The IRS' Use of Secret Subpoenas

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In *Reservoir Dogs*, Steve Buscemi's character, Mr. Pink, shocks a group of hardened criminals when he refuses to leave a tip for a waitress. Unfazed by arguments that tipping is woven into the fabric of society, no law compels Mr. Pink to leave a buck, so he doesn't. The IRS recently made the same argument in a pending Tax Court case when it refused to produce all nonparty subpoenas and all responses and documents received by the IRS with respect to such subpoenas. Just as Mr. Pink's mob-boss employer reacted swiftly and critically to his refusal to tip, the Tax Court's reaction to the IRS' argument may nudge the Tax Court one step closer to district court practice and procedure.

Since 2010, Anthony and Suzanne Kissling have been locked in a Tax Court dispute with the IRS over a charitable deduction corresponding to a conservation easement.[1] During the litigation, the Kisslings discovered that the IRS had served at least one subpoena upon a third party, seeking the production of documents, without giving notice to the Kisslings. In any federal district court, before such a subpoena is served upon the third party, the government must give notice of the subpoena to the opposing party.[2] Understandably, after learning of the subpoena, the Kisslings asked the IRS to produce all nonparty subpoenas and all responses and documents received by the IRS relating to the subpoena. The IRS refused.

Like tipping in a restaurant, the IRS argued that, technically, the Tax Court has no expressed rule that requires the IRS to let taxpayers know it is serving subpoenas to third parties. In effect, the IRS' argument ignored the fundamental aspects of fairness and disclosure that have been woven into the fabric of the federal judiciary since the courts were created in 1789.[3] Unfortunately, the IRS appeared to be correct.

While Judge Mark Holmes agreed that the Tax Court had no expressed notice rules concerning nonparty subpoenas, he acknowledged the presence of such rules in the federal district courts. Instead of giving the IRS license to continue its secretive discovery techniques, the court incorporated the federal district court's notice rule into the case's pretrial order, commanding all parties to provide notice and produce documents.[4] Holmes' decision is consistent with Tax Court Rule 1(b), which directs the court to give weight to the Federal Rules when the court's own rules are lacking. The Tax Court clearly made the right call, but such a feat should not have been necessary.

One fundamental reason the Federal Rules require notice to parties is to give litigants an opportunity to object to the subpoenaed documents prior to their release. In federal district court, the practice of notice to opposing parties is followed. Parties may object to the relevance of the documents requested, the breadth of the request, the time allotted for production, the time period covered in the subpoena, the specificity with which the documents are described, the burden imposed on the subpoenaed individual, and the disclosure of privileged or other protected matter.[5] Just as in federal district court, Tax Court parties may object to the production of privileged or irrelevant materials and productions that are unduly burdensome, expensive, or unreasonable and oppressive to produce.[6] Thus, the Tax Court rules give parties the right to object to materials the IRS subpoenas, but here, stealth tactics allowed the IRS to bypass that possibility.

Undoubtedly, the effect of the government's actions goes beyond the Kisslings. How long has the IRS been using secret subpoenas? The Kisslings "fortuitously learned"[7] that the IRS had served a nonparty in their case and were able to receive a favorable and pragmatic ruling from Judge Holmes, but what about other litigants who were less fortunate? And what is the IRS doing with the information it has gathered but not disclosed? Is it launching investigations into other taxpayers? An IRS John Doe summons could be considered a federal district court analogue to a Tax Court "secret subpoena," but even a John Doe summons requires the government to first establish to the satisfaction of a federal district court that the summons relates to an investigation, that there is a reasonable basis that the tax laws have been violated, and that the information sought is not readily available elsewhere.[8]

If subpoenas are issued in the Tax Court without disclosure, no one can tell how the information is used. Indeed, "[w]ith the power to coerce production goes the increased responsibility and liability for the misuse of the power. When the power is misused, public confidence in the integrity of the judicial process [and the IRS] is eroded."[9]

On Nov. 10, 2015, the ABA Section on Taxation submitted comments to the Tax Court concerning changes to the court's rules of practice and procedure.[10] Specifically referencing *Kissling*, the letter urged the Tax Court to amend its rules to be more consistent with the Federal Rules of Civil Procedure and require that a party issuing a subpoena should be required by an amendment to Tax Court Rule 147 to provide to the other party copies of the nonparty subpoenas and all responses and documents ultimately produced by nonparties.

While both the IRS' subpoena argument and Mr. Pink's tipping argument were technically correct, Mr. Pink was ultimately shot and apprehended by law enforcement.[11] Nothing so drastic will surely befall our tax collector. However the IRS' reliance on a technicality that contradicts the Tax Court's culture of informal discovery[12] suggests that the Tax Court may be forced to adopt district-court-style litigation practices. In other words, gratuity will be automatically included. ⊙

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Endnotes

[1]*Kissling v. Comm'r*, No. 19857-10 (T.C. Sept. 7, 2010).

[2]The Federal Rules of Civil Procedure require that parties must receive notice and copies of a subpoena before service when the subpoena compels the production of documents, electronically stored information, tangible things, or the inspection of premises before trial. Fed. R. Civ. P. 45(a)(4). Indeed, the very form utilized by district courts (Form AO 88B) includes such an instruction to the issuer.

[3]The Judiciary Act of 1789 created the federal courts. Section 15 of the Act empowers courts to require parties to produce and serve documents upon each other. 1 Stat. 73, 82 (1789).

[4]*Kissling v. Comm'r*, No. 19857-10 (T.C. July 15, 2015).

[5]Fed. R. Civ. P. 45(d)(3)(A); Fed. R. Civ. P. 26(b)(1) ("Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense. … Information within this scope of discovery need not be admissible in evidence to be discoverable"); *see also Travelers Indem. Co. v. Metro. Life Ins. Co.*, 228 F.R.D. 111, 113 (D. Conn. 2005) ("Whether a subpoena imposes an 'undue burden' depends upon 'such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed' ").

[6]Tax Court Rule 70(b) ("The Information or response sought through discovery may concern any matter not privileged and which is relevant to the subject matter involved in the pending case."); Tax Court Rule 70(c) (discovery shall be limited by the Court if the "discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome or less expensive" or if "the discovery is unduly burdensome or expensive"); Tax Court Rule 147(b) ("The Court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive …").

[7]*Kissling v. Comm'r*, No. 19857-10, 1 (T.C. July 15, 2015).

[8]26 U.S.C. § 7609(f).

[9]*Spencer v. Steinman*, 179 F.R.D. 484, 488-89 (E.D. Pa. 1998) *vacated in part on reconsideration*, No. 2:96-CV-1792 ER, 1999 WL 33957391 (E.D. Pa. Feb. 26, 1999) (citations and internal quotation marks omitted) (discussing attorney misuse of the subpoena power).

[10]Letter from George C. Howell III, chair, Section of Taxation, American Bar Association, to Hon. Michael B. Thornton, chief judge, U.S. Tax Court (Nov. 10, 2015).

[11]Although the outcome of Mr. Pink has been subject to some discussion, after the standoff and Mr. Pink's departure from the warehouse, viewers with exceptional audio and even better ears can hear Mr. Pink yelling off-screen to the police that he has been shot.

[12]Tax Court Rule 70(a) provides that the court "expects the parties to attempt to attain the objectives of discovery through informal consultation or communication before utilizing the discovery procedures provided in these rules."