SMALL BUSINESS LEGISLATIVE COUNCIL

SBLC WEEKLY

Via E-mail
January 25, 2010

Volume XII, Issue 04

ESTATE TAX REVIVAL

I am betting many of you were quite surprised to read in last week's Weekly that the debt ceiling increase legislation could be the vehicle for reviving the estate tax. For those who did not catch it, I reported that Senate Majority Leader Harry Reid (D-NV) had been contemplating an amendment to the debt ceiling increase to establish a statutory pay-go scheme (I won't repeat the details of what statutory pay-go means as opposed to a congressional rule pay-go means; the bottom line is that Congress would still need revenue offsets for any tax relief). Senator Reid was forced to do so because when the House passed its version of a debt ceiling increase last year, the House leadership made a deal with the House fiscally conservative Democrats— "Blue-Dogs"— that a statutory pay-go bill had to be passed (which the House did pass). At the time, the Blue Dogs agreed to exempt four items from the pay-go requirement, including a permanent freeze of the 2009 estate tax top rate (45 percent) and exemption ($3.5 million) and a permanent patch for the Alternative Minimum Tax (AMT) income thresholds.

I speculated that the Senate Majority Leader would probably not offer an amendment identical to the House waiver provision, but instead would offer a modified version

On Friday, the Senate Majority Leader introduced an amendment which the House and Senate majority leadership have agreed is an acceptable compromise. Unfortunately, it allows for only a two-year extension of the estate tax freeze and the AMT patch. The amendment to the debt ceiling would not actually institute the freeze; Congress would have to pass the freeze bill separately. Passage would be no easy feat as the freeze bill would still require 60 votes in the Senate, assuming somebody filibusters. I am also still skeptical that they could pass a bill that makes the "freeze" retroactive to the first of the year. I do not think there are 60 votes for that.

In theory, Congress would not be bound to any specific design of the freeze. The "waiver" is for an amount of tax revenue "lost" if a two-year freeze, based on the 2009 rate and exemption, is instituted. So they could devise any variation on the rate and exemption as long as it fits within the revenue lost number.

Unfortunately, if the waiver does pass and they are able to pass a subsequent freeze bill, it still means in 2012 the top rate goes back up to 55 percent and the exemption down to $1 million. If they do not pass the "waiver" and the freeze, the estate tax comes back into existence, as currently scheduled, in 2011.

P.S. If the amendment passes, it also means statutory pay-go will likely become a reality.

DO YOU ACCEPT CREDIT CARDS?

If you accept credit cards or similar forms of payment, your tax administrative challenges are getting closer. You may recall that the Housing Assistance Tax Act of 2008 included a tax-gap- closing provision to require "credit-card networks" (my words; they call them "payment settlement entities" because it involves more than just credit cards) to send an information report (like a Form 1099) to the IRS and to the business for which the "credit card network" processed payments. The amount reported on the form would be the receipts the business received from its customers through such transactions.

From the day this first appeared as a tax-gap proposal, we howled about it. The explanation and purposes changed through the debate and the scope of "merchants" expanded (basically, any business that accepts payments by credit or debit cards or electronically). Since enactment, the Internal Revenue Service (IRS) has been working on regulations to implement it. The requirement takes effect in 2011. SBLC provided comments during the pre-proposal phase. The IRS has now issued a proposed regulation, and we have commented again.

Our concern is that the IRS has chosen a definition of "gross amount" to be reported on the information report that is basically the biggest number possible. The amount on the information report will be the "total dollar amount of aggregate reportable payment transactions for each participating payee without regard to any adjustments for credits, cash equivalents, discount amounts, fees, refunded amounts or any other amounts."

The use of this particular definition places the responsibility on the small business taxpayer to reconcile this amount with the appropriate net amount that should be reported for tax purposes.

It is a well-established fact that there are a variety of charge backs, refunds and other fees that have to be taken into account in order to arrive at a true net receipts amount from payment card transactions. It seems ironic that given the options, the IRS is contemplating placing the burden upon the millions of small businesses rather than on the payment settlement entities, which, in general, are fewer in number but larger in size.

If a taxpayer is required to report the gross amounts on the tax return as reported on information returns, the amounts would bear no relationship to the receipts reported elsewhere on the tax return. In short, a taxpayer would have to prepare an annual reconciliation report to explain the almost certain deviation between the amount on the information report and the receipts reported on the tax return. (A deviation, I might add, that on the face of it, is almost always going to make it appear that the small business has understated receipts, given the fact that the amount on the information report is most likely to be higher by definition.) As we noted in our comments filed on March 13, 2009, "Certainly, it will never be possible to simply match the amount reported on this new form with any number on the return."

When this proposal was under consideration by Congress, we were told numerous times that an exact matching program was not contemplated. "IRS is not planning an exact match anyway but only a trigger for questions" (GAO Report GAO-08-266 TAX ADMINISTRATION: Costs and Uses of Third-Party Information Returns.) Any matching program would increase the burden for small business taxpayers.

