

The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View From Within

Mitchell Rogovin (1931–1996)
Chief Counsel, Internal Revenue Service 1965–1966¹

Donald L. Korb
Chief Counsel, Internal Revenue Service 2004–²

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1. This article is a revision of Mitchell Rogovin's monograph *The Four R's: Regulations, Rulings, Reliance, and Retroactivity: A View from Within*, which was originally published by Commerce Clearing House, Inc., in *Federal Tax Guide Reports*, Vol. 49, No. 8 (December 3, 1965) and reprinted by the Government Printing Office as Document 6062 (4-1970).

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I. INTRODUCTION

Over forty years have passed since then-Chief Counsel Mitchell Rogovin published his original *The Four R's* monograph, and several generations of tax practitioners have looked to it as a guide in interpreting the value of the communications issued by the Internal Revenue Service. As the cliché goes, much has changed in those years, but much has remained the same.

Those who are familiar with the prior version of this monograph will find that this revision shares the same structure, focusing on describing the kinds of guidance the Internal Revenue Service issues to the public and explaining the reliance the public can place on each type of guidance. Now, as then, tax litigation is not a very satisfactory means for either taxpayers or the Government to resolve issues about the meaning and application of the Internal Revenue Code, and, thus, it continues to be vital that the Service use guidance to inform taxpayers of the positions it takes and that it is clear whether taxpayers can rely on those positions in planning their transactions.

Just as in 1965, the Service continues to use the publication of regulations and revenue rulings as its principal means of giving taxpayers guidance in interpreting the Internal Revenue Code. Today, however, the Service oftentimes issues substantive guidance in the form of Internal Revenue Bulletin Announcements and Notices, which are published with the intent that taxpayers can rely upon them as statements of Service position. With the advent of the internet and the growth of the tax press, more information

than ever is available to tax practitioners concerning how the Office of Chief Counsel analyzes the provisions of the Code. However, the sheer volume of guidance available to tax practitioners can only be properly understood if the reader has a comprehensive understanding of how that the guidance was developed and whether it can be relied upon.

This is particularly true of the new kinds of work products that have made their way into the public domain over the past fifteen years or so: Chief Counsel Notices, Chief Counsel Advice, Associate Chief Counsel Memoranda, and the soon-to-be-released informal email advice. These work products are not drafted with the intent that taxpayers may rely upon their analyses or conclusions as statements of Service positions. Some of these work products, however, do represent the collective and considered view of the Associate Chief Counsel Office in the Office of Chief Counsel that is responsible for interpreting the particular provisions of the Code. While taxpayers and their advisers may find these work products informative about the thinking of that particular Associate Chief Counsel Office and the likely response of the Service to a particular situation, thoughtful tax practitioners and well-advised taxpayers understand that they cannot be assured that the Service will continue to maintain that position. Some of the other work products may represent only the views of a particular Office of Chief Counsel attorney and/or that attorney's reviewer, while still others may represent a reaction to a time-sensitive problem that was based on limited information and facts, which may not even be apparent from the publicly available work product. Needless to say, these kinds of work products have a very limited value in predicting the Service's future responses to similar situations, and taxpayers and their advisers should be extremely careful about drawing any conclusions from them.

What all of this means is that Mr. Rogovin's caution at the end of the introduction to his original *The Four R's* monograph remains true today:

In utilizing the information offered by the Service to the taxpayer, it is important for the taxpayer to keep in mind that the medium through which the information is communicated to him has been carefully chosen by the Service and represents a balance between the taxpayer's needs for information and the Service's needs for reasonable latitude in administering the tax law.

Wise taxpayers and their advisors should keep this caution in mind as they work with the various forms of guidance available to them.

II. REGULATIONS PROGRAM

The regulations³ constitute the primary source for guidance as to the Service's position regarding the interpretation of the Internal Revenue Code.⁴

Regulations may be broadly categorized into two types. First is the "legislative regulation." Under the Code, Congress delegates to the Secretary of the Treasury specific authority in certain Code sections to promulgate detailed rules. The best example of this is, as it was in 1965, the power given to the Secretary under the consolidated return sections.⁵

The second and broader category is what may be termed "interpretative regulations."⁶ They contain the Service's interpretation

3. The Treasury Department has been issuing income tax regulations since 1914. See U.S. Treas. Reg. 33 (1914); these original regulations consisted of a total of 170 pages. The authority to issue regulations is given to the Secretary of the Treasury or his delegate in some cases under specific sections of the Code and in general under I.R.C. § 7805(a) (2000). Unless otherwise stated, references to the Code refer to the Internal Revenue Code of 1986, as amended.

4. The ultimate authority to promulgate regulations is vested in the Secretary of the Treasury. Treas. Reg. § 601.601(a) (1987). To assist him in this function, the Offices of the Associate Chief Counsel in the Office of Chief Counsel are responsible for drafting regulations. See *id.*; see also I.R.S., Chief Counsel Directives Manual 32.1.1.1(4) (Aug. 11, 2004) [hereinafter C.C.D.M.], available at <http://www.irs.gov/irm/index.html> (follow Part 32 hyperlink). Further assistance is provided by the Office of the Assistant Secretary for Tax Policy in the Treasury Department, which reviews all regulations to ensure that they are consistent with the Government's overall tax policy. The Assistant Secretary of the Treasury (Tax Policy) is the final signatory in the regulations approval process. See Treasury Order 111-01 (Mar. 16, 1981), available at <http://www.ustreas.gov/regs/to111-01.htm>; C.C.D.M., *supra*, 32.1.1.3.12(1), 32.1.6.8.4(1) (Aug. 11, 2004); MICHAEL I. SALTZMAN, IRS PRACTICE AND PROCEDURE ¶ 3.02[2] (2007).

5. I.R.C. § 1502 (Supp. V 2005). One organization estimates that there are more than 550 individual provisions of the Code that specifically grant authority to promulgate regulations to effectuate the purposes of a particular section, to apply the provisions of a particular section to a particular transaction, or to implement concepts that are expressed in general terms. See New York State Bar Ass'n Tax Section, *Report on Legislative Grants of Regulatory Authority* 2-6 (Nov. 3, 2006), http://www.nysba.org/Content/ContentGroups?Section_Information1/Tax_Section_Reports/1121rpt.pdf.

6. There is a third general class of regulations usually referred to as "procedural regulations." See, e.g., I.R.C. § 706(d) (2000) ("if during any taxable year of the partnership there is a change in any partner's interest in the partnership, each partner's distributive share of any item of income, gain, loss, deduction, or credit of the partnership for such taxable year shall be determined by the use of any method prescribed by the Secretary by regulations . . ."). Procedural regulations are generally considered to be of binding effect. See, e.g., *Boulez v. Comm'r*, 810 F.2d 209, 213-14 (D.C. Cir. 1987) (procedural offer and

of the various sections of the Code and serve to guide the personnel of the Service as well as the taxpaying public in the application of the law.⁷

Legal Effect of Regulations

Historically, distinctions were drawn between the legal effect of legislative regulations and interpretive regulations. It has been broadly stated that legislative regulations were given the force and effect of law⁸ while interpretive regulations were not.⁹ The Supreme Court, however, has addressed the binding legal effect of regulations without regard to whether they were legislative or interpretive. In *United States v. Mead Corp.*,¹⁰ the Supreme Court observed that Congress

may not have expressly delegated authority or responsibility to implement a particular [statutory] provision or fill a par-

compromise regulations at Treas. Reg. § 301.7122-1(d) (1986) requiring written offer and acceptance entitled to a "strong presumption of validity").

Procedural regulations relating to particular sections of the Code must be distinguished from the Statement of Procedural Rules, 26 C.F.R. Part 601, that are procedural rules promulgated by the Commissioner of Internal Revenue pursuant to the authority granted under 5 U.S.C. § 301 (2000) ("The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use and preservation of its records, papers, and property."). The purpose of these rules is to outline both for public consumption and internal guidance those rules which control the operation of the Internal Revenue Service in carrying out its prime function of administering and enforcing the internal revenue laws. See *Luhring v. Glotzbach*, 304 F.2d 560, 564 n.2 (4th Cir. 1962). See also *Flynn v. Comm'r*, 269 F.3d 1064, 1072 (D.C. Cir. 2001) (Part 601 rules "serve merely as guidelines for conducting the internal affairs of the agency"); *Estate of Jones v. Comm'r*, 795 F.2d 566, 571 (6th Cir. 1986) ("the circuits have consistently held that the Internal Revenue's Statement of Procedural Rules is only directory and not mandatory"); *Ward v. Comm'r*, 784 F.2d 1424, 1431 (9th Cir. 1986) (procedural rules directory, not mandatory); *United States v. Horne*, 714 F.2d 206, 207 (1st Cir. 1983) (procedural rules set forth in 26 C.F.R. § 610.101 "were not designed to protect the constitutional rights of taxpayers"); *Einhorn v. DeWitt*, 618 F.2d 347, 350 (5th Cir. 1980) (procedural rules' purpose "to govern the internal affairs of the Internal Revenue Service"); *Rosenberg v. Comm'r*, 450 F.2d 529, 532-33 (10th Cir. 1971) (procedural rules directory, not mandatory).

7. The notice and comment provisions of the Administrative Procedure Act do not apply to interpretive regulations. 5 U.S.C. § 553(b)(A) (2000). Nevertheless, the Treasury Department issues interpretive regulations under procedures similar to those applicable to legislative regulations following the APA's procedures for notice and comment rulemaking. See, e.g., *Banker's Life & Cas. Co. v. United States*, 142 F.3d 973, 978 (7th Cir. 1998); SALTZMAN, *supra* note 4, ¶ 3.02(2).

8. See *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) (valid administrative rules legislative in nature have the force and effect of law).

9. See, e.g., *Bureau of Alcohol, Tobacco, and Firearms v. Fed. Labor Relations Auth.*, 464 U.S. 89, 97-98 (1983).

10. 533 U.S. 218 (2001).

ticular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which "Congress did not actually have an intent" as to a particular result.¹¹

More recently, the Supreme Court reiterated that an agency's authority to administer a congressionally created program "necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress," and when an agency fills such a gap reasonably, and in accordance with other applicable requirements, the courts accept the result as legally binding.¹²

In any event, the Supreme Court has consistently ruled with regard to both interpretive and legislative Treasury Regulations that courts must defer to and uphold the agency's regulatory interpretation so long as it is reasonable.¹³

Reliance

Treasury regulations that are final or temporary may be relied on by taxpayers in planning transactions in the same manner in which they may rely upon a provision of the Code. In fact, one

11. *Mead*, 533 U.S. at 229 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984)).

12. *Long Island Care at Home, Ltd., v. Coke*, 127 S. Ct. 2339, 2345-46 (2007) (quoting *Chevron*, 467 U.S. at 843, and citing *Mead*, 533 U.S. at 227). Applicable requirements, such as procedural requirements, include Federal Register publication of certain proposed rules. Other applicable requirements are providing the opportunity to submit oral or written comments on proposed rules and generally not publishing substantive rules less than 30 days before their effective dates. *See generally* 5 U.S.C. § 553 (2000).

13. *Boeing Co. v. United States*, 537 U.S. 437, 447-450 (2003) ("Even if we regard the challenged regulation as interpretive because it was promulgated under § 7805(a)'s general rulemaking grant rather than pursuant to a specific grant of authority, we must still treat the regulation with deference."); *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 219 (2001) ("[W]e defer to the Commissioner's regulations as long as they implement the congressional mandate in some reasonable manner. We do this because Congress has delegated to the [Commissioner], not to the courts, the task of prescribing all needful rules and regulations for the enforcement of the Internal Revenue Code. This delegation helps guarantee that the rules will be written by masters of the subject . . . who will be responsible for putting the rules into effect.") (internal citations and quotation marks omitted; alteration in original)); *Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 560-61 (1991) ("Because Congress has delegated to the Commissioner the power to promulgate "all needful rules and regulations for the enforcement of [the Internal Revenue Code]," 26 U.S.C. § 7805(a), we must defer to his regulatory interpretations of the Code so long as they are reasonable.").

important purpose for issuing regulations is to give the public knowledge of the Service's position with respect to particular Code sections.¹⁴ However, taxpayers generally may not rely on proposed regulations for planning purposes, except if there are no applicable final or temporary regulations in force and there is an express statement in the proposed regulations that taxpayers may rely on them currently. If there are applicable final or temporary regulations in force, taxpayers may only rely on proposed regulations for planning purposes in the limited circumstances that the proposed regulations contain an express statement permitting taxpayers to rely on them currently, notwithstanding the existence of the final or temporary regulations.¹⁵

Retroactivity

Before 1996, all Treasury Regulations were assumed to have retroactive effect unless the Secretary specifically noted otherwise.¹⁶ Amended by the Taxpayer Bill of Rights 2,¹⁷ the Code now generally prohibits retroactive application of any temporary, proposed, or final regulation.¹⁸ Exceptions to the general rule against retroactive application include regulations issued: (1) within 18 months of enactment of the related statutory provision;¹⁹ (2) to

14. See H.R. REP. NO. 70-1882, at 22 (1928) (Conf. Rep.), reprinted in 1928 U.S.C.A.N. ("[I]t is believed that sound administration properly places upon the Government the responsibility and burden of interpreting the law and of prescribing regulations upon which taxpayers may rely . . ."); *Mutual Sav. Life Ins. Co. v. United States*, 488 F.2d 1142, 1145-46 (5th Cir. 1974) ("A taxpayer has the right to rely upon the Government's Regulations and their published illustrations. Treasury Regulations having the force and effect of law are binding on tax officials, as well as taxpayers." (citing *Pacific Nat'l Bank of Seattle v. Comm'r*, 91 F.2d 103 (9th Cir. 1937))).

15. See C.C.D.M., *supra* note 4, 32.1.1.2.2(2) (Aug. 11, 2004).

16. See I.R.C. § 7805(b) (1986), which read as follows: "(b) Retroactivity of regulations or rulings. The Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect."

17. Pub. L. No. 104-168, § 1101(a), 110 Stat. 1452, 1468-69 (1996).

18. Section 7805 of the Internal Revenue Code states:

Except as otherwise provided in this subsection, no temporary, proposed, or final regulation relating to the internal revenue laws shall apply to any taxable period ending before the earliest of the following dates:

(A) The date on which such regulation is filed with the Federal Register.

(B) In the case of any final regulation, the date on which any proposed or temporary regulation to which such final regulations relates was filed with the Federal Register.

(C) The date on which any notice substantially describing the expected contents of any temporary, proposed, or final regulation is issued to the public.

I.R.C. § 7805(b)(1) (2000).

19. *Id.* § 7805(b)(2).

prevent abuse;²⁰ (3) to correct procedural defects in the issuance of a prior regulation;²¹ (4) relating solely to internal Treasury Department policies, practices, or procedures;²² and (5) pursuant to an explicit legislative grant from Congress authorizing a retroactive effective date.²³ The Secretary also may permit any taxpayer to elect to apply any regulation before the statutory effective date.²⁴

Conclusions

The regulations are the most authoritative source for determining the meaning of the Code. They are binding upon the Service, and current administrative practice is to make all amendments or modifications of a regulation prospective except when such modification or revocation benefits the taxpayer, merely clarifies an existing regulation, or is to prevent abuse.²⁵

III. OTHER PUBLISHED GUIDANCE

Revenue Rulings

Definition

Revenue rulings are official interpretations by the Service, which are prepared in the Associate Chief Counsel Offices and published in the Internal Revenue Bulletin by the Service. Revenue rulings are compiled annually in the Cumulative Bulletin²⁶ and represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling.²⁷ They are intended to inform both the taxpayers and the personnel of the Service as to the Commissioner's position with respect to a par-

20. *Id.* § 7805(b)(3).

21. *Id.* § 7805(b)(4).

