

The Irish experience of tax exile: a modern-day anachronism?

By

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ABSTRACT

This paper examines the invocation of tax exile status in contemporary Ireland by wealthy individuals who have exploited generous provisions designed in (and appropriate to) another epoch. It considers the extent to which this practice subverts the social contract, and basic principles of fairness. It explores the damage done by the inappropriate invocation of tax exile status, in terms of Exchequer loss, and a lowering of the esteem in which the tax system, in general, is held.

Given Ireland's current, unprecedented economic difficulties, the paper suggests that it is necessary to find some method of dealing with the issue of tax exile. It considers a raft of potential solutions, such as legislative change, an increase in the extent to which tax exiles are monitored by Revenue officials, and the forming of an international coalition of nations to jointly pursue the wealthiest evaders. The paper concludes, however, that most of the 'conventional' solutions – unless practised by one of the major hegemonics – would be unlikely to have any practical effect.

Therefore, the most appropriate method for Ireland to deal with the abuse of 'tax exile' is to effect a change in culture, and to harness the power of social disapproval to ensure pariah status for wealthy individuals who will otherwise continue to abuse the tax code and subvert the social contract with impunity.

Key words: Tax Exile, Ireland, Tax Residence, Social Contract, Horizontal Equity, Vertical Equity Social Norms, Cultural Shifts, Moral Disapproval

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1: Introduction:

For centuries, people have been leaving their homes in Ireland and re-locating on faraway shores. Traditionally, much of such emigration has been a last resort – ships and aeroplanes full of persons reluctant to leave their homes and families, but desperate to escape massive unemployment, grinding poverty, or even famine. Popular culture is replete with examples of expatriate lament, of the sense of dislocation felt by ordinary people who yearned to return to the land of their birth and to be re-united with friends and families.

The first verse of William Percy French's *Mountains of Mourne* exemplifies this sense of expatriate longing for home and discontent with regard to current location: "*Oh, Mary, this London's a wonderful sight/With people here working by day and by night/They don't sow potatoes, nor barley nor wheat/But there's gangs of them digging for gold in the streets/But for all that I found there I might as well be/Where the Mountains of Mourne sweep down to the sea ...*"²

Another negative view of the emigration experience is depicted by a traditional song, "*Paddy's Lamentation*", which advises would-be emigrants in stark terms to avoid America, ending on the plaintive note: "...*I wish I was at home in dear old Dublin ...*"³

Although, in more modern times – in particular, during the Celtic Tiger era – the financial/economic imperative to leave these shores all-but disappeared, certain individuals have continued to leave Ireland, even if in some cases these departures would appear to be more notional than real.⁴ This time, however, far from departing as a last resort, a large number of individuals

² This song was written in 1896 and describes French's life experiences and his own particular perspective on the Irish diaspora.

³ Although the writer of this song is unknown, it was evidently written by an Irishman who had travelled to America during the early 1860s and had found himself embroiled in the American Civil War, with no prospect of a return to his homeland.

⁴ This is a reference to the practice of leaving the jurisdiction just before midnight in order that one's presence in Ireland for the rest of that day was not counted towards the 183-day annual maximum stay for a "non-resident" person. This loophole – the so-called 'Cinderella rule' - has finally been closed off in the Finance Act (No. 2) 2008.

have actively chosen to walk away from this country - becoming, in popular parlance "tax exiles" – in order to avoid Irish taxes being levied on their income and/or their gains. In many ways, therefore, the trend has come full circle. In modern times, as before, people still leave this country. The difference is that today, some do so not, as would previously have been the case, as desperate souls in search of refuge, but instead for reasons of expedience and in a way that undermines the shared sense of social solidarity.

Not a particularly edifying spectacle, the abuse of tax exile status is a problem Irish policy-makers need to solve, especially given Ireland's present straightened economic circumstances. Of course, some tax exiles are by no means super-rich, and are non-resident for genuine reasons, arising out of personal circumstances. Typical examples would be those who work for a large part of the year in another jurisdiction, and any criticisms levelled in this paper at those who abuse tax exile status are most emphatically not directed at them. Others may have left Irish shores as youths, seeking and finding their fortune elsewhere but retaining some Irish interests which they now strive to generously support. These genuine cases apart, whilst the numbers of taxpayers claiming tax exile status might - in numerical terms - only represent a tiny fraction of Ireland's two million taxpayers, they tend almost invariably to be among the wealthiest. To put the issue into some kind of meaningful context, the Irish Government has recently been embroiled in a controversy surrounding the withdrawal of just €6 million per annum to fund a national cervical cancer-screening programme for pre-teenage girls. Yet, it is likely that a solitary one of the thousands of wealthy Irish tax exiles could (in effect) single-handedly fund the screening programme by voluntarily coming back within the domestic tax net.

Essentially, an individual's liability to pay tax in Ireland is determined by a series of rules. These rules set out whether a taxpayer is resident, ordinarily resident, and/or domiciled in Ireland and the tax liability consequences of such a determination. Over the past decade, in particular, many Irish citizens of substantial means have exploited the residence provisions of the tax code,

becoming non-resident for tax purposes by spending less than 183 midnights per annum in Ireland, and thus escaping the charge to Income Tax in a manner never intended by the legislature. In 2007, for example, 5,803 people declared themselves to be non-resident for tax purposes on their tax returns,⁵a practice that has caused significant loss to the Irish Exchequer (irrespective of whether they have paid tax in other jurisdictions), particularly given that some 440 of these exiles are defined as high worth individuals.

From a policy perspective, serious thought needs to be given as to whether this anachronistic practice of tax exile should be allowed to continue in its present form, or whether it could realistically be constrained in some way. In tax terms, the most basic principles of fairness - that all persons should pay their share of tax – are undermined by the concept of tax exile as practiced by some of Ireland’s wealthiest individuals. This paper will consider how best to tackle the issue of tax exile, bearing in mind that – in a globalized world in which freedom of movement is a *sine qua non* – there are limits to the practical effects of any measures that Ireland could potentially take in an attempt to stamp out or restrict the practice. Accordingly, we will explore the role that culture can potentially play in deterring the inappropriate invocation of tax exile status. The paper will examine changes in aspects of society, behaviour, culture and expectations over a period of time that have shaped attitudes towards tax. It will be argued that, without necessarily effecting a formal change in a nation’s laws, progress can equally be made by changing common culture or values. The basic point made will be that the boundary between what is deemed acceptable and not acceptable changes considerably over time. If a consensus can be reached on where the ‘line’ is, most taxpayers will be unwilling to transgress this boundary. The paper will, therefore, chart changes in (and the evolution of) culture, and how social norms have evolved in a tax context. Whilst this paper adopts a particularly Irish focus, the issue of tax exiles and the problems that it causes are by no means confined to Ireland. The Irish experience of tax exile, in many ways, represents the broader issue in microcosm and is symptomatic of a much

⁵ Kehoe, I. (2009) “Tax exiles feel the heat”, *Sunday Business Post*, March 29 2009; <http://archives.tcm.ie/businesspost/2009/03/29/story40646.asp> as at October 1 2009.

wider issue. Accordingly, both the issues raised by tax exile and the proposed solutions are of a wider application.

The remainder of this paper is set out as follows: Section two will trace the historical roots of residency rules in the UK and Irish tax codes. It will also explore the original framework for these residency rules, and will consider the societal and technological conditions that once underpinned them. It will briefly set out Ireland's present residency rules for tax purposes. Section three will go on to discuss the social contract, the moral obligation of taxpayers to fund the State and the whole issue of equity or fairness within the tax system. It will also examine how this contract is being undermined, by introducing the problem of tax exile. It will consider the implications of this practice for the Exchequer and, by extension, wider society. Section four will discuss conventional methods of tackling tax exile, and will consider whether, for example, a change in the relevant legislation would be appropriate or effective, and whether Ireland could assemble an international coalition of nations to collectively tackle tax exiles and require that they pay a fair share of tax in some jurisdiction to prevent a complete evasion of responsibility. Section five will discuss whether, in light of reservations about other methods of tackling the problem, a change in the culture of all relevant parties – be they taxpayers, practitioners, administrators or the judiciary - will ultimately be required instead. Section six contains the conclusion.

2: Residency rules in the UK and Ireland

Tax exiles are persons who have ceased to reside in Ireland for tax purposes but still complete an Irish tax return because they are in receipt of Irish-source income. Such persons are largely outside of the charge to tax in Ireland.⁶ Before proceeding any further, the context within which the rules on residence were originally drawn up needs to be examined. It should be noted that this basic principle - that the charge to tax arises as a function of residence - dates from the introduction (in the UK) of income tax in 1799.⁷

2.1 *The UK's income tax experiment of 1799*

Up to and including the eighteenth century, governments exercised nothing resembling absolute power in matters of taxation policy. To a degree that would be unimaginable in modern times, the State was circumscribed in the collection of revenue. For example, when first mooted, the very concept of an income tax was described as a “*daring innovation*”.⁸ O'Brien describes a “... *deep antipathy found among all classes of society towards the payment of taxes,*” coupled with a “... *low quality of administrations at their disposal for the enforcement of the law,*” which rendered the levying and collection of taxes a very fraught and often fruitless task.⁹ Many citizens would have viewed the very concept of a tax upon income as ‘*abhorrent to a free constitution*’.¹⁰ Such a tax would, it was feared, lead to the invasion of liberty, the prying by the Crown into the personal affairs of the subject establishing “...*an inquisition which would be generally invidious*.”¹¹ Some observers

⁶ As will be seen in later paragraphs, Irish-domiciled taxpayers who are neither resident nor ordinarily resident (a status that is achieved by residing outside of the jurisdiction for the past three tax years) are taxable in the State only on Irish-source income. The same person, if resident in Ireland, would be taxable on worldwide income.

