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John E. Donaldson

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Access to IRS "Working Law": New Tools for the Tax Attorney

by
*John E. Donaldson**

The Internal Revenue Service, in administering a complex body of law of nationwide application, undertakes to do so as uniformly as possible. To accomplish its goal of achieving uniformity in the application of the tax laws, it must inform its personnel of the interpretations it places on the statutes and decisions that comprise the formal body of law. To this end it promulgates regulations published in the Federal Register and Revenue Rulings and Revenue Procedures published in the Internal Revenue Bulletin. In addition, when cases in the Tax Court are decided against the Internal Revenue Service, brief announcements of "acquiescence" or "nonacquiescence" are also published in the Internal Revenue Bulletin.¹ Interpretations so published are relied upon both by the public and by personnel of the I.R.S. These published interpretations of the law are accorded considerable deference by the courts. Given the practical reality that "if the I.R.S. agrees with you, it generally does not matter what the law really is," these published interpretations are especially helpful to the tax practitioner. A significant component of tax practice consists of trying to structure transactions in a manner that will pass scrutiny by the I.R.S.

Treasury Regulations and Revenue Rulings and Procedures typically interpret the law either in fairly general language or by reference to very narrow fact situations. Thus, notwithstanding these published positions, the tax practitioner often lacks firm guidance as to the probable response of the I.R.S. to the seemingly countless transactions and arrangements in which clients may be actually or potentially involved. Also, field personnel of the I.R.S. are often in need of guidance as to the agency position, if any, on interpretive issues arising from audit activity. Procedures exist whereby taxpayers can receive "private" rulings on the tax consequences of proposed transactions and field representatives can obtain advice on interpretive questions. Pursuant to such procedures, Private Letter Rulings (PLRs) are issued to taxpayers and Technical Advice Memoranda (TAMs) are issued to field personnel. The Tax Reform Act of 1976 added I.R.C. §6110, which requires public disclosure, after editing out confidential

*Mr. Donaldson is the Ball Professor of Law at the Marshall-Wythe School of Law of the College of William and Mary. He is currently chairman of the Virginia State Bar's Taxation Law Section.

data, of these agency interpretations of the law. By I.R.C. §6110(j)(3), and the regulations thereunder, these "private rulings" cannot be cited as precedent. In recent years, the number of such rulings have ranged from 10,000 to 15,000 per annum. Although regarded as "private" rulings because they are not published by the government, they are published by Prentice-Hall and Commerce Clearing House.

These private rulings, while not citable as precedent, are nonetheless useful to the practitioner in that they provide hints regarding the I.R.S. positions on thousands of transactions that fall outside the patterns of "published" positions. By study of applicable private rulings, the practitioner can better assess the likelihood of a proposed transaction passing scrutiny. They are also helpful in providing guidance for the preparation of private ruling requests for clients. The potential utility of these private rulings to practitioners, however, is undermined by their format. They are often conclusionary as to the tax consequences of a particular set of facts and short on analysis of the underlying law. They provide indicia of what constitutes the body of "working law" of the I.R.S. but fall far short of expounding this "working law."²

The Office of the Assistant Commissioner-Technical of the Internal Revenue Service is charged with the responsibility of formulating interpretations of the tax law which will be applied by agency personnel on a uniform basis.³ In the discharge of that responsibility, the Assistant Commissioner-Technical is assisted by the Office of Chief Counsel. Interpretations adopted by the Assistant Commissioner-Technical constitute the body of "working law" within the Internal Revenue Service and are followed by personnel of the Service involved in the issuance of rulings to taxpayers and field representatives and in the settlement process. Private Letter Rulings, Technical Advice Memoranda and announcements of acquiescence and nonacquiescence are only partial, incomplete manifestations of this body of "working law." The "working law" of the Internal Revenue Service is more fully to be found in certain documents approved by the Assistant Commissioner-Technical and widely distributed throughout the Service. These documents are digested and indexed and are widely accessible within the national office in field offices through the Service's computer-assisted RIRA (Reports and Information Retrieval Activity) System. These documents setting forth the "working law" of the Internal Revenue Service are regarded internally as authoritative and are cited as precedents in internal memoranda prepared in connection with the issuance of private rulings, the handling of matters that may be raised on audit and in the disposition of contested cases. The principal documents setting forth the "working law" of the Internal Revenue Service are known as General Counsel Memoranda (GCMs), Technical Memoranda (TMs) and Actions on Decisions (AODs).⁴ These documents definitively interpreting the law for the guidance of Service personnel until superceded or modified were, until recently, withheld from public knowledge and

scrutiny. However, as a result of litigation brought under the Freedom of Information Act, they are now entering the public domain.

