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Tax Analysts Exclusive: Conversations: David Gamage
by Matthew Dalton


Gamage recently spoke with Tax Analysts’ Matthew Dalton about his time at Treasury and the unexpected tax consequences of healthcare reform.

Tax Analysts: How were you brought into Treasury?

David Gamage: Ed Kleinbard [of the University of Southern California Gould School of Law] contacted me after Emily McMahon [then Treasury deputy assistant secretary for tax policy] reached out to him to see if he knew an academic who might be interested in coming into Treasury for a couple of years to work primarily on the Affordable Care Act [the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 (ACA)].

When I went into academia, I had always thought that I would be interested in the right government opportunity. When I heard about this, it seemed perfect.

Part of the reason for me to go to Treasury was to gain in-depth knowledge of specific tax provisions, and of the tax lawmaking process more generally, so as to inform both my academic writing and my teaching. I'm grateful to be coming out of Treasury with a fairly detailed perspective on the tax provisions of the ACA.

TA: What projects were you involved with?

Gamage: I worked primarily on implementing the ACA, with a focus on the components that affect individuals. I also worked on a number of other projects related to individual income taxation, such as the [earned income tax credit] and the education tax credits.

TA: What role does Treasury play as one of the three agencies issuing guidance on the ACA, in addition to the Department of Health and Human Services and the Labor Department?

Gamage: Treasury has a lot of input whenever HHS or Labor are doing something that requires coordination with the tax provisions. When there are provisions that have only minimal or incidental bearing on the tax components of
the ACA, then Treasury has little reason to be involved.

Some of the healthcare projects are specifically three-agency regulations, to be coordinated between Treasury, HHS, and Labor. There's a long-standing three-agency guidance process that some of these regulations go through. There are representatives from Treasury and IRS who regularly go to those meetings. That process works relatively smoothly, and has for years.

There are other three-agency guidance projects that go through a separate process, particularly when guidance relates more directly to the [insurance] exchange provisions of the ACA -- such as the premium tax credits or the employer or individual mandates. There is a more elaborate process for working through these forms of guidance, because more coordination is often necessary.

Even ACA guidance projects that fall exclusively to one of the three agencies have to be coordinated with the other agencies and with the White House. Each agency has its own process for issuing guidance, but there is regular coordination and communication.

**TA:** Your coming paper states that the ACA imposes unintended "effective taxes" on low- and moderate-income individuals. What led you to write about that?

**Gamage:** I wrote that paper for two reasons. First, I thought I could offer a better explanation of how the tax provisions of the ACA fit together than what is in the existing literature. Second, I felt it important to critique ways in which I consider the ACA legislation to be poorly designed. Beginning in 2014, when major provisions of the ACA are expected to come into effect, I argue that the ACA will impose significant costs on low- and moderate-income workers and that these costs could be avoided by legislative reforms. My bottom line is that the ACA was drafted so as to minimize explicit budgetary costs, but [it creates] far worse hidden costs that result primarily from the employer mandates and from restrictions on the premium tax credits.

As I try to make clear in the paper, I do not intend to attack the ACA, nor do I argue that the ACA will do more harm than good for low- and moderate-income workers or for any other population. In my view, the benefits of the ACA more than counterbalance the harms. Nevertheless, I argue that we could have done even better, and that hopefully we still might do better either by reforming the ACA or by making different choices in future healthcare reforms. One of my roles as an academic is to point out costs that the political system might not sufficiently take account of and to explain how legislation can be reformed so as to avoid those costs, and this is what I am trying to do in the paper.

Because the paper relates to my work at Treasury, I was only able to publicly release it after the end of my Treasury position. Depending on what the Supreme Court does with respect to the ACA, I will likely write more on the intersection of healthcare and taxation.

**TA:** Do you see any parallels between the ACA and ERISA, with the rise of defined contribution plans in place of defined benefit plans as an unintended consequence?