22. *Id.* § 7805(b)(5).

23. I.R.C. § 7805(b)(6) (2000).

24. *Id.* § 7805(b)(7).

25. See I.R.S. Chief Couns. Notice CC-2003-014 (May 8, 2003) (Chief Counsel litigating positions should be derived from, and consistent with, the Code and published guidance).

26. Treas. Reg. § 601.601(d)(2) (1987).

27. *Id.* § 601.601(d)(2)(i). "The conclusions expressed in Revenue Rulings will be directly responsive to and limited in scope by the pivotal facts stated in the Revenue Ruling. Also, the stated facts will be so technically oriented that field employees and taxpayers may clearly understand what was, and what was not, decided." Policy Statement 11-69, Internal Revenue Manual 1.2.16.1.11 (May 18, 1967) [hereinafter I.R.M.], available at <http://www.irs.gov/irm/index.html>. See also Introduction, 2008-1 I.R.B. (reprinted in all issues of the Internal Revenue Bulletin).

ticular issue thus ensuring that this issue will be handled uniformly throughout the country.²⁸

The published revenue ruling program tends to provide many of the same benefits as the letter ruling program.²⁹ The emphasis of the revenue ruling program is centered upon uniformity of interpretation, rather than on the problem of the individual taxpayer. By informing the taxpayers of the Service's position in a published ruling, the need for taxpayers to request a letter ruling on the same subject is eliminated.³⁰ This reduces the burden on the letter rulings program and, as a general rule, tends to reduce or even eliminate litigation.

At one time, the primary source for revenue rulings were letter rulings, and the Service selected for publication all letter rulings having substantial value as precedents. Now that letter rulings are publicly released, there is less need to convert letter rulings to revenue rulings. Nowadays, the Service does not usually initiate the publication of a revenue ruling in any area until the public or an operating division within the Service has demonstrated the need for guidance in an area by initiating litigation or requesting advice. The decision to prepare a revenue ruling is now part of the Service and Treasury Department's Priority Guidance Plan.³¹

28. Treas. Reg. § 601.601(d) (1987); C.C.D.M., *supra* note 4, 32.2.2 (Aug. 11, 2004).

29. The letter ruling program is discussed *infra* page 342 and following.

30. Practice does not always follow theory. See Rose, *The Rulings Program of the Internal Revenue Service*, 35 TAXES 907, 910 (1957), in which a former Chief Counsel stated "far too many rulings are requested today—unnecessary rulings where competent tax advisers know that there can be no successful challenge on audit." But see Taylor, *Tax Rulings: New Rules and Procedures*, N.Y.U. 21ST INST. ON FED. TAX. 69, 91 (1963) (suggesting that "it is always prudent if possible to obtain a private ruling where substantial sums are involved").

31. The Priority Guidance Plan (PGP) is a document developed jointly by the Service and the Treasury Department's Office of Tax Policy "on an annual basis to identify and prioritize the tax issues [to] be addressed in . . . published . . . guidance." I.R.S. Notice 2007-41, 2007-21 I.R.B. 1287 (2007). The process for selecting projects for inclusion on the Priority Guidance Plan involves soliciting, evaluating, and prioritizing proposals for guidance. Every year the Service invites suggestions from the public at large and the subject-matter experts within the Government (including those in the IRS operating divisions). See *id.* Also, the Office of Chief Counsel engages in an extensive dialogue regarding potential guidance projects with stakeholder groups, including professional organizations, industry associations, and taxpayer advocacy groups. Finally, recent legislative changes to the Internal Revenue Code are considered.

A number of considerations are then taken into account in evaluating a project for inclusion on the PGP. A project is considered high priority if recently enacted legislation mandates specific published guidance, or if guidance is necessary to implement a new statutory provision. A new statutory provision that is susceptible to more than one interpretation may merit a priority project to eliminate, or at least reduce, future disputes with taxpayers over the meaning of the new statute. Priority may also be given in a current guidance plan year to finalizing guidance issued in temporary or proposed form as part of a prior guidance plan

A revenue ruling is different, both in form and in substance, from a letter ruling dealing with the same subject matter. A letter ruling essentially consists of a detailed recital of the relevant facts followed by a statement of conclusions. The rationale and reference to authorities should be limited to that necessary to support the conclusion, and no attempt is made to formulate specified decisions into a stated principle or rule.

Revenue rulings, on the other hand, detail all relevant facts in generic terms, and consideration is given to all of the possible situations which might fall within the basic framework of the ruling. Necessary distinctions and limitations are drafted to insure the proper application of the revenue ruling to other cases within the ambit of its facts.³²

In the final analysis, however, both the revenue ruling and the letter ruling constitute an interpretation of the Code with respect to a particular set of facts. In that sense, they differ from regulations which are defined as "statements of general policy or interpretation formulated and adopted by the agency for guidance of the public."³³ To ensure that revenue rulings avoid the characterization of "junior regulations,"³⁴ the Service has adopted the rule that revenue rulings will generally be directly responsive to, and limited by, the stated factual basis of the underlying letter ruling or technical advice request, much in the manner of a judicial decision.³⁵ By doing so, the Service has established the boundaries of this medium of communication.

year. The number of taxpayers who would be affected by a guidance project and the amount of taxes at stake are also important considerations in prioritizing projects; greater priority will be given to projects that affect millions of taxpayers than those that affect less than a hundred. *See id.* All reasonable suggestions for guidance are evaluated based on these types of considerations and the availability of resources, with the highest priority being given to projects that can be accomplished consistent with available resources listed on the Priority Guidance Plan.

32. Another important difference between the published revenue ruling and the letter ruling is the level of review given the matter. Few letter rulings are reviewed above the branch level of an Associate Chief Counsel Office in the Office of Chief Counsel. Revenue rulings are all reviewed by the Chief Counsel, the Commissioner's office, and the Office of Tax Policy in the Treasury Department prior to issuance. *See generally* C.C.D.M., *supra* note 4, 32.2.7 (Aug. 11, 2004).

33. *See* H.R. REP. NO. 79-1980, at 19 (1946); S. DOC. NO. 79-248, at 253 (1946), *reprinted in* 1946 U.S.C.C.A.N.

34. Mortimer M. Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles*, N.Y.U. 20TH INST. ON FED. TAX. 1, 31-32 (1962).

35. I.R.S. Tech. Info. Rel. 288 (Jan. 13, 1961), Ann. 61-16, 1961-7 I.R.B. 29. *Cf.* Cong. Rec. May 24, 1946, 5649 ("Advisory interpretative rulings in particular cases are not rules within th[e] definition" of rulemaking under the APA.).

Some History

The revenue ruling program grew out of the Service's reluctance to make letter rulings publicly available to everyone. Initially, there was controversy regarding whether the Service should be required to publish all, or substantially all, of the rulings issued to individual taxpayers.³⁶ A number of arguments were put forth to support the publication of all letter rulings:

- (1) publication would enable taxpayers to insist upon being treated uniformly;
- (2) publication would reduce the duplication of effort which takes place within the Service as a result of the continued discussion and consideration of questions which would have been long since disposed of by published precedents;
- (3) publication would permit Congress to know the manner in which the Service applies Congressional mandates, thereby enabling Congress to intelligently determine the desirability or necessity of amending the Code;
- (4) publication would enable Congress to more effectively hold the Commissioner responsible for the exercise of the discretionary powers which Congress has lodged in him;³⁷ and
- (5) reliance on unpublished material by Service personnel would be stopped.³⁸

Some of these criticisms regarding publication have been met by the Service in other ways. For instance, since the King Subcommittee hearings in 1951, the prior practice of Service personnel relying on unpublished materials was discontinued. To this end, the Internal Revenue Bulletin states: "Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel

36. See S. 2047, 89th Cong. (1st Sess. 1965), which would require the Internal Revenue Service to publish within 10 days all rulings involving potential tax liabilities in excess of \$100,000. See also S. REP. NO. 69-V, Parts 1 and 2 at 229-36 (1st Sess. 1926); S. DOC. NO. 77-10, Part 9 (1st Sess. 1941), reprinted in 1941 U.S.C.C.A.N. See generally *Hearings Before the Subcommittee on Administration of the Internal Revenue Laws of the House Committee on Ways and Means*, 82d Cong. (2d Sess. 1952), 83d Cong. (1st Sess. 1953).

37. Statement of Senator Albert Gore, Sr. in support of S. 2047, 111 CONG. REC. 11399 (daily ed. May 26, 1965).

38. E.g., S. REP. NO. 59-27, at 229-36 (1st Sess. 1926).

in the disposition of other cases.”³⁹ Again, as a result of the inquiry into the administrative practice of the Internal Revenue Service between 1951 and 1953, a partial solution was found to objections (2), (3), and (4). The Service proposed in Revenue Ruling 2⁴⁰ to publish all letter rulings constituting new precedents with four exceptions. The first three of these exceptions related to the question of whether or not the letter ruling had any precedential value. There, it was decided that it would not be necessary to publish rulings that were either specifically and clearly covered by statute or regulation; that were specifically and clearly covered by rulings or court decisions previously published in the Cumulative Bulletin; or that involved novel or nonrecurring sets of facts. Rulings in any one of these categories would not serve as significant precedents.

The fourth non-publication category involved matters which, by their nature, “in the interests of a wise administration of the Internal Revenue Service dictated a policy of non-publication.”⁴¹

Section 6110 eventually required the release of all letter rulings starting in 1976.⁴² This removed much of the incentive to convert letter rulings constituting new precedents into revenue rulings. It is telling that in 1976, the Service issued 568 revenue rulings. The numbers of rulings have decreased steadily from there. By the late eighties, the number of revenue rulings issued annually was generally between 100 and 150, and in 1997, the program hit an all-time low when only 57 revenue rulings were issued.⁴³

Since that time, the number of rulings issued has increased somewhat, although only 68 were issued in 2007. The decline of revenue rulings is the result of a combination of factors. The release of all letter rulings obviated the concern that led to the initial creation of the revenue ruling program. Now, revenue rulings are just one component of the Service and Treasury Department’s annual Guidance Priority Plan. Other forms of guidance, such as notices and announcements, cover some of the issues that were previously addressed in revenue rulings. With the reorganization of the Office of Chief Counsel in 1989, the same attorneys who were writing regulations were also tasked with drafting revenue

39. Introduction, 2008-1 I.R.B. 3, available at <http://www.irs.gov/pub/irs-irbs/irb08-01.pdf>.

40. 1953-1 C.B. 484.

41. *Id.* § 4(j).

42. I.R.C. § 6110 (1976). See *infra* page 342 for a complete discussion of this issue.

43. Numbers of Revenue Rulings are taken from either the final Cumulative Bulletin or the final Internal Revenue Bulletin for each year quoted.

rulings. Thus, when regulations are need to address statutory changes to the tax law, which by now have become almost an annual event, fewer resources are devoted to the development of revenue rulings.

Reliance and Revocation

The Commissioner has the power to revoke a revenue ruling retroactively if it is contrary to law.⁴⁴ This is consistent with the holding in *Dixon v. United States*, in which the Supreme Court treated the acquiescence in issue as if it were a revenue ruling because, until 1953, the cumulative announcements of acquiescence and nonacquiescence were given revenue ruling numbers.⁴⁵ Moreover, consistency and logic require that the Commissioner's power to change a position expressed in a ruling be certainly no less than his power to change a position expressed in a regulation.⁴⁶

The information transmitted through the revenue ruling program is intended to benefit the taxpayer by not only informing him of the Commissioner's position but also permitting him, in most circumstances, to rely upon the position stated in the revenue ruling in planning and consummating a transaction. Accordingly, the Commissioner has limited the exercise of his power to modify his position retroactively.⁴⁷

The general policy of the Service is that taxpayers may rely upon revenue rulings published in the Internal Revenue Bulletin and need not have a specific letter ruling of their own.⁴⁸ To encourage this, it is the practice of the Service to make revocation or modification of revenue rulings prospective only.⁴⁹ In addition, revenue rulings provide recognized authority for the possible defense of the negligent and substantial understatement penalties

44. *Auto. Club of Mich. v. Comm'r*, 353 U.S. 180 (1957); *Bornstein v. United States*, 345 F.2d 558 (Ct. Cl. 1965). This accords with the Congressional intent evidenced by I.R.C. § 7805(b) (2000).

45. This was prior to the institution of the Revenue Ruling series begun in 1954. See *Dixon v. United States*, 381 U.S. 68, 71 n.2, 75 n.8 (1965). The Acquiescence program is discussed *infra* at page 364.

46. The Supreme Court in *Dixon* stated that the reasons supporting the Commissioner's power to retroactively revoke his regulations "applies with even greater force to rulings and acquiescences." 381 U.S. at 75. Now, however, I.R.C. § 7805(b) requires that most regulations apply only prospectively.

47. See C.C.D.M., *supra* note 4, 32.2.3.5.1.2.7 (Aug. 11, 2004); Treas. Reg. § 601.201(d) (1987). This position was first announced in Rev. Rul. 54-172, 1954-1 C.B. 394.

48. Rev. Proc. 89-14, 1989-1 C.B. 814.

49. C.C.D.M., *supra* note 4, 32.2.3.5.1.2.7(3) (Aug. 11, 2004).

provisions of sections 6662 and 6664.⁵⁰ However, although a taxpayer following a revenue ruling need not prove reliance—meaning that he may enter into the transaction without ever having seen the revenue ruling—upon audit, it must be clear that the taxpayer's facts are substantially the same as those contained in the revenue ruling.⁵¹

Even if it is clear that the taxpayer did not rely on a revenue ruling, courts will often hold the Service to the position expressed in the revenue ruling.⁵² The Office of Chief Counsel has now expressly stated that it will not take positions in litigation contrary to a published revenue ruling, even if subsequent case law has resulted in a state of law more favorable to the Service than existed at the time of the revenue ruling.⁵³

Revenue Procedures

History

Prior to 1955, the Service from time to time published a variety of documents regarding internal management practices. Occasionally, when thought to be of an essential nature, the same information contained in those documents was incorporated into a revenue ruling. To make more regular the means for disseminating procedural information, the Service created the Revenue Procedure series in 1955. In Revenue Procedure 55-1, the Service announced its intention to publish all statements of practice and procedure which, although issued primarily for internal use, affected the rights and duties of taxpayers.⁵⁴ Today, the program also includes procedural information that, while not affecting the

50. Treas. Reg. §§ 1.6662-3(a) (2003), 1.6662-4(d) (2003), 1.6694-2(b) (2003), and 1.6664-4 (1992). *See also infra* note 82 (discussing the evolution of the substantial authority standard).

51. *See* Introduction to Internal Revenue Bulletin, *supra* note 27.

52. An example of this situation is *Rauenhorst v. Comm'r*, 119 T.C. 157 (2002). The Tax Court, which previously had adopted a position contrary to the Service's revenue ruling, nonetheless required the Service to follow the revenue ruling position. *Rauenhorst*, 119 T.C. at 170-171. The court explained,

Although we do not question the validity of the opinions of this Court and the Courts of Appeals upon which respondent relies, we are not prepared to allow respondent's counsel to argue the legal principles of those opinions against the principles and public guidance articulated in the Commissioner's currently outstanding revenue rulings.

Id. (citations omitted).

53. C.C.D.M., *supra* note 4, 32.2.2.10(4) (Aug. 11, 2004).

54. Rev. Proc. 55-1, 1955-2 C.B. 897, *superseded by* Rev. Proc. 89-14, 1989-1 C.B. 814.

rights and duties of taxpayers or others, the Service nevertheless determines should be a matter of public knowledge.⁵⁵

Revenue procedures are issued principally by the Associate Chief Counsel Offices in the Office of Chief Counsel, published in the Internal Revenue Bulletin, and compiled annually in the Cumulative Bulletin.⁵⁶ The stated practice of the Service is to publish as much of the internal management documents or communication as necessary to understand the procedure at issue.⁵⁷ When publication of the substance of a revenue procedure is required by the Administrative Procedure Act,⁵⁸ it has historically been accomplished by an amendment of the Statement of Procedural Rules, found at 26 C.F.R. Part 601.⁵⁹ This is usually done for generally applicable procedures that are to have continuing force and effect.

