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Focus on the Facts

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FOCUS ON THE FACTS

by

*Shay Menuchin**

ABSTRACT

This Essay highlights the importance of the data analysis process (the curation) as part of analyzing and determining the strength of tax positions. This short Essay will review some of these challenges and discuss what can be done about them.

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INTRODUCTION

In law school we are taught that it is not enough to know the law and its principles. The important thing is to know how to apply the law to a given set of facts. As such, in exams throughout law school we are given

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problem questions that give us the factual scenario and ask us to apply the law and principles we just learnt to these facts and conclude what is the correct answer.

While there is plenty of discussion on tax law itself and on the definition and application of the legal terms, it would appear that there is not enough discussion on the not less important part of gathering the facts, understanding the circumstances, and curating the basis for the application of these legal rules. This Essay attempts to be a step in this direction. This issue is not new. It has existed all along. The increase in transparency and digitization only make it more relevant than ever.

In practice, we learn that the facts are not given to us on a silver platter; we need to research and check carefully to ascertain what are the facts and circumstances of a given situation. We review legal documents, invoices, bank printouts, and trial balances. In some cases, we interview people who participated in the transaction and can give us more insight. After an elaborative exercise, we summarize what we have learnt and apply the law to this summary of facts to provide our position on the application of the law to the given facts and circumstances as we understand them to be. In a way, students spend years learning how to apply the law to a given set of facts, assuming certain facts exist, living in a world where the facts are clear, summarized, and are seemingly presented on a silver platter. But are they?

Establishing the factual circumstances of a case was always a challenge. In common law jurisdictions, judges make decisions based on the facts as these are presented to them by the parties—in our case, the tax authorities on the one hand and the taxpayer on the other hand. There are detailed and extensive rules of evidences and procedure that govern the method by which the parties can present, their case and or rebut the other party's position, and there are certain presumptions that apply and burden of proof that has to be met. At the end of the day, judges, looking at all the evidence presented, have to decide what the factual narrative of the case is and summarize it. It is possible that this narrative differs from what actually took place because, for example, the party was not able to establish its case, the burden of proof was not met, and the evidence/witness was not available. Nonetheless, at the end of the day, the legal principles will be applied to the facts as determined by the court based on the evidence presented to it.¹

1. There are many questions related to the rules of evidence and burden of proof that are raised as a result of the discussion in this Essay. For

As a result, the legal outcome of the case may differ significantly from the outcome contained in an opinion provided to the taxpayer by her tax advisers. This is not new. It has existed for many years. The taxpayer has the responsibility to know its facts, to document them, and to be able to establish them, if and when required, to support her case in audit or in court. Transparency on the one hand and digitization on the other hand, makes this process more challenging in several respects. The purpose of this Essay is to highlight the importance of the data analysis process (the curation) as part of analyzing and determining the strength of tax positions. This short Essay will review some of these challenges and what can be done about them.

I. TAXPAYERS AS CURATORS OF FACTS

In today's world, transparency prevails. Whether we like it or not, information and data we generate and give on a regular basis minute by minute, in most cases for free, is collected by private and public organizations, shared among them and with others, each with his or her own agenda and purposes for using the information.² Most of it is done without taxpayers' true consent.³ Technically, we all agreed to it; we just did not know, or even if we knew, preferred to ignore this, or we were unable to do anything about this.⁴ This current principle/premise that a person does not legally own his or her facts and the digital footprint he or she generates is a fundamental principle in our current environment

example, whether the burden of proof in tax cases should be shifted off the taxpayers' hands, as is the case in many jurisdictions, to the hands of the tax authorities. We will leave this discussion to a separate article.

2. Matt Simon, *Facebook Knows More About You Than the CIA*, WIRED (July 24, 2019, 7:00 AM), <https://www.wired.com/story/facebook-knows-more-about-you-than-cia/>. For a comprehensive discussion, see SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A FUTURE AT THE NEW FRONTIER OF POWER* (2019).

3. See ZUBOFF, *supra* note 2, ch. 8.

4. *Id.* Technically, we can avoid using services like Google, Gmail, Facebook, and use VPN and privacy respecting browsers for our Internet use. This is likely to reduce our information sharing but is unlikely to remove completely our digital footprint. As Zuboff refers to this—"It is difficult to be where rendition is not." *Id.* at 241.

as it allows third party to collect, share, or exchange information about them without their knowledge or consent.⁵

The combination of the transparency with the digitalization generates an interesting and challenging outcome. On the one hand, the amount of information that is available nowadays is far greater than information that was available only few years ago. Most of this information is in digital form, which means that it is easy to process and also in many cases easy to access and analyze. Every document leads to a trail of other documents. It is no longer possible to control the facts. A better view, suggested by this Essay, is to curate the facts and to be able to identify the true and false, the important and the insignificant, and above all, acknowledge control is no longer a possibility as “unknown knowns” or “unknown unknowns”⁶ may exist.

