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

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Introduction

Over 40 years have passed since then—Chief Counsel Mitchell Rogovin published his original The Four R’s monograph (attached, infra, as Exhibit A), and several generations of tax practitioners have looked to it as a guide in interpreting the value of the communications issued by the IRS. 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 IRS 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 IRS 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 IRS 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 IRS 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 IRS 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 15 years or so: Chief Counsel Notices, Chief Counsel Advice, Associate Chief Counsel Memoranda and the soon-to-be-released informal e-mail advice. These work products are not drafted with the intent that taxpayers may rely upon their analyses or conclusions as statements of IRS 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 advisors may find these work products informative about the thinking of that particular Associate Chief Counsel Office and the likely response of the IRS to a particular situation, thoughtful tax practitioners and well-advised taxpayers understand that they cannot be assured that the IRS 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 IRS’s future responses to similar situations, and taxpayers and their advisors 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.

**Regulations Program**

The regulations constitute the primary source for guidance as to the IRS’s position regarding the interpretation of the Internal Revenue Code. 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.

The second and broader category is what may be termed “interpretative regulations.” They contain the IRS’s interpretation of the various sections of the Code and serve to guide the personnel of the IRS as well as the taxing public in the application of the law.

**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 law while interpretive regulations were not. 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.*, the Supreme Court observed that Congress:

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

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.

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.

**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 important purpose for issuing regulations is to give the public knowledge of the IRS’s position with respect to particular Code sections. 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.
Retroactivity

Before 1996, all Treasury Regulations were assumed to have retroactive effect unless the Secretary specifically noted otherwise. Amended by the Taxpayer Bill of Rights 2, the Code now generally prohibits retroactive application of any temporary, proposed, or final regulation. Exceptions to the general rule against retroactive application include regulations issued (1) within 18 months of enactment of the related statutory provision; (2) to prevent abuse; (3) to correct procedural defects in the issuance of a prior regulation; (4) relating solely to internal Treasury Department policies, practices or procedures; and (5) pursuant to an explicit legislative grant from Congress authorizing a retroactive effective date. The Secretary also may permit any taxpayer to elect to apply any regulation before the statutory effective date.

Conclusions

The regulations are the most authoritative source for determining the meaning of the Code. They are binding upon the IRS, 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.

Other Published Guidance

Revenue Rulings

Definition

Revenue rulings are official interpretations by the IRS, which are prepared in the Associate Chief Counsel Offices and published in the Internal Revenue Bulletin by the IRS. Revenue rulings are compiled annually in the Cumulative Bulletin and represent the conclusions of the IRS on the application of the law to the pivotal facts stated in the revenue ruling. They are intended to inform both the taxpayers and the personnel of the IRS as to the Commissioner’s position with respect to a particular issue thus ensuring that this issue will be handled uniformly throughout the country.

The published revenue ruling program tends to provide many of the same benefits as the letter ruling program. 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 IRS’s position in a published ruling, the need for taxpayers to request a letter ruling on the same subject is eliminated. 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 IRS 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 IRS does not usually initiate the publication of a revenue ruling in any area until the public or an operating division within the IRS 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 IRS and Treasury Department’s Priority 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.

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.” To ensure that revenue rulings avoid the characterization of “junior regulations,” the IRS 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. By doing so, the IRS has established the boundaries of this medium of communication.

Some History

The revenue ruling program grew out of the IRS’s reluctance to make letter rulings publicly available to everyone. Initially, there was controversy regarding whether the IRS should be required to publish all, or
substantially all, of the rulings issued to individual taxpayers.34 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;15 and

(5) reliance on unpublished material by Service personnel would be stopped.16

Some of these criticisms regarding publication have been met by the IRS in other ways. For instance, since the King Subcommittee hearings in 1951, the prior practice of IRS 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 in the disposition of other cases.”37 Again, as a result of the inquiry into the administrative practice of the IRS between 1951 and 1953, a partial solution was found to objections (2), (3) and (4). The IRS proposed in Revenue Ruling 216 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 nonpublication 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.”39

Code Sec. 6110 eventually required the release of all letter rulings starting in 1976.40 This removed much of the incentive to convert letter rulings constituting new precedents into revenue rulings. It is telling that in 1976, the IRS issued 568 revenue rulings. The numbers of rulings have decreased steadily from there. By the late 80s, 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.41

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 IRS 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 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.42 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.43 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.44

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.45
The general policy of the IRS 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. To encourage this, it is the practice of the IRS to make revocation or modification of revenue rulings prospective only. In addition, revenue rulings provide recognized authority for the possible defense of the negligent and substantial understatement penalties provisions of Code Secs. 6662 and 6664. 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.

Even if it is clear that the taxpayer did not rely on a revenue ruling, courts will often hold the IRS to the position expressed in the revenue ruling. 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 IRS than existed at the time of the revenue ruling.

Revenue Procedures

History
Prior to 1955, the IRS 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 IRS created the revenue procedure series in 1955. In Rev. Proc. 55-1, the IRS 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. Today, the program also includes procedural information that, while not affecting the rights and duties of taxpayers or others, the IRS nevertheless determines should be a matter of public knowledge.

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. The stated practice of the IRS is to publish as much of the internal management documents or communication as necessary to understand the procedure at issue. When publication of the substance of a revenue procedure is required by the Administrative Procedure Act, it has historically been accomplished by an amendment of the Statement of Procedural Rules, found at 26 CFR Part 601. 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 IRS employees and the provision of assistance to taxpayers for the purpose of maximizing voluntary compliance with the revenue laws. 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. 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. They also serve an important function, as do notices, in keeping the public informed of certain transactions that the IRS may closely scrutinize.

Reliance and Revocation
The IRS is generally bound to adhere to the procedural rules it sets forth as revenue procedures in administrative matters. As a statement published for the purpose of informing taxpayers of IRS 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 Code Secs. 6662 and 6664. 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.

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. However, as statements of the administrative procedures the IRS follows, revenue procedures are not generally revoked, but instead modified prospectively.

Announcements and Notices
The IRS 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
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procedure, but the desire to issue immediate guidance outweighs the benefit of attempting to modify the original pronouncement.66

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.67 Topics can include changes to forms or to other previously published materials, solicitation of public comments on issues under consideration and advance notice of rules to be provided in regulations when the regulations may not be published in the immediate future.71 Increasingly, notices have served as a critical component of the IRS’s efforts to combat abusive tax avoidance transactions, as they have been used to identify transactions about which the IRS 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 interest to the IRS, including so-called listed transactions and transactions of interest, both of which are “reportable transactions” under Code Sec. 6011.

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. Announcements can provide guidance of both a substantive and procedural nature, frequently of only immediate or short-term value.76 Announcements may serve to summarize the Code or regulations without making any substantive interpretation or they may provide explanations for newly adopted IRS policies or programs.

Reliance and Revocation

Taxpayers may generally rely on announcements and notices to the same extent as revenue rulings and revenue procedures. If on point, these pronouncements bind the IRS in its administrative actions and represent statements of position on which taxpayers may rely. 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.

The IRS 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.81

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 IRS’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 IRS can be responsive to the needs of the public. The IRS’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. Rulings are issued only by these offices and are generally issued in respect to transactions that have not been consummated. 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. Just as consulting the tax specialist is a way of life in business transactions, so too is obtaining a favorable tax ruling. A private letter ruling has been described as a policy of insurance that is a practical prerequisite to a merger of corporate giants. The IRS has restricted the areas in which it will provide letter rulings, preferring not to devote scarce resources to issuing so-called comfort rulings. “Comfort rulings” concern areas that the IRS 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 IRS 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.”

The letter ruling program is advantageous to both the IRS and the taxpayer. It benefits the taxpayer by:

- informing the taxpayer of the IRS’s position, which enables the taxpayer to make a determination of whether or not to consummate the contemplated transaction;
- enabling the taxpayer to choose a course of action that will avoid future controversy and litigation with the IRS; and
- 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 IRS similarly receives its share of the benefits:

- 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.
- Advance rulings tend to decrease the amount of litigation that the IRS otherwise would be involved in.
- The rulings program constitutes a source of valuable information to the IRS by keeping it abreast of the kinds of transactions which are being consummated or considered by taxpayers.
- The rulings program still serves as one basis for the published rulings program.
- 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, when it gave the Commissioner authority to enter into binding closing agreements with respect to prospective transactions. By 1940, the closing agreement procedure was recognized as too cumber-

some a vehicle to handle the volume of requests and proved to be generally unsatisfactory to both the IRS and the taxpayer. 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 IRS would do if the taxpayer requested a formal closing agreement, thus representing an “agreement to agree.” However, it was not until 1953 that the IRS formally announced the existence of the letter rulings program.

Since 1953, the letter ruling program has gone through many changes. For 30 years, the program was administered by the IRS. Then, in 1984, responsibility for the majority of the program was transferred to the Office of Chief Counsel. The IRS’s Corporate and Individual Tax Divisions, charged with administering the ruling program, were transferred from the IRS to the Office of Chief Counsel. The Employee Plans and Exempt Organizations Division, however, remained part of the IRS. Thus, the rulings program for those areas remains part of the Tax Exempt and Government Entities operating division today.

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 Memoranda related to corporate reorganizations and prepares all regulations, revenue rulings and other published guidance in the same area.

Another major change lies in the area of the public release of letter rulings. Historically, the IRS was very reluctant to release letter rulings publicly. To appreciate the IRS’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 IRS 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 IRS 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. Through the medium of the letter ruling and its limited exposure,
the IRS 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 IRS 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 IRS’s position—that is finally reflected in the published rulings of the IRS. In the published rulings program, the IRS 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 IRS 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 IRS position.99

In 1977, however, the IRS began releasing letter rulings after the enactment of Code Sec. 6110.100 This section was prompted by the outcome of two lawsuits seeking letter rulings and technical advice memoranda under the Freedom of Information Act.101 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 IRS’s proposed rules to publicize rulings in 1976, Congress enacted Code Sec. 6110 to require that written determinations (including rulings) be open for public inspection.102 To preserve taxpayer confidentiality, Code Sec. 6110 requires the IRS 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 IRS to develop a user fee program for letter rulings.103 The fees are based on calculations of the actual cost to the IRS of preparing the rulings. At the outset of the program, the fee was $300.104 Now, the fee has risen to $11,500 for a letter ruling, with discounted fees for lower income taxpayers.105

Reliability and Retroactivity of Letter Rulings

The policy of the IRS 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 1954.106 Initially, the policy was to make revocation “generally” prospective. The present statement of IRS policy, contained in Rev. Proc. 2008-1, makes a stronger case for reliance upon letter rulings by providing for retroactivity upon revocation only in “unusual circumstances.”107 However, it must be emphasized that only the taxpayer to whom the letter ruling is addressed is entitled to rely upon the ruling.108 It has long been the policy of the IRS, a policy supported by numerous court decisions, to limit reliance upon letter rulings to the recipient of the ruling.109 Only in some unusual and very limited circumstances has a taxpayer been allowed to rely on letter rulings issued to another taxpayer.110

At the same time that Congress required the IRS to release letter rulings to the public, it also addressed the IRS’s major concern regarding their release; namely, taxpayers other than the recipient of the ruling would rely on the letter rulings. Code Sec. 6110(k)(3) provides that letter rulings may not be used or cited as precedent unless a regulation has been issued allowing such reliance.111 The only regulations that come close to allowing reliance are the penalty regulations under Code Sec. 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.112

Present practice holds that a letter ruling found to be in error or no longer in accord with position of the IRS may be modified or revoked.113 It is, however, only in rare or unusual circumstances that such modification or revocation will be retroactive in effect. A change in IRS position will be prospective if:

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.114

Closing Agreements

Closing agreements are intended to resolve issues permanently. The closing agreement binds both the taxpayer and the IRS according its terms absent fraud, malfeasance or misrepresentation.115 The majority of closing agreements resolve issues that arise during the examination of a taxpayer and are signed off by IRS field officials. Some closing agreements, however, are used to resolve issues regarding prospective transactions or concluded transactions before the return is filed. As de-
scribed in the letter ruling section above, the letter ruling program evolved out of prospective closing agreements. Letter rulings, although generally binding on the IRS, do not have the finality of closing agreements. Moreover, because a letter ruling is less final, the IRS 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 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 IRS will insist on a closing agreement as a condition of issuing a letter ruling.

