STRENGTHEN THE OFFICE OF THE TAXPAYER ADVOCATE

Legislative Recommendation #37

Clarify That the National Taxpayer Advocate May Hire Legal Counsel to Enable Her to Advocate More Effectively for Taxpayers

SUMMARY

- *Problem:* In advocating for taxpayer rights and developing an independent position on matters that affect taxpayers both individually and collectively, the National Taxpayer Advocate often requires independent legal advice. Prior to 2015, the IRS permitted the National Taxpayer Advocate to hire her own attorneys. Since that time, the IRS has prohibited her from hiring attorneys, undermining her ability to do her job effectively.
- *Solution:* Authorize the National Taxpayer Advocate to hire attorneys who report directly to her.

PRESENT LAW

Pursuant to 31 U.S.C. § 301(f), the General Counsel of the Department of the Treasury is the chief law officer for the Department. The IRS Chief Counsel is an Assistant General Counsel and the chief law officer for the IRS. With a few exceptions, Treasury Department Order 107-04 provides that all attorneys in the Treasury Department must work in the Legal Division and report to the General Counsel.[1] Treasury's inspectors general and the Office of the Comptroller of the Currency (OCC) are excluded from this requirement based on specific statutory language in 5 U.S.C. App. III § 3(g) and 12 U.S.C. § 482, respectively, and therefore are authorized to hire and supervise their own attorneys.[2] No law specifically authorizes the National Taxpayer Advocate to hire and supervise attorneys. However, IRC § 7803(c) makes clear that TAS is expected to operate independently of the IRS in key respects. A few examples:

- IRC § 7803(c)(2)(A) directs TAS to assist taxpayers in resolving problems with the IRS, to identify areas in which taxpayers have problems in their dealings with the IRS, and to make administrative and legislative recommendations to mitigate such problems.
- IRC § 7803(c)(4)(A) requires each local taxpayer advocate to notify taxpayers that its offices "operate independently of any other Internal Revenue Service office and report directly to Congress through the National Taxpayer Advocate."
- IRC § 7803(c)(2)(B)(iii) requires the National Taxpayer Advocate to submit reports to Congress directly "without any prior review or comment from … the Commissioner, the Secretary of the Treasury, the Oversight Board, any other officer or employee of the Department of the Treasury, or the Office of Management and Budget." This provision is similar to the one that applies to the OCC (12 U.S.C. § 250).

1 Treas. Order 107-04 states: "With the exception of persons employed by the Treasury Inspector General, TIGTA, SIGTARP, SIGPR, or the Chief Counsel of the Office of the Comptroller of the Currency, all attorneys whose duties include providing legal advice to officials in any office or bureau of the Department are part of the Legal Division under the supervision of the General Counsel."

2 The Inspector General Act of 1978 (codified as amended at 5 U.S.C. § 403(g)) provides: "Each Inspector General shall, in accordance with applicable laws and regulations governing the civil service, obtain legal advice from a counsel either reporting directly to the Inspector General or another Inspector General." Similarly, 12 U.S.C. § 482 provides: "Notwithstanding any of the provisions of section 481 of this title or section 301(f)(1) of title 31 to the contrary, the Comptroller of the Currency shall, subject to chapter 71 of title 5, fix the compensation and number of, and appoint and direct, all employees of the Office of the Comptroller of the Currency."

When Congress reorganized the IRS in 1998, it recognized that the National Taxpayer Advocate requires independent counsel to advocate for her positions. The version of the IRS Restructuring and Reform Act of 1998 passed by the Senate contained the following authorization: "The National Taxpayer Advocate shall have the responsibility and authority to … appoint a counsel in the Office of the Taxpayer Advocate to report directly to the National Taxpayer Advocate."[3] In explaining the provision, Senator Grassley said: "In order to make the Taxpayer Advocate more independent, which is what this bill does, it logically follows that the Taxpayer Advocate should have its own legal counsel."[4]

This provision was not included in the final bill. However, the conference report stated that the "conferees intend that the National Taxpayer Advocate be able to hire and consult counsel as appropriate."[5]

REASONS FOR CHANGE

Beginning in 2004, with the approval of the Commissioner of Internal Revenue, TAS hired and employed attorney-advisors. The National Taxpayer Advocate requires independent attorney-advisors because she often takes positions, both in working taxpayer cases and in systemic advocacy, that are directly contrary to the position of the IRS and the Office of Chief Counsel.

Once attorneys in the Office of Chief Counsel have adopted a legal position interpreting a law or regulation for purposes of IRS operations, procedures, or litigation, it would be unrealistic to expect those same attorneys to effectively help the National Taxpayer Advocate develop a legal position that challenges their own interpretation, or an interpretation adopted by the Chief Counsel organization for which they work. Notably, the Chief Counsel organization requires its attorneys to reconcile disputes internally so that they ultimately all "speak with one voice."[6] Thus, although the National Taxpayer Advocate sometimes receives legal advice from Chief Counsel attorneys, the advice is not independent from the advice they provide to the rest of the IRS. By contrast, TAS's own attorney-advisors have enabled the National Taxpayer Advocate to develop an independent perspective and advocate independently for taxpayers, as the law intends.

