

Disclosure Litigation **BULLETIN**

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DISCLOSURES IN CONNECTION WITH CONGRESSIONAL INQUIRIES

I.R.C. § 6103(c) applies to disclosures of returns and return information to a designee of the taxpayer. Treasury Regulation § 301.6103(c)-1(b) addresses requests made by taxpayers to designees for information or assistance relating to the taxpayer's return or a transaction or other contact between the taxpayer and the Service. This could include requests by taxpayers to their congressional representative for information from or assistance with the Service. For the Service to disclose tax information to such a designee in these circumstances, the taxpayer's request for information or assistance must be in the form of a letter or other written document signed and dated by the taxpayer. The taxpayer must also indicate in the letter or other written request--

- (1) the taxpayer's identity information described in I.R.C. § 6103(b)(6) (i.e., the taxpayer's name, address, TIN or combination thereof);
- (2) the identity of the person to whom disclosure is to be made; and
- (3) sufficient facts underlying the request for information or assistance to enable the Service to determine the nature and extent of the information to be disclosed in order to comply with the taxpayer's request.

Treas. Reg. § 301.6103(c)-1(b).

This regulation further states that a return or return information will be disclosed to the taxpayer's designee only to the extent considered necessary by the Service to comply with the taxpayer's request for information or assistance. Thus, returns or return information may only be disclosed to Members of Congress (or certain members of their staff as set forth in Disclosure of Official Information Handbook, IRM 1.3.4.2.(1)(d)) when the taxpayer's letter or other written request meets the above three conditions. Generally, the congressional representative will send a letter requesting information on the matter and attach the

taxpayer's letter or other written request. So long as the congressional representative's letter is accompanied by the taxpayer's letter or other written request to the representative which satisfies the above three conditions, disclosure is permissible.

There are a number of fairly common issues that arise in the area of congressional inquiries. If the congressional correspondence does not attach the taxpayer's letter or other written request, the Service has not received a valid authorization. The congressional office should be contacted and the taxpayer's letter or other written request obtained or, alternatively, Form 8821, Tax Information Authorization, can be provided to the congressional office so that office may obtain the taxpayer's consent. In addition, the taxpayer's attorney generally cannot authorize a disclosure on behalf of the taxpayer to a third party unless that authority is specifically granted by the taxpayer. (See Disclosure Litigation Bulletin No. 97-3). Thus, generally, taxpayer information cannot be disclosed to a congressional representative based on a letter signed by the power of attorney. Further, it should be noted that the taxpayer can only authorize disclosure of the taxpayer's own return information, not that of third parties. For example, if a congressional inquiry is forwarded to the Service on behalf of a taxpayer alleging disparate treatment, the Service may not disclose to the congressional representative any protected return or return information of third party taxpayers who allegedly received different treatment.

For further guidance in reviewing congressional inquiries, refer to Disclosure of Official Information Handbook, IRM 1.3.4, entitled "Congressional Inquiries."

ACCESS TO TAX INFORMATION BY TIGTA

The Internal Revenue Service Restructuring and Reform Act (Act) of 1998, Pub. Law 105-206, 112 Stat. 685 (RRA), at section 1103(a), amended the Inspector General Act of 1978 by, among other things, establishing the Office of Treasury Inspector General for Tax Administration (TIGTA) and, at section 1103(c)(2), terminating the Office of Chief Inspector of the Internal Revenue Service. The legislative history of the Act provides:

Taxpayer returns and return information are available for inspection by [TIGTA] pursuant to section 6103(h)(1). Thus, [TIGTA] has the same access to taxpayer returns and return information as does the Chief Inspector under present law.

H.R. REP. NO. 105-599 AT 224 (1998) (Conference Report to Accompany H.R. 2676 (the RRA)).

I.R.C. § 6103(h)(1) provides:

Returns and return information shall, without written request be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for tax administration purposes.

Thus, employees of TIGTA, in connection with their official tax administration duties, may access tax information under section 6103(h)(1) just as employees of the Office of Chief Inspector did under prior law.

