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Norman A. Sugarman

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TAX RULING PROCEDURE REVISITED

NORMAN A. SUGARMAN*

INTRODUCTION

One of the contributions of Dr. T. C. Atkeson to the federal tax system was a concept that the legal and technical aspects of the tax laws could and should be reduced to practical and understandable procedures which would permit taxpayers to be willing participants in the administration of the tax laws. One important result of Dr. Atkeson's concept occurred in 1953 when the Revenue Service, for the first time, officially published a definitive statement of its policy and procedures with regard to advance income tax rulings to taxpayers.¹

A statutory base has long existed for the issuance of rulings to taxpayers;² but prior to 1953, the only official statement of Internal Revenue Service policy with regard to rulings was a limited 1939 mimeograph indicating that the Commissioner would rule prospectively only where the Code or Regulations expressly or impliedly authorized rulings or where the rulings could be the subject of a closing agreement.³ Nevertheless, a broad rulings practice was developing, which was described in the writings of knowledgeable tax practitioners⁴ and acknowledged in some statements by Revenue officials.⁵

A number of factors were involved in the timing of the publication of a statement on tax rulings policy and procedure in 1953 and the amplification thereof in 1954.⁶ One factor was a concern over so-called "secret rulings," arising from a general lack of knowledge of tax rulings policy and procedure and the fact that a comparatively small number of rulings were being published. The second factor was the reorganization

* Partner in Baker, Hostetler & Patterson, Cleveland, Ohio. Former Assistant Commissioner of Internal Revenue, 1952-1954. Member of the Ohio and District of Columbia Bar.

1. Rev. Rul. 10, 1953-1 CUM. BULL. 488. There have been a series of superseding statements building on and amplifying the procedure announced in 1953.

2. INT. REV. CODE OF 1954, § 7805, corresponding to INT. REV. CODE OF 1939, § 3791. See also INT. REV. CODE OF 1954, § 7121 authorizing closing agreements, corresponding to INT. REV. CODE OF 1939 § 3760.

3. MIM. 4963, 1939-2 CUM. BULL. 459.

4. See, e.g., Casey, *Closing and Compromise Agreements and Taxpayers' Rulings*, N.Y.U. INST. ON FED. TAX. 260 (1947).

5. Oliphant, *Declaratory Rulings*, 24 ABA J. 7 (1938). Wenchel, *Taxpayers' Rulings*, 5 TAX L. REV. 105 (1949).

6. Rev. Rul. 54-172, 1954-1 CUM. BULL. 394.

of the Revenue Service in 1952, as part of which there was established, for the first time, a Tax Rulings Division in the National Office, bringing together, on a functional basis, the various units issuing rulings to taxpayers and to field offices on substantive questions concerning all types of taxes (except alcohol and tobacco taxes). A third factor was a recognition within the Revenue Service itself that it was, in fact, and, as a matter of policy should be, committed to the issuance of rulings to taxpayers and field offices as a vital part of our system of tax administration.

The purposes which the tax rulings function were considered to serve as a part of tax administration⁷ were:

- (1) To make it easier for taxpayers to compute their taxes correctly in the first instance and thereby to promote voluntary compliance;
- (2) To lay the groundwork for fair and economical tax administration by placing within the knowledge of both taxpayers and examining officers principles to be applied in the enforcement of tax laws and in the settlement of disputes; and
- (3) To provide certainty as an aid to business and other elements of the economy.

The basic reasons for the Revenue Service, expending money and manpower in the issuance of rulings have not changed over the years.⁸ The role of rulings *as a part of tax administration* has been given greater emphasis by the expanded statements of policy and new rulings procedures. In fact, these have been designed to give greater knowledge of and encouragement to the use of the rulings procedure to enable both taxpayers and field offices to obtain definitive answers to tax questions.

In the past fifteen years, since the first official definitive statement on tax rulings procedure was made, there has been an evolution in the process by which rulings are issued and a broadening of the base of taxpayers' rights under the procedure. A number of other changes have occurred. The purpose of this paper is to review some of these developments and evaluate the role of the tax rulings procedure and policy today. There are inherent limitations in this evaluation. One, of course, is that the field of rulings is so broad—involving so many specialized areas as well as different types of taxes and issues—that to attempt to cover all of them would result in a paper far exceeding permissible pub-

7. Sugarman, *Federal Tax Rulings Procedure*, 10 TAX L. REV. 1, 5 (1954).

8. Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43 TAXES 756, 757.

lication limits and would bog the reader down in detail obscuring important policy points. Another limitation stems from the fact that much information and experience in current Government operations in this field is peculiarly in the hands (and minds) of various officials. The difficulties any one person would have in accurately describing this "elephant" are accentuated where the author is outside the Government. Accordingly, this paper is an attempt to present one practitioner's perspective on certain developments in policy and procedure for the issuance of advance tax rulings by the National Office of the Revenue Service and their use by taxpayers and the Government as tools in tax administration.⁹

TAX RULINGS POLICY AND PROCEDURE IN GENERAL

Definitions and Related Procedures

The term "tax ruling" may be applied to a number of different procedures and processes in the Internal Revenue Service. Properly speaking a "ruling" is an opinion letter issued to a taxpayer or his authorized representative by the National Office of the Revenue Service which interprets and applies the tax laws to a specific set of facts.¹⁰

The term is sometimes (erroneously) applied to the following:

1. A determination letter issued by the District Director of Internal Revenue. This is a letter to a taxpayer or his representative in response to an inquiry by an individual or organization, in which the district director's office seeks to apply the principles and precedents previously announced by the National Office to the particular facts involved. District directors' offices are not authorized to issue "rulings" and a determination letter does not carry the same weight as a ruling.¹¹

2. An advisory letter from the National Office to a field office of the Revenue Service in response to a request for technical advice. Such a letter states the National Office's view as to the interpretation and proper application of Internal Revenue laws and related statutes and regula-

9. As indicated, this paper will not attempt to cover, except by references, procedures involving "requests for technical advice" from field offices to the National Office and requests by taxpayers to District Directors' Offices for "determination letters," including requests for advance determinations of exempt status under § 501 and certain aspects of pension, profit sharing and stock bonus plans.

10. Rev. Proc. 67-1, 1967-1 CUM. BULL. 544, § 2.02.

11. *Id.* at §§ 2.02, 4 and 14.

tions, in connection with a specific set of facts arising in connection with the examination or consideration of the taxpayer's return or claim for a refund or credit.¹²

3. A "closing agreement" between the Commissioner of Internal Revenue or his delegate and a taxpayer. A closing agreement may take several forms. The one most like a ruling is an agreement made with respect to a specific issue or issues, on which a ruling has been issued indicating that a closing agreement will be entered into under section 7121 on the basis of the holding in the ruling letter. Because of the announced policy of the Service generally to honor a ruling issued to a taxpayer, closing agreements are rarely used, and will not be discussed further in this paper.

4. A "Revenue Ruling" or "Revenue Procedure" published in the Internal Revenue Bulletin. These are generally derived from rulings or requests for technical advice but may be otherwise initiated and published for the guidance and information of taxpayers, Revenue personnel and others concerned.

