

SOME CONTROVERSIAL ISSUES FACING THE ACCOUNTING PROFESSION IN SOUTH AFRICA

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GRAHAMSTOWN
RHODES UNIVERSITY
1985

0-86810-132-X

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INAUGURAL COLLOQUIUM
DELIVERED AT RHODES UNIVERSITY
on 25 September, 1985

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Mr Vice-Chancellor, honoured guests, ladies and gentlemen: it is appropriate that we should commence this colloquium by expressing our gratitude to the accounting firms Peat Marwick Mitchell and Company and Arthur Andersen and Company which have generously subvented the Chairs we occupy.

It is a popular misconception that the Chartered Accountant is a little grey man existing in a static environment, checking the work of other people and helping them to pay less income tax than is socially or legally proper. In addition it is perceived that what little flair and creativity he may have is firmly hidden under a bushel of professional rules of conduct to which he must strictly adhere. In fact, the profession is in a dynamic situation, and has been for a decade at least. Various recent developments have placed some thought-provoking issues before it; issues which must be addressed by all existing and aspirant members, and which may profoundly affect the general public.

This evening we intend to consider two of these issues, which in recent years have particularly concerned the profession. They are: advertising and income tax advice. We shall deal firstly with the former.

The Rules of Professional Conduct and Disciplinary Rules of the Public Accountants' and Auditors' Board place restrictions on advertising: They require the Registered Accountant and Auditor ... to endeavour to enhance the reputation and dignity of the profession, to refrain from soliciting or advertising for professional business, or from unduly

bringing his name before the notice of the public.

Faced with commercial development, the code of ethics has become the target of assault by certain members of the profession, and indeed by outsiders as well.

Hearne and Beckingsdale express this assault in the following terms: (1)

"Professionals as a whole have traditionally been accorded a privileged position in society and have worked with a privileged minority. However they now serve and depend upon companies, institutions and the public at large. Codes of ethics in all professions are being assaulted which is typical of the attacks on elitism of any form, and reflects the strong undercurrent of egalitarianism which exists in most advanced western economies today".

Against this background, the undermentioned issues summarise the grounds for opposing the advertising of professional accounting services and hence resisting this assault

1. The professional person by definition places service to clients above profit making and therefore is not operating a normal commercial business. Advertising is a tool of commercial business.

Carl S. Chiltern has urged that members should be careful not to permit competitive conditions to turn the accounting profession into a "commercial industry". (2) He points out that

"professionalism is a state of mind, a way of doing business, a commitment of service to others, It encompasses some old fashioned virtues such as dealing fairly with clients and fellow practitioners, independence of mind in all professional work as well as the highest quality of work at all times". (3) Advertising simply does not belong in such an environment; it would debase the ideals of the profession and invite the risk of crass commercialism where this is totally alien.

2. The independence of the auditor, which is the key stone of the profession, will be impaired if advertising is allowed.

The relationship between auditor and client differs from all other professional relationships in that the auditor is not necessarily working for the betterment of the client, but rather to satisfy the attest function; that is, the process whereby he independently reports to shareholders on the custodianship of their business by management. Due to the nature of the attest function it is critical that the auditor has no influence over his appointment. If indeed the auditor is able to influence his appointment by self promotion his independence must be at risk.

3. Professionalism and advertising are not compatible. In the USA, only minimal restrictions on advertising exist. The result, in the words of Martin Shandling (4) is that:

'the profession in America operates in many ways which would send a shudder through the spine of any self-respecting Chartered Accountant steeped in the traditions of professional behaviour spelled out in those immutable green pages known as the Rules and Etiquette.

Public accounting in America today is a fast-moving, dog-eat-dog world, where 'hustle's the name of the game'. Junior clerks barely capable of forming proper tick-marks talk glibly over lunch about their firm's 'growth potential'. Aspiring supervisors discuss 'new business' they've brought in. Dare-devil managers tell hair-raising stories of last-minute flight changes made at airports when they spotted a 'potential client' about to board a plane headed in the same general direction as their own.

Staff partners sternly hand out forms requiring all employees to enter details of all clubs, societies and social programmes that they are involved with in the spare waking moments their jobs allow. Weekly in-office news digests record with wild enthusiasm details of 'new acquisitions' and the luckless competitors from whom the prey was snatched".

