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Federal Tax Rulings: Procedure and Policy

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NOTES

Federal Tax Rulings: Procedure and Policy

I. INTRODUCTION

> Although we have developed a highly sophisticated judicial mechanism for ultimately resolving tax disputes, such a system fails to meet the needs of the most industrialized nation on earth. A taxing statute of one quarter of a million words cannot be complied with solely through the results of litigation. Proper tax administration requires that the Service provide reliable and timely information to aid taxpayers in interpreting this complex statute.[1]

The rulings program of the Internal Revenue Service was designed to meet the need for predictability of the tax consequences of any given financial transaction. Though the rulings program is not particularly important to the average taxpayer, it has become increasingly crucial both to the financial community[2] and to the Service itself. As the tax laws become more complex, and tax risks become increasingly important to the success of business ventures, the need for confirmation before entering into a transaction is intensified.[3] Thus parties to a transaction will generally request a ruling

> whenever the answer is uncertain or when the transaction involves substantial sums of money, even when the uncertainty may not be very great. In such circumstances the availability of a ruling in advance of the transaction has become almost as important as the financing or the know-how involved.[4]

This note will study the growth of the rulings program, the factors which must be weighed by the tax practitioner before requesting a ruling, and the amount of reliance which the taxpayer can safely place upon the Service's interpretation of the law as applied to his particular fact situation.

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1. Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43 TAXES 756-57 (1965).

2. Redman, *New Procedures Re Letter Rulings; Request for Washington Assistance*, 15 U. SO. CAL. 1963 TAX INST. 411. "Perhaps the most popular phrase in many complicated . . . business transactions is—'subject to favorable rulings of the Internal Revenue Service.' There is barely a corporate merger, reorganization, or liquidation that rates notice on the financial pages that does not include that phrase among the mountains of paperwork that reflect the terms of the transaction."

3. Lore, *Revision of Ruling Procedures Now Issued; "No Ruling" Areas Outlined*, 18 J. TAXATION 114 (1963). "With rates as high as they are and the tax law as complex as it is, clients frequently will not move without a specific ruling where one can be obtained. The consequences of an adverse stand by the Service are frequently so horrendous as to rule out many business transactions unless official assurances are given as to the tax consequences."

4. Redman, *supra* note 2, at 413.

II. Definitions

Before beginning a discussion of "rulings," it is necessary to define the exact types of communication embodied by that term—the "letter ruling" and the "Revenue Ruling"—and to compare them to other forms of communication between the Internal Revenue Service and the taxpayer.

"A 'ruling' is a written statement issued to a taxpayer . . . by the National Office which interprets and applies the tax laws to a specific state of facts."[5] This is an expression of an official interpretation by the Commissioner, and may not be given orally by anyone employed by the Service.[6] Rulings are applicable both to prospective transactions and to completed transactions for which a return has not yet been filed;[7] they "serve the purpose of establishing principles and procedures of the Service in the interpretation and application of substantive tax law."[8]

In contrast to a ruling:

> [a] 'determination letter' is a written statement issued by a District Director in response to an inquiry . . . which applies to the particular facts involved the principles and precedents previously announced by the National Office. Determination letters are issued only where a determination can be made on the basis of clearly established rules as set forth in the statutes, Treasury Decisions or regulations, or by rulings, opinions, or court decisions published in the Internal Revenue Bulletin.[9]

The determination letter generally applies only to completed transactions[10] and appears more limited in scope than the ruling, since the District Director is restricted to determinations based upon "clearly established" rules.[11] Thus, the National Office, in its rulings, "makes" law, while the District Director is limited to applying that law to the facts according to the sharply defined patterns established by the superior branch. This seems a wise limitation since the various District Directors, if allowed total freedom to interpret the tax laws as they saw fit, might destroy the uniformity so necessary to the national tax structure.

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5. Rev. Proc. 28, § 2.02, 1962-2 Cum. Bull. 496, 497.

6. Marshall, *Recent Developments in Ruling Procedures: The New Two-Part Procedure; Requests for Technical Advice,* N.Y.U. 24th Inst. on Fed. Tax. 83 (1966).

7. Redman, *supra* note 2, at 417.

8. Marshall, *supra* note 6, at 84.

9. Rev. Proc. 28, § 2.03, 1962-2 Cum. Bull. 497.

10. Redman, *supra* note 2, at 418.

11. "Where such a determination cannot be made, e.g. where the question presented involves a novel issue, a determination letter will not be issued by a District Director. A determination letter . . . is similar to a ruling in that it is an interpretaton of facts submitted by the taxpayer. It differs in that it does not normally venture into untried issues." Marshall, *supra* note 6, at 84.

> An 'information letter' is a statement issued either by the National Office or by a District Director which does no more than call attention to a well established interpretation or principle of tax law, without applying it to a specific set of facts.[12]

The information letter is usually extremely general in nature, and does not give a solution based on the application of the law to specific facts.[13] Its primary purpose is to impart general knowledge which the Service feels will be of assistance to taxpayers requesting information.[14]

"A 'Revenue Ruling' is an official interpretation by the Service which has been published in the Internal Revenue Bulletin . . . for the information and guidance of taxpayers, Internal Revenue Service officials, and others concerned."[15] Published rulings concern questions which the National Office considers important both to taxpayers and Service officials, and are generally derived from letter rulings, determination letters, and requests for technical advice.[16] The Service takes the position that if the taxpayer's factual situation is "substantially the same" as that proposed in the Revenue Ruling, he may consummate his transaction without requesting a letter ruling;[17] however, practitioners feel that the wiser course is to obtain a letter ruling whenever there is uncertainty about the outcome.[18]

Two additional devices, the "closing agreement"[19] and the request for "technical advice,"[20] are employed in taxpayer-Service relations. The closing agreement is a method, authorized by statute,[21] by which the taxpayer's ruling becomes final and conclusive upon both the taxpayer and the Service, in the absence of fraud, malfeasance or misrepresentation of material facts. This procedure seems highly desirable, since the Service is not actually bound by its rulings; but

12. Rev. Proc. 28, § 2.04, 1962-2 CUM. BULL. 497.

13. Ellentuck, *How and When to Use the Advance Ruling*, 21 J. TAXATION 52 (1964).

14. Rogovin, *supra* note 1, at 771 n.79, points out that in 1964 the National Office answered over 32,000 general information requests.

15. Rev. Proc. 28, § 2.05, 1962-2 CUM. BULL. 497.

16. Redman, *supra* note 2, at 418.

17. Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service: A Statement of Principles*, N.Y.U. 20TH INST. ON FED. TAX. 1, 18 (1962). Caplin goes on to caution the taxpayer to give "careful consideration . . . to subsequent legislation and subsequently published rulings, regulations and court decisions, for any one of them may change the results of the original published position."

