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INTERNAL REVENUE SERVICE
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OFFICE OF
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MEMORANDUM FOR BERNARD NELSON, AREA COUNSEL
(NATURAL RESOURCES - HOUSTON)

FROM: Joseph W. Clark, Chief, Branch 3
(Collection, Bankruptcy, Summons)

SUBJECT: Requests for Revenue Agents' Personal Information as
Condition for Access to Audit Sites

This memorandum is the combined response from Collection, Bankruptcy and Summons and General Legal Services to your request for advice pertaining to conditions being placed on Internal Revenue Service employees for access to audit sites. It is our understanding that, in the wake of the events of September 11, 2001, a number of corporate taxpayers are requiring that IRS revenue agents provide personal information, such as their social security number, home address and home telephone number, as well as their vehicle identification information in order to obtain access to the taxpayers' sites for audits. At least one taxpayer has requested that the IRS agents consent to a background check before admission to the site. A separate, but related, matter is the issuance of identification badges by the taxpayer's security force for use by the IRS employee.

ISSUES

1. Whether a taxpayer's requirement that an IRS employee provide personal information before granting access to the audit site interferes with the IRS's ability to set the time and manner of the audit.
2. Whether the employee can use taxpayer issued identification badges for security purposes while auditing the taxpayer on site.

Conclusion

1. A taxpayer's requirement that IRS employees provide personal, private information before receiving access to the taxpayer's audit site contravenes the IRS's authority to set the time and manner for the audit.

2. Taxpayer-issued badges provided to revenue agents for security purposes may be displayed or worn without violating any legal or ethical restrictions.

DISCUSSION

A. *IRS Has Authority Under I.R.C. § 7605 to Set Time and Place for the Examination of Taxpayer Records*

Congress has conferred upon the Secretary of the Treasury the authority to determine the correct tax liability and granted to the Secretary broad powers to conduct investigations to determine the correctness of a taxpayer's liability. See I.R.C. § 7801, § 7601.¹ I.R.C. § 7601(a) provides in relevant part:

The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owing or having care and management of any objects with respect to which any tax is imposed.

The Commissioner of the Internal Revenue has been delegated by the Secretary the duty of making inquiries, determinations and assessments of all taxes imposed by the Internal Revenue Code. See I.R.C. § 7803(a)(2); Donaldson v. United States, 400 U.S. 517, 523-24 (1971); Treasury Order 150-10.

While I.R.C. § 7601 grants the IRS broad authority to make inquiries, it is generally I.R.C. § 7602 which is cited for the IRS's investigatory authority. That section provides in relevant part:

(a) AUTHORITY TO SUMMON, ETC.—For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax . . . the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

¹ I.R.C. § 7601(b) provides that

(b) PENALTIES.— For penalties applicable to forcible obstruction or hindrance of Treasury officers or employees in the performance of their duties, see section 7212.

(2) To summon the person liable for tax . . . , or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business if the person liable for the tax . . . , or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and produce such books, papers, records or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) to take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Courts interpreting this section have consistently held that it empowers the IRS with broad information gathering authority to conduct investigations. See United States v. Arthur Young & Co., 465 U.S. 805, 813-815 (1984); United States v. Saunders, 951 F.2d 1065, 1067 (9th Cir. 1991). The broad authority of the IRS to summons records is delineated in the seminal case of U.S. v. Powell, 379 U.S. 48 (1964). In Powell at 57-58, the Court held that the Secretary was not required to show probable cause to issue a summons, but was required to demonstrate that

the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed – in particular, that the 'Secretary or his delegate,' after investigation, has determined the further examination to be necessary and has notified the taxpayer in writing to that effect.

The Court further noted that the inability of the district court to determine whether probable cause existed for issuance of the summons does not rob an enforcement proceeding of meaning inasmuch as the district court still has the authority to determine whether the summons was issued for an improper purpose in order to prevent abuse of the court's process. 379 U.S. at 58. See also United States v. Davis, 636 F.2d 1028, 1034 (5th Cir. 1981) (once the government meets the Powell standards, the burden shifts to the summoinee to disprove one of the four elements or demonstrate that enforcement would constitute an abuse of the court's process).

Relevance has been described by the Supreme Court in the summons context as whether there is any information that would "throw light" on the correctness of the return. See Arthur Young, 465 U.S. at 814-15 & n. 11. As the Supreme Court stated in Arthur Young, at 814:

The language "may be" [in I.R.C. § 7602] reflects Congress' express intention to allow the IRS to obtain items of even potential relevance to an ongoing investigation, without reference to its admissibility. The purpose of Congress is obvious: the Service can hardly be expected to know

whether such data will in fact be relevant until they are procured and scrutinized.

The IRS need not accept the word of the summoned party that the records are not relevant; it is entitled to make that determination for itself. Tiffany Fine Arts, Inc. v. United States, 469 U.S. 310, 323 (1985). See also Wyatt, 637 F.2d at 299 (taxpayer cannot be judge of what is relevant and restrict the examination of his financial affairs to papers of his choosing).

