

Comments Concerning H.R. 5444 “Taxpayer First Act”

AMERICAN BAR ASSOCIATION SECTION OF TAXATION

June 6, 2018

*Hon. Orrin G. Hatch
Chairman
Senate Finance Committee
United States Senate
Washington, DC 20510*

*Hon. Ron Wyden
Ranking Member
Senate Finance Committee
United States Senate
Washington, DC 20510*

Re: Comments Regarding HR 5444 – “Taxpayer First Act”

Dear Chairman Hatch and Ranking Member Wyden,

Enclosed please find comments on H.R. 5444, which was reported out of the House Ways and Means Committee on Wednesday, April 11, 2017, and passed by the full House on April 18, 2018 (“Comments”). These Comments are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association (the “Association”). Accordingly, they should not be construed as representing the position of the Association.

The Section of Taxation will be pleased to discuss the Comments with you or your staff.

*Sincerely,
Karen Hawkins
Chair, Section of Taxation*

cc:

*Hon. Kevin Brady, Chairman, House Ways and Means Committee
Hon. Richard Neal, Ranking Member, House Ways and Means Committee
Thomas A. Barthold, Chief of Staff, Joint Committee on Taxation*

Hon. Steven Mnuchin, Secretary, Department of the Treasury
Hon. David Kautter, Assistant Secretary (Tax Policy), Department of Treasury
David Kautter, Acting Commissioner of Internal Revenue Service
William M. Paul, Acting Chief Counsel, Internal Revenue Service

These comments (“Comments”) are submitted on behalf of the ABA Section of Taxation (“Section”) and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the Association.

Principal responsibility for preparing these Comments was exercised by Jennifer E. Breen, Chair of the Administrative Practice Committee, James Creech, Chair of the Individual and Family Taxation Committee, Niles Elber, Chair of the Civil and Criminal Tax Penalties Committee, Thomas Greenaway, Council Director, Joshua Odintz, Chair of the Court Procedure and Practice Committee, and Christine Speidel, Chair of the Pro Bono and Tax Clinics Committee. The following individuals provided substantial assistance in drafting these comments: Mitchell Horowitz and Sean Akins. These Comments were reviewed by John M. Colvin of the Committee on Government Submissions.

Although the members of the Section of Taxation who participated in preparing these Comments have clients who would be affected by the federal income tax rules addressed by these Comments, or have advised clients on the application of such rules, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date: June 6, 2018

Comments on H.R. 5444

The following Comments are submitted in response to H.R. 5444, which was reported out of the House Ways and Means Committee on Wednesday, April 11, 2017, and passed by the full House on April 18, 2018.

We appreciate that the Congress has turned its attention to the relationship between taxpayers and the agency charged with the assessment and collection of taxes. We agree with most of the proposed changes but write to express our concerns with certain aspects of the proposed changes.

I. Section 101

A. *Establishment of Independent Office of Appeals and the Right to an Appeal*

We support this change. A statutory right to appeals will ensure that taxpayers obtain an independent and impartial review of administrative actions taken with respect to their tax liabilities. We are concerned, however, that the language in proposed section 7803(e)(4)—which states that the right of appeal “shall be generally available to all taxpayers”—is vague and could be interpreted by the Internal Revenue Service (the “Service”) to limit the ability of taxpayers to obtain appeals consideration.¹ To the extent that the Service wishes to deny appeal rights to taxpayers, it should be required to articulate objective standards for when appeals will not be available, so that any Service determination to deny appeal rights can be measured against those standards.

Furthermore, the legislative language leaves a significant gap between the general principle that all taxpayers should have a right to an independent administrative appeal, and the specific statutory language of proposed section 7803(e)(5)(A), which by its terms only applies to deficiency cases—*i.e.*, where the Service has issued a proposed assessment and has given the taxpayer the right to contest that proposed assessment in Tax Court. Many cases reviewed by Appeals are not deficiency cases. For example, taxpayer claims for refunds, collection due process cases, and Service partnership level determinations are not within the scope of proposed [section] 7803(e)(5)(A). We therefore recommend that the language of proposed section 7803(e)(5)(A) be expanded to include all determinations issued by the Service which give taxpayers the right to go to Appeals. Appeals responsibility includes the administrative determination of liability, including additions to tax, additional amounts and penalties for the following types of cases, among others:

- Income, estate, gift, employment and excise taxes
- Collection appeals program
- Offer-in-compromise
- Trust fund recovery penalty²
- Penalty appeals

¹ The Service has successfully argued that there is no right to consideration by the Service’s Office of Appeals, including under the Protecting Americans from Tax Hikes Act of 2015, which enacted certain taxpayer rights in section 7803(a)(3), such as “the right to appeal a decision of the Internal Revenue Service in an independent forum.” See *Facebook, Inc. & Subs v. IRS*, No. 17-cv-06490-LB, 2018 U.S. Dist. LEXIS 81986 (N.D. Ca[l.] May 14, 2018) (dismissing taxpayer’s complaint alleging a right to Office of Appeals consideration of a proposed deficiency before the Tax Court).

² See *Types of Cases Worked in Appeals*, I.R.M. 8.1.3.1 (rev. Oct. 23, 2007).

B. *The Appointment of the Chief of Appeals*

As written, the qualifications for the Chief of Appeals require an individual inhabiting the role to have experience and expertise in management of large service organizations may unduly limit the Service's ability to select the best candidate to lead Appeals. Many well-qualified tax professionals with deep experience in issues involving appeals may have backgrounds that do not include the management of large service organizations.

