear tax laws, as opposed to the definition of wilfulness itself.

Although ignorance of the law is not typically recognised as a defence to a criminal charge in the US, the Court explicitly held that criminal tax offences should be afforded special treatment

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[173] Comisky et al (n 121) § 2.03[3][a].

[174] *United States v Renner* 648 F3d 680, 687 (8th Cir 2011); *United States v Wright* 798 Fed. Appx. 849, 852 (6th Cir 2019).

[175] *James v United States*, 366 U.S. 213 (1961).

[176] *United States v Critzer,* 498 F2d 1160, 1162 (4th Cir 1974).

[177] MM Kwon, 'The Criminality of Tax Planning' (2015) 18(4) *Florida Tax Review* 153, 180.

[178] *United States v Mallas*, 762 F2d 361, 364 (4th Cir 1985).

[179] *United States v Garber,* 607 F2d 92 (5th Cir. 1979). In Harris, the Court held that 'the doubtfulness of a tax law can influence a criminal trial in two ways. The law can be objectively ambiguous, (…) Alternatively, the defendant or the defendant's tax advisors may have subjectively, but wrongly, seen an ambiguity' *United States v Harris,* 942 F2d 1125, 1132 (7th Cir. 1991).

[180] *United States v George* 420 F3d 991 (9th Cir 2005); *United States v Kahre,* 737 F3d 554, 570 (9th Cir 2014).

[181] Stein (n 165) 1357. See also *United States v Dahlstrom,* 713 F2d 1423 (9th Cir 1983).

'due to the complexity of the tax laws'.[182] The holding in *Cheek* bears similarities to the *Ghosh* interpretation of dishonesty in the UK and has garnered similar criticisms; specifically, that employing a subjective test will allow tax evaders with 'outrageously unreasonable' beliefs to escape liability and will prompt tax evaders to 'cling to frivolous views of the law in the hope of convincing a jury of their sincerity', inhibiting law enforcement.[183] Nonetheless, as in the UK, the reasonableness of a belief will no doubt be influential in determining its sincerity.[184] Additionally, subjective wilfulness can be inferred from circumstantial evidence of the defendant's conduct, including affirmative attempts to evade taxation.[185] The court will take into account the defendant's previous conduct and compliance history,[186] as well as their knowledge and abilities.[187] Further, wilfulness extends to wilful blindness, encapsulating defendants who claim ignorance owing to their deliberate attempts to ignore the facts,[188] thus mitigating the impact of a subjective standard on the ability to bring prosecutions for this offence.[189] Many US commentators also lamented defendants' ability to rebut wilfulness through obtaining professional advice, arguing that it will encourage tax evaders to avoid liability by seeking professional services, as well as increase the number of unscrupulous legal

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[182] *Cheek v United States*, 498 US 192, 200 (1991) citing *United States v Murdock,* 290 US 389, 396 (1933).

[183] *Cheek v United States*, 498 US 192, 210 (1991); Mirkay (n 170) 1139; MD Yochum, 'Cheek is Chic. Ignorance of the Law is an Excuse for Tax Crimes – A Fashion that Does Not Wear Well' (1993) 31 *Duq Law Review* 249, 253.

[184] *Cheek v United States*, 498 US 192, 203-4 (1991); *United States v Pensyl,* 387 F.3d 456, 459-60 (6th Cir. 2004); DE Field, 'Sincerity & Credibility: The True Concerns in Assessing Willfulness – An Analysis and Criticism of United States v. Pensyl' (2005) 59(1) *Tax Law* 283, 294.

[185] *United States v Guidry,* 199 F.3d 1150, 1157 (10th Cir. 1999); *Spies v United States* 317 US 492, 499 (1943).

[186] *United States v Lavoie,* 433 F3d 95, 98 (1st Cir 2005); *United States v Daraio,* 445 F3d 253, 264-65 (3rd Cir 2006).

[187] *United States v Guidry,* 199 F3d 1150, 1157–58 (10th Cir 1999); *United States v Bok,* 156 F3d 157, 166 (2nd Cir 1983) M Angelo, A Welles Hasen, U Hindberg, R Kesselring and H Perlman, 'Tax Violations' (2020) 57 *Am Crim L Rev* 1349, 1367.

