

1989

Taxpayer Bill of Rights

Lawrence B. Gibbs

Repository Citation

Gibbs, Lawrence B., "Taxpayer Bill of Rights" (1989). *William & Mary Annual Tax Conference*. Paper 199.
<http://scholarship.law.wm.edu/tax/199>

Copyright c 1989 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<http://scholarship.law.wm.edu/tax>

TAXPAYER BILL OF RIGHTS

By

**Lawrence B. Gibbs
Johnson & Gibbs
Washington, D.C.**

TAXPAYER BILL OF RIGHTS

By

Lawrence B. Gibbs
Johnson & Gibbs
Washington, D. C.

I. Background

A year ago Congress passed the Taxpayer Bill of Rights. Technical and Miscellaneous Revenue Act of 1988 ("TAMRA"), Pub. Law No. 100-647, 100 Stat. 3342 (1988). To a large extent the legislation codifies rights that taxpayers had under previously existing IRS practices and procedures. However, the legislation also provides taxpayers and their advisers with new rights in dealing with IRS during audit, appeals, litigation, and in the course of collection activities. See generally, Coppinger, "The Taxpayer Bill of Rights", 20 The Tax Adviser 297 (May 1989); Cross "Taxpayer Bill of Rights," 75 ABA Journal 76 (June 1989); Kafka, "Taxpayer Bill of Rights Expands Safeguards, Civil Remedies", 70 J. Taxation 4 (Jan. 1989); Saubert and O'Neil, "The New Taxpayer Bill of Rights", 67 Taxes 211 (April 1989).

A. Role of Senator Pryor

Senator David Pryor, Chairman of the IRS Oversight Subcommittee of the Senate Finance Committee, was the principal sponsor and spokesman for the Taxpayer Bill of Rights. Senator Pryor introduced several versions of this legislation during 1987 and 1988. See S. 2223, 63 BNA Daily Tax Rep. L-11 (April 1, 1988); S. 1774, 54 BNA Daily Tax Rep. L-1 (March 21, 1988); S. 604, 36 BNA Daily Tax Rep. J-10 (Feb. 25, 1987). Senator Pryor's hearings during 1987 highlighted alleged abuses of IRS powers in dealing with taxpayers, and these hearings fueled the drive towards passage of the legislation. Hearings Before Subcommittee on Private Retirement Plans and Oversight of the Internal Revenue Service, U. S. Senate Committee on Finance, S. 579 and S. 604, April 10 and 21, 1987, U. S. Government Printing Office (Washington: 1987). During 1988, Senator Pryor wrote extensively and made numerous public appearances in support of the legislation. See, e. g., Pryor "Let's Halt IRS Taxpayer Abuse Now" Reader's Digest p. 146 (Oct., 1988); Pryor, "The Near Totalitarian I. R. S." New York Times (April 15, 1988); Pryor, "The Taxpayer Bill of

Rights and Tax Compliance Legislation: Are They Compatible?" Fed. Bar Assoc. Section of Taxation Report p.1 (Winter, 1988).

B. IRS response

While admitting that certain criticisms were justified in specific cases, IRS responded that abuse situations were limited to exceptional cases; that taxpayer rights were protected under existing IRS practices and procedures; that changes in IRS management techniques and procedures would satisfactorily address most of the concerns; and that other problems (such as the constant change in the tax laws and inadequate funding of IRS), rather than additional taxpayer substantive rights, were necessary to remedy many of the problems. See Gibbs "Improving Quality Puts the 'Service' Back Into Internal Revenue Service", Fed. Bar Assoc. Section of Taxation Report p.1 (Winter, 1988).

C. Funding

Despite promises made by Senator Pryor and others, no funding accompanied the passage of the Taxpayer Bill of Rights, and no additional funding has been provided to IRS during the last year. However, since the legislation was passed, IRS has expressed the desire to carry out the spirit as well as the letter of the new law and has diverted funds from other activities in order to implement the changes required by the new law.

II. Change In IRS Audit Procedures

The new law provides taxpayers and their representatives with new statutory rights in connection with the examination of a taxpayer's return.

