

CORPORATE SOCIAL RESPONSIBILITY AND TAXATION:

THE NEXT STEP OF THE EVOLUTION

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ABSTRACT

This paper will focus on the evolution of the corporate tax world and how Corporate Social Responsibility ("CSR") may affect the tax planning of multinational companies. Based on the historical reforms of the tax system, it is anticipated that there will continue to be major changes in order to keep up with the way companies continue to evolve the global business world. The effective tax rate ("ETR") is a prime example of how businesses have used tax-planning initiatives to achieve greater profits. Although the statutory corporate tax rate remains at a seemingly high 35%, most multinational company's ETR is nowhere near as high. This is a result of various credits, exemptions, and other benefits that corporations utilize to minimize their tax liability. Although it is perfectly legal to minimize tax liability, it is often debated whether or not it is morally ethical. It can be argued that it is not the responsibility of the business, but the responsibility of the governing nation to close the tax loopholes and find a way to make the entities pay their dues. However, in today's society, corporations hold just as much power, if not more than political affiliates. It is for this reason that many individuals have started looking to multinational companies to act on a more socially responsible level than they have in the past. Companies have started implementing CSR into their business plans, and although short-term profits may not be as high, in the long-term period, greater recognition and positive feedback from the public will help the company bring in higher profits. With this in mind, it is becoming more popular for multinational corporations to use tax planning initiatives to help with their CSR. Companies may start looking more to increase the amount of taxes that they pay to have a better reputation with the public. Even though the multinational corporations will not be paying the maximum tax rate, by paying more than they would normally, they are able to look better in the public eye and also keep national services such as the IRS from investigating their tax planning objectives and causing them to receive negative press. This partnership between CSR and tax planning will help evolve the corporate world into one that looks to benefit not only shareholders, but also the stakeholders in the company and the general public.

I. INTRODUCTION

In theory, United States (“U.S.”) multinational corporations (“MNCs”) face the highest corporate tax rate in the world, with the U.S. having a marginal corporate federal tax rate of 35% and an effective corporate tax rate that could potentially reach 40% once the state corporate tax rate is considered.¹ However, there is a big difference between the rates prescribed by law, mentioned above, and the ones actually levied on typical U.S. MNCs. This is often a direct result of various tax credits, exemptions, and other benefits that often are not discussed or well-known amongst individuals who are not tax practitioners.

The rate prescribed by law, known as the statutory rate, denotes the tax liability due before any tax credits could potentially be used to offset the company’s taxable income. On the other hand, the effective tax rate, or ETR, aims to compute the taxes paid “as a proportion of economic interest.”² For instance, according to the U.S. Government Accountability Office (“GAO”), for the tax year 2010, profitable U.S. corporations that filed a Schedule M-3 paid an average U.S. federal income tax rate of 12.6% on the pre-tax worldwide income reported on their financial statements.³ In addition, it was reported that the amount only reaches a mere 17% when other taxes, such as those from foreign and state rates, are included.⁴ One must also consider unprofitable companies, which generally pay a substantially smaller amount of tax, or even none at all. As explained by the U.S. GAO, this raises the average U.S. company’s ETR “because the losses of unprofitable corporations greatly reduce the denominator of the measure.”⁵ It was found

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>; Scott Cooley, *Corporate Tax Reform’s Winners and Losers*, MORNINGSTAR (Feb. 16, 2015), <http://www.morningstar.com/advisor/t/102059076/corporate-tax-reform-s-winners-and-losers.htm>.

2. U.S. GOV’T ACCOUNTABILITY OFFICE, *Corporate Income Tax: Effective Tax Rates Can Differ Significantly from the Statutory Rate* (May 30, 2015), <http://www.gao.gov/assets/660/654957.pdf>.

3. *Id.*

4. *Id.*

5. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 2. 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-many-fortune-500-cos-paid-0-taxes/> (explaining that 280 Fortune 500 companies studied between 2008 and 2010 had an effective tax rate that was much lower than 35 percent); 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.”).

that even with the unprofitable filers, the average ETR for U.S. companies was still nearly 12% below the statutory rate.⁶

In a study conducted by the Citizens for Tax Justice and the Institute on Taxation and Economic Policy, published in 2011, which examined Fortune 500 companies during the years 2008–2010, it was found that 280 of the companies studied were profitable each of these years and the average ETR was only 18.5% during that time.⁷ To make matters more interesting, in those three years, 10.7% of these companies averaged a negative tax bill, and nearly 28% had at least one no-tax year.⁸ The study concluded that these companies received total tax subsidies of nearly \$223 billion.⁹ In addition, U.S. corporations with significant foreign profits paid tax to foreign countries that was almost a third higher than what they had paid in the U.S.¹⁰

Examples of everyday companies that were highlighted by the study for the limited amounts of tax paid to the U.S. included FedEx Corporation (“FedEx”) and Amazon.com, Inc. (“Amazon”), which paid 0.9% and 7.9%, respectively.¹¹ Additionally, it also reported that Pepco Holdings, Inc. (“Pepco Holdings”) paid an astounding negative 57.6% between 2008 and 2010.¹² Most of this is a result of an extensive use of “complex structures, dubious transactions and legal fictions,” to move profits into other countries and avoid paying U.S. taxes.¹³ This raises the question, is it a legitimate corporate goal to minimize tax? Should companies actively work to be in the position of FedEx and Pepco Holdings at the end of the year?

It is widely known that corporations are in business to make money. A corporation’s main objective is to promote and maximize their shareholders’ wealth and welfare. At the end of the day, a corporation’s managers should always hold themselves accountable to the corporation’s shareholders, as they are essentially its owners. As a result, in theory, a corporation’s managers then have little to no responsibility for employees,

6. *Id.* See also O’Toole, *supra* note 1.

7. See Morgan, *supra* note 5.

8. *Id.*

9. ROBERT S. MCINTYRE ET AL., CITIZENS TAX JUSTICE & INST. TAXATION ECON. POLICY, CORPORATE TAXPAYERS & CORPORATE TAX DODGERS 2008-20106 (Nov. 2011), <http://www.ctj.org/corporatetaxdodgers/CorporateTaxDodgersReport.pdf>.

10. *Id.* at 10.

11. *Id.* at 15, 30.

12. *Id.* at 3.

13. *Offshore Profit Shifting and the U.S. Tax Code—Part 1 (Microsoft and Hewlett-Packard): Hearing Before the Permanent Subcomm. on Investigations on Offshore Profit Shifting and the U.S. Tax Code*, 112th Cong. 77 (2012) (statement of Sen. Carl Levin) [hereinafter *Offshore Profit Shifting Hearing*].

creditors, suppliers, their own customers, or the community, right?

While some of those statements are probably widely accepted today, others may not be. For example, most people will agree that a corporation's main objective is to be profitable and distribute dividends to its shareholders. However, most people will hesitate to agree that a corporation has little to no responsibility towards its own clients, and these people would be wise to do so. After all, most companies offer some type of customer service and often try to do their best to keep their customers happy. A prime example of this can be seen with the fast food restaurant, Chick-fil-A, Inc. ("Chick-fil-A"), where store owners have been known to give leftover food to pet owners, staff have offered to carry heavy trays for moms with small children, as well as having performed many other over the top actions. Customer service like this helped the company obtain the number one spot for the Fast Foods Industry in the 2014 Temkin Customer Service Ratings.¹⁴ In addition, companies often have a much more generous return policy than what is required.¹⁵ The fact that these companies do this to make their customers happy and as a result encourage them to return and spend more money, is irrelevant. As mentioned before, there is nothing wrong with a company wanting to do well and fulfill its main objective of being as profitable as possible, while at the same time, going above and beyond customer expectations to keep them happy with its performance. In fact, some may call this a business plan.

Furthermore, when it comes to employees, what started many years ago by way of the birth of labor laws, has significantly developed. In today's standard, it is common to hear about how companies pride themselves on being even more "generous" to their employees than what the law demands them to be with regard to social benefits. This can be seen through companies such as Target Corporation ("Target"), which won the CareerBliss's Leap Award in 2011 by increasing employee happiness by 12%, and Costco Wholesale Corporation ("Costco")

14. *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 (last visited Feb. 7, 2016); 2014 Temkin Customer Service Ratings 2014, TEMKIN GROUP, <http://temkinratings.com/temkin-customer-service-ratings-2014/> (last visited Feb. 7, 2016).

15. *See generally, Target Returns and Refunds Policy*, RETURNS AND REFUNDS, <http://www.returnsandrefunds.com/Target>Returns> (last visited Feb. 19, 2016); *Costco Returns and Refunds Policy*, RETURNS AND REFUNDS, <http://www.returnsandrefunds.com/Costco>Returns> (last visited Feb. 19, 2016); *L.L. Bean Satisfaction Guarantee*, L.L. BEAN, <http://www.llbean.com/customerService/aboutLLBean/guarantee.html> (last visited Feb. 19, 2016).

which pays almost double the national average and offers employees benefits, such as insurance at the low premium price of 12%.¹⁶ However, most people will likely disagree with the statement that a corporation has no responsibility for its employees' wellbeing.

These responsibilities, even when apart of some type of "business plan," are still usually broad and are often related to the fact that a corporation is not only a tool to make money for a small number of shareholders, but rather a MNC organized many years ago with its own reputation, history, and legacy.

Therefore, although a corporation's main objective is still, and will probably always be, to make money and become as profitable as possible,¹⁷ it has other types of responsibilities which may result, especially in the short run, with less than maximum profits.¹⁸ On this matter, the U.S. Supreme Court decision, *Burwell v. Hobby Lobby*, stated:

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.¹⁹

Furthermore, Justice Alito extended the argument and said, "the purpose of this fiction [of corporate personhood] is to provide protection for human beings."²⁰ Hence, a corporation is not

16. See generally, CAREER BLISS, *2011 CareerBliss Leap Awards Reveal Top 50 Companies with the Biggest "Leap" In Employee Happiness*, (Aug. 5, 2011), <http://www.careerbliss.com/press-releases/careerbliss-leap-awards-2011-reveal-top-50-companies/>; Aaron Taube, *Why Costco Pays Its Retail Employees \$20 An Hour*, BUS. INSIDER (Oct. 23, 2014, 4:15 PM), <http://www.careerbliss.com/press-releases/careerbliss-leap-awards-2011-reveal-top-50-companies/>; *100 Best Companies to Work For*, FORTUNE, <http://fortune.com/best-companies/> (last visited Feb. 7, 2016). *Contra* Douglas McIntyre et al., *America's Worst Companies to Work For*, YAHOO FIN. (July 22, 2013, 11:22 AM), <http://finance.yahoo.com/news/america%E2%80%99s-worst-companies-to-work-for-152240719.html?page=all>.

17. Bernard S. Sharfman, *Shareholder Wealth Maximization and Its Implementation Under Corporate Law*, 66 FLA. L. REV. 389 (2013); Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135 (2012).

