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Memorandum

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CC:SB:4:MIL

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subject: Summonses for Electronic Records

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUES

1. May an examiner summon the taxpayer's original electronic data files (or the backup files) [1] to obtain the associated metadata if the taxpayer offers to provide paper printouts of these data files (or spreadsheets created from the data files) that do not contain the metadata?

2. May an examiner summon the taxpayer's original electronic data files to obtain the associated metadata if the taxpayer offers to provide a truncated or an altered copy of the original files in which the original metadata was removed or changed when the altered copy was created?

3. May an examiner summon the taxpayer's original electronic data files to obtain the recorded entries and associated, unaltered metadata for transactions that occurred before or after the periods being examined if the taxpayer offers to provide a copy of the data file showing only the recorded entries without the metadata for transactions that occurred during the periods being examined?

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[1] Hereinafter referred to as the "original electronic data files."

4. May the Service summon the taxpayer's original electronic data files from the taxpayer's accountant if the accountant recorded the entries of the business transactions into the electronic file and possesses the records?

5. If a taxpayer provides the Service with an electronic data file on a CD or a thumb drive, must the examiner retain the original CD or thumb drive in the examination case file? Alternatively, may the examiner make an electronic copy of that file and include it in the examination file if the case is closed unagreed and the data file supports the examiner's conclusions (or the data file contains information that may be relevant to a separate criminal investigation)?

6. Do the Federal Rules of Civil Procedure and the case law thereunder offer analogous support for summoning electronic records with intact metadata?

CONCLUSIONS

1. So long as the information in the metadata "may be relevant," within the broad meaning of I.R.C. § 7602(a)(2), to a proper purpose for which the examination is being conducted, such as ascertaining the correctness of the return, the Service may properly summon the taxpayer's original electronic data files containing the unaltered metadata. The taxpayer's offer to provide copies that omit the metadata or actual production thereof does not restrict the Service's authority to summon the original, unaltered metadata.

2. The same conclusion regarding the first issue applies equally to this issue.

3. The Service may summon information, including metadata, concerning transactions and events that occurred before and after the periods under examination so long as that information "may be relevant," within the meaning of I.R.C. § 7602(a)(2), to the issues arising in the examination of the taxable periods at issue. If the summons must be enforced or defended, the examiner must be prepared to describe in an affidavit the potential relevance of the information sought from periods before or after those being examined.

4. The Service may summon a third-party witness, such as the taxpayer's accountant, to give testimony or produce information that may be relevant to the examination, including electronic data files and the associated unaltered metadata.

5. In any case in which a taxpayer voluntarily (without a court order) provides the Service with an electronic or paper copy of its books and records, the taxpayer can require the Service to return the original copy. Therefore, upon receipt of the CD or thumb drive, the examiner should immediately copy the electronic records for inclusion within the examination file to avoid being forced to prematurely relinquish the only available copy.

6. Fed. R. Civ. P. Rule 34(a)-(b) specifically addresses the production of electronically stored information, including metadata. Recent case law supports the proposition that Rule 34 generally requires electronically stored information to be produced in the specified form or forms in which it was requested. If a request does not specify a form for producing electronically stored information, then the information must still be produced in the form or forms in which it was ordinarily maintained or in a reasonably usable form or forms. The case law supports the required production of metadata associated with electronic records, when the specifically requested form includes such metadata or when the metadata is necessary for the requested information to be reasonably usable under the circumstances.

FACTS

Generally, metadata is information that describes how, when, and by whom a particular item or set of electronic information was collected, created, accessed, modified, and formatted. The questions above arise in the context of examinations of taxpayers that keep their business records electronically with metadata automatically created as an integral part of the records. In many instances, the Service's examinations would be advanced by accessing metadata that identifies the original date a transaction was entered in the electronic records, the dates of any changes to the entries, and the username of the person who made the entries. The value inherent in an examiner's ability to obtain the date and source of recorded entries is self-evident; the information tends to support or undermine the credibility of the entries in the business records.

