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 § 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] 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 102 federal cases decided between June 1, 2013, and May 31, 2014, that included issues of IRS summons enforcement. In 49 cases, the government filed a petition to enforce the summons. In 51 cases, the taxpayer or a third party initiated the litigation by filing a motion to quash the summons. In two cases, the IRS was allowed to issue "John Doe" summonses.[10]

Of the 102 cases, the parties contesting the summonses prevailed fully in two cases, with three other cases resulting in split decisions. The IRS prevailed in full in the remaining 97 decisions.

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

2 IRC § 7602(a).

3 IRC § 7604(b).

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

5 IRC § 7609(b).

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

7 *United States v. Clarke*, 189 L. Ed. 2d 330, 337 (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). For a more detailed discussion of this important Supreme Court case, see *Significant Cases*, *supra*.

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*.

10 *In re Tax Liabilities of John Does*, 112 A.F.T.R.2d (RIA) 5982 (N.D. Cal. 2013); *In re Does*, 112 A.F.T.R.2d (RIA) 5466 (N.D. Pa. 2013). A John Doe summons identifies a particular group or class of people instead of a specific person. For the requirements for issuing a John Doe summons, see note 13, *infra*.

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] Another situation in

11 IRC § 7602(a). *See also LaMura v. United States*, 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 *Powell*, 379 U.S. at 58.

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. United States*, 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. United States*, 205 F.3d 1168, 1172-76 (9th Cir. 2000).

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.[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:

- 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.[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 can prove that the IRS issued in 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 statutory or common-law privilege, such as the

- 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. United States*, 112 A.F.T.R.2d (RIA) 6630 (E.D. Cal. 2013).

24 *Powell*, 379 U.S. at 57-58.

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

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

27 *Id*.

28 *Powell*, 379 U.S. at 58.

29 *United States v. Clarke*, 189 L. Ed. 2d 330, 337 (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). For a more detailed discussion of this important Supreme Court case, see *Significant Cases*, *supra*.

30 *Id*.

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. *United States 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)).

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

However, these privileges are limited. For example, attorney-client privilege protects "tax advice," but not tax return preparation materials.[34] 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.[35] 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."[36] 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."[37]

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. That year, we identified only 44 cases but predicted the number would rise as the IRS became more aggressive in its enforcement initiatives. The volume of cases rose to 101 during the reporting period ending on May 31, 2006, peaked at 158 for the reporting period ending on May 31, 2009, and stands at 102 during this year's period as shown in Figure 3.3.1 below. A detailed list of these cases appears in Table 3 of Appendix III.

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. *United States 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).

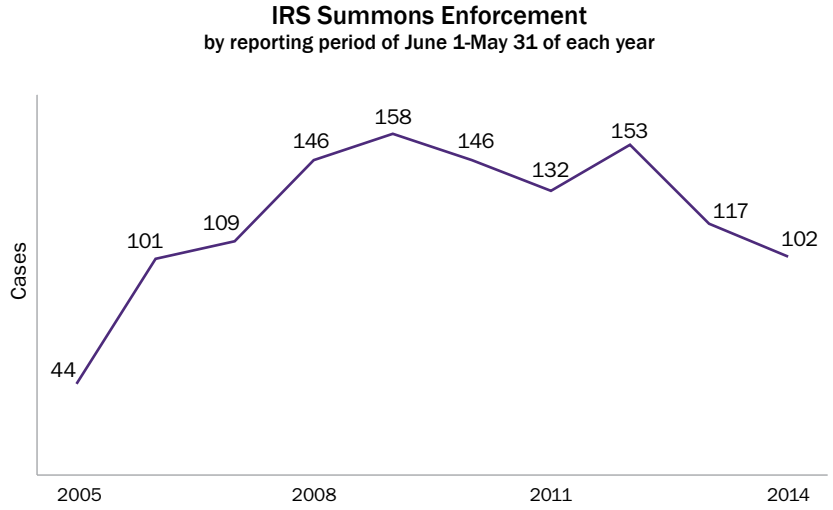
34 *United States v. Frederick*, 182 F.3d 496, 500 (7th Cir. 1999).

