In This Issue:

1 The Oregon Taxpayer Bill of Rights: A Comparative Analysis

8 Taxation in Popular Culture: The Big Lebowski

9 Rethinking Choice of Entity — Section 1202 Stock

11 Future Events

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OREGON STATE BAR

Taxation Section

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The Oregon Taxpayer Bill of Rights
A Comparative Analysis

By Dominic Paris
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Taxpayer rights have been a subject of legislative interest in Oregon for more than 20 years. Just as has been done at the federal level, the state has adopted a body of law crafted to highlight certain rights afforded to all taxpayers when interacting with tax authorities. This legislative restraint on the Oregon Department of Revenue is known as the Taxpayer Bill of Rights ("TBOR"). The legislative history of the Oregon TBOR, enacted in 1989, indicates that it was intended to approximate the rights granted to taxpayers under federal law. This article is meant to provide a comparison of the Oregon and federal statutes, regulations, and administrative procedures that define and give effect to the rights of taxpayers.

History of the Oregon TBOR

Oregon law governing the determination of taxable income is tied to the Internal Revenue Code of 1986. In order to effectuate the legislature's intent that Oregon tax law would continue to conform to federal tax law, it was necessary to devise an efficient, consistent method to keep up with continuing changes to the federal tax law. Under Oregon HB 2209, signed into law in 1989, much of the future federal legislation affecting the substantive provisions of the Internal Revenue Code of 1986 were to be automatically incorporated into Oregon law by way of broad reconnect statutes.[1]

With respect to administrative tax law, however, the state legislature acknowledged that Oregon maintains its own administrative rules which might differ from federal administrative rules. The federal Omnibus Taxpayer Bill of Rights, enacted in 1988, fell into the category of administrative provisions not subject to automatic incorporation into Oregon law. Nevertheless, the legislature recommended that Oregon's TBOR conform as closely as possible to the federal provisions.[2] In discussing the federal TBOR, one report noted that:

> [t]his taxpayer bill of rights is a very significant body of legislation for the average taxpayer. It is a collection of provisions designed to clarify and strengthen taxpayer rights, better inform them of their rights and provide more alternatives to get relief from IRS action. The Oregon Department of Revenue is strongly encouraged to review its practices and procedures in light of the federal action and conform where possible. In the spirit of conformity, a set of uniform procedures that taxpayers can generally follow or be subject to should minimize confusion between federal and Oregon law in this area.[3]

1 Oregon Society of Public Accountants, *An Analysis of Changes Resulting from the Revenue Act of 1987*, presented to the 65th Oregon Legislative Assembly, House Revenue & School Finance Subcommittee (1989).

2 *Id.*

3 Roy Abromowitz, *Technical and Miscellaneous Revenue Act of 1988: Taxpayer Bill of Rights,* presented to the 65th Oregon Legislative Assembly, House Revenue & School Finance Subcommittee (1989).

Because the provisions of the Oregon TBOR were closely modeled after the federal TBOR, it is important to understand the policies underlying the federal legislation. The principal sponsor of the federal TBOR was Democratic Senator David Pryor from Arkansas, Chairman of the Senate IRS Oversight Committee. He cited numerous cases of taxpayer abuse in arguing that "[t]he IRS operates a near totalitarian system. It has the power unilaterally to order the seizure of a person's property or the garnisheeing of his income. The taxpayer, meanwhile, is afforded hardly any rights during such proceedings other than to pay the alleged deficiency." The new Taxpayer Bill of Rights was necessary "to inject reason and protection for individual rights into the tax collection process."[4]

The 1988 federal TBOR provided taxpayers with new rights and protections for dealing with IRS audits, assessments, and collections. Several provisions of the Oregon TBOR, including the statutes governing taxpayers' rights to installment agreements and rights during meetings or communications with the Department, were almost identical to their federal counterparts. The Oregon legislature declined to adopt other provisions of the federal TBOR. In contrast to the IRS, for example, the Department of Revenue has never had a taxpayer ombudsman or advocate, or any set of formal procedures by which to resolve taxpayer hardships that result from Department of Revenue collection actions. As the federal TBOR was updated and improved, the divergence between the Oregon and federal TBOR became more pronounced.

Evolution of the Federal TBOR

"TBOR II," the first major revision of the federal TBOR, was signed into law in 1996 and established the Office of the Taxpayer Advocate to serve as an independent voice for taxpayers. The new Taxpayer Advocate was assigned the task of making annual, independent reports to Congress intended to make legislators aware of "recurring and unresolved problems and difficulties taxpayers encounter in dealing with the IRS" and to propose administrative and legislative changes to mitigate those problems.[5] The Taxpayer Advocate was also granted broad authority "to affirmatively take any action as permitted by law with respect to taxpayers who would otherwise suffer a significant hardship as a result of the manner in which the IRS is administering the tax laws."[6] In an effort to make the collections process more taxpayer friendly, TBOR II made several changes to IRS installment agreement procedures. Internal Revenue Code ("IRC") Section 6159 was amended to provide a 30-day notice period for modification or termination of any installment agreements,[7] and the act created an independent administrative review process for the termination of an installment agreement once it was in effect.[8]

The second revision of the federal TBOR came as a response to continuing complaints that the IRS was too aggressive in its tax collections. "TBOR III," enacted as part of the 1998 IRS Restructuring and Reform Act ("RRA 98"), created the Collection Due Process ("CDP") hearing as a taxpayer remedy for IRS abuse. The need for collection hearings arose out of the legislature's belief "that taxpayers are entitled to protections in dealing with the IRS that are similar to those they would have in dealing with any other creditor. Accordingly, the [legislature] believe[d] that the IRS should afford taxpayers adequate notice of collection activity and a meaningful hearing before the IRS deprives them of their property."[9] The new law established the right to CDP hearings following the IRS's filing of a Notice of Federal Tax Lien and before the IRS is allowed to take any levy action.[10] In either case, Appeals Officers tasked with conducting the hearings are required to consider whether the collection action balances the need for the efficient collection of taxes with the legitimate concern of the taxpayer that the collection action be no more intrusive than necessary.[11] At the hearing, taxpayers may propose alternatives to the IRS levy or lien. The result of a CDP hearing, a "Notice of Determination," is appealable to the U.S Tax Court.[12]

The Restructuring and Reform Act of 1998 provided a number of other protections for taxpayers, directing the Secretary of the Treasury to prescribe guidelines for calculating minimum acceptable installment payments and to "develop and publish schedules of national and local allowances designed to provide that taxpayers entering into a compromise have adequate means to provide for basic living expenses."[13] The new standards, derived from the Bureau of Labor Statistics Consumer Expenditure Survey, were designed to promote consistency in the determination of a taxpayer's ability to pay. The IRS had previously published a set of Collection Financial Standards on its website, but some critics argued that the IRS standards were too rigid as applied, making it difficult for taxpayers to resolve their liabilities. In order to better protect taxpayers from abuse in their interactions with the IRS, RRA 98 provided that the financial standards should not be applied if it would result in the taxpayer not having adequate means to provide for basic living expenses.[14]

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4 David Pryor, *The Near Totalitarian I.R.S.,* N.Y. Times, April 15, 1988.

