MLI #4 Summons Enforcement Under IRC §§ 7602, 7604, and 7609

SUMMARY

Pursuant to IRC § 7602, the IRS may examine any books, records, or other data relevant to an investigation of a civil or criminal tax liability.[1] To obtain this information, the IRS may serve a summons directly on the subject of the investigation or any third party who may possess relevant information.[2] If a person summoned under section 7602 neglects or refuses to obey the summons, or to produce books, papers, records, or other data, or to give testimony, as required by the summons, the IRS may seek enforcement of the summons in a United States District Court.[3]

A person who has a summons served on him or her may contest its legality if the government petitions to enforce it.[4] Thus, summons enforcement cases are different from many other cases described in other Most Litigated Issues because often the government, rather than the taxpayer, initiates the litigation pertaining to summons enforcement. If the IRS serves a summons on a third party, any person entitled to notice of the summons may challenge its legality by filing a motion to quash or by intervening in any proceeding regarding the summons.[5] Generally, the burden on the taxpayer to establish the illegality of the summons is heavy.[6]

We identified 117 federal cases decided between June 1, 2012, and May 31, 2013, that included issues of IRS summons enforcement. In 80 cases, the government initiated the litigation by filing a petition to enforce the summons. In 37 cases, the taxpayer or a third party initiated the litigation by filing a motion to quash the summons. Of the 117 cases, the parties contesting the summonses prevailed fully in four cases, with two other cases resulting in split decisions. The IRS prevailed in full in the remaining 111 decisions. Of the 117 cases, 56 included a discussion of the law and interaction between the taxpayer and the government.[7] Of these 56 cases, the parties contesting the summonses prevailed fully in four cases, with two other cases resulting in split decisions. The IRS prevailed in the remaining 50 cases.

PRESENT LAW

The IRS has broad authority under IRC § 7602 to issue a summons to examine a taxpayer's books and records or demand testimony under oath.[8] Further, the IRS may obtain information related to an investigation from a third party if, subject to the exceptions of IRC § 7609(c), it provides notice to the taxpayer

1 Internal Revenue Code (IRC) § 7602(a)(1); Treas. Reg. § 301.7602-1.

2 IRC § 7602(a).

3 IRC § 7604(b).

4 *U.S. v. Powell*, 379 U.S. 48, 58 (1964).

5 IRC § 7609(b).

6 *U.S. v. LaSalle Nat'l Bank*, 437 U.S. 298, 316 (1978).

7 These 56 cases do not include cases for which there was reported solely (1) an order to show why the case should not be decided on the basis of the government's allegations once the government established a *prima facie* case; (2) an order to obey a summons; or (3) a dismissal for failure to prosecute.

8 IRC § 7602(a). *See also LaMura v. U.S.*, 765 F.2d 974, 979 (11th Cir. 1985) (*citing U.S. v. Bisceglia*, 420 U.S. 141, 145-146 (1975)).

or other person identified in the summons.[9] In limited circumstances, the IRS can issue a summons even if the name of the taxpayer under investigation is unknown, *i.e.*, a "John Doe" summons.[10] However, the IRS cannot issue a summons after referring the matter to the Department of Justice (DOJ).[11]

If the recipient fails to comply with a summons, the United States may commence an action under IRC § 7604 in the appropriate U.S. District Court to compel document production or testimony.[12] If the United States files a petition to enforce the summons, the taxpayer may contest the validity of the summons in that proceeding.[13] Also, if the summons is served upon a third party, any person entitled to notice may petition to quash the summons in an appropriate district court, and may intervene in any proceeding regarding the enforceability of the summons.[14]

A taxpayer or other person named in a third-party summons is generally entitled to notice,[15] but exceptions may apply. For example, the IRS is not required to give notice if the summons is issued to aid in the collection of "an assessment made or judgment rendered against the person with respect to whose liability the summons is issued."[16] This exception reflects congressional recognition of a difference between a summons issued in an attempt to compute the taxpayer's taxable income, and a summons issued after the IRS has assessed tax or obtained a judgment. For example, notice to the taxpayer or person named in the summons is not required where the IRS is attempting to determine whether the taxpayer has an account in a certain bank with sufficient funds to pay an assessed tax because such notice might seriously impede the IRS's ability to collect the tax.[17] The courts have interpreted this "aid in collection" exception to apply only where the taxpayer owns a legally identifiable interest in the account or other property for which records are summoned.[18] Another situation in which notice is not required is when an IRS criminal investigator serves a summons, in connection with a criminal investigation, on any person who is not the third-party record-keeper.[19]

9 IRC § 7602(c). Those entitled to notice of a third-party summons (other than the person summoned) must be given notice of the summons within three days of the day on which the summons is served to the third party but no later than the 23rd day before the day fixed on the summons on which the records will be reviewed. IRC § 7609(a).

