

IDR's

Robert E. McKenzie
©2017

7:3. Information document requests

Research References

West's Key Number Digest, Internal Revenue &key;4495

West's Key Number Digest, Internal Revenue &key;4496

West's Key Number Digest, Internal Revenue &key;4499

Mertens Law of Federal Income Taxation §§49B:3, 50:326

Most IRS requests for documents, books, and records proceed informally and voluntarily. In the initial notice of examination, or shortly thereafter, the Agent may deliver a list of requested documents. This list is generally called an Information Document Request (IDR).¹ The IDR is a written request for production of documents. The taxpayer is not obligated to comply with the request, but most do so voluntarily. In complex or troublesome examinations, multiple IDRs may be issued over time.

7:4. Oral requests

Research References

West's Key Number Digest, Internal Revenue &key;4495

West's Key Number Digest, Internal Revenue &key;4496

West's Key Number Digest, Internal Revenue &key;4499

Mertens Law of Federal Income Taxation §§49B:3, 50:326

In addition to IDRs, the Agent may request cooperation orally, such as, "Can you show me the documents that substantiate this deduction?" Responses to oral requests are voluntary, but if the taxpayer fails to comply, an IDR is likely to follow. In collection matters, if the IRS knows the taxpayer is represented by counsel, the IRS cannot bypass counsel unless counsel fails to respond.¹ In all tax controversies, the IRS may notify the taxpayer that the representative is responsible for unreasonable delay or hindrance.²

Practice Tip

1

For an example of an IDR, see Appendix 7A.

1

I.R.C. §6304(a)(2).

2

I.R.C. §7521(c).

Even if the taxpayer intends to comply, some taxpayers ask the Agent for an IDR in lieu of an oral request. In larger organizations, collection of the requested documents may be difficult; an IDR from the IRS may be useful in achieving internal compliance. Disadvantages include the delay inherent in asking for a written document and the likelihood that the IDR will be worded much more broadly than an oral request. The IDR also leaves a paper trail of the IRS requests and the taxpayer's responses, which may prove problematic if an important document turns up subsequently that should have been disclosed under an IDR.

7:5. Voluntary interviews

Research References

West's Key Number Digest, Internal Revenue &key;4495

West's Key Number Digest, Internal Revenue &key;4496

West's Key Number Digest, Internal Revenue &key;4499

Mertens Law of Federal Income Taxation §§49B:3, 50:326

The taxpayer is not required to submit to an interview or to produce documents during the audit unless the IRS issues an administrative summons. (Discussed in §§7:14 to 7:21 of this work). Nevertheless, taxpayers generally find it useful to agree to voluntary interviews with the IRS. At these interviews, the taxpayer and the IRS have the right to make audio recordings, and the IRS is required to provide the taxpayer with an explanation of the audit process, including the right of the taxpayer to suspend the interview and seek counsel.¹

Practice Tip

In most cases, the taxpayer should not be interviewed by the IRS without counsel present. At the initial audit meeting, provide a letter to the IRS noting that the taxpayer requests counsel present during all interviews. Practically speaking, counsel rarely stays during the entire audit, so it is important to instruct the taxpayer and all taxpayer employees not to discuss company business with the IRS agent, even on a “friendly” basis. It is advisable to conduct the audit at a location outside of the taxpayer's office, such as your office, if possible, and without the taxpayer present.

7:6. Third-party contacts

Research References

West's Key Number Digest, Internal Revenue &key;4495

West's Key Number Digest, Internal Revenue &key;4496

West's Key Number Digest, Internal Revenue &key;4499

Mertens Law of Federal Income Taxation §§49B:3, 50:326

In the course of an audit examination, appeals or collection process, the IRS may contact persons other than the taxpayer for information without using the administrative summons. Financial institutions, accountants, business partners, neighbors, co-workers, ex-spouses, and

¹

I.R.C. §7521.

employers may possess information of interest to the IRS. In former years, the IRS could informally request information from these persons without additional restrictions.¹ As a result of the IRS Restructuring and Reform Act of 1998, third-party contacts must comply with the applicable statute and regulation.

7:7. Definition of third-party contacts

Research References

West's Key Number Digest, Internal Revenue &key;4495

West's Key Number Digest, Internal Revenue &key;4496

West's Key Number Digest, Internal Revenue &key;4499

Mertens Law of Federal Income Taxation §§49B:3, 50:326

A “third-party contact” is a communication which:

(1) is initiated by an IRS employee;

(2) is made to a person other than the taxpayer;

(3) is made with respect to the determination or collection of the tax liability of such taxpayer;

(4) discloses the identity of the taxpayer being investigated; and

(5) discloses the association of the IRS employee with the IRS.¹

“IRS employees” include persons working with the IRS under a non-disclosure agreement under I.R.C. §6103(n), such as external appraisers.² Returning an unsolicited telephone call is not a communication “initiated by an IRS employee,” and thus is not a third-party contact.³

“Person other than the taxpayer” does not include any current employee, officer, or fiduciary of the taxpayer when acting within the scope of his or her employment.⁴

Communications during business hours on business premises will be “conclusively presumed” to be within the scope of employment.⁵ To assist with identifying whether questionable employees

1

IRS agents are always subject to restrictions protecting taxpayer confidentiality, such as I.R.C. §6103(a), (k).

1

Treas. Reg. §301.7602-2(b).

2

Treas. Reg. §301.7602-2(c)(1)(i)(B), (ii) (Example 2).

3

Treas. Reg. §301.7602-2(c)(1)(ii) (Example 1).

4

Treas. Reg. §301.7602-2(c)(2).

5

qualify as a third-party contact, inform the examiner of those authorized to speak on behalf of the employer.⁶

Practice Tip

Control access of the IRS Agent to all persons on the business premises of your client. The IRS Agent should not have the opportunity to wander around and converse with employees. Conduct the audit at your office, if possible.

Computer database searches⁷ and communications with government entities⁸ are not considered third-party contacts.

“Made with respect to the determination or collection of the tax liability of such taxpayer” includes all taxes, additions to tax, penalties, and interest imposed under Title 26.⁹ Taxpayers do not enjoy derivative rights to receive notice of third-party contacts: bondholders have no “third-party contact” rights during the examination of the tax-exempt status of a bond, and partners (other than the TMP) have no such rights during a TEFRA partnership audit or a Trust Fund Recovery Penalty recovery until the examination turns to specifically focus on the particular taxpayer.¹⁰ The rules also do not apply to general investigations into an industry, or a review of a paid preparer's records, so long as the investigation does not yet target the specific taxpayer.¹¹

“Discloses the identity of the taxpayer being investigated” includes giving information that allows the person being contacted to “readily ascertain” the taxpayer's identity.¹² Asking for

Treas. Reg. §301.7602-2(c)(2)(i)(C).

6

IRS CCA 200914034, 2009 WL 889685 (IRS CCA) (2009); I.R.M. 4.11.57.3 (12-20-2011).

7

Treas. Reg. §301.7602-2(c)(2)(i)(B), (ii) (Example 3).

8

Treas. Reg. §301.7602-2(f)(5). See, e.g., *Martini v. U.S.*, 2006-2 U.S. Tax Cas. (CCH) P 50383, 97 A.F.T.R.2d 2006-2592, 2006 WL 1285416 (D. Nev. 2006).

9

Treas. Reg. §301.7602-2(c)(3).

10

Treas. Reg. §301.7602-2(c)(3)(i)(A), (ii) (Examples 4 to 6).

11

Treas. Reg. §301.7602-2(c)(3)(i)(D), (ii) (Examples 1 to 3).

12

Treas. Reg. §301.7602-2(c)(4)(i).

the value of real estate at a particular address is enough to identify the taxpayer and trigger the third-party contact rules.¹³

“Discloses the association of the IRS employee with the IRS” occurs when the IRS employee knows or should know that the person contacted can readily ascertain the IRS association.

