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Caveat Taxpayer: How and Why the Internal Revenue Service May Examine Your Books, Your Accountant and Even Your Attorney

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The IRS is authorized, by the use of an administrative summons, to thoroughly inspect a taxpayer's business and financial background. Although the taxpayer's attorney may feel powerless to restrict this free flow of information, there are defined limitations to the use of an administrative summons. These limitations are designed to abrogate its abuse by the IRS. This comment provides a summary of the limitations of an administrative summons, case law interpretation of the requirements for its issuance, and practical considerations for the protection of the taxpayer's financial privacy.

I. INTRODUCTION: THE BELEAGUERED TAXPAYER

Picture the so-called average American taxpayer: It's April 14th, tax receipts, wage statements and checkstubs pile up around his kitchen table as he sifts through volumes of Internal Revenue Service (IRS) publications and instructions. All taxable income must be recorded correctly and each expense must be individually researched in order to prove its deductibility. Each property transaction must be properly labeled as capital or non-capital, long-term or short-term. All t's must be crossed and all i's dotted in order to correctly figure his true tax liability and avoid an audit with the dreaded IRS. Therein lies the subject of satirical cartoons and election year promises.

The reality of all this, however, is that the average American taxpayer is ill-equipped to analyze the voluminous and complicated tax laws of the United States. Based on this reality, many taxpayers turn to professional tax preparers, Certified Public Accountants, or attorneys for advice.

These “tax” professionals are ill-equipped to protect their clients' interests when the IRS seeks information about the taxpayer's returns. The IRS, armed with a legislatively enacted and judicially enforceable administrative warrant, can search into the taxpayer's records and his preparer's records—even examine his attorney under oath—merely to insure that the taxpayer's return is correct.

Can the IRS really do such things? Will the Constitution stand for it? Is there a valid rationale for such powers? The answers to these questions is an emphatic yes.
This comment will delineate the power of an IRS administrative summons used to examine books and witnesses, the liberal construction given to this power by the courts, and the rationale or policy considerations underlying such power. Finally, a few practice suggestions will be given on how an attorney can best protect his client from the powerful IRS.

II. THE RATIONALE BEHIND IRS EXAMINATION POWERS

Before researching the tremendous powers which Congress has bestowed upon the IRS, one should first understand why such powers were granted and what the IRS hopes to accomplish. In general, the mission of the IRS is to collect the nation's revenues by enforcing compliance with tax laws.1 Since the United States operates under a self-reporting system,2 voluntary compliance must occur for the American taxation system to work.3 In modern times, however, noncompliance seems to be in vogue.4 In order to decrease taxpayer noncompliance, the IRS must be allowed sweeping powers to enforce compliance with the tax laws.

The American Bar Association’s Section of Taxation has developed some astounding statistics on the amount of income unreported in the United States.5 While noncompliance estimates are subject to definitional problems and less than perfect data,6 one economist esti-

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1. More exactly, the function of the IRS is to:
[E]ncourage and achieve the highest possible degree of voluntary compliance with the tax laws and regulations and to maintain the highest degree of public confidence in the integrity and efficiency of the Service. This includes communicating the requirements of the law to the public, determining the extent of compliance and causes of non-compliance and cause all things needful to a proper enforcement of the law.
2. Id. The fact that Americans are required to keep their own records and summarize their own income, rather than report each transaction to the IRS, increases the chances of mistake and fraud occurring because the average taxpayer is not well versed in tax law and records can be kept so as to “hide” income.
3. Williams, Strengthening IRS Examination and Collection Processes by Administrative Changes in Staffing, Training, Deployment and Technology in Income Tax Compliance, A REP. OF THE A.B.A. SEC. TAX’N INVITATIONAL CONF. ON INCOME TAX COMPLIANCE 235, 235 (1983) [Hereinafter cited as REP. ON TAX COMPLIANCE]. Mr. Williams goes on to say that the effectiveness of the tax administration has been reduced due to an inadequate budget. Id. at 237.
4. Keynote Address by Roscoe L. Egger, Jr., Commissioner of Internal Revenue, A.B.A. Sec. of Tax’n Invitational Conf. on Income Tax Compliance (March 16, 1983), reprinted in REP. ON TAX COMPLIANCE, supra note 3, at 11-14.
5. REP. ON TAX COMPLIANCE, supra note 3, at 243-45.
6. Henry, Noncompliance with U.S. Tax Law—Evidence on Size, Growth and Composition, REP. ON TAX COMPLIANCE, supra note 3, at 15-17. Several other studies have been undertaken to estimate the extent and amount of noncompliance and taxpayer attitudes. See Mason & Calvin, A Study of Admitted Income Tax Evasion, 13 LAW & SOC’Y REV. 73 (1978) (interviews with taxpayers regarding their outlook on noncompliance and their acknowledged noncompliance conduct); Song & Yarbrough,
mated that unreported income in 1976 was approximately $100 billion. This amounts to about 13 percent of total United States income. If this estimate is even close to being correct, the United States Treasury is being cheated out of large amounts of revenue, another compelling reason for allotting the IRS sufficient powers to force taxpayer compliance.

The national debt, which has become an important political issue in recent years, is another rationale for broad IRS examination powers. The national debt has risen dramatically from 43 billion dollars in 1940 to 1.5 trillion dollars in 1984. Further, it is expected to rise to 2.8 trillion dollars by the end of the 1980’s. These numbers are simply staggering. The bottom line is that the United States needs the money.

