OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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MEMORANDUM FOR BETTIE N. RICCA
ASSOCIATE DISTRICT COUNSEL, DELAWARE-MARYLAND DISTRICT CC:SER:DEM:WAS

FROM: Lawrence H. Schattner
Chief, Branch 3 (General Litigation) CC:EL:GL:BR3

SUBJECT:

This responds to your memorandum dated March 19, 1999. This document is not to be cited as precedent.

Legend:

Taxpayer
X Examination Team
District X
Employee A
Employee B
Employee C
United States Corporation
Foreign Citizen
The Bank

ISSUES:

Can a summons be issued for documents already in the Service's possession which were received from the X examination team in an unrelated audit ?

CONCLUSION:

Yes. The documents that were obtained from the X examination team is return information of the taxpayer examined by the X examination team. The Service must issue a new summons to the bank to obtain the same documents in order to disclose those documents to the taxpayer in the taxpayer's examination.

FACTS:

The Service is examining the taxpayer's 1994, 1995, and 1996 consolidated federal income tax returns. The examination involves two lease stripping transactions structured by a United States corporation using a foreign citizen. In both transactions, large depreciation expenses and losses were deducted by the taxpayer's subsidiaries while the lease rent stream income was realized by the foreign citizen. Field Service Advice was obtained from the National Office recommending, in part, that the lease stripping transactions be challenged under the sham transaction theory. Among the documents reviewed by the National Office were documents that the X examination team had previously received from the bank in an unrelated case pursuant to a summons issued to the Bank. Employee A, a member of the taxpayer examination team, became aware of the Bank documents when they were mentioned by Employee B who indicated that a similar transaction was being audited by a team in District X. Employee A contacted Employee C, the team coordinator in District X, and Employee C provided the Bank documents to the taxpayer examination team.

The Case Manager in the taxpayer's examination is reluctant to issue a summons for documents already in his possession. However, in discussing possible settlement of the lease stripping issue, it is critical that the taxpayer be made aware of the facts set forth in the Bank documents as these documents strengthen the Service's position.

LAW AND ANALYSIS:

In order for a summons to be enforceable, the government must show that: (1) the investigation is being conducted pursuant to a legitimate purpose; (2) the inquiry must be relevant to the purpose; (3) the information sought must not already be within the Service's possession; and (4) all administrative steps required by the Code have been followed. United States v. Powell, 379 U.S. 48 (1964). It is the third of these requirements that the Case Manager is concerned about.

Disclosure Litigation has advised you that it was appropriate for the X examination team to disclose relevant information received pursuant to a summons in the X examination to the taxpayer's examination team under I.R.C. § 6103(h)(1); that information received pursuant to a summons in the X examination is the return information of the taxpayer that was examined by the X examination team; and that since there is no transactional relationship between the taxpayer examined by the X examination team and the taxpayer, the information received pursuant to a

summons in the X examination cannot be disclosed to the taxpayer in the taxpayer's examination or in a subsequent judicial tax proceeding under section 6103(4).

We are not aware of any cases that have addressed the issue of whether the Service can issue a summons for documents that the Service already has in its possession, but which the Service may not use in an examination because of the restrictions of section 6103. However, case law overwhelmingly holds that the possession requirement enunciated in Powell should not be literally or narrowly construed and is not an absolute prohibition. Rather, this requirement should be merely considered a gloss on the prohibition against unnecessary summonses, consistent with the purpose of the Powell standards to prevent abuse of the process. "The purpose of requiring the Government to meet the four-pronged Powell showing of good faith is to prevent abuse of the administrative summons process and harassment of the taxpayer." United States v. First National State Bank of New Jersey, 616 F.2d 668, 674 (3rd Cir. 1980), cert. denied, 100 S.Ct. 2987 (1980). This rule has been most notably applied to summonses to obtain Forms 1099 and 1087 which, although in the Service's possession, cannot be practically retrieved. See, United States v. Linsteadt, 724 F.2d 480 (5th Cir. 1984); United States v. Kis, 658 F.2d 526 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); But see, United States v. Bank of California, 652 F.2d 780 (9th Cir. 1980) (summons for Forms 1099 not enforced where the Service failed to present evidence as to retrievability). "Where resort to an administrative summons is necessary to achieve a lawful goal, i.e., to obtain information not otherwise available, there can be no legitimate charge of 'harassment'." 616 F.2d at 674.

In this case, the documents that are technically within the possession of the Service are, as a practical matter, "unavailable" because of the restrictions imposed by I.R.C. § 6103(h)(4). Therefore, the Service must issue a new summons for the documents in order to obtain them and to disclose them to the taxpayer during settlement negotiations.

If you have any questions, please call (202) 622-3630

cc: