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# WHY IS TAX AVOIDANCE (IM)MORAL? ETHICS, METAETHICS AND TAXES

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HANNA FILIPCZYK\*

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*“But there is no morality in a tax and no illegality or immorality in a tax avoidance scheme”*<sup>70</sup>

*“We are not accusing you of being illegal; we are accusing you of being immoral”*<sup>71</sup>

Along with the intensified efforts to combat “aggressive tax planning”, “harmful tax practices” or “abuse of law” observed at the international<sup>72</sup>, the European Union<sup>73</sup> and the national levels<sup>74</sup>, the

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\* Hanna Filipczyk, dr nauk prawnych, doradca podatkowy, Wydział Prawa i Administracji Uniwersytetu Warszawskiego, e-mail: Hanna.Filipczyk@enodo.pl.

<sup>70</sup> Lord Templeman, summarizing the argument of John Gardiner QC, counsel for the taxpayer, without endorsing it, in: *Ensign Tankers vs. Stokes* [1992] 1 AC, p. 668. I am indebted to Prof. John Prebble for the explanation on the correct reading of this statement, as well as for other helpful comments on this paper. The usual disclaimer applies.

<sup>71</sup> Comment made by the Chair of the Public Accounts Committee of the House of Commons, Lady Margaret Hodge, to Matt Brittin, Google Vice President for Sales and Operations, Northern and Central Europe, 12 November 2012, <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmpublicacc/716/121112.htm>.

<sup>72</sup> See OECD (2015) *Final BEPS package for reform of the international tax system to tackle tax avoidance*, available at <http://oecd.org>.

<sup>73</sup> The most recent and comprehensive initiative is the *Anti Tax Avoidance Package* (January 2016, [http://ec.europa.eu/taxation\\_customs/taxation/company\\_tax/anti\\_tax\\_avoidance/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/company_tax/anti_tax_avoidance/index_en.htm)).

<sup>74</sup> See e.g.: J. Freedman (ed.), *Beyond Boundaries. Developing Approaches to Tax Avoidance and Tax Risk Management* (Oxford University Centre for Business Taxation, Oxford 2008); A. Olesińska, *Klauzula ogólna przeciwko unikaniu opodatkowania* (TNOiK, Toruń 2013).

question of moral status of tax avoidance becomes acute. We are far from consensus as to how it should be answered.

The main purpose of this paper is to present and defend against certain counterarguments the argument following the pattern of Immanuel Kant's categorical imperative in order to make a case for immorality of tax avoidance. This will be done against the backdrop of previous meta-ethical remarks, concerning ethical strategies built to approach the problem of tax avoidance and its moral status.

## 1. PRELIMINARY REMARKS – DOES IT REALLY MATTER?

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Is tax avoidance (im)moral? In order to show the interest of the discussed subject first one devastating objection needs to be dispelled: that the title question is senseless or irrelevant.

It is actually neither the former nor the latter. It is not senseless because – as I believe and assume – generally ethical and meta-ethical questions are not. Let this be considered the underlying assumption of this text, in the post-empiricist era quite naturally accepted even in the realm of analytical philosophy.

More importantly, the investigated question is not irrelevant: it deserves serious attention and answer. The relation between law and morality is a bone of contention for legal philosophers. Not attempting to provide the comprehensive and once-and-for-all resolution of this issue, suffice it to observe that the two domains, whilst most probably based on two distinct kinds of normativity, are intersecting or overlapping with respect to their field of application. Both law and ethics (being the theoretical systematic elaboration of morality) are human enterprises and govern human practice. What is more, ethics raises claim to all-encompassing evaluation of human behaviour. Even a fervent supporter of the “separation thesis” presumably would agree that human actions and inactions performed in connection or in (non)compliance with legal provisions may become subject of moral evaluation. Why should they not if they are human?

But there is more to it. The state's “monopoly on violence” (M. Weber) does not entail that law (whether taken as *law in books* or *law in action*) is morally indifferent. Quite the opposite: the use of force by the state (its officials) calls for moral grounding. Lawyers – those enacting the letter of the laws as legislators and those who give flesh to this letter as practitioners in administrative authorities and courts – are not only „technicians of violence” – or we prefer to believe they are not. Their acts and omissions are subject to moral evaluation.

Judging tax avoidance upfront as morally neutral would make anti-avoidance measures devoid of justification other than pure financial interest of state budget and desire to increase tax collection. That would not be tantamount to these measures themselves being neutral. This is because the harmful

side effect of their employment is a dent in legal certainty for taxpayers<sup>75</sup>. Legal certainty, as a component of the rule of law ideal, is a value which we should not put in jeopardy without proper reasons. Lack of moral reasons justifying the combating of tax avoidance would place us in the situation of imbalance – we would see legal certainty compromised without any offsetting moral (axiological) benefit.

Some of us have the moral intuition pointing to the wrongfulness of practices consisting in tax avoidance<sup>76</sup>. It seems that we observe a swing of public opinion against tax avoidance: it is increasingly considered as morally dubious or at least ambivalent<sup>77</sup>. The negative axiological connotation is marked in the pejorative terminology. When our laws, jurisprudence and doctrine refer to “abuse of law” („abus de droit”), “*fraus legis* doctrine”, „aggressive tax planning” etc., we find ourselves far away from neutral, value-free language<sup>78</sup>. The tendency is also attested by proliferation of texts, published in newspapers and blogs, discussing the issue of moral status of tax avoidance<sup>79</sup>; this circumstance seems to show that there is something problematic in it. The moralizing note is not absent from the jurisprudence of the Court of Justice of the European Union (ECJ) as well<sup>80</sup>.

The idea of moral intuition as a cognitive moral faculty (i.e. able to produce reliable knowledge concerning the characteristics of human acts in the aspect of their moral standing) is venerable and well-founded in the history of ethics<sup>81</sup>, though it has temporarily fallen into disrepute. It may deliver only *prima facie* rules of behaviour, to be subsequently critically scrutinized, but its findings should not be done away with without proper discussion. Accordingly, also the intuitive lack of moral comfort about tax avoidance should not be thus discarded.

<sup>75</sup> R. Prebble, J. Prebble, *Does the Use of General Anti-Avoidance Rules to Combat Tax Avoidance Breach Principles of the Rule of Law – A Comparative Study*, (2010-2011) Saint Louis University School of Law Journal 55:21, pp. 22-46; G.S. Cooper, *Conflicts, Challenges and Choices – The Rule of Law and Anti-Avoidance Rules*, in: G.S. Cooper (ed.), *Tax Avoidance and the Rule of Law* (IBFD Publications, Amsterdam 1997), pp. 13-50.

<sup>76</sup> The empirical evidence pointing to the conclusion that tax avoidance is usually perceived as legal and moral was presented e.g. in: E. Kirchler, B. Maciejovsky, F. Schneider, *Everyday representations of tax avoidance, tax evasion, and tax flight: Do legal differences matter?*, (2003) 4 Journal of Economic Psychology, pp. 535-553. However, the answers given by respondents may have been heavily influenced by the structuring of practical cases they were confronted with. On ambivalence concerning the wrongfulness of “tax evasion” (understood by the author as covering also tax avoidance) see: S.P. Green, *What is Wrong with Tax Evasion?*, Rutgers School of Law-Newark, Research Papers Series Paper no. 45.

