

from some old burned-out tax shelter, could push you over the \$100,000 limit. If the conversion has already been made, and you later find yourself over the \$100,000 limit, bad stuff happens. The 10 percent penalty could be owed. For a conversion in 1998, all the tax triggered on the distribution would be due for tax year 1998, rather than spread out over four tax years. Furthermore, I suspect that the money improperly rolled over into the Roth IRA must be some kind of non-qualified contribution. I don't want to take the trouble to look up the specifics, but I'll bet it results in some kind of 50 percent excise tax, penalty, or something even worse. What is certain is that after paying all the tax and penalties, there won't be much left for retirement.

Those who drafted this new IRA provision apparently understood that AGI for the year of the conversion cannot include the income from the distribution from the traditional IRA (i.e., the money going into the Roth IRA). If it did, many taxpayers would be disqualified from making the conversion simply by virtue of making the conversion. To solve this dilemma, the drafters provide that AGI does not include the income triggered by the distribution from the traditional IRA. A good idea, but it doesn't go far enough! There is still the problem of not knowing in advance what AGI will be for the year of the conversion. Congress should move the January 1, 1999 deadline for the distribution back to April 15, 1999. That way, a taxpayer can determine whether he qualifies for the conversion, as well as the four-year spread, before making the conversion. Then, for subsequent tax years, an April 15 deadline for ordinary conversions should apply. Or perhaps, AGI from the prior tax year should be used as the magic number for denying taxpayers the privilege of converting to a Roth IRA. As it is, a conversion will be tricky business for those in the \$90,000 to \$100,000 AGI range.

Anyway, if the stock market keeps going up, it still might make sense to cash out your profits — and to hell with the Roth IRA and your miscellaneous itemized deductions.

Sincerely,

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Burden of Proof — Response to the Tax Profs

To the Editor:

Although I agree entirely with the group of professors' conclusion that the burden of proof in civil tax matters should remain that of the taxpayer as stated in their January 26, 1998 letter to Chairman Roth (*Tax Notes*, Feb. 9, 1998, p. 755), I must dissent when it comes to some of their underlying reasoning.

In their letter, the tax professors state: "The present burden-of-proof rule encourages taxpayers to take return positions consistent with the law, since they know that they would have to establish their claims were they audited." It is with this statement that I so vigorously disagree. The logic behind it seems at first glance to be correct, that taxpayers fearing the IRS and the burden of proof will file honest returns. Unfortunately, one needs only look at the number of taxpayers who simply don't file their returns, those who have for years claimed exemptions to which they are not entitled, or those taxpayers who fail to report all of their business income or who overreport business deductions to realize that some (many?) taxpayers are not concerned about the burden of proof.

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Most taxpayers who intentionally file incorrect tax returns probably don't think about the burden of proof, they simply think of the tax savings. Others who file accurate returns do so not because of the burden of proof or even their fear of getting caught, they simply don't want to incur the time, trouble, and cost of an IRS audit. It is not uncommon for the cost of taxpayer representation to far exceed the amount of taxes owed. Thus, when faced with a questionable deduction of \$500, many taxpayers realize that the cost of representation at an audit could easily exceed the benefit of a proper, yet questionable, deduction. Thus, some risk-averse taxpayers fail to claim all of their proper deductions simply because the costs of being audited greatly exceed the possible benefits. This is an economic, not a burden of proof, issue.

The letter further states that if the burden of proof is shifted, the IRS would have no other choice but to issue a summons for information, which is "time-consuming to prepare, and it gives an adversarial tinge to a process that should be cooperative." Do the professors really think that audits are currently cooperative or that under the current system the IRS does not present taxpayers with long document requests or requests for information to substantiate deductions or credits? Current IRS requests for information are often form requests probably identical to the "costly, burdensome, and intrusive" summons the letter indicates will come from shifting the burden of proof to the IRS.