In order to focus on the major aspects of advance rulings policy and procedure, we can put to one side certain limited alternative or related procedures. One of these involves determination letters issued by district directors' offices. Except in the case of applications for exemption of organizations under section 501,¹³ certain aspects of pension, profit-sharing and stock bonus plans,¹⁴ and certain employment and excise tax matters,¹⁵ determination letters are issued by the district directors' office only with regard to questions raised on completed transactions.¹⁶ Generally, experienced practitioners will not raise a question with the Internal Revenue Service *after* a transaction has been completed as to how it should be reflected on a tax return. (I)f such advice is desired or needed, it should be the subject of a request for ruling *in advance* of the transaction. Where the taxpayer has completed the transaction, a request for a determination letter is frequently a one way street from a tax standpoint—if the taxpayer raises the issue with the Revenue Service and receives an adverse answer, he has probably lost whatever chance he had that the Service would not otherwise have

12. Rev. Proc. 67-2, 1967-1 CUM. BULL. 555.

13. Rev. Proc. 67-3, 1967-1 CUM. BULL. 560.

14. Rev. Proc. 67-4, 1967-1 CUM. BULL. 565.

15. Rev. Proc. 67-1, 1967-1 CUM. BULL. 544, § 4.03.

16. *Id.* at § 4.01.

raised the issue or would have decided it favorably on audit; if he raises the issue and receives a favorable answer, such favorable answer is not binding on the Internal Revenue examining agent when he does examine the return (although it can be expected that the determination letter would have some persuasive value).¹⁷ Accordingly, except where the tax practitioner is reasonably sure in advance of a favorable response, he is not likely to use the determination letter procedure (with the exception of the exempt organization and pension, profit-sharing and stock bonus plan areas, as previously indicated).

For reasons similar to those described in the case of determination letters, the rulings procedure has little application or use in connection with federal estate tax matters. Only where there is an estate (i.e., after the client has died) and before the tax return is filed, will the National Office entertain a ruling on a federal estate tax matter.¹⁸

Likewise, there are certain impediments to requests for rulings in employment and excise tax matters. While the Revenue Service has announced that the National Office will issue rulings with respect to these taxes on prospective or completed transactions, either before or after the return is filed, nevertheless the National Office ordinarily will not rule with respect to an issue under the employment or excise taxes if it knows or has reason to believe that the identical issue is before any field office in an active examination or audit of the liability of the same taxpayer for a prior period, or is being considered by a branch office of the appellate division.¹⁹ Since both employment and excise tax matters frequently involve continuing issues, it is often difficult to raise a bona fide new issue on a ruling request to the National Office.²⁰

Hence, the principal areas in which taxpayers can request advance rulings from the National Office of the Revenue Service are in the income tax and gift tax fields.

On the other hand, a procedure comparable in some respects to that applicable to a ruling, and available for income and gift, and estate, employment and excise taxes as well, is the request for technical advice

17. A recent case in which the court made short shrift of the taxpayer's reliance on a favorable determination letter is *Bookwalter v. Brecklein*, 357 F.2d 78 (8th Cir. 1966).

18. Rev. Proc. 67-1, 1967-1 CUM. BULL. 545, § 3.02.

19. *Id.* at § 3.03.

20. An application for a determination letter may be made to a District Office with respect to an employment or excise tax matter on a prospective transaction, but this suffers from the same limitations described above as to timing and reliance. See, however, note 64, *infra*.

procedure.²¹ Generally this is used where an issue is raised by a field office on audit. The field office may initiate a request for technical advice or be persuaded by the taxpayer to do so. In many respects, the consideration by the National Office of an issue raised on a request for technical advice is not different from the consideration given on a ruling, i.e., the taxpayer is entitled to present a statement of the facts, to present a brief of authorities in support of his position and to have a conference in the National Office with respect to the issues raised. The issues involved will be considered by the same branch of the National Office as would consider the issue had the matter been presented, in advance, on a request for a ruling from the taxpayer.

Nevertheless, the availability of the request for technical advice procedure hardly offers taxpayers all of the advantages of an advance ruling. Where an issue is known to exist in connection with a proposed transaction, and the taxpayer has any choice about the transaction and something to lose if his hoped for tax consequences do not materialize, then requesting an advance ruling, where that procedure is available, is clearly superior to waiting for the issue to be raised on audit and then seeking advice from the National Office.

The request for technical advice procedure, while not entirely a one-way street in favor of the Government, is hardly a planning tool for the careful practitioner. To reject the opportunity to request an advance ruling, on reliance that if the issue is raised it can be referred to Washington, requires, in the first instance, an optimistic view that the issue will not be raised on audit and, if raised, that the revenue agent can be persuaded to accept the taxpayer's position. With improved skills on the part of examining agents, the odds of a known issue not being raised on audit are decreasing. Furthermore, if the issue is raised on audit and the examining agent is not persuaded to agree with the taxpayer's position, then there is no assurance that the district office will refer the issue to the National Office (although the National Office, by new procedures, has encouraged the referral of disputed issues on technical matters to it).²² Even so, on such a referral, the presentation of the facts is not in the control of the taxpayer; instead there is an agreed statement of facts, with the district director's office having the right (as does the taxpayer) to present additional facts which are not agreed

21. Rev. Proc. 67-2, 1967-1 CUM. BULL. 555.

22. *Id.* at § 3.02 *et seq.*

to by the other party. Ordinarily, the National Office looks to the field office as the "finder of the facts."

Furthermore, the taxpayer who waits until an issue is raised and then seeks a hearing through a request for technical advice in the National Office, may find that in the meantime the National Office has taken a position or changed its position as the result of the presentation of someone else's case or an intervening court decision.

Finally, the request for technical advice procedure generally requires a difficult decision on the part of the taxpayer's representative as to whether the issue should be presented to the National Office of the Revenue Service, or, alternatively, to the appellate division of the regional commissioner's office. Should the taxpayer present his views under the request for technical advice procedure to the National Office and be turned down, then he can hardly expect the same sympathetic reaction in the appellate division as he might have received had he presented the matter without an adverse precedent. While the appellate division technically is not bound by the advice received by the district director's office from the National Office, the taxpayer obviously has a much more difficult case in attempting to persuade an appellate conferee that not only was the district director's office in error, but also the National Office of the Revenue Service.

The request for technical advice procedure may be characterized as an important safety valve. However, the opportunity to request an advance ruling from the National Office of the Revenue Service before a transaction is finalized is a unique and important tool which allows the tax practitioner (and his client) and the Government to avoid expensive controversy and obtain reasonable repose.

Procedure for Requesting an Advance Ruling

The basic guidelines for requesting advance rulings are now spelled out in Revenue Procedure 67-1,²³ with additional guidelines for requests for technical advice²⁴ and for certain specialized areas involving exempt organizations and pension, profit-sharing and stock bonus plans found in supplemental revenue procedures.²⁵

23. 1967-1 CUM. BULL. 544. The rulings procedure is also set forth in the IRS statement of Procedural Rules, 26 CFR § 601.201. For convenience, references hereafter will be made only to the rules as published in the Revenue Procedures.

24. Rev. Proc. 67-2, 1967-1 CUM. BULL. 555.

25. Rev. Proc. 67-3, 1967-1 CUM. BULL. 560; Rev. Proc. 67-4, 1967-1 CUM. BULL. 565.

The basic procedures and requirements for filing an application for an advance ruling as to income tax or gift tax questions arising in a proposed transaction are as follows:

1. The application should be in the form of a letter addressed to the Commissioner of Internal Revenue.

2. The letter should be directed to the attention of the particular branch which has jurisdiction over the principal issue involved. This is generally shown by symbols;²⁶ for example, a ruling relating to a tax-free reorganization would be directed to the attention T:I:R (meaning the Reorganization Branch (R) of the Income Tax Division (I) under the Assistant Commissioner, Technical(T)). It is generally advisable to submit the request for ruling in duplicate, although this is not always necessary.

3. The request for ruling may be from the taxpayer on his or its letterhead or from the taxpayer's authorized representative. In the latter case, a statement should be made at the outset of the ruling request that it is being filed on behalf of a taxpayer, who is identified.²⁷

4. It is desirable at the outset of the request for ruling to indicate by a brief summary paragraph the nature of the matter and of the issue or question being presented. This will assist in the assignment of the request to the proper personnel and comprehension of the subject matter.

