



Article from

Taxing Times

October 2016

Volume 12 Issue 3

In the Beginning... A Column Devoted to Tax Basics Requesting Guidance from the IRS

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A previous “In the Beginning . . .” column (May 2014) discussed the hierarchy of authorities that establish and interpret federal tax law. To recap: (i) tax laws are passed by Congress and signed by the president, (ii) regulations, which interpret and expand on the law, are written by the IRS together with the Treasury Department, and (iii) additional guidance is issued by the IRS in various forms, including revenue rulings, revenue procedures, private letter rulings (PLRs), technical advice memoranda (TAMs), and notices.

This column will discuss how a taxpayer can solicit guidance from the IRS. For this purpose, IRS guidance generally falls into three categories: (i) published guidance in the form of regulations, revenue rulings, revenue procedures, and notices, (ii) PLRs, which rule on the tax treatment of a specific transaction or activity of a taxpayer that is not yet reflected on a tax return, and (iii) TAMs, which rule on the tax treatment of a transaction or activity in which the taxpayer has already engaged and is reflected on its tax return.

The guidance in the first category is published in the IRS’s *Internal Revenue Bulletin* and is applicable to all taxpayers. PLRs and TAMs are generally only applicable to a specific taxpayer and are released in redacted form by the IRS but are not officially published.

PUBLISHED GUIDANCE

Taxpayers can solicit published guidance from the IRS by requesting additions to the IRS’s Business Plan or by requesting acceptance of an issue in the IRS’s Industry Issue Resolution program.

Requesting Additions to Business Plan

Each year the IRS releases its Priority Guidance Plan—more commonly known as the Business Plan—that lists the topics on which the IRS and Treasury Department plan to publish guidance. This is the IRS’s “to do” list. The Business Plan is broken down by subject area, one of which is Insurance Companies and

Products. Items from other categories (e.g., Employee Benefits and Corporations and their Shareholders) may also affect insurance companies. The items in the Insurance Companies and Products category of the current Business Plan are:

- Final regulations under section 72 on the exchange of property for an annuity contract,
- Regulations under sections 72 and 7702 defining cash surrender value,
- Guidance on annuity contracts with a long-term care insurance rider under sections 72 and 7702B,
- Guidance under sections 807 and 816 regarding the determination of life insurance reserves for life insurance and annuity contracts using principles-based methodologies, including stochastic reserves based on conditional tail expectation,
- Guidance under section 833,
- Guidance on exchanges under section 1035 of annuities for long-term care insurance contracts, and
- Guidance relating to captive insurance companies.

Prior to each year’s release of the Business Plan, the IRS publishes a notice requesting recommendations from the public for items to be included in the Business Plan. This is the taxpayer’s opportunity to request guidance on a particular issue. The requests need not be in any particular format, but the IRS asks that the request include an explanation as to why the guidance is needed, an analysis of how the issue should be resolved, and if multiple requests are made, a ranking of the priority of the requests.

Many requests for the inclusion of items on the Business Plan are submitted to the IRS each year. There are usually a couple of requests for insurance items; these are typically submitted by insurance or annuity company trade associations.

The IRS usually only publishes one or two items of guidance from the insurance portion of the Business Plan each year. This guidance is generally in the form of a regulation, revenue ruling, revenue procedure, or notice and is published in the IRS’s *Internal Revenue Bulletin*. Regulations can be quite complex and lengthy elaborations of the often vague tax law and frequently have short illustrative examples. Revenue rulings are generally a few pages long and have a simple hypothetical fact pattern, a discussion of the relevant law, and a conclusion on how some aspect of the fact pattern should be treated for tax law purposes.

Revenue procedures describe procedures that a taxpayer should follow to participate in some IRS program or obtain some defined result. Notices pertain to a substantive tax issue and are often interim guidance, including describing the content of a regulation that may be published in the near future.