III. THE SOURCE OF IRS EXAMINATION POWERS: 26 U.S.C. § 7602

The IRS has been granted far-reaching examination and inspection powers by Congress. Such authority is not a modern development. In fact, the government has had wide-ranging powers to examine books and witnesses since 1927.

7. Henry, supra note 6, at 62.
8. Id.
10. Id. (as estimated by the Federal Office of Management and Budget). However, the nonpartisan Congressional Budget Office estimates that federal debt will exceed three trillion dollars by 1989. Id.
11. One must remember, however, how inaccurate economists can be. See, e.g., Greenwald, The Forecasters Flunk, TIME, Aug. 27, 1984, at 42-44 (some of the foremost economists in the United States have failed to predict the 1984 economic boom and the 1981-82 recession).
12. The full scope of such power is described in I.R.C. § 7602(a) (1982), which provides in pertinent part:
For the purpose of ascertaining the correctness of any return, . . . determining the liability of any person for any internal revenue tax . . . or collecting any such liability, the Secretary or his delegate is authorized —
(1) To examine any books, papers, records or other data which may be relevant or material to such inquiry;
(2) To summon the person liable for tax . . . or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax . . . or any other person the Secretary or his delegate may deem proper, to appear . . . and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry . . . .
13. In particular, section 7602 is based upon the following sections of the Revenue Act of 1926 and revised statutes: § 3714 (summons); § 3175 (failure to obey summons;
A. Purpose of Section 7602

The IRS is given summons powers under section 7602 for the following purposes: (1) to determine if a tax return is correct; (2) to make a return where none has been made; and (3) to determine the tax liability of any person or the liability, at law or in equity, of any transferee or fiduciary of that person, or to collect such liability. In order to prove any of the above, the IRS is empowered "[t]o examine any books, papers, records, or other data which may be relevant . . . ." While at first glance this power to examine any relevant documents may seem appropriate, if carried to its logical conclusion, all of the taxpayer's records "may be relevant" to his tax return. Statutes relating to examination of books and witnesses have generally been broadly applied by the courts when found to be in pursuit of a legitimate purpose.

B. Mechanics of Section 7602

The authority to issue a summons is given to the Secretary or his delegate by section 7602. But in July, 1980, a Delegation Order became effective which expanded the number of IRS employees with authority to issue a summons.

An IRS investigation must have a legitimate purpose and the investigation must be in furtherance of that purpose. Moreover, the IRS

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15. Id. at § 7602(a)(1) (emphasis added).
16. See id. at §§ 7602, 7604.
must not already possess the sought-after information, and the administrative procedures outlined in the Code must be followed.\textsuperscript{19} However, the facts of each case are necessarily different, and sifting out the specific purpose of each examination can prove to be difficult. The results have varied. Taking a strict view of the legitimate purpose doctrine, the fourth circuit has held that a section 7602 summons must be for the singular purpose of determining tax liability, and any other aim surpasses the field of authority granted to the IRS.\textsuperscript{20} However, the fifth circuit has ruled that the dual purpose of determining the correctness of a return and assembling research data be allowed.\textsuperscript{21}

\section*{C. Good Faith}

A section 7602 summons must be issued in good faith.\textsuperscript{22} An IRS agent must swear that the requested summons is directed toward obtaining records material to determining the civil tax liability of the taxpayer.\textsuperscript{23} When such a showing is made, the government has met its burden of good faith, and the burden shifts to the taxpayer to prove the government acted in bad faith.\textsuperscript{24}

However, consider the situation of an agent ordered to investigate a taxpayer pursuant to an invalid IRS policy.\textsuperscript{25} Without knowledge that the policy is invalid, the individual agent can be said to be acting...
in subjective good faith. Hopefully such a situation will be rare, but this may illustrate why courts are more interested in the institutional posture of the IRS rather than the agent's good faith.26

D. Before Recommendation for Criminal Prosecution

A summons may not be issued if a recommendation by the IRS to the Justice Department has been made concerning a grand jury investigation or criminal prosecution of the taxpayer.27 Since tax law merges both criminal law and civil law, it may be difficult to decide when the purpose for the summons is to aid solely in a criminal prosecution.28 A summons for the sole purpose of criminal investigation is the concern here because a summons issued for the dual purpose of civil and criminal investigations has received judicial approval and will be enforced.29 However, the fifth circuit has stated that a section 7602 summons is not enforceable if the investigation is predominately for criminal prosecution.30

Differentiating between issuing a summons for an approved dual purpose and for improper use in a criminal proceeding may prove difficult. Therefore, the Supreme Court, in a 1971 decision, has offered some guidelines.31 The Court, analyzing dictum from a 1964 Supreme Court case,32 held that use of a section 7602 summons will be barred only when the taxpayer can establish that the sole purpose of the investigation was to procure evidence for use in a criminal prosecution.33 The Court reasoned that criminal prosecution is a possibility

