



# The Bulletin



East Bay Association of Enrolled Agents  
*To Enhance and Protect the Professional, Economic, and  
Educational Interests of all Enrolled Agents*

February 2008

**NEXT MEETING Wed, February 20, 2008**

Place: **NEW SITE: DUBLIN Radisson Hotel**  
(go to [http://www.radissondestinationguide.com/location/Map.process/OID\\_EB39EA2D/?hotelCode=CADUBLIN](http://www.radissondestinationguide.com/location/Map.process/OID_EB39EA2D/?hotelCode=CADUBLIN))

4:30 Board Meeting

6:15 Networking

6:45 Dinner Buffet

7:15 Program: **"FTB Panel"**

Cost: \$35.00 with reservation by Friday February 15  
\$45.00 with reservation after deadline

Signup online at:

<https://www.123signup.com/calendar?Org=ebaea>

(please print out your confirmation to ensure that you clicked all the right buttons to register) Questions: email [ebaean@ebaean.org](mailto:ebaean@ebaean.org) (preferred) or call 800-617-1040.

## February Topic: "FTB Panel"

**Speakers:** Steve Sims, EA and Karen Brosi, EA, CFP®

*By Gregory Crofton, EA, Program Chair*

This month we will have a panel discussion on California tax issues. Questions will be taken during dinner, but they will be answered in the order received, with all the emailed questions going first. If your question is complex, PLEASE email it in early so the panel will have a chance to research it before the event.

**It is crucial to e-mail your questions to Mike Power ([michael.power@PowerInvesting.Net](mailto:michael.power@PowerInvesting.Net)) by the afternoon of Monday, Feb. 18<sup>th</sup>, if you want to have the best chance of having them answered.**

As in years past, the session will be transcribed and the questions and answers will be emailed to everyone on the Chapter NEWS mailing list, so if you're not on that, go to

<http://ebaean.org/cgi-bin/dada/mail.cgi>

and select the NEWS list from the pull-down menu and follow the simple instructions to subscribe to that list.

Our panelists will be Karen Brosi, EA, CFP®, and Steve Sims, EA, who is from FTB. Steve is one of the few FTB employees you'll ever meet who is also an EA. He has been with FTB for 25 years (I guess he was about 17 when he started there) and has worked as an auditor, collection supervisor, and project manager. He has just been named the new FTB Taxpayer Advocate. Steve is living proof that good guys do sometimes wear black hats.

Karen, whom I'm sure most of you know of, has been practicing in Palo Alto for over fifteen years. She is a Certified Financial Planner® and an Enrolled Agent. She was a senior tax specialist and director of financial planning at a respected Palo Alto CPA firm before forming her own practice. Karen is a past-president of Golden Gate Chapter and past officer of CSEA. She lectures with Spidell Publishing, is often a speaker at CSEA Super Seminars, and writes content for Spidell's California Taxletter and Elder Client Planner.

## PRESIDENT'S MESSAGE

*by Tom Johnston, EA*

For a number of years our popular Tax Panels have provided timely answers to our questions as we attempt to apply all the law changes to our client's tax returns. Be sure to schedule the February and March Dinner Meetings as part of your tax season. And send your questions in before the meeting so our panelists can prepare answers for you.

I am most appreciative for Karen Brosi, EA, Steve Sims, and Joe Calderaro's willingness to attend our meetings and answer our questions. They have done this for a number of years. They provide a service of great value to us. Thank you.

Another must for a successful tax season is having a network of people you can call when you need to discuss a situation to determine the best way to put it on the tax return. The breakfast meetings provide an excellent forum for brain storming issues and getting the ben-

efit of our colleague's experience. If we don't know who to talk to we can always call the Chapter Office, an officer, or someone we know to see if they can help or recommend someone to call.

Remember you are not alone. You are part of a great professional association. Together we can lift one another and all have a successful tax season.

*Remember the Legacy and Accept the Opportunity to Serve with Purpose.*

## **CHAPTER OFFICE HAS MOVED**

**Effective immediately, the new address is 30100 Mission Blvd, Suite 6, Hayward 94544. The contact phone remains the same at 800-617-1040, and the new local number is 510-487-2063. The old local number 925-691-1866 has been disconnected. The new fax number is 510-487-1501. The email address remains [ebaea@ebaea.org](mailto:ebaea@ebaea.org).**

**\*\*PLEASE UPDATE YOUR RECORDS\*\***

## **HOW BREAKFAST SAVED MY PRACTICE**

*By Judy Gilmer EA, Membership Co-Chair*

When I first joined the EBAEA, I only knew a few people. I joined for networking and for education. The education was fabulous. But I could only attend 4 or 5 meetings out of the year, so I didn't really get a chance to meet many people. Since I was a sole practitioner working out of my home, when I came up to a new tax situation, I stumbled along trying to get it figured out. I read pubs, called the IRS, looked at the tax law (when I could figure out that silly search engine!!!) I just didn't know anyone well enough to be comfortable enough to call them up and ask for help. I was convinced that I would be a bother.

