

11/23/10

# Regulatory Analysis Form

(Completed by Promulgating Agency)



# IRRC

Independent Regulatory Review Commission

## SECTION I: PROFILE

(1) Agency:

Revenue

(2) Agency Number:

Identification Number: 15-449

IRRC Number:

2852.

2011 OCT - 4 A 10 23

RECEIVED  
IRRC

(3) Short Title:

Amendments to Chapter 117. Return and Payment of Tax

(4) PA Code Cite:

61 Pa. Code §§ 117.9, 117.9b & 117.9c

(5) Agency Contacts (List Telephone Number, Address, Fax Number and Email Address):

Primary Contact:

Mary R. Sprunk, Regulatory Coordinator  
Pennsylvania Department of Revenue, Office of Chief Counsel  
P.O. Box 281061  
Harrisburg, PA 17128-1061  
(717) 783-7524  
(717) 772-1459 (Fax)

Secondary Contact: Douglas A. Berguson (717) 346-4633

(6) Primary Contact for Public Comments (List Telephone Number, Address, Fax Number and Email Address) – Complete if different from #5:

(All Comments will appear on IRRC'S website)

(7) Type of Rulemaking (check applicable box):

- Proposed Regulation
- Final Regulation
- Final Omitted Regulation
- Emergency Certification Regulation;
  - Certification by the Governor
  - Certification by the Attorney General

## Regulatory Analysis Form

(8) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

The Department is promulgating a regulation change that 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.

(9) Include a schedule for review of the regulation including:

- |   |                                     |
|---|-------------------------------------|
| A. The date by which the agency must receive public comments:                               | <u>30 days after publication</u>    |
| B. The date or dates on which public meetings or hearings will be held:                     | <u>N/A</u>                          |
| C. The expected date of promulgation of the proposed regulation as a final-form regulation: | <u>1<sup>st</sup> Quarter, 2011</u> |
| D. The expected effective date of the final-form regulation:                                | <u>Upon final publication</u>       |
| E. The date by which compliance with the final-form regulation will be required:            | <u>Upon final publication</u>       |
| F. The date by which required permits, licenses or other approvals must be obtained:        | <u>N/A</u>                          |

(10) Provide the schedule for continual review of the regulation.

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

**SECTION II: STATEMENT OF NEED**

(11) State the statutory authority for the regulation. Include specific statutory citation.

Statutory authority for the regulation is set forth in section 354 of the Tax Reform Code of 1971 (TRC) (72 P.S. § 7354).

(12) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

The regulation is not mandated by federal or state law, court order or federal regulation.

(13) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

Amendments to § 117.9, the creation of §§ 117.9b and 117.9c 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.

Pennsylvania taxpayers and tax practitioners will benefit as a result of the new regulation.

## Regulatory Analysis Form

(14) If scientific data, studies, references are used to justify this regulation, please submit material with the regulatory package. Please provide full citation and/or links to internet source.

No scientific data, studies or references are used to justify this regulation.

(15) Describe who and how many will be adversely affected by the regulation. How are they affected?

No parties should be adversely affected by the regulation.

(16) List the persons, groups or entities that will be required to comply with the regulation. Approximate the number of people who will be required to comply.

Pennsylvania taxpayers and tax practitioners will be required to comply with the regulation.

**SECTION III: COST AND IMPACT ANALYSIS**

(17) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

There are no costs and/or savings to the regulated community associated with this regulation.

(18) Provide a specific estimate of the costs and/or savings to **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

This regulation does not increase costs or savings to local governments. No legal, accounting, or consultant procedures are required by this regulation.

(19) Provide a specific estimate of the costs and/or savings to **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

This regulation does not increase costs or savings to state government. No legal, accounting, or consultant procedures are required by this regulation.

## Regulatory Analysis Form

(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

**There are no savings from implementing this regulation. There are minimal costs for implementing this regulation.**

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
<b>SAVINGS:</b>	\$	\$	\$	\$	\$	\$
Regulated Community						
Local Government						
State Government						
<b>Total Savings</b>						
<b>COSTS:</b>						
Regulated Community						
Local Government						
State Government						
<b>Total Costs</b>						
<b>REVENUE LOSSES:</b>						
Regulated Community						
Local Government						
State Government						
<b>Total Revenue Losses</b>						

(20a) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY -3	FY -2	FY -1	Current FY
N/A	N/A	N/A	N/A	N/A

## Regulatory Analysis Form

(21) Explain how the benefits of the regulation outweigh any cost and adverse effects.

The Department is promulgating a regulation change that 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 and is expected to have a minimal fiscal impact.

(22) Describe the communications with and input from the public and any advisory council/group in the development and drafting of the regulation. List the specific persons and/or groups who were involved.

A copy of the regulation was forwarded to the Pennsylvania Bar Association, the Philadelphia Bar Association, the Pennsylvania Institute of Certified Public Accountants, the Pennsylvania Society of Public Accountants, and the Pennsylvania Chamber of Business and Industry. The regulation is listed on the Department's Quarterly Regulatory Report posted on the Department's website and will be forwarded to interested parties upon request.

