

## TAXPAYER BILLS OF RIGHTS 1 AND 2: A CHARTER TO BE FOLLOWED BY THE REST OF THE WORLD OR JUST ANOTHER ATTACK ON THE TAX AUTHORITY?



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This article looks at the Technical and Miscellaneous Revenue Act of 1988, PL 100-647, Subtitle J, better known as Taxpayer Bill of Rights 1, which was passed by US Congress and signed into law in 1988. The article also examines a bill to amend the Internal Revenue Code of 1986 to provide for increased taxpayer protections, PL 104-168, or Taxpayer Bill of Rights 2 which passed unanimously in the House of Representatives 16 April 1996 and was passed without amendment by the Senate, received Presidential endorsement and became law on 30 July 1996.

This article focuses on the changes to the US Internal Revenue Code and analyses whether they advance taxpayers' rights or whether these legislative changes are merely a means by which the politicians can undermine the Internal Revenue Service (IRS) and thus score cheap points with their constituents. The article also considers whether the changes represent an attack on the IRS and its effective operation.

### INTRODUCTION

One of the most popular topics of discussion in the tax area is that of taxpayer rights. This is a popular topic with good reason. Taxpayers often perceive themselves as helpless morsels in the jaws of the tax system leviathan. Further, many legislators find that, although it is very difficult to explain the efficacy of a new tax or a reformed tax procedure, everyone is in favour of promoting taxpayer rights, even though few can readily enunciate what taxpayer rights are. Politicians are always keen to promote taxpayer rights. The Congress of the United States of America (USA) is no exception. The Congress

passed, in 1988, the Taxpayer Bill of Rights ("TBR1")<sup>1</sup> and, in 1996, Congress passed and the President signed the Taxpayer Bill of Rights 2 into law ("TBR2").<sup>2</sup> The names of both pieces of legislation are misnomers. In both instances the legislation was merely an omnibus law which provided a variety of procedural changes to the Internal Revenue Code without any coherent scheme. In the case of TBR1, the procedural provisions were merely one subdivision of an even larger piece of legislation. This legislation did not have a specific aim to enhance or advance the rights of taxpayers, which distinguishes it from the legislative efforts in other nations, where taxpayer bills of rights or charters of rights systematically establish specific rights and delineate limits on the tax administration.

Since TBR1 and TBR2 comprise a variety of procedural provisions, which have been put together into two pieces of omnibus legislation, it seems appropriate that the legislation is analysed by looking at the provisions, section by section, and discussing whether they advance taxpayers' rights. That is the aim of this article. It is the assertion of the author that TBR2, and to a lesser degree TBR1, are less an attempt by the legislators to advance the rights of taxpayers than a means by which politicians improve their stature with their electorate by attacking the IRS.

## TAXPAYER BILL OF RIGHTS 1

The Taxpayer Bill of Rights 1 was the name of a subtitle of an omnibus law affecting revenue collection and spending.<sup>3</sup> The stated policy aim of TBR1 was to provide a means by which abuses of power by the Internal Revenue Service ("IRS") could be prevented. Actual and perceived abuses by the IRS were noted and targeted for legislative treatment.

### 1 Audit quotas

Audit quotas are where the tax administration sets for its auditors arbitrary targets of tax dollars to be recovered, regardless of the specific facts of the auditors' caseloads. Associated with the use of audit quotas was the use of dollar amounts of taxes collected by an

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<sup>1</sup> Technical and Miscellaneous Revenue Act of 1988 PL 100-647 Subtitle J.

<sup>2</sup> TBR2 PL 104-168 was passed unanimously in the House of Representatives, 16 April 1996, was then passed unanimously, without amendment in the Senate, 11 July 1996, and was signed into law by the President, 30 July 1996.

<sup>3</sup> Above n 1.

auditor as a means of evaluating her or his performance. Prior to the passage of TBR1 it was alleged that the IRS used quotas as a means of assessing the performance of its staff.<sup>4</sup> Although it may be argued that this was an objective criterion for the assessment of performance, there were some serious worries about how this might affect the objectivity of the tax auditor. There would be a real concern (borne out by experience) that some auditors may become overly zealous in the pursuit of their work if they know that their performance is being gauged by the number of dollars they bring in on an audit. In light of this, the use of audit results as a criterion for performance appraisal was prohibited by the Act.<sup>5</sup> The Act also prohibited the use of audit result quotas.<sup>6</sup> This meant that the tax administration was not permitted to set targets for auditors in terms of number of dollars they were to collect in a particular period. These provisions make management appraisal of staff more difficult. However, this must be seen as a beneficial change for the taxpayer and not an unreasonable additional burden on the IRS.

## 2 Rule-making procedures

The procedures for making regulations were altered by TBR1. Any proposed regulation must be given to the Administrator of the Small Business Administration for comment on how the regulation might affect small businesses. The Administrator has four weeks in which to respond.<sup>7</sup>

The question may be asked why the small business sector should be given a special opportunity to comment on prospective regulation, since there is already a general publicity and comment requirement under the Administrative Procedure Act.<sup>8</sup> The answer may be the political influence of the small business sector in Washington, or their relative importance to the national economy as an employer.

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<sup>4</sup> Similar allegations are regularly made in Australia regarding Australian Taxation Office auditors and there, too, the allegations are denied.

<sup>5</sup> Section 6231(a)(1).

<sup>6</sup> Section 6231(a)(2).

<sup>7</sup> Section 6232(f).

<sup>8</sup> There is a requirement under the Administrative Procedure Act 5 USC §553 which requires that all substantive rule-making by an administrative agency must first be published in the Federal Register. Adequate opportunity must be given for interested parties to make submissions on the proposed regulations. This legislative procedure is currently being proposed in Australia in the guise of the Legislative Instruments Bill 1996 (Cth), introduced in the Australian House of Representatives on 26 June 1996.

The provisions calling for consultation in the regulation-making process can, on the other hand, be regarded as positive, since they make more democratic the regulation-making process. However, the provision can be criticised as pandering to an interest group, since the opportunity of the general public to comment on proposed regulations already exists under the Administrative Procedure Act. A special power providing for small business comment is redundant. The four week period for response is also a potential problem because it unnecessarily slows down the regulation process and the administration as a whole.

### 3 Assessment notices

Assessment notices are the statement by the tax administration of a taxpayer's taxable income and of taxes owed or refund payable. TBR1 has codified what information must be included in assessment notices. TBR1 requires that any notice of tax due or of a deficiency<sup>9</sup> (the general notices of assessment in the US system), must be accompanied by information regarding the "tax due, interest, additional amounts, additions to the tax, and assessable penalties included in such notice".<sup>10</sup> In the event that the notice does not have all of the required information, the notice will be considered invalid.<sup>11</sup>

The requirement to provide a basic explanation of the IRS conclusion, and the reasoning which led them to that conclusion, is basic to taxpayers' rights and principles of fairness. It is also essential to an efficient tax administration. If a taxpayer does not know why the administration reached its conclusion, they are more likely to seek review of the decision or to appeal it, if only to find out the basis upon which the decision was made. The administration must have sufficient confidence in their decisions to be willing to inform the affected person of the reasons underpinning the decision. This is an absolute minimum right that a taxpayer should expect. Codifying a requirement to provide the taxpayer with this information not only indicates an aim to improve taxpayer service but, at the same time, assists the IRS, as it will likely reduce further litigation and thus contribute towards the efficient operation of the tax system. That is not to say that appeal and review should be discouraged, since the taxpayer must have the right to have administrative decisions

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<sup>9</sup> Section 6233, Internal Revenue Code ("IRC") s 7522(b).