Would the dignity and esteem of the profession be enhanced by advertisements like the following one, which appeared in Los Angeles: (5)

"You change your lawyer, your banker, your doctor and even your butcher. So if you are dissatisfied why not change your auditor? Come and see us first. We guarantee more than a fraction of satisfaction".

It sounds like an advertisement for a massage parlour. If this is to be the level of professional advertising, we must accept that advertising will tarnish the image of the profession.

4. Advertising will increase the cost to users of professional accounting services and at the same time may compromise the quality of that service.

The advertising costs would have to be borne by the client. Every practising accountant is aware that he continually makes fee concessions in applying the principle of placing service above fee income. This professional principle would surely be endangered in the face of increased costs. Further to this, in order to ameliorate the effects of greater costs, accountants could well be tempted to compromise their standards by minimising the amount of work they would consider necessary.

In support of this contention a survey conducted by my colleague revealed that 56,3% of practitioners agreed that advertising would ultimately add to the cost of accounting services, whilst only 17,4% disagreed.

With regard to the quality of service being affected, W. Douglas Sprague (6) considered that the real issue was "how to permit the free flow of information to the public, including the benefits of price and service competition, without risking serious deterioration in the quality of performance."

I submit that this is not possible; quality is going to suffer.

Professional reputation for skill and competence is established by the manner in which an accountant conducts his professional practice and the quality of the services he offers. The establishment of reputation by self advertisement should not be permitted to supplant the establishment of a professional reputation by the traditional methods, as no amount of self promotion can ensure a high degree of competence or quality of professional services.

5. Advertising would affect the relationship between the professional accountant and his fellow practitioners.

Howard F. Stettler considers that one of the attributes which is common to groups that are generally recognised as having achieved professional status is "freedom from uninhibited competition so that practice may be carried on in an atmosphere of dignity and self-respect, with adequate opportunity for concentration on the improvement of services". (7)

Essentially what Stettler is saying is that if competition is allowed, the self-respect and dignity amongst members of the profession will suffer. Advertising of professional accounting services would certainly create greater competition within the profession, and would be to the detriment of the dignity and self-respect of the profession.

It must be accepted, however, that the accounting profession does not compete solely with itself. Obviously the audit function remains the preserve of the accounting profession; but there is an increasing tendency for the profession to encounter competition in non-audit assignments, primarily in management advisory services and taxation and estate planning. In these categories, the profession competes with other financial institutions and individuals who are not bound by restrictive advertising rules. The solution to this disadvantage lies not in lifting restrictions on advertising by members of the profession, but rather in the professional body, The South African Institute of Chartered Accountants, promoting the profession amongst the public. This would ensure that the advertising of professional services would be tasteful, would not contain any misstatement or make any false claims. In addition,

advertising in this manner would ensure a spirit of fairness to all members of the profession within the confines of the Rules of Professional Conduct and Disciplinary Rules.

Mr Vice-Chancellor, honoured guests, ladies and gentlemen, like all good controversies this one has another side. I should like therefore to proceed with some of the counter arguments and considerations which suggest that the advertising of professional services is desirable, if not necessary.

1. The professional accountant's misconception of advertising.

There can be little doubt that the accounting profession is big business, yet few of its members like to think of themselves as businessmen. They show hostility to any suggestion that they are motivated by money rather than by service to their clients.

Professionalism is a blind spot which keeps them from acting to achieve their goals. Consequently the tools of business such as advertising are treated with disdain.

Hearne and Beckingsdale suggest that the real problem is that professionals see marketing as selling, and selling is not consistent with the behaviour, standards or ethics of the professional accountant. They point out that although marketing is an acceptable concept to large corporations (for which no doubt the auditors have great respect), it is totally unacceptable to the professional.

They write that

"A well planned marketing program is an acceptable concept to the Coca Cola Corporation or Colgate Palmolive, indeed it is an essential management discipline, but to many professional people the phrase is anathema. It has overtures of selling".

