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A Vision of Tax Administration in the 21st Century Should Reflect the Multiple Roles the IRS Plays and the Characteristics of All Taxpayers, Not Just Those With Resources, Skills and Internet Access

Introduction

In this testimony I will focus on lower-income taxpayers, though there are themes that I believe apply broadly, whether in delivering service to lower-income or wealthy taxpayers, individuals or corporations, or financial institutions or overseas citizens trying to comply with voluminous reporting obligations. A fundamental starting point in thinking about service is that the IRS needs to know whom it is serving and the characteristics and challenges associated with that particular group of taxpayers or parties it is regulating. That sounds easy enough but knowing the taxpayer actually is a resource-intensive endeavor, as I describe below. An agency fixated on efficiency and delivering service at the lowest possible short-term costs without knowing the impact and burdens of its actions may find itself pushing more serious problems down the road, while at the same time jeopardizing taxpayer rights. While taxpayers with resources can perhaps delegate responsibilities to third parties to address a more distant and automated tax administrator, over time, continued poor service has the potential for undermining respect and confidence in the tax system. Once the public loses trust in an agency charged with administering a tax system, it is difficult to recapture.

There are various reasons why there is both a general vitriol that some feel toward the government and with IRS in particular. It is not simply that people dislike paying taxes. After all, for many Americans, April 15 is now associated with refunds. Consider that this year more than 70 percent of taxpayers filing tax returns will receive refunds. Last year, the IRS issued approximately 109 million refunds, with an average refund of \$2,797.¹

The IRS administers a wide variety tax credits addressing poverty relief, health insurance, education, and the IRS has become the principal federal face for the delivery of benefits on top of its still key role as collector of over 90 percent of all federal receipts.² When one thinks of the IRS's role as benefits' distributor, the dissatisfaction with the IRS becomes somewhat more difficult to explain, though I try below.

¹ See I.R.S. News Release IR-2016-05 (Jan. 14, 2016).

² See CONG. BUDGET OFFICE, REFUNDABLE TAX CREDITS 1 (2013), available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/RefundableTaxCredits_One-Col.pdf; see also Michelle Lyon Drumbl, *Those Who Know, Those Who Don't, and Those Who Know Better: Balancing Complexity, Sophistication, and Accuracy on Tax Returns*, 11 PITT. TAX REV. 113 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2338161.

The elephant in the room in discussing the IRS's performance in delivering service to low-income taxpayers is program integrity and in particular improper payments and error rate when it comes to the earned income tax credit (EITC).³ To be sure, on a relative scale, business income underreporting dwarfs in terms of costs and underpayment rate errors due to refundable credits, but there is legitimate concern over any program where twenty to twenty-five percent of payments may in fact be erroneous. But to focus on sanctions alone at the expense of service is shortsighted.⁴ Research suggests two of the main determinants of tax compliance are the power that tax authorities exercise and taxpayer trust in authorities.⁵ As Professor Kirchler and his colleagues have discussed, increasing the levels of trust between taxpayers and the tax administration can contribute to greater voluntary compliance.⁶ A tax administrator that fails to build a tax system around the needs of the taxpayers themselves is likely to threaten the level of trust that is necessary to enhance voluntary compliance. A lack of trust, especially when trust is not easily regained, can thus contribute to a greater perceived and actual need for punitive measures to control for program integrity.

Increasing sanctions without accounting for the administrative resources necessary to effectively administer those sanctions can also contribute to lessening trust in the tax system. In recent years when considering measures to increase program integrity, Congress has often emphasized sanctions, such as penalties and reduced rights to judicial review in the form of expanded math error powers to allow the IRS to dispense with traditional pre-assessment judicial review procedures. An over-reliance on sanctions without the IRS properly allocating resources or Congress equipping the IRS with the resources to properly administer those sanctions can lessen trust in tax administration. As

³ The EITC is the most studied of the refundable credits both in terms of its impact and compliance. There are two main measures of EITC noncompliance, improper payments and overclaims. Improper payments are an annual measure of credit improperly claimed net of IRS enforcement; overclaims do not reflect IRS enforcement actions. For a useful summary of the compliance problem with the EITC, see MARGOT L. CRANDALL-HOLLIK, CONG. RESEARCH SERV., R43873, THE EARNED INCOME TAX CREDIT (EITC): ADMINISTRATIVE AND COMPLIANCE CHALLENGES (2015), *available at* <https://www.fas.org/sgp/crs/misc/R43873.pdf> (discussing how Treasury releases information on improper payments annually but IRS has only periodically reported on gross overclaims, with last overclaim studies released in 1999 and 2014). In FY 2013, the IRS estimates that the improper payments ranged between 22% and 26%, that is, between \$13.3 billion and \$15.6 billion annually. See INTERNAL REVENUE SERV., PUB. 5162, *COMPLIANCE ESTIMATES FOR THE EARNED INCOME TAX CREDIT CLAIMED ON 2006-2008 RETURNS* (2014), *available at* <https://www.irs.gov/pub/irs-soi/EITCComplianceStudyTY2006-2008.pdf>.