26. United States v. Moon, 616 F.2d 1043, 1046 (8th Cir. 1980) (The IRS need only meet its initial burden of showing proper purpose, then the burden of showing an abuse of the court's process shifts to the taxpayer.). See also United States v. National State Bank, 454 F.2d 1249, 1252 (7th Cir. 1972) (Simply accusing the IRS of issuing a summons for an improper purpose is insufficient to support a claim of bad faith.). But cf. United States v. McCarthy, 514 F.2d 368, 371-72 (3d Cir. 1975) (taxpayer is entitled to a hearing prior to the enforcement of a summons in order to prevent abuse of the court's process).
28. For example, a civil tax investigation may be going on at the same time as a criminal investigation.
30. In Venn v. United States, 400 F.2d 207 (5th Cir. 1968), a taxpayer was involved in a political campaign with a third party and had issued three checks to the third party. Even though the third party was a defendant in a criminal antitrust prosecution, he was forced to disclose all of his records relating to the checks as well as all records relating to the campaign because such materials were relevant to, and would be predominately used for, investigating the tax liability of the taxpayer.
31. Donaldson v. United States, 400 U.S. 517 (1971) (taxpayer argued that a section 7602 summons should not be enforced to aid an investigation that could potentially result in a criminal investigation).
32. Reisman v. Caplin, 375 U.S. 440 (1964) (taxpayer sued for injunctive relief to stop enforcement of a section 7602 summons. The Court avoided the issue by stating that the taxpayer had an adequate remedy at law).
33. Donaldson, 400 U.S. at 531-36 (The Court cites, as examples, cases where a
if the uncovered facts warrant such action, but mere possibility of criminal charges is not enough to invalidate a section 7602 summons.\textsuperscript{34}

The Supreme Court gave further guidance in a 1978 case by stating two elements for determining if a section 7602 summons is invalid.\textsuperscript{35} First, the summons must be issued before the IRS recommends to the Department of Justice that a criminal prosecution should be undertaken.\textsuperscript{36} Second, the IRS must, at all times, use their summons authority in a good faith pursuit of the congressionally authorized purpose of section 7602.\textsuperscript{37}

The first element, recommendation for criminal prosecution, only applies to \textit{formal} recommendations.\textsuperscript{38} For example, consider the case of a special agent who recommends to his immediate supervisor that a criminal prosecution begin. If the supervisor endorses the recommendation and the Chief of Intelligence Division forwards the case to the Assistant Regional Commissioner for review, a summons issued thereafter is not invalid, on the theory that its purpose was to secure evidence for criminal prosecution, because the IRS had not yet \textit{forwarded} the case to the Justice Department.\textsuperscript{39} Further, even though an investigation may be "criminally oriented," the fact that no formal recommendation has been made allows the summons to remain valid if the criminal prosecution has begun or is pending when the summons is issued, or where the investigation is only for criminal purposes.).

\textsuperscript{34.} Id. (In essence, the IRS should not be restrained from investigating a taxpayer simply because further improprieties by the taxpayer may be uncovered.).

\textsuperscript{35.} United States v. LaSalle Nat’l Bank, 554 F.2d 302 (7th Cir. 1977), rev’d, 437 U.S. 298 (1978) (district court improperly refused enforcement of summons where evidence did not necessarily indicate that the summons was issued in bad faith).

\textsuperscript{36.} Id. at 308.

\textsuperscript{37.} Id. That purpose is to determine the correctness of tax. See supra note 12.

\textsuperscript{38.} United States v. Hodge & Zweig, 548 F.2d 1347, 1351-52 (9th Cir. 1977) (recommendation for criminal prosecution was made by the District Director and forwarded to Regional Counsel, but was never formally presented to the Justice Department; therefore, absent a showing of bad faith, the summons is valid). See also Statement of Organization and Functions, \textsection 1113.55, 1974-1 C.B. 452, \textsection 1113(11)22, 1974-1 C.B. 482, \textsection 1116(3), 1974-1 C.B. 488, \textsection 1118.6, 1974-1 C.B. 496 (regarding the internal procedure by which recommendations for criminal prosecution are processed by the IRS).

\textsuperscript{39.} United States v. Billingsley, 469 F.2d 1208, 1209-10 (10th Cir. 1972) (Civil and criminal aspects are necessarily intertwined during a tax investigation. The civil and criminal elements do not disentangle, however, until the Justice Department becomes involved. It is at this point where the possibility of criminal prosecution becomes likely. Therefore, it is also at this point in the investigation where the taxpayer’s need for protection from criminal prosecution ripens and the IRS must be restricted in its investigation.).
valid.40

E. Specificity of a Section 7602 Summons

Due to the fact that the tax law arena is complicated and ever-changing, the specificity requirements of a section 7602 summons are inherently different from those of a criminal summons. However, there still remains the fourth amendment requirement that the summons may not be indefinite.41

In general, the summons need not describe the records sought in minute detail, but only with sufficient particularity to allow the person on whom it is served to ascertain which records are to be produced.42 Applying this simple standard to complex tax litigation, however, may prove to be a formidable task. While there is a social policy of allowing the IRS sufficient power to enforce compliance with voluntary reporting, the mere fact that tax law is complicated does not excuse an overly broad summons.43 This view presents a dilemma because, unlike most other civil litigation, almost all discoverable documents are in one party's (the taxpayer's) hands. Therefore, a balance must be struck between overly broad summonses and effective tax investigations.

The specificity element, along with purpose, good faith, and formal recommendation for criminal prosecution, have been resolved in favor of the IRS.44 For instance, the IRS may wish to prove the accuracy of a tax return, but the only information the IRS has is contained on the return itself. Therefore, before a detailed investigation may begin, the IRS must decide which issues are relevant. In essence, the IRS cannot describe any documents with specificity before it knows which documents it will need.45 In light of this, the IRS has no choice but to employ a general summons. There remains, how-

41. Alioto v. United States, 216 F. Supp. 48, 49 (E.D. Wis. 1963) (A warrant which lacks particularity becomes a general exploratory search which is condemned by the fourth amendment.).
43. United States v. Richards, 479 F. Supp. 828, 833 (E.D. Va. 1979) (Questions directed to the taxpayer by the IRS concerning auditing schemes designed to circumvent tax laws must be sufficiently relevant and no broader than necessary to achieve their purpose.).
44. This policy of favoring IRS discovery is further expounded in the section on views favorable to the IRS.
45. United States v. Arthur Young & Co., 677 F.2d 211, 216 (2d Cir. 1982), aff'd in part, 104 S. Ct. 1495 (1984) (The court reasoned that a generally broad summons must be enforced before the specific issues are raised because if the taxpayer's own opinion of relevance controlled the summons procedure, the entire audit process would be eviscerated.).
ever, reasonable limits to that power.  