General Counsel Memoranda are analyses of the law prepared in the Interpretative Division of the Office of Chief Counsel, Internal Revenue Service, to provide guidance to the Office of the Assistant Commissioner-Technical regarding issues involved in proposed letter rulings, technical advice memoranda, revenue rulings and, occasionally, other proposed documents. They become authoritative when accepted by the Assistant Commissioner-Technical, at which point they are numbered, digested, indexed and distributed within the Service. They are utilized to maintain consistency of position and are used as guides in formulating field office positions, including positions to be taken in negotiations concerning liability for tax. Over 38,000 GCMs have been issued since 1926. According to the Court of Appeals for the District of Columbia Circuit, "completed GCMs...are 'adopted' as final statements of agency policy and function as the 'working law' of the agency."

Technical Memoranda are memoranda from the Commissioner of the Internal Revenue Service to the Assistant Secretary of Treasury for Tax Policy which are prepared to facilitate Treasury Department review of proposed regulations and Treasury Decisions (final regulations). They originate in the Legislation and Regulations Division of the Office of Chief Counsel. With respect to the proposed regulation to which they relate, the TM explains the proposed rules, furnishes background information, identifies the principal issues involved and discusses the approaches taken and the reasons for rejection of alternative approaches. They function as detailed explanations of the regulations to which they relate and are available to both national office and field personnel. Their function in relation to interpretation of legislation is comparable to that of congressional committee reports in relation to interpretation of legislation. The Court of Appeals for the District of Columbia Circuit describes TMs as "documents informally adopted by the agency as explanations of its policy" which are "used by personnel within the agency as the 'working' law of the agency."

Actions on Decisions are legal memoranda prepared in the Tax Litigation Division of the Office of Chief Counsel in connection with formulations of recommendations to the Department of Justice as to whether particular cases lost by the I.R.S. should be appealed. Originating as statements of legal conclusions by the Office of Chief Counsel, they are reviewed and approved by the Office of the Assistant Commissioner-Technical, after which they are printed and widely distributed to Service personnel, who may refer to them for guidance as to positions to be taken in dealing with taxpayers. They form the basis of the Commissioner's determination to "acquiesce" or "nonacquiesce" in adverse decisions of the Tax Court. The Court of Appeals for the District of Columbia Circuit has described AODs recommending "no appeal," "acquiescence" or

“nonacquiescence” as clearly pertaining “to the law that will be applied by the agency henceforth” and of the explanations contained therein as being “the agency’s ‘final’ legal position on an issue.”⁷

The Freedom of Information Act⁸ requires that all federal agencies make available to the public interpretations adopted by the agency. As a result of litigation ending with the entry of a consent decree⁹ on December 24, 1981, it is clear, and the I.R.S. now acknowledges, that the Act requires disclosure of General Counsel Memoranda, Technical Memoranda and Actions on Decisions. Pursuant to the consent decree, the Service has agreed to release, after appropriate editing, all GCMs, TMs and AODs adopted after December 24, 1981 within short specified time frames. It has also agreed to release all such documents adopted between July 4, 1967 and December 24, 1981 in reverse chronological order by December 24, 1983. Efforts are planned to compel release of those adopted prior to 1967.¹⁰

