

LB&I International Practice Service Process Unit – Overview

IPS Level	Number	Title	UIL Code	Number
Shelf	N/A	Cross-over	–	–
Volume	17	Information Gathering (Cross Over)	Level 1 UIL	9560
Part	17.8	6038A(e) – Failure to authorize an agent	Level 2 UIL	9560.06
Chapter	N/A	N/A	Level 3 UIL	NA
Sub-Chapter	N/A	N/A	–	–

Unit Name	Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned
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Introduction

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

- It may be necessary for an examiner to examine books, records or other data in the custody or control of a foreign related person. Generally, a summons issued by the U.S. government to such foreign related person is not legally enforceable when that person resides in a foreign country. When such records regard a transaction of a domestic corporation that is 25-percent owned by a foreign shareholder, Internal Revenue Code (“IRC”) 6038A(e) provides that such domestic corporation may be designated by such foreign shareholder (and/or other foreign related persons) as its agent with respect to any IRS request or summons for records. A domestic corporation with a 25% foreign shareholder is referred to in the regulations as a domestic reporting corporation (“DRC”).
- When a 25-percent foreign shareholder (or a foreign related person) does not designate the DRC as agent pursuant to IRC 6038A(e), a noncompliance rule applies. Such rule also applies when a DRC that was designated as agent fails to substantially comply in a timely manner with an IRS summons with respect to IRC 6038A (“IRC 6038A Summons”) to produce records of, or take testimony from, the designating foreign related party. Under such rule, the Service has sole discretion to determine the amount of DRC’s deductions related to, and the cost of property purchased from (or transferred to), that foreign related party. The adjustment may be based on the information the Service has available or from information the Service chooses to obtain through testimony or otherwise.
- This Process Unit - Overview describes the steps for issuing an IRC 6038A Summons and the steps to take when DRC does not substantially comply with such summons.
- Example circumstances of when an examiner should consider issuing an IRC 6038A Summons are listed at [Slide 55](#).



CONSULTATION: Work closely with your manager and counsel when making decisions regarding the topics discussed in this Unit.

Process Overview

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

- **Qualifications to issue an IRC 6038A Summons.** The Service may issue an IRC 6038A Summons when:
 - the taxpayer under exam is a domestic corporation with a 25% foreign shareholder,
 - there was a transaction between DRC and such 25% foreign shareholder or any foreign person related to DRC or to such 25% foreign shareholder, and
 - DRC is appointed to act as a limited agent for purposes of IRC 7602, 7603, and 7604 with respect to any request by the Service to examine records or produce testimony that may be relevant to the tax treatment of any transaction between DRC and a foreign related party.

- **Records and testimony sought.** The Service may seek copies of records related to a transaction between DRC and a foreign related party or ask for related testimony (such as for the location where those records are generally maintained).

- **Small corporation exception.** A DRC with less than \$10 million of U.S. gross receipts in a tax year is not required to be authorized as an agent for that tax year. Gross receipts means all amounts received or accrued in determining the gross income of all related reporting corporations including the DRC under exam.

- **Transactions of de minimis value exception.** A DRC with gross payments to and from foreign related parties of not more than \$5 million and less than 10% of its U.S. gross income for a tax year is not required to be authorized as an agent for that year.

- **Noncompliance penalty.** Once an Authorization of Agent (“A of A”) is executed, if DRC fails to substantially comply in a timely manner with an IRC 6038A Summons, the Service has sole discretion to determine the amount of DRC’s deductions related to, and the cost of property purchased from (or transferred to) that foreign related party. There is no reasonable cause exception to this determination. For discussion of requesting an A of A, see the Practice Unit titled “Using an Authorization of Agent when a US Corporation is 25% Foreign Owned.”

Detailed Explanation of the Process

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Analysis

- A DRC must maintain records that are sufficient to determine the correctness of DRC's federal income tax return. [Treas. Reg. 1.6038A-3(a)]
- In addition to the record keeping requirements of IRC 6001, regulations under IRC 6038A require DRC to maintain certain records that may be relevant to determine the correct U.S. tax treatment of transactions with foreign related parties. An awareness of such regulatory authority may be useful for your discussions with DRC and for the preparation of IDRs. **Note:** For discussions about the record maintenance requirements under IRC 6038A, the monetary penalties for failing to maintain and produce such records, and the reasonable cause exception to those penalties, see the Practice Unit titled "Using an Authorization of Agent when a US Corporation is 25% Foreign Owned"
- Early in the exam, the examiner should issue an IDR to determine (a) if the DRC has met the record maintenance requirements and (b) where such records are located. Consider obtaining a complete listing of all foreign maintained records.
- When there is a failure to authorize the DRC as an agent (as described in Treas. Reg. 1.6038A-5) or a failure to timely furnish information after granting the A of A (under Treas. Reg. 1.6038A-6), the rules of Treas. Reg. 1.6038A-7 for noncompliance apply to the DRC. In such case, the Service may determine:
 - the amount of the deduction allowed for any amount paid or incurred by the reporting corporation to the related party in connection with such transaction, and
 - the cost to the reporting corporation of any property acquired in such transaction from the related party or transferred by such corporation in such transaction to the related party.

Detailed Explanation of the Process (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Analysis

- The Service shall determine the amount of the deduction or cost based on the Service's knowledge or such information as the Service may choose to obtain through testimony or otherwise. The Service may disregard any information or materials submitted by DRC or a foreign related party if the Service deems such information or materials insufficiently probative of the relevant facts.
- Throughout the process described in this unit, the Service should consider whether a request pursuant to an income tax treaty, or a tax information exchange agreement ("TIEA"), with a country where the records are located could secure the information sought. When records of a foreign related party ("FRP") are obtainable within 180 days of an information exchange request pursuant to a tax treaty or tax information exchange agreement, generally the Service will use such procedures before issuing an IRC 6038A Summons.

Process Applicability

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

The following criteria must be met before issuing an IRC 6038A Summons.

Criteria	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Domestic Corporation. The taxpayer must be a domestic corporation with a 25% foreign shareholder (i.e., a domestic reporting corporation “DRC”). ▪ Note: Final regulations, issued December 13, 2016, treat a domestic disregarded entity wholly owned by a foreign person as a corporation for the limited purposes of the reporting, record maintenance and associated compliance requirements under IRC 6038A. These entities do not qualify for the exceptions for small corporations, de minimis transactions, and reporting under IRC 6038 or for FSCs. The regulations are effective for tax years beginning after December 31, 2016, and ending on or after December 13, 2017. These changes provide the IRS with improved access to information that it needs to satisfy its obligations under U.S. tax treaties and other international agreements, and to strengthen the enforcement of U.S. tax laws. 	<ul style="list-style-type: none"> ▪ IRC 6038A(a) Requirement. ▪ Treas. Reg. 1.6038A-1(c) Reporting corporation. ▪ Treas. Reg. 1.6038A-1 General requirements and definitions. ▪ Treas. Reg. 1.6038A-2 Requirement of return. ▪ Treas. Reg. 301.7701-2 Business entities; definitions. 	

