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

FEB 11 2000

MEMORANDUM FOR NATIONAL TAXPAYER ADVOCATE

Attn: Cheryl Harskowitch

FROM:

Kirsten Wielobob *KW*
Acting Counsel to the National Taxpayer Advocate

SUBJECT:

"Significant Hardship" under I.R.C. Section 7811(a)

You asked us for assistance in interpreting section 7811(a)(2)(A), "an immediate threat of adverse action," and section 7811(a)(2)(B), "a delay of more than 30 days in resolving taxpayer account problems." The discussion below is a starting point in determining reasonable interpretations of the above phrases and is made for purposes of your consideration and evaluation. We expect that this memo may raise more questions. As you further consider these issues and as questions arise, we are certainly available to further assist you with this matter.

In general, we believe that mechanical rules as to what circumstances qualify as significant hardship under section 7811(a)(2)(A) and (B) would not serve the purpose Congress intended for this statute. The decision to issue a TAO should involve the exercise of good, reasonable judgment based on the facts and circumstances of each case.

Background.

The Internal Revenue Service Restructuring and Reform Act of 1998 ("RRA 98") amended section 7811(a) to expand the circumstances in which a Taxpayer Advocate may issue a Taxpayer Assistance Order ("TAO") by including certain factual situations in the definition of "significant hardship" under section 7811(a)(2). A significant hardship now specifically includes "an immediate threat of adverse action; a delay of more than 30 days in resolving taxpayer account problems; the incurring by the taxpayer of significant costs (including fees for professional representation) if relief is not granted; or irreparable injury to, or a long-term adverse impact on, the taxpayer if relief is not granted." I.R.C. § 7811(a)(2)(A)-(D).

The legislative history of RRA 98 does not provide guidance regarding the meaning of the various phrases. As such and with no discernible legal limitation on the

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phrases, the Taxpayer Advocate Service ("TAS") has a good deal of flexibility in crafting reasonable interpretations of these phrases that will serve the needs of taxpayers and the TAS.

In interpreting the new provisions of section 7811, we suggest you keep in mind certain rules of statutory construction. First, these phrases should be given meaning within the context of the overall authority provided by section 7811. It appears that, in expanding the definition of significant hardship, subparagraphs (A) through (D) are examples of the circumstances in which relief should be available under the existing statute and that the expanded criteria continue to involve issues of process and taxpayer equity. In other words, the expanded authority does not provide mechanisms to contest the merits of a tax or to supplant established Service procedure. Second, each provision should be defined so as not to include situations that qualify as significant hardship under another provision of section 7811. For example, an immediate threat of adverse action should not address cases involving delays of more than 30 days in resolving taxpayer account problems.

Immediate threat of adverse action.

Section 7811(a)(2)(A) defines significant hardship to include an "immediate threat of adverse action." The basic principle governing the interpretation of this authority, as with all TAO authority, is that a determination of significant hardship relates to the administration of the tax law and not the law itself. The purpose of the TAO is to assist taxpayers with problems that arise with the IRS or with their accounts as a result of the Service's administration of the tax laws, but a TAO cannot override the tax law. Thus, a TAO cannot provide relief that releases the taxpayer from his or her obligation to pay taxes, stops the running of interest on an underpayment of tax or provides additional time for filing a claim for refund, even if the taxpayer is adversely affected. Accordingly, the authority to issue a TAO in the case where the taxpayer is under an immediate threat of adverse action by the Service should be limited to cases where administrative conduct or action substantially and negatively affects the interests of the taxpayer.

The question is then what conduct or action constitutes an "immediate threat of adverse action" reachable by the new TAO authority. The answer will depend largely on the facts and circumstances of the taxpayer's specific situation and, therefore, will vary by case.

A dictionary definition of certain terms may be useful in understanding the scope of this phrase. "Immediate" means near in time or close at hand and "threat" means a communicated intent to cause loss or harm to another or to another's property or an

indication of impending danger or harm. In the case of a taxpayer's interaction with the Service, we believe that a threat of an action could reasonably be construed as an action that will take place within the next 30 days or some shorter period. To include actions that may occur beyond the next 30 days would seem to stretch unduly a reasonable interpretation of "immediate."

An "adverse" action, again using a dictionary definition, means an action that is contrary one's interests or welfare or an action that is harmful or unfavorable. Thus, an adverse action, in the context of section 7811, should involve more than inconvenience to the taxpayer or dissatisfaction with or dislike of normal Service processes or tax law. Merely informing the taxpayer that he or she owes a legally determined tax or is expected to make arrangements to pay the tax (e.g., notice of tax due and demand for payment) should not be considered an adverse action. An "adverse action" should constitute actions by the Service that create negative financial consequences or economic burdens for the taxpayer because of the unusual nature of the taxpayer's situation or because of an abuse or misuse of process by Service personnel.