10 IRC § 7609(f). The court must approve a "John Doe" summons prior to issuance. In order for the court to approve the summons, the United States commences an *ex parte* proceeding. The United States must establish during the proceeding that its investigation relates to an ascertainable class of persons; it has a reasonable basis for the belief that these unknown taxpayers may have failed to comply with the tax laws; and it cannot obtain the information from another readily available source. IRC § 7609(f).

11 IRC § 7602(d). This restriction applies to "any summons, with respect to any person if a [DOJ] referral is in effect with respect to such person." IRC § 7602(d)(1).

12 IRC § 7604.

13 *U.S. v. Powell*, 379 U.S. 48, 58 (1964).

14 IRC § 7609(b). The petition to quash must be filed not later than the 20th day after the date on which the notice was served. IRC § 7609(b)(2)(A).

15 IRC § 7609(a)(1); *Shaw v. U.S.*, 109 A.F.T.R.2d (RIA) 1333 (M.D. Fla. 2012), *adopted by* 109 A.F.T.R.2d (RIA) 2364 (M.D. Fla. 2012), *affirmed by* 111 A.F.T.R.2d (RIA) 1754 (11th Cir. 2013).

16 IRC § 7609(c)(2)(D)(i). The exception also applies to the collection of a liability of "any transferee or fiduciary of any person referred to in clause (i)." IRC § 7609(c)(2)(D)(ii).

17 H.R. Rep. No. 94-658 at 310, reprinted in 1976 U.S.C.C.A.N. at 3206. *See also* S. Rep. No. 94-938, pt. 1, at 371-371, *reprinted* in 1976 U.S.C.C.A.N. at 3800-01 (containing essentially the same language).

18 *Ip v. U.S.*, 205 F.3d 1168, 1172-76 (9th Cir. 2000).

19 IRC § 7609(c)(2)(E). A third-party record-keeper is broadly defined and includes banks, consumer reporting agencies, persons extending credit by credit cards, brokers, attorneys, accountants, enrolled agents, and owners or developers of computer source code but only when the summons "seeks the production of the source or the program or the data to which the source relates." IRC § 7603(b)(2).

Regardless of whether the taxpayer contests the summons in a motion to quash or in response to the United States' petition to enforce, the legal standard is the same.[20] In *United States v. Powell*, the Supreme Court set forth four threshold requirements (referred to as the *Powell* requirements) that must be satisfied to enforce an IRS summons:

- The investigation must be conducted for a legitimate purpose;
- The information sought must be relevant to that purpose;
- The IRS must not already possess the information; and
- All required administrative steps must have been taken.[21]

The IRS bears the initial burden of establishing that these requirements have been satisfied.[22] However, this burden is minimal, as the government need only introduce a sworn affidavit of the agent who issued the summons declaring that each of the *Powell* requirements has been satisfied.[23] The burden then shifts to the person contesting the summons to demonstrate that the IRS did not meet the requirements or that enforcement of the summons would be an abuse of process.[24]

A taxpayer may also allege that the information requested is protected by a statutory or common-law privilege, such as the

- Attorney-client privilege;[25]
- Tax practitioner privilege;[26] or
- Work product privilege.[27]

However, these privileges are limited. For example, the attorney-client privilege protects "tax advice," but not tax return preparation materials.[28] The "tax shelter" exception limits the tax practitioner privilege and permits discovery of communications between a practitioner and client that promote participation in any tax shelter.[29] Thus, the tax practitioner privilege does not apply to any written communication between a federally authorized tax practitioner and "any person, any director, officer, employee, agent, or representative of the person, or any other person holding a capital or profits interest in the person" that is "in

20 *Villarreal v. U.S.*, 111 A.F.T.R.2d (RIA) 778 (D. Nev. 2013), *aff'g* 110 A.F.T.R.2d (RIA) 6777 (D. Colo. 2012).

