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## ARTICLE

### **CAN THE TAXPAYER BILL OF RIGHTS ASSIST YOUR CLIENTS?**

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#### ABSTRACT

*The Taxpayer Bill of Rights (TBOR) passed by Congress in 2016 has started to draw attention from tax litigators and others seeking to use the provisions of the legislation to obtain results that they might not otherwise achieve. Facebook brought the first substantial litigation seeking to involve TBOR as a basis for relief. Facebook's effort to rely on TBOR failed. Several other cases now also seek relief based in whole or in part on TBOR. This Article examines several pending cases, each of which relies on TBOR for a different reason, in order to discuss situations in which TBOR may assist litigants in achieving the desired result or will*

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\* Clinical Professor of Law, Harvard Law School. The author wishes to thank Steve Sharp, who works for the Low-Income Taxpayer Clinic covering Southwest Ohio, for pointing me to the *Winthrop Towers* case and the possibility that TBOR could bring important factors to certain types of litigation; Frank Agostino, the principal in Agostino & Associates in Hackensack, New Jersey, for sharing with me memorandums and briefs he has filed in several cases pending before the Tax Court and for always pushing to find the procedural corners unexplored by others; Nina Olson, the National Taxpayer Advocate, who was my opponent for a decade when she ran the Community Tax Law Project in Richmond, Virginia, whose passion for taxpayer rights continues to burn just as strong as when she let me know I was trampling those rights over a quarter of a century ago; Les Book, professor at Villanova University's Charles Widger School of Law, who is not only responsible for getting me into academia but persuaded me to join him in blogging where we get to discuss these issues in real time; Susan Morgenstern for her insights on the arguments available with respect to the timeliness of CDP requests; and Carl Smith for his relentless pursuit of the right of taxpayers to be heard in court when something outside their control otherwise prevents timely receipt of their petition. Thanks also to my research assistant, Michael Rochford, for helping to bring this Article together and for volunteering at the Federal Tax Clinic at the Legal Services Center of Harvard Law School in the summer of 2018 to assist clients seeking to pursue their rights as taxpayers.

*likely provide no benefit. In addition to discussion of pending cases in which taxpayers have asserted TBOR as a basis for relief, this Article examines the effect that TBOR might have generally in determining the outcome of an examination or collection action. Finally, this Article looks at the potential impact of TBOR in six specific situations: training, litigation, administration (internal policy decisionmaking), regulatory and subregulatory guidance, attorney's fees, and ancillary matters involving tax controversy not covered by the Internal Revenue Code.*

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## INTRODUCTION

The National Taxpayer Advocate, Nina Olson, pitched the idea of a taxpayer bill of rights several years before the Internal Revenue Service (IRS) adopted the idea administratively in 2014.<sup>1</sup> Two years after the IRS

1. See, e.g., 2 NAT'L TAXPAYER ADVOCATE, 2007 ANNUAL REPORT TO CONGRESS 481–82, 485 (2007), <http://www.irs.gov/advocate/national-taxpayer-advocates-2007-annual-report-to-congress> [<http://perma.cc/TWE9-BJTH>] [hereinafter 2 NAT'L TAXPAYER ADVOCATE, 2007 ANNUAL REPORT];

1 NAT'L TAXPAYER ADVOCATE, 2013 ANNUAL REPORT TO CONGRESS 5–19 (2013), <http://>

administratively adopted the Taxpayer Bill of Rights (TBOR), Congress codified the same TBOR rights in Internal Revenue Code (IRC) Section 7803(a)(3).<sup>2</sup> Just like the original Bill of Rights, TBOR lists ten rights held by taxpayers:

- (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.<sup>3</sup>

Now that taxpayers have these rights, the question remains: What good do they do? Can taxpayers and their representatives look to these rights for relief or resolution in resolving a problem with the IRS?<sup>4</sup> In addition to the ten rights themselves, the IRS has provided explanatory notes regarding each of the rights

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[taxpayeradvocate.irs.gov/2013-Annual-Report/full-2013-annual-report-to-congress.html](http://taxpayeradvocate.irs.gov/2013-Annual-Report/full-2013-annual-report-to-congress.html) [http://perma.cc/F29G-6DS2]; NAT'L TAXPAYER ADVOCATE, TOWARD A MORE PERFECT TAX SYSTEM: A TAXPAYER BILL OF RIGHTS AS A FRAMEWORK FOR EFFECTIVE TAX ADMINISTRATION 2-3 (2013), <http://www.taxpayeradvocate.irs.gov/2013-Annual-Report/downloads/Toward-a-More-Perfect-Tax-System-A-Taxpayer-Bill-of-Rights-as-a-Framework-for-Effective-Tax-Administration.pdf> [http://perma.cc/6Q5N-EADL].

2. I.R.C. § 7803(a)(3) (2018). The Taxpayer Bill of Rights (TBOR) was officially codified as part of the Consolidated Appropriations Act, which was signed into law on December 18, 2015. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242 (2015) (codified as amended at I.R.C. § 7803(a)(3)). The language of TBOR was taken directly from a bill proposed by Representative Peter Roskam earlier that year. H.R. 1058, 114th Cong. (2015). Prior to its codification, TBOR made its way into several other bills, thanks in large part to the work of the National Taxpayer Advocate; however, none of these bills were actually enacted into law. *See, e.g.*, H.R. 2768, 113th Cong. (2013); S. 3355, 112th Cong. (2012); H.R. 6050, 112th Cong. (2012); S. 3215, 111th Cong. (2010); H.R. 5047, 111th Cong. (2010); H.R. 5716, 110th Cong. (2008). Still, a common thread exists throughout TBOR's legislative history: TBOR was generally meant to highlight *existing* rights, not to confer new rights.

3. I.R.C. § 7803(a)(3).

4. The IRS is not the only place taxpayers have rights. Many state and local tax systems have adopted the same or similar rights. *See, e.g.*, N.Y. STATE DEP'T OF TAXATION & FIN., PUBLICATION 131, YOUR RIGHTS AND OBLIGATIONS UNDER THE TAX LAW (2018), <http://www.tax.ny.gov/pdf/publications/general/pub131.pdf> [http://perma.cc/XC5W-4HWG]. The rights also exist in many countries around the world. OBSERVATORY ON THE PROT. OF TAXPAYER'S RIGHTS, INT'L BUREAU OF FISCAL DOCUMENTATION, 2015-2017 GENERAL REPORT ON THE PROTECTION OF TAXPAYER'S RIGHTS (2018), [http://www.ibfd.org/sites/ibfd.org/files/content/pdf/OPTR\\_General-Report.pdf](http://www.ibfd.org/sites/ibfd.org/files/content/pdf/OPTR_General-Report.pdf) [http://perma.cc/4T5R-JHWQ]. This Article will focus on the rights granted in the IRC, but practitioners should keep an eye out for any administrative or decisional law in other jurisdictions that might impact arguments with respect to TBOR in the IRC.

in order to provide taxpayers with a better understanding of the meaning of the rights.<sup>5</sup>

Prior articles have talked about what the codification of TBOR might mean.<sup>6</sup> This Article examines several cases decided or argued in the past year in which the taxpayer has sought relief, at least in part, based on one or more of the rights granted in TBOR. It also examines a case decided a few decades ago that involved a similar type of pronouncement with respect to housing law. The goal of this Article is to think about possible uses of TBOR in litigation and other settings in light of the preliminary rulings received thus far.

Disappointment will follow taxpayers expecting TBOR to provide significant relief or to overcome specific statutory requirements. But the possibility exists that under the right circumstances TBOR can make a difference in the outcome of a matter. This Article first discusses situations in which reliance on TBOR did not or probably will not benefit the taxpayer. It cannot override, or even provide much assistance, if specific statutes exist for resolving an issue or where regulatory or subregulatory guidance already provides a clear answer. TBOR will not likely provide much assistance in cases at the examination stage that involve the merits of liability but might tip the scales in a situation in which a judge must resolve an ambiguity.

After looking at what TBOR cannot do or is unlikely to do, this Article explores the collection area, where TBOR stands a greater chance of making a difference. Many collection actions involve policy decisions by the IRS in its administration of the law. TBOR can guide those decisions and watching how it does or does not guide those decisions will be interesting. In discussing the application of TBOR in the collection context, this Article will explore its application in Collection Due Process (CDP) cases.

Finally, this Article will look at the possible application of TBOR in six settings: training, litigation, administration, regulatory and subregulatory guidance, attorney's fees, and tax issues not covered by the IRC. Each of these settings presents an opportunity to apply TBOR in reaching an outcome. The more effectively the IRS and practitioners apply TBOR at stages of the formulation of outcomes, the more powerful TBOR will become. If the IRS creates an effective training program as the legislation requires, and if it considers TBOR in writing regulations, *Internal Revenue Manual* (IRM)

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5. *Taxpayer Bill of Rights*, IRS, <http://www.irs.gov/taxpayer-bill-of-rights> [<http://perma.cc/36PU-5RDL>] (last updated Sept. 11, 2018).

6. Others have examined and explained TBOR in slightly different contexts and those articles assist in framing the discussion. See, e.g., Alice G. Abreu & Richard K. Greenstein, *Embracing the TBOR*, 157 TAX NOTES 1281 (2017) (focusing on integrating TBOR into the fabric of tax administration); Amanda Bartmann, *Making Taxpayer Rights Real: Overcoming Challenges To Integrate Taxpayer Rights into a Tax Agency's Operations*, 69 TAX LAW. 597 (2016) (focusing on information about taxpayer rights both at the IRS and in the public). In addition to her annual reports recommending and describing TBOR, the National Taxpayer Advocate, Nina Olson, spoke about it in the annual Laurence Neal Woodworth Lecture on May 9, 2013. See Nina Olson, *A Brave New World: The Taxpayer Experience in a Post-Sequester IRS*, 139 TAX NOTES 1189 (2013).

provisions, litigation strategies, and general administrative guidance, TBOR can make a difference in tax administration.

# I. TBOR CANNOT OVERRIDE SPECIFIC STATUTES AND MAY PROVIDE NO ASSISTANCE WHEN STATUTES GOVERN THE SITUATION

When Congress codified TBOR, it sought some impact. The IRS had already adopted TBOR administratively.<sup>7</sup> Congress did not need to adopt it to have the provisions apply to taxpayers and federal taxes, yet it decided to codify TBOR.<sup>8</sup> Now that these ten rights are codified, the question remains: What impact does codification have beyond the statement made by the administrative adoption of these rights? This Article argues that codification has little impact where a taxpayer seeks to use one or more of the TBOR rights to argue that it overturns an outcome controlled by another statute. Instead of overruling statutory provisions in the IRC or other sections of the United States Code, TBOR serves as a policy statement regarding congressional goals for the IRS in its interactions with taxpayers. As such, it cannot provide a source of specific authority that overrides other statutory provisions.

Whether TBOR provides affirmative rights that do not otherwise exist in the statutes applicable to a taxpayer's situation is something that courts will determine over time. The most significant cases decided to this point are *Facebook, Inc. v. Internal Revenue Service* and *Moya v. Commissioner*.<sup>9</sup> In *Facebook*, the court found that even if TBOR created rights that did not previously exist, it did not provide the specificity that Facebook needed to require the result Facebook sought.<sup>10</sup> The case also points to the importance of regulatory and subregulatory guidance. Facebook did not lose because a statute prohibits the result it sought but because no statute provided for the result requested by Facebook and subregulatory guidance had already charted a

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7. Robert W. Wood, *IRS Announces a Taxpayer Bill of Rights*, FORBES (June 10, 2014, 3:24 PM), <http://www.forbes.com/sites/robertwood/2014/06/10/irs-reveals-taxpayer-bill-of-rights/> [http://perma.cc/DP77-985F] (describing how the IRS regrouped existing rights in the tax code into ten categories).

8. H.R. REP. NO. 114-70, at 4 (2015) (“Although the IRS has recently published a Taxpayer Bill of Rights, such publication does not itself carry force of law or impose any obligations on the management or employees of the IRS. Accordingly, codifying the requirement that the Commissioner assume responsibility to implement the bill of rights is warranted to ensure public trust.”).

9. *Facebook, Inc. v. IRS*, No. 17-cv-06490-LB, 2018 WL 2215743 (N.D. Cal. May 14, 2018); *Moya v. Comm’r*, No. 13343-15, 2019 WL 1714740 (T.C. Apr. 17, 2019); see Leslie Book, *Facebook Loses Challenge in District Court*, PROCEDURALLY TAXING (May 15, 2018), <http://procedurallytaxing.com/facebook-loses-challenge-in-district-court/> [http://perma.cc/A5NZ-XF2R]; see also Leslie Book, *Chamber of Commerce Files Amicus in Facebook Case: In Praise of Appeals*, PROCEDURALLY TAXING (Mar. 16, 2018), <http://procedurallytaxing.com/chamber-of-commerce-files-amicus-in-facebook-case-in-praise-of-appeals/> [http://perma.cc/MTQ4-MNLS]; Leslie Book, *Facebook Asserts that TBOR Mandates Right to Appeals*, PROCEDURALLY TAXING (Mar. 14, 2018), <http://procedurallytaxing.com/facebook-asserts-that-tbor-mandates-right-to-appeals/> [http://perma.cc/ZG2Y-9W4A].

10. *Facebook*, 2018 WL 2215743, at \*14–15.

different path.<sup>11</sup> This Part examines the *Facebook* and *Moya* decisions and three pending cases to probe the issue of the rights granted and the possible remedies available through litigation as a result of the passage of TBOR.

#### A. *Facebook, Inc. v. Internal Revenue Service*

Facebook relied almost exclusively on Section 7803(a)(3)(E), the right to appeal a decision to an independent forum, as the basis for arguing that it had a right to a hearing with the IRS Office of Appeals (Appeals) after filing its Tax Court petition.<sup>12</sup> The district court granted the IRS's motion to dismiss based on its decision that Facebook lacked standing to challenge the action of the IRS because it had no right to a hearing with Appeals.<sup>13</sup>

The IRS audited Facebook. The audit took many years during which Facebook extended the statute of limitations on assessment several times and provided the IRS with thousands of pages of information and the opportunity to speak with many employees. Eventually, Facebook sought to bring the audit to a close. The obvious means of closing the audit absent an agreement with the IRS involved refusing to further extend the statute of limitations on assessment. Had Facebook extended the statute of limitations on assessment to allow the IRS to continue to audit until the IRS reached its end point, the IRS would have issued a thirty-day letter and Facebook would have had the chance to go to Appeals prior to the issuance of the notice of deficiency. Because of the length of the examination, Facebook chose to end it, which essentially forced the IRS to issue a notice of deficiency from the examination division without giving Facebook a chance to go to Appeals prior to petitioning the Tax Court. By forcing the case into litigation, it appears that Facebook expected to have the opportunity to go to Appeals after filing the Tax Court petition, like most taxpayers.

