eJournal of Tax Research

Volume 14, Number 2 November 2016
(Special Edition: Atax 12th International Tax Administration Conference)

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ISSN 14482398

eJournal of Tax Research (2016) vol 14, no. 2, pp. 405-436

To shame or not to shame: That is the question

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Abstract

This paper evaluates the naming and shaming of large corporations and concludes that such a response is unhelpful and counterproductive. The author argues that the only effective response to tax planning schemes is to enact effective laws that capture the income sought to be taxed.

Without the media, naming and shaming would not be effective. Naming and shaming campaigns appear to be a (deliberate?) misconception of the tax laws. 'Avoidance' is given an indeterminate and open-ended meaning. The media is not sufficiently versed in the tax laws to make an expert judgment of avoidance. It is not their role to punish extra-curially without any legal basis for assigning blame/guilt.

Keywords: Naming and shaming; tax planning; avoidance; effective legislation and Google.

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1. INTRODUCTION

This article evaluates the approach that the media, activists and politicians take to the manner in which large Australian and multinational corporations structure either themselves or individual transactions to ensure they limit their tax liability.[2] The response is to name and shame the entities concerned.

This article concludes that naming and shaming is unhelpful, counterproductive and

to make do with the 'letter of the law'.[6] Freedman argues that proper consideration has to be given to the actual legal position, rather than focusing on vague and unenforceable notions.[7] If corporations pay all the tax required by law, the integrity of the system presumably cannot be impaired in any way. The contrary would appear to be the case. Irrespective of the ego forming it is this extended and indeterminate meaning of 'tax avoidance' that is used to name and shame these corporations.

Before commencing the evaluation of the naming and shaming option a number of facts must be borne in mind. The first is that the all regulators accept tax planning is a legitimate function of taxpayers.[8] Second, avoidance in Australia has usually been understood to be a breach of either the general anti-avoidance rule or specific anti-avoidance rules contained in the tax laws. This is generally the case in all countries although some rely on the courts to devise methods to.6 c2 (-6)-1.7 (t)-4. (t)-4. (nc)9.2

When shaming occurs there is some form of conscious manipulation of an entity with the purpose of obtaining some desired but different result that about which

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Braithwaite and Drahos believe that naming and shaming may cause corporations to take steps to determine personal responsibility and '[put] things right'.

[14] According to them this is a relatively cheap remedy but it could reflect society's moral outrage at the conduct.[15] They contend that if the corporation is named, then internal compliance

[16]

systems go to work to define personal responsib

complaint has been made.

The learned judge in the above extract was commenting on the injustice of a penalty being imposed on different entities for the essentially the same act. With naming and shaming a penalty may be imposed for no wrongful conduct, but if such wrongful conduct were found to exist there would be a double penalty on the same party first in being shamed and second the penalty imposed by the court or regulator.

Grabosky and Shover, although referring to criminal conduct, consider that the refusal to acknowledge the criminality of conduct is one of the sharpest distinguishing characteristics of 'white-collar' criminals. Ways of mobilising public indignation to combat this is something worthy of consideration, to induce those targeted to acknowledge their wrong and to take steps to make amends.[19]

Shame can occur without the public display of being publicly named. Grasmick and Bursik describe shame as the feeling of guilt one experiences after having committed a wrong; it is a self-imposed punishment.[20] The greater the wrong committed, the greater is the prospect and extent of the feeling of shame.[21] Grasmick and Bursik found, after surveying a number of respondents, that the prospect of feeling shame inhibited tax cheating.[22]

when criminal charges have been laid and made public because the public ascribes real meaning to cases in which criminal conduct is alleged by the state. This has

Kohn notes 'since the latter part of the 20th century, humiliation has become amplified through the mass media in the name of crime control and entertainment'.[33] Steel referring to the financial press in the US states:

> Business Week and its peers, by contrast, have a huge reputational stake in the accuracy – or at the least, the objectivity – of their reports. Readers buy the magazines because they offer sophisticated, inside looks at the business world.[34]

As this article demonstrates it seems this objectivity may be lacking when corporations are named and shamed.

