

G. SUMMONS AND ENFORCEMENT

by
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1. Preface

The Internal Revenue Service is responsible for determining and collecting the internal revenue tax, and ensuring that taxpayers comply with the internal revenue laws. Congress has given the Service broad authority to obtain and examine all information necessary to perform these functions effectively. This authority is found in Internal Revenue Code (IRC) sections 7601 to 7612.

An internal revenue agent or other authorized examiner involved in a tax investigation can obtain, by force if necessary, any information that may be relevant to the investigation. "Authorized examiner" includes Exempt Organization specialists involved in examination or determination cases. The examiner may issue an administrative summons to taxpayers or other persons. An administrative summons directs the person summoned to appear before the examiner and testify or produce information.

If the summoinee fails to appear or disobeys the summons, the examiner may seek to enforce the summons in federal district court. If the court agrees that the summons should be enforced, it will order the summoinee to comply. If the summoinee disobeys the court's order, the court can hold the summoinee in contempt.

This article explores the power to summon, its limitations, summons enforcement, and the procedures involved in issuing a summons. Part two discusses the why, what, and who relating to summonses. The third part illustrates that the summons is a broad, information-gathering tool. It describes who may be summoned, and lists various types of summonses. Part four details the limitations of the Service's power to summon. This section explains each limitation and the rationale for it. The fifth part provides a brief look at summons enforcement and what the Service must prove in court to get a summons enforced. Part six details the special procedures governing church inquiries and examinations. Part seven explains the procedures the examiner must follow to issue a summons. Part eight provides a general description of what occurs at the examination. Finally, the Appendix contains copies of relevant orders and forms.

Summons procedures are set forth in IRM 7(10)22.2(1). It directs EO specialists to follow the instructions in IRM 4022, except where specifically instructed otherwise. Two significant areas where IRM 7(10)22.2(1) takes precedence over IRM 4022 involve churches and political organizations.

Throughout this article, the following terms are used: "Examiner" denotes any Service employee authorized to issue a summons; "taxpayer" denotes the person being investigated, usually the exempt organization; a "third party" is anyone other than the person being investigated; and, a "summonee" is the person receiving the summons. The summoinee can either be the taxpayer or a third party.

2. Introduction

A. Why Issue a Summons

Exempt organizations will usually cooperate with Service examinations because they want to resolve matters. Voluntary compliance is preferred and the examiner should make every effort to obtain the voluntary surrender of desired information, such as making a written request to the party that possesses it. The request should be sufficiently detailed to articulate clearly the nature and scope of the information or documents sought.

Before issuing a summons, the examiner should explore all other means of obtaining the information. He or she should examine any returns filed, seek information from third parties or public sources, or meet with the persons refusing to comply to discuss their concerns and reasons for not complying. The examiner should also document all steps taken to obtain the necessary information.

A summons should only be issued when: (1) the information required is vital to the investigation; (2) the taxpayer or third-party summoinee is unreasonably refusing to cooperate; and (3) the information cannot be easily obtained from other sources.

A summons may convince an otherwise reluctant person to surrender the requested records. For example, a former employee, upon leaving an exempt organization, may have signed an agreement not to discuss the former employer unless required by law. This person will probably be unwilling to testify unless a summons is issued. Further, third parties such as banks, insurance companies, or accounting firms, may insist on the receipt of a summons before turning over client records.

B. What May Be Summoned

The examiner can use a summons to compel testimony and/or the production of relevant books, papers, records, or other data. The information, however, must already be in existence. A summons may not require the creation of documents. (See discussion later in this article under the subheading "The Fifth Amendment.")

Original documents, not just copies, may be summoned. Also, a summons may request more than written materials. Examiners may summon computer tapes, video cassettes, handwriting exemplars, and any other type of information. See United States v. Campbell, 524 F.2d 604 (8th Cir. 1975). Where the information is stored on tapes or in a computer format, it may be necessary to summon information about the tape or computer system sufficient to access the information. Service computer specialists can help in crafting such summons requests.

C. Who May Be Summoned

IRC 7602 permits a summons to be issued to: (1) a person liable for tax, (2) an officer or employee of such person, (3) a person with possession, custody, or care of the business books of a person liable for tax, or (4) any other person that the examiner deems necessary.

If the examiner needs to obtain the books and records of an exempt organization, he or she should serve a summons on an officer, director or managing agent of the organization. IRM 4022.7(5). Also, service may be made on any employee authorized to accept service of process for the organization. The examiner may issue a summons to other officers, trustees, or employees of the organization to inquire about the kinds of records that are available.

A summons may be issued to a political organization for the purpose of determining exempt status or tax liability. The EP/EO key district director must authorize such a summons before it is issued. IRM 7(10)22.2(2) provides that a political organization includes: (1) a political party; (2) a national, state or local committee of a political party; and (3) a campaign committee or other organization that accepts contributions or make expenditures to influence the selection of any candidate for public office.

IRC 7609(i) imposes certain duties on a summoinee receiving a summons. The summoinee must assemble the requested records and be prepared to produce them on

the day set by the summons. He also must safeguard the records so that they will be available for examination. See In Re D. I. Operating Co., 240 F. Supp. 672 (D. Nev. 1965), where a court held the taxpayer in civil contempt and imposed a fine for failing to preserve summoned records while contesting a summons.

3. Summons Power

IRC 7602 authorizes the Service to issue summonses. The Commissioner has delegated the power to summon to the district level. Revenue agents, tax law specialists, and tax auditors of the district office's Employee Plans and Exempt Organizations Division can issue summons and perform other related functions. See Delegation Order No. 4 (Rev. 21), which is included the Appendix as Exhibit A.

IRC 7602(a) authorizes the Service to use its summons power for the following purposes: (1) to determine if a return is correct; (2) to make a return where there is none; (3) to determine tax liability; (4) to collect taxes; and (5) to inquire into any offense connected with the administration or enforcement of the internal revenue laws. Thus, an examiner can summon any person with information helpful to a tax investigation and direct that person to testify or produce written evidence. United States v. Powell, 379 U.S. 48 (1964).

The Service's power to summon is not limited to the records within the taxpayer's control, but extends to any information that may be relevant to an investigation. In exempt organization matters, the summons may also be used in exemption application cases. The U.S. Claims Court held, in Church of Spiritual Technology v. United States, No. 581-88T, slip opinion at 21 n.34 (Cl. Ct., reissued June 29, 1992), that the Service was well within the law to summon a former officer of the Church while considering the Church's exemption application. The Service's information-gathering arsenal includes third-party, John Doe, and dual-purpose summonses.

A. Third-Party Summons

A third-party summons is a summons served on anyone who is not the person or entity under investigation. Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 315-16 (1985). The following examples illustrate third-party summonses: (1) An examiner, investigating the extent of a taxpayer's income, summons the taxpayer's attorney and requires him to surrender all information about his financial arrangement with the taxpayer; (2) the taxpayer's accountant receives a summons directing him to surrender the taxpayer's financial records in his possession; (3) a financial institution

receives a summons directing it to surrender records relating to the taxpayer; and (4) the Service serves a summons on a former officer of an exempt organization ordering him to provide information about his previous employer.

B. Third-Party Recordkeeper Summons

The special procedures contained in IRC 7609(a) and (b) apply anytime an examiner issues a third-party summons to a third-party recordkeeper. These procedures require the examiner to notify the taxpayers that a third-party recordkeeper summons has been issued and inform them of their right to intervene in any court proceeding brought to enforce the summons. These procedures apply only when the summoinee is a third-party recordkeeper.

A third-party recordkeeper is specifically defined in IRC 7609(a)(3) as: (1) any bank, savings institution, or credit union; (2) any consumer reporting agency; (3) a broker; (4) an attorney; (5) an accountant; (6) any barter exchange; and (7) any regulated investment company and its agents. Also included in this group are recordkeepers that extend credit by credit cards or similar devices, such as telephone companies and gambling casinos that extend credit or cashing privileges through credit cards. See United States v. New York Telephone Co., 644 F.2d 953 (2d Cir. 1981).