After Facebook filed its Tax Court petition, the attorneys representing the IRS decided that they did not want to give Facebook the opportunity to have a hearing with Appeals. Citing Revenue Procedure 2016-22, the IRS attorneys told Facebook that they had determined referring the case to Appeals was not in the interest of sound tax administration. The IRS did not provide Facebook with an explanation of why giving an Appeals hearing would not be in the interest of sound tax administration. The cited revenue procedure came into existence following the publication of Notice 2015-72. This notice modified Revenue Procedure 87-24, which had governed the procedure for referring Tax Court cases to Appeals for almost three decades. Notice 2015-72 provides that "[t]he proposed update to Rev. Proc. 87-24 is not intended to materially modify the

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11. *See id.* at \*17.

12. *Id.* at \*12.

13. *Id.* at \*16. In addition to the arguments made by Facebook, the Chamber of Commerce filed an amicus brief arguing that Facebook had a statutory right to an administrative appeal. Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* at 5, *Facebook, Inc. v. IRS*, No. 17-cv-06490-LB, 2018 WL 2215743 (N.D. Cal. May 14, 2018), <http://www.chamberlitigation.com/sites/default/files/cases/files/18181818/U.S.%20Chamber%20Amicus%20Brief%20--%20Facebook%20C%20Inc.%20v.%20IRS%20%28USDC%20-%20Northern%20District%20of%20California%29.pdf> [<http://perma.cc/H8LU-FYL7>].

current practice of referring docketed cases to Appeals for settlement currently utilized in the vast majority of cases” and that “[t]he proposed revenue procedure clarifies that, except in rare circumstances, Counsel will refer cases docketed in Tax Court to Appeals for settlement consideration.”<sup>14</sup>

The IRS sought comments on Notice 2015-72 and on March 23, 2016, issued Revenue Procedure 2016-22, essentially adopting the notice with minor changes. The proposal for the new revenue procedure provided:

Counsel will not refer to Appeals any docketed case or issue that has been designated for litigation by Counsel. In limited circumstances, a docketed case or issue will not be referred to Appeals if Division Counsel or a higher level Counsel official determines that referral is not in the interest of sound tax administration. For example, Counsel may decide not to refer a docketed case to Appeals in cases involving a significant issue common to other cases in litigation for which it is important that the IRS maintain a consistent position or in cases related to a case over which the Department of Justice has jurisdiction. If Counsel determines that a docketed case or issue will not be referred to Appeals, Counsel will notify the taxpayer that the case will not be referred to Appeals.<sup>15</sup>

The IRS received four comments, including one from the Tax Section of the American Bar Association.<sup>16</sup> It published the revenue procedure with few changes from the notice. The new revenue procedure provided:

Counsel will not refer to Appeals any docketed case or issue that has been designated for litigation by Counsel. In limited circumstances, a docketed case or issue that has not been designated for litigation will not be referred to Appeals if Division Counsel or a higher level Counsel official determines that referral is not in the interest of sound tax administration.<sup>17</sup>

Facebook did not challenge the decision of the IRS attorneys not to refer its case to Appeals in the Tax Court but rather brought an action in the District Court for the Northern District of California where the matter was referred to a magistrate judge. It sought an order that the IRS must refer its case to Appeals because Section 7803(a)(3)(E) gave it the right to appeal a decision to an independent forum. To reach this result, Facebook argued that relief should be granted through the Administrative Procedure Act (APA) because the IRS action in promulgating Revenue Procedure 2016-22 violated the APA. Additionally, it argued that the denial of a post-petition hearing with Appeals violated its rights. With respect to both arguments, Facebook alleged the action of the IRS was “arbitrary, capricious, an abuse of discretion, not in accordance

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14. I.R.S. Notice 2015-72, 2015-44 I.R.B. 613, <http://www.irs.gov/pub/irs-irbs/irb15-44.pdf> [<http://perma.cc/4ECA-4UHK>].

15. *Id.* at 614.

16. AM. BAR ASS'N, SECTION OF TAXATION, COMMENTS ON NOTICE 2015-72 CONCERNING THE ADMINISTRATIVE APPEALS PROCESS (2015), <http://www.americanbar.org/content/dam/aba/administrative/taxation/policy/111615comments.pdf> [<http://perma.cc/N3E6-X9NQ>].

17. Rev. Proc. 2016-22 § 3.03, 2016-15 I.R.B. 578, <http://www.irs.gov/pub/irs-irbs/irb16-15.pdf> [<http://perma.cc/8ZB8-L5Q4>].

with the law, exceeded statutory jurisdiction, authority, or limitation, or was short of a statutory right.”<sup>18</sup>

The court looked to the right to appeal that Facebook relied upon as the basis for its claim. It described the history of Appeals going back to 1927 and looked for legislation granting taxpayers a right to have a hearing in Appeals. It found specific grants of a right to go to Appeals in several IRC sections enacted as a part of the Restructuring and Reform Act of 1998 including the right (1) to engage in a CDP hearing following the filing of a notice of federal tax lien,<sup>19</sup> (2) to engage in a CDP hearing following the issuance of a notice of intent to levy,<sup>20</sup> (3) to review the decision following the denial of an installment agreement,<sup>21</sup> and (4) to review the decision following the denial of an offer in compromise.<sup>22</sup> It noted the absence of a statutory right to go to Appeals in the context of a Tax Court case and cited several cases specifically holding that no such right existed.<sup>23</sup>

Failing to find a preexisting or non-TBOR right to have a hearing with Appeals, the court then went back through the history of TBOR starting with the original recommendation by the National Taxpayer Advocate in her 2007 Annual Report.<sup>24</sup> In its analysis, the court looked at the recommendation for TBOR as it passed through numerous legislative proposals, the administrative adoption of TBOR, and the legislation ultimately enacted in 2015 that amended Section 7803.<sup>25</sup>

18. *Facebook*, 2018 WL 2215743, at \*11.

19. *Id.*; see also I.R.C. § 6320 (2018).

20. *Facebook*, 2018 WL 2215743, at \*2; see also I.R.C. § 6330.

21. *Facebook*, 2018 WL 2215743, at \*2; see also I.R.C. § 6159.

22. *Facebook*, 2018 WL 2215743, at \*2; see also I.R.C. § 7122.

23. *Facebook*, 2018 WL 2215743, at \*3; see also *New Hope Servs., Inc. v. United States*, 285 F.3d 568, 572 (7th Cir. 2002) (noting “there is no provision in the procedural rules for a taxpayer request for an Appeals Office conference” for a case docketed in Tax Court (quoting *Swanson v. Comm’r*, 106 T.C. 76, 99–100 (1996))); *Vosters v. United States*, No. C-88-20458-WAI, 1989 WL 90554, at \*2 (N.D. Cal. June 2, 1989) (rejecting a claim that “the IRS violated its own procedural rules by denying the taxpayer an administrative hearing before the Appellant Review Division” because the IRS’s “procedures were ‘directory rather than mandatory’” (citing *Rosenberg v. Comm’r*, 450 F.2d 529, 533 (10th Cir. 1971))); *Estate of Weiss v. Comm’r*, 90 T.C.M. (CCH) 566 (2005); *Swanson v. Comm’r*, 106 T.C. 76, 99–100 (1996); Leandra Lederman & Steven Mazza, *When Does the Taxpayer Have a Right to an IRS Appeal?*, 25 ABA SEC. OF TAX’N NEWSQUARTERLY 16, 16–17 (2006), <http://www.law.indiana.edu/people/lederman/PTRLedermanMazza.pdf> [<http://perma.cc/3MTC-NSJX>].

24. *Facebook*, 2018 WL 2215743, at \*3–4; see also 2 NAT’L TAXPAYER ADVOCATE, 2007 ANNUAL REPORT, *supra* note 1, at 485.

25. *Facebook*, 2018 WL 2215743, at \*3–9. In February 2015, Representative Roskam re-introduced his proposed legislation to enact a statutory TBOR. H.R. 1058, 114th Cong. (2015). The bill was referred to the House Ways and Means Committee, which revised Representative Roskam’s bill so that the ten rights listed in the proposed statutory TBOR exactly tracked the language of the IRS’s 2014 TBOR. Compare H.R. 1058, 114th Cong. (2015), with I.R.S. News Release IR-2014-72, 2014 WL 2590817, at \*1 (June 10, 2014). The Committee reported the reason that the proposed legislation was needed:

The Committee has found examples of IRS employees showing disregard for the rights and protections afforded taxpayers under the Code, and that such disregard may be a result of lack of emphasis on the importance of such rights. Any public perception that



Having set the scene with the background of TBOR, the statutory availability of a right to Appeals absent TBOR, and the relevant revenue procedure guiding the IRS decision, the court determined that Facebook's sole alleged injury concerned the denial of a statutorily mandated appeals process but "Facebook fail[ed] to establish that it ha[d] a legally protected right to take its tax case to IRS Appeals."<sup>26</sup> The court found that no statutorily created right granted Facebook the right to go to Appeals prior to the enactment of TBOR. Then it determined that TBOR did not create any new statutory rights based on the legislative history of TBOR and the language of the statute itself. Finally, it determined that even if TBOR did grant new rights, it did not grant the right for the type of Appeals hearing requested in this case by Facebook.

In reaching its conclusion that TBOR granted no new rights, the court cited the language of the statute that TBOR rights are "afforded by *other* provisions of this title."<sup>27</sup> It found that, when looking at the ten rights as a whole, it did not make sense to argue that TBOR itself granted rights. In support of its conclusion the court noted that some of the provisions of TBOR, such as the right to be informed, were simply too broad and undefined in scope to grant specific rights. Since not all of the TBOR provisions granted rights, the court reasoned that it was logical that none granted rights. It also observed that, even if TBOR did grant new rights, in Section 7803(a)(3)(E) the language used was "independent forum" and that could just as easily refer to the Tax Court, or some other court, as to Appeals.<sup>28</sup>

The decision in *Facebook* seems faithful to the overall statutory scheme and to the grant of rights in TBOR. Nothing in the IRC generally or in TBOR specifically grants an Appeals hearing in the context in which Facebook sought a hearing. Facebook's attempt to use TBOR to obtain the specific relief it wanted in this case seems to reach beyond the rights conferred in TBOR. Even though it lost the case, Facebook raised the profile of TBOR and may influence other taxpayers to make arguments which cite TBOR in an effort to obtain relief. The decision points to the difficulty a taxpayer will have in trying to use TBOR to create a right that does not exist elsewhere and is not specifically granted by the language of TBOR. As discussed further in this Article, TBOR cannot defeat specific statutory requirements nor can it create a specific remedy such as the one sought here that has no basis elsewhere in the IRC. Despite its limitations,

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such disregard is common and not taken seriously by upper management at the IRS undermines trust in the integrity of the IRS. The Committee believes that the public trust that the top management of the IRS is committed to ensuring such rights is imperative to good tax administration. Although the IRS has recently published a Taxpayer Bill of Rights, such publication does not itself carry force of law or impose any obligations on the management or employees of the IRS. Accordingly, codifying the requirement that the Commissioner assume responsibility to implement the bill of rights is warranted to ensure public trust.

H.R. REP. NO. 114-70, at 4 (2015); *see also Facebook*, 2018 WL 2215743, at \*8.

26. *Facebook*, 2018 WL 2215743, at \*12.

27. *Id.* at \*14 (quoting I.R.C. § 7803(a)(3) (2018)).

28. *Id.*

TBOR may assist a taxpayer in arguing for an interpretation of a right otherwise created or a result not otherwise prohibited.

*B. Moya v. Commissioner*

In *Moya* the petitioner raised TBOR as her sole basis for assignment of error with respect to the notice of deficiency sent to her.<sup>29</sup> In the notice the IRS asserted a deficiency primarily resulting from disallowance of expenses she claimed with respect to her Schedule C business. In her petition and in her argument of the case Ms. Moya made no effort to prove that she actually had the expenses disallowed by the IRS but focused solely on the actions of the IRS during the audit, which she said violated her rights under TBOR.<sup>30</sup>

Ms. Moya based her TBOR argument on the failure of the IRS to transfer her case from its Las Vegas office to an office near her home in California.<sup>31</sup> In failing to move the examination the IRS issued conflicting correspondence and she argued that the IRS issued the notice of deficiency in violation of her right to have her questions answered and to meet with the IRS at a time and place convenient to her.<sup>32</sup> In response to her argument, the IRS stated that TBOR had no application to the determination of the deficiency in Tax Court because it is a proceeding de novo.<sup>33</sup>

The Tax Court first found that the history of TBOR “makes clear that it accords taxpayers no rights they did not already possess.”<sup>34</sup> The Tax Court cited statements by the IRS Commissioner and the NTA, as well as legislative history, in support of its conclusion.<sup>35</sup> After concluding TBOR provided no benefit to the taxpayer, the Tax Court examined the conduct of the IRS to determine if the actions and inaction of the IRS provided a basis to deviate from the general principle that it would not look behind the notice of deficiency.<sup>36</sup> Having examined the facts for that purpose, the Tax Court concluded that the IRS actions here did not rise to the level of extraordinary misconduct needed to allow it to look behind the notice of deficiency.<sup>37</sup>

The *Moya* opinion is a precedential opinion of the Tax Court. It made a clear statement that violations of taxpayer rights under TBOR will not provide a basis for relief in a deficiency case. By citing *Greenberg's Express, Inc. v.*

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29. *Moya v. Comm'r*, No. 13343-15, 2019 WL 1714740, at \*1 (T.C. Apr. 17, 2019).

30. *Id.* at \*2–3.

31. *Id.*

32. *Id.* at \*3.

33. *Id.* at \*5. The IRS cited *Greenberg's Express, Inc. v. Commissioner*, 62 T.C. 324 (1974), in which the Tax Court stated that it would not look “behind the notice of deficiency” in determining the correct amount of tax owed by the taxpayer. The case is often cited when taxpayers seek to raise issues that occurred during the examination phase. The Tax Court routinely states in response to such an attempt that it does not care what happened during the audit but is only concerned with determining whether the notice of deficiency is correct.

