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Questions the IRS Will Not Answer

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When a taxpayer plans to undertake a transaction and its tax consequences are unclear, the taxpayer can request a letter ruling from the IRS. The IRS issues numerous letter rulings each year. In 2020, for instance, the IRS issued 777 letter rulings. The IRS refrains from issuing letter rulings on certain topics. At the beginning of each year, the IRS publishes an updated list of the topics on which it will not rule. Many of the topics on which it will not rule arise in areas of tax law governed by standards where the tax outcome depends heavily on each transaction's specific facts. This pattern is consistent with the IRS's stated position that it ordinarily does not rule in certain areas because of the factual nature of the matter involved.

This Article suggests that a policy against ruling on fact-specific topics sacrifices an opportunity to rule on many of the very topics for which a letter ruling could be particularly useful. Because the fact-specific nature of a topic makes it ill-suited for generally applicable guidance, such a topic is a particularly good candidate for a letter ruling.

Existing literature contains very little examination of the reasons for the IRS's policy against ruling on fact-specific topics. This Article begins to fill that gap and suggests eight potential concerns that might underlie the IRS's reticence. This Article analyzes whether each concern could be addressed by means other than simply not issuing rulings. To gauge the validity of some of the concerns, this Article examines letter rulings that the IRS did, in fact, issue on several fact-specific topics prior to adding them to the no ruling list. The previously issued letter rulings illustrate that many of the concerns do not inevitably arise in the case of all letter rulings on fact-specific topics. Some of the previously issued letter rulings also demonstrate steps that the IRS should take, or avoid, in order to mitigate some of the concerns if it does rule on fact-specific topics.

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INTRODUCTION

A vast body of federal income tax law is contained in statutes, regulations, judicial opinions, and IRS guidance. Notwithstanding (and in some cases because of) the volume and intricate nature of enacted tax law, a ready answer does not exist regarding the tax treatment of numerous transactions and events. This residual uncertainty in tax law stems from several causes.[1] Some transactions and events occur

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1. *See, e.g.*, Yehonatan Givati, *Resolving Legal Uncertainty: The Unfulfilled Promise of Advance Tax Rulings*, 29 VA. TAX REV. 137, 144 (2009) ("Tax law, like many other areas of the law, is indeterminate in many cases."); Jeffrey H. Kahn, *Hedging the IRS—A Policy Justification for Excluding Liability and Insurance Proceeds*, 26 YALE J. ON REG. 1, 2–3 (2009); Sarah B. Lawsky, *Probably? Understanding Tax Law's Uncertainty*, 157 U. PA. L. REV. 1017, 1032–34 (2009) (describing judicial anti-abuse doctrines as a source of uncertainty in tax law and stating that "[m]ore important for our purposes than the details of these doctrines, though, is that the doctrines are standards, not rules"); Kyle D. Logue, *Tax Law Uncertainty and the Role of Tax Insurance*, 25 VA. TAX REV. 339, 363 (2005) ("Although the tax system is primarily a system of rules, it is inevitably a system of standards as well, as some scholars have recently begun to emphasize. This is because, even in a system with highly complex rules—in fact, perhaps especially in such a system—there can be difficult questions of how the rules are to be applied to complex transactions."); Leigh Osofsky, *The Case Against Strategic Tax Law Uncertainty*, 64 TAX L. REV. 489, 494 (2011) ("As is well known to tax

that simply were not contemplated by lawmakers. In some cases, the novelty of an event or transaction occurs naturally. In other cases, it is manufactured by sophisticated taxpayers designing transactions with the aim of obtaining tax treatment more beneficial than lawmakers intended. Uncertainty in tax law also arises because some areas of tax law are governed by standards. In these areas, the tax outcome in any given case depends on the facts and circumstances of that particular case. As a result, unless existing guidance describes the tax treatment of precisely the same transaction, a transaction's tax outcome will not be entirely free from doubt.

One tool available to a taxpayer who plans to engage in a transaction with uncertain tax consequences and who desires more certainty regarding its tax outcome is to seek a letter ruling from the IRS.[2] To seek a ruling, the taxpayer must submit a ruling request that describes all of the relevant facts, the questions on which the taxpayer seeks a ruling, relevant legal authority, and how the authority applies to the taxpayer's facts.[3] In addition, the taxpayer must pay a filing fee.[4] Once the IRS issues a ruling, the taxpayer to whom it is issued generally can rely upon it if the taxpayer carries out the transaction consistent with the facts described in the ruling request. This is the case because the Treasury Regulations provide that a letter ruling will generally not be revoked retroactively as long as the ruling request completely and accurately disclosed relevant facts, the subsequently developed facts were not materially different from the facts on which the ruling was based, there has been no change in law, the ruling was issued with respect to a transaction the taxpayer planned to undertake, and the taxpayer relied upon the ruling in good faith such that retroactive revocation of the ruling would harm the taxpayer.[5] As a result, obtaining a letter ruling affords certainty to the taxpayer. However, if the IRS later discovers that the taxpayer did not accurately and completely disclose relevant facts when requesting the ruling, the IRS can revoke the ruling retroactively.[6] Only the taxpayer to whom a ruling is issued can rely upon it.[7] That said, the publication of issued letter rulings in anonymized form provides a guide to taxpayers who plan to engage in similar transactions regarding the IRS's likely position on such transactions.[8]

The IRS will not issue letter rulings on certain topics. At the beginning of each year, the IRS issues a revenue procedure containing the most up-to-date list of topics

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experts but perhaps much less well known to nontax experts, taxpayers with more complicated tax profiles regularly have to deal with tax law uncertainty. . . . There are a number of sources of tax law uncertainty. Prevalent use of standards in the tax law may leave taxpayers unsure of the application of a standard to a particular set of facts.").

2. *See* Rev. Proc. 2021-1, 2021-1 I.R.B. 1, § 2.01 ("A 'letter ruling' is a written determination issued to a taxpayer by an Associate office in response to the taxpayer's written inquiry, filed prior to the filing of returns or reports that are required by the tax laws, about its status for tax purposes or the tax effects of its acts or transactions.").

3. *Id.* at § 7 (setting forth general instructions for requesting letter rulings).

4. *Id.* at App. A (listing the user fees for various types of letter ruling requests).

5. Treas. Reg. § 601.201(l)(5) (1967).

6. *Id.* at § 601.201(l)(5)(i).

7. *See id.* at § 601.201(l)(1) ("A taxpayer may not rely on an advance ruling issued to another taxpayer.").

8. *See, e.g.*, Rachelle Y. Holmes, *Forcing Cooperation: A Strategy for Improving Tax Compliance*, 79 U. CIN. L. REV. 1415, 1427 (2011) (noting that the publication of letter rulings in redacted form provides "helpful guidance" to other taxpayers).

on which it will not rule,[9] and if the IRS decides to modify the list before the beginning of the next year, it will issue a revenue procedure providing any updates.[10] The revenue procedures describe some no ruling topics in general terms—for instance, the IRS will not issue letter rulings on "questions that the Service determines, in its discretion, should not be answered in the general interests of sound tax administration, including due to resource constraints."[11] The revenue procedures also contain lists of specific topics on which the IRS will not issue letter rulings, as well as lists of specific topics on which the IRS "ordinarily" will not issue letter rulings.[12] The most recent revenue procedure lists a total of 141 particular topics on which the IRS will not issue letter rulings and 63 particular topics on which the IRS ordinarily will not issue letter rulings.[13]

Many of the topics on which the IRS will not rule or will not ordinarily rule occupy areas of tax law that are governed by facts and circumstances tests or, in other words, areas of tax law governed by standards. As the IRS has stated in the revenue procedure that provides guidance on how to seek a letter ruling, "[t]he Service ordinarily does not issue letter rulings . . . in certain areas because of the factual nature of the matter involved or for other reasons."[14] Examples of topics on the current list that fall in this category are numerous and include:[15] (1) whether a transfer is a gift for purposes of Internal Revenue Code Section 102(a); (2) whether a capital expenditure for an item that is ordinarily used for personal, living, or family purposes, such as a swimming pool, has as its primary purpose the medical care of the taxpayer or the taxpayer's spouse or dependent, or is related directly to such medical care for purposes of Internal Revenue Code Section 213; and (3) whether an

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9. *See, e.g.*, Rev. Proc. 2021-3, 2021-1 I.R.B. 140, § 3.

10. *See, e.g.*, Rev. Proc. 82-65, 1982-2 C.B. 852.

11. *See* Rev. Proc 2021-3, 2021-1 I.R.B. 140, § 3.02(10).

12. *See id.* at §§ 3.01, 4.01.

13. *Id.*

14. *See* Rev. Proc. 2021-1, 2021-1 I.R.B. 1, § 6.02; *see also* Treas. Reg. § 601.201(s)(2). Similar language also used to be included in the annual revenue procedure containing the no ruling list. It can be found in that revenue procedure as early as 1960 and as recently as 2020. *See* Rev. Proc. 60-6, 1960-1 C.B. 880, § 2; Rev. Proc. 2020-3, 2020-1 I.R.B. 131, § 2.01 ("There are, however, certain areas in which, because of the inherently factual nature of the problems involved, or for other reasons, the Service will not issue rulings . . . .") Curiously, this specific language was omitted from the 2021 revenue procedure that contains the no ruling list. *See* Rev. Proc. 2021-3, 2021-1 I.R.B. 140, § 2.01 ("There are, however, certain areas in which the Service will not issue rulings . . . ."). However, the language persists in the 2021 revenue procedure that provides guidance on how to seek a ruling. *See* Rev. Proc. 2021-1, 2021-1 I.R.B. 1, § 6.02. Also, the list of topics on which the IRS will not rule remains largely unchanged from 2020 to 2021. *See* Rev. Proc. 2021-3, 2021-1 I.R.B. 140, § 1.02 (cataloguing changes).

15. This Article focuses on examples that represent a small subset of the fact-specific topics on which the IRS will not rule. When narrowing the universe of potential examples to a more manageable size, this Article aims to omit certain topics that tend to only affect taxpayers with sufficient resources to obtain certainty in other ways. *See infra* Part III.h. While the examples that this Article does discuss will affect such taxpayers, they will not exclusively affect such taxpayers. Also, the examples are selected with the goal in mind of illustrating the range of potential concerns discussed in Part III.

exchange described in Internal Revenue Code Section 1031(f) involving related parties, or a subsequent disposition of property involved in the exchange, has as one of its principal purposes the avoidance of federal income tax, or whether an exchange is part of a transaction (or series of transactions) structured to avoid the purposes of Section 1031(f).[16] The most recent revenue procedure containing the no ruling list provides that the IRS will not rule on either of the first or second of these topics and, as to the third topic, the IRS ordinarily will not rule subject to some specified exceptions.[17]

The IRS added each of these three topics after publishing the first no ruling list. In particular, the first topic—involving gifts—was added in 2008.[18] The second topic—related to whether certain expenditures are for the primary purpose of medical care or directly related to medical care—was added in 1982.[19] The third topic—entailing Section 1031(f)—was added in 2014.[20] Prior to adding each of these topics, the IRS did, in fact, issue quite a number of letter rulings on each of the first two topics.[21] In 2014, the third topic was added to the list of topics on which the IRS ordinarily will not rule subject to two specified exceptions. Most of the rulings on this topic issued before 2014 involve fact patterns that are described by those specified exceptions, but a small number of rulings issued before 2014 fall outside of the specified exceptions.[22]

Aside from making the general observation that the IRS refrains from ruling on some topics because of their fact-specific nature, existing literature contains very little examination of the reasons for the IRS's policy against ruling on fact-specific topics.[23] This Article begins to fill that gap by offering eight possible rationales for the IRS's reluctance to rule on these topics and analyzing each of the possible rationales. Assessing these potential rationales is a useful exercise because it reveals that most or all of the goals served by not ruling on fact-specific topics could be

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16. *See* Rev. Proc. 2021-3, 2021-1 I.R.B. 140, §§ 3.01(19), 3.01(43), 4.01(46).

17. *Id.*

18. *See* Rev. Proc. 2008-1, 2008-3 I.R.B. 110, § 1.02(1) ("New section 3.01(9) (Section 102—Gifts and Inheritances) has been added.")

19. Rev. Proc. 82-65, 1982-2 C.B. 852 (amending Rev. Proc. 82-22 to add this item to the list of issues on which the IRS will not issue letter rulings).

20. Rev. Proc. 2014-1, 2014-3 I.R.B. 111, § 1.02(11) ("Section 4.01(43), regarding § 1031(f), has been added.").

21. *See infra* Parts I.A. and I.B.

22. *See infra* Part I.C.

23. For one note that does offer some explanations for this policy, see Stephen M. Goodman, Note, *The Availability and Reviewability of Rulings of the Internal Revenue Service*, 113 U. PA. L. REV. 81, 86 (1964) ("For purposes of analysis, there are three basic categories into which this list can be divided: 1) where the matter is 'inherently factual'; 2) where the Commissioner's position is unsettled; 3) where the Commissioner's concept of 'sound tax administration' dictates that he not rule."). This note went on to group fact-specific questions into different categories and offered some explanation for not issuing rulings in those categories. *Id.* at 87–89. For one other article that does offer one explanation for the IRS's refusal to rule on fact-specific topics, see Logue, *supra* note 1 at 409–10 ("One conceivable answer is that the Service . . . [does] . . . not have a large enough or sufficiently capable staff to do the factual and legal analysis necessary to issue rulings on such fact-intensive questions without running a big risk of adverse selection and moral hazard.").

equally well served or better served by taking steps other than simply not issuing rulings.

Moreover, taking steps other than simply not issuing rulings to address the concerns undergirding the IRS's reluctance to rule on fact-specific questions could allow the IRS to issue letter rulings on questions for which a letter ruling could be particularly useful. Letter rulings are designed to address questions not readily answered by statutes, regulations, cases, and other sources of legal authority. Indeed, the IRS generally will not issue rulings on questions that are already adequately addressed by these other sources.[24] Fact-specific questions will often fall in the category of questions for which a ready answer is not already available. Given that the answer to a fact-specific question, by definition, turns on the facts of a particular case, generally applicable authority, often, will not provide a definitive answer regarding the tax treatment of a particular transaction. Unless the facts of a taxpayer's transaction exactly match the facts of a transaction described in existing guidance, the question of how the taxpayer's transaction will be treated cannot be answered, with complete certainty, based upon existing authority. Thus, a fact-specific question is one type of question for which a ruling could be particularly useful to a taxpayer.

This Article considers eight potential rationales for the IRS's refusal to rule on fact-specific questions. First, issuing a ruling on a fact-specific question could be very time consuming because the IRS needs to obtain and consider all the relevant facts of the transaction. Given the IRS's resource constraints, engaging in a time-consuming factual analysis might not be the best use of the IRS's time. Second, it is possible that the risk that taxpayers will fabricate or exaggerate certain facts is heightened when taxpayers are providing information necessary for a fact-specific inquiry, and, therefore, the IRS hesitates to rule on these topics to avoid being duped into issuing an unduly favorable ruling. Third, in some circumstances, the taxpayer will not be the person best positioned to provide the IRS with all of the facts relevant to a fact-specific inquiry.

Fourth, similar to the notion that the fact-finder at the trial level is better positioned to determine facts while appellate court judges are better positioned to determine law, the IRS's refusal to rule on fact-specific questions may be driven by the view that, as between individuals at the IRS's national office who issue rulings and local auditing agents, the former have a comparative advantage when it comes to making judgments of law while the latter have a comparative advantage when it comes to finding facts. Fifth, a letter ruling on a fact-specific question might be of little use to anyone other than the taxpayer to whom it is issued. Technically, no letter rulings can be relied upon by other taxpayers, but they nevertheless can provide other taxpayers with useful information about the IRS's likely views on the tax treatment of similar transactions. However, a letter ruling on a fact-specific question may be less suitable for this purpose than letter rulings on other topics because a letter ruling on a fact-specific topic may offer little insight into how the IRS would likely rule in the case of a different transaction.

Sixth, particularly when the fact-specific question entails determining whether a transaction was overly tax-motivated (as is true in the case of the topics related to Section 1031(f) on which the IRS ordinarily will not issue letter rulings), the IRS's

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24. *See* Rev. Proc. 2021-1, 2021-1 I.R.B. 1, § 6.11.

hesitation might be driven, in part, by a concern that providing too much certainty regarding an anti-abuse provision's contours will allow taxpayers to disguise their overly tax-motivated transactions as not so motivated. Seventh, the IRS might be concerned that the publication of letter rulings issued on fact-specific topics will cause the public to perceive inconsistencies among the conclusions reached in rulings with similar but slightly different facts, and this concern might prompt the IRS to refrain from issuing rulings on such topics altogether. Eighth, and finally, the hesitation to rule might be based on the notion that we ought to use alternative means to provide taxpayers with certainty.

