

IV.B.2. Summons

Introduction

The Commissioner has broad investigatory powers to ascertain the correctness of any return or to determine or collect a tax liability. The Commissioner may examine any books and records that may be relevant or material and summons any person he deems proper to produce records or testify as to matters that “may be relevant or material to such inquiry”.

When Should the Summons Authority be Used?

There are, of course, advantages and disadvantages to using a summons as part of any audit. The advantages include better factual case development and helping assure that the Government’s discovery will be enforced in litigation. Disadvantages include the possibility that an adversarial situation could be created during the course of the audit that further affects taxpayer cooperation. And, of course, there is the perception that performing an audit by summons will add time and delay the closing of the audit. One thing seems certain however: when the Service encounters an uncooperative taxpayer or an uncooperative third party in a tax shelter investigation, failure to use its summons authority will result in an undeveloped case. An undeveloped case may, in turn, result in the Service receiving less value than its case deserves in Appeals or in litigation. What is more, discovery in litigation could be limited if the Service could have obtained information at the administrative level, but failed to do so. Considering the sophistication of the taxpayers, the brokerage firms, banks, law firms and accounting firms involved with abusive corporate tax shelters, and the prevailing resistance to the Service’s information requests in such cases, summoning records may be a normal and required procedure for full factual development.

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When Should the Summons Authority be Used?

The summons authority is an important and powerful tool for effective tax administration. Rule Number One when considering the use of a summons is consult the Summons Handbook - Section 25.5 of the Internal Revenue Manual. <http://publish.no.irs.gov/pubsys/irm/indp25.html> . The Service must be judicious in using this enforcement tool in all cases, including those involving abusive corporate tax shelters. While the Service can summon persons having information or documents that may be relevant to the investigation, the Service should never issue a summons to pursue a fishing expedition for information unrelated to the taxpayer's liability. Such a summons will not meet the requirements of *United States v. Powell*, 379 U.S. 48 (1964) which is discussed below.

To assure proper use of summonses in tax shelter cases, LMSB Division Commissioner requires that:

- (1) Before a summons is issued in a tax shelter case, a legal memorandum supporting the issuance of the summons is necessary. This rule applies to all summonses (administrative and third-party). The agent seeking to issue the summons should ask local counsel to prepare the memo.
- (2) Only in connection with a promoter penalty audit under IRC §§ 6707 or 6708, the Industry Director must contact the promoter (for example, managing partner or CEO) before a summons can be issued to the promoter. If the promoter has retained (and properly designated) outside representation, then the Industry Director should first contact the designated representative. The ID should specifically ask the representative if the ID should directly contact the head of the firm on the matter of the summons.

Procedure (2) does not apply to any summons issued in connection with an income tax audit. Thus, for example, if the audit team needs to issue a third-party summons to a promoter, the Industry Director is not required to contact the promoter before the summons can be issued. Please note that Procedure (1) does apply to the summons. Similarly, if a John Doe summons is to be issued to a person to obtain a list of investors, the ID is not required to contact the person before the summons is issued.

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Drafting a Summons

When drafting a summons for issuance to the taxpayer, use the previously issued and unanswered IDRs as a starting point. Books and records to be produced must be described with *reasonable certainty*. Although you should strive to include a reasonable description of items sought, care should be exercised so that that descriptions are not so narrow that they may provide the taxpayer an opportunity to exclude desired information in its response. A recommended drafting technique is a funnel approach whereby a category of documents is first described generally with more specific categories and ultimately specific items following. This may be accomplished in part by using the statement: “All documents relating to [General Category], *including, but not limited to* [Specific categories and Specific Items]”. There is, of course, a balance that must be struck. While examiners desire complete information to fully develop their cases, they must resist overly broad and comprehensive document descriptions. Seeking document production that is overly broad and unduly burdensome may affect summons enforcement. In addition, you may run the risk of a “box dump,” a tactic used to overwhelm the summoning party by complying literally with the “any and all documents” language in the summons. The same techniques should be used for summonses issued to third parties.

It is always prudent to seek Counsel assistance in drafting summonses.

Rules of an Enforceable Summons

Standards for Enforcement of a Summons (Powell Requirements)

- Investigation must be conducted for a legitimate purpose.
 - Inquiry must be relevant to the purpose.
 - Test is whether the inspection of the records or the information might throw light on the accuracy of the tax return.
 - Information sought must not already be within the Commissioner’s possession.
 - Administrative steps required by the Code have been followed.
 - Summons not issued for an improper purpose.
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Rules of an Enforceable Summons

Statutory Requirements

Proper Service (I.R.C. § 7603)

- Personal Service
- Must be served on a Corporate Officer authorized to accept the summons
- –DON'T leave with a secretary unless summoned party authorized secretary to accept
- If summons is for corporate records, issue the summons to the corporation through a person in his/her capacity as custodian of the particular records
- Improper service is waived if taxpayer attempts or begins to comply

Third-Party Record Keeper (I.R.C. § 7609)

- When a summons is issued to a third party record keeper, that information must be included on the name of the person summonsed.
- When a third party record keeper is summonsed, the taxpayer must receive notice of such summons.