But then a miracle happened.....I heard about a breakfast meeting in my own home town. I contacted the "facilitator" to find out where we met, what we did, etc. He invited me to join them the following week. At first, there were only 3 of us meeting once a month. Here I was, this "new kid" to the business eating breakfast with two men that had over 30 years of experience between. I was sure they knew EVERYTHING. Finally....I had found a source to bring my questions.

Then another miracle happened. One day someone asked a questions and I was the one who had experience in that area and knew the answer. Wow! I could actually contribute something here. As my confidence grew (and I was recruited to be a member of the Board), I learned to reach out to others at the monthly meetings. Our little breakfast group has grown. We meet every week.....cuz there is always another question to ask, another issue to hammer out, another perspective to hear.

I joined this group about a year ago. I have made some good friends that I trust with my tax questions. We have overlapping areas of experience – financial plan-

ning, QuickBooks, corporations, entity choices, book-keeping, payroll – and we all share and contribute. Now I confidently take on new challenges because I don't ever feel like I have to "go it alone." I've got good colleagues that can point out the pitfalls they already learned. When one of us finds an interesting tax article in a publication, we bring it to share with the others. ANYONE is welcome in our group – not yet an EA, brand new credential, just breaking away from a storefront to start own business, or been doing this since before software.

Not everyone can make every monthly meeting. But that is not the only education and networking EBAEA offers. Check out the local breakfast meeting in your area. Or come check out ours! If you want one in your area, just pick a time and place and start announcing it at the monthly meeting. Send Duncan an email and he'll put it into the bulletin. Eventually, our web-site will have this information updated.

Breakfast with colleagues - \$8. Value to your business – Priceless!

## **FORM 8453 RULES**

A Chapter Member posed this question recently: "The new 8453 is for transmittal of signature documents (per someone at the local e-file coordinator office.) It now has a check list of items and says "File this form only if you are attaching one or more of the following forms or supporting documents." My question is what if I have something else – the IRS response was attach it anyway. One item I can think of is 83(b) election or some of those other goodies we get from stock acquisitions. My 1st reaction was the same as the IRS agent. Do you agree?"

Gerry Kelley-Brenner of local IRS responds: "The short answer is: DON'T DO IT!!! The looooooong answer is: The instructions for the 2007 Form 8453 has a CAUTION that states: ***Do not attach any form or document that is not shown on Form 8453 next to the checkboxes. If you are required to mail in any documentation not listed on Form 8453, you cannot file the tax return electronically.***

You are correct that they regularly destroy attachments that are not considered "required". Some practitioners attach documents to paper filed returns in hopes that they are disclosing information that is pertinent to supporting a position or dollar amount listed on the return. Sometimes these documents are required. However often they are not, and the clerks that process the returns do not look at this additional information. Sometimes it is not considered unless or until the return gets pulled for audit. At that time, the Tax Compliance Officer (TCO) or Revenue Agent (RA) may or may not receive the entire return, as filed, and may still have to ask for these same supporting documents AGAIN.

Note that only certain line items of paper filed returns are transcribed by the Submission Processing Center clerks and those same line items are saved in the IRS Master File for e-filed returns. Some tax prep software includes a preparer's notes section (different names for different software) in which a note may be typed that the supporting documentation for "whatever" will be furnished upon request. These documents that are not otherwise "required" are then stored safely (either paper or electronically) with other taxpayer records in the practitioner's office. If and when requested, the practitioners produce the supporting documentation.

So whether the returns are paper filed or e-filed, only submit the IRS REQUIRED documents...and store the rest."

### **S-CORP – SALARY OR DIVIDEND**

This is the time of the year we always get questions from S-Corp shareholders who swear they didn't earn any salary; it was all a dividend. Uh-huh, sure. If any of your clients try to convince you of that, show them this article from the Journal of Accountancy: [http://www.aicpa.org/pubs/jofa/sep2007/s\\_corporation.htm](http://www.aicpa.org/pubs/jofa/sep2007/s_corporation.htm). It does a nice job of pointing out the most common arguments, and how the IRS (and the Tax Court) has responded.

