

STRENGTHEN THE OFFICE OF THE TAXPAYER ADVOCATE

Legislative Recommendation #37

Clarify That the National Taxpayer Advocate May Hire Legal Counsel to Enable Her to Advocate More Effectively for Taxpayers

SUMMARY

- *Problem:* In analyzing legal issues that affect taxpayer rights and developing an independent position on matters that affect taxpayers both individually and collectively, the National Taxpayer Advocate often requires independent legal advice. Prior to 2015, the IRS permitted the National Taxpayer Advocate to hire her own attorneys. Since that time, the IRS has prohibited her from hiring attorneys, undermining her ability to do her job effectively.
- *Solution:* Authorize the National Taxpayer Advocate to hire attorneys who report directly to her.

PRESENT LAW

Pursuant to 31 U.S.C. § 301(f), the General Counsel of the Department of the Treasury is the chief law officer for the Department. The IRS Chief Counsel is an Assistant General Counsel and the chief law officer for the IRS. With few exceptions, Treasury Department Order 107-04 provides that all attorneys in the Treasury Department must work in the Legal Division and report to the General Counsel.¹ Treasury's inspectors general and the Office of the Comptroller of the Currency (OCC) are excluded from this requirement based on specific statutory language in 5 U.S.C. App. III § 3(g) and 12 U.S.C. § 482, respectively, and therefore are authorized to hire and supervise their own attorneys.² No law specifically authorizes the National Taxpayer Advocate to hire and supervise attorneys.

IRC § 7803(c) makes clear, however, that TAS is expected to operate independently of the IRS in key respects. 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 each local taxpayer advocate 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." IRC § 7803(c)(2)(B)(iii) requires the National Taxpayer Advocate to submit reports to Congress directly "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." This provision is similar to the one that applies to the OCC (12 U.S.C. § 250).

1 Treas. Order 107-04, states: "With the exception of persons employed by the Treasury Inspector General, TIGTA, SIGTARP, SIGPR, or the Chief Counsel of the Office of the Comptroller of the Currency, all attorneys whose duties include providing legal advice to officials in any office or bureau of the Department are part of the Legal Division under the supervision of the General Counsel."

2 The Inspector General Act of 1978 (codified as amended at 5 U.S.C. App. III § 3(g)), provides: "Each Inspector General shall, in accordance with applicable laws and regulations governing the civil service, obtain legal advice from a counsel either reporting directly to the Inspector General or another Inspector General." Similarly, 12 U.S.C. § 482 provides: "Notwithstanding any of the provisions of section 481 of this title or section 301(f)(1) of title 31 to the contrary, the Comptroller of the Currency shall, subject to chapter 71 of title 5, fix the compensation and number of, and appoint and direct, all employees of the Office of the Comptroller of the Currency."

When Congress reorganized the IRS in 1998, it recognized that the National Taxpayer Advocate requires independent counsel to advocate for her positions. The version of the IRS Restructuring and Reform Act of 1998 passed by the Senate contained the following authorization: “The National Taxpayer Advocate shall have the responsibility and authority to . . . appoint a counsel in the Office of the Taxpayer Advocate to report directly to the National Taxpayer Advocate.”³ In explaining the provision, Senator Grassley said: “In order to make the Taxpayer Advocate more independent, which is what this bill does, it logically follows that the Taxpayer Advocate should have its own legal counsel.”⁴

This provision was not included in the final bill. However, the conference report stated that the “conferees intend that the National Taxpayer Advocate be able to hire and consult counsel as appropriate.”⁵

REASONS FOR CHANGE

Beginning in 2004, with the approval of the Commissioner of Internal Revenue, TAS hired and employed attorney-advisors. 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 regulation for purposes of IRS operations, procedures, or litigation, it would be unrealistic to expect that those same attorneys could effectively help the National Taxpayer Advocate develop a legal position that challenges their own interpretation or an interpretation adopted by the Chief Counsel organization for which they work. Notably, the Chief Counsel organization requires its attorneys to reconcile disputes internally so that they ultimately all “speak with one voice.”⁶ Thus, although the National Taxpayer Advocate sometimes receives legal advice from Chief Counsel attorneys, the advice is not independent from the advice they provide to the rest of the IRS. By contrast, TAS’s own attorney-advisors have enabled the National Taxpayer Advocate to develop an independent perspective and advocate for taxpayers as the law intends.

