

## Developing sustainable tax strategies in the post-BEPS era.

Desarrollo de estrategias fiscales sostenibles en la era post-BEPS.

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**ABSTRACT:** As never before, the concepts of tax planning, corporate governance and sustainability are having a close relation. Despite the fact that governments have tackled tax avoidance schemes, the director's duty of care still obliges them to seek the best tax optimization for the Company they manage. In that sense, developing sustainable tax strategies that comply with transparent post-BEPS policies should be considered as a standard of good corporate tax governance in today's entrepreneurial world.

**KEYWORDS:** Corporate governance; sustainability; tax planning; BEPS; transparency.

**RESUMEN:** Como nunca antes, los conceptos de planificación fiscal, gobierno corporativo y sostenibilidad están teniendo una relación cercana. A pesar de que los gobiernos han combatido los esquemas de elusión fiscal, el deber de cuidado de

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los directores todavía los obliga a buscar las mejores alternativas fiscales para las compañías que estos gestionan. En este sentido, el desarrollo de estrategias fiscales sostenibles, que cumplan con políticas transparentes post-BEPS debería considerarse como un estándar de buen gobierno fiscal en el mundo empresarial de hoy.

**PALABRAS CLAVE:** Gobierno corporativo; sostenibilidad; planificación fiscal; BEPS; transparencia.

## I. INTRODUCTION

Planning is an essential part of conducting business and making its operation sustainable. Under current managerial standards, designing a “Business Plan” before starting a commercial operation is considered to be a good business practice. Business Plans usually include issues such as the company’s vision, mission, market research, marketing plan, operational and financial plans or strategies<sup>1</sup>. Within the financial plan, items such as costs, sales, personnel expense and administrative forecasts are addressed, as well as the creation of revenue models for the business<sup>2</sup>. However, regardless of the importance that taxes have in the general cost structure of a company, tax planning has recently been seen –by tax authorities– as a problem<sup>3</sup> and as an undesirable conduct by taxpayers.

This conception has gotten stronger since the OECD<sup>4</sup> launched its BEPS<sup>5</sup> Project. This project includes requests for countries to counter “tax practices more effectively with a focus on improving transparency”<sup>6</sup> and improve the design of their “mandatory dis-

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<sup>1</sup> See <<https://www.smallbusiness.wa.gov.au>>

<sup>2</sup> See HILL, Brian at <<https://smallbusiness.chron.com/step-by-step-small-business-startup-2027.html>>

<sup>3</sup> IBFD, *Interpretation and Application of Tax Treaties in North America*. Chapter 2. “International double taxation, excess taxation, tax avoidance, tax evasion and aggressive tax planning are all related problems and can cease to exist, in the author’s opinion, only when a country is able to provide much better taxing platforms which are sustainable over time and reflect the principle of “ability to pay” (...).”

<sup>4</sup> Organization for Economic Cooperation and Development.

<sup>5</sup> Base Erosion and Profit Shifting.

<sup>6</sup> See Action 5, OECD’s BEPS Project at <[www.oecd.org/ctp/beps-actions.htm](http://www.oecd.org/ctp/beps-actions.htm)>

closure rules for aggressive tax planning schemes”<sup>7</sup>, as well as a mandate for the development of a multilateral instrument of tax treaty measures to tackle BEPS<sup>8</sup>. Similar positions have been adopted by the United Nations<sup>9</sup>, the European Union<sup>10</sup>, the G20<sup>11</sup> and the International Monetary Fund<sup>12</sup>. Finally, international measures such as the adoption, by 126 jurisdictions, of the Convention on Mutual Administrative Assistance in Tax Matters, the issuing of

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<sup>7</sup> See Action 12, OECD’s BEPS Project at <[www.oecd.org/ctp/beps-actions.htm](http://www.oecd.org/ctp/beps-actions.htm)>

<sup>8</sup> Action 15 of the BEPS project orders member countries to “Analyze the tax and public international law issues related to the development of a multilateral instrument to enable jurisdictions that wish to do so to implement measures developed in the course of the work on BEPS and amend bilateral tax treaties. On the basis of this analysis, interested parties will develop a multilateral instrument designed to provide an innovative approach to international tax matters, reflecting the rapidly evolving nature of the global economy and the need to adapt quickly to this evolution”. Retrieve at <<https://www.oecd.org/tax/beps/beps-action-15-mandate-for-development-of-multilateral-instrument.pdf>>

<sup>9</sup> See UN, Resolution adopted by the UN Economic and Social Council on July 24, 2013 and the creation of the Subcommittee on Base Erosion and Profit Shifting Issues for Developing Countries.

<sup>10</sup> See Council of the European Union, Code of Conduct Group Report of 25 of May, 2010 and the work on harmful tax competition by the Code of Conduct Group. See also the EU’s Anti-Tax Avoidance Package, which “contains concrete measures to prevent aggressive tax planning, boost tax transparency and create a level playing field for all business in the EU”. Retrieve at <[https://ec.europa.eu/taxation\\_customs/business/company-tax/anti-tax-avoidance-package\\_en](https://ec.europa.eu/taxation_customs/business/company-tax/anti-tax-avoidance-package_en)>

<sup>11</sup> See G20 Leaders’ Declaration given at Los Cabos, México, on June 19, 2012.

<sup>12</sup> See IMF, Fiscal Affairs Department, Globalization: Threats or Opportunity (IMF Publications 2000), available at: <<https://www.imf.org/external/np/exr/ib/2000/041200to.htm>>.

the Foreign Account Tax Compliance Act (FATCA) and the adoption of the Anti-Avoidance Directive by the EU Council<sup>13</sup> have set an implicit prejudice towards tax planning.

Despite the fact that there is no specific fiduciary duty by directors to avoid tax, there is a duty for a director to “act in the way he considers, in good faith, would be the most likely to promote the success of the company for the benefit of its members as a whole”<sup>14</sup>. In this sense, being taxes such a fundamental factor to the company’s finances, it is unquestionable that tax analysis (and therefore planning) is an essential part of the board of directors’ duties so as to comply with their duty of care.

Academics have acknowledged the existence of a symbiotic relationship between corporate governance and tax planning. Hannetel, for instance, has stated that the “composition and organization of the board of directors might also influence the optimization of tax planning”<sup>15</sup>. Other academic sectors, such as that represented by Holland, state that “tax planning is not valued by shareholders and is in fact value reducing”<sup>16</sup>. On the contrary, Springer states that “(...) tax governance- that must be seen as part of corporate governance- adds value (in the short, medium and long term) to their owners and stakeholders as well as help to make the enterprises more sustainable and less risky in the context of the principles of good corporate governance”<sup>17</sup>.

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<sup>13</sup> See Council Directive (EU) 2016/1164 of July 12 2016.

<sup>14</sup> See Section 172(1) of the UK Companies Act of 2006.

<sup>15</sup> HANNETEL, Chris, *The influence of corporate governance measures on the efficiency of tax planning undertaken by multinational companies*. Master thesis, Tilburg School of Law, Tilburg University.

