

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA and)
ROBERT SCOTT, Revenue Officer,)
)
Petitioners,)
)
v.)
LAUGHLIN GILLIES,)
)
Defendant.)
_____)

No. [11-CV-03623] MEJ
~~PROPOSED~~
(1) ORDER THAT CASE BE
REASSIGNED TO DISTRICT COURT
JUDGE, AND (2) REPORT AND
RECOMMENDATION THAT VERIFIED
PETITION TO ENFORCE IRS SUMMONS
BE GRANTED

This matter is before the court on an order to show cause why respondent Laughlin Gillies should not be required to appear before the Internal Revenue Service (IRS) in compliance with an IRS summons. Mr. Gillies did not file any papers in response to the order to show cause. Because respondent has not consented to proceed before a magistrate judge, the undersigned has prepared a report and recommendation as to the instant petition and directs the Clerk of the Court to reassign this case to a District Court Judge. Having considered the moving papers and all other evidence of record, this court recommends that the petition be GRANTED.

I. BACKGROUND

According to the petitions, the IRS is conducting an investigation to determine respondent's tax liabilities for tax year 2006, and quarterly tax periods ending December 31, 2007, March 31, 2008, and June 30, 2008. (Pet. ¶ 2). Petitioners believe that respondent has possession and control of records, documents and other information concerning the IRS's

1 inquiry, as to which the IRS has no access, possession or control. (See id. ¶ 5). As part of its
2 investigation, petitioners served a summons on respondent; and, the record before the court
3 shows that service properly was made pursuant to 26 U.S.C. § 7603.¹ On January 7, 2011,
4 petitioner Scott served a summons on respondent by leaving an attested copy of the summons
5 with Paul Peloso, a person who identified himself as respondent's roommate and who appeared
6 to be over 18 years of age, at respondent's last and usual place of abode. (See id. ¶ 6 and Ex. A).
7 Respondent did not appear on January 24, 2011, as requested. When respondent failed to appear,
8 he was given another opportunity to appear and comply on February 14, 2011. Respondent again
9 failed to appear. (See id. ¶¶ 8-10 and Ex. B).

10 On July 22, 2011, petitioners filed the instant verified petition to enforce the summons.
11 On July 22, 2011, this court issued an order to show cause, setting a hearing for November 10,
12 2011. On November 2, 2011, petitioners applied to continue the show cause hearing until
13 November 14, 2011. On November 3, 2011, this court granted petitioners' application, and
14 continued the hearing until November 14, 2011. Petitioners have submitted evidence showing
15 that the order to show cause and verified petition were served on respondent on August 26, 2011.
16 (Docket #6). Petitioners have submitted evidence showing that the order continuing the show
17 cause hearing was served on respondent on November 8, 2011. (See Docket #10). However,
18 Mr. Gillies never filed a written response to the order to show cause or the verified petition.

19 II. DISCUSSION

20 Under 26 U.S.C. § 7602(a), the IRS is authorized to issue a summons relevant to the
21 investigation of any taxpayer's liability. Summonses may be issued for the purposes of
22 "ascertaining the correctness of any return, making a return where none has been made,
23 determining the liability of any person for any internal revenue tax or . . . collecting any such
24 liability." 26 U.S.C. § 7602(a); see also Crystal v. United States, 172 F.3d 1141, 1143 (9th Cir.

25
26 ¹ Title 26 United States Code, Section 7603 provides that service of summons shall be
27 made "by an attested copy delivered in hand to the person to whom it is directed, or left at his last
28 and usual place of abode." 26 U.S.C. § 7603(a). Further, "the certificate of service signed by the
person serving the summons shall be evidence of the facts it states on the hearing of an
application for the enforcement of the summons." Id.

1 1999) (quoting 26 U.S.C. § 7602(a)). To enforce a summons, the IRS must establish a prima
2 facie case for enforcement by showing that the summons (1) is issued for a legitimate purpose;
3 (2) seeks information relevant to that purpose; (3) seeks information that is not already in the
4 IRS's possession; and (4) satisfies all of the administrative steps set forth in the Internal Revenue
5 Code. United States v. Powell, 379 U.S. 48 57-58 (1964). "The government's burden is a slight
6 one, and may be satisfied by a declaration from the investigating agent that the Powell
7 requirements have been met." Crystal, 172 F.3d at 1144 (quoting United States v. Dynavac, Inc.,
8 6 F.3d 1407, 1414 (9th Cir. 1993)). "The burden is minimal because the statute must be read
9 broadly in order to ensure that the enforcement powers of the IRS are not unduly restricted." Id.
10 (quoting Liberty Fin. Servs. v. United States, 778 F.2d 1390, 1392 (9th Cir.1985)).