The primary objectives of revenue procedure publication are the promotion of uniform application of the tax laws by Service employees and the provision of assistance to taxpayers for the purpose of maximizing voluntary compliance with the revenue laws.⁶⁰ As originally conceived, the scope of revenue procedures included all statements of practices, procedures, or regulations not otherwise captured by revenue rulings or regulations, including Treasury Decisions.⁶¹ Today, revenue procedures cover a wide array of administrative and procedural matters, including procedures relating to the adoption of new accounting methods, requests for private letter rulings or revenue rulings, and methods of electronic filing.⁶² They also serve an important function, as do notices, in keeping the public informed of certain transactions that the Service may closely scrutinize.⁶³

55. Treas. Reg. § 601.601(d) (1987); Rev. Proc. 89-14, *supra* note 54, § 3(02).

56. Treas. Reg. § 601.601(d) (1987).

57. *Id.* § 601.601(d)(2)(vi).

58. 5 U.S.C. § 552 (2000).

59. Rev. Proc. 89-14, 1989-1 C.B. 814, § 7(2).

60. *Id.* § 5.

61. Rev. Proc. 55-1, *supra* note 54, § 2.

62. *See, e.g.*, Rev. Proc. 2007-17, 2007-1 C.B. 368 (setting forth procedures for the Pre-Filing Agreement Program, under which Large and Mid-Sized Business taxpayers may request examination of specific issues relating to tax returns before returns are filed); Rev. Proc. 2003-40, 2003-1 C.B. 1044 (establishing the Fast Track Settlement program to expedite case resolution and to expand the range of dispute resolution options available to taxpayers).

63. *See, e.g.*, Rev. Proc. 2007-20, 2007-1 C.B. 517 (modifying and superseding Rev. Proc. 2004-65, 2004-50 I.R.B. 965); Rev. Proc. 2004-66, 2004-2 C.B. 966; Rev. Proc. 2004-67, 2004-2 C.B. 967; Rev. Proc. 2004-68, 2004-2 C.B. 969.

Reliance and Revocation

The Service is generally bound to adhere to the procedural rules it sets forth as revenue procedures in administrative matters.⁶⁴ As a statement published for the purpose of informing taxpayers of Service procedures affecting them, revenue procedures are similar in effect to revenue rulings. As with revenue rulings, revenue procedures provide recognized authority for the possible defense of the negligence and substantial understatement penalties provisions of sections 6662 and 6664.⁶⁵ Revenue procedures do not, however, typically address matters that affect the rights and duties of taxpayers, so they would generally not be useful to taxpayers in planning transactions or determining positions to be taken on returns.⁶⁶

Given the similarity of the purposes of revenue procedures and revenue rulings, the Commissioner has the same ability to revoke the positions stated in revenue procedures as he has to revoke those stated in revenue rulings.⁶⁷ However, as statements of the administrative procedures the Service follows, revenue procedures are not generally revoked, but instead modified prospectively.

64. See Treas. Reg. § 601.601(d) (1987) (revenue procedures are published in order to promote the correct and uniform interpretation of the law by Service employees). See also I.R.M., *supra* note 27, 4.10.7.2.6 (Jan. 1, 2006) (describing the effect of revenue procedures); *Dillon, Read & Co. v. United States*, 875 F.2d 293 (Fed. Cir. 1989) (citing *Eli Lilly & Co. v. Comm'r*, 856 F.2d 855, 865 (7th Cir. 1988)) (failure to revoke a revenue procedure gives rise to a reasonable expectation that the statements made in it have continued validity). See generally C.C.D.M., *supra* note 4, 32.2.2.2(1) (Aug. 11, 2004) (stating that a purpose of revenue procedures is to ensure correct and uniform application of tax law by Service personnel).

65. Treas. Reg. §§ 1.6662-3(a) (2003), 1.6662-4(d) (2003), 1.6694-2(b)(1992), and 1.6664-4 (2003). See also *infra* note 82 (discussing the evolution of the substantial authority standard).

66. Courts have found that revenue procedures providing procedural rules promulgated by the Commissioner without approval of the Treasury Department are internal procedural guides that do not confer rights upon taxpayers. *Boulez v. Comm'r*, 810 F.2d 209, 215 (D.C. Cir. 1987); *Ward v. Comm'r*, 784 F.2d 1424 (9th Cir. 1986); *Rosenberg v. Comm'r*, 450 F.2d 529 (10th Cir. 1971); *Vosters v. United States*, 1989 WL 90554 (N.D. Cal. 1989); *Noske v. United States*, 1988 WL 146612 (D. Minn. 1988). *But see* *Dillon, Read & Co., Inc. v. United States*, 875 F.2d 293 (Fed. Cir. 1989) (citing *Eli Lilly & Co. v. Comm'r*, 856 F.2d 855 (7th Cir. 1988)) (Commissioner may not take a position in litigation repudiating the position in a revenue procedure properly characterized as a substantive statement).

67. See *Capitol Fed. Sav. & Loan Ass'n & Subsidiary v. Comm'r*, 96 T.C. 204 (1991); *Lansons, Inc. v. Comm'r*, 69 T.C. 773 (1978), *nonacq.*, *action on dec.*, 1979-155, 1979 WL 53184 (July 9, 1979), *aff'd*, 622 F.2d 774 (5th Cir. 1980) (retroactive revocation of long-standing revenue procedure regarding situations in which rulings would be revoked would be an abuse of the Commissioner's discretion). See also discussion of the Commissioner's ability to revoke revenue rulings, *supra* at page 335.

Announcements and Notices

The Service often resorts to notices and announcements, rather than other kinds of guidance, when there is need for guidance on an expedited basis. Oftentimes the matter is already the subject of some more formal type of guidance, such as a revenue ruling or revenue procedure, but the desire to issue immediate guidance outweighs the benefit of attempting to modify the original pronouncement.⁶⁸

A notice, which is published in the Internal Revenue Bulletin and compiled annually in the Cumulative Bulletin, contains guidance that involves substantive interpretations of the Code or other provisions of law.⁶⁹ Topics can include changes to forms⁷⁰ or to other previously published materials,⁷¹ solicitation of public comments on issues under consideration,⁷² and advance notice of rules to be provided in regulations when the regulations may not be published in the immediate future.⁷³ Increasingly, notices have served as a critical component of the Service's efforts to combat abusive tax avoidance transactions, as they have been used to identify transactions about which the Service has concerns. Given the rapid pace of developments in this area, notices have proven particularly useful for quickly disseminating information that allows taxpayers to understand exactly which transactions will be of

68. See generally I.R.M., *supra* note 27, 4.10.7.2.4.1(1)(a) (Jan. 1, 2006) (discussing the usefulness of announcements where expedited guidance is required).

69. C.C.D.M., *supra* note 4, 32.2.2.3.3(1) (Aug. 11, 2004); I.R.M., *supra* note 27, 4.10.7.2.4.1(1)(b) (Jan. 1, 2006).

70. See, e.g., Revision of Forms 8898 and 8840, I.R.S. Notice 2006-73, 2006-2 C.B. 339 (effecting interim revisions to Form 8898, Statement for Individuals Who Begin or End Bona Fide Residence in a U.S. Possession, and Form 8840, Closer Connection Exception Statement for Aliens, by instructing those filing the forms to disregard certain line items until such time the Service publishes revised forms).

71. See, e.g., Certification of Energy Efficient Home Credit, I.R.S. Notice 2008-35, 2008-12 I.R.B. 647 (clarifying and *superseding* I.R.S. Notice 2006-27 by substantially republishing the guidance provided in the earlier notice); Qualified Payment Card Agent Determination, I.R.S. Notice 2007-59, 2007-30 I.R.B. 135 (providing a proposed revenue procedure by which a payment card organization would request a determination that it is a Qualified Payment Card Agent, *superseding* Rev. Proc. 2004-42, 2004-2 C.B. 121 (August 2, 2004)).

72. See, e.g., Cell Captive Insurance Arrangements: Insurance Company Characterization and Certain Federal Tax Elections, I.R.S. Notice 2008-19, 2008-5 I.R.B. 366 (requesting comments on a specific framework for determining whether an individual cell or the protected cell company as a whole is treated as an insurance company for federal income tax purposes).

73. See, e.g., Reissuance Standards for State and Local Bonds, I.R.S. Notice 2008-27, 2008-10 I.R.B. 543 (providing interim guidance in advance of regulations to issuers of state and local bonds to clarify when certain tax-exempt bonds are treated as reissued or retired for purposes of I.R.C. §§ 103, 141-150).

interest to the Service, including so-called "listed transactions"⁷⁴ and "transactions of interest,"⁷⁵ both of which are "reportable transactions" under section 6011.⁷⁶

Announcements are also published in the Internal Revenue Bulletin and contain matters of general interest, such as effective dates of temporary regulations, clarification of rulings, or modification of form instructions.⁷⁷ Announcements can provide guidance of both a substantive and procedural nature, frequently of only immediate or short-term value.⁷⁸ Announcements may serve to summarize the Code or regulations without making any sub-

74. A listed transaction is a transaction that the Service has determined is a tax avoidance transaction for the purpose of triggering the registration and disclosure requirements of section 301.6111-2(b)(2) of the Procedure and Administration Regulations. Treas. Reg. § 1.6011-4(b)(2) (2007). See e.g., Listed Transactions, I.R.S. Notice 2004-67, 2004-2 C.B. 600 (setting out transactions that have been identified as listed transactions); Loss Importation Transaction, I.R.S. Notice 2007-57, 2007-29 I.R.B. 87 (identifying as a listed transaction those transactions in which a U.S. taxpayer uses offsetting positions with respect to foreign currency or other property for the purpose of importing a loss, but not the corresponding gain, in determining U.S. taxable income); and Notification of Removal of the Transaction With a Significant Book-Tax Difference Category of Reportable Transaction Under § 1.6011-4, I.R.S. Notice 2006-6, 2006-1 C.B. 385 (announcing the removal of the book-tax difference category of reportable transactions).

75. A transaction of interest is one the Service believes has potential for tax avoidance or evasion, but for which the Service lacks enough information to determine whether the transaction should be identified specifically as a tax avoidance transaction. See Treas. Reg. § 1.6011-4(b)(6) (2007); I.R.C. §§ 6111, 6112 (Supp. V 2005). Transactions of interest are identified in notices. See, e.g., Transaction of Interest – Contribution of Successor Member Interest, I.R.S. Notice 2007-72, 2007-36 I.R.B. 544 (identifying contributions of successor member interests as a transaction of interest); Transaction of Interest – Toggling Grantor Trust, I.R.S. Notice 2007-73, 2007-36 I.R.B. 545 (identifying the toggling of grantor trusts as a transaction of interest). Just as the Service identifies transactions that qualify for reporting, it also removes certain transactions from the reporting requirements. See, e.g., Lease Exception to the Tax Shelter Regulations, I.R.S. Notice 2001-18, 2001-1 C.B. 731 (providing an exception from registration and list maintenance requirements for certain leasing transactions).

76. The Service has currently identified six categories of reportable transactions: (1) listed transactions; (2) confidential transactions; (3) transactions with contractual protections; (4) loss transactions; (5) transactions of interest; and (6) transactions involving a brief asset holding period. Treas. Reg. § 1.6011-4(b) (2007). The Service has relied on notices to help define the context and nature of these transactions and to expand or contract the universe of reportable transactions. See, e.g., Listed Transactions, I.R.S. Notice 2004-67, 2004-2 C.B. 600; Loss Importation Transaction, I.R.S. Notice 2007-57, 2007-29 I.R.B. 87 (identifying as listed transactions those in which a U.S. taxpayer uses offsetting positions with respect to foreign currency or other property for the purpose of importing a loss, but not the corresponding gain, in determining U.S. taxable income); Notification of Removal of the Transaction With a Significant Book-Tax Difference Category of Reportable Transaction Under Treas. Reg. § 1.6011-4, I.R.S. Notice 2006-6, *supra* note 74 (announcing the removal of the book-tax difference category of reportable transactions).

77. I.R.M., *supra* note 27, 4.10.7.2.4.1(1)(a) (Jan. 1, 2006). In recent years, the Service has begun compiling announcements in the Cumulative Bulletin.

78. C.C.D.M., *supra* note 4, 32.2.2.3.4(1) (Aug. 11, 2004).

stantive interpretation or they may provide explanations for newly-adopted Service policies or programs.⁷⁹

Reliance and Revocation

Taxpayers may generally rely on announcements and notices to the same extent as revenue rulings and revenue procedures.⁸⁰ If on point, these pronouncements bind the Service in its administrative actions and represent statements of position on which taxpayers may rely.⁸¹ As with revenue rulings and revenue procedures, announcements and notices can provide substantial authority sufficient to relieve taxpayers from the negligence and substantial understatement penalties and, consequently, may be relevant to whether certain penalty provisions apply.⁸²

79. *Id.* See, e.g., Request for Tax Accrual and Other Financial Audit Workpapers, I.R.S. Announcement 2002-63, 2002-2 C.B. 72 (announcing that the Service revised its policy concerning requests for tax accrual workpapers); Compliance Assurance Process, I.R.S. Announcement 2005-87, 2005-2 C.B. 1144 (announcing the Compliance Assurance Process pilot program for large business taxpayers, with the objective of reducing taxpayer burden and uncertainty while assuring the Service of the accuracy of tax returns prior to filing, reducing or eliminating the need for post-filing examinations).

80. Rev. Rul. 87-138, 1987-2 C.B. 287; I.R.M., *supra* note 27, 4.10.7.2.4.1(1)(a)-(b) (Jan. 1, 2006).

81. See *supra* pages 335, 338 (discussing reliance and retroactivity in the sections on revenue rulings and revenue procedures).

82. The addition to tax under I.R.C. § 6662 for substantial understatements of income can be limited if there is substantial authority for a filing position taken by a taxpayer. I.R.C. § 6662(d)(2)(B) (2000). The Tax Equity and Fiscal Responsibility Act of 1982 first established the standard of "substantial authority" to provide relief from the penalty for substantial understatement of income. Pub. L. No. 97-248, § 323(a), 96 Stat. 324 (1982). Regulations under prior I.R.C. § 6661 and the pertinent Committee Reports offered a limited list of authorities that would constitute substantial authority for purpose of relieving taxpayers from application of I.R.C. § 6661. H.R. REP. NO. 97-760, at 575 (2d sess. 1982) (Conf. Rep.), reprinted in U.S.C.C.A.N.; accord Treas. Reg. § 1.6661-3(a)(2). This list included, among other items, "administrative pronouncements," but that group of authority was limited, by definition, to revenue rulings and revenue procedures. The Service expanded the list of authorities in 1987, announcing that tax practitioners could rely on Notices and Announcements just as they rely on revenue rulings and revenue procedures. Rev. Rul. 87-138, *supra* note 80, superseded by Rev. Rul. 90-91, 1990-44 I.R.B. 11. Notices and Announcements issued by the Service were later deemed to serve as "administrative pronouncements" as that term is used in Treas. Reg. § 1.6661-3(b)(2). See, e.g., I.R.S. Notice 88-22, 1988-1 C.B. 489; I.R.S. Notice 88-5, 1988-1 C.B. 476; I.R.S. Announcement 88-16, 1988-5 I.R.B. 28. The Omnibus Budget Reconciliation Act of 1989 made several substantial revisions to the penalties regime. Pub. L. No. 101-239, 103 Stat. 2106 (1989). The "substantial authority" standard is now an objective standard, involving an analysis of the law and application of the law to relevant facts. The weight of authorities supporting the tax treatment must be substantial in relation to the authorities supporting contrary positions. The weight to be accorded an authority depends on its relevance, its persuasiveness, and the type of document providing the authority. Treas. Reg. § 1.6662-4(d)(3)(ii) (2003). Treas. Reg. § 1.6662-4(d)(3)(iii) (2003) identifies the authorities to be considered in determining whether there is substantial authority for the tax treatment of an item. The list includes revenue procedures; Actions on Decisions (AOD) issued after March 12, 1981;

The Service does not administratively revoke notices or announcements. Since these types of guidance are intended to provide information to taxpayers, a new notice or announcement providing updated information is issued when necessary.⁸³

IV. LETTER RULINGS PROGRAM

Letter Rulings

Regulations and other forms of published guidance are written as a general guide to interpretation and are not necessarily intended to answer each and every specific problem. For many taxpayers, the material contained in published guidance is sufficient for their purposes, supplying the knowledge to enable them to determine the tax consequences of their transactions. Taxpayers are often involved in complex financial transactions or transactions involving intricate fact patterns that are not clearly covered by the regulations. To enable these taxpayers to gain advance knowledge as to the Service's position, the letter rulings program was developed.

