

Office of Chief Counsel
Internal Revenue Service
Memorandum

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date: October 14, 2005

to: William G. Merkle,
Deputy Area Counsel (SL)
CC:LM:RFP:SLCHI

from: Peter J. Devlin, Chief, Branch 3
Collection, Bankruptcy & Summonses
(Procedure & Administration)

subject: Scanning Project

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUES

You have asked about the legal requirements the Service must observe when asking a taxpayer to provide custom-designed, proprietary computer software, which the Service cannot acquire commercially but needs to effectively examine the taxpayer's electronic books and records. This type of software is typically designed specifically for the taxpayer, who may either own the software outright or merely use it as licensee. The advice that you seek does not involve obtaining access to a computer software source code. You have also asked that we review proposed language for requesting proprietary computer software and other electronic records not involving proprietary software in an Information Document Request and in a summons. Our revisions to your proposed language appear in an attachment to this memorandum.

CONCLUSIONS

In circumstances where the Service requests access to a taxpayer's custom-designed, proprietary computer software, the Service must follow the requirements of I.R.C. § 7612(c).

FACTS

When examining the electronic books and records of various businesses, the Service occasionally encounters circumstances in which the taxpayer's records are organized and stored by proprietary software, custom designed for that taxpayer. Because of the high volume of records and data kept by large and mid-sized taxpayers, the Service's examinations are greatly aided if revenue agents can obtain and search these electronic records in the same format in which the taxpayer has stored them. This presents little or no difficulty where the taxpayer is using commercially available software. However, where the taxpayer is using custom-designed software, the Service must either acquire this special software from the taxpayer or must go through the time-consuming, labor-intensive process of creating a new database by scanning and converting the taxpayer's electronic records into a format that the Service can electronically search and examine.¹

LAW AND ANALYSIS

The Service can request, and if necessary, summon this software from the taxpayer. United States v. Norwest Corporation, 116 F.3d 1227 (8th Cir. 1997) (computer software is a record within the meaning of I.R.C. § 7602 and can be summoned). If the Service takes either action, the provisions of I.R.C. § 7612(c) will apply. If the Service seeks to enforce a summons for this software, section 7612(c)(1) provides that the court may hear evidence and issue any order necessary to protect trade secrets or other confidential information pertaining to that software, including placing the software under seal to be opened only as directed by the court. If the Service obtains this software informally, via the taxpayer's consent, the Service must comply with the requirements of section 7612(c)(2)(A) – (H), which in paraphrased form provides:

1. The Service may only use the software in connection with the taxpayer's examination, the taxpayer's appeal to the Office of Appeals, any judicial proceeding, and any criminal investigation.
2. The Service shall provide, in advance, the taxpayer and the owner of the software with a written list of the names of all individuals who will have access to the software.
3. The software shall be maintained in a secure area or place.²

¹ After consulting with one of the Service's artificial intelligence specialists, we are advised that the scenario posed in your request for advice does not involve requests for any type of computer software source codes. See I.R.C. § 7612(d)(2) and IRM 25.5.6.10.

² In the case of any computer software source code, tax related or otherwise, the source code shall not be removed from the owner's place of business unless the owner consents or a court orders the removal. I.R.C. § 7612(c)(2)(C). Under these circumstances, the owner must make available any necessary equipment or materials for analysis of the source code.

4. The software may not be copied except as necessary to perform such analysis, and the Service shall number all copies made and certify in writing that no other copies have been (or will be) made.

5. At the end of the period (examination, appeals proceeding, judicial proceeding, or criminal investigation) during which the software may be used, the Service must return the software and all copies to the person from whom they were obtained. Any copies made on a hard drive of a machine or other mass storage device shall be permanently deleted. And all persons who had access to the software must certify in writing, under the penalties of perjury, that all copies of the software and related materials have been returned and that they made no other copies.

6. The software may not be decompiled or disassembled.

7. If the Service intends to disclose the software to any other person, such as an independent contractor, who is not an officer or employee of the United States, the Service must provide to the taxpayer (and to any other person having any interest in the software) a written agreement between the Service and such other person (who is not an officer or employee of the United States) providing that such person --

- will not disclose the software to anyone other than persons to whom such information could be disclosed for tax administration purposes under I.R.C. § 6103; and
- will not participate for 2 years in developing software intended for a similar purpose as the software being examined.

The owner of any interest in the software shall be considered a party to the agreement between the Service and such person.

8. The software shall be treated as return information under section 6103.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (202) 622-3630 if you have any further questions.

Attachment:
As stated.

[Redacted]

[Redacted]

[Redacted]

1. [Redacted]

2. [Redacted]

3. [Redacted]

4. [Redacted]

5. [Redacted]

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1. [REDACTED]

2. [REDACTED]

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4. [REDACTED]

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