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Doron Narotzki
University of Akron, dnarotzki@uakron.edu

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INTRODUCTION

Multinational corporations ("MNCs") in the United States face the highest corporate tax rate in the world, with a marginal corporate federal tax rate of 35%, which is raised to 40% when state corporate tax rates are included.[1] Although these rates seem high, once U.S. MNCs utilize various tax credits, exemptions, and other benefits, the effective tax rate is significantly less than the statutory rate prescribed by law. The effective tax rate ("ETR") is computed by "measur[ing] [the] taxes paid as a proportion of economic income."[2] For example, according to the U.S. Government Accountability Office ("GAO"), profitable U.S. corporations that filed a Schedule M-3 paid an average U.S. federal income tax rate of only 12.6% on their pre-tax worldwide income reported on their financial statements.[3] This rate only increased to an average of 17% when foreign and state taxes were considered.[4] It is important to consider the effect that unprofitable companies have on an ETR because losses from unprofitable corporations greatly reduces the denominator in measuring the average ETR.[5]

* Assistant Professor of Tax, George A. Daverio School of Accountancy, College of Business, The University of Akron.

1. James O'Toole, *GAO: U.S. Corporations Pay an Average Effective Tax Rate of 12.6%*, CNN MONEY (July 1, 2013, 6:08 PM), http://money.cnn.com/2013/07/01/news/economy/corporate-tax-rate/index.html [https://perma.cc/BXZ3-DRC7]; Scott Cooley, *Corporate Tax Reform's Winners and Losers*, MORNINGSTAR ADVISOR (Feb. 16, 2015), http://www.morningstar.com/advisor/t/102059076/corporate-tax-reform-s-winners-and-losers.htm.

2. U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-520, CORPORATE INCOME TAX: EFFECTIVE TAX RATES CAN DIFFER SIGNIFICANTLY FROM THE STATUTORY RATE 9 (2013), http://www.gao.gov/assets/660/654957.pdf [https://perma.cc/428Q-EDAL].

3. *See id.* at 14.

4. *Id.*

5. *Id.* at 12; *see also* David Morgan, *Study: Many Fortune 500 Cos. Paid $0 Taxes*, CBS NEWS (Nov. 3, 2011, 3:00 AM), http://www.cbsnews.com/news/study-

Even with the unprofitable filers, the average ETR for U.S. companies was still 12% below the statutory rate.[6] The Citizens for Tax Justice and the Institute on Taxation and Economic Policy conducted a relatively recent study, which found that from the 280 profitable Fortune 500 companies, the average ETR was only 18.5% from 2008 to 2010.[7] Several of the companies this study highlighted are companies that we encounter every day and include FedEx Corporation ("Fedex") and Amazon.com, Inc. ("Amazon"), which paid only 0.9% and 7.9% in taxes respectively.[8] Furthermore, the report also found that Pepco Holdings, Inc. ("Pepco Holdings") paid an astounding -57.6% between 2008 and 2010,[9] as a result of profit shifting into other countries in order to avoid paying U.S. taxes.[10]

These examples of low tax-paying corporations raise several questions about how companies approach their tax liabilities and what their objectives are with regard to their shareholders. A corporation is in the business of making money, while promoting the most economic benefit for its shareholders' wealth and welfare. Although this business approach seems to exclude other stakeholders in a corporation, most companies appear to uphold greater responsibilities towards clients, customers, employees, and suppliers. For example, Chick-fil-A, Inc. ("Chick-fil-A") demonstrates quality customer service by giving leftover food to pet owners, encouraging employees "to carry heavy trays for moms

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many-fortune-500-cos-paid-0-taxes/ [https://perma.cc/8U82-RW5U] (explaining that 280 Fortune 500 companies studied between 2008 and 2010 had an ETR that was much lower than 35%); O'Toole, *supra* note 1 ("The federal corporate tax rate stands at 35%, and jumps to 39.2% when state rates are taken into account. But thanks to things like tax credits, exemptions and offshore tax havens, the actual tax burden of American companies is much lower.").

6. *See* Morgan, *supra* note 5; *see also* O'Toole, *supra* note 1.

7. Morgan, *supra* note 5; ROBERT S. MCINTYRE ET AL., CITIZENS TAX JUSTICE & INST. ON TAXATION ECON. POLICY, CORPORATE TAXPAYERS & CORPORATE TAX DODGERS 2008-10 3 (Nov. 2011), http://www.ctj.org/corporatetaxdodgers/CorporateTaxDodgersReport.pdf [https://perma.cc/7RKC-VJCS].

8. *See* MCINTYRE ET AL., *supra* note 7, at 15, 30.

9. *Id.* at 3.

10. *Offshore Profit Shifting and the U.S. Tax Code—Part 1 (Microsoft and Hewlett-Packard): Hearing Before the Permanent Subcomm. on Investigations of the Comm. On Homeland Sec'y and Governmental Affairs*, 112th Cong. 77 (2012) (statement of Sen. Carl Levin, Chairman, Subcomm. On Investigations) [hereinafter *Offshore Profit Shifting Hearing*].

with small children," and going "above and beyond" the normal fast-food customer service expectations.[11] This type of customer service helped Chick-fil-A receive the number one rated Fast Foods Industry in the 2014 Temkin Customer Service Ratings.[12] Companies commit to their customers' satisfaction so that these customers will continue to return to their product or service on a repeat basis and become loyal to their brand. There is nothing wrong with a company wanting to make as much money as possible, and by treating other stakeholders with quality care, they can satisfy others, while also improving the company's economic position.