<sup>77</sup> Interesting facts about public perception of tax avoidance are cited in: Z.M. Prebble, J. Prebble, *The Morality of Tax Avoidance*, Creighton Law Review, Vol. 43, No. 3, pp. 737-744. “Tax governance” (including tax avoidance policies) emerges as part of corporate governance or corporate responsibility agenda (*Taxing Issues. Responsible Business and Tax*, SustainAbility Limited 2006, [http://www.taxjustice.net/cms/upload/pdf/Sustainability\\_taxing\\_issues.pdf](http://www.taxjustice.net/cms/upload/pdf/Sustainability_taxing_issues.pdf)).

<sup>78</sup> Cf. B. Sage-Fuller, F. Prinz zur Lippe, *Abuse of tax law as language of morality of modern times*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2156223](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2156223).

<sup>79</sup> For an overview of the positions taken in the debate in the British press see, e.g.: *Tax Avoidance is Morally Wrong*, September 2012, [http://www.debatingmatters.com/documents/DM\\_TopicGuidesTaxAvoidance.pdf](http://www.debatingmatters.com/documents/DM_TopicGuidesTaxAvoidance.pdf).

<sup>80</sup> Cf. “Community law cannot be relied on for abusive or fraudulent ends” (case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 68; Joined Cases C-439/04 and C-440/04 *Kittel* [2006] ECR I-6161, paragraph 54).

<sup>81</sup> Among the proponents of moral intuitionism one could mention G.E. Moore, H.P. Prichard or H. Elzenberg.

Summing up, it is justified to assume tentatively that tax avoidance as a practice poses a moral problem. The rest of this paper is an attempt to tackle it.

## 2. TAX AVOIDANCE – A DEFINITION

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The concept of tax avoidance is somewhat elusive. Whereas some tax structures indisputably fall into the category of “tax avoidance”, there are borderline cases located in the grey area of what is debatable and unsure. It is claimed that to make anti-avoidance legal measures effective, they should be shaped with a measure of vagueness, resulting in an uncertain or not fully determinate *ex ante* field of their application<sup>82</sup>. Delineating tax avoidance is often a judgmental issue, and the judgment is made on the case-by-case basis. This lack of complete precision is not attributable only to practical difficulties in applying the concept (or legal provisions which express it); it concerns the concept itself.

The characteristics of tax avoidance, as from the perspective of various tax jurisdictions, whilst displaying Wittgensteinian “family resemblance” to some extent diverge. No one and simple definition of the phenomenon has been worked out at the European Union level<sup>83</sup> – the defining features of tax avoidance (resp. abuse of law etc.) differ depending on whether we examine the EU direct taxation directives<sup>84</sup>, the ECJ’s judicial doctrine of preventing tax avoidance as an overriding reason in the public interest which may justify restrictions on fundamental freedoms<sup>85</sup>

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<sup>82</sup> R. Prebble, J. Prebble, *Does the Use...*, pp. 41-42; J. Freedman, *Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle*, (2004) 4 British Tax Review, pp. 345-347.

<sup>83</sup> The view that there is no uniform (“monolithic”) EU doctrine of prohibition of (tax) law abuse is persuasively advocated in: J. Englisch, *National measures to counter tax avoidance under the Merger Directive*, Oxford University Centre for Business Taxation, Working Paper 11/13, pp. 21-28. See also A. Zalański, *The principle of prevention of (Direct Tax) abuse: scope and legal nature: remarks on the 3M Italia case*, (2012) 9 European Taxation, pp. 449-452; M. Greggi, *Avoidance and abus de droit – The European Approach in Tax Law*, (2008) eJournal of Tax Research, vol. 6, no. 1, pp. 23-44. For the up-to-date discussion of tax avoidance in the European tax law context see: D. Weber, *Abuse of Law in European Tax Law: An Overview and Some Recent Trends in the Direct and Indirect Tax Case Law of the ECJ*, Part 1 and 2, (2013) 6 and 7 European Taxation, pp. 251-264 and 329-340.

<sup>84</sup> Applying national anti-abuse measures to the effect of withdrawing the benefits of respective directives is allowed by: Article 15 of Council Directive 2009/133/EC (OJ L 310, 25.11.2009, p. 34), Article 1.4 of Council Directive 2011/96/EU (OJ L 345, 29.12.2011, p. 8) and Article 5 of Council Directive 2003/49/EC (OJ L 157, 26.6.2003, p. 49) – formulations differ between the directives. The minimum anti-avoidance rule is currently included in Article 1.2-3 of Council Directive 2011/96/EU (as amended by Council Directive (EU) 2015/121 amending Directive 2011/96/EU on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, OJ L 21, 28.1.2015, p. 1).

<sup>85</sup> See e.g.: ECJ rulings in cases C-446/03 *Marks & Spencer* [2005] ECR I-10837; C-196/04 *Cadbury Schweppes* [2006] ECR I-7995; C-282/12 *Itelcar and Fazenda Pública* [2013] ECR I-0000; Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee “The application of anti-abuse measures in the area of direct taxation – within the EU and in relation to third countries”, 10.12.2007, COM(2007) 785 final, available at <http://eur-lex.europa.eu>.

or the ECJ's judicial doctrine of the principle prohibiting abusive practices as applied in the field of indirect taxation<sup>86</sup>.

It is a platitude to say nowadays that the distinction between tax avoidance and tax planning (tax mitigation, legitimate tax arbitrage, etc.<sup>87</sup>) is blurred. What is less frequently observed but equally justified as a claim, this observation holds true also for the demarcation line between tax avoidance and tax evasion<sup>88</sup>. Illegality, typically quoted as a feature possessed by the latter but not the former, is inadequate as a distinguishing criterion, for where there are anti-avoidance legal provisions in force, tax avoidance is, literally speaking, against the law, and can trigger adverse legal consequences for a committer, extending to civil (administrative) penalties. More promising is pointing to the aspect of non-disclosure or misrepresentation, present in tax evasion but not in tax avoidance; however, it does not work smoothly as well since also tax avoiders are “economical with the truth”<sup>89</sup>, e.g. often not revealing the scheme in its entirety, but only piecemeal and only to the extent explicitly required by the legislation<sup>90</sup>.

Still, despite all apparent similarities between them, tax avoidance in fact has its specificity and should not be conflated with tax planning or tax evasion. The state of confusion necessitates terminological clarification. For the purposes of this paper „tax avoidance” will be taken to mean any course of action of a taxpayer fulfilling jointly two conditions: i) based on literal reading of tax laws but contrary to their „spirit” and ii) enabling a taxpayer to derive tax benefits.

The first condition is crucial for the considerations which follow. According to the dictum of Paulus: “contravenes the law whoever does what the law forbids, but acts fraudulently who without infringing the wording of the law, circumvents its sense” (“[c]ontra legem facit, qui id facit, quod lex prohibet, in fraudem vero qui, salvis verbis legis, sententiam ejus circumvenit”)<sup>91</sup>.

It is commonly observed that tax avoidance capitalizes on the incongruence between the language of the law and its purpose<sup>92</sup>. This feature is reflected in one way or another in many statements made by

<sup>86</sup> See ECJ rulings e.g. in cases: C-255/02 *Halifax and Others* [2006] ECR I-1609; C-162/07 *Amplificientifica and Amplifin* [2008] ECR I-4019; C-103/09 *Weald Leasing* [2010] ECR I-13589 or C-653/11 *Paul Newey* [2013] I-0000.

<sup>87</sup> I do not elaborate on or catalogue purely linguistic variety of terms denoting tax avoidance which in practice adds to the confusion (e.g. compare English “tax avoidance” with French “*évasion fiscale*”).