With respect to each of these concerns, this Article will analyze whether the concern is valid and whether the concern could be addressed by means other than simply not issuing rulings. To gauge the validity of some of these concerns, this Article examines letter rulings that the IRS did, in fact, issue on several fact-specific topics prior to adding them to the list of topics on which the IRS will not (or ordinarily will not) rule. With respect to many of the concerns, the previously issued letter rulings illustrate that the concern does not inevitably arise in the case of all letter rulings on the topic so that it may not justify a blanket policy against ruling on that topic. Some of the previously issued letter rulings also demonstrate steps that the IRS should take, or avoid, to mitigate some of the concerns if it does rule on fact-specific topics.

Two additional notes about the scope and aim of this Article are in order. First, some topics are included on the no ruling list for reasons other than their fact-based nature. For instance, the IRS may include on the no ruling list topics on which it has not yet developed a position.[25] This Article does not address all reasons for including topics on the list and focuses solely on the notion that the fact-specific nature of a topic results in its inclusion on the list. Second, it is difficult to conclude with certainty that the reason for including any particular topic on the no ruling list is only that it is a fact-specific topic because typically topics are added to the list without much explanation by the IRS. For that reason, it is possible that some of the particular examples that this Article uses for purposes of illustration did not make their way onto the no ruling list only because they involve fact-specific inquiries. Instead, the IRS may have decided that issuing guidance on the topic does not warrant use of administrative resources for reasons unrelated to its fact-specific nature. If this is true for any given topic, the analysis in this Article does not necessarily suggest that the topic ought not be on the no ruling list. However, while it is difficult to determine whether the fact-specific nature of an inquiry was the driving force behind including any particular topic on the list, it is clear, based on the language of numerous revenue procedures,[26] that the IRS views the fact-specific nature of a tax determination as a factor that weighs in favor of not ruling on the topic. The aim of this Article is to question whether a topic's fact-specific nature justifies not ruling on the topic and to suggest that, if the fact-specific nature of a topic is the only or primary reason for including it on the no ruling list, the topic may not belong on that list.

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25. *See, e.g.*, Goodman, *supra* note 23, at 90 (describing this as a reason for why the IRS will refuse to issue letter rulings in some circumstances).

26. *See* sources cited *supra* note 14.

This Article proceeds as follows. Part I provides examples of fact-specific topics on which the IRS will not (or ordinarily will not) rule. Part II explains why letter rulings on fact-specific topics could be particularly useful. Part III examines each of the eight potential rationales for the IRS's hesitation to rule and makes recommendations for better ways to address some of these concerns. To undertake the analysis in Part III, this Article draws upon previously issued letter rulings on fact-specific topics to determine what lessons can be gleaned from those previously issued rulings. Even though some of these topics might be on the no ruling list for other reasons as noted above, they are fact-specific topics, and, as a result, an examination of rulings that were issued on these topics can be used to gauge the validity of some of the concerns about ruling on fact-specific topics generally.

I. FACT-SPECIFIC NO RULING TOPICS

When a taxpayer plans to undertake a transaction and its tax consequences are unclear, the taxpayer can request a letter ruling from the IRS. The IRS issues numerous letter rulings each year. In 2020, for instance, the IRS issued 777 letter rulings.[27] At the beginning of each year, the IRS publishes a revenue procedure containing a list of topics on which the IRS will not issue letter rulings as well as a list of topics on which the IRS ordinarily will not issue letter rulings. Many of the topics involve fact-specific determinations. This Part will proceed by discussing three examples.

A. Gift Determination

When a taxpayer receives property as a gift, the taxpayer can exclude the value of the property from income.[28] In *Commissioner v. Duberstein*, the Supreme Court concluded that whether a transfer is a gift turns on the transferor's intention, and the requisite intention is "detached and disinterested generosity."[29] When litigating the *Duberstein* case, the IRS advocated for the adoption of clearer tests.[30] The court rejected the IRS's approach, stating, "We are of opinion that the governing principles are necessarily general . . . and that the problem is one which, under the present statutory framework, does not lend itself to any more definitive statement that would produce a talisman for the solution of concrete cases."[31]

When determining whether any given transfer is a gift, courts have examined various objective indicia of the transferor's intent. As one such objective factor, courts have taken into account statements made by the transferor close to the time of the transfer. In *Runyon v. Commissioner*, for instance, the court concluded that payments made by two individuals to another individual were gifts, and the court

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27. This number is based on a Westlaw search for all private letter rulings from 2020.

28. *See* I.R.C. § 102(a).

29. 363 U.S. 278, 285–86 (1960).

30. In particular, the IRS argued that "gifts should be defined as transfers of property made for personal as distinguished from business reasons." *Id.* at 284 n.6.

31. *Id.* at 284–85.

appeared to have been influenced by the fact that one of the transferors stated to the transferee at the time of transfer that the payments were gifts.[32]

The relationship between the transferor and transferee is also a relevant factor. In *Mesinger v. Commissioner*, for example, the court treated the rent-free use of an apartment as a gift where the transferor and transferee had a close family friendship.[33]

Courts have also considered the transferor's tax treatment of the transfer as potential evidence of the transferor's intent. As one illustration, in *O'Connor v. Commissioner*, the court concluded that the payor's issuance to the payee of a Form 1099-MISC that reported the payment as taxable income demonstrated that the payor did not intend the payment to be a gift.[34] As another example, in *Duberstein*, the court stated that the fact that the transferor takes a business deduction for the cost of a transfer is relevant, although not determinative.[35]

Also pertinent to the determination of whether a transfer constitutes a gift is whether the transferor has received or has an expectation of receiving an economic benefit from the transferee. In *Hornung v. Commissioner*, for instance, the court concluded that the free use of a car provided to a professional football player by a car dealership was not a gift because the dealership likely believed that use of the car would act as a celebrity endorsement.[36] Also, in *Duberstein*, the Supreme Court held that the Tax Court's determination that the transfer of a Cadillac was not a gift was not clearly erroneous because the transferee had provided business referrals to the transferor in the past and the transferor may have hoped to induce additional referrals in the future.[37]

Another factor at play is whether the transferee has already been adequately compensated for any economic benefit provided to the transferor. Thus, for instance, in *Runyon*, the court concluded that payments made by two individuals to another individual were gifts, and the court took note of the fact that the transferee had already been adequately compensated for services she provided in the past to a corporation owned, indirectly, by the transferors.[38]

In summary, a multitude of factors may influence an assessment of whether a transferor possesses the requisite state of mind for a transfer to constitute a gift. Thus, the determination of whether a transfer is a gift is generally governed by a facts and circumstances test.

In 2008 the topic of whether something constitutes a gift for income tax purposes was added to the list of topics on which the IRS would not issue letter rulings.[39] Before that time, the IRS issued various letter rulings on this topic. Some of the rulings provided taxpayers with their hoped-for answers that transfers did constitute gifts. For example, in a 1958 letter ruling, the taxpayer was a pastor at a church, and the church regularly paid him a salary.[40] At a church meeting, the members passed a

32. 49 T.C.M. (CCH) 208 (1984).
33. 31 T.C.M. (CCH) 1127 (1972).
34. 104 T.C.M. (CCH) 571 (2012).
35. 363 U.S. 278, 287 (1960).
36. 47 T.C. 428 (1967).
37. 363 U.S. at 291–92.
38. 49 T.C.M. (CCH) 208 (1984).
39. *See* Rev. Proc. 2008-1, 2008-3 I.R.B. 110, § 1.02(1).
40. I.R.S. Priv. Ltr. Rul. 5806045370A (June 4, 1958).

motion authorizing the church to give funds to the pastor and his wife upon his retirement.[41] The IRS concluded that the amounts could be treated as gifts for income tax purposes.[42]

As a second example, in a 1970 letter ruling, the IRS concluded that payments received while panhandling could be treated as gifts for income tax purposes.[43] The ruling assumed facts that were not directly supplied by the taxpayer stating, "The information you furnished did not indicate precisely what you mean by 'panhandling.' However, we have assumed that you refer to a person who . . . does not perform any services or sell a product in the course of his 'panhandling' activities."[44] The ruling concluded, "[I]f passersby contribute to you out of purely charitable motives, or from a disinterested generosity or similar impulse it would be proper to regard such amounts as gifts."[45]

Several other previously issued letter rulings also determined that transfers are gifts. For instance, a 1954 letter ruling concluded that an award given to a taxpayer for creative television work which was funded by contributions from 8,000 individuals constituted a gift.[46] A 1957 letter ruling characterized as gifts the payments made by a city to the widow of a former employee.[47] A letter ruling issued in 1959 treated as gifts payments to a widow of a Supreme Court Justice made pursuant to a law passed by Congress after the death of the Justice.[48] In 1959, the IRS ruled that an award provided by the United States to the widow of a deceased university employee in recognition of scientific contributions constituted a gift.[49] A 1977 letter ruling determined that a transfer of stock to a trust for the benefit of the taxpayer's wife and children was a gift.[50] The transferor was the brother of the taxpayer's wife, but the taxpayer was also an employee and officer of a company where the transferor was a director and officer.[51] The ruling concluded that the transfer was a gift and stated that the IRS's conclusion was based on the assumption that the decision to transfer the stock was "intended solely as an expression of [the transferor's] affection, respect, and admiration for [his sister and the taxpayer's family] and not as compensation to [the taxpayer] for past, present, or future services."[52] The IRS reached the same conclusion in a series of other rulings issued close in time with similar facts that appear to have been requested by the relatives of the taxpayer who requested the 1977 ruling just described.[53]

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41. *Id.*
42. *Id.*
43. I.R.S. Priv. Ltr. Rul. 7004070460A (Apr. 7, 1970).
44. *Id.*
45. *Id.*
46. I.R.S. Priv. Ltr. Rul. 5401064520A (Jan. 6, 1954).
47. I.R.S. Priv. Ltr. Rul. 5705294700A (May 29, 1957).
48. I.R.S. Priv. Ltr. Rul. 5907085170A (July 8, 1959).
49. I.R.S. Priv. Ltr. Rul. 5906195290A (June 19, 1959).
50. I.R.S. Priv. Ltr. Rul. 7733026 (May 17, 1977).
51. *Id.*
52. *Id.*
53. *See* I.R.S. Priv. Ltr. Rul. 7733058 (May 19, 1977); I.R.S. Priv. Ltr. Rul. 7733059 (May 19, 1977); I.R.S. Priv. Ltr. Rul. 7733060 (May 19, 1977); I.R.S. Priv. Ltr. Rul. 7733061 (May 19, 1977).

In addition to issuing rulings concluding that various transfers did constitute gifts, the IRS has also issued letter rulings concluding that various transfers did not constitute gifts. For example, in a 1957 letter ruling, the taxpayer and the taxpayer's family were selected as part of a nationwide search to find an "average American family" from each state and asked to attend an event that involved televised interviews.[54] As a result of being selected, the taxpayer and the taxpayer's family were given a week-long trip, a complete set of jewelry and accessories, and a wardrobe. The ruling concluded that the items were not gifts but rather prizes and had to be included in income.[55]

As a second example, in a 1984 letter ruling, an assistant professor at a large university received a monetary award that was sponsored by various private companies.[56] The awards were given to junior faculty members who had demonstrated abilities in research and teaching.[57] The university selected recipients and determined the amount of each award.[58] Enough money was available to give awards to every untenured faculty member.[59] The ruling concluded that the award received by the taxpayer was not a gift and had to be included in income.[60]

A third example can be found in a letter ruling issued in 1986.[61] In that ruling, A and B met in 1947 when they worked for the same employer, and they had maintained their friendship after A's retirement in 1963.[62] In 1981, A was hospitalized and required ongoing in-home care. A asked B to live with her.[63] B was expected to return home from work by seven or eight in the evening on weekdays and to spend the majority of her free time with A on weekends.[64] A executed a trust providing that if B was living in the house when A died, the house would be deeded to B.[65] If the living arrangement ended prior to A's death, then, in lieu of the house, B would receive $1000 per month for every month B had lived with A.[66] When A died, B still lived with A, and as a result, B received the house.[67] The ruling concluded that the house was not a gift for income tax purposes but, instead, was compensation for services.[68]

Some other previously issued letter rulings concluded that various transfers did not constitute gifts. For instance, a letter ruling issued in 1955 determined that strike benefits paid from a fund that was financed with union members' contributions were

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54. I.R.S. Priv. Ltr. Rul. 5710044440A (Oct. 4, 1957).
55. *Id.*
56. I.R.S. Priv. Ltr. Rul. 8442027 (July 12, 1984).
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. I.R.S. Priv. Ltr. Rul. 8615063 (Jan. 13, 1986).
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*

not gifts.[69] In 1958, the IRS issued a letter ruling noting that annual payments made to a former United States president, pursuant to a law passed by Congress, were not gifts.[70] A 1963 letter ruling concluded that a $100,000 payment made to an individual's estate by the U.S. government was not a gift where the payment was in full satisfaction of any claims the estate might have against the government based upon an invention by the individual.[71] Several letter rulings issued in 1964 and 1965 determined that annual distributions that a taxpayer received from a Christmas fund were not gifts where it appeared that employees expected their salaries to be supplemented by annual distributions from the fund.[72] A 1976 letter ruling decided that awards based on the length of active service granted to volunteer firemen were not gifts.[73] Two letter rulings issued in 1981 and 1983 considered payments made by a state or local government to residents to encourage them to remain residents, finding that they were not gifts.[74] In 1985, the IRS ruled that cash awards for referring new clients to a bank's trust department based upon the business generated by the referrals were not gifts.[75] As a final example, a 1987 letter ruling concluded that early retirement payments received by an employee upon an employee's retirement did not constitute gifts.[76]

In at least one instance, prior to adding the topic of whether a transfer constitutes a gift to the list of specific items on which the IRS will not rule, the IRS issued a ruling that declined to reach a conclusion regarding whether a transfer was a gift by pointing to the fact-specific nature of that inquiry.[77] In particular, in a 1985 letter ruling, a tax-exempt organization provided vocational development services to persons with disabilities.[78] Some of the organization's clients participated in a program in which they were not expected to produce sellable products and were paid $1.50 weekly.[79] The payments did not relate to work performed but were intended to help the clients become accustomed to the program.[80] The ruling stated, "While it appears that the payments . . . may be gifts and excludable from the gross income of the clients, we are unable to rule on the issue. . . . [T]he Service will not ordinarily rule with respect to any matter in which the determination requested is primarily one of fact."[81]

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69. I.R.S. Priv. Ltr. Rul. 5508125320A (Aug. 12, 1955).

70. I.R.S. Priv. Ltr. Rul. 5812015510A (Dec. 1, 1958).

71. I.R.S. Priv. Ltr. Rul. 6304104830A (Apr. 10, 1963).

72. I.R.S. Priv. Ltr. Rul. 6404241760A (Apr. 24, 1964); I.R.S. Priv. Ltr. Rul. 6404245530A (Apr. 24, 1964); I.R.S. Priv. Ltr. Rul. 6503015530A (Mar. 1, 1965).

73. I.R.S. Priv. Ltr. Rul. 7609230400A (Sep. 23, 1976).

74. *See* I.R.S. Priv. Ltr. Rul. 8121122 (Feb. 27, 1981); I.R.S. Priv. Ltr. Rul. 8317090 (Jan. 27, 1983).

75. I.R.S. Priv. Ltr. Rul. 8520014 (Feb. 11, 1985).

76. I.R.S. Priv. Ltr. Rul. 8737037 (June 15, 1987).

77. *See* I.R.S. Priv. Ltr. Rul. 8528017 (Apr. 11, 1985).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

B. Medically-Related Capital Expenditures

Just as the determination of whether something is a gift for income tax purposes turns on a fact-specific inquiry, so too does the determination of whether something is a deductible medical expense.[82] An individual taxpayer is entitled to a deduction for certain medical expenses.[83] The deduction can only be claimed by individuals who itemize deductions rather than claim the standard deduction.[84] In addition, the deduction is only allowed for medical expenses to the extent that they exceed 7.5% of the taxpayer's adjusted gross income.[85] Subject to those limitations, the deduction is granted for expenses "not compensated for by insurance or otherwise for 'medical care' of the taxpayer, the taxpayer's spouse, or the taxpayer's dependent."[86]

Determining whether something constitutes "medical care" often entails an examination of the particular facts of any given case. The Internal Revenue Code defines "medical care" to include, among other items, amounts paid "for the diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body."[87] In addition to providing other guidance, the Treasury Regulations provide, "[A]n expenditure which is merely beneficial to the general health of an individual, such as an expenditure for a vacation, is not an expenditure for medical care."[88]

From time to time, courts have had to grapple with whether an expense that would typically be a nondeductible personal expense—such as an expense incurred for something that is typically merely beneficial to an individual's general health—can qualify as an expense incurred for medical care. As Professor Pratt has noted, "Much of the case law under § 213 involves taxpayers trying to deduct as a medical expense the cost of an item, such as a pool or a vacation, which is usually purchased for nonmedical personal reasons."[89]

In *Havey v. Commissioner*,[90] for instance, the taxpayer's spouse suffered from a serious heart condition, and her cardiologist advised that she take a trip to the seashore during the summer months to benefit from the humid weather and take a trip to Arizona during the winter.[91] The taxpayer deducted the costs of the trips, and the Tax Court held that they did not qualify as deductible medical expenses.[92] As the

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82. For discussion of the determination of whether something qualifies as a deductible medical expense, see, for example, Katherine T. Pratt, *Inconceivable? Deducting the Costs of Fertility Treatment*, 89 CORNELL L. REV. 1121, 1139–44 (2004).

