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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA – FRESNO DIVISION

RANDALL S. MOYES,

CASE NO. 1:10-mc-00021-SKO

Petitioner,

**ORDER DENYING PETITIONER'S
MOTION TO QUASH; DENYING
PETITIONER'S MOTION TO STRIKE;
AND GRANTING RESPONDENT'S
MOTION TO DISMISS**

v.

UNITED STATES OF AMERICA,

Respondent.

/ Docket Nos. 7, 8

I. INTRODUCTION

A. Procedural Background

Randall Moyes (“Moyes” or “Petitioner”) filed this action on April 23, 2010, seeking to quash a third-party summons issued by the Internal Revenue Service (“IRS”). On June 25, 2010, Respondent, United States of America, filed a “Motion to Dismiss”¹ on behalf of the IRS opposing Moyes' motion to quash, asserting that Moyes failed to carry his burden of showing that the IRS was acting in bad faith by issuing the third-party summons. Moyes filed a Motion to

¹ This motion also serves as a responsive pleading opposing Moyes' petition to quash the IRS's third-party administrative summons to Union Bank.

1 Strike portions of Respondent’s opposition to his petition. It is Moyes' motions to quash the
2 administrative summons and to strike portions of Respondent's opposition that are currently
3 pending before the Court.²

4 **B. Factual Background**

5 Moyes alleges that the IRS has improperly issued a third-party summons for information
6 and records pertaining to his Union Bank account.

7 According to Respondent, the IRS has been conducting an investigation to determine
8 Moyes' federal income tax liabilities for the 2002 through 2008 tax years. Respondent is
9 informed and believes that Moyes is allocating taxable income to a Roth IRA and is not reporting
10 income on any personal federal income tax returns.

11 On November 20, 2008, as part of the IRS's investigation, Revenue Agent Barfels
12 (“Barfels”) mailed Moyes a notice that the IRS would be contacting third parties regarding the
13 investigation. On May 8, 2009, Barfels served an administrative summons on the First Regional
14 Bank of Carlsbad. The bank provided copies of documents showing that Moyes has a bank
15 account at Union Bank in Vallejo, California. On April 7, 2010, Barfels served an administrative
16 summons on Union Bank to examine Moyes' account transactions. On that same day, Barfels
17 sent Moyes notice of issuance of the summons to Union Bank.

18 Moyes moves to quash the third-party summons issued to Union Bank. Moyes argues
19 that the IRS has no jurisdiction over him because it is not a valid federal agency created by
20 positive law. Moyes further avers that the IRS violated 26 U.S.C. § 7602 by failing to send
21 notice of summons to him prior to sending the summons to the third party. Moyes maintains that
22 his right to privacy would be violated if his personal financial information were released, and he
23 argues that disclosure of his Union Bank records would violate his Fourth, Fifth, and Fourteenth
24 Amendment rights.

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28 ² This case is assigned to Magistrate Judge Sheila K. Oberto as the presiding judge pursuant to Local Rule
302(c)(9)-(10).

1 **II. DISCUSSION**

2 **A. Legal Standard**

3 The district court has jurisdiction to hear and decide a motion to quash a summons issued
4 to a third-party record keeper. 26 U.S.C. §§ 7609(b)(2), 7609(h)(1); *see Liberty Fin. Servs. v.*
5 *United States*, 778 F.2d 1390, 1392 (9th Cir. 1985), *cert. denied*, 492 U.S. 906 (1989). In any
6 proceeding to quash a summons, the government may seek to compel compliance with the
7 summons. 26 U.S.C. § 7609(b)(2)(A). In order to establish a prima facie case for enforcement
8 of a summons, the government must "make a 'minimal' showing that it issued the summons for a
9 legitimate purpose, and that the information sought in the summons was relevant to that
10 purpose." *United States v. Abrahams*, 905 F.2d 1276, 1280 (9th Cir. 1990). "Assertions by
11 affidavit of the investigating agent that the requirements are satisfied are sufficient to make the
12 prima facie case." *Liberty Fin. Servs.*, 778 F.2d at 1392. Once the prima facie burden for
13 enforcement of the summons has been met, a "heavy" burden then shifts to the taxpayer to show
14 that the government is acting in good faith. *Id.*

15 **B. Analysis**

16 **1. Petitioner's Motion to Strike Portions of Respondent's Motion to Dismiss Is**
17 **Denied**

18 In response to Respondent's opposition to the petition, Moyes filed a Motion to Strike
19 portions of Respondent's brief. Moyes disputes Respondent's statements that he failed to file
20 personal income tax returns. Moyes further maintains that these allegations are based on the
21 Declaration of Barfels ("Barfels Decl."), which Moyes asserts was improperly submitted without
22 a signature and must also be stricken.

