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International Taxation and the Moral Debate: A Propos of the Panama Papers Scandal

Guillermo O. Teijeiro (Bomchil) · Monday, August 1st, 2016

Back in April this year, my contribution on the Panama Papers scandal started by saying that: “Massive leaks of information on offshore activity like the Panama Papers illustrate the need for enhanced global tax cooperation with an improved and deeper inter-jurisdictional information sharing scheme.”[1]

It is not now my intention to follow the subsequent episodes of this scandal in term of journalistic revelations or further reactions from governments or international bodies,[2] nor to focus on the legitimate uses of offshore jurisdictions, including family wealth protection and arrangement of corporate investment flows, but to address the ethical queries that arise in connection with the shifting and hiding of assets and income offshore by corporate or individual taxpayers.[3]

At first sight one may easily smell something shady, or even worse, gravely immoral or unethical underlying corporate or personal efforts to hide assets and income at home by shifting them offshore to opaque, ring-fenced jurisdictions, but are those practices always blatantly immoral regardless of the surrounding circumstances or conflicting duties? Is it the moral duty to pay taxes at home somehow dependable on the governments’ actual procurement of public goods and the rendering of public services under a sort of *do ut des* or *do ut facias* relationship where public and private behavior justifies each other? Is it dependable on a comparison-of-efficiency approach between private and public uses of tax money?[4]

Similarly, are those practices justifiable to escape a perceived unfair tax system or to avoid financing a corrupt administration? Could it be acceptable in modern civil societies for a conscientious objector to refrain from paying taxes that would be used to finance evil goals from a personal perspective (e.g., a war, persecusión of minorities, race or religious groups)?[5]

From a different perspective, it would be sound to argue that beyond fairness or efficiency, in a functioning democracy, the State is allowed to take in taxes as much as it wants to? It is arguable that the State is allowed to do so but always within the constitutional framework of recognized private rights and guarantees?[6]

On addressing these ethical questions I am not pretending to negate that moral judgements may well drive (and in fact usually do) people’s behavior even in the tax field, but trying to ascertain if there might be an ethical-based legal relief for non-compliant taxpayers beyond the constitutional and legal framework. On the contrary, should ethical values underlying a given national tax system

be deemed embodied solely in the legal framework? In other words, is there an ethical, meta-legal protection –a sort of innominate warranty– for taxpayers who breach the tax law based on moral grounds? I fairly doubt it; it is true that, in general terms, as the experience demonstrates, a legal behavior is not always ethical, and *vice versa*, but I find an ethical justification of taxpayers' behavior beyond the legal framework as dangerous as it is the States' attempt to tax beyond the scope (text and spirit) of the law on moral grounds.

It is easily perceived that today the traditional legal borders between the States' power to impose and the taxpayers' behavior vis-à-vis the application of taxes are deeply shaken because of the irruption and increasing influence of somehow conflicting approaches to taxation coming from other disciplines, including ethics. However, from a strictly legal perspective the ethical dimension is subsumed in the law. Moreover, the public-private collision inherent to taxation is so significant to social equilibrium that States' permissible scope of action and private protection against state overflows in this field are usually set forth in the foundational documents of every organized society. And, thus, modern western constitutionalism adopts almost unanimously the principle of reserve or legality as the clear dividing line between the States' power to impose and the taxpayers' freedom to arrange their own private affairs from a tax angle.[7]

But now let's go back to my initial queries to comment a case of possible conflicting duties: That would be the case of Board members and top corporate managers who have a fiduciary duty towards shareholders to protect corporate assets and maximize profits; couldn't be that duty a possible ethical justification to reduce or minimize the tax bite by, among other possible alternatives, shifting income-producing corporate assets from the home jurisdiction to lower-tax jurisdictions even beyond what it would be permissible under the law (e.g., without a legitimate business purpose)? No matter how attractive this premise could be, I would be fairly inclined to believe that modern but already well-established concepts of corporate governance and corporate social responsibility (CSR) would have a decisive influence against that premise so that what at first sight appears to be a moral dilemma, it ends up being none.[8]

The idea of making the moral obligation to pay taxes somehow dependable on public outputs (in terms of public goods and services received in exchange) though pervasive is not convincing upon further reflexion either. It is almost uncontroverted nowadays that the State's power to tax is inherent or essential to the sovereign status, and, hence, it is not conditioned upon any proof on the delivering of public goods or services as a contractual approach to the matter would suggest. Moreover, the own concept of tax (except for the case of levies earmarked to a particular goal, which is seldom the case in modern public finances, and public prices) makes it incompatible with a moral justification of non-compliance based on the State's lack of delivery to the taxpayer or group of taxpayers concerned.

