

LR #1 STATUTE OF LIMITATIONS: Repeal or Fix Statute Suspension Under IRC § 7811(d)

TAXPAYER RIGHTS IMPACTED¹

- *The Right to Quality Service*
- *The Right to Finality*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

PROBLEM

Under Internal Revenue Code (IRC) § 7811(d)(1), the statutory period of limitations on assessment or collection is suspended “beginning on the date of the taxpayer’s application ... [for a Taxpayer Assistance Order (TAO)] and ending on the date of the National Taxpayer Advocate’s decision with respect to such application.”² Thus, if the IRS significantly harms a taxpayer financially and repeatedly ignores his or her concerns, and the taxpayer asks TAS for help, IRC § 7811(d) rewards the IRS and punishes the taxpayer by granting the IRS with more time to make and collect tax assessments. In this way it undermines TAS’s mission and the taxpayer’s rights to *quality service, finality, privacy (which includes the right to expect that enforcement will be no more intrusive than necessary), and a fair and just tax system.*

The IRS has not implemented statute suspension because its computers cannot reliably track extensions of these periods.³ It remains impossible to track many of these extensions, including extensions on cases that do not meet TAS’s acceptance criteria.⁴

The IRS protects its interests in other ways. If the end of a limitations period is near, the IRS routinely asks the taxpayer to agree to an extension even if TAS is involved. It may also continue enforcement activity on TAS cases, if necessary.⁵ Even if TAS issues a TAO ordering the IRS to suspend collection, TAS will generally agree to modify the TAO if collection is in jeopardy.⁶ If it does not, the Commissioner, Deputy Commissioner, or National Taxpayer Advocate may nonetheless modify or rescind the TAO.⁷

In addition, IRC § 7811(d) only applies to taxpayers who submit written TAO applications, making it elective for those who know how to avoid it (*e.g.*, by calling TAS) and a trap for those who do

1 See Taxpayer Bill of Rights, available at www.TaxpayerAdvocate.irs.gov/taxpayer-rights.

2 The periods subject to suspension and the length of any such suspension are subject to a wide variety of interpretations, as discussed below.

3 See, *e.g.*, Memorandum from Commissioner of Internal Revenue, *Taxpayer Advocate Service Statute Suspension Provisions Under IRC Section 7811(d)* (Nov. 10, 2003); Internal Revenue Manual (IRM) 13.1.14, *Suspension of the Statutes of Limitation Under IRC § 7811(d)* (Oct. 31, 2004).

4 Statute suspension does not apply if the application is rejected on the same day it is received. See Treas. Reg. § 301.7811-(e)(1).

5 See, *e.g.*, IRM 5.1.9.4.1(8) (June 24, 2014); IRM 13.1.18.2.4(4) (Feb. 1, 2011); IRM 13.1.10.15, *Suspending Collection Action* (Apr. 9, 2012); *White v. Comm’r*, 899 F. Supp. 767, 773 (D. Mass. 1995).

6 See, *e.g.*, IRM 13.1.20.3.1(5) (Dec. 15, 2007) (“TAS will consider modifying the TAO if there are compelling circumstances that require immediate action by the IRS (*e.g.*, situations where collection is in jeopardy may require the immediate issuance of a Notice of Levy”).

7 IRC § 7811(c).

not.⁸ Further, about 54 percent of the taxpayers who requested TAS assistance in writing in fiscal year (FY) 2015 were unrepresented — the taxpayers most likely to get caught in the trap of inadvertently granting the IRS additional time for enforcement.⁹ If implemented, the statute suspension would also create uncertainty and disputes about deadlines that would otherwise be clear.

A recent decision by the United States Court of Appeals for the 5th Circuit in *Rothkamm* increases the need for Congress to repeal IRC § 7811(d).¹⁰ The 5th Circuit held that IRC § 7811(d) extended the period for filing a wrongful levy claim, a deadline applicable to a third party. Thus, any third party or taxpayer who misses a statutory deadline (e.g., the deadline to file a wrongful levy claim, to request a refund or a collection due process (CDP) hearing, or to petition the tax court) after applying to TAS may now argue that the application extended his or her deadline. This expansion of IRC § 7811(d) and uncertainty concerning the period(s) to which it applies will exacerbate implementation problems and increase uncertainty and controversy.¹¹ Congress should repeal IRC § 7811(d), or at least fix it.

EXAMPLES

Example 1: Statute Suspension Could Penalize Taxpayers Who Seek TAS Assistance

Taxpayer A seeks TAS assistance with a collection matter by submitting a Form 911, *Request for Taxpayer Advocate Service Assistance (and Application for Taxpayer Assistance Order)* to TAS. Taxpayer B has the same problem but does not seek TAS assistance. While TAS is attempting to resolve Taxpayer A's problem, prior to the issuance of a TAO, the IRS retains the discretion to issue a lien or levy to collect the liability if necessary.¹² Because Taxpayer A's request for TAS assistance triggers IRC § 7811(d)(1), he or she is subject to IRS collection for longer than the normal ten-year period, but Taxpayer B is not.¹³ Thus, IRC § 7811(d) penalizes Taxpayer A for seeking TAS assistance.

Example 2: Statute Suspension Will Generate Unnecessary Controversy and Inconsistency

The IRS proposes adjustments to the returns of Taxpayers C, D, and E, and mails a statutory notice of deficiency (SNOD) to each of them on the same day. A SNOD provides a taxpayer with the right to petition the Tax Court if he or she disagrees with the adjustments described in the SNOD and specifies

8 See, e.g., Treas. Reg. §§ 301.7811-1(b) and -1(e)(4).

9 Taxpayer Advocate Management Information System before (TAMIS) query (Oct. 26, 2015).

10 *Rothkamm v. United States*, 802 F.3d 699 (5th Cir. 2015) (hereinafter *Rothkamm*), *rev'g and remanding*, 114 A.F.T.R.2d (RIA) 5919, 2014-2 U.S. Tax Cas. (CCH) 50441 (M.D. La. 2014).

