*Number: 200117035* *March 8, 2001*
*Release Date: 4/27/2001* *GL-124634-00*
*UIL: 9999.98-00* *CC:PA:CBS:B2*

***FEBRUARY 2001*** ***BULLETIN NO. 485***

# COLLECTION, BANKRUPTCY AND SUMMONSES BULLETIN

**Department of the Treasury** **Office of Chief Counsel** **Internal Revenue Service**

### *Service Announces Nonacquiescence in Vinick*

The Service has decided to nonacquiesce as to whether actual, exercised authority over a company's financial matters, including the duty and power to determine which creditors to pay, is necessary for a finding that a taxpayer is a responsible person under the Trust Fund Recovery Penalty, I.R.C. § 6672. In **Vinick v. United States, 205 F.3d 1 (1st Cir. 2000)**, the issue was the liability of an officer and co-owner of a corporation for unpaid withholding taxes. I.R.C. § 6672 makes officers, employees or other persons involved in a business personally liable for a penalty equal to the amount of the delinquent taxes if they are responsible for the collection and payment of trust fund taxes and they willfully fail to collect or pay the tax.

Prior First Circuit cases held that an individual need not be in day to day control of the administrative and financial aspects of the business in order be a responsible person so long as the individual has the right to control such aspects of the business. See Thomsen v. United States, 887 F.2d 12 (1st Cir. 1989); see also Harrington v. United States, 504 F.2d 1306 (1st Cir. 1974). In Vinick, the court did not overrule earlier precedent, but stated that "[a]bsent a finding that [the taxpayer] possessed actual, exercised authority over the company's financial matters, including the duty and power to determine which creditors to pay, as a matter of law he cannot be a responsible person." 205 F.3d at 15. In AOD CC-2001-02 http://ftp.fedworld.gov/pub/irs-aod/aod20012.pdf (February 26, 2001), the Service announced that it would not follow Vinick to the extent that it conflicts with prior, undisturbed First Circuit precedent. Specifically, the Service will not follow the statement in Vinick that "actual, exercised authority" is necessary for a finding of responsibility under I.R.C. § 6672.

### *Emotional Distress Not Damages for Automatic Stay Violation*

In a non-tax case, **Aiello v. Providian Financial Corp., 2001 App. LEXIS 1664 (7th Cir. Feb. 6, 2001)**, the Seventh Circuit decided that "actual damages" under B.C. § 362(h) does not include damages for emotional distress.

After the debtor filed a bankruptcy petition under Chapter 7, a credit card company sent her a letter. The letter threatened to charge her with fraud if she refused to reaffirm the debt. The debtor testified that the letter caused her to cry, feel nauseous and quarrel with her husband. She also testified that the letter caused her to be afraid, although she later filed a class-action suit against the credit card company.

The appellate court, affirming the lower court, presumed the creditor's actions to be a violation of the automatic stay. Although the debtor was clearly entitled to protection under the bankruptcy laws, the court found that protection did not extend to peace of mind. Although not precluding compensation for emotional damages in a case where financial loss included incidental harm, the Seventh Circuit refused to permit compensation for emotional harm alone under section 362(h). The court found sufficient the remedies for oppressive debt collection under state tort law, which action would not be barred by the stay.

# CASES

**1. BANKRUPTCY CODE CASES: Allowance of Administrative Expenses: Interest**
**In re Beane, 87 AFTR2d ¶ 2001-454 (Bankr. M.D. Pa. Nov. 29, 2000)** - Debtors in Chapter 13 bankruptcy filed post-petition administrative expense claim on behalf of Service, which did not provide for interest payment. The Service objected, and the court ruled that B.C. § 1305 does not allow the debtor to file a proof of claim for a post-petition debt on behalf of a tax creditor.

**2. BANKRUPTCY CODE CASES: Automatic Stay: Tax Court Proceeding**
**In re George, 2001 U.S. App. LEXIS 2361 (9th Cir. Feb. 13, 2001)(*unpublished*)** - In an unpublished decision, the Ninth Circuit disagreed with the debtor's contention that a taxing authority must file for determination of tax liability under B.C. § 505 in order to qualify as a "party in interest" who may move to lift the automatic stay under B.C. § 362(d). Instead, the appellate court found that the Service was a "party in interest" entitled to request that the stay be lifted because a deficiency notice had been issued prior to the debtor's bankruptcy filing, and the Service was a party to the scheduled tax court proceeding for which relief from the stay was sought. The court also found the Service's efforts to notify the debtor of the expedited hearing and order lifting stay to be sufficient, despite the short time frame between the bankruptcy filing and the tax court trial date.