The present letter rulings program is another example of man's inventive genius operating in response to his needs. It was developed to provide certainty as to the tax consequences of contemplated transactions and remains concrete proof of the fact that even an agency as vast as the Service can be responsive to the needs of the public. The Service's letter rulings program is one of the largest and oldest programs in the Government. Each year several thousand letter rulings are issued to taxpayers.

Definition

A letter ruling is a written statement issued to a taxpayer by an Associate Chief Counsel Office of the Office of Chief Counsel or by the Tax Exempt and Government Entities Division that interprets and applies the tax laws to a specific set of facts.⁸⁴ Rulings are

notices; and announcements. Notice 90-21 provides additional guidance on what constitutes substantial authority under the present regime. *See* Accuracy-Related Penalty Income Tax Return Preparer Penalty, I.R.S. Notice 90-21, 1990-1 C.B. 332, § V(A).

83. *See, e.g.*, I.R.S. Notice 2006-6, *supra* note 74.

84. C.C.D.M., *supra* note 4, 32.3.1.1(2) (Aug. 11, 2004). The Office of Chief Counsel currently has seven Associate Chief Counsel Offices that issue letter rulings on issues within their subject matter. These offices are the Office of the Associate Chief Counsel (Corporate), Office of the Associate Chief Counsel (Financial Institutions and Products), Office of the Associate Chief Counsel (Income Tax and Accounting), Office of the Associate

issued only by these offices and are generally issued in respect to transactions that have not been consummated.⁸⁵

Although the letter rulings program directly affects only a comparatively small percentage of taxpayers, it has a broad impact on our national economy and on proper and reasonable tax administration.⁸⁶ Just as consulting the tax specialist is a way of life in business transactions, so too is obtaining a favorable tax ruling.⁸⁷ A private letter ruling has been described as a policy of insurance⁸⁸ that is a practical prerequisite to a merger of corporate giants.⁸⁹ The Service has restricted the areas in which it will provide letter rulings, preferring not to devote scarce resources to issuing so-called "comfort rulings."⁹⁰ "Comfort rulings" concern areas that the Service views as adequately addressed in existing authority such as case law or published guidance. In other words, the "policies of insurance" described above may not be available when the Service deems them unnecessary. As one group has observed, however, "[t]he private letter ruling program . . . will continue to play a significant role in assisting taxpayers and their advisors in coping with the complexity of the tax system."⁹¹

The letter rulings program is advantageous to both the Service and the taxpayer. It benefits the taxpayer by

Chief Counsel (International), Office of the Associate Chief Counsel (Passthroughs and Special Industries), Office of the Associate Chief Counsel (Procedure and Administration), and Office of the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). See Rev. Proc. 2008-1, 2008-1 I.R.B. 1.

85. I.R.S. Deleg. Order No. 190 (Rev. 4), I.R.M. 1.2.53.5 (Oct. 8, 1996).

86. See I.R.S. Tech. Info. Rel. 610 (July 9, 1964); *Goodstein v. Comm'r*, 267 F.2d 127 (1st Cir. 1959); *Int'l Bus. Machines Corp. v. United States*, 343 F.2d 914, 925 (Ct. Cl. 1965) (Cowen, C.J., dissenting).

87. See Warwick, *Fund Ruling Withdrawn; IRS Policy Questioned*, 19 J. TAX'N 197 (1963); Stephen M. Goodman, Note, *The Availability and Reviewability of Rulings of the Internal Revenue Service*, 113 U. PA. L. REV. 81, 84-86 (1964).

88. Taylor, *supra* note 30, at 72.

89. Study has also been devoted to the question of when to seek a ruling. Many factors enter into this, such as whether there is sufficient time to request the ruling, the probability that the ruling will be adverse, and the possible effects of an adverse ruling. See Taylor, *supra* note 30, at 72-73 (suggesting that a ruling ought not to be requested where the probability of an adverse answer is high, and noting that even though the request for ruling is withdrawn the national office may furnish its views to the Service official in whose office the return has been or will be filed). See also Rev. Proc. 2008-4, 2008-1 I.R.B. 121 (discussing withdrawal of requests for rulings). On the other hand it has been suggested that "getting an unfavorable ruling has some advantages too. Perhaps the proposed transaction can be revamped to meet the IRS objections. At the very least it permits the parties to bargain with full knowledge of the possibility of tax litigation." Yager, *When and How Should the Practitioner Ask for Rulings and Technical Advice?*, 14 J. TAX'N 38 (1961).

90. Rev. Proc. 2008-1, § 6.11, 2008-1 I.R.B. 1, 15.

91. Donald E. Osteen, Nelson F. Crouch & Phoebe Bennett, *Obtaining Private Guidance From the Internal Revenue Service*, in U.S.C. TAX LAW INST. 17-1 (2002).

- (1) informing the taxpayer of the Service's position, which enables the taxpayer to make a determination of whether or not to consummate the contemplated transaction;
- (2) enabling the taxpayer to choose a course of action that will avoid future controversy and litigation with the Service; and
- (3) enabling the taxpayer to properly report the transaction once consummated, thereby promoting voluntary compliance.

The rulings program is not a one-way street, however, and the Service similarly receives its share of the benefits:

- (1) letter rulings provide a high degree of uniformity in the application of the law and regulations because all rulings on prospective transactions, other than those concerned with qualification of exempt organizations and employee benefit plans, are issued by the Associate Chief Counsel Offices;
- (2) advance rulings tend to decrease the amount of litigation that the Service otherwise would be involved in;
- (3) the rulings program constitutes a source of valuable information to the Service by keeping it abreast of the kinds of transactions which are being consummated or considered by taxpayers;
- (4) the rulings program still serves as one basis for the published rulings program; and
- (5) the work of the auditing agents is also simplified. They need only verify that the facts of the consummated transactions correspond to the facts in the rulings.

History

The necessity for advance rulings as to prospective transactions was first recognized by Congress in 1938,⁹² when it gave the Commissioner authority to enter into binding closing agreements with respect to prospective transactions.⁹³ By 1940, the closing agree-

92. For the early history of the rulings program, see Caplin, *supra* note 34. A more abbreviated history can be found in Osteen, Crouch & Bennett, *supra* note 91.

93. See Revenue Act of 1938, ch. 289, § 801, 52 Stat. 447, 573, amending 606(a) of the Revenue Act of 1928, ch. 852, 45 Stat. 874.

ment procedure was recognized as too cumbersome a vehicle to handle the volume of requests and proved to be generally unsatisfactory to both the Service and the taxpayer.⁹⁴ This resulted in the initiation of the letter rulings program, under which requests for rulings were treated as potential requests for closing agreements. The letter sent to the taxpayer in reply to his request, in essence, stated what the Service would do if the taxpayer requested a formal closing agreement, thus representing an "agreement to agree."⁹⁵ However, it was not until 1953 that the Service formally announced the existence of the letter rulings program.⁹⁶

Since 1953, the letter ruling program has gone through many changes. For thirty years, the program was administered by the Service. Then, in 1984, responsibility for the majority of the program was transferred to the Office of Chief Counsel. The Service's Corporate and Individual Tax Divisions, charged with administering the ruling program, were transferred from the Service to the Office of Chief Counsel. The Employee Plans and Exempt Organizations Division, however, remained part of the Service. Thus, the rulings program for those areas remains part of the Tax Exempt and Government Entities operating division today.⁹⁷ Five years later, Chief Counsel's national office was reorganized by subject matter. Each division became responsible for all forms of guidance and advice within its subject matter jurisdiction. For example, the Associate Chief Counsel (Corporate) issues all letter rulings and Technical Advice Memoranda⁹⁸ related to corporate reorganizations and prepares all regulations, revenue rulings, and other published guidance in the same area.⁹⁹

94. See Caplin, *supra* note 34.

95. No statutory provision requires the Commissioner to rule in all cases. Rulings are mandatory under certain sections of the Code, for example, I.R.C. §§ 367 (2000 & Supp. V 2005), 446(c) (2000), and 706(b)(1) (2000). Absent such requirement, the Commissioner derives his general authority to issue rulings under I.R.C. § 7805(a) (2000), a provision that vests discretionary authority in the Commissioner to provide "all needful rules and regulations for the enforcement of" the Code. See Caplin, *supra* note 34, at 7-8.

96. Rev. Rul. 10, 1953-1 C.B. 488.

97. See Rev. Proc. 2008-4, *supra* note 89.

98. The procedures governing Technical Advice memoranda are discussed below. See *infra* pages 354-56.

99. The procedures for seeking a letter ruling are customarily published in the first revenue procedure each year. See, e.g., Rev. Proc. 2008-1, *supra* note 84. A pre-submission conference may be held at the discretion of the Associate Chief Counsel Office between the Associate Chief Counsel Office, the taxpayer and any representative of the taxpayer to discuss substantive or procedural aspects of the request. *Id.* § 10.07. The taxpayer generally has only one conference of right with the Associate Chief Counsel Office, unless that office proposes to rule adversely to the taxpayer on an issue or grounds other than those discussed at the conference of right. *Id.* §§ 10.02, 10.05.

Another major change lies in the area of the public release of letter rulings. Historically, the Service was very reluctant to release letter rulings publicly. To appreciate the Service's reluctance to publish all rulings, it is necessary to understand the nature of a letter ruling as a communication. The letter ruling was developed to provide taxpayers with definite and reliable determinations as to the tax treatment of future transactions. This was achieved by creating a form of communication that was addressed to an individual taxpayer and concerned one particular transaction. By so doing, the Service limited the scope of the ruling and, accordingly, limited its risk. Responsibility for issuing rulings in such cases could be delegated to lesser officials.

The letter rulings program must also be able to operate within a wide area of the law. If it is to be effective, the Service must be prepared to rule not only on questions that fall within the black or white areas, but those questions that fall within the gray areas too.¹⁰⁰ Through the medium of the letter ruling and its limited exposure, the Service can, within a short period of time, issue a letter ruling in a case of first impression in a gray area. As additional ruling requests in this same area are received, the Service can develop a mature view of the problem. It is this mature consideration of a problem—a study of all the possible ramifications of the Service's position—that is finally reflected in the published rulings of the Service. In the published rulings program, the Service has the opportunity to convert what was once a gray area into a clear rule to guide all taxpayers.

The letter ruling program represents a fair balance between the present need of taxpayers for advance, rapid, and reliable information in regard to future transactions and the need of the Service to limit both the possible loss to the revenue resulting from a mistake in interpretation and the difficulties that might result from a premature freezing of Service position.¹⁰¹

100. There are certain areas in which rulings will not be issued, set forth in a "no-ruling list." This list was first published in 1960 as Rev. Proc. 60-6, 1960-1 C.B. 880, and has been revised and reissued periodically since then. Two Revenue Procedures are published annually detailing the "no rule" areas with respect to domestic issues and international issues. *See, e.g.*, Rev. Proc. 2008-3, 2008-1 I.R.B. 110; Rev. Proc. 2008-7, 2008-1 I.R.B. 229. The no-ruling list contains both specific areas in which the Service will not rule, and areas in which the Service generally will not rule. This list may be regarded more as a convenience for taxpayers than as an articulation of the Commissioner's policies offered for public scrutiny and censure. In general, public response to this program of publishing the no-ruling list has been most favorable. *See Goodman, supra* note 87; *Caplin, supra* note 34, at 14-16.

101. Section 6110 of the Internal Revenue Code provides that, except to the extent otherwise provided in regulations, taxpayers may not rely on letter rulings issued to other

In 1977, however, the Service began releasing letter rulings after the enactment of section 6110.¹⁰² This section was prompted by the outcome of two lawsuits seeking letter rulings and technical advice memoranda under the Freedom of Information Act.¹⁰³ In both lawsuits, the courts agreed that letter rulings should be made public; however, the courts disagreed whether technical advice memoranda should be made public. In response to these lawsuits and the Service's proposed rules to publicize rulings in 1976, Congress enacted section 6110 to require that written determinations (including rulings) be open for public inspection.¹⁰⁴ To preserve taxpayer confidentiality, section 6110 requires the Service to work with the taxpayers to ensure that their identifying information is redacted from the public versions of the letter rulings.

Another major change to the letter ruling program occurred in 1987, when Congress required the Service to develop a user fee program for letter rulings.¹⁰⁵ The fees are based on calculations of the actual cost to the Service of preparing the rulings. At the outset of the program, the fee was \$300.¹⁰⁶ Now, the fee has risen to \$11,500 for a letter ruling, with discounted fees for lower income taxpayers.¹⁰⁷

Reliance and Retroactivity of Letter Rulings

The policy of the Service to permit and encourage taxpayer reliance on letter rulings is clearly reflected by the change in language between the present statement of policy and that first issued in 1954.¹⁰⁸ Initially, the policy was to make revocation "generally" prospective. The present statement of Service policy, contained in Revenue Procedure 2008-1, makes a stronger case for reliance upon letter rulings by providing for retroactivity upon

taxpayers. I.R.C. § 6110(k)(3) (2000); *see also* Rev. Proc. 2008-1, *supra* note 84, § 11.02 (same). As discussed below, both before and after the enactment of this provision, courts have generally refused to allow taxpayers to rely on letter rulings issued to unrelated taxpayers.

102. Pub. L. No. 94-455, 90 Stat. 1520 (1976) (codified as amended at I.R.C. § 6110 (2000)).

103. *Fruehauf Corp. v. Internal Revenue Serv.*, 522 F.2d 284 (6th Cir. 1975) (subsequent history omitted); *Tax Analysts v. Internal Revenue Serv.*, 505 F.2d 350 (D.C. Cir. 1974).

104. Tax Reform Act of 1976, Pub. L. No. 94-455, § 1201(a), 90 Stat. 1520 (1976) (codified as amended at I.R.C. § 6110 (2000 & Supp. V 2005)).

105. Revenue Act of 1987, Pub. L. No. 100-203, § 10511, 101 Stat. 1330, 1987-3 C.B. 1 (an off-code provision subsequently codified at I.R.C. § 7528 (Supp. V 2005)).