11 See Treas. Reg. § 301.7811-1(e); *Rothkamm* at 700 (assuming without discussion that IRC § 7811(d) suspended the period from the date TAS opened the case until the day TAS closed the case).

12 See, e.g., IRM 5.1.9.4.1(8) (June 24, 2014) ("While TAS is attempting to work with the taxpayer to resolve the tax problem, action to collect the tax, such as filing of NFTL or levy, while not prohibited, will generally be suspended. If the RO believes such action is necessary, e.g., the taxpayer is dissipating assets; TAS should be contacted and advised of Collection's plans in advance."); IRM 13.1.18.2.4(4) (Feb. 1, 2011); IRM 13.1.10.15, *Suspending Collection Action* (Apr. 9, 2012) ("If the RO, Operating Division or Functional Unit refuses to suspend lien filing or levy action, discuss with the Manager whether the issuance of a TAO is appropriate."). See also *White v. Comm'r*, 899 F. Supp. 767, 772 (D. Mass. 1995) (noting a TAO "application merely suspends the running of the period of limitations on collection. It does not immediately suspend the collection activity itself.").

13 IRC § 6502.

the last day for filing.¹⁴ It must also advise the taxpayer of his or her “right to contact a local office of the taxpayer advocate and the location and phone number of the appropriate office.”¹⁵ None of the taxpayers understand the adjustment or how to file a petition.

Taxpayers C and D both mail Form 911, *Request for Taxpayer Advocate Service Assistance (and Application for Taxpayer Assistance Order)*, to TAS on the same day, but Taxpayer E does not. Taxpayer D has proof the IRS received his Form 911 the next day, but Taxpayer C does not. Unbeknownst to them, Taxpayer C and Taxpayer D’s forms do not actually reach a TAS office for another 15 and 20 days, respectively, due to security screening and interoffice mail delays. Within one day of receiving the Forms 911 (17 and 22 days, respectively, after receipt by the IRS), TAS determines that Taxpayers C and D are eligible for TAS assistance and assigns a case advocate (CA) to assist them.¹⁶ Three days later (20 and 25 days, respectively, after receipt by the IRS), the CA determines Taxpayers C and D are experiencing a “significant hardship” and sends Operation Assistance Requests (OARs) to the Operating Division (OD) to obtain more information. Twenty-six days later — 30 days after TAS’s receipt of each Form 911 (46 and 51 days, respectively, after receipt by the IRS) — the CA receives and reviews the information and determines not to recommend issuing a TAO. Five days later — 35 days after receipt by TAS (51 and 56 days, respectively, after receipt by the IRS), the CA contacts the taxpayers to explain his decision and closes the cases.

Twenty-nine days after the deadline for filing a petition in Tax Court, which is printed on the SNOD, Taxpayers C, D and E each contact a low income taxpayer clinic (LITC). The LITC advises Taxpayer E not to file because his petition would be untimely, but advises Taxpayers C and D to file because they can argue the deadline for filing a petition with the Tax Court was extended by the period the TAO application was pending.¹⁷

Because Taxpayer C’s case is appealable to the 5th Circuit, but Taxpayer D’s is not, the Tax Court is more likely to accept Taxpayer C’s argument that the period was extended, pursuant to *Rothkamm*, even if it holds that Taxpayer D’s is not.¹⁸

If the court accepts Taxpayer C’s or D’s argument, it will have to decide how long the TAO application extended the period. The IRS may argue it was extended from TAS’s receipt until TAS’s determination to accept the case (*i.e.*, by one day for each), from the IRS’s receipt until TAS’s determination to accept the case (*i.e.*, by 16 or 21 days, for Taxpayers C and D, respectively), from TAS’s receipt until its determination that Taxpayers C and D were facing a “significant hardship” and that it would send an OAR and not a TAO (*i.e.*, by three days for each), or from the IRS’s receipt until this determination (*i.e.*, by 20 or 24 days for C and D, respectively); whereas Taxpayers C and D may argue it was extended by the period their

14 IRC § 6212; IRC § 6213(a) (providing that taxpayers have 90 days (150 days if they are outside the United States) from the date of the SNOD to petition the Tax Court); IRS Restructuring and Reform Act of 1998 (RRA 98), Pub. L. No. 105-206, § 3463(a), 112 Stat. 685, 767 (1998) (the IRS “shall include on each notice of deficiency under section 6212 ... the last day on which the taxpayer may file a petition with the Tax Court.”).

15 RRA 98, Pub. L. No. 105-206, § 1102(b), 112 Stat. 685, 703 (1998) (modifying IRC § 6212(a)).

16 The application is not frivolous or subject to a penalty for frivolous submissions. See IRC § 6702(b)(2)(B)(ii)(III) (penalty for frivolous TAO applications).

17 *Rothkamm* held that IRC § 7811(d) tolled the period for filing a wrongful levy claim, which by operation of IRC § 6532(c)(2), extended the period for filing suit.

18 Although the Tax Court is a national court with its own precedents, where a case before it is appealable to a circuit court that disagrees with it on a legal issue, it will follow the decision of that court under the so-called *Golsen* rule. See *Golsen v. Comm’r*, 54 T.C. 742, 756-758 (1970), *aff’d*, 445 F.2d 985 (10th Cir. 1971).

cases were open in TAS (*i.e.*, by 30 days) or from the IRS's receipt of Form 911 until TAS closed their cases (*i.e.*, by 51 or 56 days, respectively).¹⁹

Further, the arguments may not be the same for Taxpayers C and D because Taxpayer D retained proof of receipt of Form 911 by the IRS or because Taxpayer D's form traveled more slowly to TAS through IRS security and interoffice mail.²⁰ Thus, a deadline that was previously clear, evenly applied, and easy to administer may now be unclear, unevenly applied, difficult to administer, and subject to litigation.

