



Render *what* as tax through *which* Caesar?

A conciliatory contribution to the discussion

■ by Matthew Turnour

In the winter 2003/2004 edition of this journal Richard Murphy provided a first contribution to a Christian perspective on tax policy in a paper titled: *A Theology of Taxation*.¹ Immediately Richard Teather took issue with most of Murphy's theses titling his response: *The road to hell is paved with honest tax returns*.² The issue then lay in abeyance in FiBQ until the complexities were further explored by Robert Fox in a paper titled *Render unto Caesar: a Taxing Question*.³ In all three papers the theological context is the rendering to Caesar of that which is Caesar's.⁴ In this paper Matthew Turnour, an Australian lawyer on sabbatical at Ridley Hall Cambridge, suggests that the divergent views may be reconcilable, and the discussion of domestic and international tax advanced, by relocating the discussion in the duty to care for neighbours.

Introduction

A reconciling by return to foundations

Upon reviewing the three papers mentioned above, it is clear that there is consensus between the authors, that people have a duty to care for one another. Murphy says that the payment of tax is a Christian's moral duty and Fox seems to agree, stating that taxation 'is the modern equivalent of that responsibility the Lord laid on his people to care for one another'.⁵ Teather agrees there is a duty to care but denies payment of tax is a moral response as it is compulsory. His view is that 'our duty to love our neighbour is far wider than [to pay taxes]'. Our 'duty of charity is one that we have to carry out voluntarily; there is no moral benefit in forced giving' - that is by payment of taxation.

Starting from where they agree, I suggest that the threshold question might be recast as: what is the role of tax in providing care for

our neighbours? The importance of this recasting is that it shifts the subject of the tax debate from the 'tax' to the duties owed to a 'neighbour' and locates tax in that discussion. I suggest that a theology of tax is not about tax, at least not primarily, it is primarily a debate about the way the second of the great commandments, to love one's neighbour (Mt 22:39), is discharged. Recasting the discussion in this way provides a way of carrying forward in a more unified way the development of a theology of taxation. Turning from the simpler domestic tax situation to the challenges of international taxation, I also suggest that when there are cross-border issues, the discussion is assisted by shifting the subject of the debate from the 'tax' to the duties owed to a 'neighbour' in another jurisdiction. I believe that mapping the way that relationships are formed internationally, and linking a tax to those 'neighbour' relationships, is a possible way forward for Christians to think about international tax obligations. ►►

What as tax?

What care should be provided by tax and what care should be provided voluntarily? This is a subject to consider in developing the discussion towards a comprehensive theology of taxation. It is a discussion to which Lester Salamon has contributed. He noted that there are four areas where charity tends to fail and where government is the best provider. They are where charitable provision:

1. is unable to generate through donations resources 'on a *scale* that is both adequate enough and reliable enough to cope with the human-service problems of an advanced industrial society';
2. leaves some without care who most need it because its contributors have a propensity to *favour* those of their own class, race, religion or other basis for social segmentation;
3. is *paternal* and consequently funds flow to charities 'enjoyed also by the rich such as fine arts and opera [and] a sense of dependence [is] cultivated among the poor'; and
4. cannot, or does not, provide a sufficiently *professional* response.⁶

In Salamon's view these four situations where charity is weak 'correspond well with government's strengths', and *vice versa*.⁷

Salamon's opinions do not need to be accepted in their entirety for the discussion to progress. It is only necessary to concede that there is a place for government to provide *some* care alongside charity. Once that step is taken, though, a theology of tax (for the compulsory supply of caring services) and a theology of charity (for the voluntary supply of caring services) can both be understood as subsets of a theology for the supply of care services – that is love of neighbour.

I must now address a difference that has been skated over. Teather makes the point that we 'cannot contract out our duty to others nor nationalise them into the Welfare State'.⁸ Almost certainly he does not mean by this that all care must be delivered personally and



Providing directly and personally
A poor sugarcane seller in Saigon stops by a handicapped beggar to give him some money

directly. I think he means that paying tax does not relieve a person of their duty to care. If I have understood him correctly, then I doubt that Fox or Murphy disagree with him.

We all 'contract' our duty to care when we make a donation to a charity instead of providing directly and personally the assistance ourselves. It is not such a large step from this position, using social contract theory,⁹ for citizens such as Teather, Murphy and Fox *because they care* to elect a government that taxes them and then provides certain types of care in certain circumstances. If they are informed by Salamon, they may choose to do this *because* that is the *best way* for the care to be provided. How satisfactory this explanation is to the reader may turn on the reader's view of the social contract and more generally, democratic processes. The point is that tax and charity can be seen as complementary, not necessarily adversaries.