Just as the taxpayer cannot halt a proper investigation or determine what information is relevant to the IRS's investigation of tax liability, the taxpayer cannot determine the conditions under which the IRS can conduct the investigation. I.R.C. § 7605 grants to the Secretary the authority to set the time and place of examination. I.R.C. § 7605(a) provides in relevant part:

The time and place of examination pursuant to the provision of section . . . 7602 shall be such time and place as may be fixed by the Secretary and as are reasonable under the circumstances. . . .

Treasury Regulation § 301.7605-1(a)(1) provides that the "time and place of examination pursuant to . . . [section] 7602 . . . are to be fixed by an officer or employee of the Internal Revenue Service, and officers and employees are to endeavor to schedule a time and place that are reasonable under the circumstances." (Emphasis added.) The regulation further indicates that it is reasonable for the IRS to schedule an examination during regular work days for the IRS throughout the year, regardless of "seasonal fluctuations" in the taxpayer's business. See § 301.7605-1(b)(1). In addition, the regulation provides that the IRS is to determine whether the audit should occur at the IRS office or the taxpayer's place of business. See 301.7605-1(c), (d).

Reasonableness of time and place are determined by the circumstances of the case. See, e.g., United States v. United Distillers Products Corporation, 156 F.2d 872 (2d Cir. 1946) (requiring taxpayer to take company books to revenue agents office was reasonable after agents were unable to conduct site audit due to harassment by taxpayers' employees); In re Wolrich, 84 F. Supp. 481 (S.D. N.Y. 1949) (In absence of showing by taxpayer that production at IRS office was not fair or proper, commissioner's request for production at IRS office was deemed reasonable.)

With respect to the identification of the employees, Congress has legislated that officers and employees of the IRS must provide to the taxpayer their name and a unique identifying number. This requirement was initiated by section 3705 of the IRS Restructuring and Reform Act of 1998 ("RRA98").² That section provides in relevant part:

² RRA98 § 3705 was not codified into title 26 U.S.C.

(a) Notice.—The Secretary of the Treasury or the Secretary's delegate shall provide that—

• • • •
(3) an Internal Revenue Service employee shall give a taxpayer during a telephone or personal contact the employee's name and unique identifying number.

No other section of the Code requires IRS employees to identify themselves to taxpayers.³ No Code section requires that employees provide personal, private information to taxpayers. The Internal Revenue Manual, which sets forth guidelines for IRS employees, provides guidance for employees on what material is to be provided to the taxpayer. In IRM Part 4.2 (Examination of Returns Handbook), subsection 1.6.9.1.2 provides as follows:

(1) Revenue Agents and Tax Auditors must verify during their first contact with the taxpayer (either telephone or in-person) that the taxpayer has the employee's correct name, telephone number, and unique employee identification number. . . .⁴

The taxpayer has no right to set any conditions on the time and place of the audit, rather, the taxpayer is limited to objecting to the IRS's designation of time and place as being unfair or improper. See, e.g., United Distillers; Wolrich, supra. Any taxpayer who requires that IRS employees provide their personal, private information, or consent to a background check before being granted access to an audit site is acting in contravention of the Secretary's authority to set the time and place for the audit.⁵

³ Various subsections of I.R.C. § 6103 permit IRS employees to make certain disclosures to taxpayers and to third parties for tax administration purposes and such disclosures would include their name and credentials. That code section is beyond the scope of this memorandum and will not be discussed here.

⁴ The collection and criminal investigation functions also have published guidelines for their employees to follow. See IRM Handbook 5.1, subsection 5.1.10.1 (collection - name, telephone number and unique identifying number) and IRM Handbook 9.4, subsection 5.11.3.1.1 (criminal investigation - name and credentials).

⁵ Federal law prohibits anyone copying or duplicating the employee's credentials. Title 18 U.S.C. § 701 which provides in relevant part:

Whoever . . . photographs, prints, or in any other manner makes or executes any engraving, photograph, print or impression in the likeness of any such badge, identification card, or other insignia . . . except as authorized under regulations . . . shall be fined under this title or imprisoned not more than six months, or both.

The Office of Personnel Management (“OPM”) has determined that six pieces of information about federal employees can be made available when such information is sought by members of the public.⁶ IRM 1.3.20.7.2(1), 5 C.F.R. § 293.311. Generally, this information is available from the employees Official Personnel File (OPF). The items of information are (1) name; (2) present and past position titles and series; (3) present and past grades; (4) present and past annual salary rates, including awards; (5) present and past duty stations, including address and (6) position description and job elements. *Id.* By determining that these pieces of information about federal employees may be publicized, the OPM has determined that personal information is not to be publicized and, therefore, the employees will not be required by the government to provide this information.

B. *Taxpayer Issued Identification Badges*

As indicated in Area Counsel’s memorandum, based on increased security concerns, taxpayers have requested all audit team personnel to wear company-provided badges, and some taxpayers may have required social security numbers before issuing a badge. In the absence of a company-provided badge, building security personnel or persons operating adjacent parking facilities have requested agents to present personal identification, such as a driver’s license, for access to the building or the parking facility, and to leave the personal identification with security personnel.