106. Rev. Proc. 88-8, 1988-1 C.B. 628.

107. Rev. Proc. 2008-1, *supra* note 84, app. A.

108. Rev. Rul. 54-172, 1954-1 C.B. 394.

revocation only in “unusual circumstances.”¹⁰⁹ However, it must be emphasized that only the taxpayer to whom the letter ruling is addressed is entitled to rely upon the ruling.¹¹⁰ It has long been the policy of the Service, a policy supported by numerous court decisions, to limit reliance upon letter rulings to the recipient of the ruling.¹¹¹ Only in some unusual and very limited circumstances has a taxpayer been allowed to rely on letter rulings issued to another taxpayer.¹¹²

At the same time that Congress required the Service to release letter rulings to the public, it also addressed the Service’s major concern regarding their release; namely, taxpayers other than the recipient of the ruling would rely on the letter rulings. Section 6110(k)(3) provides that letter rulings may not be used or cited as precedent unless a regulation has been issued allowing such reliance.¹¹³ The only regulations that come close to allowing reliance are the penalty regulations under section 6662. These regulations provide that letter rulings issued after 1976 may be considered in determining whether a taxpayer’s position is supported by substantial authority and, hence, not subject to penalty for a substantial understatement.¹¹⁴

Present practice holds that a letter ruling found to be in error or no longer in accord with position of the Service may be modified or revoked.¹¹⁵ It is, however, only in rare or unusual circumstances that such modification or revocation will be retroactive in effect. A change in Service position will be prospective if

109. Rev. Proc. 2008-1, *supra* note 84, § 11.07.

110. *Id.* § 11.03.

111. *E.g.*, *Minchin v. Comm’r*, 335 F.2d 30 (2d Cir. 1964); *Goodstein v. Comm’r*, 267 F.2d 127 (1st Cir. 1959); *Bornstein v. United States*, 345 F.2d 558 (Ct. Cl. 1965).

112. *E.g.*, *Int’l Bus. Machines v. United States*, 343 F.2d 914 (Ct. Cl. 1965) (allowing IBM to rely on a favorable letter ruling issued to its sole competitor, Remington Rand, after the Service denied IBM’s request for a similar ruling).

113. I.R.C. § 6110(k)(3) (2000).

114. *Treas. Reg. § 1.6662-4(d)(3)(iii)* (2003). See *supra* note 82 for a fuller discussion of the issue of what constitutes substantial authority sufficient to relieve taxpayers from the application of I.R.C. § 6662.

115. A letter ruling may be revoked without direct notice to the taxpayer. Rev. Proc. 2008-1, *supra* note 84, § 11.04. A change in the applicable statutory law or amendment of the regulations has the effect of an automatic revocation to the extent that the letter ruling is inconsistent with the amended statute or regulation. *Id.* Letter rulings may also be revoked or modified by direct letter to the taxpayer—a procedure which is ordinarily not possible—or by publication in the Internal Revenue Bulletin of a ruling or regulation stating a position different than that in the letter ruling issued to the taxpayer. *Id.* See *Caplin*, *supra* note 34, at 22.

- (1) there has been no misstatement or omission of material facts;
- (2) the facts subsequently developed are not materially different from the facts upon which the ruling was based;
- (3) there has been no change in the applicable law;
- (4) the ruling was originally issued with respect to a prospective or proposed transaction; and
- (5) the taxpayer acted in good faith in reliance upon such ruling and a retroactive revocation would be to his detriment.¹¹⁶

Closing Agreements

Closing agreements are intended to resolve issues permanently. The closing agreement binds both the taxpayer and the Service according to its terms absent fraud, malfeasance, or misrepresentation.¹¹⁷ The majority of closing agreements resolve issues that arise during the examination of a taxpayer and are signed off by Service field officials. Some closing agreements, however, are used to resolve issues regarding prospective transactions or concluded transactions before the return is filed. As described in the letter ruling section above, the letter ruling program evolved out of prospective closing agreements. Letter rulings, although generally binding on the Service, do not have the finality of closing agreements. Moreover, because a letter ruling is less final, the Service is not as concerned with verifying the facts of a transaction for a ruling as it is before entering into closing agreement. Therefore, a letter ruling can generally be issued in a shorter time than can a closing agreement. But closing agreements are still

116. Rev. Proc. 2008-1, *supra* note 84, §§ 11.05-.06. There are a number of cases considering the question of reliance. See, e.g., *Knetsch v. United States*, 348 F.2d 932 (Ct. Cl. 1965) (transaction consummated prior to acts constituting basis for claim of reliance); *Bornstein*, 345 F.2d 558 (reliance not proved). Few cases have analyzed the question of how to define detriment. *Schuster v. Commissioner* analyzes this problem in relation to a claim of equitable estoppel made by a trustee bank and the trust beneficiary in an estate tax case. 312 F.2d 311 (9th Cir. 1962). The court held that the bank, which had distributed the corpus of a trust to the beneficiary in reliance upon the Commissioner's prior determination that the trust was not part of decedent's gross estate, had materially changed its position to its detriment. *Schuster*, 312 F.2d at 318. On the other hand, the court held that the beneficiary suffered no detriment in relying on the Commissioner's prior determination. *Id.* Distribution of the trust assets to the beneficiary, who would have received such assets in any event, could not be said to cause a material change in the beneficiary's position. *Id.*

117. I.R.C. § 7121 (2000).

occasionally used for prospective transactions. Sometimes taxpayers request closing agreements instead of letter rulings because they seek a greater degree of finality. At other times, the Service will insist on a closing agreement as a condition of issuing a letter ruling.

Prospective closing agreements must be signed in the national office.¹¹⁸ Closing agreements are not written determinations subject to public inspection under section 6110¹¹⁹ and, except as may be otherwise authorized by the Code (e.g., by section 6104), closing agreements are exempt from disclosure under section 6103.¹²⁰ Because closing agreements are not generally released to the public, the issue of reliance by an unrelated taxpayer on the terms of a closing agreement rarely arises.

There are two specific Service programs that use closing agreement mechanisms to resolve issues prospectively: the Advanced Pricing Agreement (APA) program and the Prefiling Agreement (PFA) program.

Advanced Pricing Agreements

The APA program originated in 1991.¹²¹ The agreements resolve transfer pricing issues with multinational corporations for future years.¹²² Prior to the development of APAs, transfer pricing was a frequent issue in litigation, requiring extensive factual development, numerous experts, and years to reach final results. During the course of this litigation, neither the Service nor the taxpayer would have any certainty regarding the resolution of the issue. APAs are designed to preempt the need for such costly litigation and to provide certainty for both the multinational taxpayers and the Service for future years. Like other closing agreements, APAs are exempt from disclosure.¹²³

118. I.R.S. Deleg. Order No. 97 (Rev. 34), I.R.M., *supra* note 27, 1.2.47.6 (Aug. 18, 1997).

119. S. REP. NO. 94-938, at 306-07 (2d sess. 1976).

120. *Tax Analysts v. Internal Revenue Serv.*, 410 F.3d 715 (D.C. Cir. 2005). There, the court found that the closing agreement between the Service and the Christian Broadcasting Network was not material submitted in support of its application for tax exemption, upon which the Service made its determination that the Christian Broadcasting Network was entitled to exemption. *Tax Analysts*, 410 F.3d at 722. Accordingly, the closing agreement was not authorized to be disclosed under I.R.C. § 6104 and remained confidential under I.R.C. § 6103. *Id.*

121. Rev. Proc. 91-22, 1991-1 C.B. 526.

122. Rev. Proc. 2006-9, 2006-1 C.B. 278.

123. I.R.C. §§ 6103(b)(2)(C) (2000), 6110(b)(1)(B) (2000).

Prefiling Agreements

PFA's are a relatively recent program developed by the Service to resolve issues with taxpayers after a transaction is consummated but prior to the filing of the return. A pilot program was announced in 2000.¹²⁴ The program was judged a success in resolving contentious issues related to completed transactions and has since been renewed periodically.¹²⁵ Issues that are eligible for PFA's are generally ones for which the law is well-settled, but may require the resolution of factual disputes. While the original program had strict limits on the years and the issues that could be addressed, the current PFA program allows taxpayers to seek PFA's for multiple years and a greater number of issues.¹²⁶ Taxpayers seeking a PFA must pay a user fee of \$50,000.¹²⁷

Determination Letters

Of lesser impact than the ruling program in interpreting the Code is the determination letter program. A determination letter is a written statement issued by the Service (rather than the Office of Chief Counsel) in response to an inquiry by an individual or an organization. It applies to the particular facts involved and is based upon principles and precedents previously announced by the national office. Determination letters are issued only when a determination can be made on the basis of clearly established rules as set forth in the statutes, Treasury Decisions, or regulations, or by rulings, opinions, or court decisions published in the Internal Revenue Bulletin. Determination letters are issued in response to taxpayers' requests involving completed transactions in income, profits, and gift tax matters.¹²⁸

124. I.R.S. Notice 2000-12, 2000-1 C.B. 727.

125. I.R.S. Announcement 2002-54, 2002-1 C.B. 1190; Rev. Proc. 2001-22, 2001-1 C.B. 745, *superseded by* Rev. Proc. 2005-12, 2005-1 C.B. 311.

126. Rev. Proc. 2007-17, *supra* note 62. Rev. Proc. 2001-22, *supra* note 125, limited the eligible years for the PFA program to current or prior taxable years for which returns were neither due nor filed. Rev. Proc. 2005-12, 2005-1 C.B. 311, *superseded by* Rev. Proc. 2007-17, *supra*, expanded the program in several ways. An eligible taxpayer could request a PFA for the current taxable year, any prior taxable year for which the original return is not yet due (taking into account any extensions of time to file) and is not yet filed and, with some exceptions, for a limited number of future taxable years. PFA's could also be used to determine the appropriate methodology for determining tax consequences affecting future tax years. Finally, PFA's may now be obtained for certain international issues and issues having "international implications." Rev. Proc. 2007-17, *supra*, § 3.07.

127. Rev. Proc. 2007-17, *supra* note 62, § 10.

128. Rev. Proc. 2008-1, §§ 12-13, 2008-1 I.R.B. 1, 54; Rev. Proc. 2008-6, 2008-1 I.R.B. 192 (employee plans determination letters); Treas. Reg. § 601.201(c) (2002).

The most important use of determination letters in prospective transactions is in the qualification of plans under I.R.C. § 401, the related exempt status of trusts under I.R.C. § 501, and in determining the exempt status of organizations under I.R.C. §§ 501 and 521.¹²⁹ Statistics are not kept on the number of determination letters issued in income, profits, estate, and gift tax. However, in Fiscal Year 2006, nearly 17,000 determination letters were issued with respect to employee plans.¹³⁰

Reliance and Revocation

The Service may revoke a determination letter upon reexamination or upon audit of a taxpayer's return. In the income, profits, estate, and gift tax area, such revocation is automatically retroactive. If prospective application is desirable, the Service can refer the matter to the Chief Counsel for exercise of his authority to limit the modification or revocation under section 7805(b). The revocation of a determination letter in the exempt organization and employee benefit trust areas, however, is generally prospective, except for a few clearly defined situations.¹³¹

The rationale for retroactive revocation of determination letters in the income, estate, and gift tax areas is simply that such a determination letter is only issued as to a completed transaction. Therefore, taxpayers could not have relied upon the determination letter in entering into the transaction initially. Determination letters as to exempt status, however, are relied upon by taxpayers in connection with prospective transactions, and this accounts for the difference in treatment.

Information Letters

An information letter is a statement, issued either by the Office of Chief Counsel or by the Service, which does no more than call attention to a well-established interpretation or principle of tax law, without applying it to a specific set of facts.¹³² An information letter may be issued when the nature of the request from the individual or the organization suggests that it is seeking general information, or when the request does not meet all the require-

129. See generally Rev. Proc. 2008-6, *supra* note 128.

130. IRS DATA BOOK 2007, tbl.3, available at <http://www.irs.gov/pub/irs-soi/07db23dl.xls>.

131. Rev. Proc. 2008-4, § 13.05, 2008-1 I.R.B. 121, 149.

132. Rev. Proc. 2008-1, *supra* note 84, § 2.04.

ments of a request for ruling or for a determination letter.¹³³ Its primary purpose is to impart general information which the Service feels will assist the individual or the organization making such request.¹³⁴

The Service is not bound by any statements contained in information letters, since these letters are not rulings. A taxpayer who relies on written erroneous advice from the Service, however, may have any penalties or interest attributable to such reliance abated.¹³⁵

V. LEGAL ADVICE PROGRAM

While the Service issues published guidance in order to provide assistance to taxpayers, it releases to the public certain legal advice prepared by the Office of Chief Counsel because it is required to do so by the Code and other federal law, most notably the Freedom of Information Act. Regulations and other published guidance represent the culmination of substantial time, effort, and thought of the legal staff of the Office of Chief Counsel and the Treasury Department, principally the Office of the Assistant Secretary for Tax Policy. Yet no matter how precise, exhaustive, or carefully thought-through regulations, revenue rulings, and other published guidance may be, their authors can never hope to address every conceivable issue or situation to which the guidance might apply. There will invariably be issues and fact patterns confronting Service personnel and Chief Counsel attorneys that are not resolved definitively by existing law or published guidance. Many of these cases will be confined to a particular taxpayer or group of similarly-situated taxpayers and involve a relatively narrow issue.

To meet the needs of these taxpayers, the Office of Chief Counsel provides legal advice both orally and in writing to Chief Counsel field personnel, as well as to Service employees in the national office and in the field. Over the years, the form and the name given to this advice have varied. However denominated, all legal advice provided by the Office of Chief Counsel is intended to assist Service employees to properly administer and enforce the internal revenue laws and related statutes. It is the most fundamental function of any government or private legal office to provide advice

133. *Id.*

134. *Id.*

135. I.R.C. § 6404(f) (2000).

concerning the application of the law to a given situation and to recommend a course of action. Unlike published guidance—and to a lesser extent letter rulings—legal advice is not intended to be a policy pronouncement, instruction, or advisement to taxpayers, tax practitioners, or the general public. For this reason, the Service cautions its own employees against applying legal advice beyond the situation to which the advice pertains and the taxpayer or class of taxpayers as to whom it is issued.¹³⁶

The Office of Chief Counsel makes much of its formal legal advice available to the public, after first redacting privacy-protected and privileged material. Despite the limited applicability of legal advice, much of it is publicly accessible, so there may be a strong temptation to consider the advice as determinative in similar situations or to use it to support a desired position. However, taxpayers cannot and should not rely upon this legal advice in planning transactions or taking positions, and, to the extent taxpayers and their advisors base their decisions on legal advice issued by the Office of Chief Counsel, they do so at their own risk.¹³⁷

Technical Advice Memoranda

Definition

The most authoritative form of legal advice, and the only one for which the Service publishes an annual revenue procedure,¹³⁸ is the Technical Advice Memorandum, or TAM. A TAM is legal advice from one of the Associate Chief Counsel Offices to a Division Commissioner of an operating division¹³⁹ or an Appeals Area Director.¹⁴⁰ A TAM responds to a request for assistance on a technical or procedural question that arises during any proceeding before the Service.¹⁴¹ The request for advice must concern the interpretation and application of the internal revenue laws, tax treaties, regulations, revenue rulings, or other precedents to a specific set of facts to determine the correct tax treatment for an item in a year under audit or on appeal.¹⁴² Service personnel assigned to

136. See, e.g., C.C.D.M., *supra* note 4, 33.1.2.2.3.4(1), 33.1.2.2.3.5 (Aug. 11, 2004).

137. See I.R.C. § 6110(k)(3), which provides that a written determination may not be used or cited as precedent.

138. See Rev. Proc. 2008-2, 2008-1 I.R.B. 90.

139. These operating divisions are Large and Mid-Size Business, Small Business/Self-Employed, Wage and Investment, and Tax Exempt and Government Entities.

140. Rev. Proc. 2008-2, *supra* note 138, §§ 1.01, 2.01, 2.02, 3.01.

141. *Id.* § 3.01.

