

Taxpayer Advocate Powers & Responsibilities

by Dan Meador

I. Three Essential Accountability Forums

Via legislation up to and including the Internal Revenue Service restructuring and reform act of 1998 (RRA98), Congress established several tax administration accountability forums to prevent undue injury to those who contest liability allegations and otherwise challenge Internal Revenue Service procedure. Three are particularly important: The administrative appeals function, the Treasury Inspector General for Tax Administration (TIGTA), and the Taxpayer Advocate Service (TAS). Each is supposed to operate more or less independent of Internal Revenue Service examination and collection departments and each has specific responsibilities.

The administrative appeal function and TAS are departments within the Internal Revenue Service where the TIGTA is a separate office in the Department of the Treasury. The administrative appeal function and the TAS work with actual case situations where there is controversy or special circumstance while TIGTA is primarily an investigative office that has authority to recommend administrative correction and discipline of wayward IRS personnel under § 1203 of RRA98.

The administrative appeal is technically a taxpayer's first line of defense as any controversy concerning facts or law that arises during the examination process should be referred to appeals for resolution by the examination officer. The examination process is governed by the administrative regulation at 26 CFR § 601.105. Once a matter has been referred for appeals resolution, procedure for IRS appeals is governed by 5 U.S.C. § 553 through 557; impartiality of the appeals officer is mandated by § 556; and essentials of the appeals officer decision are governed by §§ 556(d) & 557. IRS appeals procedural rules are published at 26 CFR § 601.106(f). The general appeals function regulation is 26 CFR § 601.106.

The administrative appeal is supposed to be an adversarial proceeding just like any other judicial or quasi-judicial case. The IRS administrative appeals officer, the decision-maker, is supposed to be impartial. IRS is supposed to be represented by counsel, evidence must be disclosed via discovery, and the taxpayer is supposed to be able to call witnesses, cross-examine adverse witnesses, and submit his or her own evidence. The appeals officer decision, which must include findings of fact and law, must be based on what is in the official record – that which is in the administrative case file and whatever is presented at the formal hearing. In the event the appeals officer relies on information that isn't part of the case file, the taxpayer must be informed of the source and has the opportunity to rebut or correct. The burden of proof lies with the advocate, which is to say, if IRS personnel have advanced a claim, the burden of proof lies with the government. Additionally, administrative appeals hearings must be open to the public,

they cannot be sequestered behind closed doors. See *Bothke v. Flour Engineers and Constructors, Inc.* 713 F.2d 1405 (9th Cir., 1982).

Even before a case advances to appeals, IRS personnel are required to cooperate with discovery by (1) providing records the agency has in its possession, and (2) on request, providing “decisions.” These requirements are dictated by Administrative Procedures Act, 5 U.S.C. § 552(a)(1)(A):

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public--

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions; [Underscore added for emphasis]

The Administrative Procedures Act (§ 552) is commonly used to secure documents, records and other items government agencies have on file via Freedom of Information Act requests, but access to items any given agency has on file is only one of the duties imposed by the Act. Government agency decisions are just as important as a comprehensive decision may resolve existing or potential controversy. The decision should clearly state the government’s position with respect to (1) facts of any given case, along with disclosing witnesses capable of verifying facts, (2) the law of a case, and (3) demonstrate how the designated law applies to whatever facts are mutually stipulated or the government can prove. These are indispensable elements of any case or controversy “arising under” the Constitution and laws of the United States.

The three primary IRS “decision” documents are the Status Determination Letter, the National Office Ruling Letter and the National Office Technical Advice Memorandum. See 26 U.S.C. § 6110. Directions and particulars relating to the three are variously published in 26 CFR §§ 601.105, 601.106 & 601.201; the Status Determination Letter is an essential part of the appeal process where the National Office Technical Advice Memorandum is an important element in the examination process and/or appeals. See 26 CFR §§ 601.105 & 601.106.

The Privacy Act (5 U.S.C. § 552a) and various Internal Revenue Code sections, along with attending regulations, also entitle people to secure documents and records and request decisions. For example, 26 CFR § 301.6203-1 entitles taxpayers to secure copies of assessment certificates, and 26 U.S.C. § 6001 entitles people who are concerned about whether or not they are liable for a tax imposed by the Internal Revenue Code to secure notice from whatever officer succeeds former district directors with notice authority. In the event someone is dealing with IRS personnel in examination, collection or other capacities, he is supposed to secure records directly from whatever IRS official he is dealing with, per § 2 of 31 CFR Part 1, Appendix B of Subpart C.

These are for the most part what are described as “procedural” due process rights. Laws of the United States, administrative regulations and published policy, including the

Internal Revenue Manual, impose mandates and prohibitions on Internal Revenue Service personnel engaged in tax administration process. The discovery and decision mandates outlined above are based on “substantive” due process rights secured by the Sixth Amendment to the Constitution – rights to know the nature and cause of action, to confront adverse witnesses, which includes examination of evidence, etc.

Substantive due process rights are antecedent to procedural due process rights. Essential substantive due process rights are secured by the First, Fourth, Fifth, Sixth and Seventh Amendments.

For example, the Fifth Amendment due process clause is a simple, unambiguous statement comprised of fifteen words: No person shall be deprived of life, liberty or property without due process of law.