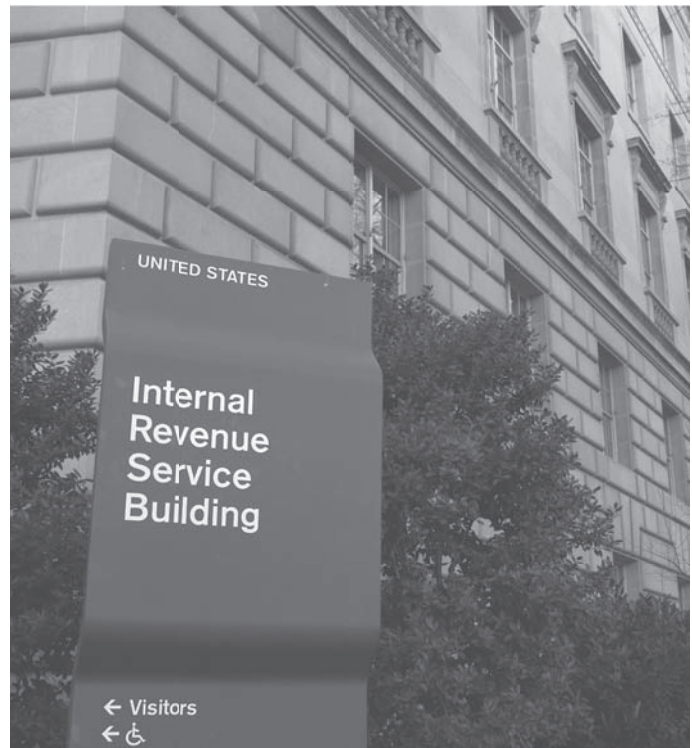
Only one or two insurance items are generally added to the Business Plan each year. These items may be taken from requests made by taxpayers or added at the IRS's own initiative. When determining what items to add to the Business Plan, the IRS considers what issues might be significant to a large number of taxpayers, whether the guidance will reduce controversy and lessen the burden on taxpayers and IRS, and the IRS's competing priorities.

Requesting Acceptance in the Industry Issue Resolution Program

Another avenue for soliciting published guidance from the IRS is through the IRS's Industry Issue Resolution (IIR) program.¹ The IIR program allows industry groups to collaborate with the IRS to resolve frequently disputed or burdensome tax issues that affect a significant number of taxpayers in an industry. The resolution of an issue frequently takes the form of published guidance but may also be a directive to field offices of an operating division of the IRS (*i.e.*, to the IRS personnel that actually examine tax returns and propose adjustments) that the issue be handled in a prescribed manner.

A request that an issue be accepted in the IIR program need not be in a particular format but the IRS does ask that requests be made by an industry group (*e.g.*, a trade association or ad hoc group) representing a cross section of the affected industry and that requests include an explanation of the issue, a statement as to why the issue is appropriate for the IIR program, and an explanation of how the requester recommends the issue be resolved. The IRS is not obligated to accept an issue into the program. In determining whether to accept an issue into the IIR program, the IRS considers, among other things, (i) whether the proper tax treatment of the issue in a common factual situation is uncertain, (ii) whether the uncertainty results in repetitive examination of the issue for many taxpayers, requiring significant resources of both the IRS and taxpayers, and (iii) whether collaboration with the industry would facilitate a proper resolution of the issue by promoting an understanding of taxpayer views and business practices. The IRS only accepts a few issues into the program each year.

Once an issue is accepted, the IRS selects a team to analyze the issue and develop appropriate guidance. The team is drawn both from industry and from various offices of the IRS and Treasury Department. The industry team members are expected to actively participate and may be requested to provide in-



formation about industry practice and from books and records of specific taxpayers. This is often necessary because the issues usually accepted in the IIR program are those that involve a unique industry issue or practice with which the IRS may not be familiar or have expertise. The industry's active involvement in resolving the issue distinguishes the IIR program from the process by which guidance is developed and published from the Business Plan.

The process of reaching a resolution and developing appropriate guidance may take a year or more. The insurance industry has twice used the IIR program successfully as described in previous *TAXING TIMES* articles.²

Obtaining published guidance by requesting that items be added to the IRS's Business Plan or by seeking acceptance of an issue in the IIR program is neither certain nor fast. Requesting published guidance is most appropriate for industry-wide issues. If a taxpayer needs guidance that is relatively quick or specific to its circumstances, the taxpayer will have more luck seeking a PLR.