Process Applicability

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

The following criteria must be met before issuing an IRC 6038A Summons.

Criteria	Resources	6103 Protected Resources
<ul style="list-style-type: none">▪ Foreign Related Party (“FRP”). There must be a transaction between DRC and:<ul style="list-style-type: none">– a direct or indirect 25% foreign shareholder of DRC,– any foreign person related to the reporting corporation or to a 25% foreign shareholder of DRC within the meaning of IRC 267(b) or 707(b)(1), or– a foreign person related within the meaning of IRC 482.	<ul style="list-style-type: none">▪ IRC 6038A(e)(1) Agreement to treat corporation as agent.▪ IRC 6038A(c)(2) Related party.▪ Treas. Reg. 1.6038A-1(e) Attribution rules.▪ Treas. Reg. 1.6038A-1(d) Related party.	

Process Applicability (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

The following criteria must be met before issuing an IRC 6038A Summons.

Criteria	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Authorization of Agent. The FRP must be a party to a properly executed Authorization of Agent (“A of A”) that appoints DRC to act as a limited agent for purposes of IRC 7602, 7603, and 7604 with respect to any request by the Service to examine records or produce testimony that may be relevant to the tax treatment of any transaction between DRC and FRP. ▪ Note: For information about the requirements to issue an A of A request, see the Practice Unit titled <i>“Using an Authorization of Agent when a US Corporation is 25% Foreign Owned.”</i> ▪ The Service may not issue an IRC 6038A Summons if an A of A is not required to be executed due to DRC meeting the small 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038A-5 Authorization of Agent. 	

Process Applicability (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

The following criteria must be met before issuing an IRC 6038A Summons.

Criteria	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Authorization of Agent (cont'd) corporation exception or the transaction of de minimis value exception. ▪ <u>Small corporation exception.</u> A DRC with less than \$10 million of US gross receipts in a tax year is not required to be authorized as an agent for that tax year. Gross receipts means all amounts received or accrued in determining the gross income of DRC and all related reporting corporations. ▪ <u>Transactions of de minimis value exception.</u> A DRC with gross payments to and from FRPs of not more than \$5 million and less than 10% of its US gross income for a tax year is not required to be authorized as an agent for that year. Aggregate gross payments means those reportable on Form 5472, Part IV. The 10% test must be met for the combined US gross income of DRC and all related reporting corporations. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038A-1(h) Small corporation exception. ▪ Treas. Reg. 1.6038A-1(i) Safe harbor for reporting corporations with related party transactions of de minimis value. ▪ <i>Bittker & Lokken Fed. Tax'n Inc., Est. and Gifts Para 65-99</i> 	

Process Applicability (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

The following criteria must be met before issuing an IRC 6038A Summons.

Criteria	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Authorization in Prior Year Continues. Once an A of A designation is made, it is effective for all tax years not barred by the statute of limitations (“SOL”). 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038A-5(b)(1) Authorization by related party. ▪ IRM 4.60.8.3.5.8 - Failure to Obtain Authorization of Agent 	
<ul style="list-style-type: none"> ▪ IDR issued for records or testimony that may be relevant. After an A of A is properly executed, if DRC provides an unsatisfactory response to an IDR request for records (or to produce testimony) that may be relevant to the tax treatment of any transaction between DRC and FRP (which is a party to the A of A) the Service may issue an IRC 6038A Summons. ▪ Note: IRC 7602 provides the Service with authority to issue a summons for records and testimony. IRC 6038A(e)(1) provides that a FRP may authorize DRC to act as its agent for purposes of applying IRC 7602, 7603 and 7604 with respect to a summons by the Service for records 	<ul style="list-style-type: none"> ▪ IRC 6038A(e)(2) Rules where information not furnished. ▪ IRM 4.60.8.3.5.8 (2)(b) - Failure to Obtain Authorization of Agent ▪ <i>Nissei Sangyo America, Ltd. v. U.S.</i>, 95-2 USTC P 50,327 (N.D. IL 1995) 	

Process Applicability (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

The following criteria must be met before issuing an IRC 6038A Summons.

Criteria	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ IDR issued for records or testimony that may be relevant (cont'd) and testimony relevant to transactions between DRC and any FRP. ▪ <u>Coordination with IDR Enforcement Process.</u> Requesting an A of A and thereafter issuing an IRC 6038A Summons are processes independent of the IDR Enforcement Process. An unsatisfactory response to an IDR, that was issued after an A of A was executed, corresponds with Step 1 in Attachment 2 of the IDR Enforcement Process as described in LB&I Directive LB&I-04-0214-004 issued February 28, 2014. 	<ul style="list-style-type: none"> ▪ LB&I-04-0214-004 - Updated Guidance for Examiners on Information Document Requests Enforcement Process 	
 <p>DECISION POINT: Consider issuing a pre summons letter when the DRC has not substantially complied with the IDR.</p>	<ul style="list-style-type: none"> ▪ IRM 4.60.8.3.5.12(2)b - IRC Section 6038A(e) Procedures and Guidelines 	

Process Applicability (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

The following criteria must be met before issuing an IRC 6038A Summons.

Criteria	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Coordination with treaties. When records of a FRP are obtainable within 180 days of an information exchange request pursuant to a tax treaty or tax information exchange agreement (“TIEA”), generally the Service will use such procedures before issuing an IRC 6038A Summons. However, the absence or pendency of a treaty or TIEA request is not (a) grounds for a DRC to refuse to comply with an IRC 6038A summons or (b) a defense against the noncompliance penalty. ▪ According to the IRM, the Service may issue an IRC 6038A Summons when an exchange of information (“EOI”) request is pending. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038A-6(b) Coordination with treaties. ▪ IRM 4.60.8.3.5.11(3) - Summoning Records 	

Summary of Process Steps

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Process Steps

Before issuing a summons, first determine the identify of the person who has custody or control over the records sought. For summons to be enforceable, the *Powell* requirements must be met. Also, regulatory requirements must be met for the preparation, distribution, and delivery of summonses. If a taxpayer has not substantially complied with an IRC 6038A Summons, the Service may apply the noncompliance penalty, which can be overridden only by clear and convincing evidence that the Service abused its discretion.

Step 1	Consider where the desired records are located and the entity with custody or control over them.
Step 2	Review the requirements for enforceability of a summons.
Step 3	Prepare the IRC 6038A Summons.
Step 4	Consider issuing a summons for records under domestic reporting corporation's custody or control.

Summary of Process Steps (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Process Steps

Before issuing a summons, first determine the identify of the person who has custody or control over the records sought. For summons to be enforceable, the *Powell* requirements must be met. Also, regulatory requirements must be met for the preparation, distribution, and delivery of summonses. If a taxpayer has not substantially complied with an IRC 6038A Summons, the Service may apply the noncompliance penalty, which can be overridden only by clear and convincing evidence that the Service abused its discretion.

[Step 5](#)

Deliver the summonses.

[Step 6](#)

Prepare for challenges to an IRC 6038A Summons.

[Step 7](#)

Review responses to the IRC 6038A Summons.