18. Taylor, *Tax Rulings: New Rules and Procedures*, N.Y.U. 21ST INST. ON FED. TAX. 69, 91 (1963).

19. Rev. Proc. 28, § 2.06, 1962-2 CUM. BULL. 497. "A 'closing agreement' . . . is an agreement between the Commissioner . . . and a taxpayer with respect to a specific issue or issues entered into pursuant to the authority contained in section 7121 of the Internal Revenue Code of 1954. Such a closing agreement is based on a ruling which has been signed by the Commissioner . . . . Closing agreements are final and conclusive . . . ."

20. Rev. Proc. 29, § 2.01, 1962-2 CUM. BULL. 507.

21. INT. REV. CODE of 1954, § 7121.

the complex and cumbersome procedures involved in obtaining an agreement, and the fact that the Service will generally limit revocation of rulings to prospective effect,[22] reduce its use greatly. "This is evidenced by the fact that in fiscal 1964 the IRS received requests for only four closing agreements as compared with 40,000 requests for rulings."[23]

> 'Technical advice' . . . means advice or guidance as to the interpretation and proper application of internal revenue laws . . . and regulations, to a specific set of facts, furnished by the National Office upon request of a district office in connection with the examination or consideration of a taxpayer's return or claim for refund or credit.[24]

This device is used by the National Office to aid the district offices in closing cases, and to help maintain a uniform approach to similar tax problems throughout the various districts.

Of the various forms of communication, the private ruling is the most significant to the taxpayer who desires advance assurance of the tax consequences of a proposed transaction. The closing agreement, though attractive in its finality, is too slow and would be of little value if a relatively quick determination is needed. The information letter is too general to aid in determining the specific tax results which will flow from given facts, and the determination letter, though often useful, will generally not issue in response to a novel tax question which requires interpretation. Though the Revenue Ruling is often helpful, there are hidden dangers if the taxpayer's factual situation is not "substantially the same," or if the Ruling is later superseded and the taxpayer consummates a transaction without this knowledge. Thus, the wise course demands an individual ruling which interprets the law according to the taxpayer's specific factual situation.

III. History of the Rulings Program

Under the original Revenue Act of 1913,[25] the policy of the Service was to answer all questions,[26] whether related to proposed or consummated transactions. These answers were considered purely advisory, and the Service could change its mind without warning, even though the taxpayer had relied upon its opinion.[27] In 1919, however, the Service began to restrict its rulings to completed transactions, except

22. Caplin, *supra* note 17, at 21.

23. Rogovin, *supra* note 1, at 770.

24. Rev. Proc. 29, § 2.01, 1962-2 Cum. Bull. 507.

25. 38 Stat. 66.

26. Houser, *Current Problems in the Office of the Chief Counsel*, Tulane 12th Tax Inst. 1, 3 (1963).

27. Caplin, *supra* note 17, at 3.

in those areas in which rulings were commanded by statute before a proposed transaction might be closed.[28]

This restrictive policy was continued through 1937, when taxpayer concern over the lack of reliable advice resulted in legislation which authorized the Commissioner to enter into formal closing agreements with regard to proposed transactions. It soon became obvious that the closing agreement was too formal and cumbersome to handle the number of requests submitted, and this method was recognized as unsatisfactory both to the taxpayer and to the Service.[29] In answer to this problem, the Service began to treat each request for a ruling concerning the tax consequences of a proposed transaction as a *potential* request for a closing agreement, and responded to these requests with letter rulings. This policy was formally publicized by the Service in 1953, in Revenue Ruling 10.[30]

In 1954, through Revenue Ruling 54-172, the Service clearly stated that its policy would be

> to answer inquiries of individuals and organizations, whenever appropriate in the interest of sound tax administration, as to their status for tax purposes and as to the tax effects of their acts or transactions, prior to their filing of returns . . . .[31]

The ruling went on to point out that taxpayers who relied upon rulings would generally be protected from retroactive change[32]—a clear shift from the prior practice of regarding rulings as mere advisory opinions.[33] Ruling 54-172 has been supplemented on several occasions, but it still is a valid statement of the Service's position that rulings are purely a matter of discretion,[34] and that in numerous instances they will not be granted.[35]

A. *The No-Ruling List*

The rulings program grew as an answer to the consistent taxpayer plea for a convenient method of obtaining advance assurance in tax questions. This growth, if taken to its logical extreme, would lead to a policy of answering any and all questions, whether based on hypothetical or actual facts, whether attempting to solve a serious business problem or attempting to use the Service's information to establish a tax avoidance scheme. Furthermore, if the Service seri-

28. Memo 2228, § 1309, 1 CUM. BULL. 310 (1919). This type of provision—requiring prior rulings—appears in INT. REV. CODE of 1954, § 367.
29. Rogovin, *supra* note 1, at 763.
30. 1953-1 CUM. BULL. 488; Redman, *supra* note 2, at 424.
31. Rev. Rul. 172, § 2.01, 1954-1 CUM. BULL. 395.
32. Rev. Rul. 172, § 12.05, 1954-1 CUM. BULL. 401.
33. Caplin, *supra* note 17, at 6.
34. Rev. Rul. 172, § 5.01, 1954-1 CUM. BULL. 398.
35. Rev. Rul. 172, § 6, 1954-1 CUM. BULL. 398.

ously attempted to answer all questions presented to it, it is doubtful whether any would be answered within sufficient time to be useful to the taxpayer. Thus, the policy favoring easily accessible advance advice was balanced against the administrative feasibility of attempting to rule upon every request submitted.[36] The scope of the rulings program was limited by excluding certain questions, first under the discretionary power of the Commissioner and later through the published "no-ruling" lists.

Revenue Ruling 54-172 indicated that the Commissioner retained a large degree of discretion,[37] and that rulings generally would not be issued in response to questions primarily factual in nature.[38] This classification was not completely satisfactory, however, since the guidelines established were rather vague, and since it is always difficult to determine whether a particular problem constitutes a question of fact. Taxpayers continued to request rulings and the Service continued to reject the questions, causing a waste of time, effort, and money to the Service and to taxpayers.

Realizing that these vague guidelines would continue to result in fruitless attempts to gain rulings in areas upon which the Service would not rule, the Commissioner, in 1960, published a list of specific areas in which rulings would never be given, and those in which rulings would not ordinarily be given.[39] In Revenue Procedure 60-6, the Commissioner set forth twenty-seven specific and three general areas in which the Service would not rule. The twenty-seven specific questions were characterized as "factual in nature,"[40] while the general

36. The Service presently handles 30,000 to 40,000 ruling requests each year. *See* Caplin, *supra* note 17, at 9; Rose, *The Rulings Program of the Internal Revenue Service,* 35 TAXES 907 (1957).