(23) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

There are no alternative regulatory provisions associated with the regulation.

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

There are no federal standards associated with this regulation.

## Regulatory Analysis Form

(25) How does this regulation compare with those of other states? How will this affect Pennsylvania's ability to compete with other states?

The regulation will not put Pennsylvania at a competitive disadvantage with other states.

(26) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

This regulation does not affect any other existing or proposed regulations of the Department or any other state agency.

(27) Submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

This regulation does not change existing reporting, record keeping or other paperwork requirements. The new regulatory language will provide uniformity and guidance to Pennsylvania taxpayers.



## Regulatory Analysis Form

(28) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

No special groups are affected by the regulation.

# RAF SUPPLEMENTAL PAGE

(This page valid for use through November 1, 2011) RECEIVED

INDEPENDENT REGULATORY  
REVIEW COMMISSION  
OCT -4 A 10 23

## Regulatory Analysis Form

(Completed by Promulgating Agency)

(All Comments submitted on this regulation will appear on IRRC's website)

(1) Agency:

Revenue

(2) Agency Number:

Identification Number: 15-449

IRRC Number:

2852

(3) PA Code Cite: 61 Pa. Code §§ 117.9, 117.9b & 117.9c

(4) Short Title: Amendments to Chapter 117. Return and Payment of Tax

(5) Agency Contacts (List Telephone Number and Email Address):

Primary Contact: Mary R. Sprunk, Regulatory Coordinator, (717) 783-7524

Secondary Contact: Douglas A. Berguson (717) 346-4633

(6) Type of Rulemaking (check applicable box):

Proposed Regulation

Emergency Certification Regulation;

Final Regulation

Certification by the Governor

Final Omitted Regulation

Certification by the Attorney General

(7) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

No scientific data, studies or references are used to justify this regulation.

FACE SHEET  
FOR FILING DOCUMENTS  
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

11/23/10

RECEIVED  
IRRC

DO NOT WRITE IN THIS SPACE

Copy below is hereby approved as to form and legality. Attorney General

By: \_\_\_\_\_  
(Deputy Attorney General)

DATE OF APPROVAL

Check if applicable  
Copy not approved. Objections attached.

Copy below is hereby certified to be true and correct copy of a document issued, prescribed or promulgated by:

PA Department of Revenue  
(AGENCY)

DOCUMENT/FISCAL NOTE NO. 15-449

DATE OF ADOPTION \_\_\_\_\_

BY C. Daniel Hassell  
C. Daniel Hassell  
TITLE Secretary of Revenue  
(Executive Officer, Chairman or Secretary)

Copy below is hereby approved as to form and legality. Executive or Independent Agencies

Andrew C. Clark  
Andrew C. Clark

SEP 7 2011

DATE OF APPROVAL

(Deputy General Counsel)  
(Chief Counsel Independent Agency)  
(Strike inapplicable title)

Check if applicable. No Attorney General Approval or objection within 30 days after submission.

NOTICE OF FINAL RULEMAKING

DEPARTMENT OF REVENUE

61 Pa. Code §§ 117.9, 117.9b & 117.9c

Amendments to Chapter 117. Return and Payment of Tax

Department of Revenue - Notice of Final Rulemaking

61 Pa. Code §§ 117.9, 117.09b & 117.9c

Amendments to Chapter 117  
Return and Payment of Tax

15-449

SECRETARY'S CERTIFICATION

I, C. Daniel Hassell, do hereby certify that I have reviewed this regulation and determined that the regulation is consistent with the principles outlined in Executive Order 1996-1.



---

C. Daniel Hassell  
Secretary of Revenue

Department of Revenue - Notice of Final Rulemaking

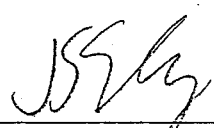
61 Pa. Code §§ 117.9, 117.09b & 117.9c

Amendments to Chapter 117  
Return and Payment of Tax

15-449

FORM AND LEGALITY

I certify that I have reviewed this regulation for form and legality, that I have discussed any legal and policy issues with the attorneys responsible for this regulation, that I have made all appropriate revisions and that all information contained in the Preamble and Annex A is current and accurate.

 11/1/10  
\_\_\_\_\_  
Jeffery Snaveley  
Acting Chief Counsel

## 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

CONTINUATION SHEET  
FOR FILING DOCUMENTS  
WITH THE LEGISLATIVE REFERENCE BUREAU  
(Pursuant to Commonwealth Documents Law)

ANNEX A

Title 61. Revenue, Part I. Department of Revenue, Subpart B. General Fund Revenues, Article V. Personal Income Tax, Chapter 117. Return and Payment of Tax.

§ 117.9. Form of return.