[Step 8](#)

Consider applying the non-compliance penalty.

Step 1

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 1 Consider Where the Desired Records are Located and the Entity with Custody or Control Over Them.

An IRC 6038A Summons may be issued to obtain records in the custody and control of certain foreign related parties.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ An IRC 6038A Summons is enforced against the agent. An IRC 6038A Summons may be enforced against a person who has (or who is acting as the agent for a FRP that has) possession, custody, or control over the records sought. 	<ul style="list-style-type: none"> ▪ IRM 4.60.8.3.5.11 - Summoning Records 	
<ul style="list-style-type: none"> ▪ Determine the location of the records. Although you may have issued at least one IDR inquiring as to the existence and location of records you seek, consider interviewing DRC's domestic personnel who have knowledge of the location of the records relevant to issues under exam. Then, consider an IDR to confirm such records existence and their location. 		
<ul style="list-style-type: none"> ▪ A DRC is required to maintain certain records. In addition to the record keeping requirements of IRC 6001, regulations under IRC 6038A require DRC to maintain certain records that may 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038A-3(a) General maintenance requirements. 	

Step 1 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 1 Consider Where the Desired Records are Located and the Entity with Custody or Control Over Them.

An IRC 6038A Summons may be issued to obtain records in the custody and control of certain foreign related parties.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ A DRC is required to maintain certain records (cont'd) be relevant to determine the correct U.S. tax treatment of transactions with foreign related parties. An awareness of such regulatory authority may be useful for your discussions with DRC and for the preparation of IDRs. ▪ Note: For discussions about the record maintenance requirements under IRC 6038A, the monetary penalties for failing to maintain and produce such records, and the reasonable cause exception to those penalties, see the Practice Unit titled <i>“Using an Authorization of Agent when a US Corporation is 25% Foreign Owned.”</i> 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038A-3(c) Specific records to be maintained for safe harbor. ▪ Treas. Reg. 1.6038A-3(f)(2) Non-U.S. maintenance requirements 	

Step 2

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 2: Review the Requirements for Enforceability of a Summons.

For a summons to be enforceable, the *Powell* requirements must be met.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none">▪ Enforceability of a summons. Generally, a court will enforce a summons if:<ul style="list-style-type: none">– there is a legitimate purpose for the investigation;– the material sought is relevant to that purpose;– the material sought is not already within the IRS' possession; and– those administrative steps which are required by the IRC have been taken.	<ul style="list-style-type: none">▪ <i>U.S. v. Powell</i>, 379 U.S. 48 (1964)▪ CCA 200950044 – IRC 7602	
<ul style="list-style-type: none">▪ Relevant material. Regarding the relevance of material sought, the Service has the authority to examine any books, paper, records, or other data that may be relevant to ascertain the correctness of a return, make a return (when none was made), or determine the proper tax liability.		

Step 2 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 2: Review the Requirements for Enforceability of a Summons.

For a summons to be enforceable, the *Powell* requirements must be met.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Relevant material (cont'd) ▪ The language “may be relevant” allows the IRS to obtain documents of potential relevance to an ongoing investigation. The Service cannot be expected to know that a document is relevant until it is obtained and reviewed. Thus, the Service should not be required to establish that the documents sought are actually relevant in any technical, evidentiary sense. ▪ The Second Circuit’s relevance standard, that the material sought “might have thrown light upon the correctness of the return,” is widely accepted. 	<ul style="list-style-type: none"> ▪ IRC 7602(a) Authority to summon, etc. ▪ <i>U.S. v. Arthur Young</i>, 465 U.S. 805 (1984) ▪ CCA 200950044 – IRC 7602 ▪ <i>Foster v. U.S.</i>, 265 F.2d 183 (2nd Cir. 1959) ▪ <i>U.S. v. Egenberg</i>, 443 F.2d 512 (3rd Cir. 1971) ▪ <i>U.S. v. Wyatt</i>, 637 F.2d 293 (5th Cir. 1981) ▪ <i>U.S. v. Turner</i>, 480 F.2d, 272 (7th Cir. 1973) ▪ <i>U.S. v. Ryan</i>, 455 F.2d 728 (9th Cir. 1972) 	

Step 2 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 2: Review the Requirements for Enforceability of a Summons.

For a summons to be enforceable, the *Powell* requirements must be met.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Relevant material (cont'd) ▪ In <i>U.S. v. Harrington</i>, the Second Circuit added that “might” indicated a realistic expectation (not an idle hope) that something may be discovered. ▪ The Service may summons the records of years (a) not under exam or (b) barred from exam by statute, if such records are relevant to an issue of a year under exam. ▪ Relevant records include books, papers, electronic records, and other data of DRC and/or any FRP (which is a party to the A of A) that may be relevant or material to determine the correct US tax treatment of a transaction between DRC and a FRP. 	<ul style="list-style-type: none"> ▪ <i>U.S. v. Harrington</i>, 388 F.2d 520 (2nd Cir. 1968) ▪ <i>Dunn v. Ross</i>, 356 F.2d 664 (5th Cir. 1966) ▪ <i>Paine v. U.S.</i>, 682 F. Supp. 739, (E.D. NY 1987); 	

Step 2 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 2: Review the Requirements for Enforceability of a Summons.

For a summons to be enforceable, the *Powell* requirements must be met.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Relevant testimony. The Service may summons the testimony of an officer or employee of a FRP (that is a party to the A of A) under oath. Like records requested, the testimony requested must be relevant to the tax treatment of an examined item. 	<ul style="list-style-type: none"> • IRC 7602(a)(3) Authority to summon, etc. • CCA 200950044 – IRC 7602 	
<ul style="list-style-type: none"> ▪ Preparing a valid summons. In order to be valid, a summons must: <ul style="list-style-type: none"> – identify the person with respect to whose tax liability the summons is issued, – identify the tax period(s) of the tax liability, – identify the summoned person, – describe the books, papers, records, or other data summoned with reasonable certainty, and – specify the date, time, and place of appearance. 	<ul style="list-style-type: none"> • IRC 7603(a) Service of summons. In general. • IRC 7605(a) Time and place. • CCA 200950044 – IRC 7602 	

Step 3

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 3: Prepare the IRC 6038A Summons.

Statutory and regulatory requirements must be met for the preparation and delivery of summonses.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Preparing a valid summons (cont'd) ▪ <u>Identifying the pages of a summons.</u> The October 10, 2010 revised Form 2039 contains the following twelve pages: <ol style="list-style-type: none"> 1. Summons (Original - to be kept by the IRS) 2. Service of Summons, Notice and Recordkeeper Certificates 3. Summons (Part A – to be given to person summoned) 4. Provisions of the Internal Revenue Code 5. Notice of Payment Information for Recipients of IRS Summons (Part B – to be given to person summoned) 6. Sec. 7609. Special procedures for third-party summons 7. Summons (Part C - to be given to noticee) 8. Provisions of the Internal Revenue Code 	<ul style="list-style-type: none"> • Form 2039 (Summons) (Rev. 10-2010) 	

Step 3 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 3: Prepare the IRC 6038A Summons.

