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PHONE: (717) 783-5417
FAX: (717) 783-2664
irrc@irrc.state.pa.us
<http://www.irrc.state.pa.us>

INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

August 11, 2010

Honorable C. Daniel Hassell, Secretary
Department of Revenue
Strawberry Square, 11th Floor
Harrisburg, PA 17128

Re: Regulation #15-449 (IRRC #2852)
Department of Revenue
Return and Payment of Tax

Dear Secretary Hassell:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director

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Enclosure

cc: Honorable Patrick M. Browne, Majority Chairman, Senate Finance Committee
Honorable Jim Ferlo, Minority Chairman, Senate Finance Committee
Honorable David K. Levdansky, Majority Chairman, House Finance Committee
Honorable Samuel E. Rohrer, Minority Chairman, House Finance Committee
Robert A. Mulle, Esq., Office of Attorney General
Andrew Clark, Esq., Office of General Counsel

Comments of the Independent Regulatory Review Commission



Department of Revenue Regulation #15-449 (IRRC #2852)

Return and Payment of Tax

August 11, 2010

We submit for your consideration the following comments on the proposed rulemaking published in the June 12, 2010 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (Act) (71 P.S. § 745.5a(a)) directs the Department of Revenue (Department) to respond to all comments received from us or any other source.

1. 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. 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 a for person that fails to file a return.

2. Section 117.9. Form of return. – Implementation procedures; Clarity

Subsection (a) Required form.

This subsection allows tax returns to be transmitted to the Department electronically or telephonically. 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.

Subsection (b) Filing processible returns.

This subsection states that the filing of a processible return is required to: commence the running of the statute of limitations for the assessment of tax; commence the running of interest on overpayments of tax; and obtain credit or refund of the overpayment showing on a return. The proposed regulation includes a citation to the underlying statutory provision pertaining to obtaining a credit or refund of an overpayment. To improve clarity and to assist the regulated community with complying with the rulemaking, we suggest that the appropriate statutory references for the other two events that commence with the filing of a processible return also be included in the final-form regulation.

Subsection (e) Exception.

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.

Subsection (f) Partners and Pennsylvania S corporation shareholders.

A commentator has asked the Department to provide direction on how a taxpayer that owns a *de minimus* 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.

3. Section 117.9b. Consistent positions. – Statutory authority; Implementation procedures; Clarity.

Subsection (a) states, in part, the following: “A taxpayer shall take consistent positions with respect to the facts asserted in a prior taxable year.” 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.

**4. Section 117.9c. Execution of return by Secretary of Revenue. –
Statutory authority; Implementation procedures; Clarity.**

Subsection (a) of this section reads as follows:

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.

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.

5. Miscellaneous clarity.

- 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.
- Section 117.9c(b) includes the phrase “all legal purposes.” We have the same concern with this phrase as we do with the phrases directly above.

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Phone: (717) 783-5417
Fax #: (717) 783-2664
E-mail: irrc@irrc.state.pa.us
Website: www.irrc.state.pa.us

INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

To: Mary Sprunk
Agency: Department of Revenue
Phone: 3-7524
Fax: 2-1459
Date: August 11, 2010
Pages: 5

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Revenue Department's regulation #15-4349 (IRRC #2852). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Mary R Sprunk Date: 8/11/10