

Why the Obamas Paid Too Much in Taxes

By Dorothy A. Brown

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The American tax system is supposed to be progressive. Yet, for the very rich, nothing could be further from the truth.

You know the expression that the rich are different. Well, we found out that President and Mrs. Obama made more than \$5 million last year, and after examining their tax returns, I can say that they are different — but not in the way you might think. They are different because, for their income group, they *paid too much in taxes*.

The first couple earned more than \$5 million and paid 32 percent in federal income taxes.¹ When compared with their peers, they paid too much. According to the most recent IRS statistics, most households with adjusted gross incomes of at least \$5 million paid only 23 percent in federal income taxes.² Were the Obamas trying to single-handedly reduce the deficit by paying extra taxes they did not owe? No. Their taxes were high because of how they earned their money.

The typical taxpayer with \$5 million of income received almost half of it from capital gains and qualified dividends, which are taxed at the lower 15 percent rate.³ That is why their tax rate is 23 percent. The Obamas, however, had a negligible amount (less than \$2,500) of income subject to the 15 percent rate, with the rest of their income subject to the maximum 35 percent rate.⁴ That is why their tax rate was 32 percent. The president is not the only taxpayer paying too much in taxes. Every taxpayer

without income subject to the 15 percent rate is paying too much in taxes when she compares herself with someone who has income that is taxed at the 15 percent rate.

Taxpayers in households between \$50,000 and \$100,000 have no more than 3 percent of their income from capital gains and corporate dividends.⁵ Most of their income will be subject to tax at up to 35 percent. Taxpayers with between \$100,000 and \$200,000 of income pay the 15 percent rate on only 6 percent of their income.⁶ For households with income between \$200,000 and \$500,000, almost 13 percent of their income is subject to the 15 percent rate.⁷ However, the percentages steadily increase until finally we see 60 percent of income subject to the 15 percent rate for households with at least \$10 million of income.⁸ Most of us do not benefit greatly from the 15 percent rate.

Obama's solution to this problem is to let the Bush tax cuts expire for households with incomes greater than \$250,000, which will increase their tax rate on capital gains to 20 percent and increase their tax rate on all other income to 39.6 percent.⁹ This misses the point. The differential between 39.6 percent and 20 percent will be virtually the same as we have now (35 minus 15). The real beneficiaries of Obama's reform will be high-income taxpayers with significant percentages of capital gains.

What you often hear from those who support lower taxes on corporate dividends is that income has already been taxed once at the corporate level and that the lower tax rate reflects that fact. What they fail to tell you is that in some instances that income has never been taxed at the corporate level.¹⁰ Those who support lower taxes on capital gains argue that it generates additional government revenue. In the short term it does, especially when the lower rate is only temporary, as it was in 2003. In the long term, the government loses lots of money from capital gains rate cuts.¹¹

In the final analysis, the question is clear. Should someone who receives \$5 million in royalties from a book

¹A copy of President and Mrs. Obama's tax returns are available at [http://www.taxanalysts.com/thp/presreturns.nsf/Returns/CBBA4F0CDB3C35198525742F005A334A/\\$file/B_Obama_2009.pdf](http://www.taxanalysts.com/thp/presreturns.nsf/Returns/CBBA4F0CDB3C35198525742F005A334A/$file/B_Obama_2009.pdf). The tax rate was calculated by dividing adjusted gross income of \$5,505,409 by total tax of \$1,792,414.

²Martin A. Sullivan, "Is the Income Tax Really Progressive?" *Tax Notes*, Dec. 14, 2009, p. 1135, *Doc 2009-27036*, 2009 TNT 237-4. ³*Id.* at 1136.

⁴Michael D. Shear and David S. Hilzenrath, "Obamas Report \$5.5 Million in Income on 2009 Tax Return," *The Washington Post*, Apr. 16, 2010, at A4. The Obamas did have a capital loss last year from selling bank stock that the president inherited from his grandmother after she passed away in 2008. Because the president reported a capital loss greater than his capital gains, he was able to use \$3,000 of the loss to offset ordinary income.

