

#43 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.”¹⁶¹ The Anti-Deficiency Act implements this provision.¹⁶² Specifically, 31 U.S.C. § 1341(a)(1)(B) forbids any officer or employee of the United States government or 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 (IRC) § 6343(a)(1)(D) requires the Secretary to release a levy and promptly notify the affected individual when the Secretary has determined the levy “is creating an economic hardship due to the financial condition of the taxpayer.”

IRC § 7803(c)(2)(A) directs the Office of the Taxpayer Advocate to “assist taxpayers in resolving problems with the Internal Revenue Service,” among other things. 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.” Significant hardship includes “an immediate threat of adverse action” and “irreparable injury to, or a long-term adverse impact on, the taxpayer if relief is not granted.” A TAO may require the Secretary “within a specified time period ... to release property of the taxpayer levied upon.”

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 2018-2019 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. During the 2018-2019 shutdown, more than 16,500 scheduled appointments at Taxpayer Assistance Centers were cancelled, approximately 3.8 million calls from taxpayers to the IRS went unanswered, and the IRS received more than five million pieces of taxpayer correspondence.¹⁶³

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

¹⁶¹ U.S. CONST. art. I, § 9, cl. 7.

¹⁶² Pub. L. No. 97-258, 96 Stat. 923 (1982).

¹⁶³ *IRS Oversight: Treasury Inspector General for Tax Administration, Hearing Before the Subcomm. on Financial Services and General Government of the H. Comm. on Appropriations*, 116th Cong. (Sept. 24, 2019) (statement of J. Russell George, Treasury Inspector General for Tax Administration).

cases during a shutdown.¹⁶⁴ As a result, taxpayers facing economic hardship were unable to obtain assistance from TAS to request or obtain release of these levies.¹⁶⁵ 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.

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.

¹⁶⁴ 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).

¹⁶⁵ 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 (Area of Focus: *The IRS's Decision Not to Except Any TAS Employees During the Government Shutdown Resulted in Violations of Taxpayer Rights and Undermined TAS's Statutory Authority to Assist Taxpayers Suffering or About to Suffer Significant Hardship*) and National Taxpayer Advocate Fiscal Year 2020 Objectives Report to Congress 40-44 (*Impact of the 35-Day Partial Government Shutdown on the Taxpayer Advocate Service*).