
Responding to Summonses and Subpoenas for Client Documents

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Starting Point – Confidentiality Obligations Owed to Client

- 21 NCAC 08N .0205
- AICPA Rule 301
- AICPA Rules 1.700.001 and 1.700.100 (effective December 15, 2014)
- I.R.C. § 7216

21 NCAC 08N .0205

- (a) Nondisclosure. A CPA shall not disclose any confidential information obtained in the course of employment or a professional engagement except with the consent of the employer or client.
- (b) Exceptions. This Rule shall not be construed: (2) to affect in any way the CPA's compliance with a **validly issued** subpoena or summons **enforceable** by this Board or by order of a court; or ... (7) to affect a CPA's disclosure of confidential information when such disclosure is required by state or federal laws or regulations.

AICPA Rule 301 – Confidential Client Information

- A member in public practice shall not disclose any confidential client information without the specific consent of the client.
- This rule shall not be construed ... 2) to affect in any way the member's obligation to comply with a ***validly issued*** and ***enforceable*** subpoena or summons, or to prohibit a member's compliance with applicable laws and government regulations.....

AICPA Rule 1.700.001 (effective December 15, 2014)

- A member in public practice shall not disclose any confidential client information without the specific consent of the client. (identical to Rule 301)

AICPA Rule 1.700.100.01 (effective December 15, 2014)

- The member's disclosure of confidential of confidential client information in compliance with a ***validly issued*** and ***enforceable*** subpoena or summons would not violate the "Confidential Client Information Rule." (emphasis supplied) (similar to Rule 301)

AICPA Rule 1.700.001.100.02 (effective December 15, 2014)

- When complying with such subpoena or summons, the member is not required to notify the client that its records have been subpoenaed or that a summons related to the client's records has been issued. The member may wish to consult with legal counsel [to determine validity and enforceability and the information required to be provided]. The member may also wish to consult with his or her state board of accountancy.
- This is new content.

I.R.C. § 7216 -- Disclosure or use of information by preparers of returns

- (a) General rule.--Any person who is engaged in the business of preparing, or providing services in connection with the preparation of, returns of the tax imposed by chapter 1, or any person who for compensation prepares any such return for any other person, and who ***knowingly*** or ***recklessly*** --

I.R.C. § 7216 -- Disclosure or use of information by preparers of returns

- (1) discloses any information furnished to him for, or in connection with, the preparation of any such return, ... shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

I.R.C. § 7216 -- Disclosure or use of information by preparers of returns

- (b) Exceptions.--
- (1) Disclosure.--Subsection (a) shall not apply to a disclosure of information if such disclosure is made—
- (A) pursuant to any other provision of this title, or
- (B) pursuant to an order of a court.

Types of Requests

- Informal Requests
- Formal Requests include:
 - IRS Summonses
 - Civil Subpoenas
 - Grand Jury/Criminal Subpoenas

Informal Requests

- Easy Rule – Do not provide any information or documents without the client's express written consent.

Formal Requests – What to Do

- Contact your Attorney
- Contact your Client (possible caveat – some criminal subpoenas)
- Contact your Insurance Carrier

IRS Summonses

- Resources -- Department of Justice Tax Division Summons Enforcement Manual, found at:

http://www.justice.gov/tax/readingroom/summonsmn/SumEnfMan_July2011.pdf

- Internal Revenue Manual (“IRM”) – Part 25.5 Summons Handbook

IRS Summonses

- I.R.C. §7601 directs the Secretary of the Treasury Department to make inquiries into the tax liability of every person who may be liable to pay any internal revenue tax.

IRS Summonses

- **I.R.C. § 7602(a) and (b)** authorizes the Secretary of the Treasury Department to examine any books, papers, records, or other data, issue a summons, and to take testimony **which may be relevant or material** to:

“ascertaining the correctness of any return,”

“making a return where none has been made,”

“determining the liability of any person for any internal revenue tax,”

“collecting any [internal revenue tax] liability,” or

“inquiring into any offense connected with the administration or enforcement of the internal revenue laws.”

