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# Making sense of CSR and corporate taxation – Inside view

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# My background

- Professor with special responsibilities in tax law
- Core research area: Interpretation and application of anti-avoidance legislation, but also publications on...

*Når multinationale selskaber skal betale en fair andel i skat – en balanceakt i krydsfeltet mellem skatteret og corporate social responsibility, Tidsskrift for Skatter og Afgifter, 2015, pp. 1655-1665.*

*Taxation, General Anti-Avoidance Rules and Corporate Social Responsibility, in “Fair Taxation and Corporate Social Responsibility”. Co-author: Karin Buhmann. Forthcoming December 2019, Ex Tuto.*

*Restoring Fairness of the International Tax System – Will the EU Anti-Tax Avoidance Directive help ensuring the sustainability of the international tax framework?, in “Tax Sustainability in an EU and International Context”. Forthcoming spring 2019, IBFD.*

- Background in tax advisory
  - Deloitte 2004-2013
  - CORIT Advisory 2013-?

## The Telegraph

### MP on Google tax avoidance scheme: 'I think that you do evil'

The Telegraph, 12 November 2012



"We're not accusing you of being illegal, we are accusing you of being immoral," replied Hodge.

The Guardian, 12 November 2012

## Skat skal ikke handle om moral

"Hvis selskaberne kan reddegøre for, at man har overholdt alle skattelovens regler til punkt og prikke, kan det godt irritere mig, når man i den offentlige debat hører politikere sige, at de skal betale en fair andel af skatten. Vi ender derhenne, hvor betaling af skat bliver et moralsk spørgsmål. Men hvis det er moral, der afgør det, kunne man lige så godt ophæve skattelovgivningen," påpeger han.

Professor A.N. Laursen,  
DJØF-bladet, March 2017

**"Politikerne  
må lave loven  
om, hvis  
de ikke er  
tilfredse med  
den skat, som  
selskaberne  
skal erlægge"**

*"It is part of the proper running of a business to arrange its affairs in a way that minimize tax payments. Danish Supreme Court Judge J. Nørgaard 2011\**

*"... the injection of notions of morality and fairness into the debate has added further complexity and uncertainty to an already complicated field... this is rather unfortunate." Professor Panayi 2015*

*"Taxes are a cost, like any other cost. There is nothing magical or special about taxes as a cost, except that they are subject to adjustment by government action...". Professor Rosenbloom, 2019*

\*Own translation

# Arguments – Tax as law

The legal order and the rule of law create an obstacle to power holders of society

- Taxes are not voluntary → Protection of the individual (corporation) is important
- Taxation is a complex balancing act → Needs to be carried out in a transparent democratic order
- Equal treatment of taxpayers → Presupposes a legal standard to meet some form of clarity
- Objectivity → Requires legal norms to exclude private, subjective perceptions (reducing arbitrariness)
- Procedural justice → Involves independent judicial review

Source: R.P. Österman in *Managing Sustainable Business* (S. Arvidsson ed., Springer 2018).

***A Friedman doctrine—***  
**The Social  
Responsibility  
Of Business Is to  
Increase Its Profits**

By MILTON FRIEDMAN

*The New York Times*

Published: September 13, 1970

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*"We find consistent evidence that corporate social responsibility is negatively related to five-year cash effective tax rates and positively related to tax lobbying expenditures. Our evidence suggests that, on average, corporate social responsibility and tax payments act as substitutes..."*

Source: A.K. Davis et al. in *The Accounting Review* (2016)

- **Ethical/moral view** – All regulations are based (also) on ethical values – law is more than a body of rules → The law should be applied in a responsible way
- **Real entity view** – The corporation is separated from both state and shareholders and should be considered a citizen → For all citizens that are part of the democratic process it is not legitimate to avoid paying taxes
- **Artificial entity view** – The state created the corporation and the conditions for its operation in the market → It is legitimate to expect corporations to cooperate (and not only comply).

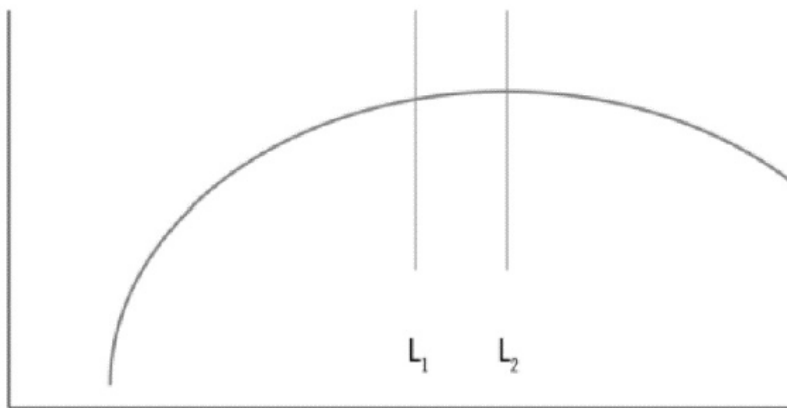
Sources: See e.g. H. Gribnau in *Social and Legal Studies* (2015), R. Avi-Yonah in *NYU Journal of Law and Business* (2014) and A. Hilling & D.T. Ostas in *Corporate Taxation and Social Responsibility* (Wolters Kluwer 2017).

## My assessment

- Claims that "businesses should pay their fair share" and "show self-restraint" are too easy and vague
- The tax base is determined by law for good reasons
- But! The bonus pater business manager still should include CSR reflections when deciding on the use of tax planning

Sources: P.K. Schmidt in Tidsskrift for skatter og afgifter 2015, P.K. Schmidt & K. Buhmann in Fair Taxation and Corporate Social Responsibility (forthcoming – Ex Tuto 2019), and P.K. Schmidt in Tax Sustainability in an EU and International Context (forthcoming, IBFD 2020).

