Tax Return Disclosures: What Is 'Adequate' and Why It Matters

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In this article, Wood and Ball discuss what it means to disclose, when and how to do it, and why it matters.

There is considerable talk in the tax world about disclosure. Tax return preparers and other tax advisers use the term. Occasionally, clients do too, although they may not understand how or why they (or their tax return preparers) are doing it.

Without knowing exactly why, most people do not want to "disclose" unless they must. Discretion and privacy sound better. They may not even know what disclosure is, but it *sounds* like extra work. Of course, disclosure also sounds like it exposes you to extra audit risk, which it can. But it can reduce risk in some cases.

What Is Disclosure?

Disclosure is more than the usual listing of income or expense. It is simply a type of extra explanation. How much extra varies considerably, not only in legal requirements but also in practice. But let us start by discussing why to disclose in the first place.

Sometimes the IRS says it is required. A prime example is when there is a debatable point about an item you are claiming. You might be claiming legal expenses for a fight with your siblings over an heirloom. Or you might be claiming that you had an ordinary loss rather than a capital one when some stock became worthless.

There are almost infinite circumstances in which disclosure could be required. The IRS wants disclosure if you do not have at least "substantial authority" for your tax position. For example, imagine you are writing off the cost of getting your law degree. Almost all case law is against that deduction because a law degree qualifies you for a new profession. So, if you claim it and you want to avoid penalties if the IRS disallows it, you must disclose it. You do so because your position is weak, and you are pointing out to the IRS that you are claiming it nevertheless.

Technically, you do not *have* to disclose. But disclosing is a way to get out of penalties, and it can also prevent the IRS from extending the usual three-year limitations period for assessment of income tax.[1] So, you help yourself by disclosing.

There is a penalty for a substantial understatement of income tax.[2] It is notable that the threshold is not high. An individual who understates his tax by more than 10 percent or $5,000, whichever is greater, may end up with this penalty.[3] However, one way to avoid or reduce the penalty is to adequately disclose the relevant facts affecting the item's tax treatment, if you have at least a reasonable basis for your tax position.[4]

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[1]When a taxpayer omits more than 25 percent of the gross income from his return, section 6501(e) extends the three-year statute of limitations period on assessment to six years. However, in determining the amount of gross income omitted from a return, "there shall not be taken into account any amount which is omitted from gross income stated in the return if such amount is disclosed in the return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature and amount of such item." Section 6501(e)(1)(B)(iii).

[2]Section 6662(b)(2).

[3]Section 6662(d)(1)(A). The substantial understatement penalty also applies to a corporation, other than S corporation or personal holding company, that understates its tax by the lesser of 10 percent or $10 million. Section 6662(d)(1)(B).

[4]Section 6662(d)(2)(B)(ii). Also, taxpayers hoping to avoid the substantial understatement must also maintain adequate books and records or be able to substantiate items properly. Reg. section 1.6662-4(e)(2)(iii). Adequate disclosure does not reduce or avoid the substantial understatement penalty when an item is attributable to a tax shelter. Reg. section 1.6662-4(e)(2)(ii).

How to Disclose

How do you disclose for section 6662(d)'s substantial understatement penalty? The classic way, which the IRS clearly prefers, is by form. There are two disclosure forms, Form 8275 and Form 8275-R.[5]

We can dispense with Form 8275-R because we have never filed one; that form is for positions that contradict the law. If you need to file a Form 8275-R, get some professional advice, possibly from more than one source. Form 8275 (without the R) is another matter. These are common forms, and we have filed and seen hundreds of them filed.

Most tax returns attaching Form 8275 are not audited; it does not automatically trigger an audit. But how much detail to provide is another matter. In the hundreds of these forms we have been asked to review, rarely have we not cut down what the taxpayer or tax return preparer is proposing to say.

Some people go on for pages on Form 8275, and even send attachments. We have seen many proposed Forms 8275 that are long-winded arguments about the law — in all capital letters — citing many cases. That is not appropriate material for a disclosure, nor are attachments. We have seen proposed Forms 8275 that attach full legal agreements or excerpts. If the IRS wants your legal settlement agreement or purchase contract, the IRS will ask for it.

In short, all ways of going overboard in a disclosure seem unwise. You are required to disclose *enough* detail to tell the IRS what you are doing.[6] But keep it short and succinct.