Example 3: Statute Suspension Could Be a Trap for the Uninformed

Taxpayers F, G, and H each ask TAS for assistance with collection matters. Taxpayer F seeks assistance by calling. Taxpayer G seeks assistance by filing a Form 911, *Request for Taxpayer Advocate Service Assistance (and Application for Taxpayer Assistance Order)*, sending an email, and mailing a letter. Taxpayer H also files Form 911, seeking assistance in resolving a liability due from him and his wife, but he only lists himself as the taxpayer on the Form 911. The IRS does not suspend its collection activity while TAS is evaluating these cases. IRC § 7811(d) only applies to those who submit written TAO applications.²¹ As a result, it extends the period for the IRS to collect from Taxpayers H and G, but not Taxpayer F or H's wife.²² In other words, the IRS has a total of ten years to collect from Taxpayer F and H's wife but more than ten years to collect from Taxpayer H and G.²³

19 Compare IRC § 7811(d)(1) (applying suspension to the "period beginning on the date of the taxpayer's application ... and ending on the date of the National Taxpayer Advocate's decision with respect to such application"), with *Rothkamm* at 700 (assuming without discussion that IRC § 7811(d) suspended the period from the day TAS opened the case until the day TAS closed the case), Treas. Reg. § 301.7811-1(e)(1) (specifying the "period beginning on the date the Ombudsman receives an application for a taxpayer assistance order ...and ending on the date on which the Ombudsman makes a *determination* with respect to the application") (emphasis added), and Treas. Reg. § 301.7811-1(e)(2) (defining the date of the "decision" as "the date on which the taxpayer's request for a taxpayer assistance order is denied, or agreement is reached with the involved function of the Service, or a taxpayer assistance order is issued (except that when the taxpayer assistance order is reviewed by an official who may modify or rescind the taxpayer assistance order ... the decision date is the date on which such review is completed).").

20 The filing of forms with TAS is not the same as filing them with the IRS. See, e.g., IRM 13.1.18.6.3, *Taxpayers Delivering Returns to TAS and TAS Date Stamp* (Feb. 1, 2011) ("Any tax return mailed to TAS is not considered filed with the IRS until it is received by an authorized IRS office. As discussed below, there are designated places for filing, and those places do not include a TAS office. Further, the postmark rule described in IRC § 7502 does not apply unless the return was properly addressed to the office with which the return was required to be filed.").

21 See, e.g., Treas. Reg. §§ 301.7811-1(b) and -1(e)(4).

22 See Treas. Reg. § 301.7811-1(b) ("A request for a TAO shall be made on a Form 911, 'Request for Taxpayer Advocate Service Assistance (And Application for Taxpayer Assistance Order)' (or other specified form) or in a written statement that provides sufficient information for the Taxpayer Advocate Service (TAS) to determine the nature of the harm or the need for assistance."); Treas. Reg. § 301.7811-1(e)(4) ("The statute of limitations is not suspended in cases where the Ombudsman issues an order in the absence of a written application for relief by the taxpayer or the taxpayer's duly authorized representative."). See also IRM 13.1.14.4.3, *Special Situations* (Oct. 31, 2004) ("In situations where only one spouse signs the form or written statement, contact the taxpayer who signed the form or written statement to determine the intent of the application.... TAS will not solicit the taxpayer's signature for the sole purpose of suspending the statute."). Further uncertainty may result if a taxpayer submits a written application, but does not sign it. *Id.*

23 IRC § 6502.

RECOMMENDATIONS

Repeal statute suspension under IRC § 7811(d). Alternatively, clarify that it:

- (1) Only extends the period for the IRS to collect or assess a liability, and not the period for the taxpayer or a third party to act; and
- (2) Only applies when:
 - a. Expiration of the relevant statutory limitations period for collection or assessment is imminent (*i.e.*, expires within one year);²⁴
 - b. The taxpayer has declined to extend the applicable limitations period;²⁵ and
 - c. The IRS is specifically prohibited by the terms of a TAO from pursuing collection or assessment, as the case may be, for more than seven days.

PRESENT LAW

A TAO Application Extends the Deadline for the IRS to Assess or Collect

In 1988, Congress enacted IRC § 7803(c), renamed the Taxpayer Ombudsman as the National Taxpayer Advocate, and established the Office of the Taxpayer Advocate (referred to as TAS).²⁶ The National Taxpayer Advocate is the taxpayer's voice at the IRS, and TAS is an independent organization within the IRS that helps taxpayers resolve problems and recommends administrative and legislative changes to mitigate and prevent future problems.²⁷ Taxpayers are only eligible for TAS assistance if they are facing an economic burden, are impacted by IRS procedures that have failed to operate as intended, or meet other specific criteria, including impairment of their rights under the Taxpayer Bill of Rights (TBOR).²⁸ Congress provided the National Taxpayer Advocate with the authority to issue TAOs to any office, operating division, or function of the IRS when a taxpayer is experiencing significant hardship as a result of the manner in which the internal revenue laws are being administered.²⁹

IRC § 7811(b) describes what a TAO may require, as follows:

The terms of a Taxpayer Assistance Order may require the Secretary within a specified time period —

- (1) To release property of the taxpayer levied upon, or;

24 See, e.g., IRM 5.1.19.5(1) (Jan. 1, 2006) (“An imminent [collection statute expiration date] CSED is any CSED with 12 months or less remaining on the collection statute.”); IRM 25.6.23.8.1, *Minimum Time Remaining on ASED* (Mar. 23, 2015) (defining an “imminent” assessment statute expiration date (ASED) in non-Tax Equity and Fiscal Responsibility Act (TEFRA) cases submitted to Centralized Case Processing or Technical Services as ranging from four to 12 months).