When properly and completely restated, the Fifth Amendment due process clause should be understood as follows: No person shall be deprived of life, liberty or property without [judicial] due process of law [in the course of the common law]. Jurisdiction is determined by the “arising under” clause in Article III § 2 of the Constitution. See *Wayman v. Southard*, 23 U.S. 1, 6 L.Ed. 253, 10 Wheat 1, and the judiciary act of 1792.

It would appear from common practice that there is an exception to Fifth Amendment constraint since Internal Revenue Service personnel routinely issues administrative notices of lien, levy and seizure without judicial due process. The notion is that 26 U.S.C. § 6321 creates a “statutory lien” when someone fails to pay a tax obligation, then thereafter the Internal Revenue Service, per §§ 6331, et seq., has authority to administratively seize property, garnish wages and bank accounts, etc., without a judgment.

However, this simply isn’t the case. Where a statute creates an interest for the United States when someone fails to perform a duty imposed by law or does something prohibited by law, the interest is not perfected until there is a judgment from a court of competent jurisdiction. At the point of the judgment, the government’s interest dates retroactively to the act or omission that gave rise to the interest. This is called “relation-back doctrine.” See *United States v. A Parcel of Land, Buildings, Appurtenances and Improvements, known as 92 Buena Vista Avenue, Rumson, New Jersey* (1993), 507 U.S. 111; 113 S.Ct. 1126; 122 L.Ed. 2d 469, *United States of America v. Real Property at 2659 Roundhill Drive, Alamo, California*, No. 00-16772 (9th Cir., March 18, 2002), and *United States v. Grundy*, 7 U.S. 337, 3 Cranch 337, 350-351, 2 L. Ed. 459 (1806). Judicial procedure for collecting tax debts is prescribed in the Federal Debt Collection Procedures Act in Chapter 176 of Title 28 (28 U.S.C. §§ 3001, et seq.).

To the point the statutory lien prescribed by 26 U.S.C. § 6321 is adjudicated, it is inchoate, i.e., unperfected; when there is a judgment per requirements of 28 U.S.C. § 3201, the lien is perfected and becomes choate. An inchoate lien is unenforceable; a choate lien is enforceable. Unless there is a judgment from a court of competent jurisdiction, a notice of federal tax lien has no lawful effect, the consequence being that

subsequent levies, seizures and garnishment predicated on a lien liability are bogus and unlawful. See *The Sarah*, 21 U.S. 391, 5 L.Ed. 644, 8 Wheat 391 (1823) for distinction between admiralty and common law jurisdictions.

The Fifth Amendment due process clause is obvious enough that the first IRS administrative due process rule preserves it (26 CFR § 601.106(f)(1)):

(1) Rule I. An exaction by the U.S. Government, which is not based upon law, statutory or otherwise, is a taking of property without due process of law, in violation of the Fifth Amendment to the U.S. Constitution. Accordingly, an Appeals representative in his or her conclusions of fact or application of the law, shall hew to the law and the recognized standards of legal construction. It shall be his or her duty to determine the correct amount of the tax, with strict impartiality as between the taxpayer and the Government, and without favoritism or discrimination as between taxpayers. [Underscore added for emphasis]

The Taxpayer Advocate has a critical role as he or she, or the down-line delegate, has authority to issue Taxpayer Assistance Orders that stop IRS collection activity until controversy is resolved. One of the primary purposes of the Taxpayer Assistance Service is to intervene when other IRS personnel fail to carry out duties imposed by law or exceed lawful authority.

The office of the Taxpayer Advocate was established via legislation behind 26 U.S.C. § 7803(c), and powers of the office were established by legislation behind 26 U.S.C. § 7811. Both were amended by the Internal Revenue Service reform and restructuring act of 1998. A summary analysis follows reproduction of the key Code sections and the controlling regulation. The primary regulation governing Taxpayer Advocate Service personnel is 26 CFR § 301.7811-1. These three authorities are reproduced in the next section in their entirety. Additionally, TAS personnel are governed by the Taxpayer Advocate Handbook, published as Part 13 of the Internal Revenue Manual. The Handbook is available on the Internal Revenue Service web page.

II. TAS Code Sections & Regulation

26 U.S.C. § 7803

(c) Office of the Taxpayer Advocate.

(1) Establishment.

(A) In general. There is established in the Internal Revenue Service an office to be known as the "Office of the Taxpayer Advocate".

(B) National Taxpayer Advocate.

(i) In general. The Office of the Taxpayer Advocate shall be under the supervision and direction of an official to be known as the "National Taxpayer Advocate". The National Taxpayer Advocate shall report directly to the Commissioner of Internal Revenue and shall be entitled to compensation at the same rate as the highest rate of basic pay established for the Senior Executive Service under section 5382 of title 5, United States Code, or, if the Secretary of the Treasury so determines, at a rate fixed under section 9503 of such title.

(ii) Appointment. The National Taxpayer Advocate shall be appointed by the Secretary of the Treasury after consultation with the Commissioner of Internal Revenue and the Oversight Board and without regard to the provisions of title 5, United States Code, relating to appointments in the competitive service or the Senior Executive Service.

(iii) Qualifications. An individual appointed under clause (ii) shall have--

(I) a background in customer service as well as tax law; and

(II) experience in representing individual taxpayers.

(iv) Restriction on employment. An individual may be appointed as the National Taxpayer Advocate only if such individual was not an officer or employee of the Internal Revenue Service during the 2-year period ending with such appointment and such individual agrees not to accept any employment with the Internal Revenue Service for at least 5 years after ceasing to be the National Taxpayer Advocate. Service as an officer or employee of the Office of the Taxpayer Advocate shall not be taken into account in applying this clause.

