Office of Chief Counsel • Internal Revenue Service • Assistant Chief Counsel (Disclosure Litigation)

Disclosure Litigation BULLETIN

This bulletin is for informational purposes; it is not a directive.

No. 97-2
April 1997

Gerald Ryan
Jamie Bernstein
Micki Martin
Amy Pfalzgraf
Julie Schwartz

PROCEDURES FOR GAO AUDITS

The General Accounting Office (GAO) is authorized to perform audits of the IRS and its operations. The audits are one of two kinds, either an audit to be performed without access to tax information (nontax review) or one in which GAO is entitled to obtain tax information (tax review). Since these audits may result in a review of Chief Counsel records or interviews with Counsel employees, you should be aware of procedures to be followed if contacted by representatives from GAO.

GAO will inform the Service of its intention to conduct an audit and of the subject matter thereof. At that time, the Assistant Commissioner (Examination) will assign a job code to the audit. The Assistant Commissioner (Examination) will also issue an authorization letter which informs Service and Chief Counsel employees of the general purpose of the audit, whether or not any particular audit is a tax or nontax review, and provides other pertinent instructions. Specific instructions on this process can be found in IRM 1272, Disclosure of Official Information Handbook, Chapter 23.

The IRM provisions outline procedures that have been established for examining certain materials. For example, GAO may examine Law Enforcement Manuals (LEM) and Classified ADP Handbooks when reviewing Service operations as part of a tax or nontax review. In view of the sensitive nature of this material, GAO has agreed that it will advise the appropriate manager of the name of the GAO auditor authorized to obtain such materials, or documents containing such materials. That auditor will be responsible for security of the material so obtained. The manager should maintain a record showing what LEM or ADP materials were inspected and/or copied by GAO and the date.

Currently, the Office of the Special Counsel (Modernization and Strategic Planning) has been designated the point of contact for all GAO matters for the Office of Chief Counsel, and can be

contacted with any questions (202-622-3360). The Service contact for GAO issues is the National Director, Governmental Liaison and Disclosure (202-622-6240).

APPLICATION FOR I.R.C. § 6103(i)(1) EX PARTE ORDERS

Recent inquiries have been made regarding the legal sufficiency of applications for I.R.C. § 6103(i)(1) orders signed by Assistant United States Attorneys. Under I.R.C. § 6103(i)(1), federal law enforcement officials enforcing a nontax criminal law must obtain ex parte court approval in order to receive a return or return information submitted by a taxpayer. Please be advised that I.R.C. § 6103(i)(1)(B) requires one of the officials specifically named therein to authorize the application for the order. Since Assistant United States Attorneys are not among the officials listed in I.R.C. § 6103(i)(1)(B), they cannot authorize the application for the order. Instead, the application must be authorized by a United States Attorney, personally. An application can be authorized by an Acting United States Attorney (officially acting in the United States Attorney's absence); however, the authority to authorize an application cannot be delegated.

While I.R.C. § 6103(i)(1)(B) requires a named official to authorize each application, there is no requirement that the official actually sign the application. The best evidence, of course, of the required authorization is the signature of the named official on the application. Nevertheless, it may be possible to design alternative methods of ensuring proper authorization. For example, documentation could be secured to indicate that each application not signed by the United States Attorney was, in fact, personally reviewed and authorized by the United States Attorney on a case-by-case basis. This could be implemented by (1) the United States Attorney retaining written documentation containing his or her specific authorization; (2) changing the language of the local I.R.C. § 6103(i) order application to specifically indicate that the United States Attorney has "personally reviewed and authorized" the application; or (3) having the United States Attorney send a letter to the district director documenting his or her practice of reviewing and authorizing each application on a case-by-case basis before submission to the court.

Internal Revenue Manual procedures do not require the Service to solicit applications simply to check for statute adherence. However, when applications are provided, or references to the application appearing in the court's order indicate that the proper official did not authorize the application, Service personnel have a responsibility to ensure that the applications meet the statutory requirements prior to providing returns and return information in accordance with the order.

It is expected that IRM, Disclosure of Official Information Handbook, Chapter 1272(28)00 will be revised to more fully cover this matter.

CASE DEVELOPMENTS

A. Tax Analysts v. Internal Revenue Service, et al., No. 1:97 CV-260 (JLG) (D.D.C. February 7, 1997)

On February 7, 1997, Tax Analysts, the American Historic Association, the Organization of American Historians, and the Society of American Archivists filed a disclosure related lawsuit in the United States District Court for the District of Columbia, naming the Internal Revenue Service and the National Archives and Records Administration (NARA) as codefendants. In the complaint, the plaintiffs allege, in part, that the Service generally improperly and too expansively invokes I.R.C. § 6103(a) which prohibits the disclosure of returns and return information. The complaint alleges that in so doing, the Service has precluded the transfer of agency records containing I.R.C. § 6103 protected information to NARA and thus, prevents such records from being made available for research purposes.

I.R.C. § 6103 contains no explicit exception which authorizes NARA employees to review returns and return information to carry out NARA's archival activities. The Department of Justice's Office of Legal Counsel (OLC) has considered the legality of NARA's access to tax information on three prior occasions. On each occasion, OLC concluded that I.R.C. § 6103 does not authorize NARA to access tax information in accomplishing their archival duties. See also American Friends Service Committee v. Webster, 720 F.2d 29 (D.C. Cir. 1983) in which the District of Columbia Circuit held that no provision of I.R.C. § 6103 authorized the National Archives and Records Service (NARA's predecessor) to inspect records for archival purposes.