⁵Sullivan, *supra* note 2, at 1136.

⁶*Id.*

⁷*Id.*

⁸*Id.*

⁹Martin A. Vaughan, "Tax Cuts to Expire for Top Earners," *The Wall Street Journal*, Feb. 2, 2010, at A5.

¹⁰Government Accountability Office, "Comparison of the Reported Tax Liabilities of Foreign- and U.S.-Controlled Corporations, 1998-2005," GAO-08-957, July 2008, *Doc 2008-17519*, 2008 TNT 157-15.

¹¹Center on Budget and Policy Priorities, "Experts Agree That Capital Gains Tax Cuts Lose Revenue," May 7, 2008, *Doc 2008-8800*, 2008 TNT 77-70, available at <http://www.cbpp.org/files/policy-points4-18-08.pdf> ("The non-partisan Congressional Budget Office and the Joint Committee on Taxation have

(Footnote continued on next page.)

he worked long and hard to write and get published pay taxes at a higher rate than someone who receives \$5 million from taking her stockbroker's advice in deciding when to buy and sell stock? Put another way, should someone who works a 40-hour week and is busy trying to raise a family pay more in taxes than someone who never gets out of bed but earns the same money from going to the mailbox and getting a dividend check (or just going to the computer and checking their account online)? Of course not — because all income should be taxed the same. No type of income should get preferential treatment.

We profess to be the land of opportunity for all, yet when it comes to our tax system, we become the land of opportunity for *some*. To quote Warren Buffett: "There's class warfare, all right, but it's my class, the rich class, that's making war, and we're winning."¹² The time for change is now. We need to have a progressive tax system that applies to all taxpayers. Even the president should have a dog in this fight.

estimated that *extending the capital gains tax cut enacted in 2003 would cost \$100 billion over the next decade*") (emphasis in original).

¹²Ben Stein, "In Class Warfare, Guess Which Class Is Winning," *The New York Times*, Nov. 26, 2006, at C3.

FLPs, the Transfer Taxes, and the Income Tax

By Laura E. Cunningham

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Despite repeated calls for reform, Congress has declined to act to curb transfer tax avoidance through the use of family limited partnerships (FLPs). Use of FLPs allows taxpayers to substantially leverage their exemption from estate tax and reduce the effective rate of tax on even the most liquid investment assets. This article reviews the current state of the law in the Tax Court on FLPs, renews the call for congressional action, and explains why FLPs are not just a "death tax" problem.

If and when Congress acts on the future of the federal transfer taxes, there are several important issues it should address. Even though these have been outstanding for decades, they have yet to be dealt with in legislation passed by the House or the Senate. I would like to bring them back to the front burner.

My principal concern is with the valuation discounts that have become part of the transfer tax landscape. The IRS and Tax Court's acquiescence in substantial valuation discounts for interests in family limited partnerships (FLPs) have allowed wealthy individuals to reduce the value of their estates for transfer tax purposes with only a modicum of careful planning. As the law has developed in the Tax Court, the only unsuccessful taxpayers are those not represented by skilled counsel. When taxpayers observe the blueprint of formalities provided by the court, even the most liquid assets transferred by the most elderly taxpayers are discounted by as much as 40 percent (or more) for transfer tax purposes. The proposals before Congress for continuing the transfer taxes call for continuing the exemption of \$3.5 million (\$7 million for married couples) that was effective in 2009.¹ That means that as the reach of the transfer taxes narrows to only the wealthiest of decedents, the sophistication level of counsel will increase. In other words, few taxpayers potentially subject to the tax will die without a carefully planned FLP.

To date, Congress has ignored all pleas for legislation limiting valuation discounts, including some made by

¹H.R. 4154, passed December 3, 2009. H.R. 439, offered by House Ways and Means Committee member Earl Pomeroy, D-N.D., in January 2009, contains a provision denying valuation discounts for nonbusiness assets held within an entity. Those provisions weren't included in H.R. 4154, which was also sponsored by Pomeroy.