# Morals, laws, taxes and sovereignty

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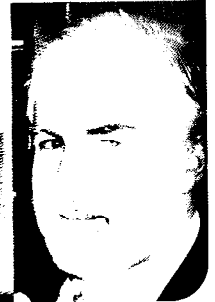

"**It is my opinion that this kingdom has no right to lay a tax upon the colonies ...** The taxes are a voluntary *gift* and *grant* of the Commons alone ...The distinction between legislation and taxation is essentially necessary to liberty." William Pitt, 1st Earl of Chatham, 14 January 1766 (reprinted *Penguin Book of Historic Speeches,* ed MacArthur, 1995, p 72).

The OECD campaign against "tax havens" has relied heavily upon the pillars of common morality and comity under international law. Essentially, the OECD accuses offshore jurisdictions, which protect privacy, of aiding and abetting OECD citizens in committing illegalities. Instead, offshore financial centres should assist OECD countries to collect taxes (even taxes on non-OECD income) just as they should assist in finding and convicting terrorists (a proposition which, even at face value, sounds less than convincing when the United States Supreme Court has yet to find "due process of law" applies to Guantanamo Bay).

When it is pointed out that what is illegal in one country is not necessarily illegal in another and that different countries have different tax systems (even OECD Australia is a death duty haven while OECD New Zealand is a capital gains tax haven), OECD supporters argue that fraud is a criminal offence everywhere and nondisclosure of overseas interests *usually* amounts to fraud on the part of an OECD citizen. International comity requires that countries render mutual legal assistance where crimes are offences against common morality, just as they co-operate to provide information to each other for the prosecution of thieves, murderers and terrorists.

This moral/legal argument would be convincing except for two basic flaws. First, it is not the case that nondisclosure of overseas interests *necessarily* indicates fraud in lodging a false tax return by an OECD taxpayer. It may or it may not. No matter how extensive the information requirements of a domestic OECD tax return form, an OECD citizen cannot be (and is not) expected to disclose income or gains which are not "his" (as defined by the relevant statute). Many offshore structures are put in place precisely to ensure that assets or income are not legally "his" - eg, for estate planning or asset protection reasons. The OECD citizen may not be legally obliged to make disclosure and may simply be seeking financial privacy, not to evade any existing tax liability, but to ensure his hitherto successful offshore arrangements do not inspire a new legislative attack in his home OECD country. For example, if a UK client is quietly enjoying the benefit of an offshore arrangement which does not fall foul of the extended interpretation of "power to enjoy" the income of an overseas person in section 739 of the Income and Corporation Taxes Act 1988, he is hardly likely to advertise that fact to the Inland Revenue and invite countervailing legislation in the next session of Parliament. In short, an OECD citizen may want secrecy in relation to offshore financial arrangements for the same reason that Coca-Cola does not publish its recipe - he does not want business or investment advantage eroded or disturbed.There is nothing dishonest about wanting a quiet life.

## Is tax evasion a form of common law theft?

The second flaw in the OECD argument is the implicit assumption that tax evasion is just another form of theft.A cynical taxpayer might retort that "tax fraud" has two possible meanings - either fraud perpetrated upon the Revenue or fraud by the Revenue (and there are, sadly, cases where Revenue authorities have been found to have lied or behaved less than reputably). But putting aside the cynics, the identification of tax evasion with fraud does not appear to be historically true. In recent times, the UK Inland Revenue has successfully argued there is a common law offence of "cheating the Revenue". In R v Allen [2001] UKHL 45, the defendant was successfully convicted of "cheating Her Majesty the Queen and the Commissioners of Inland Revenue, *contrary to common law*" [emphasis added]. However, that offence appears to have been ripped out of its historical context. (The Irish Supreme Court has rejected the existence of such a common law offence - In The Matter of the Extradition Acts:Attorney General v Hilton No. 18/2004, 30 July).

Strictly speaking, you can only cheat somebody out of something which he owns or which is due to him.We must remember that in mediaeval times, the King was expected to live "off his own" and hence the historic common law offence of "cheating the Crown" appears applicable only to the "own revenues" of the Crown, namely its feudal dues and its customary dues.These were essentially forms of "tenant pays" rents and "user pays" fees - rent from its landholders and fees for the Royal Navy's services in protecting merchants' cargoes as they entered and left the kingdom. Such revenues were not legislated revenues granted as a gift to the King by Parliament on behalf of his subjects. We should not confuse own revenues of the Crown with legislated revenues.A dishonest miner cheating the Crown of mineral royalties is like a tenant cheating his landlord of the agreed rent. Morally and legally, such traditional "dues" to the Crown are far removed from tax revenues, especially from redistributive, modern taxation, imposed by statute rather than common law, and which seeks so often to take from A to pay to B so as to punish the thrifty and reward the profligate.

There is no common law of taxation, as the judges have frequently remarked (see, for example, Hill J in Leidig v FCT [1994] 28 ATR 141 at 149 - "With respect to those who might have suggested otherwise, it is hard to conceive of some common law of income tax operating outside the terms of the Act itself"; also

Griffith CJ "there is no common law of income tax" Webb v Syme (1910) 10 CLR 482 )). Further, as Rowlatt J once said to encourage judicial restraint "There is no equity about a tax": Cape Brandy Syndicate v Inland Revenue Commissioners (1921) 1 KB 64, at p 71, (a message lost on some modern judges who seem to consider Courts should stretch legislation in favour of the tax collector, contrary to traditional rules).

Given there is no common law or equity of taxation, how, as a matter of logic, can there be a *common law* offence of cheating in relation to income tax, a tax which did not exist before 1798? It is contrary to principle that there should be a *common law* offence of cheating in relation to *statutory* tax revenues, such as income or capital gains taxes. These taxes are the *gift* of the people out of *their* revenues to the Crown, a gift granted by their representatives in Parliament. That is why Pitt the Elder declared that "taxation is not legislation". Further, since the Courts have reasonably assumed for generations that no sane person gives more than he actually says he is giving, fiscal statutes have traditionally received a strict interpretation in favour of the subject and against the Crown. The Biblical rule is "Render unto Caesar what is Caesar's" not what Caesar claims is Caesar's.

## Are taxation laws moral universals?

The OECD approach really proceeds from a different view of the relationship between the citizen and the State. Taxation is seen as a prior social mortgage over the person and body of the citizen, a sort of floating pre-eminent domain over all that he earns or possesses. This is quite contrary to traditional Anglo-Saxon notions that the subject is born into the natural liberties of an Englishman and that it is the taxpayer who consents to give part of *what is his* to assist Her Gracious Majesty in governing the country. From this point of view, tax evasion (by mere silence) or non-payment is not a form of cheating the Crown but a form of withholding of a contribution agreed to be given to a common fund, more a civil matter of disputed or unpaid contribution, rather than criminal fraud.

In terms of morality, to identify tax evasion with common law fraud is therefore historically and logically questionable. Tax evasion is usually in breach of positive law (and certainly not, for that reason alone, to be advised - few taxing statutes omit penalty provisions!). But positive law is essentially territorial. OECD tax laws hardly carry the moral authority which justifies imputing an obligation on all other countries to assist OECD countries to catch their tax evaders (especially when the income to be taxed is not even generated in the OECD country concerned).

This was the traditional and generally held view of international fiscal law as laid down in Government of India v Taylor [1955] AC 491, namely, that a jurisdiction does not directly or indirectly enforce the revenue laws of another place. In State of Norway's Application [1990] 1 AC 723, that doctrine was undermined by the curious distinction being made that compelling the giving of evidence in your state to assist in enforcing a revenue law in another country was a different thing. Another inroad has been the use of mutual assistance procedures in bankruptcies where a foreign tax authority is one of the creditors.

However, tax debts are not like normal debts from a historical or moral perspective. They are not payments owing for services rendered. From a moral point of view, therefore, those "tax havens" still being pilloried by the OECD in relation to information demands can continue calmly to observe that taxation laws are essentially a domestic matter of positive law, not part of the universal laws of nations. Taxation laws do not create a universal moral duty on the part of civilised nations to render mutual assistance in their enforcement. Morality has as little to do with taxation laws as whether a country requires motorists to drive on the left or the right side of the road and one country has about as much right to expect another to help enforce its tax laws as to require another country to change its traffic laws.


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