F. Probable Cause

The parameters of probable cause in a section 7602 summons are very easy to illustrate because section 7602 does not require the existence of probable cause that the law has been violated. In fact, a summons may be issued merely because the IRS wishes assurance that the tax laws have not been violated.  

IV. Judicial Interpretation of Such Broad Powers: Is the IRS Too Powerful?

A. In General

As the previous section illustrates, IRS examination authority under section 7602 is very broad. Such power carries with it the possibility of abuse and selectivity by those agents who enforce the law. Is the service given too much command? Is the potential for abusive discretion too great? The courts have struggled with such questions in reaching the decision that the IRS must be given broad powers in order to be effective.

B. Views Favorable to the IRS

One must first realize that the IRS is an administrative agency formed to promote voluntary reporting and to ensure that the government has sufficient tax revenues to survive. Like other administrative agencies, its investigatory powers have long been recognized |

46. See, e.g., United States v. Theodore, 479 F.2d 749, 754-55 (4th Cir. 1973) (where a summons was deemed to be too broad and too vague because it required the vice-president of an accounting firm to produce all the records and all the returns of his clients for a period of three years).

47. United States v. Mackay, 608 F.2d 830, 832 (10th Cir. 1979) (In essence, the agent’s prudent judgment in exercising the extensive power given to the IRS under section 7602 is substituted for a requirement of probable cause.).

48. See generally United States v. Chemical Bank, 593 F.2d 451, 456 (2d Cir. 1979) (the IRS should be allowed to follow up on an informant’s tip by use of a section 7602 summons); United States v. Humedco Enterprises, Inc., 512 F. Supp. 1302, 1306 (E.D. Pa. 1981) (Like a grand jury, the IRS has inquisitorial powers and must be given broad discretion in its investigations.).

49. See Raymond, New Case Sets Limits on Service’s Summons Power Under Section 7602, 44 J. Tax’N 172 (1976) (analyzing a Colorado District Court case where the IRS unsuccessfully tried to obtain a corporation’s own analysis of the “weak spots” in its tax return).

by the courts. In particular, service examination powers are analogous to that of a grand jury and should be liberally construed. In fact, even though the summons is actually issued with regard to civil matters, the investigative powers of the IRS are greater than those normally granted in civil litigation.

C. Views Favorable to the Taxpayer

In any situation where one party is given greater powers than the other party, there is a possibility that the former may abuse those powers. The courts have recognized that such IRS powers are subject to abuse. Therefore, the courts have taken it upon themselves, in part, to oversee the IRS and protect the taxpayer from undue harassment.

The taxpayer is also protected by statute. For example, the IRS may not enforce its own summons. If a taxpayer refuses to comply with the summons, the IRS must look to the court for enforcement. Also, the time and place of the examination is defined by statute and Revenue Rulings.

However, as stated earlier, the amount of protection given the taxpayer and the extent to which the IRS is allowed to examine his records must rest on social policy. The rationale behind section 7602 is "to prevent dishonest persons from escaping taxation and thus

51. United States v. Bisceglia, 420 U.S. 141, 148 (1975) ("John Doe" summonses regularly enforced in IRS investigations); Powell, 379 U.S. at 57 (administrative summonses should not be limited by forecasts of the probable results of the investigation); United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950) (administrative agencies should be given wide latitude in their investigative and accusatory duties).


53. One must note that the investigatory powers of the IRS also affect the administration of state laws. Specifically, the IRS may release specific tax information to state tax officials in order to facilitate enforcement of state tax codes. See I.R.C. § 6103 (1982); Del. Order No. 101 (Rev. 1), 1978-2 C.B. (effective November 16, 1978).

54. Bisceglia, 420 U.S. at 146.

55. See, e.g., Powell, 379 U.S. at 57 (where the Supreme Court espoused the legitimate purpose doctrine as well as placing other restraints on the IRS); Mastry, Bisceglia and Humble Oil: A New Era in Internal Revenue Service Summonses, 50 FLA. B.J. 311 (1976) (regarding the issuance of "John Doe" summonses by the IRS). For congressional history regarding the issues raised by "John Doe" summonses, see H.R. REP. No. 658, 94th Cong., 2d Sess. 310-12, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 2897, 3206-08; S. REP. No. 938, 94th Cong., 2d Sess. 372-73, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 3439, 3801-03.

56. In such a proceeding, "satisfactory proof" must be made to the court by the IRS before an attachment may be issued. I.R.C. § 7604(b) (1982).

57. Such time and place must be within ten days from service of the summons and reasonable under the circumstances. I.R.C. § 7605(a) (1982). See also Rev. Rul. 81-156, 1981-1 C.B. 597. Also note that the IRS sets its own policies which govern taxpayer examinations. See, e.g., Rev. Proc. 81-35, 1981-2 C.B. 588 (regarding the reopening of a closed case for the purpose of further examination).
shifting heavier [tax] burdens to honest taxpayers."\footnote{58} However, the taxpayer must not lose his substantive rights under the guise of this preventive power.