(a) Required form. A return of tax must be in processible form. To be in processible form, a return must satisfy each of the following requirements:

(1) It shall be filed on the form prescribed by instructions of the Department or transmitted electronically or telephonically in a manner authorized by the Department in instructions.

(2) The taxpayer's name, filing status, postal address, and taxpayer identification number must be set forth in the form or transmittal.

(3) The form or transmittal must show, for the reportable period, the self-assessed amounts of the taxpayer's income by class and tax liability before credits and payments and contain the required information (whether on the return or on required attachments or return



schedules) sufficient to permit the mathematical verification of the liability.

(4) The form or transmittal shall be verified by a signed declaration that the taxpayer, to the best of the taxpayer's knowledge and belief, believes the information submitted thereon to be true, correct, and complete.

(5) The form or transmittal, on its face, must plausibly purport to be in compliance with the tax laws of the Commonwealth and to show an honest and genuine attempt to satisfy the laws.

(6) The form or transmittal may not contain information that, on its face, indicates that:

(i) The self-assessment is substantially incorrect.

(ii) Information required by the form or transmittal or on a required attachment or return schedule has been omitted.

(iii) A required attachment, notice or schedule has been omitted.

(b) Filing processible returns. The filing of a processible return is required to:

(1) Commence the running of the statute of limitations for the assessment of the tax shown as due on the return or the assessment of a deficiency.

(2) Commence the running of interest on overpayments of tax showing on the return.

(3) Obtain credit or refund of the overpayment showing on the return under section 347 of the Tax Reform Code of 1971 (72 P.S. § 7347).

(c) Request for forms. [Persons filing returns should use the envelopes and preaddressed prescribed forms furnished to them by the Department.] A taxpayer [shall] will not be excused from making a return [, however,] by the fact that no return form has been furnished to him or the one that was furnished becomes lost or damaged. Taxpayers not supplied with or in possession of the proper form should [make application therefore] apply therefore to the Department listing their name, address, and identification number and sending [such] the request to the Department of Revenue[, the Personal Income Tax Bureau, Harrisburg, Pennsylvania 17127]. The application must be made in the manner prescribed by instructions of the Department in effect at the time of application. [Such] The request should be made in ample time to have their returns prepared, certified[, ] and filed on or before the due date. [Each taxpayer should carefully prepare his return and set forth fully and clearly the information required to be included therein. Returns which have not

been so prepared will not be accepted as meeting the requirements of this article.]

(d) Incomplete forms or transmittals. Except as provided in subsection (e), an incomplete form or transmittal will be treated as filed only when it is completed.

(e) Exception. Required details as to a particular item of gross income or deduction may be omitted only if the taxpayer attaches a statement that he is under investigation and can validly assert that the details might incriminate the taxpayer.

(f) Partners and Pennsylvania S corporation shareholders. If a complete partnership or Pennsylvania S corporation return of income for the enterprise's taxable year ending with or within a partner's or shareholder's taxable year has not been filed with the Department, a copy of the Pennsylvania Schedule RK-1 "Resident Shareholder's Share of Income, Loss and Credits" or NRK-1 "Nonresident Shareholder's Share of Income, Loss and Credits" furnished to the partner by the partnership and the Federal Schedule K-1 "Shareholder's Share of Income, Deductions, Credits, etc." furnished to the partner by the partnership or Pennsylvania Schedule RK-1 or NRK-1 furnished to the partner by the Pennsylvania S corporation and Federal

Schedule K-1 furnished to the partner by the Pennsylvania S corporation respectively is a required attachment for purposes of this section.

(g) Notice. Promptly after the date of a determination by the Department that an incomplete or otherwise non-processible return has been filed, the Department will supply the taxpayer with a written statement setting forth in reasonable detail the basis of its determination.

(h) Deductions, losses or credits. A taxpayer who fails or refuses to make a required processible return or who makes a false or fraudulent return shall be presumed to have failed to have maintained adequate records to substantiate any amount of deduction, loss or credit.

\* \* \*

§ 117.9b. Consistent positions.

(a) In general. A taxpayer shall take consistent positions with respect to the facts asserted in a prior taxable year. For example, a taxpayer may not treat the receipt of cash as a loan while the statute of limitations is open and declare it to be a dividend once the statute expires.

(b) Partners and Pennsylvania S corporation shareholders. Partners of partnerships and shareholders of

Pennsylvania S corporations shall report each partnership or Pennsylvania S corporation item consistently with the way it is reported on the entity's return under this article, unless it is reported incorrectly and the Department and the partnership are notified of the correction.

§ 117.9c. Execution of return by Secretary of Revenue.

(a) Authority of Secretary to make and subscribe return. If a person fails to make a required processible return at the time prescribed therefore, or makes, willfully or otherwise, a false or fraudulent return, the Secretary or deputy may make the return from his own knowledge and from information obtained through testimony or otherwise.

(b) Status of return. A return so made and subscribed shall be prima facie good and sufficient for all legal purposes.

