

Independent IRS Appeals Seen As Step In Right Direction

By Amy Lee Rosen

Law360 (April 11, 2018, 6:47 PM EDT) -- One of several bills before the House of Representatives to reform the Internal Revenue Service aims to ensure an independent appeals process and has gained strong support among tax professionals and lawmakers on both sides of the aisle who say assuring impartial review of taxpayer appeals should be a central component of any reform measure.

The Taxpayer First Act, known as H.R. 5444 and introduced by Rep. Lynn Jenkins, R-Kan., on Tuesday, would create an IRS independent office of appeals, improve IRS customer service, provide sensible enforcement and modernize the agency's organization. Jenkins, along with Rep. John Lewis, D-Ga., released a discussion draft in March of broader legislation that was broken down into separate bills and scheduled for markup by the Ways and Means Committee on Wednesday morning.

Ways and Means Chairman Kevin Brady, R-Texas, amended H.R. 5444 with minimal administrative change, and the committee's approval of the bill on Wednesday paves the way for the measure to be voted on, debated or amended. If the bill passes the House by a simple majority, which requires 218 out of 435 votes, it will move to the Senate.

A report from the Joint Committee on Taxation on Tuesday said while the Internal Revenue Code does not mandate that an independent office must exist to review IRS administrative determination, it does require an independent administrative review of certain determinations. With a negligible revenue effect, Jenkins' bill codifies the requirement of an independent administration appeals function by creating a new office headed by a chief of appeals. It allows taxpayers with adjusted gross income less than \$400,000 and entities with gross receipts less than \$5 million to review nonprivileged portions of their case, the joint committee said.

Former House Ways and Means Chairman Dave Camp, who now works as a senior policy advisor at PwC's Washington National Tax Services practice, told Law360 the Taxpayer First Act is long overdue, and having IRS independent appeals will ensure taxpayers are treated fairly.

"The independent appeal process and review process is probably the biggest change there," he said. "I commend Congresswoman Jenkins and Congressmen Lewis for pursuing this in a bipartisan way. It's a good government bill whose time has come."

Camp said if the bill succeeds in moving through committee in a bipartisan way, then hopefully that means the Senate will look at it seriously.

Robert E. McKenzie, a partner at Saul Ewing Arnstein & Lehr LLP, told Law360 that in 1998 Congress said there should be no ex parte conversations between the front-line IRS employees who did the audit or threatened collection and appeals, but some practitioners believed the IRS has moved away from that protection.

“I like this legislation because it adds very specific language to say that appeals must be independent from the functions doing the original audit or the original collection actions,” he said. “It creates more due process.”

The bill is designed to put a tougher wall between the front-line collection and examination functions and the appeals function, McKenzie said, while safeguarding an avenue of appeal that remains distinct from the Tax Court as well as federal district courts.

Alexander J. Reid, a partner at Morgan Lewis & Bockius LLP, said having an independent appeals process is similar to having an arbitration forum because IRS appeals are less costly than fighting in district court, which requires a person to first pay the tax liability and litigate later, or filing in Tax Court, where the taxpayer does not pay the liability but faces potentially higher litigation costs than in IRS Appeals.

“The problem with the current appeals process is that it has not been independent enough under current law and that’s where this change coming in makes a big difference,” Reid said.

Normally, appeals officers are former exam agents and not attorneys, and there is too much consultation between appeals officers and IRS attorneys. As such, the legislation would ensure the office of appeals is truly independent and gives taxpayers a right to an appeal, he said.

“Everybody should have access to this forum,” Reid said. “It’s just weird to give the judge, jury and executioner the power to decide whether you get the right to appeal. That’s just too much power to the service.”

The bill received praise from several members of Congress at the Ways and Means markup on Wednesday. Brady said creation of an independent office to handle taxpayer appeals will ensure taxpayers are no longer at a disadvantage to the IRS, while Lewis noted that improving the independent appeals process is a common-sense update to the IRS.

Jenkins, who is a certified public accountant, said her measure will make sure taxpayers receive a fair and impartial review of disputes, and that commitment to impartial treatment is at the bedrock of the faith Americans place in the IRS.

Ryan J. Kelly, a partner at Alston & Bird LLP, said while the bill will help taxpayers by providing greater confidence in the system because it is more transparent, the debate really hinges on whether all taxpayers have a right to air disputes before the office of appeals, which is the only administrative check on income adjustments that are proposed by IRS examination.

On one hand, the service does not have the resources to litigate every income adjustment fought by a taxpayer, but on the other hand, not every taxpayer has the resources to litigate a tax dispute, he said.

“Currently, with Rev. Proc. 2016-22, certain executives within LB&I or the LB&I Counsel can designate a case for litigation based on ‘sound tax administration’ without following the service’s traditional process

for designating cases,” Kelly said.

While the typical path for a case designation usually requires support from the IRS Office of Chief Counsel, there is usually little oversight of the IRS’ Large Business and International Division, or LB&I, when it uses Rev. Proc. 2016-22, and no explanation is required in making that decision, Kelly said.

If there is no universal right to an appeal, then the question arises of who is in charge of denying the appeal and what oversight would or should be involved in that decision.

“The proposed language in Section 101 may not be perfect, but it does provide some positive reforms for the appeals process that will be helpful for taxpayers by providing greater access to appeals and also increase the likelihood that more cases can be resolved without litigation,” Kelly said.

--Editing by Tim Ruel and Neil Cohen.