Congressional Research Service Report to Congress on CRP Is Incomplete and Misleading

Neil E. Harl
Iowa State University

Follow this and additional works at: http://lib.dr.iastate.edu/aglawdigest

Part of the Agricultural and Resource Economics Commons, Agricultural Economics Commons, Agriculture Law Commons, and the Public Economics Commons

Recommended Citation
Available at: http://lib.dr.iastate.edu/aglawdigest/vol19/iss8/1

This Article is brought to you for free and open access by the Journals at Iowa State University Digital Repository. It has been accepted for inclusion in Agricultural Law Digest by an authorized editor of Iowa State University Digital Repository. For more information, please contact digrep@iastate.edu.
Congressional Research Service Report to Congress on CRP
Is Incomplete and Misleading

-by Neil E. Harl*

On April 10, 2008, the Congressional Research Service released a report to Congress¹ on the Conservation Reserve Program (CRP)² which does not recognize the key issues in the controversy³ and which is both incomplete and misleading. Inasmuch as the Congressional Research Service was set up as the research arm of Congress, the contents of the report, coming at a crucial time when the 2008 farm bill, H.R. 2419, is in conference committee, are particularly important.

The key shortcomings of the CRS report

On the self-employment tax issue, which is of central importance, the CRS report commences the analysis by leading the reader to assume that the issue of exclusion of CRP payments from self-employment tax has arisen only in recent years and that the argument is all about the breadth of the exclusion from self-employment tax liability.⁴ The report dismisses the fact that CRP payments were historically not subject to SE tax for those who fell short of carrying on a trade or business (those who were retired, those who were disabled and those who were mere investors) from the time of the first sign-up under the CRP program in 1986 until IRS announced a change in position in 2003.⁵ Thus, it is misleading to omit any mention of the longstanding tax treatment of CRP payments. It is also misleading to treat the issue as involving a loss of revenue when the former exemptions are restored as the Congressional Committees have repeatedly done in their calculations. Allowing IRS to change the law as evidenced by Section 1402(a) of the Internal Revenue Code and resist challenges on the ground that any relaxation of the revisionist rule would constitute a cut in tax revenue is not only disingenuous; it goes well beyond the proper role of IRS as was extensively discussed in 1998.⁶

What is at issue here is an attempt by the Internal Revenue Service to redraw the line between income from a trade or business (which triggers self-employment tax)⁷ and income from an entity falling short of the trade or business test and, therefore, is not subject to SE tax. Nowhere in the CRS report is that test even mentioned and nowhere is Section 1402(a) of the Internal Revenue Code cited.⁸ With the IRS position taken in the 2003 ruling⁹ and the 2006 Notice,¹⁰ plus the revenue ruling threatened in the 2006 Notice,¹¹ there would be no investment activity, even those held by those in retirement or disabled, that would

* Charles F. Curtiss Distinguished Professor in Agriculture and Emeritus Professor of Economics, Iowa State University; member of the Iowa Bar.
not be subject to SE tax. The attempt by the Service to redraw the line of what constitutes a trade or business goes well beyond the CRP issue. If the IRS position prevails, it will pose a serious threat to the meaning of “trade or business” in all sectors of the economy.

No challenge to IRS authorities cited in support of the Service position

The CRS report makes no mention of the lack of authority in support of the IRS position on imposition of SE tax on CRP payments falling well short of the trade or business test. As discussed in more details elsewhere, the Service agrees that the term “trade or business” has the same meaning as when used in Section 162 of the Internal Revenue Code. Of the many cases which have addressed the issue of “trade or business” in the context of Section 162, in Notice 2006-108 the IRS singled out one of those cases, in support of the Service position that merely signing up for CRP constitutes a trade or business. The Supreme Court in stated that the “... resolution of this issue [meaning of ‘trade or business’] requires an examination of the facts of each case.”

The case involved a gambler who devoted 60 to 80 hours per week to pari-mutuel wagering on dog races with a view to earning a living from such activity. The taxpayer went to the track six days per week for 48 weeks in the year in question. The betting activity was more than a full-time job.

It is an unbelievable reach to assert that a case involving a taxpayer putting in up to twice the number of hours in a normal work week could stand as authority for a situation where merely signing up for a conservation program constitutes a trade or business.

In conclusion

The CRS report totally ignored the core issue involved in the debate over whether all CRP payments or only those from an activity constituting a “trade or business” should be subject to self-employment tax. That core issue is where the line for what amounts to a trade or business should be drawn. There is no discernible support in tax law for the notion that the line should be drawn to include all profit making ventures as has been suggested by the Internal Revenue Service. That is what the Congress needs to understand in considering H.R. 2419.

FOOTNOTES
4 Pettit, supra note 1, p. 3.
5 Rev. Rul. 60-32, 1960-1 C.B. 23; Ltr. Rul. 8822064, March 7, 1988. See Ray v. Comm’r, T.C. Memo. 1996-436 (CRP land with a “direct nexus” to a trade or business farming operation subject to SE tax; CRP payments on land not bearing such a direct nexus presumably were not subject to SE tax). See also Hasbrouck v. Comm’r, T.C. Memo. 1998-249 (IRS alleged taxpayer was not engaged in trade or business on land bid in to the CRP program; the precise opposite from the position taken from 2003 on).
7 I.R.C. § 1402(a) (.. . trade or business carried on by such individual. . . .
8 See Pettit, supra note 1.
11 Id.