FOIA PROCESSING OF DOCUMENTS OF OTHER AGENCIES

Suppose a FOIA request is made to a Service district or region or to the National Office, and included in the responsive documents are copies of documents created by another agency? The Service's FOIA regulations at 26 C.F.R. § 601.702(b)(2)(ii) provide that if a document:

. . . was created by another agency or Department of the Treasury constituent unit (i.e., in its control) and a copy thereof is in the possession of the Internal Revenue Service, the Internal Revenue Service official to whom the request is delivered shall refer the request [or that part of the request that encompasses documents originating in other agencies or Treasury constituents units] to the agency or constituent unit which originated the record for direct reply to the requester. The requester should be informed of such referral However, where the record is determined to be exempt from disclosure . . . the referral need not be made, but the Internal Revenue Service shall inform the originating agency or constituent unit of its determination [A]lso, where notifying the requester of the referral may cause a harm to the originating agency or constituent unit which would enable the originating agency or constituent unit to withhold the record . . . then such referral need not be made.

Disclosure of Official Information Handbook, IRM 1.3.13.54(3)a. states that if a request is received in a Service field office and a referral should be made, the request should be forwarded to the Office of Governmental Liaison and Disclosure in the National Office for coordination with the other agency. These procedures would, for example, apply to records such as FBI investigative materials, Department of Justice letters to the Office of Chief Counsel in referred cases, or Office of Solicitor General memoranda regarding appeal or certiorari in litigated cases.

Similarly, 26 C.F.R. § 601.702(b)(2)(iii) provides that if "a request is received for a record created by the Service (i.e., in its possession and control) that includes information originated by another agency or Department of Treasury constituent unit, the record shall be referred to the originating agency or constituent unit for review, coordination, and concurrence . . ." before a determination is issued. This procedure would apply to records like a Chief Counsel memorandum or history notes reflecting the Justice Department's legal position that was

communicated to Counsel in a case in litigation, or an agent's report (RAR or SAR) that incorporated information received from another agency.

CASE DEVELOPMENTS

Gardner v. U.S., No. 96-1467 (D.D.C., Jan. 29, 1999)

This action for unauthorized disclosure under I.R.C. § 7431 and the Privacy Act was brought by a former employee of the Office of Chief Counsel who was dismissed from employment for failure to comply with both Federal and state tax laws. In connection with his dismissal the plaintiff's relevant tax return information was examined by plaintiff's supervisors. Following his termination, plaintiff applied to the State of California for unemployment insurance benefits which were subsequently denied. Plaintiff appealed this denial. In hearings before the California Unemployment Insurance Appeals Board and the Merit Systems Protection Board, evidence was presented concerning the basis upon which plaintiff was discharged, including testimony from plaintiff's supervisors at the Service.

Plaintiff sought damages under I.R.C. § 7431, asserting that both the disclosure of his tax return information to his supervisors at the time of his dismissal and to those supervisors who were preparing to testify in administrative hearings, as well as their use of such information in these hearings, constituted unauthorized disclosures of his return information. The Government's position was that the disclosures of plaintiff's return information to his supervisors in connection with his termination were authorized under I.R.C. § 6103(h)(1) which allows disclosures of returns and return information to other Treasury employees "whose official duties require such disclosure for tax administration purposes." As to the disclosures made during the course of the administrative hearings, the Government argued that these were authorized under section 6103(l)(4) which provides that returns and return information may be disclosed to Treasury employees for use in any administrative action or proceeding affecting the personnel rights of an employee or former employee "to the extent necessary to advance or protect the interests of the United States." The court found that the disclosures were authorized.

Plaintiff also sought to recover damages under the Privacy Act for disclosing his tax return information from a "system of records" without his consent. With regard to the disclosures of his tax information, the Government, citing Cheek v. IRS, 703 F.2d 271 (7th Cir. 1983), argued that section 6103 is the exclusive remedy for this type of action. The court noted that there is a split among the circuits with regard to this issue and that in a recent case, Sinicki v. United States Department of Treasury, No. 97 CIV. 0901, 1998 WL 80188 (S.D.N.Y. Feb. 24, 1998), the court found that disclosures of the type at issue in Gardner were actionable under both the Privacy Act and section 6103. However, the Gardner court followed Lake v. Rubin, No. 98-5009, 1998 WL 852538 (D.C. Cir. Dec. 11, 1998) and found that insofar as section 6103 deals with both the disclosure and the confidentiality of returns and return information, the more detailed provisions of I.R.C. § 6103 would apply over the general provisions of the Privacy Act.

