MLI #3 Summons Enforcement Under IRC §§ 7602, 7604, and 7609

SUMMARY

Pursuant to Internal Revenue Code (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 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 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. 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] When challenging the summons's validity, the taxpayer generally must provide "some credible evidence" supporting an allegation of bad faith or improper purpose.[7] The taxpayer is entitled to a hearing to examine an IRS agent about his or her purpose for issuing a summons only when the taxpayer can point to specific facts or circumstances that plausibly raise an inference of bad faith.[8] Naked allegations of improper purpose are not enough, but because direct evidence of IRS's bad faith "is rarely if ever available," circumstantial evidence can suffice to meet that burden.[9]

We identified 84 federal cases decided between June 1, 2014, and May 31, 2015 involving IRS summons enforcement issues. The government was the initiating party in 59 cases, while the taxpayer was the initiating party in 25 cases. Overall, taxpayers fully prevailed in two cases, while one case was split. The IRS prevailed in the remaining 81 cases.

TAXPAYER RIGHTS IMPACTED[10]

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

1 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 *U.S. v. Clarke*, 134 S. Ct. 2361, 2367 (2014), *vacating* 517 F. App'x 689 (11th Cir. 2013), *rev'g* 2012-2 U.S. Tax Cas. (CCH) ¶ 50,732 (S.D. Fla. 2012).
8 *Id.* (stating that "[t]he taxpayer need only make a showing of facts that give rise to a plausible inference of improper motive").
9 *Id*. at 2367-68.
10 See Taxpayer Bill of Rights, *available at* www.TaxpayerAdvocate.irs.gov/taxpayer-rights.

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.[11] 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 or other person identified in the summons.[12] 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.[13] However, the IRS cannot issue a summons after referring the matter to the Department of Justice (DOJ).[14]

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.[15] If the United States files a petition to enforce the summons, the taxpayer may contest the validity of the summons in that proceeding.[16] 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.[17]

Generally, a taxpayer or other person named in a third-party summons is entitled to notice.[18] However, the IRS does not have to provide notice in certain situations. 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."[19] Congress created this exception because it recognized 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, the IRS does not have to give notice to the taxpayer or person named in the summons if it 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.[20] Courts have interpreted this "aid in collection" exception to apply only if the taxpayer owns a legally identifiable interest in the account or other property for which records are summoned.[21] Additionally,

11 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, 145-46 (1975)).

12 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).

13 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).

14 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).

15 IRC § 7604.

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

17 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).

18 IRC § 7609(a)(1); Treas. Reg. § 301.7609-1(a)(1). *See, e.g., Cephas v. U.S.*, 112 A.F.T.R.2d (RIA) 6483 (D. Md. 2013).

19 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).

20 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, *reprinted in* 1976 U.S.C.C.A.N., at 3800-01 (containing essentially the same language).

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

the IRS is not required to give notice when, in connection with a criminal investigation, an IRS criminal investigator serves a summons on any person who is not the third-party record-keeper.[22]

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.[23] 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:

1. The investigation must be conducted for a legitimate purpose;
2. The information sought must be relevant to that purpose;
3. The IRS must not already possess the information; and
4. All required administrative steps must have been taken.[24]

The IRS bears the initial burden of establishing that these requirements have been satisfied.[25] The government meets its burden by providing a sworn affidavit of the agent who issued the summons declaring that each of the *Powell* requirements has been satisfied.[26] 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.[27]

The taxpayer can show that enforcement of the summons would be an abuse of process if he or she can prove that the IRS issued the summons in bad faith.[28] In *United States v. Clarke*, the Supreme Court held that during a summons enforcement proceeding, a taxpayer has a right to conduct an examination of the responsible IRS officials about whether a summons was issued for an improper purpose only when the taxpayer "can point to specific facts or circumstances plausibly raising an inference of bad faith."[29] Blanket claims of improper purpose are not sufficient, but circumstantial evidence can be.[30]

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

- Fifth Amendment privilege against self-incrimination;
- Attorney-client privilege;[31]

22 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).

