

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

date: December 29, 2011

to: Kathleen L. Morton
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SB/SE Field Operations, Reviews, and Enforcement (FORE)

from: Susan Watson
Attorney, Division Counsel
(Small Business/Self-Employed)

subject: Trespass

You have requested advice regarding how revenue officers should respond to No Trespassing signs. IRM 5.1.3.2.3 lists Safety Do's and Don'ts. One is "Observe No Trespassing signs." Several revenue officers have interpreted IRM 5.1.3.2.3 as prohibiting them from any entry to premises with such a sign even though these signs often appear in places frequented by the public such as shopping centers. It appears that these revenue officers are confused about what constitutes trespassing. Furthermore, they may be concerned about possible liability. The definition of trespass, the elements of trespass, and defenses to trespass turn on state law. Since collection is national in scope, the analysis below will draw from state law sources.

Trespass is a modern intentional tort that derives from the common law tort of trespass. Generally, trespass consists of an intentional invasion of the property of another. Hawkins v. City of Greenville, 594 S.E.2d 557 (S.C. 2004). The trespass must be intentional, in the sense of an act voluntarily done or that the person intended the intrusion. Brown v. Arcady Realty Corp., 769 N.Y.S.2d 606 (3d Dep't 2003). A trespasser is "one who enters the premises of another for one's own purposes with out permission, invitation, or other right or a privilege to do so created by the possessor's consent." Sumner v. Hebenstreit, 522 N.E.2d 343 (me. 1988); Monsivais v. Winzenried, 508 N.W.2d 620 (Wis.1993). The elements of trespass are entering the property of another without any right, lawful authority, or express or implied invitation, permission, or license merely for the trespassers' own purpose, pleasure, or convenience or even just curiosity. Simcox v. Hunt, 874 So. 2d 1010 (Miss. Ct. App. 2004). The character and extent of the harm visited on the plaintiff in the interference with that person's interest in the exclusive possession of the premises are among the components of the tort of trespass. However, there may be an injury even though no harm is done, in the sense that an unauthorized intrusion upon land in the possession of another is itself an injury. It has also been said that because a legal right is involved, the law recognizes

PMTA 2012-03

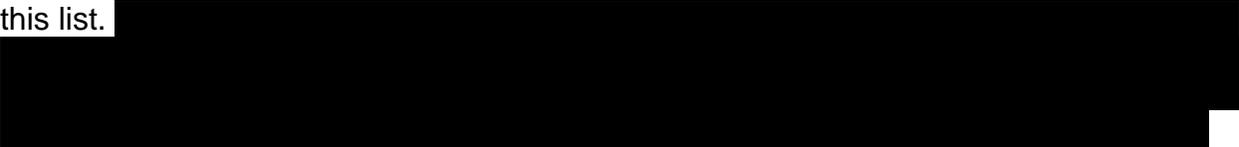
that actual harm occurs in every trespass, and thus, an action for intentional trespass is directed at vindicating a legal right, irrespective of any appreciable injury, and thus, it is not necessary that damage result. Aguilar v. Morales, 162 S.W.3d 825 (Tex. App. El Paso 2005).

There are two types of premises that revenue officers might reasonably be expected to enter in furtherance of their collection duties. One is a business establishment. The other is a residence. Opening a business establishment to transact business with the public is permission to enter. A person who enters the facility, at a reasonable time and in a reasonable manner, has the implied consent of the owner or possessor to be there. This invitation presupposes that those entering will exhibit conduct in keeping with a business purpose. City of Sunnyside v. Lopez, 751 P.2d 313 (Cal. 1988). The proprietor has the right to determine who to invite, the scope of the invitation, and circumstances under which the proprietor can revoke the invitation. Once a person has been requested to leave, there is no legal right to remain. Corn v. State, 332 So.2d 4 (Fla. 1976).¹ That person then becomes a trespasser and the owner may use force, if necessary to remove the trespasser. Commissioner v. Johnston, 263 A.2d 376 (Pa. 1970). An invitation to enter can be limited to certain persons and not all members of the public have license to enter. The absence of a “no trespassing” sign on private property does not mean an owner gives all members of the public the right to enter. Sharpe v. Turley, 191 S.W.3d 362 (Tex. App. Dallas 2006).