Silverman says the publication by the media on some issues at best, creates a permissive climate for intolerance and, at worst, for vigilantism.[35]

The media

> [e]njoy better protection when revealing corporate wrongdoing. For instance, in the U.S., freedom of the press is guaranteed in the First Amendment of the Constitution, and in many countries, the legal protection afforded to journalists prevents firms from suing them for defamation.[36]

Corporations in Australia, with limited exceptions, are unable to sue for defamation.[37] Even if they are able to sue for defamation in other jurisdictions (c)9.2 (bl)6.2 (ns)-2s(i)6.2 (

than $8.4 billion of tax.[39] Although not directly alleging wrongful conduct on the part of the corporations named in the report the inference (incorrectly) drawn is that these companies either have been guilty of what is referred to as 'aggressive corporate tax avoidance' or 'aggressive tax avoidance' or 'tax aggressive behaviour' or 'aggressive tax minimisation practices'. The meaning of these terms is never explained.

The fact that a corporation pays little or no tax in Australia means nothing without reference to the particular circumstances of that corporation and how the tax laws impact on its various transactions. Notwithstanding the foregoing, the report advocates that these corporations be named and shamed. It states:

> Disclosure and transparency of corporate tax practices needs to be increased. Greater public awareness of aggressive tax avoidance will provide an incentive to Australian corporations to be less tax aggressive. Tax dodging practices, when exposed, will damage corporate reputations and may increase regulatory and financial risks. Responsible companies should not wait for inevitable changes to the rules before deciding to act.[40]

This report was given headline treatment in the media. Examples include: Aston and Wilkins[41] who describe the main findings of the report and then give some views that do not agree with the conclusions reached; Shorten and AAP where the results of the report are extensively reported.[42]

It is the media that gives credence to misleading claims about the tax affairs of corporations by politicians and activists rather than objectively and accurately reporting on their tax affairs. Reality and candour appear to be of little consequence.

Tulberg argues that corporations are vulnerable to media power and that the solution is one of appeasement to avoid being a target and to protect the value of the company brand.[43] According to Tulberg, there is an absolute right or wrong and the media are the sole arbiters on these issues, irrespective of whether their views are correct. It is often difficult to respond to such attacks in a way that resonates with the public.

There would appear to be little or no accountability on the part of the media, politicians or activists as to the accuracy and truth of what they publish or disseminate. Simply to make broad unsubstantiated allegations is not acceptable conduct from elected representatives who have the power to enact effective laws that capture within the tax net that income which is currently not assessable. Similarly the media may be abusiher

Silverman, referring to the media states:

> Then there is the question of accountability. Kipling's resonant description of the press as the wielder of "power without responsibility – the prerogative of the harlot throughout the ages" needs no updating to depict accurately much of today's media.[44]

An example of how damaging media reports can be even where there is a finding of guilt appear from the following. ASIC published many disparaging remarks at the time of commencing proceedings and during the process of those proceedings against a high-ranking company executive by the name of Fysh.[45] He was found guilty by the court of first instance, which sentenced him to a term of imprisonment. The matter went on appeal, pending which Fysh was incarcerated. The Court of Appeal found that Fysh had no case to meet and he was released from gaol after having been incarcerated for seven months. It is reported that Fysh, in submissions to a Senate enquiry, asked '[d]id ASIC's early rush to publicise successful pursuit of a high ranking overseas oil company executive and freeze his assets sour ASIC's judgment?' In response, ASIC noted that 'the media will inevitably escalate any hint of an investigation, naming names, drawing inferences and beating up the story – this can affect any future legal action'. This report should be a salutary lesson to all those who seek to name and shame.

Irrespective of what the media disseminates or what politicians or activists may say,

entities (with income in excess of $100 million).[48] This information is the company's name, its Australian Business Number, its total income, taxable income and tax payable.[49] The requirement to publish information is not because of some alleged wrong committed by the corporations. There is no obligation on the ATO either to verify the accuracy of the information made public or to determine whether the amount of tax payable as reflected in the corporation's tax return is as prescribed by law. Since its enactment the legislation has been amended to increase the scope of these provisions on Australian private companies.

When originally enacted the objective of this legislation was, inter alia, said to be:

> [t]o discourage large corporate tax entities from engaging in aggressive tax avoidance practices.[50]

The distinction, if any, between aggressive and other tax avoidance practices eludes the author.

The purpose alluded to above cannot be achieved by a mere perusal of the return and certainly not from the limited information that must be published by the Commissioner. It is doubtful that anyone can determine from a tax return alone whether the taxpayer is fully compliant with the tax laws; has entered into an avoidance scheme or is a participant in some tax crime; or even whether there has been some inadvertent omission or addition to the return. To achieve the aim of the legislation requires an in-depth understanding of the tax laws and an investigation and understanding of how and why certain transactions are structured in a particular way and how the tax laws apply to these transactions.

