

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

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date: February 24, 2022

to: Jana McDaniel
Program Manager
Collection Policy-Global Strategic Compliance

from: Ricardo Cadenas
Chief, Branch 7
Office of the Associate Chief Counsel (International)

subject: Collection Procedures for Assets Located Outside the United States

This memorandum responds to your questions concerning collection tools and the use of various information sources available to the IRS in collection cases where taxpayer assets are located abroad. This advice may not be used or cited as precedent.

QUESTION 1

Once the IRS has attempted to contact the taxpayer, the taxpayer has neglected or refused to pay, and the IRS has exhausted domestic levy sources, whether the IRS is prohibited from simultaneously pursuing any combination of the following collection actions:

- a. Input of a Treasury Enforcement Communications System (TECS) Lookout Indicator
- b. Initiation of an outbound Mutual Collection Assistance Request (MCAR) to a treaty partner
- c. Levy on domestic branch of a foreign bank
- d. Suit to repatriate
- e. Issuance of Letter 6152, *Notice of Intent to Request U.S. Department of State Revoke Your Passport*
- f. Referral to U.S. Dept. of State (DOS) for passport revocation after Letter 6152 issuance

Note: Because the issuance of Letter 6152 and the expiration of the response period set forth in that letter must occur before a referral to DOS for passport revocation, items “e” and “f” would not be pursued simultaneously.

CONCLUSIONS

The IRS is not prohibited, in general, from pursuing multiple collection activities simultaneously. In many cases, these collection tools can complement each other. Please note that once a collection suit recommendation has been forwarded to Area Counsel, further enforced collection action should not be taken without discussion with, and the concurrence of, Advisory, Area Counsel, and if appropriate, the Department of Justice. IRM 25.3.1.5.

- a. TECS lookout indicators are used to obtain information on a taxpayer’s location. We are not aware of any legal restriction that would prevent the IRS from utilizing this tool in conjunction with any other collection action you identified.
- b. Prior to seeking assistance from a treaty partner through an MCAR, the IRS should be able to represent that all appropriate measures to collect the revenue claim that are available under its laws or administrative practice have been pursued. See, e.g., The Protocol Amending the Convention between the Government of the United States of America and the Government of Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Article XIII(15), RIA TAXT 5130. Seeking assistance under an MCAR does not preclude the United States from continuing its efforts to either secure property or personal jurisdiction over the taxpayer.
- c. We are not aware of any restriction that would prevent the IRS from issuing a levy to a domestic branch of a foreign bank in conjunction with any other collection action you identified. When seeking to levy an account with a domestic branch of a foreign bank, care must be made to proceed as set forth under 26 C.F.R. § 301.6332-1(a)(2). The IRS must provide specific types of notice depending upon whether the taxpayer is located within or without the jurisdiction of the United States at the time of levy. IRM 5.21.3.2.
- d. We are not aware of any restriction that would prevent the IRS from referring liabilities to the Department of Justice for a suit seeking repatriation of assets in conjunction with any other collection action you identified. The referral letter should establish the basic prerequisites for seeking repatriation – that a substantial tax liability exists and the government’s ability to collect the tax might otherwise be jeopardized. See *United States v. Greene*, 1984 WL 256 (N.D. Cal.1984); *United States v. McNulty*, 446 F. Supp. 90 (N.D. Cal.1978); *United States v. Ross*, 196 F. Supp. 243 (S.D.N.Y. 1961), *aff’d*, 302 F.2d 831 (2d Cir.1962). The IRS should also be prepared to certify that known domestic

sources of collection have been exhausted, or that known domestic assets are insufficient to satisfy the liability.

e and f: We know of no restriction that would prevent the IRS from pursuing passport revocation in conjunction with any other collection action you have identified. After the certification criteria is met and a taxpayer is certified as an individual having a seriously delinquent tax debt under IRC § 7345, the Service may ask the Department of State to exercise their discretion to revoke a taxpayer's passport.

Under circumstances where any combination of a levy on a domestic branch of a foreign bank, MCAR assistance, or a suit to repatriate assets could be pursued simultaneously, please consult with Counsel contacts for international collection reflected on the SBSE Offshore/International webpage or local field counsel, who will coordinate with Division Counsel as appropriate. The particular facts in a specific case may render one tool more effective than other available tools. Counsel may also have insight regarding whether the facts in a particular case merit simultaneously pursuing multiple collection avenues, or whether a sequential approach is appropriate.