PRIVATE LETTER RULINGS (PLRs)

A PLR is the IRS's written response to a taxpayer's request for a ruling on how a planned or completed transaction or other activity that has not yet been reflected on a tax return should be treated for tax purposes.³ PLRs are generally several pages long, have a summary of the relevant facts, a discussion of the appli-

cable law, a list of specific facts that the taxpayer has represented (and the IRS has assumed) to be true, and a list of rulings or legal conclusions about the treatment of the transaction or activity.

A request for a PLR is made to the part of the IRS's Chief Counsel Office that specializes in the subject matter related to the PLR request.⁴ The IRS's Chief Counsel Office has within it seven Associate Chief Counsel Offices (Associate offices), each of which specializes in a particular tax area. Branches within each Associate office are further specialized.

A request is formally made to the appropriate Associate office and is handled by the particular branch that specializes in the subject matter. For example, if a taxpayer were to submit a PLR request about an insurance issue, it would be submitted to the Associate office for Financial Institutions and Products and would be handled by its insurance branch. Multiple Associate offices may be involved if the PLR request involves more than one area of tax, *e.g.*, insurance and international tax.

A request for a PLR must include a statement of the taxpayer's business, an explanation of the reasons for the transaction or activity, all the relevant facts and documents, an analysis of the material facts, an analysis of the requested legal conclusion, all relevant legal authorities, and certain procedural statements. This submission might be compared to a brief submitted to a court in litigation. All of this must be submitted under penalties of perjury. The taxpayer frequently provides a draft of the proposed PLR to the IRS. The IRS is obviously not required to use all or any part of this draft, but it may save the IRS time. The taxpayer is usually happy to provide a draft because it is then more likely to receive a PLR that best addresses the issues raised.

The IRS has understandably placed significant limitations on the circumstances in which it will issue a PLR, and resource constraints in recent years have also significantly diminished the number of PLRs it can issue. The IRS will generally not issue a PLR in the following situations, among others:

- when the same issue is involved in a tax return for an earlier year and that issue is being examined by the IRS, being appealed within the IRS, or is being litigated,
- when the issue is the subject of related guidance that is pending publication by the IRS,
- when the issue is particularly fact intensive,
- when the ruling sought is whether a transaction qualifies as a corporate tax-free transaction (*e.g.*, a tax-free liquidation, spin-off, or reorganization),

The IIR program allows industry groups to collaborate with the IRS to resolve frequently disputed or burdensome tax issues that affect a significant number of taxpayers in an industry.

- when the ruling involves a frivolous issue—such as whether the income tax is constitutional,
- when the tax treatment of the issue is clearly and adequately addressed by statute, IRS published guidance, or court decision (often called “comfort rulings”), and
- when issuing a PLR is not in the interest of sound tax administration.

In addition, there are many specific substantive areas in which the IRS will not issue a PLR—so called “no rule” areas.⁵ “No rule” areas that relate to insurance include:

- whether a split-dollar life insurance arrangement is “materially modified” within the meaning of Treas. Reg. § 1.61-22(j)(2),
- whether “substantially all” the premiums of a contract of insurance are paid within a period of 4 years from the date on which the contract is purchased, and
- whether an amount deposited is in payment of a “substantial number” of future premiums on such a contract.

The Nitty-Gritty of Obtaining a PLR

Taxpayers (and/or their representatives) often meet with the IRS for a pre-submission conference prior to the formal submission of a PLR request. The taxpayer would normally send in advance a draft or summary of the proposed PLR request to the branch handling the request. The pre-sub conference is an excellent opportunity for the taxpayer to explain the issues in a face-to-face meeting and explain (hopefully convincingly) why the IRS should grant the requested rulings (*i.e.*, the desired tax treatment). This meeting can help improve the quality of the PLR request, and the IRS may be able to suggest some changes

to the transaction or activity that would ameliorate the tax issues. The IRS may also inform the taxpayer if the IRS would not issue a PLR for some reason.

