SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

TAX ANALYSTS and AARON DAVIS, Plaintiffs, v. DISTRICT OF COLUMBIA, Defendant.	)))))))	 No. 2020 CA 1999 B Judge Matini Next event: 26 July 2024, 10 A.M. (Further status conference)

PLAINTIFFS' RESPONSE TO DEFENDANT DISTRICT OF COLUMBIA'S REVISED *VAUGHN* INDEX AND DECLARATION

During the Watergate scandal, which ended 50 years ago this summer, the Nixon White House considered responding to demands for transparency by trying what one official called the "modified limited hangout route," *i.e.*, dribble out a limited set of facts and hope that this limited disclosure is enough to make the problem go away.[1] That approach did not work then, and it should not work here.

The Office of Tax and Revenue ("OTR") has responded to the Court's statements on 17 May 2024 by disclosing limited portions of 16 of the 107 pages previously produced, consisting of:

- 65 lines of text – approximately two full pages of text, but with no new substantive disclosure of "facts" or "conclusions" and only scattered portions of the "analysis" sections that recite what a statute or rule says, but do not help the reader understand how OTR's legal analysis applies to a specific factual setting; and

[1] The phrase was uttered by a senior White House official in a March 1973 meeting with the President about how the White House should respond to inquiries about the Watergate burglary. See American Dictionaries and Encyclopedias, "limited hangout," available at https://en-academic.com/dic.nsf/enwiki/3065176.

- 21 footnotes that contain no analysis, but cite cases and other authorities.[2]

Everything else, OTR tells us, contains "taxpayer-specific" information that is "inextricably intertwined" with non-exempt information. Indeed, OTR's new declaration uses the phrase "inextricably intertwined" 25 times (¶¶ 23, 35-48).

This response plainly inadequate. At the last hearing the Court identified six private letter rulings ("PLRs") as "examples" of PLRs where non-taxpayer-specific information could be disclosed. Transcript, pp. 7-8. OTR responded by making modest changes in three of them and modest changes in two others not cited at the hearing.[3]

OTR's error seems to stem from a belief that because a taxpayer seeking a PLR will recite specific aspects of his or her situation or propose various scenarios

---

[2] OTR did not Bates-stamp its initial production of 107 pages, so to facilitate the Court's review, we submit with this memorandum a paginated version of those 107 pages, along with an annotated version of the 19-page supplement to the latest declaration from Bazil Facchina to show the location and extent of the new disclosures, keyed to the paginated version. Our estimate that 65 lines is approximately two pages of a PLR is based on a line count of text in several pages that OTR disclosed in full, which have between 35 to 43 lines of text (PDF pp. 4, 12, 30, 34, 43).

[3] This chart compares examples of PLRs cited by the Court for less redaction and the PLRs that were revised by OTR:

PLRs identified by the Court:	PLRs revised by OTR:
	11 February 2016 (PDF pp. 10-13)
9 May 2017 (PDF pp. 36-38)	
10 May 2018 (PDF pp. 56-57)	10 May 2018 (PDF pp. 56-57 and p. 2)
	7 December 2018 (pp. 70-74)
14 February 2019 (PDF pp. 75-77)	
12 April 2019 (PDF pp. 87-98)	12 April 2019 (PDF pp. 87-98)
11 July 2019 (PDF pp. 99-102)	11 July 2019 (PDF pp. 99-102)
15 July 2019 (PDF pp. 103-107)	

for structuring a transaction, then virtually everything in the PLR is "taxpayer-specific." The fatal flaw with this approach is well illustrated by a statement in OTR's latest declaration (¶ 27) that OTR should not have released two lines of the conclusion dated 11 February 2016 (PDF p. 13). That text states:

> Based on the description provided in the scenarios, scenario 4 is the only one that conforms to the language and intent of the statute.

But it is *precisely* that sort of conclusion – along with OTR's analysis of the four hypothetical scenarios – that makes PLRs valuable to taxpayers. Which tax structures work? Which ones don't? Such information can surely be disclosed without revealing the identity of the taxpayer, and OTR has done so in the past.