Prospective closing agreements must be signed in the national office. Closing agreements are not written determinations subject to public inspection under Code Sec. 6110 and, except as may be otherwise authorized by the Code (e.g., by Code Sec. 6104), closing agreements are exempt from disclosure under Code Sec. 6103. 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 IRS 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. The agreements resolve transfer pricing issues with multinational corporations for future years. 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 IRS 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 IRS for future years. Like other closing agreements, APAs are exempt from disclosure.

**Prefiling Agreements**

PFAs are a relatively recent program developed by the IRS 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. The program was judged a success in resolving contentious issues related to completed transactions and has since been renewed periodically. Issues that are eligible for PFAs 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 PFAs for multiple years and a greater number of issues. Taxpayers seeking a PFA must pay a user fee of $50,000.

**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 IRS (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.

The most important use of determination letters in prospective transactions is in the qualification of plans under Code Sec. 401, the related exempt status of trusts under Code Sec. 501, and in determining the exempt status of organizations under Code Secs. 501 and 521. 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.

**Reliance and Revocation**

The IRS 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 IRS can refer the matter to the Chief Counsel for exercise of his authority to limit the modification or revocation under Code Sec. 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.

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 IRS, 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.\(^{130}\) 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 requirements of a request for ruling or for a determination letter.\(^{131}\) Its primary purpose is to impart general information which the IRS feels will assist the individual or the organization making such request.\(^{132}\)

The IRS 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 IRS, however, may have any penalties or interest attributable to such reliance abated.\(^{133}\)

**Legal Advice Program**

While the IRS 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 IRS 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 IRS 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 IRS employees to administer and enforce the internal revenue laws and related statutes properly. It is the most fundamental function of any government or private legal office to provide advice 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 IRS 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.\(^{134}\)

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.\(^{135}\)

**Technical Advice Memoranda**

**Definition**

The most authoritative form of legal advice, and the only one for which the IRS publishes an annual revenue procedure,\(^{136}\) 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 division\(^{137}\) or an Appeals Area Director.\(^{138}\) A TAM responds to a request for assistance on a technical or procedural question that arises during any proceeding before the IRS.\(^{139}\) 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.\(^{140}\) IRS personnel assigned to the examination of cases may seek a TAM, or a taxpayer may request that an issue be referred for technical advice.\(^{141}\)
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. 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. Only a director, however, may withdraw a technical advice request.

**Reliance and Revocation**

Technical Advice Memoranda are open to public inspection. They are redacted to remove any identifying information of the particular taxpayer involved and other exempt information. Although TAMs are available to the public, other taxpayers may not rely on TAMs as precedent that governs the outcome of their cases. A conclusion in a TAM is exclusive to the case for which it was requested. 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. Only a director, however, may withdraw a technical advice request.

**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. 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 IRS's Web site. 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*, this advice became known as Field Service Advice. Field Service Advice was case-specific written advice from one of these offices to the field in both court-docketed cases and cases not yet filed in court. Field Service Advice was neither a final determination of the IRS nor an official position of the Office of Chief Counsel, even with regard to the case in which the advice was requested.

After the U.S. District Court for the District of Columbia determined that Field Service Advice was subject to release under the Freedom of Information Act, Congress amended Code Sec. 6110 in 1998 to define certain legal advice as Chief Counsel Advice that must be released for public inspection. 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.

Code Sec. 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 IRS or Chief Counsel personnel in the field interpreting or concerning a “revenue provision.” 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 fact patterns. Similar to Code Sec. 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. 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. Chief Counsel Advice is used in developing, settling, or otherwise resolving the case or cases for which the advice is requested. Chief Counsel Advice may not be used or cited as precedent.

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 advisors. 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 IRS will apply the result in any given Chief Counsel Advice to matters other than those explicitly covered in the document, taxpayers and their advisors 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 IRS’s management of its myriad programs consistent with the law. The Office of Chief Counsel routinely provides advice to those IRS officials who manage national programs for the IRS. 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 must apply newly enacted legislation, 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 IRS’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. Some of this type of advice provides assistance to the IRS principally in the nature of comment on the content of tax forms and tax publications, the Internal Revenue Manual or pending legislation. Other technical assistance consists of memoranda issued to program managers that reflect the considered legal conclusions of the Office of Chief Counsel that the IRS must make open to public inspection.

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 advisors.

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. Based on the task force’s recommendation, new procedures were implemented to provide legal advice, referred to as Associate Memoranda, that could be applied by revenue agents to resolve these types of issues. 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 IRS 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 IRS 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 IRS 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 IRS.

Field Legal Advice

Field counsel are oftentimes the first point of contact with the Office of Chief Counsel for litigation matters and for IRS personnel. Besides representing the IRS in Tax Court and in bankruptcy court, attorneys in the Associate Area Counsel offices regularly provide legal advice to IRS employees and managers. Field attorneys have always served as the first—and often the last—source for routine, and sometimes nonroutine, legal advice to their local clients. 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 e-mail when a quick answer is needed, but is also frequently provided in a memorandum. 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. In some of these situations, field attorneys prepare a memorandum and seek the concurrence of the appropriate Associate Chief Counsel office. The reviewer’s comments may be provided orally or may consist of pen and ink changes to the memorandum. 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.

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. Literature. Litigation Guideline Memoranda additionally set forth standards and criteria on issues and topics of special interest to Chief Counsel attorneys who do litigation.

As legal advice issued by the national office to the field, Litigation Guideline Memoranda now fall under the definition of Chief Counsel Advice. Literature. 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 IRS will take in litigation.

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 IRS personnel for legal advice. Literature. 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. Literature. Nearly 40,000 GCMs were authored over several decades. Literature. 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. Literature. From 1926 to 1953, the IRS published selected GCMs in the Internal Revenue Bulletin. Literature. Beginning in 1981, GCMs were made available to the public under the FOIA.

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. Literature. In 2003, OMs were all declared obsolete, but like GCMs, they were indexed and retained for their research and historical value, and are releasable under the FOIA. Literature. Finally, several Chief Counsel offices formerly put out bulletins apprising Counsel and IRS employees of developments in the law. The Tax Litigation Bulletins, for example, were mostly summaries of decided and pending tax cases. General Litigation 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 Code Sec. 6110 made clear, all of these bulletins are Chief Counsel Advice.

**Acquiescence Program**

**Acquiescence and Actions on Decision**

A notice of acquiescence is an announcement by the IRS indicating whether it will follow a significant adverse decision. Literature. 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 IRS to announce at an early date whether it will follow the holdings in cases that involve significant issues decided adversely to the Government.

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. Literature. Issues are decided adversely to the Government when the IRS 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. Literature. Other factors taken into consideration when deciding whether to issue an AOD include the following: (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) 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 IRS or taxpayers; and (11) whether the opinion is based on Code sections, regulations or rulings that have been modified or revoked.
History
The present IRS policy of issuing acquiescences in Tax Court opinions is, in large part, a historical accident. The Revenue Act of 1924 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 IRS began to issue acquiescences and nonacquiescences in the Board of Tax Appeal cases. When the IRS 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. In 1932, the present rule of three months as the time for appeal was instituted, 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 IRS did not discontinue its use. In the 1925 Cumulative Bulletin, the IRS first announced the meaning of the acquiescence procedure. Among other things, it stated that the decisions acquiesced in should be relied upon by IRS employees as precedents in the disposition of other cases before the Bureau. Tax practitioners, as well as the IRS, found this procedure helpful when transactions were questioned by agents on audit. 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. 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 IRS. Thus, the acquiescence program serves both the IRS and the public by keeping them informed 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 IRS in an effort to acquaint taxpayers with the Commissioner's present view of the law.

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There are only three possible statements of position in an announcement of acquiescence or nonacquiescence: namely, acquiescence, acquiescence in result only or nonacquiescence. Acquiescence indicates that the IRS accepts the holding of the court in a case and will follow the holding in disposing of cases with the same controlling facts. Acquiescence does not indicate either “approval [or] disapproval of the reasons assigned by the court for its conclusions.” Acquiescence in result only likewise indicates “that the IRS accepts the holding of the court in a case and ... will follow [the holding] in disposing of cases with the same controlling facts.” Acquiescence in result only telegraphs IRS disagreement or concern with some or all of the reasons given by the deciding court for the holding in the case. 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.
AODs and subsequent announcements generally do not affect the application of stare decisis or the rule of precedent. The IRS will recognize these principles and generally concede issues accordingly during administrative proceedings. Furthermore, the IRS generally adheres to the controlling precedent of a given circuit when litigating a case bound by that circuit’s precedent, per Golsen v. Commissioner. Nevertheless, in very rare circumstances, nonacquiescence to a circuit court case will not necessarily imply an intention on the part of the IRS to comply with the precedent within the same circuit issuing the opinion. This may occur if the IRS 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. In such cases, the AOD will provide explicit guidance concerning how to handle the matter within the issuing circuit.

**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. He may also exercise his discretion to make any modification prospective.

It is important to carefully delineate the extent to which acquiescences and nonacquiescences can be relied upon by the taxpayer and by the IRS. Difficulties between the taxpayer and the IRS 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 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. Although the acquiescence was eventually withdrawn, this action did not take place until after the taxpayers had completed their transaction. The Supreme Court, in upholding the Commissioner, noted the IRS 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. Taxpayers were clearly advised that caution should be exercised in relying upon acquiescences in planning transactions, and that revocation of an acquiescence was generally retroactive. 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. 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 IRS 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, a case dealing with the characterization of income for personal holding company purposes. In 1945, the IRS acquiesced and followed the case both in rulings and on audit. In 1965, the acquiescence was withdrawn and a nonacquiescence substituted. The Commissioner, after weighing these factors and considering the hardship involved in applying this nonacquiescence retroactively, exercised his discretion by making its application prospective. 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 IRS's acquiescence program was neither designed nor intended to be relied upon by taxpayers in planning transactions. Reliance in planning situations is the function of the regulation and ruling programs of the IRS. However, to provide the taxpayers with the degree of assurance required of them to plan their transactions—which is not ordinarily present in a mere acquiescence—the IRS 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.