[188] *United States v Jinwright,* 683 F.3d 471, 478 (4th Cir, 2012).

[189] R Zuraw, 'Sniping Down Ignorance Claims: The Third Circuit in United States v Stadtmauer Upholds Willful Blindness Instructions in Criminal Tax Cases' (2012) 56(4) *Villanova Law Review* 779, 801.

professionals.[190] However, seeking legal advice should be encouraged and demonstrating good faith reliance on the advice is an onerous task.[191] Moreover, even if the doctrine 'errs on the side of underinclusion',[192] arguably, it should be dishonest facilitators, rather than clients acting in good faith, who should face criminal sanction. In this respect, when a defence of legal uncertainty is raised by a facilitator in relation to a tax avoidance shelter, it is often rejected when their role extended to fraudulent implementation.[193]

In fact, rather than unjustifiably inhibiting law enforcement, by placing such emphasis on the subjective intention of the perpetrator or facilitator to comply with their obligations, US case law pays greater deference to the inherent nature of criminal tax evasion than its UK counterpart, following the decision in *Ivey*. This is supported by the fact that wilfulness is afforded a narrower interpretation in tax offences than for other offences,[194] including BSA violations, such as, structuring offences,[195] and FBAR violations.[196] Additionally, the courts have persistently emphasised that tax offences are a rare exception to the fundamental principle of criminal law that ignorance of the law is not an excuse, owing to the complexity of the tax law and the numerous errors that result from its application, even by honest taxpayers.[197] The

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[190] See, eg, L Hall and SJ Seligman, 'Mistake of Law and Mens Rea' (1940) 8 *University of Chicago Law Review* 641, 652.

[191] SW Buell, 'Good Faith and Law Evasion' (2011) 58(3) *UCLA Law Review* 611, 642–43.

[192] ibid, 643.

[193] See, eg, *United States v Solomon*, 825 F2d 1292, 1297-98 (9th Cir 1987); *United States v Smith*, 424 F3d 992 (9th Cir 2005). Department of Justice, *Criminal Tax Manual* (16 November 2020), §13.07.

[194] *United States v Kay*, 513 F.3d 432, 447 (5th Cir. 2007); *United States v Skilling*, 554 F.3d 529, 548-49 (5th Cir 2009); Szott Moohr (n 117) 212.

[195] In *Ratzlaf v United States*, 510 US 135, 144–149 (1994) the Supreme Court held 'we are unpersuaded by the argument that structuring is so obviously "evil" or "inherently bad" that the "willfulness" requirement is satisfied irrespective of the defendant's knowledge of the illegality', Congress later amended 31 USC § 5324 to reverse this decision. I Comisky, L Feld and S Harris, *Tax Fraud & Evasion: Offenses, Trials, Civil Penalties* [Vol 2] (Thomson Reuters, 2020) at § 11.06[2][b].

[196] See, eg, *United States v Horowitz*, 978 F.3d 80, 88 (4th Cir 2020).

[197] *Spies v United States*, 317 US 492, 496 (1943); *United States v Bishop*, 412 US 346, 360 (1973); *Ratzlaf v United States*, 510 US 135, 149 (1994).

fact that Congress has not interfered with these decisions in the tax context, despite having done so for structuring offences,[198] and despite approving this interpretation in other statutory contexts,[199] demonstrates its approval of the judicial interpretation of wilfulness, as well as its intention to clearly distinguish tax evasion from other criminal offences, paying greater respect to the labelling function of the criminal law. More importantly, although wilfulness is determined by a jury, the term is not left for the jury to define.[200] Rather, as the case law suggests, the meaning of the term has been refined over 100 years through binding judicial decisions, providing greater clarity to this area of criminal law than the decisions that abdicate responsibility for defining dishonesty to juries in the UK.

3. Comparison and Reform

Both jurisdictions have comprehensive legal frameworks providing for the criminalisation of tax evasion, as well as the facilitation of these crimes by both individuals and corporations. Indeed, there appear to be few omissions in the scope of liability imposed in each jurisdiction. However, while the UK has enacted several offences pertaining to the evasion of different types of taxes, US tax evasion offences centre on the underlying conduct giving rise to the offence. The US has been able to enact a 'complete criminal code' for tax offences, obviating the need to rely on other general white-collar offences, and enabling different labels and sanctions to be attached to different categories of offending.[201] The US clearly differentiates between culpable actions and omissions in respect of tax crimes. In contrast, the UK rarely uses its statutory offences and prefers charging the common law offence of cheating the public revenue, a catch-all crime with a severe sentence of imprisonment. Both jurisdictions use one form of mens rea consistently for almost all tax evasion offences. However, whereas the judicial failure to clearly

[198] See n 195.

