

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

UNITED STATES OF AMERICA,
Petitioner,
v.
JOSE HERNANDEZ,
Respondent.

Case No. [5:17-cv-00040-HRL](#)

**ORDER FOR REASSIGNMENT TO A
DISTRICT JUDGE**
**REPORT RECOMMENDATION RE
PETITION TO ENFORCE IRS
SUMMONSES**

Re: Dkt. No. 1

This matter is before the court on an order to show cause why respondent Jose Hernandez should not be required to comply with Internal Revenue Service (IRS) summonses. Because not all parties have consented to proceed before a magistrate judge, see 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73, 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 judge. Based upon the record presented, as well as the discussion at the March 21, 2017 show cause hearing, this court recommends that the petition be GRANTED.

BACKGROUND

According to the petition, the IRS is investigating the collection of respondent's tax liabilities for 2004-2007, 2009, and 2013-2015. (Pet. ¶ 3, Exs. A & B). The United States (petitioner) believes that Hernandez has possession and control of records, documents and other

1 information concerning the IRS’s inquiry, as to which the IRS has no access, possession or
2 control. (See *id.* ¶ 5). As part of its investigation, petitioner served two summonses on
3 respondent; and, the record before the court shows that service properly was made pursuant to 26
4 U.S.C. § 7603.¹ (*Id.* ¶ 6, Exs. A & B). However, Hernandez did not appear or produce testimony
5 or records as requested by the summonses. (See *id.*, ¶ 8). By letter dated December 1, 2016,
6 respondent was given another opportunity to comply with the summonses by appearing for an
7 appointment with Revenue Officer Angela Phillips on December 20, 2016. (*Id.* ¶ 9, Ex. C).
8 According to the petition, Hernandez has still not complied. (*Id.* ¶ 10).

9 On January 5, 2017, petitioner filed the instant action to enforce the summonses. This
10 court issued an order to show cause, setting a briefing schedule and a hearing for March 21, 2017.
11 (Dkt. 7). The record shows that Hernandez was duly served with the verified petition and the
12 order to show cause on February 2, 2017. (Dkt. 8). However, the court received no written
13 response to the order to show cause, and Hernandez did not appear at the show cause hearing.

14 **DISCUSSION**

15 Under 26 U.S.C. § 7602(a), the IRS is authorized to issue a summons relevant to the
16 investigation of any taxpayer’s liability. Summons may be issued for the purposes of
17 “ascertaining the correctness of any return, making a return where none has been made,
18 determining the liability of any person for any internal revenue tax or . . . collecting any such
19 liability . . .” 26 U.S.C. § 7602(a); see also *Crystal v. United States*, 172 F.3d 1141, 1143 (9th
20 Cir. 1999) (quoting 26 U.S.C. § 7602(a)). To enforce a summons, the IRS must first establish
21 “good faith” by showing that the summons (1) is issued for a legitimate purpose; (2) seeks
22 information relevant to that purpose; (3) seeks information that is not already in the IRS’s
23 possession; and (4) satisfies all of the administrative steps set forth in the Internal Revenue Code.
24 *United States v. Powell*, 379 U.S. 48, 57-58 (1964). “The government’s burden is a slight one,

25
26
27
28

¹ Title 26 United States Code, Section 7603 provides that service of summons shall be made “by an attested copy delivered in hand to the person to whom it is directed, or left at his last 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 and may be satisfied by a declaration from the investigating agent that the Powell requirements
2 have been met.” Crystal, 172 F.3d at 1144 (quoting United States v. Dynavac, Inc., 6 F.3d 1407,
3 1414 (9th Cir. 1993)). “The burden is minimal ‘because the statute must be read broadly in order
4 to ensure that the enforcement powers of the IRS are not unduly restricted.’” Id. (quoting Liberty
5 Fin. Servs. v. United States, 778 F.2d 1390, 1392 (9th Cir. 1985)).

