

Area of Focus #4 TAS Will Continue to Advocate for Counsel to Disclose Emailed Advice

TAXPAYER RIGHTS IMPACTED¹

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

DISCUSSION

Disclosure of Counsel's Legal Analysis Helps Taxpayers

The transparency of the IRS Office of Chief Counsel (Counsel) is important to taxpayers. The *right to be informed* is the first right listed in the Taxpayer Bill of Rights for good reason. If taxpayers do not know the rules and why the IRS has adopted them, they cannot determine if they should exercise their other rights (e.g., the *right to challenge the IRS's position and be heard* or the *right to appeal an IRS decision in an independent forum*). Information about how Counsel interprets the law helps taxpayers avoid taking positions that would incur penalties or ensnare them in audits or litigation.²

Transparency was particularly important in 2018 because Congress had just enacted the Tax Cuts and Jobs Act (TCJA) at the end of 2017. The TCJA raised legal questions that Counsel was answering for IRS program managers. The program managers acted on Counsel's advice, sometimes relaying Counsel's conclusions to the public as FAQs, fact sheets, publications, instructions, etc., without the underlying legal analysis.

Counsel Is Required to Disclose Program Manager Technical Advice

Fortunately for taxpayers, the Freedom of Information Act (FOIA) and a settlement with Tax Analysts require the IRS to disclose Counsel advice to IRS program managers (called Program Manager Technical Advice or PMTA) on the basis of standards applied in two cases.³ The cases permit Counsel to withhold deliberative and pre-decisional communications, but not its final legal positions. The U.S. Court of Appeals for the District of Columbia Circuit explained “[i]t is not necessary that the TAS

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). See IRC § 7803(a)(3).

2 The IRS response to our recommendations in the 2018 Annual Report to Congress says a “[T]axpayers’ right to be informed is satisfied when the IRS provides guidance ... to those who are charged with tax administration.” See National Taxpayer Advocate Fiscal Year 2020 Objectives Report vol. 2, www.TaxpayerAdvocate.irs.gov/ObjectivesReport2020, available July 2019. However, a taxpayer needs to receive information to be informed. When the IRS provides guidance to itself, it is wrong to suggest that it has satisfied the taxpayer’s right to be informed. [Emphasis added.]

3 The IRS settled with Tax Analysts in July 2007, agreeing to disclose Program Manager Technical Advice (PMTA) dated or prepared after 1994 “on the basis of the standards announced by” the U.S. Court of Appeals for the District of Columbia Circuit in its June 14, 2002, opinion in *Tax Analysts v. IRS*, “as applied by the district court” in its February 7, 2007, opinion. *Tax Analysts v. IRS*, Stipulation of Decision, CA No. 1:96-2285-CKK (July 23, 2007) (citing *Tax Analysts v. IRS*, 294 F.3d 71 (D.C. Cir. 2002), *remanded*, 483 F. Supp. 2d 8 (D.D.C. 2007)).

[advice] reflect the final programmatic decisions of the program officers who request them. It is enough that they represent OCC's [the Office of Chief Counsel's] final legal position...."⁴ Once Counsel sends its legal analysis to a program manager, it is presumably sending its final legal position, which must be disclosed.⁵

TAS assumed the IRS would issue and disclose more PMTAs following the TCJA. That assumption was wrong. Counsel posted fewer PMTAs in 2018 than it did in 2017 before the TCJA was enacted.⁶

Delayed Disclosure Can Lead to Controversy

Although TAS does not know what advice went undisclosed, one example of delayed disclosure involves taxpayers subject to the new transition tax under Internal Revenue Code (IRC) § 965, which could be paid in interest-free installments over eight years.⁷ On March 13, 2018, the IRS posted an FAQ instructing taxpayers to designate a specific payment for this new tax. Some who had fully paid made an extra payment, which they assumed they could recover. On April 13, 2018, the IRS posted an FAQ, which said they could not. Without the underlying legal analysis, practitioners thought the FAQ was wrong or could be changed. They asked TAS for help in recovering the extra payment. Program managers informed TAS they were relying on a Counsel opinion (probably an email) when they posted the FAQ on April 13, but the opinion was not formally issued as a memo and disclosed until August 2, 2018.⁸

Had the PMTA been disclosed before or at the same time as the program manager posted the FAQ, some of the controversy and confusion could have been avoided.⁹ More taxpayers would have been aware of the IRS's legal reasoning before making extra payments and fewer would have assumed the FAQ was an error. Those who still felt it was an error could have addressed the underlying legal reasoning, helping to ensure the IRS's conclusions were correct.

⁴ *Tax Analysts v. IRS*, 294 F.3d at 81.