25 The IRS will generally not solicit an extension unless the ASED is within 180 days. IRM 25.6.22.2.1, *Assessment* (Aug. 26, 2011).

26 The Office of the Taxpayer Ombudsman was created by the IRS in 1979 to serve as the primary advocate, within the IRS, for taxpayers. This position was codified in the Taxpayer Bill of Rights (TBOR 1), included in the Technical and Miscellaneous Revenue Act of 1988 (TAMRA), Pub. L. No. 100-647, Title VI, § 6230, 102 Stat. 3342, 3733 (Nov. 10, 1988). In TBOR 1, Congress added IRC § 7811, granting the Ombudsman (now the National Taxpayer Advocate) the statutory authority to issue TAOs.

27 IRC § 7803(c)(2)(A).

28 See IRM 13.1.7.2, *TAS Case Criteria* (Feb. 4, 2015); IRM 13.1.7.2.3 *TAS Case Criteria 8, Best Interest of the Taxpayer* (Feb. 4, 2015).

29 IRC § 7811(b); Treas. Reg. § 301.7811-1(d).

- (2) To cease any action, take any action as permitted by law, or refrain from taking any action, with respect to the taxpayer under:
- (A) Chapter 64 (relating to collection);
 - (B) Subchapter B of chapter 70 (relating to bankruptcy and receiverships);
 - (C) Chapter 78 (relating to discovery of liability and enforcement of title); or
 - (D) Any other provision of law which is specifically described by the National Taxpayer Advocate in such order.

IRC § 7811(d) describes statute suspension, as follows:

The running of any period of limitation with respect to any action described in subsection (b) [the terms of a TAO, reprinted above] shall be suspended for —

- (1) The period beginning on the date of the taxpayer's application... and ending on the date of the National Taxpayer Advocate's decision with respect to such application; and
- (2) Any period specified by the National Taxpayer Advocate in a Taxpayer Assistance Order issued pursuant to such application.

Until recently, the IRS assumed IRC § 7811(d) only extended the period for the IRS to collect or assess tax.³⁰ By its terms, IRC § 7811(d) suspends “[t]he running of any period of limitation with respect to any action described in subsection (b) [the terms of a TAO].” The flush language of IRC § 7811(b) provides that “[t]he terms of a Taxpayer Assistance Order may require the Secretary...” to take action and not the taxpayer. Thus, IRC § 7811(d) does not appear to extend the deadlines applicable to taxpayers or third

³⁰ See, e.g., IRM 13.1.18.2.4(4) (Feb. 1, 2011); IRM 13.1.10.15, *Suspending Collection Action* (Apr. 9, 2012).

parties. Legislative history,³¹ instructions to Form 911,³² older court decisions,³³ Treasury Regulation examples,³⁴ and memos by IRS attorneys are all consistent with this interpretation.³⁵

A TAO Application Now Extends the Deadline for Taxpayers to File Wrongful Levy Claims in the 5th Circuit

The United States Court of Appeals for the 5th Circuit recently held in *Rothkamm* that the period of limitations for filing a wrongful levy claim was suspended by a taxpayer's application for a TAO.³⁶ It focused on the portion of IRC § 7811(d) that says tolling applies to "any statute of limitations for any action described in § 7811(b)." The court suggested that tolling applied to the wrongful levy claim because "releas[ing] property of the taxpayer levied upon," is an action described in IRC § 7811(b)(1). Thus, the court held that an application for a TAO may extend the statutory period for a taxpayer to take action.