Another stakeholder that companies treat generously with social and economic benefits is employees. Target Corporation ("Target"), who won the Career Bliss's Leap Award in 2011, increased its employee satisfaction by 12%, and Costco Wholesale Corporation ("Costco") pays almost double the national average salary and offers its employees low premiums of 12% for its insurance.[13]

MNCs are increasing their efforts and spending more money to keep other stakeholders happy, which in the short run may decrease profitability. This short-run position does not align with a corporation's main objective to make money for its shareholders, but in the long term there may be increases in profitability and brand loyalty. In the case of *Burwell v. Hobby Lobby*, the Court stated:

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11. *A Lesson in Customer Service from Chick-fil-A President Dan Cathy*, SAS, http://www.sas.com/en_us/insights/articles/marketing/a-lesson-in-customer-service-from-chick-fil-a.html [https://perma.cc/2ZGV-Z3WA].

12. *2014 Temkin Customer Service Ratings 2014*, TEMKIN RATINGS (2014), http://temkinratings.com/temkin-customer-service-ratings-2014/ [https://perma.cc/LXC8-GVWS].

13. CareerBliss Team, *2011 CareerBliss Leap Awards Reveal Top 50 Companies with the Biggest "Leap" in Employee Happiness*, CAREERBLISS (Aug. 5, 2011), http://www.careerbliss.com/press-releases/careerbliss-leap-awards-2011-reveal-top-50-companies/ [https://perma.cc/ER79-LY8Q]; Aaron Taube, *Why Costco Pays Its Retail Employees $20 An Hour*, BUS. INSIDER (Oct. 23, 2014, 4:15 PM), http://www.businessinsider.com/costco-pays-retail-employees-20-an-hour-2014-10 [https://perma.cc/9YC3-L4NY]; *100 Best Companies to Work For,* FORTUNE, http://fortune.com/best-companies/ [https://perma.cc/33S2-N3FN]; *contra* Douglas McIntyre et al., *America's Worst Companies to Work For*, YAHOO FIN. (July 22, 2013), http://finance.yahoo.com/news/america%E2%80%99s-worst-companies-to-work-for-152240719.html?page=all [https://perma.cc/26TX-WWZ7].

> While it is certainly true that a central objective of for-profit corporations is to make money, modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so. For-profit corporations, with ownership approval, support a wide variety of charitable causes, and it is not at all uncommon for such corporations to further humanitarian and other altruistic objectives.[14]

A corporation should not be used as a vehicle to protect individuals from committing wrongdoings and avoid social responsibility while imposing negative externalities on society, but rather it should be used to protect individuals who maintain ethical and legal business relationships.

Nowadays, consumers and stakeholders of a corporation have more information than ever about companies and the ability to share this information through many different forms of media. This easy access to shared information, whether the information is positive or negative, makes MNCs care more about their public appearance with regard to the environment, education, and other stakeholders that have no direct connection to their business. Therefore, corporations have to meet the public's expectations by using their increasing amount of power to be more responsible and accountable for others through what is referred to today as the Corporate Social Responsibility ("CSR") Theory.[15] As a result of voluntary CSR efforts, employees' working conditions, and other areas of influence across the world, have been significantly

14. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2771 (2014).

15. *See* Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 768 (2005) (providing a complete review of the Corporate Social Responsibility evolvement and debate); Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 12 BUS. ETHICS Q. 235 (2002) (discussing previous literature). *See also* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); *but see* Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004); Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 FLA. ST. U. L. REV. 1061 (1994) (explaining different perspectives on Corporate Social Responsibility); C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 KAN. L. REV. 261 (2002); Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705 (2002).

improved.[16] A historical look into CSR reveals that corporate activities previously viewed as generous and socially responsible, such as ensuring humane working conditions, providing decent housing or healthcare, and donating to charity, are now corporate standards that we cannot imagine the world without. This Article suggests that the next evolution in CSR development will be "Tax Fairness," meaning that corporations will soon experience the pressure to be socially responsible by paying a fair and reasonable tax rate. Before further analyzing this predicted element in the future of CSR, it is important to gain an understanding on the corporate tax system.

I. CORPORATE TAX HISTORICAL OVERVIEW

One of the unique features of a corporation is that the corporation itself is considered as a distinct entity from its owners. This feature was confirmed after the Sixteenth Amendment was passed in 1913 providing for separate taxation between individuals and corporations.[17] Throughout the history of corporate and individual tax rates, the tax system has looked at ways to reduce the concept of double taxation (where corporations are taxed, and then individual shareholders are taxed again on distributions). These efforts to reduce double taxation include allowing corporations to be pass-through entities that are not taxed, permitting various deductions or credits for dividends, and reducing the tax rate on capital gains for individuals.[18] Since the inception of the corporate tax system, companies have used the freedom within their tax planning analysis to reduce their overall tax liability. For example, individuals and corporations can shelter their income in tax jurisdictions with lower tax rates. Efforts to reduce tax liability, and sometimes not pay taxes at all, have only been looked at from

16. U.N. HUMAN RIGHTS COUNCIL, *Summary of Discussions of the Forum on Business and Human Rights*, 36 U.N. Doc. A/HRC/FBHR/2014/3 at 10–11 (Dec. 1–3, 2014); *see also* U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. HR/PUB/11/04 at 4 (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [https://perma.cc/63WY-7CPN].

