NATIONAL TAXPAYER ADVOCATE

2019 Purple Book

Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration

December 31, 2018

www.TaxpayerAdvocate.irs.gov/PurpleBook2018

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INTRODUCTION

We are pleased to present the second edition of the National Taxpayer Advocate Purple Book. In it, we provide a concise summary of 58 legislative recommendations that we believe will strengthen taxpayer rights and improve tax administration.

Section 7803(c)(2)(B)(ii)(VIII) of the Internal Revenue Code (IRC) requires the National Taxpayer Advocate to propose legislative recommendations to resolve problems encountered by taxpayers. Last year, we decided to compile and publish this Purple Book to make the legislative recommendations contained in the main volumes of the National Taxpayer Advocate's Annual Reports to Congress as accessible and user-friendly as possible.

Toward that end, each proposal is presented in a format similar to the one used for congressional committee reports, with "Present Law," "Reasons for Change," and "Recommendation(s)" sections. To assist Members of Congress and staff who interested in our proposals, we include a footnote at the end of each recommendation that identifies bills introduced in prior years that are generally consistent with what we are recommending. Because of the large number of bills introduced in each Congress, we almost surely have failed to list every relevant bill. We apologize for our inadvertent oversights.

We also have compiled a chart, which appears at the end of this volume, that that lists reference material. In addition to identifying a greater number of prior bills, the chart provides references to more detailed issue discussions that have been included in prior National Taxpayer Advocate reports.

In last year's Purple Book, we made 50 legislative recommendations. One—a proposal to hold taxpayers harmless when the IRS improperly levies on a retirement account—was enacted into law.[1] At least 20 others were included in comprehensive tax administration bills—notably, H.R. 5444, the Taxpayer First Act of 2018, which the House passed on a vote of 414-0;[2] S. 3246, also known as the Taxpayer First Act, which was co-sponsored by Senate Finance Committee Chairman Hatch and Ranking Member Wyden; and S. 3278, the Protecting Taxpayers Act, which was introduced by Senator Portman and Senator Cardin, who two decades ago were the House sponsors of the landmark IRS Restructuring and Reform Act of 1998.

Although none of these bills made it across the finish line last year and the National Taxpayer Advocate does not endorse every provision in every bill, these bills—and others—would go a long way toward helping

1 Bipartisan Budget Act, Pub. L. No. 115-123, § 41104, 132 Stat. 64, 155-157 (2018) (adding a new subsection (f) to IRC § 6343).

2 The House passed similar versions of the Taxpayer First Act twice in December 2018. *See* Taxpayer First Act of 2018, H.R. 7227, 115th Cong. (2018); H.R. 88, Division B, 115th Cong. (2018) (as passed by the House on Dec. 20, 2018). None of these bills were approved by the Senate. Because these two bills were introduced and approved as this report was going to press and because most provisions were identical to H.R. 5444, this report generally references only the provisions of H.R. 5444. Note, however, that there were some differences between the bills.

taxpayers and modernizing the IRS. We are hopeful Congress will pass comprehensive tax administration legislation in 2019.

The Office of the Taxpayer Advocate is an independent organization within the IRS that advocates for the interests of taxpayers. The office is non-partisan, and we have dubbed this the "Purple Book" because the color purple, as a mix of red and blue, has come to symbolize bipartisanship. The House approval of H.R. 5444 on a 414-0 vote underscores that tax administration is an area where bipartisan cooperation is achievable and is often the norm.

We believe most of the recommendations presented in this volume are non-controversial, common sense reforms that will strengthen taxpayer rights and improve tax administration. We hope the tax-writing committees and other Members of Congress find it useful.

Strengthen Taxpayer Rights

#1 CODIFY THE TAXPAYER BILL OF RIGHTS, A TAXPAYER RIGHTS TRAINING REQUIREMENT, AND THE IRS MISSION STATEMENT AS SECTION 1 OF THE INTERNAL REVENUE CODE

Present Law

IRC § 7803(a)(3) requires the Commissioner to "ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title [the Internal Revenue Code], including –

(A) *the right to be informed*

(B) *the right to quality service*

(C) *the right to pay no more than the correct amount of tax*

(D) *the right to challenge the position of the Internal Revenue Service and be heard*

(E) *the right to appeal a decision of the Internal Revenue Service in an independent forum*

(F) *the right to finality*

(G) *the right to privacy*

(H) *the right to confidentiality*

(I) *the right to retain representation*

(J) *the right to a fair and just tax system."*

The IRS Restructuring and Reform Act of 1998 directed the IRS to revise its mission statement "to place a greater emphasis on serving the public and meeting taxpayers' needs."[3] The IRS subsequently adopted the following mission statement: "Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and *by applying the tax law* with integrity and fairness to all" (emphasis added). In 2009, with no public discussion, the IRS quietly made a profound change to its mission statement, which now reads: "Provide America's taxpayers top quality service by helping them understand and meet their tax responsibilities and *enforce the tax law* with integrity and fairness to all" (emphasis added).

Reasons for Change

Taxpayer rights serve as the foundation for effective tax administration. The U.S. tax system is frequently characterized as a system of "voluntary compliance." While taxpayers ultimately may face penalties for noncompliance, we rely in the first instance on the willingness of taxpayers to file returns on which they self-report their income (much of which is not reported to the IRS and is therefore difficult for the IRS to discover in the absence of self-reporting) and to pay the required tax.

More than 150 million individuals and more than ten million business entities file income tax returns and pay our nation's bills every year, and they are entitled to be treated with respect. Making clear that taxpayers possess rights is not only the right thing to do, but TAS research suggests that when taxpayers have confidence

3 Pub. L. No. 105-206, Title I, § 1002, 112 Stat. 685, 690 (1998).

the tax system is fair, they are more likely to comply voluntarily, which may translate into enhanced revenue collection as well.[4]

The National Taxpayer Advocate recommends that three foundational provisions that would promote respect for taxpayer rights and thereby strengthen tax administration be codified as Section 1 of the IRC.

First: The ten rights that make up the *Taxpayer Bill of Rights* (TBOR) are currently codified in IRC § 7803(a)(3). We believe that relocating these provisions to the front of the tax code would make a strong and important statement about the value Congress places on taxpayer rights.

Second: Effective employee training and evaluation is required to ensure that conceptual respect for taxpayer rights is translated into practice. Currently, IRS training materials incorporate taxpayer rights information inconsistently and insufficiently.[5] A statutory training and evaluation requirement would ensure that agency management places appropriate emphasis on promoting employee awareness of, and compliance with, taxpayer rights, and that employees have the knowledge and incentives to consider the impact of their actions on the taxpayers with whom they are working.

Third: The IRS mission statement sends a clear message about the IRS's priorities and articulates the guiding principles around which the IRS develops its strategic plans.

As noted above, the 2009 change in the IRS's mission statement from "applying the tax law" to "enforc[ing] the tax law," while subtle, has significant consequences. If a tax agency views its primary mission as "enforcing" the tax law, it is likely to design its procedures and focus its resources on taking action against the relatively small number of taxpayers it views as noncompliant. By so doing, it may neglect to provide sufficient service and support to maintain and strengthen voluntary compliance among the overwhelming majority of taxpayers who are fully or substantially compliant, and thereby risk lower levels of compliance on their part. The phrase "applying the tax law" is broad enough to encompass enforcement while also encompassing non-coercive compliance strategies.

To make clear the value Congress places on taxpayer rights, the National Taxpayer Advocate recommends that Congress codify the TBOR, a taxpayer rights training and evaluation requirement, and the IRS mission statement as § 1 of the IRC.

4 *See* National Taxpayer Advocate 2012 Annual Report to Congress vol. 2 1-70 (Research Study: *Factors Influencing Voluntary Compliance by Small Businesses: Preliminary Survey Results*); National Taxpayer Advocate 2013 Annual Report to Congress vol. 2 34-56 (Research Study: *Small Business Compliance: Further Analysis of Influential Factors*).

5 The IRS currently requires all employees to take annual trainings, known as Mandatory Briefings, on topics such as ethics, unauthorized access of taxpayer accounts, and anti-discrimination laws. Although the Taxpayer Advocate Service has prepared materials to be used in a Mandatory Briefing on the TBOR that likely would take less than 30 minutes per employee to complete, the IRS to date has declined to require all employees who interact with taxpayers to take a briefing on taxpayer rights.

Recommendation

Amend § 1 of the IRC to read as follows (and renumber existing Sections 1, 2, and 3 accordingly):

SECTION 1. TAXPAYER BILL OF RIGHTS AND INTERNAL REVENUE SERVICE MISSION STATEMENT.

(a) **Taxpayer Rights.**

(1) In discharging their duties, every officer and employee of the Internal Revenue Service shall act in accord with taxpayer rights as afforded by other provisions of this title, including —

(a) the right to be informed,

(b) the right to quality service,

(c) the right to pay no more than the correct amount of tax,

(d) the right to challenge the position of the Internal Revenue Service and be heard,

(e) the right to appeal a decision of the Internal Revenue Service in an independent forum,

(f) the right to finality,

(g) the right to privacy,

(h) the right to confidentiality,

(i) the right to retain representation, and

(j) the right to a fair and just tax system.[6]

(2) The National Taxpayer Advocate shall develop annual training regarding taxpayer rights, including the role of the Office of the Taxpayer Advocate, and the Commissioner shall establish procedures to ensure that all officers and employees of the Internal Revenue Service receive such annual training.[7]

(3) The Commissioner shall establish procedures to ensure that annual performance evaluations of all officers and employees of the Internal Revenue Service address compliance with taxpayer rights.

(b) **Mission of The Internal Revenue Service.** The Internal Revenue Service shall aim to provide taxpayers with top-quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all and with due regard for taxpayer rights as described in subsection (a)(1) and other provisions of this title.

6 The provisions of the TBOR were codified at IRC § 7803(a)(3). *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. Q, § 401(a), 129 Stat. 2242, 3117 (2015). During the drafting of the TBOR language, we understand staff of the Joint Committee on Taxation (JCT) raised concerns that if the TBOR were codified without limitation, some taxpayers might assert purported violations and seek remedies in administrative and litigated disputes, potentially requiring the IRS and the courts to adjudicate vague claims with no clear standard for resolution. After considering the JCT's concerns, the tax-writing committees ultimately settled on the language enacted as IRC § 7803(a)(3). To avoid reopening this issue, we are proposing to relocate the existing language in IRC § 7803(c)(3) virtually without change. We are recommending a minor refinement to the lead-in language that we think makes it read more clearly and does not substantially change the meaning. However, if the JCT believes our refinement does substantially change the meaning, the text of IRC § 7803(a)(3) could be relocated with no change in language at all.

7 For legislative language generally consistent with this aspect of the recommendation, see Protecting Taxpayers Act, S. 3278, 115th Cong. § 102(2) (2018).

#2 REQUIRE THE IRS TO PROVIDE TAXPAYERS WITH A "RECEIPT" SHOWING HOW THEIR TAX DOLLARS ARE BEING SPENT

Present Law

IRC § 7523 requires the IRS to provide taxpayers with very basic information regarding federal taxes and federal spending. Specifically, the IRS is required to include pie-shaped graphs in its instructions for Forms 1040, 1040A, and 1040EZ showing the relative sizes of major budget outlay categories and major income categories. In the 2017 Form 1040 instructions booklet, the IRS published two graphs on page 103 with data from fiscal year (FY) 2016.

Reasons for Change

IRC § 7523 was enacted for tax years beginning after 1990. The purpose of the statute—namely, to help taxpayers understand the connection between the taxes they pay and the benefits they receive—is important, and it is likely that some taxpayers who perceive that connection will be more compliant with their tax obligations. However, the National Taxpayer Advocate believes the information required by IRC § 7523 is too cursory to achieve its objective. It would be more helpful to provide each taxpayer with personalized information regarding the taxpayer's own contributions, such as the taxpayer's marginal tax rate, effective tax rate, and tax benefits claimed.

In addition, the value of even this cursory requirement has diminished over time. In 1990, almost all taxpayers filed their tax returns on paper, so the instructions booklet was widely available and widely used. Today, nearly 90 percent of individual income tax returns are filed electronically,[8] and the instructions booklet is much less visible. For those reasons, far fewer taxpayers see the Form 1040 instructions booklet today.

If the statute is modified, e-filing has the potential to enhance the value of the requirement. Specifically, tax software is capable of computing and displaying personalized tax information, including the taxpayer's marginal tax rate, effective tax rate, and tax benefits claimed—as well as show how much of each taxpayer's tax payments go toward major categories of federal spending. If required by Congress and programmed by software companies, this information can be presented in far greater detail than was possible when the statute was enacted in 1990.

To further promote public engagement, once taxpayers are given information regarding their tax payments and their contribution to federal spending, taxpayers could be given an opportunity to voice their opinions about how their tax dollars should be spent in the future. This could be achieved by inviting taxpayers to "vote" on their tax returns regarding how much and on what programs the government should spend its money and by requiring the IRS to report the results of that "voting." The "voting," of course, would be non-binding. But this exercise in public engagement could help Americans gain a better understanding of the connection between the federal taxes they pay and the federal benefits they receive. And, as noted, when taxpayers have a clear understanding of the benefits they receive in exchange for the taxes they pay, tax morale and tax compliance are likely to increase.

8 *See* https://www.irs.gov/newsroom/filing-season-statistics-for-week-ending-december-29-2017 (showing the e-file rate was 87 percent in 2017).

Recommendations

Amend IRC § 7523 to require the IRS to provide each taxpayer with a "taxpayer receipt" that shows, on a single page, how federal dollars are spent and the taxpayer's own contributions in the form of taxes paid and tax benefits claimed. The IRS should develop these receipts in consultation with TAS. For taxpayers who use tax software to self-prepare their returns, this requirement may be satisfied if the IRS, as part of its Authorized IRS e-file Providers rules,[9] requires e-file providers to include a page displaying the one-page breakdown at the end of the return preparation process. For taxpayers who use paid preparers, the requirement may be satisfied by requiring the preparer to include the one-page breakdown when furnishing the taxpayer with a completed copy of his or her tax return, as required by IRC § 6107(a).

Consider amending IRC § 7523 (i) to require the taxpayer receipt to contain an online link or a paper "ballot" where the taxpayer can "vote" on what he or she believes federal funds should be spent on and in what amounts and (ii) to require the IRS to publish the aggregate results of taxpayer "voting" no later than 30 days after the end of the calendar year.

9 *See* Rev. Proc. 2007-40, 2007-1 C.B. 1488, and IRS Pub. 3112, *IRS e-file Application and Participation* (Rev. 4-2017).

Improve the Filing Process

#3 AUTHORIZE THE VOLUNTEER INCOME TAX ASSISTANCE GRANT PROGRAM

Present Law

The IRS administers important programs that provide free or low-cost assistance to lower income U.S. taxpayers. The Volunteer Income Tax Assistance (VITA) program provides assistance to low-to-moderate income, elderly, disabled, and limited English-speaking taxpayers in preparing and filing their federal income tax returns. The Low Income Taxpayer Clinic (LITC) program provides *pro bono* representation to low income taxpayers involved in controversies with the IRS, including audits, appeals, collection matters, and tax litigation, and provides information about taxpayer rights and responsibilities in multiple languages for taxpayers who speak English as a second language.[10]

As part of the IRS Restructuring and Reform Act of 1998, Congress created a federal grants program for LITCs. IRC § 7526 authorizes the Secretary, subject to the availability of appropriated funds, to make grants to provide matching funds for the development, expansion, or continuation of LITCs.

In contrast to the LITC grant program, Congress has not authorized the VITA program to receive grants through the tax-writing process. Since fiscal year 2008, however, Congress has used the appropriations process to provide funding for the IRS to administer a Community VITA matching grants program for tax return preparation assistance.[11]

Reasons for Change

The VITA grant program would stand on more solid, permanent, and predictable footing if it were authorized and not solely created and funded through the annual appropriations process. As with the LITC authorizing statute, the tax-writing committees could establish eligibility criteria for VITA programs to expand their provision of services. Absent such criteria, the IRS has administered the VITA grant program narrowly, restricting grantees' ability to use grant funds to hire experts to train volunteers and perform quality reviews, as well as to serve as Certified Acceptance Agents. As a result, few VITA grantees assist low income self-employed taxpayers who file a Schedule C, *Profit or Loss From Business (Sole Proprietorship)*, or a Schedule F, *Profit or Loss From Farming*, or low income taxpayers with disaster losses. Moreover, few VITA grantees are open year-round or assist taxpayers in preparing amended returns.

Through an authorizing statute, Congress could provide direction to the IRS about the eligibility criteria for grantees, including their ability to operate year-round, and authorize the use of funds to develop expertise to

10 A third program, Tax Counseling for the Elderly (TCE), is similar to the Volunteer Income Tax Assistance (VITA) program in that it assists elderly taxpayers in preparing and filing their federal income tax returns. The IRS administers VITA and TCE jointly in most respects. The rationale for authorizing the VITA program probably applies to the TCE program as well. However, we have not studied the TCE program closely, so we are not making that recommendation at this time. In the Revenue Act of 1978, Congress authorized the TCE program. *See* Pub. L. No. 95-600, § 163, 92 Stat. 2763, 2810 (1978). Although that authorization only applied for fiscal years 1979 and 1980, Congress continues to appropriate funds for the TCE program annually through its appropriations acts. *See, e.g.*, Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division E, Title 1, 132 Stat. 348, 540 (2018).

11 *See, e.g.*, Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 1844, 1976 (2007); Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division E, Title 1, 132 Stat. 348, 540 (2018). Not all VITA programs receive a grant from the IRS. For more details about the VITA grant program, see IRS Pub. 4671, *VITA Grant Program Overview and Application Instructions*.

assist taxpayers in preparing a broader range of forms and schedules than most VITA programs are currently able to handle.

Recommendation

Enact a new IRC § 7526A to authorize the Secretary, subject to the availability of appropriated funds, to provide grants for the development, expansion, or continuation of VITA programs, particularly VITA programs that will use the funds to prepare tax forms and schedules that are commonly needed by low income taxpayers but currently designated as "out-of-scope."[12]

12 For legislative language generally consistent with this recommendation, see Taxpayer First Act of 2018, S. 3246, 115th Cong. § 1001 (2018); Taxpayer First Act, H.R. 5444, 115th Cong. § 12001 (2018); Protecting Taxpayers Act, S. 3278, 115th Cong. § 502 (2018). These three bills are similar in substance and contain the same taxpayer eligibility criteria. However, the House bill differs from the Senate bills in the term it uses to describe eligible taxpayers. The Senate bills use the term "applicable taxpayer." The House bill uses the term "low-income taxpayer." We recommend Congress use the term "applicable taxpayer" to avoid creating inconsistent statutory definitions of the term "low-income taxpayer." In IRC §§ 7526(b) and 6159(f), the term "low-income taxpayer" is defined as a taxpayer with income at or below 250 percent of the Federal Poverty Level. The IRS has adopted 250 percent of the Federal Poverty Level as its proxy for low-income taxpayers as well, including to screen out taxpayers receiving Social Security benefits from the Federal Payment Levy Program. *See* IRM 5.19.9.3.2.3, *Low Income Filter (LIF) Exclusion* (Oct. 20, 2016). Notably, the VITA program does not use 250 percent of the Federal Poverty Level for its eligibility criterion. Instead, a taxpayer is eligible to use VITA services if his or her income does not exceed an amount equal to the completed Earned Income Tax Credit (EITC) phaseout amount for a married couple filing a joint return with three or more qualifying children. We have no concerns about using the EITC threshold for purposes of VITA eligibility, but we believe it would promote clarity to consistently use the term "low-income taxpayer" to refer to taxpayers with incomes at or below 250 percent of the Federal Poverty Level. Use of the term "applicable taxpayer" would address this concern without changing the substance of the proposal.

#4 AUTHORIZE THE IRS TO ESTABLISH MINIMUM COMPETENCY STANDARDS FOR FEDERAL TAX RETURN PREPARERS

Present Law

Current law imposes no competency or licensing requirements on tax return preparers. Attorneys, certified public accountants (CPAs), and enrolled agents are required to take courses and pass competency tests. Volunteers are required to pass competency tests as part of the Volunteer Income Tax Assistance and Tax Counseling for the Elderly programs. But most preparers are non-credentialed and are not required to pass any competency tests or take any courses in tax return preparation.

Reasons for Change

The IRS receives more than 150 million federal income tax returns every year, and the majority are prepared by paid tax return preparers. For that reason, both taxpayers and the tax system depend heavily on the ability of preparers to prepare accurate tax returns. Yet numerous studies have found that non-credentialed tax return preparers routinely prepare inaccurate returns, which has the effect of harming taxpayers, the public fisc, or both.

To protect the public, federal and state laws generally require lawyers, doctors, financial planners, actuaries, appraisers, contractors, motor vehicle operators, and even barbers and beauticians to obtain licenses or certifications, and in most of these cases, they are required to pass competency tests. Taxpayers and the tax system would benefit from requiring minimum standards of tax return preparers as well.

The following studies illustrate the extent of inaccurate return preparation:

Government Accountability Office (GAO). In 2006, GAO auditors posing as taxpayers made 19 visits to several national tax return preparation chains in a large metropolitan area. Using two carefully designed fact patterns, they sought assistance in preparing tax returns. On 17 of 19 returns, preparers computed the wrong refund amounts, with variations of several thousand dollars. In five cases, the prepared returns reflected unwarranted excess refunds of nearly $2,000. In two cases, the prepared returns would have caused the taxpayer to overpay by more than $1,500. In five out of ten cases in which the Earned Income Tax Credit (EITC) was claimed, preparers failed to ask where the auditor's child lived or ignored the auditor's answer to the question, and consequently prepared returns claiming ineligible children.[13]

The GAO conducted a similar study in 2014. It again found that preparers computed the wrong tax liability on 17 of the 19 returns they prepared.[14]

Treasurer Inspector General for Tax Administration (TIGTA). In 2008, TIGTA auditors posing as taxpayers visited 12 commercial chains and 16 small, independently owned tax return preparation offices in a large metropolitan area. All preparers visited by TIGTA were non-credentialed. Of 28 returns prepared, 61 percent were prepared incorrectly. The average net understatement was $755 per return. Of seven

13 Government Accountability Office (GAO), GAO-06-563T, *Paid Tax Return Preparers: In a Limited Study, Chain Preparers Made Serious Errors* (Apr. 4, 2006) (statement of Michael Brostek, Director - Strategic Issues, Before the Committee on Finance, U.S. Senate).

14 GAO, GAO-14-467T, *Paid Tax Return Preparers: In a Limited Study, Preparers Made Significant Errors* (Apr. 8, 2014) (statement of James R. McTigue, Jr., Director - Strategic Issues, Before the Committee on Finance, U.S. Senate).

returns involving EITC claims, *none* of the preparers exercised appropriate due diligence as required under IRC § 6695(g).[15]

New York State Department of Taxation and Finance. During 2008 and 2009, agents conducted nearly 200 targeted covert visits in which they posed as taxpayers and sought assistance in preparing income or sales tax returns. In testimony at an IRS Public Forum, the Acting Commissioner of the New York Department of Taxation and Finance testified that investigators found "an epidemic of unethical and criminal behavior."[16] At one point, the Department reported that it had found fraud on about 40 percent of its visits, and it had made more than 20 arrests and secured 13 convictions.[17]

IRS Study on EITC Noncompliance. The IRS conducted a study to estimate compliance with EITC requirements during the 2006-2008 period. Among the findings of the study, unaffiliated unenrolled preparers (*i.e.*, non-credentialed preparers who are not affiliated with a national tax return preparation firm) were responsible for "the highest frequency and percentage of EITC overclaims." The study found that half of the EITC returns prepared by unaffiliated unenrolled preparers contained overclaims, and the overclaim averaged between 33 percent and 40 percent.[18]

In 2002, before these studies were published, the National Taxpayer Advocate began recommending that Congress authorize the IRS to conduct preparer oversight based on her experience in private practice. Her proposal received widespread support from stakeholders and Members of Congress. The Senate Committee on Finance twice approved legislation authorizing preparer oversight on a bipartisan basis under the leadership of Chairman Grassley and Ranking Member Baucus,[19] and on one occasion, the full Senate approved it by unanimous consent.[20] In 2005, the House Ways and Means Subcommittee on Oversight held a hearing at which representatives of five outside organizations expressed general support for preparer oversight.[21]

In 2009, the Commissioner of Internal Revenue concluded that the IRS had the authority under § 330 of Title 31 of the U.S. Code to impose minimum standards without statutory authorization. The IRS initiated an extensive series of hearings and discussions with stakeholder groups to receive comments and develop a system within which all parties believed they could operate.[22] The IRS began to implement the program in 2011, but it was terminated after a U.S. District Court rejected the IRS's legal position, concluding it does not have the authority to impose preparer standards without statutory authorization.[23]

15 Treasury Inspector General for Tax Administration (TIGTA), Ref. No. 2008-40-171, *Most Tax Returns Prepared by a Limited Sample of Unenrolled Preparers Contained Significant Errors* (Sept. 3, 2008).

16 Statement of Jamie Woodward, Acting Commissioner, New York Dept. of Taxation and Finance, before IRS Tax Return Preparer Review Public Forum (Sept. 2, 2009).

17 *Id.*; *see* Tom Herman, *New York Sting Nabs Tax Preparers*, Wall Street Journal (Nov. 26, 2008).

18 IRS Pub. 5162, *Compliance Estimates for the Earned Income Tax Credit Claimed on 2006-2008 Returns* 24-26 (Aug. 2014).

19 Tax Administration Good Government Act, H.R. 1528 (incorporating Tax Administration Good Government Act, S. 882), 108th Cong. § 141 (2004); Telephone Excise Tax Repeal Act, S. 1321 (incorporating Taxpayer Protection and Assistance Act, S. 832), 109th Cong. § 203 (2006).

20 Tax Administration Good Government Act, H.R. 1528 (incorporating Tax Administration Good Government Act, S. 882), 108th Cong. § 141 (2004).

21 The organizations were the American Bar Association, the American Institute of Certified Public Accountants (AICPA), the National Association of Enrolled Agents, the National Society of Accountants, and the National Association of Tax Professionals. *See Fraud in Income Tax Return Preparation: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 109th Cong. (2005).

22 *See* IRS Pub. 4832, *Return Preparer Review* (Dec. 2009).

23 *Loving v. IRS*, 917 F. Supp. 2d 67 (D.D.C. 2013), *aff'd*, 742 F.3d 1013 (D.C. Cir. 2014).

Since that time, Members of the House and Senate have introduced legislation that would provide the IRS with the statutory authorization to establish and enforce minimum standards. In the Senate, Senators Portman and Cardin sponsored authorizing legislation in 2018.[24] Previously, Senators Wyden and Cardin sponsored authorizing legislation, and Chairman Hatch included language to authorize minimum standards as part of a larger bill designed to combat identity theft and refund fraud.[25] In the House, Congresswoman Black and former Congressman Becerra, both members of the Ways and Means Committee, have sponsored authorizing legislation.[26]

The IRS's evolving "Future State" plan provides an important additional basis for establishing preparer standards. The IRS envisions giving preparers access to taxpayer information through online accounts. The security risks of this plan are significant, and if the IRS proceeds with it, steps must be taken to mitigate the risks. Minimum standards for preparers are one important step. Some have argued that requiring preparers to pass a competency test and take annual continuing education courses would address only the issue of competence and would not ensure preparers conduct themselves ethically. The National Taxpayer Advocate agrees that competency and ethical conduct are distinct issues. However, we think preparer standards would serve to raise ethical conduct as well as competency levels. A preparer who learns enough about tax return preparation to pass a competency test and takes annual continuing education courses would be demonstrating a commitment to return preparation as a profession. As such, the preparer would be more likely to understand and feel like a part of the tax system and would have more to lose if he or she is found to have engaged in misconduct.

In sum, the GAO, TIGTA, and other compliance studies described above suggest that tax returns prepared by non-credentialed preparers are often inaccurate. Minimum standards would directly improve preparer competency levels and are likely to raise ethical norms as well.

Recommendation

Amend Title 31, § 330 of the U.S. Code to authorize the Secretary to establish minimum standards for federal tax return preparers.[27]

24 Protecting Taxpayers Act, S. 3278, 115th Cong. § 202 (2018).

25 *See* Taxpayer Protection and Preparer Proficiency Act, S. 137, 114th Cong. (2015); J. Comm. on Tax'n, *Description of the Chairman's Mark of a Bill to Prevent Identity Theft and Tax Refund Fraud*, JCX-108-15, at 16-21 (2015).

26 *See* Tax Return Preparer Competency Act, H.R. 4141, 114th Cong. § 2 (2015) (Cong. Black) and Taxpayer Rights Act of 2015, H.R. 4128, 114th Cong. § 202 (2015) (Cong. Becerra).

27 For legislative language generally consistent with this recommendation, see Taxpayer Protection and Preparer Proficiency Act, S. 137, 114th Cong. (2015) and other bills cited herein.

#5 REQUIRE THAT ELECTRONICALLY PREPARED PAPER TAX RETURNS INCLUDE A SCANNABLE CODE

Present Law

Present Law does not address the treatment of tax returns that are prepared electronically but filed on paper.

Reasons for Change

In recent years, more than 85 percent of individual income tax returns have been submitted electronically. While this percentage is relatively high, almost 20 million returns are still submitted on paper. When the IRS cannot capture the data from a tax return electronically, IRS employees must enter the data from paper-filed returns manually. The manual transcription of millions of lines of return data is expensive, produces transcription errors, and delays return processing.

Scanning technology is available that would allow the IRS to scan paper returns prepared with tax return preparation software and capture the data in an efficient manner. Many states have been using scanning technology for paper-based returns for many years. To allow the IRS to utilize scanning technology, a horizontal or vertical bar code containing the return information would be imprinted on paper copies of a return prepared with tax return preparation software. Upon receiving the paper return, the IRS would scan it, capture the data, decode it, and process the return just as if it had been transmitted electronically.

While scanning technology does not convert taxpayers to e-file, it produces significant advantages over paper filing, including: (1) faster processing of tax returns; (2) more accurate recording of tax return information; and (3) cost savings due to the reduction in manual data transcription. Despite these benefits, the IRS has not fully availed itself of this or similar technology for individual income tax returns. The IRS can achieve savings by working with tax software companies to incorporate scannable bar codes into their individual tax return preparation software. The IRS already provides scanning technology as an option for filers of Schedules K-1 (Form 1065).[28] The IRS is also using character recognition software to capture data on some paper returns. It is unclear whether character recognition software is more accurate than scannable technology in the context of tax return data.

Recommendation

Require the IRS to report to Congress, within 180 days of enactment, on its plans to reduce the monetary costs and transcription errors associated with the processing of individual income tax returns prepared electronically but filed on paper.[29]

28 *See* IRS, *2-D Bar Coding for Schedules K-1 is the Preferred Method*, https://www.irs.gov/e-file-providers/two-dimensional-bar-coding-for-schedules-k-1-is-the-preferred-method (last visited Oct. 23, 2018).

29 For legislative language that would impose this requirement, see Taxpayer First Act of 2018, S. 3246, 115th Cong. § 2104 (2018); *see also* Department of the Treasury, *General Explanations of the Administration's Fiscal Year 2015 Revenue Proposals* 227 (Mar. 2014).

#6 CLARIFY THAT IRS EMPLOYEES MAY HELP TAXPAYERS LOCATE A SPECIFIC LOW INCOME TAXPAYER CLINIC

Present Law

Pursuant to IRC § 7526, the IRS may award matching grants for the development, expansion, or continuation of Low Income Taxpayer Clinics (LITCs), subject to the availability of appropriated funds. LITCs are programs that provide representation to low income taxpayers for free or a nominal fee to help them resolve disputes with the IRS.

IRS employees are prohibited from recommending or referring taxpayers to specific attorneys or accountants under Department of the Treasury ethical conduct standards.[30] The Office of Government Ethics' Standards of Ethical Conduct for Employees of the Executive Branch further limit IRS employees' ability to refer taxpayers to representatives.[31]

The IRS publishes a list of LITCs, and employees often refer taxpayers to that publication or to the list available on irs.gov.[32] However, there is no provision in the law that permits IRS employees to provide information about the nearest LITC without violating the applicable standards of conduct.