⁵ The IRS has not taken the position that IRS program managers work with Counsel on legal advice. If the IRS were to take that position, then there would be a risk that unlicensed program managers would be engaged in the unauthorized practice of law. For program managers who were licensed as attorneys, there would be a risk that they were in violation of Treasury Order 107-04 (Jan. 16, 2009) and Treasury General Counsel Directive No. 2 (July 8, 2015). Those authorities generally require attorneys whose duties include providing legal advice to report to the IRS Chief Counsel.

⁶ Counsel issued and posted only 13 PMTAs in 2018, down from 15 in 2017. TAS analysis of PMTAs posted on IRS.gov (May 29, 2019). In contrast, it issued and posted 68 PMTAs following tax legislation enacted in 1998—more than double the 32 it issued and posted in 1997. *Id.*

⁷ For a more detailed discussion of this issue, see Nina E. Olson, NTA BLOG, *IRS Administration of the Section 965 Transition Tax Contravenes Congressional Intent and Imposes Unintended Burden on Taxpayers* (Aug. 16, 2018), <https://taxpayeradvocate.irs.gov/news/nta-blog-irs-administration-of-the-section-965-transition-tax-contravenes-congressional-intent-and-imposes-unintended-burden-on-taxpayers?category=TaxNews>.

⁸ PMTA 2018-16 (Aug. 2, 2018), https://www.irs.gov/pub/lanoa/pmta_2018_16.pdf. In its response to our 2018 Annual Report recommendations, the IRS asserts that “a final decision about how to address the issue was made in conjunction with the decision to issue ...[the PMTA.]. After that decision was made, the PMTA was issued and immediately released.” See National Taxpayer Advocate Fiscal Year 2020 Objectives Report vol. 2, www.TaxpayerAdvocate.irs.gov/ObjectivesReport2020, available July 2019. However, Counsel's advice must have been issued before the program manager relied on it to issue the FAQ on April 13, 2018. Once a client receives advice and acts on it, it is final. The advice is not retroactively converted into deliberative material that can be withheld simply because it is later reconsidered.

⁹ Moreover, neither this memo nor any other legal analysis posted by the IRS addressed whether the IRS could grant applications on Form 4466, *Corporation Application for Quick Refund of Overpayment of Estimated Tax*, for refunds of excess estimated tax payments pursuant to IRC § 6425, before any tax had been assessed for 2017. That issue was not addressed by PMTA 2018-16. Therefore, taxpayers asked TAS for assistance in obtaining such “quickie” refunds. The IRS does not believe it can pay such refunds. Although it received advice from Counsel, it has not released a PMTA addressing the issue.

A lack of timely guidance led 115 taxpayers to make \$2.8 billion in payments on their transition tax liability that they did not intend to make and that they could not recover from the IRS.¹⁰ Some suffered severe cash flow problems. The IRS could minimize such problems by disclosing PMTA more quickly after they are provided to program managers.

Disclosure Helps IRS Employees Do Their Jobs

Without prompt and complete direct access to Counsel's advice to program managers, other IRS employees, including the National Taxpayer Advocate, the Chief Counsel, the IRS Commissioner, and other attorneys in Counsel might not know that it exists or that they could request a copy. IRS attorneys generally check publicly available sources—including PMTAs that have been released—when analyzing a legal issue. If they cannot find PMTAs that they or their colleagues have issued (*e.g.*, when they work in different areas, memories fail, or attorneys retire or change jobs), they are more likely to provide inconsistent or incorrect legal advice when faced with similar issues in the future.

The IRS Commissioner and the Chief Counsel may also need direct access to the advice so that they can supervise their employees. Similarly, the National Taxpayer Advocate, who is required by IRC § 7803(c)(2) to assist taxpayers and to address systemic problems, needs to know the basis for IRS decisions that require her attention. A program manager or Operating Division Commissioner can revisit a policy decision, whereas only Counsel, the IRS Commissioner, the Treasury Secretary, or Congress can revisit a legal decision. When the IRS does not know the basis for its decisions, the National Taxpayer Advocate sometimes encounters finger pointing, with Counsel saying it is a policy decision and a program manager saying it is a legal decision. Indeed, program managers told TAS the IRC § 965 issue (discussed above) was a legal decision, but Counsel waited until August 2, 2018, to provide TAS with the legal analysis underlying the FAQ that was published on April 13. Thus, the National Taxpayer Advocate needs prompt and complete direct access to Counsel advice so that she can timely fulfill her statutory mandate to assist taxpayers.