23 *Kamp v. U.S.*, 112 A.F.T.R.2d (RIA) 6630 (E.D. Cal. 2013).

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

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

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

27 *Id*.

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

29 *U.S. v. Clarke*, 134 S. Ct. 2361, 2367 (2014), *vacating* 517 F. App'x 689 (11th Cir. 2013), *rev'g* 2012-2 U.S. Tax Cas. (CCH) ¶ 50,732 (S.D. Fla. 2012).

30 *Id*. at 2367-68.

31 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 8 John Henry Wigmore, Evidence in Trials at Common Law § 2292 (John T. McNaughten rev. 1961)).

- Tax practitioner privilege;[32] or
- Work product privilege.[33]

However, these privileges are limited. For example, courts reject blanket assertions of the Fifth Amendment,[34] but note that taxpayers may have valid Fifth Amendment claims regarding specific documents or testimony.[35] However, even if a taxpayer may assert the Fifth Amendment on behalf of him or herself, he or she cannot assert it on behalf of a business entity.[36]

Additionally, taxpayers cannot, on the basis of the Fifth Amendment privilege, withhold self-incriminatory evidence of a testimonial or communicative nature if the summoned documents fall within the "foregone conclusion" exception to the Fifth Amendment. The exception applies if the government establishes its independent knowledge of three elements:

1. The documents' existence;
2. The documents' authenticity; and
3. The possession or control of the documents by the person to whom the summons was issued.[37]

The attorney-client privilege protects "tax advice," but not tax return preparation materials.[38] 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.[39] 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" which is "in connection with the promotion of the direct or indirect participation of the person in any tax shelter."[40]

In June 2014, the IRS issued temporary regulations providing that outside parties hired by the IRS may receive and examine any summoned books, papers, records, or other data and may take testimony of any

32 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, 810-12 (7th Cir. 2003).

33 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).

34 *See, e.g., U.S. v. McClintic*, 113 A.F.T.R.2d (RIA) 330 (D. Or. 2013).

35 *See, e.g., U.S. v. Lawrence*, 113 A.F.T.R.2d (RIA) 1933 (S.D. Fla. 2014).

36 *See, e.g., U.S. v. Ali*, 113 A.F.T.R.2d (RIA) 1863 (D. Md. 2014) (citing *U.S. v. Wujkowski*, 929 F.2d 981, 983 (4th Cir. 1991)).

37 *U.S. v. Bright*, 596 F.3d 683, 692 (9th Cir. 2010).

38 *U.S. v. Frederick*, 182 F.3d 496, 500 (7th Cir. 1999).

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

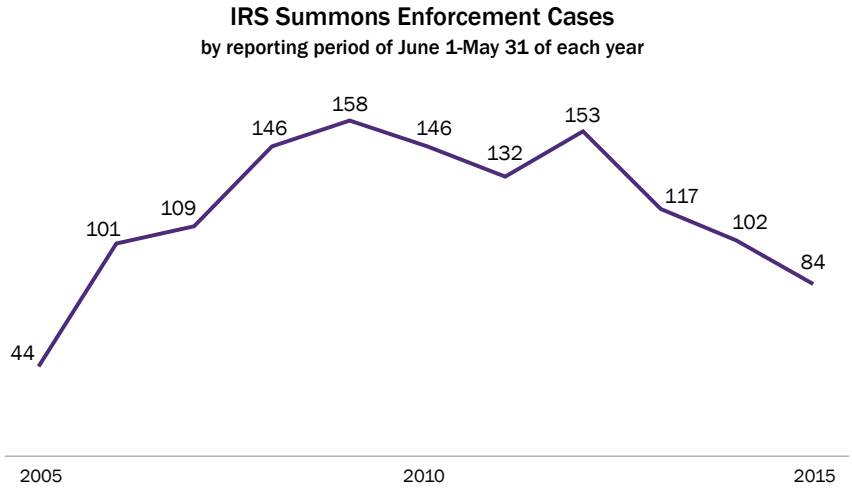
40 *Id.*

summoned person under oath.[41] These outside parties are also permitted to fully participate in a summons interview.[42]

