Fair Taxation and Corporate Social Responsibility

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Axel Hilling and Matti Kukkonen (eds)

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Chapter 1

Conference Report: Fair Taxation and Corporate Social Responsibility

Vidya Kauri, Law360[1]

In a world where material wealth is becoming increasingly concentrated in the hands of a few while the income gap between the middle and upper classes continues to grow, revelations from high-profile tax scandals ricocheted around the world as an unjust crime against the bedrocks of interdependent societies.

Disclosures from well-known media investigations such as the 2017 Paradise Papers, the 2015 Panama Papers and the 2014 Luxem-

1. Vidya Kauri is a journalist who covered US tax laws and regulations at Law360 Tax Authority in New York during the Trump administration's overhaul of US federal tax laws. She has also written about Brexit's implications for international trade and new tax laws in China aimed at attracting foreign investors. She currently oversees immigration and trade policy coverage at Law360, and her work—focused on global conflicts and foreign affairs across the Middle East, North America and the European Union—has previously appeared in *the Globe and Mail*, *Al Jazeera English*, *Huffington Post Canada* and other leading publications around the world.

bourg Leaks shed a glaring light on the various intricate and creative strategies that many corporations use to squirrel their profits away overseas, sheltered from the reach of domestic tax authorities back home.

The news of these investigations landed in an environment of high-stakes audits, legal battles and settlements involving billions of dollars between governments and businesses suspected of improperly minimizing their tax obligations. Examples of these developments include the ongoing appeals from Apple Inc. and Starbucks Corp. challenging the European Commission's assessment of €13 billion and €30 million, respectively, in back taxes; the U.S. Internal Revenue Service's investigation of Caterpillar Inc.'s profits in Switzerland which could lead to a tax bill of $2.3 billion, and a $186 million agreement between Google Inc. and Her Majesty's Revenue and Customs in the UK following a six-year audit.

The investigations by journalists and tax authorities elevated the notion of paying one's fair share of taxes on the public's agenda for a fairer and more equal society, and they have led to new legislation and international alliances to tamp down on tax-avoidance schemes—which may be perfectly legal, if ethically questionable, interpretations of tax laws. Even shareholders, who have typically prioritized cost reduction and profit maximization are calling for more responsible behaviour from corporations, fearing a blowback from the possibility of unexpectedly high tax bills in the future as a result of not having them paid in prior years.

Against this backdrop, researchers at Denmark's University of Copenhagen, Lund University in Sweden and Hanken School of Economics in Finland co-hosted a conference on emerging legal and moral expectations that businesses give due deference to the spirit and intent of tax laws, instead of merely paying the least amount that the law permits with its numerous loopholes. The Conference on Fair Taxation and Corporate Social Responsibility was a testament to the expanding definition of CSR that is moving beyond the traditional realm of focusing on environmentally and labour-friendly business practices to include compliance with tax laws.

From behind a podium emblazoned with the Greek words ‘En Pneymati Kai Aahoeia,’ meaning ‘In Spirit and Truth,’ speakers grappled with fluid definitions of CSR, what tax has to do with morality, to whom corporations should be responsible and how businesses can be motivated to act in the interests of the public good.

The overwhelming sentiment was that since multinational corporations reap the benefits of government-funded amenities, such as infrastructure, sanitation, subsidies, emergency services and court systems, they should contribute adequately to these services. Aggressive tax planning to get around the existing laws on the books is no longer acceptable if we want to build sustainable communities, panellists said.

‘This is not corruption, this is not illegal activity. This is discretion to act morally irresponsibly towards society,’ Ave-Geidi Jallai, a doctoral researcher in the area of CSR and international taxation at Tilburg University in The Netherlands, said.

It is unusual to hear an involved discussion on human rights at a tax conference. And yet, it was Parul Sharma, a human rights lawyer based in Sweden, who kicked off the panel discussions, laying out her case for tax justice and its relationship to sustainable development goals established by the United Nations.

The UN’s list of 17 sustainable development goals, with an annual price tag of approximately $5 trillion, is an ambitious roadmap to end poverty, reduce inequalities, achieve gender equality, boost innovation and economic growth and take action against climate change—all by 2030. Each of the goals depends on the others, and minimizing corruption while implementing fairer tax systems is crucial to meeting the UN’s 2030 deadline, Sharma said.

