

Private Letter Rulings Can Be a Costly, Secretive Affair

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State policy on providing — and publishing — guidance to specific taxpayers is inconsistent and often costly, Tax Analysts has found.

Tax Analysts recently surveyed all tax departments in the 50 states and the District of Columbia on their policies regarding letter rulings and other guidance often referred to as “secret tax law.”

A months-long investigation revealed a wide variety of practices among the states, including whether a fee is charged and whether the rulings are binding. Even the names used can vary by state, including — but not limited to — private letter rulings, revenue rulings, revenue legal opinions, technical assistant advisements, and declaratory rulings.

Among the findings:

- Only two states don't offer letter rulings in some form — Alaska and Minnesota.
- Many states offer letter rulings for no charge, but several have adopted the IRS's policy of charging for the rulings it issues on federal tax positions. One state — Colorado — charges \$10,000 or more for the most complex rulings.
- Policies on whether rulings are binding differ from state to state.
- Taxpayers should never assume that a “letter” or a “declaratory ruling” is the same as a letter ruling.
- States vary widely on whether they will publish rulings and how long it takes for publication.

Private letter rulings are responses by a state taxing agency to a taxpayer's request for guidance or clarification on a particular tax issue that may be unusual or complex. While often valuable to the taxpayer, private letter rulings are sometimes seen as controversial because a government authority is providing information to one taxpayer that may not be readily available to all taxpayers.

Many tax officials and observers of the tax law believe letter rulings should be published, as long as there is appropriate redaction to protect taxpayer confidentiality. The Council On State Taxation, a lobbying group representing the state tax interests of many *Fortune* 1000 companies, has adopted that position.

“Simply put, ‘secret tax laws’ benefit neither the state in its administration of the statutes nor the public in complying with them,” COST wrote in its 2013 scorecard on state tax administration. “While individual taxpayers may perceive advantages in obtaining what they believe is a beneficial ruling, ultimately the broader taxpaying public pays the price for inconsistency in application of the tax laws.”

Inconsistent Names and Definitions

Taxpayers with multistate interests may struggle to keep track of the variety of names states use for rulings and guidance, and to know what those names mean. Asking for clarification, however, may require a learning curve.

For example, asked to provide information on Indiana's “revenue rulings,” Collin Davis, senior counsel for tax policy at the state's Department of Revenue, offered the following explanation:

A Revenue Ruling is mostly like a private letter ruling, in that it is a legal ruling, issued by one of the Department's attorneys, addressing the tax implications of a particular taxpayer's situation. However, Revenue Rulings are issued without any identifying details and are published in the *Indiana Register*. Further, while the letter ruling is issued to a particular taxpayer, other taxpayers who are similarly situated may rely on the Ruling to the extent that their circumstances are similar only to that taxpayer and only for informational purposes in preparing returns and making tax decisions.

At a luncheon in June held by the State and Local Taxes Committee of the District of Columbia Bar Taxation Section, Todd Lard of Sutherland Asbill & Brennan LLP cautioned that taxpayers should take care to learn the names and what they mean. For example, he said, in Florida a “letter of technical advisement” is the opinion of one person, and “you can't really rely on it,” while “technical assistant advisements” represent department opinions that are binding.

Alyse McLaughlin of McDermott Will & Emery said it is important to learn whether the taxing authority will issue rulings only for a named taxpayer or if they also issue them anonymously, and what the implications of those policies are. She said she has found that rulings for named taxpayers are typically binding, but anonymous rulings may not be.

In Colorado there are significant differences between private letter rulings and general information letters. Private letter rulings represent a “binding determination of tax liability related to a specific transaction,” according to the DOR. By contrast, a general information letter is a “non-binding determination that addresses a general question from a taxpayer about a tax issue.”

From Free to Fee

The other major difference is that general information letters are free, private letter rulings are not. While several states charge fees to obtain letter rulings, Colorado stands out as having a unique, tiered system of fees depending on the complexity of the taxpayer's question.

The base fee for all rulings is \$500, and payment must accompany the initial request. The simplest rulings may be covered by the \$500 fee. In other cases, the DOR will evaluate the request and determine which tier of complexity it falls into. If a request is determined to fall into the sixth tier (the highest), the minimum charge for a ruling is \$10,000.

