CHAPTER II

CENTRALLY ADMINISTERED RULE-MAKING PROGRAMS

Section A. Evolution of U.S. Programs

2.1 Introduction

Among the six countries treated here, the U.S. tax administration maintains the most comprehensive set of centrally administered rule-making programs. A preliminary description of the evolution, magnitude, and effect of its programs will serve two purposes: first, to identify the consequent problems, answers to which will fix the major contours of such programs, and second, to facilitate a subsequent analytic comparison of the "Six's" diverse reactions to the vital purposes these programs serve.

Obviously, the appropriate legislative body, not the executive, ultimately is responsible for a nation's tax policy. Further, substantive policy considerations, responsive to the nation's socio-economic status and goals, alone should determine the general thrust of its income tax statute. But this is not so as to all details. Decisions regarding the latter, such as the number and types of substantive deviations to be incorporated and the manner in which the statute is to be drafted, should depend also upon the variable extent the alternatives would generate uncertainty and controversies between taxpayers and the tax administration. The significance the legislature actually attaches to any differences anticipated on this count should be affected, in turn, by the degree it is empowered and willing to share a clarifying rule-making function with administrators, independent tribunals, or both. Necessarily, its attitude toward this must be influenced by the anticipated relative capabilities of the other two. Also relevant, however, are its expectations regarding two other matters: first, the standards of construction to which administrators and/or independent tribunals would conform and second, its own willingness and power to employ pre-enactment materials (legislative committee reports, etc.) to reduce the uncertainties reflected in the statute itself and through this means control the range of rule making by the other two. Finally, in considering at the pre-enactment stage the extent to which the tax administration itself should be
counted on to satisfy a clarifying function, the legislative body should take account of the degree it is willing to permit the administration to identify its interpretative position before transactions are consummated (through regulations and rulings), i.e., before controversies emerge rather than just after they arise in the setting of the administration's conflict resolution procedures.

Though the U.S. Congress should have examined the above questions before it chose from among competing statutory approaches, in fact the answers to many evolved after it already had gone beyond the point of no return in shaping a most complex substantive statutory pattern.

For example, as to the anticipated role of courts, the rule-making consequence of the fairly strong American doctrine of precedent undoubtedly was generally understood by those who enacted the first modern income tax statute in 1913. But neither the congressional debates nor the committee reports bearing on that act reflect any concern or expectations regarding either (i) the judiciary's standard of statutory construction (i.e., the degree courts should or would exercise an active or passive role in the interpretative process) or (ii) its capacity to share the rule-making function in a manner both timely and convenient to taxpayers. As events turned out, however, the congressional sponsors of that act would have been misled for the future by any findings as of that moment with respect to the first of these. Before, and just immediately after that act was passed, the Supreme Court insisted that the judiciary would follow a passive role in construing tax statutes:

In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen.¹

Within two decades, however, it was to abandon this standard of strict construction except perhaps—now to the taxpayer's

disadvantage—in the case of deductions.\(^2\) And even as to these the Court subsequently observed:

We are not impressed by the argument that, as the question here decided is doubtful, all doubts should be resolved in favor of the taxpayer. It is the function and duty of courts to resolve doubts. We know of no reason why that function should be abdicated in a tax case more than in any other where the rights of suitors turn on the construction of a statute and it is our duty to decide what that construction fairly should be. . . .\(^3\)

Shortly thereafter, the High Court took the final major step, by making abundantly clear that it expected the judiciary to play a more active role in combating avoidance,\(^4\) though within the framework of a notion that courts should "seek the purposes of the applicable sections of the Code and adopt that construction which best gives effect to those purposes."\(^5\) The judiciary, by this belated step, began to assist the legislative body in achieving one salutary effect, namely, greater "equality among taxpayers,"\(^6\) i.e., "uniform application"\(^7\) of the law by reference to the "substance"\(^8\) of transactions rather than their mere "form."\(^9\) But these shifts also were responsible for generating additional uncertainty throughout the code and in consequence new controversies. In many affected areas, Congress then felt called upon to supply legislative refinements which made the basic law more complex\(^10\) and, because also new deviations were added, yet new uncertainties and controversies emerged.

While those who sponsored the first modern act could not have been expected to anticipate the above shifts in standards of judicial construction, they could have predicted that the then constituted federal judiciary provided a forum neither adequate

\(^7\) Burnet v. Harmel, 287 U.S. 103, 110 (1932).
\(^8\) Commissioner v. Court Holding Co., 324 U.S. 331, 334 (1945).
\(^10\) E.g., I.R.C., §§ 671-678.
nor convenient in which to resolve all the uncertainties and controversies which that and succeeding acts were certain to generate. Within a decade the Congress was forced to create a specialized independent tribunal (Board of Tax Appeals, now called the Tax Court), both to provide a means of resolving a tremendous back-log of unresolved controversies and to permit this to be accomplished with more convenience to taxpayers, i.e., before they had to pay the contested portion of the tax. But even with the addition of that tribunal, the conflict resolution burden was more than the judicial system could be expected to accommodate. Three years after that tribunal was created, top policy-making officials concluded it was necessary to adopt a compensating administrative procedure which, with certain limitations, prevails to this day. Administrative officials were directed to seek administrative "settlements" geared, if need be, to partial concessions by both sides, on the basis of their competing strengths and weaknesses, with nuisance values ignored by both. As the Under-Secretary of the Treasury described it:

...There are any number of legal questions for which there are no precedents, that are relatively unimportant, and where it pays the Government to make concessions to the taxpayer if, in return, the taxpayer will make concessions to the Government. In other words, we are applying, in the field of tax administration, the ordinary business methods of adjusting disputes, because we found that, both for the taxpayer and for the Government, litigation is unsatisfactory and expensive.

Settlement methods tend to keep tax questions where they belong: in the administration field, and tend to promote promptness and finality. ...

2.2 Evolution of U.S. regulations program

Though the Congress which passed the first modern act should have foreseen the ensuing substantial degree of uncertainty and controversy such statutes generate, there is little

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11 Prior thereto, to litigate an issue, the taxpayer had to pay the entire contested amount and then sue for refund in either a federal district court or the United States Court of Claims. Flora v. U.S., 357 U.S. 63 (1958), reh. 362 U.S. 145 (1960). Refund suits in these two forums still survive as alternative remedies to the litigate-first-pay-later remedy before the Tax Court. See Chap. IV infra. Indeed, outside the income, estate, and gift tax areas, they are the sole remedies.  
12 See Chap. III, § 3.4 infra.  
to suggest it had any real intention of sharing in any significant degree its rule-making function with administrators. It probably believed that it was accommodating only otherwise unprovided for procedural requirements when, in three different instances, it required certain things to be accomplished under rules and regulations prescribed by the Commissioner with the approval of the Secretary of the Treasury. Three years later, however, on the substantive side, it did authorize the first of what might be described as narrowly focused legislative-type regulations. When establishing a "reasonable allowance for depletion" in 1916, it provided that "such reasonable allowance" would be determined "under rules and regulations to be prescribed by the Secretary of the Treasury." That this delegation of legislative authority was upheld came as no surprise; the Supreme Court previously, in non-tax areas, had said it was appropriate for Congress, after indicating its "will," to "give to those who were to act under such general provisions 'power to fill up the details'. . ." 17

In the next year, 1917, similar legislative-type delegations were added to a few other isolated substantive provisions. And these were supplemented by the following catch-all provision which seemed broad enough to accommodate, as to the whole code, both interpretative-type regulations and procedural problems:

That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act. 19

In the years immediately following, only sporadic and limited concern was expressed in Congress regarding its increasing though still modest tendency to authorize issuance of legislative-type regulations covering specific isolated areas. 20

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15 Rev. Act of 1916, §§5(a) Eighth, 6(a) Seventh, and 12(a) Second. Cf. § 8(g).
16 Burnet v. Thompson Oil & Gas Co. 283 U.S. 301 (1931).
20 For a fairly current compilation of specific delegations, see Balter, "Relief from Abuse of Administrative Discretion," 46 Marq. L. Rev. 176, 182 n. 27 (1962).
Even a leader of the minority side of the sponsoring congressional committee defended the practice, arguing that the language of the bill in these instances was "so obscure and almost non-understandable that somebody ought to have discretion in administering its provisions."21

Far greater concern was expressed repeatedly, however, and on several counts, regarding administrative practices in implementing the catch-all provision dealing with interpretative-type regulations and rulings. From the responses to these concerns, emerged the main outlines of the present regulations program, the end product of which, as to the income tax, now could fill a volume of 3,000 pages at 400 words per page.

The first such concern, exposed to light in 1921, grew out of the administration's own belief that its interpretations did not attain automatically the force of law merely through the process of being incorporated in regulations issued under this general provision. It felt it was legally obligated not only to correct by amendment any previously issued regulation deemed by it to contain an erroneous interpretation, but in consequence to reopen all cases previously closed on the basis of the earlier "erroneous" interpretation. Frequently, from the vantage point of taxpayers, the earlier version, characterized belatedly by the administration as erroneous, proved to be the more favorable of the two. But the practice of reopening these cases on the basis of the later interpretation was defended by the administration before a congressional committee on the grounds that a mere administrative officer not only legally could not, but ordinarily as a matter of policy should not, be permitted "to waive a tax legally imposed" (i.e., imposed by the statute itself when properly interpreted). It added, however, that Congress itself might want to make room for a limited exception, by adopting a procedure enabling the administration to avoid any "great hardship" resulting from belated administrative revision of interpretative regulations or rulings.22 Congress proceeded to adopt such an arrangement,23 the modern statutory counterpart of which24 permits the administration—within its discretion—to fix the extent to which any regulation is to be applied without retroactive effect. In currently implementing

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22 Notes on the Revenue Act of 1918, submitted by the Secretary of the Treasury to the Committee on Ways and Means, 48-49 (1919).
23 Rev. Act of 1921, §1314.
24 I.R.C., §7805 (b).
this discretion, the administration according to a top official—has tried to conform to three sometimes-difficult-to-apply principles. Amendments which actually change the thrust of the regulations to the detriment of taxpayers are made prospective only. Where such a change is of benefit to taxpayers, it is applied retroactively to all open years. This is the practice also where the amendment deals with a matter not previously covered or clarifies an ambiguity in the previously issued regulation.

In 1924, just three years after the above statutory change was made, certain congressional quarters complained that the administration's interpretative regulations actually tended, on the whole, to stretch the statutory law to the disadvantage of taxpayers. The House proposed to attack this problem by adding to the general authorization a limitation which provided that "such regulations shall not enlarge or modify any provisions of this act." The Senate, however, rejected the proposed amendment after being assured by the Chairman of the Senate Finance Committee that no administrative official could ever "make any rule or any regulation in violation of the law itself with any binding force." Of course, literally neither this comment nor the proposed amendment were responsive to the only real and infinitely more subtle question: To what extent should the administration's own interpretative view regarding a statutory ambiguity gain additional weight because incorporated in its own regulations? In the end, while this question—the subject matter of 2.4 infra—was left to the courts, the Congress itself almost immediately began to step up its own effort to contain, by a flanking maneuver, what otherwise would have been a larger potential range for administrative rule making. It began to supplement newly proposed statutory

25 Rogovin, "The Four R's: Regulations, Rulings, Reliance and Retroactivity," 43 Taxes 756, 762 (1965). This was not always adhered to at an earlier time. E.g., see Manhattan General Equipment Co. v. Commissioner, 297 U.S. 129 (1936). Further, if the earlier regulation itself was a reasonable interpretation, retroactive change may be beyond the Commissioner's power. Helvering v. R. J. Reynolds Tobacco Co., 306 U.S. 110 (1939).

26 E.g., see Helvering v. Reynolds, 313 U.S. 428 (1941).


28 65 Cong. Rec. 3334 (1924).

29 Id. at 7140.

30 Id. at 7141. Statement of Senator Smoot.
provisions with more fully developed congressional committee reports which clarified and reflected more precisely the intention to be attributed to otherwise ambiguous statutory terms. Both then and now, courts deemed statements in such reports, explicitly revealing the congressional intention, to be of controlling importance in interpreting the statute.

2.3 Evolution of U.S. private and published rulings programs

Almost coincident with the foregoing 1924 debate pertaining to administrative tendencies in drafting regulations appeared the first public expression of a frequently recurring congressional concern regarding private rulings which, at that time, could be obtained by individual taxpayers only from the National Office and then only as to completed transactions. At an earlier point, in 1919, the administration had begun to publish some of these, though with names and other identifying characteristics omitted. However, in 1924 a congressional subcommittee then investigating tax administration observed that most private rulings remained secret. It contended that uniform treatment of all taxpayers could be assured only if all these rulings were published. Apparently, it was in response to this charge and contention that the tax administration publicly committed itself to publish, after necessary revision, all rulings of general interest having precedent value. Two years later, however, the Senate indicated it was not content with this commitment. This was not just because the administration had failed to fulfill its own pledge. Interested Senators recognized that the nature of that commitment actually left the

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33 C.B. 1-1 (1919).
34 C. B. 1-1 (1919).
36 Hearings before the Senate Select Committee on Investigation of the Bureau of Internal Revenue, 68th Cong., 30-31, 56-57 (1924) and more generally discussed in 3630-3661 (1925). For a more complete statement justifying publication, see S. Rep. No. 27, 69th Cong., 1st Sess. 229-234 (1926).
administration free, in any given case, to turn the question of publication on the often all too subtle difference between what is a new precedent and what is merely a new application of a previously published precedent.\(^{38}\) In an attempt to force publication of both new precedents and new applications of earlier published precedents, the Senate passed an amendment to the general provision, requiring the Commissioner to "publish all rules, practices, principles, and formulas applied or followed in the interpretation and application of any revenue act..."\(^{39}\) A conference committee, composed of representatives of both chambers, drained this of much of its vitality by reducing it to two words\(^{40}\) which, upon subsequent enactment, required the Commissioner "to prescribe and publish all needful rules and regulations for the enforcement of this act."\(^{41}\) Nevertheless, the administration itself also continued, in the fly-leaf of each Cumulative Bulletin thereafter published, to repeat its own earlier self-assumed commitment.\(^{42}\) Years later, however, in 1953, the administration openly acknowledged to a second investigating subcommittee that it had not lived up to this commitment; proportionately, of the precedent-type rulings issued, "very few" had been published.\(^{43}\) Senior administrative officials agreed, however, that this failure was not in the interest of wise tax administration, and promised immediate correction.\(^{44}\) The number published annually then jumped from 115 in the preceding year, 1952, to a peak of 801 in 1955. Beginning in 1960, however, a sharp decline set in; only 388—well under 5 percent of the private substantive rulings issued—were published in 1964.\(^{45}\) By then, because many outside the government felt that federal agencies in general held back from


\(^{39}\) 67 Cong. Rec. 3879 (1925).