ANALYSIS OF LITIGATED CASES

Summons enforcement has been a Most Litigated Issue in the National Taxpayer Advocate's Annual Report to Congress every year since 2005, when TAS identified only 44 cases but predicted the number would rise as the IRS became more aggressive in its enforcement initiatives. The number of cases peaked at 158 for the reporting period ending on May 31, 2009, but has steadily declined, except for a one-year increase for the year ending May 31, 2012, as shown in Figure 3.3.1. This year, the decline in the number of summons enforcement cases continues, as we identified 84 cases for the reporting period ending on May 31, 2015, a drop from the 102 cases during last year's reporting period. A detailed list of these cases appears in Table 3 of Appendix 3.

FIGURE 3.3.1, Summons Enforcement Cases, 2005–2015



Of the 84 cases TAS reviewed this year, the IRS prevailed in full in 81, a 96 percent success rate. Taxpayers had representation in 23 cases and appeared *pro se* (*i.e.*, on their own behalf) in the

41 Temp. Treas. Reg. § 301.7602-1T(b)(3). There is notable current summons enforcement litigation involving the IRS's use of an outside law firm in an audit of Microsoft Corporation's transfer pricing arrangements. *See* Dolores W. Gregory, *Transfer Pricing: Microsoft Pushes for Evidentiary Hearing, Cites IRS's 'Illegal' Deal With Quinn Emanuel*, Tax Notes Today (Apr. 27, 2015). Although it is outside of the reporting period for the Most Litigated Issues section, Microsoft was successful in obtaining an evidentiary hearing in the summons enforcement case. *See U.S. v. Microsoft Corp.*, 2015 WL 4496749 (W.D. Wash. 2015). Commentators have come out both for and against the IRS's use of outside attorneys in cases such as Microsoft's. *Cf.* Roger A. Pies, *IRS Prerogative to Hire Outside Counsel*, Tax Notes Today (July 7, 2015) (arguing that the IRS should be allowed to retain outside counsel in a big document case) and Stuart Gibson, *If the IRS needs Good Lawyers, it Should Look Across the Street*, Tax Notes Today (Mar. 30, 2015) (questioning why the IRS did not seek assistance from the DOJ in the Microsoft case).

42 Temp. Treas. Reg. § 301.7602-1T(b)(3). The regulations provide that full participation includes, but is not limited to, receipt, review, and use of summoned materials, being present during summons interviews, questioning the person giving testimony, and asking the summoned person's representative to clarify an objection or assertion of a privilege. These temporary regulations went into effect for all summons interviews held on or after June 18, 2014 and will expire on June 16, 2017.

remaining 61. Sixty-four cases involved individual taxpayers, while the remaining 20 involved business taxpayers, including sole proprietorships.[43] Cases generally involved one of the following themes.

Petitions to Enforce and *Powell* Requirements

The United States petitioned to enforce a summons in 59 cases and successfully met its burden under *Powell* in 58 cases. In only one case, *United States v. Taylor*, did the IRS fail to satisfy the *Powell* requirements.[44] In *Taylor*, the IRS was investigating the taxpayer for the collection of tax liabilities for the taxable year ending December 31, 2007.[45] However, the revenue officer issued a summons for all documents and records from December 1, 2013 to present.[46] The district court declined to enforce the summons and held that the IRS did not meet the relevance prong of the *Powell* requirements because the documents requested were not necessary to determine the taxpayer's tax liability for 2007.[47]

