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From the Editor:

Camp Pushes Forward With Tax Reform

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Congress likes to talk about tax reform. President Obama will even mention it on occasion, although with much less fervor than many on Capitol Hill. But so far very few viable plans have actually been offered by either party. And the disagreement over whether tax reform should be revenue neutral or part of a deficit reduction package has kept hopes for a bipartisan agreement in check. But that hasn't stopped House Ways and Means Committee Chair Dave Camp from pressing forward. Camp released a corporate tax reform draft in 2011 that attracted attention from both sides of the aisle, and he has now followed that up with a plan to change the taxation of derivatives.

Camp's plan would force derivatives to be marked to market each year and would eliminate section 1256 (p. 399). It would also do away with the controversial 60/40 rule, which permits capital gains treatment for some contracts. Camp's new draft relies on a 2011 ABA Section of Taxation report on financial products. It includes several other provisions designed to reform the taxation of financial products and, possibly as a sweetener, it would simplify the treatment of hedges, prevent the recognition of so-called phantom income on debt restructurings, and require the accrual of market discount limited to prevailing interest rates. The Camp plan for derivatives is clearly designed to raise revenue, and his spokesman cautioned that it should be seen as part of a broader tax reform effort, not a stand-alone proposal. Camp's goal, remember, is to produce a tax system with a top rate of 25 percent. Ranking minority member Sander Levin didn't quite praise the bill, but he did say it contained interesting ideas that might cure some serious market inequities.

It would be unfair to characterize Camp as the only member of Congress who is serious about tax reform. After all, Sen. Ron Wyden has had a bipartisan plan for years (first cosponsored by Judd Gregg, and now by Sen. Dan Coats). And Senate Finance Committee Chair Max Baucus has pushed his committee to hold hearings on the topic. But Camp is the most influential member of Congress who continues to put his ideas on paper, allowing for discussion and debate. If the United States seriously considers a move to a territorial system, expect many (if not most) of the provisions in Camp's original discussion draft to be part of a final package. And if Congress does anything in the area of individual tax reform, you can be sure that its approach to marking derivatives to market will closely mirror Camp's new plan.

FATCA

The final FATCA regulations have received a mixed reception. Most practitioners are generally pleased with the guidance, but others have cautioned that holes still remain. Specifically, many practitioners are concerned about the tight deadlines that were preserved in the regs (p. 401). Government officials defended the regulations and pointed out that the IRS's goal was to get them out so institutions can begin complying (p. 407).

The final regulations seem to be encouraging countries to sign IGAs. In fact, several provisions in the regs will put a great deal of pressure on countries to begin negotiating IGAs with Treasury. Marie Sapirie looks at the interaction of IGAs and the final regulations (p. 405). Sapirie writes that by keeping the end of the transition period at December 31, 2013, the United States has essentially forced most countries to consider an IGA, and quickly.

Commentary

Despite its setback in *Loving*, which permanently enjoined the government from enforcing its return preparer oversight regime, the IRS is expected to continue with its expansion of Circular 230's jurisdiction. The government announced that it is appealing *Loving* (p. 416). Circular 230 contains another threat to return preparers beyond simple registration requirements, according to Doug Moy (p. 445). He points out that under Circular 230, registered return preparers cannot provide tax advice to a client except as necessary to prepare a return. In other words, they cannot give clients pre-transaction tax advice. Moy argues that the provision jeopardizes the livelihood of many preparers. He analyzes the pre-transaction advice issue and offers an alternative interpretation of Circular 230.

While Camp moves ahead with his tax reform agenda, which now includes both corporate tax and financial product tax reform, others have begun to question whether the political climate will allow

any sort of compromise. Corporate tax reform remains the area where there is the most potential agreement between Democrats and Republicans, but, according to Fabrice Georis, the corporate tax cannot be fixed (p. 459). No corporate tax reform proposal will raise substantial revenue, Georis writes. He proposes replacing the corporate income tax and the tax on dividends and capital gains with a direct tax on the capital of business entities. He discusses the potential objections to his proposal and the problems with the corporate tax regime.

Any practitioner who has ever attended a conference with a government speaker is probably familiar with the phrase ''speaking on my own behalf.'' Almost all government officials who attend conferences preface their remarks with those words. Monte Jackel has had enough. He writes that this practice is not appropriate and should be corrected (p. 466). He analyzes the Internal Revenue Manual and finds that the exculpatory practice of using ''speaking on their own behalf'' does not fit with the mission of chief counsel. In a second article this week, Jackel discusses the IRS's final regs on the partner de minimis rule (p. 479).

Even though the election is several months past, it is likely that most television viewers are still sick of campaign ads. Candidates spent hundreds of millions of dollars in the 2012 election and inundated network programming with thousands of ads. Jasper Cummings, Jr., says that voters might be even more outraged to learn that the treasury might be subsidizing those expenditures (p. 469). He argues that television networks that cater to one political demographic might provide inurement of benefit to a particular political party that is more than remote, negligible, or incidental. That would mean disallowing deductions under section 162, according to Cummings.

In the second part of their discussion of state law and the treatment of personal goodwill, Robert Wood and Brian Beck look at the developing history of personal goodwill (p. 483). They emphasize its ownership and transferability under state law. State property law is the key to federal income tax treatment of this type of goodwill, they conclude.

In Estate and Gift Rap, Wendy Gerzog writes that in *Wimmer*, the Tax Court held that the income stream from a taxpayer's gift of family limited partnership interests was eligible for the annual exclusion (p. 489). However, the court did not allow the underlying interests to be eligible for the exclusion. Gerzog says that the court compared the income to the partnership's dividend-paying marketable securities. She concludes, however, that it is not clear whether the trust analogy used by the court was proper.

After years of promoting transfer pricing practices that allowed multinationals to shift income from country to country, the OECD is now trying to draft rules that will help avoid this type of base erosion. Michael Durst praises its efforts, but says that it will be difficult for OECD members to agree on legal measures to combat this problem (p. 495). He suggests that developing countries with strong economies might be able to take the lead in adopting legislation to curtail base erosion. He specifically proposes passing legislation limiting the deductibility of some payments made by multinationals to related parties.

Dell Inc. recently announced a $12 billion restructuring involving the use of Netherlands, Singapore, and Cayman Islands entities. David Cay Johnston has analyzed the transactions and argues that if Dell is allowed to avoid U.S. taxation, it will have major consequences for tax policy (p. 499). He also criticizes the manner in which Dell disclosed the transaction in its Form 8-K and hopes that the IRS and Congress will take a close look at the restructuring. At stake might be billions of dollars in taxes, he writes. ■

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