37. Rev. Rul. 172, § 5.01, 1954-1 CUM. BULL. 398. "[T]he Internal Revenue Service has discretionary authority to issue determination letters or rulings . . . . That discretion will be exercised in the light of all relevant circumstances, including the business or other reasons motivating the transaction, and . . . only to the extent consistent with a wise administration of the revenue system."

38. Rev. Rul. 172, § 6, 1954-1 CUM. BULL. 398. "In addition to the other situations described herein, rulings or determination letters ordinarily will not be issued in connection with income, profits, estate, and gift tax matters where the determination requested is primarily one of fact, e.g., (1) market value of property, (2) whether compensation is reasonable in amount, (3) whether a transfer is one in contemplation of death, (4) whether retention of earnings and profits by a corporation is for the purpose of avoiding surtax on its shareholders, or (5) whether a transfer or acquisition is within section 15(c) or section 129 of the . . . Code."

39. Caplin, *supra* note 17, at 14. "In issuing Revenue Procedure 60-6, the Service was striving for clearer and fairer administration of the ruling process. Essentially, it sought to save taxpayers and tax practitioners time, trouble and frustration in developing and submitting requests for rulings, only to be advised that the Service could not rule on the question presented." *Id.* at 15.

40. Rev. Proc. 6, § 3.01, 1960-1 CUM. BULL. 881-84. Typical questions upon which the Service will not rule include: (1) Whether an amount paid to an employee is gift or compensation. (4) Whether compensation is reasonable in amount. (5) Whether

areas seemed to be subjects upon which the Service would not wish to rule for its own protection or for administrative reasons.[41] In addition, Revenue Procedure 60-6 stated five specific questions and one general area, also essentially factual in nature, in which the Service would not ordinarily rule.

Revised listings were published in 1962[42] and 1964,[43] and in each list the scope of prohibition was narrowed. Revenue Procedure 64-31 has significantly narrowed the "no-ruling" list by removing from the prohibited area such questions as:

(1) Whether an amount paid by an employer to an employee under specific factual circumstances is a gift, or compensation.
(2) Whether a corporation has earnings and profits available for distribution to its shareholders.
(3) Whether the retention of earnings and profits by a corporation is for the purpose of avoiding surtax on its shareholders.[44]

Some commentary[45] has suggested that Revenue Procedure 64-31 will be of only limited value to taxpayers since

> as *Rev. Proc.* 64-31 so carefully points out, the elimination of items previously described in *Rev. Proc.* 62-32 should not be construed as meaning the Service *will* rule on these items, but merely that the Service will *consider* such requests and may decline to rule in advance on any question . . . .[46]

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advances to thin corporations are loans or equity capital. (7) Whether an acquisition is within the meaning of § 269. (10) A determination of earnings and profits of a corporation which are available for dividends. (13) Whether a corporation is "collapsible." (20) Whether retention of earnings and profits by a corporation is for the purpose of avoiding surtax on its shareholders.

41. Rev. Proc. 6, § 3.02, 1960-1 CUM. BULL. 884. These general areas include: "1. The results of transactions which lack bona fide business purpose and have as their principal purpose the reduction of Federal taxes. 2. A matter upon which a court decision adverse to the Commissioner has been handed down and the question of following the decision or litigating further has not yet been resolved. 3. A matter involving the prospective application of the estate tax to the property or the estate of a living person."

42. Rev. Proc. 32, 1962-2 CUM. BULL. 527. Though this list contains 26 specific no-ruling areas with 37 specific questions, some of the previous no-ruling questions were shifted to the "not ordinarily" list. For example, the question of whether a corporation is "collapsible" within the meaning of § 341 was shifted to the category of questions in which rulings will not ordinarily be issued in 1962.

43. Rev. Proc. 31, 1964-2 CUM. BULL. 947.

44. In addition to the questions mentioned in text, Rev. Proc. 64-31 removes such questions as: (1) whether stockholders who waive their rights to future dividends for a specified period of time will be in receipt of income should the corporation subsequently declare and pay a dividend during the waiver period; (2) determination of the year of taxability of amounts realized pursuant to arrangement, designed to defer the time of receipt to a date later than that upon which the right becomes vested.

45. 21 J. TAXATION 156 (1964).

46. *Id.* This comment further points out that "[T]he practitioner must still rely upon informal chats with Treasury officials and must be certain that he will obtain a favor-

This caveat is true in any ruling situation, since the Commissioner always retains discretion to refuse to rule; and the warning is no more applicable to this particular example, *i.e.*, deletions from the no-ruling list, than to the entire ruling area. The entire concept of rulings is based on the good faith desire of the Commissioner to enable the taxpayer to obtain advance information, and there is no reason to suspect that he would remove items from the prohibited list if he knew in advance that no rulings would be issued. The majority of commentators seem to agree that Revenue Procedure 64-31 "represents a movement toward the principles of ruling whenever feasible."[47]

B. *Effect of "No-Ruling"*

Although the no-ruling lists were instituted to save taxpayers time and money, it is possible that they have taken on the character of indirect economic controls, due to the adverse effects which the addition of an item to the no-ruling list may have on proposed transactions. This economic control has been illustrated by several commentators in discussions of the Warwick Fund, and its demise after a refusal to rule upon its tax consequences.[48] The Warwick Fund was a "swap-fund" which was to have been organized in partnership form so as to avoid the no-ruling policy which was already in force with respect to corporate funds. A favorable private ruling was obtained by the Fund, but this ruling was quickly revoked.[49] The Service did not rule adversely to the plan; it merely refused to rule at all,[50] thus chilling any plans for continuation of the project[51] due to the "contemplated difficulty of convincing a sufficient number of individuals holding highly appreciated stocks to subscribe [to the Fund] without the final assurance of the Commissioner that this would not be a taxable exchange."[52] Thus, the power to refuse to act gives

able ruling before he can consider requesting a ruling." *Id.* at 157. This statement raises serious questions as to the effect of this private rule-making on the concept of equal treatment for all taxpayers.

47. Note, *The Availability and Reviewability of Rulings of the Internal Revenue Service*, 113 U. PA. L. REV. 81, 93 (1964).

48. *See* Goldman, *Warwick Fund Ruling Withdrawn; IRS Policy Questioned*, 19 J. TAXATION 197 (1963); Note, *supra* note 47, at 84-86.

49. Goldman, *supra* note 48, at 197.

50. This refusal to rule was published in Rev. Proc. 63-20, 1963-2 CUM. BULL. 754, and incorporated in Rev. Proc. 64-31, § 3.07, 1964-2 CUM. BULL. 950.

51. "The promoters of the Warwick Fund upon notice of the revocation abandoned their venture, either out of fear or general conservatism." Goldman, *supra* note 48, at 198.