142. *Id.*

the examination of cases may seek a TAM, or a taxpayer may request that an issue be referred for technical advice.¹⁴³

A TAM has certain characteristics in common with a letter ruling. For example, before a field director submits a request for technical advice, a pre-submission conference is held with the field office, field counsel, the Associate Chief Counsel Office, and the taxpayer (and any representative of the taxpayer) to define the scope of the request and to determine the factual information and documentation that should accompany the request.¹⁴⁴ Also, similar to letter rulings, if an Associate Chief Counsel Office proposes to issue a TAM adverse to the taxpayer, the taxpayer has the right to a conference with the Associate Chief Counsel office.¹⁴⁵ Only a director, however, may withdraw a technical advice request.¹⁴⁶

Reliance and Revocation

Technical Advice Memoranda are open to public inspection.¹⁴⁷ They are redacted to remove any identifying information of the particular taxpayer involved and other exempt information.¹⁴⁸ Although TAMs are available to the public, other taxpayers may not rely on TAMs as precedent that governs the outcome of their cases.¹⁴⁹ A conclusion in a TAM is exclusive to the case for which it was requested.¹⁵⁰ That said, TAMs issued after October 31,

143. *Id.* § 5.02.

144. *Id.* §§ 6.01, 6.02.

145. Rev. Proc. 2008-2, *supra* note 138, § 9.01.

146. *Id.* § 11.01.

147. Section 6110(a) of the Internal Revenue Code provides that any "written determination" and any "background file document" relating to the written determination shall be open to the public. Technical Advice Memoranda are included in the definition of a "written determination" in section 6110(b). A background file document is basically any background materials, such as the request for the TAM or other written determination and supporting records. I.R.C. § 6110(b)(2) (2000).

148. Section 6110(c) lists seven exemptions, which cover obvious types of sensitive information, such as information that would identify the taxpayer, and some that may be less obvious, such as geological and geophysical information. I.R.C. §§ 6110 (c)(1), (7) (2000). Once a TAM is issued, the Service notifies the taxpayer that the TAM will be publicly disclosed with the taxpayer's identifying information removed. *Id.* § 6110(f); Treas. Reg. § 301.6110-5(a) (2001). The taxpayer may submit a written statement to the Service protesting the proposed disclosure of information in a TAM, and if the taxpayer is unsatisfied with the final administrative determination as to what will be disclosed, the taxpayer may file a petition with the Tax Court challenging the extent of the intended disclosure. I.R.C. § 6110(f)(2)-(3) (2000); Treas. Reg. § 301.6110-5(b) (2001).

149. I.R.C. § 6110(k)(3); Rev. Proc. 2008-2, *supra* note 138, § 13.04; C.C.D.M., *supra* note 4, 31.1.1.1.1(3) (Aug. 11, 2004).

150. Rev. Proc. 2008-2, *supra* note 138, § 12 ("After a TAM is issued, the director must process the taxpayer's case on the basis of the conclusions in the TAM."). As to the taxpayer concerned (but not a different taxpayer), a TAM is usually retroactive, and it is also

1976, are authority in determining whether there is substantial authority for the tax treatment of an item as a defense to the section 6662 accuracy-related penalty.¹⁵¹

Chief Counsel Notices

Chief Counsel notices are internal directives of the Office of Chief Counsel that provide interim guidance, temporary procedures, changes in litigating positions, personnel announcements, or other administrative updates.¹⁵² Chief Counsel notices are the most effective way to convey important developments and changes to all Counsel personnel. The contents of notices that furnish interim guidance or instructions to staff are eventually incorporated into the Chief Counsel Directives Manual, but the notices serve as immediate notification. Chief Counsel notices that have not yet been incorporated into the Chief Counsel Directives Manual or are otherwise active, are available to the public on the Service's website.¹⁵³ Taxpayers may not rely on Chief Counsel notices as authority on any issue.

Chief Counsel Advice

Historically, Chief Counsel attorneys in certain offices in the national office issued legal advice to Chief Counsel field offices. After the filing of *Tax Analysts v. Internal Revenue Service*,¹⁵⁴ this advice became known as Field Service Advice.¹⁵⁵ Field Service Advice was case-specific written advice from one of these offices¹⁵⁶

prospective if it relates to a continuing action or series of actions. *Id.* § 13.03. TAMs apply to ongoing matters until withdrawn or until the conclusion is modified or revoked by a court decision, statute, treaty, regulation, or other published guidance. *Id.*

151. Treas. Reg. § 1.6662-4(d)(3)(iii) (2003).

152. C.C.D.M., *supra* note 4, 30.2.1.4(1) (Aug. 18, 2006). Chief Counsel Notices should not be confused with Notices published in the Internal Revenue Bulletin. *See* discussion *supra* at p. 338.

153. The Service makes Chief Counsel Notices and other work products written by the Office of Chief Counsel available in the Service's Electronic Reading Room. *See* <http://www.irs.gov/foia/article/0,,id=110353,00.html>.

154. *Tax Analysts v. Internal Revenue Serv.*, No. Civ. A. 94-923 (GK), 1996 WL 134587 (D.D.C. Mar. 15, 1996), *remanded for further consideration*, 117 F.3d 607 (D.C. Cir. 1997).

155. H.R. REP. NO. 105-599, at 298 (1998) (Conf. Rep.), *reprinted in* 1998 U.S.C.C.A.N. Field Service Advice was the name given to legal advice that had been issued prior to a reorganization of the Office of Chief Counsel by the Tax Litigation Division, an office that was then responsible for providing advice in tax litigation cases to field offices litigating cases.

156. These offices were the Associate Chief Counsel (Employee Benefits and Exempt Organizations), the Associate Chief Counsel (International), and the Field Service Division of the Associate Chief Counsel (Domestic). At one time, these offices also provided similar

to the field in both court-docketed cases and cases not yet filed in court.¹⁵⁷ Field Service Advice was neither a final determination of the Service nor an official position of the Office of Chief Counsel, even with regard to the case in which the advice was requested.¹⁵⁸

After the United States District Court for the District of Columbia determined that Field Service Advice was subject to release under the Freedom of Information Act,¹⁵⁹ Congress amended section 6110 in 1998 to define certain legal advice as Chief Counsel Advice that must be released for public inspection.¹⁶⁰ This amendment to the statute provided a mechanism for taxpayers to participate in the process of redacting their identifying information from the advice, similar to that provided for TAMs and letter rulings, which was not required if the advice had been released under the FOIA.

Section 6110 defines Chief Counsel Advice as “written advice or instruction, under whatever name or designation, prepared by any national office component of the Office of Chief Counsel” that is issued to Service or Chief Counsel personnel in the field interpreting or concerning a “revenue provision.”¹⁶¹ Unlike TAMs, Chief Counsel Advice may provide advice relating to specific taxpayers or it may provide advice relating to a class of taxpayers or certain

legal advice to the field in the form of Service Center Advice, which was made public. As the name suggests, Service Center Advice was legal advice to Service Centers and related to functions regarding their tax administration responsibilities. C.C.D.M., *supra* note 4, (35)2(13)1(1) (Sept. 29, 1997) (no longer in effect). After the changes to I.R.C. § 6110, Service Center Advice was subsumed with the definition of Chief Counsel Advice. I.R.S. Chief Couns. Notice N(35)000-143a (Feb. 16, 1999).

157. C.C.D.M., *supra* note 4, (35)3(19)3(4) (Jan. 6, 1997) (no longer in effect); *id.* (35)274(2)(b) (July 24, 1996) (no longer in effect).

158. *Id.* (35)274(2)(b)3 (July 24, 1996) (no longer in effect).

159. Tax Analysts v. Internal Revenue Serv., 1996 WL 134587, at *1.

160. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3509, 112 Stat. 685, 772-74 (codified at I.R.C. § 6110(i) (2000)); H.R. REP. NO. 105-599, at 298-99 (1998) (Conf. Rep.), *reprinted in* 1998 U.S.C.C.A.N. The Act also added Chief Counsel Advice to the definition of a “written determination” in I.R.C. § 6110(b). By including Chief Counsel Advice within the disclosure framework of I.R.C. § 6110, *see* I.R.C. § 6110(b)(1)(A) (2000), Congress intended to remove the advice from disclosure under the Freedom of Information Act, 5 U.S.C. § 552 (2000 & Supp. V 2005). *See* I.R.C. § 6110(m) (2000) (providing that “written determinations” are not subject to mandatory disclosure); H.R. REP. NO. 105-599, at 302 (1998) (Conf. Rep.), *reprinted in* 1998 U.S.C.C.A.N.

161. I.R.C. § 6110(i)(1) (2000). A “revenue provision” means not only a current or prior provision of the Code, but a tax treaty, regulation, revenue ruling, revenue procedure, or “other published or unpublished guidance.” *Id.* § 6110(i)(1)(B). Chief Counsel Advice also includes “any Internal Revenue Service or Office of Chief Counsel position or policy concerning a revenue provision” and “any legal interpretation of State law, foreign law, or other Federal law relating to the assessment or collection of any liability under a revenue provision.” *Id.* § 6110(i)(A)(ii).

fact patterns.¹⁶² Similar to section 6110 written determinations, Chief Counsel Advice is open to the public, subject to the removal of identifying information of the taxpayer's and any third party's information exempt under the FOIA.¹⁶³ For Chief Counsel Advice that relates to a specific taxpayer, that taxpayer has the rights to notification of what will be publicly disclosed and to pursue additional redactions.¹⁶⁴ Chief Counsel Advice is used in developing, settling, or otherwise resolving the case or cases for which the advice is requested.¹⁶⁵ Chief Counsel Advice may not be used or cited as precedent.¹⁶⁶

While these documents may provide some insight into how the Office of Chief Counsel analyzes issues, any advice they contain must be viewed cautiously by taxpayers and their advisers. These forms of legal advice are written by docket attorneys within the Associate Chief Counsel Offices and are usually reviewed by a first line manager, such as a senior technician reviewer or a branch chief. As there is no assurance that the Service will apply the result in any given Chief Counsel Advice to matters other than those explicitly covered in the document, taxpayers and their advisers cannot rely on these documents in determining how to consummate transactions or take return positions.

Program Manager Advice

One of the most vital purposes of legal advice is to facilitate the Service's management of its myriad programs consistent with the law. The Office of Chief Counsel routinely provides advice to those Service officials who manage national programs for the Service.¹⁶⁷ Division Counsel are currently responsible for providing routine legal advice to these program managers. Program managers may also seek program advice from the Associate Chief Counsel Offices, such as when the advice principally concerns the interpretation of provisions of the Code or when program managers

162. C.C.D.M., *supra* note 4, 33.1.3.1.1(2) (Aug. 11, 2004).

163. I.R.C. §§ 6110(a), (c)(1), (c)(3), (i)(3)(B) (2000); Treas. Reg. § 301.6110-1(a) (1977). FOIA Exemption 3, 5 U.S.C. § 552(b)(3) (2000), however, which incorporates the exemption provisions of other federal statutes, does not apply in conjunction with I.R.C. § 6103 or any other section of title 26. I.R.C. § 6110(i)(3)(B) (2000).

164. I.R.C. § 6110(i)(4) (2000).

165. C.C.D.M., *supra* note 4, 33.1.2.2.3.5 (Aug. 11, 2004).

166. I.R.C. § 6110(k)(3) (2000); Treas. Reg. § 301.6110-7(b) (1977).

167. The most obvious examples are the Commissioners for the Service's Operating Divisions. Others include operational directors and the directors of industry-wide programs.

must apply newly enacted legislation,¹⁶⁸ which will eventually be released to the public under the name Program Manager Technical Assistance.

Program manager advice is generally directed at resolving issues at a systemic level. This type of advice is an outgrowth of a type of advice called Technical Assistance, since it was historically provided by tax law specialists working for the Service's Assistant Commissioner (Technical). Technical Assistance was traditionally legal advice provided on technical issues mostly outside the context of a taxpayer's case, though a certain amount of the assistance was devoted to specific cases.¹⁶⁹ Some of this type of advice provides assistance to the Service principally in the nature of comment on the content of tax forms and tax publications, the Internal Revenue Manual, or pending legislation.¹⁷⁰ Other technical assistance consists of memoranda issued to program managers that reflect the considered legal conclusions of the Office of Chief Counsel that the Service must make open to public inspection.¹⁷¹

Like Chief Counsel Advice, Program Manager Advice may provide some insight into how the Office of Chief Counsel analyzes issues, but it has the same inherent limitations. As a result, any legal advice they contain must be viewed cautiously by taxpayers and their advisers.

Associate Memoranda

In 2005, I asked an internal Chief Counsel Task Force to consider improvements in the way field counsel and the Associate Chief Counsel Offices work together in the legal advice process. One of the concerns addressed by the Task Force was revenue agents' overly broad reliance on the conclusions in TAMs to resolve industry wide issues.¹⁷² Based on the task force's recommendation, new procedures were implemented to provide legal

168. C.C.D.M., *supra* note 4, 33.1.2.2.4(2) (Aug. 11, 2004).

169. *Id.* (35)274(2)(c) (July 24, 1996) (no longer in effect). Technical Assistance is not synonymous with Technical Advice Memoranda or TAMs discussed *supra* at page 355.

170. See *Tax Analysts v. Internal Revenue Serv.*, 97 F. Supp. 2d 13, 15 (D.D.C. 2000), *aff'd in part and rev'd in part*, 294 F.3d 71 (D.C. Cir. 2002), *reh'g denied*, 2002 U.S. App. LEXIS 15956 (D.C. Cir. Aug. 5, 2002), *motion granted in part, and motion denied in part*, 483 F. Supp. 2d 8 (D.D.C. 2007). As this kind of advice is protected by the deliberative process privilege, it is not released to the public.

171. *Tax Analysts v. Internal Revenue Serv.*, 152 F. Supp. 2d 1, 20-24 (D.D.C. 2001), *aff'd in part and rev'd in part*, 294 F.3d 71 (D.C. Cir. 2002); *Tax Analysts v. Internal Revenue Serv.*, 483 F. Supp. 2d 8 (D.D.C. 2007). This advice may include general legal advice on program or it may also include advice sought with respect to particular taxpayers' cases.

172. I.R.S. Chief Couns. Notice CC-2006-013 (May 5, 2006).

advice, referred to as Associate Memoranda, that could be applied by revenue agents to resolve these types of issues.¹⁷³ Unlike most Chief Counsel Advice, this type of legal advice must be issued by an Associate Chief Counsel executive and is provided to program managers in the Service and Division Counsel executives.

An Associate Memorandum is written so that it can be released in its entirety to the public, but it is not intended to state Service position. Since it is reviewed at higher levels and issued by an executive who has responsibility for providing legal advice on the issue, the legal advice it states is more reliable than that contained in Chief Counsel Advice. Nonetheless, the Service is not bound to resolve cases in accordance with a position stated in an Associate Memorandum, and taxpayers, therefore, cannot assume that transactions conforming to that advice will not be challenged by the Service.

Field Legal Advice

Field counsel are oftentimes the first point of contact with the Office of Chief Counsel for litigation matters and for Service personnel. Besides representing the Service in Tax Court and in bankruptcy court, attorneys in the Associate Area Counsel offices regularly provide legal advice to Service employees and managers. Field attorneys have always served as the first—and often the last—source for routine, and sometimes non-routine, legal advice to their local clients.¹⁷⁴ Area Directors and their staffs, Appeals Officers, and the campuses rely on that advice to carry out day-to-day operations.

Field legal advice can be delivered orally or by email when a quick answer is needed, but is also frequently provided in a memorandum.¹⁷⁵ Depending on the case or the significance of the issue, it may be necessary for field attorneys to coordinate advice with the headquarters office of Division Counsel or an Associate Chief Counsel Office.¹⁷⁶ In some of these situations, field attorneys prepare a memorandum and seek the concurrence of the ap-

173. *Id.*; see also I.R.S. Chief Couns. Notice CC-2007-003 (Jan. 17, 2007).

