# Tax Research & Writing I Professor Kate Dodson

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# I. <u>INTRODUCTION TO TAX RESEARCH & WRITING I</u>

## A. Objectives of Course

#### 1. Tax Research

- a. Tax Authorities & Strength of Authorities
- b. Efficient and Effective Tax Research
- c. Learn Search Engines

## 2. Tax Writing

- a. Tools for Communicating Tax Research
- b. Tips and Techniques for Persuasive Writing-Advocacy
- c. Learning to Explain Technical Tax Issues in Plain English

# B. <u>Overview of Tax Practice:</u> There are three general categories of fields in the tax practice. These are comprised of the following:

## 1. <u>Tax Compliance Practice</u>

- -Return preparation
- -Tax Audit Defense
- -Penalty Abatements
- -Resolving Tax Liabilities

# 2. Tax Planning Practice

- -Estate Planning
- -Asset Protection
- -Merger & Acquisitions
- -Real Estate Transactions

#### 3. Tax Litigation

- -IRS Appeals (Contesting IRS Audit Assessments)
- -Claims for Refunds
- -Litigation in United States Tax Court
- -Refund Litigation in United Court of Claims
- -Refund Litigation in United States District Court

- -Audit Reconsiderations
- -Criminal Tax Defense
- C. <u>Tax Research Process:</u> Our course is focused on learning the sources of federal and state tax law, how to evaluate those sources, and the research process for preparation of client deliverable or internal research memorandum.

The steps of the tax research process include the following:

#### 1. Establish the Facts

-May have several rounds of fact gathering, including additional questions that emerge as you evaluate the tax authorities.

**Example:** You have a new client that has come to you about some outstanding state income tax liabilities. Many of these liabilities are very old. He would like to make an offer to the state taxing authorities to resolve his outstanding tax liabilities for less than he owes. He would like you to prepare a letter to him explaining his ability to compromise these liabilities.

In preparing the client letter, it would be important for you to summarize the relevant facts and identify other facts that could impact the research and conclusions or is needed in order to provide any conclusions/recommendations.

- -Need additional information concerning the nature of the tax liabilities (did they arise from returns prepared by the taxpayer, where the returns timely filed)
  - -What tax years are included in the outstanding tax liabilities?
  - -What actions had the state taken to collect these liabilities?
  - -Was a state tax lien filed?
  - -Was the state tax return filed joint or separate?
  - -Does the taxpayer have any other outstanding tax liabilities/
  - -Financial information on the taxpayer

#### 2. Identify the Issues

Example: Your client, Megan Bear, is in the process of divorcing her husband, Michael Bear. She tells you that they have outstanding tax liabilities related to jointly filed tax returns for tax years 2005 and 2006. She believes that the returns were filed late. She indicated that the liabilities arose as a result of the IRS' audit of their joint 2005 and 2006 returns. The IRS determined that there was an understatement of tax related to erroneous deductions taken on the return. In addition to the understated tax, the IRS also assessed the Bears with interest and penalties. The disallowed deductions were all related to Michael's Schedule C business. Megan indicated that she did not know anything about Michael's business or the legitimacy of the deductions taken on the return. The IRS is trying to collect the outstanding tax liabilities from Megan. Now, due to the divorce, Megan would like your assistance in determining whether she has a defense to the IRS attempting to collect from her personal assets. What are the issues?

Issue One: Are any defenses to the joint and several liabilities arising from signing the joint federal income tax return available to Megan?

Issue Two: Does Megan have a defense to the imposition of penalties?

Issue Three: Can Megan seek relief from the interest?

## 3. Locate the Authority

**a. Primary Authority**: Original pronouncement that comes from statutory, administrative, and judicial sources.

-<u>Statutory Sources</u>: Include the U.S. Constitution, tax treaties, and tax laws passed by Congress (i.e. Internal Revenue Code).

-Administrative Sources: Various rulings of the Treasury Department and the IRS, including Treasury Regulations, Revenue Rulings, and other pronouncements.

-Judicial Sources: Collected rulings of the various courts on tax matters.

**b.** <u>Secondary Authority</u>: Interpretations of primary authority and an unofficial source of information. Secondary authority should NOT be relied upon or cited in any legal writing. Rather, this authority should be used as your guide to getting a better understanding of the technical tax/legal issue.

A FULL DISCUSSION OF SOURCES OF TAX AUTHORITIES IS BELOW.

## 4. Evaluate the Authorities

- a. <u>Precedential Value of Authorities:</u> All primary authorities have differing weight of authorities. It is very important that the tax researcher understand the weight of the various authorities and ensure reliance on the authorities with the most precedential value.
  - -U.S. Constitution
  - -Tax Treaties
  - -Internal Revenue Code
  - -Treasury Regulations (Code of Federal Regulations)
  - -United State Supreme Court Rulings
  - -U.S. Court of Appeals
    - -Examination of the controlling Circuit for taxpayer.
  - -United States District Courts
    -Controlling District for taxpayer.
  - -U.S. Court of Federal Court of Claims
  - -United States Tax Court
  - -Tax Court, Small Cases Division
- -IRS Pronouncements (e.g. Revenue Rulings, Revenue Procedure, Technical Advice Memorandum, Private Letter Rulings).
  - b. <u>Authorities in Taxpayer's Jurisdiction:</u> In addition to being concerned with the precedential value of the tax authorities, also need to pay attention to the authorities that control the taxpayer. This is relevant when reviewing court decisions from various U.S. Court of Appeals, District Courts and even decisions from the United States Tax Court.

