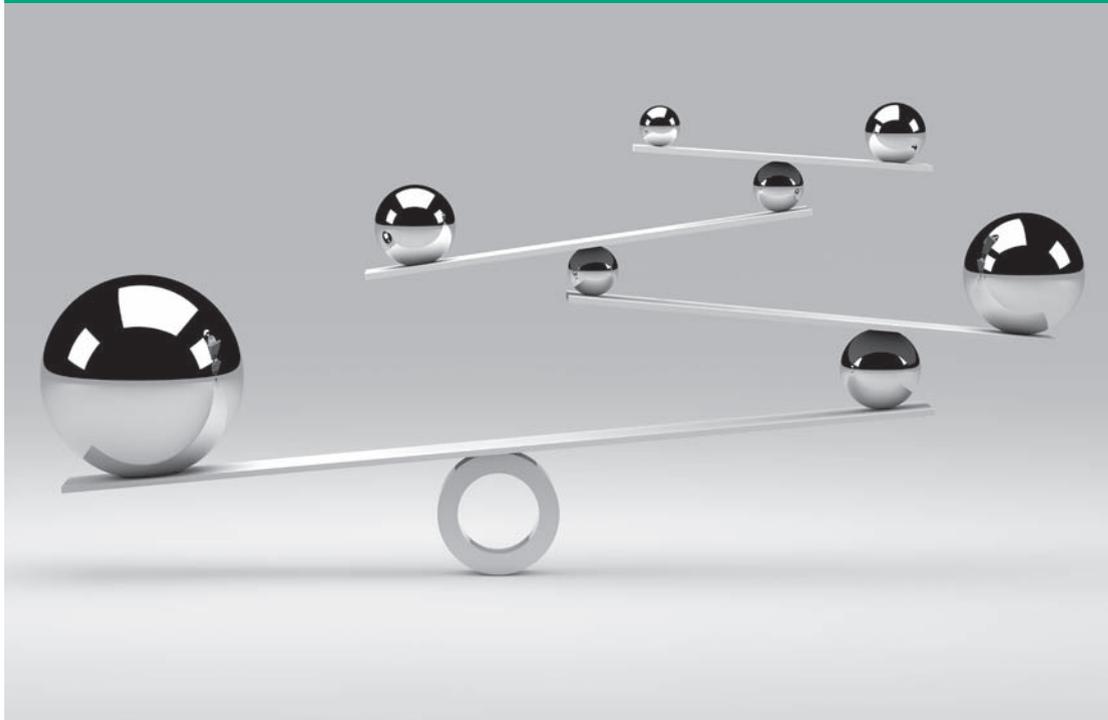




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What Good Is a Taxpayer Bill of Rights, Anyway?



Introduction

In 2007, when I was serving as the United States National Taxpayer Advocate, I proposed that the United States (US) Congress enact a Taxpayer Bill of Rights (TBOR).¹ In fact, Congress had already passed three pieces of legislation titled “Taxpayer Bill of Rights”,²

but I had in mind something more akin to the US Bill of Rights, the term describing the first ten amendments to the US Constitution. The three TBOR statutes, enacted between 1986 and 1998, contained many specific statutory protections for taxpayers. What was missing was an overarching statement, in clear and plain

¹ 2007 National Taxpayer Advocate Annual Report to Congress, 478-489. See also 2013 National Taxpayer Advocate Annual Report to Congress, 5-19; 2014 National Taxpayer Advocate Annual Report to Congress, 275-310.

² The US Congress has passed several pieces of legislation with “Taxpayer Bill of Rights” in the title. See Technical and Miscellaneous Revenue Act, Pub. L. No. 100-647 (1988) (containing the “Omnibus Taxpayer Bill of Rights”, also known as TBOR 1); Taxpayer Bill of Rights 2, Pub. L. No. 104-168 (1996) (also known as TBOR 2); and Internal Revenue Service Restructuring and Reform Act, Pub. L. No. 105-206 (1998) (also known as “Taxpayer Bill of Rights III” or TBOR 3).

language, of the rights taxpayers can expect to enjoy in their dealings with the tax agency. I did not believe Congress would make the TBOR self-enforcing, unlike the constitutional bill of rights. Instead, I viewed the TBOR as a statement of foundational principles, a “roadmap for effective tax administration”. In addition, the TBOR could serve as an educational tool – the various statutory rights could be categorised under each of the ten rights, helping taxpayers identify already-existing avenues for realising such rights, and highlighting gaps in remedies.

During my research on the TBOR, I came across a 1990 survey of member countries of the Organisation for Economic Co-operation and Development (OECD)³ and a subsequent 2003 OECD Practice Note on the subject on of taxpayers’ rights and obligations.⁴ The Practice Note observed that, according to the 1990 survey, many countries had created charters that were based on fundamental rights and obligations, and the Note suggested common elements for such charters. I used these elements as a starting point for my proposed TBOR.