(2) Functions of Office.

(A) In general. It shall be the function of the Office of the Taxpayer Advocate to--

(i) assist taxpayers in resolving problems with the Internal Revenue Service;

(ii) identify areas in which taxpayers have problems in dealings with the Internal Revenue Service;

(iii) to the extent possible, propose changes in the administrative practices of the Internal Revenue Service to mitigate problems identified under clause (ii); and

(iv) identify potential legislative changes which may be appropriate to mitigate such problems.

(B) Annual reports.

(i) Objectives. Not later than June 30 of each calendar year, the National Taxpayer Advocate shall report to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate on the objectives of the Office of the Taxpayer Advocate for the fiscal year beginning in such calendar year. Any such report shall contain full and substantive analysis, in addition to statistical information.

(ii) Activities. Not later than December 31 of each calendar year, the National Taxpayer Advocate shall report to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate on the activities of the Office of the Taxpayer Advocate during the fiscal year ending during such calendar year. Any such report shall contain full and substantive analysis, in addition to statistical information, and shall--

(I) identify the initiatives the Office of the Taxpayer Advocate has taken on improving taxpayer services and Internal Revenue Service responsiveness;

(II) contain recommendations received from individuals with the authority to issue Taxpayer Assistance Orders under section 7811;

(III) contain a summary of at least 20 of the most serious problems encountered by taxpayers, including a description of the nature of such problems;

(IV) contain an inventory of the items described in subclauses (I), (II), and (III) for which action has been taken and the result of such action;

(V) contain an inventory of the items described in subclauses (I), (II), and (III) for which action remains to be completed and the period during which each item has remained on such inventory;

(VI) contain an inventory of the items described in subclauses (I), (II), and (III) for which no action has been taken, the period during which each item has remained on such inventory, the reasons for the inaction, and identify any Internal Revenue Service official who is responsible for such inaction;

(VII) identify any Taxpayer Assistance Order which was not honored by the Internal Revenue Service in a timely manner, as specified under section 7811(b);

(VIII) contain recommendations for such administrative and legislative action as may be appropriate to resolve problems encountered by taxpayers;

(IX) identify areas of the tax law that impose significant compliance burdens on taxpayers or the Internal Revenue Service, including specific recommendations for remedying these problems;

(X) identify the 10 most litigated issues for each category of taxpayers, including

recommendations for mitigating such disputes; and

(XI) include such other information as the National Taxpayer Advocate may deem advisable.

(iii) Report to be submitted directly. Each report required under this subparagraph shall be provided directly to the committees described in clause (i) 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.

(iv) Coordination with report of treasury inspector general for tax administration. To the extent that information required to be reported under clause (ii) is also required to be reported under paragraph (1) or (2) of subsection (d) by the Treasury Inspector General for Tax Administration, the National Taxpayer Advocate shall not contain such information in the report submitted under such clause.

(C) Other responsibilities. The National Taxpayer Advocate shall--

(i) monitor the coverage and geographic allocation of local offices of taxpayer advocates;

(ii) develop guidance to be distributed to all Internal Revenue Service officers and employees outlining the criteria for referral of taxpayer inquiries to local offices of taxpayer advocates;

(iii) ensure that the local telephone number for each local office of the taxpayer advocate is published and available to taxpayers served by the office; and

(iv) in conjunction with the Commissioner, develop career paths for local taxpayer advocates choosing to make a career in the Office of the Taxpayer Advocate.

(D) Personnel actions.

(i) In general. The National Taxpayer Advocate shall have the responsibility and authority to--

(I) appoint local taxpayer advocates and make available at least 1 such advocate for each State; and

(II) evaluate and take personnel actions (including dismissal) with respect to any employee of any local office of a taxpayer advocate described in subclause (I).

(ii) Consultation. The National Taxpayer Advocate may consult with the appropriate supervisory personnel of the Internal Revenue Service in carrying out the National Taxpayer Advocate's responsibilities under this subparagraph.

(3) Responsibilities of Commissioner. The Commissioner shall establish procedures requiring a formal response to all recommendations submitted to the Commissioner by the National Taxpayer Advocate within 3 months after submission to the Commissioner.

(4) Operation of local offices.

(A) In general. Each local taxpayer advocate--

(i) shall report to the National Taxpayer Advocate or delegate thereof;

(ii) may consult with the appropriate supervisory personnel of the Internal Revenue Service regarding the daily operation of the local office of the taxpayer advocate;

(iii) shall, at the initial meeting with any taxpayer seeking the assistance of a local office of the taxpayer advocate, notify such taxpayer that the taxpayer advocate offices operate independently of any other Internal Revenue Service office and report directly to Congress through the National Taxpayer Advocate; and

(iv) may, at the taxpayer advocate's discretion, not disclose to the Internal Revenue Service contact with, or information provided by, such taxpayer.

(B) Maintenance of independent communications. Each local office of the taxpayer advocate shall maintain a separate phone, facsimile, and other electronic communication access, and a separate post office address.

26 U.S.C. § 7811

§ 7811. Taxpayer assistance orders.

(a) Authority to issue.

(1) In general. Upon application filed by a taxpayer with the Office of the Taxpayer Advocate (in such form, manner, and at such time as the Secretary shall by regulations prescribe), the National Taxpayer Advocate may issue a Taxpayer Assistance Order if--

(A) the National Taxpayer Advocate determines the 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; or

(B) the taxpayer meets such other requirements as are set forth in regulations prescribed by the Secretary.

