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The Ethical Tax Judge

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Chapter 16

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ABSTRACT:

This chapter advances the claim that judges have an ethical obligation of competence that requires them to enhance their knowledge about language (in the context of statutory interpretation) and income tax law design and policy. It articulates some of the foundational understandings that support that competence and provides a simple hierarchy of approaches to interpreting income tax law. It concludes by contending that greater competence is not only more ethical but also advances other important societal goals fulfilled by the imposition of income tax systems.

16.1 The Importance of Judicial Competence in Adjudicating Cases under Income Tax Law

Judicial ethics, as a strand of legal ethics more generally, conventionally focuses on practices that support judicial independence, integrity and impartiality (e.g., Noonan and Winston (1993). It is often assumed implicitly that the role also demands competence.[1] As a result, the scope of judges' required competence and the accepted limits to it are underexplored. This chapter makes the claim the judges have an ethical obligation to enhance their knowledge about the archeology and art of statutory interpretation.[2] To that end, it fills a lacunae in the literature on judicial ethics (which does not address the implications of judicial ethics for rendering decisions in tax cases) and the literature on tax ethics (which does not address the obligations of judges).
This chapter proceeds in five sections. Sections 2 and 3 argue that to be competent a tax judge must both have a competent understanding of language and a competent understanding of income tax law. Specifically, Section 2 argues that to be ethical, a judge must understand something about theories of language and must see learning more about language as part of her obligation of competence. Section 3 describes the "context" of income tax law. It sets out, in a straight-forward way, the broadly-agreed aims of income tax law. Judges must understand this context to appropriately interpret income tax provisions. Section 4 offers a hierarchy of competence in income tax law interpretation. It accepts that judging is a process – one where no judge can be expected to know everything about statutory interpretation or tax law at the outset of his career; instead, it urges judges to build their knowledge and skills over the course of their

[1] Occasionally the requirement of competence is made express. See, for example, Canadian Judicial Council (2004) Ethical principles for judges. https://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf. Accessed 1 Aug 2018 which includes a "Diligence" requirement. Judges are required to "take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for judicial office" (see principle 4.2). The obligation to maintain and enhance knowledge is to be balanced against the "burden of work, the adequacy of resources including staff, technical assistance and time for research, deliberation, writing and other judicial duties… [and] [t]he importance of the judge's responsibility to his or her family is also recognized." (Commentary 4.3).
[2] For the art and archeology metaphor see Sullivan (2016, 29).

careers to move up the competence hierarchy. Finally, section 5 justifies the classification of some types of interpretive approaches as "better" than others not only because they reflect a higher degree of competence (and as a result, are more ethical), but also because they advance other important societal goals.

16.2 Competent Statutory Interpretation Requires Some Understanding of Theories of Language

The necessity for judges to know something about language seems self-evident: one of their foremost tasks in the modern world of regulatory law is to serve as interpreters of words. As urged by Dennis Klinck, professor emeritus at McGill's faculty of law, "[l]awyers [and presumably we could urge this even more strongly for judges] should be alive to other institutions, especially one so radical and pervasive as language, which … 'play a vital role in… the 'social construction of reality.'"

There have been feisty debates among academics, primarily in the United States, but also in other jurisdictions, about the most sensible theories about how to interpret statutes.[3] At this point, the vast majority of legal theorists who approach statutory interpretation, all of Canada's major statutory interpretation textbook authors (and likely the authors of major statutory interpretation texts in other common law jurisdictions),[4] and linguists of all persuasions accept the fundamental understanding that "because statutes are merely 'strings of words,' statutory meaning is not inherent in the text but instead is derived from the interaction of the text and the interpretive process" (Rosenkranz 2002, 2141/2). In other words, words do not have inherent meaning; rather, they are understood through their use.