‘In my world, since I work with sustainability issues, this distinction between tax planning and [illegal] tax evasion is dangerous. There is a great deal of planning in evasion as well,’ Sharma said.

The UN’s 2030 agenda carried the theme throughout the daylong conference exploring different approaches to taxation and the supports that corporations need in a highly competitive business environment to absorb greater tax expenditures.

The dialogue to thwart, or at least curtail, international tax-avoidance gimmicks that take advantage of complex and differing tax systems across multiple jurisdictions began years before the first major public exposés of tax misconduct.

Frustrated at the profusion of highly aggressive tax planning strategies, the Organisation for Economic Co-operation and Development set out to amend its principles of good corporate governance to include tax compliance in 2006, according to Grace Perez-Navarro, deputy director at the OECD's Centre for Tax Policy and Administration and a panellist at the conference. The International Monetary Fund estimates that tax avoidance results in a global revenue loss for governments of approximately $650 billion every year.

The OECD ultimately issued recommendations in October 2015 as part of its landmark Base Erosion and Profit-Shifting, or BEPS, project to minimize international tax avoidance. The BEPS project offered guidelines for governments to collect and share with each other the financial data of multinational companies operating within their borders and earning at least €750 million.

It also led to a multilateral convention between nearly 85 countries—the first of its kind among tax treaties that tend to be bilateral in nature—to restrain the abuse of the vast network of hundreds of existing bilateral tax treaties in tax-avoidance schemes.

As countries begin to implement the BEPS recommendations, speakers at the conference questioned how governments themselves can be held accountable in the quest for tax compliance. It isn't possible to talk about fair taxation without also examining legislation to see if it is strong enough to combat tax avoidance, talking about corruption among elected officials, and asking if governments are using tax revenues efficiently, panellists said.

'There is a political, government failure that has led us to this discussion,' Sharma said. 'Conventionally, the government is the upholder of human rights and yet, we see that tax injustice has had a very bad effect on human rights.'

Maria Amparo Grau Ruiz, a professor in the department of commercial, financial and tax law at Universidad Complutense de Madrid, said that the public and private sectors need to cooperate to implement a fair tax system.

While governments may find ways to use their tax revenues more efficiently, businesses are keen to demonstrate that they are having a positive impact on society, she said.

'We need a smart mix of voluntary policy measures and if necessary, some complementary regulation because tax systems need more openness and more trust,' Ruiz said.

Corporate Social Responsibility can be hard to define on its own, let alone pair it with the subjective idea of paying one's fair share of taxes. It is a dynamic concept that has changed over the decades, struggling with abstract terms such as 'just' and 'fair' that are hard to quantify.

'[There is a] weakness in subjective terms like ethical conduct that can be easily dismissed in the tax law context because taxation is very much about certainty,' said Axel Hilling, an associate professor at Lund University in Sweden, author of the book *Corporate Taxation and Social Responsibility* and one of the conference organizers.

While CSR generally entails an obligation to be a good corporate citizen and do what's right by society, it is still a matter of debate whether it is something corporations do with their profits or what they do to earn profits, whether it is voluntary or requires government regulation leading to mandatory compliance, and what exactly the responsibilities are and to whom businesses are responsible.

'Despite the enthusiasm corporations have shown for adopting the language of corporate social responsibility and its synonyms, confusion prevails. For good reasons,' Jeremy Moon, a professor of corporate sustainability at Copenhagen Business School, said on one of the conference panels.

While some theorists shun the idea of government regulation to implement CSR, Moon said that it is possible to have varying degrees of non-mandatory regulation that don't impinge on the discretion that companies crave to run their own businesses.

For example, governments could politically endorse CSR through information campaigns, provide subsidies and tax incentives for companies that adopt the CSR agenda, or collaborate with businesses to establish standards and guidelines, Moon said.

A traditional corporate governance model has typically prioritized shareholder value, but CSR advocates are now increasingly turning toward a stakeholder theory that advances the collective interests of multiple other groups including the government, consumers, employees, suppliers, civil society and sometimes, even competitors.

