

Office of Chief Counsel
Internal Revenue Service
memorandum

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MTSargent

date: August 17, 2005

to: Chief, Criminal Investigation

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

subject: Disclosure Concerns in Response to *Snider, et al. v. United States*

The purpose of this memorandum is to provide an analysis of the recent decision of the United States District Court for the Western District of Missouri, Central Division, in *Snider, et al. v. United States*, case nos.: 01-4256-CV-C-SOW and 02-4066-CV-C-SOW, wherein the district court found a special agent liable for multiple disclosure violations. In short, we believe the case represents no departure from prior law and, instead, further supports existing guidelines.

We therefore concur with the four suggestions that Andre' Martin set forth in his email to CI HQ – Senior Staff as to the manner in which special agents should conduct investigations and interviews.

BACKGROUND

- I. *Snider, et al. v. United States*, case nos.: 01-4256-CV-C-SOW and 02-4066-CV-C-SOW

On December 19, 2001, plaintiffs Leonard Snider ("Snider") and National Sales & Service, L.L.C. ("NSS") filed a civil complaint pursuant alleging numerous disclosures of taxpayer return information in violation of 26 U.S.C. § 6103 by the lead special agent assigned to the underlying investigation. On April 17, 2002, plaintiffs Theresa Turley ("Turley") and Labor Resources, L.L.C.¹ filed a similar complaint also alleging unlawful disclosures of tax information by the special agent. The two complaints were consolidated for trial on February 19, 2004.

Plaintiffs' complaints were based upon their allegations that the special agent, during his investigation of the plaintiffs for allegedly violating Titles 13, 18, 26, and 42 of the United States Code, made numerous unnecessary and illegal disclosures of tax return

¹ Plaintiff Labor Resources, L.L.C. dismissed its complaint prior to the commencement of trial on May 3, 2005.

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information and taxpayer return information while interviewing third-party witnesses.² They further contend that the alleged disclosures were made repeatedly and intentionally during the witness interviews. The interviews at issue occurred during a time period beginning in September of 2001, and continuing through February, 2004. According to the government, the reason the agent interviewed NNS' customers was to learn the nature of their business dealing with NSS; what representations Snider had made to those customers; and the details surrounding the contractual arrangement between NSS and each customer.

At trial, the plaintiffs produced twenty fact witnesses whose "collective testimonies" the district court found to be "remarkably consistent in describing repeated, virtually identical, unnecessary disclosures, and provide compelling evidence of a pattern of improper disclosures by [the special agent]." In response, the government argued that: (1) the special agent made no disclosures whatsoever of taxpayer information or tax return information; (2) that the third-party witnesses simply inferred matters from the line of questions asked of them; and (3) that any actual disclosures were within the limits of recognized exceptions, notably §§ 6103(k)(6) or 7431(b).

In regard to the evidence presented at trial, the district court opined that the case was "uniquely a matter of witness credibility." It ultimately found that the special agent "repeatedly volunteered to his interview subjects that Snider, Turley, and NSS were being investigated for criminal activity," and, "[i]n some cases, he went further and stated that Snider, Turley, and NSS had engaged in numerous criminal activities." These findings were largely based upon the court's determination that the agent's "credibility was significantly undermined when he attempted to change on direct examination testimony from his deposition regarding the issue of what was said to the Holiday Inn Sun Spree and The Knolls Condominiums witnesses regarding the payment of payroll taxes," since it was established that none of those witnesses had inquired about payroll taxes before that information was volunteered by the agent.

The court then found that none of the disclosures were authorized under the "not otherwise available" provision of 26 U.S.C. § 6103(k)(6) or the "good faith" exception set forth in § 7431(b). As for 26 U.S.C. § 6103(k)(6), the district court initially noted a letter exchange between the agent and Snider's attorney, Robert R. McQuain ("McQuain"), wherein McQuain apparently complained of the unnecessary effects of contacting third-parties and offered to provide Snider's relevant tax return documents upon request. It found more compelling, however, the fact that the special agent was adamant that he never made the alleged disclosures. Specifically, the court stated:

[the special agent] simply says he did not make the alleged disclosures. If he did not make such disclosures, he could not have made a determination that he needed to make the disclosures to obtain information not otherwise available.

² The underlying investigation focused on the non-payment of income and employment taxes, the employment of illegal aliens, and the filing of false documents on behalf of those individuals during tax years 1996 through 2000.

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For one to claim the need to make a disclosure to obtain information on the one hand and to claim he did not make the disclosures on the other hand is intellectually and logically inconsistent. The witnesses all testified that they cooperated with [the agent]. The Government agents claim only two witnesses to be uncooperative. For those reasons, the Court finds that the Section 6103(k)(6) exception is not available to the Government.

As for the "good faith" exception set forth in § 7431(b), the district court referred to a memorandum from Chief, Criminal Investigation, to CI Special Agents in Charge which was introduced into evidence at trial, and which authorizes a case agent to disclose that the subject is under investigation, but not that the subject is under criminal investigation. Moreover, the court noted that the agent should have been well versed in the disclosure provisions of § 6103 as he was only one year removed from his participation in mandatory disclosure training.

Absent any justification, the district court held that the special agent's actions went well beyond that which is authorized under § 6103 or the applicable IRS regulations and internal rules, *i.e.*, the scope of his disclosures "went far beyond the minimal identification of the subject and that there was an investigation in process." The court also noted the agent "conceded that he did not rely on good faith."

In sum, the district court found that the special agent committed a total of 78 § 6103 disclosures and awarded Snider \$44,000 in statutory damages and \$88,000 in punitive damages; Turley \$29,000 in statutory damages and \$58,000 in punitive damages; and NSS \$4,000 in statutory damages and \$27,589.26 in punitive damages.

II. Practical Impact of the *Snider* decision Upon CI's Existing Rules and Regulations

While there is no denying the negative result which the district court reached in *Snider*, we believe the decision was the direct result of facts and circumstances which were clearly adverse to the government. Moreover, the district court's findings of fact and conclusions of law were so fact laden that the precedential value of the decision is unclear.

We accordingly do not believe the decision in any way departs from the existing rules, regulations, and guidelines³ concerning § 6103 and the recognized exception for investigative purposes. Further, we have reviewed the email that Andre' Martin sent to CI HQ – Senior Staff on August 3, 2005 and agree with his four suggestions as to the manner in which special agents should conduct investigations and interviews.

³ See Dwight Sparlin's Memorandum for Special Agents in Charge, CI, dated October 7, 2003, regarding "New Regulations Regarding the Disclosure of Return Information for Investigative Purposes"; IRM 9.3.1, Disclosure; IRM 9.4.5, Interviews; and the Disclosure Litigation Reference Handbook, Chapter 4 – Section 6103(k)(6) and (n), Tax Administration Investigative Disclosures and Disclosures to Contractors.

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CONCLUSION

As stated above, and based upon our review of the existing guidelines and regulations pertaining to the disclosure of a taxpayer's return information during witness contacts, we do not believe that the *Snider* decision represents any departure from existing law and support the suggestions set forth in Andre' Martin's email dated August 3, 2005.

If we can be of further assistance to you regarding this matter, please feel free to contact the undersigned at (202) 622-4460 or Mike Sargent at (202) 622-4470.