

**From the desk of  
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## **Taxpayer Advocate Finds IRS Inconsistent and Unreliable**

The Taxpayer Advocate Service (TAS) issued a statement relating to taxpayer reliance on Internal Revenue Service frequently asked question (FAQ) posted on the IRS website which is subject to change, or removed.

IRS Regulations provides that a taxpayer may avoid an accuracy-related penalty for substantial understatements of income tax if there is "substantial authority" for the taxpayer's position. IRS Regulations also state that reliance on "Internal Revenue Service information or press releases" is considered to meet that substantial authority standard.

The Internal Revenue Manual (IRM) states that Internal Revenue Service employees must follow items published in the [Internal Revenue] Bulletin, and that taxpayers may rely on those published policies, procedures, and guidance.

There is quite a bit of confusion as to this issue in that frequently asked questions (FAQs) can be found on **IRS.gov** but may not have been published in a bulletin.

FAQs that appear on **IRS.gov** but that have not been published in the Bulletin are not legal authority and should not be used to sustain a position unless the items (e.g., FAQs) explicitly indicate otherwise, or the IRS indicates otherwise by press release or by notice or announcement published in the Bulletin.

The TAS points out as an example that the IRS has posted nearly 500 COVID-19-related FAQs on its website over the past number of months, including 94 on the employee retention credit, 93 on the Families First Coronavirus Response Act, 69 on Economic Impact Payments, 67 on COVID 19-related tax credits, and 40 on filing and payment deadlines.

The TAS further pointed out the FAQs are frequently changed and updated, and there is no formal archive of older FAQs.

### **Issue**

The problem is that if a taxpayer followed an FAQ and finds out later that:

- i. The IRS is taking the opposite position on audit;
- ii. The IRS is imposing an accuracy-related penalty on the taxpayer for taking the position the FAQ had advised; and

- iii. The taxpayer cannot locate the original FAQ because the IRS has changed it, or removed the initial FAQ from its website –the question then is whether the taxpayer can argue that there was substantial authority at one time, but cannot locate it.

### **Advice**

The TAS states that under current law the taxpayer would probably be subject to the accuracy-related penalty.

The TAS suggest that the IRS should never assess a penalty against a taxpayer for taking a position consistent with an FAQ posted on the IRS website at the end of a taxpayer's taxable year, or at the time of return filing unless the IRS has convincing evidence the taxpayer knew the FAQ had been changed.

The TAS also advocates that the IRS should include the versions and dates of each FAQ on its website or create an archive of obsolete or modified FAQs including applicable dates so that taxpayers can locate an FAQ that was in effect at the time they filed their returns.

Finally someone other than those of us in the profession is willing to point out that the IRS is inconsistent, and in some cases unreliable.

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