83. I.R.C. § 213.

84. *See* I.R.C. §§ 63(b) (not including the deduction for medical expenses in the list of deductions from adjusted gross income that are allowed if an individual does not elect to itemize), 63(d) (defining itemized deductions as deductions other than those allowed in arriving at adjusted gross income and other than those listed in Section 63(b)).

85. I.R.C. § 213(a).

86. *Id.*

87. I.R.C. § 213(d)(1)(A).

88. Treas. Reg. § 1.213-1(e)(1)(ii) (1960).

89. Pratt, *supra* note 82 at 1141.

90. 12 T.C. 409 (1949).

91. *Id.* at 409–10.

92. *Id.* at 411–13.

court stated, "[M]any expenses, such as the cost of vacations, though undoubtedly highly and directly beneficial to the general health . . . are not deductible because they fall within the category of personal or living expenses."[93] The court listed several factors that ought to be considered when determining whether an expense qualifies as a medical expense including (1) the taxpayer's motive or purpose for incurring the expense, (2) whether the expense was incurred at the direction or suggestion of a physician, (3) whether the treatment bears directly on the physical condition in question, (4) whether it would be reasonable to believe that the treatment would be effective, and (5) whether the treatment is undertaken close in time to the onset or recurrence of the disease or condition.[94] Under the facts of *Havey*, the court was not convinced that the expenses constituted medical expenses for several reasons, including that a change in climate was not the generally accepted treatment for the taxpayer's wife's specific condition, that the trips occurred sometime after the onset of the medical condition, that the taxpayer and his wife had taken similar trips for vacation purposes in previous years, and that the taxpayer's wife did not seek any medical services during the trips.[95]

Given the fact-specific nature of the inquiry, cases with somewhat similar facts have come out differently.[96] In *Watkins v. Commissioner*,[97] the taxpayers, a husband and wife, claimed a medical expense deduction for the costs of trips taken to Florida.[98] The husband's physician and wife's physician had each prescribed the trips because natural sunlight treatments would mitigate the condition from which each was suffering.[99] The court concluded that the expenses were for medical care.[100] The court reached this conclusion based upon its observations that the medical conditions existed immediately before the taxpayers went to Florida, the taxpayers' physicians prescribed the trips, and the beneficial effect of the Florida climate was related to the taxpayers' specific conditions and "apart from the general benefit to health which any vacationer or visitor would receive from being out of doors in the sun."[101]

The Treasury Regulations contain special rules regarding whether and to what extent a capital expenditure is deductible as a medical expense.[102] Amounts paid that permanently improve or increase the value of property generally constitute capital

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93. *Id.* at 411–12.

94. *Id.* at 412.

95. *Id.* at 412–13.

96. Courts have addressed whether expenses incurred for items that would typically be personal expenses can constitute medical expenses in numerous other cases. For just a few more, see, for example, Ring v. Comm'r, 23 T.C. 950 (1955) (holding that a trip to the Shrine of Our Lady of Lourdes to seek spiritual aid and take mineral baths did not constitute medical care); Ochs v. Comm'r, 195 F.2d 692 (2nd Cir. 1952) (holding that expenses incurred to send the taxpayer's and his spouse's children to boarding school did not constitute medical expenses); Rodgers v. Comm'r, 241 F.2d 552 (8th Cir. 1957) (holding that costs of trips to states with milder climates did not constitute deductible medical expenses).

97. 13 T.C.M. (CCH) 320 (1954).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. Treas. Reg. § 1.213-1(e)(1)(iii).

expenditures.[103] Subject to some exceptions, a capital expenditure cannot be deducted in its entirety in the year in which it is incurred.[104] The Treasury Regulations provide, however, that a capital expenditure can qualify as a deductible medical expense if it has as its "primary purpose" the "medical care" of the taxpayer, the taxpayer's spouse, or the taxpayer's dependent. The Treasury Regulations go on to provide that

> [A] capital expenditure for permanent improvement or betterment of property which would not ordinarily be for the purpose of medical care . . . may, nevertheless, qualify as a medical expense to the extent that the expenditure exceeds the increase in the value of the related property, if the particular expenditure is related directly to medical care.[105]

In numerous cases, courts have ruled on whether some or all of a capital expenditure that would typically be incurred for personal purposes can constitute a deductible medical expense. Many of the cases involve swimming pools. For instance, in *Haines v. Commissioner*, after the taxpayer underwent two operations for a fractured leg,[106] the taxpayer discussed with his doctor the benefits of swimming as therapy, and his doctor recommended that he build a home swimming pool because the taxpayer was a "busy man."[107] The taxpayer claimed a portion of the cost of constructing the pool as a medical expense deduction.[108] The court concluded that the expenditure was not "related directly to" the taxpayer's medical care.[109] As a result, the taxpayer was not entitled to any deduction.[110] The court reasoned that the taxpayer only required swimming as a form of exercise for a short period of time during which he could have arranged to swim at a health club at a much lower cost.[111] After that short time, the court reasoned that the taxpayer's swimming routine was not significantly different from any other individual who chooses to swim as a preferred form of exercise.[112] The court's decision was also guided by its finding that the doctor's testimony suggested that building the pool at the taxpayer's house was not a medical necessity but merely made it more convenient for the taxpayer to swim.[113] In addition, the court viewed the fact that the taxpayer could only use the pool for approximately one-half of the year as undercutting the taxpayer's claim that the pool was medically necessary.[114]

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103. *See* I.R.C. § 263(a).

104. *See id.* (providing that, subject to some exceptions, "no deduction shall be allowed for any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate").

105. Treas. Reg. § 1.213-1(e)(1)(iii).

106. 71 T.C. 644 (1979).

107. *Id.* at 646.

108. 71 T.C. at 645–46.

109. *Id.* at 647.

110. *Id.* at 649.

111. *Id.* at 648.

112. *Id.*

113. *Id.*

114. *Id.* at 648–49.

In *Evanoff v. Commissioner*, the court held that no portion of the cost of installing a swimming pool was a deductible medical expense.[115] The court noted that the taxpayers could have obtained the benefits to their daughter of swimming by using one of the available community swimming pools, and several other individuals made use of the pool in addition to the taxpayer's daughter.[116] Along similar lines, in *Worden v. Commissioner*, the court concluded that the taxpayer had failed to establish that the primary purpose of a swimming pool was medical care.[117] The taxpayer installed a swimming pool in his backyard after his chiropractor advised that swimming would help his chronic back problems, and the pool was used by other members of the taxpayer's family.[118]

The IRS issued a revenue ruling on the topic of medical expense deductions for swimming pools.[119] The ruling noted that a medical expense deduction is allowed for a taxpayer's cost of constructing a special exercise swimming pool to the extent the expenditure exceeds any resulting increase in the value of the taxpayer's property where the taxpayer suffered from severe osteoarthritis, the taxpayer's physician prescribed a treatment of swimming several times a day, and the pool was specially designed for therapy and not suitable for general recreational use.[120]

Some cases that have decided whether some or all of a capital expenditure that would typically be incurred for personal purposes can constitute a deductible medical expense have involved items other than swimming pools. For example, courts have denied medical expense deductions for the cost of a tractor and a snowblower;[121] the cost of an automobile;[122] the expenses of clothing, remodeling of a lake cottage, new furniture and appliances;[123] and the cost of a mechanical horse that the taxpayer had purchased as exercise equipment.[124] In other cases, courts have allowed medical expense deductions. For instance, in *Gerard v. Commissioner*, the court held that the installation of an air conditioner upon the advice of a physician because the taxpayer's daughter had cystic fibrosis was an expenditure for medical care and deductible to the extent it exceeded the resulting increase in the value of the taxpayer's home.[125] In *Pols v. Commissioner*, the court allowed a taxpayer to deduct as a medical expense the excess of the cost of adding an attached garage over the resulting increase in property value.[126] The taxpayer had a medical condition that made it difficult and dangerous for him to walk from a detached garage to his home in the winter time, and his doctor concluded that having a garage near his home was essential.[127]

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115. 44 T.C.M. (CCH) 1394 (1982).
116. *Id.*
117. 42 T.C.M. (CCH) 399 (1981).
118. *Id.*
119. Rev. Rul. 83-33, 1983-1 C.B. 70.
120. *Id.*
121. Lepson v. Comm'r, 44 T.C.M. (CCH) 19 (1982).
122. Volwiler v. Comm'r, 57 T.C. 367, 371 (1971).
123. Rabb v. Comm'r, 31 T.C.M. (CCH) 476 (1972).
124. Disney v. United States, 267 F. Supp. 1, 4 (C.D. Cal. 1967).
125. 37 T.C. 826, 829–30 (1962).
126. 24 T.C.M. (CCH) 1140 (1965).
127. *Id.*

One item on the IRS's most recent list of topics on which it will not issue letter rulings is "[w]hether a capital expenditure for an item that is ordinarily used for personal, living, or family purposes, such as a swimming pool, has as its primary purpose the medical care of the taxpayer or the taxpayer's spouse or dependent, or is related directly to such medical care" for purposes of Internal Revenue Code Section 213.[128] This topic was added to the no ruling list in 1982.[129] Before that time, the IRS issued various letter rulings on this topic—some specific to expenditures for swimming pools and some regarding other items that are ordinarily used for personal, living, or family purposes such as air conditioning units and similar equipment,[130] reclining chairs,[131] steam baths,[132] dishwashers,[133] pianos,[134] clarinets,[135] a first-floor bathroom,[136] treadmills,[137] furniture,[138] a separate room attached to a house,[139] new home siding,[140] and cars.[141] Some of the issued letter rulings allowed a medical expense deduction while others denied one.

In the case of swimming pools, for instance, the IRS allowed a medical expense deduction for the cost of installing a pool to the extent that it exceeded any resulting increase in the value of a taxpayer's home in three letter rulings. First, in a 1968 letter ruling, the taxpayer purchased a home swimming pool following the taxpayer's doctor's recommendation to do so to engage in therapeutic water exercises to treat a hip condition.[142] The IRS ruled that the taxpayer could claim a medical expense deduction for the cost of the pool to the extent that it exceeded any resulting increase in value of the taxpayer's home.[143] Second, in a 1982 letter ruling, the taxpayer had osteoarthritis and had been advised by a doctor to swim several times each day to slow the progression of the disease.[144] There were no adequate swimming facilities near the taxpayer's home where the taxpayer could swim as regularly as the doctor

128. Rev. Proc. 2021-3, 2021-1 I.R.B. 140, § 3.01(43).

129. Rev. Proc. 82-65, 1982-2 C.B. 852 (amending Rev. Proc. 82-22 to add this item to the list of issues on which the IRS will not issue letter rulings).

130. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 5402169340A (Feb. 16, 1954) (air conditioning); I.R.S. Priv. Ltr. Rul. 5403109320A (Mar. 10, 1954) (air conditioning); I.R.S. Priv. Ltr. Rul. 5907284550A (Jul. 28, 1959) (humidification and filtration system); I.R.S. Priv. Ltr. Rul. 6603294460A (Mar. 29, 1966) (air conditioning in a car); I.R.S. Priv. Ltr. Rul. 8009080 (Dec. 6, 1979) (house and car air conditioners).

131. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 5512324650A (Dec. 22, 1955), *revoked by* I.R.S. Priv. Ltr. Rul. 5604274650A (Apr. 27, 1956).

132. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 5701304800A (Jan. 30, 1957).

133. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 5903195230A (Mar. 19, 1959).

134. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 5903205410A (Mar. 20, 1959); I.R.S. Priv. Ltr. Rul. 6302264710A (Feb. 26, 1963).

135. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 6205294660A (May 29, 1962).

136. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 6809130350A (Sept. 13, 1968).

137. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 8019025 (Feb. 12, 1980).

138. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 8009080 (Dec. 6, 1979).

139. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 7948029 (Aug. 28, 1979).

140. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 8112069 (Dec. 29, 1980).

141. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 8226162 (Apr. 6, 1982).

142. I.R.S. Priv. Ltr. Rul. 6809100210A (Sept. 10, 1968).

143. *Id.*

144. I.R.S. Priv. Ltr. Rul. 8208128 (Nov. 27, 1981).

prescribed.[145] The taxpayer arranged to have an indoor exercise pool constructed at the taxpayer's home.[146] The pool was 8 feet wide by 36 feet long. It was equipped with specially designed stairs to enable the taxpayer to get in and out of the pool, and the pool had a steam hydrotherapy device to aid the taxpayer's therapy.[147] The pool did not have a diving board and was not suitable for general recreational use.[148] The IRS concluded that the taxpayer could claim a medical expense deduction for the cost of the pool to the extent that the costs were not more than the "minimum reasonable costs of a functionally adequate facility" and to the extent that the costs of such a facility exceeded any resulting increase in value of the taxpayer's home.[149] Third, in another 1982 letter ruling, the taxpayer's son was born with lower thoracic lumbar myelomeningocele, a condition affecting the spinal cord.[150] As a result of the condition, the son experienced paralysis in his lower limbs.[151] The son's doctor prescribed swimming therapy several times a day.[152] The doctor advised the taxpayer to install a heated pool with certain features to accommodate the swimming therapy.[153] The nearby public pools were not maintained at the necessary temperature and lacked the necessary equipment.[154] The IRS ruled that "the amount paid for the swimming pool is an expenditure made primarily for the medical care of your son" and "[a]ccordingly, to the extent that the cost of the swimming pool does not exceed the minimum reasonable cost of a functionally adequate facility, and to the extent that such minimum reasonable cost exceeds the increase in value of your home as a result of its installation, such cost is deductible as a medical expense."[155]

In the case of the three letter rulings described above, the IRS allowed a medical expense deduction for the cost of swimming pools to the extent the costs exceeded any resulting increase in the value of the taxpayer's home. By contrast, the IRS denied a medical expense deduction for any portion of the cost of installing a swimming pool in four letter rulings. First, in a letter ruling issued in 1977, the taxpayer had a heart condition and the taxpayer's doctor prescribed weight loss and regular exercise.[156] The taxpayer started distance swimming and installed a pool at the taxpayer's home because local public pools were not open at convenient times.[157] The IRS denied a medical expense deduction because the taxpayer's doctor did not particularly prescribe swimming—any type of exercise would suffice.[158] Second, in a 1979 letter ruling, the taxpayer's son had allergies that prevented him from spending long periods of time outside, and he had asthma and was highly susceptible

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145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. I.R.S. Priv. Ltr. Rul. 8221128 (Feb. 26, 1982).
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. I.R.S. Priv. Ltr. Rul. 7803037 (Oct. 20, 1977).
157. *Id.*
158. *Id.*

to infections. As a result of these conditions, the taxpayer tried to keep him away from crowds at public swimming pools.[159] The taxpayer supplied two letters from doctors stating that the taxpayer's son had asthma and that the doctors recommended swimming for exercise.[160] The taxpayer requested a ruling regarding whether the costs of constructing, maintaining, and operating a pool were deductible medical expenses.[161] The IRS ruled that they were not deductible medical expenses, pointing to cases that have held that the costs of treatments that are merely beneficial to general health and wellbeing—as opposed to the costs of treatments that are aimed at alleviating a specific illness or disease—are not deductible medical expenses.[162] Third, in a 1981 letter ruling, the taxpayer suffered from a heart attack and a heart condition.[163] The taxpayer's doctors advised swimming five days per week to facilitate recovery.[164] The taxpayer constructed a pool at the taxpayer's home.[165] The IRS ruled that the taxpayer was not entitled to a medical expense deduction for any portion of the cost of constructing the pool, at least partly because the IRS took the view that the taxpayer failed to establish that the construction of the pool was directly related to medical care.[166] The taxpayer had started to pay for its construction before being advised to swim for exercise, and the taxpayer had not shown why the construction of a pool was necessary to allow the taxpayer to swim.[167] In any event, the cost of the pool did not exceed the resulting increase in the value of the taxpayer's home, so no amount would have been deductible even if the construction of the pool had been directly related to medical care.[168] Finally, in another 1981 letter ruling, the taxpayer's son had cystic fibrosis.[169] The son's physician stated that anything that allowed the son to exercise and increase his physical activity would be useful, and a swimming pool would be "of value" but "not a necessity."[170] The IRS ruled that no part of the cost of constructing a swimming pool was a deductible medical expense.[171]

