

Legislative Recommendation #41**Authorize the Office of the Taxpayer Advocate to Assist Certain Taxpayers Experiencing Economic Hardships During a Lapse in Appropriations****SUMMARY**

- *Problem:* During government shutdowns, IRS lien and levy activities carried out by automation are permitted to continue, but IRS and TAS employees, including the National Taxpayer Advocate, generally are prohibited from assisting taxpayers experiencing economic hardships as a result of those collection activities.
- *Solution:* Clarify that TAS and IRS Collection employees may work during government shutdowns to the extent necessary to assist taxpayers experiencing economic hardships as a result of IRS collection actions.

PRESENT LAW

Article I of the Constitution provides that, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”¹ The Antideficiency Act (ADA) is one of several statutes that implement this provision.² Specifically, 31 U.S.C. § 1341(a), among other things, prohibits any officer or employee of the U.S. government or the District of Columbia government from (i) making or authorizing an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation or (ii) involving his or her respective government employer in a contract or obligation for the payment of money before an appropriation is made, unless authorized by law. The ADA contains an additional prohibition against the acceptance of voluntary services, “except for emergencies involving the safety of human life or the protection of property.”³

IRC § 6343(a)(1)(D) requires the Secretary to release a levy and promptly notify the affected person if the Secretary determines the levy “is creating an economic hardship due to the financial condition of the taxpayer.”

IRC § 7803(c)(2)(A)(i) directs the Office of the Taxpayer Advocate (commonly referred to as the Taxpayer Advocate Service, or TAS) to “assist taxpayers in resolving problems with the Internal Revenue Service.” IRC § 7811 authorizes the National Taxpayer Advocate to issue a Taxpayer Assistance Order (TAO) where a “taxpayer is suffering or about to suffer a significant hardship as a result of the manner in which the internal revenue laws are being administered by the Secretary.” A significant hardship includes “an immediate threat of adverse action” and “irreparable injury to, or a long-term adverse impact on, the taxpayer if relief is not granted.” A TAO may require the Secretary “within a specified time period ... to release property of the taxpayer levied upon.”

1 U.S. CONST. art. I, § 9, cl. 7.

2 Pub. L. No. 97-258, 96 Stat. 877, 923 (1982).

3 31 U.S.C. § 1342.

REASONS FOR CHANGE

Lien and levy activities carried out by automation, which do not require the expenditure of additional appropriations, are permitted to continue during government shutdowns resulting from a lapse in appropriations. During both the 2018-2019 and 2013 shutdowns, the IRS issued thousands of notices of levy on Social Security and other government benefits as well as levies on wages and financial accounts of individuals and businesses, because these notices were preprogrammed into the IRS's computer systems before the shutdowns began.

Thousands of additional taxpayers were affected by collection actions taken in the weeks preceding the shutdowns. For example, a bank generally has up to 21 days to remit levied account proceeds to the IRS. Therefore, levies issued in the 21 days preceding a government shutdown may affect taxpayers after the shutdown begins.

Despite IRC provisions that protect and relieve taxpayers who are experiencing economic hardship from levies, the IRS Lapsed Appropriations Contingency Plans generally have not permitted IRS or TAS employees, including the National Taxpayer Advocate, to work economic hardship cases during government shutdowns to assist these taxpayers.⁴ In addition, some taxpayers who requested the assistance of the National Taxpayer Advocate and TAS prior to the shutdown experienced significant hardships and irreparable injuries because TAS could not work on their cases during the shutdown.⁵

In its Lapsed Appropriations Contingency Plans,⁶ the IRS, with concurrence from the Treasury Department and the Office of Management and Budget (OMB), takes the position that the ADA's exception for "protection of property" applies solely to *government* property – not *taxpayer* property.⁷ As a result, it has concluded that TAS's activities to assist taxpayers in releasing IRS levies that create an economic hardship due to the financial condition of the taxpayer do not fit within the exception. We question that interpretation. First, the statute itself simply says "property." The distinction between "property" and "government property" is obvious, and if Congress intended to limit the scope of the exception to "government property," it presumably would have written the statute to specify "government property." Second, interpreting "property" to include only "government property" undermines Congress's more recent statutory enactment of IRC § 6343(a)(1)(D), which is intended to protect taxpayers from levies that cause economic hardships.