7:8. Exceptions

Research References

West's Key Number Digest, Internal Revenue &key;4495

West's Key Number Digest, Internal Revenue &key;4496

West's Key Number Digest, Internal Revenue &key;4499

Mertens Law of Federal Income Taxation §§49B:3, 50:326

Congress provided three exceptions to the third-party contact rules: (1) any contact authorized by the taxpayer;¹ (2) if advance notice would jeopardize collection or may trigger a reprisal;² or (3) pending criminal investigations.³

“Authorized by the taxpayer” includes contacts with the taxpayer's authorized representative (such as a person holding a power of attorney, a corporate officer, a personal representative, an executor, or an attorney representing the taxpayer) and any contact requested or approved by the taxpayer or the taxpayer's authorized representative.⁴ This waiver need not be in writing; if a taxpayer tells an IRS Agent, “Go ahead and talk to my friends and business associates; they will back me up,” then the third-party contact rules will have been waived as to these persons.

¹³

Treas. Reg. §301.7602-2(c)(4)(ii) (compare Examples 1 and 2).

¹

I.R.C. §7602(c)(3)(A); Treas. Reg. §301.7602-2(f)(1).

²

I.R.C. §7602(c)(3)(B); Treas. Reg. §301.7602-2(f)(2), (3); See IRS CCA 200914034, 2009 WL 889685 (IRS CCA) (2009) (a statement by the third-party contact of fear of reprisal, alone, may be sufficient by itself to satisfy exception under I.R.C. §7602(c)(3)(B)).

³

I.R.C. §7602(c)(3)(C); Treas. Reg. §301.7602-2(f)(4). See CCA 200814008, 2008 WL 905371 (2008).

⁴

Treas. Reg. §301.7602-2(f)(1). The IRM encourages the use of Form 12180, Third-Party Contact Authorization, for this purpose. I.R.M. 4.10.1.6.12.4.1 (05-14-1999). Neither the IRC nor the final Regulations are this specific; thus anything that reasonably indicated authorization would probably suffice.

Practice Tip

Consider sending the IRS examining agent a letter revoking all prior waivers, requests, and approvals of third-party contacts, particularly if you began to represent the client after the examination was already underway and you can't determine whether prior waivers have been granted orally or in writing. The IRS regulations do not address the effect of such a letter, but it should be effective prospectively.

Third-party contact rules do not apply if the IRS employee has good cause to believe that giving notice of the third-party contact may jeopardize the collection of any tax.⁵ Examples of good cause include a reasonable belief that any person will conceal, remove, destroy or alter records or assets, or that intimidation, bribery, collusion, or flight might occur to block examination and enforcement.⁶ Likewise, the disclosure rules do not apply in situations of potential reprisal against the third-party contact.⁷ Reprisal includes any fear of harm, whether physical, emotional, economic or otherwise,⁸ and the IRS is not required to investigate or determine the likelihood that reprisal might occur.⁹ The IRS employee is also allowed to infer the fear of reprisal, without any statement from the third-party contact, in appropriate cases.¹⁰ The IRM suggests that third-party contacts relating to taxpayers identified as Potentially Dangerous Taxpayers (PDTs) may automatically qualify for the reprisal exception.¹¹

Pending criminal investigations are also excluded from the third-party contact rules, but only when the contact is made by an IRS employee whose primary duties include criminal

5

I.R.C. §7602(c)(3)(B); Treas. Reg. §301.7602-2(f)(2).

6

Treas. Reg. §301.7602-2(f)(2).

7

Treas. Reg. §301.7602-2(f)(3).

8

Treas. Reg. §301.7602-2(f)(3)(i).

9

Treas. Reg. §301.7602-2(f)(3)(i), (ii) (Example 2).

10

The example in the Regulations is a woman whose ex-spouse has violated protective orders after an acrimonious divorce. Treas. Reg. §301.7602-2(f)(3)(ii) (Example 3).

11

I.R.M. 4.10.1.6.12.4.3 (05-14-1999). If your client is identified as PDT, consider requesting a process with the IRS for you to review the post-contact list.

investigation.¹²

7:9. Other exceptions

Research References

West's Key Number Digest, Internal Revenue &key;4495

West's Key Number Digest, Internal Revenue &key;4496

West's Key Number Digest, Internal Revenue &key;4499

Mertens Law of Federal Income Taxation §§49B:3, 50:326

The final Regulations add three exceptions to the third-party contact rules not found in the statute: (1) contacts with any government agency (other than contacts concerning the taxpayer's employment or business with the agency); (2) confidential information from informants protected under I.R.C. §6103(h)(4); and (3) contacts made in the course of a pending court proceeding.¹ The IRM adds other exceptions, including exchanges of information under tax treaties and the dissemination of tax information via electronic format to other taxing jurisdictions.²

7:10. Required IRS notices of third-party contacts

Research References

West's Key Number Digest, Internal Revenue &key;4495

West's Key Number Digest, Internal Revenue &key;4496

West's Key Number Digest, Internal Revenue &key;4499

Mertens Law of Federal Income Taxation §§49B:3, 50:326

If a communication satisfies all five of the elements of the definition of third-party contact, the IRS must comply with both the pre-contact notice requirement and the post-contact notice requirement. Neither the statute nor the Regulation provides a remedy if the IRS fails to provide the required notices. In egregious cases, perhaps the taxpayer could seek to exclude the testimony.

7:11. Pre-contact notice

Research References

¹²

Treas. Reg. §301.7602-2(f)(4)(i)(B).

¹

Treas. Reg. §301.7602-2(f)(5) to (7); *Seawright v. C.I.R.*, 117 T.C. 294, 2001 WL 1631496 (2001).

²

I.R.M. 4.10.1.6.12.1 (05-14-1999). It is doubtful whether a Federal court would give any weight to an "exception" to a statute based solely on the text of the Internal Revenue Manual. To find a basis for these exceptions, one must look to other Federal law, such as the specific tax treaty involved.

West's Key Number Digest, Internal Revenue &key;4495
West's Key Number Digest, Internal Revenue &key;4496
West's Key Number Digest, Internal Revenue &key;4499
Mertens Law of Federal Income Taxation §§49B:3, 50:326

The Internal Revenue Code prohibits any third-party contacts unless the IRS provides reasonable notice in advance that persons other than the taxpayer may be contacted.¹ The Regulations interpret reasonable notice in advance to permit generic oral or written notification that the IRS may contact other persons.² “Written notice is deemed reasonable if it is: (i) Mailed to the taxpayer's last known address; (ii) Given in person; (iii) Left at the taxpayer's dwelling or usual place of business; or (iv) Actually received by the taxpayer.”³ If this pre-contact notification is routinely given with the notice of audit, then the requirement will be practically worthless. The IRM suggests that the pre-contact notice will follow the form of Letter 3164.⁴ An alternative method used to provide notice to taxpayers of potential third-party contacts is Publication 1.⁵ While neither the Code nor the Regulations specifies a time period, the IRM states that advance notice in person is immediately effective, while notice by mail to the taxpayer's last known address is effective after 10 days.⁶

7:12. Post-contact notice

Research References

West's Key Number Digest, Internal Revenue &key;4495
West's Key Number Digest, Internal Revenue &key;4496

1

I.R.C. §7602(c)(1).

2

Treas. Reg. §301.7602-2(d)(1).

3

Treas. Reg. §301.7602-2(d)(1).

4

I.R.M. 4.10.1.6.12.2 (05-14-1999). Notice 1219 alone is apparently insufficient to give advance notice of third-party contacts, but a detailed cover letter or a telephone call from the IRS employee could satisfy the Regulations.

5

Thompson v. U.S., 2008 WL 4279474, 102 A.F.T.R.2d 2008-6130, 2008-2 USTC P 50,555 (S.D.Tex. Sep 11, 2008) (IRS memorandum from March 2006 instructed examination agents to discontinue use of Form 3164 and to begin using Publication 1 as method for providing taxpayer notice of potential third-party contacts).

