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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

INTERNATIONAL AUTOMATED SYSTEMS, INC., Petitioner v. UNITED STATES OF AMERICA, Respondent	**MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTIONS TO SUMMARILY DENY PETITIONS TO QUASH SUMMONSES AND COUNTER-PETITIONS FOR ENFORCEMENT OF THE SUMMONSES** Case No.: 2:16-cv-00370-JNP Judge: Jill N. Parrish Referred to: Magistrate Judge Brooke C. Wells

PETITIONER, through its attorney, respectfully submits this *Memorandum In Opposition to Respondent's Motion To Summarily Deny Petition to Quash Summons and Counter-Petition For Enforcement of the Summons*. On May 4, 2016, Petitioner filed its petition for an order quashing the Internal Revenue Service ("IRS") third-party Summonses served on Wells Fargo Bank, N.A. ("Wells Fargo"), Zions Bank ("Zions"), and Bank of American Fork ("BAF") in the matter of International Automated Systems, Inc. ("IAS" or the "Petitioner") for the fiscal year ending June 30, 3013.[1] On July 11, 2016, in response to the Petition filed the United States of America's (the "Government") filed its *Motion to Summarily Deny Petition to*

[1] The Summonses all state that they cover the Period "June 30, 3013", but all request information for the period "June 2012 – July 2013".

Quash Summons and Counter-Petition For Enforcement of the Summons. In opposition of the Government's filing, the Petitioner argues 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) requires the Government to establish that the Summonses: (1) were issued for a legitimate purpose; (2) seek information relevant to that purpose; (3) seek 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. Petitioner sets forth below the reasons that the Government has not met its burden.

a. The Summonses Were 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 Summonses were 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.

The statement that bears the most specificity is where the Government states that Mr. Zeilke issued the Summonses "in furtherance of his investigation of IAS's federal corporate tax liability for the year ending June 30, 2013." The Government's argues that "A review of the SEC website included in the Petition does not reveal any filings by IAS with the SEC for the period

ending June 30, 2011 through December 31, 2014." See P. 11 from the Government's Motion. However, it is clear that, among many other documents, IAS filed an annual report that was "accepted" by the SEC's EDGAR system in July of 2015 that covers the fiscal year ended June 30, 2013. See Exhibit A. Thus, it is unclear why the Respondent is unable to access this publically available information.

The annual report of IAS that are reported to the Securities and Exchange Commission shows that IAS had no revenue from operations for the period ending June 30, 2013 and expenses totaling $1,592,363. See Exhibit B, the excerpt from the annual report containing the financial statements of IAS.[2] These financial statements were prepared by an independent certified public accountant, whose report is also attached in Exhibit B. Based upon the financial reports issued by the certified public accountant it is not plausible for IAS to have a tax liability for the period ending June 30, 2013. Thus, there must be an alternative explanation for the Government to have issued the Summonses.

It is particularly relevant that 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).[3] Said complaint names IAS as a Defendant in that action.[1] Because it is this Court's process which is invoked to enforce the Summonses this Court should not permit its processes to be abused. An abuse of process would take place if a Summons was issued for an improper purpose, such as to harass IAS or to put pressure on it 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

[2] https://www.sec.gov/Archives/edgar/data/820380/000155116315000167/f10kdec312014draft4vedgar3.htm
[3] 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.

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 Summonses appear to be an improper information gathering tool for that separate case and not for IAS's examination. These IAS bank statements have been sought in other investigative matters before the IRS as to some of its shareholders.[4] Each examination is not intended to determine tax liability or to ascertain filing requirements. Rather, these investigations are an improper information gathering tools to conduct a fishing expedition for the Government's injunction case (Case No. 2:15-cv-00828 DN).

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

b. The Summonses Do Not Seek Relevant Information.

The Government has also failed to meet the second element of the Powell Test. As set forth in the Petitioners' petitions 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.

As mentioned above, Exhibit B shows that IAS does not plausibly have an income tax liability. Thus, the documents do not have an impact on the outcome of the examination. There will be no tax due whether the documents are produced or not.