⁴ Some have suggested that relatively high (for the tax system) Congressional attention on refundable credit error may be due to negative attitudes towards policies that redistribute wealth. See Leslie Book, *Do Attitudes on Redistribution Fuel a Particular Focus on Errors*, *Procedurally Taxing* (Oct. 31, 2013), *available at* <http://www.procedurallytaxing.com/eitc-do-attitudes-on-redistribution-fuel-a-particular-focus-on-errors/>

⁵ Christoph Kogler, Stephan Muehlbacher & Erich Kirchler, *Trust, Power, and Tax Compliance: Testing the 'Slippery Slope Framework' Among Self-Employed Taxpayers*, WU INTERNATIONAL TAXATION RESEARCH PAPER SERIES, no. 2013-05, July 17, 2013, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2294886

⁶ See Christoph Kogler, Stephan Muehlbacher & Erich Kirchler, *Trust, Power, and Tax Compliance: Testing the 'Slippery Slope Framework' Among Self-Employed Taxpayers*, WU INTERNATIONAL TAXATION RESEARCH PAPER SERIES, no. 2013-05, July 17, 2013, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2294886.

such, even if one's primary objective is on program integrity, rather than taxpayer rights, it is important to focus on the IRS's interactions with taxpayers, tax return preparers and other tax system stakeholders. Those interactions will have a material impact on the trust that the stakeholders have in the system generally and the IRS in particular, with a likely effect on voluntary compliance.

Learned Helplessness: Poor Service Has an Effect on Taxpayer Morale

Why are many taxpayers feeling that the tax system is not serving them well? Insights from other disciplines may shed some light on the issue. Martin Seligman has introduced the concept of learned helplessness to the lexicon of human behavior. Learned helplessness is a “psychological condition in which a human being or an animal has learned to act or behave helplessly in a particular situation — usually after experiencing some inability to avoid an adverse situation — even when it actually has the power to change its unpleasant or even harmful circumstance.”⁷

California psychologist Michael Bader has offered an explanation in part for some of the current deep dissatisfaction with government that builds on Professor Seligman's work.⁸ He acknowledges that Americans are increasingly subject to delays and lines, both physical and digital, when interacting with bureaucracy and government in general. That delay contributes to a deep dissatisfaction and at times anger. Bader notes that

[h]elplessness is the most destructive of human emotions. Human beings respond to helplessness with depression or, more commonly, rage. The Tea Party exploits these feelings of helplessness by tapping into this rage — blaming government and scapegoating liberals and the poor. Their narrative suggests that everyone but them gets help. Rather than receive support and respect, they feel that they get the cold shoulder or are pushed around. They have to wait in line and their place always seems to be in the back.

This narrative may be wrong and mean-spirited, but the helplessness from which it stems is real. Our lives are shot through with things we can't control, from job opportunities, workplaces, health care, schools, to politicians beholden to special interests.⁹

Bader was not talking about the tax system in particular when offering his comments. But consider those thoughts in the context we are discussing today.

⁷ See CHRISTINE M. NEZU, CHRISTOPHER R. MARTELL, & ARTHUR M. NEZU, SPECIALTY COMPETENCIES IN COGNITIVE AND BEHAVIORAL PSYCHOLOGY 30 (2014) (describing Seligman's theory of learned helplessness).

⁸ See generally MICHAEL BADER, MORE THAN BREAD AND BUTTER: A PSYCHOLOGIST SPEAKS TO PROGRESSIVES ABOUT WHAT PEOPLE REALLY NEED IN ORDER TO WIN AND CHANGE THE WORLD (2015).

⁹ See Michael Bader, *The Surprising Reason Americans Might Feel Helpless and Depressed*, ALTER NET (Mar. 26, 2014), <http://www.alternet.org/personal-health/all-we-do-wait-wait-wait-hold-and-its-making-us-nuts-why-people-join-tea-party>.