18. Lynn A. Stout, *Takeovers in the Ivory Tower: How Academics Are Learning Martin Lipton May Be Right*, 60 BUS. LAW. 1435, 1445 (2005) ("[U]ntil quite recently, the idea that directors might show concern for stakeholders has been associated mostly with sandals-wearing activists . . .").

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

20. *Id.* at 2768.

formed to enable individuals to commit wrongdoing and avoid social responsibilities, but to protect them while conducting business, and it should not be used in order to impose negative externalities on society.

This paper does not address the question of whether or not corporations should pay taxes. Not only is it safe to say that the corporate tax is not going anywhere anytime soon, but this paper will also argue that the new direction, not only from society's and the State's standpoint, but also from, perhaps most surprisingly, the corporate standpoint, is that corporations carry a responsibility to pay corporate tax and help others "carry the burden." The development of this idea is not something new. Similar to what often happens in life, it started with a completely different idea. This idea evolved over the years, becoming what we know today as the Corporate Social Responsibility Theory, or more commonly known as CSR.²¹

Over the past few decades, CSR has become a trend and MNCs across the world, especially American multinationals, have started to voluntarily adopt CSR programs and self-regulating standards for what is considered responsible corporate activities. These standards were soon developed in every industry.²² As a result of these voluntary efforts, the working conditions of the employees of MNCs, and other areas of influence across the world, have been significantly improved.²³ At the same time, a large amount of legal development in the United States has allowed corporations to take a much more

21. 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 (2005) (providing a complete review of the Corporate Social Responsibility evolution 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 Meckling, *The Theory of the Firm: Managerial Behaviour, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). But see 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 (1992); Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705 (2002); Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004).

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

23. U.N. Human Rights Council, *Summary of discussions of the Forum on Business and Human Rights*, para. 36, U.N. Doc. A/HRC/FBHR/2014/3 (Dec. 1, 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*, (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

active role in the day-to-day life of every citizen, and recognized a constitutional right for corporations to give financial support to a wide range of electioneering activities, including the use of corporate funds;²⁴ meaning, corporations can now achieve even more political power and influence on decision makers. This is a risky move, no doubt, but although this development may result in an ultimately negative effect, the approach of allowing corporations to increase their power results in a public expectation of more responsibility and accountability from these companies. In my opinion, since nowadays everyone has access to more information than ever before and the ability to share this information is now faster and easier, individuals now know how much power corporations have. As a result, they expect to see instances where corporations are showing their increased responsibility and accountability for society on a regular basis.

The power of each person to influence public opinion is now extraordinary and allows almost anyone to monitor and criticize everyone and everything. This fact alone makes MNCs care not only about their own clients and customers, but also the public's opinion of them in general. This is why corporations are continuing to engage in voluntary CSR programs such as trying to help the environment, education, and other areas that have nothing to do directly with conducting their business.

A closer look into CSR activities reveals and somewhat parallels the historical evolution of the corporate world: ensuring humane working conditions, providing decent housing or healthcare, and donating to charity. All of these CSR activities are now a requirement of corporations which most of us cannot imagine the world without. With this development, this paper suggests that the next evolution of CSR development will be "Tax Fairness." Meaning, CSR activities will now include a responsibility to pay a reasonable tax rate as part of the corporate social responsibility to others who are not necessarily shareholders. However, before diving into this issue, a general background on corporate tax is needed.

II. CORPORATE TAX—HISTORICAL OVERVIEW

Since the inception of the modern federal corporate income tax in 1909, the corporate income tax brackets and rates have gone through a wide number of changes during the course of

24. See *Citizens United v. FEC*, 558 U.S. 310 (2010).

history.²⁵ Today, it is widely known that corporations are treated as separate and distinct entities from their owners. This concept was first depicted in the Revenue Act of 1894, even though it was eventually ruled unconstitutional.²⁶ In 1909, the corporate income tax, with the same principle of corporations being separate entities, was reenacted.²⁷ After the passing of the 16th Amendment, the individual income tax and a separate corporate income tax were implemented in 1913.²⁸ The principles established have since remained in the modern tax structure.²⁹

Ever since the creation of a separate corporate and individual income tax, there have been issues with the concept of double taxation (where the corporations are taxed and then the shareholders are taxed again on distributions). The tax system has looked at ways to ease this burden including: allowing corporations to be pass-through entities that are not taxed, permitting various deductions or credits for dividends, and the reducing the tax rate of capital gains for individuals.³⁰ The most prevalent business entity that avoids the corporate income tax is the S Corporation.³¹ Since 1958, closely held companies, called S Corporations, which meet certain criteria, can avoid paying the corporate tax by electing to allocate all of its income to its shareholders, who are then taxed on it at the individual federal income tax rates.³² This is why more than half of all corporations file as an S Corporation.³³ The treatment of affiliated groups of corporations has also been an issue in this regard.

Corporations under the same ownership or control have been forced to deal with several different tax regimes.³⁴ From 1917–1921, such corporations were required to consolidate their income statements for tax purposes, while during 1934–1941 they were

25. Jack Taylor, *Corporation Income Tax Brackets and Rates, 1909-2002*, IRS DATA RELEASE 284, <http://www.irs.gov/pub/irs-soi/02corate.pdf>.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*; RONEN PALAN ET AL., *TAX HAVENS: HOW GLOBALIZATION REALLY WORKS*, 109 (CORNELL UNIVERSITY PRESS, 2013).

30. Taylor, *supra* note 25.

31. See I.R.C. §1361(a)(1) (2015) (defining S corporation as “a small business corporation for which an election under section 1362(a) is in effect for such year). See also Tim Worstall, *Two Thirds of US Corporations Don't Pay Federal Income Tax: True But Horribly Misleading*, FORBES (Aug. 16, 2011), <http://www.forbes.com/sites/timworstall/2011/08/16/two-thirds-of-us-corporations-dont-pay-federal-income-tax-true-but-horribly-misleading/#206e51115a0c>.

32. Shareholder Lending and Tax Avoidance in the Subchapter S Corp., 67 COLUM. L. REV. 495, 496–98 (1967).

33. Worstall, *supra* note 31.

34. See, e.g., I.R.C. § 368(c), § 1563 (2015).

prohibited to do so, except for very specific types of corporations.³⁵ Between 1932–1933 and again during the period 1942–1963, corporations were able to consolidate, but then have been required to pay a higher tax rate. Finally, as established in 1964, these companies are allowed to consolidate without having to be concerned about any type of fine.³⁶

Different corporate and individual federal income tax rates may also result in many opportunities to shelter income and gains from tax, especially when corporate tax rates are lower, sometimes significantly lower, than the individual federal income tax rate.

Initially, corporate income tax was imposed, in general, on corporate profits as defined under general accounting principles.³⁷ However, the tax rules started to quickly diverge from the accounting rules since the two sets are different in their basic purpose.³⁸ The tax law started to include all kinds of very definitive definitions of income and deductions and specific rules regarding how to account for each item.³⁹

Without delving deeper into the subject regarding the corporation's ability to reduce its tax liability, it is a well-known fact that corporations enjoy a great deal of freedom in their tax planning as a direct result of their ability to invest time and significant financial resources in this matter. However, for a long time, corporate ethical and social responsibility was subject to an extensive analysis and discussions, but this aspect of the corporate "life" tax planning has not been subject to any real moral standard except for the question of whether tax planning was legal or not.

III. CORPORATE TAX POLICY

From perhaps an over simplified tax policy perspective, corporate responsibility, in regard to tax liability and enforcing it, has always been on the state. Whether by state legislation, through international committees mostly run by the Organization for Economic Co-operation and Development

35. Taylor, *supra* note 25, at 285.

36. *Id.*

37. *Id.*

38. See David S. Logan, *Three Differences Between Tax and Book Accounting that Legislators Need to Know*, TAX FOUND (July 27, 2011), <http://taxfoundation.org/article/three-differences-between-tax-and-book-accounting-legislators-need-know> (asserting that accounting rules regulate and prevent the overstatement of income, while tax rules regulate and prevent taxpayers from minimizing income).

39. Taylor, *supra* note 25, at 284.

(“OECD”) that constantly try to eliminate or at least minimize tax shelters and publicly ban them,⁴⁰ or by international cooperation between countries.⁴¹ At the same time, from the taxpayer’s standpoint, whether it is done at the individual or corporate taxpayer level, tax planning was always legitimate as long as it was done legally and supported by the opinions of lawyers and accountants. In addition, not only is it legitimate, the taxpayer has a right, and often even an obligation, to minimize his or her tax liability, because there is no reason for any individual to pay more than he or she has to. As Judge Learned Hand stated in *Helvering v. Gregory*, “there is not even a patriotic duty to increase one’s taxes.”⁴² Likewise, for the corporate taxpayer there is an obligation towards its shareholders to maximize its profits; it too has no reason to pay more than it has to in tax liability.

This approach is mostly derived from the belief, which was highly accurate for a long time, that countries are the most important factors as they are the richest and most influential forces in the global economy. As a result, it makes sense to put most of the responsibility, at least the technical aspects of it, on the state. Whether one likes this or not, this belief is in more than just one way, simply not as accurate as it used to be.

IV. CORPORATE SOCIAL RESPONSIBILITY

A. History

CSR, also often referred to as “corporate conscience, corporate citizenship, social performance, or sustainable responsible business,”⁴³ is, in a way, an action taken by a corporation to adopt a certain standard of self-regulation that a corporation cannot otherwise be forced into, nor does it produce any direct gain by doing so.⁴⁴ However, this is most likely an

40. *Global Forum on Transparency and Exchange of Information for Tax Purposes*, OECD.ORG, <http://www.oecd.org/tax/transparency/about-the-global-forum/> (last visited Feb. 17, 2016).

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

42. *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934), *aff'd*, 293 U.S. 465 (1935).

43. Michael Fontaine, *Corporate Social Responsibility and Sustainability: The New Bottom Line?*, 4 INT’L J. BUS. & SOC. SCI. 110 (2013). See also Donna J. Wood, *Corporate Social Performance Revisited*, 16 ACAD. MGMT. REV. 691, 694–95 (1991).

44. Abigail McWilliams & Donald Siegel, *Corporate Social Responsibility and Financial Performance: Correlation or Misspecification?*, 21 STRAT. 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,

oversimplified definition, which does not fully explain the true elements of CSR.

