

# Disclosure Litigation BULLETIN

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Bulletin 2000-1

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## PROCEDURES FOR DISCLOSING TAX INFORMATION TO SATISFY BRADY v. MARYLAND

In all criminal cases the Government is under a constitutional obligation to disclose, upon a defendant's request, evidence material either to guilt or punishment (*i.e.*, exculpatory evidence), Brady v. Maryland, 373 U.S. 83 (1963). This includes evidence which may be used to impeach a Government witness, Giglio v. United States, 405 U.S. 105, 154 (1972). An issue arises in a criminal tax matter where there is tension between the constitutional principle embodied in Brady and I.R.C. § 6103, which provides for the confidentiality of returns and return information.

In most cases, because I.R.C. § 6103 permits disclosure of the defendant's tax information, as well as, generally, the tax information of third parties who are related to the defendant and related to the matter that is being prosecuted, there will be no tension. See I.R.C. § 6103(h)(4). However, in the event of a conflict, the due process clause requires the IRS to produce, upon request in a criminal tax matter, exculpatory "Brady material" notwithstanding I.R.C. § 6103. Service and Chief Counsel employees working on the matter must aid the prosecutor by reviewing third party return information, *i.e.* return information of taxpayer[s] other than the defendant, gathered or reviewed during the investigation and prosecution, that has the potential to be exculpatory, and that has not otherwise been properly disclosed to the prosecutor under I.R.C. § 6103(h)(2) and (3). Information that is determined by the Service or Counsel to be exculpatory Brady material must be turned over to the prosecutor for disclosure to the defendant.

Should a question arise as to whether information constitutes Brady material, and if I.R.C. § 6103 does not otherwise permit the disclosure, the information may be disclosed to the prosecutor for a determination as to whether it meets the requirements for disclosure to the defendant under Brady. If the information is determined to be exculpatory, the prosecutor will provide it to the defendant in accordance with Brady. If the prosecutor determines that the information is not exculpatory Brady material, it may not be further used in the matter and should be returned to the Service.

It may also be appropriate to request in camera review by the judge, who can make the Brady determination and turn over any Brady material to the defendant. Given the privacy implications which arise when third party tax information meets the Brady criteria, consideration should be given to seeking a court order limiting the use of the third party returns and return information by the defendant to the particular proceeding. See U.S. v. Moriarity, 69-1 USTC ¶ 9212 (E.D. Wisc. 1969). Finally, if the Service is not one of the investigating agencies in a prosecution, there are generally no Brady obligations. For additional guidance, the Office of the Assistant Chief Counsel (Criminal Tax) should be consulted concerning any questions about the scope of the Service's Brady obligations.

### ACCESS TO THIRD PARTY TAX DATA IN PERSONNEL RECORDS

On occasion, employees or former employees seek access to information in their own personnel files under the Freedom of Information Act (FOIA) and/or Privacy Act. Under the FOIA and the Privacy Act the employee or former employee has no right to access the tax return information of third parties which may be included in such file. See, Larue v. IRS, 1994 U.S. Dist. LEXIS 1937 (E.D. Tenn. Jan. 27, 1994); Barnard v. IRS, 48 AFTR2d 81-5157 (S.D. Fla. 1981). Accordingly, tax information is redacted when responding to a FOIA or Privacy Act request that includes third party tax information in personnel files. However, statutory authorization does exist for obtaining this information. I.R.C. § 6103(l)(4) authorizes access to tax information in a personnel file by employees or former employees for use in, or preparing for, administrative or judicial proceedings affecting their personnel rights (such as grievances, EEO complaints, or unemployment compensation cases).

I.R.C. § 6103(l)(4) authorizes the disclosure of returns and return information upon written request, to an employee or former employee (or his/her representative) who is or may be a party to any administrative action or proceeding affecting the personnel rights of such employee or former employee. Authorized recipients of returns or return information may only use the information in the action or proceeding, or in preparing for the action or proceeding, affecting their personnel rights. Although I.R.C. § 6103(l)(4) permits the disclosure of tax information for personnel related purposes, it is the Service's practice to sanitize records containing tax information by redacting identifying tax information from such records before providing them, along with a coded key, to employees or former employees (or their representatives) in order to afford third party taxpayers greater privacy protection. See Disclosure of Official Information Handbook 1.3.20.9.1(6).

