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Corporate officers’ duties to tax planning vs. tax morality and compliance

Chair: Wilhelm Haarmann
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Tax Directors Seminar - Corporate officers’ duties to tax planning vs. tax morality and compliance

Chair

Prof. Dr. Wilhelm Haarmann

Lawyer, Certified Tax Advisor, Certified Auditor, Frankfurt/Main, Germany

Panel Members

Alan McLean

Executive Vice President Taxation and Controller, Shell International Limited, London, UK

Prof. Dr. Christine Osterloh-Konrad

Full Professor of Law, University of Tübingen, Germany

Grace Perez Navarro

Deputy Director, OECD Centre for Tax Policy and Administration

Gustavo Scravaglieri

EY Argentina, Partner, International Tax and Transaction Services Latam South Leader, Buenos Aires, Argentina

Secretary

Ezgi Arık

PhD Candidate, Leiden University, Institute of Tax and Economics, The Netherlands

Agenda

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II. The View of the OECD

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V. Are Answers different dependent on the Size of the Company and the Country affected?

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VII. Tax Planning: What is Legal, what is Legitimate?

VIII. What’s next?

I. Tax Law and Tax Morality

- Increasing pressure for „responsible“ tax practices
- Justification for a naming-and-shaming approach?
- **Tax evasion (illegal) - tax avoidance (legal)**
- Fundamental difference from a lawyer’s perspective:
    - *Moral* norms are inherently *subjective*.
    - *Legal* norms have *objective* validity.
    - No *objective* condemnation for (aggressive) tax planning.
- Instrumentalization of *moral* condemnation by the state is illegitimate.

II. The View of the OECD

- 2011 OECD MNE Guidelines: Tax Chapter (1)

(XI. Taxation)

1. It is important that enterprises contribute to the public finances of host countries by making timely payment of their tax liabilities. In particular, enterprises **should comply with both the letter and spirit of the tax laws and regulations of the countries in which they operate.** Complying with the spirit of the law means discerning and following the intention of the legislature. It does not require an enterprise to make payment in excess of the amount legally required pursuant to such an interpretation. Tax compliance includes such measures as **providing to the relevant authorities timely information** that is relevant or required by law for purposes of the correct determination of taxes to be assessed in connection with their operations and conforming transfer pricing practices to the arm’s length principle.
2. Enterprises should treat **tax governance** and tax compliance as important elements of their oversight and broader risk management systems. In particular, **corporate boards should adopt tax risk management strategies to ensure that the financial, regulatory and reputational risks associated with taxation are fully identified and evaluated**.

II. The View of the OECD (cont.)

- 2011 OECD MNE Guidelines: Tax Chapter (2)
- Commentary:
- An enterprise complies with the spirit of the tax laws and regulations if it takes reasonable steps to determine the intention of the legislature and **interprets those tax rules consistent with that intention in light of the statutory language and relevant, contemporaneous legislative history**. Transactions should not be structured in a way that will have tax results that are inconsistent with the underlying economic consequences of the transaction unless there exists specific legislation designed to give that result. In this case, the enterprise should reasonably believe that the transaction is structured in a way that gives a tax result for the enterprise which is not contrary to the intentions of the legislature.

III. Corporate Law requires Tax Planning

- Tax morality - tax planning: not contradictory
- Tax planning: business responsibility conduct
- Tax costs: second or third largest costs
- Any excess or misinterpretation may end in TM issue
- Different understanding of tax morality by stakeholders
- Tax certainty
- Tax law spirit and interpretation is dynamic.
- Tax complaint: reaching a certain result?