Reasons for Change

Congress created the LITC grant program so low income taxpayers, who otherwise could not afford representation, could obtain assistance in resolving disputes with the IRS. IRS employees receive training about LITCs and the valuable resources they provide for low income taxpayers. Taxpayers with tax problems often call the IRS for help. In some cases, a taxpayer asks the IRS to provide information about organizations that can provide assistance. In other cases, an IRS employee recognizes on his or her own that a taxpayer would benefit from LITC assistance. The inability of IRS employees to refer taxpayers to a specific LITC undermines the usefulness of the LITC program by impeding—rather than advancing—taxpayer awareness of the program.

Recommendation

Amend IRC § 7526(c), *Special Rules and Limitations,* to clarify that, notwithstanding any other provision of law, IRS employees may refer taxpayers to LITCs receiving funding under this section.[33]

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30 "Employees of the IRS or TIGTA (Treasury Inspector General for Tax Administration) shall not recommend, refer or suggest, specifically or by implication, any attorney, accountant, or firm of attorneys or accountants to any person in connection with any official business which involves or may involve the IRS." Supplemental Standards of Ethical Conduct for Employees of the Department of the Treasury, 5 C.F.R. § 3101.106(a). A Low Income Taxpayer Clinic (LITC) is similar enough to a firm of attorneys or accountants to fall within the scope of the regulation.

31 *See* 5 C.F.R. § 2635.702(c)(1) and 5 C.F.R. § 2635.101(b)(8).

32 *See* IRS Pub. 4134, Low Income Taxpayer Clinic List (Rev. 1-2018), and https://www.irs.gov/advocate/low-income-taxpayer-clinics.

33 For legislative language generally consistent with this recommendation, see Taxpayer First Act, H.R. 5444, 115th Cong. § 14001 (2018); Protecting Taxpayers Act, S. 3278, 115th Cong. § 503 (2018); Taxpayer Protection Act of 2017, H.R. 2171, 115th Cong. § 303 (2017); Taxpayer Protection Act of 2016, H.R. 4912, 114th Cong. § 303 (2016); Taxpayer Protection and Assistance Act of 2007, S. 1219, 110th Cong. § 2(b)(3) (2007); Taxpayer Protection and Assistance Act of 2005, S. 832, 109th Cong. § 2(b)(3) (2005).

#7 EXTEND THE TIME FOR SMALL BUSINESSES TO MAKE SUBCHAPTER S ELECTIONS

Present Law

IRC § 1362(b)(1) provides that small business corporations ("S corporations") may elect to be treated as pass-through entities by submitting Form 2553, *Election by a Small Business Corporation*, at any time during the preceding taxable year or at any time on or before the 15th day of the third month of the current taxable year.

The due date for an S corporation to file Form 1120S, *U.S. Income Tax Return for an S Corporation*, is the 15th day of the third month after the end of its taxable year.

Reasons for Change

Many small business owners are not familiar with the rules governing S corporations, and they learn about the effects of S corporation status for the first time when they hire a tax professional to prepare the corporation's tax return for its first year of operation. By that time, the deadline for electing S corporation status has passed. The failure to make a timely S corporation election can cause significant adverse tax consequences for businesses, such as taxation at the corporate level and the inability to deduct operating losses on shareholders' individual income tax returns.[34] For context, more than 4.8 million S corporation returns were filed in FY 2017, which accounted for about 70 percent of all corporate returns.

Taxpayers may seek permission from the IRS to make a late S corporation election under the provisions of Revenue Procedure 2013-30 or through a private letter ruling (PLR) request. Under the revenue procedure, a corporation that failed to timely file Form 2553 may request relief by filing Form 2553 within three years and 75 days of the date the election is intended to be effective. In addition, the corporation must attach a statement explaining its reasonable cause for failing to timely file the election and its diligent actions to correct the mistake upon its discovery.

Finally, each shareholder, during the period between the date the S corporation election was to have become effective and the date the completed election form is filed, must sign a statement affirming that they have reported their income on all affected returns consistent with the S corporation election for the year the election should have been filed and for all subsequent years. If an entity is unable to comply with the requirements of the revenue procedure, it may request relief through a PLR, for which the IRS charges a user fee ranging from $5,800 to $28,300 per request.

The current S corporation election deadline burdens small businesses by requiring them to pay tax professionals and often IRS user fees to request permission to make a late election. It also burdens shareholders, because when the IRS rejects an S corporation return due to the absence of a timely election, the status of the corporation is affected, and that, in turn, may result in changes on the shareholders' personal tax returns. In addition, the current deadline and relief procedures require a commitment of significant resources on the part of the IRS to process late-election requests.

34 The value of an S corporation election increased for many taxpayers with the passage of Pub. L. No. 115-97 (2017), which generally allows an individual taxpayer to deduct 20 percent of domestic "qualified business income" (QBI) from a pass-through business, including an S corporation, effectively reducing the individual income tax rate on such income by 20 percent. The deduction is subject to certain income thresholds (first $315,000 of QBI for joint filers and $157,500 for single returns), phase-outs for professional services, and limitations based on W-2 wages paid or capital invested by a business owner for larger pass-through entities. *See* Pub. L. No. 115-97, § 11011 (2017); H.R. Rep. No. 115-466, at 205-224 (2017) (Conf. Rep.). Some taxpayers will not realize they must make an S corporation election by March 15, 2018 to obtain the benefits of this provision for taxable year 2018.

Because small business owners often consider the S corporation election for the first time at the end of the taxable year in connection with the preparation of their company's first tax return, the burdens described above would be substantially eliminated if corporations could make an S election on their first timely filed tax return.

Recommendation

Amend IRC § 1362(b)(1) to allow a small business corporation to elect to be treated as an S corporation by checking a box on its first timely filed (including extensions) Form 1120S, *U.S. Income Tax Return for an S Corporation*.[35]

35 For legislative language generally consistent with this recommendation, see Protecting Taxpayers Act, S. 3278, 115th Cong. § 304 (2018); S Corporation Modernization Act of 2017, S. 711 and H.R. 1696, 115th. Cong. § 7 (2017).

#8 REQUIRE EMPLOYERS FILING MORE THAN FIVE FORMS W-2, 1099-MISC, AND 941 TO SUBMIT THEM ELECTRONICALLY

Present Law

IRC § 6011(e)(1) authorizes the IRS to issue regulations that provide standards for determining which returns must be filed on magnetic media or in other machine-readable form. IRC § 6011(e)(2) provides that when issuing regulations, the IRS cannot require any person to file returns on magnetic media unless the person is required to file at least 250 returns during the calendar year, except that partnerships having more than 100 partners must file returns on magnetic media. The term "person" is broadly defined to include "an individual, a trust, estate, partnership, association, company or corporation."[36]

Treasury regulations provide that taxpayers must file IRS Forms W-2, *Wage and Tax Statement*, and 1099-MISC, *Miscellaneous Income*, electronically when they file 250 or more information returns.[37] "[T]he 250-threshold applies separately to each type of form required to be filed."[38] Taxpayers may request waivers of the electronic filing requirement if they cannot comply due to technological constraints or if compliance with the requirement would result in undue financial burden.[39]

Every employer is generally required to make a return on Form 941, *Employer's Quarterly Federal Tax Return*, for the first calendar quarter in which the employer pays wages subject to the tax imposed by the Federal Insurance Contributions Act and for each subsequent quarter (whether or not wages are paid therein) until the employer has filed a final return.[40] Employers report the number of employees, total wages paid, and federal income tax withheld from employees' wages in the aggregate. Employers are not required to provide an employee-specific breakout of this information.[41] Employers are not required to file Forms 941 electronically but can do so voluntarily.[42] In contrast, a corporation required to file a corporate income tax return is required to file Form 1120, *U.S. Corporation Income Tax Return*, electronically if it files at least 250 required returns of any type during the calendar year in the aggregate (including Forms W-2, 1099-MISC, and 941).[43]

Reasons for Change

Increasing the electronic filing of information returns and requiring the electronic filing of Forms 941 with a breakdown of the amounts reported by employee would significantly benefit taxpayers and the IRS in several ways.

First: Effective data matching is an indispensable tool in the IRS's battle to combat identity theft (IDT) and refund fraud. Requiring employers to provide each employee's name, address, Social Security number (SSN),

36 IRC § 7701(a)(1). *See also* Treas. Reg. § 301.6011-2(a)(3).

37 Treas. Reg. § 301.6011-2(c)(1)(i).

38 Treas. Reg. § 301.6011-2(c)(1)(iii).

39 *See* IRS Pub. 8508, *Request for Waiver from Filing Information Returns Electronically* (Rev. 9-2017).

40 Treas. Reg. § 31.6011(a)-1(a)(1). *See* Treas. Reg. § 31.6011(a) -1(a)(2) through (5) for details about when an employer must use something other than Form 941.

41 Although the final version of Pub. L. No. 115-97 (2017) did not include a provision modifying the reporting requirements of Form 941, a proposal to include the name, address, and wages of each employee was included in the version of the tax reform bill approved by the House. *See* H.R. Rep. No. 115-409, at 142-144 (2017). *See also* H.R. Rep. No. 115-466, at 235 (2017) (Conf. Rep.).

42 See https://www.irs.gov/businesses/small-businesses-self-employed/e-file-form-940-941-or-944-for-small-businesses (last visited Oct. 4, 2018).

43 Treas. Reg. § 301.6011-5(a)(1) and (d)(5).

and wages on a quarterly basis on an electronically filed Form 941 would allow the IRS an opportunity to gather information for purposes of data matching in advance of the filing season.

The earlier availability of Forms W-2 and 1099-MISC via electronic filing also would provide the IRS with real-time data on wages and withholding, without the delays and errors associated with transcribing data from paper-filed forms. When the IRS is able to receive and process information about a taxpayer's wages and withholding before it processes the taxpayer's tax return, the IRS can match the data on the tax return with the data reported on the information returns before paying a refund. If there are significant disparities, the IRS can review the tax return more carefully. Similarly, the IRS could more quickly match wages and withholding reported on information returns against the employer's Forms 941. From the government's perspective, data matching reduces the revenue loss associated with unpaid employment taxes, improper payments, and stolen refunds. From the taxpayer's perspective, the IRS helps the legitimate taxpayer either avoid a refund delay or resolve a delay more quickly by spotting an IDT return before a refund is paid.

The potential benefits of earlier access to taxpayers' wages and withholding information are significant because of the magnitude of the IDT problem. The IRS estimates at least $12.24 billion in IDT tax refund fraud was attempted in calendar year 2016. It estimates it prevented at least $10.56 billion (86 percent) but paid at least $1.68 billion (14 percent). Business IDT is a growing subset of the IDT problem. The IRS handled nearly three times as many business IDT cases in 2017 as it did in 2016, an increase of more than 10,000 cases. Yet in 2017, less than half of Forms 941 were filed electronically. Greater electronic filing of Forms 941 would allow the IRS to match Form 941 data against Form W-2 and Form 1099-MISC data to identify instances of potential business IDT fraud.

Second: Data submitted on paper returns must be manually entered into Social Security Administration (SSA) or IRS computer systems, and manual data entry necessarily produces transcription errors. When a transcription error on an information return or on an employer's Form 941 occurs, the IRS's document matching process will identify a disparity that may delay a refund or initiate an erroneous adjustment notice, causing needless hassle for the taxpayer and unnecessary work for the IRS.

Third: Manual data entry of information returns is much more expensive than electronic data processing. According to SSA estimates, the cost to transcribe and process 24.2 million paper W-2s in 2016 was about $13.3 million, or $0.55 per paper W-2. SSA officials estimated that lowering the W-2 paper filing requirement to ten or fewer W-2s would save the SSA between $9.7 and $11.3 million per year.[44]

The current threshold of 250 returns that triggers the requirement for electronic filing was established in 1989.[45] The electronic filing requirement applies to Form 1120, *U.S. Corporation Income Tax Return*, if a corporation files at least 250 required returns of any type during the calendar year in the aggregate (including Forms W-2, 1099-MISC, and 941). Considering the significant advances in technology and digital capability that have taken place since that time, the National Taxpayer Advocate believes the threshold should be reduced substantially.

There are some employers for whom an electronic filing requirement would impose disproportionate burden. For example, an elderly individual who pays one or several health aides and must file Forms W-2 may not have

44 *See* GAO, GAO-18-224, *Tax Fraud and Noncompliance: IRS Can Strengthen Pre-Refund Verification and Explore More Uses* (Jan. 30, 2018).

45 Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7713, 103 Stat. 2106, 2394 (1989) (codified as amended at 26 U.S.C. § 6011).

the technological skills to file electronically without help. A threshold of five avoids burdening very small employers.

We note that the SSA has a fillable Form W-2 available on its website that employers can use to submit Forms W-2 electronically at no cost.[46] The IRS should develop a similar fillable Form 941, *Employer's Quarterly Federal Tax Return*, and a fillable Form 1099-MISC, *Miscellaneous Income,* for small businesses that may not have access to tax software to electronically file. By developing fillable forms and thereby making it easier for businesses to file electronically, the IRS will be in a better position to protect revenue by identifying and resolving inaccurate reporting at the time of return filing and preventing the release of improper refunds.

Recommendations

Amend IRC § 6011(e)(2), *Requirements of Regulations*, to require employers with more than five employees to electronically file Forms W-2 and Forms 941, and require payers who issue more than five Forms 1099-MISC with non-employee compensation to electronically file Forms 1099-MISC.[47]

Amend IRC § 6011 to require that Form 941 contain information about each employee's name, address, SSN, and wages.

To promote electronic filing, direct the IRS to create fillable Forms 941 and Forms 1099-MISC that can be electronically filed, at no cost, directly from the irs.gov website.[48]

46 See https://www.ssa.gov/employer/what.htm (last visited Dec. 1, 2018).

47 For legislative language generally consistent with our recommendation to reduce the mandatory e-file thresholds, see Taxpayer First Act, H.R. 5444, 115th Cong. § 18401 (2018); Taxpayer First Act of 2018, S. 3246, 115th Cong. § 2102 (2018).

48 For legislative language generally consistent with our recommendation to create an Internet platform for filing Forms 1099, see Taxpayer First Act, H.R. 5444, 115th Cong. § 18203 (2018); Taxpayer First Act of 2018, S. 3246, 115th Cong. § 2103 (2018).

#9 AUTHORIZE THE TREASURY DEPARTMENT TO RECOVER MISDIRECTED DEPOSITS OF TAX REFUNDS AND PAY THEM TO THE CORRECT TAXPAYERS

Present Law

The IRC does not currently authorize procedures through which the IRS may obtain information about an account holder who receives a misdirected direct deposit refund. The IRS has erroneous refund procedures to recover a direct deposit that has been applied to the wrong taxpayer's bank account due to IRS error.[49] An erroneous refund is defined as "the receipt of any money from the Service to which the recipient is not entitled."[50] However, the IRS may not use its erroneous refund procedures to recover a refund if it does not know the identity of the account owner.

Existing regulations provide that when federal payments (other than vendor payments) are deposited, the account at the financial institution shall be in the name of the recipient.[51] However, financial institutions are not required to verify whether the name on the designated account matches the name of the depositor/taxpayer,[52] and the IRS has no authority to take money out of the incorrect account or receive confidential information from the financial institution regarding the owner of the incorrect account.

The relevant guidelines provide, in part: "If the taxpayer or the taxpayer's agent gave incorrect account information, neither Fiscal Service nor IRS will assist the taxpayer with recovering the funds."[53]

Reasons for Change

When a taxpayer or a preparer requests a tax refund via direct deposit, the taxpayer or preparer must enter the bank routing number and the taxpayer's account number on the return. Bank routing numbers are nine digits, and bank account numbers vary in length but generally are comparable. When entering roughly 18 digits, transcription errors sometimes happen. As a result, tax refunds are sometimes erroneously directed into the account of an unrelated third party. In a small number of cases, moreover, dishonest tax return preparers change the routing information on a return and the taxpayer's refund is deposited into the preparer's account.

There currently are no procedures that allow the IRS to recover a misdirected direct deposit and reissue it to the correct taxpayer. Thus, the IRS can do little more than contact the financial institution and ask that it attempt to persuade the incorrect account owner to return the misdirected funds. While the financial institution is required to take corrective action when the mistake is its own, it is generally not required to take action if the mistake is made by the taxpayer.[54] As a result, a taxpayer may lose his tax refund in entirety if he or his preparer inadvertently enters a wrong digit. This is an unacceptable and avoidable outcome.

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49 *See* IRM 21.4.5.5.5, *Overview of Category D Erroneous Refunds* (Oct. 1, 2016).

50 *See* IRM 21.4.5.2, *Erroneous Refunds Overview* (Oct. 9, 2015).

51 31 C.F.R. § 210.5(a).

52 "It is important to note that [a financial institution] is not required to manually verify that the name on the [Automated Clearing House (ACH)] entry matches the name on the account at the time the payment is posted." Bureau of the Fiscal Service (BFS), Green Book: *A Guide to Federal Government ACH Payments* 2-6 (Rev. May 2013), https://www.fiscal.treasury.gov/fsreports/ref/greenBook/pdf/greenbookchapter2.pdf.

53 BFS, Green Book: *A Guide to Federal Government ACH Payments* 1-9 (Rev. May 2013), https://fiscal.treasury.gov/fsreports/ref/greenBook/pdf/greenbookchapter1.pdf.

54 *See* 31 C.F.R. § 210.8(d) (providing that if a financial institution becomes aware that an agency has originated an Automated Clearing House credit entry to an account that is not owned by the payee whose name appears in the ACH payment information, the financial institution shall promptly notify the agency).

By contrast, a taxpayer has substantially greater recourse if he requests that his refund be paid by paper check. If a taxpayer elects to receive his refund by check and the check does not arrive, the taxpayer may notify the IRS, and the Treasury Department's Bureau of the Fiscal Service (BFS, formerly Financial Management Service) will determine whether the check has been negotiated. If it has not been negotiated, BFS will issue a replacement check to the taxpayer. If BFS finds the paper check has been negotiated, it will conduct additional research and, if it determines the taxpayer was not involved in negotiation of the check, it will issue a replacement to the taxpayer and charge the Check Forgery Insurance Fund.[55]

Current procedures providing recourse for taxpayers who elect to receive their tax refunds by check but not for taxpayers who elect to receive their tax refunds electronically make little sense. Direct deposit is a faster, more secure, and less expensive way of transmitting refunds than paper checks, and for those reasons, the IRS strongly encourages taxpayers to elect to receive their refunds in that way. The current procedures undermine the IRS's objective by providing a strong incentive for taxpayers to elect to receive their refunds by check.

One way to remedy a misdirected deposit is to grant the Treasury Department the authority to recover the mistakenly directed deposit from the bank and post the funds to the correct taxpayer's account. More specifically, when the BFS makes a direct deposit to a bank, the transmittal information would include both the taxpayer's name and account number. The bank would be required to verify that the account number into which the funds are deposited matches the taxpayer's name. If the bank does not do so, the BFS could require the bank to return the funds and the BFS could then issue the refund to the taxpayer.

Recommendation

Require financial institutions to verify that the name of the taxpayer matches the name on the account prior to processing a federal payment via the Automated Clearing House network.[56] If a financial institution fails to match the taxpayer's name with the name on the account, the Bureau of the Fiscal Service shall have the authority to demand that the financial institution return the funds, and shall use those funds to make the taxpayer whole for any loss sustained as a result of the institution's failure to conduct the name-matching.[57]

55 *See* 31 U.S.C. § 3343. Once it is determined a refund check has been cashed and the BFS determines whether or not the payee endorsed the check, BFS may issue a replacement check or, when appropriate, may issue a denial letter. IRM 21.4.2.4.13 (Jan. 13, 2016).

56 There may be circumstances in which financial institutions cannot precisely match an account number with a taxpayer name. For example, if the guardian of an incapacitated taxpayer files a return and receives a refund, the refund may be directed to the taxpayer, but the account may be titled in the name of the guardian "for the benefit of" the taxpayer. Therefore, it may be necessary for Congress to provide the Secretary with flexibility to provide exceptions from the matching rule, where warranted.

57 This recommendation may fall within the jurisdiction of the banking committees (Senate Committee on Banking, Housing, and Urban Affairs; House Committee on Financial Services). For legislative language generally consistent with this recommendation but taking a different approach, see Protecting Taxpayers Act, S. 3278, 115th Cong. § 203 (2018).

#10 TREAT ELECTRONICALLY SUBMITTED TAX PAYMENTS AS TIMELY IF SUBMITTED BEFORE THE APPLICABLE DEADLINE

Present Law

IRC § 7502(a)(1) provides that if certain requirements are satisfied, a document or payment is deemed to be filed or paid on the date of the postmark stamped on the envelope. If the postmark date is on or before the last day of the period prescribed for filing the document or making the payment, the document or payment is considered timely filed or paid, even if it is received after the due date.

IRC § 7502(b) and (c) provide that this timely mailed/timely filed rule (commonly known as the "mailbox rule") applies to documents sent by U.S. postal mail, private delivery services, and electronic filing through an electronic return transmitter. The Secretary is authorized to promulgate regulations describing the extent to which the mailbox rule shall apply to certified mail and electronic filing.[58] To date, the only regulations the Secretary has promulgated relating to electronically filed documents cover documents filed with an electronic return transmitter.[59]

Reasons for Change

The statutory mailbox rule in IRC § 7502 does not apply to the electronic transmission of payments to the IRS. In addition, the mailbox rule does not apply to the electronic filing of time-sensitive documents (except documents filed electronically with an electronic return transmitter).[60] If the IRS does not receive an electronically submitted document (including a facsimile transmission) or payment until after the due date, the document or payment is considered late, even if the taxpayer can produce a confirmation that they transmitted the payment or document before the due date. The comparatively unfavorable treatment of electronically submitted documents and payments undermines the IRS's efforts to encourage greater use of digital services and creates additional cost and burden for taxpayers and the IRS alike.

Along similar lines, the IRS encourages U.S. taxpayers to make payments electronically using the Treasury Department's Electronic Federal Tax Payment System (EFTPS). However, the EFTPS website displays the following warning: "Payments using this Web site or our voice response system must be scheduled by **8 p.m. ET the day before the due date** to be received timely by the IRS. The funds will move out of your banking account on the date you select for settlement"[61] (emphasis in original). This limitation applies to all payments.

Example: If a taxpayer owes a balance due on April 15 and mails the payment to the IRS before midnight on April 15, the payment will be considered timely, even though it will probably take about a week until the IRS receives, opens, and processes the check. If the same taxpayer submits the payment on EFTPS, the payment will be considered late if submitted after 8:00 p.m. on April 14 (28 hours earlier), even though the payment would be debited from the taxpayer's account on April 16—about one week earlier than if submitted by mail.

This disparity in the treatment of mailed and electronically submitted payments makes little sense. As compared with a mailed check, an electronic payment is received more quickly, is cheaper to process, and eliminates the risk that a mailed check will be lost or misplaced. Yet, rather than encouraging taxpayers to use EFTPS, the relative deadlines serve as a deterrence.

58 IRC § 7502(c)(2).

59 Treas. Reg. § 301.7502-1(d).

60 See Treas. Reg. § 301.7502-1(d)(3)(i) for a definition of an electronic return transmitter. See also Rev. Proc. 2007-40, 2007-1 C.B. 1488, for a list of documents that can be filed electronically with an electronic return transmitter.

61 *See* www.eftps.gov (last visited Oct. 23, 2018).

Recommendation

Amend IRC § 7502 to direct the Secretary to issue regulations that apply the mailbox rule comparably to documents and payments submitted by a taxpayer regardless of whether they are submitted electronically or by mail.

#11 ADJUST ESTIMATED TAX PAYMENT DEADLINES TO OCCUR QUARTERLY

Present Law

Under IRC § 6654(c)(2), taxpayers are required to make estimated tax payments in four required installments on the following dates: April 15, June 15, September 15, and January 15.

Reasons for Change

Although estimated tax installment payments are sometimes referred to as "quarterly payments," they do not coincide with calendar-year quarters. Nor are the payment dates evenly spaced. The April 15 and June 15 installments are due two months apart; the June 15 and September 15 installments are due three months apart; the September 15 and January 15 installments are due four months apart; and the January 15 and April 15 installments are due three months apart.

These dates are not intuitive and create compliance burdens. Small business owners and self-employed taxpayers are disproportionately affected by the estimated tax rules because their incomes generally are not subject to wage withholding. Yet, small businesses are far more likely to keep their books on the basis of regular three-month quarters than on the basis of the seemingly random intervals prescribed by IRC § 6654. These uneven intervals make it more difficult for many taxpayers to calculate net income and save appropriately to make payments. They also cause confusion, as taxpayers struggle to remember the due dates. This confusion affects traditionally self-employed workers as well as workers in the gig economy.

Setting due dates to fall 15 days after the end of each calendar quarter would be substantially easier for taxpayers to remember and comply with.

Recommendation

Amend IRC § 6654(c)(2) to set the estimated tax installment deadlines on April 15, July 15, October 15, and January 15.[62]

62 For legislative language generally consistent with this recommendation, see Protecting Taxpayers Act, S. 3278, 115th Cong. § 305 (2018); Small Business Owners' Tax Simplification Act, H.R. 3717, 115th Cong. § 2 (2017).

#12 HARMONIZE REPORTING REQUIREMENTS FOR TAXPAYERS SUBJECT TO BOTH FBAR AND FATCA BY ELIMINATING DUPLICATION AND EXCLUDING ACCOUNTS A U.S. PERSON MAINTAINS IN THE COUNTRY WHERE HE OR SHE IS A *BONA FIDE* RESIDENT

Present Law

The Currency and Foreign Transaction Reporting Act of 1970 (commonly known as the Bank Secrecy Act) requires U.S. citizens and residents to report any foreign account with an aggregate value of $10,000 or more at any time during the calendar year on FinCEN Report 114, *Report of Foreign Bank and Financial Accounts* (FBAR).[63]

The Foreign Account Tax Compliance Act (FATCA)[64] added IRC § 6038D, which requires U.S. citizens, resident aliens, and certain non-resident aliens to file Form 8938, *Statement of Specified Foreign Financial Assets*, with their federal income tax returns to report foreign assets exceeding specified thresholds. As codified by FATCA, IRC §§ 1471-1474 provide that foreign financial institutions (FFIs) that do not register with the IRS and agree to report certain information about their "United States accounts,"[65] including accounts held by U.S. persons and accounts of certain foreign entities with substantial U.S. owners, are subject to a 30 percent withholding tax on certain U.S. source payments they receive.

IRC § 1471(d)(1) authorizes the IRS to issue regulations to eliminate duplicative reporting requirements. IRC § 6038D similarly authorizes the IRS to issue regulations or other guidance to provide appropriate exceptions from FATCA reporting when such reporting would be duplicative of other disclosures.

Reasons for Change

Many U.S. taxpayers, particularly those living abroad, face increased compliance burdens and costs as a result of FATCA reporting obligations that significantly overlap with the FBAR filing requirements.[66] The IRS has exercised its regulatory authority to eliminate duplicative reporting of assets on Form 8938 if an asset is reported or reflected on certain other timely filed international information returns (*e.g.*, Forms 3520, 3520A, 5471, 8621, 8865, or 8891).[67] It has also provided an exception from the reporting rules for financial accounts held in U.S. territories for *bona fide* residents of such territories.[68]

However, the IRS has repeatedly declined to adopt the recommendations of the National Taxpayer Advocate and supported by other stakeholders, including the Government Accountability Office, to eliminate duplicative FATCA reporting where assets have already been reported on an FBAR[69] and to provide a same-country exception for reporting financial accounts held in the country in which a U.S. taxpayer is a *bona fide* resident. The recommendations, if adopted, would reduce the compliance burdens on U.S. taxpayers, who now must file complex, additional forms themselves or pay higher tax return preparation fees. They would also reduce the compliance burdens on FFIs, some of which are declining to do business with U.S. expatriates because of the significant costs and regulatory risks associated with ongoing FATCA compliance. In addition,

63 *See* 31 U.S.C. § 5314(b)(3) and 31 C.F.R. § 1010.306(c).

64 Pub. L. No. 111-147, Title V, Subtitle A, 124 Stat. 71, 97 (2010).

65 *See* IRC § 1471(d)(1) for a definition of "United States account."

66 IRS, *Comparison of Form 8938 and FBAR Requirements*, http://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements.

67 Treas. Reg. § 1.6038D-7(a)(1).

68 Treas. Reg. § 1.6038D-7(c).

69 *See*, *e.g.*, GAO, GAO-12-403, *Reporting Foreign Accounts to the IRS: Extent of Duplication Not Currently Known, but Requirements Can Be Clarified* (Feb. 2012).

the unwillingness of certain FFIs to do business with U.S. expatriates makes it difficult for U.S. citizens to open bank accounts in some countries.

Recommendations

Amend IRC § 6038D (i) to eliminate duplicative reporting of assets on Form 8938, *Statement of Specified Foreign Financial Assets,* where an asset is or has been reported or reflected on an FBAR and (ii) to exclude financial accounts maintained by a financial institution organized under the laws of the country of which the subject U.S. person is a *bona fide* resident from the specified foreign financial assets required to be reported on Form 8938.

Amend IRC § 1471 to exclude financial accounts maintained by a financial institution organized under the laws of the country of which the subject U.S. person is a *bona fide* resident from the definition of "financial account" subject to reporting by FFIs.[70]

70 For additional information on the National Taxpayer Advocate's recommendations, see National Taxpayer Advocate 2015 Annual Report to Congress 353-363 (Legislative Recommendation: *Foreign Account Reporting: Eliminate Duplicative Reporting of Certain Foreign Financial Assets and Adopt a Same-Country Exception for Reporting Financial Assets Held in the Country in Which a U.S. Taxpayer Is a Bona Fide Resident*).

Improve Assessment and Collection Procedures

#13 CONTINUE TO LIMIT THE IRS's USE OF "MATH ERROR AUTHORITY" TO CLEAR-CUT CATEGORIES SPECIFIED BY STATUTE

Present Law

Before assessing a deficiency, the IRS is ordinarily required by IRC § 6213(a) to send the taxpayer a statutory notice of deficiency that gives the taxpayer 90 days (150 days if addressed to a taxpayer outside the U.S.) to contest it by filing a petition with the U.S. Tax Court (known as "deficiency procedures"). The taxpayer's ability to appeal a deficiency determination to the Tax Court before paying is central to the taxpayer's *right to appeal an IRS decision in an independent forum*. As an exception to that requirement, IRC § 6213(b)(1) authorizes the IRS to summarily assess and collect tax after 60 days, without first providing the taxpayer with a statutory notice of deficiency or access to the Tax Court, when it is addressing "mathematical and clerical" errors (known as "math error authority"). Taxpayers who do not contest a proposed deficiency within this shorter period lose the opportunity to do so in court before paying. Under current law, the IRS may summarily assess 17 types of "mathematical or clerical error," which are codified at IRC § 6213(g)(2) in subparagraphs A-Q.

Reasons for Change

Congress generally requires the IRS to follow deficiency procedures—to provide taxpayers with notice and a reasonable opportunity to challenge an adverse IRS tax adjustment. Math error authority, which provides fewer taxpayer protections, was authorized as a limited exception to regular deficiency procedures. It allows the IRS to make adjustments in cases of clear taxpayer error, such as where a taxpayer incorrectly adds numbers or incorrectly transcribes a number from one form to another. Because taxpayers have fewer protections under math error procedures, the procedures are not intended to be used where a substantive disagreement may exist. When Congress has expanded the IRS's math error authority, it has done so consistent with that principle.

Because math error procedures are cheaper and simpler for the IRS than standard deficiency procedures, the Department of the Treasury on several recent occasions has requested that Congress grant it the authority to expand its math error authority to add certain categories of "correctable errors" by regulation.[71]

The National Taxpayer Advocate understands the administrative simplicity of math error procedures but is concerned about the impact of a broad grant of regulatory authority on taxpayer rights. In her reports to Congress, we have documented circumstances in which the IRS has used its existing math error authority to address discrepancies and mismatches that go beyond simple arithmetic mistakes and have undermined taxpayer rights.[72]

71 *See* Department of the Treasury, *General Explanations of the Administration's Fiscal Year 2016 Revenue Proposals*, 245-246 (Feb. 2015), https://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2016.pdf (last visited Dec. 20, 2017).

72 *See, e.g.*, National Taxpayer Advocate 2015 Annual Report to Congress 329-339; National Taxpayer Advocate 2014 Annual Report to Congress 163-171; National Taxpayer Advocate 2013 Annual Report to Congress vol. 2 5, 91-92; National Taxpayer Advocate 2011 Annual Report to Congress 74-92; National Taxpayer Advocate 2006 Annual Report to Congress 311; National Taxpayer Advocate 2003 Annual Report to Congress 113; National Taxpayer Advocate 2002 Annual Report to Congress 25, 186; National Taxpayer Advocate 2001 Annual Report to Congress 33.