Statutory and regulatory requirements must be met for the preparation and delivery of summonses.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Preparing a valid summons (cont'd) ▪ <u>Identifying the pages of a summons (cont'd)</u> 9. Transmittal form (Part D – to be given to noticee) 10. Sec. 7609. Special procedures for third-party summons 11. Suspension of Corporate Taxpayer's Period of Limitations on Assessment If a Court Proceeding is Brought Regarding a Designated or Related Summons (Part E- to be given to the corporate taxpayer only if this is a designated or related summons) 12. Sec 6503(j). Extension In case of certain summonses ▪ <u>Tips for preparing a summons.</u> Consider the following tips for preparing a valid summons: 	<ul style="list-style-type: none"> ▪ CCA 200950044 – IRC 7602 	

Step 3 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 3: Prepare the IRC 6038A Summons.

Statutory and regulatory requirements must be met for the preparation and delivery of summonses.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Preparing a valid summons (cont'd) ▪ <u>Form 2039, page 1, Summons (Original):</u> <ul style="list-style-type: none"> - The pdf version of Form 2039 replicates the information you enter on the original summons (page 1) to the copies of the summons on Part A (page 3) and Part C (page 7). - In the blank line after “In the matter of” enter DRC’s complete legal name and EIN. For example, “DRC, Inc. and Subsidiaries EIN: 12-3456789.” - In the blank line after “To” enter DRC’s complete legal name and the phrase “as agent for related parties.” - In the blank line after “At” enter DRC’s legal physical address which includes number, street, city, state, and zip. 	<ul style="list-style-type: none"> ▪ IRM 4.60.8.3.5.12(2)d -IRC Section 6038A(e) Procedures and Guidelines 	

Step 3 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 3: Prepare the IRC 6038A Summons.

Statutory and regulatory requirements must be met for the preparation and delivery of summonses.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Preparing a valid summons (cont'd) ▪ <u>Form 2039, page 1, Summons (Original) (cont'd)</u> ▪ In the blank area after "...for the periods shown." enter "IRC 6038A summons." It is important to clearly indicate that the summons is issued with respect to IRC 6038A to distinguish it from a summons issued for records under DRC's custody or control. ▪ At the bottom of this page, accurately describe a location and legal address of the place for appearance. For example, 5555 Able Street, 11th Floor, Room 1111, City, State, Zip. ▪ The Service has authority to set a time and place for appearance that is reasonable under the circumstances. <ul style="list-style-type: none"> – Choose a place for appearance based on the address shown on the return for the period selected for exam. Generally, that place is the IRS office located nearest the summoned 	<ul style="list-style-type: none"> ▪ IRC 7605(a) Time and place. ▪ Treas. Reg. 301.7605-1(d)(1) Place of examination. ▪ IRM Exhibit 25.5.2-1 -General Instructions for Preparation of a Summons ▪ Treas. Reg. 301.7605-1(e) Requests by taxpayers to change place of examination. ▪ IRM 4.60.8.3.5.12(2) - IRC Section 6038A(e) Procedures and Guidelines ▪ IRM 25.5.3.4(1)b - Time and Place of Examination Set by Summons 	

Step 3 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 3: Prepare the IRC 6038A Summons.

Statutory and regulatory requirements must be met for the preparation and delivery of summonses.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Preparing a valid summons (cont'd) ▪ <u>Form 2039, page 1, Summons (Original) cont'd</u> person. Resolve requests for changing the place of appearance on a case-by-case basis. The Service and the summoned person can agree (in a letter separate from the summons) that a summons seeking only records may be satisfied by mailing those records to the Service. ▪ At the bottom of the page, the date for appearance shall be no less than ten calendar days from the date the summons is issued. The date of appearance shall not be a Saturday, Sunday or legal holiday. The date the summons is issued is certified on Form 2039, page 2 by the signature of the person who served the summons. 		

Step 3 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 3: Prepare the IRC 6038A Summons.

Statutory and regulatory requirements must be met for the preparation and delivery of summonses.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Preparing a valid summons (cont'd) ▪ <u>Form 2039, page 1, Summons (Original) cont'd</u> ▪ Any Internal Revenue Agent is authorized to sign an IRC 6038A Summons as the issuing officer. The signature may be electronic or manual. ▪ After “Issued under the authority of the Internal Revenue Code this” enter the date the issuing officer signed the summons. This date is not considered the date of the summons for purposes of setting the date of appearance. 	<ul style="list-style-type: none"> ▪ IRM 25.5.1.3 - Authority ▪ IRM 1.2.52.2(8) & (9) -Delegation Order 25-1 ▪ IRM 25.5.1.3.3 - Authority to Issue Summonses Requiring Approval (Except John Doe Summonses) ▪ Treas. Reg. 301.7605-1(b)(2) Date of appearance when summons is used. ▪ IRM 25.5.2 - Summons Preparation ▪ IRM Exhibit 25.5.2-1 -General Instructions for Preparation of a Summons 	

Step 3 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 3: Prepare the IRC 6038A Summons.

Statutory and regulatory requirements must be met for the preparation and delivery of summonses.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Preparing a valid summons (cont'd) ▪ <u>Form 2039, page 2 (Service of Summons, Notice and Recordkeeper Certificates).</u> <ul style="list-style-type: none"> – Form 2039, page 2 has three certifications: <ul style="list-style-type: none"> ▪ The agent that served the summons to the taxpayer certifies: How Summons was served. ▪ Below line 4, the agent giving notice certifies: How Notice was given. ▪ At the bottom of the page, an agent certifies the status of a proceeding to quash the summons by signing and entering his/her title. ▪ In a federal district court proceeding for enforcement of the summons, the certificate of 	<ul style="list-style-type: none"> • IRC 7603(a) Service of summons. In general. 	

Step 3 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 3: Prepare the IRC 6038A Summons.

Statutory and regulatory requirements must be met for the preparation and delivery of summonses.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Preparing a valid summons (cont'd) service signed by the person serving the summons is evidence of the facts it states. ▪ <u>Form 2039, page 3, Summons (Part A)</u>. On Form 2039, page 3, the agent serving the summons signs and adds his/her title to attest that Summons (Part A) is a true and correct copy of the Summons (Original). Both the issuing officer and the approving officer (group manager or case manager) sign at the bottom of the page. Their respective titles carry over from page 1 of the summons. ▪ <u>Form 2039, page 7, Summons (Part C)</u>. On Form 2039, page 7, both the issuing officer and the approving officer sign at the bottom of the page. Their respective titles carry over from page 1 of the summons. 	<ul style="list-style-type: none"> • IRM Exhibit 25.5.2-1 14 General Instructions for Preparation of a Summons 	

Step 3 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 3: Prepare the IRC 6038A Summons.