A. Notice of taxpayer's rights

IRS is required to notify a taxpayer in simple, non-technical language about the taxpayer's rights and IRS obligations during an audit, the procedures by which a taxpayer may appeal administratively and judicially any adverse IRS decision, the procedures for filing refund claims and taxpayer complaints,

and IRS enforcement and collection procedures. TAMRA §6227. Before the legislation was passed, IRS announced Publication 1, "Your Rights As A Taxpayer", and after passage of the legislation, IRS modified this publication to meet the new requirements. See Attachment A.

B. Taxpayer rights during audit interviews

The Bill of Rights adds new §7520[1] which largely codifies prior IRS procedures in connection with taxpayer interviews during the audit or collection process. TAMRA §6228(a). Note that these provisions do not apply to either an IRS criminal investigation or an integrity investigation of IRS personnel by IRS Inspection. §7520[1](d).

1. An IRS agent must explain the audit process and advise a taxpayer about his or her rights at the beginning of the process. §7520[1](b)(1).
2. At the request of any taxpayer, an IRS agent must suspend an interview if the taxpayer wishes to consult with an attorney, certified public accountant, enrolled agent, or other person permitted to represent the taxpayer before IRS. §7520[1](b)(2).
3. An IRS agent may not require a taxpayer to accompany a representative to an interview without issuance of an IRS administrative summons. §7520[1](c). However, an agent may request that the taxpayer voluntarily attend an IRS interview. See S. Rep. No. 100-309, 100th Cong., 2d Sess. (1988) at p. 5. In addition, with a supervisor's permission, an IRS agent may inform the taxpayer that the agent believes that the taxpayer's representative is delaying or hindering an audit or investigation. §7520[1](c).

4. An IRS agent must permit a taxpayer to make an audio recording of the audit interview if the taxpayer provides advance notice to IRS, pays the expenses, and uses the taxpayer's own equipment. §7520[1](a)(1). IRS may not record an interview unless it gives the taxpayer advance notice and at taxpayer's request and expense provides the taxpayer with a recording of the interview. §7520[1](a)(2).
5. IRS is required to issue regulations setting standards for reasonable time and place for taxpayer interviews. TAMRA §6228(b).

III. Taxpayer Assistance Orders

The Bill of Rights adds new §7811 which allows the IRS Taxpayer Ombudsman to issue a "Taxpayer Assistance Order" (TAO) if IRS determines that a taxpayer "is suffering or about to suffer a significant hardship" as a result of tax administration. TAMRA §6230(a); §7811(a). IRS has issued proposed and temporary regulations (see T.D. 8246, Vol. 54 Fed. Reg. 11699 (March 22, 1989)) and has published Form 911 (See Attachment B) and Manual guidance to its employees to implement these new provisions.

A. Scope and Terms of TAO

1. A "significant hardship" means more than inconvenience or financial hardship to the taxpayer. The action by IRS causing the hardship "must be such that it would offend the sense of fairness of taxpayers in general were they aware of all the surrounding facts and circumstances." Temp. Reg. §301.7811-1T(a)(4)(ii).
2. At a taxpayer's request (by filing Form 911) or by independent action of the Ombudsman, a TAO may be issued to:
 - a. Release taxpayer's property that has been levied upon,

- b. To take an action (such as issue a refund), or
- c. To cease or refrain from taking an action relating to tax collection, bankruptcy, receivership, enforcement or other tax provisions described by the Ombudsman. §7811(b).
- d. Generally a TAO may not be issued in a criminal investigation, for an action taken by Chief Counsel (except Appeals), to contest the merits of a tax liability, or to circumvent any established administrative or judicial procedure. Temp. Reg. §301.7811-1T(c)(3).

B. Modification or Rescission of TAO

If a TAO is issued by a problem resolution officer, it may be changed or rescinded by a higher IRS management authority (district director, Service or compliance center director, regional director of appeals, or other higher authority). §7811(c). However, if a TAO is rescinded by a higher official, the IRS Ombudsman may appeal to the superior of such official. Temp. Reg. §301.7811-1T(d).