### **SPECIAL ENROLLMENT EXAM CLASS**

Once again, we are offering the SEE prep class for all prospective EAs. The class will be offered in three parts, corresponding with the three parts of the exam. Classes will start July 12 and continue through October 18th. The class qualifies for CTEC continuing education credit. More information is available on the web at EBAEA.org or by contacting Tom Johnston at 925-828-4500 or at [taxtomea@comcast.net](mailto:taxtomea@comcast.net).

### **ASK THE ATTORNEY**

(Attorney Frank Acuña answers questions frequently asked by our clients (and us). These are general answers and are NOT legal advice. For clarification or other questions, contact Frank at (925) 906-1880 or at [ohc@aclawnet.com](mailto:ohc@aclawnet.com))

### **My loved one has recently died. What do I need to do?**

One of the advantages of having created a living trust is that it gives survivors time to grieve. Nothing needs to be done immediately and most legal matters can wait for two to three weeks. However, if there are pressing business or legal matters, an attorney should be called immediately. An attorney also should be contacted before you make any asset transfers or decisions about retirement plan rollovers.

You should order at least ten death certificates at the funeral home or mortuary. They also will notify Social Security of your loved one's death.

If a trust exists, you will review your assets with your attorney and make sure that they are properly held in trust. Organizing assets in certain ways can reduce present and future taxes. Finally, certain administrative steps must be taken, such as lodging the Will at the local courthouse and giving notices to creditors and beneficiaries, when required. Your attorney also will assist you with notifying pension plans, insurance companies, and financial institutions.

Some estates may require probate court action to transfer assets to the surviving spouse. This usually does not require formal probate proceedings! Instead, California law provides for a probate shortcut, a Spousal Property Petition, which usually takes about 60 days to complete.

In all estates, final income tax returns should be filed and annual trust tax returns may be required. If your estate is of sufficient size, an Estate Tax Return must be filed within nine months of the date of death. In all estate matters, your attorney should coordinate with your tax professional.

### **IRS PRIORITY TELEPHONE LINES**

Practitioner Priority Service	(866) 860-4259
IRS Individual Tax Help Line	(800) 829-1040
Business & Specialty Tax Line	(800) 829-4933
e-Help (Practitioners only)	(866) 255-0654
Refund Hotline	(800) 829-1954
Forms & Publications	(800) 829-3676
National Taxpayer Advocate	(877) 777-4778
EFTPS	(800) 555-4477
TeleTax Topics & Refund Status	(800) 829-4477
Forms 706 & 709 Help Line	(866) 699-4083
Employer Identification Number	(800) 829-4933
Excise Tax & Form 2290	(866) 699-4096
Information Return Reporting	(866) 455-7438

*For the complete 2008 FTB Directory, go to:*

<http://www.ftb.ca.gov/forms/misc/1240.pdf>

### **CIRCULAR 230 UPDATING**

The Office of Professional Responsibility advised us that the Treasury Department Circular 230 (Rev. 9-2007) has been removed from IRS.gov for technical corrections. IRA expects to have the document reloaded to the website within the next 60 days.

We understand that many EAs may have linked to the publication on IRS.gov directly. It will be necessary for you to redirect your links to the Federal Register for the September 2007 Circular 230 Revision and the CFRs for the code. Here is the link established to assist you in locating the information.

<http://www.irs.gov/taxpros/actuaries/article/0,,id=177851,00.html>

## **WANT TO BE PART OF THE ACTION?**

by *Bonnie Buhnerkempe, EA, etc, Imm Past President*

Do you want to make some more friends? Now is your chance to get your name in to be considered for next year's Board of Directors. By joining the Board you get a chance to develop a deeper friendship with people than just attending the dinner meetings, plus you get to be a part of what will affect our organization for next year and the years to come. Yes, we want new people who have not served before who will have a fresh new approach to things. Send me an email so I can pass your name on to the nominating group. [bonniebuhnerkempe@comcast.net](mailto:bonniebuhnerkempe@comcast.net)

## **INTERIM GUIDANCE FOR "MORE LIKELY THAN NOT" PREPARER PENALTIES**

(*received at press time from Gerry Kelly-Brenner of IRS. For more info, follow the links and read the five page "Talking Points" at the end of the regular Bulletin - ed*)

I know that many of you have voiced concern about the IRS implementing enhanced standards of conduct for tax return preparers.