52. Note, *supra* note 47, at 85. The Commissioner has pointed out that the mere addition of an item to the no-ruling list is not to be construed as "*necessarily* reflecting a hostile attitude towards the transaction." (emphasis added). Caplin, *supra* note 17, at 15. It is difficult to comprehend the Commissioner's statement in view of the realities of the situation. If a specific transaction is added to the no-ruling list, it will always

the Commissioner a key influence upon the success or failure of economic ventures, even though the plan in question is arguably within the express language of the Code. It is this "propriety of refusing to rule when the Service could not, in good conscience, rule unfavorably"[53] which has been questioned by the tax bar in situations such as the Warwick Fund.

The Commissioner explains the no-ruling policy by pointing out that

> [c]ertain plans have tax attractiveness if a narrow reading of a Code provision is assumed. In fact, the correct tax interpretation may be uncertain or borderline in light of the total legislative history. Others may appear to be designed solely, or at least primarily, for tax avoidance purposes—or fall into the category of what is commonly called a 'tax gimmick.' In these situations where the correct tax result is in doubt, it does not appear to be 'wise administration' for the Service to give its official blessing by issuing a favorable advance ruling.[54]

The Commissioner's argument is valid, but it fails to meet the argument against which it is directed. No one could seriously expect the Commissioner to bless a tax gimmick with a favorable ruling, but this does not mean that the Commissioner should do nothing at all. If the Commissioner feels that only a narrow reading of a particular provision would result in a favorable ruling, he should feel free to issue an unfavorable response, and to explain to the taxpayer exactly why this response was issued. If, on the other hand, the Commissioner feels that the transaction, as presented, is a borderline situation, upon which he does not wish to commit the Service, he might refuse to rule, but at the same time present the taxpayer with a statement of the problems which have caused his hesitancy to rule.[55] The disclosure of the reasons behind the Commissioner's acts would serve to decrease the confusion and uncertainty resulting from an unarticulated refusal, and would increase public confidence in the Commissioner. Also, the taxpayer might be able to reorganize his transaction so as to overcome the problems suggested by the Commissioner rather than being left in a state of total ignorance and indecision. There is no doubt that such a solution to the no-ruling problem would increase the administrative workload of the Service, but the overall policy of the rulings program would receive great support. Hopefully, the recent trend toward narrowing the no-ruling areas will continue, and the Commissioner will further the policy of advance guidance (whether by favorable or adverse ruling) whenever possible.

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be construed, and probably accurately, as subject to hostility from the Service, because the Commissioner has expressly refused to grant a favorable ruling in the matter.

53. Goldman, *supra* note 48, at 198.

54. Caplin, *supra* note 17, at 16.

55. Note, *supra* note 47, at 93-94.

IV. Practical Considerations in Obtaining a Ruling

Clearly a practice which affords advance information concerning the tax consequences of a proposed transaction is quite advantageous to the taxpayer.[56] Indeed, it has been recognized by Mortimer Caplin (then Commissioner of Internal Revenue) that the present rulings policy is most helpful to the Service as well. Mr. Caplin points out that the present policy provides:

> (1) Uniformity in the application of the laws and regulations . . . through centralized interpretation.
> (2) [F]air and economical tax administration . . . .
> (3) [V]aluable information to the Service by advising it in advance of audit or litigation, on the kinds of transactions being consummated or considered by taxpayers.[57]

The advantages of such a program apply to taxpayers as a group; but before the individual taxpayer decides to obtain a ruling, there are numerous other factors to be considered. In essence, the taxpayer must balance "the desirability of obtaining a high degree of tax certainty against the time and expense involved in obtaining a ruling and against the consequences of obtaining an adverse ruling or no ruling at all."[58] This broad statement must be sub-divided before it can provide meaningful guidance to the tax practitioner faced with the problem of obtaining a ruling.

A. *Is a Favorable Ruling Likely To Be Obtained?*

A tax practitioner should not request a ruling if he is not fairly optimistic about the Service's potential response to his request. Thus, he must attempt to ascertain the basic position of the Service with regard to the type of transaction in question before he ever asks for the ruling. One method by which this may be accomplished is the so-called "telephone practice," whereby tax practitioners call individuals in the National Office and determine the Service's position on a

56. Caplin, *supra* note 17, at 7. "Taxpayer advantages include: (1) A measure of certainty is provided that assists them in deciding whether to consummate contemplated transactions. (2) Advance advice on the Service's position serves to minimize future controversy and tax litigation. (3) Rulings make it easier to determine taxes correctly . . . and promote voluntary compliance." *Id.* Mr. Caplin points out that the third advantage applies equally to the Service.

57. *Id.*

58. Clark, *Practical Considerations in Obtaining Rulings and in Filing Claims for Refund*, Tulane 6th Tax Inst. 257, 268 (1957). Ellentuck, *supra* note 13, at 53, explains the problem in terms of cost: "The first step in deciding whether to request a ruling is to make an estimate of (1) the cost of obtaining the ruling . . . and (2) the amount of 'tax dollars' at issue. Clearly, if the estimated cost of the ruling exceeds the maximum deficiency that could be assessed against the transaction, a ruling should not be requested."

particular issue without the need for a formal request.[59] In addition, the practitioner must consider the language of the Code sections involved and the general policy against ruling on any transaction which seems to lack a bona fide business purpose.[60] If the Code language indicates a restrictive policy, or if the transaction is subject to an interpretation which points towards tax motivation as a primary purpose, there will be little chance that the Service will rule formally.[61]

B. *Time Factor*

If time is of the essence to the success of the transaction, it is best to act without the assurance of a ruling.[62] Although the average ruling request (65%) takes approximately sixty days,[63] this average is of no value to the individual taxpayer with a complex problem, as his request may take three months or longer to process.[64] If the taxpayer is forced to make a binding decision within two months of the request, it is probably unwise to request a ruling.

C. *Possibility of Raising Collateral Issues*

In every ruling request there is a possibility that the submission of facts to the Commissioner will raise additional issues which the taxpayer would rather avoid at that time.[65] As one commentator points out, the request for a ruling always places the tax practitioner

> in the extraordinary position of seeking a judicial response from an opposing litigant. This fact has certain significant consequences; it means that counsel must always take into account the dangers of (1) disclosing unnecessary facts to this adversary and (2) calling the attention of the latter's investigative and auditing arm to this particular transaction.[66]

Thus the request for ruling on one transaction may result in audit or litigation on a tangential problem which was not clearly brought to the tax advisor's attention.

D. *Nature of the Transaction*

If the transaction is established in such an inflexible form that it cannot be changed if an unfavorable ruling is returned, and the tax-

59. Yager, *When and How Should the Practitioner Ask for Rulings and Technical Advice*, 14 J. TAXATION 38 (1961). *See* quote, *supra* note 46 for additional evidence indicating the wide-spread use of "telephone practice."