You can avoid the penalty if you had "substantial authority" or if (1) the relevant facts affecting the item's tax treatment are *adequately disclosed in the return or in a statement attached to the return*, and (2) there is a reasonable basis for the tax treatment.[7]

Just how you should go about making an adequate disclosure is addressed in the Treasury regulations. Reg. section 1.6662-4(f) states that:

> Method of making adequate disclosure — (1) *Disclosure statement.* Disclosure is adequate with respect to an item (or group of similar items, such as amounts paid or incurred for supplies by a taxpayer engaged in business) or a position on a return if the disclosure is made on a properly completed form attached to the return or to a qualified amended return (as defined in section 1.6664-2(c)(3)) for the taxable year. In the case of an item or position other than one that is contrary to a regulation, disclosure must be made on Form 8275 (Disclosure Statement); in the case of a position contrary to a regulation, disclosure must be made on Form 8275-R (Regulation Disclosure Statement).
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> (2) *Disclosure on return. The Commissioner may by annual revenue procedure (or otherwise) prescribe the circumstances under which disclosure of information on a return (or qualified amended return) in accordance with applicable forms and instructions is adequate. If the revenue procedure does not include an item, disclosure is adequate with respect to that item only if made on a properly completed Form 8275 or 8275-R, as appropriate, attached to the return for the year or to a qualified amended return.*[8]

Form 8275 or White Paper?

Can you omit Form 8275 and instead disclose in a footnote to your return? The answer depends. According to the IRS, Form 8275 is required to avoid the substantial understatement penalty unless the item is listed as an exception in Rev. Proc. 2016-13.[9]

First, let us define what a white paper disclosure might be. Suppose there is a Form 1099 reporting a personal physical injury legal settlement, but the taxpayer claims the settlement is not income.

Let's say the taxpayer has pictures and medical expenses to prove that he had physical injuries, and so the only problem is the Form 1099. Line 21 to Form 1040 might report zero, and "see Statement 1." Statement 1 might say:

Form 1099-MISC from X for legal settlement	$100,000
Less amount excludable for physical injuries under section 104	-$100,000
Net to line 21:	$0

That seems clear and concise. Yet Rev. Proc. 2016-13 lists some things the IRS says must be disclosed on Form 8275. But some things can be disclosed on the tax return itself or on a statement that is not the form. Those include medical, dental, and some trade or business expenses.[10]

If your item is not listed in Rev. Proc. 2016-13, it and the regulations indicate that under section 6662(d)(2) you must file Form 8275. But only the IRS is saying that, not the courts.

However, the IRS's preference for Form 8275 appears to be supported by recent cases. Several cases rely on reg. section 1.6662-4(f)(2) in holding that a taxpayer has *not* made an adequate disclosure

[5]Reg. section 1.6662-4(f)(1).
[6]*Schirmer v. Commissioner*, 89 T.C. 277, 285-286 (1987).
[7]Section 6662(d)(2)(B).
[8]Reg. section 1.6662-4 (emphasis added).
[9]2016-4 IRB 290; reg. section 1.6662-4(f).
[10]*See* Rev. Proc. 2016-13, section 4.02(1).

if he has not filed Form 8275. There are arguments, however, that a white paper disclosure is still acceptable.[11]

Indeed, in practice whether an item has been adequately disclosed appears to be decided on an item-by-item basis. For example, when a taxpayer states that she is excluding a payment under section 104(a)(2), it might be sufficient to disclose in a footnote on a tax return. But it might not be.

For example, if there is precedent holding that a specific item can be disclosed only on Form 8275 or Form 8275-R, courts are more likely to hold that the disclosure of that specific item in a tax return is inadequate. Nevertheless, in many of those published cases, it also appears that the taxpayers failed to prove that they had a reasonable basis.

It does not matter how fully you disclose something if you are unable to show that you had a reasonable basis (or a stronger position) for claiming the item. After all, to avoid the substantial understatement penalty, a reasonable basis is the other element you must meet to have made an adequate disclosure.[12] Notably, in many cases, the reasonable cause and good-faith exception is used to determine whether a taxpayer can avoid the substantial understatement penalty, instead of the reasonable basis and adequate disclosure exception.

After Rev. Proc. 2010-15,[13] every revenue procedure that has identified the circumstances under which there are adequate disclosures to avoid section 6662's substantial understatement accuracy-related penalty included the following statement (or similar language):

> If this *revenue procedure does not include an item, disclosure is adequate with respect to that item only if made on a properly completed Form 8275 or 8275-R*, as appropriate, attached to the return for the year or to a qualified amended return.[14]

Before that language was added, several cases suggested that an adequate disclosure could be satisfied either by disclosure in a *statement attached to a return*, or by *disclosure on a return* as stated in section 6662(d)(2)(B).[15] When a taxpayer did not attach a statement to his tax return, courts would ask whether the taxpayer adequately disclosed an item or position on his return.[16] To answer that question, courts presumably would look to Treasury regulations.

