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Challenges to Summonses After 'Polselli v. IRS'

By Jeremy H. Temkin
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The Internal Revenue Service has broad powers to collect unpaid taxes. In order to locate a delinquent taxpayer's assets, the IRS can issue summonses seeking records relating to the delinquent taxpayer's financial accounts, as well as accounts held by third parties with whom the delinquent taxpayer has done business. Over the years, courts have split over whether such third parties are entitled to notice that the IRS has summoned their financial records.

In *Polselli v. Internal Revenue Service,* 143 S. Ct. 1231 (May 18, 2023), the U.S. Supreme Court unanimously refused to limit the IRS's ability to issue summonses without notice to situations in which it seeks records of accounts in which a delinquent taxpayer has an interest. While the IRS prevailed on the narrow question presented in *Polselli*, both the unanimous opinion drafted by Chief Justice Roberts and a concurring opinion drafted by Justice Ketanji Brown Jackson make clear that the IRS's authority to summon records of financial accounts belonging to individuals other than a delinquent taxpayer without notice to the affected account holder is not unconstrained. This column discusses the court's decision in *Polselli*, Justice Jackson's concurring opinion, and the potential for future challenges to the IRS's issuance of summonses without notice.

Background

Title 26 U.S. Code Section 7609(a) sets forth the general rule that "any person" identified in an IRS summons issued to a third-party recordkeeper must receive notice and an opportunity to challenge the summons. Section 7609(c)(2) provides exceptions to the notice requirement and specifies that notice is not required where a summons is "(D) issued in aid of the collection of" either "(i) an assessment made or judgment rendered against the person with respect to whose liability the summons is issued" or "(ii) the liability … of any transferee or fiduciary" of such person.


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In *Polselli,* the IRS had entered over $2 million in assessments against Remo Polselli. When an IRS revenue officer went to collect this liability, he suspected that Mr. Polselli was using his wife's bank accounts to conceal assets and that his lawyers had financial records that might reveal, among other things, the source of his funds and additional bank accounts. Based on these suspicions, the IRS issued summonses to three banks seeking records of accounts held by Polselli's wife and his lawyers. Relying on Section 7609(c)(2)(D)(i), the IRS did not notify either Mrs. Polselli or the lawyers (collectively, the petitioners) of the summonses. Despite the lack of notice, the petitioners learned of the summonses and moved to quash.

In moving to dismiss the actions, the IRS argued that because the petitioners were not entitled to notice of the summonses, the government had not waived sovereign immunity and the district court lacked subject matter jurisdiction. Relying on the U.S. Court of Appeals for the Ninth Circuit's decision in *Ip v. United States,* 205 F.3d 1168 (9th Cir. 2000), the petitioners argued that Section 7609(c)(2)(D) only excused notice where

the assessed taxpayer had "some legal interest or title in the object of the summons," and that because Mr. Polselli lacked any interest in the accounts in question, they should have received notice and were thus entitled to challenge the summonses.

The district court rejected this argument and dismissed the motions to quash, and a divided panel of the U.S. Court of Appeals for the Sixth Circuit affirmed. The petitioners then sought Supreme Court review, teeing up a test between the plain meaning of the statute and the privacy interests of third-party account holders whose financial records had been summoned in connection with collection activity. See J. Temkin, "U.S. Supreme Court to Address the IRS's Summons Authority," N.Y.L.J. (Jan. 18, 2023).

Chief Justice Roberts' Unanimous Opinion

Writing for a unanimous court, Chief Justice Roberts rejected the petitioners' claim that Section 7609(c)(2)(D)(i)'s exception to the notice requirement "applies only where a delinquent taxpayer has a legal interest in accounts or records summoned by the IRS," finding that a "straightforward reading of the statutory text" provides no such limitation. *Polselli,* 143 S. Ct. at 1236-37.

The court explained that Section 7609(c)(2)(D)(i) sets forth three conditions to the notice exemption: (1) the summons must be "issued in aid of … collection"; (2) the summons must aid the collection of a liability that is the subject of "an official assessment [made by the IRS] or a judgment has been rendered with respect to a taxpayer's liability"; and (3) a summons must aid the IRS in collecting assessments or judgments "against the person with respect to whose liability the summons is issued" thereby "linking the subject of the assessment or judgment with the subject of the collection effort." (quoting Section 7609(c)(2)(D)(i)). The court emphasized that none of the three statutory conditions for excusing notice "mentions a taxpayer's legal interest in the records sought by the IRS, much less requires that a taxpayer maintain such an interest for the exception to apply." Rather, pointing to Section 7610(b)(1), which precludes reimbursement of costs associated with producing records if a delinquent taxpayer "has a proprietary interest in the records to be produced," the court noted that Congress knew how to include a legal interest requirement if it wanted to do so. (quoting Section 7610(b)(1)).