**Other Communications**

**News Releases and Fact Sheets**

The IRS frequently issues news releases and fact sheets. In 2007, the IRS issued 213 general news
releases and 27 fact sheets. 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. 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 dates and news releases that indicate that reliance is intended.

**Coordinated Issue Papers**

The IRS'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 IRS's legal position. The IRS has published more than 90 Coordinated Issue Papers, all of which are available on the IRS's Web site. Generally, Coordinated Issue Papers cannot be relied on by taxpayers.

**Appeals Settlement Guidelines**

The IRS'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 40 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. Appeals Settlement Guidelines, like IRM provisions, are created and intended to aid the IRS'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 industry 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 IRS's internal administration and should not be relied on by taxpayers.

**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 IRS's internal operations. These Directives are not legal guidance and do not establish the IRS'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 IRS's primary forms of communication with the public about how to comply with the tax law. The IRS 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. The IRS 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, Instructions and Publications are also available through the IRS's Web site.
The Electronic Reading Room on the IRS Web site provides access to a large collection of training and reference materials.\textsuperscript{239} For example, most of the IRS’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 Web site.\textsuperscript{240}

**Reliance**

The sources of authoritative tax law are the relevant statutes, regulations, and judicial decisions, not the IRS’s informal publications.\textsuperscript{241} The Tax Court has cautioned that “[w]ell-established precedent confirms that taxpayers rely on such publications at their peril.”\textsuperscript{242} While the IRS makes every effort to ensure the correctness of the information contained in these publications, tax practitioners should understand that “[a]dministrative guidance contained in [IRS] publications does not bind the IRS to the positions they state, nor can it change the plain meaning of tax statutes.”\textsuperscript{243} This principle equally applies to forms and instructions\textsuperscript{244} 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, thousands of taxpayer questions and requests are answered by telephone.\textsuperscript{245} The IRS also conducts phone forums, seminars and training and education events. These communications reflect the IRS’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 IRS 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 IRS as to a particular issue and, to that extent, they are similar in nature to informal publications.\textsuperscript{246}

Over the years, oral statements made by agents on audit or IRS 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.\textsuperscript{247}

**Conclusion**

Mitchell Rogovin ended the prior version of this article by commenting that the IRS’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 for flexibility in the administration of the tax laws.” Today, the IRS 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 IRS is considering or how the IRS 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 advisors need to be much better informed about the kinds of IRS information that is available to the public and be able to accurately discern which of these communications can be used to predict future IRS actions.

The IRS 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 IRS is fairly and uniformly administering the Code.

But, as Mitchell Rogovin wrote over 40 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.
Exhibit A

The Four R's: Regulations, Rulings, Reliance and Retroactivity

A View from Within

By MITCHELL ROGOVIN *

Chief Counsel, Internal Revenue Service

Today, some 50 years after the enactment of our modern income tax statute, the Internal Revenue Service finds itself involved to a very substantial degree in a diversified publication program aimed at giving taxpayers, their advisors, and Service representatives advance information. No agency in government can match the size and scope of this administrative effort to give the public at large its most current interpretative views.

Introduction

Our complex tax law, with its "invisible boomerangs" makes the need for certainty a primary requisite of good administration. The program of advance information has become an indispensable part of our tax system and, in no small part, has been responsible for economic growth and stability. Yet, the program did not come into being full bloomed on a day certain. Rather, the various component parts, stimulated by pressures both from within and without, grew over the years.

If we can indulge a fanciful presumption for a moment, it would not seem unlikely that when the forerunner of our income tax, the "faculty tax" of 1646, was first introduced someone immediately asked the Royal Tax Collector whether a tax on "every laborer, artificer, and handicraftsman" included lawyers and furthermore "can I rely on your interpretation?" For the following 300 years, the taxpaying public has continued to ask not only "what about me?" but "can I bank on it?"

Although we have developed a highly sophisticated judicial mechanism for ultimately resolving tax disputes, such a system fails to meet the needs of the most highly industrialized nation on earth. A taxing statute of one quarter of a million words cannot be complied

* Mr. Rogovin gratefully acknowledges the assistance of his associate, Joel Mallin, in the preparation of this manuscript.
with solely through the results of litigation. Proper tax administration requires that the Service provide reliable and timely information to aid taxpayers in interpreting this complex statute.

This paper views the program as a whole and attempts to analyze its strengths and weaknesses. The central thread relates not to how accurate the advance information is as a substantive matter, but rather the more practical inquiry, can it be relied upon.

Not only do Service communications vary in their degree of specificity but they also vary in the degree to which reliance may be placed upon them in planning a prospective transaction. Some communications such as Determination Letters issued by District Directors in certain cases are, by their very nature, not intended to be relied upon in prospective transactions since their issuance is generally limited to completed transactions. Others, such as acquiescences have peripheral value in that they provide some information as to the present position of the Service but yet cannot be relied on with assurance to provide information as to the future position of the Service—highlighting the distinction between guidance and assurance. Still others, such as Revenue Rulings and Regulations, are specifically designed to be relied upon by taxpayers in planning their future transactions.

In this context, it is not enough for the taxpayer to know what the Commissioner’s present position is. The taxpayer must also know that he will be entitled to the benefits of the Commissioner’s position if the transaction is consummated prior to an announcement of a change in position. This is the essence of reliance. In the discussion that follows various means of communication will be analyzed; first, to determine the nature and specificity of the communications; and second, to determine the Service’s view as to the nature and degree to which the taxpayer may rely on the method of communication.

In analyzing reliance two concepts will be explored. With respect to each of the major forms of communication the extent of the Commissioner’s power to retroactively change or modify his position will be considered and related to the limits that the Commissioner has imposed upon his powers, through the exercise of the discretion conferred upon him by Section 7805 (b) of the Code, in the interest of the proper administration of the tax law.

To make the self-assessment system work, the Service recognizes the fact that it is necessary to provide taxpayers with information as to the Service’s position on future transactions. Were this the only consideration it would not be necessary to resort to multiple means of communication. However, proper administration of the tax law requires that the Service, at least in certain areas, retain wide discretion. Each time that the Service takes a position with respect to an individual taxpayer’s future transaction, its freedom of action is circumscribed. The degree to which this occurs depends upon the method employed for communicating the Service’s position. A Regulation or a published Revenue Ruling sets the Service’s position as to all taxpayers. In contrast, a published acquiescence, while imparting information, does not have the effect of freezing the position of the Service. This may be compared to a letter ruling addressed to a particular taxpayer which has the effect of an advance audit determination as to that taxpayer and that particular transaction.

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.

**Regulations Program**

The Regulations constitute the primary source for guidance as to the Service's position with respect to the interpretation of the Internal Revenue Code. Regulations may be broadly categorized into two types. First is the "legislative regulations." Under the 1954 Code Congress has delegated to the Secretary of the Treasury specific authority in certain Code sections to write detailed rules. The best example of this is the power given to the Secretary under the consolidated return sections.

The second and broader category is, what may be termed "interpretative regulations." These Regulations which review all Regulations to ensure that they are consistent with the government's over-all tax policy. See Spiegel, "Current Operations in the Chief Counsel's Office." 38 TAXES—The Tax Magazine 905, 909 (1960); Williams, Preparation and Promulgation of Treasury Department Regulations Under Internal Revenue Code of 1954, University of Southern California 1956 Tax Institute 733, 741.

" The ultimate authority to promulgate Regulations is in the Secretary. To assist him in this function, the L&R Division of Chief Counsel's Office has 45 attorneys drafting Regulations. This compares favorably with the staff used to draft Regulations in the period from 1914 through 1934. At that time Regulations were drafted in the Interpretive Division of the Office of General Counsel for the Bureau of Internal Revenue. The drafting was carried on by a committee of three members, two from the Office of General Counsel for the Bureau of Internal Revenue and one from the Income Tax Unit of the Bureau. Schmeckebier & Eble, The Bureau of Internal Revenue 134, 224 (1923). In 1904 the Legislation and Regulations Division of the Office of Chief Counsel was created and the responsibility for drafting Regulations was placed in their hands. As late as 1951 the L&R Division was staffed by only 17 attorneys. In an effort to speed up the Regulations process the Technical Planning Division was created in the Office of Assistant Commissioner (Technical) in 1952. Between 1952 and 1964 the task of initial drafting of new Regulations was split between the Legislation and Regulations Division of the Chief Counsel's Office and the Technical Planning Division. In 1964 the Treasury placed the responsibility for preparing the initial drafts of new Regulations back with the L&R Division. I. R. S. News Release, May 21, 1964. Further assistance is provided by the Office of Tax Legislative Counsel in the Treasury which reviews all Regulations to ensure that they are consistent with the government's over-all tax policy. See Spiegel, "Current Operations in the Chief Counsel's Office." 38 TAXES—The Tax Magazine 905, 909 (1960); Williams, Preparation and Promulgation of Treasury Department Regulations Under Internal Revenue Code of 1954, University of Southern California 1956 Tax Institute 733, 741.

" There is a third general class of Regulations usually referred to as "procedural regulations." See, for example, Code Section 333(d) (making and filing of elections). Procedural Regulations are generally considered to be of binding effect. But cf. TIR No. 756, August 24, 1965, announcing the Service's intention to revise the Regulations under Section 453 of the Internal Revenue Code, relating to the sales of method for sales of real property and casual sales of personal property, to reflect recent court decisions.

Procedural Regulations relating to particular sections of the Code must be distinguished from the "Statement of Procedural Rules," 26 C. P. R. Pt. 601 that are procedural rules promulgated by the Commissioner pursuant to the authority granted under R. S. 161; 5 U. S. C. Sec. 22 ("The head of each department is authorized to prescribe Regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of
constitute the Service's interpretation 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.  

Legal Effect of Regulations. — Distinctions have been drawn between legislative regulations and interpretative regulations. In regard to legislative regulations, it may be broadly stated that they are given the force and effect of law unless the Regulation exceeds the scope of the delegated power, or is contrary to the statute, or is unreasonable.  Having the effect of law, these Regulations bind both the Commissioner and the taxpayer. 

While not having the force and effect of law, interpretative regula-
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Insofar as the Service is concerned, interpretive regulations set the position of the Service, and the courts generally accord such Regulations great weight. A number of rationales support the weight given to the Treasury’s interpretative regulations. One of the most frequently mentioned principles is that of legislative reenactment—the theory being that Congress is aware of the Treasury’s interpretative regulations and is tacitly approving the Commissioner’s interpretation, when it reenacts a statute without change. It is an indication that the Regulations properly express the intent of Congress. A corollary of the reenactment argument is found in the statement that Regulations expressing a long-continued administrative practice are entitled to respectful consideration.

Another basis used by the courts in upholding the validity of Regulations is that of contemporaneous construction. Under this doctrine Regulations issued contemporaneously with the enactment of a statute will be presumed to represent the general understanding of the meaning of the statute and of legislative intent. Since the Treasury Department and the IRS take an active part in drafting not only legislation but committee reports as well, the doctrine of contemporaneous construction has a real basis in fact.