In 2015, the IRS for the first time denied a routine TAS request to backfill existing attorney 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. On November 29, 2016, the National Taxpayer Advocate submitted a nine-page memo to the Acting General Counsel requesting permission to continue to hire attorney-advisors. It asked the Acting General Counsel to modify General Counsel Directive No. 2 to add a carve-out for the Office of the Taxpayer Advocate as it does for the Inspectors General offices. Alternatively, the National Taxpayer Advocate orally requested that a “waiver” be granted, as provided in the directive. In the fall of 2018, TAS submitted another hiring request, and it was again denied by the IRS.

3 H.R. 2676, 105th Cong. § 1102(a) (as passed by the Senate, May 7, 1998).

4 144 CONG. REC. S4460 (daily ed. May 7, 1998). The provision was added to the bill as an amendment sponsored by Senator Grassley on the Senate floor.

5 H.R. REP. NO. 105-599, at 216 (1998) (Conf. Rep.). In 2003, the House passed legislation with nearly identical language. It 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.” See Tax Administration and Good Government Act, H.R. 1528, 108th Cong. § 306 (2003) (as passed by the House, June 19, 2003). The legislation was sponsored by then-Cong. Rob Portman, who had previously been the lead House sponsor of the IRS Restructuring and Reform Act of 1998. It would have added this language as a new subsection (III) to IRC § 7803(c)(2)(D)(i). Although the authorization was not enacted into law, it bears mention that the Senate in 1998 and the House in 2003 approved virtually identical provisions of the legislation. That suggests the RRA 98 conference report language cited above had significant congressional support.

6 See Chief Counsel Directives Manual (CCDM) 35.4.1.4, Coordination with Other Counsel Offices (Feb. 7, 2013), https://www.irs.gov/irm/part35/irm_35-004-001; CCDM 31.1.4.6, Reconciliation of Disputes (Aug. 11, 2004), https://www.irs.gov/irm/part31/irm_31-001-004.

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 well-performing attorneys cannot be promoted to higher-graded positions. This has accelerated attrition. If the National Taxpayer Advocate is not able to hire attorney-advisors, TAS's ability to advocate for taxpayers both individually and collectively and the National Taxpayer Advocate's ability to produce high-quality reports to Congress will be significantly compromised. The National Taxpayer Advocate believes the conference report language stating that the "conferees intend that the National Taxpayer Advocate be able to hire and consult counsel as appropriate" provides a sufficient legal basis for her to hire attorneys who report to her. The General Counsel has disagreed, maintaining that a statutory change is required.

RECOMMENDATION

- Amend IRC § 7803(c)(2)(D) to expressly authorize the National Taxpayer Advocate to hire legal counsel who report directly to him or her.⁷

7 For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 37 (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*, https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16_Volume1_SpecialFocus.pdf) (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 2002 Annual Report to Congress 198 (Legislative Recommendation: *The Office of the Taxpayer Advocate*, https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/arc2002_section_two.pdf). The Taxpayer and Fairness Protection Act of 2003, 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."

Legislative Recommendation #38**Clarify the Authority of the National Taxpayer Advocate to Make Personnel Decisions to Protect the Independence of the Office of the Taxpayer Advocate****SUMMARY**

- *Problem:* To protect the independence of TAS, the tax code authorizes the National Taxpayer Advocate to take independent personnel actions with respect to employees of local TAS offices. The tax code does not provide this authority with respect to national office TAS employees, yet national office TAS employees who advocate for systemic changes in IRS practices and policies are most likely to take positions in conflict with IRS leadership and require personnel protection.
- *Solution:* Clarify that the National Taxpayer Advocate has the authority to take independent personnel actions with respect to all TAS employees.