<sup>16</sup> HOLLAND, Kevin and ABDUL WAHAB, Nor Shaipah, *Tax planning, corporate governance and firm value*, *The British Accounting Review*, June 2012.

<sup>17</sup> DE OLIVEIRA NETO, A.M., *Governance and Risk Management in Taxation*, 2017.

On the other hand, “fiscal governance” is a concept that has always been related to the correct management of the States finances<sup>18</sup>. But this concept can be successfully transplanted into the private sector in the way of “good corporate tax governance”, which, according to Dixon, is “increasingly becoming a theme that Boards are expected to include in their corporate governance framework”<sup>19</sup>.

As will be addressed in the article, Ferrero-Soto<sup>20</sup> proves its hypothesis according to which “stakeholders-oriented organizational behavior positively affects financial performance”. Given that both government and shareholders are company’s stakeholders, it could seem reasonable to manifest that developing non-aggressive tax strategies that increase financial performance of a company could be a standard of “good corporate tax governance” for boards of directors, and therefore enhance the business’ sustainability.

With this essay, we pretend to answer the question of whether non-aggressive tax planning, in the post –BEPS era, be considered as a good corporate tax governance mechanism that enhances sustainability. Our hypothesis is favourable.

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<sup>18</sup> See *What is fiscal governance?* “National fiscal governance influences how budgetary policy is developed and implemented, including most notably national numeric fiscal rules, medium-term budgetary frameworks and independent fiscal institutions”. Retrieve at <[https://ec.europa.eu/info/business-economy-euro/indicators-statistics/economic-databases/fiscal-governance-eu-member-states/what-fiscal-governance\\_en](https://ec.europa.eu/info/business-economy-euro/indicators-statistics/economic-databases/fiscal-governance-eu-member-states/what-fiscal-governance_en)>.

<sup>19</sup> DIXON, Paul and MACLEAN, *Annamaria*, October 2015. “Best practice in corporate governance- from the finance team to the Board”. Tax Alert. Retrieve at <<https://www2.deloitte.com/nz/en/pages/tax-alerts/articles/best-practice-in-corporate-tax-governance.html>>.

<sup>20</sup> FERRERO-SOTO, C; MACÍAS-QUINTANA, L.A.; VÁZQUEZ-RODRÍGUEZ, P., *Effect of Stakeholders-Oriented Behavior on the Performance of Sustainable Business*. Sustainability, 2018, p. 10.

## II. THE CO-RELATION BETWEEN BEST CORPORATE PRACTICES AND FINANCIAL PERFORMANCE; AN ISSUE OF SUSTAINABILITY?

Sustainable development, as defined by the UN<sup>21</sup>, is the “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”. Some authors, such as Pohle and Hittner<sup>22</sup> have argued that attaining sustainable growth can only be achieved by engaging in corporate social responsibility (CRS), whilst authors like Professor Andrew Chambers<sup>23</sup> states that CRS has no real impact on performance.

Sustainability is sometimes thought as an opposite concept to profitability, given that the first is often related to increased production costs and compliance with onerous standards. However, a good sustainability strategy can offer “distinction elements, increase in productivity and efficiency, risk mitigation and can

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<sup>21</sup> See World Commission on Environment and Development convened by the United Nations in 1983, as cited by Bob Tricker in “Corporate Governance: Principles, Policies and Practices”. Oxford. Third Edition. p. 231.

<sup>22</sup> POHLE, George and HITTNER, Jeff, “Attaining sustainable growth through corporate social responsibility”, IBM Global Business Services. Retrieve at: <<https://www.crhnet.ca/sites/default/files/library/Pohle.Hittner.2008.Attaining%20sustainable%20growth%20through%20corporate%20social%20responsibility.pdf>>

<sup>23</sup> According to Professor Andrew Chambers “The idea that CRS is in the enlightened self-interest of the company and adds to the profit bottom line is only “sustainable” (...) if it is the “band-aid” type of CRS – the type of CRS that is embarked upon for PR reasons and would not be embarked upon if it impacted negatively on bottom line economic performance”. Chambers, Andrew *Chambers Corporate Governance Handbook*. Seventh Edition. Bloomsbury Professional. 2017, p. 493.

bring untold benefits to all stakeholders, including –of course– shareholders”<sup>24</sup>.

Multiple studies have shown that there is a direct correlation between good governance practices and corporate and financial performance<sup>25</sup>. These good practices include environmental practices<sup>26</sup>, knowledge management<sup>27</sup>, board size and composition<sup>28</sup>,

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<sup>24</sup> ARANGO, Sol Beatriz, “La sostenibilidad como impulsora de la rentabilidad”, *Revista Semana Sostenible*, núm. 25, Nov. 2018- March 2019.

<sup>25</sup> The joint white paper by Deloitte and Nyenrode Business Universiteit called “*Good Governance driving Corporate Performance? A meta-analysis of academic research & invitation to engage in the dialogue*” concluded, that “good governance enhances corporate performance, as it produces six governance variables with an academically proven positive impact on performance. These identifies good governance variables are: board independence, board diversity, remuneration, characteristics of the CEO, oversight and ownership structure”.

<sup>26</sup> According to Bartolacci “(...) the research findings seem to exclude the possibility that the financial results may deteriorate as a consequence of improved environmental practice in the form of separate waste collection”. Bartolacci, Francesca (et. al) (April 2018). “The relationship between good environmental practices and financial performance: Evidence from italian waste management companies”, *Sustainable Production and Consumption*, vol.14, pp. 129-135.

<sup>27</sup> According to Vidović “(...) by confirming the significant link between knowledge management success factor “knowledge culture” and financial indicators (both ROS and ROA), this research proved the importance of knowledge culture for managing knowledge”. VIDOVIĆ, Maja, “The link between the quality of knowledge management and financial performance –The case of Croatia”. Working Paper Series, Paper, num. 10-03, University of Zagreb.

<sup>28</sup> According to Ngwenze “Board size, independence of board and audit committee correlated negatively with both, ROA and ROE while board composition related positively. Board size, independence of board correlated positively with debt equity ratio while audit committee and board composition related negatively”. NGWENZE *et. al.*, “Effect of Corporate Governance Practices

organizational performance<sup>29</sup>, enterprise risk management<sup>30</sup>, remuneration, leadership practice, among others<sup>31</sup>. This correlation between sustainability and financial performance<sup>32</sup> creates a

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of Financial Performance of Listed Agricultural Firms in the Nairobi Securities Exchange”, IOSR Journal of Economics and Finance, Volume 8, Issue 3, 2017.

<sup>29</sup> According to DE SMET, et al. “*We found strong correlations between organizational performance and financial performance. Companies in the top quartile of organizational performance, for example, are 2.2 times likelier to have above-average EBITDA margin than companies in the bottom quartile of organizational performance*”. DE SMET, Aaron, *The Missing Link: Connecting Organizational and Financial Performance*. McKinsey & Company, 2007.