A third-party recordkeeper, because it is not the target of the tax investigation, generally does not have a sufficient interest in the summoned records to protect them from governmental intrusion. The third-party recordkeeper may voluntarily surrender the records, whether or not they are relevant to the investigation. Congress did not want the examiner going on a fishing expedition where the summoinee is compliant. Thus, Congress established the special notice procedures of IRC 7609 to prevent the examiner from trampling on the taxpayer's legitimate privacy rights.

IRM 4022.12(1), which implements IRC 7609, requires that a case manager, group manager, or higher supervisory official pre-authorize the issuance of either a third-party or a third-party recordkeeper summons. The authorizing official should indicate the pre-authorization by signing the face of the original and all copies of the summons. If the examiner receives oral authorization or the authorizing official cannot sign the summons, the examiner should write on the face of the original and all copies of the summons that authorization was received to issue it. This notation should include the title of the authorizing official and the date the authorization was received. Another way of noting this would be for the authorizing official to confirm

in a separate document that he or she pre-authorized the summons. This can be done after the summons is issued.

Pursuant to IRC 7609(a), the examiner must notify the taxpayer within three days of issuing a third-party recordkeeper summons, that a summons was issued. The notice must: (1) be in writing; (2) include an attested copy of the summons; and (3) inform the taxpayer of his or her statutory right to intervene in any court proceeding brought to enforce the summons. (See Part 7 of this article for a description of the form used to satisfy this notice requirement.) The examiner should ensure that the notice is handed to the taxpayer or sent to his (or the fiduciary's) last known address by certified or registered mail. If neither the taxpayer nor the fiduciary has a last known address, the notice should be left with the third-party recordkeeper.

If the Service seeks court enforcement of the summons, it will file suit against the recordkeeper. IRC 7609(b) gives the taxpayer the absolute right to intervene in any court proceeding brought by the Service to enforce a third-party recordkeeper summons. The taxpayer's right to intervene allows the taxpayer to come to court and protect his or her right to privacy.

It is not always necessary for the Service to go to court to obtain summoned information. The third-party recordkeeper may voluntarily surrender the summoned records to avoid the expense of litigation. In this situation, IRC 7609(b)(2) allows the taxpayer to initiate a court action to quash the summons. If the taxpayer is successful, enforcement is denied and the third-party recordkeeper does not surrender the records.

The taxpayer must file the petition to quash the summons with the court no later than twenty days after the examiner serves the taxpayer with notice of the summons. The taxpayer must then send, by registered or certified mail, a copy of the petition to the third-party recordkeeper and the Service. Although the government and the taxpayer are the principal participants in a proceeding to quash the summons, IRC 7609(b)(2)(C) gives the third-party recordkeeper the right to intervene in the proceeding to protect its interests.

a. Third-Party Recordkeeper's Duties

IRC 7609(i) imposes certain duties on a third-party recordkeeper receiving a summons. The recordkeeper must assemble the requested records and be prepared to produce them on the day set for examination. It must surrender the records if the Service provides it with a certificate indicating: (1) the taxpayer consents to an

examination of the records; or (2) the period for bringing an action to quash has expired and the taxpayer has not brought such an action. IRC 7609(i)(3) protects the recordkeeper who relies in good faith on the certificate or a court order from being sued by the taxpayer for damages resulting from the surrender of summoned documents.

If the third-party recordkeeper does not surrender the summoned records within six months after receiving a summons, IRC 7609(e) suspends the statutes of limitations for assessment and collection (IRC 6501) and criminal prosecution (IRC 6531). Neither a proceeding brought to enforce the summons nor a taxpayer's petition to quash will stop this suspension from taking effect. The suspension starts six months after service of the summons and terminates on final resolution of the matter. The suspension includes periods in which appeals are pending.

b. Notice Not Required

IRC 7609(a) and (b), the notice requirement and the right of intervention, do not apply if: (1) the summoee is not a third-party recordkeeper; (2) the summons directs a third-party summoee (including a third-party recordkeeper) to testify concerning matters unrelated to records; (3) the summoee is the taxpayer, an officer of the taxpayer, or the taxpayer's employee; or (4) a John Doe summons is issued (discussed later in this article).

The taxpayer does not have a right to intervene where the summoee is not a third-party recordkeeper. However, the taxpayer might be able to intervene if he or she: (1) has a proprietary interest in the records; (2) presents a valid constitutional issue; or (3) can claim a recognized privilege. Donaldson v. United States, 400 U.S. 517 (1971). For example, in United States v. Zolin, 905 F.2d 1344 (9th Cir. 1990), cert. denied, Church of Scientology v. United States, 111 S. Ct. 1309 (1991), the Ninth Circuit Court of Appeals denied an intervenor's (the Church of Scientology of California's) assertion that the attorney-client privilege protected records the U.S. had summoned from the clerk of another court in connection with an examination of the church.

C. John Doe Summons

A John Doe summons directs a third party to surrender information concerning taxpayers whose identities are currently unknown to the Service. See Tiffany Fine Arts, 469 U.S. at 313 n.4. A John Doe summons is used to obtain books and records relating to certain transactions involving unknown parties. The following examples

illustrate John Doe summonses: (1) A bank receives a summons directing it to disclose the identity of the individual who deposited old one-hundred dollar bills in an account; and (2) an examiner, attempting to identify contributors to a church involved in a "sham" tax-shelter scheme, issues a summons to a bank directing it to surrender all bank records relating to the church. 80 IRC 7609(f) contains special procedures that apply anytime the Service intends to issue a John Doe summons. The statute requires the Service to obtain, ex parte,¹ court approval prior to issuing a John Doe summons. The third-party summons recipient who is not a target of the tax investigation does not have sufficient interest in the matter to protect the privacy of the summoned documents. Unlike the case of the third-party recordkeeper summons, the examiner cannot notify the taxpayer that a John Doe summons has been issued because the taxpayer's identity is unknown. Congress decided to protect the interests of the affected taxpayer(s) by placing the courts between an overzealous examiner and the records sought. Before authorizing a John Doe summons, the court will ensure that the tax investigation has a legitimate purpose and the records sought may be relevant to that purpose.

To obtain court authorization to issue a John Doe summons, the Service must show: (1) the summons relates to an investigation of a particular person or ascertainable group; (2) a reasonable basis exists for believing such person or group may fail or may have failed to comply with the internal revenue laws; and (3) the information and the identity of the person or group sought is not readily available from other sources. IRC 7609(f). The Service does this by presenting to the court its petition requesting that the court authorize the summons and supporting affidavits. The court makes its determination based solely on these submissions. IRC 7609(h)(2). 80 IRC 7609(e) contains suspension provisions that apply not only to a third-party recordkeeper summons, but also to a John Doe summons. (See Part 3 for a discussion of this suspension.) IRC 7609(i)(4) provides that the summoinee must notify the taxpayer if the suspension is triggered. The summoinee's failure to notify the taxpayer, however, will not nullify the suspension.

D. Summons Issued for a Dual Purpose

A summons may be issued for a dual purpose, *i.e.*, to investigate both the summoinee and unknown taxpayers. A dual-purpose summons directs the summoinee to surrender information concerning both the summoinee and taxpayers whose

¹ "Ex parte" is a court proceeding initiated and attended by one party only, without notice to the person adversely affected.

identities are currently unknown to the Service. Tiffany Fine Arts, 469 U.S. at 310, provides an example of such a summons. There the Service issued several summonses to a taxpayer, a holding company,² and its tax-shelter promoting subsidiaries. The summonses ordered the holding company to surrender its own financial statements and the names and addresses of all persons who had acquired from the taxpayer licenses to distribute medical devices.

The John Doe procedures of IRC 7609(f) do not apply as long as all the summoned information is relevant to the investigation of the taxpayer-summonee. This is true even if the examiner's primary target is the unknown licensees. See 469 U.S. at 317 n.5. The IRC 7609(f) procedures are not necessary because the summoned party, a target of the investigation, is deemed to have sufficient interest in the summoned records to protect their privacy. This incentive to oppose the summons provides some assurance that the Service will not obtain irrelevant material. The Service must, however, comply with the John Doe procedures of IRC 7609(f) if the information sought is relevant only to the investigation of the unnamed taxpayers.