5. Any discussion of this principle is beyond the scope of this Essay. There is plenty of discussion elsewhere of the pros and cons of the current environment. Suffice it to say for our purposes that the business model of companies as Google, Facebook, Instagram, and the like is based on this principle. *Id.* Zuboff, *supra* note 2, contains an updated and in-depth discussion of the current state of affairs and the dangers of not changing the status quo of users not owning their data and allowing third parties to collect, manage, and exchange users’ data. The current state of affairs gives rise to several issues related to human rights laws, burden of proof questions, and law of tax procedure that are beyond the scope of this Essay and will be addressed separately.

6. An “unknown unknown” in our context can be a fact or data where we are unaware of its potential existence. Compare to “unknown known,” which is a fact that we are aware can exist, and we just do not know if it exists or not. A known unknown means that we know there are some things we do not know. As for unknown knowns, a philosopher by the name of Slavoj Žižek extrapolated to define this term: The things that we know but are unaware of knowing. So, in short, there is a big difference. “*Known Unknown*” vs. “*Unknown Known*,” ENG. STACK EXCHANGE, <https://english.stackexchange.com/questions/35284/known-unknown-vs-unknown-known> (last visited Nov. 2, 2019). Unknown unknowns (unexpected or unforeseeable conditions), which pose a potentially greater risk simply because they cannot be anticipated based on past experience or investigation. Known unknowns result from recognized but poorly understood phenomena. *There Are Known Knowns*, Wikipedia, https://en.m.wikipedia.org/wiki/There_are_known_knowns (last visited Nov. 2, 2019). In this context, consider also the discussion by Nassim Nicholas Taleb of “black swans.” NASSIM NICHOLAS TALEB, *THE BLACK SWAN, THE IMPACT OF THE HIGHLY IMPROBABLE* (2d ed. 2010).

Moreover, the quickly growing amount of information means that taxpayers need to continuously curate and review their position to make sure that all legal opinions received and positions taken are still applicable in light of accumulating evidence being generated on an ongoing basis at a pace that is faster than before. To the extent change is required, taxpayers need to respond quickly and align the legal opinions and positions taken to match the ever-changing facts and circumstances. Again, this is not new. The changing landscape only substantially increases the pace of changes, the amount of data, and the focus taxpayers are required to show to be able to keep up with the pace of change. In a way, the process that is outlined below should be looked at more as a continuous cycle and less as a one-off process.

II. THE TAX PROFILE—SETTING PRIORITIES AND PREFERENCES

Before we jump in to discuss the curation process, a few words about the tax profile and the important task of setting priorities and preferences in the determination and design of the tax profile, especially in light of the lack of control. With growing compliance requirements worldwide,⁷ taxpayers are required to spend more and more money and time to recruit more people to fulfil these requirements. With the increase in compliance requirements and costs, there is more pressure on disclosure and transparency on the part of taxpayers and a corresponding increase in the cost and attention required to ensure that a structure or a business model is properly implemented. Taxpayers need to consider these matters prior to adopting a structure or plan that can be appropriate for them.

As part of the move to a more transparent operation, and with the growing demand for disclosure and reporting in many jurisdictions

7. For example, the Country-by-Country reporting requirements introduced by the OECD in the BEPS initiative and implemented by many jurisdictions worldwide require multinationals with more than a certain amount of revenues to provide extensive disclosure of their revenues and other information per jurisdiction. See *What Is BEPS?*, OECD, <http://www.oecd.org/tax/beps/beps-about.htm> (last visited Oct. 8, 2019). Another example, consistent with the OECD BEPS initiative, is the requirement for additional disclosure requirement, the HMRC requirement for large businesses to publish their tax strategy. *Publish Your Large Business Tax Strategy*, GOV.UK, <https://www.gov.uk/guidance/large-businesses-publish-your-tax-strategy> (last updated June 22, 2018).

