

Office of Chief Counsel
Internal Revenue Service
memorandum

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to: Allen McClurd
Territory Manager
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from: Elissa M. Sissman
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Disclosure and Privacy Law

subject: **Disclosure of Public Record Tax Information in the Tenth Circuit**

This memorandum responds to your October 15, 2002, request for legal advice, which you sent to Martin Kaye, Area Counsel (SB/SE) Denver. Your request was subsequently forwarded to our office for response.

Issue

Whether the Internal Revenue Service (Service) may publicize information, such as criminal tax prosecutions, injunctions and convictions of promoters and/or participants of abusive tax schemes, in the Tenth Circuit.

Conclusion

The Tenth Circuit has adopted the "independent source" test, which permits the Service to disclose criminal tax indictments and other events that transpired in judicial proceedings related to tax administration, but would prohibit disclosure of information obtained from internal Service documents related to a taxpayer's tax return.

Legal Analysis

As a general rule, federal tax returns and return information are confidential and may not be disclosed by the Service, unless that disclosure is specifically authorized by I.R.C. § 6103. See Church of Scientology v. IRS, 484 U.S. 9, 10 (1987). A return is defined as:

[A]ny tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment of supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.

I.R.C. § 6103(b)(1).

Return information is defined, inter alia, as:

a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense . . .

I.R.C. § 6103(b)(2)(A).

I.R.C. § 6103 contains no express exception authorizing the disclosure of tax returns or return information that has become a matter of public record in connection with tax administration. See Johnson v. Sawyer, 120 F.3d 1307, 1317 (5th Cir. 1997); Thomas v. United States, 890 F.2d 18, 20 (7th Cir. 1989). As a result, the circuit courts are split regarding the proper treatment of tax information that has become a matter of public record in connection with tax administration.¹ The Tenth Circuit has adopted the "independent source" test first enunciated by the Seventh Circuit in Thomas, *supra*.

¹We note that the Ninth Circuit has taken the most liberal view with regard to public record information. It has held that tax information that has been made a part of the public record in connection with tax administration loses its confidentiality and is no longer subject to I.R.C. § 6103's disclosure restrictions. See William E. Schrambling Accountancy Corp. v. United States, 937 F.2d 1485, (9th Cir. 1991), *cert. denied*, 502 U.S. 1066 (1992); Lampert v. United States, 854 F.2d 335 (9th Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989). In contrast, the Fourth Circuit has taken a very restrictive position and has relied on the absence of an express exception in section 6103 to find that the release of previously publicized return information violates section 6103. See Mallas v. United States, 993 F.2d 1111 (4th Cir. 1993). While the Sixth Circuit has not made any determinations about information released in judicial proceedings, it has determined that tax information that has been made public in connection with recording a Federal tax lien is no longer protected by I.R.C. § 6103. See Rowley v. United States, 76 F.3d 796 (6th Cir. 1996).

The question presented to the Court in Thomas was whether the issuance by the IRS of a press release that contains information about a taxpayer's tax liability drawn from a Tax Court opinion was an unauthorized disclosure under I.R.C. § 6103. The taxpayer contended that the information the IRS released was tax return information as defined in section 6103 and, thus, that its release (without authorization) violated the statute. The government argued that the taxpayer waived the confidentiality of his tax return by contesting the deficiency in the Tax Court.

The Seventh Circuit did not find either argument persuasive. Instead, the Seventh Circuit held that because the information disclosed by the IRS in the press release came from a Tax Court opinion, *i.e.*, a source *independent* of the IRS, it did not fall into the purview of section 6103. The Court reasoned as follows:

[T]he definition of return information comes into play only when the immediate source of information is a return, or some internal document based on a return, as these terms are defined [in] § 6103(b)(2) and not when the immediate source is a public document lawfully prepared by an agency that is separate from the Internal Revenue Service and has lawful access to tax returns. The Tax Court is such an agency.²

Thomas, at 21 (footnote added). Accordingly, the Court held that the IRS may publicize Tax Court opinions.

The Tenth Circuit Court of Appeals has adopted the "independent source" test set forth in Thomas. See Rice v. United States, 166 F.3d 1088 (10th Cir. 1999), *cert. denied*, 528 U.S. 993 (October 12, 1999). In Rice, the IRS issued two press releases publicizing a criminal tax conviction of one Jerry Rice. Rice was found guilty on two counts of filing a false tax refund claim and three counts of making and subscribing a false tax return. The IRS agent who prepared the press releases obtained all of the information included in the release from public sources. Specifically, the agent obtained and reviewed a copy of the indictment, attended the taxpayer's entire trial, researched potential penalties applicable to the taxpayer's crimes, and attended his sentencing. Quoting extensively from the Seventh Circuit's opinion in Thomas, the Tenth Circuit held for the government. Specifically, the Court stated that, "[i]f, as the government claims, the two press releases about which Rice complains were based solely on public documents and proceedings, *i.e.*, the IRS public affairs officer's review of the indictment, her attendance at trial and sentencing, and her research into the possible criminal penalties, then Rice's assertion that the government violated § 6103 by issuing the press releases must fail." Id. at 1091.

