REPORT #637

TAX SECTION

New York State Bar Association

Report on Modification of Ruling Procedures and Other Taxpayer Guidance Programs by Committee on Practice and Procedure

November 16, 1989

Table of Contents

TAX SECTION
New York State Bar Association

December 1, 1989

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Dear Mr. Klein:

Enclosed is a Report on Modification of Ruling Procedures and Other Taxpayer Guidance Programs by our Committee on Practices and Procedures. The principal draftsman of this Report is Sydney R. Rubin.

The recommendations in the Report focus on reallocation of time now spent on private letter rulings to other programs in order to increase taxpayer guidance without abandoning a private letter ruling program.

The Report encourages the Service in its efforts to improve the expeditious provision of needed guidance to taxpayers and endorses many of the possibilities raised in Announcement 89-104. It questions, however, the effectiveness of attempting to screen each ruling request for whether the issues involved are "clearly and adequately addressed by published authorities". Instead, it recommends using that test to develop and publish a list of types of transactions for which ruling would no longer be issued, in combination with identifying more safe harbors (including converting ruling guidelines to safe harbors) and issuing more model forms. If the Service does decide to adopt the practice of refusing to consider a private letter

ruling request because the issue involved is clearly and adequately addressed by published authorities, it should cite those authorities in its refusal and be prepared to allow the taxpayer on audit to rely on the position stated in those authorities.

An innovation that the Report recommends is allowing taxpayers to rely on certain types of acquiescences in decided cases and on the reasoning and conclusions in certain selected private letter rulings, with a “sunset” time limit beyond which reliance for further transactions would not be authorized. In addition, it recommends procedures for shortening many private letter rulings and advocates charging larger user fees so that the private letter ruling program is self-funding. It encourages the Service not to devote greater resources to expanding telephone assistance.

Sincerely,

WLB/JAPP
Enclosure
4757r

Wm. L. Burke

cc(w/encl.): The Honorable Fred T. Goldberg, Jr.
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NEW YORK STATE BAR ASSOCIATION

TAX SECTION

Report on Modification of Ruling Procedures and Other Taxpayer Guidance Programs by Committee on Practice and Procedure*

November 16, 1989

Introduction

In May of this year, the Internal Revenue Service issued Revenue Procedure 89-34, I.R.B. 1989-20, 145, as a modification to Revenue Procedure 89-1.

Rev. Proc. 89-34 deals with so-called "comfort rulings." In it, the Service announces that, "In order to devote its resources more efficiently to resolving issues in need of attention by the public in general through the issuance of regulations, revenue rulings, and other published guidance* * * the Office of Associate Chief Counsel (Technical) is discontinuing, except in extraordinary circumstances, the issuance of letter rulings with respect to issues that are clearly and adequately addressed by published authorities." Accordingly, a new sec. 7.02 is added to Rev. Proc. 89-1 to provide that the National Office ordinarily will not issue a ruling "with respect to an issue that is clearly

* The principal draftsman of this Report was Sydney R. Rubin. Helpful comments were received from Renato Beghe, William L. Burke, Arthur A. Feder, and Dennis E. Ross.

and adequately addressed by a statute, regulation, decision of the Supreme Court, tax treaty, revenue ruling, revenue procedure, notice, or other authority published in the Internal Revenue Bulletin except in extraordinary circumstances* * *."

Rev. Proc. 89-34 was to have taken effect with respect to ruling requests filed after June 15, 1989. However, under date of August 28, 1989 the Service issued two announcements. Ann. 89-104, I.R.B. 1989-35, describes Rev. Proc. 89-34 "as one component of an ongoing effort to maximize the value of the guidance that the Service is able to provide, within the limits of available resources." It expresses the Service's view that it can improve the quality and timeliness of both its private and published guidance programs by concentrating on questions that involve significant unresolved legal issues, and perform a more useful service if it allocates its limited resources to guidance applicable to many taxpayers, rather than to a particular taxpayer. However, the Announcement refers to a number of expressions of concern by practitioners regarding the potential effects of Rev. Proc. 89-34, and describes various suggestions and "initiatives" that the Service is considering. Ann. 89-105, I.R.B. 1989-35, contains a series of questions and answers, designed to implement Rev. Proc. 89-34 and to describe "how the new procedures are to be administered."

