I have been asked to comment on Reuven Avi-Yonah’s prompt from the point of view of an international tax lawyer practising in London.

It would not be appropriate for me to comment on the correct interpretation of US legal provisions or principles so I am approaching this issue from the point of view of “what the law should say” as opposed to what Reuven and the US legal commentators think “the law does say”.

The UK has had plenty of experience over the past five years with tax controversy in the media – and at times the committees in the UK Parliament have appeared to behave like star chambers bullying witnesses and seeming to be more interested in the headlines their sessions will create rather than having a balanced debate.

The trouble with tax in this context is that it is difficult to explain simply in a heated debate – anyone who tries to defend his or her position in such a debate is at risk of verbal abuse as the debate grows increasingly complex. One cannot really have an open and educated debate when one side is only interested in damaging the other’s reputation with cheap points that are easy to make, difficult to answer against the background noise but have no real substance.

In addition, because newspapers are generally only interested in printing bad news, there is a danger of commercial organisations becoming public targets purely for the sake of that and then finding it difficult to get a fair hearing.

Being put in the stocks so that the public can throw rotten vegetables at you is not an appealing prospect and, at the end of the day, it serves no real public purpose.

The question then is whether the public purpose is best served by:-

(a) public naming and shaming to ensure that taxpayers comply with what is perceived as the “spirit of the law”; or

(b) having clear legislation backed up by disclosure obligations to tax authorities that enable them to ensure that profits are being taxed where they are truly being generated.

Mixed up in all this, of course, is the often difficult concept of “the public’s right to know”. This was something that featured in recent EU proposals on transparency.

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Ironically, all this furore has come at a time when, as a result of the desire to encourage large corporations to behave better by being responsive to their own suggestions and grievances about the tax system coupled with real-time working initiatives by Her Majesty's Revenue and Customs (“HMRC”), corporate tax peace has broken out in the UK. Few large multi-nationals based in the UK would consider doing anything close to being labelled as aggressive avoidance. There needs to be mutual trust and understanding for that to work fairly and properly so both sides are now more interested in working collaboratively. Fair and sensible administration of any tax system is almost as important as its structure in a competitive world.)

That is all, however, by way of background.

In determining legislative policy, I believe the approach here should be:

(1) to define the objective – which is that people should pay the right amount of tax and not be allowed to game or abuse the international tax system by accruing profits tax free or taxed at negligible rates in jurisdictions where there is not commensurate economic activity;

(2) to decide how best and most effectively that objective can be achieved; and

(3) to ensure that the solution, as implemented, does not give rise to unnecessary collateral damage – which (subject to the “public’s right to know”) is what the debate about commercial privacy hinges on.

The question I would thus pose in response to what Reuven has offered is: what is the purpose of disclosure and what is it to achieve?

Questions of the right to privacy and business or other damages that could be caused by disclosure are to my mind secondary to that. If public disclosure is inevitable, then so be it – but it should be avoided if it is simply a “crowd pleaser” that will do more harm than good.

The truth is that any information put into the public domain will not be of much interest to the majority of people who don’t look at the details and are happy to leave it up to tax authorities to regulate matters once the government has laid down policy. The people who, in practice, will trawl over published information are likely those who seek to make money or promote their own reputations by stirring up controversy.

If, having posed the question that in my view matters, the object of disclosure is to make it easier for the tax authorities to check, by reference to a group’s global activities, that profits are being recognised in the right places and the right amounts of taxes are being paid (as well as to check for the existence of abusive transactions), then what is wrong with avoiding uninformed public controversy by relying on the tax authorities to review that information without public disclosure and all the damage that that might entail?

Surely, the whole point here is to have tax authorities that are trusted by the public and put in the position where they can do their job in the most effective way for the public benefit.

Information presented to the tax authorities which enables them to cross-check their positions across the group – and, equally important, having legislative requirements to ensure both that aggressive tax deals are disclosed and, as the UK is considering at present, that those who promote the abusive schemes are potentially subject to penalties themselves – must be the best way of achieving the objective without the downsides.

(In the UK, I suspect it would be said that, largely because of inaccurate media criticism, much of the public does not trust the tax authorities to “do a proper job”, but that
is a separate political issue. I do not know whether there is a similar feeling abroad in the US.)

Generally, in a democracy, we vote for governments to make difficult decisions on our behalves and to appoint and supervise the executive that administers the law. There is every good reason to do that here while avoiding any fall-out from information that may be commercially sensitive or give rise to uninformed public controversy being scattered around.

(Interestingly, in this context, when the UK Prime Minister was recently forced to agree to publish his own tax returns, no one pointed out that the reason why HMRC is a non-ministerial department in the UK and taxpayers have to consent for their information to be made available by HMRC to other government departments is that it was thought, when the Inland Revenue was formed, that political independence prevented politicians from being tempted to introduce taxes that would damage their political rivals but not themselves. Tax confidentiality then had a very definite purpose!)

I thus approach this issue in a very different way. The question in my mind is not what the law in the US does but what it ought to do, and how you can get the benefits of open disclosure without the potential drawbacks. That seems to me to be the real challenge.

None of this should be read as support by me for general non-disclosure or for unchecked corporate tax avoidance. I’m certainly not in favour of either of those – the question here is what should best be done to achieve the objective without unnecessary collateral damage.