6

I.R.M. 4.10.1.6.12.2.1 (05-14-1999).

West's Key Number Digest, Internal Revenue &key;4499
Mertens Law of Federal Income Taxation §§49B:3, 50:326

In the 2001 Proposed Regulations to I.R.C. §7602, the IRS required that taxpayers be given a list of third-party contacts, but only periodically and upon reasonable request.¹ When final Regulations were issued on December 18, 2002, the periodic requirement was dropped.² The only way to receive the post-contact list is to specifically request it from the IRS in writing, and to renew the request on a reasonable periodic basis.³ This final Regulation seems directly inconsistent with I.R.C. §7602(c)(2), which says: “The Secretary shall periodically provide to a taxpayer a record of persons contacted during such period” The final Regulations also sharply limit the content of the record. One example states that it is sufficient to identify the contact as “John Doe” if that is how the person identified himself to the IRS, or to merely say that the third-party contact was “a person on the street in front of” a certain address.⁴

Practice Tip

Routinely request the post-contact list from the IRS at the beginning of all client engagements and renew the request in writing annually. In some cases, more frequent renewal requests might be appropriate.

7:13. Debriefing third-party contacts

Research References

West's Key Number Digest, Internal Revenue &key;4495
West's Key Number Digest, Internal Revenue &key;4496
West's Key Number Digest, Internal Revenue &key;4499
Mertens Law of Federal Income Taxation §§49B:3, 50:326

Once third-party contacts are identified, you can approach them to find out what questions the IRS asked and what information was voluntarily turned over to the IRS. This

1

Prop. Reg. §301.7602-2(e) (2001).

2

TD 9028 (Dec. 18, 2002) (“These final regulations do not finalize the provisions in the proposed regulations regarding periodic reports. Subsequent to the issuance of the proposed regulations, the IRS determined that the issuance of periodic reports may result in harm to third parties and, accordingly, has determined that periodic reports should not be issued. Taxpayers will continue to receive pre-contact notice and may specifically request from the IRS reports of persons contacted.”).

3

Treas. Reg. §301.7602-2(e)(1).

4

Treas. Reg. §301.7602-2(e)(4).

debriefing process could yield important clues concerning the IRS audit. Do not intimidate or harass third-party contacts.

Practice Tip

If it is likely that the IRS will contact the third-party contact again, send a letter to the third party, requesting that the third party: (1) declines to cooperate with the IRS unless an administrative summons is issued (which triggers other rights described in §§7:22 to 7:29 of this work); and (2) contact you immediately upon an IRS contact with respect to your client.

3. Formal IRS Examination Requests

7:14. Generally

Research References

West's Key Number Digest, Internal Revenue &key;4505

West's Key Number Digest, Internal Revenue &key;4506

Mertens Law of Federal Income Taxation §§49B:3, 50:326

Taxpayer compliance with oral document requests and IDRs is voluntary.¹ When voluntary methods prove inadequate, the IRS may compel production of documents and records. The primary mandatory tool during the examination and collection process is the administrative summons, in its various forms. The second process is the discovery rules: while a tax case is pending before a court (such as the U.S. Tax Court), both the government and the taxpayer may request production of documents under court supervision. The following section will discuss the administrative summons. Third-party summonses are discussed in §§7:22 to 7:29 of this work. Discovery rules are discussed in §§7:38 to 7:45.

7:15. Administrative summons

Research References

West's Key Number Digest, Internal Revenue &key;4505

West's Key Number Digest, Internal Revenue &key;4506

Mertens Law of Federal Income Taxation §§49B:3, 50:326

In an administrative summons, the IRS formally demands that the taxpayer appear at a specified time and place and produce certain documents or give such testimony under oath as may be relevant.¹ The administrative summons is issued by specified IRS employees.² A judge is

1

I.R.C. §7609(j) states that the administrative summons process is not exclusive and that the IRS may pursue any other formal or informal procedures permitted by law.

1

I.R.M. 25.5.3.4 (August 1, 2016).

2

Treas. Reg. §301.7602-1(b)(1); Treas. Reg. §301.7603-1(b) (2008); I.R.M. 25.5.1.3 (Summons Handbook) (09-10-2014).

not involved in the process unless the taxpayer files suit to quash the summons or the IRS files suit to enforce the summons. The IRS generally issues an administrative summons on Form 2039.³ The IRM contains helpful information on third-party contacts and the administrative summons⁴ as well as documents produced by the Chief Counsel Advisory.⁵

Under the rules governing practice before the IRS, the taxpayer's representative must either promptly submit the information requested or assert in good faith and on reasonable grounds a claim of privilege.⁶ Documentary privileges are discussed in §§7:46 to 7:54 of this work.

7:16. Purposes of summons

Research References

West's Key Number Digest, Internal Revenue &key;4505

West's Key Number Digest, Internal Revenue &key;4506

Mertens Law of Federal Income Taxation §§49B:3, 50:326

An administrative summons may be issued for the following purposes:

- (1) ascertaining the correctness of any Internal Revenue tax return;
- (2) making a return where none has been made;
- (3) determining the liability of any person for any Internal Revenue tax or any transferee or fiduciary tax liability;
- (4) collecting any such tax liability; or
- (5) inquiring into any offense connected with the administration or enforcement of the Internal Revenue laws.¹

Once the IRS has shown that the summons is issued for a proper purpose and is in good faith, the burden shifts to the taxpayer to demonstrate that the summons is improper, using the four factors from the Powell case in the U.S. Supreme Court,² or by demonstrating that the IRS was acting in

3

For an example of an administrative summons, see Appendix 7B.

4

I.R.M. 4.10.1.6.12 (third-party contacts) (05-14-1999), I.R.M. 25.5 (Summons Handbook) (Updated 09-10-2014), and I.R.M. 34.6.3 (Summons Enforcement Actions) (08-11-2014).

5

IRS CCA 200950044, 2009 WL 4730285, (IRS CCA Dec 11, 2009).

6

Treas. Dept. Circ No. 230, 31 C.F.R. §10.20(a) (8-2011).

1

I.R.C. §7602(a), (b); Treas. Reg. §301.7602-1(a).

2

U.S. v. Powell, 379 US 48, 85 S Ct 248, 13 L Ed 2d 112 (1964). See §7:31 of this work.

bad faith, to harass or intimidate.³ The IRS may also use the administrative summons to access portions of the taxpayer's website that are blocked from the public.

7:17. Service of summons

Research References

West's Key Number Digest, Internal Revenue &key;4505

West's Key Number Digest, Internal Revenue &key;4506

Mertens Law of Federal Income Taxation §§49B:3, 50:326

An administrative summons must be served in person or left at the taxpayer's "last and usual place of abode."¹ Since July 28, 1998, third-party summonses may also be served on the recordkeeper by certified or registered mail.² Authorized persons may accept service for entities.³ The courts generally look to whether the attempted service successfully gave the taxpayer notice of the summons. In several cases where the technical standards of the statute were arguably not met, the court nevertheless ruled that improper service was harmless or that the issue had been waived when the taxpayer was able to sue to quash in a timely fashion.⁴ Unlike Federal Rule of

3

U.S. v. Jose, 131 F3d 1325 (CA9 1997) discussed in *Lidas, Inc. v. U.S.*, 1999 WL 164409 (CD Cal 1999), affd 238 F3d 1076 (CA9 2001); *Scotty's Contracting and Stone, Inc. v. U.S.*, 326 F.3d 785, 2003 FED App. 0121P (6th Cir. 2003) (summons valid, even if the purpose of the IRS investigation is criminal, so long as a Justice Department referral has not yet been made). See *U.S. v. Bright*, 2007-2 U.S. Tax Cas. (CCH) &p;50711, 100 A.F.T.R.2d 2007-5905, 2007 WL 2694479 (D. Haw. 2007), motion for stay pending appeal denied, 2008 WL 351215 (D. Haw. 2008) (summons is valid even if the IRS has issued a notice of deficiency for the tax year in question or Tax Court proceeding exists).

