AN INVESTOR’S CASE FOR CBC TRANSPARENCY

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The question posed in this prompt is not of legality - the government already gets country-by-country tax disclosure as part of a company’s tax returns – but of policy. Do we (we the people, acting through our elected representatives) want country-by-country tax information to be made available to the general public?

In prior work, I have concluded that with regards to public companies, investors (owners) of companies and anyone researching those companies for investment opportunities have reasonable need for that information. There is significant risk (both reputational and operational) to companies that avoid paying taxes in jurisdictions wherein they have significant activities.

Two examples come immediately to mind:

- The poster child example is when members of the UK parliament called for a boycott on Starbucks in 2012. Starbucks had avoided paying taxes in the UK, risking severe backlash from parliament. The resulting very public campaign against the corporation caused a huge reputational hit that also affected shareholder value. Starbucks investors probably would have liked to have known beforehand that Starbucks was avoiding taxes so that they could be aware of the associated risks.

- More recently, the Republic of Ireland has faced vocal opposition to its decision to grant Apple a very low tax rate. As a result of the near-zero tax arrangement, Apple stands to be embroiled for years in lawsuits relating to a ruling by Europe’s antitrust enforcer that Apple pay Ireland $14.5 billion in back taxes. Public opinion in Ireland seems to be opposed to the special agreement between Apple and the Irish government. After the European Commission stated that Ireland was unfairly subsidizing Apple, implying that the subsidy was anti-competitive, some Irish citizens claimed that the subsidy was additionally unfair to all other taxpayers in Ireland.

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1 See Country-by-Country Reporting, 81 FR 42482 (Final regulations from the IRS and Treasury Department requiring country-by-country reporting by certain large multinational corporations).
5 Id.
I have made and still make this argument because I am trying to say not that the SEC could require disclosure, but that the SEC must require that disclosure. In the United States, at least, many large multinational companies are public companies. Therefore, a rule that applies to all public companies would supply the benefits of a level playing field.

I turn to address the question of the authority of the people (acting through their elected representatives) to compel such disclosure. My response is as follows:

1. All corporations are artificial constructs, created by the state, subject to regulation by the state, and allowed to conduct business and to exist at the pleasure of the state. One could argue that this regulation lies properly at the state level and not the federal level. However, corporations are subject to federal income tax, and can be and are required to furnish all manners of information to the federal government. The federal government can use the information for whatever purposes designated by governing statutes.

2. Public companies are extensively regulated by the federal government (as issuing securities trading on exchanges falls clearly within interstate commerce). The federal government has unequivocal authority to regulate public companies. These companies already have to make public information about everything from mine safety to the compensation of senior executives. There is no rational argument that information about foreign taxes is somehow more special.

3. Companies can, of course, contractually agree to make the data public. The government deals with many companies (government contractors) and uses contracts with many provisions for myriad purposes. In fact, the government imposes all kinds of requirements in public contracts - disclosure of foreign tax payments would not be a revolutionary concept.

Why do the people want such disclosure?

People want such disclosure so that they can be confident that tax rules are being applied fairly. They want to know that companies are not shifting profits that are intuitively being earned in one jurisdiction to another (lower tax) jurisdiction by transactions that have more form than substance. There have been many examples of companies that sell things (smart phones, coffee, etc.) in one jurisdiction and pay money to affiliates in another jurisdiction through fees associated with using intellectual property or some similar method. The common thread, which most people intuitively see as abusive, is that first some asset that can be easily moved by the stroke of a pen is deposited in an affiliate in a low tax jurisdiction. The affiliate in the high tax jurisdiction, then, incurs expenses for the use of that asset. When the ultimate sale is made in the high tax jurisdiction, people discern that the profit is “earned” there and that the company, which claims the profit is actually made elsewhere due to these inter-company payments, is abusing international tax law.

There is a real risk that investors should know about when companies can easily move from one jurisdiction to the next with the click of a mouse and do not pay taxes in

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6 See *Hale v. Henkel*, 201 U.S. 43, 74 (1906) (“[T]he corporation is a creature of the State... It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter.”).


8 U.S. Const. art. I § 8, cl 3; *see generally, United States v. Darby*, 312 U.S. 100 (1941).


countries where they have activities. For example, earlier this year French tax authorities raided the Paris offices of Google and Spanish tax authorities did the same in Madrid.¹¹ Both countries are calling for billions in back taxes. And the problem is hardly unique to Google - companies from Airbnb to Uber are facing similar issues within the European Union.¹²

The competitiveness of a firm relies on the health, strength, and growth of the firm - not on tax disclosures. Though disclosing material may influence investors to make decisions one way or another, if every company releases the appropriate disclosures, then every company is equally tasked with an additional consideration when addressing investor decisions.

By exposing to the public the relationship between sales and taxes, we would force government officials to either take action or explain to their voters the benefits of allowing current arrangements to continue.
