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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

<p>NELDON JOHNSON and GLENDA JOHNSON,</p> <p style="text-align: right;">Petitioners</p> <p style="text-align: center;">v.</p> <p>UNITED STATES OF AMERICA,</p> <p style="text-align: right;">Respondent</p>	<p style="text-align: center;">MEMORANDUM IN OPPOSITION TO DEFENDANT’S MOTION TO SUMMARILY DENY PETITION TO QUASH SUMMONS AND COUNTER-PETITION FOR ENFORCEMENT OF THE SUMMONS</p> <p style="text-align: center;">Case No. 2:15-cv-00742-JP</p> <p style="text-align: center;">Judge: Jill Parrish</p>
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PETITIONERS, through their attorney, respectfully submits this *Memorandum In Opposition to Defendant’s Motion To Summarily Deny Petition to Quash Summons and Counter-Petition For Enforcement of the Summons*. Petitioners filed a petition for an order to quashing the Internal Revenue Service (“IRS”) third-party Summons served on Wells Fargo Bank, N.A. (“Wells Fargo”) in the matter of Neldon Johnson and Glenda Johnson (the “Johnsons”) for the calendar year 2012. In response the United States of America (the “Government”) filed its *Motion to Summarily Deny Petition to Quash Summons and Counter-Petition For Enforcement of the Summons*. The facts set forth in this memorandum are supported by the Declaration of Glenda Johnson which is filed contemporaneously herewith. In opposition of the Government’s motion and in support of their Petition, Petitioners argue as follows:

I. The Government Has Not Met Its Burden Under *U.S. v. Powell*

The Government correctly notes that *United States v. Powell*, 379 U.S. 48 (1964) *Powell*

requires the Government to establish that the summons: (1) was issued for a legitimate purpose; (2) seeks information relevant to that purpose; (3) seeks information not already within the IRS's possession; and (4) that the IRS satisfied all administrative steps required by the Internal Revenue Code (these four elements are referred to hereinafter as the "Powell Test"). However, it is clear that the Government has not met its burden as it alleges.

a. The Summons Was Not Issued For A Legitimate Purpose.

As to allegedly meeting this first element of the Powell Test, the Government makes only one argument. The Government alleges that the Summons was issued "in furtherance of [the IRS agent's] investigation of Plaintiffs' federal income tax liabilities." To support that allegation Government states only that "It is proper to issue summonses for the purpose of verifying the correctness of the taxpayer's tax return, to determine the taxpayer's tax liabilities, or to prepare tax returns if they were not filed where such filings were required by law." The Government makes no further argument and provides no support to the specific facts from the case on this element.

However, the information that the IRS would obtain through the Summons will not assist the government in "verifying the correctness of the taxpayer's tax return, to determine the taxpayer's tax liabilities, or to prepare tax returns if they were not filed where such filings were required by law." The bank statements that will be produced pursuant to the Summons are bank statements of third-party taxpayer businesses that file separate tax returns from the Johnsons. These separate tax returns are not pass-through information tax returns where the Johnsons would receive a distributive share of the profits or losses. Rather, they are independent from the Johnsons and pay their own taxes, file separate tax returns, and are separate persons under the law.

It is particularly relevant that since the time the Summons was issued and the taxpayers filed this petition to quash this summons the United States of America filed a “Complaint for Permanent Injunction and Other Equitable Relief” in this Court, Case No. 2:15-cv-00828 DN (the Honorable David Nuffer is the assigned judge).¹ Said complaint names Neldon Johnson individually and some of the businesses whose bank statements would be affected by the Summons.¹ Because it is this Court’s process which is invoked to enforce the Summons this Court should not permit its processes to be abused. An abuse of process would take place if the Summons was issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. See *United States v. Powell*, 379 U.S. 48 (1964); *United States v. LaSalle Nat’l Bank*, 437 U.S. 298, 318, n.20 (1978) (“future cases may well reveal the need to prevent other forms of agency abuse of congressional authority and judicial process”); *United States v. Berg*, 20 F.3d 304 (7th Cir 1994) (taxpayer who refused to comply with IRS summons on grounds that IRS acted in bad faith by not returning documents summoned in earlier separate audit was properly held in contempt).

