From the Editor:

AIA Might Let Supreme Court Punt in Healthcare Controversy

By Jeremy Scott — jscott@tax.org

The inevitable has occurred. With a split in the circuit courts, the Supreme Court has granted certiorari to one of the challenges to President Obama's sweeping healthcare reform legislation. The main issue before the Court will be the individual mandate and the penalty on those who do not secure health insurance coverage. Conservatives are hoping that the justices will do what the Republican House has been unable to: strike the law down. Others believe that the Court should restrain Congress's commerce clause power for reasons unrelated to healthcare. And liberals, of course, hope that the law will be upheld.

The Supreme Court might disappoint everyone. The Court has allocated an hour of oral arguments to a discussion of how the Anti-Injunction Act might apply. The AIA presents a basic jurisdictional issue and prevents challenging taxes before they go into effect. Several courts have used the AIA to dismiss challenges to the individual mandate (the most prominent case disposed in this manner being *Liberty University*). Use of the AIA might allow the Court to dismiss challenges to the healthcare law without considering the constitutionality of the tax or the deeper commerce clause issues. It would be, in some ways, an easy way for the Supreme Court to avoid deciding a very partisan issue. It might also allow Chief Justice Roberts to avoid a divisive 5-4 decision that makes the Court look overly politicized. Leaving aside these issues, there are also strong legal arguments in favor of the applicability of the AIA. (For coverage, see p. 935.)

There is one problem with the Court ruling on the applicability of the AIA: Neither side is arguing in favor of the act. The government abandoned that argument and now concedes that the AIA does not bar challenges to the law. Those arguing against the mandate and the reform law have no interest in seeing the act apply. The Court can bypass that problem, however, by simply appointing an amicus to argue the issue, and that is widely expected to happen. The amicus would then have 45 days to prepare a brief.

Although opponents of the healthcare law have won some significant victories, it seems unlikely that the Supreme Court will side with a minority of circuit and district courts and strike the healthcare law down, even if it decides that the AIA does not apply. The best chance for those hoping to repeal most of Obama's milquetoast healthcare achievement is for Republicans to take control of the White House and Senate, with public dissatisfaction with the healthcare law playing a major role in the campaign.

Commentary

Corporate blocker structures are typically used to shield private equity funds from adverse tax consequences related to investing in operating partnerships and other passthrough entities. The goal is to avoid being found to be engaged in a U.S. trade or business. In their special report, Vadim Mahmoudov, Rafael Kariyev, and Daniel Backenroth discuss why blockers are used and describe a partial blocker structure that is often used by a private equity fund to reconcile the conflicting concerns of various constituencies among its investors (p. 993). The authors also consider whether the special allocations of partnership income required in that partial blocker can withstand a challenge under the substantial economic effect provisions of section 704(b). They conclude that although the special allocation raises thorny issues, it should be respected for section 704(b) purposes either because it satisfies the after-tax test or because it complies with the partners' interest in the partnership.

The branch profits tax was enacted in 1986 and created uncertainty in the international tax community almost from its inception. Oren Penn, Steve Nauheim, and Susan Conklin write that although the uncertainties surrounding treaty limitations on the imposition of the tax in the context of hybrid entity structures have always existed, they have increased since the implementation of the check-the-box regime (p. 1003). In their report, the authors explore the purposes behind tax treaties and how those purposes should be applied in the context of the branch profits tax. Using that information, they analyze how the treaty limitations on the branch profits tax should apply under alternative hybrid and reverse hybrid structures.

Although the mandate and penalty provisions of the healthcare reform act have received the most attention, Obama's reform effort contained other tax provisions. One is an excise tax on medical

devices, a tax that some have described as a proto-VAT. The idea of using a VAT to pay for healthcare was proposed during the debates over reform, but only a small piece of the original tax survived, in the form of a 2.3 percent excise tax on medical devices. Manufacturers and importers of devices will need to be prepared for the January 1, 2013, implementation date, according to Christopher Ohmes and Michael Udell (p. 1015). They describe how the tax will operate and discuss the many issues that medical device companies will need to resolve before complying with it. They conclude that it is highly unlikely that the tax will be repealed before it goes into effect and that taxpayers should begin creating systems and procedures to ensure proper compliance.

Anyone with interest in understanding or participating in the tax reform debate should read Martin Sullivan's new book, *Corporate Tax Reform*, writes James Carter, a former deputy assistant Treasury secretary and staffer for the Republicans on the Senate Budget Committee (p. 1041). Carter discusses how Sullivan's book provides the single best survey of corporate taxation and reform available today. He also relates corporate tax reform to the Wyden-Gregg (now Wyden-Coats) tax reform proposal and expresses his wish that Sullivan had published the book several years earlier.

Tax language in litigation settlement agreements is becoming more prevalent. Use of tax language is important because within and outside the context of section 104, it can spell the difference between success and failure in one's tax position, writes Robert Wood (p. 1031). However, tax language alone is not enough, as the recent decision in *Healthpoint Ltd.* proves, Wood says. After analyzing the case, Wood concludes that Healthpoint could have done a much better job with its internal documentation. The Tax Court did not give weight to the company's in-house tax counsel when considering the substantive position and penalty protection. Wood argues that additional documentation, no matter how self-serving, could have made a pivotal difference.

In his first budget, Obama proposed limiting the deductions of high-income taxpayers by capping the tax benefits at a 28 percent rate. The president said that would raise enough money to pay for his healthcare reform effort and would restore some progressivity to the tax code. The proposal did not go very far in Congress, but that hasn't prevented the president and some Democrats from continually reintroducing it, each time to pay for a different reform priority. Mary Anne Reilly and Martin Solomon write that the proposal is poorly thought out and would be complex to implement (p. 1019). The authors discuss the president's proposal as well as an alternative proposed in the Senate. They conclude that the deduction limitation is loaded with potential inequities and questionable tax policy.

On March 18, 2010, the HIRE Act added section 6038D. The section is designed to ensnare undisclosed taxpayer accounts and assets as well as hidden income. J. Kevin Ciavarra and James Cameron write that the form drafted to implement the section is likely to result in unnecessary and duplicative reporting that will create substantial operational challenges and additional expense for financial firms (p. 1023). They hope the government will respond to comments on the draft form and carefully weigh the benefits and costs.

In Of Corporate Interest, Robert Willens looks at the deduction of bankruptcy expenses and when they are treated as capital expenditures (p. 1037). He analyzes a recent private letter ruling that found that operational expenses are deductible under section 162. ■