Is Tax Transparency A Panacea for Popular Discontent with the Tax System?

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Joshua D. Blank, *The Timing of Tax Transparency*, 90 **S. Cal. L. Rev.** __ (forthcoming, 2017).

Tax transparency is all the rage these days. The brouhaha around the disclosure (or, in one instance, the non-disclosure) of presidential candidates' tax returns during the 2016 presidential campaign brought the matter of tax transparency to the front and center of public discourse in the United States. Around the world, recent revelations that multinational corporations dramatically reduced their tax bills by securing secretive rulings from tax authorities, and that billionaires are able to use intricate offshore shell structures to evade taxation, are causing major popular uproar and a demand for increased transparency on tax matters. The demand is heard by intergovernmental as well as national bodies. For example, the Organisation for Economic Co-operation and Development (OECD) recently adopted country-by-country reporting standards, which would require multinational corporations to disclose to tax authorities their activities and tax payments in each country in which they operate. Remarkably, some countries have announced they are considering making the reports public. Another example is Luxembourg, which—responding to international criticism—recently announced it will start publishing redacted versions of advance tax agreements with taxpayers. This represents a dramatic shift in Luxembourg's usual secretive tax stance.

Against this background, Joshua Blank's article—*The Timing of Tax Transparency*—is both perfectly timed and profoundly instructive. Policy choices about whether to disclose tax return information as well as tax administrators' enforcement actions to increase public scrutiny have generally been viewed as a balancing act between competing values. Increased transparency may improve tax authorities' accountability and encourage taxpayers to avoid aggressive planning for fear of public backlash. On the other hand, increased transparency hurts taxpayers' privacy and may provide aggressive taxpayers a clear picture of tax authorities' inner workings, which in turn may impede tax authorities' enforcement efforts. The main innovation in Blank's paper is his abandonment this binary approach towards tax transparency (increased tax transparency: yes or no) in favor of a time-dependent approach (increased tax transparency: when?). Blank argues that the balancing act between the competing values involved plays out differently depending on *when*—during the administrative tax process—disclosure is made.

Blank suggests that we separately consider ex-post and ex-ante tax enforcement actions. Ex-post enforcement happens "after taxpayers have pursued transactions and claimed tax positions, such as by conducting audits or settlements." Ex-ante enforcement refers to tax authorities' engagement with a taxpayer, before that taxpayer takes a legal position in a tax return, for example, by "issuing advance tax rulings [and other] advance agreements with specific taxpayers."

Blanks then turns to consider the pros and cons of disclosure of ex-post versus ex-ante administrative tax actions. He makes a strong case against mandatory disclosure of tax return information, which would include information about tax authorities' ex-post enforcement action. Such disclosure, he argues, would impair tax authorities' ability to strategically publicize their enforcement strengths and to positively influence public perception and compliance behavior by doing so. In addition, ex-post publicity may encourage aggressive tax behavior. For example, activist corporate shareholders may pressure corporate management to engage in aggressive behavior adopted by other corporations (a

process Blank refers to as "benchmarking"). Finally, ex-post disclosure also enables aggressive tax planners to reverse-engineer tax authorities' enforcement decisions (such as, which returns to audit), and thus engage in strategic behavior.

On the other hand, Blanks proposes that the disclosure of tax authorities' ex-ante actions is justified. Ex-ante actions, in effect, "bless" taxpayers' positions in advance. Tax rulings done in secret may hurt the social legitimacy of tax authorities. The public may perceive that the tax authority creates "secret" tax law for a select group of taxpayers, and treats taxpayer inequitably. The public may question the integrity of such process (as indeed happened in the recent Luxleaks scandal, where advance tax agreement were popularly referred to as "tax deals"). Ex-ante disclosure is also efficient according to Blank, since it encourages taxpayers to seek tax rulings, which in turn increases legal certainty of the tax treatment of proposed transactions. Blank also suggests that ex-ante disclosure does not suffer from the same ails of ex-post disclosure. Since advance tax rulings are generally non-binding outside the scope of the specific transaction to which they apply, it is unlikely that they serve as benchmark instruments for strategic behavior by other taxpayers. Moreover, it is unlikely that a ruling will be granted for a particularly aggressive plan, and thus no roadmap for bad behavior will be provided.

After presenting the theoretical case, Blank turns the explore some of its practical applications, which is where, in my mind, the article is most revealing. Blank's theoretical framework offers a strong case for the disclosure of ex-ante actions that are currently not disclosed. For example, most advance rulings published by tax authorities are favorable to taxpayers. When a tax authority indicates that it will rule against the taxpayer, the ruling submission is usually withdrawn and as such never disclosed. Blank suggests that information on withdrawals of advance ruling applications should be disclosed. Without information on instances in which tax authorities declined to rule on a transaction, taxpayers may lack complete understanding of a tax authority's ex-ante legal interpretation, which may reintroduce the problem of "secret tax law". Another example is advanced pricing agreements (APAs) that determine the pricing (for tax purposes) of transactions between affiliated entities. APAs are currently undisclosed, in the United States (as well as in other countries), which may create suspicion that that tax authorities use them to facilitate tax avoidance by multinationals. Indeed, the European Commission has recently determined that certain APAs granted by tax authorities in Europe to multinationals violated European law. While the issue is hotly contested, few will disagree that these APAs would look the same if tax authorities and multinationals knew they would be publicized.

On the other hand, Blank's framework offers some counterintuitive results for ex-post disclosure. For example, Blank's framework seems to significantly weaken the case for public country-by-country reporting (which some see as a dramatic and positive achievement by the OECD). This is a counter-intuitive outcomes. I have my doubts about such outcome, but Blank's paper will certainly cause me to revisit my perception of ex-post tax disclosure.

In any case, even if one were to reject some (or all) of Blank's practical applications, Blank's article offers an important contribution to the literature on tax transparency. It shifts the debate away from its seemingly binary nature, and offers a completely original approach to evaluating tax transparency. In doing so, Blank challenges us to think about tax transparency in an original and a more nuanced way, which generates counter-intuitive outcomes that demand further research.

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