60. Clark, *supra* note 58, at 272-73.

61. *Id.*

62. Marshall, *supra* note 6, at 93-94.

63. Ellentuck, *How and When to Use the Advance Ruling*, 21 J. TAXATION 52, 55 (1964).

64. Taylor, *supra* note 18, at 72.

65. Marshall, *supra* note 6, at 94.

66. Clark, *supra* note 58, at 269-70.

payer is not confident that the reply will be favorable, it might be best to undertake the transaction without requesting a ruling. If the taxpayer receives an adverse ruling, and consummates the transaction despite it, he can be positive that the district office will take an adverse position since "the field almost always follows the conclusions of the National Office . . . ."[67]

It is also somewhat unwise to request a ruling on a consummated transaction. The facts upon which tax liability will be based have already been irrevocably established, and if an unfavorable ruling were then issued, the taxpayer would be hard-pressed indeed in trying to change the mind of a District Director armed with an adverse opinion from the National Office.[68]

It is best not to request a ruling in a transaction which is frowned upon by the Service but acceptable to the courts. Here it might be wise to take the calculated risk of litigation and proceed, rather than to evoke an immediate negative response from the Service.[69]

Assuming, however, that the tax practitioner errs, and submits a ruling request, what alternatives will be open to him, or to the Service?

1. *Withdrawal of Ruling Requests.*—The taxpayer has the right to withdraw a ruling request until the ruling letter is signed at the National Office.

> However, in such a case, the National Office may furnish its views to the District Director in whose office the return . . . will be filed. The District Director will consider the information submitted in a subsequent audit or examination . . . .[70]

Thus, the withdrawal, although motivated by fear of an unfavorable ruling, may be ineffectual. This problem is indicative of the need for extreme care on the part of the practitioner before submitting the request for advice.[71]

2. *Receipt of an Adverse Ruling.*—Some commentators suggest that the receipt of an adverse ruling is not a major disaster, since it allows the taxpayer to mold his transaction to meet the objections of the Service.[72] If, however, the transaction is inflexible, the taxpayer must

67. Ellentuck, *supra* note 63, at 55.
68. Yager, *supra* note 59, at 38.
69. Marshall, *supra* note 6, at 94.
70. Rev. Proc. 28, § 11, 1962-2 CUM. BULL. 504.
71. But note that Yager, *supra* note 59, at 41-42, points out that the danger of withdrawal is overstated, arguing that "the national office rarely takes such action unless it has reason to believe that the transaction has already been consummated or will take place in essentially the same form in which it has been considered by the national office."
72. *Id.* at 38.

either abandon it, consummate it and pay the additional taxes, or litigate. The District Office will not be amenable to compromise on the results of the transaction since it will follow the already stated position of the National Office.

3. *Refusal To Rule.*—Other than the feeling of uncertainty which is created by a refusal to rule, the taxpayer is in no worse position than if he had withdrawn his request. If the Commissioner believes that the transaction has been or will be consummated in the same form as suggested in the request, he will send the information to the District Office.[73]

In each of the three situations above, it is clear that no result of an unwise request will materially benefit the taxpayer, and the tax practitioner must carefully analyze each possible result before submitting the ruling request.

V. RELIANCE AND REVOCATION

A. *The Service's View*

Ordinarily the published Revenue Ruling will not be revoked retroactively, and the taxpayer may rely upon it if his factual situation is substantially the same as that stated in the published ruling.[74] Generally the problems in this area are caused by reliance upon Revenue Rulings which have since been modified or superseded by later rulings, regulations or legislation. The problem of greater difficulty is the amount of reliance which the taxpayer may safely place on a letter ruling. The Commissioner holds, as a matter of law, that no private ruling is binding, and that he is free to revoke retroactively if rulings are later determined to be contrary to the law.[75] Revenue Procedure 62-28 indicates that in practice, rulings will be retroactively revoked in relatively few situations if the taxpayer can meet the following conditions:

(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,

73. Clark, *supra* note 58, at 279.

74. Rev. Proc. 28, §§ 13.09-.10, 1962-2 CUM. BULL. 506.

75. The Commissioner holds that § 7805(b) of the Internal Revenue Code of 1954 gives him discretion to limit individual rulings to prospective effect, but does not give him the power to announce a firm policy against retroactive revocation in every situation. Caplin, *supra* note 17, at 21. Section 7805(b) provides: "Retroactivity of Regulations or Rulings—The Secretary or his delegate may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect." The Commissioner's reading of this provision might be unduly restrictive, brought about by other practical considerations rather than a desire to follow explicitly the will of Congress.

(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 in good faith in reliance upon the ruling and the retroactive revocation would be to his detriment.[76]

Although it may seem difficult to gain protection through satisfaction of these five conditions, it is probable that in the average ruling situation in which the practitioner has acted with care, the taxpayer will be in a position to bind the Service, under its own policy, to a prospective revocation. The Service desires to honor its word, and takes great pains to point out that it is a rare case indeed in which the taxpayer, acting in good faith, has suffered a retroactive revocation.[77]

In all probability, the Commissioner's allowance in practice of that which he refuses to allow as a matter of law reflects a simple compromise position between the extremes of no rulings at all and binding rulings in every instance. The Commissioner recognizes the advantages of rulings, but he cannot afford to bind the Service to improper positions, and must maintain maximum flexibility at all times. However, if the Service becomes too flexible, and changes its mind too often, the taxpayer will soon lose faith. Thus the Service must attempt to maintain a policy of fair play to the taxpayer when establishing ruling procedures. This policy of fair play may have received great impetus from the case of *James Couzens*.[78] Couzens was an early investor in Ford Motors, owning some 2,180 shares of stock. In 1919, Henry and Edsel Ford desired to buy out the minority interests. However, these interests would not sell until they obtained a valuation on their stock, so as to determine the tax consequences of the sale. The Service estimated a value of $9,489.34 per share as of March 1, 1913, and Couzens then sold out for $13,444.43 per share, including $8,622,096.70 as profit in the following year's return. In 1925, the Commissioner revalued the stock as of March 1, 1913, at a price of $2,634 per share, and assessed a deficiency of over ten million dollars against Couzens. The Board of Tax Appeals refused to accept Couzens' argument that the Commissioner was estopped by his earlier ruling. The Board stated that the Commissioner was in no way bound by prior opinions.[79] A case of this nature would be highly publicized in financial circles, and might tend to destroy public confidence in the Service. Since this case, the Service has

76. Rev. Proc. 28, § 13.05, 1962-2 CUM. BULL. 505.
77. Caplin, *supra* note 17, at 21; Taylor, *supra* note 18, at 87.
78. 11 B.T.A. 1040 (1928).
79. *Id.* at 1159. However, the Board revalued Couzens' stock at $10,000 per share, affording him a refund rather than a deficiency. *Id.* at 1172.

moved steadily in the direction of honoring its opinions,[80] and the good faith taxpayer is normally safe in relying upon his own letter ruling.