### Argument 1



### Argument 2

*Journal of Law, Finance, and Accounting*, 2017, 2: 247–274

## Companies Should Maximize Shareholder Welfare Not Market Value

Oliver Hart<sup>1</sup> and Luigi Zingales<sup>2\*</sup>

**Figure 3: Appropriate tax planning and tax management, aggressive tax planning, and the shareholder value.**

Source: R. Knuutinen, Nordic Tax Journal 2014

# What is currently going on?

It is now (more) common for MNEs and professional investors to:

- Ensure managerial anchoring of the tax function
- Prepare and publish tax policies (internal/external)
- Openly discuss the tax policy with shareholders and other stakeholders

Drivers of this development

- Leaks and scandals – awareness of reputational risk
- The OECD BEPS Project
- Always nice to join a winning team (the good guys)
- True professional enthusiasm

Is legislation catching up → Making "responsible tax" superfluous?

- No (not yet)



atp=



Industriens Pension

PensionDanmark

**PFA**

Mere til dig

## Tax Code of Conduct

### PREAMBLE

Tax revenue forms an essential part of a well-functioning society and constitutes a fundamental building block and funding source in achieving the UN's Sustainable Development Goals which focus on improving welfare, justice, education, emergency services, health, and environmental protection in developed and developing countries.

Internationally, there has been a growing focus on preventing aggressive tax planning and achieving increased transparency in the area of tax, resulting in a range of important international initiatives including the OECD's Base Erosion and Profit Shifting project and the EU Anti-Tax Avoidance Directives.

<https://www.atp.dk/sites/default/files/tax-code-of-conduct-eng.pdf>

## ATP's tax policy for unlisted investments

ATP does not accept aggressive tax planning as exemplified below:

- Investments in jurisdictions which are on the EU's list of non-cooperative tax jurisdictions
- Abuse of double taxation treaties where holding companies which do not have sufficient substance are used for the sole purpose of reducing or avoiding withholding tax
- Transfer pricing planning where risk and income are systematically shifted to low-tax countries
- Use of financial instruments for aggressive tax planning
- Use of hybrid companies for aggressive tax planning
- Use of shareholdings for dividend arbitrage, also by making shareholdings available to others through loans
- Use of highly leveraged acquisition structures with the aim of wrongfully reducing taxable income.

<https://www.atp.dk/en/responsibility/tax-atp/atps-tax-policy>

# Examples

## Ørsted Skattepolitik

- We only use business structures that are driven by commercial considerations, aligned with business activity and which have genuine substance.
- We will not undertake transactions whose sole purpose is to create a tax benefit which is in excess of what is reasonably understood to be intended by relevant tax rules.
- We do not use artificially fragmented structures or contracts to avoid establishing a taxable presence in jurisdictions where we do business.
- We do not use so-called secrecy jurisdictions or tax havens to avoid taxes. If we establish an entity in low or nil-rate jurisdictions, it will be for substantive and commercial reasons, for example local demand for renewable energy.

<https://orsted.com/en/Sustainability/Our-governance/Policies#7>

## The B Team Responsible Tax Principles

### APPROACH TO TAX MANAGEMENT

- **ACCOUNTABILITY & GOVERNANCE:** Tax is a core part of corporate responsibility and governance and is overseen by the board of directors (the Board).
- **COMPLIANCE:** We comply with the tax legislation of the countries in which we operate and pay the right amount of tax at the right time, in the countries where we create value.
- **BUSINESS STRUCTURE:** We will only use business structures that are driven by commercial considerations, are aligned with business activity and which have genuine substance. We do not seek abusive tax results.

### RELATIONSHIPS WITH OTHERS

- **RELATIONSHIPS WITH TAX AUTHORITIES:** We seek, wherever possible, to develop cooperative relationships with tax authorities, based on mutual respect, transparency and trust.
- **SEEKING AND ACCEPTING TAX INCENTIVES:** Where we claim tax incentives offered by government authorities, we seek to ensure that they are transparent and consistent with statutory or regulatory frameworks.
- **SUPPORTING EFFECTIVE TAX SYSTEMS:** We engage constructively in national and international dialogue with governments, business groups and civil society to support the development of effective tax systems, legislation and administration.

### REPORTING TO STAKEHOLDERS

- **TRANSPARENCY:** We provide regular information to our stakeholders, including investors, policy makers, employees, civil society and the general public, about our approach to tax and taxes paid.

## The B Team Responsible Tax Principles

### Principle 3 Business Structure

We will only use business structures that are driven by commercial considerations, are aligned with business activity and which have genuine substance. We do not seek abusive tax results.

- A** **The Group is transparent about the entities that it owns around the world** and about who owns them
- B** **We do not use so-called 'tax havens' in order to avoid taxes on activities which take place elsewhere.** Entities which are based in low or nil-rate jurisdictions exist for substantive and commercial reasons
- C** **We pay tax on profits according to where value is created within the normal course of commercial activity;** we do not use artificially fragmented structures or contracts to avoid establishing a taxable presence in jurisdictions where we do business
- D** **Our tax principles extend to our relationships with employees, customers and contractors.** We will not engage in arrangements whose sole purpose is to create a tax benefit which is in excess of what is reasonably understood to be intended by relevant tax rules

- Taxation is – for good reasons – a closely regulated legal area
- Despite the juridical foundation there are good reasons to include CSR reflections when deciding on the use of tax planning
  - Trade-off between tax savings and reputational damage
  - What does the shareholders really want (shareholder value vs shareholder welfare)?
- Preparation and publication of tax policies becoming “the new normal”
- “2nd generation tax policies” appear to become more concrete and operational
- The effect on more responsible tax behaviour on future tax legislation...?