

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

CC:PA:07:EMHill
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date: March 20, 2019

to: David Silverman, Management and Program Analyst
(Privacy, Governmental Liaison and Disclosure)

from: Charles B. Christopher, Branch Chief
(Procedure & Administration, Branch 7)

subject: Legal Opinion relating to Section 6103 and Third-Party Transportation to Taxpayer Locations

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

ISSUES

This memorandum is in response to your request for a legal opinion relating to the potential disclosure of return information. Specifically, you asked if an unauthorized disclosure of confidential return information may occur where a revenue agent's friend or relative drives him or her to an appointment at a taxpayer's residence.

CONCLUSIONS

We conclude that there is a risk of unauthorized disclosure. The fact of an exam or investigation is confidential return information under section 6103. An indirect disclosure can be made by an agent's actions or the third-party's prior knowledge giving rise to the clear inference that a taxpayer is under the Service's scrutiny. While there is no absolute bar to using alternative methods of transportation, agents should be sure that no direct or indirect disclosure is made when using a third-party for transportation to a taxpayer's location.

FACTS

A revenue agent was unable to drive to a scheduled interview at a taxpayer's residence. Several possible methods of transportation were proposed of varying modes and distances from the taxpayer's location, giving rise to this legal inquiry.

Applicable regulations direct agents to visit a taxpayer's place of business or residence during normal workday hours, but do not describe appropriate methods of travel. Treas.

Reg. § 301.7605-1(d)(3)(iii). Existing IRS and Treasury travel guidance focus on the approval and reimbursement procedures for different methods of travel, but not methods of travel in the context of who may provide the transportation. See, e.g. IRM 1.32.1, *Official IRS Local Travel Guide*; Treas. Policy Directive 560-02, *Local Travel Reimbursement*.¹

LAW AND ANALYSIS

1. Section 6103 governs disclosure of return information, and the fact of an exam is confidential "return information."

Section 6103(a) provides that taxpayer returns and return information are confidential unless a specific provision in Title 26 authorizes disclosure. "Return information" is defined at section 6103(b)(2) to include "a taxpayer's identity...[and] whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing." Congress drafted section 6103 in response to perceived "inadequate safeguards for preventing unauthorized disclosure of tax information.... [such that] would seriously impair the effectiveness of our country's very successful voluntary assessment system." S. Rep. 94-938, 94th Cong., 2nd Sess. 317 (1976). In other words, section 6103 is meant to protect taxpayers' privacy and "encourage the taxpayers' free and open disclosure to the Service." Estate of Yaeger v. Commissioner, 92 T.C. 180, 184 (1989).

The term "return information" is interpreted broadly. McQueen v. United States, 264 F. Supp. 2d 502, 516 (S.D. Tex. 2003), *aff'd*, 100 F. App'x 964 (5th Cir. 2004); LaRouche v. Dep't of Treasury, 112 F. Supp. 2d 48, 54 (D.D.C. 2000). The term includes any disclosure that could reasonably identify the subject of an exam, even where names or addresses have been withheld. Church of Scientology v. United States, 484 U.S. 9, 15 (1987). A taxpayer's identity, address, and the nature of the Service's interest in the taxpayer constitute "return information."

2. Revealing identifying information in connection with an exam is a "disclosure" under section 6103.

The threshold inquiry is whether there has been a "disclosure" as defined by section 6103. Section 6103(b)(8) defines a "disclosure" as "the making known to any person in any manner whatever a return or return information." An agent can "make known" return information by clear inference just as well as by explicit statement. Stokwitz v. United States, 831 F.2d 893, n. 4 (9th Cir. 1987) ("Section 6103 applies to all who received information from the IRS, **directly or indirectly**") (emphasis added); Jones v. United States, 898 F.Supp. 1360, 1379 (D. Neb. 1995) (IRS agent telling confidential informant that search warrant would be executed constituted a "disclosure" of "return information"), *rev'd on other grounds*, 97 F.3d 1121 (8th Cir. 1996); Chandler v. United States, 687 F.Supp. 1515 (D. Utah 1988) (the Service misapplied a taxpayer's check,

¹ Our analysis is limited to the potential for unauthorized disclosure by using third-party transportation to a taxpayer's location. Special needs accommodations, such as are permitted by federal regulations, are outside this scope of inquiry. See, e.g. 41 C.F.R. § 301-13, *Travel of an Employee with Special Needs*.

