Chapter 3

Types of Authority in Federal Tax Practice

Research is to see what everybody else has seen, and to think what nobody else has thought.

Albert Szent-Gyorgyi

---

§ 3:1 Types of Authority in Federal Tax Practice

In the practice of tax law there are four basic types of authority:

(1) Statutory/legislative authority;

(2) Administrative authority;

(3) Judicial authority; and

(4) Other types of secondary authority.

Statutory/legislative authority comprises the Internal Revenue Code and other statutory provisions; tax treaties and regulations; legislative history; and the Blue Book. Administrative authority comprises the Treasury Regulations (proposed, temporary, final, retroactive and procedural regulations), revenue rulings, revenue procedures, Private Letter Rulings (Priv. Ltr. Ruls.), Technical Advice Memoranda (TAMs), General Counsel Memoranda (GCMs), Chief Counsel Advice

(CCA) Memorandums and the *Internal Revenue Manual* (IRM). Judicial authority comprises the U.S. Supreme Court; U.S. Circuit Court of Appeals; U.S. Court of Appeals for the Federal Circuit; District Court; U.S. Court of Federal Claims; and the U.S. Tax Court. Other secondary authority is everything else that affects taxes that might lead the reader back to the primary authorities.

§ 3:2 Statutory/Legislative Authority

§ 3:2.1 The Code and Legislative History

After passage of the Sixteenth Amendment, Congress enacted a series of revenue acts. On February 10, 1939, all internal revenue laws then in effect were repealed and reenacted in codified form as title 26 of the U.S. Code (the "1939 Code"). On August 16, 1954, the Internal Revenue Code of 1954 was approved (the "1954 Code"). The 1954 Code, as it is called by practitioners despite numerous amendments,[1] again repealed, reenacted, modified, and codified prior law, this time also integrating administrative and procedural rules with the internal revenue laws.

In 1986, the 1954 Code was itself the subject of wholesale revision with the enactment of the Tax Reform Act of 1986.[2] Due to such substantial changes, it is now called the Internal Revenue Code of 1986 (the "1986 Code" or the "Code"). In interpreting the tax law practitioners should be careful about effective dates, enactment dates, and sunset dates and should never assume that the enactment date is also the effective date. As Code sections change, the effective dates may change.

§ 3:2.2 Legislative History and the Blue Book

Before a new provision of the Code or other tax law is enacted, there is a legislative process that includes hearings, debate, and reports from the House Ways and Means Committee (where all tax bills originate) and the Senate Finance Committee. The debates on the floor of the House and Senate may be found in the Congressional Record. These debates are typically not very helpful from a perspective of legislative history. Whereas, the committee reports could provide important authority to support a practitioner's position on a particular issue. Committee reports set forth what the proposed legislation

---

1. For example, Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 1993-3 C.B. 1; Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324; Economic Recovery Act of 1981, Pub. L. No. 97-34, 95 Stat. 172.
2. Pub. L. No. 99-514, 100 Stat. 2085.

accomplishes, explains the proposed legislation, and may provide examples.

Separate and distinct from the reports from the House Ways and Means Committee and the Senate Finance Committee is the "Blue Book" published by the Joint Committee on Taxation (JCT), which comprises five members of the Senate Finance Committee and five members of the House Ways and Means Committee. The JCT is involved in every aspect of the tax legislative process. The JCT prepares hearing pamphlets, markup documents, committee and conference reports, assists the House and Senate Legislative Counsel in drafting statutory language, assists members of Congress with developing tax proposals, prepares revenue estimates of all tax legislation considered by Congress, and investigates and studies various aspects of the federal tax system. One of the Committee's key functions is to investigate the tax laws, and its Blue Book provides general explanations of tax legislation often helpful to practitioners. The Blue Book,[3] released annually, analyzes tax legislation enacted by each Congress, which includes statements relating to the reasons for change, an explanation of provisions, and the presumed effect the new legislation will have on revenues. In addition, these reports are authority to establish "substantial authority" to avoid accuracy-related penalties under section 6662.[4] The Blue Book is especially useful in areas where there is little other authority to support the taxpayer's position.

§ 3:2.3 *Tax Treaties*

The United States has tax treaties with several foreign countries. Under these treaties, residents (not necessarily citizens) of foreign countries are taxed at a reduced rate, or are exempt from U.S. taxes on certain items of income they receive from sources within the United States. These reduced rates and exemptions vary among countries and specific items of income. Under these same treaties, residents or citizens of the United States are taxed at a reduced rate, or are exempt from foreign taxes, on certain items of income they receive from sources within foreign countries.

Income tax treaties exist to avoid double taxation. U.S. tax treaties have the same force as domestic law and are the "Supreme Law of the Land."[5] If a treaty conflicts with federal law, generally, for domestic law, the last-in-time rule prevails. The last-in-time rule states that

---

3. The current edition is entitled the "General Explanation of Tax Legislation in 2016."
4. Treas. Reg. § 1.6662-4(d)(3)(iii).
5. U.S. CONST. art. VI, cl. 2.

a treaty can override previous acts of Congress and later acts of Congress can override previously executed treaties.[6] The basic principle behind this rule is that the last one adopted controls. This rule was first endorsed back in 1888 by the Supreme Court in *Edye v. Robertson*.[7] The policy reasons are simple. If the treaty is self-executing, meaning no subsequent legislative act is required after ratification for the treaty to become law, last-in-time supports the broad concept of the sovereignty of nations within its own borders. If the treaty is not self-executing, meaning a legislative act had to make it law, later acts are merely considered additional legislative action.[8]

Although the last-in-time rule could be applied by the courts whenever a conflict arises between a treaty and the Code, courts mostly have stayed away from using it. Usually, courts refrain from unnecessarily invalidating prior laws or treaties. However, when two sources of law (Code and treaty) relate to the same subject, courts should attempt to interpret them to give effect to both, without violating the language of either. In *Whitney v. Robertson*,[9] the Supreme Court stressed the importance of honoring both our foreign agreements and the legislative branch's power to govern without making a policy decision about which is more important in any individual conflict.

The Code's treatment of conflicts between a Code section and a tax treaty can be illustrated in two sections (894(a) and 7852(d)). The relationship between U.S. treaties and domestic law is expressed in section 894(a), which provides that "Code provisions should be applied with due regard to any treaty obligations of the United States." Whereas, section 7852(d) states, "For purposes of determining the relationship between a provision of a treaty and any law of the United States affecting revenue, neither the treaty nor the law shall have preferential status by reason of its being a treaty or law." Congress was instructing the courts to give equal precedential weight to both tax treaties and acts of Congress. This was a significant change from the well-established Supreme Court cases that held treaties on a higher level of authority.[10] Congress enactment of a last-in-time rule resolves

---

6. *See* Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889); Whitney v. Robertson, 124 U.S. 190, 194 (1888).
7. Edye v. Robertson, 112 U.S. 580 (1884), *see also Whitney v. Robertson,* 124 U.S. 190.
8. For a good discussion on an overview of treaty interpretation and how conflicts with federal tax laws may be resolved by courts, see *Tax Treaty Interpretation and Conflicts with U.S. Federal Law*, by Stephen E. Ehrlich and Edward Dennehy, 2009 TNT 39-17.
9. Whitney v. Robertson, 124 U.S. 190 (1888).
10. *Chae Chan Ping*, 130 U.S. at 600; *Whitney*, 124 U.S. at 194; Edye v. Robertson, 112 U.S. 580 (1884).

conflicts between a later statute and a preceding treaty in favor of the statute without considering whether Congress had any intent to actually override the treaty at issue.[11]

Once a treaty has been entered into, it must still coexist with the Code. A conflict may arise between a treaty and the Code, which the Constitution considers to have equal standing. The U.S. courts have adopted a last-in-time approach, which allows existing tax law to potentially override a bilateral treaty. At this time, the U.S. Supreme Court has not addressed the last-in-time issue.

§ 3:3 Administrative Authority

§ 3:3.1 Regulations

Section 7805(b) authorizes the Secretary of the Treasury to promulgate rules and regulations that "prescribe all needful rules and regulations for the enforcement" of the Code. All rules and regulations must follow the rulemaking procedures of the Administrative Procedures Act (APA).[12] Section 553 of the APA sets forth the

---

11. In Nat'l Westminster Bank PLC v. United States (*NatWest II*), 58 Fed. Cl. 491 (2003), *aff'd*, 512 F.3d 1347 (Fed. Cir. 2008), the Court of Federal Claims held that a later-in-time Treasury Regulation may be trumped by an earlier tax treaty when the regulation is not consistent with the interpretation of the treaty. In confirming the lower court decision the Federal Circuit stated:

> When construing a treaty, "[t]he clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180, 102 S. Ct. 2374, 72 L. Ed. 2d 765 (1982) (quoting *Maximov v. United States*, 373 U.S. 49, 54, 83 S. Ct. 1054, 10 L. Ed. 2d 184, 1963 C.B. 689 (1963)); *see also Xerox Corp. v. United States*, 41 F.3d 647, 652 (Fed. Cir. 1994) (citing *United States v. Stuart*, 489 U.S. 353, 365–66, 109 S. Ct. 1183, 103 L. Ed. 2d 388 (1989)). Moreover, effect must be given to the intent of both signatories. *Xerox*, 41 F.3d at 656 (citing *Valentine v. United States*, 299 U.S. 5, 11, 57 S. Ct. 100, 81 L. Ed. 5 (1936)). Thus, when the language of a treaty provision "only imperfectly manifests its purpose," we are required to give effect to its underlying purpose. *Great-West Life Assur. Co. v. United States*, 678 F.2d 180, 183, 230 Ct. Cl. 477 (Ct. Cl. 1982) (citing *In re Ross*, 140 U.S. 453, 475, 11 S. Ct. 897, 35 L. Ed. 581 (1891)); *accord Xerox*, 41 F.3d at 652 ("'[T]he ultimate question remains what was intended when the language actually employed . . . was chosen, imperfect as that language may be.'" (second alteration in original) (quoting *Great-West Life*, 678 F.2d at 188)). To this end, we must "examine not only the language, but the entire context of agreement." *Great-West Life*, 678 F.2d at 183.

12. 5 U.S.C. § 551 *et seq.*

notice-and-comment requirements that apply to substantive or legislative regulations. These regulations must be published at least thirty days prior to their effective date to provide notice and an opportunity to comment on the proposed rule. Typically, Treasury applies this rule to issuing interpretive and procedural regulations whether or not the APA applies. One noted exception is regarding the issuance of temporary regulations as discussed below.

The initial drafting of regulations lies with the Office of Chief Counsel and the Commissioner and is ultimately finalized by the Assistant Secretary of the Treasury for Tax Policy and the Office of Tax Legislative Counsel.[13]

[A] Final Regulations

Historically, the judicial deference accorded to a Treasury regulation depended upon on whether the regulation was classified as "legislative" or "interpretive." A regulation was considered "legislative" if it was promulgated under a specific section of the Code and "interpretative" if it was promulgated under the Treasury's general rulemaking authority of section 7805(a). Legislative regulations were given much greater deference than interpretive regulations and were accorded the force and effect of law, unless they exceeded the Treasury's authority,[14] were contrary to law,[15] or were unreasonable.[16] Interpretive regulations were merely persuasive,[17] and could be invalidated for any number of reasons, such as contradicting the statute's legislative history.[18]

The 2011 Supreme Court decision in *Mayo Clinic Foundation v. United States*[19] abolished this traditional distinction between legislative and interpretative rules. In *Mayo*, the Court upheld a Treasury regulation—promulgated under the Department's general rulemaking authority in section 7805(a)—that categorically excluded medical residents who worked over forty hours a week from the student

---

13. See Sheryl Stratton's article "How Regulations Are Made: A Look at the Regulation Writing Process," 97 TNT 23-7, for a more detailed discussion of the process.
14. Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).
15. Homes v. United States, 868 F. Supp. 42 (W.D.N.Y. 1994); M.E. Blatt Co. v. United States, 305 U.S. 267 (1938).
16. Joseph Weidenhoff, Inc. v. Comm'r, 32 T.C. 1222 (1959).
17. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that the degree of judicial deference afforded a general authority regulation depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all those factors which give it power to persuade, if lacking power to control").
18. *See, e.g.*, United States v. Fogel Fertilizer Co., 455 U.S. 24 (1982).
19. Mayo Clinic Found. v. United States, 31 S. Ct. 704 (2011).

exemption to the Federal Insurance Contributions Act (which requires employers and employees to pay Social Security taxes). The Court first held that it was ambiguous whether, under section 3121(b)(10) of the Code, medical residents were exempt "students." The Court then clarified the appropriate standard of review for Treasury regulations that construe ambiguous sections of the Code, holding that the traditional distinction between legislative and interpretative Treasury regulations had been superseded by its 1984 decision in *Chevron*.[20] *Chevron* set forth the default standard of review for administrative regulations in a now-famous, two-step analysis:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

The Court in *Mayo*, seeing "no reason why [its] review of tax regulations should not be guided by agency expertise pursuant to *Chevron* to the same extent as [its] review of other regulations," applied *Chevron*'s two-step standard of review to the interpretative Treasury regulation, deferring to Treasury's "reasonable" (and thus "permissible") determination that medical residents who worked over forty hours a week were not "students" within the meaning of the Code.[21]

Notably, *Mayo* rejected the argument that a Treasury regulation should receive less judicial deference if it was promulgated in response to an adverse judicial decision—a consideration that would have been relevant under the traditional standard of review for interpretative regulations. Instead, the Court held that "agency inconsistency is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework," citing its decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, a 2005 case

---

20. Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984).
21. *See also* Swallows Holding, Ltd. v. Comm'r, 515 F.3d 162 (3d Cir. 2008) (holding that interpretative Treasury regulations are governed by *Chevron*).

upholding a "reasonable" administrative regulation that effectively overturned a court's contrary construction of an ambiguous statute.[22]

Because of the Supreme Court's unanimous opinion in *Mayo*, the IRS now has the ability (subject to approval from the Treasury Department, as discussed *infra*) to issue simple, bright-line rules interpreting ambiguous provisions of the tax code.[23] It is worth noting, however, that the Service's first post-*Mayo* invocation of *Brand X*—to effectively overturn an adverse Supreme Court decision from 1958—was recently rejected by the Supreme Court, although with no controlling opinion on the *Brand X* issue.[24] Time will tell

---

22. *See Brand X*, 545 U.S. 967, 983 (2005) (allowing "an agency to override what a court believes to be the best interpretation" of an "ambiguous statute" by promulgating a contrary—but reasonable—regulation subject to *Chevron* deference).