C. Suspension of Statute of Limitations

The statute of limitations is suspended while a TAO is being considered or is being acted upon. §7811(d). See Temp. Reg. §301.7811-1T(e).

IV. Taxpayer Recovery Of Administrative And Litigation Costs And Fees

The Bill of Rights amends §7430 to expand the types of costs that a successful taxpayer may recover against IRS. Previously a taxpayer could recover only certain litigation costs. Now the taxpayer can recover certain costs incurred in IRS administrative proceedings beyond the Appeals level. Early versions of the Taxpayer Bill of Rights would have permitted taxpayers to recover all costs incurred after the examination level and would have shifted the burden to the government in certain circumstances, but as finally passed, the taxpayer continues to bear the burden of proof and is entitled to recover administrative costs only after the Appeals level, or after the issuance of a statutory notice. TAMRA §6239(a).

V. Expanded Tax Court Remedies

The Bill of Rights provides the taxpayer with additional Tax Court remedies.

A. Restraint on Premature Assessments

The Tax Court is given the power to restrain premature IRS assessments of taxes which are subject to pending Tax Court deficiency proceedings. TAMRA §6243 amending §6213(a) and §7482.

B. Overpayment Determinations

The Tax Court is authorized to enforce its judgment through orders to IRS requiring refunds of Tax Court determined overpayments if IRS fails to pay the refund within 20 days of a judgment. TAMRA §6244 amending §6214(e) and §6512.

C. Review of Seized Property Sales

The Tax Court is authorized to review extraordinary IRS sales of seized taxpayer property if an action is pending before the court. TAMRA §6245 amending §6863(b).

D. Redetermination of Interest on Deficiencies

The Tax Court is permitted redetermine IRS-computed interest owed by a taxpayer on Tax Court determined deficiencies. TAMRA §6246 amending §6512(a) and §7481(a).

E. Modification of Estate Tax Decisions

The Tax Court is authorized to make and modify final decisions in certain estate tax cases to reflect the taxpayer's right to an interest deduction. TAMRA §6247 amending §6512 and §7481.

VI. New Taxpayer Rights During Collection Proceedings

Congressional hearings preceding the passage of the Bill of Rights raised substantial concerns about IRS collection procedures. As a result, a number of the provisions in the Taxpayer Bill of Rights provide new remedies for taxpayers in connection with collection proceedings. See generally, Haley, "Levy and Distraint After the Taxpayer Bill of Rights", 67 Taxes 223 (April 1989).

A. Installment Payment Agreements.

The Bill of Rights adds new §6159 which permits IRS to enter into written agreements with taxpayers for installment payments of outstanding tax liabilities. TAMRA §6234(a). Once the agreement is entered into, generally it must remain in effect for the term of the agreement. §6159(b)(1). IRS may terminate or modify these agreements only under specified circumstances, including:

1. If taxpayer furnishes inaccurate or incomplete information or IRS believes that collection of tax under the agreement is in jeopardy, IRS may terminate the agreement. §6159(b)(2).
2. If IRS determines that the taxpayer's financial condition has "significantly changed" and has given taxpayer 30 days notice of the reasons for such determination, IRS may modify or terminate the agreement. §6159(b)(3).
3. If a taxpayer fails to make a timely installment payment, a timely payment of any other tax liability, or to provide a financial update to IRS, then IRS may modify or terminate the agreement. §6159(b)(4).

B. Levy Procedures

The Bill of Rights made various changes to permissible levy procedures.

1. §6331(d)(2) was amended to increase the prior notice of levy from 10 days to 30 days, except in the case of jeopardy assessments. TAMRA §6236(a). However, because existing IRS notices generally are timed to provide more than 30-day's notice, this additional right is largely illusory.

