



OFFICE OF
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MEMORANDUM FOR [REDACTED] Assistant District Counsel

FROM: Lawrence H. Schattner, Chief
Branch 3 (General Litigation) CC:EL:GL:Br3

SUBJECT: Estate Tax Summons

This memorandum responds to your request for advice on how to issue a third-party summons in a particular estate tax audit.

Issue

May the Service redact certain portions of the description of the records sought in the copies of the summons given to persons entitled to notice of the summons under section 7609(a)?

Conclusion

No. Section 7609 does not authorize the Service to redact the description of the records in the copies of the summons given persons entitled to notice of the summons under section 7609(a). As an alternative, however, you could consider issuing multiple summonses and limiting the information requested to documents relating to a particular third party, so long as each summons describes the records sought with reasonable certainty as to enable the summoned party to respond.

Background

A Service employee ("the examiner") is examining an estate tax return. In response to an Information Document Request, the estate provided some documents and withheld other documents. The estate provided a cursory privilege log for the withheld documents which gives the date and a brief description of each withheld document. Most of the descriptions identify either or both of the persons who wrote or received the documents. All of the documents relate to a series of transactions engaged in or contemplated by the decedent with a variety of other people and all are in the hands of the decedent's attorney.

The examiner wishes to issue a summons to the decedent's attorney for the documents described in the estate's privilege log. The examiner plans to attach the privilege log to the summons. The examiner understands that he must send a notice of the summons to each of the persons identified in the summons, including all the persons identified in the privilege log. He understands that he must attach a copy of the summons to each notice, but is concerned that each noticee will thereby learn information about the other noticees (and likewise have information disclosed to the other noticees) which information each noticee would prefer remain private. Therefore, the examiner does not wish to disclose all the documents requested to each of the persons identified in the privilege log. The examiner asks whether he may redact the portions of the privilege log that do not obviously pertain to each person.¹

Analysis

The authority to issue summonses is generally contained in section 7602(a)(2), which authorizes the Service to require the summoned party to "produce such books, papers, records, or other data...as may be relevant or material" to the examination. As seen by the use of the plural for "books, papers, records," the plain language of section 7602(a)(2) authorizes the Service to use a single summons to request multiple documents relating to multiple parties and such has been the Service unchallenged practice from the earliest days of tax administration.

The procedure for issuing a summons to persons other than the taxpayer is governed by section 7609, which provides that any person identified in the summons is entitled to notice (i.e. is a noticee). I.R.C. § 7609(a). Noticees are entitled to petition courts to quash the summons. I.R.C. § 7609(b). The legislative history behind section 7609's original enactment is pretty clear that the underlying purpose of the statute is to give persons who might have a privacy interest in the records an opportunity to protect that privacy interest before the records are turned over to the Service. H. Rep. 94-658 306-307 (Nov. 12, 1975).

Section 7609(a) provides that the notice given to noticees "shall be accompanied by a copy of the summons which has been served." While the copy of the summons given to noticees need not be an attested copy,² it must still be a copy.

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² We note that while the copy of the summons served on the summoned party must be an attested copy, per section 7603, the copy of the summons given to the noticees need NOT be an attested copy, according to the majority of the circuits addressing this issue. See Kondik v. U.S., 81 F.3d 655; (6th Cir. 1996), Fortney v.

In light of the legislative history, we are loathe to read into the word “copy” an authorization to redact the description of records. The statute’s purpose is to give the noticees an idea of what records are being sought so they can try to prevent disclosure to the Service. Therefore, we believe section 7609 authorizes giving the entire unredacted description of the records sought to all noticees.

We note, however, that the examiner might consider issuing multiple summonses, limiting the information requested in each summons to documents which identify only one particular person. That is, the examiner wishes to issue a summons to a single third party, the decedent’s attorney, seeking specific documents, some concerning person A, others concerning person B, person C, person D. Nothing in sections 7602 or 7609 prohibits issuing four summonses, each one identifying only one person (other than the summoned party) in the summons. Thus, the examiner could in the first summons describe only records that relate to person A, in the next summons describe only records that relate to person B, etc. However, the examiner must be sure that each summons meets section 7603’s requirement that the records sought are described with “reasonable certainty” and that the taxpayer receives a copy of each summons and that the description of the documents sought is not redacted in any copy of the summons attached to notice given under section 7609(a).

While we believe the Code permits multiple summonses, we normally encourage using only one summons to request all the information in the summoned party’s possession. Using multiple summonses forces both the Service and the taxpayer to participate in multiple proceedings to quash and, unless the actions are consolidated, forces the taxpayer to incur additional litigation expenses. We think the examiner’s concerns here support issuing multiple summonses in this particular case, but we stress that the examiner needs to make careful and thorough documentation in his case history of the facts which give rise to his concern.

United States, 59 F.3d 117, 120 (9th Cir. 1995); Codner v. United States, 17 F.3d 1331, 1333-34 (10th Cir. 1994). But see, Mimick v. U.S., 952 F.2d 230 (8th Cir. 1991) (*dicta*).