**3. BANKRUPTCY CODE CASES: Chapter 7: Conversion or Dismissal**
**In re Young, 2001 U.S. App. LEXIS 559 (10th Cir. Jan. 16, 2001)** - Tenth Circuit approves "Chapter 20" bankruptcy filings, where debtor receives Chapter 7 discharge, then amortizes payment of remaining debts through Chapter 13.

**4. BANKRUPTCY CODE CASES: Chapter 13: Confirmation of Plan: Secured and General Unsecured Taxes**
**In re Fili, 2001 Bankr. LEXIS 15 (B.A.P. 1st Jan. 11, 2001)** - Debtor's Chapter 13 plan provided for discharge of creditor's secured claim. Creditor did not object, and plan was confirmed. The creditor then filed his secured proof of claim, before claims filing bar date but after confirmation. The bankruptcy appellate panel held the claim discharged under principles of res judicata, finding that since the creditor had notice that its claim was imperiled by the plan, it disregarded such notice at its peril.

**5. BANKRUPTCY CODE CASES: Exceptions to Discharge: No, Late or Fraudulent Returns**
**Mathis v. United States, 249 B.R. 324 (S.D. Fla. 2000)** - Taxpayer failed to file income tax returns for eight years. After audit, with which taxpayer cooperated, the Service filed Forms 4549, which the taxpayer signed. The taxpayer then filed Chapter 7 bankruptcy. The Government argued that, for purposes of B.C. § 523(a)(1)(B), no returns had been filed and the taxes were nondischargeable. The

bankruptcy court agreed, but the district court reversed. The court found the debtor cooperated with the Service and signed the forms, which the Service accepted and filed. Therefore, the court reasoned, the requirements of I.R.C. § 6020(a) were met, and so the Forms 4549 qualified as tax returns. The court also found B.C. § 523(a)(1)(B) broad enough to encompass a signed Form 4549, and consequently the debtor's taxes were dischargeable.

**6. BANKRUPTCY CODE CASES: Exceptions to Discharge: No, Late or Fraudulent Returns**

**In re Shrenker, 2001 Bankr. LEXIS 107 (Bankr. E.D.N.Y. Feb. 9, 2001)** - Taxpayer failed to file 1991 income tax return, so the Service prepared a substitute return and issued a deficiency notice. In 1996, the taxpayer submitted a signed Form 1040 for 1991, but the Service found substantial omissions. The taxpayer filed Chapter 7 bankruptcy at the end of 1999, moving to have the 1991 taxes discharged. The court refused, under In re Hindenlang, 164 F.3d 1029 (6th Cir. 1999), because the debtor did not file any tax forms until after the Service assessed deficiencies. Even if Hindenlang were inapplicable, the court ruled that the debtor's 1991 still would be nondischargeable, because the debtor submitted documents including all information from which his tax liability could be computed.

**7. BANKRUPTCY CODE CASES: Exceptions to Discharge: Pre-petition Priority Taxes**

**In re Kimball, Jr., 87 AFTR2d ¶ 2001-548 (Bankr. D. Mass. Jan. 18, 2001)** - The debtor filed a request for an extension of the deadline to file his 1995 tax return on Form 4868, but then listed no tax due. After filing for Chapter 11 relief, the debtor filed an action to have his taxes discharged under B.C. § 507(a)(8)(A)(i) and § 523(a)(1)(A) because, without the (invalid) extension, they were due more than three years prior to filing. The court found it inequitable to allow debtor to estimate his tax liability in order to obtain a Form 4868 extension to file, and then claim that the estimate was wrong for the sole purpose of discharging the tax debt. The court found instead that only the Service could terminate an extension under Treas. Reg. §1.6081-4, and so the debtor's taxes were nondischargeable under B.C. § 523(a)(1)(A).

**8. BANKRUPTCY CODE CASES: Priorities**
**TRANSFEREES & FRAUDULENT CONVEYANCES**

**McKowen v. United States, 2001 Bankr. LEXIS 115 (Bankr. D. Colo. Jan. 2, 2001)** - Transferee liability assessed under I.R.C. § 6324(a)(2) is not a tax, according to this court, and so is dischargeable in the debtor's bankruptcy. Although transferee liabilities are assessed and collected in the same manner as taxes, the plain language of I.R.C. § 6901 does not state that such liabilities are taxes.

**9. BANKRUPTCY CODE CASES: Setoff: Refunds: Taxes**

**In re Tubbs, 2000 Bankr. LEXIS 597 (Bankr. S.D. Cal. March 29, 2000)** - Debtors filed for bankruptcy, listing their tax refund as exempt under California law and B.C.

§ 522(c). The Service asserted a right of setoff under B.C. § 553, but the court held the majority view to be that a debtor's right of exemption trumps the Service's right to setoff.

**10. DAMAGES, SUITS FOR: Against U.S.: Unauthorized Collection**

**Ranciato v. United States, 2001 U.S. Dist. LEXIS 743 (D. Conn. Jan. 23, 2001)** - Taxpayer brought suit under I.R.C. § 7433, claiming Service improperly issued levies while taxpayer had current, nondefaulted installment agreement (the Service levied because the taxpayer refused to extend the collection statute of limitations, a policy subsequently changed). The Service argued that the suit was brought more than two years after the first notice of levy, and so was beyond the statute of limitations. The taxpayer countered that the cause of action accrued when the Service changed its policy. The court agreed with the Government that the cause of action accrued at the time of the collection activity, and that the Government had no duty to inform the taxpayer that its actions may have been in violation of policy. Further, the fact that the Government changed its policy did not mean that its prior conduct was affirmative misconduct, necessary for equitable estoppel to apply. The court concluded the taxpayer's action was barred by the two-year statute of limitations in section 7433(d)(3).

**11. LEVY: Failure to Surrender Property**

**United States v. GasTech Engineering Corp., 87 AFTR2d ¶ 2001-543 (N.D. Ok. Jan. 25, 2001)** - Taxpayer manufactured processing equipment for GasTech, informally resolving occasional disputes over invoices. When GasTech learned that the Service had levied against the taxpayer's accounts receivable, GasTech disagreed with the invoiced amounts and refused to pay under the levy. The Service then brought an action to enforce the levy. Disagreeing with GasTech's contention that it never agreed to the invoiced amounts, the trial court found under the Oklahoma doctrine of accounts stated that, where there is a manifestation of agreement between two parties, as evidenced by business practice, the amount owed can be implied. It was therefore up to GasTech to object to the invoices, which it failed to do.

**12. LIENS: Priority Over State and Local Liens**

**South Independence, Inc. v. United States, 256 B.R. 861 (Bankr. E.D. Va. 2000)** - Service assessed taxes against debtor, with liens arising under I.R.C. § 6321 by October 1998. The Commonwealth of Virginia also assessed taxes, beginning in November 1998, but claimed priority under a section of Virginia law that stated once a memorandum of lien was filed, the state tax had the effect of a judgment. The court disagreed that the state was a judgment lien creditor entitled to priority under I.R.C. § 6323(a), because Treas. Reg. § 301.6323(h)-1(g) requires the judgment to be obtained in a court of record, not by statute. The court also distinguished Monica Fuel, Inc. v. United States, 56 F.3d 508 (3d Cir. 1995), because Virginia's fuel tax liens were not first in time.

**13. SUITS: By the U.S.: Foreclosure of Tax Lien**

**United States v. Nipper, 2001 U.S. App. LEXIS 1813 (10th Cir. Feb. 8, 2001)** - Although taxpayers did not respond to the Government's motion for summary judgment, the Tenth Circuit reversed the trial court's judgment in favor of the Service. The presumption of correctness afforded a Certificate of Assessment does not apply when the taxes are based on unreported income. The appellate court found that the Government failed to provide even a minimum evidentiary foundation with the Notice of Deficiency or Motion for Summary Judgment, and so could not rely on the taxpayer's lack of response as a basis for judgment.

