

Tax Avoidance Isn't Just Smart, it's as American as Apple Pie

Since the first Presidential Debate, there has been a lot of hue and cry because Donald Trump had the temerity to declare that he paid no income taxes. More specifically Hillary Clinton said, about his refusal to make his income tax statements public:

There is something he is hiding. Or maybe he doesn't want the American people to know that he's paid nothing in federal taxes, because the only years that anybody's ever seen were a couple of years when he had to turn them over to state authorities when he was trying to get a casino license, and they showed he didn't pay any federal income tax.

Trump retorted, "That makes me smart," more or less declaring he didn't pay any income taxes and he's proud of it.

And so he should be.

To be sure, he is vulnerable to the charge of hypocrisy, not paying tax, on one hand, and advocating what could turn out to be the largest infrastructure project in American history on the other, in addition to kvetching about crumbling infrastructure and declining military spending.

Yet, on the matter of taxes alone, he is right.

Judge Learned Hand stated that "anyone may arrange his affairs so that his taxes shall be as low as possible; he is not bound to choose that pattern which best pays the treasury. There is not even a patriotic duty to increase one's taxes. Over and over again the Courts have said that there is nothing sinister in so arranging affairs as to keep taxes as low as possible.

Everyone does it, rich and poor alike and all do right, for nobody owes any public duty to pay more than the law demands.” (Gregory v. Helvering 69 F.2d 809 – 1935)

Ironically, that judgment went against the taxpayer, something not often noted by those who quote it. The issue is known as the doctrine of substance over form. In that particular case, a businesswoman named Evelyn Gregory had swapped assets between two corporations, then dissolved one of them which distributed the assets to her as owner. She then claimed a lower tax liability as a result.

In an [analysis](#) of Hand’s contribution to tax law, Yale law professor Marvin Chirelstein notes that the courts “follow no single and consistent set of rules in deciding when to accept and when to disregard the taxpayer’s choice of form” and that when the courts reject the citizen’s chosen form of organization, they “commonly assert as a matter of principle that the incidence of taxation depends upon the substance of a transaction and that mere form is not controlling.” But if the form is accepted, Hand’s maxim reigns – “There is nothing sinister in so arranging affairs as to keep taxes as low as possible.”

This results in a contradictory position. “In practice the first principle means simply that the range of effective choice is limited in the situation under review, or indeed that the only route to the taxpayer’s destination is the one that bears the highest tax. By contrast the second principle, when applicable, confirms that the availability of alternative legal procedures also gives the taxpayer a right of election with respect to the tax consequences.”

What this means is that tax law is inconclusive and vague, but there’s no harm in trying to keep taxes low. That is why many businesses hire tax attorneys to advise them of the best options available to them.

Everyone Should Do It

This is not just a privilege of the rich, though they might have more options available and the means to hire skilled tax lawyers. Every citizen has options available so as to limit or lower her taxes. These include such things as the various Individual Retirement Plans (IRAs) which confer certain tax advantages. Additionally, interest paid on a loan for business purposes is tax deductible. Many people run small businesses from their homes in order to deduct some of their living expenses.

A recent [article](#) in the *New York Times* looking at the Trump tax imbroglio notes that tax write-offs for start-up business ventures are generous. “There was a point when even ruinous projects like an unfinished, unleased office tower could end up producing a profit for some investors, thanks to ample tax write-offs.”

Such loopholes, the article notes, were largely closed off for outside investors when the Reagan administration overhauled the tax act in 1986. “But active real estate investors and developers were allowed to keep that tax break.”

The article notes that when Trump had to disclose his tax filings to get a casino license back in the 80s, there were two years, 1978 and 1979, in which Trump paid no income taxes at all. “By taking advantage of deductions available to real estate developers and claiming losses from partnerships, Mr. Trump reported a “negative income” of \$406,379 in 1978 and \$3.4 million in 1979 – thus avoiding any tax liability for those two years, a time when he claimed to be worth hundreds of millions of dollars.”

The article notes further that Trump paid no income taxes in 1984, 1991 and 1993. The Donald was losing money on his Atlantic City casinos in those latter years which would have put him under water. But that is what entrepreneurship is all

about. You take risks, including the risk of loss. And during the losing years, you pay no taxes. That is not, despite the agitations of the professional teeth gnashers, a bad thing. Nor is it shady or underhanded or in any way blameworthy.

The Widespread Demand to Pay as Little as Possible

We recently visited friends who live in a gated community on Vancouver Island. It's a fairly wealthy strata community and our host told us about one neighbor who boasts that he pays no income tax. I was amazed as I pay some tax even on my pension income. I wondered how he did it. But thinking about it, I can think of many ways in which a retired person with substantial assets can have a decent income and pay no income tax at all. These are options open to all my fellow Canadians who have accumulated some wealth during their working lives.

These include Tax Free Savings Accounts (similar to Roth IRAs in the United States), reverse mortgages, remortgaging properties and so on. There is no capital gains tax in Canada on your principal residence. So if you bought a house in Vancouver for under \$50,000 forty years ago which is worth over a million today, you can sell it and pocket that million bucks tax free. It's all above board and legal.

Corporations often use differences in jurisdictional tax laws to avoid taxes by having subsidiaries in other countries. Ireland, for example, has some of the lowest corporate tax rates in the world and some companies use Irish subsidiaries to avoid paying American taxes.

The professional crying in their soupers, of course, think this is a dastardly thing. But again, these companies are making use of existing legislation to minimize their tax liabilities. What's wrong with that? If they have a beef, it should be with the governments making those tax laws, not with

people and businesses making reasonable business decisions.

Indeed, Ireland gives generous tax benefits to creative artists. You can earn up to fifty thousand euros tax free if you live there if you are a cultural worker – a writer, a composer or a sculptor. No one seems to object to that but they cry a river when corporations use advantageous tax laws in other jurisdictions.

Loopholes Liberate

Tax avoidance is as American as apple pie. Like Clinton in the debate, the professional whinging class like to spout off all the things that the taxes would buy if only Trump or businesses or you and me were sacrificially minded enough. Clinton said, “So if he’s paid zero, that means zero for troops, zero for vets, zero for schools or health.”

A site denouncing the Irish tax haven says America’s three largest tech giants have avoided \$8 billion over the years, money that could have paid for health insurance for 4 million kids, salaries for 200,000 teachers or pay for the California highway patrol for four years. A recent meme from Occupy Democrats says not paying taxes makes Trump, not smart, but “a selfish unpatriotic crook”.

Even the Clintons use trusts and charities that they control to minimize taxes. And what’s wrong with that? Nothing.

Remember that America was founded to a large extent on a tax revolt – the Boston tea party. Tax avoidance is as American as apple pie.

The holier than thou types should consider again Judge Hand’s words. “There is (no) patriotic duty to increase one’s taxes. Over and over again the Courts have said that there is nothing sinister in so arranging affairs as to keep taxes as low as possible. Everyone does it, rich and poor alike and all do

right, for nobody owes any public duty to pay more than the law demands.”

Amen to that!

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