

Part III - Administrative, Procedural, and Miscellaneous

Uncertain Tax Positions – Policy of Restraint

Announcement 2010-9

The Internal Revenue Service is considering changes to reporting requirements regarding certain business taxpayers' uncertain tax positions in order to improve tax compliance and administration. The Service is developing a schedule requiring certain business taxpayers to report uncertain tax positions on their tax returns. This Announcement discusses the potential content of such a schedule and invites public comment on the Service's proposed approach. The schedule will require the annual disclosure of uncertain tax positions in the form of a concise description of those positions and information about their magnitude. The proposal does not require the taxpayer to disclose the taxpayer's risk assessment or tax reserve amounts, even though the Service can compel the production of this information through a summons. United States v. Arthur Young, 465 U.S. 805, 815 (1984). While the Service intends to require the reporting of uncertain tax positions, the Service is proposing to otherwise retain its existing policy of restraint as described in Announcement 2002-63, 2002-2 C.B. 72, and IRM 4.10.20.

BACKGROUND

Uncertain Tax Positions

The United States federal income tax system relies on taxpayers to make a self-assessment of tax and to file the appropriate form of return that shows the facts upon which tax liability may be determined and assessed. Section 601.103 of the Procedure and Administration Regulations. To discharge its obligation to fairly and uniformly administer the tax laws, the Service must be able to identify quickly and efficiently significant issues (including uncertain tax positions) underlying the tax return. Existing business tax returns do not currently require that taxpayers identify and explain uncertain tax positions underlying their returns.

Many taxpayers are required by FASB Interpretation No. 48, Accounting for Uncertainty in Income Taxes, an Interpretation of FASB Statement No. 109 (FIN 48)¹ to identify and quantify uncertain tax positions taken in the return for financial accounting purposes. That is, taxpayers must identify and quantify for financial accounting purposes a tax position relating to a specific federal tax return for which a taxpayer is required to reserve an amount under FIN 48. A taxpayer's tax reserves and reporting regarding its uncertain tax positions may be reflected in its own books and records or financial statements, or in the books and records or financial statements of a related domestic or foreign entity. Taxpayers not subject to FIN 48 may be subject to other requirements regarding accounting for uncertain tax positions. For example, taxpayers may be subject to other generally accepted accounting standards, including

¹ Under the codification of accounting standards, the relevant portions of FIN 48 are now contained in Accounting Standards Codification subtopic 740-10, Income Taxes. FASB ASC 740-10.

International Financial Reporting Standards (IFRS) and country-specific generally accepted accounting standards.

The information developed in the course of complying with FIN 48 or other accounting standards is highly relevant to understanding the taxpayer's tax positions and assessing how those positions affect the taxpayer's tax liability. United States v. Arthur Young, 465 U.S. at 815. That information also would aid the Service in focusing its examination resources on returns that contain specific uncertain tax positions that are of particular interest or of sufficient magnitude to warrant Service inquiry, as well as allowing examination teams to identify all of the issues underlying the tax returns more quickly and efficiently.

Schedule

The Service is developing a schedule that will require certain filers to provide information about their uncertain tax positions that affect their United States federal income tax liability. This schedule will be filed with the Form 1120, U.S. Corporation Income Tax Return, or other business tax returns. The schedule will require (i) a concise description of each uncertain tax position for which the taxpayer or a related entity has recorded a reserve in its financial statements and (ii) the maximum amount of potential federal tax liability attributable to each uncertain tax position (determined without regard to the taxpayer's risk analysis regarding its likelihood of prevailing on the merits).

In addition to those positions for which a tax reserve must be established under FIN 48 or other accounting standards, uncertain tax positions will include any position

related to the determination of any United States federal income tax liability for which a taxpayer or a related entity has not recorded a tax reserve because (i) the taxpayer expects to litigate the position, or (ii) the taxpayer has determined that the Service has a general administrative practice not to examine the position. For this purpose, a related entity is any entity that is related to the taxpayer under sections 267(b), 318(a), or 707(b).

