

Office of Chief Counsel
Internal Revenue Service
memorandum

date: October 30, 2017

to: Nina E. Olson
National Taxpayer Advocate

from: Janice Feldman 
Special Counsel to the National Taxpayer Advocate

subject: Advice You Requested from CC:PA

A few months ago, Eric LoPresti received advice from CC:PA regarding whether Code sections as well as the name of the promoter or the preparer must be listed in a summons. At your request, CC:PA has memorialized that advice in the attached memorandum. Please let me know if you have any questions.

cc: Eric LoPresti

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:PA:RGGoldman

date: October 26, 2017

to: Special Counsel to the National Taxpayer Advocate

from: Richard G. Goldman
Deputy Associate Chief Counsel
(Procedure & Administration)

Goldman
Richard G

Digitally signed by Goldman
Richard G
DN: cn=Goldman Richard G,
email=Richard.G.Goldman@IRSC
OUNSEL.TREAS.GOV
Date: 2017.10.26 13:24:22 -0400

subject: IRM 4.32.2.7.5(2): Preparation of Promoter, etc. Summonses

This responds to the question whether the procedure set forth in IRM 4.32.2.7.5(2) is legally appropriate, and if so, why. This Manual provision provides guidance to Service personnel who prepare summonses to examine promoters, return preparers, and certain others' possible liabilities under I.R.C. §§ 6694, 6695, 6700, 6701, 6707 or 6708. Specifically, the Manual provision states:

For summonses related to promoter investigations the following language must be included in the summons: *"In the matter of liability of [promoter or preparer's name] under 26 USC Secs. 6694, 6695, 6700, 6701, 6707 and 6708 [use all sections that may be applicable]."*

IRM 4.32.2.7.5(2). Sections 6694 and 6695 provide penalties for return preparers who engage in specified conduct. Section 6700 penalizes those who promote abusive tax shelters; a related provision in section 6701 penalizes those who aid and abet the understatement of a taxpayer's tax liability. Section 6707 penalizes persons who fail to disclose certain information about reportable transactions, and section 6708 penalizes those who fail to maintain a list of advisees regarding reportable transactions.

The question arises in this context: The Service issues a third-party summons, not a John Doe summons, to determine whether promoter penalties should be assessed against an identified and named taxpayer. Consistent with IRM 4.32.2.7.5(2), in the heading of the summons, the Service names the taxpayer in the heading as well as the penalties being investigated. The taxpayer, the subject of the summons, objects to this practice because it informs the summoned third party that the Service is investigating the taxpayer for the serious conduct these Code sections penalize. The question is whether including this information in the summons violates section 6103(a).

As explained below, the Service's procedure does not violate the prohibition on disclosure under I.R.C. section 6103(a) because section 6103(k)(6) permits disclosures of return information to the extent "necessary" – meaning "appropriate and helpful," not

essential or indispensable -- to further a tax examination. Treas. Reg. § 301.6103(k)(6)-1(c)(1). The disclosure of the Code provisions that are the subject of the examination provides evidence appropriate and helpful to establish the bona fide nature of the examination, because these summonses may be challenged as arising from a feigned examination that the Service constructed to avoid the John Doe summons requirements.

Discussion

In *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310 (1985), the Supreme Court held that the Service had the authority to issue a dual-purpose summons without observing the John Doe summons procedures of section 7609(f). A dual-purpose summons is one issued to examine the liability of a known, named taxpayer, as well as to learn the identities of other unnamed taxpayers the Service wishes to examine. The Court held that so long as the Service sought information that may be relevant to a legitimate investigation of the named taxpayer, the Service was not obligated to follow John Doe summons procedures to obtain the names of the other persons who will be identified by the summoned information. The Service relies on the *Tiffany Fine Arts* opinion when it issues a dual-purpose summons.