If the IRS uses math error authority to address more complex issues that require additional fact finding, the assessments are more likely to be wrong, and the IRS's computer-generated notices, which confuse many taxpayers in the simplest of circumstances, are likely to become even more difficult to understand. Shorter deadlines and confusing notices will prevent some taxpayers from responding timely. As a result, these taxpayers will lose their right to challenge the adjustments in court before paying. The IRS may also waste resources responding to calls and letters, reviewing additional documentation, and processing abatement requests from taxpayers whose returns were correct as filed. It may even seek to collect inaccurate assessments from them. Thus, expanding math error authority into more complicated areas will burden taxpayers unnecessarily, erode taxpayer rights, and sometimes waste IRS resources.

Math error authority may be appropriate to use in instances where required schedules are omitted, or annual or lifetime dollar caps have been exceeded. It also may be appropriate to use where there is a discrepancy between a return entry and data available to the IRS from a reliable government database, such as records maintained by the Social Security Administration. But the IRS alone should not be the arbiter of that reliability. Rather, Congress should retain full authority to determine whether the administrative "efficiency" of using math error authority in these instances outweighs the loss of the significant taxpayer protections that deficiency procedures provide.

Recommendations

Continue to limit the IRS's use of "math error authority" to clear-cut categories specified by statute. Because the standard deficiency procedures created by Congress provide important taxpayer protections, the IRS should not be authorized to add new math-error categories by regulation.

Instead, amend IRC § 6213(g) to authorize the IRS to summarily assess a deficiency due to "clerical errors" only pursuant to Congressional authorization and only where: (1) there is a discrepancy between a return entry and reliable government data; (2) the IRS's notice clearly describes the discrepancy and how to contest it; (3) the IRS has researched all information in its possession that could help reconcile the discrepancy; (4) the IRS does not have to evaluate documentation to make a determination; and (5) there is a low abatement rate for taxpayers who respond. In addition, amend IRC § 6213(g) to provide that the IRS is not authorized to use any new criteria or data to make summary assessments unless the Department of the Treasury, in conjunction with the National Taxpayer Advocate, has evaluated and publicly reported on the reliability of the criteria or data for that intended use.[73]

73 For a more limited recommendation, see National Taxpayer Advocate 2015 Annual Report to Congress 329-339 (Legislative Recommendation: *Math Error Authority: Authorize the IRS to Summarily Assess Math and "Correctable" Errors Only in Appropriate Circumstances*).

#14 PROVIDE ADDITIONAL TIME FOR TAXPAYERS OUTSIDE THE UNITED STATES TO REQUEST ABATEMENT OF A MATH ERROR ASSESSMENT EQUAL TO THE TIME EXTENSION ALLOWED IN RESPONDING TO A NOTICE OF DEFICIENCY

Present Law

IRC § 6213(b) authorizes the IRS to make a summary assessment of tax arising from mathematical or clerical errors as defined in IRC § 6213(g), bypassing otherwise-applicable deficiency procedures. Thus, a taxpayer has no right to file a petition with the U.S. Tax Court based on a math error notice. Under IRC § 6213(b)(2)(A), however, a taxpayer has 60 days after a math error notice is sent to file a request with the IRS for an abatement of the assessment for mathematical or clerical errors. If the taxpayer submits an abatement request within 60 days, the IRS must abate the summary assessment and follow deficiency procedures under IRC § 6212 to reassess the increase in the tax shown on the return. If the taxpayer does not submit an abatement request within 60 days, the taxpayer forfeits his right to file a petition in the Tax Court. No additional time to request abatement is allotted when the math error notice is addressed to a taxpayer outside the United States.

By contrast, a taxpayer outside the United States who receives a notice of deficiency generally is given 60 additional days to file a petition with the Tax Court. Generally, a taxpayer may file a petition with the Tax Court for a redetermination of a deficiency within 90 days from the date the notice is mailed. When the notice of deficiency "is addressed to a person outside the United States," however, IRC § 6213(a) provides that the taxpayer has 150 days from the date the notice is mailed to file a Tax Court petition. The Tax Court has construed this language broadly, concluding among other things that the 150-day period for filing a petition applies when a notice of deficiency is mailed to an address outside the United States as well as when a notice of deficiency is mailed to an address within the United States but the taxpayer is located outside the United States.[74]

Reasons for Change

Approximately nine million U.S. citizens live abroad, along with more than 170,000 U.S. military service personnel.[75] In addition, more than 330,000 U.S. students study overseas.[76] Taxpayers living (temporarily or permanently) abroad typically require more time to respond to IRS notices than taxpayers living in the United States for several reasons. First, mail delivery takes longer in both directions—in some cases, depending on where the taxpayer is located, substantially longer. Second, persons temporarily abroad often do not have access to their tax or financial records, making it impossible for them to respond immediately.

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74 *See, e.g.*, *Levy v. Comm'r*, 76 T.C. 228 (1981) (holding that the 150-day rule is applicable to a U.S. resident who is temporarily outside of the country when the notice is mailed and delivered); *Looper v. Comm'r*, 73 T.C. 690 (1980) (holding that the 150-day rule is applicable where a notice is mailed to an address outside the United States); *Lewy v. Comm'r*, 68 T.C. 779 (1977) (holding that the 150-day rule is applicable to a foreign resident who is in the United States when the notice is mailed but outside the United States when the notice is delivered); *Hamilton v. Comm'r*, 13 T.C. 747 (1949) (holding that the 150-day rule is applicable to a foreign resident who is outside the United States when the notice is mailed and delivered).

75 For FY 2017, the Department of State estimates that 9,000,000 U.S. citizens lived abroad. U.S. Department of State, Bureau of Consular Affairs, *CA by the Numbers, Fiscal Year 2017 data*, updated July 2018. *See* https://travel.state.gov/content/dam/travel/CA-By-the-Numbers%202018-Q4.pdf. As of June 30, 2018, about 170,000 U.S. military service personnel were stationed abroad; this number does not include military family members, or civilian military personnel stationed abroad. Defense Manpower Data Center (DMDC), *Location Country Report 1806, Number of Military and DoD Appropriated Fund (APF) Civilian Personnel Permanently Assigned, Updated June 30, 2018*.

76 National Association for Foreign Student Affairs, *Association of International Educators, Study Abroad Participation by State: Academic Year 2016–2017*, https://www.nafsa.org/_/File/_/2015-2016_study_abroad_state.pdf.

By giving taxpayers living abroad 60 additional days to file a petition with the Tax Court in response to a notice of deficiency, Congress recognized that holding overseas taxpayers to the same deadlines as taxpayers living in the United States would not be fair or realistic. The same considerations apply with respect to the deadline for responding to math error notices. In fact, the need for additional time to respond is arguably greater in the case of math error notices because the standard response deadline is 60 days (as opposed to 90 days for filing a Tax Court petition in response to a notice of deficiency).

The right of a taxpayer to respond to an adverse tax adjustment and have his response fairly considered is central to a fair tax system.[77] Giving U.S. taxpayers living abroad the same additional 60-day period to respond to math error notices as the law currently gives them to file petitions in response to deficiency notices would help ensure that their rights to challenge adverse IRS tax adjustments are comparable to the rights of U.S. taxpayers who are not absent from the United States.

Recommendation

Amend IRC § 6213(b)(2)(A) to allow 120 days to request abatement when the math error notice is addressed to taxpayers outside the United States.

77 The following specific taxpayer rights apply in this situation: *the right to pay no more than the correct amount of tax*, the *right to challenge the IRS's position and be heard,* and the *right to appeal an IRS decision in an independent forum*.

#15 REQUIRE THE IRS TO WAIVE USER FEES FOR TAXPAYERS WHO ENTER INTO LOW-COST INSTALLMENT AGREEMENTS AND EVALUATE THE POTENTIAL REVENUE AND COMPLIANCE COSTS OF OTHER USER FEE INCREASES

Present Law

In cases where a taxpayer is unable to pay the full amount of his or her liability in a single lump sum, IRC § 6159(a) authorizes the IRS to enter into an installment agreement (IA) under which a taxpayer will pay the full amount of tax due in monthly installments. A taxpayer can apply for an IA on paper or by using an online payment agreement (OPA).

The Independent Offices Appropriations Act (IOAA) of 1952 (31 U.S.C. § 9701) and Office of Management and Budget (OMB) Circular A-25 authorize the IRS to set user fees by regulation. In 2016, the IRS used this authority to increase the IA fee.[78] Pursuant to Treas. Reg. § 300.1, the IRS now charges $225 for entering into paper IAs and $149 for entering into OPAs. If the taxpayer authorizes the IRS to "direct debit" a bank account each month, the fee is reduced to $107, unless the taxpayer also applies online using an OPA, in which case it is reduced to $31. These fees recover the IRS's full costs of providing IAs. In addition, the fee is set at $43 for low income taxpayers. However, *The Bipartisan Budget Act (BBA) of 2018* (Pub. L. 115-123, codified at IRC § 6159(f)) requires the IRS to waive the fee for low income taxpayers who enter into direct-debit IAs and to refund the fee for low income taxpayers who cannot use a direct-debit IA (*e.g.*, because they do not have a bank account) but who pay it off in full. This law also prevents the IRS from increasing the IA user fee without legislation.

Reasons for Change

By reducing or waiving the fee for low income taxpayers, the BBA addressed part of the problem but not all of it. Even a modest IA user fee may discourage taxpayers from applying for an IA and paying their taxes voluntarily. Some taxpayers cannot afford to pay a fee, even if they do not qualify as low income. It should be emphasized that taxpayers who require IAs are, almost by definition, experiencing some level of financial hardship. In addition, even taxpayers who qualify as low income sometimes end up paying the full fee.[79] The cost to the IRS of OPAs and direct debits is so low that if it discourages even a small percentage of taxpayers from paying voluntarily, this reduced compliance is likely to cost the government more—in lost tax revenue and increased enforcement costs—than the user fee brings in. For the same reasons, the IRS should evaluate the potential for lost revenue and increased enforcement costs before imposing or increasing any fees under the IOAA, not just the IA user fees.

Recommendations

Amend IRC § 6159 to require the IRS to waive the user fee for all direct debit IAs.[80]

Also, amend IRC § 7805 to prohibit the IRS from increasing user fees unless it first determines, after considering public comments, that the increase will not: exacerbate financial hardship for taxpayers who are voluntarily trying to pay their tax liabilities, reduce government revenue by eroding voluntary tax compliance,

78 *See* User Fees for installment agreements (IAs), T.D. 9798, 81 Fed. Reg. 86,955 (Dec. 2, 2016).

79 *See* American Bar Association Section of Taxation, *Comments Concerning User Fees for Processing Installment Agreements and Offers in Compromise* 2 (Oct. 1, 2013) ("many low-income taxpayers are charged the full user fee, despite qualifying for the reduced amount").

80 For legislative language generally consistent with this recommendation, see Taxpayer Bill of Rights Enhancement Act of 2017, S. 1793, 115th Cong. § 301 (2017); Taxpayer Protection and Assistance Act, S. 1321, 109th Cong. § 301 (2006).

or increase government expenses by requiring the IRS to take more costly collection actions against taxpayers who are discouraged by the user fees from complying voluntarily.[81]

81 For related recommendations, see National Taxpayer Advocate 2017 Annual Report to Congress 307-313 (Legislative Recommendation: *User Fees: Prohibit User Fees That Reduce Revenue, Increase Costs, or Erode Taxpayer Rights*).

#16 IMPROVE OFFER IN COMPROMISE PROGRAM ACCESSIBILITY BY REPEALING THE PARTIAL PAYMENT REQUIREMENT

Present Law

IRC § 7122(a) authorizes the IRS to settle a tax debt by accepting an offer in compromise (OIC). According to IRS Policy Statement 5-100, the IRS will "accept an offer in compromise when it is unlikely that the tax liability can be collected in full and the amount offered reasonably reflects collection potential." Taxpayers must also file and pay their taxes for five years after an offer is accepted, as provided by IRS Form 656, *Offer in Compromise* (2018) (item l), or the IRS may seek to collect the unpaid tax it compromised.

IRC § 7122(c)(1)(A) requires a taxpayer who would like the IRS to consider a "lump-sum" offer—payable in five or fewer installments—to include a nonrefundable partial payment of 20 percent of the amount of the offer with the application. IRC § 7122(c)(1)(B) requires a taxpayer who would like the IRS to consider a "periodic payment" offer—an offer payable in six or more installments—to include the first proposed installment with the application and continue to make installment payments while the IRS is considering it. In addition to these partial payments, Treas. Reg. § 300.3 requires offer applications to include a user fee. Taxpayers with low incomes—less than 250 percent of the federal poverty level—can apply for a waiver of the fee and the partial payment requirement.

Reasons for Change

By accepting an offer, the IRS collects money it generally would not otherwise collect and converts a noncompliant taxpayer into a compliant one by requiring the taxpayer, as a condition of the agreement, to timely file returns and pay taxes for the following five years. The Treasury Department's *General Explanations of the Administration's Fiscal Year 2017 Revenue Proposals* acknowledged the benefit of offers by proposing to repeal the partial payment requirement, explaining that it "may substantially reduce access to the offer-in-compromise program.… Reducing access to the offer-in-compromise program makes it more difficult and costly to obtain the collectable portion of existing tax liabilities." The Treasury Department estimated that repealing the requirement would have a positive revenue impact.

A 2007 TAS study found that taxpayers above the low income threshold were no better able to afford to make partial payments than those below it and that those below it frequently did not obtain a waiver. Similarly, a 2005 Treasury Inspector General for Tax Administration report found that when the IRS first imposed a $150 OIC fee in 2003, offer submissions declined by more than 20 percent among taxpayers at every income level. Thus, the partial payment requirement likely reduces collections and increases enforcement costs.

Recommendation

Amend IRC § 7122(c) to remove the requirement that taxpayers include a partial payment with "lump-sum" and "periodic payment" offer applications.[82]

82 For legislative language generally consistent with this recommendation, see Taxpayer Protection Act, H.R. 2171, 115th Cong. § 206 (2017); Taxpayer Protection Act, H.R. 4912, 114th Cong. § 206 (2015); Taxpayer Assistance Act, H.R. 4994, 111th Cong. § 202 (2010). For legislative language that would eliminate both the partial payment requirement and the user fee requirement for low income taxpayers, see Taxpayer First Act, H.R. 5444, 115th Cong. § 11203 (2018); Protecting Taxpayers Act, S. 3278, 115th Cong. § 504 (2018). For additional background, see, *e.g.*, National Taxpayer Advocate 2006 Annual Report to Congress 507-519 (Legislative Recommendation: *Improve Offer in Compromise Program Accessibility*).

#17 MODIFY THE REQUIREMENT THAT THE OFFICE OF CHIEF COUNSEL REVIEW CERTAIN OFFERS IN COMPROMISE

Present Law

IRC § 7122 authorizes the Secretary to enter into an agreement with a taxpayer that settles the taxpayer's tax liabilities for less than the full amount owed, as long as the liabilities have not been referred to the Department of Justice. Such an agreement is known as an "offer in compromise" (OIC). Treas. Reg. § 301.7122-1(b) provides that the IRS may compromise liabilities to the extent there is doubt as to liability, doubt as to collectability, or to promote effective tax administration. The regulations further define these terms and describe instances when compromise is appropriate.

IRC § 7122(b) requires the Treasury Department's General Counsel to review and provide an opinion in support of accepted OICs in all criminal cases and in all civil cases where the unpaid amount of tax assessed (including any interest, additional amount, addition to tax, and assessable penalty) is $50,000 or more. This authority is exercised by the IRS Office of Chief Counsel.

Reasons for Change

The IRS receives tens of thousands of OIC applications every year and must verify that the legal and IRS policy requirements for compromise are met prior to proposing acceptance. Requiring Office of Chief Counsel employees to learn the facts of every criminal OIC and civil OIC where the unpaid amount of tax assessed is $50,000 or more and to write supporting opinions, creates significant delays in OIC processing and is often duplicative of work the IRS has already performed. It also requires a significant commitment of legal resources on the part of the IRS.

In addition, delays in OIC processing may impede a taxpayer's ability to make other financial decisions while awaiting a response and may even jeopardize the taxpayer's ability to pay the amount offered if his financial circumstances change.

The National Taxpayer Advocate believes the OIC process would be improved if the indiscriminate requirement for counsel review of all OICs in civil cases where the unpaid tax assessed is $50,000 or more is repealed and replaced with language authorizing the Secretary to require counsel review in cases that present significant legal issues.

Recommendation

Amend IRC § 7122(b) to repeal the requirement that counsel review all OICs in civil cases where the unpaid amount of tax assessed (including any interest, additional amount, addition to tax, or assessable penalty) is $50,000 or more and replace it with language authorizing the Secretary to require counsel review of OICs in cases that he determines present significant legal issues.[83]

83 For legislative language generally consistent with this recommendation, see Taxpayer Bill of Rights Enhancement Act of 2017, S. 1793, 115th Cong. § 303 (2017); Taxpayer Bill of Rights Enhancement Act of 2015, S. 1578, 114th Cong. § 403 (2015); Tax Administration Good Government Act, S. 882, 108th Cong. § 104 (2003); Tax Administration Good Government Act, H.R. 1528, 108th Cong. § 304 (2004).

#18 REQUIRE THE IRS TO MAIL NOTICES AT LEAST QUARTERLY TO TAXPAYERS WITH DELINQUENT TAX LIABILITIES

Present Law

IRC § 7524 requires the IRS, "[n]ot less often than annually," to send taxpayers with delinquent accounts a reminder notice that sets forth the amount of the tax delinquency as of the date of the notice.

Reasons for Change

The IRS satisfies the IRC § 7524 requirement by sending taxpayers with delinquent accounts Notice CP-71, *Reminder Notice*, once a year. However, the infrequency of IRS billing notices leaves collectible revenue uncollected and subjects taxpayers who would make payments if they received more frequent reminders to additional penalties and interest charges.

We recognize that sending more frequent notices after the IRS's initial notice stream would entail additional postage and processing costs. Private sector businesses, including credit card issuers and retailers, face this same trade-off and almost uniformly send billing notices more frequently than once a year. Most send delinquency notices on at least a monthly basis. Thus, private businesses that depend on maximizing net revenue have consistently found that the collection costs of mailing more frequent notices more than pay for themselves.

We believe the IRS would similarly collect more revenue, net of costs, if it sends more frequent notices. In addition, taxpayers receiving more frequent notices would be more likely to notice that penalties and interest charges continue to accrue, causing their balances to increase. This would provide an additional incentive for them to resolve their liabilities.

Recommendation

Amend IRC § 7524 to require the IRS to mail notices at least quarterly to taxpayers with delinquent tax liabilities.[84]

84 For legislative language generally consistent with this recommendation, see Protecting Taxpayers Act, S. 3278, 115th Cong. § 201 (2018).

#19 PROTECT RETIREMENT FUNDS FROM IRS LEVIES IN THE ABSENCE OF "FLAGRANT CONDUCT" BY A TAXPAYER

Present Law

The IRS has wide discretion to exercise its levy authority. IRC § 6331(a) provides that the IRS generally may "levy upon all property and rights to property," which includes retirement savings. Some property is exempt from levy pursuant to IRC § 6334. Under IRC § 6331(h), the IRS may place a continuing levy on a series of specified payments to or received by a taxpayer, which will run from the date the levy is first made until the date the levy is released.

As a policy matter, the IRS has decided it will not levy on a taxpayer's retirement savings unless it has made a determination that the taxpayer engaged in "flagrant conduct."[85] Neither the Code, the regulations, nor internal IRS guidance defines the term "flagrant conduct" for purposes of this analysis.

Reasons for Change

There are strong public policy reasons to encourage retirement savings and to shield retirement savings from IRS levies. Almost all workers eventually retire, and they require retirement savings for support. In addition, retired taxpayers who do not have sufficient savings are more likely to experience economic hardship and qualify for public assistance, which other taxpayers pay to support.

For these reasons, Congress has provided significant tax incentives to encourage taxpayers to save for retirement. Similarly, the IRS has taken certain steps to protect retirement savings by requiring a specialized analysis prior to levy, including a determination of whether the taxpayer engaged in "flagrant conduct." However, recent changes in IRS procedures have eroded these protections. Specifically, the IRS recently adopted procedures that allow taxpayers to request or agree to "voluntary" levies on retirement accounts.[86] If a taxpayer agrees to a "voluntary" levy, the IRS bypasses the determination of "flagrant conduct."

Without protection from levy, taxpayers who have not engaged in "flagrant conduct" in their tax matters and who therefore would have been shielded from levies on their retirement accounts in the past may agree to "voluntary" levies out of fear or anxiety and thus find themselves in economic hardship during retirement.

Under IRC § 6334, the IRS is prohibited from levying on certain sources of payment, such as unemployment benefits and child support. These exceptions reflect policy determinations. For example, Congress has determined that the IRS should not levy on child support payments because doing so would likely harm the children who rely on those benefits for support. For the reasons described above, the National Taxpayer Advocate believes that retirement savings should be added to the list of exempt property absent "flagrant conduct" and that the term "flagrant conduct" should be defined in the statute.

Recommendations

Amend IRC § 6334(a) to include qualified retirement savings as a category of property exempt from levy if it is determined that (i) the levy would, in retirement, create an economic hardship within the meaning of Treas. Reg. § 301.6343-1(b)(4)(i) based on a review of the taxpayer's financial condition and (ii) the taxpayer has not engaged in "flagrant conduct."

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85 IRM 5.11.6.3(5) (Aug. 16, 2017).

86 IRM 5.11.6.3(3) (Aug. 16, 2017).

Amend IRC § 6331 to stop the accrual of penalties and interest when a levy has attached to a retirement account and the period of limitation in IRC § 6502 has elapsed (generally ten years from the date of assessment of the liability). Consider a levy on retirement funds to be unenforceable after the period of limitations provided in IRC § 6502 has elapsed.

Amend IRC § 6334 to define "flagrant conduct" as willful action (or failure to act) that is voluntarily, consciously, and knowingly committed in violation of any provision of chapters 1, 61, 62, 65, 68, 70, or 75 and that appears to a reasonable person to be a gross violation of any such provision.[87]

87 For legislative language generally consistent with this recommendation, see Taxpayer Protection Act, H.R. 4912, 114th Cong. § 203 (2016) and Taxpayer Rights Act, S. 2333 and H.R. 4128, 114th Cong. §§ 306 & 307 (2015).

#20 TOLL THE TIME PERIODS FOR REQUESTING THE RETURN OF LEVY PROCEEDS WHILE THE TAXPAYER OR A PERTINENT THIRD PARTY IS FINANCIALLY DISABLED

Present Law

Under IRC § 6331, the IRS is authorized to collect outstanding tax by levying against a taxpayer's nonexempt property and rights to property. In certain circumstances, under IRC § 6343 and the related regulations, levies must be released and levied money may, or in some situations must, be returned to its owner. When the IRS has seized tangible property and it is in the IRS's possession, it can be returned at any time. With respect to the return of levied money, however, time limitations apply.

i. Return of Wrongfully Levied Money to Third Parties Under IRC § 6343(b)

An administrative wrongful levy claim under IRC § 6343(b) is a request, made by a person other than the taxpayer who owes the taxes being levied upon, for the return of money believed to be wrongfully levied upon or seized. Generally, the basis for a wrongful levy claim is that the third-party believes the levied money belongs to him or her and not the taxpayer or that the third-party believes he has a superior claim to the money that is not being recognized by the IRS.

There are strict time constraints for third parties to request the return of money wrongfully levied upon. The third party may file an administrative claim for the return of the levied money or bring a civil action against the United States in a U.S. District Court. If the third-party files an administrative claim for the return of levied money, the claim must be made in writing to the appropriate IRS office within two years from the date of the levy. If the third party brings a civil action against the United States without having first filed an administrative claim, the third party has two years from the date of the levy to file the suit. If the third-party files an administrative claim and the IRS rejects it, the third party can still file suit. In this circumstance, the period for filing suit will be extended for the shorter of the following two periods:

(1) A period of 12 months from the date of filing the request, or

(2) A period of six months from the date a notice of disallowance is mailed to the third-party by registered or certified mail.

ii. Return of Levied Money to the Taxpayer Under IRC § 6343(d)

If a taxpayer (as opposed to a third-party) seeks the return of money levied upon, the taxpayer may request return of the levied money under IRC § 6343(d). Generally, the taxpayer making the request believes the IRS should return the levied money because one of the conditions in IRC § 6343(d)(2) has been met. These conditions include the following: (A) the levy was premature or otherwise not in accordance with administrative procedures; (B) the taxpayer has entered into an installment agreement to satisfy the liability for which the levy was imposed (unless the agreement provides otherwise); (C) the return of the levy proceeds will facilitate the collection of the tax liability; or (D) with the consent of the taxpayer or the National Taxpayer Advocate, return of the levy proceeds would be in the best interests of the taxpayer (as determined by the National Taxpayer Advocate) and the United States.

A taxpayer seeking return of levied money faces the same time constraints as a third party (two years from the date of the levy) to file a written administrative claim. Unlike a third party, however, a taxpayer has no right to seek judicial review if a request for the return of levied money is denied by the IRS under IRC § 6343(d).

Reasons for Change

The law, as currently written, prevents the IRS from returning levied funds in situations where a taxpayer is unable, due to a physical or mental impairment, to manage his or her financial affairs and does not file a request for the return of levied money until after the two-year period. Likewise, a district court lacks jurisdiction over a wrongful levy suit filed by a third party if the deadline for filing the suit is missed due to a health problem of the third party.

To ensure that an impaired taxpayer or third party (who is an individual) can have his or her request for return of levied money considered by either the IRS or the courts, the two-year period should be tolled if the taxpayer or third-party can show that he or she was financially disabled during the period. Without this change, an impaired taxpayer or other third party who is prevented due to the impairment from requesting the return of levied funds in a timely manner will not be able to get back levied money that otherwise would be eligible for return under IRC §§ 6343(b) and 6343(d), even in cases where the IRS violated the law.

Recommendation

Amend IRC §§ 6343(b) and 6532(c) to toll the time periods for filing a claim for the return of levied money, a wrongful levy claim, and a wrongful levy suit during any period in which an individual is financially disabled.

#21 AUTHORIZE THE IRS TO RELEASE LEVIES THAT CAUSE ECONOMIC HARDSHIP FOR BUSINESS TAXPAYERS

Present Law

IRC § 6343(a)(1)(D) requires the IRS to release a levy if "the Secretary has determined that such levy is creating an economic hardship due to the financial condition of the taxpayer." Treasury Regulation § 301.6343-1(b)(4) defines economic hardship as arising when "[t]he levy is creating an economic hardship due to the financial condition of an individual taxpayer. This condition applies if satisfaction of the levy in whole or in part will cause an individual taxpayer to be unable to pay his or her reasonable basic living expenses." The regulatory definition of economic hardship as the inability to pay reasonable basic living expenses means that only individuals (including sole proprietorship entities) can experience economic hardship and thereby qualify for a levy release.

Reasons for Change

When the IRS takes enforced collection action against a business, the enforcement action often forces the business into bankruptcy by reducing its available cash and preventing it from obtaining additional financing. In many cases, a business that is delinquent on its taxes is no longer viable. But in other cases, such as when a business is experiencing an economic hardship that is temporary, both the business and the government would benefit if the IRS could release outstanding levies and instead work with the business to resolve its tax debt through collection alternatives.

The IRS should have the discretion to release levies in cases where it determines a business is likely to remain viable. When a levy causes a viable business to terminate, employees may lose their jobs unnecessarily and the delinquent tax may never be collected. Moreover, lessening the harshness of IRS enforcement actions may avert noncompliance, because harsh enforcement actions sometimes force taxpayers into the cash economy.

Recommendations

Amend IRC § 6343 to authorize the IRS to release a levy if it determines that the levy is creating an economic hardship due to the financial condition of the taxpayer's viable trade or business. The legislation should require the IRS, in determining whether to release a levy against a business on economic hardship grounds, to consider the economic viability of the business, the nature and extent of the hardship (including whether the taxpayer exercised ordinary business care and prudence), and the potential harm to individuals if the business is liquidated.[88]

In addition, we recommend Congress clarify that in determining whether to release a levy against a business on economic hardship grounds, the IRS should also consider whether the taxes could be collected from a responsible person through a IRC § 6672 trust fund recovery penalty assessment.

88 For language generally consistent with this recommendation, see Protecting Taxpayers Act, S. 3278, 115th Cong. § 303 (2018); Small Business Taxpayer Bill of Rights Act of 2018, S. 2689, 115th Cong. § 16 (2018); Taxpayer Rights Act of 2015, H.R. 4128 114th Cong. § 304 (2015); S. 2333, 114th Cong. § 304 (2015); H.R. 4368, 112th Cong. § 1 (2012). In the antitrust context, courts strictly interpret the "failing firm" defense, which may permit an anticompetitive merger or acquisition, and the burden of proof falls on the parties invoking the defense. *See, e.g.*, *Citizen Pub. Co. v. U.S.*, 394 U.S. 131 (1969).

#22 STRENGTHEN TAXPAYER PROTECTIONS IN THE FILING OF NOTICES OF FEDERAL TAX LIEN

Present Law

Under IRC § 6323, the IRS is authorized to file a Notice of Federal Tax Lien (NFTL) in the public record when a taxpayer owes past-due taxes. The NFTL protects the government's interest in property against subsequent purchasers, secured creditors, and judgment lien creditors. Unlike other creditors, the IRS does not need to obtain a judgment to file an NFTL.

IRC § 6320 provides taxpayers with a right to a collection due process (CDP) hearing related to the filing of an NFTL. However, the right to a CDP hearing is triggered only after an NFTL has been filed.

Section 3421 of the IRS Restructuring and Reform Act of 1998 (RRA 98) requires the IRS to adopt procedures under which an employee's determination to file an NFTL would, "where appropriate," be approved by a supervisor and to set out disciplinary actions when such approval is required but not obtained.

Reasons for Change

An NFTL filing is a significant IRS enforcement tool, but it can have a devastating financial impact on the taxpayer. For that reason, due process safeguards are critical. The filing of an NFTL can significantly damage the credit worthiness of a taxpayer, which can negatively impact the taxpayer's ability to obtain financing for a home or other major purchase, find or maintain a job, secure affordable rental housing or insurance, and even pay the tax debt. If not properly used, NFTL filings may undermine the government's interest, because when the taxpayer's financial position worsens, he becomes less able to afford to make payments. Several TAS studies show that NFTLs can unnecessarily harm taxpayers and reduce their ability to become or remain compliant with their federal tax filing obligations.

Despite the directive in RRA 98 regarding managerial approval before the filing of NFTLs, the IRS has interpreted the "where appropriate" qualification in the statute narrowly and does not require managerial approval in the majority of cases. Rather, it files most NFTLs automatically based on an arbitrary dollar threshold of the unpaid liability. In addition, there is no requirement in IRS procedures for employees to make, or to attempt to make, personal contact with the taxpayer prior to filing an NFTL. Without any meaningful contact with the taxpayer, determinations to file NFTLs may be made without a complete evaluation of the taxpayer's financial condition and without consideration of collection alternatives.

The government also has a secondary interest at stake. If an NFTL increases the living expenses of a taxpayer and the taxpayer's family, or renders him or her unemployed or underemployed, the government may be forced to provide a social safety net in the form of unemployment benefits, food stamps, and the like, thus increasing the overall societal cost and raising everyone's share of taxes. Yet by automatically filing NFTLs in most cases, the IRS practices focus exclusively on attempting to collect the tax liability and ignore the impact of the NFTL filing on the taxpayer or on other government programs.

Inadequate taxpayer protections in NFTL filings cause an imbalance between the IRS's significant lien power and a taxpayer's *right to a fair and just tax system*—an imbalance Congress sought to correct when it enacted RRA 98 and noted its intent to preclude the IRS from "abusively us[ing] its liens-and-seizure authority." In light of current IRS collection practices, additional taxpayer protections are needed to restore the appropriate balance.

Recommendations

Amend IRC § 6323 to provide clear and specific guidance about the factors the IRS must consider in making NFTL filing determinations; require that prior to making a determination to file an NFTL, the IRS must make a "live contact," or at least a good faith effort to make "live contact," with the taxpayer telephonically or in person to obtain financial information and discuss collection alternatives; and allow for pre-filing administrative review of IRS lien determinations by the IRS Office of Appeals.