⁷ Whig Prime Minister, William Gladstone, would only extend the concept of income tax to Ireland half a century later, in 1853.

⁸ *The Morning Chronicle*, 3 November 1798. As to how such opposition was overcome in order to institute an income tax, O'Brien argues that “...*developments in inheritance taxation, together with the Triple Assessment of 1798, paved the way for the most radical of all wartime alterations to the kingdom's fiscal base – the first income tax of 1799.*” See O'Brien, P.K. (2007) “*The Triumph and Denouement of the British Fiscal State: Taxation For the Wars against Revolutionary and Napoleonic France, 1793-1815*”, London School of Economics, Economic History Department Working Papers No. 99/07, at p. 11.

⁹ See O'Brien, P.K. (2007) “*The Triumph and Denouement of the British Fiscal State: Taxation For the Wars against Revolutionary and Napoleonic France, 1793-1815*”, London School of Economics, Economic History Department Working Papers No. 99/07, at p. 2.

¹⁰ Sinclair, J. (1802-04) *History of the public revenue of the British Empire*, 3 vols, pp. 232-48.

¹¹ Pitt in Memorandum of 11 October 1797, on the possibility of a tax on income or property.

stressed possible deleterious consequences of any such tax upon incentives, investment and prices. Others simply lamented its (assumed) incidence upon particular classes invariably described as the '*backbone of the nation*.'¹²

Whilst an income tax was successfully introduced for the first time in the UK in 1799,¹³ its introduction was on the express proviso that the tax would help to meet the cost of the Napoleonic Wars.¹⁴ Certainly, O'Brien confirms that for generations before and after, any kind of general tax on incomes continued to be "*repugnant to the kingdom's wealthy elites*."¹⁵ In the circumstances, however, the tax commanded "*patriotic wartime assent*".¹⁶

The income tax was imposed upon all income arising from property in Great Britain, whether or not the person was resident in the UK, and on the totality of the incomes of those defined as being resident there. By 1800, the definition of residence had been tightened so that those who spent six months of a given year in Britain, even if their presence was merely for a temporary

¹² Pope, S., 1799. *A measure; productive of substantial benefits*, Goldsmith's Collection, University of London Library.

¹³ On 3 December 1798, Pitt introduced proposals for an income tax in a Budget speech of some two and a half hours in length - the speech was described by the émigré Mallet du Pan as "*a complete course in political economy*"; cited in Rosebury, A. (1891) *Life of Pitt*, London: MacMillan, at p.153 Pitt's Bill contained 124 clauses but the tenor was clear - it replaced the old system of Triple Assessment (itself only introduced the previous year in the Aid and Contribution Act of 1798) with an income tax. The income tax was structured so that there were: Exemptions for those on incomes of less than £60 per annum; rates of between 5% and 9% applied to those on incomes of £60-£200 per annum; a 10% rate applied to those on incomes of greater than £200 per annum. The Bill passed through Parliament by 183 votes to 17 and became law (in the Duties on Income Act 1799 39 Geo III c.13) five weeks after it was introduced, on 9 January 1799.

¹⁴ O'Brien explains that "*...expenditures on the forces of the Crown had to be financed and the patriotic (or frightened) upper classes were expected to make sacrifices for the security of the realm*"; see O'Brien, P.K. (2007) "*The Triumph and Denouement of the British Fiscal State: Taxation For the Wars against Revolutionary and Napoleonic France, 1793-1815*", London School of Economics, Economic History Department Working Papers No. 99/07, at p. 12. As Lord Auckland remarked, the successful piloting of the tax through Parliament was really only '*... accomplished by the union of opinions respecting the nature of French hostility*'; see Auckland, Lord, (1799) *Substance of a speech*, Goldsmith's Collection, University of London Library, at p. 30.

¹⁵ The strength of this opposition to income tax became manifest during successful campaigns for its immediate repeal at the Peace of Amiens in 1802, and again after the final victory over France in 1816. House of Commons Journal (57) 250, 251, 273, 276, 286, 290, 296-97, 303; Parliamentary History (36) 446-47. See also O'Brien, P.K. (2007) "*The Triumph and Denouement of the British Fiscal State: Taxation For the Wars against Revolutionary and Napoleonic France, 1793-1815*", London School of Economics, Economic History Department Working Papers No. 99/07, at p. 11.

¹⁶ Ehrman, J (1996) "*The Younger Pitt: The consuming struggle*", London: Constable and Robinson Ltd, at p. 262.

purpose, were treated as resident.¹⁷ Given that the Irish and British legal systems are so closely associated, this six-month or 183-day rule was also adopted in Ireland and continues to be the cut-off point for establishing the question of tax residence today.

2.2 *Original framework for residence rules: An era of primitive international travel*

We have seen that present residence rules essentially date from 1800,¹⁸ when it was first conceived that a person's presence in a taxing jurisdiction for six months - or 183 days - of any particular year was tantamount to being resident, and thus within the charge to tax. Of course, at the beginning of the nineteenth century, international travel was a necessarily primitive affair. This was an era in which most people were born, lived their lives and died within a small and quite restricted radius, and international travel was therefore a rather epic affair for the few who were fortunate enough to be able to experience it. The locomotive engine had yet to be invented, let alone the aeroplane. In fact, it would be 109 years before the British Channel would be successfully crossed by air.¹⁹

In his popular classic *Around the World in Eighty Days*, published in 1873, French writer Jules Verne neatly encapsulated the difficulties of international travel that pertained, even during late Victorian times. In Verne's book, the principal character, Phileas Fogg confounds his sceptical friends at the Reform Club in London and (successfully) wagers twenty thousand pounds that he can circumnavigate the globe in "eighty days or less."²⁰ In contemporary times of course, the same journey could be completed in less than forty-eight hours!

¹⁷ Duties on Income Act 1800 39 Geo III c.49/c.96.

¹⁸ *Ibid.*

¹⁹ It was not until 25 July 1909 that Frenchman Louis Bleriot successfully flew from Les Baraques in France to Dover in England, a 46 minute flight, becoming the first man to fly an aeroplane across the English Channel (and, in the process, winning the £1,000 reward offered by the *Daily Mail* for the first person to do so. See Ogilvy, D. (1991) *From Bleriot to Spitfire*, London: Airline Publishing.

²⁰ See Verne, J (1873) *Around the World in Eighty Days*, London: Cox & Wyman, at p.24.

When the residence rules were first conceived, therefore, there was, quite evidently, no possibility that an individual - no matter how resourceful or intrepid - could simply enter and exit particular countries on particular days (or times of the day) in order to exploit the rules and limit exposure to tax. Given the developments in technology and in modes of transportation in the two centuries since the residence rules were first introduced, the ease with which international travel can be conducted has grown immeasurably. Accordingly, there has been a huge growth in the mobility not only of capital and investment, but also of private individuals. One's country of residence is now almost a lifestyle choice, where once it was almost invariably an accident of birth.

2.3 Current Irish residence rules

Irish-resident individuals who are both ordinarily resident (a status that is achieved by residing in a jurisdiction for three successive tax years) and domiciled (having a permanent home and intending to reside in Ireland) are liable to tax on their worldwide income and gains, wherever these arise. Irish domiciled taxpayers who are neither resident nor ordinarily resident are taxable in the State only on Irish-source income. The same person, if resident in Ireland, would be taxable on worldwide income. In other words, taxpayers who are not resident in Ireland are only obliged to pay Irish tax on Irish-sourced income such as employment and rental income. This may be offset against their foreign tax liability in their country of tax residence depending on the provisions of Ireland's Double Tax Treaty with that country. Crucially, taxpayers who are not resident in Ireland do not have to pay Irish tax on non-Irish sourced income.

In a direct echo of the UK legislation, a taxpayer is deemed to be resident for tax purposes in Ireland if s/he spends 183 or more days per annum in this jurisdiction, which equates to just over six months of the year.²¹ On its face, this would seem to be a reasonable threshold to employ. An issue soon arose, however, in respect of how to decide whether a taxpayer had spent the

²¹ The 183-day rule is set out in Section 819(1) Taxes Consolidation Act 1997.

day in the jurisdiction, especially as international travel become more frequent, and it became possible to spend parts of a day in various different jurisdictions. In light of concerns expressed by a number of politicians,²² it was deemed necessary – in the Finance Act of 1994 – to set out a taxpayer would only considered to have spent a day in Ireland if s/he was present in the State at midnight.²³ However, as will be explained in later paragraphs, this provision was widely abused by some of Ireland's wealthiest individuals, until - following concerted public pressure – it was finally removed by Section 15 of Finance (No.2) Act 2008, which inserted a new subsection (4) into Section 819 TCA. The new Section 819(4)(b) provides that: “...for the tax year 2009 and subsequent tax years, an individual shall be deemed to be present in the State for a day if he or she is present in the State at any time during that day.”