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- 31 H. Rept. 100-1104 II at 215 (1988) (Conf. Rept.) ("Any applicable statute of limitations (e.g., the statute of limitations under sec. 6501 relating to the assessment or collection of tax) is suspended starting on the date that the taxpayer files an application for a taxpayer assistance order with the Ombudsman and ending on the date that the Ombudsman makes a decision on the taxpayer's application (or a later date if the Ombudsman's order resulting from a taxpayer's application provides for continued suspension of the statute of limitations. The statute of limitations is not suspended in cases where the Ombudsman issues an order in the absence of an application for relief by the taxpayer.") (Emphasis added).
- 32 Form 911, *Request for Taxpayer Advocate Service Assistance (and Application for Taxpayer Assistance Order)* (2015) ("The signing of this request allows the IRS by law to suspend any applicable statutory periods of limitation relating to the assessment or collection of taxes. However, it does not suspend any applicable periods for you to perform acts related to assessment or collection, such as petitioning the Tax Court for redetermination of a deficiency or requesting a Collection Due Process hearing.")
- 33 See *Demes v. United States*, 52 Fed.Cl. 365, 373 (Fed. Cl. 2002) ("This provision does not go to the tolling of the statute of limitations in court, but rather confers the IRS with discretion to effect tolling upon a taxpayer's request. Plaintiffs therefore cannot sue in a court for a refund under this provision, nor can the court use it as a basis to toll the statute of limitations in plaintiffs' case."). See also *Next Generation Wireless, Ltd. v. United States*, No. 06-CV-838, 2008 WL 4115516 (S.D. Oh. 2008) (considering only whether the application for a TAO extended the period of limitation for filing a wrongful levy claim under IRC § 6532(c)(2) and ignoring IRC § 7811(d)).
- 34 All three examples illustrating statute suspension involve the limitations on IRS collection. Treas. Reg. § 301.7811-1(e)(3) (Examples 1-3).
- 35 See, e.g., IRS Litigation Bulletin (LB) 360, 1990 WL 1086174, 1990 GLB LEXIS 12 (1990) ("The legislative history identifies the limitations period in section 6501 (assessment and collection of tax) as a statute subject to the suspension. Thus, we believe that only those statutes of limitation that would continue to run to the detriment of the Service when an application for a TAO is filed, are subject to the suspension.... We do not believe that section 6511 – limitation on credit or refund – would be suspended."); Program Manager Tech. Adv. (PMTA) 2007-00429, *Suspension of the Statutes of Limitations Under Section 7811(d)* 4 (Mar. 9, 2001) (concluding a broad interpretation of IRC § 7811(d) to toll the period to take "any action" included in a TAO application would be "inconsistent with the statutory language and inconsistent with the examples provided in the regulations...").
- 36 *Rothkamm* did not directly hold that IRC § 7811(d) extended the period for filing suit. Rather, it held that IRC § 7811(d) extended the period for filing an administrative claim, and that the IRS's denial of the timely-filed administrative claim extended the period for filing suit by operation of IRC § 6532(c)(2). A future decision could clarify that IRC § 7811(d) does not extend jurisdictional deadlines for filing in court, but this case still invites litigation in this area. Compare *Volpicelli v. United States*, 777 F.3d 1042 (9th Cir. 2015) (holding the limitations period for filing suit to challenge a wrongful levy was subject to equitable tolling because it was procedural and not jurisdictional) with *Becton Dickinson & Co. v. Wolckenhauer*, 215 F.3d 340 (3d Cir. 2000) (holding that the limitations period for filing suit to challenge a wrongful levy was jurisdictional, and thus, not subject to equitable tolling). *Rothkamm* also held that Mrs. Rothkamm was a "taxpayer" for purposes of IRC § 7811(d) because the levy on her assets paid the tax of another. For additional discussion of this case, see Significant Cases, *infra*.

REASONS FOR CHANGE

The IRS Cannot Program Its Computers to Take Advantage of Extended Deadlines Under IRC § 7811(d)

IRC § 7811(d) was enacted in 1988 but not implemented. In 2003, at the National Taxpayer Advocate's request, the IRS Commissioner formally announced the IRS would not implement IRC § 7811(d) because of two major technical difficulties.³⁷ First, the IRS's Integrated Data Retrieval System (IDRS) could not reflect multiple assessment statute expiration dates (ASEDs) or collection statute expiration dates (CSED) for a husband and wife on a joint liability. For example, if a wife applied for a TAO on a joint liability, but the husband did not, IDRS could not properly reflect an extended ASED or CSED for her without improperly reflecting an extended ASED or CSED for him.

Second, the codes the IRS uses to update IDRS (called transaction codes) could not update a single tax year to reflect multiple CSEDs for different assessments. For example, assume a taxpayer timely reported an unpaid liability on her 2009 return filed on April 15, 2010, which the IRS could collect for ten years (*i.e.*, until April 15, 2020). Two years later, the IRS audited the 2009 return and on April 15, 2012, assessed another liability, which it could collect for ten years (*i.e.*, until April 15, 2022). If the taxpayer later applied for a TAO, triggering a nine-month extension of the CSED for both assessments, TAS could not properly update both CSEDs on IDRS. If TAS tried to update IDRS to extend them, IDRS would incorrectly move the CSED for the first 2009 assessment (from the balance due return) to equal the CSED for the audit adjustment for 2009 that occurred two years later (*i.e.*, from 2020 to 2022), and then add nine months to both CSEDs. As a result, IDRS would incorrectly show that the IRS had an additional two years (*i.e.*, 12 years and nine months) to collect the first assessment.³⁸

In other words, the IRS could not accurately track the extensions of the ASED and CSED, as required by IRC § 7811(d). Although IDRS may now be able to reflect different ASEDS and CSEDs for each spouse, it is still unable to extend the CSED correctly when multiple assessments apply to the same year, as illustrated above.³⁹

Statute Suspension Is Not Needed to Protect the Government

U.S. Appeals Court for the 5th Circuit Judge Higginbotham's dissent in *Rothkamm* quoted various authorities for the following proposition:

All suspension provisions [including 7811(d)] are designed and intended to avoid prejudice to the IRS's ability to collect during periods of time in which collection or assessment is prohibited [or otherwise impeded]⁴⁰

37 See, e.g., Memorandum from Commissioner of Internal Revenue, *Taxpayer Advocate Service Statute Suspension Provisions Under IRC Section 7811(d)* (Nov. 10, 2003); IRM 13.1.14, *Suspension of the Statutes of Limitation Under IRC § 7811(d)* (Oct. 31, 2004).

38 National Taxpayer Advocate FY 2003 Objectives Report to Congress, App. V, 4 (*Suspension of Statute of Limitations Periods*). See also IRM 5.19.10.4.5(3) (Feb. 1, 2014) ("Input of TC 550 will update all CSEDs on the module to the same date. Care must be taken when inputting a TC 550 to a module with multiple CSEDs. If correcting one CSED will cause the other CSEDs to be incorrect, then a TC 550 cannot be done.")

39 See IRM 5.19.10.4.5, *Resolving a Module with CSED Problems* (Feb. 1, 2014).

40 *Rothkamm* at 717 n.14. (quoting *In re Turner*, 182 B.R. 317, 329 (Bankr. N.D. Ala. 1995), *adhered to on reconsideration*, 195 B.R. 476 (Bankr. N.D. Ala. 1996) and citing *In re Gore*, 182 B.R. 293, 304 (Bankr. N.D. Ala. 1995)).