Amend IRC § 7433 to allow civil actions for damages that result from NFTL filings made in violation of the required NFTL filing determination procedures.

Codify and expand § 3421 of RRA 98 to require IRS employees to obtain managerial approval prior to filing an NFTL where it is likely that the NFTL will cause a hardship, will be unlikely to protect the government's interest in the taxpayer's property or rights to property, or will impair the taxpayer's ability to pay the tax; require the IRS supervisor, as part of the approval process, to consider whether the NFTL would attach to property, whether the benefit of filing an NFTL for the government would outweigh the harm to the taxpayer, and whether the NFTL filing will jeopardize the taxpayer's ability to comply with the tax laws in the future; and require the IRS to discipline employees who fail to secure managerial approval prior to filing an NFTL in situations where approval is required by law.[89]

89 For additional information on these recommendations, see National Taxpayer Advocate 2016 Annual Report to Congress 386-392 (Legislative Recommendation: *Notices of Federal Tax Lien (NFTL): Amend the Internal Revenue Code to Require a Good Faith Effort to Make Live Contact With Taxpayers Prior to the Filing of the NFTL*); National Taxpayer Advocate 2014 Annual Report to Congress 396-403 (Legislative Recommendation: *Managerial Approval for Liens: Require Managerial Approval Prior to Filing a Notice of Federal Tax Lien in Certain Situations*). We have also made recommendations to provide additional taxpayer protections relating to the treatment of NFTLs by the credit rating agencies. *See* National Taxpayer Advocate 2009 Annual Report to Congress 357-364 (Legislative Recommendation: *Strengthen Taxpayer Protections in the Filing and Reporting of Federal Tax Lien*). Senators Cardin and Becerra proposed similar protections in 2015. *See* the Taxpayer Rights Act of 2015 (S. 2333, 114th Cong. § 303 (2015)/H.R. 4128, 114th Cong. § 303 (2015)).

#23 PROVIDE TAXPAYER PROTECTIONS BEFORE THE IRS RECOMMENDS THE FILING OF A LIEN FORECLOSURE SUIT ON A PRINCIPAL RESIDENCE

Present Law

The IRS may follow either of two sets of procedures to seize the principal residence of a taxpayer to satisfy a delinquent tax liability: (i) an administrative seizure or (ii) a lien foreclosure suit. The two cannot be used concurrently.

Administrative Seizure. IRC § 6334(a)(13) provides that the principal residence of a taxpayer is generally exempt from levy, except as provided in subsection (e). IRC § 6334(e) provides that a principal residence shall *not* be exempt from levy if a judge or magistrate of a U.S. District Court "approves (in writing) the levy of such residence." An administrative seizure is subject to significant taxpayer protections. Among them, IRC § 6343(a) requires the IRS to release a levy under certain circumstances, including where it determines that the levy "is creating an economic hardship due to the financial condition of the taxpayer."

Lien Foreclosure Suit. IRC § 7403 authorizes the Department of Justice (DOJ) to file a civil action against a taxpayer in U.S. District Court to enforce a tax lien and foreclose on a taxpayer's property, including on a taxpayer's principal residence. As compared with administrative seizures, statutory taxpayer protections are considerably more limited in lien foreclosure suits. For example, the Supreme Court has held that courts have essentially no discretion to refuse to authorize a sale simply to protect the interests of the delinquent taxpayer.[90]

Reasons for Change

In enacting the IRS Restructuring and Reform Act of 1998, the Senate Finance Committee report stated that the "seizure of the taxpayer's principal residence is particularly disruptive to the occupants" and a principal residence therefore "should only be seized to satisfy tax liability as a last resort."[91]

Meaningful taxpayer protections are needed to protect not only the taxpayer himself but also to protect family members, including a spouse and minor children, who may live in the house.

As described above, taxpayers have far fewer statutory protections in lien foreclosure suits under IRC § 7403 than in administrative seizures under IRC § 6334(e).

At the recommendation of the Office of the Taxpayer Advocate, the IRS has written procedures into its Internal Revenue Manual (IRM) that provide additional taxpayer protections before a case may be referred to the DOJ for the filing of a lien foreclosure suit. The IRM prescribes certain initial steps IRS employees must take, such as attempting to identify the occupants of a residence and advising the taxpayer about Taxpayer Advocate Service assistance options. It also sets forth an internal approval process prior to referring a lien enforcement case to the DOJ. However, the IRM is simply a set of instructions to IRS staff. Taxpayers generally may not rely on IRM violations as a basis for challenging IRS actions in court, and the IRS may modify or rescind IRM provisions at any time.

Because of the devastating impact the seizure of a taxpayer's principal residence may have on the taxpayer and his or her family, the National Taxpayer Advocate believes taxpayer protections from lien foreclosures suit referrals should be codified and should not be left for the IRS to determine through IRM procedures.

90 *United States v. Rodgers*, 461 U.S. 677, 709 (1983).

91 S. Rep. No. 105-174, at 86-87 (1998).

Recommendations

Amend IRC § 7403 to codify current IRM administrative protections, including that the employee must receive executive-level written approval to proceed with a lien foreclosure suit referral.

Amend IRC § 7403 to preclude IRS employees from requesting that the DOJ file a civil action in U.S. District Court seeking to enforce a tax lien and foreclose on a taxpayer's principal residence except where the employee has determined that (1) the taxpayer's other property or rights to property, if sold, would be insufficient to pay the amount due, including the expenses of the proceedings, and (2) the foreclosure and sale of the residence would not create an economic hardship due to the financial condition of the taxpayer.[92]

92 For legislative language generally consistent with this recommendation, see Small Business Taxpayer Bill of Rights Act, H.R. 1828, 114th Cong. § 16 (2015); Small Business Taxpayer Bill of Rights Act, S. 949, 114th Cong. § 16 (2015); and Eliminating Improper and Abusive IRS Audits Act, S. 2215, 113th Cong. § 8 (2014).

#24 PROVIDE COLLECTION DUE PROCESS RIGHTS TO THIRD PARTIES HOLDING LEGAL TITLE TO PROPERTY SUBJECT TO IRS COLLECTION ACTIONS

Present Law

Current law authorizes the IRS to file Notices of Federal Tax Lien (NFTLs) and issue levies against a taxpayer's property or rights to property, including property owned jointly, by certain third parties, or secured by certain creditors. However, these third parties are not considered "taxpayers" for purposes of the Collection Due Process (CDP) notice and hearing procedures described in IRC §§ 6320 and 6330, and they are therefore not entitled to CDP rights. For that reason, the IRS does not issue CDP lien notices pursuant to IRC § 6320 or provide notice of proposed levies pursuant to IRC § 6330 to these third parties.[93]

Reasons for Change

Congress created the CDP notice and hearing procedures to give taxpayers the right to a meaningful hearing before the IRS levies their property or immediately after the IRS files a NFTL against their property. During a CDP hearing, a taxpayer has the right to raise defenses, challenge the appropriateness of collection actions, and propose collection alternatives.

However, affected third parties, such as joint owners or alleged nominees, alter egos, and transferees, do not have CDP rights. This may be an oversight.[94] Affected third parties would benefit from CDP hearings at least as much as the underlying taxpayer. Indeed, an affected third party may warrant additional protection because the underlying liability is generally not his or hers, and if the property at issue belongs strictly to the third party, the IRS may have no right to take its proposed collection action. Without the benefit of the CDP protections, an affected third party against whom the IRS takes a collection action has comparatively limited remedies. For these reasons, the National Taxpayer Advocate believes affected third parties should be given the same CDP rights to raise defenses and propose collection alternatives as taxpayers who owe a liability.

Recommendation

Amend IRC §§ 6320 and 6330 to extend CDP rights to "affected third parties" who hold legal title to property subject to IRS collection actions.[95]

93 *See generally* IRC §§ 6321, 6322, 6323(a), (f) and (h)(6), and 6331(a).

94 In the context of explaining the Collection Due Process (CDP) provisions, the Senate report accompanying its version of the IRS Restructuring and Reform Act of 1998 referred to "[t]he taxpayer (or *affected third party*)." S. Rep. No. 105-174, at 67 (1998) (emphasis added).

95 For more detail, see National Taxpayer Advocate 2012 Annual Report to Congress 544-552 (Legislative Recommendation: *Amend IRC §§ 6320 and 6330 to Provide Collection Due Process Rights to Third Parties (Known as Nominees, Alter Egos, and Transferees) Holding Legal Title to Property Subject to IRS Collection Actions*).

#25 EXTEND THE TIME LIMIT FOR TAXPAYERS TO SUE FOR DAMAGES FOR IMPROPER COLLECTION ACTIONS

Present Law

IRC § 7433(a) provides that if an IRS employee recklessly or intentionally, or by reason of negligence, disregards any provision of the IRC or any regulation in connection with the collection of federal tax, the taxpayer harmed by the improper collection action may sue the United States for damages. Under IRC § 7433(d)(3) and Treasury Regulation § 301.7433-1(g)(2), the suit must be brought in U.S. District Court within two years from the date on which the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action.

Under IRC § 7433(d)(1), before bringing suit, the taxpayer must file an administrative claim with the IRS. Treasury Regulation § 301.7433-1(d) provides that a taxpayer generally may not file suit in court until the earlier of: (i) the date six months after filing an administrative claim, or (ii) the date on which the IRS renders a decision on the claim. However, if the claim is filed within the last six months of the two-year period for filing suit, the taxpayer may file suit in court at any time before expiration of the two-year period.

Reasons for Change

IRC § 7433(d)(1) reflects a policy decision that it is generally in the best interests of both the taxpayer and the government to allow the IRS to consider and render a decision on a taxpayer's claim before a case is brought to court. If a case is resolved at the administrative level, both parties are spared the time and expense of litigation. Treasury Regulation § 301.7433-1(d) reflects a complementary policy decision that where the IRS does not render a decision on an administrative claim within six months, taxpayers should be able to bring their cases to court without having to wait indefinitely for an IRS decision.

The existing rules do not always achieve the goal of allowing the IRS to consider and render a decision before suit is filed. For example, while a claim is pending at the administrative level, the two-year period for filing suit in a U.S. District Court continues to run. If a taxpayer files an administrative claim during the final six months of the two-year period, the taxpayer may be forced to file suit in a U.S. District Court before the IRS has an opportunity to render a decision on the administrative claim.

To give the IRS this opportunity, the two-year period that commences when the right of action accrues should be pegged to the deadline for filing an administrative claim (rather than the deadline for filing suit). At the same time, to ensure taxpayers do not have to wait indefinitely for an IRS decision, a taxpayer should be permitted to file suit in U.S. District Court if a timely-filed administrative claim goes unanswered for six months.

Furthermore, if the IRS renders an adverse or partially adverse decision on a timely-filed administrative claim, the taxpayer should be allowed to file suit within two years from the date of the IRS's decision, similar to the time period permitted for filing suit after the denial of a refund claim. These rules would ensure the IRS has a full six-month period to consider and render a decision on a taxpayer's damages claim based on an alleged improper collection action, while preserving the taxpayer's right to file suit if the IRS does not render a timely decision.

Recommendation

Amend IRC § 7433(d)(3) to allow taxpayers who file an administrative claim with the IRS within two years after the date a right of action accrues to file a civil action in U.S. District Court any time after six months from the date the administrative claim was filed or, if the IRS renders a decision, within two years from the date the IRS mails its decision on the administrative claim to the taxpayer by certified mail or registered mail.[96]

96 The Taxpayer Bill of Rights Enhancement Act, S. 1793, 115th Cong. § 201(c) (2017), and S. 1578, 114th Cong. § 301 (2015) would have amended IRC § 7433(d)(3) to replace the requirement that taxpayers bring suit within two years of the date the cause of action accrues with a requirement that a suit be commenced "*the later of the date on which administrative remedies available within the Internal Revenue Service have been exhausted* or the date on which the taxpayer reasonably could have discovered that the actions of the officer or employee were done in disregard of a provision of this title or any regulation promulgated under this title" (emphasis added). This proposed change would prevent taxpayers from being forced to file suit before the IRS has had the opportunity to render a decision on the administrative claim and is thus generally consistent with this recommendation. However, the recommendation we are making would also preserve the IRC § 7433(d)(1) requirement that taxpayers must file an administrative claim before they can bring suit in a U.S. District Court and is thus more comprehensive.

#26 CODIFY THE RULE THAT TAXPAYERS CAN REQUEST EQUITABLE RELIEF UNDER IRC § 6015(f) ANY TIME BEFORE EXPIRATION OF THE PERIOD OF LIMITATIONS ON COLLECTION

Present Law

Under IRC § 6015, taxpayers may obtain relief from the joint and several liability that results from filing a joint federal income tax return. IRC § 6015 (b) and (c) provide for relief from an understatement of tax if certain conditions are met. Both subsections impose a two-year time limit for requesting relief, which begins when the IRS first takes collection action against the spouse seeking relief.

If relief is unavailable under IRC § 6015(b) or (c), subsection (f) provides for "equitable" relief from both understatements and underpayments. Unlike subsections (b) and (c), subsection (f) does not impose a two-year time limit for requesting relief. However, Treasury regulations impose a two-year time limit for requesting relief.[97]

In 2009, the Tax Court, in *Lantz v. Commissioner*, held that the regulation imposing the two-year limit for requesting equitable relief under IRC § 6015(f) is invalid. The IRS appealed *Lantz* and similar decisions, and three U.S. Courts of Appeals overturned the Tax Court's decision and upheld the validity of the two-year limit.

In July 2011, the IRS changed its position and issued Notice 2011-70, which provides that taxpayers may request equitable relief within the IRC § 6502 period of limitation on collection or, for any credit or refund of tax, within the period of limitation imposed by IRC § 6511. Proposed Treasury regulations to remove the two-year deadline consistent with Notice 2011-70 were published on August 13, 2013 (RIN 1545-BK51, 78 Fed. Reg. 49242-01), and public comment on the proposed regulations was invited. Four comments were received. None opposed removing the two-year rule. To date, however, the proposed regulations to remove the two-year rule have not been finalized.

Reasons for Change

In codifying IRC § 6015, Congress placed a two-year time limit on claims made under subsections (b) and (c) but did not impose such a limit on claims made under subsection (f). In light of the differences in statutory language, the National Taxpayer Advocate believes Treasury erred in promulgating regulations that imposed a two-year time limit on claims made under subsection (f). In our view, the purpose of subsection (f) is to provide a fallback mechanism for innocent spouses to obtain relief who do not meet the requirements of subsection (b) or (c) without regard to time limitations, and the two-year time limit imposed by the IRS has prevented otherwise eligible innocent spouses from receiving relief. Although the IRS no longer imposes this two-year time limit and has published a notice to that effect, final regulations imposing the two-year time limit remain on the books, and the IRS could reimpose the two-year rule at any time.

97 Treas. Reg. § 1.6015-5(b)(1).

Recommendation

Amend IRC § 6015(f) to provide that taxpayers may request equitable relief within the period of limitation on collection in IRC § 6502 or, for any credit or refund of tax, within the period of limitation in IRC § 6511.[98]

98 For language generally consistent with this recommendation, see Taxpayer First Act, H.R. 5444, 115th Cong. § 11303 (2018); Taxpayer First Act of 2018, S. 3246, 115th Cong. § 1003 (2018); Strengthening Taxpayer Rights Act of 2017, H.R. 3340, 115th Cong. § 202 (2017); Taxpayer Protection Act of 2016, S. 3156, 114th Cong. § 113 (2016); Taxpayer Rights Act of 2015, H.R. 4128 and S. 2333, 114th Cong. § 303 (2015).

#27 DIRECT THE IRS TO STUDY THE FEASIBILITY OF USING AN AUTOMATED FORMULA TO IDENTIFY TAXPAYERS AT RISK OF ECONOMIC HARDSHIP

Present Law

The IRC contains several provisions that protect taxpayers experiencing economic hardship from IRS collection actions.

IRC § 6343 requires the IRS to release a levy if the IRS determines that the levy "is creating an economic hardship due to the financial condition of the taxpayer."

IRC § 6330 authorizes a taxpayer, in a collection due process hearing, to raise the inability to pay the tax due to hardship as a challenge to the appropriateness of an IRS collection action.

IRC § 7122 requires the IRS to develop and publish schedules of national and local allowances (known as "allowable living expenses" or (ALEs)) to ensure that taxpayers entering into offers in compromise are left with an adequate means to provide for basic living expenses.

Reasons for Change

The IRS is generally required to halt collection actions if a taxpayer demonstrates that he or she is in economic hardship, yet the IRS routinely enters into installment agreements (IAs) with taxpayers without undertaking the financial analysis required to make a hardship determination. For example, taxpayers need not submit any financial information to qualify for streamlined IAs and may enter into them online without interacting with an IRS employee. Many anxious or intimidated taxpayers seeking to resolve their liabilities as quickly as possible may be unaware that the IRS is required to halt collection action if they are in economic hardship, and thus they agree to make tax payments they cannot afford.

Over the last six years, taxpayers whose cases were assigned to the IRS's Automated Collection System (ACS) entered into nearly 4.3 million IAs. About 84 percent of those IAs were streamlined. TAS estimates that about 40 percent of taxpayers who entered into streamlined IAs with ACS in fiscal year (FY) 2018 had incomes at or below their ALEs. To emphasize the point: four out of every ten taxpayers who agreed to streamlined IAs in ACS could have been eligible for collection alternatives, such as offers in compromise or "currently not collectible - hardship" (CNC-Hardship) status, if they had known to call the IRS to explain their financial circumstances.

That is not a fair result. Whether a taxpayer is left with sufficient funds to pay for his or her basic living expenses, or his or her family's basic living expenses, should not depend on the taxpayer's knowledge of the IRS's procedural rules.

The TAS Research function has developed an automated algorithm that we believe can, with a high degree of accuracy, identify taxpayers whose incomes are below their ALEs. If the IRS validates this formula or develops an alternative formula that is reasonably accurate, it could apply the formula by automation to the accounts of all taxpayers who owe back taxes and then place a marker on the account of all taxpayers whom the screen identifies as having incomes below their ALEs. While this marker would not automatically close a case as CNC-Hardship, it could be used to alert collection employees speaking with taxpayers over the phone of the need to request additional financial information.

Furthermore, the marker could be used to trigger a notification to taxpayers entering into IAs online that informs them of their right to contact the IRS collection function for assistance if they cannot pay their tax debt without incurring economic hardship. The IRS could also use this algorithm to screen out these taxpayers from automated collection treatments such as the Federal Payment Levy Program, from selection for referral to private collection agencies, or for passport certification, unless and until the IRS has made direct personal contact with the taxpayer to verify their financial information.

An automated economic hardship screen would benefit taxpayers and the IRS alike—it would help protect low income taxpayers from agreeing to make payments that would leave them without adequate means to provide for their basic living expenses, and it would avert rework for the IRS that occurs when taxpayers default on IAs they cannot afford.

Recommendation

Direct the IRS to study the feasibility of developing an automated formula to identify taxpayers who are at high risk of economic hardship and, if a reliable formula can be developed, to apply the formula for purposes of scoring cases for collection assignment, responding appropriately to taxpayers who contact the IRS regarding a balance due, alerting taxpayers at risk of economic hardship who seek to enter into streamlined IAs online of the resources available to them, and determining whether to exclude taxpayers' debts from assignment to private collection agencies.

#28 AMEND IRC § 6306(D) TO EXCLUDE THE DEBTS OF TAXPAYERS WHOSE INCOMES ARE LESS THAN THEIR ALLOWABLE LIVING EXPENSES FROM ASSIGNMENT TO PRIVATE COLLECTION AGENCIES OR, IF THAT IS NOT FEASIBLE, EXCLUDE THE DEBTS OF TAXPAYERS WHOSE INCOMES ARE LESS THAN 250 PERCENT OF THE FEDERAL POVERTY LEVEL

Present Law

IRC § 6306(c) requires the IRS to assign certain tax receivables to private collection agencies (PCAs). IRC § 6306(d) lists categories of tax receivables that are not eligible for assignment to PCAs, but the list does not include the debts of taxpayers whose incomes are less than their allowable living expenses (ALEs).

IRC § 7122(d)(2) requires the IRS to develop "national and local allowances designed to provide that taxpayers entering into a compromise have an adequate means to provide for basic living expenses." The amount by which a taxpayer's income exceeds these standards, or ALEs, is the starting point for determining whether the taxpayer can afford to pay the debt immediately in full or over time in installments. If the ALE standards exceed the taxpayer's income, the taxpayer is presumed unable to pay his or her basic living expenses. In this circumstance, the taxpayer may qualify for collection alternatives such as an offer in compromise (OIC) or the IRS may designate the taxpayer's account as "Currently Not Collectible (CNC)-Hardship." IRC § 7122(d)(2), enacted in 1998, codified the IRS's practice of taking into account a taxpayer's ALEs both in determining the extent to which the taxpayer can pay off his or her tax liability and in considering collection alternatives.

Both the law and IRS procedures use the measure of 250 percent of the federal poverty level as a proxy for "low income" in several contexts. IRC § 7526(b)(1)(B)(i) provides that taxpayers are eligible for assistance from Low Income Taxpayer Clinics (LITCs) if their incomes do not exceed 250 percent of the federal poverty level. IRC § 6159(f)(2)(A) grants taxpayers a waiver from the requirement to pay a user fee to enter into an installment agreement with the IRS if they make payments via direct debit from their bank account and their adjusted gross income, as determined for the most recent year for which information is available, does not exceed 250 percent of the federal poverty level. IRC § 6159(f)(2)(B) provides that for taxpayers whose incomes do not exceed 250 percent of the federal poverty level and who are unable to make payments via direct debit (commonly because they do not have bank accounts), the IRS shall reimburse the taxpayer in the amount of the user fee when the installment agreement is paid off.

Administratively, the IRS has adopted 250 percent of the federal poverty level for purposes of screening out low income taxpayers from its automated Federal Payment Levy Program. If a taxpayer owes a tax debt and receives federal payments, the IRS ordinarily may offset a portion of the federal payments until the tax debt is satisfied. However, the IRS has implemented a "low income filter" to exclude taxpayers with incomes below 250 percent of the federal poverty level from the automated levy program so that their Social Security retirement benefits or military pensions are not offset to pay delinquent tax liabilities.

Reasons for Change

Low income taxpayers are at high risk of economic hardship. Nevertheless, TAS has found that these taxpayers often make payments even where doing so may leave them unable to meet their basic living expenses. IRC § 7122(d)(2) and other provisions of law described above show Congress does not want the IRS to require taxpayers to pay amounts they cannot afford. The IRS can determine taxpayers' income levels from information shown on their returns or from reports of income (such as W-2s and 1099s) submitted by third parties. Just as it uses this information for purposes of determining whether a taxpayer qualifies for the waiver of the installment agreement user fee or should be excluded from automated levies, the IRS can use this information to identify taxpayers whose accounts should not be assigned to the PCAs.

Where the IRS designates a taxpayer's debt as CNC-Hardship, it treats the case as closed and does not assign it to the PCAs. However, the IRS only designates debts as CNC-Hardship if an employee has performed an analysis of the taxpayer's financial condition. (This analysis may be based on oral statements from the taxpayer and may not require substantiation.) Because taxpayers often do not contact the IRS to request a financial analysis of their ability to pay, or because even if they call the IRS they may not know—or be afraid to ask about—CNC-Hardship status, the accounts of many taxpayers whose incomes are below the ALE standards are not designated as CNC-Hardship and continue to be assigned to the PCAs for collection. Then, as discussed above, the PCAs call these taxpayers and some taxpayers feel pressured into making payments they cannot afford.

The National Taxpayer Advocate believes the IRS should develop an algorithm to make preliminary ALE determinations using automation. Automated determinations would allow the IRS to exclude appropriate taxpayers from PCA assignment. These preliminary determinations would also flag the accounts of taxpayers at risk of economic hardship, which would prompt assistors and collection personnel to ask questions that may lead the IRS to place the account into CNC-Hardship status, rather than waiting for the taxpayer to self-identify. Finally, the IRS could use this tool to send letters to these taxpayers, outlining collection alternatives such as OICs and encouraging them to contact the IRS, TAS, or LITCs for assistance in resolving their debts.

Alternatively, if the IRS reasonably determines it cannot perform ALE determinations by automation, it should establish 250 percent of the federal poverty level as a proxy for CNC-Hardship for purposes of PCA assignment, as it already does in other areas. IRS data shows that during fiscal year (FY) 2018, there were 45,371 taxpayers who made payments while their debts were assigned to PCAs. Of these 45,371 taxpayers, 41 percent had incomes at or below their ALEs.[99] Of the same 45,371 taxpayers, 44 percent had incomes at or below 250 percent of the federal poverty level.

Because the ALE calculations and the 250-percent-federal-poverty-level standard produce similar results, it appears that 250 percent of the federal poverty level is a reasonable proxy for the ALE standards for purposes of determining a taxpayer's ability to pay.

Recommendation

Amend IRC § 6306(d) to exclude from eligibility for assignment to PCAs the debts of taxpayers whose incomes are less than their ALEs. Alternatively, if the IRS concludes it is not feasible to do this, exclude the debts of taxpayers whose incomes are less than 250 percent of the federal poverty level, as shown on the taxpayer's most recent return, or if no return was filed in the last three years, as shown on third-party wage and income reports for the most recent year data is available.[100]

99 If no allowance is made for car ownership expenses in calculating allowable living expenses (ALE), 35 percent of the 45,371 taxpayers had incomes at or below their ALEs.

100 See Taxpayer First Act, H.R. 5444, 115th Cong. § 11305 (2018) and Protecting Taxpayers Act, S. 3278, 115th Cong. § 501 (2018), which contain legislative language generally consistent with this recommendation by excluding from assignment to PCAs the debts of taxpayers whose incomes do not exceed 250 percent of the federal poverty level, except that the bills limit the provision to debts identified by the IRS within 180 days of enactment of the Act and ending on Dec. 31, 2019. See also Taxpayer First Act of 2018, H.R. 7227, 115th Cong. § 1205 (2018), which would exclude from assignment to PCAs the debts of taxpayers who receive substantially all of their income from Social Security Disability Insurance or Supplemental Security payments, and those whose adjusted gross incomes do not exceed 200 percent of the federal poverty level, applicable to tax receivables identified after Dec. 31, 2019.

Reform Penalty and Interest Provisions

#29 CONVERT THE ESTIMATED TAX PENALTY INTO AN INTEREST PROVISION FOR INDIVIDUALS, TRUSTS, AND ESTATES

Present Law

Through the combination of wage withholding and the requirement that taxpayers make estimated tax payments, the IRC aims to ensure that federal income and payroll taxes are paid ratably throughout the year. IRC § 3402 generally requires employers to withhold tax on wages paid to employees. IRC § 6654 generally requires taxpayers to pay at least the lesser of (i) 90 percent of the tax shown on a tax return for the current tax year or (ii) 100 percent of the tax shown on a tax return for the preceding tax year (reduced by the amount of wage withholding) in four installment payments that are due on April 15, June 15, September 15, and January 15 of the following tax year.[101]

IRC § 6654(a) provides that a taxpayer who fails to pay sufficient estimated tax will be liable for a penalty that is computed by applying (i) the underpayment rate established under IRC § 6621 (ii) to the amount of the underpayment (iii) for the period of the underpayment. IRC § 6621 is an interest provision. Therefore, the additional amount a taxpayer owes for failing to pay sufficient estimated tax is computed as an interest charge, but it is nevertheless denominated as a "penalty."

Reasons for Change

For a variety of reasons, taxpayers often have difficulty predicting how much tax they will owe. Self-employed taxpayers or taxpayers who own small businesses experience significant fluctuations in their incomes and expenses from year to year. Taxpayers with significant investment income also may experience significant fluctuations. In addition, substantial changes in tax laws, such as those that took effect in 2018, affect tax liabilities in ways that taxpayers may not fully anticipate. As a result, millions of taxpayers do not satisfy the requirements of IRC § 6654 and are liable for penalties, even though many have attempted to comply.

The term "penalty" carries negative connotations, and the National Taxpayer Advocate believes it should be reserved for circumstances in which a taxpayer has failed to make reasonable efforts to comply with the law. Thus, she agrees with the assessment of the Ways and Means Committee when it wrote during a previous Congress: "Because the penalties for failure to pay estimated tax are calculated as interest charges, the Committee believes that conforming their title to the substance of the provision will improve taxpayers' perceptions of the fairness of the estimated tax payment system."[102] Along those lines, the Office of the Taxpayer Advocate has conducted research studies that have found "tax morale" has an impact on tax compliance.[103] Accordingly, we believe the failure to pay sufficient estimated tax is better characterized as an interest charge than a penalty for deficient taxpayer behavior.

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101 If the adjusted gross income of a taxpayer for the preceding tax year exceeds $150,000, "110 percent" is substituted for "100 percent" in applying clause (ii). IRC § 6654(d)(1)(C).

102 H.R. Rep. No. 108-61, at 23-24 (2003).

103 *See* National Taxpayer Advocate 2013 Annual Report to Congress vol. 2 1-13 (Research Study: *Do Accuracy-Related Penalties Improve Future Reporting Compliance by Schedule C Filers?*).

Recommendation

Convert the penalty for failure to pay sufficient estimated tax to an interest charge. Toward that end, relocate IRC § 6654 from part I of subchapter A of chapter 68 to the end of subchapter C of chapter 67 and make conforming modifications to the headings and text.[104]

104 For legislative language generally consistent with this recommendation, see Taxpayer Protection and IRS Accountability Act, H.R. 1528, 108th Cong. § 101 (2003). If the additional charge for failure to pay estimated tax remains a penalty, then the National Taxpayer Advocate reiterates her prior recommendation that Congress enact a reasonable cause exception. *See* National Taxpayer Advocate 2008 Annual Report to Congress vol. 2 34-36 (Analysis: *A Framework for Reforming the Penalty Regime*).

#30 APPLY ONE INTEREST RATE PER ESTIMATED TAX UNDERPAYMENT PERIOD FOR INDIVIDUALS, ESTATES, AND TRUSTS

Present Law

IRC § 6654 provides that taxpayers who make estimated tax payments must submit those payments on or before April 15, June 15, September 15, and January 15 of the following tax year. Failure to do so results in a penalty that is determined by the underpayment rate, the amount of the underpayment, and the period of the underpayment. The underpayment rate is established by IRC § 6621(a)(2) to be the Federal short-term interest rate, plus three percentage points. Under IRC § 6621(b)(1), the Federal short-term interest rate is determined quarterly by the Secretary of the Treasury. If the Secretary determines a change in the Federal short-term interest rate, the change is effective January 1, April 1, July 1, and October 1.

Reasons for Change

Under current law, more than one interest rate may apply for a single estimated tax underpayment period. For example, if a taxpayer fails to make an estimated tax payment due June 15 and the Secretary determines a change in the Federal short-term interest rate effective July 1, one interest rate would apply for the period from June 16 through June 30, while another interest rate would apply for any continued delinquency from July 1 through September 15. The application of more than one interest rate for a single underpayment period causes unnecessary complexity and burden for taxpayers and the IRS alike. This complexity and burden would be reduced if a single interest rate were applied for each period.

Recommendation

Amend IRC § 6654 to provide that the underpayment rate for any day during an estimated tax underpayment period shall be the underpayment rate established by IRC § 6621 for the first day of the calendar quarter in which the underpayment period begins.[105]

105 For legislative language generally consistent with this recommendation, see Taxpayer Bill of Rights Enhancement Act of 2017, S. 1793, 115th Cong. § 305 (2017). *See also* H.R. Rep. No. 108-61, at 25 (2003); Taxpayer Protection and IRS Accountability Act, H.R. 1528, 108th Cong. § 101 (2003).

#31 REDUCE THE FEDERAL TAX DEPOSIT PENALTY IMPOSED ON CERTAIN TAXPAYERS WHO MAKE TIMELY TAX DEPOSITS

Present Law

IRC § 6656(a) imposes a penalty, computed as a percentage of a tax underpayment, for the failure to deposit (FTD) taxes in a manner prescribed by regulation, unless such failure is due to reasonable cause and not due to willful neglect.