3: The social contract, fairness and the problem of tax exile

Whereas the initial rationale for raising taxes was to fund participation in overseas conflicts, there has, over the years, been a subtle but discernible shift in emphasis.²⁴ Nowadays, the costs of waging wars notwithstanding, taxes are now generally levied to pay for public services. This is especially so given that, in the aftermath of the Second World War, many nations committed to creating a Welfare State, which, by its very nature required significant funding on an ongoing basis. Therefore, over the last fifty years of relative peace in Europe, the contemporary justification for levying taxes on individuals has been altered: taxes are now viewed as a method of funding essential public services, an acknowledgement of the reality that the capacity

²² For example, Deputy Ivan Yates expressed concern that if a person came to the State at 11 p.m. and left the following day at 6 a.m. the person would be treated as being in the State for 2 days. For more on this topic, the reader should consult *Parliamentary Debates*, Thursday May 12 1994 <http://historical-debates.oireachtas.ie/D/0442/D.0442.199405120055.html> as at October 1 2009.

²³ Specifically, Section 819 (4) Taxes Consolidation Act 1997 (as inserted by Section 150 Finance Act 1994) stated that: “An individual shall be deemed to be present in the State for a day if the individual is present in the State at the end of the day”. It should be noted, however, that the Revenue administrative practice prior to the 1994 Finance Act was based on the number of nights spent in the State and the legislative amendment merely confirmed this procedure.

²⁴ This shift of emphasis is more applicable to the UK than Ireland, as Ireland has long maintained a strict policy of neutrality and did not participate in either of the two world wars that were waged during the twentieth century. In fact, Irish neutrality is the subject of a constitutional guarantee, contained in Article 28.3 of the Constitution of Ireland, which states that “War shall not be declared and the state shall not participate in any war save with the assent of Dail Eireann.”

of a state to act and to realize its policy goals depends, more than anything else, upon its financial resources.²⁵

This is not a wholly new idea. Indeed, from the seventeenth century onwards, philosophers have been devoting attention to the subject of taxation and the justification for levying taxes on the citizenry. A number of influential philosophers conceived of a 'social contract' evolving out of a pragmatic self-interest,²⁶ under which the individual has a duty to pay tax to the State in return for the protection afforded by the apparatus of the State.²⁷

UK philosopher, John Locke is perhaps most associated with the concept of the social contract. Locke argued that the relationship between state and citizens took the form of a contract, whereby the citizens agreed to surrender certain freedoms they enjoyed under the state of nature in exchange for the order and protection that a state could provide. However, if the state should overstep its boundaries and begin to exercise arbitrary power, it would forfeit its side of the contract and thus, the social contract would become void (whereupon the citizens not only have the right to overthrow the state, but are indeed morally compelled to revolt and replace it).²⁸ The social contract concept quickly gained currency and continues to be used today, notably – in Ireland, at least - by the former Chairman of the Irish Revenue Commissioners, Mr. Frank Daly.²⁹

²⁵ Skocpol, T 'Bringing the state back in: strategies of analysis in current research', in P.B. Evans, D. Rueschmeyer and T. Skocpol (eds.), *Bringing the State Back In*, Cambridge: 1985, pp. 16-18.

²⁶ Thomas Hobbes first proposed this idea in *Leviathan* in 1651, which concerns the structure of society and legitimate government and is still regarded as one of the earliest and most influential examples of social contract theory. For more, please see Hobbes, T. (1651) *Leviathan, The Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil*. London: Crouke.

²⁷ This idea was set out at length in Jean-Jacques Rousseau's famous tract, *The Social Contract, or Principles of Political Right*. See Rousseau, J.J. (1762) *Du contrat social ou Principes du droit politique*, [translated as *The Social Contract, Or Principles of Political Right*] Amsterdam: M. M. Rey.

²⁸ Locke, J. (1690) *Two Treatises of Government: In the Former, The False Principles and Foundation of Sir Robert Filmer, And His Followers, are Detected and Overthrown. The Latter is an Essay concerning The True Original, Extent, and End of Civil-Government*, London: Awnsham Churchill.

²⁹ See Daly, F. (2006) "Freedom: Licence or Liberty? Engaging with a transforming Ireland", an address given to the 9th Annual Ceifin Community Conference, 8th November 2006; <http://www.revenue.ie/en/press/speeches/tax-community.html> as at October 1 2009. On the 'social contract' concept, a former President of the Irish Taxation Institute recently wrote to a national newspaper in which he underlined "...the civic duty of all citizens to pay their fair share of taxes". See Hussey, F. (2004) "Tax advisors and tax evasion", *Irish Times*, 31 July 2004 <http://www.irishtimes.com/newspaper/letters/2004/0731/1091051847814.html> as at October 1 2009.

In general terms, the social contract seems now to refer to the contemporary expectation that the State will provide certain guaranteed minimum benefits “*from the cradle to the grave*”,³⁰ in practically every area of its citizens lives. This, in turn, requires a gargantuan state apparatus in respect of which policy-makers are often loath to make criticisms or suggest reforms.³¹ Thus, relatively high levels of taxation have become almost inevitable. Unfortunately, as Daly argues: “... *there remains a very limited appreciation*” that the rights and privileges that we enjoy as citizens - such as services, security, infrastructure and, of course, democratic representation, “... *are dependent on taxation.*”³²

Daly suggests that the payment of taxes is “...*an essential part of good citizenship*” and explicitly invokes the social contract concept. He notes that “*all*” democracies operate on the basis of “*this type of ‘social contract’*” and that citizens “*enjoy rights – such as security, proper legal process, access to education, health care and other services*” – and, in return, “*have duties*”, which include “*providing the resources to ensure such rights*”.³³ The social contract, this paper argues, connotes not only adherence to the letter of the rules (or laws) but also to their underlying spirit.

³⁰ This phrase will forever be associated with Sir William Beveridge whose eponymous *Report*, published in 1942 on the manner in which Britain should be rebuilt after the Second World War, recommended that the government should find ways of fighting the five ‘*Giant Evil*’ of ‘*Want, Disease, Ignorance, Squalor and Idleness*’. When, in 1945, the Labour Party routed Churchill’s Conservatives in the General Election, the new Prime Minister, Clem Attlee, announced he would introduce the welfare state outlined in the Beveridge Report. This included the establishment of a National Health Service in 1948 with free medical treatment for all. A national system of benefits was also introduced to provide ‘social security’ so that the population would be protected from the ‘*cradle to the grave*’. Beveridge, W. (1942) *Social Insurance and Allied Services*, Report by Sir William Beveridge, Presented to Parliament by Command of His Majesty, November 1942, HMSO, CMND 6404.

³¹ For example, more than thirty years on, William Hague, a Conservative politician in the UK, is still remembered for a speech to his party Conference in which he called for politicians to “*roll back the frontiers of the State*”; see Evans, S. (2008) “*Consigning its Past to History? David Cameron and the Conservative Party*”, *Parliam Aff*, Vol. 61, No. 2. (1 April 2008), pp. 291-314.

³² See Daly, F. (2004) ‘*Nothing to fear, nowhere to hide,*’ Speech delivered by Mr. Daly at the Small Firms Association Annual Conference, Dublin Castle, 7 September 2004; <http://www.payeanytime.ie/en/press/speeches/Presentation-SFA-annual-conference-dublin-castle-sept04.html> as at October 1 2009

³³ *Ibid.*

In the final analysis, as Daly underlines, taxation is not levied for the benefit of Revenue, or, indeed the Government “...it's ultimately for the people, for the community”. The vast majority of people - Daly contends - act by reference to principles or standards not defined in any Act of the Oireachtas, but according to “...a sense of social and civic responsibility and from the “norms” of the community of which they are part”. He argues that the actions of most people are tempered by a regard for “...an unwritten moral code which is influenced by these wider principles” as opposed to considerations of mere personal gain or advantage.³⁴

For many, the underlying rationale for the duty of the citizen to pay taxes in order to fund the State is clearly understood and – in some cases - positively welcomed. As famous US jurist, Justice Oliver Wendell Holmes, Jr., opined: “I like paying taxes. With them I buy civilization.”³⁵

This concept of the social contract - under which individuals, each paying their “fair” share, fund the State, which, in turn, protects them - is, of course, inextricably linked with notions of fairness. Although an inherently nebulous concept, fairness is nonetheless crucial to our discussion. It is no coincidence, surely, that the very first of Adam Smith's *Canons of Taxation*³⁶ relates to equity, or fairness, and the sense that, ideally, the tax system should bear equally, so that it does not confer an advantage on any particular individual. In this context, Daly argues that most Irish people have “an inbuilt sense” of fair play, which underlines the need for the tax system to be both “...fair, and perceived to be fair”.³⁷

³⁴ Daly, F. (2006) “Freedom: Licence or Liberty? Engaging with a transforming Ireland”, an address given to the the 9th Annual Ceifin Community Conference, 8th November 2006; <http://www.revenue.ie/en/press/speeches/tax-community.html> as at October 1 2009.

