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COUNTRY BY COUNTRY REPORTING AND CORPORATE PRIVACY: SOME UNANSWERED QUESTIONS

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Corporate privacy is an oxymoron.

Individuals have a right to privacy, which the Supreme Court has recognized at least since *Griswold v. Connecticut* (1965). Warren and Brandeis' famous defense of the right to privacy (1890) clearly applied only to individuals, because only individuals have the kind of feelings that are affected by invasions of privacy:

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing *to the individual* what Judge Cooley calls the right "to be let alone" . . . Of the desirability -- indeed of the necessity -- of some such protection, there can, it is believed, be no doubt. The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that *solitude and privacy have become more essential to the individual*; but modern enterprise and invention have, through invasions upon his privacy, subjected him to *mental pain and distress*, far greater than could be inflicted by mere bodily injury. . . . It is our purpose to consider whether the existing law affords a principle which can properly be invoked *to protect the privacy of the individual*; and, if it does, what the nature and extent of such protection is.¹

Corporations are legal entities, and the concept of privacy does not apply to them.²
As the Supreme Court held in 1906:

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¹ Samuel D., Warren & Louis D. Brandeis, *The Right to Privacy*, 5 HARV. L. REV. 1 (1890) (emphasis added).

² *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 65-66 (1974) ("While they may and should have protection from unlawful demands made in the name of public investigation, *corporations can claim no*

Conceding that the witness was an officer of the corporation under investigation, and that he was entitled to assert the rights of the corporation with respect to the production of its books and papers, we are of the opinion that *there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State.* The individual may stand upon his constitutional rights as a citizen. . . Upon the other hand, the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. . . . It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose . . .³

Thus, any objection to making corporate tax returns public cannot rest on the right to privacy. In fact, corporate returns were made public in 1909,⁴ and while this provision was soon repealed, the argument in favor of repeal was not based on privacy but on confidentiality: Disclosure of corporate tax returns, it was said, could give competitors access to confidential information and put the corporation at a competitive disadvantage.⁵

The same arguments from confidentiality were made in favor of preventing the publication of advance pricing agreements (APAs), even in redacted form. Thus, in my opinion the question whether the results of country by country reporting (CbC) should be

equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favours from government often carry with them an enhanced measure of regulation. Even if one were to regard the request for information in this case as caused by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.”) (internal citations omitted); see also Arthur J. Cockfield & Carl D. MacArthur, *Country-by-Country Reporting and Commercial Confidentiality*, 63 CANADIAN TAX JOURNAL 627, 650-651 (2015) (“At the outset, it is important to note that, in Canada and elsewhere, there are often different legal conceptions of the right to privacy for individuals (natural persons) and for business entities such as corporations that are legal persons (albeit of the artificial variety). As discussed in the legal academic literature, taxpayer privacy rights tend to focus on individual rights.”) (internal citations omitted). For a (different) European perspective, see Juliane Kokott & Christoph Sobotta, *The distinction between privacy and data protection in the jurisprudence of the CJEU and the ECtHR*, 3 INTERNATIONAL DATA PRIVACY LAW 222, 225 (2013) (“However, as regards the personal scope, the European Court of Justice has excluded legal persons from data protection, *though they can rely on the right to privacy*. It is difficult to base this exclusion on the wording of the Charter, as both privacy and data protection are granted to ‘everyone’. However, the definition adopted by the Luxembourg Court results from Article 2(a) and Recital 2 of the Data Protection Directive, which limit data protection to natural persons. The Convention on Data Protection seems to be more ambiguous in this regard, as it refers to ‘individuals’ in Article 2(a). But the similarly binding French version of the Convention uses the clearer term ‘*personne physique*’ that also excludes legal persons.”) (internal citations omitted).

³ *Hale v. Henkel*, 201 U.S. 43, 74-75 (1906).

⁴ Act of Aug. 5, 1909, Ch. 6 § 38(3), 36 Stat. 11, 116.

⁵ Marjorie E. Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 IND. L.J. 53 (1990).

made public has nothing to do with privacy. Instead, the answer depends on the following questions:

1. Does CbC reporting include information that could reasonably be regarded as confidential, in that revealing it will lead competitors to discover future business plans (like the APAs)?
2. Do these costs overcome the advantage of making CbC reports public, which is to increase pressure on companies to align their reported profits with the location in which they pay taxes?
3. For US-based multinationals, some of the information included in CbC reporting is already public (e.g., profits reported by subsidiaries in tax havens). Would making CbC reports public change significantly the information that is already publicly available?⁶
4. Last, but not least, does public CbC tax reporting really harm firm competitiveness? According to Cockfield and MacArthur, empirical evidence on this issue is mixed.⁷

⁶ Recently, Robert Stack, deputy assistant secretary at the U.S. Treasury, said that the U.S. will not share country-by-country report (CbCR) information with foreign authorities who choose to make the reports public; for a comment see Joelle Jefferis, *Stack says US will withdraw CbC information if made public*, INTERNATIONAL TAX REVIEW, at 13 (April 2016), <http://www.internationaltaxreview.com/Article/3541626/Stack-says-US-will-withdraw-CbC-information-if-made-public.html>.

⁷ See Cockfield and MacArthur, *supra* note 2 at 632.