[4] See Consolidated Case No. 2:15-cv-00742-JNP-PMW

Further, the information sought by the Summonses is not specifically identified as to how it pertains to the IAS's 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." As mentioned above, it is not plausible that IAS owes income tax as it had no revenue from operations and its expenses are over $1.5 million dollars for the period at issue here. See Exhibit B. Regardless, the Government fails to articulate how the requested information has any relevance to the underlying examination here.

The Government argues that the information sought by the IRS in the Summonses only needs to be potentially relevant, and not actually relevant. The Government cites to *United States v. Arthur Young & Co.*, 465 U.S. 805, 813-814 (1984) to support that position. 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. A 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,[5] and, second, may the summoned records be relevant to the inquiry.[6]

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 "bank and financial records will facilitate the examination by showing the source and amount of deposits into IAS' bank accounts which is relevant to determining the amount of income received by IAS." However, the Government is seeking the same information that is has already sought through other summonses. It also seeks information that is unnecessary because it is implausible for IAS to owe income tax given what it's publicly available and independently audited financial statements show for the fiscal year ended June 30, 2013. This is also shown because of the commencement of Case No. 2:15-cv-00828 where it is a named party in that matter and the Government is the Plaintiff.

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

[5] *United States v. Abrahams*, 905 F.2d at 1282, 1285
[6] *In the Matter of the Tax Liabilities of John Does v. United States*, 866 F.2d 1015, 1021 (8th Cir. 1989)

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).

Because the Summonses do not seek information that is relevant to the Petitioner's examination as set forth above the Summonses should be quashed.

c. The IRS Already Possesses Certain Information Sought and Is Already Seeking the Remaining Information Through Other Summonses

The Ninth Circuit in *Action Recycling Inc. v. United States*, 721 F.3d 1142, 1146 (9th Cir. 2013) stated that the IRS "cannot issue repeat summons to the taxpayer for the exact same records. This limitation prevents unnecessary summonses that are designed to 'harass the taxpayer' or that otherwise abuse the court's process." The Fifth Circuit in *United States v. Davis*, 636 F.2d 1028, 1037 (5th Cir. 1981), cert. denied, 454 U. S. 862, 102 S. Ct. 320, 70 L. Ed.2d 162 (1981), the Court stated:

> Read in context, we construe the "already possessed" principle enunciated by Powell as a gloss on Section 7605(b)'s prohibition of "unnecessary" summonses, rather than an absolute prohibition against the enforcement of any summons to the extent that it requests the production of information already in the possession of the IRS.

In this case the Summonses are "unnecessary" because they seek information that is already being sought in separate summonses. The Government's Motion/Counter-petition acknowledges this. Although the Government claims that it doesn't seek to obtain information that it already admits it possesses (bank information from Zions Bank), the Summons does actually seek this information. As to the remaining information, the IRS has separately sought to obtain this information through additional summonses. Thus, these Summonses are what the Fifth Circuit termed as "unnecessary" and should be quashed.

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. The period of the examination listed on all three Summonses is erroneous. Although the time period list in the section setting forth the overly broad information requested is within the time frame of the IRS's examination period, the Summonses themselves bear a period in the future that is not under examination—June 30, 3013.

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

II. The Government Has Not Met Its Burden, Therefore Its Motion and Counter-Petition to Enforce Must Be Denied

The Government argues that the burden should shift to the Petitioners to establish a valid defense to the Summonses. 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. When the Government does not meet their burden the burden will not shift to the taxpayer, but rather the Summonses 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 Summonses.

WHEREFORE, Respondent respectfully requests this Court quash the IRS third-party Summonses served on Wells Fargo, Zions Bank, and BAF in the matter of International Automated Systems, Inc. for the fiscal year ending "June 30, 3013".

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Respectfully submitted this 25th day of July, 2016.

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/s/ Paul W. Jones

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing MEMORANDUM IN OPPOSITION TO RESPONDENT'S MOTIONS TO SUMMARILY DENY PETITIONS TO QUASH SUMMONSES AND COUNTER-PETITIONS FOR ENFORCEMENT OF THE SUMMONSES has been made this 25th day of Junes, 2016, via the Court's CM/ECF system to:

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