Reliance.—Legislative regulations may be relied on by taxpayers in planning transactions in the same manner in which a taxpayer may rely upon a provision of the Internal Revenue Code. With respect to interpretative regulations, these too may be relied on by the taxpayer in planning transactions. In fact, one important purpose for issuing Regulations is to give the public knowledge of the Service’s position with respect to particular Code Sections.

Retroactivity.—It is well settled that both legislative and interpretative regulations may be changed prospectively. In considering the problem of retroactivity, the decisions appear not to have drawn distinctions between legislative and interpretative regulations.
This may be a reflection of the fact that Congress similarly has drawn no distinction. Prior to 1921, Congress acquiesced in the view that all changes in Regulations were retroactive. The only change in the attitude of Congress since that period is that expressed in the power delegated to the Commissioner to prescribe the extent to which changes in Regulations and Rulings shall not be retroactive.

The most recent case supporting this view of the Treasury's power to retroactively change its position is Dixon v. United States. The taxpayer was arguing that the Commissioner was precluded from assessing a tax otherwise legally due because taxpayer had relied upon the Commissioner's prior but mistaken view of the law in embarking upon the transaction. In discussing the general problem of reliance and retroactivity the court said:

"The Commissioner is empowered retroactively to correct mistakes of law in the application of the tax laws to particular transactions. He may do so even where a taxpayer may have relied to his detriment on the Commissioner's mistake. This principle is no more than a reflection of the fact that Congress, not the Commissioner, prescribes the tax laws."

To support this conclusion the Supreme Court cited two of its prior cases with approval, Helvering v. Reynolds and Manhattan General Equipment Company. The latter case is particularly significant. There, taxpayers had sold certain shares of stock acquired in a reorganization at a loss, the amount of which they determined under the Regulations which were in force during 1926. The Regulation in question was a legislative regulation, being required by the language of Section 204(a)(9), Revenue Act of 1926. In 1928 the Commissioner amended this Regulation, and applied the amended Regulation to the taxpayer's 1926 transaction. In upholding the Commissioner's right to apply the change in position retroactively the court stated:

"...[T]he power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmonious with the statute, is a mere nullity. The original regulation as applied to a situation like that under review is both inconsistent with the statute and unreasonable... The contention that the new regulation is retroactive is without merit. Since the original regulation could not be applied, the amended regulation in effect became the primary and controlling rule in respect of the situation presented... The statute defines the rights of the taxpayer and fixes the standard by which such rights are to be measured. The regulation constitutes only a step in the administrative process. It does not, and could not alter the statute. It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand."
Dixon, concerns the application of a Regulation to a transaction which had occurred before its promulgation. Taxpayer's argument was that the Commissioner had espoused a contrary position prior to the adoption of the Regulations through the medium of published rulings and GCMs. The Supreme Court held that the prior statements of the Commissioner as well as the presence of certain lower court decisions were not of such a nature as would bring into play the doctrine of legislative reenactment. Moreover, Congress, in reenacting the statute could not have intended to bless these prior interpretations and thus to prevent the Commissioner from promulgating contrary Regulations. Furthermore, since the Court found that the Regulation was a proper interpretation of the statute, it held that the fact that it was promulgated after the transaction had been consummated was immaterial.

Both Manhattan and Reynolds are consistent with the rule that the first Regulations interpreting a particular Code section are retroactive in application. Under these circumstances, the Supreme Court has questioned whether it is even proper to characterize the relation back of the first Regulation to the effective date of the interpreted Code section as being a retroactive application of the Regulation. Absent a Regulation, the taxpayer must rely upon the particular Code section for guidance. Accordingly, no question of reliance as a bar to retroactivity can arise; Regulations do not alter the statute—they explain its meaning.

The only exception to the Commissioner's power in this area seems to be that developed by the Supreme Court in Helvering v. R. J. Reynolds Tobacco Co., cited above, in which the Court refused to allow the Commissioner to apply an amended Regulation retroactively because the prior Regulation that had been in force when the transaction occurred was a reasonable interpretation of the statute. This reasonableness was evidenced by the fact that Congress had reenacted the statute in question while the prior Regulation was in force. The additional fact that Congress had similarly later reenacted the same statute while the amended Regulation was in force did not, in the eyes of the Court, indicate that Congress' approval of the amended Regulation was meant to be retroactive. At most it would permit the Commissioner to apply his amended Regulations prospectively.

It is clear that there is a broad area in which the Commissioner has the power to change his Regulations and apply the change retroactively. However, in recent years it has been the administrative practice of the Treasury and the Commissioner to exercise the discretion granted under Section 7805(b) by making any changes in the regulations...
Regulations which would act to the 
detriment of the taxpayer prospective. On the other hand changes in Regu-
lations benefiting the taxpayer have 
generally been applied retroactively 
to all open years. Similarly, amend-
ments to the Regulations that merely 
provide certainty as to problems not 
previously covered by the Regulations 
or which clarify an ambiguity in exist-
ing Regulations are generally retro-
active in application. (T. D. 6825, 1965-26, I. R. B. 6.)

Conclusions.—The Regulations are 
the most authoritative source for de-
termining the meaning of the Code. 
They are binding upon the Service 
and current administrative practice 
is to make all amendments or modi-
fications of the Regulations prospective 
except where such modification or 
revocation benefits the taxpayer, or is 
merely a clarification of an existing 
Regulation.

Regulations are written as a gen-
eral guide to interpretation and are 
not intended to apply to each and 
every specific problem. For many 
taxpayers the material contained in 
the Regulations is sufficient for their 
purposes—supplying the knowledge 
to enable them to determine the tax 
consequences of their transactions. 
However, taxpayers are often involved 
in complex financial transactions or 
intricate fact situations which are 
not clearly covered by the Regula-

(Postnote 32 continued.)

tions. To enable these taxpayers to 
gain advance knowledge as to the 
Service's position the advance rulings 
program was developed.

Rulings Program

The present rulings program is an-
other example of man's inventive 

genius operating in response to his 
needs. It was developed to provide 
for certainty as to the tax conse-
quences of contemplated transactions 
and is concrete proof of the fact that 
even an agency as vast as the IRS can 
be responsive to the needs of the 
public.

History.—The necessity for advance 
rulings as to prospective transactions 
was first recognized by Congress in 
1938 when it gave the Commissioner 
authority to enter into binding 
close agreement transactions. 

By 1940 the closing agreement 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.

This resulted in the initiation of the 
letter rulings program under which 
requests for rulings were treated as 
potential requests for closing agree-
ments. The letter sent to the tax-

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any, to which any ruling or regulation, 
related to the internal revenue laws, shall 
be applied without retroactive effect."

The history of this section may be traced 
back to Section 1314 of the Revenue Act 
of 1921, Ch. 136, 42 Stat. 314, which granted 
the Commissioner similar discretion with 
respect to Regulations and Treasury Deci-
sions, in all cases except those occasioned 
by court decision. This exception was 
removed in Section 605 of the Revenue Act 
of 1928, Ch. 852, 45 Stat. 874. The Statute 
achieved its present form in Section 506 
of the Revenue Act of 1934, Ch. 277, 48 
Stat. 757. Congress expressed its understand-
ing of this section in the Committee 
Reports, stating: "... in some cases the 
application of regulations, Treasury Deci-
sions and rulings to past transactions which

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agree.” However, it was not until 1953 that the Service formally announced, the existence of the letter rulings program.

Definition.—The rulings program of the IRS is divided into two parts—the letter rulings program and the published rulings program. Each of these performs independent functions and yet are related.

A letter “ruling” is a written statement issued to a taxpayer by the Office of Assistant Commissioner (Technical) in the National Office which interprets and applies the tax laws to a specific set of facts. Rulings are issued only by the National Office and are generally issued in respect to transactions that have not been consummated.

In contrast to the letter ruling, a “Revenue Ruling” is an official interpretation by the Service, issued only by the National Office and published in the Internal Revenue Bulletin for the information and guidance of taxpayers, Service personnel, and others concerned.

Although the 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. Just as the tax specialist has become a way of life in business transactions today so has the tax ruling. A tax ruling has been described as a policy of insurance that is a practical prerequisite to a merger of corporate giants. Businesses have been destroyed by the failure to receive a favorable ruling. Study has also been devoted to the question of when to seek a ruling.

No statutory provision requires the Commissioner to rule in all cases. Rulings are mandatory under certain sections of the Code, for example, Secs. 367, 466(c) and 706(b)(1). Absent such requirement, the Commissioner derives his general authority to issue rulings under Sec. 7805(a), a provision that vests discretionary authority in the Commissioner to provide “all needful rules and regulations” for the enforcement of the Code. See Caplin, cited at footnote 35, at pp. 7-8.

Rev. Rul. 1, 1953-1 CB 488.

Related to the rulings program is the Revenue Procedure program. Prior to 1955 the Service would, on occasion, issue I.R. mimeographs and I.R. circulars as well as similar documents which contained information in respect to internal management practices which affected taxpayers. In order to consolidate this practice and to bring together all announcements relating to internal procedure the Service created the Revenue Procedure series. Rev. Proc. 55-1, 1955-2 CB 897 announced the new policy of the Service to publish for public information all statements of practice and procedure issued primarily for internal use, which affect rights and duties of taxpayers or other members of the public under the Internal Revenue Code and related statutes in the form of Revenue Procedures in the Internal Revenue Bulletin.

Revenue Procedures are also used to inform taxpayers of the instructions that are being given to Service personnel for use in audit. In that context the Revenue Procedure is used to promulgate rules of convenience—rules which set guidelines enabling the Service to simplify audits in many areas. They may cover something as simple as the allowance of ten cents a mile for business use of a car, Rev. Proc. 64-10, 1964-1 CB 667, or something as complex as how the agents will handle a Section 482 adjustment between a domestic parent and foreign subsidiary corporation, Rev. Proc. 64-54, 1964-2 CB 1008.


TIR 610, July 9, 1964. See Goodstein v. Commissioner, 59-1 ustc ¶ 9474, 267 F. 2d 127 (CA-1); International Business Machines Corp. v. United States, 65-1 ustc ¶ 15,620, 343 F. 2d 914 (Ct. Cls.) (dissenting opinion).


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, cited at footnote 44, at pp. 72-73, suggesting that a ruling ought not to be requested where the probability of an adverse answer is high, noting that even though the request for

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The rulings program is advantageous to both the government and the taxpayer. It benefits the taxpayer by:

1. Informing the taxpayer of the Service's position thereby enabling 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 which will avoid a 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. Among these are:

1. A high degree of uniformity in the application of the law and Regulations is attained since all rulings on prospective transactions, other than those concerned with qualification of exempt organizations and employee benefit plans, are issued from the National Office;
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 serves as the principal basis for the published rulings program; and
5. The work of the auditing agents is also simplified. He need only verify that the facts of the consummated transaction correspond to the facts in the ruling.

The published rulings program tends to also provide many of the above benefits. However, the emphasis, rather than being placed on the problem of the individual, is centered upon uniformity of interpretation. A Revenue Ruling informs both the taxpayers and the personnel of the Service as to the Commissioner's position with respect to a particular issue and insures that this issue will be handled uniformly throughout the country both in planning and on audit. 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. This reduces the burden on the rulings program and as a general rule tends to eliminate litigation in the area.

