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February 8, 2019

William M. Paul,
Acting Chief Counsel and Deputy Chief Counsel (Technical)
Internal Revenue Service
1111 Constitution Ave., NW
Washington, DC 20224

Re: *Priv. Ltr. Rul. 201502008*

Dear Mr. Paul:

I write to further protest Priv. Ltr. Rul. 201502008 (see previous letter, attached). Based on disturbing information that has been accumulated through various means, including FOIA, § 6110 requests, and requests and suits under public records laws, this PLR should be withdrawn with retroactive effect.

I write to you because you are ultimately responsible for determining whether any restrictions apply to the IRS Office of Chief Counsel's use of the private letter ruling process to intervene in ongoing examinations.

I write to you now because Senator Grassley recently stated that it is his goal to "hold the IRS accountable . . . [to] review the practices and compliance of the tax-exempt sector, [and to] ensure tax whistleblowers are treated fairly for exposing tax evasion and abuse."

And I make this letter public because sunshine is oftentimes the best disinfectant.

Specific Facts Relating to the PLR

The structure addressed by the private letter ruling involves a bank (and/or its related entities) wearing two hats, as the swap provider and owner of the bonds, pricing (or in this case, mis-pricing) two separate but integral transactions with a tax indifferent party, a tax-exempt organization. The structure employs a unique twist on a common abusive theme: the potential for manipulation of the pricing of the components should be obvious to any practitioner in the exempt bond community and to bond agents and IRS counsel. In the past, tax schemes employing these sorts of abusive structures have resulted in substantial fines and prison terms.

In 2013, the IRS Office of Tax Exempt Bonds was in the process of examining multiple transactions involving total return swaps and exempt bonds. The IRS examining agent was taking the position (rightfully so) that the transactions included price manipulation by Bank of

America Merrill Lynch ("Bank of America") with an exempt organization. The primary purpose of the transactions, from Bank of America's perspective, was to receive excessive tax-exempt interest and create phony tax losses.

In several particular examinations involving Bank of America, which has paid substantial fines in the past for similar fraudulent schemes, the IRS field agent had moved forward aggressively on the bank's price manipulation by the summer of 2013. In August of 2013, a senior attorney with your office reached out to the head of the field examination team about these ongoing examinations. This same senior attorney apparently communicated with Hobby Presley, a private practitioner, to discuss how the issue arising in these ongoing field examinations could be presented for his review. By September, Mr. Presley had submitted a request for a private letter ruling on behalf of Bank of America on a proposed extension of an existing total return swap, ostensibly pursuant to Rev. Proc. 2013-1 and Rev. Proc. 96-16, and this same senior attorney took control over this ruling request.

By using the private letter ruling process, the field examination team was, of course, cut out of the decision-making process. The field examination team was not provided an opportunity to question Bank of America's factual statements or legal arguments. The submission for the ruling did, in fact, contain numerous factual falsehoods made under penalties of perjury, including material factual misstatements by Bank of America about the values of the swaps and bonds, and the true ownership of the bonds.

While the ruling request was pending, attorneys in your office contacted IRS headquarters personnel to gather additional information about the ongoing field examinations of outstanding bonds. An attorney in your office described one person contacted as the "TRS [total return swap] abuse author." Therefore, your attorneys were well aware of the closed and pending field examination activity and the treatment of the tax shelters involving total return swaps and exempt bonds as abusive transactions.

During the private letter ruling process, your attorneys told Mr. Presley that they could not provide a favorable ruling on the question of whether the outstanding bonds would be treated as reissued when the term of the tax shelter was extended. Nonetheless, your attorneys ultimately punted in a manner favorable to Mr. Presley by agreeing that the issuer would send in a precautionary IRS Form 8038 and execute a new tax certificate under the arbitrage regulations. There is no legal support for the receipt of a precautionary Form 8038, and it is unclear why attorneys in your office would condone the filing of a "maybe yes/maybe no" form with the IRS Service Center. And, the promised tax certificate was never prepared or executed.

