

PREAMBLE

The Department of Revenue (Department), under authority contained in section 354 of the Tax Reform Code of 1971 (TRC) (72 P.S. § 7354), proposes amendments to 61 Pa. Code, Chapter 117. Return and Payment of Tax, by adding clarifying language to section 117.9 (relating to form of return), and creating new sections 117.9b (relating to consistent positions) and 117.9c (relating to execution of return by Secretary of Revenue) to read as set forth in Annex A.

Purpose of this Final-form Rulemaking

This final-form rulemaking will clarify the Department's policy on the form of return taxpayers are required to submit for Pennsylvania Personal Income Tax. In addition, the regulation will provide clear instructions for taxpayers regarding reporting requirements.

Explanation of Regulatory Requirements

Amendments to § 117.9 (relating to form of return), the creation of § 117.9b (relating to consistent positions) and § 117.9c (relating to execution of return by Secretary of Revenue) are proposed to reflect the Department's policy regarding the form of Pennsylvania Personal Income Tax returns. This new regulatory language will provide uniformity and guidance to Pennsylvania taxpayers.

Affected Parties

Pennsylvania taxpayers and tax practitioners may be affected by this final-form rulemaking.

Comment and Response Summary

Notice of proposed rulemaking was published at 40 Pa.B. 3122 (June 12, 2010). No amendments have been made to the proposed rulemaking. This proposal is being adopted to read as set forth in Annex A.

The Department has prepared a detailed "Comment and Response Document" that is available to interested parties by contacting Mary R. Sprunk, Office of Chief Counsel, Pennsylvania Department of Revenue, P.O. Box 281061, Harrisburg, Pennsylvania 17128-1061.

The Department received one comment from the public during the public comment period. No comments were received from either the House Finance Committee or the Senate Finance Committee. The Independent Regulatory Review Commission (IRRC) submitted comments on the proposed rulemaking. The following is a summary of the Department's responses to the key issues referenced in the comments:

IRRC commented on the need for more information to determine if the regulation is in the public interest and an explanation of the policy that is the basis for this rulemaking. The General Assembly has given discretion to the Department of

Revenue to prescribe, by regulation, forms of returns and has made it the duty of the taxpayer to comply. It thus implements the system of self-assessment which is so largely the basis of our American scheme of income taxation. The purpose is not alone to get tax information in some form but also to get it with such uniformity, completeness, and arrangement that the physical task of handling and verifying returns may be readily accomplished without undue additional cost to the public. The Department believes most taxpayers understand that they should at least appear to have made an honest and genuine attempt to satisfy filing requirements.

IRRC requested the appropriate statutory references for § 117.9 (b)(1) and (b)(2) regarding "Filing processible returns." Except as otherwise provided, 72 P.S. § 7348 commences the running of the statute of limitations for the assessment under (b)(1) the tax shown as due on the return or the assessment of a deficiency on the date "the return is filed." 72 P.S. § 806.1 commences the running of interest on overpayments of tax showing on a return under (b)(2). Each of these provisions assumes that what is filed is consistent with Departmental regulations. 72 P.S. § 7335.

IRRC recommended the citation 72 P.S. § 806.1(a)(5) be added at § 117.9 (b)(2) regarding interest on overpayments. 72 P.S. § 806.1, which relates to interest on overpayments,

addresses several different situations. The Department did not accept this recommendation and explained this matter in detail in the "Comment & Response Document." No revisions to the final rulemaking have been made concerning this comment.

IRRC requested clarification of the phrase "under investigation" that appears in § 117.9 (e) under "Exception." The Department cannot constitutionally require a taxpayer to report information that would implicate the taxpayer's involvement in a crime. This constitutional protection is not limited to information that reasonably could be used in a criminal prosecution under the Tax Reform Code of 1971 or could reasonably lead to other evidence that might be so used in such a criminal prosecution. It also applies to any information that may be so used in a criminal prosecution under the Crimes Code of the Commonwealth, under Federal law or under the laws of other jurisdictions. Accordingly, a taxpayer is allowed to omit such information from a tax return without regard to who may be conducting the criminal investigation or even if there has been no investigation.