IRS Policy as to Summonses

- IRS says that its policy and practice is to obtain information and documents by means other than a summons when possible.
- “Attempt to obtain information voluntarily from taxpayers and witnesses prior to issuing a summons. Consent may be obtained voluntarily by acquainting the taxpayer or witness with the provisions of the Internal Revenue Code.” IRM ¶ 25.5.1.4(1)

IRS Summonses

- IRS employees are to consider the following factors before issuance of a summons:
 - The tax liability involved;
 - The time and expense of obtaining the records;
 - The probability of having to resort to court action;
 - The potential adverse effect on voluntary compliance by other parties if the enforcement efforts are not successful; and
 - Whether a criminal case is pending.

IRM ¶ 25.5.1.4(2)

IRS Summons Authority

- IRS employees are instructed to consider serving a summons in the following situations:

No records are made available to permit an adequate examination within a reasonable period of time;

Submitted records are known or suspected to be incomplete, and additional records are presumed to be in the possession of the taxpayer or a third party;

It appears serious efforts to provide documentation for substantiation will not be made because records and explanations will be offered at another level or after notice of deficiency has been issued; and

The existence and location of records are in doubt.

IRM ¶ 25.5.1.4(3)

Technical elements of a valid summons:

1. Identifies the taxpayer;
2. Identifies the summoned person;
3. Identifies the IRS employee designated to take testimony and receive summoned information and documents;
4. Sets an appropriate place and time for appearance;
5. Insure that authorized IRS employees issue and approve the summons;
6. Satisfies the attestation requirement;
7. Gives proper notice of third-party summonses; and
8. Proper service of the summons.

IRS Summonses

- Service of summons:

A summons must be served by hand to the person to whom it is directed or left at the person's last known address. I.R.C. § 7603(a); Treas. Reg. § 301.7603-1(a); IRM ¶25.5.3.2(1).

A summons issued to a third-party record-keeper, defined in I.R.C. § 7603(b)(2), may also be served by certified or registered mail. See I.R.C. §7603(b)(1); Treas. Reg. §301.7603-1(a)(2); IRM ¶ 25.5.3.2(1).

- IRS must give timely notice to the taxpayer of a third party summons (Form 2039 part D). IRM ¶25.5.6.6.4(1).

Petition to quash a summons

- If a notice of a third-party summons is required to be given to any person identified in the summons, the person receiving such notice is entitled to bring a proceeding to quash the summons. (Summoned third party may not petition to quash)
- A taxpayer has the right to file a petition to quash the summons within 20 days after the date the notice of summons is given.
- An action to enforce a summons must be brought by the United States in federal district court. I.R.C. §§ 7402(b) and 7604(a).

Where a taxpayer files a petition to quash a summons, the United States may counterclaim for enforcement of the summons. I.R.C. § 7609(b)(2)(A).

Jurisdiction: petition to quash or enforce a summons must be filed in judicial district where the summoned person resides or is found.

Petition to quash a summons

- When a third-party summons action is pending, the IRS may not examine records subject to the summons (I.R.C. § 7609(d)), all statutes of limitations are suspended (I.R.C. § 7609(e)), and the summoned third-party is required to assemble the records in question. I.R.C. §7609(i)(1).
- A taxpayer has the right to intervene in a summons enforcement proceeding. I.R.C. § 7609(b).

Summons enforcement actions

- A summons enforcement action is commenced by the United States by filing a petition in federal district court seeking issuance of an order for the summoned party to show cause. Also to be filed is the issuing IRS agent's affidavit, which must state the *prima facie* facts showing compliance with all statutory and judicial requirements for enforcement.

Summons enforcement action

- *United States v. Powell*, 379 U.S. 48, 57-58 (1964).
Enforcement – the four *Powell* requirements:
To be enforceable, a summons must:
 - 1. Be issued for a legitimate purpose;
 - 2. Seek information that may be relevant to the investigation;
 - 3. Seek information that is not already in the IRS's possession; and
 - 4. Meet all administrative requirements.