In 2015, the IRS for the first time denied a routine TAS request to backfill existing attorney positions due to attrition. It cited Treasury Department General Counsel Directive No. 2, which states: "Except for positions in the Inspectors General offices or within the Office of the Comptroller of the Currency, attorney positions shall not be established outside of the Legal Division" unless the General Counsel or Deputy General Counsel(s) provides a waiver. On November 29, 2016, the National Taxpayer Advocate submitted a nine-page memo to the Acting General Counsel requesting permission to continue to hire attorney-advisors. It asked the Acting General Counsel to modify General Counsel Directive No. 2 to add a carve-out for the Office of the Taxpayer Advocate, as it does for the Inspectors General offices. Alternatively, the National Taxpayer Advocate orally requested that a "waiver" be granted, as provided in the directive. TAS subsequently submitted another hiring request, and it was again denied by the IRS.

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3 H.R. 2676, 105th Cong. § 1102(a) (as passed by the Senate, May 7, 1998).

4 44 Cong. Rec. 8476 (1998). The provision was added to the bill as an amendment sponsored by Senator Grassley on the Senate floor.

5 H.R. Rep. No. 105-599, at 216 (1998) (Conf. Rep.). In 2003, the House passed legislation with nearly identical language. It would have authorized the National Taxpayer Advocate to "appoint a counsel in the Office of the Taxpayer Advocate to report solely to the National Taxpayer Advocate." *See* Taxpayer Protection and IRS Accountability Act of 2003, H.R. 1528, 108th Cong. § 306 (2003) (as passed by the House, June 19, 2003). The legislation was sponsored by then-Cong. Rob Portman, who had previously been the lead House sponsor of the IRS Restructuring and Reform Act of 1998. It would have added this language as a new subsection (III) to IRC § 7803(c)(2)(D)(i). Although the authorization was not enacted into law, it bears mention that the Senate in 1998 and the House in 2003 approved virtually identical provisions of the legislation, suggesting the RRA 98 conference report language cited above had significant congressional support.

6 *See* Chief Counsel Directives Manual (CCDM) 35.4.1.4, Coordination with Other Counsel Offices (Feb. 7, 2013), https://www.irs.gov/irm/part35/irm_35-004-001; CCDM 31.1.4.6, Reconciliation of Disputes (Aug. 11, 2004), https://www.irs.gov/irm/part31/irm_31-001-004.

The inability of the National Taxpayer Advocate to hire attorney-advisors extends to announcing higher graded positions for attorneys currently working in TAS. Therefore, TAS is barred from both hiring new attorneys and promoting well-performing attorneys to higher-graded positions. This has accelerated attrition. If the National Taxpayer Advocate is not able to hire attorney-advisors, TAS's ability to advocate for taxpayers both individually and collectively and the National Taxpayer Advocate's ability to produce high-quality reports to Congress will be significantly compromised. The National Taxpayer Advocate believes the conference report language stating that the "conferees intend that the National Taxpayer Advocate be able to hire and consult counsel as appropriate" provides a sufficient legal basis for her to hire attorneys who report to her. The General Counsel has disagreed, maintaining that a statutory change is required.[7]

RECOMMENDATION

- Amend IRC § 7803(c)(2)(D) to expressly authorize the National Taxpayer Advocate to hire legal counsel who report directly to him or her.[8]

7 As an interim measure, the National Taxpayer Advocate has hired attorneys into a non-attorney job series. While the National Taxpayer Advocate is very proud of the staff she has, TAS's inability to hire attorneys into the attorney-advisor job series has significantly limited the pool of qualified candidates who apply, particularly from leading law firms. The job series the IRS has authorized TAS to use is titled "Legal Administrative Specialist." Many skilled attorneys seeking to maximize their future employment prospects in the legal profession want to work in an attorney-designated position and are reluctant to apply for an "administrative specialist" position. Moreover, individuals searching for attorney positions on USAJobs.gov would be unlikely even to come across a "Legal Administrative Specialist" position.

8 For legislative language generally consistent with this recommendation, see National Taxpayer Advocate Enhancement Act, H.R. 2755, 118th Cong. (2023). For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 37 (Special Focus: *Provide the National Taxpayer Advocate the Authority to Hire Independent Counsel, Comment on Regulations, and File* Amicus *Briefs in Litigation Raising Taxpayer Rights Issues*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16_Volume1_SpecialFocus.pdf (recommending that Congress "[a]uthorize the National Taxpayer Advocate to appoint independent counsel who report directly to the National Taxpayer Advocate, provide independent legal advice, help prepare *amicus curiae* briefs and comments on proposed or temporary regulations, and assist the National Taxpayer Advocate in preparing the Annual Report to Congress and in advocating for taxpayers individually and systemically"); National Taxpayer Advocate 2002 Annual Report to Congress 198 (Legislative Recommendation: *The Office of the Taxpayer Advocate*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/arc2002_section_two.pdf.

