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P.O. Box 5714
Chicago, IL 60680
(312) 642-9614

Anti-Boycott Bulletin

Joseph A. Kamalick
Robert L. Warden
Editors

UPDATE UPDATE UPDATE UPDATE

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REPORT ON THE PUBLIC HEARING HELD APRIL 29TH ON THE TREASURY DEPARTMENT'S PROPOSED GUIDELINES CONCERNING BOYCOTT COMPLIANCE UNDER THE TAX REFORM ACT OF 1976.

By Mark A. Bruzonsky

Mr. Bruzonsky is an associate editor of Worldview magazine and a research associate on U.S. Middle East policy at the Center for Strategic and International Studies of Georgetown University, Washington, D.C.

At the April 29th hearing, four lawyers representing specific interest groups and two businessmen outlined their opposition to various aspects of the Treasury Department's proposed Guidelines relating to the Boycott Provisions (Section 999) of the Internal Revenue Code, as enacted in the Tax Reform Act of 1976. In general, Jewish organizations called for stricter Guidelines while business groups suggested that the proposed Guidelines are too vague and should be reconsidered. The business representatives also suggested that the tax provisions should be repealed in view of the impending passage of anti-boycott sanctions in this year's Export Administration Act.

The hearing was held before a five-man panel consisting of:
Laurence N. Woodworth, Assistant Secretary for Tax Policy
Gary C. Hufbauer, Deputy Assistant Secretary for Trade and Raw Materials Policy
David S. Foster, International Tax Counsel
Russell L. Munk, Assistant General Counsel for International Affairs
Robert A. Bley (Moderator), Director, Legislation and Regulation Division, Office of Chief Counsel, Internal Revenue Service

The hearing location, the Treasury Department's Cash Room, was filled with more than 100 persons as Paul Berger of Arnold & Porter, Washington, D.C., spoke first, representing the National Jewish Community Relations Advisory Council (NJCRAC), an umbrella organization for nine national Jewish service organizations.

Both Berger and Sheldon Cohen of Cohen & Uretz, Washington, D.C., representing the American Israel Public Affairs Committee (AIPAC), which is popularly referred to in Washington as the "Jewish lobby," vigorously challenged the proposed Guidelines. They insisted the Guidelines as now written fail to adequately implement the clear legislative intent of Congress -- to penalize any agreement by any American company to participate in the Arab boycott. Berger, in summarizing his views, stated that "It is essential that the existing Guidelines be revoked because they are not consonant with the tax laws." "The Guidelines issued by the past Administration...seem to frustrate the original Congressional intent," Berger charged. He and Cohen further insisted that what is involved is religious and ethnic discrimination which it is the public policy of the United States to oppose. We are involved in "trying to develop a body of laws protecting people against racial and religious discrimination," Berger noted. "We believe we are dealing with a body of public law involving such discrimination." Cohen emphasized that even though an anti-discrimination provision "may not belong in the tax laws, it is there and it is there to be administered faithfully." He further cited a number of personal examples of discrimination, loudly noting that "It is real if you feel it!" Other speakers later indicated that such discrimination is a thing of the past and that the Arab boycott today relates strictly to the Arab-Israeli conflict.

Berger's primary complaint related to an alleged major inconsistency between various Guidelines defining whether there has been an agreement to participate in the boycott -- the basic issue which causes incurrence of tax penalties. Berger repeatedly emphasized that if the conduct outlined in Guideline H9 (exclusion from consideration for employment based on religion with awareness of boycotting country policies but without agreement) is considered an implied agreement, then Guidelines H5, H6, and H23 are "fundamentally wrong." There is an implied agreement in all cases, he argued. H5 deals with refraining from purchasing goods for export to a boycotting country from a company which trades with a boycotted country without agreement but with awareness; H6 expands this situation to cover supply of services and construction projects; and H23 deals with a similar situation but involves the choice of ships for delivery. The "answer should be identical for H5, H6, H9 and H23," Berger insisted. "There is no basis in the statute for H9 coming out one way and the others the other way."

Instead of looking at this kind of action "with an aspect of innocence," Berger stated, the action should arouse "suspicion" at the very least. Berger did concede under questioning, however, that the burden of proof should not necessarily fall on companies who simply refrain from certain conduct with awareness of laws in boycotting countries. He further agreed -- when questioned in relation to what he called the "roadmap problem" where Guidelines show companies how to avoid penalized conduct -- that "it is not the roadmap feature that you object to but rather the direction of the roadmap."

James P. Holden of Steptoe & Johnson, Washington, D.C., representing the Rule of Law Committee, an association of 11 multinational corporations, followed Berger. The "primary position of the Rule of Law Committee is that the anti-boycott tax provisions should be repealed and Treasury should advocate that position even while applying the law." Since the Export Administration Act will contain strong anti-boycott provisions and since the Business Round Table and Jewish organizations are moving toward a compromise position which will also be acceptable to the Carter Administration, last year's IRS anti-boycott penalties will not be needed, Holden argued. He further noted that these provisions burden the tax system with non-revenue functions which the IRS has no experience in administering and that two separate sets of anti-boycott provisions will be an unnecessary burden on the business community.