³⁵ See Frankfurter, F. (1961) *Mr. Justice Holmes and the Supreme Court*, Massachusetts: Harvard University Press, at p. 71.

³⁶ For the purposes of completeness, the other canons are as follows: 1) Taxation should bear as lightly as possible on production; 2) It should be easy and cheap to collect, and fall directly on the ultimate payer; and 3) It should be certain. See Smith, A. (1776) *An Inquiry into the Nature and Causes of the Wealth of Nations*, London: Methuen and Co. Ltd.

³⁷ Daly, F. (2006) “Freedom: Licence or Liberty? Engaging with a transforming Ireland”, an address given by Mr. Daly to the 9th Annual Ceifin Community Conference, 8th November 2006; <http://www.revenue.ie/en/press/speeches/tax-community.html> as at October 1 2009.

To all intents and purposes, there is a consensus that the tax system should be characterized by *horizontal* equity, so that the same treatment is given to people in identical situations. For example, if two people each earn €35,000 per annum, then, in theory, if their circumstances are roughly equal,³⁸ both should pay the same amount of income tax. Horizontal equity attempts to prevent discrimination on such grounds as race and gender.

By the same token, it is accepted that the tax system should also reflect *vertical* equity, so that people with higher incomes should pay more tax, in line with that conventional standard of tax fairness: “ability to pay”. Vertical equity seeks to tax in a proportional or progressive way – individuals with a greater ability to pay should pay more tax. In Ireland, as in most civilized countries, the taxation system is progressive, and seeks a higher contribution from those who can afford to contribute more, so that people with higher incomes assume a greater part of the tax burden.

An alternative principle – that of “benefits received” – seeks to achieve fairness by levying taxes according to the value of the benefits people have received. Although one could argue that a young, healthy, childless, professional effectively subsidizes an older social welfare recipient in poor health and with children, it is no less true that Ireland’s young healthy professionals themselves benefit (albeit indirectly) simply by living in a society in which large numbers of people are both healthy and educated, much like themselves. Of course, as Daly argues, most persons will quite willingly accept their responsibilities with regard to subsidizing those less well off than themselves. Joan Burton does caution, however, that, in Ireland “...*the people in the middle bear a lot of tax*”, and whilst they are “*willing to do it for services up to a point ...they are not willing to be completely fleeced.*”³⁹

³⁸ Of course, for this to be the case, this would also assume *ceteris paribus* that both individual’s personal circumstances are comparable. If one were entitled to a particular allowance or relief based on, for example, the fulfilment of caring duties, it would not offend against the principle of horizontal equity for this taxpayer to pay *less* tax than a person on the same nominal wage rate.

³⁹This remark was made by Ms. Burton TD in a recent debate; see *Parliamentary Debates*, Wednesday May 27 2009; <http://debates.oireachtas.ie/DDebate.aspx?F=DAL20090527.xml&Node=H6&Page=8> as at October 1 2009.

3.1 *Undermining this social contract?*

In an era of undeveloped and patchy public service provision, such as prevailed until 1945, taxes were not particularly high by modern standards, particularly during peacetime. The creation, in many Western nations, of 'welfare states' and the accompanying increase in taxes, have prompted wealthy individuals (and corporates) increasingly to explore opportunities to avoid paying taxes in high-tax countries (like Ireland) and have exploited the increase in the ease of individual mobility to (ostensibly) move their residence to lower-tax regimes.⁴⁰

The contemporary experience in Ireland has been that, in times of prosperity, a considerable number of high worth individuals – who, according to the latest figures, account for 440 out of a total of 5,803 non-resident taxpayers - claim tax exile status.⁴¹ A cursory glance at any Irish newspaper would inform the reader that the list of tax exiles includes some of Ireland's wealthiest people.

It must be acknowledged, however, that the option of tax exile is not one that is available to many taxpayers. In general terms, tax exiles tend to be middle-aged male entrepreneurs with considerable personal wealth and access to private aircraft. Such persons will typically not be an employee and are not thus tied down to any one location in any geographical sense. Whilst the term has never actually been formally defined, the common understanding of tax exile is of a person who elects to leave a country and instead to reside elsewhere to avail of appreciably lower personal tax rates.⁴² Until late 2008, many wealthy individuals routinely exploited the provision that allowed for an individual's presence in Ireland on a particular day not to count provided s/he

⁴⁰ "That old chestnut about tax being one of the only two certainties in this world no longer rings true now that ...the super-rich and an entire industry of consultants ... devote huge amounts of time and money to paying the taxman as little as possible." Rusbridger, A. (2009) 'The price of avoidance', *The Guardian*, February 2 2009 <http://www.guardian.co.uk/commentisfree/2009/feb/02/tax-gap-series-avoidance> as at October 1 2009.

⁴¹ This was the figure for 2007. See Kehoe, I. (2009) 'Tax exiles feel the heat', *Sunday Business Post*, March 29 2009; <http://archives.tcm.ie/businesspost/2009/03/29/story40646.asp> as at October 1 2009. In 2005, 3,050 people claimed non-residency for tax purposes, a figure that increased to 3,996 in 2006. See Kehoe, I. (2008) "4,000 Irish living as tax exiles", *Sunday Business Post*, May 18 2008; see <http://archives.tcm.ie/businesspost/2008/05/18/story32986.asp> as at October 1 2009.

⁴² Accordingly, in a recent Irish parliamentary debate, Sean Barrett T.D. argued: "...it is time we decided on the exact definition of a tax exile." *Parliamentary Debates*, Wednesday May 27 2009; <http://debates.oireachtas.ie/DDebate.aspx?F=DAL20090527.XML&Dail=30&Ex=All&Page=1> as at October 1 2009.

was not in the jurisdiction at midnight, and so effectively were able to have the best of both worlds: maintaining a *de facto* presence in Ireland for most of the year, but paying a much lower rate of personal tax on the basis of tax residence elsewhere.⁴³

In practice, Irish tax exiles would spend the vast majority of the day in Ireland before leaving the jurisdiction – often in private aircraft – just before midnight so that their presence during that day did not count towards the 183-day threshold. The equity, or fairness, in a person jetting from country to country late at night, to technically satisfy an abstract residency criterion in order to artificially minimize his/her ultimate tax liability was not immediately obvious. Prior to the recent tightening of this ‘Midnight Rule’⁴⁴, Senator Mary White was strongly critical of tax exiles: “*Such people are held up as icons. They are seen to be successful because they make millions of euro. They have helicopters and can fly out of the country at five minutes before midnight — excusing themselves at parties and dinners on the grounds that they must leave the jurisdiction before midnight.*”⁴⁵

In behaving like this, the various wealthy Irish tax exiles have been effectively breaching the social contract, their non-resident status providing them with the legal cover to neglect to pay their fair share for the benefits received from the Irish State. The fact is that some of the wealthiest individuals in the State, with large resources and ability to pay, eschew their civil, social and moral responsibilities, and hide behind the flimsy veneer of tax exile status in order to avoid a charge to Irish income tax.⁴⁶ The incidence - and prominence - of

⁴³ This was known as the ‘Cinderella Rule’ and was introduced by Section 150 of the Finance Act in 1994.

⁴⁴ Section 15 of Finance (No.2) Act 2008 inserted a new subsection (4) into Section 819 TCA, part (b) of which provides that: “...for the tax year 2009 and subsequent tax years, an individual shall be deemed to be present in the State for a day if he or she is present in the State at any time during that day.”

⁴⁵ Seanad Éireann - Volume 181 - 29 September, 2005 <http://historical-debates.oireachtas.ie/S/0181/S.0181.200509290010.html> as at October 1 2009.

⁴⁶ Writing recently in this context, UK writer Polly Toynbee argues: “*Paying taxes makes us citizens. Living and voting together, citizenship means belonging to the community that decides how much tax to levy and how to spend it. Most people can't avoid PAYE and they are rightly outraged by those who go to great lengths to avoid paying their fair share. There's likely to be greater indignation about avoiders in times when public spending will be pinched tight and taxes rise*”. See Toynbee, P. (2009) ‘It's time to rattle and bang in protest at this outrage’ *The Guardian*, January 31 2009

tax exiles raises a number of issues. For example, it causes an artificially restricted tax base in depriving the Exchequer of substantial funds that could be re-distributed. This problem is not confined to Ireland. In the UK, Brendan Barber, general secretary of the Trade Union Congress (TUC), argues that tax avoidance is “*hollowing out*” the British tax system. With ordinary taxpayers “*having to fill the tax gap left by [the] most wealthy, there is a real threat to the future of public services - especially as the recession takes its toll on normal tax flows.*” It will be hard to maintain public support for tax when it looks “*increasingly optional*” for the super-rich, “*...who increasingly float free from the network of mutual obligations that underpin any civilised society*”.⁴⁷

Equally, it sets a very bad example for compliant taxpayers, and erodes the perception of equity amongst those taxpayers who remain in Ireland and do pay their taxes. In a UK context, Vincent Cable, deputy leader of the Liberal Democrats, argues that those who avoid tax “*deeply anger households and businesses who pay their fair share*”.⁴⁸ This general perception of unfairness is dangerous because, in the long term, it is a most corrosive phenomenon that ultimately causes a loss of faith in the tax system as a whole.⁴⁹

In the global capitalist system, there is a constant need for producers to find new untapped markets in order to provide a growth stimulus when their original markets have become saturated. This, coupled with the advent of the multi-national corporation and the international circulation of capital, has changed the world quite profoundly. The manipulation and exploitation of residence rules is not, therefore, confined to wealthy individuals. In fact, it is

<http://www.guardian.co.uk/commentisfree/2009/jan/31/corporate-tax-avoidance-polly-toynbee> as at October 1 2009.