PRESENT LAW

The IRS Restructuring and Reform Act of 1998 (RRA 98) included provisions to protect TAS's independence from other IRS functions. For example, IRC § 7803(c)(4)(A)(iii) requires local TAS offices to notify taxpayers that they “operate independently of any other Internal Revenue Service office and report directly to Congress through the National Taxpayer Advocate.” To reinforce TAS's independence, IRC § 7803(c)(2)(D) authorizes the National Taxpayer Advocate to “appoint” local taxpayer advocates in each state and to “evaluate and take personnel actions (including dismissal) with respect to any employee of any local office.”

The National Taxpayer Advocate's authority to make independent personnel decisions is discussed in the legislative history of RRA 98. The conference report states that the National Taxpayer Advocate “has the responsibility to evaluate and take personnel actions (including dismissal) with respect to *any local Taxpayer Advocate or any employee in the Office of the Taxpayer Advocate.*”¹ Thus, there is an inconsistency between the conference report and the statute. The conference report states the statute gives the National Taxpayer Advocate the authority to make independent personnel decisions regarding all TAS employees, but the statute confers that authority only regarding employees of TAS's local offices.

REASONS FOR CHANGE

IRC § 7803(c)(2)(A) assigns the National Taxpayer Advocate two principal responsibilities: (i) to advocate for taxpayers in specific cases (case advocacy) and (ii) to advocate for administrative and legislative changes to resolve problems that affect groups of taxpayers or all taxpayers (systemic advocacy). While the conference report language indicates Congress intended to give the National Taxpayer Advocate independent personnel authority over all TAS employees engaged in both advocacy functions, the statute as written only covers employees of TAS local offices, who primarily engage in case advocacy. Currently, the National Taxpayer Advocate does not have independent personnel authority over TAS senior leadership, TAS attorney-advisors, employees of TAS systemic advocacy and research functions, and other national office employees, even though these employees also engage in independent advocacy on behalf of taxpayers, have the same potential conflicts, and face the same potential retaliatory personnel actions by the IRS leadership that Congress sought to address in 1998.

¹ H.R. REP. NO. 105-599, at 214 (1998) (Conf. Rep.) (emphasis added). The report states that the conference committee adopted the Senate amendment with respect to the National Taxpayer Advocate provisions, except as modified. H.R. REP. NO. 105-599, at 216 (1998) (Conf. Rep.). The Senate bill and report contained the same inconsistency as the conference bill and report. See H.R. 2676, 105th Cong. § 1102 (as passed by the Senate, May 7, 1998); S. REP. NO. 105-174, at 23 (1998).

The rationale for authorizing the National Taxpayer Advocate to make independent personnel decisions for TAS's national office employees is, in key respects, more compelling than the rationale for TAS's local office employees. National office employees primarily advocate for systemic change in IRS practices and policies, often placing them in direct conflict with IRS senior officials.

This concern is not merely theoretical. In recent years, IRS executives peer reviewed and approved performance ratings for senior TAS leaders. This creates the potential for TAS leaders perceived by the IRS as "team players" to receive better performance ratings and bonus awards than TAS leaders perceived to be more assertive in their advocacy. For the same reasons it would be inappropriate for IRS leaders to evaluate and make salary and bonus award determinations for Treasury Inspector General for Tax Administration employees, the IRS's ability to affect the careers of TAS's national office employees has the potential to undermine TAS's independence.

RECOMMENDATION

- Amend IRC § 7803(c)(2)(D) to clarify that the National Taxpayer Advocate shall have the authority to take personnel actions with respect to all TAS employees.

Legislative Recommendation #39**Clarify the Taxpayer Advocate Service's Access to Files, Meetings, and Other Information****SUMMARY**

- *Problem:* The IRS has occasionally refused to provide the National Taxpayer Advocate with information she requires to do her job of advocating for taxpayers and prevented TAS employees from attending IRS conferences with taxpayers who have open TAS cases and have requested TAS attendance.
- *Solution:* Require the IRS to give the National Taxpayer Advocate and her staff access to all IRS information relevant to TAS's duties and require the IRS to allow TAS Case Advocates to participate in taxpayer conferences when requested by taxpayers.

