

### *From the Editor:*

## Hopes for Payroll Tax Compromise Continue to Fade

By Jeremy Scott — [jscott@tax.org](mailto:jscott@tax.org)

Time is running out for a conference committee to succeed where Congress failed in December. A yearlong extension of the payroll tax cut doesn't appear any closer now than at Christmas, when lawmakers adjourned after hastily agreeing to extend the lower payroll tax rates for two months. The conference committee met again last week, but Republicans continue to resist Democrats' pay-fors, and the Democrats continue to press for a millionaire surtax that has little chance of passing in either chamber.

Although conference Chair Dave Camp pleaded for time for the committee to work, leaders in both the House and Senate repeatedly sniped at each other last week. Senate Majority Leader Harry Reid anticipated the failure of the conference and promised that the Senate would take up legislation early this week, regardless of whether Camp's group is able to agree on a compromise. Minority Leader Mitch McConnell retorted that Democrats continued to oppose spending-related offsets (including a pay freeze and limits on Medicare benefits) that they have supported in the past. And while Senate Finance Chair Max Baucus said that the millionaire surtax was dead in the Senate, other members of his party continue to push it at every opportunity. At the moment, Republicans seem unwilling to admit that tax increases will be part of the offsets for an extension, and Democrats have yet to move beyond obvious electioneering. It feels just like Christmas. (For coverage, see p. 795.)

While lawmakers from both sides and President Obama agree that the payroll tax cut should be extended for the remainder of the year, it is starting to seem as if another short-term extension might be in the works. If a small number of offsets can be agreed to in the next week, then both sides could once again push the debate several months into the future and not risk the blame of raising taxes on almost every taxpayer. As in December, however, the question is whether the parties will be any more likely to abandon their entrenched positions in the spring or early summer than they are now.

### FATCA Regs

The long-awaited FATCA regs were released last week, and practitioners were largely pleased at the concessions made by the government. The regulations are incredibly technical and detail how foreign financial institutions must comply with the new reporting and withholding regime. Perhaps the most interesting aspect of the guidance is the joint statement released by the United States and five European nations that proposed an alternative method of complying with the new regime. Although Treasury vociferously denied that the alternative approach weakened the stringent intentions of Congress, it is hard to see how that is true. At first glance, the statement seems to gut the withholding rules contemplated by Congress in the face of international and practitioner pressure. (For coverage, see p. 767.)

### Facebook IPO

The shareholders and founder of Facebook are expected to greatly profit from the company's upcoming IPO. After the IPO, Facebook may be valued near \$100 billion, making many of its founders, officers, and long-term investors quite rich. But the government might also benefit from the huge IPO, as Shamik Trivedi reports that the tax bill from Mark Zuckerberg's exercise of 120 million options could be in the billions. Trivedi describes the tax consequences of the Facebook IPO and looks at how the IRS might treat Zuckerberg and the newly public company. (For his analysis, see p. 763.)

The initial public offering by Facebook prompted David Miller to publish an op-ed in *The New York Times* calling for a "Zuckerberg tax." In an article for *Tax Notes* in 2008, Miller presented a much more detailed version of his plan to force large corporations and wealthy taxpayers to mark to market publicly traded securities and derivatives on those securities. Republished on p. 887, Miller's Shelf Project proposal addresses the problem of realization in those types of transactions and points out that deferral disproportionately benefits the very rich.

### Commentary

The ramifications of the Supreme Court's decision in *Mayo* continue to reverberate throughout the tax community and the IRS. The Court's holding that tax regulations should be treated the same as any other administrative guidance might significantly affect how Treasury drafts and issues future projects. David Shakow writes that practitioners

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should also be more sensitive to administrative law and judicial deference to administrative rules (p. 825). In his special report, Shakow reviews several administrative doctrines that have been formulated by the courts and discusses *Chevron* deference. He concludes that although there is very little statutory guidance on those questions, there is substantial, if confusing, judicial authority.

The House Ways and Means Committee continues to proceed on corporate tax reform, even though there is mounting evidence that very little will get done during an election year. At a hearing last week, Camp argued that the U.S. corporate rate is a major impediment to economic growth and must be lowered to 25 percent. (For coverage, see p. 794.) As the corporate tax reform debate unfolds at the federal level, Congress and policymakers may benefit from looking at how state governments have dealt with the issue since 2001, Robert Cline and Steven Wlodychak write (p. 839). In their special report, the authors look at several state initiatives to stimulate growth and cut corporate tax rates, along with Michigan, Ohio, and Texas's push for much broader corporate tax restructuring. They conclude that states have already faced the same challenges, albeit on a smaller scale, that Camp and his colleagues in Congress are grappling with right now.

Over the last 80 years, it has been an article of faith that Keynesian stimulus and monetary policy are the most effective tools in combating a recession. While many might argue that one or the other is inefficient, both policies have been applied repeatedly. Jay Starkman writes that it is time to consider tax policy as a substitute when monetary policy and stimulus have lost their effectiveness (p. 853). He addresses how tax policy can be effective in the short run. The solution to the nation's fiscal woes requires slashing spending, transfer payments, and entitlements, while returning tax revenues to their historic 18 to 20 percent of GDP, he concludes.

At a recent Tax Analysts conference on small business taxation, Donald Williamson supported

tax simplification. In a viewpoint with David Kautter, Williamson proposes a simplified cash method of accounting that is already in use by small businesses (p. 863). Their proposal would call for the recognition of income and deductions only when cash is received or expenses actually paid. It would eliminate calculations of depreciation and cost of goods sold. Kautter and Williamson write that their cash method would increase compliance and would not cost the government any revenue.

Applying the aggregate or entity theory of partnerships has long puzzled tax practitioners and administrators. Annie Jeong writes that one situation that has yet to be clearly addressed is the manner in which a partnership should determine whether a dividend paid on stock held by a partnership should be treated as a qualified dividend under section 1(h)(11) (p. 849). She argues that the entity theory makes the most sense from an administrative perspective and concludes that it is doubtful that partners will apply that theory to engage in abusive transactions.

In this week's 40th anniversary retrospective piece, practitioners and colleagues remember Laurence Woodworth (p. 821). In an article published on December 12, 1977, Woodworth, who was serving as Treasury assistant secretary for tax policy at the time of his death, was praised as being in favor of equity and for making a huge difference in the formation of tax policy.

In this week's Shelf Project, Prof. Calvin Johnson advocates requiring deductions and accumulated income to be allocated among partners in proportion to their capital accounts (p. 873). He argues that that would more fairly reflect income and would make the partnership consistent with 100 percent ownership. Robert Wood looks at termination pay withholding issues in Woodcraft (p. 869). He expresses surprise at the wide variation in how employers address termination pay and advises taxpayers to consider tax issues before preparing checks. And in honor of February 14, be sure to look at p. 895. ■

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