Once the actual submission is made, it usually takes six months or more (sometimes much more) for the IRS to rule. The IRS has a four to six month target for rulings, but this is frequently not met. While the PLR request is pending, the IRS may ask for additional documentation or explanations.

If the IRS proposes to rule adversely (*i.e.*, not give the taxpayer the rulings it requests), it will contact the taxpayer and propose a conference. If, after the conference, the IRS still plans to rule adversely, the taxpayer may withdraw its request for a PLR so it will not have a formal adverse ruling on record. The Associate office, however, would almost certainly inform the IRS field office (*i.e.*, the IRS office that actually audits taxpayers' tax returns) for the taxpayer that a PLR was requested, what the issues were, and that a tentative adverse ruling was proposed. Obviously, the field office would then be on the lookout for the issue.

Obtaining a PLR is not cheap. The standard fee for a PLR request is \$28,300 with lesser amounts being charged for certain simple requests. This fee is set by the IRS to cover the time and expense of the IRS personnel. Additionally, the taxpayer's lawyer or CPA may, depending on the complexity, charge a significantly greater amount for the work that goes into a PLR request.

After the PLR is released to the taxpayer, it will be released to the public. The IRS is required to redact all identifying and confidential information from the PLR before it is released to the public, and the taxpayer has the opportunity to review this redacted version and request additional redactions.

Effect of a PLR

The ability to rely on an authority means that the IRS will not dispute the accuracy of an item on a tax return to the extent the item is based on such authority. For example, if a revenue ruling based on a hypothetical fact pattern concluded that a certain policy was insurance for tax purposes, the IRS would not dispute a taxpayer's treatment of a similar policy as insurance, unless there were some facts of the taxpayer that were meaningfully different than the facts in the revenue ruling.

In contrast to statutes, regulations, revenue rulings, revenue procedures, notices, and certain other tax guidance published by the IRS, PLRs may not be relied upon by taxpayers other than the one to whom the PLR was issued.⁶ Every PLR states: "This ruling is directed only to the taxpayer requesting it. Section 6110(k) (3) of the Internal Revenue Code provides that it may not be used or cited as precedent." If there were a material misstate-

ment in the PLR or an intervening change in law, even the taxpayer to whom the PLR was issued could not rely on it.

Nonetheless, PLRs are generally well reasoned and reflect the IRS's analysis of a particular issue at the time the PLR was issued. Taxpayers (and their advisors) consider PLRs when coming to their own conclusions about tax issues. There is little reason to think that the IRS would come to a different conclusion with respect to one's own issue than it came to in a PLR recently issued to a different taxpayer on substantially similar facts.

Because of the time and expense involved, PLRs are generally only requested in connection with large or important transactions and activities. Frequently, a taxpayer's willingness to proceed with the transaction or activity is dependent on its obtaining a favorable PLR. The benefit of obtaining a PLR is the relative certainty of the tax treatment. The downside of requesting a PLR (apart from the time and expense) includes the possibility that (i) an adverse PLR is proposed when the taxpayer may have been able to convince the IRS field office auditing its return of the propriety of the taxpayer's treatment or (ii) the IRS may issue some other guidance or document describing the taxpayer's issue and taking an adverse position.

TECHNICAL ADVICE MEMORANDA (TAM)

Like a PLR, a TAM is issued by an Associate office and addresses the tax treatment of a specific issue of a taxpayer.⁷ Unlike a PLR, a TAM is requested by an IRS field office⁸ in the course of auditing a taxpayer's return or processing a taxpayer's claim for a refund when the office needs technical assistance applying the law to the particular facts of the taxpayer. Thus, PLRs are issued for transactions and activities before the tax return is filed, and a TAM is issued when a transaction or activity has already occurred and has been reported on a tax return. TAMs are not issued if the taxpayer is litigating the same issue for any tax year.

If a field office comes across an issue with which it wishes technical assistance, it would first consult the IRS field counsel. If additional assistance is desired after such consultation, the field office may request a TAM of the appropriate Associate office. The branch within the Associate office that specializes in the relevant tax area would handle the TAM request.

