

TAX LITIGATION ISSUES

Expert Analysis

Confidentiality of Tax Returns, Congressional Authority and the President

Running to approximately 25 pages of statutory text, §6103 of the Internal Revenue Code sets out a simple “general rule,” that tax returns and return information cannot be disclosed by federal employees or persons receiving such materials from federal employees. This straightforward provision is then modified by a maze of exceptions, several of which are the subject of litigation between Congressional Democrats seeking President Trump’s tax returns and the President seeking to avoid such disclosure. The resulting court cases present a number of potentially novel issues about the confidentiality of, and Congressional authority to obtain, tax returns that should be resolved in the coming months, and also suggest potential implications of §6103 in other contexts.

Section 6103’s Many Exceptions. The current structure of §6103—a presumption of confidentiality

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with enumerated exceptions—was established by Congress via amendments adopted in 1976, following revelations that President Nixon was seeking the tax returns of political opponents, presumably to harass them. See Congressional Research Service (CRS), *Congressional Access to the President’s Federal Tax Returns* (May 7, 2019).

The most straightforward exception appears in §6103(c), which permits the IRS to disclose returns to individuals designated by the taxpayer to receive them. This provision presupposes a broader point: Nothing in §6103 precludes individual taxpayers (including candidates for public office) from disclosing their own returns.

Under §6103(e), returns may also be disclosed to specific “persons having [a] material interest” in those returns. This exception

applies narrowly with respect to returns filed by individuals, but it authorizes the disclosure of corporate returns to, among others, an officer or employee upon written request of a principal officer, or any shareholder owning 1 percent or more of the company’s stock.

Various provisions also authorize disclosure of returns to federal and state authorities. Section 6103(d)

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generally permits disclosure to state officials for the administration of their own tax laws, while §6103(h) allows the IRS to disclose returns to Department of Justice attorneys engaged in proceedings or investigations involving “tax administration,” which includes “the execution and application of the internal revenue laws.” In non-tax matters, federal prosecutors are able to obtain tax returns pursuant to ex parte applications submitted to district judges under §6103(i).

Under §6103(j), the Department of Commerce, the Federal Trade Commission, the Department of Treasury, the Department of Agriculture, and the Congressional Budget Office are permitted to obtain returns from the IRS for specific statistical purposes. Section 6103(l) further permits other federal agencies to obtain returns under certain circumstances, while §6103(k) sets out other situations in which disclosure is allowed for tax administration purposes, and §6103(g) allows the President or a designee to obtain returns (requiring only that the President state why the request is being made) and provides for access to returns of certain high level government appointees.

Authorized Disclosures to Congress. Most relevant to current events is §6103(f), which was initially enacted in part as a response to perceived difficulties obtaining tax returns during congressional investigations of the Teapot Dome scandal during President Harding's administration. CRS, *Congressional Access*, supra. Section 6103(f)(1) provides: "Upon written request from the chairman of the Committee on Ways and Means of the House of Representatives, the chairman of the Committee on Finance of the Senate, or the chairman of the Joint Committee on Taxation, the [Treasury] Secretary shall furnish such committee with any return or return information specified in such request, except that any return or return information which can be associated with

... a particular taxpayer shall be furnished to such committee only when sitting in closed executive session unless such taxpayer otherwise consents in writing to such disclosure" (emphasis added). Other Congressional committees are permitted to receive tax returns pursuant to §6103(f)(3), but only upon resolution by the Senate or the House (or, in the case of a joint committee, by both chambers).

Section 6103(f)(5) permits whistleblowers, i.e., individuals with lawful access to returns, to disclose them to the House Ways and Means Committee, the Senate Finance Committee, or the Joint Committee on Taxation provided "such person believes such return or return information may relate to possible misconduct, maladministration, or taxpayer abuse." Commentators reviewing the legislative history of that provision have noted that it appeared intended to focus on IRS misconduct as opposed to wrongdoing by taxpayers. See Bryan Camp & Victor Thuronyi, *Disclosing President Trump's Tax Returns—An Unconventional Idea*, Forbes (Feb. 21, 2017).