The complaint also alleges that the Service has failed to comply with federal laws governing federal records management, and challenges NARA's exercise of its oversight and enforcement responsibilities under those laws. Specifically, plaintiffs claim that the Service has failed to preserve and manage certain historical records, transfer those records to NARA, and make the records available to the public as required under Title 44. Plaintiffs claim NARA has failed to take action under the Federal Records Act to ensure that the Service complies with its statutory responsibilities regarding the management of federal records.

On April 8, 1997, the Department of Justice filed a Motion to Dismiss plaintiffs' suit against NARA and the Service for lack of a case or controversy that is ripe for judicial review. The memorandum in support of this motion argues that because the Service and NARA are continuing to work to implement improvements

in the Service's records management program, that NARA previously suggested, and are making progress in that regard, plaintiffs' claims are premature. Therefore, it is argued on behalf of defendants, until the Service completes the improvements it is making to its records management practices and NARA concludes its oversight of that process, there is no final agency action for a court to review.

B. United States v. Czubinski, 106 F.3d 1069 (1st Cir. 1997)

The defendant Czubinski, was convicted on nine counts of wire fraud, 18 U.S.C. §§ 1343, 1346, and four counts of computer fraud, 18 U.S.C. § 1030(a)(4) for unauthorized searches of taxpayer files in the Integrated Data Retrieval System (IDRS).

The First Circuit reversed the U.S. District Court for the District of Massachusetts on both the wire fraud and computer fraud counts. With regard to the wire fraud counts, the circuit court rejected the government's contentions that Czubinski (1) defrauded the Service of its property, under section 1343, by acquiring confidential information for certain intended personal uses, and (2) defrauded the Service and the public of their intangible right to his honest services, under sections 1343 and 1346. The appellate court acknowledged that confidential information may constitute intangible "property" and that its unauthorized use may deprive the owner of its property rights. The appellate court, however, found that the government failed to show that "merely accessing confidential information, without doing, or clearly intending to do, more, is tantamount to a deprivation of [Service] property under the wire fraud statute." 106 F.3d at 1074. The appellate court also found that the government "simply did not prove that Czubinski deprived, or intended to deprive, the government or the public of their right to his honest services." 106 F.3d at 1077.

With regard to the computer fraud counts, the First Circuit held that Czubinski's searches of taxpayer return information did not satisfy the statutory requirement that he obtain "anything of value." 18 U.S.C. § 1030(a)(4). In so finding, the appellate court emphasized that under section 1030(a)(4), "the thing obtained, may not merely be the unauthorized use." 106 F.3d at 1078.

With the passage of the Economic Espionage Act of 1996, Pub. L. No. 104-294, 110 Stat. 3488, 18 U.S.C. § 1030 was amended to provide that any person who "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains information from any department or agency of the United States ... shall be punished as provided in subsection (c)... ." Subsection (c) provides that a violation is a misdemeanor punishable by a fine or imprisonment for not more than one year, or both, for the first conviction. 18 U.S.C § 1030(c)(2). The

legislative history makes clear that the amendment was intended to deal with, among other things, the unauthorized browsing of tax information in IRS computers.

C. Terry Jones, et al. v. U.S., 97 F.3d 1121 (8th Cir. 1996)

Mary Charles McDonald, et al. v. U.S., 103 F.3d 1009 (9th Cir. 1996)

I.R.C. § 7431 provides for civil damages for the unauthorized disclosure of tax returns and return information in violation of I.R.C. § 6103. However, under I.R.C. § 7431(b) no liability arises with respect to any disclosure resulting "from a good faith, but erroneous interpretation" of I.R.C. § 6103. In recent decisions, the U. S. Circuit Courts of Appeals for the Eighth and Ninth Circuits have rejected the Sixth Circuit's holding in Davidson v. Brady, 732 F.2d 552 (6th Cir. 1984), that bad faith is an element of an I.R.C. § 7431 suit that plaintiffs must plead and prove.

In Terry Jones, et al. v. U.S., 898 F. Supp. 1360 (D. Neb. 1995), the district court had ruled, following a trial on the merits of the plaintiffs' I.R.C. § 7431 claims, that a special agent's disclosure to a confidential informant that a search warrant was to be executed was the result of a good faith, but erroneous, interpretation of I.R.C. § 6103. However, on appeal the Eighth Circuit held that the district court had improperly placed the burden of pleading and proving bad faith on the plaintiffs. The circuit court disagreed with Davidson and ruled that the burden of pleading and proving good faith was on the government. The case was remanded for a determination as to whether the government met its burden of proving that the disclosure by the special agent met an objective standard of good faith. On remand, the district court held that the government failed to meet its burden of proving that the special agent met the objective standard of good faith (i.e., agent failed to consult statutory language as interpreted and reflected in Internal Revenue Service regulations and manuals) in disclosing the fact of the search warrant to the informant, and referred the case to a magistrate judge for expeditious scheduling for a trial on damages.

Two months following Jones the Ninth Circuit, in Mary Charles McDonald, et al. v. U.S., also rejected the reasoning in Davidson finding that the district court, 1995 U.S. Dist. LEXIS 6284 (E.D. Cal. 1995), had improperly relied on Davidson to place the burden of pleading and proving bad faith in an I.R.C. § 7431 case on the plaintiff. However, unlike Jones, in which the Eighth Circuit remanded the case for a determination as to whether the government met its burden of proving good faith, the Ninth Circuit found that the record established beyond dispute that the revenue agent acted in good faith in relying on I.R.C. § 6103(h)(4)(C) in distributing audit reports containing the

plaintiffs' return information to related taxpayers.

* * * * *

Your suggestions for topics to be included in future Bulletins are invited.

Department of the Treasury
Internal Revenue Service
Document 10028 (4-97)
Catalog Number 24384V