23. As Clarissa Potter, IRS deputy associate chief counsel (technical), stated in 2011, the Supreme "Court recognizes very clearly that in a world where we have really complicated facts and really complicated law, sometimes the best solution is not the perfect" legal rule that analyzes each individual case based on its facts. Potter spoke at a January 21, 2011 at the Real Estate and Partnerships & LLCs committee luncheon of the American Bar Association Section of Taxation meeting in Boca Raton, Florida.

24. *See* United States v. Home Concrete & Supply, LLP, 132 S. Ct. 1836 (2012), discussed at section 11:2.16, Substantial Omission of Gross Income, *infra*. In the *Home Concrete* case, the IRS had issued regulations purporting to resolve a circuit split over whether a 1958 Supreme Court decision, Colony, Inc. v. Comm'r, 78 S. Ct. 1033 (1958), still governed the application of I.R.C. §§ 6501(e)(1)(A) and 6229(c)(2). These provisions provide an extended, six-year limitations period for assessments if a "taxpayer omits from gross income an amount properly includible therein which is in excess of 25[%] of the amount of gross income stated in the return." *Colony*, interpreting this same language in a prior version of the IRC, held that the extended limitations period applied only when a taxpayer omitted its gross receipts, not when a taxpayer understated its gross income by inflating its basis in an asset. The IRS, however, argued that *Colony* was no longer good law, and that under the current version of the Code an inflated basis *could* trigger the extended, six-year limitations period. The IRS also had the Treasury Department issue a regulation to this effect: a regulation explicitly stating that "an understated amount of gross income resulting from an overstatement of unrecovered cost or other basis constitutes an omission from gross income." *Home Concrete*, 132 S. Ct. at 1842 (quoting). In a fractured decision, five justices rejected the IRS's argument that *Colony* was no longer good law, *see id*. at 1839–43, but only four of those five justices rejected the IRS's argument that, under *Brand X*, its new regulation could re-interpret the statute of limitations provisions and effectively overrule *Colony*. *See id*. at 1843–44 (Part IV-C). The fifth justice in the majority, Justice Scalia, agreed with the IRS that under *Brand X* it had the authority to effectively overrule *Colony*, but Justice Scalia nonetheless refused to apply *Brand X* since he continued to disagree with that decision. *See id*. at 1846–48 (Scalia, J., concurring in

how aggressively the Service plans to use its authority under *Chevron* and *Brand X*.[25]

In *Altera Corp. & Subsidiaries v. Commissioner*,[26] the Tax Court unanimously invalidated regulations under section 482 on the grounds that the regulations were not the product of "reasoned decisionmaking" as required by APA section 706(2)(A) and *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Co*.[27]

On the APA issue, *Altera* confirms what *Mayo, Home Concrete*, *Cohen*[28] and *Dominion Resources*,[29] already indicated: In *Altera*, the Tax Court embraced *Mayo*'s admonition and confirmed that the administrative review applicable to tax law will include the APA litigation set forth in *State Farm*. The Tax Court also rejected Treasury's argument for application of the "harmless error" rule of APA section 706. In fact, it excoriated Treasury's "*ipse dixit* conclusion" and its lack of responses to the data-based arguments about stock-based compensation, stating that this "epitomizes arbitrary and capricious decision making." Treasury can no longer rely on tax exceptionalism to support a relaxed administrative-law standard. For legislative regulations, the full APA rules will apply. Given the Tax Court's reasoning, it may be difficult for the IRS to argue that Treasury regulation—whether promulgated under specific or general authority—is exempt from APA notice-and-comment rulemaking requirements as an interpretative rule. The government appealed the Tax Court's decision and challenges to regulations are expected to increase. As of this publication, *Altera* is pending with the Ninth Circuit.[30]

---

part and concurring in the judgment) (citing his dissent in *Brand X* and arguing that "the Court should abandon th[at] opinion"). The four dissenting justices, for their part, agreed with both of the IRS's arguments. In short, a majority the Court in *Home Concrete* agreed with the IRS's argument that *Brand X* gives it the authority to re-interpret ambiguous statutes contrary to the way the Supreme Court has already interpreted them, but one of them refused to apply *Brand X*, so the IRS still lost that particular case.

25. *See* Carpenter Family Invs., LLC et al. v. Comm'r, 136 T.C. 373 (2011) (chastising the IRS for its indecisive legal argument and stating that, if the IRS seeks "to repeal *Colony* in the name of *Brand X*," it "should decisively say as much").
26. Altera Corp. & Subsidiaries v. Comm'r, 145 T.C. No. 3.
27. Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).
28. Cohen v. United States, 650 F.3d 717 (D.C. 2012).
29. Dominion Res., Inc. v. United States, 681 F.3d 1313 (Fed. Cir. 2012).
30. As the Ninth Circuit has a backlog of cases, the scheduling of oral argument is not expected in 2017. Oral arguments in tax cases typically take at least a year after the briefing is concluded. It is anticipated that a decision would not be issued prior to mid-2018.

[A][1] Prospective and Retroactive Regulations

Prior to amendment in 1996,[31] section 7805(b) merely provided, "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." With few exceptions,[32] the Commissioner could apply regulations retroactively in interpreting specific Code sections. But it had been the practice of the Treasury and the Commissioner not to issue retroactive regulations unless they were mere clarifications or changes to the benefit of taxpayers. Section 7805(b)[33] was amended to state no temporary, proposed, or final regulation relating to the internal revenue laws shall be retroactive.[34] The Code provides some exceptions to permit retroactivity to prevent abuse and to correct procedural defects.

In *Kandi v. United States*,[35] the taxpayer contended that a proposed regulation should be applied retroactively, and failure to do so by the Service was an abuse of discretion. The district court disagreed. The court explained the history of section 7805(b), as originally enacted, and as amended:

> Despite the evident intent of the IRS [to] maintain the status quo until the proposed changes become final, Petitioner argues that not applying the regulation retroactively would constitute an abuse of discretion. The general rule is that regulations are not to be applied retroactively. 26 U.S.C. § 7805(b)(1). This was not always the case. Prior to the 1996 amendments to the statute, § 7805(b) was understood to establish "a presumption that rulings will be retroactive unless otherwise specified." *See, e.g., Manocchio v. Comm'r of Internal Revenue*, 710 F.2d 1400, 1403 [52 A.F.T.R.2d 83-5566] (9th Cir. 1983). However, the Taxpayer Bill of Rights 2, passed in 1996, included a section titled "Relief from retroactive application of Treasury Department Regulations." Taxpayer Bill of

---

31. Pub. L. No. 104-168, § 1101(a), 110 Stat. 1452 (1996).
32. *See* Helvering v. R.J. Reynolds Tobacco Co., 306 U.S. 110 (1939).
33. Effective for regulations that relate to statutory provisions enacted on or after July 30, 1996.
34. In Murfam Farms LLC v. United States, No. 1:06-cv-00245 (Fed. Cl. July 31, 2009), the Court of Federal Claims stated that "retroactive legislative rules are not permitted unless there is a plain and unequivocal grant of such authority from Congress. As the Supreme Court made clear in striking retroactive regulations in *Bowen*, '[r]etroactivity is not favored in the law [and] a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.'"
35. Kandi v. United States, 97 A.F.T.R.2d 2006-721 (W.D. Wash. 2006), *aff'd*, 295 F. App'x 873 (9th Cir. 2008).

> Rights 2, Pub. L. No. 104-168, § 1101 (July 30, 1996). This section amended the statute to provide the current presumption against retroactivity, but preserved the IRS's ability to apply regulations retroactively in order to prevent abuse, 26 U.S.C. § 7805(b)(3), or to correct a procedural defect in a prior regulation, 26 U.S.C. § 7805(b)(4). These two statutory exceptions to the general presumption against retroactivity are qualitatively different from judicial interpretation of the statute's predecessor, which reviewed the agency's decisions to apply a regulation retroactively only for an abuse of discretion. *See, e.g., Dixon v. United States*, 381 U.S. 68, 72 [15 A.F.T.R.2d 842], 85 S. Ct. 1301 [15 A.F.T.R.2d 842], 14 L.Ed.2d 223 (1965) (stating the principle that § 7805(b) gave the Commissioner "discretion to apply the withdrawal of the acquiescence retroactively"). Because it is the amended version of § 7805 that applies to the present case, Petitioner's reliance on case law interpreting the pre-1996 version of § 7805 is inapposite.
>
> There is no indication that retroactive application of the proposed regulations would be appropriate under the narrow post-1996 exceptions to the general presumption against retroactivity. In any case, the statutory language vests discretion in the agency to determine whether retroactive application is appropriate. Assuming that the IRS's decision would be not to apply the regulations retroactively to Petitioner's case, the statute only allows the Court to determine whether this decision constitutes an abuse of discretion. Since, as Petitioner concedes, the IRS has consistently espoused the position that in the case of a disregarded single-member LLC, the owner is the employer for employment tax purposes, the IRS's application of this rule to Petitioner can hardly be deemed arbitrary or capricious. Accordingly, the Court finds that the IRS's refusal to apply the proposed regulations retroactively to Petitioner's case does not constitute an abuse of discretion. Therefore, the regulations applicable to the Court's analysis of the present case are the regulations currently in force.[36]

[B] Proposed Regulations

All regulation must be disseminated by the Treasury in proposed form. Comments and suggestions for their improvement are solicited from practitioners and the general public during a statutory period. A proposed regulation may be withdrawn, modified, or revised several times before it is adopted as a final regulation. When the Treasury believes immediate interpretation of a newly enacted section of the Code is necessary, it will issue a temporary regulation concurrent with the proposed regulation.

