Does the IRS Have to Notify Third Parties Whose Records Are Summoned?
Not Always Says Supreme Court

by Robert S. Horwitz

The Internal Revenue Service has long had the power to issue and enforce administrative summonses for the purpose of "ascertaining the correctness of any return … determining the liability of any person for any internal revenue tax … or to collect any such liability." See *Reisman v. Caplin*, 375 U.S. 440 (1964). While the courts and the IRS recognized that a taxpayer or an interested party had a right to intervene in an action brought by the IRS to enforce a summons, prior to the 1976 enactment of Internal Revenue Code §7609, there was no legal requirement that notice of a summons be given to a person identified in the summons (other than the summoned person).

Section 7609(a) requires the IRS to give written notice of the summons to any person "who is identified in the summons." As originally enacted, §7609(b)(2) gave the party entitled to notice the right to stay compliance with the summons. Not only did this limit the persons who could move to stay compliance, this also put the onus on the IRS to petition a district court to enforce a summons. In 1982, §7609(b)(2) was amended to replace the right to stay compliance with a right to bring a proceeding to quash the summons, thus putting the onus on those persons entitled to notice to file an action in court to quash the summons.

Since its enactment, §7609 has had *exceptions* to the notice requirement, including in the case of a summons

> issued in aid of the collection of--
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> (i) an assessment made or judgment rendered against the person with respect to whose liability the summons is issued; or
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> (ii) the liability at law or in equity of any transferee or fiduciary of any person referred to in clause (i).

§7609(c)(2)(D).

In *Poselli v. United States*, __ U.S. __, 143 S.Ct. 1231 (May 18, 2023), the Court addressed the question of "whether the exception to the notice requirement in §7609(c)(2)(D)(i) applies only where a delinquent taxpayer has a legal interest in accounts or records summoned by the IRS under §7602(a)." To cut to the chase, the answer was a resounding no.

At the beginning of the opinion, Chief Justice Roberts observed:

> For as long as Americans have had to pay taxes, at least some have tried to avoid them. And for as long as Americans have avoided taxes, the Internal Revenue Service and its predecessors have tried to collect them. As an old joke goes: "I believe we should all pay taxes with a smile. I tried but they wanted cash."

Congress has given the IRS "considerable powers," including summons authority, "to go after unpaid taxes." After giving a brief overview of the IRS's summons power and the Congressionally imposed safeguards over that broad power, the Court discussed the facts of the case.

The taxpayer, Remo Poselli, owed over $2 million in unpaid tax, penalties and interest. The IRS believed he hid funds in his wife's bank accounts and controlled funds belonging to a limited liability company that had paid $300,000 toward his tax liability. The IRS issued summonses to Wells Fargo Bank, JPMorgan Chase, and Bank of America for bank records for accounts in the name of Mrs. Poselli, the LLC and Mr. Poselli's attorneys. The IRS did not give notice to Mr. Poselli, Mrs. Poselli, the law firm or the LLC but the banks did.

Mrs. Poselli and the law firm filed petitions to quash the summonses. The district court dismissed the petitions. Since the summonses were issued in aid of collection, they were excepted from the notice requirements under §7609(c)(2)(D)(i). The Sixth Circuit affirmed, putting it in conflict with the Ninth Circuit's opinion in *Ip v. United States*, 205 F.3d 1168, 1175 (2000), which held that the taxpayer must have some legal interest in the summoned records for the exception to apply. To resolve the Circuit split, the Supreme Court granted certiorari.

The Supreme Court reached its decision based on the plain language of the statute. The statute did not require the taxpayer to have a legal interest in the records or information sought for the exception to apply. If Congress wanted to condition the exception on the taxpayer having a legal interest in the records, it could have clearly done so, as it did in the reimbursement provisions of §7610, where there is no right to reimbursement if the taxpayer with respect to whose liability the summons was issued has a proprietary interest in the records.