Treasury Regulation § 31.6302-1(h) requires federal tax deposits to be made electronically via electronic funds transfer. To comply with this requirement, most taxpayers use the Electronic Federal Tax Payment System (EFTPS), a free service offered by the Department of the Treasury. The penalty rate for FTD varies, depending on the length of the taxpayer's delay in making the deposit. IRC § 6656(b)(1) provides that the penalty is two percent for an FTD of not more than five days, five percent for an FTD of more than five days but not more than 15 days, and ten percent for an FTD of more than 15 days. Thus, taxpayers must make deposits on time, in full, and in the correct manner to avoid a penalty for FTD.[106]

Reasons for Change

The IRS has taken the position that the maximum ten percent penalty rate automatically applies if a deposit is not made in the manner prescribed by the regulation.[107] As a result, taxpayers who timely remit full payment to the IRS but who do not do so in the manner prescribed, are subject to a higher penalty rate than taxpayers who do not make a timely payment at all. The National Taxpayer Advocate believes it is inappropriate to penalize taxpayers who make timely payments more harshly than taxpayers who do not. Moreover, the Ways and Means Committee has observed that this approach "does not reflect the intent of the Congress."[108]

Recommendation

Amend IRC § 6656 to establish a penalty rate of two percent for FTD in the manner prescribed by the Secretary of the Treasury.[109]

106 *See F.E. Schumacher Co. v. U.S.*, 308 F. Supp.2d 819, 830 (N.D. Ohio 2004) ("penalties assessed pursuant to Section 6656 are appropriate even where taxes are timely paid, albeit by means other than [Electronic Funds Transfer]").

107 Rev. Rul. 95-68, 1995-2 C.B. 272; IRM 20.1.4.2, *Authorized Deposit Methods* (Jan. 6, 2012).

108 H.R. Rep. No. 108-61, at 36 (2003).

109 For legislative language generally consistent with this recommendation, see Taxpayer Bill of Rights Enhancement Act of 2017, S. 1793, 115th Cong. § 309 (2017); Taxpayer Protection and IRS Accountability Act, H.R. 1528, 108th Cong. § 108 (2003).

#32 AUTHORIZE A PENALTY FOR TAX RETURN PREPARERS WHO ENGAGE IN FRAUD OR MISCONDUCT BY ALTERING A TAXPAYER'S TAX RETURN

Present Law

TAS has handled hundreds of cases involving return preparer fraud or misconduct. In the most common scenario, a taxpayer visits a preparer to get his tax return prepared, the preparer completes the return while the taxpayer is present, and the preparer then alters the return after the taxpayer leaves before submitting it to the IRS. In some cases, the items of income, deduction, and credit are accurate, but the preparer alters the direct deposit routing information so the entire refund is directed to his account instead of the taxpayer's account. In other cases, the preparer increases the refund amount and elects a "split refund,"[110] so the taxpayer receives the refund amount he expects and the additional amount goes to the preparer.

IRC § 6694 authorizes the IRS to impose a penalty where a preparer has understated a tax liability on a "return or claim for refund" when the understatement is due to willful or reckless conduct.[111] However, when a preparer has altered items of income, deduction, or credit in an attempt to increase a taxpayer's refund after the taxpayer has reviewed and approved the return for filing, the IRS Office of Chief Counsel has concluded that the resulting document is not a valid "return or claim for refund."[112] As a consequence, the § 6694 penalty does not apply.

By contrast, when the preparer has altered only the direct deposit information on the return, the resulting document is treated as a valid "return or claim for refund." However, the penalty still does not apply because there is no understatement, as the return is otherwise accurate.

IRC § 6695(f) imposes a $500 penalty on a preparer who negotiates a taxpayer's refund check.[113] The IRS and Treasury have interpreted this penalty to apply to a preparer who negotiates "a check (including an electronic version of a check)."[114] However, it is not clear whether an "electronic version of a check" is legally identical to a direct deposit. Therefore, when a preparer diverts a taxpayer's refund via direct deposit but the return is otherwise accurate, it is not clear whether the preparer's misconduct is subject to the § 6695(f) penalty. Moreover, even if the penalty is applicable, the penalty amount is typically small in relation to the size of refunds that some preparers have misappropriated.

Reasons for Change

While the Department of Justice (DOJ) may bring criminal charges against preparers who alter tax returns, resource constraints generally preclude criminal charges except in cases of widespread schemes. In addition, the dollar amount of a refund obtained by a preparer in these cases often will determine whether the DOJ pursues an erroneous refund suit under IRC § 7405, as resources again constrain the number of suits that can be brought each year. It is therefore important that the IRS have the authority to impose sizeable civil tax penalties against preparers who alter tax returns without the knowledge or consent of taxpayers.

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110 Taxpayers can split their refunds among up to three accounts at a bank or other financial institution. *See* IRS Form 8888, *Allocation of Refund (Including Savings Bond Purchases)*. The instructions to Form 8888 specifically advise taxpayers not to deposit their refunds into their tax return preparer's account.

111 The amount of the penalty is per return or claim for refund and is equal to the greater of $5,000 or 75 percent of the income derived (or to be derived) by the tax return preparer with respect to the return or claim.

112 PMTA 2011-20, *Tax Return Preparer's Alteration of a Return* (June 27, 2011); PMTA 2011-13, *Horse's Tax Service* (May 12, 2003).

113 Similarly, section 10.31 of Circular 230 (31 C.F.R. Part 10) prohibits a tax practitioner who prepares tax returns from endorsing or negotiating a client's federal tax refund check.

114 Treas. Reg. § 1.6695-1(f)(1).

If the penalty amount is equal to the amount by which a preparer has benefited (*i.e.,* a 100 percent penalty), the public fisc would be made whole.

Recommendations

Amend IRC § 6694 so the penalty the IRS may assess against a tax return preparer for understating a taxpayer's liability is broadened beyond tax returns and claims for refund by adding "and other submissions."

Amend IRC § 6695 to explicitly cover a preparer who misappropriates a taxpayer's refund by changing the direct deposit information and increase the dollar amount of the penalty to deter preparers from engaging in this type of fraud or misconduct. To make the public fisc whole, the penalty should be equal to 100 percent of the amount a preparer improperly converted to his own use through fraud or misconduct by altering a taxpayer's tax return.

#33 REQUIRE WRITTEN MANAGERIAL APPROVAL BEFORE ASSESSING THE ACCURACY-RELATED PENALTY FOR "NEGLIGENCE"

Present Law

A taxpayer who submits a return that is not accurate (*i.e.*, reflects an "underpayment") may be subject to an accuracy-related penalty under IRC § 6662. In particular, a penalty for "negligence or disregard of rules or regulations" may be imposed under IRC § 6662(b)(1). IRC § 6662(c) defines "negligence" as "any failure to make a reasonable attempt to comply with the provisions of this title" and defines "disregard" to include "any careless, reckless, or intentional disregard."

As a taxpayer protection, IRC § 6751(b)(1) requires that the immediate supervisor of an employee making the initial determination of a penalty assessment must personally approve the determination in writing.[115] However, penalties "automatically calculated through electronic means" are not required to receive managerial approval.[116]

Reasons for Change

The purpose of penalties is to encourage voluntary compliance and deter noncompliance. Unlike penalties that can be assessed by answering a simple yes/no question (for example, the penalty for failing to file a return under IRC § 6651), the determination of whether to assess a negligence penalty requires knowledge of what actions the taxpayer took to comply with the tax laws, as well as his or her motivations for taking those actions. Negligence cannot reasonably be determined by a computer, because a computer cannot assess whether a taxpayer made a "reasonable attempt" to comply with the law.

Nevertheless, the IRS has programmed its computers to apply negligence penalties automatically as part of its Automated Underreporter (AUR) program. More specifically, the AUR program identifies discrepancies between the amounts taxpayers report on their returns and the amounts payors report via Forms W-2, Forms 1099, and other information returns, and it generally assesses penalties automatically based on the discrepancies it detects. If the negligence penalty is assessed through the AUR program without an employee independently determining its appropriateness, there is no requirement for managerial approval.

An IRS employee will review a penalty assessment to make a determination of "negligence" only if a taxpayer responds to initial notices issued by AUR. There are many reasons why a taxpayer may not respond to a notice. A taxpayer may not receive it if he or she has moved and does not receive the notice. A taxpayer may put the notice aside and not get back to it before the response deadline. Or a taxpayer may accept the proposed tax adjustment but not realize he or she must respond to avoid the penalty assessment. In these and other circumstances, taxpayers may be assessed a penalty for negligence without any analysis into their

115 This area of law has been the focus of recent litigation. In 2016, a majority of the U.S. Tax Court ruled that the written approval for an accuracy-related penalty could be given at any time prior to assessment, including while a case was in litigation before the Tax Court. As a result, the Tax Court held it was premature for it to consider an argument under IRC § 6751(b). *Graev v. Comm'r*, 147 T.C. No. 16 (2016), *vacated*, No. 30638-08 (T.C. Mar. 30, 2017). However, the decision in *Graev v. Comm'r* has since been vacated, because shortly after the decision was issued, the U.S. Court of Appeals for the Second Circuit (to which *Graev* would have been appealed) came to a different conclusion. In *Chai v. Commissioner*, the Second Circuit ruled that managerial approval for penalty assessments must be obtained before the IRS issues a notice of deficiency. *Chai v. Comm'r*, 851 F.3d 190 (2d Cir. 2017). These two rulings initially suggested a split between the majority of the Tax Court and the Second Circuit. Following the ruling in *Chai*, however, the Tax Court reversed course in a subsequent ruling in *Graev*. Taking *Chai* into account, the Tax Court ruled that it is not premature to consider an argument under IRC § 6751(b) in a deficiency proceeding, and the IRS bears the burden of production under IRC § 7491(c) to show the penalty received managerial approval. *Graev v. Comm'r*, 149 T.C. No. 23 (2017).

116 IRC § 6751(b)(2)(B).

reasonable attempts to comply with tax laws (or lack thereof). This result undermines the protections afforded in IRC § 6751(b).

The National Taxpayer Advocate believes strongly that a computer cannot determine "negligence"—*i.e.,* whether a taxpayer has failed to "make a reasonable attempt to comply with the provisions of this title." Therefore, when Congress authorized the IRS to impose certain penalties "automatically calculated by electronic means" without managerial approval, we do not believe Congress intended that exception to apply to negligence penalties.

In response to several judicial decisions, the IRS Office of Chief Counsel recently issued a notice instructing IRS attorneys to submit evidence of compliance with IRC § 6751(b)(1) when addressing penalty disputes.[117] If an attorney cannot find sufficient evidence of compliance, the notice says the attorney must concede the penalty. We commend the Office of Chief Counsel for taking this step, but a Counsel notice does not have the force of law and can be reversed at any time.

Recommendation

Amend IRC § 6751(b)(2)(B) to clarify that written managerial approval is required prior to the assessment of the accuracy-related penalty imposed on the portion of an underpayment attributable to negligence or disregard of rules or regulations under IRC § 6662(b)(1) and consider clarifying which penalties or facts-and-circumstances result in penalties "automatically calculated through electronic means" that are exempt from the managerial-approval requirement.

117 IRS Office of Chief Counsel, Notice CC-2018-006, *Section 6751(b) Compliance Issues for Penalties in Litigation* (June 6, 2018).

#34 COMPENSATE TAXPAYERS FOR "NO CHANGE" NATIONAL RESEARCH PROGRAM AUDITS

Present Law

There is no provision under present law that authorizes compensation of taxpayers who are audited under the IRS's National Research Program (NRP) or provides relief from the assessment of tax, interest, and penalties that may result from an NRP audit.

Reasons for Change

Through the NRP, the IRS conducts audits of randomly selected taxpayers. The NRP benefits tax administration by gathering strategic information about taxpayer compliance behavior as well as information about the causes of reporting errors. This information assists the IRS in developing and updating its workload selection formulas and helps the IRS estimate the "tax gap." NRP studies benefit Congress by providing taxpayer compliance information that is useful in formulating tax policy, and they help the IRS focus its audits on returns with a relatively high likelihood of errors, thereby building trust in the fairness of the tax system and helping the IRS to maximize revenue collection.

For the tens of thousands of individual taxpayers (or businesses) that are subject to NRP audits, however, they impose significant burden. In essence, these taxpayers, even if fully compliant, serve as "guinea pigs" to help the IRS improve the way it does its job. They must contend with random and intensive audits that consume their time, drain resources (including representation costs), and may impose an emotional and reputational toll.

In 1995, the House Ways and Means Subcommittee on Oversight held a hearing on the NRP's predecessor, the Taxpayer Compliance Measurement Program (TCMP).[118] Testimony provided during the hearing and subsequent witness responses to questions-for-the-record indicated that TCMP audits impose a heavy burden on taxpayers and a strong sentiment that audited taxpayers were bearing the brunt of a research project intended to benefit the tax system as a whole. Proposals raised at the hearing included compensating taxpayers selected for TCMP audits as well as possibly waiving tax, interest, and penalties assessed during the audits.

Subsequent to the hearing, the House Budget Committee included a proposal in its 1995 budget reconciliation bill to compensate individual taxpayers by providing a tax credit of up to $3,000 for TCMP-related expenses.[119] Ultimately, this proposal was not adopted. Instead, the IRS was pressured to stop conducting TCMP audits. The inability to perform regular TCMP audits, however, undermined effective tax administration because it prevented the IRS from updating its audit formulas. It was also bad for compliant taxpayers, because when the IRS is not able to accurately identify returns with a high likelihood of noncompliance, taxpayers who file compliant returns are more likely to face audits.

About a decade later, the IRS reinstated the TCMP under the NRP label. Some procedures were changed, but the random selection of taxpayers and the burden on many of these taxpayers remained substantially unchanged. For the same reasons identified during the 1995 House hearing, the National Taxpayer Advocate believes it is appropriate to recognize that taxpayers audited under the NRP are bearing a heavy burden to help the IRS improve the effectiveness of its compliance activities. A tax credit or authorized payment would alleviate the monetary component of the burden. Further relief could be provided by waiving any assessment

118 *Taxpayer Compliance Measurement Program: Hearing Before the H. Subcomm. on Oversight of the H. Comm. on Ways and Means*, 104th Cong. (1995).

119 *See* H.R. Rep. No. 104-280, vol. 2, at 28 (1995).

of tax, interest, and penalties resulting from an NRP audit. Such a waiver might also improve the accuracy of the NRP audits, as taxpayers might be more likely to be forthcoming with an auditor if they were assured they would not face additional assessments. However, this waiver should not apply where tax fraud or an intent to evade is uncovered in an NRP audit.

Recommendations

Amend the IRC to compensate taxpayers for no change NRP audits through a tax credit or other means (such as IRS user fees). Consider waiving the assessment of tax, interest, and penalties resulting from an NRP audit, absent fraud or an intent to evade federal taxes.

Strengthen Taxpayer Rights Before the Office of Appeals

#35 PROVIDE TAXPAYERS WITH A LEGALLY ENFORCEABLE RIGHT TO AN ADMINISTRATIVE APPEAL WITHIN THE IRS, EXCEPT IF SPECIFICALLY BARRED BY REGULATIONS

Present Law

The Internal Revenue Service Restructuring and Reform Act of 1998 generally grants taxpayers the right to an administrative appeal within the IRS. This recourse, however, can be curtailed by the IRS for subjective reasons, including on the nebulous grounds of "sound tax administration."[120]

Reasons for Change

Access to the IRS's Office of Appeals is important for a variety of reasons, including Appeals' function as the independent administrative decisionmaker of last resort; its role of negotiating case settlements; and its ability to accept affidavits, evaluate the credibility of witnesses, and consider potential hazards of litigation. Currently, however, the IRS has the unilateral ability to deny this forum to a taxpayer on an *ad hoc* basis. Since taxpayers generally lack a legally enforceable right to an appeal, they are powerless to prevent the IRS from bypassing Appeals if it wishes to punish what it views as uncooperative behavior or avoid settlement negotiations involving a particular taxpayer or issue. The IRS's unfettered discretion to deny an appeal raises the specter of unfair and inequitable treatment of individual taxpayers or groups of taxpayers.

The National Taxpayer Advocate believes taxpayers should be entitled to an administrative appeal, except in rare cases. The standards for denying an appeal should be clear and narrow (*e.g.,* where multiple taxpayers face the same legal issue and the IRS has designated the issue for litigation or where a taxpayer is taking a frivolous position). To further ensure the IRS denies appeals only in rare cases, taxpayers whose right to an administrative appeal is denied should have the right to protest the decision to the Commissioner.

Recommendation

Amend Internal Revenue Code § 7803(a) to establish an independent Office of Appeals and grant taxpayers the right to a prompt administrative appeal within the IRS that provides an impartial review of all compliance actions and an explanation of the Appeals decision, except where the Secretary has determined, pursuant to regulations, that an appeal is not available, including where the IRS has designated the central legal issue in the case for litigation or where the taxpayer is advancing a frivolous position. Where an appeal is not available, the Secretary shall establish procedures by which an affected taxpayer may file an administrative protest with the Commissioner and shall furnish taxpayers with information about filing such a protest.[121]

120 In *Facebook, Inc. & Subs. v. IRS*, 2018-1 U.S.T.C. (CCH) ¶50,248 (N.D. Cal. 2018), a United States District Court recently concluded that taxpayers generally do not have an enforceable right to an administrative appeal.

121 For legislative language substantially consistent with this recommendation, see Taxpayer First Act, H.R. 5444, 115th Cong. § 11101 (2018); Protecting Taxpayers Act, S. 3278, 115th Cong. § 601-605 (2018).

#36 REQUIRE THAT AT LEAST ONE APPEALS OFFICER AND ONE SETTLEMENT OFFICER BE LOCATED AND PERMANENTLY AVAILABLE IN EACH STATE, THE DISTRICT OF COLUMBIA, AND PUERTO RICO

Present Law

Section 3465(b) of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98) provides: "The Commissioner of Internal Revenue shall ensure that an appeals officer is regularly available within each State."

Reasons for Change

Twelve states and Puerto Rico currently have no Appeals or Settlement Officers with a post of duty within their borders.[122] These states are Alaska, Arkansas, Delaware, Idaho, Kansas, Montana, North Dakota, New Mexico, Rhode Island, South Dakota, Vermont, and Wyoming. The IRS takes the position that its current staffing satisfies the statutory requirement by providing for "circuit riding" on at least a quarterly basis to states lacking a permanent Appeals field office.

As a legal matter, the National Taxpayer Advocate believes "circuit riding" does not satisfy the statutory requirement, because Appeals Officers engaged in "circuit riding" among multiple states are not "regularly available" in any one state. As a practical matter, "circuit riding" does not provide taxpayers who request in-person hearings with timely service and does not ensure that Appeals Officers are familiar with local conditions. Taxpayers and their representatives regularly complain about the difficulty of obtaining convenient and timely in-person access to Appeals and Settlement Officers. During fiscal year 2018, for example, non-docketed cases involving in-person conferences remained in Appeals' inventory for more than twice as long (394 days) as Appeals cases overall (194 days).[123]

In addition, Appeals' ability to effectively pursue administrative case resolutions often depends on the Appeals Officer's familiarity with prevailing economic circumstances and other local factors impacting taxpayers in a given geographic region. Appeals Officers who live elsewhere and visit a state for an occasional hearing often do not have this familiarity.

Recommendations

Amend the IRC to require that at least one Appeals Officer and one Settlement Officer be located and permanently available in each state, the District of Columbia, and Puerto Rico.

Alternatively, amend section § 3465(b) of RRA 98 by striking "an appeals officer is regularly available within each State" and inserting "there is at least one appeals officer and one settlement officer located and permanently available in each State, the District of Columbia, and Puerto Rico."[124]

122 Generally, Appeals Officers are assigned to cases associated with the IRS Examination function, whereas Settlement Officers are assigned to Collection cases.

123 Appeals response to TAS fact check request (Nov. 21, 2018).

124 For legislative language generally consistent with this recommendation, see Taxpayer Bill of Rights Enhancement Act, S. 1793, 115th Cong. § 502 (2017).

#37 REQUIRE TAXPAYERS' CONSENT BEFORE ALLOWING IRS COUNSEL OR COMPLIANCE PERSONNEL TO PARTICIPATE IN APPEALS CONFERENCES

Present Law

Present law does not directly address the inclusion of personnel from the IRS Office of Chief Counsel or IRS compliance functions in conferences held by the Office of Appeals.

Reasons for Change

Until recently, the Office of Appeals only occasionally invited personnel from the Office of Chief Counsel or the IRS compliance functions to participate in taxpayer conferences. In October 2016, the Office of Appeals revised provisions of the Internal Revenue Manual (IRM) to allow Appeals Officers to include personnel from the Office of Chief Counsel and/or the IRS compliance functions in Appeals conferences as a matter of routine. Under the new procedures, an Appeals Officer may invite these additional participants regardless of whether taxpayers agree or object to their presence.

Including non-Appeals IRS personnel in an Appeals conference may be sensible in certain cases, and tax practitioners sometimes find this approach to be helpful in achieving case resolution. Including Counsel and Compliance personnel over taxpayer objections, however, contravenes the purpose of an Appeals conference, which is neither to give Compliance personnel another bite at the apple nor to transform Appeals into a mediation forum. Instead, the mission and credibility of Appeals rests on its ability to undertake direct and independent settlement negotiations with taxpayers and their representatives.

This change in conference procedures could have far-reaching negative consequences for Appeals' effectiveness in resolving cases with taxpayers. Among other things, the expansion of Appeals conferences to routinely involve Counsel and Compliance personnel alters the relationship between the taxpayer and the Appeals Officer. It makes interactions less negotiation-based and transforms the conference into a more contentious proceeding.

Moreover, the initiative jeopardizes the real and perceived independence of Appeals, both of which are essential to effective administrative dispute resolution. As a result, taxpayers will be less likely to feel that their case has been fully heard, that they have been treated fairly, and that the outcome of the proceeding should be respected. To the contrary, taxpayers are more likely to come away disillusioned with the Appeals process, more likely to pursue their case in court, and potentially less likely to comply voluntarily with the tax laws in the future.

Recommendation

Amend the IRC or amend § 1001(a) of RRA 98 to add a subsection (5) that provides: "A taxpayer shall have the right to a conference with the Office of Appeals that does not include personnel from the Office of Chief Counsel or the compliance functions of the IRS unless the taxpayer specifically consents to the participation of those parties in the conference."[125]

125 For legislative language generally consistent with this recommendation, see Protecting Taxpayers Act, S. 3278, 115th Cong. § 601 (2018).

Enhance Confidentiality and Disclosure Protections

#38 LIMIT REDISCLOSURES AND UNAUTHORIZED USES OF TAX RETURNS AND TAX RETURN INFORMATION OBTAINED THROUGH § 6103-BASED "CONSENT" DISCLOSURES

Present Law

Under IRC § 6103, tax returns and tax return information generally must be kept confidential and may not be disclosed. This general rule is subject to certain exceptions, including an exception for disclosures requested or consented to by the taxpayer.[126] For example, a taxpayer may request that the IRS disclose his or her tax return or tax return information, or sign a form providing consent to the disclosure, when the taxpayer is applying for a mortgage and the lending bank requires the documents for income-verification purposes.[127] A taxpayer may request or provide a consent to disclosure in other circumstances as well.

Under present law, recipients of a taxpayer's tax return or tax return information are not prohibited from using it for other purposes other than the purpose for which the taxpayer granted consent or from re-disclosing it. In theory, recipients may share the information with an affiliate, sell it, or even publish it. A bank might use the information to market ancillary products to the taxpayer.

Reasons for Change

It is widely agreed that tax returns and tax reform information should be kept confidential except in circumstances where a compelling need exists for the disclosure. Maintaining general confidentiality and defining exceptions as narrowly as possible to accomplish their intended purposes protects taxpayers and promotes tax compliance.

If a taxpayer applies for a mortgage or must provide his tax return or tax return information to a third party for another purpose, the third party should be limited to using it only for the intended purpose, and should not be permitted to disclose it further without the express, written permission of the taxpayer.

Recommendation

Amend IRC § 6103 to provide that persons designated by a taxpayer to receive tax returns or tax return information may not use the information for any purpose other than the limited purpose for which the authorization was granted and may not disclose the information to any other party without the express, written permission of the taxpayer.[128]

126 *See* IRC § 6103(c). *See also* Treas. Reg. § 301.6103(c) -1.

127 The taxpayer often signs a copy of Form 4506-T, *Request for Transcript of Tax Return*, which gives the lender access to the taxpayer's return information relating to the tax periods or years specified on the form.

128 For legislative language generally consistent with this recommendation, see Taxpayer First Act, H.R. 5444, 115th Cong. § 18302 (2018); Taxpayer First Act of 2018, S. 3246, 115th Cong. § 1002 (2018).

#39 AUTHORIZE THE TREASURY DEPARTMENT TO ISSUE GUIDANCE SPECIFIC TO IRC § 6713 REGARDING THE DISCLOSURE OR USE OF TAX RETURN INFORMATION BY PREPARERS

Present Law

IRC §§ 7216 and 6713 impose criminal and civil sanctions, respectively, on preparers who, with the requisite level of intent,[129] disclose or use tax return information for any purpose other than preparing or assisting in the preparation of a tax return, except as expressly permitted by statute or regulation. Exceptions to the broad prohibition in IRC § 6713 are provided in IRC § 6713(b), which states that the rules of IRC § 7216(b) apply. IRC § 7216(b) authorizes the Secretary to create regulatory exceptions to the criminal penalty statute. Thus, the current statutory framework seemingly requires that exceptions be made either to both the criminal and civil statutes or to neither.

Reasons for Change

IRC § 6713 has historically been identified as the civil counterpart to the criminal penalty imposed on tax return preparers under IRC § 7216. The criminal penalty regime under IRC § 7216 is substantially harsher than the civil penalty regime under IRC § 6713.[130] The Treasury Department is understandably reluctant to subject preparers to criminal sanctions except for egregious conduct, so it has used its regulatory authority to carve out broad exceptions from the general prohibition on the disclosure or use of tax return information set forth in IRC § 7216.[131]

Because the exceptions under IRC § 7216 (criminal statute) are deemed to apply to IRC § 6713 (civil statute), there is no room for the Treasury Department and the IRS to designate the disclosure or use of tax return information for certain questionable business practices or the sale of certain products with high abuse potential as civil violations without also making them criminal violations. Therefore, disclosures and uses with high abuse potential are generally permitted. The Treasury Department and the IRS would be more likely to strengthen taxpayer protections against the improper disclosure or use of taxpayer return information by return preparers if they are given the flexibility to promulgate separate regulations applicable to the civil penalty, without concern that the criminal penalty would also apply.[132]

Recommendation

Amend IRC § 6713 to authorize the Secretary to prescribe regulations under IRC § 6713.

129 Unlike IRC § 7216, IRC § 6713 does not require that the disclosure or use be knowing or reckless.

130 IRC § 6713 imposes a $250 penalty for each improper disclosure or use. In contrast, IRC § 7216 makes the preparer guilty of a misdemeanor, and upon conviction, the preparer will be fined not more than $1000 or imprisoned not more than one year, or both, together with the costs of prosecution.

131 *See* Treas. Reg. § 301.7216-2.

132 IRC § 7805(a) provides the Secretary general authority to promulgate regulations under Code provisions. However, because IRC § 7216(b)(3) provide the Secretary express authority to carve out exceptions, IRC § 6713 should provide similar authority.

#40 ALLOW A PERIOD OF NOTICE AND COMMENT ON NEW INTERGOVERNMENTAL AGREEMENTS AND REQUIRE THAT THE IRS NOTIFY TAXPAYERS BEFORE THEIR DATA IS TRANSFERRED TO A FOREIGN JURISDICTION

Present Law

Present law does not require a period for notice and comment before the U.S. government enters into new intergovernmental agreements (IGAs) and does not provide for the notification of taxpayers before their data is transferred to foreign jurisdictions.

Reasons for Change

The Foreign Account Tax Compliance Act generally requires foreign financial institutions (FFIs) to provide the U.S. with information regarding foreign accounts held by U.S. taxpayers. Typically, this information exchange occurs via IGAs, under which FFIs furnish the information to their local tax authority, which in turn transfers it to the U.S. These IGAs also generally incorporate reciprocity, pursuant to which the U.S. agrees to provide the foreign jurisdiction with information regarding accounts maintained in the U.S. regarding its citizens.

We are concerned that the IRS cannot ensure the data on U.S. taxpayers transferred by FFIs is used properly by IGA partners. We are also concerned that the data transfers to foreign recipients do not conform to cybersecurity standards established by the National Institute of Standards and Technology.

The IRS has identified the risks inherent in its data transfers to IGA partners, but has determined that these risks are acceptable. The data being disclosed and potentially breached, however, relate to taxpayers, not to the IRS. Taxpayers, rather than the IRS, are exposed to the consequences of data theft or misuse potentially arising during or after information transfers to foreign partners pursuant to IGAs. These taxpayers could, among other things, be the victims of identity theft or the targets of persecution within foreign jurisdictions, with outcomes ranging from substantial inconvenience to serious economic damage to harassment, and even physical danger. Currently, taxpayers have no voice in these IGAs and receive no specific notification that their personal information is being transferred outside of U.S. jurisdiction. If informed that IGA negotiations or data transfers were pending, taxpayers would have an opportunity to provide the U.S. government with potentially important information to minimize risks to their property and physical safety.

Recommendation

Amend IRC § 1474 to add a new subsection (g)(1) to require the public announcement of IGAs for notice and comment by taxpayers; a new subsection (g)(2) to require that, as part of this announcement, the IRS specify the extent to which the proposed IGA partner jurisdiction complies with the cybersecurity standards to which U.S. federal agencies are held and the taxpayer privacy standards that govern the IRS; and a new subsection (g)(3) to require that, barring unique and compelling circumstances, taxpayers be informed prior to the transfer of their individual information pursuant to the terms of an IGA.

Strengthen the Office of the Taxpayer Advocate

#41 CLARIFY THAT THE NATIONAL TAXPAYER ADVOCATE MAY HIRE LEGAL COUNSEL TO ENABLE HER TO ADVOCATE EFFECTIVELY FOR TAXPAYERS

Present Law

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 TAS 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." Similarly, IRC § 7803(c)(2)(B)(iii) bolsters the National Taxpayer Advocate's independence by requiring that her Reports to Congress be submitted directly to Congress "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."

When Congress reorganized the IRS in 1998, it recognized that the National Taxpayer Advocate requires independent legal advice. The Senate passed legislation providing for counsel to the National Taxpayer Advocate to be appointed by and report directly to the National Taxpayer Advocate and to operate within the Office of the Taxpayer Advocate.[133] This provision was eliminated in the conference agreement without any explanation. However, the conference report stated that the "conferees intend that the National Taxpayer Advocate be able to hire and consult counsel as appropriate."[134]

Reasons for Change

Since 2004, with the approval of the Commissioner of Internal Revenue, TAS has employed attorney-advisors to provide independent legal advice and analysis to the National Taxpayer Advocate. 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 regulations for purposes of IRS operations, procedures, or litigation, it would be unrealistic to expect those same attorneys could effectively help the National Taxpayer Advocate develop a legal position that challenges their own interpretation. It would also create an untenable conflict of interest. Thus, TAS attorney-advisors are indispensable in enabling the National Taxpayer Advocate to develop an independent perspective and advocate for taxpayers as the law intends.

Among other things, TAS attorney-advisors help TAS case advocates develop legal positions in complex taxpayer cases; write the section of the National Taxpayer Advocate's Annual Report to Congress that identifies and analyzes the ten tax issues that were most frequently litigated in the U.S. Tax Court and other federal courts over the preceding year; and write the section of the National Taxpayer Advocate's Annual Report to Congress that proposes legislative changes to mitigate taxpayer problems, including the Purple

133 H. Rep. No. 105-599, at 215 (1998) (Conf. Rep.). *See also* 144 Cong. Rec. S. 4460 (May 7, 1998) (statement of Sen. Grassley).

134 *Id*.

Book. All of this work requires considerable legal expertise and could not be performed at anywhere near the same level by non-attorneys.

In 2015, the IRS for the first time denied a routine TAS request to hire attorney-advisors to backfill existing 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. We were told that General Counsel Directive No. 2 had long been on the books, but it was only recently being enforced.

On November 29, 2016, the National Taxpayer Advocate submitted a nine-page memorandum to the Acting General Counsel requesting permission to continue to hire attorney-advisors. The memorandum noted that the Office of the Taxpayer Advocate, from an independence standpoint, plays a role somewhat akin to an inspector general—*i.e.*, the office exists within the agency but is required by statute to operate independently in key respects. On the basis of independence, the memorandum asked the Acting General Counsel to modify General Counsel Directive No. 2 to add a carve-out for the Office of the Taxpayer Advocate to the clause that contains the carve-out for the Inspectors General offices. Alternatively, the National Taxpayer Advocate orally requested that a "waiver" be granted, as provided in the directive. To date, TAS has not received a response, notwithstanding that the IRS currently employs more than 200 attorneys outside the Office of Chief Counsel and has apparently obtained waivers for other positions.

