

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.”