

Legislative Recommendation #40

Authorize the National Taxpayer Advocate to File *Amicus* Briefs**SUMMARY**

- *Problem:* When a federal court is deciding a case that may affect the rights of many or all taxpayers, the court would benefit if the National Taxpayer Advocate were authorized to share her views as the voice of the taxpayer. Under current law, the National Taxpayer Advocate is not authorized to submit an *amicus* brief in a federal tax case.
- *Solution:* Authorize the National Taxpayer Advocate to appear as *amicus curiae* in federal tax cases and submit *amicus* briefs on issues pertaining to the protection of taxpayer rights.¹

PRESENT LAW

IRC § 7803(c)(2)(A) requires the Office of the Taxpayer Advocate to assist taxpayers in resolving problems with the IRS, to identify areas in which taxpayers experience problems in their dealings with the IRS, and to make administrative and legislative recommendations to mitigate such problems. IRC § 7803(c)(2)(B)(ii)(XI) directs the National Taxpayer Advocate in her annual reports to Congress to “identify the 10 most litigated issues for each category of taxpayers, including recommendations for mitigating such disputes.”

Under 28 U.S.C. § 516, only officers of the Department of Justice may represent the United States in litigation, except as otherwise authorized by law. Under 5 U.S.C. § 3106, the head of an executive department may not employ an attorney or counsel for the conduct of litigation in which the United States is a party, except as otherwise authorized by law. IRC § 7452 specifies that the Secretary of the Treasury “shall be represented by the Chief Counsel for the Internal Revenue Service or his delegate” in litigation before the U.S. Tax Court.

Under 5 U.S.C. § 612(b), the Small Business Administration (SBA) Chief Counsel for Advocacy is authorized to appear as *amicus curiae* in certain circumstances to represent the interests of small businesses. By contrast, the National Taxpayer Advocate, who is often referred to as “the voice of the taxpayer” both within the IRS and before Congress, is not authorized to appear as *amicus curiae* in federal tax litigation.

REASONS FOR CHANGE

While trial lawyers advocate on behalf of clients to win individual cases, precedential issues that could affect many or all taxpayers sometimes come before the courts with no one representing the interests of taxpayers as a group or advocating to protect fundamental taxpayer rights.

For example, in *Facebook, Inc. v. IRS*, a U.S. district court considered Facebook’s position that it was legally entitled to a hearing before the IRS Independent Office of Appeals.² For support, *Facebook* cited the provision of the Taxpayer Bill of Rights (TBOR) that describes “the right to appeal a decision of the Internal Revenue Service in an independent forum.”³ The court rejected Facebook’s position, broadly holding that TBOR “did not grant [taxpayers] new enforceable rights.” The court’s decision may well be correct, but in the rare cases

1 See Taxpayer Bill of Rights (TBOR), <https://www.taxpayeradvocate.irs.gov/taxpayer-rights> (last visited Sept. 18, 2024). The rights contained in TBOR are also codified in IRC § 7803(a)(3).

2 *Facebook, Inc. v. IRS*, 121 A.F.T.R.2d 2018-1752 (N.D. Cal. 2018).

3 IRC § 7803(a)(3)(E).

where a court's decision has the potential to affect the fundamental taxpayer rights of all or a large group of taxpayers, the court would benefit from hearing the position of the National Taxpayer Advocate as the voice of the taxpayer.

Just as the SBA Chief Counsel for Advocacy may submit *amicus* briefs to help ensure federal courts are informed about the impact of regulations on small businesses, the National Taxpayer Advocate could more effectively protect taxpayer rights if she were granted comparable authority to submit *amicus* briefs in cases that affect taxpayer rights. It is anticipated this authority would be used sparingly, as is the practice of the SBA Chief Counsel for Advocacy.

RECOMMENDATION

- Amend IRC §§ 7803 and 7452 to authorize the National Taxpayer Advocate to appear as *amicus curiae* in federal tax litigation and submit *amicus* briefs on matters relating to the protection of taxpayer rights.⁴

4 For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 37 (Special Focus: *Provide the National Taxpayer Advocate the Authority to Hire Independent Counsel, Comment on Regulations, and File Amicus Briefs in Litigation Raising Taxpayer Rights Issues*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16_Volume1_SpecialFocus.pdf. See also IRS Program Manager Technical Advice 2007-00566 (Oct. 2, 2002), https://www.irs.gov/pub/iraoa/pmta00566_7189.pdf.