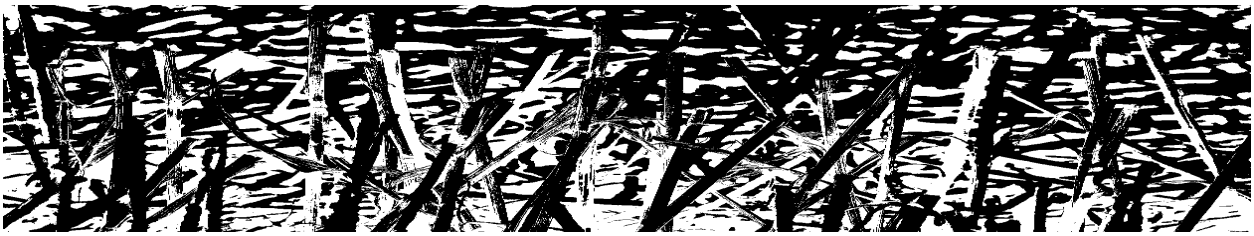

Jack Straw Fortnightly*

the burden of

Well, Jack called it.[1]

Rather than continuing to try to defend Rev. Proc. 2018-38 in the face of an adverse ruling by a federal district court in Montana, the Treasury and IRS have issued proposed regs that would relieve exempt orgs other than (c)(3)s of the obligation to report the identities of substantial contributors on their annual information returns.

And some other housekeeping, to incorporate adjustments IRS had made to the section 6033 reporting requirements over the years in subregulatory guidance, having mostly to do with increasing filing thresholds for smaller orgs.

At page 9 of the preamble, the agency argues that the rev. proc. that was invalidated in *Bullock* was "consistent" with these earlier actions, but hey, you want notice and comment, we will give you notice and comment.

In pretending to explain the policy behind the proposed change, the preamble reiterates what IRS had said in issuing the rev. proc., *i.e.*, the agency "does not need" the information, the requirement "increases compliance costs" for affected orgs, the agency has to "consume resources" in redacting the information, and there is a risk of inadvertent disclosure.

Each of these purported rationales is disingenuous, but Jack would like to focus on "does not need" -- keeping in mind, as we noted in our previous issue, that the criminal investigations unit at IRS apparently was not consulted prior to the decision to issue the rev. proc. last year.

An exempt org is still required to file a schedule L, says the preamble, disclosing transactions between the org and "interested persons," including substantial contributors.

And the org is still required to keep the info that would have been reported on the schedule B.[2]

So if we somehow get it in our head to examine a return, we can ask for this info then. If.

each by each by each

But in making this argument, the preamble also says -- twice -- that these orgs will still be required to

report amounts contributed by "each" substantial contributor. This is true, but with a caveat.

What the rev. proc. sought to accomplish,[3] and what the proposed reg. seeks, is to release exempt orgs other than (c)(3)s from the requirement to complete column (b) of Part I of the schedule, *i.e.*, the identifying info.

While the instructions are not entirely clear on the point, apparently the amounts of "each" gift from a substantial contributor are to be listed separately, even if you are not providing identifying info.

But this separate reporting of "each" is not expressly required in the text of the regs. What existing reg. sec. 1.6033-2(a)(2)(ii)(f) says is, report all contributions and identify substantial contributors. The proposed reg would limit the "identify" language to (c)(3)s.[4]

So apparently we are relying on the current configuration of schedule B, and on reporting compliant with unclear instructions.[5]

Comments on the proposed regs are due December 09.

interim relief

Simultaneously, IRS issued Notice 2019-47, relieving orgs who had already filed 990s omitting schedule B in reliance on the rev. proc. from the imposition of penalties.

Which makes some sense, but the notice also applies to orgs with fiscal years ending on or before the date of the district court order, July 30, regardless whether the return was already due or filed.

Jack says this seems overly broad: why not just returns due on or before the date of the order? or maybe thirty days after, to allow the judgment to become final?[6] This is, after all, the logic of the stated rationale -- that returns filed prior to the date of the order may have omitted the schedule B in reliance on the rev. proc.

But then, the proposed regs also provide that an org filing its information return after the date of publication, September 10, may rely on the proposed rule.