and for different purposes (accounting, securities regulations, and tax), taxpayers are likely to put consistency and simplicity as two of the principles governing and guiding their tax behavior. The increase in compliance requirements and the cost of being compliant makes tax planning more complex.⁸ Yet, taxpayers are still expected to show similar tax results with a relatively similar budget. As a result, like tax authorities, taxpayers are required to become more efficient and smarter in using their available resources, while ensuring that the reporting in the various jurisdictions and to the various authorities is consistent.⁹

The increase in reporting makes consistency more important than before.¹⁰ In this environment, taxpayers, especially those with limited resources, may find it beneficial to apply simplicity as a guiding principle in tax matters. Simplicity and consistency are also very relevant in the context of public profile. The availability of data and its public nature requires taxpayers to examine whether their business model or the planning they would like to embark on is appropriate to their overall public profile and whether they will be able easily to explain their tax affairs not only to tax authorities but also to clients, employees, investors, and the public at large. Some taxpayers may be more aggressive than others, and these taxpayers will need to make sure

8. Another reason for the additional complexity is different unilateral actions taken by governments around the world following the OECD BEPS project. For example, the U.S. 2017 tax reform. Pub. L. No. 115-97, 131 Stat. 2054 (2017).

9. For the use of AI and data analysis by tax authorities, see, e.g., Internal Rev. Serv., *Advance Data Access, Usability and Analytics to Inform Decision-Making and Improve Operational Outcomes*, IRS.GOV, <https://www.irs.gov/about-irs/strategic-goals/advance-data-analytics> (last updated May 15, 2019); Andrej Kovacevic, *AI Is Changing How We Pay Taxes, and How They're Collected, Too*, READWRITE (Mar. 22, 2019), <https://readwrite.com/2019/03/22/ai-is-changing-how-we-pay-taxes-and-how-theyre-collected-too/>.

10. For example, taxpayers that are subject to the CbyC reporting will be required to show consistency between their CbyC reporting and their local filing and between the master file and the local file, explain differences from financial reporting, and reconcile all this with their public profile and data available on them and their dealing from the various sources. HMRC's requirement for large businesses to publish their tax strategy puts an additional pressure on companies to ensure that what they say they do is consistent with what they actually do in practice. *Publish Your Large Business Tax Strategy*, *supra* note 7.

that their approach is consistent with their overall public profile and with the potential adverse consequences of negative public coverage due to tax matters.¹¹ A taxpayer that is very conservative in its overall operations and presents a conservative profile overall should take this into account when making decisions in tax matters.

For example, consider a company that is a consumer services business. The company has been very successful in creating a solid brand for itself and, as a result of its success, ended up with several competitors who are trying to follow its success. As part of its brand, the

11. Lush, for example, is a company that is proud not to engage in using loopholes in its tax planning. In its disclosure to the HMRC company tax policy requirements it stated:

This idea that tax is the common enemy of all people has led some companies to think that it is somehow acceptable to manipulate their business structures and accounting practices to avoid paying their contribution. But this attitude is not just self-serving, it is also short sighted, because those taxes are what will keep the infrastructure of our society in place and deliver healthy customers to our doors on well maintained, clean, lit streets.

....

At Lush, we believe that we should pay a fair tax in each of the countries in which we operate. We will take advantage of legitimate business tax structures and benefits available in each country—but we will never search for loopholes or devise schemes that stretch the rules beyond their obvious intended purpose.

Company Tax Policy, LUSH, <https://uk.lush.com/article/company-tax-policy> (last visited Nov. 2, 2019). Other companies do not always share the same view. In 2012, in the United Kingdom, Starbucks (and other companies) witnessed the consequences of adopting what was perceived to be a relatively aggressive tax planning in a business that is based on selling goods to the general public; customers preferred to buy elsewhere in the wake of the tax planning testimonies in the U.K. Parliament. See Juliette Garside, *Amazon UK Boycott Urged After Retailer Pays Just £4.2m in Tax*, GUARDIAN (May 9, 2014), <https://www.theguardian.com/business/2014/may/09/margaret-hodge-urges-boycott-amazon-uk-tax-starbucks>; *How Starbucks Avoids Paying Taxes in the U.K.*, FIN. POST (Oct. 17, 2012), <https://business.financialpost.com/news/retail-marketing/how-starbucks-avoids-paying-tax-in-the-u-k>.

company is promoting a motto of being considerate, along with contributing to the environment and to society. Entering into sophisticated tax positions (or even tax positions that would be perceived by lay people to be sophisticated or aggressive just because they are difficult to explain to the lay person) may put at risk the company's brand as such tax positions can be perceived to be inconsistent with the general message the company is trying to promote, regardless of whether the company is successful in sustaining its tax positions on audit. This can also cause it to lag behind the competition if customers decide to shop elsewhere. The company should consider this potential impact when designing its tax profile.