In addition to rulings about swimming pools and other capital expenditures, before and after 1982, the IRS issued letter rulings regarding the ability to treat noncapital expenditures as medical expenses in contexts where the expenses were incurred for items ordinarily used for personal, living, or family purposes. For example, in a 1956 letter ruling, the IRS concluded that the costs of vacations were not deductible medical expenses because the trips were made for general improvement of health and morale.[172] In a 1964 letter ruling, the IRS decided that

159. I.R.S. Priv. Ltr. Rul. 7942061 (July 20, 1979).
160. *Id.*
161. *Id.*
162. *Id.*
163. I.R.S. Priv. Ltr. Rul. 8125193 (Mar. 30, 1981).
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. I.R.S. Priv. Ltr. Rul. 8136073 (June 12, 1981).
170. *Id.*
171. *Id.*
172. I.R.S. Priv. Ltr. Rul. 5601174890A (Jan. 17, 1956).

the costs incurred for joining a golf, gun, fishing, or health club; the cost of hunting and fishing licenses; and the costs of purchasing guns, fishing equipment, and golf equipment did not qualify as medical expenses.[173] In that ruling, the taxpayer's doctor had recommended recreational activities to treat hypertension, restore the taxpayer's feeling of good health, and reduce the risk of a heart attack.[174] In a 1980 letter ruling, the taxpayer's wife was under a doctor's treatment for various conditions and the recommended treatment involved only eating in restaurants and not preparing food at home.[175] The IRS concluded that a taxpayer was not entitled to deduct as a medical expense any of the cost of restaurant meals.[176] As a final example, in a 1983 letter ruling, the IRS allowed the deduction of a $100 annual swimming pool fee paid to allow the taxpayer's son to swim pursuant to a doctor's recommendation that he swim three to four times per week as therapy for arthritis.[177]

C. Section 1031(f) and Related Party Like-Kind Exchanges

Determining whether a transfer constitutes a gift for income tax purposes is an inherently factual inquiry because tax law's characterization of a transfer as a gift turns on whether the transferor's intent was detached and disinterested generosity. Gauging a person's intent necessarily requires an examination of all the relevant evidence. For similar reasons, determining whether the primary purpose of an expenditure is medical care is an inherently factual inquiry. Tax law could supplant these fact-based determinations with bright-line rules, but, if the goal is to determine a transferor's intent and the purpose of an expenditure as accurately as possible, tax law needs to preserve flexibility to examine the relevant facts. To put it differently, a bright-line rule would not do the trick because it would be both overinclusive (leading to the conclusion that some taxpayers possessed the relevant intent even when they did not) and underinclusive (leading to the determination that other taxpayers did not possess the relevant intent even when they did).[178] Thus, in the context of gifts and medical expenses, we could think of facts and circumstances tests as necessary because, as a definitional matter, tax law has opted for the characterization of something as a gift or as a medical expense to turn on a taxpayer's motive or purpose which, in turn, must be assessed based on an examination of all relevant facts.

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173. I.R.S. Priv. Ltr. Rul. 6406024950A (June 2, 1964).

174. *Id.*

175. I.R.S. Priv. Ltr. Rul. 8024080 (Mar. 21, 1980).

176. *Id.*

177. I.R.S. Priv. Ltr. Rul. 8326095 (Mar. 30, 1983).

178. For further discussion of the overinclusivity and underinclusivity of bright-line rules, see, for example, Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 72–74 (1983); John A. Miller, *Indeterminacy, Complexity, and Fairness: Justifying Rule Simplification in the Law of Taxation*, 68 WASH. L. REV. 1, 5 (1993); Susan C. Morse, *Safe Harbors, Sure Shipwrecks*, 49 U.C. DAVIS L. REV. 1385, 1419–24 (2016); Gideon Parchomovsky & Alex Stein, *Catalogs*, 115 COLUM. L. REV. 165, 175 (2015) ("Any such rule will either be too narrow (underinclusive) or too broad (overinclusive)."); Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 992–93 (1995).

In the context of Section 1031(f) and in other contexts, tax law makes use of tests based on facts and circumstances for purposes of assessing a taxpayer's motive for a slightly different reason. In particular, Section 1031(f)'s aim is to determine whether a transaction was excessively tax motivated.[179] Section 1031(f) contains standards that supplement the more certain rules in other parts of Section 1031 as a means of preventing taxpayers from engaging in overly tax-motivated transactions that produce results that were not intended by lawmakers when crafting the Section 1031 rules.[180] Section 1031(f) is based on facts and circumstances rather than more clearly

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179. The staff of the Senate Committee on Finance summarized the legislative history surrounding the adoption of Section 1031(f): "Because a like-kind exchange results in the substitution of the basis of the exchanged property for the property received, related parties have engaged in like-kind exchanges of high basis property for low basis property in anticipation of the sale of the low basis property in order to reduce or avoid the recognition of gain on the subsequent sale. Basis shifting also can be used to accelerate a loss on retained property . . . A disposition also will not invalidate the nonrecognition treatment of the original exchange if it is established to the satisfaction of the Secretary of the Treasury that neither the exchange nor the disposition had as one of its principal purposes the avoidance of Federal income tax." STAFF OF S. COMM. ON FIN., 101ST CONG., REVENUE RECONCILIATION ACT OF 1989: EXPLANATION OF PROVISIONS APPROVED BY THE COMMITTEE 151–52 (Comm. Print 1989).

180. For discussion of the need to do this generally in tax law, see, for example, Noël B. Cunningham & James R. Repetti, *Textualism and Tax Shelters*, 24 VA. TAX REV. 1, 33 (2004) ("[P]romoters could easily concoct new abusive transactions that literally complied with the rule."); Andrew T. Hayashi, *A Theory of Facts and Circumstances*, 69 ALA. L. REV. 289, 291 (2017) ("If the facts that create a favorable inference about a hidden factor are publicized in advance, they will provide a roadmap for well-advised individuals to create those very facts to induce factfinders to draw the inference those individuals want."); Calvin H. Johnson, *H.R. ____, The Anti-Skunk Works Corporate Tax Shelter Act of 1999*, 84 TAX NOTES 443, 445 (1999) ("Loopholes can be created in any human tax system unless the system is defended and repaired."); Logue, *supra* note 1, at 366 ("[I]t simply is not possible to write tax laws that are devoid of all unintended loopholes."); Martin J. McMahon Jr., *Beyond a GAAR: Retrofitting the Code to Rein in 21st Century Tax Shelters*, 98 TAX NOTES 1721, 1722 (2003) ("The mechanical terms of specific rules . . . provide a tremendous temptation to treat the rules as an instruction manual for creating and structuring transactions outside the ordinary course of business or normal investments in which the taxpayer would not engage except as a result of the tax avoidance potential of the inventive transaction."); Andrea Monroe, *What's in a Name: Can the Partnership Anti-Abuse Rule Really Stop Partnership Tax Abuse?*, 60 CASE W. RSRV. L. REV. 401, 409 (2010) ("[T]hese flaws create a playground for those who engage in transactions that comply with . . . literal language, yet result in tax consequences that Congress did not contemplate."); Daniel N. Shaviro & David A. Weisbach, *The Fifth Circuit Gets It Wrong in* Compaq v. Commissioner, 26 TAX NOTES INT'L 191, 192 (2002) ("Inevitably, there will be some unforeseen interaction of the tax rules so that, if one arranges one's affairs in just the right manner, magic happens."); David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860, 860 (1999). For similar discussion regarding rules generally, see, for example, Parchomovsky & Stein, *supra* note 178, at 179 ("Rules allow self-seeking individuals to 'walk the line' by engaging in conduct that runs against society's interest and would be prohibited by a standard."); Sunstein, *supra* note 178, at 995 ("Because rules have clear edges, they allow people to 'evade' them by engaging in conduct that is technically exempted but that creates the same or analogous harms.").

defined rules because clearly defined rules would merely produce other opportunities for taxpayers to exploit those rules.[181]

To demonstrate the purpose of Section 1031(f), imagine the following facts.[182] Anabel and Michael are siblings who own various real estate investment properties. Anabel owns an apartment building with a basis of $70,000 and a fair market value of $100,000. Michael owns an office building with a basis of $20,000 and a fair market value of $100,000. A third party, Catherine, approaches Michael about the possibility of acquiring the office building for $100,000. If Michael sold the office building to Catherine for $100,000, Michael would recognize and be subject to tax on $80,000 of gain (the $100,000 selling price minus his $20,000 basis in the office building).

Under Section 1031 of the Internal Revenue Code, a taxpayer will not recognize gain as a result of exchanging real estate held for investment purposes or in a trade or business for other real estate held for investment purposes or in a trade or business.[183] The taxpayer's basis in the new property will preserve any gain that had accrued in the old property and was not recognized at the time of exchange.[184] Were it not for Section 1031(f), rather than Michael selling the office building to Catherine for $100,000, Anabel and Michael might obtain a more favorable tax outcome by first engaging in a Section 1031 exchange of the apartment building for the office building and, second, having Anabel sell the office building to Catherine for $100,000.

As a result of the Section 1031 exchange, neither Anabel nor Michael would recognize any gain.[185] After the exchange, Anabel's basis in the office building would be $70,000 (the same as her basis in the apartment building before the exchange).[186] As a result, when Anabel sells the office building to Catherine, if it were not for Section 1031(f) and assuming the transactions are not recharacterized under substance over form principles, Anabel would recognize and be subject to tax on $30,000 of gain (the $100,000 selling price minus her $70,000 basis in the office building).[187] Thus, instead of Michael recognizing $80,000 of gain as a result of selling the office building directly to Catherine, Anabel would recognize only $30,000 of gain. The siblings would have reduced the amount of gain currently recognized by $50,000.

Section 1031(f) likely prevents this outcome, however, assuming that Anabel's sale to Catherine occurs within two years of the siblings' Section 1031 exchange.[188] Section 1031(f) provides that if related parties[189] engage in a like-kind exchange and

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181. *See supra* note 180.

182. For additional discussion of Section 1031(f), see, for example, Emily Cauble, *Presumptions of Tax Motivation*, 105 IOWA L. REV. 1995, 2010–13 (2020).

183. I.R.C. § 1031(a).

184. I.R.C. § 1031(d).

185. I.R.C. § 1031(a).

186. I.R.C. § 1031(d).

187. I.R.C. § 1001(a).

188. I.R.C. § 1031(f).

189. Related parties include not only family members but also various related entities, as well as individuals and entities in which individuals own sufficient interests. I.R.C. §§ 1031(f)(3), 267(b), 707(b)(1).

one of the related parties disposes of the property acquired in the exchange within two years, then, at the time of later disposition, both parties must recognize any gain or loss that was not recognized at the time of the earlier like-kind exchange.[190] As a result, at the time Anabel sells the office building to Catherine, Michael likely recognizes $80,000 of gain from sale of the office building, and Anabel likely recognizes $30,000 of gain from sale of the apartment building.

Section 1031(f)(2)(C), however, provides that this gain recognition will not be required if the taxpayers establish that neither the like-kind exchange nor the later disposition had, as one of its principal purposes, the avoidance of federal income tax.[191] Whether taxpayers have established a lack of principal tax avoidance purpose (in other words, the question of whether Section 1031(f)(2)(C) applies) is one item on the current list of topics on which the IRS ordinarily will not issue letter rulings, subject to two specified exceptions.[192]

Even if a transaction is not squarely covered by Section 1031(f), it might still be vulnerable to attack. Section 1031(f)(4) provides that Section 1031's nonrecognition treatment is not available to any exchange that is "part of a transaction (or series of transactions) structured to avoid the purposes" of Section 1031(f).[193] This might include, for instance, a transaction in which a third party is inserted into the exchange between Anabel and Michael so that the initial exchange does not occur directly between related parties.[194] Likewise, it could include a transaction in which more than two years passes between the Section 1031 exchange and the later sale, but the related parties clearly planned the later sale at or close to the time of the Section 1031 exchange.[195]

The question of whether "a transaction (or series of transactions) was structured to avoid the purposes" of Section 1031(f) (in other words, the issue of whether Section 1031(f)(4) applies) is another item on the current list of topics on which the IRS ordinarily will not issue letter rulings, subject to two specified exceptions.[196] Both of these topics—namely whether Section 1031(f)(2)(C) applies and whether Section 1031(f)(4) applies—were added to the list of items on which the IRS ordinarily will not rule in 2014, subject to two specified exceptions.[197] Regarding the exceptions, the IRS remains willing to rule on these topics in instances in which (1) a transaction involves an exchange of undivided interests in different properties that results in each taxpayer holding either the entire interest in a single property or a larger undivided interest in any of the properties, or (2) the subsequent disposition of property occurs in a nonrecognition transaction in which the taxpayer or the related party receives no cash or other property that results in gain recognition.[198]

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190. I.R.C. § 1031(f).

191. I.R.C. § 1031(f)(2)(C). The parties also do not have to subsequently recognize gain or loss in certain specified situations. *See* I.R.C. § 1031(f)(2)(A)–(B).

192. Rev. Proc. 2021-1, 2021-3, I.R.B. 140, § 4.01(46).

193. I.R.C. § 1031(f)(4).

194. *See also* Cauble, *supra* note 182, at 2012.

195. Cauble, *supra* note 182, at 2012–13.

196. Rev. Proc. 2021-1, 2021-3, I.R.B. 140, § 4.01(46).

197. Rev. Proc. 2014-1, 2014-3, I.R.B. 111, § 1.02(11) ("Section 4.01(43), regarding § 1031(f), has been added.").

198. *See* Rev. Proc. 2021-1, 2021-3, I.R.B. 140, § 4.01(46).

Two letter rulings issued before 2014 provide examples of the first exception.[199] In one of those rulings, issued in 1999, the taxpayer and a related party each held an undivided one-half interest in 39,000 acres of timberland.[200] The taxpayer wanted to hold the timberland as an investment and objected to anything more than minimal cutting of timberlands during her lifetime.[201] The related party wanted to harvest timber.[202] The taxpayer and the related party planned to engage in a like-kind exchange of portions of their undivided interests in the timberland so that, afterwards, each party would be the sole owner of one-half of the timberlands.[203] The related party planned to harvest timber within two years, which might be treated as a disposition of the property within two years.[204] The ruling concluded that the transactions did not have, as one of their principal purposes, the avoidance of federal income tax (in other words, Section 1031(f)(2)(C) applied), and, as a result, even if harvesting the timber was a disposition, it would not cause the parties to recognize gain under Section 1031(f).[205]

The ruling pointed to the legislative history accompanying the adoption of Section 1031(f).[206] When explaining Section 1031(f)(2)(C), the Senate Finance Committee's report stated that it was intended that this nontax avoidance exception would generally apply in limited situations, one of which is "a transaction involving an exchange of undivided interests in different properties that results in each taxpayer holding either the entire interest in a single property or a larger undivided interest in any of such properties."[207]

Under facts like those of the ruling just described, a plausible non-tax explanation for the transactions exists. It appears that the two parties wanted to go their separate ways with respect to property in which they each owned an undivided interest. The exchange was undertaken as a means to divide the property into portions that each owned individually so that each party could hold or dispose of a portion of the property as the party chose. Likely, this potential nontax explanation for such a transaction is what prompted the Senate Finance Committee to include it as an example in its report and what prompted the IRS to include it as an exception to its policy of generally not ruling on whether Section 1031(f)(2)(C) applies.

Several rulings issued before 2014 also provide examples of the second exception to the IRS's general policy of not ruling on whether Section 1031(f)(2)(C) or Section 1031(f)(4) applies.[208] For instance, in a 2010 letter ruling, the taxpayer, an unrelated

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199. *See* I.R.S. Priv. Ltr. Rul. 199926045 (July 2, 1999); I.R.S. Priv. Ltr. Rul. 200730002 (July 27, 2007).

200. I.R.S. Priv. Ltr. Rul. 199926045 (July 2, 1999).

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. STAFF OF S. COMM. ON FIN., 101ST CONG., 1ST SESS., EXPLANATION OF PROVISIONS APPROVED BY THE COMMITTEE ON OCTOBER 3, 1989 (Comm. Print 1989).

