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## 3 Tips For Responding To IRS Document Requests

By **Eric Kroh**

Law360, New York (July 23, 2015, 2:32 PM ET) -- Summons enforcement actions are on the rise thanks to new IRS rules that require examiners to bring litigation against taxpayers who fail at responding to information document requests.

Under an internal directive from the IRS' Large Business and International Division issued in late 2013, if a taxpayer does not comply with an IDR from the agency by a certain time, examiners must follow a mandatory enforcement process that starts with a delinquency notice sent to the taxpayer, followed by a presummons letter and finally a summons.

While the IRS has broad authority under the law to issue and enforce summonses, there are steps taxpayers can take at each stage in the process to head off or challenge a summons. Here, experts share three tips for responding to information document requests and summons enforcement actions from the IRS.

### Lawyer Up

Andrew S. Feldman of the Feldman Firm PLLC said the first thing a taxpayer should do when he receives an IDR or summons from the IRS is to hire an attorney who has experience in those matters. Ideally, the attorney should then hire a certified public accountant to keep everything privileged, he said.

"Number one is, you should not ever, ever, ever try to handle a summons by yourself as a taxpayer," Feldman said.

The attorney should be able to look at the IDR or summons and figure out what kind of investigation the IRS is undertaking, for example whether the examiners are looking for unreported domestic income or perhaps an undisclosed foreign bank account, Feldman said. The CPA should be able to deduce how much taxable income is at stake and what potential penalties apply, he said.

If the case gets to the summons enforcement stage and the taxpayer must appear before the IRS, she absolutely needs an attorney at her side to give advice in real time, Feldman said. The taxpayer has the right to leave the room during questioning and consult with her attorney on a question-by-question basis, he said.

"That might seem a little awkward at the time, but it's something that has to be done in these kinds of situations," Feldman said.

David Greene of The Greene Law Firm PA said taxpayers with in-house counsel should consider getting outside help to provide an objective take.

"A taxpayer is emotionally involved with the situation; a professional is not," Greene said. "If I get in trouble, I'm certainly not going to represent myself. I'm going to get someone who

represents me.”

## **Be Cooperative**

Steven Walker of The Law Offices of Steven L. Walker PLC said a smart strategy in tax controversy work is to cooperate with the IRS agent without volunteering unnecessary information. At each stage in the process, contacting the agent and figuring out what she is looking for and responding to that can go a long way toward heading off any problems, he said. The idea is to move the agent as quickly as possible through the issue, he said.

If the examination is in the IDR stage, the priority should be to stop it from turning it into a summons enforcement action, Walker said. Agents sometimes use canned language cut-and-pasted from a template in document request letters, so it can be helpful to call the agent to find out exactly what he wants, he said. Then, respond with a set of core documents that pertains to the request but goes no further, he said.

Though a taxpayer is not legally required to respond to an IDR, playing hardball with an IRS agent will just be followed by more intensive actions by the agency, Walker said.

“The problem is if you don’t respond to the IDR, then the case can escalate,” Walker said. “You want to have a very good working relationship with the agent.”

If the taxpayer doesn’t produce the documents, then the service can rule against the taxpayer at the audit level and make the adjustment to taxes owed, which makes the case much more difficult to fight, he said.

The only legitimate reasons for not responding to a document request are if the taxpayer doesn’t have the documents or if they are already in the possession of the IRS, he said.

## **Fight Back**

A taxpayer’s ability to fight an IRS summons is limited, but there are still things that can be done. Last year, the U.S. Supreme Court ruled in *U.S. v. Clarke* that a taxpayer is entitled to an evidentiary hearing on an IRS summons if she can “point to specific facts or circumstances plausibly raising an inference of bad faith.”

Though each situation is different, any time a taxpayer has an opportunity to cross-examine or question an IRS agent in front of the court he should do it, Feldman said. It is difficult to show that the IRS has an improper motive, but if an agent is using deception or hiding the actual purpose of the summons, if there are multiple examinations that seem to be duplicative or if the actions of the examiner amount to harassment, a court will pay attention, he said.

“If you have enough support in the records for that, the judge most likely is going to want to hear what’s going on,” Feldman said.

Walker said one approach to take when challenging a summons is to set up a meeting with the IRS agent and persuade him to call off the summons because the information sought by the agent is already in the agency’s possession.

Otherwise, there are four ways to shoot down an IRS summons in court, Walker said. You can show that the agency had an improper purpose in issuing the summons, that the summons is overly broad, that the information sought is already in the possession of the IRS or that the agency hasn’t followed the proper administrative steps in issuing the summons, he said.

Feldman said the courts have generally sided with the IRS in maintaining that the Fifth Amendment does not extend to documents that are required to be maintained by the taxpayer and the agency can compel their production. Nevertheless, he said he thought it was

still an open question as to whether the contents of the documents themselves are protected by the Fifth Amendment.

The IRS will continue to paint with a broad brush and assert their authority, but it is incumbent upon defense counsel to argue to the courts and the IRS that the required records doctrine isn't as broad as they say it is, Feldman said.

"That's something that hasn't been definitively resolved among federal courts and federal judges," he said.

--Editing by John Quinn and Patricia K. Cole.

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