

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) ¶150,248 (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).