1

I.R.C. §7603(a); I.R.M. 5.17.6.5.1 (09-26-2014).

2

I.R.C. §7603(b)(1); Treas. Reg. §301.7603-1.

3

See, e.g., *U.S. v. Toyota Motor Corp. (Toyota II)*, 569 F Supp 1158 (CD Cal 1983). See I.R.M. 5.17.6.5.1 (09-26-2014).

4

See, e.g., *Sylvestre v. U.S.*, 978 F2d 25 (CA1 1992) (untimely notice did not harm taxpayer; summons upheld); *U.S. v. Myslajek*, 568 F2d 55 (CA8 1977) (taxpayer waived strict compliance with service requirements when representative appeared to oppose summons and did not raise improper service argument until three months later); but see *U.S. v. Jillson*, 99-2 U.S. Tax Cas. (CCH) P 50937, 84 A.F.T.R.2d 99-7115, 1999 WL 1249414 (S.D. Fla. 1999) (quashing summons when taxpayer was prejudiced by the failure to give statutory notice); *Thompson v. U.S.*, 2008 WL 4279474, 102 A.F.T.R.2d 2008-6130, 2008-2 USTC P 50,555 (S.D. Tex. Sep 11,

Civil Procedure 4(e)(2), the IRS administrative summons does not have to be left with a responsible person, but can be merely taped to the door or otherwise left.⁵ One Federal court refused to enforce a summons that was not left with a person, citing the Due Process Clause of the Fourteenth Amendment,⁶ but subsequent courts have not followed its lead.⁷ The IRM suggests, but does not require, that the summons be left with a responsible person over the age of 16, who is capable of understanding the importance of giving the summons to the summoned party.⁸

For service on U.S. taxpayers residing abroad, see §7:63 of this work.

7:18. Attestation of summons

Research References

West's Key Number Digest, Internal Revenue &key;4505

West's Key Number Digest, Internal Revenue &key;4506

Mertens Law of Federal Income Taxation §§49B:3, 50:326

The statute requires that the served copy of the summons be “attested,”¹ meaning the IRS

2008) (distinguishing *U.S. v. Jillison*).

5

U.S. v. O'Meara, 894 F2d 403, 1990 WL 2208 (CA4 1990) (unpublished decision); *U.S. v. Bichara*, 826 F2d 1037 (CA11 1987); *U.S. v. Lonigro*, 2009 WL 587846, 103 A.F.T.R.2d 2009-794 (M.D.Fla. Jan 12, 2009) (summons upheld as valid despite last and usual abode being vacant due to water damage, medical issues, and vandalism); *U.S. v. Hahn*, 1979 WL 1451, 44 AFTR2d 79-5667, 79-2 USTC &p;9595 (WD Wis 1979) (describing the prior version, Rule 4(d)(1)).

6

U.S. v. Giertz, 650 F Supp 886 (SD Fla 1987). See also *U.S. v. Martin*, 106 A.F.T.R.2d 2010-6973, 2010 WL 4628631 (E.D. Ky. 2010), report and recommendation adopted, 106 A.F.T.R.2d 2010-6974, 2010 WL 4625461 (E.D. Ky. 2010) (whether leaving summons with taxpayer's wife at place of abode violates the Due Process Clause not decided for failure to raise objection by taxpayer).

7

U.S. v. Schindler, 21 F3d 1118, 1994 WL 123890 (CA9 1994) (unpublished disposition), revg and remg 92-2 USTC &p;50,478 (CD Cal 1992) (9th Circuit reversed District Court's invalidation of the summons; District Court had held that summons not left with a person violated the Due Process Clause); *U.S. v. Gilleran*, 992 F2d 232 (CA9 1993); I.R.M. 5.17.6.5.1(09-26-2014); *Camaro Trading Co., Ltd. v. U.S.*, 1991 WL 130158, 71A AFTR2d 93-4309, 91-1 USTC &p;50,275 (ND Ga 1991); *Long v. Pippin*, 914 P2d 529 (Colo Ct App 1996) (other factors suggested due process had been satisfied for notice of Federal tax summons).

8

I.R.M. 25.5.3.2.

1

has examined the original and the copy and attests in a signed writing that the copies conform to the original. This simple provision has spawned much fruitless litigation as taxpayers have attempted to challenge the attestation. In the widely cited Mimick case, the Eighth Circuit was willing to overlook the fact that the summons was not attested when the IRS acted in good faith, the copies were actually correct, and the summoned parties had not been harmed by the failure.² Apparently, the only successful quashing of a summons in the federal courts due to a failure of attestation was a Montana District Court magistrate's report in 1992.³

7:19. Certificate of service of summons

Research References

West's Key Number Digest, Internal Revenue &key;4505

West's Key Number Digest, Internal Revenue &key;4506

Mertens Law of Federal Income Taxation §§49B:3, 50:326

The signed certificate of service of the summons¹ is evidence that the summons was actually served.² The certificate will be used in any summons enforcement proceeding by the IRS.

7:20. Time and place of appearance

Research References

West's Key Number Digest, Internal Revenue &key;4505

I.R.C. §7603(a).

2

Mimick v. U.S., 952 F.2d 230 (CA8 1991); see also, e.g., Kondik v. U.S., 81 F.3d 655 (CA6 1996) (third party recordkeeper summons need not be attested); Fortney v. U.S., 59 F.3d 117 (CA9 1995) (similar); Tuka v. U.S., 2009 WL 36593 (E.D.Va., 2009) (same); but see Lindberg v. U.S., 2007-2 U.S. Tax Cas. (CCH) ¶50827, 99 A.F.T.R.2d 2007-3007, 2007 WL 1582881 (D. Minn. 2007) (copy of the summons served upon third-party required to be attested); Miller v. U.S., 202 F.3d 274 (7th Cir. 1999) (taxpayer was not misled by the unattested notice copies); O'Doherty v. U.S., 97 A.F.T.R.2d 2006-322, 2005 WL 3527271 (N.D. Ill. 2005) (taxpayer was neither misled nor prejudiced by unattested notice copies).

3

Larson v. U.S., 1992 WL 104791, 69 AFTR2d 92-845, 92-2 USTC ¶50,367 (DC Mont 1992). The opinion merely accepts the magistrate's report since the government failed to file a notice of objection. Westlaw and the CCH Citator reveal no citations to this case as of December 13, 2009.

1

Form 2039, Appendix 7B.

2

I.R.C. §7603(a).

West's Key Number Digest, Internal Revenue &key;4506

Mertens Law of Federal Income Taxation §§49B:3, 50:326

The summons will specify a time and place for the taxpayer's appearance. The time and place must be "reasonable under the circumstances."¹ Under longstanding Treasury Regulations, the IRS will ordinarily schedule the appearance to occur during normal business hours. The date of appearance must be no less than 10 days from the date of an ordinary summons,² and 23 days' notice must be given for third-party summons.³ If the IRS gives tardy notice and yet the taxpayer is able to file a motion to quash the third-party summons, courts have been reluctant to dismiss the summons, despite the violation of the statute.⁴ The overriding principle here is reasonableness; taxpayers may argue that 10 days' notice is inadequate given the difficulties of preparing for the appearance.⁵

The summons will also describe the place of examination. If the proposed location of the examination is inconvenient to the taxpayer, the Regulations provide for flexibility to request a transfer to a more suitable location.⁶

7:21. Rights at the summons appearance

Research References

West's Key Number Digest, Internal Revenue &key;4505

West's Key Number Digest, Internal Revenue &key;4506

Mertens Law of Federal Income Taxation §§49B:3, 50:326

1

I.R.C. §7605; Reg §301.7605-1.