Even accepting the IRS's position that the ADA's exception for the "protection of property" is limited to the protection of *government* property, a threshold determination must be made about whether levied funds are, in fact, government property. IRC § 6343(a)(1)(D) requires the Secretary to release a levy if it is "determined that such levy is creating an economic hardship due to the financial condition of the taxpayer." In blunt terms,

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- 4 See IRS, Servicewide Electronic Research Program Alert 19A0017, Release of Levy and Release of Lien (2019) ("While there is a lapse in funding during the partial shutdown we are not authorized to take this action. We may do so once we are fully opened, so please call us back at that time. Please apologize to the taxpayer and explain we are not authorized to release the levy or lien due to the partial government shutdown. Explain that they may call us back after we are fully reopened.").
 - 5 For additional discussion of how TAS's statutory authority to assist taxpayers suffering or about to suffer significant hardships was undermined during a shutdown, see National Taxpayer Advocate Fiscal Year 2015 Objectives Report to Congress 79 (Area of Focus: *The IRS's Decision Not to Except Any TAS Employees During the Government Shutdown Resulted in Violations of Taxpayer Rights and Undermined TAS's Statutory Authority to Assist Taxpayers Suffering or About to Suffer Significant Hardship*), <https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/The-IRSs-Decision-Not-to-Except-Any-TAS-Employees-During-the-Government-Shutdown.pdf>, and National Taxpayer Advocate Fiscal Year 2020 Objectives Report to Congress 40 (*Impact of the 35-Day Partial Government Shutdown on the Taxpayer Advocate Service*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/JRC20_Volume1_GovShutdown.pdf.
 - 6 See, e.g., IRS, Fiscal Year 2024 Lapsed Appropriations Contingency Plan (Mar. 15, 2024), <https://home.treasury.gov/system/files/266/IRS-FY24LapsePlan.pdf>.
 - 7 See Government Accountability Office, GAO-060382SP, *Principles of Federal Appropriations Law*, vol. II at 6-111 (3d ed. 2006) (citing 9 Comp. Dec. 182, 185 (1902)), <https://www.gao.gov/assets/2019-11/202819.pdf>.

Congress has made a determination that the IRS should not take property if doing so would put the taxpayer and the taxpayer's family out on the street.

TAS plays a central role in helping the Secretary determine whether a levy would create an economic hardship and therefore whether property can be levied upon (meaning that it would become government property). Thus, if the IRS seeks to protect "government property" via a levy, it must give affected taxpayers an opportunity to show that the levy will cause an economic hardship and therefore should be released (meaning it is not government property).⁸

From a policy perspective, the current interpretation produces results that greatly undermine taxpayer rights, including the *right to a fair and just tax system*.⁹ The asymmetry of allowing the IRS to take collection action against a taxpayer while not allowing TAS to work with the taxpayer and the IRS to determine whether the collection action is creating an economic hardship (*e.g.*, imminent eviction) that requires a levy release under law shocks the conscience. To eliminate the abrogation of the taxpayer protections codified in IRC § 6343(a)(1)(D), the National Taxpayer Advocate believes the IRS should either work with the Treasury Department and OMB to adopt an ADA interpretation allowing TAS and Collection employees to release ongoing levies that create economic hardships or suspend all existing levies and refrain from imposing new levies during a government shutdown. The current asymmetrical approach produces an absurd "heads the IRS wins, tails the taxpayer loses" result.

While we will continue to advocate within the agency to protect taxpayers during government shutdowns, our experience to date suggests the existing legal interpretation is unlikely to change. For that reason, we recommend Congress clarify the law to ensure that government shutdowns resulting from a lapse in appropriations do not subject taxpayers to serious economic hardships, which in some cases may include eviction, utility shutoffs, or the inability to pay for medical treatment.

RECOMMENDATION

- Clarify that during a lapse in appropriations (i) the National Taxpayer Advocate may incur obligations in advance of appropriations for purposes of assisting taxpayers experiencing an economic hardship within the meaning of IRC § 6343(a)(1)(D) due to an IRS action or inaction and (ii) the IRS may incur obligations in advance of appropriations for purposes of complying with any TAO issued pursuant to IRC § 7811.

⁸ The Justice Department has issued a legal opinion concluding that certain government functions not specifically authorized to continue during a lapse in appropriations must nonetheless continue where the lawful continuation of these functions is "necessarily incident" to other activities for which there is statutory authority to continue. See Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 5 Op. O.L.C. 1 (1981), www.justice.gov/file/22536/download.

⁹ See IRC § 7803(a)(3)(J). See also Taxpayer Bill of Rights (TBOR), <https://www.taxpayeradvocate.irs.gov/get-help/taxpayer-rights> (last visited Sept. 25, 2024). The rights contained in the TBOR are also codified in IRC § 7803(a)(3).