Although they will not be published by the government, they will be available to the public through several publishing sources. Those released to date can be found in Commerce Clearing House’s *I.R.S. Position Reporter* and in Prentice-Hall’s *Internal Memorandums of the I.R.S.* They can also be found in weekly editions of *Tax Notes*, published by Tax Analysts. A review of the GCMs, TMs and AODs thus far in the public domain suggests that they will prove to be valuable tools to the tax practitioner in revealing the currently operative legal interpretations observed and followed within the I.R.S. Through improved knowledge of current agency thinking the practitioner will be able to render better service to clients in dealing with the I.R.S. An agent on audit may unknowingly take a position contrary to an applicable GCM, which, on being brought to the attention of the agent, may more readily produce a concession in the client’s favor. Knowledge of the heretofore secret “working law” of the agency will also enable the practitioner to better structure client transactions in a manner that will enjoy I.R.S. approval. Awareness of the full legal analysis underlying previously issued Private Letter Rulings will better enable practitioners to formulate rulings requests on behalf of clients. Familiarity with all of the GCMs bearing on a particular issue may facilitate favorable negotiations with settlement officers, who may have placed undue reliance on a particular GCM. Conjecture as to the significance of failure by the I.R.S. to appeal a case lost in a U.S. District Court can be eliminated by examination of the applicable Action on Decision. In short, the body of secret law which has heretofore governed the personnel of the I.R.S. in its goal of attaining uniformity in the administration of tax statutes may now be used in a variety of important ways in tax planning and in dealing with I.R.S. personnel in attempting to resolve disputes. Although in the past I.R.S. personnel have been forbidden to cite the documents comprising the “working law” of the agency in dealing with taxpayers, there is nothing to prevent taxpayers from citing

such documents in dealing with the I.R.S., especially given the agency's commitment to uniformity in the application of the tax law and the taxpayer's justifiable expectation that the law not be applied arbitrarily and inconsistently.

The question of using GCMs, TMs and AODs as precedent in dealing with the I.R.S. has been somewhat clouded by the recent I.R.S. press release announcing that such documents "may not be relied upon or otherwise cited as precedent."¹¹ The legal foundation for such a conclusion is highly questionable. Unlike Private Letter Rulings and Technical Advice Memoranda, which are expressly denied precedential status under I.R.C. §6110(j)(3), GCMs, TMs and AODs are in the public domain by the requirements of the Freedom of Information Act,¹² which is silent on the question of precedential value of documents released pursuant to its provisions. A GCM that has not been modified or superceded is certainly evidence of what the "working law" of the agency is and is so regarded within the I.R.S. As such, it should be citable to personnel within the agency to aid them in following currently operative interpretations intended by the Assistant Commissioner-Technical to be observed throughout the agency by all concerned personnel.

An entirely different question of "precedential value" is involved in the matter of whether the "working law" of an agency is cognizable by courts in their determination of the true meaning of applicable law. It would appear that this is a matter for the courts, not the I.R.S., to decide. In a recent case,¹³ the United States Supreme Court relied with little discussion on a Technical Memorandum associated with a vague Treasury Decision (regulation) in determining the meaning of the regulation. The Court, in reaching a decision for the government, treated the TM as part of the history of the regulation and useful in determining its meaning. Clearly, the TM was treated as evidence of what the law is and in that regard enjoyed a kind of "precedential value." Because of the deference given by courts to formally adopted regulations, and the unique role of Technical Memoranda in the overall process of their adoption, it should not be assumed that the Supreme Court would accord similar "precedential value" to Actions on Decisions and General Counsel Memoranda.

A different question of "precedential value" is presented when an agency, having adopted an interpretation that becomes a part of its "working law," later abandons that interpretation in favor of another. In this context it is clear that principles of *stare decisis* are not applicable to the earlier formulation. An agency, having adopted an interpretive position to guide the disposition of certain cases, enjoys considerable freedom in being able to acknowledge prior error and to formulate a different position.¹⁴ In this sense an agency is not bound by its earlier interpretations and thus it may be said that GCMs, AODs and TMs lack binding "precedential value." Even in this context, however, courts may attach legal significance to prior administrative interpretations in determining

that later, different interpretations made by the agency are invalid.¹⁵ In a recent case,¹⁶ involving the issue of whether interest-free demand loans were taxable gifts, the Seventh Circuit, applying "equitable considerations" in favor of the taxpayer, noted that

Although we recognize that the Commissioner has broad discretion in applying a ruling retroactively...the Commissioner has only recently begun to assert that the making of non-interest bearing loans is a taxable event, even though the statutory authorities offered in support of that position have been in existence since the creation of the gift tax laws. When the Commissioner's position in the same issue involved in the case at bar was squarely rejected by the Court in *Johnson v. United States*, 254 F. Supp. 73 (N.D. Tex. 1966), no appeal was taken. Moreover, the Commissioner's nonacquiescence in that decision was not made public until seven years later, six years after the alleged gifts now before us were made.¹⁷

It would clearly seem that, if the Seventh Circuit is willing to attach relevance to a prior administrative practice, it would also find relevance in documents such as GCMs and AODs expounding the "working law" underlying the prior practice.