The regulations stated that Treasury would prescribe regulations for circumstances in which disclosure on a return was adequate.[17] If the Treasury regulations did not list a controversy or form that constituted adequate disclosure, the taxpayer would not satisfy the requirements of the revenue procedure. Despite the taxpayer's failure to meet

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[11]*See* S. Rep. No. 494, at 273-274 (1982) (explaining the adequate disclosure exception) ("An item is disclosed if it is disclosed in such a way as to apprise the secretary of the nature of the controversy surrounding the item and amount of such item. The committee bill provides Broad regulatory authority to permit the secretary to prescribe the form of disclosure. However, the committee intends that the secretary shall in no event require disclosure of accountant's work papers. Instead, disclosure will be made if the taxpayer discloses facts sufficient to enable the internal revenue service to identify the potential controversy, if it analyzed that information. For example, if a taxpayer has only a reasonable basis that an amount received was a business gift and therefore not includable in income, he may avoid a penalty by attaching a readily identifiable statement to his tax return disclosing the amounts received and the name and business relationship of the payor. Also, a taxpayer taking a bad debt deduction in a particular year, when there is a question as to the correct year in which the loss is allowable, could avoid the penalty by disclosing the issue to the secretary.").

[12]Section 6662(d)(2)(B)(ii).

[13]2010-7 IRB 404.

[14]Rev. Proc. 2016-13 (emphasis added); *see* IRS, "Instructions for Form 8275" ("Unless provided otherwise in the General Instructions above, your disclosure will not be considered accurate unless the information described above is provided using Form 8275. For example, your disclosure will not be considered adequate if you attach a copy of an acquisition agreement to your tax return to disclose the issues involved in determining the basis of certain acquired assets. If Form 8275 is not completed and attached to the return, the disclosure will not be considered valid even if the information described above is provided using another method, such as a different form or an attached letter."); Alan J. Tarr and Pamela Jensen Drucker, "Civil Tax Penalties," 634-3rd T.M., at section IV.E.4 (2016) ("Under the regulations, a disclosure is adequate only if: it is made on a properly completed and filed Form 8275 (Disclosure Statement), or, in the case of a position contrary to a regulation, Form 8275-R (Regulation Disclosure Statement); or it is disclosed on a return in accordance with an annual revenue procedure addressing return disclosure."); *cf.* Rev. Proc. 94-69, 1994-2 C.B. 804 (predecessor to Rev. Proc. 2016-13) ("Sections 1.6662-3(c) and 1.6662-4(f) provide the methods for making adequate disclosure for purposes of the (1) penalty for negligence or disregard of rules or regulations, and (2) the substantial understatement penalty, respectively. *These methods include* attaching a properly completed Form 8275, Disclosure Statement, to an original return or to a qualified amended return in the case of an item or position other than one that is contrary to a regulation. In the case of a position contrary to a regulation, disclosure must be made on Form 8275-R (Regulation Disclosure Statement).").

[15]*Recovery Group Inc. v. Commissioner*, T.C. Memo. 2010-76, *aff'd*, 652 F.3d 122 (1st Cir. 2011) ("A taxpayer may adequately disclose by providing sufficient information on the return to enable the IRS to identify the potential controversy."); *Intertan Inc. v. Commissioner*, T.C. Memo. 2004-1, *aff'd*, 117 F. App'x 348 (5th Cir. 2004) ("Petitioner does not dispute respondent's position concerning petitioner's failure to attach Form 8275 to petitioner's 1993 return, but disputes respondent's position concerning the October 11, 1996 disclosure letter."); *Schirmer v. Commissioner*, 89 T.C. 277, 285-286 (1987), *acq.* AOD-CC-1989-004, 1989-1 C.B. 1 (Apr. 3, 1989).

[16]*Schirmer*, 89 T.C. 277, 285-286 (citing S. Rep. 97-494 at 274 (1982)).

