Introduction

On November 18 and 19, 2015, the inaugural International Conference on Taxpayer Rights was held at the National Archives in Washington, DC. The Conference was convened by the National Taxpayer Advocate and co-sponsored by the American Bar Association Section of Taxation, the American College of Tax Counsel, American Tax Policy Institute, the International Association of Tax Judges, and the International Fiscal Association—USA Branch, with Tax Analysts as publishing sponsor. Over two days, 170 individuals from 22 countries discussed the role taxpayer rights play in tax administration. Panel topics included The Right to Be Informed: Transparency and Tax Administration; The Rights to Confidentiality and Privacy in an Age of Transparency; Taxpayer Rights, Due Process, and Procedural Justice; and Challenges in “Operationalizing” Taxpayer Rights.1

The Conference built on work initiated by the Organization for Economic and Cooperative Development (OECD) in the early nineties.2 This work in turn informed my 2007 legislative proposal that Congress adopt a Taxpayer Bill of Rights (TBOR).3 The Internal Revenue Service adopted the TBOR on June 10, 2014, in response to a more recent administrative recommendation by my office.4

1 The conference agenda, abstracts of papers, reference documents pertaining to taxpayer rights, and videos of the conference panels are available at taxpayerrightsconference.com.
2 OECD Committee of Fiscal Affairs, Taxpayers' rights and obligations – a survey of the legal situation in OECD countries (Apr. 27, 1990); OECD Centre for Tax Policy and Administration, Taxpayers' Rights and Obligations – Practice Note (Aug. 2003).
Congress has now enacted into law a similar provision that lists verbatim the same ten taxpayer rights.5

The International Conference on Taxpayer Rights broadened the focus on taxpayer rights beyond the United States. Tax administrators, academics, and tax professionals from all over the world were afforded the opportunity to discuss the reasons for and challenges in adopting and implementing a TBOR or taxpayer charter. Equally important, the Conference engendered serious scholarship about the role of tax administration in promoting fairness and effectiveness in tax administration.

The four papers included in this issue of The Tax Lawyer are indicative of the breadth of ideas exchanged at the Conference. Professors Alice G. Abreu and Richard K. Greenstein analyze and question why tax law is excused from operating according to rules of reasonableness followed by other areas of law. Professor Keith Fogg and Sime Jozipovic explore collection practices both in the United States and internationally and measure them against fundamental taxpayer rights. Professor Leslie Book discusses how the tax administrator through its processes and manner of interacting with taxpayers can “bureaucratically oppress” taxpayers’ opportunity to challenge the tax administrator and be heard. And Amanda Bartmann of the Taxpayer Advocate Service lays out a roadmap for the Service’s implementation of the TBOR, weaving it into the daily life of the Service employees and taxpayers alike, and ensuring it doesn’t become a pretty but meaningless piece of paper.

The Conference demonstrated that each country has its own culture, its own tax system, and within that system its own priorities and challenges. We learned, however, that while different countries have different levels of taxpayer protections, everyone agreed that stating and affirming the rights of taxpayers increased taxpayer trust in the tax system. The inaugural International Conference on Taxpayer Rights is just one step toward achieving taxpayer protections throughout the world. The conversations begun at the inaugural Conference form a foundation for the second Conference, to be held in Vienna, Austria, in March 2017. I am profoundly grateful to the ABA Section of Taxation and the other cosponsors for their willingness to take a chance on an untested idea that, thanks to their support, now has a life of its own.

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5 The Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Div. Q, § 401 (2015) states that the Commissioner shall ensure IRS employees “are familiar with and act in accord with taxpayer rights as afforded by other provisions of [Title 26]” and then lists the ten TBOR rights.
Tax as Everylaw: Interpretation, Enforcement, and the Legitimacy of the IRS

ALICE G. ABREU & RICHARD K. GREENSTEIN

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I. Introduction

The central perspective which animates the concept of a Taxpayer Bill of Rights is taxpayer rights as experienced by the taxpayer. Although understanding the taxpayer’s experience is vital to the crafting of meaningful taxpayer rights, we believe that there is another side to the taxpayer experience coin, and that failing to look carefully at that side produces a lack of transparency that threatens the legitimacy of the tax system and the agency that administers it. That other side of the taxpayer experience coin consists of

* Alice G. Abreu and Richard K. Greenstein are Professors of Law at Temple University’s Beasley School of Law. We wish to thank Nina E. Olson, the National Taxpayer Advocate, for serving as the chief motivating and organizational force behind the Inaugural International Conference on Taxpayers’ Rights, as well as for inviting our presentation at that Conference and for encouraging the writing of this Essay (and for many other things too numerous to mention in this context). We also thank the Conference participants, many of whom provided insightful commentary on the ideas expressed in this Essay, including Allison Christians, Kristen Hickman, Marty Davidoff, and Diana Leyden. We are especially indebted to the other members of the Procedural Justice panel, Les Book, Keith Fogg, and Scott Schumacher, and again to Nina Olson, who moderated the panel, for their comments and suggestions on earlier drafts. We are also exceedingly grateful to our Temple colleagues Andrea Monroe and Rafael Porrata-Doria for their important substantive input (tax and Roman law, respectively) and for the dedicated and excellent research assistance provided by Samantha Ramagano (Temple Law ’17) and Charlene Cain (Temple Law Library). All errors are ours alone.
the views of those who mediate the taxpayer’s experience with the tax law. We refer here to the thousands of tax scholars, judges, lawyers, accountants, administrators, and other professionals, whose view of the tax law shapes and is shaped by the taxpayer experience. These individuals affect the taxpayer experience by interpreting and framing the system in both formal and informal ways. Their views of the tax system are reflected in opinions, guidance, scholarly publications and even the accounts of the tax system that appear in the popular press. Their views also inform the way they explain the system to clients and the advice they give. Together, these communications create a picture of the tax system that can determine how it is perceived by taxpayers, regardless of whether they receive the communications directly, as do the over 70% of taxpayers who receive some professional assistance in tax preparation, or indirectly through the portrayal of the tax system in media and other accounts.

That tax professionals serve as mediators who both shape and are shaped by the taxpayers’ experience is important. If tax professionals view the tax system and its administrators as illegitimate, they will likely convey that view

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1IRS Strategic Plan 2014-2017, at 7 (June 2014), available at https://www.irs.gov/pub/irs-pdf/p3744.pdf (finding more than 75.6 million electronically-filed individual returns were submitted to the IRS through paid preparers, accounting for 64% of all individual income tax e-filers; similarly, in FY 2012, 43.5 million individual taxpayer returns were completed using software, an increase from 39.6 million in 2011); 2014 Nat’l Taxpayer Advocate Ann. Rep., Executive Summary: Preface & Highlights 11, available at http://www.taxpayeradvocate.irs.gov/Media/Default/Documents/2014-Annual-Report-to-Congress-Executive-Summary.pdf (finding VITA and TCE programs prepared 3,472,696 returns in FY 2014, an increase of about 27% over the FY 2009 level and VITA and TCE sites that received funding from the IRS alone prepared more than 1.4 million and 1.3 million returns, respectively, during FY 2014).
to taxpayers and those taxpayers will, in turn, be less likely to be fully compliant.\(^2\) Legitimacy is vital to any legal institution, but in the case of the IRS legitimacy has been discussed and analyzed only in the face of catastrophic assaults. These include attempts by a President to use the IRS to persecute political enemies;\(^3\) allegations of serious abuse of taxpayers by IRS agents, which led to Senate Finance Committee hearings involving witnesses with electronically disguised voices testifying behind security screens and ultimately to the Reform and Restructuring Act of 1998;\(^4\) and most recently allegations that conservative organizations seeking section 501(c)(4) status were

\(^2\) As Nina Olson, the National Taxpayer Advocate and principal organizer of this International Taxpayer Rights Conference, has recently observed, “If most taxpayers believe that the tax agency exercises its power legitimately, they will be comfortable cooperating and engaging with the agency and more likely to defer to its directions and decisions.” Nina E. Olson, Procedural Justice for All: A Taxpayer Rights Analysis of IRS Earned Income Credit Compliance Strategy, 22 ADVANCES IN TAXATION 1-35 (2014). Legitimacy has been defined by scholars in various, often complementary, ways. Throughout this Essay we adopt Professor Tom Tyler’s definition of term legitimacy:

Legitimacy, therefore, is a quality possessed by an authority, a law, or an institution that leads others to feel obligated to obey its decisions and directives. This feeling of responsibility reflects a willingness to suspend personal considerations of self-interest, because a person thinks that an authority or a rule is entitled to determine appropriate behavior within a given situation or situations.

Thomas Tyler, Legitimacy and Criminal Justice: The Benefits of Self-Regulation, 7 OHIO ST. J. CRIM. L. 307, 313-14. We adopt this definition not only because it is the definition which Nina Olson adopts in Procedural Justice for All, supra, but also because it captures the link between legitimacy and the individual’s response to law, and hence to compliance with the law; see also THOMAS TYLER, WHY PEOPLE OBEY THE LAW (Princeton Univ. Press 2006) (defining legitimacy as “an acceptance by people of the need to bring their behavior in line with the dictates of an external authority,” (at 25), citing Gerstein and Freedman, and citing David Easton for “suggesting that legitimacy exists when the members of a society see adequate reason for feeling that they should voluntarily obey the commands of authorities.” (Id.)) One of us has used a more succinct definition, with less emphasis on compliance: legitimacy is “the community’s belief that an action by a government official is proper and justified.” Richard K. Greenstein, Toward a Jurisprudence of Social Values, 8 WASH. U. JUR. REV. 1, 9 (2015).

\(^3\) See Tax History: Auditing Your Enemies Away: Russian and U.S. Experiences, 105 TAX NOTES (TA) 1183 (2004) (describing President Nixon’s infamous list of about 300 liberal politicians, actors, activists, journalists, and newspapers as a failed attempt to punish his political enemies and media critics for his own gain); see also Amy Hamilton, The Ghosts of IRS Past, Present, And Future, 90 Tax Notes (TA) 17 (2001) (describing the three IRS commissioners during the Nixon administration as “paying a personal price” for resisting White House attempts to attack members of the list using IRS resources).

\(^4\) See IRS Oversight: Hearing Before the S. Comm. on Fin., 105th Cong. 96-99 (1998) (statements of Sen. Frank Murkowski and Sen. Kent Conrad) (describing the “gestapo-like” efforts employed by the IRS in abusing taxpayers by raiding small businesses); see also Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (codified in various sections of the I.R.C.) (including provisions mandating the replacement of regional divisions of the IRS with units dedicated to serving particular categories of taxpayers, providing a five-year term of office for the Commissioner, and creating an IRS oversight board to protect taxpayers from improper treatment by IRS employees).
disproportionately singled out for intrusive scrutiny and delay,⁵ which have led to the initiation of impeachment proceedings against the Commissioner.⁶

While these instances have posed significant threats to the agency’s legitimacy, what we explore here is more subtle, more pervasive, and hence, more invidious and threatening. It is the way in which the unexamined assumption of tax exceptionalism—the idea that tax is different—has produced a situation in which the tax law and its administrators are viewed by tax professionals, and eventually by the taxpaying public, as behaving in ways that are not understood, are therefore misperceived, and are ultimately judged illegitimate.

In this Essay we explore tax exceptionalism and the manner in which it threatens the legitimacy of the IRS. We also offer a suggested path to the reclamation of legitimacy. In a nutshell, our claim is that tax professionals should abandon the notion that tax is exceptional and accept that tax is Everylaw, no different in any fundamental way from any other law. It will then follow that the IRS is an agency like any other, possessing the same powers and subject to the same constraints as any other agency. This recognition can free the IRS

⁵See Lindsey McPherson & Meg Shreve, Lawmakers Demand Answers in IRS Scandal, 139 Tax Notes (TA) 983 (2013) (reporting based on findings by the Treasury Inspector General that IRS employees in Cincinnati had referred applications for further review based on the use of terms like “Tea Party” or “patriot” in the organizations’ names); see also William Hoffman, Lindsay McPherson, Meg Shreve & Fred Stokeld, EO Scandal Rocks IRS, 139 Tax Notes (TA) 829 (2013) (reporting the IRS targeting of conservative organizations leading to the resignation of Acting Commissioner Steven Miller, the announcement of investigations by Treasury’s Inspector General and multiple congressional committees, a criminal probe by the Justice Department, and the need for damage control by the Obama administration). But see U.S Dep’t of Justice, Office of Leg. Affairs, Opinion Letter (Oct. 23, 2015), available at http://online.wsj.com/public/resources/documents/IRS1023.pdf (explaining the decision not to criminally prosecute the IRS for mishandling the processing of tax-exempt applications for conservative groups).

⁶See Wesley Elmore, House Republicans Introduce Resolution to Impeach Koskinen, 2015 Tax Notes Today 208-3 (Oct. 28, 2015) (citing H.R. 494, 114th Cong. (2015), which calls for impeaching of IRS Commissioner Koskinen for “high crimes and misdemeanors” involving Commissioner Koskinen’s alleged failure to comply with subpoenas ordering him to locate and preserve IRS records related to congressional investigations of the IRS’s handling of conservative groups’ exemption applications, lying regarding the emails of Lois Lerner, “fail[ing] to act with competence and forthrightness in overseeing the investigation” and “act[ing] in a manner inconsistent with the trust and confidence placed in him as an Officer of the United States”); see also William Hoffman, Koskinen Says He Testified Truthfully ‘Every Time’, 2015 Tax Notes Today 209-4 (Oct. 29, 2015) (stating impeachment is a rare tool used by Congress that has never been used to impeach an IRS Commissioner and outlining the difficulty of success of impeachment because the resolution must first go to a vote in the House Judiciary Committee followed by a simple majority vote in the full House and a conviction by a two-thirds majority in the Senate trial); Lisa Rein, The Republican Campaign to Impeach IRS Commissioner: What Comes Next?, Wash. Post Oct. 30, 2015, https://www.washingtonpost.com/news/federal-eye/wp/2015/10/30/the-republican-campaign-to-impeach-the-irs-commissioner-what-comes-next/ (claiming it is likely the resolution will at least make it through the Judiciary panel controlled by Republicans, who outnumber Democrats 23 to 16, and led by Chairman Bob Goodlatte (R-Va.)).
to be transparent in its actions, stating clearly when it is interpreting the law, when it is declining to enforce the law (exercising prosecutorial discretion for reasons consistent with the values important in the tax law), and when its actions reflect aspects of both interpretation and enforcement. We begin by exploring tax exceptionalism.

II. Tax Exceptionalism

A. What Is It?

Taxpayers experience the tax law as different from other areas of law. One important reason for this is that tax law is complex and its impact pervasive. It imposes multiple reporting requirements and requires annual or more frequent accountings. And it requires arithmetic—lots of arithmetic. No other field of law is thought to be so complex or to compel so many to regularly bare their financial souls to the government just to be in compliance with the law. You cannot just mind your own business and stay out of the way of the tax law; you have to account to the government, and in many cases, you have to pay. Through the tax system, the government is in your face. The approach of April 15 produces an annual ritual that surpasses national holidays in its impact because for most taxpayers there is no choice but to participate, in some way. It is therefore not surprising that taxpayers experience the tax law as exceptional, different from other areas of law.

This experience of difference—tax exceptionalism—is so prevalent that it extends to the way that tax scholars, most of whom are also taxpayers, think of the tax law. And it has led them to think of tax as different from other fields of law and, in some cases, even as something separate from law. For example, Louis Kaplow and Steven Shavell, two respected and prolific scholars at the Harvard Law School, distinguished the “legal system” from “the income tax” in such a profound way that the distinction appears in the title of an important article,7 (Why the Legal System is Less Efficient than the Income Tax in Redistributing Income), and that distinction is repeated in the scholarly dialog that ensued.8 Other scholars have examined ways in which the

7 Louis Kaplow and Steven Shavell, Why the Legal System is Less Efficient than the Income Tax in Redistributing Income, 23 J. LEGAL STUD. 667 (1994).
8 Subsequent work leaves no doubt that Kaplow and Shavell were invoking the tax system as a whole. The opening sentences of a subsequent article state that: “In prior articles, we demonstrated in a natural model that legal rules should not be adjusted to favor the poor in order to further redistributive objectives. The reason is that the income tax and transfer system is a superior instrument for redistributing income.” Louis Kaplow and Steven Shavell, Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income, 29 J. LEGAL STUD. 821 (2000) (emphasis added, footnote omitted). And Kaplow and Shavell are not alone in their treatment of the tax system as different from the ‘legal’ system. Chris Sanchirico challenges some of their claims in an article tellingly titled Taxes versus Legal Rules as Instruments for Equity: A More Equitable View. Chris William Sanchirico, Taxes versus Legal Rules as Instruments for Equity: A More Equitable View, 29 J. LEGAL STUD. 797 (2000).
characterization of tax as different affects its role in the law school curriculum and its attraction as an area of practice.9

Tax exceptionalism is not a specific idea. Rather, it is a way of conceiving of tax or, still more loosely, an attitude toward tax. At its simplest, tax exceptionalism is “the notion that tax law is somehow deeply different from other law, with the result that many of the rules that apply trans-substantively across the rest of the legal landscape do not, or should not, apply to tax.”10 As former Treasury officials have put it: “Federal tax statutes and the legislative process that produces them differ from other legislation in such degree that the difference is tantamount to a difference in kind. The unique nature of the Internal Revenue Code is widely acknowledged . . . .”11 This exceptionalist quality is strongest in the income tax, and has caused the income tax to be regarded, in contrast to other fields of law and even to other taxes, as composed principally of rules. As Professor Charlotte Crane has observed, the income tax was perhaps the first tax ever born as a concept, not just as an administrative expedient aimed at raising revenue in the most politically congenial way possible. The income tax has also always been one under which, uniquely among taxes, the taxpayer’s liability is supposed to be determined by the objective application of a set of well-defined rules. It, in contrast to most other existing taxes, holds out the promise of being administered under the rule of law.12

The income tax has thus been imbued with an “aura of rationality”13 that has produced an “aspiration toward rational perfection,”14 unmatched in other fields of law. This quest for rational perfection has contributed to the perception of tax as doctrinally exceptional and has constrained the analytical growth of the field.

Nowhere has tax exceptionalism had such profound effects and been subject to greater scrutiny than in the area of administrative law.15 For decades Treasury and the IRS had taken the position that unlike regulations in other areas of law, tax regulations were not subject to the notice and comment process provided by the Administrative Procedure Act, and were thought to

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10 Lawrence Zelenak, Maybe Just a Little Bit Special, After All? 63 Duke L.J. 1897, 1901 (2014).
13 Id. at 180.
14 Id. at 178.
15 Indeed, Professor Crane has wondered “Why is the administration of the income tax so much more dominated by a drive to be conceptually consistent and to provide a set of base-defining rules than other taxes and, perhaps, more than any other area of administrative law?” Id. at 178.
merit a lesser level of judicial deference than other regulations. Then, in 2011 the United States Supreme Court seemed to kill tax exceptionalism in the administrative law context when it held in *Mayo* that tax regulations were entitled to the same degree of deference as any other regulations. Many rejoiced and a new era promised to dawn. Yet tax exceptionalism has refused to die.

Perhaps the tenacity of tax exceptionalism reflects its age; tax exceptionalism seems to have existed as far back as the Roman Empire, when rendering unto Caesar was really thought to be a rendering to the Emperor, distinct from other legal obligations. This exceptionalist view of tax is captured by its absence from the Corpus Juris Civilis, of which the Emperor Justinian was the chief architect. In the Corpus Juris Civilis, the Emperor Justinian sought to capture all of the existing law so that all of the law could be found in one place and be applied uniformly throughout the Empire. By codifying all existing law into one text, the Corpus Juris Civilis, Justinian sought to

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16 *See, e.g.*, Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 Minn. L. Rev. 1537 (2006) (discussing, and then arguing against, the reasons for different deference standards in the tax context, including the severity of penalties on taxpayers who take a position contrary to regulations, the importance and uniqueness of the revenue collection function, the superior expertise required to interpret the Code, and the desire to preserve the longstanding tradition of special deference in the tax context).


18 *See* Kristin E. Hickman, *Administrating the Tax System We Have*, 66 Duke L.J. 1717, 1719 (2014) (explaining that even post-*Mayo*, tax lawyers and administrators continue to label general authority Treasury regulations as “interpretive rules” even when those regulations are legally binding and are actually legislative rules, and claim that such rules don’t require notice-and-comment rulemaking procedures under the APA); *see also* Kristin E. Hickman, *Agency-Specific Precedents: Rational Ignorance or Deliberate Strategy?* 89 Tex. L. Rev. 92 (2011) (suggesting deliberate ignorance of the difference between general and agency-specific precedents to avoid having to comply with general administrative law doctrine); Kristin E. Hickman, *Unpacking the Force of Law*, 66 Vand. L. Rev. 465, 496 (2013) (citing Public Inspection of Material Relating to Tax Exempt Organizations, T.D. 9581, 77 Fed. Reg. 12,202-01, 12,203 (Feb. 29, 2012), which claims that APA section 553(b) is inapplicable to regulations issued under I.R.C. section 7805 general authority). More recently, *in Altera Corp. & Subs. v. Commissioner*, 145 T.C. No. 3 (July 27, 2015), the Tax Court pointedly held Treasury regulations to the same standards required of other regulations under the Administrative Procedure Act, showing that while the judiciary seems to have abandoned tax exceptionalism, the IRS seems to persist in keeping it on life support. For perceptive commentary on *Altera*, see Kristin E. Hickman, *Tax Court Delivers an APA-Based Smack-down*, Taxprof Blog, July 28, 2015 http://taxprof.typepad.com/taxprof_blog/2015/07/hickman-altera-corp-subsv-commissioner-the-taxcourt-delivers-an-apa-based-smackdown.html.

19 Charles Phineas Sherman, *Roman Law in the Modern World* 114-15 (1917); *see* Code Just. 10.17.2-3 (Honorian & Theodosian 416) (mentioning taxation in passing when compelling all landowners to pay the amount of tax determined in the “delegation” or the tax levy, but giving no explanation as to how this tax would be determined).
ensure that law would be both transparent and uniform.\textsuperscript{20} Hence, the Corpus Juris Civilis included much of what we would identify as law today: torts, contracts, property, and crimes.\textsuperscript{21} But it did not include much on tax, even though taxation had long been in existence.\textsuperscript{22} The reason for the exclusion of taxation—for its exceptionalist treatment—is that taxation was then seen as the exclusive province of the Emperor.\textsuperscript{23} In other words, the Emperor did not want taxation to be either transparent or uniform. On the contrary: he wanted to retain the power to determine the level and manner of taxation differently for different populations within the empire.\textsuperscript{24} By keeping taxation largely out of the codification that became the Corpus Juris, he could ensure precisely that. And that motivation—the preservation of power that could be exercised opaquely—illustrates what we believe is the trouble with tax exceptionalism. Tax exceptionalism produces the very opacity that Justinian and other Roman emperors may have wanted; but because of that, it threatens the legitimacy of the tax system and of the agency that administers it.

B. Two Types of Exceptionalism

Although tax exceptionalism may have its roots in a desire by the sovereign to preserve greater prerogative over taxation than other areas of law, we do not believe that its longevity is attributable to any similarly sinister motive.

\textsuperscript{20} Id. at 115-16; see Timothy G. Kearley, The Creation and Transmission of Justinian’s Novels, 102 Law Libr. J. 377, 378-79 (2010) (describing the process Justinian used to create the code including a first compilation in 529, the issuance of the “fifty decisions” resolving differences among classical jurists and adding new laws in 530 and 531, and the issuance of the second edition integrating the new legislation into the code and superseding the first edition in 534).

\textsuperscript{21} Id. at 115-16.

\textsuperscript{22} Of course, showing that the Corpus Juris Civilis did not include much on tax is attempting to show a negative—a difficult if not impossible proposition. But finding secondary sources related to tax provisions in the Corpus is exceedingly difficult, which strongly suggests that tax, if included at all, was not included very prominently and certainly was not treated in the way that other fields of law were. A literature search on this subject yielded many analyses of law regarding the social issues of Justinian’s day, including treatment of slaves and the status of women, but legal scholars seem to have avoided analyzing the range of tax law compiled during the massive project. For a brief explanation of how the Corpus was compiled, see Alan Watson, Justinian’s Corpus Iuris Civilis: Oddities of Legal Development and Human Civilisation, 1 J. Comp. L. 461 (2006).

\textsuperscript{23} See R.I. Frank, Ammianus on Roman Taxation, 93 Am. J. Phil. 70 (1972) (describing the origins of taxation in the Roman Republic as a tool of Emperors for raising money for emergencies in wartime meant to be reimbursed later on); see also Arnold H. M. Jones, The Roman Economy 82-83 (P. A. Brunt ed., 1974) (commenting on the lack of documented figures about the rate of agriculture taxation during most of the Roman Empire and the difficulty of estimating the relationship of the tax to the yield of the land except for a couple registrars from the cities of Antaeopolis and Ravenna which show rents amounting to staggering rates of over 50% of the gross yield of the land).

\textsuperscript{24} See Tony Weir, Two Great Legislators, 21 Tul. Eur. & Civ. L.F. 35, 38 n.17 (2006) (describing Justinian’s novellae, which did deal mostly with public and tax law, but which were an unofficial collection of laws enacted after the codification was complete and were not fully enacted until Justinian’s death, as evidence of Justinian’s “obsession with controlling everything”).
We believe that the stubborn persistence of tax exceptionalism is due to an important but previously unidentified and unexplored feature. Tax exceptionalism has two distinct aspects: a visceral aspect and an objective aspect. The visceral aspect is what we described above—tax is experienced as exceptional—exceptionally complex, intrusive, and pervasive. We do not challenge the reality or the intensity of that experience. But we believe that the experience of difference has been reified, so that tax law is thought to be really different—objectively different in kind from other fields of law or, as we said earlier, perhaps not even law at all. It is this second aspect of tax exceptionalism—the objective aspect—which we want to challenge, for its powerful influence on tax scholarship, administration, and adjudication threatens the legitimacy of the tax law and of the agency that administers it.

Our central claim is that when tax is viewed as objectively exceptional—that is, when tax is thought to be fundamentally different in kind from other fields of law—it is deprived of the analytical tools and vocabulary commonplace in other fields of law. That constraint makes tax law appear opaque and the operation of the IRS inscrutable, creating a shroud of mystery and murkiness and contributing to taxpayers’ visceral experience of tax exceptionalism, thereby perpetuating the cycle. Unmasking and then abandoning that objective aspect of tax exceptionalism, therefore, has significant implications for tax law, tax administration, and the legitimacy of the IRS. It will allow the IRS to exercise both interpretive authority and enforcement discretion in ways that are open and transparent and that communicate to the public precisely what it is doing and why it is doing it.

III. Interpretation and Enforcement

Several features of the tax system combine to generate a powerful desire for certainty and predictability: the pervasiveness of taxation; the structure of the income tax system, which invites taxpayers to engage in specific transactions in specific ways to produce a specific tax result; and the need to account to the government on a regular basis. Accordingly, taxpayers’ visceral experience of tax exceptionalism includes a longing for rules, for a strictly limited interpretive role for the IRS, and for a rejection of any kind of robust enforcement discretion on the part of that agency. Standards, interpretive authority, and enforcement discretion feel like the enemies of certainty and predictability.

But a conclusion that tax is objectively exceptional need not follow from this visceral experience. That is, just because many, if not most, taxpayers long for certainty and predictability (for understandable reasons), it does not follow that tax law really consists almost entirely of rules and that the IRS really lacks strong interpretive authority and enforcement discretion. We argue that tax law and tax administration are not objectively exceptional. That is, we believe that tax is law and as such is composed of standards as well as rules, and that the IRS has the same powers and is subject to the same constraints that all administrative and enforcement agencies have.
A. Interpretive Authority

We turn first to the matter of rules and standards and their relationship to the IRS’s interpretive authority. As noted above, one of the ways in which tax is thought to be objectively exceptional manifests itself in the assumption that the tax law is composed exclusively of rules. Of course, certain features of the tax law invite that assumption: the existence of a massive, detailed, and complicated codification, the need to reduce tax liability to a specific number, and the importance of treating similarly situated taxpayers similarly, all seem to demand the clarity and consistency that are the hallmark of rules. In addition, the frequency with which taxpayers turn to tax professionals for a prediction of how the tax law will apply makes those professionals long for clear, consistent rules.

Nevertheless, nothing in the theory or policy of taxation demands that the tax law be composed exclusively of rules when other fields of law are acknowledged to be composed of both rules and standards, or, more accurately, of provisions that lie at various points in the rules–standards continuum. If the criminal law can deprive an individual of life and liberty based on provisions that are acknowledged to be standards, why not the tax law? The criminal law has rules, but ‘reasonable doubt’—that is a standard.

We believe that like the criminal law the tax law employs both rules and standards, but the failure to acknowledge that impedes analytical clarity. An example will help to explain.

In prior work we have claimed that the unexamined assumption that the tax law is composed only of rules has led to much handwringing over the definition of income.25 As all United States tax lawyers know, the statute provides that “except as otherwise provided . . . , gross income is income from whatever source derived . . . ,”26 and the United States Supreme Court in Glenshaw Glass,27 put meat on those bones by explaining that income consisted of “all undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.”28 Yet, the IRS has asserted that government

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25 See Alice G. Abreu & Richard K. Greenstein, Defining Income, 11 Fla. Tax Rev. 295 (2011) [hereinafter Defining Income]. Given the specifically international context of this Conference it is interesting to note that scholars in other countries, writing about other tax systems, have struggled with precisely the questions we addressed in Defining Income. Notably, Lotta Bjorklund Larsen, a Swedish scholar, has wrestled with precisely the definitional issue we have, examining the concept of income in the Swedish income tax in Common Sense and the Swedish Tax Agency: Transactional boundaries that separate taxable and tax-free income, ScienceDirect, Aug. 31, 2015, http://www.sciencedirect.com/science/authShare/S1045235415000520/20150808T215300Z/1?md5=14efcf2d625e894d91ab0c186d6d2e84f8&cookieChk=y. We see common ground in what she describes as a ‘common sense’ approach to determining the definition of income and what we describe as interpretation of a standard informed by reference to the values relevant in a field of law, as all standards are.

26 I.R.C. § 61(a).


28 Id.
transfer payments are not income, although they are clearly accessions to wealth, clearly realized, and nothing in the statute excludes them. Although this “general welfare exclusion” is eminently sensible as a matter of policy, the technical and theoretical rationale for it has befuddled scholars and commentators: If all accessions are income unless excluded by statute, how can the IRS categorically maintain that such a broad and economically significant category of accessions is not income absent a statutory exclusion? How can the receipt of cash, not as a gift, not be income?

We believe that untangling this conundrum is easy. It only requires acknowledging that tax law, like other fields of law, is composed of both rules and standards and that the definition of income is a standard, constructed by the values that inform that field of law. Treating government transfer payments as income would run counter to the values important in taxation, so of course it should not be done.

Analyzing the definition of income as a standard resolves the conundrum. It allows the IRS to interpret the term so as to reach a sensible result that comports with the values that animate the tax law and explains the law as administered. If the IRS acknowledged that the definition of income is a standard and that it is exercising its interpretive authority in defining income, its actions would be transparent and legitimate. The IRS would not need to create an exclusion in the face of statutory language confining exclusions to the Code, which seems lawless and illegitimate. Interpreting the term “income” as a standard, the application of which results in a conclusion of no income in a particular case, offers transparency and legitimacy.

Transparency would also make the tax law more predictable. If tax advisors, and eventually taxpayers, know that the IRS interprets “income” as a standard informed by tax values that implicate what it is reasonable and administratively feasible to include in the tax base, they can more accurately predict whether the IRS would likely interpret a particular item as constituting income.

For example, with income-as-standard, the kerfuffle over the tax treatment of caught record-breaking baseballs need not have occurred. If income is a standard, it would not follow that because the indisputably valuable baseball

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29 Examples are payments under the Temporary Aid to Needy Families (TANF) program, medical and hospitalization services provided by Medicaid and Medicare, and public education. See Defining Income, supra note 25, at 308-09.


31 For a discussion of these values and their application, see Defining Income, see supra note 25, at 334-36, 339-48.
is a realized accession, it must be income.\textsuperscript{32} The valuable baseball would only
be income if interpreting the term income to include the caught baseball
would be consistent with the values important in taxation, including admin-
istrability as informed by community expectations.\textsuperscript{33}

It is the myth of income-as-rule that leads to the conclusion that catching
the valuable baseball produces income, and it is the assumption of tax excep-
tionalism that leads to the myth of tax law as consisting only of rules. If the
\textit{Glenshaw Glass} definition of income were not viewed as a rule, the conclusion
that catching the valuable baseball produced income would not have been
seen by so many tax professionals, inside and outside the IRS, as inevitable.\textsuperscript{34}
A more nuanced analysis could have been undertaken from the start, and the
calls for congressional action and the introduction of legislation could have
been averted. The IRS could have simply stated that it was construing the
term income so as to not include caught baseballs because including them
would be contrary to important tax values, like administrability as informed
by community expectations.

Instead, the agency had to scramble to come up with a rationale that would
produce the obviously sensible no-income result while not acknowledging
that what it was doing was interpreting the \textit{Glenshaw Glass} definition as a
standard. The rationale it came up with (an agency theory) plausibly resolved

\textsuperscript{32}As we explained in \textit{Defining Income}:

When contemporary players began to threaten long established home run records [in
the late 1990s], it was clear that any ball that broke such a record would become a
collector’s item worth substantial amounts of money. When the records began to be
broken and a fan caught the record-breaking ball, the tax controversy erupted. Prac-
titioners, academics, and former IRS Commissioners all agreed that catching the ball,
like finding old currency in a used piano, which was held to be income in a case known
to virtually every student of taxation, resulted in the realization of income. But the
public and Congressional outcry at such a prospect was fierce . . . Scholarly articles
were written and the question was debated, but the IRS’s position remains unknown.

\textit{Defining Income}, supra note 25, at 319 (footnotes omitted). The receipt and retention of
the baseball is clearly a realization event because it changes the legal relationship of the recipient to
the baseball, giving the recipient something she did not have before. Cottage Savings v. Com-
missioner, 499 U.S. 554 (1991); Helvering v. Bruun, 309 U.S. 461 (1940); see Lawrence A.
Zelenak & Martin J. McMahon, Jr., \textit{T axing Baseballs and Other Found Property}, 84 Tax Notes
(TA) 1299, 1300 (1999) (reporting former IRS Commissioner Donald Alexander’s opinion
that a record-breaking baseball is income when caught by a fan, documenting that Alexander’s
opinion was “universally shared among tax experts,” and attributing the “unanimity of expert
opinion” to its reliance on the literal language of Treas. Reg. § 1.61-14); see also Joseph M.
Dodge, \textit{Accessions to Wealth, Realization of Gross Income, and Dominion and Control: Applying
the “Claim of Right Doctrine” to Found Objects, Including Record-Setting Baseballs}, 5 Fla. Tax

\textsuperscript{33}We develop the role of values and conformity with community expectations in promot-
ing administrability in \textit{Defining Income}, and we point out that interpretations that run coun-
ter to community expectations are necessarily more difficult to administer and enforce than
those that are consistent with such values and expectations. \textit{Defining Income}, supra note 25, at
334-36, 345.

\textsuperscript{34}See Zelenak, supra note 31; Dodge, supra note 31.
the question in the initial incident that began the controversy (caught baseball immediately returned to the batter) but left open the question of the treatment of other situations (caught baseballs kept by the fan). It did succeed in quelling the popular uproar, and that made legislation unnecessary.