The full impact of the Freedom of Information Act in requiring disclosure of the heretofore secret "working law" of federal agencies on the overall development of principles of administrative law has yet to be fully assessed. However, it seems probable that agencies will continue to enjoy significant latitude in applying revised interpretations retroactively. Thus, a taxpayer relying on a GCM, TM or AOD will do so at the risk of a retroactive change in interpretive position by the I.R.S. and it will remain prudent, in many cases, to obtain Private Letter Rulings as to proposed transactions, even where current "working law" appears favorable. Notwithstanding the continuing problem of "reliance," the availability of the documents comprising "working law" of the I.R.S. will prove to be a valuable resource to the tax practitioner.

FOOTNOTES

1. Such notices are published only in relation to regular opinions of the Tax Court and not in relation to "memorandum" opinions. The I.R.S. has no regular procedure for communicating acceptance or rejection of the legal holdings in district courts, court of claims and appeals court cases which are adverse to it.

2. For a fuller discussion of the concept of "working law," see *Taxation With Representation Fund v. I.R.S.*, 646 F.2d 666 (D.C. Cir. 1981).

3. Internal Revenue Service Manual §1113.9. The Assistant Commissioner-Technical "acts as the principal assistant to the Commissioner in providing basic principles and rules for the uniform interpretation and application of the federal tax laws."

4. For a fuller discussion of the nature, quality and uses made of these documents see *Taxation With Representation Fund*, supra, n.2. See also Field, "I.R.S. Administrative Documents: A Report on the Status of Disclosure Efforts," *Tax Notes*, April 12, 1982, p. 123.

5. *Taxation With Representation Fund*, supra, n.2 at p. 683.

6. *Id.*

7. *Id.* at p. 684.

8. 5 U.S.C. §552(A)(2).

9. *Tax Analysts v. I.R.S.* (D.C. Dist. of Col. No. 78-2304, 1981) 49 A.F.T.R. 2d 82-421 and I.R. 81-144.

10. Field, supra, n. 4, at p. 125.

11. I.R. 81-144.

12. 5 U.S.C. §552.

13. *Jewett v. Comm.*, 50 L.W. 4215 (1982).

14. *Automobile Club of Michigan v. Comm.*, 353 U.S. 180 (1957). See also Swift, "Interpretive Rules and The Legal Opinions of Government Attorneys," 33 Adm. L. Rev. 425, pp. 434-8 (1981). Also, I.R.C. §7805 contemplates that rulings may be applied retroactively. See Comment, "Limitations on Retroactive Decision Making by the Internal Revenue Service," 23 U.C.L.A. Law Rev. 529 (1976).

15. In *Andrus v. Shell Oil Co.*, 446 U.S. 657 1980 the Supreme Court invalidated a departure by the Department of Interior from a long-standing administrative interpretation relating to patentable mineral claims by attaching "peculiar weight" to the earlier rule because the earlier rule was a contemporaneous construction of the statute by the agency charged with its administration. Also, with respect to regulatory agencies, some courts express the view that prior administrative interpretations are binding on an agency unless the departure therefrom is reasonably explained. *F.T.C. v. Crowther*, 430 F.2d 510 (D.C. Cir. 1970).

16. *Crown v. Comm.*, 585 F.2d 234, 241, (7th Cir. 1978), aff'd. 67 T.C. 1060 (1977). The Tax Court, in relation to the possible relevance of a departure from prior administrative practice, noted that the fact that the Commissioner only recently began to assert its current interpretive position, given the age of the applicable statute, was the crux of the matter before the Court.

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