Historically, the corporation has evolved throughout two millennia since it was first introduced in Roman law, into what we know today, and can be related to the three major theories of corporate identity.⁴⁵ First came the aggregate theory, which views the corporation as an aggregate of its shareholders.⁴⁶ Second, the artificial entity theory, which views the corporation as a creature of the State, and third, the real entity theory, which views the corporation as a separate entity controlled by its senior managers.⁴⁷

When it comes to MNCs, it is more likely that corporations, meaning the way they see themselves and in the eyes of the public, are closer to the third theory and by now are separate entities controlled mostly by senior managers. As a result, the responsibility of the corporation towards its shareholders has become softer than ever before, leading to considerations of other factors and stakeholders as well.⁴⁸ Therefore, the way we look at CSR activities that are unrelated to the corporation, but are still beneficial to society, is that although it is not obligated and legally required to, it is praiseworthy and encouraged when it happens.⁴⁹

Scholarly writing on CSR is largely a product of the 20th century, but the concept of CSR has a long history. Evidence of business entities' concerns for the general well-being of society can be traced back to centuries.⁵⁰ Although, most of the formal scholarly writing on this subject has been made in the past 60 years, it should be noted that some significant writing on CSR

often due to positive public opinion, increased customer happiness, etc.; however, extensive research done by Abigail McWilliams and Donald Siegel shows that CSR has a neutral impact on a corporation's financial outcomes.).

45. Reuven S. Avi-Yonah, *Corporate Social Responsibility and Strategic Tax Behavior* 6–7 (Univ. Mich. Pub. Law, Working Paper No. 69, 2006).

46. *Id.*

47. *Id.* at 2. See also Avi-Yonah, *supra* note 21, at 771.

48. John M. Conley & Cynthia A. Williams, *The Corporate Social Responsibility Movement as an Ethnographic Problem* 1–2 (Univ. N.C. Legal Studies, Working Paper No. 1285631, 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1285631.

49. Avi-Yonah, *supra* note 21, at 770 (asserting that in past years it was mostly encouraged by traditional press, but in more recent years it is not uncommon to see a Facebook post or a Twitter tweet praising one company or another for “doing good”).

50. Archie B. Carroll, *Corporate Social Responsibility Evolution of a Definitional Construct*, 38 BUS. & SOC'Y 268, 268 (1999), <http://bas.sagepub.com/content/38/3/268.short?rss=1&ssource=mfc>.

has been made prior to that, especially during the 1930s and 1940s.⁵¹

In the 1950s, CSR was mostly referred to as social responsibility and not corporate social responsibility, most likely because corporations were not as powerful as they later became and had much less influence on the general public.⁵² Even the author of the most important research done at this time on this subject, Howard R. Bowen, called his work "Social Responsibilities of the Businessman,"⁵³ perhaps referring to the fact that around this time there was considerable tension regarding the view that the corporation was not seen as an independent entity standing by itself separated from its shareholders, but rather as an aggregate of its individual shareholders.⁵⁴ Bowen's writing benchmark said that powerful businessmen and their corporations had enough power to influence the general public, and he raised a basic but important question, "What are the social responsibilities which businessmen [reasonably] may be expected to assume?"⁵⁵ He continued by setting up an initial 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."⁵⁶ He continued by quoting Fortune magazine's survey use of "social consciousness," as CSR was referred to by the magazine, as the means by which businessmen are responsible for the consequences of their actions in a broader way than just profit-or-loss financial statements.⁵⁷

The trend of CSR, starting in the 1950s, became much stronger during the 1960s as we saw significant growth in attempts to analyze and define CSR. One of the most prominent

51. See generally CHESTER I. BARNARD, *THE FUNCTIONS OF THE EXECUTIVE* (Harvard Univ. Press 1956) (1938); JOHN M. CLARK, *SOCIAL CONTROL OF BUSINESS* (McGraw-Hill Book Co. 2d ed. 1939) (1926); THEODORE J. KREPS, *MEASUREMENT OF THE SOCIAL PERFORMANCE OF BUSINESS* (U.S. Government Printing Office Washington 1940).

52. See generally HOWARD R. BOWEN, *SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN* (UNIVERSITY OF IOWA PRESS 2013) (1953).

53. *Id.* See RICHARD EELLS, *CORPORATE GIVING IN A FREE SOCIETY*, 1-210 (HARPER, 1956); Morrell Heald, *Management's Responsibility to Society: The Growth of an Idea*, 31 *BUS. HIS. REV.* 375, 375-84 (1957); BENJAMIN M. SELEKMAN, *MORAL PHILOSOPHY FOR MANAGEMENT*, 1-219 (MCGRAW-HILL, 1959).

54. Taylor, *supra* note 22.

55. See BOWEN, *supra* note 52.

56. *Id.* at 6.

57. *Id.* at 44 n.1. ("Perhaps what is even more surprising is that 93.5% of the businessmen that responded to the survey, agreed with that statement.")

writers on CSR at this time 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."⁵⁸ Davis further argued that although social responsibility, as it was still referred to at that time, was a vague idea, it should be seen in a broad managerial context, and that at least some social activities done by the corporation could be justified by having a strong likelihood of the corporation obtaining a "long-run economic gain."⁵⁹ His view became commonly accepted during the 1970s and 1980s.

Amazingly enough, Davis was able to somewhat foresee the future in his article when he stated that "social responsibilities of businessmen need to be commensurate with their social power,"⁶⁰ and further explained that if social responsibility and power were relatively equal, "then the avoidance of social responsibility leads to gradual erosion of social power."⁶¹ In the same year as Davis, William C. Frederick wrote the following on CSR:

[Social responsibilities] means that businessmen should oversee the operation of an economic system that fulfills the expectations of the public. And this means, in turn, that the economy's means of production should be employed in such a way that production and distribution should enhance total socio-economic welfare. Social responsibility in the final analysis implies a public posture toward society's economic and human resources and a willingness to see that those resources are used for broad social ends and not simply for the narrowly circumscribed interests of private persons and firms.⁶²

Joseph M. McGuire later elaborated on those CSR definitions and said, "the corporation must take an interest in politics, in the welfare of the community, in education, in the 'happiness' of its employees, and in the whole social world about it."⁶³

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

59. *Id.*

60. *Id.* at 71.

61. *Id.* at 73.

62. William C. Frederick, *The Growing Concern Over Business Responsibility*, 2 CAL. MGMT. REV. 54, 60 (1960). See also JOSEPH W. MCGUIRE, *BUSINESS AND SOCIETY*, 144 (MCGRAW-HILL, 1963) ("The idea of social responsibilities supposes that the corporation has not only economic and legal obligations but also certain responsibilities to society which extend beyond these obligations.")

63. *Id.*

The next step of the CSR evolution was made in 1967, when Keith Davis added to the CSR definition the idea that “the substance of social responsibility arises from concern for the ethical consequences of one’s acts as they might affect the interests of others.”⁶⁴ Additionally, he said that “social responsibility moves one large step further by emphasizing institutional actions and their effect on the whole social system Social responsibility, therefore, broadens a person’s view to the total social system.”⁶⁵

Therefore, by 1970, it was accepted by most that social responsibility is expected from businessmen, but still not the corporation at this point, and that it refers to the obligation to consider the effect of his actions on the general public and to look beyond his own narrow economic interest. Also, it was understood, by then as it is nowadays, that in some cases, these socially responsible activities may, in the long run, create economic benefits to the corporation.⁶⁶

A significant contribution to the development of CSR came from the Committee for Economic Development (“CED”) in 1971 in its publication, “Social Responsibilities of Business Corporations.” This was, perhaps for the first time, where social responsibility was directly referring to the corporation and not its shareholders.⁶⁷ The CED stated in its publication that “business functions by public consent and its basic purpose is to serve constructively the needs of society—to the satisfaction of society.”⁶⁸ The CED further 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

64. Keith Davis, *Understanding the Social Responsibility Puzzle: What Does the Businessman Owe to Society?*, 10 BUS. HORIZONS 45, 46 (1967).

65. *Id.*

66. RAMON MULLERAT, INTERNATIONAL CORPORATE SOCIAL RESPONSIBILITY: THE ROLE OF CORPORATIONS IN THE ECONOMIC ORDER OF THE 21ST CENTURY, 439 (2010).

67. 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 AND POLICY COMMITTEE, COMMITTEE FOR ECONOMIC DEVELOPMENT, SOCIAL RESPONSIBILITIES OF BUSINESS CORPORATIONS⁶ (1971). Also, it is still important to remember the time and environment that the CED operated in, the late 1960s and early 1970s, a time where social movements were at its peak, with regard to environment, worker safety, consumers, and employee rights.

68. *Id.* at 11.

will depend on the quality of management's response to the changing expectations of the public.⁶⁹

Another example of the rise of the corporation's duty to society and the change in terminology with regard to social responsibility, was the statement from George Steiner, a significant contributor to CSR research. He stated:

Business is and must remain fundamentally an economic institution, but . . . it does have responsibilities to help society achieve its basic goals and does, therefore, have social responsibilities. The larger a company becomes, the greater are these responsibilities, but all companies can assume some share of them at no cost and often at a short-run as well as a long-run profit.⁷⁰

Hence, the discussion is no longer about businessmen, but corporations. The important acknowledgment is that, first and foremost, the corporation should remain profitable before engaging in CSR activities.⁷¹ Now that the discussion has shifted from individual social responsibility to corporate social responsibility, the question is, what constitutes a socially responsible activity for a corporation? In 1972, Henry G. Manne set forth his answer to that question and later summarized as follows:

To qualify as a socially responsible corporate action, a business expenditure or activity must be one for which the marginal returns to the corporation are less than the returns available from some alternative expenditure, must be purely voluntary, and must be an actual corporate expenditure rather than a conduit for individual largesse.⁷²

Also, in a later statement made by Manne, he explained that business expenditures may have multiple motives, and it would be impossible to determine whether or not a corporation pursued an ethical activity purely for voluntary purposes.⁷³

69. *Id.* at 16.

70. GEORGE A. STEINER, *BUSINESS AND SOCIETY*, 164 (1st ed. RANDOM HOUSE, 1975).

71. Rob Fenn, *SUSTAINABLE BUS. TOOLKIT*, *Benefits of Corporate Social Responsibility*, <http://www.sustainablebusinesstoolkit.com/benefits-of-corporate-social-responsibility/> (last visited Feb 20, 2016).

72. Carroll, *supra* note 50, at 276 (summarizing the argument of Professor Henry G. Manne in a 1972 debate against Professor Henry C. Wallich). Henry G. Manne, First Lecture, in *THE MODERN CORPORATION AND SOCIAL RESPONSIBILITY*, 1, 4-6 (Am. Ent. Inst. for Pub. Policy Research 1972).

73. *Id.*

In 1975, Joles Backman contributed to the definitional evolution of CSR by taking another step beyond just giving us his definition of it, but also identifying what he views as examples of CSR:

Employment of minority groups, reduction in pollution, greater participation in programs to improve the community, improved medical care, improved industrial health and safety—these and other programs designed to improve the quality of life are covered by the broad umbrella of social responsibility.⁷⁴

To summarize, in the last 25 years of extensive research, CSR has made significant progress and transitioned from very general statements about shareholders' responsibility toward society, to a list of very specific socially responsible activities expected from the corporation, itself. Obviously, there is more than just a single explanation to such transition, but it is my belief that the main reason for that is the fact that in the early 1970s we saw the first real MNC starting to grow, which at this point, made them a very significant force in their state economy, and perhaps as equally important, very influential in society's day-to-day life.

