

Office of Chief Counsel
Internal Revenue Service
Memorandum

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to: GUY LAVIGNERA
Associate Area Counsel, SB/SE
(CC:SB:2:NEW:1)

from: Peter J. Devlin, Chief, Branch 3
Collection, Bankruptcy & Summonses
(CC:PA:CBS:Br3)

subject: I.R.C. § 7602 Summons Issues

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUES

You have received a number of general questions from revenue officers concerning various summons issues. You have proposed certain responses and asked that we review them. Except as set forth below in our revisions to your questions and answers, we concur with your proposed responses.

1. Summons on Limited Liability Companies

How should a limited liability company (LLC) that has elected to be treated as a partnership for tax purposes be identified as the taxpayer in the heading of a summons?

RESPONSE:

Since the LLC elected partnership treatment, the summons procedures to use are those that specify how a partnership should be identified in the heading of a summons. IRM 25.5.2.2, which advises agents to list both the name of partnership and the individuals, is currently being revised. The correct advice is that the partnership or the LLC should be identified by name, and if the partnership or the LLC is relatively unknown, the

Service can add the name of a key member if this assists the summoned person to recognize the LLC taxpayer being investigated. The classic example of this scenario is where a bank is summoned to produce the records of a newly formed Mom and Pop partnership. The bank may be far more likely to recognize the individual partners' names than the new business name. (If the Service does add the individual partner's or member's names in the heading of a third-party summons, those persons become noticees under section 7609(a).) In lieu of listing the name of a key member, the Service can list the LLC or partnership business address. The method for identifying a partnership or LLC in the heading of a summons is the same for any type of examination, such as an employment tax examination or an income tax examination.

2. Third Party and Notice Requirements

Occasionally, during a TFRP investigation, summoned bank records identify a corporate officer that was previously unknown to the revenue officer. As such, this individual will not have received Letter 3164A, the Third-Party Contact Letter. Also, this individual will not have been given notice of the summons served on the bank or the opportunity to petition to quash. Does this pose a legal problem for the Service? Should the individual be given Letter 3164A after the receipt of the summoned information? Is there any prohibition on using the summoned information to assess the TFRP against that individual?

RESPONSE:

During an initial interview, if the revenue officer does not know names of the potentially responsible parties, section 7602(c) notification is not required. However, if the revenue officer knows the names of other potentially responsible officers, then the officer should have issued a Letter 3164 to all potentially responsible officers that were known before conducting any interviews. The fact that the revenue officer may discover the identities of other potentially responsible officers during an interview does not mean that the revenue officer must stop the interview. The revenue officer may continue the interview, obtain identifying information regarding the other potentially responsible officers, and complete the Form 4180. If the revenue officer intends to contact third parties as part of an investigation of the other responsible officers identified during the interview, he or she must send the Letter 3164 to such persons before making any further contacts for purposes of determining whether they may be held liable.

Completing the Form 4180 should not be viewed as a third-party contact with respect to persons who are being identified for the first time during the interview. First, it is impossible to send advance notice to persons whose identities are not known at the time of the interview. Second, the questions relating to the duties of other persons are relevant to determining the I.R.C. § 6672 liability of the person being investigated. Third, questions relating to other persons are for the purpose of identifying other potentially responsible persons and being able to locate such persons. A revenue officer should not have to stop in the middle of an interview and send the advance

notice each time a potentially responsible officer is identified during the interview. However, if the revenue officer knows the identity of other potentially responsible officers before conducting any interviews, all potentially responsible officers should be provided with the advance notice before any interviews are conducted.

Similar rules apply to the third-party summons questions you have raised. When investigating the persons who may be responsible for the TFRP, the Service often summonses a bank (or other third party) to obtain records of the corporation's accounts. In many cases, the Service knows of several corporate officers or employees who may be responsible for the penalty. In such cases, the Service should issue a separate summons for each potentially responsible person and should follow the notice and waiting period requirements of I.R.C. § 7609(a). (The bank should be informed that it need provide only one set of documents for these types of multiple summonses with identical document requests.) Each such summons should only have one potentially responsible person's name typed in the heading.

In many situations, the Service will know the identity of many potentially responsible persons, but perhaps not all. For example, Corporation A has failed to pay its employment taxes for several quarters, and there are five potentially responsible persons. If the Service knows the identity of four of the five potentially responsible persons, the Service will serve four summonses on the bank even though they all seek the same information. As a matter of law, I.R.C. § 7609 does not require the Service to serve all four summonses. However, as a matter of practice, the Service will do so to give each person (then known to the Service) an opportunity to petition to quash that summons. However, the Service need not later serve on the bank a summons that names the fifth person (unless more records are needed to determine that person's liability). There is no prohibition on using the information obtained from the original four summonses to support an assessment against the later-identified fifth person.

