Editor's Notebook

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More on Tax Treaty Overrides

by Mike McIntyre

Last month, I argued in this space that most, perhaps all, of the treaty override legislation actually adopted by the United States is consistent with its obligations under international law. In this issue, we present a recent OECD report that addresses, in its typically politic fashion, the override issues raised by recent U.S. actions. The authors of that report disapprove of what I have characterized as trial balloon overrides. They would accept, however, those overrides that are truly interpretative. Canada's 1982 override legislation, described by Neil Brooks in the last issue of *TNI*, would qualify as an acceptable interpretative override under OECD standards. How much of the U.S. override legislation would qualify as interpretative under those standards is unclear.

The U.S. Congress, to the relief of many international tax specialists, has backed away somewhat from its experiment in direct treaty overrides. It does have an override provision attached to the income-stripping provision adopted as part of the 1989 act, but the income-stripping provision, according to Congress, is consistent with U.S. treaty obligations. Some distinguished commentators take a different view, arguing that it violates the nondiscrimination clause of many U.S. tax treaties. We can take some comfort, however, from the fact that Congress is making a serious effort to work within the treaty system in responding to the tax avoidance schemes of foreign taxpayers.

The OECD report does not address override legislation designed to limit the potential scope of a nondiscrimination clause. I argue that such legislation is generally interpretative and thus is compatible with international law. My sense is that the authors of the OECD report would disagree, but there is nothing in their report that is inconsistent with my position.

In recent years, I have come to question the wisdom of including an open-ended nondiscrimination clause in a tax treaty. We can all agree in principle that the residents of a treaty state should be protected in some way against discriminatory actions. The problem is identifying cases of discrimination that warrant remedy through the treaty process. My problem with a nondiscrimination clause is the absence of clear standards for identifying garden variety cases of discrimination.

Toward the end of last November, I travelled by train with my wife and two boys, ages 5 and 10, to a small town in Eastern Ontario to discuss current tax treaty issues, including nondiscrimination issues, with officials of Revenue Canada. On the whole, I enjoyed the trip a lot. During the trip,

my wife and I played about a hundred games of Uno with the boys, and we adjudicated an equal number of their claims of discriminatory treatment. None of the claims, in my judgment, had much merit, but the claims were pressed with great intensity and could not be easily dismissed. I was asked to decide, for example, who should get to push the buttons on the elevator, to remember who pushed them the last time, to work out an appropriate adjustment when the buttons on a particular elevator were too high for the five-year old to reach, and so on.

I doubt that my children are above average in their ability to identify possible cases of discrimination. Most sibling are very, very good at it. And so are many international tax advisors. In my opinion as a parent and a tax analyst, people who have an interest in discovering cases of discrimination will find them. Of course we should all strive to avoid unjust discrimination. But parents and governments should not assume the responsibility for eliminating every result that someone can plausibly allege is discriminatory.

Poetry Contest

In the October, 1989, issue of *TNI*, we announced our first tax poetry contest. The contest has generated a lot of interest, but the number of entries received so far is disappointing. Let me remind readers that the deadline for submitting a tax poem is February 1, 1990, and the winner of the contest will receive some wonderful prizes. Limericks are welcome, but there are no limitations on form, length, or meter.

To encourage more submissions, we are now sweetening the pot. The first 15 persons making a suitable entry will receive a copy of an abridged version of the U.S. Internal Revenue Code. That version of the Code contains the provisions of primary interest to international tax specialists, and it highlights the changes made in the 1986 Code by the 1988 tax act. I made the selection of Code provisions, but the actual work in preparing the abridged Code for publication was done of Mark Starcher of Tax Analysts. It has never been offered for sale to the public.

Competitiveness Issues

Also in our October, 1989, issue we opened a forum on international competitiveness. We kicked off this forum with a letter from Mr. David Roth of General Motors. Dave discussed some of the tax problems that the recent U.S. tax reforms have created for his company. I devoted my column in the November, 1989, issue of *TNI* to a discussion of the problems that tax analysts must confront in order to make valid competitiveness arguments. In this issue, we devote our **Tax Advisors' Forum** to a discussion of a proposal for improving the ability of U.S.-based multinational companies to compete in post-1992 Europe.

We welcome commentary from our readers on the items already published on this topic. We also are eager to receive additional items. This forum will remain open for the next several issues of *TNI*.