The effective date of Rev. Proc. 89-34 is postponed to February 5, 1990. Rev. Proc. 89-51, 1989-36 I.R.B. 1989-36, 19. Public comments are solicited, to be submitted by December 4, 1989.

SUMMARY

The Committee encourages the Service in its efforts to continue and improve the expeditious provision of needed guidance to the taxpaying public within the limits of the Service's resources. It is not clear, however, to what extent the process described in Rev. Proc. 89-34 will advance these objectives when various exceptions and countervailing factors are taken into account. Of the various proposals that have been advanced for implementing Rev. Proc. 89-34, the Committee favors those that would limit its application to specifically listed types of transactions, in combination with identifying more safe harbors and the issuance of more model forms. An advisory board that would include representatives of the Bar and the accounting profession should work with the Service in developing and updating the list of types of transactions in which the Service will not rule, and in otherwise implementing Rev. Proc. 89-34.

The Committee recommends that taxpayers be given assurance that they can rely on acquiescences in decided cases, or certain types of acquiescences. It also recommends that the Service permit limited reliance on selected private letter rulings (PLRs) which the Service would select, after receiving public comments, without the full review given revenue rulings. The Service would then monitor the usage.

The Committee supports plans for shortening many letter rulings, although those involving important or novel questions of law should continue to detail the Service’s reasoning and its views on the controlling legal principles, as well as its conclusions. Taxpayers should then be allowed to rely on designated private letter rulings for their reasoning and stated principles, for a trial period of, say, three years. As an aid in

helping to identify and review possible PLRs for designation for such limited reliance, the Service should publish periodically a list of rulings and invite comment on whether the rulings are of sufficient importance to be so designated, and if so, the legal reasoning on which the result should be based.

The Service should be permitted to fund the private letter ruling program by charging larger user fees, at least sufficient to cover all of its expected costs, particularly with regard to "pure comfort" rulings, and perhaps for other types of rulings as well, with appropriate exceptions for taxpayers of limited income or those not having ready access to tax advice.

The Service should cite applicable authorities when it issues a written determination that it will not rule because of Rev. Proc. 89-34, and if that determination is based on the Service's view that the authorities clearly favor the taxpayer's position the Service should stand by that determination in the same manner and to the same extent as if it had issued a letter ruling.

DISCUSSION

The Committee is in full agreement with the premise underlying Rev. Proc. 89-34 -- that the public needs continuing guidance in many areas of the tax law. This is particularly true given the plethora of statutory enactments and amendments since 1981, and the complexity of many of the resulting regulations. The question is how best to provide, and to expedite, that guidance within the resources available to the Service. For purposes of this discussion, we assume, as does Ann. 89-104, that the dollars available for these functions are fixed -- that is, "an expansion of activity in one area may compel the allocation

of fewer resources to other areas." We would point out, however, that if higher fees were charged for rulings it would seem possible to increase funds available for providing guidance without adverse budgetary effect. Moreover, to the extent that measures suggested herein should reduce typing and proofreading time, they should free funds so that additional manpower can be applied to providing substantive guidance.

A basic assumption of Rev. Proc. 89-34 is that reducing the number of private letter rulings to be issued will, within the same "limited resources," enable the Service to provide more published guidance through the issuance of regulations, revenue rulings, and other published materials. In the Committee's view, there are a number of reasons why this is far from clear. For it seems apparent that any savings effected from the present system will be offset in some degree by increased demands on personnel and resources for the following functions:

1. Responding by telephone or letter, or holding a pre-submission conference, with respect to whether a ruling request involves a comfort ruling. Ann. 89-105, Q & A 5-6.