208. *See, e.g.*, I.R.S. Priv. Ltr. Rul. 200440002 (Oct. 1, 2004); I.R.S. Priv. Ltr. Rul. 200616005 (Apr. 21, 2006); I.R.S. Priv. Ltr. Rul. 200810016 (Mar. 7, 2008); I.R.S. Priv. Ltr. Rul. 200810017 (Mar. 7, 2008); I.R.S. Priv. Ltr. Rul. 200820017 (May 16, 2008); I.R.S. Priv.

buyer, an unrelated seller, and an entity related to the taxpayer (the "related party") planned to engage in a multiparty like-kind exchange, using qualified intermediaries to facilitate the exchange.[209] From the taxpayer's perspective, the transaction involved an exchange, through a qualified intermediary, of Property #1 for Property #2 and a small amount of cash.[210] Property #2 was previously owned by the related party, and Property #1 was acquired by an unrelated buyer.[211] The taxpayer planned to continue to hold Property #2 for at least two years.[212] From the related party's perspective, the transaction involved an exchange, through a qualified intermediary, of Property #2 for Property #3 and a small amount of cash.[213] Property #3 was formerly owned by either an unrelated seller or potentially the taxpayer or another related party.[214] The related party planned to hold Property #3 for at least two years.[215]

Because the taxpayer and the related party each exchanged property with a qualified intermediary, the Section 1031 exchanges did not occur directly between related parties.[216] However, because Property #2 obtained by the taxpayer was, prior to the exchange, owned by the related party, the taxpayer sought a ruling on whether Section 1031(f)(4) would apply (in other words, whether these transactions would be considered to be structured to avoid the purpose of Section 1031(f)).[217] The IRS ruled that Section 1031(f)(4) would not apply.[218] The ruling, once again, pointed to the Senate Finance Committee's report accompanying the adoption of Section 1031(f).[219] This time it mentioned the second example in that report of a situation in which Section 1031(f)(2)(C)'s nontax avoidance conclusion would generally apply—namely when the disposition of property occurs in a nonrecognition transaction.[220] Under the facts of the ruling, the only transaction in which either party engaged within two years was a Section 1031 exchange in which only a small amount of gain was recognized (as a result of the receipt by each party of a small amount of cash).[221] Thus, the ruling's facts aligned with the example provided by the legislative history.

When the only subsequent disposition that occurs within two years is a transaction in which a party does not recognize any gain or loss, the parties obtain no benefit at the time of the disposition from having engaged in an earlier exchange that affected

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Ltr. Rul. 201048025 (Dec. 3, 2010); I.R.S. Priv. Ltr. Rul. 201216007 (Apr. 20, 2012); I.R.S. Priv. Ltr. Rul. 201220012 (May 18, 2012).

209. I.R.S. Priv. Ltr. Rul. 201048025 (Dec. 3, 2010).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. STAFF OF S. COMM. ON FIN., 101ST CONG., 1ST SESS., EXPLANATION OF PROVISIONS APPROVED BY THE COMMITTEE ON OCTOBER 3, 1989 152 (Comm. Print 1989).

221. I.R.S. Priv. Ltr. Rul. 201048025 (Dec. 3, 2010).

the parties' basis in the properties that they held. If no gain or loss is recognized, the property's basis does not affect the amount of gain or loss recognized. This rationale is likely what justified the Senate Finance Committee including subsequent nonrecognition transactions as an example in its report as well as what justified the IRS including subsequent non-recognition transactions as an exception to its policy of generally not ruling on whether Section 1031(f)(2)(C) or Section 1031(f)(4) apply.

Even before the IRS added to the list of topics on which it ordinarily will not rule the question of whether Section 1031(f)(2)(C) applies to a transaction, the IRS issued a letter ruling declining to rule on the topic of whether Section 1031(f)(2)(C) applied. In a 1991 letter ruling, a partnership (the "AB Partnership") and a corporation ("C Corp") were related parties within the meaning of Section 1031(f).[222] These two related entities engaged in a like-kind exchange of real estate (the AB Partnership exchanged an interest in Ranch A for an interest in Ranch C that was held by C Corp).[223] The AB Partnership already owned Ranch B which was next to Ranch C, and it was more economical for the same entity to operate Ranch B and Ranch C.[224] C Corp sought to exit the ranching business.[225] Within two years of the exchange, C Corp planned to sell its newly acquired interest in Ranch A to a third party.[226] Given that AB Partnership and C Corp were related and given that the subsequent sale would occur within two years of the Section 1031 exchange, Section 1031(f) would apply unless the parties established that the principal purpose of the transactions was not to avoid federal income tax (in other words, unless Section 1031(f)(2)(C) applied).[227] The IRS declined to rule on whether Section 1031(f)(2)(C) applied, drawing an analogy to a topic on the no ruling list that existed at the time (namely whether the principal purpose of an acquisition was the avoidance of federal income tax in the context of Section 269).[228] The ruling stated, "In this case, for which the applicable statute invokes a similar principal purpose standard, we think it appropriate and consistent for the Service to administratively decline to rule. . . . It would be better policy to leave it to an examining agent to ascertain whether one of the taxpayer's principal purposes for engaging in this series of transactions is the avoidance of Federal income tax."[229]

Despite its hesitation to rule on these topics, before 2014, the IRS did issue a small number of rulings regarding whether Section 1031(f)(4) applied to a transaction that did not fall within the currently specified exceptions. In one such ruling, issued in 2007, the taxpayer sought to engage in two transactions with respect to two properties.[230] Each transaction involved the taxpayer disposing of property (the "Relinquished Property"), and the taxpayer obtaining like-kind replacement property

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222. I.R.S. Priv. Ltr. Rul. 9126007 (June 28, 1991).
223. *Id.*
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.*
230. I.R.S. Priv. Ltr. Rul. 200728008 (July 13, 2007). For another example, see I.R.S. Priv. Ltr. Rul. 200712013 (Mar. 23, 2007).

(the "Replacement Property").[231] The Replacement Property was owned by an unrelated seller.[232] A party related to the taxpayer (the "Related Party") planned to acquire the Relinquished Property for cash.[233] The taxpayer, the unrelated seller, and the Related Party would carry out the transactions through an intermediary.[234] The intermediary would sell the Relinquished Property to the Related Party for cash, the intermediary would acquire the Replacement Property from the unrelated seller for cash, and the intermediary would transfer the Replacement Property to the taxpayer.[235] From the taxpayer's perspective, the transaction entailed a like-kind exchange of the Relinquished Property for the Replacement Property.[236] From the perspective of the Related Party, this transaction involved acquiring the Relinquished Property for cash equal to the value of the property.[237] The Related Party planned to sell the Relinquished Property within two years.[238]

Because the taxpayer and the Related Party exchanged property through an intermediary, the Section 1031 exchanges did not occur directly between related parties. However, because the Relinquished Property was acquired by a related party who planned to sell it within two years, the taxpayer sought a ruling on whether Section 1031(f)(4) would apply (in other words, whether these transactions would be considered to be structured to avoid the purpose of Section 1031(f)). The IRS ruled that Section 1031(f)(4) would not apply.[239] The ruling stated, "The related parties in this case did not exchange high basis properties for low basis properties in anticipation of the sale of the low basis properties. Only [the taxpayer] held properties before the exchanges and continued its investments after the exchange."[240] In other words, the Related Party who sold the property within two years had a basis in the property that was not determined by reference to the basis in any other property but rather equaled the amount paid by the Related Party for the property.

To demonstrate, imagine the Relinquished Property had a basis of $40 in the hands of the Taxpayer and a fair market value of $100 at the time of the exchange, and imagine the Replacement Property had a fair market value of $100 at the time of the exchange. The taxpayer would recognize no gain on the exchange, and the taxpayer would take a basis in the Replacement Property equal to $40. The Related Party would take a basis in the Relinquished Property of $100. If the Related Party subsequently sold the Relinquished Property for $100, the Related Party would recognize no gain. However, the Related Party's high basis in the property was not created by transferring basis from other property held by the Related Party but instead by the Related Party purchasing the property for $100. In this respect, the transactions differ from the typical transactions at which Section 1031(f) is aimed that are illustrated by the example above involving Anabel and Michael.

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231. I.R.S. Priv. Ltr. Rul. 200728008 (July 13, 2007).
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*

Although this ruling did not involve facts that fall within the specified exceptions contained in the IRS's post-2014 policy against ordinarily issuing rulings on whether Section 1031(f)(2)(C) or Section 1031(f)(4) applies, it is worth noting that the ruling does involve facts that implicate the third example provided in the Senate Finance Committee's report of an instance in which an exchange and subsequent disposition would typically not be principally tax motivated. That third example was "transactions that do not involve the shifting of basis between properties."[241]

In summary, as of 2014, the IRS's official policy is to ordinarily not issue rulings on whether Section 1031(f)(2)(C) or Section 1031(f)(4) apply to a transaction subject to exception in two specified sets of circumstances—namely, where parties exchange undivided interests in property so that each can obtain an entire (or a larger undivided) interest in one property and where any subsequent disposition within two years by the taxpayer or a related party occurs in a nonrecognition transaction in which neither the taxpayer nor the related party recognizes gain.[242] Even prior to 2014, the vast majority of rulings issued by the IRS regarding Section 1031(f)(2)(C) or Section 1031(f)(4) involved these specified circumstances.[243] In a very small number of instances, the IRS did issue letter rulings concluding that Section 1031(f)(4) did not apply to a transaction even though the transaction did not involve these specified circumstances.[244] In those instances, however, the rulings involved facts that tracked another example contained in the legislative history of a not principally tax-motivated transaction.[245]

II. Particular Usefulness of Rulings on Fact-Specific Topics

The fact-specific topics on which the IRS will not issue letter rulings (or ordinarily will not issue letter rulings) arise in contexts in which tax law makes use of standards in lieu of or as a supplement to rules. A "rule" specifies, clearly and in advance, the tax consequences resulting from various activities.[246] A "standard" provides only limited guidance to taxpayers before they act, deferring definitive determinations of tax consequences to after-the-fact analysis by courts.[247] Whether something is a gift,

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241. *See* Staff of Comm. on Fin., 101st Cong., 1st Sess., Explanation of Provisions Approved by the Committee on October 3, 1989 (Comm. Print 1989).

242. Rev. Proc. 2014-1, 2014-3, I.R.B. 111, § 1.02(11) ("Section 4.01(43), regarding § 1031(f), has been added.").

243. *See supra* notes 199–221 and accompanying text.

244. *See supra* notes 230–241 and accompanying text.

245. *See supra* notes 230–241 and accompanying text.

246. *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557, 560 (1992) ("This Article will adopt such a definition, in which *the only distinction between rules and standards is the extent to which efforts to give content to the law are undertaken before or after individuals act*.") (emphasis in original); *see also* Alice G. Abreu & Richard K. Greenstein, *Defining Income*, 11 Fla. Tax Rev. 295, 330 (2011) ("A rule . . . is formal, and in the great majority of circumstances the rule either clearly applies or clearly does not.").

247. *See* Abreu & Greenstein, *supra* note 246, at 330 ("Application of a standard tends to be contextual and fact-sensitive."); Kaplow, *supra* note 246, at 560 ("A standard may entail leaving both specification of what conduct is permissible and factual issues for the adjudicator.").

whether something is a medical expense, whether Sections 1031(f)(2)(C) or 1031(f)(4) apply, and other fact-specific determinations are governed by standards. Lawmakers do not specify ahead of time an exclusive list of facts that will be relevant to the tax outcome or predetermine what the outcome will be under any given set of facts.

As compared to rules, standards produce less certainty of tax outcome. Reduced certainty matters for numerous reasons. First, as others have noted, when tax outcome is not clearly specified, the IRS and courts have more discretion when applying the law, which can lead to greater enforcement costs[248] and less uniform enforcement.[249]

Second, as others have observed, uncertainty may affect different types of taxpayers differently.[250] Some taxpayers may respond to uncertainty by erring on the side of caution and potentially paying more in tax than they owe, while other

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248. *See*, *e.g*., Holmes, *supra* note 8, at 1437 (discussing how allowing taxpayers to obtain certainty before filing their returns can save taxpayer and IRS resources that would otherwise be used for enforcement and litigation); Edward Yorio, *Federal Income Tax Rulemaking: An Economic Approach*, 51 FORDHAM L. REV. 1, 43 (1982) ("More importantly, a rule that places a heavy burden of proof on one of the parties will reduce the number of disputes between taxpayers and the government because parties with the burden are likely to realize in many cases that their chances for success are slim. Fewer disputes mean reduced transaction costs of negotiations and litigation.").

249. *See, e.g.*, L. Harold Levinson, *The Legitimate Expectation that Public Officials Will Act Consistently*, 46 AM. J. COMP. L. SUPP. 549, 558 (1998) ("Throughout the legal system, officials administer statutes or apply judicial precedents which require determinations based on vague terms, such as 'in the public interest.' Inconsistent exercises of this discretion are inevitable, and cannot all be remedied by judicial review."); Peter P. Swire, *Safe Harbors and a Proposal to Improve the Community Reinvestment Act*, 79 VA. L. REV. 349, 372 (1993) ("An important source of uncertainty is the discretion of lower-level bureaucrats.").

250. *See, e.g.*, Sheldon I. Banoff, *The Use and Misuse of Anti-Abuse Rules*, 48 TAX LAW. 827, 837 (1995) ("The effect of [some anti-abuse rules] . . . is to erase the bright line or relocate it for more cautious taxpayers. Those who are overly aggressive may use the vagueness and ambiguity of the rule as an indirect endorsement of their proposals."); Mark P. Gergen, *Reforming Subchapter K: Contributions and Distributions*, 47 TAX L. REV. 173, 196–97 (1991) ("But an approach that uses indeterminate standards . . . invites abuse by those who want to take advantage of the system. . . . At the same time, doubt is costly to those who want to comply with the law, since they must employ attorneys who can plumb the mysteries of the law to tell them what is safe."); Richard J. Kovach, *Bright Lines, Facts and Circumstances Tests, and Complexity in Federal Taxation*, 46 SYRACUSE L. REV. 1287, 1303 (1996) ("Risk aversion can produce unnecessarily conservative determinations by practitioners. Yet if the risk of audit is perceived to be relatively slight, some professionals will ignore the ominous implications of a faulty facts and circumstances analysis in favor of taking a turn at the roulette wheel of the audit casino."); Logue, *supra* note 1, at 374–75 ("[U]sing such legal uncertainty in this way is a fairly imprecise tool for deterring aggressive tax planning, since some taxpayers will be induced to over-comply and others, the less risk-averse, will be inclined to take a chance and exploit the ambiguity."); *see also* David A. Weisbach, *Ten Truths About Tax Shelters*, 55 TAX L. REV. 249–50 (2002) ("[T]hose arguing against uncertainty . . . would argue that taxpayers vary in their risk aversion, so that uncertainty affects taxpayers differently."). For a similar observation regarding standards in law generally, see, for example, Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 385 (1985).

taxpayers will exploit additional uncertainty by structuring their transactions more aggressively and erring on the side of underreporting tax liability. These varying effects of uncertainty may cause taxpayers to perceive the tax system as unfair, may inspire more taxpayers to adopt aggressive reporting positions, and may prompt more tax advisors to provide aggressive advice to compete for client business.[251] For these reasons and others, uncertainty may negatively affect tax compliance.[252]

The ability to obtain letter rulings could, to a degree, mitigate some of these effects of uncertainty.[253] In terms of enforcement costs, when a taxpayer seeks and obtains a ruling from the IRS, the costs of considering and issuing the ruling are typically covered, at least partially, by a ruling request fee paid by the taxpayer,[254] and the costs incurred by the IRS when auditing that taxpayer are often lower than they would have been without the ruling. As former IRS Chief Counsel Donald Korb noted, one of the benefits to the IRS of the letter rulings program is that "the work of the auditing agents is also simplified. They need only verify that the facts of the consummated transactions correspond to the facts in the rulings."[255] In addition, the ability to obtain a ruling may reduce the likelihood of later litigation, another benefit noted by the former IRS Chief Counsel.[256]

As mentioned above, more uncertainty might also lead to less uniform enforcement. The ability to obtain letter rulings can also make enforcement more uniform—in part because letter rulings entail more centralized decision making.[257]

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251. *See, e.g.*, Kovach, *supra* note 250, at 1306 ("Other professionals are able to view the numerous facts and circumstances tests as opportunities to take daring risks on behalf of grateful clients who are consistently interested in tax avoidance."). For more general discussion of how tax planning opportunities can cause the public to perceive the tax system as unfair or how perceptions of fairness can affect compliance, see, for example, Michael S. Knoll, *Tax Planning, Effective Marginal Tax Rates, and the Structure of the Income Tax*, 54 TAX L. REV. 555, 555 (2001); Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L.J. 1453 (2003); David M. Schizer, *Frictions as a Constraint on Tax Planning*, 101 COLUM. L. REV. 1312, 1319 (2001).

252. *See, e.g.*, Benjamin Alarie, Kalmen Datt, Adrian Sawyer & Greg Weeks, *Advance Tax Rulings in Perspective: A Theoretical and Comparative Analysis*, 20 N.Z. J. TAX'N L. & POL'Y 362, 367 (2014); *id*. at 387 ("Offering taxpayers the opportunity to learn the requirements of the tax law in advance should bolster tax compliance and tax morale more generally, even if taxpayers are reluctant to use the rulings regimes."); Osofsky, *supra* note 1, at 502–11 (describing various ways in which a lack of guidance might prompt certain taxpayers to be more likely to take aggressive reporting positions).

