

Summons Enforcement Under IRC §§ 7602, 7604, and 7609

TAXPAYER RIGHTS IMPACTED¹

- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

OVERVIEW

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.² 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.³ If a person summoned under IRC § 7602 neglects or refuses to obey the summons; 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 U.S. district court.⁴ A person who has a summons served upon him or her may contest the legality of the summons in a U.S. district court if the government petitions the court to enforce it.⁵ Also, if the summons is served upon a third party, any person entitled to notice may petition to quash the summons in the appropriate district court, and may intervene in any proceeding regarding the enforceability of the summons.⁶

TAS used commercial legal research databases to identify 40 federal opinions issued between June 1, 2019, and May 31, 2020, involving IRS summons enforcement and related issues. For the purposes of this section of the National Taxpayer Advocate's Annual Report to Congress, the term "litigated" means cases in which the court issued an opinion.⁷ The summons enforcement cases reviewed involved requesting taxpayer records directly from a taxpayer or a third party, such as a financial institution. Of these 40 opinions reviewed, seven cases applied the standards for summons enforcement set forth in *United States v. Powell*,⁸ five cases involved the assertion of a privilege by the taxpayer, and two cases involved the issuance of a John Doe summons

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the IRC. See IRC § 7803(a)(3).

2 IRC § 7602(a)(1); Treas. Reg. § 301.7602-1.

3 IRC § 7602(a).

4 IRC § 7604(b) (providing that if any taxpayer or third party is summoned to appear, testify or produce records, the United States District Court for the district in which the taxpayer resides or is found has jurisdiction to compel the taxpayer or third party to appear, testify or produce the records). 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. However, regardless of whether the taxpayer initiates the litigation via a motion to quash a summons that was served upon him or her or in response to the United States' petition to enforce a summons, the legal standard is the same. *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).

5 IRC § 7604(b). See also *U.S. v. Powell*, 379 U.S. 48, 58 (1964).

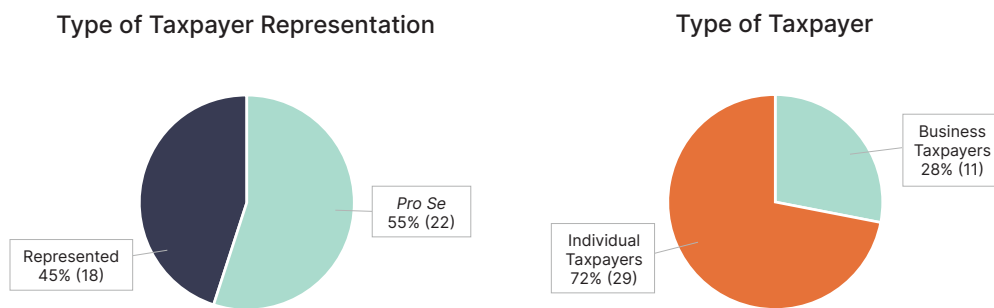
6 IRC § 7609(b).

7 We recognize that many cases are resolved before the court issues an opinion. Some taxpayers reach a settlement with the IRS before trial, while the courts dismiss other taxpayers' cases for a variety of reasons, including lack of jurisdiction and lack of prosecution. Additionally, courts can issue less formal "bench opinions," which are not published or precedential.

8 *United States v. Powell*, 379 U.S. 48 (1964). To be enforceable, the IRS must show: 1) that the investigation was conducted pursuant to a legitimate purpose; 2) that the inquiry is relevant to the purpose; 3) that the information sought is not in possession of the IRS; 4) that all administrative steps required have been followed; and 5) that the summons was not issued for an improper purpose such as harassment, pressuring a taxpayer to settle a collateral dispute or other purpose adversely reflecting on good faith. *Id.* at 57-58.