Finally, it is difficult for me to understand how the IRS can conclude in this proposed rulemaking, "it is hereby certified that the regulations will not have a significant economic impact on a substantial number of small entities." It appears the IRS has assessed the impact on the payment settlement entities but not on the "merchants." As a result of the definition of "gross amount," any small business that accepts payment by the means covered by this rule will have to reconcile annually the information report with its own receipts' reporting. Sounds like a burden to me.

P.S.: As this credit-card-payment-reporting proposal was winding its way through Congress to become law, we told Congress the only tax-gap-closing proposal that would be worse than this one is the one that would require every business to issue a Form 1099 to any vendor that provides goods and/or services to it. As you know, the health care reform bills passed by the House and Senate each included the expanded all-vendor Form 1099 proposal. I guess we have received a temporary reprieve from that sentence. However, you can expect the Form 1099-for-all-vendors proposal to resurface soon. Now that it has passed in the House and Senate in the health care reform bills, everybody on the Hill now knows, despite the howling of SBLC and our friends at NFIB, that it is "passable." Hello, $17 billion revenue offset!

DO YOU EXTEND CREDIT TO CONSUMERS?

On January 12, 2010, the Board of Governors of the Federal Reserve System (Board) issued a mammoth (1,155 pages!) new regulation, in part implementing the Credit Card Accountability Responsibility and Disclosure Act of 2009 (CARD Act), and in part revising some previously pending regulations under the Truth in Lending Act (TILA) and their unfair trade practices authority.
You may recall "credit card accounts" were the primary focus of the CARD Act. So for the most part, the law and now these

regulations do not have a direct impact on retailers and service businesses that "merely" accept third-party credit cards. However, that is not the end of the story. Credit card accounts are a sub-category of what are called open-end credit plans, sometimes referred to in the trade as "revolving" plans. The CARD Act has some provisions that changed the law regarding all open-end credit plans, not just the charge card accounts. In addition, the Board took the liberty of cleaning up some other pending regulations it had outstanding that affect open-end credit plans.

Open-end credit means "consumer credit" extended by a creditor (e.g. retailer, service provider) under a plan in which:
(i) The creditor reasonably contemplates repeated transactions;
(ii) The creditor may impose a finance charge from time to time on an outstanding unpaid balance; and
(iii) The amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid.

"Consumer credit" means credit offered or extended to a consumer primarily for personal, family, or household purposes.

Why I am telling you about this? Many of the CARD Act provisions take effect on February 22, 2010. There is a lot of general media and Internet information floating around. Not all of it is as nuanced as it should be. For example, there is one particularly virulent story about the limitations on "instant credit" approvals. Most of the stories do not tell you that it applies to "credit card accounts." How do I know? The Board included a table listing which types of credit plans are covered by various sections of the regulations. The only problem is the table includes only the section numbers, so you have to go look through the regulations to find out which sections apply to which type of accounts. Nothing is easy.

KEEPING THE OZONES STRAIGHT

There are two ozone areas in the atmosphere, In the earth's lower atmosphere, ground-level ozone is considered "bad." It is not usually emitted directly into the air, but at ground-level is created by a chemical reaction between oxides of nitrogen (NOx) and volatile organic compounds (VOCs) in the presence of sunlight. "Good" ozone occurs naturally in the stratosphere approximately 10 to 30 miles above the earth's surface and forms a layer that protects life on earth from the sun's harmful rays. When we talk about greenhouse gases and their impact on the climate or global warming, we are talking about the gases that "erode" the good ozone.

In Washington and in the general media, the ozone zones keep colliding. Two weeks ago, I reported on the Environmental Protection Agency's (EPA) proposed rule to tighten up the standard for air quality. This would affect the emissions that create "bad" ozone. The EPA is hoping for a final standard by the end of the summer. If a new standard is set, States would have several years to attain that standard.

Back in September, 2009, the EPA published a Mandatory Reporting of Greenhouse Gases Rule to take effect on December 29, 2009. It deals with the "good" ozone. The rule requires reporting of greenhouse gas (GHG) emissions from large sources and suppliers in the United States. Under the rule, suppliers of fossil fuels or industrial greenhouse gases, manufacturers of vehicles and engines, and facilities that emit 25,000 metric tons or more per year of GHG emissions are required to submit annual reports to EPA. The gases covered by the proposed rule are carbon dioxide (CO2), methane (CH4), nitrous oxide (N2O), hydrofluorocarbons (HFC), perfluorocarbons (PFC), sulfur hexafluoride (SF6), and other fluorinated gases including nitrogen trifluoride (NF3) and hydrofluorinated ethers (HFE).

It is that greenhouse gas rule and "good" ozone that are getting attention these days. The EPA used an "endangerment finding" to justify the rule. To say the least, the decision to use this approach is controversial. Senator Lisa Murkowski (R-AK) and others are attempting to invalidate the rule. Senator Murkowski is attempting to use the Congressional Review Act (CRA) to do so. SBLC members are familiar with the CRA because we helped use it to overturn the Clinton Administration's Ergonomics Rule at the beginning of the Bush Administration. The challenge facing Murkowski is that it requires passage of the resolution by both chambers of Congress and signature by the President. In 2001, the stars and moons aligned for such a move. It does not look like the karma is in place this time around. However, her effort has attracted bi-partisan support, so even if it is not successful, we can expect more legislative discussion about the appropriateness of the EPA's action.