Office of Chief Counsel, the Office of Professional Responsibility and SB/SE Exam are coordinating a servicewide team developing education and outreach materials for preparer penalties amended by recent legislation. Office of Chief Counsel recently released interim guidance that they provided to us today to address practitioner inquiries. The original article addressing these changes is available on IRS.gov at

<http://www.irs.gov/newsroom/article/0..id=177036.00.html>

Tax return preparers are invited to submit comments by March 24, 2008 on *Notice 2008-13*

<http://www.irs.gov/pub/irs-drop/n-08-13.pdf>

**Comments should be submitted to:**

(*see address on last page of "Talking Points"*)

**Comments may also be submitted electronically via the following e-mail address: [No-Notice.Comments@irscounsel.treas.gov](mailto:No-Notice.Comments@irscounsel.treas.gov)**

[No-Notice.Comments@irscounsel.treas.gov](mailto:No-Notice.Comments@irscounsel.treas.gov)

Please include "*Notice 2008-13*" in the subject line of any electronic submissions. **Chief Counsel is working on final guidance for the provisions.**

## **TAX HELP NEEDED**

Accountant/Tax Preparer for 2007 tax season. Fast paced Walnut Creek CPA firm needs experienced tax preparer. Great place to work, pay commensurate with production and ability. Call 925-979-1099 or fax resume 925-979-1088.

## **CLIENTS AVAILABLE**

Enrolled Agent who is lightening work load wishes to sell partial client list at favorable terms. Enquiries welcome to Mary at (925) 671-7325.

## **IS YOUR INFORMATION CORRECT?**

Please look at your listing on the NAEA "Find an Enrolled Agent" online directory at [www.naea.org](http://www.naea.org) (<http://www.naea.org>). Is your contact information correct? Do you have your website listed? Have you provided a text description of your practice? If you offer bilingual services, have you indicated so on your record?

Log in using your 6-digit ID and 5-digit zip code and click on "View/Edit My Profile". To edit your contact information, click on the "Edit" icon located at the bottom of the page. To add or change your tax specialties, click on "My Specialties" on the top of the page. You may also fax changes to 202-822-6270 or email [membership@naeahq.org](mailto:membership@naeahq.org).

## **BULLETIN ADVERTISING POLICY**

by *Duncan Sandiland, Bulletin Editor*

To encourage more Members to use the Bulletin to fill their needs, we present the Bulletin advertising policy:

- 1) All Bulletin notices are run for three months maximum. If you wish to run a notice for a longer period, you must resubmit it.
- 2) Maximum notice size is 1.5 column inches. This equals a space one and one-half inches high by one column (3.5 inches) wide. The standard Bulletin font is Times New Roman 11 point.
- 3) The Bulletin Editor reserves the right to edit any notice for style, content and length.
- 4) All notices must be submitted (and payment received) by the 25<sup>th</sup> of the month prior to initial publication. Send the desired text to: [bulletin@ebaea.org](mailto:bulletin@ebaea.org)
- 5) Member notices seeking or offering employment, clients or EA-practice-related matters are run at no charge as a Member benefit. This includes an ad run by a firm which employs a Member. Member notices offering other services or products, and all non-Member notices are run at the standard fee of \$150 for the three-month insertion. The Bulletin Editor reserves the right to modify or reject any notice which, in the sole opinion of the Editor, violates any of the principles of EBAEA.

## **TAX SEASON HELP WANTED**

Oakland EA seeks part-time help from 2/15 thru 4/15, 6-12 hours (1-2 days) per week. Schedule negotiable with possibilities for evenings or weekends. Responsibilities will include tax return preparation (Lacerte experience preferred) and administrative tasks (phones, mail processing, filing/copying, document and tax return assembly). Must have a good memory, reasonable computer skills including MS Office, multitasking, prioritization and good communications skills. Send resume with cover letter and expected level of compensation to [pf1592-job@yahoo.com](mailto:pf1592-job@yahoo.com).

## HMMMM...

In the first 182 years of our nation (1789-1970) where financial records were maintained, the USA spent \$2.8 trillion in aggregate. \$2.8 trillion is also the projected total of government outlays during the 2007 fiscal year (OMB).

The estate of Albert Einstein earned \$18 million over the last year for merchandise sales relating to the German physicist. The 1921 Nobel Prize winner in physics, Einstein died in 1955 (Forbes).

The five largest economies in the world (US, China, Japan, Germany, India) make up 48% of the total world economy (World Bank).

The price of a gallon of gasoline will average \$3.11 in 2008, vs \$1.85 in 2004 (Department of Energy).

The minimum salary paid to an NBA basketball player during the 2007-08 season is \$427,163 (NBA).