253. For related discussion of the use of Advance Pricing Agreements to reduce uncertainty, see, Diane M. Ring, *On the Frontier of Procedural Innovation: Advance Pricing Agreements and the Struggle to Allocate Income for Cross Border Taxation*, 21 MICH. J. INT'L L. 143, 147 (2000) ("Ideally participating taxpayers obtain tax certainty before actually engaging in their transactions.").

254. *See* Rev. Proc. 2021-1, 2021-1 App. A.

255. *See, e.g.*, Mitchell Rogovin & Donald L. Korb, *The Four R's Revisited: Regulations, Rulings, Reliance, and Retroactivity in the 21st Century: A View From Within*, 46 DUQ. L. REV. 323, 344 (2008). For related discussion of the use of Advance Pricing Agreements, see Ring, *supra* note 253, at 148 ("[A] successful APA program might reduce government administration and enforcement costs . . . .").

256. Rogovin & Korb, *supra* note 255, at 344.

257. Rogovin & Korb, *supra* note 255, at 344.

Furthermore, the publication of issued rulings in anonymized form makes issued rulings more transparent than decisions the IRS makes on audit, for instance.[258] This transparency could encourage more consistency. Indeed, this rationale is often relied upon as a justification for more transparency as a means of reducing the risk of the IRS developing "secret law" if it makes decisions with respect to particular taxpayers that are not publicized.[259]

Finally, uncertainty might cause different taxpayers to respond differently, with conservative taxpayers reporting less favorable tax consequences than aggressive taxpayers. To some degree, the ability to obtain letter rulings can mitigate this effect by providing conservative taxpayers with another means of obtaining certainty. For a taxpayer who seeks a ruling, that certainty will come at the cost of the expense of preparing a ruling request and a ruling request fee. However, even without incurring those expenditures, some taxpayers would benefit from some degree of additional certainty as a result of the publication of issued rulings in anonymized form.[260] If the IRS publicized instances when taxpayers withdraw requests for a ruling in response to an indication from the IRS that it might rule adversely, letter rulings could do even more to mitigate the tendency of some taxpayers to report aggressively in response to uncertainty.[261]

This is not to say that rulings would be a cure all for the effects of uncertainty. Even with the ability to obtain rulings, some taxpayers would refrain from doing so for a variety of reasons, including the cost and time involved and the fact that some taxpayers might opt to take their chances on audit rather than request a ruling from the IRS.[262] Rather, the point is that the ability to obtain a ruling can mitigate uncertainty in some cases. Moreover, in the case of a fact-specific topic, alternative means of providing certainty—such as general guidance in the form of a revenue ruling—may not be particularly viable. Precisely because the inquiry is fact specific, developing generally applicable guidance is difficult. For this reason, other scholars have noted that advance tax rulings may be particularly useful in areas of law where tax outcome turns on the taxpayer's particular circumstances.[263] In other words, fact-

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258. *See infra* notes 330–31 and accompanying text.

259. *See, e.g.*, Judy S. Kwok, *The Perils of Bright Lines: Section 6110(K)(3) and the Ambiguous Precedential Status of Written Determinations*, 24 VA. TAX REV. 863, 870 (2005) ("Indeed, one of the concerns motivating Congress to make these documents public was the fear that this enormous body of tax knowledge and interpretation would result in a secret law, the limited accessibility of which would undermine the private ruling system's credibility."); Kristin E. Hickman, *Should Advance Pricing Agreements Be Published?*, 19 NW. J. INT'L L. & BUS. 171, 174 (1998) ("Supporters of BNA's position [that advanced pricing agreements should be published] also express concern that a secret body of law is being developed with respect to transfer pricing, and that similarly situated taxpayers may be treated unfairly as a result."); Ring, *supra* note 253, at 148 ("[T]he [Advance Pricing Agreement] program's use of private individualized agreements raises a number of risks . . . including the specter of uneven application of substantive law.").

260. Although, in some cases, the fact-specific nature of the question being addressed could make the ruling less useful to other taxpayers. For further discussion, see *infra* Part III.E.

261. *See infra* notes 324–26 and accompanying text.

262. *See, e.g.*, Givati, *supra* note 1, at 152–63.

263. *See* Alarie et al., *supra* note 252, at 382 ("[Advance tax rulings] can play a valuable role when the government wants to provide tailored tax treatment to a specific category of

specific topics may warrant the use of letter rulings even more than other topics which is in tension with the IRS's policy against ruling on such topics.

III. POTENTIAL RATIONALES FOR THE IRS'S RETICENCE

Despite the potential usefulness of letter rulings on fact-specific topics, the IRS generally refrains from issuing such rulings. Eight potential rationales might explain the IRS's policy against ruling on fact-specific questions. This Part will proceed by describing each of the eight potential rationales and analyzing whether each rationale justifies a blanket policy against ruling or could, instead, be better served or equally well served by other means. As this Part will show, some of the rationales have merit and may warrant refraining from issuing letter rulings on a case-by-case basis. For instance, if the taxpayer's request does not contain sufficient facts to allow for a ruling, refusing to rule makes a great deal of sense.[264] However, the rationales do not justify a blanket policy against issuing letter rulings on fact-specific topics.[265]

A. Letter Rulings on Fact-Specific Topics May Be Overly Time Consuming

One factor that might explain the IRS's policy against ruling on fact-specific topics is the time involved in obtaining and analyzing all of the relevant facts needed to reach a conclusion on such a topic. Indeed, other scholars have pointed to the time and resources required to analyze fact-specific questions as one rationale for the IRS's refusal to rule on such questions.[266]

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taxpayers whose members are not too numerous, and where it is difficult to craft a rule *ex ante* to address a given situation because the taxpayer's circumstances are too specific to incorporate into legislation and regulations."). Relatedly, see Yehonatan Givati, *Game Theory and the Structure of Administrative Law*, 81 U. CHI. L. REV. 481, 490–91 (2014) ("[W]hen firms are relatively homogenous, that is, when most of them are expected to have the same reaction to a policy, then agencies should choose rule making as a policy-making instrument. When firms are relatively heterogeneous, that is, when they are expected to have different reactions to a policy, then agencies should choose either licensing or adjudication supplemented with advance ruling.").

264. For further discussion see *infra* Part III.C.

265. One might respond by arguing that, if the underlying factors tend to frequently weigh against ruling on a particular fact-specific topic, announcing a blanket policy against ruling on that topic ahead of time will save taxpayer and IRS resources by preventing taxpayers from requesting rulings that are likely to be met by a refusal to rule. In the context of some topics, refusals to rule may turn out to be common. However, this concern may also be addressed by flagging the topic as one on which the IRS often will not rule and allowing a taxpayer to seek an informal indication at the outset of whether the IRS would consider granting the ruling the taxpayer seeks.

266. *See* Goodman, *supra* note 23, at 87–88 ("Moreover, while all relevant facts might be extant at the time of the ruling request, it would require extensive investigation to extricate them."); Logue, *supra* note 1, at 409 ("[O]ne conceivable answer is that the Service simply does not . . . have a large enough or sufficiently capable staff to do the factual and legal analysis necessary to issue rulings on such fact-intensive questions without running a big risk of adverse selection and moral hazard.").

There is no denying that the IRS faces increasingly significant resource constraints. In 2018, for instance, the IRS employed the equivalent of 73,519 full-time individuals, many fewer than the 92,577 individuals the IRS employed in 2009.[267] Devoting a substantial amount of time to ruling on fact-specific topics may not be the best use of the IRS's remaining resources.

This potential rationale, however, overlooks several things. First, by not issuing a ruling on a taxpayer's fact-specific question, the IRS does not necessarily avoid addressing the question altogether. If the IRS does not issue a ruling, the IRS must still grapple with the time-intensive nature of the question if the IRS audits the taxpayer.

Second, while this was not the case when the IRS started issuing letter rulings (and started its policy of not ruling on certain topics),[268] the IRS currently charges a user fee for most ruling requests. The fee charged varies based on the type of request,[269] and the fees are generally designed to cover the costs incurred by the IRS in considering and issuing the ruling.[270] Indeed, the statute requiring the imposition of a user fee provides that the fee shall be determined based on the average time and difficulty of responding to taxpayer requests.[271] For 2021, depending on the type of request and other factors, the fee could range from $0 to $38,000.[272] Various factors limit the ability of the fees to completely cover the IRS's costs.[273] For instance,

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267. *Personnel Summary, by Employment Status, Budget Activity, and Selected Type of Personnel*, IRS (June 24, 2021), https://www.irs.gov/statistics/soi-tax-stats-personnel-summary-by-employment-status-budget-activity-and-selected-type-of-personnel-databook-table-32 [https://perma.cc/AUZ2-FJ3N].

268. For discussion of this history, see, for example, Givati, *supra* note 1, at 150–69.

269. *See* Rev. Proc. 2021-1, 2021-1 I.R.B. 1, app. A.

270. Rogovin & Korb, *supra* note 255, at 347 ("The fees are based on calculations of the actual cost to the Service of preparing the rulings . . . with discounted fees for lower income taxpayers.").

271. I.R.C. § 7528(b)(1)(B).

272. Rev. Proc. 2021-1, 2021-1 I.R.B. 1, app. A.

273. TREASURY INSPECTOR GEN. FOR TAX ADMIN., THE OFFICE OF CHIEF COUNSEL ACCURATELY ADMINISTERED USER FEES BUT COULD IMPROVE ITS USER FEE REFUND PROCESS 1–2 (2017), https://www.treasury.gov/tigta/auditreports/2017reports/201710012fr.pdf [https://perma.cc/5NE5-49HL] ("Overall, Chief Counsel does not recuperate all costs associated with administering the rulings because of reduced user fees, user fee exemptions, cases for which the Chief Counsel does not rule, and a steady increase in the hours that it takes to complete a ruling."). User fees are also not a complete answer to resource constraints because, at least over an immediate time horizon, staffing decisions are fixed. As a result, additional fee revenue does not necessarily mean that more time on ruling requests does not detract from other uses of the IRS's time. However, over a longer time horizon, the IRS may be able to make adjustments. The extent to which user fees will address resource constraints also depends on the extent to which the fees are retained by the IRS or transferred to the U.S. Treasury's General Fund, which will depend on what Congress has specified in an appropriations act. In 2004, for instance, of the $9.3 million of user fees collected from Chief Counsel letter rulings and determination letters, $3.8 million was retained by the IRS. JAMES R. WHITE, DAVID A. POWNER, STEVEN J. SEBASTIAN & GREGORY C. WILSHUSEN, U.S. GOV'T ACCOUNTABILITY OFF., IRS MODERNIZATION: CONTINUED PROGRESS REQUIRES ADDRESSING RESOURCE MANAGEMENT CHALLENGES 17 (2005), https://www.gao.gov/assets/120/111684.pdf [https://perma.cc/LAR8-KBZJ].

reduced user fees are assessed in some circumstances, so the fees collected may not always cover the costs incurred. In 2021, for example, a reduced letter ruling request fee of $2800 applies to many requests from a person with a gross income of less than $250,000.[274] Also, because the fees are based on the average time and difficulty of considering requests in a given category,[275] the fee collected may be less than the cost of any particular request.

Despite these limitations, the user fees can help to address resource concerns. Moreover, changes to the user-fee schedule could do even more to address resource constraints. For instance, the current user-fee schedule includes three tiers of user fees based on gross income: one for taxpayers with less than $250,000 of gross income, one for taxpayers with less than $1,000,000 of gross income but not less than $250,000 of gross income, and one for taxpayers with $1,000,000 or more of gross income.[276] If more tiers were introduced into the user-fee schedule, fees that came closer to the cost involved might be assessed upon taxpayers with higher incomes while still providing relief to taxpayers who would be unable to shoulder the burden of high user fees.

A third consideration that may be overlooked when pointing to resource constraints as the justification for singling out fact-specific topics for the no-ruling list is that, when requesting a ruling, the taxpayer must submit a request that contains all of the relevant facts.[277] The taxpayer cannot rely upon any issued ruling if the taxpayer misstated or omitted any relevant facts.[278] Thus, much of the cost of gathering the relevant facts will be borne by the taxpayer rather than the IRS. As a result, while resource constraints might necessitate generally cutting back on letter rulings, it is not clear that rulings on fact-specific topics should be targeted as particularly resource intensive, especially given that alternative means of providing certainty may be ill-suited to fact-specific topics, as discussed below in Part III.H.

Finally, the IRS's policy against ruling on fact-specific topics is a long-standing one that has been in place even during times when the IRS's resource constraints were not as stringent.[279] Given the longstanding nature of this policy against ruling on fact-specific topics, it is worthwhile to consider whether any other rationales justify the policy to gauge whether the policy would be appropriate even if the IRS were equipped with more resources.

B. Letter Rulings on Fact-Specific Topics May Pose a Heightened Risk of Taxpayer Fabrication

A second factor that might explain the IRS's refusal to rule on fact-specific questions is a concern that the risk that taxpayers will fabricate or exaggerate certain facts is heightened when taxpayers are providing information necessary for a fact-specific inquiry. Many such inquiries are undertaken as a means of assessing a

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274. Rev. Proc. 2021-1, 2021-1 I.R.B. 1, app. A.
275. I.R.C. § 7528(b)(1)(B).
276. Rev. Proc. 2021-1, 2021-1 I.R.B. 1, app. A.
277. Rev. Proc. 2021-1, 2021-1 I.R.B. 1, § 7.01.
278. Treas. Reg. § 601.201(l)(5) (1987).
279. *See supra* note 14.

taxpayer's motive or purpose for engaging in a particular transaction.[280] Others have expressed the concern that motive-based or state-of-mind-based tax determinations invite taxpayer dishonesty as a general matter.[281] Furthermore, another commentator pointed to the potential for taxpayer dishonesty as a possible reason for the IRS's refusal to rule on topics that turn on issues such as intent or motive.[282]

However, while concern about undetected taxpayer dishonesty might be a potential drawback to utilizing a motive-based determination in the first place, once lawmakers have opted for tax consequences to turn on motive or purpose, the risk of potential taxpayer fabrication does not justify refraining from ruling on such topics. If a motive-based determination invites deceit, the IRS must cope with that possibility when auditing a taxpayer even if a letter ruling was not issued to the taxpayer. The IRS's task is not made any more difficult if a favorable ruling was issued to the taxpayer based upon inaccurate facts because a taxpayer cannot rely upon a ruling if the taxpayer did not accurately and completely disclose the relevant facts when requesting the ruling.[283]

Even though a taxpayer cannot rely upon a ruling that was issued based upon inaccurate taxpayer representations, the concern may be that, once a letter ruling is issued, the IRS might direct its resources elsewhere and not uncover the deception. If a letter ruling had never been issued, perhaps in a face-to-face audit the IRS would have been more likely to uncover the deception that went unnoticed during the ruling process, which may not have entailed face-to-face interaction (although that is not inevitably the case).[284] This concern, however, does not justify a blanket refusal to issue rulings on fact-specific topics for two reasons. First, it may be overly optimistic to assume a higher chance of detecting the deception on audit, given the low audit rate and given that many audits that do occur are not face-to-face. For one recent data

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280. Indeed, asking for a ruling on a topic that turns on motive or state of mind may seem a bit odd—effectively like asking the IRS to tell you what your motive (or another party's motive) was. Perhaps a more coherent way to understand such a request is that the taxpayer is asking the IRS if it agrees about what motive or state of mind ought to be inferred from the available objective evidence that is used to gauge motive or state of mind.

281. *See, e.g.*, Hayashi, *supra* note 180, at 299–300 (discussing how this concern has been raised in the case of intent-based tests).

282. Goodman, *supra* note 23, at 88 ("This would not be of overriding significance if the Commissioner could attach credence to the facts as stated by the taxpayer; however, issues such as intent and relationship are particularly susceptible to coloration of the facts by the taxpayer in his favor.").

283. *See* Treas. Reg. § 601.201(l)(5). Others have suggested, however, that the IRS may not make full use of its ability to revoke rulings. *See* Logue, *supra* note 1, at 410 ("The Service, as mentioned, does have the authority to revoke a ruling after-the-fact if it can show that there were demonstrable misstatements in the ruling request. Such misstatements, however, may be difficult to identify, much less prove; in any event, issuing such a retroactive revocation may be administratively and politically costly.").

284. When requesting a ruling, a taxpayer can request a conference with the IRS, but some rulings may be issued without conferences. Rev. Proc. 2021-1, 2021-1 I.R.B. 1, § 10.01 ("A taxpayer may request a conference regarding a letter ruling request. Normally, a conference is scheduled only when the Associate office considers it to be helpful in deciding the case or when an adverse decision is indicated.").

point, consider that, in 2018, the IRS audited only 0.5% of all returns filed,[285] and roughly 25% of the audits that did occur were field audits rather than correspondence audits.[286] Second, in lieu of simply not issuing rulings, the IRS could address the concern that the IRS may be misled by requests for rulings on fact-specific topics by not allowing the issuance of a ruling to reduce the likelihood of the IRS verifying the underlying facts on audit (which may very well be consistent with the IRS's current practice).