As mentioned above, taxpayers who are the subject of such summonses may challenge them in court by alleging that the summonses were issued as part of a sham investigation to avoid the John Doe procedures. The following cases illustrate this dynamic: *Liberty Financial Services v. United States*, 778 F.2d 1390 (9th Cir. 1985) (6700 investigation); *United States v. Balanced Financial Management*, 769 F.2d 1440 (10th Cir. 1985) (6700 investigation); *Benistar Employer Service Trust Co. v. United States*, 184 Fed. Appx. 93 (2^d Cir. 2006) (6700 investigation); *Benistar 419 Plan Services v. United States*, 144 Fed. Appx. 902 (2^d Cir. 2005) (6700 investigation); *Clower v. United States*, No. 1:15-cv-2120-TCB (N.D. Ga. Dec. 17, 2015), *aff'd*, 666 Fed. Appx. 869 (11th Cir. 2016) (6694, 6695, 6700, 6701, 6707 and 6708 investigation); *United States v. Rooney*, No. 1:09-CV-2696-WSD-JFK, 2010 WL 11505833 (N.D. Ga. Mar. 12, 2010) (6700 and 6701 investigation); *Boelter v. United States*, No. C 05-689-Z, 2005 WL 1799739 (W.D. Wash. July 26, 2005) (6700 and 6701 investigation); *Xelan, Inc. v. United States*, 397 F. Supp.2d 1111 (S.D. Iowa 2005) (6700, 6707 and 6708 investigation); *Xelan, Inc. v. United States*, 361 F. Supp.2d 459 (D. Md. 2005) (6700, 6701, 6707 and 6708 investigation); *Xelan, Inc. v. United States*, No. Civ.A.04-2289, 2004 WL 2486268 (E.D. Penn. Nov. 3, 2004) (6700, 6701, 6707 and 6708 investigation), and *Financial Securities Corp. v. United States*, No. C-84-4268-MHP, 1984 WL 3127 (N.D. Cal. Dec. 6, 1984) (6700 investigation).

In two reported cases, courts have found that the Service was not genuinely examining the named taxpayer and, therefore, should have followed the John Doe summons requirements. See *United States v. Ritchie*, No. civ-3-92-610, 1992 WL 695477 (E.D. Tenn. Sept. 11, 1992), *aff'd*, 15 F.3d 592 (6th Cir. 1994) (court found, based on a revenue agent's comment, that the Service was not actually examining the law firm, but was only seeking the identities of the firm's clients who paid large retainers in cash), and *United States v. Gertner*, 873 F. Supp. 729 (D. Mass. 1995), *aff'd in part*, 65 F.3d 963 (1st Cir. 1995) (court found that the summons was a pretext for investigating an unnamed

client, thus requiring the Service to follow the John Doe summons procedures). We disagree with these decisions because in both cases, the Service's examinations of the named taxpayers were bona fide notwithstanding the courts' findings to the contrary.

Examinations of return preparers under sections 6694 and 6695, of promoters (and those who aid and abet) of tax shelters under sections 6700 and 6701, and of persons involved in reportable transactions under sections 6707 and 6708 are bona fide investigations; these examinations seek to determine whether the named taxpayer has engaged in conduct to which the penalties may apply. These examinations and any summonses issued during the examinations almost always will have the dual purpose of identifying other persons who may owe taxes because of the known promoter's or preparer's conduct. In order to reflect the bona fide nature of the examination and legality of these summonses, it is appropriate and helpful to disclose, under the authority of section 6103(k)(6), the name of the taxpayer and penalties being investigated on the face of the summons.

This procedure informs the court of the distinct nature of the examination of the named taxpayer – that it is indeed a separate and bona fide examination, not a disguised John Doe taxpayer examination. In *United States v. Powell*, 379 U.S. 48 (1964), the Supreme Court set forth a four-part test for establishing the validity of a summons: First, the summons must be issued pursuant to a proper purpose; second, it can only seek information that may be relevant to that purpose; third, the summoned information must not already be in the Service's possession, and fourth, the Service must have followed all the requirements of the Code and the regulations. Including the relevant Code sections in the heading of the summons helps prove three of the basic elements that the Government must establish to make its prima facie case for summons enforcement. Regarding the first requirement, this information signals to the court that the summons is issued for a proper purpose – the taxpayer named in the heading of the summons (the preparer or promoter or person obligated to file returns identifying reportable transactions) – is the subject of a genuine examination. The named taxpayer has real obligations under the Code that can and should be examined, and the Service is fulfilling its duty to do so. By showing the court the legitimate purpose for the examination of the named taxpayer, the Service also shows that it did not violate the fourth requirement failing to follow the John Doe summons requirements.

Setting forth the relevant Code sections in the summons also enables summoned third parties that may be under separate legal privacy duties, such as banks, to evaluate the possible relevancy of the information summoned and to make an informed decision about whether to interpose objections. Banks engage in this analysis because they are subject to privacy statutes, which generally exculpate them from liability only if their summoned disclosures are made in good faith. For example, banks may question the relevance of a request for documents created before or after the periods being examined. Many dual-purpose summonses, especially promoter summonses, seek documents created over a substantial period of time. Knowing that the summons relates to a promoter examination places the document request into context and the potential relevancy becomes clear.

For these reasons, we conclude that the disclosure of these Code sections in the heading of the dual-purpose summonses is necessary. Please contact us if you need anything further.