

High Noon in the Tax Policy Corral:
Edward Kleinbard's Race Against Time
(forthcoming, by Bankman & Shaviro)

Daniel Shaviro, NYU Law School
Conference in Honor of Edward Kleinbard
November 5, 2021

A spot of background

Cubbyholes, “Eddie” (!?)

David Bradford, “100%.”

The move to academics: Sinecure??? Clients???

“Stay in your lane”???

Gary Cooper in *High Noon*.

But urgency -> save *us* time (not himself). BEIT prospectus, figure out not just all design details but all needed compromises.

Implicit theory about the rest of us

1) Experts are persuadable, a la honest judges reading the parties' briefs.

(Vs. being set in our ways, lazy, subject to “kewl-kidism,” or overly lane- & credentials-conscious.)

2) Public has decent moral instincts, is reachable through rhetoric. But needs palliative compromises for intuitive plausibility, curb appeal.

Ed will find those needed compromises for us!

We will be grateful once it has all been explained.

He may have been giving us too much credit – but also, he was asking a lot!

Road map for the rest of this talk

Shaviro: tax expenditures, the BEIT, international.

The method, not the merits – & note differential success.

Ed gets more take-up when he leaves some of the “work” to others!

Bankman: *What's Luck Got to Do With It?*

A tour guide – like Virgil in Dante's *Divine Comedy*?

Many lands to get through, and not much time.

Tax expenditures: background

“Scientist” vs “moralist,” or fox vs. hedgehog: Surrey vs. Bittker “stances” & their continued pertinence today.

Surrey vs. Bittker on tax expenditure analysis (TEA): “Yes” vs. a “No” that (well into p. 17 out of 18) turns out to actually be “Yes, but...”

Later tax policy literature: e.g., Shaviro more on the “Yes” side, Weisbach-Nussim more on the “But” side.

Ed, at JCT, is on the Yes side, & can actually do something about it there.

Ed on the prior debate

Weisbach-Nussim: TEA implies the tax system should be "privileged" - but it shouldn't be. Generally no downside to using it to "spend."

Ed: A correct analysis of the underlying political biases "runs in exactly the opposite direction."

Shaviro: While "taxes vs. spending" is a merely formal distinction, "allocation vs. distribution" may be illuminating.

Ed: (1) This would add to the "analytical precision" of TEA. But also:

(2): It would "decrease [TEA's] accessibility ... to policymakers & others not comfortable with the rhetoric of public finance."

The need for an accessible TEA

To Shaviro (reflecting his Bittker side), this issue of inaccessibility to the mass public was perhaps not a central concern.

But to Ed it was vital.

He argued that TEA's apparent failure, since introduced by Surrey, to make a significant difference on the ground showed the need to rethink & revitalize it.

Vital not just to strengthen TEA analytically, but address concerns that it was unduly privileging a “normal income tax” baseline.

The JCT's short-lived TEA change

The “normal income tax rules” baseline is replaced by inquiry into the actual IRC’s **general** rules (as distinction from **exceptions** to these rules).

And “tax expenditures” are replaced by “tax subsidies” & “tax-induced structural distortions.”

Further distinctions between “tax transfers,” “social spending,” & “business synthetic spending.”

But the JCT dropped this changed methodology within moments of Ed’s departure.

And it hasn’t resurfaced as yet elsewhere.

What went wrong?

Patrick Driessen: “Napoleonic TE invasion of Russia at JCT ...

“... I was one of the 400,000 casualties caught in that over-extended supply line in the dead of winter.”

My own post-mortem: Each proposed change to TEA addressed a real conceptual problem & had a logical rationale. But ...

... it was merely one person’s very thoughtful & elaborate response to a host of tough conceptual problems that lacked clear answers.

Others don’t buy in just because *he* deems a given set of changes best.

But Ed learned from this experience.

The BEIT

Ed designed the BEIT all by himself – much of it while working full-time (or probably a lot more!) at Cleary.

A *very* serious effort that belongs alongside the rival work of leading economists, teams of economists, gov't agencies, & NGOs.

Brings to mind an economist's comment to me once re. David Ricardo:

“We're all here on the mountaintop w/ our climbing gear & oxygen tanks – & then we see that *he* got here in a T-shirt & running shoes!”

The BEIT's non-takeup

We'll be hearing more about the BEIT later today from a great panel.

Among their topics: how does it handle various inherently tough trade-offs & design challenges; why hasn't it gotten more take-up?

I myself view it as having many virtues – biggest problem (for me) is its leaning so heavily on US corporate residence.

But has rightly made the “long list,” even if not (as yet?) the “short list.”

This reflects its care, scope, & rigor w/in a plausible set of premises.

But still: doing so much oneself, & (to some readers) outside one's “lane” -> lesser attention in the field.

International tax policy

We'll also hear today about Ed's work in international tax policy.

Including tributes to its importance & huge influence – both when he was publishing it, & *right now* in the US & global debates.

3 reasons for its huge success:

(1) Brilliant rhetorical skills: e.g., phrasemaking (e.g., “stateless income”) + ability to explain the important yet esoteric (e.g., “double Dutch sandwich”).

(2) Deep practical & theoretical understanding (e.g., tax rents; MNC tax planners as “brewmasters” blending high-tax & low-tax spigots).

(3) His focus on *explanation & diagnosis* – w/o trying to do it all for us!

Which is not to say that we *shouldn't* have just let Ed handle it!

Final thoughts

Ed wanted to change the world – an impossible task for *anyone*.

Trusted not only himself to get it right, but the rest of us to meet high standards of open-minded persuadability.

Got best results when setting the table (not cooking the entire dinner).

Is incredibly missed in ongoing debates like those surrounding 2021 international tax policy.

Also greatly missed by friends who recall his wit, kindness, acuity, and charm.

Next up: Joe on his effort, through books, to persuade the public directly.