\(^{42}\) E.g., see fly-leaf, C.B. 1951–2 (1952).

\(^{43}\) Hearings on Administration of the Internal Revenue Laws Before a Subcommittee of the House Committee on Ways and Means, 82d Cong., 1st Sess. 1340 (1953).

\(^{44}\) Id. at 1564. Also, Hearings on Administration of the Internal Revenue Laws Before a Subcommittee of the House Committee on Ways and Means, 83d Cong., 2d Sess. 51 (1954).

\(^{45}\) Of course, many of the private rulings had no precedent value. See note 50 infra. Nevertheless, to assure accuracy and integrity of the private rulings program, and to acquaint Congress with the manner in which the Commissioner exercised his interpretative function, a bill
the public far more information than could be justified, a statutory remedy was being sought—a so-called "Freedom of Information Act." For a variety of reasons, including the argument that the proposals would require publication of all private rulings, and thus cripple the latter program, the tax administration opposed these efforts. In 1966, however, one such proposal was enacted by Congress. While the intent of the act was clear, to increase public knowledge and access to material not theretofore available, the language of the act was not. In consequence, the tax administration now argues that, to determine congressional intention, recourse must be made to the relevant congressional committee reports. And to support the proposition that it need not publish all private letter rulings, it relies on the following statement in the sponsoring committee's report:

... under § 1160, an agency may not be required to make available for public inspection and copying any advisory interpretation on a specific set of facts which is requested by and addressed to a particular person, provided that such interpretation is not cited or relied upon by any officer or employee of the agency as a precedent in the disposition of other cases....

(footnote continued)
introduced but not enacted in 1965 would have required the administration to publish within ten days all rulings involving potential tax liabilities exceeding $100,000. S. 2047, 89th Cong., 1st Sess. (1965). See Statement of Senator Gore, 111 Cong. Rec. 11810, 11814 (1965).


48 Ibid. Also see Statement of Edwin Rains in hearings before the same subcommittee, op. cit. supra note 47, 89th Cong., 1st Sess. 30 (1965) and Treasury Department exhibit, id. at 441.


A second major problem in the rulings area concerned prospective transactions. In 1921, a Commissioner had explained that the administration was not equipped to do more than "advise taxpayers promptly of their present liabilities arising out of past transactions."\(^{53}\) In 1938, however, to avoid delay or abandonment of legitimate transactions because of tax uncertainties, both the Treasury\(^{54}\) and a congressional subcommittee\(^{55}\) proposed to empower the Commissioner to issue binding advance rulings on prospective transactions where this appeared to be in the interest of wise tax administration. The Congress, however, substituted the more cumbersome bilateral closing agreement arrangement, with the signature of at least an Assistant Secretary of the Treasury being required in each case.\(^{56}\) Sharp rate increases and the explosion of the economy accompanying the outbreak of World War II resulted in an enormous increase in requests for these closing agreements. To meet the demand, the administration—acting on its own initiative—substituted the less cumbersome unilateral advance-ruling arrangement. By the 1960's, the number annually processed always exceeded 30,000, of which about 10,000 involved substantive income tax questions.\(^{57}\) Generally speaking, none of these involved either factual questions or transactions

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\(^{53}\) Min. 2880, C.B. I-1 400 (1921). Italics added.

\(^{54}\) Statement of Under-Secretary of the Treasury, Hearings Before the House Committee on Ways and Means, 75th Cong., 3d Sess. 109 (1938).


\(^{56}\) Rev. Act of 1938, § 802. The statute itself no longer requires the signature of such a high official. I.R.C., § 7121.

\(^{57}\) E.g., see Commissioner of Internal Revenue, Annual Report 1966, 6. A large proportion of the balance are requests for permission to change accounting methods or years for federal tax purposes. Further, of the 10,000 requests for substantive income tax rulings, not all spring from known doubts or real interpretative issues; in effect, some simply request what is tantamount to an "insurance policy" to protect the taxpayer—because of the large sums involved—from unanticipated or unrecognized doubts or uncertainties. For conflicting views regarding the propriety of this practice, see Rogovin, op. cit. supra note 25, at 765 n. 48. Finally, a majority of the 10,000 actually concerned exempt organizations. Quite apart from this, however, district offices issued 14,330 determination letters to organizations seeking exemptions, 15,515 determination letters affirming qualification of pension and profit sharing plans covering employees, and 7,231 determination letters covering pension plans for self-employed persons.
lacking in business purpose; well publicized administrative practice renders both ineligible.\textsuperscript{58}

Finally, there is a difference between private and published rulings regarding the extent to which taxpayers may rely thereon. Implicit in the first public announcement that the National Office would issue private rulings on prospective transactions,\textsuperscript{59} was a limitation—later expressly stated\textsuperscript{60}—to the effect that a private ruling issued to a taxpayer on a particular transaction applied, generally speaking, only to that transaction and to that particular taxpayer. In other words, the government expressly sought to exclude the possibility that such a ruling could be relied upon either by the same taxpayer as to other similar transactions or by other taxpayers involved, say, in the same industry.\textsuperscript{61} It acknowledged, however, that the limitation would be appropriately adjusted where the ruling itself expressly either covered a series of identical transactions, as in the case of a taxpayer's excise tax, or covered all parties to a given transaction, such as a merger of two or more corporations. It is only because this limitation ordinarily has been respected by the courts\textsuperscript{62} that the National Office has been willing to permit the great majority of these rulings to be issued by its own junior staff officials—an absolute essential if it is to accommodate in an even reasonably timely manner the tremendous number of such requests.\textsuperscript{64} In contrast to the limited range attributed to a

\textsuperscript{58} See §§ 2.13 and 2.15 infra.
\textsuperscript{59} Rev. Rul. 54-172, C.B. 1954-1, 394.
\textsuperscript{61} France, on the other hand, tends to issue rulings on prospective transactions only to industrial, trade, professional, or labor groups. See Chapter XIV, § 2.7 infra.
\textsuperscript{63} See Rogovin, op. cit. supra note 25. Within the National Office, more than 75% are issued at the Branch level; proportionately few go above the higher Division level, and not over 2% are reviewed by the legal staff in the Chief Counsel's Office. For a more detailed breakdown, see Caplin, "Taxpayer Rulings Policy of the Internal Revenue Service," N.Y.U. 20th Inst. on Fed. Tax. 1, 28 (1962).
\textsuperscript{64} Even so, of those issued in fiscal 1965, 58% took from two to six months, and of these almost one-third took more than six months. Rogovin, op. cit. supra note 25, at 767 n. 59. Not all of this delay is due, however, to excess inventory coupled with the actual time taken to resolve a given question; initial submissions by taxpayers often are
private ruling, the above mentioned public announcement made it equally clear that the more carefully processed published rulings were addressed to all taxpayers. It added, in consequence, that a given taxpayer "need not request a specific ruling applying the principles of the published ruling to the facts of the taxpayer's particular case where otherwise applicable."65

However, such a taxpayer does assume some risk, apart from that necessarily involved in determining whether the principle of a given published ruling applies to his own facts. Not all of the 14,776 substantive rulings published since 1919 continue to have vitality. Some expressly modified or reversed earlier ones. Others, however, have been affected by subsequent legislation,66 regulations, or court decisions without any attempt by the Service to alert taxpayers to this fact. And, thus, the taxpayer assumes the risk. In other words, the practice governing the published rulings program67 imposes on each taxpayer the burden of determining whether any such subsequent events affected an earlier published ruling on which he proposes to rely in consummating a transaction.68 In theory, to overcome the particular hazard implicit in this practice, he need only research and carefully analyze relevant decisions, etc., post-dating that published ruling.

But no matter how carefully a taxpayer researched a question, he still could not protect himself if, having consummated a transaction in reliance on that ruling, the administration thereafter changed its interpretative position and applied the change retroactively to his case. In consequence, given the statutory limitations on its authority, the administration itself has stretched a long way in trying to minimize this risk. The type of protection it accords differs slightly, however, as between the two different types of rulings.

(footnote continued)

66 E.g., of the 14,776 rulings issued between 1919 and 1965, 9,234 were issued before the revision of the code in 1954.
68 In 1967, the administration announced that it planned to re-examine all pre-1954 rulings, to the end of identifying publicly those it deems to be obsolete.
Relevant to the sweep of the protection accorded in the case of private rulings is the fact that the tax administration, without congressional blessing, itself extended this program to prospective transactions at the beginning of World War II. This action was taken in spite of the fact that the statute itself, enacted immediately prior thereto, literally authorized the administration to bind itself only by bilateral closing agreements.\(^\text{69}\) However, at an earlier time when the National Office confined rulings to completed transactions, a previously mentioned statute, giving the Commissioner discretion to prescribe the extent a regulation would be applied without retroactive effect,\(^\text{70}\) was amended so as literally to include also "any ruling."\(^\text{71}\) In the first public announcement extending the private rulings program to prospective transactions, the administration sought in two ways to reconcile the two foregoing statutory provisions: first, by asserting its right to revoke any ruling retroactively, and second, by declaring its "general policy" was not to do so (absent a retroactive change in the law itself) if the taxpayer had consummated a prospective transaction in good faith reliance on the ruling and retroactive revocation would be to its detriment.\(^\text{72}\) As applied to a situation of this type, the administration later sought to strengthen the image of its so-called "general policy," by noting that deviations would be limited to "rare and unusual circumstances."\(^\text{73}\)

As to modifications of earlier published rulings, the first public announcement mentioned above laid down what appeared to be an even more sweeping immunity, for no conditions were attached expressly to the asserted "general practice of the

\(^{69}\) That the administration has the power to revoke both published and private rulings retroactively is not open to serious question. Dixon v. U.S., 381 U.S. 68 (1965); Automobile Club of Michigan v. Commissioner, 353 U.S. 180 (1957); Helvering v. Reynolds, 313 U.S. 428 (1941). For one exception regarding excise taxes, see Rev. Act of 1926, § 1108(b) and Treas. Reg. § 601.201(1)(a). Also cf. International Business Machines v. U.S., 343 F.2d 914 (Ct. Cl. 1965).

\(^{70}\) Rev. Act of 1921, § 1314, now I.R.C., § 7805(b).


\(^{72}\) Rev. Rul. 54–172, C.B. 1954–1, 394, 401. The limitation would not apply, of course, if the taxpayer had misrepresented the transaction.

Service to make such revocation or modification prospective only."74 Presumably, a taxpayer favored by an earlier published ruling would be protected whether or not he actually had relied on that ruling to his detriment, such as by reliance thereon before entering into a prospective transaction. There is nothing to suggest that the administration meant to change this policy when, in a later substitute announcement, it put the matter differently, saying that such rulings "ordinarily are not revoked or modified retroactively."75

That taxpayers place considerable reliance on the policy not to revoke retroactively either type of ruling is evident from the fact that, in fiscal 1964, only four asked for closing agreements,76 in contrast to the thousands who secured private rulings or relied on published rulings.

2.4 Weight normally accorded U.S. interpretative regulations and published rulings

Related to the matter just considered is a broader question: just how much stature does an administrative interpretation gain from the mere fact, in a given case, it is housed in an interpretative regulation or ruling previously published by the National Office? Field personnel who examine returns would be bound, of course, by both—as a matter of hierarchical control.77 Taxpayers, however, on challenging either of these before the independent judiciary, find that it subscribes to a different view. To regulations, it attaches substantial but not binding significance,78 and ordinarily even this is not extended to rulings as such.

76 Rogovin, op. cit. supra note 25, at 770.
77 As to the limited power of certain regional officials, on exercising their "settlement" function, to compromise private rulings, see Chap. III, § 3.4 infra.
The Supreme Court's view is that an interpretative regulation, construing an otherwise ambiguous statute, ordinarily is entitled to "respectful consideration,"\(^\text{79}\) indeed, to "great weight,"\(^\text{80}\) and that an "assertion of its invalidity must be predicated either upon its being inconsistent with the statutes or its being in itself unreasonable or inappropriate."\(^\text{81}\) Depending on the circumstances, the Court has relied upon one or more of three different rationales to justify this special significance.

The first involves the circumstances which surround the original promulgation of most but not all regulations. Currently, they are drafted shortly after a statute is enacted, by in-service personnel who also worked closely with the congressional committees through which the bill was processed (furnishing drafting assistance both as to it and the committees' explanatory reports).\(^\text{82}\) Given their intimate acquaintance with the specific congressional purposes, their "wide experience in tax matters,"\(^\text{83}\) and the administration's own general "'responsibility of setting ... [the] machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new,'"\(^\text{84}\) their "contemporaneous construction"\(^\text{85}\) of the statute undoubtedly warrants the respectful consideration it enjoys. Of course, a regulation though contemporaneous will not survive if deemed inconsistent with a statute not thought

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\(^{80}\)See Koshland v. Helvering, 298 U.S. 441, 445 (1936).