<sup>10</sup> Section 6233, IRC s 7522(a).

<sup>11</sup> Ibid. The effect of an assessment notice being invalid is that no action regarding collection may be effected unless and until first a valid notice is served.

reviewed by a disinterested reviewer. However, the appeal and review mechanisms should not have to be used by taxpayers as a means of obtaining basic information from the IRS regarding their assessment.

#### 4 Audits

One of the cornerstones of the investigative powers of the tax administration is the audit. The audit is a procedure by which statements regarding a taxpayer's return are verified, or additional information that is required by the tax administration is obtained. Under TBR1, the taxpayer has a right to record any in-person interview with an officer or employee of the IRS.<sup>12</sup> It is necessary, however, for a request to be made to the IRS officer in advance of the interview.<sup>13</sup> Further, the taxpayer must be given, prior to the conduct of an audit<sup>14</sup> or interview,<sup>15</sup> an explanation of the process, and the statement of the rights which the taxpayer has in relation to the process. These amendments are not really "reforms", they are a codification of then existing IRS practice.

Although the right to record an interview is an important one, this statutory right is flawed. If an IRS agent refuses to permit an interview or an audit to be recorded, the only remedy available to the taxpayer is a damages suit. This may be an illusory remedy since, if no recordings were made, it may be difficult for the taxpayer to prove that they made a request and that it was denied. This evidentiary problem could easily be rectified by requiring that the recording request be made in writing and served on a central office, in addition to serving the officer directly involved. If a request were made and the recording did not take place, questions would immediately be raised.

Another right introduced, allows a taxpayer to request, at any time during an interview, other than an interview initiated under an administrative summons,<sup>16</sup> a consultation with any person who is permitted to represent the taxpayer before the IRS. If such a request is made, the interview must be suspended.<sup>17</sup>

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<sup>12</sup> Section 6228, IRC s 7520(a)(1).

<sup>13</sup> *Ibid.*

<sup>14</sup> Section 6228, IRC s 7520(b)(1)(A).

<sup>15</sup> Section 6228, IRC s 7520(b)(1)(B).

<sup>16</sup> IRC Ch 78 subch A.

<sup>17</sup> Section 6228, IRC s 7520(b)(1)(B)(2).

Further, a taxpayer may have their representative appear at an interview in their place, if that representative has power of attorney. The IRS cannot compel the attendance of taxpayers themselves at an interview if they are represented at the interview by a legislatively recognised tax professional, unless the interview was pursuant to an administrative summons.<sup>18</sup> This means that, in most cases, the IRS is required to deal with the agent as representative of the taxpayer and cannot bypass them, at least in the context of the interview and audit. The IRS may contact the taxpayer directly where they feel that the representative is responsible for unreasonable hindrance or delay of their investigations.<sup>19</sup>

This change is an improvement for taxpayers' rights on the past practice of the IRS, which was to contact the taxpayer directly, even when they knew there was an agent representing them. The practice of bypassing the professional representative of the taxpayer was to elicit information or actions from the taxpayer which would not be forthcoming if the taxpayer's professional representative had been in attendance when the taxpayer was approached. This bypass practice was a colossal abuse of power. If similar tactics were used by the police in the criminal context, convictions would be overturned and cries of outrage would be heard.

## 5 IRS advice becomes binding

The IRS provides advice to taxpayers and others on the operation of the tax law and their interpretation of the law. This advice might take the form of rulings, which are statements of the official interpretation of the law by the IRS, or it may take the form of less formal advice to taxpayers on the meaning or application of the law. An important reform requires the IRS to be bound by their own advice and decisions. The amendment to the tax law provides that any additional tax or penalty shall be abated by the Secretary of the Treasury if that tax or penalty is attributable to erroneous written advice given by an employee or officer of the IRS, acting in their official capacity.<sup>20</sup> For this section to apply, the advice had to have been sought by the taxpayer,<sup>21</sup> reasonably relied upon by the taxpayer,<sup>22</sup> and the additional tax or penalty may not have been due to a failure of the

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<sup>18</sup> Section 6228, IRC s 7520(c).

<sup>19</sup> Ibid.

<sup>20</sup> Section 6229, IRC s 6404(f).

<sup>21</sup> Section 6229, IRC s 6404(f)(2)(A).

<sup>22</sup> Ibid.

taxpayer to provide adequate information to the IRS.<sup>23</sup> The abatement is not an excessive burden on the IRS. It merely requires the IRS to take responsibility for giving correct advice and not penalise taxpayers when they rely on information provided by the IRS which is not correct.

## 6 Taxpayer Assistance Orders

"Taxpayer Assistance Orders" are orders protecting the taxpayer from actions of the IRS. Taxpayer Assistance Orders are made by the Taxpayer Ombudsman where the Taxpayer Ombudsman determines, either as a result of a taxpayer application<sup>24</sup> or on its own initiative,<sup>25</sup> that the "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 [of the Treasury]".<sup>26</sup> The Orders are of broad application. They can require the Secretary of the Treasury to release property of the taxpayer,<sup>27</sup> or compel the Secretary to cease any action or refrain from taking any action which he or she is empowered to take under the Code.<sup>28</sup> Limitation periods in relation to actions subject to Taxpayer Assistance Orders are also affected by the order. All limitation periods cease to run from the time of the application by the taxpayer for a Taxpayer Assistance Order until the decision of the Ombudsman is made.<sup>29</sup> Further, the Ombudsman may, in the Taxpayer Assistance Order, set different limitation periods or suspend the running of limitation periods.<sup>30</sup>

## 7 Collection of taxes

Tax collection refers to processes by which the administration extracts taxes from persons or entities which do not comply voluntarily with their taxpaying obligations. A number of changes have been made to the regime governing collection of taxes. The basic time frame to respond to a demand for payment was increased from 10 to 30 days.<sup>31</sup>

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<sup>23</sup> Section 6229, IRC s 6404(f)(2)(B).

<sup>24</sup> Section 6230, IRC s 7811(a).

<sup>25</sup> Section 6230, IRC s 7811(f).

<sup>26</sup> Section 6230, IRS s 7811(a).

<sup>27</sup> *Ibid.*

<sup>28</sup> Section 6230, IRC s 7811(2), in particular the open-ended reserved powers in s 7811(2)(D).

