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From: Peter N. Calcara [PCalcara@picpa.org]
Sent: Monday, July 12, 2010 4:38 PM
To: msprunk@state.pa.us
Cc: Peter N. Calcara; IRRC
Subject: PICPA Comments on Proposed Return and Payment of Tax Regulation [61 PA.Code CH. 117] [40 Pa.B. 3122]
Attachments: Comments on 61 Pa Code Ch 117 Regs.pdf

Ms. Sprunk:

On behalf of the 21,000 members of the Pennsylvania Institute of Certified Public Accountants (PICPA), attached please find our comments on the Department of Revenue's proposed return and payment of tax rulemaking [61 PA.CODE CH. 117] [40 Pa.B. 3122].

Please do not hesitate to contact me if you have questions.

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Peter N. Calcara | Vice President - Government Relations
Pennsylvania Institute of CPAs | 500 North 3rd Street, Suite 600A | Harrisburg, PA 17101
(717) 232-1821 | Fax (717) 232-7708 | www.picpa.org

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The opinions expressed herein are my own, and do not reflect those of the Pennsylvania Institute of Certified Public Accountants, or the Institute/Foundation's officers, members or employees.

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Pennsylvania Institute of Certified Public Accountants (PICPA)
Comments on 61 Pa. Code Ch. 117 – Return and Payment of Tax

<u>§ 117.9. Form of return.</u>

§ 117.9(a)(5) – 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."

§ 117.9(a)(6)(i) – The phrase "substantially incorrect" is vague and should be clarified.

§ 117.9(a)(6)(ii) – 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.

§ 117.9(b)(2) – The proposed regulation does not accurately reflect 72 Pa.C.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, *<u>pursuant to 72 Pa.C.S. § 806.1(a)(5).</u>*

§ 117.9(c) – 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.

§ 117.9(d) – For consistency purposes, "return," should be added before "form or transmittal" and "completed" should be changed to "processible."

§ 117.9(f) – See "Partners and Partnerships" comments below.

§ 117.9(h) – See "Partners and Partnerships" comments below.

<u>§ 117.9b. Consistent positions.</u>

§ 117.9b(a) – 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. Under AICPA Statement on Standards for Tax Services No. 1, Tax Return Positions, a practitioner would not be permitted to prepare/sign a return knowing that the return was prepared incorrectly. In addition, the knowing preparation/filing of a false return presents other serious issues.

In order to address the underlying issue raised in the regulation, the Department should seek legislation to amend the PIT statute to include 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.

§ 117.9b(b) – 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.

<u>§ 117.9c. Execution of return by Secretary of Revenue.</u>

§ 117.9c(a) – The PIT statute needs to be amended to give the Secretary the authority to make and subscribe a return. It is questionable whether the general authority granted to the Department in 72 Pa.C.S. § 7354 to adopt rules and regulations to administer the PIT would broaden the specific powers given to the Department to adopt rules and regulations regarding returns contained in 72 Pa.C.S. §§ 7332 – 7335. Those sections do not grant the Secretary of Revenue 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.

Recommended Change:

(a)(1) If a person fails to make a required return processible return at the time prescribed thereof, the Secretary or deputy may make the return from his own knowledge and from information obtained through testimony or otherwise. Prior to making the return, the Secretary shall provide the person with notice of his intention and reasonable time to file a processible return. The Secretary shall provide the person with a copy of the return by certified mail to his last known address within 30 days after making that return.

(a)(2) If a person makes, willfully or otherwise, a false or fraudulent return .... The Secretary shall provide the person with a copy of the return by certified mail to his last known address within 30 days after making that return.

§ 117.9c(b) – 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."

Partners and Partnerships

The proposed regulations unfairly punish a partner in instances where the partnership fails to provide the partner with a PA Schedule RK-1 or NRK-1. In many instances partners only own *de minimis* interests in partnerships and are unable to obtain the requisite information from them in order to prepare at least a PA Schedule RK-1 or NRK-1. In addition, partnerships themselves that own interests in lower tier partnerships are not able obtain information from those entities for the same reason.

Rather than address this issue in a reasonable manner, the proposed regulations merely codify the Department of Revenue's policies regarding the treatment of partners in partnerships in instances where the partnership fails to provide the partner with a PA Schedule RK-1 or NRK-1 or a properly completed. This situation most frequently arises in instances where a resident partner invests in a partnership that does not have nexus with PA, or in tiered partnership situations. In many instances, the lower tier entities have no knowledge that residents own interests in the upper tier partnerships. As a result, the upper tier partnerships are unable to provide adequate information to resident partners. Under current policy, the Department does not treat the partner's return as complete, and ultimately will deny deductions or losses if adequate documentation is not provided within a specified period of time.

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.