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From the Editor:

UBS Agreement: Did the Swiss Get the Better End of the Deal?

By Petya Kirilova — pkirilov@tax.org

This week we continue with two major themes in tax policy and enforcement: cracking down on offshore tax evasion and the merits of the recently concluded Switzerland-U.S. agreement in the UBS matter pertaining to disclosure of the identities of certain UBS account holders considered tax cheats by the U.S. government. The long-awaited deal between the two countries arrived, but in vague terms that raise substantial doubt whether the United States will actually obtain meaningful information to prosecute tax evaders. The media oversimplified the agreement and portrayed it as a milestone in information exchange between the two nations, but *Tax Notes* authors Lee A. Sheppard and David Cay Johnston believe that the United States has struck a lousy deal that is deficient in many respects. For Sheppard's analysis, see p. 847. For Johnston's article, see p. 927. Consequently, the efficacy of the agreement and its intended results are largely uncertain.

While Johnston expresses disenchantment with the Swiss for not seeing anything wrong with garden-variety tax cheating on their soil being aided by Swiss banks, and he urges the rest of the world to condemn their society and government for promoting lawlessness that steals from many, Sheppard is disappointed with the substance of the agreement, its lack of clarity, and the disingenuous way it has been portrayed. In other words, she does not think that it is the success it has been touted to be. She views the compromise as an attempt to show the U.S. government as making vast strides against tax evasion when in reality, under the terms of the agreement and because the disclosure is to take place under the existing bilateral tax treaty, the Swiss are in control of whether and to what extent tax information will be relayed to the United States. The author further argues that implementing the agreement in practice largely depends on the Swiss government and/or UBS. Moreover, it's unclear how effective the agreement will be because it was reached before the protocol to the 1996 Switzerland-U.S. treaty has been signed, and because the most important document, the annex, has not been made public. Sheppard argues that the annex contains the criteria by which the agreed-on 4,450 account holders will be chosen for disclosure under the treaty tax information exchange process.

Both Sheppard and Johnston question the ability of the IRS to actually collect taxes on the purported tax evaders because of its insufficient resources, and they say that as a result, even if all 4,450 accounts are identified, there won't be enough agents to collect the unpaid taxes. Johnston has called this a ''de facto program of catch and release.'' He even argues that the agreement with Switzerland discriminates against all honest taxpayers and all domestic banks and that because of a lack of resources to collect the additional tax, there is a de facto discrimination in the application of the tax laws.

In the end, Sheppard is not convinced that the agreement will have much effect on Switzerland's banking business or its secrecy laws. Johnston believes that the biggest beneficiaries of the UBS agreement will be tax cheats because of the diminished capacity of the IRS to actually collect taxes from tax shelter users.

Commentary

The *en banc* decision by the First Circuit in *Textron* denying work product protection to tax accrual workpapers has sent shockwaves through the tax community. Practitioners were mostly critical of the appellate court opinion that overruled the original panel holding that the work product doctrine applied to the workpapers. Ronald Buch believes that the decision has far-reaching consequences that will affect cases both inside and outside the tax law (p. 915). Specifically, Buch is concerned that the majority's reasoning will open a company's litigation reserves to potential discovery by an adversary. The ''for use'' test used by the First Circuit may prove to be too high of a threshold to protect litigation reserves from private litigants, according to Buch. He does acknowledge that the *Textron* opinion might have some positive effects, including subjecting the IRS to the same discovery rules. Buch also finds some comfort in the fact that the decision did not address the issue of waiver, thus limiting the reach of the majority's take on the work product doctrine.

Employer-provided healthcare has become a major focus of the debate in Congress on how to raise

revenue to fund President Obama's reform package. For now, the focus seems to have shifted from a cap on the employer-provided healthcare exclusion to a tax on insurers that offer so-called Cadillac plans, but the tax treatment of employer-provided healthcare might not remain unchanged. Prof. Peter Wiedenbeck believes that tax law has had a pervasive influence on the structure of healthcare financing in the United States (p. 889). In his special report, he looks at the various employment-related embellishments added to the tax code over the last three decades, including health spending accounts, health reimbursement arrangements, and the favorable treatment of long-term care expenses. Wiedenbeck also analyzes the proposed reforms in Congress and how they would likely affect the interplay between taxes and healthcare costs.

Automatic enrollment in IRAs has become very popular with lawmakers. The Obama administration recently proposed requiring firms without retirement savings plans to automatically enroll their workers in IRAs. In a special report on p. 903, Benjamin Harris and Rachel Johnson address the revenue costs and distributional effects of the president's proposal. The authors find that automatic enrollment in 401(k) plans is rapidly rising as employers and policymakers use it to boost retirement savings. Harris and Johnson conclude that the revenue costs to the federal government from automatic enrollment are modest, but that an expansion of the Saver's Credit implemented at the same time would cause those costs to rise substantially. They also find that the benefit of these proposals is fairly evenly distributed over the middle three quintiles of taxpayers.

It is an established principle of tax law that if a company pays an employee's taxes, that payment constitutes income to the employee. However, Kaye Thomas highlights a situation wherein executives are receiving the equivalent benefit without being subject to tax. Thomas writes that this problem occurs in the area of nonqualified deferred compensation and points out several instances in which executives effectively receive the investment income earned on the deferred compensation tax free; the employer is essentially paying the tax. Thomas calls this the parity principle and explains when it affects retirement planning and compensation (p. 918).

The increasing use of gift cards by retailers and consumers creates tax accounting problems for both businesses and tax collectors. In Tax Accounting Developments, George White writes that state and local governments might soon try to tax the roughly 10 percent gift card value that goes unredeemed (p. 923). Robert Wood addresses the issue of tax experts in civil litigation, focusing on a recent criminal tax case in which the court found malpractice occurred because an accountant's criminal defense attorneys failed to retain a tax expert to dispute the government's valuation of a tax loss figure (p. 885). Bridget Crawford writes about the tax lessons learned from the case of Brooke Russell Astor on p. 933. Robert Willens's Of Corporate Interest this week discusses a novel approach to monetizing a corporation's tax attributes (p. 931).

A recent Johnston's Take argued that tax policies adopted since President Reagan have substantially contributed to growing income inequality in the United States. (For Johnston's article, see *Tax Notes*, Aug. 17, 2009, p. 713.) Tom Daley doesn't agree, and in a letter to the editor, he questions Johnston's numbers and analysis. Daley is particularly displeased that Johnston's discussion of the marginal tax rate paid by the rich failed to mention the distinction between ordinary income and capital gains tax rates. Prof. William Turnier writes that the common perception that a cap or tax on Cadillac insurance plans would be a progressive tax is incorrect. In fact, according to Turnier, taxing health insurance as income would likely turn out to be ''quite regressive in nature.'' (For Daley's letter, see p. 943. For Turnier's letter, see p. 939.) ■

The Courts column in the Weekly Update section of *Tax Notes* will no longer appear. Please look for future coverage of significant court decisions in the News and Analysis section of the magazine. Feedback on this decision is welcome at taxnotes@tax.org.

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