06/12/10 Pa. Bulletin (same version as published at 40 Pa.B. 3122).

AMENDMENTS TO CHAPTER 117. RETURN AND PAYMENT  
OF TAX - PERSONAL INCOME TAX  
61 Pa. Code, §§ 117.9, 117.9b & 117.9c

DEPARTMENT OF REVENUE REGULATION  
#15-449

COMMENT AND RESPONSE DOCUMENT

Department of Revenue Regulation #15-449  
AMENDMENTS TO CHAPTER 117 -  
PERSONAL INCOME TAX  
61 PA. CODE, §§ 117.9, 117.9b & 117.9c

This is a list of organizations and interested parties from whom the Department of Revenue has received comments regarding the above-referenced regulation.

<u>ID #</u>	<u>Name/Address</u>
(1)	Kim Kaufman, Executive Director Independent Regulatory Review Commission (IRRC) 14 <sup>th</sup> Floor 333 Market Street Harrisburg, PA 17101
(2)	Peter N. Calcara, Vice President Government Relations Pennsylvania Institute of Certified Public Accountants (PICPA) 500 N. 3 <sup>rd</sup> Street, Suite 600A Harrisburg, PA 17101

Department of Revenue Regulation # 15-449  
61 Pa. Code, §§ 117.9, 117.9b & 117.9c  
Amendments to Chapter 117 - Personal Income Tax

**COMMENTS AND RESPONSES**

**Amendments to Chapter 117 - General**

**1. Comment - Determining whether the regulation is in the public interest:**

"The explanation of the regulatory requirements contained in the Preamble states that the amendments provide uniformity and guidance to taxpayers in the Commonwealth. The Preamble also states that the purpose of the rulemaking is to reflect and clarify the Department's policy regarding the form of Personal Income Tax (PIT) returns. These statements do not provide this Commission with the necessary information to determine if the regulation is in the public interest." (1)

**Response:**

It is imperative in the context of the proposed regulation to consider the purpose for requiring returns to be filed. The General Assembly could have required taxpayers only to provide the Department of Revenue whatever tax information is readily available to them at little or no cost; or it could have imposed on the Department the duty to make the inquiries and determinations of taxpayers' taxes entirely at public expense. The General Assembly, however, 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 Tax Court of the United States uses the following test for treating a document as a return:

(1) There must be sufficient data to calculate tax liability;



1. Comment - Determining whether the regulation is in the public interest:

Response (Cont'd):

(2) The document must purport to be a return;

(3) There must be an honest and reasonable attempt to satisfy the law; and

(4) the taxpayer must sign the return under penalty of perjury.

WG&L TAX DICTIONARY, 691 (2004-2005).

More specifically, to qualify as a return, a document must "on its face plausibly purport to be in compliance" with the law and there must be "an honest and genuine endeavor" to satisfy the requirements of a return. *Badaracco v. Commissioner*, 464 U.S. 386 (1984); *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 180 (1934); *Florsheim Bros. Drygoods Co. v. United States*, 280 U.S. 453, 462 (1930); *United States v. Moore*, 627 F.2d 830, 834-835 (7th Cir. 1980); *Franklin v. Commissioner*, T.C. Memo 1984-278.

The Department believes most taxpayers understand that they should at least appear to have made an honest and genuine attempt to satisfy filing requirements.

## Amendments to Chapter 117 - General

### **2. Comment - Preamble:**

"In the Preamble included with the final-form regulation, we ask the Department to include a more detailed explanation of the policy that is the basis for this rulemaking, especially the provisions that require taxpayers to take consistent positions with respect to the facts asserted in a prior taxable year and the provision that allows the Secretary of the Department, or a deputy, to make a return for a person that fails to file a return."  
(1)

### **Response:**

As requested by IRRC, the Department has added more detailed explanations of these matters under the "Comment and Response Summary" of the Preamble.

Section 117.9. Form of return.

Subsection (a) Required form.

**3. Comment - § 117.9. Subsection (a)(4) Signed Declaration:**

"Subsection (a)(4) requires a transmittal to be verified by a 'signed declaration.' When a taxpayer transmits a return electronically or telephonically, how would the requirement for a 'signed declaration' be met? We recommend that the final-form regulation specify how this obligation can be met." (1)

**Response:**

Currently, there are four different virtual signature methodologies. For Federal/State *e-file* purposes, the Department accepts the federal self-select personal identification number (PIN) when it is entered as a signature, provided the IRS accepts the PIN. If the IRS does not accept the PIN, the taxpayer must complete and sign Form PA-8453. Conversely, for TeleFile returns, the taxpayer individually signs his or her return by entering his or her Social Security Number after listening to the taxpayer's oath.

The fourth method applies to a first-time direct filer. A first-time direct filer may select a PIN using Form PA-8879, "Pennsylvania *e-file* Signature Authorization," and enter it as a signature. The "e-Signature Agreement" is a prerequisite to obtaining a User ID and password for the purpose of conducting transactions by electronic means. By clicking on the "I agree" button, the taxpayer agrees that his or her User ID and password will be an electronic signature that identifies the record or transaction as his or hers and will be kept secure.

