DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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January 9, 2001

MEMORANDUM FOR JODY 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 intended to allow the IRS to serve administrative summonses abroad where such service would be contrary to

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[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).

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

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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.

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 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]

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 –
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> (A) jurisdiction of courts, or
>
> (B) enforcement of summons.

[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 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).

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 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).

Please call the attorney assigned to this case at 202-622-3630 if you require further assistance.

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[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).

cc: Branch 1, Associate Chief Counsel (International)
Attn: W. Edward Williams, Senior Technical Reviewer