5. The most important part of the request for ruling is the statement of facts. A complete statement of facts should be given which identifies the parties involved and, whenever possible, all documents involved in the proposed transaction. (Alternative plans to accomplish a transaction should not be presented.)²⁸

The importance of the statement of facts is obvious because the ruling issued by the National Office will be based upon the facts as presented. If on audit the examining agent determines that the facts were not as presented, he is authorized to question the application of the ruling (under the request for technical advice procedure) and the taxpayer may find that his reliance on the ruling was misplaced.

6. The Revenue Service's announced policy also calls for the request for ruling to contain a statement "whether, to the best of the knowledge of the taxpayer or his representative, the identical issue is being con-

26. These are published from time to time in the Internal Revenue Bulletin and in the standard tax services.

27. Rev. Proc. 67-1, 1967-1 CUM. BULL. 544, § 6.02.

28. *Id.* at § 6.01.

sidered by any field office of the Service in connection with an active examination or audit of a tax return already filed.”²⁹ This presumably refers to the identical issue raised with respect to a taxpayer who is a party to the request for ruling.

7. The request for ruling should also contain the opinion or determination which the taxpayer is seeking from the Revenue Service.

8. The ruling request should then contain an explanation of the grounds for the taxpayer's contentions together with a statement of relevant authorities in support of his view. This can be part of the letter request for ruling and need not be a separate brief unless the issues are difficult and extensive. (Usually a supplemental brief can be filed with the national office if a controversy erupts.)

9. The request for ruling should also state whether the taxpayer desires a conference. Generally, it is the policy of the Revenue Service to allow only one conference and that “at the stage of consideration when it will be most helpful.”³⁰ Generally, this stage is reached when the branch in the National Office has reached a tentative conclusion that, on the facts presented, either no ruling or an adverse ruling appears to be required. The timing of the conference is important—it must be late enough to be reasonably sure it is necessary (i.e., there is no point in scheduling a conference when a favorable ruling is in process of issuance) and early enough that positions are not frozen. A conference may be the taxpayer's last hope of obtaining a favorable ruling. Even so, after a conference a taxpayer usually is afforded the opportunity to file a further brief in elaboration of and in further support of views which may have been presented at a conference.

10. Another matter of great importance in particular situations is the expeditious treatment of the request for ruling. Generally, the Revenue Service processes requests for rulings in the order in which received. If the taxpayer believes he has grounds for asking that his request for ruling be taken out of order and expedited, then such a request should be the subject of a separate letter (addressed the same as the initial request for ruling) giving the reasons for the request. This request will be separately considered in the branch of the National Office which has the request for ruling but will usually be granted only where a case of hardship is established. The taxpayer can find out whether his request has been granted or denied simply by calling the branch.

29. *Id.* at § 6.02.

30. *Id.* at § 6.08.

11. Finally, the request for ruling must be signed by the taxpayer or his authorized representative. Except where special procedures apply, the request need not be under oath. If signed by a representative or if the representative is to appear before the Revenue Service in connection with the request, then a power of attorney usually must be given to the representative and filed with, or shortly after, the request for ruling. It is important both on the request for ruling and on the power of attorney to indicate the person or firm to whom the original of the ruling is to be issued and to whom copies are to be sent.

There are, of course, variations in the amount of material and type of information to be submitted in a request for ruling, depending on the subject matter of the request. For example, in connection with a ruling involving a tax-free reorganization, the business purpose of the transaction is an essential element of the request for ruling. Other facts become important depending on the position of the Revenue Service or the requirements of the statute. For example, a request for ruling under section 367, relating to tax-free incorporations, reorganizations or liquidations involving a foreign corporation, must not only contain certain factual representations but also a statement "executed under the penalties of perjury" setting forth the facts and circumstances relating to the plan under which the transaction is to take place.³¹

The Revenue Service has indicated that in some circumstances it will issue rulings on prospective transactions based on a summary statement of the facts as submitted by the taxpayer (although even under this procedure the Revenue Service still requires a complete statement of facts and reserves the right to rule on the basis of a more complete statement of facts).³² This, in effect, permits the taxpayer to write the statement of facts portion of the ruling, and is a means of avoiding misrepresentations of facts and documents presented, and possibly expediting the handling of a ruling request.

The above outline of the requirements of a request for ruling indicate the efforts of the Revenue Service to keep the requirements simple so that letters from unsophisticated taxpayers can be treated as ruling requests while at the same time retaining an arsenal of requirements for the sophisticated taxpayer or the complicated transaction. Requesting a ruling is a serious business, and a taxpayer should not do so

31. Inc. Tax Reg. § 1.367-1.

32. TIR No. 692, Feb. 11, 1965.

unless he is reasonably sure of a favorable ruling or is prepared to live with an unfavorable one.

DEVELOPMENTS IN TAX RULINGS POLICY AND PROCEDURE

There have been a number of important developments in tax rulings policy and procedure during the past fifteen years, most of them generally in the direction of removing the mystery with regard to the policy and procedure of the Service concerning rulings and the guidelines used for issuing or not issuing rulings.

Areas of "No Rulings"; Guidelines as to When Rulings Will be Issued

Historically, the Revenue Service has said that it will not issue rulings in hypothetical cases and that ordinarily rulings will not be issued where the determination requested is primarily one of fact.³³ These generalized statements became more particularized beginning in 1960 and have been generally codified in a series of rulings beginning in 1964. In Rev. Proc. 64-31, the Revenue Service listed areas "in which rulings will not be issued" and areas "in which rulings will not ordinarily be listed."³⁴ These two lists contain twenty-five types of problems, generally of a factual nature or of the kind about which most tax practitioners would be reluctant to request advice from Washington. For instance, there is no point in asking for an advance ruling that tax considerations are not part of the motivation in a transaction when even to ask the question suggests an adverse answer (such as whether the acquisition of assets of another corporation, which would result in the enjoyment of a deduction or a credit for tax purposes, would be regarded as made for the principal purpose of tax avoidance under section 269).

On the other hand, some of the proscribed areas reflect the policy of the Revenue Service not to encourage particular types of transactions. An example is the application of section 264, relating, in part, to the deduction of interest on indebtedness incurred or continued to purchase or carry life insurance, endowment or annuity contracts. The statute allows the deduction under some circumstances; for example, if no part of four of the annual premiums due during the seven-year period (beginning with the date the first premium on the contract was paid) is paid pursuant to a plan of purchase which contemplates the

33. Rev. Rul. 10, 1953-1 CUM. BULL. 488, § 4. The current general statement of policy is found in Rev. Proc. 67-1, 1967-1 CUM. BULL. 544, § 5.01.

34. 1964-2 CUM. BULL. 947.

systematic direct or indirect borrowing of part or all of the increases in the cash value of such contract. The Revenue Service apparently has determined that it will not assist in the purchase of insurance where borrowing is involved.

On the other hand, there has been some evolution in the policy of the Revenue Service in broadening the scope of areas in which it will issue rulings. For example, in Rev. Proc. 64-31, the Service included in the areas in which rulings will not *ordinarily* be issued, the question "whether the distribution or disposition or redemption of '306 stock' in a closely held corporation is in pursuance of a plan having as one of its principal purposes the avoidance of Federal income taxes within the meaning of § 306(b)(4)."³⁵ More recently the Revenue Service has issued Rev. Proc. 66-34 containing certain operating rules it follows in issuing or declining to issue ruling letters.³⁶ In Rev. Proc. 66-34, the Service indicated certain circumstances under which advance rulings usually will be issued that stock is not "section 306 stock" or, where it is held to be "section 306 stock," that a distribution, or disposition or redemption will not be regarded as in pursuance of a plan of tax avoidance and the penalties of ordinary income treatment under § 306(a)(1) and (a)(2) will not be applicable.