4. Limitations on the Service's Summons Power

The Service has broad "information-gathering" powers. Holifield v. United States, 909 F.2d 201, 205 (7th Cir. 1990). Its powers are analogous to those of a Grand Jury, which can "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." United States v. Powell, 379 U.S. 48, 57 (1964). Courts are reluctant to restrict these powers. For example, the Supreme Court held in United States v. Arthur Young & Co., 465 U.S. 805, 816 (1984), that except for traditional privileges and limitations, "other restrictions upon the [Service's] summons power should be avoided absent unambiguous directions from Congress."

Although expansive, the Service's summons power is not limitless. To get its summons enforced, the Service must show the court: (1) the investigation has a legitimate purpose; (2) the examiner only seeks information that may be relevant to

² A holding company is a company that confines its activities to owning stock in, and supervisory management of, other companies.

that purpose; (3) the information is not in the Service's possession; and (4) all required administrative steps have been followed. Powell, 379 U.S. at 57-58. The Service must also show that the case has not been referred to the Department of Justice. Zoe Christian Leadership, Inc. v. United States, 89-1 USTC (CCH) para. 9236 (C.D. Cal. 1988).

The Service's burden to prove these matters is "slight." An affidavit from the examiner attesting to these facts is sufficient. United States v. Samuels, Kramer and Co., 712 F.2d 1342, 1345 (9th Cir. 1983). IRM Exhibit 4020-1 is a sample copy of this affidavit.

After the Service has established these prerequisites to enforcement, the taxpayer can "challenge the summons on any appropriate grounds." Powell, 379 U.S. at 58. To quash the summons, the taxpayer must show: (1) there has already been an examination of his books and records; (2) the tax years under investigation have been closed by the statute of limitations; (3) enforcing the summons will violate the taxpayer's constitutional rights or common law privileges; or (4) the summons has been issued for an improper purpose. An "improper purpose" includes harassing the taxpayer, pressuring the taxpayer to settle a collateral dispute, or any other purpose reflecting negatively on the good faith of the particular investigation. Id.

A. Investigation Must Have a Proper Purpose

The tax investigation must have a legitimate purpose. As previously noted, IRC 7602 authorizes the issuance of a summons for five purposes only: (1) to determine if a return is correct; (2) to make a return where there is none; (3) to determine tax liability; (4) to collect taxes; and (5) to inquire into any offense connected with the administration or enforcement of the internal revenue laws.

The Service may not issue a summons for any other purpose unless specifically authorized by Congress. The Supreme Court noted, in United States v. LaSalle National Bank, 437 U.S. 298, 316 n.18 (1978), that the Service does not have the inherent authority to summon the private papers of citizens. It can only exercise the power that Congress has bestowed on it.

B. The "May Be Relevant" Standard

Pursuant to IRC 7602(a), an examiner may summon any information that may be relevant to the legitimate purpose of the investigation. The information does not have to be relevant in any "technical, evidentiary sense," rather it is "relevant" if it

"might throw light upon the correctness of the return." United States v. Harrington, 388 F.2d 520, 524 (2d Cir. 1968).³ Congress bestowed upon the Service broad investigatory powers because it realized that the examiner cannot be certain that the documents requested are relevant until he or she sees them. Arthur Young, 465 U.S. at 814. The examiner, however, must have "a realistic expectation rather than an idle hope that something may be discovered" in the summoned information. *Id.* at 813 n.11.

C. One Investigation Limit

The examiner, under IRC 7605(b), may inspect the taxpayer's books of account for each taxable year only once. The courts, however, are reluctant to deny the Service enforcement of its summons on the basis of IRC 7605(b). The courts have held that it is not a reexamination if the present examination has not been completed. See United States v. Held, 435 F.2d 1361 (6th Cir. 1970), cert. denied, 401 U.S. 1010 (1971). An examination is not completed until the District closes the case. See Rev. Proc. 85-13, 1985-1 C.B. 514.

Further, the one inspection limitation has several exceptions that virtually swallow the rule. First, a reexamination of the taxpayer's tax return does not constitute a second inspection. Curtis v. Commissioner, 84 T.C. 1349 (1985). Second, an inspection of a third-party's books and records also does not constitute a second inspection. *Id.* Third, if the taxpayer requests another inspection, the Service can reinspect his or her books and records. An example of this is when the taxpayer files an amended return for a year previously examined. Fourth, where a case is closed, the Service may reexamine the taxpayer's books and records if it sends the taxpayer a reopening letter. A reopening letter notifies the taxpayer that an additional inspection of the books and records is necessary. See IRM 4023.1. Revenue Procedure 85-13, 1985-1 C.B. 514, establishes certain procedures for issuing a reopening letter.

³ The Supreme Court appears to have tacitly adopted this standard, and even hints that it may allow a broader interpretation of "may be relevant." Arthur Young, 465 U.S. at 813 n.11. However, courts have continued to apply the "might shed light upon" relevance standard subsequent to the Arthur Young case. See La Mura v. United States, 765 F.2d 974, 981 (11th Cir. 1985); United States v. Darwin Construction Company, Inc., 632 F. Supp. 1426, 1429 (D. Md. 1986).

D. Statute of Limitations

An examiner cannot investigate tax years closed by the Statute of Limitations. However, a taxpayer's claim to this statutory bar is not absolute. It is ineffective where there is fraud. An examiner can audit years already closed by the statute on the mere suspicion of fraud, or just to make sure there is no fraud. Powell, 379 U.S. at 56 n.15 (and accompanying text). An examiner can also examine the books and records of closed years for information that may be relevant to an investigation of open years. See La Mura, 765 F.2d at 974.

E. Justice Department Referral

An examiner may not issue or seek to enforce a summons when a Justice Department referral is in effect. United States v. Abrahams, 905 F.2d 1276 (9th Cir. 1990). A Justice Department referral is in effect when: (1) the Service recommends a grand jury investigation or a criminal prosecution of the taxpayer; or (2) the Attorney General, Deputy Attorney General, or Assistant Attorney General makes a written request to the Service for the taxpayer's tax return or other return information relating to the taxpayer. See IRM 4022.3(2).

A referral ends when the Department of Justice notifies the Service, in writing, that: (1) it will not prosecute the taxpayer; (2) it will not authorize a grand jury investigation; (3) it will discontinue a grand jury investigation; or (4) there has been a final disposition in a criminal tax proceeding against the taxpayer. In the case of a referral initiated by the Attorney General, the referral ends when the Attorney General notifies the Service, in writing, that the taxpayer will not be prosecuted. IRM 4022.3(2).

The Service, pursuant to IRC 7602(b), can issue a summons for the sole purpose of uncovering evidence of a crime. The mere potential of criminal prosecution is insufficient to preclude enforcement of the summons. Donaldson v. United States, 400 U.S. 517 (1971). Referral to the Department of Justice for criminal proceedings is the bright-line, cut-off point.

F. Constitutional and Common Law Privileges

Two constitutional provisions, i.e., the fourth and fifth amendments, are frequently raised by the summoinee when appearing pursuant to a summons. The fourth amendment provides for "the right of the people to be secure in their houses, papers, and effects, against unreasonable search and seizure" It protects U.S.

citizens from unreasonable governmental intrusion into their private lives. The fifth amendment provides, "[n]o person...shall be compelled in any criminal case to be a witness against himself." It bars the government from forcing a person to help in his own criminal prosecution.

The extent of protection derived from these constitutional provisions varies with the type of summoinee. For example, the fourth amendment may protect the taxpayer from having to disclose personal records, but it may not be relied on by anyone else connected with the case. This article discusses how the privileges relate to various types of summoinees.

Likewise, two common law privileges, i.e., the attorney-client and the accountant-client, are frequently raised to prevent the surrender of information. Others may from time-to-time apply, such as the marital communication privilege. For purposes of this article, only the attorney-client and the accountant-client privileges will be discussed.