Providing through a Charity
Magnus MacFarlane-Barrow, CEO of Mary's Meals, with children at the Chirimba Primary School in Blantyre, Malawi where his charity feeds 6,000 children every school day

Building on the ideas so far, I suggest that further progress in reconciling views on 'what as tax' can be made by reading each author as contributing partially to a more comprehensive theology. Fox may be partially right in saying that ▶▶



State welfare provision
Food stamps issued by the USA dept of Agriculture feed over 37 million Americans

►► tax can be, in certain circumstances, ‘the modern equivalent of that responsibility the Lord laid on his people to care for one another’ - but not in all cases. Teather is arguably also right that our ‘duty of charity is one that we have to carry out voluntarily; there is no moral benefit in forced giving’ - but that does not mean that citizens cannot provide for neighbours in some circumstances by paying taxes and ensuring services are delivered by government to those neighbours. Murphy’s statement that ‘the modern application of [charity] is by way of progressive taxation rates’ is also possibly correct if it is not read as an abnegation of the duty to provide charitable care. This is an attempt at reconciliation of views by stating that each may be read as stating a partial truth. Reconciling the divergent views is less important, though, than the central idea that a theology of tax is one part of a theology of care and should not be considered in isolation.

Seeing tax as raised, and paid, for the care of others rather than mere compliance with legal duty enriches the discussion. It provides a more comprehensive platform for discussing the function of tax. Within that discussion of how the second of the great commandments is to be applied will be a discussion of what care should be provided as charity and what as tax. From this simpler case of the domestic tax debate, I turn now to focus on the more difficult issue of international tax concerns.

Which Caesar?

To which government must tax be paid? I have suggested this, also, should be considered in terms of obligations to care for neighbours – the second limb of the great commandment. Framed in this way and informed by Fox’s three principles (Right tax, right time, right

place) I ask: What relationship gives rise to the obligation on a person (or corporation), at a particular point in time, to provide care to members of the community in one place (rather than another) by the payment of tax to the government of that community (rather than another)? The wordy vagueness of this general statement is acknowledged so its practical application to a controversial concern which all three authors consider important may help. That issue is transfer pricing.

What is transfer pricing? For the purposes of this discussion, it is enough to say it is a lawful way of moving taxable profits from a jurisdiction with higher taxes to a jurisdiction with lower taxes. A common way of moving such profits is to locate intellectual property, such as logos and trademarks, in an entity residing in a tax-favourable jurisdiction, and then for the entity in the tax-favourable jurisdiction to charge a fee for the use of the intellectual property to entities in less tax-favourable jurisdictions. The amount of the fee may be substantial and the cumulative

effect on tax revenues can be very significant. This is because the fee can amount to all or most of the taxable profit, leaving little or no taxable profit in the less tax-favourable jurisdiction.

How might transfer pricing be thought about theologically with regard to the second of the great commandments? I suggest that a way forward into this issue is to map the relationships and link the taxes to them. I suggest this because it is the ‘neighbour’ relationships that give rise to the obligation to care.¹⁰ In the context of pre-global pre-multinational sovereign states, the relationships could be taken as given and linked to citizenship. Where the only ►►



Transfer Pricing

►► connection between a trader and the citizens of a country is that there is an agreement that its trademark can be used by an entity in that country, the relationship of neighbour is tenuous. There is however a relational link. I suggest that it is upon that relationship that a theology of tax should be developed. But how?

The G20 has said it will focus on taxing profits 'where economic activities deriving the profits are performed and where value is created.'¹¹ The method is not clear. The language is vague. One possibility is to focus on the contracts that underpin the economic activity and attach the tax to them. Consumption taxes are obvious examples of a link between a tax and a contractual relationship. At a more general level, it might be suggested that merely forming any relationship with a person in the jurisdiction justifies taxation. Arrival and departure taxes are a tax linked to forming and dissolving an association with a particular country. Where a trader does not physically attend a country but merely allows its logo to be used for a fee, where is the nexus forming the 'neighbour' relationship? Can the impact of the commercial relationship on the country or the impact of the utilisation of brand itself be taken into account? Possibly.