17. Jack Taylor, *Corporation Income Tax Brackets and Rates, 1909–2002*, Fall 2003 IRS STATISTICS OF INCOME BULLETIN 284 (2003), http://www.irs.gov/pub/irs-soi/02corate.pdf [https://perma.cc/MAV6-C4LR].

18. *Id.*

a legal aspect of what a corporation can do, as opposed to what a corporation should do from a social and ethical standpoint.

States and international committees, mostly run by the Organization for Economic Co-operation and Development ("OECD"), work to minimize tax shelters and publicly ban them,[19] or encourage international cooperation between countries.[20] Corporations have a right to minimize their tax liability through tax planning efforts so that they can maximize profits for their shareholders. A corporation has no duty to pay more than the amount of taxes it is legally responsible to pay. However, after looking further into CSR, paying the "fair" share of taxes should become a required element in today's business environment.

II. CORPORATE SOCIAL RESPONSIBILITY

CSR is an action taken by a corporation to adopt specifically identifiable standards of self-regulation that are not imposed by law and do not provide the corporation with any direct gain.[21] The recent history of CSR dates to 1950, and the CSR movement gained significant traction in the 1960s, when Howard R. Bowen wrote and conducted research on the *Social Responsibilities of the Businessman*.[22] The view changed from the idea that a corporation was a separate entity from its shareholders to one that a corporation was an aggregate of its individual shareholders.[23] Bowen's proposed new view of corporations raised several important issues to the public, such as: "[W]hat are the social

19. *Global Forum on Transparency and Exchange of Information for Tax Purposes: About the Global Forum*, OECD, http://www.oecd.org/tax/transparency/about-the-global-forum/ [https://perma.cc/E8LW-5424].

20. Robert Thornton Smith, *Tax Treaty Interpretation by the Judiciary*, 49 TAX LAW. 845, 858 (1996).

21. Abagail McWilliams & Donald Siegel, *Corporate Social Responsibility and Financial Performance: Correlation or Misspecification?*, 21 STRATEGIC MGMT. J. 603, 603–05 (2000) (asserting that it is reasonable to assume that adopting CSR elements may end up, indirectly, producing some economic gain for the company who adopted such regulations, often due to positive public opinion, increased customer happiness, etc.). However, the extensive research done by Abagail McWilliams and Donald Siegel was inconclusive in finding whether CSR has an overall positive, negative, or neutral impact on corporate profitability. *Id.* at 608.

22. *See generally* HOWARD R. BOWEN, SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN (University of Iowa Press 2013) (1953).

23. Margaret M. Blair et al., *The New Role for Assurance Services in Global Commerce*, 33 J. CORP. L. 325, 329–44 (2008).

responsibilities which businessmen [reasonably] may be expected to assume?"[24] He furthered this new discussion point by stating the definition of what responsibilities businessmen should have towards society: "It refers to the obligations of businessmen to pursue those policies, to make those decisions, or to follow those lines of action which are desirable in terms of the objectives and values of our society."[25] Another prominent writer to analyze CSR at this nascent stage was Keith Davis, who argued that "businessmen's decisions and actions [are] taken for reasons at least partially beyond the firm's direct economic or technical interest."[26] This introduced the idea that some of the social activities that a corporation participates in may have a strong connection, although indirectly, to its "long-run economic gain."[27]

By 1970, it became widely accepted that businessmen have a social responsibility to look beyond their narrow economic interests and consider the effects that their decisions have on the general public. In 1971, the Committee for Economic Development ("CED") published *Social Responsibilities of Business Corporations*, which was perhaps the first time that social responsibility referred directly to the corporation, and not the decisions of the individual shareholders.[28] The CED noted that:

> Business is being asked to assume broader responsibilities to society than ever before and to serve a wider range of human values. Business enterprises, in effect, are being asked to contribute more to the quality of American life than just supplying quantities of goods and services. In as much as business exists to serve society, its future will depend on the

24. *See* BOWEN, *supra* note 22, at 5.

25. *Id.* at 6.

26. Keith Davis, *Can Business Afford to Ignore Social Responsibilities?*, 2 CAL. MGMT. REV. 70, 70 (1960).

27. *Id.*

28. It should also be noted that the CED was composed of business people and scholars, and therefore, reflects an important view, coming from both sides of the table. *See* RESEARCH & POLICY COMM., COMM. FOR ECON. DEV., SOCIAL RESPONSIBILITIES OF BUSINESS CORPORATIONS 6 (1971), https://www.ced.org/pdf/Social_Responsibilities_of_Business_Corporations.pdf [https://perma.cc/UG85-C5SE]. Also, it is still important to remember the time and environment that the CED operated within, the late 1960s and early 1970s, a time where social movements were at their peak, especially with regard to environment, worker safety, consumers, and employee rights.