The policy of issuing guidelines has been most fruitful in the area of corporate reorganizations in which the Revenue Service has issued not only Rev. Proc. 66-34, and amendments thereto,³⁷ but also an announcement of its guidelines for rulings policy under section 367.³⁸ The latter is particularly important because this is one of the few areas in which the statute expressly provides for the issuance of advance rulings by the Secretary of the Treasury or his delegate (the Commissioner) and in which, unless the ruling is obtained in advance of the transaction, the tax consequences generally are adverse. For many years the policy of the Revenue Service under section 367 was shrouded in mystery in the sense that certain practices were readily discernible but there appeared to be no announced or unannounced policy formulated as the basis for the practice. The salutary effect of the announcements in the reorganization areas, including section 367, is that taxpayers can determine in advance, in planning transactions,

35. *Id.* at § 401.

36. 1966-2 CUM. BULL. 1232, §§ 4, 5.

37. Rev. Proc. 67-13, 1967-1 CUM. BULL. 590.

38. Announcement 66-63, 1966-40 INT. REV. BULL. 17.

whether they are wasting their time in expecting to obtain an advance ruling.³⁹

On balance, it must be said that the Revenue Service deserves credit for the policy of announcing its operating rules and guidelines as to whether it will or will not issue rulings. These announcements have been long in forthcoming and the Revenue Service, if it is to maintain an effective rulings program, should do more in this area. It is not only important for taxpayers to know what the position of the Revenue Service is, and whether an advance ruling will be issued, but it is also helpful to the Government that transactions and requests for rulings are tailored so that the Government can rule favorably. By increasing such announcements, the Revenue Service can contribute effectively to tax administration by discouraging taxpayers from engaging in questionable transactions and possibly in alerting field offices as to issues to be scrutinized carefully.

There are also some dangers in the Revenue Service policy. The announcement of areas in which rulings will be issued or not issued tends to dictate the form of transactions, because, where substantial sums are involved, the taxpayer frequently cannot take a chance on engaging in a transaction in which he cannot obtain a favorable ruling in advance.

39. In some situations, the Service has announced new policies as amendments of Rev. Proc. 64-31. An example is Rev. Proc. 65-4, 1965-1 CUM. BULL. 720, amplifying Rev. Proc. 64-31 by adding a policy statement to the effect that the Revenue Service will not issue an advance ruling as to whether a taxpayer who advances funds to a charitable organization and receives therefor a promissory note may deduct as contributions, in one taxable year or in each of several years, amounts forgiven by the taxpayer by endorsements on the note.

Another example is Rev. Proc. 67-13, 1967-13 INT. REV. BULL. 23, amending Rev. Proc. 66-34, to indicate the policy of issuing rulings with respect to reorganizations involving contingent stock.

On the other hand, the Revenue Service has issued new revenue procedures or revenue rulings, as to a rulings position, which are not made amendments to the basic codification. An example is Rev. Proc. 67-14, 1967-13 INT. REV. BULL. 23, setting forth the conditions under which the Revenue Service will issue rulings on waiver of dividend transactions where a family relationship exists between the waiving and remaining stockholders.

Possibly another example is Rev. Rul. 67-326, 1967-40 INT. REV. BULL. 12, in which the Service takes the position that it will not rule that a *merger* of one corporation (the transferor) into a subsidiary of another corporation (the parent), in which the parent's stock is used to effectuate the merger, is a tax free reorganization under IRC § 368(a) (1)(A), although it may rule that it will qualify as a tax free reorganization under § 368(a) (1)(C). Compare Rev. Rul. 67-448, 1967-51 INT. REV. BULL. 15, where a merger of the subsidiary into the first corporation may result in a favorable ruling under § 368(a) (1)(B).

Another danger lies in the fact that the no rulings policy of the Service may be interpreted by field offices and possibly by others as being the law of the land, requiring an adverse tax determination. While the Revenue Service should continue its policy of announcing its rules and guidelines for issuing rulings, it also should make it clear that these guidelines are for purposes of those who request a favor of the National Office in the form of an advance ruling, i.e., a commitment in advance of audit, and that the refusal of the Service to issue an advance ruling simply means that it will not give the taxpayer an insurance policy. However, this should not be interpreted as meaning that if the taxpayer goes forward with the transaction, an adverse tax determination is required.⁴⁰

Reliance on Rulings; Nonretroactive Application of Reversals

One of the principal reasons for a taxpayer requesting an advance ruling from the Revenue Service is to obtain a determination of tax consequences upon which the taxpayer can rely. While the Revenue Service had for many years a general policy to honor a ruling letter to a taxpayer on which the taxpayer relied in good faith, it was not until 1954⁴¹ that this policy was officially published. While the published statement has been modified over the years, the policy has not been substantially changed and as presently stated is as follows:

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 (1) there has been no misstatement or omission of material facts, (2) the facts subsequently developed are not materially different from the facts on which the ruling was based, (3) there has been no change in the applicable law, (4) the ruling was originally issued with respect to a prospective or proposed transaction, and (5) the taxpayer directly involved in the ruling acted

40. For example, where a corporation in liquidation sells its assets to another corporation in which shareholders of the transferor corporation own stock, the Revenue Service will not rule in advance that the transaction is a sale and liquidation (rather than a reorganization) unless the shareholders of the transferor corporation own not more than 20% of the stock of the transferee corporation. Rev. Proc. 64-31, 1964-2 CUM. BULL. 947, § 3.01, and Rev. Proc. 66-34, 1966-2 CUM. BULL. 1232, § 3.04. The law, however, is not limited to such 20% situations. Gallagher, 39 T.C. 144 (1962).

41. Rev. Rul. 54-172, 1954-1 CUM. BULL. 394 § 12.

in good faith in reliance upon the ruling and the retroactive revocation would be to his detriment.⁴²

As part of this policy the Revenue Service takes the position that a ruling issued to one taxpayer cannot be relied upon by another taxpayer and that a ruling issued to a taxpayer with regard to a particular transaction cannot be relied upon by that taxpayer for the tax consequences of another transaction. While this position may seem to be harsh, it is felt to be necessary by the Revenue Service to protect itself against perpetuating errors in case it finds that an initial ruling was in error or should be reversed and no longer represents a position that the Revenue Service believes is correct under the law.

The policy of the Revenue Service is that published rulings have precedent value. Once a ruling is published, it is available to all taxpayers and, under the announced policy of the Revenue Service "taxpayers generally may rely upon such [published] rulings in determining the rule applicable to their own transactions and need not request a specific ruling applying the principles of a published Revenue Ruling to the facts of their particular case where otherwise applicable . . . Revenue Rulings published in the Internal Revenue Bulletin ordinarily are not revoked or modified retroactively."⁴³ This precedent-aspect of rulings provides a vehicle making it unnecessary for a particular taxpayer to request repeated rulings in order to apply his previous ruling to other similar transactions. It also will presumably act to provide equivalent treatment for other taxpayers with similar problems.

An additional safety valve to the retroactive revocation of a private letter ruling, which may be known and used by many taxpayers, is the fact that the Revenue Service may use discretion in giving only prospective effect to a newly published position even though the prior position was not published in the Internal Revenue Bulletin. The statutory base for the Commissioner to limit the retroactive application of the ruling is the same whether the ruling publicly states a position for the first time or revokes a previously published revenue ruling.⁴⁴ While the Revenue Service zealously maintains its legal authority to make any published ruling retroactive (except where specifically limited by statute),⁴⁵ nevertheless, in the exercise of judgment in the administra-

42. Rev. Proc. 67-1, 1967-1 CUM. BULL. 544, § 13.05.

43. *Id.* at 13.09.

44. INT. REV. CODE OF 1954 § 7805(b). See *International Business Machines Corp. v. U.S.*, 343 F.2d 914 (Ct. Cl. 1965), especially n. 13.

