

An Overview of Summons Enforcement

By James R. Gadwood

James Gadwood examines the summons enforcement process.

Summons have been in the news lately. On the issuance front, the IRS Large Business and International (LB&I) Division recently implemented a mandatory enforcement process for Information Document Requests (IDRs) that culminates with the issuance of a summons.¹ And on the enforcement front, in its 2013 Term the U.S. Supreme Court handed down a rule for lower courts to apply in determining when, in the context of a summons enforcement proceeding, a taxpayer has a right to question IRS officials about their reasons for issuing a summons.² Against this backdrop, this article provides an overview of the summons enforcement process.³

I. Introduction

The IRS has broad authority to “examine any books, papers, records, or other data” that may be relevant to determine or collect a liability for tax, interest, or penalties.⁴ As a general matter, the IRS requests such information in the form of an IDR. If a taxpayer refuses to provide the requested information, the IRS can issue a summons to compel the taxpayer to do so.⁵ An IRS summons, however, is not self-enforcing and has no force in the absence of a court order from a U.S. district court.⁶ So if the summoned party refuses to comply with the summons, the IRS must decide whether to seek judicial enforcement.

Depending on the circumstances, the IRS may decide that the summoned information does not justify the time and expense of an enforcement proceeding and decline to seek enforcement of the summons. In contrast, if the IRS decides to pursue the matter, it must ask the U.S. Department of Justice (DOJ) to bring a summons enforcement action in a U.S. district court.⁷ A summons enforcement proceeding is public and will make the IRS investigation a matter of public record.

II. IRS Procedures

If a summoned party fails to respond to an IRS summons, the IRS examination team will consider whether to seek judicial enforcement. Ordinarily, the

JAMES R. GADWOOD is a Tax Associate at Sullivan & Cromwell LLP.

examination team will not seek to enforce a summons if, among other things: (1) the summoned party is willing to comply with the summons but has requested a reasonable extension of time to comply; (2) the summoned party has denied, under oath, possession or control of the documents called for in the summons; (3) the IRS already has possession of the documents; or (4) the IRS improperly prepared, issued, or served the summons.⁸

If the examination team recommends enforcement, it will refer the matter to the IRS Office of Chief Counsel (Chief Counsel).⁹ The examination team generally makes this referral by means of a referral memorandum prepared by the revenue agent who issued the summons.¹⁰

As a result of LB&I's mandatory IDR enforcement process, U.S. district courts may begin to see an uptick in the number of summons enforcement actions.

Upon receipt of the referral memorandum, Chief Counsel makes its own determination as to whether to seek judicial enforcement.¹¹ If Chief Counsel determines that summons enforcement is appropriate, it will take one of three actions: (1) refer the matter to a U.S. Attorney; (2) refer the matter to the DOJ Tax Division; or (3) route the matter through the Office of Associate Chief Counsel (Procedure & Administration) (P&A).¹²

As a general matter, Chief Counsel refers routine summons enforcement requests to a U.S. Attorney.¹³ The referral letter will include three proposed pleadings for the U.S. Attorney to file with the U.S. district court: (1) a petition; (2) a declaration; and (3) an order to show cause.¹⁴ The petition provides the jurisdictional grounds for a summons enforcement action in a U.S. district court, asserts the underlying facts, and provides a request for relief.¹⁵ The declaration is a sworn statement, signed by the revenue agent who issued the summons, that sets forth the relevant facts of the case, including the nature of the examination and the relevancy of the documents requested. The declaration attempts to present a *prima facie* case that the IRS has satisfied the requirements necessary for enforcement (discussed below).¹⁶ Finally, if approved by a U.S. district court, the order to show cause will require the summoned party to demonstrate why the summons should not be enforced.¹⁷

In contrast, Chief Counsel sends certain categories of summons enforcement requests to the DOJ Tax Division

or P&A. For example, Chief Counsel must send summons enforcement requests from the Criminal Investigation Division¹⁸ and summons enforcement actions against attorneys to the DOJ Tax Division.¹⁹ In contrast, Chief Counsel must send summons enforcement requests to P&A if they come from LB&I and request tax accrual workpapers or records located outside of the United States.²⁰ Chief Counsel may also refer a summons enforcement request to P&A if it involves a “significant, novel, or important” issue.²¹

III. U.S. District Court Procedures

A. Summons Enforcement Proceedings

The United States initiates a summons enforcement proceeding by filing a petition in the U.S. district court where the summoned party resides or is found.²² At a summons enforcement proceeding, the United States has the initial burden of making a *prima facie* showing that the summons is valid.²³ This burden is “slight,” and the DOJ is generally able to satisfy it by means of a declaration from the IRS revenue agent (which is ordinarily submitted to the U.S. district court as an attachment to the petition).²⁴ To make a *prima facie* showing that the summons is valid, the DOJ must satisfy the “Powell requirements” by establishing that the summons: (1) was issued for a legitimate purpose; (2) seeks information that may be relevant to that purpose; (3) seeks information that is not already in the IRS’s possession; and (4) satisfies all administrative steps required by the Code.²⁵