(8)

It would seem then that the professional accountant sees marketing, advertising and selling as being one and the same. Disdain for marketing precludes him from giving due consideration to the question of advertising. They do not understand that advertising is not synonymous with marketing, it is a part of marketing. Marketing does not simply mean advertising. By serving and satisfying clients' needs through delivery of appropriate services in a manner consistent with professional goals and norms, a firm will be engaging in professional service marketing.

Perhaps it is more succinctly put by Donald L. Atwell who states that restrictive rules against advertising are:

"rooted in the fear that without a restriction of advertising, members of the profession will resort to neon signs and men wearing sandwich boards in order to attract new clients".

2. The assault on professional Codes of Ethics

Hearne and Beckingsdale claim that:

"The assailants of the professional body believe that the attitude and approach of the profession is depriving the business man and the public of information, freedom of choice and competitive services". (9)

In the United States of America the formal assault by the Federal Trade Commission on the professional codes has caused the professions to make alterations to their codes. For example, the Federal Trade Commission (FTC) has moved against the American Dental Association claiming that its ban on advertising has prevented dentists from seeking new patients. The Federal Trade Commission has also moved against the American Medical Association alleging that the doctors ban on advertising prevented competition, whilst the Justice Department has filed an action against the American Bar Association contending that its advertising ban restrained price competition among lawyers.

As a result of Federal Trade Commission investigations and Justice Department deliberations over the question of advertising rules in the accounting profession, the American Institute of Certified Public Accountants moved to amend its regulations on advertising.

At this stage the social climate in South Africa may not be particularly conducive to this type of "social activist" action to be brought against the professions, but for the accounting profession in South Africa, it may be wise to take heed of the words of Carl A. Craig:

"There is little to be gained by standing in opposition to the tide of history as perceived by social activists with court backing. In other words either the accounting profession modifies its advertising ethics or it will be modified for its membership by the courts". (10)

The influence which the American accounting profession has on South Africa should not be underestimated. The vast majority of major accounting firms in South Africa have direct links with the USA by either an association through the firm itself or an association through the client where the client is a subsidiary of an American company.

3. The public needs to be aware of the services the accounting profession can offer.

The relationship between the profession and the public is not obvious but it is vital. The auditor may rightly be regarded as the umpire of the business world. He should be an independent party who by the attest function, assists with the maintenance of business practice acceptable to the public in general. The

The accounting profession should be seen to act with dignity and wisdom. Whether this is in fact the case is doubtful. Howard

F. Stettler writes:

"The uninformed are still likely to picture the auditor as a wizened individual wearing the traditional green eyeshade and sleeve garters. They would expect to find him perched atop a high stool, counting money or meticulously adding long columns of figures, and gaining his sole pleasure in life from the apprehension of luckless persons whose books failed to balance or whose cash account proved to be short". (11)

Although people well acquainted with the business and financial world recognize the professional auditor as highly skilled, reliable and competent, there are many others who have failed to recognize that he is a far cry from his turn of the century counterpart. The professional accountant operates and exists in a fast-moving, vibrant business environment, an environment that is continually experimenting with new ideas, new products, new marketing methods and a host of other matters, all of which have direct bearing on the professional accountant. He should project an image which indicates that he is equal to the situation, and by his actions he should prove that he is equal. Advertising of the profession and the services it offers would assist in the projection of a suitable image.

As Max Bloch states:

"Advertising and promotion have a legitimate social and economic purpose in the profession as well as in business. This legitimate purpose is to inform the public of valuable services that are available and of which the public may be unaware. This legitimate use of advertising and promotion develops the entire 'market' to the benefit of the public and the professions". (12)

Two of the arguments raised by my colleague remain uncontested. I should like now to comment on independence and cost and quality.

1. Independence.

Nobody would question that independence is the keystone of the accounting profession. The argument that advertising would impair independence appears to be more traditional than substantive.

Clayton Ostlund supports this view in his statement that

"No one has yet stated how obtaining a client by advertising impairs an Accountant's independence, since truthful advertising is just a means of informing potential clients that services are available". (13)

It is quite reasonable to argue that the independence of the auditor relates to his attitude in the performance of his duties rather than to the means of obtaining his appointment. It must be conceded

however that where factors which may affect the performance of his duties are introduced into the securing of an appointment, his independence may be impaired. For example, if an auditor advertises that he guarantees a reduction in audit fees, and in doing so obtains an audit engagement, the performance of his duties may be affected and so too his independence.