Once the basic concepts of CSR had been established, the focus of CSR research shifted to the development of alternative concepts such as Corporate Social Responsiveness, Corporate Social Performance, public policy, business ethics, and stakeholder theories. Although some of these developments have, by now, developed a life of their own, it is still important to understand that they are part of CSR.

In 1983, Archie B. Carroll shared his view on the definition of CSR:

CSR involves the conduct of a business so that it is economically profitable, law abiding, ethical, and socially supportive. To be socially responsible . . . then means that profitability and obedience to the law are foremost conditions to discussing the firm's ethics and the extent to which it supports the society in which it exists with contributions of money, time, and talent. Thus, CSR is composed of four parts:

74. Ed J. Backman, *Social Responsibility and Accountability*, NEW YORK UNIV. PRESS 1, 2-3 (1975).

economic, legal, ethical, and voluntary or philanthropic.⁷⁵

Joining him with a close definition of CSR is Edwin M. Epstein. In his definition, he associated the ideas of social responsibility, business ethics, and responsiveness. He states:

Corporate social responsibility relates primarily to achieving outcomes from organizational decisions concerning specific issues or problems which (by some normative standard) have beneficial rather than adverse effects on pertinent corporate stakeholders. The normative correctness of the products of corporate action has been the main focus of corporate social responsibility.⁷⁶

At this point in time, it seemed like CSR was well defined, and perhaps more importantly, accepted by both academics and practitioners, since we saw that corporations had truly adopted significant elements of CSR and started to implement those elements into their business activities.

We can see that the EU Commission's definition of CSR is, in most parts, based on definitions mentioned previously:

By stating their social responsibility and voluntarily taking on commitments which go beyond common regulatory and conventional requirements, which they would have to respect in any case, companies endeavor to raise the standards of social development, environmental protection, and respect of fundamental rights and embrace an open governance, reconciling interests of various stakeholders in an overall approach of quality and sustainability.⁷⁷

Others may have used a different language but the idea was similar: “[a] situation [] where the firm goes beyond compliance and engages in ‘actions that appear to further some social good, beyond the interests of the firm and that which is required by law.’”⁷⁸

75. Archie B. Carroll, *Corporate Social Responsibility: Will Industry Respond to cutbacks in Social program Funding?*, 49 VITAL SPEECHES OF THE DAY 604, 604 (1983).

76. Edwin M. Epstein, *The Corporate Social Process: Beyond Business Ethics, Corporate Social Responsibility, and Corporate Social Responsiveness*, 29 CAL. MGMT. REV. 99, 104 (1987).

77. *Promoting a European Framework for Corporate Social Responsibility*, Green Paper Doc. 01/9, at 4 (July 18, 2001).

78. See Abigail McWilliams et al., *Corporate Social Responsibility: International Perspectives*, 4 (Rensselaer Working Papers in Economics, Working paper No. 0604, 2006), <http://www.economics.rpi.edu/workingpapers/rpi0604.pdf>.

These definitions show that according to researchers, CSR is a form of corporate strategic management which sets its standards of conduct at a level higher than legal constraints, and envisions CSR as a system for the governance of transactions and relations between the corporation and its stakeholders.

B. *Shapes and Forms*

In general, CSR can come into force in three different ways. The first, where activities done by the corporation may end up being beneficial in the long run for stakeholders. For instance, when a corporation chooses to comply with all legal and ethical rules, no matter what the cost is, they will likely avoid most expensive fines and law suits against the corporation. The second is where a corporation chooses to assume responsibility for actions that resulted in a bad effect, even where there is no direct legal responsibility for such actions. Some may claim that the benefit from such behavior is mostly the betterment of public opinion toward the corporation, and perhaps this is true. Corporations, and especially MNCs, put a lot of effort towards creating a strong positive public image. This eventually will impact the value and the revenue of the corporation.⁷⁹ The third is where a corporation chooses to take some sort of action on something that the corporation is not responsible for in any way. For instance, one can find donations made by a corporation to places that have gone through some sort of natural disaster, or when a corporation chooses to make a donation to hospitals or schools. Once again, this type of action may be viewed as an investment made by the company in order to improve its public image. The difference between the second type and the third, is that the former is done where there is no direct legal responsibility. However, there is still a link between the two, and in the public mind, the company may be very well liable for it, or at least should be liable for it. Sometimes just because the company is so profitable, the public “expects” it to do the right

79. A simple example is when Nike, Inc. (“Nike”), decided to take responsibility for hiring underage employees in Asia although this was completely legal in Asia and Nike did not violate the rules there. See John Cushman, *International Business; Nike Pledges to End Child Labor and Apply U.S. Rules Abroad*, N.Y. TIMES (May 13, 1998), <http://www.nytimes.com/1998/05/13/business/international-business-nike-pledges-to-end-child-labor-and-apply-us-rules-abroad.html>. Another example is when Apple made efforts in order to make sure that the employees of Foxconn Technology Group (“Foxconn”), Apple Inc.’s (“Apple’s”) main product manufacturer in China, followed the rules and Foxconn took care of its employees. See Connie Guglielmo, *Apple’s Supplier Labor Practices In China Scrutinized After Foxconn, Pegatron Reviews*, FORBES (Dec. 12, 2013, 7:15 PM), <http://www.forbes.com/sites/connieguglielmo/2013/12/12/apples-labor-practices-in-china-scrutinized-after-foxconn-pegatron-reviewed/#4c29334e647f>.

thing, as with the third type. Although the public would not expect a local business owner to take responsibility for something that happened in the neighborhood, it does expect a MNC to act with a much higher standard and “do the right thing.”

Putting aside the legal and contract implications of it,⁸⁰ it is important to acknowledge that a MNC has an unwritten agreement with the public to “do the right thing” because it has such a direct and indirect influence on society,⁸¹ and of course, because it does so well from a financial standpoint.⁸²

In today’s complex business reality, these three general types of CSR are far from telling the whole story. CSR is much more than donations and public image, but rather, CSR is also the evolution of corporate responsibilities towards its employees, clients, and the people it is “living” amongst on a day-to-day basis. In this context, the criticism and actions done as a result of that criticism, should be seen and analysed.

C. *The Next Step*

We live in a corporate world. Countries are stepping down from their traditional role and corporations around the world are becoming more and more important and influential in everyone’s life, whether we actually acknowledge that or not. If in recent years we would expect the government to fulfill our needs, we now acknowledge that the government’s ability to fill this role is highly restricted by numerous factors and circumstances. As a result, we now hear, see, and read, almost on a daily basis, reports on corporate misbehavior and scandals, or on the other hand, positive recognitions of when a corporation decides to contribute back to society in some way.⁸³ At the same time, it also seems like corporations have “decided,” for more than just a

80. It seems like, in a way, the corporation has some real obligations towards people it is not engaged directly with, in any type of business relationship.

81. A multinational corporation will have not only thousands and thousands of employees, but it will have a large number of sub-contractors and other linked companies who deal with it on a day to day basic and lean on it for their existence.

82. For example, I doubt if anyone would expect Blackberry to make a donation to a hospital while it has been losing so much money over the past few years, however, we do expect Apple to do good and make an effort to improve other things than just iPods.

83. See Susan Adams, *The Most Responsible Companies: Another Ranking*, FORBES (Sept. 16, 2011, 5:37 PM), <http://www.forbes.com/sites/susanadams/2011/09/16/the-most-responsible-companies-another-ranking> (giving examples of this, including the Global 100, produced by Corporate Knights, a Toronto-based media company, Ethisphere Institute’s Most Ethical Companies, the Corporate Responsibility Magazine’s 100 Best Corporate Citizens and a ranking called the Goodness 500, that professes to rate the 500 companies with “the social responsibility of the companies with the most power to change the world”).

single reason, to accept this responsibility and see how they can take a more significant role in society even when, at first glance, it may seem that it will hurt their profits.

Almost all of the MNCs and most of the large companies now feature some type of CSR reports, manager or other relevant titles and departments, and the idea of CSR is being promoted as a core area of management, right next to other traditional areas like accounting, finance, and marketing.⁸⁴

V. TAX RESPONSIBILITY

On December 9, 2012, *The Sunday Times*' headline reported that Microsoft Corporation ("Microsoft") paid no tax on 1.7 billion pounds of online sales in the U.K. thanks to creative tax planning.⁸⁵ It was explained that Microsoft was channeling cash generated by online sales of its Microsoft Windows 8 Operating Software ("Windows 8") to Luxembourg to sidestep tax obligations.⁸⁶ The next day, the news desk of a relatively small website named TruthDive.com,⁸⁷ came out with an even bolder headline saying, "Microsoft accused of 'immoral' tax practices in UK for paying 'no tax' on 1.7 billion pounds of revenue."⁸⁸ Assuming such allegations are true, and Microsoft actually did this, it will definitely not be the first or the last to join a fast growing number of MNCs who are coming under scrutiny for avoiding taxes, such as Amazon.com, Inc. ("Amazon"), Apple Inc. ("Apple"), Google Inc. ("Google"), Starbucks Corporation ("Starbucks"), Teva Pharmaceutical Industries Ltd. ("Teva"), and many others.

In order to have a general and basic understanding of how this alleged tax evasion works, let's continue with the Microsoft example. Imagine a customer in the U.K. pays to download the

84. 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 found at most Fortune 500 companies. See, e.g., Annual Sustainability Reports, The Coca-Cola Company (July 23, 2015), <http://www.coca-colacompany.com/stories/sustainability-reports/>.

85. Jon Ungood-Thomas ET AL., *Microsoft pays no UK tax on £1.7bn a year*, *THE SUNDAY TIMES* (Dec. 9, 2012), http://www.thesundaytimes.co.uk/sto/news/uk_news/National/article1173016.ece.

86. *Id.*

87. TruthDive.com is a News and Opinion magazine covering South-Asian current affairs. See About us, TRUTHDIVE.COM, <http://truthdive.com/about-us> (last visited Feb. 20, 2016).

88. Ani, *Microsoft accused of 'immoral' tax practices in UK for paying 'no tax' on 1.7 billion pounds of revenue*, <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-mmklRUjddjsi.html> (last visited Feb. 20, 2016).

new Windows software and the money is paid (online) to Microsoft in Luxemburg. The software royalties then go to Microsoft in Ireland, and right after dividends can then be directed to a parent company in Bermuda with no U.K. corporate tax being paid. It should be noted, and perhaps even more importantly understood, that this whole process is completely legal. Microsoft is not violating any law by conducting its business this way.