Contrast this example with a scenario of a large distributor and discount seller of goods that is known for its low prices. Its size and internal efficiencies allow it to keep the prices low and, as a result, to be ahead of potential competition. Customers who would prefer not to buy there would be required to pay more for the same goods elsewhere. As a result, this taxpayer is likely to be less sensitive to potential adverse reaction as a result of being involved in sophisticated tax planning. A more sophisticated and aggressive tax profile is not inconsistent with the taxpayer's overall profile as a very efficient operator. Its competitive edge is its low prices, which are likely to keep customers regardless of its tax affairs.

This changing environment and the move to a data-based economy require taxpayers to identify priorities and preferences and act based on these priorities and preferences. Very few taxpayers, if any, are able to dedicate the resources and time necessary to fully manage their digital footprint and the data they generate and that is being generated by third parties about them, not to mention the outcomes and analysis of data done by third parties with respect to them.

Taxpayers will have to decide on the amount of investment and resources they are willing to dedicate to data management and proactive management of their tax affairs. Based on these decisions, taxpayers should also make matching decisions on the type of structures and planning they should pursue, as some structures and planning are more fact dependent than others and, as a result, require more attention and more care in implementation in order to continue and be viable.

Once the taxpayer has decided on its tax profile and overall tax risk aversion, the taxpayer has to review its tax positions and make sure these are in line with such profile. Traditionally, review of the tax positions focuses mostly on the legal positions and their probability to sustain a tax audit, if and when challenged. Today, as this Essay

suggests, the review has to be wider in its scope and contemplate more than just the legal arguments and their viability. Tax positions should be reviewed to ensure consistency with the tax profile. Tax positions should also be reviewed, preferably prior to being entered into, from a resource perspective, to ensure that the taxpayer is able and has the resources required to maintain the position.

Given the amount of available data, taxpayers should also review the factual basis for their tax positions and analyze potential weak links that might lead to the collapse of the position. As we know, even the strongest legal position will not stand if the factual basis upon which it rests is not there. In a world of data, transparency, and connectivity, it is highly probable that there is more data on individuals and businesses that they are not aware of than data that they are aware of, and the data that they are not aware of can potentially hurt them. Aside from improving the ways in which data is being gathered, analyzed, and stored, taxpayers should also consider improving the ability of the overall tax structure to withstand not only a legal challenge but also a data challenge that affects the taxpayer's knowledge of facts and representations upon which the legal positions were based and, as a result, may affect the strength of those legal positions.¹²

12. TALEB, *supra* note 6. In doing this, consideration should be given to the approach developed by Nassim Nicholas Taleb with “black swans,” an unforeseen and unpredictable event that have significant consequences (in a way, the BEPS initiative can be seen as a “black swan”). As noted by Taleb, we are generally planning ahead by using the information we learnt in the last crisis. This may not be sufficient if the future event is completely different and is unprecedented. If something is completely unprecedented, the likelihood of it being predicted and prepared for is very low. Instead of trying to forecast the future, attention can be focused on improving the taxpayer's ability to handle successfully a “black swan.” *Id.* For each position, a taxpayer can review the different facts and separate them into three categories—fragile, robust, and anti-fragile. Once the allocation into the different categories is complete, taxpayers will be able to understand how sustainable or fragile their tax position is to unknown additional data. For example, adopting a relatively factual fragile structure is likely to require more attention in maintaining it and potentially replacing it with an alternative structure in the future should it no longer fit its purposes. The question of fragility should be considered not only per structure but also per the overall tax position of the taxpayer to the extent the taxpayer would like to make sure that it will have the resources to deal with several challenges at the same time.

III. GATHERING THE FACTS

Historically, in an analog world, life was simpler. The pace was much slower; less documentation was produced; there was almost no connection between the different bodies that collected information on a transaction or a taxpayer; and it was generally easier to ascertain what are the facts and circumstances of a given case. If the client did not have a certain document, it probably did not exist.¹³ In this pre-transparency era, taxpayers had the ability to almost completely control the documentation evidencing a transaction or activity undertaken by them by executing a set of legal documents supported by several bank statements documenting the transaction that took place. Governmental authorities, even if they had the data, were usually unable to use it or share it with other governmental authorities and bodies.