The Australian Treasurer announced in February 2014 that if he was 'advised that an Australian company is a major taxpayer and it is purchased by someone overseas and therefore its tax liability would be reduced domestically to zero' that he would take this into account in deciding whether or not to allow the takeover'.¹² To put this in relational terms, if entering into the relationship will be too adverse to the Australian people then the Australian Treasurer will stop the formation of the relationship. Stopping the contract forming is an extreme response. 'Sin taxes'; designed to discourage, smoking, alcohol consumption or even eating fatty foods are

lesser examples of the same idea, that where the effects of a contract are adverse, then a tax is appropriate. Many jurisdictions including the UK also require traders to put health warnings on cigarettes as the trader's supply of the goods is adverse to the health of the citizen. Again Australia is even more demanding and has prohibited the use of intellectual property in certain cases. It specifies that cigarette wrapping 'must be drab dark brown' and there is a general prohibition on trademarks appearing on cigarette retail packaging.¹³

Turning now to international tax and linking these ideas: if the relationship of a trader through the contract or the display of intellectual property is adverse to a country, is it appropriate to deny the trader the right



Relationship

Should a factory pay its taxes to the area in which it has a close relationship?

to contract or to allow the use of the brand in the jurisdiction? The Australian government seems willing to ban contracts and brands to ensure the wider public are recognised as 'neighbours' for whom regard must be had, by any trader connected with that jurisdiction. Since the landmark case of *Donague v Stevenson* in 1932 the law of negligence has required persons to have regard to the impact of what they do, or fail to do, on their 'neighbours'. I am suggesting that mapping the relationships and linking tax to it may be a way to progress the theological discussion on this difficult subject. My point ►►

►► is not to solve the problem of transfer pricing in this paper. It is to lift the debate from a question of ‘tax’ to a question of relationships and provide illustrations of how a relational analysis might be used.

Implicit in this analysis is that the nature of the tax will depend upon the nature of the relationship. The closer the tax can be linked to the nature of the relationship, arguably the better. It is beyond the scope of this paper to explore avoidance and minimisation techniques. However I suggest that if the relationship is mapped through, for example, the brand use, and a government like the Australian government is willing to ban the use of brands, then tax might be more easily collected if the threat of loss of brand utilisation lurks in reserve. If the relationship is adverse, then there is all the more reason for denying the relationship or taxing it more onerously, as the affected ‘neighbour’ will be in greater need of compensatory care.

Conclusion

The quest for a theology of taxation is advanced by recasting it as a debate over how the second of the great commandments, to care for others, is to be carried into effect. Sometimes care may be best provided charitably as a voluntary contribution, and sometimes it might best be provided through taxation as a compulsory contribution. The theological discussion of *which* government is entitled to tax, is also advanced by looking at the relationships involved. The issue of transfer pricing might be advanced by reviewing it as a question of relationships in the light of steps already utilised in some countries. Examples exist of governments linking taxes, and even the right to trade at all, to the positive and negative effects of a relationship, contractual or otherwise, upon a country. Rendering what as tax and to which Caesar are questions that can usefully be considered theologically in the light of how we love our neighbours. ■

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- 1 *FiBQ* 7:4. pp 3-7 (hereafter Murphy).
- 2 *FiBQ* 8:1 pp 3-5 (hereafter Teather).
- 3 *FiBQ* 15:3, pp 7 – 12.(hereafter Fox).
- 4 Murphy p 3, Teather, p 3 although arguably only because he is responding to Murphy and Fox, p 7.
- 5 Fox p 7.
- 6 Lester Salamon, ‘Of Market Failure, Voluntary Failure, and Third Party Government: Toward a Theory of Government-Nonprofit Relations in the Modern Welfare State’ (1987) 16 *Journal of Voluntary Action Research* 35, pp 35 and 40-42. Italics added. (Hereafter Salamon)
- 7 Salamon p 43.
- 8 Teather p 3.
- 9 Social contract theory is either an implicit or explicit agreement among members of a society to cooperate for social benefits, eg by sacrificing some individual freedom for state protection.
- 10 Elsewhere I have mapped how relationships give rise to obligations to care in the context of access to resources. see: Matthew Turnour *The Stewardship Paradigm* 1999 pp 118-131 <http://eprints.qut.edu.au/35810/1/35810.pdf>
- 11 G-20 Communiqué Meeting of Finance Ministers and Central Bank Governors Sydney, 22-23 February 2014 [9]:
https://www.g20.org/sites/default/files/g20_resources/library/Communique%20Meeting%20of%20G20%20Finance%20Ministers%20and%20Central%20Bank%20Governors%20Sydney%2022-23%20February%202014_0.pdf
- 12 David Crowe and David Uren, ‘New Tax Test on Foreign Takeovers’ *The Australian* February 25, 2014. (In fact the law has not changed but the statement probably does signal a change in its application by the Treasurer.)
- 13 Tobacco Plain Packaging Act 2011 s 19(2)(b)(ii), 20 and 21 (Australia).