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3 UNITED STATES DISTRICT COURT  
4 NORTHERN DISTRICT OF CALIFORNIA

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6 **JOSEPH GARY BAXTER AND PATRICIA  
MARY BAXTER,**

7 Petitioners,

8 v.

9 **UNITED STATES OF AMERICA,**

10 Respondent.

Case No. 15-cv-04764-YGR

**ORDER ON FIRST AMENDED PETITION TO  
QUASH; RESPONDENTS' MOTION FOR  
SUMMARY DENIAL OF FIRST AMENDED  
PETITION TO QUASH**

Re: Dkt. Nos. 7, 10, 16, 20

11 Petitioners Joseph Baxter and Patricia Baxter (“Baxters” or “petitioners”) bring this action  
12 against the United States (“government”), seeking to quash third party summonses the Internal  
13 Revenue Service (“IRS”) served on the California Supreme Court for documents related to  
14 payments made to petitioners. The government opposed and filed a motion for summary denial of  
15 the first amended petition to quash (“FAP”). Having carefully considered the papers submitted<sup>1</sup>  
16 and the pleadings in this action, oral argument held February 2, 2016, and for the reasons  
17 discussed below, the Court **GRANTS IN PART** the first amended petition to quash and **GRANTS IN**  
18 **PART** the motion for summary denial.

19 **I. FACTUAL AND PROCEDURAL BACKGROUND**

20 The IRS randomly chose the Baxters as participants for a National Research Program  
21 (“NRP”) audit for the 2011 tax year. (Dkt. No. 7, FAP ¶ 6.) The NRP examination led to an  
22 investigation into the Baxters’ 2011 tax liabilities, which in turn resulted in the opening of an  
23 examination of their 2012 federal income tax liabilities. (*See id.* ¶ 8.) On September 25, 2015,

24  
25 <sup>1</sup> Petitioners filed a motion to strike the government’s reply in support of its motion for  
26 summary denial (Dkt. No. 16), arguing the government’s reply was filed in violation of the Civil  
27 Local Rules and this Court’s prior scheduling orders. Petitioners’ motion to strike is **DENIED**.  
28 The Civil Local Rules entitle the government to file a reply in support of its motion and the  
Court’s prior scheduling orders allowed the same, even if not explicitly. Petitioners’ arguments to  
the contrary do not persuade. Moreover, petitioners’ motion to enlarge or shorten time to  
accommodate briefing on the motion to strike (Dkt. No. 20) is **DENIED AS MOOT**. All motions  
were fully briefed and addressed at the February 2, 2016 hearing.

1 IRS agent Shirley Steen served two IRS third-party summonses on the California Supreme Court  
2 directing them to provide “documents relating to billing statements, invoices, or other documents  
3 resulting in payments to Petitioners, contracts operable during those time periods, and other  
4 information about how attorneys are paid by the Judicial Council.” (Dkt. No. 10-2, “Steen Decl.,”  
5 ¶ 11.) Petitioner Joseph Baxter, who is an attorney, represents capital defendants and is paid for  
6 that work by the California Supreme Court. (FAP ¶ 9.) One summons served on the California  
7 Supreme Court requested documents for the 2011 taxable year (the “Summons for 2011”) and  
8 another requested documents for the 2012 taxable year (the “Summons for 2012”). (*Id.* ¶¶ 1, 8.)

9 On the same day, September 25, 2015, Agent Steen sent separate notices of service for  
10 each summons by certified mail to the Baxters, and both were returned as unclaimed mail. (Steen  
11 Decl. ¶¶ 12, 15.) In addition, Agent Steen sent a notice of service of the Summons for 2011 to the  
12 Baxters’ personal representative, Sara Baxter, petitioners’ attorney of record in this action. (*Id.* ¶  
13 12.) A similar notice of service of the Summons for 2012 was not sent to Sara Baxter because she  
14 was not listed as the petitioners’ personal representative for their 2012 federal income tax  
15 liabilities. (*Id.*)

16 On October 15, 2015 – twenty days after the notices were sent – petitioners instituted this  
17 action, filing a petition to quash the Summons for 2011. (Dkt. No. 1.) October 20, 2015,  
18 petitioners filed the FAP, which also seeks to quash the Summons for 2012. (FAP p. 2 n. 1.)  
19 According to petitioners, they were “never served with the [Summons for 2012] and thus did not  
20 include it within their [original] petition to quash.” (*Id.*) Petitioners became aware of the  
21 Summons for 2012 on October 19, 2015, when counsel for the California Supreme Court informed  
22 petitioners’ attorney thereof. (*Id.*) The FAP seeks to quash both summonses on several grounds,  
23 including that: (1) the IRS failed to provide petitioners advance notice it would contact the  
24 California Supreme Court in violation of 26 U.S.C. section 7602(c)(1), and (2) the documents the  
25 IRS seeks are protected by the attorney-client privilege.