The same rules apply to claimant representative matters before the Director of Practice. While the practitioner who is the subject of a disciplinary proceeding may not access third party tax information under the FOIA, access may be permitted pursuant to a written request under I.R.C. § 6103(l)(4).

## CASE DEVELOPMENTS

### TAX ANALYSTS v. IRS, 1999 U.S. Dist. LEXIS 14950 (USDC D.D.C.)

Subsequent to the production of more than 1,300 Field Service Advice (FSA) memoranda in accordance with a court ordered release schedule, the plaintiff filed a motion contesting the Service's claim of various FOIA exemptions and requesting that the court order the release of additional information from 40 specified FSAs. The court has issued three memorandum opinions, addressing FOIA exemptions (b)(5), (b)(7)(E), and (b)(3), in conjunction with I.R.C. § 6103, which exemptions formed the basis for the Service's redaction of information from the 40 specified FSAs.

In its September 3, 1999, order the court, following in camera review of the FSAs, addressed redactions made pursuant to FOIA exemptions (b)(5) (which exempts information normally privileged in the civil discovery context) and (b)(3), in conjunction with I.R.C. § 6103 (which exempts tax information the disclosure of which is prohibited by statute). The court reserved ruling on redactions based upon exemptions (b)(7)(E) and (b)(3), in conjunction with treaty secrecy provisions.

The court addressed two FSAs which contained redactions based upon (b)(5) and the attorney-client privilege. In one, the court determined that a recommendation by Counsel that the field obtain additional documentation regarding a taxpayer under audit was not "based upon confidential information transmitted by the field to the attorney," and ordered it disclosed. In the other, the court accepted the redactions based upon attorney-client privilege, concluding that revealing legal advice about whether certain information may be properly used as evidence would directly affect the scope and direction of the examination.

Three FSAs containing redactions based upon (b)(5) and the attorney work product privilege were reviewed by the court. The court found that in one, the information redacted was merely an outline of issues discussed in a docketed case and did not reveal or affect the Service's litigation strategy, and ordered it disclosed. The attorney work product redactions in the remaining two FSAs were accepted by the court on the grounds that mental impressions and recommendations by an attorney as to whether a docketed case should continue to be litigated and opinions as to the reasonableness of a particular position and the effect of specific financial information maintained by the taxpayer, are protected attorney work product.

The remainder of the court's September 3, 1999, opinion addressed FSAs in which redactions were based upon exemption (b)(3), in conjunction with I.R.C. § 6103. In seven of those FSAs the court accepted the Service's redactions. In thirteen others the court rejected at least a portion of the Service's argument that particular redactions were necessary because, absent such redactions, a person generally knowledgeable with respect to the appropriate community would be able to identify the taxpayers involved. Accordingly, the court ordered additional disclosures.

In its November 3, and November 9, 1999, orders, the court addressed three FSAs in which exemption (b)(7)(E) was claimed. Exemption (b)(7)(E) permits the withholding of law enforcement information which would disclose techniques and procedures for law enforcement investigations or prosecutions or would disclose guidelines for such investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. The court accepted the redactions in one of the FSAs agreeing with the Service that revealing information which discusses a systemic weakness with regard to the Service's computer records utilized to ascertain a taxpayer's last known address would significantly risk circumvention of law, *i.e.*, informing taxpayers about a weakness in the Service's enforcement methods of ascertaining a taxpayer's last known address. The court ordered additional disclosures in two other FSAs, including ordering the disclosure of a description of acceptable settlement criteria, reasoning that taxpayer knowledge of such criteria would not risk circumvention of the law.

Remaining to be decided are additional claims under (b)(7)(E) and (b)(3), in conjunction with tax treaty secrecy provisions.

JERRY V. RICE v. U.S., et al., 166 F.3d 1088 (10th Cir. 1999), cert. denied, 120 S. Ct. 334 (Oct. 12, 1999)

A Service public affairs officer attended plaintiff's criminal tax trial and sentencing hearing. Based upon her notes taken in court and her research on potential penalties in the Internal Revenue Code, she issued two press releases, one after the trial and one after the sentencing hearing. Plaintiff filed suit under I.R.C. § 7431 and the Privacy Act, asserting that the press releases constituted unauthorized disclosures of return information (see Disclosure Litigation Bulletin 99-2).