## HUMOR

Dan was a single guy living at home with his father and working in the family business. When he found out he was going to inherit a fortune when his sickly father died, he decided he needed a wife with which to share his fortune. One evening at an investment meeting, he spotted the most beautiful woman he had ever seen. Her natural beauty took his breath away. "I may look like just an ordinary man," he said to her, "but in just a few years, my father will die, and I'll inherit 20 million dollars." Impressed, the woman obtained his business card and three days later, she became his step-mother. Women are so much better at estate planning than men. (Thanks to Luise Roke)

## SAVE THE DATES!

Tax Talk 2008 will be held on November 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup>, 2008 at the Radisson Hotel Dublin. Our program is still developing but we have confirmed Mel Kreger on November 5<sup>th</sup> presenting My Very First 1041, and My Second, and My Third..., followed by Frank Acuna in the afternoon presenting Trust Administration and Funding Trusts. We are also bringing back Gary McBride with Tom Daley on November 6<sup>th</sup> presenting our Federal & California Updates. We will have the Two Hours Required Ethics on November 7<sup>th</sup>, but still have not yet developed the rest of our program.

Please feel free to email Diane Jaworski-Faulhaber @ [synergyf@pacbell.net](mailto:synergyf@pacbell.net) with suggestions for topics and/or speakers for the rest of our program. See you in November!

## CALENDAR OF EVENTS

### February 2008

- 20** EBAAE Dinner Meeting  
-> FTB Panel: Karen Brosi and Steve Sims  
@ Radisson Hotel, Regional St, Dublin

### March 2008

- 19** EBAAE Dinner Meeting  
-> IRS Panel: Karen Brosi and Joe Calderaro  
@ Radisson Hotel, Regional St, Dublin

### April 2008

No April meeting – enjoy your nap!

### May 2008

- 19-21** CSEA SuperSeminar A  
@ Flamingo Hotel, Las Vegas
- 21** EBAAE Annual Corporate and Dinner Meeting  
-> Election of Officers, possible Ethics topic  
@ Radisson Hotel, Regional St, Dublin
- 22-24** CSEA SuperSeminar B  
@ Flamingo Hotel, Las Vegas
- 29-31** CSEA SuperSeminar  
@ Grand Sierra Resort, Reno

### June 2008

- 18** EBAAE Dinner Meeting
- 26** CSEA Annual Meeting (Sacramento)

## Small Group Tax Meetings

<b><u>Antioch /Brentwood</u></b>	Fridays 8:00am
Brentwood Café, 8500 Brentwood Blvd, Brentwood	
<b>Ken Seamann EA</b>	(925) 634-8297
<b><u>Oakland/Berkeley</u></b>	3 <sup>rd</sup> Fri 10:30am
Park Avenue Grill, 4184 Piedmont Ave at Linda, Oakland	
<b>Philip Fiegler EA</b>	(510) 530-1174
<b><u>Danville Area</u></b>	4 <sup>th</sup> Tue 9:30am
Pascals French Oven, 155 Railroad Ave, Danville	
<b>Michael Power EA</b>	(510) 366-8836
<b><u>San Ramon</u></b>	2 <sup>nd</sup> & 4 <sup>th</sup> Fri, 7:30am
<b>Contact Bonnie for location</b>	
<b>Bonnie Buhnerkempe EA</b>	(925) 855-0829
<b><u>Livermore Area</u></b>	Fridays 8:45am
Rock House Café on Portola Ave, Livermore	
<b>Richard Goudreau EA</b>	(925) 606-6672
<b><u>Castro Valley</u></b>	3 <sup>rd</sup> Tue 8:00am
Carrow's, 2723 Castro Valley Blvd @ Lake Chabot, CV	
<b>Dagmar Bedard EA</b>	(510) 537-3883
<b><u>South Alameda County</u></b>	1 <sup>st</sup> Wed 9:30am
Dino's, 1 block W of I-880 on Industrial Blvd, Hayward	
<b>Sal Romo EA or Walt Thomas EA</b>	(510) 487-1691

# 2007 - 2008 Board of Directors and Committee Chairs

Web Page <http://www.ebaea.org>

President: Thomas Johnston EA 925-828-4500  
1st VP: Walter Nygaard EA, etc 510-547-0440  
2nd VP: Peggy Hall EA 925-388-1040  
Treasurer: Tim Hintzoglou EA 925-930-7737  
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Barbara Sparks EA 925-634-8630  
Greg Crofton EA 925-218-2301  
Director 2007-2009:  
Dagmar Bedard EA 510-537-3883  
Lonnie Gary EA, USTCP 650-559-5124  
Ravi Sundarraj EA 925-984-1219  
CSEA Directors: Walter Nygaard EA 510-547-0440  
Peggy Hall EA 925-388-1040  
IRS Practitioner Panel: Phil Fiegler EA 510-530-1174