45. For a study of legal and administrative considerations, see Note, *Retroactive Re-*

tion of the tax laws, it has found increasing occasions in which it has announced that a published position will be applied only prospectively.

One example of this policy is found in the promulgations beginning in 1964 concerning the Revenue Service's position in the application of section 482, which relates to the allocation of income and deductions among related taxpayers.⁴⁶ The Revenue Service announced a series of revenue procedures to permit taxpayers to adjust to new administrative interpretations of section 482 in taxable years in which the taxpayers may have been unaware of such interpretations.

Another example is the position the Revenue Service took with regard to "swap funds." The Service had issued certain letter rulings to the effect that individuals could transfer their securities tax free to a new investment company considered to be controlled by the transferors under section 351. This, in effect, provided a method of tax free diversification of portfolios. In 1961, the Revenue Service announced that it would not issue rulings with respect to this type of transaction,⁴⁷ although copies of such letter rulings were generally in widespread circulation. On July 14, 1966, the Commissioner issued proposed regulations under section 351 which, in effect, would treat the type of transactions on which it had previously given favorable rulings as taxable transactions. Simultaneously, the Revenue Service announced that in view of previous uncertainty, the position stated in the regulations would not apply to transfers which had taken place previously (including securities deposited prior to July 14, 1966 to be transferred after that date).⁴⁸

A somewhat different situation, but illustrating the same principle, was the announcement made in Rev. Rul. 65-259⁴⁹ in which the Revenue Service held that personal holding company income includes rental income derived from a corporate lessee, any one of whose shareholders owns twenty-five percent or more of the stock of the lessor corporation. The position was contrary to the decision of the Tax Court in

vocation of Revenue Rulings, 42 NYU L. REV. 92 (1967). As to an express legal limitation, see Rev. Act of 1926, § 1108(b), relating to the excise tax on sale or lease of certain articles, discussed in Rev. Proc. 67-1, 1967-1 CUM. BULL. 544, § 13.08.

46. Rev. Proc. 65-17, 1965-1 CUM. BULL. 833.

47. TIR No. 303 as amended by TIR No. 311, 7 CCH 1961 STAND. FED. TAX REP. ¶ 6311.

48. TIR No. 832, 7 CCH 1966 STAND. FED. TAX REP. ¶ 6658. Subsequently additional extensions were provided by legislation, now INT. REV. CODE OF 1954, § 351 (a) and (d).

49. 1965-2 CUM. BULL. 174.

*Minnesota Mortuaries, Inc.*⁵⁰ There had been no previous revenue ruling on the particular point involved, but the Commissioner acquiesced in the *Minnesota Mortuaries* decision.⁵¹ Rev. Rul. 65-259 illustrates that the Commissioner may make a new revenue ruling prospective only when it is contrary to a prior acquiescence.⁵²

The exercise of discretion by the Commissioner in these and other situations indicates the Commissioner's awareness of the concern, and even the attacks, by practitioners on his exercise of the power to issue rulings with retroactive application. A case which brought this issue sharply into focus was the Court of Claims decision in *International Business Machines Corp. v. United States*.⁵³ This case involved the excise tax on the sale or lease of business machines. The facts indicated that Remington Rand received a favorable ruling in 1955 that its computer was not subject to the tax. IBM, upon hearing of the ruling, immediately requested the same, but it did not obtain a ruling until more than two years later and then it was adverse. The favorable tax ruling to Remington was finally revoked prospectively as of February 1, 1958. IBM did not enjoy a similar advantage. The Court of Claims allowed IBM to recover the taxes paid by it on the rental and sale of computers for the period that Remington was not subjected to the tax. The court, by a three to one decision held that the Commissioner abused his discretion in granting Remington tax free treatment without applying a like ruling to IBM. The court indicated that the power given to the Revenue Service under IRC section 7805(b) to limit the retroactive effect of a ruling carries with it the obligation to consider the totality of the circumstances surrounding the ruling, and cited a Supreme Court decision for the proposition that "The Commissioner cannot tax one and not tax another without some rational basis for the difference."⁵⁴ On the facts, the court concluded: "When we examine the agreed facts, we cannot escape holding that there was clear abuse, that the circumstances compelled the Service to confine its ruling (when it was finally given) to the future period for which Remington Rand's computers were held to be taxable."⁵⁵

50. 4 T.C. No. 280 (1944).

51. 1945 CUM. BULL. 5.

52. 1965-2 CUM. BULL. 174. The prior acquiescence was also withdrawn. 1965-1 CUM. BULL. 5.

53. 343 F.2d 914 (Ct. Cl. 1965).

54. Frankfurter, J. concurring in *United States v. Kaiser*, 363 US 299, 308 (1960).

55. 343 F.2d 914, 921 (Ct. Cl. 1965).

While the *IBM* decision is a clear warning that a court will compel a nonretroactive application of a ruling where the failure to do so by the Commissioner is, under all the circumstances, an abuse of discretion, the decision has not created widespread limitations on the Commissioner's authority to make a ruling retroactive. The *IBM* case presented some highly unusual facts and, in subsequent decisions, both the Court of Claims,⁵⁶ and the Court of Appeals for the Eighth Circuit have limited the application of the *IBM* decision.⁵⁷ These decisions, however, do not dispel the importance of the *IBM* decision. The decision, while probably not a popular one among defenders of the legal position of the Commissioner, is a salutary one in indicating that the courts will

56. *Bornstein*, 345 F.2d 558 (Ct. Cl. 1965); *Knetsch* 348 F.2d 932 (Ct. Cl. 1965). See also *Shakespeare Co. v. U.S.* 21 AFTR 2d 510 (Ct. Cl. 1968), discussed in note 70, *infra*.

57. In *Bookwalter v. Brecklein*, 357 F.2d 78 (8th Cir. 1966), reversing 231 F. Supp. 404 (W.D. Mo. 1964), the taxpayer sought and obtained a "determination letter" from his local district director's office applying, in effect, the same principle as was stated in a "private" letter ruling issued to taxpayers in another state and published in a private tax service. The letter ruling was not published by the Internal Revenue Service in the Internal Revenue Bulletin and, in fact, was revoked (prospectively) by a letter to the taxpayer that had initially applied for the ruling. The determination letter issued by the district director's office in *Brecklein* was likewise revoked about a year later, after the Revenue Service published a revenue ruling contrary to the determination letter. Rev. Rul. 60-327, 1960-2 CUM. BULL. 65. The taxpayers in *Brecklein* paid tax on the basis of the new (adverse) determination, filed suit for refund and were successful in the district court on the ground that the taxpayers were entitled to the non-retroactive application of the Commissioner's revocation of his previous ruling letter to others. The court of appeals did not agree, distinguishing the *IBM* case on its particular facts and holding that the *IBM* decision "was not intended to be a blanket ruling." The court upheld the Commissioner's authority not to apply a ruling to one taxpayer in favor of another taxpayer where the Commissioner had not published the ruling. It should be noted, however, that the court indicated that "when the Commissioner abuses his discretion . . . remedial action should be taken."

A similar conclusion has recently been reiterated by the Tax Court in *McLane v. Commissioner*, 46 T.C. 140 (1966). In this case the taxpayer argued that he relied upon several well publicized private rulings to the effect that interest paid and/or prepaid on certain loans used to purchase single premium and multiple premium annuities was deductible in the year of payment. In 1954, the Revenue Service published Rev. Rul. 54-94, 1954-1 CUM. BULL. 53, holding that such interest was not deductible. The taxpayer complained of the retroactive application of the published revenue ruling because of his reliance on prior private rulings and a statement made by a revenue official. The court, apparently with little sympathy for the taxpayer's basic position in seeking to benefit from a loophole, held that he could not "avoid the numerous decisions holding that one taxpayer cannot rely upon a private ruling issued to another under the guise of equality of treatment." The court distinguished the *IBM* case on the ground that the taxpayer's situation was not factually the same as those of the taxpayers to whom the private letter rulings were issued.

step in where there is an abuse of discretion. This should be helpful in keeping Revenue Service personnel alert against extreme arbitrariness and give taxpayers some feeling of confidence—both of which will contribute to a sound tax system. Of course, resort to the courts is no substitute for the sound exercise of discretion by the Commissioner, and even the *IBM* case is restricted to abuses of discretion.