(2) Determination of hardship. For purposes of paragraph (1), a significant hardship shall include--

(A) an immediate threat of adverse action;

(B) a delay of more than 30 days in resolving taxpayer account problems;

(C) the incurring by the taxpayer of significant costs (including fees for professional representation) if relief is not granted; or

(D) irreparable injury to, or a long-term adverse impact on, the taxpayer if relief is not granted.

(3) Standard where administrative guidance not followed. In cases where any Internal Revenue Service employee is not following applicable published administrative guidance (including the Internal Revenue Manual), the National Taxpayer Advocate shall construe the factors taken into account in determining whether to issue a Taxpayer Assistance Order in the manner most favorable to the taxpayer.

(b) Terms of a Taxpayer Assistance Order. 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

(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.

(c) Authority to modify or rescind. Any Taxpayer Assistance Order issued by the National Taxpayer Advocate under this section may be modified or rescinded--

(1) only by the National Taxpayer Advocate, the Commissioner of Internal Revenue, or the Deputy Commissioner of Internal Revenue, and

(2) only if a written explanation of the reasons for the modification or rescission is provided to the National Taxpayer Advocate.

(d) Suspension of running of period of limitation. The running of any period of limitation with respect to any action described in subsection (b) shall be suspended for--

(1) the period beginning on the date of the taxpayer's application under subsection (a) 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.

(e) Independent action of National Taxpayer Advocate. Nothing in this section shall prevent the National Taxpayer Advocate from taking any action in the absence of an application under subsection (a).

(f) National Taxpayer Advocate. For purposes of this section, the term "National Taxpayer Advocate" includes any designee of the National Taxpayer Advocate.

26 CFR § 301.7811-1

§ 301.7811-1 Taxpayer Assistance Orders

(a) Authority to issue--(1) In general. When an application is filed by the taxpayer or the taxpayer's duly authorized representative, in the form, manner and time specified in paragraph (b) of this section, the Ombudsman may issue a taxpayer assistance order if, in the determination of the Ombudsman, the taxpayer is suffering or is about to suffer a significant hardship as a result of the manner in which the internal revenue laws are being administered by the Internal Revenue Service, including action or inaction on the part of the Internal Revenue Service.

(2) Issuance without an application. The Ombudsman may issue a taxpayer assistance order in the absence of an application under section 7811(a).

(3) Duly authorized taxpayer's representative. A "duly authorized taxpayer's representative" is any attorney, certified public accountant, enrolled agent, enrolled actuary, or any other person permitted to represent the taxpayer before the Internal Revenue Service who is not disbarred or suspended from practice before the Internal Revenue Service and who has a written power of attorney executed by the taxpayer.

(4) Significant hardship--(i) Determination required. A determination of significant hardship is required to be made by the Ombudsman prior to the issuance of a taxpayer assistance order.

(ii) Term Defined. The term significant hardship means a serious privation caused or about to be caused to the taxpayer as the result of the particular manner in which the revenue laws are being administered by the Internal Revenue Service. Mere economic or personal inconvenience to the taxpayer does not constitute significant hardship.

(5) Finding different from relief. A finding that 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 Internal Revenue Service will not automatically result in relief being granted to a taxpayer under this section. A finding of "significant hardship" is separate and distinct from a determination that the taxpayer will be granted relief. The granting of relief requires an examination of the behavior of the taxpayer and of the action or inaction of the Internal Revenue Service that causes or is about to cause the significant hardship to the taxpayer.

(b) Application for taxpayer assistance order--(1) Form. The application for a taxpayer assistance order shall be made on a Form 911 (Application for Taxpayer Assistance Order to Relieve Hardship) available from any local office of the Internal Revenue Service or in a written statement which shall contain the following information:

(i) Name, social security number (or the employer identification number), and current mailing address of the taxpayer submitting the application.

(ii) Kind of tax (individual, corporate, etc.) and tax period or periods involved.

(iii) Description of the Internal Revenue Service action or proposed action which is causing or is about to cause a significant hardship to the taxpayer and, if known, the Internal Revenue Service office and personnel involved.

(iv) Description of the specific hardship caused or about to be caused and the kind of relief requested.

(v) Signature of the taxpayer/applicant or duly authorized representative.

(2) Manner. An application for a taxpayer assistance order shall be filed with the Internal Revenue Service Problem Resolution Office in the district where the taxpayer resides. Overseas applicants having a APO or FPO address shall file applications with the Internal Revenue Service, Problem Resolution Office where the return was filed. All other overseas applicants shall file applications with the Internal Revenue Service, Problem Resolution Office, Assistant Commissioner (International), Washington, DC. Where appropriate, these Problem Resolution offices may refer an application for a taxpayer assistance order to another office of the Internal Revenue Service.

(3) Time. An application for a taxpayer assistance order shall be submitted within a reasonable time after the taxpayer becomes aware of the significant hardship or the potential significant hardship.

