
Easier 355 Rulings

By Robert W. Wood • Wood & Porter • San Francisco

Sometimes IRS pilot programs aren't exactly barn-burners. Or stated differently, sometimes in the wake of an IRS pilot program, the IRS must be tempted to throw away its equivalent of a plane's black box that recorded what happened when. The IRS's newest revamped Web site, for example, supposedly racked up a whopping \$19 million price tag (ouch, but at least that's million with an "m"!) before being scuttled. For full details, see http://taxprof.typepad.com/taxprof_blog/2009/05/irs-scrap-.html#more and www.treas.gov/tigta/auditreports/2009reports/200920079fr.html.

Better Pilot

On the more positive side, though, another new IRS pilot program (that Sully-like, will hopefully have a softer landing) has been announced regarding rulings on Section 355 transactions. The program is embodied in Rev. Proc. 2009-25, IRB 2009-24, 1. With a kind of *INDOPCO*-like flair (and here, I'm using *INDOPCO* as code for bifurcation), the IRS

now says that it will give rulings on mere parts of a transaction.

Normally, of course, the IRS will not issue a letter ruling on only part of an integrated transaction. [See Rev. Proc. 2009-1, IRB 2009-1, 1.] However, if part of a transaction falls under a no-rule area, the IRS is willing to issue a ruling on the *other* parts of the transaction. What if the IRS cannot comment on the tax consequences of a larger transaction without coming to a resolution on an issue on which it will not issue rulings, and if the IRS nevertheless chooses to rule on the larger transaction?

In that event, the taxpayer must state (in the request) what the taxpayer thinks (to the best of its knowledge and belief) the tax consequences of the no-rule issue might be.

Even then, the IRS can decline to issue a ruling on larger transactions, depending on the importance of the no-rule issue. The IRS can do this notwithstanding the taxpayer's representation that the tax consequences will follow a particular path.

In short, this complete picture has been a bit of a mess, at least for taxpayers. As a result, the IRS is trying to ramp up the availability of private letter rulings on spinoffs, and Rev. Proc. 2009-25 is designed to do just that.

Spin Doctor

Spinoffs, of course, are probably the most classic kind of transformation in which to seek an IRS blessing. It isn't that spinoffs are the *most* difficult transaction, but the stakes are usually very large if you fail. Plus, the number of potential foot-faults is large.

Borrowing a term from current Washington culture, one might say a spinoff for most companies is "too big to fail." That means you want a ruling whenever possible. And that, in turn, means you are more likely to run up against a Catch-22 when it comes to a spinoff ruling.

Parsing Judgment

Under the new guidelines, taxpayers can request (and the IRS can issue) a ruling on part of a transaction rather than on the entire transaction. This is now allowed for one or more issues that:

- are solely under the jurisdiction of the Associate Chief Counsel (Corporate);
- are significant (as defined in Rev. Proc. 2009-3, Section 3.01(38)); and

- involve the tax consequences (or characterization) of a transaction (or part of a transaction) that occurs in the context of a Code Sec. 355 distribution.

The new procedure also makes clear that taxpayers may request (and the IRS may rule) on a particular legal issue under a code section or regulation provision. This stands in contrast to getting a ruling that addresses *all* aspects of that Code section or regulation. For example, the IRS may rule on whether an acquisition of assets of one corporation by another corporation meets the continuity of business enterprise requirement (in Reg. §1.368-1(d), or in Code Sec. 355(b)(2)(C)).

This is so even though the ruling fails to address the *overall* qualification of the transaction under either Code Sec. 368 or 355. The IRS can do this as long as the acquisition occurs in the context of a Code Sec. 355 distribution.

Pennies from Heaven

It may be too soon to say exactly how much this procedure will be used. It also is not clear how much (if any) time it may shave off of the machinations of getting a Code Sec. 355 ruling. From my perspective, though, it's good news and a step in the right direction. That \$19 million Web site, on the other hand ...