26 In opposition to the FAP, the government contends that petitioners cannot challenge the  
27 Summons for 2012 because the FAP was untimely with respect to that summons. The government  
28 further contends that FAP should be denied as to both the Summons for 2011 and Summons for

1 2012 because it satisfied the requirements for enforcement of an administrative IRS summons as  
2 announced by the Supreme Court in *United States v. Powell*, 379 U.S. 48 (1964), including the  
3 advance notice requirement. Petitioners’ assertion of attorney-client privilege fails, according to  
4 the government, because petitioners fail to show the documents would reveal the substance of  
5 protected communications between attorney and client. Based thereon, the government requests  
6 that the Court deny petitioners’ request that it quash both summonses.

7 **II. THE SUMMONS FOR 2011**

8 To enforce a summons or dismiss a petition to quash a summons, the government must  
9 first establish a prima facie case of good faith by making a showing that: (1) the underlying  
10 investigation is for a legitimate purpose, (2) the inquiry requested is relevant to that purpose, (3)  
11 the information sought is not already in the government’s possession, and (4) the administrative  
12 steps required by the Internal Revenue Code (“IRC”) have been followed. *Powell*, 379 U.S. at 57-  
13 58. The government’s burden is “minimal” and “[a] prima facie case of good faith typically is  
14 made through the introduction of the sworn declaration of the revenue agent who issued the  
15 summons.” *United States v. Gilleran*, 992 F.2d 232, 233 (9th Cir. 1993). If the government  
16 establishes its prima facie case, the burden of proof shifts to the party challenging the summons to  
17 show “abuse of process” or “the lack of institutional good faith.” *United States v. Dynavac, Inc.*, 6  
18 F.3d 1407, 1414 (9th Cir. 1993).

19 The Court finds that the government has met its burden as to the first three *Powell*  
20 requirements. First, the Summons for 2011 was issued for the legitimate purpose of investigating  
21 the IRS’s suspicion of unreported income. (Steen Decl. ¶¶ 7, 9.) The government may use its  
22 summons authority “merely on suspicion that the law is being violated, or even just because it  
23 wants assurance that it is not.” *Powell*, 379 U.S. at 57. Second, the relevance requirement is  
24 satisfied here. As the source of a significant amount of petitioners’ income during 2011, the  
25 California Supreme Court is an obvious entity to summons upon suspicion of unreported income.  
26 (*Id.* ¶ 18.) Third, the government has submitted testimony indicating the summonsed information  
27 is not already in the government’s possession. (*Id.* ¶ 16) For example, the bank records already in  
28 the government’s possession do not reveal all relevant information, such as the reason for

1 payment, which would allow the IRS to determine which payments were taxable income and  
2 which were not.

3 As to compliance with IRC’s administrative steps (element four), the government has not  
4 met its burden under *Powell*. The IRC limits IRS contact with third parties to occur only after  
5 notice of the contact is given to the taxpayer:

6 An officer or employee of the Internal Revenue Service may not  
7 contact any person other than the taxpayer with respect to the  
8 determination or collection of the tax liability of such taxpayer  
9 without providing reasonable notice in advance to the taxpayer that  
10 contacts with persons other than the taxpayer may be made.

11 26 U.S.C. § 7602(c)(1). It is uncontested that the IRS did not provide advance notice to the  
12 Baxters of its intent to make contact specifically with the California Supreme Court. Instead, the  
13 government argues that it satisfied this requirement on July 25, 2013 by providing petitioners with  
14 generic notice, *i.e.* IRS Publication 1, which states that the IRS will “sometimes talk with other  
15 persons if [they] need information that [the taxpayers] have been unable to provide.” (Steen Decl.  
16 ¶ 8, Exh. A.) The Court finds that the advance notice procedure cannot be satisfied by the  
17 transmission of a publication about the audit process generally. The IRC and its implementing  
18 regulations highlight that advance notice should be specific to a particular third party. For  
19 example, a contact is “authorized” and therefore not subject to the advance notice requirement if  
20 the “taxpayer or the taxpayer’s authorized representative requests or approves *the contact*.” 26  
21 C.F.R. § 301.7602-2(f)(1)(i)(B) (emphasis supplied). In that regard, the implementing regulations  
22 contemplate notice for each contact, not a generic publication’s reference that the IRS may talk to  
23 third parties throughout the course of an investigation. The government’s argument that  
24 Publication 1 satisfied their obligation of advance notice under Section 7602(c)(1) does not  
25 persuade.

