Nobody's Perfect, Not Even the IRS

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Leigh Osofsky, *The Case for Categorical Nonenforcement*, 69 **Tax L. Rev.** (forthcoming, 2015), available at SSRN.

We tax academics in law schools have an affinity for the logical operation of rules. We could not remain immersed in the intricacies of the income tax—and therefore remain competent as scholars and teachers—if we did not. Considerable resources have been devoted to the elaboration of rules developed through the logical application of a few basic principles. These principles, including those associated with the Haig-Simons definition of income and those governing accounting for capital, allow us to view this body of law as determinative, and thus capable of uniform application. In other words, the income tax system has long used this logic as the basis of its claim to rule-of-law legitimacy. The resulting set of rules is elaborate, indeed, it often seems as if it is among the most elaborate sets of rules ever devised.

But as specialists engaged in this elaboration, we must also understand that a legitimate tax system cannot be maintained merely by the articulation of these rules. The rules themselves will never be self-enforcing. And the mere elaboration of additional rules will never close the gap between the revenue that would be collected under a perfect application of the rules and the revenue that will actually be collected.

Leigh Osofsky's article, *The Case for Categorical Nonenforcement*, soon to appear in the Tax Law Review, provides an opportunity to explore this tension between the formal elaboration of the tax law and the capacity of the Internal Revenue Service to enforce it. The tension is easily seen throughout the actual operation of the income tax law, whether one looks at the actual treatment of large partnerships, frequent flyer miles, fringe benefits claimed by non-employees, or many other provisions.

At bottom, Osofsky argues that the IRS can and should admit that it cannot always do what it has been asked to do. Stated in this way, the proposition is incontrovertible. The administration of the tax law requires far more than the mere articulation of rules. It requires communication of these rules not only to the taxpayers to whom they will apply, but also to the bureaucrats who must ensure that the rules are consistently applied. Given that every revenue officer cannot know every relevant tax rule, much less every relevant fact relating to a taxpayer's liability under those rules, tax administration must inevitably fall short.

How then can the income tax, as actually enforced by the IRS, retain its claim to legitimacy? Borrowing from the literature on administrative processes more generally, Osofsky offers three routes to legitimacy: steps that enhance political accountability, steps that promote civic deliberation and popular engagement, and steps that reduce the arbitrariness of the ultimate outcomes. Her primary claim is that categorical nonenforcement—by which she means public declarations that the tax consequences of some aspects of taxpayer behavior will simply not be explored—will enhance the legitimacy of the IRS rather than detract from it.

This conclusion has to be correct. Surely it is better that Congress and the public know where the weak spots in tax enforcement are. Osofsky's contribution does not provide definitive answers to when and how these confessions should be made. But it should help us all in developing more realistic approaches to tax administration.

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