**Gamage:** The elephant in the room for both healthcare policy and for U.S. tax and budget policy more generally is the ongoing trend of rising healthcare costs. Due to these rising costs, most analysts expect employers to increasingly shift health insurance expenses to employees, or in some cases to stop offering health insurance to employees altogether. A central dilemma in the design of the ACA is that any reforms that improve the health insurance available on the individual market -- a major goal of the ACA -- thereby undermine the incentives for employers to continue offering subsidized health insurance. Analogous to our experiences with ERISA, the structure through which the ACA manages this dilemma is likely to create all sorts of unintended consequences. I try to explain some of these consequences in my recent paper on the ACA, and I will likely say more on this theme in future writings.

**TA:** Another issue you mention in the paper is the basis for determining whether employer-provided health coverage is affordable when determining eligibility for the section 36B insurance premium tax credit. The proposed regs based the definition on self-only coverage, which received criticism for limiting the credit's availability to dependents. What do you think of that interpretation? (For prior coverage, see Doc 2011-24198 📖 or 2011 TNT 223-4 📖.)
**Gamage:** Speaking only for myself, this was a very hard call that had to be made by Treasury and IRS. I think there is authority to come out the other way, to rule that affordability could be based on the cost of family coverage. Deciding between these two interpretations mostly comes down to evaluating legislative intent along with policy concerns and budgetary considerations.

There have been a number of estimates of the increased costs that would be involved in making affordability based on family coverage. Many of these estimates conclude that the costs could be very large. As I suggest in my recent draft paper, I think that there are even larger costs to basing affordability on self-only coverage, but that these costs are more hidden as compared to explicit budgetary outlays.

**TA:** Did you see the effect of budget cuts constraining the resources of Treasury or the IRS on developing guidance?

**Gamage:** Yes, particularly at IRS. I've been very impressed with everyone I've worked with at IRS. The IRS has done an incredible job, but the fact remains that the IRS is an underfunded agency, tasked with doing too much while being questioned at every turn, and with its limited resources constantly under threat.

The main problem with implementing social welfare policy through the tax code is that the Service's resources are usually not increased along with its increased duties. By charging the IRS with engaging in politically sensitive areas, Congress opens the IRS to even more criticism. There's no way for the IRS to appease everyone on these issues, and yet it's crucially important for the IRS to maintain its core role in administering the tax system.

**TA:** Is the tax code the right way to implement healthcare policy?

**Gamage:** I think it's very easy for those of us in the tax community to have a knee-jerk reaction that the tax code should be kept clean of social welfare provisions. In a perfect world, I would agree with that sentiment. Undoubtedly, adding social welfare provisions to the tax code complicates the tax code and increases the burden on the IRS.

Nevertheless, at this point, unless we significantly reform our tax legislative process, it's not realistic to think that we're going to keep the tax code clean of social welfare provisions. Both political parties frequently use the tax code for nontax purposes, and it's often hard to draw a line between what counts as a tax purpose or a nontax purpose.

Although I do think that we'd be better off having fewer social welfare provisions in the tax code, I don't think that the goal of keeping the tax code clean is all that important as compared to making sure that whatever legislation we do pass is written in the best fashion possible and that the IRS has the resources to carry out the duties it is charged with. No one thinks that the ACA, or any other form of social welfare legislation, is designed perfectly. We hope for the best we can get through the legislative process, and we hope for legislation that, on balance, does more good than harm.

**TA:** Was Treasury involved with any of the ACA litigation?

**Gamage:** We did work with the Justice Department to some extent, primarily on the issue of severability, advising Justice on what their position should be as to what provisions should be maintained if the individual mandate is struck down.

In terms of the implications of the Supreme Court litigation for tax administration, in many ways the most interesting questions will arise if the individual mandate is struck down with other portions of the act maintained. Severing the individual mandate could raise novel questions of statutory interpretation, with enormous stakes, in terms of how the other tax provisions should be interpreted without the individual mandate, since the tax provisions were written to be tightly integrated.

**TA:** What are your thoughts on the current tax reform discussions?

**Gamage:** Almost everyone in Washington supports tax reform in theory. Yet I'm not convinced there's much appetite for real tax reform, which would necessarily create both winners and losers. Tax reform is always supposedly on the agenda, but that doesn't mean in any particular year that there's any real likelihood of us seeing meaningful tax reform.
Of course, if we were to try to aim for a 1986-style tax reform, there is much that should be looked over throughout the code.

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