Statutory and regulatory requirements must be met for the preparation and delivery of summonses.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Preparing a valid summons (cont'd) ▪ <u>Form 2039, page 9, (Part D).</u> On Form 2039, page 9, enter the name of the noticee, the physical address where the notice of the summons was delivered and the date such notice was provided. ▪ <u>White paper.</u> On white paper, describe (using enforceable language) the records and/or testimony sought. Attach such white paper descriptions to page 1, Summons (Original), and attach complete copies of the white paper descriptions to pages 3, Summons (Part A), and 7 Summons (Part C). 		

Step 3 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 3: Prepare the IRC 6038A Summons.

Statutory and regulatory requirements must be met for the preparation and delivery of summonses.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Distributing the pages of a summons. The twelve pages of a summons are retained by (or issued to) as follows: <ul style="list-style-type: none"> - Service – pages 1, 2 - DRC – pages 3, 4, 5, - Noticee – pages 7, 8, 9 - Pages 6, and 10 are not applicable to an IRC 6038A Summons. - Pages 11 and 12 pertain to a designated summons which is issued infrequently. Such summons suspends the SOL on assessments during the period that the Service and a corporation are involved in a court proceeding to enforce or quash such summons. The person summonsed must be a corporation examined under the Coordinated Industry Case Program (or any successor program) or any person to whom such corporation has transferred records. 	<ul style="list-style-type: none"> ▪ IRC 6503(j) Extensions in case of certain summonses. ▪ Treas. Reg. 301.6503(j)-1(c)(1) Definitions. ▪ Announcement 96-5, 1996-4 IRB 99, page 101 	

Step 3 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 3: Prepare the IRC 6038A Summons.

Statutory and regulatory requirements must be met for the preparation and delivery of summonses.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Distributing the pages of a summons cont'd). ▪ Such summons must be issued within 60 days before expiration of the SOL under IRC 6501 and must clearly state that it is a designated summons. 		
 <p>CONSULTATION: Contact a Technical Specialist in the Information Gathering PN and/or IRS Counsel for procedural questions regarding an IRC 6038A Summons. Prior to issuing the summons, send a copy to a Technical Specialist in the Information Gathering PN and/or ACC(I) to ensure the summons is enforceable and to obtain ACC(I) approval.</p>	<ul style="list-style-type: none"> ▪ IRM 4.60.8.3.5.11.1 - Summoning Testimony ▪ IRM 4.60.8.3.5.12(2)f - IRC Section 6038A(e) Procedures and Guidelines 	

Step 4

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 4: Consider Issuing a Summons for Records Under a Domestic Reporting Corporation's Custody or Control.

If you are unsure what entity has custody or control over the records sought, consider also issuing a Domestic Summons.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Consider issuing a domestic summons with the 6038A summons. Although you are issuing an IRC 6038A Summons, consider issuing another summons for records that are in the custody or control of DRC (i.e., a “Domestic Summons”) instead of FRP. ▪ The Service may summon for examination any books, papers, records (including electronic records), or other data that may be relevant or material to a tax matter. Also, the Service may summon the taxpayer or any other person the Service deems proper for the purpose of taking testimony, under oath, that is relevant or material to the tax matter. ▪ The Service may issue a Domestic Summons under IRC 7602 for records located within or without the U.S. to any party that is subject to a 	<ul style="list-style-type: none"> ▪ IRC 7602(a)(1) & (3) Authority to summon, etc. 	

Step 4 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 4: Consider Issuing a Summons for Records Under a Domestic Reporting Corporation's Custody or Control.

If you are unsure what entity has custody or control over the records sought, consider also issuing a Domestic Summons.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Consider issuing a domestic summons with the 6038A summons (cont'd) U.S. court's jurisdiction if the summoned party has: <ul style="list-style-type: none"> - custody or control of the documents, or - the legal power to obtain the documents (for example the power of a U.S. multinational corporation over its subsidiaries). ▪ <u>Coordination with IDR Enforcement Process.</u> Issuing an IRC 6038A Summons is independent of the IDR Enforcement Process, however, issuing a Domestic Summons is not independent. For more information about issuing a Domestic Summons, see the discussions of (a) Delinquency Notice, (b) Pre-Summons Letter, and (c) summons in Attachment 2 of the IDR Enforcement Process as described in LB&I Directive LB&I-04-0214-0004 issued February 28, 2014. 		

Step 5

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 5: Deliver the Summonses.

Statutory and regulatory requirements must be met for the delivery of summonses.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Delivery of summons. Summonses issued shall be delivered in hand to the person to whom it is directed, or left at his last and usual place of abode. 	<ul style="list-style-type: none"> ▪ IRC 7603(a) Service of summons ▪ IRC 6038A(e)(1) Agreement to treat corporation as agent. ▪ CCA 200945057 – IRC 7603 ▪ CCA 200950044 – IRC 7602 	
<ul style="list-style-type: none"> ▪ Authorized acceptance of summons. A summons issued to a corporation may be served on a corporate officer, director, managing agent, or other person authorized to accept service. 	<ul style="list-style-type: none"> ▪ <i>U.S. v. Intergold Corp.</i>, 39 AFTR2d 77-505 (N.D. NY 1976) ▪ <i>U.S. v. Toyota Motor Corp.</i>, 569 F. Supp. 1158 (C.D. CA 1983) ▪ IRM 25.5.3.2(13) - Service of Summons 	

Step 6

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 6: Prepare for Challenges to an IRC 6038A Summons.

DRC may begin judicial proceedings to quash an IRC 6038A Summons or to review the Service's determination of substantial compliance. The SOL on assessment is suspended during such proceedings and for ninety days after a court's final determination.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Judicial proceedings. A DRC may begin a judicial proceeding in a U.S. district court (not later than the 90th day after the summons was issued) to quash a summons. In <i>ASAT, Inc. v. U.S.</i>, the district court dismissed a motion to quash an IRC 6038A Summons because DRC did not file the motion within ninety days from the date the Service issued the summons. ▪ The DRC may also begin a judicial proceeding in a U.S. district court (not later than the 90th day after the day the notice of noncompliance was mailed) to review the Service's determination that DRC did not substantially comply with an IRC 6038A Summons. If not so appealed, the Service's determination is binding and shall not be reviewed by any court. 	<ul style="list-style-type: none"> ▪ IRC 6038A(e)(4)(A) Proceedings to quash. ▪ <i>ASAT Inc. v. U.S.</i>, 76 AFTR2d 95-7821 (N.D. Cal.1995) ▪ IRC 6038A(e)(4)(B) Review of secretarial determination of noncompliance. 	

Step 6 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 6: Prepare for Challenges to an IRC 6038A Summons.

DRC may begin judicial proceedings to quash an IRC 6038A Summons or to review the Service's determination of substantial compliance. The SOL on assessment is suspended during such proceedings and for ninety days after a court's final determination.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Judicial proceedings (cont'd) ▪ While either such judicial proceeding (or appeals thereof) is pending, the SOL on the assessment and collection of the tax is suspended with respect to any transaction to which the IRC 6038A Summons relates. In no event shall the SOL period expire before the 90th day after the day on which there is a final determination of either such proceeding. 	<ul style="list-style-type: none"> ▪ IRC 6038A(e)(4)(D) Suspension of statute of limitations. ▪ Treas. Reg. 1.6038A-6(e) Suspension of statute of limitations. 	