<sup>29</sup> Section 6230, IRC s 7811(d)(1).

<sup>30</sup> Section 6230, IRC s 7811(d)(2).

<sup>31</sup> Section 6236, IRC s 6331(d).

This is not a change of great significance, but it does appear to be a more reasonable time frame for taxpayers to meet.

Previously, under the Internal Revenue Code, the powers to collect unpaid taxes were considerable, even by Australian standards. Where a US taxpayer has a tax liability and it remains unpaid, the Secretary has the power to levy on all of the taxpayer's property and rights to property (including wages and salary).<sup>32</sup> The levy power includes the seizure of property and its subsequent sale to meet tax liabilities. This power is not limited, unlike a Mareva Injunction in Australia where the scope of the injunction only extends to the amount of property equal to the value of the tax liability. The IRS power over the tax debtor's property is limitless, while taxes remain unpaid. The Secretary essentially may seize all property of the taxpayer, as contrasted with Australia where the property remains with the taxpayer, albeit with some restrictions on the way in which the taxpayer may deal with it.

Such a seizure power is potentially very dangerous in the hands of the administration unless there are considerable safeguards. This concern was addressed in TBR1 in the form of amendments to the levy power of the Secretary of the Treasury. The seizure and sale of the taxpayer's property cannot now take place without prior notice being given to the taxpayer. The amendments to the law increased the notice period from 10 to 30 days.<sup>33</sup> No notice is required, however, if the collection of the tax is in jeopardy according to a finding of the Secretary.<sup>34</sup>

Procedural safeguards were also introduced by the requirement in TBR1 mandating what information must be included in the notice.<sup>35</sup> The notice must contain references to the part of the Code relied upon to support the levy;<sup>36</sup> an outline of the procedures for levy and sale of property;<sup>37</sup> the administrative appeals available to the taxpayer;<sup>38</sup> other alternatives available to the taxpayer (including instalment agreements);<sup>39</sup> reference to the statutory provisions related to the

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<sup>32</sup> IRC s 6331(a).

<sup>33</sup> Section 6236(a)(1), IRC s 6331(d)(1).

<sup>34</sup> IRC s 6331(d)(3).

<sup>35</sup> Section 6236(a)(3), IRC s 6331(d)(4).

<sup>36</sup> Section 6236(a)(3), IRC s 6331(d)(4)(A).

<sup>37</sup> Section 6236(a)(3), IRC s 6331(d)(4)(B).

<sup>38</sup> Section 6236(a)(3), IRC s 6331(d)(4)(C).

<sup>39</sup> Section 6236(a)(3), IRC s 6331(d)(4)(D).



redemption of property and release of liens;<sup>40</sup> and the procedures related to the redemption of property and release from liens.<sup>41</sup>

When a levy is made, basic necessities of life are accommodated through a set of exclusions from levy found in the Internal Revenue Code.<sup>42</sup> The meagre exemptions for "fuel provisions, furniture, personal effects"<sup>43</sup> and "books and tools"<sup>44</sup> were increased in TBR1 by a factor of 10% as a recognition of the effect of inflation on the existing exemptions. Also added to the list of exemptions were payments under the Aid to Families with Dependent Children program (AFDC) and supplemental social security for the blind, aged or disabled.<sup>45</sup>

One large addition to the exempt category is the principal residence of the taxpayer.<sup>46</sup> This means that the principal residence is not subject to the levy at all. This is of particular benefit to high income, or formerly high income, tax debtors, who may have a great deal of their money tied up in their residence. The only exceptions to the principal residence exemption are if the Secretary concludes that the collection of tax is in jeopardy<sup>47</sup> or if the District Director or Assistant District Director of the IRS approves the levy.<sup>48</sup> It is difficult to understand why the law has, on the one hand, provided a meagre exemption for the basics of life, but then exempts the residence, no matter how lavish or expensive, clearly benefiting the wealthier taxpayer in a disproportionate manner. In its most positive reading, this may be just another representation of the sacrosanct nature of the principal residence and the preferences given to it by the law in the USA.<sup>49</sup> A more cynical view is that this is a means by which monied interests receive preferential treatment over lower income groups.

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<sup>40</sup> Section 6236(a)(3), IRC s 6331(d)(4)(E).

<sup>41</sup> Section 6236(a)(3), IRC s 6331(d)(4)(F).

<sup>42</sup> IRC s 6334.

<sup>43</sup> Section 6236(c)(1), IRC s 6334(a)(2).

<sup>44</sup> Section 6236(c)(2), IRC s 6334(a)(3).

<sup>45</sup> Section 6236(c)(4)(A), IRC s 6334(a)(11)(A).

<sup>46</sup> Section 6236(c)(4)(A), IRC s 6334(e).

<sup>47</sup> Section 6236(c)(4)(B)(2), IRC s 6334(e)(2).

<sup>48</sup> Section 6236(c)(4)(B)(1), IRC s 6334(e)(1).

<sup>49</sup> The preferential treatment of the primary resident is an almost universal feature in the tax laws of developed nations. The fact that these preferences are not eliminated, notwithstanding their distortionary effects on the economy, as well as their enormous negative effect on revenue collected, is a testimony to the strength of the house-owning electorate.

The TBR1 prohibits the IRS from engaging in an "uneconomic levy". An uneconomic levy is where the expenses related to the seizure and sale of a property are in excess of the amount which would have been netted by the sale of the property.<sup>50</sup> This provision protects the poorer tax debtor, whose assets are of little value financially, but nevertheless represent all they have. There were already some protections prior to TBR1, against such sales, under the provisions governing the sale of seized properties. The Secretary was already obliged to consider whether the sale of the property at the minimum price set and according to the other criteria given for the sale of property, was in the best interest of the USA.<sup>51</sup> The TBR1 requirement recognises that the pre-existing safeguards were not adequate, since an uneconomic levy could still be in the best interests of the USA. The additional requirement that the levy be economically viable permits the levy to be stopped earlier in the process. It also makes less likely the seizure and sale of property of the poor tax debtor with a small tax liability. These levies yield little or no tax and have the obvious appearance of unfairness. Furthermore, this restriction protects the IRS as it prohibits them from engaging in embarrassing activities which the press and the politicians love to publicise and use as a bludgeon to attack the tax administration.

The power of the Secretary of the Treasury to release property subject to levy was expanded and further particularised under TBR1.<sup>52</sup> Prior to the reforms, the Secretary could release the property upon a determination that the release would "facilitate the collection of the liability".<sup>53</sup> Instead of this single general criterion, the amendment added four more situations under which the Secretary could release property from levy.<sup>54</sup> Additional reasons to release from levy include: that the liability was satisfied or becomes unenforceable due to lapse of time;<sup>55</sup> an instalment agreement was entered into;<sup>56</sup> the Secretary has determined that exercising the levy would create an undue economic hardship on the tax debtor;<sup>57</sup> or the fair market value of the property exceeds the amount of the liability and the property could be released without hindering the collection of the tax debt.<sup>58</sup> Requiring

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<sup>50</sup> Section 6236(d), IRC s 6334(f).