⁴⁷ Rusbridger, A. (2009) ‘Firms’ secret tax avoidance schemes cost UK billions’, *The Guardian*, February 2 2009 <http://www.guardian.co.uk/business/2009/feb/02/tax-gap-avoidance> as at October 1 2009.

⁴⁸ *Ibid.*

⁴⁹ As the *Sunday Times* newspaper recently argued: “*It is inconceivable that the government can allow [tax exiles] to carry on with their à la carte attitude to Irish citizenship, picking and choosing which projects to support with voluntary contributions while avoiding the personal taxes and swinging income levies being applied to those of us who live here permanently. It is impossible for any finance minister to claim with a straight face that the tax system is fair and progressive if serious efforts are not made to put an end to the perks being enjoyed by the gilded few.*”; see Fitzgibbon, F. (2009) ‘Tax-Exile perks for the gilded few must end’, *Sunday Times*, March 29 2009; see <http://www.timesonline.co.uk/tol/news/world/ireland/article5993213.ece> as at October 1 2009 .

also practiced by large numbers of these multinational corporates. Any suggestions for restricting its practice by individuals should also be taken as applying to their corporate equivalents, though many international observers – cognizant of Ireland's much-talked-about and aggressively marketed⁵⁰ 12.5% rate of corporation tax – may be forgiven for smiling at Ireland's predicament on this occasion. "What goes around, comes around", they could be forgiven for thinking!

4: The difficulty in addressing tax exile using conventional solutions

How can the tax exile phenomenon be addressed? It is to potential solutions that the paper now turns.

4.1 Freedom of movement under Irish law

It must be acknowledged, at the outset, that certain (imagined) domestic solutions, such as amending the law to restrict the right to travel or to reduce the number of days tax exiles spend in Ireland per annum are simply not feasible. Residence rules are predicated upon an unspoken assumption that citizens have a right to freedom of movement and to reside wherever they may choose.

Ireland has a long and noble legal tradition of respect for the freedoms of its citizens and the rule of law. Freedom of movement is also enshrined in Irish law, and, up until the late 1980s, it was never seriously challenged. However, following a series of controversial cases centring on abortion and the right to provide information about the practice, it briefly seemed as if Irish judges were prepared to restrict freedom of movement in certain circumstances. Ultimately, however, in the aftermath of the notorious X case in the early 1990s, the concept of free movement was given constitutional protection following a referendum.⁵¹

⁵⁰ Stewart, for example, notes that "*consideration between financial centres is considerable*", which leads to calls for light-touch regulation and cut-throat tax competition; see Stewart, J. (2008) 'Low tax Financial Centres and the Subprime Crisis: The IFSC in Ireland', *Tax Justice, Transparency and Accountability*, AABA and Tax Justice Network, University of Essex, 3/4/July 2008; <http://visar.csustan.edu/aaba/Stewart2008.pdf>

⁵¹ In a series of judgments leading up to and including the controversial X case, it seemed that Irish judges were prepared to restrict freedom of movement, and specifically the right to travel to and from

Therefore, there is no suggestion that any formal restrictions on travel should be introduced to curb the practice of tax tourism. As Carey concludes: “Ultimately, it’s a free world, for some, and if businessmen make money and choose to live abroad ...that’s their business.”⁵² A light-hearted *Irish Times* article, published on April 1st of this year, captured the impracticality of attempting to curb the movement of tax exiles.⁵³ The spoof article purported to reveal that electronic tagging⁵⁴ of the exiles was being considered by the Department of Finance in advance of the Budget, and was ostensibly “aimed at monitoring the presence in the State” of individuals who claim to be non-resident for tax purposes.⁵⁵

Satirical newspaper articles aside, whilst the exploitation and manipulation of residency rules is an extremely serious issue for the Exchequer, and particularly in these straightened times, freedom of movement is sacrosanct and should not be challenged.

4.2 The monitoring of tax exiles by the Revenue Commissioners?

Although it might be expected that Revenue officials in Ireland would closely scrutinize and monitor all tax exiles, the reality is far more prosaic. Whilst, in theory, a tax exile must keep flight logs and must maintain a detailed diary of

this jurisdiction in circumstances where it was envisaged that an abortion would take place during the period abroad. Popular hostility to this line of reasoning was such that freedom to travel was later affirmed in a constitutional amendment in 1992. The Thirteenth Amendment to the Irish Constitution now provides that Art 40.3.3 “...shall not limit freedom to travel between the State & another state.”; see *Bunreacht na hÉireann* (1937) Dublin: Government Publications, at p. 148. The cases in which freedom of travel was questioned were *Attorney General (Society for the Protection of the Unborn Child) v Open-Door Counselling* [1988] IR 593, *Society for the Protection of the Unborn Child v Coogan* [1989] IR 734, and *Attorney General v X* [1992] 1 IR 1.

⁵² Carey, S. (2007) ‘Tax Exiles and Democracy’, *Sunday Times*, October 14 2007.

⁵³ The article also quoted an unnamed spokesperson who supposedly voiced the concern that “...there are a few fairy tales being told about where people are actually living,” Linehan, H. (2009) “Electronic tagging for exiles of 'high net worth' proposed”, *Irish Times*, April 1 2009; <http://www.irishtimes.com/newspaper/frontpage/2009/0401/1224243795000.html> as at October 1 2009.

⁵⁴ As the article explained: “Electronic tagging is a form of non-surreptitious surveillance consisting of an electronic device attached to a person, usually certain criminals, allowing their whereabouts to be monitored.” See *Ibid*.

⁵⁵ In a satirical aside, the article also revealed that - whilst the tagging devices were designed to be tamper-resistant - if any of the wealthy exiles were to remain in a lead-lined ‘panic room’ for days or weeks, the signal from the electronic tag would be blocked. By this ingenious device, an exile could theoretically stay in Ireland beyond the 183-day limit, though the sheer indignity of the process would surely be off-putting!

their daily whereabouts - to be given to Revenue in the event of an audit⁵⁶ - in practice, Revenue is not even aware of the identities of many of the individuals concerned. Whilst it is known that 5,803 persons claimed tax exile status in 2007, only three years previously, former Chairman, Frank Daly told a Joint Committee on Finance and the Public Service⁵⁷ that there was “*no such thing*” as a Revenue list of Irish citizens who were tax exiles. This was because tax returns did not historically request data on citizenship because the question of whether or not a person is an Irish citizen has no general relevance for tax purposes. Without a comprehensive list of tax exiles, however, it is difficult to see how policy-makers can put together a coherent, fair and just approach to taxation. The first step in dealing with the issue is surely to gather precise information as to who the tax exiles are, verify exactly how many of them exist and calculate what their contribution would otherwise be in income tax and other capital taxes. Accordingly, Ireland’s Minister for Finance has recently acceded to opposition party pressure and will, “*as soon as is practicable*”,⁵⁸ publish a report into the “*number, status and rights and liabilities of tax exiles, a comparison to other tax exile regimes, and the annual cost to the exchequer of such tax exiles.*”⁵⁹

Whether due to organizational resource concerns or not, there also seems to be a real reluctance on the part of Revenue to subject tax exiles to the sort of scrutiny that ordinary taxpayers would demand. This was evident from Daly’s assertion – in 2004 – that, in spite of Revenue’s inability to commit sufficient resources to comprehensively police the various private airports across the jurisdiction, there were “*no indications at this time*” that Irish domiciled persons

⁵⁶ See Kehoe, I. (2008) “4,000 Irish living as tax exiles”, *Sunday Business Post*, May 18 2008; see <http://archives.tcm.ie/businesspost/2008/05/18/story32986.asp> as at October 1 2009.

⁵⁷ Joint Committee on Finance and the Public Service Meeting, 10 November, 2004.; see <http://www.revenue.ie/en/press/speeches/joint-committee-finance-meeting-november04.html> as at October 1 2009.

⁵⁸ Finance Bill 2009, Report Amendments; see <http://www.oireachtas.ie/documents/bills28/bills/2009/2409/b2409d-drn.pdf> as at October 1 2009.