The theory isn't new. It was first conceptualized in 1984 by R. Edward Freeman, a philosopher and business administration professor at the University of Virginia, and it has helped shape the business community's perception of good management practice.

What it does now, however, is firmly integrate the government's role as a tax collector and provider of public goods with the concept of corporate sustainability. Each stakeholder group is seen as being important to a company's success, and a business that ignores local law or the quality of life in the communities it relies on can experience declining profits.

'Public goods are outputs, but without the input of taxation, then none of these public goods are possible at all,' Moon said.

When tax is viewed as a public debt and an obligation from individuals and corporate citizens to society, Hilling said that taxpayers can feel that they are contributing 'to the building and maintenance of a just and sustainable society, and a good way to do that is to act ethically.'

'It requires self-restraint and a professionally honest interpretation of the regulations including due deference to plain meaning, but also to legislative purpose, prior interpretations and maxims of statutory construction,' he said.

In other words, would business leaders and lawyers feel comfortable telling their mothers what they do to minimize their tax obligations? Or would they feel like they got caught getting their fingers sticky in a communal honey jar under the lens of media scrutiny?

It isn't enough for companies merely to comply with existing tax laws which are necessarily technical and imperfect by nature, Hilling said. Companies must instead exercise moderation while determining their tax liabilities as part of their overall financial planning process, and refrain from lobbying for legislation that would be a detriment to society's well-being.

At the other end of the spectrum, when taxation is considered unfair, it is deemed acceptable to avoid it as much as possible, as long as the tax-planning strategies are not illegal. This ties into the shareholder model which demands the greatest possible reduction of a business' expenses and the maximization of profits.

This perspective—dominant in the free-market economy—takes away all obligations to the state, except to follow the laws on the books, and disregards fundamental societal values as long as economic profits are not negatively affected, Hilling said.

'It's senseless as it puts the entire responsibility on the governments while at the same time advocating actions to reduce governments' possibilities to exercise that responsibility,' he said.

The view that businesses should behave more ethically and responsibly toward society when considering their tax expenses requires cooperation, not polarization, between public and private stakeholders, and it aligns with the UN's sustainable development goals, Hilling said.

Responsible tax behaviour is difficult for a multitude of reasons other than the requirement to exercise self-restraint.

Corporations, which typically tend to shun public scrutiny, have to figure out how to walk the fine line between responding to the public's demand for transparency and protecting confidential information. They have to re-examine their relationships with investors, push for clearer tax and financial laws while holding policy makers accountable, and strengthen dialogue with civil society.

Global transport and logistics company Maersk is one of a growing number of multinational corporations that have committed to paying taxes worldwide responsibly and in accordance with their commercial operations.

'We do not create artificial tax structures,' Signe Schans Christensen, Maersk's in-house tax counsel said at the conference. 'We define artificial structures as being legal but [they don't] have a business motive.' Sometimes this approach can result in a competitive disadvantage.

Serving more than 340 ports across 120 countries, the exercise to pay tax where business takes place is 'very complex' while analysing business structure, commercial considerations and relationships with local tax authorities, Christensen said.

However, aggressive tax planning also comes with significant risks in the long term, and Maersk has decided that the costs of being more fiscally and socially responsible toward society are worth the benefits, as have others responding to public pressure and concerns from shareholders about the long-term value of their investments.

According to CSR Europe, a business network of more than 45 corporate members dedicated to enhancing sustainable growth and advancing the UN's 2030 agenda, one of the main benefits of responsible tax planning is the ability to safeguard investments over a mid- to long-term range.

This is especially in light of national tax authorities across the European Union moving to close tax loopholes. Emerging laws and regulations to prevent tax avoidance manoeuvres will also introduce adaptation costs for companies, and getting ahead of the legislative curve can lower these costs while improving a business' position with policy makers.

Jallai also pointed to research from the Business and Sustainable Development Commission that shows that realizing the UN's 2030 agenda could lead to $12 trillion of market opportunities and create 380 million new jobs in the food and agricultural sector, urban areas, and energy and health industries—areas that represent about 60 percent of the real economy.