The media, activists and politicians are not so constrained and in the vast majority of cases (the author would suggest all) they are not sufficiently versed in the tax laws to be able to do so.

It would seem the reason for this legislation is in large measure to encourage the media to name and shame some or all of these corporations into paying more tax than they currently do, or to pay what is euphemistically called 'a fair share of taxes.'[51] The fact that these companies may be fully compliant with their tax obligations seems to be irrelevant. If this view is correct (and it seems to be), it is an indictment on politicians that seeks by extra legislative and judicial means to impose taxation on corporations when the law is unable to do so. As Terry McCrann noted (referring to a report published by the Commissioner in terms of this legislation) albeit in somewhat exaggerated terms:

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[48] The idea for this legislation may be found in Marjorie E Kornhauser, 'Doing the Full Monty: Will Publicizing Tax Information Increase Compliance' (2005) 18 Canadian Journal of Law & Jurisprudence 95.

[49] All corporations must file a return reflecting their income, claimed deductions and the amount of tax payable on the assessable income reflected in the return. The return is deemed to be an assessment: Section 166A of the Income Tax Assessment Act 1936 (Cth).

[50] Explanatory Memorandum, Tax Laws Amendment (2013 Measures No 2) Bill 2013 (Cth) Schedule 5 [5.6].

[51] Datt argues that the call to pay a 'fair share of taxes' is meaningless and constitutes empty rhetoric: Kalmen Datt, 'Paying a Fair Share of Tax and Aggressive Tax Planning: A Tale of Two Myths' (Nov 2014) 12 (2) eJournal of Tax Research 410-432 <http://search.proquest.com/docview/1674651839?accountid=12763>

Identification of material temporary and non-temporary differences; and
Accounting effective company tax rates for Australian and global operations

3. I

A tax liability can only be created by legislation and liability should not be based on attempts to appease what may be unjustified, uninformed and vociferous criticism. For corporations to act in this way may require directors to breach their common law and legislative obligations to the corporation and its stakeholders. This in fact occurred in the UK, when a spokesperson of Starbucks was reported as stating:

> We listened to our customers in December and so decided to forgo certain deductions which would make us liable to pay £10m in corporation tax this year and a further £10m in 2014. We have now paid £5m and will pay the remaining £5m later this year.[61]

> Google funnelled £6 billion through Bermuda last year, halving its 2011 tax bill and paying £1 billion less to government coffers.
>
> The company paid £6 million in UK tax last year, funnelling 80 per cent of its global revenue through the tiny island of Bermuda, twice as much as three years ago.[63]

BBC News Magazine on 21 May 2013 reports:

> In a report published on Monday, the committee's chairwoman Margaret Hodge said the level of tax taken from some multinational firms was "outrageous" and that HM Revenue and Customs needed to be more aggressive and assertive in confronting corporate tax avoidance".[64]

The Register of 14 June 2013 states:

> British MPs have demanded that the government act to revamp the tax structure after damning revelations about Google's corporate payments structure in the country.[65]

The Telegraph

which income years these back taxes are calculated. These taxes were for the disallowance of specific deductions claimed in previous years.[71]

After what was presumably an intensive investigation of more than three years, the disallowed deduction of £24 million is miniscule in relation to Google's earnings in

In 2016, in what was triumphantly announced as a major victory for HMRC Google entered into an agreement to pay HMRC £130 million. The Guardian reported:[74]

> Google has agreed a deal with British tax authorities to pay £130m in back taxes and bear a greater tax burden in future. The deal will cover a decade of underpayment of UK taxes by the company, which has been criticised in the past for its tax avoidance policies. A Google spokesman confirmed reports that the firm was to pay £46.2m in taxes on UK profits of £106m for the 18 months to June 2015, as well as back taxes owed for the previous decade.

This 'triumph' was immediately criticised. An example appears from an ABC News reports as follows:[75]

> John McDonnell, finance spokesman for the opposition Labor Party, said that the tax authorities needed to explain how they had settled on the figure of 130 million pounds, which he described as relatively insignificant.
>
> "It looks to me ... that this is relatively trivial in comparison with what should have been made, in fact one analysis has put the rate down to about 3 per cent, which I think is derisory," he told BBC Radio.
>
> "This looks like another sweetheart deal."
>
> Prem Sikka, professor of accounting at Essex University, agreed, saying that for a company that enjoyed UK turnover of around 24 billion pounds over