23 Barfels' declaration was filed electronically with the Court and contains his electronic
24 signature. Apparently, the copy of the declaration with which Moyes was originally served did
25 not contain Barfels' signature. Declaration of Kaycee M. Sullivan ("Sullivan Decl.") at 1:25-2:5.
26 Respondent was unaware of this mistake, and when it was brought to counsel for Respondent's
27 attention, she immediately mailed a signed copy of Barfels' declaration to Moyes. *Id.* 2:6-12.
28 The Court finds that, because the copy filed with the Court contained the appropriate electronic

1 signature and Respondent's counsel has served a copy of the signed declaration on Moyes, his
2 motion to strike Barfels' declaration is moot.³ Moreover, despite Respondent's oversight,
3 Petitioner's case will not be prejudiced by this harmless error. *See Larita-Martinez v. INS*, 220
4 F.3d 1092, 1095 (9th Cir. 2000) (showing of prejudice requires demonstration that alleged
5 violation will affect outcome of proceedings); *see also Neri v. Hornbeak*, 550 F. Supp. 2d 1143,
6 1172 (C.D. Cal. 2008) (counsel's filing of unsigned declaration deficient but not prejudicial).

7 Moyes further requests that the statement in Respondent's opposition brief that Moyes has
8 not paid his personal income taxes be stricken. This is a statement of Respondent's position in
9 this case. It is a disputed issue of fact between the parties and is not deemed established simply
10 by its inclusion in Respondent's motion. Although this statement does not preclusively establish
11 any factual matter about Moyes' tax liability that is apparently in dispute between the parties, it
12 does, however, provide an explanation regarding why the IRS issued the summons to Union
13 Bank. For these reasons, Moyes' motion to strike Respondent's statement is denied.

14 **2. The Third-Party Administrative Summons Satisfies the *Powell* Requirements**

15 The Internal Revenue Code ("Code") authorizes the IRS to make inquiries,
16 determinations, and assessments of all taxes. 26 U.S.C. § 6201. The IRS may examine any
17 books, papers, records, or other data which may be relevant or material to its investigations.
18 *Id.* § 7602(a)(1). Thus, the IRS may issue a summons to any person having possession, custody,
19 or "care of books of account containing entries relating to the business of the person liable for
20 tax." *Id.* § 7602(a)(2). However, the subject of an IRS investigation may petition to quash a
21 third-party summons pursuant to 26 U.S.C. § 7609(b).

22 To obtain enforcement of a third-party summons, the IRS must establish its good faith in
23 issuing the summons by demonstrating that the summons satisfies the requirements of *United*
24 *States v. Powell*, 379 U.S. 48, 57-58 (1946). *Powell* requires that the IRS show that the

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26 ³On or about July 16, 2010, Respondent's counsel Kaycee M. Sullivan served Mr. Moyes with an executed
27 copy of Mr. Barfels' declaration because the initial declaration served on Mr. Moyes did not contain a signature,
28 although an electronically signed copy was presented to the Court. Mr. Moyes refused delivery of this signed
declaration and asks that the Court take judicial notice of the copy that Ms. Sullivan sent to him, stating that there is
"a tracing overwrite." The Court detects no fraud and relies upon the sworn assertions of Respondent's counsel in
her declaration that a true and correct signed copy of Barfels' declaration was provided to Mr. Moyes.

1 summons: (1) is issued for a legitimate purpose; (2) seeks information relevant to that purpose;
2 (3) seeks information that is not already within the IRS's possession; and (4) satisfies all
3 administrative steps required by the Code. *Fortney v. United States*, 59 F.3d 117, 119-20 (9th
4 Cir. 1995) (citing *Powell*, 379 U.S. at 57-58). The government's burden is a slight one and is
5 typically satisfied by the introduction of the sworn declaration of the revenue agent who issued
6 the summons that the *Powell* requirements have been met. *Fortney*, 59 F.3d at 120; *United*
7 *States v. Dynavac, Inc.*, 6 F.3d 1407, 1414 (9th Cir. 1993); *United States v. Gilleran*, 992 F.2d
8 232, 233 (9th Cir. 1993). Once the government establishes a prima facie case for enforcement, a
9 heavy burden shifts to the taxpayer to show an abuse of process or the lack of institutional good
10 faith. *Dynavac, Inc.*, 6 F.3d at 1414. To meet this burden, the taxpayer must allege specific facts
11 and evidence to support his allegations. *Liberty Fin. Servs.*, 778 F.2d at 1392.