Gandy v. United States, No. 6:96cv730 (E.D. Tex. Jan. 15, 1999)

The Service sent letters to 269 of plaintiff's customers seeking information in connection with a criminal investigation of plaintiff. Two special agents followed up with in-person interviews of third parties to obtain further information. One agent conducted several telephone interviews and also served administrative summonses to financial institutions to obtain information that the plaintiff had consented to have provided to the Service. While the agents could not recall the exact words they used in these specific instances, they testified during the bench trial that their general practice for third party contacts was to display their badges and credentials, identify themselves as special agents with the Criminal Investigation Division and/or specifically state that the plaintiff was under criminal investigation.

With respect to the in-person contacts of third parties, the court found that regardless of the exact language used, the agents' identification of themselves as special agents by words and/or the display of CI credentials disclosed the fact that plaintiff was under criminal investigation. The court then found that the disclosure of the criminal nature of the investigation was not necessary for the agents to obtain the information sought from those third parties, and therefore not authorized under I.R.C. § 6103(k)(6) which states that "[a]n internal revenue officer or employee may, in connection with his official duties relating to any . . . criminal tax investigation . . . , disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the . . . liability for tax," The court, however, found no civil liability under I.R.C. § 7431(b) because it found the agents involved acted based on a good faith but erroneous interpretation of I.R.C. § 6103, by following the Service's procedures, as reflected in the Handbook for Special Agents and in a Continuing Professional Education course given by the Service. Plaintiff has filed a notice of appeal from this decision.

Rice v. United States, et al., No. 97-2276 (10th Cir. Jan. 28, 1999)

Rice was convicted by a jury on five felony counts based on filing false tax returns. The Service's district public affairs officer attended the trial and sentencing hearing, and issued press releases based upon her notes taken in court and her own research on potential penalties in the Internal Revenue Code. Plaintiff filed suit under I.R.C. § 7431 and the Privacy Act, asserting that the press releases constituted unauthorized disclosures of return information.

The District Court for the District of New Mexico held that the issuance of press releases which reported the events in the trial and the sentencing hearing were not unauthorized disclosures of return information. Specifically, the district court found that information obtained by the public affairs officer by attending the court proceedings for the purpose of issuing press releases was not "return information" as defined in I.R.C. § 6103(b)(2). Further, the court found that such information was not a record in a system of records regardless of whether the same information existed within an agency system of records.

On appeal, the Tenth Circuit distinguished this case from Rodgers v. Hyatt, 697 F.2d 899

(10th Cir. 1983), noting that the holding in Rodgers was that a Service employee who had testified in court could not thereafter repeat information from his testimony because he had obtained that information from Service records, not the court proceedings in which he testified. In Rice, the Tenth Circuit found that the public affairs officer obtained the information in the press releases from public court documents, the trial proceedings, and her own research in the Internal Revenue Code. Citing the Seventh Circuit's "immediate source" test (Thomas v. United States, 890 F.2d 18 (7th Cir. 1989)) the court held that the press releases contained no return information, *i.e.*, the immediate source of the information was not a tax return or some internal document based on a return protected by I.R.C. § 6103. In a footnote, the circuit court found that the press release information did not come from a Privacy Act system of records, so no cause of action existed under the Privacy Act.

Hernandez v. United States, Civ. No. A-98-CA-621 JN, (W.D. Tex. Feb. 2, 1999)

Plaintiff, a tax return preparer, had her privilege of limited practice before the Service revoked by the district director. Before her privilege was revoked, an examination group in the district notified taxpayers who were plaintiff's clients that their returns were under examination and that "[T]he individual who prepared these returns for you is no longer eligible to represent taxpayers before the Internal Revenue Service" Examination personnel were instructed to respond to taxpayer requests why plaintiff was no longer eligible to represent them by informing the taxpayers that the district director had decided to suspend plaintiff from limited practice, but that the taxpayers should direct questions about the revocation itself to plaintiff. In this I.R.C. § 7431 action for unauthorized disclosure, plaintiff claimed that the information disclosed to her clients was a disclosure of return information in violation of I.R.C. § 6103(a).

The court examined the definition of return information in I.R.C. § 6103(b)(2) and concluded, *inter alia* that the revocation of plaintiff's privilege of representing clients before the Service did not constitute ". . . data, received by, recorded by, prepared by, furnished to or collected by the Secretary with respect to . . . the existence, or possible existence of liability (or the amount thereof) of any person . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense . . ." under the Internal Revenue Code. Thus, there was no disclosure of the plaintiff's return information.

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Your suggestions for inclusion of topics in future Bulletins are invited.