

February 8, 2010

CC:PA:LPD:PR (REG-101896-09)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Submitted electronically: <http://www.regulations.gov> (IRS REG-101896-09)
<http://www.regulations.gov/search/Regs/home.html#submitComment?R=0900006480a6c9b8>

**Re: Basis Reporting by Securities Brokers and Basis Determination for
Stock; Proposed Rule (REG-101896-09)**

The New York State Society of Certified Public Accountants, representing 28,000 CPAs in public practice, industry, government and education, welcomes the opportunity to comment on the above captioned proposed regulations.

The NYSSCPA's Taxation of Individuals Committee deliberated the proposed regulations and prepared the attached comments. If you would like additional discussion with us, please contact Amy M. Vega, Chair of the Taxation of Individuals Committee at (212) 624-5450, or Ernest J. Markezin, NYSSCPA staff, at (212) 719-8303.

Sincerely,



David J. Moynihan
President

Attachment

**NEW YORK STATE SOCIETY OF
CERTIFIED PUBLIC ACCOUNTANTS**

**COMMENTS ON
BASIS REPORTING BY SECURITIES BROKERS AND BASIS DETERMINATION
FOR STOCK; PROPOSED RULE (REG-101896-09)**

February 8, 2010

Principal Drafters

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Jonathan M. Horn
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New York State Society of Certified Public Accountants

Comments on

Basis Reporting by Securities Brokers and Basis Determination for Stock; Proposed Rule (REG-101896-09)

The New York State Society of Certified Public Accountants welcomes the opportunity to comment on the above-captioned proposed regulations concerning information reporting of basis.

We are concerned that an unintended consequence of the proposed regulations is the possibility of paid tax return preparers being subjected to the penalty provisions of Internal Revenue Code Section 6694. In general, Section 6694 imposes penalties on tax return preparers who prepare returns taking positions that may not be fully supported by current law. There could be circumstances in which erroneous information is reported by a broker to a taxpayer in a Form 1099-B with no reasonable basis for the taxpayer to know it to be erroneous and with a duly diligent preparer including the information in the tax return.

Background:

The proposed regulations relate to the reporting and determination of basis of securities by brokers. The proposed regulations address changes in the law made by “The Energy Improvement and Extension Act of 2008,” that require brokers, when reporting the sale of securities to the Internal Revenue Service (IRS) to include the customers’ adjusted basis in the securities sold and to classify any gain or loss as long-term or short-term.

The proposed regulations address changes with regard to how basis should be calculated, implementation of new reporting requirements on persons when custody of stock is transferred from one broker to another, issuers of stock regarding organizational actions that affect the basis of the issued stock, how brokers report short sales of securities, and set new standards to allow brokers and others until February 15 to furnish certain information statements to their customers.

The proposed regulations also contain amendments to the Income Tax regulations (26 CFR part 1), the regulations on Employment Tax and Collection of Income Tax at the Source (26 CFR part 31) and the Regulation and Procedure and Administration (26 CFR part 301) relating to information reporting by brokers and others as required by section 6045. There are proposed amendments relating to the scope and computation of basis by the average basis method under section 1012 and to new information reporting requirements by brokers, custodians and issuers of securities under section 6045A and 6045B. These sections were amended or added by section 403 of “The Energy Improvement and Extension Act of 2008.”

Comments:

In general, under Section 6694, Understatement of taxpayer’s liability by tax return preparer, penalties apply in this manner:

(a) Understatement due to unreasonable positions

(1) In general

If a tax return preparer—

- (A) prepares any return or claim of refund with respect to which any part of an understatement of liability is due to a position described in paragraph (2), and
- (B) knew (or reasonably should have known) of the position,

such tax return preparer shall pay a penalty with respect to each such return or claim in an amount equal to the greater of \$1,000 or 50 percent of the income derived (or to be derived) by the tax return preparer with respect to the return or claim.

In this circumstance, we believe it would be reasonable for the IRS to take the position that it would not subject tax return preparers to the penalty provisions of Section 6694 when they relied on *bona fide* Forms 1099-B or client supplied information that in some way contradicts information contained on a Form 1099-B provided that they exercised due diligence in the performance of their services.

As demonstrated in the following scenarios, the tax return preparer is in the position of having to rely on the information that is provided, frequently in varying circumstances that are out of his or her control, and without clear guidance.

Scenarios Reflecting the Potential Impact of the Proposed Regulations on Preparers

Scenario A: A broker reports cost basis and a holding period of a sale on Form 1099-B using the FIFO method. The taxpayer informs the preparer that he requested specific lot identification on a sale via a telephone conversation with the broker. The introduction to the proposed regulations states that in communicating a lot selection, “any reasonable method of communication, including electronic and oral communication, is permissible” (page 37, section 9d). It is unclear what further steps the preparer need undertake to accept taxpayer’s claim. Must he attempt to verify the transaction with the broker? Must he request a signed statement from the taxpayer? What steps must be taken to adjust the broker’s records so that future sales are properly reported?

Scenario B: A broker has made a single account election on RIC or DRP stock. A taxpayer does not believe that the basis information used by the broker for shares acquired before the effective date of regulations (“uncovered security”) are accurate. The taxpayer wishes to report sales as though the shares acquired prior to and after the effective date are held in separate accounts. How should the preparer proceed?

Scenario C: A broker has chosen to report basis for an “uncovered security.” A taxpayer claims that the broker information is incorrect, though he had not bothered to update it because it was not necessary to report it to the IRS. He states, “I have always reported the correct basis on my returns using my own information.” Can the preparer accept the taxpayer data without substantiation?

Scenario D: The taxpayer has an account with Broker A, and decides to transfer the account to Broker B. The transfer between Brokers A and B does not happen seamlessly, and Broker B does not end up with the correct basis for a specific lot of securities. The taxpayer knows what his basis should be, and it is different from that which Broker B now has. The taxpayer sells the securities when they are in the custody of Broker B, and Broker B's "system" has not been updated to reflect the accurate basis; therefore, the 1099-B now reflects the incorrect basis. What must the preparer do to ensure that the correct basis is reported on the taxpayer's return?

Scenario E: The information received on the disposition of PTP investments is sometimes confusing in its own right. The partnerships do not provide the cost basis for the unit lots, but rather the adjustments are provided. How will the reporting for the disposition of these investments change or be affected if, for example, it is held within a brokerage account? How will the taxpayer determine his true cost basis (given the adjustments)? Sometimes these additional calculations required for PTP investments are not done by the preparer until after the tax year (*i.e.* when the Schedule K-1 is received). How will the cost basis be reflected on the 1099-B?

Concerns:

The penalty provisions under Section 6694 present some problematic concerns to the tax preparer with regard to a lack of guidance under the proposed regulations on how the preparer should proceed given certain scenarios. The examples above just indicate some of the possibilities that the tax return preparer may be faced with due to real life basis reporting anomalies.

Solutions:

We suggest, in the name of full disclosure, that there be some type of form such as a "Notice of Inconsistent Treatment" similar to a partnership, so that the preparer is advising the IRS that a contrary position to the broker reporting is taking place.

Also, in furtherance of the proposed regulations having to do with basis reporting, we would seek guidance in situations in which the broker information is incomplete, inaccurate in fact, or inaccurate based on client assertions, in order for the tax return preparer to avoid a potential penalty situation. This guidance could be to the effect that absent other information or knowledge of the facts, a preparer may reasonably rely on the taxpayer provided basis where a conflict with the broker data exists and not be subject to penalties provided the differences are disclosed on the return.