Calendar No. 482

110TH CONGRESS, 1st Session — SENATE — REPORT 110–228

AMERICAN INFRASTRUCTURE INVESTMENT AND IMPROVEMENT ACT OF 2007

NOVEMBER 13, 2007.—Ordered to be printed

Mr. BAUCUS, from the Committee on Finance, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 2345]

The Committee on Finance, having considered an original bill, S. 2345, to amend the Internal Revenue Code of 1986 and to extend the financing for the Airport and Airway Trust Fund, and for other purposes, having considered the same, reports favorably thereon and recommends that the bill do pass.

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VIII. STATEMENT REGARDING SENATE RULE XLIV

Rule XLIV of the Standing Rules of the Senate provides that "it shall not be in order to vote on a motion to proceed to consider a bill or joint resolution reported by any committee unless the chairman of the committee of jurisdiction, or majority leader or his or her designee certifies: (1) that each congressionally directed spending item, limited tax benefit, and limited tariff benefit, if any, in the bill or joint resolution, or the committee report accompanying the bill or joint resolution, has been identified through lists, charts, or other similar means including the name of each senator who submitted the request to the committee; and (2) that the information in clause (1) has been available on a publicly accessible website in a searchable format at least 48 hours before such vote."

In connection with the request for proposed amendments to the Chairman's mark, Senator Schumer filed a proposed amendment to restructure the Liberty Zone tax incentives to provide a tax credit to the City and State of New York against certain withholding taxes required to be paid by the City and State of New York to the Internal Revenue Service. The credit amount is, subject to certain limitations, determined by expenditures on qualifying infrastructure projects in (or connecting with) the New York Liberty Zone. The amendment was incorporated as part of the Chairman's modification.

In making the determination required by Rule XLIV, a memorandum from the Chief of Staff of the Joint Committee on Taxation (set forth below) and other information were considered. In accordance with Rule XLIV, I have determined that section 301 of the bill, relating to the restructuring of New York Liberty Zone tax incentives, is a limited tax benefit.

MAX BAUCUS.

MEMORANDUM

To: Bill Dauster, Deputy Chief of Staff, Senate Finance Committee.
From: Ed Kleinbard.
Date: October 30, 2007.
Subject: Application of Senate Rule XLIV (relating to limited tax benefits) to sec. 301 of the American Infrastructure Investment Improvement Act of 2007 (as passed by the Senate Finance Committee on September 21, 2007).

Request

You have requested that the staff of the Joint Committee on Taxation analyze the application of Senate Rule XLIV's limited tax benefit provision to section 301 of the American Infrastructure Investment and Improvement Act of 2007 ("Section 301"), as passed by the Senate Finance Committee (relating to the restructuring of

New York Liberty Zone tax incentives). I offer this analysis at your request to assist Chairman Baucus in making his determination of this issue, as contemplated by Rule XLIV.

Senate Rule XLIV

Section 521 of the Honest Leadership and Open Government Act of 2007[130] (the "HLOGA") provides for "earmark" reform. Specifically, HLOGA adds a new Rule XLIV to the Standing Rules of the Senate. Under this rule, "it shall not be in order to vote on a motion to proceed to consider a bill or joint resolution reported by any committee unless the chairman of the committee of jurisdiction, or majority leader or his or her designee certifies: (1) that each congressionally directed spending item, limited tax benefit, and limited tariff benefit, if any, in the bill or joint resolution, or the committee report accompanying the bill or joint resolution, has been identified through lists, charts, or others similar means including the name of each senator who submitted the request to the committee; and (2) that the information in clause (1) has been available on a publicly accessible congressional website in a searchable format at least 48 hours before such vote". Failure to satisfy this requirement makes a bill or joint resolution subject to a point of order until these requirements are satisfied under the rule.

For purposes of the rule, the following definitions apply.

A congressionally directed spending item "means a provision or report language included primarily at the request of a Senator providing, authorizing, or recommending a specific amount of discretionary budget authority, credit authority, or other spending authority for a contract, loan, loan guarantee, grant, loan authority, or other expenditure with or to an entity, or targeted to a specific State, locality, or Congressional district, other than through a statutory or administrative formula-driven or competitive award process."

A limited tax benefit "means any revenue provision that (A) provides a Federal tax deduction, credit, exclusion, or preference to a particular beneficiary or limited group of beneficiaries under the Internal Revenue Code of 1986; and (B) contains eligibility criteria that are not uniform in application with respect to potential beneficiaries of such provision."

A limited tariff benefit "means a provision modifying the Harmonized Tariff Schedule of the United States in a manner that benefits 10 or fewer entities."