2. Cost and Quality.

The true professional will render the services necessary in the circumstances no matter how he obtains the client. Regrettably, there will always be a few who will lessen the quality of service just to obtain the engagement. However, these groups will probably follow their characteristic behaviour patterns without regard to whether the advertising rule is modified or not.

Obviously, quality of service should be the basis on which a professional accounting firm is judged. It is also a sound basis for competition amongst professional accountants. Competition which is wholly or largely based upon promotional advertising, becomes dependent upon the inherent quality of the service rendered and the competence and efficiency of the practitioner concerned. In other words, the market will ultimately be the arbiter on the basis of quality of service, and the promotional content of advertising will be insignificant in relation to appointment decisions.

In response to the contention that advertising will result in increased costs for accounting services it is equally arguable that costs may be reduced as it may prod firms into becoming more efficient in their operations in order to compete effectively.

In final response to the contentions of my colleague, the advertisement he referred to earlier as an example of tastelessness was, like massage parlours, remarkably successful : no fewer than 115 clients engaged the firm in one year as a result of this advertisement.

Perhaps the strongest argument in support of lifting restrictions on advertising is that advertising is already taking place in South Africa. For example, firms issue brochures under their names, have business cards and entertain clients to business lunches. Clerks are sent on "practice development" programmes, whilst partners and managers enjoy golf afternoons with potential clients. Some firms are more aggressive in their advertising, being quite prepared to accept the disciplinary action taken against them as small cost for the publicity gained.

More serious still is the emergence in South Africa of "open proposals". This is a system whereby audit firms are invited by potential clients to tender or propose for assignments in competition with other accounting firms. In response to this invitation a document is prepared by the accounting firm indicating how responsive it may be to the potential client's needs. This is followed by a meeting with the potential client at which a presentation may be given which expands upon the manner in which the client's needs may be satisfied. Open proposal is simply a

euphemism for advertising.

In conclusion, perhaps it is time that the Rules of Professional Conduct and the disciplinary rules relating to advertising be amended to take the promotion of the Accounting Profession out of the Dark Ages and into the enlightened eighties.

Our second controversial issue to be discussed this evening is within the realm of income tax advice. The controversy revolves around the grey area falling between tax avoidance and tax evasion. Central to this issue have been allegations that tax consultants, the majority of whom are Chartered Accountants, are increasingly assisting clients to engage in what has been termed tax 'avoision'. Obviously this word is derived from the terms avoidance and evasion and relates to conduct within this grey area.

Let us examine the three terms.

Tax avoidance is the minimisation of one's tax burden by legitimate means provided for in the Act : it is perfectly acceptable and the legislature anticipates that taxpayers will practise it. A simple example of avoidance is investment in securities which generate tax-free interest or dividends. A slightly less simple example is the declaration of dividends by a company in order to avoid the imposition of undistributed profits tax.

Tax evasion is the deliberate falsification of tax returns by suppressing income or inflating expenditure in order to pay less tax than is legally due. It is a crime. The severity of tax evasion

is recognised by the disciplinary rules of the Public Accountants' and Auditors' Board which make it an offence for a RAA to assist any client to evade tax. (14)

Tax 'avoidance' is the practice whereby taxpayers, usually guided by experts, arrange their affairs in such a way that the consequent transactions are as close to being tax evasion as they can be without actually constituting the crime.

The controversy facing the Accounting profession is the attitude members should adopt towards tax 'avoidance'. The nub of this controversy is an ethical one. Should the Chartered Accountant as a member of a profession in which ethical conduct is a cardinal requirement, engage in activities which:

1. Assist clients to shift their rightful tax burdens to others?
2. Obscure the substance of a transaction by altering its form, simply to reduce tax?
3. Compromise his position as umpire of the business world?

Let us consider the implications of, and some attitudes towards, his involvement in these activities.

1. Shifting the burden.

Avoision results in the erosion of the tax base; this means that the tax burden is not spread fairly over the complete body of taxpayers. Essentially, because only the powerful and wealthy can afford to engage in these intricate schemes, the additional burden is thus shifted to those less able to bear it. It is a case of the rich getting richer and the poor getting poorer.

