Notice 2009-17

National Association of Enrolled Agents

LEGAL PROCESSING DIVISION
PUBLICATION & REGULATIONS
BRANCH

MAR 1 7 2009

By U.S. Mail and e-mail to notice.comments@irscounsel.treas.gov

February 25, 2009

Internal Revenue Service
CC:PA:LPD:PR (Notice 2009-17), Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Information Reporting of Customer's Basis in Securities Transactions (Notice 2009-17)

The National Association of Enrolled Agents (NAEA) appreciates the opportunity to comment on guidance to be provided to brokers, transferors, issuers, customers, and other affected persons concerning new requirements to report a customer's basis in securities transactions. As the organization representing the interests of 46,000 enrolled agents, NAEA is well positioned to offer an informed perspective about the practical impact the reporting requirement will have on taxpayers as well as paid income tax return preparers in general and Circular 230 practitioners in specific.

Enrolled agents have typically supported efforts that make basis tracking simpler for taxpayers. Basis tracking is troublesome both for the occasional, inexperienced investor and for the accomplished, veteran investor. In the former case, the investor does not recognize the importance of tracking his individual purchases, dividends (or dividend reinvestments), and sales and as a result often fails to retain vital information. In the latter case, the volume of purchase and sales data can quickly become quite burdensome.

For a variety of reasons, many of our clients struggle when asked to provide cost basis for securities they sold. Of particular concern are long-term holdings to which the client has made additional sporadic investments and spin-offs as well as mutual funds with reinvestments (e.g., long/short capital gains distributions and ordinary income distributions).

The taxpayer, while ultimately responsible for tracking the bases of her own securities, will in practice rely heavily on her broker to report the correct information to the IRS. To protect the taxpayer against inadvertent basis calculation errors on the part of the broker (alluded to in question 14), we believe the taxpayer should have the right to present, in her return, IRS a basis that differs from the broker-reported basis (regardless of method—average cost, first-in first-out, or specific identification), provided the taxpayer can offer a reasonable case to support her calculation.

We also suggest that overall reporting accuracy may be strengthened by permitting taxpayers who were gifted securities prior to January 1, 2011 to make

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a good faith effort to determine the basis of those securities and to report that estimate to the broker holding the securities currently. Clearly the case of long ago gifts from a deceased person will make this exercise challenging, but third party services exist to perform this function. Further, the basis of a security is necessarily non-zero and a taxpayer is in a far better position than her broker to approximate basis.[1] Regarding question 32, such self-reported bases should be clearly noted by the broker, and therefore clear and distinct both to the taxpayer and to the IRS.

We strongly encourage the Service to concentrate on question 12. One possible and unfortunate outcome for taxpayers would be to create a world in which Forms 1099-B provided by brokers do not align with how taxpayers report gains on Schedule D. The Service does not desire to send erroneous notices and taxpayers certainly have no desire to reply to them, or to retain the services of an enrolled agent or other tax professional to represent them.

Ultimately, we believe the broker basis reporting requirement is a significant opportunity both to decrease burden on individual taxpayers and to increase tax compliance. While we offer only a few comments on the specific questions raised in Notice 2009-17, we offer the following suggestion: the goal should be to provide information to taxpayers in as clear and concise a fashion as possible and to provide IRS with information as useful as possible.

NAEA appreciates the opportunity to submit comments on Notice 2009-17 basis reporting for securities transactions. Should you seek further clarification or explanation of our positions, please contact NAEA at 202-822-6232.

Sincerely,

David Hatt, EA
President

cc: Douglas Shulman, Commissioner, Internal Revenue Service
Nina Olson, National Taxpayer Advocate

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[1] Practitioners anecdotally report the IRS will assert a basis of zero for gifted property where there is no clear evidence of cost. But, reality says otherwise. Judge Learned Hand once wrote in the famous Cohan case [Cohan v. Commissioner (39 F.2d 540(2d Cir. 1930)) that the Tax Court's predecessor ("the Board") could not completely disallow business expenses merely because it was impossible to determine in the absence of records how much the taxpayer had spent. While that case involved business expenses, it appears the sentiments he espoused would carry over to these gifted securities. He stated, "But to allow nothing at all appears inconsistent with saying that something was spent. ... there was obviously some basis for computation, if necessary drawing upon the Board's personal estimates of the minimum of such expenses. ... there was basis for some allowance, and it was wrong to refuse any...It is not fatal that the result will inevitably be speculative; many important decisions must be such."

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