USD Tax Clinics

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Overview

• Learn about the sources of tax law;

• Learn and apply research methodology when approaching tax problems;

• Critically analyze tax law sources;

• Tax research databases
Primary Authority

- Resources from a primary branch of government (legislative, executive, judicial)
  - Constitutions
  - Statutes
  - Regulations
  - Judicial Decisions
  - IRS Documents

Secondary Authority

- Provide an explanation of primary authorities
  - Law reviews / journal articles
  - Treatises
  - Textbooks
  - Looseleaf services
  - Legislative history (even if published by the gov’t)
Hierarchy of Authority

- Primary authority (usually) carries more weight than secondary authority

- Sometimes a primary authority carries more weight than other types of primary authority

- How do you define authority?
  - Precedential/Mandatory
  - Persuasive
  - Substantial
Precedential Authority

- Authority that *must* be followed by a court or agency

Persuasive Authority

- Authority that is given little, if any, deference by a court or agency

Substantial Authority

- Unique to tax situations – taxpayer penalties can be waived if substantial authority exists to support a position
- Treasury regulations lists items considered “substantial authority”

IRC § 6662: “substantial authority” for the taxpayer means = IRC, temporary and final Regulations, court cases, administrative pronouncements, tax treaties, and congressional intent as reflected in committee reports, Proposed Regulations, Private Letter Rulings, Technical Advice Memoranda, Actions and Decisions, General Counsel Memoranda, Information or Press Releases, Notices, and IRS documents in the *Internal Revenue Bulletin*
Hierarchy of Authority: Primary Sources

- Federal primary sources that carry a high weight of authority include:
  - Statutory / Legislative Authority
    - **Internal Revenue Code**
    - Other Federal tax statutes
  - Administrative Authority
    - Revenue Rulings
    - Revenue Procedures
    - Final and temporary regulations
    - Other published IRS positions (Notices and Announcements)
  - Judicial Authority
    - Judicial decisions on tax matters
Constitutional and Legislative Sources

• Statutory Sources:
  - Constitution
  - Internal Revenue Code
    Title 26 USC
  - Also found in 18 USC (criminal law) 11 USC (bankruptcy) and other titles
Primary Authority: Administrative Authority

- IRS is part of the Treasury Department

- IRS takes laws enacted by Congress and translates them into detailed regulations, rules, and procedures

- Revenue Rulings, Revenue Procedures, Notices, and Announcements are published in the weekly *Internal Revenue Bulletin (IRB)*

- Rulings, procedures, notices, etc. - as authoritative as regulations
Hierarchy of Authority: IRS Guidance

Hierarchy of Authority for IRS Guidance and Other Information Sources

- **Legally binding statute**
- **Legally binding interpretation of statute**
- **Taxpayers can rely on it as authoritative and as precedent because IRS is bound by it**
- **Binding on the IRS as to the specific taxpayer and facts and can only be relied on as authoritative and as precedent by addressee taxpayer**
- **Source of general information, but taxpayers should not cite to sustain a position as authoritative and as precedent**

Source: GAO analysis of IRS documents. | GAO-16-720
1. **Regulations (IRS):**
   - Treasury Decisions (TDs), published in the Federal Register and in the Internal Revenue Bulletin (IRB)
     - Proposed while awaiting the hearing process
     - Final Regulations have the effect of law

**Types of Regulations:**

- **General:** issued under the general authority granted to the IRS to interpret the language of the Code
- **Legislative:** IRS is directed by Congress to fulfill a law-making function and to specify substantive requirements of a tax provision; not easily challenged.
- **Temporary:** not subject to public hearings, effective immediately. Provide immediate guidance and must be followed until superseded.
2. Revenue Rulings
   • Second to the Regs as important administrative sources of precedent. Deals with the application of the Code and Regs to a specific factual situation.
   • Earlier Terms: Appeals and Review Memorandum (ARM), General Counsel’s Memorandum (GCM), and Office Decision (OD)

3. Revenue Procedures
   • Issued in the same manner similar to that for Revenue Rulings; first published in the weekly IRB and later included in the bound edition of the Cumulative Bulletin. The IRS issues approx 75 RPs per year.