The US Internal Revenue Service (IRS) adopted the TBOR in June 2014, and Congress ultimately codified the TBOR in December 2015, so it is now part of the Internal Revenue Code.⁵ Specifically, the IRS’s adherence to TBOR is now an explicit duty of the Commissioner of Revenue. The IRS has also incorporated the TBOR in its Publication 1, which is required by law to be provided to taxpayers in the initial contact with respect to an audit or collection action.⁶ Publication 1 includes plain-language explanations of each right, heavily negotiated between the IRS and my staff.

The TBOR as a Vehicle for Taxpayer Awareness and Empowerment

As noted above, my original focus for the TBOR was to provide both taxpayers and IRS employees with a clear and concise statement of the rights taxpayers had before the IRS. As a policy statement of the IRS, these rights should guide its employees’ actions with respect to taxpayers, and they could form an excellent teaching device for educating taxpayers about their specific statutory protections. Sadly, surveys conducted by the Taxpayer Advocate Service showed that in 2012 less than half of US taxpayers believed they had rights before the IRS, and only 11% knew what those rights were.⁷

For example, consider an unrepresented taxpayer under audit by the IRS. The TBOR tells taxpayers they have the right to appeal an IRS decision to an independent forum. Seeing that language in Publication 1, our taxpayer under audit might be prompted to ask the IRS, “Don’t I have the right to an appeal?”. Without that language, taxpayers – especially unrepresented ones – might never assume they have the right, and so would never ask. Now, it might be that in the specific case the taxpayer does not have a right to an administrative appeal, but at least the taxpayer has asked the question; and the denial of such a right might lead to legislative reform.

In fact, this is exactly what happened in *Facebook, Inc. & Subsidiaries v IRS*.⁸ According to public court filings, Facebook was under audit for several years and had agreed to extend the statutory period for assessing tax on several occasions. At some point Facebook requested that the audit function issue its audit report, granting Facebook the right to go to the IRS Office of Appeals. The IRS determined

3 OECD, Committee on Fiscal Affairs, *Taxpayer Rights and Obligations: A Survey of the Legal Situation in OECD Countries* (27 April 1990).

4 OECD, Centre for Tax Policy and Administration, *Taxpayers’ Rights and Obligations – Practice Note* (August 2003), at https://www.oecd.org/tax/administration/Taxpayers%27_Rights_and_Obligations-Practice_Note.pdf.

5 PATH Act, Pub. L. No. 114, 129 Stat. 2242 (2015), adding new paragraph 26 USC 7803(a)(3).

6 Publication 1: Your Rights as a Taxpayer (Rev. 09-2017), at <https://www.irs.gov/pub/irs-pdf/p1.pdf>.

7 2013 National Taxpayer Advocate Annual Report to Congress, 5.

8 2018-1 U.S.T.C. (CCH) 50,248 (N.D. Cal. 2018).

that it was “not in the interest of sound tax administration”⁹ for such an appeal to be granted, notwithstanding the TBOR. The IRS issued a “Notice of Deficiency”, which proposes to assess a deficiency in tax unless the taxpayer petitions the United States Tax Court within 90 days of the notice. Facebook timely petitioned the Tax Court and also filed suit in Federal district court, claiming that its right to an administrative appeal under the TBOR had been violated and seeking injunctive relief.

The district court, although acknowledging that Facebook had never been provided with **any** explanation of why granting it an administrative appeal was “not in the interest of sound tax administration”, denied relief. Quoting me and others, the court held that the TBOR created no new rights for taxpayers and thus no new remedies.

Well, Facebook may have lost the skirmish on that one, but US taxpayers won a larger battle on this very point with the passage of the Taxpayer First Act (TFA) on 1 July 1 2019. Section 1001 of the TFA mandates the establishment of an **independent** Office of Appeals that:

- “resolve[s] Federal tax controversies without litigation on a basis which –*
- (A) is fair and impartial to both the Government and the taxpayer,*
 - (B) promotes a consistent application and interpretation of, and voluntary compliance with, the Federal tax laws, and*
 - (C) enhances public confidence in the integrity and efficiency of the Internal Revenue Service.”¹⁰*

Under the statute, such resolution “shall be generally available to all taxpayers”. Where a taxpayer has requested an appeal with respect to a Notice of Deficiency (as in Facebook, above) and the IRS denies that appeal, the

Commissioner **shall** provide the taxpayer with a written notice, giving a detailed description of the facts involved, the reason for denying the right to appeal and a detailed explanation of how that reason applies to the facts. The Commissioner must also include a description of the process whereby the taxpayer can protest the IRS decision to deny an appeal. Moreover, the IRS must annually report to Congress the number of denied requests for appeals, and the reasons therefor.

