



Volume 15 Number 4

September 2008

# State Tax Return

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## New York State Revises Rules For Obtaining Guidance From The Tax Department

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On August 27, 2008, the New York State Department of Taxation and Finance (the "Department") issued a Technical Services Bureau Memorandum<sup>1</sup> (the "Memorandum") revising its rules for issuing Advisory Opinions.

Advisory Opinions will no longer be issued by the Taxpayer Guidance Division, but by the Office of Counsel, which previously served as reviewer of Advisory Opinions prior to their publication. While the Office of Counsel will begin issuing Advisory Opinions, it will no longer issue Advice of Counsel or formal Opinions of Counsel.

The Taxpayer Guidance Division instead of writing Advisory Opinions, will issue "Tax Guidance Bulletins," that will be made available on the Department's website, to explain various New York tax law developments or tax law consequences with respect to specific types of business or particular transactions. As the Memorandum notes, the Tax Guidance Bulletins will be "subjects of interest to a wider audience." The Memorandum states, however, that these Bulletins will not be binding on the Department. This is the same kind of "disclaimer" as currently applies to Technical Services Bureau Memoranda, which are "accurate on the date issued," but subject to subsequent changes in departmental policies. Advisory Opinions, by contrast, continue to bind the Department vis-à-vis the person who requested the Opinion.

Significantly, effective August 8, 2008, the Department ceased accepting Advisory Opinion petitions from any person requesting an Advisory Opinion on behalf of an unidentified party. The Memorandum thus terminates the practice whereby accountants and lawyers anonymously requested Advisory Opinions on behalf of their clients. However, all identifying information, including information that would affect the petitioner's competitive position and other information protected under New York's Freedom of Information Law, will now be redacted from Advisory Opinions before publication. The petitioner must identify the information to be redacted in its petition. In making these changes to the Advisory Opinion process, New York is adopting procedures more akin to the procedures for obtaining Private Letter Rulings from the Internal Revenue Service.

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<sup>1</sup> TSB-M-08(10)C, (5)I, (5)M, (3)R, (8)S, All Taxes, August 27, 2008.

When requesting an Advisory Opinion, the petitioner may “elect” to reserve the right to later apply for the Voluntary Disclosure and Compliance (“VDC”) program, recently codified as Tax Law § 1700. Thus, if the Department commences an audit or initiates contact with the petitioner while the Advisory Opinion petition is under consideration, the petitioner, assuming that it otherwise complies with the VDC program requirements, would still be eligible to participate in the VDC program with respect to the subject matter of the Advisory Opinion. The Memorandum states that this election is made when submitting the petition, but does not explain how the election is made.

The loss of an ability to request Advisory Opinions on an anonymous basis deprives taxpayers of a tool that was quite useful in certain cases. Nevertheless, the taxpayer may still schedule meetings with Department personnel to discuss significant issues, without identifying the client. In many cases, this can be as effective as, and more efficient than, an anonymous petition.

It would seem prudent for all taxpayers otherwise eligible for the VDC program to “elect” to reserve their rights to apply for this program when requesting an Advisory Opinion, so as to remain eligible to limit exposure as provided under the VDC program. With respect to the VDC program, it should be noted that the Department’s Commissioner Robert Megna recently stated that the Department will soon formally announce its policy to limit the “look back” under the VDC program to the taxpayer’s tax liabilities for the past three years, or the past six years if the taxpayer’s conduct is fraudulent or criminal. Although the Commissioner’s statement has yet to be confirmed in writing, this is certainly a positive development, since without the “look back” limitation the VDC program is unlikely to be used in many circumstances.



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