Constitutional and common law privileges apply only in very limited situations. If and when the summoinee declines to testify or produce documents based on a privilege, the examiner should continue with the request for records and/or testimony to establish a record of noncompliance with the summons. The record may be used in a subsequent court proceeding brought to enforce the summons. See IRM 4022.41.

a. The Fourth Amendment

The fourth amendment governs all searches and seizures by government agents. The privilege prevents the government from conducting unreasonable searches and seizures. It protects a person's right to privacy, that is the sanctity of one's home and other privacies of life.

(1) Taxpayer and Third-Parties

The fourth amendment privilege may apply to a summons that seeks documents in which the taxpayer has a reasonable expectation of privacy. A third-party summoinee may not depend on the privilege, only the taxpayer. **The taxpayer may assert the privilege only as to his or her private papers and effects.** Boyd v. United States, 116 U.S. 616 (1886).

The protection of the privilege is lost for what the taxpayer has knowingly shown to others. Katz v. United States, 389 U.S. 347, 351 (1967). The taxpayer takes the risk, in revealing his affairs to another, that the information may be conveyed by that person to the government. United States v. Miller, 425 U.S. 435, 443 (1976). This is true even if the taxpayer revealed the information in confidence and assumed that it would be used only for a limited purpose. Id. For example, original bank slips, deposit slips, and other transactional documents are not protected by the privilege because the taxpayer voluntarily discloses these instruments to banks and bank employees. Further, it does not apply to records that the law requires to be kept in the taxpayer's personal possession for inspection by or disclosure to the government. See California Bankers Assoc. v. Shultz, 416 U.S. 21 (1974).

Nor can the privilege be asserted for documents owned by the taxpayer that are in the possession of others. See Couch v. United States, 409 U.S. 322 (1973). For example, the taxpayer cannot assert the privilege regarding: (1) tax records left with his or her accountant, id.; (2) bank records, such as checks and deposit slips, relating to his or her account, Miller, 425 U.S. at 435; or (3) books or records left with his or her attorney, Abrahams, 905 F.2d at 1276 (see also Fisher v. United States, 425 U.S. 391, 401 n.6 (1976)). However, the taxpayer may claim the "attorney-client privilege" to protect oral or written statements he or she conveyed in confidence to an attorney.

(2) Artificial Entities

Corporations, partnerships, and unincorporated associations enjoy limited fourth amendment rights concerning documents in their possession. Hale v. Hinkel, 201 U.S. 43 (1906). These entities have public attributes and, therefore, do not enjoy the same right to privacy as individuals. See United States v. Morton Salt Co., 338 U.S. 632 (1950). Infrequently, an artificial entity has successfully asserted the privilege where the summons was too indefinite or overbroad in the items described, Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186 (1946), such as a summons that requires the surrender of a prodigious amount of documents. The examiner should, therefore, ensure that the scope of the summons is limited and the items requested are specifically described.

b. The Fifth Amendment

The fifth amendment prevents the government from forcing an individual to make self-incriminating statements. See Fisher v. United States, 425 U.S. 391, 409 (1976). The privilege applies only when a person's statements or acts: (1) constitute

testimony, (2) are forced from him, and (3) incriminate him. All three elements must be present for a valid claim of the privilege.

The fifth amendment privilege extends not only to criminal proceedings, but to civil proceedings as well. Allen v. Illinois, 478 U.S. 364, 368 (1986). This includes Service examinations and investigations. IRM 4022.41(1) provides that the examiner generally does not have to give Miranda warnings to the summonee because the type of information sought does not tend to develop the criminal potential of a case.

(1) Testimony

The examiner cannot force the summonee to make self-incriminating oral statements. This is true regardless of whether the person testifying is the taxpayer or a third-party summonee. However, the privilege is a personal one and cannot be claimed for someone else. The examiner can compel a summonee to incriminate others.

The summonee cannot make a "blanket" assertion of the privilege and, thereby, refuse to answer all questions asked. The privilege can be claimed only on a question-by-question basis. Therefore, the summonee must hear each question and decline to answer only the self-incriminating ones. United States v. Schmidt, 816 F.2d 1477, 1481-82 (10th Cir. 1987). At the conclusion of the examination, the examiner should make a memorandum for the file noting each question to which the privilege was claimed. Later, the Service may use this memorandum in court during a summons enforcement proceeding.

(2) Books and Records

(A) The Taxpayer

The fifth amendment privilege extends to the taxpayer's personal papers. However, the taxpayer has to be the owner of the papers and also have them in his or her possession in order to assert the privilege. Ownership is required because the privilege protects only personal papers. Possession is required because if the documents are surrendered by a third party the taxpayer is not making the incriminating statements. Someone else is incriminating the taxpayer.

The examiner can order the taxpayer to surrender **voluntarily** prepared personal papers, even if their contents are highly incriminating. United States v. Doe, 465 U.S. 605, 610 (1984). Documents prepared by the taxpayer before the summons

is issued are deemed to be prepared voluntarily. Voluntarily prepared documents lack the element of force or coercion required for a valid claim of the privilege.

The fifth amendment privilege protects the taxpayer's personal papers that are **not voluntarily prepared**, *i.e.*, documents that are required by law. Governmental force is involved in the making of these documents. The taxpayer, however, cannot entirely fail to surrender summoned information. The taxpayer must assert the privilege item-by-item. Schmidt, 816 F.2d at 1481-82.

(B) Third-Party Summonees

If a third-party summonee possesses the taxpayer's documents or documents relating to the taxpayer, he or she must surrender them. See Couch, 409 U.S. at 322. The privilege is inapplicable unless the summoned documents also incriminate the summonee. In Couch, the Supreme Court held that a taxpayer could not assert the privilege to prevent her accountant from surrendering tax records that she had left with the accountant. A key factor in the Court's decision was that the summons was issued to the accountant. The taxpayer was not compelled to do anything.

Additionally, the privilege does not protect records produced by others, even if they were produced for the taxpayer's benefit and are in the taxpayer's possession. Webster v. United States, 86-2 USTC (CCH) para. 9540 (C.D. Ill. 1986). The producer, not the taxpayer, is making the statements. The taxpayer is not being made to do or say anything. (But see discussion titled "The Act of Production," *infra*.)

(C) Artificial Entities

Corporations and other "collective entities," such as partnerships and unincorporated associations, do not have a fifth amendment privilege against self-incrimination. Braswell v. United States, 487 U.S. 99 (1988); Bellis v. United States, 417 U.S. 85 (1974) (partnerships); United States v. White, 322 U.S. 694 (1944) (unincorporated associations). The reasons for the rule are: (1) the state created these entities and presumably reserved a right to investigate them; and (2) allowing these entities to claim the privilege would frustrate legitimate governmental actions designed to regulate them. A "collective entity" is an organization which is recognized as an independent entity apart from its individual members. Bellis, 417 U.S. at 92.

A records custodian cannot refuse to surrender corporate records, even if those records would incriminate him or her. The custodian holds the records in his or her

representative, not individual, capacity. The privilege is a personal one and, therefore, the custodian cannot claim the privilege on behalf of the corporation.

Except for sole proprietorships, the type and size of the entity are irrelevant. Braswell, 487 U.S. at 108. In Braswell, the Supreme Court held that a records custodian, who was also the corporation's sole shareholder, could not assert the privilege to prevent the production of corporate records. The Court also noted that whether the summons is addressed to the entity or to the custodian is unimportant.

A sole proprietor may resist a summons for proprietorship records. The sole proprietor acts in an individual, not a representative, capacity. See Doe, 465 U.S. at 610. To invoke the privilege, the proprietor must show that the act of surrendering the records would incriminate him or her.

(3) The Act of Production

"Although the contents of a document may not be privileged, the act of producing the document may be." Doe, 465 U.S. at 612. There are testimonial aspects to the act of surrendering documents. It is a tacit admission that: (1) the documents exist; (2) the summoinee possesses them; and (3) the documents surrendered are those described in the summons. Id. at 613. Therefore, the privilege may prevent the Service from making the summoinee surrender the documents.