The Summons appears to be used as an improper information gathering tool for that separate case and not for the taxpayers’ examination. This is true because the production of documents from the Summons would result in the production bank statement of these third-party businesses’ bank statements and their related banking information rather than production of documents of the taxpayers that would be used to determine the taxpayers’ tax liability.

Lastly, a summons issued to determine the identity of, or gather information about, unidentified taxpayers should be held invalid and found to be issued for an improper purpose

¹ Pursuant to Federal Rule of Evidence 201 Petitioner respectfully requests the Court take judicial notice of the filing referred to in Case No. 2:15-cv-00828.

when the IRS fails to comply with the John Doe summons requirements of 26 U.S.C. §7609(f). See 26 U.S.C. §7609(f) and *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310 (1985). 26 U.S.C. §7609(f) states:

(f) Any summons described in subsection (c)(1) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that—

(1) 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 that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

(3) the information sought to be obtained from the examination of the records or testimony (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

In this case, although the Summons was issued to Wells Fargo it seeks information of several unidentified taxpayers. It is also important to note that these taxpayers were not notified of the IRS's Summons. Wells Fargo sent notice of the Summons to those persons after it received the Summons, but the IRS did not provide any notice to the third-parties affected. More importantly, the IRS did not comply with the requirements of 26 U.S.C. §7609(f) as to the third-parties whose information will be produced and may be attempted to be used in Case No. 2:15-cv-00828.

Because the Summons was not issued for a legitimate purpose as set forth above the Summons should be quashed.

b. The Summons Does Not Seek Relevant Information.

The Government has also failed to meet the second element of the Powell Test. As set forth in the Petitioners' petition the test for whether or not a summons seeks relevant information is whether or not (1) the requested documents have no impact on the outcome of the

examination; and (2) the requests lack any relevance to the underlying examination. See *Powell*, 379 U.S. at 57; *United States v. First Nat'l St. Bank of N.J.*, 616 F.2d 668 (3rd Cir. 1980). The Government failed to address either of those points of authority.

Petitioners argued in their petition that the Johnsons do not have a personal bank account at Wells Fargo Bank, N.A. during the time period of the examination.² Thus, the only information that will come from this summons is information from other taxpayers—business entities over which the taxpayer(s) have signatory authority. These business entities are not under examination. These businesses file tax returns that do not pass-through income or losses to the Johnsons.

The information sought is not specifically identified as to how it pertains to the Johnsons' examination and is therefore irrelevant to the examination. The Government fails to even discuss this point or articulate how the information sought would have an “impact on the outcome of the examination.”

Further, the Government fails to articulate how the requested information has any relevance to the underlying examination—especially when the information sought is the financial records of third-parties not under examination. The Government points to a check that it obtained through another summons that Petitioners did not object to. However, that transaction stands alone and separate on its face. The check identified in the summons was the result of Zions Bank requiring the businesses to close their banking accounts. The businesses had to find a new bank to handle their banking needs.

Specifically, to accommodate the closing of these businesses' accounts and to provide time to find a new financial institution these business accounts were closed with the funds being

² Even though the Johnson do not have a personal bank account at Wells Fargo they do not object to the IRS summoning Wells Fargo for only their individual bank accounts.

disbursed to Glenda Johnson because she was a signer on the accounts. Glenda Johnson held the funds merely as a custodian of the funds until new accounts for these businesses could be opened. At the time the business accounts were opened at Wells Fargo the funds were deposited in those accounts. However, there is not connection with the banking transactions of these businesses and the examination of the Johnson's examination. For example, even if the IRS were to argue that the check paid to Glenda is income there are no other transactions are relevant to that assertion other than the transaction which IRS already possesses—the check itself.

