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Expert Analysis

John Doe Summonses: Procedural Hurdles With Limited Review

By
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First authorized by the Supreme Court in *United States v. Bisceglia*, 420 U.S. 141 (1975), and subsequently codified by Congress at §7609(f) of the Internal Revenue Code, John Doe summonses have long been a powerful tool in the IRS's arsenal to combat tax fraud schemes. These summonses enable the IRS to seek data on a class of otherwise unidentified persons (e.g., customers of a specific bank) where it can articulate a reasonable basis to believe that individuals within that class have failed to comply with their tax obligations.

As this column has recounted, in recent years the IRS has expanded its use of John Doe summonses to investigate tax evasion through cryptocurrency and even to help foreign governments identify individuals using credit cards issued in the United States to evade their tax obligations to their home countries. See Jeremy H. Temkin, *Tax Enforcement, John Doe Summonses and Digital Currency*, N.Y.L.J. (Jan. 19, 2017); Jeremy H. Temkin, *Closed for Business: Shutting Down the U.S. as an Offshore Tax Haven*, N.Y.L.J. (May 19, 2019). While practitioners should anticipate the IRS will continue to accelerate its use of John Doe summonses, a recent decision by the U.S. District Court for the Western District of Texas demonstrates some of the obstacles recipients of such summonses face in attempting to avoid compliance.

On the other hand, an opinion earlier this year by the U.S. Court of Appeals for the Sixth Circuit highlights how IRS agents can run afoul of the procedural requirements for obtaining a John Doe summons and, more recently, Congress imposed an additional factual element for the IRS to establish before district courts can authorize the issuance of such a summons.

Taylor Lohmeyer

In October 2018, the IRS sought and obtained leave to serve a John Doe summons on Dallas-based Taylor Lohmeyer Law Firm PLLC, seeking names and other information relating to the firm's clients between 1995 and 2017. The application was predicated on evidence, developed through an audit, that the firm had assisted one of its clients (Taxpayer-1) in establishing offshore accounts and structures used to evade tax obligations. Based on an ex parte affidavit submitted by an IRS agent, the district court authorized service of the

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summons, finding that (1) it related to an "ascertainable group or class of persons"; (2) there was "a reasonable basis for believing that … [the] group or class of persons … may have failed to comply with any provision of" the Internal Revenue Code; and (3) the information sought was "not readily available from other sources."

Upon receipt of the summons, Taylor Lohmeyer filed a petition to quash it. In rejecting that petition, the district court highlighted procedural and substantive obstacles faced by parties attempting to resist compliance with a John Doe summons. See *Taylor Lohmeyer Law Firm PLLC v. United States*, 385 F. Supp. 3d 548 (W.D. Tex. 2019). The district court first emphasized that the findings made in the ex parte proceeding underlying the *issuance* of the summons cannot be challenged in a proceeding relating to its *enforcement*.

The court then noted that the IRS's burden with respect to enforcement "is a slight one because the statute must be read broadly in order to ensure that the enforcement powers of the IRS are not unduly restricted." Thus, under *United States v. Powell*, 379 U.S. 48 (1964), in a summons enforcement proceeding, the IRS first bears the burden of establishing that (1) the summons had been issued for a legitimate purpose, (2) it seeks information that may be relevant to that purpose, (3) the information being sought is not already within the IRS's possession, and (4) it has complied with the necessary administrative steps. Once the government satisfies its threshold burden, the opposing party may avoid complying with the summons by showing that enforcement would constitute an abuse of the court's process.

Taylor Lohmeyer sought to establish an abuse of process by attacking the accuracy of the ex parte affidavit that had been submitted in connection with the IRS's application for the summons. While noting that Taylor Lohmeyer was precluded from disputing the findings underlying the issuance of the summons, the court nonetheless addressed the firm's argument on the merits. After finding that the underlying affidavit established a "clearly ascertainable group (firm clients between 1995 and 2017) and [that] the information sought (these clients' identities) is not readily available elsewhere," the court concluded that evidence developed during Taxpayer-1's audit—including the admission by a former partner that the firm had given similar advice to 20 to 30 other clients—provided the requisite "reasonable basis" for believing that other Taylor Lohmeyer clients had likewise breached their tax obligations.