2

Treas. Reg. §301.7605-1(b)(2).

3

I.R.C. §7609(a)(1).

4

Cook v. U.S., 104 F3d 886 (CA6 1997) (third-party summons enforced despite tardy notice when taxpayer was not harmed and was able to file motion to quash). See Boyd v. U.S., 87 Fed. Appx. 481, 2003 WL 23172044 (6th Cir. 2003) (slight deviation does not invalidate summons); Superior Trading, LLC v. U.S., Department of the Treasury-Internal Revenue Service, 2008 WL 5192379 (M.D.Pa.,2008) (valid summons does not require that notice be provided to taxpayer's representative).

5

Reg §301.7605-1(d).

6

Reg §301.7605-1(d).

When taxpayers appear in response to a summons, they have the right to counsel¹ and to record the interview.² Taxpayers may suspend the interview at any time to consult counsel³ and may pay a fee to obtain a transcript.⁴

4. Third-Party Summonses

7:22. Generally

Research References

West's Key Number Digest, Internal Revenue &key;4499

West's Key Number Digest, Internal Revenue &key;4505

West's Key Number Digest, Internal Revenue &key;4506

West's Key Number Digest, Internal Revenue &key;4507

Mertens Law of Federal Income Taxation §50:326

Third-party administrative summonses are formal requests for documents, issued by the IRS to persons other than the targeted taxpayer. Typical recipients of third-party summonses include financial institutions, employers, and business associates. Informal third-party requests (“third-party contacts”) are subject to regulations, as discussed in §§7:6 to 7:13 of this work. To a large extent, third-party summonses are subject to the same rules as ordinary administrative summonses, discussed in §§7:14 to 7:21 and §§7:30 to 7:37 of this work. The following sections will discuss the distinctive aspects of third-party summonses.

7:23. Notice of third-party summonses

Research References

West's Key Number Digest, Internal Revenue &key;4499

West's Key Number Digest, Internal Revenue &key;4505

West's Key Number Digest, Internal Revenue &key;4506

West's Key Number Digest, Internal Revenue &key;4507

Mertens Law of Federal Income Taxation §50:326

A third-party summons is a formal request by the IRS for information, records, testimony, or computer software source code that relates to a person other than the person being

1

5 U.S.C.A. §555(b).

2

I.R.C. §7521(a).

3

I.R.C. §7521(b)(2). But see I.R.M. 25.5.5.4.2 (12-18-2015) (An interview of a taxpayer, when required by a summons, is not required to be suspended upon requests for counsel.).

4

5 U.S.C.A. §555(c).

served with the summons.¹ The third-party summons will identify the targeted taxpayer by name to permit the summoned party to locate the proper documents.² The third-party summons is issued in the ordinary fashion, but the IRS is generally required to give the identified taxpayer notice within three days after service is made on the third party.³ This notice may be given to the taxpayer either by service (following the general rules in I.R.C. §7603) or by registered or certified mail to the last known address of the taxpayer.⁴

7:24. Proceedings to quash a third-party summons

Research References

West's Key Number Digest, Internal Revenue &key;4499

West's Key Number Digest, Internal Revenue &key;4505

West's Key Number Digest, Internal Revenue &key;4506

West's Key Number Digest, Internal Revenue &key;4507

Mertens Law of Federal Income Taxation §50:326

Once the notice of third-party summons is given to the identified taxpayer, the taxpayer has 20 days from the date the notice is made to sue in the United States District Court to quash the summons and thus prevent the disclosure of the information to the IRS.¹ Proceedings to quash may be pursued even after the third party has complied.²

Practice Tip

While this period is sometimes described as “23 days following the service of the summons,” the statute specifies 20 days following the notice of third-party summons to the taxpayer. If the notice is indeed given on the third day following the service, then these statements are equivalent. If notice is given on a prior day, however, then “23 days” becomes misleading. One should also carefully note that

1

I.R.C. §7609(a)(1); 26 C.F.R. §301.7609-1.

2

I.R.C. §7609(a)(3).

3

I.R.C. §7609(a)(1); 26 C.F.R. §301.7609-2.

4

I.R.C. §7609(a)(2).

1

I.R.C. §7609(b)(2); see also 26 C.F.R. §301.7609-4.

2

Church of Scientology of California v. U.S., 506 US 9, 113 S Ct 447 (1992).

the notice is deemed delivered when served under I.R.C. §7603 or when mailed under I.R.C. §7609, even if not actually received until many days later.

The summoned third party does not have the right to attempt to quash the third-party summons,³ but if the third party simply refuses to comply with the summons, the IRS will begin a court action to enforce, and the third party will receive a court hearing. Once the IRS files the action, any person entitled to notice of the third-party summons (such as your client) has the right to intervene in the proceeding to attempt to quash.⁴

Practice Tip

If you have missed the 20-day window for a proceeding to quash, convince the third party to resist the summons, and then the identified taxpayer can intervene as a matter of right. Third parties may want to be indemnified against their expenses to resist a summons at your request. In addition, while the taxpayer has no right to attend the third-party summons appearance, the third party may invite any observer to attend.⁵

7:25. Third-party recordkeepers

Research References

West's Key Number Digest, Internal Revenue &key;4499

West's Key Number Digest, Internal Revenue &key;4505

West's Key Number Digest, Internal Revenue &key;4506

West's Key Number Digest, Internal Revenue &key;4507

Mertens Law of Federal Income Taxation §50:326

The term “third-party recordkeepers” is defined in Section 7603(b)(2) of the Code.¹ It includes banks, consumer reporting agencies, persons extending credit through credit cards, securities brokers, attorneys, accountants, barter exchanges, regulated investment companies (mutual funds), enrolled IRS agents, and any owner or developer of computer software source code if the summons requests production of the code. The definition of third-party recordkeepers is relevant for two reasons:

(1) the IRS can serve a third-party summons on third-party recordkeepers by certified or

3

Monumental Life Ins. Co. v. U.S., 2000 WL 1058959, 86 A.F.T.R. 2d 2000-5256 (W.D. Ky. 2000). See also U.S. v. Monumental Life Ins. Co., 345 F. Supp. 2d 712 (W.D. Ky. 2004) (further proceedings).

4

I.R.C. §7609(b)(1); 26 C.F.R. §301.7609-4.

5

U.S. v. Puckett, 573 F Supp 713 (ED Tenn 1981).

1

See also 26 C.F.R. §301.7603-2.

registered mail, rather than the ordinary summons service provisions;² and

(2) third-party summons are exempt from the notice requirement if issued by an IRS criminal investigator to a person that is not a third-party recordkeeper.³

7:26. Exceptions to the notice requirement

Research References

West's Key Number Digest, Internal Revenue &key;4499

West's Key Number Digest, Internal Revenue &key;4505

West's Key Number Digest, Internal Revenue &key;4506

West's Key Number Digest, Internal Revenue &key;4507

Mertens Law of Federal Income Taxation §50:326

Section 7609(c) contains several exceptions to the notice requirement for third-party summonses:¹

(1) served on the person that is the identified taxpayer, or on any officer or employee of such person, in which case the summons is not a third-party summons at all;

(2) issued to determine whether or not the records have been made or kept, but not actually requesting production;

(3) issued solely to determine the identity of a person with a numbered or secret financial account;

(4) issued in aid of collection against the identified taxpayer or his/her transferee or fiduciary (in the Ninth Circuit, the scope of this exception has been narrowed);² or

2

I.R.C. §7603(b)(1); 26 C.F.R. §301.7603-1.

3

I.R.C. §7609(c)(2)(E).