In response to *The Sunday Times*' headline, Richard Murphy of the Tax Justice Network, an independent organization dedicated to high-level research and analysis in the field of tax and regulation,⁸⁹ said: "Like many other companies, Microsoft is trying to avoid tax. 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." Just in case his message was not clear enough, he added: "159 million pounds would more than pay for a hospital, or provide IT training for young people so they can work in that industry. They are withholding money from the people who need it."⁹⁰ In response, Microsoft issued a public statement and said, "Microsoft pays all due taxes, as required by law, worldwide. Microsoft subsidiaries are fully subject to tax in the jurisdictions in which we operate. We are regularly audited by major tax jurisdictions, which ensure that the company is complying with all rules and regulations."⁹¹

Approximately two weeks later, *The Guardian* came out with a headline asking whether Microsoft is a tax dodger, and explained that although Microsoft's headquarters is in Redmond, Washington, when it comes to licensing its software, Microsoft is actually based in Reno, Nevada.⁹² Why specifically there, one may ask? Perhaps it is because it means Microsoft will not pay a tax on software licensing, which Washington State applies. How significant is this factor? Well, experts estimate that Microsoft has avoided paying taxes of more than \$700 million over the past

89. Richard Murphy, *Microsoft—looking like it's in the upper echelons of the tax avoiders*, TAX RES. U.K.: RICHARD MURPHY ON TAX AND ECON. (Dec. 9, 2012), <http://www.taxresearch.org.uk/Blog/2012/12/09/microsoft-looking-like-its-in-the-upper-echelons-of-the-tax-avoiders/>.

90. 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>.

91. *Id.*

92. 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>.

thirteen years, while the State of Washington is facing a deficit of \$430 million in its biannual budget, which changes somewhat the way of looking at the aforementioned numbers.⁹³ Again, it is important to understand that Microsoft is not doing anything illegal. All it is doing is what most tax practitioners and corporate lawyers would consider being smart, efficient, and perhaps most importantly, legitimate tax planning, from the corporate shareholder's standpoint.

As mentioned earlier, Microsoft is hardly alone in this game. On May 21, 2013, the Senate Permanent Subcommittee for Investigations dug into Apple's tax activities.⁹⁴ Their findings showed that Ireland has been a major player in Apple's business operations.⁹⁵ Using information provided by Apple itself, the subcommittee found that the company used subsidiaries in Ireland to channel more than \$70 billion in worldwide income away from the United States.⁹⁶ To make things even more interesting, the three legal entities involved ("Apple Sales International," "Apple Operations Europe," and "Apple Operations International") were all were incorporated in Ireland, but were not tax residents anywhere.⁹⁷ This complex structure has allowed Apple to pay an ETR of 2% (or less) since the year 2003, while Ireland's corporate tax rate is 12.5%.⁹⁸ Apple argued that Ireland has agreed for many years to provide it with a special tax rate through negotiations and comprehensive discussions. Once again, just like with Microsoft, Apple was not doing anything illegal, just the contrary; all activities were supported by legal opinions and memos from the most respectable law and accounting firms in the world. However, the question is whether, from a public stand point, Microsoft or Apple's actions are morally and ethically right, or even acceptable, and if it is not, then by whom?

Essentially the same headlines came out at approximately the same time as those mentioned before, regarding another MNC, this time, Google. This is the company that has a formal

93. Nick Eaton, *Are Microsoft back taxes the answer to Wash. Budget woes?*, SEATTLEPI.COM (Sept. 23, 2009, 4:30 PM), <http://blog.seattlepi.com/microsoft/2009/09/23/are-microsoft-back-taxes-the-answer-to-wash-budget-woes>.

94. *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. and Governmental Affairs*, 113th Cong. 2 (2013).

95. *See id.* at 2–3.

96. *Id.* at 6.

97. *Id.* at 3–4.

98. *Id.* at 18.

corporate motto of “don’t be evil.”⁹⁹ “Google has been accused of swerving UK tax on the £1.6bn it makes in Britain.”¹⁰⁰ In response to this accusation, Margaret Hodge,¹⁰¹ chair of the Public Accounts Committee in the British Parliament, told Google’s northern Europe Vice President, Matt Brittin, that his company’s behavior on tax was “devious, calculated, and, in my view, unethical.”¹⁰² Quick to join her was Ed Miliband, a British Labor Party politician, who accused Google of: “contributing to an unacceptable culture of irresponsibility.”¹⁰³ Vince Cable, the Liberal Democrats deputy leader at the British parliament, also accused Google of not playing fair. He said that Google “was ducking its social responsibilities, especially during a time of recession.”¹⁰⁴ In reaction to these headlines and growing public criticism, the voices calling to do something about it became stronger. On June 13, 2013, CNN reported that a committee of lawmakers said that the U.K. should launch a full investigation into Google to ensure it was complying with the tax law.¹⁰⁵ The U.K. Public Accounts Committee released a report focusing on Google’s corporate taxes.¹⁰⁶ This time questions were asked if Google had really been complying with all tax laws. It is reasonable to assume that this investigation will not result in a significant finding against Google, because the company has done its homework and every tax planning step made was learned, researched, and talked about by the world’s biggest experts in order to assure that Google was in full compliance with every tax law there is. However, it is clear to Google and probably everybody else that from a policy perspective, Google was not supposed to have such low tax liabilities around the world, and

99. *U.S. Public Policy Transparency*, GOOGLE, <https://www.google.com/publicpolicy/transparency.html> (last visited Feb. 7, 2016).

100. John Oates, *Google: Do no evil, pay no tax*, THE REGISTER (Dec. 21, 2009, 11:10 AM), http://www.theregister.co.uk/2009/12/21/google_tax/.

101. MARGARET HODGE MP, <http://margaret-hodge.co.uk/> (Margaret Hodge is a British Labour politician, who has been the Member of Parliament for Barking since 1994) (last visited Feb. 7, 2016).

102. 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>. See also Kadhim Shubber, *MP to Google: ‘you do do evil’ when it comes to tax*, WIRED UK (May 17, 2013), <http://www.wired.co.uk/news/archive/2013-05/17/google-amazon-tax>.

103. Alexi Mostrous, *Google Attacked by MPs over ‘evil’ of tax avoidance*, THE TIMES (May 17, 2013, 12:01 AM), <http://www.thetimes.co.uk/tto/money/tax/article3767392.ece>.

104. Oates, *supra* note 100.

105. 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>.

106. *Id.*

as most people will say, this result is just not fair. For a company who invests so much money in its public image, this is a problem. After all, Google built a reputation as a different type of company, where employees enjoy coming to work, enjoy all kinds of benefits that most employees working for other companies can only dream about, and more importantly, a company who intends to improve the greater good.

During this time, Starbucks was also facing bad publicity. However, unlike the other MNCs before it who found themselves in that situation, Starbucks, who operated in the U.K since 1998, chose a different path. By the middle of June 2013, Starbucks released a public statement saying that it had decided to voluntarily pay over 5 million pounds in U.K. taxes, and 15 million pounds in additional taxes in 2013 and 2014, in order to try and minimize the negative public opinion which would ultimately hurt the company's image and future profits.¹⁰⁷ Starbucks continued to claim, however, that its U.K. business was not profitable, which means it should not have any tax liability.¹⁰⁸ Starbucks also released a statement saying: "Six months ago, we felt that our customers should not have to wait for us to become profitable before we started paying U.K. corporation tax."¹⁰⁹ The company had reported losses in 14 of the first 15 years of its existence there.¹¹⁰ However, at the same time, the company had a 31% market share and shareholder reports indicating solid profitability for the Starbucks group attributable to its U.S. operations.¹¹¹

With incredible operations and profitability in the U.S., what was happening in the U.K. to induce such substantial losses? A further analysis of Starbucks Coffee Company (UK) Limited ("Starbucks UK"), the principal operating company in the United Kingdom, showed in Fiscal Year 2011,¹¹² under U.K. financial accounting principles, turnover of about 400 million pounds,

107. Matthew Boyle, *Starbucks Pays \$15.4 Million U.K. Corporation Tax Amid Backlash*, BLOOMBERG BUS. (June 24, 2013, 6:55 AM), <http://www.bloomberg.com/news/articles/2013-06-24/starbucks-pays-15-4-million-u-k-corporation-tax-amid-backlash>.

108. *Starbucks Commitment to the UK*, STARBUCKS (Oct. 17, 2012), <http://www.starbucks.co.uk/blog/starbucks-commitment-to-the-uk/1240>.

109. Boyle, *supra* note 107.

110. HC COMMITTEE OF PUBLIC ACCOUNTS, HM REVENUE & CUSTOMS: ANNUAL REPORT AND ACCOUNTS 2011-12, 2012-13, HC 716, at 8 (UK).

111. *Id.* at 8. At the parliamentary inquiry, the M.P.s questioning Starbucks consistently contrasted Starbucks' losses in the United Kingdom to the significant company taxes paid by its largest competitor, Costa. *E.g., id.* at Ev 25, Ev 28.

112. Edward D. Kleinbard, *Through a Latte, Darkly: Starbucks' Stateless Income Tax Planning*, 139 TAX NOTES 1515-1535, 1520 (2013) (noting that fiscal year 2010 was generally similar in results).

gross profit of 78.4 million pounds, an operating loss after “administrative expenses” of 28.8 million pounds, and a net pretax loss on an ordinary activity of 32.9 million pounds.¹¹³ Starbucks stated to the House of Commons Public Accounts Committee that during its first 15 years of operations, it paid 8.6 million pounds of corporate tax.¹¹⁴ That tax was paid on revenue accumulating more than 3.4 billion pounds.¹¹⁵ It was further explained by the Chief Financial Officer (“CFO”) at the time, Troy Alstead, that 8 million pounds (93%) of the taxes paid were attributable to an audit settlement with the U.K. taxing authority.¹¹⁶ In 14 out of the 15 years, Starbucks UK recorded losses. According to *Reuters*, the company was able to achieve losses in 14 out of 15 years by paying substantial amounts to other related group companies through “(i) royalties and license fees paid to a Dutch affiliate, (ii) markups on coffee purchased via another Dutch affiliate and Swiss affiliate, and (iii) interest paid on a loan from the U.S. parent company.”¹¹⁷

While Starbucks reported staggering losses on their financial statements, their reports to analysts and shareholders on their U.K. subsidiary’s performance were much more positive.¹¹⁸ For instance, the *Financial Times* reviewed the transcripts of Starbucks’ securities analyst conference calls, and when viewed from the perspective of the group as a whole, Starbucks believed its U.K. operations to be profitable.¹¹⁹ In 2009, Starbucks told analysts: “Canada, the U.K., China and Japan are our largest international markets and drive the majority of the segment’s revenue and operating profits. Each of these markets is profitable to Starbucks. Each is a priority for future investment, and each is a key component of future growth.”¹²⁰ This statement makes it very clear that Starbucks viewed itself as a highly profitable company. Hence, it is easy to see why the public found it so hard to accept the fact that they paid little to no tax in the U.K.¹²¹

113. *Id.* at 1519–20.

114. *Public Accounts Committee Report*, *supra* note 110, at para. 10.

115. *Id.*

116. *Id.* See also, Kleinbard, *supra* note 112, at 1520.