\(^{81}\)U.S. v. Morehead, 243 U.S. 607, 614 (1917). The Court has not always been careful to note a distinction between legislative and interpretative regulations; it even suggested in Koshland v. Helvering, 298 U.S. 441, 446 (1936) that they were governed by the "same principle." Elsewhere, however, it has indicated that the special delegation of power associated with legislative-type regulations provides "added reasons why... regulations under it should not be overruled by Courts unless clearly contrary to the will of Congress." Commissioner v. South Texas Lumber Co., 333 U.S. 496, 503 (1948).

\(^{82}\)Indeed the division of the Service's legal staff housing draftsmen of income tax regulations is called the "Legislation and Regulations Division." Further, policy reviews are performed by lawyers in the Office of the Tax Legislative Counsel—a constituent of the Treasury Department.

\(^{83}\)Colgate-Palmolive-Peet Co. v. U.S., 320 U.S. 422, 426 (1943).


to be ambiguous. Conversely, the fact a given regulatory interpretation was not promulgated contemporaneously with enactment of the statute is not in itself necessarily fatal to its claim for respectful consideration; a second or third rationale may be invoked to justify attributing substantial weight to it.

The second possible justification is bottomed on the Supreme Court's long-standing conviction that uniform application of tax laws is one of the positive goals warranting encouragement. The implementation by the Court of this conviction began when—long before the first modern income tax act was passed—it stated with respect to a tax regulation, in force for many years:

... But when there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons.

According to this theory, in any given case, the extent to which the previous uninterrupted life span of a regulation will tip the judicial scales in favor of the regulatory interpretation necessarily is affected by the relative length of that life span. That the regulation will benefit substantially from this argument where the period is forty years hardly means that it will benefit in like degree if only a relatively few years are involved. But again, that a given regulation has been outstanding only a relatively short time when first challenged, does not mean it will have no special significance. Though challenged promptly, it may be entitled to special weight by reference to the first-mentioned rationale, i.e., because the regulation reflected the construction of experts contemporaneous with the enactment of the statutory provision. Or it may derive special weight from a third rationale which is of such a nature, however, that—as a practical matter—it is more likely to serve only as a complementary factor adding yet further

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weight to regulations otherwise entitled to respectful consideration because of their fairly long life.

This third rationale emerged out of the High Court's conviction that taxation is essentially statutory in character; therefore it is not too much to expect Congress, having itself expressly authorized regulations, to exercise—perhaps "through its committees"—some measure of legislative oversight, to which the judiciary could then attach significance. Even at a point before the first modern income tax statute was adopted, the foregoing premise had led the Supreme Court to the following conclusion:

... And we have decided that the re-enactment by Congress, without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction.94

This rationale proved to be of particular significance to the host of regulatory interpretations promulgated during the first twenty-five-year period (1913-1938) immediately following adoption of the first modern income tax act. In that period, each Congress—usually on a biennial basis—re-enacted the whole of the income tax law, making only such changes as it deemed appropriate. Thus, by reference to the above-quoted theory, any regulation promulgated during the early part of that period was certain to derive great vitality from the consequent repeated re-enactments of the underlying statutory provision.95 The added possibility that, in the interval between re-enactments, a regulation actually was challenged by taxpayers but sustained by the lower courts, served only to reinforce the Supreme Court's conviction that Congress, upon re-enactment, should be deemed to have acquiesced in the earlier regulatory interpretation.96

In 1939 the environmental setting changed drastically. Congress adopted a permanent tax code, the intention being that this law would survive ad infinitum. Each subsequent Congress, instead of making isolated revisions in the course of an otherwise wholesale re-enactment, was expected to do

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nothing more than amend the particular statutory provisions warranting change. Not until 1954 did Congress again re-enact the whole code in the course of a major revision.

The vitality which pre-1939 regulatory interpretations derived from the biennial re-enactments of the pre-1939 period survived, of course, the codifications in 1939 and 1954, provided the underlying statutory provision itself remained unchanged. However, the 1939 change in congressional procedure regarding tax legislation did pose the threat that newly promulgated post-1939 interpretations would have no chance to benefit from this third alternative rationale, and would have to justify their claim to substantial weight solely by reference to one or both of the two rationales first discussed. This threat did not materialize at once, however. For a time, a divided Supreme Court appeared willing to go a long way in reshaping its "re-enactment" theory to accommodate this environmental change. In one case, the Court attributed "substantial weight" to a post-1939 regulation though the underlying statutory provision had not been re-enacted even once. It observed that, after the regulation had been issued, Congress had amended many provisions of the code without amending the particular statutory provision interpreted by this regulation.97 From this congressional inaction, a majority of the Court apparently was prepared to presume congressional acquiescence to the regulatory interpretation. More recently, however, it appears that the Court has become more sensitive to reality and intends at least to back away from so sweeping a view regarding congressional acquiescence. Indeed, as to a post-1954 taxable year of one taxpayer, the Court refused to apply the re-enactment theory even to a regulation which had been promulgated three years before the 1954 code was substituted for the 1939 code. It reasoned as follows:

... The regulation had been in effect for only three years, and there is nothing to indicate that it was ever called to the attention of Congress. The re-enactment of § 3290 in the 1954 Code was not accompanied by any congressional discussion which throws light on its intended scope. In such circumstances, we consider the 1954 re-enactment to be without significance.98

This, of course, represented just a retrenchment, not an aban-
donment of the re-enactment theory. And it left completely
unaffected the vitality of either of the first two previously dis-
cussed reasons which courts have invoked to justify special
consideration for an interpretative regulation. Observe further
that in fact both these reasons would support most currently
existing interpretative regulations, and that the first of them
alone would warrant respectful consideration of future regula-
tions if promulgated more or less contemporaneously with new
statutory amendments.

However, this latter justification (that the interpretation is
contemporaneous, and is made by expert officials whose agency
is responsible for enforcement and who worked closely with
the legislative processing of the underlying provision) would
seldom if ever warrant special consideration for the usual
published ruling, as distinguished from the typical regulation.
Most published rulings, as well as the private rulings from
which they emerge, are issued long after, not more or less
coincident with, adoption of the relevant statutory provision,
and are drafted by personnel who did not work with the con-
gressional committees at the earlier point when the statutory
provision was being processed. Moreover, Treasury offi-
cials (as distinguished from those of the Internal Revenue
Service), to whom Congress assigned final administrative au-
thority in the case of interpretative regulations, ordinarily
make no review of a private ruling and at best assume only a
modest role regarding published versions. These differ-
ences undoubtedly contributed to the Service's initial position,
expressed in its first volume of published rulings, that the
latter were intended to reflect only "the trend and tendency of
official opinion in the administration of the income and profits
tax provisions of the Revenue Acts. The rulings have none of
the force or effect of Treasury Decisions [i.e., regulations]

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(1966).
100 While the published version ordinarily is reviewed by the Chief
Counsel's Office, the review is carried out by the Interpretative Di-
vision, not by the Legislation and Regulations Division which drafted the
regulations.
101 I.R.C., §7805.
102 The Treasury receives a syllabus of proposed published rulings,
and even this just immediately prior to publication. Its attention is
called specifically only to published rulings involving policy issues of
a high order. See Rogovin, op. cit. supra note 25, at 766 n. 50.
and do not commit the Department [i.e., the Treasury] to any interpretation of law which has not been formally approved and promulgated by the Secretary of the Treasury." 103 Implicit in this was the suggestion that the government itself ordinarily did not expect courts—by reference at least to the circumstances existing at the point a ruling was published—to give any greater weight to a published ruling than that accorded a brief submitted by the government at the point of litigation.

Later, however, the Commissioner did seek to induce the Supreme Court to extend the re-enactment theory to published rulings. The facts involved a ruling published between adoption of the 1921 and 1924 acts and applied by him in interpreting a provision in the latter which was common to both. The court refused, however, to apply the re-enactment theory to this situation, partly because of the government's own previously published disclaimer limiting the intended significance of published rulings. It stated:

The Commissioner's suggestion that, by retaining the same definition in the 1924 Act, Congress approved the construction for which he contends is without merit. The definition had not been construed in any Treasury Decision [i.e., in a regulation], by the Board of Tax Appeals or by any court prior to that enactment. . . . The rulings, I.T. 1379, 1660 and 1889, cited by the Commissioner were made before the passage of the 1924 Act but they "have none of the force or effect of Treasury Decisions and do not commit the Department to any interpretation of the law." See cautionary notice published in the bulletins containing these rulings. It does not appear that the attention of Congress had been called to any such construction. There is no ground on which to infer that by the 1924 Act Congress intended to approve it. 104

Later efforts to induce the High Court to reconsider the applicability of the re-enactment theory to published rulings always originated with taxpayers, not with the Commissioner. In each such instance, a taxpayer challenged an assessment which conflicted with a previously published ruling, claimed by him to have achieved irrevocable vitality through congressional acquiescence. With the parties thus reversed, twice the High Court seemed to find some attraction in the taxpayer's position, as distinguished from its own earlier view as quoted above. In both cases however, it first expressed its own

conviction that the initial published rulings properly interpreted the act; then, by way of dictum, it merely added that Congress' repeated re-enactment of the underlying provision indicated its acquiescence also to that administrative interpretation.\textsuperscript{105}

This dictum has not yet "blossomed into full fruition." However, a favorable environment for this was not provided by the cases subsequently arising before the High Court. In each such case except the most recent, the Court's own conviction, regarding the correctness of the ruling itself, was opposite to that reached in the two cases just described. In other words, in the subsequent situations, the initial published ruling each taxpayer sought to sustain was believed by the Court to reflect a clearly erroneous interpretation of the act. After expressing this conviction, the Court was to add that only in extreme circumstances could such rulings, of "less dignity" than regulations, be saved by the re-enactment theory. In one case, it put the matter as follows:

... Unless the administrative practice is long continued and substantially uniform in the Bureau and without challenge by the Government in the Board and courts, it should not be assumed, from rulings of this class, that Congressional re-enactment of the language which they construed was an adoption of their interpretation.\textsuperscript{106}

Any practical assessment of this judicial position would require the addition of one further fact: once the more or less permanent codes replaced the earlier biennially adopted revenue acts, there was much less chance that Congress would ever re-enact any given statutory provision. Equally important because of this changed circumstance is the Court's recent refusal, in the case of published rulings deemed clearly erroneous, to equate congressional inaction with congressional acquiescence. In one such case, the Court again pointed to the "ample notice" contained in the rulings volume, that published rulings lack the

\textsuperscript{105} Helvering v. Bliss, 293 U.S. 144 (1934); McFeely v. Commissioner, 296 U.S. 102 (1935).

\textsuperscript{106} Higgins v. Commissioner, 312 U.S. 212, 216 (1941). Italics added. The Court also noted that the quoted comment in the two previously discussed cases was only dictum. \textit{Id}. In circumstances similar to the Higgins case (earlier published ruling deemed clearly erroneous), the Supreme Court refused even to apply the re-enactment theory to "[t]wo rulings [published] ... twenty-five years ago, [though] not repeated in the intervening quarter-century...." Manning v. Seeley Tube & Box Co., 338 U.S. 561, 571 (1950).
"force or effect of Treasury Decisions," and do not commit the Treasury. Its holding, that a revised or corrected interpretation could be applied retroactively even though a taxpayer may have relied to his detriment on the Commissioner's earlier mistake, then was explained as follows:

...This principle is no more than a reflection of the fact that Congress, not the Commissioner, prescribes the tax laws. The Commissioner's rulings have only such force as Congress chooses to give them, and Congress has not given them the force of law. Consequently it would appear that the Commissioner's acquiescence in an erroneous decision published as a ruling, cannot in and of itself bar the United States from collecting a tax otherwise lawfully due.107

In conclusion, of the three different rationales used to justify the special weight accorded by the Supreme Court to most regulations, two (so-called "contemporaneous-construction" and "re-enactment" theories) currently fail to generate any special standing for rulings as such. However, as to the third, because of the High Court's interest in maintaining uniformity, there is reason to believe that a previously untested, long continued and consistent, administrative interpretation, of which published rulings may be evidence, will enjoy the judiciary's respectful consideration when interpreting an otherwise ambiguous statutory provision.108

Section B. Analytic Comparison: The "Six's"
Reactions to Vital Purposes Served by Centrally Administered Interpretative Programs

2.5 Introduction: Programs of the Six compared

There is no uniformity in the extent to which the central administrative offices of the six countries covered by this study engage in substantive rule-making activity.

107 Dixon v. U.S., 381 U.S. 68, 73 (1965). However, where published rulings merely support the Court's own view regarding the clear import of an interpretative regulation, this reinforces the applicability of the re-enactment theory as applied to regulations. Fribourg Navigation Co., Inc. v. Commissioner, 383 U.S. 272 (1966).

Under some limited circumstances, authority to engage in such activity has been extended specifically to all six offices. Each national legislature has encountered at least a few income tax problems which it believed could be resolved effectively only by a type of detailed rule making for which the otherwise burdened legislative process was deemed ill adapted. And in that situation, all six legislative bodies have chosen to complement statutory expression of a general objective with a specific delegation of legislative authority enabling the executive arm to fix the technical standards governing that isolated area.\textsuperscript{109} Since these gap-filling administrative promulgations do much more than merely interpret statutory language and, if not \textit{ultra vires}, generally have the force of law,\textsuperscript{110} they previously have been characterized as \textit{legislative-type} regulations.