Knowledge about how language functions displaces any possibility that we could imagine words have a meaning that is dislocated from its usage. That insight leaves open a range of other debates about the best approach to interpreting statutes, but it of necessity displaces an approach that believes one can look only at the words in the statute, without further research or knowledge, and have an effective understanding of how the statute might be sensibly applied to any of a broad range of fact situations. At a minimum, imagine providing a section of the income tax law to a very strong grade 6 reader. The person might be able to read every word of the statute, but

[3] See e.g., Eskridge (2016, 27) "Statutory interpretation has always been, and ought to be, a pragmatic exercise in textual exegesis in light of democratic projects and the larger norms that bind together our community."
[4] See e.g., Beaulac (2008, 5) "…a satisfactory interpretation of a statute cannot stop after the examination of the communicational support of normativity, that is, after looking at the legislative text; it must continue to include more elements of what has been recognized over the years as a legitimate means of ascertaining statutory meaning….".; Sullivan (2016, 32) "The second assumption [that the legislature's views are discoverable by judges] seems dubious in light of modern theories of meaning that emphasize the role of the listener or reader in constructing the meaning of a communication."; Driedger (1983, 3) "Words, when read by themselves in the abstract can hardly be said to have meanings."; Sullivan (2002, 161) "The meaning of a word depends on the context in which it is used. This basic principle of communication applies to all texts, including legislation."; Côté (2000, 280-281) "Without going so far as to say that words have no intrinsic meaning, their dependence on context for real meaning must be recognized."; Sullivan (2014, 8) "Research in psycholinguistics has shown that the way readers understand the words of a text depends on the expectations they bring to their reading. While these expectations are rooted in linguistic competence and shared linguistic convention, they are also dependent on the wide-ranging knowledge, beliefs, values and experience that readers have stored in their brain."

one predicts would have no idea what it means, let alone how to apply it to a specific set of facts. The reason why judges even imagine they can do this exercise is because they bring to the exercise of reading the law a host of prior knowledge and assumptions – views about how legislation is drafted, views about the structure and design of the income tax law, views about the relationship between the judiciary and the legislature and so on. Ross Charnock, a linguist at the University of Paris 9, has argued that "[w]here there is no authority on the question, the judge is obliged in the end to rely on his personal, linguistic intuition, occasionally reinforced by references to dictionary definitions" (Charnock 2006, 91).

The simple argument in this chapter is that to be ethical, that is, to be competent to interpret income tax law, judges must appreciate that their ability to read the words in the income tax law and make sense of how they apply to any particular set of facts is predicated on what they already know. And that if they knew more, they would likely make better (more competent, and therefore more ethical) decisions.

As a result, this chapter does not need to resolve heated debates about some aspects of statutory interpretation; for example, the precise place for legislative intention in the hierarchy of sources to be attended to by judges or debates about whether a legislature can have an intention. Nevertheless, it does express a view on some of them. To illustrate, the position adopted in this chapter is that all sources of information about a provision's role and function should be explored and the quest for articulating a hierarchy of sources that might be applied in the same way in every case, abandoned.

To be clear, although it is not necessary to support the claim about higher-orders of competence in statutory interpretation, I share the view propounded several times ineffectively by Neil Brooks that "in interpreting tax statutes the responsibility of judges is to reach a sensible policy result after considering the consequences of alternative interpretations."[5] This approach to theorizing statutory interpretation accepts that textualism does not offer enhanced certainty,[6] that it is unrealistic to imagine that legislative drafters are all-knowing in their efforts to craft legislation (e.g. that they always use the same word in the same way) and that they adhere to judicial innovations (e.g. that more specific provisions should prevail over more general ones), that attempting to create a hierarchy of sources (e.g. legislative history, administrative guidance, scholarly articles, decision of courts from other jurisdictions etc.) in interpreting a statute ignores the varying usefulness of those sources depending on the question before the court, and that judges play an important role in the democratic function that requires them to understand the policy aspirations of the legislation they seek to apply.[7]

It is easy to imagine critics of this approach; an approach that advocates for judges to learn more about language and linguistics. For example, some scholars have argued that legal interpretation is superior to literary interpretation, suggesting that learning about language through reading statutes might be the highest-order of language-learning possible (or necessary):

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[5] Brooks (2006, 2) See also Brooks (1997) and Sullivan R (1999).

[6] See Eskridge (2016, 17) …"evidence from several fields of law suggests that a stringent canons-based textualism generates *less* certainty in the law and constrains judges *less* reliably than more context-based approaches…

[7] The position aligns with the school of thought that suggests judges are "cooperative partners" in making sense of statutes and not simply agents of the legislature.

> …non-legal interpretive enterprises [for example, literary interpretation], however, merely distance [ ] us from the task at hand. In the absence of an exposition of the specifically juridical nature of interpretation as applied to law, the appeal to the general phenomenon of interpretation is merely a restatement of the problem that profitlessly enlarges its scope. For it implies that interpretation in literature is a more lucid enterprise than interpretation in law, so that the former can cast light on the latter. This ignores the possibility – prominent in hermeneutic writing – that law is itself exemplary for the understanding of interpretation (Weinrib 1988, 1014).

