Forbes

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THE TAX LAWYER

TAXES 8/19/2016

Will Apple's 'I'll Pay Tax If Its Fair' Excuse Help You With IRS?

Apple CEO Tim Cook hasn't exactly been praised for his remarks about taxes in a recent interview. He told the *Washington Post* that Apple *has to* keep its large profits abroad. American taxes are simply too high to bring them back, he said. America's 35% corporate tax rate has to be reduced if big players like Apple are going to pay up. In fact, Mr. Cook said that he couldn't advocate Apple bringing money to the U.S. *unless* America adopted a "fair rate."

Mr. Cook's interview didn't reveal what he thought *would* be a fair tax rate. But his remarks have prompted discussion about whether the tax system is fair, and about just how voluntary it is supposed to be. Apple reportedly has a staggering $230 *billion* in cash. And some people argue it is keeping profits that really belong in the U.S. out of reach, with most of it overseas where America can't tax it. Apple isn't the only huge company to stockpile cash outside the U.S. where the IRS can't get it. But Apple is good at it, very good.

Apple CEO Tim Cook delivers the keynote address at Apple's annual Worldwide Developers Conference at the Bill Graham Civic Auditorium in San Francisco, California, on June 13, 2016. (Photo credit: GABRIELLE LURIE/AFP/Getty Images)

Most of us can't wait for a fairer rate. And plainly, individual taxpayers can't stash money offshore and avoid paying taxes on it. A 2013 report from the Senate Permanent Subcommittee on Investigations said Apple avoided $9 billion in U.S. taxes in 2012 alone via offshore units with no tax home. CEO Tim Cook testified vigorously that Apple did nothing illegal. Still, Apple saved billions by claiming that companies registered in Ireland are not tax resident in any country. In fairness to Mr. Cook, Apple isn't breaking the law, and he is not alone in thinking the U.S. corporate tax rate is too high.

It may be legal, but it isn't clear it is fair. And individuals can't make these moves. In that sense, the 'pay-if-it-is-fair' mantra is a little like the Hillary defense. The FBI said she was careless, not criminal. Can you tell the IRS, "I didn't know," or "it was an innocent mistake?" Maybe, but some conduct can be considered *criminal* even if you didn't have a bad intent. Besides, it is clear that individuals can't avoid paying taxes just by keeping money offshore.

For individuals, the last seven years of IRS crackdowns show that American individuals *must* pay U.S. tax on their worldwide income. Period. In contrast, more than a few big U.S. companies with far-flung operations (yes, like Apple) go to extreme lengths to situate income offshore. Why not deposit it where it's taxed at a fraction of the U.S. 35% corporate tax rate? In fact, U.S.

law seems to invite putting intellectual property somewhere where the revenue will be taxed at a low rate. Can individuals do that? Nope.

Indeed, by comparison, some individual Americans who pay tax at up to 39.6% on their worldwide income might feel they're getting a raw deal. Can they pay less until the rate becomes more fair? Not really. The stakes for individuals are high. The test for willfulness is whether there was a voluntary, intentional violation of a known legal duty. Willfulness is shown by your knowledge of reporting requirements, and your conscious choice not to comply. Willfulness means you acted with knowledge that your conduct was unlawful—a voluntary, intentional, violation of a known legal duty.

It applies for civil and criminal tax violations. You may not have *meant* to cheat anyone, but that may not be enough. The failure to learn of IRS filing requirements, coupled with efforts to conceal what you did, may be willful. Some courts say willfulness is a purpose to disobey the law, but one that can be inferred by conduct. So, watch out for conduct meant to conceal.

Conduct meant to conceal might include setting up trusts or corporations, dealing in cash, keeping two sets of books, and even swapping goods or services to avoid income. It might include filing some forms and not others, or cash deposits and cash withdrawals. Mixing personal and business funds, failing to keep records, and under-reporting your receipts all look bad. Any of that conduct could suggest willfulness.

Plus, repeated failures can turn inadvertent neglect into reckless or deliberate disregard. Willful blindness—a kind of conscious effort to *avoid* learning about reporting requirements—can be enough for criminal charges. "I didn't know," can work in some cases. But the IRS can be unforgiving, and the IRS can say you were willful in circumstances that you might think are innocent. You will have the burden of proving that your mistakes were innocent. You may not have meant any harm or to cheat anyone, but that may not be enough.

For alerts to future tax articles, email me at Wood@WoodLLP.com. This discussion is not legal advice.