

*From the Editor:*

### **Obama Pushes Buffett Rule in State of the Union**

*By Jeremy Scott — jscott@tax.org*

President Obama's first term has gone a long way toward proving the axiom that everything old will someday be new again. In what might be his last State of the Union address to Congress, Obama once again made tax policy a major focus, arguing for several tax reforms and incentives he has called for in the past. But the focus of his tax plan was reviving the Buffett rule, first pushed in the fall, and expanding it to cover a minimum tax on foreign income earned by U.S. multinationals. Obama's emphasis on a rule to require millionaires to pay a minimum effective tax rate probably has much more to do with the income level of his likely Republican challenger than any realistic hope of its passing Congress.

The Buffett rule was endlessly dissected in September and found to be overly complicated and probably unworkable. In his speech, Obama called for millionaires to be subject to a minimum 30 percent effective tax rate. Such a rate would be double the current tax on income from capital gains and would nearly double the effective tax rate paid by Warren Buffett and Republican presidential candidate Mitt Romney. However, it would not be much more than the 29 percent average effective rate that the Tax Policy Center has reported for taxpayers making more than \$1 million. As expected, the president framed the Buffett rule in terms of fairness, not deficit reduction. Income inequality and heavier tax burdens on the wealthy are expected to be major themes in his reelection campaign.

The Buffett rule wasn't the only tax component to the speech. Obama called for a minimum tax rate on foreign profits. While he didn't specify an exact rate, the president promised that the revenue from the minimum tax would go toward cutting taxes for companies that focused on domestic employment and investment. Obama also proposed narrowing the focus of the current deduction for domestic production, squeezing out oil production and diverting the savings to double the deduction for manufacturing. He would provide an additional \$5 billion in tax credits for investment in U.S. clean

energy and would extend 100 percent expensing through 2012. (For coverage, see p. 505.)

Republicans were quick to criticize virtually all of the president's proposals, casting doubt on whether any of the plan will become law. But again, that probably wasn't the point of the address. At a time when the GOP front-runner was reeling from questions about his income level and wealth, Obama's main goal was almost certainly to frame the 2012 debate in a manner beneficial to his party and that shifts focus away from the economy, healthcare reform, and the failed 2009 stimulus package.

### **Romney's Tax Returns**

Romney endured a firestorm of criticism for failing to release his tax returns before the South Carolina primary, and he suffered from that largely self-inflicted wound. Former House Speaker Newt Gingrich rolled to an easy win, and this defeat finally prompted Romney to give in and release his 2010 return, along with 2011 estimates. Lee Sheppard dissects Romney's returns and finds that he is still reaping the benefits of his relationship with Bain Capital. Romney paid just under a 15 percent effective tax rate on more than \$40 million of income over the two years released. Sheppard also looks at Romney's IRA, attempting to explain how it could have accrued such a high value. She speculates that Romney might have found a way to assign some of his Bain profits interests to the account and analyzes other ways that it might have increased so much. (For her analysis of the returns, see p. 491. For the IRA article, see p. 494.)

### **40th Anniversary**

Romney's low effective tax rate has focused attention on the effect of the capital gains preference on tax rates. Capital gains rates are not a new issue by any means, and in an article from 1975, Prof. Roger Brinner presents arguments against a rate preference (p. 549). Instead, he proposed taxing inflation-adjusted gains in full, including unrealized gains on assets passed on at death. Brinner wrote that most of the justifications for a rate preference are based on inflation, something that can be easily compensated for in the code.

### **Offshore Reporting**

The reporting of offshore accounts has emerged as a major issue for the IRS and taxpayers. The success of the UBS probe has led to three different voluntary disclosure initiatives and thousands of

taxpayers attempting to come clean with the government over their offshore assets and income. Despite three separate programs, not all of the kinks have been worked out in the voluntary disclosure process, according to Robert Wood and Christopher Karachale (p. 553). Much noncompliance still remains and it is not all attributable to one issue, they write. They find that the 2009 and 2011 programs show a systemic problem with the tax code and argue that the failure to educate tax professionals and a system overload have created a perfect storm of noncompliance in the offshore area. The complexity of some filing obligations shows that the tax system needs fixing, they conclude.

Many practitioners have criticized the voluntary disclosure programs for failing to differentiate between those that willfully sought to evade taxes and those that simply were not aware of their filing obligations. The one-size-fits-all penalty approach in the 2009 initiative led to some flexibility in the subsequent programs, but many taxpayers are still not satisfied. Robert Stack and Douglas Andre write that an expedited opt-out procedure is needed for taxpayers in the initiatives that owe little or no tax (p. 561). The penalty structure in the disclosure program is a poor fit for many taxpayers that simply failed to file a foreign bank account report or other information return on accounts that generated no tax obligations. An expedited procedure for processing those types of cases is needed to provide fairness and certainty and could help improve the entire program, they write.

After the closing of the 2011 program, an article by Scott Michel and Mark Matthews asked what is next for voluntary disclosures (*Tax Notes*, Oct. 17, 2011, p. 369). Although the opening of a third initiative answered part of their question, Thomas Zehnle writes that the approach to voluntary disclosure needs to be seriously reexamined (p. 575). He argues that voluntary disclosure initiatives should be permanent and should apply some of the principles from the federal sentencing guidelines. It is obvious that the IRS needs to promote some form of voluntary disclosure of offshore accounts, but so far the Service has failed to perfectly hit the mark with its initiatives, Zehnle concludes.

### Commentary

On August 26, 2011, the IRS released a GLAM that analyzes the tax consequences of making a check-the-box election to convert an insolvent foreign subsidiary into a partnership. Monte Jackel and Nadine Holovach write that the GLAM raises several questions, including how section 752(c) applies to check-the-box transactions and whether section 721 applies to a contribution of property with no net value (p. 569). The GLAM implies that applying section 752(c) is the correct treatment, which may open opportunities for taxpayers to shift basis between partners in some nonrecognition transactions, they write. Jackel and Holovach question whether that result is desired by either the drafters of the GLAM or Congress.

Although the payroll tax conference committee has announced that it will not consider extenders during its attempt to extend the payroll tax cut, many inside and outside Congress hope that the conference will reconsider. (For coverage, see p. 528.) Stewart Karlinsky is in that camp, and he writes that the failure to address the extenders will greatly affect many C corporations (p. 589). Along with the extenders, Karlinsky summarizes many important tax developments and planning opportunities that affect C corporations and property.

The Supreme Court recently heard oral arguments in *Home Concrete*, which involves the IRS's attempt to apply an extended statute of limitations to overstated basis claims. Prof. Kristin Hickman provides an overview of the oral arguments and the facts of the case (p. 579). She believes that the oral arguments suggest that the Court is leaning toward restricting *Colony* to the 1939 code, but that the outcome of *Home Concrete* is unclear.

In *Estate and Gift Rap*, Prof. Wendy Gerzog discusses *Estate of Olivo*, a case in which the Tax Court determined the deductibility of a claim against the decedent's estate for elder care services (p. 595). She concludes that caregivers should obtain written, signed compensation agreements detailing the services to be provided for an elderly family member. Claire Nash presents a plan for Social Security reform on p. 582. The Tax Policy Center looks at the effect of healthcare reform on investment income on p. 599. ■

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