2. Resolving disagreements "as to whether a request for a particular ruling is clearly and adequately addressed by published authority." It is noted that, generally speaking, a good faith disagreement in this regard will be resolved in favor of the taxpayer. Q & A-7. While we agree that this should be the answer, we note that this process will not only impose substantial demands on Service time, but may also curtail the number of PLR reductions achievable.

3. More audits because of fewer letter rulings, which will produce little revenue if in fact the law is clear and supports the taxpayer’s position.

4. Keeping Rev. Proc. 89-34 up to date, including monitoring, determining what constitutes “extraordinary circumstances,” and determining whether the issues are in fact “clearly and adequately addressed by published authorities” as more published guidance becomes available.

5. Administering one or more of the various “initiatives” described in Ann. 89-104 intended to implement, and in some cases, narrow, Rev. Proc. 89-34, with the attendant personnel costs and time required for this purpose.

Even assuming that reducing the number of PLRs produces substantial savings, will they find their way into significantly more and timely published guidance for the taxpaying public, given the various levels of review and comment to which revenue rulings and regulations are exposed before publication; or will the savings, somehow, fall through the cracks or be diverted into other areas, however worthwhile?

Despite these questions, the Committee encourages the Service to experiment, say over a three to five-year period, with techniques that will reduce taxpayers' need to request PLRs and shortening those that are issued, utilizing some of the proposals described in Ann. 89-104 as well as others. In this report we shall comment on some of those proposals, and offer additional comments and suggestions.

The Committee believes that the proposals or suggestions discussed below have considerable merit, although there are also

caveats or possible negative aspects connected with at least some of them.

Shorter or abbreviated letter rulings. This may take various forms or involve different processes. One mode, as described in Ann. 89-104, would consist of a “no-action letter” procedure for some categories of private rulings, in which the Service would issue check lists specifying the factual tests which must be met for particular types of transactions. The taxpayer would make representations indicating how each requirement has been met, and the Service, if satisfied, would issue a letter stating that it would not challenge the taxpayer's treatment if upon audit the facts proved to correspond to those represented. As with present PLRs, taxpayer would be required to attach a copy of this response to its return. It has also been suggested that the taxpayer itself might prepare the ruling, including a list of required representations, and if approved the Service would simply so stamp it.

Another suggested form of no-action procedure is analogous to that which we understand the Securities and Exchange Commission utilizes, and which does not contain an extensive statement of the reasoning underlying the ruling. Requests for these SEC letters frequently contain the applicant's reasoning in support of the request. In the same way, the PLR could simply note that the Service agreed with the taxpayer’s reasoning, or could supply its own reasoning using the taxpayer's statement of facts as a framework. This approach would of course require, similar to the practice with regard to SEC no-action letters, that the request be published with the PLR. Taxpayer confidentiality would be protected by requiring that the taxpayer submit, with its request, a suitably edited version.

The Committee understands that rulings by the Canadian Department of National Revenue (DNR) are considerably shorter than most PLRs. In general, they contain concise statements of fact and conclusions, with little if any legal reasoning. There is no lengthy reproduction of the relevant statutes.[1] Ann. 89-104 contains a similar proposal. It may be useful for Service officials to meet with the officials of the Canadian Department of National Revenue to explore the DNR's experience with its ruling procedure and its adaptability to our letter ruling process. As discussed further below, this approach and form of ruling would not be desirable in every case. But we believe that the Canadian approach may be particularly appropriate and useful in those rulings where the principal focus is application of facts to well-settled legal principles and no particularly novel legal analysis is believed to be involved.