One way of dealing with fragility is through the use of several lines of defense to positions taken by the taxpayer so that, if one position is no longer viable or is unsuccessful on audit, a secondary alternative position can still be taken with respect to the same structure. In that way, a tax position that is made up of several elements, some of which are fragile themselves, may be more anti-fragile as a position, provided each of the fragile elements is interdependent of the other fragile elements. Once the various tax positions are analyzed, it is time to analyze the overall tax position as a whole and to place it on the spectrum from fragile to anti-fragile. As in the process with the individual tax positions, the focus should be on creating a network that may have fragile components that are interdependent one from each other and instead of weakening the overall structure actually strengthen it.

This principle can be illustrated using the following example—a taxpayer that is experiencing relatively small tax audits every year and is able to learn from each experience to improve its recordkeeping, its audit file preparation, its audit management capabilities, and review of its tax positions on a regular basis is more prepared to handle a large tax audit, or even several large tax audits simultaneously, as it is increasing its ability to deal successfully with tax audits and improve its efficiency in doing so from one tax audit to another. Compare this to a taxpayer who has not been subject to a tax audit for more than five years and is then subject to a large tax audit. In the latter situation, the taxpayer is likely to be more fragile to the tax audit as it did not have the benefit of constant improvement offered by the former scenario. For a discussion of fragility, anti-fragility, and black swans, see NASSIM NICHOLAS TALEB, *ANTI-FRAGILE: THINGS THAT GAIN FROM DISORDER* 29 (2012) (discussing definitions in its Introduction).

13. Even if it was out there, for all practical purposes, it did not exist.

In the analog and pre-transparency era, the need to go above and beyond in research for the facts was not critical because the information that was available in external databases and in the public domain was relatively limited and, even if available, most of this information was not in a digital form making it less accessible and less useful. During this period, very few governmental authorities and bodies had an interest in the taxpayer's data, and even those who had an interest were in most cases unable to collect, store, and analyze the data in a meaningful and efficient way. Moreover, those who had it and were able to collect it, usually limited it to themselves (e.g., credit cards companies, banks, and insurance companies) as the data was stored on paper or on computerized databases that had little or no ability to communicate with third parties. No less important, the amount of data was much more limited in the pre-social media world.

Even before we consider the impact of the increase in exchange of information and assistance in tax collection among tax authorities, tax authorities today have much easier access to data about taxpayers and their activities than ever before. Digitization of transparency changes the state of affairs—it increases the amount of data generated and collected, increases the amount of accessible databases, increases the connectivity of these databases, increases the ability to efficiently search and process data in these databases, and significantly increases the number of non-governmental bodies who collect information on taxpayers on a regular basis. Simultaneously, with a significant reduction in the cost of storage, there is less need to delete information.

With digitization and transparency, taxpayers and third parties create and generate data on a regular and constant basis.¹⁴ Even taxpayers who do not participate in the digital world have a digital footprint, from data and information generated by third parties, including government units. Moreover, in today's legal framework, taxpayers do not usually own the data generated in relation to them and do not have

14. As a recent article states, “[T]here are 2.5 quintillion bytes of data created each day at our current pace, but that pace is only accelerating with the growth of the Internet of Things (IoT). Over the last two years alone 90 percent of the data in the world was generated.” Bernard Marr, *How Much Data Do We Create Every Day? The Mind-Blowing Stats Everyone Should Read*, FORBES (May 21, 2018, 12:42 AM), <https://www.forbes.com/sites/bernardmarr/2018/05/21/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/#3c6ac35460ba>.

control over or knowledge of the ways it is being used and shared. As a result, most of this data can be accessed, used, and analyzed by third parties without the consent or notification of the taxpayer.¹⁵ This is done on a regular basis. These third parties gather, analyze, and store this data for their own purposes. Yet, the data that was gathered is available to be used for other purposes. As third parties generally share data, the same data that was collected by \times for marketing purposes can potentially be used by a tax authority or a governmental agency for other purposes.¹⁶

For example, a tax authority in country \times where the taxpayer has an operation can request company F , a social media company, to provide it with all the information it has on the taxpayer, whether collected by F or received from third parties. As the information collected is not the property of the taxpayer and the analysis generated from the information is arguably owned by company F , company F usually does not need to even notify the taxpayer when it is providing the information to the tax authorities. Moreover, in many cases, the tax authorities may be able to gather the information themselves without the need to approach company F for it, simply by logging on to the social media platform and collecting the information themselves.

