



Robert W. Wood

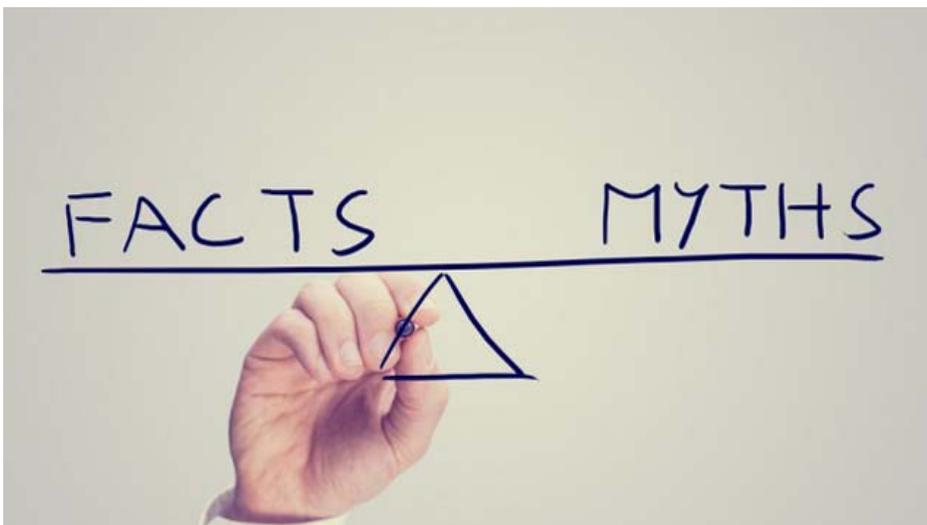
THE TAX LAWYER

TAXES 7/07/2015

Ten Myths About Tax Opinions

Why might you want a tax opinion? Surprisingly, many clients and tax advisers have trouble saying exactly why one should get a tax opinion or how to use it. An opinion can be about almost any tax issue, past or future. A good tax opinion discusses the facts, legal arguments, and pertinent authorities. One portion of the opinion says, "it is our opinion that...." But the vast majority of the opinion should analyze the facts and the law, presenting an even-handed assessment. Here are ten myths about tax opinions to help clear up some misconceptions:

1. Tax Opinions Bind the IRS. Obviously, they do not. If you want a binding commitment from the taxing authority in question, ask for a ruling.



2. Tax Opinions Are About Penalty Protection. The most commonly stated reason to get a tax opinion is to avoid penalties. Just about everyone in the tax business says this at one time or another. But I do not believe most tax opinions are primarily for purposes of penalty protection. No client wants or expects the claimed tax position to fail. If all the opinion accomplishes is saving penalties, the client won't be happy. Clients want their tax position upheld, or to compromise it on an acceptable basis.

3. A Good Tax Opinion Is Strong and Assertive. Clients want their tax lawyer to be an advocate. Clients want their case stated as strongly as can be justified. For that reason, some tax lawyers write opinions that are one-sided rather than balanced. Clients may like an opinion that is one-sided (in their favor) rather than wishy-washy.

4. A Good Opinion Should Not Argue Both Sides. Actually, it should. A client should want a tax opinion that thoroughly documents and develops the case and its legal theories. The opinion's bottom line may be that there is substantial authority (or some other level of confidence) for the position. But it should be accompanied by a thorough examination of the relevant authorities.

5. Assumptions Can Be About Anything & Need Not Be Reasonable. For many years, the Treasury Regulations said that tax opinions could not be based on unreasonable assumptions or unreasonably rely on representations. The rules were changed, but it is still true that the assumptions should be stated and should be reasonable.

6. I'll Get An Opinion if I'm Audited. No. There is rarely time to get a good and thoughtful opinion at the audit stage. Even if there were, it would hardly be the same as one done before the transaction or before tax return filing. Opinions should be written before the tax return is filed.

7. There is No Advantage In Writing Opinions Early. This one could not be further from the truth. Not only should an opinion be done before the tax return is filed. The opinion should be done in parallel with the event or transaction. That is the best way to help shape the transaction or issue.

8. You Should Give the Opinion To the IRS. A legal opinion is a sensitive document, usually prepared by a lawyer for a client, subject to attorney client privilege. As such, it is worth asking who should receive it and to whom it should be disclosed, both then and later. The client will receive it, but be careful who you copy, since that simple act may waive the privilege. You do not want to waive privilege, since you rarely want to give it to the IRS.

9. Give the Opinion To the Return Preparer. No. The accountant usually does not need the whole opinion, but a short letter saying how to report. Most accountants are satisfied with a short directive letter telling them there is a written opinion protected by attorney client privilege. That way, the accountant is not ever tempted to give the opinion to the IRS during an audit. If the accountant is not satisfied with this procedure, the accountant can be brought within the attorney client privilege with a [Kovel letter](#). The attorney hires the accountant and remains subject to the direction of the attorney as part of the representation.

10. Opinions Are Not Helpful In a Dispute. Actually, opinions are *extremely* helpful in an audit or tax dispute. In 35 years, I have never handed an opinion to the IRS. The only reason one would do so is for penalty protection, and once again, I do not think tax opinions are primarily about penalty protection. Tax opinions are of enormous value as a resource for cutting and pasting. For the small percentage of tax cases that ultimately end up in controversy, there will be deadlines.

There is rarely enough time to prepare thorough and targeted responses that will be convincing to the IRS. A thorough legal opinion is a luxury. You can use the opinion's best facts and best arguments to draft advocacy letters or briefs, targeting the issues the IRS is raising. And if you can address the tax issues and resolve them, you hopefully will not have to talk about penalties!

For alerts to future tax articles, follow me on Forbes. You can reach me at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.