Service in Today's Tax Environment

Most people who file tax returns do so intending to file returns that accurately reflect their income, expenses, payments and credits. Most Americans either on their own or increasingly with the assistance of software or commercial preparers navigate the filing season with little hiccup. For most, the return goes in via the cloud and the refund of excess withholdings or refundable credits comes out, increasingly via a direct deposit to a bank account.

Millions of Americans though are not so lucky. Sometimes they do not understand the law, despite their best efforts; sometimes they are missing key facts that relate to their tax situation, perhaps due to a life disruption, such as a move. Sometimes they have received a letter from the IRS from a past year that they do not understand, including letters that suggest a prior year's return was incorrect or missing some needed information. Some do not have a bank account and must rely on old-fashioned paper checks and the possibility of high fees to convert a refund to cash.

As the National Taxpayer Advocate has explained in her most recent report to Congress, the taxpayer demand for service from the IRS is high. Consider the following from the Number One Most Serious Problem, *The IRS Has Developed a Comprehensive "Future State" Plan That Aims to Transform the Way it Interacts With Taxpayers, But Its Plan May Leave Critical Taxpayer Needs and Preferences Unmet*.¹⁰ People place over 100 million phone calls to IRS per year, there are over five million in-person visits to IRS per year, and people send over ten million pieces of correspondence to IRS in response to a letter proposing or making an adjustment per year.¹¹

How has the IRS done in response to taxpayers reaching out to IRS in person, on the phone or via the old-fashioned mail? A recent GAO report considering the 2015 filing-season perhaps helps explain deep dissatisfaction with the IRS's levels of service.¹² The report has lots of data, and I will not refer extensively to the detailed findings (for those who want to be depressed about the state of our tax system we encourage a reading). The report provides a useful listing of the ways that the IRS interacts with taxpayers during the filing season, looking at the following main areas:

Answering Telephone Calls

Correspondence with Taxpayers

Delivering Online Services

¹⁰ 1 NAT'L TAXPAYER ADVOCATE, INTERNAL REVENUE SERV., 2015 ANNUAL REPORT TO CONGRESS, THE MOST SERIOUS PROBLEMS ENCOUNTERED BY TAXPAYERS, at 3-13 (2015), *available at* http://www.taxpayeradvocate.irs.gov/Media/Default/Documents/2015ARC/ARC15_Volume1.pdf.

¹¹ *See id.* at 4.

¹² *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-16-151, 2015 TAX FILING SEASON: DETERIORATING TAXPAYER SERVICE UNDERSCORES NEED FOR A COMPREHENSIVE STRATEGY AND PROCESS EFFICIENCIES 5-6 (2015), *available at* <http://www.gao.gov/assets/680/674248.pdf>.

Face-to-Face Interactions

Return Processing

In all of the areas, the IRS has significant room for improvement. Consider one of the areas, telephone calls. When it came to telephone calls, IRS reduced by over a third the number of people answering telephone calls between fiscal years 2010 and 2015. While the number of calls the IRS received decreased about 6 percent over that five year period (from about 54.3 million to 51.1 million) the decline in resources “contributed to the lowest level of telephone service in fiscal year 2015 compared to recent years IRS answered about 50 percent fewer calls from taxpayers seeking an assistor (from about 36.7 million to about 18.2 million) during the same period, while about 73 percent more calls were abandoned, disconnected by IRS, or met with a busy signal (from about 32.4 million to 56.2 million).”¹³ Wait times have substantially increased (almost tripling from 11 minutes in FY 2010 to 30 minutes in FY 2015) and only 38 percent of people who wanted to reach an assistor were able to reach an assistor.¹⁴

Even for taxpayers who owe money and want to call the IRS to arrange payments, IRS service has been abysmal. In the 2015 annual report to Congress, the NTA described how almost two-thirds of all calls to IRS in response to collection notices went unanswered and that for calls that were answered wait times were almost 35 minutes.¹⁵

When it came to face-to-face visits, the GAO also painted a not so pretty picture:

As a result of budget cuts, IRS officials said IRS reduced staff devoted to face-to-face assistance at walk-in sites and directed customers to self-service options. IRS reduced staff at walk-in sites by about 4 percent in fiscal year 2015 compared to the previous year (from 1,938 to 1,867 FTEs). However, the percentage of customers at walk-in sites waiting for longer than 30 minutes for service increased by 7 percentage points in fiscal year 2015 (from about 25 to 32 percent) during the same period.¹⁶

Imagine that you have filed a tax return and are expecting a refund due to your having worked in a low-wage job so you can support your kids or your grandkids. Imagine that rather than get the refund you were expecting, IRS instead sends a letter that you may not in fact receive because you have moved or may not in fact understand due to language or literacy barriers. Imagine a tax system where you are unable to find out information that allows you to meet your responsibilities or find out when you will be receiving a benefit that is a significant if not the most significant annual financial transaction.