**Communication Committee, (2<sup>nd</sup> VP)**  
**Chair:** Walter Nygaard EA 510-547-0440  
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Judy Gilmer EA 925-373-1468  
Outreach: (vacant)  
Public Affairs: Dagmar Bedard EA 510-537-3883  
Social Affairs: Janet Bridges EA 510-505-0818  
Practice Preservation: Linda Fox EA 925-846-5913

Disaster Services: Janet Bridges EA 510-505-0818

**Education Committee, (1<sup>st</sup> VP)**  
**Chair:** Peggy Hall EA 925-388-1040  
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Tax Talk: Diane Jaworski-Faulhaber EA 510-538-0948  
Charleen Daefield EA 925-872-4075  
Program: Greg Crofton EA 925-218-2301  
Scholarship: Norm Madge EA 510-489-8713  
Continuing Ed: Joanne Anderson EA 925-938-9086  
Town Hall: Ravi Sundarraj EA 925-984-1219  
SEE Class: Thomas Johnston EA 925-828-4500  
Mini Seminar Team: (vacant)

**Administration Committee (IPP)**  
**Chair:** Bonnie Buhnerkempe EA 925-855-0829  
Financial Review: Lonnie Gary EA 650-559-5124  
Bylaws/SOP: Sal Romo EA 510-487-1691  
Budget & Finance: Walt Thomas EA 510-785-8356  
Chapter Off.: Bonnie Buhnerkempe EA 925-855-0829  
Legislative Affairs: Kim Kastl EA 510-537-2122  
Nominating: Bonnie Buhnerkempe EA 925-855-0829  
Strategic Advisory:  
Bulletin: Duncan Sandiland EA, etc 925-691-1040  
Tax Agency Liaison:

## EAST BAY ASSOCIATION OF ENROLLED AGENTS

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# **TALKING POINTS FOR PREPARER PENALTY PROVISIONS UNDER THE SMALL BUSINESS AND WORK OPPORTUNITY TAX ACT OF 2007 (IRC 6694 and 6695)**

## **INTRODUCTION**

The IRS recognizes that the vast majority of return preparers and practitioners are ethical, honest and serve their clients' best interests by preparing complete and accurate tax returns.

These professionals render great service daily to the tax system by promoting voluntary compliance.

Notice 2008-13, issued December 31, 2007, provides interim guidance for the legislation passed by Congress in May under the Small Business and Work Opportunity Tax Act of 2007, which expanded tax return preparer penalties and heightened the standards of conduct that must be met by tax return preparers in order to avoid a penalty. Regulations implementing the May 2007 legislation are expected to be finalized by December 2008.

The interim rules emphasize the:

- importance to preparers of understanding the legal basis for positions taken on tax returns
- need for preparers to advise taxpayers about the various penalties that can apply when a position is taken on a return that does not meet the applicable legal standard

## **BACKGROUND**

Congress passed Section 8246 of the Small Business and Work Opportunity Tax Act of 2007, ([Pub. L. No. 110-28](#)) in May 2007. It amended several provisions of the Internal Revenue Code relating to paid return preparers, including:

- Extending the application of the income tax return preparer penalties to all tax return preparers to include preparers of estate and gift tax, employment tax, and excise tax returns, and returns of exempt organizations
- Heightening the standards of conduct that must be met by tax return preparers in order to avoid that penalty
- Increasing the 6694 (a) penalty for understatements due to unreasonable positions from \$250 to the greater of \$1,000 or 50 percent of the income derived by the preparer
- Increasing the 6694(b) penalty for willful or reckless conduct from \$1,000 to the greater of \$5,000 or 50% of the income derived by the preparer

The changes are effective for tax returns prepared after May 25, 2007.

## **INTERIM PENALTY COMPLIANCE RULES**

The new law alters the standards of conduct that must be met to avoid imposition of the penalties for preparing a return with an understatement of tax. It also applies to preparers of estate and gift tax, employment tax, and excise tax returns, as well as returns of exempt organizations, not just income tax returns.

Under the interim guidance, the IRS can impose a penalty on a preparer for an **undisclosed** position on a tax return that does not meet the "more likely than not" standard. This *replaces* the **realistic possibility standard** for undisclosed positions with a requirement that there be a reasonable belief (**a reasonable belief standard**) that the tax treatment of the position was more likely than not the proper treatment.

The penalty can be imposed with respect to a **disclosed** position for which there is no reasonable basis. This *replaces* the **not-frivolous standard accompanied by disclosure** with the requirement that there be a reasonable basis (**a reasonable basis standard**) for the tax treatment of the position accompanied by disclosure.