V. CONSTITUTIONAL IMPLICATIONS OF SECTION 7602

A. In General

The issues in tax law which are raised with respect to unreasonable searches and seizures under the fourth amendment and the privilege against self-incrimination under the fifth amendment have been the subject of many legal commentaries.\footnote{59} Other issues may be raised but they are generally outside the scope of a summons.\footnote{60} The importance of the fourth amendment in tax law is that it enables the taxpayer to suppress evidence which is already in the government's hands. In comparison, the fifth amendment can be used to prevent the IRS from initially obtaining evidence.

B. Fourth Amendment Implications

The fourth amendment protects the taxpayer from "unreasonable searches and seizures."\footnote{61} Since nearly all taxpayer records "may be relevant"\footnote{62} to a tax investigation, the issue is generally whether the search and seizure was "reasonable."\footnote{63} For example, it has long been

\footnote{58} Bisceglia, 420 U.S. at 146.
\footnote{59} See Bower, Miranda and the IRS: Protecting the Taxpayer by Administrative Due Process, 24 AM. U.L. REV. 751 (1975); Herskovitz, Supreme Court Says Miranda Warnings Do Not Apply to Non-Custodial Interviews, 45 J. TAX'N 5 (1976); Lipton, Partnership Records Lose Fifth Amendment Protection, 5 TAX ADVISER 454 (1974); Mednick & Greiner, Supreme Court Further Limits Scope of Privilege Against Self-Incrimination, 41 J. TAX'N 182 (1974); Segal, Supreme Court: Fourth Amendment Does Not Bar Subpoena of Taxpayer's Bank Records, 45 J. TAX'N 80 (1976).
\footnote{60} See United States v. Harper, 397 F. Supp. 983 (E.D. Pa. 1975) (held that the government's legitimate interest in examining the taxpayer's records was sufficiently compelling to overcome the taxpayer's religious ideals predicated upon the first amendment).
\footnote{61} U.S. CONST. amend. IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . ." Id.
\footnote{62} Additionally, unlike the fifth amendment, the fourth amendment can be asserted by corporate as well as individual taxpayers. Mancusi v. DeFort, 392 U.S. 364 (1968) (union official had such a reasonable expectation of privacy in seized union records as to be able to challenge the reasonableness of the search); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (corporations are protected from unlawful searches and seizures).
\footnote{63} See United States v. United Distillers Products Corp., 156 F.2d 872 (2d Cir. 1946) (the court held it was not unreasonable to demand production of records in a city
held that the fourth amendment may not be used to prevent examination of books and papers showing receipt of income by taxpayers. However, by showing that the IRS used unreasonable methods to pursue such an examination, the taxpayer may be able to suppress the ill-gotten records by arguing that an "unreasonable" search and seizure had taken place.

Where the IRS has procured evidence by misrepresentation or deception, such methods are also in violation of fourth amendment protections, and the evidence obtained can be suppressed. In order to suppress evidence, the taxpayer must show that the misconduct affirmatively misled him, or that from the totality of the circumstances his statements were not voluntary. However, if a special agent fails to identify the specific nature of the audit, the courts do not deem such inaction to be a deception worthy of fourth amendment protection.

C. Fifth Amendment Implications

The right to claim the privilege against self-incrimination under the fifth amendment is personal in nature. Further, actual posses-

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25 miles from taxpayer's principle place of business); see also Redlich, Searches, Seizures and Self-Incrimination in Tax Cases, 10 TAX L. REV. 191 (1955).
64. In re International Corp., 5 F. Supp. 608 (S.D.N.Y. 1934) (receipt of income goes to the heart of proving the correctness of a return).
65. See, e.g., Gouled v. United States, 255 U.S. 298 (1921) (consent induced by trickery is unlawful). But cf. United States v. Robson, 477 F.2d 13 (9th Cir. 1973) (failure of an agent to advise taxpayer of the true purpose of his audit, e.g., to verify an informant's tip as to the crime of tax evasion, does not constitute deceit and trickery sufficient to vitiate taxpayer's consent).
66. United States v. Bland, 458 F.2d 1, 8 (5th Cir.), cert. denied, 409 U.S. 843 (1972) (in order to have legal effect, a misrepresentation must be material); see also United States v. Willoz, 449 F.2d 1321 (5th Cir. 1971) (totality of the circumstances); United States v. Stribling, 437 F.2d 765 (6th Cir.), cert. denied, 402 U.S. 973 (1971), cert. denied, 410 U.S. 957 (1973) (affirmatively misleading statements).
67. United States v. Stamp, 458 F.2d 759, 775 (D.C. Cir. 1971), cert. denied, 409 U.S. 842 (1972) (since there was no suspicion of criminal behavior at the time the investigation was made and because there was little chance the audit would lead to criminal prosecution, taxpayer's consent was not obtained through fraud or misrepresentation); United States v. Jaskiewicz, 433 F.2d 415, 421 (3d Cir. 1970), cert. denied, 400 U.S. 1021 (1971) (agent has no affirmative duty to inform the taxpayer of the extent and nature of the investigation).
68. Couch v. United States, 409 U.S. 322 (1973). As Justice Powell succinctly stated:

It is important to reiterate that the Fifth Amendment privilege is a personal privilege: it adheres basically to the person, not to information that may incriminate him. As Mr. Justice Holmes put it: "A party is privileged from producing the evidence but not from its production." The Constitution explicitly prohibits compelling an accused to bear witness "against himself"; it necessarily does not proscribe incriminating statements elicited from another . . . . It is extortion of information from the accused himself that offends our sense of justice.

Id. at 328 (citation omitted).