In the fall of 2018, TAS submitted a new hiring request, and it was again blocked by the IRS. The National Taxpayer Advocate asked the Commissioner if he would support a renewed request for a waiver from General Counsel No. 2 to allow TAS to continue to hire attorney-advisors. The National Taxpayer Advocate has not received a formal response to this request.

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 not only barred from hiring new attorneys, but existing, well-performing attorneys cannot be promoted to higher graded positions, either. If the National Taxpayer Advocate is not able to hire attorney-advisors in the next few months, TAS's ability to advocate for taxpayers both individually and systemically and the National Taxpayer Advocate's ability to produce high-quality reports to Congress will be seriously jeopardized.

This problem can be fixed administratively. However, in light of the difficulty TAS has encountered in obtaining administrative relief—difficulty that has spanned several years—and in light of the significance of the issue, we are recommending Congress codify the directive in the RRA 98 conference report.

Recommendation

Amend IRC § 7803(c)(2)(D) to expressly authorize the National Taxpayer Advocate to hire legal counsel that reports directly to her, rather than to the IRS Office of Chief Counsel.[135]

135 For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 37-39 (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*) (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 2011 Annual Report to Congress 573-581 (same); National Taxpayer Advocate 2002 Annual Report to Congress 198-215 (same). The Taxpayer and Fairness Protection Act, H.R. 1661, 108th Cong. § 335 (2003), 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."

#42 CLARIFY THE AUTHORITY OF THE NATIONAL TAXPAYER ADVOCATE TO MAKE PERSONNEL DECISIONS TO PROTECT THE INDEPENDENCE OF THE OFFICE OF THE TAXPAYER ADVOCATE

Present Law

The IRS Restructuring and Reform Act of 1998 (RRA 98) included several provisions to protect TAS's independence from the IRS, such as those that provide the National Taxpayer Advocate with authority to make independent personnel decisions. 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 bolster this independence, IRC § 7803(c)(2)(D) provides the National Taxpayer Advocate with the authority to "appoint" Local Taxpayer Advocates (LTAs) in each state and to "evaluate and take personnel actions (including dismissal) with respect to any employee of any local office." IRC § 7803(c)(2)(C)(iv) also provides that the Commissioner and the National Taxpayer Advocate will "develop career paths for local taxpayer advocates."

The RRA 98 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*."[136] However, the statutory language does not include the final italicized clause.

Reasons for Change

IRC § 7803(c) directs the National Taxpayer Advocate to operate independently in advocating for systemic change, as well as in advocating on behalf of specific taxpayers. For example, the National Taxpayer Advocate is required by IRC § 7803(c)(2) to propose administrative and legislative changes to mitigate problems that taxpayers encounter in their dealings with the IRS and to provide "full and substantive" analyses of a wide range of issues in reports to Congress. Moreover, IRC § 7803(c)(2)(B)(iii) requires these reports to be submitted "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." Thus, the National Taxpayer Advocate is required to hire and retain qualified and independent employees in both her case advocacy and systemic advocacy operations to fulfill TAS's statutory mission.

As noted above, the RRA 98 conference report expressed congressional intent to give the National Taxpayer Advocate personnel authority over "any employee" in the Office of the Taxpayer Advocate. However, IRC § 7803(c)(2)(D) grants the National Taxpayer Advocate personnel authority only over employees of "any local office." It does not grant the National Taxpayer Advocate the authority to make independent personnel decisions with respect to TAS's senior leadership, TAS attorney-advisors, employees of TAS's systemic advocacy and research functions, and other national office employees, even though those employees are also charged with engaging in independent advocacy on behalf of taxpayers and are subject to the same potential conflicts and potential retaliatory personnel actions by the IRS leadership that Congress sought to address in 1998.

136 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.). Because this provision was not modified, the language quoted above reflects the conference agreement.

Recommendation

Amend IRC § 7803(c)(2)(D) to clarify that the National Taxpayer Advocate has the responsibility to evaluate and take personnel actions with respect to all employees of the Office of the Taxpayer Advocate.

#43 CODIFY THE NATIONAL TAXPAYER ADVOCATE'S AUTHORITY TO ISSUE TAXPAYER ADVOCATE DIRECTIVES

Present Law

Under IRC § 7803(c)(2)(A), TAS is charged with advocating for taxpayers both in specific cases and systemically. With regard to "case advocacy," TAS is directed to "assist taxpayers in resolving problems" with the IRS. With regard to "systemic advocacy," TAS is directed to "identify areas in which taxpayers have problems" in dealings with the IRS and to make administrative and legislative recommendations to mitigate those problems.

To assist TAS with case advocacy, IRC § 7811 authorizes the National Taxpayer Advocate to issue Taxpayer Assistance Orders (TAOs) when a taxpayer is suffering or about to suffer a significant hardship as a result of the manner in which the IRS is administering the internal revenue laws. TAOs may order the IRS to, within a specified time, cease certain actions, take certain actions permitted by law, or refrain from taking certain actions. Only the National Taxpayer Advocate (or her delegate), the Commissioner or Deputy Commissioner may modify or rescind a TAO. If the Commissioner or Deputy Commissioner rescinds a TAO, a written explanation of the reasons for the modification or rescission must be provided to the National Taxpayer Advocate. Thus, the TAO is a powerful tool to help ensure that important issues are appropriately elevated before final decisions are made. In addition, IRC § 7803(c)(2)(B)(ii)(VII) directs the National Taxpayer Advocate to "identify any Taxpayer Assistance Order which was not honored by the Internal Revenue Service in a timely manner" in her Annual Report to Congress.

The National Taxpayer Advocate has no comparable statutory authority to assist her in advocating for systemic change. To fill this gap, the Commissioner issued Delegation Order 13-3, which provides the National Taxpayer Advocate with the non-delegable authority to issue a Taxpayer Advocate Directive (TAD). A TAD may require an IRS unit to change procedures "to improve the operation of a functional process or to grant relief to groups of taxpayers (or all taxpayers) when implementation will protect the rights of taxpayers, prevent undue burden, ensure equitable treatment or provide an essential service to taxpayers." As with a TAO, the Commissioner and the Deputy Commissioner both retain the authority to modify or rescind a TAD.

Reasons for Change

IRS business units periodically fail to address emerging problems or implement new programs or procedures that may have a significant adverse impact on taxpayers. When the National Taxpayer Advocate has responded by issuing TADs, IRS officials have not always complied with, or even timely responded to them. The fact that a TAD is not a statutory authority contributes to this problem. Moreover, it is not clear that the National Taxpayer Advocate has the authority to elevate TADs to the Commissioner or to require the IRS to provide a written explanation of the reasons for their modification or rescission.

Recommendations[137]

Enact a new IRC § 7812 (modeled after existing IRC § 7811) to grant the National Taxpayer Advocate non-delegable authority to issue a TAD to mandate changes, within a specified period, to improve or preserve the operation of a functional process, grant relief to groups of taxpayers or all taxpayers, protect the rights of taxpayers, prevent undue burden, ensure equitable treatment, or provide or retain an essential service for taxpayers.[138]

Amend IRC § 7803(c)(2)(B)(ii) to require the National Taxpayer Advocate in her Annual Reports to Congress to "identify any Taxpayer Advocate Directive which was not honored by the Internal Revenue Service in a timely manner."

137 Under this proposal and consistent with current administrative practice, a TAD would be issued initially to the head of a business unit or division. The recipient would be authorized to appeal a TAD by delivering a detailed written explanation that facilitates a full and fair consideration of the issues to the National Taxpayer Advocate and the Deputy Commissioner, either of whom would be authorized to modify or rescind the TAD. The Deputy Commissioner's authority to modify or rescind a TAD would be conditioned on providing the National Taxpayer Advocate a detailed written explanation of the reasons for his or her determination. The National Taxpayer Advocate could elevate a TAD to the Commissioner for a final determination. In such cases, the Commissioner would be required to provide the National Taxpayer Advocate with a detailed written explanation of his or her determination within 90 days, unless the National Taxpayer Advocate determined that time was of the essence and great harm would occur absent a more expedited decision by the Commissioner.

138 For additional background, see National Taxpayer Advocate 2016 Annual Report to Congress 39-40 (Special Focus: *Codify the Authority to Issue a Taxpayer Advocate Directive (TAD) and Clarify the Appeal Process Applicable to Taxpayer Assistance Orders (TAOs) and TADs*). For legislative language generally consistent with this recommendation, see Taxpayer Rights Act of 2015, H.R. 4128, 114th Cong. § 402 (2015) and S. 2333, 114th Cong. § 402 (2015). In addition, the Taxpayer First Act, H.R. 5444, 115th Cong. § 11402(a) (2018), is partially consistent with this recommendation. It would authorize the National Taxpayer Advocate to elevate TADs to the Commissioner, require the Commissioner to provide a detailed description of his reasoning in cases where he modifies or rescinds a TAD, and require the National Taxpayer Advocate to report to Congress on any TADs modified or rescinded by the Commissioner. Significantly, however, H.R. 5444 would not codify the foundational authority of the National Taxpayer Advocate to issue TADs. Instead, it cross references the Commissioner's delegation of authority. We recommend that the National Taxpayer Advocate's authority to issue TADs be codified in the same manner as the authority to issue TAOs. Otherwise, the Commissioner would be able to modify or revoke his delegation of authority at any time and thereby negate the other TAD provisions in the legislation.

#44 CLARIFY THE TAXPAYER ADVOCATE SERVICE'S ACCESS TO FILES, MEETINGS, AND OTHER INFORMATION

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 annually report to Congress. 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."

Because the National Taxpayer Advocate and her staff are required to review tax return information to fulfill their statutory duties, they are authorized by IRC § 6103(h) to do so. 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 needs 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 other IRS employees, or obtain other information from the IRS.

Reasons for Change

In general, the National Taxpayer Advocate has significant access to IRS systems and data. Both in the context of specific cases and systemic advocacy, however, the IRS periodically has 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 the taxpayer has requested TAS's attendance; and (3) information required by the National Taxpayer Advocate to enable her to analyze a systemic problem for purposes of the Annual Report to Congress.

Recommendations

Amend IRC § 7803(c) to clarify that the National Taxpayer Advocate (and her delegates) shall have access to tax returns and return information with respect to cases open and pending in TAS and shall have the right to participate in meetings between taxpayers and the IRS when asked to do so by a taxpayer.

Clarify that, in furtherance of her tax administrative duties, the National Taxpayer Advocate (and her delegates) shall have access to all data, statistical information, and documents necessary to perform a "full and substantive analysis" of the issues, as required by IRC § 7803(c)(2)(B).[139]

139 For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 34-36 (Special Focus: *Reinforce the National Taxpayer Advocate's Right of Access to Taxpayer and IRS Information and to Meetings Between the IRS and Taxpayers*). The Taxpayer First Act, H.R. 5444, 115th Cong. § 11402(b)(3)(A) (2018), would require the Secretary to provide the National Taxpayer Advocate with "statistical support" for the Annual Report to Congress, but would not address TAS's broader need for access to information. The Taxpayer Rights Act, H.R. 4128, 114th Cong. § 403 (2015) and S. 2333, 114th Cong. § 403 (2015), would grant TAS access to case-related files and meetings, but would not address TAS's access to information needed to report on systemic issues.

#45 AUTHORIZE THE NATIONAL TAXPAYER ADVOCATE TO FILE *AMICUS* BRIEFS

Present Law

IRC § 7803(c)(2)(A) requires the TAS, an organization led by the National 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)(X) 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."

Although the National Taxpayer Advocate must report on litigation and recommend legislation to address the problems it creates, 28 U.S.C. § 516 provides that only officers of the Department of Justice may represent the United States in litigation, except as otherwise authorized by law. Similarly, 5 U.S.C. § 3106 provides that 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" 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 statutorily authorized to represent the interests of small businesses by appearing in litigated cases as an *amicus curiae*. 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 represent the interests of taxpayers by appearing in litigated cases as an *amicus curiae*.

Reasons for Change

While the conduct of trials is best left to trial lawyers equipped to advocate zealously on behalf of clients to win individual cases, precedential issues that could potentially affect many taxpayers sometimes come before the judiciary with no one representing the rights of taxpayers in general.

Just as the SBA Chief Counsel for Advocacy may file briefs to help ensure the federal courts are informed about the impact of regulations on small businesses, TAS could be more effective in protecting taxpayer rights if the National Taxpayer Advocate were granted comparable authority to file *amicus curiae* briefs in cases implicating taxpayer rights. It is anticipated that this authority would be used sparingly, as is the case with the SBA Chief Counsel for Advocacy.

Recommendation

Amend IRC §§ 7803 and 7452 to authorize the National Taxpayer Advocate to submit briefs as an *amicus curiae* in federal litigation on matters relating to the protection of taxpayer rights.[140]

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140 For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 37-39 (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*); National Taxpayer Advocate 2011 Annual Report to Congress 573-581 (Legislative Recommendation: *Codify the Authority of the National Taxpayer Advocate to File Amicus Briefs, Comment on Regulations, and Issue Taxpayer Advocate Directives*); and National Taxpayer Advocate 2002 Annual Report to Congress 198-215 (Legislative Recommendation: *The Office of the Taxpayer Advocate*). *See also* Program Manager Technical Advice 2007-00566 (Oct. 2, 2002), https://www.irs.gov/pub/lanoa/pmta00566_7189.pdf.

#46 REQUIRE THE IRS TO ADDRESS THE NATIONAL TAXPAYER ADVOCATE'S COMMENTS IN FINAL RULES

Present Law

IRC § 7805(f) requires the Secretary of the Treasury to submit certain proposed or temporary regulations to the Chief Counsel for Advocacy of the Small Business Administration (SBA) for comment regarding the impact such regulations may have on small businesses and to discuss any response to such comments in the preamble to the final regulations. Yet despite the fact that the National Taxpayer Advocate is required by IRC § 7803(c)(2)(A) to assist taxpayers in resolving problems with the IRS and to identify administrative and legislative solutions, there is no comparable provision that requires the Secretary to seek comments from the National Taxpayer Advocate on proposed or temporary regulations or to discuss any response to such comments in the preamble to the final regulations.

Reasons for Change

The requirement that the IRS solicit comments from the SBA and respond to its comments benefits tax administration because it forces the agency to consider and respond to the SBA's concerns about the impact of regulations on small businesses. Similarly, tax administration would benefit if the IRS were required to consider and respond to the National Taxpayer Advocate's concerns about the impact of regulations on taxpayer rights and taxpayer burden. While the National Taxpayer Advocate currently provides comments to the IRS on an informal basis, a requirement that the IRS provide a written, public response would ensure the agency considers the National Taxpayer Advocate's comments carefully, and would be informative for the public and interested stakeholders.

Recommendation

Amend IRC § 7805 to require the IRS to submit proposed or temporary regulations to the National Taxpayer Advocate for comment within a reasonable time and to address any such comments in the preamble to the final rule.[141]

141 For legislative language generally consistent with this recommendation, see Taxpayer Bill of Rights Enhancement Act, S. 1578, 114th Cong. § 404 (2015) (except, as a timing matter, this bill would require the IRS to solicit comments from the National Taxpayer Advocate *before* publication of proposed or temporary regulations rather than *after* publication of such regulations, as the statute currently requires for SBA comments). For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 37-39 (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*); National Taxpayer Advocate 2011 Annual Report to Congress 573-581 (Legislative Recommendation: *Codify the Authority of the National Taxpayer Advocate to File Amicus Briefs, Comment on Regulations, and Issue Taxpayer Advocate Directives*); and National Taxpayer Advocate 2002 Annual Report to Congress 198-215 (Legislative Recommendation: *The Office of the Taxpayer Advocate*).

#47 AUTHORIZE THE OFFICE OF THE TAXPAYER ADVOCATE TO ASSIST CERTAIN TAXPAYERS DURING A LAPSE IN APPROPRIATIONS

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."[142] The Anti-Deficiency Act implements this provision.[143] Specifically, 31 U.S.C. § 1341(a)(1)(B) forbids any officer or employee of the United States government or of the District of Columbia government to involve 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. A significant exception to this rule is provided in 31 U.S.C. § 1342, which permits such government activity "for emergencies involving the safety of human life or the protection of property."

Internal Revenue Code section 7803(c) established the Office of the Taxpayer Advocate to "assist taxpayers in resolving problems with the Internal Revenue Service," among other things.[144] 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."[145] 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."[146]

Reasons for Change

Past IRS shutdown contingency plans have interpreted the exception under 31 U.S.C. § 1342 as applicable to activities necessary to safeguard human life or protect the property of the federal government, but not to protect the property of U.S. taxpayers. Thus, lien and levy activities carried out by automation can continue. During both the 2018 and 2013 shutdowns, the IRS issued thousands of notices of levy on financial accounts of individuals and businesses, on wages, and on Social Security and other government benefits because these notices were pre-programmed into the IRS's computer systems before the shutdown began.

Yet despite the requirement under IRC § 6343(a)(1)(D) that the IRS release any levy that creates an economic hardship for a taxpayer, and the explicit charge in IRC § 7811(b)(1) that the National Taxpayer Advocate may issue a TAO "to release property of the taxpayer levied upon" where the taxpayer is experiencing significant hardship, no IRS or TAS employee, including the National Taxpayer Advocate, was excepted to work these

142 U.S. CONST. Art. I, § 9, cl. 7.

143 Pub. L. No. 97-258, 96 Stat. 923 (1982).

144 IRC § 7803(c)(2)(A)(i).

145 IRC § 7811(a)(1)(A).

146 IRC § 7811(a)(2)(A) and (D).

cases during a shutdown.[147] As a result, taxpayers facing economic hardship were unable to obtain assistance from TAS to request or obtain release of these levies.[148] Additionally, because cases that were in TAS's inventory at the time of the shutdown could not be worked, some taxpayers who had requested the assistance of the National Taxpayer Advocate and TAS immediately prior to the shutdown experienced significant hardship and irreparable injury.[149]

Recommendations

Clarify that the emergency exception to the Anti-Deficiency Act for the protection of property includes taxpayer property as well as government property. Alternatively, clarify that (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.

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147 *See* IRS SERP Alert #19A0017, *Release of Levy and Release of Lien* (Jan. 23, 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.").

In reaching its conclusion that TAS may not assist taxpayers with collection issues during the shutdown, the IRS Office of Chief Counsel reasoned as follows:

> My office reviewed the Plan that we discussed in our conference call on Tuesday. We have determined that TAS may continue to issue manual refunds and enter into streamlined installment agreements, because TAS has authority to take these actions on behalf of IRS.
>
> In contrast, there are a number of functions listed in the Plan where TAS acts derivatively, serving as a conduit or advocate for action by other business units. This includes, for example, fixing refund issues and assisting with general collection processes. As to these derivative functions, we have concluded that there is insufficient evidence that Congress intended for the functions to continue during a lapse in appropriations. In reaching this conclusion, we relied on guidance from the Office of Legal Counsel. OLC has stated that there is implied authority for an unfunded function to continue during a lapse if the function is "necessary to the effective execution of" a function that has funding or is excepted, "such that suspension of the [unfunded] function[] … would prevent or significantly damage the execution of [the funded or excepted] function[]." OLC, *Effect of Appropriations for Other Agencies*, 19 Op. OLC 337, 338 (Dec. 13, 1995). Upon considering TAS's role and its statutory mandates, we do not believe that Congress has implied that suspension of TAS's derivative functions would prevent or significantly damage IRS's execution of its tax collection and refund issuance functions.

Email from Senior Counsel, General Legal Services, to Deputy National Taxpayer Advocate (Jan. 17, 2019).

148 For additional discussion of how TAS's statutory authority to assist taxpayers suffering or about to suffer significant hardship was undermined during a shutdown, see National Taxpayer Advocate Fiscal Year 2015 Objectives Report to Congress 79-91 and preface to National Taxpayer Advocate 2018 Annual Report to Congress.

149 The IRS has since revised its contingency plan to allow the National Taxpayer Advocate and Local Taxpayer Advocates (LTAs) to check mail and process taxpayer payments outside of the filing season. *See IRS Fiscal Year 2019 Lapsed Appropriations Contingency Plan (Non-Filing Season - December 831, 2018*) (Nov. 29, 2018). If a shutdown occurs during the filing season (Jan. 1 – Apr. 30, 2019), additional TAS employees are excepted to open mail and process payments. *See IRS Fiscal Year 2019 Lapsed Appropriations Contingency Plan (Tax Year 2018 Filing Season*) (Jan. 15, 2019).

#48 REPEAL STATUTE SUSPENSION UNDER IRC § 7811(d) FOR TAXPAYERS SEEKING ASSISTANCE FROM THE TAXPAYER ADVOCATE SERVICE

Present Law

IRC § 7811(d) suspends the statutory period of limitations for any action with respect to which a taxpayer is seeking assistance from TAS, but only if the taxpayer submits a written application for assistance.[150]

Reasons for Change

Suspension of the assessment or collection periods disadvantages the taxpayer because it gives the IRS more time to take enforcement actions. If the IRS has caused a problem that the taxpayer is working with TAS to resolve, statute suspension makes little sense because it effectively punishes the taxpayer for coming to TAS.

Further, there is no compelling reason for the suspension, as evidenced by the fact that the IRS itself has never implemented it. It is unnecessary to protect the government's interests because an application for TAS assistance does not prevent the IRS from taking enforcement action while the taxpayer is working with TAS. IRC § 7811(d) is also impossible for the IRS to administer using its existing computer systems.

Moreover, if IRC § 7811(d) were ever to be implemented, it would create an elective trap for the unwary. As noted above, it applies only when a taxpayer submits a written request for TAS assistance. The provision does not apply when taxpayers request TAS assistance by phone, which is the method by which most taxpayers seek TAS's assistance. 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.

Recommendation

Repeal IRC § 7811(d).[151]

150 Treas. Reg. § 301.7811-1(e)(4).

151 For legislative language generally consistent with this recommendation, see 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 316-328 (Legislative Recommendation: *Repeal or Fix Statute Suspension Under IRC § 7811(d)*).

#49 ESTABLISH THE COMPENSATION OF THE NATIONAL TAXPAYER ADVOCATE BY STATUTE AND ELIMINATE ELIGIBILITY FOR CASH BONUSES

Present Law

IRC § 7803 describes four positions in tax administration. Subsection (a) establishes the position of Commissioner of Internal Revenue. Subsection (b) establishes the position of Chief Counsel for the IRS. Subsection (c) establishes the position of National Taxpayer Advocate. Subsection (d) describes duties of the Treasury Inspector General for Tax Administration.[152]

The Commissioner of Internal Revenue and the Chief Counsel of the IRS hold positions that generally require them to act in accordance with the policy of the Executive Branch.

The National Taxpayer Advocate and the Treasury Inspector General for Tax Administration hold positions that, by statute, require them to present an independent perspective. IRC § 7803(c)(4)(A)(iii) requires the Office of the 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." Similarly, IRC § 7803(c)(2)(B)(iii) bolsters the National Taxpayer Advocate's independence by requiring that her Reports to Congress be submitted directly to Congress "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."

Under the Inspector General Act of 1978, Inspector General offices must be "independent and objective units" and agency directors may not "prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation."[153]

Pursuant to the Inspector General Act of 1978, as amended, the compensation for Inspector General positions established under the Act is "the rate payable for level III of the Executive Schedule under section 5314 of Title 5, United States Code, plus 3 percent." An Inspector General "may not receive any cash award or cash bonus." For 2018, the compensation provided under this provision was $179,735.[154]

Pursuant to IRC § 7803(c)(1)(B)(i), the compensation of the National Taxpayer Advocate is "the same rate as the highest rate of basic pay established for the Senior Executive Service under section 5382 of title 5, United States Code, or, if the Secretary of the Treasury so determines, at a rate fixed under section 9503 of such title." For 2018, the highest rate of basic pay established for the Senior Executive Service was $189,600.[155] The rate fixed under 5 U. S. C. § 9503 (so-called "critical pay authority") is variable and is capped at the salary paid to the Vice President of the United States. For 2018, the Vice President's salary was $243,500.[156] The National Taxpayer Advocate is eligible to receive cash bonuses.

152 The position of Treasury Inspector General for Tax Administration is established in the Inspector General Act of 1978, as amended. 5 U.S.C. App., Inspector General Act of 1978, § 2(3)(B)(ii).

153 5 U.S.C. App., Inspector General Act of 1978, §§ 2 & 3.

154 Exec. Order No. 13,819, 82 Fed. Reg. 61, 431 (Dec. 22, 2017), https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/pay-executive-order-2018-adjustments-of-certain-rates-of-pay.pdf. Schedule 5 shows the salary at Level III of the Executive Schedule is $174,500. The IG salary reflects the three percent addition provided by statute.

155 Exec. Order No. 13,819, 82 Fed. Reg. 61, 431 (Dec. 22, 2017), https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/pay-executive-order-2018-adjustments-of-certain-rates-of-pay.pdf. Schedule 4.

156 *Id.*

Reasons for Change

In advocating for the interests of taxpayers both in individual cases and systemically, the National Taxpayer Advocate often must take positions that run contrary to policy decisions made by IRS management, including by the Commissioner of Internal Revenue, to whom she reports by statute.[157] Under the current compensation rules, pursuant to his evaluation of the National Taxpayer Advocate's performance for the preceding fiscal year, the Commissioner annually sets the compensation of the National Taxpayer Advocate and determines whether the National Taxpayer Advocate will receive a bonus and, if so, the amount of the bonus. The Commissioner's determination may affect the compensation of the National Taxpayer Advocate by tens of thousands of dollars.

Giving the Commissioner such significant control over the National Taxpayer Advocate's compensation places the National Taxpayer Advocate in a position where her statutory mission to advocate independently on behalf of taxpayers may conflict with her personal financial interests.

In enacting the Inspector General Act of 1978, Congress recognized that giving agency heads control over the compensation of inspectors general could undermine their independence, and it provided that inspectors general would be paid at a fixed rate that the head of the agency over which they have audit responsibility cannot change.

The same considerations apply to the position of National Taxpayer Advocate. To enable the National Taxpayer Advocate to focus on advocating for taxpayers without concern about financial retaliation for taking positions that may run counter to the IRS's corporate position, the compensation of the National Taxpayer Advocate should be fixed by statute and eligibility for cash bonuses should be eliminated; accordingly, the Commissioner would not be in a position to evaluate the National Taxpayer Advocate's performance of her statutory duties, which at times requires critical analysis of the IRS's activities.

Recommendation

Amend IRC § 7803(c)(1)(B)(i) to set the compensation of the National Taxpayer Advocate at a fixed amount and to stipulate that the National Taxpayer Advocate may not receive any cash award or cash bonus.[158]

157 *See* IRC § 7803(c)(1)(B)(i).

158 As a transition rule, we recommend that the prohibition against bonuses take effect immediately and the rate of pay of the incumbent National Taxpayer Advocate be frozen at its current level. For legislative language partially consistent with this recommendation, see Taxpayer First Act, H.R. 5444, 115th Cong. § 11402(c) (2018) (establishing a fixed salary but not prohibiting bonuses).

Strengthen Taxpayer Rights in Judicial Proceedings

#50 REPEAL *FLORA*: GIVE TAXPAYERS WHO CANNOT PAY THE SAME ACCESS TO JUDICIAL REVIEW AS THOSE WHO CAN

Present Law

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 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 U.S.) to review the IRS determination.

IRC §§ 6201 and 6671(a) authorize the IRS to assess other liabilities, including so-called "assessable" penalties (*e.g.*, penalties codified in IRC §§ 6671-6725), without first issuing a notice of deficiency. Assessable penalties are not computed by reference to a tax deficiency. For example, penalties under IRC §§ 6721 and 6707 for failure to file various information returns are assessable penalties. A taxpayer generally may not obtain judicial review of assessable penalties in the Tax Court.

28 U.S.C. § 1346(a)(1) provides that a taxpayer may sue in a U.S. District Court or the U.S. Court of Federal Claims to recover "any sum" that the taxpayer believes has been erroneously assessed or collected. In *Flora v. United States*, 362 U.S. 145 (1960), however, the U.S. Supreme Court held that, with limited exceptions, a taxpayer must have "fully paid" the assessment (called the "full payment rule") before suing in these courts. In contrast, IRC § 7422(j) provides that the U.S. District Courts and the U.S. Court of Federal Claims "shall not fail to have jurisdiction" to determine the "estate tax liability of such estate (or for any refund with respect thereto) solely because the full amount of such liability has not been paid by reason of an election under section 6166" to pay the liability in installments.

Under IRC § 7422(a) the taxpayer must make a timely administrative claim for refund before filing suit. Assuming the claim is timely, IRC § 6511(b)(2) generally limits a taxpayer's recovery to amounts paid within two years (or, in some cases, within three-years plus any extension of time to file) before the date of the claim.[159]

Under IRC §§ 6330 and 6320, the Tax Court may review an assessed liability if the IRS issues levies or liens to collect an assessment and the taxpayer requests a Collection Due Process (CDP) hearing. However, IRC §§ 6330(c)(2)(B), 6320(c), and Treas. Reg. §§ 301.6320-1(e)(3)A-E2 and 301.6330–1(e)(3)A–E2, provide that the Tax Court may do so only if the taxpayer did not receive a notice of deficiency and did not have an opportunity to raise the dispute in an administrative appeal. In practice, the IRS generally provides an opportunity for an administrative appeal.

Under 11 U.S.C. § 505(a)(1), a bankruptcy court "may" review a tax dispute, but it generally will not review tax issues unless resolution of the dispute would benefit the taxpayer's other creditors.

159 To be timely, IRC § 6511(a) generally requires that an administrative claim must be filed within the later of (i) three years from when the original return was filed or (ii) two years from when the tax was paid. If the claim is filed within the three-year period, then IRC § 6511(b)(2)(A) provides that the taxpayer can only recover amounts paid within three years, plus any extension of time to file, before the date of the claim. Otherwise, IRC § 6511(b)(2)(B) provides that the taxpayer can only recover amounts paid within two years before the date of the claim.

Under IRC § 7803(a)(3), the Commissioner is required to ensure that IRS employees act in accord with certain rights (known as the "Taxpayer Bill of Rights"), including the *right to appeal a decision of the Internal Revenue Service in an independent forum*.

Reasons for Change

Consistent with the Taxpayer Bill of Rights, all taxpayers should have an opportunity to obtain judicial review of adverse IRS determinations. Moreover, taxpayers who cannot pay what the IRS says they owe in order to challenge an adverse determination should have the same opportunities as wealthier taxpayers who can pay.

Under current law, there are circumstances in which taxpayers do not have a right to judicial review. Significantly, assessable penalties are not subject to judicial review unless the taxpayer is wealthy enough to fully pay.

Even taxpayers who fully pay may lose the opportunity to recover a portion of their payments if they pay in installments. Payments made more than two years before a taxpayer fully pays and files a refund claim generally cannot be recovered. Thus, a taxpayer who is not affluent enough to pay his alleged debt within two years will lose the right to request a refund of his early payments, even if he eventually pays in full and the court agrees with him on the merits of the refund claim.

Even when the IRS sends the notice of deficiency to low income taxpayers, they may not have a realistic opportunity for judicial review. A TAS study found that when the IRS sent an audit notice to those claiming the Earned Income Tax Credit (EITC)—a refundable tax credit for the working poor—almost 40 percent did not understand what the IRS was questioning, and only about half of the respondents felt that they knew what they needed to do. Thus, many are also unlikely to understand whether and how to timely petition the Tax Court.

Since the *Flora* case was decided, the problems created by the full payment rule have grown while the reasons for it have faded. Specifically, whether judicial review occurs before or after payment is not as important to the government as it once was. Moreover, in 1960 when *Flora* was decided, there were only four assessable penalties. Today, there are over 50. Thus, the IRS's authority to assess penalties that cannot be reviewed has increased. In addition, the EITC was not enacted until 1975. It brought the working poor into the tax system by giving them tax benefits. Thus, the full payment rule increasingly erodes the *right to appeal an IRS decision in an independent forum* for tens of millions who were not a part of the tax system in 1960.

The National Taxpayer Advocate recommends that Congress provide all taxpayers with a realistic opportunity to obtain judicial review of adverse IRS determinations without regard to ability pay.