Step 7

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 7: Review Responses to the IRC 6038A Summons.

Substantial compliance with an IRC 6038A Summons is a matter of facts and circumstances.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none">▪ Review the IRC 6038A Summons responses for substantial compliance. If DRC did not provide any foreign-based documentation requested by the due date, then DRC did not substantially comply with the IRC 6038A Summons. Prepare a Notice of Proposed Adjustment (“NOPA”) with reasonable adjustments based on the information currently known.▪ DRC may respond with some, but not all of the foreign-based documentation requested. Substantial compliance is a matter of facts and circumstances. Generally, it is the importance of the foreign-based documentation provided, not the number or proportion.	<ul style="list-style-type: none">▪ Form 5701 (Notice of Proposed Adjustment)	

Step 7 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 7: Review Responses to the IRC 6038A Summons.

Substantial compliance with an IRC 6038A Summons is a matter of facts and circumstances.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Reasonable efforts are required for substantial compliance. Courts have ruled that reasonable efforts are required to meet substantial compliance for the production of records that are summonsed. ▪ In <i>U.S. v. Darwin Construction Co.</i>, the Service issued a summons, on May 2, 1985, to Mr. Robinson. Under the summons, Darwin Construction Company (“Darwin”) was requested to produce (1) twenty-five specified categories of corporate business records and (2) all corporate business records for the period 1980 to 1983. The summons was issued in connection with an investigation of Mr. Robinson’s civil and criminal tax liabilities. In response to the summons, Mr. Robinson asserted his fifth amendment privilege and refused to produce the records. 	<ul style="list-style-type: none"> ▪ <i>U.S. v. Darwin Construction Co.</i>, 873 F.2d 750 (4th Cir. 1989) 	

Step 7 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 7: Review Responses to the IRC 6038A Summons.

Substantial compliance with an IRC 6038A Summons is a matter of facts and circumstances.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none">▪ Reasonable efforts are required for substantial compliance (cont'd)▪ On January 6, 1986, the Service petitioned a federal district court for enforcement of the summons.▪ On May 6, 1986, Darwin produced documents in only two of the twenty-five categories and requested an amendment of the order to comply with the summons. The request alleged that Darwin's Comptroller could produce only a limited number of documents without Mr. Robinson's assistance. During a second hearing on June 10, 1986, the court explored Darwin's reasons for producing only some of the documents summonsed. The court found that Darwin's showing of an inability to comply with the summons was inadequate and ordered Darwin to produce the records by June 20th.		

Step 7 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 7: Review Responses to the IRC 6038A Summons.

Substantial compliance with an IRC 6038A Summons is a matter of facts and circumstances.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Reasonable efforts are required for substantial compliance (cont'd) ▪ In a third hearing on June 23, 1986, the court held that the summonsed records existed and that Darwin had not adequately explained why it had not produced the records. The court held Darwin in civil contempt and ordered Darwin to produce the records or be fined \$5,000 per day. In making its decision, the district court noted that earlier decisions provided the appropriate rule regarding substantial compliance: <ul style="list-style-type: none"> - “all reasonable efforts are required for substantial compliance” (<i>U.S. v. Hayes</i>, <i>U.S. v. Rizzo</i> and <i>U.S. v. Ryan</i>) - “If a violating party has taken ‘all reasonable steps’ to comply with the court order, technical or inadvertent violation of 	<ul style="list-style-type: none"> ▪ <i>U.S. v. Hayes</i>, 722 F.2d 723 (11th Cir. 1984) ▪ <i>U.S. v. Rizzo</i>, 539 F.2d 458 (5th Cir. 1976) ▪ <i>U.S. v. Ryan</i>, 402 U.S. 530 (1971) ▪ <i>General Signal Corp. v. Donallco</i>, 787 F.2d 1376 (9th Cir. 1986) 	

Step 7 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 7: Review Responses to the IRC 6038A Summons.

Substantial compliance with an IRC 6038A Summons is a matter of facts and circumstances.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Reasonable efforts are required for substantial compliance (cont'd) the order will not support a finding of contempt.” (<i>General Signal Corp. v. Donallco</i>) – “no contempt where defendants ‘acted diligently and with steadfast purpose to comply’” (<i>Halderman v. Pennhurst State</i>) ▪ Darwin’s Comptroller delivered the remaining summonsed documents to the Service on June 24 and June 30, 1986. Subsequently, Darwin and Mr. Robinson appealed the district court decision to the Fourth Circuit Court. ▪ Affirming the district court’s analysis, the Fourth Circuit ruled that Darwin did not substantially comply with the summons for the six day period 	<ul style="list-style-type: none"> ▪ <i>Halderman v. Pennhurst State</i>, 526 F. Supp. 414 (E.D. Pa. 1981) ▪ <i>Halderman v. Pennhurst State</i>, 533 F. Supp. 631 (E.D. Pa. 1981) ▪ <i>Halderman v. Pennhurst State</i>, 673 F.2d 628 (3rd Cir. 1982) 	

Step 7 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 7: Review Responses to the IRC 6038A Summons.

Substantial compliance with an IRC 6038A Summons is a matter of facts and circumstances.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Reasonable efforts are required for substantial compliance (cont'd) June 24 to June 30, 1986. The circuit court noted that “the documents were found is proof that the documents were locatable with some effort.” Darwin was required to make that effort. “The fact that only a few items were missing from the June 24 production does not excuse their absence when Darwin had extensive opportunity to ensure complete production and notice that it would be required.” 		
 CONSULTATION: After analyzing the IRC 6038A Summons responses for substantial compliance, consider discussing your findings with Counsel and the Information Gathering PN.		

Step 7 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 7: Review Responses to the IRC 6038A Summons.

Substantial compliance with an IRC 6038A Summons is a matter of facts and circumstances.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Notice of not substantially complying. If DRC does not substantially comply with an IRC 6038A Summons, send DRC notice, by certified or registered mail, that substantial compliance was not met. 	<ul style="list-style-type: none"> ▪ IRC 6038A(e)(2)(C) Rules where information not furnished. ▪ Treas. Reg. 1.6038A-6(a)(1)(ii) In general. 	
<ul style="list-style-type: none"> ▪ English translation requirement. Any records provided to the Service in response to an IRC 6038A Summons must be translated into English within thirty days of a request from the Service for such translation. ▪ When a taxpayer submits a foreign document in response to an IRC 6038A Summons, consider issuing an IDR for the English translation that specifies the date the English translation is due. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038A-3(b)(3) Translation of records. ▪ CCA 200950044 – IRC 7602 ▪ <i>Nissei Sangyo America, Ltd. v. U.S.</i>, 95-2 USTC P 50,327 (N.D. IL 1995) 	

Step 8

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 8: Consider Applying the Noncompliance Penalty.