The frequency with which the six administrations exercise this particular type of rule making varies, of course. But there is a far more substantial range of variation in the magnitude and types of \textit{interpretative} programs they centrally administer for the benefit of taxpayers as well as field personnel. No doubt national tradition and basic philosophical differences regarding the role appropriate to administrators are partially responsible for this. That this diversity in attitude (whether legislative, administrative, or both), regarding the need for full blown centralized interpretative programs, has survived in an area as complex as taxation may also be due to yet other differences peculiar to these individual tax systems. Most relevant to this are their differences in (i) assessment techniques, (ii) the types of income tax statutes being administered, and (iii) the standards of statutory construction to which their respective judiciaries adhere.

As to the relevance of the first of these, observe that the most comprehensive interpretative program is carried on by the one country (United States) which relies on the so-called self-assessment system.

In effect, in the first instance, each of its sixty-seven million taxpayers must assess himself, for returns prepared and filed personally constitute the sole basis for initial liability-fixing assessments. The other five countries employ the

\textsuperscript{109} See \S 2.4 in Chaps. VI, X, XIV, XVIII, and XXII \textit{infra}. In France power to issue regulatory texts is also derived by the Prime Minister directly from the Constitution itself. See Chap. X, \S 2.4 \textit{infra}.

\textsuperscript{110} See \S 2.4 as in note 109 \textit{supra}. 
so-called non-self-assessment system. In theory, the taxpayer himself is relieved of question-resolution burdens. The government assessor determines each assessment, theoretically on the basis of his examination.

As to the relevance of the second (type of statute), if every one of the sixty-seven million U.S. taxpayers was required to fix his individual liability unassisted by administratively fostered interpretations, in theory each would have to rely primarily on his own interpretation of what clearly is the longest, most complex statute of the six. The U.S. code's substantive income tax provisions, if spread at the rate of 400 words per page, would cover an awesome 754 pages. Uncertainty persists, however, despite the meticulous care and supposedly finespun precision with which the provisions are drafted. Transactions in the United States vary from one another in every possible degree. To this, add the fact that most of the words used in that longest of all statutes are more likely than not to have multiple shades of meaning. These factors react cumulatively upon each other to produce countless interpretative difficulties, which are complicated further by a related factor, which in itself contributes further to the statute's length and complexity. The basic principles of this statute have been subjected to a multitude of deviations which have spawned their own sub-deviations, and even deviations from sub-deviations, thereby creating additional interpretative difficulties with stress and pressure at many joints. Not just a few taxpayers are potentially affected by many of these. Indeed, of the total 754 pages, only 138 deal with tax patterns confined to peculiar types of enterprises such as cooperatives, insurance companies, exempt organizations, estates and trusts.

In contrast to the situation in the United States, the Parliaments of the Netherlands, Germany, Belgium, and France not only assign full responsibility for determining initial assessments to the government's own trained personnel, but also confine statutory provisions of a substantive character to abstract principles, which, if spread on the same basis as that indicated above, would cover, respectively, only 40, \[114\]

\[111\] See §3.2, Chaps. VII, XI, XV, XIX, and XXIII, infra.

\[112\] No doubt, they or their representatives actually would rely on interpretations appearing in texts written by experts but devoid of the harmonizing effect of interpretative regulations.

\[113\] As of 1964.

\[114\] Section 2.1 Chap. XXII infra, refers to 57 pages, but of these 30% are devoted to administrative or procedural provisions.
VITAL PURPOSES SERVED

50,115 100,116 and 120117 pages. While the variation between the types of statutory techniques employed by these four countries, and those employed by the United States, may be one reason why the four have not embarked on a centralized interpretative program even approaching the magnitude of that in the United States, this underlying difference does not account at all for Britain. Its statute actually resembles that of the United States more than those of the other four European countries, being both complex and long—exceeding 350 pages.118 Yet its administration does not publish interpretative regulations at the point a statutory provision is enacted;119 does not thereafter ordinarily issue advance private rulings on prospective transactions120 nor publish rulings which explain to one and all the reasoning behind specific interpretative positions in-service field personnel will be expected to take in examining returns.121 Nor does its Parliament attempt to clarify the statute by publishing carefully designed interpretative reports.122 In final analysis, of the five European countries covered here, it appears, surprisingly, that administrations in the four having the shortest and most abstract tax statutes (Belgium, France, Germany, and the Netherlands) actually carry on more comprehensive interpretative programs than does the fifth (Britain), which has a long and complex statute somewhat like that of the United States. The four, with Belgium traditionally at the head,123 publish for one and all to see more of

115 Section 2.1 Chap. XIV infra, indicates that the corporate and individual taxes combined require 95 pages when spread at the different rate of 300 words per page, but of these about one-third are devoted to administrative or procedural provisions.

116 See § 2.1, Chap. VI infra.

117 Section 2.1 Chap. X infra, refers to 80 pages, calculated, however, at the different rate of 600 words per page.

118 Section 2.1 Chap. XVIII infra, indicates that of the 511 pages, approximately 30 percent are devoted to administrative and procedural matters.

119 See Chap. XVIII, § 2.4 infra. Interpretative instructions are distributed internally, however.

120 Id. § 2.7.

121 Id. § 2.10. While a series of pamphlets covering many different areas is published, these usually are devoid of the legal reasoning on which the indicated results were reached.

122 Id. § 2.2. The Belgian Parliament stands alone among the five European countries in making even modest use of this device. See Chap. VI, § 2.2 infra. Cf. the use of Parliamentary debates in France, Chap. X, § 2.2 infra.

123 However, official commentaries on the recent tax reform law of 1962 are much less complete than those on the earlier law. See Chap.
their administratively engineered interpretative instructions, with at least the expectation that field personnel will be bound as a matter of hierarchical control. Further, Germany and the Netherlands also sporadically publish some rulings and—as to prospective transactions—give much advance advice, though usually through local offices, which, in practice, do respect the advice thus given.\footnote{124} There is a third difference among the six countries, however, which may partially account for the fact that Britain appears to feel the least pressure to develop a substantial published interpretative program. At least it is not surprising that the least comprehensive administrative program is carried on in the one country (Britain) whose judiciary apparently tends to interpret the tax statute most strictly.\footnote{125} Given this circumstance, it could be argued that Britain has less room for, and thus less need for, a large scale, published, administrative interpretative program.

But this conclusion is relative in character. The fact is that differences in methods of assessment, in statutory approaches, and in the judiciary's standards of statutory construction, \textit{taken together}, actually do not provide sufficient reason for the substantial differences existing in the Six's administrative interpretative programs. Other relevant characteristics, common to the Six, suggest that properly administered programs of this type would achieve purposes \textit{vital}, whether or not equally so, to each country's tax system.

Each of the Six has millions of taxpayers, a highly decentralized administration bottomed on thousands of geographically dispersed field officials, a statute relatively imprecise and mysterious to everyone but the specialist and, finally, \textit{very} high rates. These characteristics, taken together, should have led each of the six systems to include among its administrative goals three which are almost impossible to accomplish—given

\footnote{\textit{VI, § 2.5 infra.} Further, even the voluminous regulations interpreting the earlier law were, in substantial part, a compilation of results previously reached by courts. Finally, Belgian administers neither a formal private nor a published rulings program. Advance rulings ordinarily take the form only of informal advice or—as in France—of published answers to oral questions put to the Ministry on the floor of Parliament for the benefit of a taxpayer-constituent. See Chap. VI, \textsection 2.7 \textit{et seq.}, \textit{infra}.
\textsection 124 See Chaps. XIV and XXII, \textsection 2.7 \textit{et seq.}, \textit{infra}.
\textsection 125 Cf. Chap. XVIII, \textsection 2.3 \textit{infra}, with \textsection 2.3 in Chaps. VI, X, XIV, and XXII \textit{infra}, and—as to the United States—with \textsection 2.1 \textit{supra}.}
those same characteristics—without substantial centralized published interpretative programs, namely:

(i) Achieving timely nationwide uniformity in application of the law, efficiently and fairly;
(ii) Choosing the wisest possible interpretative positions;
(iii) Preventing uncertain tax effects from impeding, unnecessarily, consummation of legitimate prospective transactions.

Each of these three goals, and the general relationship of centralized rule making to each, is considered separately in the immediately succeeding sub-topics. Thereafter attention shifts to precise methods of implementation and difficulties to be circumvented.

2.6 Achieving timely uniformity, efficiently and fairly

Because all six of the statutes under consideration here involve national taxes and high rates, country-wide uniformity in applying the law is an absolute essential. This is difficult to achieve when income tax statutes are superimposed on, and hence must take account of the nice distinctions inherent in, sophisticated systems of private law and complex economies.

In the application of each such tax statute a host—albeit a varying number—of interpretative difficulties will be generated whether that statute expresses abstract principles, as in Germany, or employs great detail, as in the United States. Nationwide uniformity in resolving these doubts can be achieved in adequate degree, efficiently, fairly, and in a timely manner, only if the central office administers an adequate interpretative program.

In both self- and non-self-assessment systems, many an interpretative difficulty, whether or not foreseen by the central office, actually becomes a "live" issue only at the point an examining official in the field faces the question of whether there is sufficient merit on the government's side to warrant pressing the matter as to a given taxpayer. Since that question necessarily includes the other side of the coin, i.e., whether to abandon the issue, nationwide uniformity will be achieved among similarly situated taxpayers only if all these lower echelon officials conform to a uniform interpretation. Left to their own devices, however, this goal will not be attained. These officials are seldom legally trained, \[126\] their number is large,

\[126\] See §1.5 in Chaps. V, IX, XIII, XVII, and XXI infra.
and they are scattered through many widely dispersed local offices—ranging from 100 in the Netherlands to 1700 in France.\textsuperscript{127} Their individual analysis and research, however painstaking, in attempting to resolve interpretative problems of common concern to many, guarantees only duplication of effort, not uniformity in results reached. However, a centralized interpretative program, administered by officials more expert in analysis and research, not only efficiently avoids the duplication otherwise generated by this necessary decentralization, but also in itself assures a far greater degree of uniformity.

To attain the maximum possible degree of uniformity, and to accomplish this with efficiency and fairness, it is not enough to disseminate centrally-arrived-at interpretations only among the government's own field personnel.\textsuperscript{128} Public access to these interpretations, even in countries employing the non-self-assessment system, contributes efficiently to greater uniformity because knowledgeable voluntary compliance with the law is thereby encouraged. Even now, to assist assessors in those countries, taxpayers are required to file information returns.\textsuperscript{129} However, neither in those countries nor in a self-assessment country such as the United States, is it wise or even possible to design a form which requires taxpayers to reflect their affairs on a transaction-by-transaction basis. Details ordinarily are reflected only by subtotals, each covering transactions alleged to be of the same class. Obviously even under the non-self-assessment systems, assessors cannot possibly ascertain, with respect to each return, the true nature of each transaction affecting each subtotal.\textsuperscript{130} Thus, by trying to make the taxpaying public as knowledgeable as possible, albeit indirectly through published interpretations, the tax system efficiently furthers uniformity at least among the honest segment. The aim is to increase the likelihood that subtotals initially submitted by that segment will conform to what the tax administration believes to be the proper treatment of the underlying transactions, with exceptions anticipated where honest taxpayers believe the administration to be in error. Further, it is only fair to taxpayers, and responsive to the administration's

\textsuperscript{127} Id. §1.4. While the U.S. is divided into 58 districts, these spread audit personnel across approximately 800 posts of duty.

\textsuperscript{128} All five of the European countries maintain at least this restricted type of program. See §§2.4 and 2.9, Chaps. VI, X, XIV, XVIII, and XXII infra.

\textsuperscript{129} See §3.2, Chaps. VII, XI, XV, XIX, and XXIII infra.

\textsuperscript{130} Id.
own interest in having its interpretations applied correctly, that these centrally-arrived-at interpretations be exposed to the public's view. This exposure enables a taxpayer to determine whether the examiner has correctly interpreted the central office's regulation or ruling when applying it to that taxpayer's situation.

The foregoing analysis cannot be shunted aside by the argument that statutory interpretative difficulties should be resolved, not by tax administrations, but by tribunals independent of them. Such argument itself necessarily assumes that, on proper occasions, someone somewhere in the tax administration must adopt interpretative positions antagonistic to given taxpayers; otherwise such matters would never reach the independent tribunal. Thus, mere adoption of a centralized interpretative program, without more, need neither subtract from, nor add to, the ultimate role of independent tribunals. Further, even where the independent tribunals are not expected to attach any special weight to administratively adopted published positions, a centrally administered program of that type is still vital to the maintenance of uniformity. Without such a program, interpretative anarchy will prevail until long after the interpretative difficulties are exposed to light, i.e., until that typically much later point in time when an independent appellate tribunal has had an opportunity to respond to the issue in an adversary proceeding initiated by some taxpayer. Of course, in theory, uniformity in an equally timely manner also could be secured by requiring the central administrative office, immediately upon discovering a significant interpretative difficulty, to seek binding advice from a so-called independent tribunal.\(^{131}\) But, disregarding other shortcomings of this arrangement, if the sole aim is to avoid the administrative character of the interpretation's sponsorship, the arrangement would be self-defeating. The so-called independent tribunal no longer would be independent of administration, for the tribunal itself would have become the administrator in fact, if not in name.

\(^{131}\) Cf. the French practice wherein the government can seek advisory opinions from the separate Council of State. Chap. X, §2.4 infra. In the United States, a declaratory judgment regarding the tax effect of a prospective transaction cannot be obtained in the regular federal courts. See Goodman, "The Availability and Reviewability of Rulings of the Internal Revenue Service," 113 U. Pa. L. Rev. 81, 97 (1964). It appears, however, that the Tax Court has the discretion to enter a declaratory order in such a situation. Id. at 109.
2.7 Choosing the wisest possible interpretative positions

Centralized interpretative programs are essential, not just to achieve uniformity in a timely and efficient manner, but also to facilitate wise selection of those interpretative positions as to which uniformity is to be sought. And this is true whether the controlling statutory datum is cast in quite broad terms or, as such things go, is fairly precise.