PRESENT LAW

IRC § 7803(c)(2) requires TAS to assist taxpayers in resolving problems with the IRS, identify areas in which taxpayers are experiencing problems in their dealings with the IRS, make administrative and legislative recommendations to mitigate those problems, and annually report to Congress. IRC § 6103 generally prohibits the disclosure of tax returns or return information, but IRC § 6103(h) provides that “returns and return information shall, without written request, be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for tax administration purposes.”

TAS employees are authorized by IRC § 6103(h) to review tax return information because their statutory duties require this access. In furtherance of their duties, they may also need to attend meetings between taxpayers or their representatives and other IRS employees and obtain other information from the IRS. Similarly, the National Taxpayer Advocate requires information to analyze systemic problems and provide Congress with a “full and substantive analysis” of such problems in her annual reports to Congress, as required by IRC § 7803(c)(2)(B). However, the law does not expressly state that the National Taxpayer Advocate is authorized to access return information, attend meetings with other IRS employees, or obtain other information from the IRS.

REASONS FOR CHANGE

In general, the National Taxpayer Advocate has significant access to IRS systems and data. However, the IRS has sometimes declined to provide TAS with access to (1) audit files of taxpayers with cases open in TAS; (2) meetings between the IRS and taxpayers with cases open in TAS, even when the taxpayer has requested TAS's attendance; (3) advice that the Office of Chief Counsel has provided to other business units; and (4) information required by the National Taxpayer Advocate to enable her to analyze systemic problems for reports to Congress.

RECOMMENDATIONS

- Amend IRC § 7803(c) to clarify that the National Taxpayer Advocate (and authorized TAS employees) shall have access to tax returns, return information, and legal advice provided by the Office of Chief Counsel to any IRS employee regarding cases open and pending in TAS and may participate in meetings between taxpayers and the IRS when the taxpayer requests it.

- Clarify that, in furtherance of her tax administrative duties, the National Taxpayer Advocate (and authorized TAS employees) shall have access to all data, statistical information, legal advice provided by Counsel to any IRS employee, and documents necessary to perform a “full and substantive analysis” of the issues, as required by IRC § 7803(c)(2)(B).¹

¹ This recommendation is not intended to create a waiver of privilege with respect to information the IRS may lawfully keep confidential. When TAS receives information from the IRS, it protects the information from disclosure if it is privileged. For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 34 (Special Focus: *Reinforce the National Taxpayer Advocate's Right of Access to Taxpayer and IRS Information and to Meetings Between the IRS and Taxpayers*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16_Volume1_SpecialFocus.pdf#page=34. Under the Taxpayer First Act of 2019, the Secretary is now required to provide the National Taxpayer Advocate with “statistical support” for the Annual Report to Congress. Pub. L. No. 116-25, § 1301(b), 133 Stat. 981 (2019). However, this requirement only encompasses statistical studies, compilations, and the review of information already obtained by TAS. It does not address TAS’s broader need for access to information, including the right to review case files and attend taxpayer meetings. The Taxpayer Rights Act of 2015, H.R. 4128, 114th Cong. § 403 (2015) and S. 2333, 114th Cong. § 403 (2015), would have granted TAS access to case-related files and meetings, but it did not address TAS’s need for access to information required to report on systemic issues.

Legislative Recommendation #40**Authorize the National Taxpayer Advocate to File *Amicus* Briefs****SUMMARY**

- *Problem:* When a federal court is deciding a case that may affect the taxpayer rights of all or many taxpayers, the court would benefit from hearing and considering the views of the National Taxpayer Advocate as the voice of the taxpayer. Under current law, however, the National Taxpayer Advocate is not authorized to submit an *amicus curiae* brief in a federal tax case.
- *Solution:* Authorize the National Taxpayer Advocate to appear as an *amicus curiae* in federal tax cases and submit a brief on issues pertaining to the protection of taxpayer rights.