under IRC § 7609(f) (where the taxpayer(s) under investigation is not specifically identified or is unknown).⁹ Furthermore, six of the 40 cases were appeals decided by a United States Court of Appeals. Twenty-nine of the opinions involved individual taxpayers, while 11 involved business taxpayers as demonstrated in Figure 2.6.1. Furthermore, most taxpayers were not represented by counsel (*i.e.*, they were *pro se*), also shown in Figure 2.6.1. The government filed a petition to enforce the summons in 19 cases, while the taxpayer initiated by filing a petition to quash the summons in 21 cases. Overall, no taxpayers fully prevailed, but one case resulted in a partial taxpayer win with a split decision.¹⁰

FIGURE 2.6.1¹¹



In fiscal year (FY) 2020, at least 433 summons cases were in the Office of Chief Counsel’s inventory.¹² In general, the Department of Justice (DOJ) handles motions to quash summons (the U.S. is listed as a defendant), and the U.S. Attorneys’ Offices handle suits to enforce the summons (the U.S. is listed as a plaintiff). A total of 34 cases were referred to DOJ in FY 2020.¹³ Subtracting those 34 from the total inventory, that means 399 cases were handled by U.S. Attorneys’ Offices. Many summons are complied with and do not require court enforcement (as demonstrated by the relatively small number of summons enforcement court cases TAS identified for the period June 1, 2019, through May 31, 2020).

9 Under IRC § 7609(f), as amended, the IRS may issue a John Doe summons if it can establish: 1) that the summons relates to the investigation of a particular person or ascertainable group or class of persons; 2) there is a reasonable basis for believing such person or group or class may fail or may have failed to comply with the internal revenue laws; and, 3) that the name(s) of the unidentified taxpayer(s) is not readily available from other sources. IRC § 7609(f). See also *United States v. Bisceglia*, 420 U.S. 141 (1975) (often referred to as the “case of the moldy money”).

10 See *Williams Dev. & Constr., Inc. v. United States*, 124 A.F.T.R.2d (RIA) 6976 (D.S.D. 2019) (limiting the scope of one of the thirteen third-party summonses to certain limited documents while enforcing the rest of the summonses in full).

11 In the forty opinions analyzed by TAS, taxpayers were unrepresented in 22 of the cases. Due to rounding issues, the percentage of business taxpayers was rounded from 27.5 percent to 28 percent while the number of individual taxpayers was rounded from 72.5 percent to 72 percent.

12 Data compiled by the IRS Office of Chief Counsel (Dec. 2, 2020).

13 Data provided by DOJ to the IRS Office of Chief Counsel (Nov. 9, 2020).

ANALYSIS OF LITIGATED CASES

In a summons enforcement action, the IRS bears the initial burden of establishing that the requirements for issuing a summons have been satisfied.¹⁴ The IRS meets its burden by providing a sworn affidavit of the IRS agent who issued the summons.¹⁵ 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.¹⁶ This year's opinions simply applied the rules to new fact patterns.

The number of summons enforcement opinions have been declining as mirrored by the decrease in total IRS tax law enforcement and litigated cases.¹⁷ Another contributing factor to this decline may be related to the gradual reduction in IRS examinations since 2010.¹⁸ As noted above, TAS identified 40 opinions this year, down from 60 last year, and 85 the year before.¹⁹ In addition, the additional taxpayer protections to the summons rules added by the Taxpayer First Act (TFA), coupled with the COVID-19 pandemic, may have had an impact on the decline of summons enforcement cases as well.²⁰ Under the TFA, the IRS must narrowly tailor the information sought in a John Doe summons, take additional steps before issuing a designated summons, and give taxpayers 45 days advance notice if it intends to contact third parties.²¹

CONCLUSION

The IRS may issue a summons to obtain information needed to determine the correctness of a tax return, determine if a return should have been filed, determine a taxpayer's tax liability, or collect a liability.²² Taxpayers and third parties continue to contest IRS summonses, but rarely succeed due to the broad statutory language in favor of the government,²³ the significant burden of proof for taxpayers, and the strict procedural requirements. Further, in the past, courts have generally justified broad readings of the summons enforcement statutes to ensure IRS investigatory powers are not unduly restricted.²⁴ As the IRS employs a more aggressive enforcement policy, it will continue to rely heavily on the summons enforcement tool. We expect the courts will continue to see these cases litigated.