No legislative history addresses why IRC § 7811(d) was enacted.⁴¹ However, it seems to address concerns expressed by IRS Commissioner Egger in 1981 that granting an independent Ombudsman (the predecessor to the National Taxpayer Advocate) legal authority to stop collection activity could “seriously impair the Service’s ability to collect revenue.”⁴² These concerns have not materialized.

As the government has not implemented IRC § 7811(d), it has found other ways to protect its interests. The IRS routinely asks the taxpayer to agree to extend limitations periods even if TAS is assisting them. Moreover, the IRS is not required to suspend enforcement while TAS is evaluating an application for a TAO.⁴³ Even if TAS issues a TAO ordering the IRS to suspend enforcement, TAS will generally agree to modify the TAO if collection is in jeopardy and if it does not, the IRS Commissioner or Deputy Commissioner may nonetheless modify or rescind the TAO.⁴⁴ Thus, the government can protect its interests without statute suspension.

The Automatic Statute Suspension Period Will Be Subject to Dispute

Under IRC § 7811(d)(1) statute suspension applies to the “period beginning on the date of the taxpayer’s application... and ending on the date of the... decision with respect to such application.”⁴⁵ Treas. Reg. § 301.7811-1(e)(1) specifies that the period begins on the date TAS “receives an application for a taxpayer assistance order”⁴⁶ and ends on the date TAS “makes a determination with respect to the application.” Thus, the National Taxpayer Advocate’s position is that the suspension period ends when TAS makes its first determination.

TAS makes a number of determinations on TAO applications.⁴⁷ It first determines whether the taxpayer qualifies for TAS assistance based on TAS’s case acceptance criteria. For 99 percent of the cases that TAS

41 Technical and Miscellaneous Revenue Act of 1988 (TBOR I), Pub. L. 100–647, Title VI, § 6230(a), 102 Stat. 3733 (Nov. 10, 1988) (enacting IRC § 7811(d)).

42 *Taxpayers’ Bill of Rights: Hearings Before the Subcomm. on Oversight of the Internal Rev. Serv. of the S. Comm. on Fin. on S. 850*, 97th Cong. 57 (June 2, 1981) (Statement of Roscoe L. Egger, Jr., Commissioner of Internal Revenue), reprinted at <http://www.unclefed.com/TxprBoR/1981/81Egger.html>.

43 See, e.g., IRM 13.1.18.2.4(4) (Feb. 1, 2011); IRM 13.1.10.15, *Suspending Collection Action* (Apr. 9, 2012) (“If the RO, Operating Division or Functional Unit refuses to suspend lien filing or levy action, discuss with the Manager whether the issuance of a TAO is appropriate.”). See also *White v. Comm’r*, 899 F. Supp. 767, 773 (D. Mass. 1995) (noting a TAO “application merely suspends the running of the period of limitations on collection. It does not immediately suspend the collection activity itself.”).

44 See, e.g., IRC § 7811(c) (permitting the Deputy Commissioner or Commissioner to modify or rescind a TAO, even if issued directly by the National Taxpayer Advocate); IRM 13.1.20.3.1(5) (Dec. 15, 2007) (“TAS will consider modifying the TAO if there are compelling circumstances that require immediate action by the IRS (e.g., situations where collection is in jeopardy may require the immediate issuance of a Notice of Levy).”).

45 The statute says the date of the “National Taxpayer Advocate’s decision.” Under IRC § 7811(f), however, the term “National Taxpayer Advocate” includes any designee of the National Taxpayer Advocate. The National Taxpayer Advocate has delegated her TAO authority to Area Directors, Local Taxpayer Advocates, the Executive Director, Case Advocacy, and the Deputy National Taxpayer Advocate. Treas. Reg. § 301.7811–1(a)(2); IRM 1.2.50.2, *Delegation Order 13-1 (Rev. 1)* (Mar. 17, 2009); IRM 13.1.20.2, *Determining When to Issue a Taxpayer Assistance Order* (Feb. 1, 2011).

46 Particularly in cases where there is a significant delay between the date the taxpayer mailed the application and the date TAS received it, the date the suspension period begins could be subject to dispute, as illustrated by the example above. Disputes may also arise when TAS receives a TAO application originally delivered to the IRS and not TAS because TAS and the IRS are sometimes treated as separate entities for purposes of filing. See, e.g., IRM 13.1.18.6.3, *Taxpayers Delivering Returns to TAS and TAS Date Stamp* (Feb. 1, 2011) (“Any tax return mailed to TAS is not considered filed with the IRS until it is received by an authorized IRS office. As discussed below, there are designated places for filing, and those places do not include a TAS office. Further, the postmark rule described in IRC § 7502 does not apply unless the return was properly addressed to the office with which the return was required to be filed.”).

47 See, e.g., IRM 13.1.18.1, *Processing Taxpayer Advocate Service (TAS) Cases* (Feb. 1, 2011).

accepted and closed in FY 2015, it made this determination and entered them into its case management system (called the Taxpayer Advocate Management Information System (TAMIS)) within four days.⁴⁸ Because TAS does not currently track cases that it does not accept (*i.e.*, because they do not meet TAS criteria), it is impossible to track many of these short extensions.⁴⁹

TAS employees must also determine whether the taxpayer is facing a significant hardship before taking action (*i.e.*, issuing an OAR, a TAO, or closing the case).⁵⁰ For 77 percent of the cases that TAS closed in FY 2015, it made the significant hardship determination within seven days.⁵¹ Because a taxpayer's circumstances can change, TAS may make more than one significant hardship determination during the course of its assistance.