<sup>51</sup> IRC s 6335(e)(1)(A)(ii).

<sup>52</sup> Section 6236(f), IRC s 6343(a).

<sup>53</sup> IRC s 6343(a) prior to the 1988 amendments.

<sup>54</sup> Section 6236(f), IRC s 6343(a).

<sup>55</sup> Section 6236(f), IRC s 6343(a)(1)(A).

<sup>56</sup> Section 6236(f), IRC s 6343(a)(1)(C).

<sup>57</sup> Section 6236(f), IRC s 6343(a)(1)(D).

<sup>58</sup> Section 6236(f), IRC s 6343(a)(1)(E).

further particularisation of circumstances under which the Secretary can release seized property will result in more protection for the taxpayer, since less unfettered discretion is vested in the administration. The discretion exercised by the administration is subject to known and clear criteria.

Payments by instalment have also been formalised. Payment by instalment agreements are written agreements entered into by the Secretary and the taxpayer, whereby the taxpayer agrees to make instalment payments to pay off an outstanding tax debt. In an important reform, representing an improvement of the treatment of the taxpayer, TBR1 introduced a formalised system governing the payment of outstanding tax liability by instalments.<sup>59</sup> Instalment agreements are only to be made where the Secretary is of the view that collection of the money would not otherwise be practicable.<sup>60</sup> Prior to the introduction of the TBR1, the IRS practice was to enter into instalment agreements regularly with the view that they could always unilaterally withdraw from the agreement and pursue the full amount later. Taxpayers complained that it was very unfair that they should negotiate in good faith and enter an instalment agreement, only to have it terminated unilaterally at some later time. The fact that the agreement could be terminated unilaterally, and without notice to the taxpayer, with the full amount of tax outstanding then being pursued, would often place the taxpayer in a grave situation.

This practice was correctly perceived by Congress as the IRS not dealing with the taxpayer in a bona fide manner when entering into these negotiations. The TBR1 amendments provide that, in the normal situation, once entered into, the instalment agreement will be in force for its full term.<sup>61</sup> Under the TBR1 amendments, the Secretary may only terminate an instalment agreement where the information provided by the taxpayer prior to entering into the agreement is inaccurate or incomplete,<sup>62</sup> or where the Secretary takes the view that the agreement will place the collection of tax in jeopardy.<sup>63</sup> The Secretary may also alter, modify or terminate an agreement where the taxpayer has failed to make an instalment payment under the agreement,<sup>64</sup> failed to meet any other tax liability,<sup>65</sup> or failed to

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<sup>59</sup> Section 6234, IRC s 6159(a).

<sup>60</sup> Ibid.

<sup>61</sup> Section 6234, IRC s 6159(b)(1).

<sup>62</sup> Section 6234, IRC s 6159(2)(A).

<sup>63</sup> Section 6234, IRC s 6159(2)(B).

<sup>64</sup> Section 6234, IRC s 6159(4)(A).

<sup>65</sup> Section 6234, IRC s 6159(4)(B).

provide a financial conditions update when requested to by the Secretary.<sup>66</sup>

If there has been a significant change in the financial position of the taxpayer, the Secretary retains the power to alter, modify or terminate the agreement.<sup>67</sup> A provision such as this has to be available, to provide flexibility to the IRS to address the situations where the financial position of the taxpayer has appreciably changed for the better, or worse, thus altering their ability to meet their obligation to pay, either under the instalment agreement or the original tax liability. Even here, procedural safeguards were introduced. Before the Secretary may make changes to the instalment agreement in relation to change of financial circumstances, he or she must give at least 30 days notice of intention to change the agreement.<sup>68</sup> The notice must provide reasons why the Secretary believes there has been a significant change in the taxpayer's financial condition.<sup>69</sup> These changes to the law provide taxpayers with some assurance that, if they enter into an instalment agreement, the IRS is negotiating in a bona fide manner. This means that taxpayers will not have the rug pulled out from under them without notice and without good cause.

## 8 Taxpayer service

Taxpayer service is the term used to describe advice and assistance provided to taxpayers. The Internal Revenue Code was amended to create a new administrative position of Assistant Commissioner (Taxpayer Services).<sup>70</sup> This Assistant Commissioner joins the other 11 Assistant Commissioners of the IRS and has the jurisdiction over "taxpayer services such as telephone, walk-in, and taxpayer educational services, and the design and production of tax and informational forms".<sup>71</sup> The Assistant Commissioner must give an annual report to Congress, jointly with the Taxpayer Ombudsman, focussing on the quality of taxpayer service being provided by the IRS.<sup>72</sup> Whether these changes will assist taxpayers is unclear. However, there is at least the intention to attempt to improve taxpayer service and coordinate reform efforts.

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<sup>66</sup> Section 6234, IRC s 6159(4)(C).

<sup>67</sup> Section 6234, IRC s 6159(3)(A).

<sup>68</sup> Section 6234, IRC s 6159(3)(B)(i).

<sup>69</sup> Section 6234, IRC s 6159(3)(B)(ii).

<sup>70</sup> Section 6235(a), IRC s 7802(c).

<sup>71</sup> Ibid.

<sup>72</sup> Section 6235(b).

## 9 Suits against the government

The award of reasonable litigation costs was expanded, beyond the then existing position of only covering court actions, to include administrative review.<sup>73</sup> These costs are awarded to whichever side of the litigation prevails.<sup>74</sup> The prevailing party will not be awarded costs if it is determined that administrative remedies within the IRS had not been exhausted<sup>75</sup> or that the prevailing party unreasonably protracted the proceedings.<sup>76</sup> Although this situation represents the normal "costs following the event" in British Commonwealth courts, it is unusual in the USA. The award of litigation expenses in the USA only occurs where it is specifically provided for by statute, and represents the exceptional situation. This expansion of taxpayer court remedies against the government was set out in TBR1.<sup>77</sup>

The definition of "reasonable litigation costs" is more comprehensive and generous than an ordinary order for costs under the Australian court model. Under TBR1, reasonable litigation costs include reasonable court costs,<sup>78</sup> and the reasonable expenses for expert witnesses up to the amount that the USA government pays expert witnesses.<sup>79</sup> In addition, the award would cover legal fees up to \$75 per hour, unless it can be shown that a higher hourly rate should be payable due to special factors, such as cost of living or the limited availability of qualified lawyers.<sup>80</sup>

A civil cause of action seeking compensation for damages sustained as a result of certain unauthorised actions of IRS personnel was introduced in TBR1.<sup>81</sup> The section provides that if, in relation to the collection of federal tax, an IRS employee or officer recklessly or intentionally disregards any provision of the Internal Revenue Code or any regulation promulgated under the Code, the taxpayer may

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<sup>73</sup> Section 6239, IRC s 7430.