Those in favour of tax 'avoision' are fond of quoting the famous dictum of Lord Tomlin in the 1936 case *Duke of Westminster v IRC*:
(15) The learned judge began by saying:

'It is trite law that His Majesty's subjects incur no legal penalties and, strictly speaking, no moral censure, if, having considered the lines drawn by the legislature for the imposition of taxes, they make it their business to walk outside them.'

He continued:

"The Inland Revenue is not slow - and quite rightly - to take every advantage which is open to it under the taxing statutes for the purpose of depleting the taxpayer's pocket. And the taxpayer is, in like manner, entitled to be astute to prevent, as far as he honestly can, the depletion of his means by the Revenue.'

Lord Tomlin concluded:

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

However, opponents of 'avoidance' have been quick to point out that this dictum presents only one side of the issue. They claim that it boils down to shifting one's burden on to the shoulders of one's fellow citizens.

Eminent judges have expressed themselves on the subject. For example, Mr Justice MacDonald said: (16)

"I endorse the opinion expressed that the avoidance of tax is an evil. Not only does it mean that a taxpayer escapes the obligation of making his proper contribution to the fiscus but the effect must necessarily be to cast an additional burden on taxpayers who, imbued with a greater sense of civic responsibility, make no attempt to escape or, lacking the financial means to obtain the advice and set up the necessary tax-avoidance machinery, fail to do so. Moreover, the nefarious practice of tax

avoidance arms opponents of our capitalistic society with potent arguments that it is only the rich, the astute and the ingenious who prosper in it and that 'good citizens' will always fare badly. While undoubtedly the short term effects of the practice are serious, the long term effects could be even more so."

It is generally accepted that the learned judge was referring to 'avoidance' when he spoke of 'avoidance' in this dictum.

2. Form v. Substance.

In 1984 in an interview on the eve of his retirement, the Commissioner of Taxation for the Commonwealth of Australia, Mr W J O'Reilly, also referred to the Duke of Westminster case. (17) He stated that although this dictum had comforted a number of people in recent years, current interpretation was that the courts ought to distinguish between the form and substance of tax-avoiding transactions when considering the applicability of the dictum of Lord Tomlin. His point was that Her Majesty's subjects, in ordering their affairs so that their tax burdens would be as low as possible, should not be allowed to introduce aspects into a transaction which changed the form merely to save tax without affecting the substance of the transaction.

3. Umpire of the business world.

In his role as independent reporter and attestor, the Chartered Accountant is obliged to adopt a moral approach to his activities. His position is that of even-handed link between his client and others. Within the income tax context, this obligation is properly met by a fair, disinterested interpretation of the law to ensure an application which is fair to both parties. Every decision he makes in this respect should be unbiased and reflect the independence which is the cornerstone of his profession.

Seen in this light, connivance in devious, sometimes dubious, schemes for the selfish tax benefit of his client can hardly be favourably viewed.

I shall now describe an example of the 'avoision' type of transaction which was, until recently, increasingly prevalent in this country. The model may then be measured against the three aspects which render 'avoision' unacceptable conduct by members of the profession.

A Limited owns a piece of land. A manufacturing company, B Limited, wishes to rent the land and erect a factory on it. If the transaction takes place on a straightforward basis using appropriate sections of the Act, A enters into a lease agreement with B, in terms of which B will pay an annual rental for, say, ten years. As a condition of the lease, B will erect the factory at a cost of R200 000. The income tax results of this, besides rental payments,

are that A will be taxed on an income of R200 000 being the value of the factory erected, while B will be entitled to deduct R200 000 in equal instalments over the period of the lease. The effect of this arrangement is that the allowance of R200 000 made to taxpayer B is duly taxed in the hands of taxpayer A, and no burden attaches to the general body of taxpayers.

Now consider what happens when an 'avoidance' play is introduced into the transaction.

A Limited has a pension fund, P. Pension funds are exempt from taxation for very sound sociological reasons. This fact is used, indeed abused, by the parties in the following way:

A leases the land to P, which in turn enters into a sublease with B on the same conditions regarding erection of the factory. The effect of this arrangement is that A receives a small rental which has a minimal effect on its taxable income; B enjoys the right to deduct R200 000 from taxable income over the period of the lease; but P, being a pension fund, is not taxed on the value of the building. Consequently, the parties as a whole are relieved of a tax burden of R200 000.