4. Letter Rulings
   • Issued by the IRS in several forms: Private Letter Rulings, Determination Letters, and Technical Advice Memoranda. Not published in any official collection but are available from commercial sources.
Primary Authority: Administrative Pronouncements

5. Technical Advice Memorandum
   • In response to IRS requests arising out of tax return examinations
   • Created by Office of Chief Counsel
   • Final determination of the position of the IRS, but only on specific case

6. Notice
   • Provides notice before revenue rulings, revenue procedures, and regulations are available

7. Announcement (Ann.)
   • Alert taxpayers to a variety of information, but somewhat less informal than rulings, procedures, and notices
   • Only has immediate or short-term value
Primary Authority: Judicial Decisions

Tax Court Decisions

• Golsen Rule

• Types of Decisions
  • Regular Decision
    • Published in:
      • Officially 2x a year: *U.S. Tax Court Reports* (Prior to 1943, named Board of Tax Appeals) citation:
      • Party Name, vol T.C. page, Dec. No. (year)
      • Unofficial: CCH US Tax Cases & RIA’s AFTR
  • Memorandum Decision
    • Published in:
      • CCH (*TCM*) and RIA (RIA *T.C. Memo*)
      • 1x per year
  • Small Case Division – Summary Opinions (no precedential value, available after 2000 in RIA and CCH)
Hierarchy of Authority

- Primary sources which provide guidance, but which *should not* be cited as legal authority include the following
  - Proposed regulations
    - (unless specifically earmarked as “reliance regulations”)
  - Legislative history (e.g., Committee Reports)
  - IRS Letter Rulings (may be relied on by recipient of ruling)
  - IRS internal documents made available to public
    - Internal Revenue Manual
    - Audit Technique Guides
  - Taxpayer assistance
    - IRS publications
    - Federal tax forms / instructions
    - IRS FAQs
Substantial Authority

• Substantial Authority
  • Several types of IRS pronouncements provide recognized authority for the possible defense of the negligent and substantial understatement penalties provisions of IRC § 6662.
  • IRC § 6662 imposes a 20% penalty for significant understatement of income tax liability.
  • However, the penalty is waived if the taxpayer relied on “substantial authority” for the position taken on the return.
Substantial Authority

According to Treas. Reg. § 1.6662-4(d)(3)(iii), “substantial authority” includes the following:

- Internal Revenue Code
- Other statutory provisions
- Treasury Regulations of all types
- Court cases
- Revenue Rulings
- Revenue Procedures
- Tax treaties
- Treasury Decision official explanations of treaties
- Committee Reports
- Floor statements made prior to bill enactment by manager
- Blue Book
- Private Letter Rulings
- Technical Advice Memoranda
- Actions on Decisions
- General Counsel Memoranda
- IRS press releases, notices, announcements
- Other IRS pronouncements published in the Internal Revenue Bulletin
Hierarchy of Authority: Secondary Sources

- Secondary sources that provide guidance in tax issues include:
  - Academic Journals / Tax Journals
  - Treatises
  - Current Awareness Services / Looseleafs
  - Publications of Institutes and Conference Proceedings
Tax Research Methodology

1. Establish the Facts
2. Identify the Issues
3. Locate Authority
4. Evaluate Authority
5. Draw Conclusions/Recommendations
6. Communicate Research Results & Recommendations

Repeat Steps 1-4 as Necessary to Complete Research & Analysis of Issues
Locating Authority
Locating Federal Authority

Primary Source: Researching the IRC

- United States Code (GPO / Fed. Gov’t)
- United States Code Annotated (USCA – West)
- United States Code Services (USCS – Lexis)
- Other sources with compiled statutes
Locating Federal Authority

Primary Source: IRS Guidance Documents

- Also on Checkpoint, Intelliconnect, Bloomberg Law, Westlaw, Lexis, and HeinOnline (1919-2008)

Current Awareness

- Bloomberg – Daily Tax Report
- CCH – Federal Tax Day / State Tax Day
- IRS GuideWire
- taxanalysts.org
Constitutional and Legislative Sources

Finding Committee Reports:

• When a new tax law is passed committee reports are released in the IRS’s weekly IRB. Past reports can be found in the IRS’s Cumulative Bulletin
  • www.congress.gov
  • www.waysandmeans.house.gov
  • www.finance.senate.gov

Legislative History Research

• Joint Committee on Taxation: www.jct.gov
Secondary Sources

• Print and Electronic Resources
  • Tax Database Services:
    • RIA
    • CCH
    • Bloomberg BNA
    • Lexis
    • Westlaw

• Tax Journals & News Resources
Tax services have been considered among the best secondary resource for using and understanding the Internal Revenue Code.