Relationship Between Letter and Revenue Rulings. There are three main sources for material in the Revenue Rulings program. The primary source is the letter ruling. The Service selects for publication all letter rulings having substantial value as precedents. The other two major sources are significant court decisions and requests for technical advice. The Service does not usually initiate the

(footnote 46 continued.)

ruling is withdrawn the National Office may furnish its views to the District Director in whose office the return has been or will be filed. Rev. Proc. 62-28, Sec. 11, 1962-2 CB 496, 504. 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 Journal of Taxation 38 (1961).

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publication of a Revenue Ruling in any area until the public or the field offices have indicated the need for guidance in an area by requesting advice or initiating litigation. This is in contrast with the Regulations program where the Service initiates publication of the Regulations interpreting, in general terms, all new Code provisions.

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

On the other hand, when a letter ruling is processed for publication as a Revenue Ruling, extensive editing is necessary. The name of the taxpayer and all identifying facts are deleted or changed. A thorough examination of the facts is made so that all relevant facts may be accurately and concisely stated. Consideration is given to all of the possible situations which might fall within the basic framework of the ruling, and necessary distinctions and limitations are drafted to insure the proper application of the ruling to other cases within the ambit of its facts. 

``Another important difference between the published and the letter ruling is level of review given the matter. Less than two per cent of the letter rulings issued are reviewed above Division level prior to issuance. More than 75 per cent of all letter rulings are issued with no review above Branch level. Published rulings are all reviewed above Division level and are all subject to some review, either formal or informal, in Chief Counsel’s Office before publication. In addition, where policy issues are involved in public rulings, there is also a review at the Treasury. See Caplin, cited at footnote 35, at pp. 27-29.
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Basically, however, both the Revenue Ruling and the letter ruling constitute an interpretation of the Code with respect to a particular state 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.” To insure that Revenue Rulings avoid the characterization of “Junior regulations” 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. By so doing, the Service has established the boundaries of this medium of communication.

Need for Distinction Between Letter and Revenue Rulings Programs.—It has often been suggested that the Service be required to publish all, or substantially all, of the rulings issued to individual taxpayers. At least five arguments have been put forth to support the publication of all letter rulings. These are:

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 for amendment of 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;24

(5) Reliance on unpublished material by Service personnel would be stopped.25

Some of the 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 has been discontinued. To this end the preface to the Cumulative Bulletin states "No unpublished ruling or decision will be cited or relied upon by any officer or employee of the Internal Revenue Service as a precedent in the disposition of other cases."26 Again, as a result of the inquiry into the administrative practice of the IRS between 1951 and 1955, a partial solution was found to the objections (2), (3) and (4). The Service proposed, in Rev. Rul. 27 to publish all letter rulings constituting new precedents with four exceptions. The first three of these exceptions relate to the question of whether or not the letter ruling has 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; specifically and clearly covered by rulings or court decisions previously published in the 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."

However, 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 a definite and reliable determination as to the tax treatment of a future transaction. This was achieved by creating a form of communication which 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, thereby avoiding the problem that plagued the closing agreement program.28 At present, response to most rulings is made within 90 days of receipt,29 a fact that is made possible only because most letter rulings are subject to limited review in the National Office.30

25For example, S. Rept. 27, 69th Cong., 1st Sess. at 229-36 (1926).
261964-1 CB 1.
271953-1 CB 484.
28See footnote 49.
29For the fiscal year ended June 30, 1965, the Service processed 42 per cent of the ruling requests in less than 60 days, 37 per cent required more than 60 days but less than 6 months and the remaining 21 per cent required more than 6 months to process. Former Chief Counsel Nelson Rose has listed the three major causes of delay attributable to the taxpayer. These are: (1) failure to present facts fully and clearly; (2) failure to pinpoint actual issue on which a ruling is requested; and (3) failure to submit statement of relevant supporting authorities. Rose, cited at footnote 48.
30In addition, publishing letter rulings could create a conflict with the present restrictions on the Service’s right to disclose information obtained from tax returns. Even if this could be cured, taxpayers may well hesitate to request rulings in prospective transactions if the ruling, containing all the facts of the proposed transaction—possibly a highly confidential business deal—

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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 which fall within the black or white areas but those questions which fall within the gray areas. 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 that gray area. As additional ruling requests in this same area are received, the Service is enabled to 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. It is there that 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.

Reliance and Revocation.—The Commissioner has the power to revoke both a Revenue Ruling or letter ruling retroactively if it is contrary to law. This is consistent with the holding in Dixon. The Supreme Court

(Part of footnote 60 continued.)

such as a merger of two listed companies—were to be published by the Service before the transaction was consummated. What would happen if, after being made public, the proposed transaction were to be cancelled?

Similarly, the published rulings program would suffer. Instead of publishing approximately 500 rulings each year the Service might well be publishing 5,000 rulings each year. The tax practitioner would have to read not only the decisions from the Tax Court, district court, court of appeals and Supreme Court, but 5,000 rulings as well, with the result that Revenue Rulings would tend to lose their character as significant precedents.

There are certain areas in which rulings will not be issued. They are set forth in a "no-ruling list." This list was first published in 1960 as Rev. Proc. 60-4, 1960-1 CB 880, and has been revised and reissued every two years since then. Rev. Proc. 62-32, 1962-2 CB 527 superseded by Rev. Proc. 64-31, 1964-2 CB 947. The no-ruling list contains a number of general and specific areas in which the Service will not rule, as well as a number of areas in which the Service generally will not rule. Although each revision has diminished the number of no-ruling areas to some extent the Service feels that the primary function of the no-ruling list is in saving the taxpayers the time and expense of preparing a ruling request in the listed areas. 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, Note, 113 University of Pennsylvania Law Review 81 (1964); Caplin, cited at footnote 35, at pp. 14-16.

The courts have recognized this problem in denying one taxpayer the right to rely on private rulings issued to another. See, for example, Goodstein v. Commissioner, 59-1 ustc 9474, 267 F. 2d 127 (CA-1);

Automobile Club of Michigan v. Commissioner, 57-1 ustc 9593, 353 U. S. 180;

Bormann v. United States, 65-1 ustc 9365, 345 F. 2d 558 (Cl. Cths.). This accords with the Congressional intent evidenced by Section 7805(b), Int. Rev. Code of 1954. See footnote 32. A letter ruling may be revoked without direct notice to the taxpayer. 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. 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 from that in the letter ruling issued to the taxpayer. Rev. Proc. 62-28, 1962-2 CB 496, 505. See Caplin, cited at footnote 35, at p. 22.

One exception to the Commissioner's power to revoke is that contained in Sec. 1108(a) of the Revenue Act of 1926, Ch. 27, 44 Stat. 114. This statute prohibits retroactive revocation of a ruling concerning ex-
treated the acquiescence in Dixon as if it were a Revenue Ruling because, until 1953, the cumulative announcements of acquiescence and nonacquiescence were given revenue rulings numbers.46 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.66

The information transmitted through either the letter ruling or the Revenue Ruling programs is intended to benefit the taxpayer by not only informing him of the Commissioner’s position but also by permitting him, in most circumstances, to rely upon the position stated in the ruling in planning and consummating a transaction. Accordingly, the Commissioner has limited the exercise of his power to modify his position retroactively.65 Present policy holds that a letter ruling found to be in error or no longer in accord with the position of the Service may be modified or revoked. It is, however, only in rare or unusual circumstances that such modification or revocation will be retroactive in effect. If (a) there has been no misstatement or omission of material facts; (b) the facts subsequently developed are not materially different from the facts upon which the ruling was based; (c) there has been no change in the applicable law; (d) the ruling was originally issued with respect to a prospective or proposed transaction; and (e) the taxpayer acted in good faith in reliance upon such ruling and a retroactive revocation would be to his detriment68 a change in Service position will be prospective.

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 1954.69 Initially it was stated that revocation would be “generally” prospective. The present statement contained in Rev. Proc. 62-28, makes a stronger case for reliance upon letter rulings by providing for retroactivity upon revocation only in “rare or unusual circumstances.” However, it must be emphasized that only the taxpayer to whom the letter ruling is addressed is entitled to rely upon it. It has long been the policy of the Service, a policy supported by numerous court decisions, to limit reliance

(Footnote 64 continued.)

... taxes if the manufacturer receiving the letter ruling relied upon it (or a published Revenue Ruling) and did not pass the tax on to his customers. Treas. Reg. Sec. 601.201(1)(B). See International Business Machines Corp. v. United States, cited at footnote 43.

45 This was prior to the institution of the Rev. Rul. series begun in 1954. See Dixon v. United States, 65-1 ustc § 9306, 301 U. S. 77 n. 2, 75 n. 4. See discussion at footnotes 24-31. The Supreme Court in Dixon states 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 p. 75.

46 The current announcement is contained in Rev. Proc. 62-28, 1962-2 CB 496. This position was first announced in Rev. Rul. 54-172, 1954-1 CB 394. See Treas. Reg. 601.201.

47 There are a number of cases considering the question of reliance—see, for example, Bornstein v. United States, cited at footnote 63 (reliance not proved); Kmetz v. United States, 65-2 ustc § 9306, 348 F. 2d 932 (Ct. Cls.)(transaction consummated prior to acts constituting basis for claim of reliance). Few cases have analyzed the question of how to define detriment. Schuster v. Commissioner, 62-2 ustc § 12,121, 312 F. 2d 311 (CA-9 1962) does analyze this problem in relation to a claim of equitable stoppage made by a trustee bank and the trust beneficiary in an estate tax case. 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. On the other hand, the court held that the beneficiary suffered no detriment in relying on the Commissioner’s prior determination. 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.

Rev. Rul. 54-172, 1954-1 CB 394.

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upon letter rulings to the recipient of the ruling.\textsuperscript{16}

Rev. Proc. 62-28 also stated that it is the general policy of the Service that taxpayers may rely upon Revenue Rulings published in the Internal Revenue Bulletin with regard to their own transactions and need not have a specific letter ruling. To encourage this, it is the practice of the Service to make revocation or modification of Revenue Rulings prospective only.\textsuperscript{71} However, although a taxpayer following a Revenue Ruling need not prove reliance, that is, 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 similar to those contained in the Revenue Ruling.

Closing Agreements and Rulings.

Since the Service does not, as a matter of administrative practice, revoke or modify its rulings retroactively,\textsuperscript{17} is there a difference between a Revenue Ruling and a closing agreement with regard to a prospective transaction? As a theoretical matter the Commissioner does have the right to revoke a ruling retroactively whether or not it has been relied upon by the taxpayer.\textsuperscript{73} On the other hand, the closing agreement, being a creature of statute, cannot be changed retroactively. It binds both the taxpayer and the government according to its terms absent fraud, malfeasance or misrepresentation.\textsuperscript{18} However, as a practical matter, tax practitioners have relied upon the good faith of the Service in adhering to its policy of not revoking rulings retroactively except under certain clearly defined and well-publicized circumstances. This is evidenced by the fact that in fiscal 1964 the IRS received requests for only four closing agreements as compared with 40,000 requests for rulings.