Legislative Recommendation #38

Clarify the Authority of the National Taxpayer Advocate to Make Personnel Decisions to Protect the Independence of the Office of the Taxpayer Advocate

SUMMARY

- *Problem:* To protect the independence of TAS, the tax code authorizes the National Taxpayer Advocate to take independent personnel actions with respect to employees of local TAS offices. The tax code does not provide this authority with respect to national office TAS employees, yet national office TAS employees who advocate for systemic changes in IRS practices and policies are most likely to take positions in conflict with IRS leadership and therefore require personnel protection.
- *Solution:* Clarify that the National Taxpayer Advocate has the authority to take independent personnel actions with respect to all TAS employees.

PRESENT LAW

The IRS Restructuring and Reform Act of 1998 (RRA 98) included provisions to protect TAS's independence from the rest of the IRS. For example, IRC § 7803(c)(4)(A)(iii) requires local TAS offices to notify taxpayers that they "operate independently of any other Internal Revenue Service office and report directly to Congress through the National Taxpayer Advocate." To reinforce TAS's independence, IRC § 7803(c)(2)(D) authorizes the National Taxpayer Advocate to "appoint" local taxpayer advocates in each state and to "evaluate and take personnel actions (including dismissal) with respect to any employee of any local office."

The National Taxpayer Advocate's authority to make independent personnel decisions is discussed in the legislative history of RRA 98. The conference report states that the National Taxpayer Advocate "has the responsibility to evaluate and take personnel actions (including dismissal) with respect *to any local Taxpayer Advocate or any employee in the Office of the Taxpayer Advocate*."[1] Thus, there is clear inconsistency between the conference report and the statute. The conference report states the statute gives the National Taxpayer Advocate the authority to make independent personnel decisions regarding all TAS employees, but the statute confers that authority only with respect to employees of TAS's local offices.

REASONS FOR CHANGE

IRC § 7803(c)(2)(A) assigns the National Taxpayer Advocate two principal responsibilities: (i) to advocate for taxpayers in specific cases (case advocacy) and (ii) to advocate for administrative and legislative changes to resolve problems that affect groups of taxpayers or all taxpayers (systemic advocacy). While the conference report language indicates Congress intended to give the National Taxpayer Advocate independent personnel authority over all TAS employees engaged in both advocacy functions, the statute as written only covers employees of TAS local offices, who primarily engage in case advocacy. Currently, the National Taxpayer Advocate does not have independent personnel authority over TAS's senior leadership, TAS's attorney-advisors, employees of TAS's systemic advocacy and research functions, and other national office employees,

1 H.R. Rep. No. 105-599, at 214 (1998) (Conf. Rep.) (emphasis added). The report states that the conference committee adopted the Senate amendment with respect to the National Taxpayer Advocate provisions, except as modified. H.R. Rep. No. 105-599, at 216 (1998) (Conf. Rep.). The Senate bill and report contained the same inconsistency as the conference bill and report. *See* H.R. 2676, 105th Cong. § 1102 (as passed by the Senate, May 7, 1998); S. Rep. No. 105-174, at 23 (1998).

even though these employees also advocate independently on behalf of taxpayers, have the same potential conflicts, and face the same potential retaliatory personnel actions that Congress sought to address in 1998.

The rationale for authorizing the National Taxpayer Advocate to make independent personnel decisions for TAS's national office employees is, in key respects, more compelling than the rationale for TAS's local office employees. National office employees primarily advocate for systemic change in IRS practices and policies, often placing them in direct conflict with IRS senior officials.

This concern is not merely theoretical. In recent years, IRS executives have reviewed and approved performance ratings for TAS's senior leaders. This creates the potential for TAS leaders perceived by the IRS as "team players" to be given better performance ratings and bonus awards than TAS leaders perceived to be more assertive in their advocacy. For the same reasons it would be inappropriate for IRS leaders to evaluate and make salary and bonus award determinations for Treasury Inspector General for Tax Administration employees, the IRS's ability to influence the careers of TAS's employees has the potential to undermine TAS's independence.

RECOMMENDATION

- Amend IRC § 7803(c)(2)(D) to clarify that the National Taxpayer Advocate shall have the authority to take personnel actions with respect to all TAS employees.

Legislative Recommendation #39

Clarify the Taxpayer Advocate Service's Access to Files, Meetings, and Other Information

SUMMARY

- *Problem:* The IRS has occasionally refused to provide the National Taxpayer Advocate with information she requires to do her job of advocating for taxpayers and prevented TAS employees from attending IRS conferences with taxpayers who have open TAS cases and have requested TAS attendance.
- *Solution:* Require the IRS to give the National Taxpayer Advocate and her staff access to all IRS information relevant to TAS's duties and require the IRS to allow TAS personnel to participate in taxpayer conferences when requested by taxpayers.

PRESENT LAW

IRC § 7803(c)(2) requires TAS to assist taxpayers in resolving problems with the IRS, identify areas in which taxpayers are experiencing problems in their dealings with the IRS, make administrative and legislative recommendations to mitigate those problems, and submit two reports to Congress each year. IRC § 6103 generally prohibits the disclosure of tax returns or return information, but IRC § 6103(h) provides that "returns and return information shall, without written request, be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for tax administration purposes."

