Tax Advice in the Age of the 24-Hour News Cycle

ABA Tax Section Teaching Tax Committee
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Tax Advice in the Age of the 24-Hour News Cycle

Moderator:
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Panelists:
David Cay Johnston, Journalist, DCReport.org
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Michael H. Plowgian, Principal, KPMG LLP
Michael Lang, Professor of Law, Chapman University
Tax Exposés Ripped From The Headlines

2007 - Bradley Birkenfeld & UBS
2008 - Herve Falciani & HSBC
2016 - Panama Papers - Mossack Fonseca & Co.
2016 - Bahamas Leaks - Bahamas Corporate Registry
2017 - Paradise Papers - Appleby, Asiaciti, and 19 secrecy jurisdictions company registries
The Panama Papers Investigation

- Massive data leak exposing the largest global corruption scandal in history
- Hundreds of journalists around the globe worked in secret
- Scandal involved corrupt power brokers, the uber rich, elected officials, dictators, cartel bosses, athletes and celebrities who used the Panamanian law firm of Mossack Fonseca to hide their money
- 11.5 million documents taken by a Mossack Fonseca employee
- Shared with Sueddeutsche Zeitung, a newspaper in Munich, and later with the Washington-based International Consortium of Investigative Journalists (ICIJ), BBC, Guardian, Indian Express, and others
- Reports of tax evasion, fraud, bribes, election meddling, and murder
- Conduct covers more than 40 years, from late 1970s to 2015
- Approximately 215,000 accounts in more than 200 countries
- More than $32 trillion hidden in more than 80 tax havens in 2010 alone
How MOST Journalism Works

• Most reporting is an accurate rendition of the official version of events & criticisms of the official version

• Most journalism is -- “, she said.”
How MOST Journalism Works

• The commonly accepted narrative dominates, even if its false, as in 501(c)(4) “targeting.”
• Whoever gets story out often first shapes the narrative
• Herd journalism repeats more than reports
How Investigative Journalists Work

• Work apart from the herd
• Enterprising – dig on their own initiative
• Focus on the UNofficial version of events
• Know how to find disclosure documents
How Investigative Journalists Work

• Patient, dogged, relentless
• Often deeply informed in subject area
• Know the honest answers to their questions
• Fact driven -- so use to your advantage
How to Respond

• Answer calls and **listen** to questions
• Set a time to call back with responses
• Even if not respond, SAY “no comment.”
• Don’t lie, mislead or try to intimidate
• Good manners are your friend
If you respond

- Speak in plain English
- Avoid modifiers
- Focus on the issue
- Give a name for attribution
If you respond

• Consider fessing up – undercuts impact

• Point to documents that help you
If you respond

• Never go to a news competitor

• Know “off record” v “background”

• You have to live with actions you choose
If NOT respond

• You don’t get to tell your story

• Journalist gets more space or time to make the case
Our Credos

• If your mother says she loves you check it out
• Cross check as much as needed to bolt down facts
• Put facts in proper place in universe (gnats v elephants)
• Accuracy and integrity are our friends
The Government’s Point of View

• Mission is to *Do Justice*, not make headlines
• Balance the Following Interests:
  ➢ Individual’s right to a fair trial or adjudicative proceeding
  ➢ Individual’s interest in privacy
  ➢ Government’s ability to administer justice, promote public safety
  ➢ The right of the public to have access to information
• General Deterrence and Public Perception of Accountability Matter
• Stick to the Facts - Less in More
• Stay Within the Lines (Statutory and Ethical Obligations)
Defense Point of View

• The Attorney Should Not Be the Star of the Show
• As a General Rule, Clients Don’t Like Press
• If You are Counter-Punching, Consult with an Expert
• Proceed with Caution
• Don’t Overpromise or Box Yourself In
• Don’t Help the Government Investigate
• Stay Within the Lines (Statutory & Ethical Obligations)
Response to the Panama Papers

• Government
  o Act Quickly
  o Coordinate Efforts
  o Navigate Privileges
  o Consider Your Sources
  o Select the Best Cases
  o Let Your Cases Do the Talking
Response to the Panama Papers

• Defense Counsel
  o Act Quickly
  o Trust But Verify
  o Gather Your Records
  o Identify (and decide whether to contact) Your Witnesses
  o Establish Your Defenses
  o Keep a Low Profile
Increased media and political attention on tax since at least the financial crisis

- Concern about tax evasion
- Concern about potential for profit shifting by multinationals (especially in non-U.S. media)

Proliferation of disclosure regimes

Possible changes to the international consensus

- What is the “right” way for jurisdictions to divide taxing rights?