Once TAS makes its first determination, which is usually a determination about whether to accept the case, the suspension period should end, even if TAS later determines the taxpayer is experiencing a significant hardship, determines to issue an OAR instead of a TAO, determines to issue a TAO, or determines to close the case. The taxpayer may not always be informed of the operative date and it is likely to be subject to dispute.⁵² However, the United States Court of Appeals for the 5th Circuit held in *Rothkamm*, *without any analysis*, that the period ended on the day TAS closed its case.

To reduce burden to taxpayers and the IRS of tracking short extensions, the National Taxpayer Advocate previously recommended legislation to create an exception to statute suspension in cases where the extension would be for seven days or less.⁵³ This would help reduce controversy surrounding extensions that are less likely to be important and that may not even be possible to track unless accepted under TAS case acceptance criteria. However, confusion and litigation will likely continue until Congress repeals or clarifies IRC § 7811(d).

Statute Suspension Could Penalize Taxpayers for Seeking Assistance

If statute suspension were applied in cases where IRS enforcement was not actually suspended, then taxpayers who come to TAS would be at a disadvantage. They would be subject to enforcement for longer periods than taxpayers who did not come to TAS.

48 TAMIS Query (Nov. 23, 2015).

49 Statute suspension does not apply if the application is rejected on the same day it is received. See Treas. Reg. § 301.7811-(e)(1) ("For the purpose of computing the period suspended, all calendar days except the date of receipt of the application shall be included.").

50 See, e.g., IRM 13.1.18.1, *Processing Taxpayer Advocate Service (TAS) Cases* (Feb. 1, 2011).

51 TAMIS Query (Nov. 23, 2015). It made the significant hardship determination within 23 days in 90 percent of its closed cases and within 90 days in 99 percent for FY 2015.

52 Treas. Reg. § 301.7811-1(e)(2) defines the date of the "decision" as "the date on which the taxpayer's request for a taxpayer assistance order is denied, or agreement is reached with the involved function of the Service, or a taxpayer assistance order is issued (except that when the taxpayer assistance order is reviewed by an official who may modify or rescind the taxpayer assistance order... the decision date is the date on which such review is completed)." Some may argue that this regulatory language suggests an earlier decision or determination by TAS (e.g., a determination regarding eligibility for TAS assistance or significant hardship) may not end the suspension period, as illustrated above, particularly in cases where TAS issues a TAO.

53 In response to this proposal, Rep. Lewis sponsored H.R. 586, 107th Cong § 224 (2001), which passed the House and was referred to the Senate on April 18, 2002; Rep. Houghton sponsored H.R. 3991, 107th Cong. Title II § 204 (2001), which was defeated in the House on March 19, 2002; and Rep. Portman sponsored H.R. 1528, 108th Cong. § 106 (2003), which passed the Senate on May 19, 2004. See National Taxpayer Advocate 2002 Annual Report to Congress 159.

Perhaps for this reason, some Chief Counsel attorneys have even suggested that the IRS cannot rely on IRC § 7811(d) unless IRS enforcement activity was actually prohibited by internal procedures.⁵⁴ However, this view was limited to a specific fact pattern and is not necessarily the IRS's current official position. If statute suspension penalizes taxpayers from seeking assistance from TAS, then it encumbers the taxpayer's *right to quality service, finality, privacy* (which includes the right to expect that enforcement will be no more intrusive than necessary), and *to a fair and just tax system*.

Statute Suspension Is a Trap for the Uninformed and Elective for Others

Statute suspension only applies to those who submit written TAO applications to TAS or who are granted TAOs that expressly provide for statute suspension.⁵⁵ Well-informed taxpayers who know that statute suspension only applies to written TAO applications could take advantage of its electivity. To avoid giving the IRS more time for enforcement, they could simply request TAS assistance by phone.⁵⁶ By contrast, similarly situated but uninformed taxpayers who file Forms 911 could be subject to IRS enforcement for longer periods.

Statute Suspension Could Affect Thousands Each Year

TAS received 227,189 cases in FY 2015.⁵⁷ Of these, 37,484 were opened in response to correspondence from the taxpayer.⁵⁸ A sample of TAS cases received in FY 2008 found that about 49.2 percent of those received by correspondence included Form 911.⁵⁹ Assuming taxpayers submitted Forms 911 at about the same rate in FY 2015, statute suspension could apply to 18,442 taxpayers in FY 2015 alone (37,484 x 49.2 percent). Further, about 54 percent of the taxpayers who asked for TAS assistance by correspondence in FY 2015 were unrepresented — or potentially 9,959 of the 18,442 who may have been subject to statute suspension.⁶⁰ Unrepresented taxpayers are the least likely to be aware that they may have inadvertently granted the IRS additional time to assess or collect their liabilities.

Statute Suspension Could Frustrate TAS's Mission

If TAS were to level the playing field by requiring a signed TAO application (thereby triggering statute suspension) before accepting a case, then statute suspension could discourage taxpayers who need help from seeking assistance, frustrating TAS's mission. Such a policy could also prevent TAS from offering prompt assistance to taxpayers by phone, particularly those without immediate access to the technology required to submit a written TAO application electronically (*e.g.*, a fax machine or scanner and Internet access). Legislation could clarify that written TAO applications are not required to trigger statute suspension, but then TAS would need to ensure taxpayers are aware that even a request by phone could suspend the statute, potentially discouraging taxpayers from seeking assistance.

54 IRS CCA 199910043, 1999 IRS CCA LEXIS 99 (Jan. 14, 1999) (“the Service may rely on IRC § 7811(d) and B.C. § 105(a) to toll the periods only where, pursuant to its own internal procedures, the Service was prohibited from collecting the taxes it seeks to have declared priority or nondischargeable and actually made no attempt to collect those taxes. Additionally, courts may well require evidence of abuse of the system by the debtor, *e.g.*, that the application was filed as a delaying tactic.”).

