Office of Chief Counsel
Internal Revenue Service
memorandum

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to: Technical Advisor, Criminal Investigation
Office of Governmental Liaison and Disclosure

from: Charles B. Christopher
Chief, Branch 7
(Procedure & Administration)

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subject: Disclosures in Response to Demands for Tax Records

This memorandum is in response to your request for a guidance received in this office on April 19, 2011. In recent months your office has seen an increase in the number of demands for tax records pursuant to federal court orders. Some of these orders do not seek exculpatory evidence pursuant to *Brady v. Maryland*,[1] nor do they seek records to assist in the prosecution of a nontax federal crime. What should the IRS do when faced with demands for returns or return information when there is no recognized constitutional basis for release, or section 6103 of the Code would not authorize disclosure?

BACKGROUND

You provided two examples of the type of demands for tax records received by the IRS from Assistant U.S. Attorneys for use in nontax criminal proceedings. In one instance, the IRS received a court order demanding that the IRS produce tax records for a list of individuals who had been assassinated by an organized crime figure convicted under the RICO statute. The AUSA wanted to calculate the amount of restitution for sentencing purposes using the descendants' lost revenue, based on income reported before their deaths. The IRS was not a part of the investigation, nor assigned to assist the grand jury. In a second instance, an AUSA demanded the wage records pertaining to the parents of a suspect involved in an attempted murder. In neither instance did the AUSA specifically refer to *Brady* or section 6103(i), but rather, submitted an order demanding production on a generalized "due process" theory. In addition to seeking

[1] 373 U.S. 83 (1963). In *Brady*, the U.S. Supreme Court ruled that the prosecution cannot withhold from the defense evidence that could tend to exculpate a defendant.

guidance on the validity of these vague due process orders, you have asked us whether the existing IRM provision reflects the current state of the law.

LEGAL ANALYSIS

I. *Confidentiality of Return Information*

Section 6103(a) provides that returns and return information are confidential and may only be disclosed as authorized by Title 26, *i.e*., the Internal Revenue Code. Section 6103(b)(2)(A) broadly defines "return information" to include a taxpayer's identity, the nature, source, or amount of his income and other tax and financial items, and any other data collected by the Secretary (IRS). This expansive definition has been held to cover all information received or generated by the Service during an investigation of a taxpayer for liability under the internal revenue laws. *See, e.g., Payne v. United States,* 289 F.3d 377, 381 (5th Cir. 2002). Thus, as a general rule, the IRS cannot disclose returns and return information unless some provision of the Code permits, or, some greater authority requires disclosure. There are exceptions to the general confidentiality rule authorizing the IRS to disclose return information, but Congress included each of these exceptions within the statute after careful consideration as to whether there was a genuine need for return information in order to implement federal programs or further federal interests.

When considering amendments to section 6103 in 1976, Congress recognized that the IRS had more information about citizens than any other federal agency and that other agencies routinely sought access to that information. Congress also understood that citizens reasonably expected the IRS to protect the privacy of the tax information they were required to supply. If the IRS abused that reasonable expectation of privacy, the resulting loss of public confidence could seriously impair the tax system. In each area of authorized disclosure, Congress attempted to balance the particular office or agency's need for the information with the citizen's right to privacy, as well as the impact of the disclosure upon continued compliance with the voluntary tax assessment system. *See* GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, H.R. 10612, 94TH CONG. PUB. L. 94-455, 313-316 (JCT Print 1976). The congressional mandate to protect returns and return information should not be viewed lightly.

II. *Authorized Disclosures to Justice Department Attorneys*

A. Title 26 authority to disclose returns and return information

Sections 6103(h)(2) and (3) provide the mechanism for officers and employees of the Justice Department, which includes United States Attorneys, to obtain returns and return information to carry out their responsibilities in both the civil and criminal tax administration matters. Under section 6103(h)(2), tax information may be disclosed to DOJ for preparations for, or use in, any proceeding before a federal grand jury, or in preparation for, or use in, any tax administration proceeding before any federal court if: (1) the taxpayer is or may be a party, or the proceeding arose out of, or in connection

with, determining the taxpayer's civil or criminal liability, or the collection of civil tax liability; (2) the treatment of an item reflected on a return is or may be related to the resolution of an issue in the proceeding; or (3) the return or return information relates or may relate to a transactional relationship between a person who is or may be a party to the proceeding and the taxpayer which may resolve an issue in the proceeding.

