DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

MEMORANDUM FOR NATIONAL TAXPAYER ADVOCATE

FROM: Eliot D. Fielding, Associate Chief Counsel
(Enforcement Litigation)

SUBJECT: Authority of Taxpayer Assistance Orders Over Appeals

BACKGROUND:

This responds to your request dated August 3, 1998, for our opinion concerning the extent of the Taxpayer Advocate's (TPA) authority over the Office of Appeals (Appeals). You refer to one particular case involving a taxpayer who incurred a casualty loss in [redacted] but decided not to claim the loss until he actually incurred the repair expenses in [redacted], a decision apparently made with input from an IRS employee. On audit, the casualty loss for [redacted] was disallowed but the taxpayer was now time-barred from claiming the loss on his [redacted] return. The taxpayer paid the deficiency and submitted a claim for refund, eventually ending up in Appeals. The Appeals Officer reviewing the case recommended that the deficiency be reduced by half, essentially splitting the difference with the taxpayer, but was overruled by the Associate Chief of Appeals. The taxpayer appeared at a local problem solving day and his case was reviewed by the [redacted] Taxpayer Advocate who believed the taxpayer should have received relief, but was not sure whether he had authority to issue a Taxpayer Assistance Order (TAO) granting the relief sought. The [redacted] TPA was not able to coordinate the case with the Appeals representative at the Problem Solving day because the Appeals representative at the Problem Solving Day was the same Appeals Officer who had been overruled. After consulting with [redacted] District Counsel on the potential litigation hazards of the case, the TPA decided that it was not appropriate to force the taxpayer to litigation because of the low dollar amount and litigation risks and so resolved the problem by following the original Appeals Officer's recommendation and splitting the difference with the taxpayer.

ISSUES:

You believe that the TPA has some authority over Appeals but the extent of that authority is unclear. You ask this office (1) whether the TPA's actions were proper in this particular case and (2) what options does the TPA have to help taxpayers in

similar situations when Appeals makes a determination with which the TPA disagrees.

CONCLUSION:

It is our view that the relationship between the Office of the Taxpayer Advocate and the Office of Appeals is not intended to be hierarchical or adversarial in nature but is instead intended to be coordinate in nature. Each office serves as a check upon the various activities of the Service, not as a check upon the other. Each provides administrative review and remedies for what are for the most part differing classes of problems which taxpayers may encounter with different functions within the Service; the Office of Appeals is oriented towards substantive, technical decisions while the TPA is oriented towards internal procedures and the processing of taxpayer disputes. That is, Appeals generally strives to resolve technical disagreements the taxpayer may have either with the merits of the tax or the legality of its collection. It provides a review which ensures that the Service complies with the revenue laws both in properly determining the taxpayer's liability (a tax liability determination) and properly collecting it (a collection determination). [1] The TPA, in contrast, generally strives to resolve procedural problems the taxpayer may be encountering in resolving the collection or settlement of the account balance. The TPA facilitates the resolution of taxpayer problems by ensuring that the taxpayer receives proper process—that is, proper consideration by the proper function—without suffering a significant hardship in the meanwhile. We do not believe that Congress intended to subject either function, each of whose very existence is to provide independent administrative review and relief, to the operation of the other.

Accordingly, we conclude that a TAO may not overturn or modify a tax liability determination made by Appeals. Nor may the TPA overturn or modify a collection determination made by Appeals or act as a substitute for a collection determination which should be made by Appeals. As we explain below, however, there will be times where the changed circumstances of the taxpayer may warrant the TPA's

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[1] We consider Appeals' role in the Collection Appeal Process to be part of its technical review function. A CAP review is designed to ensure that the Service's collection action is within the bounds of the law. In the recently passed IRS Reform and Restructuring Act (RRA), Congress continued to vest the authority to make a technical review of the propriety of collection actions in Appeals in the "Due Process" provisions, discussed below.

review of collection activity if the taxpayer has no recourse to Appeals and the relief requested or ordered is allowed by law.