Regardless of which method is used, the requirement for a "signed declaration" is automatically met if the return can be transmitted electronically or telephonically. The "send button" cannot work unless and until the return is "signed" in accordance with the foregoing. Accordingly, no revisions to the final rulemaking have been made concerning these comments.

Section 117.9. Form of return.

**4. Comment - § 117.9. Subsections (a)(5) & (a)(6) - language:**

"The phrases 'plausibly purport to be in compliance' and 'honest and genuine attempt' need to be defined. The Department should consider changing 'honest and genuine' to 'good faith.'" (2)

"The phrase 'substantially incorrect' is vague and should be clarified." (2)

"Section 117.9 (a) includes the following phrases: 'must plausibly purport;' 'honest and genuine;' and 'substantially incorrect.' These phrases lack clarity and do not establish a binding norm, as regulations are intended to do. Therefore, the phrases should be replaced or deleted from the final-form regulation." (1)

**Response:**

See Response to Comment #1. There are numerous federal and state court cases that clarify what can and cannot be plausibly considered to be intended to have the appearance of conforming to return filing requirements.

The terminology "substantially incorrect" is statutory. See 72 P.S. § 7352 (i).

No revisions to the final rulemaking have been made concerning these comments.

Section 117.9. Form of return.

5. Comment - § 117.9. Subsection (a)(6)(ii) - too broad:

"This provision is too broad. 'Information required . . . has been omitted' should only make a return not processible if the information affects the ability of the Department to review the return. For example, if a taxpayer fails to place his telephone number or school code on his tax return, it would not be a processible return under the proposed regulation." (2)

**Response:**

Although the omission of a school district identification number from a return form or transmittal does not affect the ability of the Department to examine the return, the Secretary of Revenue is required under the Public School Code of 1949 to make a determination of the valuation of total taxable income to be certified to the Secretary of Education on the basis of school district identification numbers designated on State income tax returns. 24 P.S. § 25-2514.1. From a tax compliance perspective, the school district identification number also allows the Department more readily to share tax return information with school districts.

The Department is also required, subject to budgetary constraints, to make the inquiries of all taxes imposed by Article III of the TRC. 72 P.S. § 7338 (a). Omissions of telephone numbers not only limit the Department's ability to verify returns within the assessable period but also increase the costs of government. Moreover, many taxpayers do not have their telephone numbers listed in a phone directory.

No revisions to the final rulemaking have been made concerning this comment.

Section 117.9. Form of return.

Subsection (b) Filing processible returns.

6. Comment - Improve clarity:

"We suggest that the appropriate statutory references for the other two events [(b)(1) and (b)(2)] that commence with the filing of a processible return also be included in the final-form regulation." (1)

**Response:**

Except as otherwise provided, 72 P.S. § 7348 commences the running of the statute of limitations for the assessment of (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 as set forth in the next response. Each of these provisions assumes that what is filed is consistent with Departmental regulations. 72 P.S. § 7335.

The Department has provided the references in the Preamble included with the final-form regulation.

Section 117.9. Form of return.

**7. Comment - § 117.9.(b)(2) Interest on overpayments:**

"The proposed regulation does not accurately reflect 72 P.S. § 806.1(a)(5). In general, there would be no interest on an overpayment if a refund is paid within 75 days after a final return or report is filed. However, if the Department does not pay the refund within 75 days, it would appear that interest would begin running from the original due date of the return, as per similar language in IRC § 6011(e) has been interpreted. The proposed regulation should be amended to read "[c]ommence the running of interest . . . on the return, pursuant to 72 P.S. § 806.1(a)(5)." (2)

**Response:**

72 P.S. § 806.1 which relates to interest on overpayments addresses several different situations. One situation is where a tax return is required to be filed and a "complete" final return of tax is filed on or before the last date prescribed for filing the return (determined without regard to any extension of time for filing). In this instance, unless the overpayment is refunded or credited within 75 days of such last date, interest begins running from such date on any overpayment of tax actually deducted and withheld at the source, any amount overpaid as estimated tax, and any payment made on or before such date. Interest on payments made after such date, however, only runs from the date received by the Department.

Another situation is where a tax return is required, a "complete" final tax return is filed after the last date prescribed for filing the return (determined without regard to any extension of time for filing), and no overpayment of tax is refunded or credited within 75 days of the date the Department received the return. In this instance, as in the first situation, interest begins running from the last date prescribed for filing the return (determined without regard to any extension of time for filing) on any overpayment of tax actually deducted and withheld at the source, any amount overpaid as estimated tax, and any payment made on or before such last date. Interest is allowed on overpayments made after such date only for the period during which the Commonwealth retained the overpayment, beginning with the date of the overpayment.

Section 117.9. Form of return.

