

REG-152166-05
Taxpayer Assistance Orders

RIN 1545-BF33

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Withdrawal of notice of proposed rulemaking and notice of proposed rulemaking.

SUMMARY: This document withdraws the notice of proposed rulemaking published on April 19, 1996, in the Federal Register and contains proposed regulations relating to the issuance of Taxpayer Assistance Orders (TAOs). The IRS is issuing these proposed regulations to provide guidance relating to the issuance of a TAO. These proposed regulations are necessary because the existing regulations do not reflect changes to the law made by the Taxpayer Bill of Rights II (TBOR 2), the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98), the Community Renewal Tax Relief Act of 2000, and the American Jobs Creation Act of 2004 (AJCA). The action taken in these proposed regulations will affect IRS employees in cases where a TAO is being considered or issued.

DATES: Written or electronic comments and requests for a public hearing must be received by October 26, 2009.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-152166-05), room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20224. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-152166-05), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20044, or sent electronically via the Federal eRulemaking Portal at <http://www.regulations.gov/> (IRS REG-152166-05).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Janice R. Feldman, (202) 622-8488; concerning submissions of comments, Richard.A.Hurst@irscounsel.treas.gov (202) 622-7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 7811 of the Internal Revenue Code (Code) authorizes the NTA to issue a TAO when a taxpayer is suffering or is about to suffer a significant hardship as a result of the manner in which the internal revenue laws

are being administered by the IRS and the law and the facts support relief. A TAO may be issued to direct that the operating division or function take a specific action, cease a specific action, or refrain from taking a specific action or to order the IRS to review at a higher level, expedite consideration of, or reconsider a taxpayer's case. The IRS will comply with a TAO unless it is appealed and then modified or rescinded by the Commissioner, the Deputy Commissioner, or the NTA. Appeal procedures are provided in the Internal Revenue Manual (IRM).

Proposed regulations were published on April 19, 1996, in the Federal Register (61 FR 17265). The proposed regulations limited the authority to modify or rescind TAOs to the Ombudsman, the Commissioner, and the Deputy Commissioner, and, with the written authorization of one of these officials, a district director, a service center director, a compliance center director, a regional director of appeals (director), or the superiors of a director. Following the publication of the proposed regulations, Congress enacted TBOR 2, Public Law 104-168, 110 Stat. 1452 (1996), which, among other things, authorized only the Taxpayer Advocate, the Commissioner, or the Deputy Commissioner to modify or rescind a TAO. In light of the enactment of TBOR 2, this document withdraws the proposed regulations published in the Federal Register on April 19, 1996.

This document also contains proposed amendments to the Procedure and Administration Regulations (26 CFR part 301) relating to TAOs under section 7811. Temporary regulations (TD 8246) were published on March 22, 1989, in the Federal Register (54 FR 11699). Final regulations (TD 8403) were published on March 23, 1992, in the Federal Register (57 FR 9975). After the final regulations were published, sections 101 and 102 of TBOR 2, Public Law 104-168, 110 Stat. 1452 (1996), amended section 7811 by changing the name of the Ombudsman to the Taxpayer Advocate, providing that TAOs may order the IRS to take certain affirmative actions, and restricting who may modify or rescind a TAO. Section 1102 of RRA 98, Public Law 105-206, 112 Stat. 685 (1998), further amended section 7811, by providing examples of significant hardship and replacing "Taxpayer Advocate" with "National Taxpayer Advocate." Section 881(c) of AJCA, Public Law 108-357, 118 Stat. 1418 (2004) clarified that a TAO applies to personnel performing services under a qualified tax collection contract to the same extent as it applies to IRS personnel. Thus, this document contains a new notice of proposed rulemaking implementing the amendments under section 7811 pursuant to the enactment of TBOR 2, RRA 98, the Community Renewal Tax Relief Act of 2000, and AJCA and also to provide guidance on issues that have arisen in the administration of section 7811. Section 301.7811-1(e) of the existing regulations, which concerns the suspension of statutes of limitations, is not being revised as part of this proposed rulemaking as changes to that section may involve changes to IRS computer processing systems and will be dealt with at a later date.

