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]

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.

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).