**7. Response - § 117.9.(b)(2) Interest on overpayments:  
(Cont'd)**

The third situation is where a tax return is required but only an "incomplete form or transmittal" is received by the Department. 72 P.S. § 806.1 (a)(5) provides that a "final return" of tax shall be deemed to have been filed when it is received by the Department only if it has been submitted on a permitted form containing-

- The taxpayer's name, address and identifying number,
- The required signature, and
- Sufficient required information, either on the permitted form or attachments thereto, to permit the verification of the tax liability shown on the return.

If the form or transmittal has not been submitted on a permitted form or the form fails to contain the foregoing listed items, it is nothing more than an incomplete form or transmittal. Under 72 P.S. § 806.1(a)(5), the 75-day period in which an overpayment may be refunded without interest only begins when the "complete" final return is filed.

It is the position of the Department that-

- To constitute the submission of a return, the requirements of proposed § 117.9 (a)(6) must be met,
- To satisfy the signature requirement, the form or transmittal must be verified by a signed declaration that the taxpayer, to the best of the taxpayer's knowledge and belief, believes the information submitted thereon to be true, correct and complete, and
- To satisfy the "sufficient required information" requirement of 72 P.S. § 806.1 (a)(5),--
  - The form must show, for the reportable period, the self-assessed amounts of the taxpayer's income by class and tax liability *before credits and payments*, and
  - Those self-assessed amounts must mathematically verify.



Section 117.9. Form of return.

**7. Response - § 117.9.(b)(2) Interest on overpayments:  
(Cont'd)**

The latter requirement is met even if the return shows payments or credits without any required supporting documentation.

The essential point of 72 P.S. § 806.1 (a)(5) is that, for purposes of computing the 75-day period, a "final return" is not deemed "filed" on the day when it is received by the Department if it does not contain all of the above-listed items, because what has been received by the Department is nothing more than an "incomplete form or transmittal." It would, however, be deemed "filed" for purposes of 72 P.S. § 806.1 (a)(5) on the day "when it is completed."

The tax liability shown on a tax return may, of course, be less than the tax imposed by Article III of the TRC, and the tax return, *on its face*, may contain no information that indicates that a required attachment, notice or schedule has been omitted. However, the return may nonetheless be incomplete because a required attachment, notice or schedule has in fact been omitted.

For purposes of § 806.1 (a)(5) and the proposed regulation, there is no requirement that a final return contain sufficient information to establish the proper amount of the tax or the amount of tax due with the return. There is also no requirement that a return supply the information required to claim tax credits. What is required is only that the form or transmittal contain sufficient information to establish the *self-assessed* amounts of income by class and resulting tax.

No revisions to the final rulemaking have been made concerning this comment.

Section 117.9. Form of return.

**8. Comment - § 117.9 (c) Request for forms - add language:**

"Add to the last sentence '[r]eturns which have not been so prepared . . . article *'if they do not contain information sufficient for the Department to review a taxpayer's self-assessed tax liability.'* As drafted, the omission of *de minimis* information would be basis for the Department not to accept a return." (2)

**Response:**

The sentence that commentator is suggesting revisions to is being deleted in this rulemaking.

No revisions to the final rulemaking have been made concerning this comment.

**9. Comment - § 117.9 (d) Incomplete forms or transmittals - add language.**

"For consistency purposes, 'return,' should be added before 'form or transmittal' and 'completed' should be changed to 'processable.'" (2)

**Response:**

See Response to Comment #7. No revisions to the final rulemaking have been made concerning this comment.

Section 117.9. Form of return.

**10. Comment - Subsection (e) Exception - vague language:**

"Under this subsection, if a taxpayer is 'under investigation,' that person may be allowed to omit certain information from a tax return. The phrase 'under investigation' is vague. Does this phrase refer to an investigation by the Department, or can it refer to an investigation by another party, such as the Internal Revenue Service? The final-form regulation should clarify what this phrase means." (1)

**Response:**

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.

The right to "plead the fifth amendment," however, is not self-executing. Consequently, a taxpayer who is desirous of claiming the right must assert the claim in a timely manner; and the Department has an obligation to verify that the taxpayer is reasonable in believing that the omitted disclosure is liable to be incriminating. The only ways to verify a claim without infringing the right against self-incrimination are to-

- Determine if the taxpayer is "under investigation" by the Department's Office of Criminal Tax Investigations or by the Pennsylvania State Police or other law enforcement agency, or
- Investigate tips received from informants who are thought to have access to special or inside sources of information.

10. Comment - Subsection (e) Exception - vague language:

**Response (Cont'd):**

In either case, the taxpayer would be "under investigation."

No revisions to the final rulemaking have been made concerning this comment.

