

#43 CLARIFY THAT THE NATIONAL TAXPAYER ADVOCATE MAY HIRE LEGAL COUNSEL**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 or that are the subject of frequent litigation, and to make administrative and legislative recommendations to reduce controversy and 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 needed 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.¹⁴⁵ This provision was eliminated in the conference agreement without any explanation. Nevertheless, the conference report stated that the “conferees intend that the National Taxpayer Advocate be able to hire and consult counsel as appropriate.”¹⁴⁶

Reasons for Change

Even though the IRS Office of Chief Counsel (OCC) has established the position of “Division Counsel/ Associate Chief Counsel (National Taxpayer Advocate Program)” to manage and coordinate OCC’s support for the National Taxpayer Advocate, that individual reports to, and her performance is evaluated by, the IRS Chief Counsel. IRC § 7803(b) provides that the IRS Chief Counsel reports to both the General Counsel for the Department of Treasury and the Commissioner of Internal Revenue. All personnel in the OCC report to the IRS Chief Counsel. When the National Taxpayer Advocate wishes to articulate a position that is contrary to the OCC’s position, the Division Counsel/Associate Chief Counsel is obligated to follow the position of the IRS Chief Counsel.

Since 2004, with the approval of the Commissioner of Internal Revenue, TAS has employed attorneys to provide independent legal advice and analysis to the National Taxpayer Advocate. TAS attorneys do not purport to offer formal legal advice or represent the agency. However, they enable the National Taxpayer Advocate to develop an independent perspective (*i.e.*, a perspective that emphasizes taxpayer rights), including by providing support in legally complex taxpayer cases and by writing large sections of the National Taxpayer Advocate’s Annual Reports to Congress.

In 2015, the IRS prevented TAS from hiring 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. On November 29, 2016, the National Taxpayer Advocate requested a waiver, but TAS has

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

146 H. REP. No. 105-599, at 216 (1998) (Conf. Rep.).

not received one, notwithstanding the fact that the IRS employs hundreds of attorneys outside of the Legal Division (*i.e.*, the IRS Office of Chief Counsel).

The National Taxpayer Advocate's inability to hire attorneys jeopardizes TAS's effectiveness and independence.

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.¹⁴⁷

¹⁴⁷ 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). 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.”