TAS employees are authorized by IRC § 6103(h) to review tax return information because their statutory duties require this access. In furtherance of their duties, they may also need to attend meetings between taxpayers or their representatives and other IRS employees and obtain other information from the IRS. Similarly, the National Taxpayer Advocate requires information to analyze systemic problems and provide Congress with a "full and substantive analysis" of such problems in her annual reports to Congress, as required by IRC § 7803(c)(2)(B). However, the law does not expressly state that the National Taxpayer Advocate is authorized to access return information, attend meetings with IRS or Office of Chief Counsel employees, or obtain other information from the IRS or the Office of Chief Counsel.

REASONS FOR CHANGE

In general, the National Taxpayer Advocate has significant access to IRS systems and data.[1] However, the IRS has sometimes declined to provide TAS with access to (1) audit files of taxpayers with cases open in TAS; (2) meetings between the IRS and taxpayers with cases open in TAS, even when a taxpayer has requested TAS's attendance; (3) advice that the Office of Chief Counsel has provided to other business units; and (4) information required by the National Taxpayer Advocate to enable her to analyze systemic problems for

1 Nina E. Olson, *Institutionalizing Advocacy: Some Reflections on the Taxpayer Advocate Service's Evolution as an Advocate for Taxpayers*, 18 PITT. TAX REV. 11, at 19 (2020) ("In House and Senate hearings, members of Congress struggled to come up with the right design, one that would balance the office's need to be inside the IRS so as to have immediate access to information and planning, with the unremitting pressure to conform to the IRS leadership's point of view."), https://taxreview.law.pitt.edu/ojs/taxreview/article/view/122/194.

reports to Congress.[2] Lack of access undermines TAS's ability to fully advocate for taxpayers, both individually and collectively.

RECOMMENDATIONS

- Amend IRC § 7803(c) to clarify that for any cases open and pending in TAS, the National Taxpayer Advocate (and authorized TAS employees) are authorized to participate in meetings between taxpayers and employees of the IRS or the Office of Chief Counsel, at the taxpayer's request; and the National Taxpayer Advocate (and authorized TAS employees) shall have access to tax returns, return information, administrative files, and legal advice provided by the Office of Chief Counsel to any IRS employee.
- Amend IRC § 7803(c) to clarify that, in furtherance of her tax administrative duties, the National Taxpayer Advocate (and authorized TAS employees) shall have access to all data, statistical information, legal advice provided by the Office of Chief Counsel to any IRS employee, and documents necessary to perform a "full and substantive analysis" of the issues, as required by IRC § 7803(c)(2)(B).[3]

2 *See, e.g.,* National Taxpayer Advocate 2018 Annual Report to Congress 42 (Most Serious Problem: *Transparency of the Office of Chief Counsel: Counsel Is Keeping More of Its Analysis Secret, Just When Taxpayers Need Guidance More Than Ever*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_Volume1_MSP_02_TransparencyOCC.pdf; National Taxpayer Advocate 2016 Annual Report to Congress 34 (Special Focus: *Reinforce the National Taxpayer Advocate's Right of Access to Taxpayer and IRS Information and to Meetings Between the IRS and Taxpayers*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16_Volume1_SpecialFocus.pdf.

3 This recommendation is not intended to create a waiver of privilege with respect to information the IRS may lawfully keep confidential. When TAS receives information from the IRS, it protects the information from disclosure if it is privileged. Under the Taxpayer First Act of 2019, the Secretary is now required to provide the National Taxpayer Advocate with "statistical support" for the Annual Report to Congress. Pub. L. No. 116-25, § 1301(b), 133 Stat. 981, 991 (2019). However, this requirement only encompasses statistical studies, compilations, and the review of information already obtained by TAS. It does not address TAS's broader need for access to information, including the right to review case files and attend taxpayer meetings. The Taxpayer Rights Act of 2015, H.R. 4128, 114th Cong. § 403 (2015) and S. 2333, 114th Cong. § 403 (2015), would have granted TAS access to case-related files and meetings, but it did not address TAS's need for access to information required to report on systemic issues.

Legislative Recommendation #40

Authorize the National Taxpayer Advocate to File *Amicus* Briefs

SUMMARY

- *Problem:* When a federal court is deciding a case that may affect the rights of many or all taxpayers, the court would benefit if the National Taxpayer Advocate were authorized to share her views as the voice of the taxpayer. Under current law, the National Taxpayer Advocate is not authorized to submit an *amicus* brief in a federal tax case.
- *Solution:* Authorize the National Taxpayer Advocate to appear as *amicus curiae* in federal tax cases and submit *amicus* briefs on issues pertaining to the protection of taxpayer rights.[1]

PRESENT LAW

IRC § 7803(c)(2)(A) requires the Office of the Taxpayer Advocate to assist taxpayers in resolving problems with the IRS, to identify areas in which taxpayers experience problems in their dealings with the IRS, and to make administrative and legislative recommendations to mitigate such problems. IRC § 7803(c)(2)(B)(ii)(XI) directs the National Taxpayer Advocate in her annual reports to Congress to "identify the 10 most litigated issues for each category of taxpayers, including recommendations for mitigating such disputes."