35 IRC § 7525(b); *Valero Energy Corp. v. United States*. 569 F.3d 626 (7th Cir. 2009).

36 IRC § 7525(b).

37 IRC § 6662(d)(2)(C)(ii).

FIGURE 3.3.1



In November of 2013, the Large Business and International Division (LB&I) of the IRS issued guidance to examiners on how to handle cases where the taxpayer does not provide a complete response to an Information Document Request (IDR) by the response date. The guidance requires that the examiner issue a delinquency notice and then a pre-summons letter prior to issuing a summons.[38] LB&I created these new procedures, which focus on enhanced pre-summons communications, because it believes the new process will improve the IRS's "ability to gather information timely and reduce the need to enforce IDRs through summonses." 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.

Of the 102 cases we reviewed this year, the IRS prevailed in full in 97, a success rate of 95 percent. Taxpayers were represented in 32 cases and appeared *pro se* (*i.e.*, on their own behalf) in the remaining 70. Seventy-nine cases involved individual taxpayers, while the remaining 23 involved business taxpayers, including sole proprietorships.[39] The arguments the litigants raised against IRS summonses generally fell into one of seven categories:

***Powell* Requirements:** Taxpayers frequently but unsuccessfully argued that the IRS did not meet one or more of the *Powell* requirements. Taxpayers often were unable to meet the substantial burden to rebut the IRS's *prima facie*[40] showing that the summons should be enforced. The U.S. Court of Appeals for the Eighth Circuit described the taxpayer's burden as heavy since the taxpayer must disprove one of the *Powell* requirements or show that enforcement of the summons would otherwise be an abuse of process.[41]

38 Memorandum for LB&I Employees From Heather C. Maloy, Commissioner, Large Business and International Division, *Large Business and International Directive on Information Document Requests Enforcement Process*, Control No. LB&I-04-1113-009, 2013 TNT 214-19 (Nov. 4, 2013).

39 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, we placed these cases into the business taxpayer category.

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

41 *United States v. Claes*, 747 F.2d 491, 494 (8th Cir. 1984).

When taxpayers challenge the IRS's compliance with the *Powell* requirements, they often allege that the IRS failed to take one of the required administrative steps.[42] One recurring argument was that the person who issued the summons did not have the authority to do so.[43] Taxpayers were unsuccessful in making that argument because the Commissioner of Internal Revenue delegated his power to serve summonses to certain employees.[44]

However, one taxpayer was able to prove that the IRS did not meet one of the *Powell* requirement—namely, failing to complete all of the required administrative steps. In *Jewell v. United States*,[45] the United States Court of Appeals for the Tenth Circuit determined that the IRS could not establish a *prima facie* case for summons enforcement under *Powell* because it failed to comply with the 23-day notice of a third party summons required by statute.[46] The Tenth Circuit felt obliged to quash the summons to comply with Supreme Court precedent that requires *all* administrative requirements of the IRC be met even if its ruling might be viewed as "inequitable" or "form over substance."[47] In choosing to quash the summons for failure to meet the notice requirement, the Court of Appeals for the Tenth Circuit created a circuit split because the five other circuits to consider this issue all held that the failure to comply with the statutory notice requirement did not prevent enforcement of the summons.[48]

Criminal Referral: The IRS can issue summonses for the purpose of investigating a possible criminal offense, unless the matter has already been referred to the DOJ.[49] Some taxpayers argued that because the IRS issued a summons pursuant to a possible criminal investigation, it violated IRC § 7602(d).[50] However, the courts clearly state that a criminal investigation is not sufficient to show a referral to the DOJ.[51]

Constitutional Arguments: At least one court reiterated the longstanding rule that taxpayers cannot use the Fourth Amendment as a defense against a third-party summons.[52] Courts also continued to reject blanket assertions of the Fifth Amendment,[53] but noted that taxpayers may have valid Fifth Amendment

42 *See, e.g.*, *United States v. Soong*, 113 A.F.T.R.2d (RIA) 1589 (N.D. Cal. 2014), *appeal docketed*, No. 14-15987 (9th Cir. May 20, 2014); *Gangi v. United States*, 113 A.F.T.R.2d (RIA) 1175 (D. Mass. 2014).

43 *See, e.g.*, *Mahmood v. United States*, 2013 U.S. Dist. LEXIS 184841, at *6 (S.D. Cal. Dec. 10, 2013).