<sup>88</sup> Cf. P. Baker, *Tax avoidance, tax evasion & tax mitigation*, [http://www.taxbar.com/documents/Tax\\_Avoidance\\_Tax\\_MitigationPhilip\\_Baker.pdf](http://www.taxbar.com/documents/Tax_Avoidance_Tax_MitigationPhilip_Baker.pdf); W.B. Barker, *The Ideology of Tax Avoidance*, (2009) 40 *Loyola University Chicago Law Journal*, p. 240.

<sup>89</sup> J. Freedman, *Defining Taxpayer...*, p. 349.

<sup>90</sup> That is why in counteracting tax avoidance much stress is put on building relationship of trust by “full and contemporaneous disclosure” of taxpayer’s tax arrangements. See e.g. J. Freedman, G. Loomer, J. Vella, *Moving Beyond Avoidance? Tax Risk and the Relationship between Large Business and HMRC*, in: J. Freedman (ed.), *Beyond Boundaries...*, pp. 81-100. Consented transparency of tax affairs is considered a token of good will; other examples are the Netherlands and Australia.

<sup>91</sup> *Corpus iuris civilis*, Dig. 1.3.29. The Roman *fraus legis* concept originally concerned civil law only.

<sup>92</sup> President F.D. Roosevelt put it in his address to Congress as follows: “All [methods of avoidance] are alike in that they are definitely contrary to the spirit of the law. (...)” (I cite after W.B. Barker, *The Ideology...*, p. 232). See also, e.g., the ECJ hallmark ruling in C-110/99 *Emsland-Stärke* case, [2000] ECR I-11569, paragraph 52: “[a] finding of an abuse requires, first, a combination of objective circumstances in which, despite

policy makers and many legal definitions adopted by tax legislators. To take an example: “Commission recommendation of 6 December 2012 on aggressive tax planning” commends that the General Anti-Abuse Rule (GAAR) be introduced into the national laws of the Member States. It draws on the previous ECJ jurisprudence. The GAAR is to apply where an artificial arrangement or an artificial series of arrangements is put into place “for the essential purpose of avoiding taxation” (point 4.2.). It is then explained that “the purpose of a arrangement or series of arrangements consists in avoiding taxation where, regardless of any subjective intentions of the taxpayer, it defeats the object, spirit and purpose of the tax provisions that would otherwise apply” (point 4.5.). “Object, spirit and purpose” of the legal provision – it is what tax avoidance disregards and contravenes. It is a feature central to the concept of tax avoidance<sup>93</sup>.

Tax avoidance is about the clash between the literal meaning of tax provisions and their purpose: it is an exploitation of the former to the detriment of the latter. Consequently, in order to counter tax avoidance first legal interpretation is employed<sup>94</sup>. There are, however, inherent limits to what can still be called interpretation – how much purpose can be inferred from laws<sup>95</sup>. Even though the boundaries are set differently in different legal cultures, demarcation line is always there. Where interpretation is pushed to its limits and becomes impotent, the need for distinct legal basis arises and the statutory GAARs or judge-made anti-abuse doctrines emerge<sup>96</sup>. Nevertheless, their mechanism is still such that they target tax avoidance schemes from the perspective of the purpose („spirit”) of tax laws; in this aspect purposive interpretation and anti-abuse measures meet.

The second indispensable element characteristic of tax avoidance (but this time not as an exclusionary condition, distinctive for tax avoidance) is that through engineering tax affairs it enables a taxpayer to derive tax benefits. “Tax benefits” encompass all consequences advantageous for a taxpayer. Tax avoidance allows to directly or indirectly lessen the tax burden of an entity or a person engaged in it, usually by deferring<sup>97</sup>, reducing or eliminating tax liability<sup>98</sup>.

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formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved”.

<sup>93</sup> IRC vs. Willoughby case [1997], STC 995, pp. 1003-1004, Lord Nolan: tax avoidance is “a course of action designed to conflict with or defeat the evident intention of Parliament“. It is most clearly seen in the ECJ jurisprudence in the field of VAT where a defining feature of an abusive transaction is that it results in the accrual of a tax advantage the grant of which is contrary to the purpose of the VAT directive. See *Halifax and Others*, paragraph 74, followed by, e.g., C-525/06 *Part Service* [2008] ECR I-00897 paragraph 42; *Weald Leasing*, paragraphs 29 and 32-45.

<sup>94</sup> V.L. Almendral, *Tax Avoidance and the European Court of Justice: What is at Stake for European Anti-Avoidance Rules?*, (2005) 12 *Intertax*, p. 566: “[p]urposive interpretation is then the main instrument to re-characterize abusive transactions”.

<sup>95</sup> In this connection see an interesting discussion in: W. Schön, *Statutory Avoidance and Disclosure Rules in Germany*, in: J. Freedman (ed.), *Beyond Boundaries...*, pp. 47-55.

<sup>96</sup> J. Englisch, *National measures...*, p. 11-12. This is not to say that with the introduction of the GAARs (or any other legal measures) *all* cases of tax avoidance are surely dealt with by the law.

<sup>97</sup> It is not contrary to the ECJ’s position in *Weald Leasing*, paragraphs 31-45 (discussed in D. Weber, *Abuse of Law...*, Part 1, p. 254). The ECJ does not deny that a deferral of tax is a tax advantage, it only claims that it is not contrary to the purpose of the VAT Directive.

The definition determines or elucidates<sup>99</sup> in what tax avoidance is similar to tax evasion and tax planning and in what they differ. They have in common that they all allow to derive tax benefits. However, tax avoidance is contrary to the spirit of tax laws and not to their letter, tax evasion is contrary to the letter of tax laws and not (only) to their spirit, and tax planning is contrary neither to the letter nor to the spirit<sup>100</sup>. They are *conceptually* distinct, despite the fact that *practically*, classifying the taxpayer's conduct may still pose difficulties.

Two explanatory remarks are in place. First, it is noticeable that the definition does not indicate „artificiality” amongst the characteristics of tax avoidance: it being unnatural, abnormal, contrived, inappropriate for attaining business or economic objective sought, circular, etc. (consider “wholly artificial arrangement” – the fact that it does not reflect economic reality – as an essential feature of tax avoidance in the ECJ's jurisprudence). The reason is that, as it seems, mentioning this feature as an independent one would be superfluous, since it is already implicitly captured within the first condition. The conclusion that a tax scheme is artificial stems from the observation of incongruity or mismatch between the purpose of tax law provisions which are exploited and economic substance of the challenged scheme. Hence the „artificiality” feature is basically the same as the feature of contravening the „spirit of the law” – only viewed from different perspective, where the point of departure is not the provision of law but the operation under scrutiny<sup>101</sup>.

Second, the definition does not mention any subjective criteria: it does not point to any motivational, psychological grounds of the taxpayer's decision: his „intention”. I side with those who exclude such criteria from *legal* definition of tax avoidance<sup>102</sup>, yet for *moral* evaluation of tax avoidance they are essential. I believe that we can be held morally accountable only if we deliberately (intentionally) enter the tax avoidance scheme: only where we *will* to engage in an action showing characteristics delineated above. The reason why subjective criteria are not mentioned is therefore not that their fulfillment is unnecessary; it is rather that they are uncharacteristic of tax avoidance. Any moral evaluation presupposes an agent having certain attitude towards an act he commits. Hence this attitudinal factor is not a prerequisite of tax avoidance as such but rather a condition allowing for moral assessment of it, as of any other human act subjected to such an assessment.

Whereas the definition thus proposed is certainly not criticism-proof (such an immunity seems unachievable for a definition of tax avoidance), it seems to encapsulate well enough the gist of the analyzed phenomenon.

