

[*Editor's Notebook*, January 1991]

## IRS Affirms Plans for Developing Secret Tax Law on Transfer Pricing

3 TAX NOTES INT'L 267-269 (March 1991)

by *Mike McIntyre*

*Michael J. McIntyre, the Editor-in-Chief of Tax Notes International, is Professor of Law at Wayne State University Law School in Detroit, Michigan.*

*Address: Wayne State University Law School, Detroit, Michigan 48202, U.S.A.  
Telephone: (313) 577-3944; Email: mcintyre@wayne.edu.*

Last summer, U.S. tax authorities circulated a draft revenue procedure that set forth the IRS plan to issue what it then characterized as "Advance Determination Rulings" (ADRs). (See 2 TAX NOTES INT'L 565 (June 1990).) The draft revenue procedure did not include a discussion about the IRS plans for publishing the ADRs. It stated that the disclosure policy was still under consideration and that the Service welcomed comments. I assumed, nevertheless, that the IRS would abide by the established rules applicable to other types of rulings and would publish sanitized versions of the ADRs in a timely fashion.

In 1976, after the IRS had lost a Freedom of Information suit and was forced to release sanitized versions of its private letter rulings, Congress adopted Code section 6110. In that section, it provided clear and workable guidelines for disclosing rulings and other written determinations. Congress also provided that written determinations governed by section 6110 would be exempt from discovery under the much broader disclosure requirements imposed by the Freedom of Information Act. The obvious purpose of that Code section is to balance the public's right to know against the legitimate privacy concerns of affected taxpayers.

Last October, a representative of the Service publicly announced that the IRS intended to conceal completely from the public the results of the ADR process. In the following issue of TNI, I explained why I thought nondisclosure would be unwise. (See 2 TAX NOTES INT'L 1127 (November 1990).) In my view, the existence of a body of secret tax rules gives an unfair advantage to those law firms that are in on the secrets and deprives the international tax community of badly needed guidance on the substance of the Service's ruling policies. I also pointed out that rulings, including Advance Determination Rulings, must be published under current law. Whatever some of us may think about the proper balance between the benefits of disclosure and the benefits of confidentiality, Congress has acted rather decisively to establish that balance.

[\*268]

Soon after that column was published, the IRS announced that it had a new name for what it had been calling an Advance Determination Ruling. An ADR was now to be called an Advance Pricing Agreement (APA). The Service apparently made the name change in the hope of improving its position in court should its secrecy rule be challenged. In the January 1991 issue of *TNI*, I poked fun at the Service for thinking that such a name change would have significant legal consequences. (See “What’s in a Name,” 3 *TAX NOTES INT’L* 29 (January 1991).)

Rev. Proc. 91-22, just released, sets forth the Service’s final position on the procedures for obtaining an APA. (See page 251 of this issue for a story on that revenue procedure.) Section 11 of Rev. Proc. 91-22 states that the Service intends to keep APAs confidential. In support of its secrecy policy, the Service asserts that an APA is either part of a “return” or is “return information” within the meaning of Code section 6103.

The IRS is prohibited by law from disclosing the contents of documents properly classified as tax returns or as return information. Code section 6110 provides, however, that sanitized versions of all “written determinations” must be disclosed. A written determination is defined to be a “ruling, determination letter, or technical advice memorandum.” The regulations under Code section 6110 define a ruling as “a written statement issued by the National Office to a taxpayer ... that interprets and applies tax laws to a specific set of facts.” An APA unquestionably would fit within this definitional language.

To paraphrase U.S. Treasury Secretary Nicholas Brady, I do not claim to be the Western World’s expert on FOI suits. It seems dead wrong to me, however, to classify a document designed to establish the legal framework for settling future disputes over transfer prices as a tax return or as “return information.” Obviously an APA is not a tax return. The term “return information” is defined in Code section 6103(b)(2). The key issue under that section is whether the information contained in a document has been collected or provided so as to determine the “existence, or possible existence,” of liability for tax, penalties, or the like. The whole point of an APA is to establish the ground rules for determining future tax liabilities — that is, liabilities that do not exist at the time the APA is issued. [\*269]

I assume that the IRS has taken a position against disclosure of APAs so as to induce more taxpayers to participate in the APA process. Taxpayers afraid of a public APA process are not likely to be much comforted, however, by the secrecy policy announced in Rev. Proc. 91-22. They will worry -- for good reason — that the policy will be challenged in the courts and that the Service will come out the loser. They may even worry about the Service losing a general FOI suit that would require more extensive disclosure than is required under Code section 6110. Thus the Service can expect to gain very little from putting itself on the wrong side of this important policy issue.