Preston Memorial Hospital v. Joseph M. Palmer, State Tax Commissioner, No. 30682

Davis, J., concurring:

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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

I join fully in today's opinion. I write separately only to sound a cautionary note on the use of technical assistance advisories (hereinafter "TAAs"). W. Va. Code § 11-10-5r(b) (1986) (Repl. Vol. 1999) provides, "[a] technical assistance advisory shall have no precedential value except to the taxpayer who requests the advisory and then only for the specific transaction addressed in the technical assistance advisory, unless specifically stated otherwise in the advisory." While the State Tax Commissioner (hereinafter "Commissioner") initially raised the non-precedential nature of TAAs, he later expressly waived reliance on W. Va. Code § 11-10-5r(b) by "embrac[ing] the reasoning of TAA 95-008 . . . ." Thus, the Court had no need, nor basis, to address this section. *See Morris v. Painter*, 211 W. Va. 681, 684-86, 567 S.E.2d 916, 921 (2002) (per curiam) (Davis, C.J. dissenting) (explaining that an appellate court lacks jurisdiction to address a claim that a party expressly waives). Nevertheless, recognizing that TAAs are not the only type of non-precedential administrative materials authorized by the Legislature,[1] and further recognizing that they are a valuable resource to the people of West

[1]*See, e.g.*, W. Va. Code § 29A-4-1 (1964) (Repl. Vol. 1998) (authorizing an agency to issue a declaratory ruling that, "if issued after argument and stated to be binding, is binding between the agency and the petitioner on the state of facts alleged, unless it is altered or set aside by a court, but it shall not be binding on any other person"); W. Va. Code § 29A-2-9 (Repl. Vol. 1998) ("Every agency shall file in the state register all final orders, decisions and (continued...)

Virginia, I take this opportunity to discuss them so that our Opinion is not taken out of context and the citizens of this State are not denied an important tool in dealing with their state government.

TAAs are similar to federal Internal Revenue Service (hereinafter "IRS") Private Letter Rulings (hereinafter "PLR"). Under 26 U.S.C. § 6110(k)(3) (2000), "[u]nless the Secretary [of the Treasury] otherwise establishes by regulations, a written determination may not be used or cited as precedent."[2] Because TAAs and PLRs are so similar, federal case law provides guidance to us in interpreting W. Va. Code § 11-10-5r. *See Cox v. Amick*, 195 W. Va. 608, 612 n.1, 466 S.E.2d 459, 563 n.1 (1995) (recognizing that "[b]ecause the wording of the [federal and state] statutes is similar we f[ind] an examination of federal case law to be helpful in establishing our standard of review"). W. Va Code § 11-10-5r does not countenance application of a TAA to anyone other than the requesting taxpayer. *See, e.g., Penn Mut. Life Ins. Co. v. United States*, 68 F.3d 1371, 1372 (D.C. Cir. 1995) ("In a private letter ruling, the

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[1](...continued)
opinions in the adjudication of contested cases except those required for good cause to be held confidential and not cited as precedent. Except as otherwise required by statute, matters of official record shall be made available for public inspection pursuant to rules adopted in accordance with the provisions of this chapter."); W. Va. Code § 5E-1-18(a) & (c) (1991) (Repl. Vol. 2000) (authorizing the economic development authority to issue informal rulings under the statute and authorizing the release or publication of such rulings, but expressly stating that "[s]uch rulings shall not constitute binding precedent, and are issued solely for the guidance of those persons requesting the ruling").

[2]"Written determinations" under the federal Internal Revenue Code include private letter rulings. *See* 26 U.S.C. § 6110(d)(1)(A) (2000).

IRS applies the tax laws to a specific factual problem presented by a particular taxpayer; only that taxpayer may then rely on the ruling.") Likewise, as the federal Court of Claims has recognized, "[a]ssiduously giving effect to the statute's language, most courts have refused to consider private letter rulings as any form of precedent." *Vons Cos., Inc v. United States*, 51 Fed. Cl. 1, 9, *opinion modified on other grounds*, 2001 WL 1555306, at *1 (Fed. Cl. Nov. 30, 2001).

The detriment that would result from reading advisory opinions like TAAs as having precedential weight is monumental. In addressing 26 U.S.C. § 6110, the federal counterpart to W. Va. Code § 11-10-5r(b), both a Senate and a House of Representatives report explains:[3]

> If all publicly disclosed written determinations were to have precedential value, the IRS would be required to subject them to considerably greater review than is provided under present procedures. The committee believes that resulting delays in the issuance of determinations would mean that many taxpayers could not obtain timely guidance from the IRS and the rulings program would suffer accordingly. Consequently, both the committee amendment and the House bill codify the present administrative rules by providing that determinations which are required to be made open to public inspection are not to be used as precedent.

S. Rep. No. 94-938, at 311, *reprinted in* 1976 U.S.C.C.A.N. 3439, 3740 (1976). *See also* H. R. Rep. No. 94-658, at 322-23, *reprinted in* 1976 U.S.C.C.A.N. 2897, 3219 (1975) (similar).

[3]Section 6110 was originally enacted as section 1201(a) of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, 1660. The above-quoted Committee Reports accompanied that piece of legislation.

Moreover, the disclosure provisions of W. Va Code §§ 11-10-5r(d) & (e) are consistent with the public policy articulated in the West Virginia Freedom of Information Act "that all persons are, unless otherwise expressly provided by law, entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." W. Va. Code § 29B-1-1 (1977) (Repl. Vol. 1998). W. Va Code §§ 11-10-5r(d) & (e) are textually and contextually consistent with a legislative purpose of advancing public awareness and enhancing popular accountability-rather than creating any type of precedent. *See, e.g.*, Syl. pt. 7, *Ewing v. Board of Educ.*, 202 W. Va. 228, 503 S.E.2d 541 (1998) (observing that a statute should be read to make it harmonize with other statutory enactments).

In sum, "[TAAs], in accordance with [W. Va. Code § 11-10-5r], may not be used or cited in any precedential way and thus, *a fortiori*, may not be used to support, in any fashion, an argument that one interpretation of the Code is more authoritative than another." *Vons*, 51 Fed. Cl. at 12. The use of TAAs to create precedent negates the plain language of W. Va. Code § 11-10-5r(b) and "threatens the functional relationship between allowing the [Commissioner] to use a streamlined review process to issue such rulings and memoranda on a relatively expedited basis in exchange for assurances that those documents will have no precedential impact except as to the taxpayers to which they are issued." *Vons*, 51 Fed. Cl at 12.

TAAs can be of valuable benefit to those seeking an expeditious and inexpensive ruling

upon which they can confidently rely--especially in an area, like tax law, which is "highly specialized and so complex as to be the despair of judges." *Dobson v. Commissioner of Internal Revenue*, 320 U.S. 489, 498, 64 S. Ct. 239, 245, 88 L. Ed. 248, 254 (1943). Therefore, I do not suggest that the Commissioner refrain from issuing TAAs in future matters.[4] Rather, I wish only to caution against the improper use thereof as precedential authority.

Thus, with the above-stated observations, I join in today's opinion.

[4]W. Va. Code § 11-10-5r does not require the Commissioner to issue TAAs.