> quality of management's response to the changing expectations of the public.[29]

Now the discussion revolves around the corporation's social responsibility, as opposed to the individuals that make up the corporation, and what constitutes a socially responsible activity for a corporation. Over the last twenty-five years, CSR has transitioned from general statements about shareholders' responsibility towards improving society to specific activities that a corporation should engage in to be socially responsible. All of these activities and definitions have set a standard of conduct that is higher than the legal constraints imposed on a corporation, and CSR has become a governing system of transactions and relations between the corporation and its stakeholders. CSR is about much more than a corporation donating money to increase its public image; it is the evolution of corporate responsibilities with regard to employees, clients, and the environment of people living amongst a MNC on a daily basis. Today, almost all MNCs now promote CSR as a core area of management and feature some type of CSR report.[30]

III. TAX RESPONSIBILITY

On December 9, 2012, *The Sunday Times* reported that Microsoft Corporation ("Microsoft") paid no taxes on its £1.7 billion of U.K. online sales due to tax planning strategies.[31] Online sales of Windows 8 (a computer operating system) were channeled to Luxembourg—allowing Microsoft to avoid a large tax liability.[32] Microsoft received negative publicity for its tax planning strategy;

29. *Id.* at 16.

30. Some examples include the CSR/Sustainability Report (adopted by companies such as Cisco, Nike, and Coca-Cola). The newly added positions of CSR Specialist or Director, Global Sustainability Specialist, and Diversity Specialist can be found at most Fortune 500 companies. *See, e.g.*, *Corporate Social Responsibility*, CISCO, http://csr.cisco.com/ [https://perma.cc/CW82-SQCD]; *Sustainable Innovation: A Powerful Engine for Growth*, NIKE, http://about.nike.com/pages/sustainable-innovation [https://perma.cc/6ULT-CJJK]; *Annual Sustainability Reports*, COCA-COLA COMPANY, http://www.cocacolacompany.com/stories/sustainability-reports [https://perma.cc/VZG3-4K65].

31. Jon Ungoed-Thomas et al., *Microsoft Pays No UK Tax on £1.7bn a Year*, SUNDAY TIMES (Dec. 9, 2012), http://www.thesundaytimes.co.uk/sto/news/uk_news/National/article1173016.ece [https://perma.cc/JX4V-82US].

32. *Id.*

one headline read: "Now, Microsoft accused of 'immoral tax practices in UK' for paying 'no tax' on 1.7 b[illio]n pounds [of] revenue."[33] Several other large MNCs have also received negative attention for their tax avoidance over the past several years, including Amazon, Apple Inc. ("Apple"), Google Inc. ("Google"), Starbucks Corporation ("Starbucks"), Teva Pharmaceutical Industries Ltd. ("Teva"), and many others.[34]

To demonstrate how tax planning can lead to alleged evasive tax practices, we will continue to analyze Microsoft to better understand how MNCs accomplish tax avoidance. Imagine a customer in the U.K. pays to download Windows software, and the money is paid online to Microsoft in Luxembourg. These software royalties then are transferred to Microsoft in Ireland, and then dividends are immediately directed to a parent company in Bermuda, which has no U.K. corporate tax liability. This transfer and distribution of revenue is a completely legal way to conduct business. Richard Murphy from the Tax Justice Network, stated: "Like many other companies, Microsoft is trying to avoid taxes. It has tried hard to represent itself as doing the best thing for the world, but if you really want to solve the world's problems, pay taxes."[35] His message was that if Microsoft were to pay taxes on the revenue that they avoided, the taxes could then be used by the U.K. to promote the greater good for society, such as building hospitals or providing information technology ("IT") training for

33. ANI, *Microsoft Accused of 'Immoral' Tax Practices in UK for Paying 'No Tax' on 1.7bn Pounds of Revenue*, SIFY FINANCE (Dec. 20, 2012, 6:23 AM), http://www.sify.com/finance/now-microsoft-accused-of-immoral-tax-practices-in-uk-for-paying-no-tax-on-1-7bn-pounds-revenue-news-news-mmklRUijddjsi.html [https://perma.cc/7WQ6-69LL].

34. *See, e.g.*, Jonathan Chew, 7 *Corporate Giants Accused of Evading Billions in Taxes*, FORTUNE (Mar. 11, 2016); Simon Marks, *Amazon: How the World's Largest Retailer Keeps Tax Collectors at Bay*, NEWSWEEK (July 13, 2016, 5:10AM), http://www.newsweek.com/2016/07/22/amazon-jeff-bezos-taxes-479814.html [https://perma.cc/A6TF-7U4K]; Robert Reich, *The Apple Tax Avoidance Scam is Just the Start*, NEWSWEEK (Sept. 10, 2016, 6:30 AM) http://www.newsweek.com/apple-tax-avoidance-scam-just-start-496420 [https://perma.cc/845R-PKDB].

