



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

OFFICE OF
CHIEF COUNSEL

APR 9 2004

CC:CT:NO-109196-04
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MEMORANDUM FOR CHIEF, CRIMINAL INVESTIGATION

FROM: Edward F. Cronin 
Division Counsel/Associate Chief Counsel (Criminal Tax)

SUBJECT: Third Party Contacts by Fraud Detection Centers in the Tenth
Circuit and Where Summons Are Requested

You requested our views on whether Fraud Detection Centers (FDC) may directly contact banks to identify an unknown perpetrator in an online erroneous refund scheme. Online schemes occur when stolen identities are used to file fraudulent online returns requesting an erroneous refund. When investigating these schemes, sometimes the only lead involves the identity of a bank account into which the refund was directed. CI is attempting to identify the owner of such account by contacting the bank.

The Right to Financial Privacy (RFPA) allows the IRS to informally seek and receive bank records without a summons. One caveat to this general rule is in the Tenth Circuit. In instances where the bank requests a summons or where the bank is located in the Tenth Circuit, CI has proposed issuing a I.R.C. § 7609(a) summons to obtain the account identifying information. In this regard, you solicited our views on whether the exception to the general notice provisions found in I.R.C. § 7609(c)(2)(C)¹ was operable, thus eliminating the need to follow the John Doe summons requirements. We in turn asked Collection, Bankruptcy & Summonses (CBS) for their views since they have ownership of the summons issue.

In their attached memorandum, CBS concludes that the exception found in I.R.C. § 7609(c)(2)(C) is not broad enough to relieve CI from the general notice requirement. The accounts into which the erroneous refunds are deposited do not appear to meet the restrictive definition of "numbered account" found in Treas. Reg. § 301.7609-4(b). Therefore, CBS instructs that CI must follow the procedures for John Doe summonses. The requirements for John Doe summonses set forth in I.R.C. § 7609(f), however, should be relatively easy to comply with.

¹ I.R.C. § 7609(c)(2)(C) provides an exception to third party summons notice requirements when they are "issued solely to determine the identity of any person having a numbered bank account (or similar arrangement) with a bank or other institution described in section 7603(b)(2)(A)."

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CBS also cautions that a summons must be used in all cases where the financial institution is located in the Tenth Circuit as well as when the taxpayer resides in the Tenth Circuit (note footnote #1 in CBS's memo), regardless of the location of the financial institution or when the Service's office is located in the Tenth Circuit, regardless of the location of the financial institution or the residence of the taxpayer

Should any additional questions arise, please feel free to me on (202) 622-4460 or Martin Needle on (202) 622-4470.

Attachment: As stated

Office of Chief Counsel
Internal Revenue Service

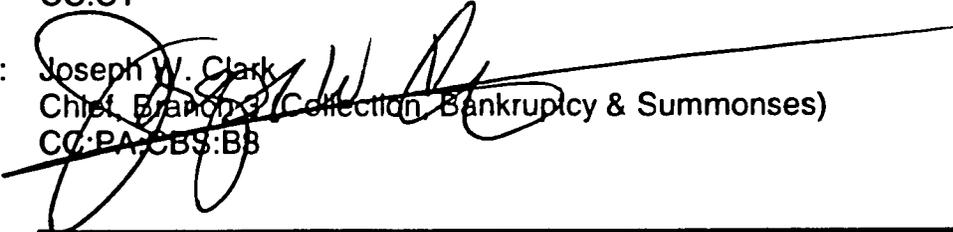
memorandum

CC:PA:CBS:Br3
POSTS-112210-04

date: April 8, 2004

to: EDWARD F. CRONIN
Division Counsel/Associate Chief Counsel (Criminal Tax)
CC:CT

from: Joseph W. Clark
Chief, Branch 9 (Collection, Bankruptcy & Summonses)
CC:PA:CBS:BB



subject: **Third Party Contacts by Fraud Detection Centers and Summons Authority**
Your reference: CC:CT:NO:109196-04

You have asked advice on how the Criminal Investigation Division (CID) can learn the identity of persons who fraudulently claim refunds when filing on-line returns. As explained in your February 27, 2004 memorandum, these schemes occur when some unidentified person uses a stolen identity to file an on-line return that authorizes a refund to be deposited in a bank account. Sometimes these fraudulent claims are used as a basis for a refund anticipation loan. Often the only thing that the Service knows about these transactions is the number of the bank account into which the refund was deposited. Thus, to learn the identities of the persons filing fraudulent claims, it is necessary to obtain the bank account records. In circumstances governed by the Tenth Circuit's decision in Neece v. Internal Revenue Service, 922 F.2d 572 (10th Cir. 1990), the Service must use a summons to obtain bank records. CID proposes to issue a memorandum instructing its agents that, in circumstances where a summons must be used, the agents may serve on the bank a summons that is exempt from the I.R.C. § 7609(a) notice requirement under the exception in section 7609(c)(2)(C) for summonses "issued solely to determine the identity of any person having a numbered account (or similar arrangement) with a bank or other institution described in section 7603(b)(2)(A)."