In any event, it appears that the Service could considerably reduce the burden of preparing PLRs, including typing time and editing, by eliminating reproductions or lengthy recitations of the relevant statutory and regulatory material, as in the Canadian format. It could simply set forth the facts as represented, the central issue to be addressed and, where appropriate, the reasoning underlying its conclusion, with only citations (and not repetitions of the text) to the supporting sections of the Internal Revenue Code and regulations. Once such a PLR has been issued, including the underlying reasoning, subsequent PLRs involving the same issue could simply cross refer to the earlier PLR.

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[1] A sampling of recent rulings by the Canadian tax authorities is attached.

The Committee recognizes that in more complex situations or where the ruling may affect a large body of taxpayers, this shortened procedure may not be appropriate.

Also, even though letter rulings may not be cited as precedent,[2] the legal analysis and discussion in some letter rulings does provide valuable guidance both to taxpayers and Service personnel. They are frequently discussed and referred to by practitioners and Service officials in subsequent ruling applications and in tax audits. To the extent that consistency in the treatment of similarly-situated taxpayers is required[3] or desirable, a failure to include the reasoning supporting the conclusion would make it more difficult for taxpayers to establish claimed differences in treatment and for the Service to achieve and monitor consistency. And courts, including the Supreme Court, have cited PLRs not as precedent, but as evidence of the Service's practice or interpretation. See discussion, infra, page 14. Accordingly, while the Committee believes there are several areas in which letter rulings may be considerably shortened, the Committee expresses its concern that the Service not abandon the more traditional form of rulings entirely -- particularly in cases involving complex facts or difficult or novel legal questions.

However, having taken the time to set forth such an analysis once, there is no reason to repeat the analysis. Subsequent PLRs involving the same issue should simply refer to the “base” PLR and then discuss any issues peculiar to the case at hand.

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[2] Sec. 6110(j)(3) IRC.

[3] See: International Business Machines v. U.S., 343 F.2d 914 (Ct. Cl. 1965), cert. den. 502 U.S. 1026; Xerox Corp. v. U.S., 656 F.2d 659 (Ct. Cl. 1981).

Applying the policy of Rev. Proc. 89-34 only to types of transactions specified on a list which the Service would release. The Committee believes that this proposal described in Ann. 89-104 has particular merit. Depending on the number and types of transactions so included from time to time, of course the application of Rev. Proc. 89-34 would be narrowed. However, in the Committee's view the proposal could go far toward cutting down the number of PLR requests. Presumably only types of transactions would be listed which are beyond reasonable controversy concerning whether they are "clearly and adequately addressed by published authorities." So there should be little room for extended controversy, or need to refer disagreements to the Assistant Chief Counsel. See Ann. 89-105, Q & A-7.

Rev. Proc. 89-34 would add a new section 8.07 to Rev. Proc. 89-1 requiring that a ruling request contain a statement supporting the taxpayer's judgment that the issue is not clearly and adequately addressed by published authority, and Ann. 89-105 recites that the Service expects the taxpayer "to include a fair analysis as to why published authority does not clearly and adequately address the issue" or to state that the taxpayer can find no such published authority. Q & A-8. But the proposal limiting the revenue procedure to specified types of transactions "would eliminate the requirement that the taxpayer supply a statement supporting the position that the treatment of the transaction is unsettled" (Ann. 89-104), presumably because that question would no longer be open to dispute. This is another reason why the Committee supports that proposal. Indeed, whether or not that proposal is adopted the burden ought not to be placed on attorneys requesting rulings to establish that the law is uncertain while at the same time urging that the law supports the ruling they seek.

If this mode of implementing Rev. Proc. 89-34 were adopted, the Bar and the accounting profession could certainly assist. As in other situations, an advisory group could be drawn from the Service and the professions to develop and update the list from time to time, as uncertainties are eliminated through court decisions and other published guidance.