6 Once the government has met its burden in establishing the Powell elements, if the
7 taxpayer chooses to challenge the enforcement, he bears a heavy burden to show an abuse of
8 process or lack of good faith on the part of the IRS. Indeed, “[e]nforcement of a summons is
9 generally a summary proceeding to which a taxpayer has few defenses.” Crystal, 172 F.3d at
10 1144 (quoting United States v. Derr, 968 F.2d 943, 945 (9th Cir. 1992)). “The taxpayer must
11 allege specific facts and evidence to support his allegations of bad faith or improper purpose.” Id.
12 (quoting United States v. Jose, 131 F.3d 1325, 1328 (9th Cir. 1997)). As explained by the Ninth
13 Circuit:

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

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

28 While the government’s burden is not great, it is not necessarily satisfied by an agent’s
mere assertion of relevance. United States v. Goldman, 637 F.2d 664, 667 (9th Cir. 1980). Once a
summons is challenged, it must be scrutinized by the court to determine whether it seeks
information relevant to a legitimate investigative purpose, and the court may choose either to
refuse enforcement or narrow the scope of the summons. Id. at 668.

In the instant case, petitioner has met its burden of showing that the Powell elements have
been satisfied, largely through the verification of the petition by Revenue Officer Phillips. See

1 Crystal 172 F.3d at 1144 (stating that it was undisputed that the special agent’s declaration
2 satisfied the Powell requirements and that the government therefore “established a prima facie
3 case to enforce the summonses”); Dynavac, Inc., 6 F.3d at 1414 (stating that the government’s
4 burden “may be satisfied by a declaration from the investigating agent that the Powell
5 requirements have been met.”); United States v. Bell, 57 F. Supp.2d 898, 906 (N.D. Cal. 1999)
6 (“The government usually makes the requisite prima facie showing by affidavit of the agent.”).

7 Here, the verified petition indicates that the IRS’s investigation is being conducted for a
8 legitimate purpose of ascertaining respondent’s assets and liabilities as part of an effort to
9 investigate federal tax liabilities for certain periods of time. (Pet. ¶ 3). The summonses are
10 relevant to that purpose and asks respondent to appear and bring with him documents pertaining to
11 his assets and liabilities (e.g., bank statements, checkbooks, canceled checks, saving account
12 passbooks, and records or certificates of deposit). (See id., Exs. A & B). The petition further
13 indicates that the information is not already in the IRS’s possession, that there has been no referral
14 for criminal prosecution of this matter, and that all administrative steps required by the internal
15 Revenue Code for the issuance of the summons have been taken. (Id. ¶¶ 5, 7, 11-12).

16 Because petitioner has met its burden in establishing the Powell elements, the burden shifts
17 to Hernandez to disprove the actual existence of a valid civil tax determination or collection
18 purpose. As discussed above, he did not file any response to the order to show cause and did not
19 appear at the show cause hearing. This court therefore finds that he has not met his burden of
20 showing an abuse of process or lack of good faith on the part of the IRS and recommends that the
21 verified petition to enforce the IRS summonses be granted. In any event, at the motion hearing,
22 petitioner advised that it has been in contact with Hernandez’s accountant, who reports that
23 Hernandez is willing to cooperate with the government to resolve this matter.

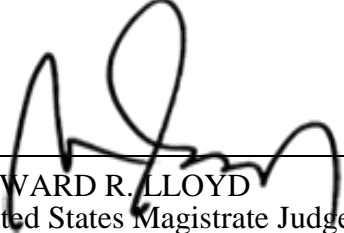
24 Based on the foregoing, this court ORDERS the Clerk of the Court to reassign this case to
25 a district judge, with the RECOMMENDATION that the petition be granted and that an order be
26 issued enforcing the IRS summonses and directing Hernandez to appear before the IRS on a date
27 certain to provide testimony and produce the requested documents and records.

28 Any party may file objections to this report and recommendation with the district judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

within 14 days after being served with a copy. See 28 U.S.C. § 636(b)(1)(B), (C); Fed. R. Civ. P.
72. Petitioner is directed to promptly serve a copy of this report and recommendation on Hernandez
and to file a proof of service with the court.

Dated: March 21, 2017



HOWARD R. LLOYD
United States Magistrate Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

5:17-cv-00040-HRL Notice has been electronically mailed to:

Thomas Moore tom.moore@usdoj.gov, CaseView.ECF@usdoj.gov,
EDWARD.SOLIS@USDOJ.GOV, kathy.tat@usdoj.gov