The reason the IRS has not simply said that caught baseballs are not income remains shrouded in mystery. And the absence of an answer to the question why a valuable caught-and-kept baseball should not be treated as an accession to wealth caused a subsequent IRS Chief Counsel to cover his head with his hands and plead “please don’t ask me that.”

But the drama over caught baseballs could have been avoided completely if the IRS had felt it could state transparently what it seems to us it was clearly doing: interpreting the definition of income as a standard, to be operationalized by the application of relevant values, such as administrability as informed by community expectations. Had it done that, its actions would not have seemed out of touch, and in need of congressional correction. The predictability of the law would have been enhanced, as advisors could have clearly told the fortunate fans who caught valuable baseballs what the tax consequences of the happy event would be—no income until sale. And the legitimacy of the agency’s actions would also have been enhanced.

Similarly, if the definition of income is acknowledged to be a standard, pronouncements like Ann. 2015-22 (assuring taxpayers that the IRS will not treat as income identity protection services provided to victims of identity theft by employers or other organizations), would not be regarded as surprising exercises of administrative largesse. They would be seen just as lawful and legitimate exercises of the administrative function.

The key to this more transparent, predictable view of tax administration is accepting that tax law is just law. This, in turn, requires abandonment of the objective aspect of tax exceptionalism. Stripped of its exceptionalist cloak, tax law becomes just law and the IRS just an administrative agency, subject to the same constraints, but able to exercise the same powers, as other agencies.

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35 Tom Herman, *The Big Catch Could Have a Big Catch*, Wall St. J. July 25, 2007, at D1. The Chief Counsel in question was Don Korb. *Id.*

36 In this case the relevant community expectations include the expectation that going to a baseball game and being fortunate enough to catch the record-breaking baseball is not an appropriate occasion for taxation.

37 Announcement 2015-22, 2015-35 I.R.B. 288, provides that:

The IRS will not assert that an individual whose personal information may have been compromised in a data breach must include in gross income the value of the identity protection services provided by the organization that experienced the data breach. Additionally, the IRS will not assert that an employer providing identity protection services to employees whose personal information may have been compromised in a data breach of the employer’s (or employer’s agent or service provider’s) recordkeeping system must include the value of the identity protection services in the employees’ gross income and wages. The IRS will also not assert that these amounts must be reported on an information return (such as Form W-2 or Form 1099-MISC) filed with respect to such individuals.
B. Enforcement Discretion

Under the more nuanced analysis that we propose—tax as Everylaw—the public view of the administering agency can change, and otherwise obscure agency actions can become clear. Not only could the IRS use openly its interpretive authority, like other administrative agencies, but it could also openly use its enforcement discretion, even if that exercise takes the form of categorical nonenforcement.38 A recent example illustrates this point.

In Notice 2014-23,39 the IRS announced that a married individual who could not and did not file a joint return and whose only filing option under the relevant statutory provisions was to file a separate return, would nevertheless be treated as having filed a joint return. Specifically, the Notice provided that an individual would:

satisfy the joint filing requirement of § 36B(c)(1)(C) if the taxpayer files a 2014 tax return using a filing status of married filing separately and the taxpayer [indicates on his or her 2014 income tax return that the taxpayer . . . is living apart from the individual’s spouse at the time the taxpayer files his or her tax return [and] . . . is unable to file a joint return because the taxpayer is a victim of domestic abuse . . . .40

Hence, pursuant to the Notice, some separate returns would be treated as if they were joint returns. For us, the crucial questions are: why and where does the IRS get the authority to say that a separate return is a joint return? Nowhere in the statute does it say that under some circumstances a separate return will be treated as a joint return, or even that the IRS has the specific authority to treat some separate returns as joint returns under some circumstances.

We do not quarrel with, and indeed we endorse, the policy objective that generated this result. Notice 2014-23 addresses the plight of victims of domestic abuse and abandonment who for a number of reasons cannot and in many cases emphatically should not file a joint return, but nevertheless would not qualify for the Head of Household (HOH) status that allows married individuals to file as not married.41 Because the statute allows otherwise qualifying married individuals to obtain the health insurance “Premium Tax Credit” only if they file a joint return, a married individual who cannot file jointly as a result of domestic abuse or abandonment would necessarily forfeit the credit. That is a demonstrably unfair result.

Nevertheless, the statute does not contain an explicit safety valve. It has no provision for a waiver of the joint return requirement when such filing is precluded by exigent circumstances. It also has no provision specifically delegating to the Secretary of the Treasury the authority to promulgate regulations specifying circumstances under which a separate return may satisfy the

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38 For discussion of categorical nonenforcement, see note 50, infra, and accompanying text.
41 I.R.C. § 7703(b).
statutory joint return requirement, even though numerous statutory provisions do provide such broad grants of regulatory authority.42 Although the result achieved by the Notice and confirmed and extended by the subsequent proposed and temporary regulation is clearly correct as a matter of policy, there is no theoretical justification for it under traditional tax analysis.43 That is because the statute contains explicit, detailed provisions setting forth the very limited circumstances when a filing status other than married—HOH—will be available to an individual who is married under state law.44 Therefore, saying that an individual who does not meet the statutory requirements for HOH status, and who must and does file a separate return, has filed a joint return cannot reasonably be said to be an interpretation. A separate return cannot reasonably be interpreted to be a joint return.

If the analysis were to stop there, the IRS’s issuance of Notice 2014-23, however equitable and welcome by taxpayers, would have to be regarded as lawless. Nevertheless, we do not think such a conclusion is warranted. The reason is that when the tax law is not seen as objectively exceptional, but is seen as Everylaw, another lawful and even rather ordinary explanation reveals itself. That explanation is that the IRS was exercising the enforcement discretion that all administrative agencies possess. It was simply deciding not to enforce the law under circumstances that made enforcement unfair or unwarranted. And it was performing an important public function by announcing its decision ex ante. That action brings certainty and predictability to the law.

In short, in Notice 2014-23 the IRS was behaving like a District Attorney who announces that he will not prosecute individuals accused of possessing less than 30 grams of marijuana.45 In such a situation the positive law has

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42 See, e.g., I.R.C. §§ 336(e), 337(d), 338(b)(3)(A), 338(e)(3), 338(h)(8), (10), (15), and 338(i), all of which confer broad regulatory authority far beyond interpretation of specific statutory language. These provisions are properly read as narrowly focused congressional delegations of interpretive authority to Treasury, enabling it to achieve desirable results through the promulgation of specific interpretive regulations. As our discussion of Notice 2014-23 indicates, Treasury can, in the absence of such interpretive authority, achieve similar desirable results through the proper exercise of its enforcement discretion. This in turn illustrates the often complex relationship between an agency’s interpretive authority and its enforcement discretion. We will develop this relationship in future work.


44 I.R.C. § 7703(b).

not changed and the prosecutor is not purporting to interpret that law to no longer forbid possession of marijuana. 46 He is simply exercising prosecutorial discretion. Although the wisdom of that exercise can reasonably be debated, the very possibility of open debate lends it legitimacy. The announcement makes the decision transparent and, thus, subject to the democratic process.

Our claim is that the IRS should behave likewise, but it can only do so by embracing its status as an administrative agency, no more or less powerful than any other. Abandoning the objective aspect of tax exceptionalism allows that, and the resulting benefits are transparency and legitimacy. When the agency can articulate its motives clearly, those motives can be understood, debated, and accepted or rejected. Moreover, if tax advisors and other professionals can understand and explain the agency’s actions to the taxpayers affected by them, those taxpayers can have increased confidence in the agency itself and in the legitimacy of its actions. Respect for the system and increased compliance should result. 47

Put another way, taxpayer rights should include the right to be informed not only about the position the IRS has taken, but also why it has taken it. Abandoning the objective aspect of tax exceptionalism will give the IRS the freedom it needs to exercise the powers it has, and to bring that exercise to light, where full debate can occur.

We are not suggesting that the IRS relinquish its right to keep necessary secrets, such as the DIF score and other criteria for selecting returns for audit. 48 Nor are we suggesting that the IRS should not be permitted privacy in its deliberations. What we are saying is that when the IRS exercises its interpretive authority or its enforcement discretion, it is exercising its legitimate

46 In the case of the announcement by the Philadelphia District Attorney discussed in supra note 45, the reaction of the police, which refused to stop making arrests because the criminal status of the action had not changed, illustrates this vividly. See Masterson, supra note 45.

47 This is where our perspective differs from that of many other advocates for taxpayer rights: our concern is not limited to the perceptions of taxpayers, but extends to those who interact with the tax system as tax scholars, judges, lawyers, and other professionals. As described earlier, these individuals mediate taxpayers’ understanding of the tax system and IRS action. How those actors view the tax system therefore plays a crucial role in how taxpayers experience that system; whether in the public or private sector, these actors occupy the space between congressional enactments and the taxpayer’s experience of the tax system. They are the priests who administer religion to the masses, not only through direct advice but also through commentary in the media, and how those priests view and portray the religion matters.

powers as an agency and should, accordingly, be forthright about what it is doing.49

We recognize that we are treading on very controversial ground here. Recent presidential announcements of non-prosecution and other high-profile executive enforcement decisions have brought the subject of “categorical non-enforcement” to the forefront of both the public and academic agenda, and a rich literature is developing around it.50 Nevertheless, bringing the actions of the IRS within that larger discussion is precisely our point. There is no question that the IRS exercises enforcement discretion, and sometimes it does so forthrightly, but those instances are rare.

For example, in Rev. Proc. 2015-57, the IRS announced that it would “not assert that certain taxpayers, whose Federal student loans are discharged under [two] Department of Education . . . discharge process[es], must recognize gross income as a result of [those] discharge process” or that such taxpayers would owe additional taxes as a result of previously having claimed any of a variety of education credits.51 Here, the IRS did precisely what we advocate it should do routinely: it explained the reason for its decision to announce its categorical nonenforcement of a provision. The IRS first noted that many taxpayers would be able to exclude the discharges in question under one of a variety of statutory provisions. Nevertheless, it excused all taxpayers from having to determine the applicability of those provisions by explaining that:

determining whether one or more of these exceptions is available to each affected borrower would require a fact intensive analysis of the particular borrower’s situation to determine the extent to which the discharged amount is eligible for exclusion under each of the potentially available exceptions. The Treasury Department and the IRS are concerned that such an analysis would impose a compliance burden on taxpayers, as well as an administrative burden on the IRS, that is excessive in relation to the amount of taxable income that would result. Accordingly, the IRS will not assert that a taxpayer within the scope of this revenue procedure recognizes gross income as a result of the Defense to Repayment discharge process.52

49We recognize that the concepts of interpretive authority and enforcement discretion are not necessarily binary or clearly distinct, but are often ends of a spectrum. See Alice G. Abreu & Richard K. Greenstein, The Rule of Law as the Law of Standards: Interpreting the Internal Revenue Code, 64 DUKE L. J. ONLINE 53, 81-86 (2015), available at http://dlj.law.duke.edu/2015/01/the-rule-of-law-as-a-law-of-standards-interpreting-the-internal-revenue-code/ [hereinafter Law of Standards]. Nevertheless, we believe that at a minimum, in those cases in which the distinction can be made, the IRS should be open and forthright about making it.

50See, e.g., Leigh Osofsky, The Case for Categorical Non-Enforcement, 69 TAX L. REV. 489 (forthcoming 2016) [hereinafter Categorical Non-Enforcement]. These include the President’s action with respect to immigration (DACA, the Deferred Action for Childhood Arrivals program, and DAPA, the Deferred Action for Parental Arrivals program) the Department of Justice’s decision to let states who have legalized marijuana for medicinal or recreational purposes enforce their laws without interference from Federal law, which prohibits all use of marijuana, and the decision to defer implementation of certain portions of the Affordable Care Act. Id.


52Id.
The precision and clarity of that explanation is a vibrant example of the kind of transparent exercise of enforcement discretion that we believe essential to the legitimacy of the agency and its actions. Our criticism is that the agency does not speak so forthrightly often enough.

Another example will illustrate this point. Most tax lawyers recall many of the events surrounding the collapse of the financial markets seven years ago, in Fall 2008, when some institutions were deemed to be “too big to fail.” Among those was Wachovia Bank. It turned out that Wells Fargo was willing to acquire Wachovia and thus save it from collapse or the need for a government-funded rescue, but as is usually true, willingness to acquire depended on the price of acquisition. In this case the problem was that section 382, which was enacted to provide clear rules limiting the use of pre-acquisition net operating losses subsequent to an acquisition, would have prevented Wells Fargo from using Wachovia’s very substantial losses after the acquisition. If Wells Fargo could not use the Wachovia losses to offset future tax liabilities, it might not have been willing to buy Wachovia, or it might not have been willing to offer enough to make the transaction possible. This is because use of the losses meant that a portion of the purchase price would be recovered through lower future tax payments. However, section 382, which applies to “corporations,” would have prevented that, since banks are corporations and nothing in the statutory language exempts them from the operation of section 382.

Then the IRS issued Notice 2008-83. In that Notice the IRS proclaimed, without any explanatory rationale, that it was “studying” the application of section 382 to banks and that until further notice, section 382 would not apply to banks. Commentators reacted swiftly and negatively, pointing out that nothing in the text or legislative history of section 382 even remotely suggested that the provision should not apply to corporations that happened


55 Id.

to be banks. Of course, Wells Fargo and Wachovia likely rejoiced, for the acquisition proceeded, but the issuance of the Notice, and a similar one that followed in 2010 regarding the sale of the Government’s stake in General Motors, left distrust of the agency’s action in its wake. Although Congress stepped in to undo the effect of the Notice, at least prospectively, the IRS action hardly looked legitimate.

Now consider an alternative narrative, one in which instead of purporting to be “studying” the interpretation of section 382, the IRS felt free to acknowledge what many, including us, believe it was doing: exercising enforcement authority to suspend the application of section 382 because exigent circumstances—the threat of wholesale economic collapse—required it. In other words, imagine what might have happened if the IRS had been able to behave openly, like any other enforcement agency which has the ability to exercise enforcement discretion. We believe that if the IRS had acted with such candor and forthrightness, saying precisely what it was doing and why, it would not have been subject to the type of criticism that followed the issuance of the Notice. While such an action would not have been uncontroversial, it would have been transparent. The real question (whether extraordinary financial conditions not anticipated by Congress when it enacted the

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57 See Lee A. Sheppard, Technical Objections to the Bailout, Part 2, 121 Tax Notes (TA) 359 (Oct. 27, 2008) (claiming that issuance of Notice 2008-83 was an illegal use of IRS power to interpret the law and that “section 382 is not a well-drafted provision . . . but it is the law, and the Constitution says Congress makes the law”); see also Built-In Loss Limit Rules: Didn’t Congress Get the Memo?, 121 Tax Notes (TA) 627 (Nov. 3, 2008) (describing the decision to not inform Congress about Notice 2008-83 and abide by the congressional Review Act as a “blindsight”); Paul Caron, Tax Lawyers Decry Financial Bailout NOL Tax Break for Banks, TaxPROF Blog, Nov. 10, 2008, http://taxprof.typepad.com/taxprof_blog/2008/11/tax-lawyers-decry-financial-bailout-nol-tax-break-for-banks.html (quoting George K. Yin, the former Chief of Staff of the Joint Committee on Taxation, on the issuance of Notice 2008-83, “Did the Treasury Department have the authority to do this? I think almost every tax expert would agree the answer is no.”); Citizens for Tax Justice, New IRS Ruling on Bank Acquisitions Imposes Major Federal Corporate Tax Cuts—and Will Hurt States Too, CITIZENS FOR TAX JUSTICE, Nov. 7, 2008, http://www.ctj.org/pdf/irsruling20081106.pdf (claiming by issuing Notice 2008-83 the IRS “usurped the legislative role of Congressional tax writers” and the IRS had no power to make such substantive changes to the law); Shenoi, supra note 53 (arguing there is “no textual basis” for providing an exception to section 382 for banks and that the notice was inconsistent with the text of section 382); Lawrence Zelenak, Can Obama’s IRS Retroactively Revoke Massive Bank Giveaway?, 122 Tax Notes (TA) 889 (Feb. 16, 2009); Victor Fleischer, NOLs and the Rule of Law, TAXPROF BLOG, Nov. 23, 2008, http://taxprof.typepad.com/taxprof_blog/2008/11/nols-and-the-rule-of-law.html (suggesting that it is unlikely that “Congress delegated lawmaking authority to the Treasury to make [a] new exception to the statutory language”).

58 Notice 2010-2, 2010-1 C.B. 25. We believe that Notice 2010-2 implicates somewhat different considerations than Notice 2008-83; we discuss these in Law of Standards, Abreu & Greenstein, supra note 49, at n.144.

59 American Recovery and Reinvestment Tax Act of 2009, Pub. L. No. 111-5, § 1261(a), 123 Stat. 115 (stating that the IRS lacked authority to exempt “particular industries or classes of taxpayers” from section 382 and that Notice 2008-83 was “inconsistent with the congressional intent” with regard to section 382).
section 382 limitations, justified suspension of those limitations in the case of an acquisition of a failing bank by another bank) could have been debated openly. The position taken in the Notice could then have been limited to the duration of the financial crisis, and the congressional action against the IRS action may well have been averted. Abandoning objective tax exceptionalism and acknowledging the IRS to be an agency like any other would permit such openness and the attendant transparency and legitimacy gains.

IV. Conclusion

We are not unmindful of the magnitude of the change we are calling for. The IRS has long thought of itself and of the tax law as exceptional, and we know that changing longstanding habits of thought and action will require a herculean effort. But we think that the transparency and legitimacy gains are well worth that effort. Although the job of a tax collector is hardly likely to allow the IRS to win a ‘most popular Federal agency award,’ the suspicion and distrust with which the IRS is viewed in some quarters today pose a grave threat to the integrity of the tax system. That alone justifies consideration of a shift in behavior. We propose that abandoning the objective aspect of tax exceptionalism be an integral part of that shift.

60 See supra note 18 and accompanying text.

61 The recent proliferation of academic papers that provide mechanism for “saving the IRS” is indicative of the increasing severity of the problem. See, e.g., Donald B. Tobin, The Internal Revenue Service and a Crisis of Confidence: A New Regulatory Approach for a New Era, 16 FlA. Tax Rev. 429 (2014); George K. Yin, Saving the IRS, 100 Va L. Rev. Online 22 (2014), available at http://www.virginialawreview.org/sites/virginialawreview.org/files/Yin_final.pdf; Ellen P. Aprill, Reforming the Charitable Contribution Substantiation Rules, 14 FlA. Tax Rev. 275 (2013); Ellen P. Aprill, Fixing the IRS: Clarify the Rules on Political Involvement, CHRON. OF PHILANTHROPY, June 3, 2013, http://philanthropy.com/article/article-content/139583 (suggesting that hard line rules on the prohibition of partisan politics for exempt organizations may help fix the IRS); Cindy M. Lott, Fixing the IRS: Provide More Money for Enforcement, CHRON. OF PHILANTHROPY, June 5, 2013, https://philanthropy.com/article/Fixing-the-IRS-Provide-More/154757; Lloyd Hitoshi Mayer, ‘The Better Part of Valour Is Discretion’: Should the IRS Change or Surrender Its Oversight of Tax-Exempt Organizations?, COLUM. J. TAX L. (forthcoming 2016, available at http://ssrn.com/abstract=2658325). Despite the difficulty of imagining the IRS as anything other than the agency everyone loves to hate, it is worth observing that the mere fact that the agency’s chief task is the administration of the tax system need not doom it to unpopularity. As an example, Sweden has one of the highest tax burdens in the world, but its tax agency is one of the most popular in the country. As Lotta Bjurklund Larsen has observed:

Known as one of the most highly taxed populations in the world, Swedes contribute a large share of their wages as tax. How the Agency collects a considerable amount of money from each taxpayer (Sweden has one of the highest tax levels in the world) while being a governmental institution that Swedes currently in the highest esteem of all the nation’s government agencies (Ekonomistyrningsverket, 2012) makes the Agency an interesting object of study. The Agency is aware of its vulnerable position and works continuously with legitimacy questions. (Footnotes omitted).

Larsen, supra note 25 at 78.
How Can Tax Collection Be Structured to Observe and Preserve Taxpayer Rights: A Discussion of Practices and Possibilities

KEITH FOGG* & SIME JOZIPOVIC**

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I. Introduction

Tax collection occurs in many ways, which generally can be categorized as either voluntary or involuntary. The bulk of tax collection occurs voluntarily and without much thought or incident as taxpayers purchase products with a tax imposed at the source of payment, as employers withhold taxes on wages, or as taxpayers make a voluntary remittance with an estimated payment or a tax return. The discussion about taxpayer rights and collection will not focus on this voluntary, routine collection of taxes but rather on the enforcement mechanisms used by the government when the routine collection has failed.

The decisions concerning collection of taxes from persons who have not voluntarily paid impact not only the individual facing liability but also society as a whole. If the government does not have adequate mechanisms to pursue collection from those who do not pay voluntarily, citizens may be discouraged from paying. Over time, this failure to collect could become a failure that renders the tax system either unfair to those properly participating or unworkable if enough citizens “opt out.” Conversely, the government must pursue collection from those who do not pay voluntarily in a manner that does not drive them to an underground economy, to discontinue producing income or to economic positions that fall through the necessary social safety net.

In structuring a workable collection process, the government should build a system that recognizes taxpayer rights. Some of the questions it might face in making these decisions include what systems of checks and balances need to be in place to ensure that tax collection maximizes recovery of funds for the state while minimizing harm to the persons owing the tax? What relief mechanisms in either the tax system or bankruptcy system should exist to allow a person owing a tax debt to avoid being pushed out of the social safety net? How much judicial and administrative oversight is needed in the collection system to preserve taxpayer rights? How long should a taxpayer bear responsibility for a tax debt? What systems must be in place to ensure that a taxpayer has the right to challenge their responsibility for a tax debt imposed in a joint or multiparty context such as marriage or a business? Should travel restrictions based on tax debt exist and, if so, how should such restrictions be enforced? How should countries work together to collect debts when a taxpayer and their assets cross international borders? What systems should exist to ensure taxpayer rights when one country uses its power over the person or property to collect from citizens of another country?

In the context of enforced tax collection, this Article will focus on three taxpayer rights the government should preserve in building an effective system: (1) the right to be informed, (2) the right to challenge the underlying liability and the proposed collection action, and (3) the right to a fair and just tax system. In order to provide a broad outlook on these principal taxpayer rights, this Article will discuss the tax collection systems of six countries: the United States, England, Germany, Switzerland, Croatia, and Australia. Within the context of each country’s enforcement mechanism, this Article will highlight
how the identified taxpayer rights are viewed and determine the efficacy of each system structure in protecting the rights of its citizens.

Finally, after outlining the collection process of each country, this Article will offer concrete observations on how to best protect the identified taxpayer rights when collecting from citizens who did not voluntarily pay, considering the rights and needs of individual citizens, as well as the needs of society as a whole.

II. United States

A. Basic Structure of Tax Collection System

In the United States, the collection of taxes from those who do not voluntarily pay begins with assessment. Without an assessment, no recorded liability exists against the taxpayer. To understand the collection system and the rights citizens have, a brief discussion of the process leading to assessment lays the necessary foundation.

Most assessments result when taxpayers voluntarily tell the Internal Revenue Service (IRS) that they owe a tax. This system has the name “self-assessment system” because in most cases the taxpayer provides the information for the amount of the tax, as well as grants permission for the IRS to assess the tax. If the self-assessment aspect of the system works properly, the taxpayer knows when an outstanding tax liability exists, knows the amount and knows the reason for its existence. Accordingly, the taxpayer has the necessary information to understand why and when the collection of non-voluntarily paid taxes commences. As discussed further below, this part of the assessment system provides the taxpayer with the type of information that satisfies any “right to know” concerns.

Not every assessment, however, results from amounts reported on a return submitted by the taxpayer. Taxes assessed in alternate methods have a much greater chance of requiring the application of collection procedures. While these types of assessments represent a relatively small fraction of the overall assessments, they constitute a relatively high percentage of the taxes the IRS must collect through some process other than voluntary payment. If the taxpayer does not consent to assessment by filing a return, the IRS must find permission to assess from another source. Through the process of examination, the IRS determines whether the amount reported on a return for the period at issue matches the correct amount of tax calculated by the IRS from facts applicable to the taxpayer’s circumstances or, where the taxpayer fails to file a return, the IRS determines the amount the taxpayer should have reported on the return.

During the examination process the taxpayer may agree with the findings of the IRS and consent at that point to an assessment of additional tax not reported on a return. Where the taxpayer disagrees, or simply fails to agree, with the IRS’s findings, the IRS then must issue a notice of deficiency or notice of intention to assess—depending on the type of tax. In the case of a
notice of deficiency, if the taxpayer fails to petition the Tax Court, the IRS is granted permission to assess by default; if the taxpayer loses all or a portion of the Tax Court case, the IRS is granted permission to assess through such loss. While these processes leading to assessment require either the taxpayer’s consent or notice to the taxpayer prior to the assessment, these safeguards may prove inadequate to inform the taxpayer of liability in cases where the taxpayer lacks understanding of the process or fails to receive the notice.\(^1\)

Whether the assessment results from self-reporting or from an examination, the assessment causes the IRS to search its records for payment(s) that satisfies the liability. If the IRS finds insufficient payments exist on the account for the tax period at issue, it will initiate its collection process. First, the IRS notifies the taxpayer that an unpaid balance exists. The action, required by Code section 6303, carries the name “Notice and Demand.” The IRS should send the notice and demand letter to the taxpayer within 60 days of the assessment. The statute requires that “[s]uch notice . . . be left at the dwelling or usual place of business of such person, or shall be sent by mail to such person’s last known address.” This letter alerts the taxpayer that the collection process has begun by stating the amount of unpaid tax and the tax period(s) to which the unpaid liability relates and requesting payment within 10 days.

If the taxpayer does not respond to the notice and demand by making full payment, a federal tax lien comes into existence.\(^2\) This lien, known only to the IRS and the taxpayer, attaches to all of the taxpayer’s property and rights to property. Because the assessment of the tax and the non-payment of the assessment remain cloaked in secrecy by the disclosure laws set forth in Code section 6103, no one else knows of the taxpayer’s delinquent tax liability at this point.\(^3\)

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\(^1\)This Article does not attempt to describe every possible basis for assessment. In rare cases, the IRS can assess immediately and without the taxpayer’s consent because it determines that the taxpayer’s action places collection of the tax in jeopardy. The IRS may also assess where it determines the self-reported tax form contains a math error. Both situations involve notice to the taxpayer prior to assessment or immediately thereafter in the case of jeopardy. Another possible circumstance of assessment results when a thief steals the taxpayer’s identity and files a return using the taxpayer’s name. In such a situation, the possibility for collection action against the taxpayer where the actual taxpayer received no prior notice exists because the thief has confused the IRS and the taxpayer has no knowledge of the theft of the identity. This Article will not discuss collection in the context of identity theft because the thief’s actions have derailed the normal process; however, the IRS must pay attention to pleas of taxpayers who claim no knowledge of a liability to ascertain if it has resulted from the actions of an identity thief.

\(^2\)I.R.C. §§ 6321-22.

\(^3\)The tax debt remains a private matter between the IRS and the taxpayer unless and until the IRS decides to make it public by filing a notice of the federal tax lien, one of three administrative processes the tax code provides to the IRS to obtain collection from the taxpayer who does not voluntarily pay.
After sending the notice and demand letter, the IRS typically sends the taxpayer two reminder notices by mail. Though not required by statute, these reminder notices bring in sufficient revenue to the IRS that the benefits outweigh the costs of preparation and mailing. The notices also serve to further inform the taxpayer about the existence of the liability. Absent voluntary payment at this point the IRS will use the collection processes given to it in the statute. The processes include offset, lien, and levy.

Section 6402 grants the IRS authority to take funds otherwise due to the taxpayer from the IRS and divert them to pay any outstanding assessments. The IRS typically uses this process when the taxpayer files a tax return seeking a refund in a year subsequent to the year in which the assessment occurred. If the IRS agrees with the refund request, it will simply offset the refund against the outstanding liability and remit to the taxpayer any excess. When the IRS makes a refund offset, it notifies the taxpayer by letter that it has affected the offset and provides information regarding the amount of the refund and the tax and period to which it was applied.

As mentioned above, the IRS can make public the fact that it has a lien on the taxpayer’s property. The process of making the lien public involves the filing of a notice of federal tax lien in the location where the taxpayer resides, where the taxpayer has real property or at the taxpayer’s principal place of business. The filing of this notice, in a public record in a local court or with a state agency, alerts other current or potential creditors of the taxpayer of the existence of the federal tax liability including notice of the amount of the liability and the relevant period(s). When the IRS files this notice, it alerts the taxpayer by letter. The first time the IRS files this notice for a tax period, it sends the taxpayer a Collection Due Process (CDP) notice giving the taxpayer the opportunity to request an administrative hearing with the Appeals Office of the IRS and potentially to be heard in the Tax Court regarding the appropriateness of filing the notice and possible collection. This type of hearing is remedial rather than preventative and therefore can occur only after the filing of the notice of lien.

The filing of the notice of federal tax lien does not, by itself, require the payment of the outstanding taxes. It does, however, put financial and public pressure on the taxpayer to resolve the liability. Moreover, the filing of the notice will effect payment if the taxpayer sells real property since any buyer will want clear title to the property unencumbered by the federal tax lien. Finally, the impact of the notice of lien on the taxpayer’s credit score provides

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5 I.R.C. § 6323(g).

6 I.R.C. § 6320. The notice must be sent to the taxpayer’s last known address by certified mail return receipt requested.
a significant incentive for the taxpayer to pay the tax, if possible, rather than have this lien sit on the public record.

In addition to offset and notice of lien, the IRS can take a taxpayer’s property by levy in order to satisfy the outstanding tax debt. To do this, the IRS must first send to the taxpayer’s last known address a notice of intent to levy by certified mail return receipt requested. As with the notice of federal tax lien, this notice gives the taxpayer the opportunity to request an administrative hearing with the Appeals Office of the IRS and potentially to go to the Tax Court to discuss the appropriateness of levying on the taxpayer’s property and possible collection alternatives. This hearing, however, occurs before the IRS can levy so the taxpayer must argue in the hearing that the levy would create a hardship, the taxpayer will pay over time with an installment agreement, or the IRS should agree to compromise the tax debt for a smaller payment. The prospect of a levy on taxpayer’s wages or bank account puts significant pressure on the taxpayer to work with the IRS to avoid the taking of the property.

B. Sources of Relief from Tax Collection

A taxpayer who cannot pay the outstanding liability owed to the IRS may seek relief from the IRS using administrative processes set out in the Internal Revenue Code or may seek general relief available through an insolvency proceeding.

1. Administrative Relief from Tax Collection

Three basic options exist for the taxpayer who cannot pay the outstanding tax liability and who seeks administrative relief from collection: (1) currently not collectible, (2) installment agreement, and (3) offer in compromise. Each option serves a separate function and provides a different form of relief to the taxpayer seeking to avoid immediate payment of the tax liability. In addition to these three options discussed below in detail, taxpayers can also work with the IRS to postpone payment until a check arrives, property sells or some other event allows them to pay the past due taxes.

Currently Not Collectible: If the taxpayer demonstrates to the IRS that insufficient assets exist to satisfy the liability and that the necessary and allowable expenses exceed the taxpayer’s income, then the IRS will place the account into currently not collectible status. This status does not reduce the liability but merely puts it on the shelf until such time as the taxpayer has the ability to pay part or all of the liability. While the account remains in currently not collectible status, the IRS can offset any refunds due to the taxpayer and generally will file the notice of federal tax lien where the liability is greater than $10,000. This status keeps the IRS at bay while the taxpayer faces financial hardship but does not provide a guarantee that the IRS will remain dormant throughout the remaining life of the liability. While section

7I.R.C. § 6330.
6343 prohibits the IRS from issuing a levy when the taxpayer has a hardship, currently not collectible is an administrative remedy otherwise not required by the Internal Revenue Code. The IRS’s Collection Financial Standards provide a formula for allowable expenses in this and other collection situations to determine the taxpayer’s ability to pay.8

Installment Agreement: Section 6159 authorizes the IRS to enter into installment agreements, which allow taxpayers to pay tax liability over an agreed amount of time. During the agreement period, the IRS will not levy based on the settled liability but may file the notice of federal tax lien.9 The taxpayer can agree to extend to statute of limitations on collection in order to provide extra time in order to pay the taxes. The taxpayer has a right to an installment agreement in certain circumstances generally involving a relatively low amount of liability and where the taxpayer has not had previous tax collection problems.

Offer in Compromise: Finally, section 7122 permits the IRS to compromise a tax debt, called an offer in compromise (OIC). The IRS has created a list of assets that it allows the taxpayer to exclude from the calculation of available assets based primarily but not entirely on section 6334, the statute exempting property from levy. Form 433-A(OIC) guides taxpayers in calculating the excluded assets. It has also created a detailed list of allowable expenses bases on Bureau of Labor Statistics information. Following this list requires use of the IRS website and some judgment in interpretation of the information. The result of the asset and expense decisions the IRS has made is a relatively clear picture for any given case of the likelihood of success a taxpayer will have in submitting an OIC based on doubt as to collectability. The IRS has even created a program that calculates this for practitioners to use prior to submission of the offer. Even where the IRS allowances do not predict acceptance, taxpayers can seek acceptance based on special circumstances or, if they have the ability to pay the liability but have special needs for the funds, based on effective tax administration.

Taxpayers who obtain an OIC have their outstanding taxes eliminated and pay the IRS only the amount agreed upon in the offer. The OIC imposes upon the taxpayer the responsibility to timely file and pay the federal taxes for the five-year period following acceptance of the offer. The failure to timely file or pay during this period causes revocation of the offer and reinstatement of the tax liabilities existing prior to the offer. The IRS views the offer program as its form of fresh start for taxpayers, similar to the concept of discharge in bankruptcy, with the hope that the fresh start will create a compliant taxpayer who needs no further attention from the IRS to file and pay going forward.

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9I.R.C. § 6331(k) (prohibiting levy while installment agreement offer is pending and while installment agreement is being paid as well as no levy for 30 days after rejection of offer of installment agreement or termination of installment agreement).
2. Insolvency System

In addition to the system for collection of taxes set out in the Internal Revenue Code, persons in the United States have the option to seek relief from all debts through bankruptcy. The bankruptcy laws providing for debt relief apply to tax debts in addition to almost every type of debt a person may owe. A brief discussion of the insolvency system as it relates to tax debts will help to complete the picture of the opportunities for taxpayers to address the collection of those debts.