35. Sam Webb, *Microsoft Avoids Paying £159 MILLION in Corporation Tax EVERY YEAR Using Luxembourg Tax Loophole*, DAILY MAIL ASSOCIATED NEWSPAPERS (Dec. 9, 2012, 12:48 PM), http://www.dailymail.co.uk/news/article-2245412/Microsoft-avoids-paying-159MILLION-corporation-tax-EVERY-YEAR-using-Luxembourg-tax-loophole.html [https://perma.cc/MVE6-MEWM].

young people in the tech industry.[36] *The Guardian* also criticized Microsoft for organizing its licensing division in Reno, Nevada (where it is permitted to pay zero taxes), rather than the State of Washington, where the company is headquartered.[37] This organizational structure has allowed Microsoft to legally avoid paying taxes on more than $700 million over the past thirteen years. Meanwhile, the State of Washington is facing a deficit of $430 million in its biannual budget.[38]

Apple has also been criticized for its tax activities due to its organizational structure, which allowed for over $70 billion in worldwide income to be channeled away from the United States through subsidiaries in Ireland.[39] Their complex structure allowed for an ETR of 2% (or less) since 2003, while Ireland has a statutory corporate tax rate of 12.5%.[40] There are commonalities between these avoidance practices and the tax planning of many other MNCs. The question then becomes whether Microsoft's or Apple's actions are morally and ethically correct or even acceptable? Just because a MNC can avoid taxes, should they?

Google, whose corporate motto is "don't be evil," also faced negative attention for its MNC tax-avoidance strategies[41] after being "accused of swerving [the] UK tax on the £1.6 [billion] it ma[de] in Britain."[42] Ed Miliband, a British Labor Party politician, also accused Google of "contributing to an 'unacceptable culture of

36. *Id.*

37. Charles Arthur, *Is Microsoft a Tax Dodger?*, THE GUARDIAN (Sept. 23, 2009, 11:57 AM), http://www.theguardian.com/technology/blog/2009/sep/23/microsoft-tax-avoidance-questions [https://perma.cc/6TK6-3SHF].

38. Nick Eaton, *Are Microsoft Back Taxes the Answer to Wash. Budget Woes?*, SEATTLEPI (Sept. 23, 2009, 4:30 PM), http://blog.seattlepi.com/microsoft/2009/09/23/are-microsoft-back-taxes-the-answer-to-wash-budget-woes [https://perma.cc/FT69-DW38].

39. *Offshore Profit Shifting and the U.S. Tax Code—Part 2 (Apple Inc.): Hearing Before the Permanent Subcomm. on Investigations of the Comm. On Homeland Sec'y and Governmental Affairs*, 113th Cong. 6 (2013) (statement of Sen. Carl Levin, Chairman, Subcomm. on Investigations).

40. *Id.* at 18.

41. *Transparency*, GOOGLE: U.S. PUB. POL'Y, https://www.google.com/publicpolicy/transparency.html [https://perma.cc/KSB9-L5GY].

42. John Oates, *Google: Do No Evil, Pay No Tax*, REGISTER (Dec. 21, 2009, 11:10 AM), http://www.theregister.co.uk/2009/12/21/google_tax/ [https://perma.cc/Y5EQ-NJD2].

irresponsibility.'"[43] There were many headlines that attacked Google's lack of social responsibility. The peak of criticism came on June 13, 2013, when CNN reported that a committee of lawmakers said that the U.K. should launch a full investigation into Google to make sure it was complying with all requisite tax laws.[44] These investigations and reports will likely not show that Google evaded its taxes in an illegal way because Google has the resources necessary to make sure that each tax-planning step was properly learned, researched, and discussed amongst the top tax experts in the world. However, the attention that Google received showed that, from a policy perspective, Google's tax liability was too low for a company that works so hard to create a positive public image. Google strives to establish a working environment where its employees enjoy unprecedented benefits, and to improve the greater good for people outside of the company.

Starbucks faced negative publicity due to its tax practices as well, but in 2013, it released a public statement saying that it had decided to voluntarily pay over £5 million in U.K. taxes and £15 million in additional taxes in 2013 and 2014.[45] This control effort to voluntarily pay taxes, which could have otherwise been avoided, was something that other MNCs had not considered. A quick analysis of Starbucks Coffee Company (U.K.) Limited ("Starbucks U.K.") shows that in the Fiscal Year of 2011, it had a turnover of about £400 million; gross profit of £78.4 million; an operating loss after "administrative expenses" of £28.8 million; and a net pre-tax loss on ordinary activity of £32.9 million.[46] Even though Starbucks was not profitable in the U.K., and as a result did not have to pay

43. Alexi Mostrous, *Google Attacked by MPs Over 'Evil' of Tax Avoidance*, TIMES (May 17, 2013, 12:01 AM), http://www.thetimes.co.uk/tto/money/tax/article3767392.ece [https://perma.cc/7ECX-HBML].

44. Mark Thompson, *U.K. Should Probe Google's Tax Affairs: Report*, CNN (June 13, 2013, 10:40 AM), http://money.cnn.com/2013/06/13/news/companies/google-uk-tax/index.html [https://perma.cc/E9R8-CU62].

45. Matthew Boyle, *Starbucks Pays $15.4 Million U.K. Corporation Tax Amid Backlash*, BLOOMBERG (June 24, 2013, 7:55 AM), http://www.bloomberg.com/news/articles/2013-06-24/starbucks-pays-15-4-million-u-k-corporation-tax-amid-backlash [https://perma.cc/E6K5-7469].

46. Edward D. Kleinbard, *Through a Latte, Darkly: Starbucks's Stateless Income Planning*, TAX NOTES 1515, 1519–20 (June 24, 2013) (Ctr. in Law, Economics, & Org. Research Paper Series No. C13-9, Legal Studies Research Paper Series No. 13-10) (noting that fiscal year 2010 was generally similar in results).

taxes, it stated: "[W]e felt that our customers should not have to wait for us to become profitable before we started paying U.K. corporation tax."[47] According to Reuters, the company was able to achieve losses in fourteen out of fifteen years by paying substantial amounts of money to other related group companies through "(1) royalties and license fees paid to a Dutch affiliate, (2) markups on coffee purchased via another Dutch affiliate and a Swiss affiliate, and (3) interest paid on a loan from the U.S. parent company."[48] Even though Starbucks U.K. was recognizing yearly losses, it was still considered a profitable company in other international markets and was continuing to invest in markets that reported losses, which made it so hard for the public to accept the fact that Starbucks paid such little taxes in the U.K.[49]

The main takeaway from the Starbucks case is that any MNC can manipulate its operations to appear as a loss on its books, which results in zero tax liability, yet still appear profitable to its confident shareholders. Regardless of whether Starbucks should be participating in tax-avoidance planning, it is shocking that Starbucks decided to proactively pay taxes, and it may be concluded by some that it only paid taxes to improve its public

47. Boyle, *supra* note 45.

48. Kleinbard, *supra* note 46, at 1520–21; Tom Bergin, *Special Report: How Starbucks Avoids UK Taxes*, REUTERS (Oct. 15, 2012, 9:48 AM), http://www.reuters.com/article/us-britain-starbucks-tax-idUSBRE89E0EX20121015 [https://perma.cc/9G8D-JBX9].

49. Starbucks U.K. argued to the House of Commons that, in fact, the company did not claim to analysts and shareholders that its U.K. business were profitable, and even more than that, it denied it ever claimed that the company's operating margins in the United Kingdom approached 15%; rather, according to the company the different statements may be the direct result of the fact that pursuant to US GAAP rules the company had to add back the intercompany royalties and interest paid to its affiliates, while at the same time pursuant to U.K. rules the company had to include them. However, this explanation means probably nothing to the public or even to the House of Commons who examined the case simply because they do not know much about these issues and sounds more like a sophisticated accounting and tax planning. *See* HC COMMITTEE OF PUBLIC ACCOUNTS, HM REVENUE & CUSTOMS: ANNUAL REPORT AND ACCOUNTS 2011-12, 2012-13, HC 716, at 8 (UK); *see also* Doron Narotzki, *Corporate Social Responsibility and Taxation: The Next Step of the Evolution*, 16 HOUS. BUS. & TAX L.J. 166 (2016). For the House of Commons, the questions (Q. 195) at issue in the U.K. tax controversy were the overall Starbucks group's profitability from dealing in the United Kingdom, and whether the division of those profits among different business legal entities reflected a true economic reality (*i.e.*, had a real business purpose to it) or, on the other hand, was it driven by the desire to reduce its tax liability in the U.K and the result of a sophisticated tax planning.

image.

IV. CORPORATE SOCIAL RESPONSIBILITY AND TAXATION

CSR decisions, along with all other aspects of the corporate decision-making process, are driven by the obligation to give shareholders a return on their investment. The adoption of a new agenda by a company should be focused on risk minimization in order to keep the corporation successful. CSR and tax responsibility should go hand in hand because so many companies are facing intense scrutiny for their tax practices and negative publicity in a media-driven world can directly impact financial results.[50] With the negative impact of public scrutiny on MNC tax-planning efforts, corporations should consider CSR principles while planning their tax strategies. ActionAid published an article called "Tax Responsibility: The Business Case for Making Tax a Corporate Responsibility Issue," which stated:

> An effective CR response to tax planning must be based on three insights: (1) compliance with the letter of the law is no longer sufficient to protect business from the risks associated with tax planning; (2) lack of transparency around tax planning leads to increased risk; (3) it is the structures and practices of tax planning that are at the heart of tax responsibility, rather than the amount of tax paid, which is an outcome of these practices.[51]

In addressing these CSR issues, a corporation must first look to how profitable it is in order to be able to distribute dividends to its shareholders. If a company is not making a profit, then it should not be engaged in voluntary CSR activities. Second, if the corporation is profitable, yet is still recognizing a negative ETR, it

50. *See* Margaret Hodge & Jeff Jarvis, *Should We Boycott Google, Starbucks and Amazon?*, THE GUARDIAN (Nov. 17, 2012, 1:00 PM), http://www.theguardian.com/commentisfree/2012/nov/17/should-boycott-google-starbucks-amazon [https://perma.cc/NQ98-WMLP] ("Of course it is up to [the] government to act, both in the UK and internationally, to ensure that global companies pay tax according to where they make their profit and don't stash it away in tax havens such as Luxembourg and Bermuda. But consumers can use their power too. By boycotting these companies we not only voice our anger but hit them where it hurts. And any credible government will have to respond to public outrage at unacceptable tax avoidance.")