44 See Delegation Order No. 25-1, IRM 1.2.52.2 (Apr. 30, 2009).

45 *Jewell v. United States*, 749 F.3d 1295 (10th Cir. 2014), *aff'g* 111 A.F.T.R.2d (RIA) 1129 (E.D. Okla. 2013) and *rev'g* 111 A.F.T.R.2d (RIA) 1005 (W.D. Okla. 2013), *reh'g denied en banc*, No. 13-7038 (10th Cir. June 16, 2014).

46 "[N]otice shall be given to any person so identified [in the summons] within 3 days of the day on which such service is made but no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined." IRC § 7609(a)(1).

47 *Jewell*, 749 F.3d at 1301.

48 Four circuit courts declined to hold that the 23-day notice period was mandatory. *See Sylvestre v. United States*, 978 F.2d 25, 26, 28 (1st Cir. 1992) (per curiam) (acknowledges that *Powell* requires the IRS to comply with all administrative requirements but ignores the 23-day notice requirement found in the Code); *see also Cook v. United States*, 104 F.3d 886, 889- 90 (6th Cir. 1997), *Azis v. United States* IRS, 522 Fed. Appx. 770, 777 (11th Cir. 2013) (per curiam), *Adamowicz v. United States*, 531 F.3d 151, 161 (2d Cir. 2008) (*per curiam*) (all assume equitable power to excuse notice defect if taxpayer not prejudiced). One other circuit court allowed enforcement of the summons to avoid elevating "form over substance" and rejected the suggestion that every infringement of a statutory requirement absolutely precludes enforcement of an IRS summons. *United States v. Bank of Moulton*, 614 F.2d 1063, 1066 (5th Cir. 1980) (per curiam).

49 IRC § 7602(d);

50 *See, e.g.*, *Bone v. United States*, 2013 U.S. Dist. LEXIS 127631 (D. Idaho Sept. 5, 2013), *adopting* 2013 U.S. Dist. LEXIS 127748 (D. Idaho Aug. 12, 2013); *Hunkler v. United States*, 113 A.F.T.R.2d (RIA) 1788 (S.D. Oh. 2014).

51 *Worsham v. Dep't of the Treasury*, 112 A.F.T.R.2d (RIA) 6315 (D. Md. 2013) (D. Md. Sept. 17, 2013).

52 *See, e.g., Nevius v. Tomlinson*, 113 A.F.T.R.2d (RIA) 1872 (W.D. Mo. 2014).

53 *See e.g., United States v. McClintic*, 113 A.F.T.R.2d (RIA) 330 (D. Or. 2013).

claims regarding specific documents or testimony.[54] However, even if a taxpayer may assert the Fifth Amendment on behalf of himself, he cannot assert it on behalf of a business entity.[55]

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:

- The documents' existence;
- The documents' authenticity; and
- The possession or control of the documents by the person to whom the summons was issued.[56]

In *United States v. Lawrence*, the court analyzed the applicability of the foregone conclusion exception, specifically, the government's ability to meet the authenticity requirement of the exception.[57] The IRS wanted the taxpayer to produce "cheat sheets" that the taxpayer allegedly withheld. The IRS contended that because one of its agents saw the cheat sheets, their existence was a foregone conclusion, precluding the taxpayer from asserting his Fifth Amendment privilege. The court disagreed, finding that "[e]ven if the IRS may have knowledge of the documents' existence, the Government has made no showing that the documents' authenticity can be independently verified."[58] Because compelling the taxpayer to produce the "cheat sheets" would implicitly affirm the authenticity of the documents, producing the documents would be sufficiently testimonial so that the Fifth Amendment privilege should apply.[59]

When the IRS issues a summons for oral testimony, the process for claiming the Fifth Amendment is similar to that involving an IRS request for documents. In *United States v. Tagle*,[60] the IRS wanted the court to enforce a summons for oral testimony,[61] and the taxpayers argued the order to enforce the summons would violate their Fifth Amendment rights. When the IRS is seeking to enforce summons by way of oral testimony, the taxpayer is required to show that he or she has a reasonable fear that answering the IRS's questions could be incriminating.[62] The court granted the enforcement of summons because it could not assess the hazards of self-incrimination before particular questions had been posed. However, the court noted that the taxpayers may invoke their Fifth Amendment privilege in response to specific questions asked at the interview.

