

Private Letter Rulings

The IRS has lots of ways to communicate to both professionals as well as the general public including: publications, regulations, procedures, revenue rulings, notices, memorandums, etc., etc. Most tax professionals have a reasonably good understanding of why certain documents are written and how much weight they carry — most members of general public do not. Again, in general, the IRS issues three kinds of documents:

- (1) Regulations. These tend to be lengthy and written on subjects of broad or major import. Regulations should be thought of as at the top of the IRS food chain in terms of authority. Think of them as a law as most of the time they literally are. Frequently, Congress does not want to bother with details, so Congress will legislate a tax bill and contained within the bill will be language to effect: “as determined by the Commissioner.” With those words, Congress just passed law-making authority explicitly to the IRS — so, if the IRS says so in a regulation — it is the law; treat it as such.
- (2) Procedures. These are also lengthy but for a different reason. Procedures are primarily for tax professionals. A procedure is the IRS saying: “If you want to conduct business with the IRS you will follow our rules and forms in doing so...”.
- (3) All Other Writings. Are the IRS’s opinion on a subject — sometimes their opinion is a good one; sometimes their opinion is not. Sometimes the IRS will take it a step further and actually write an opinion that is contrary or adverse to standing authority as adjudicated in federal and/or tax court.

Here is what you can be sure of. Any writing that is not a regulation and not a procedure should be treated as the IRS’s opinion and position on a specific subject — it does not make them right; it just makes them the 800 pound gorilla in the room.

So how do private letter rulings, (“PLRs”), fit in this mix? PLRs have often been called the making of tax law, one taxpayer at a time. This is surprisingly very close to the truth. Some rules:

- (1) A PLR starts with a submission by a taxpayer to the IRS. It looks, not unlike, a legal brief or pleading in a law suit. It is rather lengthy, usually 40 to 100 pages in length (as required by the IRS Procedures that tell you how to prepare a PLR submission).
- (2) The taxpayer swears that he or she is telling the truth, the whole truth and nothing but the truth. Anything less effectively results in a voided request.
- (3) The taxpayer is obligated to:

- (A) Present in a straight-forward manner, the issue(s) to be resolved.
- (B) Present both favorable as well as adverse authorities on the tax matter (kinda like acting as both the prosecution and defense in a law suit).
- (C) Present thoughtful concepts and discussion on the tax matter as well as the practical consequences of both favorable and unfavorable rulings.
- (D) Pay a tax professional to put all of this together in a procedural manner as defined by the IRS.
- (E) Pay the IRS \$10,000 (going to \$12,500 on 7/1/2022) for the time and privilege of the IRS reading what you wrote¹.
- (F) Wait 6 to 12 months for a decision.

Lastly, because of the PLR process as well as the associated expense, it essentially becomes a contract (think judge's decision or verdict) between the submitting taxpayer and the IRS and only the submitting taxpayer. Essentially, the submitting taxpayer owns the PLR as if it were property. Technically, no one else can use it or rely upon it.

Without question, this sounds like a lot of grief for little reward; I would rather visit my proctologist. ABSOLUTELY TRUE. So when would a PLR make sense? Only when the economic / tax outcomes to the submitting taxpayer are so large that the costs associated with the PLR process start to appear to be insignificant compared to the potential benefits to be achieved by obtaining a favorable ruling. As an example, two taxpayers may both design identical SEPP plans in terms of theory and both might be considered somewhat aggressive. Both taxpayers are therefore considering filing for a PLR:

- (1) Taxpayer #1's plan calls for annual distributions approximating \$50,000 per year for six years. Worst possible outcome is he is audited in year seven and the plan is found to be non-compliant resulting in an additional tax bill of \$50,000 for the surtax and interest. He could have filed for a PLR and potentially gotten a favorable ruling at a cost of \$15,000. Does a 30% (insurance) premium sound worth it? Most likely the answer is no. Most likely this taxpayer backs off his

¹ This is familiar country for this author so please permit a bit of opinion. You didn't really expect the IRS to create or do anything here, did you? Of course not. You get to do all of the work and then pay the IRS \$10,000 for them to read it. Then, six to twelve months later, the IRS will rule either affirmatively or adversely. Worse, there is little discussion and no jury. Now my opinion: the IRS does not care about the tax consequences to the submitting taxpayer; they further do not care about how this issue might influence the acceleration or delay in US Treasury tax receipts; they actually care very little about fundamental right versus wrong and they don't care about whether they have the authority to make a decision; they just assume they do whenever it suits their purpose. So what do they care about? Simple, at all costs, the Associate General Counsel's Office of the IRS does not want inadvertently publish a document that creates the equivalent of a tax loophole big enough for a fleet of Peterbilt semis' to drive through.

plan design and launches something more conservative.

- (2) Taxpayer #2's plan design looks identical to #1 but calls for annual distributions near \$300,000 for 12 years. Same worst potential outcome but the price skyrockets to \$500,000. Does a 3% premium sound worth it? Most would say yes².

In summary, the PLR process is skewed in favor of the IRS, lengthy and expensive. This is a primary contributor as to why there have been zero PLRs on §72(t) matters in last five years. Needless-to-say, if your circumstances warrant for a jump in the deep end of the pool, please call us; we would love to hear how you fair.

² By implication of this example; does this make the PLR process discriminatory in favor of the rich and disadvantages the relatively poor. Unfortunately YES and it is clearly wrong. Feel free to write your Congressperson as well as the Commissioner of the IRS to request that PLR fees for individual taxpayers be fairly restructured. This author has done so in the past; the result has been no response.

