

Disclosure Litigation **BULLETIN**

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TBOR 2 DISCLOSURE PROVISIONS UPDATE

I.R.C. § 6103(e)(7), in conjunction with section 6103(e)(1)(B), permits the disclosure of return information relating to a joint return to either spouse. I.R.C. § 6103(e)(8) permits a spouse who filed a joint return in a prior year, and who is now divorced or separated, to obtain certain specified items of information concerning collection activity taken against the former spouse related to the joint return, *i.e.*, whether the Service has attempted to collect the deficiency from the other individual, the general nature of the collection activities, and the amount collected. See Disclosure Litigation Bulletin No. 96-3. Section 6103(e)(8) requires a request in writing by the taxpayer. Section 6103(e)(7) does not require a written request. In addition, a taxpayer's attorney can make a request under I.R.C. § 6103(e)(7). That is not the case under section 6103(e)(8), which requires that the taxpayer make the request. A number of questions have arisen involving the overlap and resulting tension between these provisions. To give effect to these respective provisions, while at the same time affording the taxpayer reasonable access to information relating to the joint return, the Internal Revenue Service generally is guided by the following:

If the taxpayer makes a section 6103(e)(8) request in writing, the Service is required to make a written response to the taxpayer providing the items of information described in the statute.

If the taxpayer requests information orally and makes reference to section 6103(e)(8), the Service can provide the information, either orally or in writing, as circumstances dictate, making clear that the taxpayer is receiving the information pursuant to section 6103(e)(7), in conjunction with section 6103(e)(1)(B).

If the taxpayer's attorney, who has a power of attorney on file with the Service, requests information, whether or not specifically referencing section 6103(e)(8), the information may be provided. It should be made clear that the attorney is receiving the information under section 6103(e)(7), in conjunction with section 6103(e)(1)(B).

I.R.C. § 6103(e)(9) ("Disclosure of Certain Information Where More Than One Person Liable for Penalty for Failure to Collect and Pay Over Tax"), a companion provision to I.R.C. § 6103(e)(8) that was enacted by the Taxpayer Bill of Rights II, permits a person against whom the trust fund recovery penalty has been assessed to obtain the names of other responsible persons against whom the penalty has been assessed, whether the Service has attempted to collect from other responsible persons, the general nature of the collection activities, and the amount collected. The provision requires a written request from the taxpayer, and the Service is required to respond in writing. In the trust fund recovery penalty situation, the only applicable disclosure authority for obtaining information about other responsible persons is section 6103(e)(9). An oral request, or a request made by the taxpayer's power of attorney, is not sufficient.

A Technical Correction in the current Restructuring legislation will permit taxpayers' attorneys to make requests under section 6103 (e)(8) and (e)(9).

INCLUSION OF RETURN INFORMATION IN EEO COMPLAINTS

When an IRS employee pursues an Equal Employment Opportunity (EEO) complaint, sometimes the manner in which the employee has handled particular taxpayer matters is relevant to his or her EEO claim. Generally, I.R.C. § 6103(a) prohibits Service employees from disclosing returns and return information except as expressly authorized by the Internal Revenue Code. However, in appropriate circumstances, there is authority for employees to access returns and return information to prepare for and use in EEO proceedings.

I.R.C. § 6103(1)(4)(A) authorizes disclosure of returns and return information "upon written request" to an employee or former employee (or his/her representative):

... who is or may be a party to any administrative action or proceeding affecting the personnel rights of such employee or former employee ... solely for use in the action or proceeding, but only to the extent that the Secretary determines that such returns or return information is or may be relevant and material to the action or proceeding;...

The EEO proceeding, including the complaint itself and the administrative steps preceding the complaint, is covered by this provision because it is an administrative proceeding affecting personnel rights. The provision authorizes access by the complaining employee and the employee's representative to certain returns and return information from cases worked by the employee in order to prepare for the proceeding, and use of such returns and return information by the employee and the employee's representative in the proceeding.

It is important that all employees, including managers, be aware that third-party returns and return information may be accessed by or disclosed to an EEO complainant for use in developing the complaint

only after the requisite procedures under section 6103(1)(4)(A) have been followed. See also IRM 1272, Disclosure of Official Information Handbook, text (20)60 et. seq; NTEU v. FLRA, 791 F.2d 183 (D.C. Cir. 1986) (disciplinary action against employee for unauthorized disclosure of return information in a personnel action held an unfair labor practice where management found to misinform employee that disclosure was properly authorized).

The employee must make a written request to an authorized official, and then that official must make a "relevant and material" determination. The delegated authority to determine that returns and return information are (or could be) "relevant and material" to the personnel case, so that the employee or representative may access and use the information in that case, is set forth in Delegation Order No. 156 (rev. 14), IRM 1229, Handbook of Delegation Orders, ¶ 1(d).

PROCEDURES FOR I.R.C. § 6103(i)(3) REFERRALS

I.R.C. § 6103(i)(3)(A) permits the Service to disclose in writing tax information which may constitute evidence of a violation of a nontax federal criminal law to the head of the agency responsible for enforcing that law. Under this provision, generally, only tax information that has not come from the taxpayer or the taxpayer's representative may be disclosed. In addition, only the information necessary to apprise the head of the agency of the potential violation can be disclosed.

Under procedures that had been in place for many years, I.R.C. § 6103(i)(3) nontax "referrals" were reviewed and approved in the National Office by the Office of Governmental Liaison and Disclosure. Those procedures have recently changed. As authorized by Delegation Order 156, rev. 14, ¶ 1(f), IRM 1229, Handbook of Delegation Orders, I.R.C. § 6103(i)(3) referrals may be transmitted to the appropriate agency by the district or service center director or assistant director. Recommendations regarding such referrals are made by the disclosure officers.

CASE DEVELOPMENTS

Maxwell v. Rubin, Civ. No. 97-2768 (D.D.C. April 23, 1998)

Section 7852(e) of the Internal Revenue Code provides that the Privacy Act:

shall not be applied, directly or indirectly, to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person for any tax, penalty, interest, fine, forfeiture, or other imposition or offense to which the provisions of this title [26] apply.

Subsection (g) of the Privacy Act provides for civil actions by individuals when an agency violates any of the various provisions of the Act. In Maxwell, the first of over 70 virtually identical cases, the District Court for the District of Columbia recently held that

I.R.C. § 7852(e) divests the district courts of jurisdiction over civil litigation under the Privacy Act with respect to access requests for records used to determine the existence or possible existence (or the amount thereof) of liability under title 26. Notice of appeal has been filed with respect to 41 cases. The D.C. Circuit has consolidated these cases sub nom. Lake v. Rubin, appeal docketed, No. 98-5009 (D.C. Cir. Jan.7, 1998).

Although the issue is new to the D.C. Circuit, the Ninth Circuit and its district courts have addressed the interplay of I.R.C. § 7852(e) and subsection (g) of the Privacy Act. The First and Seventh Circuits, and several district courts have also addressed the issue. With one exception, Becker v. IRS, 34 F.3d 398 (7th Cir. 1994), the courts have entered dismissals for lack of jurisdiction.

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Your suggestions for topics to be included in future Bulletins are invited.