Recommendations[160]

While a simple solution might be to repeal the full payment rule, Congress should also consider one or more of the following options:[161]

- Amend 28 U.S.C. § 1346(a)(1) to clarify that the full payment rule only applies in cases where the taxpayer has received a notice of deficiency.

160 For more detail, see National Taxpayer Advocate 2018 Annual Report to Congress (Legislative Recommendation: *Fix the Flora Rule: Give Taxpayers Who Cannot Pay the Same Access to Judicial Review as Those Who Can*).

161 The doctrines of *res judicata* and *collateral estoppel* should help ensure the IRS does not re-litigate the same issues with respect to unpaid liabilities. *See, e.g.*, CCDM 34.5.1.1.2.2.4 (Aug. 11, 2004).

- Treat a taxpayer as having fully paid a disputed amount for purposes of the full payment rule when the taxpayer has paid some of it (including by refund offset) and either (a) the IRS has classified the account as currently not collectible due to economic hardship or (b) the taxpayer has entered into an agreement to pay the liability in installments.[162]
- Authorize the U.S. Tax Court to review liabilities where the taxpayer has not received a deficiency notice *(e.g.,* assessable penalties) in a manner that parallels the deficiency process. Alternatively, expand the Tax Court's jurisdiction to review these liabilities in connection with CDP appeals, even if the taxpayer has had an opportunity for an *administrative* appeal.

162 As noted above, a similar rule applies to estates that elect to pay in installments. *See* IRC § 7422(j).

#51 PROVIDE THAT THE TIME LIMITS FOR BRINGING TAX LITIGATION ARE SUBJECT TO THE JUDICIAL DOCTRINES OF FORFEITURE, WAIVER, ESTOPPEL AND EQUITABLE TOLLING

Present Law

Various provisions in the IRC authorize proceedings or suits against the government, provided such actions are brought timely. These actions are generally brought in the United States Tax Court, a United States District Court, or the United States Court of Federal Claims.[163]

Equitable doctrines which, if available, might excuse an untimely filing include equitable tolling (applicable when it is unfair to hold a plaintiff to a statutory deadline because of an extraordinary event that impeded the plaintiff's compliance); equitable estoppel (applicable when it is unfair to allow the defendant to benefit from the statutory deadline because of something the defendant did to prevent a timely suit); forfeiture (applicable when the parties have acted as if the case need not operate under the statutory deadlines); and waiver (applicable when the parties have agreed explicitly that a case need not operate under legal deadlines).

United States Tax Court

For some types of tax controversies, the United States Tax Court is the only judicial forum in which taxpayers, by filing a petition within a specified period; may litigate their tax liability without first paying the tax asserted. Examples of these types of controversies include deficiency proceedings, collection due process (CDP) proceedings, and "stand-alone" innocent spouse cases (*i.e.*, where innocent spouse relief is sought other than in response to a statutory notice of deficiency or as part of a CDP proceeding).

Other types of cases brought in the Tax Court include interest abatement cases, worker classification cases, and whistleblower claims.

IRC § 7442, which describes the jurisdiction of the Tax Court, does not specify that prescribed periods for petitioning the Tax Court are not subject to equitable doctrines.

The Tax Court has held that, in the absence of a timely filed petition, it does not have jurisdiction to re-determine deficiencies, hear appeals from IRS CDP proceedings, or consider stand-alone innocent spouse claims.

With respect to deficiency cases and stand-alone innocent spouse cases, several United States Courts of Appeals have agreed with the Tax Court that the time limits for filing a Tax Court petition are jurisdictional requirements that cannot be modified by applying equitable doctrines.

Other Federal Courts

In some cases, taxpayers have the right to obtain judicial review in federal courts other than the Tax Court if they sue within a specified period. For example, a refund suit can generally be brought in the United States District Courts or in the United States Court of Federal Claims within two years after the IRS denies the

163 Some tax claims may also be heard by United States bankruptcy courts. For a fuller discussion of this recommendation, see National Taxpayer Advocate 2017 Annual Report to Congress 283 (Legislative Recommendation: *Make the Time Limits for Bringing Tax Litigation Subject to the Judicial Doctrines of Forfeiture, Waiver, Estoppel, and Equitable Tolling, and Clarify That Dismissal of an Untimely Petition Filed in Response to a Statutory Notice of Deficiency Is Not a Decision on the Merits of a Case*).

claim. There is a split between circuits regarding whether the statutory period for seeking refunds is subject to equitable doctrines.[164]

Similarly, taxpayers may sue in a U.S. District Court to enjoin enforcement of a wrongful levy or sale, or to recover property (or proceeds from the sale of the property) if they do so within a specified period (generally, within two years of levy). Several federal courts have held that the applicable period is not subject to equitable tolling,[165] but at least one appellate court has held that it is.[166]

Taxpayers may also bring suit, if they do so within the specified periods, to seek civil damages in a United States District Court or bankruptcy court with respect to unauthorized actions by the IRS. Courts have differed on whether equitable doctrines can toll the applicable period for bringing suit.[167]

Reasons for Change

The sanction for failing to commence suit in the Tax Court or another federal court within the time limits prescribed by the IRC is severe: taxpayers lose their day in that court, which may be the only prepayment forum, or the only forum at all, with jurisdiction to hear their claim. Treating the IRC time limits for bringing suit as jurisdictional, and not subject to equitable doctrines, leads to unfair outcomes.

Unrepresented taxpayers, in particular, may be less likely to anticipate the severe consequences of filing a Tax Court petition even one day late, and most Tax Court petitioners do not have representation. The IRS itself occasionally provides inaccurate information regarding the filing deadline to a taxpayer, and taxpayers have been harmed by relying on that erroneous information.[168]

The right to a fair and just tax system requires that equitable doctrines be available to taxpayers in the rare cases they would apply. Taxpayers would still be required to demonstrate that an equitable doctrine applies in their cases, and courts could still dismiss petitions or complaints as untimely.

164 *Compare RHI Holdings, Inc. v. U.S.*, 142 F.3d 1459, 1460-1463 (Fed. Cir. 1998) (declining to apply equitable principles to § 6352) *with Wagner v. U.S.*, 2018-2 U.S.T.C. (CCH) ¶50,496 (E.D. Wash. 2018) (the time limits set forth in § 6532 are not jurisdictional; furthermore, plaintiff's petition was timely filed) *and Howard Bank v. U.S.*, 759 F. Supp. 1073, 1080 (D. Vt. 1991), *aff'd*, 948 F.2d 1275 (2d Cir. 1991) (applying equitable principles to § 6352 and estopping the IRS from raising the limitations period as a bar to suit).

165 *See Becton Dickinson and Co. v. Wolckenhauer*, 215 F.3d 340, 351-354 (3d Cir. 2000) and cases cited therein (holding that IRC § 6532(c) period is not subject to equitable tolling).

166 *See, e.g., Volpicelli v. U.S.*, 777 F.3d 1042, 1047 (9th Cir. 2015) (holding that IRC § 6532(c) period is subject to equitable tolling); *Supermail Cargo, Inc. v. U.S.*, 68 F.3d 1204 (9th Cir. 1995) (same).

167 *Compare Aloe Vera of America, Inc. v. U.S.*, 580 F.3d 867, 871-872 (9th Cir. 2009) (time for bringing suit under IRC § 7431 is not subject to equitable tolling), *with U.S. v. Marsh*, 89 F. Supp. 2d 1171, 1177 (D. Haw. 2000) (doctrine of equitable tolling is an extraordinary remedy that did not apply in this § 7433 action), *Ramos v. U.S.*, 2002-2 U.S.T.C. (CCH) ¶50,767 (N.D. Cal. 2002) (denying motion to dismiss because doctrine of equitable tolling might apply to a § 7433 action), *and Bennett v. U.S.*, 366 F. Supp. 2d 877, 879 (D. Neb. 2005) (whether equitable tolling applies to §§ 7432 and 7433 actions has not been definitively determined, but it is an extraordinary remedy and did not apply in this case).

168 *See, e.g., Nauflett v. Comm'r*, 892 F.3d 649, 652-654 (4th Cir. 2018) (doctrine of equitable tolling did not apply to innocent spouse case despite reliance on erroneous IRS advice regarding the filing deadline); *Rubel v. Comm'r.*, 856 F.3d 301, 306 (3d Cir. 2017) (same).

Recommendation

Enact a new section of the IRC, or amend IRC § 7442, to provide that the periods set forth in the IRC within which taxpayers may petition the Tax Court or file suit in other federal courts are not jurisdictional and are subject to the judicial doctrines of forfeiture, waiver, estoppel, and equitable tolling.[169]

169 If this change to the IRC were enacted, late-filed claims would no longer be dismissed for lack of jurisdiction, which would mean that the taxpayer would have no right to pursue a refund suit. As a result, we are also recommending that IRC § 7459(d) be amended to make clear that a dismissal based on timeliness is not a decision on the merits.

#52 CLARIFY THAT THE SCOPE AND STANDARD OF JUDICIAL REVIEW OF DETERMINATIONS UNDER IRC § 6015 ARE *DE NOVO*

Present Law

Taxpayers who file joint federal income tax returns are jointly and severally liable for any deficiency or tax due with respect to their joint returns. IRC § 6015, sometimes referred to as the "innocent spouse" rules, provides relief from this joint and several liability. If "traditional" relief from a deficiency is unavailable under subsection (b) and "separation of liability" from a deficiency is unavailable under subsection (c), a taxpayer may qualify for "equitable" innocent spouse relief from deficiencies and underpayments under subsection (f). Relief under IRC § 6015(f) is appropriate when, taking into account all the facts and circumstances of a case, it would be inequitable to hold a joint filer liable for the unpaid tax or deficiency. If the IRS denies relief under any subsection of IRC § 6015, the taxpayer may petition the Tax Court.

In 2008, the Tax Court held that the *scope* of its review in IRC § 6015(f) cases, like its review in IRC § 6015(b) and (c) cases, is *de novo*, meaning that it may consider evidence introduced at trial that was not included in the administrative record.[170] In 2009, the Tax Court held that the *standard* of review in IRC § 6015(f) cases is also *de novo*, meaning that the Tax Court will consider the case anew, without deference to the agency's determination to deny relief.[171]

In 2009, the IRS Office of Chief Counsel (Chief Counsel) issued guidance to its attorneys instructing them to argue, contrary to the Tax Court's holdings, that the scope of review in all IRC § 6015(f) cases is limited to issues and evidence presented before the IRS Appeals or Examination functions and that the proper standard of review is abuse of discretion.[172] In 2011, the National Taxpayer Advocate recommended that Congress amend IRC § 6015 to reflect the Tax Court's holdings.

In June 2013, following an appellate court decision affirming the Tax Court's holdings, Chief Counsel issued guidance instructing its attorneys to cease arguing that the scope and standard of review in IRC § 6015(f) cases is not *de novo*.[173] In June 2013, Chief Counsel also issued an Action on Decision stating that although the IRS disagrees that section 6015(e)(1) provides for both a *de novo* standard of review and a *de novo* scope of review, the IRS will no longer argue that the Tax Court should limit its review to the administrative record or review section 6015(f) claims solely for an abuse of discretion.[174]

Reasons for Change

Although Chief Counsel issued an Action on Decision and issued instructions to its attorneys to stop arguing that Tax Court review in section 6015(f) cases should be limited to the administrative record and for an abuse of discretion, Chief Counsel could change its position in the future. To eliminate ambiguity and preclude

170 *Porter v. Comm'r*, 130 T.C. 115 (2008).

171 *Porter v. Comm'r*, 132 T.C. 203 (2009) (a continuation of the same case that produced the 2008 holding, discussed above, that Tax Court review of denials of relief under IRC § 6015(f) is not limited to the administrative record).

172 Notice CC-2009-021, *Litigating Cases Involving Claims for Relief From Joint and Several Liability Under Section 6015(f): Scope and Standard of Review* (June 30, 2009).

173 Notice CC-2013-011, *Litigating Cases that Involve Claims for Relief From Joint and Several Liability Under Section 6015* (June 7, 2013).

174 Action on Decision (AOD) 2012-07, I.R.B. 2013-25 (June 17, 2013), issued in response to *Wilson v. Comm'r*, 705 F.3d 980 (9th Cir. 2013), *aff'g* T.C. Memo. 2010-134. An AOD is a formal memorandum prepared by Chief Counsel that announces the future litigation position the IRS will take with regard to the court decision addressed by the AOD.

future changes in the IRS's litigating position, the statute should be amended to clarify that courts may consider all relevant evidence in IRC § 6015 cases and that the standard of review is *de novo***.**

Recommendation

Amend IRC § 6015 by adding flush language after subsection (e)(A)(iii) providing that that in any proceeding in a court with jurisdiction over a case, the scope and standard of review of determinations under IRC § 6015 is *de novo*.[175]

175 *See* Taxpayer First Act, H.R. 5444, 115th Cong. § 11303 (2018); Taxpayer First Act of 2018, S. 3246, 115th Cong. § 1003 (2018); Strengthening Taxpayer Rights Act, H.R. 3340, 115th Cong. § 202 (2017); Taxpayer Protection Act, S. 3156, 114th Cong. § 113 (2016); Taxpayer Rights Act, H.R. 4128 and S. 2333, 114th Cong. § 303 (2015). While these bills are similar to our recommendation, they differ in one important respect. All five of these bills would amend IRC § 6015(e) to add a new numbered paragraph providing that "[a]ny review of a determination under this section shall be reviewed *de novo* by the Tax Court." This proposed language could be construed as conferring exclusive jurisdiction on the Tax Court to hear innocent spouse claims, which would preclude innocent spouse relief in collection, bankruptcy, and refund cases litigated in other federal courts and would be inconsistent with IRC § 6015(e)(1)(A) (conferring Tax Court jurisdiction "in addition to any other remedy provided by law"). It would also be inconsistent with the legislative recommendations, *Clarify that Taxpayers May Raise Innocent Spouse Relief As a Defense in Collection Proceedings and in Bankruptcy Cases*, *infra* and *Clarify that Taxpayers May Seek Innocent Spouse Relief in Refund Suits*, *infra.*

#53 CLARIFY THAT TAXPAYERS MAY RAISE INNOCENT SPOUSE RELIEF AS A DEFENSE IN COLLECTION PROCEEDINGS AND IN BANKRUPTCY CASES[176]

Present Law

Married taxpayers who file joint returns are jointly and severally liable for any deficiency or tax due. Spouses who live in community property states and file separate returns are generally required to report half of the community income on their separate returns. IRC §§ 6015 and 66, sometimes referred to as the "innocent spouse" rules, provide relief from joint and several liability and from the operation of community property rules. Taxpayers seeking innocent spouse relief generally file Form 8857, *Request for Innocent Spouse Relief.* After reviewing the request, the IRS issues a final notice of determination granting or denying relief in whole or in part.

If the taxpayer files a petition within 90 days from the date the IRS issues its final notice of determination, the United States Tax Court has jurisdiction to determine the appropriate relief. The Tax Court's jurisdiction to decide innocent spouse claims does not appear to be exclusive; IRC § 6015(e)(1)(A) provides that an individual may petition the Tax Court for review of an innocent spouse determination "in addition to any other remedy provided by law."

The Tax Court does not have jurisdiction over collection suits arising under IRC §§ 7402 or 7403 or over bankruptcy proceedings arising under Title 11 of the United States Code. Some federal courts with jurisdiction over these cases have considered taxpayers' claims that they are entitled to innocent spouse relief, which is consistent with IRC § 6015(e)(1)(A).[177] Notwithstanding the language of IRC § 6015(e)(1)(A), however, some federal courts have held that the Tax Court's jurisdiction to decide innocent spouse claims *is* exclusive and have declined to consider innocent spouse claims in these collection or bankruptcy cases.[178]

Reasons for Change

Inconsistent decisions about whether taxpayers may raise innocent spouse relief as a defense in collection suits and bankruptcy proceedings have created confusion and have resulted in different treatment of similarly situated taxpayers. Moreover, the effect of treating the Tax Court as having exclusive jurisdiction over innocent spouse claims may be to create economic hardships. If the federal courts that decide collection suits and bankruptcy proceedings cannot consider innocent spouse claims, taxpayers in those cases may be left without any forum in which to seek innocent spouse relief before a court enters a financially damaging court judgment or, in rare cases, the taxpayer loses his or her home to foreclosure.

Legislation is needed to clarify that the statutory language of IRC § 6015 conferring Tax Court jurisdiction "in addition to any other remedy provided by law" does not give the Tax Court exclusive jurisdiction to

176 Our recommendation that Congress clarify taxpayers may seek innocent spouse relief in collection proceedings and bankruptcy cases addresses issues similar to those discussed in our recommendation that Congress clarify taxpayers may seek innocent spouse relief in refund cases.

177 *See, e.g., U.S. v. Diehl*, 460 F. Supp. 1282 (S.D. Tex. 1976), *aff'd per curiam*, 586 F.2d 1080 (5th Cir. 1978) (IRC § 7402 suit to reduce an assessment to judgment); and *In re Pendergraft*, 119 A.F.T.R.2d (RIA) 1229 (Bankr. S.D. Tex. 2017) (bankruptcy proceeding).

178 *U.S. v. Boynton*, 99 A.F.T.R.2d (RIA) 920 (S.D. Cal. 2007) (IRC § 7402 suit to reduce an assessment to judgment); *U.S. v. Cawog*, 97 A.F.T.R.2d (RIA) 3069 (W.D. Pa. 2006), appeal dismissed (3d Cir. July 5, 2007) (IRC § 7403 suit to foreclose on federal tax liens); and *In re Mikels*, 524 B.R. 805 (Bankr. S.D. Ind. 2015) (bankruptcy proceeding).

determine innocent spouse claims and that U.S. District Courts and bankruptcy courts are also authorized to consider whether innocent spouse relief should be granted.[179]

Recommendation

Amend IRC §§ 6015 and 66 to clarify that taxpayers are entitled to raise innocent spouse relief as a defense in a proceeding brought under any provision of Title 26 (including §§ 6213, 6320, 6330, 7402, and 7403) and in cases arising under Title 11 of the United States Code.

179 Related to this recommendation, some proposed amendments to IRC § 6015 address the scope and standard of Tax Court review in innocent spouse cases. *See, e.g.*, Taxpayer First Act, H.R. 5444, 115th Cong. § 11303 (2018) and Taxpayer First Act of 2018, S. 3246, 115th Cong. § 1003 (2018), proposing to add a new subsection to IRC § 6015(e) to provide that "[a]ny review of a determination under this section shall be reviewed de novo by the Tax Court." The National Taxpayer Advocate agrees that the standard and scope of Tax Court review of innocent spouse cases should be *de novo*. However, the proposed amendments as written could be construed as conferring exclusive jurisdiction on the Tax Court to hear innocent spouse claims, which would be inconsistent with IRC § 6015(e)(1)(A). It would also be inconsistent with this recommendation relating to raising innocent spouse as a defense in collection suits and bankruptcy proceedings, and with the recommendation to *Clarify That Taxpayers May Seek Innocent Spouse Relief in Refund Suits*, *infra*. For this reason, the National Taxpayer Advocate recommends adding flush language about scope and standard of review to IRC § 6015(e)(A)(iii), thereby avoiding the inference that the Tax Court has exclusive jurisdiction over innocent spouse claims. *See Clarify that the Scope and Standard of Judicial Review of Determinations Under IRC § 6015 Are De Novo*, *supra*.

#54 CLARIFY THAT TAXPAYERS MAY SEEK INNOCENT SPOUSE RELIEF IN REFUND SUITS[180]

Present Law

IRC §§ 6015 and 66, sometimes referred to as the "innocent spouse" rules, provide relief from the joint and several liability that arises from filing a joint federal income tax return and from the operation of community property rules. Taxpayers may request that the IRS grant innocent spouse relief, and if a request is denied, they may seek judicial review.

United States Tax Court

Under IRC § 6015(e), the Tax Court has jurisdiction to review the IRS's denial of a claim for innocent spouse relief and to determine the appropriate relief.

Until the Tax Court's decision in a deficiency case becomes final, interest and penalties continue to accrue with respect to the entire unpaid liability, if any, ultimately determined to be owed. A taxpayer who obtains innocent spouse relief in Tax Court may be entitled to a refund to the extent permitted by IRC § 6015(g). Interest on any refund would be payable at the rate of three percentage points above the Federal short-term rate. A taxpayer may, without waiting for the outcome in Tax Court, stop the accrual of interest and penalties in a deficiency case by making a deposit under IRC § 6603, and if the taxpayer ultimately prevails in the Tax Court litigation, the deposit will be returned. However, interest will be paid at the Federal short-term rate.

There is no right to a jury trial in Tax Court.

Other Federal Courts

Taxpayers who pay a proposed deficiency and whose claims for tax refunds have been denied by the IRS cannot bring refund suits in the Tax Court, but they may seek refunds by filing suit in a United States District Court or in the U.S. Court of Federal Claims.

IRC § 6015(e) states that a taxpayer's right to petition the Tax Court for innocent spouse relief is provided "[i]n addition to any other remedy provided by law." Despite this language, a U.S. District Court recently concluded in the case of *Chandler v. United States* that it lacked jurisdiction to consider a taxpayer's innocent spouse claim in a refund suit arising under IRC § 7422.[181]

A jury trial is available if a refund suit is brought in a U.S. District Court. If an individual taxpayer ultimately prevails in the refund suit, his or her payment will be refunded together with interest at the Federal short-term rate plus three percent.

180 This recommendation that Congress clarify that taxpayers may seek innocent spouse relief in refund cases addresses issues similar to those discussed in our recommendation *Clarify that Taxpayers May Raise Innocent Spouse Relief as a Defense in Collection Proceedings and in Bankruptcy Cases*, *infra*.

181 *Chandler v. U.S.*, 2018 U.S. Dist. LEXIS 173880 (N.D. Tex. 2018) *adopting* 2018 U.S. Dist. LEXIS 174482 (N.D. Tex. 2018). The decision quoted *U.S. v. Elman*, 2012 U.S. Dist. LEXIS 173026 (N.D. Ill. 2012), which stated that "although the statute itself does not address whether the Tax Court's jurisdiction is exclusive, courts interpreting the statute have concluded that it is."

Reasons for Change

The *Chandler* decision is inconsistent with decisions by other federal courts that for decades have allowed taxpayers to seek innocent spouse relief in refund suits.[182] The decision in *Chandler*, by foreclosing district court review of innocent spouse claims, leaves taxpayers with only one forum—the Tax Court—in which to seek review of an adverse IRS determination. Because there is no right to a jury trial in the Tax Court, the *Chandler* decision circumvents taxpayers' right to have their cases decided by a jury. The *Chandler* decision also means that taxpayers who are willing to pay the asserted liability prior to litigation must forego three percentage points of interest. They cannot seek a refund in a district court (where any refund would be paid with interest at the Federal short-term rate plus three percentage points), but may make a deposit pending the outcome in the Tax Court (which would be repaid with interest at the short-term Federal rate).

Legislation is needed to clarify that the statutory language of IRC § 6015 conferring Tax Court jurisdiction "in addition to any other remedy provided by law" does not give the Tax Court exclusive jurisdiction to determine innocent spouse claims and that U.S. District Courts and the Court of Federal Claims are also authorized to consider whether innocent spouse relief should be granted in refund suits. Clarification will prevent further confusion as to whether seeking innocent spouse relief is allowable in those courts and will provide uniformity among all federal courts.[183]

Recommendation

Amend IRC §§ 6015 and 66 to clarify that taxpayers are entitled to assert a claim for innocent spouse relief in refund suits arising under IRC § 7422.

182 *See, e.g.*, *Sanders v. U.S.*, 509 F.2d 162 (5th Cir. 1975) *aff'g* 369 F. Supp. 160 (N.D. Ala. 1973); *Mlay v. IRS*, 168 F. Supp. 2d 781 (S.D. Ohio 2001); *Flores, v. U.S.*, 51 Fed. Cl. 49 (2001).

183 Several recent bills would amend IRC § 6015 to address the scope and standard of Tax Court review in innocent spouse cases. See, *e.g.*, Taxpayer First Act, H.R. 5444, 115th Cong. § 11303 (2018) and Taxpayer First Act of 2018, S. 3246, 115th Cong. § 1003 (2018), proposing to add a new subsection to IRC § 6015(e) to provide that "[a]ny review of a determination under this section shall be reviewed de novo by the Tax Court." The National Taxpayer Advocate agrees that the standard and scope of Tax Court review of innocent spouse cases should be *de novo*. However, the proposed amendments as written could be construed as conferring exclusive jurisdiction on the Tax Court to hear innocent spouse claims, which would be inconsistent with IRC § 6015(e)(1)(A). They would also be inconsistent with this recommendation relating to seeking innocent spouse relief in refund suits and with the recommendation to *Clarify that Taxpayers May Raise Innocent Spouse Relief as a Defense in Collection Proceedings and in Bankruptcy Cases*, *supra*. For this reason, the National Taxpayer Advocate recommends adding flush language about scope and standard of review to IRC § 6015(e)(A)(iii), thereby avoiding the inference that the Tax Court has exclusive jurisdiction over innocent spouse claims. *See Clarify that the Scope and Standard of Judicial Review of Determinations Under IRC § 6015 is De Novo*, *supra*.

#55 FIX THE DONUT HOLE IN THE TAX COURT'S JURISDICTION TO DETERMINE OVERPAYMENTS BY NON-FILERS WITH FILING EXTENSIONS

Present Law

IRC § 6511(a) provides that the limitations period for filing a claim for refund generally expires two years after paying the tax or three years after filing the return, whichever is later. The amount a taxpayer can recover is limited to amounts paid within the applicable lookback period provided by IRC § 6511(b)(2). If a return is filed, then the lookback period is three years, plus any filing extension. Otherwise, the lookback period is two years. IRC § 6513(b) provides that withholding and other pre-payments are deemed paid on the due date of the return without regard to extensions. Thus, taxpayers who have overpaid on or before the original return filing deadline generally cannot claim a credit or refund more than two years later unless they file a return.

When a taxpayer does not file a return, the IRS sometimes sends a notice of deficiency to assess additional tax. A notice of deficiency gives the taxpayer the right to petition the Tax Court, and if the taxpayer timely does so, then the Tax Court generally has jurisdiction under IRC § 6512(b) to determine whether the taxpayer is due a refund for the taxable year at issue to the same extent the IRS could have considered a claim for refund filed on the date the IRS mailed the notice of deficiency. In the absence of a special rule, the Tax Court would have no jurisdiction to award refunds to non-filers who are issued a notice of deficiency after the two-year lookback period.

IRC § 6512(b)(3)(flush) provides such a special rule. It extends the limitations and lookback periods if the IRS mails a notice of deficiency *before* the taxpayer files a return. Specifically, it provides that if the IRS mails the notice of deficiency "during the third year after the due date (*with extensions*) for filing the return," then the limitations and lookback periods are three years (not two), even though the taxpayer has not filed a return. Because the Tax Court's general refund jurisdiction lapses after the second year following the original due date (*without regard to extensions*) and the special rule does not apply unless the IRS mails the notice after the second year (*with regard to extensions*), there is a six-month "donut hole" during which the IRS can send a notice of deficiency without triggering the Tax Court's jurisdiction to consider the taxpayer's claim for refund.

An example may help to illustrate these rules. Assume John Doe was over-withheld on April 15, 2016, the original filing deadline for a 2015 tax return. He requested a six-month extension of time to file, but did not get around to filing before July 1, 2018, when the IRS mailed him a notice of deficiency. He responded to the notice by petitioning the Tax Court to claim his refund. Under the general rule, Mr. Doe's overpayment could only be refunded within two years of the due date of the return, *without regard to extensions* (*i.e.*, April 15, 2018). Thus, he can only recover his overpayment if the special rule extends this period.

The special rule only applies if the IRS mails the deficiency notice during the third year after the due date of his return (*with extensions*) (*i.e.*, the year beginning after October 15, 2018). Because the IRS mailed his deficiency notice before the beginning of the third year, the special rule does not apply, and Mr. Doe cannot get his refund.

Reasons for Change

According to H.R. Rep. No. 105-220, at 701 (1997) (Conf. Rep.), Congress enacted the special rule of IRC § 6512(b)(3)(flush) to put non-filers who receive notices of deficiency after the two-year lookback period on the same footing as taxpayers who file returns on the same day the IRS mailed the notice of deficiency. It was supposed to allow non-filers "who receive a notice of deficiency and file suit to contest it in Tax Court during the third year after the return due date, to obtain a refund of excessive amounts paid within the 3-year period prior to the date of the deficiency notice."

However, the statute as written does not fully fix the problem it was enacted to solve. In *Borenstein*, the Tax Court concluded that it had no jurisdiction to determine a non-filer's overpayment because the non-filer had requested a six-month extension to file and the IRS mailed the notice of deficiency during the first six months of the third year following the original due date—*after* the second year following the due date (without extensions) and *before* the third year following the due date (*with extensions*).[184] Thus, the court found that the special rule of IRC § 6512(b)(3)(flush) leaves a donut hole in its jurisdiction.

Although this problem only affects the relatively limited number of taxpayers who request a six-month filing extension and then, for whatever reason, do not file a return, Congress felt it was important to provide them with this special rule. For that reason, we believe it is important to highlight this unintended result and recommend a solution.

Recommendation[185]

Amend IRC § 6512(b)(3) to clarify that when the IRS mails a notice of deficiency to a non-filer after the second year following the due date of the return (*without regard to extensions*), the limitations and lookback periods for filing a claim for refund or credit are at least three years from the due date of the return (*without regard to extensions*).

184 *Borenstein v. Comm'r*, 149 T.C. No. 10 (2017), *appeal docketed*, No. 17-390 (2d Cir. Dec. 4, 2017). Although the *Borenstein* case is being appealed, the Tax Court would not have to follow a taxpayer-favorable Second Circuit decision in cases arising in other circuits. Thus, unless the Tax Court revisits its decision, a legislative fix is needed.

185 For more detail, see National Taxpayer Advocate 2018 Annual Report to Congress (Legislative Recommendation: *Fix the Donut Hole in the Tax Court's Jurisdiction to Determine Overpayments by Non-filers with Filing Extensions*).

Miscellaneous Recommendations

#56 ESTABLISH THE POSITION OF IRS HISTORIAN WITHIN THE INTERNAL REVENUE SERVICE TO RECORD AND PUBLISH ITS HISTORY

Present Law

The IRS, as a federal agency, is required to properly maintain and manage its records under the Federal Records Act[186] and to provide access to these records to the public under the Freedom of Information Act.[187] However, the IRS is not required to publish a historical analysis of its tax administration programs and policies.

Reasons for Change

A documented history of the IRS's programs and policies would assist Congress, the agency itself, and the public. It would assist Congress by helping Members and staff gain a fuller understanding of the IRS's successes and failures, so future legislation can be developed in a manner that plays to the agency's strengths and helps to address the agency's weaknesses. It would help the IRS more effectively assess its programs, reduce redundant efforts, and share knowledge within the agency. In addition, an IRS historian could assist the public by promoting a more accountable and transparent IRS.[188]

During the early 1990s, the IRS made an administrative decision to hire an IRS historian. However, the relationship was tense, and the individual who held the position subsequently told Congress that the IRS undermined her work and fought transparency, concluding that "the IRS shreds its paper trail, which means there is no history, no evidence, and ultimately no accountability."[189] The IRS eliminated the position and never hired a historian again.

There are at least 29 federal offices of history operating in the executive, judicial, and legislative branches.[190] Government historians serve various roles, such as researching and writing for publication and internal use, editing historical documents, preserving historical sites and artifacts, and providing historical information to the public through websites and other media.[191] Historians are generally required to be objective and accurate in preparing histories that can be controversial.[192] For example, the Historian of the Department of State is required to publish a documentary history of the foreign policy decisions and actions of the United States, including facts providing support for, and alternative views to, policy positions ultimately adopted without omitting or concealing defects in policy.[193] Historians in federal agencies serve an important role, and because

186 44 U.S.C. §§ 3101-3107.

187 5 U.S.C. § 552.

188 See, *e.g.*, 22 U.S.C. § 4351(a), which states in pertinent part: "Volumes of this publication [Foreign Relations of the United States historical series] shall include *all records* needed to provide a comprehensive documentation of the major foreign policy decisions and actions of the United States government, including the facts which contributed to the formulation of policies and records providing supporting and alternative views to the policy position ultimately adopted." (Emphasis added.)

189 *See Practices & Procedures of the Internal Revenue Service: Hearings Before the S. Comm. on Finance*, 105th Cong. 35 (Sept. 23-25, 1997) (statement of Shelley Davis, former IRS Historian).