With digitization and transparency, the taxpayer is still required to document and evidence the facts of the transaction and is also required to address and deal with any information that challenges or contradicts its own documentation. One of the most important changes in today's world is the amount of readily available and easily transferable auxiliary data that is generated alongside the data that is directly related to the transaction (e.g., legal documents and bank documents). This auxiliary

15. The consent is usually inserted into the lengthy terms and conditions sheet that is accepted by users when downloading an app or its update. Most users, while aware in a general sense that such consent is given, are usually not aware of its scope and far-reaching potential impact. In a sense, there is a "wild west" of data that is available to governments and third-party players.

16. For example, Apple, Inc. recently issued an apology to customers for collecting and listening to recordings of conversations performed by customers using the Siri app. Mark Gurman, *Apple Apologizes over Siri Privacy and Will No Longer Retain Audio Recordings*, BLOOMBERG (Aug. 28, 2019), <https://www.bloomberg.com/news/articles/2019-08-28/apple-apologizes-will-no-longer-retain-siri-audio-recordings>. Similar issues were reported in devices sold by Google and Amazon, raising serious privacy and data collection concerns.

data is generated either by the taxpayer or by third parties and can be collected by either the taxpayer or by third parties; it can have a direct bearing and impact on the characterization of a transaction or on a business model. This information, referred to in this Essay as “background information,” is not necessarily direct information on the transaction but can have an impact on the documentation evidencing the transaction.

For example, the taxpayer argues that its employees are not physically present in country *J* and, even if they are, that this is not related to the business that the taxpayer has with company *B*, a resident of country *J*. Evidence collected from social media accounts of employees of company *B*, as well as information collected from the public pages of social media accounts of the taxpayers’ employees help to establish a contrary position. Similarly, information gathered when tracking the key employees’ GPS data from their mobile devices or the IP addresses they used to access their emails can collaborate or negate the taxpayer’s position as to their physical presence in the country, even where full border controls are no longer in place (e.g., certain countries in Europe).

Alternatively, consider a taxpayer who argues that its financing subsidiary has effective management in country *Z* and has sufficient board resolutions supporting this position. The background information generated by the different participants can be used either to support or contradict the position that is evidenced in the board resolutions. Obtaining the data in real time can be helpful to the taxpayer as it can make redundant the need to summon witnesses in case of an audit to support the position. This can ease the burden on otherwise busy members of management in the taxpayer’s organization and also establish an alternative in case one or more of the members of the management of the financing subsidiary are unavailable to be present at the audit or case discussion (for example, because by then they already left the company).

IV. STORING AND ARCHIVING THE DATA

The ease and low cost of storing digital data and, above all, the ability to efficiently search through the stored information and connect one storage source to another, changes completely the way people look at and treat archiving and deletion of data. For example, historically, companies had to rent expensive storage locations to archive documents from prior years and, at the end of a certain period required for retaining the information (generally a period prescribed by law), to destroy the files to manage the costs of storage. Today, the ease of using digital storage, even for documents that were created prior to the digitization

era, and the inexpensive nature of digital storage, lead taxpayers to keep every piece of document ever created. Moreover, the ability to search efficiently through the massive amount of data makes deletion an option that is often not needed, which makes the stored data much more accessible and usable.¹⁷

As a result, taxpayers have to deal with massive amounts of data, either created or stored by them or by third parties, and to be able to navigate through these piles of data and curate a trail of documentation that would support their view of a given transaction. As taxpayers, especially corporate taxpayers, consist of the collection of many individuals, the digital footprint of a corporate taxpayer is comprised of information and data generated by and gathered from the individuals who make up the corporate taxpayer, including from acts and omissions of the corporate taxpayer's agents. This means that both tax authorities and taxpayers alike have vast amounts of data to search through, and whoever is more effective in the way it manages and analyzes the data is likely to have a significant advantage. While tax authorities around the world already began using data analysis to better identify and handle potential audit questions, taxpayers are also required to analyze and curate the data available to better understand their position and address it on audit. This stage is the curation stage.¹⁸

All this results in a state of affairs whereby taxpayers are usually not fully familiar and aware of their own facts and circumstances and the data they generate.¹⁹ This leads to challenges for taxpayers who wish to better ascertain that their digital footprint is accurate, up to date, and corresponds to their overall tax position.

17. For example, when it was introduced, Gmail, Google's webmail service, promoted the use of search instead of filing as a mechanism for finding and retrieving emails.