This is most apparent by examining Pl. Exs. 9, 11, 12, a point that OTR does not address. Consider Pl. Ex. 11, two declaratory orders that address whether tax-payers who petitioned for guidance qualify for favorable treatment as a "Qualified High Technology Company" or QHTC." There are no individual identifiers, yet the salient facts about the taxpayer's business operations and potential tax liability are disclosed – presumably without disclosing the taxpayer's "tax information" or "return information" or anything else protected by statute. Compare Pl. Ex. 11 with four PLRs in OTR's production that seek a ruling on whether a certain business structure qualifies as a QHTC. These four PLRs are heavily redacted, provide no facts, only a boilerplate recitation of the applicable law and no conclusion.[4]

---

[4] The four QHTC PLRs are dated 11 February 2016 (PDF pp. 10-13); 5 July 2017 (PDF pp. 39-45); 28 June 2018 (PDF pp. 58-63); and 14 February 2019 (PDF pp. 75-77).

Nor does OTR's declaration try to square its current position with OTR's statement in Pl. Ex. 10 (at p. 1) that private letter rulings are some times converted into notices and "published on our website under 'Law and Guidance'"[5] or the statement on OTR's website that PLRs are "bind[ing]" on OTR as to the specific taxpayer, constitute OTR's "official tax position," and "provide guidance to other District taxpayers." OTR, *Private Letter Rulings – Tax and Law Guidance*, available at https://otr.cfo.dc.gov/page/private-letter-rulings-tax-and-law-guidance (accessed 15 July 2024 and reproduced in the record as Pl. Ex. 6/Def. Ex. 8).

Official interpretations that are binding on the agency, but are not disclosed to the public, are the sort of "secret law" that the FOIA was intended to root out and open to public view. *Fraternal Order of Police v. District of Columbia*, 79 A.3d 347, 355 n. 24 (D.C. 2013), citing *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854 (D.C. Cir. 1980), which stated (at 868, internal citation omitted):

> [A]n agency will not be permitted to develop a body of "secret law," used by it in the discharge of its regulatory duties and in its dealings with the public . . .. The theme was sounded as early as 1971 when the court emphatically stated that agencies would be required to disclose "orders and interpretations which it actually applies to cases before it," in order to prevent the development of "secret law."[6]

---

[5] Page 1 of Pl. Ex. 10 is reproduced at p. 13 of the appendix to our last filing, which also contains Pl. Exs. 9, 11 and 12.

[6] In Coastal States the agency withheld memoranda in which agency lawyers responded to questions from agency auditors about how agency regulations apply to specific facts. The agency relied on the exemption for pre-decisional records that are part of an agency's deliberative process (5 U.S.C. § 552(b)(5), the local analogue to which is D.C. Code § 2-534(a)(4)). Regardless of the exemption, the core principle – there shall be no "secret law" in agency decision making – remains the same.

How then does OTR justify its wholesale withholding of information?

The heart of OTR's argument appears in paragraph 20 of the Facchina declaration, which states that "any information in a PLR that concerned a specific taxpayer, including the taxpayer who requested the ruling, was protected from disclosure." This assertion rests on a number of claims, none of which persuades.

First, in an apparent effort to distinguish PLRs from Pl. Exs. 9, 11 and 12, OTR argues (at ¶ 11) that PLRs "contrast with other types of tax guidance" that OTR provides that are publicly available. Not so. In the first place, the line between different types of guidance is rather porous: Pl. Ex. 9, a "General Counsel Memorandum," states that it was originally issued as a PLR; Pl. Exs. 11 and 12 both had their origins in requests for guidance from an individual taxpayer.

More generally, the label that an agency attaches to a record is not determinative. D.C. Code § 2-532(a) mandates disclosure of all "records" unless there is an exemption in D.C. Code § 2-534. The fact that D.C.M.R. § 9-4200 empowers OTR and other agencies to issue a type of document called a "declaratory order" does not override the agency's obligation to respond to a proper FOIA request. Indeed, if the Council wanted agencies to decide for themselves which records to disclose and with what redactions, there would have been no need to enact a Freedom of Information Act.

Second, OTR's declaration (at ¶ 17) over-reads the protections for "return information" in the federal statute that the Court of Appeals cited in defining OTR's FOIA obligations. In brief, "return information" is defined in I.R.C. § 6103(b)(2)(A) as certain identifying items such as a taxpayer's identity, source of income, tax payments and "any other data" collected by IRS "with respect to the determination of the existence, or possible existence of liability (or the amount thereof) . . . ." OTR gives a broad reading to the "any other data" language to embrace "*any* information in a PLR that concerned a specific taxpayer." *Id.*, ¶ 20 (emphasis added).