2. §6331(d)(4) was added to require each notice of levy to state in brief, simple, non-technical terms the rules and procedures for levy and sale of property, taxpayer appeals rights and alternatives to prevent levy and sale of property, and rules and procedures to permit taxpayers to redeem property after it is sold by IRS. TAMRA §6236(a).
3. New §6332(c) requires IRS to wait 21 days after serving a notice of levy before it can take possession of taxpayer bank accounts. TAMRA §6236(e).
 - a. This provision was largely in response to media stories about alleged IRS seizures of children's bank accounts. The new provision generally codifies IRS procedures that grew out of IRS attempts to minimize the possibility that IRS would seize bank accounts belonging to someone other than a taxpayer who is the subject of the collection actions.
 - b. IRS recently indicated that banks have been ignoring this new provision by sending funds in taxpayers' accounts to IRS before the expiration of the 21 day period. IR-89-114 (Sept. 28, 1989).

C. Property exempt from levy

The Bill of Rights expands the categories of taxpayer property exempt from levy. TAMRA §6236(c)&(d).

1. The \$1,500 exemption from levy for fuel, provisions, furniture and personal household effects is increased to \$1,550 in 1989 and then \$1,600 in 1990. §6334(a)(2). The \$1,000 exemption for books, tools and equipment necessary for a taxpayer's trade, business or profession is increased to \$1,050 in 1989 and to \$1,100 in 1990. §6334(a)(3).
2. The Bill of Rights also replaces wage exemptions of \$75 per week plus \$25 per dependent with a weekly exemption based on a formula equal to the sum of the taxpayer's standard deduction plus personal exemptions divided by 52. §6334(d). It also exempts from levy certain public assistance payments and certain payments under the Job Training Partnership Act. §6334(a)(12).
3. The Bill of Rights also adds new §6334(e) which exempts a taxpayer's principal residence from levy unless the levy is approved by an IRS district director or assistant district director or unless IRS determines that the collection of tax is in jeopardy.
4. New §6331(f) prohibits a levy if the levy expenses would exceed the fair market value of the property.
5. New §6331(g) prohibits a levy on the date the taxpayer is required to appear in response to an IRS summons unless collection of the tax is in jeopardy.

D. Release of property from levy

The Bill of Rights amends §6343(a) to require IRS to release a levy upon property if:

1. The tax liability is satisfied or becomes unenforceable,

2. Release of the levy will facilitate collection,
3. The IRS has entered into an installment agreement with the taxpayer that permits release,
4. The IRS has determined that the levy is creating an economic hardship due to the financial condition of the taxpayer, or
5. The fair market value of the property exceeds the tax liability and the release of the levy can be made without endangering collection.
6. Also, if the levied tangible personal property is essential to a taxpayer's trade or business, IRS is required to make an expedited determination of the propriety of releasing the property from levy. §6343(a)(2).

E. Review of jeopardy levy and assessment procedures

The Bill of Rights amends §7429(a)&(b) to allow both IRS administrative review and federal district court review of jeopardy levies. New §7429(b)(2)(B) broadens the Tax Court's jurisdiction so that it has concurrent jurisdiction with federal district courts to review jeopardy assessments and levies if a taxpayer has timely petitioned the Tax Court for a redetermination of the deficiency covered by the assessment or levy. If the court determines that the jeopardy levy is inappropriate or the assessment is unreasonable, the court can order IRS to release the levy, abate the assessment or redetermine the amount assessed, as appropriate. §7429(B)(4). TAMRA §6237(c), (d) & (e).

F. Administrative review of tax liens

The Bill of Rights adds new §6326 to provide a new administrative procedure for expedited review and release of erroneous tax liens. TAMRA §6238(a). IRS and Treasury have issued Proposed and Temporary Regulations to implement this provision. See T.D. 8250, 54 Fed. Reg. 19568 (May 8, 1989).