LAW AND ANALYSIS

Issues 1 - 3

The resolution of the first three issues set forth above is governed by three legal concepts. The first is the scope of the phrase "books, papers, records, and other data" appearing in I.R.C. § 7602(a). The second is the relevance requirement, codified in section 7602(a) and elaborated on in *United States v. Powell*, 379 U.S. 48, 57 (1964). The third is the *Powell* requirement that the Service must not already possess the information summoned. The application of each of these concepts to summonses seeking electronic records with associated metadata is discussed below.

a. "Books, papers, records, and other data"

I.R.C. § 7602(a) authorizes the Service to examine and to summon "any books, papers, records, or other data" which may be relevant to a proper tax inquiry as listed in section 7602(a) and (b). [2] The phrase "books, papers, records, or other data" is broadly crafted,

[2] The purposes for which the Service is authorized to issue a summons are ascertaining the correctness of a return, making a return where none has been made, determining the liability of any person for any

and the courts' interpretation has been equally so. In *United States v. Euge*, 444 U.S. 707, 711 (1980), the Supreme Court construed the phrase "other data" to include handwriting exemplars, even though the statute does not explicitly authorize the production of handwriting exemplars. In its reasoning, the Court emphasized that the Service's summons authority, critical as it is to effective tax administration, should not be circumscribed absent express and unambiguous direction from Congress. *United States v. Euge*, 444 U.S. 707, 712 (1980); *United States v. Bisceglia*, 420 U.S. 141, 150 (1975). Citing this broad construction as authority, the Eighth Circuit held in *Norwest* that the phrase "records, or other data" encompassed tax preparation software containing a series of coded instructions enabling a computer to generate the taxpayer's returns. The Eighth Circuit rejected the opposing parties' argument that the Service did not need the software to reconcile the taxpayer's return to its books, reasoning that the Service need not show a necessity for a summoned record; it need only show that the record will "illuminate any aspect of the return." *United States v. Norwest*, 116 F.3d 1227, 1233-34 (8th Cir. 1997) (citing *United States v. Arthur Young*, 465 U.S. 805, 815 (1984)).

Given these expansive precedents, it is readily apparent that the phrase "books, papers, records, and other data" is more than broad enough to encompass the compelled production of the metadata associated with electronic documents.

b. "May be relevant"

The second legal concept governing the resolution of the first three issues listed above is the requirement that the summoned information "may be relevant" to the particular tax inquiry. *United States v. Powell*, 379 U.S. 48, 57 (1964).

The *Powell* relevance requirement has its statutory basis in I.R.C. § 7602(a), which authorizes the Service to examine and to summon any books, papers, records, or other data and to take testimony which "may be relevant or material" to ascertaining the correctness of a return or any of the other proper purposes listed in section 7602(a) and (b). The widely accepted standard used by the appellate courts to determine whether summoned information "may be relevant" is whether it "might throw light upon the correctness of the return." *See United States v. Wyatt*, 637 F.2d 293, 300 (5th Cir. 1981); *United States v. Turner*, 480 F.2d 272, 279 (7th Cir. 1973); *United States v. Ryan*, 455 F.2d 728, 733 (9th Cir. 1972); *United States v. Egenberg*, 443 F.2d 512, 515-516 (3d Cir. 1971); *Foster v. United States*, 265 F.2d 183, 187 (2d Cir. 1959).

The Supreme Court elaborated in *United States v. Arthur Young*, 465 U.S. 805, 814 (1984), on the meaning and purpose of the "may be relevant" requirement of section 7602(a). The Court first observed that the relevance standard of section 7602(a) is far

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internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person regarding any internal revenue tax, collecting any such liability, and inquiring into any offense connected with the administration or enforcement of the internal revenue laws. I.R.C. § 7602(a) and (b).

broader than that used in deciding whether to admit evidence in federal court under Fed. R. Evid. 401. The Court further opined:

> The language “may be” reflects Congress' express intention to allow the IRS to obtain items of even *potential* relevance to an ongoing investigation, without reference to its admissibility. The purpose of Congress is obvious: the Service can hardly be expected to know whether such data will in fact be relevant until it is procured and scrutinized. As a tool of discovery, the § 7602 summons is critical to the investigative and enforcement functions of the IRS … .