So here we have it: the TBOR gave rise to an expectation that taxpayers have a certain right; the court determined that the TBOR did not grant a self-enforcing right, or at least provide a remedy for requiring the IRS to honour that right; and Congress responded by enacting a new right, available **generally** to all. Through Congressional action, when the IRS wants to deny a taxpayer this general right to an administrative appeal, it must state its reasons and provide an appeals process for that decision, and it must also report publicly (through Congress) on such denials. Presumably, if the IRS denies a large number of these, or offers superficial reasons for denials, Congress will take further action.

What is missing here? Well, we are missing an enforceable remedy. Yes, the taxpayer has the ability to “protest” the IRS’s decision to deny the general right to appeal. But that “protest” remains within the agency, and usually by the time that the IRS has decided to deny access to appeals, it is pretty much dug in. To whom does this appeal go? The Office of Appeals? To date, we do not know the process. Moreover, there appears to be no direct avenue for the taxpayer to have the IRS’s actions in this regard reviewed by the judiciary. Congress may have been concerned about opening the “floodgates of litigation”, and hoped that requiring a written notice, a protest process and annual reporting would chasten the IRS into granting a right to appeal in all but the most egregious cases (whatever that means). Going forward,

⁹ See Rev. Proc. 2016-22 s303, 2016-15 I.R. B. 577, 578.

¹⁰ Taxpayer First Act, Pub. L. No. 116-25, s1001, adding 26 USC 7803(e).

taxpayers will find out whether Congress's faith is well founded.

Framing a TBOR in Rights-Based Language Is Essential

This seems to be the conundrum for TBORs and taxpayer charters: governing bodies are afraid to create a self-enforcing document for fear of negatively impacting the revenue stream that government relies on. This concern has led most charters and even TBORs to be stated as “mutual agreements” and often described as “service charters”. A 2007 OECD report noted that its 2004 survey had found that two-thirds of its member countries had formal statements (e.g. charters) specifying taxpayers' rights and/or the services they could expect.¹¹

For example, Irish Revenue's webpage outlining its “Revenue Customer Service Charter” states, “[t]he effective and fair administration of tax and customs law requires Revenue and citizens to recognise certain basic rights and responsibilities. This customer charter sets out mutual expectations in this context.”¹² The charter lists the “mutual expectations” under six categories, with descriptions of commitments and expectations under each:

- consistency, equity and confidentiality,
- courtesy and consideration,
- information and assistance,
- presumption of honesty,
- compliance costs and
- complaints, review and appeal

These are laudable commitments. The problem, however, is that they are framed as customer service obligations, and are not framed in the

language of rights and due process. They also contemplate a quid pro quo. While Ireland has a different legal system, my general concern is that if the revenue authority views the taxpayer as a bad actor, will it no longer seek to minimise the taxpayer's compliance costs? Will it no longer provide it with an avenue for complaints? Will it no longer be courteous to the taxpayer? In my opinion, if this were a document under US law, framing fundamental taxpayer rights as a customer service strategy would obscure and undermine the foundation of those rights.

This framing has consequences for taxpayers seeking remedies for violations of their rights/service standards. The Tax and Duty Manual states, “If a customer considers the Charter is not being adhered to, Revenue would like to know”.¹³ Taxpayers can bring their “complaints” to the Ombudsman, or can raise them first with the office dealing with the taxpayer's matter, then with the local manager and finally with the Customer Service Manager in the relevant region or division.¹⁴

Now, as someone who led an organisation (the Taxpayer Advocate Service) with 2,100 employees, I am all for addressing taxpayers' concerns at the lowest level possible and then raising it through the organisation. I wanted my subordinate managers to know what their employees were doing and I wanted them to accept responsibility for the climate and culture of their offices. However, in my view, where the complaints allege violations of taxpayer rights, there needs to be a direct channel to the top, and a method of independently investigating such allegations. Lumping taxpayer rights violations in with customer service complaints minimises the seriousness of the former.

11 OECD, Centre for Tax Policy and Administration, Forum on Tax Administration, *Tax Administration in OECD and Selected Non-OECD Countries: Comparative Information Series (2006)* (February 2007), 49-52, at <https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/comparative/CIS-2006.pdf>.

12 See <https://www.revenue.ie/en/corporate/information-about-revenue/customer-service/customer-charter/index.aspx>.

13 Tax and Duty Manual Part 37-00-01, Revenue Customer Service Charter (rev. April 2019), at <https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-37/37-00-01.pdf>.