Accordingly, adverse actions could include (1) a levy and/or seizure of the taxpayer's property where the taxpayer has been accorded the requisite due process but has had a change in financial circumstance subsequent to the conclusion of the due process proceedings; or (2) the termination of an installment agreement based on taxpayer default without any consideration of the nature of the circumstance which caused the default; or (3) a failure to provide requested emergency processing of an offer to compromise that meets expedited processing criteria that will cause the taxpayer to be in breach of a business agreement; or (4) the failure to timely release a lien where the liability has been fully satisfied or is no longer collectible and the lien is interfering with the taxpayer's ability to sell the property.¹ In some instances, it may also include the filing of a notice of federal tax lien.² Although the previously existing TAO authority could have provided

¹ In most cases where the Service issues a Notice of Intent to Levy, the taxpayer will have the right to a "Collection Due Process" hearing before the Office of Appeals as a result of the notice. See I.R.C. § 6330. Thus, in the routine case, the immediacy of the threat of adverse action would be diminished by the taxpayer's assertion of his or her rights under section 6330.

² As a general matter, the filing of a notice of federal tax lien should not be considered an adverse action because the filing of such a lien does not deprive the taxpayer of the use of property. However, because the filing of a notice of federal tax lien has the potential to create economic consequences for a taxpayer seeking to obtain credit or to sell encumbered property, depending upon the particular

relief in many, if not all, of the examples above, relief would have been available only **after** finding that a "significant hardship" existed. Under the new authority, the immediate threat of an adverse action *is* the hardship and, thus, the basis for issuing a TAO.

A delay of more than 30 days in resolving taxpayer account problems.

Section 7811(a)(2)(B) also defines significant hardship to include "a delay of more than 30 days in resolving taxpayer account problems." This phrase presents two phrases that require definition: a "delay of more than 30 days" and a "taxpayer account problem". Again, we believe that the application of this subparagraph should be a product of the exercise of good judgment and reasonable interpretation rather than a mechanical rule.

The dictionary defines a "delay" as the act of moving slowly or putting off an action or decision. Where the Service has established procedural time frames for specific actions that exceed 30 days or where a process without a specific time frame would reasonably require more than 30 days to complete, the Service's failure to resolve the taxpayer's account problem within 30 days of the taxpayer's request should not be an action that the new TAO authority reaches. The Service is responsible for establishing reasonable operating procedures. It appears that RRA 98 did not remove that responsibility from the Service. Consequently, we do not believe that this provision can be used as a mechanism to override the Service's administrative authority.

We believe that "a delay of more than 30 days" can be interpreted fairly to include situations in which (1) the Service has not reached a determination on the taxpayer's request for assistance on the 31st day beyond (a) the time provided by published guidance (including the IRM) for the Service to act or (b) any reasonable time to act if published guidance is silent on the issue or merely makes a recommendation as to time frames; or (2) published guidance or procedures fail to take into account the exigencies of the taxpayer's current situation or unreasonably result in the compounding of applicable time periods. For example, if 30 days is the established time period for entity change requests (which would include name and SSN changes) and a taxpayer submits a name change and a SSN change request with the necessary documentation on the same date, it should not take 60 days (or

circumstances of the taxpayer's case such a filing may constitute an immediate threat of adverse of action.

30 days for each change) to complete the request.³ Where a taxpayer has raised an account problem, however, we do not believe that the Service should be permitted to “tack” on additional periods of time to its standard processing times by providing interim responses.

With regard to the “account problems” language, we believe that the term “account” is a direct limitation on the authority being granted. Congress specifically addressed taxpayer account problems in this provision rather than referring to delays related to “taxpayer problems” in general. Again, because the rules of statutory construction require that all words in a statute be given meaning, interpretation of this phrase must reflect Congress’ choice of language. In short, this provision extends to issues related only to a taxpayer’s actual account. We believe an “account problem” would not include questions regarding general interpretations of the law, administration of the tax laws, or to any other issues unrelated to a taxpayer’s actual liability, such as claims for damages. Further, we believe that taxpayer account problems do not include criminal matters or issues related to the accounts of third parties that do not directly impact the taxpayer’s account.

Please let me know if you have questions or need further assistance.

³ We have no idea how long it takes or should take the Service to complete entity change information. The 30 day time period included herein is strictly hypothetical.