and conceded that a wrongful levy notice issued to the taxpayer's employer for the amount already paid constituted a "disclosure" that the taxpayer had been subject to an exam); Roebuck v. United States, 1999 WL 501003 (E.D.N.C. 1999) (agent's presentation of credentials in connection with ongoing investigation of plaintiff for tax fraud constituted an indirect disclosure, although authorized by section 6103(k)(6)). There is, however, no disclosure where otherwise confidential return information is already known to the recipient because there is no "making known" of the information. See Haywood v. United States, 642 F. Supp. 188, 190-91 (D. Kan. 1986) (there was no disclosure of taxpayer's name to employer, who already knew that information).

Providing the taxpayer's address or identity to a third-party transportation provider, coupled with the agent's job description and employing agency, may indirectly and impermissibly disclose that the taxpayer is subject to an exam.

3. The risk of unauthorized disclosure depends on the facts and circumstances, including the third-party's prior knowledge and the agent's actions.

According to irs.gov, there are generally only three reasons an agent might visit a taxpayer residence in an official capacity:

- Examination
- Criminal investigation
- Collection

IR-2017-86, *IRS Provides Tips on Determining If It's Really the IRS at Your Door* (April 19, 2017). As established above, the fact of an exam, criminal investigation, or collection focused on a given taxpayer is the return information of that taxpayer. This information is to be kept confidential unless disclosure is authorized by section 6103. Absent taxpayer consent, no such authorization under section 6103 exists to support the disclosure contemplated here.²

A third-party could reasonably infer from a Service employee's visit to a taxpayer's residence during work hours that the taxpayer is under exam, criminal investigation, or collection procedures. Whether the inference is reasonably arrived at is highly dependent on the facts and circumstances, including but not limited to consideration for the agent's actions and the third-party's prior knowledge.

For example, public transportation should be permissible, unless the agent directly discloses protected taxpayer information by telling or showing the agent's purpose for traveling to fellow travelers. Transportation by any means to a location where the exact taxpayer's identity or address is not readily discernable should also be acceptable,

² We have not formally considered whether this would qualify as an "investigative" disclosure within the purview of section 6103(k)(6). Generally, section 6103(k)(6) would not authorize disclosure unless the driver provides information to help the Service correctly determine the taxpayer's liability. See, e.g. Malis v. United States, No. CV83-7767 (CBM), 1986 WL 15721, at *6 (C.D. Cal. Dec. 17, 1986) (agent's statements to third-party witnesses did not seek information and thus were not investigative disclosures); Rodgers v. Hyatt, 697 F.2d 899, 904-906 (10th Cir. 1983) (disclosing rumors as to taxpayer's involvement in the theft of oil was not necessary to obtain information from the third-party witness).

either by terminating the transportation service a distance away from the taxpayer's actual location, or by traveling to a location with multiple residents or businesses.

Using a taxi, Uber, Lyft, or other car service to travel to the taxpayer's residence should generally be permissible as well, unless the driver can reasonably infer the tax-based reason for the agent's visit. For example, if materials in the agent's possession clearly indicate that the agent works for the Service or that the Service is conducting an exam, and these materials are visible to the third-party driver, and the destination leaves little question as to the identity of the taxpayer, these factors could give rise to a reasonable inference and thus an unauthorized disclosure. There is also a higher risk of disclosure if the agent's spouse, relative, or close friend is providing the transportation. It is more likely that such a driver would know the agent's work duties, schedule, and work habits. Driving the agent to a taxpayer's location in the middle of a workday, then, could give the driver enough information to reasonably infer who is under exam, resulting in an unauthorized disclosure. Risk of disclosure could be mitigated here by dropping the revenue agent off in the neighborhood, rather than at the specific taxpayer's residence.

In conclusion, using any third-party transportation has some risk of disclosure, but the level of risk varies based on facts at hand. If a reasonable person could infer the taxpayer's identity or the fact of an exam, the risk of disclosure is impermissible. Therefore, agents may use a third-party for transportation if, considering all the facts and circumstances, there will be no direct or indirect disclosure of confidential information.

HAZARDS AND OTHER CONSIDERATIONS



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Please call Procedure & Administration, Branches 6 or 7 at (202) 317-6833 or (202) 317-6834, if you have any further questions.