<sup>74</sup> IRC s 7430(a).

<sup>75</sup> Section 6239(b), IRC s 7430(b)(1).

<sup>76</sup> Section 6239(b)(4), IRC s 7430(b)(4).

<sup>77</sup> Subtitle J Part III Proceedings by taxpayers ss 6239-6242.

<sup>78</sup> Section 6239(c)(1)(A), IRC s 7430(c)(1)(A).

<sup>79</sup> Section 6239(c)(1)(B)(i), IRC s 7430(c)(B)(i).

<sup>80</sup> Section 6239(c)(1)(B)(iii), IRC s 7430(c)(B)(iii). Tax lawyers are not seen under the law as being of limited availability and thus eligible for more money than the \$75 hourly cap. The TBR2 has increased the hourly rate payable to the lawyer to \$110 per hour. See discussion below.

<sup>81</sup> Section 6241.

bring an action for damages against the US government.<sup>82</sup> In almost all instances, this damages suit is the exclusive remedy of the aggrieved taxpayer for unauthorised action by IRS personnel.<sup>83</sup>

The award of damages is limited to direct and actual economic damages suffered by the taxpayer as a result of IRS malfeasance, plus costs of the action. The quantum of damages is limited to \$100,000.<sup>84</sup> The action has a very short limitation period. The action must be brought within two years of the right of action accruing.<sup>85</sup> If an action for damages under this section is pursued by the taxpayer, and it is found by the Tax Court to be frivolous or groundless, damages of up to \$10,000 may be awarded to the US government.<sup>86</sup>

The establishment of this civil cause of action under TBR1 was touted as a significant advance in taxpayers' rights. It is certainly an advance over the previous situation. However, questions must be raised about some aspects of the legislation. Conclusions may be drawn from the fact that the maximum penalty for pursuing a frivolous or groundless action in the Tax Court is generally \$25,000<sup>87</sup> and in the case of this new damages claim against the IRS it is only \$10,000. Perhaps this is the way in which the legislators feel that they can encourage (or at least not discourage) taxpayers to sue the IRS. It may also mean that actions bordering on frivolous will be brought, since the penalty is relatively low. This differential penalty limit also acts as a warning to the IRS that they will be subject to damages litigation if they engage in unauthorised activity. Although there is a valid argument that a civil action against the IRS should be available in the appropriate circumstances, it should be noted that such an action is not without risks to the operation of the tax system. The availability of a civil action against the IRS is of concern, since the threat of civil action may have a "chilling effect"<sup>88</sup> on the legitimate actions of the IRS and thus diminish its effectiveness.

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<sup>82</sup> Section 6241(a), IRC s 7433(a).

<sup>83</sup> Ibid. The only situation where there is an additional remedy is under IRC s 7432, where the taxpayer may bring a civil action for damages in District Court when an IRS employee fails to release property from lien under IRC s 6325.

<sup>84</sup> Section 6241(a), IRC s 7433(b).

<sup>85</sup> Section 6241(a), IRC s 7433(d)(3).

<sup>86</sup> Section 6241(b), IRC s 6673(b)(1).

<sup>87</sup> IRC s 6673(a)(1).

<sup>88</sup> "Chilling effect" is the situation where the threat of possible negative occurrences makes a decision-maker think twice about making a decision to do something, which otherwise they might not have hesitated making, had this

## TAXPAYER BILL OF RIGHTS 2

The second round of amendments affecting taxpayers' rights were signed into law 30 July 1996, through PL 104-168, "A bill to amend the Internal Revenue Code of 1986 to provide for increased taxpayer protections". Its short title was Taxpayer Bill of Rights 2 (TBR2). The two most significant events on the political landscape of the US during the eight year interval between TBR1 and TBR2 were, the Presidency changing from Republican (Reagan/Bush) to Democrat (Clinton) and the shift of majority power in the legislature from the Democrats to the Republican party in both houses of Congress. Of particular significance was a large change in personnel in the House of Representatives (lower house of Congress) with the election of a sizeable contingent of very conservative, very dogmatic, anti-government Republicans.

TBR2 was passed by the House of Representative on 16 April 1996.<sup>89</sup> One of the indications of the powerful nature of the concept of taxpayers' rights, even if it is only in perception and not in actuality, is the degree of bi-partisan consensus in support of this legislation in both houses of Congress. The bill was passed unanimously by the House of Representatives and only seven of 435 members were not present for the vote. Just like its predecessor, TBR2 is an omnibus bill covering a variety of procedural issues. The bill was passed unamended by a unanimous Senate and signed into law by the President on 30 July 1996.<sup>90</sup>

### 1 Taxpayer Advocate

TBR2 establishes an office of Taxpayer Advocate within the IRS.<sup>91</sup> The Taxpayer Advocate replaces the Taxpayer Ombudsman.<sup>92</sup> The Taxpayer Advocate will report directly to the Commissioner of the IRS with duties listed as: assisting taxpayers in resolving problems with the IRS; identifying problem areas in dealing with the IRS; proposing changes to the IRS practices and identifying possible legislative changes to reduce such problems.<sup>93</sup> It also proposed that

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external influence not existed. For example, the defamation laws in some jurisdictions may make a journalist hesitate to tell the "full truth" about an individual.

<sup>89</sup> TBR2 HR 2337.

<sup>90</sup> Public Law 104-168 TBR 2.

<sup>91</sup> TBR2 HR 2337 s 101.

<sup>92</sup> TBR2 HR 2337 s 101(b)(1).

<sup>93</sup> TBR2 HR 2337 s 101(a).

the office of Taxpayer Advocate will have an extensive reporting responsibility.

The office of Taxpayer Advocate will be required to make annual reports to the House Ways and Means Committee and the Senate Finance Committee. The reports must deal with a wide range of matters.<sup>94</sup> The reports will consist of two parts, objectives and activities. The objectives report will state what the goals of the Office of Taxpayer Advocate are for the upcoming fiscal year.<sup>95</sup> The activities report is more extensive. The report must provide information under ten headings.<sup>96</sup> The first three categories are first, initiatives taken by the Taxpayer Advocate to improve taxpayer service and IRS responsiveness;<sup>97</sup> second, recommendations from persons authorised to issue taxpayer assistance orders;<sup>98</sup> and, third, a summary of at least 20 of the most serious problems encountered by taxpayers.<sup>99</sup> The report must also outline which of these three categories has been addressed and the result of the action,<sup>100</sup> and which of the three actions has not yet been completed.<sup>101</sup> Finally, the report must also list those matters in the second and third categories which have not been addressed at all, accompanied by reasons why no action has been taken and naming the IRS official responsible for the inaction.<sup>102</sup>

The Taxpayer Advocate is forbidden from providing the report to the Commissioner of the IRS prior to its submission to the Congressional Committees.<sup>103</sup> The legislation also mandates that the Commissioner establish a mechanism for providing an official response to all recommendations of the Taxpayer Advocate within three months of receiving them.<sup>104</sup>

