Revisiting the Four R’s Revisited:
A View from Without

By Mark R. Solomon*

Mark R. Solomon reviews Donald L. Korb’s 2009 article,

Introduction

Young (and not so young) tax lawyers and tax accountants face a daunting task—learning the tax law and its myriad interpretations. The purpose of this article is to alert tax practitioners, both new and old, to the recent publication of one of the most important (and most helpful) tax articles ever written.¹ Students and entry-level practitioners will find the reviewed article particularly useful, although, as will be shown, even the most experienced person may benefit substantially from it. An article that was a predecessor to the reviewed article was originally published in TAXES—The Tax Magazine in 1965 by then—Chief Counsel, IRS, Mitchell Rogovin.² Appropriately entitled, *The Four R’s: Regulations, Rulings, Reliance and Retroactivity: A View from Within* (hereinafter, “the Rogovin article”), this article comprehensively (at the time) undertook to bring together an accurate description (at least from the point of view of the Treasury and the IRS) of the legal effect of Treasury Regulations, revenue rulings and various other tax pronouncements of the Treasury and the IRS. In particular, the Rogovin article described when taxpayers could rely on such pronouncements, interpretations and guidance, and the circumstances in which they would be applied retroactively following publication or issuance, as well as following modification or revocation.

Now some 43 years later, Donald L. Korb,³ who at the time of preparation of his article was Chief Counsel, IRS, has done the tax community a huge service by publishing in the Duquesne Law Review a successor article, *The Four R’s Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View From Within* (hereinafter, “the Korb article”), a substantial and comprehensive update of the original Rogovin article. For the tax community’s convenience, the Rogovin and Korb articles were reprinted in 2009 and appear side by side in the August issue of TAXES—The Tax Magazine.

The Korb article is divided into an Introduction and six substantive parts followed by a Conclusion. Each of the substantive parts discusses one or more kinds of positions or interpretations (most of which are publicly available) of the Treasury and the IRS. The groupings are (1) the Regulations Program, (2) Other Published Guidance, (3) the Letter Rulings Program, (4) the Legal Advice Program, (5) the Acquiescence Program, and (6) Other Communications.

A number of things that make the Korb article so valuable are (1) the precise descriptions of these various kinds of administrative authorities; (2) the discussions of their legal weights (that is to say, the extent to which they are binding legal authority); (3) the discussions of the degree to which taxpayers may rely upon them and the circumstances under which they may do so; and (4) and the explanations of the extent to which these administrative authorities and interpretation may be applied retroactively.

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Of course the two authors are careful to warn that tax practitioners must be cautious in dealing with IRS guidance. Korb in particular notes that:

…the sheer volume of guidance available to tax practitioners can only be properly understood if the reader has a comprehensive understanding of how that guidance was developed and whether it can be relied upon.

The other major caution expressed is that IRS guidance is often a moving target. Some guidance, for example regulations, generally have the force and effect of law; other guidance, such as revenue rulings, reflect an official position of the IRS; yet other guidance, such as private letter rulings, may reflect the view of only one Associate Office of Chief Counsel or even of a single attorney in that office.

II. Some Miscellaneous Observations

Given the objective of the Rogovin and Korb articles to further the tax community’s understanding of the legal effect of the wide variety of ways in which the IRS takes positions and renders guidance, this writer would like to demonstrate, especially to young attorneys and accountants, the vast array of information contained in the two “Four R’s” articles. To that end there follows next a noncomprehensive, representative sample of interesting items with which even experienced practitioners may not be familiar, but which they might find interesting:

- Part 32 of the Internal Revenue Manual contains handbooks and directives to Chief Counsel attorneys for publishing IRS guidance.  
- The Statement of Procedural Rules is distinguishable from procedural regulations and has a different source of authority. Thus, the Statement of Procedural Rules is viewed by the courts merely as directory and not mandatory, while procedural regulations are generally considered binding authority.  
- The notice and comment provisions of the Administrative Procedures Act are inapplicable to interpretative regulations (although the Treasury pretty much follows them anyhow).  
- Notices and announcements differ in that although both are intended to give expedited guidance. Notices usually announce substantive interpretations, while announcements tend to contain matters of other general or temporary interest.  
- Taxpayers, when requesting a private letter ruling, may request, but not require, a pre-submission conference with the Associate Chief Counsel Office.  
- Closing agreements are not subject to public inspection under Code Sec. 6110 and are exempt from disclosure under Code Sec. 6103. Unlike private letter rulings, determination letters, except for determination letter as to exempt status, are usually revoked retroactively because they are issued with respect to completed transactions and therefore could not have been detrimentally relied upon by the taxpayer.  
- Taxpayers who rely upon nonbinding erroneous written advice from the IRS have a basis for penalty and interest abatement.  
- Chief Counsel Advice (that is, written advice of the Office of Chief Counsel to field personnel) is distinguishable from public guidance (such as regulations or rulings) and may not be relied upon by taxpayers.  
- There exists a form of legal advice from the Office of Chief Counsel known as Program Manager Technical Assistance, the purpose of which is to provide advice to IRS regional program managers. Such advice might, for example, relate to new legislation, forms, or publications.  
- Associate Memoranda are non-taxpayer specific legal memoranda written by an Associate Chief Counsel Executive to field personnel, usually to resolve an industry-wide issue, and are released to the public but may not be relied upon by the public.  
- An Action on Decision is more than just a memorandum on whether a case should be appealed. It is in fact a measured decision on what announcement should be made to the public regarding a significant issue decided by a court that has resolved the issue adversely to the IRS.  
- Because revocations of acquiescences, unlike revocations of rulings, are usually retroactive in effect and thus cannot be relied upon by taxpayers, the IRS occasionally issues a revenue ruling
in addition to an acquiescence in order to provide guidance on which taxpayers may rely.24