The United States must also show that, with respect to the taxpayer whose liabilities are being investigated, no “Justice Department referral” was in effect at the time the IRS issued the summons or the United States commenced the summons enforcement proceedings.²⁶ A Justice Department referral is in effect with respect to a taxpayer if (1) the IRS has recommended a grand jury investigation or criminal prosecution of the taxpayer for a tax-related crime, or (2) the DOJ submits a request to the IRS requesting disclosure of the taxpayer’s return or return information.²⁷

If the U.S. district court determines that the United States has made a *prima facie* showing that the summons is valid, the court will approve and issue an order to show cause, thereby shifting the burden to the summoned party to demonstrate (or “show cause”) why the summons should not be enforced.²⁸ In contrast to the United States’ burden, the summoned party’s burden to overcome the United States’ *prima facie* showing is “a heavy one” that requires the allegation of specific facts and the introduction of affirmative evidence.²⁹ The summoned party must

show that one of the *Powell* requirements has not been satisfied or that enforcement would constitute an abuse of the court's process.³⁰

The summoned party may also challenge the IRS summons on the ground that the information sought is protected by the attorney–client privilege, the tax practitioner–client privilege under Code Sec. 7525, or the work–product doctrine.³¹ In fact, as discussed below, the summons enforcement proceeding is likely the summoned party's only opportunity to present arguments to a court that the summons should not be enforced on the ground that it requests privileged information. Therefore, although a summoned party cannot be fined or imprisoned for failing to appear in response to an order to show cause,³² the summoned party should nevertheless appear to assert any privilege defenses with respect to the summoned information.

If the summoned party fails to carry its burden, the U.S. district court will issue an order requiring the summoned party to comply with the summons (an Enforcement Order). Unlike the summons and the order to show cause, the Enforcement Order is backed by the contempt power of the U.S. district court. Therefore, failure to comply with the Enforcement Order can result in both civil and criminal penalties.³³

B. Contempt Proceedings

If a summoned party fails to comply with an Enforcement Order, the United States may file a motion to compel compliance by way of a contempt proceeding.³⁴ As a general matter, the only issue that can be litigated in a contempt proceeding is whether the summoned party has the present

ability to obey the Enforcement Order.³⁵ “Any questions regarding the propriety of the summons and whether it should have been enforced must have been raised in the summons enforcement hearing.”³⁶ As a result, the summoned party may not litigate a defense in a contempt proceeding that could have been raised in an enforcement action but was not,³⁷ or a defense that was raised but not appealed.³⁸ Therefore, claims of attorney–client privilege, tax practitioner–client privilege under Code Sec. 7525, or work–product doctrine should be raised during the summons enforcement hearing.

As an initial matter, the United States is required to establish a *prima facie* case of contempt.³⁹ This may be accomplished by either affidavits or sworn testimony presented in open court. Once the United States makes a *prima facie* showing, the burden shifts to the summoned party to produce detailed evidence specifically explaining why the summoned party cannot comply with the summons.⁴⁰ This burden is not satisfied by “a mere assertion of inability.”⁴¹ Rather, the summoned party is generally required to show that it has made “in good faith all reasonable efforts to comply.”⁴²

IV. Conclusion

As a result of LB&I's mandatory IDR enforcement process, U.S. district courts may begin to see an increase in the number of summons enforcement actions. The overview of the summons enforcement process in this article should provide a good starting point for taxpayers and practitioners who find themselves in the summons enforcement arena for the first time.

ENDNOTES

¹ See IRS, *Large Business and International Directive on Information Document Requests Enforcement Process*, LB&I-04-0214-004 (Feb. 28, 2014).
² See *M. Clarke*, S Ct, 2014-1 USTC ¶150,326, 134 S Ct 2361, 2367 (“As part of the adversarial process concerning a summons's validity, the taxpayer is entitled to examine an IRS agent when he can point to specific facts or circumstances plausibly raising an inference of bad faith.”).
³ This article is limited to civil enforcement proceedings. The IRS may also seek criminal enforcement by recommending that the summoned party be prosecuted for willfully failing to comply with a summons. See Code Sec. 7210. All “Code Sec.” references are to the Internal Revenue Code (Code).
⁴ See Code Sec. 7602(a)(1).
⁵ See Code Sec. 7602(a)(2).
⁶ *Schulz*, CA-2, 413 F3d 297, 298-99 (2005).
⁷ See Code Secs. 7402(b) and 7604(a).
⁸ See IRM §25.5.10.3(3) (Jan. 13, 2012).