The only significant change in TBR2 from the existing Taxpayer Ombudsman structure is the reporting requirement which the Taxpayer Advocate must fulfil. Although reporting by government

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<sup>94</sup> TBR2 HR 2337 s 101(d)(2)(B)  
<sup>95</sup> TBR2 HR 2337 s 101(d)(2)(B)(i).  
<sup>96</sup> TBR2 HR 2337 s 101(d)(2)(B)(ii)(I)-(X).  
<sup>97</sup> TBR2 HR 2337 s 101(d)(2)(B)(ii)(I).  
<sup>98</sup> TBR2 HR 2337 s 101(d)(2)(B)(ii)(II).  
<sup>99</sup> TBR2 HR 2337 s 101(d)(2)(B)(ii)(III).  
<sup>100</sup> TBR2 HR 2337 s 101(d)(2)(B)(ii)(IV).  
<sup>101</sup> TBR2 HR 2337 s 101(d)(2)(B)(ii)(V).  
<sup>102</sup> TBR2 HR 2337 s 101(d)(2)(B)(ii)(VI).  
<sup>103</sup> TBR2 HR 2337 s 101(d)(2)(B)(iii).  
<sup>104</sup> TBR2 HR 2337 s 101(d)(3).



agencies to the legislature can be of assistance to operating open government and should therefore be applauded, the manner in which these reporting provisions are structured is aimed at promoting witch hunts against the tax administration rather than disclosing useful information.

## 2 Taxpayer Assistance Orders

Taxpayer Assistance Orders, introduced in TBR1,<sup>105</sup> had some procedural modifications under TBR2. Under TBR2, the opportunity for a taxpayer assistance order to be modified or rescinded has been restricted. The power to modify or rescind is now only vested in the Taxpayer Advocate and the Commissioner or Deputy Commissioner of the IRS.<sup>106</sup> It may only be exercised if a written explanation for the modification or rescission is provided to the Taxpayer Advocate. Under TBR1, a wider range of personnel could modify or rescind a taxpayer assistance order, including a Regional Director of Appeals, Compliance Center Director, Service Center Director or District Director.<sup>107</sup>

## 3 Collection of taxes

The collection rules allow a grace period where no interest is charged. The interest free period for payment of taxes after notice and demand is increased from 10 to 21 calendar days under TBR2. The 10 day rule will still apply when the amount at issue is equal to, or greater than, \$100,000.<sup>108</sup>

The rules governing instalment agreements have also been modified. TBR2 adds a notice requirement where the Secretary wishes to terminate an instalment agreement.<sup>109</sup> Previously, if certain conditions existed, the Secretary could terminate an agreement without notice. Under the proposed legislation, not only would it be necessary to provide 30 days written notice of termination, but the written notice would have to include reasons justifying the termination.<sup>110</sup> Under TBR2, there is an independent administrative

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<sup>105</sup> See subheading 6 of Part A "Taxpayer Assistance Orders".

<sup>106</sup> TBR2 HR 2337 s 102(b).

<sup>107</sup> IRC 1986 s 7811(c).

<sup>108</sup> TBR2 HR 2337 s 303(a).

<sup>109</sup> See Part A, subheading 7 "Collection of taxes", especially n 59 and following, and accompanying text.

<sup>110</sup> TBR2 HR 2337 s 201(a).

review of the decision to terminate an instalment agreement.<sup>111</sup> The additional protections to taxpayers entering into instalment agreements such as written reasons explaining any alteration or termination of an agreement, and particularly the establishment of an independent administrative review, is a great step forward in taxpayer rights.

Rules affecting the application of liens have been changed. TBR2 provides that, in certain circumstances, a notice of lien<sup>112</sup> can be withdrawn, *ab initio*.<sup>113</sup> The circumstances under which the lien may be withdrawn are: where the filing of the notice is premature or otherwise not in accord with administrative procedures; the taxpayer enters into an instalment payment agreement to satisfy the tax debt; withdrawal of the notice of lien would facilitate collection of the debt; or, with consent of the taxpayer or Taxpayer Advocate, if the withdrawal is in the best interests of the taxpayer<sup>114</sup> and the USA.<sup>115</sup> An additional protection for taxpayers who have had a lien withdrawn, is that they may require that the Secretary of the Treasury send a notice to any financial institution or creditor listed by them, stating that the notice of lien has been withdrawn. The Secretary would promptly make reasonable efforts to contact credit reporting agencies.<sup>116</sup> While significantly assisting taxpayers to correct damage to their credit records, the deficiency with this remedy is that taxpayers do not necessarily know which credit agencies hold credit information on them.

#### 4 Timely filing rules

The Internal Revenue Code requires that tax returns be lodged (or filed) in a timely fashion. The rules governing what constitutes a timely lodgement are called the "timely filing rules". A simple, yet important practical change for the better in TBR2, is to the postal filing rule. Prior to TBR1, only delivery by hand or posting by US Post prior to the deadline was acceptable to meet the statutory requirements of timely filing.<sup>117</sup> The TBR2 changes that rule to provide that reputable

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<sup>111</sup> TBR2 HR 2337 s 202(a).

<sup>112</sup> Under US income tax law, once a tax debt has been established and a notice to pay the taxes has been served on the taxpayer and not acted upon, the revenue authorities may place a lien on property and then sell it to meet the tax debt.

<sup>113</sup> TBR2 HR 2337 s 501(a).

<sup>114</sup> As determined by the Taxpayer Advocate.

<sup>115</sup> TBR2 HR 2337 s 501(a).

<sup>116</sup> TBR2 HR 2337 s 501(a), adding IRC s 6323(j)(2).

<sup>117</sup> IRC s 7502.

courier services which have delivery records comparable or better than that of US Post<sup>118</sup> may be used to meet the timely filing rules.<sup>119</sup>

## 5 Joint filing issues

Under US income tax law, married persons may file a joint return.<sup>120</sup> When married persons file jointly, they have joint and several liability to pay tax. This means that each is responsible for the entirety of the tax liability of the couple, regardless of the actual distribution of the income. TBR2 mandates the Secretary of the Treasury or the Comptroller General of the USA to perform a number of studies on issues related to joint tax returns.<sup>121</sup> Studies are called for on each of the following:

- the effect of changing liability in relation to filers of joint returns from joint and several liability (that each spouse is potentially responsible for the full tax liability of both spouses) to liability proportionate to the tax liability of each spouse (each spouse being legally responsible for taxes owing in relation to income earned by them only);<sup>122</sup>
- the effect of a divorce decree which allocates liability for tax as between the couple: must the Secretary limit the pursuit of taxes in accordance with that decree?<sup>123</sup>
- whether the current provisions of the Internal Revenue Code, which were designed to protect innocent spouses, actually perform the job for which they were designed;<sup>124</sup> and
- whether rules currently applying to non-resident aliens, which provide that certain community income is considered the income of one spouse, and so not subject to levy for failure to pay tax, should be made to apply to resident taxpayers as well.<sup>125</sup>

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<sup>118</sup> TBR2 HR 2337 s 1210, adding IRC s 7502(f)(2)(B).

