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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

IN THE MATTER OF THE TAX
LIABILITIES OF:

No. 2:10-mc-00130-MCE-EFB

JOHN DOES, United States
taxpayers, who during any
part of the period January 1,
2005, through December 31,
2010, transferred real
property in the State of
California for little or no
consideration subject to
California Propositions 58 or
193, which information is in
the possession of the State of
California Board of
Equalization, sent to BOE by
the 58 California counties
pursuant to Propositions 58
and 193.

MEMORANDUM AND ORDER

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Presently before the Court is the United States' Ex Parte
Petition for Leave to Serve "John Doe" Summons ("Petition"). By
way of its Petition, the United States seeks leave to serve,
pursuant to 26 U.S.C. § 7609(f), an Internal Revenue Service
("IRS") "John Doe" Summons (hereafter "Summons") on California's
Board of Equalization ("BOE"). For the following reasons, the
United States' Petition is denied without prejudice.

1 **BACKGROUND¹**

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3 The United States' current request derives from its need for
4 information pertaining to property transfers that may affect the
5 federal gift and estate taxes. Any person making "gifts" in
6 excess of the annual exclusion amount must file a "Form 709
7 United States Gift (and Generation-Skipping Transfer) Tax Return"
8 ("Form 709"). 26 U.S.C. §§ 2503(b), 6019(a). Taxpayers have a
9 lifetime credit against gift taxes, and Form 709 is used to track
10 the amount of credit both: 1) utilized by the taxpayer; and
11 2) remaining for future use. *Id.*, § 2505.

12 In addition, estate taxes may be due based on the value of
13 an estate when transferred. *Id.*, § 2001. The estate tax owed
14 includes certain taxable gifts reported on Form 709 during the
15 decedent's lifetime. *Id.*

16 The IRS has recently realized "a pattern of taxpayers
17 failing to file Forms 709" for real property transfers between
18 non-spouse related parties. The IRS has thus launched a
19 "Compliance Initiative" to investigate those taxpayers who have
20 failed to file Forms 709. As a part of this Compliance
21 Initiative, the government has sought to capture data from states
22 and counties regarding real property transfers taking place
23 between non-spouse family members for little or no consideration
24 during the period of January 1, 2005, through December 31, 2010.

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¹ Unless otherwise stated, the following facts are taken
28 from the United States' Memorandum in Support of Ex Parte
Petition for Leave to Serve "John Doe" Summons.

1 Due to the structure of its own property tax system,
2 California, like many other states, segregates the information
3 sought by the IRS from other real property transfers. In
4 California, increases in property taxes on a particular parcel of
5 property are capped at two (2) percent per year, unless there is
6 a change in property ownership. Cal. Const. art. 13A § 2.
7 Propositions 58 and 193, however, extended this property tax cap
8 to certain transfers of property from parents to children and
9 grandparents to grandchildren. Id., § 2(h)(1)-(2); Cal. Rev. &
10 Tax. Code § 63.1. To benefit from these Propositions, California
11 taxpayers must file Forms BOE-58-AH (Claim for Reassessment
12 Exclusion for Transfer Between Parent and Child) or BOE-58-G
13 (Claim for Reassessment Exclusion for Transfer Between
14 Grandparent and Grandchild). Declaration of Josephine Bonaffini
15 ("Bonaffini Decl."), ¶ 14. These forms are filed with the local
16 county assessor's office, and the respective assessor's offices
17 then forward the information from the forms to the BOE. Id. The
18 BOE maintains a statewide database of the information garnered
19 from these forms. Id.

20 Because the BOE maintains the Propositions 58 and 193
21 information in a format that separates the property transfers
22 relevant to the IRS Compliance Initiative from all other property
23 transfers, the IRS has asked the BOE to turn over this data.
24 Unlike many other states, however, the BOE has refused to
25 disclose the requested information absent a summons because
26 California law prohibits the disclosure of personal information
27 without written consent unless required by law. Cal. Civ. Code
28 § 1798.24.

