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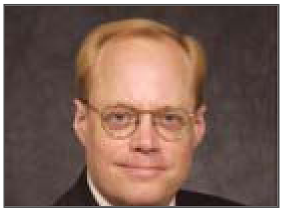

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Apple: Think Different. Tax Different

The Apple Computer slogan "Think Different." set in Apple Garamond. The rainbow apple logo was created by Rob Janoff in 1977. (Photo credit: Wikipedia)

No person or company wants to be accused of skirting tax obligations. Yet despite Joe Biden's "paying higher taxes is patriotic" gaffe, paying too much could make you a chump. When Mitt Romney tried to stem the tide of negative tax press by ***forgoing*** deductions, he was derided for that too. See Romney Paid 14% in Taxes This Year but Could Have Paid Less. All the way around, taxes make a poor spectator sport.

Tax evasion? Bad. Tax avoidance? Less so. Tax planning? Above reproach. Yet sometimes tax planning is so über-creative it is virtually gymnastics. Tax gerrymandering is especially bad if you brag about it like Leona Helmsley. Her "only the little people pay taxes" motto landed her in prison.

Where does Apple fit on this scale? The Senate Permanent Investigations Subcommittee's report on Apple paints a grim picture, but the company seems far less aggressive than many others. In his Senate testimony, CEO Tim Cook distanced Apple from tax gimmicks like IP offshoring. Apple's income sourcing?

Probably fine, despite outrage from Senators McCain and Levin. Lawfully reducing taxes is, well, lawful. And sourcing much outside the U.S. isn't illegal. What's more, Apple shareholders could say the company has a ***duty*** to save taxes if it can.

A key issue is Apple's Irish subsidiary, Apple Operations International. See How Apple Sidesteps Billions in Taxes. Another key issue is whether Apple fairly attributes income in some places in what amounts to a kind of corporate forum shopping. Apple sells huge volumes outside the U.S. and therefore also keeps substantial cash outside the U.S.

Repatriating the funds to the U.S. would trigger a 35% tax to the IRS. And that means it is cheaper for Apple to borrow. Apple opted to raise billions in debt financing to fund share repurchases and dividends rather than simply repatriating its overseas cash. Under U.S. tax law, Apple can return capital to shareholders using debt at lower cost than through repatriating its own money.

Those accused of manipulating taxes often find comfort in a Gordon Gekko-sounding admonition from Judge Learned Hand:

> "Anyone may arrange his affairs so that his taxes shall be as low as possible; he is not bound to choose that pattern which best pays the treasury. There is not even a patriotic duty to increase one's taxes. [T]here is nothing sinister in so arranging affairs as to keep taxes as low as possible. Everyone does it, rich and poor alike...." *Gregory v. Helvering*.

So does Apple think different? Not really. Apple may be a big target, and in some respects Apple is aggressive. But in September 2012, the Senate Permanent Investigations Subcommittee examined the tax avoidance strategies of Microsoft and Hewlett-Packard. The list of similar companies and tax plans is long. But focused on Apple, Senators Levin and McCain claim it skirted U.S. taxes on $44 billion over the last four years.

Much of that is a matter of opinion. The IRS audits Apple continuously. If the IRS could change much of this, it would. But U.S. tax laws need a major overhaul, as Tim Cook testified. And then the IRS—once it addresses a few other problems—needs to enforce it.

You can reach me at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.