Holden pointed out a number of inconsistencies between the tax legislation and the pending Export Administration Act legislation. He also noted that "last year's legislation was hastily put together" while the "current legislation has been considered over a broad time frame." "We urge you not to make major changes in the proposed Guidelines," Holden pleaded to the panel. "Most objective observers will advocate repeal once we do get" the new legislation. Addressing himself to Berger's arguments, Holden indicated that the proposed Guidelines are "not a roadmap to avoidance but faithfully reflect the intent of the legislation."

Citing specific provisions, Holden stated that on the facts of H5, for instance, "there is no rational alternative that could be reached." He suggested that possibly an H5A and an H5B could be drafted and that if the latter included additional facts such as a taxpayer "suddenly and precipitously severing its relations" with a boycotted company, then the facts could justify a conclusion that there was an agreement.

Holden cited a number of cases where the pending Export Administration Act will clearly regulate conduct which is only ambiguously discussed in the Guidelines. For instance, the Act will "expressly prohibit letters of credit which have boycott terms," thus overriding Guideline H29.

Questioned on why Sen. Ribicoff, chief sponsor of the tax provisions, disagrees with Holden's assertion that the proposed Guidelines are adequate, Holden replied that "Sen. Ribicoff is impatient with the legislation and with the Guidelines. The rectification of this lies with the Export Administration Act. This (tax) legislation is probably deficient in reaching some of the things Sen. Ribicoff is concerned about."

Sheldon Cohen associated himself with all of Mr. Berger's comments. He went on to stress that "bank letters of credit are a gut element in enforcing the boycott" and that the Treasury Department has a "basic responsibility to look to the clear intent of Congress," which he did not think had been done adequately. He also stressed that since the Export Administration Act provisions "haven't yet passed,...therefore you have an obligation to enforce the law." Deputy Assistant Secretary Hufbauer appeared to agree that the letters of credit Guidelines need revision. "The argument that issuing letters of credit is doing business has great force in my mind," he stated, and he asked all those speaking for any counter-views.

George Beatty of Lee, Toomey and Kent, Washington, D.C., then spoke in order to share problems that tax firms have with the proposed Guidelines. Generally he called for greater clarity and gave a number of examples. He strongly pointed out that there is so much paper work involved that there is often a likelihood of technical but unwilling compliance with the boycott. He suggested that the term agreement mean "conscious agreement, a deliberate undertaking to participate," not just an "inadvertent oversight." A "preponderence of the evidence" test should be stated, he further noted, though the Guidelines are silent on this.

In general, Beatty indicated that "many companies feel they are somewhat innocent victims caught in a cross-fire as a result of non-tax legislation that took tax form." He supported Holden's view that from a policy standpoint there should be "one law with specific criminal sanctions for violating what is our national policy rather than broad tax policy." He also emphasized that "penalizing shareholders is not appropriate for violations" by companies.

John S. Withers spoke as chairman of the International Commerce Committee of the Associated General Contractors of America, Washington, D.C. He stressed that his organization opposes "discrimination of all types based on race and religion," but that "we do not believe that the Arab boycott is discrimination based on religion, rather it may be against Israel....Discrimination is not what we are talking about."

Withers pointed out examples where businesses face serious dilemmas that could result in not being able to do business in Arab countries. "In our opinion these provisions inject into the tax law political considerations" creating a situation where the "risks of doing business in an Arab country act as a deterrent." "We think this act to be grossly unfair with no reasonable relationship between the bad act and the penalties," he continued. "We have reached the conclusion that we are going to be considered guilty until proven innocent."

Withers charged that the Guidelines as now written are often confusing and unnecessarily restrictive. He noted that even the reporting requirements present quite a burden. Withers pointed, for instance, to the subtleties of Guidelines H3 and H4 which yield a different result in the decision whether or not there has been an agreement -- H3 is the case where the laws of a boycotting country "will apply" to a company and H4 where the company "will comply" with the boycotting country's laws. "I find an awfully hard time applying this. I don't understand it," Withers complained. "You're not alone," Hufbauer responded, illiciting the only laughter of the morning from the audience.

Withers concluded with the observation that the "Guidelines should be modified in relation to the practical nature of doing business."

This view was then seconded by Dan M. Burt of D. M. Burt & Associates, Marblehead, Massachusetts. Burt stressed that the problems created by these Guidelines are much greater for small companies like his than for large firms. Underscoring Beatty's comments, Burt noted that "the fact that small companies can inadvertently comply is extraordinarily easy. Those of you who are not contractors cannot appreciate this," he insisted.

Burt pointed out that the "nature of the legislation passed is relatively unusual, perhaps unique." "It is much more like a criminal statute and so you should interpret it as a criminal statute, relatively narrowly." Burt stated that he is aware of a number of cases where small companies have simply stopped considering doing business in the Middle East until the Guidelines are clarified. He also emphasized that when the current legislation before the Congress is passed, Treasury should move to issue additional regulations consistent with this new legislation.

In addition to the verbal comments delivered at the April 29th hearing, the Treasury Department has also received 24 written comments.

It is expected that Treasury will take some time to digest the verbal and written comments made against the Guidelines and then draft possible revisions to the Guidelines. Assistant Secretary Woodworth has previously indicated that once a set of proposed revisions to the proposed Guidelines have been drawn up, another public hearing will be held at which the proposed revisions can be contested by interested parties. Other Treasury Department officials have said that it is unlikely that the Guidelines will ever appear in "final" form, rather that the Guidelines will be what one official called "a living animal," with changes being made as new developments warrant.

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