---

36. *Id.*

In *Laglia v. Commissioner*,[37] the court held that proposed regulations carry no more weight than a position advanced in a government brief. However, the court also held that a taxpayer may rely on the proposed regulation for accuracy-related penalty protection absent authoritative guidance.[38]

[C] Temporary Regulations

The Technical Corrections and Miscellaneous Revenue Act of 1988 made several significant changes regarding procedures the government must follow to issue Internal Revenue Service (IRS or "Service") regulations.[39] Effective for regulations issued ten days after enactment,[40] the following is applicable: Any temporary regulation issued by the Treasury Department must also be issued as a proposed regulation.[41] Any temporary regulation issued after November 20, 1988 must expire within three years after issuance of such regulations[42] and is binding as of enactment. In addition, after the publication of any proposed regulation by the Treasury Department and before the promulgation of any final regulation that does not supersede a proposed regulation, Treasury must submit such regulation to the Administrator of the Small Business Administration for comment on the impact of the regulation on small business.[43] The administrator has four weeks from submission to respond.[44]

[D] Procedural Regulations

Unlike legislative and interpretive regulations, the Commissioner of Internal Revenue, not the Secretary of Treasury, promulgates procedural regulations, such as the Statement of Procedural Rules. The IRS Statement of Procedural Rules is contained in 26 C.F.R. Part 601. These regulations are preceded by "601" and are cited, for example, as "26 C.F.R. § 610.101," to distinguish them from regulations issued by the Treasury Department. Procedural regulations cover matters such as what information a taxpayer must provide, IRS internal practices on hours, overtime, pensions, and similar matters, and procedural rules setting forth how employees should conduct business. Procedural regulations are promulgated by the IRS, not by

---

37. Laglia v. Comm'r, 88 T.C. 894, 897 (1987).
38. *See* Treas. Reg. § 1.6662-4(d)(3)(iii).
39. Technical and Miscellaneous Revenue Act of 1988, § 6232 [hereinafter TAMRA]; 26 U.S.C. § 135.
40. TAMRA § 6232(b).
41. I.R.C. § 7805(e)(1), added by TAMRA § 6232(a).
42. I.R.C. § 7805(e)(2), added by TAMRA § 6232(a).
43. I.R.C. § 7805(f), added by TAMRA § 6232(a).
44. *Id.*

the Treasury Department, and are not subject to the notice-and-comment requirements of the APA. Unlike legislative and interpretative regulations, procedural regulations may have retroactive effect.[45]

Some regulations address procedural matters not considered procedural regulations. For example, regulations establishing a taxpayer's obligation to file forms and furnish other information are typically issued as part of interpretive regulations and are promulgated under the same APA notice and comment procedures that accompany legislative regulations and as a result are afforded greater weight. Similarly, regulations interpreting the administrative and procedural sections of the Code are treated as interpretive regulations and can be found in Treasury Regulations sections 301.6001 *et seq.* Internal IRS management rules and descriptions of IRS business procedures are promulgated by the Commissioner of Internal Revenue under the general housekeeping rulemaking authority of the APA at 5 U.S.C. § 301.[46] The procedural regulations establish rules to govern the conduct of the agents of the Service in the performance of their duty to determine the correctness of the income tax returns of the taxpayers. However, there have been several cases holding that procedural regulations may not bind the Service.[47] Where the Commissioner issues housekeeping-type and procedural regulations, the notice requirements of the APA do not apply.[48]

The Fourth Circuit in *Luhring v. Glotzbach* held that compliance with the Statement of Procedural Rules was not essential because these rules are promulgated without the approval of the Secretary of the Treasury, and, so lack the authority of regulations promulgated with the approval of the Secretary. To determine whether the Service is bound by its own procedural rules, the circuit court distinguished between procedural rules "promulgated without the approval of the Secretary . . . laid down by the Commissioner for the regulation of the

---

45. I.R.C. § 7805(b).

46. 5 U.S.C. § 301 reads, "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. This section does not authorize withholding information from the public or limiting the availability of records to the public."

47. Luhring v. Glotzbach, 304 F.2d 560, 565 (4th Cir. 1962); Rosenberg v. Comm'r, 450 F.2d 529, 533 (10th Cir. 1971); Cleveland Tr. Co. v. United States, 421 F.2d 475 (6th Cir.), *cert. denied*, 400 U.S. 819 (1970); Iowa Inv'rs Baker v. Comm'r, T.C. Memo 1992-490.

48. 5 U.S.C.A. § 553b(A) states that notice of rulemaking does not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."

affairs of his office" under section 7802 and "formal regulations with the force and effect of law" that are prescribed by the Secretary of the Treasury under section 7805. In *Luhring*, the court held that unlike Treasury Regulations, the Commissioner's rules were "directory and not mandatory in legal effect," because if they were mandatory, they would operate to curtail the higher authority of the Secretary.

In *United States v. Caceres*,[49] the Supreme Court determined that the IRM procedures were not required by either the Constitution or statute, and violation of the procedures did not raise constitutional issues. The Court said, "It does not necessarily follow, however, as a matter of either logic or law, that the agency had no duty to obey [regulations more rigorous than either the Constitution or law required]." Before *Caceres*, the Court in *Morton v. Ruiz*[50] held, "[W]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required."[51]

[E] Finding Regulations

Treasury Regulations are in title 26 of the Code of Federal Regulations (C.F.R.) (which corresponds to title 26 of the United States Code). The general form of a regulation section is a C.F.R. part number, a decimal point, a Code section number, a dash, and some number of further subdivisions, beginning with an Arabic numeral. The C.F.R. parts indicate the general nature of the regulation: 1 relates to income tax, 20 relates to estate tax, 25 relates to gift tax, 31 relates to employment taxes (withholding), 301 relates to procedure and administration, and 601 relates to the Commissioner's rules. For example, Treasury Regulations section 1.162-1 (often cited as Treas. Reg. § 1.162-1, sometimes with the date of promulgation) relates to income tax (C.F.R. part 1), deals with the deduction of business expenses (section 162 of the Code), and is the first subdivision of the regulation.

---

49. United States v. Caceres, 440 U.S. 741 (1979).
50. Morton v. Ruiz, 415 U.S. 199 (1974).
51. *See also* Serv. v. Dulles, 354 U.S. 363, 388 (1957); Vitarelli v. Seaton, 359 U.S. 535, 539–40 (1959); United States v. Sourapas, 515 F.2d 295, 298 (9th Cir. 1975); United States v. Heffner, 420 F.2d 809, 812 (4th Cir. 1969).

PRACTICE POINTER

Treasury Regulations may have expired and be outdated but may not have been withdrawn and may still be included in the published version of the regulations. It is important to always check the effective dates of a regulation, and whether it has been superseded or is no longer applicable. Another consideration that practitioners must consider is whether there is an adverse court decision on the regulation. If an adverse opinion is issued the Service may disagree with the holding (see Action on Decision (AOD) below). Use a citator to update all of your authorities.

§ 3:3.2 *IRS Rulings*

A ruling[52] is defined in the regulations as "a written statement issued to a taxpayer or his authorized representative by the National Office which interprets and applies the tax laws to a specific set of facts. Rulings are issued only by the National Office."[53] There are generally two types of rulings: a letter ruling and a revenue ruling. Each is an important tool for the tax practitioner.

[A] Letter Rulings

Each year the IRS issues a revenue procedure explaining the advice provided by the Service and the manner in which advice must be requested by taxpayers.[54] This revenue procedure is updated annually as the first revenue procedure of the year, that is, Revenue Procedure 2017-1, but it may be modified or amplified during the year. The revenue procedure applies for advice on issues under the jurisdiction of the Associate Chief Counsel (Corporate), the Associate Chief Counsel (Financial Institutions and Products), the Associate Chief Counsel

52. See Rev. Proc. 2017-1, 2017-1 I.R.B. 1, which applies to rulings under the jurisdiction of the offices of Associate Chief Counsel (Corporate), Associate Chief Counsel (Financial Institutions & Products), Associate Chief Counsel (Income Tax & Accounting), Associate Chief Counsel (International), Associate Chief Counsel (Passthroughs & Special Industries), Associate Chief Counsel (Procedure and Administration), and Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). Rev. Proc. 2013-4, 2013-1 I.R.B. 126 applies to procedures for furnishing ruling letters, information letters, and closing agreements on matters under the jurisdiction of the Commissioner (Tax Exempt and Government Entities Division).
53. Treas. Reg. § 601.201(a)(2).
54. A sample format of a request for a letter ruling is provided in Appendix B of Rev. Proc. 2017-1, 2017-1 I.R.B. 1.

(Income Tax and Accounting), the Associate Chief Counsel (International), the Associate Chief Counsel (Passthroughs and Special Industries), the Associate Chief Counsel (Procedure and Administration), and the Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities). The revenue procedure covers letter rulings, closing agreements, determination letters and information letters.

A letter ruling, also called private letter ruling, PLR, or Priv. Ltr. Rul., is a written statement issued to a specific taxpayer that interprets and applies tax laws to the taxpayer's specific set of facts. A letter ruling is issued to establish with certainty the federal tax consequences of a particular transaction before the transaction is consummated or before the taxpayer's return is filed. A letter ruling is issued in response to a written request submitted by a taxpayer and binds the IRS if the taxpayer fully and accurately described the proposed transaction in the request and carries out the transaction as described. A private letter ruling is issued to a specific taxpayer and may not be relied on as precedent by other taxpayers or IRS personnel. Letter rulings are generally made public after all information has been removed that could identify the taxpayer to whom it was issued.[55] Upon receiving a favorable reply from the IRS, the taxpayer can proceed with the transaction in confidence it has passed muster. The value of securing such a favorable ruling is clear but not free. The Service has established separate user fees depending upon the request. Revenue Procedure 2017-1[56] sets forth the fees in Appendix A and has reduced user fees for certain circumstances.[57] The Service defines a letter ruling:

> A "letter ruling" is a written determination issued to a taxpayer by an Associate office in response to the taxpayer's written inquiry, filed prior to the filing of returns or reports that are required by the tax laws, about its status for tax purposes or the tax effects of its acts or transactions. A letter ruling interprets the tax laws and applies them to the taxpayer's specific set of facts. A letter ruling is issued when appropriate in the interest of sound tax administration. One type of letter ruling is an Associate office's response granting or denying a request for a change in a taxpayer's method of accounting or accounting period. Once issued, a letter ruling may be revoked or modified for a number of reasons. See section 11 of this revenue procedure. A letter ruling may be issued with

---

55. Prior to the Tax Reform Act of 1976, Private Letter Rulings were not made public. However, I.R.C. § 6110 provides for letter rulings to be made available to the public after redaction of taxpayer-specific information. *See* I.R.C. § 6110(c).
56. Each year the Service reissues the first revenue procedure. Rev. Proc. 2017-1, 2017-1 I.R.B. 1 will be reissued, and updated if necessary in January 2018.
57. *See* Rev. Proc. 2017-1, 2017-1 I.R.B. 1.

a closing agreement, however, and a closing agreement is final unless fraud, malfeasance, or misrepresentation of a material fact can be shown. See section 2.02 of this revenue procedure.[58]

PRACTICE POINTER

Note, however, that the only person who can rely on that ruling is the taxpayer to whom it was issued.[59] Although taxpayers to whom the rulings were not issued may not technically "rely" on them, they can use the rulings to understand how the IRS approaches similar transactions and use the ruling in discussions with an IRS agent and as justification for their position. The taxpayer to whom the letter ruling was issued must be cautioned that it is possible, though improbable, that the IRS may revoke the ruling retroactively.[60] The few instances of retroactive revocation generally involve mistakes of fact or law.[61]

---

58. *Id.* § 2.01. For the reasons explaining when a letter ruling may be revoked, see Rev. Proc. 2017-1, 2017-1 I.R.B. 1, *supra*, § 11.
59. Treas. Reg. § 601.201(l)(1).
60. Treas. Reg. § 601.201(l)(5):

> Except in rare or unusual circumstances, the revocation or modification of a ruling will not be applied retroactively with respect to the taxpayer to whom the ruling was originally issued or to a taxpayer whose tax liability was directly involved in such ruling if (i) there has been no misstatement or omission of material facts, (ii) the facts subsequently developed are not materially different from the facts on which the ruling was based, (iii) there has been no change in the applicable law, (iv) the ruling was originally issued with respect to a prospective or proposed transaction, and (v) the taxpayer directly involved in the ruling acted in good faith in reliance upon the ruling and the retroactive revocation would be to his detriment.

61. The Commissioner cannot be estopped from correcting a mistake of law, even where a taxpayer may have relied to his detriment on that mistake. Dixon v. United States, 381 U.S. 68, 72–73 (1965); Auto Club of Mich. v. Comm'r, 353 U.S. 180, 183–84 (1957); *see also* Massaglia v. Comm'r, 286 F.2d 258, 262 (10th Cir. 1961), *aff'g* 33 T.C. 379 (1959); Zuanich v. Comm'r, 77 T.C. 428, 432–33 (1981). An exception exists only in the rare case where a taxpayer can prove he or she would suffer an unconscionable injury because of that reliance. Manocchio v. Comm'r, 78 T.C. 989, 1001 (1982), *aff'd*, 710 F.2d 1400 (9th Cir. 1983). Moreover, "the doctrine of equitable estoppel is applied against the Government with the utmost caution and restraint." Kronish v. Comm'r, 90 T.C. 684, 695 (1988) (quoting Boulez v. Comm'r, 76 T.C. 209, 214–15 (1981), *aff'd*, 810 F.2d 209 (D.C. Cir. 1987)).

[A][1] Closing Agreement

A "closing agreement" is a final agreement between the Service and a taxpayer on a specific issue or liability. It is a binding contract entered into under the authority in section 7121 and it is final unless fraud, malfeasance, or misrepresentation of a material fact can be shown.[62] A taxpayer may request a closing agreement with a letter ruling or in lieu of a letter ruling, regarding a transaction that would be eligible for a letter ruling.

A closing agreement may be entered into when it is advantageous to have the matter permanently and conclusively closed or when a taxpayer can show there are good reasons for an agreement and that making the agreement will not prejudice the interests of the government. In appropriate cases, a taxpayer may be asked to enter into a closing agreement as a condition for issuing a letter ruling.

[A][2] Determination Letter

A "determination letter" is a written determination issued by the Service that applies the principles and precedents announced by the Service to a specific set of facts. It is issued only when a determination can be made based on clearly established rules in a statute, a tax treaty, the regulations, a conclusion in a revenue ruling, or an opinion or court decision that represents the position of the Service.