Specifying factual safe harbors and providing model forms. These procedures, also described in Ann. 89-104, would also be most helpful in providing needed guidance. The Committee believes that this proposal, in tandem with the "list of types of transactions" proposal, embody a highly desirable mode for implementing Rev. Proc. 89-34, and perhaps the one most likely to provide needed guidance consistent with cost effectiveness. These two proposals, taken together, would delineate what the Service regards as "certainty" in the law, or at least what it agrees not to challenge, and should therefore plainly eliminate the need for letter rulings in those areas. There are already, of course, a number of areas in which the Service has issued model forms -- for example, those which it issued last year and earlier this year, relating to charitable remainder trusts and pooled income funds.[4]

But many cases will still have significant variances on their particular facts. Along with the increased use of safe harbors and model forms, the Committee suggests that the Service re-emphasize to its personnel, including examining agents, that variations from safe harbors do not necessarily make the transaction "bad," and that additions to or departures from the model forms, while warranting special scrutiny, are to be

[4] Rev. Proc. 89-21, I.R.B. 1989-9, 60; Rev. Proc. 89-20, I.R.B. 1989-9, 59; Rev. Proc. 88-53, 1988-2 C.B. 712.

expected without tainting the transaction or detracting from the fact that the taxpayer has, in substance, followed the model.

Upgrading ruling guidelines to safe harbors. Ann. 89-105 (Q & A-18) states that the existence of ruling guidelines for certain types of transactions will not cause the issue involved to become subject to Rev. Proc. 89-34. An example is given of the conditions specified in Rev. Proc. 75-21, 1975-1 C.B. 715, as modified, which are necessary if Technical is to rule that a transaction constitutes a lease for tax purposes. Yet, such guidelines, embodied in revenue procedures, often reflect the Service's view of transactions as to which the substantive law is clear. Other examples are the guidelines contained in several revenue procedures setting forth standards to be met before the Service will issue a letter ruling as to the partnership status of a limited partnership.[5] Likewise, a number of revenue procedures contain ruling guidelines in the reorganization area. These standards are widely adopted by counsel in rendering opinions on these matters.

The Committee recommends that these guidelines and others contained in similar revenue procedures be converted to safe harbors. The ability of counsel to rely formally on such guidelines and standards in rendering opinions may significantly reduce the number of letter rulings requested in these areas even though some rulings may still continue to be sought on a penumbra of other factual situations that may be similarly acceptable under the Code.

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[5] Rev. Proc. 72-13, 1972-1 C.B. 735; Rev. Proc. 74-17, 1974-1 C.B. 438; Rev. Proc. 89-12, I.R.B. 1989-7.

Conversion of selected letter rulings to published rulings, or permitting reliance on the principles of some letter rulings. Conversion of some private letter rulings to published rulings may also be a fertile area for reducing letter ruling requests. The Committee understands that the Service maintains an index-digest of letter rulings deemed to have "significant future reference value because of the issues involved* * *."[6] It should be possible to select letter rulings dealing with important questions, which have stood the test of time, received careful review, and contain sound legal analysis, as candidates for publication.

There may be a body of private letter rulings which, for whatever reason, the Service feels do not merit publication as revenue rulings, but yet are widely relied upon both by taxpayers and Service personnel. And even though sec. 6110(j)(3) of the Code bars citing letter rulings "as precedent," courts from the Supreme Court on down have referred to them as showing the Service's own position or interpretation. For example, in Hanover Bank v. Commissioner, 369 U.S. 672, 686, 687 (1962), the Court noted that "such [letter] rulings do reveal the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws* * *." (note 20).[7]

The Service may be able to identify, and publish a list of

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[6] See Zelenak, "Should Courts Require the Internal Revenue Service to be Consistent?", 38 Tax Law Review (Winter 1985) 411, 442 (Note 4).

