From the Editor:

The 2001 Bush Tax Cut Turns 10

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On June 7, 2001, President George W. Bush signed the first major tax cut of his administration into law. The 2001 tax cut focused on lowering individual income tax rates, doubling the child credit, and reducing the marriage penalty. The Bush tax cuts are a polarizing issue, with those on the right claiming the reductions staved off a deep recession and those on the left blaming them for the current deficit and debt crisis.

The tax cut was sold as a means of stimulating the economy, raising growth, and reducing unemployment, but they accomplished none of those things, according to Bruce Bartlett. He writes that the problem with the tax cut package was that it was crafted as a means of eliminating the budget surplus but then sold as a stimulus package. The surpluses evaporated on their own and then the 2001 law did little to help the economy, Bartlett argues. Interestingly, Bartlett wonders whether the shortened transition period after the 2000 election contributed to Bush's failure to reexamine the tax cut package he proposed during the campaign and tailor it more to the economy's needs in early 2001. The economy performed poorly during the 2000s despite low taxes, Bartlett contends, adding that the failure to control spending and the expiration dates for the new rates helped to depress business activity and long-term planning. The 2001 tax cut is prima facie evidence of the failure of Bush's economic policies as a whole, Bartlett concludes. (For his column, see p. 1195.)

The 2003 Bush tax cut would later reduce capital gains and dividend tax rates to 15 percent, something that Bartlett points out is more in line with classic supply-side tax policy. But the 2001 tax cut might be more important and successful than many on the left are willing to admit. First, it enjoyed widespread political popularity at the time. Many Democrats were in favor of returning some of the budget surplus to taxpayers. The strongest objections were over the reductions in the top rates, but many policy experts would agree that a functional tax system should generally include logical increases in rates — too steep of a climb in rates creates compliance problems and disincentives to work. And an argument could be made that the 2001 tax cut was less responsible for the Bush-era deficits than profligate spending and two large-scale military operations. Democrats who want to restore progressivity to the U.S. tax system would be wise to look less at the top rate introduced in 2001 and more at the extremely low tax rates on capital gains and dividends introduced during the Clinton administration and then lowered even further in 2003.

Tax Havens

The United States and other world governments have long complained about tax havens and the practice of multinationals routing foreign earnings through small island (or even mainland European) nations in order to escape higher domestic tax rates. But until recently, no one really seemed all that interested in cracking down on the tiny governments. Now it might be too late, according to Lee Sheppard. In her review of a recent book by Nicholas Shaxson on tax havens, Sheppard writes that those parasites have subsumed the host and that tax havens have essentially become the banking sector. Almost half of the world's trade is routed through low-tax jurisdictions, she writes. She agrees with Shaxson's argument that Wall Street and London have used the existence of tax havens to combat financial regulation in the United States and Britain. Shaxson writes that this has all been part of the process of the United States converting itself into a tax haven. Sheppard also addresses Shaxson's conclusion that the British Empire has been reborn as a spider web of interconnected former colonies that serve as offshore vehicles for tax minimization and evasion. (For Sheppard's analysis, see p. 1111.)

Treasury and Tax Reform

The Treasury Department played a major role in the 1986 tax reform effort. In fact, it would not be an exaggeration to say that the department actually led the push to simplify the tax system by issuing Treasury II, which President Reagan used as the starting point in negotiations with lawmakers. While tax reform may be on the minds of Congress and President Obama in 2011, Treasury has been conspicuously absent as a driving force, writes Jeremiah Coder. Coder discusses the decline of the Office of Tax Policy as an influential force in reform proposals and points out the differences between the 1986 reform effort and the push for tax changes today. He concludes that although it might be unfair to require Treasury to be as influential today as it was under Reagan, tax reform efforts still would benefit from a more assertive Office of Tax Policy and concrete proposals from Treasury. (For Coder's analysis, see p. 1116.)

Commentary

The IRS is under considerable criticism for its handling of innocent spouse relief cases, particularly because of its insistence that equitable relief under section 6015(f) be subject to a two-year statute of limitations. Under pressure from Congress, the national taxpayer advocate, and outside commentators, the IRS is reviewing its innocent spouse procedures, and odds are that the two-year period will end up being scrapped (either voluntarily or because Congress acts). However, Carlton Smith writes that there are other problems with how the IRS is administering innocent spouse relief, particularly how it interprets ''inequitable'' under subsections (b) and (f) (p. 1165). Smith argues that the IRS's revenue procedure on the topic deserves no judicial deference, as it conflicts with 27 years of jurisprudence. According to Smith, the revenue procedure contains factors and thresholds that go beyond those in the case law. Not only are many of these new factors unwise, but they were arbitrarily chosen by the IRS, he writes. The IRS should withdraw the revenue procedure and allow determinations of what is inequitable to be made by courts, Smith concludes.

The IRS issued regulations on D reorganizations in 2009. That guidance clarified so-called cash D reorganizations and helped to address many questions that vexed practitioners. However, several other questions remain, including the treatment of tiered reorganizations. Benjamin Willis, Pat Grube, and Henry Miyares write that the deemed consideration mechanic in the cash D regulations could help practitioners structuring the contribution of the stock of a two-tiered corporate structure immediately after a deemed liquidation (p. 1179). While there is case law supporting deemed reorganization treatment, there is still confusion on the proper treatment of a tiered reorganization, the authors argue. They recommend using a bottom-up approach and also suggest ways to address the allocation of consideration in those types of transactions.

Continuing his series of practice-tip-themed articles, Robert Wood addresses the issue of nontax advisers offering common bits of supposed tax wisdom. According to Wood, many of the purported rules or analyses offered after the statement ''I'm not a tax lawyer, but . . . '' are wrong (p. 1191). The phrase is often used by corporate lawyers, real estate brokers, bankers, and other professionals, particularly during settlement or contract proceedings. If lawyers make such statements, what is the extent of their professional liability if the advice turns out to be false? That is a serious issue, according to Wood. Reviewing a series of court cases, Wood finds that even using a disclaimer can sometimes subject an attorney to liability when providing tax advice. In the end, the use of such a phrase isn't always a bad thing for tax lawyers because it keeps producing work for actual tax professionals, Wood concludes.

The expansion doctrine can sometimes permit a corporation to accomplish a tax-free spinoff of a business acquired within the past five years in a transaction that generated gain or loss. Robert Willens writes that before the expansion doctrine, case law adopted a much narrower view of when that type of transaction could be successful (p. 1187). Regulations issued by the IRS have rendered the *Nielsen* decision obsolete, Willens writes. He concludes that the IRS will respect expansion doctrine transactions when the businesses merely inhabit the same line of business. ■