1. The appeal must be made by the person upon whose property the lien was filed to the district director of the district in which the lien was filed. If IRS agrees, then generally within 14 days the district director must file a certificate stating that the lien was erroneous and releasing it. Temp. Reg. §301.6326-1T(a).
2. Only an erroneously filed lien may be appealed. A lien is filed erroneously only if the tax liability that gave rise to the lien was:
 - a. satisfied before the lien was filed,
 - b. assessed in violation of the deficiency procedures under §6213,
 - c. assessed in violation of the Bankruptcy Code, or
 - d. extinguished by expiration of the statute of limitations on collection before the lien was filed. Temp. Reg. §301.6326-1T(b).
3. To be effective, the appeal must:
 - a. be filed within one year after the taxpayer becomes aware of the lien,
 - b. be in writing and addressed to the district director (attention: Chief, Special Procedures Function),

- c. provide the name, address, and identification number of the taxpayer,
- d. provide a copy of the notice of lien being appealed, and
- e. state the reason the lien was erroneously filed. Temp. Reg. §301.6326-1T(d).

G. Civil damages for IRS failure to release tax lien

The Bill of Rights adds new §7432 which permits taxpayers to bring a civil action against IRS in U.S. District Court to recover damages caused by the IRS knowing or negligent failure to release an erroneous tax lien. TAMRA §6240.

- 1. The taxpayer must exhaust administrative remedies within IRS, reasonably mitigate any damages that the lien may cause, and bring the action to recover damages within two years after the right of action accrues. §7432(d).
- 2. If the above actions are taken and the court determines that IRS is liable, then the court may award the taxpayer actual, direct economic damages for the IRS failure to release the lien, plus "costs of the action." §7432(b).

H. Civil damages for certain unauthorized IRS collection actions

The Bill of Rights adds new §7433 which permits a taxpayer to bring a civil action to recover damages up to \$100,000 caused by IRS reckless or intentional disregard of any code provision or IRS regulation dealing with a tax collection. TAMRA §6241(a).

I. Production quotas prohibited

The Bill of Rights prohibits IRS from evaluating IRS agents or their supervisors based on tax enforcements results. IRS

cannot suggest or impose production quotas on employees. The Bill of Rights requires each district director to make a quarterly certification to the Commissioner regarding compliance. TAMRA §6231.

VII. Miscellaneous Provisions

A. Taxpayer reliance on IRS advice

New §6404(f) requires IRS to abate any penalty or addition to tax due to erroneous written advice furnished by IRS in response to a taxpayer's specific written request. TAMRA §6229(a). IRS and Treasury have issued Proposed and Temporary Regulations under this section. T.D. 8254, 54 Fed. Reg. 21055 (May 16, 1989).

1. In order for this provision to apply, the taxpayer must demonstrate that:
 - a. the taxpayer reasonably relied on the advice,
 - b. the IRS provided the advice in response to the taxpayer's written request for the advice, and
 - c. the taxpayer provided adequate, accurate information in the request. Temp. Reg. §301.6404-3T(b)(1).
2. To obtain abatement of any penalty or addition to tax (as defined in Temp. Reg. §301.6404-3T(c)(2)), the taxpayer must file Form 843 with IRS and include:
 - a. the taxpayer's original request for advice,
 - b. the IRS written response, and

c. the IRS report of tax adjustments showing the penalty or addition to tax. Temp. Reg. §301.6404-3T(d).

3. The request for abatement must be made before the expiration of the statute of limitations on collection of the penalty or addition to tax (if unpaid), or before the expiration of the statute on the refund of the penalty or addition to tax (if paid). Temp. Reg. §301.6404-3T(e).
4. The request for abatement must be filed at the Service Center where the taxpayer filed the return (if the advice relates to a position in the return) or at the Service Center where the tax return for the taxable year in which the taxpayer received the advice (if the advice does not relate to an item in the return). Temp. Reg. §301.6404-3T(d).

B. Contents of tax due deficiency and other IRS notices

Beginning in 1990, certain IRS notices must describe the basis for and identify the amount due in taxes, interest, additional amounts, additions to tax, and assessable penalties. TAMRA §6233(a), adding §7521[2] to the Code. Notices covered by this section include:

1. Collection notices issued pursuant to §6155 and §6303 and statutory notices of deficiency issued pursuant to §6212.
2. Notices generated by the IRS document matching program (the so-called CP-2000 notices), and
3. The thirty day letters issued by IRS District Examination offices that permit administrative appeals to the IRS Regional Appeals office. §7521[2](b).