Time and Place for Appearance (I.R.C. § 7605)

- The date and time set for appearance be reasonable under the circumstances.
- Not less than 10 days from the date of the summons (In computing the period, exclude the date of service and the date of the appearance).
- When summoning a third party:

Set the date for appearance at least 24 to 26 days after the date notice of summons is given to all persons entitled to notice.

I.R.C. § 7609(a)(1) provides that noticees must be given notice “within 3 days of the day on which service is made (on the third party) but no later than the 23rd day before the day fixed in the summons” as the appearance

Attested Copy

- The copy served must contain a signed certification that a true and correct copy of the original summons was served.

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**Summoning
US Citizens
Residing
Abroad**

Since many abusive tax shelter transactions have foreign aspects, information gathering often requires additional steps and approaches. Chief Counsel Advice released on September 21, 2001 discusses one technique that may be useful when information is sought from a US citizen residing abroad.

The US and UK and many other nations are parties to the Hague Service Convention (HSC). The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. 1361; 658 U.N.T.S. 163; T.I.A.S. No. 6638; 28 U.S.C.A.; 16 I.L.M. 1339 (1977) (the "Service Convention") provides for service of an IRS administrative summons on a US citizen residing in the United Kingdom, because such summons is considered an extrajudicial document under the Convention. A properly served summons may be enforceable in the US District Court for the District of Columbia pursuant to IRC §§ 7604 and 7701(a)(39). The summons may be personally served by the Tax Attaché (formerly the Revenue Service Representative) or the Assistant Tax Attaché stationed at London, after being authorized by the Central Authority of the United Kingdom under the Service Convention. The service of the summons in the United Kingdom will be processed by the London Tax Attaché of the Office of Director, International (LMSB), and coordinated by the office of Associate Chief Counsel (Intl.) and the office of Assistant Chief Counsel (Collection, Bankruptcy and Summons). The office of the Tax Attaché in London is an appropriate place for requiring the witness to appear for the summons interview. Further details of the recommended procedures are set forth in the Chief Counsel Advice. You should seek the assistance of local Counsel when using this approach.

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Designated Summons - IRC Section 6503(k)

IRC § 6503(k) authorizes the Service to issue summonses that toll the running of the statute of limitations during the period in which judicial enforcement proceedings are pending and for either 60 or 120 days thereafter, depending on whether or not the court orders compliance with the summons. This provision was enacted by Congress in 1990 to deal with an information gathering tactic employed by some taxpayers – some taxpayers reportedly made a practice of responding quite slowly to IRS requests for information, and then deciding quite quickly not to extend the statute of limitations.

Requirements For A Designated Summons

- Must be issued at least 60 days before the statute of limitations expires.
- Must be marked a designated summons pursuant to IRC § 6503(k) on the face of the summons.

Limitations

- Only one designated summons may be issued for each taxable year.
- Only applies to corporations.

Suspends the Statute of Limitations

- During any judicial enforcement period with respect to the designated summons or any other summons that is issued during the 30 day period which begins on the date on which such designated summons is issued and which relates to the same return as the designated summons
- If a Court requires compliance, during the 120 day period beginning with the first day after the close of the judicial enforcement period.
- If a Court does not require compliance, the period of suspension shall not expire before the 60th day after the close of the judicial enforcement suspension period.
- Judicial enforcement period begins on the day on which the court proceeding with respect to such summons is brought and ends on the day on which there is a final resolution as to the summoned person's response.

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Summoning Tax Accrual Workpapers

Although the Service has the legal authority to summons accountants' audit or tax accrual workpapers, the Service has adopted a policy of restraint. Under the Service's policy, a summons for tax accrual workpapers should normally be used only when factual data cannot be obtained from the taxpayer's records and then only as a collateral source for factual data, access to which should be requested with discretion and not as a matter of standard examining procedure.

By Announcement 2002-63, the Service stated a change to the longstanding policy. Now, the Service may request tax accrual workpapers in the course of examining any return after June 30, 2002, that claims any tax benefit arising out of a transaction that the Service has determined to be a listed transaction at the time of the request under Temp. Reg. section 1.6011-4T(b)(2). For returns filed before July 1, 2002, that claim any tax benefits arising out of a listed transaction, the Service may request tax accrual workpapers pertaining to the listed transactions, if the taxpayer had an obligation to disclose the transaction under Temp. Reg. section 1.6011-4T, and failed to do so on the return, under Rev. Proc. 94-69, 1994-2 C.B. 804, if applicable, or under Announcement 2002-2, 2002-2 I.R.B. 304. You should confer with local Counsel before seeking tax accrual workpapers.