Under 28 U.S.C. § 516, only officers of the Department of Justice may represent the United States in litigation, except as otherwise authorized by law. Under 5 U.S.C. § 3106, the head of an executive department may not employ an attorney or counsel for the conduct of litigation in which the United States is a party, except as otherwise authorized by law. IRC § 7452 specifies that the Secretary of the Treasury "shall be represented by the Chief Counsel for the Internal Revenue Service or his delegate" in litigation before the U.S. Tax Court.

Under 5 U.S.C. § 612(b), the Small Business Administration (SBA) Chief Counsel for Advocacy is authorized to appear as *amicus curiae* in certain circumstances to represent the interests of small businesses. By contrast, the National Taxpayer Advocate, who is often referred to as "the voice of the taxpayer" both within the IRS and before Congress, is not authorized to appear as *amicus curiae* in federal tax litigation.

REASONS FOR CHANGE

While trial lawyers advocate on behalf of clients to win individual cases, precedential issues that could affect many or all taxpayers sometimes come before the courts with no one representing the interests of taxpayers as a group or advocating to protect fundamental taxpayer rights.

For example, in *Facebook, Inc. v. IRS*, a U.S. district court considered Facebook's position that it was legally entitled to a hearing before the IRS Independent Office of Appeals.[2] For support, *Facebook* cited the provision of the Taxpayer Bill of Rights (TBOR) that describes "the right to appeal a decision of the Internal Revenue Service in an independent forum."[3] The court rejected Facebook's position, broadly holding that TBOR "did not grant [taxpayers] new enforceable rights." The court's decision may well be correct, but in the rare cases

1 *See* Taxpayer Bill of Rights (TBOR), https://www.taxpayeradvocate.irs.gov/taxpayer-rights (last visited Sept. 18, 2024). The rights contained in TBOR are also codified in IRC § 7803(a)(3).
2 *Facebook, Inc. v. IRS*, 121 A.F.T.R.2d 2018-1752 (N.D. Cal. 2018).
3 IRC § 7803(a)(3)(E).

where a court's decision has the potential to affect the fundamental taxpayer rights of all or a large group of taxpayers, the court would benefit from hearing the position of the National Taxpayer Advocate as the voice of the taxpayer.

Just as the SBA Chief Counsel for Advocacy may submit *amicus* briefs to help ensure federal courts are informed about the impact of regulations on small businesses, the National Taxpayer Advocate could more effectively protect taxpayer rights if she were granted comparable authority to submit *amicus* briefs in cases that affect taxpayer rights. It is anticipated this authority would be used sparingly, as is the practice of the SBA Chief Counsel for Advocacy.

RECOMMENDATION

- Amend IRC §§ 7803 and 7452 to authorize the National Taxpayer Advocate to appear as *amicus curiae* in federal tax litigation and submit *amicus* briefs on matters relating to the protection of taxpayer rights.[4]

4 For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 37 (Special Focus: *Provide the National Taxpayer Advocate the Authority to Hire Independent Counsel, Comment on Regulations, and File* Amicus *Briefs in Litigation Raising Taxpayer Rights Issues*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16_Volume1_SpecialFocus.pdf. *See also* IRS Program Manager Technical Advice 2007-00566 (Oct. 2, 2002), https://www.irs.gov/pub/lanoa/pmta00566_7189.pdf.

Legislative Recommendation #41

Authorize the Office of the Taxpayer Advocate to Assist Certain Taxpayers Experiencing Economic Hardships During a Lapse in Appropriations

SUMMARY

- *Problem:* During government shutdowns, IRS lien and levy activities carried out by automation are permitted to continue, but IRS and TAS employees, including the National Taxpayer Advocate, generally are prohibited from assisting taxpayers experiencing economic hardships as a result of those collection activities.
- *Solution:* Clarify that TAS and IRS Collection employees may work during government shutdowns to the extent necessary to assist taxpayers experiencing economic hardships as a result of IRS collection actions.

PRESENT LAW

Article I of the Constitution provides that, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[1] The Antideficiency Act (ADA) is one of several statutes that implement this provision.[2] Specifically, 31 U.S.C. § 1341(a), among other things, prohibits any officer or employee of the U.S. government or the District of Columbia government from (i) making or authorizing an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation or (ii) involving his or her respective government employer in a contract or obligation for the payment of money before an appropriation is made, unless authorized by law. The ADA contains an additional prohibition against the acceptance of voluntary services, "except for emergencies involving the safety of human life or the protection of property."[3]

IRC § 6343(a)(1)(D) requires the Secretary to release a levy and promptly notify the affected person if the Secretary determines the levy "is creating an economic hardship due to the financial condition of the taxpayer."

IRC § 7803(c)(2)(A)(i) directs the Office of the Taxpayer Advocate (commonly referred to as the Taxpayer Advocate Service, or TAS) to "assist taxpayers in resolving problems with the Internal Revenue Service." IRC § 7811 authorizes the National Taxpayer Advocate to issue a Taxpayer Assistance Order (TAO) where a "taxpayer is suffering or about to suffer a significant hardship as a result of the manner in which the internal revenue laws are being administered by the Secretary." A significant hardship includes "an immediate threat of adverse action" and "irreparable injury to, or a long-term adverse impact on, the taxpayer if relief is not granted." A TAO may require the Secretary "within a specified time period … to release property of the taxpayer levied upon."