In addition, a company's reputation is one of its most valuable assets, and abusing corporate power through aggressive tax planning is bound to be risky.

'Even though the value of reputation is difficult to quantify, good reputation can bring competitive advantage. Moreover, corporate reputation is a key to a social license to operate from the local communities; it increases corporate legitimacy,' Jallai said, cautioning that a company's profits are especially vulnerable when its social stature and brand power take a hit.

Moving to a sustainable growth model may be disruptive for businesses, but there are support systems in place to facilitate the change.

Lorena Sorrentino, a senior project manager at CSR Europe, said that responsible tax planning is still an emerging area and that her organization is one of a few that works on sustainability issues and also talks about tax planning. The group, whose members include big names such as Honda, IBM and L'Oréal that care to be seen as front-runners when it comes to sustainability, takes an educational approach to try to convince companies that their internal tax policies have an impact on the environment, economy and society at large.

'You will not just convince them by telling them that it's bad. You have to show them how it's bad for the business actually if they are involved in [tax] scandals,' Sorrentino said.

Companies will inevitably need guidance both during and after the process of revamping their tax policies. The journey to tax responsibility is one of continuous improvement involving internal collaboration, a strong narrative on a corporation's overall impact on society and a methodology for companies and society members to cooperate, Sorrentino said.

In November 2016, CSR Europe launched a self-assessment tool for companies to help determine where they stand on the spectrum of tax transparency and responsible tax behaviour. Approximately 20 corporations have taken this assessment to examine whether their tax payments align with where their real economic activity takes place, if their executive boards and CSR departments are involved in determining their tax policies, and their relationship with tax authorities. A company's tax managers and personnel leading sustainability issues are encouraged to work together and participants receive a score and recommendations from CSR Europe on best practices for sounder and more stable tax planning decisions.

The tool helps companies begin the conversation internally on how to integrate their tax policies with their sustainability strategies, and CSR Europe then follows up with workshops and opportunities to meet with and learn from other businesses that are leading in this area. Some of the companies that have gone through the process are now in the advanced stages of engaging with stakeholders to amend and publicize their internal tax protocols, Sorrentino said.

Experts at the conference agreed that aggressive attempts and judgmental statements about tax havens can have the unhelpful effect of making businesses feel like they are being attacked. Tax is a sensitive topic and corporations are generally averse to talking about it, according to Marianne Bogle, executive director CSR Sweden, a sibling organization and founding member of CSR Europe.

Bogle, an attendee at the conference, said that she and her colleagues have switched to a more diplomatic approach where stakeholders and company representatives are invited to round-table discussions with a set of house rules designed to make participants more comfortable.

Often-times, the staff in charge of tax management and those heading sustainability affairs within a company have never met, and it is important to bring them together as tax personnel may be unaware of Agenda 2030 or how their work is connected to it, Bogle said in an interview after the conference. In addition, sustainability staff may lack an understanding of technical tax concepts, she said.

'It's also very much about the grey zone between aggressive tax planning and what could be smart planning and still could be sustainable,' she said. 'And of course, I'm very humbled because when the tax people start to talk about their work and the world they live in, it's hard for me to understand. So, it's very much needed to have an understanding of what they do and sometimes it can be very complicated.'

Workshops where businesses can learn from each other how to navigate the murky waters of financial transparency and responsible tax planning are crucial to keeping companies motivated, experts said.

Christensen at Maersk said that the company believes it has an 'obligation to share [its] knowledge with others,' acknowledging that re-designing internal tax policy and committing to responsible tax principles is ‘not smooth sailing.’

Maersk’s tax principles include ‘humbleness’ to listen to stakeholders and investors about tax issues, and a desire ‘to be associated with trustworthiness.’ Although the company does operate in low-tax jurisdictions, it says it does not artificially shift profits earned elsewhere to these areas. It follows Danish law and OECD recommendations to submit country-by-country reports of its revenue, profits, staff numbers, assets and payments, and employs people whose values are in line with its tax principles.

When it comes to hiring business leaders, an oft-overlooked quality is emotional intelligence. There is little focus, if any, on developing empathy in business schools and the emotional quotient tends to be undervalued in comparison to other leadership traits such as IQ, creativity and decision-making skills, according to Sharma.