In the case of broad statutory language, frequently it would be equally reasonable, solely by reference to technical considerations, to draw the interpretative line at any one of two, three, or more competing places. In net effect, the ultimate choice must be based on non-technical or policy considerations. Ordinarily, however, the scattered local offices are staffed only with technicians. In addition to their difficulty in achieving uniformity if left without guidance, they obviously are ill-prepared to make the type of policy choice required here. Wiser selections can be expected from policy-oriented officials in the central office, using a centralized interpretative program as their medium.

Even in the setting also, relatively speaking, of fairly precise statutory language, diverse factual patterns can generate doubt—in every conceivable degree—regarding the correct technical answer. This is because, prior to litigation, the truly correct technical answer can be nothing more than a prediction. While the very nature of a prediction precludes certainty, often it is clear that technical arguments favoring the government's side are sufficiently persuasive to require a mere administrative official to adopt that position solely on the basis of technical considerations. On other occasions, however, the converse is true; it simply is not clear whether the technical arguments favoring that side are sufficiently persuasive to warrant forcing the matter to litigation if the taxpayer will not yield. In striking the balance here, account should be taken administratively of other variables, such as the degree to which a given answer could be effectively administered or the importance of the question to the tax system. Again, because of their broader administrative perspective, central office officials are better suited to this task, and uniform compliance with their decision can be achieved best through a comprehensive centralized interpretative program.

2.8 Neutralizing risks re prospective transactions

Tax systems have the capacity, though not always adequate authority, to neutralize legal uncertainties regarding the tax
effects of prospective transactions. Such a program (i) satisfies a real need and (ii) enables the tax system to realize on a unique opportunity of benefit to itself. These two considerations provide distinct additional reasons for maintaining centralized interpretative programs.

As to the first, substantive tax uncertainties adversely affect the country as a whole, as well as individual taxpayers. Both suffer if, because of tax uncertainty, legitimate prospective business transactions are delayed or abandoned. Moreover, a tax system's own image also suffers. It will be held responsible not only for the consequent delay or abandonment of transactions but for complaints generated later if a taxpayer—having consummated the transaction—finds he must litigate the tax question to defend the personal interpretation on which he proceeded but which the tax system belatedly claims to have been erroneous. That it is the tax system, and not the individual taxpayer, which produces the tax uncertainty seems clear in the case of prospective transactions supported by legitimate business purposes. In consequence, where feasible, the system should bear the cost of neutralizing that uncertainty through some sort of advance ruling. And if the need really springs from uncertainty or doubt, this in itself is a reason for resolving it through a centrally administered interpretative program, rather than at the local office level. As previously explained, this centralization will provide greater uniformity—more efficiently and fairly—and simultaneously yield a wiser selection of those interpretative positions as to which uniformity is sought.

Second, requests from taxpayers regarding rulings on prospective transactions serve better than any other device to alert the central office immediately as new interpretative problems arise. They give that office the opportunity to develop and publish its position in a timely manner, for the benefit of field personnel as well as other taxpayers. In the United States, despite efforts to encourage field personnel to seek the central office's advice on difficult matters, the fact is that requests which originate with taxpayers are ten times as great.\textsuperscript{132}

\textsuperscript{132} E.g., Commissioner of Internal Revenue, \textit{op. cit. supra} note 57, at 6.
Section C. *Implementing an Interpretative Regulations Program*

2.9 *Introduction: Inherent conflict among the goals*

A program, responsible for promulgating interpretative regulations of proper quality, in a timely manner, without undue expenditure of talented manpower, cannot hope to succeed unless these goals are considered in proper perspective. To this end, the first need is to analyze the specifics which make for proper quality, to maximize the likelihood that, in practice, the right balance will be reached between inherently conflicting constituents of that one goal. The essential second step is to take suitable account of yet another inherent conflict: the one between that goal—viewed as a whole—and the other two goals of timeliness and efficiency. The solution here is to so design the procedures (through which drafts will be processed) that they will avoid undue compromise of any one of the three goals.

2.10 *The goal of proper quality*

To say that interpretative regulations will be of proper quality if they are complete, technically correct, and understandable is to say much but not enough. So simplistic a standard tends to obscure the complexity of each constituent and the inherent conflict among them.

*If* regulations alone discharged the entire interpretative function, then to be complete they would have to deal precisely with every significant ambiguity in the statute. Yet to seek absolute precision in an initial regulation issued more or less simultaneously with the enactment of the underlying statute involves great risk. With every precise line drawn at this embryo stage come increased risks of reaching unintended results in unanticipated situations and of committing technical error in the eyes of the judiciary. There is, of course, a competing risk. Overzealousness in trying to achieve absolute accuracy can produce regulations which are nothing more than purposeless sterile echoes of the statute itself and, thus, well below any meaningful level of completeness and understand-ability.

Technical accuracy, nevertheless, not perfect precision, does stand foremost among the constituents insuring proper

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quality. If inaccurate, a regulation achieves the opposite of its sole purpose. Typically, after promulgation, several years will pass before the judiciary can make a final determination regarding a regulation. And if the courts belatedly disapprove the regulation, it alone bears responsibility for the injustice suffered by those who voluntarily complied and for the resulting nonuniformity between this group and those who successfully resisted. Further, recurring invalidation of regulatory interpretations, if by a judiciary which—in principle—customarily gives respectful consideration to regulatory interpretations, can tend only to shorten the life span of that customary practice. And too frequent invalidation even by a judiciary not so committed tends to lead taxpayers also to lose respect for the whole regulations program, and this will tend to produce wholesale nonconformity.

In attempting to achieve the right balance between two competing standards, technical accuracy and completeness in the sense of precise interpretations, three considerations should lead to a rather obvious conclusion. First, at the point when a statutory provision is enacted, those who must draft the interpretative regulation cannot possibly envisage the actual shape of every potentially affected transaction. In effect, from the vantage point of transactions not foreseen, any perfectly precise regulatory line would have been drawn by draftsmen who were "blindfolded." Second, to help alert the draftsman to factual situations not imagined, and also to test the logic behind his proposed interpretation and his choice of language in trying to reflect his intention, some type of public hearings, formal or informal, should be held after publication of a tentative draft and before its formal adoption. Third, while this practice will help educate the draftsman, neither public hearings at this early stage in the life of the statute nor the

134 Fairness to taxpayers also requires the government to take this type of meticulous care, given the fact that regulations, once formally adopted, bind employees at least as a matter of hierarchical control and can be tested, where adverse to a taxpayer, only by litigation.

135 Of the countries covered by this study, only the United States holds formal hearings where any taxpayer may appear in person or submit statements in writing. However, most of the others do receive pre-adoption comments from interested professional, industrial, and labor groups. See §2.6, Chaps. VI, X, and XIV infra. While the U.S. practice, as it relates to interpretative as distinguished from legislative regulations, may not be required by statute, it is consistently followed. See Rogovin, op. cit. supra note 25, at 759 n. 6.

136 See Williams, op. cit. supra note 133, at 753.
draftsman's own study, can be expected to alert him to more than a fraction of all the diverse factual situations his attempt at a precise line would affect.\textsuperscript{137} In consequence, the draftsman should be made to understand that a new regulation is not expected to discharge the whole interpretative function. A rulings program should assume part of the burden. After the regulation is issued, sporadic requests from taxpayers for rulings will further educate the central office regarding the factual patterns of the really marginal cases, thus removing additional bits of its blindfold and enabling it intelligently, through individual rulings, to "pinprick" its way toward a more precise line.\textsuperscript{138}

These considerations suggest that an interpretative regulation which clarifies a statutory ambiguity by the use of a general definition or principle—supplemented by illustrative concrete applications to the most frequently recurring but seemingly not marginal situations—is the only method which can balance properly completeness (in the sense of precision) and the paramount aim of technical accuracy. By hypothesis, such a regulation is more likely to survive judicial scrutiny than one which establishes a perfectly precise line. For absent a precise line, the courts remain free, when testing subsequent rulings in seemingly more marginal cases, to edge toward the exact location of the dividing line without prejudice to the regulation's general definition or to the large measure of uniformity achieved by its illustrative concrete responses to the more frequently recurring but seemingly less marginal cases.

Finally, to be of proper quality, a regulation must be understandable. Hence, draftsmen have the further burden of determining the intellectual level of the expected audience.

\textsuperscript{137} This is amply demonstrated by U.S. experience, where, though such hearings always are held, post-promulgation requests for rulings continue to expose problems in previously unanticipated situations.

\textsuperscript{138} This opportunity to pinprick toward a line is also the reason why, generally speaking, it is wise to use a series of narrowly tailored published rulings, rather than a general amendment to the regulations, to deal with situations not anticipated when the original regulations were drafted.

There is a yet further reason for conforming to this practice in countries such as the United States, where regulations, but not rulings, are given great weight by the judiciary. In good conscience, the government ought not try, through the amending process, to "bootstrap" what essentially are just belatedly arrived at litigation positions.
This will differ, not just from country to country, but also from regulation to regulation. To illustrate, the U.S. program assumes that the regulations will not be used by the typical individual taxpayer who usually is completely unaware of their existence. The administration attempts to resolve the questions of such a taxpayer in 18 pages of instructions which accompany his return. As to other relatively small U.S. taxpayers for whom those instructions are inadequate (farmers, small business men, and employees with some outside interests), over two and a half million pay a few cents for a much detailed booklet distributed by the government.\textsuperscript{139} Millions more purchase an inexpensive commercial counterpart of those booklets. Yet other millions of taxpayers in the same bracket employ one of the many thousands of persons who, usually on a part-time basis and for only a few dollars, prepare these relatively simple returns. Further, these groups can consult field personnel associated with the taxpayers-assistance program which each local office maintains throughout the year (though the great bulk of its activity is concentrated in the filing season). During fiscal 1966, for example, this program—manned by the lowest grade technicians in the local office—responded to 16.6 million inquiries made by telephone and to questions raised by 9.1 million taxpayers who visited the local offices.\textsuperscript{140} Thus, those persons who use portions of the regulations affecting relatively simple returns include widely diverse groups. They range from tax professionals, who draft the instructions attached to returns and write the government's booklets or their commercial counterparts, to the far less well trained individuals who either man the local offices' taxpayers-assistance program or, as part-time practitioners, prepare uncomplicated returns for small fees. And it is to these less less capable individuals that draftsmen of such regulations address their efforts.

At the other extreme, regulations affecting, say, depletion or consolidated returns, have an audience as sophisticated as

\textsuperscript{139}See Commissioner of Internal Revenue, \textit{op. cit. supra} note 57, at 90. Of the large ones, the three most widely used are \textit{Your Federal Income Tax}, \textit{Tax Guide for Small Business} (the 1965 editions of which, in both cases, ran to 160 pages), and the \textit{Farmer's Tax Guide} (164 pages). Approximately 60 other more narrowly focused pamphlets are distributed. Altogether, the total taxpayers' assistance program in fiscal 1965 required an expenditure of 1,298 man-years. See Commissioner of Internal Revenue, \textit{Annual Report 1965}, 4.

\textsuperscript{140}See Commissioner of Internal Revenue, \textit{op. cit. supra} note 57, at 4.
the business enterprises affected. Thus these regulations, in the interest both of technical accuracy and brevity, can use terms of art incomprehensible to those not intimately familiar with the affairs of such enterprises, and still conform to an acceptable level of understandability.

The understandability of a regulation is affected also by whether it is expected to respond to anything more than the anticipated ambiguities in a given statutory provision. Unquestionably, the interpretation accorded these, and its significance, will be both more readily understood and easier to draft if put in the context of a comprehensive regulation sufficiently self-contained to serve for most purposes as a substitute for the statutory provision itself.\textsuperscript{141} This approach, to which the United States conforms, also enables the draftsman to rephrase otherwise unambiguous parts of the statute to compensate, where necessary, for the formal legalistic mode of expression.\textsuperscript{142} But this is not without risk; to change language not otherwise ambiguous may change the meaning, however slightly.

\textit{2.11 Processing regulations: Reconciling the goal of proper quality with competing goals of timeliness and efficiency}

To design a regulation of proper quality (striking the right balance as to technical accuracy, completeness, and understandability) takes both time and talented manpower. In consequence, stress inevitably emerges between that goal and the competing need for regulations to be issued in a \textit{timely} manner, without undue expenditure of precious talented manpower.

A draftsman may invest substantial time just to identify the significant ambiguities in a new statutory provision and to learn something about the diverse types of transactions each such ambiguity affects. Then comes the painstaking effort to find language that is technically accurate, that is responsive both to the views of policy makers and to the administrative need of easy application, that is sufficiently precise to resolve

\textsuperscript{141} Persons who have some doubt about either the meaning of the regulation or its validity necessarily must have recourse to the statute itself, pre-enactment materials, and court decisions.

\textsuperscript{142} Of the four European countries which issue interpretative regulations, apparently Germany is the only one which makes no attempt to rephrase the statute into the language of laymen, its premise apparently being that the regulations are intended to guide only in-service professionals. Cf. Chap. XIV, §2.5 with §2.5 in Chaps. VI and XXII \textit{infra}, and with §2.4, Chap. X \textit{infra}.
most recurring situations but not so precise as to create great risk of producing unintended results in unanticipated situations, and that clarifies the "legalese" in the unambiguous part of the statute without changing the meaning. Any public hearing, if scheduled to insure the public adequate time to react thoughtfully to a published tentative draft, will contribute to yet further delay, but also to an improved draft, as will any resulting revisions and necessary reviews by higher officials.