1 Having been unable to secure the BOE's informal cooperation, the
2 United States now seeks, pursuant to 26 U.S.C. §§ 7602(a) and
3 7609(f), a John Doe Summons ordering the State of California to
4 produce the requested information.

5
6 **ANALYSIS**
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8 "For the purpose of ascertaining the correctness of any
9 return, making a return where none has been made, [or]
10 determining the liability of any person for any internal revenue
11 tax...", the Internal Revenue Code empowers the Secretary of the
12 Treasury, or its delegate, "[t]o summon the person liable for tax
13 or required to perform the act...or any person having possession,
14 custody, or care of books of account containing entries relating
15 to the business of the person liable for tax or required to
16 perform the act, or any other person the Secretary may deem
17 proper...to produce such books, papers, records, or other data,
18 and to give such testimony...as may be relevant or material to
19 such inquiry. 26 U.S.C. §§ 7602(a), 7701(11).

20 The IRS power to summon extends even to those situations in
21 which the identity of the taxpayer is unknown. 26 U.S.C.
22 § 7609(f). This power is somewhat limited, however, because
23 where, as here, the IRS seeks to summon information that pertains
24 to an unknown taxpayer and is in the custody of a third party,
25 the United States must first make a showing to a court that:

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1 These conclusory assertions do not provide any detail
2 regarding the IRS's contacts with the BOE. For example, it is
3 unclear who at the IRS contacted the BOE,² who within the BOE was
4 contacted, when these contacts occurred, or whether, prior to
5 filing its Petition, the United States exhausted all of its
6 remedies within the BOE to try to obtain the information sought.

7 Likewise, though the IRS states that the BOE is the only
8 agency from which the necessary data is readily available, the
9 United States' papers indicate that the information is filed with
10 each of California's counties prior to being forwarded to the
11 BOE. It thus remains unclear why information pertaining to the
12 specific property transactions critical to the IRS Compliance
13 Initiative cannot be obtained directly from the counties without
14 resort to a review of every property transaction conducted
15 throughout the State of California.

16 Accordingly, because the United States has failed to show
17 that the information sought cannot be obtained from another
18 readily available source, the instant Petition is denied without
19 prejudice.

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24 ² According to the only declaration submitted in conjunction
25 with the Petition, the declarant, Ms. Bonaffini, is responsible
26 for contacting "IRS Governmental Liaisons in state governments"
27 and the "Government Liaison then makes contact with the state or
28 county government authorities to facilitate disclosure of data in
order to help the IRS identify taxpayers who may have failed to
file required Forms 709." Id., ¶ 5. No declaration from any
"Government Liaison" actually responsible for contacting the BOE
is before the Court.

1 It bears mention here as well, however, that, should the
2 United States choose to renew its Petition, this Court has
3 serious concerns about the fact that the United States seeks to
4 utilize the power of a federal court to sanction the issuance of
5 a John Doe Summons upon a state. Indeed, the Court's own review
6 of the case law has revealed no other circumstances on par with
7 the United States' current request. As such, prior to
8 resubmitting the Petition, the United States is cautioned that it
9 must address, inter alia, the following issues:

- 10 1) Whether a state is a "person" as that word is used
11 in 26 U.S.C. §§ 7602(a) and 7609(f);
- 12 2) Whether a state's sovereign immunity precludes
13 issuance of a John Doe Summons;
- 14 3) Whether, assuming a state is subject to the Court's
15 power to issue a John Doe Summons, the United States
16 must exhaust all administrative remedies prior to
17 proceeding in federal court; and
- 18 4) Whether the United States should be required to
19 attempt to pursue any and all state court remedies
20 prior to seeking relief in federal court.

21 The Government is strongly advised to be thorough in any future
22 briefing since it will be asking this Court to make a decision
23 ex parte without the benefit of any similar briefing from the
24 state.

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1 **CONCLUSION**

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3 Accordingly, for the reasons just stated, the United States'
4 Ex Parte Petition for Leave to Serve "John Doe" Summons is DENIED
5 without prejudice.

6 IT IS SO ORDERED.

7 Dated: May 20, 2011

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MORRISON C. ENGLAND, JR.
11 UNITED STATES DISTRICT JUDGE
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