

# Disclosure Litigation **BULLETIN**

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Bulletin 99-3

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## DISCLOSURE OF TAX DATA TO STATE AND LOCAL PERSONNEL ASSISTING THE JUSTICE DEPARTMENT IN A GRAND JURY INVESTIGATION

Disclosure Litigation Bulletin 94-2 addressed the issue of disclosures of tax information to state and local personnel assisting the attorney for the Government in a Federal grand jury investigation. It was noted that I.R.C. § 6103 limits disclosures of tax data in both tax and nontax criminal matters to Federal officers and employees personally and directly engaged in the investigation. Thus, disclosures of tax information under I.R.C. § 6103(h)(2) and (i) to state and local personnel assisting the attorney for the Government in a Federal grand jury investigation are prohibited. However, disclosure of tax information is permitted if the state and local personnel are made Federal employees. State and local personnel who serve as Special United States Attorneys (5 U.S.C. § 543), Special Deputy United States Marshals, and other personnel who are formally appointed as Federal employees under the Intergovernmental Personnel Act are considered Federal employees for purposes of disclosure of tax information under I.R.C. § 6103(h)(2) and (i). Disclosure to or inspection of tax information by state personnel, (e.g., state auditors), who are not deputized by the Marshal's Service, not formally appointed under the Intergovernmental Personnel Act, or not otherwise formally made Federal employees would not be authorized. The Criminal Investigation and Disclosure manuals further address these issues. See IRM 9.3.1.4.4, 1.3.22.12.1.2 and 1.3.28.5.

## DISCLOSURES IN MULTI-AGENCY MONEY LAUNDERING INVESTIGATIONS

An issue that frequently arises is the use and disclosure of tax information in a multi-agency money laundering investigation after the Chief, Criminal Investigation (CI), makes a "related statute" determination. Under certain circumstances, tax information may be used and disclosed by the Department of Justice in a tax/nontax multi-agency grand jury investigation without obtaining an ex parte court order under section 6103(i)(1).

Those circumstances are described in Treas. Reg. § 301.6103(h)(2)-1(a)(2)(ii):

- The nontax matter involves or arises out of the particular facts and circumstances giving rise to the tax proceeding
- The tax portion of the proceeding has been authorized by or on behalf of the Assistant Attorney General (Tax Division) at the request of the IRS
- If the tax portion of the proceeding is terminated for any reason, any further use or disclosure of returns and taxpayer return information in the nontax portion of the proceeding may be made only upon the grant of a section 6103(i)(1) ex parte court order.

The related statute determination permits access to tax information by IRS personnel working a money laundering or currency crime investigation. Under I.R.C. § 6103(b)(4), tax administration “. . . includes assessment, collection, enforcement, litigation . . .” under the internal revenue laws and related statutes. The Chief, CI determines whether, under the particular facts and circumstances, the money laundering or currency crime violation is “related.” While the related statute determination permits CI personnel to access the tax information, the rules regarding access by Justice Department and other investigative personnel are more complex.

The related statute determination makes the money laundering case a tax administration investigation. Thus, the rules in I.R.C. § 6103(h)(2) and (3) must be followed in disclosing the tax information to the Department of Justice. I.R.C. § 6103(h)(3) requires that prior to disclosing tax information to the Department of Justice in a tax matter, the IRS must have referred the case. The referral of a money laundering case would be the written request to the United States Attorney to criminally pursue the money laundering matter. The referral permits use and disclosure of the tax information by Federal officers and employees for purposes of the tax related money laundering charge only, not other Title 18 offenses.

A tax related money laundering investigation is directly referred by CI to the United States Attorney's office, without Tax Division involvement. Therefore, because a multi-agency money laundering investigation does not meet the requirements for using tax data in the joint tax/nontax investigation, tax information obtained by CI in such an investigation cannot be disclosed to or used by the other agencies involved in the investigation (including FBI and DEA) for the nontax Title 18 or Title 21 offenses (e.g., bank fraud, bankruptcy fraud, narcotics violations), unless the procedures in I.R.C. § 6103(i) are followed. See IRM 9.3.1.4.3.1.1 for further discussion of disclosures in money laundering investigations.

