

REPORTING UNCERTAIN TAX POSITIONS

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Panelists

Eli J. Dicker
Tax Executives Institute

John Gamino
Texas State University

Deborah M. Nolan
Ernst & Young LLP

Moderator: Diana L. Wollman, Sullivan & Cromwell LLP

Reporting Uncertain Positions

Today's Agenda

- Why Schedule UTP? Why now?
- Schedule UTP – A Short Primer
- How Might Things Change for
 - Taxpayers
 - External Advisers
 - Internal Revenue Service
- Take-Away's and Concluding Remarks

Why Schedule UTP? Why now?

- Overview of IRS initiatives and objectives;
- Increased transparency in accounting treatment of tax uncertainties;
- Create certainty sooner for taxpayers;
- Reduce the time it takes the IRS to find issues and complete an audit, which benefits both the IRS and taxpayers;
- Ensure that both the IRS and the taxpayer spend time discussing the law as it applies to the facts, rather than looking for information.

Schedule UTP – A Short Primer

- Large corporate taxpayers required to include new Schedule UTP with annual tax return.
- Will disclose information about the taxpayer’s “UTPs”
 - FIN48 reserves, plus two additions (litigation and administrative practice).
- Commencing with 2010 tax year return.
- Disclosure required of “maximum tax amount” and nature and reasons for uncertainty, but NOT risk-adjusted number reflecting taxpayer’s hazards assessment.

Schedule UTP – Comments To Date

- Professional Organizations & Trade Associations
 - AICPA
 - American Bankers Ass’n (Coalition)
 - ABA
 - FEI
 - TEI
 - State CPA Societies
 - State Bar Associations
- Accounting Firms:
 - Big Four
 - Deloitte
 - EY
 - KPMG
 - PwC
 - Other Accounting Firms
- Law Firms
 - on their own behalf
 - on behalf of unidentified coalition of clients
- Individual CPAs and Lawyers

How Might Things Change For *Corporate Taxpayers?*

- Alter corporation's "risk tolerance"
 - Fewer positions that require reserves? (How far beyond MLTN required to not reserve?)
- How will discussions with external auditors change?
 - Schedule UTP as the quarterly "agenda"
 - Intention to litigate: how prove? consequences?
 - "Administrative Practice" items: out of the closet?
- Thin inventory of UTPs through use of IRS resolution tools.

Impact on Taxpayers

Partnership Hypothetical

- “Corp” is a partner in “Partnership”;
- Corp is uncomfortable with an item on its K-1;
 - If Corp reserves for the item --> Schedule UTP (identifies Partnership’s EIN);
 - If Corp files “inconsistent” with K-1 --> must disclose that;
 - Which is worse for the other partners?
- How can Partnership and the other partners plan ahead for this?
 - Newly-formed partnerships;
 - Pre-existing partnerships.

Impact on Taxpayers

M&A Hypothetical

- Equity Fund sells Target Corp to Buyer
 - Equity Fund indemnifies for all pre-closing taxes;
- Buyer posts a FIN48 reserve for a pre-closing tax (and posts an offsetting receivable);
- Equity Fund will bear cost of pre-closing tax
 - *But* cannot contractually prohibit Buyer from complying with FIN48 and Schedule UTP.
 - Will Equity Fund claim that Buyer “caused” the tax to become due (so no indemnity due)?
- How can each party protect itself?

How Might Things Change For *External Advisers?*

- Rendering advice to clients
 - written advice: *not* include all possible IRS arguments?
 - is it *ok* to intentionally address some possible IRS arguments *orally only (not in writing)*?
- Providing assistance in completing Schedule UTP
 - Do you need to see the FIN48 workpapers?
 - Do you need to see all the written advice received?
 - Does IRC 6694 apply if only complete Schedule UTP?
- How about Circular 230?
 - Sections 10.21, 10.34, 10.35, 10.37?

How Might Things Change For *External Advisers?*

- Privilege and work product
 - Does existence of Schedule UTP mean “no expectation of confidentiality” in adviser’s advice?
 - Is IRS saying: “I don’t want to see your privileged opinions or your work product, I just want you to tell me what you learned from reading them.”
 - Can taxpayer assert privilege or work product on the Schedule UTP itself?

How Might Things Change For *IRS?*

- How will IRS use information? What is their objective?
 - Risk Assessment – evolving approach to auditing
 - Revenue agents
 - Training
 - Recognition
 - Quality controls
 - Rules of engagement
- What will IDRs look like?
- How will agents verify the accuracy of Schedule UTP?
 - What if a discrepancy is found?

How Might Things Change For *IRS?*

- Pressure from taxpayers to eliminate uncertainties as quickly as possible
 - Requests for formal guidance
 - Increased use of issue resolution tools
 - More interest in pre-filing assurance processes (APAs, PFAs, PLRs, CAP)
- What are the potential penalties for lack of disclosure?
- What are the potential benefits for taxpayers for disclosure?

Take-Away's and Concluding Remarks