

*From the Editor:***Textron Ends Summer With a Bang***By Jon Almeras — jalmeras@tax.org*

Happy Labor Day. Officially, fall is three weeks away, but we all know summer really ends today. The kids are all back in school tomorrow, and everyone — including Congress — returns from vacation.

But not everyone was on vacation last week. A U.S. district court in Rhode Island set off some late-summer fireworks by refusing to enforce an IRS summons on Textron Inc. and its subsidiaries for tax accrual workpapers relating to sale-in, lease-out transactions.

Even though the *Arthur Young* case in 1984 made clear that the IRS has the authority to summons workpapers, the agency followed a policy of restraint until 2002 when it announced it would seek workpapers for listed transactions. SILOs were listed in 2005, and the IRS sought Textron's workpapers for nine SILO transactions from 2001.

Textron objected to the summons on the grounds that the workpapers were protected by attorney-client privilege, the work product doctrine, and the tax practitioner privilege of section 7525. The company had allowed its auditor, Ernst & Young, to examine the workpapers, and that disclosure blew the claims of attorney-client and tax practitioner privilege. However, the district court found that the workpapers were protected by the work product doctrine because the papers were prepared in anticipation of litigation with the IRS.

The case is a major victory for taxpayers, according to several practitioners who spoke with Tax Analysts. As Thomas Callahan of Thompson Hine put it, the IRS "took it on the chin." But IRS Chief Counsel Donald Korb cautioned that the taxpayer's victory may be short-lived, and he pointed to several recent shelter cases in which the taxpayer won at the trial level but the result was reversed on appeal. Korb doesn't think the work product doctrine should apply to tax accrual workpapers, and that will probably be the government's argument on appeal to the First Circuit. See p. 815 for full coverage.

IRS Leadership

Other big news came from the IRS last week, as it announced replacements for two top officials who are retiring in the next few months. In October Frank Ng will become Large and Midsize Business Division commissioner, replacing Deborah Nolan, and Richard Byrd Jr. will become commissioner of the Wage and Investment Division when Richard Morgante steps down in January (p. 818).

Congress Returns

Several things are on the legislative agenda when Congress returns to Washington this week. Battles over energy and farm packages, children's health insurance and tobacco taxes, and Federal Aviation Administration funding will all pick up where they left off before the August recess. Tax Analysts' Meg Shreve gives you a full preview beginning on p. 819.

One item to watch will be what a Senate homeland security investigations subcommittee does with responses to a questionnaire it sent to an unknown number of corporations on August 23. A letter from subcommittee Chair Carl Levin asks the companies to return the questionnaire — which asks about tax benefits and FIN 48 compliance — by September 20 (p. 819).

Blackstone, one of the private equity firms that have been the subject of much debate this summer, has fired back at proposed legislation that the firm says would reduce its market capitalization by 40 percent. The legislation, introduced by Senate Finance Committee Chair Max Baucus and ranking minority member Chuck Grassley, would tax as corporations those publicly traded partnerships that derive income from investor adviser or asset management services. Blackstone also says that legislation would reduce government revenues (p. 821).

Also this week, the Senate is expected to vote on President Bush's nomination of Jim Nussle as director of the Office of Management and Budget. Nussle will most likely be confirmed, but he could be in for a rough ride the next year and a half as the White House and congressional Democrats battle over tax cuts and spending (p. 822).

Foreign Tax Credit

In the latest installment of her examination of the proposed foreign tax credit generator regs, Lee Sheppard says the regs are highly detailed but lightly reasoned. The IRS needs to get its head in the game, she says, if it wants to crack down on foreign tax credit arbitrage by banks and other large corporations (p. 824).

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Commentary

It's not often that a *Tax Notes* article discusses Albert Einstein and theoretical physics, but this week George White's special report does just that as he covers the basics of the IRS's latest consolidated return regulations. White says the IRS was attempting to set forth a unified standard to deal with the problems of *General Utilities* repeal and the *Rite Aid* case (much like Einstein looked for a unifying theory of the universe). White concludes that, unlike Einstein, the IRS has succeeded in its endeavor (p. 857).

In our second special report, Michael Karlin and Stanley Ruchelman provide an in-depth guide to the tax issues surrounding the purchase of a home in the United States by foreign persons (p. 863).

Knock Knock

In *Tax History*, Joseph Thorndike highlights an enforcement experiment from 1953 that seems unbelievable now. IRS agents went door-to-door in New England, asking if people had filed their tax returns, and if the taxpayer said yes, the agent asked for proof of payment (p. 891).

A few weeks ago (*Tax Notes*, Aug. 6, 2007, p. 493), Prof. Joel Newman recounted the scandalous divorce that led to the Supreme Court's decision in *Gilmore*. Robert Wood writes to compliment that article (p. 899), and Newman is back this week with a viewpoint to discuss a recent case in which the Tax Court finessed a 1982 law prohibiting business deductions for drug dealers in the case of a medical marijuana group in California (p. 887).

In another viewpoint, Prof. David Roberts discusses the relationship of tax cuts and the mortgage market crisis (p. 889). Robert Willens discusses advance trade discounts and wonders whether the IRS will reconsider its position to follow a Ninth Circuit decision on the subject after the Third Circuit ruled in the Service's favor (p. 893).

In a practice article, Michael Gompertz notes that recent chief counsel advice concludes that a bankruptcy estate is an "estate or trust." Gompertz argues that "estate or trust" refers only to subchapter J decedent estates and points out the problems with extending the term of art to cover bankruptcy estates (p. 843).

And in a letter to the editor, Tom Daley responds to Prof. Darryll Jones's recent article on the taxation of carried interests (p. 897). ■