The court went on to address and reject the petitioners' arguments for limiting the notice exception. First, the petitioners had argued that the requirement that a summons be issued "in aid of the collection" of a liability serves to limit the notice exclusion to summonses that "directly advance" the IRS's collection efforts, meaning that the summons must be "targeted at an account containing assets that the IRS can collect to satisfy the taxpayer's liability." (quoting Brief for Petitioners 21). According to the petitioners, "a summons issued to a third party will [only] produce collectible assets … if the delinquent taxpayer has a legal interest in the targeted account." Chief Justice Roberts rejected this argument as reflecting too narrow an interpretation of the phrase "in aid of the collection." Noting that the ordinary meaning of "aid" is "to help" or "assist," the court concluded that "even if a summons may not reveal taxpayer assets that can be collected, it may nonetheless help the IRS find such assets."

The petitioners had also argued that clause (i) of Section 7609(c)(2)(D) must be read narrowly to avoid rendering clause (ii) unnecessary. According to the petitioners, including "a 'legal interest' requirement … would cabin the scope of clause (i), leaving some purpose for clause (ii)."Chief Justice Roberts, however, noted two key differences between the clauses: clause (i) excuses notice where there has been "an assessment made or judgment rendered" against a taxpayer, while clause (ii) applies upon a finding of "liability at law or in equity" with respect to any "transferee or fiduciary" of the taxpayer. Id. The Court concluded that, in light of the distinctions "between liability and assessment or judgment, and between taxpayers and their transferees or fiduciaries," the two clauses applied in different situations.

Finally, the petitioners had also argued that a narrow reading of Section 7609(c)(2)(D)(i) was supported by the fact that Congress had enacted the general notice requirement to address privacy concerns following two Supreme Court decisions—*Donaldson v. United States,* 400 U.S. 517 (1971) and *United States v. Bisceglia, 4*20 U.S. 141 (1975)—that broadly construed the IRS's summons power. While acknowledging "apprehension about the scope of the IRS's authority to issue

summonses" and the potential for abuse, Chief Justice Roberts took solace in the government's concession at oral argument that the phrase "in aid of the collection" is not "'limitless'" and its suggestion that the notice exception only applies to summonses that are "'reasonably calculated to assist in collection.'" (quoting Transcript of Oral Argument, *Polselli v. IRS,* No. 21-1599 (Mar. 29, 2023) ("Tr.") at 33). Ultimately, because the sole issue before the court was "whether the exception provided in Section 7609(c)(2)(D)(i) requires that a taxpayer maintain a legal interest in records summoned by the IRS," Chief Justice Roberts concluded that it was unnecessary "to define the precise bounds of the phrase 'in aid of the collection.'"

Concurring Opinion

While agreeing with Chief Justice Roberts that the IRS's ability to issue summonses without notice does not require that the delinquent taxpayer have a "legal interest" in the records being summoned, Justice Jackson, joined by Justice Gorsuch, wrote separately to emphasize that "the summoning power of the IRS under [Section 7609(c)(2)(D)(i)] is circumscribed nonetheless." First, Justice Jackson noted that the default rule of notice and the opportunity for judicial review reflects Congress's attempt to balance the IRS's need to gather information with the right of affected persons to challenge potential overreaching. According to Justice Jackson, Congress recognized that "in the collection context … providing notice [can] frustrate the IRS's ability to effectively administer the tax laws" and that Section 7609(c)(2)(D)(i) "prevents notice from tipping the balance entirely in favor of the delinquent taxpayer, at the expense of the IRS." Id. However, the exemption from the notice requirement does not give "the IRS a blank check, so to speak, to do with as it will in the collection arena." Rather, Justice Jackson read the statute as imposing a balancing test "depending on whose information the summons seeks … or the nature of the requested records."

Second, Justice Jackson rejected the notion that Congress intended Section 7609(c)(2)(D)(i) to permit the IRS to issue a broad, intrusive summons for a third party's financial records without notice "so long as the agency thinks doing so would provide a clue to the location of a delinquent taxpayer's assets." Justice Jackson offered an example to underscore her point: the mere fact that a delinquent taxpayer patronized a local dry cleaners would not justify the IRS issuing a summons to the dry cleaners' bank for years of its financial records "because knowing what methods of payment (or aliases) the taxpayer regularly uses could help the agency track down the taxpayer's assets." Thus, allowing the government to obtain and review all of the records of a business in which a delinquent taxpayer did not have either a known financial interest or a special relationship with the business's owners without providing notice to the proprietors was a bridge too far for Justice Jackson. At bottom, Justice Jackson viewed the issue of whether notice is properly exempted as dependent on "a careful fact-based inquiry … depending on the scope and nature of the information the IRS seeks."

Conclusion

While *Polselli* refused to limit the exception to the general notice requirement to situations where a delinquent taxpayer has an interest in the records at issue, the court made clear that the IRS's ability to issue summonses without notice in the collection arena is not boundless. Rather, it left open a potentially broader avenue for challenging summonses where the records being sought are not clearly tied to the liability to be collected. Following *Polselli,* third parties challenging summonses for their records should focus their arguments on the relationship between the records being sought and the liability to be collected. It remains to be seen whether there is a point at which the court will find the connection to be too attenuated for the summons to be considered to have been issued "in aid of the collection" of the delinquent taxpayer's debts, thereby necessitating notice to affected third parties.

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