Determination Letters.—Of only slightly lesser impact than the ruling program in interpreting the Code is the determination letter program. A determination letter is a written statement issued by a District Director 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 where 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. These are issued in response to taxpayers' requests submitted to their offices involving completed transactions in income, profits and gift tax matters.\textsuperscript{75}

The most important use of determination letters in prospective transactions is in the qualification of plans under Section 401 of the Code, and the related exempt status of trusts under Section 501, and in determining the exempt status of organizations under Sections 501 and 521 of the Code.\textsuperscript{76} Statistics are not kept on the number of determination letters issued by District Directors in income, profits, estate and gift tax. However, in fiscal 1964 over 12,000 determination letters on the status of trust funds under Section 401 (retirement benefits, profit-sharing, stock bonus) were issued. In addition, over

\textsuperscript{16} Bornstein v. United States, cited at footnote 63; Minchin v. Commissioner, 64-2 ustc ♯ 9649, 335 F. 2d 30 (CA-2); Goodstein v. Commissioner, cited at footnote 62.

\textsuperscript{17} But see footnote 48.

\textsuperscript{18} The few recent cases concerning a retroactive revocation of a revenue ruling generally involve a revocation of a ruling as to the tax-exempt status of an organization where there has been a change in the facts upon which the tax exemption was predicated. See, Stevens Bros. Foundation, Inc. v. Commissioner, 63-2 ustc ♯ 9820, 324 F. 2d 633 (CA-8); Cleveland Chiropractic College v. Commissioner, 63-1 ustc ♯ 9200, 312 F. 2d 203 (CA-8). Cf. Automobile Club of Michigan v. Commissioner, 57-1 ustc ♯ 9593, 353 U. S. 180 (1957).

\textsuperscript{19} See discussion at footnote 63.

\textsuperscript{20} Int. Rev. Code of 1954, Sec. 7121.


7,000 determination letters were issued to tax-exempt organizations.

Reliance and Revocation.—The District Director may revoke a determination letter upon re-examination or upon audit of taxpayer's return. In the income, profits, estate and gift tax area such revocation is automatically retroactive. In the event that prospective application is desirable, the District Director can refer the matter to the National Office for exercise by the Commissioner 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. These are set forth specifically in Rev. Proc. 62-3077 and 62-31.78

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, and this accounts for the difference in treatment.

Information Letters.—An information letter is a statement issued either by the National Office or by the District Director 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. 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 where the request does not meet all the requirements of a request for ruling or for a determination letter. Its primary purpose is to impart general information which the Service feels will assist the individual or the organization making such request.79

The Service is not bound by any statements contained in such a letter since such a letter is not a ruling. Taxpayer reliance on such a document for planning is therefore misplaced.80

Acquiescence Program

History.—The present Service policy of issuing acquiescences in Tax Court opinions is in large degree an historical accident. The Revenue Act of 192481 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 Board of Tax Appeal cases. Where the Service acquiesced it simply meant the Commissioner had determined not to appeal the case. When the Commissioner nonacquiesced 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.82 In 1932, the present rule of three months as time for appeal was instituted.83

Certainly after 1932 the need for the acquiescence procedure as an indicator to the petitioner as to whether the Commissioner planned to appeal had disappeared. However, the Service did not discontinue the use of the acquiescence procedure because another

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and certainly more significant use for this procedure had developed.

The 1925 Cumulative Bulletin contained the first announcement as to the meaning of the acquiescence procedure. Among other things it stated that the decisions acquiesced in should be relied upon by Revenue Service employees as precedents in the disposition of other cases before the Bureau. Tax lawyers as well as the Service found this procedure helpful when transactions were questioned by Agents on audit. The questioned transaction 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 it was the present position of the Service not to litigate this same issue again.

Need for Acquiescence Program.— The acquiescence program was continued as a helpful tool to both the Revenue Agents and the taxpayers in settling controversies over completed transactions. Moreover, the use of this procedure spilled over into the letter ruling and the determination letter area at a later date. With respect to prospective transactions, acquiescences and nonacquiescences served as a guide to taxpayers. Where taxpayer’s transaction paralleled that of a transaction in an acquiesced case, absent other considerations, taxpayer could reasonably expect a favorable ruling could be obtained from the Service.

The acquiescence program was continued because it served both the Service and the public by keeping them informed of the Commissioner’s current litigation 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 the taxpayer with the Commissioner’s present view of the law.

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. He may also exercise his discretion to make any modification prospective.

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 must often arise in the acquiescence program when the taxpayer attempts to use an acquiescence for a purpose for which it was not intended. Dixon 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 George Pech Caulkins. Although the acquiescence was withdrawn, this action did not take place until after the taxpayers had completed their transaction. The 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. Taxpayers were clearly advised that caution should be exercised in relying upon acquiescences in planning transactions, and that revocation of an acquiescence was generally retroactive. This may be contrasted with the administrative treatment given to revocations of Regulations or 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.\textsuperscript{91}

In general, it may be said that such discretion will be exercised where the acquiescence to be revoked was one of broad general application and of long standing which has been consistently relied upon by the National Office and the District Directors in issuing private rulings or determination letters. An example of this situation is the Commissioner's change in position in *Minnesota Mortuaries, Inc.,*\textsuperscript{88} 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. In 1965, the acquiescence was withdrawn and a nonacquiescence substituted. The Commissioner, after weighing these factors and considering the hardship involved in applying this nonacquiescence retroactively, exercised his discretion by making its application prospective.\textsuperscript{88} The fact many people may be involved or that hardship will ensue if the revocation of an acquiescence is made retroactive does not, however, automatically insur e 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 the taxpayer in planning transactions. Reliance in planning situations is the function of the Regulation and ruling programs of the IRS. However, to provide the taxpayers with the degree of assurance required for them to plan their transactions which is not ordinarily

\*\*\* Dixon v. United States, cited at footnote 24.\n
\* CCH Dec. 14,209, 4 TC 280 (1944), acq. 1945 CR 5, acq. withdrawn and nonacq. substituted 1965-23 I. R. B. 7.\n
\* In Journal-Tribune Publishing Co. v. Commissioner, 65-2 TC 1455, 348 F. 2d 266 (CA-8), the court suggested that when the Service neither issues a statement objecting to the result reached by the court of ap-

**Future of Acquiescence Program.**—The Service is in the process of re-examining the acquiescence program. Numerous suggestions have been made both within and without the Service for improving this information program. The most significant suggestions involve expanding the acquiescence program to include not only all decisions of the Tax Court but also decisions of the federal courts.\textsuperscript{85}

The Service is also giving careful consideration to suggestions that acquiescences and nonacquiescences be given the status of Revenue Rulings so as to enable taxpayers to rely to a greater extent on such announcements in planning prospective transactions. To accomplish this, the Service would have to discontinue the issuance of the present acquiescences and replace them with a statement, similar in form to a Revenue Ruling, briefly discussing the position of the Service in the case and indicating the relevant precedents and the areas of agreement and disagreement. Under this suggested program, however, such statements could not be issued in all cases but would be limited to those cases that are considered to have value as precedents.\textsuperscript{85}

**Other Communications**

**Technical Information Release (TIR).**—The Technical Information Release (TIR) resulted from the complaints in 1956 that the Internal Revenue news releases were becoming

peals or requests certiorari that this is an indication that the Service agrees with the court's decision. This is not the case. The mere fact that the Service does not indicate its position with respect to an adverse decision and does not appear such decision should not be taken as agreement with that decision on the part of the Service. There are many reasons for declining to take an appeal from an adverse decision. No appeal.

*(Continued on following page.)*
entirely too complicated and technical and thus had very little interest to newspapermen and lay readers. From this developed the TIR series which has been established as a public information vehicle for the technical press and the tax specialists. The TIR gives the National Office the ability to inform the public quickly with respect to important technical developments. For example, a new public law creates an election which has to be made within a very limited time of the TIR enables the Service to immediately explain the election, what its tax consequences are, how it works, how and when it must be made, the effect it will have on future years and to get this to the public quickly.\textsuperscript{96}

Reliance and Revocation. — The content of a TIR generally determines whether taxpayer reliance upon it is justified.\textsuperscript{97} Where a TIR states that reliance is intended\textsuperscript{98} or announces a mechanical rule such as a due date for an election or return, taxpayer reliance on such TIR is clearly warranted.\textsuperscript{99}

News Releases.—The IRS also issues news releases. During the 1964 fiscal year 125 general news releases were issued. These contained information of general rather than technical interest. For example, a news release of Monday, October 4, 1965, IR-778 announced that for the fiscal year ending June 30, 1965, for the first time in this country, beer production exceeded 100 million barrels. The release noted that this compared quite favorably with the production figures for 1934, the first full year after Prohibition which showed 32 million barrels of beer produced.

The nature of the material contained in news releases obviates the reliance problem.

Miscellaneous Material.—The Service published approximately 60 pamphlets designed to provide taxpayers with the means for self-help. At the top of the best seller list is I. R. S. Publication No. 17 entitled Your Federal Income Tax. It is written to aid the individual taxpayers in filing out their returns. In fiscal 1964 about 850,000 copies of this booklet were sold. Second on the best seller list was Tax Guide for Small Business, I. R. S. Publication No. 334, which is designed to impart information to the sole proprietor, partnership, and small corporation. Over 250,000 copies were sold in fiscal 1964.

Many publications are distributed without charge to taxpayers who may be affected. For instance, I. R. S. Publication No. 463 entitled, “Rules for Deducting Travel, Entertainment, and Gift Expenses,” had a distribution of over 2 million in 1964. Similarly the “Farmer’s Tax Guide,” I. R. S. Publication No. 225, the contents of which are self-explanatory, had a distribution of over 1 million.

The Service has also not been slow to take advantage of technological related to Revenue Procedures and related to announcements of general interest later published in the Bulletin. Twenty-one of the TIRs related to specific provisions of the Revenue Act of 1964.\textsuperscript{94} The TIRs are published in the Internal Revenue Bulletin in modified form. Where they are merely informative, they are published as announcements. Where they contain the substance of a Revenue Ruling or Revenue Procedure it is the ruling or procedure that appears. The Cumulative Bulletin deletes all material that appeared as an announcement in the Internal Revenue Bulletin.

\textsuperscript{95} TIR 700 (Feb. 25, 1965).

\textsuperscript{96} TIR 675 (Jan. 12, 1965); TIR 678 (Jan. 19, 1965).
advances in communication. In addition to its documentary film program, with films available to civic groups, the Service has provided filmed spot announcements for use by television stations as an aid to taxpayers during the filing season. During the period from January to April 1964, these spot announcements were used by over 520 television stations. Spot announcements are also prepared for radio stations and the Service had three 5-minute films on closed circuit television at the New York World’s Fair.

Reliance and Revocation.—It is the position of the Service that these various pamphlets and material are similar in nature to information letters. They are not designed to be relied upon by taxpayers in planning future transactions. This was reaffirmed in a recent case in the Ninth Circuit involving a taxpayer’s claim that, based on the pamphlet “Your Federal Income Tax,” he contracted for a series of dance lessons, believing the expense to qualify as a medical deduction. The Court, in denying taxpayer’s claim stated, “nor can any interpretation by taxpayers of the language used in government pamphlets act as an estoppel against the government, nor change the meaning of taxing statutes. . . .” This rationale is merely another reflection of the Supreme Court’s position in Dixon.