If the IRS files a notice of federal tax lien prior to the time the person files a bankruptcy petition and if the federal tax lien attaches to equity in property owned by the debtor, the bankruptcy case will not destroy the lien. The tax liability may get paid through the bankruptcy. If it does not, the lien interest of the IRS in the property will survive the bankruptcy case and the IRS may pursue collection from the taxpayer thereafter whether or not the taxes forming the basis for the lien were discharged.10

Where the IRS does not file a notice of federal tax lien or, if filed, the taxpayer has no equity to which the lien can attach, then the IRS has an unsecured claim in the bankruptcy case. Whether the debt owed to the IRS will survive the bankruptcy case depends primarily on the age and type of tax liability and secondarily on the timely filing of the tax return on which the debt rests or fraud in the taxpayer’s actions. The bankruptcy code distinguishes between types of unsecured debts and places those with greater importance on a list of priority creditors.11 These unsecured creditors get paid from the bankruptcy estate prior to general creditors who do not make the priority list. Certain taxes make the priority list. More important than getting paid through the bankruptcy estate, which in liquidation cases may have little money for unsecured creditors, is the link between priority status and dischargeability. If a tax debt makes its way onto the priority list, the exceptions to discharge apply allowing the IRS to continue pursuing collection of this debt after the conclusion of the bankruptcy case.12

Income tax liabilities have priority status if the due date of the tax return for year falls within three years of the date of filing of the bankruptcy petition.13 Income taxes also achieve priority status when the assessment of the tax occurred within 240 days of the bankruptcy petition or if the IRS may still assess the taxes.14 Taxes collected by the taxpayer and held in trust for the IRS retain their priority status no matter when assessed. Employment and excise taxes achieve priority status if the return for the tax was due within three years of the filing of the bankruptcy petition.

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10 In re Isom, 901 F.2d 744 (9th Cir. 1990).
In addition to the taxes not discharged in bankruptcy because of priority status, the taxpayer also cannot discharge taxes for any tax period in which the taxpayer has failed to file a return or has filed a return late and within two years of the bankruptcy petition date.\textsuperscript{15} If the taxpayer files a fraudulent return or attempts to evade or defeat the payment of the assessed tax, the taxpayer also cannot discharge the tax debt in these situations.\textsuperscript{16} While it may seem that a taxpayer can only discharge taxes in exceptional circumstances, the insolvency provisions in the United States offer many opportunities for a taxpayer to obtain a discharge of taxes which have grown old. The relief from tax collection provided by the insolvency provisions adds to the bases for relief provided under the Internal Revenue Code. In addition to the opportunity for debt relief through discharge, the insolvency provisions also allow taxpayers to postpone and restructure the payment of their taxes in the reorganization chapters.

C. Right to Be Informed

With this background in mind, the collection system of the United States can be tested against the taxpayer rights that require protection in an effective tax administration system. The right to be informed includes the right to ask questions and obtain information about the collection process. In the collection context, the taxpayer’s right to be informed has more than one facet. First, the taxpayer has the right to be informed about the amount of and the basis for the underlying liability. Second, the taxpayer must be informed about the process of collection that the IRS will employ. Third, the taxpayer must be informed about the status of the debt and collection actions in effect. Finally, in situations in which the taxpayer shares the debt with others, such as a joint return or joint liability on unpaid trust fund taxes, the taxpayer has the right to know the amount collected from the other parties liable on the debt.

1. Basis of Liability

If the debt arises because the taxpayer files a return and does not remit the tax shown as due, the taxpayer should be aware of the basis for the amount of the assessment by the IRS. In most, but not all, situations of self-reported liability, the taxpayer also should know the amount that has been paid on the tax. Knowing the amount paid with a return or on a tax liability does not always, however, present a simple situation. Even though a taxpayer may obtain a transcript of their account for a tax year, the payments on the


account are not always clearly delineated.\textsuperscript{17} If a taxpayer can get through to the IRS telephone assisters, these individuals usually have the appropriate training and skills to review a taxpayer’s account to determine the sources of payment and the application of payments and they can explain to the taxpayer the basis for any liability. However, the correspondence from the IRS may not contain sufficient detail to allow a taxpayer to understand the basis for the liability.\textsuperscript{18}

Because it has become so difficult to speak to an IRS employee and because account transcripts do not set out all of the information necessary to understand the assessments and application of payments, the taxpayer’s right to know the basis for their liability is an area in which taxpayer rights are not fully met in the United States. In order to address this problem, the IRS could send taxpayers an account transcript with the annual statement of outstanding liability or with other bills. More important, however, is having an adequate phone presence with properly trained assistors who can explain the account, which ensures that taxpayers will have the opportunity to learn the basis of their liability when questions arise.

2. \textit{Process of Collection}

The IRS notice process after the assessment of a tax debt generally keeps the taxpayer properly informed of the amount of the debt. The notice phase of a collection case generally occurs in the first several months following

\textsuperscript{17}For example, credits on the account often aggregate payments, making them difficult to understand if questions exist about one or more sources of payment. The IRS also takes payments intended for one account and moves them to earlier account balances if the instructions with the remittance do not clearly direct the IRS or if it misinterprets the instructions. Unwinding the application of payments can become a difficult exercise for a taxpayer in situations where liabilities exist for multiple periods and payments get posted to different accounts.

\textsuperscript{18}A recent case in my clinic illustrates the difficulties that taxpayers can encounter when trying to understand the basis for their liability. This taxpayer had an outstanding assessment for an earlier year and had entered into an installment agreement for that debt which he was faithfully paying. In the subsequent year, the IRS adjusted his tax from the amount reflected on the return. He came to our clinic complaining that the IRS was trying to collect twice on the later year and he was worried that the outstanding debt on this year would cause the IRS to default the installment agreement. Using only the account transcript and without the benefit of any correspondence the IRS sent to the taxpayer, we determined that when the IRS sent the taxpayer notice of the proposed change in the later year, he immediately paid the amount reflected in that notice. At the time he made that payment, the IRS had not yet assessed the liability for the later year. Although it posted that payment to the correct year initially, it reversed that post and moved the payment to the year for which he was paying on the installment agreement. When it made the assessment for the later year, it had no funds sitting on the account to satisfy the liability so it sent notice and demand and initiated the collection process for the later year. The taxpayer tried to obtain an explanation of why it was collecting on that year after he paid it but failed in his efforts to obtain an explanation which led him to the clinic. Only after we obtained the transcripts for the past several years on his account were we able to determine the correct account status. A phone call to the IRS from our office during this process did not reveal the error.
assessments. Thereafter, the debt moves to another phase of the collection process, which may involve an Automated Call Site (ACS), field collection, the Queue or CNC status. When the case moves out of the notice phase, the taxpayer generally has little knowledge of the status of their account within the IRS unless the liability is sufficiently large for field collection or the taxpayer receives a phone call from ACS. Although the IRS provides taxpayers with Publication 1, which gives a broad overview of the process, the taxpayer does not receive details of how the individual account will be handled. The current system therefore provides basic information but is not equipped to inform inquiring taxpayers about what will happen or not happen as the IRS tries to collect.

The IRS could easily provide taxpayers with a more detailed statement of the process of with a link to an explanation on its website. Providing web-based information may present a challenge to low-income taxpayers who often do not have ready access to the web but may better serve most taxpayers who would not appreciate a bulky explanation of the details of the collection process. In addition, telephone assisters could receive training on how best to explain the process of collection when dealing with taxpayers who seem puzzled or have questions about collection procedure.

3. Status of Debt and Collection Efforts

Prior to 1996, the IRS did not have a practice of annual notification of taxpayers of the status of their account. Before this change in the law, years could pass between contacts by the IRS, during which taxpayers assumed that the liability was forgiven or forgotten. Once the taxpayers exited the notice stream, they generally entered a period of little information about the actions taken with respect to their outstanding account. When the IRS offset a refund or took other collection action after years of the liability lying dormant, it caused concern and questions from the taxpayers about the status of their case. The addition of the annual notice provides the taxpayer with a statement of the outstanding balance on their account. However, the annual notice does not inform the taxpayer as to where the account sits within the collection process. For taxpayers who do not have a large liability, the last nine years that their liability exists is shrouded in mystery though the sending of the annual notice of liability does let them know the IRS still looks to

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19 See Treasury Inspector General General Report, supra note 4 (describing the collection notice process employed by the IRS).
22 Certainly, some taxpayers simply did not want to think about the liability and “wished” it away but the IRS silence supported their actions.
them to pay.\textsuperscript{23} To better inform taxpayers of the status of their account from the collection perspective, the IRS could include with the annual statement information about whether the account was in CNC status, offer pending, OIC pending or other status and a more detailed explanation of the process.

4. \textit{Shared Debt}

The IRS has significant restrictions on its ability to provide information to one taxpayer about another taxpayer.\textsuperscript{24} These restrictions, designed to protect taxpayer rights, sometimes have the effect of impeding the rights of other taxpayers in the collection context because they prevent related or jointly liable taxpayers from knowing the full picture. Congress has taken steps to amend the disclosure provisions to permit jointly liable taxpayers to obtain information about the payments made by other persons on the debt.\textsuperscript{25} The changes, which occurred in 1996, allow taxpayers to learn the true remaining liability for a debt but do not fully pull back the curtain to provide related taxpayers with all information.\textsuperscript{26} These changes definitely improve the taxpayer’s ability to know concerning collection actions but would benefit from further development providing the joint parties with information as co-debtors make payments.

IRS policies also play a role in the taxpayer’s right to know as it comes up against another taxpayer’s right to privacy. Recently, the IRS made a long needed administrative change that will assist taxpayers who become victims of identity theft.\textsuperscript{27} The IRS begins collecting against certain taxpayers as a result of actions taken by an identity thief. Taxpayers in this situation have long been held at bay by the IRS in trying to obtain information about the underlying liability so that they could address the basis for the collection action. More assistance to victims of identity theft should follow. This area

\textsuperscript{23} The annual notice is a positive development in keeping taxpayers informed during the life of the liability but it does cause confusion for some taxpayers who view the annual notice as a signal that the IRS is renewing its efforts to collect in situations in which they have caused the account to go into CNC status. The IRS has recently improved the notices in the notice stream as discussed in the TIGTA report cited in footnote 19. It should look to test the market and improve its annual notice to use it to its full advantage and to insure that the notice does not create concern among some taxpayers who wrongly read it as a renewal of enforced collection action as recommended by the National Taxpayer Advocate in her 2015 Annual Report, \textit{supra} note 21.

\textsuperscript{24} I.R.C. § 6103.

\textsuperscript{25} I.R.C. § 6103(e)(8), (9).


needs attention if the victims are to truly be informed about the collection taking place.

The IRS policy regarding the collection of trust fund liabilities places the persons liable in a difficult position regarding the actions they should take. The policy has the effect not only of disadvantaging the responsible persons but also of encouraging them to delay payment as long as possible. It combines problems with the taxpayer’s right to know with policy problems regarding encouraging taxpayers to pay their just debts.\(^{28}\) The IRS should reexamine how it informs responsible officers of the debts of the co-responsible individuals and how it posts those debts.

5. **Conclusion of Right to Be Informed**

Through both legislation and administrative practice, the IRS has improved the information provided to taxpayers in the collection process during the past two decades. The trend for providing information is moving in the right direction. Legislative changes creating the annual statement and the sharing of information of co-debtors, enacted in 1996 as part of the Taxpayer Bill of Rights 2 legislation, significantly help to shed light on the collection process. The recent administrative change to provide greater information to victims of identity theft as well as the redesign of the notices sent to taxpayers provides an example of the IRS taking steps to improve the information available to taxpayers in the collection process.

Countervailing the improvements is the significant degradation over the past decade of the ability of taxpayers to speak to someone at the IRS to obtain information about their case when the IRS engages in the collection process. Correspondence from the IRS on collection matters raises serious concerns for its recipient. Yet, taxpayers in the United States have great difficulty getting through to the IRS by telephone or in person to discuss concerns they may have about the correctness of their account or the proposed collection action. In some instances, taxpayers seeking to work out an agreement with the IRS to avoid having the IRS file a notice of lien or take levy action cannot get through to the IRS. The IRS assumes that the taxpayer’s failure to make contact indicates a refusal to deal with the problem and moves forward with more serious collection action when the taxpayer has been trying to get through to the IRS without success. The right to information includes the right to obtain information from the IRS in a reasonable manner within a reasonable time frame as well as the right to exchange information. The inability or unwillingness of the IRS to properly staff the phones presents a serious failure in its ability to provide taxpayers in the United States with their right to obtain information.

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D. **Right to Challenge the Underlying Debt and the Proposed Collection Action**

In the collection context, the taxpayers in the United States have several avenues to challenge the underlying debt and the proposed collection action: (1) the taxpayer may challenge the debt informally through correspondence, telephone or personal contact with the front line IRS employee, (2) the taxpayer may follow one of two semi-formal processes to challenge the correctness of the underlying liability giving rise to the debt, (3) the taxpayer may propose a statutory collection alternative such as an offer in compromise or installment agreement, (4) the taxpayer may challenge application of the debt through the statutory process provided to those claiming innocent spouse status, (5) the taxpayer may use CDP to challenge the debt itself, the filing of a notice of lien or proposed levy action,29 (6) the taxpayer may seek post-assessment determination of the liability and return of money paid through the refund process,30 and (7) the taxpayer may work with the Taxpayer Advocate’s office to stop a collection process or redirect a process that has moved off track.

This discussion will not address the ways that a taxpayer can challenge the underlying debt prior to assessment because this Article focuses on collection. This discussion therefore begins with the assumption that an assessment exists and addresses post-assessment remedies as they relate to taxpayer rights. Pre-assessment processes for contesting the proposed assessment of tax debt exist and provide significant safeguards for most taxpayers. These safeguards break down when the process does not provide adequate pre or post assessment options for the taxpayer. Certain penalties which are neither subject to the deficiency procedures allowing the taxpayer to contest their imposition in Tax Court before assessment nor the divisible tax exception to the Flora rule allowing the taxpayer to seek judicial relief in District Court without paying the entire amount of the assessment fail to provide adequate safeguards in the process of contesting the underlying liability and can require a taxpayer to fully pay liabilities of millions of dollars in order to contest the underlying

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29 Many opportunities exist for the taxpayer to challenge the underlying debt, to seek debt relief through forgiveness or forbearance, and to propose to the IRS the best way to collect the debt. In some ways the CDP process, which potentially allows taxpayers to contest the merits or propose alternate means to collect, has parallels in the bankruptcy process. Although the list here does not include bankruptcy, a taxpayer in an insolvency proceeding can contest the merits of the tax debt pursuant to Bankruptcy Code section 505(a) or can propose a payment plan in the reorganization bankruptcy chapters.

30 This Article does not address every possible opportunity to challenge the debt or the proposed collection action. In rare circumstances taxpayers may have the right to use an injunction or other extraordinary writ to stop certain action by the IRS related to collection. Because these situations are extraordinary, the Article will not spend time addressing them but it is worth noting that the possibility exists.
assessment. For this narrow group of liabilities the system of challenging the underlying debt utterly fails these taxpayers.\textsuperscript{31}

1. **Informal Challenges to the Debt or to Collection Action**

At any time, a taxpayer engages with the IRS in the collection process, the taxpayer can raise the issue that the underlying debt incorrectly states the amount owed by the taxpayer or the proposed collection action does not represent the best method to collect the tax. The taxpayer will likely fail to persuade someone in the IRS collection function that the amount shown on the IRS account for that person contains the wrong information unless the error is obvious, but sometimes obvious errors exist. IRS employees generally will not continue to pursue collection in circumstances where doing so is obviously wrong. Taxpayers can, and should, seek to convince IRS collection employees of the incorrectness of the debt. Even in circumstances in which the collection employee will not or cannot make the change, the challenge to the underlying debt often results in forbearance of collection while the taxpayer uses one of the other processes discussed below to more formally challenge the liability.

The IRS listens to taxpayers who propose an alternative means for payment. The degree to which the IRS listens depends on a number of factors including the stage of the proceeding, the logic of the proposal and the taxpayer’s prior cooperation. Taxpayers should not hesitate to make proposals at the informal stage in an effort to achieve agreement on the proposed plan for collection or forbearance. The greatest challenge to the informal system in the United States is the inability of taxpayers to reach the IRS by phone to discuss their collection issue. Many cases get pushed into the more formal remedies discussed below because of the absence of someone at the IRS to listen to the taxpayer at the informal stage. Taxpayers with high dollar liabilities will have the opportunity to discuss the situation with an individual revenue officer. Taxpayers who pick up the phone when the IRS calls will have a similar opportunity to discuss their case with someone from ACS. Taxpayers seeking to affirmatively and proactively discuss their situation with someone in collection need time and perseverance to talk to the IRS about how they can pay. As discussed above, the inability of the IRS to adequately staff its telephone sites hampers not only the ability to obtain information but also the ability to discuss the known debt and work out a mutually agreeable resolution.

2. Semi-Formal Challenges to the Debt or to Collection Action

The IRS recognizes that assessments do not always reflect the correct liability of the taxpayer and that many taxpayers lack the ability to fully pay the assessment and pursue relief from the incorrect amount of debt through the refund process described below. The IRS has established a process called audit reconsideration to provide taxpayers with a chance to informally and administratively pursue debt relief where the taxpayer has information not presented during the examination stage leading to the assessment. The IRS developed the audit reconsideration process without a Congressional nudge. It does an excellent job of reexamining cases when the taxpayer presents new evidence. However, the IRS does a poor job of keeping taxpayers informed of its receipt and processing of the audit reconsideration request. So, taxpayers remain significantly in the dark as their case receives reconsideration. Despite problems with communications during the consideration of an audit reconsideration request, the IRS deserves great credit for administratively developing this system and nurturing it. It goes a long way toward providing taxpayer rights to challenge the debt.

In addition to the ability to challenge the debt through audit reconsideration, the IRS has a parallel process, an offer in compromise for doubt as to liability (OICDL). While significant overlap in the purpose of OICDL and audit reconsideration exists, some situations develop in which audit reconsideration is not appropriate and OICDL will provide the avenue for relief. Because OICDL comes from section 7122, it does not quite fit as an informal process; however, by its nature, it operates as an informal request to abate a tax debt in exchange for a small payment. Audit reconsideration does not involve making a payment or entering into a formal compromise and differs from OICDL in that way as well.

To address the application of certain collection processes in a semi-formal yet not statutorily required manner, the Appeals Office developed the CAP appeal program in the 1990s. Similar to the audit reconsideration program on the liability side, the CAP appeal program provides the debtor with an administrative appeal of certain collection actions or proposed collection actions to change their course before resorting to more formal methods of seeking relief. The CAP appeals program predated the passage of the CDP provisions and in some ways presaged those changes. Perhaps because the taxpayer must move very quickly to use the CAP appeal process or because of the creation of the CDP process, the number of CAP appeals may be small; nevertheless, like audit reconsideration, this is another process for which the IRS deserves credit in developing and nurturing. This informal administrative

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process potentially provides taxpayer relief in addressing proposed collection action and directly addresses the right to do so.

3. Statutory Collection Alternatives

The Internal Revenue Code provides two clear options for taxpayers seeking relief from enforced collection of their assets and one important right that leads to a less statutorily direct but still important basis for relief. The three forms of statutory relief from collection are currently not collectible (CNC), installment agreement (IA) and OIC. Each serves a different purpose but each provides a significant right to the taxpayer in addressing the prospect of enforced collection of an unpaid tax debt.

Section 6343 provides the indirect statutory path to CNC. This statute prohibits the IRS from levying on a taxpayer’s assets if the taxpayer’s financial situation prevents the taxpayer from paying the liability or hardship. If the taxpayer can show the IRS that payment of the tax would create a financial hardship preventing the taxpayer from meeting life’s necessities, the IRS will place the account into CNC status and forgo the use of levy to collect the debt. This is a remedy of only partial relief because it does not protect the taxpayer from having the notice of lien filed and it does not eliminate the liability or stop the running of interest and penalties. The relief provided by CNC status theoretically lasts only so long as the taxpayer’s financial condition continues to prevent the taxpayer from paying the tax and having enough money to buy life’s necessities. Once the taxpayer returns to secure financial footing, the IRS can take the taxpayer out of CNC status and return them to the pool of persons subject to levy. The statutory right to have a taxpayer’s account placed into a hold status, from the perspective of levy, when the taxpayer experiences financial hardship directly addresses the right to challenge the proposed collection action.

Section 6159, enacted in 1988 as a part of the first Taxpayer Bill of Rights legislation in the United States, allows taxpayers to pay their taxes over time instead of having to pay everything at once or face enforced collection. The statute prohibits the IRS from levying on a taxpayer’s property after the

35 See I.R.M. 5.16.1(14).
36 The benefit of CNC status is available even if the taxpayer is not current in their filing obligations to the IRS. Vinetieri v. Commissioner, 133 T.C. 392 (2009). The fact that a taxpayer can hold the levy at bay through CNC status even though the taxpayer is out of compliance with filing obligations provides a significant benefit to taxpayers experiencing hardship. While the Tax Court has held that the IRS cannot require filing compliance as a prerequisite to granting hardship status, it has had difficulty implementing the rule required by the case. See 2014 Nat’l Taxpayer Advocate Ann. Rep. Most Serious Problem #7, Hardship Levies: Four Years After the Tax Court’s Holding in Vinatieri v. Commissioner, the IRS Continues to Levy on Taxpayers It Acknowledges are in Economic Hardship and Then Fails to Release the Levies, INTERNAL REVENUE SERVICE, last accessed Dec. 12, 2015, http://www.taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/HARDSHIP-LEVIES-Four-Years-After-the-Tax-Courts-Holding-in-Vinatieri-v-Commissioner-the-IRS-Continues-to-Levy-on-Taxpayers.pdf.

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submission of the installment agreement and while the agreement is in place. It does not prevent the filing of a notice of federal tax lien.\textsuperscript{38} In addition to the statutory right to an installment agreement, the IRS has adopted certain administrative rights guaranteeing the installment agreement in certain instances.\textsuperscript{39} The ability to postpone payment and pay over time provides taxpayers a significant right in challenging proposed collection action.

Section 7122 grants authority to the IRS to compromise tax debts.\textsuperscript{40} It does not mandate that the IRS do so and the IRS basically made an administrative decision not to do so until 1991.\textsuperscript{41} The change in IRS policy at that time has had a significant impact on taxpayers and their relationship with federal tax debt. In 1998 Congress took a look at this provision for the first time in many years and made structural changes that further impacted taxpayer rights in the collection process.\textsuperscript{42} Congress mandated that the IRS not base its decision to compromise on the amount of money a low-income taxpayer could pay to achieve the compromise.\textsuperscript{43} It also created a path to compromise for persons with the ability to pay but for whom payment of the tax would create an inequitable or unjust situation.\textsuperscript{44} The change in the IRS policy toward the OIC process has greatly improved the ability of taxpayers, particularly low income taxpayers, to address their federal tax debts and provides a significant right in challenging proposed collection action.

\textsuperscript{38} I.R.C. § 6331(k). There is an absence of restriction in I.R.C. § 6323.
\textsuperscript{39} I.R.M. 5.14.5(14).
\textsuperscript{40} For a general overview of the modern offer-in-compromise process see generally Shu-Yi Oei, Getting More by Asking Less: Justifying and Reforming Tax Law’s Offer-In-Compromise Program, 160 U. Pa. L. Rev. 1071, 1077 (2012).
\textsuperscript{41} Id. at 1101.
\textsuperscript{42} Id. at 1103.
\textsuperscript{43} I.R.C. § 7122(d)(3)(A).
\textsuperscript{44} Pub. L. No. 105-206, 112 Stat. 685 (1998); Reg. § 301.7122-1(b)(3). The Committee Report for the Internal Revenue Service Restructuring and Reform Act of 1998 expressed the intent to expand use of the OIC procedure beyond the two traditional grounds:

[T]he conferees expect that the present regulations will be expanded so as to permit the IRS, in certain circumstances, to consider additional factors . . . in determining whether to compromise the income tax liabilities of individual taxpayers. For example, the conferees anticipate that the IRS will take into account factors such as equity, hardship, and public policy where a compromise of an individual taxpayer’s income tax liability would promote effective tax administration.

4. Statutory Relief for Innocent Spouses

In 1971 Congress first recognized that the joint and several liability status created by the filing of a joint return could create an unfair tax debt on one of the spouses signing the joint return. It initially addressed the problem by passing a narrow provision that allowed some spouses relief from their joint obligation.45 In 1998, Congress significantly expanded innocent spouse relief and created a statute that provides meaningful debt relief for spouses in narrowly prescribed statutory circumstances or when such relief would provide the equitable remedy necessary for the situation. While this provision relates to the narrow circumstance of a jointly filed individual income tax return, it provides an important right in challenging proposed collection action by eliminating the underlying debt.

5. Collection Due Process

The greatest change in the way the United States approaches federal tax debt collection since it began collection tax debts occurred in 1998 with the passage of the CDP provisions.46 Sections 6320 and 6330 provide persons owing federal tax debts with the right to discuss how the IRS might best collect the debt and the right to have the decision reviewed by the Tax Court. The CDP provisions allow the taxpayer to challenge the underlying debt in certain circumstances and to challenge the proposed collection action in all circumstances in which the CDP provisions apply.47 These provisions create and recognize the significant taxpayer rights in the collection process.

The ability to raise a challenge to the merits of the underlying debt, though limited in its applicability, provides an important right in itself. Prior to the passage of the CDP provisions, taxpayers were barred in many instances from going to court to challenge a tax debt when they had not previously had the opportunity to do so. To fulfill the complete promise of this provision, Congress or the Tax Court needs to strike down the regulation treating the opportunity for an administrative hearing as meeting the full right granted by these statutes.48

While the ability to contest the merits of the underlying liability provides a significant right when it exists, the creation of a path to discuss collection alternatives to the proposed path of the IRS represents the most significant change and improvement of taxpayer rights in collection matters. Because the Appeals employee reviewing the case must verify that the IRS has properly followed all procedures leading up to the proposed action, the taxpayer

receives a significant benefit of having an independent review within the IRS. The CDP process also provides the taxpayer, frequently for the first time, the opportunity to speak to a person assigned to their specific account. This individual attention to the case allows the taxpayer to provide information and approach resolution of the collection matter with a single individual rather than the pool of cases that exists in ACS. Moreover, the involvement of an individual experienced in collection matters leads to many resolutions where cases otherwise would have moved into enforced collection.

Finally, the ability to present concerns to the Tax Court gives taxpayers the opportunity to voice their concerns outside the agency and also allows them to work with a Chief Counsel attorney. The opportunity to work with a knowledgeable attorney and to go before the Court if necessary, give the taxpayer with a collection problem very significant rights to influence the IRS’s decision to collect the liability and the IRS’s method of collection.

6. **Refund Litigation**

A taxpayer’s ability to seek a refund always comes after the IRS has made an assessment.49 While it does not always come after the IRS pursues enforced collection of some type, it does, by nature, provide a safety valve for the taxpayer who believes the underlying assessment incorrect in whole or in part. Accordingly, allowing taxpayers to seek the return of the taxes they have paid provides a significant right.

In instances where the taxpayer faces financial disability, Congress extended the statute of limitations to allow individuals meeting the criteria set forth in the statute to undo collection of the tax in circumstances otherwise barred by the statute of limitations.50 The promise of the financial disability provisions has not been completely fulfilled because of the unreasonably rigid position taken in the Revenue Procedure adopted by the IRS without notice or comment to implement the Code section.51 Fixing the administration of this provision will further enhance the rights of those from whom a tax has been

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wrongfully collected at a time when their ability to protect their financial interests was impaired.52

7. **Taxpayer Advocate**

The Taxpayer Advocate’s office serves as both the backstop to persons caught up in the collection process facing hardship or other circumstances that fit into the Advocate’s portfolio, as well as the voice to problems with the system.53 As with the innocent spouse and CDP provisions, the revisions to the Code in 1998 made a huge change in the role the advocate’s office plays in the collection process. The Advocate’s office can play a significant part in deciding the course that collection activity will take. Congress granted to the advocate’s office the right to issue a Taxpayer Assistance Order which can stop collection to allow time for discussion about the proposed action and in some cases stop the proposed action altogether.54 In addition to all of the administrative and legislative provisions providing rights to taxpayers to ensure that they can contest the underlying liability and the proposed collection action, in creating the advocate’s office, Congress provided an additional safeguard should the other processes fail. Unfortunately, the administrative and legislative avenues fail regularly because taxpayers do not pay attention until too late or the IRS chooses the wrong path. This safety net plays an important role in making sure that whatever breakdowns in the system of rights might occur, the taxpayer has a final option to protect their rights.

8. **Conclusion of Right to Challenge the Underlying Debt and the Proposed Collection Action**

The changes made by Congress in 1998 to the process of collecting federal tax debts in large measure, when added to the pre-existing system, have created a collection system that protects the taxpayer’s right to challenge the underlying debt and the proposed collection action. With minor exception, the administrative and statutory provisions in place provide the necessary protections. The problem areas regarding this taxpayer right concern IRS employees, namely the training of employees to understand all of the

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52 This Article will not address the wrongful levy provisions because they involve persons who are not taxpayers. The wrongful levy provisions of I.R.C. 6343 do provide a significant right for third parties against whom the IRS has wrongfully collected property. The rights of individuals facing wrongful levy situations will improve when the Courts begin to apply equitable estoppel normatively. See, e.g., Volpicelli v. United States, 777 F.3d 1042 (9th Cir. 2015); see also Carlton Smith, Volpicelli v. U.S.: 9th Circuit Holds Time to File a Wrongful Levy Suit is Subject to Equitable Tolling, PROCEDURALALLY TAXING, Jan. 30, 2015, http://www.procedurallytaxing.com/?s=9th+Circuit+Holds+Time+to+File+a+Wrongful+Levy+Suit+is+Subject+to+E+quitable+Tolling.

53 I.R.C. § 7803(c); see Bryan Camp, What Good is the National Taxpayer Advocate?, 126 Tax Notes (TA) 1243 (Mar. 8, 2010).

rights and remedies in the collection area and the ability of employees to answer the phone or work on a case when the taxpayer needs assistance with a collection problem.

E. Right to a Fair and Just Tax System

In the collection context, the right of taxpayers in the United States to a fair and just tax system has several components. First, the system must be just for all taxpayers facing collection and not just to taxpayers who can afford representation. Second, the collection system must treat the persons from whom the IRS must use enforcement in a fair and just manner. Third, the system must be just to taxpayers who pay their taxes without the need for enforced collection. These taxpayers must feel that the system works and they have not acted foolishly in voluntarily complying.

1. A Fair and Just System for the Represented and Unrepresented

Taxpayers who have representation generally will obtain a better result than those who do not. While the IRS may not have the ability to change the statistically more favorable outcomes for those with representatives versus those without representation, it can build systems that foster a better understanding of taxpayer problems and that seeks to resolve problems for taxpayers even when they do not know to raise them. Such a system requires a change in culture, a commitment to training and adequate staffing to address taxpayer needs and not just rush to the next case.

The culture at the IRS has a strong foundation for such a system because it rests on finding the right result rather than collecting the most revenue; however, that culture needs much more nurturing to move employees at the IRS engaged in collection from a compliance mentality to a customer service mentality. Cases in which the IRS engages in enforced collection generally foster in IRS employees a view that the taxpayer does not want to pay the liability and will actively take steps to avoid doing so. The collection employees do not begin each case thinking how can they assist the taxpayer in finding the right path to payment but generally begin with an attitude of what must I do to make the taxpayer see their responsibility to pay. Certainly, taxpayers exist who teach the IRS employees to adopt this approach; however, approaching collection cases from the negative rather than positive perspective may hinder IRS employees and the tax system from benefiting from the good will it could create trying first to assist and then to enforce.

Unrepresented taxpayers face a daunting task as they approach the collection system. They generally have smaller amounts the IRS seeks to collect which means that the IRS will not assign an individual to their account. Instead, the IRS handles their cases through ACS and the phone lines. The impersonal and very challenging phone system requires these individuals to

commit significant blocks of time and phone minutes, which they may not have, simply to reaching the IRS to discuss the matter or understand a notice they have received. It also means that each time they interface with the IRS they speak to a different person who understands prior interactions only through the lens of the write up of the prior employee handling the case.

To make the system fair and just for unrepresented taxpayers, the IRS needs to significantly improve its phone service, to train its employees to identify problems and to reopen walk in sites. The move to inadequately staffed phone systems and enhanced web sites has left a significant segment of the population by the wayside. The system cannot be fair and just if it leaves an entire segment of taxpayers, who are frequently forced into interaction with the tax system because Congress chose to use that system to deliver benefits, without an adequate mechanism for talking to the system. The continued reductions in IRS staffing and training take a much higher toll on the unrepresented than on those who can pay a professional to work the system.

In 1998 Congress created a small safety valve for low income taxpayers with the passage of section 7526 and the creation of grants for low income taxpayer clinics. The grants for these clinics exist because of Congress’s recognition that the system works best if taxpayers have a professional voice when seeking relief. The existence of the clinics also provides some benefits and relief to the IRS because the clinicians can assist taxpayers in organizing data and in recognizing which path to take in working with the IRS. The number of clinics relative to the number of taxpayers needing assistance remains small. Efforts by the ABA Tax Section and local bar associations with their own pro bono efforts to supplement the work done by clinics helps but does not fill the gap in the need for assistance to unrepresented taxpayers facing the collection system.

To make a more fair and just system, Congress must consider allocating more resources to the IRS and to representation opportunities such as clinics, the IRS must consider how it allocates its resources in a manner that adequately serves the unrepresented and the IRS needs to address cultural changes that will foster more justice for those who do not have the resources to hire representatives.


2. Treating Taxpayers in the Collection System in a Fair and Just Manner

Not all taxpayers receive the same treatment when they owe taxes. Taxpayers who work for the IRS can lose their job if they owe taxes. Taxpayers who work for the federal government can have their pension plans taken even though they may not themselves have the right to withdraw the funds. Taxpayers who owe more than $10,000 are presumed to have a liability for which the IRS should file the notice of federal tax lien whether or not they have any assets that the IRS needs to protect with the filing of the notice. Taxpayers who seek to leave the country may soon find they cannot if they owe federal taxes. Taxpayers receiving age based social security payments can have these payments levied upon even where the amount of their social security benefits are much less than the person with a large pension from a major corporation whose pension benefits the IRS will only levy in extraordinary circumstances.

Is it fair to distinguish between taxpayers based on who they work for or who is paying the benefit rather than the amount of the tax debt and the resources available to the respective taxpayers? Congress has placed significant restrictions on IRS employees while few if any on its own employees yet which would have a bigger impact on tax compliance: the failure of a GS-4 service center employee to pay $3,000 after mistakenly overclaiming the earned income tax credit or the failure of the chief of staff of a Senator to pay their $20,000 tax liability after failing to report income from a Schedule C? Some of the choices Congress has made in creating categories of individuals to receive “special” treatment in the collection of taxes create a system that may lack horizontal fairness.


60 Before the adoption of the Freshstart program, the IRS had set the dollar level for filing the notice of federal tax lien much too low. See Keith Fogg, Systemic Problems with Low-Dollar Lien Filing, 133 Tax Notes (TA) 88 (Oct. 11, 2011); see also 2011 NAT’L TAXPAYER ADVOCATE ANN. REP., MANAGERIAL APPROVAL FOR LIENS: REQUIRE MANAGERIAL APPROVAL PRIOR TO FILING A NOTICE OF FEDERAL TAX LIEN IN CERTAIN SITUATIONS.


As it moves to replicate some state tax authorities and impose restrictions on passport usage similar to the revocation of driver’s licenses and automobile registrations by certain states, Congress enters into a dangerous zone in the fair use of the laws to “encourage” the payment of federal taxes. When passing extraordinary remedies that allow dismissal of employees, restrictions on travel and taking retirement benefits from some, Congress does so in a manner that may remove rather than inject fairness into the system.

