

## ■ GUEST COMMENTARY

## How Voluntary Is The New VDC Program In New York State?

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As a matter of practice, under the previous voluntary disclosure compliance program in New York State, taxpayers disclosed their fact patterns and negotiated the terms of a disclosure agreement prior to voluntarily disclosing their identity. The former voluntary disclosure compliance program was truly voluntary in the sense that if a taxpayer could not agree on terms with the New York State Department of Taxation & Finance (the "Tax Department"), such a taxpayer was free to opt out of the process without "volunteering" his or her identity.

In technical services bureau memorandum number 6 of 2008 ("TSB-M-08(6)C") which discusses the new voluntary disclosure compliance program (the "VDC"), the Tax Department asserts its commitment to taxpayer confidentiality even if the taxpayer applies for entry into the VDC program but does not enter into the program. Although a technical services bureau memorandum does not have the weight of law, it does express the Tax Department's policy on important matters. Specifically TSB-M-08(6)C states:

If the taxpayer submits an application and a disclosure statement but then chooses not to use the VDC program, or if it is determined by the department that the taxpayer is not eligible for the program, the department cannot use the disclosure against the taxpayer in any proceeding or share the information with any other agency.

Additionally on the same point TSB-M-08(6)C states:

The VDC law and the Tax Department's policies are intended to encourage taxpayers to make full, honest, and complete disclosures without fear that those disclosures may later be used against them. Under the VDC law, taxpayer disclosures (includ-

ing all information and returns submitted by the taxpayer under the program) are confidential. They cannot be used by the department against the taxpayer or shared with any other agency, including the IRS, except where the taxpayer intentionally violates a compliance agreement under the VDC program.

Absent such a violation by the taxpayer, the department will not use the disclosures against the taxpayer or share them with department personnel outside the VDC program. The department may, however, audit and examine the returns filed by the taxpayer as part of the VDC program.

If a taxpayer applies but does not enter the VDC program, the information provided by the taxpayer cannot be used by the department for any purpose and will not be shared with any other agency.

What is troubling is that in the last paragraph quoted above from TSB-M-08 (6)C does not state that if a taxpayer applies but does not enter the VDC program, the identity of the taxpayer will not be shared with any department personnel outside the VDC program. Such an assurance is specifically made by the Tax Department in the preceding paragraph with respect to taxpayers who enter the VDC program and do not violate the terms of the compliance agreement. Without a similar assurance, can a taxpayer rest assured that their identity will not be revealed to audit personnel who work outside of the VDC program? Will such taxpayers show up on a short list of people or entities to be audited? The assurance that the Tax Department cannot use information provided by a taxpayer who applies but does not enter the VDC program falls short of the mark.

A commitment to safeguard a taxpayer's identity from audit personnel working outside of the VDC program would preserve a significant taxpayer enticement existing under the former voluntary disclosure process. While taxpayers should always do the right thing and pay their taxes, the very existence of a VDC program is based on the realization that it does not always happen. With this in mind, it is foreseeable that some taxpayers will not take advantage of the VDC program because they must disclose their identities before they can execute a voluntary disclosure agreement with the Tax Department. That is a shame given that this situation could easily be fixed. ♦