ANALYSIS:

Our view is supported by a consideration of what functions the Office of Appeals and the TPA were created to perform. The Office of Appeals was created administratively as part of the Reorganization Plan No. 1 of 1952 to provide an administrative forum in which taxpayers could receive competent and unbiased technical review of audit determinations with which they disagreed without having to litigate. Through regulations (26 C.F.R. 601.106) and Delegation Orders (DOs) (DO Nos. 60 (Rev. 7)(5-5-94), 66 (Rev. 15)(1-23-92), and 225 (Rev. 1) (10-31-87), the Commissioner has carefully allocated the closing and compromise authority given him by I.R.C. §§ 7121 and 7122 between Appeals and the Office of Chief Counsel (Counsel). The regulations and DOs have created a system whereby Appeals is authorized to review and compromise tax controversies before, and in many cases after, a case is docketed in Tax Court. The Chief Counsel is given the authority to compromise those docketed cases which Appeals may not. Appeals serves as a check and administrative review over the Service's compliance functions of Examination and Collection.

The Taxpayer Advocate's Office was created administratively in 1979 as the Taxpayer Ombudsman to administer the Problem Resolution Program (PRP) which was designed to help taxpayers for whom normal administrative procedures had failed. The Ombudsman could issue orders to stay collection actions pending resolution of the taxpayer's problems and the Ombudsman could issue orders to bypass normal administrative procedures in order that the taxpayer might receive effective review of the problem. The Ombudsman had no authority, however, to change a technical decision. Conference Report on the Technical and Miscellaneous Revenue Act of 1988, H. Rep. 100-1104, at 215. The Ombudsman's function was codified in the Taxpayer Bill of Rights I (TBOR I) legislation which was included in the Technical and Miscellaneous Revenue Act of 1988, P.L. 100-647 (TAMRA). As initially written, TBOR I codified the Ombudsman's authority to issue TAOs in section 7811, subsection (b) of which provided that:

> The terms of a Taxpayer Assistance Order may require the Secretary within a specified time period—
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> (1) to release property of the taxpayer levied upon, or

(2) to cease any action, or refrain from taking any action, with respect to the taxpayer under—

(A) chapter 64 (relating to collection),

(B) subchapter B of chapter 70 (relating to bankruptcy and receiverships),

(C) chapter 78 (relating to discovery of liability and enforcement of title), or

(D) any other provision of law which is specifically described by the Taxpayer Ombudsman in such order.

As initially written, section 7811(b) did not grant the Taxpayer Ombudsman the authority to determine, contest or modify a taxpayer's tax liability. This conclusion follows from both the statutory language and the legislative history. Section 7811(b) provides that a TAO may require the release of levies from property or the ceasing of any action taken under three enumerated chapters of the Code. None of the three enumerated chapters in concern substantive tax matters. Thus, a TAO could, under section 7811(b)(2)(A), enjoin the Service from filing a Notice of Federal Tax Lien (NFTL); under section 7811(b)(2)(B), enjoin the Service from making immediate assessments; and, finally, under section 7811(b)(2)(C), enjoin the Service from issuing, or seeking enforcement of, a summons.

At the end of this list of specific chapters and subchapters, Congress placed paragraph (2)(D) which adds to the list a catchall phrase: "any other provision of law which is specifically described by the Taxpayer Ombudsman." The catchall phrase in section 7811(b)(2)(D) did not expand the permitted content of a TAO to technical, or substantive, tax matters. To begin with, the phrase "any other provision of law" cannot mean literally any provision of law. If it were so read, there would be no reason for Congress to have listed the specific provisions in paragraphs (2)(A) through (2)(C); the enumeration would serve no purpose. In construing statutory meanings, it is well established that one part of a statute should not be interpreted in such a way as to render another part meaningless. See Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253, 112 S.Ct. 1146, 1149 (1992)("courts should disfavor interpretations of statutes that render language superfluous"); Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237, 249-50, 105 S.Ct. 2587, 2594-95 (1985) (rule of statutory construction requires statute to be interpreted so that it does not render another provision a nullity).

When language in a statute cannot be construed literally, canons of statutory construction may aid in its proper interpretation. Here, the guide for the proper interpretation of paragraph (2)(D) is found in the well-settled principle that a general catchall phrase which follows a specific list of items is "construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." 2A Sutherland, Statutory Construction (1992 ed.) § 47.17 n.4. This principle of eiusdem generis is routinely used to construe statutes, including the Code. See e.g. United States v. Weadon, 145 F.3d 158 (3rd Cir. 1998); Tax Analysts v. I.R.S., 117 F.3d 607 (D.D.C. 1997) (applying eiusdem generis to construe the term "data" in I.R.C. § 6103(b)(2)(A)).