(c) Contents of Taxpayer Assistance Orders--(1) Terms of order. Upon deciding that 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, the Ombudsman may issue a taxpayer assistance order requiring the Internal Revenue Service to--

(i) Release levied property (to the extent that the Internal Revenue Service may by law release such property), or

(ii) Stop any action or refrain from taking further action against a taxpayer pursuant to:

(A) Chapter 64 (relating to collection),

(B) Chapter 70, subchapter B (relating to bankruptcy and receiverships),

(C) Chapter 78 (relating to discovery of liability and enforcement of title), or

(D) Any other section of the Internal Revenue Code under which the Internal Revenue Service is taking or is about to take administrative action against the taxpayer that causes or will cause a significant hardship.

(2) Binding effect. A taxpayer assistance order is binding on the Internal Revenue Service unless reversed by an official authorized to modify or rescind such an order as provided in paragraph (d) of this section.

(3) Scope. The terms of a taxpayer assistance order may require the release from levy of property of the taxpayer to the extent that the Internal Revenue Service will by law release such property. In the absence of an overpayment there is, for example, no authority under which the Internal Revenue Service may release sums which have been credited against the taxpayer's liability and deposited into the Treasury of the United States. A taxpayer assistance order may generally not be issued with respect to the investigation of any criminal tax violation and generally may not be issued to enjoin an act of the Office of Chief Counsel (with the exception of Appeals). A taxpayer assistance order will not be issued to contest the merits of any tax liability nor is a taxpayer assistance order intended to be a substitute for or an addition to any established administrative or judicial review procedure.

(d) Authority to modify or rescind. A taxpayer assistance order may be modified or rescinded only by the Ombudsman, a district director, a service center director, a compliance center director, a regional director of appeals, or the superiors of such officials. A modification or rescission by one of these designated officials may be elevated by the Ombudsman to the superior of such official.

(e) Suspension of statutes of limitations--(1) In general. The running of the applicable period of limitations for any action which is the subject of a taxpayer assistance order shall be suspended for the period beginning on the date the Ombudsman receives an application for a taxpayer assistance order in the form, manner, and time specified in paragraph (b) of this section and ending on the date on which the Ombudsman makes a determination with respect to the application, and for any additional period specified by the Ombudsman in an order issued pursuant to a taxpayer's application. For the purpose of computing the period suspended, all calendar days except the date of receipt of the application shall be included.

(2) Date of decision. The "date on which the Ombudsman makes a decision with respect to the application" is 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 as provided in paragraph (d) of this section, the decision date is the date on which such review is completed).

(3) Periods suspended. The periods of limitations which are suspended under section 7811(d) are those which apply to the taxable periods to which the application for a taxpayer assistance order relate or the taxable periods specifically indicated in the terms of a taxpayer assistance order.

Example 1. On August 31, 1989, the Internal Revenue Service levies on funds in the taxpayer's checking account. On September 1, 1989 (at which time 7 months remain before the period of limitations on collection after assessment will expire on April 1, 1990) the Ombudsman receives the taxpayer's written application for a taxpayer assistance order. Subsequently, on September 6, 1989, the Ombudsman determines that the levy has caused a significant hardship and the Internal Revenue Service function which served the levy agrees to release the levy. The levy is released. As a result of the application and the decision by the Ombudsman and the involved

function of the Service resolving the hardship, the statute of limitations on collection after assessment is suspended from the date the Ombudsman received the application, September 1, 1989, until the date on which the decision was made to release the levy, September 6, 1989. Therefore, the statute of limitations on collection after assessment will not expire until after April 6, 1990, which is 7 months plus 5 days after the date on which the application for a taxpayer assistance order was received by the Ombudsman.

Example 2. The facts are the same as in example 1 except that the Internal Revenue Service function which served the levy does not agree to release the levy, and the Ombudsman, having made a determination that the levy is causing a significant hardship, issues a taxpayer assistance order on September 6, 1989, in which the levy is ordered to be released and specifies that the statute of limitations on collection after assessment is suspended for an additional 15 days. The period of limitations on collection after assessment will therefore not expire until after April 21, 1990, which is 7 months and 20 days (5 days plus 15 days) after the application for the taxpayer assistance order was received by the Ombudsman.

Example 3. The facts are the same as in example 2 except that the Ombudsman does not specifically suspend the statute of limitations on collection after assessment for an additional number of days in the taxpayer assistance order, but rather the function seeks modification or rescission of the taxpayer assistance order and the appropriate official charged with that responsibility completes his consideration of the assistance order on September 8, 1989. The period of limitations on collection after assessment will therefore not expire until after April 8, 1990, which is 7 months and 7 days after the application for the taxpayer assistance order was received by the Ombudsman.

(4) Absence of a written application. 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.

(f) Independent action of Ombudsman. The Ombudsman may take any of the actions described in section 7811(b) in the absence of an application by the taxpayer.

(g) Ombudsman. The term "Ombudsman" includes any designee of the Ombudsman, such as Problem Resolution Officers in Internal Revenue Service regional and district offices and at Internal Revenue Service compliance and service centers.