Nevertheless, if a regulation is to begin to fulfill its purposes in a timely manner, it should be promulgated, as in Belgium,\footnote{See Chap. VI, § 2.6 infra.} not later than the effective date of the new statutory provision. Delay beyond this, as is the case so frequently in the United States, is unfair to the type of frequently recurring prospective transactions to which the regulation itself should have been a dependable guide. In the event of such delay, on any comparative basis, it is grossly inefficient to try to accommodate these cases through individual private rulings. Prospective transactions more marginal or doubtful in character would be even more certain to suffer, for it would be both inefficient and often unwise to try to rule on these before finalizing the general principles of the regulation. Finally, if a regulation is not promulgated at least by the filing date of the first returns affected by the new statutory provision, then in both self- and non-self-assessment countries it will default pro tanto on all its remaining purposes.

While all tax administrations tend to suffer, whether more or less, from a perpetual shortage of talented drafting personnel, the magnitude of any given statutory revision itself will determine the actual difficulty generated by the inherent conflict between the goals of proper quality and timeliness. In any circumstance, however, measures which properly reconcile these competing goals will tend also to secure the right balance in the efficient use of talented manpower.

Countries covered by this study which do issue interpretative regulations lodge the drafting responsibility in offices which maintain close contact with the legislative processing of the new statutory provision.\footnote{See § 2.6 in Chaps. VI, X, XIV, XVIII, and XXII infra.} Given this essential contact, if historically diverse U.S. practices furnish a trustworthy guide, promulgation of a regulation will be expedited if three additional arrangements are built into the process.
First, responsibility for the proposed draft should be lodged \textit{at the outset} in the type of tax professional whose prior training is most likely to produce skilled, imaginative draftsmen. Second, they should be accorded timely access to policy-level personnel, as well as to technicians familiar with both administrative necessities and taxpayer concerns in the specific substantive area. Third, in proper circumstances, a regulation should be published piecemeal.

Unfortunately, at one time or another, practice in the United States has failed to employ one or more of these techniques. During the 1950's, most initial drafts were prepared \textit{and initially} reviewed by technicians academically trained primarily as accountants. These drafts then were re-reviewed by both spadework and senior personnel academically trained as lawyers. Finally, the cumulative product was given a super-review by both spadework and senior personnel in the policy-making echelons. All too frequently, this arrangement resulted in superfluous duplication of effort on two counts, both of which contributed to substantial and unnecessary delay.

First, the reviewing lawyers tended to treat initial drafts prepared by those academically trained primarily as accountants much as they would have treated the proposed draft of a will submitted by a lay client. The lawyers tended to believe their technical review would be more effective if they started by preparing what was tantamount to an entirely new draft. In consequence, much of the original draftsman's efforts, and thus considerable time, was wasted. It took a change in procedure to remedy this. \textit{Initial} drafting responsibility for income tax regulations was shifted to the lawyers who, with timely access to administrative technicians, could be alerted to administrative and taxpayer concerns as work on a regulation progressed.

Second, also in the 1950's, because the policy-making echelon ordinarily was not involved until after a completed draft had been refined and polished, any redirection on policy grounds, coming belatedly and sometimes requiring a more or less complete overhaul, wasted the time spent previously but futilely on refinements and polishing.\footnote{The comparatively small policy-making group contributed to yet additional delay because of its tendency to fly-speck each regulation, in terms of its completeness, technical accuracy, and understandability. See Williams, \textit{op. cit. supra} note 133, at 751.} This too can be prevented by affording more timely access to the policy-making
echelon. Initial contact with this level should occur not later than the point when the drafting office has isolated the major ambiguities in the statute, is alert to the more frequently recurring situations potentially affected by each, and has thought out the competing principles, if any, which would be technically defensible and administratively feasible to implement.

The purposes of the two foregoing arrangements also can be satisfied, and not infrequently are in the United States, by assigning a regulations project at the outset to a three-man team composed of a lawyer, a technician, and a policy-making representative. This completely avoids the time-consuming seriatum nature of their respective involvements as it existed during the fifties.

The third desired arrangement affects those instances where all of a regulation interpreting a given statutory provision is complete except for one isolatable and particularly difficult matter. If completion of that one aspect would unduly postpone the timeliness of the completed portion, the latter should be promulgated without further delay. The omitted paragraphs need only carry a notice that they will be published upon completion.

Section D. Implementing Private and Published Rulings Programs

2.12 Introduction: Resolving inherent conflict between respective goals of private and published rulings programs

The first imperative in implementing separate programs covering private and published rulings is to insure that each takes proper account of the inherent conflict which exists between their respective goals. Otherwise neither goal can be adequately achieved.

As previously indicated, the principal goal of the private rulings program is to provide advance guidance to legitimate prospective transactions. To accomplish this objective, a private ruling must be timely, i.e., available before the deadline for consummation of the prospective transaction. Because in a fast moving economy, consummation of many prospective transactions cannot be long delayed, speed is an essential ingredient of the program. Published rulings, on the other hand, are intended as a supplement to the regulations program; their principal goal is nationwide uniformity, among both taxpayers
and field personnel. And precisely because these rulings do fix the nationwide position of the government, rather than just the tax effect of a single transaction, absolute correctness is their most important characteristic. In consequence, the inherent conflict between the respective essential attributes of the two different programs can be summarized in terms of speed v. quality—i.e., absolute correctness. The potential consequences of this conflict can be awesomely serious.

On the one hand, in some instances, failure to publish immediately the result of the first private ruling in a given area, thus permitting time for further study prior to publication, may lead only to a loss of efficiency. Each local audit or assessing official will have to take the time, in the case of other taxpayers similarly situated, at least to think through a problem with which National Office rulings personnel already have dealt. But much more serious is the prospect that the widely scattered officials may reach nonuniform results, thereby depriving other similarly situated taxpayers of equal treatment under the law. On the other hand, immediate publication of the result speedily reached in a private ruling covering only a single case can extend across the entire nation a conclusion, possibly incorrect. The private ruling may have been incorrectly decided, not just because it had to be issued in a timely fashion, but because, rulings personnel in the National Office were not then aware of all the potential applications and implications of that ruling, i.e., of the diverse factual situations the ruling inevitably would affect. When subsequent analysis of later requests for private rulings on somewhat similar situations discloses error in the previously published ruling, the administration—to be logical—must either enlarge that error or reverse it. In the United States, there is a tendency to try to avoid this dilemma by postponing issuance of a private ruling until rulings personnel, working at the level at which the given type of ruling normally would be issued, conclude the result reached is one which safely could be published.146 But because of this caution, too frequently the

146 Even so, private rulings sometimes are issued before the total implications are recognized. E.g., see Knetsch v. U.S., 348 F.2d 932 (Ct. Cl. 1965); "Warwick Fund Ruling Withdrawn; I.R.S. Policy Questioned," 19 J. Taxation 197 (1963). Prior to issuance of a published version, the error is likely to be recognized, however. In substantial part, this is because published versions, as distinct from private rulings, always are reviewed at a high level, involving usually the Assistant Commissioner (Technical), the Director of the appropriate Division,
private ruling covering a prospective transaction is not timely and consequently this program defaults pro tanto on its separate purpose.\footnote{147}

Obviously the inherent conflict between the goals of the two programs needs resolution—and in a manner which ordinarily permits each effectively to accomplish its own separate mission. Personnel working on private rulings should understand (i) that the tax system itself—not the taxpayer—is responsible for any tax uncertainty suffered by a legitimate prospective transaction and (ii) that in consequence of the foregoing they are expected to reach the wisest decision possible, subject ordinarily, however, to an overriding responsibility: to respond within a fairly timely manner. Conversely, personnel working on the published version of a ruling should understand that absolute correctness is their most essential goal.\footnote{148} Publication, if need be, is to be postponed until there is sufficient acquaintance with the total factual terrain to insure correctness. With this overriding limitation, at least the subject matter (as distinguished from the exact result) of all precedent-type private rulings should become, in due course, the subject of a published ruling.

(footnote continued)

and a senior official in the Chief Counsel's office. On major policy issues, the Commissioner himself and policy officials at Treasury's headquarters also become involved. See Rogovin, \textit{op. cit. supra} note 25, at 766 n. 49, and Caplin, \textit{op. cit. supra} note 63, at 27. Further, because often there is a substantial time lag between issuance of the first private ruling in an area and publication itself, several requests for rulings in that area will have been received and perhaps answered. In consequence, the senior officials who review proposed published rulings have the chance at least to become more fully acquainted with the total factual terrain than did the lower ranking official who issued the first private ruling. In further consequence, the actual result reached in the first published ruling may not coincide with the result actually reached in the first private ruling, in contrast to the supposed theory governing the relationship between the two programs as outlined in §2.3 \textit{supra}.

\footnote{147}In fiscal 1965, 37\% of the rulings required more than 60 days but less than 6 months, and another 21\% required more than 6 months. See Rogovin, \textit{op. cit. supra} note 25, at 767 n. 59. An earlier Chief Counsel put blame for much of this delay on taxpayers themselves, citing their failure to present the facts fully, to pinpoint the issue, and to submit an adequate analysis of the authorities. Rose, "The Rulings Program of the Internal Revenue Service," 35 \textit{Taxes} 907 (1957).

\footnote{148}This is not intended to imply that different personnel should be used in carrying out the two different functions. As to the shortcomings of that arrangement, see §2.17 \textit{supra}. 
There is one exceptional type of case, however, where a private ruling should be withheld until personnel are certain they have reached that result they would be willing, by publication, to apply on a nationwide basis. This withholding should occur in any case where it is recognized that a subsequent change in position, if applied to that taxpayer's competitors, would substantially affect the business struggle between them. This limitation, however, probably applies more broadly to excise taxes with their direct effect on prices than to income taxes.

Observe, finally, that if each program otherwise is to focus on its own separate function as suggested here, publication will not serve to police the integrity of the private rulings program. But that need can be satisfied by appropriate internal reviews.

2.13 Confining private rulings to legal questions: Requiring statements of fact and a brief

The central office would assume a burden for which it is ill-suited as well as make wasteful use of local office talents, should it ordinarily attempt to rule on prospective transactions.

149 For a dramatic illustration, see International Business Machines Corp. v. U.S., 343 F.2d 914 (Ct. Cl. 1965). The abuse in that case was deemed to be so great that the court, in effect, extended an earlier favorable private ruling received by one taxpayer to a competing taxpayer who later had received an adverse ruling. For an argument that this should be the universal practice, even as to income tax questions, see Kragen, "The Private Ruling," 45 Taxes 331 (1967). For a contrary view, see Rogovin, op. cit. supra note 25, at 767. That the general practice actually is to the contrary, see § 2.3, supra notes 53-55, and Kragen, id., at 334 n. 13. If the earlier erroneous ruling had continuing effect because concerned with an excise tax matter, it could be revoked prospectively, of course. This was done, though belatedly, in the above cited case.

150 In the United States, preservation of such clearly was one of the intended purposes of the publication program. See Hearings on Administration of the Internal Revenue Laws, Before a Subcommittee of the House Committee on Ways and Means, 83d Cong., 1st Sess. 1564 and 1570 (1953). In furtherance of that purpose, if S. 2047, 89th Cong., 1st Sess. (1965) had been enacted, the administration would have been required to publish within ten days any ruling involving a potential tax liability exceeding $100,000. For reasons previously related, however, both the private and published rulings programs, and thus the tax system itself, would suffer from enactment of any proposal locking publication to the actual results reached in private rulings. See Rogovin, op. cit. supra note 25, at 767 n. 60.
involving mere questions of fact.\textsuperscript{151} Such questions frequently require on-site inspections and the weight accorded much of the evidence often turns on the credibility of witnesses. Moreover, as a practical matter, the central office, precisely because it is central, would have to make its determination on the basis of a cold record. Thus, a local office would have to conduct an examination and certify that the record contained all the evidence and its own finding regarding credibility. Further, whether the central or local office actually issued the ruling, \textit{after} the taxpayer had filed the return covering the affected transaction, the local office would have to conduct \textit{another} examination to insure that neither the evidence nor facts had changed prior to the consummation itself.

This wasteful duplication of effort will be avoided, however, and the central office will be peculiarly well suited to the task if, as is generally true in the United States, it confines rulings to questions of law\textsuperscript{152} and holds the taxpayer responsible for submission of a written statement reflecting \textit{all} relevant facts—including a copy of all documents to be executed when the transaction is consummated.\textsuperscript{153} Then, later—after the ruling has been issued, the transaction consummated, and the return filed—the local office, in its first and sole examination, need only ascertain whether the actual facts corresponded to those previously submitted by the taxpayer.\textsuperscript{154} If they do correspond, the local office need not even make a legal analysis of the problem; that was done by the central office before issuing the ruling. In effect, labor has been divided between the two echelons, and all duplication avoided. On occasion, of course—particularly where unrepresented taxpayers submit self-prepared requests—rulings personnel may find an essential fact has been omitted and thus be unable to rule. Where feasible, the taxpayer should be alerted to the

\textsuperscript{151} Cf. Goodman, \textit{op. cit. supra} note 131.

\textsuperscript{152} See Rev. Proc. 64-31, C.B. 1964-2, 947, amplified in Rev. Proc. 66-34, I.R.B. 1966-34, 22, which lists the no-rulings areas. Certain mixed questions are accommodated. Also, in a very few instances where the statute itself literally turns the tax on the presence of a tax avoidance purpose (e.g., I.R.C., §§ 367 and 1492), the administration will give advance rulings on this essentially factual question. \textit{E.g.}, see Treas. Reg. § 367-1. In a somewhat similar statutory setting, England follows a similar practice. See Chapter XVIII, \textit{§ 2.7 infra}.

