Miller & Chevalier

IRS Replaces Rev. Proc. 94-69 with a New Disclosure Regime

Tax Alert

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For nearly 30 years, eligible taxpayers have relied on Revenue Procedure 94-69 to obtain protection from certain accuracy-related penalties by disclosing adjustments to an Internal Revenue Service (IRS) examiner at the start of an audit. The IRS has now obsoleted this longstanding procedural guidance and replaced it with a new disclosure regime that takes effect for examinations beginning after November 16, 2022, subject to transition rules discussed below. The new regime in Revenue Procedure 2022-39 is welcome news for eligible taxpayers given prior IRS statements about potentially eliminating Revenue Procedure 94-69 without a replacement. For prior coverage of developments in this area, see here and here.

The new disclosure regime applies to any taxpayer that the IRS selects for examination under the Large Corporate Compliance Program (LCC) if the IRS has audited (or is auditing) the taxpayer's tax returns for at least four of the five preceding taxable years under the LCC, the predecessor Coordinated Industry Case Program (CIC), or a successor program. This four-of-five requirement is the most significant element of the new disclosure regime as a taxpayer's ability to satisfy the requirement is out of the taxpayer's control and can change from year to year. For example, recent IRS resource constraints have led to IRS examination teams forgoing two-year examination cycles, which would make a taxpayer ineligible for the new disclosure regime if IRS examination activity subsequently resumed. The taxpayer would then need to consider whether a filing a "qualified amended return" is a viable alternative for obtaining protection from accuracy-related penalties.

As an example, consider a taxpayer that has been audited for Years 1 through 3, is under examination for Years 4 through 5, and intends to make disclosures under Revenue Procedure 2022-39 should the IRS examine Year 8. This taxpayer will become ineligible for the new disclosure regime if the IRS decides not to examine Years 6 and 7. Once such an IRS decision becomes apparent, the taxpayer will need to decide whether to file a qualified amended return for Year 8 or face the risk of accuracy-related penalties should the IRS examine Year 8. Importantly, a qualified amended return would have to be filed before the IRS first contacts the taxpayer regarding an examination of Year 8. So if the IRS informs the taxpayer about not examining Years 6 and 7 and at the same time informs the taxpayer about examining Year 8, then the taxpayer could neither file a qualified amended return nor use the disclosure regime under Revenue Procedure 2022-39. Taxpayers should keep this dynamic in mind when discussing future examination cycles with IRS examination teams.

Note that a short tax year appears to count for purposes of this four-of-five requirement and there is no special rule regarding predecessors. Thus, where a taxpayer eligible for the new disclosure regime spins off a corporate subsidiary (the spinco), it appears the spinco is ineligible for the new disclosure regime until the spinco itself satisfies the four-of-five requirement. Less clear is what happens when a taxpayer that is eligible for the new disclosure regime joins, through merger or acquisition, a consolidated group that is ineligible for the new disclosure regime.

The new disclosure regime also applies to any partnership that the IRS selects for examination under the Large Partnership Compliance Program (LPC) if the IRS has audited (or is auditing) the partnership's tax returns for at least four of the five preceding taxable years under the LPC or a successor program. The same issues discussed above in connection with taxpayers selected for examination under the LCC apply to taxpayers selected for examination under the LPC. However, because the LPC kicked off with respect to 2019 tax returns and the four-of-five requirement for partnerships considers only taxable years audited under the LPC, it seems that a calendar-year partnership with no short taxable years can become eligible for the new disclosure regime no sooner than an examination of the partnership's 2023 tax return.

To take advantage of the new disclosure regime, an eligible taxpayer must provide a properly completed Form 15307, "Post-Filing Disclosure for Specified Large Business Taxpayers," to the IRS examiner within 30 days of a request for the form. Contrast this 30-day period with the 15 days a taxpayer had to make a disclosure under Revenue Procedure 94-69. Each disclosed adjustment for the taxable year must be stated separately and be accompanied by a description that includes information that reasonably may be expected to apprise the IRS of the identity of the item, its amount, and the nature of the controversy or potential controversy. The Form 15307 must also include any Forms 8275, Forms 8275-R, or Schedules UTP that the taxpayer filed with respect to the disclosed adjustments.

Instructions to Form 15307 make clear that it may not be used to report foreign tax redeterminations (see Treas. Reg. § 1.905-4) or push-out statements received from a partnership subject to the centralized partnership audit rules (see Internal Revenue Code Section 6226). The instructions also contain an example regarding an eligible taxpayer that is an investor in flow-through entities and receives late Schedules K-1. The example assumes the taxpayer "makes a good faith effort to reasonably estimate the income and expense items from the flow-through entities" and files a tax return that includes a Form 8082, "Notice of Inconsistent Treatment or Administrative Adjustment Request," to notify the IRS that the taxpayer's return is inconsistent with the tax returns of the flow-through entities that issued late Schedules K-1. The example then concludes that the taxpayer can use Form 15307 to obtain penalty protection for the difference between the flow-through items the taxpayer reported on its return and the flow-through items reflected on the late Schedules K-1.

A taxpayer will not receive penalty protection under Revenue Procedure 2022-39 for any item that the taxpayer inadequately discloses. The examination team appears to have sole discretion to make this adequacy determination and is required to inform the taxpayer of any such determination. We hope and expect that any disagreement regarding adequate disclosure would be eligible for consideration by the IRS Independent Office of Appeals (Appeals). Perhaps Treasury and the IRS will address this issue when they finalize the recently proposed regulations regarding matters that are eligible for the Appeals process. See here for prior coverage regarding these proposed regulations. In a taxpayer-favorable change, the final Form 15307 does not include the rule from the draft Form 15307 that a taxpayer deemed to have made inadequate disclosure will be ineligible to use Form 15307 for a period of time (left undefined in the draft form).

Revenue Procedure 2022-39 is effective for examinations of eligible taxpayers that begin after November 16, 2022. However, a taxpayer that was historically a CIC taxpayer and remained eligible to use Revenue Procedure 94-69 after LCC replaced CIC may continue to rely on Revenue Procedure 94-69 for examinations of taxable years through 2020 — even if the examination begins after November 16, 2022. Thus, a taxpayer that remained eligible for Revenue Procedure 94-69 following the IRS's transition to LCC and has been intending to rely on this revenue procedure in an examination of a taxable year through 2020 that has not yet begun may continue to do so. In contrast, taxpayers may use only Revenue Procedure 2022-39 for examinations of taxable years 2021 and later. Note that these transition rules refer to "taxable year 2020" and "taxable year 2021" without specifically addressing potential differences between calendar-year taxpayers and fiscal-year taxpayers.

Taxpayers that are ineligible for the new disclosure regime are left with existing methods of avoiding penalties, including adequately disclosing the position on a properly completed Form 8275, Form 8275-R, or Schedule UTP filed with a tax return. If a taxpayer has already filed a tax return for tax year and is now ineligible to use the new disclosure regime for that tax year, the taxpayer should consider filing a qualified amended return that satisfies the requirements of Treas. Reg. § 1.6664-2(c)(3).

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