21 *U.S. v. Powell*, 379 U.S. 48, 57-58 (1964).

22 *Fortney v. U.S.*, 59 F.3d 117, 119-20 (9th Cir. 1995).

23 *U.S. v. Dynavac, Inc.*, 6 F.3d 1407, 1414 (9th Cir. 1993).

24 *Id*.

25 The attorney-client privilege provides protection from discovery of information where: (1) legal advice of any kind is sought, (2) from a professional legal advisor in his or her capacity as such, (3) the communication is related to this purpose, (4) made in confidence, (5) by the client, (6) and at the client's insistence protected, (7) from disclosure by the client or the legal advisor, (8) except where the privilege is waived. *U.S. v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997) (citing John Henry Wigmore, *Evidence in Trials at Common Law* § 2292 (John T. McNaughten rev. 1961)).

26 IRC § 7525 extends the protection of the common law attorney-client privilege to federally authorized tax practitioners in federal tax matters. Criminal tax matters and communications regarding tax shelters are exceptions to the privilege. IRC § 7525(a)(2), (b). The interpretation of the tax practitioner privilege is based on the common law rules of attorney-client privilege. *U.S. v. BDO Seidman, LLP*, 337 F.3d 802, 810-812 (7th Cir. 2003), *cert. denied, Roes v. U.S.*, 540 U.S. 1178 (2004).

27 The work product privilege protects against the discovery of documents and other tangible materials prepared in anticipation of litigation. Fed. R. Civ. P. 26(b)(3); *see also Hickman v. Taylor*, 329 U.S. 495 (1947).

28 *U.S. v. Frederick*, 182 F.3d 496, 500 (7th Cir. 1999), *cert. denied*, 528 U.S. 1154 (2000).

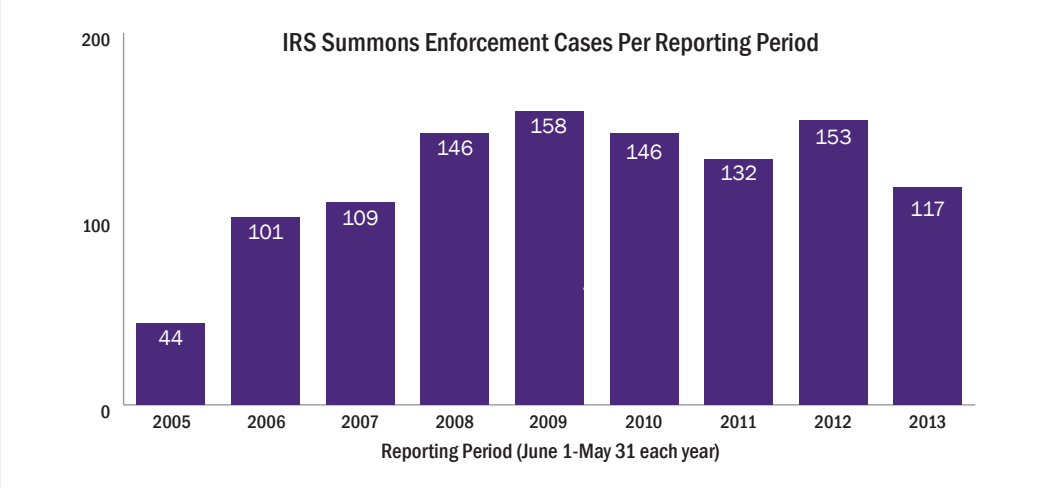
29 IRC § 7525(b); *Valero Energy Corp. v. U.S.*, 569 F.3d 626 (7th Cir. 2009).

connection with the promotion of the direct or indirect participation of the person in any tax shelter."[30] A tax shelter is defined as "a partnership or any other entity, any investment plan or arrangement, or any other plan or arrangement, if a significant purpose of such partnership, entity, plan, or arrangement is the avoidance or evasion of Federal income tax."[31]

ANALYSIS OF LITIGATED CASES

Summons enforcement has appeared as a Most Litigated Issue in the National Taxpayer Advocate's Annual Report to Congress every year since 2005. In 2005, we identified only 44 cases but predicted the number would rise as the IRS became more aggressive in its enforcement initiatives. The volume of identified cases rose to 101 during the reporting period ending on May 31, 2006, peaked at 158 cases for the reporting period ending on May 31, 2009, and stands at 117 during this year's reporting period as shown in Figure 3.1.1 below. A detailed list of these cases appears in Table 4 of Appendix III.

