



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

OFFICE OF
CHIEF COUNSEL

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MEMORANDUM FOR AREA COUNSEL CRIMINAL TAX, AREA 2 CC:CT:BAL

FROM: Chief, Branch 1
Assistant Chief Counsel (Disclosure & Privacy Law) CC:PA:DPL

SUBJECT: Criminal Investigation Disclosure Scenarios

We have reviewed the four disclosure scenarios and revised the responses to them that you forwarded to us on June 1, 2001. This document, including the attachment, are not to be cited as precedent.

The scenarios you posed concern disclosures of return information in grand jury investigations. We are currently revisiting and refining, as appropriate, our guidance in the area of grand jury investigations, in response to a request from the Associate Chief Counsel (Criminal Tax).

If you have any questions, or if we can provide any further assistance, please call us at (202) 622-4580.

Attachment

Scenario I

During an ongoing GJ investigation involving an SUA and 18-1956 allegations, an informant tells an FBI agent that he has specific info relative to tax matters of one of the targets of the investigation. The FBI agent sets up a meeting wherein he introduces the informant to the IRS agent assigned to the GJ investigation.

Question: May the FBI agent be allowed to sit in on the ascertainment of this information? Moreover, should the assigned IRS agent conduct this meeting? Up to this point, tax administration has not been invoked through the Related Statute call.

The response depends on the purpose of the FBI agent being present and the capacity in which the IRS special agent is conducting the interview. The key is the definition section, 6103(b), which states that returns and return information are materials filed with or furnished to the "Secretary" (of the Treasury). The IRS agent is assisting the attorney for the government in the grand jury investigation. A reasoned argument can be made that information collected by and under the control and direction of the Justice Department during a grand jury investigation is not return information. Certainly, if the FBI agent wanted the information for his own grand jury purposes, that would be permissible. In addition, although a Title 26 investigation is not authorized, law enforcement personnel assisting the attorney for the government (IRS or otherwise) may review the information collected to determine if such a request would be appropriate. The FBI and IRS agent could discuss the matter to determine if they wanted to make such a request. However, the IRS agent could not pull returns, access IDRS, or otherwise obtain *any* information from IRS files in connection with these discussions.

If circumstances warrant, the agent could request that a related statute determination be made. This would permit the agent to access returns and return information. However, such information could not be disclosed to the FBI agent to work the SUA.

It may be preferable to have another IRS agent conduct the interview (without the FBI agent), determine whether the information indicates Title 26 violations, and pull returns and other tax information to determine whether an expansion request is warranted. No related statute determination is necessary, and if the tax aspect is deemed not worth pursuing, the 1956/SUA investigation continues as a pure nontax investigation without any untoward 6103 consequences. If an expansion request is approved by Tax Division, all the tax

information can be given to the AUSA and the FBI agent pursuant to and subject to the conditions in the regulation for joint grand juries. See Treas. Reg. § 301.6103(h)(2)-1(a)(2)(ii).

Scenario II

During an ongoing GJ investigation involving an SUA and 18-1956 allegations, the Related Statute call was made and eventually a full fledged tax GJ investigation was initiated (9131) and completed. The FBI agent requested access to the tax investigation files, that contain both taxpayer return information and return information directly from the IRS agent. Question: Can or should the IRS special agent provide these records to the FBI for partial inclusion in an affidavit for a search warrant? Of these tax administration records, what kind of information can be provided to the FBI and what is the procedure for the exchange?

Section 6103(h)(2) and (3) permits disclosure to the Department of Justice for use in tax grand jury investigations. The disclosure is made to the Department of Justice for use in the tax administration matter. With a proper referral (9131) the IRS SA can disclose returns and return information of the subject in the tax GJ investigation. Such records as are appropriate to the investigation should be made available to the AUSA, who can use it for the tax matter under investigation. In addition, if there are nontax matters that arise out of the same facts and circumstances as the tax matters, and the tax part of the investigation has been approved by the Tax Division, the tax information that has been disclosed under section 6103(h)(2) can also be used in the nontax portion of the investigation. Treas. Reg. § 301.6103(h)(2)-1(a)(2)(ii). If the tax portion of the investigation is terminated (the T 26 portion that has been authorized by Tax Division), then an ex parte order under section 6103(i) is required to continue using “returns” and “taxpayer return information” (information provided by or on behalf of the taxpayer or the taxpayer’s representative) for the SUA. Returns and taxpayer return information could continue to be used for the related statute 1956 charge (assuming it has not been dropped).

Scenario III

During an ongoing GJ investigation involving an SUA and 18-1956 allegations, the Related Statute call is made. After the related statute call is made, are IRS agents

allowed to continue making field contacts jointly with their FBI counterparts since tax administration has been invoked? Further, what about after a full fledged tax investigation (9131) and the contacts are designed in part or whole to shore up the tax investigation. Finally, should there be a free exchange of investigative information at the agents' level?

While field contacts can continue to be made jointly, as discussed above, the related statute call does not permit disclosures to other agencies to work the SUA. While the FBI could, theoretically, have access to tax information to work the tax related 1956 charge, this could be both confusing and awkward to separate the SUA from the 1956. As such, it may be preferable to get a section 6103(i) ex parte order for the FBI to access tax information for the SUA. In lieu of a related statute call, it may be easier to obtain a section 6103(i) ex parte order for the both the SUA and the 18-1956.

To the extent a full fledged tax investigation has been authorized by Tax Division, the rules for joint grand juries described above would permit use of tax information for the tax and nontax aspects of the joint grand jury investigation. With regard to the "free exchange of investigative information at the agents' level," the rules in section 6103(h)(2) presuppose direction and control of the investigation and the relevant tax information by Justice Department attorneys. In addition, as you are aware, civil and criminal penalties attach to the unauthorized disclosure of section 6103 protected information, and agencies that receive returns and return information are required to safeguard such information. As such, the disclosure of section 6103 protected information, like Rule 6(e) protected information, is not to be taken lightly. Finally, as the IRM notes, disclosures to state and local law enforcement personnel of section 6103 information is prohibited, unless such personnel are appointed as Federal employees or deputized as Special Deputy U.S. Marshals. See IRM 9.3.1.4.4.

Scenario IV

An IRS agent has a Title 26 matter under investigation. The agent later learns that there is a non tax GJ investigation of the IRS subject. Can the assigned agent evaluate the GJ evidence to determine if IRS should join the GJ investigation? Would you set forth how we could affect the evaluation of the GJ evidence and after such, how we should proceed in terms of jointly participating in the GJ investigation.

We routinely evaluate grand jury information to determine if we will join a grand jury investigation. This is done in every request made by an Assistant United States Attorney under Tax Division Directive 86-59. The necessary IRS personnel are granted access to the grand jury information to determine if the allegations combined with the agency's tax return information are sufficient to add tax charges to the on-going grand jury investigation. The information gathered during the administrative investigation is no different from the tax returns and IDRS information in this respect. If any information relates to the investigation as proposed by the AUSA, then it is proper to be disclosed if we agree to join the investigation and properly refer the case under the 86-59 procedures. If it involves a separate allegation, then the IRS should refer the matter through the Tax Division to complete all aspects of the matter. It is almost impossible to successfully complete an administrative investigation while a grand jury investigation is going on because the records etc. will probably have been submitted to the grand jury. Also, if there is an on-going grand jury investigation involving the taxpayer, summonses will generally not be enforced. To the extent an agent is permitted access to grand jury material to determine if a joint investigation would be appropriate, that agent should no longer continue to work an administrative case because of the 6(e) issues involved.