One does not have to look far and wide to come up with scenarios where the IRS falls short. Sometimes the best way to illustrate the challenges that the IRS faces is through the

¹³ See *id.* at 8-9.

¹⁴ See *id.* at 11.

¹⁵ See 1 NAT’L TAXPAYER ADVOCATE, *supra* note 10, at x.

¹⁶ See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 12, at 16-17.

use of real taxpayer facts. I spent ten years directing a low-income taxpayer clinic, where I represented people who often without knowing why found themselves in the IRS's compliance crosshairs. In 2014, the Tax Court decided *Baker v. Commissioner*,¹⁷ a case with facts that are familiar to pro-bono, clinic and legal services attorneys who work tax cases. Frank Baker had two relatively low paying jobs that paid a total of about \$17,000, and lived with his fiancée and her two biological minor children. The fiancée had no earned income, and Frank supported the household. He went to a paid preparer for assistance in preparing his tax year 2011 federal income tax return. The preparer advised him to claim his fiancée's kids as dependents and qualifying children for the earned income tax credit. On examination, IRS disallowed the earned income credit because the kids were not related to Frank, and thus not his qualifying children. For good measure, the IRS imposed the accuracy-related penalty and, to top it all off, proposed a two year ban on his claiming the credit under IRC Section 32(k) due to its finding that his actions were reckless or intentionally disregarding the rules.

After a trial, the Tax Court found that Frank was not eligible to claim his fiancée's kids for purposes of the EITC due to his not yet being married to the children's mother and his not sharing a biological relationship with them. There was no dispute, however, that he supported the children, and the court found that he relied in good faith on his paid preparer for the positions reflected on his tax return and thus declined to penalize him. Thus the net result of this was an improperly prepared return for which he paid both a filing fee and lost his refund, and he faced a potential proposed penalty and a ban on claiming the credit in the next two years.

I will come back to this case when I discuss some of the tasks that the IRS performs in administering a program such as the EITC.

Why the IRS Needs to Build A Tax System Around the Characteristics of the People It Serves and the Tasks it Needs to Perform, Rather Than the People It Might Prefer to Serve or the Task it May Want to Do

When it comes to service, there are key external variables that undoubtedly influence how the IRS will perform in any filing season. Some of those are money and the timing of when Congress changes laws. Of course, resources are key.

To focus though on budget issues and late-enacted legislation may dilute the importance of the IRS establishing service goals around the characteristics of the taxpayers whose programs Congress expects the IRS to manage. While Congress may not provide as much money as IRS would like, and it may enact legislation that sends IRS scrambling to get forms and related information available, IRS does have sufficient lead time to understand the characteristics of the taxpayers it is responsible for serving.

¹⁷ T.C. Summ.Op. 2014-57. I borrow heavily in this discussion of *Baker* from Leslie Book, *Recent Tax Court Case Shows Challenges Administering Civil Penalties and the EITC Ban*, PROCEDURALLY TAXING (July 9, 2014), <http://www.procedurallytaxing.com/recent-tax-court-case-shows-challenges-administering-civil-penalties-and-the-eitc-ban/>.

It is incumbent on the IRS to understand the taxpayer population as is and build a tax system that meets the needs of those taxpayers.¹⁸ An agency that builds a system equipped to serve taxpayers who have resources to pay third parties and unfettered access to the Internet, as well as literacy levels needed to self-navigate a complex tax system, will miss the mark when it comes to people without the resources to delegate responsibilities or the ability to navigate the tax system on their own.

When one looks at outlines of future plans for service there should be significant concern that the tax system will exacerbate the effects of inequality. Reducing telephone service and face-to-face contacts with taxpayers seems to be part of the IRS's long-term strategy. The 2015 National Taxpayer Advocate Report to Congress discusses the broad outline of an IRS plan to improve customer service. That plan is known as the "future state" plan, a plan that as the NTA notes has the laudable "goal of creating online taxpayer accounts through which taxpayers will be able to obtain information and interact with the IRS."¹⁹ A world in which taxpayers can seamlessly interact with the IRS to avoid problems before individuals file tax returns is in theory a terrific idea. Congress has been facilitating that through pushing up the dates that third parties file information returns with the IRS, and there is little doubt that the IRS can improve the tax filing experience through enhanced access to information related to the taxpayer that the IRS itself has.

