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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA and)
MARILYN COLLINS, Revenue)
Officer, Internal Revenue Service,)
)
Petitioners,)
)
v.)
)
SHERI I. PROVOST,)
)
Respondent.)
_____)

1:09-cv-00961-AWI-GSA

**ORDER DISCHARGING ORDER TO
SHOW CAUSE (Doc. 5)**

**FINDINGS AND RECOMMENDATIONS
REGARDING PETITION TO ENFORCE
IRS SUMMONS (Doc. 1)**

Petitioners are proceeding with a civil action in this Court. The matter has been referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b) and Local Rules 72-302 and 72-303. Pending before the Court is a petition to enforce a summons issued by the Internal Revenue Service (IRS) to Respondent.

After various continuances were granted in order to permit ultimately unsuccessful efforts to obtain voluntary compliance with the summons, the petition came on regularly for hearing on November 13, 2009, at 9:30 a.m. in Courtroom 10 before the Honorable Gary S. Austin, United States Magistrate Judge. Jeffrey James Lodge appeared on behalf of Petitioners, and Sheri Provost appeared on her own behalf.

1 The Court has reviewed the petition, all supporting papers, and all papers submitted by
2 Respondent. After argument, the matter was submitted to the Court for preparation of findings
3 and recommendations.

4 ***Discharging Order to Show Cause***

5 Respondent having appeared pursuant to the order to show cause, it IS ORDERED that
6 the order to show cause BE DISCHARGED.

7 ***Petition to Enforce IRS Summons***

8 **A. Background**

9 Agent Collins declared that as a duly commissioned revenue officer employed by the IRS,
10 she was authorized to issue the IRS summons pursuant to 26 U.S.C. § 7602; she did so in the
11 course of conducting an investigation of the tax liabilities of Respondent's spouse, Andre Paul
12 Provost, Jr.,¹ for the tax years 1995 through 1997. Collins declared that she believed from her
13 knowledge of financial practices that Respondent had knowledge that could aid in carrying out
14 the investigation. Collins issued an IRS summons on August 12, 2008, directing Respondent to
15 appear before her on September 17, 2008, to provide testimony and documents relating to the
16 investigation. (Decl. ¶¶ 4-8.) She left an attested copy of the summons at Respondent's usual
17 place of abode on August 13, 2008. (*Id.* ¶ 8.)

18 An order to show cause issued on June 11, 2009, and was served on Respondent on July
19 1, 2009; it directed Respondent to appear and to file a written response. Respondent filed papers,
20 but they were returned as not recognizable or proper legal filings by order dated July 14, 2009.
21 (Doc. 6.) The matter was initially continued at the request of both parties; in September,
22 Respondent filed motions to abate the proceedings to permit settlement and a notice in which she
23 stated that she previously failed to respond due to a misunderstanding of her duties, and she
24 indicated a desire to settle the matter. (Docs. 11-12.) Petitioners asked for a further continuance
25 until the end of October in order to meet with Respondent to obtain voluntary compliance with
26 the summons. (Doc. 13.) This Court issued an Order Regarding Parties' Request for

27
28 ¹A related matter naming Andre Paul Provost, Jr., is pending before Magistrate Judge Sandra M. Snyder
and District Judge Oliver W. Wanger, case number 09-956.

1 Continuance, permitting the parties another opportunity to meet and confer, and continuing the
2 hearing to November 13, 2009, at 9:30 a.m. Respondent was to make herself available within
3 forty-five day of the date of the order to attend a meeting with Petitioners to discuss potential
4 settlement. (Doc. 14.)

5 Respondent filed a Notice and Declaration of Revocation of Power of Attorney (Docs. 16
6 & 17) on October 26, 2009.

7 ***B. The Merits of the Petition***

8 At the hearing, Petitioners stated that although a meeting had taken place, Respondent
9 had refused to answer questions or turn over any documents; thus, Petitioners were not
10 anticipating settlement, and they requested enforcement of the summons. Respondent requested
11 forgiveness and asked to settle the case.

12 In light of the previously unsuccessful meeting concerning voluntary compliance, and in
13 order to ensure that Petitioners are not deprived of the relief to which they have established that
14 they are entitled, the Court considers the merits of the petition.

15 The IRS is authorized to examine papers or data which may be relevant or material in
16 determining the correctness of a tax return or the liability of any person for any internal revenue
17 tax. 26 U.S.C. § 7602(a)(1). It has the authority to issue summonses for the purpose of
18 ascertaining the correctness of any return, making a return where none has been made,
19 determining the liability of any person for any internal revenue tax, or collecting any such
20 liability. 26 U.S.C. § 7602(a); *Crystal v. United States*, 172 F.3d 1141, 1143 (9th Cir.1999).