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sion of the records is more important in asserting a fifth amendment privilege than ownership of the records. The arguments have been stated as follows: First, an individual is protected from self-incrimination by being able to withhold private documents, but he may be forced to produce public documents that are required by law. Taxpayers are required by law to keep books of accounts or records. Therefore, the authority to require recordkeeping implies the right to inspect records on demand. Second, business records are deemed not to be personal communications but business accounts. Since other persons have knowledge of the records, such as employees, the records are not of a personal nature and therefore do not come under the protection of the fifth amendment.

VI. APPLICATION OF SECTION 7602: ACCOUNTANT-CLIENT

Couch v. United States, a Supreme Court decision ruling that there is no federally recognized accountant-client privilege, has been widely accepted. Further, no state has recognized such a privilege. The Court's opinion, written by Justice Powell, based its reasoning on the privilege against self-incrimination and the right to a reasonable expectation of privacy.

As to the fifth amendment, the Court recognized the fact that the privilege against self-incrimination is a personal privilege. It adheres

69. Id. at 331-33. The Court stated that to tie the privilege of self-incrimination to a concept of ownership would draw a meaningless line. Id. at 331.
70. United States v. Shapiro, 159 F.2d 890, 892 (2d Cir. 1947) defined public documents as, “information of transactions which are the appropriate subjects of governmental regulations . . . .”
71. Treas. Reg. § 1.6001-1 (1976). “Any person subject to tax . . . or any person required to file a return of information with respect to income, shall keep such permanent books of account or records . . . as are sufficient to establish . . . matters required to be shown by such person in any return of such tax or information.” Id.
72. See United States v. Ohio Bell Tel. Co., 475 F. Supp. 697 (N.D. Ohio 1978) (Since the IRS has the authority to require that certain records be kept, it is implicit in that authority that the IRS be allowed to inspect those records.).
74. Id.
76. Id. This case has been either cited as support or, most often, followed in all jurisdictions. Because it is such a widely accepted ruling, the reasoning behind it will be used to explain this system. For background on the nature of the accountant-client relationship, see Goldstein, Steps the Accountant Can Take When A Client is the Focus of a Tax Fraud Investigation, 19 TAX. FOR ACCT. 178 (1977); Note, Couch v. United States—Protection of Taxpayer’s Records, 23 De Paul L. Rev. 810 (1974).
77. Couch, 409 U.S. at 335.
to the person, not to information which may be incriminating. Since the plaintiff in that case had divested herself of control of the records and the summons was directed against her accountant, the ingredient of self-compulsion was lacking. There was no pressure or coercion on the plaintiff to incriminate herself.

In referring to the fourth amendment, Justice Powell stated that there can be little expectation of privacy when a taxpayer hands over records to an accountant. The reasoning behind this is that the taxpayer knows that he is required to disclose what is contained in his records to the IRS in the form of a tax return. Nondisclosure of information is due more to the accountant's wisdom than the taxpayer's choice.

The taxpayer is not left totally unprotected when he turns his tax records over to a third party. Justice Brennan, in his concurring opinion, recognized the fact that no per se rule defeating the taxpayer's fifth amendment privilege had been created. In his view, this privilege still exists for the taxpayer who hands his tax records over to a third party, such as an accountant, for custodial safekeeping.

However, Justice Douglas, in a caustic dissent, reflected on the fact that the majority decision had overlooked the basic nature of the accountant-client relationship. In order to accurately report his income and legally take all his deductions, the average taxpayer, who is in all likelihood unfamiliar with the complicated tax laws, may have to seek an accountant for professional tax preparation and planning. By refusing to allow any privilege between the taxpayer and his accountant, the taxpayer is thus inhibited from making a full disclosure.

The result of such reasoning seems to run afoul of the basic precepts behind voluntary reporting. By holding back information

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78. Id. at 328. See also Johnson v. United States, 228 U.S. 457 (1913).
79. Couch, 409 U.S. at 329. In effect it is the accountant, not the taxpayer, who is compelled to produce the records.
80. Id. at 335.
81. Id. The accountant will often require the right to disclose the information given to him for his own self protection.
82. Id. at 337 (Brennan, J., concurring). Justice Brennan outlines some exceptions which are stated in the text of this comment.
83. Id. See also United States v. Guterma, 272 F.2d 344 (2d Cir. 1959) (corporate holding of personal papers); Schwimmer v. United States, 232 F.2d 855 (8th Cir. 1956) (constructive possession and control of the records remains with the owner when records are handed over for custodial safekeeping).
84. Couch, 409 U.S. at 338 (Douglas, J., dissenting). Justice Douglas describes the majority decision as "sanction[ing] yet another tool of the ever-widening governmental invasion and oversight of our private lives." Id.
85. Id. at 342 (Douglas, J., dissenting). If the taxpayer knows that any information he gives to the accountant is subject to examination, he may withold any records which may be incriminating. This will result in inaccurate reporting by the accountant because he does not have the proper figures to begin with.
from his accountant, the likelihood of inaccurate reporting by the accountant comes to the forefront. This is exactly the situation which section 7602 was designed to avoid.

Justice Marshall, dissenting in Couch, argued that the transfer of such records to an accountant is a result of practical considerations. This is the same uninformed taxpayer-professional tax preparer argument espoused by Justice Douglas. Further, Justice Marshall extended the reasonable expectation of privacy argument by stating that the taxpayer expects that records handed over to a tax preparer will remain confidential.