5 Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in the 104th Congress JCS-12-96, 20 (Dec. 18, 1996).

6 *Id*. at 22.

7 104 P.L. 168, Section 201 (1996).

8 104 P.L. 168, Section 202 (1996).

9 S. Rep No. 105-174 at 67-68 (1998).

10 105 P.L. 206, Section 3401 (1998) (codified as IRC 6320 and 6330).

11 IRC 6320(c) and 6330(c)(3)(C).

12 IRC 6330(d) and 6320(c).

13 105 P.L. 206, Section 3462 (1998) (codified in IRC 7122(c), and later moved to subsection (d)).

14 *Id.*

Finally, for rejected installment agreement requests or offers in compromise, RRA 98 provided taxpayers with an opportunity to appeal the rejection through the IRS Office of Appeals.[15]

The Oregon TBOR

The Oregon TBOR has undergone few revisions since its enactment, and there has been very little judicial interpretation of the Oregon TBOR. In total, five cases have made reference to any provision of the Oregon law. Most of the discussion of the Oregon TBOR in these cases is dicta and provides little insight into the meaning of the statutes.[16] There are no regulations and few administrative materials to offer guidance. The provisions of the Oregon TBOR, as currently applied, are discussed below.

ORS 305.860, Statement of Rights of Taxpayers

The language of this provision is modeled after the first provision of the federal Omnibus Taxpayer Bill of Rights.[17] ORS 305.860 requires the Director to prepare "a statement which sets forth in simple and nontechnical terms," the rights of taxpayers with regard to audits and other activities of the Department. The statute contains language that is sufficiently broad to cover any issue arising under the tax laws of Oregon, requiring a statement setting forth the procedures by which taxpayers may appeal "any adverse decision" of the Department and the procedures of the Department in enforcing the provisions of the laws of the state. The statement shall be provided to taxpayers upon request.[18]

To fulfill its obligations under this statute, the Department has prepared a two-page document titled "Your Rights as an Oregon Taxpayer," which provides a brief overview of the procedures for tax liens, garnishments, seizures, audits, and audit appeals. The document does not purport to be a complete statement of taxpayer rights, but is instead referred to as a "general description of [taxpayer] rights and the appeals process. It does not cover all situations." The document contains no mention of the taxpayer's right to an installment agreement or any other taxpayer rights during the collection process.[19]

By comparison, the IRS provides a 20-page publication describing the audit process.[20] For dealing with IRS collections, taxpayers have access to detailed publications discussing the collections process and collection appeals.[21] Aside from the "Your Rights as an Oregon Taxpayer" publication and a 3-page challenge to garnishment form, the Oregon Department of Revenue does not provide any instructions or publications regarding the collections process or collections appeals. The Oregon publications do not include any route to appeal collection activities of the Department other than to claim assets exempt from garnishment.

ORS 305.870, Personnel Evaluation Not Based On Amount of Tax Collected[22]

This statute provides that the Department shall not use the dollar amount of taxes collected as its *primary* evaluation criteria. To comply with this provision, the Department's employee evaluation forms do not include dollar amounts as a factor for assessing revenue agent performance. Even so, the Department is under a great deal of pressure to ramp up its collection efforts. A recent Secretary of State Audit Report emphasized the need for the state to collect more of the debts owed to the state, and listed the Department of Revenue as one state agency that could stand to improve in terms of dollars collected. When it comes to liquidated and delinquent debts, the Department of Revenue is the second largest creditor agency in the state with $758 million assigned to it for collection and a recovery rate of 14.9%.[23]

Because the report was focused on improving collection numbers, it was not concerned with the fairness of the collections process and contained no discussion of taxpayer rights. Instead, the report suggested a number of tools the Department could use to improve its collection numbers, including the publication of an online delinquent taxpayer list.[24] The Department has gone forward with the Secretary of State's recommendation and recently published new regulations to implement its Public Notification of Delinquent Taxpayer's pilot project.[25] The delinquent taxpayer list is now available online.[26]

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15 *Id*. (amending IRC 7122 and 6159).

16 *See Tilbury v. Multnomah County*, 322 Ore. 112 (1995); *Cohn v. Dep't of Revenue*, 2004 Ore. Tax LEXIS 83 (Magistrate Division, 2004); *Masse v. Dep't of Revenue*, 18 OTR 100 (2004); *Masse v. Dep't of Revenue,* 18 OTR 240 (2005); *Stancorp v. Dep't of Revenue,* 2011 Ore. Tax LEXIS 329 (Magistrate Division, 2011).

17 100 P.L. 647, Section 6227, *Disclosure of Rights of Taxpayers* (1988).

18 ORS 305.860(2).

19 Regarding payment agreements, the document states "where a proven hardship exists, we may accept installment payments."

20 IRS publication 556: Examination of Returns, Appeal Rights, and Claims for Refund.

21 IRS Publication 1, Your Rights as a Taxpayer; Publication 594, The IRS Collection Process; Publication 1660, Collection Appeals.

22 *Compare to* 100 P.L. 647, Section 6231, *Basis for evaluation of Internal revenue service employees* (1988) (the statute provides that the IRS "shall not use records of tax enforcement results to evaluate employees directly involved in collection activities," or to impose production quotas).

23 Oregon Needs Stronger Leadership, Sustained Focus to Improve Delinquent Debt Collection. Secretary of State Audit Report, Report Number 2015-25, p. 6 (September 2015).

