

Real Tax Policy

But they're a necessary sideshow, at least for anyone committed to serious fiscal reform. Ultimately, solving the long-term fiscal crisis will require both spending cuts and tax increases. Both elements will be broadly regressive, sparing the rich and soaking the poor.

Lower spending will squeeze programs that principally benefit the non-wealthy, including Medicare and Social Security. Meanwhile, tax increases — at least the kind necessary to make a real dent in the fiscal gap — will fall on everyone, not just the rich.

The regressive nature of meaningful fiscal reform — including the likely introduction of a broad-based consumption tax — militates for compensatory policy. In particular, it underscores the need for higher taxes on the rich. If political leaders are going to ask poor and middle-class Americans for sacrifice, they have an obligation to make sure that rich Americans share the pain.

Taxing corporate jets, of course, won't do that. To right the scales of tax justice, more substantive progressive reform is vital. In particular, lawmakers should eliminate the preferential treatment of capital gains (which would, of course, solve the carried interest issue, too).

There aren't many Democrats willing to make that argument — at least not yet. But the sideshow reforms currently in play still represent progress for liberals. By insisting that taxes are a necessary part of any balanced approach, they are building the foundation for a broader program of progressive tax reform.

Small Steps

Democrats have a long way to go. They are nowhere near breaking the bad tax news to lower- and middle-income Americans. But they finally have a president who is trying to restore the value proposition that lies at the heart of progressive governance.

"We all want a government that lives within its means," Obama said last week. "But there are still things we need to pay for as a country — things like new roads and bridges; weather satellites and food inspection; services to veterans and medical research."

And there it is: the hoary "price of civilization" argument that Oliver Wendell Holmes made famous and American voters made reality. With taxes, we do buy civilization. But Democrats have been afraid to say so for decades. Finally, they may be starting to speak up. ■

Roundtable Panelists Bemoan Tax Guidance Processes

By Amy S. Elliott — aelliott@tax.org

The "inherently cumbersome" process that Treasury's Office of Tax Policy and the IRS use to develop and release tax guidance could be improved with confirmed leadership, a streamlined review process, and the expanded use of "pretty good guidance," according to panelists at a July 22 roundtable discussion in Washington hosted by Tax Analysts.

"The fear by Treasury or the IRS of getting it wrong has crippled those agencies so much that now they issue rules on only the most urgent or noncontroversial projects," argued Christopher Bergin, president and publisher of Tax Analysts and moderator of the event. (For a transcript of the discussion, see *Doc 2011-16078* or *2011 TNT 142-100*.)

There was some disagreement among panelists over how dysfunctional the tax guidance process actually is, but everyone agreed that opportunities for efficiencies exist. Former acting IRS Commissioner Linda Stiff, now with PricewaterhouseCoopers LLP's Washington National Tax Services group, suggested that the IRS and Treasury rethink their division of labor. "There are appropriate, separate, and distinct roles to be played by Treasury Tax Policy, IRS, and IRS operations," Stiff said. "There are times where we don't need equal measures of all three on every issue, and I'm not sure that the system works to make those kinds of distinctions the way it should today."

'There are appropriate, separate, and distinct roles to be played by Treasury Tax Policy, IRS, and IRS operations,' Stiff said.

But any significant changes to the decision-making mechanisms of the guidance process should be initiated at the top, and Treasury's Office of Tax Policy is operating — as it has during much of the last decade — without a confirmed assistant secretary for tax policy in place.

Armando Gomez of Skadden, Arps, Slate, Meagher & Flom LLP argued that it makes a difference whether Treasury's tax policy arm has only an acting leader. He said it takes a confirmed leader to push guidance through the bureaucracy.

Informal Guidance

In recent years the IRS has increasingly used informal guidance such as frequently asked questions, forms and publications, private letter rulings,



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Linda Stiff, managing director, PricewaterhouseCoopers LLP

and industry directives to address tax law uncertainty. By sidestepping the review process used for Internal Revenue Bulletin items, the IRS can get guidance out more quickly to taxpayers and the field.

Michael J. Desmond of Bingham McCutchen LLP said the trend creates several problems. "It doesn't fit well with the historical paradigm of how guidance is reviewed," he said. (For prior coverage, see *Tax Notes*, Apr. 4, 2011, p. 7, *Doc 2011-6812*, or *2011 TNT 64-1*.)

Christopher S. Rizek of Caplin & Drysdale said that the Justice Department abandoned arguments for *Chevron* deference for revenue rulings and revenue procedures after the Supreme Court's *Mayo* decision. "I assume that means [informal] guidance is even further down the path of less deference," Rizek said. "But on the other hand, I've seen in recent years the Justice Department citing notices and announcements, things that . . . I would never have been allowed to cite when I was in the Justice Department." (For prior coverage, see *Tax Notes*, May 16, 2011, p. 674, *Doc 2011-9936*, or *2011 TNT 90-7*. For *Mayo Foundation for Medical Education and*

Research v. United States, 131 S. Ct. 704 (Jan. 11, 2011), see *Doc 2011-609* or *2011 TNT 8-10*.)