B. *The Courts' View*

Though the Commissioner normally refrains from a retroactive revocation, the possibility of such an unfortunate occurrence cannot be entirely dismissed. What remedies are available at law for the taxpayer who has relied upon a private ruling, only to have it revoked retroactively and followed by a deficiency letter? The courts, in dealing with this problem have recognized, at least in principle, that the Commissioner may abuse the discretion granted him under section 7805(b) of the Internal Revenue Code,[81] and that this question is a proper subject of judicial review.[82]

In *Automobile Club of Michigan v. Commissioner*,[83] the Supreme Court made it quite clear that the Commissioner may abuse his discretion in certain retroactive revocation situations. The Commissioner had granted the taxpayer exemption rulings in 1934 and 1938, which relieved the taxpayer of income taxes as a "club."[84] In 1945, the Commissisoner revoked these rulings, and retroactively applied taxes to the years 1944 and 1943. The taxpayer admitted liability for 1945 and all future years, but argued that the Commissioner should not be allowed to levy taxes for the two previous years. After pointing out that the doctrine of estoppel could not be used to bar the Commissioner from correcting a mistake of law,[85] the Court clearly indicated that, while the Commissioner could be guilty of an abuse of discretion,[86] there was no abuse in this case because the Commissioner treated the taxpayer in exactly the same fashion as all other taxpayers in the same situation.[87] This case is important not because of its

80. Wenchel, *Taxpayers' Rulings*, 5 TAX L. REV. 105, 111-13 (1949).

81. For a complete discussion of all the methods by which the courts have tried to restrain incidents of taxpayer abuse, see Lynn & Gerson, *Quasi-Estoppel and Abuse of Discretion as Applied Against the United States in Federal Tax Controversies*, 19 TAX L. REV. 487 (1964). *See also* Automobile Club of Michigan v. Commissioner, 353 U.S. 180, 185 (1957); Lesavoy Foundation v. Commissioner, 238 F.2d 589 (3d Cir. 1956).

82. Goodstein v. Commissioner, 267 F.2d 127 (1st Cir. 1959).

83. 353 U.S. 180 (1957).

84. INT. REV. CODE of 1939, § 101(9), 53 Stat. 33:

"The following organizations shall be exempt from taxation under this chapter—

. . .

(9) Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnings of which inures to the benefit of any (private) shareholder . . . ."

85. Automobile Club of Michigan v. Commissioner, 353 U.S. 180, 183 (1957).

86. "The Commissioner's action may not be disturbed unless, in the circumstances of this case, the Commissioner abused the discretion vested in him by § 3791(b) of the 1939 Code." (Now INT. REV. CODE OF 1954, § 7805(b)). *Id.* at 184.

87. *Id.* at 186. It would appear that if an abuse of discretion had been found in this

narrow holding, but because the Court indicated that the Commissioner might be barred from collecting back taxes based on retroactive revocations if an abuse of discretion were found.

Other than noting that all taxpayers were treated equally, the Court stated no criteria concerning what constitutes fair play, and what constitutes an abuse. One careful study of this area suggests that an abuse will be found, "usually only when the results of retroactive revocation are very harsh."[88] Such an abuse was found in *Lesavoy Foundation v. Commissioner*,[89] in which the Commissioner retroactively revoked the taxpayer's charitable foundation exemption and claimed a deficiency which, if collected, would have wiped out the entire assets of the foundation. The Court refused to condone this harsh result, holding that the retroactive revocation of the taxpayer's exemption would constitute an abuse of discretion. Although the Court did not clearly set forth a rationale for decision, and seemed to confuse abuse of discretion with estoppel,[90] it was definite on one point—the result of this retroactive revocation would be too harsh to allow.[91]

The legislative history of section 7805(b) indicates that its passage was intended to authorize the Commissioner "to limit retroactive application to the extent necessary *to avoid inequitable results*."[92] The predecessor[93] of 7805(b) was enacted because

> [i]n some cases the application of regulations, Treasury Decisions, and rulings to past transactions which have been closed by taxpayers in reliance upon existing practice, will work such inequitable results that it is believed desirable to lodge in the Treasury Department the power to avoid these results by applying certain . . . rulings with prospective effect only.[94]

Reasoning with this legislative history in mind, it becomes more logical to argue that the discretion of the Commissioner is not absolute, but is limited when considerations of equity are compelling.

This equity is generally strongest in excise tax situations. A retroactive revocation of a favorable excise tax ruling can do serious financial damage to any business, since it might wipe out the entire profit margin for the years in question. Excise taxes are normally passed on to the consumer, and any company relieved of taxes would be able

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case, it would have been based on discrimination between similar taxpayers rather than upon the unfairness of the Commissioner's action with regard to the individual.

88. Lynn & Gerson, *supra* note 81, at 510.

89. 238 F.2d 589 (3d Cir. 1956).

90. In citing authority for its abuse of discretion argument, the court relied on several cases which involved estoppel questions. *Id.* at 592 n.7.

91. *Id.* at 594.

92. Automobile Club of Michigan v. Commissioner, 353 U.S. 180, 184 (1957) (emphasis added).

93. Revenue Act of 1934, ch. 277, § 506, 48 Stat. 757.

94. H. R. REP. No. 704, 73d Cong., 2d Sess. 38 (1934).

to sell or lease at a lower price, creating a serious competitive difference due to tax administration. Thus, it is not surprising that a second avenue of taxpayer relief has been opened in several excise tax cases—abuse of discretion through discrimination between similarly situated taxpayers.[95] The *Automobile Club* holding stressed the importance of equality in taxation of similarly situated parties, and pointed out that the Commissioner cannot use his power in a discriminatory manner.[96] The success of the taxpayer's charge of discrimination rests upon the Commissioner's explanation for treating the taxpayer differently from others in similar situations. If the Court is satisfied that a reasonable distinction between taxpayers has been established, it will not find the necessary discrimination.[97] Thus, mere discrimination is not enough; the discrimination must be based upon an arbitrary classification.