24 *Id*. at 28.

25 Proposed Rule No. 150-305.120; the rule cites as authority the language of ORS 305.120, which provides that the Department shall see "that all taxes are collected." *But see,* ORS 314.835, *Divulging particulars of returns or reports prohibited*.

26 http://www.oregon.gov/DOR/Pages/delinquent.aspx

ORS 305.875, Rights of Taxpayer in Meeting or Communication with Department[27]

The statute is broadly worded to cover "audits, conferences, interviews, and any other meeting or communication between the taxpayer and the Department," providing taxpayers with the right to consult with an authorized representative "at any time during any meeting." The statute further provides that taxpayers have the right not to be present if represented (unless subpoenaed by the Department). The Department of Revenue has no written policies or procedures regarding communications with represented taxpayers, but takes the position that it is not prohibited from contacting taxpayers who have designated an authorized representative with a power of attorney form on file with the Department. As a courtesy, Department employees will "try to coordinate with representatives when possible, but [revenue] agents still need to do their jobs and communicate with taxpayers about their tax accounts."[28]

ORS 305.875 also provides that before or during any meeting or communication with the Department, taxpayers are entitled to an explanation of "the collection process and the taxpayer's rights under such process." The 2-page document made available to taxpayers, "Your Rights as an Oregon Taxpayer," contains no reference to the taxpayer's right to consult with an attorney, right to an installment agreement, or any other provision of the TBOR.

ORS 305.880, Waiver of Interest or Penalty When Department Misleads Taxpayer[29]

Although this is the most oft cited TBOR provision in case law (briefly discussed in four cases), the Department's written procedures and policy manuals contain no discussion of the statute. However, in determining whether a taxpayer has been misled by the Department, the statute incorporates the analysis carried out under ORS 305.145, *When interest required to be waived.* The regulations under OAR 150-305.145(4) provide limited guidance.

ORS 305.885, Right of Clear Explanation

In any initial notice from the Department regarding a deficiency or delinquency, the statute guarantees taxpayers the right to a clear explanation of "the basis for underpayment, interest, and penalties."[30] The Department's notices regarding the assessment of additional taxes and penalties generally comply with the statutory requirement. Although many of the Department's notices are confusing, that is partially due to the complexity of the tax statutes. As part of the process of rolling out its new information system in December 2015, the Department has made an effort to improve some of its assessment and collection notices.

ORS 305.890, Right to Enter into Agreement to Satisfy Liability in Installment Payments[31]

For taxpayers who find themselves subject to the Department of Revenue's collections process, a common resolution is to pay the tax liability in monthly installments. Under ORS 305.890, "a taxpayer shall have the right to enter into a written agreement with the Department of Revenue to satisfy liability for payment of any tax in installment payments if the Director of the Department of Revenue determines that the agreement will facilitate collection of such liability." Because there are no administrative rules, guidelines or written policies that discuss the meaning of the statute, it is not clear what standards the Director must apply in order to determine whether a payment agreement will facilitate collection. In practice, the Department calculates a taxpayer's monthly payment amount based on living expenses actually paid by a taxpayer. The Department requires taxpayers to substantiate allowable living expenses with bank statements, receipts, or other documentation. The Department takes the position that it is not required to abide by the IRS Collection Financial Standards.[32]

The Department's lack of uniform collection standards can be problematic for taxpayers who pay for expenses with cash, who have variable monthly income and expenses, or who have unusual expenses. When analyzing taxpayer financial statements, revenue agents have broad discretion to determine the monthly installment amount. In authorizing revenue agents to set up "creative payment plans," the Department reminds them that "much of the information and decision making is subjective." Revenue agents are encouraged to think "outside the box" and "make decisions on their own."[33] Such unfettered discretion calls into question the meaning of the taxpayer's "right." Also concerning are the Department's procedure manuals and training materials, which have routinely stated that installment agreements are offered to taxpayers "as a courtesy." The Department's only reference to the statute itself (ORS 305.890) can be found in a PowerPoint training presentation informing revenue agents that "payment

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27 *Compare to* 100 P.L. 647, Section 6228, *Procedures involving taxpayer* interviews (1988) (codified as IRC 7521).

28 Department of Revenue written response to public records request for the Department's policies and procedures regarding communication with represented taxpayers (October 1, 2015, courtesy of Matthew Erdman). By comparison, the IRS has implemented its version of the statute to prohibit IRS collections personnel from directly contacting a taxpayer if the IRS knows that the taxpayer has an authorized representative, except in limited circumstances in which the IRS must follow strict procedures to bypass a taxpayer's representative. *See* IRM 5.1.10.6.1; IRM 5.1.23.5.

29 *Compare to* 100 P.L. 647, Section 6229, *Abatement of any penalty or addition to tax attributable to erroneous written advice by the IRS* (1988) (codified as IRC 6404(f))

30 ORS 305.855

31 *Compare to* 100 P.L. 647, Section 6234, *Agreements for payment of tax liability* (1988) (codified as IRC 6159).

32 "Financial Statement Team Procedural Steps" (included in every revenue agent's desktop manual).

33 "Creative/Extended Payment Plans" (included in every revenue agent's desktop manual).

plans are a courtesy not a right."[34] Revenue agents who are charged with making decisions that affect taxpayer rights appear to be unaware that the rights exist.

The Department takes the position that the right to enter into an installment agreement is not absolute, but is conditioned on the determination by the Director, or his designee, that the agreement will facilitate collection. Senior-level collections personnel at the Department contend that "the taxpayer's 'right' is a right to enter an agreement to pay in installments, but the terms of the agreement are left to the department's discretion" and that "there is no path to appeal from a department-proposed payment plan that the taxpayer does not like or chooses not to enter."[35] The language of ORS 305.890 suggests a more flexible accommodation of the taxpayers' financial needs. To give effect to the taxpayer's "right," the Director should at least make a good faith determination of a taxpayer's ability to pay when considering whether an installment agreement will facilitate collection.