[A][3] Information Letter

An "information letter" is a statement issued by an Associate office or by a Director that calls attention to a well-established interpretation or principle of tax law (including a tax treaty) without applying it to a specific set of facts. An information letter may be issued if the taxpayer's inquiry indicates a need for general information or if the taxpayer's request does not meet the requirements of the revenue procedure and the Service concludes that general information will help the taxpayer. An information letter is advisory only and has no binding effect on the Service. If the Associate office issues an information letter in response to a request for a letter ruling that does not meet the requirements of the revenue procedure, the information letter is not a substitute for a letter ruling.

[A][4] Circumstances Under Which Letter Rulings Are Issued

Generally, letter rulings are issued for these situations:

---

62. For additional information about closing agreements see chapter 9, Administrative Appeal.

(1) income and gift tax matters on a proposed transaction or on a completed transaction if the letter ruling request is submitted before the return is filed for the year in which the transaction is completed;

(2) relief for late S corporation and related elections in lieu of letter ruling process;[63]

(3) section 301.9100[64] request for extension of time for making an election or for other relief;

(4) determinations under section 999(d);

(5) matters involving section 367;

(6) estate tax matters;

(7) matters involving additional estate tax under section 2032A(c);

(8) matters involving qualified domestic trusts under section 2056A;

(9) generation-skipping transfer tax matters;

(10) employment and excise tax matters;

(11) administrative provisions matters involving the time, place, manner, and procedures for reporting and paying taxes or filing information returns;

(12) Indian tribal government matters including definition of Indian tribal government, or the inclusion in list of tribal governments;

(13) constructive sales price under section 4216(b) or 4218(c); or

(14) issuance of a temporary or final regulation or other published guidance that interprets any act.

[A][5] Circumstances Under Which Letter Rulings Are Not Issued

Generally, the Service will not issue a letter ruling if the request involves:

---

63. In lieu of requesting a letter ruling under the revenue procedure, a taxpayer may obtain relief for certain late S corporation and related elections by following the procedures in Rev. Proc. 2004-49, 2004-2 C.B. 210; Rev. Proc. 2013-30, 2013-36 C.B. 1, supplementing Rev. Proc. 2004-49, 2004-2 C.B. 210, and superseding Rev. Proc. 2003-43, 2003-1 C.B. 998; Rev. Proc. 2004-48, 2004-2 C.B. 172; and Rev. Proc. 2007-62, 2007-2 I.R.B. 786. These procedures are in lieu of the letter ruling process and do not require payment of any user fee.

64. 26 C.F.R. § 301.9100-1.

(1) an issue under examination or consideration or in litigation;

(2) an issue inherently factual;

(3) only a part of an integrated transaction;

(4) two entities under a common law employer;

(5) business, trade, or industrial associations or similar groups concerning applying the tax laws to members of the group;

(6) something other than the tax status, liability, or reporting obligations of the requester;

(7) foreign governments;

(8) consequences of proposed legislation;

(9) an issue that cannot be readily resolved before a regulation or any other published guidance is issued;

(10) frivolous issues;

(11) a "comfort" request on an issue clearly and adequately addressed by statute, regulations, decisions of a court, revenue rulings, revenue procedures, notices, or other authority published in the Internal Revenue Bulletin;

(12) alternative plans or hypothetical situations; or

(13) the replacement of involuntarily converted property, whether or not the property has been replaced, if the taxpayer has already filed a return for the taxable year in which the property was converted.

[A][6] Circumstances Under Which Determination Letters Are Not Issued

The Service will not issue a determination letter if the taxpayer has directed a similar inquiry to an Associate office; the same issue, involving the same taxpayer or a related taxpayer, is pending in a case in litigation or before Appeals; the request involves an industry-wide problem; the specific employment tax question at issue in the request has been, or is being, considered by the Central Office of the Social Security Administration or the Railroad Retirement Board for the same taxpayer or a related taxpayer; or the request is for a determination of constructive sales price under section 4216(b) or 4218(c), which deal with special provisions applicable to the manufacturers' excise tax.

[A][7] Considerations Involved in Ruling Requests

Planning is an important aspect of any transaction and the impact of taxes may determine how the taxpayer ultimately structures the transaction. Practitioners can file a private letter ruling request on behalf of a taxpayer to determine if the transaction will yield the intended tax consequences. A private letter ruling can provide a taxpayer with tax certainty before the transaction is complete or raises questions about the structure.[65]

A private letter ruling must be followed by the examiner or Appeals Officer in determining the tax liability of the taxpayer who requested the ruling, provided that (1) the conclusions stated in the letter ruling are properly reflected in the return; (2) the representations upon which the letter ruling was based reflected an accurate statement of the controlling facts; (3) the transaction was carried out substantially as proposed; and (4) there has been any change in the law that applies to the period during which the transaction or continuing series of transactions were consummated.[66] A favorable ruling will provide the taxpayer with certainty[67] but the Service may also provide useful assistance during the process resulting in a favorable tax result. Certainty is a major consideration not only for individual taxpayers but especially for large public companies. Certainty is important not only regarding their tax considerations but with respect to the impact on their financial statements. But with any IRS involvement there are some downsides such as cost, length of time, and the risk of an unfavorable result. The process can be time-consuming and due to professional fees and the user fees cost can become an issue. Another factor to consider is the timing of the transaction. If the transaction must be completed within a certain time frame, obtaining a ruling before executing the transaction may not be practical. Depending upon the issues this may not be a quick or painless process, but one best way to help move the process along is to provide as complete a request as possible on the front end to eliminate the need for additional requests for facts or documentation. Practitioners must discuss the advantages and disadvantages of filing a ruling request with the taxpayer and provide them information to reach the right result for the taxpayer's particular set of facts.

---

65. There is a laundry list of issues in which the Service has precluded taxpayers from requesting private letter rulings. See Rev. Proc. 2017-3, 2017-3 I.R.B. 130, for the list of domestic issues and Rev. Proc. 2017-7, 2017-1 I.R.B. 269, for international issues. Both revenue procedures are updated annually.
66. 26 C.F.R. § 601.201(2). *See* Rev. Proc. 2017-7, 2017-1 I.R.B. 269.
67. Even if the taxpayer receives a private letter ruling, practitioners should consider whether it is appropriate to enter into a closing agreement in order to provide finality.

[A][8] Letter Ruling Conferences

Practitioners may request a conference on the issues and should indicate this request in writing when filing the request or soon thereafter. Generally, a conference is scheduled only when an Associate office considers it to be helpful in deciding the case or when an adverse decision is indicated. If a conference has been requested, the taxpayer or the taxpayer's representative will be notified of the time and place of the conference, which must then be held within twenty-one calendar days after this contact.

Revenue Procedure 2017-1[68] permits each taxpayer one conference of right. This conference is normally held at the branch level and is attended by a person with the authority to sign the letter ruling in his or her own name or for the branch chief. Conferences are informal and the IRS may provide its tentative recommendations on substantive issues and the reasons for the decision. The Associate office may offer the taxpayer an additional conference if, after the conference of right, an adverse holding is proposed, but on a new issue, or on the same issue but on different grounds from those discussed at the first conference. There is no right to another conference when a proposed holding is reversed at a higher level with a result less favorable to the taxpayer, if the grounds or arguments on which the reversal is based were discussed at the conference of right.

Sometimes it will be advantageous to both the Associate office and the taxpayer to hold a pre-submission conference before the taxpayer submits the letter ruling request to discuss substantive or procedural issues relating to a proposed transaction. These conferences are held only if the identity of the taxpayer is provided to the Associate office, only if the taxpayer actually intends to make a request, only if the request involves a matter on which a letter ruling is ordinarily issued, and only at the discretion of the Associate office and as time permits. Pre-submission conferences may be held in person at the Associate office or may be conducted by telephone. This may occur, for example, when a taxpayer wants a conference of right but believes that the issue involved does not warrant incurring the expense of traveling to Washington, D.C., or if it is believed that scheduling an in-person conference of right will substantially delay the ruling process. If a taxpayer makes such a request, the branch reviewer will decide if it is appropriate in the particular case to hold a conference by telephone. Whether the conference is in person or on the telephone, the conference is informal with no preset procedures. Basically, the conference provides the practitioner on behalf of the taxpayer the opportunity to present the facts and authorities supporting the taxpayer's position

68. 2017-1 I.R.B. 1.

and it gives the Service the ability to ask questions and clarify facts or clear up any confusion. If the issue is important the practitioner should try to meet in person with the Service. Telephone conversations may not be as productive as face-to-face meetings.

If the Service has tentatively ruled against the taxpayer, the taxpayer can consider withdrawing from the process. But that decision should be carefully considered before any decision is made. One thing to know is if the taxpayer withdraws the ruling request, the National Office will notify the appropriate examination function with jurisdiction over the taxpayer. The National Office may also inform the examination function in writing on their initial findings and determinations. Remember, however, this documentation may be Chief Counsel Advice and as such the taxpayer may be entitled to a copy if requested.

[A][9] Disclosure Pursuant to Section 6110

The text of letter rulings and determination letters is open to public inspection under section 6110; however, the Service must make taxpayer-specific deletions from the text before it is provided for inspection. The Service provides taxpayers twenty-one days to provide their proposed deletions ("deletion statement"). A taxpayer who wants only names, addresses, and identifying numbers to be deleted should state this in the deletion statement. If the taxpayer wants more information deleted, the deletion statement must come with a copy of the request and supporting documents on which the taxpayer should bracket the material to be deleted. The deletion statement must include the statutory basis under section 6110(c) for each proposed deletion.

If the taxpayer asks for additional deletions before the letter ruling or determination letter is issued, additional deletion statements may be submitted. After receiving from the Service the notice under section 6110(f)(1) of intention to disclose the letter ruling or determination letter (including a copy of the version proposed to be open to public inspection and notation of third-party communications under section 6110(d)), the taxpayer may protest the disclosure of certain information in the letter ruling or determination letter. The taxpayer must send a written statement to the Service office indicated on the notice of intention to disclose, within twenty calendar days of the date the notice of intention to disclose is mailed to the taxpayer. The statement must identify those deletions that the Service has not made and that the taxpayer believes should have been made. Within twenty calendar days after the Service receives the response to the notice, the Service will mail to the taxpayer its final administrative conclusion regarding the deletions to be made. The taxpayer does not have the right to a conference to resolve any disagreements about material to be deleted

from the text of the letter ruling or determination letter. These matters may, however, be taken up at any conference otherwise scheduled regarding the request.

After receiving the notice of intention to disclose but within sixty calendar days after the notice, the taxpayer may send a written request for delay of public inspection under either section 6110(g)(3) or (4). The request for delay must be sent to the Service office indicated on the notice of intention to disclose. The request for delay under section 6110(g)(4) must contain a statement from which the Commissioner may determine whether there are good reasons for the delay.

[A][10] 9100 Relief

With the complexities of the tax code and the numerous regulatory elections taxpayers often find themselves in the untenable position of having missed an election and dealing with the negative tax consequences of a missed election. In today's environment practitioners should understand the benefits of "9100 relief" and realize that failing to timely make an election is not always irreversible. But be mindful that once an election is made, it generally cannot be revoked without the Commissioner's consent. 9100 relief refers to a letter ruling issued under Treasury Regulations section 301.9100-1 which authorizes the Commissioner to grant an extension of time permitted by the regulations or a statute commonly called "discretionary extensions." Two criteria must be established before the Commissioner grants a discretionary extension relief:

(1) the taxpayer must have acted reasonably and in good faith; and

(2) granting the relief will not prejudice the interest of the government.

The reasonableness and good-faith criteria can be established by showing the failure was due to intervening events beyond the taxpayer's control; the taxpayer exercised reasonable diligence; the taxpayer relied upon the written advice of the IRS; or the taxpayer reasonably relied upon a qualified tax professional who failed to make or to advise the taxpayer to make the election. Some examples of not acting reasonably include trying to seek a more favorable position to avoid the accuracy-related penalty, knowingly choosing not to make the election based upon the known facts, or realizing in hindsight it is more advantageous to make the election based upon new facts.[69]

---

69. Treas. Reg. § 301.9100-3(b)(3).

The first criterion seems aimed at applying an equitable relief test rather than providing a taxpayer the ability to change his mind. To be granted there must be a non-negligent behavior or error by the taxpayer.[70] Typically, the reasonable and good-faith criteria is the key issue in the Service's determination of whether to grant the relief. Frequently, the situation involves a professional that failed to advise the taxpayer of the possible election and its benefits or burdens. To use the "relied on professionals" excuse the taxpayer must have reasonably relied upon a tax professional. The excuse is not available if the taxpayer knew or should have known that the tax professional was not competent to render advice on the election; or the taxpayer knew or should have known that the tax professional was not aware of all facts.