#### 5. Develop Conclusions & Recommendations

- -Answers to Issues identified in Step 2
- -Alternative conclusions/recommendations

# 6. Communicating the Conclusions & Recommendations

- -What is the purpose of the communication?
- -Client Memorandum
- -Letter to the IRS
- -Brief/Summary Judgment Motion
- -Letter to the Client
- -Letter to Other Professional

## II. PRIMARY SOURCES OF FEDERAL TAX LAW

#### A. Statutory Sources of Federal Tax Law

#### 1. U.S. Constitution

- -Supreme Law of the Land: This is the source of all Federal laws of the country, including both tax and nontax provisions.
- a. <u>Sixteenth Amendment</u>: Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.
- -Rarely, if ever, cite to any provisions within the United States Constitution unless representing a "tax protestor."
- b. <u>Tax Protestors</u>: These are individuals who do not pay income taxes and/or challenge the IRS's authority to assess, audit and collect income taxes on the basis that there is something unconstitutional regarding the Federal income tax. There are many different theories that tax protestors assert. For example, some tax protestors argue that since the U.S. currency no longer on the gold standard, the Sixteenth Amendment's measure of income, and therefore the tax itself is invalid. The Federal income tax laws force the taxpayer to surrender his or her Fifth Amendment rights against self-incrimination. Virtually all of the protestors' challenges have been denied and cannot even be asserted in most Federal courts.

#### c. Frivolous Tax Position Penalties:

- i. \$5,000 penalty for filing a "frivolous" tax return as a form of protest against the IRS or the U.S. budgetary process.
- ii. United States Tax Court can also independently impose a penalty, not to exceed, \$25,000, if the taxpayer or his or her representative brings a "frivolous" matter before the Court.

#### 2. Tax Treaties

**a.** <u>Defined</u>: Tax treaties are agreements that are negotiated between signatories of different countries. These agreements typically provide agreements regarding the treatment of entities subject to tax in both countries. Generally, the purpose of these treaties is to eliminate "double taxation" through the establishment of some crediting system.

## 3. Internal Revenue Code

#### a. History of Internal Revenue Code:

-After the ratification of 16<sup>th</sup> Amendment in 1913, Congress began passing revenue acts which formed the income tax laws for the United States. However, by the 1930s the separately maintained revenue acts were hard to maintain and amend. In 1939, Congress replaced the separate revenue acts with the Internal Revenue Code of 1939. This original Internal Revenue Code was not set up to adequately accommodate changes to the tax law. Accordingly, the 1939 Code was replaced by the Internal Revenue Code of 1954. Subsequently, the Tax Reform Act of 1986 made significant revisions to the Internal Revenue Code of 1954 and was renamed the Internal Revenue Code of 1986.

#### b. Legislative Process:

- i. <u>House of Representatives—Ways and Means Committee:</u> Most legislation starts in the United States House of Representatives. In order for a tax bill to begin in House of Representatives, the Ways and Means Committee must first considered and approve the suggested tax law. Once the Ways and Means Committee approves the proposed bill, it is sent to the full House of Representatives for approval.
- ii. <u>Senate—Finance Committee</u>: If the tax bill is approved by the House of Representatives, it is then sent to the United States Senate, where it is referred to the Finance Committee. The Finance Committee must review and approve the bill. Usually, when the Finance Committee reviews the bill from the House of Representatives, it makes substantial changes to the originally proposed bill. Once in final form with the Finance Committee and approved, the bill is sent to the full Senate for voting approval.
- iii. <u>Joint Conference Committee</u>: If there are differences between the tax bill that passed through the House of Representatives and the one that went through the Senate (which is usually the case), the tax bill is then referred to a Joint Conference Committee where the differences are resolved. Once a compromise bill is reached, it must be approved by both the U.S. Representatives and the Senate.

- iv. <u>President Votes</u>: Once approved by both houses of Congress, it is forwarded to the President. If the President signs, the new provisions are incorporated into the Internal Revenue Code. If the bill is vetoed, however, the tax bill will not be enacted until Congress overrides the veto with a sufficient revote.
- v. <u>Committee Reports</u>: Importantly, throughout each of the steps discussed above, the appropriate committee of Congress (i.e. House Ways and Means, Senate Financing Committee, or Joint Conference Committee) will issue a Committee Report explaining the elements of the proposed changes and reasons for each proposals. These Committee Reports are an important legislative history research tool in order to explain a certain provision of law.
- vi. <u>Blue Books</u>: In addition to these Committee Reports, there is also a "General Explanation" of tax legislation that is occasionally prepared by the Joint Committee on Taxation ("Blue Book"). The Blue Books are not "officially" part of the legislative history. However, they provide the tax researcher with a roadmap and are helpful in determining the path of the legislation through Congress.
  - c. <u>United States Code</u>: The Internal Revenue Code is found within title 26 of the United States Code. The United States Code is organized alphabetically and by title numbers.

