

OPINION – PARADISE PAPERS: EUROPE SHOULD GIVE MEMBER STATES MORE FLEXIBILITY, NOT LESS

Tax rates, credits, exemptions, and deductions all exist because legislators have determined that they serve policies that benefit society, whether broad or narrow, direct or indirect. From this perspective, too much is being made of the VAT import regime concerning corporate aircraft, since the publication of the Paradise Papers.

Among other things, the Paradise Papers have highlighted the use of VAT laws in the Isle of Man to reduce the VAT liability that attaches to the import of corporate aircraft. Unfortunately, a patina of hysteria tends to attach when tax efficient jurisdictions, taxes, and SPVs become involved. There are all sorts of legitimate reasons for individuals and entities to use these tools, which are resources at their disposal. It is likely that legitimate tax optimization structures were used in the vast majority of cases. One must remember that seeking to optimize one's tax position, without more, should not be viewed as a pre-cursor to guilt.

Taxpayers, whether rich or poor, corporate or individual, have every right to seek to pay no more tax than they legitimately owe. In the case of corporate aircraft, pre-2011, the United Kingdom had a zero-rated import regime based on aircraft weight. This regime allowed the owners of qualifying aircraft to import their aircraft into the EU at zero-rated VAT and achieve free circulation of those aircraft. The EU determined that these practices ran afoul of the EU VAT directive, and it caused the UK to bring its legislation in compliance with the EU VAT directive, which focused on commercial use. Post-2011, the Isle of Man stepped up to the plate, creating a VAT-efficient regime for the import of corporate aircraft into the EU. The Isle of Man and its service providers made no secret of these practices; in fact, they were a selling point. And, no one has sought to challenge these practices.

Taxpayers must comply with both the form and the substance of tax laws. Taxpayers who have followed tax laws should not be criticized retroactively for failing to volunteer to pay more than they owe. Economically, that is absurd. Such arguments are particularly galling when an unrelated third-party observer, such as a politician, determines in a vacuum with imperfect information that paying more would have been the right thing to do.

Applying a moral veneer to tax issues is merely a red herring that appeals to emotion to serve political ends. Functionally, it places the object of the moral criticism on the defensive, both reputationally and objectively, because the accuser will almost certainly not support the claim with objectively measurable criteria. All of this obfuscates the real issues and is geared towards what effectively amounts to blackmail. And, the hypocrisy of linking morality to taxation is laid bare when politicians enact laws resulting in retroactive taxation, which harms taxpayers who had paid tax on the basis of the then-existing laws. Changing the tax laws on a forward-going basis is the appropriate remedy when current tax law fails to achieve its objectives or those objectives are redefined.

As with Ireland and Apple, the EU, acting on its confused view of taxation and traditional fear of competition among Member States, will probably attempt to hold the Isle of Man and importers of corporate aircraft accountable for following the law as it then existed. The EU will reason that the Isle of Man's laws were immoral, and the importers should have known as much and not relied on them. The EU will then claim that back taxes are owed, which in substance is retroactive taxation.



The EU, which is experiencing skepticism in some corners, ought to do more to recognize the differences among its Member States, give them more flexibility, and support their sovereignty. (see, e.g., <https://www.politico.eu/article/fast-forward-to-two-speed-europe/> (President Macron and Chancellor Merkel advocating a two-speed Europe. As a practical matter, that may be a good starting point.)). Such actions should include giving Member States more latitude over tax.

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