

2011

## Uncertain Tax Positions

Nikki Swaney

---

### Repository Citation

Swaney, Nikki, "Uncertain Tax Positions" (2011). *William & Mary Annual Tax Conference*. 663.  
<https://scholarship.law.wm.edu/tax/663>

# 57<sup>th</sup> Annual Tax Conference

## Uncertain Tax Positions

November 11, 2011

Nikki Swaney, Partner-In-Charge  
Tax Services, Financial Institution Services Group  
Dixon Hughes Goodman LLP | Raleigh, NC

# Uncertain Tax Positions

- Schedule UTP – a new tax return schedule that requires the disclosure of uncertain tax positions
- Final regulations issued in December 2010 mandate the disclosure requirement on tax returns filed by affected taxpayers for tax years beginning on or after 1/1/2010

# Uncertain Tax Positions

- The disclosure requirement is limited to certain corporations in 2010, but expanded applicability is anticipated
- The IRS has issued significant guidance in the form of Announcement 2010-9, Announcement 2010-75, form instructions and various Q&A information releases, but application questions remain

# Who is impacted in 2010 and 2011

- Corporations that file form 1120, 1120-F, 1120-L or 1120-PC and:
- Have consolidated total assets equal to, or in excess of, \$100 million **and:**
- Issue audited financial statements (or are included in the audited financial statements of a related entity) covering any portion of the corporation's 2010 or 2011 year **and:**
- Have one or more reportable uncertain tax positions

# Expanded Application in Future

- The applicable total assets threshold is reduced in future years as follows:
- Year 2012 – Total assets of \$50 million
- Year 2014 – Total assets of \$10 million
- The IRS is also considering expanding the applicability to S-corporations and other pass-through entities

# What is an uncertain tax position?

- A “tax position” is any item of deduction, exclusion, credit, characterization, etc. taken on a federal tax return that would result in an adjustment to a line item on that tax return if the position is not sustained
- A tax position is “uncertain” if the taxpayer knows (or should know) that the position may be challenged under examination by the IRS
- For this purpose, the disclosure requirement relies heavily upon the financial statement analysis under ASC 740-10

*positively unique*



**DIXON HUGHES GOODMAN** LLP

# What is an uncertain tax position?

- Uncertain tax positions do not include the following tax positions, provided that no financial statement reserve is recorded with respect to these positions:
- Tax positions that are sufficiently certain, such that no reserve is required under applicable financial accounting standards; and
- Tax positions that are immaterial for audited financial statement purposes



# When must an UTP be disclosed?

- Uncertain tax positions are required to be disclosed when two conditions are satisfied:
- An uncertain tax position is taken on the tax return for the current tax year or a prior year; **and either**
- A financial statement reserve is recorded with respect to the position (ASC 740-10) **or**
- A decision not to record a reserve is made because, although the tax position is uncertain, the taxpayer expects to successfully defend the entire position in litigation

# When must an UTP be disclosed?

- A reserve is typically recorded in the year an uncertain tax position is taken on a tax return, triggering the disclosure requirement for that year
- Once disclosed, changes to the recorded tax reserve for a particular position in subsequent years do not trigger additional disclosure requirements
- Financial statement reserves initially recorded for tax positions taken in prior years are disclosed in the year the reserve is first established

# When must an UTP be disclosed?

- Transition rule – uncertain tax positions taken in tax years beginning before 1/1/2010 are not required to be disclosed regardless of when the related tax reserve is recorded

# What is required to be disclosed?

- A concise description of each uncertain tax position
- The primary code section(s) to which the position relates
- Whether the tax benefit resulting from the position is permanent or temporary
- The year to which the position relates, if disclosing a position related to a prior year (not applicable for 2010 filing)
- A numeric ranking of the positions based upon the relative size of the related reserves

# What is required to be disclosed?

- An indication of which positions comprise 10% or more of the overall reserves
- The taxpayer is not required to disclose the amount of the financial statement tax reserve related to any particular uncertain position or the analysis behind the calculation of that amount
- This information would provide insight into the perceived weakness of the taxpayer's positions and what the taxpayer expects to receive from the ultimate settlement of that position

# What is required to be disclosed?

- The IRS has not yet formalized the penalty structure for non compliance, but is considering several alternatives

# Why did the IRS require UTP disclosure?

- Since the adoption of ASC 740-10, *Accounting for Uncertainty in Income Taxes*, the IRS has focused significant attention on how the financial accounting reserve process can bridge into the IRS examination process
- The lack of any detailed information in the financial statement disclosures has frustrated this effort – public disclosures provide no useful detail to the IRS



# Why did the IRS require UTP disclosure?

- The IRS has fought diligently to protect its asserted right to examine taxpayers' tax accrual workpapers, including tax reserve calculation workpapers
- The IRS view is that greater transparency and improved tax compliance will result from the requirement to disclose uncertain tax positions
- They argue that the audit process will be streamlined and more efficient for both taxpayers and the IRS as time and resources will be immediately focused on appropriate areas



# Why did the IRS require UTP disclosure?

- The IRS has stated explicitly that the Schedule UTP will not initially be provided to the examining agent and that all disclosed tax positions will be given due consideration and not automatically written up as proposed adjustments

# Impact on IRS “Policy of Restraint”

- The IRS currently has a self-imposed “policy of restraint” under which it will not seek to obtain tax accrual workpapers in the absence of listed transactions
- In Announcement 2010-76, the IRS expanded this policy by indicating that it will not seek to obtain this same information by requesting supporting tax reserve information and the underlying calculations used to prepare the schedule UTP

# Impact on IRS “Policy of Restraint”

- This expansion is intended to address taxpayer concerns that the IRS would use schedule UTP as a reason to request legal analysis and risk assessment support in violation of the policy of restraint

# 57<sup>th</sup> Annual Tax Conference

This Page Intentionally Left Blank