Comments
Regarding “Pre-Opinion Opinions” Relating to Corporate Tax Shelter Items

The views expressed herein represent the position of the Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

The Section has considered the role of so-called “pre-opinion opinions” prepared for use by persons promoting transactions or other arrangements that may qualify as corporate tax shelters. (A “pre-opinion opinion” can be defined as written legal advice that is prepared at the request of the promoter or distributor of a corporate tax shelter and that is used, directly or indirectly, in marketing the shelter privately rather than through a public offering.)

A pre-opinion opinion may suggest that the contemplated tax treatment of a corporate tax shelter item is “more likely than not” to be upheld, or it may evaluate the contemplated tax treatment of the item without expressing that particular level of confidence. Because a pre-opinion opinion is, in any event, not prepared for the purpose of providing penalty protection to a taxpayer considering implementation of the shelter, it invariably will not meet the standards required for penalty protection opinions.

Nevertheless, an interested taxpayer reviewing a pre-opinion opinion may believe sufficient factual and legal analysis has been performed with respect to the shelter to satisfy penalty protection requirements when in fact such analysis has not been performed, or that the pre-opinion opinion would provide penalty protection when in fact it would not. The promoter
may even encourage the taxpayer to believe that the analysis contained in a pre-opinion opinion satisfies the requirements for penalty protection when in fact it does not.

We believe these concerns justify a special set of rules for practitioners preparing such opinions. In order to ensure that the significance and limitations of a pre-opinion opinion are not misunderstood, we recommend that the practitioner preparing a pre-opinion opinion with respect to an entity, plan or other arrangement that could give rise to a corporate tax shelter item (as defined in Treas. Reg. Sec. 1.6662-4(g)) be required to place a “disclaimer legend” on the document or else be held to the same standards that are imposed on a practitioner preparing a “more likely than not” opinion for the express purpose of providing penalty protection to a client with respect to a corporate tax shelter item. (See proposed new Sec. 10.35 of Circular 230 for an articulation of the standards we believe should be met by practitioners preparing “more likely than not” opinions that are intended to provide a corporate taxpayer with penalty protection regarding the tax treatment of a corporate tax shelter item.)

Specifically, with respect to pre-opinion opinions, we recommend the inclusion of new Sec. 10.36 in Circular 230, to read as follows:

Sec. 10.36. Advice not part of public offering that is prepared to assist a taxpayer in evaluating a corporate tax shelter.

Advice prepared at the request of a client for the purpose of assisting another person (but not the public generally) in evaluating the likely tax treatment of an entity, plan or other arrangement that could give rise to a corporate tax shelter item (as defined in Treas. Reg. Sec. 1.6662-4(g)) shall be subject to the same standards that apply to “more likely than not” opinions prepared for the express purpose of providing penalty protection to a corporate taxpayer reporting such an item on its return, unless the advice contains the following legend:
1. The conclusions expressed in this document may be based on certain factual assumptions and may not reflect adequate due diligence with respect to facts material to the conclusions expressed. To the extent the actual facts are different, the conclusions expressed may be incorrect or may not be sound.

2. This document may not be used as a basis for invoking the “reasonable belief” requirements of Treas. Reg. Sec. 1.6662-4(g)(4) or the “reasonable cause” requirements of Treas. Reg. Sec. 1.6664-4(c) and Treas. Reg. Sec. 1.6664-4(e) in order to avoid penalties, or otherwise to obtain relief from penalties under the Internal Revenue Code.

3. This document has been provided to [name of tax professional’s client] and may be relied on only by [name of client]. It may not be circulated, quoted, or otherwise disseminated without including the foregoing limitations.

For requirements relating to advice regarding tax shelter items that is to appear in or be referred to in public offering materials or is to be used or referred to in connection with public sales promotion efforts, see Section 10.33.