Generally, a summons that demands production of documents does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought. Fisher, 425 U.S. at 409. In some situations, a potential bar resulting from the act of production can be surmounted. In Fisher, the examiner issued a summons to the taxpayer to surrender accounting papers in the taxpayer's possession. The taxpayer claimed that surrendering the documents would not only authenticate them, but would also admit that they exist and are in his possession. The Supreme Court held that the privilege did not apply. The Service had other evidence in its possession clearly indicating that the documents exist and that he possessed them. The taxpayer was not an accountant and, therefore, was not qualified to authenticate the accounting papers. Id. at 411-13.

A records custodian cannot claim the privilege based on the act of production because he or she is deemed to act as a representative of the entity. Any tacit admission created by the surrendering of documents is deemed to be the entity's admission. Braswell, 487 U.S. at 99. The custodian is protected by judicial "immunity." Thus, the government is barred from using the act as the custodian's

admission. The government may, however, use the summoned documents and the corporation's act of producing the documents against the custodian. Id. at 118.

c. The Attorney-Client Privilege

The attorney-client privilege prevents the disclosure of information a person confidentially communicates to an attorney in order to seek legal advice. See Abrahams, 905 F.2d at 1283. Its purpose is "to protect every person's right to confide in counsel free from apprehension of disclosure of confidential communications." In Re Osterhoudt, 722 F.2d 591, 593 (9th Cir. 1983). The attorney-client privilege applies to a Service summons. See Upjohn Company v. United States, 449 U.S. 383 (1981).

The privilege arises only where an attorney is summoned to provide information concerning a client. Not every communication a client makes to an attorney is privileged. The communication has to be made: (1) to an attorney in his or her role as an attorney; (2) under circumstances that indicate that the client did not intend the communication to be communicated to others; and (3) to seek legal advice.

The privilege extends only to the substance of matters communicated in professional confidence to an attorney. Matters communicated in professional confidence are those that are: (1) intended to be kept secret; and (2) relate directly to the legal advice sought. Matters such as the identity of an attorney's client, fee arrangement, and type of work done by the attorney for the client are generally peripheral to the substantive, professional communications. Peripheral matters are not protected. United States v. Long, 328 F. Supp. 233 (E.D. Mo. 1971).

(1) Taxpayer or Third-Party Produced Documents

The privilege applies to both oral communications and to documents given by the taxpayer to the attorney. It extends only to documents the taxpayer would not have to surrender if they were still in the taxpayer's possession. Generally, documents prepared before the attorney enters a case are not protected. The privilege does not protect documents prepared by a third party who is not an attorney. But, the privilege does protect documents prepared by a third party employed by the attorney for the express purpose of assisting the attorney in the legal representation of the client.

(2) Documents Produced by the Attorney

In Upjohn Co., 449 U.S. at 383, the Supreme Court held that the "Attorney Work-Product" doctrine is applicable to tax examinations. Therefore, documents prepared by an attorney that contain the attorney's thoughts on how to best represent the client are privileged. Documents prepared by the attorney for disclosure to third parties, however, are not privileged because they are not intended to be confidential, e.g., tax returns, SEC filings, and applications for tax exemption. Further, the privilege does not apply where the attorney is merely preparing the client's tax return and not offering legal advice. Oleander v. United States, 210 F.2d 795, 806 (9th Cir. 1954).

The attorney can only assert the privilege question-by-question, document-by-document. Holifield v. United States, 909 F.2d 201, 203-05 (7th Cir. 1990). Notwithstanding an assertion of the privilege, the examiner should continue with the examination to establish a record of noncompliance with the summons. **The examiner should not attempt to overcome an attorney's claim of the privilege.**

(3) Corporations

Communications between corporate employees and corporate counsel may be protected by the attorney-client privilege. In Upjohn, the in-house counsel sent questionnaires to all corporate employees in an attempt to find out the nature of certain business payments made overseas. The employees answered the questionnaires and returned them to the counsel. The Service sought to obtain the information conveyed in these questionnaires by serving the counsel with a summons. The Supreme Court held that the attorney-client privilege applied. The privilege is not limited to communications between the corporation's controlling group (the ones in power) and counsel. It also extends to communications of corporate employees to counsel if: (1) the communications are made for the purpose of securing legal advice; (2) the employees making the communications do so at the direction of their corporate superiors; (3) the information is not available to upper-echelon management; (4) the communications concern matters within the scope of the employee's corporate duties; (5) the employees are aware, when making the communications, they are being questioned so that the corporation can obtain legal advice; and (6) the communications are made in confidence and kept confidential by the corporation.

d. Accountant-Client Privilege

The Service does not recognize an accountant-client privilege. See IRM 4024. The examiner may summon any material in an accountant's possession that was

prepared by the accountant for the taxpayer. Material that the taxpayer gives to the accountant may also be summoned.

The Supreme Court has held that an accountant's workpapers can be summoned. No confidential accountant-client privilege exists under federal law. Couch v. United States, 409 U.S. 322, 335 (1973). Nor is there any immunity for an accountant's work-product. In United States v. Arthur Young & Co, 465 U.S. 805 (1984), the Service issued a summons to an independent accounting firm directing it to surrender its "tax accrual" workpapers. Such workpapers often include opinions on questionable tax positions taken and weak spots on clients' tax returns. The Court held that federal law does not recognize an accountant-client privilege. The Court reasoned that independent accountants have a duty to the public and, therefore, their clients cannot reasonably believe that communications are confidential.

IRM 4024 contains special procedures that must be followed before an examiner may summon accountant workpapers. These procedures include: (1) taking all reasonable steps to secure the information from the taxpayer; (2) requesting documents only to the extent materials are relevant to the examination; (3) obtaining authorization from the chief, EP/EO Division, to request the workpapers; and (4) coordinating the proposed summons with district counsel.

5. Summons Enforcement

A. General Rule

IRC 7604(a) and (b) grant primary jurisdiction over Service summons enforcement to the United States district courts. The Service must seek enforcement in the court for the district in which the summoinee resides or is found. If the court determines that the summons should be enforced, it will order the summoinee to comply with the summons. The court has inherent power to hold the summoinee in contempt for refusing to obey its order. United States v. Asay, 614 F.2d 655, 659 (9th Cir. 1980).

The Service can bring an action against the summoinee under either IRC 7604(a) or (b). Enforcement under IRC 7604(a) is appropriate where the summoinee appears in response to the summons, and refuses, in good faith and on appropriate grounds, to testify or surrender documents. See United States v. Powell, 379 U.S. 48, 52 (1964). Enforcement under IRC 7604(b) constitutes a criminal contempt action. It authorizes the government to request the prehearing sanctions of attachment and arrest. Id. The Service rarely, if ever, brings an action under IRC 7604(b).

A summons enforcement proceeding is a limited hearing. The sole reason for such a proceeding is to ensure that the Service has issued the summons for proper investigatory purposes and not for some illegitimate purpose. United States v. Kis, 658 F.2d 526, 535 (7th Cir. 1981). To obtain enforcement of its summons, the Service must show the court that it met the requirements of Powell and IRC 7602(c). (See the discussion earlier in this article in Part 3.)

B. Churches

The requirements contained in IRC 7611 for issuing a church summons vary from the Powell requirements in one significant regard. Several courts have so far held that Powell's "may be relevant" standard has been replaced. The examiner may examine church records and activities only "to the extent necessary." United States v. Church of Scientology of Boston, Inc., 933 F.2d 1074, 1075 (1st Cir. 1991). See also United States v. Church of Scientology International, No. 90-3690 (C.D. Cal. Feb. 11, 1991)(order), where the court found that the Service had met the higher standard and ordered the church to produce almost all the summoned records.