[17]*Schirmer*, 89 T.C. 277, 285-286.

the requirements of the revenue procedure, a taxpayer could otherwise adequately disclose an item ''by providing on the return sufficient information to enable [the IRS] to identify the potential controversy involved.''[18]

Now, Treasury regulations indicate that the ''statement attached to a return'' exception under section 6662(d)(2) is in fact a form attached to a return, and that form is Form 8275 or Form 8275-R. Reg. section 1.6662-4(f) states:

> Method of making adequate disclosure — (1) *Disclosure statement. Disclosure is adequate* with respect to an item (or group of similar items, such as amounts paid or incurred for supplies by a taxpayer engaged in business) or a position on a return *if the disclosure is made on a properly completed form attached to the return or to a qualified amended return* (as defined in section 1.6664-2(c)(3)) for the taxable year. In the case of an item or position other than one that is contrary to a regulation, disclosure must be made on Form 8275 (Disclosure Statement); in the case of a position contrary to a regulation, disclosure must be made on Form 8275-R (Regulation Disclosure Statement). [Emphasis added.]

All of the above suggests that in the IRS's view, using Form 8275 or Form 8275-R is necessary in order to avoid the substantial understatement penalty, unless the item is listed as an exception in Rev. Proc. 2016-13.[19] Further, it appears that reg. section 1.6662-4(f) and Rev. Proc. 2016-13 preclude courts from considering whether a taxpayer made an adequate disclosure when he otherwise provided sufficient information to enable the IRS to identify a potential controversy.

That is further supported by recent cases that rely on reg. section 1.6662-4(f) in holding that a taxpayer has not made an adequate disclosure if she has not filed Form 8275 or Form 8275-R.[20] Does that really end the query? Perhaps not.

After all, in many of the published cases, it also appears that the taxpayers failed to prove that they had a reasonable basis for their positions.[21] That is the other element one must meet to come within the adequate disclosure exception. However, the courts might still consider whether a taxpayer made an adequate disclosure on an item-by-item basis.[22]

For example, consider *Sharp*.[23] In that case, the Tax Court held that the taxpayer could not meet the reasonable basis and adequate disclosure exception. The taxpayer did not have a reasonable basis for excluding income under section 104(a)(2).

In the findings of fact section of *Sharp*, the Tax Court notes:

> Petitioner received $70,000 of the settlement proceeds in 2010. Petitioner did not report this payment on her Federal income tax return for 2010. Rather, she attached a statement to her

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[18]*Id.*

[19]*See* Martin K. McMahon Jr., ''Recent Developments in Federal Income Taxation: The Year 2015,'' 18 *Fla. Tax Rev.* 275, 433 (2015-2016) (referring to Rev. Proc. 2015-16, the predecessor to Rev. Proc. 2016-13, as ''Updated instructions on how to rat yourself out.'').

[20]*Sampson v. Commissioner*, T.C. Memo. 2013-212 (citing *Vianello v. Commissioner*, T.C. Memo. 2010-17) (''If the annual revenue procedure does not permit the disclosure of an item on the face of the return, disclosure is adequate only if the disclosure is made on a properly completed Form 8275, Disclosure Statement, or Form 8275-R, Regulation Disclosure Statement, attached to the taxpayer's return for the year the disclosure applies. *See* sec. 1.6662-4(f), Income Tax Regs.'').

[21]*Gardner v. Commissioner*, T.C. Memo. 2014-148 (''We note that petitioners did not have a reasonable basis for the expenses they reported from the cattle operation. Respondent argues that under section 1.6662-4(f)(2), Income Tax Regs., for the disclosure to be adequate, petitioners were required to make the disclosure on Form 8275, Disclosure Statement, or Form 8275-R, Regulation Disclosure Statement. Petitioners did not attach Forms 8275 or Forms 8275-R to their returns for the years at issue.''); *Vianello*, T.C. Memo. 2010-17 (''Petitioners argue that they adequately disclosed the relevant information in a footnote to Schedule C and had a reasonable basis for their position. Adequate disclosure generally requires the inclusion of Form 8275, Disclosure Statement, with the return. See sec. 1.6662-4(f), Income Tax Regs. Petitioners did not include that form. Moreover, reasonable basis 'is a relatively high standard of tax reporting, that is, significantly higher than not frivolous or not patently improper. The reasonable basis standard is not satisfied by a return position that is merely arguable or that is merely a colorable claim.' Sec. 1.6662-3(b)(3), Income Tax Regs. Thus, we find petitioners did not have a reasonable basis for their tax treatment.''); *see Prough v. Commissioner*, T.C. Memo. 2010-20 (finding taxpayers' disclosure inadequate when no Form 8275 or Form 8275-R was filed, and inferring that taxpayers did not have a reasonable basis for position) (''Petitioners argue that they should be absolved from the penalty because they had reasonable cause for failing to report the entire amount as taxable. We disagree. Nationwide informed petitioners that the distributions did not qualify as substantially equal periodic payments exempt from the section 72(t) additional tax and the Jefferson National withdrawal request specifically indicated that the distribution was subject to section 72(t). Moreover, the 1099-Rs issued by Jefferson National and Nationwide indicated that all the distributions were early distributions for which no exception to the additional tax applied.'').