PRESENT LAW

IRC § 7803(c)(2)(A) requires the Office of the Taxpayer Advocate to assist taxpayers in resolving problems with the IRS, to identify areas in which taxpayers experience problems in their dealings with the IRS, and to make administrative and legislative recommendations to mitigate such problems. IRC § 7803(c)(2)(B)(ii)(XI) directs the National Taxpayer Advocate in her annual reports to Congress to “identify the 10 most litigated issues for each category of taxpayers, including recommendations for mitigating such disputes.”

Under 28 U.S.C. § 516, only officers of the Department of Justice may represent the United States in litigation, except as otherwise authorized by law. Similarly, 5 U.S.C. § 3106 provides that the head of an executive department may not employ an attorney or counsel for the conduct of litigation in which the United States is a party, except as otherwise authorized by law. IRC § 7452 specifies that the Secretary of the Treasury “shall be represented by the Chief Counsel” or his delegate in litigation before the U.S. Tax Court.

Under 5 U.S.C. § 612(b), the Small Business Administration (SBA) Chief Counsel for Advocacy is statutorily authorized to represent the interests of small businesses by appearing in litigated cases as an *amicus curiae*. By contrast, the National Taxpayer Advocate, who is often referred to as “the voice of the taxpayer” both within the IRS and before Congress, is not authorized to represent the interests of taxpayers by appearing in litigated cases as an *amicus curiae*.

REASONS FOR CHANGE

While trial lawyers advocate zealously on behalf of clients to win individual cases, precedential issues that could affect all or many taxpayers sometimes come before the courts with no one representing the interests of taxpayers as a group.

For example, in *Facebook, Inc. v. IRS*, the U.S. District Court for the Northern District of California considered Facebook’s claim that it was legally entitled to a hearing before the IRS Independent Office of Appeals.¹ For support, *Facebook* cited the provision of the Taxpayer Bill of Rights (TBOR) that describes “the right to appeal a decision of the Internal Revenue Service in an independent forum.” See IRC § 7803(a)(3)(E). The court rejected Facebook’s position, broadly holding that TBOR “did not grant [taxpayers] new enforceable rights.” The court’s decision may well be correct, but in the rare cases where a court’s decision has the potential to affect the fundamental taxpayer rights of all or a large group of taxpayers, the court would benefit from hearing and considering the position of the National Taxpayer Advocate as the voice of the taxpayer.

¹ *Facebook, Inc. v. IRS*, 121 A.F.T.R.2d 1752 (N.D. Cal. 2018).

Just as the SBA Chief Counsel for Advocacy may submit *amicus curiae* briefs to help ensure federal courts are informed about the impact of regulations on small businesses, the National Taxpayer Advocate could more effectively protect taxpayer rights if she were granted comparable authority to submit *amicus curiae* briefs in cases that affect taxpayer rights. It is anticipated this authority would be used sparingly, as is the practice of the SBA Chief Counsel for Advocacy.

RECOMMENDATION

- Amend IRC §§ 7803 and 7452 to authorize the National Taxpayer Advocate to submit briefs in federal litigation as an *amicus curiae* on matters relating to the protection of taxpayer rights.²

2 For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 37 (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*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16_Volume1_SpecialFocus.pdf. See also Program Manager Technical Advice 2007-00566 (Oct. 2, 2002), https://www.irs.gov/pub/irsoia/pmta00566_7189.pdf.

Legislative Recommendation #41**Authorize the Office of the Taxpayer Advocate to Assist Certain Taxpayers Experiencing Economic Hardships During a Lapse in Appropriations****SUMMARY**

- *Problem:* During government shutdowns, IRS lien and levy activities carried out by automation are permitted to continue, but IRS and TAS employees, including the National Taxpayer Advocate, generally are prohibited from assisting taxpayers experiencing economic hardships as a result of those collection activities.
- *Solution:* Clarify that TAS and IRS Collection employees may work during government shutdowns to the extent necessary to assist taxpayers experiencing economic hardships as a result of IRS collection actions.