Senate Floor Statement

A colloquy[131] between Senators Baucus, Durbin, and Grassley provides some guidance regarding how the new rule will be applied in the case of limited tax benefits. In relevant part the colloquy states:

> For more guidance, we also recommend the interpretative guidelines developed by the staff of the Joint Committee on Taxation in response to the prior-law line item veto. These guidelines may also be applicable to the inter-

[130] Public Law 110–81.
[131] Congressional Record, August 2, 2007 (page S10699).

pretation of the proposed earmark disclosure rules for limited tax benefits in this bill. The Joint Committee on Taxation documents are called, first, the "Draft Analysis of Issues and Procedures for Implementation of Provisions Contained in the Line Item Veto Act, Public Law 104–130, relating to Limited Tax Benefits," that's Joint Committee on Taxation document number JCX–48–96, and second, the "Analysis of Provisions Contained in the Line Item Veto Act, Public Law 104–130, relating to Limited Tax Benefits," that's Joint Committee on Taxation document number JCS–1–97.

The proposed rule in this bill would require the disclosure of limited tax benefits. It would define a limited tax benefit to mean any revenue provision that, first, provides a Federal tax deduction, credit exclusion, or preference to a particular beneficiary or limited group of beneficiaries under the Internal Revenue Code of 1986; and second, contains eligibility criteria that are not uniform in application with respect to potential beneficiaries of such provision.

The proposed rule would apply in most cases where the number of beneficiaries is 10 or fewer for a particular tax benefit. But the Finance Committee will not be bound by an arbitrary numerical limit such as "10 or fewer." Rather, we will apply the standard appropriately within the unique circumstances of each proposal. For example, if a proposal gave a tax benefit directed only to each of the 11 head football coaches in the Big Ten Conference, we may conclude that the rule would nonetheless require disclosure of this benefit, even though the number of beneficiaries would be more than 10.

We will not limit the application of the proposed rule to proposals that result in a reduction in Federal receipts relative to the applicable present-law baseline. We believe that the proposed rule would have application to limited tax benefits that provide a tax cut relative to present law for certain beneficiaries, like, for example, a tax rate reduction for certain beneficiaries. But we also believe that the rule would apply to limited tax benefits that provide a temporary or permanent tax benefit relative to a tax increase provided in the proposal, like, for example, exempting a limited group of beneficiaries from an otherwise applicable across-the-board tax rate increase.

For example, a new tax credit for any National Basketball Association players who scored 100 points or more in a single game would be covered by the rule. And the rule would also cover a new income tax surtax on players in the National Hockey League that exempted from the new income surtax any players who were exempted from the league's requirement that players wear helmets when on the ice.

The rule defines a beneficiary as a taxpayer; that is, a person liable for the payment of tax, who is entitled to the deduction, credit, exclusion, or preference. Beneficiaries include entities that are liable for payroll tax, excise tax, and the tax on unrelated business income on certain activities.

The rule does not define a beneficiary as the person bearing the economic incidence of the tax. For example, in some instances, a taxpayer may pass the economic incidence of a tax liability or tax benefit to that taxpayer's customers or shareholders. The proposed rule would look to the number of taxpayers. That number is easier to identify than the number of persons who might bear the incidence of the tax.

In determining the number of beneficiaries of a tax benefit, we will use rules similar to those used in the prior-law line item veto legislation. For example, we will treat a related group of corporations as one beneficiary for these purposes. Without such a rule, a parent corporation could avoid application of the disclosure rule by simply creating a sufficient number of subsidiary corporations to avoid classification as a limited tax benefit under the proposed rule.

For example, if a related group of corporations—like parent-subsidiary corporations or brother-sister corporations—owns a football team, then the related group will be considered one beneficiary. That treatment is analogous to the team being one entity, not separate entities, like the coaching staff, offensive unit, defensive unit, specialty unit, and practice squad.

The time period that we will use for measuring the existence of a limited tax benefit will be the same time period that is used for Budget Act purposes. That is the current fiscal year and 10 succeeding fiscal years. Those are also all the fiscal years for which the Joint Committee on Taxation staff regularly provide a revenue estimate.

For purposes of determining whether eligibility criteria are uniform in application with respect to potential beneficiaries of such a proposal, we will need to determine the class of potential beneficiaries. In the case of a closed class of beneficiaries—for example, all individuals who hit at least 755 career home-runs before July 2007—that class is not subject to interpretation, since only Henry Aaron satisfies this criteria. If, instead, the defined class of beneficiaries is all individuals who hit at least 755 career home-runs, then we will determine the class of potential beneficiaries by assessing the likelihood that others will join that class over the time period for measuring the existence of a limited tax benefit.

