

## **Listen to Peter: Embrace the TBORs**

**by Alice G. Abreu and Richard K. Greenstein**

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In this viewpoint, Abreu and Greenstein encourage practitioners to take Peter L. Faber's advice on using a Taxpayer Bill of Rights, and point to ways that such laws can be beneficial to taxpayers even in the absence of a specific enforcement mechanism.

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A TBOR is a Taxpayer Bill of Rights, and 43 states and the federal government have one. Unfortunately, most practitioners either don't know that TBORs exist, or think they are of little, if any, practical importance — toothless tonics designed to make taxpayers feel better about the unpleasantness of paying taxes but offering no enforceable rights. Nevertheless, no less an authority than Peter L. Faber urged in an article in the September 4 edition of *State Tax Notes* that for tax advisers to ignore the "more general taxpayer protection rules of the sort that are embodied in bill of rights legislation . . . [is] a mistake. There are

times when these rules may be helpful in controversy situations."<sup>1</sup>

Faber's excellent article uses the New York TBOR to offer concrete examples of ways tax advisers may use TBOR provisions to obtain useful information from tax authorities, offset proposed deficiencies with overpayments, record taxpayer interviews, and even abate interest and penalties. And he offers this advice even though New York's TBOR, like others, lacks specific provisions for enforcement and provides that failure to comply with a TBOR requirement will not invalidate a notice.

Not only do we agree with Faber's observations, but we also think TBORs can do even more. TBORs can transform both tax practice and the relationship between taxpayers and taxing authorities, and their provisions can be enforced by courts even in the absence of statutory language providing for such enforcement. We developed at least three arguments in support of that proposition in a special report we recently published in *Tax Notes* titled "Embracing the TBOR."<sup>2</sup>

Our first argument in that article is that construing a TBOR as a meaningless gesture that adds nothing of value for taxpayers ignores the well-established canon of statutory construction against surplusage. It also ignores that canon's important corollary: When the legislature amends a statute (the TBOR is an amendment to section 7803 of the Internal Revenue Code), it intends to change something. Hence, we should not be so quick to assume that the enactment of a TBOR is a meaningless gesture.

<sup>1</sup>Faber, "Using Taxpayer Bill of Rights Laws," *State Tax Notes*, Sept. 4, 2017, p. 947.

<sup>2</sup>Alice G. Abreu and Richard K. Greenstein, "Embracing the TBOR," *Tax Notes*, Nov. 27, 2017, p. 1281.

Second, a TBOR can significantly enhance taxpayers' normative basis for demanding legal remedies for violations of their rights because it uses the language of rights and thereby invokes procedural justice. As the scholarly literature on performative utterances reveals, words and who says them matter in the law. For example, the words "guilty as charged," when spoken by a judge in a courtroom to an accused, mean something different than the same words spoken by a mother to a child who has his hand in the cookie jar. Likewise, the use of the words "taxpayer rights" by a legislature should mean something different than the duties the government already had. The use of the language of rights to recharacterize those duties is the legislature's invocation of procedural justice in a context in which it did not exist before, and that should strengthen the taxpayer's position when demanding enforcement.

Third, a TBOR may actually create taxpayer rights that therefore deserve to be enforced, precisely as was the case with the U.S. Constitution's Bill of Rights. Consider that the Fourth Amendment does not contain any enforcement mechanism.<sup>3</sup> Nevertheless, we have and can enforce the right to be free from unreasonable searches and seizures. This is because courts have ruled that the Bill of Rights created rights that would be meaningless unless enforced, so they devised enforcement mechanisms.<sup>4</sup> We maintain that a similar process can occur in the case of TBORs.

Although the arguments we make in "Embracing the TBOR" are specifically directed at the statute codified as section 7803(a)(3) of the Internal Revenue Code, we think they should be useful to state and local tax practitioners seeking enforcement of rights provided by state TBORs.

