

### 3. The John Doe Summons.

The "John Doe Summons" is a summons to a third party who has information related to taxpayers whose identities are unknown to the IRS.<sup>515</sup> The quintessential example of a target of a John Doe Summons is the promoter of an allegedly abusive Schedule C tax shelter that has been widely sold where the IRS desires to discover the names of all the investors.

The John Doe Summons procedures require the IRS to first convince a court that the investigation relates to a particular person or ascertainable group or class of persons, that there is reasonable cause to believe that the person or persons so identified may not have complied with the tax laws, and that the information sought is not readily available from other sources. The check in the normal third party summons procedures is that the taxpayer, who must be notified (subject to the rules noted above), will have the incentive to contest any overreaching by the IRS. As to unidentified taxpayers, however, the IRS cannot provide notice because it does not know who they are. The requirement for advance court approval for such summonses is a surrogate -- a check by an objective third party -- for notice to the taxpayer.

The John Doe Summons procedures were designed to provide checks and balances. But, the IRS often finds that the procedures slow it down. The IRS must first go to DOJ Tax Division and convince the Tax Division that it is worth going through the procedures to get the summons. The Tax Division must gear up and present the matter to a frequently skeptical and almost always overworked District Judge who must play devil's advocate to the Government's ex parte application for the summons. Obviously, the IRS would much prefer just to use its administrative summons which has no such cumbersome steps.

In United States v. Tiffany Fine Arts, Inc., 469 U.S. 310 (1985), the Supreme Court blessed the IRS's use of the regular administrative summons rather than the John Doe summons where the target of the summons has transactions relevant to its tax liability which, if discovered, might also identify unknown third parties' and be relevant to their tax liabilities. The context there was a tax shelter promoter who sold the product to unknown third parties. By allegedly investigating the promoter's tax liability to support inquiries into whether it reported its income from those unknown third parties, the IRS could summons the information under the general administrative summons by meeting the minimal requirements of Powell. The Supreme Court blessed that gambit and refused to require the John Doe Summons procedure. After Tiffany Fine Arts, the IRS saw the end-run around the John Doe Summons procedures -- simply find a reason to audit the third party record-keeper such as the tax shelter promoter and find some pretext that obtaining the names of the third parties is relevant under the Powell standards to the audit of the record-keeper.

In United States v. Gertner<sup>516</sup> which you should now read, a law firm had filed a Form 8300 (currency transaction report) notifying the IRS that the law firm had received in excess of \$10,000 in cash. The form, however, failed to identify the taxpayer, asserting ethical grounds, the attorney client privilege

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<sup>515</sup> § 7609(f).

<sup>516</sup> 65 F.3d 963 (1st Cir. 1995).

and constitutional grounds. The IRS then issued a regular IRS summons to the law firm to produce the withheld information. The IRS used the regular IRS summons as opposed to the John Doe summons on the ground the Supreme Court blessed in Tiffany Fine Arts -- i.e., that the summonsee's taxes were being investigated as well as the unknown taxpayer's taxes. Analyzing the case under the Powell good faith standard, the district court concluded that the IRS's grounds for using the general summons -- i.e., that it was investigating the law firm's tax liability -- was pretextual, mere smoke and mirrors to achieve the real goal of investigating the unidentified taxpayer. The Court of Appeals affirmed, noting importantly that the John Doe Summons procedure required advance court approval, a procedure the Government sought to avoid here on the pretext that it was after something more than the taxpayer's identity. The Court of Appeals noted that the requirement of advance court approval could not be ignored by the IRS simply by chanting a litany based on Tiffany Fine Arts.

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<sup>517</sup> This is a program for auditing large corporate taxpayers. It is often referred to acronymically as CEP.

<sup>518</sup> For a discussion of the interplay of the suspension for the designated summons and consents to extend the statute of limitations, see FSA 200221004 (2/6/02), reprinted at 2002 TNT 102-74 (5/28/02).

<sup>519</sup> Presumably, under the new structure this would be LMSB Division Counsel.