⁹ See IRM §25.5.10.4.3(2) (Jan. 13, 2012).
¹⁰ See IRM §25.5.10.4(4) (Jan. 13, 2012).
¹¹ See IRM §34.6.3.3(1) (Feb. 1, 2011). The INTERNAL REVENUE MANUAL provides protest procedures in the event Chief Counsel considers denying a request for civil enforcement of a summons. See IRM §25.5.10.6 (Jan. 13, 2012).
¹² See IRM §34.6.3.3(3) (Feb. 1, 2011).
¹³ See IRM §34.6.3.3.1(1) (Feb. 1, 2011). TAX DIVISION, U.S. DEP'T OF JUSTICE, SUMMONS ENFORCEMENT MANUAL 77 (2012) [hereinafter TAX DIVISION MANUAL]; U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §6-5.230 (2007) [hereinafter U.S. ATTORNEYS' MANUAL].
¹⁴ See IRM §34.6.3.3.1.1(6) (Feb. 1, 2011).
¹⁵ See IRM Exhibit 34.12.1-21 (May 10, 2013) and TAX DIVISION MANUAL, *supra* note 13, Exhibit 2, for sample petitions.
¹⁶ See IRM Exhibit 25.5.10-3 (Apr. 30, 1999), IRM Exhibit 34.12.1-22 (May 10, 2013), and TAX DIVISION MANUAL, *supra* note 13, Exhibit 3, for sample declarations.

¹⁷ See IRM Exhibit 34.12.1-23 (May 10, 2013) and TAX DIVISION MANUAL, *supra* note 13, Exhibit 4, for sample orders to show cause.
¹⁸ See IRM §34.6.3.3.3(1) (Feb. 1, 2011).
¹⁹ See IRM §34.6.3.3.3(2) (Feb. 1, 2011).
²⁰ See IRM §34.6.3.3.2(1)(B) and (F) (Feb. 1, 2011).
²¹ IRM §34.6.3.3.2(1)(E) (Feb. 1, 2011).
²² See Code Secs. 7402(b) and 7604(a); IRM §25.5.10.4(3) (Jan. 13, 2012); U.S. ATTORNEYS' MANUAL, *supra* note 13, at §6-5.200.
²³ See *Garden State Nat'l Bank*, CA-3, 79-2 USTC ¶9632, 607 F2d 61, 68; TAX DIVISION MANUAL, *supra* note 13, at 4.
²⁴ *Supra* note 2, 134 S Ct 2365.
²⁵ See *M. Powell*, S Ct, 64-2 USTC ¶9858, 379 US 48, 57-58, 85 S Ct 248.
²⁶ Code Sec. 7602(d)(1).
²⁷ Code Sec. 7602(d)(2)(A).
²⁸ See *Garden State Nat'l Bank*, *supra* note 23, 607 F2d 70 (quoting *L. Genser*, CA-3, 78-2 USTC ¶9682, 582 F2d 292).
²⁹ *LaSalle Nat'l Bank*, S Ct, 78-2 USTC ¶9501, 437

US 298, 316, 98 Sct 2357.

³⁰ *Supra* note 25, 379 US 58. An abuse of the court's process takes place "if the summons has been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *Id.*

³¹ See *S. Reisman v. M. Caplin*, 64-1 ustrc ¶9202, 375 US 440, 449, 84 Sct 508.

³² See *Riewe*, CA-10, 676 F2d 418, 421 (1982).

³³ The summoned party can appeal the Enforcement Order to a U.S. court of appeals within which the U.S. district court resides. See *supra*

note 31, 375 US 449.

³⁴ See IRM §25.5.10.4.4(2) (Jan. 13, 2012); TAX DIVISION MANUAL, *supra* note 13, at 23.

³⁵ See, e.g., *Rylander*, Sct, 83-1 ustrc ¶9300, 460 US 752, 760-61; see also TAX DIVISION MANUAL, *supra* note 13, at 23.

³⁶ TAX DIVISION MANUAL, *supra* note 13, at 24 (citing *Rylander*, 460 US 757).

³⁷ See *Rylander*, *supra* note 35, 460 US 757 (holding that because the summoned party could have raised a defense of lack of possession of records in the summons enforcement hearing, the summoned party could not raise it, for the first time, as a defense to contempt).

³⁸ See, e.g., *Bright*, CA-9, 2010-1 ustrc ¶50,249, 596 F3d 683, 694; *Millstone Enters.*, CA-3, 89-1 ustrc ¶9252, 864 F2d 21; *Daly*, CA-8, 68-1 ustrc ¶9323, 393 F2d 873, 876.

³⁹ See *Hayes*, CA-11, 84-1 ustrc ¶9146, 722 F2d 723, 725.

⁴⁰ See *Roberts*, CA-11, 89-1 ustrc ¶9153, 858 F2d 698, 701 (citing *Rylander*, 460 US 752); *Hayes*, 722 F2d 725 (citing *Maggio v. Zeitz*, Sct, 333 US 56, 75-76 (1948)).

⁴¹ See *Roberts*, *supra* note 40, 858 F2d 701 (citing *Hayes*, 722 F2d 725).

⁴² See, e.g., *supra* note 39, 722 F2d 725.

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