FIGURE 3.4.1, SUMMONS ENFORCEMENT CASES, 2005-2013



The IRS recently issued guidance that requires examiners, when they do not receive information they request from a taxpayer, to issue delinquency notices followed by a pre-summons letter, and to then proceed to issue a summons.[32] The National Taxpayer Advocate is concerned about the increased use of summons the guidance is likely to trigger, and will scrutinize such use to determine whether it is appropriate and necessary.

Of the 117 cases we reviewed this year, the IRS prevailed in full in 111 cases. Taxpayers were represented in 26 cases and appeared *pro se (i.e.*, on their own behalf) in 91 cases. Eighty-eight cases involved individual taxpayers, while the remaining 29 involved business taxpayers, including sole proprietorships (16 of whom appeared through a representative). There were 56 cases where the taxpayer or a third party actually appeared in the proceeding, and the court issued an opinion discussing the law. Of these 56 cases, the IRS prevailed in full in 50 cases. The parties contesting the summonses prevailed fully in four

30 IRC § 7525(b).

31 IRC § 6662(d)(2)(C)(ii).

32 LB&I directive LB&I-04-1113-009, 2013 Tax Notes Today 214-19 (Nov. 5, 2013).

cases with two others ending in split decisions. Taxpayers were represented in 22 cases and appeared *pro se* in 34 cases. Thirty-six cases involved individual taxpayers, while the remaining 20 involved business taxpayers, including sole proprietorships (14 of whom appeared through a representative). The arguments the litigants raised against IRS summonses generally fell into the following categories:

***Powell* Requirements:** Taxpayers frequently argued that the IRS did not meet one or more of the *Powell* requirements, but such arguments met with little success. This outcome is due in large part to the substantial burden placed upon the taxpayers to rebut the IRS's *prima facie*[33] showing that the summons should be enforced. The U.S. Court of Appeals for the Eighth Circuit has described the IRS's burden here as slight, and the taxpayer's burden as heavy.[34]

Criminal Referral: The IRS may issue summonses for the purpose of investigating a possible criminal offense, so long as the matter has not yet been referred to the DOJ.[35] Many taxpayers argued that because the IRS issued a summons pursuant to a possible criminal investigation, it violated the IRC § 7602(d) restriction on issuing a summons after referring the matter to the DOJ. However, the courts are careful to distinguish between a *referral* to the DOJ, which prevents the IRS from issuing a summons, and a *criminal investigation* by the IRS, which does not.

Constitutional Arguments: Courts reiterated the longstanding rule that taxpayers cannot use the Fourth Amendment as a defense against a third-party summons.[36] Courts also continued to reject blanket assertions of the Fifth Amendment protection,[37] but noted that taxpayers may have valid Fifth Amendment claims regarding specific documents or testimony.[38] However, even if a taxpayer may assert the claim on behalf of himself or herself, he or she may not assert it on behalf of a business entity.[39]

Taxpayers may not be able to rely on the Fifth Amendment privilege to withhold self-incriminatory evidence of a testimonial or communicative nature if summoned documents fall within the "foregone conclusion" exception to the Fifth Amendment. The forgone conclusion exception applies where the government establishes its independent knowledge of three elements:

- The documents' existence;
- The documents' authenticity; and
- The possession or control of the documents by the person to whom the summons was issued.[40]

In *United States v. Sideman & Bancroft, LLP*,[41] the court considered the applicability of the foregone conclusion exception. In that case, the IRS executed a search warrant in connection with an ongoing criminal investigation of the taxpayer but failed to locate the relevant documents. During the investigation, the IRS learned that the taxpayer's tax return preparer had previously become very familiar with

33 *Prima facie* means "at first sight, on appearance but subject to further review or evidence." *Black's Law Dictionary* (9th Ed. 2009).

34 *U.S. v. Claes*, 747 F.2d 491, 494 (8th Cir. 1984).

35 IRC § 7602(d); *see, e.g., Peterson v. U.S.*, 110 A.F.T.R.2d (RIA) 6562 (D. Neb. 2012).

36 *See, e.g., Peterson v. U.S.*, 110 A.F.T.R.2d (RIA) 6562 (D. Neb. 2012).