Driven by domestic politics, but key multilateral players include:

- G20
- OECD
- EU
- UN, IMF, World Bank
Proliferation of Disclosure Regimes

FATCA/CRS
• Intended to detect and deter tax evasion, primarily by individuals
• Significant impact on financial institutions

Beneficial Ownership Registries
• Intended to detect and deter tax evasion and money laundering

Country-by-Country Reporting
• Intended to detect and deter profit shifting by large multinationals
• Public CbyC?

BEPS Action 5 – Exchange of Rulings
• Intended to detect certain ruling practices by governments and multinationals

BEPS Action 12/EU Mandatory Disclosure
• Intended to detect certain cross-border arrangements by multinationals
EU Efforts on Transparency – State of play

**DAC1**
- Directive 2011/16 on administrative cooperation in the field of taxation (January 2013)
- New framework and tools (incl. removal of banking secrecy) for administrative cooperation and new provisions for: Exchanges on request AND Spontaneous exchanges

**DAC1 AEOI**
- Directive 2011/16/EU of 15 February 2011 (from 1 January 2015)
- Mandatory AEOI on 1) income from employment, 2) director’s fees, 3) life insurance products not covered by other Directives, 4) pensions, and 5) ownership of and income from immovable property.

**DAC2 - CRS**
- Directive 2014/107/EU of 16 December 20141 as regards the automatic exchange of financial account information between Member States based on the OECD Common Reporting Standard (CRS)
  - (First exchanges September 2017).

**DAC3 – Tax Rulings**
- Directive 2015/2376 of 8 December 2015 as regards the mandatory automatic exchange of information on advance cross-border tax rulings

**DAC4 – CbC reports**
- Directive 2016/881 of 25 May 2016 as regards the mandatory automatic exchange of information on country-by-country reporting (CbCR) amongst tax authorities.
  - Entered into force in June 2017.
  - Proposal for public CbCR?

**DAC5 – AML information**
- Directive 2016/2258 of 6 December 2016 as regards access to anti-money-laundering information by tax authorities.
  - Entered into force on 1 January 2018.

**DAC6 – Mandatory Disclosure**
- Directive 2018/822 of 25 May 2018 as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements
  - Entered into force on June 25, 2018 and applicable as of July 1, 2020

Implementation monitored by the European Commission (launch of several infringement procedures in 2018)
Possible Changes to International Consensus

Group 1
- User participation is value creation
- Targeted measures needed
- Otherwise maintain existing international framework

Group 2
- Digitalization challenges existing international framework
- Such challenges are not exclusive to DE

Group 3
- BEPS appears to be effective
- Full impact yet unknown
- Satisfied with existing framework
- No significant reforms
Big Picture and Looking Forward

• What is the future of the international tax consensus?
  • Is consensus possible?
  • Where will we be in the future?

• What can companies do?
  • Communication with C suite
  • Communication with public affairs
  • Engagement with governments
Ethical Concerns

1) False Statements of Material Fact or Law
2) Client Confidentiality and Attorney-Client Privilege
3) Impact on Judicial Proceeding
4) Return Information
5) Advertising/Solicitation Restrictions
6) Zealous Representation
7) Statements of Counsel as Admissions
8) Prejudicial Trial Publicity and Protective Statements (Model Rule 3.6)
9) Statements about Qualifications and Integrity of Judge or Adjudicatory Officer, Legal Officer or Candidate (Model Rule 8.2(a))
10) Social Media Issues