1 U.S. Const. art. I, § 9, cl. 7.
2 Pub. L. No. 97-258, 96 Stat. 877, 923 (1982).
3 31 U.S.C. § 1342.

REASONS FOR CHANGE

Lien and levy activities carried out by automation, which do not require the expenditure of additional appropriations, are permitted to continue during government shutdowns resulting from a lapse in appropriations. During both the 2018-2019 and 2013 shutdowns, the IRS issued thousands of notices of levy on Social Security and other government benefits as well as levies on wages and financial accounts of individuals and businesses, because these notices were preprogrammed into the IRS's computer systems before the shutdowns began.

Thousands of additional taxpayers were affected by collection actions taken in the weeks preceding the shutdowns. For example, a bank generally has up to 21 days to remit levied account proceeds to the IRS. Therefore, levies issued in the 21 days preceding a government shutdown may affect taxpayers after the shutdown begins.

Despite IRC provisions that protect and relieve taxpayers who are experiencing economic hardship from levies, the IRS Lapsed Appropriations Contingency Plans generally have not permitted IRS or TAS employees, including the National Taxpayer Advocate, to work economic hardship cases during government shutdowns to assist these taxpayers.[4] In addition, some taxpayers who requested the assistance of the National Taxpayer Advocate and TAS prior to the shutdown experienced significant hardships and irreparable injuries because TAS could not work on their cases during the shutdown.[5]

In its Lapsed Appropriations Contingency Plans,[6] the IRS, with concurrence from the Treasury Department and the Office of Management and Budget (OMB), takes the position that the ADA's exception for "protection of property" applies solely to *government* property – not *taxpayer* property.[7] As a result, it has concluded that TAS's activities to assist taxpayers in releasing IRS levies that create an economic hardship due to the financial condition of the taxpayer do not fit within the exception. We question that interpretation. First, the statute itself simply says "property." The distinction between "property" and "government property" is obvious, and if Congress intended to limit the scope of the exception to "government property," it presumably would have written the statute to specify "government property." Second, interpretating "property" to include only "government property" undermines Congress's more recent statutory enactment of IRC § 6343(a)(1)(D), which is intended to protect taxpayers from levies that cause economic hardships.

Even accepting the IRS's position that the ADA's exception for the "protection of property" is limited to the protection of *government* property, a threshold determination must be made about whether levied funds are, in fact, government property. IRC § 6343(a)(1)(D) requires the Secretary to release a levy if it is "determined that such levy is creating an economic hardship due to the financial condition of the taxpayer." In blunt terms,

4 *See* IRS, Servicewide Electronic Research Program Alert 19A0017, Release of Levy and Release of Lien (2019) ("While there is a lapse in funding during the partial shutdown we are not authorized to take this action. We may do so once we are fully opened, so please call us back at that time. Please apologize to the taxpayer and explain we are not authorized to release the levy or lien due to the partial government shutdown. Explain that they may call us back after we are fully reopened.").

5 For additional discussion of how TAS's statutory authority to assist taxpayers suffering or about to suffer significant hardships was undermined during a shutdown, see National Taxpayer Advocate Fiscal Year 2015 Objectives Report to Congress 79 (Area of Focus: *The IRS's Decision Not to Except Any TAS Employees During the Government Shutdown Resulted in Violations of Taxpayer Rights and Undermined TAS's Statutory Authority to Assist Taxpayers Suffering or About to Suffer Significant Hardship*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/The-IRSs-Decision-Not-to-Except-Any-TAS-Employees-During-the-Government-Shutdown.pdf, and National Taxpayer Advocate Fiscal Year 2020 Objectives Report to Congress 40 (*Impact of the 35-Day Partial Government Shutdown on the Taxpayer Advocate Service*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/JRC20_Volume1_GovShutdown.pdf.

6 *See, e.g.*, IRS, *Fiscal Year 2024 Lapsed Appropriations Contingency Plan* (Mar. 15, 2024), https://home.treasury.gov/system/files/266/IRS-FY24LapsePlan.pdf.

7 *See* Government Accountability Office, GAO-060382SP, *Principles of Federal Appropriations Law*, vol. II at 6-111 (3d ed. 2006) (citing 9 Comp. Dec. 182, 185 (1902)), https://www.gao.gov/assets/2019-11/202819.pdf.

Congress has made a determination that the IRS should not take property if doing so would put the taxpayer and the taxpayer's family out on the street.

TAS plays a central role in helping the Secretary determine whether a levy would create an economic hardship and therefore whether property can be levied upon (meaning that it would become government property). Thus, if the IRS seeks to protect "government property" via a levy, it must give affected taxpayers an opportunity to show that the levy will cause an economic hardship and therefore should be released (meaning it is not government property).[8]

From a policy perspective, the current interpretation produces results that greatly undermine taxpayer rights, including the *right to a fair and just tax system*.[9] The asymmetry of allowing the IRS to take collection action against a taxpayer while not allowing TAS to work with the taxpayer and the IRS to determine whether the collection action is creating an economic hardship (*e.g.*, imminent eviction) that requires a levy release under law shocks the conscience. To eliminate the abrogation of the taxpayer protections codified in IRC § 6343(a)(1)(D), the National Taxpayer Advocate believes the IRS should either work with the Treasury Department and OMB to adopt an ADA interpretation allowing TAS and Collection employees to release ongoing levies that create economic hardships or suspend all existing levies and refrain from imposing new levies during a government shutdown. The current asymmetrical approach produces an absurd "heads the IRS wins, tails the taxpayer loses" result.

