

Chapter 12(c)

Other Topics-Summons Procedures

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**INTERNAL REVENUE SERVICE
TAX EXEMPT AND GOVERNMENT ENTITIES**

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Background

Introduction

Our system of taxation relies on self-assessment and the integrity of taxpayers to disclose all information, which is relevant for compliance with all of our tax statutes. However, this spirit of voluntarism is not shared by all persons subject to tax.

Accordingly, Congress has conferred the Service with the authority to make inquiries and conduct examinations in order to verify such compliance.

Congress granted Commissioner authority to issue summons-section 7602

In conjunction with such examination authority, Congress has provided the Commissioner with the authority to issue a summons. Courts have held that this power can be delegated to Internal Revenue Agents.

Section 7602(a) and (b) of the Code authorizes the Secretary of the Treasury to examine records, to issue summonses, and to take testimony for the purposes of

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

Issuing a summons

If a taxpayer refuses to provide information

Our experience indicates; however, that in most examinations, a taxpayer will provide an IRS examiner accessibility to the books and records, which are needed to verify the plan's or sponsor's level of compliance with the provisions of IRC Section 401(a) and correlative code sections.

There are limited instances; however, where the taxpayer may refuse to provide this information to the agent. If the taxpayer or plan sponsor refuses to provide such information, the examiner should seek guidance from his or her group manager and Counsel.

Prior to issuing a summons, the agent and manager should determine if alternative means are available to secure the necessary information. A cost/benefit analysis should be performed to determine "if the cost" of issuing a summons exceeds the benefit derived from such issuance.

Summons can be issued to taxpayer or to a third party

A summons can be issued directly to a taxpayer or a third party (discussed subsequently).

Form 6014- permission from taxpayer to summon a third party

Before requesting the issuance of a summons to a third party, an examiner may request that the taxpayer complete Form 6014 (Authorization-Access to Third Party Records for Internal Revenue Employees).

This Form authorizes the examiner to access the same information from a third party as a summons without its issuance.

Compliance with this Form is not legally enforceable.

Summons may not be issued if Department of Justice referral is in effect

**Introduction-
section 7602(d)**

Under section 7602(d), a summons may not be issued if a Department of Justice (DOJ) referral is in effect with respect to the taxpayer.

Section 7602(d)(2) states that, a DOJ referral is in effect if

- **the Service** recommends to the Attorney General, a grand jury investigation; or criminal prosecution of such person for any offense connected with the Internal Revenue laws; or
- **the Attorney General** (or Deputy Attorney General or Assistant Attorney General) makes a written request of the Service for any return information relating to a taxpayer, which sets forth the any need for disclosure for tax administration purposes.

**When DOJ
referral ceases
to exist**

A Department of Justice referral ceases to exist when the Attorney General notifies the Service, in writing under Section 7602(d)(2)(B), that he will not

- prosecute,
- authorize or
- discontinue a grand jury investigation,

with respect to the taxpayer for any offense connected with the administration or enforcement of the Internal Revenue laws.

**DOJ referral
will also
terminate with
a final
disposition**

A termination of a DOJ referral; therefore, allowing the issuance of an IRS summons, will also occur when there is with respect to a taxpayer, either

- a final disposition of any criminal proceeding, or
- notification from the Attorney General that there will be no prosecution

for any offense in which the DOJ made a written request of the Service for any return or return information relating to a taxpayer, which sets forth the need for disclosure for tax administrative purposes.

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Summons may not be issued if Department of Justice referral is in effect, Continued

If examiner has reason to believe a referral is in effect	If the examiner has reasons to believe that a Department of Justice referral is in effect, contact should be made with the District Fraud Coordinator to determine if the taxpayer is under grand jury investigation or is under criminal prosecution.
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Information that can be requested with a summons

Introduction	A summons may only be issued to secure information that may be relevant:
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- a. ascertaining the correctness of any return;
 - b. making a return where none has been made;
 - c. determining a tax liability;
 - d. collecting such liability;
 - e. inquiring into any offense connected with the administration or enforcement of the Internal Revenue laws.
-

How information can be obtained from a summons	This information may be received through oral testimony (taken under oath at the request of the examiner) or by obtaining:
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- the taxpayer's books and records directly relating to the proposed adjustments,
 - third party books and records relating to the proposed adjustment,
 - document evidence such as loan applications, financial statements, state and local regulatory records, brokerage transaction records, real estate records, etc., which may have evidence inconsistent with the taxpayer's position.
-

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Information that can be requested with a summons, Continued

EP information that can be obtained from a summons

For employee plans, a summons may be used to obtain the books and records that would be pertinent to the determination including but is not limited to,

1. plan qualification by compliance with section 401(a),
 2. deduction limitations under section 404 and
 3. determination of distributions that are required to be included in individual gross income under section 72.
-

IRS must apply to district court to enforce a summons

The IRS has not been designated statutory power to enforce a summons, but must apply to the District Court in order to enforce the production of the requested information for Section 7604(a).