In response to questions from Tax Analysts, Colorado DOR Taxation Division spokeswoman Mim Mirsky said the tiered system has been in place since 2006. She provided data for fiscal years 2010-2014, saying that during that period the DOR issued 47 private letter rulings and 79 general information letters, and declined requests for three letter rulings and another 79 general information letters.

Asked if the tiered system holds down the number of request for letter rulings, Mirsky said, "Based on the feedback we receive from constituents, we believe some private letter ruling requests are submitted as general interest letters instead to avoid the fee."

A Case for Not Issuing Private Letter Rulings

A few states do not issue letter rulings, for various reasons. Alaska, for example, has neither a personal income nor a sales tax. In Minnesota, though, Ryan Brown, a spokesman for the DOR, said the state believes it is more transparent not to offer rulings, because of the risk of giving some taxpayers information that is not available to all.

"Unlike private letter rulings, by providing publicly accessible information to our customers through publications such as fact sheets and revenue notices, we can effectively and efficiently serve a larger set of customers," Brown said. "Revenue notices provide transparent interpretation, details, or supplementary information concerning the application of state revenue laws, while informational guides like fact sheets enable our customers to become more familiar with state revenue laws and their rights and responsibilities under these laws."

Jamie Yesnowitz of Grant Thornton LLP said that practitioners may find revenue notices valuable for information that is "applicable to all taxpayers, but not necessarily something you can rely on for a particular fact pattern." A letter ruling, on the other hand, he said, is "a directive regarding a particular fact pattern, and usually specific to the taxpayer." However, any information from the department "is good information, and much better than none," he added.

States Should Stand by Their Word

Asked by Tax Analysts to reflect on the importance of letter rulings and other guidance to their practice, practitioners had varied responses but all agreed on one common theme — the importance of being able to rely on the written word.

Bruce Ely of Bradley Arant Boult Cummings LLP said it is "extremely important" for the taxpayer to be able to count on the fact that a ruling is binding so the company knows how to proceed.

Stephen P. Kranz of McDermott Will & Emery said that "companies require clear guidance from the taxing authority, and the taxing authority should be bound by its word."

Jordan Goodman of Horwood Marcus & Berk Chtd. said that "some states are better than others." He cited Washington and California as two states that will keep strictly to their written guidance, even if they later change their minds. "They will walk away, and that's the right thing

to do," Goodman said. "Some other states will say, well, we were wrong [with prior guidance], and you can waive the penalty, but you still owe the tax."

Change Is Occurring

States are aware that taxpayers want more guidance, and that many are pushing for transparency. They frequently revisit their policies, as evidenced by several significant changes that took place in 2016.

In Arkansas, the Department of Finance and Administration on January 1 began publishing legal opinions and hearing decisions, ending what taxpayers had described as an unhelpful process of releasing opinions only in response to Freedom of Information Act requests. (Prior coverage: *State Tax Notes*, Jan. 11, 2016, p. 107.)

In North Carolina, Gov. Pat McCrory (R) in July signed S.B. 841, which requires the DOR to publish on its website all "written determinations" in redacted form, within 90 days of issuance to a particular taxpayer.

And in Maryland, Gov. Larry Hogan (R) in May signed S.B. 843, which requires the comptroller's office to implement for the first time a private letter ruling process to provide additional tax guidance to taxpayers. (Prior coverage: *State Tax Notes*, May 30, 2016, p. 680.)

Before S.B. 843 was signed into law, Maryland had been one of several states that did not issue letter rulings. The Maryland Chamber of Commerce identified that as a problem during hearings before the Augustine Commission, which in January released a report recommending changes to the state's tax code and tax administration process. Among the changes was the creation of a system to issue private letter rulings, which led to S.B. 843.

Alexandra Sampson of Alston & Bird LLP said the new Maryland law is a win for taxpayers. She said the comptroller still has a variety of issues to decide on, including whether he will publish guidance, whether letter rulings will be binding, and whether taxpayers will be charged a fee. "One thing that taxpayers are always seeking is guidance," Sampson said. "This will formalize the process. Without a formal process, taxpayers may get information from one division of the comptroller's office and they might get another answer from another department."

Tax Analysts researcher Shannon Yen and reporter Zoe Sagalow contributed to this article. ■