117. Tom Bergin, *How Starbucks Avoids U.K. Taxes*, REUTERS (Oct. 15, 2012, 6:21 PM), <http://www.reuters.com/article/2012/10/15/us-britain-starbucks-tax-idUSBRE89E0EX2012101>; Kleinbard, *supra* note 112, 1520–21.

118. Kleinbard, *supra* note 112, at 1520.

119. *Id.* at 1520-21.

120. Lisa Pollack, *Media Said, Starbucks Said*, FIN. TIMES (Dec. 12, 2012, 10:15 AM), <http://ftalphaville.ft.com/2012/12/12/1304442/media-said-starbucks-said/>.

121. Starbucks UK argued strenuously to the House of Commons that in substance Starbucks had not claimed to securities analysts and shareholders that its U.K.

On its face, it seems like a clear result of a sophisticated tax planning structure. For instance, in 2007, Starbucks UK had one of its best years, reporting a pretax loss of 1.4 million pounds.¹²² However, if the royalties and interest expense paid are reversed from Starbucks UK affiliates, Starbucks UK's income would have been about 21 million pounds.¹²³ As a result, the company would have had a positive operating margin of about 6% (as Starbucks UK itself suggested in its statements).¹²⁴

The key take away from this case is that if Starbucks can manipulate its successful operations to result in a very minimal tax liability position, then any MNC can. Starbucks represents a classic retail business model, with direct customer interactions in thousands of locations around the world, whether in a high tax jurisdiction or a low to no-tax jurisdiction. But even without getting into the heart of this statement, and actually examining whether Starbucks is right or wrong regarding their profitability, their decision to voluntarily pay income tax is shocking. A MNC that operated consistently under the supervision of the best law and accounting firms, decided to not take advantage of what tax laws have to offer. The short and perhaps even cynical explanation to this remarkable choice would be to improve public opinion.

If we examine the development and changes in CSR we see that this may be just another step of its evolution. Following one of the more accurate definitions of CSR, made by Manne and mentioned previously, (i) are the marginal returns to the corporation less than the returns available from some alternative's expenditure? Most likely, since it can be assumed that if they had other possible alternatives which would allow them to avoid such payment at all. (ii) Is it purely voluntary? De facto, it is, since it is reasonable to assume the company was in full compliance with the law and therefore did not have to make

operations were profitable, and in particular denied that it had ever claimed (as the Reuters story had stated) that operating margins in the United Kingdom approached 15%; rather, the facially different statements could be explained by the fact that US GAAP rules "require" Starbucks to add back the intercompany royalties and interest paid to affiliates, while U.K. rules "require" Starbucks to include them. However, these type of explanations does not mean a lot to the public, and not even to the House of Commons who examined the case. See *Public Accounts Committee*, *supra* note 110, at Ev. 22. 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 with U.K. customers, and second whether the division of those profits among different group entities reflected economic reality or simply was a result of a sophisticated tax planning.

122. Kleinbard, *supra* note 112, at 1521.

123. *Id.*

124. *Id.*

such a payment. (iii) Must be an actual corporate expenditure rather than a conduit for individual largesse. Due to the fact we are discussing a MNC, we can assume that there is no shareholder standing behind it, which will directly benefit from it.

Carroll's definition from 1983 also confirms that what we see in Starbucks' actions is in fact another evolution of CSR, as it follows all the elements involving CSR, (i) economically profitable, since the company is in fact profitable but it uses a complex set of accounting and tax rules in order to avoid taxes, (ii) law abiding, the company is in fact law abiding every step of the way, and (iii) ethical and supportive, this may be the real trigger behind Starbucks' decision to take such action.¹²⁵

Even if we examine that action under the definition of Backman to CSR activity, mentioned above, we see that it has a direct link to it.

VI. CORPORATE SOCIAL RESPONSIBILITY AND TAXATION

A. *What Does it all Actually Mean?*

CSR decisions, like any other aspect of the corporation's business decisions, are driven mostly by its obligation to maximize its returns for its shareholders. Therefore, the adoption of a new agenda by the company should follow the same principle focused on risk minimization in order to keep promoting the corporation's success. In this reality, CSR and tax responsibility should, under the right circumstances, fit very well together, especially in times when so many companies are facing intense scrutiny for their tax practices.¹²⁶

Such mass criticism is by no means good for business, and that fact alone is a good reason for a change.¹²⁷ With that in

125. Carroll, *supra* note 50.

126. 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> ("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.").

127. See Jasmine M. Fisher, *Fairer Shores: Tax Havens, Tax Avoidance, and Corporate Social Responsibility*, 94 B.U. L. REV. 337, 355(2014), (pointing out that the market reaction to news of a corporation's aggressive tax practice may only have minimal reputational costs due to the fact that "the corporations in these studies likely had little to lose from such a reputational hit to begin with, and that for those corporations, the

mind, and the growing public scrutiny on MNC tax planning efforts, businesses should be looking for ways to view their tax planning through CSR principles. ActionAid, an international charity, went as far as creating a business case specifically for this purpose. In their publication, *Tax responsibility: The business case for making tax a corporate responsibility issue*, it is stated:

An effective CSR behavior with regard to tax planning will have to be based upon three principles, (i) simple compliance with the different laws is no longer sufficient in order to keep corporations away from the public criticism associated with tax planning, (ii) lack of transparency and complexity around tax planning leads to increased risk and criticism, and (iii) it is the structures and practices of tax planning that are at the core of tax responsibility, rather than the amount of actual tax paid, which is simply the outcome of these practices.¹²⁸

The sum of the above three principles is the more aggressive a corporation is in its tax planning the less CSR it has.

However, the most important issue, “where does the line cross?” is still unanswered and it probably cannot be answered by simply stating a number. In order to answer it, the following should be addressed: first and foremost, how well, from a pure profitability standpoint, does the company do? A company’s main goal is to be profitable in order to be able to distribute dividends to its shareholders. Hence, if a company is not doing well, it should not be involved in any voluntary CSR actions. This does not mean the company should not be in full compliance with the law, whether it is an environmental issue or tax issue, but it does mean it should not be engaged with any voluntary CSR activities. Second, if the corporation finds itself in a negative ETR position while it is profitable, it will mean most likely that its tax planning efforts are probably too aggressive and does not follow CSR standards. Third, if the corporation feels like it cannot be transparent with its financial statements and business activities,

benefits of adopting a tax aggressive strategy outweighed the costs.”). The author goes on to say that “companies whose success depends strongly on their reputations are more likely to eschew a tax avoidance scheme in favor of tax practices that are less likely to attract public scrutiny.” *Id.* See also Michelle Hanlon & Joel Slemrod, *What Does Tax Aggressiveness Signal? Evidence from Stock Price Reactions to News About Tax Shelter Involvement*, 93 J. PUB. ECON. 126 (2009) (investigating stock market responses to tax avoidance practices).

128. *Tax Responsibility: The business case for making tax a corporate responsibility issue*, ACTIONAID (July 2011), https://www.actionaid.org.uk/sites/default/files/doc_lib/tax_responsibility.pdf.

it possibly means it does not follow CSR standards. Fourth, if the corporation needs to issue a public statement in order to apologize and explain the reason for its ETR, it is reasonable to assume it does not follow CSR standards. Fifth, if the corporation's managers feel like they are doing what is good for the public and not only for the corporation's shareholders, it means that there is a strong possibility the corporation follows CSR standards.

However, there is another bottom line, relevant to all of this. In the words of Oliver Wendell Holmes, "taxes are what we pay for a civilized society."¹²⁹ This states in a simple sentence and summarizes the fact that paying taxes is the most basic and fundamental way that corporations engage with society. This is their most basic responsibility towards the state and the people.¹³⁰ When corporations choose to avoid paying taxes, but volunteer to do other CSR activities, they try to fill the traditional role of the state. Therefore, instead of doing so, they should first pay their taxes and then let the state do its job. Imagine a reality where Microsoft does not avoid its tax payment in the State of Washington and the huge impact this would have on the state's ability to invest more in schools, health, and public transportation. Compare that reality to the one where Microsoft perhaps does extremely well and tries to fill the gap through CSR activities, and not only does Microsoft do well, but the State of Washington has more money to invest in its residents and infrastructure. Hence, the bottom line is that not only has tax responsibility evolved to be a part of CSR, but avoiding corporate tax is simply a socially irresponsible behavior.

B. *An Important Step Forward*

"Creative tax planning is, for better or worse, a quintessentially American tradition."¹³¹ That statement, together

129. *Compania General de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1904) (statement by Oliver Wendell Holmes, Jr.).

130. John Christensen & Richard Murphy, *The Social Irresponsibility of Corporate Tax Avoidance: Taking CSR to the bottom line*, 47 SOC'Y INT'L DEV. 37-44, 37 (2004) http://www.taxjustice.net/cms/upload/pdf/Development_Journal_-_CSR_to_the_Bottom_Line_-_SEP-04.pdf.

131. *Hampshire Grp., Ltd. v. Kuttner*, No. 3607-VCS, *31 (Del. Ch. July 12, 2010). See also, A. Didar Singh, *CSR, a winning proposition*, THE HINDU BUSINESS LINE (Sept. 15, 2013), <http://www.thehindubusinessline.com/opinion/csr-a-winning-proposition/article5131620.ece>, (saying that this is an American tradition and therefore one should accept it as is, is not enough in the current global economy and business environment.). The article by Singh highlights this by saying the following: "In the last 20 years, a large percentage of British and American companies have been at the forefront of CSR activities to demonstrate themselves as socially responsible corporate citizens."

with the fact that tax avoidance and the aggressive use of different tax planning schemes became an acceptable business practice is something that we, as a society, as scholars, as consumers, and as citizens, is simply something we cannot accept as is and “for better or worse.” The fact that in recent years the mass media and the public became more aware of that practice is extremely important and will assist in making the change. Like any other change, it may not be simple and easy, it may also not happen quickly, but it also does not mean it is not needed and necessary. Hence, the question is how to proceed in order to start this change?

Much of the work that is done in the past decade by government and international organizations, such as the OECD, is to find ways to limit the MNCs ability to avoid paying taxes or even limit their ability to minimize their tax liability. However, much of these efforts were useless, aimless, and fruitless. Not to say that it is something that should not be done, on the contrary. However, focusing all the efforts on that is simply not going to be enough.

For instance, let’s take the Procter & Gamble Co. (“P&G”) transaction where it sold 43 beauty brands to Coty, Inc. (“Coty”) for about \$12.5 billion through a tax scheme often referred to as a “Reverse Morris Trust,” and saved between \$2 to \$4 billion in taxes by some estimates.¹³²

Without getting too much into the technical aspect of this tax planning, a Reverse Morris Trust is a transaction that combines two major steps. The first, a divisive step, a spin-off pursuant to the Internal Revenue Code Section 355.¹³³ The Second, an acquisitive step, a statutory merger pursuant to the Internal Revenue Code Section 368(a)(1)(A).¹³⁴ This tax scheme is used where a parent corporation owns a subsidiary corporation that the parent wishes to sell.¹³⁵ The parent corporation will complete a tax free spin-off of its subsidiary corporation to its

Both Japan and South Korea have had a long tradition of CSR, while emerging markets such as Brazil have witnessed an active CSR movement in recent times. *Id.* Even in China, there is an increasing realization among corporates to be seen as socially responsible.” *Id.* Hence, the reality of corporations assuming more and more responsibility is a global phenomenon, and the United States, will adjust like any other state in order to keep its leading position in the global economy. *Id.*

132. 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.