Significantly, in support of its claim that the summons constituted an abuse of process, the firm argued both that Taxpayer-1 had not followed its legal advice and that it had reviewed its other clients' files and had found "no evidence that any of the remaining taxpayers disregarded Taylor Lohmeyer's advice regarding the proper structure and maintenance of foreign grantor trusts." In staking out this position, Taylor Lohmeyer took the unusual step of appearing to disclose details about the advice it gave Taxpayer-1, and implicated the advice given to (and the actions taken by) other clients. Ultimately, however, the court concluded that the allegations of misrepresentations and inaccuracies in the ex parte application did not satisfy the firm's "heavy burden" to establish an abuse of the summons process.

Finally, relying on *United States v. Liebman*, 742 F.2d 807 (3d Cir. 1984), Taylor Lohmeyer sought to avoid the general rule that a client's identity is not privileged by arguing that disclosure would reveal "the essence of a confidential communication." In response, the IRS distinguished the summons in *Liebman*, which sought the identity of clients who received specific advice (i.e., that certain fees were deductible), from the summons issued to Taylor Lohmeyer, which defined the client class based on the nature of the services provided (i.e., advice with respect to certain offshore activities). The court avoided addressing this distinction and instead rejected the firm's argument, finding its blanket assertion of privilege insufficient to meet its burden under *Powell*.

Taylor Lohmeyer has appealed the district court's decision to the U.S. Court of Appeals for the Fifth Circuit, and the district court has stayed enforcement of the

summonses, noting that the potential application of the attorney-client privilege raised a sufficiently serious legal question and concluding that the firm faced potentially irreparable harm absent a stay.

Section 7609(f)'s Unique Procedural Requirements

While the court in *Taylor Lohmeyer* showed great deference to the IRS's application for a John Doe summons, a recent Sixth Circuit opinion made clear that the IRS is not entitled to unlimited deference. Thus, in *Hohman v. IRS*, 768 F. App'x 329 (6th Cir. April 1, 2019), "two low-level IRS employees" issued a John Doe summons without obtaining the statutorily mandated judicial approval. Through the summons, the IRS obtained bank records relating to Hohman, who filed a complaint with the Treasury Inspector General for Tax Administration. After the conclusion of the TIGTA's investigation, Hohman filed a Freedom of Information Act request seeking records relating to the investigation and then filed an action in federal court to compel production of the records sought in her FOIA request.

Ultimately, the Sixth Circuit dismissed Hohman's appeal of the district court's dismissal of her action based on her failure to object to a magistrate judge's report and recommendation. While noting the seriousness of Hohman's allegations of misconduct and that it "had already warned the IRS about this exact behavior" in two decisions issued in the 1990s, the court concluded that the nature of Hohman's interest in the relief sought (i.e., access to the TIGTA's investigation) would not create "a manifest injustice if left uncorrected."

New Limits to the IRS's Use Of §7609(f)

Aside from the rare instance where the IRS is caught violating the statutory prerequisites, the district court's decision in *Taylor Lohmeyer* reflects the extremely limited review of John Doe summonses. However, in connection with the Taxpayer First Act, Congress expanded §7609(f) to include a further limitation on the issuance of John Doe summonses. Thus, effective Aug. 16, 2019, district courts are directed to consider whether the proposed John Doe summons "is narrowly tailored to information that pertains to the failure (or potential failure) of the [relevant] person or group or class of persons … to comply with one or more provisions of the internal revenue law which have been identified for purposes of" issuing such a summons.

While the Senate Finance Committee's report claims that the amendment brings the statute into line with the current Internal Revenue Manual, which instructs that John Doe summons cannot be used for a "fishing expedition" (see U.S. Senate Finance Committee, *Taxpayer First Act of 2019* at 3), the tailoring concept has yet to be addressed in any reported decision, and it remains to be seen whether courts will give teeth to this additional requirement in considering petitions to quash John Doe summonses.

Conclusion

John Doe summonses provide the IRS with a powerful investigative device bounded by a set of requirements inapplicable to other IRS summonses. As *Taylor Lohmeyer* demonstrates, these statutory prerequisites are effectively unreviewable in a proceeding to quash a summons. Given the high threshold for challenging John Doe summonses, other law firms might want to evaluate whether the limited likelihood of success warrants disclosing potentially privileged information in connection with a petition to quash. Finally, it remains to be seen whether Congress's recent efforts to impose additional conditions on the use of John Doe summonses will provide new avenues for parties seeking to quash such summonses.