3. Appropriately Collecting from Everyone in Order to Make the System Fair and Just for Those Who Pay Without Enforced Collection

One of the challenges of any tax systems is fairness to all. This type of fairness gets more attention on the determination of tax side than the collection side but applies with equal force in collection of taxes. The system must convince those who pay without coercion that doing so does not create a disadvantage to them. They must feel that the system will vigorously pursue collection from those who fail to voluntarily pay rather than allow them to get by without paying. As the IRS loses resources to put to the collection of taxes from those who do not voluntarily pay, this issue gains more ground. The amount of uncollected taxes written off each year is high. Could the IRS collect more with additional resources or with better use of its available resources? Does the amount of uncollected taxes that fall off the books each year encourage others to not pay taxes or are the resources currently devoted to collection sufficient to convince taxpayers that voluntarily paying remains the best option?

Starting in the 1980s, the IRS began placing cases into a collection queue rather than assigning each balance due account to a collection employee.\(^{63}\) The amount of inventory and the number of employees reached a tipping at which IRS collection employees could not reasonably handle a divisible share of all of the balance due cases. The disparity between the number of collection employees and the number of balance due cases has only increased in the following three decades. The high volume of outstanding collection cases has recently caused the IRS to stop sending out levies because it cannot handle the incoming calls.\(^{64}\) Taxpayers who place their assets in forms that make it difficult for the IRS to collect have a significantly better chance that the IRS will not spend the resources to unwind the asset structure than those who represent easier collection targets. At some point the failure to pursue persons making it difficult to collect from them could have an impact on the overall level of voluntary compliance. Both Congress and the IRS must keep a careful watch to insure the tipping point for compliance does not occur.


4. Conclusion of a Fair and Just System for the Represented and Unrepresented

The collection of taxes in the United States generally provides taxpayers with a fair and just system for working with the IRS. The greatest impediment to this system, however, is that it favors the represented, and the IRS does not devote sufficient resources to unrepresented taxpayers. The level field also faces disruption due to the lack of resources allocated to pursuing those who can structure their assets in difficult to attack forms of ownership.

III. A Comparative Analysis of the Enforcement of Tax Debt Collection

TBOR’s objective to systematize the procedural rights of taxpayers in the United States has influenced legislatures around the world. Due to systematic differences in the complexity of the tax systems, the various procedures of tax collection and the influence of constitutional and supranational law on the tax collection process, taxpayer rights, as measured by TBOR, diverge greatly in the various tax systems.

This section seeks to provide a comprehensive analysis of solutions in the field of enforcement of tax debt collection and tax forgiveness in five selected countries—the UK, Australia, Germany, Croatia, and Switzerland as well as the influence of EU law on tax debt collection. The key elements of each system are considered in order to highlight the extraordinary solutions within the U.S. system. Because this Article seeks to apply the rights created by TBOR to the areas of interaction between the tax authorities and the taxpayers in the enforcement phase, the respective regulations regarding access to information prior to the tax enforcement will be analyzed in the light of the right to be informed. The different ways to protest against decisions of the tax authorities with which the taxpayer disagrees will be analyzed under the right to challenge the underlying liability and the proposed collection action. Finally, the overall enforcement and tax forgiveness procedures are scrutinized within the context of the right to a fair and just tax system.

A. Non-EU Countries

1. Switzerland

The high level of decentralization in Swiss tax procedure strongly influences its tax procedures. Because of the right of the Swiss regional entities—cantons—to implement their own taxes and to have their own measures of tax collection within the broader context of the federal tax collection system, the Swiss enforcement procedures present complexity due to their dependence on the nature and the type of tax the government seeks to collect.65 The following analysis will concentrate on the federal measures; but, because

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of the importance of the cantonal regulations on taxpayer rights, it also will address the more important rules arising in the cantons.

a. Enforced Tax Collection. The Swiss tax law has a developed system to prevent tax collection default. This system relies upon preventive distraints, which the government can impose for different reasons. Two types of preventive distraints exist: voluntary and involuntary. As denoted by its name, the government creates voluntary distraints with the consent of the taxpayer pursuant to a compromise agreement between the taxpayer and the tax authorities.66 The government can only create an involuntary preventive distraint under certain circumstances defined by law in which the government has certain defined concerns regarding the collectability of taxes:67 where the taxpayer has no permanent residence or headquarters in Switzerland, and where the tax authorities have objective reasons to believe that it may not be possible to collect the tax.

In circumstances where the taxpayer does not have a permanent residence in Switzerland, the legislature took into account its lack of cross-border enforcement power, which outweighs the negative effects to the taxpayer;68 however, the validity of such a standpoint will remain unsettled for the foreseeable future with new developments concerning tax cooperation. The new developments for tax collaboration and tax enforcement, as well as the implementation of article 27 of the OECD Model Tax Convention, which contains an agreement on collaboration in enforcement matters, could provide a safeguard that calls into question the necessity of preventive measures.

An involuntary preventive distraint may occur in matters where the tax authorities have reason to believe, when considering the objective facts surrounding the tax liability, that the tax may be uncollectible. Such objective circumstances include bad faith behavior, as well as the mere fact that a taxpayer may leave the country.69 Economic difficulties of the taxpayer are insufficient to trigger an involuntary preventive distraint because an enforced tax collection could still take place.70 If the tax authorities believe

66 For the voluntary distraint basically the same rules apply as for other preventive distraints; the method of establishing and the ways of releasing a taxpayer from a distraint are, however, different and directly connected to a compromise agreement, which will be discussed in the subchapter bellow.
68 Verwaltungsgerichtshof [VGer] [Administrative Court of Switzerland] ZH 10.1.2001, RB 2001 No. 96.
70 The Swiss doctrine distinguishes between the action of enforcement and the level of satisfaction of the claims against the taxpayer. Just if the taxpayer takes any action that would procedurally make it more difficult to enforce (by selling off assets, transporting them abroad, etc.) the criteria would be satisfied, where the fact that a car loses 15% of its value each year and therefore at the end of the procedure would be worth half its original price is not a valid reason for itself. See VGer ZH 24.3.2004, ZStp 2004, 315 E 1.2.
that one of the above-mentioned conditions is met, they will issue a so-called “Sicherungsverfügung.” This administrative act contains the reasoning of the tax authority and the directly applicable measures that will apply to the case in question.71

In the Sicherungsverfügung the tax authorities can utilize a preventive distraint,72 which allows the tax authorities to take into their possession property of the taxpayers valuable enough to satisfy the tax liability, including any interest and penalties, while title to the property remains with the taxpayer. Title cannot be transferred from the taxpayer without a separate enforcement procedure.73 Regarding the measure itself, the taxpayer can either voluntarily hand over the property or, if he refuses, the rules for permanent seizure of tax debt will apply in analogy.74 The property then remains in the possession of the tax authorities until satisfaction of the tax debt. The taxpayer has a right to protest before the cantonal Steuerrekurskommission, an appellate body of the tax authority.75

When a taxpayer does not fulfill his obligations in time, the tax authorities have the option to proceed with an enforcement procedure.76 This enforcement procedure of monetary claims is regulated the same way as private law claims in the enforcement and bankruptcy act (Bundesgesetz für Schuldentrichtungs und Konkurs).77 However, even though the law regulates bankruptcy procedures in general, the law does not provide an avenue for the tax authorities to initiate a bankruptcy procedure based on an ordinary tax claim.78 If a preventive distraint exists, the enforcement nevertheless must be based on a separate decision by the tax authorities because still no assessment and enforcement act for the transfer of property exist. After the decision has been delivered to the taxpayer, the property can be seized or, if the tax authorities are already in possession of the property, the government can sell the property to satisfy the tax debt.79 If the taxpayer lives outside of the

72The term “preventive distraint” is used for a measure in civil law countries, which involves a preventive seizure of the possession of a property but not the transfer of the ownership. The property is just used as collateral and can later be sold if the taxpayer does not pay the tax debt when it is due. Preventive distraints are usually used just for movable property and property for which no special registers exist while for plots of land, ships and cars it usually is enough to have a lien on the property which is marked in the registers. For any information available in public registers the fiction applies that it is a generally known fact and therefore the tax authorities reserve a position in the register for enforcement purposes.
73DBG art. 185 (1).
74Martin Zweifel & Hugo Casanova, Schweizerisches Steuerverfahrensrecht: direkte Steuern 433 (2d ed. 2008).
75DBG art. 169 (3).
76DBG art. 165 (1).
77Bundesgesetz über Schuldentrichtungs und Konkurs [SchKG] [Insolvency and Enforcement Act] 1997 AS (Ger.).
78SchKG art. 43 nr. 1.
79SchKG art. 88.
country, the tax authorities can enforce tax debt collection without ensuring previous notice.80

b. Tax Forgiveness. Swiss federal law does not regulate the tax forgiveness procedures for local taxes.81 For forgiveness of federal taxes, however, a unified system exists. The federal procedure begins through a taxpayer’s request. The taxpayer can make this request at any point after the taxpayer’s tax obligations have been fixed and before he has made his final payment. The procedural criteria for obtaining tax forgiveness include that the tax has not been paid yet but is past due and that special circumstances exist in connection to the taxpayer which would allow for tax forgiveness. The regulations describe the necessary circumstances as special hardship and the enforcement of the tax collection being extremely harsh for the taxpayer.82

The “special hardship” is a purely economic criterion. It is defined as a situation in which the financial power of the taxpayer is so minimal that it is in a strong disproportion to the outstanding tax debt.83 If the taxpayer cannot pay an outstanding tax debt using reasonable efforts and this hardship situation did not result because of his actions, the special hardship criteria is satisfied. Unlike the first criteria, the condition of a tax being extremely harsh on the taxpayer takes into account non-economical considerations, primarily fairness.84 In most cases, a significant tax burden will not be considered harsh if the taxpayer was responsible for the final result. For example, fairness will not be applicable where a taxpayer has attempted to illegally evade taxation or has acted in a significantly unreasonable way that decreased his wealth. If the tax authorities agree to settle the debt, they can decrease, forgive or defer the debt85 and as mentioned above, if they deem necessary, include a voluntary preventive distraint as requirement.

c. Taxpayer Rights. The Swiss tax authorities have published guidelines for taxpayers which briefly touch on the topic of taxpayer rights86 but are far from developing an extensive list of all rights taxpayers have. Most taxpayer rights in Switzerland, including the right to equal treatment, the right to be informed and the right to challenge the underlying liability, have their basis in the Swiss Federal Constitution (Bundesverfassung87). The Federal Constitution contains a bill of rights that generally applies to all aspects of

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80DBG art. 165 (1), (2).
82DBG art. 167.
83DBG art. 167 (1).
85DBG art. 166.
government action, including tax law, and also includes a special list of taxpayer rights which applies on all levels of tax collection, including cantonal tax procedures.\textsuperscript{88} Due to the specific norm hierarchy structure in Switzerland, statutes can be considered further directions of the general rules. However, federal statutes cannot be deemed unconstitutional which prevents direct norm control through the constitutional court.\textsuperscript{89} As a result, the constitutional rules have no way to be directly enforced against federal law and taxpayer rights are dependent on the federal tax laws to implement them.\textsuperscript{90}

The equal treatment of taxpayers is guaranteed by two constitutional provisions. First, the general provision in article 8 of the Federal Constitution guarantees equal treatment before the law. In addition, article 127 (2) guarantees equal treatment of taxpayers and taxation based on the economic capacity of an individual. While the constitutional provisions regarding equal treatment ensure that taxpayers are not discriminated against in general, the constitutional guarantee related to economic capacity determines the basic reasoning behind the definition of an individual taxpayer’s tax burden. As discussed above, an adaptation of the taxpayers’ burden to new developments (economic hardship, etc.) is limited because, besides the new economic situation of the taxpayer, equity reasons also receive consideration.

In addition to the above provisions, some additional constitutional articles of general applicability have some impact within the context of tax collection. Article 29 (1) of the Federal Constitution ensures that within a procedure before of a public authority, including a tax authority, every person has a right to fair and equal treatment. Under the provision of article 29 (2), all individuals have the right to be heard in any procedure before a public body. In addition, article 29, guarantees that individuals have the right to appeal a decision. Finally, article 36 (3) defines the rule of proportionality, which guarantees that all actions of public authorities which intrude into the rights of citizens must be proportional to the public benefit they aim to accomplish.

2. \textit{Australia}

Australia operates with a federal system primarily relying upon a centralized government tax authority. Unlike the other countries analyzed in this Article, Australia has no direct ties to the European Union apart from its connection to the United Kingdom as a Commonwealth country. Accordingly, the influence of the EU’s market freedoms and other peculiarities of tax enforcement have even less of an effect on Australia than on Switzerland

\textsuperscript{88}Taxpayer rights do not have to be written in the statutes regulating procedural matters but are directly guaranteed on all levels. \textit{See Martin Zweifel \& Hugo Casanova, Schweizerisches Steuerverfahrensrecht: direkte Steuern} 23 (2d ed. 2008).

\textsuperscript{89}BV art. 190.

\textsuperscript{90}For a discussion on this issue in the general constitutional system and the criticism of such a limitation \textit{see Bernhard Ehrenzeller et. al., Die Schweizerische Bundesverfassung} 2796 f. (3d ed. 2014).
a. **Enforced Tax Collection.** If a taxpayer does not satisfy a tax obligation, the tax authorities have right to file a so called claim of summons with the court in order to have the court recognize that the debt is duly owed. After the court recognizes the tax debt, the tax authorities have several alternatives for enforcement on the financial assets and property of the taxpayer to satisfy the liability. In addition to their enforced collection mechanisms under the tax code, the tax authorities can force both corporations as well as individual taxpayers into a bankruptcy proceeding.

The tax authorities are able to enforce the tax obligations of foreign taxpayers through a general withholding rule, which authorizes enforcement procedures if there is a danger that the taxpayer’s income could leave the country before it has been taxed.\(^91\) The tax authorities clarified that this withholding rule is applicable regardless of whether assessment has been made.\(^92\) Therefore, the system effectively allows for enforcement of tax debt that is not yet due, placing international taxpayers in a disadvantageous position. In addition, the tax authorities can require a taxpayer to offer securities for the payment of future tax debt in circumstances where the taxpayer is conducting business for a limited period or if there are any other reasons that securities are an appropriate form of payment.\(^93\)

As mentioned above, the tax authorities also can seek enforcement by issuing a bankruptcy notice to the taxpayer as first step towards a bankruptcy procedure. Upon receipt of the notice, the taxpayer has 21 days to either pay the debt in full or make a payment arrangement with the tax authorities. In the case the taxpayer does not comply with the notice, the taxing authority may file a creditor’s petition to start the bankruptcy procedure.\(^94\) For corporate taxpayers, tax authorities can serve the corporation with a statutory demand for payment. If the company does not pay or enter a payment plan within 21 days, the tax authority can place it into a liquidating procedure, also known as a “wind-up.” If this occurs, a trustee will liquidate the company and assuming sufficient assets exist, the creditors will receive payment from the liquidated assets.

b. **Tax Forgiveness and Deferral.** Under Australian law, the tax authorities have a large array of measures at their disposal to discharge a tax liability in full, including deferral rules, agreements with taxpayers and special hardship rules. First, the tax authorities may grant the taxpayer permission to enter into an installment plan or to otherwise defer the payment.\(^95\) Such a decision rests within the discretion of the tax authorities.\(^96\) Under the rules

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\(^91\) *Income Tax Assessment Act 1936* (Cth) § 255 (Austl.); see also *Commissioner of Taxation v. Wong* (2002) 121 FCR 60 (Austl.).
\(^92\) *Taxation Ruling No. IT 2544 1989* (Austl.).
\(^93\) *Tax Administration Act 1953* (Cth) sch 1, § 255-100 (Austl.).
\(^94\) Such a procedure will be based on section 40 f of the Bankruptcy Act 1966.
\(^95\) *Tax Administration Act 1953* (Cth) sch 1, §§ 255-10, 255-15 (Austl.).
\(^96\) *Asiament (No. 1) Resources Pty Ltd. v. Federal Commissioner of Taxation* (2003) 52 ATR 140 (Austl.).
for compromising tax debt, a taxpayer must provide comprehensive documentation of his financial situation, including all sources of income and total assets. Based on the information provided, the tax authorities may grant a partial waiver of tax debt if certain conditions are met. Importantly, the tax authorities consider the willingness of the taxpayer to pay the liability and the potential return for the government.97 A refusal by the tax authorities based on the Administrative Decisions (Judicial Review) Act of 1977 cannot be challenged in court.

Finally, the release of tax liability due to hardship release is available only for certain individual taxes and duties.98 One requirement for this type of release is that it must have a positive effect on the economic situation of the taxpayer; accordingly, a taxpayer who would be insolvent regardless of the hardship release would not be granted tax forgiveness.99 In the case that a significant hardship would occur through the enforcement of a tax debt, the tax authorities can, but need not, release the taxpayer partially or in total from the debt.100

c. Taxpayer Rights. The Australian Constitution, unlike many other constitutions, does not include a bill of rights. Therefore, the extent of individual rights protected through the constitution is rather scarce. One reason that the constitution lacks a bill of rights stems from the belief that within a democratic system, the parliament as representative of the Australian citizens provides sufficient protection for citizens’ rights.101 This position also extends to the area of tax procedure. Similar to the United States, Australia has a taxpayer charter-a bill of rights that taxpayers can expect in the interaction with the tax authorities.102 The charter has no binding legal effect but the tax authorities have obliged themselves to follow it in all proceedings.103 The charter outlines the rights of taxpayers and, although a broad array of rights is included, they do not fully overlap with the rights presented under the Taxpayer Bill of Rights in the United States.104 Within the rights granted by

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98 Tax Administration Act 1953 (Cth) § 340-10 (Austl.).
100 Id.
101 For more on the concrete influence of ordinary law on citizens’ rights, see, for example, John McMillan & Neil Williams, ADMINISTRATIVE LAW AND HUMAN RIGHTS IN DAVID KINLEY: HUMAN RIGHTS IN AUSTRALIAN LAW (David Kinley ed., The Federation Press 1998).
104 The rights are that the tax authorities will: (1) Treat you fairly and reasonably, (2) Treat you as being honest unless you act otherwise, (3) Offer you professional service and assistance, (4) Accept you can be represented by a person of your choice and get advice, (5) Respect your privacy, (6) Keep the information we hold about you confidential, (7) Give you access to information we hold about you, (8) Help you to get things right, (9) Explain the decisions we make about you, (10) Respect your right to a review, (11) Respect your right to make a complaint, (12) Make it easier for you to comply, (13) Be accountable.
the Australian taxpayer bill of rights, three deserve special discussion in connection with collection of unpaid taxes: the right to receive an explanation of decisions, the right to a fair and reasonable treatment, and the right for an independent review.

The right to an explanation of decisions requires that the Australian tax authorities provide the taxpayer notice regarding tax determinations the basis for the decisions. The right to a fair and reasonable treatment includes on one hand, the right to be respected by the tax authorities and on the other hand, the right to equal treatment under the law even though the equality aspect itself is not mentioned in the provision and has to be considered more limited especially when it comes to discretionary decisions. Although the right for an independent review exists within the charter, it is limited in reach as the tax authorities have to the authority for discretionary decision-making.

B. The EU and the EU Member States

1. The European Union

The European Union serves as a supranational body limited to influencing just those areas of legislation of the member states within the competences explicitly transferred to the EU. Historically, tax law, as one of the most essential areas of national rather than supranational law, has largely remained with the member states. Exceptions to this general rule exist in the area of cross-border taxation, but tax procedure law and especially tax collection enforcement do not fall under the competences of the Union. EU law has two components: primary and secondary. Primary EU laws have a status similar to a nation’s constitution, and all other rules must fall in line with the primary laws. Secondary EU laws operate in a manner similar to statutes of member states and have a more specific focus than primary laws. Both types of EU law have priority of application over the national law of the member states, but the primary laws only sporadically contain direct tax rules, while the secondary laws concerning taxes focus on aspects of cross-border transactions and information exchange.

However, under the principles of subsidiarity and proportionality, the existing competences of the EU apply without limitations to other areas of law outside of the usual scope of EU law legislation if necessary to fulfill the goals of the EU rules. One prominent illustration of such an extension beyond the primary scope are the EU freedoms under which, for instance, one EU citizen cannot be discriminated against because of his citizenship in another EU member state. Even though this anti-discrimination rule is not inherently tax specific, it would apply to any discriminative tax rule in a member state, including discriminating enforcement of tax collection.

In the context of this Article, several aspects of European law overlap with tax collection and enforcement. The EU fundamental freedoms consist of four main groups of freedoms: the free movement of capital; the free movement of goods; the free movement of persons; and the free movement of services. Even though these freedoms do not have tax law as their focus, they influence the ability of member states to prevent companies or individuals with existing tax debt from conducting cross-border activities or leaving the member state. Furthermore, the state aid rules of the EU limit the ability of member states to grant tax deferrals and tax forgiveness for businesses beyond a certain threshold. In addition, a secondary act, the Tax Claims Recovery Assistance Directive, influences the framework of tax enforcement through the creation of an EU-wide enforcement network. Finally, Commission efforts in support of the implementation of debt relief mechanisms are evident throughout the member states.\footnote{Commission recommendation of 12.3.2014 on a new approach to business failure and insolvency SWD (2014) 61-62 (Mar. 12, 2014).}

\textbf{a. Basic Freedoms of the EU and the Enforcement of Tax Debt Collection.}

In the context of tax debt and basic freedoms, two of the freedoms granted by the EU have special importance to this discussion: the free movement\footnote{TEFU art. 45.} of persons and the freedom of establishment.\footnote{TEFU art. 49 f.} As discussed above, a special treatment of foreign citizens in tax collection procedures is authorized in Switzerland and can lead to prevention mechanisms such as temporary preventive distrains, which directly affect the taxpayer. Under EU law, such an action could, however, directly violate the basic freedoms, because a seizure of assets based solely on a taxpayer’s desire to move to another EU-member state or the obligation of making certain types of advance payments may discourage cross-border activities or the movement of businesses between EU countries.

Counterincentives to free movement across borders violate a fundamental freedom. Therefore, there exists a potential conflict between the protection of fiscal interests of the member states such as Switzerland which use restrictions against movement as a tax collection enforcement mechanism and the goals of the European Union. While EU law prohibits discrimination of and limitations on cross-border activities, it does not specifically purport to prohibit debt collection in any way as long as the debt was created on a valid basis.\footnote{Case C-269/09, Spain v. Comm’n 12.07.2012 E.C.J. Nr. 69; Case C-250/95, Futura v. Administration des Contributions 15.05.1997 E.C.J. I-2492.} Accordingly, member nations can use their own enforcement mechanisms to collect tax debt even if the taxpayer in question intends to move to another EU member state because the enforcement of debt, which is due does not represent a limitation of movement but rather a normal and adequate procedure. The only limitation is direct discriminatory treatment of taxpayers from other EU countries who are in the same situation as local taxpayers.
b. *EU State Aid Law*. In addition to the basic freedoms protecting individuals, the state aid law aims to protect the EU market itself. As such, it has the goal to prevent any distortions caused by the states’ intervention through subsidies in the broadest sense. State aid law is in no way limited to direct grants; actually, debt forgiveness and tax benefits represent two of the main fields in which the EU commission provides aid to member states. As those two areas themselves already have a high level of complexity, the forgiveness of tax debt, which includes both, raises even more questions as seen through recent cases in this field.\(^{110}\) To put it briefly, based on the European Court of Justice (ECJ) legislation, there exists an invisible line between debt forgiveness and taxation in the state aid field which divides the pure public law area of tax law from the actions of a state in its function as creditor; under the ECJ doctrine, for most state aid cases, the “private investor test” applies, under which the court examines whether a private investor would have acted similarly in the situation of the state.\(^{111}\) For example, a debt forgiveness of 50% would not be considered state aid if a private creditor would believe that such a solution would be more beneficial for him than the insolvency of the company. Such an analogy, however, cannot be drawn in tax law, which contains arbitrarily\(^{112}\) defined tax rates and benefits. Therefore, a tax specific framework, which takes into account the uniqueness of the tax system, is necessary.\(^{113}\)

The ECJ held that a state’s actions can be considered under the private investor test only when the state can prove that its actions were motivated by private and not authoritative interests.\(^{114}\) As a result, a state cannot take into account if a company is exceptionally important for the regional economy or if the insolvency of one company will cause insolvency of various suppliers.\(^{115}\) As all member states of the EU have to comply with this rule, debt forgiveness is strictly limited, apart from certain exceptions like the *de minimis* threshold.\(^{116}\) If a country still wants to grant state aid, it has to apply for a waiver of

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\(^{110}\) See, e.g., Case C-507/08, Slovakia v. Comm’n 22.12.2010 E.C.J.
\(^{111}\) Wolfram Cremer, AEUV art. 107 Nr. 21 f. in Calliess/Ruffert, EUV/AEUVR (4th ed. 2011.).
\(^{112}\) The word “arbitrarily” here is used in the sense that political decisions steer the tax system; even though some general tax principles like progressivity may apply, the exact tax burden is not given by natural law but man-made.
\(^{113}\) See on the issue of “normality” in tax state aid law and the definition of a tax benefit Wolfgang Schön in Koenig/Roth/Schön: Aktuelle Fragen des EG-Beihilfenrechts 115 f., addition to the ZHR 2001, 133.
\(^{114}\) Case C-124/10, European Commission v. EDF, 5.6.2012 E.C.J.
\(^{115}\) This statement may sound harsh, but it must be put in the context of the early stages of the EU, when in Germany and France the coal industry remained a strong part of the economy and because of its decreasing profitability the alternative to the state aid rules would have created an “arms race” over the highest coal subsidies in Europe.
\(^{116}\) The state aid rules do not apply to small amounts of aid under 200,000 euro in total in a 3-year period as such amounts could not distort the EU-wide market to a significant extent and controlling all cases of such size would prove impractical.
the European Commission, which may grant exceptions from the rule only if the state applying for the exception meets specific conditions.\textsuperscript{117} Of recent importance, the use of these exceptions saved various financial institutions during and after the financial crisis.\textsuperscript{118}

One of the most relevant questions in the area of tax law during the recent years concerns the interplay of the EU and the national law on debt forgiveness. The issue arose when the German tax authorities waived the right to tax fictional profits created in the accounts of (nearly) insolvent companies\textsuperscript{119} when private investors forgave a part of their debt.\textsuperscript{120} For example, private investors forgave a company that had assets valued at 1.5 million euro and a debt of 2 million euro half of its debt because the private investors thought that in an insolvency procedure they would receive less than the book value of the property. In such a case, the book value of the company changed from negative 0.5 million euros to positive 0.5 million euros and the company “made” a 1 million euro fictional profit.

Under German law, the tax authorities had the right to tax the fictional profit. Because the situation created no real gain but just a change in the book value of a nearly bankrupt company, the authorities waived their right to impose a tax on this form of profit. The problem in this case was that a “private investor” who received the right to enforce a debt after other private investors already waived their rights would not give up his entire claim because he could recover at least a part of the sum in an insolvency procedure.\textsuperscript{121} However, as the government acted from a purely authoritative position, which is not comparable to the situation of private investor who grants tax relief, the tax system was the dominant basis for the test. The High Tax Court of Germany approved the grant of relief under state aid considerations, amongst other reasons, because the general tax principle of taxation based on economic capacity would be the basis for relief under the following consideration: the principle requires that taxation follows the real increase of

\textsuperscript{117}TEFU art. 107 (2), (3).
\textsuperscript{119}This happened based on the so called “Sanierungserlass” (restructuring order) Ertragsteuerliche Behandlung von Sanierungsgewinnen; Steuerstundung und Steuererlass aus sachlichen Billigkeitsgründen (§§ 163, 222, 227 AO) GZ IV A 6 - S 2140 - 8/03.
\textsuperscript{120}The circumstances presented here raise the issue addressed in section 108 of the United States tax code. The issue of debt forgiveness arises not in the context of collection of the tax but on its imposition. Yet, the nexus between forgiveness at the imposition stage versus the collection stage presents only one of semantics for the taxpayer facing the situation.
\textsuperscript{121}For example, five creditors decide to forgive half of the total debt to a nearly insolvent company. If now a new debt is created for whatever reason, the new creditor would not give up the whole claim just because earlier some creditors gave up a part of their claim. He would consider the new circumstances and analyze if the debtor could pay the whole debt to him or not. He especially would not, like the tax authorities in Germany, give up his whole claim while the other creditors still hold half their claim.
economic capacity of the taxpayer.\textsuperscript{122} Since only a fictional increase exists and the taxpayer emerged no better off economically than before the debt relief, no factual basis existed for taxation under the general principles guiding the tax law of Germany. As a result, the Sanierungserlass only articulates what the constitutional principles of equal treatment require the state to do anyway; the state has to tax taxpayers equally based on their economic capacity and not some fictional economic capacity. Therefore, the measure is an essential part of the tax system which prevents unreasonable taxation and not state aid.

This case, however, demonstrates the complexity of issues at the intersection of debt forgiveness and taxation and that EU member states must consider EU law before including new debt forgiveness regulations in their national legislation.\textsuperscript{123} How different the resulting tax systems can still be will be shown in the examples of three member states of the EU: Germany, Croatia, and the UK.

c. **Tax Claims Recovery Assistance Directive.** The administrative support in collecting funds amongst member states has a long-lasting tradition.\textsuperscript{124} The current EU rule on tax enforcement—the Tax Claims Recovery Assistance Directive\textsuperscript{125}—was introduced as a measure to support inter-European trade by allowing member states to receive due taxes even if the taxpayer himself or his assets are out of the reach of tax enforcement of the respective state. Such a solution made it possible for tax authorities to be more accepting of taxpayer activities in other EU countries without the need for potentially harmful business measures. The directive included regulations regarding information exchange\textsuperscript{126} and delivery of notices,\textsuperscript{127} which are necessary to fulfill the prerequisites for collection and enforcement.

If the conditions for enforcement in a member state are met and the member state needs the enforcement to take place in another member state, it can

\textsuperscript{122} Bundesfinanzhof [BFH] [Federal Tax Court], 25.3.2015 – X R 23/13 Rn. 75 f (Ger).

\textsuperscript{123} Competition drives the overriding concern at the EU level. If one nation forgives debts and another does not, does the company in the nation forgiving the debt achieve a competitive advantage over one in the country that does not forgive the debt? Does the country forgiving the debt cause other nations to, in effect, subsidize the forgiveness? Because the EU binds countries in certain economic ways but does not make all of their laws uniform, a mismatch in a tax law concerning forgiveness of debt can create an economic imbalance? This makes national laws on debt treatment within a system such as the EU much more difficult to balance than in a unified system such as the United States where federal debt collection issues apply across the entire country.


\textsuperscript{127} TCRAD art. 8.
issue a request for enforcement directed to the tax authorities in the respective member state. In the case that the debt is not challenged in the requesting state, an enforcement procedure will be initiated in the other state. Moreover, if the tax system of the requesting country normally allows collecting and enforcing tax debt even if the basis for the debt is challenged, the tax collection in another country can still take place under the directive.  

2. **Germany**

The German tax collection system is built around the country’s federal structure. Tax collection is within the competences of the Länder, the German federal states. To ensure equal treatment of taxpayers across Germany, those federal states agreed on an interstate contract, which defines the basic procedures of tax collection. Due to the rather low impact of the economic crisis in Germany and various other reasons such as a rather conservative accounting in comparison to global standards and low individual debt, the need for tax debt restructuring has not arisen as much as in other EU-countries.

   a. **Enforced Tax Collection.** Enforced tax collection in Germany is executed by the tax authorities, either by the authority that issued the primary tax assessment or through the cooperation rules by any other tax authority in the country.  

   The tax authorities have a broad spectrum of measures for enforcement, which include: the seizure of bank accounts, the seizure of property, the failing for an insolvency procedure for corporations and the filing of property evaluation for individuals. The tax authorities can also use a preventive distraint in order to protect a future claim. In general, Germany has adopted preventive distraint rules similar to those in Switzerland; they are different from permanent asset seizures in the way that just the possession, not the ownership rights are taken from the owner and the property just is used as collateral. Also they are limiting the transfer of tangible property to a foreign country or converting existing assets into money or other assets which can either be cash or cash equivalents to facilitate the transfer of an asset out of the country. The German system as well requires that a special not purely economic reason exist and the plain financial situation of the taxpayer be not sufficient. Unlike in Switzerland, however, the fact that

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128 TCRAD arts. 11 (1), 14 (4).
130 Bundesfinanzhof [BFH] [Federal Tax Court] Aug. 28, 1968, 93 SAMMLUNG DER ENTSCHEIDUNGEN UND GUTACHTEN DES BUNDESFINANZHOFES [BFHE] 405, 1968 (Ger.).
131 Gerhard Bruschke, Möhnese: Dinglicher Arrest im Steuerrecht, 41 DStR 54, 54 (2003).
133 Bundesfinanzhof [BFH] [Federal Tax Court] 2.21.1952, 56 SAMMLUNG DER ENTSCHEIDUNGEN UND GUTACHTEN DES BUNDESFINANZHOFES [BFHE] 225, 1952 (Ger.).
134 Bundesgerichtshof [BGH] [Federal Court of Justice] 10.19.1995, 131 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 95 (105), 1995 (Ger.).
that the taxpayer does not have German citizenship cannot in itself trigger certain remedies. Because of the European regulations, the term “out of the country” means that interaction with other EU countries (transfer of assets) usually will not trigger the right to a distraint.

After Germany makes a tax assessment, the taxpayers have limited options to protect himself from enforced collection. Protest against the material part of a decision does not postpone enforcement as the fiscal interest of the state overrides postponement of collection. A procedural protest against the enforcement generally does not stop the enforcement procedures. A taxpayer cannot materially protest against the assessment itself in the enforcement procedure if he has not done so within the assessment procedure, but he can consider a procedure under § 258 AO, which grants him protection from enforcement measures if the measures the tax authorities plan to take are not the least harmful for the taxpayer while equally promising for the tax authorities.

b. Tax Debt Forgiveness and Deferral. While the interstate agreement defines the procedural rules, the German Duties Act (Abgabenordung, AO) contains the essential material rules of tax forgiveness. As a result, under German law there exist two main rules regarding tax forgiveness: a substantive rule contained in section 227 for tax forgiveness in cases defining application of the merits of the imposition of tax; and a procedural rule contained in the interstate agreement called deferral agreement “Stundungserlass” which addresses forgiveness from a collection perspective. Besides those rules, the special provision regarding tax forgiveness in extraordinary circumstances in the § 163 AO also bears mentioning.

The rule for extraordinary circumstances is based on the idea that the legislator cannot predict all factual situations in which a tax rule will apply and consequently serious inequitable solutions could arise, which this rule should counteract. The rule does not state explicit criteria besides the worthiness of the taxpayer and the extraordinary circumstances presented by the situation. However, because one of the criteria for the application of this rule requires that the legislature would have acted if it knew of the potential situation, the application of this rule has limited application because in most cases in which the legislature could have acted but did not, the presumption exists that the legislature did not want to act.

