REPORT #582

TAX SECTION

New York State Bar Association

Resort on the Omnibus Taxpayer Bill of Rights

June 1, 1988

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Dear Senator Bentsen:

Enclosed is a report of the Executive Committee of the Tax Section analyzing and evaluating various provisions of S. 2223, the Omnibus Taxpayer Bill of Rights (the "Bill"), as reported by the Senate Finance Committee on March 29, 1988. The report was principally drafted by Donald C. Alexander. The Tax Section believes that, although parts of the Bill have merit, other parts are not desirable. Accordingly, the Tax Section recommends that the Bill not be adopted in its present form.

The reasons for our basic concerns are as follows:

1. Although the Bill as a whole is designed to further the effective but fair administration of the tax laws, certain provisions of the Bill would impede, not advance, tax administration.

2. Certain provisions intended to safeguard taxpayers' rights and to inform taxpayers of such rights appear to be a legislative substitute for what can best be handled by proper tax administration subject to effective Congressional oversight.

3. The Bill is costly. Its estimated revenue effect in the period 1988-93 is $517 million. Also, Commissioner Gibbs estimates that the Internal Revenue Service will have to spend

from $40 million to $60 million annually administering the Bill.

Very truly yours,

Herbert L. Camp

The Honorable Lloyd Bentsen,
Chairman, Senate Finance Committee,
205 Dirksen Senate Office Building,
Washington, D.C. 20510

Enclosure

Copies w/encl. to The Honorable Bob Packwood,
259 Russell Senate Office Building,
Washington, D.C. 20510

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2111 Rayburn House office Building,
Washington, D.C. 20515

The Honorable John J. Duncan,
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House Ways and Means Committee,
2206 Rayburn House Office Building,
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The Honorable Lawrence B. Gibbs,
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The Honorable O. Donaldson Chapoton,
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1500 Pennsylvania Avenue,
Washington, D.C. 20220

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This report [1]/ comments on S. 2223, entitled the Omnibus Taxpayer Bill of Rights (the "Bill"), as reported by the Senate Committee on Finance on March 29, 1988. The Bill is the most recent and watered-down version of the taxpayer bill of rights. The Bill has been placed on the Senate calendar and is apparently awaiting a House vehicle.

I. Section 101 (Statement of Taxpayer Rights).

Section 101 of the Bill directs the Treasury to prepare a statement setting forth, in "simple and nontechnical terms," rights of taxpayers and obligations of the Internal Revenue Service (the "Service") during audits, as well as taxpayers' appeals procedures, procedures for prosecuting refund claims and taxpayer complaints, and service enforcement procedures such as

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[1]/ The principal draftsperson of this report was Donald C. Alexander. Helpful comments were received from David H. Brockway, William L. Burke, Herbert L. Camp, Richard G. Cohen, Richard D'Avino, Arthur A. Feder, David C. Garlock, James M. Peaslee, Sydney R. Rubin and David E. Watts.

assessment, levy, distraint and liens. The proposed publication is to be distributed to all taxpayers whom “the Secretary contacts with respect to the determination or collection of any tax (other than by providing tax forms).” For example, the Service would be required to send the publication to all taxpayers receiving computer-generated notices, regardless of the lack of relevance of most of the material.

We oppose adoption of Section 101. As commentators and the Service have pointed out in considering similar provisions of prior versions of the Bill, it is impossible to have a short, non-technical but accurate description of taxpayers' rights and Service powers and procedures in the vast area described by the Bill. Further, the enormous breadth of the subject matter to be covered by the proposed publication would dilute its meaning and usefulness if it were sent to all taxpayers with respect to any determination or collection of any tax.

The Service now sends explanatory publications to taxpayers at meaningful and relevant times, such as a description of collection procedures with the notice and demand for payment; instructions on how to comply with and oppose a summons with the service of a summons; and a description of the audit procedure

with a notice of audit.[2]/ Those publications appear to address most, if not all, of the general areas described in Section 101. Also, the Service is producing a new publication on taxpayer rights (Publication 1).

We believe that Section 101 would impose a heavy cost on the Service with little benefit (and perhaps much confusion) to the taxpayer. That is not to say that the Service should not exert every effort to make its notices and correspondence with taxpayers as clear, intelligible and informative as possible. In particular, while there have been recent improvements, much remains to be done in improving computer-generated notices. Also, if the Service issues a check to a taxpayer, it should identify each of the components (tax, interest, penalty) and the taxable periods involved.