¹⁴ *Fortney v. U.S.*, 59 F.3d 117, 119-20 (9th Cir. 1995).

¹⁵ *U.S. v. Dynavac, Inc.*, 6 F.3d 1407, 1414 (9th Cir. 1993) (citations omitted).

¹⁶ *Id.*

¹⁷ As reflected in the most recent IRS Databook, IRS tax law enforcement and litigation cases decreased in FY 2019 as compared to FY 2018. Compare IRS Pub. 55B, IRS Databook 2019, table 28 (June 2020) (showing 60,108 cases received and 58,307 cases closed by the IRS Office of Chief Counsel in FY 2019) and IRS Pub. 55B-2019, IRS Databook 2018, table 26 (May 2019) (showing 66,531 cases received and 66,886 cases closed by the IRS Office of Chief Counsel in FY 2018).

¹⁸ See IRS Pub. 55B, IRS Databook 2019, Table 17b (June 2020) (showing a decline in the total number of tax returns examined, by examination type, in fiscal years 2010–2019).

¹⁹ National Taxpayer Advocate 2019 Annual Report to Congress 168 (Most Litigated Issue: *Summons Enforcement Under IRC §§ 7602, 7604, and 7609*).

²⁰ *Id.*

²¹ Taxpayer First Act (TFA), Pub. L. No. 116-25, §§ 1204, 1206, and 1207, 133 Stat. 981, 988, 990-91 (2019). Under the revisions added by the TFA, general third-party contact notices issued by the IRS are no longer acceptable. IRC § 7602(c) as amended also forbids the IRS from issuing a notice unless it intends at that time to make third-party contacts (*i.e.*, thereby creating a present-intent requirement).

²² IRC § 7602(a).

²³ See IRC § 7602(b). The government may examine, summon, and take testimony for the purpose of *inquiring into any offense* connected with the administration or enforcement of the internal revenue laws of the United States (emphasis added). Whatever may shine a light on the accuracy of a tax return can be summoned. Within this broad boundary, very few things would be considered an “unreasonable search.”

²⁴ *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).

Recommendations to Mitigate Disputes

To reduce summons enforcement challenges, it could be helpful for the government to do more to avoid the need for third-party summonses. Allowing taxpayers with an opportunity, where appropriate, to provide the information the IRS needs before contacting third parties protects taxpayer rights.²⁵ Under the *right to privacy*, taxpayers have the right to expect that any IRS inquiry, examination, or enforcement action will be no more intrusive than necessary.

The National Taxpayer Advocate recommends that Congress:

1. Amend IRC § 7602(c)(1) to require the IRS to tell the taxpayer in third-party contact notices what information it needs (if any) and give the taxpayer a reasonable opportunity to provide the information before contacting a third-party, unless an exception applies.²⁶

The National Taxpayer Advocate recommends that the IRS:

1. Revise its third-party contact letters and internal guidance, including updated Letter 3164-A,²⁷ to inform the taxpayer of what the IRS needs and to give the taxpayer a reasonable opportunity to provide the information before contacting third parties.

25 There are, however, certain categories of IRS summonses which do not require the IRS to give notice to a taxpayer, as detailed in IRC § 7609(c)(2).

26 National Taxpayer Advocate 2021 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration 137-138 (Require the IRS to Specify the Information Needed in Third-Party Contact Notices)*.

27 The IRS will send IRS Letter 3164-A, Third Party Contact (Jan. 1999), to notify taxpayers that the IRS may contact third parties to obtain information during the audit process. An IRS employee who issues Letter 3164 must wait ten days before contacting a third party under the Internal Revenue Manual 25.27.1.3.1.7, TPC Notification Procedures (Oct. 19, 2017).