The schedule will require a concise description of each uncertain tax position in sufficient detail so that the Service can determine the nature of the issue. The sufficiency of a description will depend on the taxpayer's particular facts and the nature of the underlying transaction. As currently contemplated, this concise description will include the rationale for the position and a concise general statement of the reasons for determining that the position is an uncertain tax position. To be sufficient, the description must contain:

1. The Code sections potentially implicated by the position;
2. A description of the taxable year or years to which the position relates;
3. A statement that the position involves an item of income, gain, loss, deduction, or credit against tax;
4. A statement that the position involves a permanent inclusion or exclusion of any item, the timing of that item, or both;
5. A statement whether the position involves a determination of the value of any property or right; and

6. A statement whether the position involves a computation of basis.

In addition, the schedule will require a taxpayer to specify for each uncertain tax position the entire amount of United States federal income tax that would be due if the position were disallowed in its entirety on audit. This amount is the maximum tax adjustment for the position reflecting all changes to items of income, gain, loss, deduction, or credit if the position is not sustained.

The Service anticipates publishing a notice of proposed rulemaking to provide that certain businesses required to make a return (including corporations required to make a return under section 6012) will be required to file a form or schedule relating to the disclosure of uncertain tax positions as part of its return in accordance with the forms, instructions, or other appropriate guidance provided by the Service.

The Service is also evaluating additional options for penalties or sanctions to be imposed when a taxpayer fails to make adequate disclosure of the required information regarding its uncertain tax positions. One option being considered is to seek legislation imposing a penalty for failure to file the schedule or to make adequate disclosure.

Continuation of Policy of Restraint

Except as described in this Announcement, the Service intends to retain the existing policy of restraint for requesting tax accrual workpapers during the course of examinations described in IRM 4.10.20. The Service will continue to review the policy and to consider additional modifications, however, as appropriate or necessary to

ensure it obtains complete and accurate information regarding a taxpayer's uncertain tax positions on a timely basis.

SCOPE

The Service intends the new schedule to be filed by a business taxpayer with total assets in excess of \$10 million if the taxpayer has one or more uncertain tax positions of the type required to be reported on the new schedule. This includes a taxpayer who prepares financial statements, or is included in the financial statements of a related entity that prepares financial statements, if that taxpayer or related entity determines its United States federal income tax reserves under FIN 48, or other accounting standards relating to uncertain tax positions involving United States federal income tax.

REQUEST FOR COMMENTS

Given the importance of these issues to both the Service and taxpayers, the Service intends to publish the new schedule as quickly as possible and therefore invites the public to submit comments on the proposal described in this Announcement by March 29, 2010. The Service intends to mandate that the new schedule for uncertain tax positions be filed with returns filed after release of the schedule. The Service is particularly interested in comments regarding:

1. How the maximum tax adjustment should be reflected on the schedule so that it provides the Service with an objective and quantifiable measure of each reported tax position (e.g., specific dollar amount or by appropriate dollar ranges);

2. What alternative methods of disclosure of the amount at issue would allow the Service to identify the relative importance of the uncertain tax positions;
3. Whether the calculation of the maximum tax adjustment should relate solely to the tax period for which the return is filed or to all tax periods to which the position relates, and whether net operating losses or excess credits should be taken into account in determining the maximum tax adjustment;
4. How the related entity rules should be applied;
5. Whether the scope of the Announcement should be modified regarding the uncertain tax positions for which information is required to be reported (e.g., positions for which no tax reserve has been established because the taxpayer determined the Service has a general administrative practice not to examine the position);
6. Whether transition rules should be used or criteria modified to either include or exclude certain businesses taxpayers (e.g., the proposed threshold of \$10 million total assets);
7. How the new schedule should address taxpayers that initially did not record a reserve for an issue, but in later years do record a reserve; and
8. Whether the list of information proposed to be included should be modified, including whether certain information should be requested in some circumstances upon examination rather than with tax return.

Comments should be submitted to: Internal Revenue Service, CC:PA:LPD:PR (Announcement 2010-9), Room 5203, P.O. Box 7604, Ben Franklin Station, N.W., Washington, D.C. 20044. Alternatively, comments may be hand delivered between the hours of 8:00 a.m. and 4:00 p.m., Monday through Friday, to CC:PA:LPD:PR (Announcement 2010-9), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, D.C. Comments may also be transmitted electronically via the following e-mail address: Announcement.Comments@irs.counsel.treas.gov. Please include "Announcement 2010-9" in the subject line of any electronic communications. All comments will be available for public inspection and copying.

DRAFTING INFORMATION

The principal author of this Announcement is Kathryn Zuba of the Office of Associate Chief Counsel (Procedure and Administration). For further information regarding this Announcement, contact the Office the Associate Chief Counsel (Procedure and Administration) at (202) 622-3400 (not a toll-free call).