190 Society for History in the Federal Government, *History at the Federal Government*, http://www.shfg.org/history-at-fedgov#agencies (last visited on Nov. 13, 2018).

191 *Id.*

192 *See*, *e.g.*, 22 U.S.C. § 4351(a).

193 *Id.*

more U.S. citizens interact with the IRS than with any other federal agency, the public interest and potential benefit in learning from the agency's successes and failures are particularly high.

Recommendation

Add a new subsection to IRC § 7803 to establish the position of IRS historian within the IRS. The IRS historian should have expertise in federal taxation and archival methods, be appointed by the Secretary of the Treasury in consultation with the Archivist of the United States, report to the Commissioner of Internal Revenue, and have access to IRS records, including tax returns and return information (subject to the confidentiality and disclosure provisions of IRC § 6103). The IRS historian should be required to report IRS history objectively and accurately, without omitting or concealing defects in policy.[194]

194 For additional background, see National Taxpayer Advocate 2011 Annual Report to Congress 582-586 (Legislative Recommendation: *Appoint an IRS Historian*).

#57 AMEND THE COMBAT-INJURED VETERANS TAX FAIRNESS ACT OF 2016 TO ALLOW VETERANS OF THE COAST GUARD TO FILE CLAIMS FOR CREDIT OR REFUND FOR TAXES IMPROPERLY WITHHELD FROM DISABILITY SEVERANCE PAY

Present Law

IRC § 61(a)(1) provides that compensation for services is includable in gross income. Severance payments generally are treated as compensation and therefore subject to taxation.

IRC § 104(a)(4) provides an exclusion from gross income for payments received for personal injuries or sickness resulting from active service in the armed forces.

IRC § 104(b)(2) clarifies that the exclusion from gross income in IRC § 104(a)(4) applies to an amount received by reason of a combat-related injury, or if the individual, upon application, would be entitled to receive disability compensation from the Department of Veterans Affairs. IRC § 104(b)(3) defines "combat-related injury."

To obtain a credit or refund, a taxpayer must file a timely claim. IRC § 6511(a) provides generally that a taxpayer must file a claim for credit or refund within 3 years from the time the tax return was filed or 2 years from the time the tax was paid, whichever period expires later.

In 2016, Congress passed the Combat-Injured Veterans Tax Fairness Act (the "Act").[195] In a findings section, the Act states: "Since 1991, the Secretary of Defense has improperly withheld taxes from severance pay for wounded veterans, thus denying them their due compensation and a significant benefit intended by Congress." Recognizing that the period of limitation for filing a claim for credit or refund to recover overwithheld tax had long since expired for most tax years since 1991, the Act created an exception from the general period of limitation.

Specifically, the Act directed the Secretary of Defense (i) to identify disability severance pay (DSP) that was not considered gross income pursuant to IRC § 104(a)(4) and from which the Secretary improperly withheld tax and (ii) to send notices to all affected veterans notifying them of their eligibility to receive credits or refunds and providing instructions for filing amended tax returns. It further provided that veterans who received DSP from the Department of Defense may file timely claims for credit or refund within one year from the date of the notice sent by the Secretary of Defense or by the date the period of limitations described in IRC § 6511(a) expires, whichever is later.

IRC § 7701(a)(15) defines the terms "military or naval forces of the United States" and "Armed Forces of the United States" to include "all regular and reserve components of the uniformed services which are subject to the jurisdiction of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, or the Secretary of the Air Force [as well as] the Coast Guard."

Reasons for Change

Notwithstanding that the IRC's definition of "military or naval forces of the United States" includes the Coast Guard, the Act was drafted in a manner that excludes veterans of the Coast Guard from its scope. More specifically, Section 3(a) of the Act directed the Secretary of Defense to identify DSP paid after January 17, 1991, that should have been excluded from gross income, but it did not direct the Secretary of Homeland

195 Pub. L. No. 114-292, 130 Stat. 1500 (2016).

Security, to whom the Coast Guard reports, to identify affected Coast Guard veterans and DSP amounts from which taxes were withheld.

The result is that similarly situated Coast Guard veterans with combat-related injuries are not eligible for the relief provided by this Act. We believe the exclusion of Coast Guard veterans was inadvertent and that members of the Coast Guard should be provided the same additional time to file a claim for credit or refund as other veterans of the "military or naval forces of the United States."

Recommendation

Amend Section 3(a) of the Combat-Injured Veterans Tax Fairness Act of 2016 to require the Secretary of Homeland Security to notify veterans of the Coast Guard about disability severance pay from which taxes were withheld, and provide that the severance payments specified under Section 3(a) include those paid by the Secretary of Homeland Security (or predecessor) to allow veterans of the Coast Guard to file claims for refund or credit for one year from the date of the notification.

#58 AUTHORIZE INDEPENDENT CONTRACTORS AND SERVICE RECIPIENTS TO ENTER INTO VOLUNTARY WITHHOLDING AGREEMENTS WITHOUT RISK THAT THE AGREEMENTS WILL BE USED TO CHALLENGE WORKER CLASSIFICATION DETERMINATIONS

Present Law

Under IRC § 3402(p), the IRS is authorized to accept withholding agreements. Specifically, IRC § 3402(p)(3) authorizes the Secretary to promulgate regulations to provide for withholding from any type of payment that does not constitute wages[196] if the Secretary finds withholding would be appropriate and the payor and recipient of the payment agree to such withholding. However, the provision specifically states that the Secretary must find the withholding would be appropriate "under the provisions of [IRC chapter 24, Collection of Income Tax at Source on Wages]."

IRC chapter 24 addresses collection of taxes at the source with respect to employees (*e.g.,* wage withholding). Although current regulations provide that the Secretary may issue guidance by publication in the Internal Revenue Bulletin describing other payments for which withholding under a voluntary withholding agreement would be appropriate,[197] the only such guidance that has been issued to date is Notice 2013-77, dealing with dividends and other distributions by an Alaska Native Corporation.[198]

Reasons for Change

Unlike employees, whose wage payments are subject to federal income tax withholding, independent contractors are generally responsible for paying their own income taxes. Independent contractors are required to make four estimated tax payments during the year. However, many contractors fail to make estimated tax payments for a variety of reasons and therefore face penalties under IRC § 6654. Some have difficulty saving money and finish the year with substantial tax liabilities they cannot afford to pay. As a result, they face additional penalties and interest charges, and they may face IRS collection action, including liens and levies.

The absence of withholding on payments to independent contractors also has a negative impact on revenue collection. IRS National Research Program studies show that tax compliance is substantially lower among workers whose income taxes are not withheld.[199]

This problem is increasing as more workers are choosing to work in the so-called "gig economy." To reduce the risk that they will not save enough money to pay their taxes, some independent contractors would prefer that taxes be withheld throughout the year, as they are for employees. There is a legitimate debate about the circumstances under which withholding should be required. However, the National Taxpayer Advocate believes there should be no disagreement that workers and businesses should have the option to enter into voluntary withholding agreements when both parties agree to do so.

For many businesses, withholding on payments to independent contractors will not impose additional burden. In addition to paying independent contractors, most large companies have full-time employees, such as administrative staff, so they already have procedures in place to withhold. Significantly, however, some businesses are reluctant to withhold due to concern that the IRS may use the existence of a withholding

196 Payments made when a voluntary withholding agreement is in effect are treated as if they are wages paid by an employer to an employee for purposes of the income tax withholding provisions and related procedural provisions of subtitle F of the IRC.

197 *See* Treas. Reg. § 31.3402(p)-1(c).

198 Notice 2013-77, 2013-50 I.R.B. 632.

199 Government Accountability Office, *Timely Use of National Research Program Results Would Help IRS Improve Compliance and Tax Gap Estimates*, GAO-17-371 (Apr. 18, 2017), https://www.gao.gov/products/GAO-17-371.

agreement to challenge the worker classification arrangement. This concern would be addressed if the IRS is restricted from citing the existence of a voluntary withholding agreement as a factor in worker classification disputes. Indeed, the IRS could, on a case-by-case basis, provide a safe-harbor worker classification in which it affirmatively agrees not to challenge the classification of workers who are a party to such agreements at all, since these agreements will ensure the IRS collects the full amount of income taxes due.

Recommendations

Amend IRC § 3402(p) to clarify that when voluntary withholding agreements are entered into by parties who are not in an employer-employee relationship, the IRS may not consider the existence of a voluntary withholding agreement as a factor in worker classification disputes. In addition, direct the Secretary to evaluate the benefits of agreeing not to challenge worker classification arrangements when a voluntary withholding agreement is in place.[200]

200 For legislative language generally consistent with this recommendation, see Small Business Owners' Tax Simplification Act, H.R. 3717, 115th Cong. § 9 (2017).

Additional Reference Materials

LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
Strengthen Taxpayer Rights			
1	Codify the Taxpayer Bill of Rights, a Taxpayer Rights Training Requirement, and the IRS Mission Statement as Section 1 of the Internal Revenue Code	NTA 2017 Annual Report 93-106; NTA 2016 Annual Report 15-16; NTA 2016 Annual Report 98-108; NTA 2013 Annual Report 51-60; NTA 2013 Annual Report 5-19; NTA 2011 Annual Report 493-518; NTA 2007 Annual Report 478-489	**S. 3278**, 115th Cong. § 102(2) (2018) (taxpayer rights training requirement); **S. 2333**, 114th Cong. § 308 (2015) (same); **H.R. 4128**, 114th Cong. § 308 (2015) (same)
2	Require the IRS to Provide Taxpayers with a "Receipt" Showing How Their Tax Dollars Are Being Spent	NTA 2011 Annual Report 469; NTA 2010 Annual Report 368	**H.R. 3855**, 114th Cong. § 2 (2015); **H.R. 3039**, 113th Cong. § 2 (2013); **S. 437**, 112th Cong. § 2 (2012); **H.R. 1527**, 112th Cong. § 2 (2012)
Improve the Filing Process			
3	Authorize the Volunteer Income Tax Assistance Grant Program	NTA 2014 Annual Report 55-66; NTA 2002 Annual Report vii-viii	**S. 3246**, 115th Cong. § 1001 (2018); **S. 3278**, 115th Cong. § 502 (2018); **H.R. 5444**, 115th Cong. § 12001 (2018); **S. 1**, 115th Cong. §11076 (2017); **S. 797**, 115th Cong. § 2 (2017); **H.R. 2901**, 115th Cong. § 2 (2017); **S. 193**, 115th Cong. § 4 (2017); **H.R. 605**, 115th Cong. § 4 (2017); **S. 3156**, 114th Cong. § 111 (2016) (reported by Sen. Fin. Comm.), *see also* **S. Rep. No. 114-298**, at 11-13 (2016); **H.R. 4835**, 114th Cong. § 4 (2016); **S. 2333**, 114th Cong. § 201 (2015); **H.R. 4128**, 114th Cong. § 201 (2015); **S. 996**, 114th Cong. § 4 (2015); **S. 1368**, 113th Cong. § 4 (2013); **H.R. 341**, 113th Cong. § 4 (2013); **H.R. 5719**, 110th Cong. § 7 (2008) (passed by House), *see also* **H.R. Rep. No. 110-584**, at 21-22 (2008)
4	Authorize the IRS to Establish Minimum Competency Standards for Federal Tax Return Preparers	NTA 2009 Annual Report 41-69; NTA 2008 Annual Report 423-426	**S. 3278**, 115th Cong. § 202 (2018); **H.R. 4912**, 114th Cong. § 401 (2016); **S. 676**, 114th Cong. § 406 (2015); **S. 2333**, 114th Cong. § 202 (2015); **H.R. 4128**, 114th Cong. § 202 (2015); **S. 137**, 114th Cong. § 2 (2015); **H.R. 4141**, 114th Cong. § 2 (2015); **H.R. 1528**, 108th Cong. § 141 (2004) (passed by Senate); **S. 882**, 108th Cong. § 141 (2003) (reported by Sen. Fin. Comm.), *see also* **S. Rep. No. 108-257**, at 30-31 (2003)

LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
5	Require That Electronically Prepared Paper Tax Returns Include a Scannable Code	NTA 2013 Annual Report vol. 2, 70, 91, & 96	**S. 3246**, 115th Cong. § 2104 (2018); **S. 606**, 115th Cong. § 205 (2017); **S. 3157**, 114th Cong. § 205 (2016) (reported by Sen. Fin. Comm.), *see also* **S. Rep. No. 114-299**, at 20-21 (2016); **S. 2736**, 113th Cong. § 4 (2014)
6	Clarify That IRS Employees May Help Taxpayers Locate a Specific Low Income Taxpayer Clinic	N/A	**H.R. 5444**, 115th Cong. § 14001 (2018); **S. 3278**, 115th Cong. § 503 (2018); **H.R. 2171**, 115th Cong. § 303 (2017); **H.R. 4912**, 114th Cong. § 303 (2016); **S. 2333**, 114th Cong. § 201(d)(4) (2015); **H.R. 4128**, 114th Cong. § 201(d)(4) (2015); **H.R. 5719**, 110th Cong. § 6 (2008) (passed by House), *see also* **H.R. Rep. No. 110-584**, at 20-21 (2008)
7	Extend the Time for Small Businesses to Make Subchapter S Elections	NTA 2010 Annual Report 410-411; NTA 2004 Annual Report 390-393; NTA 2002 Annual Report 246	**S. 3278**, 115th Cong. § 304 (2018); **S. 711**, 115th Cong. § 7 (2017); **H.R. 1696**, 115th Cong. § 7 (2017); **H.R. 1**, 113th Cong. § 3606 (2014); **S. 2271**, 112th Cong. § 2 (2012); **H.R. 3629**, 109th Cong. § 2 (2005); **H.R. 3841**, 109th Cong. § 302 (2005)
8	Require Employers Filing More than Five Forms W-2, 1099-MISC, and 941 to Submit them Electronically	N/A	**H.R. 5444**, 115th Cong. §§ 18203 & 18401 (2018) (Internet platform for Forms 1099-MISC and mandatory e-file, respectively); **S. 3246**, 115th Cong. §§ 2103 & 2102 (2018) (same); **H.R. Rep. No. 115-409**, at 142-144 (2017); **H.R. Rep. No. 115-466**, at 235 (2017) (Conf. Rep.)
9	Authorize the Treasury Department to Recover Misdirected Deposits of Tax Refunds and Pay Them to the Correct Taxpayers	NTA 2006 Annual Report 503-505	**S. 3278**, 115th Cong. § 203 (2018)
10	Treat Electronically Submitted Tax Payments as Timely if Submitted Before the Applicable Deadline	N/A	N/A
11	Adjust Estimated Tax Payment Deadlines to Occur Quarterly	N/A	**S. 3278**, 115th Cong. § 305 (2018); **H.R. 3717**, 115th Cong. § 2 (2017)
12	Harmonize Reporting Requirements for Taxpayers Subject to Both FBAR and FATCA By Eliminating Duplication and Excluding Accounts a U.S. Person Maintains in the Country Where He or She Is a *Bona Fide* Resident	NTA 2015 Annual Report 353-362	Bills Pertaining to FATCA Reporting Requirements Repeal: **S. 869**, 115th Cong. § 1 (2017); **H.R. 2054**, 115th Cong. § 1 (2017); **H.R. 2136**, 115th Cong. § 1 (2017); **H.R. 5935**, 114th Cong. § 1 (2016); **S. 663**, 114th Cong. § 1 (2015); **S. 887**, 113th Cong. § 1 (2013)

LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
Improve Assessment and Collection Procedures			
13	Continue to Limit the IRS's Use of "Math Error Authority" to Clear-Cut Categories Specified by Statute	NTA 2015 Annual Report 329-339; NTA 2014 Annual Report 163-171; NTA 2011 Annual Report 74-92	N/A
14	Provide Additional Time for Taxpayers Outside the United States to Request Abatement of a Math Error Assessment Equal to the Time Extension Allowed in Responding to a Notice of Deficiency	NTA 2016 Annual Report 393-397	N/A
15	Require the IRS To Waive User Fees for Taxpayers Who Enter into Low-Cost Installment Agreements and Evaluate the Potential Revenue and Compliance Costs of Other User Fee Increases	NTA 2017 Annual Report 307-313; NTA 2015 Annual Report 14-35; NTA 2007 Annual Report 66-82	**S. 1793**, 115th Cong. § 301 (2017); **S. 3471**, 114th Cong. § 504 (2016) (reported by Sen. Fin. Comm.) (low-income fee waiver provisions and limitation on future increase), *see also* **S. Rep. No. 114-375**, at 84 (2016); **S. 3156**, 114th Cong. § 114 (2016) (low-income fee waiver provisions and limitation on future increase), *see also* **S. Rep. No. 114-298**, at 17-19 (2016); **S. 1321**, 109th Cong. § 301 (2006); **H.R. 1528**, 108th Cong. § 101 (2004) (passed by Senate); **S. 882**, 108th Cong. § 101 (2003), *see also* **S. Rep. No. 108-257**, at 5-6 (2003)
16	Improve Offer in Compromise Program Accessibility by Repealing the Partial Payment Requirement	NTA 2006 Annual Report 507-519	**S. 2689**, 115th Cong. § 17 (2018); **H.R. 5444**, 115th Cong. § 11203 (2018) (low income waiver); **S. 3278**, 115th Cong. § 504 (2018); **H.R. 2171**, 115th Cong. § 206 (2017); **H.R. 4912**, 114th Cong. § 206 (2015)
17	Modify the Requirement That the Office of Chief Counsel Review Certain Offers-in-Compromise	N/A	**S. 1793**, 115th Cong. § 303 (2017); **S. 1578**, 114th Cong. § 403 (2015); **H.R. 1528**, 108th Cong. § 304 (2004) (passed by Senate); **S. 882**, 108th Cong. § 104 (2003), *see also* **S. Rep. No. 108-257**, at 8-9 (2003); **H.R. 1528**, 108th Cong. § 304 (2003) (passed by House), *see also* **H.R. Rep. No. 108-61**, at 43-44 (2003);
18	Require the IRS to Mail Notices at Least Quarterly to Taxpayers with Delinquent Tax Liabilities	N/A	**S. 3278**, 115th Cong. § 201 (2018)
19	Protect Retirement Funds from IRS Levies in the Absence of "Flagrant Conduct" By a Taxpayer	NTA 2015 Annual Report 340-345; NTA 2006 Annual Report 527-530	**H.R. 2171**, 115th Cong. § 203 (2017); **H.R. 3340**, 115th Cong. § 204 (2017); **H.R. 4912**, 114th Cong. § 203 (2016); **S. 2333**, 114th Cong. §§ 306 & 307 (2015); **H.R. 4128**, 114th Cong. §§ 306 & 307 (2015)

LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
20	Toll the Time Periods for Requesting the Return of Levy Proceeds While the Taxpayer or a Pertinent Third Party is Financially Disabled	NTA 2015 Annual Report 368-375	**H.R. 2171**, 115th Cong. § 204 (2017); **H.R. 4912**, 114th Cong. § 204 (2016)
21	Authorize the IRS to Release Levies That Cause Economic Hardship for Business Taxpayers	NTA 2011 Annual Report 537-543	**S. 3278**, 115th Cong. § 303 (2018); **S. 2689**, 115th Cong. § 16 (2018); **S. 2333**, 114th Cong. § 304(a) (2015); **H.R. 4128**, 114th Cong. § 304(a) (2015); **H.R. 4368**, 112th Cong. § 1 (2012)
22	Strengthen Taxpayer Protections in the Filing of Notices of Federal Tax Liens	NTA 2016 Annual Report 386-392; NTA 2014 Annual Report 396-403; NTA 2009 Annual Report 357-364	**S. 2333**, 114th Cong. § 301 (2015); **H.R. 4128**, 114th Cong. § 301 (2015); **S. 3355**, 112th Cong. § 301 (2012); **H.R. 6050**, 112th Cong. § 301 (2012); **H.R. 6439**, 111th Cong. § 2 (2010); **S. 3215**, 111th Cong. § 301 (2010); **H.R. 5047**, 111th Cong. § 301 (2010)
23	Provide Taxpayer Protections Before the IRS Recommends the Filing of a Lien Foreclosure Suit on a Principal Residence	NTA 2012 Annual Report 537-543	**S. 949**, 114th Cong. § 16 (2015); **H.R. 1828**, 114th Cong. § 16 (2015); **S. 2215**, 113th Cong. § 8 (2014)
24	Provide Collection Due Process Rights to Third Parties Holding Legal Title to Property Subject to IRS Collection Actions	NTA 2012 Annual Report 544-552	**S. Rep. No. 105-174**, at 68 (1998) (Senate report accompanying its version of the RRA 98 legislation referred to "[t]he taxpayer (or affected third party).")
25	Extend the Time Limit for Taxpayers to Sue for Damages for Improper Collection Actions	N/A	**S. 1793**, 115th Cong. § 201(c) (2017); **S. 1578**, 114th Cong. § 301 (2015)
26	Codify the Rule That Taxpayers Can Request Equitable Relief Under IRC § 6015(f) Any Time Before Expiration of the Period of Limitations on Collection	NTA 2010 Annual Report 377-382; NTA 2010 vol. 2, 1-12; NTA 2006 Annual Report 540-541	**H.R. 5444**, 115th Cong. § 11303 (2018); **H.R. 3340**, 115th Cong. § 202 (2017); **S. 3156**, 114th Cong. § 113(a)(2) (2016) (reported by Sen. Fin. Comm.), *see also* **S. Rep. No. 114-298**, at 15-17 (2016); **S. 2333**, 114th Cong. § 303(a)(2) (2015); **H.R. 4128**, 114th Cong. § 303(a)(2) (2015)
27	Direct the IRS to Study the Feasibility of Using an Automated Formula to Identify Taxpayers at Risk of Economic Hardship	NTA 2016 vol. 2, 54-66.	N/A
28	Amend IRC § 6306(d) to Exclude the Debts of Taxpayers Whose Incomes Are Less Than Their Allowable Living Expenses From Assignment to Private Collection Agencies or, If That Is Not Feasible, Exclude the Debts of Taxpayers Whose Incomes Are Less Than 250 Percent of the Federal Poverty Level	NTA 2017 Annual Report 10-21	**H.R. 5444**, 115th Cong. § 11305 (2018); **H.R. 7227**, 115th Cong. § 1205 (2018); **S. 3278**, 115th Cong. § 501 (2018); **H.R. 7227**, 115th Cong. § 1205 (2018)

LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
Reform Penalty and Interest Provisions			
29	Convert the Estimated Tax Penalty into an Interest Provision for Individuals, Trusts, and Estates	N/A	**H.R. 1528**, 108th Cong. § 101 (2003) (passed by House), *see also* **H.R. Rep. No. 108-61**, at 23-24 (2003)
30	Apply One Interest Rate Per Estimated Tax Underpayment Period for Individuals, Estates, and Trusts	N/A	**S. 1793**, 115th Cong. § 305 (2017); **S. 1578**, 114th Cong. § 405 (2015); **H.R. 1528**, 108th Cong. § 101 (2003) (passed by House), *see also* **H.R. Rep. No. 108-61**, at 25 (2003)
31	Reduce the Federal Tax Deposit Penalty Imposed on Certain Taxpayers Who Make Timely Tax Deposits	NTA 2001 Annual Report 222	**S. 1793**, 115th Cong. § 309 (2017); **S. 1578**, 114th Cong. § 409 (2015); **S. 1321**, 109th Cong. § 405 (2005), *see also* **S. Rep. No. 109-336**, at 48-49 (2005); **H.R. 1528**, 108th Cong. § 207 (2004) (passed by Senate); **S. 882**, 108th Cong. § 208 (2003), *see also* **S. Rep. No. 108-257**, at 45 (2004); **H.R. 1528**, 108th Cong. § 108 (2003) (passed by House), *see also* **H.R. Rep. No. 108-61**, at 35-36 (2003)
32	Authorize A Penalty for Tax Return Preparers Who Engage in Fraud or Misconduct by Altering a Taxpayer's Tax Return	NTA 2011 Annual Report 558-561	**S. 2333**, 114th Cong. § 203 (2015); **H.R. 4128**, 114th Cong. § 203 (2015)
33	Require Written Managerial Approval Before Assessing the Accuracy-Related Penalty for "Negligence"	NTA 2014 Annual Report 404-410	N/A
34	Compensate Taxpayers for "No Change" National Research Program Audits	N/A	**S. 2689**, 115th Cong. § 14 (2018); **H.R. Rep. No. 104-280**, vol. 2, at 28 (1995)
Strengthen Taxpayer Rights Before the Office of Appeals			
35	Provide Taxpayers with a Legally Enforceable Right to an Administrative Appeal within the IRS, Except if Specifically Barred by Regulations	N/A	**H.R. 5444**, 115th Cong. § 11101 (2018); **S. 3278**, 115th Cong. § 601-605 (2018)
36	Require That At Least One Appeals Officer and One Settlement Officer be Located and Permanently Available in Each State, the District of Columbia, and Puerto Rico	NTA 2016 Annual Report 203-210; NTA 2014 Annual Report 46-54, 311-314; NTA 2009 Annual Report 346-350	**S. 1793**, 115th Cong. § 502 (2017); **S. 2333**, 114th Cong. § 309 (2015); **H.R. 4128**, 114th Cong. § 309 (2015); **S. 1578**, 114th Cong. § 602 (2015)

LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
37	Require Taxpayers' Consent Before Allowing IRS Counsel or Compliance Personnel to Participate in Appeals Conferences	NTA 2017 Annual Report 203-210	**S. 3278**, 115th Cong. § 601 (2018); **S. 2689**, 115th Cong. § 7 (2018); **S. 949**, 114th Cong. § 7 (2015); **H.R. 1828**, 114th Cong. § 7 (2015); **S. 725**, 113th Cong. § 7 (2013); **H.R. 3479**, 113th Cong. § 7 (2013); **S. 2991**, 112th Cong. § 7 (2012); **H.R. 4375**, 112th Cong. § 7 (2012)
Enhance Confidentiality and Disclosure Protections			
38	Limit Redisclosures and Unauthorized Uses of Tax Returns and Tax Return Information Obtained Through § 6103-Based "Consent" Disclosures	NTA 2007 Annual Report 554-555	**H.R. 5444**, 115th Cong. § 18302 (2018); **S. 3246**, 115th Cong. § 1002 (2018); **H.R. 3340**, 115th Cong. § 102 (2017); **S. 3156**, 114th Cong. § 112 (2016) (reported by Sen. Fin. Comm.), *see also* **S. Rep. No. 114-298**, at 14-15 (2016); **S. 2333**, 114th Cong. § 205 (2015); **H.R. 4128**, 114th Cong. § 205 (2015)
39	Authorize the Treasury Department to Issue Guidance Specific to IRC § 6713 Regarding the Disclosure or Use of Tax Return Information by Preparers	NTA 2007 Annual Report 547-548	N/A
40	Allow a Period of Notice and Comment on New Intergovernmental Agreements (IGAs) and Require That the IRS Notify Taxpayers Before Their Data is Transferred to a Foreign Jurisdiction	NTA 2013 Annual Report 238-248	N/A
Strengthen the Office of the Taxpayer Advocate			
41	Clarify That the National Taxpayer Advocate May Hire Legal Counsel to Enable Her to Advocate More Effectively For Taxpayers	NTA 2016 Annual Report 37-39; NTA 2011 Annual Report 573-581; NTA 2002 Annual Report 198-215	**H.R. 1528**, 108th Cong. § 306 (2003) (passed by House), *see also* **H.R. Rep. No. 108-61**, at 44-45 (2003); **H.R. 1661**, 108th Cong. § 335 (2003)
42	Clarify the Authority of the National Taxpayer Advocate to Make Personnel Decisions to Protect the Independence of the Office of the Taxpayer Advocate	N/A	N/A
43	Codify the National Taxpayer Advocate's Authority to Issue Taxpayer Advocate Directives	NTA 2016 Annual Report 39-40; NTA 2011 Annual Report 573-581; NTA 2002 Annual Report 198-215	**H.R. 5444**, 115th Cong. § 11402(a) (2018) (partial); **S. 2333**, 114th Cong. § 402(a) (2015); **H.R. 4128**, 114th Cong. § 402(a) (2015); **S. 3355**, 112th Cong. § 306(a) (2012); **H.R. 6050**, 112th Cong. § 306(a) (2012)

LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
44	Clarify the Taxpayer Advocate Service's Access to Files, Meetings, and Other Information	NTA 2016 Annual Report 34-36	**H.R. 5444**, 115th Cong. § 11402(b)(3)(A) (2018) (providing "statistical support" for the Annual Report to Congress); **S. 2333**, 114th Cong. § 403 (2015) (addressing case-related file and meeting access); **H.R. 4128**, 114th Cong. § 403 (2015) (addressing case-related file and meeting access)
45	Authorize the National Taxpayer Advocate to File *Amicus* Briefs	NTA 2016 Annual Report 37-39; NTA 2011 Annual Report 573-581; NTA 2002 Annual Report 198-215	N/A
46	Require the IRS to Address the National Taxpayer Advocate's Comments in Final Rules	NTA 2016 Annual Report 37-39; NTA 2011 Annual Report 573-581	**S. 1578**, 114th Cong. § 404 (2015) (require the IRS to solicit NTA comments before publication rather than after)
47	Authorize the Office of the Taxpayer Advocate to Assist Certain Taxpayers During a Lapse in Appropriations	NTA 2011 Annual Report 552-557	**S. 2333**, 114th Cong. § 404 (2015); **H.R. 4128**, 114th Cong. § 404 (2015)
48	Repeal Statute Suspension Under IRC § 7811(d) for Taxpayers Seeking Assistance from the Taxpayer Advocate Service	NTA 2015 Annual Report 316-328	**H.R. 2171**, 115th Cong. § 202 (2017); **H.R. 4912**, 114th Cong. § 202 (2016);
49	Establish the Compensation of the National Taxpayer Advocate by Statute and Eliminate Eligibility for Cash Bonuses	N/A	**H.R. 5444**, 115th Cong. § 11402(c) (2018) (partial)
Strengthen Taxpayer Rights in Judicial Proceedings			
50	Repeal *Flora* - Give Taxpayers Who Cannot Pay the Same Access to Judicial Review as Those Who Can	NTA 2018 Annual Report	N/A
51	Provide That the Time Limits for Bringing Tax Litigation Are Subject to the Judicial Doctrines of Forfeiture, Waiver, Estoppel and Equitable Tolling	NTA 2017 Annual Report 283-292	N/A
52	Clarify That the Scope and Standard of Judicial Review of Determinations Under IRC § 6015 Are *De Novo*	NTA 2011 Annual Report 531-536	**H.R. 5444**, 115th Cong. § 11303 (2018); **S. 3246**, 115th Cong. § 1003 (2018); **H.R. 3340**, 115th Cong. § 202 (2017); **S. 3156**, 114th Cong. § 113 (2016); **H.R. 4128**, 114th Cong. § 303 (2015); **S. 2333**, 114th Cong. § 303 (2015)
53	Clarify That Taxpayers May Raise Innocent Spouse Relief as a Defense in Collection Proceedings and in Bankruptcy Cases	NTA 2010 Annual Report 377-382; NTA 2009 Annual Report 378-380; NTA 2007 Annual Report 549-550	N/A

LR #	Tax Administration Legislative Recommendations	National Taxpayer Advocate (NTA) Annual Report References	Congressional Bill and Committee Report References
54	Clarify That Taxpayers May Seek Innocent Spouse Relief in Refund Suits	N/A	N/A
55	Fix the Donut Hole in The Tax Court's Jurisdiction to Determine Overpayments by Non-Filers with Filing Extensions	NTA 2018 Annual Report	N/A
Miscellaneous Recommendations			
56	Establish the Position of IRS Historian Within the Internal Revenue Service to Record and Publish Its History	NTA 2011 Annual Report 582-586	N/A
57	Amend the Combat-Injured Veterans Tax Fairness Act Of 2016 to Allow Veterans of the Coast Guard to File Claims for Credit or Refund for Taxes Improperly Withheld from Disability Severance Pay	N/A	N/A
58	Authorize Independent Contractors and Service Recipients to Enter into Voluntary Withholding Agreements Without Risk That the Agreements Will Be Used to Challenge Worker Classification Determinations	NTA 2016 Annual Report 322-323; NTA 2012 Annual Report 19-20; NTA 2010 Annual Report 371; NTA 2008 Annual Report 375-390	**H.R. 3717**, 115th Cong. § 9 (2017)

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