We recognize the time savings this interpretation would yield, but section 7609(c)(2)(C) is not broad enough to permit it. The term "numbered account" has a specific meaning, which is set forth in the regulations. Specifically, Treas. Reg. § 301.7609-4(b) provides:

Numbered account (or similar arrangement). Under section 7609(c)(2), a ~~summons solely to determine the identity of a person having a numbered~~ account (or similar arrangement) with a bank or other institution is

excepted from the requirements of section 7609. A "numbered account (or similar arrangement)" under section 7609(c)(2) is an account through which a person may authorize transactions solely through the use of a number, symbol, code name, or other device not involving the disclosure of the person's identity. A "person having a numbered account (or similar arrangement)" includes the person who opened the account and any person authorized to use the account or to receive records or statements concerning it.

We have no information suggesting that the accounts into which the fraudulently obtained refunds are being deposited are anything other than typical bank accounts. We have no reason to believe that they are accounts designed to allow the owner to authorize transactions by disclosing only a number or some other code. Accordingly, the exception under section 7609(c)(2)(C) cannot apply to the summonses referred to in CID's proposed memorandum.

To obtain records of these accounts under circumstances in which a summons must be used, we recommend that CID follow the process we described in our September 9, 2003 memorandum. In that memorandum, we advised:

In cases where the Service questions the accuracy of the taxpayer's name that is shown on the return, we recognize that the FDC's [Fraud Detection Center] task will be complicated. We recommend making preliminary contacts with the person identified on the claim for refund or with his or her employer (if that information is contained on the claim) to definitely determine whether the filer is using an alias. Once that is determined, the Service's only option when dealing with situations governed by the Neece decision will be to seek district court approval for serving John Doe summonses on the banks

John Doe summonses are governed by the procedures set forth in I.R.C. § 7609(f), which requires, inter alia, prior approval by a district court obtained in an ex parte hearing.¹ We cannot recommend that the Service use the name appearing on the return to avoid the John Doe summons procedures. As you have acknowledged in your

¹ It is conceivable that a situation might arise where the FDC will not know that the taxpayer resides in the Tenth Circuit until he or she is identified through a bank contact where no summons was originally required. In such a case, the FDC should erect a "Chinese wall" and temporarily stop the investigation, seal the file, and record in writing what had transpired. The FDC employee should then follow the John Doe summons requirements and re-obtain the records in compliance with the Tenth Circuit's requirements. (However, the bank should be advised that it need not again produce any records it has already provided to the Service.) Such a good faith attempt to comply with the law should be favorably viewed by the courts, given the Service learned of the taxpayer's state of residence after the fact.

prior and current memorandums on this subject, the Service has every reason to suspect that the names used on these returns are not those of the persons filing the fraudulent refund claims. Congress has provided the mechanism for investigating an individual whose identity is unknown. If the Service were to attempt to use a regular section 7609(a) third-party summons instead of a John Doe summons, the Service would subject itself to intense public criticism for attempting to circumvent the John Doe summons requirements.

Additionally, it should be quite simple for the Service to satisfy the requirements of section 7609(f) for obtaining the court's authorization to serve a John Doe summons. It is clear that the summons will relate to a particular person as required by section 7609(f)(1) because it will relate to the person who filed the false return. It is equally clear that the section 7609(f)(3) requirement will be satisfied because the filer's true identity is not readily available from other sources. To satisfy section 7609(f)(2), the Service can show that it has a reasonable basis for believing the unidentified filer has failed to comply with the Code by contacting the taxpayer whose name and social security number appear on the return to confirm that the identified person did not, in fact, file the refund claim.

A second matter requires mention. CID's draft memorandum states that the Service follows the Neece decision in the Tenth Circuit, and the memorandum lists the states that comprise that circuit. It should also list the other circumstances, described in IRM 25.5.1.4.1(3), in which the Service follows the Neece decision. These circumstances exist when the financial institution is located in the Tenth Circuit; the information sought concerns taxpayers residing in the Tenth Circuit, regardless of the location of the financial institution; or the Service's office is located in the Tenth Circuit, regardless of the location of the financial institution or the residence of the taxpayer.

One last matter remains. We note that CID's proposed memorandum refers to a memorandum regarding third-party contacts in fraudulent refund schemes (██████████ 06-15-01). We would appreciate receiving a copy of this memorandum.

If you have any further questions, please contact Elizabeth Rawlins at (202) 622-3983.

cc: Barry J. Finkelstein, Deputy Division Counsel/Deputy Associate Chief Counsel
CC:CT