Explanation of Provision

1. Significant Hardship

Under Section 301.7811-1(a)(4)(ii) of the existing regulations, significant hardship means “serious privation caused or about to be caused to the taxpayer as the result of the particular manner in which the internal revenue laws are being administered by the Internal Revenue Service.” RRA 98 clarified the meaning of the term significant hardship by providing a nonexclusive list of types. Section 7811(a)(2) provides that significant hardship includes: (1) An immediate threat of adverse action; (2) a delay of more than 30 days in resolving taxpayer account problems; (3) the incurring by the taxpayer of significant costs (including fees for professional representation) if relief is not granted; or (4) irreparable injury to, or a long-term adverse impact on, the taxpayer if relief is not granted. Thus, the proposed regulations list the statutory types and also provide guidance with regard to what constitutes significant hardship under the delay standard and other criteria. Significant hardship under the 30-day delay standard is met when a taxpayer does not receive a response by the date promised by the IRS, or when the IRS has established a normal processing time for taking an action and the taxpayer experiences a delay of more than 30 days beyond the normal processing time.

2. Distinction Between Significant Hardship and Issuance of TAO

The proposed regulations discuss the distinction between a finding of “significant hardship” and “the issuance of a TAO.” The proposed regulations are designed to clarify that a finding by the NTA that 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 IRS will not automatically result in the issuance of a TAO. After making a determination of significant hardship, the NTA must determine whether the facts and the law support relief.

3. Compliance With the TAO

The proposed regulations explain that a TAO is an order by the NTA to the IRS and that the IRS will comply with the terms of the TAO unless it is appealed and then modified or rescinded by the Commissioner, the Deputy Commissioner, or the NTA. If a TAO is modified or rescinded by the Commissioner or Deputy Commissioner, a written explanation of the reasons for the modification or rescission must be provided to the NTA. Furthermore, the proposed regulations clarify that a TAO is not intended to be a substitute for an established administrative or judicial review procedure, but rather is intended to supplement these procedures if a taxpayer is about to suffer or is suffering a significant hardship. Thus, a taxpayer’s right to administrative or judicial review will not be diminished or expanded in any way as a result of the taxpayer’s seeking assistance from the Taxpayer Advocate Service (TAS).

4. Form of Request

The proposed regulations provide that a request for a TAO shall be made on a Form 911, “Request for Taxpayer Advocate Service Assistance (and Application for Taxpayer Assistance Order)” (or other specified form) or in a written statement that provides sufficient information for TAS to determine the nature of the harm or the need for assistance.

5. Scope of the TAO

The proposed regulations provide that the NTA can issue a TAO directing an action in the circumstances outlined in section 7811(b). Section 7811(b) provides that the NTA may issue a TAO ordering the IRS within a specified time to (i) release levied property, or (ii) cease any action, take any action as permitted by law, or refrain from taking any action with respect to a taxpayer under: (A) Chapter 64 (relating to collection); (B) chapter 70, subchapter B (relating to bankruptcy and receiverships); (C) chapter 78 (relating to discovery of liability and enforcement of title); or (D) any other provision of law specifically described by the NTA in the TAO. Consistent with the list of specific subchapter and chapters of the Code in section 7811(b), the proposed regulations provide that the phrase “any provision of law” refers to other provisions of the internal revenue laws similar to the provisions enumerated in the statute.

The proposed regulations further provide that in circumstances where the statute does not authorize the issuance of a TAO to order a specific action, if the NTA determines that the taxpayer is suffering or about to suffer a significant hardship and that the issuance of a TAO is appropriate, the NTA may issue a TAO seeking to expedite, review, or reconsider an action at a higher level. Although the statute does not expressly state that a TAO may be issued to request that the IRS expedite, review, or reconsider at a higher level an action, the statute and the legislative history support this interpretation.

