

Morality and Tax

Kim G C Moody FCPA, FCA, TEP
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“...there is nothing sinister in so arranging one’s affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands... To demand more of mortals is mere cant.”

Learned Hand in *Commissioner v. Newman*, 159 F2d 848 (1947).

Everywhere you look lately, the press seems to be reporting another group or person that is pontificating about the “evils” of tax avoidance and tax planning. The usual rhetoric is that corporations or individuals who plan to reduce their taxes are engaging in immoral practices since they should be paying their “fair share”. Large corporations like Google, Apple, Starbucks and now Twitter have been [roasted](#) for their tax strategies. The pressure got so heated that Starbucks agreed to make a [voluntary payment](#) to the UK Treasury notwithstanding they were under no legal obligation to do so. And to top it off, the International Bar Association has recently [released a report](#) stating that the facilitation of tax avoidance strategies could constitute a violation of international human rights law. Let’s take a moment to reflect on the magnitude of that assertion: tax avoidance strategies are tantamount to the denial of life, liberty, property, education, etc. It appears to me that the International Bar Association needs to update its hyperbole filter.

Thankfully, there have been some voices of reason that offer counter views. However, sometimes it is not easy to hear these voices over the din of populous prattle. Sadly, it is not surprising that reasoned analysis is often difficult to find given how popular and easy it is to state that tax avoidance is immoral. Let me offer some simple counterpoints.

To begin with, I understand governments’ need to raise revenues to provide services (one might say “to address the ‘human rights’ of”) to their residents. I am also sympathetic to the fact that the world is still reeling from one of the worst recessions in modern history. Most countries have been dramatically impacted by that recession and many have been forced to make difficult decisions about their delivery of fundamental services that are generally expected from government.

However, the obligation to pay tax (ignoring for the moment the challenges of the developing world) ultimately arises from the obligations enshrined in statutes. Tax avoidance involves planning one’s affairs to ensure that the quantum of tax owed is minimized according to, and in compliance with, applicable laws. Accordingly, tax avoidance is legal in that it is in compliance with applicable laws (as opposed to tax evasion which is deliberate non-compliance with taxing statutes and is illegal).

However, can planning or avoidance not be in the “spirit” of the law? Certainly. Over the years, many countries have responded to inappropriate tax avoidance by introducing “general anti-avoidance rules” (as codified in section 245 of Canada’s *Income Tax Act*) or “substance over form” rules (as codified in section 7701(o) of the US Internal Revenue Code). Such legislation attempts to shut down planning that is otherwise in compliance with the law but may not be in the “spirit” of the law. As long as such

legislation exists, then governments possess the tools to counteract planning that may not be in the “spirit” of the legislation.

I realize that the above counter argument is simplistic but so are the arguments that taxpayers should “pay their fair share,” and that failure to do so constitutes a grave injustice. What exactly is someone’s “fair share”? Should one taxpayer suffer moral derision because it pays more (or less) tax than another taxpayer when the first taxpayer has acted in accordance with applicable laws?

When companies like Starbucks make voluntary payments to a country, notwithstanding their tax planning was in compliance with applicable laws, how are such payments characterized? Clearly such voluntary payments cannot be considered a payment of tax. Are they charitable donations? Marketing payments? In my view, such a payment by one of my favorite coffee companies was short sighted and dangerous. If such payments become the norm, what will become of the “rule of law”? In other words, a person can be in compliance with all tax laws but it might not be “good enough” because they haven’t paid their “fair share”. Thus we descend the slippery slope that results from mixing morality and tax policy.

In my opinion, politicians, media and others who trumpet easy-to-make moralistic comments about tax planning and avoidance should direct their efforts in a more positive fashion which could result in legislation that “shuts down” inappropriate tax planning. This is much easier said than done but ultimately it is much more analytical, logical, and appropriate than simply trumpeting that people should “pay their fair share”.

The OECD has taken such an analytical approach of this issue in addressing the manner by which certain taxpayers shift their profits from a high-tax jurisdiction to a low-tax jurisdiction. In July 2013, the OECD [released a report](#) discussing base erosion and profit shifting (“BEPS”) in which it identified certain abusive practices that need to be addressed. Member countries seem intent to act quickly to implement such principles. My personal opinion is that we will likely see some significant changes in this particular area of tax avoidance but ultimately the implementation of specific legislation in each member country of the OECD will be difficult. Notwithstanding, the engagement and discussion of what is appropriate tax planning and the subsequent introduction of laws to enforce such principles is the proper way to address these issues. The use of a pillory to shame taxpayers who engage in legal tax avoidance is simply not an effective method of addressing the issue.

In the meantime, taxpayers should not feel guilty for properly planning their affairs which results in tax minimization within the confines of the law. If one does feel guilty, perhaps they could redirect their guilt by making sufficient charitable contributions to their favorite charities. My thoughts... not yours.