**14. SUMMONSES: Foreign Countries: Enforcement**

**Lidas, Inc. v. United States, 2001 U.S. App. LEXIS 1520 (9th Cir. Feb. 5, 2001)** - Principals of corporation moved to quash Service summons issued to taxpayer's bank on behalf of foreign country. The Ninth Circuit found the exchange of information provisions in the tax treaty severable and constitutional, and also found the summons valid under I.R.C. § 7602(a) even though it related to a "foreign" tax liability rather than an "internal" liability. The court went on to affirm that the test for a tax treaty partner was the same as that for the Service under Powell v. United States, 379 U.S. 48 (1964). As long as the Service demonstrated good faith under Powell, the summons could be administratively enforced.

**15. SUMMONSES: Foreign Countries: Enforcement**

**Mazurek v. United States, 2001 U.S. Dist. LEXIS 1631 (E.D. La. Jan. 11, 2001)** - Court stayed enforcement of summons issued by Service on behalf of foreign government, finding the balance of equities favored the taxpayer because (1) taxpayer presented substantial case on the merits, where serious and complex issues of law are involved and (2) enforcement of the summons would result in premature disclosure of the taxpayer's bank records to the foreign government, in derogation of the taxpayer's privacy rights.

**16. TRANSFEREES & FRAUDULENT CONVEYANCES: Nominee**

**Nantucket Village Development Co. v. United States, 2001 U.S. Dist. LEXIS 1064 (N.D. Ohio Jan. 9, 2001)** - Taxpayers objected to Service's nominee claims, arguing that Ohio law does not recognize a cause of action for nominee liability. The court recognized a split in authority under prior court opinions, but chose to acknowledge that Ohio law's recognition of the alter ego doctrine and the concept of equitable ownership is essentially a recognition of the nominee doctrine. Since under state law the taxpayers had rights in the subject property, there was a valid basis for the Service's nominee liens, and so the court denied the taxpayers' motion.

The following material was released previously under I.R.C. Sect 6110. Portions may be redacted from the original advice.

# CHIEF COUNSEL ADVICE

**SUMMONSES; CITIZEN ABROAD; SERVICE**

January 9, 2001
CC:PA:CBS:Br3
TL-N-1591-98
UIL: 7603.00-00

MEMORANDUM FORJODY TANCER, ASSOCIATE AREA COUNSEL (LMSB) – BROOKLYN CC:LM:FSH:BRK

FROM:Lawrence H. Schattner
Chief, Branch 3 (Collection, Bankruptcy Summonses)

SUBJECT: Leasing Issue Specialization Program – Enforcement of Summons Served on U.S. Citizen Who Resides Abroad

This responds to your request of July 20, 2000, on the above subject. Your proposed advice starts with the assumption that the Service's Revenue Service Representatives (RSRs) in foreign countries may personally serve U.S. citizens who reside abroad with IRS administrative summonses, pursuant to I.R.C. § 7603(a). The remainder of your memorandum is then devoted to considering how the Service might go about seeking enforcement of a summons served on a U.S. citizen abroad in this manner. While we agree with much of your proposed analysis on the manner of seeking enforcement of a summons properly served by the IRS on a U.S. citizen who resides abroad, we do not accept your initial assumption that the Service's RSRs in foreign countries may personally serve U.S. citizens who reside abroad with IRS administrative summonses as a general matter. For the reasons described further below, we also do not believe that the new provisions of I.R.C. § 7603(b) – allowing the IRS to serve administrative summonses upon specified third party recordkeepers by certified or registered mail – may be utilized by the IRS as a general matter to effect service of IRS administrative summonses by mail upon U.S. citizens abroad who are third party recordkeepers in a particular examination of another taxpayer. It is the Service's position as a general matter that no IRS agent or officer has the authority to serve a summons outside of the United States, that any act of this type may be considered a violation of sovereignty by the country in which service of the summons is attempted. See CCDM (42)210:(11). This position is consistent with the legal principles discussed in the case of F.T.C. v.