14 <https://www.revenue.ie/en/corporate/information-about-revenue/customer-service/how-to-complain/index.aspx>
<https://www.revenue.ie/en/corporate/documents/customer-service/cs4.pdf>

Words Matter

Tax administrations should not shy away from stating clearly what rights taxpayers have in their dealings with the agency. Using rights-based, rather than customer service, language indicates to taxpayers that the agency takes seriously its obligations to uphold the rule of law and respect for human dignity. Rights-based language is not just a matter of public relations and marketing; it is grounded in the legal framework that is the basis of that particular society.

Now, that grounding is precisely what makes tax agencies nervous – telling taxpayers they have rights might mean they actually start exercising them and tying the agencies' hands, even raising rights-based arguments in court challenges. In negotiating with the IRS, it was clear to me that we would never get the agency to adopt a TBOR unless I explained that it would not create any new rights but instead serve as an organising principle for those rights already possessed by taxpayers. This approach was later echoed in the congressional statements leading up to its enactment.¹⁵ And as the *Facebook* case has shown, along with the later-decided *Moya* case,¹⁶ courts have adopted this interpretation.

Some have taken this as a fundamental weakness with TBORs, namely, they have no weight as stand-alone documents. I disagree with this position, on several counts. First, we don't know what weight they have. In the United States, for example, the actual language of the TBOR is as follows:

(3) *Execution of duties in accord with taxpayer rights*

In discharging his duties, the Commissioner shall ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title, including –

- (A) *the right to be informed,*
- (B) *the right to quality service,*
- (C) *the right to pay no more than the correct amount of tax,*
- (D) *the right to challenge the position of the Internal Revenue Service and be heard,*
- (E) *the right to appeal a decision of the Internal Revenue Service in an independent forum,*
- (F) *the right to finality,*
- (G) *the right to privacy,*
- (H) *the right to confidentiality,*
- (I) *the right to retain representation, and*
- (J) *the right to a fair and just tax system.*¹⁷

The statute places the responsibility on the shoulders of the Commissioner to ensure that his or her employees adhere to all the statutory rights, including the ten rights listed above. So the statute now categorises the ten rights included in the TBOR as statutory rights. The statute **refers to the list of ten rights as rights that are “afforded by other provisions of this title”**. What does that mean? The Taxpayer Advocate Service created a list of specific taxpayer protections in the Internal Revenue Code cross-walked to the ten TBOR rights. Taxpayers can now claim that a violation of a specific taxpayer protection also violates one of the ten TBOR rights, thus fleshing out how these rights apply.

At the very least, 26 USC 7803(a)(3) may give taxpayers some standing to allege violations of these statutory rights in existing administrative and judicial proceedings and seek to hold the Commissioner accountable for his or her failure to ensure that IRS employees adhered to those rights. Should the taxpayer receive penalty relief where there is a violation of rights, even

¹⁵ See 159 Cong. Rec. H5211 (daily ed. 13 July 2013) (statement of Rep. Roskam).

¹⁶ *Moya v Comm'r* 152 TC No. 11 (17 April 2019), at https://www.ustaxcourt.gov/opinions/2019/152_TC_No_11.pdf.

¹⁷ 26 USC 7803(a)(3).

if the underlying tax is due? Would a violation of the taxpayer's right to privacy (namely, that the government's action be no more intrusive than necessary – a right based on the Fourth Amendment's protection against unreasonable searches and seizures) provide a basis for courts to find the government's actions to be arbitrary and capricious and thus an abuse of discretion and grounds for overturning the agency action?

We are just at the beginning of this journey of understanding the TBOR. We cannot know, today, how the TBOR will be applied 20 years from now, much less 100 years later. What we do know is that the US TBOR has already had an impact, notwithstanding court losses. Today, as a result of the TBOR, more taxpayers believe they have rights before the IRS, and know what those rights are, than ever before. A recent Taxpayer Advocate Service survey

found that 72.9% of US taxpayers now believe they have rights before the IRS, and 34.8% know what those rights are,¹⁸ compared to less than 50% and 11%, respectively, four years earlier. And because of the TBOR's succinct statement of taxpayer rights, taxpayers and their representatives are raising those rights in the context of audits, collection and litigation. As the *Facebook* case shows, even when their arguments do not prevail in litigation, they have a positive impact. Such litigation shows where there are gaps in rights and creates pressure either on the agency to change its ways or on Congress to change the agency's ways for it. That is what happened as a result of the *Facebook* loss in court. The statute is not perfect, but it is a start, an affirmation that taxpayers have the right to an appeal to an independent forum, whether it be administrative or judicial.

¹⁸ National Taxpayer Advocate 2017 Annual Report to Congress, Vol. 2, at 128. Interestingly, only 18.3% of US taxpayers said they had ever heard of Publication 1, which defines their rights as a taxpayer; 78.1% said "no", and 3.6% said "not sure".