Relate this transaction to the arguments against 'avoidance'.

1. Shifting the burden. Instead of the respective tax liabilities and tax benefits balancing out between the parties to the agreement, they have freed themselves of a large tax burden. The state must recover this tax from somewhere, with the result that the larger

body of taxpayers has to pay more tax. It is for reasons of this sort that the corporate tax burden in this country is presently about half of what it should be, while individuals are punitively taxed.

2. Form v. substance. The unnecessary introduction of the pension fund is quite superfluous and adds nothing to the transaction but an unfair tax benefit. The substance of the transaction is obscured by alteration to form in a blatant abuse of the tax free status of the pension fund.

3. Function as umpire. The Chartered Accountant has deserted his role as unbiased interpreter of the law and become a participant in a morally dubious, if not legally prohibited concoction.

This is what inevitably happens when the Chartered Accountant embraces 'avoidance'; his moral probity is immediately threatened.

One may conclude this argument by stating in summary that there is a strong body of opinion which holds the view that it is morally indefensible, even if legally permissible, for the Chartered Accountant to be party to involved and devious schemes aimed at avoiding taxes which might otherwise be properly payable.

It is apparent from what my colleague has said that the Chartered Accountant is faced with a battery of precedent, parliamentary, judicial, ministerial and from the CIR himself discouraging him

from abusing the provisions of the Income Tax Act for the sake of his clients. What should be his response?

For a start, there is no doubt that tax evasion is a crime and that no one, least of all a Registered Accountant and Auditor, should ever countenance its commission. But what is it that these critics want of the tax consultant in addition to not committing this crime?

The income tax law is the product of legislation and case law; it contains no common law element. In short, it is the artificial creation of Parliament as interpreted by the courts. The legislation simply is what stands in the statute. There is no room for equity; equally there is no right to apply a degree of harshness not provided for by the statute.

Several learned judges have expressed themselves on this subject: for example, Lord Cairns has stated the universal rule of fiscal interpretation thus: (18)

'If a person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the law the case might otherwise appear to be. In other words, if there be an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute.'

This dictum has repeatedly been referred to with approval by our courts (for example CIR v George Forest Timber Co Ltd 1924 AD 516, 1 SATC 20, and CIR v Delfos 1933 AD 242, 6 SATC 92).

For example, Mr Justice Rowlatt said: (Cape Brandy Syndicate v IRC (1921) 1 KB 64, 12 TC 358)

'... in taxation you have to look simply at what is clearly said. There is no room for any intendment; there is no presumption as to a tax; you read nothing in; you imply nothing; but you look fairly at what is said and at what is said clearly and that is the tax.'

It is apparent from the dicta of these learned judges that the tax law is what the Act says it is; it is then up to the taxpayer, aided if necessary by an expert in the field, to read the Act and arrange his affairs accordingly. Can the taxpayer by any stretch of the imagination be deemed blameworthy or lacking in community responsibility if he tailors his financial decisions to suit the provisions of the Act?

Perhaps the critics would have the tax consultant say to his client 'There are two ways of carrying out your proposed transaction: one will save you a moderate amount of tax and the other a substantial amount. Both are quite legal, but I suggest you adopt the first method because I think that is what Parliament had in mind and you will be helping to ease the burden of your fellow taxpayers if you follow my suggestion!

How long does the Minister imagine such a tax consultant would remain in business? Such an attitude is surely unrealistic in the extreme.

Now, what is the true position? It may be strongly argued that there is no such thing as 'avoision'; that it is a figment of the imagination of Ministers and Commissioners who take it ill when taxpayers are more astute than they are.

Furthermore, it is a useful political weapon. The Minister whose budgets cause the tax, assisted by his chief collector, posture before the public and imply that it is not they who are stripping the poor working man of his few spare cents by punitive taxes; rather it is the wealthy taxpayer aided by his tax consultant who denies the fiscus its pound of flesh, thus throwing an unfair burden on the unfortunate mass of the population too honest, too ignorant, or too poor to engage the services of the tax-fiddling consultant. With all due respect, this is arrant nonsense.