The rule for tax forgiveness in cases where the taxation would be inappropriate follows the main goal of adapting the personal circumstances of a taxpayer to his tax obligation. As such, the rule does take into account

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135 Reichsfinanzhof [RFH] [Former High Tax Court of Germany] 4.6.1932, RStrBl 419, 1932.
136 Klaus Tipke et. al., Stuererrechnt para. 22 nr. 25 (20th ed. 2010).
137 If this is the case, the tax authorities will have to move to an alternative measure for enforcement purposes. However, generally no stop of tax collection procedures can be achieved.
138 BFH VII R 54/72, BFHE 116, 87, BStBl II 1975, 727.
the current economic situation of the taxpayer; however, it requires a strong reason in the personal and social circumstances to grant a tax relief and is not easily granted.\textsuperscript{140} In this regard the rule is therefore similar to the Swiss solution. The \textit{Stundungserlass} rules define, despite the name, the procedural application of deferral rules and tax forgiveness rules. As the tax authorities of the federal state are strongly hierarchical and the hierarchies do not match perfectly from state to state, the act defines explicitly the competences of certain elements of the tax administration in regard to the cases which they can compromise. Tax forgiveness is possible for every taxpayer; only the exact agent that makes the decision differs based on the size of the deferral and forgiveness. While the German system is therefore far more equitable between taxpayers that cannot pay their tax debt, it is also more rigid in granting the tax relief (be it deferral or forgiveness) to any taxpayer.

c. \textit{Taxpayer Rights}. The German Fundamental Law, “Grundgesetz,” the \textit{de facto} constitution of Germany, similarly to the Federal Constitution in Switzerland, has the role of creating the basis for taxpayer rights. However, it does not contain special rules applying to tax law. The reason for this is primarily the long constitutional tradition in Germany under which various constitutional tax rights have been developed based on existing provisions, so that an adaptation has not been necessary to protect taxpayers. The main rules applying to the analyzed rights are article 103 \textit{Grundgesetz} and article 3(1) \textit{Grundgesetz}. In article 103 of the \textit{Grundgesetz} it is defined that everyone has the right to a hearing in front of a court on their case. Furthermore, article 3 of the constitution, which defines equality of all citizens, has been interpreted as a foundation for equal treatment of taxpayers and taxation which is based on economic capacity. Through this interpretation, the equality of taxpayers has protection on a constitutional level.

Due to the constitutional interpretation and expansion of general tax principles onto the sphere of tax law, there was no reason to create special tax law principles, as they would be redundant. However, the German Duties Act contains further rules defining how the state must ensure these rights. So article 91(1) of the act which defines the right to be heard guarantees every individual whose rights may be affected by a decision to make a statement before a decision can be rendered which could affect the rights of a taxpayer, and the violation of these rights violates the duties of the tax official.\textsuperscript{141} This provision does not apply to enforcement measures based on the explicit language of the statute.\textsuperscript{142} Just a right to previous information is guaranteed.\textsuperscript{143} This provides another expression of the view that the taxpayer must exercise all procedural rights to protest against the assessment procedure before the

\textsuperscript{140} For a case in connection with a transfer of land that created a disproportionate tax burden, see, for example, BFH IV R 9/06, BStBl. II 2010, 664.


\textsuperscript{142} Article 91 (2) 5 Abgabenordnung.

\textsuperscript{143} Article 260 Abgabenordnung.
state makes the assessment and that once the enforcement phase begins the taxpayer may only raise deficiencies of the enforcement procedure not the merits of the liability itself.

3. Croatia

While Croatia has membership in the EU, it represents the least developed country analyzed in this Article. The tax collection system in Croatia, although now significantly improved through recent reforms, has not yet achieved the efficiency and sophistication of the systems of Western European countries. The economic crisis, a nation-wide high unemployment rate and significant private debt have lead in recent years to a steep increase of tax collection problems. Currently in Croatia about 8% of the adult citizens and more than 40,000 corporations have blocks on their bank accounts. 144

a. Enforced Tax Collection. Tax authorities under Croatian law have the right to seize tangible property, funds in bank accounts 145 and tax refunds. 146 However, in almost all cases the tax authorities do not go beyond offsetting tax refunds, seizing the funds in bank accounts of individual taxpayers and blocking the accounts from further use until satisfaction of the tax debt occurs. The informal limit on pursuing only the bank accounts of individuals does not exist in the case of corporate tax debt and collection will be enforced by any means. 147 The decision not to proceed with the legally possible enforcement over property, especially real estate of individuals, is not clearly explained by the tax authorities; it may however be a policy decision not to evict taxpayers or seize their valuable mobile property (cars, etc.) as the sheer number of cases which would arise would not be easily accepted in the general population. 148 The high level of personal debt which is often secured through mortgages may also play a role from an efficiency standpoint because in most cases after a forced sale no value would be left to the non-mortgage creditor. For the enforcement of collection of tax debt, the general rules of the foreclosure act 149 apply as long as no special rules of the Tax Code define otherwise. 150 Preventive measures in general may occur at any time before

145 Article 139 Opći porezni zakon [OPZ] [General Tax Act] NN 147/08, 18/11, 78/12, 136/12, 73/13, 26/15, available at www.zakon.hr/z/100/Opći-porezni-zakon.
146 OPZ art. 115 (1).
147 Under the current system it has become quite common that tax authorities force a company into the pre-insolvency procedure. However, if the company remains solvent, the tax authorities may place tax liens on land in lieu of the pre-insolvency process. See Position of the Tax Authorities Statement, Ministry of Finance, Mar. 13, 2014, http://www.mfin.hr/hr/novosti vlada-je-dala-iste-sanse-svim-poduzetnicima-2013-03-14-13-25-36.
148 The United States has essentially reached this same conclusion regarding the seizure of tangible property and homes to satisfy personal tax debts.
149 Ovršni zakon [OZ] [Enforcement Act] NN 112/12, 25/13, 93/14, available at http://www.zakon.hr/z/74/Ovr%C5%A1ni-zakon.
150 OPZ art. 138.
the assessment if the taxpayer appears unable to pay the tax debt. They can take the form of liens on immobile property or preventive distraints on mobile property. No special rules for internationals apply but the general EU regulations have to be considered so that no discrimination within the EU is possible.

Taxpayers have to receive notice about their tax debt in advance even if they live abroad. Failure to at least attempt to provide appropriate notice to the taxpayer prior to taking collection action may result in the right to challenge the decision of the tax authority. However, once the decision of the tax authority has been issued, it can be used at any moment as a basis for an enforcement request issued directly to the government financial institutions agency (FINA) which then ensures that all banks in the country seize all bank accounts of the taxpayer up to the amount of the total debt. Once the funds are seized, the taxpayer’s only choice, if he disagrees with the seizure of the funds, is to directly sue the tax authorities for refund. When all of the funds in a taxpayer’s bank accounts combined do not contain enough funds to fully satisfy the outstanding tax debt, all of the taxpayer’s existing bank accounts as well as any newly opened accounts in the country will stay blocked except funds for basic living expenses (if the taxpayer opens a new protected account for this purpose). If the taxpayer deposits new funds into the blocked bank accounts the bank will redirect the funds to the tax authorities’ account. As it is illegal in Croatia to pay a salary in cash or by check or any method other than bank transfer, the majority of an individual’s salary will be seized until satisfaction of the debt. While individuals’ accounts can stay blocked indefinitely (at least 10 years from the filing of the request), corporations will move into a (pre)insolvency procedure if their account stays blocked for 60 days.

b. Tax Debt Forgiveness Outside of Pre-insolvency Procedures. Debt forgiveness within the Croatian system has had a rather peculiar development during the recent years due to the steep increase of personal indebtedness in the country. The government decided to introduce various one-time measures

151 OPZ art. 158.
152 The exact process of seizure is defined by the Enforcement of Monetary Funds Act – Zakon o provedbi ovrhe na novčanim sredstvima NN 91/10, available at http://www.zakon.hr/z/346/Zakon-o-provedbi-ovrhe-na-nov%C4%8Danim-sredstvima.
153 OZ art. 177 f.
155 The effect of the ongoing bank account levy coupled with employment laws requiring deposit of wages into the bank account drives taxpayers into the underground economy.
156 Article 18 Zakon o finansijskom poslovanju i predstečajnoj nagodbi [Pre-Insolvency Procedure Act article] NN 108/12, 144/12, 81/13, 112/13, 71/15, 78/15, available at http://www.zakon.hr/z/543/Zakon-o-finansijskom-poslovanju-i-predste%C4%8Dajnoj-nagodbi.
to ease the negative effects of the accumulated tax debt.\textsuperscript{157} Those measures allowed individuals,\textsuperscript{158} as well as corporations,\textsuperscript{159} to pay their tax debt off in installments. While the measures decreased the pressure of the tax debt for some of the taxpayers, they did not solve the overall problem because for individuals no effective institutional mechanisms exist in the tax system to enable tax forgiveness. Additionally, Croatian law does not have general insolvency procedures for individuals, so that the tax debt remains on the books until (1) the expiration of the statute of limitations, and (2) until four more years after the limitation no tax collection was possible, and (3) the tax authorities decide to remove the debt from their books.\textsuperscript{160} While the tax code before the introduction of the pre-bankruptcy procedures included a provision that allowed tax authorities to compromise on tax debt, this provision has never had a large impact on the tax system.\textsuperscript{161}

c. Tax Debt Forgiveness in the Pre-insolvency Procedure. The pre-bankruptcy procedure is the result of new developments in Croatia. The pre-bankruptcy procedure was enacted to increase the efficiency and optimize the chances of recovery for the taxpayer-company.\textsuperscript{162} The pre-bankruptcy procedure is only open to corporations because under Croatian law despite various reform attempts no bankruptcy procedure for natural persons exists. The pre-bankruptcy procedure allows the creditors and the taxpayer to reach an agreement on debt forgiveness, payment plans, potential debt-equity swaps or the transfer of certain property between the taxpayer and the creditors.

The tax authorities in Croatia were due to the widespread issue of tax debt forced to handle debt forgiveness on a large scale. As a result of equity considerations and also the need to prevent abuse of this rule on a local level, the Minister of Finance issued orders regarding tax forgiveness in pre-insolvency procedures. The orders distinguished between small and large debts; the larger the debt, the higher the rank of the tax official that decides the case and the higher the discretionary power for decisions in the case. While small and


\textsuperscript{158} Zakon o naplati poreznog duga fizičkih osoba [Tax Enforcement against Natural Persons Act] NN 55/13, available at http://www.zakon.hr/z/583/Zakon-o-naplati-poreznog-duga-fizi%C4%8DKih-osoba.


\textsuperscript{160} The time in most cases will be about 12 years after the taxable event occurred. However, the head of the tax authority has no obligation to delete the tax debt even after this time. See OPZ art. 120 (4).

\textsuperscript{161} See Šime Jozipović, The Treatment of Taxpayers by Croatian Tax Authorities in the Pre-Insolvency Procedure, Collected Articles of the Law Faculty of the University of Rijeka n.38 (forthcoming). The same was true in the United States until 1991, when the IRS decided to start using the offer in compromise provisions that had been on the books since the 1860s.

\textsuperscript{162} Nacrt Zakona o financijskom poslovanju i predstečajnoj nagodbi [Draft of the Pre-Insolvency Procedure Act Form] 7/5/2012, Class: 423-05/12-01/02 Inumber: 5030105-12-1.
medium-size debt could not be waived but only the interest on it forgiven, large debt could be drastically reduced through the procedure. In conclusion, large businesses and businesses that have accumulated their tax debt for a long time could receive millions in tax incentives and therefore gain an unfair advantage in comparison to small businesses and diligent businesses that were really just affected by the economic crisis.

d. Taxpayer Rights. In Croatia, like in other analyzed civil law countries, the constitution provides the main source of general tax principles. However, due to the young age of both—the Croatian Constitution and the Croatian tax system—the implementation diverges from the models in Switzerland and Germany to a certain extent. In comparison to the other analyzed systems, the Croatian tax system is simpler. It aims, as one of its key characteristics, to provide a tax system its citizens can easily understand. At the same time, the Croatian Constitution, considered a modern constitution, places almost ⅓ of its content into its bill of rights. As such, rights provided by the Croatian constitution grant its citizens a much more concrete statement of their rights than in other, older constitutions. Therefore, detecting taxpayer rights under Croatian law generally proves easier than in the more abstract systems of Germany, and to a certain extent, Switzerland.

The Croatian constitution has a general provision ensuring equal treatment before the law as well as a provision that guarantees the right to challenge a decision in front of a court or other public body. The equal treatment is a highly general rule whose application is defined by law. The right to challenge a decision is a procedural right. This right is, however, directly limited within the constitution. The guarantee of a right to challenge a decision does not apply if the challenging party was given another way of legal protection against the decision. Besides the general principles, the constitution also contains special tax principles in article 51, which guarantee equal treatment of taxpayers and taxation based on economic capacity.

Aside from the broad constitutional guarantees of rights, the Croatian General Tax Code (Opći porezni zakon), which regulates fundamental procedural issues for all types of taxes, contains its own bill of procedural taxpayer rights written in a manner easy for ordinary taxpayers to understand. These rights apply to the general tax code itself and the discretionary power of the tax authorities. The list is defined in the articles following article 5.

\[^{163}\] For in-depth analysis on the above summarized issue and the equality problems, see Jozipović, supra note 161, at Section III.

\[^{164}\] Croatia Const. art. 3, 14 (2).

\[^{165}\] Croatia Const. art. 18 (1).

\[^{166}\] OPZ art. 5.
and contains an open list of rights.\textsuperscript{167} In addition to that, two special taxpayer principles exist in regard to the enforcement procedure—the principle of appropriate measures, which guarantees that the measure must be reasonable in comparison to the tax debt, and the protection of the taxpayer’s dignity. Also, the general principles of administrative law apply and therefore all administrative procedures have to comply with that catalogue of rights as well.\textsuperscript{168}

Besides the principles that \textit{de facto} define taxpayer rights, the Croatian tax authorities have also issued a document containing a list with explanations of procedural rights in the broadest sense, which itself has no legal effect but rather systematizes the rights and options a taxpayer has during a tax procedure.\textsuperscript{169} The Croatian system can be considered an intermediate solution between the analyzed civil law systems that do not have a separate list of rights but rely on the principles of the tax code and their constitution, and the systems of common law which do not have a strong constitutional influence on the tax principles but which therefore tend to inform the taxpayers about their rights scattered through the tax laws of the country.

From an equity standpoint, the current situation with respect to tax collection in Croatia is not optimal. Due to the fact that only corporations may receive debt forgiveness in this procedure, individuals remain a vulnerable group within the tax system which offers them the relief of deferred payments but not forgiveness. As a consequence, the current system promotes illegal work by individuals as a means of receiving their salaries and non-compliance with tax laws.

4. United Kingdom

The United Kingdom has a highly developed tax system with a strong emphasis on the IRS that the tax authorities offer to the taxpayer. The tax system is based around a federal agency that is responsible for the collection of all duties and which has a special department for enforcement procedures.\textsuperscript{170} The UK has a rather strict tax system when it comes to collection, but this is balanced by the rather simple private insolvency procedures for individuals. Due to the historical connection between Australia and the United Kingdom,

\textsuperscript{167}The rights are: article 6 (1) the legality of assessment, article 6 (2) the right to an assessment that includes all relevant facts, article 6 (3) the right to be informed about your rights, article 6 (5) respect for taxpayers that are not fluent in the Croatian language, article 7 the right to protest, article 8 the right to privacy, article 9 the principle of good faith in the tax procedure, article 10 the economic approach of the tax authorities. However, those rights are complemented by the general administrative principles and, wherever the constitution grants special rights, those rights will apply as well.

\textsuperscript{168}For a detailed analysis of this issue see Jozipović, supra note 161, at Section II.


\textsuperscript{170}See Malcolm James, The UK Tax System: An Introduction 78 (2009).
many similarities can be observed in the structure of the tax system and the taxpayer rights.

a. Enforced Tax Collection. The existence of a fixed and determined tax liability serves as a prerequisite for enforced debt collection. Additionally, the collector must mail demand for the tax debt (and the taxpayer must refuse to pay) before collection begins. The demand does not have to be delivered to the taxpayer in person. Delivery to the taxpayer’s last known address meets the requirement of this provision. Under UK law, enforcement actions include the seizure of earnings and pension income, the seizure of property, and initiation of a bankruptcy procedure. The seizure of movable property is made based on distraint. Alternatively, the tax authorities can enter court proceedings for enforcement purposes. Also, the tax authorities are authorized to assign private debt collectors with the collection of the tax debt. In practice there is no guarantee that the collection will be made in the least invasive way just a protection of certain property under the collection manual is ensured. A special regime applies to tax debt settlements as they are considered to produce a civil law claim and are therefore only enforceable under private law enforcement rules.

b. Tax Debt Forgiveness and Deferral. The tax authorities can offer a taxpayer to either get a deferral of the obligation to pay or to make an installment plan and pay off the debt over a longer period of time. Debt relief can generally occur only under through a bankruptcy proceeding. In exceptional cases the tax authorities can consider administrative relief from tax debt. A taxpayer can file for special relief if he considers that the debt assessment was excessive and if he is able to prove that: (1) it would be completely unreasonable, from the tax authorities perspective, to recover the estimated tax, (2) special relief has not been claimed before, and (3) the individual’s tax affairs are up to date or will be under a special arrangement. The deferral and installment plans are considered, from the perspective of the fiscal interest, so that the payment period will still be rather short due to the time that alternative enforcement would take and the problem that new tax obligations will come up for the next year. Bankruptcy procedures are possible for both corporations and private individuals. After the bankruptcy

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171 Taxes Management Act, 1970, § 60 (1) (Eng.) [hereinafter TMA].
172 TMA § 60 (2).
173 TMA § 61 (1).
174 TMA § 65 (1), 66 (1).
175 Even though the tax authorities can seize property independently, they will often for practicability/security reasons prefer to transfer this duty to a bailiff. See Robert W. Maas, GUIDE TO TAXPAYERS’ RIGHTS AND HMRC POWERS 215 (2d ed. 2009).
176 Id. at 216 f.
177 Id. at 215.
178 TMA § 3A.
179 See Maas, supra note 175, at 230 f.
procedure, corporations will be wound-up, but private individuals will generally receive a discharge of their tax debt.180

c. **Taxpayer Rights.** The constitution of the UK is composed of various sources. For the area of civil liberties and human rights, especially in the context of this Article, the Human Rights Act of 1998 and the European Convention on Human Rights have to be considered. However, both have a very narrow impact in the area of tax law and tax procedure. Taxpayer rights are therefore listed in the UK’s Charter of Taxpayers’ Rights.181 The current Charter of Taxpayers’ Rights in the UK was not that relevant due to innovativeness of its content *per se*, but rather because of its innovative approach of presenting the rights that belong to taxpayers in one central, easily understandable document.182

The list of taxpayers’ rights contains, amongst others,183 the right to be treated even-handedly.184 This right guarantees the taxpayer will receive fair and equal treatment in accordance to the guidelines of the tax authorities and the taxpayer’s personal circumstances. The right to appeal is not separately mentioned, but the right to “be respected” includes the right to be informed of the right to appeal and the right to have the taxpayer’s personal circumstances considered. The right to help and support to get things right also includes a broad right to information about which taxes are owed and why.

C. **Conclusions of the Comparative Analysis**

The analysis of five different civil law and common law jurisdictions both inside and outside of the EU as well as the supranational law of the European Union itself have shown that a high importance of taxpayer rights protection is a common phenomenon in countries with a developed tax system. All jurisdictions handle intrusion into the taxpayers’ sphere of rights with special respect and usually view any limitation of the freedoms or the property of taxpayers through its proportionality with the fiscal interests of the state. However, while acknowledging the idea of a fair tax system that protects taxpayers’ rights solutions for certain issues vary considerably depending on differences in the general structure of the legal systems of the analyzed countries.

The enforcement phase in all jurisdictions requires first the issuing of a decision of a tax authority, which states the amount of tax debt owed and

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180 Insolvency Act, 1986, § 281 (Eng.).
182 James, * supra* note 170, at 78.
183 (1) Respect the taxpayer, (2) Help and support the taxpayer to get things right, (3) Treat the taxpayer as honest, (4) Treat the taxpayer even-handedly, (5) Be professional and act with integrity, (6) Tackle people who deliberately break the rules and challenge those who bend the rules, (7) Protect taxpayers information and respect taxpayers privacy, (8) Accept that someone else can represent the taxpayer, (9) Do all we can to keep the cost of dealing with the tax authorities as low as possible.
the time frame to pay the debt. Only in exceptional cases when the taxpayer’s actions jeopardize collection of the tax debt may tax authorities proceed with preventive measures. The analyzed civil law countries have clear mechanisms for this procedure that require the tax authorities to establish whether certain conditions are met which usually have to go beyond mere financial issues of the taxpayer before they can enter the enforcement phase. In detail, however, the prerequisites and extent of these measures vary. Switzerland allows for a very broad basis for advancing tax collection, especially in cases foreign taxpayers. Germany closely follows the Swiss rules, prohibiting, however, discrimination of foreigners on the mere basis that they are not German citizens or corporations. Croatia, on the other hand, has a more abstract rule, which does not differ largely from the general rules of Germany and partially Switzerland. The United Kingdom is like Germany and Croatia bound by the limitations of European law. Australia has very wide-ranged measures relating to the protection of revenue loss. The tax authorities can either use an extensive withholding system or enter preventive enforcement even before making an assessment.

All European jurisdictions have in common that a discrimination of EU corporations or citizens violates EU law and that through the Tax Claims Recovery Assistance Directive countries can enforce tax debt collection throughout the EU. The cross-border enforcement rules show that in today’s time ensuring an effective enforcement in an international environment through multilateral rules serves as a viable option. The fact that the OECD model treaty also contains enforcement rules could therefore be a good step closer to a multinational tax enforcement system, which would not only ensure a better protection against revenue loss but, even more importantly, make the highly invasive preventive measures of tax collection in international cases unnecessary. To date, the United States only has collection language in treaties with five countries—Canada, France, the Netherlands, Denmark, and Sweden. The absence of collection language in the treaties with the United States limits cross border collection by the United States and by countries whose citizens go to the United States and appears out of step with modern trends in cross border tax collection. The inability to effect cross border collection, in turn, can impact fairness of tax systems in a world where movement of money occurs with such ease.

In the next step, after issuance of a tax assessment, all analyzed tax systems have a notification rule that closely connects to the right to be informed or the right to protest against a decision made by a public (tax) authority. While the basis may vary based on the human rights and taxpayer rights system of each country, each system essentially reaches the same result: A taxpayer has the right to know what he owes and the right to protest against the decision of the tax authorities if he disagrees with it. In conclusion, it therefore does not matter whether the basis of the rule is a constitutional tax procedure rule like in Switzerland, or just a taxpayer right under the bill of rights which is interwoven in the tax rules like in the common law jurisdictions or a combination
of abstract general procedural rights and special taxpayer rights as it is the case in Germany.

The same notification and protest right which applies to the general assessment does not necessarily carry over to the enforcement phase. The historical reasons for the different treatment may be partially doctrinal. The wording of the analyzed civil law constitutions usually includes a rule that only guarantees that a way to protect the rights of individuals has to be ensured, without a clear definition of what it has to look like. In practice, the main reason for such an approach exists in the urgency and the fiscal interest, which countries must protect after making an assessment. The German argumentation, however, may have played a role in most jurisdictions even outside of the doctrinal analysis, as the protection on the assessment level already grants the taxpayer an option to protest against the merit of the tax authorities’ actions.

In the enforcement phase, most countries have the option to seize funds on bank accounts, seize property, block bank accounts for further use or monetize property that has been acquired through preventive measures. Only the Croatian system, as one of the less developed tax systems, does not strictly enforce all possible measures on natural persons due to policy and efficiency reasons. However, one big difference amongst the analyzed systems is the use of bankruptcy procedures for enforcement purposes. While especially the common law systems do include this option in their enforcement rules, civil law countries seem much more reluctant to grant their tax authorities such rights. Germany and Croatia both do not force private individuals into bankruptcy for tax debt, albeit for different reasons. Germany’s rules about personal bankruptcy seek the long-term relief of the debtor and therefore a forced personal bankruptcy would not fit into the general logic of the system. Croatia simply does not have a personal bankruptcy law, so that such a procedure cannot exist. Switzerland goes even further and explicitly forbids its tax authorities from initiating bankruptcy proceedings, as the legal system is based on the belief that the state should not instigate a debtor’s bankruptcy under ordinary circumstances. This variety of solutions shows that states take very different standpoints on bankruptcy issues and that these issues closely connect to the purpose of the respective insolvency procedures, to the position of the state in private activities and of course to national economic considerations.

In the area of debt forgiveness different approaches also exist. The Swiss and German systems have large similarities in their procedures and include equity considerations as well as economic hardship in their evaluation. These considerations spring from their constitutional and legislative requirements to treat taxpayers equally. Both common law countries have shown a strong commitment to treat taxpayers equally, especially by defining some guidelines but still granting the tax authorities discretionary power to decide on a case by case basis. However, the approach of the UK is especially due to the importance of the insolvency procedure rather limited. A big difference, however, exists between more developed tax systems and less developed tax systems. In
practice, the German system has a relatively limited reach but applies it very equitably towards all taxpayers, while the Croatian system primarily targets large debtors with its more sophisticated procedures. Moreover, the Croatian tax system shows in this regard a big emphasis on regulation and structuring in order to create a unified system across the country and avoid potential abuse. In general, therefore, the choice of tax forgiveness is often also a matter of belief in the neutrality and qualification of local tax authorities to come to an equitable result.

In relation to the basis and presentation of taxpayer rights, different approaches also exist. Australia, having no extensive bill of rights, puts a large emphasis on the Taxpayers’ Charter, which contains a list of rights taxpayers have when interacting with tax authorities. Similarly, the UK, which does not have a single-document written constitution, has a well-structured charter of taxpayers’ rights easily accessible to all taxpayers. On the other hand, Germany and Switzerland have nothing similar to a taxpayer bill of rights. They fully rely on the rights granted to taxpayers through the constitution and ordinary law, without the need for a codification in one place. This, of course, has the negative effect for the taxpayer that it becomes difficult to access all rights in procedural matters. However, it has to be considered that taxpayer rights, at least in Germany stem from long development, which was strongly influenced by the case law of the constitutional courts and courts responsible for tax matters.

As shown in the German segment, general constitutional rules such as the equality principle were the basis for the development of many taxpayer rights. German legal doctrines have created highly developed principles regarding taxpayer rights and do not need more concrete definitions of taxpayer rights from a purely legal perspective. From the perspective of taxpayer information, however, an overview would be helpful. The Swiss system weaves taxpayer rights into its constitutional and general federal law. However, the precision of the constitutional taxpayer rights shows the importance those rules have within the system.

Like the other civil law countries, the Croatian system does not have a separate bill of rights; however, it has in its Duties Act a list of tax law principles, which resemble some of the taxpayers’ rights in the charters of Australia or the UK. While those rights are easily accessible and in line with the principle of simplicity of the tax system, the rights created by the Croatian system closely follow the German tax system without the same historical context as the German system because of the recent passage of Croatia’s constitution. Due to the constitutional practice and the need for general systematization, the Croatian taxpayer rights in procedural matters split themselves between the Duties Act, the Administrative Procedure Act and the Constitution. As those abstract rules directly influence the legal system, it is not easy to pull them out of their natural environment and list them within one document. Therefore, it seems that tax systems of the civil law countries though strongly
based on legal principles have more difficulty with the creation of a document similar to a taxpayers' bill of rights.

Content-wise, a big overlap among all tax systems can be found, especially regarding the rights to information, protest and equal treatment. Equal treatment of taxpayers and the consideration of their economic capacity are generally accepted principles in all jurisdictions. Access to information and the right to protest are, albeit present in all jurisdictions, to a certain extent handled differently. Especially due to the strong fiscal interest in enforcing tax debt collection, many jurisdictions like those in Germany and Croatia do not deem it necessary to give taxpayers strong rights in the enforcement phase, as they have already had a chance to act after the assessment. As this question basically is a trade-off between efficiency and taxpayer protection without a clear delineation, the diversity of solutions and practices presents few surprises.

IV. The Future of U.S. Taxpayer Rights

Despite the rather complex solutions for both tax debt collection and debt forgiveness, the U.S. tax system remains flawed. The protection of taxpayer rights for low-income taxpayers has proven a significant problem in the current system which seeks impersonal solutions and remains characterized by its complexity. The legislation in this field aims to create a fair and equal system that effectively allows a well-informed taxpayer to challenge the decisions of the tax authorities. However, as presented above, such a system requires more than the plain statement of rights. Only a system based on actions that follow the defined policy goals can achieve the necessary fairness considerations.

One way to achieve the targeted level of practical implementation of taxpayer rights is the presented civil law model, which grants the taxpayers in most civil law countries a direct remedy against statutes or actions by tax authorities. The long constitutional tradition of protecting taxpayers in Germany supports this as a valid solution. However, the Swiss model, which does not rely on such a mechanism yet still provides support for taxpayers in collection matters, shows that even in a civil law system the German model does not provide the exclusive remedy for supporting taxpayer rights. The Croatian system shows that even a broad array of substantive taxpayer rights does not guarantee effective enforcement.

The enforceability of certain elements of the taxpayer bill of rights could influence many issues, which taxpayers currently face under the U.S. system. The procedural inequality faced by low-income taxpayers demonstrates the challenges in implementation. While a direct discrimination of a taxpayer would under most civil law constitutions be considered unconstitutional, and therefore such an approach as illegal, the problem in the United States does not lie with the case-by-case discrimination of taxpayers. It rather lies in the inherent discrimination of low-income taxpayers who do not have the same access to information and legal advice, and who therefore depend much more on an efficient tax authority for direction. The funding of a public body and
its problems would, however, in most cases not qualify as a legal problem of taxpayer rights but rather an administrative issue. Therefore, enforceable taxpayer rights would most likely just for themselves not be a sufficient solution for the problem.

As a result, it should rather be considered which elements of enforced tax collection could be included in the system to make it more transparent and enable a direct solution of the problem. One solution could be a fast-track insolvency procedure which would allow taxpayers to start over after just a few years similar to the solution in the UK. Such a mechanism would require a broad inclusion of existing and potential tax debt to be efficient. One big problem of such a solution would however be again the lack of information of low income taxpayers which would have to make a life changing decision about entering an insolvency procedure with insufficient information about alternatives and consequences. Therefore, it would be necessary to grant taxpayers at least in the phase of such a decision a sufficient insight into their obligations and a complete overview about their options at hand.

If such a solution is not achievable or would have a too large impact on the system in general, different mechanisms could be possible to achieve a similar result. A bigger focus on the collection in the regular procedure without entering enforcement mechanisms or the shift to a more accurate withholding system could prevent numerous cases of enforcement from even happening. The fact that even well-developed western tax systems cut taxpayer rights in the enforcement procedure down shows that those countries most likely have avoided social issues in tax collection. The only other analyzed country that had stunningly similar issues with tax collection as the United States was Croatia. Here the tax collection issues were rather a result of the inefficiency of the regular collection system then the enforcement procedures. Therefore, a solution for the issues in the United States could be found in a reform of the procedures which take place before enforcement. Such a solution would also make sense if one takes into account the complex system of debt forgiveness, information distribution, enforcement and taxpayer protection which certainly is not without a reason so much more developed than the systems of many other analysed countries.

\[185\] For example, such a solution may not work due to other debt. The United States has a large problem of debt which does not receive a discharge during the insolvency procedure. The debts excepted from discharge could have an influence on the effectiveness of such a measure.
Bureaucratic Oppression and the Tax System

LESLEY BOOK *

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Introduction

Observers of the Service’s administration of the earned income tax credit (EITC) have leveled one main criticism, that the Service has been unable to reduce stubbornly high error rates. Congress has generally focused attention on this problem with many legislative initiatives, including unprecedented (for the tax system) penalties for improper claims, special due diligence rules for preparers submitting returns with EITC claims, and a lessening of pre-assessment right to judicial review of Service rejections of EITC claims.

In this Article I wish to shift attention to the Service’s poor service to EITC claimants. In particular, I wish to broaden the inquiry to reflect the insights of nontax scholars who have looked at the ways that administrative agencies interact with low-income individuals who rely on benefits that agencies administer.

Some observers have tried to situate IRS service shortfalls within broader notions of fairness and to explicitly recognize the Service’s importance in delivering benefits. For example, in the 2015 Annual Report to Congress, the

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1 There are two main measures of EITC noncompliance, improper payments and overclaims. Improper payments are an annual measure of credit improperly claimed net of IRS enforcement; overclaims do not reflect IRS enforcement actions. For a useful summary of the compliance problem with the EITC, see MARGOT L. CRANDALL-HOLLICK, CONG. RESEARCH SERV., R43873, THE EARNED INCOME TAX CREDIT (EITC): ADMINISTRATIVE AND COMPLIANCE CHALLENGES (2015) (discussing how Treasury releases information on improper payments annually but IRS has only periodically reported on gross overclaims, with the last overclaim studies released in 1999 and 2014). For fiscal years 2010 through 2013, the Service’s improper payments ranged between 22% and 26%, that is, between $13.3 billion and $15.6 billion annually. Internal Revenue Serv., IRS Pub. No. 5162, Compliance Estimates for the Earned Income Tax Credit Claimed on 2006-2008 Returns 2 (2014).

2 Most observers who have considered the administration of the EITC have focused attention on the compliance issues, such as Lawrence Zelenak, Tax or Welfare? The Administration of the Earned Income Tax Credit, 52 UCLA L. Rev. 1867 (2005). There are some noteworthy exceptions. See Dorothy Brown, Implicit Bias and the Earned Income Tax Credit, in IMPLICIT RACIAL BIAS ACROSS THE LAW (Justin D. Levinson & Robert J. Smith eds., Cambridge Univ. Press 2012) (discussing how racial bias contributes to Congress perceiving ineligible claimants as welfare cheats). There have been some articles directly addressing how the characteristics of claimants may contribute to the need for administrative reforms. See Jonathan Schneller, The Earned Income Tax Credit and the Administration of Tax Expenditures, 90 N.C. L. Rev. 719 (2012) (recommending moving toward a more inquisitive based model of adjudicating EITC eligibility disputes); Jonathan P. Schneller et al., The Earned Income Tax Credit, Low-Income Workers, and the Legal Aid Community, 3 Colum. J. Tax L. 176 (2012) (suggesting a number of changes to improve service in connection with administering the EITC, including that IRS revise its mission statement, and emphasize free return filing through increased use of programs such as VITA and review of eligibility disputes).
National Taxpayer Advocate (NTA) lamented that “in the current customer service environment, procedural justice is undermined by the IRS’s failure to provide tailored education and assistance to low income taxpayers, coupled with an examination strategy that creates significant burdens for EITC taxpayers trying to prove their eligibility.” In addition, the NTA has recommended that the Service change its mission statement to identify that it has dual roles, one as revenue collector and the other as benefits administrator. In leveling her criticism, the NTA has called on the Service in administering the EITC to recognize some of the characteristics of low income taxpayers, including low literacy rates, less access to internet and technology generally, and an inability to readily secure documentation that the Service may request in response to correspondence relating to eligibility.

The above points are crucial if the agency wishes to set policies and procedures that will allow it to deliver service to all individuals, not just those with resources to delegate to third parties or the skills to navigate the agency on their own. This Article builds on some of the NTA criticism and takes the small but I believe important step of looking at the general challenges that agencies face when administering programs that benefit lower-income individuals and situating some of the Service’s challenges in that framework. Many have looked at those general challenges outside tax, but observers of the tax system have not applied those insights to tax administration. It is my hope that those insights can further assist in both better identifying the problems the Service faces and also with proposing and implementing solutions.

One of the best sources of insight when it comes to general challenges agencies have when administering programs that benefit the poor is Edward Rubin. In his 2012 article *Bureaucratic Oppression: Its Causes and Cures*, Professor Rubin describes how and why agencies tend to mistreat individuals who apply for benefits. As he notes, agencies engage in bureaucratic oppression when the agency or its employees “impose unnecessary and harmful burdens on private parties.” The term includes agency actions that are not necessarily illegal or even against agency guidelines and includes employees “following rules when doing so imposes burdens for no purpose.”