- Coordinated Issues Papers issued by the IRS Large and Mid-Sized Business Division (LMSB) with regard to key industries may not be relied upon by taxpayers.25

III. Conclusion

Tax advisors are faced with a bewildered array of kinds of administrative guidance. Tax practitioners are well-advised to be thoroughly familiar with all such types of guidance and especially with the degree to which they may rely upon such guidance. There is no better summary26 of that guidance than what may be found in the Korb article, and it is mandatory reading for both beginning and experienced practitioners.

Of course, tax practice is a dynamic and ongoing process and practitioners should be ever alert to the likely emergence of new kinds of guidance by the IRS.

ENDNOTES

1 The author would like to thank Professor Daniel L. Hoops of Walsh College, Troy, Michigan, and Eric R. Skinner, Office of Chief Counsel, Internal Revenue Service, Detroit, Michigan, and Adjunct Professor of Taxation, Walsh College, Troy, Michigan for their comments in reviewing this article.


3 Mitchell Rogovin, The Four R’s: Regulations, Rulings, Reliance, and Retroactivity: A View from Within, 43 Taxes 756 (1965); Mitchell Rogovin’s monograph can also be found in 49 CCH FEDERAL TAX GUIDE 8 (Dec. 3, 1965) and as Doc. 6062 (April 1970) by the Government Printing Office.

4 Donald L. Korb is a partner in the Washington, D.C., office of Sullivan & Cromwell, LLP. He served as Chief Counsel, IRS, from 2004 to 2008.

5 Korb, supra note 1.

6 IRM §32.1.114(4) (Aug. 11, 2004).

7 26 CFR Part 601.

8 5 USC §301 (2000).

9 See, e.g., R.L. Jones, Est., CA-6, 86-2 ustc ¶13,675, 795 F2d 566.

10 See, e.g., P. Boulez, CA-DC, 87-1 ustc ¶9177, 810 F2d 209.


12 IRM §32.2.2.3.3(1) (Aug. 11, 2004).

13 IRM §4.10.7.2.4.1(1) (Jan. 1, 2006).

14 The Korb article, supra note 1, cites Rev. Proc. 2006-1, §10.07, IRB 2006-1, 1, which has since been superseded by Rev. Proc. 2010-1, §10.07, IRB 2010-1, 1.


16 Tax Analysts, CA-DC, 2005-1 ustc ¶50,437, 410 F3d 715.

17 Code Sec. 6404(f).

18 See, IRM §33.1.1 through 33.3. See also Code Sec. 6404(d)-(g) and Code Sec. 6664(r)-(w).

19 Code Sec. 6110(b)(3).

20 Korb, supra note 1, at 358.


22 Korb, supra note 1, at 339.

23 Korb, supra note 1, at 369.

24 Id.

25 Korb, supra note 1, at 370.

26 For a more elaborate discussion of the authoritative weights of various kinds of administrative guidance in BNA TAX MANAGEMENT PORTFOLIO, see LOWY, 100 T.M., U.S. Federal Tax Research.

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benefit limits for IRAs, defined contribution plans and defined benefit plans; catch-up contributions; rollover provisions; deemed IRA provisions; qualified retirement planning services; the start-up credit; the saver's credit; ESOP rules; and top-heavy rules were all permanently extended by the Pension Protection Act of 2006.

- Qualified tuition and 529 plans. Provisions from the 2001 Act involving qualified tuition and 529 plans were also permanently extended by the Pension Protection Act of 2006.

- Exclusion for persecution restitution payments. The exclusion for restitution payments to victims of Nazi persecution has been made permanent.

- Adoption credit and exclusion. The doubling of the adoption credit and the exclusion for employer-provided adoption assistance is now scheduled to sunset in 2012 rather than 2011, thanks to a provision in the 2010 health care reform legislation.

Summary

It is difficult to believe that all of the provisions scheduled to sunset in 2011 will be allowed to do so. It was also difficult to believe last year that the estate tax would be allowed to be repealed for 2010, yet that is what happened. As with the estate tax repeal, just because sunset happens is not the end of the story. Even if Congress fails to stop the sunset in 2010, it could still work to retroactively repeal the