133. I.R.C. §355 (2014).

134. I.R.C. § 368 (1999).

135. I.R.C. § 355 (2014).

own shareholders.¹³⁶ The former subsidiary corporation, now owned by the parent corporation shareholders will then merge with a target corporation to create the merged corporation.¹³⁷ Again, this can easily enough be, more likely than not, a tax free transaction.¹³⁸ This tax planning scheme is a direct result of an Internal Revenue Service Ruling in 1966 involving a very similar transaction to the one just described, except for the fact that in the original structure, the parent corporation would merge with the target corporation, rather than the subsidiary corporation in the reverse transaction.¹³⁹ In order to stop the Reverse Morris transaction, Congress enacted Internal Revenue Code Section 355(e) in 1997.¹⁴⁰ Pursuant to this code section, additional taxation is imposed on the distribution in the spin-off step, the first step, where 50% or more of the corporation that has been spun-off is transferred in a tax-free manner in the following two years to the spin-off.¹⁴¹

As one can easily assume at this point, although the original scheme has been shut down by Congress, a new way to achieve the same result was quickly found: the Reverse Morris Trust. P&G is hardly the only multinational company to use this scheme; however, P&G is somewhat unique in that it chose to use it a number of times.¹⁴² Starting in 2002, it sold Jif peanut butter and Crisco shortening to the J.M. Smucker Company ("Smucker") and then again in 2008, where it sold Folgers to Smucker, and again in the recent P&G and Coty transaction.¹⁴³ Is there a way to shut down the Reverse Morris Trust? The simple answer would be yes. Congress can come up with a new code section to close this loophole and make sure taxpayers are unable to get a tax free result of such transaction. However, this

136. Assuming certain requirements are being met, a goal that can most certainly be achieved through careful planning.

137. 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).

138. *Id.*

139. *IRS v. Morris Trust*, 367 F.2d 794, 795 (4th Cir. 1966).

140. Hanafy, *supra* note 137, at 121.

141. I.R.C. § 355(e) (2016).

142. See Karen Kroll, *Time to Call an End to Reverse Morris Trusts?*, BUS. FIN. MAG., (Oct. 21, 2011), <http://businessfinancemag.com/blog/time-call-end-reverse-morris-trusts> ("In early 2009, phone giant Verizon, using a Reverse Morris Trust, sold its rural phone lines in several New England states, to FairPoint Communication.").

143. See, e.g., Emily Chasan, *P&G Loses Tax Benefits in New Pringles Deal*, THE WALL STREET J. (Feb. 15, 2012, 1:47 PM), <http://blogs.wsj.com/cfo/2012/02/15/pg-loses-tax-benefits-in-new-pringles-deal/> (explaining that P&G tried to use the Reverse Morris Trust scheme one more time, in the Pringles deal, but was not able to go through with it due to reasons not related to tax).

answer is not accurate and oversimplified, mostly because it is a reasonable assumption that a short time after this loophole will be closed, sophisticated tax professional will find a new way to achieve this result.

This is where CSR can come into place. What Congress should do is close the loophole; there is no doubt that they should try and close any known loophole in the Internal Revenue Service. But, it is critical to understand that this will never be the full answer. The solution to limiting MNCs from aggressively minimizing their tax liability should involve two steps: first, closing loopholes in the tax law and making sure it is not simply available to anyone unless Congress wishes to make it available, and second, acknowledging the fact that step one can never achieve the ultimate goal and understand that MNCs have more power than ever before, and in some cases even more than countries. Therefore, just as citizens are able to demand their country to do some things, the same people, this time as customers and users, should demand corporations to carry the burden and pay a reasonable amount of tax. The decision of what constitutes “reasonable” in this context should be researched and studied by international organizations, such as the OECD, and just like the OECD had a whitelist and blacklist of countries, it can initiate a list of MNCs who refuse to fully disclose their tax schemes and tax liability. This way the fight for raising revenue through tax will have another front line, one directly between the public and the MNCs.

It is important to understand that the public, whether as a current customer or future one, has a lot of power in their hands. The problem now is to make that information available to the general public, and to create awareness of it. Once the public sees that information in a simple way and is able to understand it better, there is no reason for it not to react, whether by social media or traditional media. Once MNCs see that they may lose more than it may gain, the equation will change since there is a new variable and some adjustments will have to be made.

The OECD final report should include as much information as possible while keeping the bottom line clear and concise. The report should include one main chapter with the following data:

- The name of the corporation;
- What it does;
- The total income it generated in recent years;
- Where the corporation and where it's HQ is located;
- The applicable statutory tax rate;
- The corporation's ETR;

Any other important data should still be in the report, but in a different chapter, and in that order to keep the report as simple and clear as possible. Another chapter may focus on corporations who refused to cooperate with the OECD and provide the required information, just like with the “classic” CSR activities and reports, where some corporations are happy to provide information, while other refuse to do so. Hopefully, in time, some corporations will adopt the new standards and will provide that information on their website and on a CSR report that they prepare. Once the public learns that some corporations are more open to carry the burden and assume responsibility, those corporations’ public image will skyrocket and they will be able to see better financial results through sales and services.

C. *Creating the Standard*

This paper suggests that in order to tackle the issue of corporate social responsibility and taxation and build on the natural evolution, a new standard needs to be created. Pursuant to this, corporations will be able to be certified at different levels of CSR activity that focus solely, or at least mostly, on taxation. Much like how organizations strive to be “green,” they will now be able to present themselves as being responsible on a whole new level, not only towards the environment, but to society as well.

A good place to start in order to create this new standard is with the report *Harmful Tax Competition—An Emerging Global Issue*, issued by the OECD.¹⁴⁴ This report looked to create a set of international measures for nations to follow to help combat harmful tax competition.¹⁴⁵ It was hoped that this one set of standards would make the implementation of the practices more effective than if each nation was forced to create and regulate their own standards.¹⁴⁶ When the OECD issued the report in 1998, it chose to focus on countries.

The countries were grouped into three categories based on certain criteria: member country preferential regimes, tax havens, and non-member economies. The report, and the subsequent *Progress Report* from 2001, were both seen as a huge step forward, at the time.¹⁴⁷ However in retrospect, as considered

144. *Harmful Tax Competition—An Emerging Global Issue*, ORG. FOR ECON. CO-OPERATION AND DEV. (1998), <http://www.oecd.org/tax/transparency/44430243.pdf>.

145. *Id.* at 3.

146. *Id.* at 7.

147. CTR. FOR TAX POLICY & ADMIN., *THE OECD'S PROJECT ON HARMFUL TAX PRACTICES: THE 2001 PROGRESS REPORT* 8 (2001).

by many scholars, the report failed and had minimal effect, if any, on tax avoidance and tax evasion.¹⁴⁸ There are some individuals who believe that it is good that this report failed, because the regulations being imposed at the global level would lead to an economic downturn and the destruction of undeveloped nations.¹⁴⁹

There are many issues that come into play in terms of the failure of the OECD's report. One of the main factors that was attributable to the failure, is the fact that both the report and the one subsequent departed from most of the previous OECD publications in the rhetorical and substantive posture which clearly aimed to threaten the countries that failed to cooperate. Essentially, the report came up with two different approaches for dealing with harmful tax competition.¹⁵⁰ In the most part for member states, "peer reviews" were the main source of defense against these issues, as long as the members would continue to exchange information and be willing to cooperate.¹⁵¹ However, for other states that were nonmembers and were classified as potential tax havens, these countries would be blacklisted.¹⁵² Unsurprisingly, this threatening approach did not prove to be successful, especially since most tax havens are in existence because they offer tax incentives to combat the economic, geographical, or political disadvantages of operating in the country.¹⁵³ It would be crippling to their economies to remove these incentives, as they control the locations where MNCs look to invest.¹⁵⁴

Even though the report was not a success, it does not mean it was a complete failure and that nothing can or should be

148. Hugh J. Ault, *Reflections on the Role of the OECD in Developing International Tax Norms*, 34 BROOK. J. INT'L L. 757, 770 (2009); Robert T. Kudrle, *The OECD's Harmful Tax Competition Initiative and the Tax Havens: From Bombshell to Damp Squib*, 8 GLOBAL ECON. J., 1 (2008); J.C. SHARMAN, HAVENS IN A STORM: THE STRUGGLE FOR GLOBAL TAX REGULATION 72 (Cornell Univ. Press, 1st ed. 2006); Richard A. Johnson, *Why Harmful Tax Practices Will Continue After Developing Nations Pay: A Critique of the OECD's Initiatives Against Harmful Tax Competition*, 26 B.C. THIRD WORLD L.J. 351, 355 (2006); Karen B. Brown, *Harmful Tax Competition: The OECD View*, 32 GW J. INT'L L. & ECON. 311, 314 (1999).

149. Alexander Townsend, Jr., *The Global School Yard Bully: The Organization for Economic Co-operation*, 25 FORDHAM INT'L L.J. 215, 218 (2001). See also Avi Nov, *The "Bidding War" to Attract Foreign Direct Investment: The Need for a Global Solution*, 25 VA. TAX REV. 835, 843-44 (2006).

150. *Harmful Tax Competition—An Emerging Global Issue*, *supra* note 144, at 41.

151. *Id.* at 42.

152. *Id.* at 49–50.

153. *Id.* at 22, 58.

154. See Avi Nov, *supra* note 149, at 837–38. See also, *Harmful Tax Competition—An Emerging Global Issue*, *supra* note 144, at 17, 22 (explaining that firms invest in tax haven countries mainly for their tax incentives).

learned from it. In fact, there were a number of countries that took notice of the report and looked to decrease harmful tax policies in their own governments. Even small instances of reform show the positive impact the report had. The Korean government, for example, looked to counter tax evasion by having residents pay taxes on the dividends received outside of Korea.¹⁵⁵ The report was revolutionary in creating criteria and standards in which tax havens can easily be identified and the steps needed to be taken in order for countries to lose that negative status.¹⁵⁶

The OECD report mainly targeted financial activity and related services that are often relatively easy to shift and channel through low-tax jurisdictions, and eliminate corporate tax and aid in individual tax evasion.¹⁵⁷ The OECD report mostly focused on two aspects of what the organization sees as being harmful: the first, sham claims of corporations' activity in jurisdictions with low corporate tax rate;¹⁵⁸ the second, off-shore investments of individuals attempting to create scenarios where their earnings will be invisible to their home countries' tax authorities.¹⁵⁹ This paper suggests that although the OECD report was not a huge success, it is still an important step forward if utilized correctly.