Ultimately, attorneys in your office rubber-stamped the arguments presented by Mr. Presley. In doing so, your attorneys not only assumed the correctness of Bank of America's false assertions that it independently priced the swap and bonds, but worse, gave credence to Bank of America's concocted method of hiding its mispricing within "price protection." Your attorneys would have known that this would effectively undercut the IRS field agents. Your attorneys also ignored any troublesome Code provisions and regulations, including the rules regarding investment-type property and reissuance. The ruling directly contravened several existing regulations under §148.

Finally, attorneys in your office abused the letter ruling process so as to deliver favorable holdings to Bank of America on the outstanding bonds. As part of the ruling, your attorneys concluded that the "original structure of the financing plan including the TRS, and the extension of the TRS for the Bonds does not enable the Borrower to exploit the difference between tax-exempt and taxable interest rates to obtain a material financial advantage." And, further, "We conclude that the original structure of the financing plan including the TRS, and the proposed extension of the TRS does not reflect a principal purpose by the Borrower to obtain a material financial advantage by either rate exploitation or by overburdening." Under Rev. Proc. 2013-1 and Rev. Proc. 96-16, a private letter ruling is not permitted to address any aspects of the exempt status of *already issued and outstanding* bonds. Your attorneys did not investigate the outstanding bonds or the existing total return swaps or receive the input of IRS field examiners on the accuracy of the assumed facts, which are false. As such, your attorneys abused the private letter ruling process so as to give cover to Bank of America's misrepresentations.

Negative Impact

I have heard it asserted that the tax shelter scheme approved by the attorneys in your office could be distinguished from the tax shelter scheme under examination. But, immediately after your attorneys accepted the highly-inappropriate ruling request from Bank of America, the ongoing examinations were negatively and significantly impacted. Several examinations were stalled and statutes of limitations lost due solely to the decision by your attorneys to intervene into the examinations of this abusive tax shelter scheme pursuant to the letter ruling process.

Additionally, on May 30, 2014, only nine days after your attorneys delivered the favorable letter ruling on the tax shelter scheme to Bank of America, Bank of America's lawyers presented the *exact same arguments* accepted by your attorneys to the examining agent working on one of the outstanding bond examinations. These bonds were, of course, also owned (indirectly) by Bank of America. Bank of America made these same arguments notwithstanding claims that the mispricing scheme using total return swaps and exempt bonds, which was under audit, was somehow different than the mispricing scheme using total return swaps and exempt bonds approved by your office. The examining agent ultimately settled for less than 50 cents on the dollar of arbitrage profits earned on that transaction, and did not pursue any promoter or fraud penalties on Bank of America or tax counsel.

Lastly, after the involvement by attorneys in your office, the IRS effectively ended examinations of all variations of the fraudulent tax shelter scheme and did not impose tax promoter penalties against persons deploying and benefitting from this scheme. And the number of fraudulent total return swap transactions exploded. Major banking organizations have now deployed this abusive tax shelter scheme to illegally shelter well over $1 billion in taxable income. Many of these were put in place by Bank of America, who continues to reap substantial, illegal tax benefits from these tax shelter transactions.

Conclusions

A reasonable person reviewing the documents in my possession, which I can readily share without Title 26 disclosure limitations, could easily conclude that attorneys in your office used the private letter ruling process to intentionally step into the middle of multiple examinations of abusive tax shelter transactions for the principal purpose of assisting Bank of America in its defense of these ongoing audits. A reasonable person could easily conclude that attorneys in your office involved themselves in these ongoing examinations so as to reduce the amount Bank of America and others paid to resolve these ongoing audits. And a reasonable person could easily conclude that attorneys in your office used the private letter ruling process to knowingly make an opportunity for Bank of America to continue to defraud the U.S. Treasury.

Ostensibly "Attorneys in the Chief Counsel's Office serve as lawyers for the IRS." We all know this is not completely true, but, to my knowledge, your office has never before run interference on behalf of influential persons when the IRS was investigating tax fraud. The examinations mentioned above were initiated by a whistleblower and your office has been accused of having an anti-whistleblower bias. One could now conclude that some attorneys in your office have elevated thwarting the whistleblower program over allowing the IRS to stop tax fraud.