As initially enacted, section 7811(b) did not grant the Ombudsman (the predecessor to the NTA) the authority to order affirmative actions. At that time, section 7811(b) provided that a TAO could order either the release of levy or could order the IRS to cease or refrain from taking an action under the three enumerated chapters of the Code listed in the statute. Thus, under the initial version of section 7811(b)(2), except for releasing levies, TAOs could not be issued to take affirmative actions. For example, a TAO could order the IRS to refrain from filing a Notice of Federal Tax Lien (NFTL), but it could not require the IRS to release an NFTL. Delegation Order (DO) 239 (01-31-92) remedied this problem by delegating to the Ombudsman the authority to order affirmative acts. Congress also recognized the deficiency in the law and amended section 7811(b) as part of TBOR 2 to allow TAOs to be issued with respect to affirmative acts by inserting the words “take any action as permitted by law” into the statute. The Committee Report to TBOR 2, H. Rep. No. 104-506, 104th Cong., 2nd Sess., at 1148 (1996), explains how the existing law was deficient in

that, for example, it did not allow a TAO to be issued to expedite a refund or review the validity of a tax deficiency. The report explains that the reason for amendment to section 7811(b) was to allow a TAO to be issued “for a review of the appropriateness of the proposed action.” Thus, consistent with the legislative history and the statutory amendments, the proposed regulations provide that where the statute does not authorize the issuance of a TAO to order a specific action, if the NTA determines that a taxpayer is suffering or about to suffer a significant hardship and that relief is appropriate, the NTA may issue a TAO seeking to expedite, review, or reconsider an action at a higher level.

6. Who Is Subject to a TAO?

The proposed regulations provide rules regarding who is subject to a TAO. Generally, a TAO can be issued to any operating division or function of the IRS. Due to the sensitivity and importance of criminal investigations, the proposed regulations provide that a TAO may not be issued if the action ordered in the TAO could reasonably be expected to impede a criminal investigation. The IRS Criminal Investigation division (CI) will determine whether the action ordered in the TAO could reasonably be expected to impede an investigation. Procedures for handling cases where the NTA questions CI’s initial determination will be added to the IRM.

The rule for issuing a TAO to the Office of Chief Counsel has been updated to reflect the reorganization of the IRS as well as statutory changes. The existing regulations provide that: “[a] taxpayer assistance order may generally not be issued * * * to enjoin an act of the Office of Chief Counsel (with the exception of Appeals).” Due to a reorganization of the Office of Chief Counsel, effective October 1, 1995, Appeals is no longer a component of the Office of Chief Counsel. Accordingly, the proposed regulations eliminate the parenthetical reference to Appeals in Sec. 301.7811-1(c)(3). The NTA continues to have the authority to issue TAOs to Appeals. Additionally, at the time that the existing regulations were finalized, the Ombudsman could not issue a TAO to order an affirmative act, other than a release of levy. As discussed in this preamble, under the current version of the statute, the NTA has much broader authority regarding the ability to order an affirmative act. Thus, the term “enjoin” has also been eliminated, and the rule under the proposed regulations is that: “[g]enerally a TAO may not be issued to the Office of Chief Counsel.”

Special Analyses

This notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these regulations will not have a significant economic impact on a substantial number of

small entities. The information required under these proposed regulations is already required by the current regulations and the Form 911, "Request for Taxpayer Advocate Service Assistance (and Application for Taxpayer Assistance order)." In addition, the Form 911 takes minimal time and expense to prepare, and the filing of a Form 911 is optional. Therefore, preparing the Form 911 does not significantly increase the burden on taxpayers. Based on these facts, the Treasury Department and the IRS have determined that these proposed regulations will not have a significant economic impact on a substantial number of small entities. Furthermore, the substance of the regulations does not concern the Form 911, but the procedures the Taxpayer Advocate Service (TAS) or the Internal Revenue Service (IRS) must follow with respect to taxpayer assistance orders. Therefore, any burden created by these regulations is on the TAS or IRS, not taxpayers. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written or electronic comments that are submitted timely to the IRS. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the Federal Register.

Drafting Information

The principal author of these regulations is Janice R. Feldman, Office of the Special Counsel (National Taxpayer Advocate Program) (CC:NTA).

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Withdrawal of Proposed Regulations

Accordingly, under the authority of 26 U.S.C. 7805, the notice of proposed rulemaking that was published in the Federal Register on April 19, 1996 (61 FR 17265) is withdrawn.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301 is proposed to be amended as follows:

PART 301--PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 301.7811-1 is amended by revising paragraphs (a), (b), (c) and (d), removing paragraphs (f), (g), (h) and redesignating paragraph (h) as (f) and revising newly designated paragraph (f) to read as follows:

Sec. 301.7811-1 Taxpayer Assistance Orders.