If these critics are right, then what is the point of urging judges to read more about language or literature? The point is that if a judge reads only the literature of statutory interpretation or, even more limiting, simply reads statutes, they may be able to sense of the juridical nature of interpretation in law. But, they will have no exposure to developing (and developed) theories of language, to explorations of how words are used, and to the insights of thinkers who are not constrained by the perceived limits of the judicial exercise. They have, in other words, chained themselves to disciplinary boundaries that we know restrict our ability to benefit from the insights of new knowledge.

This urgings of this part of the Chapter, however, are limited. It does not suggest that to aspire to greater competence requires excelling in linguistics; rather, it suggests that competence demands an ongoing commitment to understand how to make sense of words in their context. To that end, I do not suggest a hierarchy of scholarship on interpretive practices from which judges should choose or a fixed course of study that should be required of all judges. Instead, I suggest that a more limited exercise - of sustained inquiry over the course of a judge's career into theories of language and the usages of words – is sufficient for competence. Without that inquiry, judges risk employing one of their primary talents (interpretation) in un- or under-developed ways. While there are multiple ways for judges to expand their knowledge of language and linguistics, one imagines that one of the more enjoyable and fruitful ways to do so is to engage in the work on law and literature. At least some of that work directly engages with linguistics scholarship and to that end presumably makes linguistics more accessible to a legally (but not linguistically)-educated audience. For example, in his work, *The Word of Law*, Dennis Klinck, brings the law and literature and linguistics scholarships into dialogue with some of the prominent theorists of statutory interpretation. Ultimately, in his chapter on "Interpretation" Klinck settles on the compromise that no particular direction (attend only to the text, attend only to purpose, attend only to intention) can serve independently to help us make sense of words. He advocates instead for a more thorough exploration of each of these elements in any given inquiry:

> Whether we like it or not, language – even, probably, legal language – signifies variously. In saying this, I do not adopt a radical linguistic relativism: the fact that language can be used to 'skew' our perceptions of things does not mean that there is no objective reality, even ethical reality. But it means that our medium for conveying meaning – language – is inadequate to the task. … And appreciating how language means requires becoming sensitive to the complex factors involved in its use (Klinck 1992, 123).

What Klinck believes constitutes the "ethical reality" underlying the interpretation of a particular statute is not obvious, but he concedes that "'reality' maybe amorphous, non-constraining, or at least inaccessible except through language" (Klinck 1992,409).

In a related vein, judges might be encouraged to delve into the work of scholars like Peter Goodrich, Director of Law and Humanities at Cardozo. A line of Goodrich's scholarship seeks to bring into conversation the work of legal theory and linguistic analysis (Goodrich 1987 and 1990). He eloquently raises the challenges of the unexamined life of language in law:

> Despite the linguistically dubious nature of the assumptions regularly made by formalistic (deductive) theories of adjudication, lawyers and legal theorists have successfully maintained a superb oblivion to the historical and social features of legal language, and rather than studying the actual development of legal linguistic practice, both spoken and written, have asserted deductive models of law application in which language is the neutral instrument of purposes peculiar to the internal development of legal regulation and legal discipline (Goodrich, 1987, 1).

The point of raising Klinck and Goodrich is not to offer a comprehensive review of the richness of the available sources of work to read should a judge wish to take seriously her obligation to build, continually, her linguistic competence. It is simply to point to a few small pebbles in the beach of that scholarship to demonstrate that there is no lack of fascinating material to draw from. There is a reason why so many talented legal thinkers – from Richard Posner to Martha Nussbaum to James Boyd White – turn to literature and linguistics: the interdisciplinary pursuit saves us (lawyers) from the hubris of thinking we can single-handedly know with conviction what a word means.

16.3 Competent Judging Requires Insight into the Higher-order Objectives of Income Tax Law

One of the missing components of many inquiries into statutory interpretation (undertaken by theorists of statutory interpretation, including authors of statutory interpretation textbooks) is how to interpret legislation in the light of its broader legislative context. Many authors posit a phrase (for example, "no one under the age of 18 may buy cigarettes") and then demonstrate alternative approaches to interpreting it (Sunstein 2018). But many interpretive problems, and certainly problems related to the interpretation of income tax law, arise in a complex legislative setting.