(h) Effective Date. These regulations are effective as of March 20, 1992. Miscellaneous Provisions

III. Requirement for Taxpayer Assistance Orders

To invoke assistance of the Taxpayer Advocate, it is necessary to submit a completed Form 911 request for a taxpayer assistance order along with support material. If the application states a reasonable grievance, a/k/a "significant hardship", the Taxpayer Advocate must suspend IRS collection initiatives while conducting his preliminary investigation. During the investigation, time limitations are suspended so IRS doesn't lose the right to assess a tax and execute proper collection process if there are legitimate liabilities and causes of action. (§ 7811(d)) Effect is somewhat on the order of calling time out in the course of a football game. The Taxpayer Advocate is responsible for determining whether or not IRS personnel have complied with statutes, regulations and published policy that govern tax administration. The definition of "significant hardship" at 26 CFR § 301.7811-1(a)(4)(ii) clearly speaks to the subject:

(ii) Term Defined. The term significant hardship means a serious privation caused or about to be caused to the taxpayer as the result of the particular manner in which the revenue laws are being administered by the Internal Revenue Service. Mere economic or personal inconvenience to the taxpayer does not constitute significant hardship. [Underscore added for

emphasis]

The definition is a redundancy as § 301.7811-1(a)(1) is clear enough without it:

(a) Authority to issue--(1) In general. When an application is filed by the taxpayer or the taxpayer's duly authorized representative, in the form, manner and time specified in paragraph (b) of this section, the Ombudsman may issue a taxpayer assistance order if, in the determination of the Ombudsman, the taxpayer is suffering or is about to suffer a significant hardship as a result of the manner in which the internal revenue laws are being administered by the Internal Revenue Service, including action or inaction on the part of the Internal Revenue Service. [Underscore added for emphasis]

Per § 13.1.7.2 of the Internal Revenue Manual, the Taxpayer Advocate Service must “work” any application for a Taxpayer Assistance Order (TAO) that falls into the following categories:

13.1.7.2 (10-01-2001)

Taxpayer Advocate Case Criteria

1. ANY TAXPAYER CONTACT that meets any of the criteria listed below should be worked by the Taxpayer Advocate Service:

TAS Criteria # Description

1. Taxpayer is suffering or about to suffer a significant hardship.
2. The taxpayer is facing an immediate threat of adverse action.
3. The taxpayer will incur significant professional representation [costs if relief is not granted].
4. The taxpayer will suffer irreparable injury to, or long term adverse impact if relief is not granted.
5. The taxpayer has experienced a delay of more than 30 calendar days to resolve a tax account problem.
6. The taxpayer has not received a response or resolution to their problem or inquiry by the date promised.
7. A system(s) or procedure(s) has either failed to operate as intended or failed to resolve the taxpayer's problem or dispute within the IRS.
8. Duplicate congressional correspondence case.
9. Any case not meeting TAS criteria 1-8, but kept in the TAS office to be worked.

NOTE:

If the taxpayer specifically requests TAS assistance, the case should be automatically referred to the Local Taxpayer Advocate (LTA) office for review. The LTA or his/her designee will determine if the issue should be included in the TAS program or if routine assistance from the Operating Division or Functional Unit will resolve the taxpayer's concern.

* Criteria 1 -- The term "significant hardship" is defined in IRC 7811. For example: A taxpayer calls and states he is having financial problems. He states he will be evicted from his apartment and needs his refund to pay the rent.

* Criteria 2-4 -- Section 1102(c) of RRA98 added subsection (2) to IRC section 7811(a). IRC 7811(a)(2) defines circumstances that automatically meet hardship criteria.

A. Criteria 2 -- An immediate threat of an adverse action to the taxpayer by the IRS. Actions by the IRS that create negative financial consequences or economic burdens for the taxpayer because of the unusual nature of the taxpayer's situation or because of an abuse or misuse of process by IRS personnel is considered an Adverse Action. A warning of impending action that will negatively impact the taxpayer is considered a threat. An action that will take place within the next 30 days or some shorter period is considered Immediate. For example, the termination of an installment agreement based on taxpayer default without any consideration of the nature of the circumstance which caused the default could qualify the taxpayer under this criterion.

B. Criteria 3 -- Significant costs will be incurred by the taxpayer if relief is not granted.

Situations where the IRS is unable to make adjustments, process returns, release a lien, etc., immediately and the taxpayer will incur significant costs or expenses are considered significant hardships. Significant costs could include professional fees for assistance, excessive fees for representation, or incurred bank service charges.

C. Criteria 4 -- Irreparable injury to or long-term adverse impact to a taxpayer if relief is not granted. This includes situations whereby a taxpayer may lose assets, income or potential income if relief is not provided. Examples include, loss of the ability to be licensed or bonded as part of his/her occupation, loss of borrowing power/clients due to filing of federal tax lien, and/or damage to credit rating resulting in denial of a loan.

* Criteria 5 -- Generally, a taxpayer problem or inquiry will be considered "delayed" when more than 30 days has elapsed from the date the taxpayer makes a request for IRS assistance.

A. Where there is an established time frame for a specific action based on an IRM, IRS form or other official document, criteria 5 is met when the problem or inquiry is considered delayed 31 days after the prescribed period. For example, 60 days is the normal processing time for a Form 4506 request for photocopy of a filed tax return; on the 91st day after filing Form 4506, and with no response, the taxpayer's circumstance would meet criteria 5.

B. Where there is no established time frame for a specific action based on an IRM, IRS Form or other official document, Criteria 5 is met when the problem or inquiry is delayed 31 days after the initial date the taxpayer made a request for IRS assistance. For example, a taxpayer received an Examination determination from an auditor. The taxpayer is waiting for the interest calculation from the auditor to make full payment. If it is 31 days or more from the time the taxpayer requested the interest calculation, and s(he) has not received it, Criteria 5 would be met.

C. Criteria 5 is not met when the taxpayer has received an interim response and the taxpayer is promised a reply that is within a reasonable time frame, even though it exceeds the prescribed period. However, Criteria 5 is considered met when no action has been taken since the first interim response. For example, when a second interim response is issued and the IRS has taken no action since the first interim response, Criteria 5 would be met.