Oral Communications.—Another means of transmitting information to the public is through the medium of oral communication. Each year thousands of taxpayer requests are answered by telephone. In addition, throughout the country Internal Revenue Agents in the course of their employment hold innumerable discus-

sions with taxpayers on audit, both in the field and in the office. Over the years, this has engendered litigation involving the position of taxpayers who acted in reliance upon statements made by Agents on audit or in review of their cases. The oftstated general rule is that an Agent does not have authority to bind the government. As with every general rule there are exceptions.

In very limited numbers of cases, the court has found that statements made by government agents were within the scope of their authority and accordingly have estopped the Commissioner from imposing a deficiency. The courts have held that the taxpayer should be permitted to invoke the doctrine of equitable estoppel against the government in cases where (1) there has been a waiver of sovereign immunity both as to liability and as to suit, (2) the Agent whose conduct is relied upon to work an estoppel acted within scope of his authority lawfully conferred and (3) application of the doctrine would not bring a result that is either inequitable or contrary to law. In these situations, the courts state “that common honesty and good conscience require that taxpayers receive ordinary fair play from tax officials,” relying on Justice Jackson’s remark that “while men must learn to turn square corners when they deal with the government, there is no reason why the square corners should constitute a one-way street.”

Oral statements made by the Commissioner in testifying before Congress have served as a basis for one taxpayer’s claim of estoppel. The Court of Claims never reached the question of whether the Commis-

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sioner could estop himself from assessing a deficiency, because taxpayer could not prove reliance on the oral statements.

Reliance—It is suggested that no reliance be placed on oral statements in planning transactions. At most, they may represent an informal opinion of the present position of the Service as to a particular issue and to that extent they are similar in nature to information letters or tax guides.

Conclusion

The present policy of the Service with respect to information and taxpayer reliance is the result of 50 years of experiment and experience. It reflects a practical compromise between the needs of the public for reliable and timely information and the needs of the Service for flexibility in the administration of the tax laws.

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. [The End]


SCHEDULED SESSIONS OF TAX COURT

The forthcoming scheduled sessions of Tax Court:

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<td>Buffalo, New York</td>
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<td>Chicago, Illinois</td>
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<td>Denver, Colorado</td>
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3 See Rev. Proc. 62-28, 1962-2, CB 496, 504. "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." Treas. Reg. Sec. 601.201(k).

Knetz v. United States, cited at footnote 68. Taxpayer, in an effort to place himself under the umbrella of the IBM decision also claimed that oral testimony of Service officials before Congress proved that he was not being treated in the same manner as similarly situated taxpayers.

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ENDNOTES

1 This article is a revision of Mitchell Rogovin’s monograph *The Four K’s: Regulations, Rulings, Reliance, and Retroactivity: A View from Within*, which was originally published by CCH in *43 Taxes* 756 (1965), and an original version of this article appeared in *46 D.U. L. Rev.* 323 (Spring 2008). I would like to thank the following people, who were Chief Counsel attorneys in 2008, for their assistance with this project: George Bowden, Deborah Butler, Mark Cottrell, Philip Lindennuth, Stuart Murray, Margo Stevens, Robert Wearing and Kathryn Zuba.

2 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 Code Sec. 7805(a) (2000). Unless otherwise stated, references to the Code refer to the Internal Revenue Code of 1986, as amended.

3 The ultimate authority to promulgate regulations is vested in the Secretary of the Treasury, 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 IRS, Chief Counsel Directives Manual 32.1.1.1.4 (Aug. 11, 2004) [hereinafter C.C.D.M.].

4 There is a third general class of regulations usually referred to as “procedural regulations.” See, e.g., Code Sec. 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’n*, 810 F.2d 209, 213–14 (D.C. Cir. 1987) (procedural offer and compromise regulations at Reg. §301.7122-1(d) (1986) requiring written offer and acceptance entitled to a “strong presumption of validity”).

5 Procedural regulations relating to particular sections of the Code must be distinguished from the Statement of Procedural Rules, 26 CFR Part 601, that are procedural rules promulgated by the Commissioner of Internal Revenue pursuant to the authority granted under 5 USC §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 IRS in carrying out its prime function of administering and enforcing the internal revenue laws. See *Lubringer v. Clotzbach*, 304 F.2d 560, 564, note 2 (4th Cir. 1962). See also *Flynn v. Comm’n*, 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’n*, 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’n*, 784 F.2d 1424, 1431 (9th Cir. 1986) (procedural rules set forth in 26 CFR §610.101 “were not designed to protect the constitutional rights of taxpayers”); *Einhorn v. DevWitt*, 618 F.2d 347, 350 (5th Cir. 1980) (procedural rules’ purpose “to govern the internal affairs of the Internal Revenue Service”); *Rosenberg v. Comm’n*, 450 F.2d 529, 532–33 (10th Cir. 1971) (procedural rules directory, not mandatory).

6 The notice and comment provisions of the Administrative Procedure Act do not apply to interpretive regulations. 5 USC §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, at ¶ 3.02(2).

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


11 *Long Island Care at Home, Ltd. v. Coke*, 127 SCt 2339, 2345–46 (2007) (quoting *Chevron*, 467 US at 843, and citing Mead, 533 US 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 USC §553 (2000).

12 *Boeing Co. v. United States*, 537 US 437, 447–50 (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 US 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 would 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 Savings Ass’n v. Comm’n*, 499 US 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 USC §7805(a), we must defer to his regulatory interpretations of the Code so long as they are reasonable”).
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12 See H. R. Rep. No. 70-1882, at 22 (1928) (Conf. Rep.), reprinted in 1928 USCCAN ("it 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 Savings 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))).

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

14 See Code Sec. 7805(b) (1986), which reads 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."


16 Code Sec. 7805 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 relate 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.


17 Id. Code Sec. 7805(b)(2).

18 Id. Code Sec. 7805(b)(3).

19 Id. Code Sec. 7805(b)(4).

20 Id. Code Sec. 7805(b)(5).


22 Id. Code Sec. 7805(b)(7).

23 See IRS Chief Counsel Notice CC-2003-014 (May 8, 2003) (Chief Counsel litigating positions should be derived from, and consistent with the Code and published guidance).

24 Reg. §601.601(d)(2).

25 Id. §601.601(d)(2)(ii). "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 IRM], available at www.irs.gov/irm/index.html.

See also Introduction, 2008-1 IRB (reprinted in all issues of the Internal Revenue Bulletin).


26 The letter ruling program is discussed supra.

27 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 advisors 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")

28 The Priority Guidance Plan (PGP) is a document developed jointly by the IRS 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." IRS Notice 2007-41, IRB 2007-21, 1287 (2007). For the process for selecting projects for inclusion on the Priority Guidance Plan involves soliciting, evaluating and prioritizing proposals for guidance. Every year the IRS 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 stakeholders, 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 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.

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, 32.2.2 (Aug. 11, 2004).


See S. 2047, 89th Cong. (1st Sess. 1965), which would require the IRS to publish within 10 days all rulings involving potential tax liabilities in excess of $100,000. See also S. Rpt. 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 USCCAN. 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).


35 1953-1 CB 484.

36 Id. §4(i).

37 Code Sec. 6110 (1976). See infra for a complete discussion of this issue.

38 Numbers of revenue rulings are taken from either the final Cumulative Bulletin or the final Internal Revenue Bulletin for each year quoted.


40 This was prior to the institution of the Revenue Ruling series begun in 1954. See Dixon

44 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 US at 75. Now, however, Code Sec. 7805(b) requires that most regulations apply only prospectively.

45 See C.C.D.M., supra note 4, 32.2.3.5.1.2.7 (Aug. 11, 2004); Reg. §601.601(d) (1987); Rev. Proc. 89-14, 1989-1 CB 814. IRM, supra note 27.

46 An example of this situation is Rauenhorst v. Comm’t, 119 TC 157 (2002). The Tax Court, which previously had adopted a position contrary to the IRS’s revenue ruling, nonetheless required the IRS to follow the revenue ruling position. Rauenhorst, 119 TC at 170–71. 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).

47 C.C.D.M., supra note 4, 32.2.2.1.0.4(1) (Aug. 11, 2004).


50 Id.

51 Id. §601.601(d)(2)(ii).

52 IRB No. 552 (2000).


54 IRB, supra note 54, §2.

55 Id., Rev. Proc. 2007-17, 2007-1 CB 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 CB 1044 (establishing the Fast Track Settlement program to expedite case resolution and to expand the range of dispute resolution options available to taxpayers).


57 See Reg. §601.601(d)(1) (1987) revenue procedures are published in order to promote the correct and uniform interpretation of the law by IRS employees). See also IRM, supra note 27, 4.10.7.2.6 (Jan. 1, 2006) (describing the effect of revenue procedures); Dillon, Read & Co. v. United States, 875 F2d 293 (Fed. Cir. 1989) (citing Eli Lilly & Co. v. Comm’t; 856 F2d 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 IRS personnel).

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

59 See Introduction to Internal Revenue Bulletin, supra note 27.

60 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 Treasury Department are internal procedural guides that do not confer rights upon taxpayers. Boulez v. Comm’t, 810 F2d 204 (2d Cir. 1987); Ward v. Comm’t, 784 F2d 1424 (9th Cir. 1986); Rosenberg v. Comm’t, 450 F2d 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 F2d 293 (Fed. Cir. 1989) (citing Eli Lilly & Co. v. Comm’t; 856 F2d 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).

61 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. Band v. Comm’t, 96 TC 204 (1991); Lansons, Inc. v. Comm’t; 69 TC 773 (1978), nonacq., action on dec., 1979-155, 1979 WL 53184 (July 9, 1979), aff’d, 622 F2d 774 (5th Cir. 1980) (reissue revocation of longstanding 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 ruling, infra 15.

62 See generally IRM, supra note 27, 4.10.7.2.4.1(1)(a) (Jan. 1, 2006) (discussing the usefulness of announcements where expedited guidance is required).

63 C.C.D.M., supra note 4, 32.2.2.3.3(1) (Aug. 11, 2004); IRM, supra note 27, 4.10.7.2.4.1(1)(b) (Jan. 1, 2006).

64 See, e.g., Revision of Forms 8898 and 8840, IRS Notice 2006-73, 2006-2 CB 339 (effect-
the transaction should be identified specifically as a tax avoidance transaction. See Reg. §1.6011-4(b)(6) (2007); Code Sec. 6111, 6112 (Supp. V 2005). Transactions of interest are identified in notices. See, e.g., Transaction of Interest—Contribution of Successor Member Interest, IRS Notice 2007-72, IRB 2007-36, 544 (identifying contributions of successor member interests as a transaction of interest); Transaction of Interest—Toggling Grantor Trust, IRS Notice 2007-73, IRB 2007-36, 545 (identifying the toggling of grantor trusts as a transaction of interest). Just as the IRS 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, IRS Notice 2001-18, 2001-1 CB 731 (providing an exception from registration and list maintenance requirements for certain leasing transactions).