Retrieve at <[https://www.mckinsey.com/~media/mckinsey/dotcom/client\\_service/Public%20Sector/PDFS/The\\_missing\\_link-Connecting\\_organizational\\_and\\_financial\\_performance.ashx](https://www.mckinsey.com/~media/mckinsey/dotcom/client_service/Public%20Sector/PDFS/The_missing_link-Connecting_organizational_and_financial_performance.ashx)>

<sup>30</sup> According to Mamai (et. al) “*Based on our results, it is found that there is a significant and positive impact between risk culture and financial performance while board independence does not affect financial performance*”. MAMAI, Mbiki (et. al), “Enterprise Risk Management Best Practices for Improvement Financial Performance in Manufacturing SMEs in Cameroon”, *International Journal of Management Excellence*, vol. 8, num. 3, April 2017.

<sup>31</sup> According to Seede “*This study found that five out of nine categories of best business practices, namely, leadership practice, customer and market focus practice, human resource practices, process management practice and process innovation practice were positively related to firm’s performance. Results of this study indicate that the relationship between best business practices adoption and firm’s performance could be influenced by business strategies*”. SEEDEE, Rattana, “Moderating Role of Business Strategies on the Relationship between Best Business Practices and Firm Performance”, *International Journal of Business and Social Science*, vol. 3, num. 24, 2012.

<sup>32</sup> According to Gaspar “*The relationship between sustainability and financial performance is a complex one. To begin with, there is not a standard metric for measuring sustainability, since it covers a broad number of socio-economic and environmental issues (...) Recent studies have shed some light onto this issue, suggesting that both sustainable practices and solid financial performance stem*

virtuous cycle<sup>33</sup> by which these financial results could be re-invested in sustainability, hence improving financial performance. Academic studies have shown that “sustainable tax strategies are associated with higher corporate transparency (...) and (...) well-governed companies use sustainable tax strategies (...) to improve earnings predictability by improving expense predictability<sup>34</sup>”. A recent example of this can be seen in a study made to Chinese banks, where it was proven that “corporate sustainability performance and financial performance are not a trade-off but correlate positively”<sup>35</sup>.

On the contrary, as stated by Desai and Dharmapala<sup>36</sup> “the simple view of corporate tax avoidance as a transfer of resource from the state to shareholders is incomplete” because it generates multiple risks<sup>37</sup> that can render the company unsustainable.

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*from good management, causing a virtuous cycle: actions to increase sustainability trigger good financial performance, which allows for additional investments in sustainability, which again improves financial performance”. GASPARETTO, Roman, Sustainability and financial performance: the chicken or the egg dilemma, 2013. Retrieve at <[http://www.thisisxy.com/sites/default/files/articles/xypartners\\_-\\_sustainability\\_and\\_financial\\_performance\\_0.pdf](http://www.thisisxy.com/sites/default/files/articles/xypartners_-_sustainability_and_financial_performance_0.pdf)>*

<sup>33</sup> *Ibidem.*

<sup>34</sup> NEUMAN, Stevanie S., OMER, Thomas C. and SHELLEY, Marjorie, *Corporate Transparency, Sustainable Tax Strategies, and Uncertain Tax Activities*, March 20, 2013. Retrieve at SSRN: <<https://ssrn.com/abstract=2184892>> or <<http://dx.doi.org/10.2139/ssrn.2184892>>

<sup>35</sup> WEBER, Olaf, “Corporate sustainability and financial performance of Chinese Banks”. *Sustainability Accounting, Management and Policy Journal*, vol. 8. Issue 3, 2017, p. 358-385. Retrieve at: <<https://www.emeraldinsight.com/doi/pdfplus/10.1108/SAMPJ-09-2016-0066>>.

<sup>36</sup> DESAI, M. A. and DHARMAPALA, D, “Corporate Tax Avoidance and Firm Value”, *Journal of Economics and Statistics* núm. 91, vol. 3, 2009. p. 537-546, as cited at *Tax and Sustainability: A Framework for Businesses and Socially Responsible Investors* in Accounting for Change 3, October 2011.

<sup>37</sup> Reputational risk, cash flow risk, regime risk, among others.

Several academic studies<sup>38</sup> have shown the negative correlation between tax avoidance and corporate responsibility, aiming their results at showing that tax avoidance is not a socially responsible conduct. Also, other academics have arrived at the conclusion that “investors correctly price the earnings and earnings components of firms with more sustainable tax strategies<sup>39</sup>” and that “more socially responsible firms are likely to display less tax avoidance.”<sup>40</sup>

A new concept of progress has emerged in society, where by development is not measured in terms of GDP but rather in other terms of social, economic and environmental progress, also referred to as “*Beyond GDP*”<sup>41</sup> activities. The growth-friendliness of tax systems, understood as the promotion of economic growth and sustainability through ecological and social/equity considerations has been a priority for the OECD, the International Monetary Fund and the European Commission during the last few years<sup>42</sup>.

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<sup>38</sup> RICHARDSON, G. and LANIS, R., *Corporate Social Responsibility and Tax Aggressiveness*. American Accounting Association (AAA) annual meeting, 2011; and WATSON, L., *Social Influences on Aggressive Accounting: the Impact of Corporate Social Responsibility on Tax Aggressiveness*. AAA annual meeting, 2011.

<sup>39</sup> MCGUIRE, Sean T.; NEUMAN, Stevanie S., and OMER, Thomas C., *Sustainable Tax Strategies and Earnings Persistence*, October 22, 2013. Retrieve at SSRN: <<https://ssrn.com/abstract=1950378>> or <<http://dx.doi.org/10.2139/ssrn.1950378>>.

<sup>40</sup> LANIS, Roman and RICHARDSON, Grant, “Is Corporate Social Responsibility Performance Associated with Tax Avoidance?”, *Journal of Business Ethics*, 2015, p. 127: 439. Retrieve at: <<https://doi.org/10.1007/s10551-014-2052-8>>.

<sup>41</sup> The term “Beyond GDP” emerged from the Report by the Commission on the Measurement of Economic Performance and Social Progress, also known as the Stiglitz-Sen-Fitoussi report of 2009. SCHRATZENSTALLER, Margit, *Sustainable Tax Policy; Concepts and indicators beyond tax ratio*. *Revue de l'OCDE*. (N.141), 2015, p. 57-77.

<sup>42</sup> *Ibidem*.

Therefore, multiple issues such as environmental taxes have emerged in the legislative tax agendas of almost all nations.

According to Schratzenstaller, a sustainable tax system<sup>43</sup> “should discourage consumption and production activities which contribute to climate change (...) should encourage energy transition (...) should reduce the increasingly unequal market distribution of income and wealth (...) should aim at contributing to equal opportunity (...) should be used to further or to curb the consumption or production of (de)merit goods (...) should minimize tax flight and be as transparent and simple as possible to ensure acceptability and legitimacy of taxation”.