The Government argues that the information sought by the IRS in the Summons only needs to be potentially relevant, and not actually relevant and cite to *United States v. Arthur Young & Co.*, 465 U.S. 805, 813-814 (1984). However, when summonses are too broad, indefinite, and/or burdensome they will be found to constitute an unreasonable search in violation of the Fourth Amendment of the United States Constitution. Additionally, 26 USC § 7603 limits the summons power of the IRS by requiring that the materials sought be described with “reasonable” certainty. The Summons should not be broader than necessary to achieve its purpose. See *United States v. Powell*, 379 U.S. at 58; *United States v. Lewis*, 604 F. Supp. 1169 (E.D. La 1985); *United States v. Richards*, 479 F. Supp. 828, 833 (E.D. Va. 1979), *aff'd*, 631 F.2d 341 (4th Cir. 1980).

A document demand for “all information which would be necessary to enable a representative of the IRS to properly determine total income earned or sources of funds received” was considered overbroad and in violation of the Fourth Amendment. See also *United States v. Klir*, 47 AFTR2d 81-1399 (E.D. Tex. 1979), *aff'd* by unpub. order, 644 F.2d 33 (5th Cir. 1981), wherein a case involving a similar provision, the Court reasoned that because the respondents were forced to determine whether documents were relevant, it would be impossible to enforce

the summons by a contempt proceeding. The IRS may not conduct an unfettered “fishing expedition” through a person’s records, but “must identify with some precision the documents it wishes to inspect.” See *Dauphin Deposit Trust Co.*, 385 F.2d 129, 131 (3d Cir. 1967). In testing for overbreadth, the question is not whether the summons calls for the production of a large volume of records. Instead, the questions are rather, first did the summons describe the requested documents in enough detail to inform the summoned party of exactly what is to be produced,³ and, second, may the summoned records be relevant to the inquiry.⁴

These cases are highly relevant here because the Government is merely conducting a fishing expedition. It is particularly telling that a fishing expedition is occurring because the Government argues that “Plaintiffs’ bank and financial records will facilitate the examination by showing the source and amount of income received by Plaintiff.” However, the Government is seeking bank and financial records of third-party businesses rather than those of the taxpayers.

When the documents sought pursuant to a summons are not relevant to determining a taxpayer’s tax liability courts will quash the issued summons. See generally, *United States v. Richards*, 631 F.2d 341 (4th Cir.1980) (affirming denial of enforcement because summoned information was not relevant to tax liability); *United States v. Coopers & Lybrand*, 550 F.2d 615 (10th Cir. 1977) (affirming denial of enforcement because demanded documents were not relevant), cited favorably by *US v. Goldman*, 637 F.2d 664 (9th Cir. 1980); *United States v. Matras*, 487 F.2d 1271 (8th Cir. 1973); *United States v. Theodore*, 479 F.2d 749, 755 (4th Cir. 1973); *United States v. Pritchard*, 438 F.2d 969 (5th Cir. 1971); *United States v. Dauphin Deposit Trust Co.*, 385 F.2d 129 (3rd Cir. 1967).

³ *United States v. Abrahams*, 905 F.2d at 1282, 1285

⁴ *In the Matter of the Tax Liabilities of John Does v. United States*, 866 F.2d 1015, 1021 (8th Cir. 1989)

Because the Summons does not seek information that is relevant to the taxpayers' examination as set forth above the Summons should be quashed.

c. The Summons Does Seeks information Already Within the IRS's Possession.

The Government argues that it does not already possess the information sought. However, if the IRS had a previous opportunity to examine the relevant records in detail and copy them, a court may infer that the IRS in fact possesses the records and quash the summons. See *United States v. Pritchard*, 438 F.2d 969 (5th Cir. 1971). In this case the taxpayers have provided all of the bank records that they possess for their personal bank accounts. They also are representing that they do not have any personal accounts at Wells Fargo during the examination period. The bank accounts and information that will be produced through this Summons are not personal accounts of the taxpayers, but rather are third-party business accounts for which one or both of the taxpayers are signers. Thus, any personal accounts or banking information of the taxpayers is already possessed by the IRS.