Therefore, the statute-based “may be relevant” requirement of *Powell* will be satisfied when the Service seeks information that may throw light on the tax inquiry at issue. The Service need not show that the summoned information will be relevant; it need only show that the nature of the information is such that it may potentially be relevant.

When applying this standard to the first three questions set forth in this memorandum, it is apparent that metadata associated with a taxpayer’s electronic business records “may be relevant” within the meaning of I.R.C. § 7602(a) because the nature of the information contained in the metadata, especially the dates on which the entries were made or modified and the identities of the persons entering the data, may support or undermine the credibility of the records offered to substantiate the accuracy of the return.[3] As then SBSE Commissioner Christopher Wagner explained to the AICPA in a letter of April 20, 2011, the Service requires unaltered metadata to allow “examiners to properly consider the integrity and veracity of the electronic files” through software programs “that may help to identify deleted or altered entries.” *See* 2011 TNT 90-32.

The additional factor raised in the third issue listed above, summoning electronic records (and associated metadata) dating from before or after the tax periods under examination, merely presents another facet of the same relevance requirement. When summoned information dates from a period outside of those being examined, the Service must be prepared to answer the naturally arising question of why such information may be relevant to the periods being examined. This issue is typically addressed in the agent’s affidavit that accompanies the Government’s petition to enforce or to defend the summons. The affidavit will typically identify the issues being examined and describe the potential relevance of the summoned information that dates from a period outside those being examined. As with any other summoned information, it is enough that the records sought might throw light on the tax inquiry at issue. *La Mura v. United States*, 765 F.2d 974, 980 (11th Cir. 1985) (records of year prior to year

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[3] The conclusion is consistent with the approach taken in Fed. R. Civ. P. Rule 34(a)-(b), adopted on December 1, 2006, concerning the production of electronically stored information and discussed in greater depth in Issue 6 of this memorandum. The rule provides that a party to litigation may request, consistent with Rule 26(b), the discovery of electronically stored information--including writings … and other data or data compilations--stored in any medium from which information can be obtained … .

under consideration found relevant); *Paine v. United States*, 88-1 USTC ¶ 9185 (E.D.N.Y. 1987); *United States v. Hamilton Federal Savings and Loan*, 566 F. Supp. 755, 759-60 (E.D.N.Y. 1983) (records generated during year before year being examined "may throw light upon the correctness of [the] return for the following year"). Electronic records containing metadata will be judged by the same standard. So long as the Service can demonstrate the potential relevance of the metadata associated with the records, the metadata should be obtainable by summons.

c. The Service must not already possess the information summoned.

The final legal concept governing the disposition of the first three issues is the *Powell* requirement that the Service must not already possess the summoned information. Each of the first three issues listed above describe scenarios in which the taxpayer offers to provide copies of the summoned records from which either the metadata or the data from prior or subsequent years is missing. In scenarios in which the Service summons metadata that may be relevant to the tax inquiry summoned, and the summoned person fails to produce the metadata, the taxpayer has not complied with the summons. *United States v. Rouse*, No. 8:11-mc-46-T-24 AEP, 2011 U.S. Dist. LEXIS 77028 (M.D. Fla. July 15, 2011), *aff'g* 2011 U.S. Dist. LEXIS 77025 (Mag. M.D. Fla. June 27, 2011) (court ordered summoned taxpayer to turn over electronic backup files for the tax years being examined; "other data" phrase of I.R.C. § 7602 includes electronic backup files).

This scenario is analogous to the well established rule that the Service is entitled to summon the original documents, even though it possesses copies. *United States v. Administration Co*., 94-2 USTC ¶ 50479 (N.D. Ill. 1994) (originals can assure consistency with documents already obtained), *aff'd,* 46 F.3d 670 (7th Cir. 1995). The original metadata associated with the electronic records can also assure the accuracy of the documents reproduced. For this reason, any argument that a paper printout or compact disc copy of electronic documents lacking the associated metadata is sufficient to put the summoned information in the Service's possession should fail.

Issue 4.