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<sup>98</sup> Tax relief might consist also in alleviating administrative burdens resulting from tax laws; a possibility which is rather theoretical, however. “Tax” should be understood as covering tax *sensu stricto* and other liabilities payable under tax laws (such as interest).

<sup>99</sup> Depending on whether the definition is taken to *shape* the concept of tax avoidance or just *report* or *express* it.

<sup>100</sup> Though it may be that tax planning is not *in line* with the spirit – but is rather neutral to it.

<sup>101</sup> The underlying assumption (which I happily embrace) is that general inclination in tax law is to link tax implications with economic/commercial reality (in spite of the actual operations being inevitably shrouded in civil and commercial law forms).

<sup>102</sup> Needless to add, it is a vigorously debated issue, also in the context of the EU tax law.

In what follows I will call „a tax avoider” a person engaged in tax avoidance (also when acting on behalf or in the interest of a corporate entity).

### 3. THE MATRIX OF JUSTIFICATION STRATEGIES

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If we consider a “moral justification strategy” to be a complete, self-conscious and internally structured intellectual effort to justify a moral claim, potentially, building various strategies can be attempted with the aim to justify answers to the question posed in the title.

A grain of meta-ethical reflection is called for to classify such strategies. *A priori* there are at least two criteria in which justification strategies can differ. The employment of these criteria leads to the elaboration of matrix of strategies available. In other words, the distinctions between justification strategies are predicated upon two dimensions with reference to which every strategy is to be defined and located.

According to the first criterion the strategies can vary as to their scope. One can distinguish a global and a local (targeted) strategy. A global strategy purports to answer the discussed question treating it as derivative or secondary to the (more) general issue(s) of morality of taxation – and the moral assessment of possible attitudes of a legislator or a taxpayer<sup>103</sup>. The question is addressed based on more general considerations. A local strategy, on the other hand, is aimed at answering the question in its own right – in a way not (or not necessarily) preceded by and independent of any generalized, far-reaching analysis.

The second point of comparison is the object and procedure of moral judgment. An extrinsic strategy makes an assessment of moral character of an act on the basis of what is external to this act. The most wide-spread examples of extrinsic strategies are provided by the consequentialist-type positions, deriving ethical claims concerning morality from the consequences brought about by an examined act (clearly, such implications lie „outside” the act itself). As opposed to an extrinsic one, an intrinsic strategy judges an action based on its own characteristics, its own „nature” or „course”. Theoretically, there are four positions in the matrix of strategies dictated by the above criteria: global extrinsic, global intrinsic, local extrinsic or local intrinsic.

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<sup>103</sup> What is, somewhat simplifying, presented here as a dichotomy between „general” and „local” in fact admits of degrees. Namely, the question of morality of tax avoidance can be referred to or answered within the more or less general framework.



#### 4. WHY DO GLOBAL AND EXTRINSIC SOLUTIONS FAIL?

It seems that there is a tendency to adopt, in order to deal with the question of (im)morality of tax avoidance, strategies of the global and extrinsic type. They are global in that they treat this very question as secondary to the general one(s), such as: what is the justification of taxation, what is the “fair share” a taxpayer should contribute, whether he is entitled to any “pre-taxed income”, what is the adequate distribution of tax burden, whether taxpayers have a right to save on taxes, etc. At the same time they are usually extrinsic as focused on the consequences of tax avoidance, in particular on the reducing of the tax burden for a taxpayer and the corresponding diminution of the tax revenue for a state, and not analyzing the characteristics of an action itself.

I argue that the theoretical inclination thus exhibited is for the time being unpromising and hence – misplaced. First and foremost reason for it is that global strategies require and assume elaboration of a satisfactory position on relationships holding between a state, a citizen and ownership. By a „satisfactory position” I mean not any theory or ramification of beliefs concerning interrelation between them, but one capable of gaining universal consent or being rationally debatable. Put another way: for a global strategy to prosper it is not enough to engender a theory; what is needed is a theory which has a good chance to prevail over its competitors.

Nowadays the problem is not that we do not have anything to choose from but that we have too much of it – a number of theories placed painfully at odds one with another. We have several competing pictures of interrelations between a state and a citizen over property and taxation. With no pretence to completeness and not attempting their thorough examination, the following models can immediately be mentioned<sup>104</sup>:

- “liberal” or “taxpayer’s rights model”: of property rights as natural, antecedent to state and law (and tax); this is where we shall put classical position of J. Locke, the Duke of Westminster case „pro-taxpayer literalism”<sup>105</sup>; “demonization of taxes”<sup>106</sup>, “fiscally least burdened” route and manager’s duty to minimize tax liabilities<sup>107</sup> attitudes etc.;

<sup>104</sup> Cf. “models” mentioned in: R.V. Bottomly, *Observations on the Question of Morality of Taxation* (May 2008), SSRN: <http://ssrn.com/abstract=1285382>.

<sup>105</sup> V.L. Almendral, *Tax Avoidance...*, p. 562. *Commissioner of Inland Revenue vs. Duke of Westminster* [1936] AC 1, pp. 19-20, Lord Tomlin: “Every man is entitled, if he can, to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax”. The “rights” idiom is palpable here.

<sup>106</sup> S.P. Green, *What is Wrong...*, p. 14.

<sup>107</sup> About tax avoidance as founded on liberal rights ideology and undermining fair and equitable taxation based on ability to pay see: W.B. Barker, *The Ideology...*, pp. 229-252.

- “state-ownership model”: of property rights as conventional, concomitant and defined by the state and law (and co-defined by tax law); this is the area where L. Murphy’s and T. Nagel’s<sup>108</sup> and (arguably) T. Hobbes positions can be located;
- “common good”, “solidarity” or “communitarian model”: of property rights as secondary to the pursuit of the common good and virtues; in this compartment we can find e.g. the social doctrine of the Catholic Church, and more generally, virtue ethics (the patron of which is Aristotle<sup>109</sup>).

The underpinnings of taxation are the topic of widespread moral disagreement. To claim that the fact of us being unable to reach consensus is an entirely casual circumstance which any day may cease to exist and give ground to the agreement, however tempting as it may be, is not a viable option. As Alasdair MacIntyre argues convincingly<sup>110</sup>, in the contemporary world (of thought and of action) we face the reality of incommensurable ethical and political discourses. It seems that we do not have at hand proper tools enabling us to decide which of our moral theories objectively, *sub specie aeternitatis*, deserves to be adopted. Similarly, as things are now, we do not have argumentative instruments equipping us to debate over the contentious issues and convince others. We dwell in isolated moral and ethical worlds.

That is why the high-level, global ethical debate concerning taxation runs the risk of being inconclusive. This is not to say that these difficulties are certain to subsist and that they cannot be finally surmounted. Far from it; we can or should believe in the final attainment of common ground of ethical convictions – although purely intellectual effort may prove a scarce resource if it is not rooted in *praxis* (a real „conversion” is needed, we should devote ourselves to proper practice)<sup>111</sup>. In any case, it is a process which takes time. What shall we do meanwhile to overcome the deadlock? Temporarily, a local, modest or targeted strategy – the opposite of the generalized one – may offer better chance to succeed. Practically, it is not prudent to make the answer to the question of morality of tax avoidance dependent on the exposition of a global theory, whenever a humble argument is available, better tailored to the question and more closely matching its content.