The IRS Will Address Some But Not All of the Disclosure Problems

As described in the National Taxpayer Advocate 2018 Annual Report to Congress, Counsel had no written guidance about what it would disclose as PMTA, no firm targets for when it would disclose PMTA, and was telling (but not encouraging) its attorneys they could withhold advice that would otherwise have to be disclosed if they issued it as an email, rather than as a memo.¹¹ Most attorneys would probably prefer to avoid disclosing their advice to the public because doing so can reveal errors or disagreements. Yet, the IRS's response says, "Counsel attorneys do not provide formal advice to program managers by email to avoid the release of legal advice to the public."¹² This is impossible to verify. It seems more likely that attorneys do issue advice by email to avoid disclosure. For this very reason, Counsel attorneys probably issue memos (rather than emails) only upon request. When the National Taxpayer Advocate asks Counsel for legal advice she receives an email unless she specifically asks for a

10 Treasury Inspector General for Tax Administration (TIGTA), Ref. No. 2019-34-033, *Implementation of the Tax Cuts and Jobs Act Deemed Repatriation Tax Presented Significant Challenges* 12 (May 22, 2019).

11 National Taxpayer Advocate 2018 Annual Report to Congress 34-51 (Most Serious Problem: *Transparency of the Office of Chief Counsel: Counsel Is Keeping More of Its Analysis Secret, Just When Taxpayers Need Guidance More than Ever*). See also Nina E. Olson, NTA Blog, *The IRS Office of Chief Counsel Is Using Email to Avoid Disclosure of Program Manager Technical Advice* (Mar. 6, 2019), https://taxpayeradvocate.irs.gov/IRS_Office_of_Chief_Counsel_Transparency; *The National Taxpayer Advocate on the IRS Filing Season: Hearing Before the H. Subcomm. on Oversight of the H. Comm. on Ways and Means*, 116th Cong. (2019) (statement of Nina E. Olson, National Taxpayer Advocate).

12 See National Taxpayer Advocate Fiscal Year 2020 Objectives Report vol. 2, www.TaxpayerAdvocate.irs.gov/ObjectivesReport2020, available July 2019.

memo. Thus, the National Taxpayer Advocate's report said that Counsel's focus on form over substance was making a mockery of the FOIA and the settlement with Tax Analysts.

The IRS has agreed to update the Chief Counsel Directives Manual (CCDM) to more clearly explain what must be disclosed as PMTA and to post PMTAs more quickly after they are issued. However, it has not agreed to systemically identify PMTAs (*e.g.*, by expanding the email system that it currently uses to identify Chief Counsel Advice). It has not agreed to treat PMTAs as issued when first transmitted to or acted on by a program manager. Nor has it agreed to require disclosure of any advice that is, in substance, PMTA, even if it is issued by email.

The IRS Has Not Explained Why It Does Not Disclose Emailed Advice as Program Manager Technical Advice

The form of Counsel's advice as an email or a memo has no bearing on how much thought went into the analysis, whether it is Counsel's final position, or how it will be used. The cases that the IRS agreed to follow make no distinction based on the form of the advice. Any such distinction would be wrong. *It would be like concluding that memos written in blue ink must be disclosed, but those written in black ink do not.* Moreover, the IRS apparently did not believe the distinction made sense in 2007 when it posted at least three PMTA that were issued as emails.¹³ Indeed, the distinction between emails and memos makes even less sense than the IRS's former two-hour rule—the rule that the IRS would withhold Counsel advice prepared in less than two hours—which the U.S. Court of Appeals for the D.C. Circuit found lacked any legal basis.¹⁴

CONCLUSION

Within a specific period after an IRS program manager receives a PMTA or relies on the advice to make a decision (*e.g.*, drafting an FAQ, fact sheet, instruction, publication, news release, IRM, etc.), the PMTA should be disclosed regardless of its form.

FOCUS FOR FISCAL YEAR 2020

In fiscal year 2020, TAS will:

- Continue to advocate for the IRS to require disclosure of any advice that is, in substance, PMTA, even if it is transmitted by email;
- Continue to advocate for the IRS to disclose a PMTA within a specific period after it is transmitted to a program manager or a program manager relies on it to make a decision;
- Continue to advocate for the IRS to establish a systemic process to ensure PMTA are being identified. For example, it could require attorneys to copy a disclosure mailbox or expand the automated email system that Counsel currently uses to identify Chief Counsel Advice to field employees that must be disclosed; and
- Work with Counsel on CCDM revisions that will clarify how attorneys should identify PMTA and reduce delays between the issuance and disclosure of PMTA.

¹³ See, *e.g.*, PMTA 2008-01567 (Sept. 28, 2007); PMTA 2007-01190 (Aug. 14, 2007); PMTA 2007-01186 (June 11, 2007).

¹⁴ See *Tax Analysts v. IRS*, 495 F.3d 676, 681 (D.C. Cir. 2007) ([the IRC § 6110 disclosure provision] "requires no particular form or formality. Nor does it distinguish between advice a lawyer renders in less than two hours and advice that takes longer than two hours to prepare. Thus, given the broad definition of "Chief Counsel advice" in section 6110(i)(1)(A), we believe that the temporal distinction the IRS draws in its two-hour disclosure rule is contrary to the unequivocal statutory directive...").