Income tax is the only game in the world where one of the participants - the Minister or his agent the CIR - not only makes the rules but may change them when they do not suit him. Since the first Income Tax Act was promulgated in 1914, taxpayers have sought to interpret its provisions in their favour, while the CIR has sought the opposite. Where a loophole has appeared, caused either by obviously poor drafting or by the courts applying the principles of construction referred to earlier, the CIR has had to decide whether such loopholes are major or not. If so, the Minister has

closed them by amending the Act. In this way we have built up a large body of case law, and an Act which with all its shortcomings is basically a sound piece of legislation. Thus, the search for inadequacies in the Act is part of the very fabric of the development of the legislation. There is nothing reprehensible about it.

Equally it is the duty of the Minister to protect his tax base from erosion caused, not by unscrupulous tax consultants, but by his inadequate draftsmen and the increased sophistication of business methods. He is supposed to change the Act when it becomes necessary.

To speak then, of tax consultants as if their sole purpose were to come as close to evasion as they possibly could in arranging the tax affairs of their clients gravely misstates the position and does a disservice to the accounting profession.

Bearing these remarks in mind it is appropriate to address the three aspects of so-called 'tax avoision' which my colleague has identified, namely:

1. Shifting the tax burden;
2. introducing form to obscure substance;
3. compromising the position of the Chartered Accountant as umpire of the business world.

1. With regard to shifting the burden from the wealthy to the poor, it may surely be argued that:

- . the 'poor' person is probably more aptly defined as the average salary earner with no scope in the composition of his income to engage in any fruitful tax planning. It is only the entrepreneur, the developer, the manufacturer, the corporate taxpayer, who engages in the kind of activities which lend themselves to tax planning. The relationship is thus not so much between rich and poor as between salary earner and entrepreneurs.
- . Now, the various sections of the Income Tax Act used in tax planning are directed at this entrepreneurial class of taxpayer and not at the man in the street. The latter simply does not engage in export activities, build factories, lease manufacturing assets, and own dormant companies, which activities constitute the main areas of tax planning. It is therefore misleading to suggest that those taxpayers who use the available sections of the Act are stealing a march on the greater body of taxpayers; it is just that the legislature has given them tax planning opportunities for which there are no equivalents available to salary earners;
- . therefore it is not the users of the Act who are to blame for its shortcomings; rather should the draftsmen of the legislation be criticised for leaving loopholes by their carelessness;
- . and when a new business practice becomes prevalent which necessitates amendments to the Act in order to protect the tax base, it is the duty of the lawmakers to react promptly.

It is, therefore, incorrect to suggest that the tax adviser is responsible for the imbalance which certainly exists at present between the salary earner and the business entity.

In the example involving the pension fund described by my colleague, tax has certainly been saved. Incidentally, this method has recently been terminated by appropriate amendments to the Income Tax Act.(19) However, has the Act been abused? In an artificial creation such as income tax legislation, moral judgments have no place, because they are impossible to make with any consistency. No one can say where the point is reached where avoidance becomes so-called 'avoision'. The statute states that pension funds are not liable for tax. In using this fact, the tax planner is strengthening the ability of the pension fund to perform its primary function by enriching it in addition to assisting his client. The fact that a tax imbalance occurs is the fault of the legislation. Let us consider a simpler case: a man is offered a part-time position after hours. His wife is equally able to perform the task. If he accepts the post, his entire earnings will be taxable; if she does, the first R1 600 will be tax-free. (20) If they embark on the latter course, is that unfair? Are they to blame for the resultant loss of revenue to the fiscus?

It is quite impossible to define 'fairness' in the interpretation of tax legislation. Fairness is a subjective term which is totally absent in tax law.

2. Form v substance.

Has form been introduced merely to obscure substance, or has a section of the Act been intelligently used? It is perfectly feasible for a pension fund to lease land and own property. The transactions involved are real and realistic. This is no sham.

Totally fake transactions have no place in tax advice; courts take a harsh line with them, and rightly so.

However, to categorise every ingenious, legal plan as being a matter of form over substance merely because it is not entirely simple is quite unreasonable.