When District Court will enforce a summons—Powell Requirements

Introduction

Accordingly, a District Court will only enforce a summons if its terms satisfy the "Powell Requirements", as determined by the Supreme Court decision in *United States vs. Powell*, 379 US 48 (1964).

In this decision, the United States Supreme Court held that Court does not have to inquire into the merits of the Commissioner's reasons for believing that the summoned material will contribute to re-determination of tax liability.

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When District Court will enforce a summons—Powell Requirements, Continued

Supreme Court in Powell gave Service broad discretion in issuing summons

The court stated in part that the “inquiry is not “limited...by forecasts of the probable result of the investigation” and that the Government can investigate **merely on suspicion that the law is being violated, or even just because it want assurance that is not.**”

In essence, the issuance of a summons in “good faith” in furthermore of a legitimate purpose for which the use of the authority has been authorized by Congress will mandate enforcement of the summons.

Five criteria from the Powell decision-introduction

Although, the Commissioner’s power to issue a summons is broad and expansive, there are five criterions derived from the Powell decision, which must be satisfied, in order to hold reverence to the validity of the summons.

Legitimate purpose

Basically, the Service has to demonstrate the purpose of inquiring into any offense connected with the administration or enforcement of the Internal Revenue laws, including Criminal Investigation.

Relevance-section 7602—which may be relevant

Congress has given the IRS broad direction under Section 7601 to investigate “all persons*** who may be liable” for taxes.

In turn, Section 7602 extends the summons power of the IRS to the examination of “any books, papers, records, or other date which *may be relevant* or material” to an inquiry related to one or more of the purposes set forth in Section 7602.

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When District Court will enforce a summons—Powell Requirements, Continued

Supreme court interprets section 7602

In *United States vs. Arthur Young & Co.*, 465 U.S. 805, 814 (814), the Supreme Court stated:

The language “may be” reflects Congress’ express intention to allow the IRS to obtain items of even *potential* relevance to an ongoing investigation, without reference to its admissibility. The purpose of Congress is obvious: the Service can hardly be expected to know whether such data will in fact be relevant until they are procured and scrutinized.

The Supreme Court has noted that the IRS can issue a summons to investigate **“merely on suspicion that the law is being violated, or even just because it want assurance that it is not.”** *United States vs. Powell*, 379 U.S. at 57 (quoting *United States vs. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950)).

Thus, in applying the *Powell* test for relevance, the question is not whether the records sought, when disclosed, will contradict a taxpayer’s return, but whether the records “might” throw light upon the correctness of a return. *Arthur Young*, 465 U.S. at 814-815 & p. 11.

Summons should not be overly burdensome

Compliance with the summons requirement should not be overly burdensome. In other words, describe the documents requested in sufficient detail and not be excessive for purposes of the inquiry.

In conjunction with the relevance requirement, the compliance with the terms of the summons should not be overly burdensome. In other words, describe the summoned documents in sufficient detail and do not request for superfluous information.

Information already in possession of IRS

The Service must show that the summoned information is not already in the Commissioner’s possession.

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When District Court will enforce a summons—Powell Requirements, Continued

Administrative requirements The Service must comply with the administrative steps required by the Code.

Preparing a summons

Form 2039 The summons is prepared on Form 2039.

In preparing the summons, it is important to remember the “Powell” decision parameters discussed earlier, that the Service may request any information that “may shed light” on the correctness of the taxpayer’s return.

See IRM Section 25.5.1-2 for instructions on the preparation of a summons.

Summons should not be overly broad

By being overly broad, a Court may rule that the information requested in the summons is unreasonable, and over burdensome and therefore is not enforceable. See IRM Section 25.5.2.4 for more details.

Issuing a summons to a third party-and giving notice of summons

Introduction

As previously mentioned, the Service may issue a summons to a third party record keeper.

Section 7609(a)(3) prior to RRA 1998 amendment identified third party record keeper as to include the following:

1. Any bank, savings and loan institution, or credit union.
2. Any consumer-reporting agency covered by the Fair Credit Reporting Act.
3. Anyone extending credit through the issuance of credit cards or similar devices.
4. Any broker included in the Securities Exchange Act of 1934.
5. Any attorney.
6. Any accountant.
7. Any enrolled agent.
8. Any barter exchange.
9. Any regulated investment company.

Generally, these entities are still deemed third-party record-keepers. See Form 2039.

Notice to third parties— section 7609 and rights of taxpayer

Section 7609 provides that when an IRS summons is issued to third parties, the taxpayer must receive notice of the summons and may, by letter, force the summoned party to refuse compliance with the summons.

The statute also accords the taxpayer a right to institute a proceeding to quash such a summons and to raise substantive objections to its enforcement.