<sup>119</sup> TBR2 HR 2337 s 1210.

<sup>120</sup> IRC s 6013(a).

<sup>121</sup> TBR2 HR 2337 s 401(1)-(4).

<sup>122</sup> TBR2 HR 2337 s 401(1). Under current law, each joint filer is jointly and severally liability for the full tax liability of both filers.

<sup>123</sup> TBR2 HR 2337 s 401(2).

<sup>124</sup> TBR2 HR 2337 s 401(3).

<sup>125</sup> TBR2 HR 2337 s 401(4).

The reports are to be submitted to Congress within six months of the promulgation of the legislation.

An important proposal will give ex-joint filers, who are no longer married, or who no longer reside in the same household, the power to make a request to the Secretary of the Treasury for information about whether collection activities are being undertaken against the other ex-joint filer. The Secretary will provide the person with information about the nature of the collection activity and the amount collected.<sup>126</sup> The policy rationale for this information exchange is the recognition that a joint filer has ongoing joint and several liability, even though they no longer have a relationship with the other joint filer. It is then reasonable to let the former joint filer know what is happening in an investigation on something for which they may have vicarious liability. The commissioning of studies and the changes in the law are a positive change, as they recognise that there may be problems with the current joint filing rules and that they should be studied and the problems addressed.

## 6 Actions against information providers

Information about the income position of taxpayers is not exclusively provided by the taxpayers themselves; third parties also provide income information. The taxpayer could be harmed by information providers who give information to the IRS which is not true. TBR2 provides for the establishment of a civil action against the filer of an information return who wilfully provides fraudulent information about payments made to another person. The civil action can be brought by the harmed taxpayer, against whom the fraudulent information provider proffered information.<sup>127</sup> Further, the use of third party information has been changed. TBR2 provides that, where a taxpayer is involved in a court proceeding to dispute an assessment, where the taxpayer has cooperated with the Secretary, and the Secretary has relied on information provided by a third party, the Secretary will have the burden of producing reasonable and probative information, concerning any deficiency in tax, in addition to the information provided by the third party.<sup>128</sup> Whether this is an advance in taxpayer rights can be questioned. Does this really add anything to existing concepts of evidence law? A court is surely going to be interested under general evidence law concepts in corroborative evidence and would not base a case entirely on the statement of a

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<sup>126</sup> TBR2 HR 2337 s 403(a).

<sup>127</sup> TBR2 HR 2337 s 101(a), proposed IRC s 7434 (a).

<sup>128</sup> TBR2 HR 2337 s 602(a).

third party. The civil action against fraudulent information providers is a step forward in taxpayer rights without imposing too great a burden on information providers, since the action will only be sustained if the person wilfully provides fraudulent information about the taxpayer.

## 7 Suits against the government

Taxpayers may bring civil actions against the government when there has been unauthorised collection activity. TBR1 encouraged these actions by permitting the award of costs to a successful party bringing such an action.<sup>129</sup> One of the substantive changes in TBR2 is altering the burden required to be met before a payment of lawyer fees to the taxpayer is made. The burden in TBR1 was that, the taxpayer had to establish that the position of the government in the proceeding was not substantially justified, before the taxpayer was able to recover legal fees from the government.<sup>130</sup> TBR2 shifts the burden to the government to prove that its position was substantially justified.<sup>131</sup> There is a rebuttable presumption that the government was not substantially justified if it failed to follow regulations, revenue rulings or procedures, information releases, notices and announcements or private rulings, technical advice memoranda or determination letters issued to the taxpayer.<sup>132</sup>

It is a substantial policy step to provide a right of action over the operation of a government department and to encourage the actions by awarding legal costs. However, it is questionable why the more difficult standard of proving that the government's action was not substantially justified was replaced by a complete shift of burden from the taxpayer to the IRS to prove that their position was substantially justified. It seems that whenever a taxpayer succeeds in a dispute with the IRS they will now seek their legal expenses from the IRS and require the IRS to prove that their position was substantially justified. It will not be surprising if the argument is made that the fact that the IRS lost the action is proof that the position of the IRS was not justified. If this happens in the courts, the IRS will find that it is less and less inclined to pursue disputes with taxpayers for fear of having to meet the litigation costs of the taxpayer, as well as their own, since the IRS is already hesitant to litigate due to lack of resources. Also,

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<sup>129</sup> See Part A Subheading 9 "Suits against the government", especially n 73 and following, and accompanying text.

<sup>130</sup> IRC 1986 as amended s 7430(4)(A)(i).

<sup>131</sup> TBR2 HR 2337 s 701(b).

<sup>132</sup> TBR2 HR 2337 s 701(b), adding IRC new s 7430(B)(i)-(iii).

there is no symmetry in this provision. There is no provision for the IRS to recover its legal expenses when a taxpayer brings an unsuccessful action against the IRS.

Civil damage actions against the government for unauthorised collection activity were introduced under TBR1.<sup>133</sup> The damages limit for actions related to unauthorised collection action has been raised under TBR2 from \$100,000 to \$1,000,000.<sup>134</sup> Damages will still be limited to actual, direct economic damage as a result of the intentional or reckless action of an officer or employee,<sup>135</sup> plus the costs of the action.<sup>136</sup> Also, instead of barring the award of damages if administrative remedies are not exhausted, TBR2 proposes that damages may be reduced by the court, if it finds that all administrative remedies were not exhausted.<sup>137</sup>

## 8 Retroactivity of regulations

Prior to TBR2, regulations would apply retroactively, except where the Secretary of the Treasury prescribed the extent to which the regulations would not apply retrospectively.<sup>138</sup> Under the TBR2, the general rule changed to one of no retrospectivity unless certain conditions existed.<sup>139</sup> Under the new rule, regulations do not apply until their contents are issued to the public.<sup>140</sup>

## OVERVIEW

As Bills of Rights, TBR1 and TBR2 do not meet the standard of the US Bill of Rights, whose position in the American political iconography was meant to be evoked. The Taxpayer Bills of Rights do not meet the standard of their constitutional namesake, because they are not, in the main, provisions which further the rights of taxpayers. The provisions are a hotch podge of legislative amendments rather than a coherent document formulating a comprehensive framework of rights, which a Bill or Charter of Rights should. There are some

<sup>133</sup> See Part A Subheading 9 "Suits against the government", especially n 84 and following, and accompanying text.

<sup>134</sup> TBR2 HR 2337 s 801(a).

<sup>135</sup> IRC 1986 s 7433(b)(1).

<sup>136</sup> IRC 1986 s 7433(b)(2).

<sup>137</sup> TBR2 HR 2337 s 802(a).

<sup>138</sup> IRC 1986 s 7805(b).

<sup>139</sup> TBR2 HR 2337 s 1101(b).

