

No Tax Guidance For You, Yahoo

By Robert W. Wood

In January, Yahoo CEO Marissa Mayer announced the spinoff to shareholders of Yahoo's remaining 384 million shares in Alibaba, now worth \$23 billion. But on Sept. 2, the Internal Revenue Service told Yahoo it would not issue a private letter ruling. On these numbers, this isn't a little issue. A ruling is an advance blessing from the IRS, a binding letter you attach to your tax return, worth its weight in gold.

At this writing, it is not yet clear if the deal will go ahead as planned based on a law firm's tax opinion, or if the deal will change or perhaps even be scuttled. Plainly, the fact that the IRS will not rule does not mean it will be taxable even if it proceeds exactly as advertised. But the IRS certainly *knows* about it.

There is a kind of *in terrorem* effect of asking for a ruling and not getting it. You can almost hear Clint Eastwood in a new role as IRS commissioner, on refusing to issue an IRS ruling, "Well, punk, do you feel lucky today?"

If the deal proceeds and is taxable, and if the tax lawyers don't fight about it — which they would — there's talk about what it could mean. Some say that Yahoo alone would face a tax bill of about \$7 billion on the distribution to its shareholders. Yahoo shareholders would be hurt, too.

But whatever happens to Yahoo's mega-spin, it is causing renewed discussion of the proverbial opinion vs. ruling fork in the road. "Do you want a tax opinion or a private letter ruling?" is rarely a simple question. You may not have a choice. Cost, speed, certainty and risk must be considered.

Binding vs. Not. Rulings are binding, tax opinions are not. Opinions never bind the IRS, rulings always do. That is one reason you must attach a copy of the ruling to the pertinent tax return when you file it. You never attach an opinion to a tax return.

No Rule Areas. A tax opinion can be written on just about anything. In contrast, the IRS has long lists of subjects on which it will not rule. The lists change periodically. A first line of query should be whether your subject is on a no-rule list.

Appropriate Ruling Questions. If the tax issue is plain vanilla in character, it may not be possible to get a ruling, even if it is not on a no-rule list. If the issue is plain vanilla and the result is well-established, the IRS may call your request one for a "comfort ruling," something the IRS generally will not issue.

Conversely, if the tax issue is unique or difficult, it may be outside the realm of rulings on the other extreme. (Maybe that was Yahoo's Alibaba problem?) Many taxpayers feel the middle ground — where you *can* get a ruling from the IRS — is generally where you do not need one. If the law is unclear and you really need a ruling, you may not be able to get it. If the law is settled and you are perceived as too needy for comfort, you can't get that either. Fortunately, tax opinions fill the gaps.

Don't Ask Unless You Know. One generally should not *ask* for a ruling unless there is a high likelihood you can get it. A ruling is gold-plated certainty, but the IRS does not usually give it in close or tough cases. There are consequences for asking, too.

When you request a ruling, you generally must pay a fee. There is a range of fees, but a common fee is \$28,300. If the IRS answer is no, practitioners customarily withdraw their ruling request, and they may get their fee back. More important, you don't want a "no" answer on the books.

If the IRS says it can't rule and you withdraw your request, the IRS sends an audit notice to the IRS field office in your area. The notice does not direct an audit. Yet it informs field IRS employees that

you asked for a ruling, didn't get it, and withdrew your request. If you proceed with the transaction, your return could be flagged.

Rulings Take Time. A tax opinion can be knocked out in days or weeks. A ruling takes weeks or months. Most take six months or more.

Pre-Ruling Conference. Today, almost no IRS ruling is submitted without an informal trial run. You talk to the IRS and get their general view on your proposed ruling. After talking, you submit a short (five pages or so) memo about the facts, the client, the issue, and the ruling you want. The IRS meets informally in person or by phone, generally with two to five IRS attorneys covering different areas or aspects of the topic.

The IRS reacts orally to the memo, and often can suggest a tentative positive or negative result. If all is positive, you prepare and submit your ruling request. If not, you don't. Either way, the informal request is not official and triggers no fee. If it does not go well and you never make a formal ruling request, it triggers no audit notice — at least not that I know about!

Conclusion. Rulings and tax opinions each have their place. IRS rulings can seem counterintuitive. If your position is weak or uncertain, the government will not rule. Conversely, if your position is plainly correct, the IRS calls it a comfort ruling and will not rule. A ruling makes sense only in the sweet spot between.

If the dollar consequences of being wrong are catastrophic, say with a Section 355 spinoff, a ruling may be best. But sometimes you cannot get a ruling and should not ask. In contrast, opinions are a kind of everyman, a more flexible and adaptable document. And they probably deserve more credit.

Plus, tax opinions are not just about protection from IRS penalties. Some clients say they want a tax opinion just because it gives them protection from IRS penalties. Opinions do much more, and should help you prevail in the event of an audit. Besides, think about this: If all that an opinion accomplished was protection from IRS penalties — meaning that you have to pay all the taxes and all the interest — isn't the opinion a big failure?



Robert W. Wood is a tax lawyer with www.WoodLLP.com, and the author of "Taxation of Damage Awards & Settlement Payments" (www.TaxInstitute.com). This is not legal advice.