**Section 117.9. Form of return.**

11. Comment - Subsection (f) Partners and Pennsylvania S corporation shareholders:

"The Department should incorporate into the proposed regulations guidance on how a resident and nonresident partner that owns a *de minimis* interest in a partnership may file a processible return through the use of information on his federal Schedule K-1 or other information in instances where the partnership refuses to provide him with a PA Schedule RK-1 or NRK-1. The adoption of these procedures would save both taxpayers and the Commonwealth scarce resources." (2)

"A commentator has 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. We believe such direction would assist a taxpayer with complying with the regulation and suggest that it be included in the final-form regulation." (1)

**Response:**

The federal income tax is, in effect, imposed on twenty-two discrete categories of partnership income computed in accordance with Federal tax principles and Federal tax accounting rules. Conversely, the Pennsylvania Personal Income Tax is imposed on eight separate and discrete categories of partnership income computed in accordance with acceptable accounting principles and practices; and PA courts operate on the basis that Federal tax provisions are not incorporated into the personal income tax.

Section 117.9. Form of return.

**11. Comment - Subsection (f) Partners and Pennsylvania S corporation shareholders:**

**Response (Cont'd):**

As none of the twenty-two federal income categories is exactly the same as any of the eight PIT income classes and none is computed in exactly the same manner, a taxpayer's personal income in respect of partnerships ordinarily can only be "guesstimated" solely from the information appearing on his federal Schedule K-1s. Moreover, the physical task of handling and verifying returns is made substantially more burdensome if each of the partners of a partnership make a different guesstimate.

For the above reasons, the statute requires every partnership having either a resident partner or any personal income derived from sources within this Commonwealth to make and file a partnership return for each taxable year of the partnership setting forth such partnership items of personal income, loss, and deduction, and other pertinent information as the Department may be regulation prescribe. 72 P.S. § 7335 (c). The law also requires every partnership engaged in a trade or business within this Commonwealth to make and file such a return, notwithstanding that it has no resident partners and incurred only losses. 61 Pa. Code § 117.17 (b).

If the General Assembly had intended that resident and nonresident partners use only the information on their federal Schedule K-1 to compute their distributive shares of the income of a partnership, it simply could have made the income of partnerships as returned to and as ascertained by the Federal Government a taxable category of personal income. Instead, it required and authorized the partners of "every partnership . . . having any income derived from sources within this Commonwealth" to-

- Make a return of that income,
- Exercise ordinary business care and prudence in obtaining necessary records and retaining a competent tax adviser in the making of that return, and
- Authorize at least one of the partners to sign the return and certify that, to the best of that partner's

Section 117.9. Form of return.

**11. Comment - Subsection (f) Partners and Pennsylvania S corporation shareholders:**

**Response (Cont'd):**

(or partners') knowledge and belief, the partnership return is true, correct, and complete.

72 P.S. §§ 7333 and 7335 (c); 61 Pa. Code § 117.17. The General Assembly also imposed the same obligations on the partners of partnerships that are engaged in a trade or business in Pennsylvania with operating losses; and if the partnership has neither income from sources within this Commonwealth nor engages in a trade or business within Pennsylvania, under Pennsylvania law, the duty to make and file a partnership return, to exercise ordinary business care and prudence in obtaining necessary records and retaining a competent tax adviser in the making of that return, and to sign the return devolves to the partners who are Pennsylvania residents. 61 Pa. Code § 117.17.

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.

It can, therefore, hardly be considered to be unfair punishment to have a partner who fails or refuses to file a partnership return suffer the same consequences as a sole proprietor who fails or refuses to file a complete return.

No revisions to the final rulemaking have been made concerning these comments.

Section 117.9b. Consistent positions.

**12. Comment - Subsection (a) In general - statutory authority:**

"A taxpayer should not be required to take consistent positions with respect to the facts asserted in a prior taxable year in instances where he discovers that the prior tax treatment of a transaction was erroneous. This rule should apply whether the statute of limitations for the prior year is still open. . . . In order to address the underlying issue raised in the regulation, the Department should seek legislation to amend the PIT statute to include the provisions similar to IRC §§ 1311 - 1314 (statutory mitigation provisions), and/or incorporate the judicial doctrines of estoppel, recoupment and setoff into the PIT through statute or regulation." (2)

"A commentator believes this type of regulatory requirement would require a statutory change. What is the Department's specific statutory authority for this provision? In addition, the facts surrounding a particular position may change from one year to another. If a taxpayer can demonstrate that the facts supporting a prior year's position have changed, we assume that the taxpayer would be permitted to change their position. We suggest that the final-form regulation include language that reflects that fact." (1)

**Response:**

Section 117.9b is not intended to address the subjects covered by IRC §§ 1311 through 1314. It addresses instead 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.

In income taxation what is done in one tax year is sometimes projected into another where the same fact must govern. There being continuity, there ought to be consistency in treatment.

Section 117.9b. Consistent positions.

12. Comment - Subsection (a) In general - statutory authority:

Response (Cont'd):

*Alamo Nat. Bank of San Antonio v. Commissioner*, 95 F.2d 622 (5<sup>th</sup> Cir. Tex. 1938); Writ of certiorari denied 304 U.S. 577 (1938).