<sup>140</sup> TBR2 HR 2337 s 1101(b)(1)(C).

positive reforms in TBR1 that reduce arbitrariness, improve the IRS operating procedures and make the IRS appear fairer, especially as regards to the rules governing compromise and settlement. These changes must be applauded, since anything which makes an administrative agency appear fairer will assist in voluntary compliance. TBR2 is not without merit either. There are some improvements building on the reforms in TBR1, and some changes which are new in TBR2, (notably the provisions dealing with liability of joint filers who are no longer married). However, neither piece of legislation does what its name purports, provide a comprehensive and coherent structure for the protection of taxpayer rights.

There are, however, some disturbing aspects of TBR2 which overshadow any of the positive developments. The most disturbing are the reporting requirements which the Office of Taxpayer Advocate must fulfil. There is no problem with having government agencies report to the legislative branch. In fact, such reporting is to be encouraged, in that it leads to greater responsibility in the administration and more open government generally. However, the reporting requirements go much further here. The rules set up a situation where the administration is immediately on the defensive, since it needs to explain and justify why it did not address an earlier reported problem or complaint in relation to the administration. The rule that, even though the Taxpayer Advocate reports to the Commissioner, the Commissioner cannot see the report prior to it going to Congress is also worrisome. It gives the impression of the reintroduction of the Star Chamber, where investigations take place with no opportunity to challenge information or face your accusers, a situation which would never be tolerated by the US Constitution in relation to private individuals.

The motivation for TBR2 was not the desire to improve the situation of the ordinary taxpayer. Rather it was a means by which Congress could further undermine the IRS and score popularity points with the electorate. The negative attitude towards the IRS which pervaded the House membership was clear and unambiguous in the speeches in the House prior to the vote on TBR2. One of the co-sponsors of the legislation, Rep Nancy Johnson (Republican-Connecticut), in her introduction of the legislation, said that:

[T]he Taxpayer Bill of Rights aims to expand the protections for the unlucky taxpayers who become involved in a tax

dispute with the IRS. These taxpayers often feel that they are engaged in a David versus Goliath contest.<sup>141</sup>

Who is David and who is Goliath? It could be argued that, in a conflict between the IRS and a sophisticated taxpayer with substantial financial resources, the taxpayer is Goliath, or at least David with an uncrimped semi-automatic weapon, against the IRS in the persona of a hobbled, unarmed Goliath. The IRS, having been starved of financial resources, as well as having been subjected to a hiring freeze for a number of years, is not the formidable institution it once was. The further encumbering of the IRS by some of the provisions in TBR2 should be seen as adding insult to the injury already suffered by the IRS, and not really advancing the rights of the taxpayer substantially.

The antagonistic attitude to the IRS is well characterised by the comments of Rep Archer, the Chair of the House Ways and Means Committee (one of the committees to which the Taxpayer Advocate must report), when he was speaking in favour of the TBR2.

There is no question the IRS has grown too powerful and too intrusive. However, this has come in direct response to the growing complexity of our current tax system. The ultimate solution to this problem is to tear the income tax out by its roots and eliminate the need for an agency which must delve into our private lives in order to enforce the tax system. But until Congress fundamentally reforms the tax laws, the next best approach is to make the current tax system operate in a way which treats taxpayers more fairly.<sup>142</sup>

Rep Sam Johnson from Texas said:

But this bill is important because the powers of the IRS to investigate and examine taxpayers are greater than any other Government agency. They are intrusive. They are into our lives, and it seems that the constitutional rights of taxpayers are always trampled upon but nothing is ever done.<sup>143</sup>

These leading members of Congress were using these evocative (and generally inaccurate) stereotypes of the IRS to justify their legislative proposals.

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<sup>141</sup> Rep N Johnson, House of Representatives Debates, from Tax Analysts, *Tax Notes Today*, 24 April 1996, Lexis database.

<sup>142</sup> Rep W Archer, House of Representatives Debates, from Tax Analysts, *Tax Notes Today*, 24 April 1996, Lexis database.

<sup>143</sup> Rep S Johnson, House of Representatives Debates, from Tax Analysts, *Tax Notes Today*, 24 April 1996, Lexis database.



One of the members of the House argued that the TBR2 will assist the IRS, since it will improve the relationship between the taxpayer and the IRS and thus act to improve levels of compliance beyond that of the current level.<sup>144</sup> If that were to be the effect of the legislation, that would be a goal to be applauded. However, the reality is that this is an overly optimistic view of what the effect of TBR2 will be. The more likely effect is for the law to make some administrative improvements, but have an overriding effect of undermining and demoralising the IRS.

There is a serious problem associated with undermining the IRS unnecessarily or excessively. The concern is that the IRS would no longer be perceived as a credible or effective tax administration and widespread voluntary compliance with the law would cease to take place. If this were to eventuate, the ordinary working class taxpayer, whose taxes are withheld at source by PAYE deductions, would be greatly disadvantaged. Higher income and self-employed persons would have the opportunity to refrain from fully complying with the law. These higher income taxpayers, not subject to PAYE, would take a chance with the audit roulette wheel, the odds of losing having been greatly reduced since the IRS became poorer resourced, less powerful and less effective. This lack of compliance would result in a substantial drop in revenue collected, which, in turn, would mean that revenue would have to be made up "somewhere". That "somewhere" would be the ordinary PAYE taxpayer, who is the easiest to collect from, since the tax money comes in without it ever having been in the hands of the taxpayer. PAYE taxpayers will soon notice that they are bearing the burden of, and being punished for, the lack of compliance from other sectors of society and they, too, will attempt to be non-cooperative in relation to their tax system obligations (although they have limited capacity to do so). This general breakdown in voluntary compliance is potentially disastrous to the entire tax system.

Improving taxpayer service is a goal which should not be minimised. The level of compliance with the tax law can often be greatly influenced by the perception of the taxpayer as to the fairness of the tax system. Improving the quality of the information in notices to taxpayers can only help to foster a perception that the tax system is fair in its application to the taxpayer. When taxpayers have this perception, they are more likely voluntarily to comply with its requirements, thus requiring the administration to employ fewer

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<sup>144</sup> Rep Hefley, House of Representatives Debates, from Tax Analysts, *Tax Notes Today*, 24 April 1996, Lexis database.

resources to promote compliance. However, under-resourcing and restricting the operations of the IRS undermines equity and does not serve taxpayers' rights.

There are problems in the operation of tax systems of all nations. A tax bureaucracy with over 100,000 employees, as exists in the US, will inevitably have some problems. It is appropriate for the legislative branch to seek to deal with such problems and promote taxpayers' rights and taxpayer service. However, the legislative initiatives in TBR1 and TBR2 operate in a too piecemeal and reactive fashion, when there was the opportunity to establish a comprehensive and coherent program of taxpayers' rights. It is tragic that an opportunity to advance taxpayers' rights was missed in favour of a legislative program which was designed primarily to promote an anti-government agenda.