The Revenue Service has indicated that it understands the importance of taxpayer confidence as vital to the administration of the tax laws;⁵⁸ but at the same time, the increasing complexities of the tax laws and of transactions make it clear that in many situations the Revenue Service may have a choice of positions and that taxpayers may generally with logic—and even encouragement from the Revenue Service—believe or assume that a particular interpretation represents the intended application of the law, only to find the Revenue Service making a different choice at a later time. The theory that a newly published ruling represented the law all the time—no matter how recently discovered—has certainly been exploded by many circumstances. For example, the courts have occasionally reached decisions favorable to the Government, but the language used may go beyond—and even contrary to—the Commissioner's position. In a 1950 published ruling, the Revenue Service refused to follow the views of the Court of Appeals for the Sixth Circuit which held that traveling expenses of Government employees in excess of per diem allowances are not deductible.⁵⁹ The court's holding was contrary to the Service's position and the Commissioner announced he would not follow the decision.

Other examples can be cited in which court decisions have suddenly appeared indicating a different view of the law than the Revenue Service may have been taking in unpublished rulings.⁶⁰ Aside from

58. Cohen, *The Internal Revenue Service Today*, 45 TAXES 317, 319 (1967).

59. I.T. 4012, 1950-1 CUM. BULL. 33, refusing to follow *Comm'r v. Motch*, 180 F.2d 859 (6th Cir. 1950).

60. See *Zenz v. Quinlivan*, 213 F.2d 914 (6th Cir. 1954) *reversing and remanding* 106 F. Supp. 57, (N.D. Ohio 1952) (the court of appeals held a shareholder is entitled to capital gain where a portion of the stock was first sold to outsiders and the balance retired by the corporation; the Revenue Service announced it was following this ruling, Rev. Rul. 54-458, 1954-2 CUM. BULL. 167; Rev. Rul. 551-745, 55-2 CUM. BULL. 223.); *Holsey v. Comm'r*, 258 F.2d 865 (3rd Cir. 1958) *reversing and remanding* 28 T.C. 962 (1957) (the court of appeals held the taxpayer was not in receipt of a dividend on redemption of another shareholder's stock; the Revenue Service announced it was following this decision, Rev. Rul. 58-614, 1958-2 CUM. BULL. 920). Other recent cases in which the courts have gone beyond the Commissioner's position in reaching a result favorable to the Government are: *Poole v. Comm'r*, 46 T.C. 392 (1966) (capital.

these cases indicating some lack of coordination in the Revenue Service, they give credence to the fact that there are many areas of the law in which a choice of positions can reasonably be taken. In each case where this is true, the Revenue Service, in publishing a ruling or in revoking an unpublished ruling which has become known, must weigh the question of whether the demands of revenue require it to take a retroactive position which may undermine the confidence of a great number of taxpayers. The recent trend, which indicates that the Revenue Service is not limited in its nonretroactive application of rulings to cases where it is revoking a prior published ruling, indicates an awareness of a larger problem of taxpayer confidence. Obviously not every ruling can be prospective only, particularly because many rulings can cut both ways, with some taxpayers wanting an announced position to apply to prior years and others wanting it to apply only to future years, depending on which side of the transaction the particular taxpayer falls.⁶¹

As it stands now, it appears that the department is feeling its way toward a policy as to when rulings will be prospective only. At some point, and without limiting its discretion, the Revenue Service should gather its precedents and seek to clarify its policy with regard to making rulings prospective only.

Published Rulings; Timing of Rulings

One of the important aspects of the policy adopted in 1953 was to increase the publication of rulings; one reason was to try to eliminate the appearance of secrecy and of discrimination arising from the issuance of unpublished private rulings. However, in addition to the number of rulings that are published, the speed with which ruling letters are published is an important phase of the publication program. In turn, the speed with which revenue rulings are published is closely related to the

gain treatment denied on a ground contrary to Regs. § 1.1235-1(b)) and *Gittens v. Comm'r*, 49 T.C. No. 44 (1968) (treating distributions from a terminated pension trust to an employee shifting to a new corporation in a reorganization as ordinary income rather than capital gain under INT. REV. CODE OF 1954 § 402(a)(2)).

61. See *Gordon v. Comm'r*, 67-2, U.S. TAX CAS. ¶ 9592 (2d Cir. 1967), and *Comm'r v. Baan*, 67-2, U.S. TAX CAS. ¶ 9556 (9th Cir. 1967) in which the two circuit courts reached opposite conclusions on appeals from 45 T.C. 71 (1965). Certiorari was granted by the Supreme Court January 15, 1968. In this case the Commissioner issued a ruling to the effect that a certain spin off would result in a taxable dividend. This conclusion was accepted by the corporate stockholder but not by individual stockholders who litigated with opposite results.

time of the issuance of ruling letters in the first place. These matters will be considered together in this section.

The record of the publication of revenue rulings has been somewhat uneven. Prior to the policy adopted in 1953, the number of published rulings had substantially diminished. Since then, the flow of published rulings has not only increased but also has fluctuated, probably due to internal policy rather than to the availability of rulings.⁶²

It is also apparent that not all rulings of importance to taxpayers have been published. A prime example involves the favorable rulings which were issued with regard to "swap funds" which were well known in the industry and which were never published by the Revenue Service; eventually, of course, a contrary ruling was published with non-retroactive effect.⁶³ There are a number of other positions which are known to tax practitioners as reflecting rulings policy of the Revenue Service and which appear not to have found their way into published rulings.⁶⁴ Tax practitioners who can obtain letter rulings on these matters are not likely to complain, but only to wonder what else they may be missing.

While it is hardly possible for the Revenue Service to publish in the Internal Revenue Bulletin all rulings or all rulings that *anyone* might think have some precedent value, nevertheless, it is important that the Service constantly keep alert to publish rulings that at least are likely to be important to those who are tax advisors.

As indicated, some part of this problem may be the matter of timing of publication of rulings after a ruling letter has been issued. It is not suggested that a ruling letter addressed to a taxpayer be held up until the publication in the Internal Revenue Bulletin occurs. This would

62. Substantive and procedural rulings and instructions published in the Internal Revenue Bulletin for all taxes (except those relating to alcohol, tobacco and firearms taxes) for the following fiscal years ended June 30 totaled:

1952	79
1955	618
1966	316

The corresponding number for fiscal 1967 is apparently 446. It is difficult to determine the total number of unpublished rulings because of different definitions or methods of counting "rulings" from time to time. See footnotes 68 and 70 *infra*.

63. See footnotes 47 and 48, *supra* and related text.

64. See *Shakespeare Co. v. U.S.*, 21 AFTR 2d 510 (Ct. Cl. 1968), in which there is described an affidavit of the Chief of the Excise Tax Branch in the National Office of the Revenue Service, indicating that "some letter rulings are published, others are filed in a so-called 'Precedent File' and others are filed in a 'Non-Precedent File.'" *Id.* at 512. The number of such excise tax "Precedent Rulings" issued since 1954 is said to be ten thousand, a number far exceeding those published.

place a hardship upon the taxpayer requesting the ruling and would probably have the effect of slowing down the rulings process until its usefulness might be largely destroyed. On the other hand, there certainly is an obligation to publish any important ruling promptly.