Even though Justices Marshall and Douglas have raised valid points, tax practitioners must follow the majority rule in Couch, and try to protect their clients. The taxpayer who goes to an accountant for help in preparing his taxes must be aware that there is no confidential accountant-client privilege. The IRS may, pursuant to a section 7602 summons, require the accountant to appear before the IRS and produce such documents and provide such testimony as may be relevant to ascertaining the correctness of the taxpayer’s return.

VII. APPLICATION OF SECTION 7602: ATTORNEY-CLIENT

One may assert the attorney-client privilege with regard to confidential statements communicated to an attorney who is acting in his professional capacity. Application of this privilege in the tax field depends on whether the communication can be defined as confidential, and whether the attorney was acting in his professional capacity when the communication was given.

The attorney-client privilege may only be raised when:

1. The asserted holder of the privilege is or sought to become a client;
2. the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer;
3. the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c)
for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceedings, ... and (4) the privilege has been (a) claimed and (b) not waived by the client.90

Although this privilege belongs to the client,91 the attorney may invoke the privilege and protect confidential communications made by his client.92 When the issue of privilege is raised, the burden falls upon the one raising it to prove that the communication in question comes within the scope of the attorney-client privilege.93

One of the major problems in asserting the privilege is whether or not the matters communicated are intended to remain confidential. When the taxpayer gives information to an attorney which will be used in filling out tax returns, the client may have a reasonable expectation of privacy concerning the information.94 If those records form the basis of information intended to be disclosed to the IRS, however, they are no longer deemed confidential and the privilege fails.95

Communications to the attorney must also be made to him, or his subordinate, in his capacity as an attorney. Therefore, even though the client may intend the communication to remain privileged, it will not be so if the attorney is not acting in his professional capacity. For example, if the client and his attorney are acting together as business principals, their communications are not privileged.96 Also, if the attorney is merely executing financial transactions on behalf of his client, communications regarding those transactions are not privileged.97 Similarly, if the attorney acquires real estate for his client, communications regarding those actions are not privileged.98

Some communications made to an attorney relating to the prepara-

93. United States v. Ponder, 475 F.2d 37 (5th Cir. 1973), held that a party asserting the privilege may not do so broadly, but must specify which communications come under the privilege. Id. at 39.
95. United States v. Schoenberlein, 335 F. Supp. 1048, 1057-58 (D. Md. 1971) ("cancelled checks and deposit slips were prepared with the intention that they should come to the attention of the bank and/or others, and do not qualify for the privilege"); United States v. Merrell, 303 F. Supp. 490, 492-93 (N.D.N.Y. 1969) (Material intended to be communicated to a third party is not confidential in nature and hence does not qualify for attorney-client privilege.).
96. See United States v. Rosenstein, 474 F.2d 705, 714 (2d Cir. 1973) (such communications relate to business dealings and are outside the scope of attorney-client privilege).
97. McFee v. United States, 206 F.2d 872, 876 (9th Cir. 1953) (depositing funds and cashing checks).
98. Pollock v. United States, 202 F.2d 281, 286 (5th Cir.), cert. denied, 345 U.S. 993 (1953), held that such services are not confidential because the attorney is not acting in his "professional capacity."
tion of tax returns can come under the privilege. However, many of the communications by their nature are intended to be disclosed to the IRS, and are not privileged. It thus appears that the IRS should not be allowed to examine a communication made to the attorney where its substance does not appear on the client's tax forms.

If the taxpayer-client delivers documents to the attorney, several distinctions develop. First, if the documents are not privileged in the hands of the taxpayer, they remain unprivileged even though they are now in the attorney's possession. However, if the documents were privileged while in the taxpayer's possession and were delivered to the attorney with the intention of securing legal advice, they will remain privileged.

When the attorney is also an accountant, the applicability of the attorney-client privilege depends on whether the communication is made for the purpose of securing legal counsel or for bookkeeping services. In such a situation, accounting services would have to be separated from legal services in order to discover which communications are susceptible to examination under a section 7602

99. Colton v. United States, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963). The court stated unequivocally, "[t]here can, of course, be no question that the giving of tax advice and the preparation of tax returns . . . are basically matters sufficiently within the professional competence of an attorney to make them prima facie subject to the attorney-client privilege." Id. at 637.

100. Pollock, 202 F.2d at 286.

101. While this proposition may seem to be a logical leap, the rationale for this statement does have a judicial basis. See, e.g., Baldwin v. Commissioner, 125 F.2d 812, 815 (9th Cir. 1942) (Where an attorney had filled out a deed for a client, the client's statements and motivations for executing the deed were deemed privileged while the information contained in the deed itself was not privileged.).

102. Fisher v. United States, 425 U.S. 391, 403-04 (1976) (Pre-existing documents which the court could have forced the client to disclose were not protected from court process simply because they were in the hands of the attorney.).

103. Id. at 404. The court made this distinction because it found "the purpose of the attorney-client privilege is applicable." Id. However, one must note that this holding is limited to records which were already in existence before the attorney entered the case. Id. Two factors are thus important in deciding whether the attorney-client privilege is applicable: (1) whether the taxpayer retained the attorney prior to preparation of the records; and (2) whether they were prepared at the direction of the attorney. Petersen, Attorney-Client Privilege in Internal Revenue Service Investigations, 54 MINN. L. REV. 67 (1969).

104. Olender v. United States, 210 F.2d 795, 806 (9th Cir. 1954) (attorney-client privilege is restricted to communications sent in the process of soliciting legal advice from an attorney in his capacity as a professional legal advisor). See also United States v. Heidberger, 76-1 T.C. 9366 (1976) (attorney who is also an accountant was required to produce work papers used in the preparation of his client's income tax returns).
When the IRS seeks to enforce a summons on a third party such as an attorney or an accountant, special rules apply. First, the IRS must notify the taxpayer within three days after service of the summons but not later than the twenty-third day before examination. Further, a copy of the summons and an explanation of the right to quash the summons must be furnished to the taxpayer. Other procedures such as fees for witnesses, the right to intervene, and the right to stay compliance are further set out by a 1983 Treasury Decision.

