Forbes

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THE TAX LAWYER

TAXES 11/06/23

# Tax Opinions Prevent IRS Penalties, And Seven Other Things To Know


Do tax opinions protect you from the IRS? Usually yes, provided that you get one early enough. That generally means having the tax opinion in hand before you file your tax return. Many clients and tax advisers have trouble saying exactly why one should get a tax opinion or how to use it. A tax 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 some facts about tax opinions:

**1. Tax Opinions Don't Bind the IRS**. It would be nice if they did, but an opinion is the opinion of the person or firm that writes it, it does not bind the IRS. If you want a binding commitment from the IRS, you have to ask for a formal ruling. That is a time consuming and expensive process.

**2. Tax Opinions Are About More Than Penalty Protection**. The most commonly stated reason to get a tax opinion is to avoid penalties. Most tax advisers say this, but a tax opinion should not only be about 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 Tax Opinion Should Present Both Sides of the Issue.** Clients want their tax lawyer to be an advocate and for their case to be stated as strongly as can be justified. Clients may like an opinion that is one-sided (in their favor) rather than wishy-washy, but adverse law still needs to be discussed. 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, even adverse ones.

**4. It Is Too Late To Get An Opinion if You are Audited**. To get penalty protection—and to be able to complete and sign your tax return with confidence, you need to have the tax opinion *before* you file your tax return. There is rarely time to get a good and thoughtful opinion at the audit stage. Besides, it would hardly be the same as a tax opinion done before a tax return that is filed in reliance on the opinion. To be of maximum value, tax opinions should be written before the tax return is filed. An opinion written during an audit is just pure advocacy, and it would not protect you from penalties.

**5. There Are Advantages to Getting an Opinion Early**. A tax opinion should be prepared before your tax return is filed, but what other timing is at play? If the tax opinion is about a transaction, ideally, the opinion should be done in parallel with the event or transaction. That way, the opinion writer can tweak the documents as the transaction is proceeding, to strengthen the tax position that will be expressed in the opinion. That is the best way to help shape the transaction or issue from a tax viewpoint, ideally making for a stronger tax opinion too.

**6. You Should Not 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 attorney client privilege. You do not want to waive privilege, since you rarely want to give a tax opinion to the IRS. The reason relates to #3 above. A tax opinion should be balanced, and you don't want to give the IRS arguments that it might not have thought of.

**7. Avoid Giving the Full Opinion To Your Return Preparer**. A tax preparer 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.

**8. Opinions Are Helpful In Tax Disputes**. Tax opinions are *extremely* helpful in an audit or tax dispute, but not to hand the opinion to the IRS. The only reason one would give an opinion to the IRS is for penalty protection, and if the only thig you are arguing about is penalties, you have already lost your tax case. Instead of giving the opinion to the IRS, 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.

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