So really we are only looking at a six-week window, which has already closed. Unless in the end the regulation project is abandoned, which seems unlikely.

prosperity now

Americans for Prosperity did file their petition for cert from the decision of the 9th Circuit federal appeals court rejecting their claim that a policy of the California state attorney general to require (c)(3)s to file copies of their federal schedule Bs with the state was unconstitutional as applied to them, as it threatened their contributors' freedom of association.

The attorney general has requested additional time, to October 25, to respond, but we might begin to see some *amicus* briefs in the meantime. The petitioner has filed a blanket consent. The Philanthropy Roundtable filed an *amicus* brief in the 9th Circuit, supporting the petitioner, and one supposes they will do the same here.[7]

the spirit and the letter

Comments are beginning to come in on the proposed regs implementing the 1.4 pct. excise tax on income from endowments held by a handful of private colleges and universities.

We talked about this briefly in volume two, number ten, noting that while "tax on endowment income" may be a convenient shorthand, what section 4968 actually says is simply "net investment income," with a cross-reference to section 4940(c).

The tax is imposed on schools that are holding non-charitable use assets of at least $500k per student, and that have at least 500 tuition-paying students.

As we observed in our earlier writeup, the stated objective of the proposed regs is to define the key terms of the statute -- who is a "student," when is she "tuition-paying," etc.

On that latter question, the proposed regs have taken the position that "scholarship payments provided by third parties, even if administered by the institution, are considered payments of tuition on behalf of the student."

Fittingly, the first comment posted is from Berea College, arguing that this reading is not supported by the statute, and is contrary to its supposed purpose.

The comment letter points out that while many or even most of Berea's students do receive Pell grants and/or state aid, the balance of what would otherwise be called "tuition" is paid from the college's endowment fund, and no one pays a nickel of tuition out of her own pocket.

Literally, "any student who can afford to pay tuition at Berea is ineligible for admission."

"Quite unlike the other private colleges and universities that may be subject to the excise tax," the letter says, "Berea uses its endowment principally as a tuition repayment fund." Which is kinda what section 4968 is supposed to be about.

The deadline for comments is October 01.

a thing of shreds and patches

Tomorrow, Wednesday the 18th, your correspondent will be in Tempe presenting a seven-hour seminar on the various uses of trusts in estate planning. A deck of something like three hundred slides, which he is still tweaking at the eleventh hour.

The following Tuesday, the 24th, he will be one of three panelists on an hour and a half webinar on selected issues in fiduciary income taxation.

Then in late October, on Thursday the 30th, he will be giving a seven-hour seminar in Albuquerque on fiduciary income taxation, full bore. Also in Denver in mid-December, and we are looking at possible dates in January in Cincinnati and Des Moines.

offstage lines

[1]

To be fair, Jack hedged his bets by calling all three possible outcomes.

[2]

From which one might infer that the compliance cost of completing the additional fields on schedule B ought to be nominal.

[3]

In volume two, number seven, we shorthanded the effect of the rev. proc. as no longer requiring orgs other than (c)(3)s to file schedule B at all. This was inaccurate.

[4]

And back in volume one, number nine, Jack acknowledged this is all section 6033(b)(5) actually requires. But the existing reg has been in place for almost forever and has the virtue of accumulated moss.

[5]

Jack also notes that the mechanism for revising a form is a great deal simpler than for amending a regulation. The supporting schedules to the 990 are not submitted separately, and the call for public comment is essentially limited to the paperwork burden.

[6]

There are two other counts in the amended complaint, seeking to invalidate the rev. proc. on other grounds, but presumably these are mooted by the summary judgment on count one.

At this writing there have been no further filings in the case, and it would appear IRS is simply walking away.

[7]

The Roundtable, though nominally a (c)(3), is in effect an advocate for a handful of private foundations and very large individual donors. Jack says they should not be seen as representing "the sector" as a whole.

In its brief to the 9th Circuit, the Roundtable argued that the disclosure requirement was unconstitutional not merely as applied, but on its face. Because it somehow interferes with allowing folks to make anonymous gifts.

But of course schedule B identifies only those contributors who have disclosed their identities to the recipient org. It is permissible to show as "anonymous" anyone who in fact contributed anonymously.

So really we are talking only about a claimed privilege for the org itself to withhold information from the taxing authority.

Jack suggests this might fall somewhere short of a restriction on freedom of association.