PRESENT LAW

Article I of the Constitution provides that, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”¹ The Antideficiency Act (ADA) is one of several statutes that implement this provision.² Specifically, 31 U.S.C. § 1341(a), among other things, prohibits any officer or employee of the U.S. government or the District of Columbia government from (i) making or authorizing an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation or (ii) involving his or her respective government employer in a contract or obligation for the payment of money before an appropriation is made, unless authorized by law. The ADA contains an additional prohibition against the acceptance of voluntary services, “except for emergencies involving the safety of human life or the protection of property.”³

IRC § 6343(a)(1)(D) requires the Secretary to release a levy and promptly notify the affected person if the Secretary determines the levy “is creating an economic hardship due to the financial condition of the taxpayer.”

IRC § 7803(c)(2)(A)(i) directs the Office of the Taxpayer Advocate (commonly referred to as the Taxpayer Advocate Service, or TAS) to “assist taxpayers in resolving problems with the Internal Revenue Service.” IRC § 7811 authorizes the National Taxpayer Advocate to issue a Taxpayer Assistance Order (TAO) where a “taxpayer is suffering or about to suffer a significant hardship as a result of the manner in which the internal revenue laws are being administered by the Secretary.” A significant hardship includes “an immediate threat of adverse action” and “irreparable injury to, or a long-term adverse impact on, the taxpayer if relief is not granted.” A TAO may require the Secretary “within a specified time period ... to release property of the taxpayer levied upon.”

1 U.S. CONST. art. I, § 9, cl. 7.

2 Pub. L. No. 97-258, 96 Stat. 877, 923 (1982).

3 31 U.S.C. § 1342.

REASONS FOR CHANGE

Lien and levy activities carried out by automation, which do not require the expenditure of additional appropriations, are permitted to continue during government shutdowns resulting from a lapse in appropriations. During both the 2018-2019 and 2013 shutdowns, the IRS issued thousands of notices of levy on Social Security and other government benefits as well as levies on wages and financial accounts of individuals and businesses because these notices were preprogrammed into the IRS's computer systems before the shutdowns began.

Thousands of additional taxpayers were affected by collection actions taken in the weeks preceding the shutdowns. For example, a bank generally has up to 21 days to remit levied account proceeds to the IRS. Therefore, levies issued in the 21 days preceding a government shutdown may affect taxpayers after the shutdown begins.

Despite IRC provisions that protect and relieve taxpayers who are experiencing economic hardship from levies, the IRS Lapsed Appropriations Contingency Plans generally have not permitted IRS or TAS employees, including the National Taxpayer Advocate, to work economic hardship cases during government shutdowns to assist these taxpayers.⁴ In addition, because cases that were in TAS's inventory at the time of the shutdown could not be worked, some taxpayers who requested the assistance of the National Taxpayer Advocate and TAS immediately prior to the shutdown experienced significant hardships and irreparable injuries.⁵

In its Lapsed Appropriations Contingency Plans,⁶ the IRS, with concurrence from the Treasury Department and the Office of Management and Budget (OMB), takes the position that the ADA's exception for "protection of property" applies solely to *government* property – not *taxpayer* property.⁷ As a result, it has concluded that TAS's activities to assist taxpayers in releasing IRS levies that create an economic hardship due to the financial condition of the taxpayer do not fit within the exception. We question that interpretation. First, the statute itself simply says "property." The distinction between "property" and "government property" is obvious, and if Congress intended to limit the scope of the exception to "government property," it presumably would have written the statute to specify "government property." Second, interpreting "property" to include only "government property" undermines Congress's more recent statutory enactment of IRC § 6343(a)(1)(D), which is intended to protect taxpayers from levies that cause economic hardships.

Even accepting the IRS's position that the ADA's exception for the "protection of property" is limited to the protection of *government* property, a threshold determination must be made about whether levied funds are, in fact, government property. IRC § 6343(a)(1)(D) requires the Secretary to release a levy if it is "determined that such levy is creating an economic hardship due to the financial condition of the taxpayer." In blunt

