Normative Theories and Research in Taxation

CBS Tax Colloquium
17 March 2021

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What are we going to talk about?

1. Interdisciplinary Research in Tax Law / Philosophy
2. Positive and Normative Legal Research
3. Normative Implications of Empirical Data
4. Normative Theories in International Tax Law and Policy
1. Interdisciplinary Research in Tax Law / Philosophy

• context: publish or perish
• incentive: publish!
• problem: suboptimal input/output ratio of interdisciplinary work
2. Positive and Normative Legal Research

• factual/positive statements ≠ normative statements

• **positive legal research:**
  What is the law on a certain matter?
  What were the considerations that led to the law being as it is?
  How does the law on a particular matter differ internationally?
  What are the actual consequences of the law as it is?

• **normative legal research:**
  What should the law on a certain matter be?
  How should the legal status quo be changed in order to make it „better“?
  What does „better“ mean in this context?
2. Positive and Normative Legal/Tax Research

• „Naturalistic fallacy“: normative claims cannot be inferred from positive claims.

• But: Normative claims must be informed by correct factual premises, and the reality to which these premises must conform is very complex.

• Example: Arguing that a certain design of a tax would lead to „more just“ outcomes presupposes an understanding of what those outcomes would actually be (factual, not normative question).

• Complicated in the national context, even more complicated in international tax research.
3. Normative Implications of Empirical Data

- Example: ability to pay as a design principle in national tax law
- Common claim: "Persons with the same ability-to-pay should pay the same amount of taxes."
- Contains two claims:
  1. persons should be treated equally and
  2. the ability-to-pay should be the guideline
     (and 3. income is in general considered to be a normatively valid measurement for the ability to pay)
3. Normative Implications of Empirical Data

• Let us introduce
  • Anna, 37 years old, no kids, annual income EUR 250’000 (belongs to the top 1%)!
  • Joe, 74 years old, no kids, annual income EUR 250‘000 (belongs to the top 1%)

• Assumption income tax rate is 20%

• Result: Both Anna and Joe should pay EUR 50‘000 income taxes
• Conclusion: This seems to be a normatively valid result
3. Normative Implications of Empirical Data

Net-welth-to-income-ratio in Switzerland (around 50% of the population)

Median wealth of Anna is EUR 250’000 (1:1)
Median wealth of Joe is EUR 3’500’000 (1:14)

Normative judgements are difficult with incomplete data!

4. Normative Theories in International Tax Law and Policy

- Arm’s length principle (ALP)
- Inter-company transaction have to be at arm’s length
- Current solution according to Art. 7 & 9 OECD MC and the TP guidelines

- Formulary apportionment
- Currently used in some state for domestic allocation of income (e.g. US, Switzerland, but also CC(C)TB)
- Example:
- Consolidated income is shared according to labour (1/3), assets (1/3) and revenue (1/3) in the various states
4. Normative Theories in International Tax Law and Policy

• Example: „We should use formulary apportionment as a guiding principle in distributing taxing rights internationally.“

• “We should“: normative claim!
  Implies that it would be somehow better. → But how?

• Efficiency
  ➢ neutrality?
  ➢ effective single taxation?

• Fairness/Justice
  ➢ distributive justice between states?
  ➢ effective single taxation?
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