Summons enforcement action

- The government's burden is a "slight" one.

The burden usually is met by the affidavit of the examining agent attesting to each of the four *Powell* elements.

Test - the government must demonstrate a sufficient nexus between the taxpayer and the records of a third person's affairs to make the investigation reasonable.

Summons enforcement action

- Once the government establishes a *prima facie* case, the burden shifts to the party contesting the summons.

The taxpayer's burden to overcome the IRS's *prima facie* showing is heavy, and requires the allegation of specific facts and the introduction of affirmative evidence.

Summons enforcement action

- Compliance with summons is enforced by court's contempt powers.

Defenses to an IRS summons

- Failure to meet the 4 *Powell* requirements
- Privileges: Attorney-client privilege; Section 7525 privilege; Attorney work-product doctrine.
- Not within “possession, custody or control.”
- 4th Amendment protection against unreasonable searches and seizures.
- 5th Amendment privilege against self-incrimination – this “natural individuals” (not corporations) defense applies to both documentary requests and oral testimony.

Powell – Legitimate Purpose

I.R.C. §§ 7602(a) and (b) delineate the purposes for which an IRS summons may be issued:

- Ascertaining the correctness of any return,
- Making a return where none has been made,
- Determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax,
- Collecting any such liability, or
- Inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

Powell – Relevance

- I.R.C. § 7602 authorizes the IRS to examine "any books, papers, records, or other data which **may be** relevant or material." In *United States v. Arthur Young & Co.*, 465 U.S. 805, 814 (1984), the Court stated that the language "may be" reflects Congress's express intention to allow the IRS to obtain "items of even *potential* relevance to an ongoing investigation, without reference to its admissibility." The IRS need not show that the "documents it seeks are actually relevant in any technical, evidentiary sense." *Arthur Young*, 465 U.S. at 814.
- The examining agent is to describe why the summoned documents are relevant. IRM ¶ 25.5.10.4.5.
- Related arguments – overbreadth, vagueness, burdensomeness

Powell – Not in IRS Possession

- A statement in the IRS agent's declaration that the summoned information is not in the IRS's possession is enough to shift the burden of proof to the party opposing enforcement.
- This *Powell* requirement may not be satisfied, however, when someone in the IRS other than the declaring agent has the summoned information and it is available for use in the examination.

Powell – Administrative Requirements

Statutory requirements – see slide 20

- Courts will “evaluate the seriousness of the violation under all circumstances ...”
- IRS’s failure to comply with third party contact rule is sufficient basis for denial of enforcement of summons.

Attorney-Client Privilege

- Summonses are "subject to the traditional privileges and limitations," including attorney-client privilege. *Upjohn Co. v. United States*, 449 U.S. 383, 398 (1981).
- A claim of attorney-client privilege will be upheld: (1) where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at the client's instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except if the protection is waived.

Section 7525 Tax Practitioner Privilege

- “With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.”
- A "federally authorized tax practitioner" is "any individual who is authorized under Federal law to practice before the Internal Revenue Service if such practice is subject to Federal regulation under section 330 of Title 31, United States Code.”
- "Tax advice" is defined as "advice given by an individual with respect to a matter which is within the scope of the individual's authority to practice [before the IRS].”

Section 7525 Tax Practitioner Privilege

- Section 7525 only protects communications between a taxpayer and a federally authorized tax practitioner “to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.”
- The scope of the Section 7525 privilege is thus no broader than that of the attorney-client privilege and is subject to all the limitations and restrictions imposed on the attorney-client privilege at common law (*e.g.*, waiver).