C. *The Appeals Process – Access to Case Files*

As drafted, proposed section 7803(e)(7) requires that the Service automatically provide copies of the case file only to "specified taxpayers"—*i.e.*, those taxpayers who do not exceed certain income and gross receipt thresholds. Regarding taxpayer access to case files, we agree that all taxpayers should be permitted to review information in their case files in a timely manner before an Appeals conference is held in order to adequately prepare a robust case based on knowledge of the Service's actions and information. Therefore, we recommend that the word "specified" be deleted from proposed section 7803(e)(7)(A), and that proposed section 7803(e)(7)(C), defining "specified taxpayers" be deleted. Forcing taxpayers or their representatives to obtain case file information pursuant to a FOIA request can be confusing, costly, and time consuming.

II. Section 202

A. *IRS Free-File Program*

Experience shows that some taxpayers do not report their income and deductions properly, often because third party tax information (*e.g.*, Forms 1099) either is not received by the taxpayer or is misplaced, resulting in downstream problems for both taxpayers and the Service. Congress should authorize the Service to pre-populate draft electronic returns with data from information returns.³ These pre-populated draft returns could be made available to individual taxpayers on the internet platform contemplated by section 202 of H[.]R[.] 5445. The reason for the change would be to offer taxpayers a simple means of complying with their tax obligations which would capture the information supplied to the IRS by third parties. Any authorization in this regard should be supported by adequate appropriations.

III. Section 303

A. *Clarification of Relief from Joint Liability – Standard and Scope of Review*

The Section supports the proposed *de novo* standard of review for innocent spouse cases. However, we also believe the Tax Court should continue to

³ California piloted such a program with its ReadyReturn program for 2005 and 2006, which is now incorporated into CalFile, a service that offers free, direct e-filing of returns.

have a *de novo* scope of review, allowing it to consider any relevant evidence properly submitted to the Tax Court. Proposed section 6015(e)(7) restricts the evidence that the Tax Court can consider in all innocent spouse cases to the administrative record, plus “any additional newly discovered or previously unavailable evidence.” This is a significant limitation compared to current law, which provides full *de novo* scope of review for all determinations under section 6015.⁴ The Section believes that the existing full *de novo* scope of review for all determinations under 6015 should continue and, to eliminate any future controversy, be codified.

If proposed section 6015(e)(7) remains as written, we are concerned that the proposed language could lead to burdensome litigation over whether evidence that the taxpayer seeks to introduce qualifies as “newly discovered” or “previously unavailable.” We recommend that either statutory language or legislative history confirm that those terms are to be construed broadly. Many of the taxpayers most deserving of relief under section 6015 may be unrepresented and unaware of how to ensure that the administrative record contains information supporting their position. The limitations on scope of review also could conceivably restrict the Tax Court from considering the credibility of the parties, as the Service may have placed its determinations in that regard in the administrative record.⁵ We firmly believe that the Tax Court should be able to review all the evidence in making its determination with respect to relief from joint liability, and not be limited by what the Service may have decided without having obtained (or put into the administrative record) all the relevant facts.

Finally, we note that section 6015(e) contemplates situations where the Tax Court may be called upon to hear a petition for relief where no administrative record exists—*i.e.*, when the taxpayer files a request for relief with the Service but no action is taken on the request for six months.⁶ Limiting the scope of review to the administrative record does not make any sense in such a case, which further supports continuing the Tax Court’s existing full *de novo* scope of review.

⁴ *Porter v. Comm’r*, 130 T.C. 115, 117-119 (2008); *Porter v. Comm’r*, 132 T.C. 203, 210 (2009); *Comm’r v. Neal*, 557 F.3d 1262, 1276 (11th Cir. 2009); *Wilson v. Comm’r*, 705 F.3d 980, 993 (9th Cir. 2011). While the Service had agreed that *de novo* scope of review was appropriate for determinations under sections 6015(b) and (c), it had argued for several years that, in cases under section 6015(f) where taxpayers were seeking equitable relief, the Tax Court should limit the scope of review to evidence contained in the administrative record. Considering the unfavorable court decisions, the Service announced it would no longer contend that the scope of review should be limited to the administrative record. Chief Counsel Notice CC 2013-011 (June 7, 2013).

⁵ As noted by the court in *Wilson v. Comm’r*, 705 F.3d 980, 993 (9th Cir. 2011), “[credibility] is best tested in the crucible of trial rather than in a bureaucratic office . . .”

⁶ I.R.C. § 6015(e)(1)(A)(i)(II).

IV. Section 401*A. Modification of IRS Commissioner's Title [to Administrator]*

We are concerned that this change may cause confusion on the part of taxpayers, and would require substantial revisions to existing statutes, regulations and other official documents without corresponding benefit for taxpayers.

V. Section 402*A. Taxpayer Advocate – Coordination with TIGTA*

While the requirement that the Taxpayer Advocate Service (TAS) coordinate with the Treasury Inspector General for Tax Administration (TIGTA) in order to avoid potential duplication of research efforts is laudable, the respective missions of the two agencies are substantially dissimilar. Each is very likely to be examining superficially similar issues for very different reasons, which will affect the design and methodology of any study. We suggest that this proposed provision be modified so that, if after consultation TAS and TIGTA determine that there may be potential duplication between planned research projects, the two agencies should determine if collaboration is possible to achieve the goals of both offices.

VI. Section 503*A. Changing Tax Court Special Trial Judges to Magistrates*

While the Section does not take a position with respect to this proposed name change, we suggest, should this provision be adopted, that additional language be inserted to ensure that a magistrate judge in the Tax Court has only the duties, obligations, tenure, powers, etc. imposed by Title 26 and the Rules of Practice and Procedure of the United States Tax Court, and shall not be deemed to have any of the duties, obligations, tenure, powers, etc. of a magistrate as contained in sections 631 to 639 of Title 28, nor the rules of practice and procedure of any federal district court operating within the United States and its territories.