

Disclosure Litigation **BULLETIN**

This bulletin is for informational purposes; it is not a directive.

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FOIA REQUESTS BY TAXPAYERS FOR FIELD SERVICE ADVICE (FSAs) PERTAINING TO THEM

In the wake of the finality of the D.C. Circuit's opinion in the FSA lawsuit, Tax Analysts v. IRS, 117 F.3d 607 (D.C. Cir. 1997), taxpayers and their representatives have begun making FOIA requests for FSAs issued by the National Office in connection with their own cases. The following procedure has been put into place for processing such requests.

Upon receipt of these requests, disclosure officers should notify district counsel who, in turn, will contact Field Service in the National Office. George Bowden of Field Service has been designated as the contact person who will provide assistance in coordinating the disclosure determinations for FSAs, whether written by the offices of the Assistant Chief Counsel (Field Service), Assistant Chief Counsel (Employee Benefits & Exempt Organizations) or Associate Chief Counsel (International). (If district counsel receives a FSA FOIA request directly it should be forwarded to the district disclosure office, just as any other request which is received directly, for proper FOIA processing. See Statement of Procedural Rules § 601.702(c)(3)(iii) and § 601.702(g).) While requests from taxpayers for FSAs prepared in their own cases may raise FOIA exemptions not considered by the D.C. Circuit, and may be considered by the field in processing specific requests, the assertion of the exemption claims considered by the D.C. Circuit will have to be consistent with the decision in Tax Analysts, supra. Disclosure Litigation will assist Field Service should that office have inquiries regarding whether and to what extent FSAs are to be redacted.

FILING PLEADINGS ON THE INTERNET

An increasing number of courts are permitting parties to file pleadings, exhibits, correspondence and briefs via

electronic means. In fact, several federal bankruptcy courts are initiating pilot projects in which participants (including the Service) are required to file all pleadings by Internet. Attorneys should be aware of the impact of the disclosure laws on their use of this emerging medium for court filings.

I.R.C. § 6103(a) protects returns and return information from disclosure except as expressly authorized by the Internal Revenue Code. The identity of the taxpayer, as well as other information relating to the taxpayer's liability or possible liability, necessary to be introduced by the Government for prosecution, defense or other action in a civil or criminal case dealing with tax administration, is return information. I.R.C. § 6103(b)(2).

I.R.C. § 6103(h)(4) authorizes the disclosure of returns and return information in "a judicial or administrative proceeding pertaining to tax administration." The manner of making such disclosures should be in accordance with court established rules governing the service and filing of pleadings and other materials.

Rule 5(e) of the Federal Rules of Civil Procedure provides that the local rules of a federal court may permit filing of pleadings and other papers to be accomplished "by electronic means," and items filed electronically will stand on equal footing with written filings. The rule does not define "electronic means," but the Advisory Committee Notes clarify that the concept is broader than merely facsimile transmissions.

Therefore, Chief Counsel attorneys should first verify that Internet filings are within the scope of a court's local rules. If so, such filings would be in conformity with the rules governing the proceeding; consequently, any disclosures of returns or returns information contained in such filings by the Service would be authorized by I.R.C. § 6103(h)(4), assuming the other requirements of that provision are met. See I.R.C. § 6103(h)(4)(A)-(D).

The Advisory Committee Notes to Rule 5 state that "[p]ublic access to electronic filings is governed by the same rules as govern written filings." Therefore, where filed documents are to be sealed or otherwise not publicly available, appropriate security measures should be followed to ensure the information is properly protected. Any questions regarding security requirements in an electronic environment should be referred to the Assistant Chief Counsel (General Legal Services).

USE OF IDRS TO LOCATE WITNESSES

We are often asked about the authority to access the Integrated Data Retrieval System (IDRS) to locate the current

address for a witness for trial. I.R.C. § 6103(h)(1) authorizes IDRS access to locate a witness, so long as the access is within the particular employee's official tax administration duties, for example, a docket attorney locating a witness for his or her Tax Court case.

However, in order to disclose the address to the Department of Justice (DOJ) or in court, for example, on a subpoena, the disclosure would have to meet the "item" or "transactional relationship" tests in I.R.C. §§ 6103(h)(2)(B) and (C), and 6103(h)(4)(B) and (C). As a general rule, application of these tests would not permit disclosure of the third party address information to DOJ or in court. Thus, in order to disclose such address information to DOJ or in court, each item of address information would have to be independently verified by the Service or Chief Counsel from sources other than the witness/taxpayer's tax records, *i.e.*, any source other than tax records from which the information could be verified, such as a public telephone book or other public directory. The information obtained from the independent source could then be disclosed to DOJ or in court.