While we will continue to advocate within the agency to protect taxpayers during government shutdowns, our experience to date suggests the existing legal interpretation is unlikely to change. For that reason, we recommend Congress clarify the law to ensure that government shutdowns resulting from a lapse in appropriations do not subject taxpayers to serious economic hardships, which in some cases may include eviction, utility shutoffs, or the inability to pay for medical treatment.

RECOMMENDATION

- Clarify that during a lapse in appropriations (i) the National Taxpayer Advocate may incur obligations in advance of appropriations for purposes of assisting taxpayers experiencing an economic hardship within the meaning of IRC § 6343(a)(1)(D) due to an IRS action or inaction and (ii) the IRS may incur obligations in advance of appropriations for purposes of complying with any TAO issued pursuant to IRC § 7811.

8 The Justice Department has issued a legal opinion concluding that certain government functions not specifically authorized to continue during a lapse in appropriations must nonetheless continue where the lawful continuation of these functions is "necessarily incident" to other activities for which there is statutory authority to continue. *See* Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 5 Op. O.L.C. 1 (1981), www.justice.gov/file/22536/download.

9 *See* IRC § 7803(a)(3)(J). *See also* Taxpayer Bill of Rights (TBOR), https://www.taxpayeradvocate.irs.gov/get-help/taxpayer-rights (last visited Sept. 25, 2024). The rights contained in the TBOR are also codified in IRC § 7803(a)(3).

Legislative Recommendation #42

Repeal Statute Suspension Under IRC § 7811(d) for Taxpayers Seeking Assistance From the Taxpayer Advocate Service

SUMMARY

- *Problem:* When a taxpayer requests assistance from TAS in writing, IRC § 7811(d) provides that the period of limitations within which the IRS may assess or collect tax is extended. The provision is intended to protect the IRS's interests, but the IRS has not implemented it since its enactment in 1988. In addition, the provision does not apply when a taxpayer requests assistance from TAS by phone, so if implemented, taxpayers who request TAS assistance in writing and taxpayers who request TAS assistance by phone would be treated differently.

- *Solution:* Repeal IRC § 7811(d).

PRESENT LAW

IRC § 7811(d) suspends the statutory period of limitations for any action for which a taxpayer seeks assistance from TAS. The period is only suspended if the taxpayer submits a written application for relief.[1]

REASONS FOR CHANGE

Despite the fact that Congress enacted this provision in 1988,[2] the IRS has never implemented it. The intent of the provision was to protect the interests of the government, but the IRS has not seen a need to make use of it. Moreover, implementation of the rule would require significant technology upgrades and procedural changes that the IRS has chosen not to undertake.

In concept, IRC § 7811(d) aims to ensure the IRS will not lose the ability to assess or collect tax if the applicable statutory deadlines pass while a taxpayer's case is pending with TAS. Suspension of the assessment or collection period would give the IRS more time to take enforcement actions. However, statute suspensions are unnecessary to protect the government's interests. The IRS currently may take enforcement actions against taxpayers with open TAS cases, if necessary, to protect the government's interests.[3]

Furthermore, if the IRS ever were to implement IRC § 7811(d), it would cause similarly situated taxpayers to be treated differently. By its terms, the provision only applies when a taxpayer submits a written request for TAS assistance. It does not apply when a taxpayer requests TAS assistance by phone, which is the method by which most taxpayers seek TAS's help. Thus, this provision – apart from being unnecessary and unutilized – would produce disparate outcomes for taxpayers who, despite lacking any knowledge of this issue, contact TAS by different means.

1 Treas. Reg. § 301.7811-1(e)(4).
2 Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6230, 102 Stat. 3342, 3734 (1988).
3 Even if TAS issues a Taxpayer Advocate Order (TAO) directing the IRS to suspend collection, TAS will generally agree to modify the TAO if collection is in jeopardy. If TAS ever did not agree to do so, the Commissioner or Deputy Commissioner could modify or rescind the TAO. *See* IRC § 7811(c)(1).

Lastly, despite the IRS's decision not to implement the provision, it has been raised in litigation, creating uncertainty for taxpayers and the IRS alike.[4] Given that IRC § 7811(d) has not been used since it was enacted more than 35 years ago, it serves no useful purpose, and its repeal would prevent future litigation in which the provision is cited, the National Taxpayer Advocate recommends it be repealed.

RECOMMENDATION

- Repeal IRC § 7811(d).[5]

4 In *Rothkamm v. United States*, 802 F.3d 699 (5th Cir. 2015), *rev'g* 2014 WL 4986884 (M.D. La. Sept. 15, 2014), the U.S. Court of Appeals for the Fifth Circuit held, in relevant part, that IRC § 7811(d) tolled the period for filing a wrongful levy claim, which by operation of IRC § 6532(c)(2) extended the period for filing suit. IRS Action on Decision 2020-03, 2020-17 I.R.B. 663 explains that except for cases appealable to the Fifth Circuit, the IRS will not follow the holding in *Rothkamm* that IRC § 7811(d) suspends the running of the limitations periods for third parties to file wrongful levy claims or suits, and outside the Fifth Circuit, the government will continue to defend its interpretation.