Compagnie De Saint-Gobin-Pont-A-Mousson, 636 F.2d 1300 (D.C. Cir. 1980), which you cited. Accordingly, the summons enforcement jurisdiction/venue conferred upon the U.S. District Court for the District of Columbia by I.R.C. § 7701(a)(39) is much narrower in practice than your proposed advice suggests.

## BACKGROUND

You indicate that a U.S. citizen who resides abroad[1] is believed to have knowledge of transactions relevant to the federal tax liability of U.S. taxpayers and that the Service's possible ability to obtain information from witnesses of this type by means of IRS administrative summonses has arisen in connection with Leasing ISP issues in multiple non-docketed cases.

## ISSUES & CONCLUSIONS

Issue 1: Constitutionally, may the U.S. Congress enact and may the U.S. federal courts enforce a statute that allows U.S. citizens in a foreign country to be served with an investigative summons or a subpoena that requires them to return to the United States to give testimony and/or to produce documents, irrespective of whether service of the investigative summons or subpoena abroad would conflict with applicable international law?

Conclusion: Yes. The case of Blackmer v. United States, 284 U.S. 421 (1932), cited in your memorandum, stands for this proposition, but the intent of Congress to override applicable international law must also be unmistakable, pursuant to F.T.C. v. Compagnie De Saint-Gobin-Pont-A-Mousson, 636 F.2d 1300, 1323 (D.C. Cir. 1980), which you also cited. See also IRM (42)310:(5)-(10), discussing the ability of the United States to subpoena a U.S. citizen abroad for testimony in a criminal or civil tax case in federal district court, pursuant to 28 U.S.C. § 1783 (the successor to the Walsh Act of 1923, upheld in Blackmer).

Issue 2: In I.R.C. §§ 7603 or 7701(a)(39), did the U.S. Congress indicate an unmistakable intent to override applicable international law so as to permit the IRS to effect service of IRS administrative summonses as a general matter upon U.S. citizens abroad?

Conclusion: No. Although there are no geographic limitations on service of an IRS administrative summons stated in section 7603, there is also no express authorization for extraterritorial service in the statutory language or in the legislative history of subsections (a) or (b) of section 7603, necessary to indicate that Congress unmistakably

[1] Your proposed advice and your request for assistance does not specify any particular country or countries in which the U.S. citizen(s) the Service wants information from reside(s).

intended to allow the IRS to serve administrative summonses abroad where such service would be contrary to international law.[2] In pertinent part, section 7701(a)(39) confers upon the U.S. District Court for the District of Columbia appropriate jurisdiction/venue for considering complaints to enforce or quash IRS administrative summonses (on any witness) or formal document requests (upon a taxpayer for records maintained in foreign countries, pursuant to section 982), for cases in which the summonsed witness or the taxpayer seeking to quash the summons or formal document request is a U.S. citizen or resident who does not reside in (or is not found in) any U.S. judicial district. However, it does not logically follow from section 7701(a)(39) that because Congress provided a forum with jurisdiction to consider enforcement of an IRS administrative summons that was properly served on a U.S. citizen who resides abroad that Congress intended in section 7603 to allow extraterritorial service by the IRS of administrative summonses upon U.S. citizens abroad when such service abroad would be contrary to international law.[3]

Issue 3: If the IRS may not properly serve administrative summonses outside the United States upon U.S. citizens abroad as a general matter, due to prohibitions on such service arising under international law, does that interpretation deny any practical impact to section 7701(a)(39)?

Conclusion: No. Consistent with the absence of reported case law construing section 7701(a)(39) since it was enacted in 1982, the practical effect of this provision of the Internal Revenue Code may be relatively narrow, but it is not without any practical applications. In the case of a U.S. citizen residing in Spain who was personally served with an IRS administrative summons while visiting the United States, our office has previously concluded that jurisdiction/venue for the United States enforcing that summons lay with the U.S. District Court for the District of Columbia, based upon section 7701(a)(39). When it enacted sections 982 and 7701(a)(39) together as part of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Congress also indicated in the legislative history of these provisions that section 7701(a)(39) would confer jurisdiction/venue on the U.S. District Court for the District of Columbia for a U.S. taxpayer residing abroad to file a complaint to quash a section 982 formal document request made by the IRS for documentation maintained in a foreign country, pursuant to

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[2] Interpreting the laws of particular foreign nations and the provisions of particular international treaties is within the jurisdiction of Associate Chief Counsel (International).