One reason for delay in the past was the fact that a ruling after issuance to a taxpayer was rewritten in publication form and then, perhaps for the first time, was sent to the Chief Counsel's office. This sometimes led to differences of opinion as to the correctness of the answer as well as the style and form of the ruling to be published. The Service has sought to streamline this procedure;⁶⁵ but, based upon limited observation, there appears to be a substantial gap—such as ten months—between the issuance of a ruling and its publication in the Internal Revenue Bulletin. Obviously, this is not always the case; and the Revenue Service, in many cases, has taken pains to indicate, by prepublication announcements, that important rulings will soon be published. However, taxpayers should have some assurance that the Revenue Service keeps under constant surveillance its own procedures looking toward early publication of rulings of precedent value.

To an important degree, the problem of publication and timing of publication of rulings is but one aspect of a larger problem involving the timing and the processing of rulings generally.

Requests for tax rulings are initially considered in the rulings branch which has jurisdiction over the principal issue involved. Sometimes coordination with one or two other branches is necessary. For example, if a request for a ruling is filed as to whether an individual is entitled to capital gain treatment under section 402 by reason of a total distribution of his interest under a pension plan following termination of employment, the ruling request is first directed to the pension branch which has jurisdiction under section 402. However, the question of whether the individual has terminated his employment is referred to the employment tax branch which advises the pension branch on this issue.

Rulings may be signed by a section chief or higher authority, and, of course, the more reviews to which the ruling is subject, the longer it is likely to take for final signature. In addition to consideration of the ruling in one or more of the branches and then at a division level under

65. TIR 164, June 16, 1959, announcing that review and approval by the chief counsel's office is no longer required for publication of individual rulings.

the Assistant Commissioner (Technical), the ruling request also may be referred to the Chief Counsel's Office.

In considering the timing of action on rulings, the Revenue Service has adopted a system under which certain cases take priority. These include responding to requests for technical advice from the field offices, issuing rulings in those cases in which rulings are required by the statute (such as section 367) and rulings in which the taxpayer has made out a case for expeditious treatment.

The problems delaying prompt action on rulings are contributed to both by the taxpayer (or his representative) and by the situation within the Internal Revenue Service. Taxpayers who prepare and submit incomplete requests for rulings, which require the submission of additional facts or other statements clarifying the matter at hand, obviously contribute to delay in issuing a ruling. The Revenue Service quite properly can expect the taxpayer or his representative who exercises the privilege of requesting a ruling from the national office to do all the necessary preparation, including legal research, involved in submitting the request for ruling. The Revenue Service has made it clear that it will not consider requests for rulings involving alternative plans and the Revenue Service published procedure also calls for the taxpayer to submit a statement of authorities in support of the ruling requested. If these rules are not followed, the request may be returned because of improper presentation. If it is not returned, the taxpayer who fails to follow these simple rules has little to complain about if it seems that it takes an inordinate amount of time to respond to his request for ruling.

On the other side of the coin, the Revenue Service has its own problems. One of them involves the matter of manpower and money and the other involves the matter of attitude. The problems of manpower and money are complicated because of overall budget limitations, difficulties in obtaining and keeping competent people and the constant question of whether the Revenue Service can more effectively use its money and manpower in enforcement rather than in rulings work.

With respect to these money and manpower problems, the tax practitioner can do little except to encourage competent people to accept governmental employment, to express their views to the appropriate governmental officials (including appropriations committees of Congress) when questions as to the importance of the rulings function arise, and to be patient, realizing that the tax rulings function involves only a portion of the Revenue Service's job.

Aside from these factors, however, there is the matter of attitude or policy of the Internal Revenue Service with regard to the issuance of rulings. One of the advantages of the program of issuing rulings in the National Office is that, generally speaking, the personnel of the National Office will view issues in their perspective of the statutory plan rather than on the basis of the amount of revenue in a particular case. On the other hand, to the extent there is a tendency to consider every ruling as involving a precedent for all taxpayers, there will be a reluctance to move rapidly to resolve an issue.

The dilemma is that the rulings function vis-a-vis taxpayers' requests (as distinguished from requests for technical advice from the field) serves a real purpose only if the function can be promptly performed. If it generally took a year to issue a ruling, then the rulings procedure would be available only to those select few who could afford that kind of time; and there are very few in that position. Or, to put the matter another way, the quickest way for the Revenue Service to kill off the rulings function is to delay the issuance of rulings so that, while the rulings procedure is theoretically available to taxpayers, it is of little practical use. This is not to suggest that the Revenue Service is doing so; it is only to point out that the timing of rulings and the effort of the Revenue Service to issue rulings promptly are of prime importance to the value of the function.

The time it takes for a ruling to be issued has been increasing, although it does not appear that the rulings volume is greater.⁶⁶ The attitude in the Internal Revenue Service as to the amount of time that

66. For the fiscal year ended June 30, 1953, the Treasury Department reported that the *average* time the IRS took to answer taxpayers' requests for rulings was twenty-eight days. [1953] ANNUAL REPORT OF SECRETARY OF TREASURY 132. Experience now indicates that the time appears to be ninety days or more. While it is difficult to compare statistics as to the number of rulings issued in one period with those issued in another because of possible differences in definitions of what constitutes a "ruling," the annual reports of the Commissioner of Internal Revenue indicate the following rulings were issued by the national office (excluding those relating to alcohol, tobacco and firearms taxes):

Fiscal year ended June 30, 1952	63,100
Fiscal year ended June 30, 1955	42,474
Fiscal year ended June 30, 1966	26,486

See also various statistics on rulings in Note, *Revocation of Revenue Rulings*, 42 NYU L. REV. 92, 107-08 (1967), and in Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43 TAXES 756, 767 (1965).

may be taken to issue the average ruling seems to be that it is proper for it to take three to four months. This attitude seems to be derived from a need for caution and from a view that the taxpayer is seeking a privilege in requesting a ruling. However, this function is not solely for the benefit of taxpayers. As indicated at the outset, the issuance of rulings is a vital part of tax administration in which the Revenue Service receives as much benefit as the taxpayers.

Can letter rulings and revenue rulings be issued more quickly, i.e., with less concern that every ruling is a matter of precedent for all time and with more regard to the importance of timing? Aside from budgetary and manpower problems, the answer should be in the affirmative. If the Revenue Service is willing to admit that it can make a mistake every once in a while and is willing to exercise its discretion to adopt new positions on a prospective basis, then it should be willing to take positions and issue rulings promptly and should feel under some pressure to do so. The Revenue Service has in the past reversed itself on rulings and undoubtedly will continue to do so in the future. Perfection is impossible in the complicated world of tax laws and tax administration.

Obviously, there has to be some balance; the national office cannot be merely a mill grinding out opinions at the whim of taxpayers requesting the same and then binding the Government to the ill-considered conclusion that might be reached. However, it is important that there be no drift the other way, i.e., into a position that rulings take such a low priority that there is no pressure to reach a conclusion or to issue a ruling promptly.

Revenue Service officials are well aware of these questions and to their credit have taken numerous steps to meet the issues. One of these steps is the delegation of authority to lower levels in the Revenue Service including the authority to section chiefs to sign letter rulings to taxpayers. These and other similar internal steps can expedite the handling of rulings and the promptness with which they are issued. However, this is an area in which continuing alertness to the problems and surveillance of the procedures is essential. Tax practitioners should make constructive suggestions to the Revenue officials in this area, and all personnel in the Revenue Service should be aware of the importance of the rulings function—not only as to the substance of decisions taken but also as to the timing of the rulings and the publication of the same—as part of tax administration.