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- 4 See IRS, Servicewide Electronic Research Program Alert 19A0017, Release of Levy and Release of Lien (2019) ("While there is a lapse in funding during the partial shutdown we are not authorized to take this action. We may do so once we are fully opened, so please call us back at that time. Please apologize to the taxpayer and explain we are not authorized to release the levy or lien due to the partial government shutdown. Explain that they may call us back after we are fully reopened.").
 - 5 For additional discussion of how TAS's statutory authority to assist taxpayers suffering or about to suffer significant hardships was undermined during a shutdown, see National Taxpayer Advocate Fiscal Year 2015 Objectives Report to Congress 79 (Area of Focus: *The IRS's Decision Not to Except Any TAS Employees During the Government Shutdown Resulted in Violations of Taxpayer Rights and Undermined TAS's Statutory Authority to Assist Taxpayers Suffering or About to Suffer Significant Hardship*), <https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/The-IRSs-Decision-Not-to-Except-Any-TAS-Employees-During-the-Government-Shutdown.pdf> and National Taxpayer Advocate Fiscal Year 2020 Objectives Report to Congress 40 (*Impact of the 35-Day Partial Government Shutdown on the Taxpayer Advocate Service*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/JRC20_Volume1_GovShutdown.pdf.
 - 6 See, e.g., IRS, *Fiscal Year 2024 Lapsed Appropriations Contingency Plan* (Sept. 27, 2023), <https://home.treasury.gov/system/files/266/IRS-FY24LapsePlan.pdf>.
 - 7 See Government Accountability Office (GAO), GAO-060382SP, *Principles of Federal Appropriations Law*, vol. II at 6-111 (3d ed. 2006) (citing 9 Comp. Dec. 182, 185 (1902)), <https://www.gao.gov/assets/2019/11/202819.pdf>.

terms, Congress has made a determination that the IRS should not take property if doing so would put the taxpayer and the taxpayer's family out on the street.

TAS plays a central role in helping the Secretary determine whether a levy would create an economic hardship and therefore whether property can be levied upon (meaning that it would become government property). Thus, if the IRS seeks to protect "government property" via a levy, it must give affected taxpayers an opportunity to show that the levy will cause an economic hardship and therefore should be released (meaning it is not government property).⁸

From a policy perspective, the current interpretation produces results that greatly undermine taxpayer rights, including the Taxpayer Bill of Rights' promise of the *right to a fair and just tax system*.⁹ The asymmetry of allowing the IRS to take collection actions against taxpayers while not allowing TAS to work with the IRS to halt or limit collection actions that may inflict serious and sometimes irreparable economic harm (e.g., eviction) is unacceptable. To eliminate this abrogation of the taxpayer protections codified in IRC § 6343(a)(1)(D), the National Taxpayer Advocate believes the IRS should either work with the Treasury Department and OMB to adopt an ADA interpretation allowing TAS and Collection employees to release ongoing levies that create economic hardship, or it should suspend all existing levies and refrain from imposing new levies during a government shutdown. The current, asymmetrical approach produces an absurd "heads the IRS wins, tails the taxpayer loses" result.

While we will continue to advocate within the agency to protect taxpayers during government shutdowns, our experience to date suggests the existing legal interpretation is unlikely to change. For that reason, we recommend Congress clarify the law to ensure that government shutdowns resulting from a lapse in appropriations do not subject taxpayers to serious economic hardships, which in some cases may include eviction, utility shutoffs, or the inability to pay for medical treatment.

RECOMMENDATION

- Clarify that during a lapse in appropriations (i) the National Taxpayer Advocate may incur obligations in advance of appropriations for purposes of assisting taxpayers experiencing an economic hardship within the meaning of IRC § 6343(a)(1)(D) due to an IRS action or inaction and (ii) the IRS may incur obligations in advance of appropriations for purposes of complying with any TAO issued pursuant to IRC § 7811.

⁸ The Justice Department has issued a legal opinion concluding that certain government functions not specifically authorized to continue during a lapse in appropriations must nonetheless continue where the lawful continuation of these functions is "necessarily incident" to other activities for which there is statutory authority to continue. See Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 5 Op. O.L.C. 1 (1981), www.justice.gov/file/22536/download.

⁹ See IRC § 7803(a)(3)(J). See also Taxpayer Bill of Rights (TBOR), <https://www.taxpayeradvocate.irs.gov/get-help/taxpayer-rights/>.