I also find the comparison-of-efficiency approach between private and public uses of money a false moral dilemma. Utilitarian ethics (if such a concept means something different from pure relativism) would suggest that the most ethical act is the one that is most efficient, so that the case could be made that keeping money in the more efficient private sector meets the test, simply because paying taxes would imply allocating money to the less efficient public sector.[9]

As regards corporate or personal efforts to hide assets and income at home by shifting them to offshore jurisdictions as moves to avoid financing a corrupt administration, though conceptually justifiable by the convenience not to feed such regimes, they would not be conceivable means to avoid fulfillment of tax obligations in a functioning democracy or similar system of government

assuring popular vote or at least periodic alternation in public office.[10]

All in all, I must recognize that the more I try to filter and judge the administration and/or the taxpayer's behavior concerning the tax obligation (i.e., a *per se* legal obligation) on moral or ethical grounds, the more futile I find the attempts to do so. And this is so simply because, in my view, the only ethical values that count in the legal field are those receipted and embodied in the constitutional and legal framework as reciprocal duties, rights and guarantees. These values are then those shared in a given society at a particular time and, for that very reason, the moral dimension of the tax obligation should be limited to the consideration of the ethical values which are subsumed and built into the law.

[1] *The Panama Papers Affair and the challenges ahead: AEOI and Beneficial ownership*, Kluwer International Tax Blog, April 25, 2016

[2] New details come out at such a speed that would be almost impossible to be updated on developments; in some jurisdictions the tax administrations' activity following the eruption of the scandal has been frenetic. On another front, quite recent revelations published by the International Consortium of Investigative Journalists exposed fresh details about the misuse of corporate secrecy and hidden wealth in Africa, coming out of the Panama Papers investigation, ICIJ, July 25, 2016

[3] See, among others, *Evasion y Paraisos fiscales*, Argandoña, IESE, Economía, Ética y RSE Network, May 9, 2013; McGee, *The Panama Papers, A Discussion of some Ethical issues*, Fayetteville State University, Working paper, May 27, 2016; Teijeiro, *International Taxation and the Moral Debate*, Kluwer International Tax Blog, May 23, 2016.

[4] Some super rich individuals are philanthropist persons who arrange their businesses as efficiently as possible, in accordance with the applicable tax laws at home and beyond, to be able to reach their personal philanthropic goals to the fullest possible extent. This goals, however, does not allow them to conduct their businesses beyond the law, either from a legal or ethical perspective since the end never justify the means in ethical terms.

[5] McGee, id. note 3, above, mentioned the extreme case of Jews living in Nazi Germany; to argue that Jews had a duty to pay taxes to Hitler seems to be unthinkable.

[6] For these contrasting views see Buchanan & Musgrave, *Public Finance and Public Choice, Two contrasting Visions of the State*, Cambridge MA & London, MIT Press, 2001. Of course I cannot but endorse Buchanan's position in the sense that the State is always constrained by the constitutional and legal framework.

[7] See Teijeiro, id. Note 3, above.

[8] This situation reminds me of the Starbuck case in the UK back in 2012, where, for a variety of reasons and against all odds, the UK company's managing director Kris Engskov, announced at the London Chamber of Commerce, the commitment to pay a significant amount of corporation tax during 2013 and 2014 regardless of whether the company were profitable during those years. This episode clearly illustrate that corporate managers' fiduciary duties towards shareholders nowadays go far beyond from maximizing after-tax profits to encompass a much more complex mandate fed by modern inputs of governance, CSR and market protection. See <https://www.theguardian.com/business/2012/dec/06/starbucks-to-pay-10m-corporation-tax>.

[9] See McGee, Ed, *The ethics of Tax Evasion in Theory and Practice*, NYC, Springer, 2012

[10] The same can be said in the case of the conscientious objector (leaving aside the private decision of each person in this highly sensitive hypothesis).

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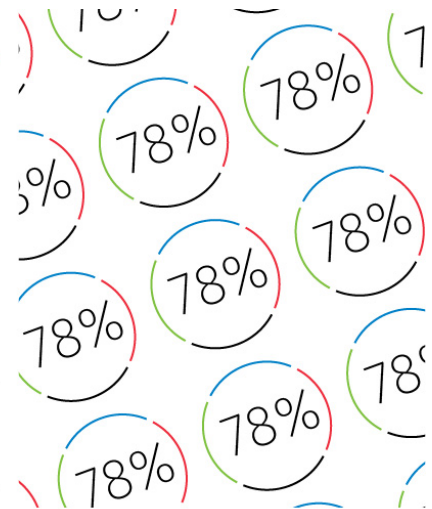
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