174. C.C.D.M., *supra* note 4, 33.1.2.2.1(1) (Aug. 11, 2004), 35(271)(1), 35(272)(1), 35(273)(1) (Apr. 8, 1992).

175. *Id.* 33.1.2.2.1(1) (Aug. 11, 2004).

176. Examples of matters that must be coordinated between the field and the Associate Chief Counsel Offices are matters involving the validity of a regulation, revenue ruling, or revenue procedure; a corporate tax shelter that is a listed transaction; and matters involving taxpayers who are local or state governments. For other examples, see *id.* 31.1.1-1 (Aug. 11, 2004).

propriate Associate Chief Counsel office.¹⁷⁷ The reviewer's comments may be provided orally or may consist of pen and ink changes to the memorandum.¹⁷⁸ Although not Chief Counsel Advice, written field advice issued after this kind of review is nevertheless processed and disclosed under procedures similar to those for Chief Counsel Advice.¹⁷⁹

Litigation Guideline Memoranda

Chief Counsel notices announce, among other things, changes in litigating positions and provide procedures for litigating certain issues or types of cases. The same sort of advice was previously provided in the form of Litigation Guideline Memoranda. These memoranda dispense information and instructions on litigating procedures and methods.¹⁸⁰ Litigation Guideline Memoranda additionally set forth standards and criteria on issues and topics of special interest to Chief Counsel attorneys who do litigation.¹⁸¹

As legal advice issued by the national office to the field, Litigation Guideline Memoranda now fall under the definition of Chief Counsel Advice.¹⁸² Litigation Guideline Memoranda were drafted as guides to help field counsel with litigation and are usable as a research tool, but the memoranda have limited utility due to their age. Taxpayers and tax practitioners may find these documents of historical interest, but should consider them in the same manner as Chief Counsel Advice in terms of reliance, understanding that they are unlikely to predict the positions the Service will take in litigation.

177. *Id.* 33.1.2.3 (Aug. 11, 2004). The advice is normally reviewed before it is issued, with post-issuance review only in unusual circumstances. *Id.* ¶ 1.

178. *Id.* 33.1.2.3.2(2); I.R.S. Chief Couns. Notice CC-2005-003 (Dec. 12, 2002).

179. C.C.D.M., *supra* note 4, 33.1.2.3.1, 33.1.2.3.2(5) (Aug. 11, 2004). This advice is released under the name Legal Advice Issued by Field Attorneys and is available in the Service's Electronic Reading Room. See *supra* note 153.

180. I.R.S. Chief Couns. Notice N(32)210-1 (Apr. 18, 1988).

181. *Id.*

182. See Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3509(d)(2)(A), 112 Stat. 774 (1998) (transition rule mentioning Litigation Guideline Memoranda among post-December 31, 1985 Chief Counsel Advice required to be publicly disclosed). See also I.R.S. Announcement 99-81, 1999-2 C.B. 244 (announcing that Litigation Guideline Memoranda issued beginning January 1, 1986 have been made publicly available). Although pre-1986 Litigation Guideline Memoranda were for a time the subject of FOIA litigation, they have likewise been made publicly available. *Tax Analysts*, 152 F. Supp. 2d at 4. These documents are available in the Electronic Reading Room on the Service website. See *supra* note 153.

Other Legal Advice

Each type of legal advice that has been discussed so far not only has a long pedigree but is in active, current use, which presumably will continue as long as these products meet the needs of the Office of Chief Counsel and Service personnel for legal advice.¹⁸³ There are a few other forms of legal advice that have been released to the public in the past but are no longer being issued.

One now all-but-extinct form of advice was the General Counsel Memorandum (GCM). These memoranda were formal legal opinions by Chief Counsel components of the national office on substantive and procedural issues.¹⁸⁴ Nearly 40,000 GCMs were authored over several decades.¹⁸⁵ Beginning with the first GCM in 1926, the opinions were written to address a specific issue or issues and were numbered and indexed for research and retrieval purposes.¹⁸⁶ From 1926 to 1953, the Service published selected GCMs in the Internal Revenue Bulletin.¹⁸⁷ Beginning in 1981, GCMs were made available to the public under the FOIA.¹⁸⁸

Almost as old and voluminous as GCMs are Office Memoranda. Between 1928 and 1991, over 20,000 OMs were issued. The national office issued OMs as formal legal advice to litigation units on questions of "major significance" resulting from tax litigation.¹⁸⁹ In 2003, OMs were all declared obsolete, but like GCMs, they were indexed and retained for their research and historical value,¹⁹⁰ and are releasable under the FOIA.

Finally, several Chief Counsel offices formerly put out bulletins apprising Counsel and Service employees of developments in the law. The Tax Litigation Bulletins, for example, were mostly summaries of decided and pending tax cases. General Litigation

183. Irrespective of name changes, the functions of the different forms of advice have remained essentially the same.

184. C.C.D.M., *supra* note 4, 30.7.2.2(1) (Mar. 26, 1985) (no longer in effect).

185. Recent GCMs have been issued only to revoke earlier GCMs and do not provide legal advice.

186. C.C.D.M., *supra* note 4, (39)(10)10(1) (Dec. 2, 1992) (no longer in effect).

187. *Taxation with Representation Fund v. Internal Revenue Serv.*, 646 F.2d 666, 671 (D.C. Cir. 1981).

188. *Taxation with Representation*, 646 F.2d at 671. In *Taxation with Representation*, the court held that GCMs reflecting the final position of the Service and distributed as such were not exempt from disclosure by Exemption 5 and the deliberative process privilege because they functioned as a body of "working law" within the Service. In contrast, GCMs that were not adopted, indexed, and distributed throughout the agency were exempt because they were remained subject to the deliberative process privilege and exemption 5. *Id.* at 681-83.

189. C.C.D.M., *supra* note 4, (39)873(1) (Dec. 2, 1992) (no longer in effect).

190. I.R.S. Chief Couns. Notice CC-2003-005 (Jan. 16, 2003).

Bulletins (and the successor Collection, Bankruptcy & Summonses Bulletins) summarized court opinions concerning topics such as bankruptcy and collection. Criminal Tax Bulletins did the same for criminal tax cases, and the Disclosure Litigation Bulletins specialized in privacy and disclosure of information. As the legislative history of section 6110 made clear, all of these bulletins are Chief Counsel Advice.¹⁹¹

VI. ACQUIESCENCE PROGRAM

Acquiescence and Actions on Decision

A notice of acquiescence is an announcement by the Service indicating whether it will follow a significant adverse decision.¹⁹² An Action on Decision (AOD) is an internal document prepared within the Chief Counsel's Office reflecting the judgment of what announcement should be made. It is the policy of the Service to announce at an early date whether it will follow the holdings in cases¹⁹³ that involve significant issues decided adversely to the Government.¹⁹⁴

In these kinds of cases, an AOD is issued. For this purpose, the "issue" is the basis upon which the court determined the tax liability of the taxpayer.¹⁹⁵ Issues are decided adversely to the Government when the Service is adversely affected in its legal position by the opinion. An issue may be considered adverse for the purpose of determining whether an AOD should be issued, even if neither the case nor the issue is appealable.¹⁹⁶ Other factors taken into consideration when deciding whether to issue an AOD include: (1) whether the opinion involves an issue under the industry resolution program; (2) the number of cases and amount of revenue affected by the opinion; (3) the impact of the opinion on regulations, revenue rulings, revenue procedures, and other technical pronouncements; (4) whether the opinion is inconsistent with legislative history or opinions in other courts; (5) whether the issue has been lost by the Government in two or more circuits; (6)

191. H.R. REP. NO. 105-599, at 298 (1998)(Conf. Rep.), *reprinted in* 1998 U.S.C.C.A.N. These documents are available in the Electronic Reading Room on the Service website. See *supra* note 153.

192. I.R.M., *supra* note 27, 4.10.7.2.9.8.1(1) (Jan. 1, 2006); C.C.D.M., *supra* note 4, 36.3.1.1 (Aug. 11, 2004).

193. I.R.M., *supra* note 27, 4.10.7.2.9.8.1(1) (Jan. 1, 2006).

194. C.C.D.M., *supra* note 4, 36.3.1.2 (Aug. 11, 2004).

195. *Id.* 36.3.1.2(2).

196. *Id.* 36.3.1.2.

whether the case is of first impression; (7) the likelihood of a future split in the circuits; (8) whether en banc review in the circuit is sought; (9) whether the opinion may be limited to its facts; (10) whether the opinion places an onerous administrative burden on the Service or taxpayers; and (11) whether the opinion is based on Code sections, regulations, or rulings that have been modified or revoked.¹⁹⁷

History

The present Service policy of issuing acquiescences in Tax Court opinions is, in large part, an historical accident. The Revenue Act of 1924¹⁹⁸ provided that the Commissioner had one year to appeal from an adverse decision of the Board of Tax Appeals. A taxpayer receiving a favorable opinion from the Board of Tax Appeals was not at all sure of the finality of the opinion until the appeal period had run. To aid the petitioner, the Service began to issue acquiescences and nonacquiescences in the Board of Tax Appeal cases. When the Service acquiesced, it simply meant the Commissioner had determined not to appeal the case. When the Commissioner issued a nonacquiescence, this signaled his intention to appeal. Two years later, the statute was amended to allow for appeals directly to the Court of Appeals; previously, appeals lay in the District Court and the appeal time was shortened to six months.¹⁹⁹ In 1932, the present rule of three months as the time for appeal was instituted,²⁰⁰ and the acquiescence procedure was no longer necessary to alert the petitioner of the Commissioner's plan to appeal.

But, by that time, another and far more significant use for the acquiescence procedure had developed, so the Service did not discontinue its use. In the 1925 Cumulative Bulletin, the Service first announced the meaning of the acquiescence procedure.²⁰¹ Among other things, it stated that the decisions acquiesced in should be relied upon by Service employees as precedents in the disposition of other cases before the Bureau.²⁰² Tax practitioners, as well as the Service, found this procedure helpful when transactions were questioned by agents on audit. The questioned trans-

197. *Id.*

198. Revenue Act of 1924, ch. 234, § 274(b), 43 Stat. 297 (1924).

199. Revenue Act of 1926, ch. 27, § 1001, 44 Stat. 109 (1926).

200. Revenue Act of 1932, ch. 209, § 1101(a), 47 Stat. 286 (1932).

201. IV-1 C.B. iv (1925).

202. *Id.*

action could easily be disposed of if an acquiesced case having similar facts could be found. Both the agent and the taxpayer understood from the acquiescence that the present position of the Service was not to litigate this same issue again.

Today, the acquiescence program has expanded beyond the original purpose of indicating the Service's litigating position following an adverse decision of the Tax Court. The Service's acquiescence program now includes all civil tax cases in which guidance is determined to be helpful.²⁰³ As a consequence, announcements of acquiescence or nonacquiescence issue are written for the holdings of memorandum Tax Court opinions, as well as decisions from the U.S. District Courts, Claims Court, and Circuit Courts of Appeal.²⁰⁴ Announcements of acquiescence and nonacquiescence are published weekly in the Internal Revenue Bulletin and consolidated periodically in the Cumulative Bulletin. They are succinct statements of the Service's formal position in a given case. The somewhat lengthier memorandum on which the notice is based—the AOD prepared within Chief Counsel's Office—is not published in the Internal Revenue Bulletin or Cumulative Bulletin, but it is released to the public.²⁰⁵

Need for Acquiescence Program

The acquiescence program continues as a helpful tool to both the revenue agents and the taxpayers in settling controversies over completed transactions. With respect to prospective transactions, acquiescence or nonacquiescence can serve as a guide to taxpayers.²⁰⁶ When a taxpayer's transaction parallels that of a transaction in an acquiesced case, absent other considerations, the taxpayer can reasonably expect that a favorable ruling could be obtained from the Service.²⁰⁷ Thus, the acquiescence program serves both the Service and the public by keeping them informed

203. C.C.D.M., *supra* note 4, 39.11.5.1(1) (Oct. 20, 1987).

204. I.R.M., *supra* note 27, 4.10.7.2.9.8.1(3) (Jan. 1, 2006).

205. Disclosure of the AOD memoranda on which notices of acquiescence or nonacquiescence are based was the subject of litigation that resulted in the disclosure of these documents. *See Taxation with Representation Fund v. Internal Revenue Serv.*, 485 F. Supp. 263 (D.D.C. 1980), *aff'd*, 646 F.2d 666 (D.C. Cir. 1981) (finding AODs not generally exempted from mandatory disclosure by the deliberative process privilege of 5 U.S.C. § 552(b)(5)). These documents are available in the Electronic Reading Room on the Service website. *See supra* note 153.

206. The internal AOD is intended to provide controlling guidance for Service personnel working similar issues in other cases. *See, e.g.*, 2007-6 I.R.B. 419, at n.1.

207. *E.g.*, 1964-1 C.B. 3.

of the Commissioner's current litigating position. When viewed in this light, it becomes apparent that this program is an additional aid to taxpayers provided by the Service in an effort to acquaint taxpayers with the Commissioner's present view of the law.

There are only three possible statements of position in an announcement of acquiescence or nonacquiescence: namely, acquiescence, acquiescence in result only, or nonacquiescence.²⁰⁸ Acquiescence indicates that the Service accepts the holding of the court in a case and will follow the holding in disposing of cases with the same controlling facts.²⁰⁹ Acquiescence does not indicate either "approval [or] disapproval of the reasons assigned by the court for its conclusions."²¹⁰ Acquiescence in result only likewise indicates "that the Service accepts the holding of the court in a case and . . . will follow [the holding] in disposing of cases with the same controlling facts."²¹¹ Acquiescence in result only telegraphs Service disagreement or concern with some or all of the reasons given by the deciding court for the holding in the case.²¹² Finally,

[n]onacquiescence signifies that, although no further review was sought, the Service does not agree with the holding of the court and generally, will not follow the decision in disposing of cases involving other taxpayers. In reference to an opinion of a circuit court of appeals, a nonacquiescence indicates that the Service will not follow the holding on a nationwide basis. [In general], the Service will recognize the precedential impact of the opinion on cases arising within the venue of the deciding circuit.²¹³

AODs and subsequent announcements generally do not affect the application of stare decisis or the rule of precedent. The Service will recognize these principles and generally concede issues accordingly during administrative proceedings. Furthermore, the Service generally adheres to the controlling precedent of a given circuit when litigating a case bound by that circuit's precedent, per *Golsen v. Commissioner*.²¹⁴ Nevertheless, in very rare circumstances, nonacquiescence to a circuit court case will not necessar-

208. I.R.M., *supra* note 27, 4.10.7.2.9.8.1(4) (Jan. 1, 2006).

209. *Id.*

210. *Id.* 4.10.7.2.9.8.1(4)(A).

211. *Id.* 4.10.7.2.9.8.1(4).

212. *Id.* 4.10.7.2.9.8.1(4)(B).