IV. The View of the Big Company

- Governments set the law and companies apply
- Different approaches to planning
- Importance of tax strategy review by Board
- Three dimensions for consideration
    - Legal and regulatory
    - Shareholder expectations
    - Building trust with other stakeholders
- Shell experiences and approach

V. Are Answers different dependent on the Size of the Company and the Country affected?

- No distinction between MNEs and SMEs
- Visibility and transparency: out of discussion
- No different ”threshold” of TM but coherent attitude
- No exclusion from TP either for some business and ind.
- Different historical backgrounds of countries
- Non-tax reasons for being less aggressive
- A consistent approach without unilateral interpretations
- Higher quality standards for all participants

VI. Investments in Low Tax Countries

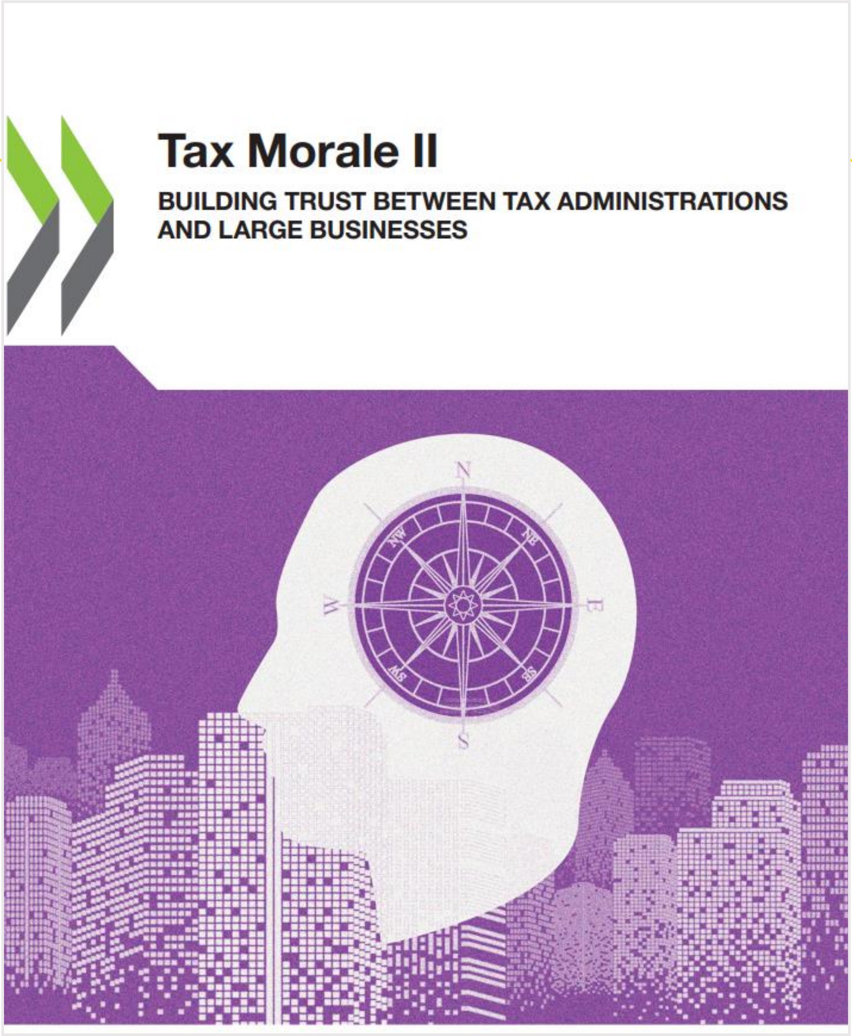
- Governments build tax frameworks in own contexts
- Low tax rates, bases; other factors
- Company responses by own business and tax strategy
- Tax ‘havens’ and harmful tax practices
- Tax incentives
- Shell experiences and approach

VII. Tax Planning: What is Legal, what is Legitimate?

- Illegitimate/aggressive tax planning ≈ tax avoidance
  - letter ⬄ “spirit” of the law
- Sometimes, all rules produce “wrong” results.
- Fighting tax avoidance: tax equality ⬄ legal certainty, allocation of powers
- Responsibility of the legislator for loopholes in the tax code
- Taxpayers exploiting loopholes: not illegitimate
- Indirectly deterring taxpayers from tax planning: illegitimate

VIII. What's next?

- Implementation at national level of measures identified?
- Actions by business?
- Increased investor activism?
- More transparency initiatives?
- Update of OECD/G20 Principles of Corporate Governance in 2023
- Update of OECD MNE Guidelines in 2023



Questions & Comments