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From the Editor:

A Brave New World

By Petya V. Kirilova — pkirilov@tax.org

It seems that the world of tax law has been shaken up lately, not by one but by two developments likely to alter tax practice in the future. A doctrine long left to the courts to apply has finally become more concrete by virtue of finding its way into the Internal Revenue Code.

In addition to the uncertain tax position reporting proposal, the economic substance doctrine was a major theme at the TEI conference in Washington. At the conference, William Alexander cast doubt on the prospects for additional guidance, while other IRS officials tried to play down the reach of codification. (For coverage, see p. 251.) In a special report, Monte Jackel takes a break from his usual focus on partnership law to explore the codified doctrine and its potential effect on future taxpayer transactions (p. 289). Jackel believes that the law has changed under codification and that the statute has a broader reach than the old judicial doctrine. Despite Alexander's assertion that guidance is not needed, Jackel finds several areas that need clarification, including definitions of the terms ''transaction,'' ''meaningful change,'' and ''substantial.''

The recent uncertain tax position proposal has gotten much attention and has made many taxpayers and their advisers uneasy about IRS audits. Both taxpayers and the private bar fear that increased transparency stemming from the mandatory disclosure of uncertain tax positions and their respective maximum adjustments could trigger IRS abuses. At the TEI conference, IRS officials pointed out that such fears are unfounded and that both the IRS and taxpayers have benefited in the past from increased transparency. They also emphasized that cooperation between the IRS and taxpayers, as well as further guidance on the proposal's implementation, is essential to the success of the proposal. Commissioner Douglas Shulman spoke about the way the IRS plans to handle audits in the new environment and emphasized that the list of uncertain tax positions will be used judiciously by agents as opposed to encouraging wholesale audits. (For coverage, see p. 243.)

Adding to the commotion in the tax world is the persistent talk about a VAT. Martin Sullivan this week argues that the VAT is the least of all evils in the revenue raising realm and the quest to contain the nation's mounting deficit. Sullivan examines the pros and cons of a VAT, the opposition to the tax by conservatives and liberals, and the shortcomings of alternatives to the VAT. He concludes that unless people can come up with better solutions, opponents must curb their anti-VAT enthusiasm. He also doubts that the tax is feasible in the current political climate because of the viewpoints of the two far ends of the partisan spectrum. He concludes that radical moderates (currently missing) might provide the VAT's best chance for passage. For Sullivan's analysis, see p. 239.

Of course, the world of tax is made that much more exciting by such entertaining things as the film *An Inconvenient Tax* and Lee Sheppard's discussion of the president's and vice president's tax returns. A review of the film, which targets lay audiences and features *Tax Notes* contributing editors Joseph Thorndike and Lee Sheppard, is on p. 275.

In her usual fascinating fashion, Sheppard uncovers the president's income tax returns on p. 241. Turns out that the Obamas' main source of income is publishing. The president takes the position that he is in the trade or business of writing books. And the foreign tax credit features prominently on the return, as most of Obama's income is from foreign sources, considering his overwhelming popularity abroad. Sheppard discusses the president's treatment of his $1.4 million Nobel Peace Prize charitable contribution and the first family's uninteresting investments, consisting mainly of Treasury bills.

Commentary

Financial statement presentation has been a major topic of discussion between FASB and the IASB in their ongoing efforts to converge U.S. and international reporting standards. Michael Calegari analyzes the discussion paper released by the two boards, pointing out several benefits to extending intraperiod tax allocation. Calegari also argues that the new format for financial statements introduces a bias against companies that invest in strategies that generate implicit taxes. He concludes that additional research on arbitrary and complex tax allocations is needed so stakeholders in the accounting regulatory process can make informed decision on intraperiod allocations. (For the special report, see p. 309.)

Using the tax code to spur job creation has become the mantra of the Democratic Party and the Obama administration this year. After Congress and the president were accused of spending too much time on healthcare and ignoring unemployment concerns last year, the Democrats hit the ground running in 2010. Their efforts resulted in the passage of the HIRE Act in March. The president and congressional Democrats hope that the law will reduce unemployment and give a boost to the party in the 2010 midterm elections. However, Thomas Hungerford and Jane Gravelle write that the evidence suggests that these kinds of business tax incentives do little to increase employment and economic growth (p. 325). The economists trace the history of several business tax credits enacted during the 1990, 2001, and 2008 recessions. They find that there is little evidence that these provisions were as effective as desired. Gravelle and Hungerford conclude that deficit-financed direct spending to increase aggregate demand would have been preferable to the HIRE Act's credit approach.

The spike in oil and gas prices in recent years has led to much discussion on Capitol Hill of obscene profits and a tax on these excess returns. Excess profit taxes are popular with the public, even though they have not made much headway toward actually becoming law. (It is even possible that they are proposed primarily to court public opinion and are not serious legislative efforts.) Ben Stein, the actor and former Nixon speechwriter, argues that there is no such thing as obscene profits and decries efforts to impose a tax on successful businesses (p. 335). He thinks that the outcry against high profits has more to do with envy than with anything disgusting about businesses earning a high rate of return.

There are several tax-related provisions in the recent healthcare reform laws. In fact, to use the reconciliation process to correct the original Senate-passed legislation, Democrats had to rely primarily on the tax code to accomplish many of their reform goals. Diana Furchtgott-Roth has looked closely at the law and discovered that there is a substantial marriage penalty in the reform's premium credits (p. 349). Specifically, she concludes that single earners below 400 percent of the poverty line will see their credits shrink or disappear when they marry. She also finds that high-income earners will face disincentives to marry and work based on the new Medicare taxes.

Constructive receipt is a fundamental tax concept that affects the entire code. Despite that, the doctrine is often misunderstood by taxpayers, according to Robert Wood. In his Woodcraft article this week, Wood explores how good documentation can help trump constructive receipt concerns (p. 339). Looking at an issue frequently of interest to Wood, Jeremy Babener argues in favor of a unified tax credit for structured settlements. The current tax exclusion fails to benefit many of those whom Congress sought to encourage not to dissipate their recoveries, writes Babener (p. 336). Wendy Gerzog focuses on *Black v. Commissioner* in Estate and Gift Rap. She believes that *Black* follows the earlier *Schutt* decision, but does not provide much clarity on what tests are being used in the Third Circuit to determine when a family limited partnership will be respected (p. 343). ■

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