3. Umpire.

It may justifiably be argued that the view of the Chartered Accountant as the umpire of the business world does not extend to all his activities. When he is advising a client on tax planning matters, he is allied to the client in an adversary position vis à vis the revenue authorities. No one could seriously argue otherwise. Consequently it is not his function to mediate or to strike a balance between the two parties concerned but to help his client within the constraints of acceptable business practice. This is quite different from his role as reporter and attestor where his independence is paramount. His conduct as tax adviser in no way violates his position as impartial observer in his other functions.

The profession is acutely aware of its ethical responsibilities in tax planning; twice in recent years the S A Institute of Chartered Accountants has issued circulars warning against malpractices which would amount to unethical conduct. (21)

In all the circumstances, the Chartered Accountant, in his function as tax consultant, performs a service which is necessary, desirable, useful and unexceptionable. He performs it within the context of the ethical requirements of the profession, and it is up to him to stay within those ethical limits.

Mr Vice-Chancellor, it is clear then, that the Chartered Accountant today is faced with controversial issues as regards his ethical conduct. In the first issue discussed this evening, within the very ranks of his profession there is uncertainty and division on the subject of his right to project his abilities to the market. On the second issue, he is called on to perform a necessary advisory function often in the face of unfair suspicion from authoritative sources.

Be assured that the students of the Department of Accounting at Rhodes University will continue to be made aware of the ethical burdens they accept when they enter their chosen profession. Be assured, too, that they will be always conscious of the need to conduct themselves in terms of the spirit, and not merely the letter, of the ethical requirements of the profession. Thus armed, they will be able confidently to fill their places in an honourable profession.

REFERENCES AND NOTES

- (1) Hearne, J.J. and Beckingsdale, C. Marketing Accounting Services. The Chartered Accountant in Australia, vol. 50, Feb. 1980, page 16.
- (2) Chiltern, C.S. Competition, professionalism and the public interest. The Journal of Accountancy, vol. 145, Jan. 1980, page 41.
- (3) Chiltern, C.S. Competition, professionalism and the public interest. The Journal of Accountancy, vol. 145, Jan. 1980, page 41.
- (4) Shandling, M. Advertising in the Accounting Profession - U.S.A. style. The South African Chartered Accountant, vol. 15, Dec. 1979, page 484.
- (5) Levitt, W. The proads are coming. The South African Chartered Accountant, vol. 17, July 1981, page 346.
- (6) Block, M. Any limits to "Marketing" C.P.A. Services. The C.P.A. Journal, vol. 50, August 1980, pages 35 and 36.
- (7) Stettler, H.F. Auditing Principles. 4th Edition, New Jersey, Prentice Hall Inc., 1977, page 25.
- (8) Hearne, J.J. and Beckingsdale, C. Marketing and Accounting Services. The Chartered Accountant in Australia, vol. 50, Feb. 1980, page 16.
- (9) Hearne, J.J. and Beckingsdale, C. Marketing and Accounting Services. The Chartered Accountant in Australia, vol. 50, Feb. 1980, page 16.
- (10) Lowry, M.K. and Craig, C.A. Should C.P.A.s advertise? The Journal of Accountancy, vol. 141, April 1976, page 64.
- (11) Stettler, H.F. Auditing Principles. 4th Edition, New Jersey, Prentice Hall Inc., 1977, page 22.
- (12) Block, M. Any limits to "Marketing" C.P.A. Services. The C.P.A. Journal, vol. 50, August 1980, pages 35 and 36.

- (13) Ostlund, A.C. Advertising - in the public interest? The Journal of Accountancy, vol. 145, Jan 1978, page 60.
- (14) Disciplinary Rules of P.A.A.B.; Rule 2(1)(f).
- (15) 51 TLR 467, 19 TC 490.
- (16) COT v Ferera, 1976 (2) SA 653 (RAD).
- (17) The Australian Accountant, June 1984.
- (18) Partington v Attorney General 21 LT 370.
- (19) Income Tax Act No. 58 of 1962, at section 11(g)(vi).
- (20) Income Tax Act No. 58 of 1962, at section 20A.
- (21) S.A. Institute of Chartered Accountants; circulars 7/83 and 4/85.