[3] Any summons enforcement cases brought pursuant to I.R.C. § 7701(a)(39) would be appealable to the Circuit Court for the District of Columbia. In F.T.C. v. Compagnie De Saint-Gobin-Pont-A-Mousson, 636 F.2d 1300, 1312-1313 (D.C. Cir. 1980), that court found that international law and the Federal Rules of Civil Procedure treat the service of subpoenas (or investigatory summonses) quite differently from the service of a complaint (by a “summons”) to initiate a lawsuit upon a person or company located abroad.

I.R.C. § 982(c)(2). See Conf. Rep. No. 97-760 (1982), reproduced at 1982-2 C.B. 600, at 659.

DISCUSSION

Issue 1: The Constitutional Authority of Congress to Compel Testimony from U.S. Citizens Abroad in Contravention of International Law

Upon discovery of the Teapot Dome scandal in 1923, a number of the prominent Americans involved, including Harry Blackmer, fled the United States for France. To compel their testimony in the subsequent criminal proceedings, Congress passed the Walsh Act authorizing the federal district courts to compel the attendance of American witnesses abroad in connection with criminal proceedings in the United States. The Walsh Act expressly authorized service of judicial subpoenas that had been approved by a district court judge upon U.S. citizens found outside of the United States and specified the means of service to be employed for such subpoenas (personal service by the consul of the United States within the country where the witness was found). F.T.C. v. Compagnie De Saint-Gobin-Pont-A-Mousson, 636 F.2d 1300, 1319-1320 (D.C. Cir. 1980); Blackmer v. United States, 284 U.S. 421, 433 n.1 (1932). The Walsh Act is the statute the Supreme Court considered and upheld in re Blackmer; the Court held in that case that the United States possesses the power inherent in sovereignty to require the return of a citizen residing abroad, whenever the public interest requires it, and to penalize him/her in case of refusal. IRM (42)310:(7).

Under the 1964 successor to the Walsh Act, 28 U.S.C. § 1783, courts of the United States (not including the Tax Court) may issue judicial subpoenas to U.S. nationals or residents who are in a foreign country, in either a criminal or civil case, if certain showings are made. A subpoena issued pursuant to 28 U.S.C. § 1783 may be served in accordance with the provisions of the Federal Rules of Civil Procedure relating to service of process for a complaint in a foreign country (i.e., F.R.C.P. 4(f) and (k)(2)). See IRM (42)310:(5)-(10).

The Walsh Act of 1923 and 28 U.S.C. § 1783 are examples of statutes where Congress specifically gave extraterritorial effect to the power of the courts of the United States to compel testimony from U.S. citizens who are found abroad and provided a specific means of effecting service of subpoenas upon such U.S. citizens outside of the United States. The Court of Appeals for the District of Columbia, to which any appeal based upon the jurisdiction/venue conferred by I.R.C. § 7701(a)(39) would lie, has interpreted Blackmer as a case upholding the constitutional authority of Congress to give extraterritorial effect to its laws, notwithstanding international law but consistent with due process, so long as congressional intent in this regard is “unmistakable” or “unambiguous.” See F.T.C. v. Compagnie De Saint-Gobin-Pont-A-Mousson, 636 F.2d at 1321 and 1323 (D.C. Cir. 1980); United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991); Price v. [Libya], 110 F.Supp.2d 10, 13 (D.D.C. 2000).

Issue 2: Congressional Intent Regarding Extraterritorial Service of IRS Administrative Summons, Pursuant to I.R.C. § 7603

Prior to 1998, I.R.C. § 7603 authorized the IRS to serve administrative summonses only by delivering an attested copy in hand to the person to whom the summons was directed or by leaving such copy of the summons at the person's last and usual place of abode. This traditional manner of serving any type of IRS administrative summons has been retained in present I.R.C. § 7603(a). In 1998, Congress added a second possible manner – by certified or registered mail to the last known address of the witness – for the IRS to serve its administrative summonses if the summonses were directed to certain specified types of third party recordkeeper witnesses. I.R.C. § 7603(b)(1). Among the types of individual witnesses whom the IRS may now choose to serve by certified or registered mail when the witness is a third party recordkeeper with respect to the transaction at issue are: (1) any attorney; (2) any accountant; or (3) any enrolled agent. See I.R.C. § 7603(b)(2).