There are sufficient academic arguments, as well as sufficient empirical evidence, to determine that making use of the best corporate practices (even if complying with these has a cost) result in an increase in long-term corporate profitability, given that these best practices motivate and inspire the company’s stakeholders (both internal as well as external) to produce and obtain the best results possible for the company.

### III. THE REVISED DUTY OF CARE IN MODERN CORPORATE GOVERNANCE; THE ROLE OF BOARDS IN DETERMINING GOOD TAX COMPLIANCE AS PART OF THEIR CORPORATE GOVERNANCE AGENDA

Directors duties, at the most general level, can be summoned as being “loyal to the company”<sup>44</sup> and being “competent when acting

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<sup>43</sup> SCHRATZENSTALLER, *Op. Cit.*, The author states that a tax system, in order to be sustainable, shall comply with two aspects; environmental sustainability and social sustainability, and that these aspects shall be measurable with sustainability indicators (aggregate/global indicators versus structural indicators).

<sup>44</sup> KERSHAW, David, *Company Law in Context; Text and Materials*. Oxford, Second Edition, 2012, p. 315.

as a director”<sup>45</sup>. Within the specific duties that directors have, lie the duty to “promote the success of the company” and the “duty of care, skill and diligence”<sup>46</sup>.

Within the basic governance structure of a corporation, the Board of Directors is the key organ that resolves the agency problems<sup>47</sup> between shareholders and executive management. Good corporate governance regarding Boards depend on their “best practices”<sup>48</sup>, which include the size of the board<sup>49</sup>, its committee structure<sup>50</sup>, the frequency of its meetings, and “the ratio of insiders to independent”<sup>51</sup> directors”<sup>52</sup>.

The key role of the Board of Directors is determining the company’s overall strategy. Therefore, this organ is strictly linked with the adoption of the company’s tax policies, and can have a direct effect in limiting or enhancing diverse tax consequences in the corporation, including tax planning, tax mitigation or even

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<sup>45</sup> *Ibidem.*

<sup>46</sup> *Ibidem.* p. 334.

<sup>47</sup> According to Hansmann and Kraakman “(...) an agency problem –in the most general sense of the term- arises whenever the welfare of one party, termed “the principal”, depends upon actions taken by another party, termed “the agent”. The problem lies in motivating the agent to act in the principals’ interest rather than simply in the agent’s own interest”. Hansmann, Henry and Kraakman, Reinier (2007). *Agency Problems and Legal Strategies in The Anatomy of Corporate Law; A Comparative and Functional Approach*. Oxford. P. 21.

<sup>48</sup> HANSMANN, Henry and KRAAKMAN, Reiner, *The Basic Governance Structure in The Anatomy of Corporate Law; A Comparative and Functional Approach*, Oxford, 2007, p. 33.

<sup>49</sup> Smaller Boards are deemed to be better than larger ones.

<sup>50</sup> Independent audit, compensation and nominating committees’, among others.

<sup>51</sup> The more, the better.

<sup>52</sup> *Ibidem.* p. 38.

tax evasion<sup>53</sup>. Likewise, studies have revealed that “the inclusion of a higher proportion of outside members on the board of directors reduces the likelihood of tax aggressiveness”<sup>54</sup>. Also, board diversity has become a hot topic in regards to taxation, given that it “could lead to constructive tax debates if women’s quota is reasonable compared to men”<sup>55</sup>.

As stated by Evans<sup>56</sup> tax issues are important for boards in the sense that this director’s body should have a good understanding “of its organizations tax practices, including legacy practices, as

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<sup>53</sup> According to Kourdoumpalou “Tax evasion has been found to be significantly lower in the companies where the chairman of the board is also the owner of the company. In addition, there is a strong negative association between tax evasion and a) the percentage of stock held by the owner and its family members and b) the percentage of stock held by board members. The results contradict international codes on corporate governance practices that call for greater independence of the board. In the case of family-controlled public companies, the owner acts in order to ensure the long-term prosperity of the firm and does not behave in an opportunistic manner pursuing shortsighted goals and personal benefits (...).” The remuneration of the board members through the distribution of profits has been found to significantly decrease the evasion of taxes. This is according to expectations as the tax and accounting earnings during the period of study aligned. A decrease in the reported earnings would also decrease or even prevent the distribution of profits to the board members. KOURDOUMPALOU, Stavroula, “Do corporate governance best practices restrain tax evasion? Evidence from Greece”, *Journal of Accounting and Taxation*, vol. 8, num. 1, January 2016, p. 1-10.

<sup>54</sup> LANIS, Roman and RICHARDSON, “Grant, The effect of board of director composition on corporate tax aggressiveness”, *Journal of Accounting and Public Policy*, Volume 30, Issue 1, 2011, p 1-102.

<sup>55</sup> KHAOULA, Aliani, “The board of directors and the corporate tax planning: Empirical evidence from Tunisia”, *International Journal of Accounting and Financial Reporting*, Vol. 2. N. 2, 2012.

<sup>56</sup> EVANS, Heather, *Creating a sustainable tax strategy – considerations for the board*. Canada Center for Financial Reporting (Deloitte Canada). February

well as associated risks”. These insights are important both in past, present and future situations. Regarding the past, boards should be fully aware of the company’s past tax audits and how they were “perceived by the organization’s stakeholders”. Regarding the present, boards should not only consider the effective tax rate of a corporation, but the potential “risk of reassessment and its association costs”<sup>57</sup> as well as the reputational risks of implementing a determined tax strategy. Regarding the future, boards should design (and oversee) a sustainable and transparent tax policy, which is discussed with the stakeholders as part of their investor relations programs, and that is in line with the “developments occurring at the OECD and elsewhere”<sup>58</sup>.

According to the OECD, “countries are increasingly countering aggressive tax planning by encouraging CEOs and Boards to consider good tax compliance as part of their good corporate governance agenda”<sup>59</sup>. Entities such as the European Investment Bank<sup>60</sup> have developed procedures in order to enhance tax good governance agendas for Boards, such as due diligence requirements prior to approving investments<sup>61</sup>.

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11, 2016. Retrieve at: <<https://www.iasplus.com/en-ca/cfos-corner/strategy/creating-a-sustainable-tax-strategy-considerations-for-the-board>>

<sup>57</sup> *Ibidem*.

<sup>58</sup> *Ibidem*.

<sup>59</sup> OECD, *Tackling Aggressive Tax Planning Through Improved Transparency and Disclosure*, OECD Publishing, 2011.

<sup>60</sup> See <<http://www.eib.org/en/about/compliance/tax-good-governance/index.htm>>. “The EIB Group closely follows international developments on tax transparency, tax good governance and anti-money laundering/financing of terrorism and proactively engages in dialogue with other International Financial Institutions as well as Civil Society Organizations to maintain its leading position by setting ambitious policies and procedures taking account of best standards and practices”.

