

AN ALERT FROM THE BDO FEDERAL TAX PRACTICE

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FEDERAL TAX

► SUBJECT

IRS EASES DISCLOSURE REQUIREMENTS FOR UNCERTAIN TAX POSITIONS

► AFFECTING

Business taxpayers generally with assets over \$10 million

► DETAILS

On September 24, 2010, the Internal Revenue Service issued two Announcements providing welcome guidance concerning the recently-proposed requirement for certain businesses with assets over \$10 million to report their uncertain tax positions beginning in 2010. Announcement 2010-75, which was issued in response to public comments, eases much of the reporting required on a newly-drafted Schedule UTP and defers the requirement to begin filing Schedule UTP until 2012 or 2014 for certain taxpayers, depending on their total assets. Announcement 2010-76 provides modifications to the Service's existing policy of restraint in requesting certain documents and workpapers documenting the filing of Schedule UTP.

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Background. Following public announcements by IRS Commissioner Douglas Shulman in January and April 2010 regarding the Service “taking a major step towards transparency” in proposing the reporting of uncertain tax positions, Announcements 2010-9 and 2010-17 detailed the Service’s proposed reporting regime. In Announcement 2010-9, the Service noted that a new schedule would be required for taxpayers to disclose their uncertain tax positions annually, along with a concise description of those positions (such as the Code sections at issue and type of tax benefit at issue), and to specify for each position the amount of United States federal income tax that would be due if the position were disallowed in its entirety on audit. Announcement 2010-17 provided that the Service would require the filing of the new schedule for the 2010 taxable year.

The Service indicated in Announcement 2010-9 that it would continue its policy of restraint in requesting taxpayers’ tax accrual workpapers, but would consider future modifications as necessary.

Announcement 2010-75. Amid strong public comments concerning the new reporting regime, the Service has made a number of significant changes to the April 2010 draft Schedule UTP and disclosure requirements. The significant changes include:

- Delayed reporting for certain corporations with audited financial statements based on their total assets:
 - Corporations with at least \$100 million in assets will be required to file Schedule UTP beginning with 2010 taxable years
 - Corporations with at least \$50 million in assets will be required to file Schedule UTP beginning with 2012 taxable years
 - Corporations with at least \$10 million in assets will be required to file Schedule UTP beginning with 2014 taxable years
- The maximum tax adjustment need not be reported, but the positions are required to be assigned a rank based on the amount of the reserve recorded for the position
- The rationale and nature of the uncertainty need not be reported
- Positions for which a reserve has not been recorded because it is considered an administrative practice need not be reported

The final instructions to Schedule UTP make clear that corporations are not required to report tax positions that are either immaterial (under applicable financial accounting standards) or are sufficiently certain such that no reserve would be required.

Several additional issues were also clarified in the final instructions, including:

- Clarifying that Schedule UTP requires reporting of United States federal income tax positions – not foreign or state positions. A corporation is, however, required to report a United States federal income tax position taken in a return that arises out of uncertainty with regard to a foreign tax position if a reserve for United States federal income tax was recorded to reflect that uncertainty.
- Making clear that a tax position is reported on Schedule UTP only once, when (1) a reserve for the position is recorded and (2) the tax position is taken on a return (regardless of the order in which the two events occur).
- Clarifying that corporations report their own tax positions on Schedule UTP and not the tax positions of related parties.
- Indicating that positions taken in years prior to 2010 need not be reported in any year, even if a reserve is recorded in audited financial statements issued in 2010 or a later year.
- Addressing reporting of recurring tax positions taken in multiple years.
- Making certain that Schedule UTP need not be filed for short periods ending in 2010.
- Clarifying that a taxpayer’s worldwide assets are used to determine whether a corporation that files a Form 1120-F (including on a protective basis) must file Schedule UTP.

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To the extent the comments urged the proposal to be withdrawn altogether because of possible inconsistencies with the attorney-client and federally-authorized tax practitioner privileges and work product doctrine, the Service noted that the new Schedule UTP would not include information related to the corporation's assessment of the hazards of a tax position or analysis in support of or against the position. The potential application of the privileges and work product doctrine did not, themselves, warrant departing from the reporting regime altogether.

Penalties. Having received comments expressly requesting that the Service not impose penalties either permanently or during a period of transition for failures associated with Schedule UTP, the Service noted that it intends to review compliance and take appropriate enforcement action, including the possibility of opening an examination or other types of taxpayer contact.

The Service had previously announced that it was considering ways to avoid duplicate reporting, such as on Forms 8275, Disclosure Statement, 8275-R, Regulation Disclosure Statement, and 8886, Reportable Transaction Disclosure Statement. The final Schedule UTP instructions provide that a complete and accurate disclosure of a tax position on the appropriate year's Schedule UTP will be treated as if the corporation filed a Form 8275 or Form 8275-R regarding the tax position. Accordingly, a separate Form 8275 or Form 8275-R need not be filed in order to avoid certain accuracy-related penalties with respect to that position. In contrast, reportable transactions must still be disclosed on Form 8886 even if they are also required to be disclosed on Schedule UTP.

Announcement 2010-76. The Service expanded its policy of restraint with its decision to require disclosure on Schedule UTP. In doing so, the Service will refrain from requesting certain documents that relate to uncertain tax positions and the workpapers that document the completion of Schedule UTP.

Implications. The Service's new guidance concerning the filing of Schedule UTP is certain to be welcomed by taxpayers and practitioners. For those taxpayers with assets less than \$100 million, the time for filing Schedule UTP for the first time has been deferred to either 2012 or 2014, depending on the amount of their assets. It is clear that the Service continues to consider less burdensome ways for taxpayers to make the kinds of disclosures sought by the reporting of uncertain tax positions. The Service also indicated that it will consider whether to extend all or a portion of Schedule UTP reporting to other taxpayers for 2011 or later taxable years, such as pass-through entities and tax-exempt entities.

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