\textsuperscript{153} Rev. Proc. 67-1, Sec. 6.02, I.R.B. 1967-1, 9.

\textsuperscript{154} In the United States, the letter ruling itself will include a statement of all facts to which the result is addressed.
but without prejudice to the overriding rule that, ultimately, he alone is responsible for exposing to light all relevant facts. If, upon later examination of his return, it appears that his request for the earlier ruling did omit a material fact or included material assertions at variance with the ultimate facts, the ruling will lack any force or effect.

In the interest of efficiency, taxpayers also should be required as in the United States, or in fairness at least be encouraged, to accompany their request with a second statement which both identifies the precise statutory issue in doubt and analyzes the legal data (authorities, etc.) supporting the taxpayer's particular contention. Exception should be made, of course, where the question in issue involves an amount so small that it would be against the taxpayer's economic self-interest to employ a private practitioner. These cases aside, however, requirement of such a statement would contribute to efficiency by relieving the rulings specialist from one of the three demanding roles he otherwise must fulfill (advocate for the taxpayer, advocate for the government, and judge). Moreover, since the taxpayer's own representative typically is best suited to develop the arguments which support his side, this requirement would insure that the taxpayer's position would be presented fully. Thus, while contributing to efficiency, the greater interest of equity also would be fostered: the taxpayer's statement serving not only himself but also the government, which should have the single aim of reaching the truly correct result.

2.14 Organization, conferences, review, and appeals re private rulings

Comparably for the reason just indicated, it serves the interest of administration and taxpayer alike to grant an oral

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155 This accords with U.S. practice. Rev. Proc. 67-1, Sec. 6.07, I.R.B. 1967-1, 11. On occasion, where this is not feasible, an information letter, describing but not applying the law, will be issued. Rev. Proc. 67-1, Sec. 5.01, op. cit., at 9.


157 The United States permits local District Directors to issue so-called determination letters as to non-doubtful situations clearly covered by statute, regulation, or previously published rulings. But because this practice generally is limited to completed transactions (Rev. Proc. 67-1, Sec. 4.01, I.R.B. 1967-1, 7), the national office itself receives many requests for rulings on prospective transactions which, while complex or involving large sums, are not believed by the taxpayer to involve any tax uncertainty. He simply wants an "insurance policy."
conference upon request. But this is so only if the specialist responsible for the problem tentatively decides to rule adversely to the taxpayer's contention. A practitioner, preparing the earlier submitted written brief, hardly can be expected to anticipate every nuance of every court decision, etc., about which rulings specialists may develop some concern. Because both sides will benefit most if the conference focuses on the specific concerns which have emerged from the specialist's own considered study of the matter, taxpayers should be at least discouraged from seeking a conference at an earlier point, before the specialist has had a chance to study the matter and to determine the particular points he believes troublesome.158

Relevant to the choice of the government's representative at such conferences is the fact that, as requests for rulings increase, so too must rulings personnel. Illustratively, the U.S. program now absorbs the time of several hundred technicians. Moreover, if reasonable standards of efficiency are to be maintained, sizeable programs require a given division of labor. Most rulings personnel should specialize in a subject-matter area with spadework on most rulings undertaken by the least experienced personnel, whose tentative conclusions will be reviewed by those more able and experienced to whom authority has been delegated to sign the ruling, yea or nay. When this division of labor has evolved, a reviewer in the latter actual decision-making category—if at all feasible—should attend any conference accorded a taxpayer, to explore at first hand, rather than hear second hand through an underling, the taxpayer's rebuttal to the actual decision-maker's concerns.

In responding to the need for efficient, fair, and informed discharge of the rulings function, rulings personnel in the United States have been spread among eight different specialized branches159 and the branch chief himself, or a reviewer empowered to sign his name, ordinarily is required to attend any conference.160 Such personnel at the branch level actually

158 This is the import of the U.S. procedure. Rev. Proc. 67-1, Secs. 6.08 and 7.02, I.R.B. 1967-1, 11 and 12.
159 Six of these involve income taxation (corporation, corporate reorganizations, individual, depreciation, exempt organizations, and pension trusts). The other two deal, respectively, with excise and with estate and gift taxation. Yet other branches deal with actuarial and administrative matters. A given branch also may further subdivide its personnel into more narrow specialities.
160 Rev. Proc. 67-1, Sec. 7.02, I.R.B. 1967-1, 12.
issue more than 75 percent of the rulings.\textsuperscript{161} Situations occur, however, where a broader-based expertise is needed. Illustratively, a particular factual situation falling within the competence of one specialized branch actually may raise an interpretative issue of common concern to two or more branches. And even where this is not so, the importance of some questions merits the attention, not just of specialists, but also of the most talented generalists. To accommodate these problems, the eight branches have been divided among three divisions, dealing respectively with income taxes, exempt organizations and pension trusts, and miscellaneous taxes. Each Division Director has a very small staff of reviewers (most of whom are generalists) and is responsible to the Assistant Commissioner (Technical).

This three-layer organizational arrangement (branch, division, Assistant Commissioner) causes some taxpayers, on receiving an adverse ruling at the branch level, to wish a further appeal were available—i.e., an appeal to the appropriate Division Director and, if need be, to the Assistant Commissioner. While no doubt such appeals would produce different results in at least a few cases, attempts at perfection must be tempered by recognition of the possible. The hard fact is that the Division Director and his staff could not possibly review in detail all adverse decisions issued by his branches. In consequence, instead of giving taxpayers a "right" to appeal to his office, the branches have been instructed to forward to it for further review, prior to issuance, any ruling the branch itself deems to be sufficiently doubtful or important to warrant such attention. Actually, well over three-fourths of all rulings are issued without such a review. And as to the remainder, it is physically possible to give affected taxpayers a "right" to a further oral conference in the Division Director's office only if that office tentatively decides either to reverse a ruling which the branch would have decided favorably to the taxpayer's contention, or to sustain an adverse ruling but on a new or different ground than that on which the branch relied.\textsuperscript{162}

\textsuperscript{161} See Rogovin, \textit{op. cit. supra} note 25, at 766 n. 49.

\textsuperscript{162} Rev. Proc. 67-1, Sec. 7.02, I.R.B. 1967-1, 12. Only a small percent of those reaching the division level are referred also to the Interpretative Division in the Chief Counsel's Office.
2.15 Priorities re advance rulings; and grounds for refusal to rule

Any private rulings program, if responsive to prospective transactions, will encounter two different types of priority problems. One involves the order in which requests should be handled; the other, the areas which should be excluded from the scope of the program.

The first will become a problem even if, in the face of typically tight budgetary limitations, an adequate number of talented personnel can be assigned to the program. Requests for rulings do not come in throughout the year at a regular rate. Instead they tend in the opposite, with the United States, for example, showing a fairly consistent seasonal variation. Because this variation is an expected phenomenon, personnel working exclusively on rulings can use their time efficiently throughout the entire year only if there is at least a modest inventory or backlog to carry them through the slack periods. Inadequate staffing not infrequently causes that essential backlog to increase beyond the essential level. Taken in conjunction with the work backlog, the varying amount of effort individual cases require typically will prevent taxpayers from receiving a ruling by return mail. Indeed, in the United States, not more than half the rulings usually can be issued within the first two months after the requests are received.\(^{163}\) In fairness, since most requests will involve prospective transactions, they normally should be disposed of, as they are in the United States, according to the order of their receipt. But situations will arise where a given taxpayer, without fault, clearly shows great need for extraordinary speed in resolving his problem. However, only if these requests for special priority are a very small fraction of the total should procedures be left sufficiently flexible to accommodate them.\(^{164}\) Otherwise, disposition of cases received earlier will be unduly postponed.

A second and more broadly ranging priority principle, of concern to management at the highest level, should contribute to a delimitation on the scope of the program. In deciding the extent to which talented personnel can be made available to this particular program, the administration must take proper account of other important but inevitably unmet needs typically spanning the entire spectrum of its responsibilities. Given

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\(^{163}\) See note 147 supra for other reasons contributing to this delay.

\(^{164}\) This is the import of U.S. practice. Rev. Proc. 67-1, Sec. 6.09, I.R.B. 1967-1, 11.
these competing needs, any administration would be hard put to justify staffing this one program so adequately that its manpower will be available to extend the advance ruling program to cover types of transactions which at best can be covered only with gross inefficiency. The argument in 2.13, supra, for denying advance rulings to mere factual questions, was bottomed solely on this priority principle.\textsuperscript{165} The existence within the Service of various unmet needs also should be one reason for precluding this program, as is the case in the United States, from being so well staffed that it can take time to respond to prospective transactions deemed lacking in business purpose.\textsuperscript{166} Indeed, in further support of this position, the only argument for launching an advance rulings program was that tax uncertainties should not be allowed to force delay or abandonment of transactions which would have been purposeful had no tax law existed.\textsuperscript{167} The proscription regarding transactions lacking in business purpose will not be easy to administer, however. Only at the extremes is it easy to distinguish between proposed transactions which are motivated solely by tax considerations—and hence should fall in the no-rulings area—and others which would have a legitimate purpose in the absence of the tax law but are shaped to take advantage of the less costly of two or more different tax routes. Though the line between these two categories becomes less discernible as transactions move toward the center, an attempt to distinguish between them must be made, for ordinarily those falling in the second category should be granted advance rulings. Not to rule on transactions falling within the latter category would leave those responsible only for administration of a tax law open to a proper charge that, having established a rulings program, they now have transcended their administrative function. That is, by discriminating through refusal to rule, they presently hope, in terms of practical effect, either to regulate the

\textsuperscript{165}The prospect that effort might be wasted no doubt is also one reason why estate tax questions posed by living persons are beyond the ambit of the U.S. rulings program. See Rev. Proc. 67-1, Sec. 3.02, I.R.B. 1967-1, 7. The prospect of waste here relates to the substantial chance that the recipient's circumstances or the law may change during the possibly long period between the date of the ruling and the recipient's death.


\textsuperscript{167}Cf. Caplin, op. cit. supra note 63.
shape of, or to deny a benefit accorded by the tax law to, transactions which would have been purposeful had the tax law not existed. Of course, the responsibility of a mere administrator to rule in this circumstance can be modified with perfect propriety expressly or implicitly by the legislature itself. For example, it may be implicit in a given statutory provision that the legislature specifically intended to use a loosely woven statutory standard (oftentimes subjective in character) as an *en terrorem* weapon to police the integrity, and hopefully in practice to fence in the range, of a given tax idea. An advance ruling in this circumstance obviously would frustrate the legislative intention.\(^{168}\)

2.16 *Completed transactions: Private rulings and in-service technical advice*

Again, employing a standard of priority, the absence of reliable tax guidance usually is less serious to a taxpayer whose transaction has been completed than to one facing a prospective transaction. Nevertheless, before filing a return covering a completed transaction, at least those taxpayers who live in self-assessment countries should be able—in a relatively routine manner—to obtain national office rulings on legal issues, to the end of enabling them to file proper returns and thereby self-assess the proper liability. And, generally speaking, this is U.S. practice. Indeed, if the question is not open to doubt and does not involve an industry-wide problem, even a local District Director can make the necessary binding commitment.\(^{169}\)

Once the return is filed, however, in both self- and non-self-assessment countries, the cumulative effect of three considerations furnishes a substantial reason why, from that point on, the taxpayer himself should be denied free access to the central rulings office. First, because both types of countries

\(^{168}\) On the other hand, in a yet different provision, the legislature may imply that the administration is expected to rule in advance regarding the motivation behind a given transaction, motivation being the crucial issue. *E.g.*, see I.R.C., § 367 and Treas. Reg. §1,367-1. A similar example can be found in England. See Chapter XVIII, §2.7 *infra*.

\(^{169}\) His commitment is called a "determination letter" rather than a ruling. See Rev. Proc. 67-1, Sec. 4, I.R.B. 1967-1, 7, and *supra* notes 57 and 157. His authority ordinarily does not extend to prospective transactions, however.
must undertake an enormous number of examinations, effective administration is possible only if initial authority over filed returns is decentralized and lodged in local offices. Second, because many, many issues will emerge from these examinations, a decentralized system of administrative appeal, geographically convenient to taxpayers—large and small—must be established. Third and finally, to preserve this indispensable decentralization and to prevent the system from being inverted and thus becoming top-heavy, every effort must be made to resolve at the lowest possible level as many issues as properly can be resolved there. To give taxpayers who had filed their returns complete freedom to deflect self-selected questions to the central rulings office, thereby enabling them to bypass the decentralized field procedures, would be totally inconsistent with this fundamental objective.

On the other hand, uniformity would be served and served efficiently if, at the earliest possible moment, legal issues of wide import and open to serious doubt (not having been resolved previously by court decisions or published rulings) could be identified, removed from the total mass of issues, and referred immediately to the central rulings office. Assuming that only the central rulings office can assure nationwide uniformity as to such properly selected issues, the greatest efficiency can be achieved if local offices can be trusted to exercise the screening function effectively; for then they also can be empowered to seek the requisite technical advice directly from the central rulings office, without involving intermediate or regional offices. Nevertheless, of the countries covered by this study which have placed intermediate regional offices

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170 In theory, non-self-assessment countries examine each taxpayer. But even the United States, in policing the integrity of its self-assessment system, annually examines about three and a half million returns. See Commissioner of Internal Revenue, op. cit. supra note 57, at 23.

171 These range from 103 in the Netherlands to 1700 in France. While the U.S. is divided into only 58 districts, audit personnel are scattered among 800 posts of duty.