Abuse of Process:[63] Taxpayers consistently tried to make the argument that it would be an abuse of the court's process to enforce the summons.[64] Taxpayers most frequently tried to show that the summons was

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

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

56 *United States v. Bright*, 596 F.3d 683, 692 (9th Cir. 2010).

57 113 A.F.T.R.2d (RIA) 1933 (S.D. Fla. 2014).

58 *Id*.

59 *Id*.

60 113 A.F.T.R.2d (RIA) 1818 (N.D. Cal. 2014).

61 The summons also requested documents but that issue is omitted.

62 *Tagle*, 113 A.F.T.R.2d (RIA) 1818 (N.D. Cal. 2014) (citing *United States v. Neff*, 615 F.2d 1235, 1239 (9th Cir. 1980) (internal quotation and citation omitted).

63 "[A] court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose …" *Powell*, 379 U.S. at 58.

64 *See, e.g., Gangi*, 113 A.F.T.R.2d (RIA) 1175; *Ryder v. United States*, 113 A.F.T.R.2d (RIA) 706 (C.D. Cal. 2014).

issued in bad faith. However, taxpayers were generally unsuccessful in proving bad faith or improper motive based on mere allegations, without any facts and circumstances that can plausibly infer bad faith.[65]

Privilege: In *Wells Fargo and Co. v. United States*, the court analyzed whether certain taxpayer documents summoned by the IRS were protected by the work product doctrine and attorney-client privilege.[66] As part of the IRS's examination of Wells Fargo's federal tax returns for 2007 and 2008, the IRS issued summonses to KPMG, Wells Fargo's independent auditor, and to Wells Fargo seeking its tax accrual work papers (TAWs) and other information. Wells Fargo moved to quash the summonses claiming, among other things, that some of the TAWs, including those related to Wells Fargo's Uncertain Tax Positions (UTPs),[67] were protected by the work product doctrine.

The IRS was partially successful in enforcing the summons. First, the court found that Wells Fargo's identification of UTPs and factual information related to those UTPs contained in the TAWs was not protected by the work product privilege because it was "created in the ordinary course of business and not in anticipation of litigation."[68] Moreover, Wells Fargo could not have anticipated litigation with the IRS because it would not enter into transactions related to a UTP unless there was at least a 70 percent probability of success in litigation. With such a high probability of success, it was unlikely that the IRS would challenge the taxpayer.

Second, the Court determined that "the recognition and measurement analysis [in TAWs] sought by the summonses is work product because it involves legal analysis prepared in anticipation of litigation."[69] Even though Wells Fargo provided the IRS with documents that referenced these analyses, they did not cease to be work product because if the IRS had access to that information, it would give the government "a window into the legal thinking of Wells Fargo's attorneys."[70]

The IRS tried to overcome the work product doctrine by arguing that Wells Fargo waived privilege by disclosing the information to a potential adversary, its auditor, KPMG. The court found that KPMG's TAWs and testimony were protected to the same extent as Wells Fargo's TAWs and testimony because the likelihood of an adversarial relationship between KPMG and Wells Fargo was insufficient to support a finding of waiver.[71] Alternatively, the IRS argued that even if KPMG was not an adversary, Wells Fargo waived the privilege because KPMG was a conduit to an adversary. The IRS based this argument on the theory that KMPG may be required to disclose the TAWs to the Securities and Exchange Commission or the Public Company Accounting Oversight Board.[72] However, the IRS failed to show that there was "more than a remote possibility of disclosure" and that there was an intention that the documents be

65 *Clarke*, 189 L. Ed. 2d 330 (2014). For a more detailed discussion of this important Supreme Court case, see *Significant Cases, supra*. *See also*, *e.g.*, *Worsham*, 112 A.F.T.R.2d (RIA) 6315.

66 *Wells Fargo and Co. v. United States*, 112 A.F.T.R.2d (RIA) 5380 (D. Minn. 2013).

67 UTPs are tax positions taken by the taxpayer in which it has reordered a reserve on its audited financial statements or expects to litigate the position. Wells Fargo would have to disclose its UTPs on Schedule UTP, which is filed with its tax return. *See* IRS Schedule UTP (Form 1120), *Uncertain Tax Position Statement* (2013).

68 *Wells Fargo*, 112 A.F.T.R.2d (RIA) 5380 (D. Minn. 2013) at *35.