Congress's §6103(f) Request for President Trump's Returns. On April 3, 2019, Rep. Richard Neal, the Chair of the House Ways and Means Committee, requested from Treasury Secretary Steve Mnuchin tax returns filed by President Trump and related business entities for the last six years. On its face, §6103(f)(1) imposes no further prerequisite on the request, other than the "closed executive session"

limitation. In a letter dated April 23, 2019, however, Secretary Mnuchin denied the request, asserting that the Constitution limits Congress's §6103 authority to instances where it is acting pursuant to a legitimate legislative purpose. Although the Committee cited an oversight purpose in its request, Secretary Mnuchin claimed that the true (and illegitimate) purpose was "to expose the President's tax returns for the sake of exposure." Thus, the letter was phrased to invoke the Supreme Court decision in *Watkins v. United States*, 354 U.S. 178, 200 (1957), which pronounced that "there is no congressional power to expose for the sake of exposure." While the Committee sued the Treasury Department and Secretary Mnuchin in the United States District Court for the District of Columbia seeking to force disclosure of the requested returns, its attempt to fast track the case was denied and it appears resolution of this issue will be delayed for some time.

Can Congress Subpoena Tax Returns in Lieu of Using §6103(f)? In addition to the Ways and Means Committee's request under §6103(f), the House Financial Services and Intelligence Committees both issued subpoenas to banks seeking financial information, including tax returns, related to President Trump, members of his family and his business interests.

President Trump (together with his children and relevant businesses) filed suit in the Southern District of New York seeking to quash the subpoenas as improper

exercises of congressional authority. In May, Judge Edgardo Ramos denied the President's request for a preliminary injunction, concluding that, although the President faces irreparable harm from the disclosure of the records, he is unlikely to succeed in quashing the subpoenas on the merits.

The U.S. Court of Appeals for the Second Circuit expedited an appeal of Judge Ramos's decision. At oral argument, which was heard on August 23, the appellate panel appeared to introduce a previously unaddressed wrinkle in the proceedings: whether the Committees were required to and had in fact complied with §6103 in subpoenaing tax returns.

In a post-argument letter, the Committees rejected the notion that §6103 applied to the subpoenas given the manner in which the banks would likely have obtained the returns. First, the Committees asserted that nothing in §6103 prohibits the banks from producing tax returns received directly from the taxpayers. After all, the general restriction set out in §6103(a) applies to federal employees and those having received the information from federal employees, and does not on its face apply to someone who received the information directly from the taxpayer. Second, the Committees further argued that, even if the banks obtained returns from the IRS at the taxpayers' request (or with the taxpayers' consent), nothing in the taxpayer-designee exception set forth in §6103(c) precludes the banks from

producing the returns in response to valid subpoenas.

In response, the Trump-related taxpayers insist that §6103(f) provides the *only* manner by which Congress can seek tax returns. Thus, in the taxpayers' view, the subpoenas themselves were improper because the Committees lacked jurisdiction to request tax returns in any way other than via §6103(f).

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confirmed that the proceedings present a real, live issue. Thus, at oral argument, the Committees noted that given the size of the loans President Trump and his entities obtained from the banks in question, it would not be unusual for the banks to have required disclosure of their returns. After argument, the Second Circuit ordered the subpoenaed banks to file letters disclosing whether they possessed the returns of the individuals and entities named in the subpoenas, and one of the banks—Deutsche Bank—confirmed that it did in fact possess tax returns responsive to the subpoenas. (Unfortunately for observers of the case, the identities

of the individuals or entities whose tax returns Deutsche Bank possesses were redacted from the public filing.)

Conclusion. The current litigation regarding the disclosure of tax returns is one of many pending cases between the Trump administration and Congress addressing previously unexplored (or under explored) constitutional and statutory issues. However, Congress's attempt to subpoena the President's tax returns from banks, by focusing a spotlight on voluntary disclosures of tax returns in business dealings, may provide a roadmap both to prosecutors seeking returns filed by targets in non-tax criminal investigations and to civil litigants seeking to avoid the heightened discovery burden when seeking copies of tax returns filed by their adversaries. See, e.g., *Uto v. Job Site Services*, 269 F.R.D. 209, 212 (E.D.N.Y. 2010). In this respect, the present dispute may have broader implications for practitioners.