When an IRC 6038A Summons is not substantially complied with, the Service has sole discretion to determine the amount of DRC's deductions related to, and the cost of property purchased from (or transferred to), a FRP. The noncompliance penalty can be overridden only by clear and convincing evidence that the Service abused its discretion.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Congressional intent. Congress enacted IRC 6038A to help the Service enforce IRC 482 in light of the difficulties the Service had in obtaining information from foreign parents of US corporations. The noncompliance penalty is among the principal enforcement mechanisms of the statute. 	<ul style="list-style-type: none"> ▪ HR Rep No 101-247 (for H.R. 3299) (1989) ▪ <i>ASAT, Inc. v. Commissioner</i>, 108 T.C. 147 (1997) ▪ FSA 200132003 – IRC 6038A 	
<ul style="list-style-type: none"> ▪ Noncompliance penalty. When a DRC fails to substantially and timely comply with an IRC 6038A Summons (or when the summons is quashed because records required to be maintained were not maintained), the Service has sole discretion to determine the amount of DRC's deductions related to, and the cost of property purchased from (or transferred to), that FRP. The adjustment may be based on the information the Service has available or from information the Service chooses to obtain through testimony or otherwise. 	<ul style="list-style-type: none"> ▪ IRC 6038A(e)(3) Applicable rules in case of noncompliance. ▪ Treas. Reg. 1.6038A-7(a) Noncompliance. ▪ IRM 4.60.8.3.5.7 - IRC Section 6038A(e) Noncompliance Penalty 	

Step 8 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 8: Consider Applying the Noncompliance Penalty.

When an IRC 6038A Summons is not substantially complied with, the Service has sole discretion to determine the amount of DRC's deductions related to, and the cost of property purchased from (or transferred to), a FRP. The noncompliance penalty can be overridden only by clear and convincing evidence that the Service abused its discretion.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Noncompliance penalty (cont'd) ▪ In exercising its discretion, the Service shall consider the information provided by DRC and related parties unless, in the Service's discretion, such information is insufficient to prove relevant facts. Such discretion is subject only to limited judicial review. There is no reasonable cause exception to the noncompliance penalty. ▪ The Service is not required to begin proceedings to enforce an IRC 6038A Summons in court in order to impose the noncompliance penalty. 	<ul style="list-style-type: none"> ▪ IRM 4.60.8.3.5.13 -Application of the Non-Compliance Penalty ▪ IRM 4.60.8.3.5.9 - Failure to Comply with IRS Summons. 	
<ul style="list-style-type: none"> ▪ De minimis summons compliance failure. A DFO may waive the noncompliance penalty if the documents subject to an IRC 6038A Summons have insignificant value in determining the correct tax treatment of transactions. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038A-6(d) De minimis failure. 	

Step 8 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 8: Consider Applying the Noncompliance Penalty.

When an IRC 6038A Summons is not substantially complied with, the Service has sole discretion to determine the amount of DRC's deductions related to, and the cost of property purchased from (or transferred to), a FRP. The noncompliance penalty can be overridden only by clear and convincing evidence that the Service abused its discretion.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Separate application of noncompliance penalty. A noncompliance penalty, that applies because DRC did not substantially comply with an IRC 6038A Summons with respect to transactions with one FRP, does not apply with respect to DRC's transactions with another FRP. 	<ul style="list-style-type: none"> ▪ Treas. Reg. 1.6038A-7(c) Separate application. 	
 <p>CONSULTATION: Consider contacting a Technical Specialist in the Information Gathering PN and/or IRS Counsel when a potential noncompliance penalty exists. Regardless, ACC(I) must be informed of any potential non compliance penalty under IRC 6038A.</p>	<ul style="list-style-type: none"> ▪ IRM 4.60.8.3.5.7(3) - IRC Section 6038A(e) Noncompliance Penalty 	

Step 8 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 8: Consider Applying the Noncompliance Penalty.

When an IRC 6038A Summons is not substantially complied with, the Service has sole discretion to determine the amount of DRC's deductions related to, and the cost of property purchased from (or transferred to), a FRP. The noncompliance penalty can be overridden only by clear and convincing evidence that the Service abused its discretion.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Discussing with Appeals that an IRC 6038A Summons was not substantially complied with. If the DRC did not substantially comply with an IRC 6038A Summons and the case is closed to Appeals, consider explaining, in the Form 4665 ("T letter"), why DRC did not substantially comply with the IRC 6038A Summons. Also, note that the Service has sole discretion to determine the amount of DRC's deductions related to, and the cost of property purchased from (or transferred to), a FRP and that such discretion is subject only to limited judicial review. Further, add that there is no reasonable cause exception to the noncompliance penalty. Consider discussing these points during the pre-conference hearing. 	<ul style="list-style-type: none"> ▪ Form 4665 (Report Transmittal) 	

Step 8 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 8: Consider Applying the Noncompliance Penalty.

When an IRC 6038A Summons is not substantially complied with, the Service has sole discretion to determine the amount of DRC's deductions related to, and the cost of property purchased from (or transferred to), a FRP. The noncompliance penalty can be overridden only by clear and convincing evidence that the Service abused its discretion.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Challenges to the noncompliance penalty. The taxpayer will be precluded from using documents to challenge the noncompliance penalty unless the IRC 6038A Summons is determined to be invalid or is quashed by a district court. ▪ The noncompliance penalty cannot be overturned in court because the amount of deductions (or cost of property) as determined by the Service (a) simply differs from the actual costs incurred by DRC or (b) does not clearly reflect income. It is not a sufficient reason to redetermine the penalty just because the information to prove that the penalty is clearly erroneous is not within the Service's knowledge or possession. 	<ul style="list-style-type: none"> ▪ IRC 6038A(e)(2) Rules where information not furnished. ▪ IRC 6038A(e)(3) Applicable rules in cases of noncompliance. ▪ <i>ASAT, Inc. v. Commissioner</i>, 108 T.C. 147 (1997) 	

Step 8 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 8: Consider Applying the Noncompliance Penalty.

When an IRC 6038A Summons is not substantially complied with, the Service has sole discretion to determine the amount of DRC's deductions related to, and the cost of property purchased from (or transferred to), a FRP. The noncompliance penalty can be overridden only by clear and convincing evidence that the Service abused its discretion.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Challenges to the noncompliance penalty (cont'd) ▪ <u>The clear and convincing evidence standard.</u> The noncompliance penalty can be overridden only by clear and convincing evidence that the Service abused its discretion. That is, that the penalty was determined with an improper motive or was clearly erroneous in light of all reasonably credible interpretations or assumptions of facts. However, when DRC asserts an abuse of discretion, all allegations and inferences that support the penalty are accepted as true even though the Service could have obtained more reliable evidence. 	<ul style="list-style-type: none"> ▪ HR Conf Rep No 101-386 at 594 (1989) ▪ <i>ASAT, Inc. v. Commissioner</i>, 108 T.C. 147 (1997) 	

Step 8 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 8: Consider Applying the Noncompliance Penalty.