[7] See also Rowan Cos., Inc. v. U.S., 452 U.S. 247, 261, 262 (1981); Xerox Corporation v. U.S., 656 F.2d 659, 660 (Ct. Cl. 1981); Estate of Blackford v. Commissioner, 77 T.C. 1246, 1252 (1981).

such private letter rulings issued within, say, the past three years, the principles and reasoning of which taxpayers could rely upon, without having to request their own letter rulings. These of course would include only rulings where there had been no intervening change in the law or regulations, or contrary published rulings or case law. It has been suggested that if this proposal is adopted, a taxpayer should be required to notify the Service of his reliance in two ways: first, by attaching a statement to his return advising that he has so relied; and secondly, by directly advising the Tax Rulings Division of the Service of his reliance. The Service would thus obtain direct information as to the importance of particular letter rulings and the extent to which they are in fact relied upon which would be useful in two respects. First, it would allow the Service to then make an informed judgment concerning the advisability of converting them to published rulings. Secondly, if these reports indicate a great deal of activity in a particular area, it might indicate a need for "fine-tuning" or for recommending legislation or regulations in that area. Any such change should of course only be made prospectively.

As an aid in helping to identify and review possible private letter rulings for designation for such limited reliance, the Committee suggests that the Service publish periodically a list of rulings that it is considering and invite comment on whether (a) the rulings are of sufficient importance to be so designated and (b) if so, the legal reasoning on which the result should be based. The Committee does not advocate making law simply on the basis of activist taxpayer responses.

But a heavy consensus on both the desirability of having the ruling designated and the rationale on which its conclusion should be based would provide a means of helping the Service select rulings for further review and a body of commentary to assist that review. Conversely, divergence of views on importance would be helpful in screening out issues for which further review within the Service may not be warranted, and divergence of opinions on the conclusions or appropriate reasoning may help identify, at an earlier stage, a rulings practice that is more open to question than might have been supposed.

Allowing Taxpayers to Rely on Commissioner's Acquiescence in Tax Court Decisions. Each Cumulative Bulletin contains a statement of the Service's policy with regard to acquiescence in adverse Tax Court decisions. The statement says that:

> Actions of acquiescence in adverse decisions shall be relied on by Revenue Officers and others concerned as conclusions of the Service only to the application of the law to the facts in the particular case. Caution should be exercised in extending the application of the decision to a similar case unless the facts and circumstances are substantially the same, and consideration should be given to the effect of new legislation, regulations, and rulings as well as subsequent Court decisions and actions thereon.

The statement adds that acquiescence means that the Service accepts only the conclusion reached, not necessarily "all of the reasons assigned by the Court for its conclusions." Virtually identical statements have been included in Cumulative Bulletins for at least the past thirty years. See, for example: 1988-2 C.B. 1; 1957-2 C.B. 3.

The Supreme Court has held that taxpayers may not rely on the Commissioner's "acquiescence as precluding correction of the underlying mistake of law and the retroactive application of the correct law to their case." W. Palmer Dixon, et al. v. United States, 381 U.S. 68, 79-80 (1965). Earlier decisions in the lower courts took a more expansive view of the meaning of acquiescence. In Arthur Stockstrom, Executor v. Commissioner, 190 F. 2d 283 (C.A.D.C. 1951), the Court interpreted the Commissioner's acquiescence to mean that "the Commissioner does not intend to seek further judicial review and is adopting the ruling as a precedent he will follow in other cases. Thus taxpayers are assured they can rely upon it without the danger of being forced to litigate the same question in their own cases." (note 2). And the dissenting justice in Beck v. Commissioner, 179 F. 2d 688 (C.A. 7th 1950) observed that, "The significance of such acquiescence * * * is that the officers and employees of the Bureau of Internal Revenue are supposed to rely upon that case as a precedent in the disposition of other cases." But in view of Dixon and other cases[8] one cannot, now rely upon such pronouncements.

The Committee recognizes that it is up to the Commissioner to determine the meaning and effect of his acquiescence or non-acquiescence in a Tax Court decision. Nevertheless, this may be an appropriate time, after these many years without change, for the

[8] See, for example, Automobile Club of Michigan v. Commissioner, 353 U.S. 180 (1957).