Imagine, even by a still incredibly simple analogy, how you might read "no one under the age of 18 may buy cigarettes" if the statement was located within a piece of legislation designed to regulate shop keepers rather than a piece of legislation designed to protect students in high school. The requirements for effective interpretation vary *because of* the aspirations of the legislation as a whole; yet the standard texts on statutory interpretation rarely address what sense judges are to make of a provision in the light of this kind of context. That may be excused; drafters of books on statutory interpretation cannot possibly know much about the full legislative context of any particular statute and so they, of necessity, tends to focus on the generalizable features of statutory interpretation and to rely on excerpted aspects of a statute, devoid of the

larger context within which that provision is situated. Because one text on statutory interpretation is not actually a text about interpretation within the context of a particular legislative framework, it misses entirely the way in which that framework affects the enterprise of interpretation. It is a bit like describing a tree and hoping that when someone gets into a forest, they can make sense of it.

In the context of income tax law, effective interpretation requires that judges understand something of the structure and objectives of income tax legislation. Presumably the significance of any particular word in the text diminishes against the richness of the body of work that is the income tax law as a whole. As legislation becomes more complex (and longer) it must be the case that our approach to statutory interpretation must similarly become more sophisticated. Approaches that pretend a law like the income tax law is simple (not that even something as straightforward as "no one under the age of 18 may buy cigarettes" is easy to apply in all circumstances), need to be abandoned in a world where legislatures increasingly have multiple aspirations. It might seem unrealistic to imagine that judges of a final court of appeal have a deep understanding of the multiple objectives and overarching design of every statute they review. However, in some countries tax judges sit on specialized courts and on general courts and in appeal courts, the heavy lifting in tax law is usually undertaken by a small number of judges. It seems realistic that those judges might be expected to have a reasonable grasp of a substantial instrument of social and economic policy, namely, the income tax law.

Happily, developing a firm understanding of a few key motivating ideas can reasonably support tax law interpretation. Most fundamentally, the purpose of income tax law is to tax "income". Although there is some debate among tax policy makers and academics, there is broad consensus that income means a taxpayer's economic income – in other words, accretions to that person's economic wealth or ability to consume (e.g., Simons 1938, 49).
Many of what were once thorny issues of income tax law have been resolved with broad consensus. For example, it is not generally thought that economic income includes some measure of a taxpayer's subjective well-being or requires measuring how that taxpayer subjectively values economic benefits. Instead, we seek to impose tax on the economic power, measured objectively, under the control of the taxpayer.[8] While there are heated and unresolved debates about the best methods of taxation – whether based on income or consumption, for example – those do not need to be resolved by judges who are confronted with legislation that attempts to capture the current dominant model – an income tax law that seeks to tax economic income. Therefore, the first question for a judge to address in reviewing an income tax law case is: has the taxpayer received or earned something of economic value (or incurred a real economic cost in the case of expenses or losses)?

If the taxpayer has received or earned something of economic value, then it is likely that the income tax law will tax the amount unless one of two conditions are present. First, in some circumstances income tax laws exempt amounts from taxation (or taxes them in an alternate fashion) because there are administrative hurdles to taxing the person who receives the economic value at its fair market value at the time of receipt. Second, there are some circumstances where Parliament has made an express decision not to tax a particular receipt (or to tax a particular

[8] In some idiosyncratic jurisdictions, like the United States, perhaps under the control should be replaced with allocated to the benefit of.

receipt in a preferential or alternatively a punitive way) to achieve particular social, political, or economic goals (tax expenditures or tax penalties). In these two cases, a judge may find that a receipt of economic value is not taxed (or is taxed differently than anticipated).

Put another way, judges should assume that in drafting an income tax law Parliament intended to tax persons on accretions to their economic power. In some cases, taxpayers and their lawyers argue, in effect, that even though the taxpayer received something with economic value, and even though there is no administrative or policy reason to exempt the taxpayer, the taxpayer should be exempted based on some narrow application of the legal words used by Parliament. This kind of approach ignores the realities of how words are used to convey meaning. It seems sensible that judges should imagine that Parliament did not intend to exempt some receipts with economic value from tax for no reason.