21 To defeat a motion to quash, or in order to enforce an IRS summons, the government has
22 the initial burden of proving that the summons: (1) is issued for a legitimate purpose; (2) seeks
23 information relevant to the purpose; (3) seeks information not already within the IRS's
24 possession; and (4) satisfies all of the administrative steps required by the Internal Revenue
25 Code. *United States v. Powell*, 379 U.S. 48, 57-58 (1964); *Crystal v. United States*, 172 F.3d at
26 1143-44. The government's burden is a slight one that may be satisfied by a declaration from the
27 investigating agent that these requirements have been met. *United States v. Abrahams*, 905 F.2d
28

1 1276, 1280 (9th Cir. 1990); *Liberty Financial Servs. v. United States*, 778 F.2d 1390, 1392 (9th
2 Cir. 1985). Once the prima facie case is made, a heavy burden falls upon the taxpayer to show an
3 abuse of process (*Abrahams*, 905 F.2d at 1280; *Liberty Financial*, 778 F.2d at 1392), or the lack
4 of institutional good faith (*Anaya v. United States*, 815 F.2d1373, 1377 (10th Cir. 1987)). *United*
5 *States v. Dynavac, Inc.*, 6 F.3d 1407, 1414 (9th Cir. 1993).

6 The summons to Respondent Sheri I. Provost summoned her to appear before Officer
7 Collins, to give testimony, and to bring with her and to produce for examination papers and other
8 data relating to the tax liability, collection thereof, or for the purpose of inquiring into any
9 offense connected with the administration or enforcement of the internal revenue laws
10 concerning Andre Paul Provost, Jr., Respondent's spouse, for the calendar years ending
11 December 31, 1995 through December 31, 1997, including verification of relationship to Andre
12 Paul Provost, Jr., last six bank statements for all accounts, and verification of home ownership
13 and the source of purchase money. (Decl. Ex. A.)

14 Collins declared that Respondent did not appear on September 17, 2008, and she failed to
15 provide testimony and documents as required by the summons. Respondent's failure to comply
16 continues, and the information sought by the summons is not already in the possession of the
17 IRS. (Decl. ¶¶ 5-7.) Further, all administrative steps required by the IRS had been undertaken,
18 and no criminal referral to the Department of Justice was in effect with respect to Respondent's
19 tax liability for the subject years. (*Id.* ¶¶ 8-9.)

20 Petitioners have shown that Respondent has received the required notice. Petitioners
21 have established that the summons was issued for a legitimate purpose and seeks information
22 relevant to the purpose that is not already within the IRS's possession; further, it is demonstrated
23 that all of the administrative steps required by the Internal Revenue Code have been satisfied. A
24 prima facie case has been made. *United States v. Dynavac, Inc.*, 6 F.3d at 1414.

25 Respondent has not submitted any evidence of bad faith or improper purpose.

26 The Court finds that Respondent has not established any basis to deny enforcement of the
27 IRS summons.

28 The Court concludes that enforcement of the summons should be ordered.

1 **FINDINGS AND RECOMMENDATIONS**

2 Accordingly, it IS RECOMMENDED that:

3 1. Petitioners’ petition to enforce the IRS summons BE GRANTED; and

4 2. Respondent Sheri I. Provost BE ORDERED to appear before Revenue Officer
5 Collins on January 13, 2010, at 10:00 a.m., at the United States Attorney’s Office at 2500 Tulare
6 Street, Suite 4401, in Fresno, California, 93721, to provide testimony, and to bring with her and
7 produce for examination documents in obedience to the summons that issued on August 12,
8 2008.

9 This report and recommendation is submitted to the United States District Court Judge
10 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636 (b)(1)(B) and Rule 72-304 of
11 the Local Rules of Practice for the United States District Court, Eastern District of California.
12 Within thirty (30) days after being served with a copy, any party may file written objections with
13 the Court and serve a copy on all parties. Such a document should be captioned “Objections to
14 Magistrate Judge’s Findings and Recommendations.” Replies to the objections shall be served
15 and filed within ten (10) court days (plus three days if served by mail) after service of the
16 objections. The Court will then review the Magistrate Judge’s ruling pursuant to 28 U.S.C. § 636
17 (b)(1)(C). The parties are advised that failure to file objections within the specified time may
18 waive the right to appeal the District Court’s order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir.
19 1991).

20
21
22 IT IS SO ORDERED.

23 **Dated: November 16, 2009**

/s/ Gary S. Austin
UNITED STATES MAGISTRATE JUDGE