51. ACTIONAID, TAX RESPONSIBILITY: THE BUSINESS CASE FOR MAKING TAX A CORPORATE RESPONSIBILITY ISSUE 1 (July 2011), https://www.actionaid.org.uk/sites/default/files/doc_lib/tax_responsibility.pdf [https://perma.cc/K49A-4WNL].

can be assumed that its tax-planning efforts were too aggressive, and it did not follow CSR standards. Third, if the corporation decides it cannot fully disclose any financial statements or business activities, then it can be assumed that it does not follow any CSR standards. Fourth, if the corporation needs to issue a public statement to explain its low ETR, then it can be assumed that it does not follow CSR standards. Fifth, it can be assumed that a corporation follows CSR standards if its managers feel like they are doing what is best for the public and not only for their shareholders.

Oliver Wendell Holmes' made a renowned observation that "taxes are what we pay for [a] civilized society . . . ."[52] Basically, paying taxes is the most elementary responsibility towards the state and the people who reside therein.[53] This reality is demonstrated by a hypothetical in which Microsoft does nothing to avoid its taxes within the State of Washington, to which the proceeds from these taxes trickle down from the state to the education, health, and public transportation sectors. Compare this with an example where Microsoft does extremely well and tries to fill its tax gap through CSR activities, where both Microsoft and the State of Washington benefit from the money that each has to invest in its residents and infrastructure. Overall, tax responsibility has become intertwined with the expectations of CSR, and avoiding corporate taxes is simply socially irresponsible.

V. LOOKING FORWARD

Although creative tax planning to avoid paying taxes has become an acceptable business practice, we—as a society, as scholars, as consumers, and as citizens—cannot freely accept this ideology. The recent media trend of shining a spotlight on any corporation that works to avoid large percentages of taxes is beginning to change the way that corporations are thinking about their tax practices. This change will not be the result of an overnight change of corporate tax plans, so the question becomes:

52. Compania Gen. de Tabacos de Filipinas v. Collector of Internal Revenue, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting).

53. John Christensen & Richard Murphy, *The Social Irresponsibility of Corporate Tax Avoidance: Taking CSR to the Bottom Line*, 47 SOC'Y FOR INT'L DEV. J. 37, 37 (2004).

how should individuals and corporations proceed in order to change for the betterment of society?

Government and international organizations, such as the OECD, continue to find ways to limit MNCs from avoiding their tax liability. However, much of their efforts become useless, aimless, and fruitless. For instance, Procter & Gamble Co. ("P&G") sold forty-three brands to Coty, Inc. ("Coty") for about $12.5 billion through a tax scheme referred to as a "Reverse Morris Trust," which saved them an estimated $2–$4 billion in taxes.[54] There are two major steps to a Reverse Morris Trust. The first step is a spin-off, pursuant to the Internal Revenue Code Section 355.[55] The second step is a statutory merger, pursuant to the Internal Revenue Code Section 368(a)(1)(A).[56] This tax-planning scheme can easily result in a tax-free transaction if careful planning ensures that all requirements are met. In order to stop the Reverse Morris Trust transaction, Congress enacted Internal Revenue Code Section 355(e) in 1997.[57] Based on the newly enacted revision to the Code, additional taxation is imposed on the distribution in a spin-off where 50% or more of the corporation that has been spun-off is transferred in a tax-free manner in the two years after the spin-off.[58] As a result of Congress's new regulations, corporations quickly found a new way to achieve the same tax-free results, known as The Reverse Morris Trust. This demonstrates that when regulations are imposed on corporate tax planning efforts, sophisticated tax professionals, equipped with the necessary resources, will find a new way to achieve similar results.

The solution to limiting MNCs from aggressively pursuing tax avoidance strategies should involve two steps. First, Congress should close the loopholes in the tax law to make sure that loopholes are only available to the qualifying corporations that

54. Allan Sloan, *For Tax Techies, P&G's Deal with Coty is a Thing of Beauty*, WASH. POST (July 16, 2015), https://www.washingtonpost.com/business/economy/for-tax-techies-pandgs-deal-with-coty-is-a-thing-of-beauty/2015/07/16/6944bb5e-2c11-11e5-a250-42bd812efc09_story.html [https://perma.cc/D2YZ-BUSX].

55. I.R.C. § 355 (2014).

56. I.R.C. § 368 (1999).

57. Karim H. Hanafy, Comment, *Section 355 Spin-Off + Section 368 Reorganization ≠ Section 355(e). It's Simple Math: The Anti-Morris Trust Bill Simply Does Not Add Up*, 1 HOUS. BUS. & TAX L.J. 119, 123 (2001).

58. I.R.C. § 355(e) (2016).

Congress intended to use. Second, acknowledge the fact that step one can never achieve its ultimate goal and understand that MNCs have more power than ever before. Customers and users should demand that corporations pay a reasonable tax liability and demand that the OECD initiate a list of companies who refuse to fully disclose their tax schemes and tax liability. The public has more power than is generally perceived due to the power that negative publicity has on a corporation competing in the current CSR landscape. The OECD final report should include a section with the following data: (1) the name of the corporation; (2) what it does; (3) the total income it generated in recent years; (4) where the corporation and where its headquarters is located; (5) the applicable statutory tax rate; and (6) the corporation's ETR.

Corporations will soon realize that their negative image can be regained by considering CSR in their tax planning efforts, and they will adopt new standards to provide information in their CSR reports. Once a corporation becomes more transparent about their tax liability and willingness to pay taxes, the positive public opinion will provide for better financial results.