(a) Authority to issue--(1) In general. When an application for a Taxpayer Assistance Order (TAO) is filed by the taxpayer or the taxpayer's authorized representative in the form, manner and time specified in paragraph (b) of this section, the National Taxpayer Advocate (NTA) may issue a TAO if, in the determination of the NTA, the taxpayer is suffering or is about to suffer a significant hardship as a result of the manner in which the internal revenue laws are being administered by the Internal Revenue Service (IRS), including action or inaction on the part of the IRS.

(2) The National Taxpayer Advocate defined. The term National Taxpayer Advocate includes any designee of the NTA, such as a Local Taxpayer Advocate.

(3) Issuance without a written application. The NTA may issue a TAO in the absence of a written application by the taxpayer under section 7811(a).

(4) Significant hardship--(i) Determination required. Before a TAO may be issued, the NTA is required to make a determination regarding significant hardship.

(ii) Term Defined. The term significant hardship means a serious privation caused or about to be caused to the taxpayer as the result of the particular manner in which the revenue laws are being administered by the IRS. Significant hardship includes situations in which a system or procedure fails to operate as intended or fails to resolve the taxpayer's problem or dispute with the IRS. A significant hardship also includes, but is not limited to:

(A) An immediate threat of adverse action;

(B) A delay of more than 30 days in resolving taxpayer account problems;

(C) The incurring by the taxpayer of significant costs (including fees for professional representation) if relief is not granted; or

(D) Irreparable injury to, or a long-term adverse impact on, the taxpayer if relief is not granted.

(iii) A delay of more than 30 days in resolving taxpayer account problems is further defined. A delay of more than 30 days in resolving taxpayer account problems exists under the following conditions:

(A) When a taxpayer does not receive a response by the date promised by the IRS; or

(B) When the IRS has established a normal processing time for taking an action and the taxpayer experiences a delay of more than 30 days beyond the normal processing time.

(iv) Examples of significant hardship. The provisions of this section are illustrated by the following examples:

Example 1. Immediate threat of adverse action. The IRS serves a

levy on A's bank account. A needs the bank funds to pay for a medically necessary surgical procedure that is scheduled to take place in one week. If the levy is not released, A will lack the funds necessary to have the procedure. A is experiencing an immediate threat of adverse action.

Example 2. Delay of more than 30 days. B files a Form 4506, "Request for a Copy of Tax Return." B does not receive the photocopy of the tax return after waiting more than 30 days beyond the normal time for processing. B is experiencing a delay of more than 30 days.

Example 3. Significant costs. The IRS sends XYZ, Inc. several notices requesting payment of the outstanding employment taxes owed by XYZ, Inc. and four of its subsidiaries. The IRS contends that XYZ, Inc. and the four subsidiaries have small employment tax balances with respect to 12 employment tax quarters totaling \$10X. XYZ, Inc. provides documentation to the IRS which it contends shows that if all payments were applied to each entity correctly, there would be no balance due. The IRS requests additional records and documentation. Because there are 60 tax periods (12 quarters for each of the five entities) involved, to comply with this request XYZ, Inc. will need to hire an accountant, who estimates he will charge at least \$5X to organize all the records and provide a detailed analysis of the how the payments should have been applied. XYZ, Inc. is facing significant costs.

Example 4. Irreparable injury. D has arranged with a bank to refinance his mortgage to lower his monthly payment. D is unable to make the current monthly payment. Unless the monthly payment amount is lowered, D will lose his residence to foreclosure. The IRS refuses to subordinate the Federal tax lien, as permitted by IRC section 6325(d), or discharge the property subject to the lien, as permitted by IRC section 6325(b). As a result, the bank will not allow D to refinance. D is facing an irreparable injury if relief is not granted.

(5) Distinction Between Significant Hardship and the Issuance of a TAO. A finding that 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 IRS will not automatically result in the issuance of a TAO. After making a determination of significant hardship, the NTA must determine whether the facts and the law support relief for the taxpayer. In cases where any IRS employee is not following applicable published administrative guidance (including the Internal Revenue Manual), the NTA shall construe the factors taken into account in determining whether to issue a TAO in the manner most favorable to the taxpayer.