D. Delays due to taxpayer unresponsiveness will not result in meeting criteria 5.

*Criteria 6 -- Interim letters can extend prescribed time frames unless the delay is extensive or unreasonable. Judgment should be used to determine if the delay is justified or may be considered an unwarranted delay by the Operating Division or Functional Unit.

*Criteria 7 -- A system or procedure has either failed to operate as intended or failed to resolve the taxpayer's problem or dispute within the IRS.

*Criteria 8 -- A congressional inquiry on the same issue as a case already in TAS or on TAMIS.

* Criteria 9 -- Any issue/problem not meeting criteria 1-8 but kept in TAS for handling and resolution.

NOTE:

TAS Delegation of Authorities apply to Criteria 1 -- 7 only.

Categories 1 through 4 require action within two days after receipt of a TAS assistance request; categories 5 through 7 require action within three days. When read in proper context, all seven categories relate to IRS personnel malfeasance and misfeasance.

In sum, when IRS personnel fail to carry out a duty imposed by law, or exceed authority conferred by law, the applicant is entitled to protection of a Taxpayer Assistance Order. In the event the Taxpayer Advocate assigned to the case fails to properly carry out duties of the office, a Taxpayer Assistance Order application may be submitted through a special oversight unit in the Senate Finance Committee. Where the TAO application is based on misbehavior and unlawful actions of IRS personnel, in addition to issuing a TAO, which may include rescission of notices of lien and levy, release of property, and/or

return of money garnished or otherwise illegally seized, the complaint must be forwarded to the TIGTA for investigation.

Authority of the Taxpayer Advocate is reasonably inclusive. Any time IRS personnel fail to comply with mandates and prohibitions of the Internal Revenue Code, or other law governing tax administration, Treasury regulations, and published policy, including the Internal Revenue Manual, the Taxpayer Advocate has authority and is required to intervene on behalf of whoever is being subjected to the unlawful collection process. Further, "In cases where Internal Revenue Service personnel are not following applicable published administrative guidance (including the Internal Revenue Manual), the National Taxpayer Advocate shall construe the factors taken into account in determining whether to issue a Taxpayer Assistance Order in the manner most favorable to the taxpayer." (26 U.S.C. § 7811(a)(3))

Just as the appeals office must compile a hard-copy case file (the complaining party may submit documents, records and other evidence for inclusion), the Taxpayer Advocate assigned to the case must compile a hard copy file and base decisions on what is actually in record. In the event that the case is complicated enough that first and second-line TAS personnel don't have sufficient expertise to rule on the case, it may be referred to specialists assigned to the office and further referral can be made up to and including the office of the IRS Chief Counsel. At the time the case is closed, there must be a comprehensive determination letter (finding of facts and law) on the order of appeals officer decisions (See 5 U.S.C. §§ 556(d) & 557).

The mandate for Internal Revenue Service personnel to comply with requirements of the Internal Revenue Code, Treasury regulations and published policy was implemented via § 1203 of the Internal Revenue Service restructuring and reform act of 1998. In addition to the Taxpayer Advocate, the Treasury Inspector General for Tax Administration has investigative authority, but does not have intervention powers. Intervention is left to the Taxpayer Advocate. Where Internal Revenue Service personnel knowingly and willfully engage in criminal acts, the Assistant Attorney General over the Criminal Division of the Department of Justice has investigation and prosecution responsibility. (28 CFR § 0.55) Acts of omission and commission by IRS personnel are classified as criminal by 26 U.S.C. §§ 7214(a)(1), (2) & (3).

The burden of proof mandate of § 7811(a)(3) embodies the same principles as the writ of habeas corpus. Once jurisdiction is challenged, the proponent of a position is responsible for proving authority. Where the habeas corpus is concerned, whoever is responsible for making an arrest is presumed guilty. He must affirmatively prove authority for his acts, i.e., jurisdiction, in record. If he does not prove lawful authority in open court, the prisoner must be discharged. Likewise, if IRS personnel cannot withstand a collateral attack and cannot prove preservation of substantive due process rights and compliance with procedural mandates, whatever claim they've made must be vacated, rescinded, withdrawn or otherwise discharged. The fact that they have acted or are acting as agents of or under color of authority of Government of the United States creates the

presumption of guilt.

Generally speaking, the tax system is structured so administrative remedies must be exhausted before judicial remedies are available. This is nearly always the case for administrative agencies. Unfortunately, administrative procedure is more challenging than a Rubik's cube. However, essential elements of a case or controversy "arising under" the Constitution and laws of the United States are constant, whether in administrative or judicial forums. (Article III § 2, U.S. Constitution)

1. Taxing and liability statutes, with implementing regulations, must be disclosed in order to establish authority and/or liability.
2. Facts must be established through testimony, which requires a competent witness. In the alternative, adversarial parties may stipulate to facts.
3. Application of law to facts must be proven.
4. The advocate of a position always bears the burden of proof.

Where the first item is concerned, IRS personnel have a legal hill to climb as to establish standing, venue and subject matter jurisdiction, (1) taxing and liability statutes along with implementing regulations must be disclosed, (2) delegated authority for administering the statutes must be entered into evidence, and (3) geographical application of delegated authority must be established.