<sup>3</sup>The Fourth Amendment provides as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

<sup>4</sup>*Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). This, of course, recalls the iconic case of *Marbury v. Madison*, 5 U.S. 137, 163 (1803), in which the Supreme Court stated that, "The Government of the United States has been emphatically termed a government of law, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."

Not only can state TBORs provide the sort of opportunities Faber details in his article, but they may also provide a route to enforcement of those rights, as we believe the federal TBOR does. Although a detailed examination of how our arguments may be adapted to the context of a specific state's TBOR is beyond the scope of this article, we believe our arguments can be used by SALT practitioners as a starting point, and perhaps even as a source for developing additional arguments applicable in the SALT context.

That some state TBORs contain language providing that a violation does not render the related government action invalid should not preclude the TBOR use we advocate. Enforcing a right by compelling government action or providing compensation for a government's failure to act in conformity with the rights provided by a TBOR is not inconsistent with maintaining the validity of the government action. Government action that violates taxpayer rights may both be valid and allow a taxpayer to be compensated for the violation of those rights. In addition, the validity of the government action in question need not be inconsistent with a taxpayer's request that a court compel the government to act in a different, and also valid, manner.

A concrete example drawn from Faber's article illustrates my point. Faber describes a situation in which a taxpayer received a notice from the New York state revenue authority claiming that additional tax was due and providing computations, but giving no explanation of why those were the correct computations. In that situation the taxpayer could not know the theory on which the tax authority was relying in claiming the additional amount, and therefore found it difficult to respond meaningfully. Such a notice violates the New York TBOR, which, as Faber explains, provides that an initial notice "shall describe the basis for (such as the statutory or regulatory law, or judicial or tax appeals tribunal decision), and identify the amounts (if any) of the tax due."<sup>5</sup>

<sup>5</sup>Faber, *supra* note 1, at 948.

The relevant provision states that “an inadequate description under the section shall not invalidate such letter or notice,”<sup>6</sup> so a taxpayer cannot invalidate the notice because of the government’s failure to explain. That is appropriate, as Faber acknowledges — but, it does not mean that a taxpayer in this situation has no recourse under the TBOR. If, for example, a taxpayer incurs additional legal expenses in seeking explanatory information that will allow its representatives to respond effectively, or has to make multiple submissions because it cannot ascertain precisely the revenue authority’s concerns, a request for compensation for those expenses on the ground that they resulted from the TBOR violation should not be barred by the statutory provision confirming the validity of the action. In such a case, the taxpayer would not be seeking to invalidate the notice; rather, the taxpayer would be seeking compensation for the costs inflicted by the government’s violation of the TBOR right to be informed. The arguments we make in “Embracing the TBOR” could be useful to taxpayers and their advisers in seeking and obtaining such compensation.

Finally, we are compelled to note that our advice to embrace the TBOR is not only the wishful thinking of idealistic academics. On November 8, 2017 the first shot in the TBOR wars was fired by no less notable a taxpayer than Facebook. On that date Facebook filed a complaint against the IRS in federal district court in San Francisco asking for “mandamus-like relief” to force the IRS to allow it access to its internal Appeals process.<sup>7</sup>

Facebook claimed that it was entitled to such access by section 7803(a)(3)(E), the provision of the codified federal TBOR that provides “the right to appeal a decision of the Internal Revenue Service in an independent forum.”<sup>8</sup> Although the Facebook complaint also made claims under the Administrative Procedure Act, the importance of its having

asked for “mandamus-like” relief on the basis of the TBOR cannot be overstated. Whether Facebook wins or loses its specific claim is important, but it is not the most important aspect of its action (except, perhaps, for Facebook itself). The importance of Facebook’s action is in its concrete embrace of the TBOR as an actionable source of taxpayer rights. The battle is joined. ■

<sup>6</sup> *Id.*

<sup>7</sup> *Facebook Inc. v. Internal Revenue Service*, No. 4:17-cv-06490, complaint (N.D. Cal., Nov. 8, 2017).

<sup>8</sup> *Id.*