II. Section 102 (Taxpayer Interviews).

Section 102 of the Sill amends section 7520 of the Internal Revenue Code of 1986 (the “Code”), regarding

[2]/ Appeal Rights and Preparation of Protests for Unagreed cases (Publication 5); The Collection Process (Publication 594 and 586A); Examination of Returns, Appeal Rights, and Claims for Refund (Publication 556). The Service also issues several general publications which contain discussions of taxpayers' rights under the revenue laws. See Your Federal Income Tax (Publication 17); Tax Guide for Small Business (Publication 334).

taxpayer interviews. Section 102 is improved compared to prior versions of the Bill because it no longer contains the requirement that taxpayer interviews be conducted only at a time and place convenient to the taxpayer; that requirement was objected to based on concerns about the safety of Service personnel and potential disruption of the audit process.

Section 102 now permits taxpayers, upon advance notice, to record their interviews by the Service. It also provides that if the Service records the interview the taxpayer will be provided, at cost, a copy of the transcript. Further, it modifies prior versions of the Bill, which appeared to require a Miranda-type warning to taxpayers prior to a civil audit examination; now the Service would be called on to provide only an explanation of the audit or collection process and taxpayers' rights at or before an initial audit or collection interview. (Of course, that requirement duplicates, in part, the requirements of section 101.)

Section 102 also deals with a taxpayer's right of consultation. An interview is to be suspended immediately if a taxpayer “clearly states” that he wishes to consult with an advisor. Without issuing an administrative summons, Service employees cannot require the taxpayer to accompany the

representative. That requirement should be eased, but otherwise Section 102 does not appear objectionable.

III. Section 103 (Abatements).

Section 103 would amend section 6404 of the Code, relating to abatement of additions to tax attributable to erroneous advice by the Service. We support Section 103. since the provision applies only to written advice, reasonably relied upon, given by an officer or employee of the Service in an official capacity in response to a specific written request and is limited to the abatement of penalties and additions to tax, the concerns of commentators and the Service about its predecessors have been satisfactorily addressed.

IV. Section 104 (Taxpayer Assistance Orders).

Section 104 of the Sill proposes new section 7811 of the Code, authorizing the Taxpayer Ombudsman to issue taxpayer assistance orders (T.A.O.'s) directing the Service to release seized property or to cease or refrain from taking any action against a taxpayer with respect to collection relating to bankruptcy, receiverships, discovery of liability, enforcement of title, or any other provision of law. The Bill differs from prior proposals both in that a T.A.O. may be modified or rescinded by a district director and in that the application by a taxpayer for a T.A.O. suspends the period of limitations with respect to any

enjoined activity.

The service has responded to the frustrations and concerns giving rise to this proposal by establishing, publicizing and strengthening its Problem Resolution Program. In February, 1988, the Service gave Problem Resolution Officers the power to issue Taxpayer Assistance Actions (T.A.A.'s) to suspend enforcement actions or expedite actions to help taxpayers (e.g., to release a lien). Internal Revenue Manual, Supplement 12G-256 (February 29, 1988). It makes sense to monitor the effectiveness of the Service's recent actions before imposing a statutory mandate. We therefore oppose adoption, at this time, of Section 104 of the Bill.

v. Section 105 (Inspector General).

Section 105 amends the Inspector General Act of 1978 (5 U.S.C., App. 3), and establishes an Office of Inspector General of Treasury for non-Service matters and an Inspector General within the Service. Prior versions of the Bill provided for an Inspector General in the Treasury Department, outside the Service, with oversight and investigative responsibility over the Service. The Service internal audit staff was to be transferred to such Inspector General. Both the Service and the Justice Department strongly opposed that provision because it would

deprive the Commissioner of investigative audit staff, increase the risk of political influence on tax administration and potentially interfere with the criminal investigation functions of the Service. The current Bill modifies the earlier proposal by placing the Service Inspector General under the direction and control of the Commissioner with respect to criminal investigations, policy, national security and other sensitive matters. Further, the Service Inspector General must be appointed from senior government career personnel, thus reducing the risk of a politically-influenced appointment. In its present form, we do not oppose Section 105.

VI. Section 106 (Personnel Evaluation).

Section 106 prohibits the Service from using records of tax enforcement results to evaluate enforcement officers, appeals officers or reviewers or to impose or suggest production quotas or goals. The Service had opposed prior (and more sweeping) versions of this provision largely because of perceived attempts to legislate management.

Long ago, the Service rejected the use of quotas or goals in evaluating enforcement personnel. IRS Policy Statement P-1-20. Reconciling the need for the Service to administer the tax laws efficiently and effectively with its duty to administer the tax laws fairly is not easy. If a revenue agent never finds a

deficiency or a revenue officer never collects an overdue account, is the Service required to ignore such facts? Are return processors at the Service Centers told to ignore goals and work at their own pace, however slow?

We oppose adoption of section 106. Evaluation of Service personnel should be left to Service management under the continued scrutiny of the President and the Congress.