Abuse of Process

Several taxpayers claimed that the IRS issued summonses in bad faith or for an improper purpose, and therefore enforcement would be an abuse of the court's process.[48] However, taxpayers were unsuccessful proving either bad faith or improper purpose because they were unable to allege facts and circumstances that could plausibly imply bad faith. For example, in *United States v. Artex Risk Solutions, Inc.*, one of the taxpayer's claims of bad faith was that the IRS did not provide reasonable deadlines to produce the necessary information.[49] The court held that the summons was not issued in bad faith because the taxpayer failed to substantiate its claims as to the burdens it faced to comply with the summonses and did not show that IRS deadlines were unreasonable.[50]

Petitions to Quash and Lack of Subject Matter Jurisdiction

Taxpayers petitioned to quash an IRS summons to a third party in 26 instances;[51] however, in 13 of these cases, courts dismissed the petitions for lack of jurisdiction on procedural or notice grounds.[52] For example, a court dismissed a *pro se* taxpayer's petition to quash for lack of jurisdiction because the taxpayer filed the petition more than 60 days after the IRS had issued the summons.[53] Another court dismissed a *pro se*

43 There were cases in which the IRS issued summons for investigations into both the individual taxpayer and his or her business. For the purposes of this MLI, TAS placed these cases into the business taxpayer category.

44 *U.S. v. Taylor*, 115 A.F.T.R.2d (RIA) 1165 (C.D. Cal. 2015).

45 *Id*.

46 *Id*.

47 *Id*. The court stated that the Government could amend its Petition and Declaration to establish a "realistic expectation" of potential relevance for the requested information.

48 *See U.S. v. Anderson*, 114 A.F.T.R.2d (RIA) 6731 (N.D. Cal. 2014), *stay denied*, 115 A.F.T.R.2d (RIA) 468 (N.D. Cal. 2015), *appeal docketed*, No. 15-15130 (9th Cir. Jan. 26, 2015); *U.S. v. Artex Risk Solutions, Inc*., 2014 U.S. Dist. LEXIS 126932 (N.D. Ill. 2014); *Haw. Pac. Fin., Ltd. v. U.S*., 114 A.F.T.R.2d (RIA) 5640 (D. Haw. 2014; *Highland Capital Mgmt., L.P. v. U.S*., 51 F. Supp. 3d 544 (S.D.N.Y. 2014), *aff'd in part and vacated in part*, 2015 U.S. App. LEXIS 17112 (2d Cir. 2015); *Schwartz v. U.S*., 115 A.F.T.R.2d (RIA) 1942 (S.D. Fla. 2015).

49 *U.S. v. Artex Risk Solutions, Inc.*, 2014 U.S. Dist. LEXIS 126932, at *14-15 (N.D. Ill. 2014).

50 *Id*. at *15.

51 In some instances, the taxpayer made the motion to quash in its answer to the government's petition to enforce.

52 In 13 of the 26 cases, the petitions to quash were denied on substantive grounds.

53 *Abusch v. U.S*., 114 A.F.T.R.2d (RIA) 5535 (M.D. La. 2014), *adopting* 114 A.F.T.R.2d (RIA) 5533 (M.D. La. 2014), *cert. denied*, No. 14-948 (Mar. 23, 2015). Under IRC § 7609(b)(2)(A), a taxpayer seeking to quash a third-party summons must file a petition with the appropriate district court within 20 days after the date the notice of the summons is mailed to the taxpayer. Under IRC § 7609(b)(2)(B), the taxpayer must send a copy of the petition to quash to the party summoned and to the IRS within this 20-day timeframe. The court in *Abusch* noted that the petition was neither timely filed nor mailed to the required parties.

taxpayer's petition to quash a summons issued to the taxpayer's bank.[54] The court held that the summons was to aid in the collection of a tax liability, and the taxpayer was therefore not entitled to notice.[55]

