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$2.18 trillion

The House Ways and Means Committee in September released proposed tax increases totaling $2.18 trillion over the next ten years. Key components of "Responsibly Funding Our Priorities" include:

• increasing the corporate income tax rate from 21% to 26.5%, raising $540 billion;

• applying the 3.8% net investment income tax to certain business income of those earning more than $400,000 per year, raising $252 billion;

• lifting the top marginal income tax rate to 39.6%, raising $170 billion;

• applying a new 3% surcharge on incomes greater than $5 million, raising $127 billion;

• boosting the tax on long-term capital gains from 20% to 25%, raising $123 billion;

• increases in tobacco taxes yielding $97 billion; and

• cutting the unified credit for estate and gift taxes roughly in half, which raises only $54 billion, in large part because that change was already scheduled for 2026.

The reduced unified transfer tax credit would not take effect until next January 1. With the net investment income tax and the new 3% surtax, the top rate for long-term capital gains would become 31.8%.

COMMENT 1: Missing from the initial release of the bill was any change to the $10,000 cap on the deduction for state and local taxes. However, Democrats reportedly were continuing to negotiate this tax break for the rich, the primary beneficiaries of the unlimited SALT deduction. The President's proposal to make death a moment for the recognition and taxation of long-term capital gains also did not appear in the initial draft.

COMMENT 2: In a September 16 statement from the White House, the President expressed the hope that his proposed changes to the capital gains tax would make it into the final bill. He did not mention the changes to the SALT deduction.

The trust will live

Dale Ackers' 1993 will left half of his estate to his son, Gary, outright, and the balance to a trust for the benefit of his son, Larry. Larry was the sole lifetime trust beneficiary, and at his death the corpus would pass to Larry's then-living descendants per stirpes, and not per capita.

Although this may sound like a routine trust provision, Larry's life circumstances turned out to be anything but routine. He had three children, but he gave up his parental rights as to two of them, and they were adopted into other families. One of those has since had two children of her own.

Larry would like to enter into negotiations with the trust remaindermen with an eye toward terminating the trust. The problem is, who are the remainder beneficiaries? Larry wanted to exclude the children adopted by other families and any of their descendants.

Larry filed a petition for declaratory relief to determine the remaindermen, and the trustee resisted. The question is not ripe for review, the lower court held, and the appellate court affirmed. Members of the class gift cannot be determined until Larry's death.

—Ackers v. Comerica Bank & Tr. , No. 11-18-00352-CV (Tex. App. Dec. 31, 2020)

COMMENT: The Court also noted that a spendthrift provision in the trust would bar any attempt by beneficiaries to terminate the trust prematurely.

Missing will has legal existence

Theodore's June 2012 will left his multimillion dollar estate to his life partner, Velma, if she survived him, or to the St. Jude Research Hospital if she predeceased him, which she did. The estate planning attorney kept the original of that will. An October 2012 will was executed changing only the nominee for executor of the estate. Theodore kept this original himself, as well as a copy of it.

Both wills explicitly disinherited Chip, Theodore's long-estranged son. He specifically asked his estate planner to not get in touch with Chip.

As Theodore's health declined, he was eventually moved into a nursing home and a guardian was appointed for him. His papers were boxed up and followed him. After Theodore died, the guardian was unable to locate the original October 2012 will. She speculated that Theodore had destroyed it and recommended to the probate court that the estate pass to Chip. When the estate planning attorney learned of this development, she contacted the probate court and St. Jude's to inform them of the existence of the earlier wills. The probate and appellate courts held that the statutory requirements for proving a lost will had not been met.

The Supreme Court of Nevada reversed. Although the original October 2012 will could not be found, it continued to have legal existence until there was proof of its destruction by the testator, which was not here provided. The statute requires that two witnesses have knowledge of the terms of the will, and in this case one witness only could confirm the testator's signature, not the terms. But the terms of the will were uncontested, and failing to probate the lost will in this situation "would create an absurd result of putting an unnecessary and onerous burden on the second witness."

—In the matter of the estate of Theodore Ernest Scheide, Jr., St. Jude Children's Research Hospital, Appellant, v. Theodore E. Scheide, III, Respondent, 478 P.3d 851 (2020)

The limits of the taxing power

Under the U.S. Constitution, direct taxes must be apportioned among the states. An income tax is a direct tax, and the early attempts to create a federal income tax were declared unconstitutional as they were not apportioned, making a constitutional amendment necessary to create today's income tax regime. Indirect taxes, such as tariffs, which are passed along to consumers, do not need to be apportioned.

A new case is going to address the limits of the federal taxing power. According to *The Wall Street Journal,* Charles and Kathleen Moore invested $40,000 in a start-up company that provided better tools to subsistence farmers in India. The company was a huge success, but it reinvested all of its profits in expanding its market. The firm grew to hundreds of employees, thousands of dealers, and millions of customers. The Moores never received a financial return from their investment, but they were more than pleased with the success of the company that they helped to fund. The growing success of the Indian farmers was their reward.

In the 2017 Tax Cuts and Jobs Act, the taxation of multinational firms was reformed. One element of that change was the imposition of a one-time tax on accumulated foreign earnings. The Moores received a tax bill for $15,000 on the accumulated but undistributed earnings from their investment.

The couple paid the bill and is suing for a refund. They argue that they have received no financial reward from their investment — no "income" as that term is used in the tax law — and therefore that $15,000 was effectively a property tax, not an income tax. As such, it would have to be apportioned, and as it was not, the tax itself is unconstitutional.

In the most recent briefing, according to a *Tax Notes* report, the government contends that a "deemed repatriation" is taxable income even though no money changes hands. As a backup position, the government has also argued that the apportionment requirement of the constitution may not apply to a direct tax on personal property (as opposed to real estate). That will be difficult to square with Supreme Court precedents in *Eisner v. Macomber,* 252 U.S. 189 (1920), and *Pollock v. Farmers' Loan & Trust Co.,* 158 U.S. 601 (1895).

This case appears to be headed to the U.S. Supreme Court for final resolution. The reply brief concludes: "The Government's pinched reading of the Apportionment and Direct Tax Clauses reduces this meaningful structural limitation on federal power into an arbitrary and pointless near-nullity. It is wrong, has already been rejected, and should continue to be rejected."

— Moore v. United States, No. 20-36122

COMMENT: This may seem like a minor transitory tax problem, as the 2017 imposition was a one-time event. However, should the Moores succeed, it could be the death knell for such proposals as Senator Elizabeth Warren's "wealth tax." A tax on wealth is very different from a tax on income, and many observers have questioned the constitutionality of wealth taxes, as they are property taxes. The Moore litigation may resolve that larger question.

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