Moving Forward

Section 11.05 of Rev. Proc 2013-1 ***requires*** the retroactive revocation of the ruling based on a misstatement of material facts. I have repeatedly submitted credible allegations regarding the intentional misstatements of material facts by Bank of America and I have repeatedly offered the sharing of technical expertise to price the swaps pursuant to a section 6103(n) agreement. All of my attempts have, to date, been rebuffed. If the IRS and your office no longer have the technical expertise to verify credible allegations regarding the mispricing of financial instruments, then this expertise should be obtained from outside the IRS, or my offer accepted.

Priv. Ltr. Rul. 201502008 should be revoked retroactively. I am available to meet in person in DC to discuss this matter in greater detail.

Sincerely,

/s/

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Wm. Mark Scott

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September 8, 2015

William J. Wilkins, Esq.
Chief Counsel, IRS Office of Chief Counsel
1111 Constitution Ave., NW
Washington, DC 20224

Re: *Priv. Ltr. Rul. 201502008*

Dear Mr. Wilkins,

I write to you to lend my voice to the discontent over Priv. Ltr. Rul. 201502008 (dated May 21, 2014, and released Jan. 9, 2015). I believe your office erred when it issued this ruling, and that the ruling should be revoked per Rev. Proc. 2015-1, §11.04. And, with full knowledge of the errors, I am hopeful you will act accordingly.

Priv. Ltr. Rul. 201502008 addresses the use of a total return swap (TRS) in conjunction with an issue of tax-exempt bonds. In the ruling, one party wears 2 hats as both the swap counterparty and the holder of the tax-exempt debt. Because of this dual role, the swap counterparty/bondholder, through pricing terms applicable to the "total return" portion of the TRS, can lower its taxable income in exchange for greater tax-exempt income. The ruling, therefore, describes an arbitrage scheme that is quite easy to abuse.

This scheme has been abused using billions of dollars of bonds, and has resulted in hundreds of millions of dollars of illegal tax benefits being stolen. The Office of Tax Exempt Bonds is well aware of this abuse. It has investigated a number of high-coupon tax-exempt bond issues where the bondholder/swap counterparty deployed TRS structures with phony terms to illegally generate greater tax-exempt income for a longer period of time in exchange for lower taxable income. These audits have been ongoing for some time and the Office of Tax Exempt Bonds has, rightfully, issued adverse findings. Your office knew about these audits and the TRS scheme.

Notwithstanding this knowledge, your office entertained a private letter ruling request involving the same scheme. This was a mistake. Although innocent looking factual representations were presented, the favorable ruling, even with its ostensibly limited application, has emboldened the use of the TRS scheme. The ruling was wrongly reasoned, and overlooked the proper application of several long-standing regulations. The ruling should have pointed out that the payment to the issuer for "price protection" results in additional gross proceeds, the TRS is investment property, and significant modifications made to outstanding tax-exempt debt by a person other than the governmental issuer results in the reissuance of taxable debt. By agreeing

to entertain this ruling request and to restrict the scope of its legal analysis, your office was used to promote an abusive arbitrage scheme.

Lastly, I add my voice to those who have objected to the issuance of any ruling that violates procedural guidance in a manner that erases the distinction between private letter rulings and technical advice memorandums. By expressing legal conclusions on outstanding bonds the ruling violates the clear standards set forth in Rev. Proc. 96-16, § 5.04(1).[1] It would be inexcusable to leave this mixed ruling (part technical advice memorandum/part private letter ruling) on the books to serve as an example of how to game the audit process.

Accordingly, I strongly recommend the immediate revocation of Priv. Ltr. Rul. 201502008 as it was issued in error.

Very truly yours,

LAW OFFICE OF WM. MARK SCOTT PLLC

/s/

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William Mark Scott

cc: Sunita Lough, Commissioner, TE/GE

[1] The ruling holds that the ***original financing structure and the terms of the TRS*** "do not reflect an intent to exploit tax-exempt versus taxable interest rate differentials for arbitrage purposes" and, later "that the structure of the ***original financing, including the TRS***, . . . does not reflect a principal purpose by the Borrower to obtain a material financial advantage by either rate exploitation or by overburdening."