In *Xoriant Corp. v. United States*, two corporations petitioned to quash IRS third-party summonses they received as part of the investigation of another corporation.[56] However, because the summons was issued directly to the two corporations, the court dismissed their petition to quash for lack of jurisdiction since "the functional effect of § 7609 is to preclude a summoned party from filing a motion to quash."[57]

Privileges

Taxpayers attempted to invoke various privileges, including Fifth Amendment, attorney-client, or other privileges in response to an IRS summons. For example, in *United States v. Ali*, the IRS summoned an individual taxpayer to produce certain documents and provide testimony.[58] The taxpayer appeared in response but refused to produce any documents or answer any questions, invoking the Fifth Amendment privilege against self-incrimination.[59] The court held that the summons was proper and ordered the taxpayer to comply. While the taxpayer appeared a second time and answered many questions, she declined to answer over 200 questions, again invoking the Fifth Amendment privilege.[60] She also claimed attorney-client privilege for a specific document. The IRS petitioned the court a second time to compel the taxpayer to answer the remaining questions and produce documents.[61] The court found that the taxpayer was not entitled to invoke the Fifth Amendment for certain documents, because these documents fell under the foregone conclusion exception to the Fifth Amendment and because the act of production was not in itself incriminating.[62] The court also held that the taxpayer had waived her Fifth Amendment rights by disclosing them previously.[63] However, the taxpayer was able to invoke Fifth Amendment protections for other documents and the remaining testimony, because the documents and testimony could prove that the taxpayer willfully misrepresented her income.[64] Finally, the court held that the taxpayer successfully invoked the attorney-client privilege for a list of foreign bank accounts she had provided to her attorneys.

In another case involving attorney-client privilege, *United States v. Sanmina Corp. & Subsidiaries*, the IRS issued a summons seeking two memoranda referenced in a footnote in a report prepared by the

54 *Knudsen v. U.S.*, 114 A.F.T.R.2d (RIA) 5848 (E.D.N.Y. 2014).

55 *Id.* Under IRC § 7609(c)(2)(D)(i), the IRS is not required to provide notice to the taxpayer and the taxpayer therefore has no right to quash the summons if the summons is issued to aid in the collection of the taxpayer's liability.

56 *Xoriant Corp. v. U.S.*, 114 A.F.T.R.2d (RIA) 6461 (N.D. Cal. 2014).

57 *Id.*

58 *U.S. v. Ali*, 114 A.F.T.R.2d (RIA) 6524 (D. Md. 2014). *See also U.S. v. Ali*, 113 A.F.T.R.2d (RIA) 1863 (D. Md. 2014) (discussing the taxpayer's first summons enforcement proceeding).

59 *U.S. v. Ali*, 114 A.F.T.R.2d (RIA) 6524 (D. Md. 2014).

60 *Id.*

61 *Id.*

62 *Id.* The court also addressed the taxpayer's request to reconsider its previous ruling that certain documents relating to the taxpayer's foreign bank accounts fell under the required records doctrine, which is another exception to the Fifth Amendment privilege. Essentially, the required records doctrine provides that the Fifth Amendment privilege does not apply to business records that are customarily kept in accordance with government regulation. The court noted that one of the rationales behind the required records doctrine is that the government or a regulatory agency should be able to overcome the assertion of the Fifth Amendment Privilege to inspect the records it requires an individual to keep as a condition of voluntarily participating in that regulated activity. Therefore, the court held that because the taxpayer chose to engage in transactions with foreign banks and entities that have specific statutory reporting requirements, she consented to present these records to the government if asked and could not invoke the Fifth Amendment privilege to avoid doing so.