In comparison to federal law, one of the purposes emphasized by congress in restructuring the IRS and creating the IRS Oversight Board as part of RRA 98 was to ensure an independent appeals process, which includes the right to Collection Due Process hearings. Through the independent appeals process, the IRS is required to verify that all statutory, regulatory, and administrative requirements have been met prior to a proposed collection action, and that the proposed action properly balances the need for the efficient collection of taxes with the legitimate concern of the taxpayer that the collection action be no more intrusive than necessary.[36] A taxpayer who owes a federal tax debt has the right to request a Collection Due Process hearing where collection alternatives, such as an installment agreement or offer in compromise, may be proposed. The result of the CDP hearing may be appealed further to the U.S. Tax Court. Even if a taxpayer no longer has the right to a CDP hearing, a rejected installment agreement request or offer in compromise may be appealed to the independent IRS Office of Appeals.

ORS 305.895, Action Against Property Before Issuance of Warrant Prohibited

If a taxpayer fails to pay a balance due after receiving a *Notice and Demand for Payment*, the Department may issue a *Distraint Warrant* thirty days later. ORS 305.895 requires that the Department send a Distraint Warrant before proceeding with enforced collections. Under the Department's new automated levy system, *recorded* Distraint Warrants, which serve the same function as a court judgment, will be issued automatically for any balance of $2,500 or more that has not been paid in full within thirty days after the Notice and Demand for Payment has been sent. A recorded Distraint Warrant perfects the Department's tax lien and is available to credit reporting agencies. The Department of Revenue will issue a recorded Distraint Warrant even if a taxpayer has entered into a payment agreement to pay the liability in full.

The statute provides that, thirty days before a warrant is issued, the Department must send a written notice and demand that includes alternatives that would prevent issuance of the warrant. The only alternative offered in the notice, as currently written, is to pay the tax in full. There is no mechanism for a taxpayer challenge to the Department of Revenue's decision to issue a Distraint Warrant. It is not clear whether the legislature contemplated additional taxpayer protections when it enacted ORS 305.895.

Evolution of the Oregon TBOR

The legislature made minor changes to ORS 305.860, *Statement of rights of taxpayers,*[37] and ORS 305.875, *Rights of Taxpayers in meeting or communication with department,*[38] in order to reflect the establishment of the Tax Court Magistrate Division in 1995. The creation of this new judicial forum shifted the first level of formal tax dispute resolution away from the executive department, allowing taxpayers to appeal a decision of the Department to a neutral judicial officer.[39] The Magistrate has repeatedly taken the position that collections decisions of the Department fall outside the Tax Court's jurisdiction under ORS 305.410.

Because the Magistrate court has cut off litigation on jurisdictional grounds, it is unsurprising that there has been very little judicial interpretation of the Oregon TBOR. Without a judicial remedy, interpretation of the collection statutes found in the Oregon TBOR is within the sole discretion of the Department of Revenue. When it comes to its duty to enforce the revenue laws, the Department has not promulgated any administrative rules to implement the provisions of the Taxpayer Bill of Rights. Further, the Department's inter-

34 "Payment Plans: Personal Income Tax & Compliance 2013" PowerPoint training presentation. When a taxpayer objects to a Department-proposed installment agreement, revenue agents are also instructed to tell taxpayers that the process is offered as a courtesy. "Financial Statement Team Procedural Steps," supra. (Disclosure: in response to repeated demands for an explanation of these documents, the Department sent out a mass email to the collection division to inform revenue agents that taxpayers do have the right to an installment agreement).

35 Letter from Deanna Mack, Oregon Department of Revenue Legislative Liaison (November 5, 2015).

36 S. Rep. 105-174, at 68 (1998).

37 1995 c.650, Section 112.

38 1995 c.650, Section 112a (For the sake of completeness, the only other legislative changes to the Oregon TBOR took place in 2003, consisting of minor clarifications of ORS 305.865, *Taxpayer rights,* and 305.890, *Right to enter into agreement to satisfy liability in installment payments* (*see* 2003 c.46, Section 7 (to "clarify intent"), and 2003 c.46, Section 8 (to correct sentence structure and section references)).

39 Henry Breithaupt and Jill Tanner, *The Oregon Tax Court at Mid-Century,* 48 Willamette L. Rev. 147, 150 (2011), (*citing* Tax Appeals-Oregon Tax Court Magistrate Division; Small Claims; Procedure; Valuations and Assessments; Etc.: Hearing on H.B. 2325 Before the House Judiciary Subcomm. on Civil Law and Judicial Admin., 68th Legis. Assemb., Reg. Sess. (1995) (statement of Scot Sideras, Hearings Officer, Oregon Dep't of Rev.)).

nal policies and procedures do not appear to acknowledge the existence of taxpayer rights.[40]

In holding that it lacks jurisdiction over collection matters, the Magistrate Division has failed to acknowledge the taxpayer's right to enter into an installment agreement under ORS 305.890. To support these holdings, it has relied on an Oregon Supreme Court case that predates the Oregon TBOR.[41] Under ORS 305.410, the Tax Court has broad jurisdiction as the "sole, exclusive, and final judicial authority for the hearing and determination of all questions of law and fact arising under the tax laws of this state." Nevertheless, the Magistrate has reasoned that:

> [I]ssues regarding the collection of taxes are not within the purview of the court's jurisdiction under ORS 305.410. The state legislature has delegated to the Department of Revenue authority to 'see that ... all taxes are collected[.]' ORS 305.120(1). The court is not aware of any authority granted it by the legislature to oversee income tax collection matters or grant a taxpayer's request for a payment plan. Such matters are solely within the discretion of the Department of Revenue.[42]

It is worth noting that ORS 305.120 is an administrative statute delegating general duties to an executive agency; it has no bearing on jurisdiction and it does not authorize the Department to collect taxes by any means or to disregard taxpayers' statutory and constitutional rights. The provisions of the TBOR are laws of the state, enacted by the legislature with the intent that they would be enforced.[43] Although the Magistrate Division recently reaffirmed the conclusion that it does not have jurisdiction, the Regular Division of the Tax Court has yet to consider the issue.[44]

40 By contrast, the Treasury Regulations and the Internal Revenue Manual (IRM) include hundreds of pages discussing installment agreement procedures, federal tax liens and levies, conduct of CDP hearings, and other collection issues.