1

Armijo v. U.S., 105 A.F.T.R.2d 2010-2822, 2010 WL 2342444 (S.D. Fla. 2010), report and recommendation adopted, 2010-2 U.S. Tax Cas. (CCH) P 50625, 105 A.F.T.R.2d 2010-2825, 2010 WL 2293109 (S.D. Fla. 2010) (the majority of courts broadly construe I.R.C. §7609 to mean that notice is not required if the summons is issued in aid of the collection of any person's tax liability). See also 26 C.F.R. §301.7609-2(b).

2

Ip v. U.S., 205 F3d 1168 (CA9 2000); Sunshine Behavioral Health Services, Inc. v. U.S., 2009 WL 1850310 (M.D.Fla. 2009) citing Robertson v. U.S., 843 F.Supp. 705 (S.D.Fla. 1993) (exception to the notice requirement applies “narrowly to summonses issued to third-party record-keepers where the taxpayer whose tax liability has been assessed has a recognizable interest in the records summoned); *cmp.* Barmes v. U.S., 199 F3d 386 (CA7 1999); Atlantic Ave. D.B. Financial/Legal Support Group v. U.S., 2009 WL 2810449, (S.D.Fla. 2009); Armijo v. U.S., 105 A.F.T.R.2d 2010-2822, 2010 WL 2342444 (S.D. Fla. 2010), report and recommendation adopted, 2010-2 U.S. Tax Cas. (CCH) P 50625, 105 A.F.T.R.2d 2010-2825, 2010 WL 2293109 (S.D. Fla. 2010) (the majority of courts broadly construe I.R.C. §7609 to

(5) issued by a criminal investigator of the IRS and served on any person that is not a “third-party recordkeeper.”

7:27. Effect of exceptions

Research References

West's Key Number Digest, Internal Revenue &key;4499

West's Key Number Digest, Internal Revenue &key;4505

West's Key Number Digest, Internal Revenue &key;4506

West's Key Number Digest, Internal Revenue &key;4507

Mertens Law of Federal Income Taxation §50:326

If an exception applies, the targeted taxpayer will not have any official notice of the third-party summons. In addition, even if the taxpayer becomes aware of the summons within the 20-day period, he/she will not be able to file a suit to quash because that right is restricted to persons entitled to notice under Section 7609(a). The same restriction also applies to the right to intervene.¹

Practice Tip

Two potential remedies might apply to these exceptions: (1) while intervention as a matter of right is blocked, the targeted taxpayer could apply for permissive intervention under the Federal Rules of Civil Procedure; and (2) the identified taxpayer could persuade the third party to resist enforcement of the summons on his/her own account, without intervention.

7:28. John Doe summonses

Research References

West's Key Number Digest, Internal Revenue &key;4499

West's Key Number Digest, Internal Revenue &key;4505

West's Key Number Digest, Internal Revenue &key;4506

West's Key Number Digest, Internal Revenue &key;4507

Mertens Law of Federal Income Taxation §50:326

If the summons does not identify the targeted taxpayer, it is a “John Doe” summons, which can be issued only after a court proceeding. The IRS must establish to the court's satisfaction that: (1) the summons relates to a particular or ascertainable person, group or class of persons; (2) there is reasonable basis for believing the targets have failed or may fail to comply with the tax law; and (3) the information sought is not readily available from other sources.¹

mean that notice is not required if the summons is issued in aid of the collection of any person's tax liability).

1

I.R.C. §7609(b)(1).

1

I.R.C. §7609(f); *Tiffany Fine Arts, Inc. v. U.S.*, 469 US 310, 105 S Ct 725, 83 L Ed 2d 678 (1985); *U.S. v. Thompson*, 701 F2d 1175 (CA 6 1983). The holding of the Thompson case was

The IRS has issued several John Doe summonses in connection with tax shelters and taxpayers holding offshore credit card accounts.²

7:29. Financial institutions in the 10th Circuit

Research References

West's Key Number Digest, Internal Revenue &key;4499

West's Key Number Digest, Internal Revenue &key;4505

West's Key Number Digest, Internal Revenue &key;4506

West's Key Number Digest, Internal Revenue &key;4507

Mertens Law of Federal Income Taxation §§50:326

In Kansas, Oklahoma, Wyoming, Utah, Colorado, and New Mexico, the 10th Circuit requires financial institutions to comply with the Right to Financial Privacy Act,¹ which effectively prevents voluntary disclosure of third-party financial institution data without notice to the taxpayer.² If the financial institution, the taxpayer, or the IRS office is in a 10th Circuit state, then the IRS will not attempt voluntary disclosure of financial institution data, but will resort to

rejected in *O'Neal v. U.S.*, 601 F. Supp. 874 (N.D. Ind. 1985).

2

In re Tax Liabilities of John Does, 2003 WL 22953182, 92 A.F.T.R. 2d 2003-7190 (S.D. Fla. 2003) (American Bankers Insurance Group credit insurance policies reinsured to entities in the Turks and Caicos Islands); Amy Hamilton, IRS Serves John Doe Summons to Second Law Firm, Tax Notes (Oct. 20, 2003) p. 316 (John Doe summons served on Sidley Austin Brown & Wood LLP for names of tax shelter clients); Amy Hamilton, Government Seeks Enforcement of Summons on Jenkens & Gilchrist, Tax Notes (Aug. 18, 2003) p. 877; In re Tax Liabilities of John Does, 2003 WL 21791551, 92 A.F.T.R. 2d 2003-5420 (N.D. Ill. 2003) (John Doe summonses filed against the law firm Jenkens & Gilchrist for tax shelters); In re Tax Liabilities of John Does, 2002 WL 31689414, 90 A.F.T.R. 2d 2002-7191 (M.D. Fla. 2002) (MasterCard transactions from offshore accounts).

The IRS has also successfully requested taxpayer identity information from tax advisors, which the courts have not blocked as improper, even if the IRS did not comply with the John Doe summons process. *Cohen v. U.S.*, 306 F. Supp. 2d 495 (E.D. Pa. 2004); *Xelan, Inc. v. U.S.*, 2004-2 U.S. Tax Cas. (CCH) P 50294, 93 A.F.T.R.2d 2004-2269, 2004 WL 1047721 (E.D. Pa. 2004). See also *Xelan, Inc. v. U.S.*, 361 F. Supp. 2d 459, 2005-1 U.S. Tax Cas. (CCH) &p;50228, 95 A.F.T.R.2d 2005-1472 (D. Md. 2005).

1

12 U.S.C.A. §§3401 et seq.

2

Neece v. I.R.S. of U.S., 922 F.2d 573, 59 U.S.L.W. 2389, 91-1 U.S. Tax Cas. (CCH) P 50007, 67 A.F.T.R.2d 91-400, 1990 WL 205531 (10th Cir. 1990), appeal after remand, 96 F.3d 460, 97-2 U.S. Tax Cas. (CCH) P 50777, 78 A.F.T.R.2d 96-6474, 1996 WL 518411 (10th Cir. 1996). On remand, *Neece v. I.R.S. of U.S.*, 1997 WL 732592 (N.D. Okla. 1997) (IRS required to pay attorney fees to taxpayer).

the administrative summons.³

5. Enforcement of Summonses

7:30. Generally

Research References

West's Key Number Digest, Internal Revenue &key;4494

West's Key Number Digest, Internal Revenue &key;4496

West's Key Number Digest, Internal Revenue &key;4503

West's Key Number Digest, Internal Revenue &key;4508

West's Key Number Digest, Internal Revenue &key;4509

West's Key Number Digest, Internal Revenue &key;4511

West's Key Number Digest, Internal Revenue &key;4512

West's Key Number Digest, Internal Revenue &key;4513

Mertens Law of Federal Income Taxation §§49B:3, 49B:11.45

The IRS may attempt to enforce a summons in the U.S. district court wherein the person resides or is found.¹ The person summoned need not wait for the enforcement action, but can affirmatively seek out the jurisdiction of the district court to quash the summons. In addition, the taxpayer may attempt to quash a third-party summons within 20 days after service.² Special protective rules apply to examinations of churches.³

7:31. The Powell test for summons enforcement

Research References

West's Key Number Digest, Internal Revenue &key;4494

West's Key Number Digest, Internal Revenue &key;4496

West's Key Number Digest, Internal Revenue &key;4503

West's Key Number Digest, Internal Revenue &key;4508

West's Key Number Digest, Internal Revenue &key;4509

West's Key Number Digest, Internal Revenue &key;4511

West's Key Number Digest, Internal Revenue &key;4512

West's Key Number Digest, Internal Revenue &key;4513

3

I.R.M. 25.5.1.4.1 (09-10-2014).