This approach does not deny the inevitable complexity of tax legislation. Judith Freedman, describing the UK's tax laws, undoubtedly in ways also applicable to other countries, has noted the difficulty in comprehending the legislation in a stand-alone fashion:

> The principles behind tax legislation are not always clear. Policies are confused and objectives are obscure. The position is complicated by the use of the tax system made by governments to fulfil social and economic goals, even though taxation may not always be the best vehicle for this purpose. In addition, tax legislation is based on an uneasy combination of legal concepts and economic outcomes, which do not always mesh well together. Tax systems for a modern, sophisticated economy and complex legal system will inevitably reflect that complexity… (Freedman 2007, 85).

Despite these complexities, though, it seems that no legislative drafter (or legislature) would deliberately decide not to tax economic income with no justification. It might be difficult to discern whether the taxpayer has, in fact, earned economic income; and it might be difficult to identify the policy rationale for exempting particular payments or for taxing them differently than might be anticipated. But, neither of those challenges suggests that anyone would design an income tax law that simply failed to tax economic income for no reason. Yet, that is what some judges appear to conclude.

What the design of modern legislation makes clear is that judges need to develop more sophisticated approaches to its interpretation. If it was ever sufficient to imagine a judge could approach tax law with little or no knowledge of the substantive content of income tax laws and expect to be able to make sense of the legislation by reading each word as though it had a discernable meaning on its face, surely it is time to abandon those dreams in favour of a more realistic approach.

16.4 Ascending the Hierarchy of Competence in Statutory Interpretation in Income Tax Law

This section of the chapter first addresses a preliminary matter: whether judges are bound by the approach to statutory interpretation adopted in previous case law. Second, it sets out a hierarchy

of approaches to interpreting tax statutes in support of argument that judges ought to continue to build their competence.

There is an academic debate about whether statutory interpretation is subject to methodological stare decisis.[9] Put another way, that debate seeks to answer the question of whether judges are bound to adopt particular approaches to statutory interpretation; namely, those advocated by the highest level of courts. In 2011, Abbe Gluck published the results of a thoughtful study of the way that federal courts use (or fail to use) statutory interpretation principles when they interpret state laws. The crux of her inquiry was "why do federal courts interpreting state statutes routinely look to U.S. Supreme Court cases for the appropriate principles of statutory interpretation rather than citing the interpretive rules of the relevant state?" (Gluck 2010). In answering this question, Gluck is forced to expose the more fundamental question of whether statutory interpretation should be conceived of as less "law"-like than other types of law. She argues that it should not and that as a consequence, federal courts should apply the state law doctrine on statutory interpretation when they interpret (other) state laws. She does not take the further step of arguing that statutory interpretation methodology ought to be law: her claim ends with the argument that *if* a state has developed a methodology of statutory interpretation then as a doctrinal matter it ought to be applied by the federal court in interpreting that state's laws.

In Canada and Australia, at least, courts articulate a relatively consistent approach to statutory interpretation. For the most part, judges do not appear to be bound by those statements. Instead, a review of the tax jurisprudence suggests that each judge tends to rely on their "common-sense" thinking about how words in statutes should be read. This suggests that, as Gluck observes, judges tend not to see a method of statutory interpretation as binding on their approach to solving the legal problems presented to them. They are willing to recite the standard mantra about how tax law ought to be interpreted (for example, in the light of its text, context, and purpose) but in practice, they rely on a grab bag of heuristics, grammatical rules, and knowledge about tax law (including legislative and administrative process and public perception) to resolve the issues before them.

This observation – that approaches to statutory interpretation do not appear to have fixed precedential force - has two important consequences for this paper. First, it means that judges are not bound to replicate inadequate approaches to statutory interpretation. Judges in tax cases could, as a doctrinal matter, situate their analysis of a particular provision within the broader context of income tax law and in the light of its overarching purposes. They could do that even though previous decisions have not taken that approach.

Second, judicial reasoning about statutory interpretation in tax law is better understood as reflecting a set of hierarchically-acquired skills. Again, the argument in this chapter is that judges ought to aspire to move to higher orders of thinking. Put another way, judges approach the resolution of tax law interpretive problems at the level of complexity that reflects their understanding of how language is used in tax law drafting and their understanding of the animating principles of income tax law. As their knowledge about language increases and their knowledge of the animating principles of income tax law is enhanced, their interpretive practices

[9] Hart and Sacks (1958) famously asserted that the "hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation."

advance and they should be expected to adopt more sophisticated approaches to statutory interpretation in tax law. To that end, this chapter advances an unusual claim; namely, judicial ethics (like competence) may not be an "on-off" switch. Instead, I argue that an ethical obligation might be scalable and that judges might be expected to become "more ethical", in this context, more competent, with experience and time.