Service to reconsider the definition and the effect to be given to an acquiescence. If the Commissioner were to adopt and announce a policy to the effect that taxpayers may rely on the principles announced and the underlying reasoning in a Tax Court decision in which the Commissioner has unqualifiedly acquiesced[9] (subject to the same caveat now expressed with respect to new legislation, regulations, etc.), to the same extent as taxpayers may rely on published rulings[10], it is reasonable to expect that requests for PLRs could be substantially reduced. If the Service deems it advisable, it could limit this policy to acquiescence announced, say, within the past ten years.

Extraordinary Circumstances Exception. Rev. Proc. 89-34 and particularly the two explanatory Announcements recognize that requests for rulings may still be appropriate in several areas even where it appears that an issue is “clearly and adequately addressed by published authorities.” Thus, the revenue procedure acknowledges that rulings will still be issued where there are “extraordinary circumstances.” It gives as an example “a request for a ruling required by a governmental regulatory authority in order to effectuate a transaction.” Ann. 89-105 invites submission of other examples. Q & A-ll.

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[9] "Acquiescence 'in result’ means acceptance of the court [decision] but disagreement with some or all of the reasons assigned for the decision." 1988-2 C.B. 2 (footnote 6).

[10] Section 7805(b) of the Internal Revenue Code provides that, "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."

Also, Ann. 89-104 acknowledges that "guidance involving even settled legal questions might be warranted" in some cases, giving as examples some personal tax questions affecting taxpayers who lack access to specialized tax advice, or with respect to transactions affecting a wide class of taxpayers. If the proposal is adopted to limit the revenue procedure to listed types of transactions, there should be little room for "extraordinary circumstances" because the list would or should automatically eliminate most such cases. If this proposal is not adopted, it will become important to identify and update what constitutes extraordinary circumstances in various types of transactions from time to time, and the Bar and other professional associations will undoubtedly be ready to help in this respect.

User Fees. We note that the Canadian Department of National Revenue has long charged hourly fees for Canadian rulings. Canadian Information Circular No. 70-6R states in paragraph 5 (as revised June 23, 1980 and apparently currently in effect) as follows:

> Advance rulings will benefit those taxpayers requesting this service. It seems reasonable that the cost of providing the service should be borne by those who benefit from it and that taxpayers in general should not be further burdened. A fee will, therefore, be charged for advance rulings. The fee will be $50.00 for each hour spent in furnishing advance rulings submitted after July 1, 1980. The minimum fee will be $250.00.

The Committee suggests that a much higher hourly rate would be appropriate for PLRs which the Service issues. Any concern that the Service might "pad its hours" could be met by limiting the maximum amount of time for which a charge could be made. A limit of 25 or 50 hours might be appropriate.

However the Service determines the fees to be charged, the Committee sees no reason why user fees, overall, should not be of sufficient magnitude to cover or even exceed the Service's total costs in producing the rulings. Any excess could be used to augment the resources available for preparation of published rulings. Further, to the extent that our recommendations and others would result in fewer resources being spent on typing, proofreading, and editorial functions, the savings should allow more resources to be devoted to substantive study in resolving tax issues.

Even if higher rates are not adopted for PLRs generally, higher rates should be charged for comfort rulings. "Comfort" is a relative term, as is the concept of whether an issue is "clearly and adequately addressed by published authorities." But responses from a small number but representative group of tax lawyers indicate that letter rulings are frequently requested for reasons of "pure comfort" principally in the following situations: (1) extremely important or very large transactions where the tax consequences could be so devastating that even minimal risk of error is not acceptable; (2) a position of the Service, though currently favorable to the taxpayer, may be subject to adverse change; (3) even though the law appears to be clear enough, there are slight factual differences in a particular case from the regulations and published rulings which a tax examiner might use as a basis for ignoring these authorities to propose a tax deficiency; or (4) the ruling is needed for public offerings or other investor-directed material because the investing public will rely on it.