In *Exchange Parts Co. v. United States*,[98] the Commissioner revoked a ruling exempting certain automobile parts from the exicse tax. In determining the limitation of this revocation, he conditioned prospective effect upon nonpayment of the tax for the previous years in question, and denied refunds to any who had paid the tax. Thus, in effect, the revocation had retroactive effect upon anyone who had paid taxes. The Court of Claims held this classification unreasonable, stating that "the promptly paying taxpayer could not be validly made the object of prejudicial discrimination."[99] The Commissioner has been unsuccessful in other cases when attempting to use this classification,[100] and the courts seem quite hesitant to punish the "occasional

95. *See* International Business Mach. Corp. v. United States, 343 F.2d 914 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 1028 (1966); Exchange Parts Co. v. United States, 279 F.2d 251 (Ct. Cl. 1960). *Contra*, Wolinsky v. United States, 271 F.2d 865 (2d Cir. 1959). This concern for the results of retroactive revocation in excise tax situations has been embodied in statute. Revenue Act of 1926, ch. 27, § 1108(b), 44 Stat. (pt. 2) 114, states: "No tax shall be levied, assessed, or collected under the provisions of Title VI of this Act on any article sold or leased by the manufacturer . . . if at the time of the sale or lease there was an existing ruling . . . holding that the sale or lease of such article was not taxable, and the manufacturer . . . parted with possession or ownership of such article, relying upon the ruling . . . ." *See also* Beaman, *How Much Reliance on a Revenue Ruling? Law Forbids Some Retroactive Revocations*, 13 J. TAXATION 22 (1960). For additional discrimination cases, see Weller v. Commissioner, 270 F.2d 294 (3d Cir. 1959), *cert. denied*, 364 U.S. 908 (1960); City Loan & Sav. Co. v. United States, 177 F. Supp. 843 (N.D. Ohio 1959), *aff'd*, 287 F.2d 612 (6th Cir. 1961); Connecticut Ry. & Lighting Co. v. United States, 142 F. Supp. 907 (Ct. Cl. 1956).

96. 353 U.S. 180, 184 (1957).

97. For example, in Weller v. Commissioner, 270 F.2d 294 (3d Cir. 1959), the taxpayer had never requested a ruling. This was enough to distinguish him from all those who had requested rulings; and since he was treated equally with others who had not requested a ruling, there was no discrimination.

98. 279 F.2d 251 (Ct. Cl. 1960).

99. *Id.* at 254.

100. Connecticut Ry. & Lighting Co. v. United States, 142 F. Supp. 907 (Ct. Cl. 1956). *Contra*, Wolinsky v. United States, 271 F.2d 865 (2d Cir. 1959). In *Wolinsky*,

unfortunate who happened to pay his taxes on the basis of the law in the books."[101]

As a general rule, the cases hold that one taxpayer cannot rely on a ruling issued to another in order to obtain tax relief.[102] The majority of these cases result in victories for the Commissioner even though the complaining taxpayer's circumstances may be strikingly similar to those who have been treated favorably. A typical factual situation appears in *Goodstein v. Commissioner*.[103] The taxpayer was assessed a deficiency resulting from the disallowance of an interest deduction. This deduction was based upon an alleged loan which was found to be lacking in substance and void for tax purposes. The taxpayer, when deciding to set up this transaction, had relied upon two private rulings which had been issued to other taxpayers, and which had assured them favorable tax treatment for similar transactions. The court clearly believed the taxpayer's plea that he had entered the transaction in reliance upon the rulings, and did not doubt the fact that he believed in good faith that the transaction was approved.[104] However, these facts were of no weight, since the "letters were not intended to be applicable to the taxpayer"[105] relying upon them. The court's rationale is fairly simple. It is based primarily upon the impracticability of allowing total freedom of reliance,[106] and does not deal with the possibility of arbitrary discrimination. It is clear, however, that had the question been raised, the court would have found a reasonable ground for discrimination—distinguishing those taxpayers with rulings from those without. This same ground was accepted by the Third Circuit in *Weller v. Commissioner*[107] to rebut the taxpayer's plea of arbitrary discrimination.

> We need not determine whether such action if carried out would be an abuse of discretion, for petitioners are not in the same position as those

the taxpayer paid excise taxes while others similarly situated did not, and gained knowledge of a favorable private ruling shortly before its revocation. The court held that this taxpayer was not entitled to a refund, though other taxpayers who had not paid would not be assessed a deficiency. The court based its holding on lack of reliance by the taxpayer, and seemed to confuse the ideas of estoppel and discrimination.

101. Connecticut Ry. & Lighting Co. v. United States, 142 F. Supp. 907, 909 (Ct. Cl. 1956).

102. *See* Hanover Bank v. Commissioner, 369 U.S. 672 (1962); Bookwalter v. Brecklein, 357 F.2d 78 (8th Cir. 1966); Pomeroy Cooperative Grain Co. v. Commissioner, 288 F.2d 326 (8th Cir. 1961); Bornstein v. United States, 345 F.2d 558 (Ct. Cl. 1965).

103. 267 F.2d 127 (1st Cir. 1959).

104. *Id.* at 132.

105. *Id.*

106. "But to hold that the Commissioner is bound by rulings specifically addressed to a taxpayer other than the one whose return is questioned would severely limit the usefulness of the long established practice of private administrative rulings." *Id.* at 132.

107. 270 F.2d 294 (3d Cir. 1959).

> parties who have been issued rulings. They are entitled to the same treatment as all other taxpayers similarly situated, *i.e.*, without rulings, no more and no less. This the Commissioner has afforded them.[108]

As a general rule, the taxpayer who bases his claim for relief upon another taxpayer's ruling has little chance of victory. However, one recent case, *International Business Machines Corp. v. United States*,[109] has been cited as an exception to the general rule. In this case Remington Rand (taxpayer's only competitor in the computer market) was granted a favorable ruling concerning the excise tax status of a certain computer. Two months later, IBM requested a ruling on the same type computer. Then Remington Rand acquired a refund for the years between 1952 and 1955. IBM also filed for a refund, but was not successful. In 1957, Remington Rand was notified that its ruling was to be revoked prospectively beginning in 1958. In 1957, more than two years after the original request for a ruling, taxpayer was notified that its machines were taxable. Soon after that, a second refund claim was disallowed. In effect, the Commissioner was forcing taxpayer to pay excise taxes on the computer for six years while its only competitor was free of the same tax on the same type of computer. The Court of Claims held that the Commissioner's refusal to grant a refund was arbitrary discrimination and an abuse of discretion.