18. At this stage, taxpayers can either continue and ignore the changing landscape or instead jump in and try to make the most of it to improve their overall tax position, ease, and simplify the daily routine, and increase efficiency of operations (not necessarily limited to tax). In the next Part, we will briefly discuss the latter.

19. It should be noted that the data can work in both directions. It can support and can negate the taxpayer's position. Nonetheless, while being in full control or having full knowledge of the facts is probably not feasible for most taxpayers, having a good understanding of the most relevant facts and the associated data is probably an achievable goal.

V. CURATING THE DATA ON AN ONGOING BASIS

With digitization and transparency, the challenge today is not to obtain evidence but rather to gather the relevant evidence out of mountains of documents and data. An even bigger challenge is to keep it up to date and current in this ever-changing world.

A significant portion of this challenge relates to the fact that a large percentage of the data, primarily what we define above as “background information,” may not be known to the taxpayer, either because the taxpayer did not generate it or because the taxpayer is not fully aware of it. This analysis is not a one-time event but rather a continuous effort, requiring a change in mindset so that the tax function becomes proactive in an effort to better understand and analyze the information generated about the taxpayer and make sure that this information is consistent with the information upon which tax and legal opinions received by the taxpayer is based. As taxpayers have tax goals and business models upon which these goals are set, taxpayers are now required to continuously be aware of their own (and their agents’) digital footprint and review it against their business model and the legal opinions received to support the tax aspects of the business model.

For example, the taxpayer has a business model based on the use of marketing agents in different jurisdictions and limited sales functions there. The sales themselves are made out of country Z where the taxpayer has 100 employees who focus their efforts on sales and marketing. Reviewing travel reports and the public pages of social media accounts of key employees, the taxpayer’s management realizes that it has a much greater presence in some of these jurisdictions than just limited marketing activity. As a result, taxpayer’s management has decided to revisit the viability of its business model. The information gathered by the taxpayer puts the management in a much better position to have a relevant discussion of the consequences of keeping the current business model and the available alternatives.

Taxpayers who wish to use technology to their advantage and not be surprised by its outcome will be required to develop mechanisms and processes to gather, analyze, and store data, or in others, to curate the data. They will be required to analyze not only internally generated and created data, such as legal documents, financial accounts, memorandums, and Excel work papers, but also external information, whether it is primary data, such as bank statements, or background information, such as travel logs or credit card statements.

The next step following the gathering of information is to analyze it and determine the credibility and strength of the information (by reference, among others, to the source of the information) and confirm whether it is supporting or contradicting the positions taken by the company. To the extent the information is supporting the tax positions taken, it should be stored efficiently to be used as additional corroborative evidence, if and when necessary.

If, however, the data is contradicting, either directly or indirectly, the data upon which a tax position is taken, the taxpayer should first review the data available to determine whether the new data warrants a change in the facts and circumstances as they were understood to be. If this is the case, the taxpayer should revisit the position taken and analyze it in light of the revised facts.²⁰ Having the ability to review the data and if necessary adjust and refine tax positions in real time as new information becomes available or known can be a significant advantage to taxpayers who are proactive in their approach and are able to constantly adjust and refine the legal analysis to meet the changing landscape.

As new data and evidence is gathered, it is necessary to evaluate their quality and trustworthiness, the sources this data is coming from, and whether there is a reason to doubt the source of the information or its quality. As data comes from various sources and differs in quality, taxpayers need to evaluate the source and quality of the data, estimate the quality and weight that the tax authorities are likely to give such data, and analyze how any piece of new data fits in the overall picture that already exists from previously available data. In doing so, it is necessary to be aware and cautious of the likely application of the confirmation bias.²¹ The confirmation bias is likely to appear in at least

20. At this stage, prior to adjusting and refining any tax positions, taxpayers should also consider whether there is other information, with higher degree of reliability or relevance that can be used to negate or rebut the contradicting information.

21. In psychology and cognitive science, confirmation bias (or confirmatory bias) is a tendency to search for or interpret information in a way that confirms one's preconceptions, leading to statistical errors. *Confirmation Bias*, SCIENCE DAILY, https://www.sciencedaily.com/terms/confirmation_bias.htm (last visited Nov. 2, 2019). In her book, Tali Sharot discusses confirmation bias and how it affects our ability to change our minds (and to change the minds of others) even in light of new facts that should, in absence of bias, cause us to change our mind. As Sharot demonstrates, not only that the new data is not helping to change our (or others) mind, it is interpreted as

two stages and taxpayers should be aware of its likely existence: first, at the stage of analyzing and curating the data, and second, at the stage of reviewing and re-evaluating existing tax positions. Confirmation bias is also likely to exist with tax authorities when they are reviewing the taxpayer's tax positions.