<sup>61</sup> *Ibidem*. “Before taking a decision to invest, projects are analyzed on a risk-based approach to avoid being misused for tax fraud, tax evasion, tax

These recommendations made by the OECD have been adopted by several member countries, such as Australia<sup>62</sup> and New Zealand<sup>63</sup> which have included corporate tax governance measures in their corporate governance framework. Also, according

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avoidance, aggressive tax planning, money laundering or financing of terrorism purposes. In addition to the standard due diligence process performed on operations (which includes, inter alia, identification of beneficial owners, integrity assessments to identify any sanctioned individuals or entities, screening for adverse media, presence of Politically Exposed Persons and potential conflict of interests), the EIB carries out an enhanced due diligence on every operation with higher risk factors identified, such as a potential link to a Non-Compliant Jurisdiction (NCJ)<sup>5</sup>, tax risk indicators and operations with complex multi-jurisdictional structures”.

<sup>62</sup> See <<https://www2.deloitte.com/nz/en/pages/tax-alerts/articles/best-practice-in-corporate-tax-governance.html>>. “The Australian Tax Office (ATO) recently issued its tax risk management and governance guide which focuses on both Board and managerial level responsibilities. The guideline provides that best practice can be demonstrated at the Board level by: (1) A Board endorsed formalized tax control framework; (2) Formalized company director roles and responsibilities for tax risk management; (3) An established tax risk committee or tax risk allocated to an independent board sub-committee (for example the audit risk committee); (4) Board / sub-committee charters include review of tax risks; (5) Regular summarized progress updates to the Board/sub-committee on how tax issues and risks are trending (i.e. high, medium, low); (6) Tax risk registers and escalation of issues where appropriate; (7) An annual report that includes a statement from the Board attesting that they have effective policies and processes in place to manage tax risk; (8) A testing plan to determine the effectiveness of tax control frameworks and reports from independent assurance providers on the effectiveness of tax control frameworks. (...)”.

<sup>63</sup> *Ibidem*. “In New Zealand, Inland Revenue includes tax governance as a behavioral criterion in its assessment of large enterprises’ risk ratings. They have also included in their recent International Questionnaire a question on whether the taxpayer has a tax governance policy or framework in place”.

to the Inter-American Center of Tax Administrations (CIAT) the Tax Agencies of countries such as Spain and Japan, acknowledging the close relation between taxation and corporate governance, are implementing a co-operative compliance program in order to enhance tax corporate governance and compliance<sup>64</sup>.

Academic literature has shown that “investment into tax management benefits shareholders.”<sup>65</sup> This is the case, for example, of incentive compensation for managers, which encourages them to “make investments into longer-horizon pay outs such as tax management”<sup>66</sup>. Other issues, such as depreciation policy changes “whether it is a method change or an estimate revision; whether it is income-increasing or decreasing; and whether it applies to new assets only or both new and existing assets<sup>67</sup>” is an issue that, given its effects on the company’s profit and losses statement, must be approved by the board of directors. Being clearly a subject of the utmost financial importance, tax risk management has become a board responsibility issue<sup>68</sup>.

Due to the fact that taxes have a major impact in the economic cycle of a corporation, constructing a tax model for the corporation, determining the key tax policies and their associated risks, and communicating these to the company’s stakeholders has become a necessary part of the overall corporate strategy. Gi-

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<sup>64</sup> See <<https://www.ciat.org/tax-and-corporate-governance-what-tax-authorities-expect-of-companies/?lang=en>>.

<sup>65</sup> MINNIK, Christina and NOGA, Tracy, “Do corporate governance characteristics influence tax management?”, *Journal of Corporate Finance*, vol. 16, Issue 5, December 2010, pp. 703-718.

<sup>66</sup> *Ibidem*.

<sup>67</sup> KEATING, Scott and ZIMMERMAN, Jerold, “Depreciation-policy changes: tax, earnings management, and investment opportunity incentives”, *Journal of Accounting and Economics*, Volume 28, Issue 3, December 1999, p. 359-389.

<sup>68</sup> ERLE, B., “Tax Risk Management and Board Responsibility”, in SCHÖN, W. (eds), *Tax and Corporate Governance*, MPI Studies on Intellectual Property, Competition and Tax Law, vol 3, Springer, Berlin, Heidelberg, 2008.

ven that corporate and tax strategy are undelegatable tasks of the board of directors, these should be taken as mandatory precepts derived from the director's duty of care.

#### IV. REDEFINING THE THIN RED LINE WHERE LEGITIMATE TAX PLANNING BECOMES ABUSIVE; AN ISSUE OF MORALITY?

The notion of Corporate Social Responsibility (CSR), which takes into consideration that companies are corporate citizens and thus shall behave as good corporate ones<sup>69</sup>, has given rise to the current debate of the relationship between law and morality, regarding “aggressive tax planning”, “tax evasion” and “tax avoidance”. These concepts shall be reviewed because their significance has greatly changed in the last decade<sup>70</sup>, shifting from the discussion of “legal or illegal”, to “moral or immoral”<sup>71</sup>.

The concept of morality and taxation comes into play due to the belief that “Companies endorsing corporate social responsibility (CSR) accept ethical obligations beyond compliance with

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<sup>69</sup> TRICKER, Bob, *Corporate Governance: Principles, Policies and Practices*, Oxford, Third Edition, p. 219.

<sup>70</sup> This basically due to focus that government and media placed on trans-national companies such as Amazon, Starbucks and Google, because of claims made in regards to them not paying their “fare share” of taxes.

<sup>71</sup> According to Gribnau “Moreover, taxpayers –thus, also corporations–have a right to structure their affairs to achieve a favorable tax treatment within the limits set by law. However, (corporate) taxpayers should balance this right with the duty of fair play towards society and thereby impose restraints on themselves in taking advantage of the inevitable imperfections of the legal system. By abstaining from aggressive tax planning, they take responsibility for the effects of their actions on society”. GRIBNAU, Hans and JALLAI, Ave-Geidi, “Good Tax Governance: A Matter of Moral Responsibility and Transparency”, *Nordic Tax Journal*, 1: 2017, pp. 70-88,.

the law”<sup>72</sup> and that they “should agree that the interpretation and use of tax rules are based on a moral choice that rules out strictly complying with the letter of the law”<sup>73</sup>. Some scholars<sup>74</sup> have seen the relation between taxation and morality as a dangerous one, in the sense that it could have an inadequate effect in the shaping of global tax policy.

The traditional conception has distinguished “tax avoidance” with “tax evasion”, in the sense that the first concept is legal, whilst the second is not. Tax avoidance (also referred to as “tax planning”) is a concept which has been longly (for almost a century) favoured by jurisprudence<sup>75</sup>, and which can be defined as “a means by which tax payers reduce tax liability by planning their affairs so as to attract the least tax possible but still acting within

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<sup>72</sup> GRIBNAU, Hans, *Corporate Social Responsibility and Tax Planning: Not by Rules Alone*. Social and Legal Studies, May 24, 2015.

<sup>73</sup> *Ibidem*.