37 *See, e.g., U.S. v. Amabile*, 109 A.F.T.R.2d (RIA) 2392 (E.D. Pa. 2012), *adopted by* 110 A.F.T.R.2d (RIA) 5017 (E.D. Pa. 2012).

38 *U.S. v. Amabile*, 109 A.F.T.R.2d (RIA) 2392 (E.D. Pa. 2012), *adopted by* 110 A.F.T.R.2d (RIA) 5017 (E.D. Pa. 2012).

39 *U.S. v. Christensen*, 110 A.F.T.R.2d (RIA) 5421 (D. Ariz. 2012).

40 *U.S. v. Sideman & Bancroft*, LLP, 107 A.F.T.R.2d (RIA) 1780 (N.D. Cal. 2011), *affirmed by* 111 A.F.T.R.2d (RIA) 460 (9th Cir. 2013).

41 *U.S. v. Sideman & Bancroft, LLP*, 107 A.F.T.R.2d (RIA) 1780 (N.D. Cal. 2011), *affirmed by* 111 A.F.T.R.2d (RIA) 460 (9th Cir. 2013).

the sought-after documents and could identify numerous distinct features of those documents. The preparer later delivered the documents to the taxpayer's civil tax attorney, who delivered them to the taxpayer's counsel handling the IRS criminal investigation. The taxpayer's criminal tax counsel refused to comply with a subsequent IRS summons for the documents, arguing that producing the documents would be a communicative act that would tacitly concede the existence of the summoned documents and their possession or control by the taxpayer.[42] The court concluded that the IRS knew with "reasonable particularity" prior to issuing the summons, from the information provided by the taxpayer's tax return preparer, that those documents existed and were in the possession of the taxpayer's criminal tax counsel.[43] The court further noted that the information provided by the taxpayer's tax return preparer could sufficiently authenticate the summoned documents, thus satisfying each element of the foregone conclusion exception.[44]

One court held that a taxpayer is not precluded from invoking the Fifth Amendment privilege for the first time at a contempt proceeding for failure to comply with a summons. In *United States v. St. John*,[45] the IRS issued two summonses requesting that the taxpayer give testimony and produce records and documents for the purpose of determining his personal tax liability. The taxpayer appeared before the Revenue Officer named in the summons but refused to produce the records and refused to answer most questions on Fifth Amendment grounds.[46] Appearing *pro se* at a summons enforcement hearing, the taxpayer failed to assert his Fifth Amendment privilege. In a subsequent proceeding, however, when the taxpayer was ordered to show cause why he should not be held in contempt and appropriately sanctioned, he invoked the privilege.[47] The court rejected the argument that the taxpayer waived the Fifth Amendment privilege by failing to raise the defense at the enforcement stage of the proceedings and failing to object to the report and recommendation on the enforcement order.[48] The court stated that every reasonable presumption against waiver of the Fifth Amendment privilege, a fundamental constitutional right, should be indulged.[49] The taxpayer could invoke the privilege for the first time as late as a contempt hearing.

A court this year affirmed a lower court's rejection of a claim that IRS agents had attempted to "deter or chill" the right to speak out against "harassing agent conduct" in violation of the taxpayer's First Amendment rights.[50] Courts also rejected taxpayers' arguments that summons enforcement violated their rights under federal privacy laws.[51] Some taxpayers argued, without success, that summonses were unconstitutionally overbroad.[52]

42 *U.S. v. Sideman & Bancroft, LLP*, 107 A.F.T.R.2d (RIA) 1780 (N.D. Cal. 2011), *affirmed by* 111 A.F.T.R.2d (RIA) 460 (9th Cir. 2013).

43 *Id*.

44 *Id*.

45 111 A.F.T.R.2d (RIA) 723 (M.D. Fla. 2013), *adopting in part* 111 A.F.T.R.2d (RIA) 719 (M.D. Fla. 2012).

46 *Id*.

47 *Id*.

48 *Id*.

49 *Id*.

50 *See, e.g., Canatella v. U.S.*, 108 A.F.T.R.2d (RIA) 5256 (N.D. Cal. 2011), *affirmed by* 111 A.F.T.R.2d (RIA) 1996 (9th Cir. 2013).