QUESTION 2

Is the IRS prohibited from utilizing FATCA data to identify and select collection cases for assignment?

CONCLUSIONS

FATCA data may be used to identify collection cases in most instances, but the authorized uses of particular sets of FATCA data may vary depending on whether they were received pursuant to an international agreement providing for the exchange of information in tax matters ("tax convention") and the use and disclosure provisions of the applicable tax convention.

All FATCA data relating to particular taxpayers is return information and subject to the nondisclosure provisions of IRC § 6103. FATCA information exchanged on a government-to-government basis is additionally subject to the nondisclosure provisions in the applicable tax convention and IRC § 6105.

The use of FATCA data to identify and select collection cases for assignment is an authorized use of return information under IRC § 6103(h)(1).

Tax conventions to which the United States is a party permit the disclosure of exchanged information to persons and authorities involved in or concerned with the collection of tax. Accordingly, using FATCA data that was exchanged pursuant to a tax convention to identify and select collection cases is also permissible under IRC § 6105(b)(1), provided that the case involves a type of tax that is covered by the relevant international agreement pursuant to which the information was exchanged.

Furthermore, a few tax conventions have a temporal limitation that would restrict the use of the information with respect to certain tax periods that predate the entry-into-effect date of the tax convention.

QUESTION 3

Is the IRS prohibited from using the internal databases shown below to identify collection accounts likely to qualify for the corresponding collection actions?

A. Collection Action – MCAR Outbound Request.

Databases matched: [REDACTED]

[REDACTED] matched to the FATCA Business Objects Environment (BOE) database to determine taxpayer ability to pay from offshore assets.

CONCLUSION 3.A

Using the FATCA BOE database to research relevant facts obtained through a tax convention for the purpose of determining the taxpayer's ability to pay in the context of formulating a request for the United States Competent Authority to issue an outbound MCAR would be consistent with the use and disclosure provisions of the United States' tax conventions and IRC § 6105, provided that the case involves a type of tax that is covered by the relevant international agreement pursuant to which the information was exchanged. A few tax conventions have a temporal limitation that would restrict the use of the information with respect to certain tax periods that predate the entry-into-effect date of the tax convention.

B. Collection Action – Repatriation Suit.

Databases matched: FATCA BOE, [REDACTED]

CONCLUSION 3.B

Using the FATCA BOE database to research relevant facts obtained through a tax convention for the purpose of developing a collection suit referral to the Department of Justice would be consistent with the use and disclosure provisions of the United States' tax conventions and IRC § 6105, provided that the case involves a type of tax that is covered by the relevant international agreement pursuant to which the information was exchanged. A few tax conventions have a temporal limitation that would restrict the use of the information with respect to certain tax periods that predate the entry-into-effect date of the tax convention or a requirement to obtain authorization prior to publicly disclosing exchanged information in the context of a judicial proceeding. See Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters (1988), Article 22(2), RIA TAXT 7506.

C. Collection Action – Referral for Passport Revocation.

Databases matched:

[REDACTED] to FATCA BOE,

FATCA BOE
[REDACTED]**CONCLUSION 3.C**

Using the FATCA BOE database to research relevant facts obtained through a tax convention for the purpose of developing a certification of an individual having a seriously delinquent tax debt pursuant to IRC § 7345 would be consistent with the use and disclosure provisions of the United States' tax conventions and IRC § 6105, provided that the case involves a type of tax that is covered by the relevant international agreement pursuant to which the information was exchanged. A few tax conventions have a temporal limitation that would restrict the use of the information with respect to certain tax periods that predate the entry-into-effect date of the tax convention.

QUESTION 4

For the bulleted items in #3 above, what are examples of when utilizing these processes would be a prohibited "fishing expedition" using either automated or manual processes?

CONCLUSIONS

In general, the term "fishing expedition" is a concept applied in the context of obtaining information pursuant to IRC § 7602 of the Code or a tax convention, and not in the context of using information that is already in the possession of the IRS. Section 7602(a)(2) permits the IRS to issue a summons for information "as may be relevant or material" to a tax-related inquiry. Similarly, tax conventions generally permit the exchange of information that "may be relevant" or is "foreseeably relevant" to a tax matter involving a covered tax. A "fishing expedition" typically refers to a situation in which the information sought is not even potentially relevant to the tax matter at issue. See *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 321 (1985) ("by definition, the IRS is not engaged in a 'fishing expedition' when it seeks information relevant to a legitimate investigation of a particular taxpayer").