IRRC and another commentator asked the Department to provide direction on how a taxpayer that owns a *de minimis* interest in a partnership may file a processible return when the partnership refuses to provide the necessary documentation. Under current law, a resident who is a sole proprietor with more

than \$1 of net profits is required to file a tax return with accompanying schedules and to exercise ordinary business care and prudence in obtaining necessary records and retaining a competent tax adviser in the making of that return. There is nothing in the personal income tax that suggests that a partner who only owns a *de minimis* partnership interest has no legal obligation to make and file a partnership return and no personal responsibility to exercise ordinary business care and prudence in obtaining necessary records and retaining a competent tax advisor in the making of the partnership return. There is also nothing in the personal income tax or any other law that suggests that a partner who only owns a *de minimis* partnership interest is not entitled to complete access to, and to inspect and copy, all of the partnership's books and records and all of the books and records of any lower tier partnerships in which the partnership is a partner and retain a tax advisor in the making of such a return.

Section 117.9b (relating to consistent positions) was commented on by IRRC and another commentator. This section addresses the situation where a taxpayer would deny the truth of facts that the taxpayer certified to be true in his tax returns for prior taxable years after the Commonwealth has justifiably acted in reliance of such certifications to its detriment. In this situation, a taxpayer has the duty of consistency and

should not be permitted to deny the misrepresented facts, even in situations where there is not intentional falsehood or wrongful misleading silence. It is the position of the Department that the proposed regulation is consistent not only with the duty of consistency but also with the laws of this Commonwealth relating to estoppel by matter of record.

IRRC and a commentator questioned the Department's statutory authority and other specifics of § 117.9c (relating to execution of return by Secretary of Revenue). The Department is expressly authorized and required to make the determinations of all unpaid or unreported taxes imposed under Article III of the TRC. 72 P.S. § 7338 (a). More specifically, the Department is expressly authorized to make an estimated assessment based on information available of the proper amount of tax owing by a taxpayer in the event the taxpayer fails to file. 72 P.S. § 7338 (c). It is also expressly required to provide a basis for any such assessment. 72 P.S. § 7338 (d).

The mode of an estimated assessment is not provided for. Accordingly, the Department is expressly authorized to establish by regulations the manner in which they are made. 72 P.S. § 7338 (b).

Under the proposed regulation, the first step in making an estimated assessment is the execution of a return by the Secretary or his deputy. If the amount shown as due on the

return is not paid upon notice and demand, it is assessed in the amount shown as due on the return signed by the Secretary or his deputy.

The second step is to provide notice of, and the basis for, the assessment to the person against whom the assessment was made. A copy of the return could accompany the notice and basis of assessment. However, as all of the return information has to be disclosed in the basis for the assessment, that would seem to be unnecessarily duplicative.

The Department believes it best to vest discretion in each Secretary of Revenue to designate who within the Department can make a return. No revisions to the final rulemaking have been made concerning these comments.

The Department explains in further detail all comments & responses in the "Comment & Response Document."

Fiscal Impact

The Department has determined that the final-form rulemaking will have minimal fiscal impact on the Commonwealth.

Paperwork

The final-form rulemaking will not create additional paperwork for the public or the Commonwealth.

Effectiveness/Sunset Date

The final-form rulemaking will become effective upon final publication in the Pennsylvania Bulletin. The regulation is

scheduled for review within five years of final publication. No sunset date has been assigned.

Contact Person

The contact person for an explanation of the final-form rulemaking is Mary R. Sprunk, Office of Chief Counsel, PA Department of Revenue, Dept. 281061, Harrisburg, Pennsylvania 17128-1061.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on May 26, 2010, the Department submitted a copy of the notice of proposed rulemaking, published at 40 Pa.B. 3122 (June 12, 2010), to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Finance and the Senate Committee on Finance for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Department has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on _____, the final-form rulemaking was _____ by the House and Senate Committees. Under

section 5.1(e) of the Regulatory Review Act, IRRC met on _____, and approved the final-form rulemaking.

Findings

The Department finds that:

(1) Public notice of intention to amend the regulations has been duly given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) The amendments are necessary and appropriate for the administration and enforcement of the authorizing statute.

Order

The Department, acting under the authorizing statute, orders that:

(a) The regulations of the Department, 61 Pa. Code, Chapter 117, is amended by adding clarifying language to § 117.9 and adding §§ 117.9b and 117.9c to read as set forth in Annex A.

(b) The Secretary of the Department shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for approval as to form and legality as required by law.

(c) The Secretary of the Department shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect upon publication in the Pennsylvania Bulletin.

C. DANIEL HASSELL
SECRETARY OF REVENUE

08/19/10