

Watch Out for Secret Tax Laws

By Robert W. Wood

While the Internal Revenue Service is a big federal agency and has a plethora of rules and policies, it must treat all taxpayers consistently right? In this age of transparency, you might be surprised that not everyone is treated the same by the IRS. The IRS tries hard to, but as a large bureaucracy it can't always succeed. In fact, there are options that allow taxpayers to ask for rulings on their own situation. When the IRS issues these rulings, surely you can rely on them right?

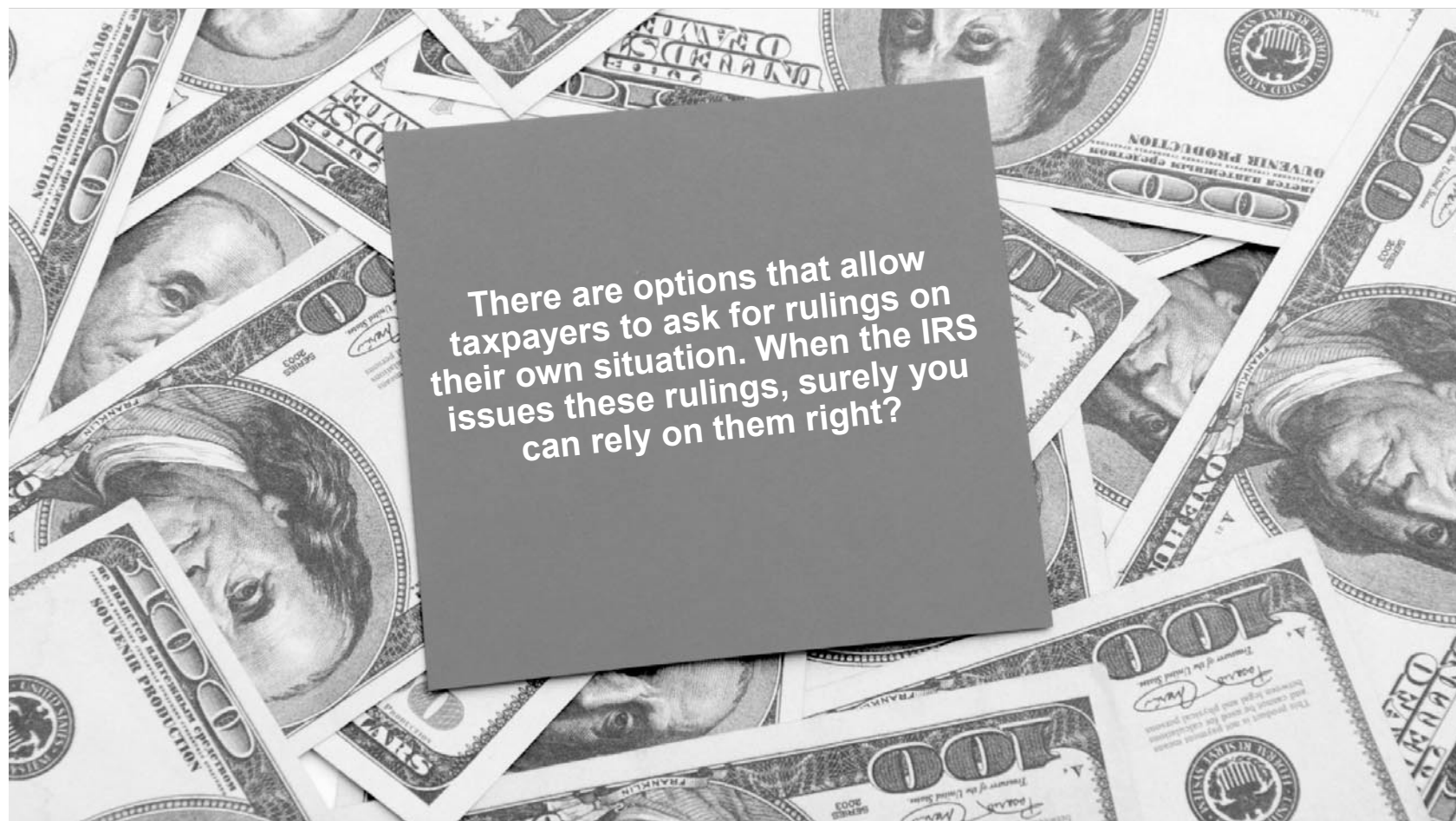


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Not so fast. I'm talking about private letter rulings (often known as "PLRs" or just "letter rulings"). Don't confuse these with published revenue rulings. The latter are based on hypothetical facts and are precedential authority. In contrast, a private letter ruling is an individualized letter the IRS writes to a particular taxpayer. You attach a copy to your return and it controls the particular tax item on which you requested IRS guidance.

While a private letter ruling is solely between you and the IRS, these are released to the public with names redacted. In fact, partially because so little other guidance is issued, private letter rulings are widely considered as some of the most important "authority" the IRS produces. The IRS didn't choose to release these rulings willingly. Lawsuits were brought to compel their release as well as much of the IRS' other secret laws. Such include chief counsel advice, technical advice memoranda, field service advice, and many other IRS missives that shed light on what the agency is doing and thinking.

The U.S. Supreme Court has even cited private



letter rulings. See *Rowan Cos. Inc. v. United States*, 452 U.S. 247 (1981). However, this case prompted a change to the tax code, requiring private letter rulings to bear a warning that it cannot be cited as precedent. In the real world, however, private letter rulings have become significantly more important over the last few decades. Today they are relied on frequently as a bellwether of how the IRS treats a particular fact pattern.

But are they "authority" like a court case, treasury regulation or revenue ruling? Technically no. So says Internal Revenue Code Section 6110(k)(3). Nevertheless, tax lawyers read them and routinely rely upon them in giving advice to clients. Our tax system is vast and there is often a paucity of "precedential"

guidance. If the facts in a private letter ruling are just like yours, they can make you feel pretty confident. That's why a new tax decision seems frightening.

The U.S. Court of Federal Claims in *AmerGen Energy* ruled that private letter rulings can't be admitted as evidence. See *AmerGen Energy Co. LLC, v. United States*, F.3d (Fed. Cl. 2010). AmerGen Energy tried to introduce private letter rulings from the IRS into evidence showing that its tax position was well grounded and was similar to one described in a private letter ruling. However, the court refused to allow it.

This is disturbing. Real-life taxpayers read and rely on private letter rulings every day. Tax lawyers tell them to. Besides, the courts have often made exceptions to the rule that they're not authority, especially

when it appears that they were seeking tax guidance in good faith. See for example *IBM v. United States*, 343 F.2d 914 (Ct. Cl. 1965).

The jury is still out on what the future will hold. Most taxpayers and advisers will still read and rely on private letter rulings. But there is a new level of concern. Substantive tax positions often depend upon reading them, and their guidance is important. Plus, in the current climate of increased penalty enforcement, taxpayers often need to prove they acted reasonably in taking a particular tax position. Now, that may be harder.

This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.