

Summons Enforcement: “Shall” Really Does Mean Shall.

The Internal Revenue Code gives the IRS the authority to issue a summons to third parties, but it also imposes a notice requirement; if the IRS wants to summon Jane Smith’s bank records from her bank, she must be given at least twenty-three days prior notice. I.R.C. § 7609(a)(1).

When the IRS seeks to enforce a summons, it must meet the requirements of *United States v. Powell*, 379 U.S. 48 (1964), which require a showing that

- the IRS is conducting an investigation for a legitimate purpose;
- the information sought is relevant;
- the IRS does not already have the information; and
- the IRS has followed the “administrative steps required” by the Code. *Id.* at 57-58.

On Monday, the Tenth Circuit addressed what happens if the IRS does not give the requisite twenty-three days of notice. *Jewell v. United States*, 2014 U.S. App. LEXIS 7899 (10th Cir. Apr. 28, 2014). In *Jewell*, the IRS issued third party summonses to four banks in two different districts seeking records relating to nursing homes run by Sam Jewell, the taxpayer. Jewell move to quash the summonses because the IRS failed to provide twenty-three days of notice, and the IRS moved to enforce its summonses. The two district courts split, and the two parties each appealed.

The Tenth Circuit began its analysis of the notice requirement by noting that the IRS had to demonstrate that it had taken all required administrative steps, as the Supreme Court held in *Powell*. 2014 U.S. App. LEXIS 7899, slip op. at *4-*5. The Court then focused on plain language of Section 7609(a)(1), which provides that “notice of the summons shall be given . . . no later than the 23rd day before the day fixed in the summons as the day upon which such records are to be examined.” Batting aside the government’s contrary argument, the court quickly concluded that shall indicates a mandatory intent. *Jewell*, slip op. at *7-*8.

The court then considered whether notice obligation was an “administrative step” within the meaning of *Powell*. Given the breadth of the term “administrative step,” the court concluded that the notice requirement was an administrative step. *Id.*, slip op. at *8-*9. This determination led the court to its ultimate conclusion that the government’s acknowledgement that it did not provide twenty-three days of notice “prevents the IRS from making a prima facie showing for enforcement of the summonses.” *Id.*, slip op. at *10.

If you came to the issue in a vacuum, the Tenth Circuit’s reasoning would seem unremarkable. But five other circuit courts have reached the opposite result. See *Jewell*, slip op. at *10 (citing *Adamowicz v. United States*, 531 F.3d 151, 161 (2d Cir. 2008) (per curiam); *Cook v. United States*, 104 F.3d 886, 889-90 (6th Cir. 1997); *Sylvestre v. United States*, 978 F.2d 25, 28 (1st Cir. 1992) (per curiam); *United States v. Bank of Moulton*, 614 F.2d 1063, 1066 (5th Cir. 1980) (per curiam); *Azis v. U.S. IRS*, 522 F. App’x 770, 777 (11th Cir. 2013) (per curiam)).

According to the Tenth Circuit noted these courts have adopted a variety of approaches:

- The First Circuit ignores the fact that the notice period is an administrative step required in connection with the summons;
- The Second, Sixth, and Eleventh Circuits deploy equitable power to excuse the notice defect if the taxpayer isn’t prejudiced;

- The Fifth Circuit, addressing a different notice requirement, refused to elevate form over substance.

Jewell, slip op. at *11-*12.

Normally, an effort to quash an IRS summons is a fool's errand, but *Jewell* suggests that may not always be true. The picture will likely become clearer after the Supreme Court decides *United States v. Clarke*, No. 13-301, in which the Eleventh Circuit ruled that a hearing should have been held on a taxpayer's assertion that summonses were issued for an improper purpose. *Clarke* was argued last week; for coverage and analysis, SCOTUS blog is helpful.

<http://www.scotusblog.com/2014/04/argument-analysis-what-is-the-boundary-on-district-court-discretion-to-decide-whether-to-develop-evidence-before-enforcing-an-irs-summons/>

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