172 Under this arrangement, the latter offices need never be involved with any issue the central rulings office decides in favor of an affected taxpayer. Except in one instance, those offices also could be freed from the need to hear administrative appeals regarding items in a return controlled by an adverse private ruling previously issued to that taxpayer by the central office. The exception would apply in any country which, as an administrative settlement practice, wants to empower the intermediate office to split or trade the less significant of these debatable legal issues in order to avoid litigation.
between the local and national echelons (England being the sole exception),\textsuperscript{173} only in the United States does a local (district) office normally bypass the intermediate office in seeking technical advice from the national office.\textsuperscript{174} This country thereby avoids the inevitable and substantial duplication of effort which otherwise could follow if its intermediate regional offices sought to rescreen the 2,500 to 3,000 difficult questions local offices refer annually to the central rulings office.

In some of the other countries, the taxpayer himself may not even know that, in effect, the local office has yielded jurisdiction over an issue to a higher office.\textsuperscript{175} In contrast, through published formal procedures, the United States not only requires the local office to inform the taxpayer of the referral but also gives the taxpayer the "right" at that point to file with the central office a memorandum analyzing the law, and later to be orally heard\textsuperscript{176} by the latter office before it can decide adversely to him.\textsuperscript{177} On these counts, the procedure is the same as that previously described in connection with rulings on prospective transactions.\textsuperscript{178} Further, before a local office can refer a question, the taxpayer is entitled to see the document in which that office presents its view of the facts, to the end that he can submit his own version if the two disagree.\textsuperscript{179} Of course, no taxpayer can prevent a local office from referring a question to the central rulings office; nor in an earlier day could a taxpayer who requested such a referral appeal that mere \textit{procedural} question if the local office chose not to refer the matter.\textsuperscript{180} In short, at that time it had exclusive jurisdiction over the screening function, presumably in the interest both of efficiency and of preserving the integrity of the decentralized field procedures. The taxpayer then had only one method of recourse: to appeal the \textit{substantive} issue.

\textsuperscript{173}See Chap. XVII, §1.3 \textit{infra}.
\textsuperscript{174}Cf. §2.9 in Chaps. VI, X, XIV, and XXII \textit{infra}. In England, of course, direct recourse is essential. See Chap. XVIII, §2.9 \textit{infra}.
\textsuperscript{175}See §2.9 in Chaps. VI and X \textit{infra}.
\textsuperscript{176}While typically such a conference is also available in Belgium, Chap. VI, §2.9 \textit{infra}, it is otherwise in Germany and Great Britain. See §2.9 in Chaps. XIV and XVIII \textit{infra}.
\textsuperscript{177}Rev. Proc. 67-2, Secs. 4.08 and 4.09, I.R.B. 1967-1, 19.
\textsuperscript{178}See §2.14 \textit{supra}.
\textsuperscript{179}Rev. Proc. 67-2, Sec. 4.06, I.R.B. 1967-1, 19.
\textsuperscript{180}Rev. Proc. 58-14, C.B. 1958-2, 1125. However, within the local office, he could appeal an adverse determination by lesser officials to the Chief of the local office's (district) Audit Division.
to the intermediate regional settlement office and, if not satisfied with the result reached there, to litigate that substantive issue. Now, however, if the Chief of the local district's Audit Division rejects a taxpayer's request to refer an issue to the central rulings office, a written explanation of the reason must be given the taxpayer. If he disagrees and submits his reasons therefor in writing, these documents, together with all data bearing on the issue automatically are referred, not to the rulings office, but to the Director of the national office's Audit Division. In effect, the latter performs a rescreening function. He decides, not the substantive issue, but rather the procedural question of whether the issue is sufficiently important and doubtful to warrant referral to the rulings office.\textsuperscript{181}

As is more fully explained in Chapter III, \textit{infra}, even if the rulings office ultimately directs a local office to decide a substantive issue against the taxpayer, that taxpayer still is free to try to "settle" the dispute by entering an administrative appeal to the regional settlement office and then, if need be, to litigate.

\textbf{2.17 Publication of rulings and in-service technical advice}

If U.S. experience proves anything,\textsuperscript{182} it is that the previously described prime purposes of a \textit{published} rulings program\textsuperscript{183} will be achieved year after year only if the program contains certain built-in arrangements which at least tend to assure its sustained compliance with two standards.

The first major need is to insure that the \textit{quality} of each published ruling is responsive to the peculiar purposes of the program. While each, of course, must reach a technically proper result, this alone will not achieve uniform treatment for other similar transactions or provide reliable guidance for prospective transactions. To provide such uniformity and guidance, each ruling must be so structured that its \textit{scope} will be understood readily both by taxpayers and field officials. A bare statement of the material facts and the result reached is not enough. If other interested individuals are to determine what actually was decided, the ruling itself must \textit{orient} the legal issue. Further, since no two cases are \textit{exactly} alike, if the ruling is to be applied properly to other cases—which is the sole reason for its publication—the legal reasoning on which

\textsuperscript{181} Rev. Proc. 67-2, Sec. 4.03, I.R.B. 1967-1, 18.
\textsuperscript{182} See §2.3 \textit{supra}.
\textsuperscript{183} See §§2.6 through 2.8 \textit{supra}.
the result is based must be set forth. In short, a published ruling should take the form of an abbreviated judicial decision. The statement of the pivotal facts, legal orientation of the problem, the stated result and the legal reasons therefor all are essential if taxpayers and field officials are to determine with precision what was and what was not decided and be in a position, by analogy, to apply that ruling properly to other cases.\(^{184}\)

To insure also that each ruling reaches a technically proper result, and that the language chosen goes far enough but not too far in fixing that ruling's affirmative thrust, it is indispensable that the draftsman exchange ideas with others. The requisite exchange is accomplished best by having his draft reviewed from four distinctly different vantage points. The first review would come from an exceptionally able technical reviewer specializing in that particular area of income tax law. The second, from an exceptionally able technical generalist who understands thoroughly the whole body of income tax law and thus the way the pieces technically fit together. The third, from a policy-oriented generalist, for oftentimes—since the courts have not yet spoken—actually there is no one technically correct result but rather, at this stage of prediction, competing technically proper results, with the ultimate choice of position properly dependent upon administrative and policy considerations. And fourth, from outside the tax administration, from the marketplace, i.e., the taxpayers themselves.\(^{185}\) The latter will serve two purposes. The public's very diversity equips it uniquely to focus the administration's attention on unanticipated situations affected, though unintentionally so, by the particular choice of words used in the ruling. Further, since the published ruling at the least will bind administrative echelons, it is only fair, before its formal and final adoption, that the public have a chance to be

\(^{184}\) This is essential, not just because of their need to determine the direct scope of the ruling but also because they will tend to use the ruling at the least as a clue pointing in one direction or the other in more remote situations, on the assumption that the rulings office itself will proceed thereafter in a logical legal manner. By way of contrast, a private ruling, if favorable to the taxpayer, need only state the facts and the result, for that will satisfy his concern and it is not intended that this private ruling be applied to any other case. See § 2.3, supra notes 60–62.

\(^{185}\) Only the first three types of review are utilized in the United States. See supra note 146.
heard, if only in writing. Otherwise, affected taxpayers across the nation are deprived of a procedural safeguard which even a private rulings program (through a conference arrangement) should accord an individual taxpayer who has requested a ruling, and which administrative appeal systems in all countries covered by this study do accord an individual taxpayer who, at the point of examination, protests an asserted liability. The fact that a given taxpayer will have the belated right to be heard in this latter circumstance is not an adequate substitute for the proposal made here. The chance to be heard at the point of examination comes too late and will be meaningless if a previously published ruling—regarding which the taxpayer had no chance to be heard—covers the issue. That ruling binds the action of examining officials with whom he must confer.

From the foregoing, it should be obvious that time is a further factor in attaining a proper standard of quality for any given published ruling. And this is precisely the reason, as explained earlier, why an essential attribute of this program conflicts directly with one equally essential to the private rulings program (quality v. speed). As explained there, to assure each program a proper chance to fulfill its own separate purpose, rulings personnel themselves must understand that the result ultimately embodied in a published ruling need not follow blindly a result previously and more hurriedly reached in a private ruling.

The second major need, once a publication program is adopted, is to build in arrangements which at the least tend to prevent the central rulings office from defaulting pro tanto on the program's purpose by foregoing publication on some important precedent-type situations to which it has been alerted through requests received either for private rulings or in-service technical advice. Matters of integrity aside, U.S. experience of an earlier day serves to indicate that there are three circumstances most likely to contribute to such non-publication.

One such circumstance will arise inadvertently: the failure of rulings personnel to appreciate the range of situations which, if covered by published rulings, would contribute significantly to the purposes of this program. While sophisticated lawyers might question the distinction which follows, not all rulings personnel are likely to be sophisticated lawyers. They must

186 See § 2.12 supra.
be made to understand that the purposes of this program are significantly served not only by publication of positions for all important precedent-type situations but also important new applications of earlier precedent-type rulings.\textsuperscript{187}

A second adverse circumstance will exist so long as the national office is permitted to send confidential communications to all field offices stating its views on substantive issues. Typically in a tax administration, only the head, and perhaps his deputy, bears an ultimate responsibility which extends both to the decentralized enforcement function carried out by field offices \textit{and} to the centralized rulings function.\textsuperscript{188} If his staff can use confidential communications to guide the field forces, he will have less interest in having his rulings office maintain a proper publication standard.\textsuperscript{189} To generate greater interest in him regarding the latter, a subcommittee of the U.S. Congress extracted from the U.S. Commissioner of Internal Revenue a promise that no confidential communications covering substantive issues would be circularized by the national office to field offices.\textsuperscript{190} Thus the publication program became the exclusive vehicle through which the Commissioner could insure that field officials received their guidance.\textsuperscript{191} The non-use of confidential communications had another salutary effect: no longer could a field official merely cite the reference number of a secret national office instruction in rejecting a taxpayer's contention. The self-interest which triggers a taxpayer into reading the relevant published communication enables him to discuss intelligently with the field

\textsuperscript{187} A U.S. congressional committee felt the second of these categories was ignored too often. See § 2.3 \textit{supra}.

\textsuperscript{188} In the United States, the Assistant Commissioner (Compliance) is responsible for the first of these, the second being under the jurisdiction of the Assistant Commissioner (Technical). The Commissioner and Deputy Commissioner oversee both.

\textsuperscript{189} This no doubt is one reason why England's Board of Inland Revenue feels no great pressure to develop a full-scale rulings program. See Chap. XVIII, §§ 2.7 and 2.9 \textit{infra}.

\textsuperscript{190} Statement of Commissioner Andrews, Hearings on Administration of the Internal Revenue Laws, before a subcommittee of the House Committee on Ways and Means, 83d Cong., 2d Sess. 51 (1954).

\textsuperscript{191} In keeping with his promise to the congressional subcommittee, the semiannual volume containing all published rulings specifically provides that no unpublished ruling or technical advice may be relied upon by field officials in resolving other cases. \textit{E.g.}, see the fly-leaf in C.B. 1966-1.
official the question of whether the latter was applying properly
the national office's substantive instruction.

A third likely circumstance, adversely affecting administra­
tive adherence to a proper publication standard, will be the
failure of that lesser but senior official, alone responsible for
the private and the published rulings programs, to attach a
sufficiently high relative priority to the publication function.
Typically, he lives with two facts: adequate staffing lags be­
behind the workload of the two programs and outside pressure
on him for work completion relates almost exclusively to pri­
vate rulings which interested individual taxpayers want ex­
pedited because they involve prospective transactions. Left to
his own devices, the official's understandable inclination will
be to respond to this constant pressure, rather than to the
abstract requirements of wise administration. He will spread
disproportionately between the two programs the inadequate
absolute amount of man-hours available to him, to the relative
prejudice of the publication function. Without disparaging the
vital function of private rulings, including the fact that the
national office learns of new problems primarily from these
requests, wise administration requires a fair balance of atten­
tion between the two programs. A private ruling, after all,
solves but one case; a published ruling covering an important
precedent-type situation not only resolves that problem uni­
formly and efficiently on a nationwide basis but simultaneously
provides guidance regarding future transactions. The U.S. tax
administration, at an earlier point in its history, divided its
rulings personnel between the two functions, assigning them
to separate subunits—each being assigned its own review
staff and subordinate director. It was hoped that this division
would assure permanently both a more balanced application of
manpower and proper application of the standard used in de­
termining whether publication of a position was warranted.
This device, however, proved to be both ineffective and in­
efficient in solving the first of these problems. At best, it
assured only that some man-hours—not a fair proportion—would
be devoted to development of published positions. The constant
outside pressure to expedite private rulings tended to keep
disproportionately large the inventory backlog of the subunit
charged with the publication function when compared with that
of the office handling private rulings. In other words, division

192 Then characterized respectively as the Tax Rulings Division and
the Bulletin Branch.
of the functions between two subunits did not guarantee that the official overseeing both would respond to their relative needs when allocating manpower between them. Further, the division was inefficient. Automatically it doubled the people who had to deal with any problem warranting a published position. Spadework personnel in the publication unit, and later its review staff, had to acquaint themselves with the total ramifications of a problem to which both spadework and review personnel in the private rulings office previously had directed considerable attention. Ultimately it was recognized that fewer total manhours would be needed if the latter, after issuing a private ruling, were given the time to develop properly a published version.

There is only one effective and efficient way to achieve a fair balance in the attention given to the two intimately related efforts. The head of the tax administration himself must provide inside pressure favoring a proper distribution of attention, to counteract outside pressure focusing exclusively on private rulings. As in other situations, he can use a survey team composed of personnel outside the rulings function periodically to determine, on a sample basis, whether attention is divided properly between these two efforts and whether rulings personnel are making a genuine effort to comply with the proper publication standard.