Citing the Seventh Circuit in Thomas v. United States, 890 F.2d 18 (7th Cir. 1989), and adopting that court's reasoning, the Tenth Circuit held that issuing the press releases based on public court documents, the trial proceedings, and her own research in the Internal Revenue Code, did not constitute a disclosure of return information. "A trial is a public event. The IRS press releases in this case did not publicize Rice's tax return information; they publicized public proceedings and documents." The Tenth Circuit found that the information disclosed in the press releases was not "return information" as defined in I.R.C. § 6103(b)(2) because the "immediate source" of the information was not a tax return or some internal document based on a return protected by I.R.C. § 6103; thus, its disclosure did not

violate § 6103. Further, in a footnote, the court held that the information did not come from a Privacy Act "system of records," and so its disclosure did not violate the Privacy Act.

The taxpayer's petition for certiorari to the Supreme Court was denied. See, Jerry V. Rice v. U.S., et al., 166 F.3d 1088 (10th Cir. 1999) cert. denied, 120 S. Ct. 334 (Oct. 12, 1999).

STANBURY LAW FIRM v. U.S., 1999 U.S. Dist. LEXIS 12170 (D. Minn. June 28, 1999)

In the FOIA request underlying this litigation plaintiff sought the list of contributors attached to the 1997 Form 990 annual tax return filed by the Page Education Foundation ("Foundation"), a public charity exempt from tax under 26 U.S.C. § 501(c)(3). The Government asserted that FOIA exemption (b)(3), in connection with 26 U.S.C. § 6103(a) and § 6104(b), prohibited the disclosure of the list of contributors. FOIA exemption (b)(3) provides for the withholding of information specifically exempted from disclosure by statute. I.R.C. § 6103(a), which prohibits the disclosure of returns and return information, and I.R.C. § 6104(b), which prohibits the disclosure of the name or address of contributors to any organization or trust (other than a private foundation, as defined in section 509(a)) required to furnish such information, are statutes within the coverage of FOIA exemption (b)(3). In opposition, plaintiff maintained that the list of contributors attached to the Foundation's Form 990 was "return information" that the Service was required to release, unless the Service determined that release would seriously impair federal tax administration under I.R.C. § 6103(e)(7). Plaintiff also argued that the Service could release the list of contributors if it exercised its discretion to classify the Page Education Foundation as a private foundation. The court rejected plaintiff's arguments, holding that the information requested was clearly exempt from disclosure pursuant to FOIA exemption (b)(3), in conjunction with § 6103(a) and § 6104(b).

Plaintiff has appealed the district court's determination to the Eighth Circuit. Stanbury Law Firm v. U.S., 1999 U.S. Dist. LEXIS 12170 (D. Minn. June 28, 1999), appeal docketed, No. 99-3138 (8th Cir. July 28, 1999).

HERNANDEZ v. U.S., 1999 U.S. Dist. LEXIS 2170 (W.D. Tex., Feb. 2, 1999) vacated, 1999 U.S. App. LEXIS 25457 (5th Cir. Sept. 23 1999)

Plaintiff, a return preparer, had her privilege of limited practice before the Service revoked. An examination group in the district notified taxpayers who were plaintiff's clients that their returns were under examination and that "the individual who prepared these returns for you is no longer eligible to represent taxpayers before the Internal Revenue Service." Examination personnel were instructed to respond to taxpayer requests why plaintiff was no longer eligible to represent them by informing them that the district director had decided to suspend plaintiff from limited practice, but that they should direct questions about the revocation itself to the plaintiff. Plaintiff brought an action under I.R.C. § 7431 for unauthorized disclosure claiming the information disclosed to her clients was a disclosure of return information in violation of I.R.C. § 6103(a). In granting the Government's motion for summary judgment, the district court determined that the revocation of plaintiff's privilege to practice before the Service did not constitute return information within the meaning of I.R.C. § 6103(b)(2); hence, there was no disclosure of any return information of the plaintiff (see Disclosure Litigation Bulletin 99-2).

On appeal, the Fifth Circuit vacated the judgment of the district court and dismissed the case for lack of jurisdiction. The circuit court reasoned that no tax information of the plaintiff was involved in the disclosure. Accordingly, plaintiff had no standing to sue as a taxpayer whose return information was disclosed in violation of I.R.C. § 6103, and thus, the district court was without jurisdiction. Hernandez v. U.S., 1999 U.S. App. LEXIS 25457 (5th Cir. Sept. 23, 1999).

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Your suggestions for topics to be included in future Bulletins are invited.