41 In *Tyler v. Dep't of Revenue,* TC-MD 040850E (2004), the Magistrate held that it lacked subject matter jurisdiction over a taxpayer's request to modify a payment plan. The court based its decision on the Oregon Supreme Court's reasoning in *Sanok v. Grimes,* 294 Ore. 684, 701 (1983). In analyzing the Tax Court's jurisdiction over a plaintiff's claims for tort damages, the *Sanok* court held that tort claims do not arise under the tax laws because they have no bearing on tax liability. The *Sanok* case did not involve tax collection matters, and the court expressed no intention to exclude collection matters from the jurisdiction of the Tax Court or to otherwise narrow the definition of "tax laws."

42 *Mohtadi* v. *Department of Revenue,* TC-MD 130543C (2014). This case does not acknowledge the provisions of the Oregon TBOR.

43 *See Force v. Dep't of Revenue, 350* Ore. 179, 190 (2011) (holding that statutory provisions "must be construed, if possible, in a manner that 'will give effect to all' of them").

44 *Landers* v. *Marion Cnty. Assessor,* TC-MD 150391C (2015).

Policy Considerations

Taxpayer rights play a critical role in promoting voluntary compliance. When the tax system as a whole is perceived as fair and just, taxpayers are more likely to voluntarily comply with their obligation to timely file their returns and pay the tax due. These ideas were discussed at great length at the inaugural International Conference on Taxpayer Rights, held in Washington D.C. in November 2015. The keynote address by Eric Kirchler, Professor of Economic Psychology at the University of Vienna, considered the ways in which taxpayer attitudes towards tax agencies affect voluntary compliance.[45] Professor Kirchler distinguished an agency's use of "legitimate power" (based on taxpayer perception of the agency's professionalism and expertise) from the agency's use of "coercive power" (based on the agency's power to punish; e.g., penalties and public shaming). If an agency exercises too much coercive power in relation to its exercise of legitimate power, the agency's enforcement activities will be viewed as unfair and oppressive. As a result, taxpayer trust in the agency will suffer and the level of voluntary compliance will fall. To be effective in promoting compliance, coercive power should be used only in limited circumstances.[46] Otherwise, taxpayers will be less apt to view tax compliance as a civic duty and more apt to deliver live poultry to Department of Revenue offices.[47]

Many of the Department's current policies fall squarely within the definition of coercive power: when taxpayers are not given a meaningful opportunity to enter into an installment agreement that leaves them with enough of their income to pay for reasonable and necessary living expenses; when the Department files automatic, recorded liens despite the taxpayer's willingness to cooperate and pay the balance in installments; and when the Department imposes 100% penalties for failure to file tax returns for three consecutive years (or worse, 125% penalties that were once assessed against taxpayers who failed to take advantage of the 2009 amnesty period). There is reason to believe that such policies have a negative impact on taxpayer compliance, especially when the Department attempts to bypass taxpayer representatives and deny taxpayers the opportunity to appeal the Department's often arbitrary actions. According to research conducted by the Taxpayer Advocate Service, collection due process hearings are "imperative to realizing taxpayer rights and improv-

45 Eric Kirchler, Professor of Economic Psychology, University of Vienna, Keynote Address at the International Conference on Taxpayer Rights, Washington D.C. (Nov. 19, 2015).

46 *Id.*

47 Christian Hill, *Police: 'Frustrated' Creswell man releases flock of chickens in Eugene tax office,* The Register Guard, Dec. 24, 2015, *available at* http://registerguard.com/rg/news/local/33888307-75/eugene-police-officer-herds-chickens-dumped-at-irs-office.html.csp.

ing voluntary compliance."[48] When taxpayers feel that they are treated with fairness and respect throughout the collections process, they are more willing to accept responsibility for payment of their tax liabilities.

Without the protections offered by collection due process hearings, and without a taxpayer advocate to insure that such procedures are effectively implemented, taxpayers might begin to doubt the fairness and integrity of the tax system. The purpose of a taxpayer advocate is to identify problems within a tax administration, promote transparency, and help taxpayers resolve specific problems. By instilling trust in the tax agency, improving taxpayer morale, and promoting compliance, taxpayer advocates can make a tax system run more smoothly.[49] More than half of the states in the U.S. now have a taxpayer advocate or ombudsman. Although Oregon has the third highest state income tax rate in the nation, it has yet to follow suit. Without an advocate to ensure that taxpayer rights are meaningfully implemented, taxpayers all too often find themselves at the mercy of the Department of Revenue, which has complete discretion to determine the meaning of the provisions of the Taxpayer Bill of Rights.

Conclusion

The Oregon Taxpayer Bill of Rights will be twenty-seven years old this year. As we look back and compare its development to that of the federal TBOR, it is important to keep in mind what the Oregon legislature was trying to achieve. Oregon's Taxpayer Bill of Rights was enacted out of a belief that taxpayers are entitled to certain protections when dealing with the Department of Revenue, just as they are when dealing with any other government agency or private debt collector. The government's power to lay and collect taxes raises fundamental questions about the relationship between taxpayers and the state. These issues are capable of evoking powerful emotions and must be carefully considered if we are to uphold a fair and just tax system.

There are several possible routes by which Oregon might reinvigorate its protection of taxpayer rights. When determining what changes are warranted, if any, it is important to consider the role of the state legislature, the Tax Court, and the Department of Revenue itself. It is in the interest of all Oregonians to ensure that taxpayers are treated with fairness and receive a sufficient level of due process in their interactions with the state.

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48 Taxpayer Advocate Service, 2014 Annual Report to Congress, p. 185-186, FN 11: "TAS Research has shown that factors related to trust in government and fairness appear to have significant influence on the taxpayer compliance behavior of self-employed taxpayers" (citing the National Taxpayer Advocate 2013 Annual Report to Congress, Vol 2, 33-56, Research Study: *Small Business Compliance: Further Analysis of Influential Factors*).

49 Nina Olson, National Taxpayer Advocate, *Panel: The Right to a Fair and Just Tax System*, at the International Conference on Taxpayer Rights, Washington D.C. (Nov. 19, 2015). In the spirit of protecting taxpayer rights and promoting voluntary compliance, the National Taxpayer Advocate has continued to press for change in the administration of federal tax laws. As a result, the IRS adopted a new Taxpayer Bill of Rights in 2014, aimed at providing taxpayers with a better understanding of their existing rights within the tax system. The provisions of the new TBOR include the Right to be Informed, the Right to Quality Service, the Right to Appeal an IRS Decision to an Independent Forum, the Right to Retain Representation, and the Right to a Fair and Just Tax System (IRS Adopts "Taxpayer Bill of Rights;" 10 Provisions to be Highlighted on IRS.gov, in Publication 1, IR-2014-72 (June 10, 2014)).