Based on eiusdem generis, the catchall phrase in section 7811(b)(2)(D) is best construed as being limited to other provisions of law like the ones enumerated in the statute. The common characteristic of the enumerated statutes is that they all concern the procedures by which the Service determines and collects the taxes due and owing. None concern the actual substantive determination of tax. Indeed, they all fall under subtitle F of the Code, which is titled "Procedure and Administration." Thus, the breadth of the catchall phrase in section 7811(b)(2)(D) is limited to similar types of statutes within the Internal Revenue Code, that is, statutes which govern the process by which the Service determines taxes and the process by which the Service collects the taxes due and owing.[2]

This interpretation has been incorporated into the implementing regulation, Treas. Reg. § 301.7811-1, promulgated on March 21, 1989, and modified on March 20, 1992. Treas. Reg. § 301.7811-1(c)(1)(ii)(D) provides that a TAO may address "any other section of the Internal Revenue Code under which the Internal Revenue Service is taking or is about to take administrative action against the taxpayer that causes or will cause a significant hardship." The regulation further provides, in subsection (c)(3), that a TAO "will not be issued to contest the merits of any tax liability nor is a taxpayer assistance order intended to be a substitute for or an addition to any established administrative or judicial review procedure."[3] Thus, for

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[2] Section 3401 of the recently passed IRS Restructuring and Reform Act, P.L. 105-205 (July 22, 1998), authorizes the Office of Appeals to review, upon taxpayer request, the appropriateness of certain proposed collection actions. We discuss the interplay between this grant of authority and section 7811 below.

[3] Subsection (c)(3) of the regulation provides that "A taxpayer assistance order

(continued...)

example, if there is an already established administrative review procedure, the TPA is not authorized to provide a second substantive administrative review, nor does the TPA's review alter the results of any established administrative or judicial review procedure.

This interpretation of section 7811(b)(2)(D) is also supported by the legislative history of section 7811. When enacting the original statute, Congress was well aware that the Taxpayer Ombudsman did not have the authority to change a technical decision. Conference Report on the Technical and Miscellaneous Revenue Act of 1988 (TAMRA), H. Rep. 100-1104, at 215. There was no indication that Congress intended to give the Taxpayer Ombudsman the ability to overturn a technical determination of the taxpayer's liability. To the contrary, the only expressed intent of the original bill was to give the Taxpayer Ombudsman an ability to "require remedial actions, such as release from levy of property of the taxpayer." Id.

As originally written, section 7811(b) allowed TAOs to restrain the Service from taking adverse actions pending resolution of the taxpayer's problem but did not explicitly authorize TAOs to order the Service to take positive actions to relieve taxpayer hardship. For example, while a TAO could require the Service to forbear filing an NFTL, it could not require the Service to release an NFTL if already filed. This gap was first remedied by administrative practice in Delegation Order (DO) 239 (01-31-92) which delegated to the Taxpayer Ombudsman, as well as to other functions (but not to Appeals), the authority to issue TAOs on issues not specifically

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[3] (_continued)
may generally not be issued...to enjoin an act of the Office of Chief Counsel (with the exception of Appeals)." This provision does not authorize a TAO to modify or overturn an Appeals determination, especially since this language comes just before the language quoted in the text. The reason why a TAO would generally not be appropriate to enjoin an act of Counsel is because section 7811 authorizes TAOs to provide relief from the way the internal revenue laws are "being administered." On the one hand, Counsel generally does not administer the statutes; it instead litigates cases, provides litigation support to the Department of Justice, and provides advisory interpretations of the law to both the Service and the public. Appeals, on the other hand, does administer the law in that Appeals makes substantive tax determinations and issues notices of deficiency. At the time the regulation was written, Appeals was a part of the Office of Chief Counsel. That is why the regulation is worded as it is. Thus, while a TAO may order Appeals "within a specified time period" to perform its review function, I.R.C. § 7811(b), it may not review or change the determination once made.

covered in section 7811 but which involved a significant hardship that the Service could relieve. Delegation Order 239 allowed TAOs to require positive acts, such as making manual refunds or expediting consideration of a taxpayer's problem.[4] In 1996 Congress incorporated this administrative practice into the Taxpayer Bill of Rights II (TBOR II), P.L. 104-168. TBOR II revised section 7811 by renaming the Taxpayer Ombudsman the Taxpayer Advocate and incorporated the above administrative practice by adding the following italicized phrase to subsection (b)(2):

> (2) to cease any action, *take any action as permitted by law,* or refrain from taking any action, with respect to the taxpayer under....

