

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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CC:SB:7:SF:1

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(Procedure & Administration)

subject: Reliance upon I.R.C. § 7609(e)(2) for a third-party exam summons

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

LEGEND

Witness =

Taxpayers =

X Family Relationship =

Y Tax Year =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Date 5 =

Date 6 =

Date 7 =

Date 8 =

Date 9 =

ISSUES

Whether in this case the running of the statute of limitations for assessment under section 6501 was suspended, pursuant to section 7609(e)(2), when a summoned third-party failed to attend a scheduled summons interview to give testimony and the summoned third-party's failure to give the testimony continued beyond six months after service of the summons.

CONCLUSIONS

Yes. The third-party summons in this case was properly served and noticed more than six months ago. The third-party's move to a foreign country after the summons was served did not excuse the witness from complying with the summons. The failure of the witness to appear, the Service's prompt "last chance" letter to the witness, and the Government's petition to enforce the summons left no room for uncertainty by the witness that the Service did not believe the witness had fully complied with the summons. The close familial relationship between the summoned third-party witness and the taxpayers, plus the petition to enforce, further suggest that the taxpayers were aware of the failure of the witness to comply with the summons, even though the agent has not sent the witness and the taxpayers a Form Letter 4432, as described in IRM 25.5.6.6.3.4(3).

FACTS

The third-party witness is a U.S. citizen who currently resides in a foreign country. The taxpayers currently under examination are related to the third-party witness as X family relationship. The Service believes the taxpayers are "United States shareholders" of controlled foreign corporations, who have failed to report income for their Y tax year. See I.R.C. §§ 951 through 958. The Service believes that the third-party witness has information that would be useful in determining the taxpayers' income tax liabilities. The Service properly hand-delivered a copy of the summons to the third-party witness on Date 1 within the United States. The witness failed to attend the summons interview scheduled for Date 2 in the United States. The witness mailed a letter on Date 3 to the Service stating that he would not attend. In this letter, the witness said he did not have any information relevant to the Service's investigation of the tax liabilities of the taxpayers and that compliance with the summons would be overly burdensome. On Date 4, the Office of Chief Counsel sent the witness a "last chance" letter requesting his attendance at a meeting with the revenue agent on Date 5, but the witness also failed to appear on that date. On Date 6, the United States filed a Petition to Enforce Internal Revenue Service Summonses in the appropriate U.S. district court. On Date 7, the court entered an amended order to show cause as to why the witness should not be compelled to obey the summons.

The assessment statute expiration date ("ASED") for the taxpayers' Y tax year income tax return has not yet expired, in part due to the tolling of their ASED for a period of time after the taxpayers filed multiple petitions to quash other third-party summonses.

LAW AND ANALYSIS

Section 7609(e)(2) provides that if the third-party recipient of a summons fails to comply with the summons for six months after service, then the periods of limitations under I.R.C. §§ 6501 and 6531 are suspended, with respect to any person with respect to whose liability the summons was issued. The period of suspension begins six months after the summons was served and ends when the dispute is resolved. This suspension provision applies to third-party summonses that are subject to the notice requirements of section 7609(a) or to a John Doe summons under section 7690(f). See also Treas. Reg. § 301.7609-5(d). Final resolution of a summoned party's response to a third-party summons or any order enforcing any part of a third-party summons occurs when the Service determines that the summoned person has fully complied with that summons or any order enforcing any part of the summons and when all appeals are disposed of or the period in which an appeal may be taken or a request for further review may be made has expired. See I.R.C. § 7609(e)(2)(B); Treas. Reg. § 301.7609-5(e)(3); IRM 25.5.6.6.3.3.

Before deciding to rely upon an ASED suspension provision under section 7609(e)(2), an examiner should obtain approval from the examiner's group manager or a higher level manager in writing. IRM 25.5.6.6.3.2(3). Your present request for advice is part of the process for the Service to decide whether to rely upon such a section 7609(e)(2) ASED suspension in this case. Additionally, the examiner should keep contemporaneous, written records in the administrative file concerning the summoned third person's compliance or failure to comply with the summons. IRM 25.5.6.6.3.4. The manager and the examiner should ensure that the contemporaneous document provisions are met and will continue to be met until the suspension terminates. If the summoned third person's production does not comply fully with the summons, IRM 25.5.6.6.3.4(3) directs an examiner to promptly contact the summoned person in writing, using a Form Letter 4432, which states the production is insufficient and describes the information that the summoned person should produce to comply with the summons. This relatively new IRM provision also states that a copy of this letter should be mailed to the taxpayer on the same date on which it is mailed to the summoned person.