This section of the chapter suggests that we might conceive of judicial approaches to statutory interpretation in tax law as reflecting three stages. In the first stage, judgments reflect a rudimentary approach to tax law interpretation. These decisions show little understanding of how language is used and little or no understanding of the overarching design principles that animate income tax legislation. The judge tends to look only at a very narrow complement of provisions, those that are urged by counsel to most directly apply to the facts at hand. The judge makes no effort to frame those provisions within in the scheme of the Act, to characterize them (as technical rules, administrative concessions, or as rules designed to incentivize particular types of activities), or to understand how reading them in one way versus another might advance the overarching objectives of tax law.

A second stage approach might be described as a functional approach to interpretation. In this stage, the judge appreciates, although likely intuitively, that language can only be understood within a context. This leads to abandoning thinner approaches to interpretation – for example, reliance on the assumption that words have inherent meaning, divorced from context. Nevertheless, the judge does not have a robust understanding of how to discern the surrounding context. As a result, he or she may rely on interpretive cannons, on statements of purpose by the legislature or on an under-developed or simplistic understanding of income tax law.

Finally, as a judge further develops her competence, she might be expected to take an enlightened approach to statutory interpretation of tax law. In this phase, the judge demonstrates clearly the ability to identify the type of provision (or provisions) in issue, can articulate their role in supporting the design of income tax law, and can assess the implications of alternative applications of the provision to the facts at hand. Where an interpretation would encourage tax avoidance, it is eschewed. Decisions reflect the role that tax law plays in supporting democratic ideals.

As an important side-comment, alluded to in the discussion of the enlightened (or fully competent) approach to interpreting tax law, the hierarchy of income tax interpretation stances makes clear a fact that is often obscured in income tax decisions: judges draw the line between acceptable and unacceptable tax avoidance. Many income tax judgments are authored as though the judge is describing a line (for unacceptable tax avoidance) that is somehow present or findable in the words of the legislation. However, the line between what tax planning works and what does not is a line drawn *only* by the ongoing interpretation of tax law by tax administrators and judges. Judges who understand their role in its more complex form see that their judgments draw that line. They must, as a result, see themselves as responsible for the integrity of the income tax system and for the consequences of enabling taxpayers to avoid tax liabilities through tricks that finesse the objective of the law: to tax economic income, subject to administrative or policy limits.

Additionally, a richer understanding of linguistics assists judges to see that the proliferation of terms to describe tax planning on a spectrum – "tax avoidance, tax minimization, tax evasion, tax

fraud, tax planning, tax dodging, tax aggressiveness, tax sheltering, tax abuse, tax mitigation, and tax resistance"[10] – is a way to use language to create categories (and as a result concepts) that can be used by strategic tax planners to argue that the devised plan has not run afoul of legality. In other words, the more we use language to draw fine lines between types of tax planning on grounds that should be largely irrelevant for the purposes of applying the income tax act, the more we create a sense of meaningfulness where none should exit.

So, what should judges do? They should act like any good student of tax law would. When confronted with a section of the income tax law they should seek to understand it. In the early stages, that process includes reading the words of the provision; situating the provision within its legislative context; reading debates and reports from Parliament about it; and reviewing the relevant secondary commentary. It entails understanding whether the taxpayer has earned economic income (or incurred an economic cost) as well as whether there is some administrative or policy reason that justifies not taxing that income, or taxing it differently. Where the provisions seem unique or novel, have international implications, or where it may seem plausible to apply it more than one sensible way on the facts, the judge might want to turn to see how other jurisdictions have resolved the policy dilemma before them and interpret the provision in the light of the experiences (successful or not) of other countries.

As judges gain experience with some of the specificities of the income tax law in their jurisdiction, they should seek to broaden their understanding of how tax law operates. They might read broadly about tax law and beyond the specific and narrow provision before them in any given case. One of the more effective ways to better understand tax law design is to read comparative tax law; which enables developing a richer understanding of how tax systems work and provides exposure at a more fundamental level to the building-blocks of tax law design. They should ensure they have a robust understanding of the distinction between the technical rules of income tax codes (for example, that define base, rate, unit, period and administration) and they should be able to identify and explain deviations from those rules. Finally, they might attend to the consequences of their own decisions, to better understand how decisions can promote tax avoidance and erode confidence in democratic institutions. It is only once judges have developed this level of sophistication about how income tax systems work that they are able to be fully competent and as a result demonstrably ethical in their decision-making.