As briefly mentioned earlier, the OECD report adopted two crucial elements, which most likely contributed to its failure. The first, it chose to focus on countries, and the second, it chose to adopt a rhetoric which clearly tried to threaten the countries who chose not to cooperate with the OECD standards of transparency and effective exchange of information. However, if we choose to adopt the standard the OECD report created, but focus on cooperation instead of threatening, and corporations instead of countries, there is a high chance for better results, especially when CSR is involved in the mix. The reason for this is that we have already seen in the past 50 years that corporations are willing to cooperate and work around CSR concepts, mostly because they believe it will be for their benefit in the long run. We have also historically seen success in terms of creating a set of standards while hoping the industry will follow it later on. For

155. *Seoul to reduce harmful tax competition*, THE KOREA HERALD (July 18, 2001).

156. OCED, *List of Unco-operative Tax Havens*, <http://www.oecd.org/countries/monaco/listofunco-operativetaxhavens.htm> (showing 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).

157. *Harmful Tax Competition—An Emerging Global Issue*, *supra* note 144, at 56.

158. *Id.* at 48.

159. *Id.* at 42.

example, in the last two decades, the organic industry has grown substantially in the United States.¹⁶⁰ Although there were standards developed by the USDA for companies to follow, some corporations like Whole Foods Market, Inc. and Trader Joe's began going above and beyond those requirements to create a public demand for higher standards.¹⁶¹ These higher standards came with a price of course, and customers have to pay more for these products.¹⁶² However, this goes back to the idea of CSR and how the public values and supports corporations that look to do the "right thing."¹⁶³ Therefore, it can be assumed that issuing a recommended guide for companies to follow may lead, if being done right, to higher public expectations and response from the corporate world.

The OECD report already did a lot of the heavy lifting in terms of defining and creating a clear understanding of what is the "right" way and the "wrong" way when it comes to the use of tax havens and harmful tax competition. Included in the report is a specific subchapter that aims to set the factors on how to identify tax havens.¹⁶⁴ "Tax haven" is a generic term referring to countries that use tax and non-tax incentives to attract activities in the financial and other service sectors.¹⁶⁵ These countries offer foreign investors no, or only nominal, taxation which is often coupled with a reduced regulatory requirement that, at the end of the day, creates a friendly, inviting economic environment.¹⁶⁶ Typical tax havens will offer a simple and clear path to minimize taxes and obtain financial confidentiality, and by doing this, as stated by the OECD, will "potentially cause harm to the tax system of other countries as they facilitate both corporate and individual income tax avoidance and evasion."¹⁶⁷ Accepting the report's analysis and definitions is a critical step towards standardizing what constitutes a positive tax and corporate

160. Catherine Green et al., *Emerging Issues in the U.S. Organic Industry*, ECON. RES. SERV., June 2009.

161. *Id.*; ICRA Online, *The Factors Helping Whole Foods Market Grow*, THE MOTLEY FOOL (Nov. 10, 2014), <http://www.fool.com/investing/general/2014/11/10/the-factors-helping-whole-foods-market-grow.aspx>.

162. Green, *supra* note 160.

163. See CONE INC. & AMP AGENCY, *THE MILLENNIAL GENERATION: PRO-SOCIAL EMPOWERED TO CHANGE THE WORLD* 9 (2006), <http://www.centerforgiving.org/Portals/0/2006%20Cone%20Millennial%20Cause%20Study.pdf> (showing that 79% of individuals surveyed were more likely to purchase a socially responsible company's products, and 69% consider a company's environmental impact when deciding where to shop).

164. *Harmful Tax Competition—An Emerging Global Issue*, *supra* note 144, at 22.

165. *Id.* at 21.

166. *Id.* at 21–22.

167. *Id.* at 22. That will usually be achieved by not following the OECD standards for information exchange and a high level of bank secrecy provisions.

socially responsible behavior. For instance, channeling profits through tax havens will obviously hurt the corporation's status in this context.

The OECD report, especially Chapter 2, is an excellent starting point, but it is not the only factor we should focus on. This is mostly because the use of tax havens, as crucial as it is, cannot (and should not) be the main or only factor in the process of whether a corporation should achieve the "good behavior" standard or not. Other factors, not necessarily by the order of its importance, should be: the other jurisdictions in which the corporation operates, the total amount of income it generates in each of them, the tax benefits it receives in each jurisdiction it operates, the corporation's ETR in each jurisdiction it operates, and the corporation's worldwide average ETR.

However, as mentioned before, this paper suggests that one reason the OECD report failed in achieving its goal was the rhetorical approach the OECD adopted. Such an approach will not work in this case either. First, because CSR activity has to be voluntary, and second, because in order to really create a change, we need to get the corporations truly cooperating. The simple reality is that there is no other way to make them pay more taxes. Therefore, one way to incentivize corporations that choose to cooperate and submit the relevant data, is to calculate it and positively factor it into the final conclusion. We need to try and work with the corporations, not against them. We tried the other approach and it did not work. We need to find a way to create a "good behavior" standard, just like we know which companies are "green" to the environment and which companies are the best to work for, we also need to create a gold standard for companies who carry the burden with the rest of the society and pay their fair share of taxes. As a result of creating this standard, in the long run, the corporations who choose to comply and cooperate will get positive public exposure and as a result, will enjoy better financial results.

An example of another great initiative looking to move forward in the fight against harmful tax practices is the creation of the non-profit Community Benefit Society, "Fair Tax Mark."¹⁶⁸ Based out of the U.K., this organization attempts to bring together ethical consumers and businesses by bridging the gap

168. CO-OPERATIVES UK, FAIR TAX MARK GUIDANCE NOTES FOR CO-OPERATIVES UK MEMBERS, 4, 26 (2015); FAIR TAX, *Ethical Consumer and the Fair Tax Mark*, <http://www.fairtaxmark.net/who-we-are/ec/> (last visited Feb. 7, 2016). Fair Tax Mark is managed on a day to day by the Ethical Consumer Research Association which also works with other ethically-minded organizations and campaign groups such as Amnesty International.

between CSR and the tax justice movement.¹⁶⁹ Their main objective is to create incentives for U.K. businesses and their stakeholders that is hoped to promote tax transparency and fairness.¹⁷⁰ This non-profit organization created an accreditation, the “Fair Tax Mark,” that supposedly rewards business that act in a positive tax manner. The group offers two versions of the accreditation according to the type of the business: (i) U.K. businesses that operate solely in the U.K.; (ii) U.K. owned MNC. However, the criteria for both types of businesses are generally measured in the same categories: (i) level of transparency; (ii) tax rate, disclosure and avoidance.¹⁷¹

The main problem or perhaps weakness with such accreditation is the fact that the group behind it lacks the resources and influence to first convince corporations to cooperate with them, and more importantly, to create an international accreditation brand. There is also a concern that due to that lack of criteria which is set that the accreditation could end up being misleading to the public, especially since it is a “paid for standard.”¹⁷² Individuals look more to the backing of highly regarded tax authority as opposed to a relatively unknown non-profit.¹⁷³ Thus, organizations like the OECD must become involved for such an objective to be achieved. So far, only 15 businesses have been rewarded the “Fair Tax Mark,”¹⁷⁴ which shows that there have been no significant changes. Nevertheless, that does not mean a standard such as this cannot achieve success. It is becoming more relevant for businesses to lean towards both CSR and more transparent tax practices. Another example of this is how in 2014 the S&P Dow Jones Indices and RobecoSAM added “tax strategy” into the assessment criteria for The Dow Jones Sustainability Indices.¹⁷⁵ Thus, with the right standard and a reputable organization standing behind it,

169. FAIR TAX, *Who We Are*, <http://www.fairtaxmark.net/who-we-are/> (last visited Feb. 7, 2016).

170. *Id.*

171. FAIR TAX, *The Fair Tax Criteria*, <http://www.fairtaxmark.net/criteria/> (last visited Feb. 7, 2016).

172. Craig Scott, *Fair Tax Mark to reward tax justice*, THE GUARDIAN (Feb. 20, 2014), <http://www.theguardian.com/sustainable-business/fair-tax-mark-to-reward-tax-justice>.

173. Vanessa Houlder, *Companies debate merits of 'fair tax' kitemark*, FIN. TIMES (Feb. 2, 2015), <http://www.ft.com/intl/cms/s/0/5960de76-a9f7-11e4-9fa7-00144feab7de.html#axzz3qQucr3BG>.

174. FAIR TAX, *Who's got it?*, <http://www.fairtaxmark.net/whos-got-it/> (last visited Feb. 7, 2016).

175. ROBECOSAM, *DOW JONES SUSTAINABILITY INDICES 2014 REVIEW RESULTS 5* (Sept. 2014). See generally S&P DOW JONES SUSTAINABILITY INDICES <http://www.djindexes.com/sustainability/> (last visited Feb. 7, 2016).

accreditations such as the “Fair Tax Mark” have the chance to change the future of tax planning.

D. Future Outlook

In the global economy, companies are constantly competing in order to maximize returns to their shareholders and achieve success. Based on the recent trend towards Corporate Social Responsibility, this paper proposes that a new standard of CSR, which incorporates responsible tax practices, be enacted.

The implementation of a new standard would align with the premise that corporations are now starting to look to the betterment of society to increase revenues. Since tax is the most basic way that corporations can engage in society, those with aggressive tax schemes to avoid paying the corporate tax should be labeled as being socially irresponsible. Once it is brought to the attention of the public that it is beyond the power of Congress to fully eliminate loopholes and corporations are able to take the matter into their own hands, there would be a demand for MNCs to help carry the burden and pay their fair share of taxes.

The largest obstacle will be having consumers realize the power that they have to influence MNCs by bringing awareness to the issue and reinforcing the idea of creating a standard. Even though the OECD report failed, the research done and terminology created will provide an adequate benchmark for characterizing corporations that participate in harmful tax competition. As stated previously, the information to analyze this type of behavior should include the amount of tax haven involvement, jurisdictions in which a company operates, amount of income generated in each jurisdiction, tax benefits received, ETR in each jurisdiction, and finally, the company’s worldwide average ETR. By providing the public with this information in a straight-forward, easy to interpret report, it will be more likely that citizens will begin to support those companies that do not participate in aggressive tax planning. In turn, MNCs will then be more apt to refrain from participating in as much harmful tax competition and look for ways to improve their level of CSR in taxation, such as voluntarily paying more tax as Starbucks did in 2013.

Overall, by pairing the ideology of Corporate Social Responsibility with the initiative of reducing harmful tax competition, a new global business standard can be achieved. The burden of taxation would be relieved on the individual and the vast wealth of corporations would be redistributed for the benefit of local economies. The OECD was on the right track to solving

the issue of harmful tax competition, but by focusing instead on encouraging companies to act voluntarily to please the public may be a more efficient way to achieve results.