

Abstract

Rules can make tax law certain in simple and stable regulatory domains. A theory of how to make the law more certain is developed for more complex, dynamic domains. Its first step is to define overarching principles and make them binding on taxpayers. One of those overarching principles would be a general anti-avoidance principle.

Next, a set of rules to cover the complex area of tax law is defined. The legislature lays down that in a contest between a rule and an overarching principle, it will not be the rule that is binding. That is, the principle is not merely used to assist in interpreting the rule. Rather it is the principle that is binding with the rules used to assist in applying the principle. Specific sets of rules for the most commonly used types of transactions or business arrangements are also written. This might involve a dozen different sets of rules to regulate concrete arrangements. Such rules actually merely specify examples of how the principles apply. Each of the dozen sets of illustrative rules are followed with an explanation that the reason for the rules being this way in this concrete situation is to honour the overarching principles. This is a way for the legislature to make it clear to judges that it is the principles that are the binding feature of the law. The paper also discusses what to do when judges do not respect this, reverting to old habits of privileging rules. It also discusses how to nurture shared sensibilities around the principles among judges, practitioners and the community.