<sup>74</sup> As stated by Allison Christians “a turn to morality to avoid delineating in law between that which is illegal (evasion) and that which is not (avoidance) is counterproductive to the pursuit of coherent tax policy in the long run. The turn to morality is understandable in that it attempts to define a space for social pressure to mount against ongoing perceived tax injustice. But the turn is dangerous in that it confirms the legitimacy of a century-old tradition of using “soft law” standards to push tax policy in a given direction”. CHRISTIANS, Allison, *Avoidance, Evasion and Taxpayer Morality*. 44 Wash. U.J.L. & Pol’y 039, 2014.

<sup>75</sup> See, among others—in UK jurisprudence— *Commissioners on Inland Revenue v. Duke of Westminster* (1936) and *Commissioners of Inland Revenue v. Ayrshire Pullman Motor Services & Ritchie*, and *Bullivant v AG* (1901). In US jurisprudence, see *Gregory v. Helvening* (1934) and in Australian jurisprudence see *Jaques v. Federal Commissioner of Taxation* (1924) where Starke J. wrote, “There is nothing wrong in companies and shareholders entering, if they can, into transactions for the purpose of avoiding, or relieving them of taxation”.

the provisions of the Income Tax Act”<sup>76</sup>. On the other hand, tax evasion is seen as “a criminal offence normally constituting a dishonest submission of a tax return involving undeclared income”<sup>77</sup>. Between these to extremes, rises the concept of “Tax Mitigation” which relates to a situation “where an individual (or a company) seeks, in compliance with the law, to minimise the taxes he or she (or it) pays”<sup>78</sup>. In the Willoughby case<sup>79</sup>, Lord Nolan explained this concept stating that “the hallmark of tax mitigation is that the taxpayer takes advantage of a fiscally attractive option offered to him by tax legislation and genuinely suffers economic consequences that Parliament intend to be suffered by those taking advantage of the option”. The concept of “tax mitigation” is not to be mistaken with the idea of “economic option”<sup>80</sup>, which is nothing different that the decision made by the taxpayer of not generating taxes, due to the non-triggering of the elements of taxation<sup>81</sup>.

The use of legitimate tax planning has been constrained by the term “aggressive tax planning”<sup>82</sup>. This concept has not been

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<sup>76</sup> XUEREB, Ann, *Tax Avoidance or Tax Evasion?*, Symposia Melitensia, num. 10, 2015, p. 217.

<sup>77</sup> *Ibidem*, p. 218.

<sup>78</sup> LENAERTS, Koen, *Tax Mitigation vs. Tax Evasion in the case law of the European Court of Justice*, Teisés Actualijos, 2013.

<sup>79</sup> XUEREB, *op. cit.*, p. 219.

<sup>80</sup> Pont Clemente states that a businessman can decide to make an investment and pay it in cash, or take a loan or make a financial leasing contract. If his decision is driven by tax purposes (such as interest deductibility), nobody can question it. See PONT CLEMENT, Joan-Francesc, *La economía de opción*, Marcial Pons, 2006, p. 18.

<sup>81</sup> This could be the case of a taxpayer that does not want to pay vehicle tax, and therefore sells his motorcar, or of a taxpayer that does not want to pay tobacco duties, and therefore quits smoking.

<sup>82</sup> This term is defined by Prof. Dr. Jeffrey Owens as “An intentional use of the tax law or a combination of tax law and/or tax treaties in a way that leads to taxation not in line with the spirit and purpose of relevant tax laws”. OWENS,

clearly defined and is not a synonym of tax avoidance, but rather refers to an idea with an instrumental purpose of reducing “the scope of legitimate tax planning in the framework of cooperative compliance programs and in the context of good corporate governance on tax matters”<sup>83</sup>. However, according to Hilling<sup>84</sup>, this term can be associated with the schemes<sup>85</sup> that have been structured by multinationals such as Google Inc. in which the phenomenon of stateless income<sup>86</sup> has appeared.

The importance of having and implementing good business practices in a corporation (both as a mean to generate wellnes to its stakeholders as well as to generate long term profitability), and the fact that the board of directors has a key role in reviewing and approving the company’s tax strategy, does not imply –per se–, that the corporation cannot make use of the fiscal benefits granted by the law. Morality has a great importartance in today’s corporate governance agenda, but can not be used by government bodies, tax agencies or regulators in order to undermine the legal prerrogatives stated by law. At least not in countries that are governed by the rule of law.

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Jeffrey, *The role of tax certainty in promoting sustainable and inclusive growth*, UNCTAD, Geneva, October 26, 2018. Retrieve at: <[https://worldinvestmentforum.unctad.org/wp-content/uploads/2018/03/UNCTAD\\_Oct\\_2018\\_The-Role-of-Tax-Certainty-in-Promoting-Sustainable-and-i...pdf](https://worldinvestmentforum.unctad.org/wp-content/uploads/2018/03/UNCTAD_Oct_2018_The-Role-of-Tax-Certainty-in-Promoting-Sustainable-and-i...pdf)>

<sup>83</sup> CALDERÓN CARRERO, José Manuel, “The Concept of ‘Aggressive Tax Planning’ launched by the OECD and the EU Commission in the BEPS Era. Redefining the Border between Legitimate and Illegitimate Tax Planning”, *Intertax*, Volume 44, Issue 3, 2016.

<sup>84</sup> HILLING, Axel and OSTAS, Daniel, *Corporate Taxation and Social Responsibility*, Wolters Kluwer, 2017, p. 42.

<sup>85</sup> Such as the “Double Irish with a Dutch Sandwich”.

<sup>86</sup> HILLING, *op. cit.*, p. 42. According to this author, a stateless income situation appears when, in use of a particular scheme, “tax planning results in no jurisdiction making a claim to tax income”.

## V. TAX PAYERS RIGHTS TO FISCAL PLANNING VS. THE OECD'S MISSION TO BUILD SUSTAINABLE TAX SYSTEMS

Ever since the Forum on Harmful Tax Practices was set by the OECD<sup>87</sup>, the principles of transparency exchange of information have always been present in multinational transactions<sup>88</sup>. These principles have been made applicable to companies, not only in the way of the EU Code of Conduct for Business Taxation<sup>89</sup>, but also as mandatory precepts to companies of member (or aspiring member) countries.

Building sustainable tax systems has been an everlong priority for the OECD. This plan is built on four pillars; “building comparable data, curbing tax evasion and illicit financial flows, tackling tax avoidance and developing capacity”<sup>90</sup>. This organization has always claimed the necessity of countries paying greater attention to “the spillovers from their tax policies”<sup>91</sup> and “establishing a fair

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<sup>87</sup> Following the OECD's 1998 report on harmful tax competition.

<sup>88</sup> VEERMEND, Willem *et al.*, *Taxes and the Economy; A survey on the impact of taxes on growth, employment, investment, consumption and the environment*, Edward Elgar Publishing, 2008, p. 287.

<sup>89</sup> *Ibidem.* p. 288 “In a Code of Conduct for Business Taxation, the EU has developed several criteria for evaluating whether a specific measure that imposes an effective level of tax significantly below the general level is considered to be harmful. The document is not legally binding, but it carries some political weight”.