The Service has the authority to summon the taxpayer's original electronic data files from the taxpayer's accountant when the accountant possesses the records, whether or not the accountant recorded the entries of the business transactions into the electronic file. I.R.C. § 7602(a)(2) specifically provides that the Service may summon:

> any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for the tax … or any other person the [Service] may deem proper, to appear … and to produce such books, papers, records, or other data, and to give such testimony … as may be relevant or material to such inquiry.

Clearly, the taxpayer's accountant may be summoned to produce the electronic records and testify about their content.

Issue 5.

An owner of records who produces summoned records, whether electronic or on paper, to the Service without being ordered to do so by a court may at any time request their return. Such a request constitutes a withdrawal or revocation of consent to the use of records. *See Vaughn v. Baldwin,* 950 F.2d 331 (6th Cir. 1991) (Business records temporarily surrendered to the Service on voluntary basis by the taxpayer in connection with tax investigation could not, consistent with Fourth Amendment, be retained and copied after the taxpayer formally demanded their return and withdrew consent to making of copies.) For this reason, upon receipt of the CD or thumb drive, the examiner should immediately copy the electronic records for inclusion within the examination file to avoid being forced to prematurely relinquish the only available copy. See IRM 25.5.4.3(2) (advising examiners to immediately copy records upon receipt). The only caveats to this approach lie in the restrictions and safeguards codified in I.R.C. § 7612(c) for copying any software, including the computer software source code and the executable code.

Issue 6.

Fed. R. Civ. P. Rule 34(a)-(b) was adopted as revised on December 1, 2006. This rule specifically addresses the production of electronically stored information. In pertinent part, Rule 34(a)-(b) provides:

> (a) In General. A party may serve on any other party a request within the scope of Rule 26(b):
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> (1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:
>
> (A) any designated documents or electronically stored information--including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations--stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form ….
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> * * * * *
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> (b) Procedure.
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> (1) Contents of the Request. The request:

* * * * *

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) Responses and Objections. …

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(D) Responding to a Request for Production of Electronically Stored Information. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form – or if no form was specified in the request – the party must state the form or forms it intends to use.

(E) Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

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(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms . …

Metadata constitutes "electronically stored information," and it is discoverable if it is relevant and not privileged, as required by Rule 26(b). Lee S. Rosenthal, A Few Thoughts on Electronic Discovery after December 1, 2006: Metadata and Issues Relating to the Form of Production, 116 Yale L.J. Pocket Part 167 (2006). [4]

Recent cases decided since the adoption of revised Rule 34 support the discovery of metadata and provide analogous support for the Service when seeking electronic records with metadata. For example, in *Celerity, Inc. v. Ultra Clean Holding, Inc.,* 476 F. Supp. 2d 1159, 1164 (N.D. Cal. 2007) (court ordered the production of metadata associated with an overwritten opinion letter for which privilege had been waived, in order to permit the requesting party to view earlier drafts of the document). Also, in *Scotts Co. LLC v. Liberty Mut. Ins. Co.*, 2007 WL 1723509 (S.D. Ohio June 12, 2007), the court considered the plaintiff's objection that it could not search for metadata in the hard copy of the records that were produced. Although the court ordered the parties to seek to resolve the dispute extrajudicially, the court opined that when electronically stored information is sought in discovery, Rule 34 requires the information to be produced in the form in which it was originally maintained or one reasonably usable under the circumstances, even when the requesting party initially failed to specify the

[4] The author is a United States district court judge who served on the Judicial Conference's Advisory Committee on the Civil Rules.

form in which the electronically stored information should be produced. *See also In re Genetically Modified Rice Litigation,* 2007 WL 1655757 (E.D. Mo. June 5, 2007) (parties ordered to preserve all communications and documents in their original condition and electronic data in its native format, with a special instruction to preserve metadata) and *Allen v. Woodford*, 2007 WL 309943 (E.D. Cal. Jan. 30, 2007) (court ordered the producing party to produce all responsive documents in electronic format, with all metadata.)

Analogous support can also be found in pre-December 2006 case law. *See, e.g., Williams v. Sprint/United Management Company,* 230 F.R.D. 640 (D. Kan. 2005) and *In re Priceline.com Inc. Securities Litigation,* 233 F.R.D. 88 (D. Conn. 2005).

Please call (202) 622-4570 if you have any further questions.