34. *Moya*, 2019 WL 1714740, at \*6 & n.6 (citing *Facebook* favorably).

35. *Id.* at \*8.

36. *Id.* at \*9.

37. *Id.* at \*9–10.

*Commissioner*,<sup>38</sup> the Tax Court lumped TBOR arguments in deficiency cases with a line of cases stretching back almost a half century in which the Tax Court has made clear it will not look at IRS actions during an audit. TBOR's failure to change this equation demonstrates that to the Tax Court a violation of TBOR serves as just another action prior to the issuance of the notice of deficiency that makes no difference once the de novo Tax Court proceeding begins.

### C. Other Relevant Cases

In addition to *Facebook* and *Moya*, there are four other cases decided or pending in litigation that deserve some mention: *City of Fairfield v. United States*,<sup>39</sup> *Crandall v. Commissioner*,<sup>40</sup> *Atlantic Pacific Management Group, LLC v. Commissioner*,<sup>41</sup> and *Peacock v. Commissioner*.<sup>42</sup> In each case the taxpayer raised one or more rights listed in TBOR as part of their defense.<sup>43</sup> For the reasons discussed below, each attempt to use TBOR in litigation has failed<sup>44</sup> or likely will fail. The cases discussed below provide an opportunity to examine why TBOR will not generally provide the taxpayer with much assistance in litigation.

#### 1. *City of Fairfield v. United States*

In *City of Fairfield v. United States*, a taxpayer brought a suit against the IRS challenging a levy on its bank account for unpaid taxes. The IRS filed a motion to dismiss the first complaint for lack of subject matter jurisdiction, arguing that the city failed to plead any valid waiver of the United States' sovereign immunity. The court granted the motion and dismissed the complaint without prejudice, allowing the city to try again. The court granted the IRS's motion to dismiss with respect to the second complaint for failure to show a waiver of sovereign immunity relative to the allegations. The court granted the IRS's second motion because the city again failed to show a valid waiver of sovereign immunity.

The city admitted it owed the IRS a significant sum. City officials met with a revenue officer in November 2016 in an effort to work out some arrangement for paying the taxes, but the meeting failed to stop a levy. The city's suit against the IRS alleged several bases for stopping the levy: (1) the IRS levy form violated the Paperwork Reduction Act; (2) the IRS violated the Privacy Act by collecting information with unauthorized documents; (3) the IRS's use of unauthorized documents to seize the city's money violated the Fourth Amendment; and (4) "the [c]ity notes the principles contained in the Taxpayer Bill of Rights, . . .

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38. 62 T.C. 324 (1974).

39. No. 2:17-CV-1064-KOB, 2018 WL 2445686 (N.D. Ala. May 31, 2018).

40. No. 9203-17 (T.C. filed Apr. 28, 2017).

41. No. 8412-18 (T.C. filed May 2, 2018).

42. No. 11728-17 (T.C. filed May 24, 2017).

43. See, e.g., *City of Fairfield*, 2018 WL 2445686, at \*7.

44. See, e.g., *id.*

but does not make any allegations.”<sup>45</sup> The court dismissed the city’s first three arguments, calling them “frivolous.”<sup>46</sup> Indeed, they seem much more like the arguments one would expect to find in a tax protestor’s motion rather than a municipality’s motion. Addressing the TBOR argument, the court noted that the city simply observed that TBOR existed but failed to explain how the existence of TBOR entitled it to relief.

The case provides the simple lesson that holding TBOR up like a cross before a vampire will not stop the IRS from taking whatever action it deems appropriate. The city’s attempt to use TBOR by citing its existence served no purpose and took the court only a few sentences to dismiss. Because the city sought to stop levy action in its suit, finding a way for TBOR to provide a meaningful basis for relief would have been difficult, if not impossible, even if the city had crafted its argument with precision. To succeed, the city needed to cite specific reasons the levy should not occur. Nothing in TBOR provides the necessary specificity. Because the litigation occurred outside of CDP, the equitable implications of some of the provisions of TBOR could not easily apply. *City of Fairfield* serves as an unsurprising warning that simply informing a court of the existence of TBOR will not bring any relief.

## 2. *Crandall v. Commissioner*

*Crandall v. Commissioner* is currently pending in the Tax Court awaiting decision.<sup>47</sup> The parties submitted the case for decision using the Rule 122 provision that allows submission of a case fully stipulated.<sup>48</sup> The taxpayer immigrated to the United States from Italy and had a pension paid to her resulting from her work in Italy.<sup>49</sup> She failed to report the income from the pension and properly flag the existence of foreign bank accounts. She engaged with the IRS in the Offshore Voluntary Disclosure Program (OVDP) in order to resolve her tax issues. As a part of that program, she made certain disclosures, paid certain taxes, and ultimately entered into a formal agreement that included a closing agreement pursuant to Section 7122.

At issue in the case is the impact of a closing agreement on the deficiency the IRS seeks in the Tax Court case. The taxpayer argued that the closing agreement prevented the IRS from asserting a deficiency because it resolved all matters for the year covered by the closing agreement. In making her arguments about the closing agreement, the taxpayer included an argument that, in addition to the finality provided by the closing agreement, the IRS had an affirmative duty under TBOR “to ‘ensure that employees of the Internal Revenue Service

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45. *Id.* at \*3 (citation omitted).

46. *Id.* at \*3–4.

47. See Docket, *Crandall v. Comm’r*, No. 9203-17 (T.C. filed Apr. 28, 2017), <http://www.ustaxcourt.gov/UstcDockInq/DocketDisplay.aspx?DocketNo=17009203> [<http://perma.cc/V6RG-HRLR>]. As of May 15, 2019, the case stood submitted awaiting a decision. *Id.*

48. See Order, *Crandall v. Comm’r*, No. 9203-17 (T.C. June 21, 2018).

49. This description of the facts is drawn from the parties’ briefs. Tax Court briefs and other filed documents are available for purchase from the Tax Court for \$0.50 per page by calling the clerk’s office at (202) 521-0700 and requesting the specific documents desired.

are familiar with and act in accord with' preexisting taxpayer rights established in other provisions of the Code. TBOR requires Respondent to ensure that IRS employees know what rights taxpayer have and act in a way that respects those rights."<sup>50</sup>

Because the taxpayer believed that the closing agreement entered into as part of the OVDP precluded a subsequent audit and deficiency notice for a tax period covered by the closing agreement, the taxpayer argued that the IRS violated the right to finality by pursuing this action.<sup>51</sup> Citing TBOR here cannot have much impact on the outcome of the underlying case because the IRS takes the position that the closing agreement does not preclude the notice of deficiency. The Tax Court will either agree or disagree with the argument that the closing agreement controls the ability to issue a notice of deficiency here. The legal issue in litigation centers on the effect of the closing agreement.<sup>52</sup> If the IRS loses the argument, then it will lose the case but not because of the existence of the right to finality. The IRS argued that the actions prior to the audit and notice of deficiency did not create finality for the tax year. TBOR adds nothing to the IRS's legal arguments and cannot impact the outcome of the litigation.

The issue of finality in the litigation of a tax matter will always come back to specific provisions of the IRC and what it allows. If the attorneys for the IRS take the position, even incorrectly, that a matter has not reached final resolution, IRS employees cannot be faulted for continuing to pursue the matter. Should the IRS lose, maybe the right to finality provision of TBOR could play a small role in the issue of attorney's fees, discussed below, because the IRS violated a provision of TBOR by wrongly interpreting the statutory provisions. It is difficult, however, to see how this provision could assist the court in deciding whether the IRS wrongly interpreted the statute.

### 3. *Atlantic Pacific Management Group, LLC v. Commissioner*

As of May 15, 2019, this case is still pending with the Tax Court.<sup>53</sup> Although the Tax Court petition filed in *Atlantic Pacific* seeks CDP relief,<sup>54</sup> the late filing

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50. Opening Brief for Petitioners at 45, *Crandall v. Comm'r*, No. 9203-17 (T.C. July 9, 2018) (quoting I.R.C. § 7803(a)(3) (2018)).

51. *Id.* This case is still pending before the Tax Court, meaning that comments concerning the impact of the TBOR arguments reflect the views of the author and not the views of the court; it remains possible that the TBOR arguments will influence the Tax Court.

52. Section 7121 allows the IRS and a taxpayer to enter into an agreement that provides closure (or finality) to a specific issue or to a tax year. *See* I.R.C. § 7121 (2018). Many reasons can exist for the parties to seek closure. These agreements do not occur frequently but they do occur regularly. The IRS has forms it uses to enter into such agreements. *See* IRM 8.1-8.26 (various dates) (describing these agreements in detail). Courts have honored closing agreements and prevented the other side from trying to reopen or amend such agreements. *See* *Davis v. United States*, 811 F.3d 335, 339 (9th Cir. 2016). Closing agreements are interpreted using contract law. *See* *Estate of Duncan v. Comm'r*, 112 T.C.M. (CCH) 505 (2016), *aff'd*, 890 F.3d 192 (5th Cir. 2018); *Long v. Comm'r*, 93 T.C. 5, 10 (1989).

53. *See* Docket, *Atl. Pac. Mgmt. Grp. LLC v. Comm'r*, No. 8412-18 (T.C. filed May 2, 2018), <http://www.ustaxcourt.gov/UstcDockInq/DocketDisplay.aspx?DocketNo=18008412> [<http://perma.cc/NG5P-Q3MV>].

of the request for relief to Appeals caused the IRS to preclude such relief.<sup>55</sup> So, the *Atlantic Pacific* case will probably ultimately fail if the goal in filing the suit was to obtain an opinion from the Tax Court due to the late filing of the CDP request. It may succeed if the goal in filing the suit was to gain a meaningful hearing with Appeals where the collection issue could reach resolution. As discussed below, the use of TBOR in making arguments regarding the relief request is unlikely to directly result in the relief requested as a result of an order or opinion from the Tax Court; however, the reference to TBOR may assist the taxpayer if the taxpayer seeks to obtain an informal hearing with the IRS rather than a favorable formal opinion from the court.

In *Atlantic Pacific* the IRS filed a notice of federal tax lien against the taxpayer and sent a Section 6320 notice to the taxpayer on June 13, 2017. The taxpayer requested a CDP hearing on July 28, 2017, well beyond the thirty-day limit. The IRS notified the taxpayer that the request was untimely. The taxpayer requested an equivalent hearing to which the IRS did not respond.<sup>56</sup> The taxpayer petitioned the Tax Court without having received a notice of determination or a notice of decision.

The taxpayer alleged several problems with the notice of federal tax lien including (1) the failure to send the Section 6320 notice within five business days of the filing of the lien notice as required by that statute, (2) the failure to send

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54. The facts discussed in this Part are taken from the parties' pleadings filed with the Tax Court. While those pleadings are publicly available, in this context publicly available means that to observe the pleadings you must either physically go into the Tax Court in Washington, D.C., or call the Tax Court and order the documents at \$0.50 per page.

55. A taxpayer must file a request for CDP relief with Appeals within thirty days of the date of the CDP notice. If the taxpayer fails to file the request within thirty days, then the taxpayer generally cannot obtain CDP relief and may either obtain relief in the form of an equivalent hearing, which does not allow for a hearing in the Tax Court, or receive no relief at all. See Treas. Reg. § 301.6320-1(i)(1) (2006); see also MICHAEL I. SALTZMAN & LESLIE BOOK, *IRS PRACTICE AND PROCEDURE* ¶ 14B.20 (2019). For a discussion of the similar but distinct consequence of missing the thirty-day period to file a Tax Court petition, see Order of Dismissal for Lack of Jurisdiction, *Atuke v. Commissioner*, No. 31680-15SL (T.C. Apr. 15, 2016). In *Atuke*, the Tax Court held that it lacked jurisdiction over a taxpayer who filed his Tax Court petition more than thirty days after the notice of determination. *Id.* *Atlantic Pacific* does not present the same issue as *Atuke* but rather focuses on the thirty-day period to make a request for a CDP hearing after the IRS issues the CDP notice. Memorandum of Law in Support of Petitioner's Objection To Respondent's Motion To Dismiss at 1, *Atl. Pac. Mgmt. Grp. LLC v. Comm'r*, No. 8412-18 (T.C. July 27, 2018). The jurisdictional bar to the Tax Court discussed in *Atuke* and more definitively in *Duggan v. United States*, 879 F.3d 1029 (9th Cir. 2018), is not at issue in *Atlantic Pacific*. Here, the petitioner filed the petition with the Tax Court within thirty days of the denial of the CDP request. Memorandum of Law in Support of Petitioner's Objection to Respondent's Motion To Dismiss at 3, *Atl. Pac. Mgmt. Grp. LLC v. Comm'r*, No. 8412-18 (T.C. July 27, 2018). The petitioner filed the CDP request more than thirty days after the Section 6320 notice; however, the petitioner alleged that the CDP notice was not sent to the petitioner's last known address and that the petitioner's tax matters partner and managing member was out of the United States when the Section 6320 notice was sent. *Id.* at 2–3. Because the time period for making a CDP request does not appear to be jurisdictional, the reasonable delay in filing the request may provide a basis for determining the request was timely. *Atuke* and this jurisdictional issue will be discussed in greater detail *infra* at Part III.D. See also T. Keith Fogg, *The Jurisdictional Ramifications of Where You Send a CDP Request*, 161 TAX NOTES 837 (2018) [hereinafter Fogg, *The Jurisdictional Ramifications*].

56. See Treas. Reg. § 301.6320-1(i)(1); see also SALTZMAN & BOOK, *supra* note 55, ¶ 14B.20.

notice and demand within sixty days after assessment, (3) the failure to obtain appropriate approval as required by Section 6751(b) prior to imposing a penalty, and (4) using the summary assessment provisions applicable to assessable penalties for the penalty imposed under Section 6038.