The underlying theme behind this Article is that in fashioning its approach to administering the EITC (or any other provision that is directed to lower-income individuals) the Service should learn from and apply insights from those who

7 Rubin, supra note 6, at 300.
8 Rubin, supra note 6, at 300.
have studied how in distributing benefits, agencies tend to mistreat individuals, or as Professor Rubin frames the discussion, engage in bureaucratic oppression. The Service and Congress can best ensure improvements to administering the EITC when policymakers understand both the specific functions that are associated with delivering benefits and the common barriers that low-income individuals face when interacting with government agencies. This Article applies insights from scholars outside the tax perspective who have examined functions associated with benefits programs and barriers associated with successful benefit delivery. Those perspectives reveal that the Service faces many challenges if it wishes to administer the program well. By isolating the functions and barriers in the context of the delivery of benefits, this Article advances the discussion surrounding the Service’s important role in the nation’s efforts to combat poverty and provide incentives to the working poor.

This Article will proceed in the following way. I will first provide some additional background on the EITC. I will then discuss the various functions that are associated with delivering benefits, drawing on a listing of functions that Professor David Super identifies in an article discussing the merits of private sector involvement in the delivery of benefits to the poor. I will then describe barriers that often prevent lower-income individuals from receiving benefits, drawing on the work of Professor Rubin. In the next Section, I will briefly identify solutions as a source of checking bureaucratic oppression. In the next Section, I identify areas for future research on some key topics that critics such as the NTA and the Government Accountability Office have raised when it comes to taxpayer service and the EITC in particular. I then apply the insights in the article to one particular challenging aspect of the IRS administration of the EITC, the ban on claiming that credit following claims that the IRS has determined are reckless or fraudulent.

I. Brief Background

The EITC is a credit that entitles recipients to a benefit irrespective of whether there is a tax liability. The maximum credit that a taxpayer with three or more qualifying children can receive in 2016 is $6,269. It is subject to a phase-in range, a plateau and a phase-out range, with the credit varying according to earned income, whether the claim arises on a joint return and the amount of qualifying children.

The following shows the ranges of the credit subject to some of the above variables, with Table 1 looking at benefits for single claimants with one child, Table 2 identifying EITC parameters for single claimants without and with children, and Table 3 looking at the EITC parameters for claimants filing joint tax returns:

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Table 1\textsuperscript{11}

![Image: Earned Income Tax Credit for Households with One Child, 2015]

Note: Assumes all income is from earnings (as opposed to investments, for example).
Source: Internal Revenue Service

Table 2\textsuperscript{12}

<table>
<thead>
<tr>
<th></th>
<th>Phase-in rate</th>
<th>Phase-in ends</th>
<th>Maximum credit amount</th>
<th>Phase-out begins</th>
<th>Phase-out rate</th>
<th>Phase-out ends</th>
</tr>
</thead>
<tbody>
<tr>
<td>Childless</td>
<td>7.65%</td>
<td>$6,580</td>
<td>$503</td>
<td>$8,240</td>
<td>7.65%</td>
<td>$14,820</td>
</tr>
<tr>
<td>1 Child</td>
<td>34%</td>
<td>$9,880</td>
<td>$3,359</td>
<td>$18,110</td>
<td>15.98%</td>
<td>$39,131</td>
</tr>
<tr>
<td>2 Children</td>
<td>40%</td>
<td>$13,870</td>
<td>$5,548</td>
<td>$18,110</td>
<td>21.06%</td>
<td>$44,454</td>
</tr>
<tr>
<td>&gt;2 Children</td>
<td>45%</td>
<td>$13,870</td>
<td>$6,242</td>
<td>$18,110</td>
<td>21.06%</td>
<td>$47,747</td>
</tr>
</tbody>
</table>

\textsuperscript{a} Note: Unmarried filers who claim children for the purposes of the EITC usually file as heads of household; the parameters for each family size are the same as for single filers.

Table 3\textsuperscript{13}

<table>
<thead>
<tr>
<th></th>
<th>Phase-in rate</th>
<th>Phase-in ends</th>
<th>Maximum credit amount</th>
<th>Phase-out begins</th>
<th>Phase-out rate</th>
<th>Phase-out ends</th>
</tr>
</thead>
<tbody>
<tr>
<td>Childless</td>
<td>7.65%</td>
<td>$6,580</td>
<td>$503</td>
<td>$13,750</td>
<td>7.65%</td>
<td>$20,330</td>
</tr>
<tr>
<td>1 Child</td>
<td>34%</td>
<td>$9,880</td>
<td>$3,359</td>
<td>$23,630</td>
<td>15.98%</td>
<td>$44,651</td>
</tr>
<tr>
<td>2 Children</td>
<td>40%</td>
<td>$13,870</td>
<td>$5,548</td>
<td>$23,630</td>
<td>21.06%</td>
<td>$49,974</td>
</tr>
<tr>
<td>&gt;2 Children</td>
<td>45%</td>
<td>$13,870</td>
<td>$6,242</td>
<td>$23,630</td>
<td>21.06%</td>
<td>$53,267</td>
</tr>
</tbody>
</table>

\textsuperscript{12} The Earned Income Tax Credit, supra note 11, at 4.
\textsuperscript{13} The Earned Income Tax Credit, supra note 11, at 4.
There is a rich literature discussing the EITC, and its current place in the mainstream of federal policy addressing poverty and incentivizing low-wage work.\textsuperscript{14} It is now a crucial part of federal policy. In FY 2013, around 26.7 million recipients shared $63 billion in total federal EITC expenditures.\textsuperscript{15} About 85\% of credit dollars claimed are refunded.\textsuperscript{16} Participation rate is high, approaching close to 80\% overall and even higher among individuals with two or more qualifying children.\textsuperscript{17}

How did we get to the place where the Service holds the keys to the welfare of millions of Americans? A major change in federal policy accompanied welfare reform in the mid-1990s, when President Clinton helped usher out traditional means-based benefits in favor of benefits attached to time limitations and a shift to benefits administered through the tax code in the form of refundable credits to supplement earned income.\textsuperscript{18} There are a number of studies that trace the growth of the EITC, and this Article will not attempt to detail that path.\textsuperscript{19} 2014 marked the fiftieth anniversary of Lyndon Baines Johnson’s announcement of a national war on poverty.\textsuperscript{20} Since then, much has changed, including the ways that the government funds programs are meant to alleviate poverty. Yet poverty is still with us, and while poverty’s causes and solutions engender at times a deeply partisan reaction,\textsuperscript{21} there is a growing consensus among the left and the right that the federal government has a role to play in alleviating the effects of an entrenched lack of mobility among the nation’s poor and near poor.\textsuperscript{22}

\footnotesize
\begin{itemize}
\item \textsuperscript{14}An excellent place to start is with Austin Nichols & Jesse Rothstein, *The Earned Income Tax Credit (EITC)* (NBER, Working Paper No. 21211, 2015).
\item \textsuperscript{15}Nichols & Rothstein, *supra* note 14, at 3.
\item \textsuperscript{16}Nichols & Rothstein, *supra* note 14, at 12.
\item \textsuperscript{17}For a good summary of participation data, including changes over time and variables, including by taxpayer demographics, see Nichols & Rothstein, *supra* note 14, at 29.
\item \textsuperscript{18}Nichols & Rothstein, *supra* note 14, at 9.
\item \textsuperscript{21}Eduardo Porter, *The Republican Party’s Strategy to Ignore Poverty*, N.Y. TIMES, Oct. 27, 2015, http://nyti.ms/1KCGL2Y.
\end{itemize}
The EITC and, to a lesser but still important extent, the Child Tax Credit (CTC) are popular with advocates, politicians on both sides of the aisle,\textsuperscript{23} tax return preparers, and the recipients themselves who increasingly depend on the tax system to meet basic needs, make one-time special expenditures and escape poverty.\textsuperscript{24}

As a result of the increased importance of tax credits, millions of poor or near poor people now rely on the tax system to address definite needs: unpaid medical utility or rent bills, a deposit on an apartment that might be in a neighborhood with better schools, the means to buy a car that will allow the person to avoid an hour and a half bus ride to drive herself to work and still get home in time to cook dinner or help a child with homework, to name just a few.

It comes as no surprise that the tax system in the United States (and elsewhere for that matter)\textsuperscript{25} has a function well beyond the collection of revenues. That the tax system furthers social and economic goals is something that has been part of our tax system since its inception.\textsuperscript{26} Yet the advent of the use of refundable credits in the tax system has fundamentally changed the relationship between the Service and those who increasingly depend on the tax system to meet basic needs. The failure of the Service and Congress to fully appreciate that change is what contributes to the agency’s shortfall in delivering appropriate levels of service.

There are a number of explanations for the placement of the EITC within the tax code rather than with laws that are more traditionally associated with benefits.\textsuperscript{27} For example, the EITC’s placement in the tax code and connection to earned income connects the benefit to participation in the formal economy thus lessening or eliminating the stigma associated with traditional welfare programs.\textsuperscript{28} Second, the placement allows for a facially simple means of administering the benefit without the typical cadre of caseworkers necessary for intake and eligibility determinations. Moreover, there is a political

\textsuperscript{23}For a discussion of the bipartisan political support, see Nichols and Rothstein, supra note 14, at 3. But see Chris Edwards & Veronique de Rugy, Earned Income Tax Credit: Small Benefits, Large Costs, Tax and Budget Bull. (Cato Inst., D.C.), Oct. 2015 (arguing that high EITC error and program costs impose burdens on other taxpayers, with the EITC’s phase-out range and investment income limitation reducing recipients’ incentives “to work, invest, and pursue other productive activities”).


\textsuperscript{25}The United Kingdom (Working Tax Credit) and Australia (Family Tax Benefit), for example, each uses its tax system to deliver tax credits based on family status. The administration of family tax credits in other countries is a topic that warrants further inquiry.

\textsuperscript{26}Nichols & Rothstein, supra note 14, at 22.

\textsuperscript{27}Nichols & Rothstein, supra note 14, at 22.

advantage associated with placing the benefit in the tax code, as the outlays do not typically count toward spending caps.

Whatever the reason, the EITC’s home in the tax code means that the Service’s administration of the EITC has a major impact on the lives of adults and for children of adults who claim the credit.

The sheer number of claimants and amounts that are claimed are a good indicator of the overall importance of refundable credits in terms of federal policy directed at improving the lot of low-wage workers. It is well known that the EITC and related family status credits such as the CTC have a major impact on poverty.29 The EITC and CTC reduce current poverty and inequality in at least two ways: (1) by supplementing the wages of low-paid poor or near-poor workers; and (2) by encouraging work. Recent research suggests the income from these tax credits leads to benefits at virtually every stage of life. For instance, children in families receiving the tax credits do better in school, are likelier to attend college, and can be expected to earn more as adults and help provide incentives to boost Social Security retirement benefits. The research suggests that the benefits associated with credits have a multiplier effect that goes far beyond the important but incomplete tabulation of the credits’ impact on poverty rates in a particular year.

Despite the EITC’s significance, the Service itself does not embrace the implications of its role as deliverer-in-chief of benefits to the poor or near poor.30 For example, the Service’s mission does not in any way connect to delivering benefits. Instead, the Service states that its mission is to “provide America’s taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.”31 To be sure, the Service does dedicate separate resources to EITC, including offering a dedicated EITC web page that states that Service goals with the EITC are to “increase participation while reducing error.”32 On the participation front, the Service does promote EITC awareness day33 and it publicizes a state-by-state breakdown on the credit’s take up rate.34

While improving take up of the credit is a Service program goal, the Service is much more active on the compliance side when it comes to the EITC. For example, it has set up an automated correspondence-based exam processing system that allows it, with minimal employee involvement, to take what the

29 Nichols & Rothstein, supra note 14, at 33-40.
NTA calls a “production line approach to individual audits.”\(^{35}\) Of the 1.5 million tax returns examined in FY 2013 (inclusive of individual and corporate income tax returns, as well as excise and estate and gift tax returns) more than one-third involved examination of EITC eligibility.\(^{36}\) The Service’s emphasis on EITC is noteworthy, given that recent estimates of the tax gap peg underreporting from other areas (such as reporting small business) as much more material than EITC, with EITC accounting for about 6% of the overall individual income tax noncompliance, and small business income underreporting at about 51.9%.\(^{37}\) The administrative attention is matched by Congress, which has enacted numerous EITC specific compliance provisions which have a major impact on Service administration.\(^{38}\)

NTA Nina Olson has forcefully argued that the Service’s self-identification as a law enforcement agency rather than an agency that administers and delivers social benefits puts taxpayers at risk:

The conversion of an agency that has historically viewed itself as a law enforcement agency into an agency that determines eligibility and entitlement to social benefits targeted to low income individuals is not an easy one. It requires a conscious recognition that the very nature of the agency’s mission has changed, requiring different strategies for taxpayer interaction

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\(^{36}\) Crandall-Hollick, *supra* note 1, at 6.

\(^{37}\) Crandall-Hollick, *supra* note 1, at 3-4. The IRS estimates that about 6.9% of all additional estimated tax owed due to examinations comes from EITC audits. *Id.* at 6.

\(^{38}\) Congress’s undue attention to EITC noncompliance as compared to other systemic issues of income tax noncompliance may in part be due to a direct bias against redistributive policies, with that contributing to a heightened concern for EITC errors as compared to other areas of individual income tax noncompliance. See Lawrence Zelenak, *Tax or Welfare? The Administration of the Earned Income Tax Credit*, 52 UCLA L. Rev. 1867, 1896 (2005); Karie Davis-Nozemack, *Unequal Burdens in EITC Compliance*, 31 Law & Ineq. 37 (2012); Leslie Book, *EITC: Do Attitudes on Redistribution Fuel a Particular Focus on Errors?*, Procedurally Taxing, Oct. 31, 2013, http://www.procedurallytaxing.com/eitc-do-attitudes-on-redistribution-fuel-a-particular-focus-on-errors/. Professor Zelenak situates the concern with a bias against redistributive policies:

When a person fails to pay a tax he is keeping his own money, and a person’s keeping his own money is not a terribly objectionable result. The ghost of the claim to one’s pretax income survives the enactment of the tax statute requiring one to pay part of that income to the government. This contrasts sharply with the everyday libertarian view of overpayments of welfare. Neither the substantive legal rules nor everyday libertarianism gives a person any semblance of a right to a welfare overpayment. Far from being viewed as a mere keeping of one’s own money, receipt of a welfare overpayment is viewed as the wrongful taking of the pretax income of others, and as such it is an unmitigated wrong.

Zelenak, *supra* note 38, at 1902. Interestingly, Zelenak notes that there may be a greater tolerance for EITC noncompliance as compared to other more traditional benefits programs’ noncompliance, like food stamps, which is likely a product of the EITC’s placement in the tax system. *Id.* at 1903 (identifying the “protective coloration of a tax program” as the reason why EITC occupies a middle ground between traditional tax error and traditional welfare errors).
and promoting compliance. To the extent that a tax agency ignores the implications of delivering social benefits through the tax system it will fail in its new mission and impose unnecessary and undue burden on the taxpayers, thereby undermining if not negating all the projected advantages of using the tax system in the first place.39

The NTA’s words are a call to action. But what does it mean for the Service to take a “conscious recognition” of its role as benefits administrator? Whether the Service directly changes its mission statement or not, few would disagree with the Service’s importance as a benefit agency. To that end the next Section discusses the various functions that agencies generally perform when delivering benefits, with the hope that if the Service is more aware of the distinct activities necessary to deliver benefits it can perhaps improve the experience for those who rely on the Service for their welfare.

II. To Understand the Challenge Requires an Understanding of What Agencies Do in Delivering Benefits

The prior Section both provides a description of the EITC as well a general background on its importance. In this Part, I begin the process of better situating the Service’s challenges in administering the EITC by identifying on a more granular level the various functions that are associated with the task of delivering benefits. Nontax scholars looking at agencies have systematically identified the functions associated with delivering benefits. For example, Professor David Super in his article Privatization, Policy Paralysis, and the Poor40 divides the function of delivering benefits into distinct activities, including the following:

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

39 Olson, supra note 35, at 2.
40 Super, supra note 9, at 403-05 (2008). Professor Super undertook his description as part of his attempt to analyze the relative roles of the private and public sectors in the task of delivering benefits. He is one of the few nontax scholars looking at poverty law to attempt to incorporate some of the insights from the IRS’s administration of the EITC and in particular the role that the private sector (commercial preparers and software developers) play in delivering benefits.
7) Someone must review performance at each of these steps to protect the program integrity.\textsuperscript{41}

An additional complication in the tax system, unlike many though not all benefits programs, is that it relies to a large extent on the private sector in the form of commercial tax return preparers and software developers who assist (for healthy fees) in the claim application process, as well as at times in the issuance or delivery of the benefits (also for fees). That private sector involvement ensures that there are dynamics present in the tax system that are not generally found in other programs.\textsuperscript{42} The presence of the private sector in performing what may be thought of as essential functions in the administration of benefits has highlighted areas where there may be in fact a divergence of interests between the private sector actors, the government and the beneficiaries.\textsuperscript{43}

For purposes of this Article, I wish to focus attention on assistance in applying for benefits, setting rules in determining eligibility, resolving disputes regarding eligibility, and reviewing performance of the agency, as they are the areas most directly related to EITC administration, where the Service faces many challenges and where I believe there is significant room for improvement. I will briefly discuss those tasks below, highlighting some key features.

A. \textit{Assistance in Applying for Benefits}

In laying out the tasks, Professor Super also provided some useful context to help consider what agencies may need to do to fully perform their duties with respect to the distinct activities. In connection with applying for benefits, Professor Super notes that the “extent of the help [that agencies provide to applicants] varies: some may require only a copy of the application form

\textsuperscript{41}Professor Super identifies three other tasks that are not directly relevant in the context of improving administration: program funding, conversion of benefit and reimbursing those who may convert benefits. Super, \textit{supra} note 9, at 404. As to the latter two tasks, the EITC itself is in the form of cash or an offset to a tax liability unlike some benefits provided in kind or in the form of vouchers, such as housing assistance or food stamps. This does highlight the IRS’s relationship with the private sector, as some claimants pay providers for the privilege of speedily obtaining cash refunds from the IRS.

As to the first factor not directly relevant, agency funding of a program, as the EITC is a tax expenditure provision, there is no specific annual appropriation, though Congress pays for the program through its net reduction in tax revenues and the Service’s administrative costs. While there are associated administrative costs that Congress must consider in light of the functions inherent in delivering benefits, and on occasion Congress has specifically appropriated moneys to be used to administer the EITC, the costs of the program are wrapped in to the Service’s general operating budget.

\textsuperscript{42}The discussion of the relative roles of the private and public sector in delivering benefits in the tax system is an important topic that is outside the scope of this Article, though a topic I hope to address in future research.

\textsuperscript{43}High error rates, for example among unenrolled preparers who submit EITC claims, are a key reason why advocates have proposed regulating and the IRS has attempted to more directly regulate unlicensed preparers. \textit{See Crandall-Hollick, supra} note 1, at 21-25 (discussing differences in error rates among types of preparers).
and information about when and where to submit it; others may need help completing the form and gathering information required to complete the form or to persuade the program to accept the assertions on the application.”44

What contributes to the varying need? Complexity of eligibility and the characteristics of the population are the main variables. It turns on the “complexity of substantive and procedural requirements, the extent of its measures to prevent incorrect awards of benefits, and the characteristics—such as education, disability, and living arrangements—of the individual claimant.”45 Beyond complexity and characteristics, Super notes that agency efforts to address those complexities and beneficiary characteristics often revolve around values that the agency itself may emphasize: “[s]ome programs value eligible persons’ participation sufficiently to conduct outreach to inform prospective claimants of the procedures for applying.”46 Unstated in Professor Super’s description but implicit in his discussion is the importance that society and the individuals themselves place on the benefit that the agency is administering.

B. Determining Whether Claimants Meet Eligibility Criteria and Procedural Requirements

An additional key task that agencies perform is determining who is eligible to receive the benefits the agency is charged with administering. The task includes addressing “a wide range of definitional questions relating to the substantive criteria and important details that must be supplied on procedural matters.”47 As Professor Super notes, some of the agency decisions come in the form of formal agency guidance but others are in the form of less formal guidance such as manuals. Super notes that to help “inform policymaking, someone typically conducts at least informal research into the program’s operations and effectiveness.”48 While Professor Super in his discussion focuses on the agency setting rules, agencies also have to apply those rules to specific applications. That division closely approximates the distinction in administrative law between rulemaking and adjudication, with the former focusing on the setting of general policies and rules and the latter focusing on applying those policies and rules to individuals.49

44 Super, supra note 9, at 403.
45 Super, supra note 9, at 403.
46 Super, supra note 9, at 403-04.
47 Super, supra note 9, at 404.
48 Super, supra note 9, at 403.
49 I have discussed rulemaking versus adjudication before. See Leslie Book, A Response to Professor Camp: The Importance of Oversight in IRS Collection Determinations, 84 Ind. L.J. Supp. 63 n.7, 64-65 (2009) (discussing the distinction between rulemaking and adjudication in administrative law).
C. Resolving Disputes with Claimants Concerning Eligibility and Issuance

This task recognizes that despite eligibility rules and application procedures, there invariably will be disputes between the agency and individuals regarding eligibility for the benefits as well as perhaps the manner in which the agency issues the benefits. Some disputes can be resolved internally, while others may require a third party such as an administrative or judicial tribunal. Accordingly, Congress and agencies must concern themselves with setting out procedures with respect to disputes. From the agency perspective that includes ensuring that its employees and individual applicants understand the rights associated with challenges to agency determinations.

While Professor Super does not address this, this task seems closely connected to challenges in applying for benefits in the first place, including the complexity of the eligibility requirements and the characteristics of the population applying for benefits. To the extent individuals face challenges and uncertainty regarding eligibility it is likely that there will be more back-end disputes with the agency that may need to be adjudicated by the agency or a judicial tribunal.

D. Review of Performance to Maintain Integrity

This task recognizes that there is a need for regular review of how the agency performs the tasks associated with delivering benefits. This includes a need to evaluate the agency’s procedures, as well as a review of the application of the rules to the individuals themselves. To perform this function well, it is important that the party charged with reviewing program integrity not only understand the various components associated with benefit delivery but also take a holistic view of the agency’s performance. Consider, for example, an agency that fails to adequately assist in applying for benefits but which excels in determining whether an applicant that does apply meets eligibility criteria. Likewise, if an agency is successful in reducing program error but in doing so deters eligible individuals from applying or in fact disallows in whole or in part eligible claimants then that agency’s performance is inadequate. A review function must therefore understand how any of its actions on one task relate to the overall goal of successfully administering the entire benefits program.

In addition, to the extent that a system (such as the tax system) relies on the private sector to perform key tasks associated with the delivery of benefits, any review of program integrity should include a mechanism to review the quality of the private sector’s actions, including the private sector’s impact on program integrity and claimant costs. A growing literature50 recognizes the private sector may exploit consumer information shortfalls or cognitive biases, both of which may contribute to individuals having benefits siphoned

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50George A. Akerlof & Robert J. Shiller, Phishing for Phools: The Economics of Manipulation and Deception (2015). Drawing on behavioral economics, the authors make the case that the market will step in to exploit information shortfalls and cognitive biases to extract fees or create demand for unneeded services or products.
off in the form of fees or claims that may in fact have a greater tendency to be erroneous, facilitated by preparers more than willing to take fees based in part on producing refunds, irrespective of eligibility.\textsuperscript{51} It is therefore crucial that program integrity take into account the ways that an agency either explicitly or implicitly relies on the private sector to perform any of the key functions associated with benefit delivery.

III. Bureaucratic Oppression: Why Agencies Tend to Act in A Way That Does Not Further Program Goals

In the prior Section, I identified the specific tasks that agencies engage in when delivering benefits. The next step in this Article is identifying the reasons why agencies tend to fail to deliver in their role as benefit administrator with a focus on the inherent challenges associated with the relationship between the government and individuals who receive benefits. Relying largely on Professor Edward Rubin’s typology in this Section I describe the causes of bureaucratic oppression. Underlying the approach Professor Rubin and I advocate is the principle that “in order to fashion remedies it is necessary to understand its sources.”\textsuperscript{52} As Professor Rubin notes, unfortunately, in looking to the problem’s source “there is an embarrassment of riches: almost every feature of the governmental process seems to possess the potential to generate oppressive behavior.”\textsuperscript{53} Professor Rubin, in framing the discussion in this way, does provide a useful caveat; by identifying the ubiquity of the problem it should not lead to the conclusion that “government is invariably oppressive and that it never does anything correctly.” That, Rubin notes, is “simplistic” and a “political vulgarity.”\textsuperscript{54} The goal of setting out the problem in a granular way is not to throw up one’s hands and say that the government cannot do the job, but rather to help pave the way for understanding the sources of the problem so to allow for solutions that can help the government overcome some of the prevalent obstacles.

\textsuperscript{51}It is outside the scope of this Article to fully examine the relative roles of the private and public sector in delivering tax benefits. As Professor Super identifies, the choice to use the private sector with respect to any task in delivering benefits is not binary; rather there is a continuum of private sector involvement in many of the tasks:

Public debates over privatization of government programs tend to have a misleadingly binary character. Either a program will be privatized, we are told, or it will not be. More sophisticated analysts may recognize that varying degrees of private involvement are possible, but fearing or desiring slippery slopes, advocates on both the left and the right prefer to draw lines in the sand.

Virtually every significant social welfare program is partially privatized; operating these programs without private entities performing some important roles is virtually unthinkable in our political culture.

Super, \textit{supra} note 9, at 403.

\textsuperscript{52}Rubin, \textit{supra} note 6, at 301.

\textsuperscript{53}Rubin, \textit{supra} note 6, at 301.

\textsuperscript{54}Rubin, \textit{supra} note 6, at 301.
A. Status Differences

The differences in socioeconomic status between government officials and the individuals who apply for benefits may contribute to oppressive behavior. The precise impact of differences in status is difficult to measure and may vary widely across programs. For example, Professor Rubin describes how in modern society officials who provide government benefits and services are located in the middle of the social hierarchy. On the one hand, “[g]overnment officials who provide assistance to disadvantaged citizens such as welfare workers are unambiguously superior because they have higher status and because their clients are automatically placed in a socially subordinate position by the nature of the benefits being provided to them.”\(^{55}\) This is a contrast with government officials located in wealthier neighborhoods (like DMV employees) where the official may be “socially subordinate” though the official benefits from the authority inherent in the position.

External circumstances such as location of the individuals and the nature of the benefits have a great impact on whether status differences have a material impact on program quality. Professor Rubin describes research (albeit a bit dated) suggesting that government officials have tended to treat beneficiaries who have higher socioeconomic status with greater respect than recipients who are of lower status and when the benefits are not attached to merit:

In his study of the Social Security Administration, Jerry Mashaw observes that people who can claim disability benefits because they are eligible for Social Security were generally treated respectfully and conscientiously. This is consistent with the idea that status differences are partially responsible for bureaucratic oppression. While the poor, the unemployed and other recipients of government benefits are generally low status persons—that is, lower than public officials—Social Security recipients are not. Everyone grows old, including the wealthy, the well connected, and the skillfully vociferous. Moreover, Social Security is not regarded as welfare but as a return on payments made by working people, which is exactly what Franklin Roosevelt intended when he crafted the program. These features confer status on Social Security recipients and thus serve to secure respectful behavior by the agency.\(^{56}\)

For purposes of considering the distribution of benefits that may not be as connected to merit, the government official may in fact have further grounds to look down upon the individual seeking the benefit. More from Professor Rubin on this:

This process may also occur in reverse. Benefits that are regarded as a recompense for meritorious effort enjoy a generally positive reputation. Examples, in addition to Social Security benefits, include veterans’ benefits and federal home loan mortgage assistance. These benefits may sometimes confer status on their recipients, but at the very least, the recipients are not viewed as

\(^{55}\)Rubin, *supra* note 6, at 304.

\(^{56}\)Rubin, *supra* note 6, at 305 (footnotes omitted).
low-status individuals. In contrast, programs that provide benefits based on general eligibility, such as food stamps, public housing, and welfare, tend to be more controversial and often become the particular focus of anti-government rhetoric. This attitude may decrease the status of those receiving such benefits, because they are seen as undeserving.57

While Professor Rubin states that there is a need for empirical research on this point, his description is useful as a possible source of either overt or subtle government mistreatment.

B. Stranger Relations

Professor Rubin notes that a closely related problem to status difference is that the government official and individual applying for benefits are likely strangers. Contrasting both historical practices when there was a greater familiarity between the state and the subjects and the modern regulatory state where some agency employees are cozy with the individuals working with the regulated entities, Professor Rubin identifies the anonymity that often accompanies the state and its apparatus used to administer benefit programs as a potential barrier in the delivery of benefits and a source of oppression.58

In addition to the anonymity, Professor Rubin also notes that government employees often have sizeable caseloads. The sheer amount of the work that often accompanies a government official contributes to a depersonalizing of the applicants as well as creating a sense that it is futile to take steps to reduce the anonymity.59

C. Institutional Pathologies

Professor Rubin looks to organizational theory as another source of potential oppressive behavior. While he notes that hierarchy and rules can constrain or prevent oppressive behavior “organizational theory documents a wide variety of pathologies, including in a large organization how midlevel managers often set intermediate goals whose consequence is to harm people they are supposed to help.”60 Rubin singles out how employees may be particularly susceptible to external pressures that take the agency away from the goal of benefit delivery to “ensure survival or advance a subsidiary goal.”61

Professor Rubin also singles out red tape, noting that “one of best known and most notorious institutional pathologies is excessive formalism.”62 What is challenging is the distinction between appropriate rules and rules that the public perceives as unnecessary, with the latter constituting the commonly heard but less often defined red tape:

57 Rubin, supra note 6, at 306-07 (footnotes omitted).
58 Rubin, supra note 6, at 307-11 (footnotes omitted).
59 Rubin, supra note 6, at 309.
60 Rubin, supra note 6, at 312.
61 Rubin, supra note 6, at 313.
62 Rubin, supra note 6, at 313.
What makes rules and procedures qualify as red tape is the perception that they are unnecessary. Large numbers of rules and restrictions are unavoidable, but unnecessary rules and restrictions are truly oppressive precisely because they impose additional burdens on inherently burdensome processes for no good reason. Distinguishing the necessary from the unnecessary, however, is likely to be a difficult task. If one opens the typically thick office manual or employees’ manual of a governmental agency, one is unlikely to find a statement that any particular requirement is unnecessary. What is needed is a microanalysis of the particular agency, a careful assessment that determines which rules and requirements are essential to the orderly operation of a large institution and which ones are imposed for the agency’s convenience or as remnants of some now-forgotten practice.63

This explanation leaves open a number of questions, including who should be charged with performing the micro-level analysis that Professor Rubin recommends and precisely how much discretion should be given to government employees in dispensing with rules that may have value on an aggregate though not individual basis.

D. Divergent Incentives

The problem of divergent incentives refers to the differing incentives that animate government employees, and in particular how there may be incentives that will discourage government employees from serving the interest of the benefit applicants. As a general matter the problem of divergent incentives with respect to government employees presupposes that people will act to maximize their own material self-interest rather than fulfilling their obligation to serve the needs of others.64 This problem is closely related to public choice theory, which “is grounded on the premise that people maximize their material self-interest.”65

Professor Rubin notes that there has been some difficulty in applying the insights of public choice theory in the context of agency conduct. The main difficulty is identifying how or more precisely what interest a government employee may be attempting to maximize, though the divergence of incentives is often associated with government employees acting in a way to benefit the private sector so that a government employee can maximize potential for post-government employment with the entity the agency regulates.66 Nonetheless he believes that a more convincing problem is that divergent

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63 Rubin, supra note 6, at 314-15.
64 Rubin, supra note 6, at 316.
65 Rubin, supra note 6, at 316.
66 Regulatory capture is the process by which regulatory agencies eventually come to be dominated by the industries they were charged with regulating. See generally George J. Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971).
incentives in benefits programs may arise because bureaucrats may act to minimize work or hassle associated with performing their functions fully.  

Professor Rubin notes that there is a lack of precision in applying the problem of diverging incentives to bureaucrats in the context of benefits targeted to the poor, with a need for perhaps some more precise cataloguing of the problem. Despite that lack of precision, he concludes that the problem is real and requires attention:

There can be little doubt, however, that government agents are subject to a vast and varied array of incentives and motivations, and that only some of these correspond to the behaviors that meet the expectations of the program’s originators or advance the program’s stated goals.

IV. How to Address the Problem of Bureaucratic Oppression: A Brief Discussion

As Professor Rubin notes, bureaucratic oppression is “hardly an obscure phenomenon . . . and every person is likely to have experienced it personally at one time or another.” Despite that awareness there is also a sense that the problems are deeply entrenched in our basic structure of government. Professor Rubin notes that despite a sense of fatalism associated with that entrenchment, “it has also elicited thoughtful programs and proposals for fundamental change in governmental operations from a variety of perspectives.”

According to Professor Rubin there are four main perspectives that offer possible solutions to the problem, though each has limitations:

1. A judicial perspective with an emphasis on imposing due process standards on government agencies;
2. A legislative perspective, which includes an awareness of the role ombudspersons can play in protecting rights;
3. A management perspective, including proposals for client-centered administration; and
4. A microeconomic perspective, with a reliance on market incentives.

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67 Rubin, supra note 6, at 317. The presence of the private market in the delivery of tax benefits with large software companies and national chain commercial return preparers may in fact create a different agency incentive, one that takes into account private sector interests rather than the interests of the beneficiaries. See generally Leslie Book, Preventing the Hybrid from Backfiring: Delivery of Benefits to the Working Poor Through the Tax System, 2006 Wis. L. Rev. 1103 (2006).
68 Rubin, supra note 6, at 318.
69 Rubin, supra note 6, at 318.
70 Rubin, supra note 6, at 319.
71 Rubin, supra note 6, at 319.
A. Due Process

In his article, Professor Rubin sketches the twentieth century’s expansion of due process hearing and notice rights to include interactions between agencies and regulated individuals, which he believes is in fact an “impressive conceptual success.”72 A main underlying concern with due process protections is to prevent the government from making erroneous determinations that deprive an individual of a protected right. The extension in a flexible way to administrative settings including the right to receive benefits is a mechanism to prevent against improper government actions, though as Professor Rubin notes, it suffers from major limitations.

The first limit is that, while due process can protect, its reach generally requires the agency to reach a determination that would generally constitute an adjudication in administrative law parlance. This, according to Professor Rubin is a major weakness, as “most of the interactions that give rise to bureaucratic oppression lie well outside this category.”73 Moreover, even if the interactions did arise to the level of adjudications, the characteristics of those receiving benefits are likely to contribute to those individuals not asserting rights anyway: “many people who receive benefits or services from government—the disabled, the sick, the elderly, the young, the very young, the mentally deficient or deranged—are precisely those whose vulnerabilities impede assertion of their rights. Like consumers generally, they are more likely to ‘lump it’ than to enter the foreign and seemingly perilous territory of legal action.”74 A further caution Rubin raises is the challenge that many poor people feel once they do assert rights, with the procedures meant to protect those rights at times serving as a new source of oppression rather than a cure for existing issues.75

B. The Ombuds Role

Professor Rubin identifies ombudsmen as an institution that he believes can assist with the problem and effects of agency oppression. The term is associated with an individual or office “that stands apart from the administrative hierarchy and is authorized to intervene in its procedures on behalf of private parties.”76 Professor Rubin traces their origin to Scandinavia and notes that many ombuds offices are situated within legislatures, though others (like the Taxpayer Advocate Service) are situated within the agencies themselves.