Sections 7603(a) and (b) do not themselves indicate that proper service of IRS administrative summons served either in person or by certified/registered mail (for certain third party recordkeepers) is limited geographically to service that may be effected by the IRS only within the geographical boundaries of the United States. The legislative histories of what is now section 7603(a) and of new section 7603(b) also do not address the issue of whether there are territorial limits on the IRS serving administrative summonses in the manner described in section 7603.

Nevertheless, it is the Service's position as a general matter that no IRS agent or officer has the authority to serve a summons outside of the United States, because the act may be considered contrary to international law. Referring to the pre-1998 provisions of section 7603 for serving an administrative summons, CCDM (42)210:(11) explains as follows:

(11) While I.R.C. § 7701(a)(39) provides for jurisdiction for enforcement, service of a summons must still be made pursuant to I.R.C. § 7603 by personal service or by delivery to the summonsed party or by leaving the summons at the summonsed party's last and usual place of abode. No Internal Revenue Service agent or officer has the authority to serve a summons outside of the United States. Any act of this type may be considered a violation of sovereignty by the country in which service is attempted. Accordingly, permission of the other government is required before service is attempted. Branch 1 of the Associate Chief Counsel [International], should be contacted so that service can be coordinated with the Assistant Commissioner and the other government.

The above-described position of the Service is consistent with the previously cited views of the Court of Appeals for the District of Columbia that the Government should not presume that Congress intended to give extraterritorial effect to its laws unless that intent is made unmistakably clear. In F.T.C. v. Compagnie De Saint-Gobin-Pont-A-Mousson, 636 F.2d 1300 (D.C. Cir. 1980), the Federal Trade Commission had adopted

a rule purporting to allow the agency to serve investigatory subpoenas by registered mail outside of the United States; the Court of Appeals held the rule invalid because service of the investigatory subpoena in this manner was inconsistent with international law, and Congress had not made its intent to allow service of such subpoenas outside of the United States in this manner unmistakably clear at the time the subpoena was issued.

You have not directed our attention to and we are not aware of any case where the IRS has served or attempted to enforce a summons that was served outside of the territorial limits of the United States. One generally respected tax law treatise, BNA's "Compelled Production of Documents and Testimony in Tax Examinations," Portfolio 633 (1997), contains a discussion of this issue which you may have relied upon, but which is ambiguous to us on closer inspection. At page A-44, the treatise states: "The IRS may seek the assistance of a treaty partner or a Revenue Service Representative based outside the territorial jurisdiction of the United States to serve or enforce a summons issued to a U.S. citizen or resident located abroad." As authority for this statement, the treatise guides the reader to another portion of the treatise (at page A-49), where the authors explain, without referring again to an IRS administrative summons that could be served outside of the United States but enforced within the United States, as follows:

In addition to information that it may already have in its possession or obtained through exchange of information requests with treaty partners, the [IRS Assistant Commissioner (International)] Office of International Programs can utilize Revenue Service Representatives ("RSRs") who are frequently able to gather information for the geographical area for which they are responsible. Because the RSR works outside the territorial jurisdiction of the United States, the procedures utilized in investigating a particular matter depend upon certain formal and informal understandings with the government of the specific country where the records are maintained. Thus, the freedom which an RSR can exercise may depend upon such factors as whether the information sought is publicly available, or whether a U.S. citizen is being interviewed, as opposed to a citizen of the country involved, or a citizen of a third country. On occasion, agents of foreign taxing authorities assist, collaborate or accompany the RSR to an investigation. In other cases, however, the scope of permissible action by the RSR may be severely limited.