VII. Section 107 (Regulations).

Section 107 provides that temporary regulations shall he issued as proposed regulations and that temporary and proposed regulations shall expire within two years after the date of issuance. We do not support Section 107. First, we believe that Section 107 might lead to a reluctance to propose regulations, or to issue “Notices” or “Announcements” instead. Second, we believe that both taxpayers and the Service benefit from proposed and Temporary regulations, and it is better to have that guidance than not to have it. Third, expired regulations could presumably be reissued, with new hearings. Fourth, if such regulations were not made final or reissued, questions of reliance might well arise. Would such expired temporary regulations constitute substantial authority under section 6661?

Section 107 also provides that after the issuance of any proposed regulation and before the issuance of any final regulation, such regulation shall be submitted to the Small Business Administration for comment on its impact upon small business. Prior versions of the Bill, which called for a more stringent review of the Service's proposed regulations, including applying the Regulatory Flexibility Act, had caused much opposition by the Service and the Justice Department. The Bill as now revised addresses some, but not all, of the concerns previously expressed by the Service and Justice. The process of issuing regulations interpreting the vast tax law changes in recent years should not be impeded, and it seems unlikely that Section 107 would further such process.

VIII. Section 108 (Tax Due and Deficiency Notices).

Section 108 requires that tax due and deficiency notices describe the basis for and identify the amounts of tax, interest, additions and assessable penalties. Taxpayers and their counsel are often frustrated in trying to comprehend certain highly-abbreviated notices; they need sufficient guidance to make such notices intelligible. Therefore, the goal of Section 108 is laudable. The primary objection of the Service to the prior version of Section 108 was based on the ambiguity of the provision, the cost of implementation and the risk of

invalidating deficiency notices. The latter concern has been addressed by providing that an inadequate description shall not invalidate the notice. Section 108 should make clear that, in successive notices of tax due, the basis for tax, interest, penalty or additions to tax need not be set out, at least in the same detail as in the first notice. With that change, we would support Section 108.

IX. Section 109 (Installment Agreements).

Section 109 of the Bill proposes new section 6159 of the Code, to make explicit the Service's authority to enter into installment agreements with taxpayers to pay tax delinquencies and limit the Service's power to terminate such agreements. Installment agreements, once entered into, will remain in effect unless the taxpayer fails to abide by the terms of the installment agreement, the Service determines that the collection of tax liabilities is in jeopardy, the taxpayer provided inaccurate or incomplete information or the taxpayer's financial condition changes and the Service gives 30 days prior notice with its reasons for termination.

Section 109 provides certainty in an area of administrative practice which, under current law, is governed by informal rules, and we support it. However, the advance-notice requirement for termination upon a change in financial

condition might have the effect of causing Service employees to be reluctant to enter into installment agreements. That requirement should be reconsidered.

X. Section 110 (Assistant Commissioner for Taxpayer Services).

Section 110 amends section 7802 of the Code by forming an Office of Assistant Commissioner for Taxpayer Services. The Service has opposed that provision because legislating a requirement for a particular office invades the management province of the Service and can prove to be an obstacle to effective management. Current Service managers state that the Service has encountered problems in its reorganization efforts with the legislatively-mandated office of Assistant Commissioner for Employee Plans and Exempt Organizations. The Service believes the proposed function of the Assistant Commissioner for Taxpayer Services is better addressed internally by the Service with existing management than externally through Congressional oversight. The Service has a good point, even though possibly some future Commissioner, bent upon privatization, might attempt to abandon the field entirely but for some legislated restrictions.

A further reason for objecting to this provision is that it specifies the particular methods of delivering taxpayer

service that are under the Assistant Commissioner's direction (telephone, walk-in and educational). Those methods can change with the state of the art.

XI. Section 111 (Levies).

Section 111 amends section 6331 of the Code to impose substantial new limitations upon the Service's powers to collect tax by levy upon a taxpayer's wages or property. The amount of wages exempt from levy would be increased; the time between notice of intent to levy and the actual levy would be increased from 10 days to 30 days; banks would be required to wait 21 days before surrendering deposits in response to a levy; a taxpayer's personal residence and tangible personal property essential to a business would be exempt unless the district director personally approves the levy in writing; no levy could be made on the compliance date of a summons issued to the taxpayer (unless there were jeopardy); and a levy would be released if, inter alia, the Service determines that the levy creates an economic hardship due to the financial condition of the taxpayer.

The Bill does not set forth the remedy in the event of a levy in violation of the new requirements. The new requirements, coupled with the absence of a specific remedy, pose numerous potential problems of interpretation and administration. Does a taxpayer have a civil cause of action against a bank that pays

deposits in response to a levy without waiting 21 days? If a district director fails to approve a levy on a personal residence or essential business property, is the levy void? How will a taxpayer know if the levy was approved? Can the taxpayer obtain a copy of the written approval document? How is it determined if tangible business property is essential? What if a lien clearly imposes an economic hardship but the Service refuses to release it? Similar provisions of a prior bill were the subject of detailed objections by the Service.