We point out that I.R.C. § 6103(h)(1) does not impose any duty on employees to exhaust all public means of securing witness addresses prior to accessing IDRS for the information.

VOLUNTEERS FOR THE HANDICAPPED

Inquiries are regularly received about whether volunteers utilized by the Service or Chief Counsel may access returns or return information protected by I.R.C. § 6103. Until recently, the rule has been that volunteers may not access confidential tax information unless they qualify as a student volunteer under 5 U.S.C. § 3111. However, a second category of volunteers may also have such access.

In the past, we have advised that there were only three categories of individuals who are authorized access to confidential tax information when providing services to the Service or Chief Counsel. Those categories are (1) employees (section 6103(h)(1)), (2) contractors (section 6103(n)), and (3) student volunteers (section 6103 (h)(1) in conjunction with 5 U.S.C. § 3111).

Recently, General Legal Services has concluded that volunteer assistants who assist handicapped employees in the performance of their official duties pursuant to 5 U.S.C. § 3102 (b)(1) have the status of employees even when the service is provided in a volunteer capacity. As a result, because they have the status as employees, these volunteers for the handicapped may have access to confidential tax information under section 6103 (h)(1) to the extent necessary to perform official tax

administration duties.

Questions as to whether an individual qualifies as a volunteer assistor for the handicapped under 5 U.S.C. § 3102(b) should be referred to the Assistant Chief Counsel (General Legal Services).

RECENT CASE DEVELOPMENTS

Baskin v. United States, F.3d 1998 WL 63047 (5th Cir. 1998)

In this action filed under I.R.C. § 7431 claiming damages for unauthorized disclosure of return information in violation of I.R.C. § 6103(a), the Fifth Circuit held that grand jury information, i.e., information procured pursuant to a grand jury subpoena, is not converted into return information simply because a special agent of the Internal Revenue Service is assisting in a nontax grand jury investigation.

During a grand jury investigation into crimes committed by persons other than plaintiff Baskin, a grand jury subpoena uncovered six checks made payable to the plaintiff by a corporation related to one of the persons being investigated. Baskin, a member of the Houston Police Department, was identified by the FBI and the Service for a joint investigation in 1992 or early 1993. At some point, officers from the police department's internal affairs division were placed on the grand jury list so they could obtain grand jury information. In 1993, the special agent disclosed the existence of the six checks to the internal affairs officers. Baskin alleged that he was forced to retire as a result of the disclosures and thereafter sued the Government for damages under section 7431 alleging that the disclosure of the six checks constituted a disclosure of return information which was not authorized by I.R.C. § 6103. The district court ruled in favor of the Government, reasoning that the checks were grand jury information, not return information within the meaning of I.R.C. § 6103(b)(2)(A).

The Fifth Circuit affirmed, explaining that to be return information within the meaning of I.R.C. § 6103(b)(2)(A), any information must first be "received by, recorded by, prepared by, furnished to, or collected by the IRS. The plain language of the statute reveals that the return information must be information which has somehow passed through, is directly from, or generated by the IRS." The court noted that "In sum, section 6103 requires that the source of the disclosed information must have been the IRS in order for there to be a violation of the general prohibition against the disclosure of return information." The Fifth Circuit determined that the checks were submitted to and in the custody of the grand jury, not the Service, and therefore, did not constitute return information. The court rejected Baskin's argument that the special agent's receipt of the

information caused it to become return information

stating that "the assistance rendered a grand jury investigation by an IRS special agent does not transform grand jury information into return information."

Lehrfeld v. Richardson. et al., 132 F.3d 1463 (D.C. Cir. 1998)

In this I.R.C. § 6104/FOIA case, the D.C. Circuit Court of Appeals affirmed the district court's grant of summary judgment in favor of the Government, finding that the Service properly withheld from the plaintiff certain documents related to the tax exemption application of the South Africa Free Elections Fund (SAFE).

The court held that the exemption application and all documents submitted in support of the exemption application constitute return information governed by the confidentiality provisions of I.R.C. § 6103 because such documents are related to the tax liability of the applicant. Accordingly, unless specifically authorized by some other provision of the Internal Revenue Code these documents cannot be disclosed. The court looked at I.R.C. § 6104, and the regulations thereunder, which specifically allow for the public inspection of certain records relating to the applications of organizations for tax exempt status. The court held that I.R.C. § 6104(a)(1)(A) provides for public disclosure of the exemption application and documents submitted by an organization in support of its application; documents submitted by third parties are therefore excluded from the coverage of I.R.C. § 6104(a)(1)(A). Hence, in this case, the court determined that documents submitted by Members of Congress in support of SAFE's application were not the kind of documents available for public inspection under I.R.C. § 6104(a)(1)(A) and thus were protected from disclosure by I.R.C. § 6103.

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