12 Here, Respondent has satisfied the *Powell* requirements. First, the third-party summons
13 to Union Bank was issued for a legitimate purpose. The IRS seeks to ascertain Moyes' internal
14 revenue tax liabilities for the tax years 2002-2008 in accordance with 26 U.S.C. § 7602(a).
15 Barfels Decl. 1:24-26. Second, the records summoned are relevant to the purpose of the
16 examination. In order to determine Moyes' federal tax liabilities, the IRS needs to examine bank
17 records of Moyes' account that may establish sources and amounts of income received. Third,
18 the information sought by the summons is not already in the possession of the IRS. *Id.* at
19 3:15-16. Finally, the fourth *Powell* requirement is satisfied, as all administrative steps were
20 followed in the issuance of the third-party summons. Barfels Decl. 3:17-18. Barfels notified
21 Moyes of the IRS's intent to contact third-parties, served a copy of the administrative summons
22 on Union Bank, and mailed certified copies to Moyes. Barfels Decl. ¶¶ 7-10. Respondent has
23 satisfied the *Powell* requirements and has established a prima facie showing of good faith.

24 **3. Moyes Has Not Met His Burden of Establishing an Abuse of Process or Lack**
25 **of Good Faith on Behalf of the IRS.**

26 Once the IRS carries its burden of establishing a prima facie case that the summons was
27 issued in good faith, a "heavy" burden falls upon the taxpayer to show an abuse of process or the
28 lack of institutional good faith. *Dynavac, Inc.*, 6 F.3d at 1414. Here, Moyes has failed to

1 establish an abuse of process or lack of institutional good faith in issuing the summons. Instead,
2 Moyes' motion to quash the subpoena raises several other issues which are addressed below.

3 **a. The IRS Is a Valid Entity with Authority to Issue a Summons**

4 Moyes argues that the IRS was not created by positive law (i.e., an act of Congress) and
5 that the agency does not have authority to enforce the Code. *See* Petition to Quash (Doc. 1) at 6-
6 9.

7 Pursuant to 26 U.S.C. § 7801, Congress granted the Secretary of the Treasury full
8 authority to administer and enforce internal revenue laws. Based on this legislative authority, the
9 IRS was created. It has since been recognized that the IRS is authorized to carry out the broad
10 responsibilities of the Secretary of the Treasury under § 7801(a) and for the administration and
11 enforcement of the internal revenue laws. *Donaldson v. United States*, 400 U.S. 517, 534 (1971).
12 Thus, the IRS has been established by positive law because it was created through a
13 congressionally mandated power, and the Commissioner of the IRS has redelegate the granted
14 authority to issue and serve summons to revenue agents. *See United States v. Derr*, 968 F.2d
15 943, 947 (9th Cir. 1992); *United States v. Hooper*, 76 F.3d 289 (9th Cir. 1995); *see also*
16 *Lonsdale v. United States*, 919 F.2d 1440, 1448 (10th Cir. 1990). Thus, the IRS has exercised its
17 summons power to investigate Moyes' tax liabilities in a valid manner.

18 **b. Petitioner Received Timely Notice of the IRS's Intent to Contact Third**
19 **Parties**

20 Moyes contends that the IRS is in violation of the 1998 Restructuring and Reform Act
21 because he did not receive notice of the third-party summons before it was sent to the third party.
22 Mot. to Quash 10:20-11:31.

23 On November 20, 2008, Respondent mailed a notice to Moyes informing him of the
24 IRS's intention to contact third parties. Barfels Decl. 2:11-14. The IRS then contacted the First
25 Regional Bank of Carlsbad where information was obtained pertaining to Moyes' account with
26 Union Bank in Vallejo, California. On April 7, 2010, Revenue Agent Barfels served an
27 administrative summons on Union Bank and sent notice to Moyes of this summons on the same
28 day.

1 Moyes maintains that Revenue Agent Barfels was required to “provide reasonable notice
2 in advance to the taxpayer that contacts with persons other than the taxpayer may be made.” 26
3 U.S.C. § 7602(c)(1). Moyes argues that he did not receive “advance notice” of the second
4 summons before it was served on Union Bank because the notice he received was sent to him on
5 the same day the summons was issued.