Until further guidance is issued, solely for purposes of section 6694, a **signing** tax return preparer shall be deemed to meet the requirements of section 6694 with respect to a position for which there is a reasonable basis but for which the tax return preparer does not have a reasonable belief that the position would more likely than not be sustained on the merits, if the tax return preparer meets **any** of the following requirements:

- The position is disclosed in accordance with § 1.6662-4(f) (which permits disclosure on a properly completed and filed Form 8275, Disclosure Statement, or 8275-R, Regulation Disclosure Statement, as appropriate, or on the tax return in accordance with the annual revenue procedure described in § 1.6662-4(f)(2));
- If the position would not meet the standard for the taxpayer to avoid a penalty under section 6662(d)(2)(B) without disclosure, the tax return preparer provides the taxpayer with the prepared tax return that includes the disclosure in accordance with § 1.6662-4(f);
- If the position would otherwise meet the requirement for nondisclosure under section 6662(d)(2)(B)(i), the tax return preparer advises the taxpayer of the difference between the penalty standards applicable to the taxpayer under section 6662 and the penalty standards applicable to the tax return preparer under section 6694, and contemporaneously documents in the tax return preparer's files that this advice was provided; or
- If section 6662(d) (2) (B) does not apply because the position may be described in section 6662(d) (2) (C), the tax return preparer advises the taxpayer of the penalty standards applicable to the taxpayer under section 6662(d)(2)(C) and the difference, if any, between these standards and the standards under section 6694, and contemporaneously documents in the tax return preparer's files that this advice was provided.

For purposes of the interim guidance in Notice 2008-13, the rules applicable to signing tax return preparers described in this section will apply instead of § 1.6694-2(c)(3)(i).

Until further guidance is issued, solely for purposes of section 6694, a **nonsigning** tax return preparer shall be deemed to meet the requirements of section 6694 with respect to a position for which there is a reasonable basis but for which the nonsigning tax return preparer does not have a reasonable belief that the position would more likely than not be sustained on the merits, if the advice to the taxpayer includes a statement informing the taxpayer of any opportunity to avoid penalties under section 6662 that could apply to the position as a result of disclosure, if relevant, and of the requirements for disclosure.

If a **nonsigning** tax return preparer provides advice to another tax return preparer, a nonsigning tax return preparer shall be deemed to meet the requirements of section 6694 with respect to a position for which there is a reasonable basis but for which the nonsigning tax return preparer does not have a reasonable belief that the position would more likely than not be sustained on the merits, if the advice to the tax return preparer includes a statement that disclosure under section 6694(a) may be required. If the advice with respect to a position is in writing, the statement must be in writing. If the advice with respect to a position is oral, the statement also may be oral. Contemporaneously prepared documentation in the nonsigning tax return preparer's files is sufficient to establish that the statement was given to the taxpayer or other tax return preparer.

For purposes of the interim guidance in Notice 2008-13, the rules applicable to nonsigning tax return preparers described in this section will apply instead of § 1.6694-2(c)(3)(ii).

Additional disclosure of facts relevant to or positions taken with respect to issues involving any of the items is unnecessary for purposes of reducing any income tax understatement provided the forms and attachments are completed in a clear manner in accordance with their instructions.

## **INTERIM GUIDANCE UNDER SECTION 6694**

Notice 2008-13 provides interim guidance about the standards of conduct that must be met by a tax return preparer to avoid a penalty for an understatement of tax that may result from a position taken on a tax return.

For undisclosed positions on a tax return, the new law replaced the realistic possibility standard with a requirement that there be a reasonable belief that the tax treatment of the position would more likely than not be sustained on its merits.

Generally, a return preparer may rely in good faith on information furnished by the taxpayer or a third party advisor, and is not required to independently verify or review the items reported on a tax return to determine if they are likely to be upheld if challenged by the IRS. The tax return preparer, however, may not ignore the implications of information furnished to the preparer or actually known to the preparer. The tax return preparer must make reasonable inquiries if the information appears to be incomplete or incorrect.

In cases in which the taxpayer discloses the position on the tax return, the new law requires there must be a reasonable basis for the tax treatment of the position taken on the tax return.

The preparer must make appropriate inquiries to determine the existence of facts and circumstances required by a Code section or regulation as a condition to the claiming of a deduction. If, after making appropriate inquiries, it appears that the specific facts and circumstances exist to support the claiming of the deduction, the preparer generally may rely in good faith upon information furnished by the taxpayer.

Practitioners will be considered to have a reasonable belief that positions have a "more likely than not" chance of being upheld on their merits if they have:

- Analyzed the pertinent facts and authorities; and
- Concluded, in good faith, that there is greater than 50 percent likelihood that the tax treatment will be upheld if IRS challenges it.