These statutory rights arise; however, only if the summoned records are maintained by the summoned party in its capacity as a “third-party record-keeper.”

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Issuing a summons to a third party-and giving notice of summons, Continued

Notice must be given within 3 days of serving notice

When any summons is issued to ANY third-party for records or testimony, both:

1. the taxpayer AND;
2. any other person identified in the description of the records to be produced.

MUST be given notice of the summons within 3 days of the day on which the summons is served.

Letter 3164 is used for such purpose. If this Form is modified for EP purposes, counsel should be consulted.

Specific mechanics for producing records under section 7609(a)(1)

When issuing a third party summons, Section 7609(a)(1) provides specific mechanics associated with the dates that a third party recipient must produce the requested books and records.

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Issuing a summons to a third party-and giving notice of summons, Continued

Taxpayer has no longer than 20 days after notice to quash summons

On or before the third day a summons is served, the taxpayer and any other person mentioned in the summons is entitled to notification of the summons within three days from which the summons is served. The taxpayer has no longer than the 20th day after the notice is served to begin a proceeding to “quash” the summons. Therefore, the records required to be produced under a summons may not be inspected by the examiner:

- a. before the close of the 23rd day after the summons is served or,
- b. where a proceeding to quash was begun within the 20-day period, except in accordance with an order of the court having jurisdiction of the proceeding; or,
- c. with the consent of the person beginning the proceeding to quash.

Certificate of notice after summons is issued

Once the notice has been delivered, the examiner must complete the certificate of notice on the reverse of the original summons.

Notice should be given to certain individuals, entities

Power of attorney If there is a power of attorney on file, notice should be given to the Power of Attorney with a copy to the noticee in order to avoid any argument of improper notice.

Corporation Likewise, if a corporation is owned by an individual taxpayer, notice should also be given to the corporation (if it is the noticee).

Joint summons If there are two names mentioned (such as husband and wife) both should receive notice.

Partnership In the case of a partnership, notice to the general partner is sufficient.

Exceptions to notice requirement

Section 7069, exceptions IRC SECTION 7609 provides that notices are not required in cases where:

1. the summons is served on the taxpayer, officer or employee of the taxpayer;
2. the stated purpose of a summons is to determine whether records of the business transactions or affairs of an identified person have been made or kept;
3. it is issued solely to determine the identify of a person having a numbered account with a
4. bank or institution.
5. it is issued to aid the collection of an assessed liability from the taxpayer or from a transferee or fiduciary of the taxpayer.
6. the summons is issued by CID in connection with the investigation of an offense connected with the administration or enforcement of the revenue laws.
7. John Doe summonses (A summons issued to receive information regarding an unknown person, usually applicable to tax shelters and not generally used by Employee Plans).

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Exceptions to notice requirement, Continued

**If exception
applies-3 day
notice not
required**

If an exception applies, the 3-day notice requirement is not required.

**Notice
requirements
can be
suspended by a
court**

Also, the notification requirements are suspended if the court determines that giving notice may lead to attempts

1. to conceal, destroy or alter records,
 2. to prevent communication of information by intimidation, bribery or collusion, or
 3. to flee to avoid prosecution, testifying or production of records.
-

Serving the summons

Serving summons is a third party contact

Summonses served on third-parties are considered be a third-party contacts under Section 3417 of RRA '98.

Methods to serve the summons

Serve the properly completed Summons, Form 2039, if applicable, as well as, all pertinent Form 2039 attachments, by:

- hand delivering the summons to the person to whom it is directed; or
 - leaving the summons with a competent person of suitable age and discretion at the last known address of the person, to whom it was directed; or
 - certified or registered mail to the last known address IF the party being summoned is a THIRD-PARTY RECORDKEEPER.
-

If summons is mailed

The summons is considered “served” on the day it is mailed.

Serve must complete portion of Form 2039

The summons server must complete the portion of the Form 2039, designated “Service of Summons, Notice and Record Keeper Certificates.” This Form serves to demonstrate that the Service complied with the procedural requirements of IRC Section 7609.

Other issues

If information is not obtainable through the examination process

In certain situations, if the information needed to ascertain the taxpayer's compliance with the code is not obtainable through the examination process, an examiner may consider plan revocation. The revocation alternative, may be utilized when the nature and scope of the information presented is discernable, but documentation is not provided to substantiate tax law compliance.

Costs to produce summoned materials

A third party recipient of a summons is entitled to receive payment for certain costs directly incurred in the production of summoned material. Details are provided within the instructions of Form 2039.

Document method of service

Document the Method of Service or delivery in the Case Chronology Record. See IRM Section 25.5.3.2 for further elaboration on these procedures. It is highly advisable that Counsel be consulted prior and during the time that the summons is outstanding.

One may seek guidance from the Mandatory Review Staff or Counsel in these situations.
