

ADMINISTRATIVE SIMPLIFICATIONS AND THE TAX LAW

Leigh Osofsky* and Joshua D. Blank**

The Internal Revenue Service, like all other agencies, possesses significant discretion in implementing the laws that Congress enacts. In recent years, tax scholars have increasingly criticized the IRS for exercising this discretion through enforcement actions that unduly favor taxpayers, whether by declining to tax executives on frequent flyer miles accumulated through business travel, entering deals that enable multinational corporations to minimize their taxes or failing to enforce the tax law against some religious groups. In response, several tax scholars have called for new institutional oversight and judicial review of IRS under-enforcement and non-enforcement of the tax law.

But there is another side of the IRS's administrative discretion—the decisions the IRS makes in its service of taxpayers. Every year, the IRS publishes myriad booklets and instructions that distill voluminous statutes, regulations, and case law into plain writing for the public. This guidance often exhibits “administrative simplifications,” summaries of the tax law that appear as impartial statements, but that deviate in varying degrees from statutes, cases and regulations in ways that benefit taxpayers in some instances and the government in others. Through an extensive review of taxpayer publications, we reveal that the IRS frequently makes administrative simplifications that (1) present contested tax law as clear tax rules, (2) add administrative gloss to the tax law and (3) fail to fully explain the tax law, including possible exceptions. In each case, administrative simplifications provide the IRS with a powerful platform to shape and remake taxpayers' views of the tax law.

As this Article argues, administrative simplifications offer a number of potential benefits, such as making the tax law understandable and even bolstering the IRS's ability to collect tax revenue. However, some administrative simplifications threaten vital values of transparency and democratic governance and can result in inequitable treatment of different taxpayers. We offer approaches for preserving some of the benefits of administrative simplifications while also responding to some of their drawbacks. We also examine how these approaches can serve as guides for the design of potential future tax compliance measures, such as government-prepared tax returns, among other recent proposals.

* Associate Professor of Law, University of Miami School of Law.

** Professor of Tax Practice and Faculty Director of the Graduate Tax Program, New York University School of Law. We are grateful to __ for thoughtful suggestions and comments on prior drafts. All errors are our own.

TABLE OF CONTENTS

I. INTRODUCTION..... 3

II. IRS DISCRETION IN ENFORCEMENT 3

 A. *Why Discretion?*..... 3

 B. *Excercises of IRS Discretion* 3

 1. *Underenforcement* 3

 2. *Nonenforcement*..... 3

 3. *Deals*..... 3

 C. *Calls for Oversight and Reform* 3

III. IRS DISCRETION IN SERVICE..... 3

 A. *The IRS's Duty to Serve* 3

 B. *Administrative Simplifications*..... 3

 1. *Presenting Contested Tax Law as Clear Tax Rule* 3

 2. *Adding Administrative Gloss to the Tax Law* 3

 3. *Failing to Fully Explain the Tax Law*..... 3

 C. *Use of Administrative Simplifications* 3

IV. ARE ADMINISTRATIVE SIMPLIFICATIONS SOUND? 3

 A. *Defenses* 3

 1. *Tax Law in Plain Language*..... 3

 2. *IRS's Views of the Tax Law* 3

 3. *Revenue*..... 3

 B. *Threats*..... 3

 1. *Opacity* 3

 2. *Unequal Benefits and Burdens* 3

 3. *Inadquacy of Administrative Law* 3

 C. *Potential Responses*..... 3

 1. *Red Flag Requirements* 3

 2. *Review of IRS Publications*..... 3

 3. *Structural Reform* 3

 D. *Application in Future of Tax Administration* 3

 1. *Government-Prepared Tax Returns*..... 3

 2. *Interactive Filing* 3

 3. *Third-Party Reporting* 3

V. CONCLUSION 3