<sup>90</sup> See OECD, “Third International Conference on Financing for Development” (OECD work to build stronger sustainable tax systems). Addis Ababa, July 2015. Retrieve at <<https://www.oecd.org/dac/financing-sustainable-development/third-UN-conference-on-financing-for-development-addis-tax-systems-flyer.pdf>>.

<sup>91</sup> See OECD, “Countries must strengthen tax systems to meet Sustainable Development Goals”. Retrieve at: <<http://www.oecd.org/tax/countries-must-strengthen-tax-systems-to-meet-sustainable-development-goals.htm>>.

and efficient system of international taxation, including efforts to fight tax evasion and tax avoidance”<sup>92</sup>. For the OECD, taxation “plays a central role in promoting sustainable development”<sup>93</sup>.

Multilateral initiatives<sup>94</sup>, such as the Platform for Collaboration on Tax (“PCT”) have helped to “raise the bar on responsible tax practice and recognize that business can’t thrive without functioning tax systems”<sup>95</sup> in order to meet the World Bank’s Sustainable Development Goals (SDGs)<sup>96</sup>. Also, new reporting standards “aimed at promoting greater transparency around a

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<sup>92</sup> *ibidem*.

<sup>93</sup> According to De Paepe and Dickinson “strengthening domestic resource mobilization is not just a question of raising revenue: it is also about designing a tax system that promotes inclusiveness, encourages good governance, responds to society’s concerns over income and wealth inequalities, and promotes social justice. More fundamentally, the centrality of taxation in the exercise of state power means that more efficient, transparent and fairer tax systems, and less corrupt tax administrations, can spearhead improvement on wider governance issues”. DE PAEPE, Gregory and DICKINSON, Ben, “Tax revenues as a motor for sustainable development”, Development Co-operation report, OCDE, 2014.

<sup>94</sup> The PCT is a joint initiative of the International Monetary Fund (IMF), the OECD and the World Bank Group to “strengthen collaboration on domestic resource mobilization (DRM)” (...) and to “foster collective action for stronger tax systems in developing and emerging countries”.

<sup>95</sup> JOSHI, Rajiv, *Raising the bar on responsible tax for a sustainable future*. Governance for development. The World Bank, 2018. Retrieve at: <<http://blogs.worldbank.org/governance/raising-bar-responsible-tax-sustainable-future>>.

<sup>96</sup> *Ibidem*. The World Bank’s SDGs are “to end poverty, reverse inequalities and curb climate change by 2030”.

company's approach to taxes<sup>97</sup> have emerged, such as that of the Global Sustainability Standards Board<sup>98</sup>.

According to Piantavigna<sup>99</sup>, under the principle of international tax efficiency, which is part of the institutional manifesto of the European Union "taxation should be neutral and affect taxpayers' business choices as little as possible(...)". As a flip-side to this coin, the principle also enables the right of the States "to discourage situations that may give rise to unfair competitive advantages for some tax payers against others, thereby resulting in ineffective allocations of resources and inequity consequences"<sup>100</sup>. Between these two ends –according to the famous landmarks stated by *Gregory v Helvening*<sup>101</sup> and the *Duke of Westminster case*<sup>102</sup>–, lie the rights of taxpayers to arrange their affairs so as for taxes to be "as low as possible".

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<sup>97</sup> See <<https://www.globalreporting.org/information/news-and-press-center/Pages/GRI-paves-the-way-for-more-transparency-around-corporate-tax-practices.aspx>>.

<sup>98</sup> The GRI's (Global Reporting Initiative) independent standard-setting body.

<sup>99</sup> PIANTAVIGNA, Paolo, "Tax Abuse and Aggressive Tax Planning in the BEPS Era: How EU Law and the OECD Are Establishing a Unifying Conceptual Framework in International Tax Law, Despite Linguistic Discrepancies", IBFD, *World Tax Journal*, 2017.

<sup>100</sup> *Ibidem*, p. 48.

<sup>101</sup> See *Grevory v Helvening* 9 F.2d 809 (2<sup>nd</sup> Cir. 1934) affirmed 293 U.S. 465 (1935) where Judge Learned Hand stated that "anyone may so arrange his affairs that his taxes be as low as possible; he is not bound to choose that pattern which will best pay the Treasury; there is not even a patriotic duty to increase one's taxes".

<sup>102</sup> See *IRC v Duke of Westminster* [1936] AC1 (HL), where judge Lord Tomlin stated that "Every man is entitled if he can to arrange his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure that result, then, however

Discussions have arisen, during the last years, relating human rights with tax avoidance. One focus of this discussion points that human rights are triggered by the fact of tax avoidance, in the sense that “the human right to education and the human right to health, may be thwarted due to a lack of tax revenue that are essential to finance programs for remedying these problems”<sup>103</sup>. This approach, together with a strict interpretation of the United Nations Guiding Principles on Business and Human Rights<sup>104</sup>, have raised objections on countries, such as Ireland, whose “tax structures facilitate corporate tax avoidance”<sup>105</sup>. However, another view is that, according to the European Convention of Human Rights, taxation has to be imposed “according to the law” and that it shall “pursue a legitimate purpose and that the means employed are not disproportionate to the ends involved”<sup>106</sup>. This, together with

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unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax”.

<sup>103</sup> HÖFNER, Susan, *Corporate Tax Avoidance and Human Rights – Examining Corporate Tax Avoidance in view of Human Rights: Benefits and Drawback of a Human Rights Approach*. Retrieve at: <[https://www.academia.edu/31384795/Corporate\\_Tax\\_Avoidance\\_in\\_view\\_of\\_Human\\_Rights\\_Benefits\\_and\\_Drawback\\_of\\_a\\_Human\\_Rights\\_Approach](https://www.academia.edu/31384795/Corporate_Tax_Avoidance_in_view_of_Human_Rights_Benefits_and_Drawback_of_a_Human_Rights_Approach)>

<sup>104</sup> Through its General Comment 24, the UN Committee on Economic, Social and Cultural Rights stated, that “Lowering the rates of corporate taxes with a sole view to attracting investors encourages a race to the bottom (...)”. See *Tax competition & avoidance “inconsistent with human rights”*. Center for Economic and Social Rights. June 28, 2017.

<sup>105</sup> DARCY, Shane, “The Elephant in the Room’: Corporate Tax Avoidance & Business and Human Rights”, *Business and Human Rights Journal*, Volume 2, Issue 1, 2017. Retrieve at: <<https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/elephant-in-the-room-corporate-tax-avoidance-business-and-human-rights/1D615D47FB0632D-CFE365DB10F07ACF7>>

<sup>106</sup> BAKER, Philip, “Taxation and the European Convention on Human Rights”, *British Tax Review*, 2000.

the other fundamental rights<sup>107</sup> stated in the Convention, could pave the way to arguing that, as a means of financial and economic freedom, taxpayers are allowed to organize their affairs in the way they find most suitable, and that tax authorities have the obligation to respect this decision.