Taxation in Popular Culture: The Big Lebowski[1]

By Dan Eller[2]

> "Speaking of which, do you think, uh, that you could, uh, give me my $20,000 in cash? Uh, my concern is, and I've gotta check with my accountant, but that this might bump me up into a higher tax, uh…."

The Big Lebowski presents the story of Jeffrey Lebowski ("The Dude"),[3] who is variously described as a "Los Angeles slacker and avid bowler"[4] as well as "an amiable unemployed slacker."[5] One might think that the ability to span not one, but two levels of "slackerism" would be a high achievement, but one might think too narrowly. The Dude has much more to offer. The above quote occurs about halfway through the movie when The Dude asks his "employer" for a payment related to certain services The Dude performed. Although the conversation then trails off to other plot points, the quotation presents interesting material for consideration by tax professionals.

Tax Brackets. The Dude touches on an important aspect of the Internal Revenue Code of 1986, as amended (the "Code").[6] Section 1 of the Code provides for graduated tax rates across various brackets. *The Big Lebowski* was released in 1998. Although it is unclear from the movie when the story was set, we can work with 1998 as the year in which The Dude would have made this statement. At that time, the lowest Section 1 tax bracket for an unmarried[7] individual went up to $25,350.[8] Given The Dude was "an amiable unemployed slacker,"[9] it is very unlikely he had more than $5,350 in taxable income from other sources. Even if he did, however, it is safe to assume The Dude's Section 63 "taxable income" would likely have been less than $25,350 by the time he took into account his standard deduction (it is safe to say The Dude was not an itemizer – itemizing, let alone filing tax returns, is too much of a hassle for a slacker) and personal exemptions. On the balance, therefore, The Dude's concern regarding being bumped into a higher tax bracket seems unfounded. But is that what is really going on here? Of course not.

Cash-Method Taxpayer. As slackers sometimes do, The Dude is ignoring a few important details. The Dude is almost certainly a cash-basis taxpayer because he is an individual. Whether he receives a cash or a check (as later in the same scene he indicates he would accept), The Dude will have income upon receipt.[10] Accepting the payment in the form of cash will not solve his problems; indeed, regardless of the form of payment, failure to report the income may not only lead to assessment of additional tax, but also penalties and interest.[11]

Moreover, if he fails to report the income to avoid that annoying tax bracket consequence, he might be in for bigger problems. He might attract the attention of the IRS's Collection Division, which could seek to prosecute The Dude for a tax crime under Section 7201, Section 7202, or several other statutes.[12] Should he decide to deposit the sum in a bank account he would be required to complete a Currency Transaction Report (FinCEN form 104)[13] or face potential consequences for "structuring" a transaction prohibited by 31 U.S.C. § 5324. Potential consequences include the criminal penalties imposable under the Federal Sentencing Guidelines.[14]

The Importance of a Good Accountant. Whether or not he actually meant it, The Dude appreciates the importance of conferring with an accountant when trying to figure out complex tax consequences. If The Dude were to confer with his accountant, the accountant would inform The Dude of his filing requirements and the other issues discussed above. Consistent with the accountant's duties and the potential for a tax-preparer penalty under Section 6694, the accountant would advise The Dude to report the entire $20,000 in the year of receipt. And The Dude would do just that because "The Dude abides."

Conclusion. *The Big Lebowski* presents a "very complicated case"[15] of civil and criminal tax concepts for our consideration.[16] "You know, a lotta ins, a lotta outs, lotta what-have-yous."[17] In the end, *The Big Lebowski* delivers some great tax content to think about over a White Russian. On a scale of zero to 300, therefore, I score this movie a Turkey.

1 *The Big Lebowski* (Gramercy Pictures 1998). Quotations from this movie are used at times in this article.

2 Dan Eller is a shareholder in the Portland, OR office of Schwabe, Williamson & Wyatt, who focuses his practice in the areas of tax and business law, advising clients with both transactional and controversy matters. Dan is a Past Chair of the Oregon State Bar Taxation Section. Special thanks go to Marc Sellers for his assistance in reviewing an early draft of this article.

3 Or "His Dudeness, or, uh, Duder, or El Duderino, if you're not into the whole brevity thing." Whatever you choose, do not go with "Mr. Lebowski."

4 https://en.wikipedia.org/wiki/The_Big_Lebowski.

5 https://en.wikiquote.org/wiki/The_Big_Lebowski.

6 Or, "The Code, man," as The Dude might say.

7 The Dude represents he is unmarried.

8 http://taxfoundation.org/article/us-federal-individual-income-tax-rates-history-1913-2013-nominal-and-inflation-adjusted-brackets.

9 https://en.wikiquote.org/wiki/The_Big_Lebowski.

10 Cf. 26 U.S.C. § 448.

11 Under Section 6321, the government's statutory tax lien extends to "all property and rights to property, whether real or personal, belonging to (the delinquent taxpayer)." Thus, the lien would extend to such personal items as bowling balls and bathrobes, exposing those items to seizure to pay the tax.

12 Given The Dude is a slacker, he probably does not file tax returns. Section 7203 (willful failure to file) could provide another basis for prosecution.

13 *See*, 31 C.F.R. § 1010.301.

14 *See generally,* USSG § 2T1.1; § 2S1.3.

15 https://en.wikiquote.org/wiki/The_Big_Lebowski.

16 Another subplot of *The Big Lebowski* involves the alleged misuse of a private foundation's funds. Although that could also form the basis of a similar discussion, in the end I found this subplot to be more nebulous.

17 https://en.wikiquote.org/wiki/The_Big_Lebowski.

Rethinking Choice of Entity - Section 1202 Stock

Lewis M. Horowitz and Justin E. Hobson

Lane Powell PC

We tax advisors spend plenty of time assessing whether a particular business is better suited operating as a flow-through entity or as a tax-paying "C corporation." Flow-through entities generally include sole proprietorships, partnerships, limited liability companies (LLCs) taxed as partnerships, and S corporations. Flow-through entities generally do not incur entity level taxation, and items of income or loss are subject to U.S. federal income taxation at the partner, member, or shareholder level. C corporations are subject to U.S. federal income tax at the corporate level. A shareholder of a C corporation is not subject to U.S. federal income tax on the corporation's income unless and until the corporation pays dividends or the owner sells or exchanges its stock.