Virtually all these situations concern transactions involving large sums. Correspondingly large user fees would seem to be the right answer. They would simply be an additional cost of the transaction -- undoubtedly very modest in relation to the size of the deal and the other attendant fees and expenses.

Additional Comments

Should the Service Make Known the Authority for its Position? Ann. 89-105 says that if Technical declines to rule because the request is for a comfort ruling, the taxpayer or representative will be so informed by telephone "and a letter will be sent to close out the case." The letter will state that, "no inference is to be drawn from the letter that Technical is expressing an opinion, directly or indirectly, on the merits of the requested ruling." Q & A-6.

This raises some obvious questions. If the Service declines to rule because the issue is "clearly and adequately addressed by published authorities," should not the Service refer the taxpayer to those published authorities? This question arises whether, in the Service's view, the answer is favorable or unfavorable to the taxpayer's position, and the Committee believes that the Service should in either event cite the authorities or state the basis for its decision not to rule. If the taxpayer requests review of the refusal to rule (Ann. 89-105, Q & A-7), he at least is entitled to know upon what authority the Service relies.

The same is true if there is a later audit, and the Service has refused to rule because, in its view, the law clearly supported the taxpayer's position. Should not the Service stand behind that determination with respect to an audit — the same as if it had issued a private letter ruling? Certainly taxpayers must be expected to object vociferously if, having been told that an issue is so clear that no ruling is necessary, a deficiency is later proposed. Even though technically the Service may not be locked into a mistake of law, notwithstanding reliance,[11] continued confidence in the system and simple fairness would seem to require that when the Service gives high level written advice or response to a taxpayer it should be willing to cite the applicable authority for it and adhere to that authority as to that taxpayer. If indeed the answer is clear, it ought not be difficult for the Service to tell the taxpayer where to find it.

Similarly, if the Service adopts the proposal limiting Rev. Proc. 89-34 to specified types of transactions, the Committee believes that the relevant authorities should be included. Again, this should be an easy matter for the Service for otherwise the "type" ought not to be on the list at all. And including the authorities will help both the taxpayer and Service personnel to be certain whether the proposed transaction is indeed of the type described.

Whether or not the Service adopts these recommendations for disclosing the authorities for its position, certainly taxpayers who have relied on it should in no event be subject to the substantial understatement penalty of sec. 6661 of the Code.

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[11] Automobile Club of Michigan v. Commissioner, 353 U.S. 180, 183 (1957); Dixon v. U.S., 381 U.S. 68 (1965).

The Service's position should be “substantial authority” for the taxpayer's treatment of an item under sec. 6661(b)(2)(B), and the situation would properly call for the exercise of the Commissioner's authority to waive the penalty for reasonable cause under sec. 6661(c). The same rationale should apply to other penalties which might otherwise be imposed.

Improved telephone assistance. One proposal described in Ann. 89-104 would be to improve the procedures “by which taxpayers and practitioners can obtain informal telephone assistance from the Office of the Associate Chief Counsel (Technical).” The Committee believes that this procedure would be of limited use. It would likely lead to confusion and controversy concerning what was said and by whom. The Service undoubtedly would not wish to be bound by claimed telephonic advice, and should not be; but many taxpayers would undoubtedly have different expectations.

Rulings under sec. 355 of the Code. Taxpayers frequently request rulings under sec. 355 of the Code, particularly with respect to the active conduct of trade or business, and business purpose, requirements of that section. Some practitioners have expressed concern about the continued availability of such rulings in view of Rev. Proc. 89-34. Ann. 89-105 is reassuring in this regard in stating that “Technical expects few sec. 355 ruling requests to be affected by Rev. Proc. 89-34.” Q & A-12. This is particularly reassuring if one may infer that the Service has no intention of discontinuing issuing rulings with respect to other business and corporate transactions involving similar or analogous standards. For the reasons already discussed above, the Committee believes that many sec. 355 rulings will be good candidates for the abbreviated form of ruling proposed in this Report.