The "to the extent necessary" standard is a more difficult one to meet. The examiner must be able to state, either by affidavit or in court, why an examination of the particular documents or activities is "necessary" to the investigation. Church of Scientology of Boston, 933 F.2d at 1075. Merely stating a conclusion that compliance with the summons is "necessary to determine" the church's tax liability is not sufficient. As the court stated at pages 1078-79:

The IRS must show that the material is "necessary" to the investigation, not necessary to prove liability. The statute focuses the court's attention on the needs of a competent investigator, not the needs of a prosecutor. It requires the IRS to explain why the particular documents it seeks will significantly help to further the purpose of the investigation.

6. Church Inquiries and Examinations

Churches enjoy protection under constitutional and statutory provisions that are not available to individuals or other entities. The first amendment provides for the separation of church and state. It prohibits the government from establishing religions and becoming excessively entangled in church affairs. The first amendment also protects the right of free association.

IRC 7611 establishes special procedures that protect churches from excessive Service investigations.⁴ IRC 7611(h) defines "church" as any organization claiming to be a church and any convention or association of churches. These procedures apply when the Service investigates a church's: (1) tax exempt status; (2) involvement in an unrelated trade or business; or (3) activities that may be taxable.

IRC 7611 divides church investigations into the inquiry and examination periods. The inquiry period always precedes the examination period. During the inquiry period, the examiner generally asks only informal questions concerning church finances or affairs. During the examination period, the examiner examines church records and activities.

A. Inquiry Period

a. Regional Commissioner's Approval Required

This period begins only when the appropriate regional commissioner (or higher official) reasonably believes, based on written facts and circumstances, that the church may: (1) not be tax exempt, (2) be carrying on an unrelated trade or business, or (3) be engaged in other taxable activities. Reg. 301.7611-1, Q & A-1. The regional commissioner must notify the church in writing that an inquiry is about to begin. The notice must be served on the church before the inquiry starts. Reg. 301.7611-1, Q & A-9.

b. The Inquiry Notice

The notice must include: (1) the reasons for the inquiry and the general subject matter of the inquiry; (2) a general explanation of the applicable administrative and constitutional provisions; and (3) a statement informing the church of its right to hold a conference before its records are examined. Reg. 301.7611-1, Q & A-9. The following facts of United States v. Church of Scientology Flag Service Organization, 90-1 USTC (CCH) para. 50,019 (M.D. Fla. 1989), illustrate proper notice:

The Service notified a church of an impending inquiry into the church's finances and affairs to determine whether it is tax exempt. The notice stated that the Service had information indicating the church was party to

⁴ For additional material on this subject, see the 1992 CPE topic entitled, "Update on Church Examinations Under IRC 7611."

various patent, trademark, and copyright agreements requiring it to operate in a manner inconsistent with its exempt status. The Service noted two possible grounds for disqualification: (1) it may be operating for a substantial nonexempt purpose, and (2) it may be operating for the personal inurement of private parties. The notice made reference to court cases that supported the Service's position.

c. Maximum Duration

The inquiry period can last no more than ninety days from the giving of the inquiry notice, unless a suspension is in effect. The Service must, by or before the ninetieth day, either: (1) terminate its investigation; or (2) notify the church of the Service's intent to examine the church's records. If the Service sends the church the latter notification, the day that notice is served starts the examination period.

d. Only One Examination Permitted

If the Service terminates its investigation, IRC 7611(f) prohibits the Service from examining the church's books and records for the next five years. The exceptions to this rule are: (1) the Service can investigate issues and years other than those already investigated; or (2) the Service can examine the church's books and records if, as a result of the first inquiry, the Service requests that the church make significant changes in its operations, including its accounting procedures. Also, the assistant commissioner for Employee Plans and Exempt Organizations can authorize further inquiries or examinations.

e. Routine Requests are Excluded from IRC 7611

Certain inquiries, called "routine requests," are not IRC 7611 inquiries. Questioning a church about its failure to file a tax or information return or its compliance with income or FICA tax withholding responsibilities does not invoke the special procedures of IRC 7611. Asking for information necessary to process filed returns, applications for exempt status, ruling requests, update registration for tax-free transactions (excise tax), or elections for exemption requests do not involve IRC 7611 procedures. Further, requesting information needed to update the Service's computer files or inquiring about the ownership or operation of a specific business, does not trigger the special church inquiry procedures.

B. Examination Period

A church tax examination is any examination of church records or activities pursuant to an investigation of the church's: (1) tax exempt status; (2) involvement in an unrelated trade or business; or (3) activities that may be taxable. Church records include private correspondence in the church's possession, and all corporate and financial records regularly kept by a church such as corporate minute books and lists of members or contributors.

a. The Examination Notice

The Service must give the church written notice, by certified or registered mail, of its intent to examine church records. This notice must include: (1) a copy of the inquiry notice previously given to the church; (2) a list of all church records and activities that will be examined; (3) a statement that the church has a right to a conference prior to the start of the examination; and (4) copies of all documents that the Service will use to prepare for the examination, if disclosure of those documents is required by the Freedom of Information Act (FOIA). A copy of the examination notice also must be sent to the regional counsel.

The examiner must send the examination notice to both the church and the regional counsel no earlier than fifteen days after issuance of the inquiry notice, and no later than fifteen days before the day set for the examination. The latter fifteen-day window gives the church sufficient time to request a conference. If the church does not make a timely conference request, the examination can begin without the conference.

b. The Conference

A conference must be held before beginning the examination if the church makes a timely request. The conference provides the church the opportunity to discuss the concerns leading to the examination and to explore ways of satisfying these concerns without the examination. Although a conference must be held if requested, the examiner does not have to reveal confidential informants or other information not required to be disclosed under FOIA standards. Moreover, in Church of Scientology Flag Service Organization, supra, the court dismissed certain arguments raised against summons enforcement based on a claim that the conference was not meaningful. The court stated that the Service does not have to make

concessions or even negotiate in good faith at the conference. The Code solely requires the Service to offer a conference, nothing more.

c. Maximum Duration

The examination period may last no more than two years from the giving of the examination notice, unless a suspension is in effect. The Service must make a final determination by or before the end of the two-year period.

C. Suspensions and Extensions

The applicable time limitations, i.e., ninety days for the inquiry period and two years for the examination period, may be extended where the Service is delayed by unanswered information requests or becomes involved in litigation concerning the church investigation.

a. Church's Failure To Answer

IRC 7611(c)(2)(B) provides that the church's failure to answer a reasonable request for church records will suspend the examination period. This suspension applies to information document requests (IDRs). It does not apply to a request for general information where no documents are sought or to a church's noncompliance with a summons. The suspension starts twenty days after the IDR is delivered to the church. It terminates when the church complies or six months pass from the date the request is delivered, whichever occurs first. The Service may, during this six-month suspense period, issue a summons and initiate a summons enforcement proceeding that will further suspend the two-year examination period.

If the church fails entirely to respond to an IDR, the examiner should notify the church that its failure triggered a suspension under IRC 7611(c)(2)(B). Similarly, if the church partially responds, the examiner should notify the church that the response is inadequate and that the Service views the examination period as suspended. A sample letter for this purpose is in the Appendix as Exhibit B. This letter should be modified to fit the circumstances of each case.

b. Church Sues the Service Regarding the Investigation

IRC 7611(c)(2)(A)(i) provides that a suspension will occur anytime the church sues the Service regarding the church inquiry or examination. This suspension is applicable to both the inquiry and examination periods. The suspension starts the day

the church files the action and continues until the suit is resolved, including periods during which appeals are pending.

The lawsuit must concern the church inquiry or examination. Examples of such suits are: (1) the church sues the examiner regarding her conduct during the church investigation; or (2) the church files a FOIA suit seeking documents relating to the church that the examiner obtained from third parties. The filing of a FOIA request does not result in a suspension.

c. Summons Enforcement Proceeding

IRC 7611(c)(2)(A)(ii) provides that a summons enforcement proceeding brought against the church will suspend the examination period. This suspension starts the day the Service files for court enforcement and continues until either the summons is quashed or the court orders the church to comply. The suspension includes periods during which appeals are pending.

d. Adverse Court Order

IRC 7611(c)(2)(A)(iii) provides for a suspension whenever a court order prevents the Service from enforcing a third-party recordkeeper summons. The court order may arise in a summons enforcement proceeding or a proceeding to quash the summons.

e. The Taxpayer Consents

IRC 7611(c)(2)(C) permit the taxpayer and the Service to extend either the inquiry or examination period by mutual consent. This consent must be in writing. IRM 7(10)71.82(1)(d) provides that the consent must be signed by the key district director or a delegate. There is a sample consent form included in the Appendix as Exhibit C.