[22]H.R. Rep. 101-247, at 1393 (1989) (''The committee believes that it is appropriate for the courts to review the determination of the accuracy-related penalties by the same general standard applicable to their review of the additional taxes that the IRS determines are owed. The committee believes that providing greater scope for judicial review of IRS determinations of these penalties will lead to greater fairness of the penalty structure and minimize inappropriate determinations of these penalties.'').

[23]*Sharp v. Commissioner*, T.C. Memo. 2013-290.

> return on the advice of her attorney explaining that she was excluding the settlement proceeds from her gross income under section 104(a)(2).

Then the Tax Court mentions in a footnote: ''The statement was not provided on Form 8275, Disclosure Statement, which is the form the Secretary prescribes.'' Thus, it is unclear whether the Tax Court *would have* held against the taxpayer based on the lack of a Form 8275 if the taxpayer had a reasonable basis for excluding her income under section 104(a)(2).

High[24] is to the same effect. In *High*, the Tax Court held the taxpayer was subject to the substantial understatement penalty after rejecting the taxpayer's claim that amounts reported on Form 1099 were excludable under section 104(a)(2). Yet in *High*, the Tax Court did not mention Forms 8275 or 8275-R when it discussed whether the taxpayer's position was adequately disclosed. Instead, the Tax Court dismissed the taxpayer's claim. The court said the item was not disclosed ''in the return.''[25]

One might also point to the fact that the Tax Court has been much more explicit regarding other items. For example, in *Gardner*[26] the Tax Court found that the taxpayers lacked a reasonable basis when they deducted expenses from a cattle operation under section 162. The IRS and Tax Court agreed that it was not for profit under section 183. Concerning disclosure, the Tax Court remarked:

> Petitioners argue that they adequately disclosed the relevant facts of the income and expenses associated with the cattle operation and that they had a reasonable basis for the tax treatment of the income and expenses. Therefore, they contend that they should not be liable for the accuracy-related penalty under section 6662(d)(2)(B)(ii).
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> We note that petitioners did not have a reasonable basis for the expenses they reported from the cattle operation.
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> Respondent argues that under section 1.6662-4(f)(2), Income Tax Regs., for the disclosure to be adequate, petitioners were required to make the disclosure on Form 8275, Disclosure Statement, or Form 8275-R, Regulation Disclosure Statement. Petitioners did not attach Forms 8275 or Forms 8275-R to their returns for the years at issue.
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> Accordingly, we hold that petitioners are liable for the accuracy-related penalties under section 6662(a) for their underpayments of tax for the years at issue.[27]

Similarly, in *Campbell*[28] the Tax Court found that the taxpayer did not have a reasonable basis for excluding his *qui tam* payment from his gross income. In discussing the reasonable basis and adequate disclosure exception, the Tax Court remarked:

> Petitioner further argues that the underpayment should be reduced because of adequate disclosure and a showing of reasonable basis. Sec. 6662(d)(2)(B)(ii). Adequate disclosure may be made either in a statement attached to the return or on the return. Sec. 1.6662-4(f), Income Tax Regs. *Disclosure generally must be made on Form 8275 unless otherwise permitted by applicable revenue procedure — in this case*, Rev. Proc. 2003-77, 2003-2 C.B. 964. Sec. 1.6662-4(f)(2), Income Tax Regs.
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> Petitioner included the $5.25 million net proceeds of the *qui tam* payment as other income on page 1 of his return. *Qui tam* payments are not addressed in Rev. Proc. 2003-77, supra. Consequently, the method for adequately disclosing the taxability of a *qui tam* payment was by the filing of a Form 8275. Petitioner's Form 8275 did not disclose the $5.25 million net proceeds of the *qui tam* payment. Instead, the Form 8275 disclosed the $3.5 million attorney's fee payment. Accordingly, we conclude that petitioner did not adequately disclose the $5.25 million net proceeds of the *qui tam* payment.[29]

It is notable that the Tax Court issued its decision in *Campbell* before the IRS issued its harsher language in Rev. Proc. 2010-15. Perhaps for some items, such as income from *qui tam* actions that are obviously taxable, there are simply more stringent disclosure requirements. What the taxpayer is disclosing and whether it is highly aggressive seems to matter, as does the precise manner of the disclosure.