According to Rubin, there are three defining features of ombudspersons: “they are complaint driven, they are empowered to investigate, and they are independent of the administrative hierarchy.”77 This independence and power

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72Rubin, supra note 6, at 323.
73Rubin, supra note 6, at 323-24.
74Rubin, supra note 6, at 324.
75Rubin, supra note 6, at 325-26.
76Rubin, supra note 6, at 327.
77Rubin, supra note 6, at 330.
to investigate leads Rubin to note the similarity between the protections offered by ombuds offices and the courts through due process:

They enable both ombudspersons and judges to redress specific wrongs or problems involving individuals, to do so on the basis of information about these wrongs and problems, and to act in a more neutral, more confrontational way toward administrative agents than those agents’ superiors or colleagues in the administrative hierarchy. 78

A key limitation that Professor Rubin notes however is that there are many times the agency itself will tend to resist the ombudsperson’s investigatory efforts and may in fact conceal rather than disclose information that would assist in a full consideration of the issue. 79 In addition, Professor Rubin notes that at times, the ombuds office has “no means of effecting change other than issuing empty threats.” 80

C. Client-Centered Administration: The Management Solution

Professor Rubin also identifies as a possible solution management theory, an idea he notes is rooted in the disciplines of both sociology and engineering. Unlike the role of ombuds offices, the “management approach attempts to change the internal structure and procedures of the agency itself, enabling it to carry out its tasks more fairly and effectively.” 81 The primary goal of injecting principles of management theory is shift government employees to one of thinking of potential beneficiaries as clients who are deserving of high levels of service. 82

While Professor Rubin notes that although in theory adopting these principles may contribute to better interactions, they are unlikely in and of themselves to be successful, as “the real causes of bureaucratic oppression are deeply embedded structural factors discussed in the previous Section: status differences, stranger relations, institutional pathologies, and divergent incentives.” 83 In effect, failing to account for structural differences will ensure that solutions based on attempts to impose a client-based customer-service ethos are likely to fail.

D. Market Mechanisms

Professor Rubin identifies the government’s use of the private market to address bureaucratic oppression in two distinct ways. The first uses “market mechanisms by diminishing the scope of regulation, benefits, and services that the government provides.” 84 The second injects principles of the market

78 Rubin, supra note 6, at 330.
79 Rubin, supra note 6, at 332.
80 Rubin, supra note 6, at 332.
81 Rubin, supra note 6, at 330.
82 Rubin, supra note 6, at 333.
83 Rubin, supra note 6, at 337.
84 Rubin, supra note 6, at 341.
to assist in the manner that the government structures agencies. As Professor Rubin notes, while “these are independent solutions” they share the same theoretical underpinning, namely they hope to ensure that self-interest motivation of workers “opposes, rather than encourages, oppressive behaviors.”85

The first mechanism (using the market directly) is more directly relevant to the tax system, as, unlike many other benefits programs, the tax system to a large extent does rely on the market in the form of commercial preparers and software to assist in the application process for benefits. There are multi-billion dollar industries with differing segments in each sector. Consumers have choice to purchase products or services, seeming to allow consumers choice and a mechanism to gain access to benefits, albeit at a cost in terms of fees.

Professor Rubin cautions that actors in the private sector may contribute in their own right to creating barriers for potential program beneficiaries, as those actors may “be governed by status differences, stranger relations institutional pathologies and divergent incentives.”86 In particular, the last point seems most apt, especially in light of research which suggests that free markets will reach an equilibrium that may derive from business practices that assist in manipulating consumer judgment and exploiting information shortfalls that lead to individuals acting inconsistent with their self-interest.87 The ability of (and some say the inevitability of) market actors to capitalize on information shortfalls and psychological biases should give caution to those who think that delegating governmental functions to the private sector is the means to ensure that individuals are treated well and avoid the pitfalls of oppressive behavior. There are interesting avenues for future research on how the government and private sector may work more closely together, especially in the context of tax administration, where commercial return preparers and software developers intersect with the vast majority of EITC claimants and play a key role in the application process and overall program integrity.

V. Case Study: The Ban on Claiming the EITC

This Article is an attempt at broadening the inquiry into the Service’s ability to administer the EITC and benefits programs generally. In evaluating legislative or administrative efforts with respect to the EITC, I believe that rather than start with a tax-centric perspective on administration the proper starting point is one that pivots off Service tasks in delivering benefits.

It is admittedly just a preliminary step, because the next step in the inquiry is to apply the insights from scholars such as Professors Super and Rubin to the specific aspects of the Service’s administration of the EITC and other

85Rubin, supra note 6, at 340-41.
86Rubin, supra note 6, at 342.
87Akerlof & Shiller, supra note 50, at xi.
provisions more generally. That inquiry must take into account current statutes, regulatory guidance, agency practice, the role of the courts, and sources that provide external nonjudicial checks on Service integrity, such as the National Taxpayer Advocate and Government Accountability Office. It must also consider private sector actors such as commercial return preparers and software companies, as well as public interest actors who are engaging the Treasury and the Service on rules that address low-income taxpayers and also coordinating on litigation.

As the inaugural International Taxpayer Rights Conference demonstrated, throughout the world, including in the United States, there is increased recognition of the importance of taxpayer rights. In this Article, I have attempted to bring awareness to the realization that while recognizing, publicizing and even legislating taxpayer rights are important, the rights themselves may be lost in translation when an agency such as the Service takes up the particular task of administering benefits programs.

As some have noted, the characteristics of the individuals who benefit from tax credits such as the EITC do not necessarily mesh with general Service efforts to more efficiently deliver service, or with traditional means of ensuring eligibility. Perhaps even more importantly, however, as Professor Rubin’s description of the sources of bureaucratic oppression suggests, policymakers should directly consider how there may be barriers that may prevent the Service from performing its tasks, with those barriers potentially having a major effect on the concerns underlying many of the explicitly recognized taxpayer rights.

This is all a bit abstract until applied in a particular context, but as an example that illustrates the next step in the inquiry consider the penalty found in section 32(k)(1)(B)(ii), which authorizes the Service to ban individuals from claiming the EITC for two years if the Service determines that they claimed the credit improperly due to reckless or intentional disregard. There have

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88 To be sure, many of the initial interactions between individuals and the Service derive from automated correspondence which may suggest a less prominent role for some of the sources of oppression described herein. Yet the presence of human discretion in setting operating rules to generate automated correspondence as well as in some of the tasks associated with distributing benefits even in the face of greater automation opens the door to the utility of the inquiry in this article.


90 Schneller, supra note 2; Michelle Drumbl, Those Who Know, Those Who Don’t, And Those Who Know Better: Balancing Complexity, Sophistication, And Accuracy On Tax Returns, 11 Pitt. Tax Rev. 113 (2013) (stating that characteristics of refundable credit claimants create particular challenges for those wishing to contest the IRS’s imposition on civil penalties).

been a number of critiques of the ban in the last few years. The criticism has focused largely on (1) the lack of defined standards to assist the Service in evaluating whether a claimant’s conduct is truly reckless,92 (2) inadequate procedural protections in ensuring that parties subject to the ban understand what the Service is imposing and why they are imposing the ban,93 and (3) a lack of clear and meaningful way for a claimant to challenge Service determinations in court.94

TAS studies have shown that the Service has not performed well in administering the ban. For example, in the 2013 Annual Report to Congress, the NTA looked at a representative sample of 2011 cases where the Service imposed the ban.95 The research found that the Service improperly imposed the ban almost 40% of the time. In almost 90% of the time the Service failed to explain to the taxpayer why in fact it was imposing the ban; in almost 30% of the cases the claimant did not participate in the audit where the Service proposed to impose the ban.

In addressing the research, the NTA sensibly noted that Service procedures do not reflect that many of the claimants who the Service imposes a ban on may be in need of education to learn why in fact the claims may be incorrect; in addition, the NTA noted that in over 70% of the cases where the Service imposed a ban the claimant had in fact used a paid preparer. As part of the NTA’s recommendations, it suggested that the Service perform internal quality review and update its manual to reject automatic impositions of the ban and to allow taxpayers to explain why they believe the ban is not proper. NTA also suggested that Treasury issue guidance to help explain when actions would be reckless in this context. In addition, NTA suggested that the examiners prior to imposing the ban (1) attempt to speak to the taxpayer, (2) determine whether anything the taxpayer submitted is suggestive of a “sincere effort” to prove the EITC even if the efforts or documents submitted are insufficient, and (3) consider the role that a paid preparer may have played in submitting the claim. The NTA also recommended a legislative change that would shift the burden of proof on the Service when the Service proposes to impose the ban to help ensure a more meaningful chance to get court review of the ban.96

In the context of the recently legislated taxpayer rights, the issues implicated in the critique of the Service’s administration of the ban include the right to challenge the Service’s position and be heard, the right to appeal a

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92 See Plecnik, supra note 91.
Service decision in an independent forum and the right to a fair and just tax system.\textsuperscript{97} The Service on the surface embraces those rights but the challenge is how to implement those rights in differing contexts. As Professor Super has identified, it is part of the agency’s job in administering a benefits program to determine whether someone meets eligibility criteria and to resolve disputes concerning eligibility. The NTA study looking at the Service’s imposition of the ban suggests that the Service has failed in ensuring that it protects taxpayer rights in this context. The insights of Professor Rubin suggest that there are likely barriers that may contribute to any agency’s challenges in interacting with lower-income individuals. Without further qualitative review of the interaction between the individuals and the Service in the context of the ban it is difficult to isolate specifically which of the barriers may have contributed to the shortfalls TAS has identified. If the Service wishes to meaningfully improve its service it would, on its own, study not only outcomes but the reasons why its examiners took or did not take certain actions, as well as the challenges that its policies will create given the characteristics of the population and sources of barriers that tend to contribute to poor agency service. An awareness of the barriers that typically exist in this context can inform the type of review that the agency should perform, as well as limit the chances that the agency will engage in conduct that will oppress individuals and impinge upon rights.

Absent more qualitative information, we do know however that there are solutions to bureaucratic oppression in the form of meaningful court review, internal reviews such as that provided by strong ombuds office, and changes in management and employee culture.

All of those solutions warrant a detailed discussion. For these purposes consider judicial review. While court review has its own limitations, it can be, as Professor Rubin identifies, a possible external check on agency abuse. On this front the ban under section 32(k) comes up woefully short. I have previously written that there is substantial uncertainty as to whether the Tax Court even has jurisdiction to hear as part of its deficiency procedures the

\textsuperscript{97}NAT 2013 Ann. Rep., supra note 93, at 16.
merits of a ban determination,\footnote{Leslie Book, \textit{The Ban on Claiming the EITC: A Problematic Penalty}, Procedurally Taxing, Jan. 23, 2014, http://www.procedurallytaxing.com/the-ban-on-claiming-the-eitc-a-problematic-penalty/. In that blog post, I discussed an exchange I had with former clinic director, Carl Smith, who noted that “Section 6665 authorizes the deficiency procedures to apply to certain penalties imposed by Chapter 68, but that does not give the Tax Court jurisdiction to treat a section 32(k) determination as if it were a penalty imposed by Chapter 68. Finally, there is no provision in the Code giving the Tax Court independent declaratory jurisdiction to review the Service determination that 32(k) will apply to any EITC claim made in a later year.”} and there is little in the way of defined procedures that would allow parties to raise meaningful challenges to an agency ban imposition. Given that a challenge to a proposed ban may require the claimant to file a tax return with a claim in another year, challenging the ban is likely to attract additional claimant costs in terms of time and potential fees. In other programs (such as in proposed bans stemming from food stamp violations), there are defined procedures for administrative disqualification procedures, and expedited court review to hear challenges to those proposed disqualifications.\footnote{See Forester v. Ohio Dept. Human Services, 122 Ohio App. 3d 750 (1997) (reviewing administrative disqualification hearing stemming from purported intentional food stamp eligibility violations).}

Rather than focus on taxpayer concerns in this process, in late 2015 Congress actually cut back on claimant procedural protections by allowing the Service to dispense with issuing a statutory notice of deficiency when a claimant files a return claiming the EITC during a time period that the ban is in place.\footnote{Section 32(k), as amended by the Protecting Americans from Tax Hikes (PATH) Act of 2015, Pub. L. No. 114-113 (extending the disallowance periods to the child tax credit (CTC) and American Opportunity Credit (AOC), as well as allowing the Service to use math error summary assessment procedures to disallow any EITC, CTC or AOC claim made during the disallowance period).} It did so without hearings or any requirement that the Service address some of the concerns that the NTA raised when it offered meaningful criticism of the ban in its prior studies.

The ball now is back in the Service’s court. No doubt that the NTA will be looking at what the Service does, but the Service could anticipate the likely concerns by embracing the challenges it faces in making key eligibility
determinations. A true appreciation of the Service’s role would look not only at the cost involved per claimant in making an assessment during the ban period but the challenges and costs associated from the claimant’s perspective.

VI. Conclusion

Administering a benefits program is not easy. One perceived advantage of using the tax system to deliver benefits is its relatively low direct administrative costs. As this Article suggests, while the Service may be in a unique position to deliver benefits without the traditional use of costly on the ground caseworkers who make upfront eligibility determinations, to administer a program that confers needed benefits to claimants requires not only a major commitment of resources but an appreciation of the nature of the challenges before it. An agency that looks mainly at expedience and not at experience will jeopardize taxpayer rights and potentially undermine confidence in the tax system. The Article provides insights from nontax scholars who have considered the challenges of delivering benefits and takes the small but important step of situating the Service’s tasks in light of those challenges.
## Appendix Historical EITC Parameters

### Earned Income Tax Credit Parameters, 1975-2016

[Dollar amounts unadjusted for inflation]

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BUREAUCRATIC OPPRESSION AND THE TAX SYSTEM

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[1] Beginning in 2002, the values of the beginning and ending points of the phase-out range were increased for married taxpayers filing jointly. The values for these taxpayers were $1,000 higher than the listed values from 2002-2004, $2,000 higher from 2005-2007, $3,000 higher in 2008, $5,000 higher in 2009, $5,010 higher in 2010, $5,080 higher in 2011, $5,210 higher in 2012, $5,340 higher in 2013, $5,430 higher in 2014, $5,520 higher in 2015, and $5,550 higher in 2016.

Sources:
1975-2003: Joint Committee on Taxation; Ways and Means Committee, 2004 Green Book.
2010-2013: Internal Revenue Service, Revenue Procedures from various years.
Making Taxpayer Rights Real: Overcoming Challenges to Integrate Taxpayer Rights into a Tax Agency’s Operations

AMANDA BARTMANN

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* J.D., American University, Washington College of Law; B.A., University of Maryland, College Park. Amanda Bartmann is an Attorney Advisor to the National Taxpayer Advocate within the Taxpayer Advocate Service, an independent organization within the United States Internal Revenue Service. The views expressed herein are those of the author and do not necessarily reflect the position of the National Taxpayer Advocate, the IRS, or the Treasury Department.
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Introduction

In 2014, the Internal Revenue Service (IRS) adopted the Taxpayer Bill of Rights (TBOR), embracing a set of fundamental principles that should guide all policies, practices, and procedures. Leading up to the IRS’s adoption of the TBOR, taxpayers’ awareness of their rights was significantly lacking. A 2012 survey conducted for the Taxpayer Advocate Service1 (TAS) found fewer than half of U.S. taxpayers believed they have rights before the IRS, and only 11% said they knew what those rights were.2

Although the Internal Revenue Code (Code or IRC) has for many years included specific provisions that ensure a fair and just tax system and protect all taxpayers from potential IRS abuse, it was not until late 2015 that Congress added a list of organizing principles to formally acknowledge the fundamental taxpayer rights from which these specific statutory rights derive.3 Congress amended IRC § 7803(a) to create a new requirement for the Commissioner of the IRS to ensure that IRS employees are familiar with and act in accord with taxpayer rights provided by other sections of the Code.4 The Code now provides that these rights include: the right to be informed, the right to quality service, the right to pay no more than the correct amount of tax, the right to challenge the position of the Internal Revenue Service and be heard, the

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1 The Taxpayer Advocate Service is an independent organization within the IRS that helps individual and business taxpayers resolve problems that have not been resolved through normal IRS channels and addresses large-scale, systemic issues that affect groups of taxpayers.


3 Although prior to 2015, Congress had passed multiple pieces of legislation with “Taxpayer Bill of Rights” in the title, and these laws created specific rights in certain instances, none of them provided a thematic, principles-based list of overarching taxpayer rights. See Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100–647, § 6226, 102 Stat. 3342, 3730 (containing the “Omnibus Taxpayer Bill of Rights,” also known as TBOR 1); Taxpayer Bill of Rights 2, Pub. L. No. 104–168, 110 Stat. 1452 (1996) (also known as TBOR 2); Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685, 726 (Title III is known as “Taxpayer Bill of Rights III” or TBOR 3).

The IRS’s adoption of the TBOR was a laudable step in the IRS’s efforts to regain the public’s trust and confidence in the fairness of the tax system. Furthermore, Congress’s decision to insert the TBOR into the Code reflects a desire to make taxpayer rights a foundational part of our tax system, giving the TBOR the force of the law. Although both of these actions hold great promise for taxpayers, the success of the TBOR depends largely on how the IRS carries it out. The TBOR will only be effective if its principles are incorporated in the thousands of daily actions and interactions undertaken by IRS employees and if there are actionable remedies for seeking redress when rights are violated.

Leading up to the adoption of the TBOR, the IRS had come under intense scrutiny, which continues today, as a result of allegations that it used inappropriate criteria to screen applications for tax-exempt status. In response to these allegations, the Principal Deputy Commissioner of the IRS issued a report that reviewed the allegations and outlined actions the IRS planned to take to fix the underlying problems. Among other items, the report asked the National Taxpayer Advocate to raise awareness of taxpayer rights, including updating IRS Publication 1, Your Rights as a Taxpayer. In response, the National Taxpayer Advocate issued a report advocating for a TBOR to serve as a framework for tax administration. The report provided recommendations to raise taxpayer and employee awareness of taxpayer rights, and outlined specific action items for TAS and recommendations for the IRS Commissioner, thus setting forth a roadmap for integrating taxpayer rights into every aspect of tax administration. Following the IRS’s adoption of the TBOR, TAS initiated a number of actions to make taxpayer rights “real”

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5 I.R.C. § 7803(a)(3).
8 See Internal Revenue Service, Your Rights as a Taxpayer, Publication 1, Catalog No. 64731W (Dec. 2014), available at https://www.irs.gov/uac/About-Publication-1 [hereinafter Publication 1]. This publication is provided to taxpayers in a number of circumstances, such as when an initial contact during an examination is made by mail and when a revenue officer contacts a taxpayer regarding a proposed seizure action. See, e.g., I.R.M. 4.10.2.7.4.2, Contacting the Taxpayer by Letter (Apr. 2, 2010); I.R.M. 5.10.1.7.2, Personal Contact to Advise the Taxpayer of Proposed Seizure Action (Aug. 4, 2014), available at https://www.irs.gov/irm/part5/irm_05-010-001.html#d0e1088.
by educating taxpayers, incorporating taxpayer rights into employee training and guidance, and integrating taxpayer rights into the measures the IRS uses to gauge performance and success. Throughout this process, there have been multiple challenges.

The first challenge is taxpayer education. Taxpayers must be aware that they have rights and know what they are. Taxpayers also need a basic understanding of what the rights mean and when they apply. Further, the rights must be operationalized in a way that taxpayers will exercise them freely when they apply. The second challenge is educating employees about taxpayer rights, which requires incorporating taxpayer rights into employee training and guidance, and driving employees to apply the rights when making decisions. Finally, in order to determine success in operationalizing taxpayer rights, a tax agency must measure whether taxpayer knowledge is increasing. In order to hold itself accountable for supporting taxpayer rights, a tax agency must fully incorporate taxpayer rights into its own measures.

I. Creating Awareness, Educating Taxpayers, and Encouraging the Exercise of Rights

A. Creating General Taxpayer Awareness About Their Rights

Taxpayer awareness and education is first and foremost in operationalizing taxpayer rights. If taxpayers do not know about their rights, they may not exercise them nor will they hold a tax agency accountable for failing to honor them. With a tax code as complex as that of the United States, and with specific taxpayer rights scattered within its nearly four million words, it is virtually impossible to educate taxpayers on all of their rights that occur in specific situations. In specific instances, the Code requires notifying taxpayers of certain rights. For example, IRC § 6213(a) requires the IRS to provide a notice of deficiency informing the taxpayer that he or she has 90 days (150 days if the notice is addressed to a person outside of the United States) to petition the U.S. Tax Court. As required by IRC § 7522(a), this notice shall provide the basis for and the amount of tax, interest, and penalties due. IRC § 6330 requires the IRS to notify taxpayers at least 30 days before a levy; this notice of intent to levy must include the amount of unpaid tax, the taxpayer’s right to request a hearing, the IRS’s proposed action, the IRC provisions relating to levy, the procedures applicable to the levy, the administrative appeals available to the taxpayer, and the alternatives available to prevent the levy.

In other instances, however, there is no statutory requirement to notify taxpayers of their rights. For example, the Code provides for Low Income Taxpayer Clinics (LITCs), which represent low income taxpayers in

11I.R.C. § 6330(a)(3).
controversies with the IRS and do not charge more than a nominal fee for their services; but, there is no requirement for the IRS to notify taxpayers that they may be represented by an LITC nor to provide a list of LITCs in the taxpayer’s geographic area.

The challenge then is how to communicate the TBOR to taxpayers so that even if taxpayers cannot know all of their rights and when they apply, they at least have a framework that helps them recognize their fundamental rights, even if they need more detail in specific circumstances. The TBOR does precisely this. By communicating the basic principles, it spurs taxpayers to seek more information when they need it. The TBOR serves as a jumping off point for taxpayers to then dig deeper by asking an IRS employee questions or researching their rights through additional sources such as the TAS website or IRS publications. Accordingly, if a taxpayer knows he has the right to retain representation, he or she might research the possibility of being represented by an LITC, even if he does not know the exact eligibility requirements outlined in the Code.

1. Using Publication 1 to Inform U.S. Taxpayers

When the IRS adopted the TBOR, it incorporated the statement of the ten core rights into its primary taxpayer publication, Publication 1, Your Rights as a Taxpayer. The revised Publication 1 provides a plain language description for each of the ten rights, and is available in English, Spanish, Chinese, Korean, Russian, and Vietnamese. For example, the right to quality service provides general guidelines as to what taxpayers can expect when dealing with the IRS—prompt, courteous, and professional assistance. It does not provide a timeline for “prompt,” as that varies in different situations, but it informs taxpayers that timeliness is an element of this right. Furthermore, this description sets forth a general policy of the IRS that allows taxpayers to speak with a supervisor if they believe they are receiving inadequate service.

Without these explanations, taxpayers may perceive the core rights as being more inclusive than they are; for example, taxpayers could mistakenly believe the right to quality service requires an employee to meet with the taxpayer face-to-face at any time. Alternatively, with no explanations, taxpayers may see the titles of the rights by themselves as wholly symbolic and thus without practical application.

The explanations in Publication 1 are also useful to taxpayers because the IRS itself has approved the explanations, and so it can be persuasive for taxpayers to cite the IRS’s words. For example, if a taxpayer provides additional documentation to prove income during an examination and does not receive a response, he or she can cite the plain language description of the right to

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12 See I.R.C. § 7526.
13 See Publication 1, supra note 8.
14 Throughout this paper, references to the fundamental rights are italicized to indicate when a right is one of the ten fundamental rights formally adopted in the TBOR.
challenge the IRS’s position and be heard, stating the taxpayer has a right “to receive a response if the IRS does not agree with their position.” Although this language does not have the power of law, as the Code only includes the titles of each of the fundamental rights, it is beneficial for taxpayers to cite the IRS’s own language in holding it to certain standards.

The IRS uses Publication 1 to comply with the Omnibus Taxpayer Bill of Rights (TBOR 1), which is a subtitle within the Technical and Miscellaneous Revenue Act of 1998 requiring the IRS to prepare a statement of taxpayer rights and IRS obligations and distribute it to taxpayers when contacting

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them regarding the determination of tax or collection of tax. The IRS also uses Publication 1 to meet other statutory requirements, such as those requiring advance notice of potential third party contacts and notice of the right to request relief from joint and several liability. In some cases, the IRS is not statutorily required to provide Publication 1, but it has chosen to do so as a matter of policy. For example, examiners provide Publication 1 to taxpayers along with other publications to notify them of their appeal rights.

During fiscal year 2015, the IRS printed approximately 31.6 million copies of Publication 1 to be distributed to taxpayers. However, taxpayers do not always read correspondence from the IRS and sometimes fail to even open the envelope. Furthermore, some taxpayers do not receive Publication 1 at all. Following the public outcry regarding the IRS’s handling of applications for tax-exempt status, the IRS Principal Deputy Commissioner found applicants for tax-exempt status never received Publication 1 because the Code only requires the IRS to provide it to taxpayers when they are contacted about an audit or the collection of tax.

2. Using Alternative Forms of Communication to Create Awareness

During focus groups of tax practitioners conducted by TAS in 2011, one of the most frequent comments was that taxpayers did not read Publication 1. Thus, there must be other avenues for informing taxpayers. A statistically representative nationwide sample of 8,911 United States taxpayers in 2012 found taxpayers preferred a variety of channels to be educated about their rights.

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16I.R.C. § 7602(c) requires the IRS to provide reasonable notice to the taxpayer in advance before contacting “any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer.” See, e.g., I.R.M. 5.1.10.2, Pre-Contact (June 7, 2013) (providing notice of potential third party contacts in field collection cases); I.R.M. 4.12.1.5.6.1, Third-Party Contacts (Oct. 5, 2010) (providing notice of potential third party contacts in nonfiler examination cases).
19See Werfel, supra note 7. The Technical and Miscellaneous Revenue Act of 1988 requires the IRS to provide taxpayers with a statement of their rights during an audit when the IRS contacts the taxpayer regarding the determination or collection of tax. Pub. L. No. 100-647, § 6227, 102 Stat. 3342, 3731 (1988).
Figure 2. Survey Question: “How would you like to learn about your rights?”

Clearly, relying solely on a printed publication does not meet the needs of all taxpayers. Following the adoption of the TBOR, TAS worked with the IRS during fiscal years 2014 and 2015 to place almost 50 “callouts” on the top pages of IRS.gov, which are prominent graphics that provide links to the main IRS TBOR page. Another accomplishment was creating a permanent homepage for taxpayer rights, which lists the rights and provides links to the

\[21\text{ See Nat’l Taxpayer Advocate, supra note 9.}\]
plain language descriptions used in Publication 1, as well as Fact Sheets on each right, discussed below.\textsuperscript{22} TAS also created a video that informs taxpayers about their fundamental rights, provides examples of what the rights mean for taxpayers, and encourages taxpayers to exercise those rights.\textsuperscript{23}

Furthermore, TAS worked with the IRS to revise the instructions to its main series of individual income tax returns, known as the Form 1040 series. This is especially important because when asked during focus groups whether they thought Publication 1 was provided at the correct time, many practitioners commented that the IRS only provided it once the taxpayer already had a problem with the IRS and it should be provided before this point.\textsuperscript{24} Informing taxpayers of their rights before they file is key because taxpayers’ problems may begin as soon as or even before they file a return, as in the case of a taxpayer who cannot understand filing instructions or who faces an unreasonably long refund delay.

Because taxpayers may be overwhelmed by a large amount of information at once, releasing smaller amounts over time can keep taxpayers interested and engaged. TAS worked with the IRS on a series of weekly TBOR Fact Sheets, released over the 2015 filing season. These Facts Sheets were posted on the IRS.gov website, linked to on TAS’s TBOR webpage, promoted via social media, and posted on the IRS’s internal website for employees. Each Fact Sheet focused on a fundamental right and provided plain language examples of how the right applies and links to other resources. For example, the \textit{Right to be Informed} Fact Sheet explained “Certain notices must include the amount (if any) of the tax, interest, and certain penalties you owe and must explain why you owe these amounts,” and also included a link to the page “Understanding Your Notice or Letter” on IRS.gov.\textsuperscript{25} By using the fundamental rights to breakout and organize the information about specific taxpayer rights and related resources, these messages made the information accessible to taxpayers without a preexisting knowledge of, or background in, taxpayer rights or tax administration.

Although these actions have boosted awareness, there are still challenges. Because taxpayers do not always enter the IRS website through the main homepage, and may view a specific page as a search engine result, the IRS needs to provide additional taxpayer rights information throughout the IRS.gov website. As of October 2015, the IRS.gov website has approximately 82,000 website pages.\textsuperscript{26} Thus, future IRS communications plans need to develop a

\textsuperscript{23}The video is available at id.
\textsuperscript{24}See Taxpayer Advocate Service, \textit{supra} note 20.
\textsuperscript{26}This data was provided to TAS by the IRS Office of Online Services using data provided by Accenture on October 9, 2015.
methodology for identifying pages that are most likely to be entrance points into IRS.gov and pages where including taxpayer rights information is most crucial based upon the rights that arise and the consequences for not exercising them at a particular stage or in reference to a particular issue.

3. Working with the Private Sector to Utilize Tax Preparation Software and Tax Return Preparers

Another challenge is providing the information before taxpayers file. Not all taxpayers read the instructions to Form 1040. With the increasing number of taxpayers using either software or a preparer to file their returns, there are opportunities for partnering with the private sector to communicate taxpayer rights information. The IRS could provide standard language to software developers to insert into their programs.

Over half of taxpayers used paid preparers to prepare their federal tax returns for tax year 2013.27 A 2014 survey of Hispanic U.S. taxpayers, which make up a sizable portion of the U.S. population,28 found that 76% used a paid preparer to prepare their prior year return.29 Although all persons preparing a federal tax return for compensation must register for a Preparer Tax Identification Number (PTIN), the PTIN information webpage on IRS.gov is devoid of any taxpayer rights information.30 The IRS misses out on a major opportunity by not communicating taxpayer rights information to preparers and providing basic resources that preparers could print and display in their offices or distribute to taxpayers. Similar to the taxpayer rights information provided in the Form 1040 Instructions, the Instructions for Form W-12, IRS Paid Preparer Tax Identification Number (PTIN) Application and Renewal, could remind preparers about the importance of taxpayers rights, explain what their role is in supporting taxpayer rights, and provide resources to which they can refer taxpayers who have questions.

27 As of week 47 of 2015, 57.5% of tax year 2013 tax returns were completed by a paid preparer. Internal Revenue Service, Individual Returns Transaction File for Tax Year 2013 (cycle 201547).


Although the IRS was enjoined from enforcing mandatory testing and continuing education requirements for unregulated paid preparers, there are still opportunities for incorporating taxpayer rights information into the education requirements for the Annual Filing Season Program, a voluntary continuing education program for unregulated return preparers. Currently, this program requires 18 hours of continuing education, including a six hour Annual Federal Tax Refresher course that covers filing season issues and tax law updates, ten hours of other federal tax law topics, and two hours of ethics. The IRS could further require an hour long standalone taxpayer rights course.

With recent cuts to taxpayer service, taxpayers are more likely to have to rely on paid preparers. Although they may be beneficial to taxpayers in helping them meet their filing requirements, paid preparers may also shield taxpayers from communications with the IRS. Thus, it is incumbent on the IRS to provide taxpayer rights information through preparers as well as directly to taxpayers.

In regards to educating taxpayers after filing or when they experience a problem, TAS has been successful in working with the IRS to provide information to taxpayers in person. TAS created a bilingual poster version of Publication 1 to be displayed in IRS Taxpayer Assistance Centers (locations where taxpayers can walk-in to receive assistance in person), local TAS offices, and all other offices where taxpayers come in for appointments, including Examination, Appeals, and Collection Offices. To ensure taxpayer rights information is shared with low income taxpayers, many of whom may rely on an LITC for their interaction with the IRS, TAS also made the bilingual poster available to LITC offices. Working with preparers to display similar posters or distribute resources would help close the gap for those taxpayers who continue to rely on their preparers to handle their IRS issues after they file.

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33 See 2014 Nat’l Taxpayer Advocate Ann. Rep. Most Serious Problem: Taxpayer Service: Taxpayer Service Has Reached Unacceptably Low Levels and Is Getting Worse, Creating Compliance Barriers and Significant Inconvenience for Millions of Taxpayers 3-25 (“The net effect of withdrawing this assistance is that many taxpayers will not receive the help they need and many others will have to pay for a previously free service, often consulting “tax preparers” who generally are unregulated and do not have to meet even minimum competency requirements.”), available at http://www.taxpayeradvocate.irs.gov/2014-Annual-Report/full-2014-annual-report-to-congress/.
B. Helping Taxpayers Understand Their Specific Rights, When They Arise, and Where to Find More Information

Once taxpayers understand a set of fundamental principles, the challenge is how to tie the principles to statutory provisions so taxpayers can learn the specific rules. While the general plain language descriptions are helpful, they do not notify taxpayers when rights emerge and when they do not apply. Taxpayers may know they have a right to quality service, but they may not know that the Code prohibits the IRS from communicating with the taxpayer regarding collection at inconvenient times, which is generally before 8 a.m. and after 9 p.m.\(^{34}\) Taxpayers may know as part of the right to finality, the IRS has a certain period of time in which it must assess the tax, but they may not realize the IRS can assess the tax at any time if a return has never been filed\(^{35}\) or if the return is considered fraudulent with the intent to evade tax.\(^{36}\) To help taxpayers use the TBOR as a starting point to guide them to the specific statutory rights, TAS created a “crosswalk” on its website that links the specific statutory provisions which underlie the TBOR with the fundamental principles. The crosswalk includes a plain language description of the statutory provisions and links to other resources where taxpayers can find more information. For example, the crosswalk includes relevant IRS publications as well as links to the U.S. Tax Court’s website, where applicable.\(^{37}\) The crosswalk is also useful in outlining what remedies taxpayers may have under the law. Creating the crosswalk helped TAS identify what rights do not have sufficient, actionable remedies, which in turn has led to the development of specific legislation and administrative recommendations.

To further assist taxpayers in learning the specific situations when their rights apply, TAS incorporated the fundamental rights into a portion of its website, called the Tax Toolkit, which is the go-to website for taxpayers who have been contacted by or have disputes with the IRS. So, when a taxpayer has an issue, such as identity theft, and turns to the Tax Toolkit to learn what to do and what his or her resources are, the Toolkit also links the taxpayer to the fundamental rights that apply in the case of identity theft—the right to be informed, and the right to pay no more than the correct amount of tax.

C. Facilitating Taxpayers in Exercising their Rights

While taxpayer education is undeniably important in operationalizing taxpayer rights, taxpayer education may only take taxpayers so far if they are unable to exercise their rights or can only do so at an inconvenience due to

\(^{34}\) I.R.C. § 6304(a).

\(^{35}\) I.R.C. § 6501(b)(3).

\(^{36}\) § 6501(c)(1).

roadblocks set up by the tax agency. Knowledge and awareness of rights will only take taxpayers so far if they are unable to act upon those rights.

1. Providing Access to the Tax Agency

The National Taxpayer Advocate’s 2014 Annual Report to Congress examined situations where the IRS was not following Congress’s intent in carrying out a number of statutory mandates, and in failing to do so, was making it difficult for taxpayers to exercise their rights. One topic covered in multiple articles was access to the IRS. In many situations, a prerequisite for exercising one’s rights is being able to contact the tax agency and communicate with an employee either over the telephone or through correspondence, part of a taxpayer’s right to quality service.