The Court rejected petitioners' argument that "to aid in collection" requires that the summons "directly advances" collection from accounts containing assets the IRS can collect to satisfy the taxpayer's liability. The Court pointed out that "to aid" means to help or assist and if the information showed the accounts were used to pay Mr. Poselli's bills, to hide his assets, or would lead to assets that could satisfy his tax liability it would aid in collection.

The Court also found lacking petitioners' argument that reading the exception as the IRS and the Sixth Circuit did would render §7609(c)(2)(D)(ii) (the exception for a summons issued to aid in collection of the liability of the taxpayer's fiduciaries or transferees) nugatory. The Court pointed out that the first clause addresses the taxpayer's liability and required an assessment or judgment against the taxpayer; the second clause is addressed to the liability of a fiduciary or a transferee. Thus, the clauses applied to different situations.

Having determined that the taxpayer did not need a legal interest in the summoned records for the exception to apply the Court stated the case before it was "not, however, the case to try to define the precise bounds of the phrase 'in aid of the collection.' The parties did not argue, and the panel below did not decide, the contours of that phrase. See *Illinois v. Gates*, 462 U.S. 213, 222–223, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). In addition, both the briefing by the parties and the question presented focus only on whether the exception provided in §7609(c)(2)(D)(i) requires that a taxpayer maintain a legal interest in records summoned by the IRS."

Justices Jackson and Gorsuch concurred but wrote separately to emphasis that the IRS's summons power is not unlimited and that the notice required by §7609(a) was not a mere formality. The notice requirement ensures "implicated interests are balanced." The "aid in collection" exception prevents a taxpayer from moving or hiding assets after a summons is issued, "tipping the balance entirely in favor of the delinquent taxpayer, at the expense of the IRS."

The concurring opinion argued that the exception should not be interpreted to give the IRS "boundless" authority. Such an interpretation would permit the IRS to summons anyone's records without notice so long as the agency believes the records might provide some clue to the location of the taxpayer's assets. According to Justice Jackson, reading the exception to require notice in attenuated tax collection activities was entirely consistent with the statutory scheme. The concurring opinion ended by warning that the courts and the IRS "must be ever vigilant when determining when notice is *not* required. Doing so properly involves a careful fact-based inquiry that might well vary from case to case, depending on the scope and nature of the information the IRS seeks."

The Internal Revenue Manual (IRM) ¶25.5.6.5.1 (03-10-2017) and ¶25.5.6.5.2 (09-04-2014) sets out parameters for application of the exception. It notes that the exception does not apply unless there is a judgment or assessment against the taxpayer. It would not apply if the IRS is investigating the liability of a third party for tax assessed against the taxpayer. Thus, notice must be given for the investigation of a person for the trust fund recovery penalty. The IRS collection employee cannot avoid the notice requirements by claiming the summons was issued to collect the corporate taxpayer's liability. Similarly, the exception under (D)(ii) would not apply to a summons issued to determine a person's liability as a fiduciary or transferee. For the exception to apply there must be an assessment or judgment against the fiduciary or transferee. The exception would apply to a summons issued in a fraudulent conveyance or nominee lien investigation.

The IRM also points out that a collection employee can share information obtained from a summons issued in aid of collection with an IRS criminal investigator or an IRS audit employee. It cautions that "the IRS must not engage in any subterfuge by having collection personnel summon information that is only needed for the examination or criminal investigation. The collection employee must act in good faith and must have a legitimate collection purpose for summoning the information."

Whether the courts or the IRS will be "ever vigilant" will only be known in those instances where the summoned party fails to comply with a summons and the IRS files a petition to enforce the summons. Only then, in such a case under §7609(b)(1), the party identified in the summons could intervene and challenge the summons on the ground that it was not issued for a proper purpose, that the summoned information is not relevant to that purpose, that the information is already in the IRS's possession, or that the required procedures have not been followed. See *Reisman v. Caplin, supra*; *Powell v. United States*, 379 U.S. 48 (1964).

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