- Typically arranged by IRC section or topic
- Contain explanations of the IRC
- List cross-references for other research
- Give annotations to other relevant authorities
  - E.g., regulations, cases, IRS documents, etc.
Major Tax Services

- Federal Tax Coordinator 2d  Topic
  Westlaw and RIA Checkpoint
- United States Tax Reporter  Code
  Westlaw and RIA Checkpoint
- Standard Federal Tax Reporter  Code
  Intelliconnect
- Federal Tax Service  Topic
  Intelliconnect
- Tax Management Portfolios  Topic
  Bloomberg and BNA
- Mertens Law of Federal Income Taxation  Topic
  Westlaw
## Tax News Resources

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California Tax Research
State Tax Research: Where to start? Where to go?

- Know your facts & issues
- Determine what research starting points you want to make:
  - Know CA agency materials (AG opinions, BOE & FTB opinions)
  - Stay current with CA legislation & news services
- Know your available databases
California Tax Resources

- **RTC:** Revenue and Taxation Code
- **Board of Equalization (BOE):** property taxes, tax on insurers, excise taxes
- **Franchise Tax Board (FTB):** personal income tax and corporate tax
- **CA Dept of Tax and Fee Administration (CDTFA):** sales and use tax and special taxes
- **Office of Tax Appeals (OTA):** administers tax appeals
- **Employment Development Department:** payroll tax
- **Secretary of State:** business filing forms
- **State Controller:** estate, inheritance and gift taxes
Board of Equalization

- Property taxes, tax on insurers, excise taxes
- Information for businesses
- Forms and publications
- Online Services

http://www.boe.ca.gov/
• Law and legislation (law summaries, litigation, directory, Regs & Agency Docs)
• News and form updates

https://www.ftb.ca.gov/
Department of Tax and Fee Administration

- Opinions
- Rules and regulations
- Legislative Analyses
- Code

https://www.cdtfa.ca.gov/
Office of Tax Appeals

The Office of Tax Appeals is an independent body created by the Taxpayer Transparency and Fairness Act of 2017. Its mission is to provide a fair, objective and timely process for appeals from California taxpayers.

**Taxpayer Transparency and Fairness Act of 2017**

The Office of Tax Appeals (OTA), created by the Taxpayer Transparency and Fairness Act of 2017, is an independent and objective body to hear appeals for various tax and fees administered by the California Department of Tax and Fee Administration and the Franchise Tax Board from California taxpayers.

The OTA is staffed with Administrative Law Judges who form three-member panels to hear appeals related to California’s personal income, corporate income, sales and use, excise and other special taxes. Appeals will be heard in Sacramento, Fresno and Los Angeles.

The OTA will begin hearing cases after January 1, 2018.

**Starting the Appeal Process**

Taxpayers may file an appeal once the Franchise Tax Board (FTB) or the California Department of Tax and Fee Administration (CDTFA), issues a Notice of Action or Notice of Determination with an “appeal-by” date. You must file a written appeal with the OTA by that time by mailing or faxing in the following:

- A copy of the notice from either the FTB or the CDTFA
- A written request for a hearing with specific grounds or reasons supporting your position that you do not owe the tax or fee.
- Any documents such as bank statements or receipts that support your case.

**If You Need Help**

If you are a taxpayer facing hardship, you have a number of options that do not involve filing an appeal. Both the Franchise Tax Board (ftb.ca.gov) and California Department of Tax and Fee Administration (cdtfa.ca.gov) accept installment plans for taxpayers who need to pay over time.

https://ota.ca.gov/
State Tax Research

- Westlaw & Lexis
- BNA State Services
- RIA State and Local Reporters
- CCH (State Tax Tab)