## **EXAMPLES**

- In preparing a tax return, Accountant G relies on the advice of an actuary concerning the limit on deductibility under section 404(a)(1)(A) of a contribution by an employer to a qualified pension trust. The actuary providing the advice was not associated with Accountant G's firm. On the basis of this advice, Accountant G completed the tax return. It is later determined that there is an understatement of liability for tax that resulted from incorrect advice provided by the actuary. Accountant G had no reason to believe that the advice was incorrect or incomplete, and the advice appeared reasonable on its face. Accountant G was also not aware of any reason why the actuary did not know all of the relevant facts or that the advice was no longer reliable due to developments in the law since the time the advice was given. Accountant G is not subject to a penalty under section 6694.
- During an interview conducted by Preparer H, a taxpayer stated that he had made a charitable contribution of real estate in the amount of \$50,000 during the tax year, when in fact he had not made this charitable contribution. Preparer H did not inquire about the existence of a qualified appraisal or complete a Form 8283 in accordance with the reporting and substantiation requirements under section 170(f)(11). Preparer H reported deductions on the tax return for the charitable contribution which resulted in an understatement of liability for tax. Preparer H is subject to a penalty under section 6694.
- Preparer I prepared the tax returns of a taxpayer for each of the past three years. While preparing this year's tax return, Preparer I realizes that the taxpayer did not provide a Form 1099 for a bank account that produced significant taxable income in each of the previous three years. Preparer I asks the taxpayer about any other existing income and the lack of this Form 1099, and the taxpayer furnishes the Form 1099 to Preparer I for use in preparation of the tax return. Preparer I did not know that the taxpayer owned an additional bank account this past year that generated taxable income and the taxpayer did not reveal this information to the tax return preparer. Preparer I is not subject to a penalty under section 6694.
- A corporate taxpayer hires Accountant J to prepare its tax return. Accountant J encounters an issue regarding various small asset expenditures. Accountant J researches the issue and concludes that there is a reasonable basis for a particular treatment of the issue. Accountant J cannot, however, reach a reasonable belief whether the position would more likely than not be sustained on the merits because it was impossible to make a precise quantification regarding whether the position would more likely than not be sustained on the merits. The position is not disclosed on the tax return. Accountant J signs the tax return as the tax return preparer. The IRS later disagrees with this position taken on the tax return. Accountant J is not subject to a penalty under section 6694.

## **REQUIRED SIGNATURES ON RETURNS PREPARED BY RETURN PREPARERS**

Among other changes made by Section 8246, the Section 6695(b) penalty on a tax return preparer of any return or claim for refund who fails to sign a return when required by regulations was extended to include non income tax returns.

Notice 2008-12 announced that regulations to implement the signature requirements under section 6695(b) for certain 2008 tax year returns and claims for refund will be issued by the end of 2008.

## **THE AUDIT PROCESS AND THE NEW LEGISLATION**

There have been no significant changes to the approach the IRS uses when interacting with tax professionals. All examinations should be conducted professionally. Agents should communicate clearly to the taxpayer and their representative about each phase of the audit process.

Each tax examination is separate and distinct from a possible Return Preparer violation case relating to the tax examination. Examiners do not propose or discuss conduct penalties in the presence of the taxpayer.

The penalties and/or Circular 230 guidelines do not come into play during the course of an audit. It is only after the audit has been concluded that a separate Preparer Penalty investigation or referral to the Office of Professional Responsibility for a Circular 230 violation is made.

## **CONCLUSION**

In addition to Notice 2008-13, additional guidance has been provided in Notice 2008-12 with respect to the implementation of the tax return preparer signature requirement, and in Notice 2008-11, which clarifies the transition relief provided in Notice 2007-54, issued earlier this year.

The Treasury Department and the IRS intend to complete the revamping of these rules by the end of 2008. The interim rules will be in effect until the overhaul of the current return preparer penalty regulations is complete.

Tax return preparers are invited to submit comments on *Notice 2008-13* by March 24, 2008. Comments should be submitted to: Internal Revenue Service, CC:PA:LPD:PR (Notice 2008-13), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20224. Comments may also be submitted electronically via the following e-mail address: [Notice.Comments@irscounsel.treas.gov](mailto:Notice.Comments@irscounsel.treas.gov). Please include *Notice 2008-13* in the subject line of any electronic submissions.

### **How can I contact OPR?**

You may contact OPR at [opr@irs.gov](mailto:opr@irs.gov). Please do not send any confidential information via this email. Inquiries containing sensitive information should be faxed to our office at (202)-622-2207.