

PUBLICATION

IRS Intends to Require Businesses to Disclose Uncertain Tax Positions

February 02, 2010

On January 26, 2010, in his speech to the New York State Bar Association Taxation Section, Internal Revenue Service (IRS) Commissioner Douglas Shulman revealed the issuance of Announcement 2010-9 (Announcement) to improve transparency regarding business tax issues. The Announcement's two objectives are as follows: First, time-of-filing reporting requirements are imposed to improve transparency; and, Secondly, special areas are highlighted in which the IRS is requesting public comment regarding the Announcement and methods to improve tax administration and business compliance.

In the Announcement, which is scheduled to be published in the Internal Revenue Bulletin on February 16, 2010, the IRS states its intention to require a new schedule to be attached to many business federal income tax returns requiring the disclosure of "uncertain tax positions." This schedule would require the identification of uncertain tax positions, the associated tax dollar amounts and other information.

From the IRS' perspective, such a schedule would provide transparency enabling the IRS to quickly and efficiently identify significant issues underlying a tax return. Taxpayers and their advisors are likely to consider the new schedule as not only a significant compliance burden, but also a "road map" to tax audit issues and a potential trap for the imposition of additional taxes, interest and penalties.

While many business taxpayers are required under Financial Accounting Standards Board Interpretation No. 48 (FIN 48) to identify and quantify uncertain tax positions for financial accounting purposes, no such disclosures have been required previously for federal tax purposes, except in the areas of tax shelters and listed transactions. In addition, though the IRS asserts that it has authority to review tax accrual workpapers, its policy (as set forth in earlier Announcement 2002-63) has been to act with restraint in doing so. This new Announcement disclosed by Commissioner Shulman arguably moves in the opposite direction.

The IRS intends that the new disclosure schedule created by this Announcement will be required for business taxpayers with total assets in excess of \$10 million and for taxpayers whose financial statements are prepared under FIN 48. The new schedule will require of such taxpayers a concise description of: (1) each uncertain tax position for which the taxpayer or a related entity has recorded a reserve in its financial statements, and (2) the maximum amount of federal income tax attributable to each uncertain tax position (determined without regard to the taxpayer's likelihood of prevailing on the merits of the position). Uncertain tax positions that were not reserved also may need to be disclosed in certain circumstances.

Additionally, the concise statement of the uncertain tax positions will include disclosures of the Internal Revenue Code sections involved in the position, the tax years involved, whether the position involves the permanent inclusion or exclusion of an item of income or expense or affects the timing of such an item, whether the position involves a determination of value, and whether the position involves a computation of basis.

The IRS believes that the new schedule can be mandated without Congressional legislation. However, probably recognizing the controversial motive of this Announcement and the fact that the IRS' ability to summons accrual workpapers is unresolved, the IRS has indicated that it may seek legislation imposing specific penalties for failures to disclose as required by the new schedule.

The disclosures described in this Announcement go well beyond any existing declaration requirements and raise a variety of issues and concerns. To possibly accommodate anticipated objections, the IRS has invited public comment to these disclosure requirements by March 29, 2010.

The effective date for compliance with these disclosure requirements is unclear, but Commissioner Shulman indicated that such requirements would not be effective for this filing season.

If you would like to discuss these developments or have your views reflected in comments we are preparing on this issue, please contact one of the attorneys in our Tax Department.