



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR ASSISTANT CHIEF COUNSEL (CRIMINAL TAX) CC:EL:CT

FROM: David L. Fish /s/ David L. Fish
Chief, Branch 4 (Disclosure Litigation) CC:EL:D:Br4

SUBJECT: Contacts with the Department of Justice in Nontax Matters

This is in response to your inquiry dated November 25, 1998, concerning contact by a special agent of the Internal Revenue Service (Service) with an Assistant United States Attorney (AUSA) where an informant has alleged violations of both tax and non-tax federal laws.

ISSUES:

1. Whether, under the specific circumstances cited, there was a violation of I.R.C. § 6103(a).
2. Whether it is appropriate for a special agent to contact an AUSA where an informant has alleged violations of both tax and non-tax federal laws.

CONCLUSIONS:

1. Jurisdiction for the determination of whether there has been an actual violation of section 6103(a) lies with the Office of the Treasury Inspector General for Tax Administration (OTIGTA), and potential violations should be referred to OTIGTA for such action as it deems appropriate.
2. In a matter not referred to the Department of Justice pursuant to I.R.C. § 6103(h)(2) in conjunction with I.R.C. § 6103(h)(3)(A), at a minimum, contact by the Service with the Department of Justice raises issues of the potential appearance of impropriety and, more importantly, is fraught with the potential for making unauthorized disclosures. For that reason, we believe such contacts should be avoided.

FACTS:

Whether the specific circumstances described in your inquiry constitute a violation of section 6103 is within the jurisdiction of OTIGTA rather than this office. As such, we have created a set of hypothetical facts to address the issue of whether it is appropriate for a special agent to contact an AUSA where an informant has alleged violations of both tax and non-tax Federal laws.

An informant goes to an office of the Service and asks to speak to someone to report violations of the tax laws. A special agent is assigned to conduct an interview of the informant. During the course of the interview, the informant professes knowledge of related tax and nontax Federal criminal violations. Because of the alleged nontax Federal criminal violations, the special agent advises the informant to contact an AUSA with whom the special agent has previously worked on tax administration matters.

The informant contacts the AUSA, advises the AUSA that the special agent had suggested that the informant contact the AUSA, and asks to meet with the AUSA. The AUSA agrees to meet with the informant, and then calls the special agent and states, "I've just talked to (the informant) and I've agreed to meet with the informant in my office tomorrow at 10:00 a.m.; I want you there for that meeting." The special agent agrees.

The meeting is held on schedule and the special agent makes not one comment and asks not one question either before, during, or after the meeting.

The AUSA thereafter prepares a request for a search warrant on the basis of both tax and nontax allegations made by the informant.

LAW AND ANALYSIS:

The general rule regarding disclosure of returns and return information is that:

Returns and return information shall be confidential, and except as authorized by [the Internal Revenue Code (Code)] –

(1) no officer or employee of the United States . . .

* * *

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or employee or otherwise under the provisions of this section.

I.R.C. § 6103(a). Thus, returns and return information are to be kept confidential unless disclosure is permitted by some specific provision of the Code. Church of Scientology of California v. IRS, 484 U.S. 9 (1987).

“Return information” includes –

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

I.R.C. § 6103(b)(2).

Thus, information provided by an informant relative to the tax liability or possible tax liability of any person is return information as defined in section 6103(b)(2).

Among the exceptions to the general rule against disclosure of returns and return information is an exception that permits the disclosure of such information to the Department of Justice (including AUSAs) in certain matters of tax administration –

(2) DEPARTMENT OF JUSTICE. – In a matter involving tax administration, a return or return information shall be open to inspection by or disclosure to officers and employees of the Department of Justice (including United States [A]ttorneys) personally and directly engaged in, and solely for their use in, any proceeding before a Federal grand jury or preparation for any proceeding (or investigation which may result in such a proceeding) before a Federal grand jury or any Federal or State court, but only if –

(A) the taxpayer is or may be a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer’s civil or criminal liability, or the collection of such civil liability in respect of any tax imposed under this title;

(B) the treatment of an item reflected on such return is or may be related to the resolution of an issue in the proceeding or investigation; or

(C) such return or return information relates or may relate to a transactional relationship between a person who is or may be a party to the proceeding and the taxpayer which affects, or may affect, the resolution of an issue in such proceeding or investigation.

(3) FORM OF REQUEST. – In any case in which the Secretary is authorized to disclose a return or return information to the Department of Justice pursuant to the provisions of this subsection –

(A) If the Secretary has referred the case to the Department of Justice, or if the proceeding is authorized by subchapter B of chapter 76, the Secretary may make such disclosure on his own motion, or

(B) if the Secretary received a written request from the Attorney General, the Deputy Attorney General, or an Assistant Attorney General, for a return of, or return information relating to, a person named in such request and setting forth the need for the disclosure, the Secretary shall disclose the return or return information so requested.

I.R.C. § 6103(h)(2) and (3). Thus, unless the prerequisites in section 6103(h)(2) and (3) have been satisfied, the Service may not disclose return information to the Department of Justice. Under the facts as posited, no tax case has been referred. Further, the Criminal Investigation Division generally does not have direct referral authority (to United States Attorneys) over Internal Revenue Code violations.

Given the hypothetical set of facts that we have described, the conditions of section 6103(h)(2) and (3) were not met, nor were there any disclosures of returns or return information. However, the presence of the Service's special agent in a meeting with an AUSA and an informant, subsequent to that informant having met with the special agent, immediately gives rise to speculation as to whether the special agent has disclosed, is disclosing, or will disclose return information (in a matter not within the exceptions to the general rule of confidentiality of return information as prescribed by the Code). To some, the special agent's action might be construed as an attempted "end run" to promote acceptance by the Department of Justice of the case and cause a search warrant to be issued or a grand jury investigation to be convened without following usual Service procedures.

Worse, the potential for unlawful disclosures of return information is great, because anything learned by the special agent from the interview with the informant is return information, none of which is available to the AUSA. Any utterance, head nod, or leading question would have to be analyzed and would likely be construed by a

court as a disclosure not authorized by I.R.C. § 6103.¹ For example, if the informant during the interview had told the special agent about the taxpayer's books and records and said to the informant, in the presence of the AUSA, "tell the AUSA what you told me about the books and records," that might well be seen by a court as an unlawful disclosure of return information. If the special agent contacts the AUSA and indicates the informant is on the way to the AUSA's office with information about potential tax violations in which the Service has an interest, that would also likely be construed as an unlawful disclosure.²

In the absence of some compelling reason to comply with the hypothetical request of the AUSA for the special agent to be present at the meeting with the informant, we believe that the better response is to avoid unnecessary speculation as to whether the Service is violating section 6103, or its standard procedures, and to minimize the potential for unlawful disclosures, by courteously declining the request of the AUSA, for the reasons stated above.

If you have any further questions, please call 622-4570.

cc: Treasury Inspector General for Tax Administration
Director, 6103/Privacy Operations OP:EX:GLD:D:O

¹See Ryan v. United States, 99-1 U.S. Tax Cas. (CCH) ¶ 50,126, 82 A.F.T.R.2d (RIA) 7454, 1998 U.S. Dist. Lexis 19554, n. 3 (D. Md. 1998).

²In rare and unusual circumstances, the AUSA might have information sought by the Service which is not available from any other course, thus permitting the special agent to disclose return information to the extent necessary to obtain the information from the AUSA, pursuant to I.R.C. § 6103(k)(6). Further, also in rare and unusual circumstances, certain information known to the special agent may be so unrelated to a tax matter so as not to be within the definition of return information, in which case the information could be disclosed to the AUSA. See IRM 1.3.34.