16.5 Additional Justifications for Ascending the Hierarchy of Interpretive Approaches to Income Tax Law

Are there reasons that judges should embrace the hierarchy of knowledge in interpreting income tax law in addition to its affiliation with the ethical obligation of competence? Five possibilities are canvassed. First, the higher-orders of judicial thinking in this area better support a consistent application of income tax law across income groups. We know that many tax evaders are located in the top 0.01% (Alstadsæter et al 2018). There are several possible explanations for why high-income people are more likely to evade taxes: most obviously, it is easier to them to do so (It's relatively hard to evade a tax on employment income subject to withholding at

[10] This list of terms is drawn from West (2018).

source). Additionally, the very wealthy may have better information about the audit lottery or better (more aggressive) advice about how to avoid income taxes. Another possibility is that some high-income taxpayers believe that avoiding taxes is a game to be played and that the game is entirely appropriate. There is some evidence that when taxpayers are led to understand that they are players in a system and their role is to reduce the tax they pay as much as possible (game-playing), they are more able to justify their tax evasion and tax avoidance (and more likely to do both) (Braithwaite 2003). This belief might sensibly be bolstered by judicial statements like a taxpayer is entitled to arrange his affairs to as to minimize tax that are made at the highest level of courts.[11]

Second, judges with a robust understanding of the interaction between the insights of linguists and the features of income tax law design would be unlikely to make statements that encourage game-playing and add nothing to the legal analysis necessary to the resolve the matter before them. It would be apparent that claiming that a taxpayer can arrange his affairs to pay the least amount of tax adds nothing to an analysis of whether or not a particular transaction has generated economic income (and if the transaction has, in applying the income tax law to ensure the income is taxed). Instead, these kinds of meaningless statements bolster the bravado of taxpayers and their advisors in assuming aggressive (or untenable) tax positions. A review of the literature on tax ethics reveals that tax advisors regularly cite these kinds of statements in advancing the claim that taxpayers must only pay the minimum amount necessary.[12] Put another way, these statements by courts are made meaningful by tax advisors even though they serve no function in resolving cases.[13]

Not only should judges avoid these kinds of assertions, which inspire taxpayers to game-play the system, a higher-order approach to statutory interpretation in tax cases might expect to see judges articulating explicitly the aims of the tax system to raise revenue fairly across income classes and to ensure that the system is adequately enforced (though the judicial branch) to assist in obtaining that objective. Empirical work on the role of social norms and ethics in taxation suggests that compliance decreases where there is social expression that is tolerant of tax evasion,[14] and when taxpayers perceive the tax system to be unfair (including fairness of outcomes, like the allocation of tax liabilities among types of taxpayers) (Wenzel 2007, 33). I found no research that examined the consequences of social expression embedded in judicial decisions; however, the only reason to imagine that it might hold less force than other forms of social expression (like voting in governments) is because it is less exposed to public scrutiny or public view. Yet we might sensibly expect that high-income taxpayers and corporations are as

[11] See e.g., *Inland Revenue Commissioners v Westminster (Duke)*, [1936] AC 1 at 19 (HL).

[12] See e.g., Hansen et al (1992, 679). The authors cite a quote from one of Judge Learned Hand's decisions where he asserts, "[o]ver and over again the courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible" (*Commissioner v. Newman*, 159 F.2d 848 (CA-2, 1947) as illustrative of the kind of language that reinforces the perception that "[t]he tax practitioner's ultimate goal is tax minimization for clients. This goal has the blessing of the courts…"

[13] These kinds of judicial tax-minimization statements might be contrasted with claims by some tax lawyers and academics that, for example, a citizen owes "his government and his neighbours the duty of paying his share of taxes". Imagine if judges repeated that mantra (which may similarly not help resolve the cases before them) instead of the tax minimization mantra. Cahn et al (1952, 9) (statements by Jerome Hellerstein).

