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In This Issue

- Tax reform is looking less likely
- A loophole in the Byrd rule?
- Extension for portability election granted
- PTIN issuance suspended
- Extensions up
- No deduction when loan was unnecessary
- Regulatory review

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Tax reform is looking less likely

The Economic Recovery Tax Act was passed by the Congress on August 4, 1981, and signed by President Reagan on August 13. The Taxpayer Relief Act was signed by President Clinton on August 5, 1997. There has generally been a rhythm to Congressional tax rewrites, in which legislative language is drafted in the spring and the process gets wrapped up by the August recess.

That won't be happening this year. Not only is there no legislative language, but legislators also have yet to reach a consensus on the broad outlines of tax reform. Recent bullet points:

• Republicans in the House Ways and Means Committee remain committed to a "border-adjustable tax" as a mechanism to offset revenue losses that may result from lowering the corporate tax rate. They are working on transition rules to meet the objections of some businesses.

• Senate Finance Committee Chair Orrin Hatch (R-Utah) is open to the border-adjustable tax, but he also has stated that a value-added tax should be considered as well.

• The White House in early June signaled that it wanted to enact health insurance legislation in the summer, with attention on tax reform delayed until the fall. National Economic Council Director Gary Cohn suggested that a draft bill would be waiting for Congress by the time that it returns from the August recess. Who would write that draft was not specified.

• The Chairman of the House Freedom Caucus, Mark Meadows (R-N.C.) reports that his caucus is divided on the border-adjustable tax. They have not taken a formal position, but Meadows suggested that dropping it might be helpful.

COMMENT: Perhaps the more likely timeline for tax reform is suggested by the precedent of the Tax Equity and Fiscal Responsibility Act of 1982. That bill was introduced on November 13, 1981, and was signed by President Reagan nearly a year later, on September 3, 1982.

A loophole in the Byrd rule?

One obstacle to enacting tax reform has been the "Byrd rule," which requires that legislation that increases the federal deficit within the budget window must have 60 votes to clear the Senate. Otherwise, the legislation must be temporary. That's why the "Bush tax cuts" enacted in 2001 were set to expire in 2011, as a 10-year budget window was used to test their revenue effects.

Grover Norquist and David McIntosh have suggested that there might be an easy way for Republicans to get around the Byrd rule and pass a tax reform bill with a simple majority in the Senate. The trick would be to use a 25-year budget window instead of the traditional 10 years.The fact that the tax reform might expire in 25 years would be inconsequential, because the tax law gets overhauled every few years, it seems.

Senator Pat Toomey (R-Pa.) may take the lead on pushing the Senate in this direction.

Extension for portability election granted

Decedent died after the effective date of the addition to the tax code of the spousal portability of unused federal exemption amounts. Decedent's spouse and his two children were the administrators of his estate. Because the estate was below the filing threshold for the federal estate tax, they never filed a Form 706.

That means they forfeited the portable exemption for the surviving spouse, because the election to preserve it can only be made on a Form 706. Now the oversight has been discovered, so they have asked for an extension of time to make the election. No extenuating circumstances or other excuses were offered.

Because the estate was below the filing threshold, the IRS granted the request.

—*Private Letter Ruling 201717011*

COMMENT: Because so many letter ruling requests have been pouring in on this subject, the IRS has issued *Rev. Proc. 2017-34*; 2017-24 IRB 1, which effectively revives *Rev. Proc. 2014-18*, providing for a simplified method of getting an extension in these circumstances without the expense of a private letter ruling. The new Procedure is available for two years after decedent's death or January 2, 2018, whichever is later.

PTIN issuance suspended

On June 1 the U.S. District Court for the District of Columbia ruled that the IRS had the authority to establish Preparer Tax Identification Numbers (PTINs), it did not have the authority to charge a fee for them [*Steele v. U.S.,* No. 1:14-cv-01523]. In response, the IRS announced that it is halting PTIN registration and renewals. The cost of processing each application for a PTIN is $17, which the IRS does not want to pay. The ruling follows the IRS loss of the authority to regulate tax preparers in *Loving v. U.S.,* 742 F.3d 1013 (D.C. Cir. 2014). That case held that tax return preparation did not constitute practice under Circular 230 and was thus outside the authority of the Treasury Department and the IRS.

Extensions up

The number of taxpayers filing for an extension of time to file their Forms 1040 during the 2017 filing season rose 6.5%, according to an IRS report obtained by *Tax Notes*. Among electronic filers, the extension requests were up more than 11%. The reasons for the increase are unclear. Taxes are becoming ever more complicated, which doesn't help with getting the job wrapped up in a timely fashion. Some have suggested that taxpayers who owed a "shared responsibility payment" because they did not have sufficient health insurance in 2016 may have contributed to the requests for delays. They may have been hoping that this Obamacare tax would be retroactively repealed during the extension period, absolving them of the need to pay it. Reportedly, some Vermont tax preparers were making just this recommendation to their clients.

No deduction when loan was unnecessary

John Koons and his father acquired shares in Burger Brewing Corp. Eventually, Koons became the company's president and CEO. In the 1960s the firm began bottling Pepsi soft drinks, and also entered the vending machine business. In the 1970s the name was changed to Central Investment Corp. (CIC) and the brewing of beer was discontinued. Koons was the largest shareholder by the 1980s.

In 1997 a dispute emerged about whether CIC had the exclusive right to sell Pepsi fountain syrup directly to restaurants, movie theaters, and other customers in CIC's territories. A lawsuit followed. In 2004 Pepsi suggested that it would purchase CIC's soft drink and vending machine businesses as a way to settle the lawsuit. The eventual settlement included the purchase of business assets for $352.4 million and the payment by Pepsi of $50 million in cash to end the litigation. Through a series of transactions, the proceeds ended up in a successor company, CI LLC, and a revocable trust.

When Koons died in 2005, his estate was faced with an estate tax of $21 million and a generation-skipping tax of $5 million. Because the estate's liquid assets were about $19 million at the time, it borrowed $10,750,000 for CI LLC to meet the tax obligations. Principal and interest payments were deferred until the years 2024 through 2031. Because of the long deferral, the interest component of the payments came to over $71 million! The estate claimed the projected interest payments as an administrative expense.

The IRS objected, and the Tax Court agreed. The estate had access to other resources to meet its tax obligation. The Court also agreed that certain estate assets had been undervalued. In an unpublished opinion, the Eleventh Circuit Court of Appeals has now affirmed the Tax Court's judgment.

—Koons, Estate of John F. III et al. v. Commissioner; No. 16-10646; No. 16-10648, affirming Estate of John F. Koons III et al. v. Commissioner, T.C. Memo. 2013-94

COMMENT: The Tax Court also noted that keeping the estate open for 25 years to pay off the note hinders the "proper settlement" of the estate under Reg. §20.2053-3(a).

Regulatory review

On April 21 President Trump ordered a review of significant federal tax regulatory actions taken since January 1, 2016. Any regulation that imposes an undue financial burden, is overly complex, or exceeds Treasury's regulatory authority may be amended. Speaking at a June 8 tax conference, Brenda Zent of the Treasury Office of International Tax Counsel outlined a few of the tax regulations that might be affected in her area of expertise:

- IRC §721(c) for transfers by U.S. persons to partnerships with related foreign partners;
- IRC §956 on property held by controlled foreign corporations connected with partnership transactions;
- IRC §385 intended to limit inversions;
- IRC §367(d) eliminating the foreign goodwill exception; and
- IRC §987 guidance on branch currency transactions.

The actual list of projects subject to review will be developed over the summer, Zent reported.

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