1

I.R.C. §7604(a). Enforcement may also be initiated before a U.S. commissioner for the district.

I.R.C. §7604(b).

2

I.R.C. §7609(b)(2); 26 C.F.R. §301.7609-4.

3

I.R.C. §7611; U.S. v. Church of Scientology of Boston, Inc., 933 F2d 1074 (CA1 1991).

Mertens Law of Federal Income Taxation §§49B:3, 49B:11.45

In *U.S. v. Powell*, the U.S. Supreme Court required the IRS to meet four “good faith” requirements in summons enforcement proceedings:

- (1) the investigation is conducted for a legitimate purpose;
- (2) the information sought is relevant;
- (3) the IRS does not already have the information; and
- (4) the procedural aspects of the summons have been satisfied.¹

Each of these factors will be examined.

7:32. Legitimacy

Research References

West's Key Number Digest, Internal Revenue &key;4494

West's Key Number Digest, Internal Revenue &key;4496

West's Key Number Digest, Internal Revenue &key;4503

West's Key Number Digest, Internal Revenue &key;4508

West's Key Number Digest, Internal Revenue &key;4509

West's Key Number Digest, Internal Revenue &key;4511

West's Key Number Digest, Internal Revenue &key;4512

West's Key Number Digest, Internal Revenue &key;4513

Mertens Law of Federal Income Taxation §§49B:3, 49B:11.45

An examination solely for the purpose of research would be an illegitimate purpose.¹ The IRS is permitted to perform research so long as an actual taxpayer's liability is at stake.² In *Powell*, the Supreme Court also suggested that a summons could be illegitimate if its purpose was to harass or to apply pressure to a collateral dispute.³ Personal animus⁴ or attempts to bypass Tax Court discovery limitations could also be illegitimate purposes,⁵ although the IRS has been

1

U.S. v. Powell, 379 US 48, 85 S Ct 248, 13 L Ed 2d 112 (1964).

1

U.S. v. Humble Oil and Refining Co., 518 F2d 747 (CA5 1975).

2

Such as in the former Taxpayer Compliance Measurement Program or TCMP audits. *U.S. v. Finer*, 709 F2d 1350 (CA10 1983).

3

U.S. v. Powell, 379 US 48, 85 S Ct 248, 13 L Ed 2d 112 (1964).

4

U.S. v. Cortese, 614 F2d 914 (CA3 1980); *U.S. v. Church of Scientology of California*, 520 F2d 818 (CA9 1975).

5

U.S. v. Administration Co., 1994 WL 240518, 74 AFTR2d 94-5252, 94-2 USTC &p;50,479 (ND

sustained in several cases involving difficult facts.⁶

7:33. Relevancy

Research References

West's Key Number Digest, Internal Revenue &key;4494

West's Key Number Digest, Internal Revenue &key;4496

West's Key Number Digest, Internal Revenue &key;4503

West's Key Number Digest, Internal Revenue &key;4508

West's Key Number Digest, Internal Revenue &key;4509

West's Key Number Digest, Internal Revenue &key;4511

West's Key Number Digest, Internal Revenue &key;4512

West's Key Number Digest, Internal Revenue &key;4513

Mertens Law of Federal Income Taxation §§49B:3, 49B:11.45

The relevancy standard under the Powell test is not difficult for the IRS to meet, and is broader than the relevancy standard for the admission of evidence. The administrative summons is not a judicial process; it is an examination tool, more akin to a grand jury investigation with its broad scope of relevance.¹ The Supreme Court has held that Congress used the words “may be relevant” in I.R.C. §7602(a) to permit the administrative summons to reach items that are even potentially relevant.² Federal courts likewise are willing to enforce the summons if it “might

Ill 1994), *affd sub nom.*, *U.S. v. Administrative Enterprises, Inc.*, 46 F3d 670 (CA7 1995); *PAA Management, Ltd. v. U.S.*, 1992 WL 346314, 71 AFTR2d 93-525, 93-1 USTC ¶50,132 (ND Ill 1992). But see *Sterling Trading, LLC v. U.S.*, 553 F. Supp. 2d 1152, 101 A.F.T.R.2d 2008-1544 (C.D. Cal. 2008).

6

Glavin v. U.S., 2010 WL 1490922 (W.D. Wis. 2010) (an affidavit of the revenue agent conducting the audit is generally considered proof that the summons was issued in good faith). See also *U.S. v. Beeman*, 2010-1 U.S. Tax Cas. (CCH) P 50235, 105 A.F.T.R.2d 2010-1137, 2010 WL 653062 (W.D. Pa. 2010), *aff'd*, 388 Fed. Appx. 82, 2010-2 U.S. Tax Cas. (CCH) P 50530, 106 A.F.T.R.2d 2010-5459 (3d Cir. 2010) (government's burden to produce a prima facie showing of good faith is slight or minimal and may be satisfied by an affidavit of the IRS agent). See, e.g., *2121 Arlington Heights Corp. v. IRS*, 109 F3d 1221 (CA7 1997); *U.S. v. Equitable Trust Co.*, 611 F2d 492 (CA4 1979); *U.S. v. Bernhoft*, 2009 WL 3451102, 104 A.F.T.R.2d 2009-7059, 2009-2 USTC P 50,730 (E.D. Wis. 2009).

1

U.S. v. Morton Salt Co., 338 US 632, 70 S Ct 357, 94 L Ed 401 (1950).

2

U.S. v. Arthur Young & Co., 1984-1 C.B. 270, 465 U.S. 805, 104 S. Ct. 1495, 79 L. Ed. 2d 826, Fed. Sec. L. Rep. (CCH) P 99721, 84-1 U.S. Tax Cas. (CCH) P 9305, 15 Fed. R. Evid. Serv. 15, 53 A.F.T.R.2d 84-866 (1984); *Miccosukee Tribe of Indians of Florida v. U.S.*, 730 F. Supp. 2d 1344, 106 A.F.T.R.2d 2010-5773 (S.D. Fla. 2010) (holding that the US need not demonstrate an actual or objective need for the materials requested in order for a summons to be enforceable;

throw light upon” a tax liability.³ A summons may be issued for years barred by the statute of limitations, so long as the information sought may be relevant to later years under examination, or may be relevant to a waiver or extension of the statute of limitations.⁴

Despite the expansive grant of power, some relevancy limits have been enforced. Records held by third parties occasionally are found to be protected on relevancy grounds.⁵ Relevancy might also be used to protect certain portions of documents.⁶

7:34. Not already held by IRS

Research References

West's Key Number Digest, Internal Revenue &key;4494

West's Key Number Digest, Internal Revenue &key;4496

West's Key Number Digest, Internal Revenue &key;4503

West's Key Number Digest, Internal Revenue &key;4508

West's Key Number Digest, Internal Revenue &key;4509

West's Key Number Digest, Internal Revenue &key;4511

West's Key Number Digest, Internal Revenue &key;4512

rather, the summons is valid so long as the documents at issue may throw light upon the correctness of a return).