‘With an increased EQ, you also have a higher responsibility towards the risks related to sustainable development. This has been tried and tested over and over again,’ she said. ‘The best performing CEOs are also the ones with a higher EQ.’

Diversity and meaningful inclusiveness are also crucial to achieving the Agenda 2030 goals, Sharma said. While corporate boards should be re-examining their tax policies, she said that law schools and other colleges and universities should be aiming to present their knowledge in a way that doesn’t exclude marginalized groups.

As difficult as it is for businesses to re-think their tax planning strategies and add to their overall expenses, it is no easier for governments to coordinate their complex tax systems with each other and devise water-tight laws that can anticipate every possible way that a company may try to circumvent the law’s intent.

What is really needed, especially since legal frameworks are still lagging behind in tackling tax avoidance, is a shift in attitude and a recognition that tax is not a bill paid to the state, but rather to society, experts said.

‘The fairness agenda is much more than the fight against fraud, evasion and avoidance,’ Ruiz, the professor at Universidad Complutense de Madrid said. 'Taxation will play a role in reducing inequalities and promoting social justice.'

Hans Gribnau, a tax professor at the Tilburg University Law School with an academic background in philosophy, said that tax lawyers have a tendency to be 'purists' or 'formalists' in their practice.

Instead of seeing the state as an intermediary which collects taxes to provide services for everybody, including corporations, formalists view the body of tax laws as an instrument which can be used for their own benefit alone. This neglects 'the values intrinsic to taxation' and leads to wealth being accumulated on the backs of other taxpayers' contributions to society, Gribnau said.

A more holistic approach entails compliance not just with the literal letter of the law, but also the spirit of the law.

'It is not so much about some moral norm to behave as an ideal corporate citizen, but rather… about the moral imperative not to engineer your way around the letter of the law which is inevitably imperfect,' Gribnau said.

In minimizing taxes to the greatest extent possible, tax lawyers may say that they are merely representing their clients' wishes, but Gribnau argues that attorneys should be able to make their own rational evaluations as individuals with a moral conscience and have explicit discussions on difficult dilemmas with their clients.

However, striving to be moral can be a confusing and distracting term for companies in their list of business goals to achieve, which is why the OECD prefers to talk about what a 'reasonable interpretation of the law' is, according to Perez-Navarro at the organization's Centre for Tax Policy and Administration.

'At the OECD we don't talk about CSR, which can have an ethical or moral connotation, and refer to responsible business conduct,' she said. 'In the tax context, what we are talking about is compliance with the law and that for us, means the letter and the spirit of the law.'

Laws are ultimately a codification, albeit not an exhaustive one, of a society's moral code, and panellists agreed that the public should keep pushing to develop and fine-tune them. It is the legal system, not the moral one, that can be more easily enforced.

Morality comes with an element of discretion, and that discretion 'needs to be judged and deployed in the light of societal expectations [and] needs,' Moon said.

'Of course, there are often no simple answers because conflicting moral values and interests are at stake. This is something to discuss with one's corporate client,' he said.

Corporations also have to be wary of the extent to which they are reliant on government-funded services and infrastructure, the panellists said. While they have a right to structure their affairs in a tax-efficient way, they have to balance that right with their responsibility to keep those services well-funded.

Companies tend to thrive in rich socio-economic environments, and multinational enterprises have strong ties to their regional headquarters. Even those that operate mainly in the online sphere, such as Amazon.com Inc., are dependent on local economies and transportation systems that may be operated by other private companies but are ultimately financed by tax revenues.

'Presumably even Amazon values staff and customers and a society who are educated and motivated, and who enjoy social protection and communication systems,' Moon said. 'I imagine that even the payments systems to Amazon rely ultimately on the role of governments in guaranteeing the banks that operate them.'

There is one group, however, that doesn't fit neatly into the CSR agenda, and that is non-profits, according to Rasmus Kristian Feldthusen, a professor at Copenhagen University.

Non-profits, foundations and similar associations are generally either tax-exempt or recipients of generous tax deductions for the philanthropic work they perform. Their tax privileges, depending on local laws, are usually based on their net earnings being used for a charitable purpose instead of distributions to shareholders.