Often the tax professional simply missed the election and the taxpayer was not properly informed of options. Relief should be granted where there was no change of facts, there was no initial well-informed decision not to make the election, the tax professional either knew of all the facts or did not have all the facts, but the tax professional just simply made a mistake.[71]

The regulations specifically state two circumstances where the taxpayer was determined not to have acted in good faith:

(1) the taxpayer was informed materially of the required election and related tax consequences, but chose not to file the election; and

(2) the taxpayer uses hindsight in deciding to file for 9100 relief.

The second criterion for discretionary extension relief is the determination of whether the interests of the government are prejudiced by granting relief to a taxpayer that would cause a lower tax liability. The Service will look towards the tax years in the aggregate to determine had the election been timely made whether the taxpayer would have a lower tax liability. The Service will not grant relief for tax years affected by the election closed by the statute of limitation on assessment under section 6501(a) *before* the taxpayer's receipt of the ruling granting

---

70. See Priv. Ltr. Rul. 200607016, where the Service ruled that the requirements of Treas. Reg. §§ 301.9100-1 and -3 were not met, because the U.S. taxpayer was deemed to have not acted reasonably and in good faith. See also Priv. Ltr. Rul. 200740002 (July 2, 2007), where the Service denied a taxpayer's request for 9100 relief to file a check-the-box election. The ruling indicates that the taxpayer filed an erroneous election (electing its existing classification rather than the desired (different) classification), discovered the error three years after the election was filed, but did not request a ruling until three years after the discovery of the error.

71. Priv. Ltr. Rul. 200320003 (Jan. 28, 2003) and Priv. Ltr. Rul. 200320014 (Feb. 4, 2003).

relief. Under the regulations, the Service also will not ordinarily grant relief if the tax year in which the election should have been made is closed. Therefore, where the assessment period of limitation is close to expiring, a taxpayer should execute a Form 872, Consent to Extend the Time to Assess Tax, extending the statute of limitations on assessment for the taxable year in which the election should have been made and any later years affected by the missed election.[72]

The second 9100 relief is an "automatic extension." An automatic extension is the easiest type of relief but is only available for a published list of elections and is made under Treasury Regulations section 301.9100-2. The automatic extension regulations do not require a "user fee" and do not require the taxpayer to file for a private letter ruling with the IRS. If the taxpayer qualifies for an automatic extension they may only need to attach the request to their tax return. There are two types of automatic extension, a twelve-month extension and a six-month extension.

There are nine elections eligible for an automatic twelve-month extension:[73]

(1) section 444: election to use other than the required taxable year;

(2) section 472: election to use the LIFO inventory method;

(3) section 505: fifteen-month rule for filing an exemption application for section 501(c)(9), 501(c)(17), or 501(c)(20) organizations;

(4) section 508: fifteen-month rule for filing an exemption application for a section 501(c)(3) organization;

(5) section 528: election to be treated as a homeowners association;

(6) section 754: election to adjust basis on partnership transfers and distributions;

(7) section 2032A(d)(1): estate tax election to specially value qualified real property where the Service has not yet begun an examination of the filed return;

(8) section 2701(c)(3)(C)(i): gift tax election to treat a qualified payment right as other than a qualified payment; and

(9) section 2701(c)(3)(C)(ii): gift tax election to treat any distribution right as a qualified payment.

---

72. *See* Treas. Reg. § 301.9100-2(a)(2).
73. Treas. Reg. § 301.9100-2(a)(2).

Under the automatic twelve-month extension rule, the taxpayer has twelve months from the due date of the election to make the election (including extensions). The twelve-month extension is available whether or not the taxpayer timely filed the return for the year in which the election was due. To be eligible for the automatic twelve-month extension, a taxpayer must take corrective action within the twelve-month extension period. Corrective action means taking the steps required to file the election under the regulation or other publication, or, if the election is due with the return, filing an original or amended return for the year in which the election should have been made, with the appropriate election form or statement attached.

Treasury Regulations section 301.9100-2(b) provides an automatic six-month extension from the due date of a return (excluding extensions) for certain elections.[74] This extension is available for those regulatory *or* statutory (an election whose due date is prescribed by statute) elections whose due dates are the due date of the return (or the due date of the return including extensions), provided that the taxpayer *timely* filed its return for the year the election should have been made, *and* the taxpayer takes corrective action within the six-month period.

[A][10][a] Filing Requirements

Regarding automatic extensions the return, statement of election, or other form required to be made to effect the election must provide at the top of the document "FILED PURSUANT TO SEC. 301.9100-2." Any filing made for the automatic extensions should be sent to the same address as if the election were filed timely. It is unnecessary to request a private letter and there is no user fee imposed to obtain an automatic extension.

Request for discretionary extensions relief must be submitted in a private letter request under Revenue Procedure 2017-1[75] or its subsequently issued annual revenue procedure. The appropriate user fee must accompany the ruling request submission and be made payable to the Service (*not* the U.S. Treasury). The regulations set forth these specific requirements for the submission:[76]

(1) the taxpayer, or his or her representative, must submit a detailed affidavit describing the events that led to failing to make a valid election or application for relief and that led to the discovery of the failure;

---

74. This automatic extension does not apply to regulatory or statutory elections that must be made by the due date *excluding* extensions.
75. This revenue procedure will be reissued annually.
76. *See* Treas. Reg. § 301.9100-3(e).

(2) the taxpayer must submit a detailed affidavit from individuals having knowledge or information about the events that led to failing to make a valid election or application for relief and that led to the discovery of the failure. These individuals must include the taxpayer's return preparer, any individual (including an employee of the taxpayer) who contributed to the preparation of the return, and any accountant or attorney who advised the taxpayer regarding the election;

(3) any affidavit from a qualified tax professional must describe the engagement and the responsibilities of the professional, and the advice that the professional provided to the taxpayer; and

(4) each affidavit must be signed, under penalties of perjury, by the persons knowing of the events that led to failing to timely file the required election or application and to the discovery of the error.

The ruling request submission must come with a declaration, made under the penalties of perjury, that the taxpayer has examined the request, including accompanying documents, and, to the best of the taxpayer's knowledge and belief, the request contains all facts relating to the request, and such facts are true, correct, and complete. This declaration must be signed by the taxpayer or corporate officer.

Examples of discretionary extension relief requests include:

(1) missed accounting method and period elections in Treasury Regulations section 301.9100-2(a)(2)(i) and (ii) and Treasury Regulations section 301.9100-3(c)(2) and (3);[77]

(2) relief for late initial Check-the-Box Elections;[78]

---

77. Requires an adjustment under I.R.C. § 481 (or would require such an adjustment if the taxpayer changed to the requested method of accounting in a year subsequent to the year the election should have been made); would permit a change from an impermissible method of accounting that is an issue under consideration by examination, an appeals office, or a federal court and the change would provide a more favorable method or terms than if the change were made as part of the examination; provides a more favorable method of accounting or terms if the election is made by a certain date or taxable year; or requires the advanced written consent of the Commissioner as provided in Treas. Reg. § 1.446-1(e)(3)(ii).

78. Treas. Reg. § 301.7701-3(c) provides that an eligible entity may elect its federal tax classification by filing Form 8832, Entity Classification Election. Treas. Reg. § 301.7701-3(c)(1)(iii) provides that the effective date specified on Form 8832 cannot be more than seventy-five days prior to the date on which the election is filed. Rev. Proc. 2009-41, 2009-2 C.B. 439, provides a simplified method to request relief for certain late initial classification (check-the-box) elections.

(3) relief for late S Corporation, QSub, ESBT, and QSST Elections;[79]

(4) relief for late Section 338 Elections;[80]

(5) relief for late Dual Consolidated Loss Filings;[81] and

(6) relief for late FIRPTA Filings.[82]

[A][10][b] Conference of Right

If the IRS informs the taxpayer it is anticipated that the relief requested will be denied, the taxpayer may request a conference of right. During the conference, the practitioner should request a detailed explanation on why the Service intends to deny the relief and address each point raised with support for the taxpayer's position. If the conference is unsuccessful the practitioner should ask the Service for reconsideration. There are no established procedures for reconsideration and a conference of right is discretionary by the Service. If unsuccessful, the taxpayer's only recourse is judicial review.

---

79. See Rev. Proc. 2013-30 (generally effective Sept. 13, 2013) updated and consolidated all prior relief provisions for late and/or defective "S" corporate elections. For prior history, see Rev. Proc. 97-48, 1997-2 C.B. 521, which provides automatic relief for certain late S corporation elections; Rev. Proc. 2007-62, 2007-2 C.B. 786, which provides an additional simplified method for certain eligible entities to request relief for late S corporation elections, provided the entity files the election pursuant to Rev. Proc. 2007-62 within six months after the due date for the tax return (excluding extensions) for the first taxable year the entity intended to be an S corporation and reasonable cause exists for the failure to make a timely election, and Rev. Proc. 2003-33, 2003-1 C.B. 803, which provides relief for late S corporation elections (other than those eligible for automatic relief in Rev. Proc. 97-48), Electing Small Business Trust (ESBT) elections, Qualified Subchapter S Trust (QSST) elections, and Qualified Subchapter S Subsidiary (QSub) elections.

80. Rev. Proc. 2003-33, 2003-1 C.B. 803, provides an automatic extension of time to file a section 338 election on Form 8023, Elections Under Section 338 for Corporations Making Qualified Stock Purchases, that taxpayers must use if qualified.

81. Treas. Reg. § 1.1503(d)-1(c) provides a reasonable cause relief procedure to cure untimely filings under section 1503(d), except for late requests for closing agreements. Taxpayers requiring relief to cure a late request for a closing agreement must continue to seek relief under Treas. Reg. §§ 301-9100-1 through -3. Relief pursuant to Treas. Reg. §§ 301-9100-1 through -3 is no longer available for untimely filings for which relief may be requested under Treas. Reg. § 1.1503(d)-1(c). User fees do not apply.

82. Rev. Proc. 2008-27, 2008-1 C.B. 1014, provides a procedure, based on a showing of reasonable cause, that provides relief from liability for failure to withhold under section 1445 with respect to certain transfers by foreign persons of property that are presumed, under the Foreign Investment in Real Property Tax Act (FIRPTA), to be taxable dispositions of U.S. real property interests (USRPIs).

[A][10][c] Judicial Review

To overturn the Service's denial of a 9100 relief request, a taxpayer must establish that it satisfied the 9100 relief requirements and litigate with the Commissioner for abuse of discretion. In *L.S. Vines v. Commissioner*,[83] the court held that a taxpayer was entitled to 9100 relief to permit a late election of the mark-to-market method of accounting, because the facts and circumstances demonstrated that the taxpayer acted reasonably and in good faith, and the late election did not prejudice the government requiring "unusual and compelling" circumstances and the taxpayer had not used hindsight in making his relief request. Whereas, in *Acar v. United States*,[84] the court held that the taxpayer failed to meet the standards for 9100 relief, although the taxpayer had not requested 9100 relief via a private letter ruling request from the IRS. The court upheld the IRS's denial of 9100 relief because he had used hindsight in making the late election and under Treasury Regulations section 301.9100-3(b)(3)(iii) did not satisfy the "good faith" requirement. The court held that ignorance of the tax laws, standing alone, cannot warrant the grant of 9100 relief.

[B] Revenue Rulings

The regulations[85] define a revenue ruling as "an official interpretation by the Service which has been published in the Internal Revenue Bulletin. Revenue rulings are issued only by the National Office and are published for the information and guidance of taxpayers, Internal Revenue Service officials, and others concerned." Therein lies a difference between private letter rulings and revenue rulings: A revenue ruling is designed to be relied upon by all taxpayers and any IRS official. This is to be compared to a private letter ruling, which can be relied upon only by the taxpayer to whom it was issued.

A revenue ruling is the Service's conclusion regarding the law applicable to a specific set of facts and unlike a regulation is not issued or reviewed by Treasury. A revenue ruling does not have the force and effect of a regulation, whether legislative or interpretive, but it nevertheless is the Commissioner's interpretation of the law as it relates to a set of facts.[86]

---

83. L.S. Vines v. Comm'r, 126 T.C. 279 (2006).
84. Acar v. United States, 2006-2 USTC ¶ 50,529 (N.D. Cal. 2006), *aff'd*, No. 06-16820 (9th Cir. Sept. 23, 2008). *See also* Kohli v. Comm'r, T.C. Memo 2009-287; Kantor v. Comm'r, T.C. Memo 2008-297.
85. Treas. Reg. § 601.201(a)(6).
86. In Omohundro v. United States, 300 F.3d 1065, 1068–69 (9th Cir. 2002), the Ninth Circuit stated:

> In United States v. Mead Corp., 533 U.S. 218 (2001), the Supreme Court held that an administrative agency's interpretation of a

However, revenue rulings are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose. Taxpayers generally may rely upon revenue rulings published in the Internal Revenue Bulletin in determining the tax treatment of their own transactions and need not request specific rulings applying the principles of a published revenue ruling to the facts of their particular cases.[87] As the court pointed out in *Rauenhorst v. Commissioner*:[88]

> the IRS has committed itself to increased and more timely published guidance, in the form of revenue rulings and revenue procedures, in the hopes of achieving increased taxpayer compliance and resolving frequently disputed tax issues. These stated goals will not be achieved if the Commissioner refuses to follow his own published guidance and argues in court proceedings that revenue rulings do not bind him or that his rulings are incorrect. Certainly, the Commissioner's failure to follow his own rulings would be unfair to those taxpayers, such as petitioners herein, who have relied on revenue rulings to structure their transactions. Moreover, it is highly inequitable to impose penalties, which respondent has done in this case. Accordingly, in this case, we shall not permit respondent to argue against his revenue ruling, and we shall treat his revenue ruling as a concession.