63 *Id.*

64 *Id.*

taxpayer's attorneys to substantiate a significant deduction.[65] The business taxpayer resisted, claiming the attorney-client and work product privileges protected the memoranda.[66] The court held that the taxpayer sufficiently demonstrated that the memoranda "constituted tax advice from lawyers," therefore the attorney-client privilege attaches. The court also held that the work product privilege applied because the memoranda were prepared in anticipation of litigation. In addition, the court found that the taxpayer did not waive either privilege.[67]

Civil Contempt

A taxpayer who "neglects or refuses to obey" an IRS summons may be held in civil contempt.[68] This year, six taxpayers were held in civil contempt for failing to comply with a court order enforcing an IRS summons.[69] Overall, contempt proceedings accounted for approximately seven percent of all summons-related cases. Unless the taxpayers complied with the court order, they were subject to arrest,[70] fines,[71] or both.[72]

The Impact of *United States v. Clarke*

The Supreme Court's decision in *Clarke* had an immediate impact, as taxpayers sought evidentiary hearings to challenge a summons. First, in *United States v. Ali* (discussed above), the taxpayer argued that the Supreme Court relaxed the standard to obtain an evidentiary hearing, thus changing the law for summons enforcement.[73] However, the district court believed that *Clarke* did not change the law; instead, *Clarke* simply resolved a circuit split.[74]

In *Schwartz v. United States*, the taxpayers alleged that the IRS issued a third-party summons in bad faith; however, the court held that the taxpayers were not entitled to an evidentiary hearing because their allegations did not "rise above conclusory allegations."[75] Similarly, in *Masciantonio v. United States*, the taxpayer also made conclusory assertions that did not "provide a basis for an evidentiary hearing."[76]

In addition to the themes above, one case raised the issue of who may be present at a summons hearing on behalf of the taxpayer. In *United States v. McEligot*, the IRS summoned a taxpayer's accountant in connection with an audit of the taxpayer.[77] The accountant appeared at the hearing but refused to testify unless the taxpayer's attorney was present.[78] The court found that IRC § 7609(b), which gives certain individuals the right to intervene in an enforcement proceeding, does not provide a right to intervene

65 *U.S. v. Sanmina Corp. & Subsidiaries*, 2015 U.S. Dist. LEXIS 66123 (N.D. Cal. 2015), *appeal docketed*, No. 15-16416 (9th Cir. July 15, 2015).

66 *Id.*

67 *Id*.

68 IRC § 7604(b).

69 *See U.S. v. Bowler*, 2015 U.S. Dist. LEXIS 57862 (D. Minn. 2015); *U.S. v. Erickson*, 115 A.F.T.R.2d (RIA) 684 (M.D. Fla. 2015); *U.S. v. Nichols*, 2015 U.S. Dist. LEXIS 59444 (E.D. Mich. 2015); *U.S. v. Snow*, 115 A.F.T.R.2d (RIA) 1002 (E.D. Tenn. 2015); *U.S. v. Thornton*, 115 A.F.T.R.2d (RIA) 1258 (D. Minn. 2015), *appeal docketed*, No. 15-1774 (8th Cir. Apr. 15, 2015); *U.S. v. Vanderpool*, 114 A.F.T.R.2d (RIA) 6968 (W.D. Mo. 2014).

70 *U.S. v. Bowler*, 2015 U.S. Dist. LEXIS 57862 (D. Minn. 2015).

71 *U.S. v. Erickson*, 115 A.F.T.R.2d (RIA) 684 (M.D. Fla. 2015).

72 *U.S. v. Thornton*, 115 A.F.T.R.2d (RIA) 1258 (D. Minn. 2015), *appeal docketed*, No. 15-1774 (8th Cir. Apr. 15, 2015).

73 *U.S. v. Ali*, 114 A.F.T.R.2d (RIA) 6524 (D. Md. 2014).

74 *Id.* The 11th Circuit had held that "a bare allegation of improper motive is sufficient," contrary to other circuits.

75 *Schwartz v. U.S.*, 115 A.F.T.R.2d (RIA) 1942 (S.D. Fla. 2015), *adopting* 115 A.F.T.R.2d (RIA) 1939 (S.D. Fla. 2015).