(b) Generally. A TAO is an order by the NTA to the IRS. The IRS will comply with a TAO unless it is appealed and then modified or rescinded by the NTA, Commissioner or the Deputy Commissioner. If a TAO is modified or rescinded by the Commissioner or Deputy Commissioner, a written explanation of the reasons for the modification or rescission must be provided to the NTA. The NTA may not make a substantive

determination of any tax liability. A TAO is also not intended to be a substitute for an established administrative or judicial review procedure, but rather is intended to supplement existing procedures if a taxpayer is about to suffer or is suffering a significant hardship. A request for a TAO shall be made on a Form 911, "Request for Taxpayer Advocate Service Assistance (And Application for Taxpayer Assistance Order)" (or other specified form) or in a written statement that provides sufficient information for TAS to determine the nature of the harm or the need for assistance. A taxpayer's right to administrative or judicial review will not be diminished or expanded in any way as a result of the taxpayer's seeking assistance from TAS.

(c) Contents of Taxpayer Assistance Orders. After establishing that the taxpayer is facing significant hardship and determining that the facts and law support relief to the taxpayer, the NTA may issue a TAO ordering the IRS within a specified time to--

(1) Release a Levy. Release levied property (to the extent that the IRS may by law release such property); or

(2) Take Certain Other Actions. Cease any action, take any action as permitted by law, or refrain from taking any action with respect to a taxpayer pursuant to--

(i) Chapter 64 (relating to collection);

(ii) Chapter 70, subchapter B (relating to bankruptcy and receiverships);

(iii) Chapter 78 (relating to discovery of liability and enforcement of title); or

(iv) Any other provision of the internal revenue laws specifically described by the NTA in the TAO.

(3) Expedite, Review or Reconsider an Action at a Higher Level. Although the NTA may not make the substantive determination, a TAO may be issued to require the IRS to expedite, reconsider, or review at a higher level an action taken with respect to a determination or collection of a tax liability.

(4) Examples. The following examples assume the existence of significant hardship:

Example 1. J contacts a local taxpayer advocate because a wage levy is causing financial difficulties. The NTA determines that the levy should be released as it is causing economic hardship (within the meaning of section 6343(a) and Treas. Reg. Sec. 301.6343-1(b)(4)). The NTA may issue a TAO ordering the IRS to release the levy in whole or in part by a specified date.

Example 2. The IRS rejects K's offer in compromise. K files a Form 911, "Request for Taxpayer Advocate Service Assistance (and Application for Taxpayer Assistance Order)." The NTA discovers facts that support acceptance of the offer in compromise. The NTA may issue a TAO ordering the IRS to reconsider its rejection of the offer or to review the rejection of the offer at a higher level. The TAO may include NTA analysis of and recommendation for resolving the case.

Example 3. L files a protest requesting Appeals consideration of IRS's proposed denial of L's request for innocent spouse relief.

Appeals advises L that it is going to issue a Final Determination denying the request for innocent spouse relief. L files a Form 911, "Request for Taxpayer Advocate Service Assistance (and Application for Taxpayer Assistance Order)." The NTA reviews the administrative record and concludes that the facts support granting innocent spouse relief. The NTA may issue a TAO ordering Appeals to refrain from issuing a Final Determination and reconsider or review at a higher level its decision to deny innocent spouse relief. The TAO may include TAS analysis of and recommendation for resolving the case.

(d) Issuance. A TAO may be issued to any office, operating division, or function of the IRS. A TAO shall apply to persons performing services under a qualified tax collection contract (as defined in section 6306(b)) to the same extent and in the same manner as the order applies to IRS employees. A TAO will not be issued to IRS Criminal Investigation division (CI), or any successor IRS division responsible for the criminal investigation function, if the action ordered in the TAO could reasonably be expected to impede a criminal investigation. CI will determine whether the action ordered in the TAO could reasonably be expected to impede an investigation. Generally, a TAO may not be issued to the Office of Chief Counsel.

* * * * *

(f) Effective applicability date. These regulations are applicable for TAOs issued on or after the date of publication of the Treasury decision adopting these rules as final regulations in the Federal Register, except that paragraph (e) is applicable beginning March 20, 1992.

Linda E. Stiff,
Deputy Commissioner for Services and Enforcement.