From the Editor:

The IRS's Long Summer Continues

By Jeremy Scott — jscott@tax.org

The IRS exempt organization scandal won't fade away. Just when it seems that Republican-led House investigations are failing to turn up any evidence of White House involvement or overt political bias, revelations appear that give the scandal new life. Last week it came to light that IRS Chief Counsel William J. Wilkins had met with President Obama just before his office issued key directions to EO examiners (p. 427). What was probably only a harmless photo op for political appointees was given a sinister cast by GOP lawmakers, *The Wall Street Journal*, *The Daily Caller*, and other news agencies.

The EO scandal has increasingly become a political farce, writes Tax Analysts President and Publisher Christopher Bergin (p. 503). Bergin says that although the IRS inflicted some serious wounds on itself by using inappropriate criteria to screen EO applications, the criticism of the agency and its employees is over the top. The nation's tax administrator has been damaged to such an extent that the self-assessment income tax apparatus is under severe threat, he says. And that's a shame because the IRS is filled with dedicated and hardworking employees, Bergin writes. He uses Mortimer Caplin's recent 97th birthday to highlight the former IRS commissioner's contributions to the tax system and calls Caplin an example of the type of person who works at the Service. Despite the focus on silly things such as the *Star Trek* video and an expensive conference, there is no evidence of mass corruption at the IRS, Bergin concludes. He calls on Congress to stop attacking the IRS and start fixing it. One fix would be to properly fund it, he argues.

IRS funding is likely to become a contentious issue. On a party-line vote, a House committee moved a bill that would cut IRS funding by 24 percent. Meanwhile, a Senate committee approved a bill that would give the IRS over $12 billion, $3 billion more than the House (p. 433). The wide differential shows how battle lines are being drawn because of the EO scandal. Democrats are determined to thwart Republican efforts to either tie the White House to the scandal or score political points off it. And Republicans are determined to keep the scandal, and the IRS's general unpopularity, in the public's mind through hearings, investigations, and appropriations bills that essentially gut the agency.

The CFTC

The head of the CFTC, Gary Gensler, is being pushed out of his job for doing it too well, Lee Sheppard writes (p. 395). Gensler, who was featured in *Time* when he was first appointed in 2009, has been a champion of stronger regulation of swaps and derivatives and lower risk in the financial system. Recent guidance on substitute compliance for the EU was seen as a setback for Gensler, but Sheppard says the headlines sound worse than the results because the CFTC retains quite a bit of regulatory authority over Europeans. Sheppard breaks down the interpretative guidance and the four no-action letters issued by the CFTC and looks at how the latest dust-up over transatlantic swap transactions will affect the world of tax.

In a second article, Sheppard discusses foreign currency issues raised at a meeting of the International Tax Institute in New York (p. 402). Danielle Rolfes of Treasury addressed the meeting and took questions on section 988. The main issue in this area is that multinationals want the tax law to be more flexible on what can be treated as an offsetting item, she writes.

Big Pharma

Multinational pharmaceutical companies are right in the middle of the debate over transfer pricing practices. That's because many of them are able to slash their effective tax rate by locating intangibles in low-tax jurisdictions. But there are other ways to lower tax rates, according to Martin Sullivan, who describes several recent tax developments for drugmakers (p. 411). Sullivan looks at an inversion transaction featuring Valeant Pharmaceuticals. He also analyzes the tax strategy being used by Teva, the world's largest generic drugmaker. The use of inversions once again calls into question just how effective the laws against them are, Sullivan writes.

Commentary

The *Loving* decision has put a halt to major parts of the IRS's effort to regulate return preparers. The surprise holding by a district court that the IRS's new regulations and registration process exceeded its authority casts doubt on one of the signature achievements of former IRS Commissioner Douglas Shulman and OPR Director Karen Hawkins. While

he was working at the IRS Office of Chief Counsel, Bryan Camp agreed with the district court that the IRS did not have the authority to regulate the preparation of tax returns by unenrolled preparers. However, after reading *Loving*, Camp is now convinced that he and Judge James Boasberg were both wrong (p. 457). In his special report, Camp expands on arguments made by the government and tries to explain why people's perception of current tax administrative practices is causing them to misinterpret the law. He also looks at the history of Circular 230 and refutes the notion that we have a self-assessment system.

Corporate residence is a hot-button topic in transfer pricing. The Senate's recent hearings on Apple's tax practices showed how the tech giant could book 30 percent of its profits in an Irish subsidiary that was almost entirely managed from the United States. Omri Marian says the problem is that the U.S. tax code focuses too much on income and not enough on the taxpayer's location (p. 471). He argues that the law should not treat Apple's Irish subsidiary as a foreign company at all, but as a U.S. company, which it in substance is. He says it is past time for lawmakers to define corporate residence. He concludes that section 7701(a)(4) needs to be fundamentally rewritten and that the code should adopt a functional test to determine residence, and ultimately how to tax multinational income.

In *Rauenhorst*, the Tax Court held that the IRS does not have the right to litigate against its own revenue rulings and published guidance. The court appear to have forgotten about that case when it decided *Barnes*, Timothy Jacobs writes (p. 481). Despite the taxpayer relying on *Rauenhorst* extensively in its brief, the court didn't even cite or mention it, he writes. Instead, the court permitted the IRS to not only argue against a revenue ruling, but also impose substantial penalties. Jacobs criticizes the Tax Court, which held that revenue rulings are only reliable when a taxpayer matches the specific facts. He concludes that *Barnes* is fundamentally flawed.

Worker centers are typically 501(c)(3) organizations funded by foundations and other donors. They offer education, training, employment services, and legal advice. However, the centers frequently advocate for worker rights through demonstrations and lobbying, actions that are not consistent with 501(c)(3) status, according to Diana Furchtgott-Roth (p. 489). She argues that the IRS needs to closely scrutinize the tax-exempt status of worker centers. She reviews how many worker centers are in operation and concludes that this issue will become increasingly relevant with the confirmation of Thomas Perez as secretary of labor and the expected confirmation of new members of the NLRB.

Legal terminology and ordinary English are frequently at odds. Robert Wood and Dashiell Shapiro explore one instance of conflict between the two in the form of a definition of liquidation (p. 495). They analyze tax matter partners and the requirement that the designation of such a partner ceases upon liquidation or dissolution. The IRS has taken the position that a termination of a partnership for tax purposes is not a liquidation or dissolution for the purposes of the tax matter partner regulations. Wood and Shapiro look at this curious decision and how it affects practitioners.

In Of Corporate Interest, Robert Willens discusses the IRS's rejection of Tribune's attempt to create a leveraged partnership for Newsday (p. 499). The transaction at issue involved Tribune's sale of Newsday and the Chicago Cubs, but it appears to have been dealt a fatal blow, according to Willens. The IRS challenged the indemnification agreement that was at the heart of the deal, Willens says. ■