C. Taxpayers May Lack Necessary Facts When Requesting a Letter Ruling on a Fact-Specific Topic

Third, in some circumstances, the taxpayer will not be the person best positioned to provide the IRS with all of the facts relevant to a fact-specific inquiry. As others have noted, this could be the case because some facts may not be known until later in time; after a transaction is completed, for instance.[287] This could also be the case because the taxpayer may lack access to the relevant information or lack necessary expertise. For instance, when evaluating whether the primary purpose of an expenditure is medical care and whether the expenditure is directly related to medical care, the taxpayer's doctor might be the best source of some of the relevant information. Although a doctor's recommendation or prescription is neither necessary[288] nor sufficient[289] for the IRS or a court to conclude that an expenditure was primarily for medical care or directly related to medical care, a doctor's recommendation or prescription is one factor that courts and the IRS consider.[290] Moreover, in some cases in which courts have concluded that an expenditure was not for medical care, the courts appeared to reach this holding in part based on the failure of the taxpayer to offer expert witness testimony from a doctor who had recommended the expenditure. For instance, in *Dobkin v. Commissioner*, the court held that the cost of a trip to Florida was not a deductible medical expense.[291] The

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285. *Examination Coverage: Recommended and Average Recommended Additional Tax After Examination, by Type and Size of Return*, IRS (June 24, 2021), https://www.irs.gov/statistics/soi-tax-stats-examination-coverage-recommended-and-average-recommended-additional-tax-after-examination-irs-data-book-table-9a [https://perma.cc/3JAD-F3XY].

286. *Id.* (showing that, of 991,168 returns that were audited, only 249,768 involved field audits while 741,400 were correspondence audits).

287. S*ee* Goodman, *supra* note 23, at 87. For a related observation, see Samuel L. Bray, *Preventative Adjudication*, 77 U. CHI. L. REV. 1275, 1329 (2010) ("Contrast a case of fact-based indeterminacy. . . . [H]ere a judge will often be in a better (or at least a different) position to decide if adjudication is delayed. . . . [D]elaying adjudication could very possibly change the question that the court is answering and thus the answer it gives.").

288. *See, e.g.*, Crain v. Comm'r, 51 T.C.M. (CCH) 806, 807 (1986) (deductions for medical care "are not limited strictly to traditional medical procedures").

289. *See, e.g.*, Seymour v. Comm'r, 14 T.C. 1111, 1117 (1950) ("The statute deals with 'expenses paid for medical care of the taxpayer.' Not every expenditure prescribed by a physician is to be catalogued under this term . . . .").

290. Havey v. Comm'r, 12 T.C. 409, 412 (1949) (listing, as among the relevant factors to consider, whether it was "incurred at the direction or suggestion of a physician").

291. 15 T.C. 886, 888 (1950).

court noted that, although at least one doctor advised the taxpayer to take the trip, the taxpayer's doctor did not testify.[292] Similarly, in *France v. Commissioner*, the court held that amounts the taxpayer paid for dancing lessons did not constitute deductible medical expenses.[293] The taxpayer had attached to her tax return statements from her doctor indicating that he recommended dancing lessons as therapy for arthritis, but the court noted that "[t]he doctor was not called as a witness."[294]

Thus, the IRS may refrain from ruling on some fact-specific topics because of the view that determinations based, in part, upon advice of an expert are better left to courts that can take into account the expert's testimony. This concern, however, does not justify refraining from issuing rulings on fact-specific questions entirely for several reasons. First, some fact-specific inquiries can be resolved without information from other parties. Second, as part of the ruling request, the taxpayer must include a complete statement of all of the relevant facts,[295] and "[t]rue copies of all . . . documents pertinent to the transactions must be submitted with the request."[296] This latter requirement could include, or could be revised to include, affidavits from the taxpayer's doctor regarding the medical necessity of the expenditure. To address any concern that any lack of credibility would be more easily revealed by live testimony, it is useful to, once again, bear in mind that a taxpayer cannot rely upon a favorable letter ruling if the ruling was based upon misstatements or omissions of material facts or if later developed facts differ materially from the facts upon which the ruling was based.[297]

D. Issuing Letter Rulings on Fact-Specific Topics May Be Inconsistent with the Comparative Advantages of the National Office Versus Auditing Agents

Similar to the notion that the fact finder at the trial level is better positioned to determine facts while appellate court judges are better positioned to determine law, the IRS's refusal to rule on fact-specific questions may be driven by the view that, as between individuals at the IRS's national office who issue rulings and local auditing agents, the former have a comparative advantage when it comes to making judgments of law while the latter have a comparative advantage when it comes to finding facts.

While this may be an accurate description of comparative advantages, this rationale ignores that issuing a ruling on a fact-specific topic does not meaningfully involve fact finding by the persons issuing the ruling. A taxpayer can only rely upon the ruling if the taxpayer provides the IRS with complete and accurate facts when requesting the ruling,[298] and thus, the taxpayer must either supply the relevant facts or risk not being able to rely upon the ruling if an examining agent later finds additional or contrary facts. If the IRS reaches a conclusion on a fact-specific topic based upon facts supplied by the taxpayer, doing so involves not fact-finding but

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292. *Id.*
293. 40 T.C.M. (CCH) 508, 510 (1980).
294. *Id.* at 509.
295. Rev. Proc. 2021-1, 2021-1 I.R.B. 1, § 7.01(1).
296. Rev. Proc. 2021-1, 2021-1 I.R.B. 1, § 7.01(2).
297. Treas. Reg. § 601.201(l)(5) (1967).
298. *Id.*

making a judgment about how the law will apply to the facts that were supplied by the taxpayer.

It is true that, in some cases, the taxpayer's request may not contain enough information to allow for a worthwhile ruling on a fact-specific topic. In those instances, the ruling's limited benefit may not justify the taxpayer and IRS resources used to produce the ruling. Some letter rulings that were issued on the question of whether a transfer constitutes a gift illustrate this potential drawback to ruling on fact-specific topics. For example, in a 1970 letter ruling, the taxpayer had requested a ruling regarding whether amounts received while panhandling constituted gifts.[299] The ruling assumed various facts that were not supplied by the taxpayer (for instance, the ruling assumed that the taxpayer did "not perform any services . . . in the course of his 'panhandling' activities").[300] If these assumed facts were not true, the ruling's usefulness to the particular taxpayer would be limited. Also, the ruling hedged its ultimate conclusion in a way that reduced its value to the particular taxpayer as well as its potential to act as a general guide to the IRS's views for all taxpayers. In particular, the ruling stated, "[I]f passersby contribute to you out of purely charitable motives, or from a disinterested generosity or similar impulse it would be proper to regard such amounts as gifts."[301] Read one way, this does little more than simply articulate the legal standard for when something constitutes a gift for income-tax purposes.[302] As discussed above in Part I.A, whether something constitutes a gift for income-tax purposes hinges on whether the transferor made the transfer out of detached and disinterested generosity. Thus, the panhandling ruling's conclusion, in a sense, amounts to stating that, assuming the transfers are gifts for income-tax purposes, they are gifts for income-tax purposes. Perhaps what the drafters intended by this statement in the ruling was, instead, something like, "Assuming the taxpayer provided no services or anything else of value in exchange for the amounts received from panhandling, then it would be proper to regard such amounts as gifts." If so, the conclusion ought to have been phrased in that way. Such phrasing would have made the ruling more useful to the particular taxpayer (provided the assumed facts were true) as well as more valuable to taxpayers in general because it would do more than simply restate the existing legal standard.

While some rulings on fact-specific topics might not be particularly valuable to the taxpayers who seek them, this risk does not necessarily justify a blanket policy against issuing such rulings. First, given that taxpayers must pay a ruling request fee that covers the cost of issuing a ruling, to some extent, we can count on the taxpayer

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299. I.R.S. Priv. Ltr. Rul. 7004070460A (Apr. 7, 1970).

300. *Id.*

301. *Id.*

302. On the other hand, if it is possible that courts might depart from a standard based on the intent of a transferor in some cases, then this conclusion could be viewed as doing something other than merely articulating the legal standard. For discussion of the possibility that a departure from a standard based on the transferor's intent may be warranted in some cases, see Douglas A. Kahn & Jeffrey H. Kahn, *"Gifts, Gafts, and Gefts"—The Income Tax Definition and Treatment of Private and Charitable "Gifts" and a Principled Policy Justification for the Exclusion of Gifts from Income*, 78 NOTRE DAME L. REV. 441, 481–83 (2003); Jeffrey Kahn, *GoTaxMe: Crowdfunding and Gifts*, 22 FLA. TAX REV. 180, 192–98 (2018).

to decide whether the risk that the ruling request does not include all material facts makes the ruling not sufficiently valuable to justify the cost. Indeed, a note written at a time when the IRS did not assess fees for letter ruling requests observed that levying fees could be an alternative to simply not issuing rulings on fact-specific topics, at least when the refusal to rule is inspired by the risk that the ruling might prove to be useless to the taxpayer based on later-developed facts.[303] As the note observed, if the taxpayer must pay a fee to cover the cost of the ruling, we could "leave it to the taxpayer to decide whether the cost involved is less than the value" of the ruling.[304] Second, the IRS could take steps to mitigate the risk that rulings will not be particularly worthwhile. For instance, if a ruling request contained very limited facts, rather than assuming facts that were not stated, the IRS could decline to rule unless and until the taxpayer submitted an updated request with additional facts. In addition, when the IRS does have sufficient facts to rule, it can avoid phrasing conclusions in ways that merely restate the applicable legal standard, making clear that its ruling stands as long as the ruling request contains an accurate description of all material facts.

E. Letter Rulings on Fact-Specific Topics May Be of Limited Value to Other Taxpayers

While only the taxpayer to whom a letter ruling is issued can rely upon it,[305] a letter ruling, nonetheless, can offer a useful guide to other taxpayers of the IRS's likely position on the tax treatment of particular events or transactions.[306] In the case of a fact-specific question, however, a ruling's potential value to other taxpayers may be particularly insubstantial. Unless another taxpayer's facts exactly match the facts of the ruling, the predictive power of the ruling is lower in the case of a fact-specific inquiry than it would be when the inquiry is less fact-specific. Indeed, as others have noted, a similar phenomenon arises in the context of judicial determinations regarding fact-specific questions: when the question involved is very fact specific, previously decided cases provide less of a clear guide as to the likely outcome of a future case.[307]

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303. Goodman, *supra* note 23, at 90.

304. *Id.*

305. *See* Treas. Reg. § 601.201(l)(1) (1967) ("A taxpayer may not rely on an advance ruling issued to another taxpayer.").

306. Holmes, *supra* note 8, at 1427 (noting that letter rulings can act as a useful guide in this way). Beyond acting as a guide to other taxpayers, in at least some cases, courts have cited to private letter rulings as persuasive authority and used them for other purposes. For discussion of use by courts of private letter rulings, for example, see Paul L. Caron, *Tax Myopia Meets Tax Hyperopia: The Unproven Case of Increased Judicial Deference to Revenue Rulings*, 57 OHIO ST. L.J. 637, 669 (1996) ("[T]axpayers and the Service nevertheless cite letter rulings in their arguments, and courts often refer to letter rulings in the course of their opinions."); Stephanie Hoffer, *Hobgoblin of Little Minds No More: Justice Requires an IRS Duty of Consistency*, 2006 UTAH L. REV. 317, 338 (2006) ("[S]ome courts, including the Supreme Court, have looked to private letter rulings for evidence of administrative interpretation."); Kwok, *supra* note 259, at 877–85; Lawrence Zelenak, *Should Courts Require the Internal Revenue Service to be Consistent?*, 40 TAX L. REV. 411, 418–22 (1985).

307. S*ee, e.g.*, Bray, *supra* note 287, at 1328 ("For example, a system might allow

The value of a ruling on a fact-specific topic to other taxpayers may also be lessened because some issued rulings include redactions that make it potentially difficult for other taxpayers to ascertain whether their facts are the same as the facts upon which another taxpayer's ruling was based. And, of course, if a topic is fact specific, knowing all of the facts of a previous ruling is even more crucial when attempting to determine whether the previous ruling sheds any light on the likely tax treatment of another taxpayer. Indeed, in another context, the concern that the fact-specific nature of determinations may reduce their value to other taxpayers—particularly after the redaction of relevant information—has been used to support an argument against the publication of advanced pricing agreements or to support an argument that the Service would need to supplement them with additional, general guidance.[308]

While it may be true that rulings on fact-specific topics offer less valuable guidance to other taxpayers than rulings on topics that are less fact specific, this observation does not necessarily justify a categorical policy against ruling on a fact-specific topic. For one thing, to some extent, this observation may suggest that the IRS should be more inclined to rule on such topics rather than less inclined to do so. The fact-specific nature of an inquiry makes it so that rulings that were issued on a given topic prior to its addition to the no-ruling list may offer little value to other taxpayers, making taxpayers' continued need for additional rulings on these topics even greater.

Second, it is useful to bear in mind that taxpayers who seek a ruling must pay a ruling request fee generally designed to cover the cost to the IRS of considering and issuing the ruling. Therefore, the fact that a ruling offers little benefit to other taxpayers may be less of a concern than it would be without a fee (in which case other taxpayers would subsidize the ruling). Moreover, while the letter ruling may be of limited use to other taxpayers, it does serve the goal of providing certainty to the taxpayer who requested it, which may make it possible for that taxpayer to carry out a transaction that the taxpayer might not have undertaken without the additional certainty. In response, one might raise the concern that issuing rulings on fact-specific topics will result in providing certainty only to taxpayers who can afford the filing fee. However, even without the ability to obtain a ruling on such topics, the

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preventive adjudication in any case of lexical indeterminacy, but not in cases of fact-based indeterminacy. There are good reasons to do this, because deciding lexical indeterminacy cases brings a greater return at a lower cost. Resolving one case of lexical indeterminacy can remove legal uncertainty in many other cases, because lexical indeterminacy is 'chunky' (involving large groups of essentially identical cases)."); Yorio, *supra* note 248, at 23 ("A multifactor test increases the costs of the legal system in another more subtle way. Since the outcome of each case turns on a balancing test involving a number of different facts, the precedential value of any decision is lessened.").

308. Hickman, *supra* note 259, at 191 ("Given the facts and circumstances nature of transfer pricing methodologies and advance pricing agreements, to preserve confidentiality, the IRS would have to cut out so much information that the published version would be virtually useless for taxpayer guidance purposes."); Ring, *supra* note 253, at 215 ("Based on the considerations outlined, disclosure of redacted APAs seems required. To the extent their 'Swiss cheese' nature would render them less than illuminating, the Service could complement their content with more explanatory general guidance.").

unfortunate fact is that taxpayers with financial resources will be more able than taxpayers with limited resources to obtain assurances by obtaining legal advice. It is possible that continuing to offer letter rulings with discounted ruling request fees for taxpayers with limited resources would do a better job of allowing taxpayers with limited resources to obtain certainty than simply refraining from ruling on fact-specific topics altogether.[309]

Third, an examination of rulings that were issued on fact-specific topics prior to their additions to the no-ruling list suggests that such rulings are not, inevitably, useless to other taxpayers. In particular, some of the rulings on fact-specific topics address fact patterns that may be fairly common fact patterns, so other taxpayers are likely to engage in transactions virtually identical to the transaction in a ruling. For instance, consider the 1985 letter ruling discussed above in which the IRS declined to rule on whether certain payments made by an organization that provided vocational development services to clients with disabilities constituted gifts.[310] Assuming many clients participated in the program or similar programs, a ruling would have addressed a question that affected numerous taxpayers. As another example, consider the 1984 ruling mentioned above in which the IRS ruled that a monetary award received by an assistant professor at a large university was not a gift where the award was sponsored by various private companies and "given to junior faculty members who had demonstrated . . . abilities in research and teaching."[311] The ruling suggested that other professors at that university received awards under virtually identical circumstances, and likely professors at other universities had as well.[312] Thus, the ruling provided a potentially useful guide to taxpayers other than the one who obtained the ruling.

Fourth, regarding redactions, the IRS has, from time to time, issued rulings that redact material facts that would make it difficult for another taxpayer to assess whether his or her facts are sufficiently close to the facts of the ruling to give the ruling predictive power. Consider, for instance, the 2010 ruling regarding Section 1031(f) discussed above in which the conclusion appeared to turn, in part, on the fact that the taxpayer had received only a small amount of cash.[313] Given that the amount of cash received was redacted, it would be difficult for other taxpayers to judge whether the facts of their transactions were consistent with the facts in the ruling. To address the issue of redactions making rulings less useful, however, rather than flatly refusing to issue rulings on fact-specific topics, the IRS could decline to rule in any circumstance in which material facts would be redacted if a ruling were issued.