In addition, the Tax Court has treated revenue rulings as the Service's position on a particular issue and similar to a position set forth in the government's brief and therefore not binding on the court.[89]

> statute contained in an informal rulemaking must be accorded the level of deference set forth in Skidmore v. Swift & Co. 323 U.S. 134 (1944) [full citation omitted]. The Court held the deference required depends on the "thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade. . . ." *Id*. at 228. . . . . Mead involved a Customs Service tariff ruling, which is closely akin to an IRS revenue ruling. Given that the two types of agency rulings are analogous, we are required to apply Mead's standard of review to an IRS revenue ruling.

87. Treas. Reg. § 601.601(d)(2)(e).

88. Rauenhorst v. Comm'r, 119 T.C. 157 (2002).

89. Stubbs, Overbeck & Assocs., Inc. v. United States, 445 F.2d 1142 (5th Cir. 1971) (a "ruling is merely the opinion of a lawyer in the agency and must be accepted as such"); Burck v. Comm'r, 63 T.C. 556, 561–62 (1975) ("We emphasize that although there is legislative support for the approach taken in the revenue ruling, we consider it advisory only. H. REP. NO. 91-413, 91st Cong., 1st Sess., p. 73 (1969), 1969-3 C.B. 246; see also *Andrew A.*

In Revenue Procedure 89-14 the Service stated:

> Taxpayer generally may rely upon revenue rulings and revenue procedures published in the Bulletin in determining the tax treatment of their own transactions and need not request specific rulings applying the principles of a published revenue ruling or revenue procedure to the facts of their particular cases. However, taxpayer, Service personnel, and others concerned are also cautioned to determine whether a revenue ruling or revenue procedure on which they seek to rely has been revoked, modified, declared obsolete, distinguished, clarified, or otherwise affected by subsequent legislation, treaties, regulations, revenue rulings, revenue procedures or court decisions.[90]

In this respect, if a practitioner finds a revenue ruling to support the taxpayer's position and the facts are substantially similar he or she should be able to rely on the revenue ruling and use it to persuade an IRS agent. If a practitioner finds an unfavorable ruling, he or she can expect initial opposition and substantial, but not insurmountable,[91] difficulty with an IRS agent or Appeals Officer.

Revenue rulings are initially published in the Treasury Department's weekly Internal Revenue Bulletin (often cited by year, week, and page: 2009-14 I.R.B. 735). Semiannually, the weekly issues are collected and bound as the Cumulative Bulletin (often cited by year, volume, and page: 2009-2 C.B. 735). Revenue rulings are numbered within the year of issue (so the usual citation would be in the form Revenue Ruling 2009-14, 2009-2 C.B. 735).

[C] Revenue Procedures

A revenue procedure is an official statement of a procedure that affects the rights or duties of taxpayers under the Internal Revenue Code, related statutes, tax treaties and regulations and that should be a matter of public knowledge. Revenue procedures are internal

---

Sandor, 62 T.C. 469 (1974). It does not carry the force of law, nor bind this Court in the slightest degree. *Andrew A. Sandor, supra*; see also *United States v. Hall*, 398 F.2d 383 (C.A. 8, 1968); *Stubbs, Overbeck & Assocs. v. United States*, 445 F.2d 1142 (C.A. 5, 1971). The revenue ruling is but a useful guide. . ."), *aff'd*, 553 F.2d 768 (2d Cir. 1978); Stark v. Comm'r, 86 T.C. 243, 250–51 (1986) (a revenue ruling does not constitute authority for deciding a case in this court); Crow v. Comm'r, 85 T.C. 376, 389 (1985) (a revenue ruling represents the view of the Commissioner, not the Treasury Department (Browne v. Comm'r, 73 T.C. 723, 731 (1980) (Hall, J., concurring)), and thus is generally only "the contention of one of the parties to the litigation").

90. Rev. Proc. 89-14, 1989-1 C.B. 814 and IRM 32.2.2.10 Force and Effect of Revenue Rulings, Revenue Procedures, Notices, Announcements, and News Releases (Aug. 11, 2004).

91. *See* chapter 9, Administrative Appeal.

procedural rules of the IRS and they are not binding upon the Service.[92] Procedural rules are merely directory, not mandatory, and do not have the force and effect of law.[93] Courts have long recognized the distinction between mandatory procedures, which bind the agency, and directory procedures, which do not.[94]

While a revenue ruling generally states an IRS position, a revenue procedure provides return filing or other procedural instructions concerning an IRS position. For example, a revenue procedure might specify how those entitled to deduct certain automobile expenses should compute them by applying a certain mileage rate in lieu of calculating actual operating expenses. A typical revenue procedure,[95] for example, sets out the circumstances under which the IRS will reopen a case closed after audit to require the taxpayer to pay additional tax. Although not legally bound by the revenue procedures, the Service typically follows the revenue procedure, which makes them useful tools of the tax practitioner.

Revenue procedures also include internal procedures and guidance that the Service believes should be public. Revenue procedures are published in the Internal Revenue Bulletin.

[D] Technical Advice Memoranda (TAMs)

A technical advice memorandum, or TAM, is guidance furnished by the Office of Chief Counsel upon the request of an IRS director or an area director, appeals, in response to technical or procedural questions that develop during a proceeding. A request for a TAM generally stems from an examination of a taxpayer's return, a consideration of a taxpayer's claim for a refund or credit, or any other matter involving a specific taxpayer under the jurisdiction of the territory manager or the

---

92. Christian v. Comm'r, 1994 T.C.M. 332; Collins v. Comm'r, 61 T.C. 693 (1974).

93. Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979) (quoting Morton v. Ruiz, 415 U.S. 199, 232, 235, 236, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1974)), establishes that a regulation or procedure has the force and effect of law when it is promulgated by an agency as a "substantive rule" or a "legislative-type rule" pursuant to a mandate or delegation by Congress "affecting individual rights or obligations." Conversely, "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" are not binding upon the agency. *Id.* at 301.

94. *See* Cleveland Tr. Co. v. United States, 421 F.2d 475 (6th Cir. 1970); Geurkink v. United States, 354 F.2d 629 (7th Cir. 1965); Luhring v. Glotzbach, 304 F.2d 560 (4th Cir. 1962); Collins v. Comm'r, 61 T.C. 693 (1974); Notaro v. United States, 71 A.F.T.R.2d 93-659, 93-1 USTC ¶ 50,030 (N.D. Ill. 1992); First Fed. Sav. & Loan Ass'n v. Goldman, 58 A.F.T.R.2d 86-5612, 86-2 USTC ¶ 9624 (W.D. Pa. 1986).

95. Rev. Proc. 2005-32, 2005-1 C.B. 1206.

area director, appeals. TAMs are issued only on closed transactions and provide the interpretation of proper application of tax laws, tax treaties, regulations, revenue rulings or other precedents. The advice rendered represents a final determination of the position of the IRS, but only regarding the specific issue in the specific case in which the advice is issued. TAMs are generally made public after all information has been removed that could identify the taxpayer whose circumstances triggered a specific memorandum.

Revenue Procedure 2017-2[96] sets forth the procedures to request TAMs. Technical advice requests are initiated at the field level either by a revenue agent, Appeals Officer, or a taxpayer. Technical advice is advice furnished by an Associate office in a memorandum that responds to any request, submitted under this revenue procedure, for assistance on any technical or procedural question that develops during any proceeding before the IRS. Typically, technical advice is requested when the application of the law to the facts involved is unclear. The question must be on the interpretation and proper application of tax laws, tax treaties, regulations, revenue rulings, notices, or other precedents to a specific set of facts that concerns the treatment of an item in a year under examination or appeal. A TAM may not be requested for prospective or hypothetical transactions.

The parties are encouraged to request technical advice early in the examination process but in practice it is not unusual for the issue and the request to come late in the examination process. Revenue Procedure 2009-2 changed the pre-submission conferences from optional to mandatory. The Service believes these conferences promote expeditious processing of requests for technical advice. If a request for technical advice is submitted without first holding a pre-submission conference, the Associate office will return the request for advice.[97] However, requests for technical advice can still proceed even if a taxpayer declines to participate in a pre-submission conference.

Once an issue has been identified that either the Service or the taxpayer believes the assistance of the National Office is warranted, the parties must prepare a written request.[98] Pre-submission conferences can promote an expeditious processing of the requests and facilitate agreement between the Service and the taxpayer on the scope of the request for technical advice, the factual information to be included, any collateral issues that should be considered and any other information that should be considered. During the pre-submission conference, the parties should discuss the framing of the issues and the

---

96. Rev. Proc. 2017-2, 2017-1 I.R.B. 106.
97. Rev. Proc. 2017-2, 2017-1 I.R.B. 106.
98. *Id*.

background information and documents that should be included in the formal submission of the request for technical advice. In cases involving complex issues, the Service encourages pre-submission conferences.

The written submission must include the facts, applicable law and the support for each party's positions. The Service strongly encourages taxpayers to participate in the process to obtain advice or guidance from the Chief Counsel on the interpretation and proper application of Internal Revenue laws, related statutes, and regulations, to a specific set of facts for an examination. If the Service determines that the taxpayer or their representative fails to participate in the technical advice request process the Service will consider that a waiver of the right to receive a conference.

If it appears the technical advice will be adverse to the taxpayer, the taxpayer will be given an opportunity for a conference to discuss the issues. The taxpayer will be notified of the time and place of the conference, which is typically held within twenty-one calendar days after contacted. The National Office conference should be used to clarify the facts and to further articulate the taxpayer's positions and authorities. If new and additional data and authorities are proposed by the taxpayer at the conference, they must be submitted within twenty-one calendar days after the conference. Once the IRS National Office has reached a decision, a taxpayer has no right of appeal from its decision to any other official in the National Office.

Once issued, a TAM is very similar to a private letter ruling. Both are written determinations that are taxpayer and fact specific and "may not be used as precedent." The key difference between TAMs and private letter rulings is the administrative effect that the Service gives technical advice but does not accord to letter rulings. Both the local office and the Appeals Office must follow technical advice favorable to the taxpayer, and process the taxpayer's case accordingly and should apply the decision retroactively. Field offices have no discretion to act contrary to the National Office's technical advice favorable to a taxpayer, unless the local office and the Appeals Office believe that the conclusions in a TAM should be reconsidered. While every effort is made to arrive at a mutually satisfactory conclusion between the National Office and field offices, if the conflict cannot be resolved, the decision of the National Office is final.

Although the revenue agent is bound by technical advice unfavorable to the taxpayer, an Appeals Officer is not similarly bound. An Appeals Officer may therefore disregard the technical advice and settle an issue under Appeals' general authority in a manner adverse to the taxpayer.[99]

---

99. *Id.*

Sometimes, the taxpayer will have no choice or input into whether to request a TAM, other times it is a mutual decision, and in other situations it may be at the insistence of the taxpayer. Practitioners should consider the impact of receiving an adverse TAM on settlement and future tax years before agreeing to a technical advice request. Once issued, the Service is bound to follow the TAM. If the facts or law are not favorable, practitioners should discourage an agent from proceeding with the request hoping to settle the issue without issuing a TAM. One school of thought is not to participate in the process and then try and distinguish the facts or law in the TAM from the actual facts. This may be difficult and an adverse TAM creates additional hurdles in trying to resolve the issue. Depending upon the facts and the taxpayer's situation it may be in the client's best interest to request a TAM. There are times that having IRS counsel involvement may be helpful in resolving the issue.

[E] Action on Decisions—IRS Acquiescence Program for Court Decisions

When a tax case is decided adversely to the government, it is the policy of the Service to announce (in the Internal Revenue Bulletin) at an early date whether it will follow the holding in a particular case or continue to litigate the issue and maintain its position. Indications of acquiescence or nonacquiescence will appear in the case citation as "acq." or "non-acq." An acquiescence "in result only" means the Service expressly disagrees with some of all or the reasoning underlying the decision.

An Action on Decision (AOD) is a memorandum setting forth the positions as to why the government should or should not appeal. AODs are prepared by the Office of Chief Counsel. An AOD will be issued at the discretion of the Service only on unappealed issues decided adverse to the government. Generally, an AOD is issued where its guidance would help Service personnel working with the same or similar issues. Unlike a Treasury Regulation or a revenue ruling, an AOD is not an affirmative statement of Service position. It is not intended to serve as public guidance and may not be cited as precedent.