The above concerned the „globality” as a feature of justification strategies. Let me now comment shortly on their „extrinsic” character. This feature is likely to produce the undesirable effect of tax avoidance being conflated either with tax evasion or with tax planning (or both). If tax avoidance is subjected to moral assessment not as such, i.e. in a way doing justice to its own

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<sup>108</sup> L. Murphy, T. Nagel, *The Myth of Ownership: Taxes and Ownership* (Oxford University Press, Oxford 2002). See also Z.M. Prebble, J. Prebble, *The Morality...*, pp. 719-722.

<sup>109</sup> For interesting remarks, though not comprehensive for the subject, see R. Happé, *Multinationals, Enforcement Covenants, and Fair Share*, in: J. Freedman (ed.), *Beyond Boundaries...*, esp. pp. 172-174.

<sup>110</sup> A. MacIntyre, *After Virtue* (University of Notre Dame Press, Notre Dame 1984).

<sup>111</sup> We may consider our “Tower of Babel”: the fact that we use discordant moral idioms to address the issues of morality of taxation, as an indication of the liberal, Lockean paradigm being in crisis. This is how, I believe, it is; however, the discussion of this problem exceeds the interests of this paper.

characteristics, but rather from the perspective of practical consequences it brings about, its particularity as a position within the spectrum of possible attitudes towards tax liability is often obscured or altogether lost from sight.

The consequences of tax avoidance lie principally<sup>112</sup> in diminishing tax revenues of a state, whereby (some say) the latter is incapacitated in pursuing its social agenda, and are unspecific to tax avoidance – they are triggered also by tax mitigation or tax evasion. Reasoning further along the same lines, the sheer fact of causing the decrease in revenues is either evaluated as morally right or morally wrong, depending on the orientation of the strategy, i.e. its „vector“: whether, absent an explicit legal prohibition, a citizen is taken to be entitled to – to have the right to – make happen such a reduction or not. In either case the tax avoidance is on an equal footing with tax evasion or tax planning, and thus its peculiarity is forfeited. To take another example: in the perception of economists tax avoidance blends with tax evasion and tax planning – they all cause deadweight losses<sup>113</sup>. If we were to base an ethical position on this finding, the emphasis on the economic impact of tax avoidance would clearly make the approach extrinsic – and would lead to ignoring the distinctiveness of this phenomenon.

This result should be considered unfortunate. As already noted, intuitively, tax avoidance has its specificity which should not be overlooked, and this is what occurs if it is treated as boiling down to tax planning or tax evasion.

This is not to claim that a valid moral judgment concerning tax avoidance cannot be based on the characteristics it shares with tax evasion<sup>114</sup>. It is argued, however, that besides those shared features, tax avoidance displays its unique attributes, and that the moral assessment of it should be based (also) on them, in order to take full account of the nature of this phenomenon.

## 5. KANTIAN ARGUMENT AS AN INTERIM SOLUTION

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As an interim solution, I advocate a local and intrinsic strategy: an argument focused on inherent features of tax avoidance. I argue that such an argument can be constructed within the setting

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<sup>112</sup> There are more negative consequences of tax avoidance than this one. I focus on the most obvious one for simplicity, but in order to allow for the possibility that for some other consequences (and extrinsic strategies) the conflation with tax evasion/tax planning does not happen, I qualify my position as indicating a tendency and not an absolute conceptual necessity.

<sup>113</sup> M. Brooks, J. Head, *Tax Avoidance: In Economics, Law and Public Choice*, in: G.S. Cooper (ed.), *Tax Avoidance and the Rule of Law* (IBFD Publications, Amsterdam 1997), pp. 53-91.

<sup>114</sup> There are grounds for moral disapproval of tax avoidance also where the focus is on similarity between tax evasion and tax avoidance, and not on differences between them. The point that there is no factual difference between avoidance and evasion, only a legal difference, was elaborated in: Z.M. Prebble, J. Prebble, *The Morality...*. The argument has been concluded with the statement that “[i]f tax avoidance is factually almost indistinguishable from tax evasion, and if despite being a legal construct tax evasion is in a deep sense immoral, then tax avoidance is similarly immoral” (p. 737).

of Immanuel Kant's categorical imperative. It enables to make a case against tax avoidance as morally wrong.

Kant's moral principle – the Formula of Universal Law (first formulation) is famously worded as follows: “[a]ct only in accordance with that maxim through which you can at the same time will that it become a universal law”<sup>115</sup>. The categorical imperative essentially demands that the agent's rule of behavior (maxim) be such that it could be universalized without contradiction (or, as a matter of fact, any other offence to reason).

The view I assert is that a tax avoider's maxim is not compliant with the Kantian test – a tax avoider contradicts himself<sup>116</sup>. The argument is developed as follows.

### 5a. Operativeness of law

As noted above (point 2. *supra*), one of the defining feature of tax avoidance is that it follows the letter of the law and not its spirit. However, literal reading of law can be effected only locally, in a small scale, in a restricted area. Law as a system could not subsist if read literally.

Any understanding of a linguistic expression presupposes that it is a meaningful utterance. Letters are mute as a stone, they are literally “dead-letter”, without the meaning attached to them they are voiceless signs on the paper or screen. To ascribe the meaning to law is to infuse sense into it – to make it intelligible or rational. Furthermore, the interpretation of law or understanding it<sup>117</sup> is not performed through taking its provisions one by one, individually or in isolation, as detached from the entire structure of it. Law is a systematic and purposive enterprise, penetrated by guiding lines of principles, goals, purposes, rationale, overarching policies. All this in combination can be called the “spirit” of the law; in other words, its internal rationality, *ratio legis*.

It is the very essence of law. I go as far as to claim that law not only practically, but also conceptually cannot exist without the spirit. It cannot be conceived of as deprived of internal rationality. It is essential for law that it can be understood, and it can be understood only thanks to its spirit.

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<sup>115</sup> I. Kant, *Groundwork of the Metaphysics of Morals*. Revised Edition (Cambridge University Press, Cambridge 2012), 4.421. Its variant is the Formula of the Law of Nature: “So act, as if the maxim of your action were to become by your will a *universal law of nature*”. I do not analyze various formulations of Kant's categorical imperative as it is needless for the purposes of this paper. Cf. A.W. Wood, *Kant's Formulations of the Moral Law*, in: G. Bird (ed.), *A Companion to Kant* (Blackwell Publishing, Oxford 2010), p. 291.

<sup>116</sup> Kant's sympathizers find themselves in difficulty trying to find out fully convincing cases of wrongdoings which fall foul of Kant's imperative and to demonstrate that the imperative(s) provide(s) workable standards of right and wrong. Some far-stretched examples are developed. The position I defend provides quite nicely cut example of a maxim actually followed in real life situations, raising ethical doubts – and failing the Kantian test.

<sup>117</sup> I will not elaborate on the alleged dichotomy between understanding law and interpreting it, which legal theorists anchor in Wittgenstein's remarks on “blind” rule following – cf. L. Wittgenstein, *Philosophical Investigations* (Blackwell Publishing, Oxford 1986), § 201. In what follows I will use interchangeably the terms: “interpretation”, “reading” and “understanding” (with reference to law), so that not to unnecessarily complicate matters.

And it is exactly this ideal that a tax avoider betrays or violates. Yet he cannot do it consistently. A tax avoider at the same time makes use of law – with its indispensable, inescapable internal rationality, its spirit – and uses it in a way violating its essence. He assumes the existence of law but acts in a way which if universally adopted, would make law dysfunctional or nonexistent. This is how he contradicts himself.

It entails that his rule of behaviour, his maxim in Kantian terms, could not be generalized without contradiction, as it is required by Kant's imperative. Law without spirit would collapse as inoperative, i.e. not able to be anyhow utilized or followed by humans. This duality (or hypocrisy, if you prefer) is the reason why tax avoidance is called "abuse of (tax) law" – a tax avoider uses law but with distortion.