Unquestionably, the tax treatment of C corporations and their owners is inferior in some respects to the tax treatment of flow-through entities and their owners. The principal disadvantages of the C corporation form are the double taxation of C corporation income and the inability of C corporation owners to use C corporation losses to offset owner income from other sources. In some cases, however, the tax benefit provided by IRC section 1202 to C corporations outweighs the disadvantages. When it applies, IRC section 1202 can completely eliminate tax on gain from the sale of C corporation stock.

Section 1202 excludes from an individual taxpayer's gross income 100 percent of the gain recognized on the sale of "qualified small business stock" (QSBS) that was held for at least five years before the sale.[1] The amount of the exclusion is limited to the *greater of* $10 million or ten times the taxpayer's tax basis in the QSBS stock. This limitation applies on a per-company basis for each individual. *Stated more emphatically, most shareholders holding QSBS will never pay any capital gains tax! In addition, application of section 1202 may also eliminate the 3.8% Net Investment Income Tax ("NIIT") and state taxation in many states!*

In order to qualify as QSBS, the following requirements must be met:

1. Stock is acquired by the taxpayer upon original issue in exchange for money, property (not including stock), or as compensation for services.
2. The corporation is engaged in an active trade or business.
3. The corporation is engaged in a qualified trade or business.
4. The corporation is an eligible domestic entity.
5. The aggregate gross assets of the corporation do not exceed $50 million immediately before and after the issuance of shares.

The section 1202 exclusion does not apply to corporations engaged in certain types of businesses. In particular, section 1202 does not apply to businesses involving most professional services and some other personal services, business involving farming, mineral-extraction, restaurant and hotel activities, and certain capital-intensive financial activities. Tax advisors should carefully consider whether or not clients meet the QSBS rules prior to analyzing potential benefits.

Assuming tax advisors and their clients get comfortable with all of the section 1202 requirements, additional items should be considered, including:

1. Losses and business failures – Tax advisors should consider whether it would be better to enable owners to take advantage of any losses generated in a flow-through structure. Losses in a corporate entity may be trapped (subject to applicable carryforwards), with limited value to a potential buyer. Worthless stock of a corporation may generate an ordinary loss for the stockholders if the stock meets the requirements in IRC section 1244.

2. Dividends and working capital needs – Tax advisors should consider anticipated dividends and working capital needs of the business. Dividends may give rise to a second layer of taxation, and additional cash infusions in exchange for new shares may not meet the section 1202 requirements.

3. Untimely stock sales – Section 1202 requires stock be held for at least five years. A client's startup business may not have such durability, especially when an attractive suitor comes knocking.

Appendix

Following is an example of a situation where the tax benefits of section 1202 outweigh the tax disadvantages of C corporation status:

Tax Advisor is approached by the founders of Tech Startup to assist with organizing a new entity to operate the business. Tech Startup has ten 10% individual owners, each of whom will contribute $100,000 to the business. Six of the ten individuals will materially participate in the business. The remaining four are passive investors. Tech Startup will develop and market a software-as-a-service solution. Tech Startup anticipates that it will spend one to two years developing the software before its product is

1 The 100 percent exclusion applies to stock issued after September 27, 2010. Partial exclusions apply to stock issued after August 10, 1993 but before September 28, 2010

widely launched and sales dramatically increase. Further, it is anticipated that it will take an additional one to two years before Tech Startup generates a profit. The owners intend that, if Tech Startup is profitable, they will take it public with an IPO or sell their stock.

Tech Startup's founders projects that its business will produce the tax results listed below over the first eight years:

	Year 1	Year 2	Year 3	Year 4
Revenue	$ 10,000	$ 10,000	$ 100,000	$ 300,000
Cost of Goods Sold	$ 10,000	$ 10,000	$ 75,000	$ 150,000
Gross Profit	$ -	$ -	$ 25,000	$ 150,000
Expenses	$ 150,000	$ 150,000	$ 150,000	$ 150,000
Tax Income/(Loss)	$ (150,000)	$ (150,000)	$ (125,000)	$ -

	Year 5	Year 6	Year 7	Year 8
Revenue	$ 600,000	$ 1,200,000	$ 2,400,000	$ 4,800,000
Cost of Goods Sold	$ 300,000	$ 500,000	$ 1,000,000	$ 2,000,000
Gross Profit	$ 300,000	$ 700,000	$ 1,400,000	$ 2,800,000
Expenses	$ 150,000	$ 175,000	$ 225,000	$ 325,000
Tax Income/(Loss)	$ 150,000	$ 525,000	$ 1,175,000	$ 2,475,000

At the end of Year 8, Tech Startup owners expect to sell the company for $25 million. The total expected tax as a result of operations and the sale are as follow:

		C Corporation	
	Flow-Through	section 1202	No section 1202
Total Tax	$ 6,700,000	$ 1,400,000	$ 7,100,000

If Tech Startup had organized as a flow-through entity (e.g., an LLC or S corporation), the losses generated in the first three years would flow through to its owners and potentially would be available to offset other items of income. Similarly, the income generated in Year 5 through Year 8 would flow through to Tech Startup's owners and would be subject to marginal tax rates as high as 39.6% (plus an additional 3.8% NIIT to the four passive owners) and produce roughly $1.7M in total taxes if taxed at the highest marginal rate. An allocation of taxable income to owners increases their tax basis in their membership interest. At the end of Year 8, each Tech Startup owner has a $490,000 tax basis in his or her membership interest ($100,000 initial investment plus $390,000 of allocated income). The sale at the end of Year 8 gives rise to taxable gain of roughly $2M to each owner. This gain is generally subject to long-term capital gain taxation at marginal rates of up to 20% (plus the additional 3.8% NIIT on the passive owners who do not materially participate). This sale could result in U.S. income tax of approximately $500,000 for each passive owner, and nearly $5M in total. The total U.S. federal income tax from operations and sale is approximately $6.7M.