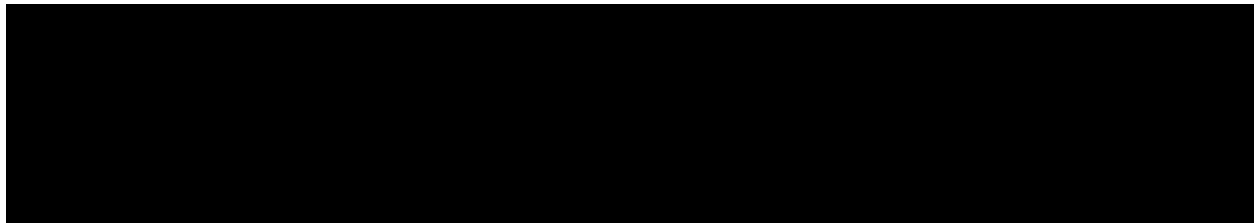
In this case, the witness has not responded to the third-party summons and it has been more than six months since the service of the summons. The third-party summons served on the witness is a summons that is subject to the notice requirement of section 7609(a). Section 7609(a) provides generally that notice is required to be given to anyone identified in a summons if a summons is directed to a third party. Because this summons is within the purview of I.R.C. § 7609(e)(2), the ASED for the taxpayers may properly be suspended. The suspension period began on Date 8 and should continue until there is final resolution of the response of the witness.

We understand that the examiner did not send a Form Letter 4432 to the third party witness, with a copy to the taxpayers, before the ASED suspension period at issue began on Date 8. Nevertheless, on Date 4, well within the first six months after the

summons was properly served on the witness, the Office of Chief Counsel sent the witness a last chance letter explaining that the witness did not have valid grounds for failing to appear in response to the summons. Because the taxpayers are X family relationship to the witness, the taxpayers should also have been well aware from Date 2 that the witness did not respond fully to the summons. Due to the above-described considerations, we conclude that the Service may appropriately decide to rely upon an ASED suspension pursuant to section 7609(e)(2) with respect to the third-party summons at issue. The Service's failure to use a Form Letter 4432 to convey this information to the witness and to the taxpayers is a harmless error under the circumstances. Further, the IRM's operating guidelines, procedures, and delegations are there to "guide Service managers and employees in carrying out their day to day responsibilities." IRM 1.11.2.1(2). Taxpayers do not have standing to challenge a Service failure to comply with IRM procedures. United States v. Caceres, 440 U.S. 741, 751 n.14, 754 n.18 (1979) (stating that agencies "are not required . . . to follow all of their rules, even those properly classified as 'internal,'" but "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures."); Urban v. Commissioner, 964 F.2d 888 (9th Cir. 1992); United States v. Powell, 835 F.2d 1095, 1100 n.13 (5th Cir. 1988); Groder v. United States, 816 F.2d 139, 142 (4th Cir. 1987); United States v. Horne, 714 F.2d 206 (1st Cir. 1983) (IRM provisions do not have the force and effect of law, their purpose is to govern internal affairs of the IRS).

The examiner should be sure to comply with the contemporaneous document provisions going forward until the suspension terminates. If the witness does produce any of the summoned information, the examiner should promptly determine if the production constitutes full compliance. The examiner should continue to keep contemporaneous, written records in the administrative file of all matters concerning the witness's compliance or failure to comply with the summons. The purpose for keeping written records as part of the administrative file is to establish and preserve a contemporary evidentiary basis to support the Service's determination of final resolution in court. IRM 25.5.6.6.3.4(2). Additionally, the examiner should adhere to the procedure for issuing Form Letter 4432 if the scheduled production by the witness does not fully comply with the summons. Form Letter 4432 should state that the production is insufficient and describe the information he must produce to comply with the summons. The letter should be sent also to the taxpayers. Form Letter 4432 should be sent every time the witness produces anything in response to the summons. IRM 25.5.6.6.3.4(3).

HAZARDS & FURTHER DEVELOPMENT SUGGESTIONS





CONCLUSION

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 622-7950 if you have any further questions.