

# MASSACHUSETTS ASSOCIATION OF PUBLIC ACCOUNTANTS 2011

November 21 – Westborough  
November 28 – Plymouth  
December 5 – Burlington

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# Agenda

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1. Voluntary Classification Settlement Program
2. “Tax Home” Implications
3. Mixed Use Travel
4. Accountable Plans
5. Economic Substance Doctrine

# Voluntary Classification Settlement Program

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- To prospectively treat independent contractors as employees
- Old Section 530 relief; only applied during audit
- New VCSP – outside of audit
- When treating workers or class of workers as independent contractors
- Eligibility
  - Consistently treated as independent contractors
  - Filed all 1099's
  - Not under IRS/DOL audit
- Form 8952

# Voluntary Classification Settlement Program

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- Cost & Rules
  - ▣ Penalty is 10% of employment taxes for past year
  - ▣ Employment taxes: FICA wages of 10.28%; Medicare wage tax of 3.24%
  - ▣ No interest assessed
  - ▣ SOL increased by 3 years
  
- Handouts/Reference
  - ▣ Form 8952 & instructions enclosed
  - ▣ IRS Announcement 2011- 64 (10/11/11)
  - ▣ IRS news release 2011- 95 (9/21/11)



# Voluntary Classification Settlement Program

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- Issues & Concerns
  - Should your client do it?
  - Exposure for non-tax liabilities?
  - Prior years for DOL, States, and employee suits
  - IRS and DOL have a “Memorandum of Understanding” to share information on misclassification issues; will VCSP information be shared?
  - Minimum wage, OT time, time and a half, blue laws violations, vacation, health insurance, retirement contributions, benefits, FICA/Medicare match
  - State unemployment tax and workers compensation
  - Mass Attorney General 3 factor test
    - Worker free from direction/control of company
    - Worker holds self out as IC, customarily engaged as IC
    - Worker provides a service outside of company’s usual business
  - Mass Attorney General penalties – triple damages!
  - Employee suits

# Tax Home Implications

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- Tax home is the primary place of business
- Travel to tax home not deductible
- Travel from tax home is deductible
- Overnight travel away from home
  - ▣ Okay if not indefinite employment duration
  - ▣ If indefinite, that becomes tax home
  - ▣ If greater than one year, its indefinite, i.e. tax home
  - ▣ Itinerant workers have no tax home

# Tax Home Implications

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- Office in Home for Employee
  - Meet with clients etc.
  - Administrative work and employer has no place to do this
  
- Telecommuting – State Issues
  - Can an employee avoid being subject to state tax where employer is located for days working from home?
  - New Hampshire/Massachusetts?
  - New York State?
  - Convenience test? Employer necessity test? Can that work be performed in employer's state?
  - Does Employer have an out of state bona fide office?



# Mixed Use Travel

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- No deduction for personal use
- Transportation
  - Trip must be primarily for business; depends on number of business vs. personal days
  - Exclude family members
- Lodging
  - Depends upon the work completed that day
- Meal
  - Only if it is a business meeting
- Miscellaneous/Direct Expenses
  - Internet fees, office expenses, fax, copying, FedEx, etc.

# Accountable Plans

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- Accounts for business expense reimbursement
- Need a written plan!
- Employee request to repay excess reimbursement within 120 days
- Exempt from income tax withholdings, FICA/Medicare
- No accountable plan: Subject to FICA/Medicare, deductible on Schedule A; subject to 2% floor
- W-2 box 12, code L for substantiated reimbursed expenses
- W-2 box 14 for unsubstantiated reimbursed expenses
- If taxable, also subject to FICA and Medicare tax on reimbursement
- Per diems – require substantiation to employer as well

# Economic Substance

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- For LMSB
- Tax benefits n/a if transaction does not have economic substance or lacks business purpose
- Economic substance exists if:
  - The transaction changes economic position
  - Substantial non-tax business purposes
- 6662(b)(6)
  - 20% penalty if disclosed transaction on underpaid tax
  - 40% penalty if undisclosed transaction on underpaid tax

# Economic Substance

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- The agent must get IRS' Director of Field Operations approval to review if the penalty should be investigated
- IRS agent to inform taxpayer under and if analyzing this possibility
- Look for:
  - ▣ Did client pay for this strategy?
  - ▣ Did client sign an NDA?
  - ▣ Is transaction “promoted” or sold by others?
  - ▣ Is transaction “highly structured?”
  - ▣ Are there some unnecessary steps in the transaction?
  - ▣ Does the transaction generate targeted tax benefits?
  - ▣ Does the transaction accelerate a loss of duplicate a deduction?

# QUESTIONS/ANSWERS

## *Panelists*

*Bill Philbrick*

*Jerry Lucente/Tammy Sizlo (IRS Audit)*

*Rich Sweeney (IRS Appeals)*