[14] Alm and Torgler (2011, 641) "…compliance is decreased, often collapsing virtually to zero, when there is a social expression via group selection by voting of the fiscal regime of a willingness to tolerate tax evasion, such as a majority vote in favor of reduced enforcement on detected evasion; however, compliance can be increased when there is a social expression of an unwillingness to tolerate tax evasion."

attentive to tax decisions at the highest level of appeal courts as they are to other expressive avenues. I also found no research exploring whether taxpayers (or select types of taxpayers) are attentive to or find tax decisions promote (or detract from) tax fairness.

The consequence for evasion by taxpayers at the high end of the income spectrum (or by taxpayers at any income level) has morale effects. Tax morale is an important feature of compliance in a self-assessment tax system; the proliferation of stories about taxpayers failing to pay tax (even when they have earned economic income) risks jeopardizing compliance with the income tax system more generally.[15] Certainly, the empirical work on compliance suggests that compliance increases where tax evaders are seen to have low social standing.[16]
Third, the ethics of some tax practices have come into question in recent years (Berkowitz 2003). In some cases, clearly unethical or arguably unethical advice on the acceptability of certain tax positions advocated by lawyers and accountants have made public headlines. Again, there are a number of possible explanations for why these stories have proliferated: perhaps aggressive tax positions have always been advanced by tax lawyers and accountants;[17] perhaps lawyers and accountants are driven by the financial rewards of tax products with contingency fees (Rostain 2006); or perhaps lawyers and accountants have been inspired by the legal rigidity of the courts in interpreting tax laws in ways that foster loophole-chasing. Judges should be attentive to the risk that their decisions are inspiring unethical practices by lawyers and accountants and that what constitutes "ethical" tax behaviour is shifting terrain.[18] That terrain is part of the context within which the words of tax law should be interpreted.

Fourth, if judges lack adequate competence in interpreting income tax law, government actors may similarly come to ignore the complex aspirations of income tax law. For example, if tax administrators feel that the courts regularly miss the mark in understanding how the income tax system functions, they may stop auditing complex cases and focus on cases where the application of the law is straightforward; government litigators may decline to appeal complex cases because they appreciate that the likelihood they will be successful in walking a judge through the nuances and consequences of proposed interpretations is limited; and legislative drafters may stop trying to draft laws that catch complex transactions because they know that language cannot be used to capture complex ideas reliably and perfectly. The result is that tax systems, even if complex in their legislative design, are only enforced in their most simplistic versions, which may undermine altogether the legislative decision to enact a regulatory system as nuanced and sophisticated as the income tax.

Fifth, judges in tax cases should anticipate that one of the primary audiences for their decisions are tax accountants. It is banal, but worth underlining, that tax accountants have different training and different ethical obligations than tax lawyers. In studies of the ethical orientation of

[15] For the connection between norms (and enforcement) and compliance see Lederman (2003).
[16] Alm and Torgler (2011, 640) "These surveys conclude, among other things, ….that compliance is higher if a "moral appeal" to taxpayer[s] is made by government, that the low social standing of tax evaders can be an effective deterrent…"
[17] See e.g., Bank (2017), arguing that the path to acceptability of tax avoidance has been longer than the recent spate of public stories would suggest.
[18] See e.g., Payne and Railborn (2018), who argue that using "the strict letter of the law" to avoid paying tax is ethically unacceptable in a globalized world. Presumably this argument could be extended to suggest that where judges engage in the identified behaviour the ethical ramifications are similarly (perhaps more) troubling.

tax practitioners in accounting firms, Elaine Doyle, Jane Frecknall-Hughes, and Barbara Summers, business school faculty from Ireland and the UK, found that none of the tax practitioners they interviewed believed themselves to be unethical. They also found that "[a]ll tax practitioners, from both large and small firms, reason in a less principled manner when presented with dilemmas in a tax context than when considering dilemmas in a social context" (Doyle et al 2004, 638). The authors of the study did not attempt to determine why this was the case, but speculate that it "may be due to a socialisation effect in private sector tax practice" (638). Judges' decisions may inadvertently lend authoritative voice to help justify a sense that every tax practitioner exercises laudable ethical behaviour, even though the evidence suggests that their work-based decisions are less principled than their decision-making in social contexts.

Ultimately, judges should seek to interpret income tax legislation in a fashion that respects our interdisciplinary understanding of how words are used to express ideas and supports the effective functioning of income tax legislation. Engaging in a process of consistent and persistent education about language and income tax law serves the ethical obligation of judicial competence and, as argued in this chapter, facilitates a robust democratic state.

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