55 See, *e.g.*, Treas. Reg. 301.7811-1(b) and -1(e)(4).

56 *Id.*

57 TAMIS query (Oct. 26, 2015).

58 *Id.*

59 TAS Technical Analysis and Guidance, *Special Study* (Dec. 2010).

60 TAMIS query (Oct. 26, 2015).

Statute Suspension Will Generate Litigation

A TAO application may now extend the period for taxpayers and third parties to take action, at least in the 5th Circuit under *Rothkamm*. Some taxpayers could file TAO applications because they want more time to meet statutory deadlines. A more likely scenario, however, is that those who seek TAS assistance and later discover they missed an important deadline will argue the deadline was extended by IRC § 7811(d).⁶¹

The IRS May Now Feel Obligated to Implement Statute Suspension

Some IRS attorneys concluded that the IRS was not legally required to implement statute suspension because IRC § 7811(d) only protects the IRS and does not extend periods applicable to taxpayers.⁶² Because *Rothkamm* has questioned that assumption, the IRS may now feel a greater obligation to implement it notwithstanding the technical difficulties and inequities of doing so.

Implementation of IRC 7811(d) Would Be More Difficult If Applied to Taxpayer Deadlines

As described above, the IRS's computer systems cannot accurately reflect the ASED and CSED extensions provided by IRC § 7811(d). These difficulties would multiply if the IRS were also required to track the extension of statutory deadlines applicable to taxpayers. For example, there is no obvious way for employees to change the refund statute expiration date (RSED) or filing deadline for a CDP hearing that is reflected on IRS systems.⁶³ Moreover, it is not even clear which taxpayer deadlines would be extended under *Rothkamm*. Although taxpayers will argue that under the reasoning of *Rothkamm* “any” statutory deadline, including jurisdictional ones, can be extended by operation of IRC § 7811(d), the court in *Rothkamm* only held that IRC § 7811(d) extended the period for a third party to file a wrongful levy claim with the IRS.⁶⁴

EXPLANATION OF RECOMMENDATIONS

TAS helps taxpayers resolve problems with the IRS when they are facing an economic burden as a result of IRS action or inaction, or when the IRS is ignoring their facts and circumstances and creating devastating problems for them. IRC § 7811(d) operates primarily, if not solely, to penalize taxpayers for seeking assistance from TAS and to reward the IRS for creating those problems by awarding it with additional time for

61 Although frivolous TAO applications could trigger a frivolous submissions penalty, a submission by a taxpayer facing a potentially significant hardship under IRC § 7811(a)(2) (e.g., incurring significant costs (including fees for professional representation) if relief is not granted) is unlikely to be frivolous. See IRC § 6702(b)(2)(B)(ii)(III) (penalty for frivolous TAO applications).

62 Compare LB 360, 1990 WL 1086174, 1990 GLB LEXIS 12 (1990) (concluding that because IRC § 7811(d) only protects the IRS by tolling collection and assessment periods, the IRS was not legally required to implement it), with PMTA 2007-00429, *Suspension of the Statutes of Limitations Under Section 7811(d)* (Mar. 9, 2001) (assuming statute suspension only applies to protect the IRS's interest but still declining to conclude its implementation was not mandatory). Further, the 5th Circuit decision stated that the IRS has no discretion under IRC § 7811(d). *Rothkamm* at 713 (“Congress did not provide the IRS with that discretion under § 7811(d), and the only discretion granted in the regulations is the discretion granted to the Ombudsman to lengthen the period of tolling beyond the date of the decision on the TAO application.”).

63 See, e.g., IRM 25.15.15, *Mirror Modules for Requests for Relief from Joint and Several Liability* (July 30, 2014) (discussing RSEDs) and IRM 21.5.6.4.8, *-D Freeze* (Mar. 3, 2014) (same); IRM 5.19.4, *Enforcement Actions* (Nov. 26, 2014) (discussing CDP filing deadline).

64 If IRC § 7811(d)(1) was inapplicable, Mrs. Rothkamm's suit would have been over seven months late, but her case was open in TAS for less than six months, according to the court. Had the court held that IRC § 7811(d)(1) merely extended the time for filing suit, the suit would still have been late. Rather, the court held that the suit was timely only because IRC § 7811(d)(1) extended the period for her to file an administrative claim. The IRS's consideration and subsequent denial of her timely-filed administrative claim extended the period for filing suit by operation of IRC § 6532(c)(2). As noted above, a future decision could clarify that IRC § 7811(d)(1) does not extend jurisdictional deadlines for filing in court.

enforcement, thereby undermining taxpayer rights and TAS's mission. It throws previously clear rules and deadlines into disarray in an inconsistent, elective, and arbitrary manner. It invites litigation over which deadlines it extends and for how long. It requires the IRS to track unspecified changes to unspecified deadlines that the IRS does not and cannot track, even if it could identify all of the deadlines it should track and what changes it should make to them. For these reasons, IRC § 7811(d) must be repealed.

In the alternative, if IRC § 7811(d) cannot be repealed, then Congress could address some of the problems with IRC § 7811(d) by clarifying that it only suspends the periods for collection or assessment and only applies in cases where it is most likely to be relevant. It is most likely to be relevant only when a TAO specifically and explicitly bars enforcement for more than seven days, expiration of the relevant statutory limitations period is imminent (*i.e.*, would otherwise expire within one year), and the IRS has asked the taxpayer to extend the applicable limitations period but the taxpayer has declined. Such situations should be rare because taxpayers who are working with TAS almost always agree to extend the limitations period upon request. To reiterate, however, the National Taxpayer Advocate's primary recommendation is to repeal IRC § 7811(d).