Where the data is already within possession of the government there cannot be a "fishing expedition" in the general sense. The propriety of a use or disclosure is governed by IRC § 6103 and, with respect to tax convention information, IRC § 6105 as well.

Within the IRS, to the extent the databases denoted above consist of "returns and return information," they are "open to inspection by or disclosure to officers and employees of

the Department of the Treasury whose official duties require such inspection or disclosure for tax administration purposes.” IRC § 6103(h)(1). Collection of federal tax liabilities is an official duty that may require such “inspection or disclosure.”

With respect to information received through a tax convention, proper *use* is defined and authorized by IRC § 6103 and the terms of the relevant instruments, which permit the disclosure of exchanged information to persons or authorities involved in the collection of taxes covered by the tax convention. See, e.g., U.S. Model Tax Convention, Art. 26(2) (2016), RIA TAXT 9001 (“Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) involved in the assessment, collection, or administration of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by the Convention or the oversight of the above.”).

QUESTION 5

Would the details by which the Service identified and selected taxpayers using any of the processes shown in item #3 be obtainable externally through the following actions?

- A.** In a federal lawsuit (e.g., discrimination, due process, civil rights, etc.), would the rules of discovery require IRS to produce documentation on the processes or identify employees for deposition to explain their roles and responsibilities in these processes?
- B.** In a request pursuant to the Freedom of Information Act (FOIA), would IRS be required to disclose details on these processes?

CONCLUSIONS

The scope of discovery in federal civil litigation is broad, and parties may generally obtain information regarding any non-privileged matter that is relevant to any claim or defense. Fed. R. Civ. P. 26(b)(1). Depending on the specifics of the suit, it is certainly possible that information or testimony describing the processes shown in item #3 would meet the relevancy requirement.

Under the FOIA, 5 USC § 552, federal agency records are subject to public disclosure except to the extent that such records, or portions thereof, are protected by one of nine statutory exemptions. Agencies are not required to create records or answer questions in response to a FOIA request, but any records that (1) were either created by or obtained by an agency, and (2) are under agency control at the time of the FOIA request are subject to disclosure.

FOIA exemption 7 protects six categories of records or information compiled for law enforcement purposes where disclosure would cause certain specific harms. 5 USC § 552(b)(7)(A)-(E). Case law has established that the Service's collection activities are "law enforcement activities" for the purposes of exemption 7. Exemption 7(A) protects records to the extent that disclosure "could reasonably be expected to interfere with [ongoing or prospective] enforcement proceedings."¹ Exemption 7(E) protects records where the release "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." Exemption 7(E) may only be used to protect investigative techniques or guidelines not generally known to the public; where a technique is generally known, but the criteria for or details of its use are not, the exemption may apply.

It is likely that the Service could assert exemptions 7(A) and 7(E) to protect certain records, or portions thereof, that describe the processes shown in item #3. However, exemption 7 does not permit a blanket denial of records, and the Service must be able to articulate the specific foreseeable harms that releasing such records would cause. For additional information about FOIA exemption 7, see IRM 11.3.13.5.2.8.

QUESTION 6

For a taxpayer who is certified as owing seriously delinquent tax debt in which lien or levy action has already occurred, is IRS required to pursue any other collection action after issuing Letter 6152 (for which the response time expired) before referring a certified taxpayer to DOS for passport revocation? No statutory/discretionary exclusions apply in this example.

CONCLUSIONS

No. The IRS does not have to pursue any collection action between issuance of the Letter 6152 and expiration of the response period and referring a taxpayer to DOS for passport revocation. After a certification has been sent to the DOS, the Secretary of State has discretionary authority to revoke or limit the passport of an individual certified as owing a seriously delinquent tax debt. 22 USC § 2714a(f). The statute does not require any further act by the IRS. For procedures to request revocation, see I.R.M. 5.19.25.11.1 and 5.19.25.11.2.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

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.

¹ When exemption 7(A) is asserted to withhold law enforcement records that constitute or contain return information, FOIA exemption 3 in conjunction with IRC § 6103(e)(7) may also apply.

If you have further questions, please call Aaron Bailey with respect to matters concerning the use or disclosure of information exchanged pursuant to a tax convention or the use of treaty-based mutual collection assistance provisions at (202) 317-6941, Andrew Keaton with respect to the disclosure of returns and return information and/or FOIA matters at (202) 317-5404, or Mary King with respect to matters concerning domestic levies or Section 7345 at (202) 317-5433.