In the United States, the IRS and Congress share responsibility for making the right to quality service “real.” The IRS is responsible for answering the telephone when taxpayers call and responding to taxpayer letters, but it is also incumbent upon Congress to fund the IRS so that it has the resources to
provide these services.38 In the United States, more than 100 million taxpayers try to reach the IRS by telephone every year.39 However, during fiscal year 2015, taxpayers calling the IRS’s toll-free telephone assistance lines were only successful in reaching an employee 38.1% of the time after waiting on hold for an average of about 30.5 minutes.40 During the 2015 filing season, 8.8 million taxpayers received what is known as a “courtesy disconnect,” where the IRS essentially hangs up on the caller without answering because the IRS switchboard cannot handle additional calls.41 The IRS has also experienced difficulty in responding to taxpayer correspondence. United States taxpayers send more than ten million letters to the IRS each year responding to proposed adjustments or other IRS notices.42 At the end of the 2015 filing season, over a quarter of all taxpayer correspondence had not been processed within normal timeframes and was considered “overage.”43

Beyond the ability to merely speak with someone or receive a response, taxpayers also must have the ability to navigate the tax agency to find and reach the correct employee in order to exercise their rights. In order for taxpayers to exercise their right to quality service and speak to a supervisor about inadequate service, they must have a way to reach the supervisor. In order for taxpayers to ask questions about documentation the IRS has deemed inadequate during a correspondence examination, part of a taxpayer’s right to challenge the IRS and be heard, they must be able to speak with an employee who is knowledgeable about their cases.

However, as explained in the National Taxpayer Advocate’s report, taxpayers are often unable to accomplish these tasks that enable them to exercise their rights. Taxpayers calling the IRS, unless calling one of a few select phone lines (such as the refund hotline), must navigate an extended phone tree, go through a number of prompts, and if the taxpayer is successful in reaching an employee, often that employee has no knowledge of the taxpayer’s case or expertise in the specific issue.44 Reaching a supervisor of a specific employee may prove even more difficult as the IRS has no public directory of the heads of departments and offices within the IRS. In the case of the examination, a taxpayer is unable to exercise his or her right to challenge the IRS’s position and be heard because the IRS has overlooked its statutory mandate to

38 For a detailed discussion of the IRS’s decline in taxpayer service and concurrent increase in workload, see Nat’l Taxpayer Advocate, supra note 33, at 3-25 (Most Serious Problem: Taxpayer Service: Taxpayer Service Has Reached Unacceptably Low Levels and Is Getting Worse, Creating Compliance Barriers and Significant Inconvenience for Millions of Taxpayers).
39 Nat’l Taxpayer Advocate, supra note 33, at 3.
42 2016 Nat’l. Taxpayer Advocate, supra note 41, at 19.
43 2016 Nat’l Taxpayer Advocate, supra note 41, at 19.
44 See 2014 Nat’l. Taxpayer Advocate, supra note 33, 123-33.
assign a single employee to correspondence examination cases and has failed to meaningfully implement the requirement to provide an employee’s contact information on examination notices.45 Without access to a knowledgeable employee assigned to the taxpayer’s case, the taxpayer cannot meaningfully challenge the IRS. Furthermore, when the IRS takes actions that impair taxpayer rights, such as not considering documentation in an examination, the taxpayer may not be able to seek redress administratively if he or she cannot locate the correct office to complain or to request an appeal.

2. Providing Taxpayers with the Information Needed to Make Informed Decisions

The IRS also creates barriers by failing to provide taxpayers with the information needed to make decisions about whether to exercise other rights, such as the right to appeal an IRS decision in an independent forum, the right to retain representation, and the right to a fair and just tax system. Although the Code requires the IRS to provide the specific reasons when it disallows a claim for refund, TAS found the IRS fails to provide clearly written explanations of the specific reasons for the disallowance so that the taxpayer can make an informed decision about whether or not he or she believes the claim should have been disallowed, whether the taxpayer should pursue a challenge to the disallowance, and whether the taxpayer might need or desire representation to do so.46

Similarly, in cases where the IRS is authorized to sidestep normal deficiency procedures and make a summary assessment of additional tax due resulting from a mathematical or clerical error on a return, the Code requires the IRS to identify the error and provide a description of it.47 This explanation is important because a taxpayer only has 60 days from the date of the notice to request abatement of the math error assessment.48 Following a timely abatement request, the IRS must abate the assessment and if it chooses to reassess,

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45 IRS Restructuring and Reform Act of 1998 (RRA 98), Pub. L. No. 105-206, §§ 3705(b), 3705(a), 112 Stat. 685, 777. See Nat’l Taxpayer Advocate, supra note 33, at 133-44 (Most Serious Problem: Correspondence Examination: The IRS Has Overlooked the Congressional Mandate to Assign a Specific Employee to Correspondence Examination Cases, Thereby Harming Taxpayers), 145-53 (Most Serious Problem: Audit Notices: The IRS’s Failure to Include Employee Contact Information on Audit Notices Impedes Case Resolution and Erodes Employee Accountability).

46 I.R.C. § 6402(l). See Nat’l Taxpayer Advocate, supra note 33, at vol. 1, 172-84 (Most Serious Problem: Notices: Refund Disallowance Notices Do Not Provide Adequate Explanations) (“TAS pulled a sample of 100 Statutory Notices of Claim Disallowance and determined that 92 of them did not provide adequate explanations to satisfy the statutory requirement. Specifically, 30 letters included language that was not clear and written in plain language, 58 did not sufficiently explain the specific reasons for the disallowance, and 65 did not provide the taxpayer with the information needed to respond to the IRS.”).

47 I.R.C. § 6213(b)(1).

48 § 6213(b)(2)(A).
it must follow regular deficiency procedures,\textsuperscript{49} which provide the right to challenge the proposed assessment in the U.S. Tax Court.\textsuperscript{50} However, taxpayers might not request abatement, losing their opportunity to exercise their right to challenge the IRS’s position and be heard, and subsequently, their right to Appeal an IRS decision in an independent forum, because the IRS uses vague and unclear explanations on math error notices, such that the taxpayer cannot understand what the error is.\textsuperscript{51}

3. Ensuring Taxpayers Understand the Consequences of Waiving their Rights and Do Not Feel Coerced into Doing So

Related to the right to be informed, the IRS sometimes even asks taxpayers to waive their rights, without clearly explaining what they are giving up. By not informing taxpayers of the consequences of giving up their rights, these waivers are the antithesis of facilitating the exercise of taxpayer rights—they are actively encouraging taxpayers to relinquish their rights without understanding the effects. For example, if the IRS disallows any portion of a claim for refund or credit of an overpayment, IRC § 6532(a) requires it to mail to the taxpayer, by certified or registered mail, a notice of claim disallowance in order to commence the two-year statute of limitations on filing suit to challenge the disallowance in a United States District Court or the Court of Federal Claims. However, taxpayers can waive the right to receive the notice of claim disallowance, which begins the running of the statutory period of limitation when the waiver is filed.\textsuperscript{52} By regulation, the waiver form must include: “the type of tax and the taxable period covered by the taxpayer’s claim for refund,” “the amount of the claim,” “the amount of the claim disallowed,” and “a statement that the taxpayer agrees the filing of the waiver will commence the running” of the two-year statute of limitations to file suit.\textsuperscript{53}

However, the letter used by examination to accompany this waiver form does not explain the significance of waiving the statutory notice, nor does it even imply the taxpayer has a choice if he or she agrees with examination’s adjustment. The letter states, “If you agree with our findings, please sign, date, and return: [check box] Form 2297, Waiver of Statutory Notification of Claim Disallowance.”\textsuperscript{54} The letter accompanying the waiver form does not explain to the taxpayer that he or she can choose not to sign the waiver, nor does it explain the two-year period to file suit in a United States District Court or the Court of Federal Claims. Beyond misleading the taxpayer about whether he or she must sign the waiver, this infringement of the right to be informed may lead to a taxpayer missing the opportunity to exercise his or her

\textsuperscript{49} § 6213(b)(2)(A).
\textsuperscript{50} § 6213(a).
\textsuperscript{51} See 2014 Nat’l Taxpayer Advocate, supra note 33, 163-71.
\textsuperscript{52} I.R.C. § 6532(a)(3).
\textsuperscript{53} Reg. § 301.6532-1(c)(1)-(4).
right to appeal an IRS decision in an independent forum due to not timely filing a suit to challenge the disallowance in court.

Another example of the IRS asking taxpayers to waive their rights involves taxpayers requesting installment agreements, where they may pay their tax liability in installments, or offers in compromise (OICs), where part of a taxpayer’s liability is compromised. The Code prohibits the IRS from levying a taxpayer during the period that an installment agreement or OIC is pending, during the 30 days after an installment agreement or OIC is rejected, and if the rejection is timely appealed, during the period the appeal is pending. However, taxpayers may waive the prohibition on levies while an installment agreement or OIC is pending, which creates the risk that the IRS will require taxpayers to waive the prohibition in order to enter into an installment agreement or OIC. In situations such as this, taxpayers may feel coerced into giving up their rights because if they do not, they may sacrifice further rights, such as the opportunity to request an installment agreement or OIC (and to have that request meaningfully considered by the IRS). The use of waivers that either obscure the consequences of giving up one’s rights or fail to present taxpayers with a real choice as to whether to waive their rights undermines the positive effects of taxpayer education and awareness of their rights.

4. Actions a Tax Agency can Take to Better Facilitate Taxpayers in Exercising Their Rights

Although TAS and the IRS have been successful in creating awareness of taxpayer rights, facilitating taxpayers in exercising those rights remains an area ripe for improvement. Fortunately, there are real solutions the IRS can make at an operational level to better assist taxpayers in putting their rights into practice. First and foremost, there needs to be a better way for taxpayers to navigate the agency. Contacting the IRS is a prerequisite to exercising many rights. One solution is to make available to taxpayers a directory of the different offices within the IRS, so if a taxpayer is experiencing an issue, he or she could reach out to a manager in the appropriate office. Another option is to establish a telephone system similar to a 311 system, where an operator

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55 See I.R.C. §§ 6159, 7122.
56 I.R.C. § 6331(k). For installment agreements, there are further prohibitions on levying during the period an installment agreement is in effect and if the agreement is terminated, during the 30 days following the termination, as well as while an appeal of the termination is pending. § 6331(k)(2).
57 I.R.C. § 6331(k)(3)(A) states that rules similar to I.R.C. § 6331(i)(3) and (4) shall apply for the purpose of I.R.C. § 6331(k). I.R.C. § 6331(i), which prohibits the IRS from levying while proceedings are pending for the refund of divisible tax, does not apply if a taxpayer files a written notice to waive the levy prohibition. § 6331(i)(3)(A)(i). For a detailed discussion of the risks of the IRS requiring taxpayers to waive the levy prohibition as a condition precedent to the IRS’s consideration of an installment agreement or OIC, see 2008 Nat’l Taxpayer Advocate Ann. Rep. Legislative Recommendation: Waiver of Levy Prohibition Under Internal Revenue Code Section 6331(k) 446-48.
58 2014 Nat’l Taxpayer Advocate, supra note 33.
would transfer each taxpayer to the specific office within the IRS that handles his or her issue or specific case.59

As explained above, a second prerequisite to exercising taxpayer rights is being informed such that a taxpayer can make an educated decision about what action to take. In the United States, taxpayers are fortunate enough to have statutory requirements, referenced above, that require some correspondence to include certain items or explanations. However, much of the current correspondence only meets the bare minimum requirements. To truly further taxpayers’ ability to exercise their rights, a tax agency should conduct a thorough review of all correspondence that gives rise to specific taxpayer rights, whether it is the right to an administrative appeal or the right to request a payment plan.

Nearly all taxpayer correspondence could benefit from a review to analyze whether it is written in plain language or includes proper detail. However, focusing solely on correspondence that gives rise to specific rights or outlines limitations (especially time limitations) for exercising those rights could have a significant impact on the number of taxpayers who exercise their rights. Such a review should focus specifically on information taxpayers would need to know to make an informed decision and what steps they would need to take. For example, TAS’s review of refund disallowance notices resulted in recommendations to require the notices to include the amount of the claim that was disallowed, and for claims disallowed due to the expiration of the refund statute of limitations, “the date the return was deemed filed, how the IRS calculated that date, and the date the claim was due.”60 Furthermore, any notices advising taxpayers of the opportunity to challenge a decision in court should include where to find more information about filing suit, including the court’s website.61

II. Educating Employees and Encouraging Them to Incorporate Taxpayer Rights into Decision-Making

The second major challenge in operationalizing taxpayer rights is educating employees and prompting them to consider taxpayer rights when they make decisions, whether in a specific taxpayer’s case or in the broader context of agency policy or procedures.

A. Providing Employees with a Broad Overarching Education About Taxpayer Rights

With an agency as large and complex as the IRS, employees tend to gain expertise in their specific areas of daily operation. For example, there are

59 2014 Nat’l Taxpayer Advocate, supra note 33.
60 2014 Nat’l Taxpayer Advocate, supra note 33.
employees who specialize in Offers in Compromise and those who specialize in property appraisal and liquidation. Even employees who cover a broader range of issues may be unfamiliar with other stages in the process of a taxpayer’s interaction with the IRS. A collection employee may become so focused on collecting the liability that he or she does not address other issues, such as if the taxpayer believes he or she does not owe the liability. The collection employee may not inform the taxpayer that he or she could request an Offer in Compromise based on Doubt as to Liability, or that he or she may be eligible for an administrative process known as Audit Reconsideration, where the IRS reevaluates a prior audit based upon new information submitted by the taxpayer. The challenge is to provide all employees with a basic understanding of the entire tax filing and controversy process and a taxpayer’s rights that arise at different points.

In the United States, efforts to improve employee training on taxpayer rights have met resistance, based on the presumptions that the few mentions of taxpayer rights in employee training are adequate and that employees do not need to understand the broader context of the rights. In 2013, TAS reviewed IRS training to gauge how well the training educated employees about taxpayer rights. TAS found the training varied greatly, with some initial training providing only minimal instruction on taxpayer rights, with a few exceptions, such as the training for new Revenue Officers that included two hours of lessons focusing on all areas of taxpayer rights that relate to Collection.

Much of the training reviewed by TAS only included a token mention of one or two taxpayer rights topics, which were extremely specific to a single task. For example, the Examination Toll-Free Telephone Assistor training only covered a handful of taxpayer rights topics, such as taxpayer authentication and power of attorney. Although protecting a taxpayer’s right to confidentiality is important, there are additional rights that taxpayers may not know about, and may not learn about, if they speak with a customer service representative who lacks knowledge of the taxpayer’s rights and how actions at a...
particular stage may lead to exercising or relinquishing those rights. Although the telephone scripts for the Examination Toll-Free Assistors did allude to the right to appeal by mentioning Tax Court deadlines, the scripts provided no explanations of what it means for a taxpayer to miss the Tax Court deadline. Employees may not realize that the U.S. Tax Court is the only judicial forum for a taxpayer to challenge a liability prior to paying the tax, and if the taxpayer does not timely file a petition, the taxpayer loses this right.68

For employees to assist taxpayers in exercising their rights, they need to have an understanding of how their day-to-day tasks and interactions with taxpayers fit in to the broader picture and support fundamental rights. The IRS should review and revise all initial training to include a comprehensive lesson on all of the taxpayer rights that apply during specific stages of the a taxpayer’s dealings with the IRS. Furthermore, all employees should be provided with a stand-alone course that covers taxpayer rights that adhere throughout the tax filing and controversy process, focusing on how actions at different stages affect a taxpayer’s ability to exercise specific rights during other stages.

To achieve this, TAS provides mandatory, comprehensive taxpayer rights training for all its employees, not limited to new hires or those who interact directly with taxpayers. This comprehensive training, called the Roadmap to a Tax Controversy, has three stages. The first is required for all TAS employees and provides a high-level overview, taught by the National Taxpayer Advocate, of the legal issues related to return filing, examinations, collections, appeals, and judicial review. The first stage includes three one-hour videos, a course book, and a facilitator guide. It also includes three roadmaps, which provide employees with a visual diagram of three processes:

• Pre-Litigation and Administrative Procedures;
• Litigation and Assessment;
• Collection.

These roadmaps are available as posters for all IRS employees and are provided to LITCs.69 The training is effective because employees gain an understanding of the entire tax controversy process and learn how the particular stage at which they come into contact with the taxpayer fits in to the big picture. As an example, Collection employees could learn about the stages of an examination and what rights arise with the issuance of a statutory notice of

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68 See I.R.C. § 6213.
69 See Internal Revenue Serv., Roadmap to a Tax Controversy: Pre-Litigation Administrative Procedures, Publication 5122-A, Catalog No. 65537S (Sept. 2013) (unpublished flowchart) (on file with The Tax Lawyer); Internal Revenue Serv., Roadmap to a Tax Controversy Litigation and Assessment, Publication 5122, Catalog No. 65536H (Sept. 2013) (unpublished flowchart) (on file with The Tax Lawyer); Internal Revenue Serv., Roadmap to a Tax Controversy: Collection, Publication 5122-B, Catalog No. 65538D (Sept. 2013) (unpublished flowchart) (on file with The Tax Lawyer).
Employees processing taxpayer responses to math error notices could learn about the taxpayer’s opportunities (or lack thereof) for challenging the liability later in the process if he or she does not timely respond to the math error notice. By understanding what rights a taxpayer has already had, which rights currently apply, and which rights a taxpayer may surrender in the future, the employee is in a better position to inform the taxpayer and safeguard critical rights.

B. Continuing Education and Reminders About Taxpayer Rights

Without continuing education on taxpayer rights, employees are likely to find themselves out of the practice of viewing their tasks through the framework of fundamental taxpayer rights. The same principle discussed above regarding not overwhelming taxpayers with too much information also applies to employees. Similar to the Fact Sheets prepared for the public, the IRS Small Business and Self-Employed Operating Division prepared a series of biweekly messages during the 2015 filing season that each focused on one or two of the fundamental rights and explained how the actions employees take on a daily basis support these rights. These messages were useful because even if employees have a big picture view of what taxpayer rights are, they may fail to connect those rights to their daily work, which can become so repetitive and mundane that employees may overlook some tasks if they do not understand the consequences to the taxpayer.

To remind employees about the TBOR, TAS worked with the IRS to distribute TBOR posters to be placed in all employee areas. TAS also developed a “TBOR IQ Test,” which is a multiple choice test available on the IRS’s internal website for employees to refresh their memory about the fundamental TBOR rights and test their knowledge of what they mean.

While periodic messaging is beneficial, it is not a substitute for including taxpayer rights information in annual training courses or training on new and emerging topics. In 2013, TAS reviewed IRS training and found it to be inadequate in its coverage of taxpayer rights. For example, the fiscal year 2013 Continuing Practical Education for Revenue Agents had six required and ten optional courses that focused primarily on technical topics, with no mention of taxpayer rights in the descriptions. Taxpayer rights information must be included in technical topics training because as technical procedures and even the tax law changes over time, employees need to understand how new processes and procedures affect taxpayer rights.

In 2014, TAS put together training on the Affordable Care Act, which provides a model for how to interweave taxpayer rights information into

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70 See I.R.C. § 6212.
71 Math Error authority allows the IRS to sidestep normal deficiency procedures and make a summary assessment of additional tax due resulting from a mathematical or clerical error on a return. I.R.C. § 6213(b)(1).
72 See 2013 Nat’l Taxpayer Advocate, supra note 31, at 54.
technical training. One example from this training involves taxpayers who are victims of domestic violence. Here, the training advised employees to work with domestic violence victims to gather the necessary documentation to prove eligibility for the Premium Tax Credit (PTC), even though the taxpayer’s filing status was married filing separately.73 It also provided examples of alternative documentation that could be used, such as oral testimony or statements from doctors or social workers. The training cited the right to a fair and just tax system and the right to pay no more than the correct amount of tax, explaining “In this instance, the taxpayer’s specific circumstances may make them eligible to receive the PTC even though they filed married filing separately.”74

Employees would also benefit from stand-alone training that provides guidance for how to think about and apply taxpayer rights to daily work. TAS produced a two-hour video for all of its employees in 2015 that highlights some of the key statutory rights that are relevant to TAS’s work and provided guidance for how to incorporate the TBOR into employees’ work, such as making recommendations to change internal guidance or working on advocacy projects to change IRS procedures. The training also included three case examples, prompting employees to discuss the TBOR rights implicated, including infringements of those rights, and how to apply the rights in formulating actions to advocate for the taxpayer.

C. Incorporating Taxpayer Rights Information in Employee Guidance

Employee education occurs not only in traditional training, but also through internal guidance. The Internal Revenue Manual (IRM) is the “primary, official compilation of ‘instructions to staff’ that relate to the administration and operation of the IRS.”75 Because employees rely on the IRM for day-to-day instructions for how to do their jobs, the IRM can be an even more effective tool than traditional training for encouraging employees to take actions to protect and promote taxpayer rights. Unfortunately, when the instructions are contradictory, unclear, or do not explain why an employee should take or refrain from taking a specific action, employees may act in a way that infringes upon taxpayers’ rights, despite best efforts to follow current guidance.

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73 See I.R.C. § 36B(c)(1)(C), which requires that a married couple must file a joint return to be eligible for the PTC. See Notice 2014–23, 2014–16 I.R.B. 942 (allowing married victims of domestic abuse who are unable to file joint returns to meet the joint filing requirement of I.R.C. § 36B(c)(1)(C) if they meet certain conditions).
1. Explaining Why an Employee Should Take an Action and How It Relates to Taxpayer Rights

Even where IRM instructions specifically direct employees to take actions to protect taxpayer rights, without an explanation of why the employee should take the action and how it relates to taxpayer rights, employees may neglect to take the action or cut corners. Furthermore, in some instances, the IRM obscures taxpayer rights information so that employees may fail to notice it. One example of successfully incorporating taxpayer rights into everyday guidance is a new IRM section on “Pre-levy Considerations.” In 2009, the U.S. Tax Court issued a significant decision for taxpayer rights, holding that if during a Collection Due Process hearing, a taxpayer establishes that a proposed levy will cause economic hardship, the IRS cannot issue the levy, even if the taxpayer has past due, unfiled returns.76 After this decision, the IRS proposed a new IRM provision on “Pre-levy Considerations,” which listed factors employees should consider when deciding whether to levy, such as the taxpayer’s responsiveness or compliance history. The only mention of economic hardship was in a bullet point, among other factors listed, which read “Anything that is known about the taxpayer’s financial condition including economic hardship and if the revenue officer has received sufficient information and verified that the levy would cause an economic hardship, the levy should not be issued.” The proposed IRM did not explain the reason why a revenue officer should not levy, and the statutory prohibition against levying when there is economic hardship was buried within a bullet point list of factors to merely consider.

TAS worked with the IRS to revise this proposed IRM section, which has become a model for other internal guidance incorporating taxpayer rights information.77 The first sentence in the revised IRM section states “Taxpayers have the right to a fair and just tax system. That is, taxpayers have the right to expect the tax system to consider facts and circumstances that might affect their underlying liabilities, ability to pay, or ability to provide information timely. (Taxpayer Bill of Rights #10.)”78 The IRM then says “Accordingly, levy determinations are made on a case-by-case basis and Revenue Officers must exercise good judgment in making the determination to levy.”79 This background is useful to educate employees about how separately considering the facts of each levy determination supports a taxpayer’s right to a fair and just tax system.

Instead of embedding the levy prohibition in a bullet, the revised IRM includes a separate indented note that says:

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78 Id.
79 Id.
Note: When determining whether the financial information available is sufficient to establish an economic hardship each levy should be considered independently. In general, it will be necessary for the taxpayer to provide information for this determination to be made. However, if the Revenue Officer can verify from the information available that the levy will cause an economic hardship, the levy will not be issued, because if there is economic hardship, the levy must be released under IRC § 6343(a)(1)(D).

This revised provision highlights the prohibition on levying when there is economic hardship and provides a reason for why employees should not levy under these circumstances. Because the law requires the levy to be immediately released, it is irrational for the IRS to levy on a taxpayer whom it knows is experiencing economic hardship.

Finally, the IRM section ends with an additional note:

Note: There is no requirement that taxpayers experiencing economic hardship be in filing or payment compliance before a levy is released. Vinatieri v. Comm’r, 133 T.C. 392 (2009). Thus, when the Service determines that the levy will create an economic hardship, do not issue the levy as a means to secure other compliance, e.g., missing tax returns.

This note is crucial because it advises employees that they are not to put a condition (i.e., filing outstanding returns) on the decision not to levy if there is an economic hardship. Similar to the note above, it provides the legal reason, citing case law, and helps employees understand why they are not to use levies to secure past returns in this case.

2. Overcoming the Problem of Employees Interpreting Guidance Too Narrowly

This pre-levy example also presents a solution to the challenge of employees taking a narrow interpretation of IRM sections. In working with the IRS to resolve taxpayer issues, TAS has witnessed countless cases where an IRS employee refuses to go beyond the literal text of the IRM section. If an IRM section provides a list of factors, and there is an item not included, an employee may refuse to consider it even if the list is not intended to be all-inclusive. This practice may not be the result of an employee simply trying to shirk doing the actual work, but at times could be driven by a fear that going beyond the exact words on the page could result in an error, which might negatively impact the employee’s performance appraisal. Although it is helpful to provide as much detail as possible, spelling out every fact pattern or scenario would make the IRM prohibitively long.

Turning back to the pre-levy example, there are countless potential fact patterns where some of the factors listed would weigh against a taxpayer. For example, perhaps a taxpayer did not return phone calls or otherwise

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80 Id.
81 Id.
correspond with Collection, meaning the “taxpayer’s responsiveness to attempts at contact and collection” would be a negative factor for the taxpayer.82 However, perhaps the taxpayer was being treated for a serious medical condition and was unable to provide the financial information requested. The challenge here is how to help the Collection employee come to the right decision about whether to levy where the taxpayer’s situation is not explicitly covered in the IRM.

This is where using the TBOR to frame taxpayer rights is extremely effective. In the updated Pre-Levy Considerations IRM, TAS inserted the right to a fair and just tax system and its description at the very beginning of the IRM section, which states that taxpayers can expect the IRS to consider their underlying facts and circumstances regarding a taxpayer’s ability to provide information timely. In this example, an employee could keep this principle in mind while reading the IRM section and come to the conclusion that even though the IRM lists the taxpayer’s responsiveness as a factor to consider, it would be unfair to this taxpayer to not consider his medical condition when looking at whether he was responsive to Collection. By encouraging employees to use the fundamental principles and descriptions as guideposts, the IRM can lead employees to protect taxpayer rights, even if the IRM does not reference the specific facts of a case.

3. Dealing with a Lengthy and Complex Compilation of Internal Guidance

Another example of effectively incorporating taxpayer rights into internal guidance involves a situation where taxpayers can waive their rights. As discussed above, it is incumbent on the IRS to fully inform taxpayers in any situation where a taxpayer may unknowingly give up rights. Furthermore, employees should understand the consequences to the taxpayer. A waiver may be convenient for the IRS, but the impact to the taxpayer could be devastating. In 2013, the National Taxpayer Advocate raised concerns about the IRS’s practice of requiring taxpayers to waive their Collection Due Processing (CDP) hearing rights by withdrawing their CDP requests if they reached an agreement with the IRS prior to the conclusion of the CDP hearing.83 Although the taxpayer may be satisfied with the agreement regarding the proposed collection action, by giving up his or her CDP rights, the taxpayer loses the opportunity for an independent Appeals Officer to verify that the IRS has followed the law and procedures, and that the collection action “balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.”84 This loss is especially harmful because now the taxpayer has also given up

82 Id.
83 See 2013 Nat’l Taxpayer Advocate, supra note 31, at 158.
84 I.R.C. § 6330(c)(3).
the opportunity for a future Appeals determination that is subject to judicial review.\footnote{See \S\ 6330(d)(1).}

Despite the IRS stating to TAS that withdrawing a CDP request is not required when a taxpayer reaches an agreement with Collection,\footnote{2013 Nat’l Taxpayer Advocate, supra note 31, at 158. The regulations provide that withdrawal is allowed but not required when a taxpayer reaches an agreement with Collection after filing a CDP request. Reg. \S 301.6330-1(c)(2), A-C9.} the IRM states: “If a resolution is reached, such as a full pay, CNC [Currently not Collectible] determination or an IA [Installment Agreement] and it involves modules in Appeals, the RO [Revenue Officer] should solicit a withdrawal of the hearing request.”\footnote{I.R.M. 5.1.9.3.5, Collection Action during the Period of the CDP or EH (Feb. 7, 2014).} The IRM goes on to provide instructions for closing the case and the only allusion to a taxpayer’s right to refuse to withdraw the request is a sentence that says “If a resolution is reached but the taxpayer does not withdraw, notify Appeals of the resolution reached.”\footnote{Id.} This IRM section is completely devoid of information regarding what taxpayer rights apply in this situation, how a taxpayer is impacted if those rights are relinquished, and what the employee can do to protect taxpayer rights.

Another IRM section, which covers the same topic, provides a better example of how to incorporate taxpayer rights into guidance. This IRM states:

A taxpayer that reaches a satisfactory resolution with Collection after filing a request for a CDP hearing can withdraw the request for a CDP hearing. When resolution is reached, explain to the taxpayer the option to withdraw the request for a CDP hearing and the effect of doing so, i.e., the taxpayer will lose CDP rights with respect to the CDP tax periods and proposed collection action, including the right to judicial review. The decision to withdraw belongs to the taxpayer. A taxpayer can also withdraw the request for hearing with Appeals.\footnote{I.R.M. 5.1.9.3.3.1, Processing Withdrawal of Request for CDP Hearing (Nov. 12, 2014), available at https://www.irs.gov/irm/part5/irm_05-001-009.html#d0e168.}

This section encourages the employee to walk the taxpayer through the decision to give up his or her rights. It also educates the employee about some of the consequences by explaining what the taxpayer is giving up, the \textit{right to appeal an IRS decision in an independent forum}. The IRM reinforces the taxpayer’s right to make the decision as to whether to give up this right, as opposed to instructing the employee to solicit it from the taxpayer.

While the above examples illustrate some success in incorporating taxpayer rights information into the IRM, there are multiple barriers to doing so on a wide scale, and thus making taxpayer rights a part of daily operations. One barrier is the sheer size and complexity of the IRM, which results in specific situations being covered in multiple sections. The two IRM sections on withdrawing a CDP request are instructive. They are completely contradictory in their approach and even in their instruction for what action employees should
take. Any benefit from the IRM section advising employees to inform taxpayers of their rights could be nullified if an employee first reads the contradictory IRM section. Unfortunately, when the IRM is revised, it is often done in a piecemeal way, with only specific subsections being reviewed for clearance at a time. Possible solutions are to either submit changes to an IRM section outside of the normal clearance process, or to flag the related IRM section so that when it does come up for review, the changes can be made. Both of these solutions have their drawbacks. The IRS has resisted TAS’s attempts to make changes to IRMs outside the clearance process in the past, and some IRMs are only rarely updated. Furthermore, because of the complexity of the IRM, reviewers may not even be aware of contradictory IRM sections.

When the National Taxpayer Advocate convened a team in 2013 to undertake a comprehensive audit of all non-administrative IRM provisions sections to add taxpayer rights information, the team developed a methodology for prioritizing IRM sections. It used the following factors to determine “high impact” sections:

- The number of taxpayers likely to be impacted by the process discussed in the subsection;
- The vulnerability of the particular taxpayer population impacted by the subsection;
- The length of time since the IRS last revised the IRM subsection;
- Whether the taxpayer would have limited time or options to appeal a decision made under the subsection; and
- The need to educate taxpayers about their rights at the earliest point in their interaction with the IRS.

Although prioritizing “high impact” sections allows an agency to focus on the most crucial internal guidance, it does not resolve the problem of procedures being covered in multiple sections with inconsistent and even contradictory guidance. IRM authors need better training regarding inserting taxpayer rights information into their IRM sections so that over time, fewer and fewer

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90 The clearance process involves an IRM author preparing a draft IRM, identifying IRS reviewers and submitting the draft for review, considering the reviewer’s comments, obtaining approval to publish, and submitting for a final review by an IRM coordinator. See I.R.M. 1.11.9.1.1, IMD Clearance Process (Dec. 4, 2014), available at https://www.irs.gov/irm/part1/irm_01-011-009.html#d0e220.

91 In 2014, TAS reviewed IRMs published through May 28, 2014 and found that of the 460 IRM sections in Part 4, Examining Process, only 19% had been issued since the end of May 2013 and more than 50 were over ten years old. Nat’l Taxpayer Advocate Objectives Rep. to Congress IRS Funding Gap Creates Severe Risk to the Delivery of the Taxpayer Advocate Service Integrated System, 94. Some of TAS’s own IRM sections are also more than ten years old. See, e.g., I.R.M 13.5.1, TAS Balanced Measure System (Oct. 1, 2001), available at https://www.irs.gov/irm/part13/irm_13-005-001.html.

92 See 2015 Nat’l Taxpayer Advocate, supra note 91, at 18.
sections will require updates. Furthermore, authors drafting updates should be advised to consider corresponding IRM sections that cover the same topic or procedure, or which are cross-referenced within an IRM. This could lead to updating multiple sections at once to provide consistent taxpayer rights information. TAS developed a one-hour video training that walks employees through examples of how to incorporate taxpayer rights into employee guidance and intends to make this training available to other IRS employees, which could have significant positive impact on future employee guidance.

III. Conclusion

Although adopting a TBOR is a great step forward for a tax agency to instill confidence in taxpayers and build their trust in the fairness of the tax system, success is contingent upon fully operationalizing taxpayer rights. This requires an agency to create taxpayer awareness, help taxpayers understand what the rights mean and when they apply, and assist them in exercising their rights, being especially careful to inform taxpayers when they may unknowingly give up their rights. Employee education and awareness is equally important. If employees are going to take actions to protect taxpayer rights, they must understand how those actions support taxpayer rights and be able to use the TBOR as a framework to assist them in making decisions.

As the IRS initiates more actions to incorporate taxpayer rights into daily operations, it will be necessary for the IRS to measure its effectiveness. TAS is planning to conduct follow-up surveys of U.S. taxpayers in the coming years to determine whether the TBOR and the IRS’s actions to support the TBOR have had an effect on taxpayers’ awareness and understanding of their rights, as well as their confidence in the tax system. Measuring how easily taxpayers exercised their rights is always going to present issues. There is no way to know whether a taxpayer failed to complain because he received exemplary service or because he was unable to identify and reach an employee’s manager. Likewise, if a taxpayer fails to petition the U.S. Tax Court to challenge a CDP determination, it could be for any number of reasons, such as the taxpayer changed his mind, the taxpayer found litigation prohibitively expensive, or the taxpayer could not understand the letter explaining his right to challenge the determination in court. Fortunately, measuring employees’ actions to protect and promote taxpayer rights may provide insight into whether taxpayers receive sufficient information to make decisions about exercising their rights. Measuring employee actions may also shed light on whether taxpayers are given opportunities to exercise their rights or seek redress when those rights are not honored. TAS is currently revising its own case quality attributes to tie its measures to the specific taxpayer rights that they support and is considering a separate case quality metric based only on measures that are closely tied to taxpayer rights.

By incorporating taxpayer rights into its own measures and reporting on its progress, the IRS can ensure efforts to operationalize taxpayer rights are effective, lending true meaning to the Taxpayer Bill of Rights.