

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.