

THE TAX ASPECTS OF THE MASSIVE FOX SETTLEMENT WITH DOMINION

[Editor note: This is a guest post by my friend Bob Lord. I am no tax policy legal expert, but he really is and I ask him to weigh in occasionally. Commenters asked about this question previously, so here is the answer. – bmaz]

My friend bmaz, noting reporting in The Lever that Fox News could claim a tax deduction for its massive settlement payment to Dominion Voting Systems, asked me to explain it further here.

Yes, Fox News claiming a massive tax deduction, resulting in a \$200 million or so tax reduction, is an unpleasant thought.

It's also sound tax policy. Fox News is a business. A shady one perhaps, but still a business. In the course of operating a business, employees sometimes screw up. Businesses get sued. Sometimes the suits are justified. Sometimes they're not. Sound tax policy dictates that the cost of resolving such claims reduce the taxable profits of a business.

To see this, consider a different scenario. Say Donald Trump, who we know to be litigious, files a bogus claim against your corporation for trade libel. You hire lawyers to defend the corporation and the corporation eventually agrees to pay a small amount to settle, rather than incur the expense of going to trial. Should the cost of settling be deductible by your corporation? Obviously, yes.

Objectively, Fox News' position is the same as yours. The corporation was sued for trade libel, and it settled the case. If your corporation is entitled to a deduction, so is Fox News. We all

may be sure Fox News' employees promoted lies here, but the objective facts are that Dominion agreed to settle for less than half the amount it was claiming in damages.

Should the tax result be the same if the case had gone to trial and Fox lost? Should the payment of the judgment be deductible? Yes, for multiple reasons. First, judgments in civil cases are not definitive. They are decided based on a preponderance of the evidence. Second, the claim arose out of the conduct of Fox's business operation, the same operation that generates its profits. Third, treatment of payment of a judgment differently from payment of settlement would put defendants in these cases in an untenable position, as their financial incentive to settle would be greater than that of the plaintiffs.

To be sure, as The Lever's reporting mentions, there are areas where public policy considerations are so compelling that tax deductions for payments of legal claims should not be allowed. But for that to make sense in Fox's case, it would have to make sense in all trade libel cases. Yes, Fox's alleged conduct here was particularly odious, but consider the case of a company that settles a claim for an allegedly false statement about a competitor's product. Do public policy considerations demand that the company not be allowed a tax deduction? In evaluating this, remember that if the company is allowed a deduction, the tax outcome is a breakeven for the government, as the claimant would be required to pay tax on the settlement payment, and if the company is not allowed a deduction, the government gets a windfall. Also, making the economic consequences of trade libel more harsh by not allowing damage payments to be deductible would have a chilling effect on speech.

So, does all that mean our tax system is not really rigged in favor of the rich? No, it absolutely is rigged in favor of those at the top. Louis Brandeis famously said that "we can

have democracy in this country or we can have great wealth concentrated in the hands of the few, but we can't have both." I'd put it differently: "We can have democracy in this country or we can have a tax system that allows great wealth to be concentrated in the hands of the few, but we can't have both."

For over four decades, our tax system has failed us and the failure now threatens our democracy. When 13,000 out of 130 million households (that's 0.01 percent) hold close to ten percent of the country's wealth, that's great wealth concentrated in the hands of the few. The average wealth of those 13,000 families, by the way, is very close to one billion dollars. And this situation is the direct result of over four decades of tax policies rigged in favor of the rich.

Those who did most of the rigging want to rig it further. A few weeks ago, 41 Republican Senators introduced their "Death Tax Repeal Act." That bill, as I explain more fully here, would allow Jeff Bezos to pass his Amazon shares to his children on his death, who then could sell them for about \$130 billion, with zero income tax and zero estate tax paid on the entire amount. We're already likely to have families with wealth in excess of one trillion dollars (think about that) within the next decade or so. If the Republicans' bill were to become law, that likelihood would become a certainty. And, by the way, when a similar bill was passed by the House in 2015, Kyrsten Sinema, then a House member, voted for it.

That's why the Patriotic Millionaires, the organization I advise on tax policy, has proposed a complete overhaul of the federal tax code. You can read about it here.

The bottom line: You shouldn't be angry about Fox News' tax deduction, but you should be very angry about the state of our tax system and join the effort to fix it, before it's too late.

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