If Tech Startup had organized as a C corporation (e.g., a corporation not electing subchapter S treatment), the losses generated in the first three years generate net operating losses available to offset taxable income in Year 5 and Year 6. Once the net operating losses are utilized, the remaining taxable income would be subject to marginal tax rates as high as 35% and produce roughly $1.4M in total taxes if taxed at the highest marginal rate. Unlike flow-through entities, corporate owners do not receive an increase in their tax basis for income generated by the entity. The sale at the end of Year 8 gives rise to gain of $2.4M to each owner. Absent section 1202, this gain is generally subject to long-term capital gain taxation at marginal rates of up to 20% (plus the additional 3.8% NIIT). This could result in U.S. income tax of approximately $570,000 for each passive owner, and $5.7M in total. However, when section 1202 applies, the entire $5.7M in tax is avoided. The total U.S. federal income tax when section 1202 does not apply is approximately $7.1M and $1.4M when it does.

This simplified example ignores the impacts of any applicable state income taxes, and U.S. federal income tax results may be altered by the circumstances in any specific case. This example highlights the tax savings section 1202 can provide. Given the potential benefits of section 1202, tax advisors should seriously consider the C corporation form of organization when forming new businesses.

Future Events

Jun 15, 2016
New Tax Lawyer Committee: Pub Talk: Partnership Tax: Targeted vs. Layercake Allocations--Talking to Clients
Portland | 5:30 – 7:00 p.m.
The Original
(300 SW Sixth Avenue)
Presenter: Gwen Griffith, Tonkon Torp

Jun 23, 2016
Portland Luncheon Series: The Complete Anatomy of a QSub Election--Not Just the Nuts and Bolts
Portland | 12:00 – 1:30 p.m.
Presenter: Larry Brant, Garvey Schubert Barer

Jul 11, 2016
New Tax Lawyer Committee: Monthly Meeting
Portland | 12:00 – 1:00 p.m.
Law Offices of Geoff Bernhardt
(5603 SW Hood Ave.)

Jul 20, 2016
New Tax Lawyer Committee: Speaker Series: International Taxation 101
Portland | Noon – 1:15 p.m.
Speaker: Justin Hobson
Miller Nash Graham & Dunn LLP
(111 SW Fifth Ave., Suite 3400)

Jul 20, 2016
New Tax Lawyer Committee: Social Hour
Portland | 5:30 – 7:00 p.m.
The Original
(300 SW Sixth Avenue)

Aug 01, 2016
New Tax Lawyer Committee: Monthly Meeting
Portland | 12:00 – 1:00 p.m.
Miller Nash Graham & Dunn
(111 SW Fifth Ave., #3400)

Aug 16, 2016
Mid-Valley Tax Forum Luncheon Series: Tax Planning for Pre-nups/Post-nups/Divorce
Salem | 12:00 – 1:15 p.m.
Roth's Hospitality Center
(1130 Wallace Road NW)
Presenter: Tammy Dentinger, Garrett Hemann Robertson P.C.

Aug 17, 2016
New Tax Lawyer Committee: Pub Talk: Issues in Employee Benefits and When to Bring in the Specialist
Portland | 5:30 – 7:00 p.m.
The Original
(300 SW Sixth Avenue)
Presenter: Kara Backus, Bullard Law

Sep 05, 2016
New Tax Lawyer Committee: Monthly Meeting
Portland | 12:00 – 1:00 p.m.
Legal Aid Services of Oregon
(520 SW 6th Ave., Ste. 700)

Sep 15, 2016
Portland Luncheon Series: What's New at DOR
Portland | 12:00 – 1:30 p.m.
Presenter: Oregon Department of Revenue

Sep 20, 2016
Mid – Valley Tax Forum Luncheon Series: Protecting and Extending Retirement Benefits
Salem | 12:00 – 1:15 p.m.
Presenter: Larry Hanslits, The H Group, Inc.
Roth's Hospitality Center
(1130 Wallace Road NW)

Sep 21, 2016
New Tax Lawyer Committee: Pub Talk: The Many Specialties in Tax and Whether to Specialize
Portland | 5:30 – 7:00 p.m.
The Original
(300 SW Sixth Avenue)
Presenter: Dan Eller, Schwabe Williamson and Wyatt

Oct 03, 2016
New Tax Lawyer Committee: Monthly Meeting
Portland | 12:00 – 1:00 p.m.
Lane Powell
(601 SW 2nd Ave., #2100)

Oct 18, 2016
Mid-Valley Tax Forum Luncheon Series: Independent Contractors: Perils and Best Practices
Salem | 12:00 – 1:15 p.m.
Roth's Hospitality Center
(1130 Wallace Road NW)
Presenter: Michael Peterson and Tricia Olson, Heltzel Williams, PC

Oct 19, 2016
New Tax Lawyer Committee: Speaker Series: Corporate Tax Issues: Formation and Capitalization
Portland | Noon – 1:15 p.m.
Miller Nash Graham & Dunn LLP
(111 SW Fifth Ave., Suite 3400)
Speaker: David Brandon

Oct 19, 2016
New Tax Lawyer Committee: Social Hour
Portland | 5:30 – 7:00 p.m.
The Original
(300 SW Sixth Avenue)

Oct 20, 2016
Portland Luncheon Series: Nonqualified Deferred Compensation
Portland | 12:00 – 1:30 p.m.
Presenter: Lorne Dauenhauer, Ogletree Deakins

Nov 07, 2016
New Tax Lawyer Committee: Monthly Meeting
Portland | 12:00 – 1:00 p.m.
Thede Culpepper
(111 SW Fifth Ave., #3675)

Nov 16, 2016
New Tax Lawyer Committee: Social Hour
Portland | 5:30 – 7:00 p.m.
The Original
(300 SW Sixth Avenue)

Nov 17, 2016
Portland Luncheon Series: Perspectives and Updates from the Bench
Portland | 12:00 – 1:30 p.m.
Presenter: Judge Henry Breithaupt, Oregon Tax Court

Dec 05, 2016
New Tax Lawyer Committee: Monthly Meeting
Portland | 12:00 – 1:00 p.m.
Black Helterline
(805 SW Broadway, #1900)

Dec 28, 2016
Portland Luncheon Series: Federal Legislative Update
Portland | 12:00 – 1:30 p.m.
Presenter: Mark Prater, Senate Finance Committee