⁵⁹ This particular request was made by Deputy Joan Burton, of the Labour Party, who – in the same speech - also called for the introduction of a “*notion of tax justice and tax fairness.*” “*In other words,*” she argued, “*we must all pay our taxes and we must be encouraged and facilitated in doing so. In a democracy, the greatest encouragement to people paying their fair share of taxes is to keep taxes moderate, make the system easy to understand, fair and just and ensure that the wealthy and powerful contribute their fair share as well.*” *Parliamentary Debates*, Wednesday May 27 2009; <http://debates.oireachtas.ie/DDebate.aspx?F=DAL20090527.xml&Node=H6&Page=8> as at October 1 2009.

who claimed non-residence would be unable to demonstrate that they were outside the State for the requisite 183 days. Instead, Daly argued, awareness of Revenue's general interest and audit programme, together with the financial consequences of non-compliance "...*certainly seems to motivate these individuals to keep their residence patterns within the rules.*"⁶⁰ However, in this respect, Daly seems to miss the point. It is not so much that wealthy non-residents are not abiding by the rules – there is no suggestion that this is the case. Instead, this paper contends that technical adherence to the rules cannot excuse flagrant breaches of the social contract in the manner we outline. Recently published figures disclose that Revenue has only managed to audit 9 of the country's 5,803 tax exiles. This equates to just 0.15%, or one seventh of one per cent of the case base, and surely undermines the extent of the scrutiny to which Ireland is prepared to subject wealthy tax exiles.⁶¹

None of this addresses the principal issue, however, which is that opting to become a tax exile in Ireland "*is no more than a temporary inconvenience.*"⁶² As it stands, a significant number of Ireland's best-known business figures have "*little difficulty in running Irish-based operations while living abroad.*" Of course, there is an argument that, however thorough the inspectors are, they will be no match for the individuals involved in this sophisticated, yet legal, exercise in globe-trotting. However, it still rankles that, under the terms of "*generous legislation*", tax exiles can spend half the year in Ireland, "*relaxing in their trophy properties, naming buildings in their honour, lecturing the government on how best to run the country,*" and attending social events where they "*let it be known*" that they have "*...written a cheque or two for some charity or other.*"⁶³

⁶⁰ Joint Committee on Finance and the Public Service Meeting 10 November, 2004. See <http://www.revenue.ie/en/press/speeches/joint-committee-finance-meeting-november04.html> as at October 1 2009.

⁶¹ Oliver, E. (2009) "Less than 1% of tax exiles audited by the Revenue", *Sunday Tribune*, July 12 2009; <http://www.tribune.ie/business/news/article/2009/jul/12/less-than-1-of-tax-exiles-audited-by-the-revenue/> as at October 1 2009.

⁶² Fitzgibbon, F. (2009) 'Tax-Exile perks for the gilded few must end', *Sunday Times*, March 29 2009; see <http://www.timesonline.co.uk/tol/news/world/ireland/article5993213.ece> as at October 1 2009.

⁶³ *Ibid.*

4.3 *Difficulties with tackling tax exile in isolation*

As a small nation with limited international clout, Ireland would experience considerable practical difficulty in dealing with the issue of tax exile in isolation. For example, if Irish legislators were to introduce volumes of penal legislation aimed at curtailing the activities of tax exiles and regulating their association with Ireland, it is probable that such persons would simply begin to associate themselves with another nation, under a 'flag of convenience.' However, whilst, at one level, the 'hard-line' might not seem to be a credible proposition for Irish policy-makers, there is a school of thought that would suggest that it might be better to let such persons leave and in the process rid Ireland of the most abusive and anti-democratic citizens. Would it be conceivable, for example, that Irish legislators might demonstrate the resolve of their US counterparts, and revoke the privileges of citizenship for taxpayers who decide to become non-resident?⁶⁴ The American approach is to tax the income of all US citizens, irrespective of residence and without regard for where that income was earned or produced. The only way to avoid paying tax in the US is to leave the country and renounce US citizenship, an irrevocable process. Heretofore, Irish policymakers have been loath to take any form of unilateral action that would risk alienating the larger corporates and high wealth individuals. In the context of the larger hegemons, however, there are no such fears, and hence the American authorities feel empowered to take a much tougher line with reluctant taxpayers than has been the custom in Ireland.

To truly tackle the phenomenon of tax exile, what would be needed would be a concerted effort on behalf of a number of nations to prevent easy refuge for tax exiles. How realistic such aspirations are must be questioned, however. Keenan observes that, whilst taxing the tax exiles would be "*hugely popular*", it would be "*extremely difficult in practice*". He cautions that, if the exiles, who, in practice can spend a large part of their time in Ireland, decided the new

⁶⁴ Nevertheless, some observers have recommended that Ireland take a tougher line with its tax exiles. For example, Carey argues that: "...the exiles can write all the cheques they want, but they should be prohibited from voting, from donating to political parties and from influencing policy. These rights are the privilege of taxpayers and, when you leave the country, you should leave those rights behind you."; Carey, S. (2007) 'Tax Exiles and Democracy', *Sunday Times*, October 14 2007; <http://www.sarahcarey.ie/category/feminism/page/3/> as at October 1 2009.

rules were too tough, they might genuinely stay away and still pay no taxes. So, whilst there may be “...a strong case” for making the rules less generous, the amount of new taxes raised could still be “minimal.”⁶⁵

4.4 Creating an international framework?

Given that the problem of tax exile is by no means confined to Ireland, the need for a coalition of nations to come together to create an international framework in which high wealth individuals are compelled to pay tax in one or other jurisdiction is obvious. Might it be necessary, for example, to re-imagine the concept of the tax border, now somewhat redundant given the ease of international travel, and to re-think the age-old concept of ‘tax competition’ between nations competing for taxing rights? In an ideal world, there would be a common international tax regime, though each country could still set its own rates. Lest it be forgotten, territoriality in terms of tax competition⁶⁶ only serves to encourage tax exiles, by setting nations against each other in competition, instead of co-operating to force the individual to contribute a fair share to one or other (or both) of their Exchequers. Ireland has, however, become deeply unpopular with many other Western industrialized nations in recent years, as a direct effect of its radical corporation tax policies that have attracted hordes of multinational corporates to take their operations out of other, more high-tax locations, and re-locate to Ireland. This being the case, Ireland is unlikely to find many sympathetic ears among the international community if it raises its concerns about the effect upon its Exchequer of the practice of tax-exile.

5: A change of culture: a possible solution to the problem of tax exile?

Given the difficulties in putting together an international coalition of nations to remove or restrict the number of potential havens to which a potential tax exile could have refuge, other approaches require consideration by Irish policymakers.

⁶⁵ Keenan, B. (2009) ‘Gilmore’s scheme relies on more than simple arithmetic’, *Irish Independent* 17 February 2009. See <http://www.independent.ie/opinion/analysis/gilmores-scheme-relies-on-more-than-simple-arithmetic-1641896.html> as at October 1 2009.

⁶⁶ Ramsay – in the course of his discussion of two recent ECJ cases - argues that “territoriality as a tax law concept is still alive and well ...”. See Ramsay, C 2006) “*Marks & Spencer plc. v David Halsey (HM Inspector of Taxes): The ECJ Decision*”, *Irish Tax Review*, March 2006, at p. 88.

One potentially feasible strategy might involve the creation of a culture of moral disapproval - if, like U2 lead singer Bono's 'Drop the Debt' campaign, public opinion can be harnessed, it may be possible to create a culture in which tax exiles meet with public disapproval. As such, Governments should be less willing to cravenly accept the donations of tax exiles for specific pet-projects, which garner positive publicity for the donor worth far in excess of the nominal amount donated. As McDonagh has argued: "*however helpful to particular causes*" such philanthropic donations may be, they are "*overshadowed by the scandal of tax exile.*"⁶⁷ There is a fiercely anti-authoritarian streak in the Irish psyche, which has traditionally fostered a widespread sympathy for those who subvert the State ("*Fair play to him for dodging his taxes*" etc.), and this needs to be tackled. Carey, for one, questions why the "*rich boy's club*" of tax exiles "*is treated with such reverence*" in Ireland?⁶⁸

The roots of such attitudes can be traced to culture – there is no doubt that, as a relatively young State, Ireland still occasionally exhibits symptoms of its 800 years of subjection to colonial rule – even at a remove of some four generations since the Irish Free State was established in 1922. That it is still a cause for admiration – in some quarters at least - that a person subverts authority, reflects the fact that, deep down, some are still conditioned to view the State as an impost, almost as an occupying power ("*them*") rather than as the creation and servant of the Irish people ("*us*").⁶⁹

5.1 *Changing the culture: Taxpayers?*

Social norms change quite perceptibly from one epoch to the next. What is deemed acceptable to one generation can seem unimaginable to another.

This is exemplified by the radical changes in social attitudes towards

⁶⁷ Carey, S. (2007) 'Tax Exiles and Democracy', *Sunday Times*, October 14. 2007 <http://www.sarahcarey.ie/category/feminism/page/3/> as at October 1 2009.