Accordingly, unless international law (by treaty or otherwise) in a particular foreign country so provides, it does not appear that RSR's may properly serve an IRS administrative summons outside of the United States that would be enforceable through the courts of the United States.[4]

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[4] For advice regarding the law of a particular foreign nation or the interpretation of a particular international treaty, you may wish to contact Branch 1 of Associate Chief Counsel (International). For instance, the United States, United Kingdom, Switzerland, France, Germany, Japan, and 30 other countries are signatories to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or

Issue 3: The Narrow Practical Impact of I.R.C. § 7701(a)(39)

Sections 7701(a)(39) and 982 were both added to the Internal Revenue Code in 1982 as part of TEFRA. Section 982 regards the admissibility by a taxpayer of documentation maintained in a foreign country, as part of a civil proceeding involving an examined tax issue, if the IRS served the taxpayer during the examination with a formal document request for such records maintained abroad and the taxpayer failed "to substantially comply" with such request within 90 days. Section 982(c)(2)(A) provides that a person served with a formal document request of this type may begin a proceeding to quash the request within 90 days and that in any such proceeding to quash, the United States may seek to compel compliance with the request. Section 7701(a)(39) reads as follows:

(39) **Persons residing outside United States.** If any citizen or resident of the United States does not reside in (and is not found in) any United States judicial district, such citizen or resident shall be treated as residing in the District of Columbia for purposes of any provision of this title relating to –
(A) jurisdiction of courts, or
(B) enforcement of summons.

You have not directed our attention to and we are not aware of any case where a court has construed section 7701(a)(39).[5] The legislative history of section 7701(a)(39) is also not very expansive or informative regarding the anticipated or intended practical applications of the new provision. The Conference Report indicates that a Senate

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Commercial Matters (Hague Service Convention). See 28 U.S.C.A. (Appendix following Rule 4 FRCP). Associate Chief Counsel (International) has advised us that terms used in the Hague Service Convention, such as "civil or commercial matters" and "extrajudicial documents," are not subject to uniform interpretations in all signatory countries. While Article 10 of the Hague Service Convention refers only to modes of sending or serving "judicial documents," where the "State of destination does not object," Article 17 goes on to state: "Extrajudicial documents emanating from authorities and judicial officers of a Contracting State may be transmitted for the purpose of service in another Contracting State by the methods and under the provisions of the present Convention." For advice on how any particular country may interpret the provisions of the Hague Service Convention with respect to service of an IRS administrative summons, contact Branch 1 of Associate Chief Counsel (International).

[5] We found one case where the Service apparently cited section 7701(a)(39) in a Tax Court brief for the proposition that the case of one of the married taxpayers who had petitioned the Tax Court would be appealable to the Court of Appeals for the District of Columbia, rather than to the Fourth Circuit (in which the petitioner's spouse resided), because the petitioner at issue was a U.S. citizen who resided outside of the United States. The Tax Court determined, however, that the outcome of that case did not turn on the identity of the circuit to which appeal would lie in the taxpayer's case. See Soboleski v. Commissioner, 88 T.C. 1024, 1035-6 (1987).

amendment "extends the jurisdiction and the summons power of the United States District Court of the District of Columbia to reach U.S. citizens and residents not present in the United States." See Conf. Rep. No. 97-760 (1982), reproduced at 1982-2 C.B. 600, at 658. The "summons power of the United States District Court," as opposed to the summons power of the IRS pursuant to section 7603, presumably refers to the court's ability to effect service of process upon the witness abroad of the complaint filed by the United States to enforce a prior, properly served IRS administrative summons on the witness now located abroad. The Conference Report, at 1982-2 C.B. at 659, also indicates an agreement of the conferees which apparently relied on new section 7701(a)(39) in circumstances where a taxpayer who is located abroad wants to file a complaint to quash an IRS foreign document request under section 982, as follows:

In any proceeding to quash, the Secretary may seek to compel compliance with the request. Jurisdiction over a proceeding to quash is retained in the United States District Court for the district in which the person to whom the formal document request is mailed resides or is found. If that person resides outside the United States, the United States District Court for the District of Columbia has jurisdiction.

In addition to providing jurisdiction/venue for a federal district court to hear the request of a taxpayer to quash an IRS foreign document request pursuant to section 982 when the taxpayer resides abroad, our office also previously opined in 1984 that when the Service personally served a U.S. citizen who resided in Spain with an IRS administrative summons while the taxpayer was visiting the United States that jurisdiction/venue for the United States filing a complaint to enforce the summons lay with the U.S. District Court for the District of Columbia on the basis of then new section 7701(a)(39).