3

See, e.g., *U.S. v. Rockwell Intern.*, 897 F2d 1255, 1263 (CA3 1990); *U.S. v. Beeman*, 2010-1 U.S. Tax Cas. (CCH) P 50235, 105 A.F.T.R.2d 2010-1137, 2010 WL 653062 (W.D. Pa. 2010), *aff'd*, 388 Fed. Appx. 82, 2010-2 U.S. Tax Cas. (CCH) P 50530, 106 A.F.T.R.2d 2010-5459 (3d Cir. 2010).

4

U.S. v. Powell, 379 US 48, 85 S Ct 248, 13 L Ed 2d 112 (1964); *Paine v. U.S. Government*, 682 F Supp 739 (EDNY 1987); *U.S. v. Ohio National Bank*, 1978 WL 4513, 42 AFTR2d 78-5500, 78-2 USTC &p;9554 (SD Ohio 1978); but see *U.S. v. Goldman*, 637 F2d 664 (CA9 1980).

5

See, e.g., *U.S. v. Harrington*, 388 F2d 520 (CA2 1968) (requiring a realistic expectation that the information sought from the third-party recordkeeper might be relevant rather than a mere idle hope); *U.S. v. Production Plated Plastics, Inc.*, 129 F Supp 2d 1099 (WD Mich 2000) (IRS initially restricted to index of documents originally collected for court-appointed trustee); *U.S. v. Cox*, 73 F Supp 2d 751 (SD Tex 1999) (computer source code not relevant in this case).

6

David H. Tedder & Associates, Inc. v. U.S., 77 F3d 1166 (CA9 1996) (law firm bank records must be redacted to protect client-identifying information not relevant to the investigation); *U.S. v. Production Plated Plastics, Inc.*, 129 F Supp 2d 1099 (WD Mich 2000) (IRS initially restricted to index of documents originally collected for court-appointed trustee). But see *Cohen v. U.S.*, 306 F. Supp. 2d 495 (E.D. Pa. 2004); *Reiserer v. U.S.*, 479 F.3d 1160, 2007-1 U.S. Tax Cas. (CCH) &p;50412, 99 A.F.T.R.2d 2007-1438 (9th Cir. 2007).

West's Key Number Digest, Internal Revenue &key;4513

Mertens Law of Federal Income Taxation §§49B:3, 49B:11.45

If a document is already held by the IRS, then the administrative summons is not necessary.¹ Even if it possesses a copy, the IRS is entitled to examine original documents.² Possession is interpreted narrowly; in some cases the IRS was unable to retrieve documents in storage and thus could obtain them through the administrative summons.³

7:35. Procedural satisfaction

Research References

West's Key Number Digest, Internal Revenue &key;4494

West's Key Number Digest, Internal Revenue &key;4496

West's Key Number Digest, Internal Revenue &key;4503

West's Key Number Digest, Internal Revenue &key;4508

West's Key Number Digest, Internal Revenue &key;4509

West's Key Number Digest, Internal Revenue &key;4511

West's Key Number Digest, Internal Revenue &key;4512

West's Key Number Digest, Internal Revenue &key;4513

Mertens Law of Federal Income Taxation §§49B:3, 49B:11.45

Federal courts give the IRS the benefit of the doubt in summons procedural errors. The general rule was stated by the Fifth Circuit in *U.S. v. Payne*, evaluating all the relevant facts and circumstances concerning the summons, particularly the good faith of the IRS and whether the taxpayer had been harmed by the procedural or other error.¹ Similar results are reached when

1

U.S. v. Theodore, 479 F.2d 749 (CA4 1973) (IRS still possessed the filed tax returns and did not need the taxpayer's retained copies). But see *Adamowicz v. U.S.*, 531 F.3d 151, 2008-2 U.S. Tax Cas. (CCH) &p;50441, 102 A.F.T.R.2d 2008-5162 (2d Cir. 2008) (some redundancy among documents sought and those already in IRS possession does not support quashing of summons).

2

U.S. v. Jungels, 910 F.2d 1501, 1504 (CA7 1990).

3

U.S. v. Linsteadt, 724 F.2d 480 (5th Cir. 1984); *U.S. v. John G. Mutschler & Associates, Inc.*, 734 F.2d 363 (8th Cir. 1984); *Pflum v. U.S.*, 2000 WL 1466194 (D. Kan. 2000), judgment aff'd, 10 Fed. Appx. 656 (10th Cir. 2001); but see *U.S. v. Bank of California*, 652 F.2d 780 (9th Cir. 1980).

1

U.S. v. Payne, 648 F.2d 361 (CA5 1981); *International Business Enterprises v. U.S.*, 1995 WL 381626, 75 AFTR2d 95-2237, 95-1 USTC &p;50,266 (SD Cal 1995) (substantial compliance with procedural requirements is sufficient to permit enforcement); *Villella v. U.S.*, 2000-2 U.S. Tax Cas. (CCH) P 50611, 86 A.F.T.R.2d 2000-5833, 2000 WL 968773 (S.D. N.Y. 2000) (failure to comply with taxpayer notice requirements does not necessarily warrant the quashing of third-party summonses).

courts find that taxpayers have waived their complaint by not pursuing it quickly,² or by merely being able to file a suit to quash the summons in a timely fashion.³ If the IRS attempted to follow the summons procedural requirements, and no harm has come to the taxpayer, then the summons is generally enforced.

7:36. Unnecessary and second examinations

Research References

West's Key Number Digest, Internal Revenue &key;4494
West's Key Number Digest, Internal Revenue &key;4496
West's Key Number Digest, Internal Revenue &key;4503
West's Key Number Digest, Internal Revenue &key;4508
West's Key Number Digest, Internal Revenue &key;4509
West's Key Number Digest, Internal Revenue &key;4511
West's Key Number Digest, Internal Revenue &key;4512
West's Key Number Digest, Internal Revenue &key;4513
Mertens Law of Federal Income Taxation §§49B:3, 49B:11.45

In addition to the Powell test, the IRC also prohibits “unnecessary examination or investigation, and permits only one inspection of the taxpayer's books of account.”¹ Despite the promising statute, the Supreme Court has found almost any relevant inquiry to be necessary.² Protection against repeated inspections lies within the IRS oversight process, not in the courts.³

2

U.S. v. Myslajek, 568 F.2d 55 (CA8 1977) (taxpayer waived strict compliance with service requirements when representative appeared to oppose summons and did not raise improper service argument until three months later).

3

Cook v. U.S., 104 F.3d 886 (CA6 1997) (third-party summons enforced despite tardy notice when taxpayer was not harmed and was able to file motion to quash). But see, Jewell v. U.S., 749 F.3d 1295, 2014-1 U.S. Tax Cas. (CCH) P 50270, 113 A.F.T.R.2d 2014-1875 (10th Cir. 2014); Kellogg v. Rossotti, 2003-1 U.S. Tax Cas. (CCH) P 50463, 91 A.F.T.R.2d 2003-2148, 2003 WL 21224782 (S.D. Cal. 2003) (same).

1

I.R.C. §7605(b); IRS CCA 200948043, 2009 WL 4092540, (IRS CCA Nov 27, 2009) (“examination” requires at a minimum access to and ability to physically view taxpayer's books and records).

2

U.S. v. Powell, 379 US 48, 53, 85 S Ct 248, 13 L Ed 2d 112 (1964).

3

U.S. v. Powell, 379 US 48, 55-56, 85 S Ct 248, 13 L Ed 2d 112 (1964); Rev. Proc. 2005-32, 2005-23 I.R.B. 1206, 2005-1 C.B. 1206, 2005 WL 1189673 (2005).

These minimal statutory protections do not apply to third-party recordkeepers.⁴

⁴

U.S. v. Lask, 703 F2d 293, 297 (CA8 1983).

Portions Reprinted from

"REPRESENTING THE AUDITED TAXPAYER BEFORE THE IRS"

by

***Robert E. McKenzie
Kevin Outterson
Karen V. Kole***

WITH PERMISSION FROM

***THOMSON REUTERS
Rochester, NY***

All Rights Reserved

COPYRIGHT 2017