Detrimental effects of tax avoidance on structure of law often observed are manifold: it is harmful to the functioning of the EU internal market, distorts the allocation of the tax burden among the citizens, threatens the balanced allocation of taxing powers between the states, undermines public confidence, spurs inequality, etc. It is a matter of course that all these kinds of damages can happen in the wake of tax avoidance. However, here we do not direct our attention to such consequences of tax avoidance – to the damages it causes – but to the act itself. It is this act as such that cannot stand the test of rationality, which automatically disqualifies it morally.

In the application of Kant's doctrine here proposed one can easily recognize its usual corollaries. First, the discussed account displays the egalitarian aspect. The fact that it is rationally excluded (or contradictory) to universalize the tax avoidance maxim translates itself into a tax avoider putting himself in a privileged position. Tax avoider makes an exception for himself and refuses to acknowledge an equal standing of other addressees of law<sup>118</sup>. He does it not only in a trivial sense: that he would probably deny others the benefits of using the loophole or inaccuracy in the legal text he himself exploits (for a set of purely practical reasons, e.g. the popularity of a tax avoidance scheme usually makes tax administration not only aware of it but also more determined to oppose it). More importantly, he denies others the possibility of reading law literally as their personal interests commands it – the option of doing what he does. Again, he cannot consent to it because allowing this would be tantamount to the annihilation of law – while in truth he makes use of it. Tax avoidance is parasitic on others' understanding law as a purposive whole.

This corollary is particularly interesting because of equality concerns which are omnipresent in the contemporary political thought<sup>119</sup> and theoretical accounts of legal discourse. This is what "universalizability" or "generalizability" principle – the examples of which are supplied by e.g.,

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<sup>118</sup> „If we now attend to ourselves in every transgression of a duty, we find that we actually do not will that our maxim should become a universal law (...), but that its opposite should rather generally remain a law; we just take the liberty of making an *exception* to it for ourselves (...)" (I. Kant, Groundwork..., 4.424).

<sup>119</sup> E.g., J. Rawls, A Theory of Justice (Harvard University Press, Harvard 1971).

R.M. Hare, J. Habermas, Ch. Perelman or R. Alexy<sup>120</sup> – aims at. “The principle of universalizability underlies the principle of formal justice. The principle of formal rule demands the observance of ‘a rule which lays down the obligation to treat in a certain way all persons who belong to a given category’” (the nested citation is from Ch. Perelman)<sup>121</sup>. As L. Morawski put it, the principle of universalizability is traceable to the generality of law: “to give up this principle would entail abandoning law as a set of general rules, and not individual privileges”<sup>122</sup>. The fact that the tax avoider’s maxim falls foul of the equality ideal is not coincidental. Law rationality has to do with its generality: the “deep structure” of law, its logic cannot manifest itself only in one and single case, for rationality assumes rule-following. Rule-following in turn cannot happen on one occurrence only, but it presupposes consistency in application. Generality is inherent in formal justice but rationality as well: these concepts are closely related.

Second, it is interesting to note that tax avoidance as a practice does not fulfill the requirement of the Kantian categorical imperative also in its second formulation, as the Formula of Humanity as End in Itself: “[s]o act that you use humanity, in your own person as well as in the person of any other, always at the same time as an end, never merely as a means”<sup>123</sup>. As J. Waldron points out, “law has a dignitarian aspect: it conceives of the people who live under it as bearers of reason and intelligence”<sup>124</sup>. This feature of law comes down to treating law as a structure that makes intellectual sense – is intelligible, meaning: organized by the internal logic. It is only upon such understanding of law that its addressees can be treated as intelligent and moral agents, i.e. as able to make autonomous choices, to grasp and follow legal rules. If legal rules are unintelligible, they (by definition) cannot be understood and consequently, they cannot be willingly, voluntarily followed but are inexorably imposed by the ruler’s whim and by force<sup>125</sup>.

A tax avoider prefers to read law as fragmented and void of the „spirit”. This implies that he withdraws the above mentioned dignitarian aspect from the idea of law.

Within the same line of reasoning it can also be claimed that a tax avoider disrespects the dignity of all those engaged in the lawmaking process. He approaches the outcome of their efforts as scarce

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<sup>120</sup> For R. Alexy it is articulated as the rule of self-consistency of the speaker: “1.3’ Every speaker may assert only those value statements or judgments of obligation in a given case which he or she is willing to assert in the same terms for every case which resembles the given case in all relevant respects”, among the Basic Rules of the “Rules and forms of general practical discourse”; R. Alexy, *A Theory of Legal Argumentation. The Theory of Rational Discourse as Theory of Legal Justification* (Oxford University Press, Oxford 2010), p. 290 and *passim*.

<sup>121</sup> R. Alexy, *A Theory of Legal...*, p. 222.

<sup>122</sup> L. Morawski, *Precedens a wykładnia*, (1996) 10 Państwo i Prawo, p. 4.

<sup>123</sup> I. Kant, *Groundwork...*, 4.429.

<sup>124</sup> J. Waldron, *The Rule of Law and the Importance of Procedure*, Public Law & Legal Theory Research Paper Series, Working Paper No. 10-73, October 2010, p. 17.

<sup>125</sup> More precisely, they could be followed on the basis of animal-like, unconscious behavioral conditioning – but it seems inconsistent with the dignity of an agent. And should they be still called “rules” at all?

in rationality, as if it was an “un-human” or “dehumanized” enterprise. For everything which is human is not without rationality.

### **5b. Standard use of civil and company law**

As a matter of fact, it is not an independent argument in its own right but rather a certain clarification or exposition of the general point made above, carried out by showing its specific application.

A tax avoider makes standard use of commercial and (or) civil law. These branches of law happen to be those *par excellence* “rational”, in the sense of being pervaded by the spirit which is quite easily identifiable and fundamental for their understanding by the addressees. Whereas it is (rightly or wrongly) claimed that in tax law – construed in a way mirroring criminal law with its *nullum crimen sine lege* adage – letter of the law plays the crucial role and should not be transgressed (which is pronounced in the similarly phrased dictum: *nullum tributum sine lege*), it seems uncontroversial and commonplace that the case of private law branches is different. Their general principles constituting the intelligible structure are potent enough to remedy the lacunae and impreciseness of any particular rule-giving provision. This is considered as a normal practice, and this attitude allows commercial and civil law provisions to be articulated in a relatively (as compared to tax law) simple, general, broad-lined way: it is known to the legislator upfront that any residual vagueness can quite easily be rectified in practice by making reference to the principles.

How should we then understand the statement that a tax avoider uses commercial and civil law in a standard way? He uses them as the rest of their users do, hence in a way respecting the above features.

In this context, and anticipating a possible objection, it should be reminded that tax avoidance operations differ from (strictly speaking) sham transactions precisely in this regard: they are genuine in that they employ legal forms canonically and correctly. It is in fact the feature on which their success or effectiveness depends. Otherwise, i.e. should they consist in operations defective in the aspect of their legal form (e.g. simulated or fictitious), tax avoidance would not get off the ground. The operations would be immediately discarded as invalid or not having any legal effect and therefore tax implications sought by a tax avoider would never ensue. Such a case would be pretty straightforward, while tax avoidance contrivance involves using commercial and civil law “by the book” – it is one of the reasons why it is difficult to tackle.