Added to these very specific and IRC-based concerns, the taxpayer made three separate arguments based on TBOR.<sup>57</sup> First, the taxpayer argued that the refusal of the IRS to grant a CDP hearing deprived it of its right to challenge the IRS's position and to be heard.<sup>58</sup> This argument provides an example of the use of TBOR that should persuade the IRS, if not the court.<sup>59</sup> By citing the right to be heard, the taxpayer also set up the opportunity to argue that the time to make the CDP request should remain open in situations in which the taxpayer fails to receive the CDP notice during the thirty-day period.<sup>60</sup> In addition to presenting an example of an effective use of TBOR in this setting, using TBOR as a basis for arguing a time period to act should be extended will receive further discussion below in the Part concerning regulatory and subregulatory comments.<sup>61</sup>

Additionally, the taxpayer argued that the refusal to offer a CDP hearing deprived the taxpayer of the right to appeal to an independent forum and the right to a fair and just tax system.<sup>62</sup> The taxpayer used these additional TBOR citations to further its argument that the IRS should have, at least, granted an equivalent hearing. The taxpayer connected these arguments to its situation with a citation of the decision in *Facebook* where the court stated that TBOR “does not provide independent relief or additional rights for taxpayers, but it does

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57. Memorandum of Law in Support of Petitioner's Objection to Respondent's Motion To Dismiss at 21–24, *Atl. Pac. Mgmt. Grp. LLC v. Comm'r*, No. 8412-18 (T.C. July 27, 2018). This case is still pending before the Tax Court, meaning that comments concerning the impact of the TBOR arguments reflect the views of the author and not the views of the court; it remains possible that the Tax Court will be influenced by the TBOR arguments.

58. See I.R.C. § 7803(a)(3)(D) (2018). In this case the petitioner sought, at a minimum, an equivalent hearing. The regulations under Section 6320 provide that a taxpayer who misses the thirty-day period within which to request a CDP hearing can obtain an equivalent hearing with Appeals if a request occurs within one year after the issuance of the CDP notice. *Treas. Reg.* § 301.6320-1(i)(1); see also SALTZMAN & BOOK, *supra* note 55, ¶ 14B.20. Here, the taxpayer clearly made the request for a hearing within the one-year period even if the Tax Court finds that the request cannot be treated as timely.

59. In fact, taxpayer's counsel has advised the author that the IRS has granted an equivalent hearing and the Tax Court case has been suspended to allow the taxpayer to meet with Appeals in an effort to resolve the matter.

60. See Carlton Smith, *Eleventh Circuit Says Untimely-Made CDP Arguments “May Deserve Attention from the Bench and Bar,”* PROCEDURALLY TAXING (June 13, 2018), <http://procedurallytaxing.com/eleventh-circuit-says-untimely-made-cdp-arguments-may-deserve-attention-from-the-bench-and-bar/> [<http://perma.cc/HG6B-H4V4>] [hereinafter Smith, *Eleventh Circuit*] (discussing the issue of untimely filed CDP requests in circumstances in which the taxpayer did not receive the CDP notice in time to file a timely request).

61. See *infra* Part III.D.

62. Memorandum of Law in Support of Petitioner's Objection to Respondent's Motion To Dismiss at 21–25, *Atl. Pac. Mgmt. Grp. LLC v. Comm'r*, No. 8412-18 (T.C. July 27, 2018); see also I.R.C. § 7803(a)(3)(E), (J).

apply those rights already guaranteed to taxpayer.”<sup>63</sup> The TBOR provision regarding a fair and just tax system<sup>64</sup> seems too generic to provide much assistance here, but the citation of the provision regarding the right to appeal to an independent forum<sup>65</sup> couples nicely with the right to challenge and be heard,<sup>66</sup> as well as with the regulations providing for an equivalent hearing.<sup>67</sup> The facts in *Atlantic Pacific* support a timely request for an equivalent hearing. While the Tax Court may not have the authority to require the IRS to hold an equivalent hearing, raising TBOR provisions in the Tax Court case draws more attention to the apparent failure of the IRS to follow its own regulation.<sup>68</sup>

The TBOR citations in *Atlantic Pacific* will not work to further the taxpayer’s argument that the federal tax lien and the notice of the federal tax lien are invalid and are also unlikely to have an impact on the Tax Court’s jurisdiction to hear the case. To succeed on those arguments, the taxpayer needs to make an IRC-based argument regarding the actions the IRS took or failed to take. The TBOR citations should and have helped the taxpayer gain the hearing that the IRS failed to offer even though the taxpayer met the requirements for such a hearing set out in the regulations.

#### 4. *Peacock v. Commissioner*

As of March 18, 2019, the case is still pending with the Tax Court.<sup>69</sup> In *Peacock v. Commissioner*, the taxpayers remitted funds to the IRS prior to the issuance of the notice of deficiency with the intention that the remittance serve as a deposit.<sup>70</sup> The IRS treated the remittance as a deposit in coding its transcripts, issuing the notice of deficiency, and other ways that it handled the transaction, including the way it answered the petition filed in response to the notice of deficiency. Subsequent to filing its answer, the IRS decided that the taxpayers failed to notate the payment in a manner appropriate to make it a deposit.<sup>71</sup> Based on that decision, the IRS filed a motion to dismiss the case for

63. Memorandum of Law in Support of Petitioner’s Objection to Respondent’s Motion To Dismiss at 22, *Atl. Pac. Mgmt. Grp. LLC v. Comm’r*, No. 8412-18 (T.C. July 27, 2018) (citing *Facebook, Inc. v. IRS*, No. 17-cv-06490-LB, 2018 WL 2215743, at \*5 (N.D. Cal. May 14, 2018)).

64. I.R.C. § 7803(a)(3)(J).

65. *Id.* § 7803(a)(3)(E).

66. *Id.* § 7803(a)(3)(D).

67. Treas. Reg. § 301.6330-1(i)(1) (2006).

68. *Id.* §§ 301.6320-1(i)(1), 301.6330-1(i)(1).

69. See Docket, *Peacock v. Comm’r*, No. 11728-17 (T.C. filed May 24, 2017), <http://www.ustaxcourt.gov/UstcDockInq/DocketDisplay.aspx?DocketNo=17011728> [http://perma.cc/Q8GU-NSCY].

70. The facts discussed in this Part are taken from the parties’ pleadings filed with the Tax Court. While those pleadings are publicly available, in this context publicly available means that to observe the pleadings you must either physically go into the Tax Court in Washington, D.C. or call the Tax Court and order the documents at \$0.50 per page.

71. According to his brief in response to the motion to dismiss, the petitioner received an examination report proposing a deficiency at the end of March 2016. Petitioner’s Brief in Opposition to Respondent’s Motion To Dismiss for Lack of Personal Jurisdiction at 4, *Peacock v. Comm’r*, No. 11728-17 (T.C. June 27, 2018). On April 8, 2016, the petitioner hand delivered a check for \$7,192.42,



lack of jurisdiction. Whether the remittance represents a payment (which would deprive the Tax Court of jurisdiction) or a deposit (which would not) turns on the application of Section 6603 and Revenue Procedure 2005-18 published in compliance with the language in the IRC section.

One of the taxpayers cited three provisions of TBOR in support of his opposition to the motion to dismiss for lack of jurisdiction filed by the IRS.<sup>72</sup> The taxpayer acknowledged and took on concerns about the impact of TBOR in the opening paragraph of this section of his argument. He stated that “[w]hen a revenue procedure conflicts or is inconsistent with a Code section, such revenue procedure becomes obsolete.”<sup>73</sup> He argued that the rights found in Sections 6603 and 7803(a)(3) make Revenue Procedure 2005-18 obsolete.<sup>74</sup> This argument, like almost no other argument made to a court regarding TBOR up to this point, sought to define the relationship between the statutory provisions of TBOR and a subregulatory pronouncement by the IRS. The argument, though grounded in logic and proper interpretation of authorities, failed to address the purpose of the revenue procedure and how that purpose impacts the relevant authority of the procedure vis-à-vis the TBOR provision.

In Section 6603 Congress created a statute designed to make clear when a taxpayer made a deposit versus when the taxpayer made a payment. In designing the statute, Congress deferred to the IRS on the answer by providing:

(a) Authority to make deposits other than as payment of tax

A taxpayer may make a cash deposit with the Secretary which may be used by the Secretary to pay any tax imposed under subtitle A or B or chapter 41, 42, 43, or 44 which has not been assessed at the time of the deposit. Such a deposit shall be made in such manner as the Secretary shall prescribe.<sup>75</sup>

Revenue Procedure 2005-18 carried out the express wish of Congress that the IRS provide details on when a deposit has occurred.<sup>76</sup> In this context, arguing that TBOR’s broad policy goals override the specific statements in the revenue procedure regarding the characterization of a remittance to the IRS becomes difficult in a court setting but might be persuasive in the creation of the subregulatory guidance as discussed below.

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the entire amount of the proposed deficiency, to the office handling the examination. *Id.* at 5. The IRS recorded the remittance as an “Advance Payment of Tax Owed” using the internal computer code for deposits. *Id.* Along with the check, petitioner submitted a letter stating specifically, inter alia, “I do, however, respectfully disagree completely with your determination” and noted he was requesting an Appeals review by separate letter. *Id.* at 6.

72. *Id.* at 16–18, 30–39. This case is still pending before the Tax Court meaning that comments concerning the impact of the TBOR arguments reflect the views of the author and not the views of the court; it remains possible that the Tax Court will be influenced by the TBOR arguments.

73. *Id.* at 30–31.

74. Petitioner’s Simultaneous Opening Brief at 30, *Peacock v. Comm’r*, No. 11728-17 (T.C. June 28, 2018).

75. I.R.C. § 6603(a) (2018).

76. See SALTZMAN & BOOK, *supra* note 55, ¶ 11.02[2][a][iv] (discussing Revenue Procedure 2005-18 and how it operates).

The taxpayer's first use of TBOR in his brief involved the discretion of the IRS to raise the jurisdictional argument. Discussing the discretion of the IRS to raise a jurisdictional argument seems odd since the court, not the IRS, ordinarily makes decisions regarding jurisdiction.<sup>77</sup> Here, the nature of Section 6603 and its grant of authority to the IRS to develop procedures<sup>78</sup> does put the IRS in a position of controlling the jurisdictional determination. To the extent that the decision to raise a jurisdictional issue rests with the IRS rather than the court, the taxpayer argued that TBOR limits any discretion the IRS possesses in making such a decision. Specifically, according to the taxpayer, the right to challenge a position and be heard limits the IRS. While the relationship of the IRS and Tax Court jurisdiction in this setting is unusual and perhaps leaves some room for interpretation, TBOR will ordinarily have nothing to do with the right to get into Tax Court. The TBOR argument here seems more appropriate at the level of creation of the guidance in the revenue procedure than application of the revenue procedure to the facts of the case.<sup>79</sup>

The taxpayer next argued that TBOR makes Revenue Procedure 2005-18 obsolete because, as described above, the statutory power of TBOR overrides the subregulatory power of Revenue Procedure 2005-18. The taxpayer relied on the right to challenge and be heard. For the reasons discussed above, this provision of TBOR does not provide sufficient specificity to override the link between the revenue procedure and Section 6603.

Finally, the taxpayer argued that the person at the IRS receiving the money from the taxpayer had a duty to guide the taxpayer to perform the necessary acts to achieve his goal of making a deposit. The taxpayer cited the right to be informed.<sup>80</sup> When applied as broadly as the taxpayer sought to apply it in this situation, the taxpayer's position appears to require that the IRS ascertain what a taxpayer would like to do and then guide the taxpayer to that result much as a representative might do. Such a reading of TBOR seems too expansive. Not only does the taxpayer seek to use TBOR to create a duty on the part of the IRS to explain what the taxpayer should do but also the taxpayer seeks to create a remedy for failure to provide a proper explanation that creates a "do over" if the IRS fails to make the proper explanation.<sup>81</sup> To the extent that TBOR created some type of duty for the IRS to explain how to make a proper deposit (assuming the taxpayer properly formed and delivered the question), a more

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77. The Tax Court or an appellate court can raise the issue of jurisdiction *sua sponte*. See, e.g., *Tilden v. Comm'r*, 110 T.C.M. (CCH) 314 (2015) (raising the issue of the Tax Court's jurisdiction at oral argument), *rev'd and remanded*, 846 F.3d 882 (7th Cir. 2017). Chief Counsel attorneys are directed to raise the issue of jurisdiction when they spot a jurisdictional issue. *IRM* 35.3.2.1.1 (Sept. 21, 2012).

78. See *I.R.C.* § 6603(a).

79. See *infra* Part III.D.

80. See *Harris v. Comm'r*, No. 15433-16S, 2017 WL 4422359 (T.C. 2017), discussed *infra*, in which Special Trial Judge Panuthos cited this TBOR provision when the IRS failed to notify a taxpayer of the impact of an offer in compromise (OIC) on the spouse with a joint tax liability who did not enter into the OIC.

81. See *infra* Part II.B.

likely place to obtain the type of relief the taxpayer sought is in the administrative process discussed below.<sup>82</sup>

The decided and pending cases discussed here reflect a growing willingness to insert TBOR into arguments made during the course of litigation. The arguments discussed in this Section, with the exception of the argument seeking an equivalent hearing in the *Atlantic Pacific* case, probably will not persuade the court in the absence of other positive law. Of course, some of the cases mentioned here still have the opportunity for a case decision that does rely on the reference to TBOR.

## II. THE APPLICATION OF TBOR TO EXAMINATION AND COLLECTION ISSUES

The two primary administrative processes in which taxpayers interact with the IRS are the examination of a tax return to determine its correctness and the collection of taxes. Section II of this Article looks at the potential impact of TBOR on those two processes as taxpayers seek relief based on some failure to provide the rights set out in TBOR. The final Part of Section II looks at the specific subset of collection cases involved in CDP.

### A. Examination

Finding uses of TBOR during an examination is difficult with respect to the merits of the liability but exist abundantly in the procedural aspects of examination.<sup>83</sup> Unless a taxpayer makes an argument to an examiner public or the fact of the TBOR argument during the examination comes out in subsequent litigation, TBOR arguments made in this setting remain shielded from the eyes of third parties. The use of TBOR to impact an outcome during the examination process seems unlikely to the extent the taxpayer seeks to impact a specific audit adjustment. Most of the issues arising in examination implicate the application of a specific statute to the facts of a taxpayer's case, for example, whether the taxpayer properly claimed a dependent, whether the IRC allows depreciation in a specific context, et cetera. In each situation in which a taxpayer seeks to influence the outcome of an examination, the taxpayer needs to find legal support in the IRC for the factual situation presented.<sup>84</sup> The types of rights

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82. See *infra* Part II.B.