26 In light of petitioners’ objection to their administrative compliance, the government  
27 professes to be “unclear [as to] what additional notice Petitioners (an attorney and his spouse),  
28 represented in at least one examination by another attorney, are demanding from the IRS.” (Dkt.  
No. 15 at 9:9-11.) The Court is not persuaded by this unsubstantiated proffer. No agent swore of  
such confusion. As the government concedes, petitioners were not “strangers to IRS audits.” (*Id.*

1 at 9:13.) Advance notice could have been satisfied in myriad ways. *See* 26 C.F.R. § 301.7602-  
2 2(d)(1) (“pre-contact notice may be given either orally or in writing”); *Highland Capital*  
3 *Management LP v. United States*, --Fed.Appx.--, 2015 WL 5692377 (2d Cir. Sept. 29, 2015)  
4 (finding oral notice to taxpayers sufficient to satisfy Section 7602(c)(1)’s advance notice  
5 requirement before issuing third party administrative summons). In short, the IRS simply failed in  
6 this particular administrative duty.

7 The government having failed to show compliance with the administrative steps provided  
8 in the IRC, the Summons for 2011 cannot be enforced. *See Powell*, 379 U.S. at 57-58.  
9 Petitioners’ motion to quash the Summons for 2011 is **GRANTED**.

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11 Should the government choose to satisfy the advance notice requirement and subsequently  
12 re-issue the Summons for 2011, the government must also comply with the parameters as set forth  
13 with respect to the Summons for 2012, *infra*, to avoid disclosure of privileged materials.  
14 Specifically, any such summons issued by the government shall direct the California Supreme  
15 Court to first deliver the summonsed documents to the Court for an *in camera* review to determine  
16 whether the documents contain any privileged attorney-client communications.

17 Prior to re-issuing the Summons for 2011, the government shall also meet and confer with  
18 petitioners to ensure compliance with *Powell*, including efforts to narrow the scope of the  
19 summons to include only information not already in the possession of the government.

20 **III. THE SUMMONS FOR 2012**

21 With respect to the Summons for 2012, the Court is without jurisdiction to address the  
22 petition to quash. Proceedings to quash an IRS summons must be filed no later than the twentieth  
23 day after the notice of a third-party summons is mailed to petitioners. 26 U.S.C. § 7609(b)(2)(A);  
24 *Mollison v. United States*, 568 F.3d 1073, 1076 (9th Cir. 2009). The twenty-day limitations period  
25 is jurisdictional and “is a condition precedent to the waiver of sovereign immunity.” *Ponsford v.*  
26 *United States*, 771 F.2d 1305, 1309 (9th Cir. 1985). Here, it is undisputed the FAP was filed to  
27 include a challenge to the Summons for 2012 more than twenty days after the IRS mailed it to  
28 petitioners. Petitioners argue that the Court may nevertheless assert jurisdiction over the

1 government for three reasons,<sup>2</sup> namely because: (1) Rule 15 allows for relation back to the date of  
2 the original petition, within the twenty-day period; (2) petitioner Joseph Baxter was in San Diego  
3 when notice was mailed to him; and (3) the IRS failed to serve notice of the Summons for 2012 on  
4 their personal representative Sara Baxter. The Court addresses petitioners' arguments in turn.

5 First, petitioners correctly assert that Rule 15(a)(1) allows amendment to pleadings as a  
6 matter of course. However, new allegations and claims in an amended pleading do not  
7 automatically date back to the time of the original pleading for purposes of limitation periods,  
8 such as Section 7609(b)(2)(A). *See* Fed.R.Civ.P. 15(c). Pursuant to Rule 15(c), an amended  
9 pleading relates back to the time of the original pleading when "the law that provides the  
10 applicable statute of limitations allows relation back" or where "the amendment asserts a claim or  
11 defense that arose of the conduct, transaction, or occurrence set out – or attempted to be set out –  
12 in the original pleading." Here, Section 7609 does not allow relation back to quash an IRS  
13 summons. In fact, no statutory provision allows for relation back in this instance. Next, the  
14 Summons for 2012 is a separate transaction not addressed by the original petition, which only  
15 challenged the Summons for 2011. *See Henderson v. United States*, 1999 WL 810380 (D.Co.  
16 Aug. 17, 1999) (denying motion to amend petition to quash where amendment would add  
17 untimely challenge of summons to same third-party entity as original petition for records  
18 pertaining to different tax year). Relation back under Rule 15(c) cannot save this jurisdictional  
19 defect.