As was famously mentioned by Oliver Wendell Holmes Jr.<sup>108</sup>, taxes are what we pay for a civilized society. Taxation is a “vital mechanism in any society to facilitate revenue raising, policymaking, and redistribution of income and wealth”<sup>109</sup> and is greatly linked to the concept of democracy, given that taxation and representation have been “inextricably linked in England<sup>110</sup>” as well as in all civilized countries in the world. So, given that taxes are such an important part of our society, the shall –far from being fought–, be embraced<sup>111</sup>. However, fairness in taxation, given that it could be seen as a fundamental human right<sup>112</sup> (which, in some cases, can be extended to corporations), is not an issue that can be overlooked whenever analyzing the rights of tax payers to seek the most favourable alternatives in their business organizations.

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<sup>107</sup> i.e. protection of property (article 1), right to a fair trial (article 6), prohibition of discrimination (article 14), freedom of thought (article 9), among others.

<sup>108</sup> See Oliver Wendell Holmes Jr., in the case of “*Compañía General de Tabacos v. Collector*”, 275 U.S. 87, 1927.

<sup>109</sup> HILLING, *op. cit.*, p. 40.

<sup>110</sup> MURPHY, Richard, *The Joy of Tax; How a fair tax system can create a better society*, Corgi Books, 2015.

<sup>111</sup> *Ibidem*, p. 27.

<sup>112</sup> LEE, Natalie, “Human rights and taxation”, in *Revenue Law; Principles and Practice*, Bloomsbury Professional. 33<sup>rd</sup> Edition, 2015.

## VI. SUSTAINABLE TAX PLANNING IN THE POST-BEPS ERA

Tax Planning in the Post-BEPs era has changed considerably in some ways, but its essence has remained untouched; “states still want to remain competitive in the international stage and multinational enterprises will look for other opportunities to minimize their tax liabilities”<sup>113</sup>. The introduction of anti-abuse rules<sup>114</sup> and high compliance costs<sup>115</sup> that prevent base erosion and profit shifting have reshaped the current inventories of tax planning techniques<sup>116</sup>, limiting them to tax incentives that follow an international agenda<sup>117</sup>.

Tax planning has changed considerably during the last decade, due to the perception of the “need to economic self-restraint”<sup>118</sup>.

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<sup>113</sup> COTRUT, Madalina and MUNYANDI, Kennedy (ed), *Tax Incentives in the BEPS Era*, vol. 3, IBFD Tax Research Series, 2018. Retrieve at: <<https://www.ibfd.org/IBFD-Products/Tax-Incentives-BEPS-Era>>.

<sup>114</sup> Both general and specific, national and international.

<sup>115</sup> According to Panayl “There is a risk that the costs of base erosion and profit shifting and the compliance costs generated from some of the [BEPS] actions could be disproportional with any additional revenue the governments could collect”. PANAYL, Christiana HJI, “International Tax Law in the Post-BEPS World”, *Bulletin for International Taxation*, November 2016, p. 628.

<sup>116</sup> Formally, tax planning techniques included tax holidays, IP tax planning structures, holding activities, international financing activities, supply chain management activities, among others.

<sup>117</sup> Such as tax incentives on carbon reduction (green taxes), among others.

<sup>118</sup> According to Hilling and Ostas, companies should always restrain themselves from taking opportunities that exist in the law, but that are incompatible with the spirit of the law. This includes, taking advantage of under enforced laws and legal loopholes.

It has shifted<sup>119</sup> from designing and implementing a determined tax strategy<sup>120</sup> to designing and implementing a determined tax policy<sup>121</sup>. To design the latter it is necessary to build a tax model<sup>122</sup>, identify and prioritise stakeholders<sup>123</sup>, access risk and resources, whilst the first is just a construction built to overpass a specific yearly fiscal situation.

Sustainable tax planning in the post-BEPs era is achieved by generating a long term strategy that takes into consideration the “organization’s stakeholders, shareholders, employees, suppliers, customers and governments of the jurisdiction in which the organization operates- and their expectations”<sup>124</sup>. Also, any sustainable tax planning in the post-BEPs era must assure that a fair amount of tax is being paid, according to the economic substance of the

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<sup>119</sup> See <<https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/tax/uk-tax-responsible-tax-v2.pdf>>

<sup>120</sup> *Ibidem*, “Tax strategy= the plan, based firmly on data and the facts of the business, which sets out the tax decisions made in supporting the organization’s goals”.

<sup>121</sup> *Ibidem*, “Tax policy = the governance framework that sets standards for the way tax decisions are made and subsequent activity executed. It formally sets out the organization standards, accountabilities and key policies for the management of taxes”.

<sup>122</sup> *Ibidem*, “This involves creating a mini P&L for each element of the tax strategy, incorporating benefits from the strategies and the costs of delivering them”.

<sup>123</sup> *Ibidem*, “Overlaying stakeholder needs with the strategies identified helps to determine whether specific strategies conflict with key stakeholder requirements. For example, where governments are key customers, some companies may need to review their strategy in response to signs that governments are looking at tax policies when considering commercial partners”.

<sup>124</sup> VANDENDRIESSCHE, Piet, “Creating a sustainable tax strategy- Considerations for the board, Deloitte. Retrieve at: <<https://www2.deloitte.com/content/dam/Deloitte/ca/Documents/tax/ca-en-directors-alert-tax.PDF>>.

transactions. This task, of creating and maintaining a sustainable tax framework, belongs to the board of directors.

A corporate responsible company, that wishes to engage in lawful tax avoidance in the post-BEPs era must always comply with the laws of the jurisdiction where it operates. Transparency “should be a central tenet of tax policy and abusive practices must be filtered from company behaviour”<sup>125</sup>. Also, tax planning is to “comply with the spirit, as well as the letter of the law”<sup>126</sup>, shall be disclosed to authorities and no intermediate transactions are to be put in place “solely or mainly to *secure a tax advantage*”<sup>127</sup>.

## VII. CONCLUSIONS

Tax planning has not vanished; it is as vivid and as important as ever. However, it has changed, shifting from opaque, complex and multi-layerd structures to simple, transparent, compliant and direct tax policies. The adoption of a tax policy is as important and as necesarry for a corporation as the adoption of a communication or investment strategy. Therefore, it shall be discussed and approved by the board of director´s, and shall exist in writing so as to be clear for all stakeholders.

Regardless of the advances of modern business, the essence of the directors’ duty of care still remains untouched; to act without negligence and with reasonable watchfulness and prudence when adopting key corporate decisions. Given the importance of taxation in the company cycle, and given that the board of directors is in charge of implementing long term strategies, it is a standard of good corporate tax governance for this body to develop sus-

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<sup>125</sup> See “Tax and Sustainability: A Framework for Businesses and Socially Responsible Investors”, in *Accounting for Change* 3.

<sup>126</sup> *Ibidem*, p. 4.

<sup>127</sup> *Idem*.

tainable tax strategies that comply with transparent post-BEPS standards.

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