To the extent possible, it would make sense to invest the time and effort to deal with confirmation bias up front at the stage of curating the data by looking for data that will allow them to overcome any biases that may exist. For example, when the taxpayer identifies a potential disagreement with tax authorities, instead of limiting the search for additional data that would support the taxpayer's position, the taxpayer should also consider looking for information that would support a "common ground" that both the tax authorities and the taxpayer can agree on.²²

Ironically, leveraging on the need to be more proactive and collect and analyze data on an ongoing basis can lead taxpayers to be more aware of their positions in an era where they can no longer control the data. To do this, taxpayers will need to identify what are the relevant facts and circumstances underlying each significant position taken, understand what are the consequences of changes in the facts and circumstances, and prepare their legal analysis to better address the facts and circumstances as curated by them through constant search and analysis.

While a proactive approach to gather, analyze, and curate data is likely to put taxpayers in a better position than taxpayers who are not proactive, both types of taxpayers must acknowledge the degree of their knowledge and its limitation. Hence, even though resources have been spent on setting up a robust system for gathering, analyzing, and curating data, taxpayers should recognize that in addition (and partly due) to the biases discussed above that have the potential to limit the

supportive of the view already held by the person who is being confronted with this new, seemingly, contradictory data. *See generally* TALI SHAROT, *THE INFLUENTIAL MIND: WHAT THE BRAIN REVEALS ABOUT OUR POWER TO CHANGE OTHERS*, at ch. 1 (2018) (referring to the Hebrew edition of the book). *See also* Shankar Vedantam et al., *Facts Aren't Enough: The Psychology of False Beliefs*, NPR: HIDDEN BRAIN (July 22, 2019, 5:00 AM), <https://www.npr.org/2019/07/18/743195213/facts-arent-enough-the-psychology-of-false-beliefs>.

22. For the use of common ground to overcome existing biases, see SHAROT, *supra* note 21, at 38–42."

effectiveness of their analysis,²³ it is likely that with the vast information generated in the world every day, taxpayers will still not have the full picture and should understand and acknowledge this important limitation.²⁴

A taxpayer who discovers, through a routine analysis of the data that is being gathered, that it can no longer sustain a certain business model may decide to change the method of operation prior to and without relation to an audit in a way that would reduce the otherwise higher risk of not sustaining the position on an audit.

CONCLUSION

As noted at the outset, this Essay is introductory in nature and its purpose is to generate discussion and to establish that, especially nowadays, facts and circumstances are not given on a silver platter and should be given at least the same attention and resources as those given to the legal analysis. In dealing with facts and data, taxpayers should act as curators and be aware of as many limitations and biases as possible that may affect the way they handle and analyze data. They should search and find it first, review and analyze it, and determine its credibility, its reliability, and its relevance. Then they should compare the data found to the data available to determine whether the tax positions taken are still relevant. Overall, the move to a more transparent and more data-driven world emphasizes the ability to analyze and curate data as an art to be mastered alongside the technical tax skills. Above all, taxpayers should acknowledge their limitations and the inability to control the facts and avoid “unknown unknowns” or “unknown knowns.”

Before embarking on a tax planning exercise, when considering a business model and/or a structure—whether it is a financing structure, an acquisition structure, or an operating structure—the taxpayer

23. Bias embedded in, for example, a search algorithm that is adapting itself to match the searcher preferences. For a critical, in-depth, and comprehensive discussion of the use of algorithms and the biases associated with them, see CATHY O’NEIL, *WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY* (2016).

24. To alleviate some of the adverse effects of existing biases in search algorithms, taxpayers should consider ways that would allow them to better understand the biases and what was overcome, or at least be aware of the impact of these biases.

will have to consider also the cost and viability of maintaining the structure,²⁵ its suitability to the changing business environment and enhanced reporting, and the cost involved in keeping the structure up to date. This decision will depend upon, among other considerations, the taxpayer's budget for tax and in particular on its decision as to how many resources and what priority is to be given to the tax function.

25. In this context, maintaining a structure should be referred to in its broader sense, including not only the direct costs of maintaining the structure but also the indirect, soft costs of doing so, which can include the cost of following a certain way of operation, the cost of operating in one way instead of another, additional bureaucracy that can result in using a certain structure, and the additional time that it takes to perform certain activities as a result of using a certain structure.