## CASE DEVELOPMENTS

### Tax Analysts v. IRS, 99-1 USTC ¶ 50,345 (D.D.C., March 16, 1999)

In this FOIA lawsuit the court held that closing agreements entered into between the Service and organizations exempt from federal income tax constitute the tax return information of those organizations, and as such, the closing agreements are exempt from disclosure pursuant to FOIA (b)(3), in conjunction with I.R.C. § 6103. FOIA exemption (b)(3) provides for the withholding of information specifically exempted from disclosure by statute. I.R.C. § 6103, which prohibits the disclosure of returns and return information, is a statute within the coverage of FOIA exemption (b)(3).

In its underlying FOIA request Tax Analysts sought access to all closing agreements relating to tax exempt organizations executed between December 31, 1992, and November 10, 1993. The Service did not respond to the FOIA request and Tax Analysts filed an administrative appeal. In response to the appeal, the IRS asserted that closing agreements are agreements entered into between the Commissioner and any person relating to the liability of such person in respect of any internal revenue tax for a taxable period. See I.R.C. § 7121(a). As such, closing agreements constitute return information in their entirety, as that term is defined in I.R.C. § 6103(b)(2).

In the subsequent lawsuit challenging the IRS withholding, Tax Analysts argued that the closing agreements were, in effect, part of the application process for exempt status, and therefore, must be released under I.R.C. § 6104. I.R.C. § 6104 provides for the public disclosure of approved applications of tax exempt organizations together with any papers submitted in support of such application, and any other letter or document issued by the Service with respect to such application. Tax Analysts contended that the closing agreements were documents “issued” by the Service with respect to applications for tax exemption.

The court rejected Tax Analysts’ argument, and agreed with the Service that the closing agreements constitute “determinations of the existence . . . of liability” and thus are return information within the meaning of I.R.C. § 6103(b)(2)(A). The court rejected Tax Analysts’ argument that the closing agreements are nevertheless subject to public disclosure under I.R.C. § 6104, finding that as a bilateral agreement signed by both the Service and the taxpayer, a closing agreement cannot be a document “issued” by the Service as that term is used in I.R.C. § 6104. The court further concluded that because the agreements appear to be products of negotiation rather than factors in granting tax exempt status, the scope of the agreements are not broad enough to mandate disclosure under I.R.C. § 6104. Tax Analysts did not appeal this decision.

### Roebuck v. United States, No. 5:98-CV-384-BO(3) (E.D.N.C., June 8, 1999)

The court issued a favorable decision to the Government in this lawsuit filed pursuant to I.R.C. § 7431 for unauthorized disclosure of tax information. Plaintiff alleged that the unauthorized disclosure was the fact that he was the subject of a criminal investigation. The case involved the display of Criminal Investigation Division credentials by a special agent during third party interviews,

and the inclusion of the agent's business card which identified her as a special agent in the Criminal Investigation Division when summonses were issued, both of which, according to plaintiff, revealed the criminal nature of the investigation. The court found that the special agent's contact of third parties was warranted as an investigative disclosure under 26 C.F.R. § 301.6103(k)(6)-1(a). It stated that the financial information sought by the agent through the interviews and summonses was not otherwise reasonably available, noting that the subject of the investigation had not cooperated. The court also acknowledged that the Service is not required to seek information from the targeted individual directly and that the Service can, in any event, contact third parties to verify information given by the subject of an investigation.

The court further found that the (indirect) disclosure to the third parties of the criminal nature of the investigation, through the display of Criminal Investigation Division credentials was necessary under the circumstances. It reasoned that the agent could not have otherwise reasonably obtained the information without impairing the performance of her official duties, and that the disclosure of the nature of the investigation was done to ensure that the third parties knew "who she was and what she was doing." The court noted, citing U.S. v. Tweel, 550 F.2d 297 (5<sup>th</sup> Cir. 1977), that had the agent not identified herself as a special agent with the Criminal Investigation Division, she may have faced misrepresentation charges and suppression of evidence at any subsequent trial. But see, Gandy v. United States, No. 6:96CV730 (E.D. Tex. Jan. 15, 1999), appeal docketed, No. 99-40205 (5<sup>th</sup> Cir., Feb. 23, 1999) discussed in Disclosure Litigation Bulletin 99-2, where the district court, while awarding no damages because the disclosures by the special agents were determined to have been made in good faith, found that the display of Criminal Investigation Division credentials constituted an impermissible disclosure of the criminal nature of the investigation.

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