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. Moreover, 72 P.S. § 7333 (c) would serve little purpose if there were no duty of consistency.

The alternative is to allow taxpayers, without any adverse legal or equitable consequence, to adopt inconsistent positions as to factual matters while retaining the tax benefits of any erroneous assertions of fact.

No revisions to the final rulemaking have been made concerning these comments.



Section 117.9b. Consistent positions.

**13. Comment - Subsection (b) Partners and Pennsylvania S corporation shareholders - form request:**

"The proposed regulation needs to explain what constitutes notice to the Department and the partnership of a correction. The Department may want to consider adopting a form similar to federal Form 8082 for reporting the inconsistent treatment of an item from a pass-through entity. The use of a form similar to federal Form 8082 would provide the Department with sufficient information to review a return." (2)

**Response:**

Parts II and III of Federal form 8082 "Notice of Inconsistent Treatment or Administrative Adjustment Request," are illustrative of the information that is needed. The Department, however, does not anticipate that a special form would be needed.

The Department will address notice requirements in its instructional publications.

No revisions to the final rulemaking have been made concerning this comment.

Section 117.9c.Execution of return by Secretary of Revenue.

**14. Comment - Subsection (a) Authority of Secretary to make and subscribe return:**

"The PIT statute needs to be amended to give the Secretary the authority to make and subscribe a return. . . . Assuming that there is statutory support for the proposed regulation, due process requires that the Department provide a taxpayer notice prior to making and subscribing a return on behalf of a taxpayer. It is unclear whether proposed § 117.9(g) would also cover this situation. In addition, the Department should be required to provide a taxpayer with a copy of that return in a timely manner." The commentator provided recommended language. (2)

"We have three concerns. First, what is the Department's specific statutory authority for this provision? Second, how will the provision be implemented? Will the taxpayer be notified of the Secretary's action and provided a copy of the return? Will the return made by the Secretary be considered a processible return under § 117.9, pertaining to form of return? Third, which deputy within the Department can make a return? These issues should be clarified in the Preamble and in the final-form regulation." (1)

**Response:**

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

Section 117.9c. Execution of return by Secretary of Revenue.

14. Comment - Subsection (a) Authority of Secretary to make and subscribe return:

Response (Cont'd):

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.

Miscellaneous clarity.

15. Comment - § 117.9c (b) Status of return - clarity:

"Assuming that the Secretary has the legal authority to make and subscribe a return, the proposed regulation needs to explain what is meant by 'all legal purposes.'" (2)

**Response:**

The phrase "all legal purposes" is used in IRC § 6020(b)(2). The same wording is used so that any return made by the Secretary of Revenue or his deputy has the same status as a federal return prepared for and signed by the Secretary of the Treasury of the United States.

It should be noted that, as there is no provision comparable to IRC § 6501(b)(3) in the personal income tax, the signing of the personal income tax return by the Secretary of Revenue would start the running of the period of limitations on assessment and collection of the tax shown as due on the return and on assessments of deficiencies. For federal tax purposes, the signing of a return by the Secretary of the Treasury would not start the running of the period of limitations.

08/24/10

### **Requests for Final-Form Regulation**

In accordance with section 5.1(a) of Act 1997-24, requests for information concerning the final-form regulation may be submitted to the Department. Commentators that request information regarding the final-form regulation will receive a copy of the regulation when the Department submits the final-form regulation to the Independent Regulatory Review Commission and the House and Senate Finance Committees.

The Department of Revenue, Office of Chief Counsel, has not received any requests for information concerning the final-form regulation for "Amendments to Chapter 117. Return and Payment of Tax."

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE  
REGULATORY REVIEW ACT**

I.D. NUMBER: 15-449  
 SUBJECT: RETURN AND PAYMENT OF TAX  
 AGENCY: DEPARTMENT OF REVENUE

**TYPE OF REGULATION**

- Proposed Regulation
- X Final Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Tolled Regulation
  - a. With Revisions
  - b. Without Revisions

RECEIVED  
IRRC  
2011 OCT - 4 A 10:24

**FILING OF REGULATION**

DATE	SIGNATURE	DESIGNATION
10-4-11	<u>Kristen Bernick (Minority)</u>	HOUSE COMMITTEE ON FINANCE <u>Phyllis Mundy</u>
10/4/11	<u>Amy J Noel</u>	MAJORITY CHAIRMAN <u>Kerry A. Benninghoff</u>
	<u>Jan Kesper (minority)</u>	SENATE COMMITTEE ON FINANCE <u>John Wozniak</u>
10/4/11	<u>Christy L. Morrow</u>	MAJORITY CHAIRMAN <u>Mike Brubaker</u>
10/4/11	<u>K Cooper</u>	INDEPENDENT REGULATORY REVIEW COMMISSION
		<del>ATTORNEY GENERAL (for Final Omitted only)</del>
		<del>LEGISLATIVE REFERENCE BUREAU (for Proposed only)</del>