83. See, e.g., TREASURY INSPECTOR GEN. FOR TAX ADMIN., FISCAL YEAR 2018 STATUTORY AUDIT OF COMPLIANCE WITH NOTIFYING TAXPAYERS OF THEIR RIGHTS WHEN REQUESTED TO EXTEND THE ASSESSMENT STATUTE (2018), <http://www.treasury.gov/tigta/auditreports/2018reports/201830059fr.pdf> [<http://perma.cc/S8EY-4ZAB>]. This annual report, which was commissioned by Congress in 1998 (long before it codified TBOR), requires the Treasury Inspector General for Tax Administration (TIGTA) to look at the information provided to taxpayers by the IRS when the IRS seeks to extend the statute of limitations in order to ensure that the IRS adequately informs the taxpayer of the pros and cons of extending the statute. This report provides a great example of the examination division meeting TBOR's right to know provisions in the context of an examination.

84. See, e.g., *Baxter v. United States*, No. 15-cv-04764-YGR, 2016 WL 468034, at \*3 (N.D. Cal. Feb. 8, 2016), *amended in part*, No. 15-cv-04764-YGR, 2016 WL 1359413 (N.D. Cal. Apr. 6, 2016) (emphasizing that the IRC and its implementing regulations "contemplate notice for each contact, not

created by TBOR will not assist a taxpayer in resolving a specific dispute regarding the amount of tax owed. For that reason, TBOR may have limited applicability in the examination process to the extent that the process focuses on the correct tax liability. TBOR does, however, have its place in the examination process.

The National Taxpayer Advocate (NTA), Nina Olson, pointed to one use of TBOR in the examination process in a blog post entitled “*Real*” vs. “*Unreal*” Audits and Why This Distinction Matters. The NTA described “unreal” audits as “contacts . . . includ[ing] math error corrections, Automated Underreporter (AUR) (a document matching program), identity and wage verification, and Automated Substitute for Return (ASFR) (a non-filer program).”<sup>85</sup> The types of examinations that the NTA described as unreal do not come with the protections afforded to real or regular audits. Specifically, these types of examinations do not provide a right to appeal the decision to an independent forum in most cases. The lack of a right to appeal fails to provide the protections described in Section 7803(a)(3)(E). The letter sent to taxpayers in the math error notice does an especially poor job of informing the taxpayer exactly what the notice seeks to accomplish. Buried on the second page, the IRS describes the right to contest the notice and move the case back onto the regular examination track. This type of letter fails to provide the protection provided in Section 7803(a)(3)(A). On the first page the letter should very explicitly and clearly explain the importance of the letter in the processing of the case so that the taxpayer can make an informed decision whether to contest the math error notice and avoid immediate assessment.

Of the cases discussed to this point, only *Peacock* involved an issue where the decision might be considered one made at the examination stage.<sup>86</sup> Even though the decision regarding the treatment of a remittance to a revenue agent occurred at the examination stage, the decision itself concerned payment and not the correctness of the tax.<sup>87</sup> Only in situations tangential to an examination will TBOR come into play. Several TBOR provisions could have an impact on an examination outside the scope of the right amount of tax. Revenue agents and correspondence examiners have a duty to explain their actions to taxpayers implicating the right to be informed. There will be instances in which someone examining a taxpayer’s return fails to provide the taxpayer with all of the necessary information. Mr. Peacock complained of this very problem.<sup>88</sup> At the administrative level a complaint of this type based upon TBOR should result in better information flow, but it is hard to follow the result of poor information

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a generic publication’s reference that the IRS may talk to third parties throughout the course of an investigation”), *aff’d sub nom.* J.B. v. United States, 916 F.3d 1161 (9th Cir. 2019).

85. Nina E. Olson, “*Real*” vs. “*Unreal*” Audits and Why This Distinction Matters, TAXPAYER ADVOCATE SERV.: NTA BLOG (July 6, 2018), <http://taxpayeradvocate.irs.gov/news/nta-blog-real-vs-unreal-audits-and-why-this-distinction-matters?category=Tax%20News> [http://perma.cc/3F3E-NY9D].

86. See *supra* Part I.C.4.

87. See *supra* Part I.C.4.

88. See *supra* Part I.C.4.

flow into a substantive remedy the taxpayer can pursue in court or in another setting.

Like all IRS employees, those engaged in examining returns should do so in a way that provides the taxpayer with quality service. Anyone with significant experience in the examination phase of the IRS has no doubt encountered an examiner whose actions have not met this standard. In this situation, a taxpayer's remedy would be to raise the poor quality service to the manager of the IRS employee. Citing this provision of TBOR to the manager may not make much difference in changing the attitudes or actions of an employee with poor performance. Depending on the training and performance evaluation standards adopted by the IRS in response to TBOR, TBOR could impact performance evaluations which could have an impact on performance eventually.

The right to pay no more than the correct amount of tax certainly has its place when discussing examinations, but the remedy usually lies with the ability of the taxpayer to show the examiner the basis for the position taken on the return. If the examiner reaches a conclusion that results in too much tax, the taxpayer will need to address the problem using the deficiency or refund procedures (together with audit reconsideration). Perhaps the best opportunity for TBOR to have meaning with respect to the right amount of tax and the examination exists in the audit reconsideration or abatement context.<sup>89</sup> There the IRS has the ability to correct its mistake without requiring the taxpayer to engage in a formal process. This Article discusses, in the collection context, a CDP case litigating this right.<sup>90</sup> Perhaps parallels can be drawn from *Dang v. Commissioner*<sup>91</sup> to the examination context, but they may be strained.

The rights to privacy and confidentiality have a role in examination cases and especially those in which a revenue agent seeks information from third parties.<sup>92</sup> Examinations involving information gathering from third-party

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89. Audit reconsideration existed before TBOR but provides a great example of the IRS creating a process not required by the Code that assists taxpayers in resolving their liabilities. IRM 4.13 (Dec. 16, 2015). It creates an important administrative right for taxpayers who have neglected or otherwise missed their opportunity to go to Tax Court to contest a proposed liability. IRM 4.13.1.3 (Dec. 16, 2015). TBOR could play a role in improving audit reconsideration by causing the IRS to redesign the process to keep taxpayers better informed of the status of an audit reconsideration request. The current system does not meet the TBOR standard of keeping taxpayers informed. Once submitted, the audit reconsideration request goes into something of a black hole. See, e.g., *Audit Reconsiderations*, TAXPAYER ADVOCATE SERV., <http://taxpayeradvocate.irs.gov/get-help/audit-reconsiderations> [<http://perma.cc/D8A5-D4ZX>] (last visited May 30, 2019) (noting taxpayers will be notified once the IRS has reviewed all their information). The IRS has done a good job of making information about refunds available to the taxpayer and needs to bring that system forward to audit reconsideration. See, e.g., *Where's My Refund?*, IRS, <http://www.irs.gov/refunds> [<http://perma.cc/R53W-6M42>] (last updated Apr. 9, 2019) (allowing taxpayers to check refund status online).

90. See *infra* notes 99–104 and accompanying text for a discussion of *Dang v. Commissioner*, No. 21100-17 L (T.C. filed Oct. 10, 2017).

91. No. 21100-17 L (T.C. filed Oct. 10, 2017).

92. See *Baxter v. United States*, No. 15-cv-04764-YGR, 2016 WL 468034, at \*3 (N.D. Cal. Feb. 8, 2016), *amended in part*, No. 15-cv-04764-YGR, 2016 WL 1359413 (N.D. Cal. Apr. 6, 2016), *aff'd sub nom.* J.B. v. United States, 916 F.3d 1161 (9th Cir. 2019).

taxpayers might highlight these rights in conversations with the examiner regarding the scope and manner of the investigation. Even when an examiner may have a legal basis for making third-party contacts, a taxpayer might seek to narrow the scope of these activities in order to protect legitimate rights to privacy and confidentiality. The willingness of the examiner to make a decision based on these TBOR rights will also be influenced by the taxpayer's cooperation.<sup>93</sup>

### B. *Administrative Collection*

Unlike the examination side of IRS action with respect to a taxpayer, the collection function regularly engages in case-specific policy decisions. Almost every decision made on the collection side of a case could implicate some aspect of TBOR. The collection employee at the IRS should engage in decisionmaking about a taxpayer's case at almost every step outside the notice stream. In making these decisions, the collection employee does not seek to apply statutory provisions to determine the right answer as an examiner does but rather seeks to make decisions that will result in the greatest return to the IRS for the least effort to the IRS and the least pain to the taxpayer. Those types of judgments implicate TBOR in a way that an examination does not.

Taxpayers in the collection process have the right to be informed.<sup>94</sup> A recent Treasury Inspector General for Tax Administration (TIGTA) report addressed the failure of IRS personnel to understand the law regarding the dissemination of information to taxpayers in the context of joint liabilities.<sup>95</sup> This is a failure on which TIGTA has reported each year for the past twenty years.<sup>96</sup> Taxpayers seeking to know how much they must still pay on a joint obligation need information from the IRS. The IRS seems consistently unable to provide this information. The TIGTA report does not address the TBOR implications of the failure, and no known remedy exists for taxpayers who do not receive the correct information.<sup>97</sup> Similar information needs to exist for taxpayers who share a trust fund recovery penalty with others or who simply seek to obtain information about their own account from an Automated Call Site. The need for information from the IRS with respect to collection issues is significant, as are the problems in obtaining that information in certain instances. If TIGTA and

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93. See, e.g., *Bletsas v. Comm'r*, 116 T.C.M. (CCH) 163 (2018) (holding that the taxpayer's failure to cooperate with the revenue officer and settlement officer had an impact on the Tax Court's decision regarding certain TBOR arguments).

94. I.R.C. § 7803(a)(3)(A) (2018).

95. TREASURY INSPECTOR GEN. FOR TAX ADMIN., FISCAL YEAR 2018 STATUTORY REVIEW OF DISCLOSURE OF COLLECTION ACTIVITIES ON JOINT RETURNS (2018), [http://www.treasury.gov/tigta/auditreports/2018reports/201830053\\_oa\\_highlights.html](http://www.treasury.gov/tigta/auditreports/2018reports/201830053_oa_highlights.html) [http://perma.cc/92AE-WEGX] [hereinafter TIGTA, DISCLOSURE OF COLLECTION ACTIVITIES]; see also Keith Fogg, *Requesting Information About IRS Collection Activity on a Spouse or Former Spouse*, PROCEDURALLY TAXING (Aug. 15, 2018), <http://procedurallytaxing.com/requesting-information-about-irs-collection-activity-on-a-spouse-or-former-spouse/> [http://perma.cc/2DC6-27E5].

96. I.R.C. § 7803(d)(1)(B).

97. See TIGTA, DISCLOSURE OF COLLECTION ACTIVITIES, *supra* note 95.

other evaluations of matters involving the right to know made an effort to grade the IRS on how it met its TBOR responsibilities, that type of focus on TBOR in the context of a review of IRS process would help to keep executives and employees focused on the TBOR issues implicated by failures.

As with the examination division, taxpayers involved with the collection process have the right to quality service.<sup>98</sup> Taxpayers can raise the failure to receive quality service with the manager of the employee who, allegedly, is not providing such service. Beyond the ability to seek assistance from management, this TBOR right does not provide much remedy. In a litigation context the failure of the IRS employee to provide quality service could negatively impact the outcome sought by the IRS but would not result in a broad remedy based on TBOR. As discussed in the examination process, this right could be baked into the evaluation process, which would more easily enable taxpayers to provide comments, positive or negative, on the quality of service received.

The case of *Dang v. Commissioner* highlights the right to pay no more than the correct amount of tax in the collection context, although not in a normal fact pattern.<sup>99</sup> Mr. Dang owed the IRS about \$100,000. He had the ability to fully pay the IRS and the desire to fully pay the IRS; however, the funds with which he sought to make the payment resided in an IRA account. Mr. Dang requested the revenue officer issue a levy on his retirement account to satisfy the liability. The first revenue officer he dealt with seemed willing to do so, but when the case transferred to a new revenue officer, she refused to levy on his retirement account and, instead, directed him to withdraw the funds and pay her. Mr. Dang declined to do so because he was under 59 ½ years old. If he complied with the revenue officer's request, he would incur the 10% excise tax imposed by Section 72(t).<sup>100</sup> If the IRS levied on his retirement account, the statute provides a waiver of the excise tax.<sup>101</sup>

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98. I.R.C. § 7803(a)(3)(B).

99. No. 21100-17 L (T.C. filed Oct. 10, 2017); see *Dang v. Comm'r*, 259 F.3d 204, 205–07 (4th Cir. 2001) (discussing the facts and procedural posture of the case before it reached the U.S. Court of Appeals for the Fourth Circuit on appeal). All Orders are available at Docket, *Dang v. Comm'r*, No. 21100-17 L (T.C. filed Oct. 10, 2017), <http://www.ustaxcourt.gov/UstcDockInq/DocketDisplay.aspx?DocketNo=17021100> [<http://perma.cc/55KP-58F3>] (last visited May 30, 2019). See also Keith Fogg, *Follow Up on TBOR and CDP*, PROCEDURALLY TAXING (July 10, 2018), <http://procedurallytaxing.com/follow-up-on-tbor-and-cdp/> [<http://perma.cc/2H52-UZAV>]; Keith Fogg, *TBOR and CDP*, PROCEDURALLY TAXING (Mar. 30, 2018), <http://procedurallytaxing.com/tbor-and-cdp/> [<http://perma.cc/A9U5-PZ2N>]. The discussion of *Dang* at this point in the Article “jumps the gun” because this case only came to light because petitioner litigated a CDP case; however, the case provides insight into the administrative collection actions that preceded the CDP case, which causes it to receive mention here. See also *Thompson v. United States*, No. 18-cv-01675-JCS, 2018 WL 4181958 (N.D. Cal. Aug. 30, 2018); Leslie Book, *District Court Holds that Premature Withdrawal from Retirement Account Under Threat of Levy Subject to 10 Percent Additional Tax*, PROCEDURALLY TAXING (Sept. 4, 2018), <http://procedurallytaxing.com/district-court-holds-that-premature-withdrawal-from-retirement-account-under-threat-of-levy-subject-to-10-percent-additional-tax/> [<http://perma.cc/CW5R-DL6V>].