The provision calling for release if the levy is determined to create an economic hardship is inexplicable. Does not a levy, by its nature and effect, almost invariably create such a hardship? Payment of any tax is an economic expense, and therefore a burden. A basic question here is one of balance. The more the Service's collection powers are curtailed, the more due but unpaid taxes go uncollected and the greater the burden that compliant taxpayers must shoulder, on balance, we support Section 111, provided it is clear that mere payment of tax is net hardship allowing release.

XII. Section 112 (Jeopardy Levies).

Section 112 extends to jeopardy levies the present procedures for review of jeopardy assessments and provides

for Tax Court jurisdiction. Similar provisions of a prior bill were not opposed by the Service.

XIII. Section 113 (Lien Appeal).

Section 113 adds new section 6326 to the Code to provide an administrative appeal of liens. It has been narrowed from earlier proposals to address the erroneous filing of a notice of lien rather than the “imposition of a lien”. That makes sense, because imposition of a lien occurs by operation of law under section 6321 after the, Service makes demand for, but does not receive, payment. Since the proposal is limited to an appeal of the filing of a notice of lien, the most likely office of the Service to handle such appeals would seem to be the Special Procedures Function, rather than the Appeals Division.

XIV. Section 121 (Costs and Fees).

Section 121 of the Bill proposes a major modification to section 7430 of the Code, pertaining to the awarding of costs and fees to taxpayers. Significant changes are: (1) extending fee awards to administrative proceedings beginning with the issuance of a 30-day letter or similar notice; (2) shifting to the Government the burden of proving that its position was substantially justified; and (3) authorizing the Service to settle fee award claims administratively. Both the Service and the Justice Department have strenuously opposed similar provisions of prior versions of the Bill and point to the

extensive Congressional review of section 7430 in 1986. Moreover, the proposed changes would be quite expensive and would consume much of the time of Appeals officers.

We oppose the first change (extension to proceedings beginning with a 30-day letter). It does not seem right to test substantial justification by using the 30-day letter. Instead, the Service position in appeals (or, if the appeals process is skipped, in the statutory notice) is more appropriate. We also oppose the second change; the burden of proof should remain with the taxpayer. We support the third change.

XV. section 122 (Damages for Failure to Release a Lien).

Section 122 proposes to make the Government liable for the greater of actual damages or per diem damages ($100/day up to $1000) for knowingly or negligently failing to release a lien on a taxpayer's property. To recover, a taxpayer must exhaust administrative remedies, though that procedure is not described. Nor are the conditions or grounds warranting a release of lien described. Both the Service and the Justice Department opposed similar provisions of a prior bill. Although Section 122 may have a laudable goal, it needs substantial clarification.

XVI. Section 123 (Damages for Disregard of Law).

Section 123 proposes a new civil cause of action against the United States for damages sustained by a taxpayer due to careless, reckless or intentional disregard of federal law by an employee of the Service. Both the Service and the Justice Department opposed similar versions of a prior bill and warned of a deluge of potential litigation. By not authorizing suits against Service employees, the redrafted provision responds to a major concern of the Service.

Providing for a recovery for merely careless conduct contradicts the Congressional policy of exempting tax-related claims from actions under the Federal Tort Claims Act and sets far too broad a standard of liability. Careless conduct should be removed from Section 123. Reckless or intentional disregard of law by a Service employee appears to justify the remedy proposed.

Section 123 also provides that if a taxpayer should bring a frivolous or groundless suit, the court can award the Government damages of up to $10,000. That provision should be kept, but it should be noted that it likely will not deter the filing of such suits; the Tax Court's imposition of the $5,000 penalty in its proceedings and sanctions under Rule 11 of the Federal Rules of Civil Procedure in federal court have not prevented countless frivolous filings in those forums.

XVII. Sections 131-136 (Tax Court Jurisdiction).

Section 131 gives the Tax Court the power to restrain certain premature assessments, and Section 132 gives it the power to enforce overpayment determinations. Under Section 133, the Tax court can review certain sales of seized property. Section 134 permits the Tax Court to redetermine interest on deficiencies, and Section 135 permits it to modify decisions in certain estate tax cases. The foregoing provisions seem noncontroversial and have not been opposed by the Service.

However, Section 136 has a much wider scope. It expands Tax Court jurisdiction to include refund suits, thus broadening our current multiple-choice system of tax litigation. One might question why that issue was placed in the Bill. Giving the Tax Court jurisdiction to hear suits for refund need not be done in the context of the taxpayer bill of rights. It should be considered on its own merits. Our Committee on Practice and Procedure is preparing a separate report on the Tax Court provisions of the Bill, particularly concurrent jurisdiction.

XVIII. Conclusions.

While some provisions of the Bill have merit or are noncontroversial, certain major provisions pose serious impediments to sound tax administration. Therefore, the Bill should not be adopted in its present form.