Practitioners question the penalty protection that informal guidance provides, as well as the extent to which it can be substantively relied on. Desmond noted that FAQs are not listed as authorities providing penalty protection under reg. section 1.6662-4, which addresses substantial understatement of tax.

Gomez pointed out that informal guidance doesn't provide an opportunity for public comment. In some cases, even developing informal guidance in a vacuum is counterproductive and inefficient, he said, adding that "not everyone on the outside is out to screw the government."

Stiff acknowledged that informal guidance has its downside but argued that it is better than nothing. She suggested that officials consider rules that would apply to informal guidance so that if a position the IRS took in the guidance ever changes, its effect would not be retroactive.

Phillip A. Pillar of Greenberg Traurig LLP said he thinks all practitioners agree with repeated statements by IRS Chief Counsel William J. Wilkins that "pretty good guidance" is good enough. Rather than wait to perfect guidance, the IRS should get guidance that provides safe harbors out to taxpayers sooner, Wilkins has said. (For prior coverage, see *Tax Notes*, Dec. 13, 2010, p. 1177, *Doc 2010-25851*, or *2010 TNT 233-4*.)

Areas of Focus

With a large percentage of senior IRS employees either having just retired or about to retire, "brain drain" at the agency "is a real problem," Rizek said. He said Congress hasn't provided the IRS with enough resources "to keep good-quality people there," and he encouraged practitioners to let their representatives know about the problem.

Desmond agreed, saying that the congressional appropriations committees are foolish to believe that cutting the salary of an IRS line attorney won't make a difference. The thousands of hours ultimately spent by IRS Exam, taxpayers, and even the courts make that decision extremely inefficient, he said.

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Stiff, however, stressed that it would be more efficient to focus on pressure points in the guidance process. One of those is expected to be Schedule UTP,



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Michael J. Desmond, partner, Bingham McCutchen LLP

which will provide the IRS not only with those uncertain tax positions ready for audit but also those needing guidance. She said accountability is necessary to ensure that the guidance needs identified by the UTP reporting regime are actually met.

Rizek argued that the IRS's continued obsession with abusive tax shelters is futile. In 2006 Pamela F. Olson, a former Treasury assistant secretary for tax policy and IRS special assistant to the chief counsel, now with Skadden and a member of Tax Analysts' board of directors, declared the government's victory in the tax shelter war.

"I think we should declare [the war] over and move on," Rizek said. The suspicion and antagonism generated by that struggle have "really inhibited the guidance process, among other things in tax administration, and I really think it's time to let that one go," he said.

The guidance process — much of which is, in Desmond's words, "an accident of history" — could be revised to improve efficiency and clarify lines of authority. The time is ripe for a "move to something that will make that process better," Stiff said, adding that "the world has changed" and that taxpayers now "have no choice but to operate, make decisions, and move in real time." ■

IRS Official Reviews International Tax Agenda

By Lee A. Sheppard — lees@tax.org

The presence of fashion coverage in these pages exerts a subtle influence on readers. We see them trying. Don't try too hard.

Overaccessorizing is fashion faux pas. "Christmas tree!" snorts Inès de la Fressange, the former Chanel model and current adviser to Roger Vivier.

Her new book, *Parisian Chic*, is mostly about how to achieve the gamine look. De la Fressange is dead set against looking like a socialite and has some good ideas about how to avoid unduly aging looks. Lay off the jewelry and go easy on the makeup. She won't tolerate earrings with a big necklace. No matchy-matchy. As for jewelry loaded onto the neck, wrists, and ears all at once, her response would be "non, non, non!"

When a woman wears a masculine business suit, we would limit accessories to small earrings, a watch, wedding jewelry, and perhaps a silk scarf, preferably Hermès. No necklaces, although we'll make an exception for the little chain with a diamond on it received as a graduation present. No beads. No bracelets. De la Fressange, who opposes ostentation, would go further — she would leave the engagement ring at home.

What with its stretched resources and raft of new assignments, the IRS is not in any danger of trying too hard. The agency will be trying hard to prioritize its guidance projects and achieve its priorities, Ronald Dabrowski, IRS associate chief counsel (international), told members of the International Fiscal Association's New York branch on July 27.

The Foreign Account Tax Compliance Act is chewing up IRS resources, and a big set of proposed regulations will be out by year-end. But Dabrowski's people will issue some other important projects before the end of the year. An important consideration is the three-year sunset rules for temporary regulations. There will be 40 to 50 international projects on the 2011-2012 business plan.

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There will be a massive section 367(a)(5) package that Dabrowski characterized as "a little PhD course" in outbound asset reorganizations. Issues covered will include minority owners and built-in losses. The package will go beyond the proposed regulations. (For the temporary regs (T.D. 9311), see