The NTA has, however raised two broad concerns with the IRS's future state plan: one, that it reflects IRS's desire to reduce resources for fielding phone calls and in-person service and two that it is likely that the IRS will rely on third parties such as preparers and tax software companies to deliver that information to taxpayers, resulting in increased compliance costs.²⁰

The NTA has through extensive research shown that taxpayers, especially lower-income taxpayers who increasingly rely on IRS to deliver needed benefits, are the very taxpayers most likely to need access to the IRS in-person or via telephone. Consider its discussion in the 2015 Annual Report to Congress, Most Serious Problem 5, *As the IRS Develops an Online Account System, It May Do Less to Address the Service Needs of Taxpayers Who Wish to Speak with an IRS Employee Due to Preference or Lack of Internet Access or Who Have Issues That Are Not Conducive to Resolution Online*.²¹

Pew Research Center's 2015 survey results revealed that while Internet usage is steadily increasing, certain populations are falling behind this trend. These stragglers "will need to use methods that do not involve Internet usage to interact with the IRS." For instance, according to Pew, 42% of adults who are over the age of 65 and 34% of adults without high school degrees do not use the Internet.²² In addition, a 2015 survey by Forrester Research found that "[w]ith few

¹⁸ The IRS also has to recognize the criminal population and the new areas of mischief created in a cyber world. It was very slow to adapt to the identity theft problems and cyber security problems. It needs help from Congress in recognizing these challenges and appropriately addressing them.

¹⁹ See 1 NAT'L TAXPAYER ADVOCATE, *supra* note 10, at 3.

²⁰ See *id.* at 3-14.

²¹ See *id.* at 56-63.

²² See *id.* at 60.

exceptions, those in lower income brackets . . . conduct online financial transactions less frequently than the national average.”²³

In 2015, the IRS’s Wage and Investment Operating Division produced research that showed “lower computer ownership and Internet usage rates” in “the elderly, low income, and rural communities.”²⁴ Further, the IRS’s 2014 survey findings showed some “migration” toward future service channels for various transactions; however, “the results showed that some taxpayers prefer to stay with existing service channels.”²⁵

The key takeaway from this is that the IRS should “design a taxpayer service strategy based on the actual requirements of the taxpayer population rather than focusing on initially attractive but ultimately short-term resource savings.”²⁶

The reality is that in today’s tax system there exists a multitude of tax sub-systems. These differing systems relate to the programs found within the Internal Revenue Code. Various programs such as the earned income tax credit have their own unique challenges, challenges that depend in part on the characteristics of the claimants themselves but also the substantive rules that determine eligibility and on access to information that assists the IRS and the claimants themselves in determining eligibility with those rules.

To the extent that the IRS is building a tax system that can deliver information and services to taxpayers, the IRS will need to take into account the taxpayers themselves rather than the characteristics that the IRS would like all taxpayers to share. In addition, the IRS needs to take a detailed look at the various tasks that are necessary to perform its roles in a manner that reflects those taxpayer characteristics.

This is not an easy charge, especially given how IRS, in addition to collecting over \$2.8 trillion dollars in FY 2015 (over 90 percent of all federal receipts), is also administering benefits programs that are fundamental to the well-being of Americans that are embedded in the tax code.²⁷ In an upcoming article I have written, I draw on the research of scholars who have looked at the way other agencies interact with individuals who rely on those

²³ *See id.* at 61.

²⁴ *See id.*

²⁵ *See id.* at 61.

²⁶ *See id.* at 62.