Section 7525 Tax Practitioner Privilege

- The Section 7525 privilege is subject to special statutory limitations that otherwise make it significantly narrower than the attorney-client privilege.
- The privilege may only be asserted in any *noncriminal* tax matter before the IRS and in any *noncriminal* tax proceeding in Federal court brought by or against the United States.
- As a result, it is *not* available in response to a summons issued by an IRS special agent pursuing a criminal investigation, nor is it available in any non-tax matter or proceeding, whether or not the IRS or the United States is a party. It "may not be asserted to prevent the disclosure of information to any regulatory body other than the IRS." S. Rep. No. 105-174, at 71 (1998).

Attorney Work Product

- Federal Rule of Civil Procedure 26(b)(3) provides qualified protection for:
- "documents and tangible things prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." If "otherwise discoverable," such materials "may be discovered" if "the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain the substantial equivalent by other means."

4th Amendment protection and *U.S. v. Powell*

- The IRS need not meet any standard of probable cause to obtain enforcement of its summons, either before or after limitation on ordinary tax liabilities has expired. It need only satisfy the 4 *Powell* requirements.
- The IRS's authority to require the production of evidence does not depend on the existence of a case or controversy. It can investigate on suspicion that the law is being violated, or because it seeks assurance that it is not.
- Whatever may shed light on the correctness of the return can be summoned. Within this broad parameter, the IRS usually will not run afoul of the 4th Amendment.

Defenses to an IRS Summons

- Privilege against self-incrimination

Limited in application to a summons for the production of documents

The mere act of production may be “testimonial” in some instances, but

- “Foregone conclusion” exception to the privilege – where the government independently knows of the existence and authenticity of the documents, production is not testimonial - e.g., known and unknown multiple foreign bank accounts & information known by return preparer
- “Required records” exception to the privilege – e.g., records required to be maintained under the 1970 Bank Secrecy Act

Defenses to an IRS Summons

- “Possession, custody, or control” issues:
 - Lack of possession or control is a valid defense.
 - Taxpayer must rebut presumption of control with “clear proof.”
 - “Control” includes the legal right of the producing party to obtain documents from another source on demand.

A court order enforcing a summons is a finding that the summoned party has the requisite control over the summoned document.

Responding to Civil Subpoenas

- North Carolina Rule of Civil Procedure 45 governs Civil Subpoenas in State Court
- Federal Rule of Civil Procedure 45 governs Civil Subpoenas in Federal Court
- Both allow for a party to command persons to attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control.
- Each has slightly different procedures for objecting.

Responding to Civil Subpoenas

- A person commanded to appear at a deposition or to produce and permit the inspection and copying of materials may, within the earlier of (a) 10 days (NC)/14 days (Fed) after service of the subpoena or (b) the time specified for compliance, serve upon the issuing party written objection to the subpoena, setting forth the specific grounds for the objection.

Responding to Civil Subpoenas

- Grounds for objecting to a subpoena:
- a. The subpoena fails to allow reasonable time for compliance.
- b. The subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection. (No accountant-client privilege in NC).
- c. The subpoena subjects a person to an undue burden or expense.
- d. The subpoena is otherwise unreasonable or oppressive.
- e. The subpoena is procedurally defective.

Responding to Civil Subpoenas

- If objection is made, the party serving the subpoena shall not be entitled to compel the subpoenaed person's appearance at a deposition or to inspect and copy materials to which an objection has been made except pursuant to an order of the court.
- If objection is made, the party serving the subpoena may, upon notice to the subpoenaed person, move for an order to compel the subpoenaed person's appearance at the deposition or the production of the materials designated in the subpoena. The motion shall be filed in the court in the county in which the deposition or production of materials is to occur.

Responding to Civil Subpoenas

- Rule 45 also allows for Motions to Quash or Modify the Subpoena. Grounds:
 - 1. Those previously mentioned on Slide 49.
 - 2. Subpoena seeks trade secrets or other confidential research, development, or commercial information.
- Rule 45 also allows for Motions for Protective Order precluding or limiting production.

Responding to Civil Subpoenas

- Subpoena Production Nightmares – Electronically Stored Information (ESI)

Conclusion:

- When the Summons or Subpoena arrives...

Call Me

(or, if not me, some other attorney)