

With IRS, Better To Ask For Permission Or Forgiveness?

By Robert W. Wood

There's an old adage that to get ahead, it is sometimes better to beg for forgiveness than to ask for permission. It isn't a crazy concept. We make such decisions frequently in our business and personal lives. Even though asking advance permission may be most polite, many of us have learned that hard way that sometimes you are better off not asking.

This concept can even be applied to the IRS. After all, do you want to *call* the IRS? Doing so is usually an exercise in frustration. In-person office visits are likely to be unproductive too. Besides, you generally cannot rely on the tax advice IRS employees dish out. There are numerous tax cases in which taxpayers claim they are relying on IRS guidance. They usually lose.

It can make the process of soliciting and getting answers to your tax questions, well, questionable. What about more formal inquiries to the IRS, where you *can* actually rely on their formal guidance? That is worth examining, too. Sometimes, asking in advance may not be as sensible as you might think.

Consider Yahoo. In 2015, Yahoo CEO Marissa Mayer announced a highly tax-advantaged plan to spin off Yahoo's remaining 384 million shares in Alibaba. At the time, Yahoo's stake in the Chinese company was worth a whopping \$23 billion. As is customary in such deals, Yahoo asked the IRS for permission via a private letter ruling.

Later, the IRS revealed that it would not issue one. A ruling is a binding letter from the IRS, an advance blessing that you attach to your tax return. Plainly, the fact that the IRS will not rule does not mean that the transaction will be taxable. But, if you ask and they say no, the IRS certainly knows about your plans.

In short, there is quite a dampening effect of asking for a ruling and not getting it. Can you still move ahead despite the negative ruling? Just imagine Clint Eastwood as IRS commissioner. Refusing to issue an IRS ruling, he might say, "Well, punk, do you feel lucky today?" After Yahoo's on-again, off-again plans, there were renewed discussions legal opinions as alternatives to IRS rulings.

But writing an opinion *after* the IRS has already said "no," can be more complicated than writing one before. Even before the IRS is involved, the question whether you want a tax opinion or a private letter ruling is rarely simple. Cost, speed, certainty, and risk should be considered.

Rulings are binding on the IRS, tax opinions are not. That is one reason you must attach a copy of the ruling to your tax return when you file it. You never attach an opinion to a tax return.

A tax opinion can be written on just about anything. In contrast, the IRS has lists of subjects on which it will not rule. If the tax issue is plain vanilla in character, it may not be possible to get a ruling, even if it is not on a no-rule list.

If the issue is plain vanilla, the IRS may call your request one for a "comfort ruling," something the IRS generally will not issue. Conversely, if the tax issue is unique or difficult, it may be outside the realm of rulings on the other extreme. Many taxpayers feel the middle ground — where you can get an IRS ruling — is generally where you do not need one!

One generally should not ask the IRS for a ruling unless there is a high likelihood you can get it. After all, there are consequences for asking. When you request a ruling, you generally must pay a fee. There is a range of fees, but a common fee is \$28,300.

Plus, if the IRS answer is no, you don't want to attach a "no" to your tax return. And if you *withdraw* your request, the IRS sends a notice to the IRS field office in your area. The notice informs field IRS employees that you asked for a ruling, didn't get it, and withdrew your request.

If you proceed with the transaction, your return could be flagged. And then there is timing. A ruling takes weeks or months. Most take six months or more. In contrast, a tax opinion can be knocked out in days or weeks.

Today, most IRS rulings are preceded by an informal trial run. You talk to the IRS and get their general view on your proposed ruling. Then, you submit a short (five-page or so) memo about the facts, the issue, and the ruling you want. IRS attorneys meet with you informally in person or by phone. If all sounds positive, you prepare and submit your ruling request. If not, you don't.

Either way, the informal request is not official and triggers no fee. If it does not go well and you never make a formal ruling request, it triggers no audit notice. With all of these factors, IRS rulings and tax opinions each have their place. If the dollar consequences of being wrong are catastrophic, a ruling is clearly best if you can get it. Yet, you can't always get it. What's more, in some cases it can be dangerous to ask. Since IRS ruling and tax opinion standards are very different, at times — even when it comes to taxes — it better not to ask permission. If you have to, you can always beg forgiveness.

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