6 When the IRS issues a third-party summons, it is required to give notice of that specific
7 contact under § 7609. Under Section 7609, the IRS must provide notice of a specific third-party
8 contact (i.e., Union Bank) “within three days of serving a third-party summons, but no later than
9 twenty-three days before the date on which third party is to appear before the IRS.” Id.
10 § 7609(a)(1). Notice of specific third-party contact does not necessarily need to occur *prior* to
11 the contact when advance notice has otherwise been provided to the taxpayer pursuant to another
12 statute. 26 C.F.R. § 301.7602-2(d)(2). In other words, once advance notice is given that third
13 parties will be contacted, additional notice of the particular third-party to be contacted does not
14 necessarily need to occur prior to the contact; notice of the specific third party contact need only
15 be given within three days of serving the third-party summons. *See* 26 U.S.C. § 7609(a)(1).

16 Here, Revenue Agent Barfels issued an advance notice of the IRS's intent to contact third
17 parties to Moyes on November 20, 2008. Moreover, Agent Barfels notified Moyes of the third-
18 party summons issued to Union Bank on April 7, 2010, well within the three-day limit provided
19 under § 7609(a)(1). Additionally, the April 7, 2009, notice of the summons to Union Bank sent
20 to Moyes included a copy of the summons and information explaining § 7609 and Moyes' right to
21 a proceeding to quash the summons. Barfels Decl. 3:3-5; Resp't Ex. 4, 5. Moyes was thus given
22 advance notice of the IRS's intent to contact third parties, and Moyes was given additional timely
23 notice of the IRS's specific intent to contact Union Bank. Thus, Respondent fulfilled the
24 requirements set forth by §§ 7602 and 7609, and Moyes received proper and timely notice of the
25 summons.

1 **c. Petitioner’s Fourth, Fifth, and Fourteenth Amendment Rights Are not**
2 **Violated by Union Bank’s Compliance with the Summons**

3 Moyes claims that his constitutional rights will be violated if his private information and
4 records are released to the IRS pursuant to the summons. However, when a person
5 communicates information to a third party, even with the understanding that the communication
6 is confidential, he or she cannot object if the third person conveys that information or records to
7 law enforcement authorities. *SEC v. Jerry T. O’Brien, Inc.*, 467 U.S. 735, 743 (1984). The
8 Supreme Court has also held that a customer of a bank cannot, on Fourth Amendment grounds,
9 challenge the admission into evidence of financial records obtained by the government from his
10 or her bank. *Id.*; *see also Donaldson v. United States*, 400 U.S. 517, 522 (1971) (Internal
11 Revenue summons directed to third party does not tread upon any interests protected by Fourth
12 Amendment). Therefore, Moyes does not have a protected Fourth Amendment right that would
13 be violated by Union Bank's compliance with the IRS summons.

14 Additionally, Moyes' due process rights under the Fifth and Fourteenth Amendments are
15 not violated by the summons. The Fifth Amendment provides that “no person . . . shall be
16 compelled in any criminal case to be a witness against himself.” However, the Due Process
17 Clause is not implicated when a federal administrative agency uses its subpoena power to gather
18 evidence against a taxpayer because an administrative investigation adjudicates no legal rights.
19 *Jerry T. O’Brien, Inc.*, 467 U.S. at 742. Further, the Self-Incrimination Clause of the Fifth
20 Amendment does not apply here, as it protects citizens only from compelled self-incrimination.
21 *Id.* The summons in this case does not compel testimony from Moyes; it was served on a third
22 party to prepare and produce certain documents and records. Thus, Moyes is not asked to be a
23 witness against himself. *See id.*; *Fisher v. United States*, 425 U.S. 391, 397 (1976); *Harris v.*
24 *United States*, 758 F.2d 456, 457 (9th Cir. 1985).

25 **III. CONCLUSION**

26 Accordingly, it is HEREBY ORDERED THAT:

- 27 1. Moyes' Petition to Quash the IRS Summons served on Union Bank is DENIED;

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- 2. Moyes' Motion to Strike Portions of Respondent's Opposition Brief and the Declaration of Barfels is DENIED; and
- 3. Respondent's Motion to Dismiss is GRANTED.

This action is concluded in its entirety.

IT IS SO ORDERED.

Dated: August 30, 2010

/s/ Sheila K. Oberto
UNITED STATES MAGISTRATE JUDGE