When considering what tax information should be available to federal law enforcement officials who are not engaged in tax administration, Congress ultimately decided that federal law enforcement officials should not have easier access to information about a taxpayer maintained by the IRS than they would have if they sought to compel the production of that information from the taxpayer himself. *See* GENERAL EXPLANATION at 323 ("Congress believes that [what] the American citizen is compelled by our tax laws to disclose to the IRS is entitled to the same degree of privacy as those private papers maintained in his home.") With this in mind, Congress established the general rule that a federal agency enforcing a nontax criminal law must obtain court approval to obtain a return or return information submitted by the taxpayer or its representative.[2] *Id*. Accordingly, Federal agencies may obtain tax information for use in nontax criminal investigations pursuant to an *ex parte* order of a federal district court judge or magistrate. *See* IRC § 6103(i)(1); Treas. Reg. § 301.6103(i)-1. The application must establish: (1) reasonable cause to believe that a federal nontax criminal violation has occurred; (2) reasonable cause to believe that tax information is or may be relevant to a matter relating to the commission of the crime; and, (3) that the information sought will be used exclusively for the federal criminal investigation or proceeding concerning such crime and cannot reasonably be obtained, under the circumstances, from any other source. *See United States v. Praetorius*, 451 F. Supp. 371, 372 (E.D. N.Y. 1978). The courts are expected to review documents and play an active role in balancing investigative need with taxpayer's privacy interests. *See id.,* at 373; *United States v. Barnes*, 604 F.2d 121, 146 (2d Cir. 1979) (large amounts of "miscellaneous" income on return relevant to drug conspiracy case), *cert. denied*, 446 U.S. 907 (1980). The section 6103(i)(1) *ex parte* order process may *not* be used to obtain tax information for use in a *civil* proceeding, including a civil forfeiture proceeding. *United States v. $57,303.00 in United States Currency*, 737 F. Supp. 1041, 1043 (C.D. Ill. 1990) ("Congress distinguished between criminal investigations or proceedings and civil forfeiture actions when drafting these disclosure provisions.").

Thus, as noted, both sections 6103(h)(2) and 6103(i) provide adequate authority for Justice attorneys to receive returns and return information as needed to conduct their

[2] "Taxpayer return information" is return information filed with or furnished to the IRS by or on behalf of the taxpayer to whom the information relates. Information filed on the taxpayer's behalf by the taxpayer's representative, either voluntarily or pursuant to summons, is taxpayer return information. The distinction between "return information" and "taxpayer return information" is very significant in the context of disclosures under section 6103(i) for use in nontax federal criminal matters.

cases, with several limited extraordinary circumstances, as discussed below.[3]

B. Constitutional basis for disclosure

In all criminal cases, the government is under a constitutional obligation to disclose evidence material either to guilt or punishment, *i.e.*, exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).[4] The obligation includes evidence that may be used to impeach or discredit a government witness. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). This requirement also includes information about the credibility or integrity of a government employee who will be called as a witness. *Henthorn v. U.S.*, 931 F.2d 29 (9th Cir. 1991).

In *Brady*, the U.S. Supreme Court held that the suppression of evidence favorable to the defendant violates due process where the evidence is material to either guilt or punishment. The intent of the *Brady* rule was described by the Court as "based on the requirement of due process." *U.S. v. Bagley*, 473 U.S. 667, 675 (1985). The Court further explained that the *Brady* rule does not displace the adversarial system as the primary means to uncover the truth, but rather, it is intended to assure that justice does not fall short. A prosecutor cannot withhold evidence from the defendant that would deprive the accused of a fair trial. *Id*. With respect to the materiality requirement, evidence is material only if there is a reasonable probability that if the evidence had been turned over to the defense, the results of the case would have been different. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." *Bagley*, at 682. When Congress considered what standard should be used to authorize disclosure of third party return information in a tax administration proceeding, it concluded that the disclosure must be "directly related to the resolution of an issue in the proceeding." I.R.C. § 6103(h)(4)(B), (C). These standards are quite similar in that both require a showing that the information could affect the outcome of the proceeding.

Because the obligations placed on the government are constitutionally based, *i.e*, affect the fairness of the trial, the IRS faces a dilemma when an AUSA submits a vague "due process" request for an accused's tax returns, or, for third party tax returns, in a nontax criminal proceeding. As noted above, section 6103(i) provides a mechanism for Justice attorneys to obtain tax records to use in a nontax criminal proceeding. When the IRS receives a request from the prosecutor for *Brady*, *Giglio* or *Henthorn* material, the IRS has an idea of the character of the information sought. The IRS understands that the evidence is either exculpatory, or demonstrates witness bias or witness trustworthiness. These are factors that the courts have recognized as something that could affect the

[3] It is our understanding that the United States Attorneys Manual has procedures for obtaining a section 6103(i) *ex parte* court order as well as sample language.