In our opinion, Service employees may use or wear taxpayer-issued badges to simplify regular access to the taxpayer’s premises without violating nontax laws or general ethics principles applicable to Government employees. Although such a practice eliminates a clear, visual distinction between the IRS employee and company employees, it is unlikely to create any appearance of a less than objective relationship to the taxpayer. A taxpayer-issued badge in the context of security concerns does not present the ethics issues that are raised when a badge is provided for the user’s personal benefit (e.g., if a taxpayer were to provide badges to IRS employees that permit access to employee benefits, such as an employee cafeteria, employee gym, etc.). See 5 C.F.R. §§ 2635.101(b)(8) (employees shall act impartially and not give preferential treatment to any private organization or individual), 2635.101(b)(14) (employees shall avoid actions creating the appearance that they are violating the law or ethical standards), 2635.702 (employees shall not use public office for private gain).

As indicated above, we conclude that if a taxpayer conditions an IRS employee’s access to its premises on the provision of personal information (other than the employee’s name and unique identifying number, as required under the IRS Reform and Restructuring Act , § 3705), the Service may invoke its authority under I.R.C. § 7605 to move the examination site to an IRS office. All agents are issued IRS pocket

⁶ The exception to this determination is information pertaining to all occupational series 1811, criminal investigators. No information pertaining to 1811 criminal investigators is to be made public. IRM 1.3.20.7.2(6).

commissions for use as proof of their authority in the performance of official duties. See IRM 1.16.4.3.1, and Exhibit 1.16.4.3-1. Therefore, although IRS employees may accept and use taxpayer badges for access to an audit site, taxpayers may not condition access to the audit site, including the audit site's parking facility, on receiving personal information or inspecting the employee's personal identification media, such as a driver's license.

In addition, taxpayers should be advised that agents may not leave their IRS credentials with security or other personnel while on the premises, nor may copies be made. Pursuant to 18 U.S.C. § 701, it is a misdemeanor to possess any department badge, identification card, or other insignia, or photograph, or make a copy or other colorable imitation of any such badge, except as authorized under regulations. Although taxpayers may inspect a pocket commission, no regulations permit anyone other than an authorized Government official to possess or copy such credentials. In order to prevent any misuse of IRS credentials in violation of the statute, agents may not leave their pocket commissions with taxpayer or security personnel nor may copies be made of their IRS credentials.

RECOMMENDATION

We recommend that if taxpayers obstinately refuse to permit IRS employees access to their site without providing personal information such as social security number, home address and telephone number or private motor vehicle information, then the IRS should invoke the Secretary's authority to move an examination from on-site to the local IRS office. As provided in Treasury Reg. § 301.7605-1:

(g) *Transfers initiated by Service.* Nothing in this section shall be interpreted as precluding the Service from initiating the transfer of an examination at a particular location if the transfer would promote the effective and efficient conduct of the examination. . . .

While the IRS generally attempts to conduct examinations in a manner to balance the convenience of the taxpayer with the need to conduct an efficient and effective examination, if the requirements of sound tax administration favor moving the location of the audit, such transfer is within the IRS's discretion. If, after initiating a transfer to the IRS examiner's post of duty, the taxpayer(s) refuses to comply with the summons and produce the records, it may be necessary to invoke judicial enforcement of the summons under I.R.C. § 7604.⁷ The IRS can, of course, pursue judicial enforcement of

⁷ If the taxpayer or its representative should continue to refuse to comply with the summons, in addition to being held in contempt, the IRS can recommend that the contumacious party be held criminally liable. See 26 U.S.C. § 7210 ("Any person who, being duly summoned . . . to appear and produce . . . records . . . as required under section[] . . . 7602 . . . , neglects to appear or to produce such . . . records shall, upon

a summons to conduct an audit on site. It will be for management to determine the best procedure to follow.

Obviously, we would hope that some arrangement can be made to satisfy the taxpayer's concerns about security without requiring that the IRS transfer the audit to the field office, or resort to judicial enforcement. However, it also is not necessary for IRS employees to jeopardize their own personal privacy - in order to satisfy the taxpayer's concerns about security - when engaging in sound tax administration.

As for taxpayer-issued badges, badges provided to revenue agents for security purposes may be displayed or worn without violating any legal or ethical restrictions. However, taxpayers may not condition access to audit sites on IRS employees complying with requests for personal identifying information, surrendering their credentials, or permitting the credentials to be copied.

If there is a need for further advice from General Legal Services with regard to information required by taxpayers from agents prior to granting access to audit sites or parking facilities, please contact Eva Tewel at (202) 283-7939. If you have any questions concerning the matter under I.R.C. § 7605, feel free to call Joseph Clark, at (202) 622-3630.

conviction thereof, be fined not more than \$1,000, or imprisoned not more than one year, or both, together with costs of prosecution.”) Recommendations for prosecution under § 7210 are rare, and fall under the jurisdiction of the Office of Division Counsel, Criminal Tax.