100. I.R.C. § 72(t).

101. *Id.* § 72(t)(2)(A)(vii).

Eventually, the IRS issued a notice of intent to levy. Mr. Dang is probably one of the few taxpayers who welcomed the notice. He timely filed a request seeking a CDP hearing. In the CDP hearing the settlement officer in Appeals determined that his request that the IRS levy on his retirement funds did not qualify as an appropriate collection alternative and denied his requested relief. He petitioned the Tax Court where he sought in a CDP case an order that the IRS levy on his retirement account in order to collect the outstanding taxes. In his Tax Court case, as in his administrative arguments, Mr. Dang raised TBOR and its right to pay no more than the correct amount of tax as a basis for relief.

The attorney for the IRS requested that the Tax Court remand the case to Appeals, arguing that the settlement officer made a mistake in failing to treat the request to levy on the retirement account as an appropriate collection alternative for consideration in the CDP context. Mr. Dang objected to the remand, arguing that the Tax Court should enter an order granting his requested relief. The court remanded the case.<sup>102</sup> On remand, Appeals determined that levying on his IRA account was appropriate. So, the court did not enter an opinion but rather a series of orders.

The use of TBOR in *Dang* demonstrates how TBOR can impact both collection matters and litigation. The decision to levy on Mr. Dang's IRA account was purely an administrative decision. It seems clear looking at the situation that the IRS should levy on the IRA since doing so saves Mr. Dang approximately \$10,000 by eliminating the applicability of Section 72(t). Hanging up the revenue officer and the settlement officer was an IRS policy that requires collection employees to avoid levying on retirement accounts whenever possible.<sup>103</sup> In this context TBOR provided a policy basis for resolving the issue in a logical, taxpayer-friendly way that did not seem possible to the IRS employee grappling with the contrary policy in the IRM. Unfortunately, the case resolved itself without a discussion of the role that TBOR played in the outcome. Yet, it seems clear that Mr. Dang's representative appropriately cited TBOR as a basis for resolving the case correctly. Maybe the court or the IRS would have gotten to the correct result without TBOR, but TBOR played a central role with its clear policy statement regarding the congressional goal that a taxpayer pay no more than the correct amount of tax.<sup>104</sup> Forcing the taxpayer to pay additional tax violated the principle announced in this TBOR provision.

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102. There is another interesting TBOR case brewing in Tennessee, *Freels v. Commissioner*, No. 26674-17 L (T.C. Dec. 26, 2017). The petitioner, like the petitioner in *Dang*, faced a motion to remand filed by the IRS when the IRS attorney realized that the position taken by Appeals and Collection would not result in an affirmation by the Tax Court of the position taken in the determination letter. Unlike *Dang*, in which Judge Armen granted the requested remand, Judge Guy denied the remand in *Freels* in an order dated December 19, 2018. Order, *Freels v. Comm'r*, No. 26674-17 L (T.C. Dec. 19, 2018). The order directed the IRS attorney to ascertain the scope of her authority to settle and to find a way to resolve the case. *Id.* Like *Dang*, *Freels* has to this point not resulted in an opinion, and all of the action has taken place in orders.

103. IRM 5.11.6.3 (Aug. 16, 2017).

104. I.R.C. § 7803(a)(3)(C).



The right to privacy and the right to confidentiality play a particularly important role in collection with respect to the filing of the notice of federal tax lien. These TBOR policies should inform IRS policy regarding lien filing though, to date, this does not appear to have happened. The notice of federal tax lien represents a major exception to the disclosure laws allowing the IRS to publicly record not only that a taxpayer owes money but the precise amount as of the date of the recording. IRS policies regarding lien filing tend toward rote determinations rather than determinations based on the benefit of the lien versus the burden to the individual and the loss of privacy. During the past year the IRS filed a lien against my client in a situation in which the lien filing served no purpose other than to create pain for her. The client was over sixty and on Social Security disability benefits as a result of a debilitating illness that will prevent her from ever working again; she owned no land, no car, no stocks, and her husband sat in prison while she lived a meager life from benefit check to benefit check. Thanks to her husband, she had a joint tax liability of over \$500,000 and failed for procedural reasons to obtain innocent spouse relief. Her account was assigned to a revenue officer because of the size of the outstanding liability. He quickly realized that he could not collect anything from her and also realized that filing the notice of federal tax lien would not bring funds into the treasury; however, he nonetheless filed the notice because either he felt he had to or because he did not want to write a memo to his supervisor explaining why he did not file the notice. Making her tax situation public for no advantage to the IRS should not occur based on the policy pronounced in TBOR. In the CDP case following the filing of the lien notice, the settlement officer also stated that he had no authority to withdraw the lien notice and was unmoved by the policy statement contained in TBOR. Of course, once a notice is filed, it's hard to put privacy and confidentiality issues back where they started.

It may take some time, but TBOR can have an impact on collection decisions. As IRM provisions are reviewed and other policies are shaped, the congressional statement embodied in TBOR should have an impact on the way the IRS makes collection decisions. If TBOR does not have an impact on collection, it will be because the leadership at the IRS does not push to incorporate the congressional policy statement into the IRS collection practices.

### C. *Collection Due Process*

CDP administrative and court review, because it primarily reviews collection actions, provides an excellent place for the application of TBOR principles. Several aspects of the CDP process give the IRS and the Tax Court distinct opportunities to apply TBOR in reaching the appropriate conclusion. In CDP cases, the Tax Court reviews the determination of the IRS with respect to its collection decisions under an abuse of discretion standard.<sup>105</sup> In reviewing a

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105. See, e.g., Order at 1, *Brown v. Comm'r*, No. 20006-13L (T.C. Jan. 24, 2017); see also Keith Fogg, *Appeals Abuses Discretion in a Collection Due Process Case by Failing To Engage in Financial Analysis*, *PROCEDURALLY TAXING* (Feb. 15, 2017), <http://procedurallytaxing.com/appeals-abuses->

case using the abuse of discretion standard it is possible that the Tax Court could conclude that a provision of the IRM or other internal guidance conflicts with an enumerated TBOR right. The abuse of discretion standard invites consideration of agency practices making CDP an especially important place for applying TBOR in litigation.<sup>106</sup>

For TBOR to have a significant impact in CDP cases, practitioners need to cite TBOR in their requests for CDP relief. In one recent case, discussed further below, in which the taxpayer requested relief based, in part, on TBOR as part of her Tax Court CDP case, the Tax Court declined to consider the CDP argument because the taxpayer did not raise it in her request for relief or in her Tax Court petition.<sup>107</sup> For those practitioners with a significant collection practice, citing one or more TBOR provisions as a basis for relief in the CDP request should become routine. In almost every Section 6320 CDP case in which the taxpayer challenges the filing of the notice of federal tax lien, the practitioner should include as a part of the CDP request a citation to the right to confidentiality. Other rights included in TBOR do not as automatically stand out as rights that should be cited every time, but other rights will play an important role in the outcome of some cases.

TBOR may have a role in the verification process required in a CDP case. The IRM has not yet directed Appeals employees to verify that the proposed collection action satisfies the TBOR provisions. Some practitioners have started to litigate this. It was placed at issue in *Bletsas v. Commissioner*,<sup>108</sup> but the court did not reach the issue because of the timing of raising of this issue.<sup>109</sup> The IRS could make an administrative decision to require Appeals employees to verify that the collection action satisfies the provisions of TBOR if it wanted to further its commitment to the process. With additional litigation placing pressure on the IRS to show it has verified compliance with TBOR and additional pressure from within the IRS, it seems possible that TBOR verification could become a part of the CDP verification process. Nothing prevents the IRS from adopting this procedure. If checking to see if the collection action satisfies the policies set out in TBOR becomes a part of the verification process, the change in procedure would have a significant downstream impact on collection as a whole. For this reason, it seems important to push for such a change in policy.

Even if not included in the verification process, TBOR has a role to play in the application of the balancing test required in CDP cases.<sup>110</sup> The policies set

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discretion-in-a-collection-due-process-case-by-failing-to-engage-in-financial-analysis/ [http://perma.cc/88BB-SPAV]. See generally SALTZMAN & BOOK, *supra* note 55, ¶ 14B.16[5][a].

106. See, e.g., *Szekely v. Comm'r*, 106 T.C.M. (CCH) 375 (2013).

107. *Bletsas v. Comm'r*, 116 T.C.M. (CCH) 163, n.3 (2018); see also Bryan Camp, *Lesson from the Tax Court: The Misunderstood Trust Fund Recovery Penalty*, TAXPROF BLOG (Aug. 27, 2018), [http://taxprof.typepad.com/taxprof\\_blog/2018/08/lesson-from-the-tax-court-the-misunderstood-trust-fund-recovery-penalty.html](http://taxprof.typepad.com/taxprof_blog/2018/08/lesson-from-the-tax-court-the-misunderstood-trust-fund-recovery-penalty.html) [http://perma.cc/PD9Y-555S] (providing a detailed discussion of *Bletsas*).

108. 116 T.C.M. (CCH) 163 (T.C. 2018).

109. *Bletsas*, 116 T.C.M. (CCH) at n.3.

110. The requirement for the application of a balancing test in a CDP case stems from Section 6330(c)(3)(C). The Appeals employee reviewing the case should balance whether the proposed

out in TBOR serve as a good measuring stick for judging whether the IRS has properly balanced the collection action it seeks to take with other options. Just as practitioners have begun to seek a role for TBOR in verification, they have started to argue for it in the appropriate application of the balancing test. The *Dang* case discussed above provides a clear example of how TBOR can play an important role in the balancing test.<sup>111</sup> A part of balancing the outcome sought by the IRS should be a determination that the outcome does not require the taxpayer to pay more than the correct amount of tax. It should also be a part of balancing to look at the impact of the collection action on confidentiality, such as in a situation like the one described above in which the filing of the notice of tax lien has almost a zero chance of providing a benefit to the IRS. The near-zero chance of benefit should be balanced against the harm created by filing the notice. If Appeals declines to appropriately incorporate these types of balancing mechanisms from TBOR, practitioners will likely start arguing for the application of TBOR in the Tax Court as part of the abuse of discretion review. Congress has given the IRS a strong statement of the policies it wants the IRS to follow by codifying TBOR. If the IRS declines to incorporate those policies in making or applying its own policy decisions, the Tax Court should consider whether that failure abuses the discretion given to the IRS. The balancing test required in CDP cases presents an excellent opportunity for the application of TBOR as a policy guide for the IRS in making collection decisions.

TBOR could also inform the IRS decision of the circumstances under which it will accept a CDP request. The time period for a taxpayer to file a Tax Court petition after a CDP determination may be jurisdictional, leaving the Tax Court with no discretion on whether to accept the petition.<sup>112</sup> The thirty-day period to file a CDP request with the Tax Court does not carry the same jurisdictional baggage that impacts the Tax Court.<sup>113</sup> The IRS could create procedures that make it easier for taxpayers to challenge the position of the IRS and be heard and to appeal a decision of the IRS in an independent forum. So far, the IRS has not changed its practice regarding the place to file a CDP request.<sup>114</sup> It has also

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collection action is no more intrusive than necessary. See SALTZMAN & BOOK, *supra* note 55, ¶ 14B.13 (discussing the balancing test); see also Keith Fogg, *How Does the Balancing Test in the Collection Due Process Statute Work with the Variance Test in the Regulations*, PROCEDURALLY TAXING (Sept. 9, 2015), <http://procedurallytaxing.com/how-does-the-balancing-test-in-the-collection-due-process-statute-work-with-the-variance-test-in-the-regulations/> [http://perma.cc/U9S6-UFZM].

111. See *supra* Part II.B.

112. See, e.g., *Duggan v. Comm’r*, 879 F.3d 1029 (9th Cir. 2018).

113. See, e.g., *Berkun v. Comm’r*, 890 F.3d 1260 (11th Cir. 2018); see also Smith, *Eleventh Circuit, supra* note 60.

114. See Carlton Smith, *CDP Requests Timely Filed in Wrong IRS Office—Tax Court Judges Disagree on Jurisdictional Consequences*, PROCEDURALLY TAXING (May 30, 2018) <http://procedurallytaxing.com/cdp-requests-timely-filed-in-wrong-irs-office-tax-court-judges-disagree-on-jurisdictional-consequences/> [http://perma.cc/ZQ24-2UFU] (discussing how the IRS treats as untimely taxpayers’ CDP hearing requests that arrive in the wrong IRS office within the thirty-day period). Compare Order at 1, *Taylor v. Comm’r*, No. 3043-17 L (T.C. Nov. 8, 2017) (holding that the Tax Court had jurisdiction), and Order at 3, *Khanna v. Comm’r*, No. 5469-16 L (T.C. Feb. 13, 2018), with Order at 4-5, *Nunez v. Comm’r*, No. 2946-17 L (T.C. May 18, 2018) (holding that the Tax Court

not changed its position regarding individuals who file their CDP requests more than thirty days after the mailing of the CDP notice, but the IRS could also change its practice in this regard in the spirit of the policy enunciated by TBOR.<sup>115</sup> Many instances exist in which the taxpayer lives outside of the United States or the taxpayer fails to receive the CDP notice within the thirty-day period yet files the CDP request within thirty days of receipt of the notice. The IRS should consider providing relief for these individuals based on the expression of policy in TBOR. If the IRS fails to revise its policy, litigation citing TBOR to seek to change this IRS policy is likely to follow. The IRS could also use TBOR and the policies it establishes, the right to a fair and just tax system or the right to be heard, to allow taxpayers the opportunity to send their CDP request to a more easily identified location or to move a CDP request to the right office without penalizing the taxpayer should the IRS fail to move it quickly.<sup>116</sup>

The IRS may have less wiggle room to apply TBOR in the examination context than in collection matters, but in both situations numerous instances exist in which the IRS could use its ability to determine the policy of collecting revenue to implement procedures consistent with TBOR that would provide greater protection of taxpayer rights. The statutory pronunciation of policy provides the IRS with the opportunity to examine its procedures.

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lacked jurisdiction in a Section 6672 penalty case), and Order at 4–5, *Nunez v. Comm’r*, No. 2925–17 L (T.C. May 21, 2018) (holding that the Tax Court lacked jurisdiction).