[199] Congress intended the term wilfully in the Child Support Recovery Act, 18 USC § 228 (1994) to be afforded the same interpretation as for tax offences. SL Davies, 'The Jurisprudence of Willfulness: An Evolving Theory of Excusable Ignorance' (1998) 48(3) *Duke Law Journal* 341, 405.

[200] As it is in the UK, owing to *Feely* [1973] QB 530 (CA).

[201] Szott Moohr (n 117) 209.

define dishonesty in the UK has left the application of this term fraught with uncertainty, US case law provides a higher level of clarity in the interpretation of the term wilfulness. Accordingly, the US framework illustrates the benefits that would stem from a reconsideration of the UK's approach to criminalising tax evasion, enacting offences based on the underlying conduct, rather than retaining a patchwork of duplicitous offences for each type of tax evaded. This would help to limit the sheer number, as well as circumscribe the overly broad scope, of UK tax evasion offences. The US also demonstrates that, while the UK does not necessarily have to alter the chosen form of mens rea, significant benefits could be gained in providing a statutory or judicial definition of this term, including a higher level of certainty for prosecutors and defendants. On the other hand, while the US approach to attributing criminal liability to corporations for the facilitation of tax crimes appears to be more effective than its UK counterpart, reform must take place within wider ongoing efforts to reform corporate criminal liability more generally.[202]

Aside from a US-style system of offences, thought should be given to other reform options.[203] For instance, the common law offences could be abolished, or their use severely restricted, in preference to the statutory offences. Otherwise, the offence of cheating the public revenue could be placed on a statutory basis, with a clear definition of dishonesty, and many of the tax-specific offences could be removed from the statute book. This would help to define the nature of criminal tax evasion in the UK; a task that has been neglected so far by both national and international stakeholders.[204] However, this would be a less preferable solution than a US-style system of offences, with clearly defined mens rea elements. A system of offences based on the underlying conduct characterising tax evasion, as opposed to the particular type of tax evaded, would more effectively address the Rule of Law's demands for clarity and certainty. This reform should be accompanied by the adoption of enforcement policies. In particular, prosecutors should be restricted in their ability to use general white-collar offences, such as fraud and money laundering, in addition or in preference to statutory tax evasion offences.

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[202] See Law Commission (n 39).

[203] Alldridge identifies several options for reform (n 13) 69.

[204] See generally, U Turksen, 'The Importance of a Common Definition of Tax Crime and its Impact on Criminal Countermeasures in the EU: An Explorative Study' (2020) 20 *European Law Enforcement Research Bulletin* 91.

While money laundering or fraud charges may be appropriate in some cases, these offences should not be used simply because they have less demanding forms of mens rea.

4. Conclusion

The historic relative disinterest in tax evasion from both politicians and academics may be explained by the lack of prosecutions.[205] However, given the increasing use of the criminal justice system, this position is no longer tenable. This chapter demonstrated that the criminal offences pertaining to tax evasion need simplification and modernisation through the enactment of a contemporary statute, returning doctrinal coherence to this increasingly utilised area of criminal law. There are several options for a logical tax evasion framework, including a statutory cheating offence. However, this chapter calls for a US-style system of offences based on the underlying conduct, with different sanctions for different degrees of culpability. In contrast to the current patchwork of tax evasion offences, significant efforts have been taken to consolidate and modernise other financial crimes in the UK, such as terrorism financing, money laundering, fraud and bribery, through the enactment of the Terrorism Act 2000, the Proceeds of Crime Act 2002, the Fraud Act 2006 and the Bribery Act 2010 respectively. As such, this chapter calls for the next seminal economic crime statute, enacting a logical scheme of tax evasion offences.

[205] J Roording, 'The Punishment of Tax Fraud' [1996] *Crim LR* 240, 248.