Because the IRS already possesses the information it seeks that is relevant to its examination this Court should quash the Summons.

d. The IRS Has Not Satisfied All Administrative Steps Required By The Internal Revenue Code

The Government also argues that it has followed all administrative steps required by the Internal Revenue Code. However, this is also erroneous. A summons issued to determine the identity of, or gather information about, unidentified taxpayers is invalid and improper when the IRS fails to comply with the John Doe summons requirements of §7609(f). See 26 U.S.C. §7609(f) and *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310 (1985). The summons specifically seeks information about unidentified taxpayers. The Summons specifically asks for

“the payor account name” and “the recipient account name” but does not identify whose information is sought.

In *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310 (1985) the U.S. Supreme Court examined the legislative history of 26 U.S.C. §7609(f) and noted one specific congressional concern: that the party receiving a summons would not have a sufficient interest in protecting the privacy of the records if that party was not itself a target of the summons.⁵ 26 U.S.C. §7609(a) and (b) gave the identified taxpayer the right to intervene in a third-party recordkeeper summons. The John Doe requirements of 26 U.S.C. §7609(f) were adopted as a substitute for the intervention procedure when the affected third-party taxpayer could not be identified. Thus, if some of the records requested are not relevant to a legitimate investigation of the summoned party, the IRS may not obtain all the information it seeks unless it complies with 26 U.S.C. §7609(f). This is clearly a case where the Government should have complied with the 26 U.S.C. §7609(f), but they did not. The Government has filed its complaint in Case No. 2:15-cv-00828 and is clear investigating third-parties in that case that would be affected by the Summons. However, the procedures set forth in 26 U.S.C. §7609(f) were not followed, but should have been as set forth in *Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310 (1985).

Because the IRS did not follow proper administrative procedures this Court should quash the Summons.

II. The Government Has Not Met Its Burden, Therefore Its Motion Must Be Denied

The Government argues that the burden should shift to for Petitioners to establish a valid defense to the Summons. However, as has been amply set forth above the Government has not met any of the four elements that it is required to meet under the Powell Test to meet its burden.

⁵ See S. Rep. No. 94-938 at 368-369 (1976); H.R. Rep. No. 94-658 at 307 (1975).

When the Government does not meet their burden the burden will not shift to the taxpayer, but rather the Summons should be quashed. *United States v. Powell*, 379 U.S. 48(1964); *United States v. Ritchie*, 15 F.3d 592, 600 (6th Cir. 1994), cert. denied, 115 S. Ct. 188 (1994); *Mimick v. United States*, 952 F.2d 230, 232 (8th Cir. 1991). Therefore, in this case the Court must deny the Government's motion and quash the summons.

III. If the Court Grants the Government's Motion the Court Should Issue a Protective Order Regarding the Information of Third-Parties Produced.

If the Court grants the Government's motion then the Petitioners respectfully request that any information obtained through the Summons that is not protected by 26 U.S.C. §6103 be protected from disclosure or use in separate proceedings through a protective order pursuant to Federal Rules of Civil Procedure 26. Specifically, any information of third-parties that is not the taxpayers' information should be covered by a protective order.

WHEREFORE, Respondent respectfully requests this Court quash the IRS third-party Summons served on Wells Fargo in the matter of Neldon Johnson and Glenda Johnson for the calendar year 2012.

Respectfully submitted this 6th day of January, 2015.

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO SUMMARILY DENY PETITION TO QUASH SUMMONS AND COUNTER-PETITION FOR ENFORCEMENT OF THE SUMMONS has been made this 6th day of January, 2016, via the Court's CM/ECF system to:

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