

IRS Floats Rule To Expand Access To Administrative Appeals

By **Stephen K. Cooper**

Law360 (September 9, 2022, 8:04 PM EDT) -- Taxpayers seeking to settle disputes with the Internal Revenue Service over their unpaid tax liabilities would get greater access to the service's office of administrative appeals under proposed regulatory guidance released Friday.

The proposed rule, required by enactment of the Taxpayer First Act in July 2019, would establish how the IRS will operate its Independent Office of Appeals to resolve federal tax controversies that do not require litigation. In most cases, the taxpayer will have received a preliminary letter from the service determining their liability, prompting an appeal request.

The law grants access to the IRS appeals function for most taxpayers, sets up a method for certain taxpayers to protest if they are denied access and requires the IRS commissioner to appoint a chief of appeals to supervise the office.

The proposed rule would limit contact between appeals office staff and employees in the IRS Office of Chief Counsel who have worked on tax litigation directly related to a taxpayer's case under appeal.

Michael Kummer, a partner at Morgan Lewis & Bockius LLP, said there's a lot of detail in the notice of proposed rulemaking that will be of interest to taxpayers, especially the definition of what constitutes a federal tax controversy and the exceptions to review by the Independent Office of Appeals.

"Taxpayers and others will want to review the proposed regulations to figure out what's included and what's excluded from the definition when thinking about their rights of access to appeals," Kummer told Law360.

"Because the term 'federal tax controversies' is not defined in the statute but is exactly what the Independent Office of Appeals is designed to resolve, there is pressure on the definition and exceptions in the proposed regulations," he said.

Although the law doesn't give a definition of what constitutes a federal tax controversy, the proposed rule mirrors the legislative history of the law, which defines it as a dispute over an administrative determination of taxpayer liability, penalties and additional tax by the IRS when it enforces laws.

Disputes arise out of the "examination, collection, or execution of other activities concerning the amount or legality of the taxpayer's income, employment, excise, or estate and gift tax liability; a penalty; or an addition to tax under the internal revenue laws," according to the proposed rule.

Taxpayers denied access to the appeals office must be given a written explanation of that decision from the IRS that includes a detailed description of the facts, an explanation of how the denial applies to the facts, and the procedures for protesting the denial.

The proposed rule notes that congressional lawmakers did not give taxpayers an unqualified right to the appeals resolution process for any dispute with the IRS. Instead, the law allows the agency to make reasonable exceptions when determining whether a federal tax controversy merits consideration by the office.

The rule notes that the exceptions used to deny access to the appeals process are generally the same as those in place before enactment of the 2019 law. Issues that don't meet the definition of what a federal tax controversy is would be ineligible for an appeal, even if they are contained in a larger case that does meet the definition, according to the proposed rule.

Other exceptions that would block the right to an appeal include a taxpayer's failure to comply with the code based on frivolous moral, religious, political, constitutional, conscientious, or similar grounds. The service also will not make exceptions for penalties assessed on frivolous positions or false information, or if the IRS Whistleblower Office decides not to issue an award for information that doesn't meet its criteria.

No exceptions will be granted if the IRS fails to issue a taxpayer assistance order or if it must delete text from a written determination in order to protect a taxpayer's right to privacy.

The Treasury Department and IRS are asking taxpayers to comment on the proposed rule and whether any exceptions to the appeals process differ from prior standards and objectives. Taxpayers are also asked to make suggestions for additional exceptions or alternative methods for making exceptions to the appeals process.

"Taxpayers are going to want to focus on the way the proposed regulations define federal tax controversy and offer comments accordingly," Kummer said.

--Editing by Roy LeBlanc.