In similar types of hearings before the Veteran’s Administration and the Social Security Administration, those agencies create one-stop shopping and also grant individuals leeway when a document gets misfiled in the administrative process. See SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEM (POMS), *GN 03101.020 Good Cause for Extending the Time Limit To File an Appeal* (2017), <http://secure.ssa.gov/poms.nsf/lnx/0203101020> [<http://perma.cc/MP8Z-CQDF>] [hereinafter *Extending Time*]; *M21-I, Part I, Chapter 4 - Regional Office (RO) Hearings*, U.S. DEP’T OF VETERANS AFFAIRS, [http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000014080/M21-1,%20Part%20I,%20Chapter%204-%20-%20%20Regional%20Office%20\(RO\)%20Hearings](http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000014080/M21-1,%20Part%20I,%20Chapter%204-%20-%20%20Regional%20Office%20(RO)%20Hearings) [<http://perma.cc/h8bg-37vh>] (last updated Feb. 19, 2019) [hereinafter *Regional Office Hearings*]. The IRS has similar authority that it could exercise in the spirit of the applicable TBOR provisions. See Fogg, *The Jurisdictional Ramifications*, *supra* note 55, at 845.

115. Compare the IRS practice of a strict thirty-day time period for filing the CDP request with the policy of the Social Security Administration, which has a lengthy regulation explaining the types of excuses individuals can provide to allow Social Security to accept their late filed administrative requests for relief and with the Veteran’s Administration. Compare *Extending Time*, *supra* note 114, with *M21-I, Part I, Chapter 2, Section C - Adverse Action Proposal Period*, U.S. DEP’T OF VETERANS AFFAIRS, [http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va\\_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000014073/M21-1-Part-I-Chapter-2-Section-C-A-Adverse-Action-Proposal-Period](http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/55440000001018/content/554400000014073/M21-1-Part-I-Chapter-2-Section-C-A-Adverse-Action-Proposal-Period) [<http://perma.cc/GDU8-N2CA>] (last updated Oct. 5, 2017) [hereinafter *Adverse Action Proposal Period*].

116. Compare IRM 8.22.5.2.3 (Aug. 11, 2017) (requiring the taxpayer’s CDP submission be perfect with the IRS practice regarding the submission of tax returns in IRM 1.2.12.1.5(2) (July 26, 2011)), with *Extending Time*, *supra* note 114, and *Adverse Action Proposal Period*, *supra* note 115.

### III. SPECIFIC AREAS FOR APPLICATION OF TBOR

Several specific areas interact with TBOR in a manner that deserves some discussion. Each of these six areas has a case example or some factor making it worth discussion.

#### A. Training

TBOR touches on many aspects of the training of IRS personnel. Increased IRS employee knowledge and information about TBOR enhances almost all of the ten rights.<sup>117</sup> In the *Peacock v. Commissioner* case discussed above, the taxpayers argued that the IRS employees accepting the remittance had a duty under the TBOR right to be informed to advise them regarding the process for successfully making a deposit.<sup>118</sup> While TBOR may or may not impose a duty in that circumstance, certainly TBOR serves as a congressional statement of policy that the IRS should inform taxpayers of actions they need to take or of the consequences of actions in order to assist taxpayers in interacting with the IRS. In order to inform taxpayers, the IRS employees themselves need to know what to do, and that requires training.

The Tax Court has not yet ruled in *Peacock* so the outcome of the TBOR argument regarding the right to be informed is unknown. The first known case to address TBOR specifically made comments about the right of taxpayers to be informed.<sup>119</sup> In *Harris v. Commissioner*,<sup>120</sup> the taxpayer filed a joint return with his wife. She brought significant tax debt into the marriage. In order to address the debt, she filed an offer in compromise (OIC). In addition to her premarital debt, she and her husband had a tax liability for the first year of their marriage, which also arose because of her failure to pay estimated taxes on her self-employment income. The Offer in Compromise Unit suggested that she include the joint return debt in the offer. She agreed. The IRS eventually accepted her offer, relieving her of the pre- and post-marital debt.

The IRS did not suggest to her that she have her husband join in her OIC with respect to the joint return debt. Neither she nor her husband realized the consequence of her entering into an offer in compromise when he did not do so.<sup>121</sup> After the IRS granted an OIC to her, it began the process of collecting

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117. See, e.g., *Improving Tax Administration Today: Hearing Before the Subcomm. on Taxation and IRS Oversight, Comm. on Fin., U.S. S., 115th Cong.* 19 (2018) (statement of Nina Olson, National Taxpayer Advocate), <http://www.finance.senate.gov/imo/media/doc/26JUL2018OlsonSTMNT.pdf> [<http://perma.cc/7Y3W-85Y3>]; see also Nina E. Olson, *Inadequate Training of IRS Employees Harms Taxpayers, Creates IRS Rework, and Erodes IRS Employee Morale*, TAXPAYER ADVOCATE SERV.: NTA BLOG (Feb. 21, 2018), <http://taxpayeradvocate.irs.gov/news/nta-blog-inadequate-training-irs?category=Tax%20News> [<http://perma.cc/KSU6-F7PN>] (discussing the National Taxpayer Advocate's 2017 Annual Report to Congress, in which Olson identified inadequate training one of the most serious problems at the IRS).

118. See *supra* Part I.B.4.

119. *Harris v. Comm'r*, No. 15433-16S, 2017 WL 4422359, \*7 n.11 (T.C. 2017).

120. No. 15433-16S, 2017 WL 4422359 (T.C. 2017).

121. *Harris*, 2017 WL 4422359, at \*7 n.11. The IRS will not have the resources to perform tax planning for taxpayers and TBOR does not create such an expectation. At the same time, in obvious

from him. He thought that the OIC extinguished the joint tax debt, which essentially resulted from the failure to make estimated tax deposits by his wife just as the premarital debt did. Learning that he still owed the taxes on the joint return even though the IRS had written off the tax debt of his wife came as a rude surprise to Mr. Harris. He felt that the IRS failed to let him or his wife know what happened in an OIC.

The husband sought innocent spouse relief in order to rid himself of the liability.<sup>122</sup> Unfortunately, he did not meet the criteria for such relief.<sup>123</sup> The Tax Court denied innocent spouse relief after applying the factors in Revenue Procedure 2013-34.<sup>124</sup> The court stated:

We are not unsympathetic to petitioner's plight; [footnote 11] however, we are bound by the statute as written and the accompanying regulations when consistent therewith. . . . The simple facts are that petitioner elected to file a joint 2012 Form 1040 with Mrs. Harris, and he was not a party to Mrs. Harris' OIC. Accordingly, we sustain respondent's determination.<sup>125</sup>

Footnote 11 contained the following statement:

It appears that petitioner did not realize the legal implications of electing joint filing status for 2012 combined with the failure to include himself as an applicant on Mrs. Harris' Form 656 and addendum. Petitioner testified that he and Mrs. Harris elected joint filing status for their 2012 Form 1040 because it was "appropriate to our end of the year end status." Mrs. Harris did not testify, and some of the circumstances surrounding the OIC, including the specific advice she received from the IRS employees while preparing her Form 656 and addendum, are unclear. It certainly would have been reasonable and appropriate for the IRS to advise Mrs. Harris of the possible consequences of submitting an OIC without petitioner as an applicant when a joint return was filed for 2012.<sup>126</sup>

The opinion in *Harris* shows that the court recognizes the TBOR right that the taxpayer be informed. Even though the court cited the administrative rather than the legislative version of TBOR, the right is the same right. The taxpayer did not argue for relief because of TBOR. Had the taxpayer argued for such relief, the court's opinion makes no suggestion that it would have granted relief on that basis.<sup>127</sup> Of course, the taxpayer could have argued for relief during the administrative consideration of the innocent spouse request based on the failure of the IRS to inform him (or his wife) of the consequences of Mrs. Harris's OIC. The IRS could have taken its failure to inform Mr. or Mrs. Harris of the consequences of granting an OIC to Mrs. Harris alone into consideration in

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situations of action that will impair a taxpayer TBOR seems to impose some duty for the IRS to step forward and provide some information to taxpayers.

122. *Id.* at \*3.

123. *Id.* at \*7.

124. *Id.* at \*4-7.

125. *Id.*

126. *Id.* at \*7 n.11 (citation omitted).

127. *See generally id.*

determining whether to grant innocent spouse relief to Mr. Harris. Even though the applicable revenue procedure for innocent spouse cases makes no mention of this situation, nothing in the revenue procedure prevents the IRS from considering the failure to provide information in deciding whether to grant relief.<sup>128</sup>

IRS employees should receive training that positions them to provide relevant information to taxpayers whenever it appears necessary or helpful. Obviously, time constraints prevent IRS employees from providing the same type of advice a taxpayer might expect from their representative. Still, based on the “right to be informed” provision of TBOR,<sup>129</sup> IRS employees should receive adequate training and should be prepared to use that training to assist taxpayers in completing the transactions they need to complete whether the matter involves how to make a deposit or whether to file a joint OIC. IRS employees should also receive training on how to appropriately mitigate a situation in which their training fails to cause them to alert the taxpayer regarding a matter on which they should be informed.

### B. Litigation

Most matters in litigation will turn on the interpretation of an IRC section or a regulation regarding a specific matter, making it difficult for the broad policy statements contained in TBOR to meaningfully impact the outcome. At least one type of tax litigation that occurs regularly, if infrequently, offers the opportunity for TBOR to play a meaningful role—lien foreclosure actions in which the IRS seeks to foreclose the federal tax lien on a specific piece of property.

Well before the adoption of TBOR, the Supreme Court set out equitable factors that courts should apply in deciding whether to foreclose the federal tax lien on a piece of taxpayer’s real property.<sup>130</sup> In *United States v. Rogers*,<sup>131</sup> the Court created a four-factor test that courts still apply today. The Court stated, “Section 7403, which provides that a district court ‘may’ decree the sale of property, does not require the court to authorize a forced sale under absolutely all circumstances. Some limited room is left in the statute for the exercise of reasoned discretion.”<sup>132</sup> The Court noted that in deciding whether to permit

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128. Rev. Proc. 2013-34 § 4.03(2), 2013-43 I.R.B. 400, <http://www.irs.gov/pub/irs-irbs/irb13-43.pdf> [<http://perma.cc/SGB4-22K8>] (noting that in determining whether equitable relief is to be granted, “all the facts and circumstances of the case are to be taken into account”).

129. I.R.C. § 7803(a)(3)(A) (2018).

130. *United States v. Rogers*, 461 U.S. 677, 709–12 (1983); see Keith Fogg, *Revisiting Craft*, PROCEDURALLY TAXING (May 3, 2018), <http://procedurallytaxing.com/revisiting-craft/> [<http://perma.cc/V3WJ-WL3E>]; see also David Gray Carlson, *The Federal Law of Property: The Case of Inheritance Disclaimers and Tenancy by the Entireties*, 75 WASH. & LEE L. REV. 3, 22 (2018); Mark J. Swerdlin, *Forced Sales of Nondelinquent Taxpayers’ Homestead Property*: *United States v. Rodgers*; *Ingram v. Dallas Department of Housing & Urban Rehabilitation*, 37 TAX LAW. 385, 392 (1984).

131. 461 U.S. 677 (1983).

132. *Rogers*, 461 U.S. at 703–12.

foreclosure, judges have discretion and need not foreclose simply because the IRS can show that the taxpayer owes taxes and has property.<sup>133</sup>

The Court stated the factors to be considered as follows:

In determining whether to authorize a sale under § 7403 when the interests of nondelinquent third parties are involved, a district court should consider such factors as the following: (1) the extent to which the Government's financial interests would be prejudiced if it were relegated to a forced sale of the partial interest actually liable for the delinquent taxes; (2) whether the third party with a nonliable separate interest in the property would, in the normal course of events, have a legally recognized expectation that such separate property would not be subject to forced sale by the delinquent taxpayer or his or her creditors; (3) the likely prejudice to the third party, both in personal dislocation costs and in practical undercompensation; and (4) the relative character and value of the nonliable and liable interests held in the property.<sup>134</sup>

The *Rogers* factors and their application fit very well with the TBOR right to a fair and just tax system and the right to challenge a position and be heard. In foreclosure litigation the Supreme Court created space for policy considerations to work together with the legal requirements that the IRS must demonstrate in order to obtain foreclosure. Other collection suits also have some policy wiggle room that permits the application of TBOR in litigation though the foreclosure suits appear to offer the clearest example of the application of policy in litigation.

In a setting similar to tax foreclosure, the Seventh Circuit used a codification of housing policy to stop foreclosure.<sup>135</sup> The Department of Housing and Urban Development (HUD) sought to foreclose on a building built to provide low-income housing because the owners were not paying their mortgage debt.<sup>136</sup> The district court granted foreclosure and the owners appealed. In the appeal, the owners argued that the foreclosure violated housing policy as codified in the National Housing Goals which provided:

The Department of Housing and Urban Development, and any other departments or agencies of the Federal Government having powers, functions, or duties with respect to housing, shall exercise their powers, functions, and duties under this or any other law, consistently with the national housing policy declared by this Act and in such manner as will

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133. *Id.* at 679, 706–09 (“The principle of statutory construction that the word ‘may’ usually implies some degree of discretion can be defeated by indications of contrary legislative intent or by obvious inferences from the statute’s structure and purpose. Such indications or inferences are not present here.”).

134. *Id.* at 679, 709–11.

135. See *United States v. Winthrop Towers*, 628 F.2d 1028, 1034–35 (7th Cir. 1980); see also Steve Sharpe, *Housing Law May Provide a Model for Application of the Taxpayer Bill of Rights in Litigation*, PROCEDURALLY TAXING (Jan. 31, 2018), <http://procedurallytaxing.com/housing-law-may-provide-a-model-for-application-of-the-taxpayer-bill-of-rights-in-litigation/> [http://perma.cc/ZWK2-LULD].

136. *Winthrop Towers*, 628 F.2d at 1031.



facilitate sustained progress in attaining the national housing objective hereby established.<sup>137</sup>

In reviewing the decision of the district court to foreclose, the Seventh Circuit stated that the law to be applied included 42 U.S.C. § 1441 and its detailed statement of national housing objectives.<sup>138</sup> It found that HUD must follow the policies in the national housing goals and that in reviewing HUD's decision to foreclose a court must determine whether the decision is consistent with national housing objectives.