69 *Id*. at *100. These TAWs were developed by both KPMG and Wells Fargo's attorneys. Several emails discussed potential challenges by the IRS and developments in possible litigation. These emails also contained analysis of cases and assessments of outcomes in potential litigation. *Id*.

70 *Wells Fargo*, 112 A.F.T.R.2d (RIA) 5380 (D. Minn. 2013) at 114.

71 Specifically, the court noted that KPMG and Wells Fargo have had a "cooperative and professional" relationship for 20 years and that litigation between a client and its auditor is rare. *Id* at 70.

72 *Id*. at 123 (citing *United States v. Johnson*, 378 F. Supp. 2d 1041, 1046 (N.D. Iowa 2005) *and Gundacker v. Unisys Corp.*, 151 F.3d 842, 848 (8th Cir. 1998)).

disclosed to the adversary.[73] The Court concluded that certain TAWs were protected by the work product doctrine and eight of the documents sought by the United States were protected by attorney-client privilege. The court ordered Wells Fargo and KPMG to disclose specific documents not protected by privilege.

The IRS prevailed in 14 cases involving motions to quash summonses based solely on the court lacking subject matter jurisdiction. 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.[74] Therefore, 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. The taxpayer must initiate the 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.[75] 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 three days after the 20-day limit expired.[76] 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.[77]

Lack of Jurisdiction Due to Notice Requirements:[78] 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.[79] In *Beakley v. United States*, the government served third-party summonses requesting information related to the taxpayer's tax liability or the collection of the liability involving the potential settlement of a case in which the taxpayer was a party.[80] 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 issued in aid of collection of tax assessment, which is a statutory exception to the notice requirement.[81] Therefore, the court held that sovereign immunity had not been waived and the court lacked subject matter jurisdiction.

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.[82] Accordingly, the IRS may request documents and testimony from taxpayers who have failed to provide

73 *Id*. at 128.

74 *United States v. Dalm*, 494 U.S. 596, 608 (1990).

75 IRC § 7609(b)(2)(A).

76 *Fisher v. United States*, 112 A.F.T.R.2d (RIA) 6971 (E. Wis. 2013).

77 *Abusch v. United States*, 112 A.F.T.R.2d (RIA) 7089 (E.D. La. 2013), *adopting* 112 A.F.T.R.2d (RIA) 7088 (E.D. La. 2013).

78 There is a jurisdictional split as to whether the failure to comply with the statutory notice requirement is an absolute bar to enforcement of the summons. *Cf. Jewell v. United States*, 749 F.3d 1295 (10th Cir. 2014) with *Sylvestre v. United States*, 978 F.2d 25, 26, 28 (1st Cir. 1992) (per curiam); *Cook v. United States*, 104 F.3d 886, 889 (6th Cir. 1997), *Azis v. United States IRS*, 522 Fed. App'x. 770, 777 (11th Cir. 2013) (per curiam); *Adamowicz v. United States*, 531 F.3d 151, 161 (2d Cir. 2008) (per curiam); *United States v. Bank of Moulton*, 614 F.2d 1063, 1066 (5th Cir. 1980) (per curiam).

79 IRC § 7609(c)(2).

80 *Beakley v. United States*, 113 A.F.T.R.2d (RIA) 1848 (N.D. Tex. 2014), *adopting* 113 A.F.T.R.2d (RIA) 1846 (N.D. Tex. 2014).

81 IRC § 7609(c)(2)(D)(i).

82 IRC § 7602(a).

that information voluntarily. Taxpayers and third parties rarely succeed in contesting IRS summonses due to the significant burden of proof and strict procedural requirements.

After a spike in 2012, the number of summons enforcement cases returned to pre-2007 levels. Because the IRS in November 2013 developed new procedures that provide for better pre-summons communications, we expect even less litigation in this area in the future. The Supreme Court's recent decision in *Clarke* may reduce the number of cases as well. The Supreme Court clarified that during a summons enforcement proceeding, a taxpayer is entitled to examine an IRS agent about the purpose of the summons only if the taxpayer presents credible evidence of bad faith or an improper motive.[83] Thus, taxpayers can no longer challenge the summons based on an unsupported claim of improper purpose, which may reduce future litigation in this area.

83 *United States v. Clarke*, 189 L. Ed. 2d 330, 337 (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).