Whether the eligibility criteria are not uniform in application with respect to potential beneficiaries will be a factual determination. To continue with the previous hypothetical, a proposal that provides a tax benefit to all individuals who hit at least 755 career home-runs may still not require disclosure if it is uniform in application. If the same proposal is altered so as to exclude otherwise eligible career home-run hitters who played for the Pittsburgh Pirates at some point in their career, then that kind of a limited tax benefit would require disclosure under the proposed rule.

Some of the guidelines in the Joint Taxation Committee's reports numbered JCX–48–96 and JCS–1–97 would not be directly applicable, but may be helpful in determining the class of potential beneficiaries. For example, the same industry, same activity, and same property rules might provide useful analysis.

Provision to restructure the New York Liberty Zone tax incentives

In addition to repealing certain depreciation and expensing provisions previously available in the New York Liberty Zone (the "NYLZ"), Section 301 provides a Federal credit against the tax imposed for any payroll period by Code section 3402 (related to withholding for wages paid) for which a NYLZ governmental unit is liable under Code section 3403. NYLZ governmental units are defined as the State of New York, the City of New York, or any agency or instrumentality of the first two.

The credit may be claimed during the 12–year period beginning on January 1, 2008 and is equal to certain amounts expended by the governmental units on a qualifying project. A qualifying project is any transportation infrastructure project in or connecting with the NYLZ that is designated by the Governor of the State of New York and the Mayor of the City of New York as a qualifying project. The Governor of the State of New York and the Mayor of the City of New York are to allocate to the New York Liberty Zone governmental units their portion of the qualifying expenditure amount for purposes of claiming the credit. The provision is effective on the date of enactment.

Congressionally Directed Spending Item or Limited Tax Benefit

The threshold question is whether Section 301 should be analyzed as a "congressionally directed spending item" or as a "limited tax benefit," because Rule XLIV treats the two somewhat differently. It can be argued that Section 301 essentially constitutes a "congressionally directed spending item," and therefore that the limited tax benefit analysis is irrelevant. The reasoning supporting this reading is that in the ordinary course, Federal withholdings on employee wages are effectively assets of the U.S. Treasury, and the tax credit made available by Section 301 may be claimed (and withholdings on wages therefore retained rather than being transmitted to the U.S. Treasury) only to the extent that the employer/governmental unit in question incurs expenditures for specifically identified projects.

Section 301 unquestionably has the economic effect of an appropriation: money otherwise due the U.S. Treasury will, by virtue of this provision, effectively fund (in light of the fungibility of money) a specific expenditure. Nonetheless, this memorandum proceeds upon the assumption that Section 301 is a "tax benefit" and not a "spending item." We believe that this is an area where legal form, not economic substance, controls. Accordingly, we are of the view that an amendment to the Internal Revenue Code that has an outlay effect is not by virtue of that fact alone a spending item. For example, we believe that the refundable portions of the child tax credit and earned income credit should be considered tax benefits for these purposes, notwithstanding the fact that these provisions have substantial outlay effects.

Our mode of analysis is dictated by practical necessity: virtually every "tax expenditure" could equally well have been implemented by Congress as an appropriation. We take comfort as well in the observation made in the colloquy quoted above that, for purposes of Rule XLIV, the "beneficiary" of a limited tax benefit is determined by looking to the formal imposition of tax liability (i.e., by determining who is the relevant "taxpayer"), not to the party bearing the economic incidence of the tax. The colloquy makes clear that the reason for doing so is one solely of administrative convenience ("The proposed rule would look to the number of taxpayers. That number is easier to identify than the number of persons who might bear the [economic] incidence of the tax.")

In this case, Section 301 is structured as a tax credit made available under the Internal Revenue Code to certain employers against their otherwise-existing obligation to remit employee withholdings to the U.S. Treasury. In light of our traditional analysis summarized above, we therefore think it appropriate to proceed on the basis that Section 301 should be analyzed under the "limited tax benefit" leg of Rule XLIV.

Limited Group of Current Beneficiaries

A second issue is whether Section 301 currently benefits a limited group of beneficiaries. Applying by analogy the colloquy's reference to treating a related group of corporations as one taxpayer, we believe that the agencies and instrumentalities of New York State and City should be treated as at most two taxpayers for purposes of whether a limited group of beneficiaries is affected by the provision. Accordingly, we believe that the statutory incidence of the provision falls on fewer than 10 beneficiaries (i.e., the State of New York, the City of New York and agencies or instrumentalities of the State or City). The economic incidence of the provision is not determinative for these purposes.