#### **B.** Administrative Sources of Federal Tax Law

SOURCE	<u>AUTHORITY</u>		
Treasury Regulations	Force and effect of law		
Temporary Regulations	May be cited as a precedent		
Proposed Regulations	Do not have the force and effect of law		
Revenue Rulings	Do not have the force and effect of law and		
Revenue Procedures	cannot be enforced against the IRS. However,		
Actions on Decision	these sources can be cited as persuasive		
	authority or for purposes of establishing		
	substantial authority for a particular tax		
	position.		
General Counsel Memorandum	May not be cited as precedent. However, these		
Technical Advice Memorandum	sources can oftentimes be persuasive authority		
	for a particular position or defense of a tax		
	reporting position.		
Letter Rulings	Applicable only to the taxpayer addressed. No		
	precedential value. However, again, may be		
	persuasive authority to a particular tax		
	position.		

- 1. <u>Treasury Regulations</u>: Treasury Regulations are the official interpretation of the Internal Revenue Code prepared by the Department of Treasury. There are generally two different ways Treasury Regulations are promulgated.
  - a. <u>Legislative Regulations</u>: The first way that regulations can be implemented is through legislative grace. Specifically, there are legislative regulations that are issued in response to legislation containing specific language granted IRS the authority to issue the regulations/interpretation. These types of regulations are authoritative and extremely difficult to challenge.
  - **b.** <u>Interpretative Regulations</u>: The second way that regulations can be implemented is through an independent act by the IRS/Department of Treasury. These types of regulations are issued under the general authority of the Treasury to make rules and regulations.
    - c. Proposed Regulations:
    - d. Temporary Regulations:
    - e. Final Regulations:

#### 2. Administrative Publications:

- **a.** Revenue Rulings: These are pronouncements issued by the IRS about a specific factual situation that taxpayer presented and that the IRS deems to be an issue of general interest. These do not have the same weight as a Treasury Regulation; they may be relief upon by a taxpayer in a similar situation.
- **Revenue Procedures:** IRS pronouncements about internal practice and procedure, such as describing how to prepare a private letter ruling request.
- c. <u>Private Letter Rulings:</u> These are responses to questions from individual taxpayers about proposed transactions like Revenue Rulings, but are not considered of general interest. The private letter rulings (also referred to as PLR) are not officially published, and their application is technically limited to the taxpayer making the request and without precedential authority. While they have no precedential authority, they can oftentimes be indicators of how the IRS will view a transaction and of IRS policy.
- **Technical Advice Memorandum:** These are another type of private riling and are issued in the same numerical series with PLRS. These are written by the IRS national office in response to a question from a field

- officer or taxpayer when auditing a return. Similar to Private Letter Rulings, they have no precedential value.
- e. <u>Notices & Announcements:</u> The IRS also oftentimes issues notices and announcements to summarize a new law, give notice of procedural changes, etc.
- f. General Counsel Memoranda (Chief Counsel Memoranda): Prepared by the IRS office of Chief Counsel as internal guidance to the IRS to explain the reasoning when Rev Rulings, PLRs, or TAMs are being prepared. Since 2002, few (if any) General Counsel Memos have been issued.
- **g.** <u>Internal Revenue Manual:</u> Compilation of operating policies and practices of the IRS.
- C. <u>Judicial Sources of Federal Tax Law:</u> The third source of federal tax law is through judicial (court) decisions involving tax controversies. There are generally three types of courts which issue decisions involving federal tax law controversies. These courts include the following:
  - 1. <u>United States Tax Court:</u> Income tax litigation can be held in the United States Tax Court. This is the only forum that will hear tax disputes BEFORE the underlying tax is paid.
    - **a.** Regular Opinions: These decisions are treated like other "published" decisions and published officially in the United States Tax Court Reports ("TC").
    - **Tax Court Memo Decisions:** These types of decisions are generally treated as "unpublished" decisions. Originally, these decisions were suppose to cover cases involving interpretations of existing law or facts. However, this classification has not also been strictly followed. So, you really should not distinguish between Regular and Memo decisions.
    - c. <u>Summary Opinions:</u> Since 2001, the United States Tax Court has been publishing Summary Opinions. These opinions are generally given little precedential value but may be relied upon for purposes of establishing substantial authority.
    - **Golsen Rule:** Golsen v. Comm'r., 54 T.C. 752 (1970); Under this court decision it was held that the United States Tax Court must follow the precedent of the Court of Appeals Circuit that has jurisdiction over the taxpayer in question. If the Court of Appeals that has jurisdiction has not rules on the matter, the Tax Court will decide the case on the basis of its own interpretation of the disputed provision.
  - 2. <u>United States District Court:</u> The second forum for tax litigation is the United States District Court in the district where the taxpayer resides. This type of litigation is called "refund" litigation because the taxpayer must first pay before bringing suit against the United States.

<u>Federal Court of Claims:</u> This is the last forum for litigating tax controversies. This is also a refund litigation.

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