



ROPES & GRAY LLP
ONE METRO CENTER
700 12TH STREET, NW, SUITE 900
WASHINGTON, DC 20005-3948
WWW.ROPESGRAY.COM

October 22, 2010

Steven M. Rosenthal
T +1 202 508 4652
F +1 202 383 9345
steven.rosenthal@ropesgray.com

BY E-MAIL AND REGULAR MAIL

Ms. Donna Crisalli
Office of Associate Chief Counsel (Income Tax
& Accounting)
Internal Revenue Service
Courier's Desk
1111 Constitution Avenue, NW
Washington, DC 20224

Re: TD 9504: Applying the FIFO rule for stock on an account-by-account basis

Dear Ms. Crisalli:

On behalf of Wolters Kluwer Financial Services, we urge the IRS to clarify that the FIFO rule for stock must be applied on an account-by-account basis under Code Sec. 1012.¹ We think the law is clear on how the FIFO rule should be applied, but the final regulations are not.² We are open to other ways to clarify the intent of the final regulations, but we suggest you could add the following *italicized* words to Treas. Reg. Sec. 1.1012-1(c)(1)(i):

“ . . . the stock sold or transferred is charged against the earliest lot the taxpayer purchased or acquired *within an account* to determine the basis and holding period of the stock.”

We believe this clarification applies the FIFO rule consistently with the Average Basis rule, which is expressly applied on account-by-account basis. See Treas. Reg. Sec. 1.1012-1(e)(7) (“Average basis is determined by averaging the basis of all shares of identical stock in an account regardless of holding period.”)

As an illustration, our clarification permits a taxpayer that owns shares of ABC stock in two separate accounts (either with the same broker or with different brokers) to specify the account from

¹ For the reasons that we discuss later, we believe every basis reporting convention should be applied on an account-by-account basis. We do not believe further clarification on this point is necessary in light of the clear statutory language and legislative history.

² We suggested that the final regulations clarify that the FIFO rule applies on an account by account basis in our comments on the proposed regulations, but our suggestion was not adopted. Our request was at page 11 of our letter dated February, 8, 2010

which the shares would be sold and, assuming taxpayer did not further identify the particular shares that were sold, to apply a FIFO rule to determine the shares that were sold within the account. We expect the broker would apply the same convention for its basis reporting, which would maximize consistency between taxpayers and brokers.

In our view, the law is clear on how the FIFO rule should be applied. The revised statute for basis determinations now provides that “[i]n the case of the sale, exchange, or other disposition of a specified security on or after the applicable date, the conventions prescribed by regulations under the section **shall be applied on an account by account basis.**” Code Sec. 1012(c)(1) (emphasis added). The legislative history to this section explains:

“the provision modifies section 1012 so that the conventions prescribed by regulations under that section for determining adjusted basis (*the first-in, first-out, specific identification, and average basis conventions*) apply on an account-by-account basis. Under this rule, for example, if a customer holds shares of the same specified security in accounts with different brokers, each broker makes its adjusted basis determinations by reference only to the shares held in the account with that broker, and only shares in the account from which the sale is made may be identified as the shares sold.”

Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in the 110th Congress (JCS-1-09), March 2009 at 364 (emphasis added).³

We believe the addition in the final regulations of the account-by-account rule for average basis determinations, without an addition of the rule for FIFO determinations, creates confusion. In addition, the preamble to the final regulations states, incorrectly we believe, that “the account by account rule in section 1012(c)(1) relates to stock eligible for the average basis rule” and “does not mandate similar treatment for cost basis stock.” The preamble concludes that “incorporating an account by account requirement into the FIFO rule creates unnecessary complexity.”

We believe many taxpayers and brokers already believe the FIFO rule is applied on an account-by-account basis, and would be surprised by a different result (and would find any other rule difficult to administer). Indeed, we understand the statutory modifications to the cost basis rules were made to facilitate reporting by taxpayers and brokers.

³ The House Committee on Ways and Means and the Senate Finance Committee did not publish any reports to accompany the cost basis legislation. Rather, the staff of the Joint Committee on Taxation prepared multiple technical explanations for the Committees and the Congress as part of the legislative process. These technical explanations consistently included the language quoted above. See, for example, Joint Committee on Taxation, *Description of the Housing Assistance Tax Act of 2008*, (JCX-27-08), April 8, 2008 at p. 44 (technical explanation prepared for the mark-up of tax legislation by the House Committee on Ways and Means).

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Ms. Donna Crisalli

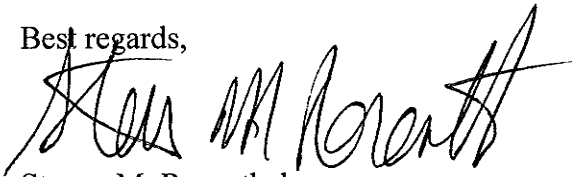
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However, other brokers and stakeholders are confused on how to interpret the FIFO rule in the final regulations, in light of the account-by-account rule only for average basis determination (and in light of the explanation in the preamble). Because brokers are now finalizing their reporting systems, we believe clarification is urgent in light of the impending effective date of January 1, 2011.

After speaking to IRS officials, we understand the IRS intended the FIFO rule to be applied on an account-by-account basis, but did not think our clarification was necessary. We urge the IRS to clarify the rule, in light of the lingering uncertainty.

Best regards,

A handwritten signature in black ink, appearing to read "Steven M. Rosenthal". The signature is stylized and written over the printed name below it.

Steven M. Rosenthal

cc: Stevie D. Conlon, Wolters Kluwer Financial Services
Dale Collinson, KPMG, LLP
Jeanne Ross, U.S. Department of Treasury