⁶⁸ *Ibid.*

⁶⁹ In the broader sense, Joe Lee is particularly interesting on this topic. See Lee, J. (1989) *Ireland 1912-1985, Politics and Society*; Cambridge: Cambridge University Press.

smoking⁷⁰ and drink driving, which have occurred in recent years. In this context, one of the most effective methods of effecting a change in behaviour is *via* social influence.⁷¹

Certainly in recent years in Ireland, the evidence suggests that attitudes towards tax responsibility are shifting quite perceptibly. Whereas until quite recently, something of a ‘blind eye’ was turned to instances of tax evasion at all levels in society, exemplified by the nod-and-wink approach taken to the rather curious financial affairs of ex-Taoiseach⁷² Charles Haughey, this appears to be changing. The seismic and very damaging revelations of offshore Ansbacher accounts and the widespread tax evasion that was facilitated by banks and by the approach of senior Government officials throughout the 1970s and 1980s gave way to a new era of disclosure in the 1990s, during which time many of these activities came to light.⁷³

Attitudes towards tax avoidance and, by extension, tax exile, are evolving. Until very recently, many were inclined to take a very benign view of such practices. Attitudes have hardened in recent months. Pejorative phrases such as “tax fugitive” have entered the lexicon,⁷⁴ replacing the softer, morally

⁷⁰ The popularity of smoking has risen and waned from generation to generation, and has been subject to varying degrees of acceptability across genders. For example, whereas, in Victorian times, the practice was deemed perfectly acceptable for a man, a woman who smoked would have been perceived as very immoral, even “loose.” Over time, however, this position gradually changed, assisted in no small part by female emancipation, the advances won by the Suffragette movement, and the increase in the numbers of women who went out to work in the factories during two world wars, replacing the men who were fighting in the front line. In fact, by the 1930s, social norms had shifted to such an extent that women were positively exhorted to smoke in advertisements for cigarettes – in fact, female smokers could even collect vouchers for family holidays on each packet! (The brand of cigarettes in question was the wonderfully-titled “Whifflet”). Alas, the contemporary position is quite different, in the sense that society has almost come full circle: in these censorious times, smoking is again very much frowned upon (though the gender distinction is no longer present and male smokers are liable to be ostracised in equal measure!). This example is set out in further detail in Doyle, E, Frecknall Hughes J, and Glaister, K (2009) “Linking Ethics and Risk Management in Taxation: Evidence from an Exploratory Study in Ireland and the UK”, *Journal of Business Ethics* Vol. 86:177–198, at p. 179. For more on the ‘Whifflet’, please consult Sayers, D (1933) *Murder Must Advertise*, London: New English Library Ltd, at p. 229.

⁷¹ Thaler, R.H. and Sunstein, C.R. (2008) *Nudge: Improving decisions about health, wealth and happiness*, New Haven, Connecticut: Yale University Press, at p.58.

⁷² This is the Irish term for Prime Minister, or Head of Government.

⁷³ See, for example, the Irish parliamentary debate on this affair. *Parliamentary Debates*, Thursday July 11 2002 <http://historical-debates.oireachtas.ie/D/0553/D.0553.200207110003.html> as at October 1 2009

⁷⁴ In recent months, Fintan O’Toole has suggested that: “...from here on in, we adopt the term “tax fugitive”. “Tax exile” makes these people sound like they’re heroic dissidents or refugees from a

neutral epithet “tax exile” which had more pleasant connotations of an expatriate yearning for home but prevented from returning by a penal taxation regime.

Daly notes that, over the last quarter of a century, we have seen attitudinal change in many areas, and have a much reduced tolerance for activities such as drink-driving, the physical chastisement of children or smoking, all of which were deemed, at one time, to be far more acceptable than they are today.⁷⁵ In the broader context, the boundaries of ethical and social acceptability change sometimes gradually, sometimes suddenly, and often unevenly. Accordingly, Daly posits that attitudes to tax compliance “*have mirrored these changes.*”⁷⁶

The question for policy-makers is whether this process should be allowed to proceed unassisted, or whether society would benefit from a subtle ‘nudge’ to speed the process along? Practical examples of how such a ‘nudge’ might be administered might include, for example, ad campaigns – much like those that were put together to combat insurance fraud, drink driving and other socially harmful conduct – that call into question the legitimacy of tax exile as a choice for wealthy mobile individuals, and inform taxpayers that most others willingly comply, not only with the strict rules, but also with the wider terms of the social contract.⁷⁷ Similarly, a concerted effort could be made to better educate

famine”. O’Toole, F. (2009) “When ‘tax fugitives’ set tone for business, *Irish Times*, February 24 2009, p.14. See <http://www.irishtimes.com/newspaper/opinion/2009/0224/1224241709273.html> as at October 1 2009.

⁷⁵ Daly argues that: “...*drink driving might never have been approved of, but it was condoned by many people. Twenty-five years ago someone taking up a job in the civil service was usually shown to a desk that had an ashtray on it. That’s unimaginable now ...*”Daly, F. (2006) “Freedom: Licence or Liberty? Engaging with a transforming Ireland”, an address given to the *the 9th Annual Ceifin Community Conference*, 8th November 2006; <http://www.revenue.ie/en/press/speeches/tax-community.html> as at October 1 2009.

⁷⁶ Daly ventures that “...*tax evasion, and increasingly even aggressive tax avoidance have joined drink driving, smoking in public offices, sexist language, insurance fraud as once tolerated but no longer acceptable to the vast majority of people.*” See Daly, *op cit*.

⁷⁷ In the context of tax compliance, a real-world experiment conducted by US tax officials produced big changes in behaviour. As Thaler and Sunstein explain in detail in their book *Nudge*, selected groups of taxpayers in Minnesota were given one of four different kinds of information. The first group were informed that their taxes funded a variety of good works, including education, police protection, and fire protection. The next group was threatened with information about the risks of punishment for non-compliance. The third group was told of help available for those who might be confused or uncertain about how to fill out their tax forms. The final group was simply informed that over 90 per cent of

taxpayers about what their tax pays for, and in so doing, address Daly's concern that too many people fail to appreciate the connection between the taxes they pay and the essential public services they receive. A common thread links both of these practical steps: information. The best way to hasten the process of culture change is to provide the public with better information on what is happening, how it matters and why it is wrong. As Toynbee argues, "*culture change starts with words and outrage, with naming and shaming,...refusing honours to any with dubious tax histories.*"⁷⁸

It remains to be seen whether the current and very severe recession in Ireland will slow down or damage these efforts to change the culture, to emphasize that, in a civilized society, to avoid tax by assuming the status of tax exile in an artificial manner is really to put oneself outside the bounds of civilized society. One probable impact of this economic slow-down will be to increase the temptation for ordinary people to avoid tax at a lower level, whereas the higher level evasion practised by tax exiles may well fall off. Their asset piles significantly reduced, most wealthy individuals have less to protect in the current climate, and may well decide that it is no longer worth engaging in strained and artificial arrangements to manipulate their tax bills.

5.2 *Changing the culture: Tax practitioners?*

Empirical evidence suggests that, compared to tax professionals, non-specialists think very differently about tax and about the boundaries of what is and is not legitimate in terms of tax planning⁷⁹. In this era of hyper-specialization, many individuals compartmentalize different aspects of their

Minnesotans already complied, in full, with their obligations under the tax law. The only one of these interventions to have a significant effect on tax compliance was the last. Accordingly, Thaler and Sunstein argue: "...some taxpayers are more likely to violate the law because of a misperception that the level of compliance is pretty low. When informed that the actual compliance level is high, they become less likely to cheat. It follows that either desirable or undesirable behaviour can be increased, at least to some extent, by drawing public attention to what others are doing"; see Thaler, R.H. and Sunstein, C.R. (2008) *Nudge: Improving decisions about health, wealth and happiness*, New Haven, Connecticut: Yale University Press, at p.72.

⁷⁸ Toynbee, P. (2009) 'It's time to rattle and bang in protest at this outrage' *The Guardian*, January 31 2009 <http://www.guardian.co.uk/commentisfree/2009/jan/31/corporate-tax-avoidance-polly-toynbee> as at October 1 2009.

⁷⁹ Doyle, E, Frecknall Hughes, J and B. Summers (2009), *Cognitive Ethical Reasoning of Tax Practitioners: A Preliminary Investigation Using a Tax Specific Version of the Defining Issues Test (DIT)*, paper presented at the IRS Research Conference 2009, Washington, 8th-9th July.

lives. Over the last twenty years, for example, many a tax professional who - in a private capacity - would not dream of snatching a lady's purse whilst walking along the street, seemed – in a professional capacity - to see nothing wrong in advising a client to exploit residency rules in order to reduce a tax bill (with knock-on effects for the Exchequer and the amount of tax ultimately collected and available for redistributive purposes).

Given that tax and non-tax specialists are indistinguishable in terms of their attitudes to non-tax issues, the evidence suggests that the difference of attitude towards tax matters must have resulted from the processes of socialization and training.⁸⁰ In other words, if a junior tax professional worked with a senior partner who adopted a very aggressive approach to tax planning on behalf of his or her clients, it was likely that some of this attitude or prevailing ethos would have influenced the orientation of the junior practitioner. In many ways, however, this is a positive finding, in that it indicates that even highly trained and highly-intelligent individuals are susceptible to changing their minds, and that attitudes were not necessarily fixed.