The examiner should always include in any request for information or documents a statement specifying a return date of no more than twenty days. If the church requests additional time, the examiner should ask the church to agree to extend the applicable time periods. The examiner should send the church a consent form and have the church sign and return it. The examiner must use caution when extending the ninety-day inquiry period. An inadvertent agreement to extend this period may preclude the examiner from investigating certain tax years. The examination notice, which is not served on the church until the end of the inquiry

period, determines which tax years can be audited. In some situations, extending the inquiry period beyond the end of the organization's tax year will close a tax year that was previously open for audit.

Example. The Service intends to investigate a church's tax exempt status for tax years 1989 through 1991. IRC 7611(d)(2) limits the years available for audit to the three most recent years ending before the examination notice date. On December 30, 1992, the Service and the church agree to extend the inquiry period until February 1, 1993. On February 1, the Service sends the church an examination notice. The examiner is now precluded from examining the 1989 tax year.

Another reason for the examiner to use caution before accepting offers to extend the inquiry or examination period is that the period for assessment and collection of taxes may inadvertently close. The statute specifically states that the parties can consent to extend the inquiry and examination periods. The statute does not specifically provide for an extension of the three and six year audit periods of IRC 7611(d)(2). However, a consensual extension of IRC 7611(d)(2) would be consistent with the extension of like audit cycles in other parts of the Code (i.e., IRC 6501). If the examiner needs to extend the inquiry period, the examiner should consult with district counsel before seeking the church's consent to extend both the inquiry and the audit cycle periods.

D. Audit Statute of Limitation

Under IRC 7611(d)(2)(A), only the church's three most recent tax years ending before the examination notice date may be audited in an investigation of the church's tax exempt status. If, as a result of the audit, it is discovered that the church was not exempt for one or more of those three years, then the examiner may examine an additional three years. In this situation, the examiner can audit the six most recent tax years ending before the examination notice date.

Example. On September 30, 1992, the examiner audits the 1989 through 1991 church tax years. The examiner discovers the church was not exempt in 1990 and revokes the church's tax exemption. He or she can now expand the investigation and audit tax years 1986 through 1991.

If the purpose of the investigation is to see whether the church has an unrelated trade or business, IRC 7611(d)(2)(B) permits the examiner to audit the six most recent tax years ending before the examination notice date.

E. Substantial Compliance

Courts will only enforce a church summons if the examiner has substantially complied with the requirements of IRC 7611. The court will look to see if: (1) the regional commissioner approved the inquiry; (2) the Service sent two notices to the church, one marking the beginning of the inquiry period and the other marking the beginning of the examination period; (3) the church was offered a pre-examination conference; and (4) a conference was requested, and whether one was held. The court may also inquire whether the regional counsel determined in writing that there was substantial compliance with IRC 7611. The court, however, does not have jurisdiction to review the reasonableness of the regional commissioner's decision to examine the church.

F. Exclusive Remedy

The church cannot assert the Service's noncompliance as a defense in any proceeding. If the Service does not comply with the statute, IRC 7611(e)(2) limits the church's remedy to a stay of the summons. If the summons is stayed, the two-year examination period may continue to run.

G. Special Procedures Not Required

The special procedures of IRC 7611 do not apply where the Service issues a third-party summons to a church in an investigation of a non-church taxpayer. The court held, in Zoe Christian Leadership, Inc. v. United States, 89-1 USTC (CCH) para. 9236 (C.D. Cal. 1988), that the IRC 7611 procedures did not apply where the Service issued summonses to two banks directing the disclosure of all records relating to two churches' accounts. The court specifically found that the Service was not investigating the churches, rather it was investigating the potential tax liability of a corporation involved in a tax-shelter scheme. The court in Life Science Church v. United States, 86-1 USTC (CCH) para. 9277 (N.D. Ohio 1985), employed a similar analysis where the Service issued several summonses to two banks directing them to surrender all banking records relating to a certain church. The court enforced the summonses, finding that the Service was only investigating a husband and wife who were trustees and officers of the churches.

IRC 7611(i) provides that the special procedures are also inapplicable where the Service's purpose for issuing the summons is to: (1) investigate a willful attempt to defeat or evade any tax; (2) investigate a knowing failure to file a tax return; (3) assess an income tax under IRC 6851, IRC 6852 (termination assessments), or IRC 6861 (jeopardy assessments); or (4) investigate a crime.

7. Preparing and Serving the Summons

A. The Summons Form

Form 2039, the Service summons, is a five-page form consisting of: (1) the original summons; (2) the first copy of the summons to be served on the summoinee; (3) an instruction sheet to accompany the first copy; (4) a second copy to be served on the taxpayer as notice that a third-party recordkeeper summons has been issued; and (5) an instruction sheet to accompany the second copy containing directions for filing a petition to quash a third-party recordkeeper summons. A sample summons form is included in the Appendix as Exhibit D.

B. Preparing the Summons

Exhibit E of the Appendix contains a copy of the original summons (page 1 of Form 2039). Handwritten numbers have been inserted on the blank lines as an aid in completing the form.

Item 1 - In the matter of

Enter the name and address, including street number, city and state of the taxpayer under investigation, i.e., "ABC Church, Inc., 55 W. 15th Street, Newark, New Jersey."

Item 2 - Internal Revenue District

Enter the key District office where the taxpayer is located, i.e., "Baltimore."

Item 3 - Periods

Enter the tax years that are under investigation, i.e., "1987 through 1988."

Items 4 and 5

Enter the full name and address of the summoinee.

When summoning a specific corporate officer to appear on behalf of the corporation, the summons should be directed to the officer in his or her representative, rather than individual, capacity (e.g., trustee, president). Enter the name and official title of the individual summoinee followed by the name of the artificial entity, i.e., "Mrs. Jane Smith, as President of ABC Church, Inc., 55 W. 15th Street, Newark, New Jersey." The exact corporate name should be used.

Item 6 - Appear before

Enter the name of the examiner before whom the summoinee must appear. "Me" is appropriate, if applicable.

Item 7

Describe the documents to be summoned. Books and records sought must be described with reasonable certainty and particularity. Specify the period of time for which the records are sought. Examples of such descriptions are included in the Appendix as Exhibit F. Other examples of how to describe documents to be summoned can be found in IRM 4022.64.

Item 8 - Address

Enter the examiner's business address and telephone number.

Item 9 - Time and Place

Enter the place and time the summoinee must appear. IRC 7605(a) provides that the time and place for appearance must be reasonable. Except in the case of a third-party or a church summons, the date for appearance must not be less than ten full days from service of the summons. For the third-party summons, the date for appearance must not be less than twenty-three days from the day notice is given to the summoinee. A church summons requires at least fifteen days between the service of the summons and the day set for the examination of church records or activities.

Saturday, Sunday, or a legal holiday should not be the day set for the summoinee to appear. In calculating the above dates, the date of service should be excluded and the date for appearance included. Specify the street address and room number where the person is required to appear.

Item 10

Enter the date the summons is signed by the issuer.

Item 11

Enter the examiner's signature and title.

Item 12

Enter the signature of the official approving the summons and his title, if required.

C. Preparing the Certificate of Service and Notice

a. Certificate of Service

On the back of the original summons form is a section titled "Certificate of Service." A copy of the Certificate of Service is included in the Appendix as Exhibit G. The person who serves the summons must sign this certificate. A properly-signed certificate certifies that the summoinee has been properly served.

Item 1 - Date

Enter the date the summons was served. This is either the date the summoinee was personally served, or the date the summons was left at the summoinee's last and usual place of abode.