213. I.R.M., *supra* note 27, 4.10.7.2.9.8.1(4)(C) (Jan. 1, 2006).

214. 54 T.C. 742, 756-57 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971). See C.C.D.M., *supra* note 4, 36.3.1.4(2)(c)-(3) (Aug. 11, 2004).

ily imply an intention on the part of the Service to comply with the precedent within the same circuit issuing the opinion. This may occur if the Service intends to continue to litigate the matter in the deciding circuit or if the case does not establish controlling circuit court precedent because the holding can be limited to its unique facts.²¹⁵ In such cases, the AOD will provide explicit guidance concerning how to handle the matter within the issuing circuit.²¹⁶

Reliance and Revocation

The Commissioner has complete power to modify, amend, or revoke his acquiescences and to make such changes retroactive as to all taxpayers or, in the exercise of his discretion, certain classes of taxpayers.²¹⁷ He may also exercise his discretion to make any modification prospective.²¹⁸

It is important to carefully delineate the extent to which acquiescences and nonacquiescences can be relied upon by the taxpayer and by the Service. Difficulties between the taxpayer and the Service most often arise in the acquiescence program when the taxpayer attempts to use an acquiescence for a purpose for which it was not intended. *Dixon v. United States*²¹⁹ is a prime example of this. In this case, the taxpayers contended they were entitled to receive capital gains treatment as to a transaction involving original issue discount because they entered into the transaction in reliance upon the Commissioner's acquiescence in *Caulkins v. Commissioner*.²²⁰ Although the acquiescence was eventually withdrawn, this action did not take place until after the taxpayers had completed their transaction.²²¹ The Supreme Court, in upholding the Commissioner, noted the Service had carefully delineated the scope of acquiescences and nonacquiescences in the Internal Revenue Bulletins, both in the preface to the bulletin and in the introduction to the announcement on acquiescences.²²² Taxpayers were clearly advised that caution should be exercised in relying

215. C.C.D.M., *supra* note 4, 36.3.1.4(3)-(4) (Aug. 11, 2004).

216. *Id.*

217. *Dixon v. United States*, 381 U.S. 68, 72-73 (1965).

218. I.R.C. § 7805(b) (2000).

219. 381 U.S. 68 (1965).

220. 1 T.C. 656 (1943), *acq.*, 1944 C.B. 5, *nonacq.*, 1955-2 C.B. 3, *aff'd*, 144 F.2d 482 (6th Cir. 1944).

221. The change of position was expanded upon in a revenue ruling. Rev. Rul. 55-136, 1955-1 C.B. 213.

222. *Dixon*, 381 U.S. at 73-74 & n.6.

upon acquiescences in planning transactions, and that revocation of an acquiescence was generally retroactive.²²³ This may be contrasted with the administrative treatment given to revocations of regulations or revenue rulings.

Because taxpayers are repeatedly warned that acquiescences are not to be relied upon in planning transactions, the Commissioner has rarely exercised his discretion to make a change in position prospective only.²²⁴ In general, it may be said that such discretion will be exercised when the acquiescence to be revoked was one of broad, general, and long-standing application, which had been consistently relied upon by Service officials in issuing private rulings or determination letters. An example of this situation is the Commissioner's change in position in *Minnesota Mortuaries, Inc. v. Commissioner*,²²⁵ a case dealing with the characterization of income for personal holding company purposes. In 1945, the Service acquiesced and followed the case both in rulings and on audit.²²⁶ In 1965, the acquiescence was withdrawn and a nonacquiescence substituted.²²⁷ The Commissioner, after weighing these factors and considering the hardship involved in applying this nonacquiescence retroactively, exercised his discretion by making its application prospective.²²⁸ The fact that many people may be involved or that hardship will ensue if the revocation of an acquiescence is made retroactive does not, however, automatically ensure that the Commissioner will exercise his discretion. It is only in unusual circumstances that a revocation of an acquiescence will be prospective only.

The Service's acquiescence program was neither designed nor intended to be relied upon by taxpayers in planning transactions.²²⁹ Reliance in planning situations is the function of the regulation and ruling programs of the Service. However, to provide the taxpayers with the degree of assurance required for them

223. See, e.g., 1952-1 C.B., title page, iv.; 1964-1 C.B. 1, 3. The current version of the Internal Revenue Bulletin contains similar statements concerning the effect of an AOD. See, e.g., 2007-6 I.R.B. 419.

224. See *Dixon*, 381 U.S. at 79-80.

225. 4 T.C. (CCH) 280 (1944), *acq.*, 1945 C.B. 5, *acq. withdrawn and nonacq. substituted*, 1965-2 C.B. 3.

226. 1945 C.B. 5.

227. 1965-2 C.B. 3.

228. Rev. Rul. 65-259, 1965-46 I.R.B. 31.

229. Unlike regulations, revenue rulings, revenue procedures, notices, and announcements, the AOD is not an affirmative statement of the Service's position. I.R.M., *supra* note 27, 4.10.7.2.9.8.1(1) (Jan. 1, 2006). Furthermore, the recommendation in the AOD can be readily superseded by new legislation, regulations, rulings, cases, or subsequent AODs. *Id.* 4.10.7.2.9.8.1(2).

to plan their transactions—which is not ordinarily present in a mere acquiescence—the Service has, on occasion, issued a revenue ruling, in addition to an acquiescence, based upon the facts of the case when a court decision concerns an area of broad, general, or administrative importance. Moreover, AODs and notices of acquiescence and nonacquiescence can provide some shelter from penalties. The regulations specifically indicate that, in determining whether a position has a “reasonable basis” or “substantial authority,” AODs issued after March 12, 1981, constitute relevant authorities.²³⁰

VII. OTHER COMMUNICATIONS

News Releases and Fact Sheets

The Service frequently issues news releases and fact sheets. In 2007, the Service issued 213 general news releases and 27 fact sheets.²³¹ News releases are nontechnical publications aimed at the general public and distributed through the news media, while fact sheets are informational documents that are also targeted for broad public distribution.²³² For example, IR-2006-116 warned taxpayers to be on the lookout for an e-mail scam that used the electronic federal payment system as a hook to lure taxpayers into disclosing personal information, while FS-2006-19, which was released during Hurricane Preparedness Week, provided tips to taxpayers on how to safeguard financial and tax records.

Generally, the nontechnical nature of the material contained in news releases and fact sheets obviates the reliance problem. Reliance is clearly warranted on news releases that announce mechanical rules such as due dates²³³ and news releases that indicate that reliance is intended.²³⁴

230. Treas. Reg. §§ 1.6662-4(d)(3) (2003); 1.6662-3(a) (2003); 1.6694-2(b) (1992). *See also supra* note 82 (discussing the evolution of the substantial authority standard).

231. Local News Releases may be issued in rare cases when an issue is limited to a certain geographic area.

232. The Service discontinued the use of Technical Information Releases (TIR), which had been an outgrowth of the news release series, in 1976. TIRs allowed the Service's national office to quickly inform the public with respect to important technical developments. The content of a TIR was generally determinative of whether reliance upon it was justified.

233. *See, e.g.*, I.R.S. News Rel. IR-2006-144 (reminding individuals who received six-month filing extensions of the filing deadline). News Releases are available in the Electronic Reading Room on the Service website. *See supra* note 153.

234. *See, e.g.*, I.R.S. News Rel. IR-2006-194 (announcing qualifying vehicles for purposes of the Alternative Motor Vehicle Credit).

Coordinated Issue Papers

The Service's Large and Mid-Sized Business Division (LMSB) strives to ensure the uniform and consistent application of the internal revenue laws by identifying, coordinating, and resolving complex and important industry-wide issues. To that end, the LMSB Commissioner provides guidance to field examiners through the issuance of Coordinated Issue Papers. These documents are unofficial pronouncements that identify key industry or cross-industry compliance issues and express the position of the LMSB Commissioner, but do not represent the Service's legal position. The Service has published more than 90 Coordinated Issue Papers, all of which are available on the Service's website.²³⁵ Generally, Coordinated Issue Papers cannot be relied on by taxpayers.²³⁶

Appeals Settlement Guidelines

The Service's Appeals function strives to ensure nationwide uniformity and consistency with respect to the resolution of factual and legal issues of broad impact or importance, as well as with respect to the resolution of whole categories of cases. As part of this effort, Appeals Coordinated Issues are identified and discussed in Appeals Settlement Guidelines (ASG). More than forty Appeals Coordinated Issues—on such diverse topics as abusive tax avoidance transactions, sports franchises, and interest computations—have been identified by Appeals, and redacted versions of Appeals Settlement Guidelines have been issued and are now available to the public.²³⁷ Appeals Settlement Guidelines, like IRM provisions, are created and intended to aid the Service's internal administration. Generally, they are not designed to be relied on by taxpayers.

Audit Techniques Guides

Audit Techniques Guides (ATG), as the title suggests, describe techniques that have proven useful in examining particular indus-

235. These documents are available in the Electronic Reading Room on the Service website. *See supra* note 153.

236. In some cases, reliance on Coordinated Issue Papers may be justified by Congressional action. *Iowa 80 Group, Inc. v. Internal Revenue Serv.*, 406 F.3d 950, 953-54 (8th Cir. 2005).

237. These documents are available in the Electronic Reading Room on the Service website. *See supra* note 153.

try or entity segments. ATGs are intended to assist examiners and develop highly trained examiners in particular market segments. They are not intended to provide legal analysis or resolve positions on controversial or unusual legal issues. Like ASGs, ATGs are created and intended to aid the Service's internal administration and should not be relied on by taxpayers.²³⁸

Large and Midsized Business Commissioner's and Industry Director's Directives

Large and Midsized Business Commissioner's and Industry Director's Directives ensure consistent tax administration by providing administrative guidance on the Service's internal operations. These Directives are not legal guidance and do not establish the Service's position on legal issues. They should not be relied on by taxpayers.

Miscellaneous Material

Tax Forms used by all taxpayers, and accompanying Instructions, are the Service's primary forms of communication with the public about how to comply with the tax law. The Service provides hundreds of forms and instructions each year, from the ubiquitous Form 1040, U.S. Individual Income Tax Return, to the Form 4361, Application for Exemption from Self-Employment Tax for Use by Ministers, Members of Religious Orders and Christian Science Practitioners.²³⁹

The Service also publishes over one hundred publications providing detailed information on key topics to help taxpayers prepare their returns. Examples include Publication 17, *Your Federal Income Tax*, which explains the rules for individuals, and Publication 51, *(Circular A) Agricultural Employer's Tax Guide*. Thousands of copies of these and all the other IRS publications are produced and distributed free of charge each year, and each can also be ordered by computer, telephone, or mail. Tax Forms, In-

238. *United States v. Marra*, 481 F.2d 1196, 1203-04 (6th Cir. 1973).

239. I.R.S. Form 4361, Application for Exemption from Self-Employment Tax for Use by Ministers, Members of Religious Orders and Christian Science Practitioners, allows qualifying individuals to apply for exemptions from self-employment tax. This form, as well as all of the Service's forms and publications, is available on the Service's website at <http://www.irs.gov/formspubs/index.html?portlet=3>.

structions, and Publications are also available through the Service's website.²⁴⁰

The Electronic Reading Room on the Service website provides access to a large collection of training and reference materials.²⁴¹ For example, most of the Service's Exempt Organizations Division's annual series of articles of interest to tax-exempt organizations, dating back to 1979, are available at the reading room. Advance Pricing Agreement Training materials, the Disclosure Litigation and Reference Book, and many other helpful resources are also available at the reading room. Training materials on a variety of topics are available elsewhere on the website.²⁴²

Reliance

The sources of authoritative tax law are the relevant statutes, regulations, and judicial decisions, not the Service's informal publications.²⁴³ The Tax Court has cautioned that "[w]ell-established precedent confirms that taxpayers rely on such publications at their peril."²⁴⁴ While the Service makes every effort to ensure the correctness of the information contained in these publications, tax practitioners should understand that "[a]dministrative guidance contained in [Service] publications does not bind the [Service to the positions they state], nor can it change the plain meaning of tax statutes."²⁴⁵ This principle equally applies to forms and instructions²⁴⁶ and any training materials that are publicly available.

Oral Communications

A final means of transmitting information to the public is through the medium of oral communication. Each year, thou-

240. See *supra* note 239.

241. See *supra* note 153.

242. One example is the Small Business/Self-Employed Virtual Small Business Tax Workshop. See *supra* note 153 for the address of the Electronic Reading Room.

243. *Zimmerman v. Comm'r*, 71 T.C. 367, 371 (1978).

244. *Miller v. Comm'r*, 114 T.C. 184, 195 (2000).

245. *Miller*, 114 T.C. at 195.

246. See, e.g., *Casa de la Jolla Park, Inc. v. Comm'r*, 94 T.C. 384, 396 (1990) (holding that the taxpayer's failure to file a Form 4224, Exemption from Withholding of Tax Income Effectively Connected with the Conduct of Business in U.S., was not excused by its reliance on instructions appearing on the face of the form); *Sadberry v. Comm'r*, 87 T.C.M. (CCH) 982, at *6-7 (2004) (rejecting equitable estoppel claim alleging reliance on I.R.S. Form 1040 Instructions); *but see Estate of Merwin v. Comm'r*, 95 T.C. 168, 179-80 (1990) (noting that Congress provided specifically targeted relief for estates that complied with the requirements listed on the face of the 1982 version of Form 706).

sands of taxpayer questions and requests are answered by telephone.²⁴⁷ The Service also conducts phone forums, seminars, and training and education events. These communications reflect the Service's strong commitment to helping taxpayers understand and meet their tax responsibilities.

Oral communications are also critical to the audit process. Throughout the country, revenue agents hold innumerable discussions with taxpayers on audit, both in the field and in the office. Similarly, discussions between Service employees and taxpayers also play a role in the ruling and determination letter processes.

Reliance

It is recommended that no reliance be placed on oral statements in planning transactions or preparing returns. At most, they may represent an informal opinion of the present position of one employee of the Service as to a particular issue and, to that extent, they are similar in nature to informal publications.²⁴⁸

Over the years, oral statements made by agents on audit or Service employees in the course of the rulings process have engendered litigation involving the position of taxpayers who acted in reliance upon the statements. However, the general rule in these cases is that an agent or employee does not have authority to bind the Government.²⁴⁹

VIII. CONCLUSION

Mitchell Rogovin ended the prior version of this article by commenting that the Service's practices regarding release of information reflect "a practical compromise between the needs of the public for reliable and timely information and the needs of the Service

247. Nowadays, some questions and requests are answered by email.

248. See Treas. Reg. § 601.201(k)(2) (2002) ("A taxpayer may, of course, seek oral technical assistance from a district office in the preparation of his return or report, pursuant to other established procedures. Such oral advice is advisory only and the Service is not bound to recognize it in the examination of the taxpayer's return.").

249. See, e.g., *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383-84 (1947); *United States v. Stewart*, 311 U.S. 60, 70 (1940); *Bornstein v. United States*, 345 F.2d 558, 561-62 (Ct. Cl. 1965). In very rare cases, courts have held that the Government is estopped by the actions of its agents. See, e.g., *Smale & Robinson, Inc. v. United States*, 123 F. Supp. 457 (S.D. Cal. 1954); but see *Heckler v. Cmty. Health Serv. of Crawford County, Inc.*, 467 U.S. 51, 65 (1984) (questioning whether an estoppel against the Government can be based on oral advice). Oral statements made by the Commissioner in testimony before Congress served as a basis for one taxpayer's claim of estoppel, but the court determined that the taxpayer could not prove reliance on the statements. *Knetsch v. United States*, 348 F.2d 932, 940 (Ct. Cl. 1965).

for flexibility in the administration of the tax laws.” Today, the Service no longer has complete control over what information is released to the public. Some of the information released may provide interesting insights into the issues the Service is considering or how the Service conducts its business, but it merely reflects its employees’ internal deliberations and actions on discrete matters that may not accurately reflect the outcome in other circumstances. The communications released range from those that are specifically crafted to allow taxpayers to rely upon them, to those that could mislead taxpayers who do not understand the limitations inherent in the communications. Now, taxpayers and their tax advisers need to be much better informed about the kinds of Service information that is available to the public and be able to accurately discern which of these communications can be used to predict future Service actions.

The Service and the Office of Chief Counsel believe that a key to furthering compliance with the tax law is helping taxpayers to understand the law and to perceive that the Service is fairly and uniformly administering the Code.

But as Mitchell Rogovin wrote over forty years ago:

Good administration is not static. Experiments with new ideas and new forms of communication are a continuing process, and the history of the Service supports the conclusion that changes in Service procedures are consistently instituted where such changes serve the public interest. Thus, the Service is performing its basic function—administering the Internal Revenue Code—in a reasonable and practical manner.