[4] It is clear that the scope of the information the prosecutor must provide under *Brady* includes more than that within the prosecutor's own files. Although the scope of the *Brady* request is determined by the prosecutor, as a general rule it includes the investigative agency involved in the case. It is not our intent to opine here on the scope of a *Brady* request. Rather, we focus on the materiality issue.

outcome of the case. A vague "due process" order gives the IRS no guideline as to how the information can affect the fairness of the trial. Bearing in mind that the IRS has a statutory obligation to protect returns and return information, the IRS needs to be certain that when it discloses confidential information it does so because that disclosure fully comports with constitutional or statutory requirements.

Courts are generally reluctant to create new rights if statutory and existing judicial remedies are sufficient. As the Supreme Court noted, "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional remedies." *See e.g., Schweiker v. Chilicky*, 487 U.S. 412, 420-23 (1988) (discussing principles of and restrictions on *Bivens* actions). Accordingly, at this time, we see no basis to equate a vague due process request with the more specific and recognizable *Brady* and *Giglio* mandates. We recommend that when the IRS receives such a request, it follow up with the requester to determine what is actually needed and suggest the appropriate procedure, as outlined in IRM 11.3.35.

III. *Touhy Regulations*

The General Housekeeping Statute, 5 U.S.C. § 301, permits agency heads to promulgate regulations addressing the use, preservation and maintenance of the agency's records. Treasury Regulation § 301.9000-1 to 301.9000-7, promulgated pursuant to that statute, establishes procedures to be followed by current and former employees of the IRS and its contractors who receive requests for disclosure of IRS records or information. The ultimate decision to disclose Service records or information belongs to the authorized official with delegated authority to authorize testimony or disclosure of IRS records or information. Thus, when an authority outside the IRS seeks to depose an IRS employee or contractor or requests that IRS records be produced by the government, disclosure is not permitted absent authorization from the Commissioner or the Commissioner's delegate in accordance with Treas. Reg. § 301.9000-3(a).

A "request" is any request for testimony of an IRS officer, employee or contractor, or for production of IRS records or information, oral or written, by any person, which is not a demand. Treas. Reg. § 301.9000.1(d). A "demand" is any subpoena or other order of any court, administrative agency or other authority, or the Congress, or a committee or subcommittee of the Congress, and any notice of deposition (either upon oral examination or written questions), request for admissions, request for production of documents or things, written interrogatories to parties, or other notice of, request for, or service for discovery in a matter before any court, administrative agency or other authority. Treas. Reg. § 301.9000-1(e).

Treas. Reg. § 301.9000-2 provides that records may not be provided if a statute, such as section 6103, prohibits disclosure. Accordingly, if neither section 6103, nor

recognized constitutional mandates, such as *Brady* or *Giglio*, permit or require disclosure, the IRS cannot provide the records.

IV. *Disclosure Not Authorized by the Privacy Act*

At least two provisions of the Privacy Act authorize an agency to provide records to another governmental agency. Section 552a(b)(7) authorizes one agency to disclose records from a system of records to another law governmental agency for either civil or criminal law enforcement purposes upon written request by the head of the requesting agency. 5 U.S.C. § 552a(b)(7). Section 552a(b)(11) authorizes the disclosure of records from a system of records upon receipt of an order issued by a court of competent jurisdiction. 5 U.S.C. § 552a(b)(11). Nonetheless, these disclosures must comport with section 6103.

As a general rule, a precisely drawn, detailed statute will preempt more general remedies. *Jett v. Dallas Indep. School Dist*., 491 U.S. 701, 733-34 (1989)(quoting *Brown v. General Svcs. Admin*., 425 U.S. 820, 834 (1976)). For example, the Fifth Circuit Court of Appeals found that section 6103, which permits disclosure of tax return information in a proceeding pertaining to tax administration, is a more detailed statute and should therefore preempt the conflicting provisions of the more general Privacy Act. *Hobbs v. U.S.*, 209 F.3d 401, 412 (5th Cir. 2000). Similarly, courts have noted that if any individual provision of the Privacy Act conflicts with a corresponding provision in section 6103 then the former must yield. *See Lake v. Rubin*, 162 F.3d 113, 115-16 (D.C. Cir. 1998); *Cheek v. I.R.S.*, 703 F.2d 271, 271-72 (7th Cir. 1983).

Section 6103 contains very strict rules that operate to protect data from unauthorized access or disclosure. Because section 6103 is dedicated entirely to confidentiality and disclosure issues related to tax returns and return information, it will preempt the more general protection provisions offered by the Privacy Act, at least when provisions conflict. Accordingly, the IRS cannot provide copies of records from a system of records upon receipt of a general court order.

IRS disclosure personnel should follow the procedures set forth in Treas. Reg. § 301.9000 *et seq*. and IRM 11.3.35 upon receipt of any demand for IRS testimony or records.

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