When an IRC 6038A Summons is not substantially complied with, the Service has sole discretion to determine the amount of DRC's deductions related to, and the cost of property purchased from (or transferred to), a FRP. The noncompliance penalty can be overridden only by clear and convincing evidence that the Service abused its discretion.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Challenges to the noncompliance penalty (cont'd) ▪ The same standard of proof (i.e., clear and convincing evidence that the Service abused its discretion, while accepting as true all allegations and inferences that may support the Secretary's position) applies to the Service's sole discretion to determine the weight to give a document or an item of information when determining the noncompliance penalty. ▪ In <i>ASAT, Inc. v. Commissioner</i>, the Service determined the noncompliance penalty based on information from (a) the audit of a similar taxpayer, (b) a trade association survey of companies providing similar services in a different industry, and (c) the report of a Service economist who was not called to testify. 		

Step 8 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Step 8: Consider Applying the Noncompliance Penalty.

When an IRC 6038A Summons is not substantially complied with, the Service has sole discretion to determine the amount of DRC's deductions related to, and the cost of property purchased from (or transferred to), a FRP. The noncompliance penalty can be overridden only by clear and convincing evidence that the Service abused its discretion.

Considerations	Resources	6103 Protected Resources
<ul style="list-style-type: none"> ▪ Challenges to the noncompliance penalty (cont'd) ▪ Agents should be familiar with the following legal terms to understand the requirements of proof: <ul style="list-style-type: none"> – <u>Clear and Convincing Evidence</u> - evidence showing that the assertion made is highly probable or reasonably certain. This is a greater burden of proof than preponderance of the evidence but less than beyond a reasonable doubt. – <u>Preponderance of evidence</u> - evidence that will incline an impartial mind to one side rather than the other so as to remove the cause from the realm of speculation. It does not relate merely to the quantity of evidence. Simply stated, evidence, which is more convincing than the evidence offered in opposition. 	<ul style="list-style-type: none"> ▪ IRM 25.1.1.2.1 - Definitions - General 	

Step 8 (cont'd)

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

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Considerations	Resources	6103 Protected Resources
<p>▪ Challenges to the noncompliance penalty (cont'd)</p> <ul style="list-style-type: none">- <u>Reasonable doubt</u> - a doubt that would cause a prudent person to hesitate before acting in matters of importance to themselves. Such a doubt will leave a juror's mind uncertain after examination of the evidence.- <u>Inference</u> - a logical conclusion from given facts.		

Examples of the Process

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Description

- **Example 1:** A U.S. corporation (authorized as agent for a 25% foreign shareholder under IRC 6038A) does not provide documents under the custody and control of such 25% foreign shareholder regarding any transaction between such U.S. corporation and such 25% foreign shareholder.
- **Example 2:** A U.S. corporation (authorized as agent for a foreign related party under IRC 6038A) does not provide documents under the custody and control of such foreign related party regarding any transaction between such U.S. corporation and such foreign related party.
- **Example 3:** A U.S. corporation (authorized as agent for multiple foreign related parties under IRC 6038A) does not provide documents under the custody and control of one such foreign related party regarding any transaction between such U.S. corporation and any of such foreign related parties.
- **Example 4:** A U.S. corporation with a transaction described in Example 1, 2, or 3 above when such transaction engaged in by a partnership is attributed to such U.S. corporation under Treas. Reg. 1.6038A-1(e)(2), which concerns the attribution of transactions with related parties engaged in by a partnership.
- **Example 5:** A U.S. corporation described in Example 1, 2, 3, or 4 above and the U.S. corporation does not provide documents (e.g., key information relating to a function and risk analysis, and potential comparables) under the custody and control of a foreign affiliate regarding a transfer pricing transaction.
- **Example 6:** A U.S. corporation described in Example 1, 2, 3, or 4 above regarding the deductibility of payments from such U.S. corporation to its foreign parent when such U.S. corporation does not provide foreign-based finance documents needed to properly characterize a prior investment or guarantee from the foreign parent to the U.S. subsidiary.

Training and Additional Resources

Using an IRC 6038A Summons when a U.S. Corporation is 25% Foreign Owned

Type of Resource	Description(s) and/or Instructions for Accessing	References
Reference materials	<ul style="list-style-type: none"> ▪ IRC 6038A discussions of agency appointment and summons compliance for 25% foreign-owned corporations in <i>Federal Taxation of Income, Estates and Gifts</i> Part 9 Foreign Income and Foreign Taxpayers: <ul style="list-style-type: none"> – Chapter 65 Introduction and Classification of Individuals and Entities: <ul style="list-style-type: none"> ▪ Para 65.5.3 Foreign-Owned Domestic Corporations and Businesses 	<ul style="list-style-type: none"> ▪ <i>Bittker & Lokken Fed. Tax'n Inc, Est and Gift</i> Para 65.5.3
Reference materials	<ul style="list-style-type: none"> ▪ Discussion of IRS summons in BNA's Tax Management U.S. Income Portfolio No. 633-1st: <ul style="list-style-type: none"> – I – IRS Summons Power and the <i>Powell</i> Test. – II – Limitations on the Summons Power – VI – Special Aspects of Foreign Records 	<ul style="list-style-type: none"> ▪ <i>BNA Tax Management U.S. Income Portfolio</i> No. 633-1st Sec. I ▪ <i>BNA Tax Management U.S. Income Portfolio</i> No. 633-1st Sec. II ▪ <i>BNA Tax Management U.S. Income Portfolio</i> No. 633-1st Sec. VI
Reference materials	<ul style="list-style-type: none"> ▪ Discussion of administrative summons in BNA's Tax Management Foreign Income Portfolio No. 949-1st: <ul style="list-style-type: none"> – XVIII – Administrative Matters. 	<ul style="list-style-type: none"> ▪ <i>BNA Tax Management Foreign Income Portfolio</i> No. 949-1st Sec. XVIII

Glossary of Terms and Acronyms

Term/Acronym	Definition
A of A	Authorization of Agent
ACC(I)	Associate Chief Counsel (International)
CCA	Chief Counsel Advice
DFO	Director of Field Operations
DRC	Domestic reporting corporation
EOI	Exchange of information
FRP	Foreign related party
FSA	Field Service Advice
IDR	Information document request
PN	Practice Network
IRC	Internal Revenue Code
IRM	Internal Revenue Manual
LB&I	Large Business & International
NOPA	Notice of Proposed Adjustment
SOL	Statute of limitations
TIEA	Tax information exchange agreement

Index of Related Issues

Issue	Associated UIL(s)	References
Using Alternative Means to Obtain Foreign Based Evidence	▪ 9460.02	▪ IGA/T/17_02_01-01
Issuing a Formal Document Request When a US Taxpayer is Unresponsive to an IDR	▪ 9460.02	▪ IGA/P/17_02_02-01
Using an Authorization of Agent when a US Corporation is 25% Foreign Owned	▪ 9560.06	▪ IGA/P/17_08_01-01
Field Procedures for Handling U.S. Initiated Specific Requests under EOI Agreements	▪ 9460.01-03	• EOI/P/20_2-03
Overview of Exchange of Information Programs	▪ 9455	• EOI/C/20_01-01
Types of EOI Exchanges	▪ 9455	• EOI/C/20_01-02