The Tenth Circuit also noted that its decision in Rice is not contrary and did not overrule its prior opinion in Rodgers v. Hyatt, 697 F.2d 899 (10th Cir. 1983). See Rice at 1091. In Rodgers, the Tenth Circuit rejected the government's argument that the special agent's

² Disclosure of return and return information in a federal and state judicial or administrative proceeding involving the taxpayer is authorized by I.R.C. § 6103(h)(4).

prior testimony in a summons enforcement proceeding barred the taxpayer from complaining about any subsequent disclosure of such information. Specifically, the Court held that the agent had obtained his confidential information from the taxpayer's tax return and not at the public hearing, and that the agent's prior testimony did not alone authorize his subsequent out of court statements to a third party regarding the Service's ongoing investigation. Rodgers, at 906. The Tenth Circuit in Rice concluded that under both Thomas and Rodgers, whether information about a taxpayer may be classified as "return information invoking the application of I.R.C. § 6103 turns on the immediate source of the information." See Rice, at 1091. Thus, it is clear that if the Tenth Circuit in Rodgers had applied the "independent source" test, it would have found the disclosure in question to be unauthorized since the information was not obtained from a source independent of the IRS (such as court records or other public documents).³

Recommendation

Based upon the above analysis of the relevant case law, the Service may publicize information regarding Tax Court cases, criminal prosecutions, injunctions, and convictions in the Tenth Circuit, as long as the information contained in the press release is obtained from a source independent of the Service.⁴ To ensure that this instruction is followed, the following procedures and guidelines are recommended:⁵

³In addition to the Seventh and Tenth Circuits, several other jurisdictions have adopted the "independent source" test. The Fifth Circuit, in Johnson v. Sawyer, 120 F.3d 1307, 1318-19 (5th Cir. 1997), held that, in connection with two IRS press releases containing some information obtained from IRS files, if the immediate source of the information claimed to be wrongfully disclosed is tax return information as defined in I.R.C. § 6103, the disclosure violates I.R.C. § 6103, regardless of whether that information has been previously disclosed (lawfully) in a judicial proceeding and has therefore arguably lost its taxpayer "confidentiality." The Third and Eight Circuits have cited Thomas in unpublished opinions to justify disclosure based upon public record information. See Barnes v. United States, 17 F.3d 1428 (3d Cir. 1994) (press release announcing indictment issued by U.S. Attorney's office was not unauthorized disclosure); Noske v. United States, 1993 U.S. App. LEXIS 14480 (8th Cir. 1993) (IRS providing a local newspaper with a copy of a district court opinion dealing with abusive tax shelter did not violate section 6103).

⁴ These procedures were adopted by the Tax Division, Department of Justice, and the Service.

⁵ See IRM 9.3.2, *Publicity and Internal Communications*; Disclosure Litigation Reference Book, Document 11028, Rev. 4-2000.

- 1) No person involved in the investigation, preparation, or litigation of the case at issue be involved of the drafting of the press release.⁶
- 2) All information to be included in the press release must be obtained from an independent source, such as court files, newspapers, previous press releases, published court opinions, and never from internal Service files. Great care should be exercised in determining whether tax information has actually become a matter of public record, as information which is supplemental to that which has become public is subject to the confidentiality provisions of section 6103.
- 3) Retrieve (and maintain) copies of documents (pleadings, indictments, arrest or search warrant affidavits, recorded notices of federal tax lien) independently from the public source, or use transcripts or copies of documents containing a court stamp.
- 4) Attribute any statements made directly to the public record document. Press releases should only contain information set forth in the public record and should indicate that the source of the information is the public record.
- 5) Press releases should be reviewed by the local disclosure office, and if necessary, by the National Office, before being published.
- 6) Information made public by a taxpayer or third party, which is identical to returns or return information in the possession of the Service, remains confidential pursuant to section 6103. Thus, the Service cannot use return information to confirm information made public by any other party unless specifically authorized to do so by I.R.C. § 6103.
- 7) Only information that has become a matter of public record in connection with tax administration may be publicized by the Service. The Service draws a distinction between general public record information, such as divorce decrees and mortgage deeds of trust, and return information that has become a matter of public record through tax administration. In this way, the

⁶ IRM 9.3.2, *Publicity and Internal Communications*, directs the Special Agent in Charge (SAC) to either draft or assist in the preparation of the press release. See e.g., IRM 9.3.2.4.1, 9.3.2.10.1.1, 9.3.2.10.1.1.1 (11). We agree that the responsibility for advising the Public Information Officer of an indictment, trial or conviction appropriately rests with the SAC and that the SAC should continually be apprized of the steps that are being taken by the Public Information Officer and/or Department of Justice in his case. However, we strongly caution against obtaining any information directly from the SAC for use in a press release, as there is the possibility that some of the information may be inadvertently taken from the Service's files.

Service avoids linking otherwise innocuous public information with a person's tax liability.

If you have any questions in this matter, please contact us at .

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