As with the original section 7811, neither the revised text or its legislative history suggest that a TAO would address the merits of a tax determination. First, as to the text, Congress did not modify paragraphs 7811(b)(2)(A) through (D). Therefore the interpretation dictated by the principle of eiusdem generis and incorporated into Treas. Reg. § 301.7811-1 still applies. The change made by Congress—adding the phrase "take any action as permitted by law" was included so as to allow TAOs to order the Service to take positive actions, and not simply prevent the Service from taking actions. But the actions still had to be ones permitted by the enumerated

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[4] DO 239 delegates to Regional Commissioners, District and Service Center Directors and Assistant Directors and others, including the TPA, "the authority to issue Taxpayer Assistance Orders on issues not specifically covered in ... section 7811..., but which involve a significant hardship that the IRS can relieve... ." While this language may appear very broad, it is not, as can be seen by comparing it with DO No. 193 (Rev. 5) (8-29-96), which delegates to the Deputy Commissioner all of the Commissioner's authority to "perform any function the Commissioner is authorized to perform." We do not read the reference to section 7811 in DO 239 as authorizing TAOs to modify or rescind substantive decisions regarding tax liabilities. First, to do so would create a conflict between the DO and the Treasury Regulation which explicitly forbids TAOs to contest technical determinations. Second, the DO can reasonably be read in harmony with the regulation. The reference to "issues not specifically covered in ... section 7811" was necessary because when the regulation was written section 7811(b)(2) allowed TAOs only to enjoin acts (and release levies). Thus, any issue which required a positive act to relieve the taxpayer's hardship would lie outside the issues specifically covered by section 7811. Third, the examples of issues given in the DO support this interpretation of the reference to "issues not specifically covered in ... section 7811." All of the examples in the DO are concerned with process; they recognize the TPA's authority to aid the taxpayer by ensuring timely review by the appropriate function. None suggest that the TPA may perform technical or substantive review.

statutes or any other like statute. Second, as to the legislative history, the Conference Report on TBOR II, H. Rep. 104-506, explains that the reasons for changing the law was that it was unclear in certain situations whether the Taxpayer Advocate had authority to issue a TAO. The examples used in the Conference Report all concern process issues. For example, the Report identifies one problem as being that "the IRS Collection Division may take an enforcement action when the taxpayer has had no actual notice of the deficiency and is not afforded any opportunity to obtain an administrative review of the validity of the tax deficiency." Significantly, the Conference Report does not then go on to say that the remedy for this problem is for the TPA to provide the missing substantive administrative review. Instead, the Conference Report says that what is expanded is the TPA's authority "to temporarily stay the IRS collection action in order to allow for a review of the appropriateness of the proposed action." There is no indication that the TPA would then have any authority to overrule the decision as to the appropriateness of the collection action. What the Conference Report describes is thus the established administrative practice of allowing TAOs both to order adverse actions stayed and to order another function to affirmatively perform its function (such as issuing or reissuing refunds due to the taxpayer or determining the appropriateness of a collection action) on an expedited basis as to a particular taxpayer.

Thus, based on the history of section 7811 and its regulations, we do not believe that TAOs can be issued to dispute the merits of a tax determination or to preempt or overrule the results of an established administrative or judicial review procedure, including the Appeals programs for examination and collection review. TAOs instead can expedite normal review processes and otherwise give special relief to taxpayers caught up in a system whose normal operating procedures cause significant hardship for the taxpayer.

The most recent chapter in this legislative story, the Restructuring and Reform Act (RRA), reinforces this view. While nothing in the RRA directly affects the scope of TAO authority under section 7811(b), two provisions in the RRA illustrate Congressional determination that taxpayers have access to various fora within the Service to resolve their problems and demonstrate that for technical determinations Congress chose Appeals as the proper forum. The first provision, RRA § 1102(c), revises I.R.C. § 7811(a) to provide for greater taxpayer access to the Taxpayer Advocate's office. The second provision, RRA § 3401, provides for greater taxpayer access to Appeals. We shall briefly discuss each one.