²⁷ NTA and others have sensibly suggested that IRS should change its mission statement to directly acknowledge its role as a key social benefits’ administrator. *See* 1 NAT’L TAXPAYER ADVOCATE, INTERNAL REVENUE SERV., 2010 ANNUAL REPORT TO CONGRESS, THE MOST SERIOUS PROBLEMS ENCOUNTERED BY TAXPAYERS, at 15-27 (2010), *available at* https://www.irs.gov/pub/tas/2010arcmsp2_irsmission.pdf. *See also* Jonathan P. Schneller, Adam S. Chilton & Joshua L. Boehm, *The Earned Income Tax Credit, Low Income Workers, and the Legal Aid Community*, 3 COLUM. J. TAX L. 176, 195 (2012). There are some excellent sources that examine the importance of benefits delivered through the tax system. *See, e.g.*, Austin Nichols & Jesse Rothstein, *The Earned Income Tax Credit* (Nat’l Bureau of Econ. Research, Working Paper No. 21211, 2015), *available at* <http://www.nber.org/papers/w21211> (discussing direct and indirect benefits associated with receiving EITC).

agencies to deliver benefits.²⁸ One of the key insights in that article is in fact there are multiple tasks that agencies perform when delivering benefits.²⁹ To that end consider the following ways agencies generally interact with those receiving benefits and how those tasks may trigger demands on the IRS:

- 1) Prospective claimants require some assistance in applying for the program;
- 2) Someone must set eligibility criteria and procedures;
- 3) Someone must determine whether each claimant meets those eligibility criteria and procedural requirements;
- 4) Someone must keep records of those eligibility decisions;
- 5) Someone must issue benefits to claimants found eligible;
- 6) Someone must resolve disputes with claimants concerning eligibility and issuance; and
- 7) Someone must review performance at each of these steps to protect the program integrity.

As I discuss in the article, in many of those tasks the “someone” is the IRS. In those areas there are numerous policy and value choices that agencies make. Agencies that tackle those tasks without a careful consideration of the qualities and characteristics of the very individuals the agency is charged to serve will likely fall short in meeting the needs of the public.³⁰

Professor Super in laying out the tasks also provided some useful context to help consider what agencies may need to do to fully perform their duties with respect to the distinct activities. Consider the first task above, applying for benefits. Professor Super notes that the “extent of the help [that agencies provide to applicants] varies: some may require only a copy of the application form and information about when and where to submit it; others may need help completing the form and gathering information required to complete the

²⁸ Leslie Book, *Bureaucratic Oppression and the Tax System* (Feb. 19, 2016) (unpublished paper) (on file with author). In the article I draw heavily on the work of Professor Ed Rubin, who has identified numerous reasons why individuals often receive poor service when they interact with agencies. See Edward Rubin, *Bureaucratic Oppression: Its Causes and Cures* 90 Wash U.L. Rev. 291 (2012)

²⁹ The insight and the list itself derives from David Super’s article considering the relative roles of the private and public sector in the delivery of benefits to the poor. See David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 Cal. L. Rev. 393 (2008). An upcoming National Tax Association/American Tax Policy Institute conference this spring will directly consider the increasing role of the private sector in tax administration, including in the context of refundable credits.

³⁰ Congress in part chooses to use IRS to administer benefits rather than other agencies due to a belief that IRS can do so in a more efficient way, without heavy direct administrative costs. See Nichols & Rothstein, *supra* note 27, at 3. Professor Super’s listing of tasks suggests that even putting aside indirect costs such as program error and fees paid to third parties such as preparers and software developers IRS and Congress must consider more carefully the direct agency and taxpayer costs of placing benefits’ programs in the Internal Revenue Code.

form or to persuade the program to accept the assertions on the application.”³¹

What contributes to the varying need? Complexity of eligibility and the characteristics of the population are the main variables. It turns on the “complexity of substantive and procedural requirements, the extent of its measures to prevent incorrect awards of benefits, and the characteristics--such as education, disability, and living arrangements--of the individual claimant.”³² Beyond complexity and characteristics, Super notes that agency efforts to address those complexities and beneficiary characteristics often revolve around values that the agency itself may emphasize: “[s]ome programs value eligible persons' participation sufficiently to conduct outreach to inform prospective claimants of the procedures for applying.”³³

Consider this as well in the context of the IRS making eligibility determinations with respect to EITC, one of the other tasks Professor Super identifies as necessary for administering a benefits program. Almost all of these audits are done by correspondence. This correspondence is more often than not fully automated, with no or minimal actual employee involvement all the way from the start of the examination through issuance of a notice of deficiency.³⁴ Aside from the difficulties in making these determinations in general in light of issues such as taxpayer literacy, language barriers and the frequency of taxpayer moves, even if the taxpayer attempts to correspond with the IRS³⁵ the examiner likely lives in a community far away from the taxpayer so the examiner also does not have the benefit of understanding the community issues and values. This system makes it much more likely that even an eligible taxpayer will fail at the audit phase which can create two potential problems: 1) the taxpayer gives up, thereby failing to receive the benefits to which she was potentially entitled without understanding why; or 2) the burden of the face-to-face meeting shifts to Appeals or Counsel, costing the IRS considerably more money than it would have cost to resolve at the audit level.