Certain information that is exempt from public disclosure is redacted from published letter rulings.[314] When requesting a letter ruling, a taxpayer must include

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309. The most recent revenue procedure provides for a reduced letter ruling request fee of $2800 if the request involves "a personal, exempt organization, governmental entity, or business tax issue" from a person with gross income of less than $250,000. Rev. Proc. 2021-1, 2021-1 I.R.B. 1, app. A.

310. *See supra* notes 77–81 and accompanying text.

311. I.R.S. Priv. Ltr. Rul. 8442027 (July 12, 1984); *see supra* notes 56–60 and accompanying text.

312. I.R.S. Priv. Ltr. Rul. 8442027 (July 12, 1984).

313. *See supra* notes 208–221 and accompanying text.

314. I.R.C. § 6110(c).

a "deletion statement" with the request.[315] In this statement, if the taxpayer wants information deleted that extends beyond names, addresses, and identifying details, the taxpayer must specify what information they want deleted and the statutory basis for each proposed deletion.[316] When deciding whether to rule in response to a particular request, the IRS could take into account whether honoring the proposed deletions would make the basis for the ruling inscrutable by other taxpayers and decline to issue a ruling in such cases.

F. Letter Rulings on Fact-Specific Topics May Create a Roadmap for Tax Abuse

Another consideration that might underlie the IRS's reluctance to rule on certain fact-specific topics is the concern that doing so might create a roadmap for taxpayers to follow to obtain more favorable tax consequences than what their transactions, in fact, warrant. This concern may arise particularly when the fact-specific question entails determining whether a transaction was overly tax motivated as is true in the case of the topics related to Section 1031(f) on which the IRS ordinarily will not issue letter rulings. A concern about potential abuse might also underlie the IRS's decision to no longer issue rulings on the deductibility of the cost of swimming pools and similar items.[317] In these contexts, the IRS's hesitation might be driven, in part, by a concern that providing too much certainty regarding an anti-abuse provision's contours will allow taxpayers to disguise their overly tax-motivated transactions as not so motivated.[318]

Relatedly, given the concern about creating a roadmap for tax abuse, when the IRS does issue letter rulings concluding that a transaction is not overly tax motivated, the IRS might have a tendency to rule on only the easy cases where lack of tax motivation is readily apparent. Some of the rulings that have been issued relating to Section 1031(f) might be characterized in this way—in other words, viewed as dealing with fairly easy cases.[319] To the extent that rulings issued on the topic of

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315. Rev. Proc. 2021-1, 2021-1 I.R.B. 1, § 7.01(12).

316. *Id.*

317. *See* Ferris v. Comm'r, 582 F.2d 1112, 1115 (7th Cir. 1978) ("Congress was responding to the hardship imposed when a taxpayer incurred extraordinary medical expenses but was obliged to pay income taxes on funds used to defray them. It nonetheless recognized that its choice would allow deductibility of expenses 'for facilities, devices, services, and transportation which are of the types customarily used, or taken, primarily for other than medical purposes,' and expressed its concern over the possibilities of abuse in such areas, swimming pools being specifically cited.") (citations omitted).

318. This can be a concern, in general, regarding providing clear rules in tax law; clear rules may serve as a roadmap for taxpayers who want to engage in abusive transactions that comply with the letter, but not the spirit, of the law. For discussion of this concern, see *supra* note 180.

319. For discussion of rulings in this area, see *supra* Part I.C. *See also* Joshua D. Blank, *The Timing of Tax Transparency*, 90 S. CAL. L. REV. 449, 494 (2017) ("Mandatory public release of the IRS's advance tax rulings and agreements also poses little risk of encouraging taxpayers to increase their use of tax avoidance strategies in order to meet benchmarks of tax aggressiveness. Unlike the tax positions that trigger audits and tax controversies over deficiency assertions, the issues that are the subject of advance tax rulings are not aggressive tax positions that rely on questionable interpretations of the tax law.").

whether a transaction is overly tax motivated might tend to be limited to easy cases, the value of such rulings may be low in that the rulings merely provide answers that taxpayers tend to expect even without a ruling.[320] If this is true, perhaps not much is lost by simply refraining from ruling on such topics altogether.

While these considerations have merit, they do not justify refraining from issuing rulings on fact-specific topics in all cases. First, this concern is not as relevant in the context of fact-specific determinations that do not, directly, relate to whether a transaction is excessively tax motivated.

Second, the concern that rulings on whether transactions are excessively tax motivated will create a roadmap for tax abuse may be overstated. Taxpayers other than the taxpayer to whom a ruling was issued cannot rely upon it.[321] Therefore, if another taxpayer did design a transaction in an attempt to imitate the facts of a ruling in circumstances in which the taxpayer's transaction was, in fact, excessively tax motivated, the existence of the ruling does not grant favorable tax treatment to the taxpayer's transaction. Despite the fact that other taxpayers cannot rely upon the ruling, many taxpayers may, nevertheless, use the ruling as a guide in planning their own transactions. As a result, the conclusion of the ruling could affect tax consequences claimed by other taxpayers which could go unchallenged if the taxpayers are not audited. However, it is not clear that the effect of the ruling would be to cause taxpayers to engage in even more aggressive transactions because, absent the ruling, some may have operated under assumptions about tax law that were even more taxpayer favorable than what the ruling provided.

Rather than simply imitate the facts of an issued letter ruling, a taxpayer might go a step further and request his or her own ruling, using an issued ruling as a model of the sort of facts to recite in his or her ruling request. Even if such a taxpayer does obtain his or her own favorable ruling, however, it will not necessarily prevent the IRS from later auditing and challenging the claimed tax consequences if the ruling request omitted other material facts that show the transaction to be more tax motivated than it appeared to be based upon the facts in the request.

Third, withholding guidance to create uncertainty and deter excessively tax-motivated transactions can affect different taxpayers differently.[322] It may only succeed in deterring conservative taxpayers and emboldening aggressive taxpayers.[323] Furthermore, even if the IRS is only willing to issue rulings on fairly easy cases, conservative taxpayers might value the certainty afforded by such a ruling. Indeed, given that taxpayers must pay a ruling request fee generally designed

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320. For discussion of this phenomenon in the context of examples in regulations, see Susan C. Morse & Leigh Osofsky, *Regulating by Example*, 35 YALE J. ON REGUL. 127, 151–52 (2018) ("A regulatory example that gives an obvious answer in an easy case does not offer as much valuable legal content as an example that gives a result in a hard case, or even merely identifies the hard case.").

321. Treas. Reg. § 601.201(l)(1) (1967).

322. *See supra* note 250.

323. We might view this disparate effect of uncertainty as undesirable for reasons discussed above. *See supra* note 251 and accompanying text. For additional discussion of various ways in which uncertainty can embolden aggressive taxpayers, see Osofsky, *supra* note 1, at 502–11 (describing various ways in which a lack of guidance might prompt certain taxpayers to be more likely to take aggressive reporting positions).

to cover the costs incurred by the IRS in considering and issuing a ruling, if a taxpayer does not think that a ruling on an easy case is valuable enough to justify the cost of the ruling, the request fee ought to discourage the taxpayer from requesting such a ruling.

Finally, refraining from issuing rulings on whether transactions are overly tax motivated sacrifices an opportunity to issue adverse rulings which might help to curb tax avoidance. As another commentator observed, "[a]lthough the Commissioner is justified in not wanting to give an advance stamp of approval regarding such issues as intent, it should be possible for him to rule whether, on the face of the ruling request together with any facts learned in conference, he *does* find an intent to avoid taxes."[324]

The ability to use adverse rulings to curb tax avoidance is constrained by the fact that taxpayers will often withdraw their ruling requests when the IRS plans to issue an adverse ruling, so oftentimes, letter rulings that would have been adverse are not made public but are only known to the taxpayer who requested them.[325] Nevertheless, a potentially adverse ruling can still deter the particular taxpayer who requested it. The request for the ruling also informs the IRS of the transaction so the IRS could publish a revenue ruling if the issue raised by the request is likely to be a recurrent one affecting multiple taxpayers. Moreover, Professor Blank has proposed that the IRS should be required to publicize circumstances in which a taxpayer withdraws a request prior to the IRS issuing a ruling.[326] Such a requirement could amplify the effects of rulings that would have been adverse but are never issued.

G. Letter Rulings on Fact-Specific Topics May Cause Taxpayers to Perceive Inconsistencies

In addition to the considerations discussed above, the IRS might be concerned that the publication of letter rulings issued on fact-specific topics will cause the public to perceive inconsistencies among the conclusions reached in rulings with similar but slightly different facts, and this concern might prompt the IRS to refrain from issuing rulings on such topics entirely. Relatedly, some have expressed the concern that the use by courts of issued letter rulings to show that the IRS has engaged in inconsistent interpretations might discourage the IRS from issuing rulings altogether.[327] Whether inconsistency would give rise to a legal remedy is not entirely

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324. Goodman, *supra* note 23, at 88.

325. *See* Rev. Proc. 2021-1, 2021-1 I.R.B. 1, § 8.06 ("Generally, after the conference of right is held but before the letter ruling is issued, the branch representative will orally notify the taxpayer or the taxpayer's representative of the Associate office's conclusions. . . . If the Associate office is going to rule adversely, the taxpayer will be offered the opportunity to withdraw the letter ruling request."); *see also* Blank, *supra* note 319, at 457 ("When the IRS publishes advance tax rulings today, it almost always discloses rulings where the agency granted taxpayers' requests. If they anticipate adverse rulings, taxpayers can withdraw their ruling requests, obviating the need for a written determination by the IRS.").

326. Blank, *supra* note 319, at 503 ("[T]he policy should mandate public disclosure of the outcome of the taxpayer's request. Possible outcomes are that the IRS grants the request, the IRS denies the request, or the taxpayer withdraws the request prior to a decision by the IRS.").

327. *E.g.*, Hoffer, *supra* note 306, at 348 ("There is a third, closely related argument

clear.[328] However, even absent legal remedy, perceptions of inconsistency could undermine public trust.

Regarding the potential concern about perceived inconsistency, a couple responses are in order. First, fact-specific determinations may inevitably result in somewhat-similar taxpayers being treated differently.[329] However, it is not clear whether perceptions of inconsistency will be exacerbated or mitigated by issuing rulings. It is at least possible that perceptions of inconsistency will be even greater absent the issuance of rulings if taxpayers become aware of incomplete and unsubstantiated information about how other taxpayers were treated on audit. Professor Johnson, for instance, has noted that the public receives only incomplete information about inconsistencies in the treatment of taxpayers on audit,[330] and Professor Yin has observed that a lack of transparency about the treatment of taxpayers could aggravate public perceptions of inconsistent treatment.[331]

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against imposing a broad duty of consistency on the Service. Some opponents of the duty fear that it will have a chilling effect on the Service's ruling and information-sharing functions."); Steve R. Johnson, *An IRS Duty of Consistency: The Failure of Common Law Making and a Proposed Legislative Solution*, 77 TENN. L. REV. 563, 599–600 (2010) ("Second, the effect of a consistency requirement on the IRS's willingness to provide guidance should be considered. . . . The number of annual rulings issued by the IRS is already at a low level according to historical standards. Requiring private letter rulings and other types of guidance to be sources of required consistency might make them less attractive and exacerbate the situation."); Gerald G. Portney, *Letter Rulings: An Endangered Species?*, 36 TAX L. 751, 751 (1983).

328. For further discussion, see, for example, Hoffer, *supra* note 306; Johnson, *supra* note 327; Kwok, *supra* note 259, at 866 ("Although the extent to which the Service has such a duty is still ambiguous, case law has raised the possibility that the Service may be bound, under certain circumstances, to give similar treatment to similarly situated taxpayers."); Christopher M. Pietruszkiewicz, *Does the Internal Revenue Service Have a Duty to Treat Similarly Situated Taxpayers Similarly?*, 74 U. CIN. L. REV. 531 (2005); Zelenak, *supra* note 306. One might argue that the possibility of inconsistency giving rise to a legal remedy is lower in the case of a fact-specific topic than it might otherwise be; in the case of a fact-specific topic, a difference in outcome might be explained as not an inconsistency but a difference justified by different underlying facts. Thus, arguably, the risk to the IRS that a previous letter ruling might be used against it in the future is lower in the case of a fact-specific topic.

329. For discussion of courts reaching different conclusions regarding whether expenses are deductible medical expenses in cases with somewhat similar facts, for instance, see *supra* notes 90–101 and accompanying text.

330. Johnson, *supra* note 327, at 568 ("It is impossible to know how often the IRS takes inconsistent positions. Most transactions between taxpayers and the IRS are subject to privacy rules and do not become matters of public record.").

331. George K. Yin, *Reforming (and Saving) the IRS by Respecting the Public's Right to Know*, 100 VA. L. REV. 1115, 1157 (2014) ("Making the decisions in secret does not make them any less contentious; if anything, it may heighten the degree of controversy. Moreover, the public may already have knowledge of some of the hard (and debatable) cases because of disclosures by the organizations affected. Those disclosures, however, may be incomplete so that the organization can put its position in the best light. Opening up the applications and the IRS's decision-making process would tend to ensure greater fairness by the tax agency in processing the applications and promote fuller communication to help insulate the agency from unfounded criticism.").

Second, unlike in the case of determinations made on audit that are not publicly available, in the case of a letter ruling, the IRS can take care to describe the facts of a ruling in a way that highlights the key facts that led to a different outcome than the outcome in other rulings. The IRS already maintains an internal system that would allow it to find any letter rulings on a similar topic.[332] Identifying the relevant rulings would allow the IRS to distinguish the facts of the current ruling from the facts of other rulings on the same topic. Thus, the IRS can take steps to mitigate any perceptions of inconsistency in the case of rulings.[333]

H. Alternatives to Letter Rulings May Be Preferable

One final explanation for the IRS's reluctance to rule on fact-specific topics may be that other preferable alternatives exist for providing certainty to taxpayers. One alternative would entail the IRS issuing generally applicable guidance—like a revenue ruling—rather than a letter ruling upon which only the particular taxpayer can rely. Another alternative would entail the taxpayer obtaining a tax opinion from an advisor, for instance.

As to the first possibility, precisely because of their fact-specific nature, general guidance is a poor fit for fact-specific topics.[334] As to the second possibility, while the alternative of a tax opinion may offer a convincing justification for refraining from issuing letter rulings on topics (fact-specific or not) that almost exclusively affect sophisticated taxpayers who have resources to obtain such advice, it does not justify a blanket prohibition against ruling on topics that can also affect taxpayers who are not in that position.[335] Of course, requesting a letter ruling also requires resources, but reduced user fees are charged for taxpayers with incomes below

332. *See, e.g.*, Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OHIO ST. L.J. 1037, 1058 (1995) ("Letter rulings that are deemed to have 'reference value,' as well as supporting documents, are retained in a reference file. When consideration of a ruling request indicates that a prior letter ruling position should be reversed or substantially modified, the new ruling may be issued only after a detailed memorandum is submitted to, and approved by, the Assistant or Associate Chief Counsel."); Hoffer, *supra* note 306, at 339 ("[T]he Service maintains prior rulings in a reference file and relies on them when dealing with similar requests. In addition, when an employee finds that a prior ruling position should be reversed or modified, the employee may issue a new ruling only with the blessing of counsel."); Kwok, *supra* note 259, at 915 ("The Service maintains an indexed reference file for PLRs deemed to have 'significant future reference value because of the issues involved.' The system is designed to ensure that the Service follows, distinguishes, or renounces its earlier rulings."); Zelenak, *supra* note 306, at 439–43.

333. This is true, assuming that perceptions are inaccurate. If there is true inconsistency, then continuing to issue published rulings could help to serve the function of discouraging inconsistency.

334. *See supra* note 263 and accompanying text. One possible response is that the IRS ought to focus its letter ruling efforts on non-fact-specific topics because requests on those topics could provide the IRS with information that it could use to select topics on which general guidance could be useful. However, there are other means by which the IRS can obtain information about topics in which guidance would be useful, such as through seeking comments on its priority guidance plan.

335. *See supra* note 15.

certain thresholds,[336] and it may be possible to simplify the process for requesting rulings on some topics affecting individual taxpayers.

CONCLUSION

Tax law contains many standard-based tests that require fact-specific analysis to determine the appropriate tax outcome. It is, in part, because of those standard-based aspects of tax law that taxpayers will often have questions about the tax treatment of their transactions, but those are precisely the types of questions on which the IRS will not issue letter rulings. Eight possible rationales might, at first, appear to explain the IRS's reluctance to rule on fact-specific topics. However, a closer examination of each potential rationale shows that the rationales do not justify a blanket policy against ruling on fact-specific topics because each rationale could be equally well addressed or better addressed by taking steps other than simply not issuing rulings. Moreover, taking steps other than simply not issuing rulings to address the concerns undergirding the IRS's reluctance to rule on fact-specific questions would allow the IRS to issue letter rulings on questions for which a letter ruling could be particularly useful.

336. In addition, the fee schedules could be modified to include additional levels based on other ranges of income, as discussed above. *See supra* notes 272–275 and accompanying text.