5 For legislative language generally consistent with this recommendation, see John Lewis Taxpayer Protection Act, H.R. 3738, 117th Cong. § 202 (2021); Taxpayer Protection Act, H.R. 2171, 115th Cong. § 202 (2017); Taxpayer Protection Act, H.R. 4912, 114th Cong. § 202 (2016). For more detail, see National Taxpayer Advocate 2015 Annual Report to Congress 316 (Legislative Recommendation: *Repeal or Fix Statute Suspension Under IRC § 7811(d)*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC15_Volume1_LR_01_Statute-Limitations.pdf.

STRENGTHEN TAXPAYER RIGHTS IN JUDICIAL PROCEEDINGS

Legislative Recommendation #43

Expand the U.S. Tax Court's Jurisdiction to Hear Refund Cases

SUMMARY

- *Problem:* For most taxpayers, the U.S. Tax Court is the optimal court in which to challenge an adverse IRS decision because payment is not a requirement for jurisdiction, the judges possess specialized tax expertise, and taxpayers can represent themselves more easily than in other federal courts. However, taxpayers generally may litigate their tax liabilities in Tax Court only when the IRS determines a taxpayer owes more tax and issues a notice of deficiency. Taxpayers who are solely seeking refunds because they believe they overpaid their tax are barred from the Tax Court and must litigate their claims in other less user-friendly and more costly federal courts.

- *Solution:* Expand the Tax Court's jurisdiction to determine tax liabilities and refunds in refund cases.

PRESENT LAW

IRC § 7442 defines the jurisdiction of the U.S. Tax Court. IRC § 6212 requires the IRS to issue a notice of deficiency before assessing certain liabilities. When the IRS issues a notice of deficiency, IRC § 6213(a) authorizes the taxpayer to petition the U.S. Tax Court within 90 days (or 150 days if the notice is addressed to a person outside the United States) to review the IRS determination.

If a taxpayer does not receive a notice of deficiency and seeks judicial review of an adverse IRS determination, the taxpayer must pay the tax, penalty, or interest and file suit in a U.S. district court or the U.S. Court of Federal Claims. This situation generally arises when the taxpayer is claiming a refund of tax, penalty, or interest that has been paid. Taxpayers solely seeking refunds of monies already paid cannot litigate their cases in the Tax Court.

REASONS FOR CHANGE

Due to the tax expertise of its judges, the Tax Court is often better equipped to consider tax controversies than other courts. It is also more accessible to less knowledgeable and unrepresented taxpayers than other courts because it offers simplified and less formal procedures, particularly for disputes that do not exceed $50,000. Another benefit is that low-income taxpayers representing themselves are generally offered the option of receiving free legal assistance from a Low Income Taxpayer Clinic or *pro bono* representative. In most instances, the Tax Court is the least expensive and best forum for low-income taxpayers to have their day in court.

Under current law, taxpayers who receive a notice of deficiency and wish to challenge the IRS's proposed adjustment can file a petition in the Tax Court, while taxpayers who have paid their tax and are seeking a refund must sue for a refund in a U.S. district court or the U.S. Court of Federal Claims to obtain a judicial determination.

Example: A taxpayer files a return that reflects a tax liability of $15,000. The taxpayer had $12,000 of withholding and pays an additional $3,000 with the return. Shortly after filing the original return, the taxpayer's preparer discovers an error, and the taxpayer files an amended return showing a tax liability of $11,000 and claiming a refund of $4,000. The IRS denies the claim. Under current law, the taxpayer cannot go to Tax Court because there is no deficiency (*i.e.*, the IRS has not determined that any additional tax is due). To pursue the $4,000 refund claim, the taxpayer will have to file a refund suit in a U.S. district court or the U.S. Court of Federal Claims. This law harms taxpayers because a refund suit is a more formal court proceeding that involves greater cost and generally requires representation by an attorney.

The National Taxpayer Advocate recommends that all taxpayers bringing refund suits be given the option to litigate their tax disputes in the Tax Court. By expanding the Tax Court's jurisdiction, Congress can give all taxpayers a better opportunity to obtain judicial review of adverse IRS liability determinations.

RECOMMENDATION

- Amend IRC §§ 7442 and 7422 to give the Tax Court jurisdiction to determine liabilities in refund suits to the same extent as the U.S. district courts and the U.S. Court of Federal Claims.[1]

1 For a related recommendation that would allow taxpayers to challenge assessable penalties in the Tax Court, see *Provide That Assessable Penalties Are Subject to Deficiency Procedures*, *supra*. Based on existing law and procedures, the IRS Office of Chief Counsel represents the government in Tax Court cases, and the Justice Department's Tax Division represents the government in U.S. district court and the U.S. Court of Federal Claims cases. If the Tax Court's jurisdiction is expanded and some cases shift toward the Tax Court, the number of attorneys representing the government in each agency may require adjustment.