However, a taxpayer can also avoid an accuracy-related penalty using the reasonable cause and good-faith exception.[30] The reasonable cause and good-faith exception was enacted by Congress to

[24]*High v. Commissioner*, T.C. Summ. Op. 2011-36.

[25]The Tax Court also found that the taxpayer lacked reasonable cause. *High*, T.C. Summ. Op. 2011-36.

[26]*Gardner*, T.C. Memo. 2014-148.

[27]*Id.*

[28]*Campbell v. Commissioner*, 134 T.C. 20 (2010).

[29]*Campbell*, 134 T.C. at 31 (emphasis added).

[30]Section 6664(c); reg. section 1.6664-4; *see, e.g., Espinoza v. Commissioner*, T.C. Memo. 2010-53 (''However, once the Commissioner has met the burden of production, the burden of proof

(Footnote continued on next page.)

provide the IRS and courts with more leeway in determining when accuracy-related penalties are appropriate.[31] Therefore, the IRS and courts should be able to make an end run around the adequate disclosure requirement if they find that the taxpayer acted with reasonable cause and in good faith.

Whether a taxpayer has acted in good faith is decided on a case-by-case basis, taking all facts and circumstances into account.[32] In the past, the Tax Court has proclaimed that "'good faith' has no precise definition but means, among other things, (1) an honest belief and (2) the intent to perform all lawful obligations."[33] Good-faith reliance on the advice of a tax professional (who is independent and competent) may meet the good faith requirement.[34]

Some courts have even held that "an honest misunderstanding of fact or law that is reasonable in light of the experience, knowledge, and education of the taxpayer" meets the good-faith requirement.[35] However, in general, the most important factor in determining whether a taxpayer has acted with reasonable cause and good faith is "the extent of the taxpayer's effort to assess his proper tax liability."[36]

Conclusion

No one wants to highlight their tax positions needlessly, especially when those tax positions are aggressive. But often a disclosure is needed and should reduce rather than enhance the taxpayer's exposure. It is easy to get deep into the weeds about when disclosure is needed, what form or format to use, and what one can expect if one does or does not disclose.

Yet, of all the topics that could be discussed at greater length, perhaps the words themselves should be explored more fully. Despite the importance of adequate disclosures, many tax advisers may think of disclosure as an up or down decision. That can be a mistake. If the decision is to disclose, that should start an important dialogue about the precise extent and manner of the disclosure. ■

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remains with the taxpayer, including the burden of proving that the penalties are inappropriate because of reasonable cause or substantial authority.").

[31]H.R. Rep. 101-247, at 1393 (1989) (House Way and Means Committee commenting on the purpose of reasonable cause exception) ("The committee is concerned that the present-law accuracy-related penalties (particularly the penalty for substantial understatements of tax liability) have been determined too routinely and automatically by the IRS. The committee expects that enactment of standardized exception criterion will lead the IRS to consider fully whether imposition of these penalties is appropriate before determining these penalties. In addition, the committee has designed this standardized exception criterion to provide greater scope for judicial review of IRS determinations of these penalties. Under the waiver provision contained in present law, the Tax Court has held that it can overturn an IRS determination of the substantial understatement penalty on reasonable cause and good faith grounds only if the Tax Court finds that the IRS abused its discretion in asserting the penalty.").

[32]Reg. section 1.6664-4(b)(1); *Gardner*, T.C. Memo. 2014-148.

[33]*Gaston v. Commissioner*, T.C. Summ. Op. 2016-41 (citing *Sampson*, T.C. Memo. 2013-212).

[34]*Neonatology Associates PA v. Commissioner*, 115 T.C. 43, 99 (2000), *aff'd*, 299 F.3d 221 (3d Cir. 2002) ("In sum, for a taxpayer to rely reasonably upon advice so as possibly to negate a section 6662(a) accuracy-related penalty determined by the Commissioner, the taxpayer must prove by a preponderance of the evidence that the taxpayer meets each requirement of the following three-prong test: (1) The adviser was a competent professional who had sufficient expertise to justify reliance, (2) the taxpayer provided necessary and accurate information to the adviser, and (3) the taxpayer actually relied in good faith on the adviser's judgment.").

[35]*Higbee v. Commissioner*, 116 T.C. 438, 449 (2001).

[36]Reg. section 1.6664-4(b)(1); *Gaston*, T.C. Summ. Op. 2016-41.