This case is difficult to utilize as authority for the proposition that the "no-reliance" rule is crumbling, since the facts are so unusual. First, this was an excise tax situation, and the two taxpayers were the only competitors in the market. Thus the refusal to aid IBM not only created an unfair tax burden, but also worked to give Remington Rand a competitive advantage. Second, IBM had made a good faith attempt to obtain its own ruling, rather than trying to rely on that of Remington Rand, and the Service could not satisfy the court that there was any justification for the two-year delay in ruling.[110] The court expanded the meaning of section 7805(b) somewhat, so that it imposed a clear duty upon the Commissioner to use his best efforts to avoid inequity: "to consider the totality of the circumstances surrounding the handing down of a ruling—including the comparative or differential effect on the other taxpayers in the same class."[111]

Some commentary suggested that this case might begin a new trend in the direction of an equity doctrine used by the courts "as a remedy

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108. *Id.* at 299. For additional cases following this rationale, see Minehin v. Commissioner, 335 F.2d 30 (2d Cir. 1964); Knetsch v. United States, 348 F.2d 932 (Ct. Cl. 1965); W. Lee McLane, Jr., 46 T.C. 140 (1966); Arnold A. Schwartz, 40 T.C. 191 (1963).

109. 343 F.2d 914 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 1028 (1966), *noted in* 64 MICH. L. REV. 541 (1966).

110. 343 F.2d at 921-22.

111. *Id.* at 920.

for administrative caprice."[112] It appears, however, that the case has been limited to its facts by later decisions.[113] This limitation process would be quite simple for the courts to undertake, since the competitive factors alone would create enough leeway to distinguish *IBM* from other cases. One month after the *IBM* decision, the Court of Claims decided *Bornstein v. United States*,[114] in which six corporations joined to build a single apartment building. One of the six obtained a ruling that a distribution of excess mortgage funds to its shareholders would receive capital gain treatment. The other five corporations did not request rulings, since they were all engaged in the same transaction, and the legal counsel who had obtained the ruling represented all six as a unit. In addition, the Internal Revenue official who had discussed the ruling with counsel had informed him that the ruling would be applicable to all six corporations. The Commissioner assessed deficiencies against the shareholders of the other five corporation and they sued for a refund, arguing arbitrary discrimination between taxpayers in the same situation. The court held for the Commissioner, distinguishing *IBM* by pointing out that IBM had made timely request for a ruling, and ignoring the other equitable concepts stated in that case.[115]

In 1966, the Eighth Circuit again limited *IBM* to its facts in the case of *Bookwalter v. Brecklein*.[116] Taxpayer sued to recover alleged overpayments of taxes for the year 1957 resulting from a failure to deduct certain city assessments which a private (though widely publicized) ruling had declared deductible to numerous other taxpayers in the same situation. The district court ruled for the taxpayer, basing its holding on the concept that this taxpayer was "entitled as a matter of law to equality of treatment with . . . any others who were accorded the benefit of the Commissioner's modification provision of no retroactive application of the . . . ruling . . . ."[117] The Eighth Circuit

112. 18 VAND. L. REV. 2069, 2074 (1965).

113. Calechman, *Recent Cases Show Need for Caution in Relying on IRS Rulings and Acquiescences*, 23 J. TAXATION 122 (1965); 25 J. TAXATION 35 (1966); 24 J. TAXATION 246 (1966).

114. 345 F.2d 558 (Ct. Cl. 1965).

115. The court relegated the *IBM* case to one footnote, in which it stated: "There are also controlling factual differences. . . . In that case the court applied section 7805b . . . in behalf of a taxpayer who had made prompt application to obtain a private ruling. . . . In these cases, none of the taxpayers nor corporations in which they are shareholders asked for rulings." 345 F.2d at 564 n.2. *Bornstein* may also be distinguished from *IBM* in that there was no real competitive factor in the former, since the taxpayers were engaged in the same enterprise. Furthermore, in *IBM* the taxpayer and Remington Rand were the only two members of the class in question, and received exactly opposite treatment, while in *Bornstein* each taxpayer was treated as any other which had not requested a ruling in the matter. For an excellent analysis of the relationship between *IBM* and *Bornstein*, see 18 STAN. L. REV. 736 (1966).

116. 357 F.2d 78 (8th Cir. 1966).

117. Brecklein v. Bookwalter, 231 F. Supp. 404, 411 (1964).

reversed this decision, holding that there was no arbitrary discrimination, since taxpayer had been treated the same as all others without rulings.[118] The court distinguished *IBM* by pointing out that it

> involved a situation where one competitor was being favored unjustly over the only other competitor in the computer industry. Thus, the only members of the only logical class therein . . . were being treated in exactly opposite ways to the great detriment of I.B.M.[119]

The above cases indicate that *IBM* will probably continue to be limited to its facts. Both involved non-excise tax situations with no questions of adverse results to the taxpayer beyond the additional taxation. The courts, in denying relief, do not seem to deny that equity is on the side of the injured taxpayer; rather they simply allow administrative practicality to outweigh this consideration. If these cases had been decided in favor of the taxpayer, the result might have been a serious slowdown in the ruling program and a flood of reliance litigation.[120] It is probable that the courts are correct in taking this conservative view of the reliance problem. Assuming that taxpayers were allowed to rely freely upon another taxpayer's private ruling, it would in all likelihood:

(1) Reduce the Service's willingness to rule,
(2) Increase the time involved in obtaining a ruling,
(3) Render obsolete the statutory closing agreement, and
(4) Cause every ruling to be subjected to intensive review at the highest levels of the Service before issuance.[121]

If these results did occur, the whole policy and purpose of the rulings program would be frustrated. Instead of a 60 to 90 day wait, the taxpayer might well have to delay a transaction six months or longer while waiting for his request to be reviewed by ranking Service officials. In addition, the Service would be most hesitant to rule at all on any point which indicated even the slightest danger to the revenue, since through publication the ruling might be binding in thousands of cases. As the Commissioner points out:

> Today, if an error is made in a given case, the revenue is not likely to be jeopardized to any great extent. On the other hand, if an erroneous interpretation in one case would be binding in all comparable cases, the Service quite naturally would be more hesitant in exercising its discretionary authority to rule on close questions.[122]

118. 357 F.2d at 82.
119. *Id.* at 84.
120. "We would not be remiss to point out that a favorable ruling. . . . herein would open the proverbial floodgates of litigation. . . . Not allowing the Commissioner some proper discretion in prospectively or retroactively revoking private rulings would cause the elimination of private letter rulings and any and all benefits to be derived therefrom." *Id.* at 85.
121. Caplin, *supra* note 17 at 26-29.
122. *Id.* at 27.

The courts must take a somewhat conservative position then, in an effort to preserve the flexibility that is so important to the proper functioning of the rulings program. However, it is obvious that in certain instances the Commissioner—due to negligence or to an overzealous desire to protect the revenue—will overstep his bounds. If this happens, the courts must be willing to protect the injured taxpayer by finding an abuse of those discretionary powers which the Commissioner has been granted. This is particularly necessary in any situation in which the taxpayer, due to some act or omission by the Service, has suffered an injury beyond mere additional taxation. It is hoped that the *IBM* rationale can be used to protect taxpayers whenever their competitive position has been damaged through discriminatory actions by the Service.

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