The application of the national housing goals to foreclosure in the HUD setting fits almost perfectly with the goals of TBOR and the applicability of TBOR to the IRS decision to foreclose. While foreclosure provides a neat fit between the two statutory provisions, the manner in which the Seventh Circuit applied the housing goals could reach to other types of litigation as well. It will be interesting to see what taxpayers can do with litigation to use the policies and goals set out in TBOR to influence the outcome of litigation.

### C. Administration

By administration, this Article intends to reference internal discussions within the IRS as it makes case or policy decisions. Most of this activity will take place outside of the view of persons not working at the IRS, but operating correctly, TBOR will make its way into these internal discussions in a manner that will impact outcomes.<sup>139</sup> The publicly available face of administrative guidance and review, such as IRM provisions and TIGTA reports, already shows

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137. 42 U.S.C. § 1441 (2018). As with TBOR, the national housing goals then list specific objectives for housing agencies to attain. *Compare id.*, with I.R.C. § 7803(a)(3) (directing the Commissioner on the discharge of the assigned duties and stating that 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").

138. *Winthrop Towers*, 628 F.2d at 1034.

139. See, e.g., Nina E. Olson, *The Systemic First Time Abatement Policy Currently Under Consideration by the IRS Would Override Reasonable Cause Relief and Jeopardize Fundamental Taxpayer Rights*, TAXPAYER ADVOCATE SERV.: NTA BLOG (Aug. 29, 2018), <http://taxpayeradvocate.irs.gov/news/NTA-blog-Systemic-Abatement?category=Tax%20News> [<http://perma.cc/NU6X-Q2T5>] (discussing the first time penalty abatement rules versus the reasonable cause exception for penalties and the need for the application of TBOR provisions in striking a balance between the types of relief in order to avoid creating a disadvantage to taxpayers by relying too heavily on first time abatement).

that TBOR gets space in the discussion.<sup>140</sup> Numerous IRM provisions and some TIGTA reports cite TBOR.<sup>141</sup>

Less transparent are the discussions that occur when the IRS decides what to do in a specific case or regarding a specific policy decision. From the instructions provided to Local Taxpayer Advocates (LTA), one expects that when an LTA writes a taxpayer assistance order (TAO) requesting that an operating division provide some type of relief to a taxpayer, the TAOs should regularly cite TBOR.<sup>142</sup> It is possible that frontline managers in the operating divisions mention TBOR occasionally when discussing cases with the employees they manage to guide those employees toward the proper outcome in their cases. It is also possible that Chief Counsel employees drafting regulations are guided in the policy choices they make in the regulations by the TBOR provisions. How much TBOR plays a role in these types of decisions may still be a work in progress. It can take a long time to build a culture of recognizing opportunities for basing a decision on the taxpayer rights it effects. Despite its often negatively portrayed image, the IRS has a long culture of seeking to find the right answer. Seeking that answer in a way that honors taxpayer rights is not a big stretch given its longstanding approach to finding the right answer.

#### D. Regulatory and Subregulatory Guidance

Parties who comment on IRS guidance should regularly include in those comments references to TBOR. As the IRS makes decisions to flush out statutory provisions or as it provides guidance on matters not covered by a statute, it could consider the goals and policies set out in TBOR in crafting this guidance, and commenters should assist it in identifying situations in which to apply those policies.

The case of *Atuke v. Commissioner*<sup>143</sup> provides an example of a situation in which the IRS could provide guidance that would alleviate a significant problem for persons seeking CDP relief.<sup>144</sup> Mr. Atuke lives in Nairobi, Kenya.<sup>145</sup> The IRS

140. See, e.g., IRM 4.2.7.1.3 (June 29, 2017); IRM 4.10.1.2.1 (Aug. 24, 2017); IRM 8.1.1.1(2)(a) (Oct. 1, 2016); IRM 25.13.1.1.2 (Feb. 5, 2018); TREASURY INSPECTOR GEN. FOR TAX ADMIN., DECLINING RESOURCES HAVE CONTRIBUTED TO UNFAVORABLE TRENDS IN SEVERAL KEY CRIMINAL INVESTIGATION BUSINESS RESULTS 23 (2017), <http://www.treasury.gov/tigta/auditreports/2017reports/201730073fr.pdf> [<http://perma.cc/2GXY-Z3GZ>]; TREASURY INSPECTOR GEN. FOR TAX ADMIN., FISCAL YEAR 2017 STATUTORY REVIEW OF RESTRICTIONS ON DIRECTLY CONTACTING TAXPAYERS 1 (2017), <http://www.treasury.gov/tigta/auditreports/2017reports/201730076fr.pdf> [<http://perma.cc/5962-GBD5>].

141. See, e.g., TREASURY INSPECTOR GEN. FOR TAX ADMIN., FISCAL YEAR 2018 STATUTORY REVIEW OF RESTRICTIONS ON DIRECTLY CONTACTING TAXPAYERS 7 (2018) <http://www.treasury.gov/tigta/auditreports/2018reports/201830070fr.pdf> [<http://perma.cc/ELF7-FHSF>].

142. See IRM 13.1.20 (May 3, 2016) (“Congress granted the NTA the authority to issue a TAO to ensure that TAS can effectively resolve problems and protect taxpayer rights when the taxpayer has a significant hardship, even when the IRS disagrees or has other internal priorities.”).

143. No. 31680-15SL (T.C. filed Dec. 21, 2015).

144. See Order of Dismissal for Lack of Jurisdiction at 1–3, *Atuke v. Comm’r*, No. 31680-15SL (T.C. Apr. 15, 2016); see also Carlton Smith, *Atuke v. Comm’r: A Clearly Unfair Dismissal for Lack of Jurisdiction Where the Taxpayer Had No Time To Timely File*, PROCEDURALLY TAXING (Apr. 19,

sent him a CDP determination letter dated October 14, 2015, that he received on November 24, 2015, more than thirty days after mailing. He filed his Tax Court petition shortly thereafter, the IRS moved to dismiss for lack of jurisdiction, and the Tax Court granted the motion. He argued that certified or registered mail from the United States to Africa regularly takes up to three months but that if the IRS had sent the notice by DHL or FedEx, the notice would have reached him within a few days. The failure of the IRS to use a delivery system that would cause the notice of determination to reach him prior to the expiration of the time to file the petition created an unacceptable situation but one which the Tax Court did not feel it had the power to address.

The IRS has the power to provide guidance that would create a better chance for someone like Mr. Atuke to receive his notice of determination prior to the expiration of the thirty-day period. It has the power to provide guidance to him on how he could meet the requirements of Section 7502 in mailing a request for a hearing back to the IRS in order to meet the timely mailing rules. It has the power to adopt rules, similar to the rules adopted by the Social Security Administration, which would provide a basis for the IRS to accept as timely a request for hearing received after the thirty-day period in circumstances in which the taxpayer had a good excuse for sending the request in “late.”<sup>146</sup>

These are all actions that the IRS can, and arguably should, take in providing guidance consistent with TBOR. If IRS employees publish rules and guidance that taxpayers must follow, the IRS should embed in those rules the principles of TBOR seeking to give taxpayers the rights that Congress has instructed the IRS to give. Persons making comments on rules should routinely cite TBOR as a basis for guiding the IRS in the rulemaking process and the IRS should follow TBOR in the rulemaking process. If the IRS receives comments regarding how it should draft rules to comply with the principles laid out in TBOR, and the IRS fails to follow the comments without good reason, parties should challenge the rules for their failure to follow the guidance provided by Congress in enacting this statute.

#### *E. Attorney's Fees*

Taxpayers face an uphill battle when seeking attorney's fees from the IRS. Congress amended Section 7430 to provide for qualified offers in an effort to allow taxpayers to overcome the requirement that the actions of the IRS were

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2016), <http://procedurallytaxing.com/atuke-v-commr-a-clearly-unfair-dismissal-for-lack-of-jurisdiction-where-the-taxpayer-had-no-time-to-timely-file-2/> [<http://perma.cc/5ZNZ-WGBT>] [hereinafter Smith, *Atuke v. Comm'r*].

145. Smith, *Atuke v. Comm'r*, *supra* note 144.

146. See I.R.C. § 7805 (2018). The Social Security Administration provides an extensive list of examples of good cause for late filing and notes that the examples provided are not exhaustive. The listed examples include “death or serious illness in the claimant’s immediate family,” “[p]ertinent records were destroyed,” “[t]he claimant was diligently seeking evidence to support his or her claim, but did not finish before the time period expired,” “[t]he claimant did not receive a notice of the determination or decision” and several others. *Extending Time*, *supra* note 114.

not substantially justified.<sup>147</sup> Most taxpayers, however, do not submit a qualified offer and must overcome the requirement of showing that the IRS lacked substantial justification for its position. TBOR may have a role to play in assisting taxpayer who seek to show the IRS actions lacked the proper justification. The pending case of *Dang v. Commissioner* is testing this issue.<sup>148</sup> Having succeeded in getting the IRS to levy on Mr. Dang's retirement account after pursuing the case into the Tax Court, Mr. Dang's attorney requested attorney's fees for, inter alia, the failure of the IRS to grant the requested relief at an earlier stage.<sup>149</sup> The IRS action in this matter, while ultimately in line with Mr. Dang's rights, forced him to litigate something that should have been resolved much more quickly and cheaply at the administrative stage. In seeking attorney's fees, the violation of TBOR plays a role in the taxpayer's argument, which seeks to show that the position of the IRS lacked substantial justification. The possibility exists that TBOR will make a difference in the court's determination of whether it should award fees in this case. While using TBOR to overcome the substantial justification hurdle may not be a normal use of TBOR, it could become another arrow in the arsenal of advocates seeking to obtain fees. In the *Dang* case, the IRS conceded in remanding the case to Appeals that the Appeals employee reviewing the CDP case did not understand the scope of their authority. That failure to understand and the negative impact the Appeals employee's lack of understanding had on the taxpayer may allow the court to determine the need for a fee award.

#### F. *Non-Title 26 Matters*

The use of TBOR in seeking relief may occur in other settings outside of Title 26, but one currently pending case, *MacVest Group, Inc. v. United States*,<sup>150</sup> presents a TBOR argument in the context of a Freedom of Information Act

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147. I.R.C. § 7430(g).

148. No. 21100-17 L (T.C. filed Oct. 10, 2017). *Dang* is discussed *supra* regarding the right to pay no more than the correct amount of tax. Here, the IRS sought to force him to make a withdrawal from his retirement account, which would trigger the 10% excise tax, rather than to levy on the account as the taxpayer requested in order to avoid the 10% excise tax. Petitioner seeks attorney's fees in this case, and the parties have each filed memorandums regarding the appropriateness of attorney's fees. On October 31, 2018, the court issued an order directing a response from the IRS to the most recent argument by Petitioner. Order at 2, *Dang v. Comm'r*, No. 21100-17 L (T.C. Oct. 31, 2018). On December 28, 2018, following the response from the IRS, the special trial judge who had handled this case for the past year released jurisdiction of the case in an order. Order at 1, *Dang v. Comm'r*, No. 21100-17 L (T.C. Dec. 28, 2018). Perhaps this order signals that a precedential opinion is forthcoming on this issue. The order is short and does not provide insight into the reason for the withdrawal of the special trial judge from the case. *See id.*

149. Petitioner's Motion for Reasonable Litigation or Administrative Costs, *Dang v. Comm'r*, No. 21100-17 L (T.C. Aug. 10, 2018).

150. No. 17-9833 (SDW) (LDW), 2018 WL 443457 (D.N.J. Jan. 16, 2018).

(FOIA) request.<sup>151</sup> The taxpayer argued in its memorandum to the court objecting to the motion to dismiss filed by the government:

Plaintiff raised in its complaint that its rights under the provisions of 26 U.S.C. 7803(b), which codified the Taxpayer Bill of Rights, had been violated. More specifically, Plaintiff alleged that it is entitled to a Right to be Informed under the Taxpayer Bill of Rights and section 7803 and that right was denied by the government. The right to be informed includes the rights under 26 U.S.C. §§ 7602, 6103, and 7517.<sup>152</sup>

The taxpayer argued entitlement to certain information based on the three cited statutes. The case has raised an interesting issue of the scope of TBOR outside of a Title 26 case or a straightforward tax matter. Because IRS employees make the decisions regarding Sections 7602, 6103, and 7517, it seems appropriate that TBOR should apply to those IRS employees making decisions on whether to provide information to the taxpayer requesting information. Whether that compliance extends to the court deciding the FOIA case or to any court deciding a non-tax matter remains an open question, but one that might be at least partially decided by *MacVest*.

#### CONCLUSION

TBOR is a toddler. It has been around long enough now to start walking and talking, but it has a long way to go to reach maturity. Advocates litigating with the IRS have begun to push TBOR as a mechanism for relief. In the first major case that relied on TBOR, *Facebook, Inc. v. Internal Revenue Service*, the court found TBOR did not provide the kind of relief necessary to get Facebook the Appeals hearing it wanted. TBOR seemed to play at least a minor role in getting Mr. Dang the relief he requested. Between these two cases lies a number of cases currently in litigation. The resolutions of these cases will begin to fashion the scope of TBOR in litigation.

Perhaps more important than litigation is the role TBOR can play in shaping policy decisions at the IRS. It could play a major role in the regulations issued and in the subregulatory guidance that governs everyday life at the IRS. Advocates have a role to play in pushing TBOR in this context, though it may be more difficult to ascertain the importance of TBOR in achieving a specific outcome than seeing that outcome in litigation. TBOR also has a role to play in internal discussions at the IRS, which shape so much of the administrative process. If TBOR can alter the culture at the IRS to incorporate taxpayer rights as a major component of each policy decision, it will become an important part of tax administration whether or not it becomes an important part of litigation.

TBOR's role as a congressional statement of policy should allow TBOR to exert influence in situations in which the IRS has no competing congressional

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151. The district court issued a "NOT FOR PUBLICATION" letter opinion dismissing counts II–IV of the complaint but allowing the basic FOIA request to remain in the case. *MacVest Group*, 2018 WL 443457, at \*1–2.

152. Plaintiff's Brief in Opposition to Defendant's Motion To Dismiss at 4, *MacVest Group, Inc. v. United States*, No. 17-9833 (SDW) (LDW), 2018 WL 443457 (D.N.J. Jan. 16, 2018).

mandate to reach a specific result. Where the IRS has discretion, it should exercise that discretion in a manner that promotes taxpayer rights and considers the impact of each decision on the taxpayer served by the IRS.