20 With respect to petitioners' second argument, they claim that notice was never "given"  
21 because petitioner Joseph Baxter was away in San Diego when the notice was mailed to his home  
22 address. *See* 26 U.S.C. § 7609(b)(2)(A). In that regard, petitioners argue that the clock on the  
23 twenty-day period never started because notice was not properly given under the statute. The  
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25 <sup>2</sup> In reply, petitioners raised a fourth argument: the related proceeding is consolidated  
26 herewith, conferring the Court with jurisdiction to not allow the government to enforce the  
27 Summons for 2012 during the pendency of the related proceeding. However, petitioners did not  
28 provide and the Court cannot discern any authority by which it may exercise jurisdiction over the  
sovereign to adjudicate a claim for which the government has not waived immunity to suit.  
Consolidation would not alter the analysis. And, the other proceeding to which petitioners refer is  
administratively related and not consolidated herewith. *See* Case No. 15-cv-02138-YGR.

1 Court disagrees. Section 7609 requires notice be sent by certified mail to petitioners’ “last known  
2 address.” Petitioners do not contend that the address to which Agent Steen sent the notices does  
3 not meet that definition. The Court finds that notice was “given” to petitioners when the notice  
4 was sent by certified mail on September 25, 2015, triggering the twenty-day period.

5 Finally, petitioners similarly argue that the twenty-day period never started because the  
6 IRS failed to give notice of the Summons for 2012 to their personal representative, Sara Baxter.  
7 Petitioners fail to provide any authority for the proposition that Sara Baxter was entitled to notice  
8 of the Summons for 2012. Although Sara Baxter is the personal representative for petitioners in  
9 connection with their 2011 tax liabilities, petitioners had not designated her as their personal  
10 representative for their 2012 tax liabilities. (Steen Decl. ¶ 12.) Regardless, petitioners argue that  
11 the government had actual knowledge that Sara Baxter represented petitioners in connection with  
12 their 2012 tax liabilities because she is their attorney of record in a related action challenging  
13 evaluation of their 2012 tax liabilities. *See* Case No. 15-cv-02138-YGR (Dkt. No. 1). While  
14 understanding the practical attractiveness of this argument, petitioners have provided no authority  
15 upon which the Court may impose such an obligation on the government.

16 Petitioners’ failure to institute a proceeding to quash the Summons for 2012 within the  
17 twenty-day period divests the Court of jurisdiction over their petition to quash the same. The  
18 government’s motion is **GRANTED** with respect to the Summons for 2012.

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20 While the Court cannot entertain a petition to quash the Summons for 2012, it must be  
21 assured that the attorney-client privilege will not be violated thereby. Petitioners’ assertions of  
22 privilege are not as conclusory as the government suggests. For example, it is plausible that  
23 attorney billing records submitted to the California Supreme Court could reveal litigation strategy.  
24 *See Clarke v. American Commerce Nat. Bank*, 974 F.2d 127, 129 (9th Cir. 1992) (“ledgers,  
25 statements, and time records which also reveal ...litigation strategy, or the specific nature of the  
26 services provided, such as researching particular areas of law, fall within the privilege”).

27 To determine whether the documents contain privileged material, and prevent disclosure of  
28 the same, the documents produced by the California Supreme Court shall be subject to an *in*

1 camera review by the Court prior to disclosure. *See United States v. Zolin*, 491 U.S. 554, 574-75  
2 (1989) (courts often review contested material when parties disagree whether a privilege applies).

3 Accordingly, the government shall advise the California Supreme Court that the  
4 summonsed documents must be delivered to this Court prior to disclosure to the government.  
5 Once received, the Court will refer the review to a magistrate judge who will contact the parties  
6 and may order any further briefing on the topic as needed.

7 **IV. CONCLUSION**

8 Based on the foregoing, petitioners' first amended petition to quash is **GRANTED** as to the  
9 Summons for 2011, and the government's motion for summary denial is **GRANTED** as to the  
10 Summons for 2012. The petition and motion are otherwise **DENIED**.

11 This Order terminates Docket Numbers 7, 10, 16, and 20.

12 **IT IS SO ORDERED.**

13 Dated: February 8, 2016

14   
15 YVONNE GONZALEZ ROGERS  
16 UNITED STATES DISTRICT COURT JUDGE