

Disclosure Litigation **BULLETIN**

This bulletin is for informational purposes; it is not a directive.

No. 97-3
July 1997

Gerald Ryan
Joe Conley
Deirdre James
Amy Pfalzgraf
Julie Schwartz
Elissa Sissman

PROPOSED LEGISLATION REGARDING UNAUTHORIZED INSPECTION OF TAX INFORMATION

On June 26, 1997, the House of Representatives passed H.R. 2014, the Taxpayer Relief Act of 1997. On June 27, 1997, the Senate passed its version of H.R. 2014, entitled the Revenue Reconciliation Act of 1997. Section 1286 of the House bill and section 1085 of the Senate bill contain virtually identical versions of proposed I.R.C. § 7213A, which would create a misdemeanor for unauthorized inspection of tax returns and return information. If enacted, the provision will impose a penalty for the willful inspection, except as authorized by the Code, of any tax return or return information by any federal employee or Service contractor. This provision also would apply to state employees and certain other persons who acquire tax returns or return information under I.R.C. § 6103. Upon conviction, proposed I.R.C. § 7213A imposes a fine in any amount not exceeding \$1,000, or imprisonment of not more than one year or both, together with the costs of prosecution. In addition, the provision would impose a penalty of mandatory discharge for federal government employees who are convicted.

Section 1287 of the House bill and section 1086 of the Senate bill also propose amendments to I.R.C. § 7431 to provide for civil damages for unauthorized inspections, which would parallel damages provided for unauthorized disclosures. Further, the proposed amendments to I.R.C. § 7431 create an obligation on the Service to notify a taxpayer of a criminal charge, by indictment or information, with regard to the inspection or disclosure of the taxpayer's tax return or return information.

POWER OF ATTORNEY (POA) ISSUES

CAN A POA SIGN A DISCLOSURE CONSENT? A question that often arises is whether a representative who has been designated as a power of attorney (POA) for a taxpayer on a Form 2848, Power of Attorney and Declaration of Representative, may execute an I.R.C. § 6103(c) consent for the disclosure of returns and return information on behalf of that taxpayer. I.R.C. § 6103(c) provides that the Secretary may disclose returns and return information with respect to a taxpayer to whomever the taxpayer may designate. Treasury Regulations § 301.6103(c)-1 set forth the requirements and conditions for the designation but are silent on a POA's authority to execute the consent. However, similar to other Internal Revenue Code responsibilities that a taxpayer may delegate to a POA, a duly designated POA may execute an I.R.C. § 6103(c) consent on behalf of a taxpayer if the Form 2848 appointing the POA specifically gives him authority to do so. Thus, if the taxpayer specifically includes "executing section 6103(c) consents for the disclosure of returns and return information" on the part on the Form 2848 where the duties and responsibilities of the POA are to be listed by the taxpayer, the POA will have such authority.

WILL A FAXED POA BE ACCEPTED BY THE IRS? Pursuant to 26 C.F.R. § 601.504(c)(4), the Service will accept a facsimile transmission (FAX) of a properly executed Form 2848. Similarly, the Service will also accept a FAX of an I.R.C. § 6103(c) consent for the disclosure of returns and return information as long as the statute and regulations requirements (see Treas. Reg. § 301.6103(c)-1) for a valid consent are met.

CASE DEVELOPMENTS

A. Ward v. United States of America, 95-WY-410-WD (D. Colo. June 3, 1997)

This I.R.C. § 7431 action for unauthorized disclosure arose out of a jeopardy assessment and the resulting dispute between the IRS and the plaintiff. Plaintiff alleged five instances of unauthorized disclosure of return information: (1) verbal disclosures by Service employees to plaintiff's business customers and to shopping mall personnel; (2) the posting of return information in the windows of stores operated by plaintiff's son; (3) disclosure of return information by Service personnel during a live radio talk show; (4) disclosure of a "fact sheet" concerning the plaintiffs dispute with the Service to a television show; and (5) disclosure of return information by a revenue officer in a letter to a newspaper editor that was subsequently published. In an opinion, entered on June 3, 1997,

the court found that the verbal disclosures to the customers and mall personnel, and the window postings of return information, did not occur as plaintiff alleged. As to the radio program disclosures and the disclosure of the fact sheet, the Service relied on a consent form signed by Carol Ward as its authorization. The court, however, determined that the consent did not comport with the identity requirement of Treas. Reg. 301.6103(c)-1, *i.e.*, specifying the identity of the person to whom disclosure was to be made. Therefore, the court concluded that the consent was invalid and the disclosures made pursuant to the consent were unauthorized. Moreover, the court determined that the letter to the editor was an unauthorized disclosure, irrespective of Ms. Ward's own prior publication of her return information in the same newspaper and on the radio.

The court held that the unauthorized disclosures were not made in good faith, and thus, were not exempt from liability under I.R.C. § 7431(b). Pursuant to I.R.C. § 7431(c)(1)(B), Ms. Ward was awarded \$75,000 in actual damages, and \$250,000 in punitive damages for the revenue officer's letter to the editor. The government is now determining whether to appeal.