Other Developments

As part of the fact that our revenue system—with its important financial impact on the country—must be responsive to the needs of taxpayers and changing personal and business developments, it can be expected that the tax ruling policy and procedure will be modified and in turn affected by the flow of events. There seems to be no question that the Revenue Service is committed to a policy of issuing advance rulings; there remains the question of how the policy and procedure is to be implemented in a vital economy.

Rulings to Groups or Associations. A recent development encouraged by the Commissioner of Internal Revenue has been the suggestion that professional and other associations present matters for consideration by the Internal Revenue Service as proper subjects for rulings to be published in the Internal Revenue Bulletin. This suggestion arises from the view that the Revenue Service is not seeing all new issues simply by responding to individual requests for rulings, and that there may be many problems common to groups of taxpayers in which professional or tax-oriented organizations might be helpful in both the presentation and solution of the problems.

This is a departure from prior concepts in the income, estate and gift tax areas but has not been unknown in the excise tax area where rulings were applied for by members of associations for the benefit of an industry. The need for this type of submission to the Revenue Service by professional groups with regard to a common problem is particularly meaningful in the estate tax area, since advance rulings are practically impossible otherwise. A notable example of a ruling published by the Revenue Service in the estate tax area which resulted from the cooperative efforts of professional organizations and the Revenue Service is Rev. Proc. 64-19,⁶⁷ relating to the estate tax treatment of pecuniary formula marital deduction bequests. It is understood that consideration is being given to developing other rulings in the estate tax and income tax areas also arising out of problems called to the attention of the National Office of the Revenue Service by professional groups.

While the Revenue Service reserves the right to determine whether it will issue any such rulings as requested, this program is a constructive use of the rulings function. It represents a maximum attempt to use

67. 1964-1 CUM. BULL. 682.

the tax rulings function as an important part of tax administration in areas that may affect a large number of taxpayers.

The Freedom of Information Act. The Freedom of Information Act became law on July 4, 1966, as an amendment of the Administrative Procedure Act.⁶⁸ The new Act is a culmination of years of effort to amend section three of the Administrative Procedure Act relating to public information. In general, the purpose of new section three is to require an agency to make available almost any information of record concerning its operations, unless the information falls within certain exempted categories. Under the new law, an agency must permit public inspection of statements of policy, interpretations and administrative staff manuals and instructions to its staff that affect any member of the public. The agency is permitted, but only "to the extent required to prevent a clearly unwarranted invasion of personal privacy," to delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation or staff manual or instruction; but even then "in every case the justification for the deletion must be fully explained in writing."

In addition, every agency is required to maintain and make available for public inspection and copying a card index providing identifying information for the public as to any matter which is issued, adopted or promulgated after the effective date of the Act (July 4, 1967) which is required by the Act to be made available or published.

One of the penalties under the Act is that no final order, opinion, statement of policy, interpretation or staff manual or instruction that affects any member of the public may be relied upon, used or cited as precedent by an agency against any private party unless it has been indexed and either made available or published as provided by the Act, or unless the private party has actual and timely notice of the terms thereof. The district courts are given jurisdiction to enjoin an agency from improperly withholding records.

There are exemptions to the requirements of public disclosure, but it is not entirely clear how these affect the Internal Revenue Service. The report of the House Committee on the Act⁶⁹ indicates that an agency need not make available any part of its staff manuals and instructions "which set forth criteria or guidelines for the staff in auditing

68. Pub. L. 89-487, 80 Stat. 250 amending Act of June 11, 1946, c. 324, 60 Stat. 238; now 5 U.S.C. § 552 *et seq.*

69. H.R. REP. No. 1497, 89th Cong., 2d Sess. 7 (1966).

or inspection procedures, or in the selection or handling of cases, such as operational tactics, allowable tolerances, or criteria for defense, prosecution, or settlement of cases." With regard to rulings, the Chief Counsel for the Internal Revenue Service relies on the House Committee report for the position that unpublished rulings are not required to be made available because they constitute advisory interpretations on a specific set of facts which is requested by and addressed to a particular person.⁷⁰

As an immediate matter, it appears that the Administrative Procedure Act amendment will make little change in the practice of the Internal Revenue Service unless some court decision should subsequently determine that the Service policy with regard to unpublished rulings is inconsistent with the Freedom of Information Act.⁷¹ There is a serious question as to whether the Freedom of Information Act, as a general overall governmental policy, is attuned to the particular situation in the Internal Revenue Service. However, the Freedom of Information Act has caused the Internal Revenue Service to re-examine its own procedures more carefully. This may serve as a spur to greater publication of rulings and if nothing more, the Freedom of Information Act in that regard will have accomplished a useful purpose.

Elimination of "Obsolete Rulings." The Revenue Service has embarked upon a program to list revenue rulings which it considers obsolete and therefore will no longer be regarded as precedent. This program may be part of the answer to the question of whether the in-

70. Uretz, *Freedom of Information and the IRS*, 20 ARK. L. REV. 283, 288, citing H.R. REP. NO. 1497, 89th Cong., 2d Sess. 7 (1966) Regulations issued under the Act take this position. 26 C.F.R. § 601.702(b) (1).

71. For a view contrary to the IRS interpretation, see Eaton and Lynch, *Tax Practice as affected by the Freedom of Information Act and the Information Retrieval System*, 1967 Tulane Tax Institute. However, see *Shakespeare Co. v. U.S.*, 21 AFTR 2d 510 (Ct. Cl. 1968), in which the court quashed a taxpayer's subpoena *duces tecum* calling upon the Chief of the IRS Excise Tax Branch to bring in all private rulings and letter rulings issued by the national office of the Revenue Service since August, 1954, with regard to certain issues on the ground that

... we can find nothing in the above act which would entitle this plaintiff to engage in a hunt for something which *might* aid it in this action any more than it could within the subpoena or discovery processes. Furthermore, even if inspection could be had under the Freedom of Information Act, *supra*, the same rules as to identification of the particular documents sought, as well as materiality, we believe should be adhered to.

creased volume of publication of rulings will make the task of the researcher more difficult.⁷²

CONCLUSION

The phenomenon of the tax rulings service which the National Office of the Revenue Service provides is now fully imbedded in our tax administration. Its knowledge and use are more widespread than ever; yet constant surveillance is needed to be assured that it serves purposes for which it was developed and which are useful under our tax system.

One possible purpose will probably never be accomplished, that is, the elimination of tax questions through the issuance and publications of rulings on all known issues. In a viable and changing tax system the number of problems seems to keep growing even as others are laid to rest. Nevertheless, the tax rulings function serves an important purpose in reducing the cost both to taxpayers and the Government of tax controversies by providing a degree of repose in advance.

More importantly it provides a line of communication between taxpayers and the Government as to issues of mutual concern. An important amplification of this line of communication has been the recent development of requests for rulings from professional groups.

To improve the usefulness and effectiveness of the tax rulings procedure as a part of tax administration in the future, efforts should be made to achieve the following goals:

1. The time required to issue letter rulings by the National Office should be reduced.
2. The publication of revenue rulings should follow more promptly after rulings or technical advice letters are issued.
3. Publication should be made of the substance of all precedent rulings.
4. The publication of guidelines or operating rules for the issuance of rulings should be expanded.
5. The policy of non-retroactive revocation of rulings should be clarified in the interests of balancing the needs for revenue with taxpayer confidence in the fairness of the system.

72. No attempt is made in this paper to discuss this subject because a very helpful discussion is presented in this same volume in the article by Assistant Commissioner Harold T. Swartz, entitled "The IRS Program to Update Published Rulings."

The Revenue Service should also consider publishing and updating, from time to time, a booklet containing all its rulings procedures (including those applicable to requests for technical advice) and its guidelines or operating rules for issuing (or denying) rulings. This should be of inestimable value not only to taxpayers but also to the Revenue Service itself.