76 *Masciantonio v. U.S.*, 114 A.F.T.R.2d (RIA) 7010 (W.D. Pa. 2014), *appeal docketed*, No. 15-1072 (3d Cir. Jan. 9, 2015).

77 *U.S. v. McEligot*, 115 A.F.T.R.2d (RIA) 1433 (N.D. Cal. 2015), *appeal docketed*, Nos. 15-16128 and 15-16134 (9th Cir. 2015).

78 *Id*.

in a summons hearing.[79] The court held that "a taxpayer does not have an absolute right to be present at a third-party summons hearing concerning the taxpayer's liabilities."[80] The proper test is "the usual process of balancing opposing equities" between the government's interest in obtaining information in a non-adversarial manner and the taxpayer's interest in preventing improper disclosure of records.[81] Under this test, the court found that the equities were in favor of the government because no attorney-client or work product privileges were implicated, and the accountant could raise the tax practitioner privilege if necessary.[82]

CONCLUSION

The IRS may issue a summons to obtain information 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.[83] Accordingly, the IRS may request documents and testimony from taxpayers who have failed to provide that information voluntarily.

While the number of summons enforcement cases has decreased since 2012, summons enforcement continues to be a significant source of litigation.[84] The IRS also continues to be successful in the vast majority of summons enforcement litigation. Taxpayers and third parties rarely succeed in contesting IRS summonses due to the significant burden of proof and strict procedural requirements. In addition, the IRS's temporary regulations allowing the use of outside parties to assist in examinations and participate in summons interviews have generated controversy and litigation.[85] Depending on the outcome of this litigation, there may be additional cases on this issue in future years.

79 *U.S. v. McEligot*, 115 A.F.T.R.2d (RIA) 1433 (N.D. Cal. 2015), *appeal docketed*, Nos. 15-16128 and 15-16134 (9th Cir. 2015).

80 *Id*.

81 *Id*.

82 *Id*.

83 IRC § 7602(a).

84 In the summons enforcement Most Litigated Issue section of the 2014 Annual Report to Congress, we noted that the IRS's Large Business and International Division (LB&I) issued guidance to examiners in November 2013 on how to handle cases where the taxpayer does not provide a complete response to an Information Document Request (IDR) by the response date. This guidance required the examiner to issue a delinquency notice and then a pre-summons letter prior to issuing a summons. LB&I created these new procedures, that focus on enhanced pre-summons communications, because it believed the new process will improve the IRS's "ability to gather information timely and reduce the need to enforce IDRs through summonses." We remarked that "if effective, these new procedures could reduce the number of summonses issued, and as a consequence, we may see less litigation in this area in the future." It is possible that LB&I's guidance and procedures have contributed to this year's significant decline in summons enforcement cases.

85 *See supra* note 41. There is notable current summons enforcement litigation involving the IRS's use of an outside law firm in an audit of Microsoft Corporation's transfer pricing arrangements. *See* Dolores W. Gregory, *Transfer Pricing: Microsoft Pushes for Evidentiary Hearing, Cites IRS's 'Illegal' Deal With Quinn Emanuel*, Tax Notes Today (Apr. 27, 2015). Although it is outside of the reporting period for the Most Litigated Issues section, Microsoft was successful in obtaining an evidentiary hearing in the summons enforcement case. *See U.S. v. Microsoft Corp.*, 2015 WL 4496749 (W.D. Wash. 2015). Commentators have come out both for and against the IRS's use of outside attorneys in cases such as Microsoft's. *Cf.* Roger A. Pies, *IRS Prerogative to Hire Outside Counsel*, Tax Notes Today (July 7, 2015) (arguing that the IRS should be allowed to retain outside counsel in a big document case) and Stuart Gibson, *If the IRS needs Good Lawyers, it Should Look Across the Street*, Tax Notes Today (Mar. 30, 2015) (questioning why the IRS did not seek assistance from the DOJ in the Microsoft case).