This would certainly go some way towards explaining recent anecdotal evidence among the 'Big Four' firms of tax practitioners, suggesting that fewer are now willing to represent clients who wish to pursue very aggressive avoidance. Essentially, practitioners seem less willing, in contemporary times, to be as blatant as perhaps they were before.⁸¹ Influenced no doubt by the changes of attitude in broader society towards tax avoidance and evasion, and by the harsh penalties meted out to professionals implicated in the National Irish Bank and other scandals, the culture of tax professionals seems to be visibly changing before our eyes. Once more, the question is whether policy-makers should allow this process to happen organically, of its own accord, or, alternatively, whether some sort of intervention – to quicken the pace of cultural change – would be appropriate?

⁸⁰ *Ibid.*

⁸¹ For example, although many leading tax barristers consider that Ireland's general anti-avoidance provision – contained in Section 811 Taxes Consolidation Act 1997 - is unconstitutional, there is a noticeable lack of appetite among the Big Four firms to pioneer the argument.

5.3 *Changing the culture: the judiciary?*

The attitude of the courts has also undergone something of a transformation over time. Initially, the courts seemed broadly to have taken the rather libertarian view that a taxpayer was entitled to organize his or her affairs as s/he saw fit, and, if s/he could avoid tax as a result, then it was no function of the courts to intervene on behalf of the Exchequer. For example, in the seminal *Duke of Westminster* case, decided in 1936, UK judge Lord Tomlin argued for the right of every man ‘... to order his affairs so that the tax attaching ... is less than it otherwise would be ...’⁸²

In more recent times, however, the UK courts have taken quite a significant turn in the opposite direction. For example, in both the *Ramsay*⁸³ and *Furniss v Dawson*⁸⁴ cases, the courts applied a doctrine of fiscal nullity to strike down tax avoidance schemes by taxpayers. Whilst the Irish Supreme Court, in *McGrath v McDermott*,⁸⁵ would subsequently refuse to apply this fiscal nullity doctrine in Ireland, it quite explicitly invited the legislature to draft a new legislative provision to create a statutory form of fiscal nullity.⁸⁶ This essentially confirmed that judicial antipathy towards tax avoidance is growing, irrespective of the verdict in *McGrath*, and represents *prima facie* evidence of a cultural shift in judicial thinking.

5.4 *Changing the culture: Revenue and the legislature?*

There has also been a perceptible shift in administrative attitudes towards tax avoidance. Whereas just two decades ago, in the 1980s, there seemed to be an almost tacit acceptance of tax evasion on the part of Revenue and the Irish Government, there has been a sea change in attitudes since.⁸⁷ The turning

⁸² *Commissioners of Inland Revenue v Duke of Westminster* [1936] AC 1.

⁸³ *WT Ramsay Ltd v Commissioners of Inland Revenue* 54 TC 101 [1982] AC 300.

⁸⁴ [1984] AC 474.

⁸⁵ [1988] IR 258.

⁸⁶ This new provision was duly created in the Finance Act of 1989, which created a new anti-avoidance provision, now titled Section 811 of the Taxes Consolidation Act [1997].

⁸⁷ As Deputy Joan Burton argues, the problem for Ireland is that, historically, we have had “...a regime, primarily facilitated by successive ... [Prime Ministers]] and Ministers for Finance, that said, in the words of F. Scott Fitzgerald, ‘the rich are different’.” See *Parliamentary Debates*, Wednesday

point was perhaps the Revenue Amnesty for tax evaders – introduced in 1993 – which, although it reduced the deterrent effect felt by evaders and was perceived by some honest taxpayers as a ‘get-out-of-jail-free’ card for the worst offenders - nevertheless was quite expedient in bringing many otherwise compliant individuals permanently back within the tax net.

In the broader sense, Revenue has been very successful in turning around the culture of tax compliance in Ireland over the past 10 years, though whether this success is due to pragmatic risk management concerns on the part of taxpayers, or whether it represents a genuine culture-shift is open to debate. What is undoubtedly true is that Revenue has taken a very positive step in devoting significant resources to the creation of an accommodative framework (“co-operative compliance”) regime in its Large Cases Division.

In this context, former Revenue chairman, Frank Daly, has made a most important contribution to the debate. The distinctions Daly drew between legitimate and illegitimate avoidance seemed to strike a chord with many taxpayers and his exhortation to taxpayers and their advisors, not to treat tax law as “*something to be played with*,” struck the right note.

Furthermore, it is easy to perceive that there has also been a cultural shift in the approach of the Irish legislature towards the issue of tax exile. Whereas, just a generation ago, the legislature was actively fuelling the concept of avoidance - for example, by introducing the notorious “Midnight Rule” (the so-called “Cinderella Rule”) in 1994 – it has performed something of a *volte-face* in recent years. Whilst its impact has yet to be measured, the recent removal of the “Midnight Rule” is a very positive step. As has already been explained, under the Rule, if a person was not in the jurisdiction at midnight, then his or her presence in Ireland during the preceding day was not counted.⁸⁸ This

May 27 2009; <http://debates.oireachtas.ie/DDebate.aspx?F=DAL20090527.xml&Node=H6&Page=8> as at October 1 2009.

⁸⁸ Prior to the 1994 Finance Act, the rules were based on a mixture of statutory provisions, old case law and Revenue administrative practice, which was an unsatisfactory situation. During the Committee Stage debate, Deputy Ivan Yates expressed concern that if a person came to the State at 11 p.m. and left the following day at 6 a.m. the person would be treated as being in the State for 2 days. Both Deputy Yates and the then-Minister for Finance put down similar amendments at Report Stage to provide that

Rule was heavily exploited by a number of wealthy individuals who had acquired private aircraft. Such persons could then spend most of any particular day in Ireland, conducting business, and then, late in the evening, board a private aeroplane and ensure that it was airborne by the time the clock struck midnight. In doing this, these individuals ensured that their presence in Ireland for most of the preceding day was not counted towards the annual limit of 183 days' presence, which is the most that an ostensibly non-resident person can spend in this jurisdiction.

With the passage of the Finance (No.2) Act 2008, however, from 2009 onwards, an individual will be deemed to be present in the State for a day if s/he is present in the State at any time during that day. Even if only an optic, the demise of the "Midnight Rule" would seem to represent tangible evidence of a firmer administrative resolve to make non-residence a more difficult status in respect of which to lay claim, and one which is not available to those who spend practically the whole of the year in Ireland, merely flying out of the jurisdiction late at night for a matter of minutes or hours, only to return again before daybreak!

6: Conclusion

Its peripheral location and lack of abundant natural resources have condemned Ireland to a long and sad history of forced emigration, as evidenced by the millions of second and third-generation Irish people scattered all over the globe. Less understandable is the fact that, in times of relative plenty, thousands of individuals continued to leave Ireland (or at least claimed to do so). In recent times, however, these émigrés have included some of Ireland's wealthiest individuals, shamelessly exploiting both a set of residency rules framed in another epoch and the increased ease of foreign travel to subvert the social contract and avoid a charge to income tax despite spending most of each year in Ireland. This practice filled ordinary taxpayers

an individual is deemed to be present in the State for a day if the individual is present in the State at the end of the day. This amendment was agreed by the Dáil and continued to be the rule until early 2009. It should be noted that the Revenue administrative practice prior to the 1994 Finance Act was based on the number of nights spent in the State and the Report Stage amendment merely confirmed this procedure.

with disgust, particularly prior to the recent removal of the “Midnight Rule” which did not count days spent in Ireland provided the person in question was outside of the jurisdiction at midnight (even if /she returned minutes later).

In general terms, the system of tax exile has been made possible by the chronic myopia afflicting the various systems of national taxation which cravenly compete for the right to (gently) tax wealthy individuals. This has facilitated the growth of ‘tax tourism’ whereby certain individuals can, in effect, avoid being declared resident in any country, and thereby avoid paying what, by any equitable or moral standard, is only their fair share of the tax burden that should really be shouldered by all.

In view of Ireland’s worsening economic position and given the lack of other feasible options - and in the (presumed) absence of a concerted international effort - perhaps the most practical method of dealing with the problem of tax exile would be to change our whole ethos and to foster a culture of disapproval towards this type of tax avoidance. Irish society must be increasingly explicit in highlighting tax exile as a problem, to harness and focus the power of social disapproval and make the practice increasingly unacceptable.

Irish policy-makers should more explicitly draw the connection between the payment of tax and social responsibility. As has been set out in the preceding paragraphs, many of the conditions are already in place for such a cultural shift to take place: We have already seen that social, judicial and administrative mores are evolving of their own accord, which make the prospect of such a shift a more realistic proposition. Although this will be a difficult undertaking, all that is really needed is to give a ‘nudge’ to processes that are already happening and harness popular opinion and public sentiment to oppose the pernicious abuse of tax exile status. Gradually, the public is waking up to the scandal that is the abuse of the anachronistic tax exile concept by some of Ireland’s wealthiest. Such individuals might technically comply with the letter of all of the relevant tax laws, but they manifestly fail to observe any of their spirit, or the social contract that underpins them. If this

process of social awakening and cultural change can be accelerated, then so much the better.

It bears repeating that, whilst Ireland has been the focus of this particular article, the issues posed by the practice of tax exile are by no means confined to Ireland. Accordingly, both the issue and the potential solutions that have been suggested are of much broader application, and could easily be applied to many other Western nations

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