Item 2 - Time

Enter the exact time the summons was served.

Items 3 and 4 - How The Summons Was Served

Show the manner in which the summons was served by checking the appropriate block. Enter the location where the summons was personally delivered to the summoinee. If the summons was left with a person at the summoinee's "last and usual place of abode," enter the name and address of the person with whom it was left. If the summons was merely left at the summoinee's last and usual place of abode, enter the address and the location where the summons was placed. Strike the phrase "with the following person (if any)."

Item 5 - Signature

Enter the signature of the person serving the summons.

Item 6 - Title

Enter the server's title.

b. Certificate of Notice

Located on the back bottom-half of the original summons is the "Certificate of Notice." The Certificate of Notice must be completed when the summons is served on a third-party recordkeeper. The person who serves the notice must sign this certificate. If notice is not required, the appropriate square should be checked. See Appendix Exhibit G.

Item 7 - Date

Enter the date the notice was served.

Item 8 - Time

Enter the exact time the notice was served. Items 9 and 10 - Name and Address
Enter the full name of the noticee. If the notice was mailed, enter the noticee's address. Show the manner in which the notice was served by checking the appropriate block. If the notice is served on a person at the noticee's last and usual place of abode, the name of the person to whom it was handed will be entered in the appropriate block.

Item 11 - Signature and Title

Enter the signature and title of the person serving the notice.

Item 12 - Signature and Title

Upon request of the third-party recordkeeper, the issuer will sign the recordkeeper certificate and give the recordkeeper a photocopy of it.

D. Serving The Summons

The authority to serve a summons has been delegated to revenue agents, tax law specialists, and tax auditors of the district office's Employee Plans and Exempt Organizations Division by Delegation Order Number 4 (Rev. 21).

IRC 7603 mandates that an attested copy of the summons be served on the summoinee either by handing it to the summoinee (personal service) or leaving it at his or her "last and usual place of abode." Personal service is preferred. If the summons is left at the summoinee's home, it should be left with a responsible person over sixteen years old with appropriate instructions. If no one is at home, it can be left in the mailbox or other conspicuous place where the summoinee is likely to find it.

The summoinee can be personally served at his business address. However, if the summoinee is not there, do not leave the summons. The business office is not the equivalent of the "last and usual place of abode." United States v. Myslajek, 568 F.2d 55 (8th Cir. 1977), cert. denied, 438 U.S. 905 (1978).

a. Serving a Corporation

If the summons is being served on a specific corporate officer to appear on behalf of the corporation, it should be served on the officer either at the corporation or wherever he or she may be found. IRM 52(12)7.2(5). A summons that does not identify a specific recipient may be served on any officer or employee of the corporation who is authorized under either state law or the corporate bylaws to receive process.

The summons must be personally served on any one authorized by the corporation to accept service. It may not be left for the person, either at the corporate office or at the person's abode. A corporation cannot be served at the "last and usual place of abode." IRM 52(12)7.2(6).

b. Attestation

IRC 7603 requires that an attested copy of the summons be served on the summoinee. An "attested copy" of a document is one that has been examined and compared with the original, and the examiner has certified, in writing, that it is a true and accurate copy of the original. Black's Law Dictionary 66 (5th ed. 1979). The person serving the summons is responsible for examining and comparing the copies with the original summons to ensure that they are exact. That person then must write on the face of the served copy that it is a true and correct copy of the original summons.

The Eighth Circuit Court of Appeals has notified the Service that the summons must contain an attestation clause. Mimick v. United States, 952 F.2d 230 (8th Cir. 1991). The Service has agreed to comply. It will be added to a revised summons form. **Each copy of the summons served on a summoinee must contain the following statement:**

I hereby certify that I have examined and compared this copy of the summons with the original and that it is a true and correct copy of the original.

(Examiner's signature and title)

This statement must contain the examiner's original signature. The person serving the summons should make a photocopy of the served copy after the required signature and certification have been placed on it. The server should retain the photocopy with the original summons. If it is not possible to make a photocopy, the server should write on the back of the original summons, in the area designated for method of service, that the served copy contained the required certification.

8. The Examination

The person summoned must appear in person at the time and place specified in the summons. A representative cannot substitute for the summoinee. IRM 4022.65 allows the examiner to grant extensions of time for valid reasons, such as sickness.

If the summoinee does not speak English, the examiner must provide an interpreter. The examiner may record the interview, but must inform the taxpayer beforehand. In such situations, IRC 7521(a)(2) requires that the taxpayer, if he or she requests, receive a transcript of the interview. The taxpayer must pay for it. The summoinee also has a right to tape record the interview. The summoinee must provide the recording equipment and pay for the transcription.

The summoinee may give advance notice that he or she will not comply with the summons. In this situation, the examiner must not indicate in any way that it is okay not to comply. The summoinee must be informed that: (1) he must appear with the summoned records; (2) he can either comply or refuse to comply at the examination; (3) if he refuses to comply, he must state his reasons; and (4) regardless of whether he appears or not, a failure to comply may result in a summons enforcement proceeding. IRM 4022.41(6). The examiner should arrange for another Service employee to be present at the examination, especially if the examiner anticipates that the summoinee will claim a constitutional or common law privilege.

Prior to the interview, the examiner should inform the summoinee of his or her right to have an attorney present. IRM 4022.41(4). The examiner controls who may be present in the room during the interview. Any person who does not represent the summoinee may be excluded, e.g., the taxpayer and his attorney. The examiner should be aware that sometimes the summoinee may appear with the attorney for the corporation under investigation. If the attorney does not also represent the summoinee, the examiner may exclude the attorney.

Sometimes, the summoinee may refuse to continue with an interview, especially when the examiner tries to exclude someone accompanying the summoinee. The examiner must always remember that the goal is to complete the interview. It may be preferable to allow that person to stay just to get the summoned information. Terminating the interview is only an option of last resort. If that person impedes the interview, the examiner must make a memorandum of this fact.

If the summoinee's attorney is disruptive, the examiner should make all efforts to complete the interview. Again, the objective is to get as much information as possible. Sometimes, however, the disruption is significant and the examiner finds that he cannot continue the interview with the attorney present.

Another potential problem is that the examiner may find the summoinee's attorney also represents the taxpayer. This may create a problem of dual representation and seriously jeopardize the investigation. IRM 4022.41(4)-(5) and 4022.42 set out procedures that must be followed whenever there is a potential of dual representation.

As a general rule, the examiner should not exclude the summoinee's attorney from the examination. Excluding the summoinee's attorney is a very serious matter. The examiner should first consult with his group manager and district counsel.

Delegation Order Number 4 (Rev. 21) authorizes the examiner to put the summoinee under oath. If the summoinee is put under oath, the summoinee should stand and raise his or her right hand. The examiner should read the following oath:

Do you solemnly swear (affirm) under the penalties of perjury that the testimony you are about to give in this matter is true and correct to the best of your knowledge and belief so help you God?

As noted, the term "affirm" may be substituted. The phrase "so help you God" may be omitted. The witness should respond by saying "I do." IRM 4022.41(3).

If a summoinee claims a privilege against testifying or producing documents, the examiner must not state or imply that the information sought will not be used against the summoinee in a criminal proceeding. IRM 4022.41(2). The examiner should continue with the interview and ask all questions necessary to develop the required information. The examiner should make requests for each document desired. IRM 4022.41(7).

If the summoinee refuses to continue with the examination, the examiner should not attempt to physically make the summoinee continue or keep the summoinee there if he or she should choose to leave. In this situation, the examiner must prepare a memorandum describing in detail the facts and circumstances of the noncompliance.

9. Conclusion

Use of the summons power can be an effective tool in the exempt organizations area. But it requires sound judgment. Before issuing a summons, an Exempt Organizations specialist should consider whether the summoned person will readily comply and, if not, whether the Service is prepared to pursue court-ordered enforcement. District counsel may be a good source of guidance in these considerations.

[APPENDIX materials are not included in this document]