First, RRA § 1102(c) lowers the threshold for taxpayers to apply for a TAO. Prior to the RRA, a taxpayer could not apply for a TAO unless suffering or about to suffer a "significant hardship," a term not defined in the statute. The RRA both defines

"significant hardship" and also expands the TPA's authority to issue TAOs to situations where there is no significant hardship but "the taxpayer meets such other requirements as are set forth in regulations prescribed by the Secretary." RRA § 1102(c). The conference report suggests that the regulations are intended to be based on principles of equity, so that the TPA may consider temporarily relieving a taxpayer from the operation of the internal revenue laws, even when the taxpayer will suffer no significant hardship, if other principles of equity would favor review of the taxpayer's situation. Thus, although the law clearly attempts to increase the number of taxpayers for whom the issuance of a TAO could be considered, it does nothing to expand the scope of a TAO and does not alter or amend the regulation's prohibition against using a TAO to contest the merits of a tax or to substitute for established administrative and judicial review processes.

Second, RRA § 3401 provides taxpayers the right to be heard before the Office of Appeals within 30 days of being told that the Service has filed an NFTL and within 30 days after being told that the Service plans to levy the taxpayers property or rights to property. The Office of Appeals is charged with ensuring (1) that the Service has complied with applicable laws, (2) that the taxpayer has an opportunity to raise any issue relevant to the collection action, including a dispute on the merits of the liability sought to be collected if the taxpayer shows that a notice of deficiency which should have been received was not actually received, and (3) that the proposed collection action balances the need for efficient collection of taxes with the legitimate concerns of the taxpayer that the collection action be no more intrusive than necessary. The statutory authority to determine the appropriateness of the collection actions described in sections 6220 and 6330 is lodged in Appeals, not the TPA. While the TPA is authorized to enjoin the filing of NFTLs and the service of levies, the TPA may not so enjoin simply because the TPA disagrees with the substantive determination made by Appeals. The TPA may not accomplish indirectly what he has no authority to accomplish directly.

Collection determinations made by Appeals are, however, different than tax liability determinations in that all the facts necessary to determine a taxpayer's tax have already occurred at the time the liability determination is made, while the circumstances which make a particular collection action appropriate at one point in time may change. Congress recognized this in section 3401 of the RRA by providing for Appeals to retain jurisdiction over collection determinations made under that statute. In other situations, however, the taxpayer may need the TPA's help to adjust the collection process to reflect the taxpayer's changed circumstances. For example, if an installment agreement is terminated by the Service under I.R.C. § 6159, the taxpayer has the opportunity to request a hearing in Appeals to discuss the situation. If Appeals sustains the termination, the TPA

may not overturn or reverse that collection determination. The fact that Appeals' has, at one point in time, sustained a termination of an installment agreement, however, does not preclude the TPA from deciding whether, if the taxpayer's circumstances change, it would be appropriate to arrange for another installment agreement for the taxpayer.

Taxpayers who are encountering difficulties should be directed to the office that is most appropriate for their problems. If a taxpayer has a substantive disagreement with an assessed or proposed tax or with the validity of certain proposed collection actions, the taxpayer should be able to obtain an independent administrative judgment through Appeals. If a taxpayer is encountering problems either in obtaining that independent judgment or in dealing with the routine or general collection and accounting processes, the taxpayer should be able to obtain the assistance of the TPA who can either help the taxpayer through the Problem Resolution Program or else issue orders tailored to the taxpayer's circumstances through the TAO program if the taxpayer is suffering a significant hardship or meets such other requirements as may be written in the regulations to justify special processing.

We recognize, however, that the TPA may not always agree with a technical determination made by Appeals or by another function. In such cases the TPA can stop enforced collection activity pending a review by the appropriate function to ensure that the Service has complied with all legal and procedural requirements. The TPA can thus facilitate the administrative review process to ensure compliance with the letter and intent of the tax laws while not itself assuming the role of decision-maker as well as facilitator.

The case which prompted your request for advice serves as an example. The taxpayer here secured an independent administrative review of his proposed tax liability from Appeals. It was not for the TPA, however, to overrule Appeals' decision as to the taxpayer's liability. Nor was it for counsel to do so, since the case was still under the jurisdiction of Appeals. Neither the TPA nor Counsel had the authority to compromise or settle the case. This does not mean that the TPA could not aid the taxpayer through the TAO program, however, assuming the taxpayer met the TAO program requirements. The TPA could, for example, (1) have requested Appeals to reconsider or, in appropriate circumstances, elevate the matter up the chain of command, or (2) arranged for the taxpayer to submit an offer in compromise, if the TPA determinated that was the appropriate relief.

We were happy to assist you in this matter and hope this memorandum adequately address your questions and concerns. If you have any questions or comments, please contact either Lawrence H. Schattner or Bryan T. Camp of this office, at 202-622-3630.

cc: Office of Appeals