If one of the four potentially responsible persons referred to in the preceding paragraph files a petition to quash the summons and the remaining three do not, the Service should not delay receiving the records described in those remaining summonses, even though doing so may render the petitioning person's case moot. This approach is necessary because the periods of limitations governing the timely assessment of the non-petitioning taxpayers are not suspended by I.R.C. § 7609(e)(1). I.R.C. § 7609(e)(1) only suspends the period of limitations for the individual taxpayer who petitions to quash. After the section 7609(a) waiting period expires, the Service can issue certificates to the bank under I.R.C. § 7609(i)(2), stating that the periods prescribed for bringing proceedings to quash the other three summonses have expired.

3. Identification of the Taxpayer or Description of the Summoned Party

IRM 25.5.2 discusses procedures for identifying the taxpayer, but is silent on using social security numbers (SSN) or tax identification numbers (TIN) as a method of describing the entity in question. Many third parties, such as banks, often request this

information to aid in locating taxpayer records. Is it appropriate to add an SSN or TIN to a summons as a way to identify a taxpayer or summoned party?

RESPONSE:

The Service may when necessary identify the taxpayer's SSN or TIN when the summoned third party needs that information to correctly identify the summoned records. As you mentioned, banks and other third-party recordkeepers in large metropolitan areas often have clients with similar names; therefore, the Service needs to provide additional means of identification. However, given the current reality of widespread identity theft, it may be prudent to use other means of identifying the taxpayer when possible. For example, the Service can type the taxpayer's address in the heading of the summons. Alternatively, the Service can provide the taxpayer's SSN or TIN to the bank in a letter or in a telephone call, which would avoid disclosing that information to every person entitled to notice under I.R.C. § 7609(a). We recommend that these approaches be used.

4. Service of Summons

Legal Reference Guide (LRG) 5.17.6.7 discusses the procedures for serving a summons. It states "[i]f a summoned party (not a third party recordkeeper) is not at home, an attempt should be made to serve him personally at some other place." Does this mean that if service of a summons is attempted at a taxpayer's home, the revenue officer may go to the taxpayer's place of employment or business, or any other location to serve the summons?

LRG 5.17.6.7(4) states when serving a corporate officer to appear on behalf of the corporation, "the officer may be personally served at the corporation's place of business or wherever he may be found." Does this include the corporate officer's home?

Are there restrictions on when or where an individual or corporate officer may be personally served with a summons?

RESPONSE:

As a preliminary matter, we refer you to Chapter 3 of the Summons Handbook, IRM 25.5.3, which provides additional guidance on serving a summons. If service is unsuccessfully attempted at a taxpayer's home, the revenue officer may go to the taxpayer's place of employment or business, or any other location believed to be appropriate, to serve the summons. This includes personal service on a corporate officer at his home.

I.R.C. § 7603(a) and the regulation promulgated thereunder do not restrict the times and places in which a summoned person may be served. However, the Summons Handbook, IRM 25.5.3.4, provides that the time and place of examination must be

reasonable and should not occur on a Saturday, Sunday, or a legal holiday. These same principles should apply to the time chosen for serving a summons.

85. Third-Party Responses

Revenue officers often summon banks to obtain account information as part of a TFRP investigation. Normally, the banks respond in a timely manner. Some revenue officers have indicated that certain banks have requested lengthy extensions of time. This has been attributed to a backlog of research for the record keeper. Aside from mutually-agreeable extensions of time, at what point does a delay become unreasonable? Is it appropriate for the revenue officer to refer the summons for enforcement?

Also, some third-party recordkeepers have required revenue officers to provide a copy of the Service of Summons, Notice and Recordkeeper Certificates on the back of the summons. Are there any restrictions on providing this information?

RESPONSE:

Aside from mutually agreeable extensions of time, there is no specific time frame which signifies an unreasonable delay. Each case must be examined on its own merits. If the revenue officer believes a bank's request is unreasonable, the summons referral should be made. If field counsel concludes the delay is unreasonable, appropriate action can be taken. If field counsel concludes the delay is not unreasonable, then field counsel will confer with the referring revenue officer.

Although the Service is not obligated to do so, there are no restrictions on providing the bank with a photocopy of the Service of Summons, Notice and Recordkeeper Certificates, which appear on the back of the original summons. I.R.C. § 7609(i)(2) provides that the Service may give the summoned third party a certificate stating that the period for bringing a petition to quash has expired and no such proceeding was begun, or that the taxpayer consents to the examination. That certificate appears at the bottom of the back of the original summons. When a bank relies in good faith on this certificate, I.R.C. § 7609(i)(3) provides that the bank is protected from any liability arising from a disclosure to the Service. It is, therefore, reasonable for the bank to request this certificate, and there is no reason why the Service should not provide it.

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Please call (202) 622-3630 if you have any further questions.