

No duty to avoid tax. No kidding. Lebowitz Edelman advises that directors will lead the way



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Recently, the Tax Justice Network sent a letter to every CEO in Hong Kong to tell them about a legal opinion they obtained from a firm of solicitors. The opinion deals with whether directors have a positive duty to shareholders to avoid tax. It concludes that they do not.

This is in fact uncontroversial, but it is only part of the story.

A key duty of a director is to promote the success of the company for the benefit of its members as a whole. When deciding what best promotes the success of their company, the directors must take into account all relevant factors and assess their relative merits.

Relevant factors for the directors to consider include how to increase the company's post-tax profits. One way this can be done is by reducing the company's tax bill, so that is likely to be a relevant consideration. There will also be other factors to consider, such as the company's business relationships, maintaining a reputation for high standards of business conduct, and the impact of the company's

actions upon the community. Any of these may counterbalance the desire to minimize tax liabilities.

Some tax planning will be likely to promote the success of the company. Some may go too far and be outweighed by other considerations. And it is up to the directors of a company to decide where to draw the line in relation to the company's specific circumstances.

So long as directors give all relevant factors proper consideration when making decisions about tax planning, and provided they can justify the decisions that they make, they should not incur liability for breach of their duties.

About Lebowitz Edelman

Lebowitz Edelman (www.lebowitz-edelman.com) is a law firm representing global clients in complex litigation and dispute resolution/arbitration, corporate, tax, restructuring and intellectual property and technology matters. The Firm has offices in Seattle WA and Hong Kong. Lebowitz Edelman is organized as a true partnership, and it operates as such. We see ourselves as a global legal institution based on a set of principles to which a large number of men and women can commit – principles that have a social purpose and permanence, that transcend individual interests. We believe this it accurately describes one important aspect of what makes Lebowitz Edelman renowned the client service organization that it is.

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