To that end, let's return to the facts as presented in *Baker v. Commissioner*, where the IRS properly (under current law)³⁶ disallowed Frank Baker's EITC claim but also proposed penalties that may have resulted in thousands of dollars in additional costs and the possibility that he would have been banned from claiming the EITC in subsequent years even if in fact he was then eligible for the credit. I do not know precisely how much time and money that Mr. Baker spent from the beginning when he hired a paid preparer

³¹ See Super, *supra* note 29, at 403.

³² See *id.*

³³ See *id.* at 403-04.

³⁴ See Nina E. Olson, *Procedural Justice for All: A Taxpayer Rights Analysis of IRS Earned Income Credit Compliance Strategy*, 22 *ADVANCES IN TAXATION* 1, 15-16 (2015), available at http://www.taxpayeradvocate.irs.gov/Media/Default/Documents/AdvancesTaxation_Vol22_Olson.pdf.

³⁵ I note that the GAO report detailing the 2015 filing season challenges discussed numerous delays and miscues relating to IRS correspondence. See generally U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 12.

³⁶ Under prior law, individuals, such as Mr. Baker, who lived with and cared for children as if the children were their own biological children would have been entitled to treat children as qualifying children. See Bankruptcy-Extension of Family Farmer Debt Adjustment, Pub. L. No. 106-70, 113 Stat. 1031 (1999) (amending eligibility rule for tax years beginning in 2000). The current law is simply ill-suited to the realities of many complex family arrangements.

to file his tax return to the end of the Tax Court trial when the court agreed with the IRS that he was not entitled to claim the EITC but also found that he was not subject to potentially thousands of dollars in penalties (where both Mr. Baker and his fiancée testified).

Could the IRS have taken actions that would have minimized the chances that Mr. Baker, IRS attorneys and the Tax Court would have had to spend countless hours on an issue and prevented the problem from occurring before the fact? This comes back to Professor Super's more granular listing of the tasks necessary to administer a benefits' program, where he notes that the need of agency up-front engagement is related to the complexity of the provisions themselves and the characteristics of the population applying for benefits. Perhaps there needs to be a more explicit emphasis on the IRS interacting with possible claimants in person prior to and during filing season to educate them about the most common reasons why today's on the ground family arrangements do not necessarily convert to tax benefits. Efforts at educating taxpayers up-front are costly and require research into and understanding which issues are likely subject to error. The information into sources of error must not only be detailed in compliance studies but also well-known among front-line employees who would interact with people. That requires knowing the population and how best to communicate with them. In addition, it requires an understanding that using the tax system to deliver benefits perhaps is not nearly as costless in terms of direct administrative costs as some advocates have emphasized.

Consider how a future vision of tax administration that sees the taxpayers as they actually are may lead to an approach that can increase trust in the tax administration and enhance voluntary compliance. Should the IRS have dedicated phone lines for benefits' issues where it knows the population faces more literacy and Internet access problems and try to focus people to the Internet in those areas where the impacted taxpayers come from younger or more affluent taxpayers? Should IRS perhaps expand its physical presence in communities where there is a likelihood that the individuals potentially benefitting from tax credits may also be particularly vulnerable to predatory, dishonest or incompetent preparers whose actions may leave taxpayers saddled with a debt and many years of future IRS problems? At a time when IRS seems focused on lessening its ability to interact in person in the interest of reducing direct costs and increasing efficiency, should it instead be looking at ways where it can perhaps leverage partnerships either with the private sector or states to facilitate greater access to walk-in sites?

The connecting theme is the need for greater personalized engagement. This would help people navigate their eligibility requirements in the first instance or at least get access to a person that can explain in a non-threatening way why perhaps a claim may be incorrect. An approach such as this has many more educational benefits than a sanction-based approach embedded in current tax compliance procedures. A tax compliance approach as currently in place looks to control for program integrity through audits done in an automated manner that have little chance of enhancing taxpayer understanding.