VI. Creating the Standard

In order to tackle the issue of CSR and taxation, a new standard needs to be created that allows corporations to be certified at different levels of CSR activity that is contingent on their CSR towards taxation. The OECD report, *Harmful Tax Competition: An Emerging Global Issue*, created a set of international measures that combat harmful tax competition.[59] Although this report was not considered successful by most, there are many aspects to the report that provide for a learning experience. Many countries that recognized the report decreased harmful tax policies within their government. Overall, the report created a set of criteria in which tax havens could easily be identified and the necessary steps were outlined to eliminate their negative status.[60] One of the main pitfalls of the OECD report was

59. Org. for Econ. Co-Operation & Dev., Harmful Tax Competition: An Emerging Global Issue (1998), http://www.oecd.org/tax/transparency/44430243.pdf [https://perma.cc/7JWV-XMBJ].

60. *List of Unco-operative Tax Havens*, OECD, http://www.oecd.org/countries/monaco/listofunco-operativetaxhavens.htm [https://perma.cc/3LJZ-4HJY] (showing

that it tried to threaten countries that did not cooperate with their transparency expectations. However, if a new plan focuses on corporations and encourages cooperation, instead of threats, there will be a greater chance to increase public expectations and responses from the corporate world.

The OECD report made clear terms and definitions, which helps to create a better understanding of the right and wrong way to use tax havens and harmful tax competition. Once the report's analysis and definitions are accepted, there will be an increased standardization when it comes to creating positive corporate socially responsible behavior. The issues in the report, and the issues faced going forward, revolve around the fact that CSR has to be voluntary, and change can only be brought through corporate cooperation. Therefore, we need to incentivize MNCs by finding a "good behavior" standard for those who carry the burden with the rest of the society and pay their fair share of taxes, which will result in better public exposure and financial results. Another approach to combat harmful tax practices is the creation of the non-profit Community Benefit Society, "Fair Tax Mark."[61] Their main objective is to promote transparency and fairness by rewarding businesses that act in a positive tax manner.[62]

VII. FUTURE OUTLOOK

Companies are constantly competing in order to maximize returns and achieve success. This paper suggests a new standard for CSR that includes tax practices because taxes are the most basic way in which corporations can positively engage in society. The public's opinion about whether or not a corporation is socially responsible is a powerful criterion that has a direct result on positive or negative financial performance. The public needs to

some countries, such as: Andorra, The Principality of Liechtenstein, Liberia, The Principality of Monaco, The Republic of the Marshall Islands, The Republic of Nauru, and The Republic of Vanuatu, followed those guidelines and were taken out of the uncooperative tax havens list by 2007).

61. CO-OPERATIVES UK, FAIR TAX MARK GUIDANCE NOTES FOR CO-OPERATIVES UK MEMBERS 4, 26 (2015); *Ethical Consumer and the Fair Tax Mark*, FAIR TAX, http://www.fairtaxmark.net/who-we-are/ec/ [https://perma.cc/G2KA-8TC3] (Fair Tax Mark is managed on a day-to-day basis by the Ethical Consumer Research Association, which also works with other ethically-minded organizations and campaign groups, such as Amnesty International).

62. *Id.*

become more informed on corporate tax haven involvement, jurisdictions, amount of income generated in each jurisdiction, tax benefits received, ETR in each jurisdiction, and, finally, the company's worldwide average ETR. Once the public can easily interpret this material, they will be able to support companies that do not explicitly participate in aggressive tax practices and taxation will become a crucial aspect of CSR for MNCs.

The recent election results in the United States taught us that the public is upset, frustrated, and even angry to some extent. Many people feel that they are not being represented or heard. When people hear that the economy has picked up and the future is bright, but this is not reflected in their personal financial status, while at the same time they hear about corporations who are making billions while not carrying the burden of taxes, they begin to care about CSR, and want these corporations to care.

For many individuals here in the United States, it is clear that there are different worlds for big corporations and little people, and they feel misrepresented. The time to create awareness among the public with regards to corporations' responsibility to pay their fair share in taxes is never better than it is now. The way to create such awareness is by talking about it, writing about it, and making people understand the situation and the importance of fair taxation within CSR. The responsibility is not only on scholars. Politicians can and should raise this issue and demonstrate the link between corporate tax and corporate social responsibility and push for cooperation, and not just enforcement, when it comes to taxing corporations. It is time for statements, such as the one that described Google as "contributing to an 'unacceptable culture of irresponsibility,'"[63] and others that were made at the U.K. parliament, to be heard here in the United States by our own politicians.[64]

63. Mostrous, *supra* note 43.

64. Simon Bowers & Rajeev Syal, *MP on Google Tax Avoidance Scheme: 'I Think That You Do Evil*,' THE GUARDIAN (May 16, 2013, 3:24 PM), http://www.theguardian.com/technology/2013/may/16/google-told-by-mp-you-do-do-evil [https://perma.cc/7D4E-83RG]; *see also* Kadhim Shubber, *MP to Google: 'I Think That You Do Evil' When It Comes to Tax*, WIRED UK (May 17, 2013, 10:23 AM), https://arstechnica.com/business/2013/05/mp-to-google-you-do-do-evil-when-it-comes-to-tax/ [https://perma.cc/EEF2-7FJU].