51 *See, e.g., U.S. v. Williams*, 111 A.F.T.R.2d (RIA) 850 (D. Or. 2013), *adopted by* 111 A.F.T.R.2d (RIA) 853 (D. Or. 2013).

52 *See, e.g., U.S. v. Lano Equipment, Inc.*, 2012 U.S. Dist. LEXIS 77900 (D. Minn. 2012), *adopted by* 2012 U.S. Dist. LEXIS 77392 (D. Minn. 2012).

Privilege: Courts generally reject claims of attorney-client privilege. In *Gjerde v. United States*,[53] the court rejected the taxpayer's argument that the attorney-client privilege protected his bank records from being summoned. The taxpayer, a licensed California attorney, argued that examination of his bank records, which included two of his client trust accounts, would contravene his duty under state law to preserve client confidences and would violate the attorney-client privilege.[54] The court concluded that the bank records were not communications made in the attorney's capacity as a legal adviser in the course of receiving or giving legal advice and therefore were not protected by the attorney-client privilege.[55]

In *United States v. Eaton Corp.*,[56] the taxpayer challenged multiple summonses, asserting various privileges including attorney-client privilege. In the first summons the court reviewed, a business failed to provide the IRS with a document-by-document privilege log but asserted that the information sought had been compiled in the course of seeking legal advice and provided a corroborating declaration from its vice president of federal tax strategy.[57] The court concluded that, pursuant to Federal Rule of Civil Procedure 26(b)(5),[58] the declaration was insufficient to establish the attorney-client privilege because it did not provide enough information about the documents withheld to enable the government to assess the claim of privilege.[59] In the second and third summonses it reviewed, the court found the privilege was sufficiently substantiated by the vice president's declaration in conjunction with logs that included the subject matter of the documents to which a privilege was asserted, the document type, the author, and the privilege claimed.[60] Accordingly, the court denied the government's petitions for enforcement of the second and third summonses.

International Treaty Obligations: Courts denied two taxpayer motions to quash summonses and granted one government motion to enforce a summons based on the government's compliance with international agreements. In *United States v. Villarreal*,[61] the court considered the enforceability of an IRS summons issued pursuant to the Agreement Between the United States of America and the United Mexican States for the Exchange of Information with Respect to Taxes ("TIEA"). In that case, an official of the taxing authority for Mexico, the Servicio de Administracion Tributaria ("SAT"), requested that the IRS obtain records from an American bank through which SAT believed the taxpayer's business transferred funds affecting the taxpayer's Mexican income tax liability.

The court noted that the same four-part *Powell* test applies where the IRS issues a summons at the request of a treaty partner.[62] The taxpayer asserted that the IRS summons was not issued for a legitimate purpose because it was being used to advance a "harassment campaign" by the SAT, and that the information

53 110 A.F.T.R.2d (RIA) 5581 (E.D. Cal. 2012).

54 *Id*.

55 *Id.*

56 110 A.F.T.R.2d (RIA) 5638 (N.D. Ohio 2012).

57 *U.S. v. Eaton Corp.*, 110 A.F.T.R.2d (RIA) 5638 (N.D. Ohio 2012).

58 Federal Rule of Civil Procedure 26(b)(5) provides that a party withholding information based on a claim of privilege must: "expressly make the claims; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Fed. R. Civ. P. 26(b)(5).

59 *U.S. v. Eaton Corp*. 110 A.F.T.R.2d (RIA) 5638 (N.D. Ohio 2012).

60 *Id*. The court also found that the tax practitioner privilege applied to the information requested in the second and third summonses and the work product privilege applied to the information requested in the third summons.

61 *Villarreal v. U.S.*, 111 A.F.T.R.2d (RIA) 1713 (10th Cir. 2013), *aff'g* 109 A.F.T.R.2d (RIA) 1522 (D. Colo. 2012).