74 The IRS 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. Reg. §1.6011-4(b) (2007). The IRS 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, IRS Notice 2004-67, 2004-2 CB 600; Loss Importation Transaction, IRS Notice 2007-57, IRB 2007-29, 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 Reg. §1.6011-4, IRS Notice 2006-6, supra note 74 (announcing the removal of the book-tax difference category of reportable transactions).

75 IRM, supra note 27, 4.10.7.2.4.1(1)(a) (Jan. 1, 2006). In recent years, the IRS has begun compiling announcements in the Cumulative Bulletin.

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

77 Id. See, e.g., Request for Tax Accrual and Other Financial Audit Workpapers, IRS Announcement 2002-63, 2002-2 CB 72 (announcing that the IRS revised its policy concerning requests for tax accrual workpapers); Compliance Assurance Process, IRS Announcement 2005-87, 2005-2 CB 1144 (announcing the Compliance Assurance Process pilot program for large business taxpayers, with the objective of reducing taxpayer burden and uncertainty while as-
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.


See Caplin, supra note 34.

No statutory provision requires the Commissioner to rule in all cases. Rulings are mandatory under certain sections of the Code, for example, Code Secs. 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 Code Sec. 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.


The procedures governing Technical Advice memoranda are discussed below. See infra.

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., at §10.07. The taxpayer generally has only one conference with 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., at §10.02, 10.05.

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 at Rev. Proc. 60-6, 1960-1 CB 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, IRB 2008-1, 110; Rev. Proc. 2008-7, IRB 2008-1, 229. The no-ruling list contains both specific areas in which the IRS will not rule, and areas in which the IRS 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.

Code Sec. 6110 provides that, except to the extent otherwise provided in regulations, taxpayers may not rely on letter rulings issued to other taxpayers. Code Sec. 6110(k) (3) (2000); see also Rev. Proc. 2008-1, supra note 84, at §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.


Fruhauf Corp. v. Internal Revenue Serv., 522 F2d 284 (6th Cir. 1975) (subsequent history omitted); Tax Analysts v. Internal Revenue Serv., 505 F2d 350 (D.C. Cir. 1974).


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

Rev. Rul. 54-172, 1954-1 CB 394.


Id., at §11.03.

E.g., Minchin v. Comm’r, 335 F2d 30 (2d Cir. 1964); Goodstein v. Comm’r, 267 F2d 127 (1st Cir. 1959); Bornstein v. United States, 345 F2d 558 (Cl. Ct. 1965).

E.g., Int’l Bus. Machines v. United States, 343 F2d 914 (Cl. Ct. 1965) (allowing IBM to rely on a favorable letter ruling issued to its sole competitor, Remington Rand, after the IRS denied IBM’s request for a similar ruling).


A letter ruling may be revoked without direct notice to the taxpayer. Rev. Proc. 2008-1, supra note 84, at §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.

Rev. Proc. 2008-1, supra note 84, at §11.05–06. There are a number of cases considering the question of reliance. See, e.g., Knetch v. United States, 348 F2d 932 (Cl. Ct. 1965) (transaction consummated prior to acts constituting basis for claim of reliance); Bornstein, 345 F2d 558 (reliance not proved). Few cases have analyzed the question of how to define detriment. Schuster v. Comm’r 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 F2d 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 F2d 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.

Code Sec. 7121 (2000).

IRS Deleg. Order No. 97 (Rev. 34), IRM, supra note 27, 1.47.6 (Aug. 18, 1997).


Tax Analysts v. Internal Revenue Serv., 410 F3d 715 (D.C. Cir. 2005). There, the court found that the closing agreement between the IRS and the Christian Broadcasting Network was not material submitted in support of its application for tax exemption, upon which the IRS made its determination that the Christian Broadcasting Network was entitled to exemption. Tax Analysts, 410 F3d at 722. Accordingly, the closing agreement was not authorized to be disclosed under Code Sec. 6104 and remained confidential under Code Sec. 6103. Id.


IRS Notice 2000-12, 2000-1 CB 727.


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. 2003-12, 2005-1 CB 311, superseded by Rev. Proc. 2007-17, supra, expanded the program in several ways. An eligible taxpayer could request a PFA for the current tax year, any prior tax 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. PFAs could also be used to determine the appropriate methodology for determining tax consequences affecting future tax years. Finally, PFAs may now be obtained for certain international issues and issues having “international implications.” Rev. Proc. 2007-17, supra, at §3.07.


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54; Rev. Proc. 2008-6, IRB 2008-1 IRB 192 (employee plans determination letters); Reg. §601.201(c) (2002).

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


131 Id.

132 Id.


134 See, e.g., C.C.D.M., supra note 4, 33.1.2.3.3.4(1), 33.1.2.2.3.5 (Aug. 11, 2004).

135 SeeCode Sec. 6110(k)(3), which provides that a written determination may not be used or cited as precedent.


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

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

139 Id., at §3.01.

140 Id.

141 Id., at §5.02.

142 Id., at §56.01, 6.02.


144 Id., at §11.01.

145 Code Sec. 6110(a) provides that any “written determination” and any “background file document” relating to the written determination shall be open to the public.

146 Code Sec. 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. Code Sec. 6110(c)(1), (7) (2000). Once a TAM is issued, the IRS notifies the taxpayer that the TAM will be publicly disclosed with the taxpayer’s identifying information removed. Id. Code Sec. 6110(f); Reg. §301.6110-5(a) (2001).

147 The taxpayer may submit a written statement to the IRS 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. Code Sec. 6110(h)(2)–(3) (2000); Reg. §301.6110-5(b) (2001).


149 Rev. Proc. 2008-2, supra note 138, at §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 prospective if it relates to a continuing action or series of actions. Id., at §13.03. TAMs apply to ongoing matters until withdrawn or until the conclusion is modified or revoked by a court decision, statute, regulation or other published guidance. Id.


152 The IRS makes Chief Counsel Notices and other work products written by the Office of Chief Counsel available in the IRS’s Electronic Reading Room. See www.irs.gov/foia/article0,00.html.


154 H.R. Rep. No. 105-599, at 298 (1998) (Conf. Rep.), reprinted in 1998 USCCAN. 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.

155 Other 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 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(12)13(1)(i) (Sept. 29, 1997) (no longer in effect). After the changes to Code Sec. 6110, Service Center Advice was subsumed with the definition of Chief Counsel Advice. IRS Chief Couns. Notice N(35)2000-143A (Feb. 16, 1999).

156 C.C.D.M., supra note 4, 35(13)19(3)(4) (Jan. 6, 1997) (no longer in effect); id., at 35(27)2(5) (July 24, 1996) (no longer in effect).

157 Id., at 35(27)2(5)(b) (July 24, 1996) (no longer in effect).


159 Code Sec. 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. Code Sec. 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., at Code Sec. 6110(i)(A)(iii).

160 C.C.D.M., supra note 4, 33.1.3.1.1.2(A) (Aug. 11, 2004).

161 Code Sec. 6110(a), (c)(1), (c)(3), (i)(3)(B) (2000); Reg. §301.6110-1(a) (1977). FOIA Exemption 3, 5 USC §552(b)(3) (2000), however, which incorporates the exemption provisions of other federal statutes, does not apply in conjunction with Code Sec. 6103 or any other section of Title 26, Code Sec. 6110(i)(3)(B) (2000).

162 Code Sec. 6110(i)(4) (2000).

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


165 Code Sec. 6110(k)(3) provides that a determination to the IRS 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. Code Sec. 6110(h)(2)–(3) (2000); Reg. §301.6110-5(b) (2001).


167 Tax Analysts v. Internal Revenue Serv., 152
Recent GCMs have been issued only to re- evoke earlier GCMs and do not provide legal advice.


TAXATION WITH REPRESENTATION FUND V. INTERNAL REVENUE SERVICE, 646 F2d 666, 671 (D.C. Cir. 1981).

TAXATION WITH REPRESENTATION, 646 F2d at 671. In Taxation with Representation, the court held that GCMs reflecting the final position of the IRS 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 IRS. 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.


IRM, supra note 27, 4.10.4.2.9.8.1(1) (Nov. 1, 2006); C.C.D.M., supra note 4, 36.3.1.1 (Aug. 11, 2004).

IRM, supra note 27, 4.10.4.2.9.8.1(1) (Jan. 1, 2006).

IRM, supra note 27, 4.10.4.2.9.8.1(1) (Jan. 1, 2006).

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

Id., at 36.3.1.2(2).


V-1 (CB iv 1925).

Id.


IRM, supra note 27, 4.10.7.2.9.8.1(3) (Jan. 1, 2006).

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 SERVICE, 485 FSupp 263 (D.D.C. 1980), aff'd, 646 F2d 666 (D.C. Cir. 1981) (finding AODs not generally exempted from mandatory disclosure by the deliberative process privilege of 5 USC 552(b)(5)). These documents are available in the Electronic Reading Room on the IRS Web site. See supra note 153.

The internal AOD is intended to provide controlling guidance for IRS personnel working similar issues in other cases. See, e.g., 2007-6 IRB 419, at note 1.
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tronic Reading Room on the IRS Web site. See supra note 153.

232 See, e.g., IRS News Rel. IR-2006-194 (an-
nouncing qualifying vehicles for purposes of the Alternative Motor Vehicle Credit).

233 These documents are available in the Elec-
tronic Reading Room on the IRS Web site. See supra note 153.

234 In some cases, reliance on Coordinated Issue
Papers may be justified by Congressional
action. Iowa 80 Group, Inc. v. Internal Rev-
enue Serv., 406 F3d 950, 953–54 (8th Cir. 2005).

235 These documents are available in the Elec-
tronic Reading Room on the IRS Web site. See supra note 153.


237 IRS Form 4361, Application for Exemption from Self-Employment Tax for Use by Minis-
ters, Members of Religious Orders and Chris-
tian Science Practitioners, allows qualifying
individuals to apply for exemptions from
self-employment tax. This form, as well as
all of the IRS's forms and publications, is

238 See supra note 239.

239 See supra note 153.

240 One example is the Small Business/Self-
Employed Virtual Small Business Tax Work-
shop. See supra note 153 for the address of
the Electronic Reading Room.

241 Zimmerman v. Comm'r, 71 TC 367, 371
(1978).


243 Miller, 114 TC at 195.

244 See, e.g., Casa de la Jolla Park, Inc. v. Comm'r, 94 TC 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 ap-
pearing on the face of the form); Sadberry
v. Comm'r, 87 TCM. (CCH) 982, at *6-7
(2004) (rejecting equitable estoppel claim
alleging reliance on IRS Form 1040 Instruc-
tions); but see Estate of Merwin v. Comm'r,
95 TC 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).

245 Nowadays, some questions and requests are
answered by e-mail.

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 IRS is not bound to recognize it in the
examination of the taxpayer’s return”).

247 See, e.g., Fed. Crop Ins. Corp. v. Merrill, 332
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 FSupp 457 (S.D. Cal.
1954); but see Heckler v. Cmty. Health Serv. of
(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 F2d 932, 940 (Ct. Cl. 1965).