This is plainly incorrect. In each of Pl. Exs. 9, 11 and 12, a taxpayer petitioned OTR for an opinion about tax liability in the taxpayer's situation, either actual or proposed. In each case OTR recited the facts, applied the law to the facts and stated a conclusion as to liability. These documents benefit other taxpayers without tying the facts or analysis or conclusion to a specific, identifiable taxpayer.[7]

Third, OTR tries to distinguish the key case upon which the Court of Appeals relied in defining "taxpayer-specific." As noted in our prior memorandum (at pp. 7-8), the Court of Appeals cited approvingly *Tax Analysts v. IRS*, 117 F.3d 607, 615-16

---

[7] Consider these examples showing that OTR understands how it is possible to provide useful guidance without disclosing an individual taxpayer's liability:

- Pl. Ex. 9, p. 1 (A hotel's attrition fee "is subject to District sales tax" in specified circumstances, while a cancellation fee in the form of a forfeited deposit "is not subject to District sales tax");

- Pl. Ex. 11 (Declaratory Order 2015-2, p. 5, states that "Company is eligible to receive qualifications of QHTC because all the requirements of QHTC qualification have been met); (Declaratory Order 2013-1, p. 4 states that if petitioner meets specific requirements, it "will not be subject to the franchise tax for the lesser of $15 million or for the first five years the QHTC has taxable income");

- Pl. Ex. 12, p. 1 (a taxpayer appointed by the President and confirmed by the Senate who cannot be removed before the end of the appointee's term except for cause is liable for District income tax and cannot take advantage of a tax provision available only to those who serve at the pleasure of the President).

(D.C. Cir. 1997), which ordered disclosure under the federal FOIA of non-precedential "field service advice" or "FSA" memoranda that IRS headquarters lawyers sent to field attorneys who were seeking advice on how federal tax law applies to a specific situation, with "return information" to be redacted to the same extent that OTR removed identifiers in the three exhibits upon which we rely here.

OTR argues (at ¶ 11) that PLRs "do not constitute guidance to agency personnel or constitute a body of law which OTR uses in its dealings with taxpayers." How does OTR square this with OTR's statements that PLRs are a body of law that "binds" the agency and reflect OTR's "official tax position"? See p. 4, *supra*.[8]

What to do?

At the May hearing, the Court stated that OTR should examine PLRs by "focusing on the unique language, unique to the taxpayer" (Tr. at 10), which OTR has clearly failed to do. The Court added that without a *Vaughn* index explaining why specific sections have been redacted, "I'm just prepared to order that a number of these PLRs be produced in unredacted form or in lesser redacted form" (Tr. 9).

We appear to be at that point. OTR has now had three opportunities (the first back in 2020) to file a proper *Vaughn* index, yet OTR has utterly failed to do so. It is therefore up to the Court to decide what matters should be disclosed.

---

[8] OTR also argues (¶ 11) that the FSA case is different because D.C. law does not have a counterpart of 26 U.S.C. § 6110, which mandates IRS disclosure, with redactions, of certain non-precedential "written determinations," even if no one has requested such determinations under the FOIA. As the FSA case illustrates, however, the IRS's obligation to disclose certain specified records as a matter of course does not affect the agency's obligation to disclose, upon request, other unspecified records under the FOIA.

What information may be withheld? Plaintiffs have never disputed that identifying words and phrases may be redacted. In note 9 below, we list certain words and phrases that constitute such identifiers, which are drawn from the definition of "return information" in I.R.C. § 6103(b)(2)(A), the redactions OTR made in Pl. Ex. 9, 11 and 12, and the Court's comments at the last status hearing.[9]

We submit that the first step from here would be to remove these individual items (perhaps with the assistance of a Magistrate Judge). After that, the Court will be able to assess *in camera* whether additional portions of these PLRs "inextricably intertwine" exempt information with non-exempt information and then make the requisite finding that all "reasonably segregable" portions of the PLRs are being disclosed.

Respectfully submitted,

Cornish F. Hitchcock

Cornish F. Hitchcock (D.C. Bar No. 238824)
Hitchcock Law Firm PLLC
5614 Connecticut Avenue, NW, No. 304
Washington, DC 20015
(202) 489-4813 • conh@hitchlaw.com
Attorney for Plaintiffs

15 July 2024

---

[9] - Taxpayer's name, address(es), telephone number(s), e-mail address(es), website, Social Security Number, Federal Employee Identification Number;

- The name of any customer or client and identifying information as identified above:

- The nature, source, or amount of the taxpayer's income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments,

- The month, date and year of any event or transaction.