

Does the current debate over what is 'acceptable' tax planning make Judge Learned Hand's famous opinion on the right of a tax payer "to arrange his affairs so that his taxes shall be as low as possible" obsolete?

The first thing we do, let's kill all the lawyers."¹ When people recall this quote by Dick the Butcher, a conspirator in *Henry VI, Part 2*, they envision it as some rallying cry against that contemptible breed. In fact it is part of a scene where the self styled revolutionary Jack Cade is scheming on ways to steal the crown. In this context ridding the realm of lawyers would facilitate his villainy, a somewhat different spin than many believe. Such is the world of quotes out of context.

So too has Judge Learned Hand's oft-quoted permission for tax planning been misquoted by taking it out of context. And by doing so he seemed to bless even extreme planning ideas by planners, specifically those that swoop down upon gaps in the statutes to feast like ravenous seagulls hungrily devouring newly hatched sea turtles in a feeding frenzy.

One must be cognizant of the *Helvering v Gregory* case,² the source of Judge Hand's quote, to fully appreciate what he meant when he said "[a]nyone may so arrange his affairs that his taxes shall be as low as possible. . . ."³ In that case Judge Hand, later affirmed by the Supreme Court, held against the taxpayer, who had swooped down upon a gap in the statute by structuring a corporate reorganization that complied with all the written rules set forth in the Code.



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A pedantic reading of the law would have yielded a win for the taxpayer. But, according to Judge Hand, in what should have been a more memorable quote, "the meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can ever obviate recourse to the setting in which all appear, and which all collectively create."

In other words, one must adhere to the spirit, the intent, of the law and not just a literal interpretation that does violence to it. "To dodge the shareholders' taxes," said the judge, "is not one of the transactions contemplated as corporate 'reorganizations.'" In fact, what his more famous quote was addressing was the idea that one may do all that one is allowed within the law, both letter and spirit, regardless of his desire to avoid tax.

With that as background, can one say that the attitude towards tax planning has changed in the current environment when compared with what was acceptable in 1928 when Mr Gregory did his dastardly deed, in 1934 when Judge Hand handed down his decision and the quote that has long outlived him, Mr Gregory and Commissioner Helvering, or at the turn of the 21st century? Well, no. If tax planning involves taking affirmative actions in structuring one's life, business and transactions in a way that minimizes one's taxes, so long as it complies with both the letter and the spirit of the law, that seems no more impermissible today than it had at any time in the past, including the day Judge Hand penned his learned opinion. It's when tax lawyers stray too far that popular opinion is in accord with Dick the Butcher's own famous misquote.

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¹ *Shakespeare, Henry VI, part 2, Act IV, Scene 2.*

² 69 F.2d 809 (2d Cir. 1934)

³ 69 F.2d at 810-811