AODs shall be relied upon within the Service only as conclusions, applying the law to the facts at the time the AOD was issued. Caution should be exercised in extending the recommendation of the AOD to similar cases where the facts are different. The recommendation in the AOD may be superseded by new legislation, regulations, rulings, cases, or AODs.

Prior to 1991, the Service published acquiescence or nonacquiescence only in certain regular Tax Court opinions. The Service has expanded its acquiescence program to include other civil tax cases where guidance is determined to be helpful. So the Service now may

acquiesce or nonacquiesce in the holdings of memorandum Tax Court opinions, and those of the U.S. District Courts, U.S. Court of Federal Claims, and Circuit Courts of Appeal. Regardless of the court deciding the case, the recommendation of any AOD will be published in the Internal Revenue Bulletin.

The recommendation in every AOD will be summarized as acquiescence, acquiescence in result only, or nonacquiescence. Both "acquiescence" and "acquiescence in result only" mean that the Service accepts the holding of the court in a case and that the Service will follow it in disposing of cases with the same controlling facts. However, "acquiescence" indicates neither approval nor disapproval of the reasons assigned by the court for its conclusions; whereas, "acquiescence in result only" indicates disagreement or concern with some of those reasons. "Nonacquiescence" 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. Referring to an opinion of a circuit court of appeals, a "nonacquiescence" indicates that the Service will not follow the holding on a nationwide basis. However, the Service will recognize the precedential impact of the opinion on cases arising within the venue of the deciding circuit.[100]

The AODs are published in the weekly Internal Revenue Bulletin and consolidated semiannually and appear in the first Bulletin for July and the Cumulative Bulletin for the first half of the year. A semiannual consolidation also appears in the first Bulletin for the following January and in the Cumulative Bulletin for the last half of the year.

[F] Chief Counsel Advice[101]

A major role of the Office of Chief Counsel is to advise IRS personnel on legal matters at all stages of case development. The Office of Chief Counsel issues various forms of written legal advice to IRS field agents and its own field attorneys. The taxpayers who are the subject of Chief Counsel Advice (CCA),[102] generic legal advice memorandum (GLAM) or Associate Memorandum (AM) rarely participate in the process. In the past, there was controversy on whether the Office of Chief Counsel must release this form of advice under the Freedom of Information Act (FOIA) and if so, how much must be disclosed.[103]

---

100. IRM 4.10.7.2.9.8.1 (Action on Decision) (01-01-2006).
101. Formerly called field service advice (FSA), which were taxpayer-specific rulings furnished by the IRS National Office in response to requests made by Service employees.
102. Formerly referred to as field service advice (FSA).
103. *See* Tax Analysts v. IRS, 117 F.3d 607 (D.C. Cir. 1997); IRS Restructuring and Reform Act of 1998, Committee Report at 122–23.

The Taxpayer Bill of Rights 3 requires written documents issued by the National Office of Chief Counsel to its field components and field agents of the IRS to be subject to public release in a manner similar to TAMs or other written determinations.[104] So, CCA/GLAM is now deemed written determinations subject to public inspection under section 6110.[105] The term "Chief Counsel Advice" is an umbrella term that means written advice or instruction, under whatever name or designation, prepared by any national office component of the Office of Chief Counsel issued to field or service center employees of the IRS or regional or district employees of the Office of Chief Counsel, and conveys any legal interpretation of a revenue provision; any IRS or Office of Chief Counsel position or policy about a revenue provision; or 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. The term "revenue provision" is broadly defined and means any existing or former Internal Revenue law, regulation, revenue ruling, revenue procedure, other published or unpublished guidance, or tax treaty, either in general or as applied to specific taxpayers or groups of specific taxpayers.[106]

Back in 1993, Tax Analysts pursued its mission to bring the IRS's "secret law out of the shadows and into the light of day" when it brought a FOIA request to obtain field service advice (FSA) memoranda. FSA served essentially the same functions as TAMs, but unlike the latter, were not released by the IRS to the public nor provided to the taxpayer. Taxpayers had no input in the FSA process and no right to even know of its existence. This contrasts with the TAM process, which carried several procedural rights for taxpayers—including the opportunity for taxpayers to submit their version of the facts and obtain a conference with IRS officials about an adverse ruling.

The IRS denied Tax Analysts' FOIA request, asserting that FSA contains "return information" or information protected by attorney-client privilege. Tax Analysts sued in April 1994 in the U.S. District Court for the District of Columbia. "Unless disclosed to the public under FOIA," the suit claimed, FSA "will comprise a body of secret law, as private letter rulings, General Counsel Memorandums, Actions on Decisions, and TAMs once did, before their disclosure was required" under FOIA and section 6110. The district court agreed with Tax

---

104. I.R.C. § 6110(b)(1), amended by Pub. L. No. 105-206, § 3509(a), 112 Stat. 685 (1998).

105. IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, Committee Report at 124.

106. I.R.C. § 6110(i). *See also* Sheryl Stratton and Judy Parvez's article "IRS Guidance 1980-2003: An Ever-Changing Landscape Notes," TAX NOTES, 2004 TNT 221-32.

Analysts in a March 1996 ruling, saying FSA shares the same characteristics and serves the same purpose as GCMs and TAMs. The court held that an FSA is "statements of policy and interpretations which have been adopted" by the IRS, and it is therefore subject to disclosure under section 552(a)(2) of FOIA. The court ordered release of the guidance content of FSA, permitting deletion of "return information" specific to a particular taxpayer and some attorney work product. The D.C. Circuit Court of Appeals upheld the decision requiring disclosure of FSA. Because of the FSA case, Congress in 1998 added subsection (i) to section 6110 to require the Service to make public redacted versions of all documents constituting CCA.[107]

All CCA/GLAMS are released to the public, however, the Service redacts the portion of the memorandum that may discuss hazards of litigation and trial strategy. Exemption 5 of the FOIA provides that an agency may withhold inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.[108] This exemption entitles an agency to withhold documents that a private party could not discover in litigation with the agency.[109] Specifically, it protects documents covered by the attorney work product privilege and the executive deliberative process privilege and the attorney-client privilege.[110] The Service contends that the redacted information is pre-decisional advice that shields intra-governmental communications relating to matters of law or policy from disclosure.[111] The underlying purpose of the privilege is to protect the quality of governmental decision-making by maintaining the confidentiality of advisory opinions, recommendations, and deliberations that comprise part of the process by which government formulates law or policy.[112]

---

107. *See Long History Preceded Settlement of IRS-Tax Analysts Two-Hour Legal Advice Dispute*, 2009 TNT 64-5.
108. 5 U.S.C. § 552(b)(5).
109. Pac. Fisheries Inc. v. United States, 539 F.3d 1143, 1148 (9th Cir. 2008).
110. Maricopa Audubon Soc'y v. U.S. Forest Serv., 108 F.3d 1082, 1084 n.1 (9th Cir. 1997).
111. *See* Nat'l Wildlife Fed'n v. U.S. Forest Serv., 861 F.2d 1114, 1116–17 (9th Cir. 1988).
112. *See* Gen. Motors Corp. v. United States, No. 2:07 cv-14464 (E.D. Mich. Oct. 30, 2009). "To come within the deliberative process privilege, a document must be both 'predecisional,' meaning it is 'received by the decision maker on the subject of the decision prior to the time the decision is made,' and 'deliberative,' the result of the consultative process. . . ." Rugiero v. U.S. Dep't of Justice, 257 F.3d 534, 550 (6th Cir. 2001). "Factual materials are generally not privileged unless they are inextricably intertwined with policy-making processes. . . . . Non-factual materials that express opinions or recommendations, on the other hand, are clearly protected." Trentadue v. Integrity Comm., 501 F.3d 1215, 1227 (10th

[G] General Counsel Memoranda (GCMs)

GCM are legal memorandums from the Office of Chief Counsel prepared in the review of certain proposed rulings (revenue rulings, private letter rulings, TCMs). They contain legal analyses of substantive issues and can help clarify the reasoning behind a particular ruling and the Service's response to similar issues. GCMs are publicly available but are not officially published by the IRS.

[H] Other Pronouncements

In lieu of releasing time-consuming revenue rulings and revenue procedures, the Service has been relying heavily on notices, announcements, and information releases. The Service issues a notice when it wishes to provide guidance before a ruling or regulation is available. Notices appear weekly in the Internal Revenue Bulletin, and are bound in the semi-yearly Cumulative Bulletin. Notices may be relied upon to avoid the substantial understatement penalty.[113]

A notice is a public pronouncement that may contain guidance that involves substantive interpretations of the Internal Revenue Code or other provisions of the law. For example, notices can relate what regulations will say where the regulations may not be published in the immediate future.

An announcement is a public pronouncement with only immediate or short-term value. For example, announcements can summarize the law or regulations making no substantive interpretation; to state what regulations will say when they are certain to be published in the immediate future; or to notify taxpayers of an approaching deadline.

Announcements do not have the authority of notices, revenue rulings, or revenue procedures. Still, they serve a useful purpose of alerting taxpayers to new information and, as with notices, constitute authority for avoiding the substantial understatement penalty.[114] Announcements are published weekly in the Internal Revenue Bulletin, but not in the Cumulative Bulletin.

Information releases are essentially press releases put out by the IRS. While these releases do not have the authority of notices or announcements, they are helpful in ascertaining federal tax procedure news.

Cir. 2007) (citing *Nat'l Wildlife Fed'n*, 861 F.2d at 1119). "Draft documents are considered to be predecisional and exempt from disclosure if such material is deliberative in nature." King v. IRS, 684 F.2d 517 (7th Cir. 1982).

113. *See* chapter 15, Major Civil Penalties.

114. *Id.*

§ 3:3.3 *Judicial Authority*

[A] Tax Court

The predecessor of the U.S. Tax Court[115] was created in 1924 and known as the U.S. Board of Tax Appeals. The Revenue Act of 1942 changed its name to the Tax Court of the United States. The Tax Reform Act of 1969 changed the court's name to its present form, the U.S. Tax Court, and established it as a court of record under article I of the Constitution.[116]

The Tax Court is a court of law,[117] not a court of equity, and has limited jurisdiction possessing only those powers to adjudicate controversies expressly, statutorily granted by Congress.[118] The majority of cases heard by the Tax Court involve the redetermination of a deficiency asserted for income, gift, or estate taxes imposed by Subtitles A and B of the Code.[119] The Tax Court is the only court in which taxpayers can seek redeterminations of the Commissioner's notices of deficiency without first paying the taxes that the IRS alleges are due.

The Tax Court judges have expertise in the tax laws and apply that expertise in a manner to ensure that taxpayers are assessed only what they owe, and no more. Although the court is physically in Washington, D.C., the judges travel nationwide to conduct trials in approximately seventy-four designated cities.[120]

Decisions of the Tax Court that involve more than mere factual determinations or applications of well-established legal principles and generally involve new decisions on points of law that set precedents are published as regular opinions in Reports of the United States Tax Court by the Government Printing Office. Commercial publishers also print these decisions. Tax Court decisions are commonly cited like any court case: *Doe v. Commissioner*, 120 T.C. 555 (1986), but older cases which some practitioners may still prefer today to use the administrative style of citation, they identify the case by the plaintiff's full name, for example: William C. Horrmann, 17 T.C. 903 (1951).

---

115. See chapter 8, Claims for Refund and Refund Suits and chapter 10, Tax Court Litigation, for additional discussions on the U.S. Tax Court.
116. Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730.
117. The Tax Court lacks equitable powers but does have the authority to grant equitable recoupment. I.R.C. § 6214(b).
118. I.R.C. § 7442. Note that as a court of law, the Tax Court's jurisdiction is limited by statute; nonetheless, while the court lacks general equitable powers, the court does apply certain equitable principles in deciding issues before the court. *See, e.g.*, Woods v. Comm'r, 92 T.C. 776 (1989).
119. I.R.C. § 6213.
120. See http://ustaxcourt.gov/dpt_cities.htm for a complete list. Note that approximately eleven cities are only for small Tax Court cases.

Memorandum decisions primarily involve factual determinations and applying well-established legal rules. Memorandum decisions do not warrant publication in bound volumes in the opinion of the court. They are published in pamphlets by the government and in bound volumes by commercial publishers. Although an official Tax Court decision carries more weight than a memorandum decision, practitioners should not hesitate to cite to memorandum decisions. Memorandum decisions are regularly cited by the Tax Court itself.[121] So if an applicable point of law is addressed in a memorandum decision, counsel should cite such case to the IRS at the administrative level and on brief to the Tax Court at the litigation stage.[122]

In determining precedent the Tax Court looks to the "Golsen Rule." The Golsen Rule originated with the case of Jack E. Golsen.[123] In *Golsen*, the Tax Court held that generally it would follow the rule of law laid down by the court of appeals to which an appeal before it would lie assuming the facts were squarely on point. If, however, the appeal would be to a different circuit, the Tax Court will reconsider an issue, given the reasoning of the reversing appellate court but if the Tax Court is of the opinion that its original opinion is correct the court will follow its original holding.[124] Under this rule, the Tax Court will follow decisions of the circuit court to which an appeal would lie.[125] Assume, for example, the First Circuit has held for the taxpayer on a particular set of facts and the Ninth Circuit has held for the IRS on essentially the same facts. A taxpayer who wishes to litigate those same facts in the Tax Court can predict how the court will rule based upon the Golsen Rule.