As to the point that shifting the burden of proof would create an adversarial rather than a cooperative relationship, one can only wonder if this is a hypothetical final

examination question for the students. Anyone who has ever talked to a taxpayer who has been "chosen" for an audit or who has represented such a taxpayer knows that this is an adversarial rather than a cooperative encounter. Shifting the burden of proof probably would not affect that perception or reality. If the system were cooperative, would Chairman Roth be holding his hearings? Those who benefit under the current system, enrolled agents, accountants, and attorneys, would continue to benefit if the burden is shifted to the IRS, but even most of them would probably prefer to do enjoyable or productive work such as tax or estate planning rather than represent a taxpayer in an audit, even if the burden of proof were shifted to the government.

So why does the IRS need to perform audits, since the problem of underreporting of wages, interest, dividends, and sales of stocks, bonds, or real estate has largely been eliminated by the proliferation of W-2 and Form 1099 reporting? Even the possible abuse by taxpayers of overreporting the amount of mortgage interest paid on their residence has been mostly eliminated by Form 1098 reporting by financial institutions. Unfortunately, there are still numerous items of income and deductions that are not reported directly to the IRS for which taxpayers can continue to over- or underreport.

Is there any doubt that some self-employed taxpayers, knowing that they not only owe income tax of up to 39.6 percent but also self-employment taxes of 15.3 percent, might underreport income or overreport business expenses? For example, are "business" cellular phones, notebook computers, automobiles, or business meals and entertainment really 100 percent business-related? If they are not, how much would it cost the IRS to catch all or even a majority of those who cheat? The burden of proof has done a poor job of turning the underground economy into honest taxpayers.

Although most honest nonbusiness owners may feel that abuses by businesses are unethical and illegal, very few of them report all of their income! For example, almost all gamblers fail to report their gross winning from a race track, a casino, or a church bingo game, and how many taxpayers report the taxable profit from an unreported sale, gifts of over \$10,000 to a child, or don't fudge a bit on the value of clothing given to the Red Cross, Goodwill, or the Salvation Army?

Those taxpayers who are aware of the law and fail to report their proper taxable income do so not because of their fear of the burden of proof. Instead, except as otherwise provided, they fail to properly report taxable income from whatever source derived, including (but not limited to) the following items:

(1) They honestly don't know that they are making a mistake

(A) The cost of parking as an employee perk is limited and not even deductible by those who are self-employed?

(B) Deductions aren't allowed for the total cost of a charity concert?

(C) A 19-year-old child who earns \$8,000 and who lives at home while attending a state two-year college is not a dependent?

(2) If they do know the rules, they often feel that the IRS will never catch them (the lottery theory of tax compliance)

(3) They believe that even if caught, they will come out ahead because:

(A) They got away with it for so many years

(B) The IRS will never catch all of the errors

(C) They will keep doing it in future years

(4) The cost of accurate compliance is far too expensive

(A) They don't have the money to pay the proper tax

(B) The tax rates are too high, thus they deserve to pay less tax

(C) They can't afford professional tax advice

The burden of proof should remain with the taxpayer, not because it will cause fear but simply because the taxpayer has a way to prove their deductions and income; they at one time or another had all of the documents. However, it appears improper to state that the burden of proof either encourages or causes taxpayer voluntary compliance. Most taxpayers who currently report their proper taxable income would probably continue to do so even if the burden of proof were shifted to the IRS. Those who currently underreport taxable income will probably continue to do so. In either case, the solution to underreported taxable income has nothing to do with burdens of proof; it has to do with simplicity and fairness.

As long as there are rules and policies such as interest-free loans; deducting the fair market value of appreciated property given to charity but only if it is long-term gain property; not allowing self-employed taxpayers a full deduction for medical insurance; the marriage penalties; the marriage bonus; business use of the home; so many tax credits that no one understands them; IRAs; Keoghs; 401(k)s; 403(b)s; qualified plans; phaseouts for credits, personal exemptions, itemized deductions, and the lowly \$2,000 IRA contribution; and tax rates of up to 39.6 percent for hard working citizens and residents whose neighbors pay taxes of only 20 percent on their long-term capital gains (and zero tax on the sale of their principal residence as often as every two years), is the burden of proof really an issue that should be high on anyone's agenda?

Fix the system first or get another one. Once it is simple and fair. . .

Sincerely,

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February 11, 1998