To sum up, a tax avoider, while reading the law (here represented by commercial and civil law) as pervaded by the spirit, makes exception only for tax law. In this area he adheres to the *verbatim* reading of legal provisions, deliberately overlooking their spirit. This is how he falls into incoherence, equivalent to immorality.

### 5c. Financing law

Finally, for the sake of completeness I wish to account for what I consider the weakest, least convincing facet of the Kantian argument here proposed. Its weakness lies in that unfortunately, it does not distinguish between tax avoidance and other ways of reducing tax burdens, including tax mitigation and tax evasion – it attacks all these phenomena indiscriminately.

Law would not subsist if tax avoidance became universal also for practical, resp. empirical reasons. Law is a social, real-world, institutional undertaking. As such, it needs constant, stable and quite substantial financing to support its functioning. The main source of such financing is state taxation.

The point is that once tax avoidance were universalized (perpetrated by all), it would deprive the state budget of any revenues which could be used to finance law as a structure made of institutions. This cannot be rationally wished for by tax avoiders because they use law to carry out their business. This is how the contradiction pops out.

This line of argumentation has already been briefly sketched by Z.M. Prebble and J. Prebble. “The argument from Kant’s categorical imperative would proceed similarly to the point (...) that tax avoidance is a deadweight loss to the economy and that for individual taxpayers to achieve gains through avoidance it is necessary that only a minority of taxpayers should engage in this behaviour”<sup>126</sup>. Tax avoidance is – again – parasitic, this time on the „normal”, standard practice of paying taxes and feeding the state budget.

## 6. A SELECTION OF COUNTERARGUMENTS

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At this final stage I wish to discuss a selection of possible objections to the position taken in this paper.

### 6a. Spirit of the law?

It can be argued that the thesis which I subscribe to assumes that the “spirit of the law” exists and that it can be identified – and this is unwarranted.

I do not think that it can be claimed with any measure of plausibility that law is absolutely and hygienically without spirit, purpose, internal logic, “deep structure”, underlying rationale, etc. Thus the first prong of the argument may be forthwith done away with. I should rather address the claim

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<sup>126</sup> Z.M. Prebble, J. Prebble, *The Morality...*, p. 726.



that in many practical cases no such purpose can be identified, and therefore no sense can be made of the allegations of tax avoidance.

It is true that contemporary law is often the bewildering patchwork result of prolific and chaotic legislation. Legislation process is a playing field of many conflicting interests and goals; the upshot of this process tends to be accidental, ambiguous as to its logic, hardly comprehensible. Tax legislation epitomizes complexity and impenetrability of the present-day law. It is particularly tortuous, displaying the unwanted “value-added” in comparison to the standard, easy-to-deal-with or accommodate, tolerable *quantum* of lack of clarity which any branch of law unavoidably embraces. Against this backdrop it is easy to imagine that the spirit of tax law may escape us.

To this I can respond, quite trivially, that whenever we are unable to ascertain the rationale of the given law obviously the proposed argument cannot thrive. It applies only if and where this exercise is doable. In the event of such inability we are not entitled to make moral claims about wrongfulness of a given structuring of operations; what is more, we cannot call it “tax avoidance” (in the light of definition here adopted). Yet it is equally true that we often pretend not to see the underlying rationale of tax laws. Do we really not know that general principle of income taxation is to get a hold of income in order to tax it, or that the idea behind double tax treaties is to avoid double taxation, and not to escape any taxation? This sort of very serviceable ignorance has hypocritical taint and is yet another aspect of the “culture of artificiality” we are plunged in, to use the expression of J. Freedman.

Moreover, it would be entirely wrong to draw a conclusion that since tax law is often obscure and over-complicated it is capable of functioning without spirit, on the basis of purely literal understanding. The difference between tax law and commercial law (and any other branch of law, for that matter) in the aspect of their complexity is one of degree, not of kind: the essence of law is the same across the board. The general claim that law cannot operate without internal rationality holds true also for tax law.

There is, however, a more pertinent problem which makes the exercise of ascertaining the spirit of the law more challenging than it may seem at the first glance. The issue is that we often have to deal not with one and single rationale (intention, purpose, etc.) but rather the entire array of them. Sometimes they seem to be ordered into a neat hierarchy, sometimes not and resemble rather the intertwined mesh of disorderly strands.

I leave aside for further analysis, not to be effectuated within the confined boundaries of this paper, the question of how to deal with possible clashes between different goals or objectives of law and to which of them we should give preference; yet I readily admit it may be problematic<sup>127</sup>. It can be safely supposed already at this stage that the fact of rationale of law being debatable in many concrete,

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<sup>127</sup> For a discussion of difficulties in ascertaining the “intention” of tax legislation, the significance of factual findings of the courts concerning composite pre-ordained series of transactions and the “zigzag” British jurisprudence see e.g.: J. Freedman, *Interpreting Tax Statutes: Tax Avoidance and the Intention of Parliament*, (2007) 123 Law Quarterly Review 123, pp. 52-90.

real-life cases is an important factor contributing to difficulties in discerning tax avoidance and tax mitigation (tax planning). It needs to be reminded that as opposed to tax avoidance, tax mitigation is not in contradiction with the rationale of law.

It may be as well a good place to explain that it is unnecessary (if not altogether inadequate) to put equation mark between what I call the “spirit of the law” and the intention of any empirical legislator, and in particular one of the Parliament (superseded or assisted by any other legislative agenda – the government, the ministers, the president etc.). The claim being made does not commit to accept intentionalism or originalism as a stance in the debate on what is the ultimate goal of the legal interpretation and the methods to attain this goal. On a purely linguistic level, conventionally, we are free to call the spirit of the law the intention of the Parliament, the legislative intent, as we often do. However – in a Kantian vein – I think that the “legislative intent” is only a transcendental idea which we use while interpreting law to which no empirical entity corresponds in reality. In its role as a transcendental, regulative idea it organizes and unifies our thinking, it is a *focus imaginarius* with reference to which we carry out our interpretative activities, our “guiding star”<sup>128</sup>. The “legislative intent” is not discovered or reconstructed, it is constructed. More appropriately it should be called *ratio legis*, or as it is common in the Polish legal philosophy, the ideal or the presumption of a rational lawmaker<sup>129</sup> – not empirically observed but hypothesized.

### 6b. *Nullum tributum sine lege*

One could also make the objection referring to the textualist approach in tax law: claiming that in this area it is legitimate that the letter of the law prevails over its spirit, marking boundaries of what can be achieved with the aid of legal interpretation. As already mentioned, this idea is couched in the maxim *nullum tributum sine lege* (where the black letter of law is meant by *lex*).

Responding to this objection I would point to the difference between law and morality. As stated, morality fuels law, and in particular provides proper justificatory grounding for anti-avoidance measures, yet identity relation between them does not obtain. While it might be conceded that the literal meaning (or “ordinary meaning”) of tax law provisions sets the boundaries of their interpretation and cannot be overridden by purposive considerations<sup>130</sup>, this concession does not have

<sup>128</sup> I borrow this pretty metaphor from Zygmunt Tobor – who maintains, however, that we can and should establish the legislator’s intent, conceived of empirically. See Z. Tobor, *W poszukiwaniu intencji prawodawcy* (Wolters Kluwer, Warszawa 2013).

<sup>129</sup> The expression: “the presumption of a rational interpreter” would be equally adequate.