A taxpayer cannot ask for a TAM directly, but it can ask the field office to request a TAM. The taxpayer may do this if it disagrees with the field office's application of the law. If the field office declines to request a TAM, the taxpayer may appeal the denial.

As a first step in requesting a TAM, the field office, field counsel, taxpayer, and assigned attorney within the branch of the relevant Associate office have a pre-submission conference to discuss the

coming request. Before the conference, each of the taxpayer and field office must submit to the Associate office a statement of facts and issues. At the conference, the parties are to determine the scope of the TAM request and the factual information that must be included in the field office's formal request for a TAM. This information would typically include a complete statement of the facts, explanation of the issues at dispute, a legal analysis, and any other helpful information.

As part of the formal request for a TAM, the field office must prepare for the Associate office a memorandum that includes the information agreed upon in the pre-submission conference. The field office is encouraged to work with the taxpayer and agree upon the facts and issues included in the memorandum. If they cannot agree, the taxpayer may submit its own memorandum to the Associate office, and in cases where the taxpayer initiated the TAM, the taxpayer must submit such a memorandum. Any submission by the taxpayer must be made under penalties of perjury.

During the course of processing the TAM, the Associate office may seek additional information or have conferences in order to further understand the facts and issues. If the IRS proposes a TAM that is adverse to the taxpayer, then, as with a PLR request, the taxpayer has the right to a conference with the IRS. The taxpayer may not withdraw a request for a TAM.

The TAM itself looks much like a PLR. It is generally several pages in length and has a summary of the relevant facts, an explanation of the issues, a discussion of the relevant law, and conclusions. The field office and field counsel are given the opportunity to review the draft TAM before its release and provide input. Once issued, the field office is bound by the conclusions in the TAM.

Before a redacted version of the TAM is released to the public, the taxpayer is given the opportunity to review it and request additional redactions. As with PLRs, a taxpayer may not rely upon a TAM issued to another taxpayer.⁹ ■

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ENDNOTES

- ¹ The Industry Issue Resolution program is described in Rev. Proc. 2016-19, 2016-13 I.R.B. 497.
- ² See Eric Bisighini and Tim Branch, "Variable Annuity Hedging Directive – A Long and Winding Road," *TAXING TIMES*, Vol. 10, Issue 3 at 1 (Oct. 2014); Arthur C. Schneider and Samuel A. Mitchell, "IRS Utilizes Industry Issue Resolution Program to Resolve the Insurance Industry Bad Debt Issue," *TAXING TIMES*, Vol. 9, Issue 1 at 20 (Feb. 2013).
- ³ Sub-categories of PLRs not discussed here include (i) requests to change a method of accounting and (ii) requests for extensions to file certain tax elections under Treas. Reg. § 301.9100-3.
- ⁴ Each year the IRS publishes a revenue procedure that explains the process for requesting a PLR. The most recent such revenue procedure is Rev. Proc. 2016-1, 2016-1 I.R.B. 1.
- ⁵ Each year the IRS publishes revenue procedures that list the "no rule" area for domestic and international issues. The most recent such revenue procedures are Rev. Proc. 2016-3, 2016-1 I.R.B. 126 (domestic) and Rev. Proc. 2016-7, 2016-7 I.R.B. 239 (international).
- ⁶ A taxpayer may however avoid a penalty for paying too little tax to the extent the taxpayer's position is based on a PLR, even if it was not issued to the taxpayer. Treas. Reg. § 1.6662-4(d)(3)(iii).
- ⁷ Each year the IRS publishes a revenue procedure that explains the process for requesting a TAM. The most recent such revenue procedure is Rev. Proc. 2016-2, 2016-1 I.R.B. 102.
- ⁸ TAMs may also be requested by the Appeals office within the IRS.
- ⁹ As with a PLR, a taxpayer may avoid penalties for paying too little tax if its position is based on a TAM issued to another taxpayer. Treas. Reg. § 1.6662-4(d)(3)(iii).