In Denmark, non-profits are subject to tax, but when they are able to minimize their tax liabilities with deductions, they are also subject to public pressure and questions about why they should be allowed to pay so little in tax, Feldthusen said.

'One would argue that tax is a contribution—a payment back to society from what a company has actually made of profits using the resources of a country, human capital or what have we,' he said. 'So how does the non-profit contribute to society? Well, It's not by taxes. It's by [...] distributions to a charitable purpose.'

Tax incentives for businesses may appear confusing in the context of CSR and raise questions about how much of a tax break businesses should get, if at all, for making positive contributions to society that are not inherently economic in nature.

The rationale for not taxing non-profits or giving them large deductions for their various expenses is justifiable because of the charitable work they do that society has deemed a worthy cause, Feldthusen said. In addition, unused net earnings remain in the non-profit to be used as earmarked donations.

Corporations with a business purpose, on the other hand, have to be treated differently for tax purposes since individuals with sufficient wealth could feasibly store their income inside the company for decades without paying tax on that income, Feldthusen said.

'So perhaps, one should not see non-profits, even though they might be taxed, as fitting into the agenda of CSR and corporate tax, but rather see the non-profits as doing their contribution to society through its charitable donations and activities,' he said.

The research is clear: investing in socially responsible and transparent firms comes with fewer risks. Short-term profits are powerfully attractive, but responsible business conduct should not be shirked just because it is difficult.

Participants at the conference—both attendees and panellists—walked away with an understanding of the colossal complexity and the magnitude of the issues before them, eager to collaborate and form alliances with like-minded thinkers.

As the academic discussion continues to evolve on what responsible corporate behaviour is in the context of tax, there is an urgent need to put that discussion into practice and implement strategies for how that responsible behaviour can be enabled, they said.

There was also a realization that inclusivity is important to furthering Agenda 2030. This means listening sincerely to the perspectives of businesses, in addition to the voices of marginalized groups who may directly or indirectly be affected by tax avoidance schemes.

Christian Hallum, a senior tax and extractives specialist at Oxfam IBIS, spoke up from the audience to say that representatives from developing countries should be included in discussions of global corporate tax issues. Intense lobbying, unfair or secret tax incentives and corruption are rife in both developed and developing countries. However, the negative effects of tax avoidance may be more exacerbated in developing countries that rely more heavily on corporate income tax to fill their coffers.

'We have to recognize that this is a conversation that is equally important both places,' Hallum said in an interview after the conference. 'These are issues that are so vital in many of these developing countries that to have a discussion about responsible corporate tax, this has to figure very, very prominently. That's our concern that sometimes, when you have these discussions in a Nordic setting or a Western setting, they don't get the sufficient attention that they really deserve.'

Karsten Lauritzen, the tax minister of Denmark, also spoke at the end of the conference to say that the consequences of irresponsible and immoral tax behaviour are that businesses will lose the credibility and the trust of their customers, and that the public demand to institute tighter laws and regulations will increase.

'It's stupid to break the trust between you and your own customer,' Lauritzen said. 'Both the Panama and Paradise papers showed that this is something people feel strongly about. Citizens are offended when they hear that somebody [...] is making millions of dollars and paying very little in tax, but not necessarily breaking the law.'

One of the business advantages to working in a globalized and digital world is that it is practically impossible for governments to formulate laws without loopholes. This is why it is necessary for the public to continue to be offended by tax avoidance games and rally around the issue of fair corporate taxation, Lauritzen said.

Tax laws are complex and intricate, and the moral discretions that come with the legal right to minimize one's tax obligations are even more so. Even though the concept of responsible tax planning is still a novel idea in the upper echelons of many corporate suites, the academic discussion of its benefits have been taking place for years and experts agree that it is past time to put these discussions into practice. A precise definition of corporate social responsibility may be forever elusive and shifting, but it is clear that secrecy and prioritization of short-term gains deeply hurt the very societies that private interests rely on.

'Every taxpayer has the right to structure their affairs in a tax efficient way, and I would say you have to balance that with your societal obligations,' Gribnau said.