<sup>130</sup> I concede it only for the purposes of the present discussion. I feel increasing doubts as to whether tax law can justifiably be compared to criminal law, and what follows, whether the same interpretative prohibitions and taboos should apply to both. Judges should rather strive to ensure “integrity” of tax law (in the Dworkinian sense) or take on “pragmatic tax analyst approach” – N. Brooks, *The Responsibility of Judges in Interpreting Tax Legislation*, in: G.S. Cooper (ed.), *Tax Avoidance and the Rule of Law* (IBFD Publications, Amsterdam 1997), pp. 93-129. This does not remove from consideration legal certainty concerns, but lessens their impact.

any bearing on the moral standing of tax avoidance. Restrictions on methods of interpretation of tax law are safeguards: their function is to protect a taxpayer against arbitrariness of the state's agendas and officials. The same reasons are not relevant for morality, as it does not apply coercion. As a result, a moral duty may be more demanding and onerous than a legal obligation<sup>131</sup>.

To make the same point differently: it may well be that the spirit of the law cannot receive full articulation in the interpretation of tax laws. Words, or rather words together with interpretative embargos, curb meanings to be ascribed to legal provisions, confine the sphere of possible interpretation. Parenthetically, for precisely that reason we need the GAARs and similar legal instruments – in order to introduce into the legal system the mechanism enabling to counteract tax avoidance outside the circumference of what can be effected as the interpretation of an “abused” provision<sup>132</sup>. Had the legal interpretation been infinitely liberal, the GAARs would have been dispensable<sup>133</sup>.

Be it as it may, we may still label as immoral what is legal, whereby we evaluate behaviour of a taxpayer using two distinct normative standards: one of law and the other of morality. Whether a taxpayer contravenes the law and effectively can be penalized is hardly relevant here; the fact that he contravenes the spirit of the law suffices to consider his position morally dubious.

### 6c. Theory-dependence

Finally I need to face up the challenge that my thesis is theory-dependent and well-fitted only for those already convinced. One could claim that it makes any sense only for those already sympathizing with the philosophy of Kant. Doesn't it mean that it has no more merit than global theories criticized above – that it is as hopelessly questionable as they are?

I believe that you do not have to be a follower of Kant to accept the argument. The framework of Kant's philosophy was put to work in order to articulate the argument. Even so, quintessentially this argument echoes and reproduces our intuition: that it is morally wrong to have manipulative attitude towards the others and their (speech) acts, including those constituting law (“pretend not

<sup>131</sup> Z.M. Prebble, J. Prebble, *The Morality...* investigates this issue in depth.

<sup>132</sup> More precisely, the choice of anti-abuse instruments is a matter of tax policy, and where the legal interpretation is not enough there is more to choose from than just a GAAR. The alternative is eliminating the loopholes through amendments to the laws or/and targeted anti-avoidance rules (the “TAARs”). The other problem is whether the GAAR should be constructed and construed as a rule or rather as a principle. J. Braithwaite argues convincingly that treating the GAAR as one of the “overarching principles” of the tax system is likely to bring about more certainty since “[a] smorgasbord culture of rules engenders a cat and mouse legal drafting culture – of loopholes closing and reopening by creative compliance” (J. Braithwaite, *Making Tax Law More Certain: A Theory*, (2003) 31 *Australian Business Law Review* 72, pp. ; Working Paper no. 44, December 2002, p. 6). A similar point is made in: D.A. Weisbach, *Formalism in the Tax Law*, (1999) 66 *University of Chicago Law Review*, pp. 860-886.

<sup>133</sup> It may appear that the GAARs are needed to introduce and legitimize “economic substance” considerations in adjudication process: J. Freedman, *Interpreting Tax Statutes...*, *passim*.

to understand” or “twist the words” where it gives benefits). More generally, it is morally wrong to take advantage of the rightful conduct of others, “exploit the system”, use the gamesmanship. As remarked by R. Prebble and J. Prebble, “tax avoidance exploits the formality of the law, and in doing so, exploits the values of the rule of law itself”<sup>134</sup>. In that sense almost everyone of us is some of a Kantian, only not a conscious and consistent one. This does not necessarily sponsor the claim that the thought of Kant pervades our moral reflection, even though in its popularized form it is indisputably one the most prominent moral philosophies. It argues only that Kant gave theoretical underpinnings to certain shared intuitions. Incidentally, this is what Kant himself believed to have achieved. I also believe that when the global theory of taxation is accomplished (along with the practice matching it) it will be capable of accommodating the “humble” argument here outlined even if it does not draw on Kant’s philosophy.

Furthermore, the proposed argument seems to be effective in that it is phrased within the individualist, liberal tradition based on “rights”, it emanates from it – as the philosophy of Kant belongs to the core of this tradition. “Common good” thinkers presumably are more easily convinced that tax avoidance is morally wrong than “liberals”, who are wedded to the individual rights discourse. Therefore the fact that the argument is convincing more for the latter than for the former represents rather its merit than a weakness. Simplifying: we do not need this argument for communitarians, we need it for liberals – and they would be in difficulty trying to refute an argument developed out of Kantian themes.

## 7. CONCLUSION

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Tax avoidance is a social phenomenon addressed primarily by legislation. Nonetheless its “legal” aspect does not waive interest in deliberating tax avoidance also from the moral perspective; quite the contrary, it should rather foster it. We do explore this perspective more and more frequently, as the phenomenon is a growing concern for today’s social world.

Strategies employed to deal with this issue vary according to the general/local and extrinsic/intrinsic criteria. As things are now, we find ourselves unprepared to address tax avoidance within any general framework of compelling persuasiveness. Analyzing tax avoidance extrinsically tends to overlook its specificity, as against and in comparison to tax evasion and/or tax mitigation. Hence, searching for a local and intrinsic strategy seems to be a prudent move.

The advocated solution, propounded as a provisional one, formally derives from Kant’s ethics, but its structure is a reflection of our everyday moral intuitions. One of the defining features of tax avoidance is that it contravenes the spirit of the law. Since the “spirit of the law” is a unifying and

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<sup>134</sup> R. Prebble, J. Prebble, *Does the use...*, p. 45.

rationalizing force which makes the law operational, the maxim of a tax avoider cannot be generalized without contradiction. If not for any other reason, this is why it is immoral.

It is definitely not all which could and should be said on the vast topic of the alleged (im)morality of tax avoidance. It seems that we have still only begun this discussion, the subject of which is intimately related to so many other issues of our political morality.

### SUMMARY

#### Why is Tax Avoidance (Im)moral? Ethics, Metaethics and Taxes

Tax avoidance is a serious problem of public finance and social life. Yet in the world of incommensurable ethical paradigms (A. MacIntyre) arguing that this practice is morally wrong is an uneasy task. The article attempts to develop such an argument.

Tax avoidance, as a course of action in line with the “letter” of the tax law but contrary to its “spirit”, fails the test of I. Kant’s categorical imperative. The “maxim of behaviour” of a tax avoider cannot be universalized without contradiction. He assumes the existence of law and uses it but acts in a way which if universally adopted, would make law dysfunctional and lead to its collapse. Law could not subsist as a system if read literally across the board. This is because its essential feature is intelligibility, which in turn is due to its “spirit” (ratio legis).

This line of reasoning is not without difficulties. However, it reflects a core moral intuition: that it is morally wrong to have manipulative attitude towards others and their speech acts, including those constituting the law. It is one of the reasons why “the avoidance of tax may be lawful, but it is not yet a virtue” (Lord Denning).

**Key words:** ethics in tax law, tax avoidance, tax avoidance morality, the Kantian Moral Argument in tax law

**Słowa kluczowe:** etyka w prawie podatkowym, unikanie opodatkowania, moralność unikania opodatkowania, Argument Moralny Kanta w prawie podatkowym