The implication for the IRS in terms of failing to deliver quality service goes beyond that of a specific failure for a given taxpayer in a given year. In particular, the NTA connects the IRS's shortcomings with the broader issue of procedural justice:

“Procedural justice” (or fairness) is a concept that considers how a taxpayer is treated by the IRS. It looks to more than just the outcome of the interaction; it also considers if the interaction was “nonjudgmental, polite, and respectful of the individual’s rights.” Procedural justice is an important concept to consider when discussing EITC cases because a taxpayer’s perception of procedural fairness will affect his or her perception of the agency’s fairness and legitimacy, as well as his or her willingness to comply with the tax laws.³⁷

Conclusion

It is not easy to administer a tax system in any country. Add into the mix a country as diverse as ours with a tax system that serves multiple functions and you have a system that needs constant care and attention.

It is time for both the IRS and Congress to explicitly recognize the IRS’s role in administering and delivering benefits. Congress and the IRS have gone a long way through last year’s legislative requirement that all IRS employees be familiar with the taxpayer bill of rights.³⁸ The adoption of rights without a concomitant appreciation and recognition of the administrative challenges that the IRS faces in effectuating those rights can render the rights more illusory than real.

The focus in this testimony has been on actions that the IRS should take, but Congress also needs to be sensitive to the administrative burdens associated with giving the IRS additional responsibilities. Through a robust commercial preparer and software industry the tax system differs from many other benefits’ programs in that the private sector plays a much more direct role in the application (tax return filing) process. In light of research that shows that unlicensed preparers are responsible for a higher rate of errors on EITC returns than all other types of preparers, Congress should authorize IRS to regulate unlicensed preparers.

There are other efforts that would reflect the importance of administrative attention to taxpayer characteristics. For example, Congress should score new tax provisions for their administrative burden so that as Congress passes new legislation, it provides the agency with the resources necessary to carry out the legislation. The scoring must recognize that the more you use the tax system to service low income populations the more resources the IRS needs because this population segment needs more hands-on assistance.³⁹

³⁷ See Olson, *supra* note 34, at 4 (citations omitted).

³⁸ See Consolidated Appropriations Act of 2016, Pub. L. No. 114-113, Division Q, § 401, 129 Stat. 2242, 3117 (2015) (amending I.R.C. § 7803(a) to add paragraph stating “Commissioner shall ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights.”)

³⁹ I am grateful to my colleague Keith Fogg for this suggestion. This suggestion is in the same spirit as the proposal for the IRS to directly adopt in its mission statement the recognition that one of its main roles is administering benefits’ programs *See generally* 1 NAT’L TAXPAYER ADVOCATE, *supra* note 27. Both ideas come from the starting point that IRS needs to think more holistically about administering the laws, especially the laws that place the IRS as the gatekeeper to benefits.

I will end this in a way similar to how I started, by bringing this back to broader issues of psychology. You may be familiar with so-called placebo buttons though maybe not the term itself. Those are buttons that literally do not do anything but when you press the button you are comforted that in fact something is happening. Think of the close door button on an elevator. Or the button at the crosswalk that says, “push button to walk.”

I recently read an article that discussed research originally done by psychologist Ellen Langer. Professor Langer’s research introduced the concept illusion of control.⁴⁰ The article discussed how “there are plentiful examples of buttons which do nothing and indeed other technologies which are purposefully designed to deceive us.”⁴¹ The key insight in that research is that people need to feel they have some control over their lives. A button on an elevator that says close door, even if in fact it does not trigger the door to close, gives the illusion that in fact you have power over your external environment. That control contributes to one’s sense of well-being.

Our tax system does not even have that placebo button to placate the people it serves. As IRS builds its vision of a future state, it must take into account the current state of a growing number of the citizens who feel that their government does not serve them well. Those people feel as though they are powerless and at times voiceless.

I do not suggest that as IRS moves forward it looks for placebos to let people feel they have control even if they do not. Rather IRS should build a system that is based on support and respect for all citizens, one that can give people a voice and actually can contribute to people having the power to understand their rights and responsibilities. With that support and respect, the people IRS serves will repay that back in kind, thus contributing to a tax system that can continue to be the backbone for an increasingly diverse and complex society.

⁴⁰ See generally Ellen J. Langer, *The Illusion of Control*, 32 *Journal of Personality and Social Psychology* 311 (1975). See also Ellen J. Langer & Judith Rodin, *Long-Term Effects of a Control-Relevant Intervention with the Institutionalized Aged*, 35 *JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY* 897 (1977).

⁴¹ See Chris Baraniuk, *Press me! The buttons that lie to you*, BBC (Apr. 17, 2015), <http://www.bbc.com/future/story/20150415-the-buttons-that-do-nothing>.