Legislative Recommendation #42**Repeal Statute Suspension Under IRC § 7811(d) for Taxpayers Seeking Assistance From the Taxpayer Advocate Service****SUMMARY**

- *Problem:* When a taxpayer requests assistance from TAS in writing, IRC § 7811(d) provides that the period of limitations within which the IRS may assess or collect tax is extended. The provision is intended to protect the IRS's interests, but the IRS has not implemented it since its enactment in 1988. In addition, the provision does not apply when a taxpayer requests assistance from TAS by phone, so if implemented, taxpayers who request TAS assistance in writing and taxpayers who request TAS assistance by phone would be treated differently.
- *Solution:* Repeal IRC § 7811(d).

PRESENT LAW

IRC § 7811(d) suspends the statutory period of limitations for any action for which a taxpayer seeks assistance from TAS. The period is only suspended if the taxpayer submits a written application for relief.¹

REASONS FOR CHANGE

Despite the fact that Congress enacted this provision in 1988,² the IRS has never implemented it. The intent of the provision was to protect the interests of the government, but the IRS has not seen a need to make use of it. Relatedly, implementation of the rule would require significant technology upgrades and procedural changes that the IRS has chosen not to undertake.

In concept, IRC § 7811(d) aims to ensure that the IRS will not lose the ability to assess or collect tax if the applicable statutory deadlines pass while a taxpayer's case is pending with TAS. Suspension of the assessment or collection period would give the IRS more time to take enforcement actions.

However, statute suspensions are unnecessary to protect the government's interests. The IRS currently may take enforcement actions against taxpayers with open TAS cases, if necessary, to protect the government's interests.³

Moreover, if IRC § 7811(d) were ever to be implemented, it would cause similarly situated taxpayers to be treated differently. By its terms, the provision only applies when a taxpayer submits a written request for TAS assistance. It does not apply when a taxpayer requests TAS assistance by phone, which is the method by which most taxpayers seek TAS's help. Thus, this provision – apart from being unnecessary and unutilized – would produce disparate outcomes for taxpayers who, despite lacking any knowledge of this issue, contact TAS by different means.

1 Treas. Reg. § 301.7811-1(e)(4).

2 Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6230, 102 Stat. 3342, 3734 (1988).

3 Even if TAS issues a Taxpayer Advocate Order (TAO) directing the IRS to suspend collection, TAS will generally agree to modify the TAO if collection is in jeopardy. And if TAS ever did not agree to do so, the Commissioner or Deputy Commissioner could modify or rescind the TAO. See IRC § 7811(c)(1).

Lastly, despite the IRS's decision not to implement the provision, it has been raised in litigation, creating uncertainty for taxpayers and the IRS alike.⁴ The National Taxpayer Advocate recommends this provision be repealed as it has not been used since it was enacted more than 30 years ago, it serves no useful purpose, and its repeal would prevent future litigation in which this provision is cited.

RECOMMENDATION

- Repeal IRC § 7811(d).⁵

4 In *Rothkamm v. United States*, 802 F.3d 699 (5th Cir. 2015), *rev'g* 2014 WL 4986884 (M.D. La. Sept. 15, 2014), the U.S. Court of Appeals for the Fifth Circuit held, in relevant part, 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. IRS Action on Decision 2020-03 (Apr. 24, 2020) explains that except for cases appealable to the Fifth Circuit, the IRS will not follow the holding in *Rothkamm* that IRC § 7811(d) suspends the running of the limitations periods for third parties to file wrongful levy claims or suits, and outside the Fifth Circuit, the government will continue to defend its interpretation.

5 For legislative language generally consistent with this recommendation, see John Lewis Taxpayer Protection Act, H.R. 3738, 117th Cong. § 202 (2021); Taxpayer Protection Act, H.R. 2171, 115th Cong. § 202 (2017); Taxpayer Protection Act, H.R. 4912, 114th Cong. § 202 (2016). For more detail, see National Taxpayer Advocate 2015 Annual Report to Congress 316 (Legislative Recommendation: *Repeal or Fix Statute Suspension Under IRC § 7811(d)*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC15_Volume1_LR_01_Statute-Limitations.pdf.