

# Interrogating the Relationship Between “Legally Defensible” Tax Planning and Social Justice

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# Tax Planning < -- > Social Justice

If tax cheating by the super-rich & major corporations were a major cause of rising high-end inequality ...

... then the link between tax ethics & distributive justice would be straightforward.

But most of these groups' tax planning – reflecting their interests & incentives – is “legally defensible.”

Doesn't eliminate the link – but certainly complicates it.

# The Romney defense

“I paid every penny I owed – but not a cent more.”

Agreed, no ethical duty to overpay (if accept self-interest as a permissible guide in ordinary daily life).

On the other hand, that sounds way more passive & automatic than high-end tax planning actually is.

Note (a) legal uncertainty, (b) audit lottery, (c) fault standard (“reasonable basis”) for most penalties, (d) “unintended” results, (e) lobbying activity (playing both offense & defense).

# Opinion “quality”

|   |  |
|---|--|
| <b>Will</b>                             | At least 90% probability of success if challenged by IRS   |
| <b>Should</b>                           | At least 70% probability of success if challenged by IRS   |
| <b>More likely than not</b>             | Greater than 50% probability of success if challenged by IRS   |
| <b>Substantial authority</b>            | At least 40% probability of success; weight of authorities in support is “substantial” relative to that of authorities opposing the position |
| <b>Realistic possibility of success</b> | At least 1 in 3 probability of success if challenged by IRS  |
| <b>Reasonable basis</b>                 | Significantly higher than not frivolous, but lower than 1/3  |
| <b>Not frivolous</b>                    | Not patently improper; some merit to position  |
| <b>Frivolous</b>                        | Patently improper  |

## On the one hand, on the other hand

Change the incentives & rules if one wants to change outcomes?

After all, one expects, e.g., Apple & Tim Cook to seek to pay less taxes rather than more. (And note general fiduciary duties to shareholders.)

But exploiting legal uncertainty amid the audit lottery & devising “unintended” tax benefits both raise ethical issues.

Plus, social norms play a role in what TPs & their advisors do.

## Ethics for myself vs. ethics for you

Suppose I hold myself to a higher ethical standard than I demand of others.

I would not be proud of myself (although I'd be well-compensated) if I had devised Apple's "Double Dutch Irish Sandwich" &/or negotiated its deals with Irish & Luxembourg tax officials.

But (a) rightly or wrongly, I have no qualms about maintaining friendships with people who do these things,

(b) Given that I'm doing what I want & am not being treated badly at all, my "ethics" are quite convenient for me.

# Why not write a boring “2-handed lawyer” paper?

On the one hand, blah blah; but on the other hand, blah blah.

But since I thought this would be boring, I tried something a bit different.

To wit, a dialogue – not Socratic, but between 2 evenly matched friends who have taken different career turns & who argue intelligently (I think) & in good faith.

I am hoping it's a fun read – but not well-suited to presentation here.

One possible advantage: blend of audiences at this conference, this purports to show how certain groups actually think (albeit, perhaps a bit flattering; there are plenty worse than these two).

## The players and the ground rules

“Megan,” a tax professor who “favors increasing high-end effective rates,” but is now “keenly aware ... of the associated efficiency costs & practical difficulties” that can turn well-intended rules into fiascos.

“Russell,” an economist & her former Treasury colleague, now doing tax planning & lobbying in DC for an accounting firm, has seen first-hand how convoluted pro-gov’t rules just create tedious mazes through which he must (& can) guide his clients.

Their rule: 2 propositions each, fair-minded & candid debate.

My rule: No speeches longer than a short paragraph w/o interjection.

## The first two propositions

(1) MEGAN: “Large-scale tax avoidance by wealthy individuals and large companies that is legally defensible can nonetheless harm social justice and public morale.”

Russell gives some ground, but demands evidence re. both corporate tax incidence & the claimed ill effects on public morale.

(2) RUSSELL: “Taxpayers have a right to pay as little tax as they legally can. If you don’t like the results, change the rules!”

Megan brings up legal uncertainty & the audit lottery, proposes no-fault penalties; they disagree re. whether this means Russell “wins” from its foregrounding the importance of incentives.

## The last two propositions

(3) MEGAN: “Tax advisors’ professional and personal ethical obligations require them to do more than just minimize expected tax liability.”

Russell notes fiduciary obligations to clients. And, even outside his comfort zone, “if people have incentives to do things, they will do them. It’s like an ecological niche for nasty things like mosquitoes.”

(4) RUSSELL: “It’s a tactical error for human rights advocates to focus on ‘corporate social responsibility’ & tax professionals’ ethics rather than on the existing rules & resulting incentives.”

The issues here are too speculative for their discussion to make much headway.

## How it ends

RUSSELL: “Until next time, then. But it’s been fun. Should I buy the first round?”

MEGAN: “I wish. But I’d better get to Union Station, or the Acela line will be halfway down the concourse.”

Movie rights available; casting suggestions appreciated; lessons inconclusive; a shame they can’t hear other perspectives at this conference.