Uniform Application to Potential Beneficiaries

Under Rule XLIV, a tax provision that in practice applies only to a limited number of current beneficiaries nonetheless is not a "limited tax benefit" unless in addition that provision's "eligibility criteria are not uniform in application with respect to the potential beneficiaries of the provision." (Emphasis supplied.) The only direct indication of what constitutes the "uniform application" of a taxing statute to potential beneficiaries is the colloquy described above.[132] In this regard, the colloquy indicates that a tax benefit that applies equally to current and potential future beneficiaries will not constitute a limited tax benefit, just because the number of identifiable beneficiaries today is fewer than 10.

We suggest that the most logical way to read Rule XLIV that is consistent with its obvious intended scope and with the colloquy is

[132] The JCT staff documents on the former line-item veto legislation to which the colloquy refers do not discuss the issue of "uniform application," because that concept was not part of the definition of a "limited tax benefit" under that legislation.

to conclude that Rule XLIV applies a two-step analysis towards "potential" beneficiaries. First, a sponsor of a Bill that has a limited number of current beneficiaries can rely on the existence of a sufficiently large class of reasonably-likely potential beneficiaries to demonstrate that the Bill applies to more than a limited number of taxpayers. In that case, however, Rule XLIV goes on to provide that the statute must be applied uniformly to them and to currently-known beneficiaries. This reading finds direct support in the fact that Rule XLIV's "uniform application" clause applies only with respect to "potential beneficiaries" of a statute.[133]

In other words, a Bill that has a large number of current beneficiaries is not a limited tax benefit provision, because by definition it does not apply to a limited number of taxpayers, without regard to whether future ("potential") taxpayers are treated differently from current ones. If , however, a Bill today applies only to a limited number of beneficiaries, then the Bill's sponsor cannot rely on a sufficient number of "potential" beneficiaries emerging in the future to avoid the application of the limited tax benefit rule unless the statute would treat all current and potential beneficiaries equally.

Under this reading, a statute that has no possible future ("potential") beneficiaries and that applies today to a limited number of current beneficiaries must be a limited tax benefit. It cannot be the case, for example, that a rule identifying a class of taxpayers comprising only Hank Aaron nonetheless is not a limited tax benefit, on the theory that all those taxpayers (a single individual) are treated equally.

Following this mode of analysis, the most important analytical step in applying Rule XLIV to a case (like this) where a statute's current beneficiaries are limited in number is to determine the relevant class of potential (i.e., future) beneficiaries. The colloquy concludes that a statute's class of potential beneficiaries is to be determined "by assessing the likelihood" that beneficiaries beyond those to whom the benefit applies today may appear at a later date.

Thus, to continue with the colloquy's baseball analogy, a permanent tax benefit made available on a uniform basis to all individuals who hit a least 755 major league career home-runs is probably not a limited tax benefit (because the number of individuals who could qualify in the future is unlimited), but a comparable temporary provision expiring December 31, 2008, probably does constitute a limited tax benefit, because the class of individuals who could reasonably be expected to satisfy that test would come down to two identifiable individuals.

Having identified the class of potential beneficiaries, and having determined that they are sufficiently numerous as to overcome the "limited" nature of the tax benefit in question, the final step in the analysis is to ensure that the statute will apply uniformly to all potential and current beneficiaries. In most cases, this determination will be straightforward.

In sum, we acknowledge that the "uniform application" test is both vague and difficult to apply. The "uniform application" leg of

[133] In this regard, it is important to note that clause (A) of Rule XLIV refers to "a particular beneficiary or limited group of beneficiaries." It is only the "uniform application" clause (clause (B)) that refers to "potential" beneficiaries.

the analysis should not be read, however, to undercut the entire purpose of Rule XLIV. If the only taxpayers that can reasonably be expected to satisfy a bill's definition of the class of beneficiaries of a tax benefit are both few in number and known to the Senator proposing the Bill at the time that the legislation is considered, then in our view that Bill must give rise to a Rule XLIV issue. Any other reading would vitiate the Rule of any meaning.

This mode of analysis leads to a straightforward resolution of the present case. In practice, only New York State and New York City (and political subdivisions thereof) can be expected to qualify for the benefits of Section 301. The fact that these two identifiable beneficiaries are treated equally is not enough, in our view, to avoid the reach of Rule XLIV.

Conclusion

While we recognize that colorable arguments can be made in support of the contrary conclusion, we believe that Rule XLIV's disclosure requirement for limited tax benefits is applicable to Section 301.

I would be pleased to discuss this issue further with you, should you wish. In any event, I hope that this memorandum is helpful to the Chairman's decision-making process.

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