62 *Id*.

sought was irrelevant. The court held that the taxpayer's assertion of improper purpose was conclusory and therefore insufficient to meet his burden of proof. Moreover, relying on Supreme Court precedent, the court held that it is not the good faith of the foreign tax authority that is relevant in the analysis of proper purpose but rather the good faith of the IRS.[63] The court also held that the information requested by the summons need only be *potentially* relevant to an ongoing investigation; the information about the taxpayer's transferred funds satisfied this standard.[64]

The IRS prevailed in 33 cases involving motions to quash summonses, in part because the courts lacked jurisdiction to hear the cases. The courts dismissed these cases for lack of jurisdiction for the following reasons:

Lack of Jurisdiction Due to Procedural Requirements: The United States is immune from suit unless Congress has expressly waived its sovereign immunity.[65] Because a motion to quash service of an IRS summons is a suit against the United States, a court has jurisdiction only when Congress has expressly waived this immunity. When a taxpayer wishes to challenge an IRS summons issued to a third party, federal law sets forth the exclusive method by which the taxpayer can proceed. IRC § 7609(b) allows a taxpayer to initiate a proceeding in U.S. District Court for the district in which the third party resides, but the proceeding must be initiated no later than 20 days from the date the notice of summons was given. Courts have strictly construed the IRC § 7609(b) deadline when determining whether sovereign immunity has been waived. For example, a court dismissed a *pro se* taxpayer's motion to quash for lack of jurisdiction because the taxpayer filed the motion two days after the 20-day limit expired.[66] Another court held that it lacked subject matter jurisdiction over a petition to quash a third-party summons, where the third parties neither resided in nor were found within the jurisdiction of the district court.[67]

Lack of Jurisdiction Due to Notice Requirements: Courts denied multiple motions to quash because the parties contesting the summonses were not entitled to notice of the summonses due to one of the IRC § 7609(c) exceptions and therefore lacked standing to contest their validity.[68] In *Bybee v. United States*, the government served third-party summonses on the taxpayer's son and the son's business during an investigation into potential tax evasion by the taxpayer.[69] The taxpayer moved to quash the summonses, arguing that the IRS failed to give him proper statutory notice. The court rejected this argument because the summonses were not issued to third-party record-keepers and therefore the taxpayer had no right to notice of the summons.[70] The court held that sovereign immunity had not been waived and the court lacked subject matter jurisdiction.

63 *U.S. v. Stuart*, 489 U.S. 353, 370 (1989).

64 *Villarreal v. U.S.*, 111 A.F.T.R.2d (RIA) 1713 (10th Cir. 2013), *aff'g* 109 A.F.T.R.2d (RIA) 1522 (D. Colo. 2012).

65 *U.S. v. Dalm*, 494 U.S. 596, 608 (1990).

66 *U.S. v. Chavira*, 111 A.F.T.R.2d (RIA) 1931 (C.D. Cal. 2013).

67 *Maxwell v. U.S.*, 876 F. Supp. 2d 22 (D.D.C. 2012).

68 IRC § 7609(c)(2)(E); *See, e.g., U.S. v. Bybee*, 110 A.F.T.R.2d (RIA) 6212 (D. Utah 2012), *adopted by* 110 A.F.T.R.2d (RIA) 6215 (D. Utah 2012).

69 110 A.F.T.R.2d (RIA) 6212 (D. Utah 2012), adopted by 110 A.F.T.R.2d (RIA) 6215 (D. Utah 2012).

70 IRC § 7609 does not apply to any summons served on any person who is not a third-party record-keeper (as defined in IRC § 7603(b)). IRC § 7609(c)(2)(E)(ii).

CONCLUSION

The IRS may issue a summons to obtain information needed to determine whether a tax return is correct or if a return should have been filed, to ascertain a taxpayer's tax liability, or to collect a liability.[71] Accordingly, the IRS may request documents and testimony from taxpayers who have failed to provide that information voluntarily. The IRS may also summon information from taxpayers at the request of a foreign taxing authority with which the United States is a treaty partner. Taxpayers and third parties rarely succeed in contesting IRS summonses due to the significant burden of proof and strict procedural requirements. Courts have justified broad readings of the summons enforcement statutes to ensure IRS investigatory powers are not unduly restricted.[72] Thus, taxpayers seldom challenge summons enforcement at the appellate level.[73] It appears that the IRS will continue to rely heavily on its summons enforcement power to effectively administer the IRC, and as a result, there will be challenges to these administrative actions that will be decided by the courts.

71 IRC § 7602(a).

72 *Flight Vehicles Consulting, Inc. v. U.S.*, 110 A.F.T.R.2d (RIA) 5487 (N.D. Cal. 2012), *adopting* 110 A.F.T.R.2d (RIA) 5484 (N.D. Cal. 2012).

73 Appeals were docketed in eight of the 117 cases reviewed herein.