[B] Decisions of Other Federal Courts

Generally, the U.S. District Courts[126] and the U.S. Court of Federal Claims hear tax cases after the taxpayer has paid the tax and filed

---

121. *See, e.g.*, King v. Comm'r, 116 T.C. 198, 202 (2001); Butler v. Comm'r, 114 T.C. 276, 287 (2000).
122. For a discussion of Tax Court litigation, see generally chapter 8, Claims for Refund and Refund Suits and chapter 10, Tax Court Litigation.
123. Golsen v. Comm'r, 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971). See also Lardas v. Comm'r, 99 T.C. 490 (1992), where the Tax Court explained the Golsen Rule, noting that the Tax Court will only follow a circuit court's opinion that is "squarely on point."
124. *See* Peat Oil & Gas Assocs. v. Comm'r, 100 T.C. 271 (1993).
125. Golsen v. Comm'r, 54 T.C. 742 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971), *cert. denied*, 404 U.S. 940, 92 S. Ct. 284 (1991).
126. Each of the ninety-four federal judicial districts handles bankruptcy matters, and in almost all districts, bankruptcy cases are filed in the bankruptcy court. The bankruptcy courts are under the jurisdiction of the district courts.

a claim for refund or credit. If the claim is denied by the Service, the taxpayer may sue for refund or credit either with the District Court or the Court of Federal Claims. District Court decisions may be appealed to the Courts of Appeals for the appropriate circuit and decisions of the Court of Federal Claims may be appealed to the Court of Appeals for the Federal Circuit. The Supreme Court of the United States may, at its discretion, review decisions of a Court of Appeals.

Decisions of the federal courts are available in the Federal Supplement, Federal Reporter, United States Reports, Supreme Court Reporter, U.S. Law Week, etc. The U.S. Court of Federal Claims, of particular interest to tax practitioners who seek refunds of taxes paid, was called the U.S. Court of Claims from 1929 to September 30, 1982. Its decisions were printed in the Federal Reporter from 1929 to 1932 and from 1960 to 1982. Between 1932 and 1960 and since October 1, 1982, the court's decisions appear in the Federal Supplement.

The Bankruptcy Court may also hear tax issues.[127] Bankruptcy courts generally have jurisdiction over all matters about payment of a debtor's financial obligations under the Bankruptcy Code and administration of the bankruptcy estate. Bankruptcy court jurisdiction includes the authority to determine the tax due by the debtor or estate and what taxes will be discharged, meaning the debtor no longer will be personally liable. The bankruptcy court also has jurisdiction over any matters about collection of tax debts at issue in the bankruptcy case or collection from any property of the estate.[128]

[C] Court of Appeals

Either the taxpayer or the government may appeal decisions of the Tax Court (except for cases handled under the "small tax case procedures"), district courts, and the Court of Federal Claims to the

---

127. The U.S. Constitution grants Congress authority to enact federal bankruptcy laws. The Bankruptcy Act of 1898 formed the basis of federal bankruptcy law until 1979 when enactment of the Bankruptcy Code (11 U.S.C.) repealed the old law and codified procedures making the bankruptcy process less burdensome for the debtor. The Bankruptcy Reform Act of 1994 (BRA 94) brought about a major amendment to the Bankruptcy Code affecting the government's treatment of debtors, notably granting permission to assess taxes while the debtor is under the protection of the automatic stay.

128. In some circuits, appeals from the bankruptcy courts may also go to a Bankruptcy Appellate Panel (BAP), consisting of three bankruptcy judges from another district within the circuit. 28 U.S.C. § 158(b)(1), (5). A BAP cannot hear appeals in a district unless a majority of the district judges for that district authorize it. 28 U.S.C. § 158(b)(6). However, once authorized, the BAP can hear and determine appeals otherwise directed to the district court unless the appellant or any other party elects to have the appeal heard by the district court. 28 U.S.C. § 158(c)(1).

U.S. Circuit Courts of Appeals. There are thirteen circuits, each with its own geographic territory—eleven regional circuits, Court of Appeals for the Federal Circuit, and the D.C. Circuit.

District courts must follow the decisions of the court of appeals for the circuit in which they are located. For example, the District Court for the Central District of California must follow decisions of the Court of Appeals for the Ninth Circuit. If the Ninth Circuit has not decided a particular issue, the district court may reach its own conclusion or follow the decision of another circuit or district court that has reviewed the issue. Because the courts in one circuit are not bound by the decision of the appellate court in another circuit, practitioners should cite, or possibly distinguish, cases supporting their position from the circuit where the taxpayer resides. If the appellate court for that circuit has not taken a position on the issue, the practitioner should consider decisions of other appellate courts or district courts to support their position.

Since one circuit court is not bound by the decision of another circuit, find a cite from the circuit that will hear the matter. If a decision on a particular issue has not been rendered in the taxpayer's circuit, practitioners should cite a supporting decision rendered in another circuit.

Decisions of the U.S. Courts of Appeals, including the Court of Appeals for the Federal Circuit, may be appealed to the U.S. Supreme Court.

[D] U.S. Supreme Court

The Supreme Court of the United States is the highest court of the land. Court review is discretionary; the Court accepts cases it views as having national importance. Only a few tax cases are heard. Court review is by a petition for a Writ of Certiorari. If the Court accepts the petition, it will grant the writ, cited "cert. granted." If the petition is denied, the case is cited "cert. denied."

[E] Judicial Authority

Knowledge of the judicial history of a tax case is important and research of case law is not complete until the history of a case is reviewed in a citator. For example, practitioners should consider whether a case is current, whether other cases are on the same point of law that should be considered, or whether a ruling is still valid. A citator lists court decisions alphabetically by case name and shows where the full text of the decisions may be found. The citator traces the case history from its original entry into the court system through the Supreme Court, if appealed.

Decisions made at various levels of the court system are considered interpretations of tax laws and may be used by practitioners to support

a position. Certain court cases lend more weight to a position than others. A case decided by the Supreme Court becomes the law of the land and takes precedence over decisions of lower courts. The Service must follow Supreme Court decisions. Decisions made by lower courts, such as Tax Court, District Courts, or U.S. Court of Federal Claims, are binding only for the particular taxpayer and the years litigated but establish the law and are precedent for taxpayer's position.

Decisions reached in a lower court are sometimes reversed in the appellate courts or Supreme Court. When this happens, the lower case decision has no legal affect and may not be cited as an authority. A citator will show whether a higher court reversed, affirmed, modified or otherwise disposed of a lower court decision. A citator will also direct practitioners to later cases or rulings that deal with the same legal principle in the setting of other Code sections or fact patterns. It lists cases, rulings, or procedures and whether the courts or Service have followed it, or if there are superseded materials.

Citators are published by commercial publishers of tax services such as CCH Incorporated and Research Institute of America. While formats differ, commercial citators provide basically the same information.

§ 3:3.4 Other Secondary Authority

Sometimes, half the battle is just knowing where to look. Although not authoritative, secondary authority can be very useful in assisting practitioners with a general understanding of a particular topic and lead the practitioner in the right direction. Secondary authority comprises treatises, professional association reports (ABA, AICPA, and state bar journals), articles, instructions to tax forms, IRS publications, IRM, tax services (RIA, CCH, Tax Analysts' Tax Notes Today, Westlaw's Daily Tax Report), journals and periodicals, trade journals, even Google and other websites.

PRACTICE POINTER

The tax law is ever changing and as useful as something may appear to be, the practitioner should always go back to the primary authority, verify the information provided in the secondary authority, and check the cites to determine status of the law. Many treatises and articles become outdated by the changes in the law. Use secondary authorities as a reference to help you get to where you need to go and then verify the primary authorities and use a citator.

§ 3:3.5 Internal Revenue Manual

The IRM is the single official source for IRS policies, directives, guidelines, procedures, and delegations of authority in the IRS. Practitioners have access to most of the IRS but some information in the IRM is classified as "Official Use Only." The IRM comprises policy statements, which are major decisions of the Commissioner and other specified executives that govern and guide personnel in the administration of the tax laws; procedures and guidelines, which tell IRS employees how to administer the tax law; and delegations of authority, which are official notifications by the Commissioner of certain rights and responsibilities delegated to subordinate officials. The IRM, is divided into audit, collection, appeal, and administrative parts, among others. The practitioner will find the IRM very informative about the Service's internal workings. The manual explains the procedures, guidance, and instructions for its employees.

Treasury Regulations section 601.702(b)(1)(iii) changed the confidentiality of the manual and now requires that the Service provide for inspection or offer for sale its "administrative staff manuals and instructions to staff that affect a member of the public." The IRM can be located at www.irs.gov, LexisNexis or Westlaw. The main advantage to using LexisNexis or Westlaw is the ability to use a search engine.

Most revenue agents consider the IRM their primary authority rather than just the Service's internal procedures. For example, the manual sets forth various recommendations about extending the assessment statute of section 6501 and many agents interpret those manual provisions as a legal requirement and it is difficult to convince them that the IRM is only Service guidance and not akin to a statutory provision. Taxpayers, however, do not have to follow the manual, but it is important to understand the guidance and policies set forth for the IRS agents, appeals and Counsel.

§ 3:3.6 Computerized Research

Westlaw and LexisNexis provide outstanding online research databases. They not only provide annotated Code, regulations, rulings, court decisions, etc., but they also provide excellent secondary sources. For example, Westlaw provides tax treatises and journals published by Warren Gorham and Lamont, and the Tax Management Portfolio series published by Bloomberg BNA. The LexisNexis database includes Matthew Bender Publications; PLI treatises can be found on both databases.

§ 3:3.7 Free Databases and Websites

Besides Westlaw and LexisNexis, there are several useful databases and websites free of charge. The AICPA Statements on Standards for Tax Services[129] is one such useful resource. In November 2009,[130] the AICPA updated the Statements to reflect changes in the tax law and Circular 230. The Statements are:

- No. 1—Tax Return Positions (including Interpretation No. 1-1, Realistic Possibility Standard). Sets forth the applicable standards for members when recommending tax return positions, or preparing or signing tax returns filed with any taxing authority. This statement also addresses a member's obligation to advise a taxpayer of relevant tax return disclosure responsibilities and potential penalties.
- No. 2—Answers to Questions on Returns. Sets forth the applicable standards for members when signing the preparer's declaration on a tax return if one or more questions on the return have not been answered.
- No. 3—Certain Procedural Aspects of Preparing Returns. Sets forth the applicable standards for members concerning the obligation to examine or verify certain supporting data or to consider information related to another taxpayer when preparing a tax return.
- No. 4—Use of Estimates. Sets forth the applicable standards for members when using estimates in the preparation of a tax return.
- No. 5—Departing from a Position Previously Concluded in an Administrative Proceeding or Court Decision. Sets forth the

---

129. Available at www.aicpa.org/download/tax/sstsfinal.pdf. The AICPA's Statements on Standards for Tax Services (SSTSs) are enforceable tax practice standards for members of the AICPA. The SSTSs apply to all members regardless of the jurisdictions in which they practice and the types of taxes with respect to which they are providing services.

130. The revised AICPA standards went into effect January 1, 2010. Proposed changes to the two existing interpretations to SSTS No. 1 were released on Feb. 3, 2011. Following a comment period, the revised interpretations became effective Jan. 31, 2012. Interpretation No. 1-1, *Reporting and Disclosure Standards,* of SSTS No. 1: Provides that a member should not recommend a tax return position or take a position on a tax return that the member prepares unless that position satisfies applicable reporting and disclosure standards. Interpretation No. 1.2, *Tax Planning*, of SSTS No. 1: Clarifies existing standards, recognizing the compelling need for a comprehensive interpretation of a member's responsibilities in connection with tax planning.

applicable standards for members in recommending a tax return position that departs from the position determined in an administrative proceeding or in a court decision with respect to the taxpayer's prior return.

- No. 6—Knowledge of Error: Return Preparation and Administrative Proceedings. Sets forth the applicable standards for members who becomes aware of: (a) an error in a taxpayer's previously filed tax return, (b) an error in a return that is the subject of an administrative proceeding, or (c) a taxpayer's failure to file a required tax return.
- No. 7—Form and Content of Advice to Taxpayers Federal Government Links. Sets forth the applicable standards for members concerning certain aspects of providing advice to a taxpayer and considers the circumstances in which a member has a responsibility to communicate with a taxpayer when subsequent developments affect advice previously provided.

For a list of free websites, see Appendix 3A, Free Websites.