These are described as collateral issues. Figuratively, "I am attacking the ground you are standing on." Venue, standing and subject matter jurisdiction are all threshold issues, and as odd as it may seem, they are also fact issues. They should be raised at each stage of administrative and judicial procedure. However, from the point IRS personnel threaten or take steps that are adverse to private interests, substantive and procedural due process rights take stage center. Then the question is, "Have IRS personnel acted in compliance with statutes and regulations that preserve constitutionally secured rights and procedural mandates established by law?" This is the first consideration of the Taxpayer Advocate Service. The TAS must intervene even if the adverse action hasn't taken place: "A warning of impending action that will negatively impact the taxpayer is considered a threat. An action that will take place within the next 30 days or some shorter period is considered Immediate." (Cited *supra*)

Substantive due process rights are rights secured by the First, Fourth, Fifth, Sixth and Seventh Amendments. For example, the Sixth Amendment assures that whoever is charged with a crime is entitled to know the nature and cause of the action, to confront adverse witnesses, and to compel testimony. The status determination letter, prescribed by 26 CFR § 601.201, requires district directors, or their successors, to make comprehensive statements of law and fact and demonstrate application of law to whatever facts IRS bases liability claims on. The status determination letter preserves the right to know the nature and cause of action. Disclosure required by 5 U.S.C. § 552, 5 U.S.C. § 552a, 26 U.S.C. § 6103 and § 2 of 31 CFR Part 1, Appendix B of Subpart C is a substantive due process right. The Fifth Amendment establishes that no person shall be deprived of life,

liberty or property without judicial due process of law. The Federal Debt Collection Act, classified as Chapter 176 of Title 28, preserves the necessity of judicial process before IRS personnel can encumber or convert private property. There are no exceptions to declaratory and restrictive clauses in the first ten amendments. Unless or until the Constitution is amended, rights secured by the first ten amendments are the same as carved in stone.

Assessment officers are required to execute lawful, procedurally proper assessment certificates in compliance with requirements of 26 CFR § 301.6203-1 before there is a tax liability. IRS personnel must then provide lawful, procedurally proper notice and demand for payment in compliance with requirements of 26 CFR § 301.6303-1. These are among procedural due process rights imposed by statutes and regulations governing tax administration. If the law prescribes A > B > C procedure, IRS personnel cannot jump from A to C or bypass A and B prior to enforcement of C.

A defect that abridges substantive or procedural due process rights deprives the Internal Revenue Service of subject matter jurisdiction. Without subject matter jurisdiction, all administrative acts, judicial orders, or any other act or determination by a government entity is a nullity that is void from inception.

For case law concerning government personnel liability, see *Owen v. Independence*, 445 U.S. 621, *Maine v. Thiboutot*, 448 U.S. 1, and *Hafer v. Milo*, 502 U.S. 21. In the event actions exceed the reach of federal authority, the actor may be prosecuted under state law. See *State of Idaho v. Lon T. Horiuchi*, No. 98-30149, Ninth Circuit, June 5, 2001. In *Basso v. Utah Power & Light Co.*, 495 F.2d 906 at 910, the court stated an absolute that has been true throughout English and American judicial history: “Jurisdiction can be challenged at any time.” In *Main v. Thiboutot*, 100 S.Ct. 2502 (1980), the Supreme Court of the United States proclaimed that, “The law provides that once state and federal jurisdiction has been challenged, it must be proven.”

When jurisdiction is challenged during the examination process (26 CFR § 601.105) or at any later stage of the assessment and collection process, the officer or agent engaged in the activity has responsibility for referring the “protest” to the appeals office for resolution. In the alternative, he may personally resolve disputes by providing appropriate records and decisions (5 U.S.C. § 552(a)(1)(A)) that resolve contested issues. Whenever these procedural requirements are ignored, the aggrieved party is entitled to protection of a Taxpayer Assistance Order.

A complaint filed with the Taxpayer Advocate cannot be ignored, particularly if it incorporates a collateral challenge or alleges that IRS personnel have deprived the complaining party of substantive and/or procedural due process rights. Implicitly, the Taxpayer Assistance Order is executed on the date an application is submitted. When revenue agents and other IRS personnel are made aware of an application for a Taxpayer Assistance Order, all collection procedure must stop until the Taxpayer Advocate issues an assistance order or denies the application. In any event, the Taxpayer Advocate must make a written statement of reasons for whatever action is or isn't taken. (§ 7811(c)(2))

The statement must recite essential elements of fact and law. In the meantime, only the Taxpayer Advocate, the Commissioner of Internal Revenue or an Assistant Commissioner of Internal Revenue may rescind or amend a Taxpayer Assistance Order.

If IRS personnel proceed with collection activity once notified of an application for a Taxpayer Assistance Order, they should be reported to the Taxpayer Advocate with appropriate supporting affidavits, documents and other evidence. The Taxpayer Advocate is required to report IRS personnel who do not comply with the Taxpayer Advocate program. (§ 7811(c)(2)(B)(ii)(VII)) They should also be reported to the Treasury Inspector General for Tax Administration for violation of § 1203 of the IRS restructuring and reform act of 1998 and whatever other offenses the abusive acts embody.

As is the case with the Treasury Inspector General for Tax Administration, the problem is convincing the Taxpayer Advocate to carry out statutory responsibilities. Consequently, nonperformance complaints, where there is conspicuous malfeasance and/or misfeasance, should be sent to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate. These congressional committees, along with the Joint Committee on Taxation, have tax administration oversight responsibilities.