B. Spence v. United States, 97-1 USTC ¶ 50,485 (10th Cir. 1997)

In this case the Tenth Circuit held that disclosures of return information made in summonses (the taxpayer's name, address, and tax years) issued by a revenue officer were authorized by I.R.C. § 6103(k)(6).

The summonses in question were issued to tenants of real property that the plaintiff had purported to transfer to religious entities and family members. The summonses sought records of rental payments and other information pertinent to whether the plaintiff retained an interest in the properties. Plaintiff brought suit under I.R.C. § 7431, seeking damages for the unauthorized disclosure of his return information in violation of I.R.C. § 6103(a).

The district court granted summary judgment in favor of the government on the ground that the disclosures made in the summonses were authorized by I.R.C. § 6103(k)(6). Spence v. United States, 96-2 USTC ¶ 50,615 (D. N.M. July 18, 1996). I.R.C. § 6103(k)(6) authorizes certain disclosures of return information by officers and employees of the Service for investigative purposes where such disclosures are necessary in obtaining information not otherwise reasonably available.

On appeal, the plaintiff questioned the underlying validity of the summonses, asserting that he had no unpaid tax liability. Relying on its decision in DiAndre v. United States, 968 F.2d 1049 (10th Cir. 1992), and consistent with the longstanding

position of the government, the Tenth Circuit held that the validity of the vehicle by which information is disclosed is irrelevant to a determination of whether the disclosure of return information violated § 6103.

The plaintiff also argued on appeal that the district court erred because the information sought through the summonses was reasonably available through other means, *i.e.*, from himself. The circuit court held that the information sought was not otherwise reasonably available, noting that the summonses sought information from the tenants that only the tenants would possess and that the plaintiff previously had advised the revenue officer that he had no ownership interest in the properties.

C. Peddie v. United States, No. 97-1252 (4th Cir., appeal docketed February 13, 1997)

The issue presented in this appeal is whether the district court erred in concluding that informal requests made by the Service to several financial institutions for records pertaining to the taxpayers are subject to the procedural requirements of the Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3401-3422.

Following the reasoning of the Tenth Circuit in Neece v. IRS, 922 F.2d 573 (1990), the district court held that the Service's method of informally obtaining bank records by use of a standard form letter is not a procedure authorized by the Internal Revenue Code, and that the exception provided in subsection (c) of section 3413 of the RFPA, therefore, does not apply. Section 3413(c) specifically permits disclosure of financial records in accordance with procedures authorized by the Code without compliance with the RFPA.

In its appellate brief the government argued that the disclosures made by the various financial institutions of records pertaining to the Peddies' tax liabilities pursuant to informal requests by the Service were in accordance with procedures authorized by the I.R.C., and therefore, were exempt from the procedural requirements of the RFPA. In support of this position the government asserted that pursuant to I.R.C. § 7602(a) and (b), in order to determine the correctness of any return, to determine the liability of any person for any internal revenue tax, or to inquire into any offense connected with the administration or enforcement of the internal revenue laws, the Service is authorized to obtain and examine any documents and data and to take any testimony which may be relevant or material to such inquiry.

The Service's procedures for obtaining this information call for the use of informal efforts at voluntary cooperation in the first instance pursuant to I.R.C. § 7602(a)(1), which authorizes

the Service to examine any books, papers, records or other data. If such records are not obtained voluntarily, the Service may compel their production by issuing (and seeking enforcement if necessary) an administrative summons pursuant to I.R.C. § 7602(a)(2) and (a)(3). Thus, under this statutory scheme, section 7602(a)(1) provides for an informal, noncompulsory means of inquiry. The government argued that because the Service's practice of seeking voluntary cooperation falls within its authority provided in section 7602(a)(1), the Service's receipt of the documents did not violate the RFPA. The government further argued that the district court had erroneously concluded that the Service's only means of obtaining records from financial institutions without violating the RFPA is to issue a summons pursuant to I.R.C. § 7602(a)(2) and to comply with the special procedural requirements for issuing such a summons contained in I.R.C. § 7609.

DISCLOSURE LITIGATION TRAINING FOR CHIEF COUNSEL ATTORNEYS

In April, Disclosure Litigation sponsored its fifth Disclosure Training for Field Attorneys. Thirty-two field attorneys, representing each of the regions, attended the 3-day program. Topics covered included a history and overview of I.R.C. § 6103, disclosures for tax administration purposes, for nontax criminal purposes, and for tax administration investigative purposes. Other areas of consideration were disclosures in the bankruptcy context, civil and criminal penalties for unauthorized disclosures, privileges, the Freedom of Information and Privacy Acts, and testimony authorizations. Our appreciation is extended to guest lecturers Barry Finkelstein, Assistant Chief Counsel (Criminal Tax), Mark Pendery, Assistant District Counsel (Michigan District Counsel) and Bob Williams, Senior Attorney (Delaware-Maryland District Counsel) for their time and efforts. The Disclosure Litigation Training Reference, distributed at the school and intended as a desk reference, has since been distributed to all Regional and District Counsel attorneys.

* * * *

Your suggestions for topics to be included in future Bulletins are invited.