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Americans for Tax Reform? Really?

By Laura Breech — lbreech@tax.org

To say tax reform is the hot topic both on and off Capitol Hill would be putting it mildly. A perfect example of the worlds colliding is Grover Norquist's ''Taxpayer Protection Pledge,'' under which signers promise to oppose any and all efforts to increase rates for businesses and individuals. Forty-one senators and 237 representatives in the 112th Congress have signed the pledge. However, many of those signatories are now involved in tax reform discussions that would involve breaking that pledge. It's tough to argue that we'll be able to improve our fiscal situation without tax increases somewhere, which will be hard to accomplish with the hands of so many lawmakers tied by the pledge. Norquist is holding politicians' feet to the fire, saying no tax reform negotiation can involve anything other than spending cuts. He's even suggested that recent indications that the GOP ''Gang of Six'' members (all of whom signed the pledge) would be open to tax increases as part of a deficit reduction plan are nothing but a political ploy. (For coverage, see p. 1392.)

Does anyone else find it strange that one of the biggest obstacles to the tax reform efforts is a group called Americans for Tax Reform? Bruce Bartlett might. He argues on p. 1491 that Norquist is playing a dangerous game of chicken with his absolutist position against any form of tax increases. The ''starve the beast'' theory won't dig us out of our fiscal hole, Bartlett writes.

Lee Sheppard uses Cisco's financials to look at the migration of intangibles and proposals around the world (p. 1379). President Obama's proposal to claw back excess profits as subpart F income is a fairly straightforward approach, according to Sheppard, but it nevertheless has given courts a lot of trouble. She discusses the questionably decided *Veritas* case and the IRS's subsequent action on decision refusing to follow the decision. The British patent box plan might work well in combination with an excess profits clawback, Sheppard concludes, especially given the more costly alternatives.

Martin Sullivan has taken a closer look at the revenue that could be generated as a result of a controversial Tax Court case that held that limited partners are not exempt from self-employment taxes under section 1402(a)(13) (p. 1386). According to Sullivan's analysis (which is based on 2008 figures, the most recent available), the *Renkemeyer* decision could cost individual limited partners of law and accounting firms an additional $1.2 billion in self-employment taxes — nothing to sneeze at.

March/April Madness Mash-Up

The NCAA tournament has finally begun. If your bracket went up in flames in the Louisville-Morehead State debacle, you probably won't be shocked by this week's upsets in Robert Nassau's taxpayer-friendly code section bracket. (No spoilers here — see p. 1489.)

Commentary

Kip Dellinger takes on David Cay Johnston's assertion that federal tax revenues were much smaller in 2010 than in 2000 (*Tax Notes*, Feb. 28, 2011, p. 1089). On p. 1495, Dellinger argues that tax revenues were *bound* to go down, given the state of economic affairs in 2010 (recession) compared with 2000 (prosperity). He criticizes those who think the country's fiscal solution is to tax the rich, noting that per capita taxes declined because high-income earners suffered severe adverse financial consequences as a result of the economic downturn. Dellinger thinks a closer look should be given to ''how voraciously the public employees [are] feasting on the working taxpayers in the private sector,'' suggesting public employees are the real free-riders in the revenue game.

David Porter writes about *United States v. Richey*, a *Harry Potter*-type case questioning whether an IRS summons issued in good faith can be transformed into one issued in bad faith if the taxpayer pays the proposed deficiency (p. 1451). Porter examines the attorney-client privilege and work product doctrine in light of *Richey*, saying that the IRS's aggressive stance on enforcement of production of privileged information should make tax and accounting advisers wary and could transmogrify a summons from good to bad.

In What Were They Thinking?, Jasper Cummings questions why the Tax Court followed the nearly 70-year-old *Alabama Asphaltic* opinion to hold that only in limited cases may a bankrupt's creditors be seen as owning its equity for continuity purposes. How the ''rule of *Ralphs*'' will affect post-1998 bankruptcy organizations is unclear — much like the *Ralphs* opinion itself, Cummings writes (p. 1469).

Payroll taxes and worker classification are big issues for the IRS. Determining whether to classify your workers as employees or independent contractors is no small feat — just ask FedEx. In Woodcraft (p. 1483), Robert Wood shifts the examination to whether a franchisee is an employee, using *Coverall* and other cases to frame his analysis. He notes that FedEx argued that its delivery drivers were like franchisees, highlighting the importance of the franchisee/employee argument in worker classification. He concludes that while many consider the issue outside the employee/independent contractor arena, there is ample evidence that it is not.

David Shapiro and Jeffrey Maddrey observe on p. 1461 that the IRS has issued 40 almost identical private letter rulings sanctioning the use of tax-motivated blockers. The authors note that while the IRS does not discuss the economic substance doctrine, it implicitly rules that the doctrine does not apply to the blockers. Because the IRS won't provide taxpayers with an ''angel list'' of transactions to which the doctrine does not apply, Shapiro and Maddrey suggest a good alternative would be for the agency to bite the bullet and provide more formal guidance on whether the doctrine applies to blockers.

James Riordan jumps into the tax reform fray by suggesting sequencing those efforts (p. 1465). Riordan says that Congress needs to address spending and revenue caps as a percentage of GDP to control the deficit, agree on how progressive it wants the code to be, and reform the code to make it simpler and less biased against savings. He offers a plan that achieves those goals by breaking a reform effort into three parts: reforming the income tax base, reducing the bias against savings, and eliminating tax expenditures.

The Pension Protection Act of 2006 imposed stricter funding requirements on sponsors of single-employer defined benefit plans starting in 2008. Kathryn Kennedy expands and updates her 2009 special report discussing benefit restrictions under the section 436 proposed regulations issued in August 2007 (p. 1429). She looks at the effects of the final Treasury regs issued in October 2009 and the Department of Labor proposed regs from November 2010 on single employers that maintain defined benefit plans and the result of the financial crisis on plan funding. She finds that the PPA was a nice attempt to achieve full funding of single-employer defined benefit plans, but that the recession has made the PPA's funding and benefit restriction changes burdensome for plan sponsors. ■

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