VIII. PRACTICE COMMENTS: RESPONDING TO A SECTION 7602 SUMMONS

In reviewing section 7602 mechanics, one must remember that the IRS looks to the court to enforce a summons. By refusing to comply with the initial summons and forcing the IRS to obtain an enforcement order from the court, the attorney may protect his client's privacy as well as save valuable time in familiarizing himself with the client's case. Therefore, the first step in responding to a section 7602 summons could be refusal to comply.

If the taxpayer decides not to comply with the summons, there are some advantages to this response. First, the mere fact of noncooperation will not support a tax fraud charge. Such a fraud charge must be based upon facts. Further, by refusing to comply with an oral examination, the taxpayer may protect himself from making reference to incriminating acts which the IRS may not be aware of in their analysis of secondary information.

On the other hand, the taxpayer may actually benefit by complying with the summons. First, by handing over the requested documents, the taxpayer assures himself that the initial IRS examination is made with complete and correct information regarding the taxpayer's financial affairs. The IRS would not have to rely upon secondary, and perhaps incorrect, information. If the IRS does rely upon incorrect information, it may lead to a full-scale fraud investigation and possi-

105. See Olender, 210 F.2d at 805-06, which held that communications made with regard to business advice are not privileged while communications made while seeking legal advice from an attorney in his capacity as an attorney are privileged.
107. Id. § 7609(a)(1), (c)(1).
109. Accord Bailer, Don't Cooperate with IRS Agent: Reliance on Constitutional Rights Is Better Tactic, 6 J. TAX'N 293 (1957); Crowley, The Role of the Practitioner When His Client Faces a Criminal Tax Fraud Investigation, 40 J. TAX'N 18 (1974).
110. Knowles, 224 F.2d at 169 (taxpayer was charged with fraud because he made affirmative false statements to the IRS).
bly criminal charges. The taxpayer will want to avoid such a situation when he has taken a reasonable position on his tax standing. Second, there is a human nature element to consider. Antagonizing a special agent assigned to analyze the taxpayer’s position can have no real advantages. Noncooperation may lead the agent to believe that the taxpayer is hiding something. This in turn may cause the agent to scrutinize the taxpayer’s status more closely than he had originally intended. In any event, if the taxpayer initially decides to cooperate and then discovers that the investigation is leading to possibly incriminating documents, he may later invoke his constitutional rights and demand a return of his documents.

However, should the taxpayer decide to comply with the summons, he must do so truthfully and completely. If the IRS later discovered that the taxpayer was feeding them false information, this could not help but lead to a full-scale audit. Further, not only may such action lead to later tax fraud charges, but it may be a crime in and of itself.

Finally, in order to be able to better claim the attorney-client privilege, the attorney should take some precautionary steps of his own. For example, while interviewing a client the attorney should carefully make note of when he is giving legal advice in his capacity as an attorney, and when he is simply helping the taxpayer with a business analysis. By documenting and separating these two topics in his files, the attorney will be better prepared to assist his client when the IRS shows up at his office with a section 7602 summons. The privileged communications will already be separated from the non-privileged communications, and the attorney will be better prepared to protect his client.

111. For information on how the IRS handles criminal investigations, see IRS Manual § P-9-2 (1973) (regarding the criteria employed).
112. Armstrong v. United States, 354 F.2d 274 (Ct. Cl. 1965). “The agents construed [the taxpayer’s] resentment as reflecting a lack of cooperation on his part, and forthwith launched a full investigation which ultimately was extended to cover his income tax returns for the years 1945-1950.” Id. at 279.
113. Mason v. Pulliam, 402 F. Supp. 978 (N.D. Ga. 1975), aff’d, 557 F.2d 426 (5th Cir. 1977) (The taxpayer has a sufficient property interest in the documents to demand their return, and may also demand that any copies also be returned.). See also United States v. Ponder, 444 F.2d 816 (5th Cir. 1971), cert. denied, 405 U.S. 918 (1972) (regarding the constitutional basis for demanding return of the documents).
114. 18 U.S.C. § 1001 (1982) (Making knowingly false statements in any matter within the jurisdiction of any agency of the United States can result in a fine of “not more than $10,000 or imprisonment for not more than five years, or both.”). Knowles v. United States, 224 F.2d 168, 172 (10th Cir. 1955) (statement made to the IRS is within the jurisdiction of an agency of the United States).
IX. CONCLUSION

The plight of the beleaguered taxpayer, who is charged with knowing and abiding by complicated tax laws, is outweighed by the need of the IRS to be able to enforce those laws. Reporting compliance is a must in order for the United States to collect needed tax revenues. Therefore, the IRS must be given broad examination powers. There are, however, specific checks on those powers. A summons must be executed in good faith before recommendation for criminal prosecution, and there must be a legitimate purpose for the summons.

Still, the IRS may enforce its administrative summons in situations where no other branch of the government can. Most notable is the fact that no probable cause is required before issuance of a section 7602 summons. Here, the integrity of the agent is substituted for probable cause. Also, the IRS may inquire into communications made between a taxpayer and his attorney. Such invasions into the taxpayer's privacy must be required, or the IRS would be without power to enforce the tax laws and noncompliance would bankrupt the country.

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