11 Once the government has met its burden in establishing the Powell elements, if the
12 taxpayer chooses to challenge the enforcement, he bears a heavy burden to show an abuse of
13 process or lack of good faith on the part of the IRS. Indeed, "[e]nforcement of a summons is
14 generally a summary proceeding to which a taxpayer has few defenses." Crystal, 172 F.3d at
15 1144 (quoting United States v. Den, 968 F.2d 943, 945 (9th Cir. 1992)). "The taxpayer must
16 allege specific facts and evidence to support his allegations of bad faith or improper purpose."
17 Id. (quoting United States v. Jose, 131 F.3d 1325, 1328 (9th Cir. 1997)). As explained by the
18 Ninth Circuit:

19 The taxpayer may challenge the summons on any appropriate grounds,
20 including failure to satisfy the Powell requirements or abuse of the court's process.
21 Such an abuse would take place if the summons had been issued for an improper
22 purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral
23 dispute, or for any other purpose reflecting on the good faith of the particular
24 investigation. In addition, it has become clear since Powell that gathering evidence
25 after having decided to make a recommendation for prosecution would be an
26 improper purpose, and that the IRS would be acting in bad faith if it were to pursue
27 a summons enforcement under these circumstances. While neither the Powell
28 elements nor the LaSalle requirements is an exhaustive elaboration of what good
faith means, still the dispositive question in each case is whether the Service is
pursuing the authorized purposes in good faith.

26 Id. at 1144-45 (internal quotes and citations omitted).

27 While the government's burden is not great, it is not necessarily satisfied by an agent's
28 mere assertion of relevance. United States v. Goldman, 637 F.2d 664, 667 (9th Cir. 1980). Once

1 a summons is challenged, it must be scrutinized by the court to determine whether it seeks
2 information relevant to a legitimate investigative purpose, and the court may choose either to
3 refuse enforcement or narrow the scope of the summons. Goldman, 637 F.2d at 668.

4 In the instant case, petitioners have met their initial burden of showing that the Powell
5 elements have been satisfied, largely through the verification of the petition by Revenue Agent
6 Scott. See Crystal, 172 F.3d at 1144 (finding that the special agent's declaration satisfied the
7 Powell requirements and that the government therefore "established a prima facie case to enforce
8 the summonses"); Dynavac, Inc., 6 F.3d at 1414 (stating that the government's burden "may be
9 satisfied by a declaration from the investigating agent that the Powell requirements have been
10 met."); United States v. Bell, 57 F. Supp.2d 898, 906 (N.D. Cal. 1999) ("The government usually
11 makes the requisite prima facie showing by affidavit of the agent.").

12 Here, the verified petition indicates that the IRS's investigation is being conducted for a
13 legitimate purpose of ascertaining respondent's tax liabilities for certain periods of time. (See
14 Pet. ¶ 2). The summons is relevant to that purpose. It indicates that petitioner is determining
15 respondent's tax liabilities for the calendar year 2006, and quarterly tax periods ending December
16 31, 2007, March 31, 2008, and June 30, 2008. The summons asks him to appear and bring with
17 him documents pertaining to his income and expenses during that period (e.g., bank statements,
18 checkbooks, canceled checks, saving account passbooks, records or certificates of deposit). (See
19 id. A). The petition further indicates that the information is not already in the IRS's possession,
20 that there has been no referral for criminal prosecution of this matter, and that all administrative
21 steps required by the Internal Revenue Code for the issuance of the summons have been taken.
22 (See Pet. ¶¶ 5, 11, 12, and Exs. A and B).

23 Although the record presented demonstrates that respondent was duly served with notice
24 of these proceedings, he failed to respond at all to the verified petition or the court's order to
25 show cause. Accordingly, he has not met his burden of showing an abuse of process or lack of
26 good faith on the part of the IRS, and this court recommends that the verified petition to enforce
27 the IRS summonses be GRANTED.

1 **III. RECOMMENDATION**

2 Based on the foregoing, this court recommends that the petition be granted and that an
3 order be issued enforcing the IRS summonses and directing Mr. Gillies to appear before the IRS
4 on a date certain to provide testimony and produce the requested documents and records.

5 Any party may file objections to this report and recommendation with the district judge
6 within ten days after being served with a copy. See 28 U.S.C. § 636(b)(1)(B), (C); Fed. R. Civ.
7 P. 72(b); Civ. L.R. 72-3.

8 Petitioners are instructed to promptly serve a copy of this report and recommendation on
9 respondent and to file a proof of service with the court.

10
11
12 Dated: November 18 2011



MARIA E. JAMES
United States Magistrate Judge