Courts have held that entrance onto property that would otherwise be considered a trespass may be justified by reason of authority vested in the persons entering. This includes firefighters investigating reports of a fire; physicians and EMTs investigating possible elder abuse; humane society personnel investigating animal abuse; process servers; and power company employees running transmission lines. All of these persons were held by various courts not to be trespassers. In re Catalano, 623 P.2d 228 (Cal. 1981); State v. Howard, 167 N.W.2d 80 (Neb. 1969); Easton v. Sutter Coast Hosp., 95 Cal. Rptr. 2d 316 (1st Dist. 2000); Reisdorff v. County of Yellowstone, 989 P.2d 850 (Mont. 1999) (overruled on other grounds by, Miller v. City of Red Lodge, 65 P.3d 562 (Mont. 2003)); Mesgleski v. Oraboni, 748 A.2d 1130 (N.J. 2000); Hand v. Stray Haven Humane Soc. and S.P.C.A., Inc., 799 N.Y.S.2d 628 (3d Dep't 2005); Kucker v. Kaminsky & Rich, 776 N.Y.S.2d 72 (2d Dep't 2004); Harris v. Carbonneau, 685 A.2d 296 (Vt.1996); Zanoni v. Hudon, 678 A.2d 12 (Conn. 1996) (precluding a trespass claim by the ward's child who was excluded from using the property); Brassette v. Central Louisiana Elec. Co., Inc., 383 So. 2d 120 (La. Ct. App. 3d Cir. 1980).

Revenue Officers investigating the tax liability of a taxpayer might also be included in

¹ Criminal trespass is not fundamentally different from the civil tort. Helms v. Zubaty, 495 F.3d 252 (6th Cir. 2007) ([defendant] defied a lawful order not to ... remain. Ky. Rev. Stat. Ann § 511.090(2). Criminal trespass concerns *presence*, not behavior.) (Emphasis in original.) See also Borgman v. Kedley, 646 F.3d 518 (8th Cir. 2011) (Under Iowa law, person commits criminal trespass if she enters the property of another after being notified or requested not to enter.) We do not think criminal trespass is material to the discussion here.

this list. 

While the state law of trespass also applies to private residences, federal constitutional issues also arise when civil or criminal law enforcement authorities enter onto property. State v Cook, 2011 WL 1376622 (guiding principle is a police officer on legitimate business may go where any reasonably respectful citizen may go.) State v Posenjok, 111 P.3d 1206 (Wash. 2001). With respect to criminal law enforcement, courts have held that the porch of a residence is a public place for purposes of the 4th Amendment. Coffin v. Brandau, 662 F.3d 999, 1012 (11 Cir. 2011) (In carrying out their duties, the police are free to go where the public would be expected to go.); State v. Detlefson, 335 So.2d 371, 372 (Fla. App. 1976) (It cannot be said [that] the defendant had a reasonable expectation of privacy in the front porch of his home where, presumably, delivery men and others were free to observe the [marijuana] plants thereon.). Most of the cases center on the constitutional issue and not whether the law enforcement officers were trespassing. If a revenue officer goes to a taxpayer's front door to deliver documents or make other contact, the revenue officer is not trespassing. If the taxpayer then tells the revenue officer to leave, the revenue officer should leave. Usually at that point he has completed his task. We suggest revising the IRM to tell the revenue officer he can go up to someone's front door to deliver a summons or other document requiring personal service even if there is a "no trespassing" sign posted. See Schaal v. Unites States, 2008 WL 5638684 (E.D. Wis.), explained in more detail *infra*. Revenue officers should use caution and only enter areas of a private residence that are commonly understood to be open to the public such as the area of the front door and porch. The UPS man would probably deliver a package to the front door as would the mail carrier. Until told otherwise, the revenue officer has a valid business reason to be there. Revenue officers should approach premises with a no trespassing sign in a rural area more cautiously than one posted on a suburban residence with no fence. If revenue officers see a "no trespassing" sign in a rural, possibly fenced residential premises, they may wish to leave and request the assistance of a special agent or TIGTA agent to accompany them on a second attempt to contact the taxpayer.

Revenue Officers who leave when requested to do so will not incur liability. Taxpayers may not sue employees acting within the scope of their employment. Reisman v. Bullard, 14 Fed. Appx. 377 (6th Cir. 2001). Furthermore, a plaintiff who asserts that a government employee acted outside the scope of employment has the burden of proof on the issue. Noqueras-Cartagena v. United States, 172 F. Supp. 2d 296 (D. Puerto Rico 2001).

Case law involving revenue officers and trespass claims is sparse. In Schaal v. United States, 2008 WL 5638684 (E.D. Wis.), a revenue officer was serving a summons and had asked a sheriff to accompany him to a residence. The taxpayer had affixed a "no trespassing" sign to the premises. No one answered so the revenue officer taped the summons to the door. Just then the taxpayer arrived home. The court held that the

taxpayer's attempt to sue in tort for trespass was barred by both the Federal Tort Claims Act and sovereign immunity and dismissed the case for failure to state a cause of action.

In summary, a "no trespassing" sign might suggest to a revenue officer to proceed with caution. That caution is attenuated when the sign appears at a shopping mall, restaurant, or other business establishment that by implication invites the public to enter. Revenue officers should not assume that they cannot approach the front door of a residence that has a "no trespassing" sign. If the postman or other persons with legitimate business may approach, so may the revenue officer. The revenue officer should use his judgment based on the facts and circumstances whether to proceed when a "no trespassing" sign is in evidence.

Please call me if you have any questions.