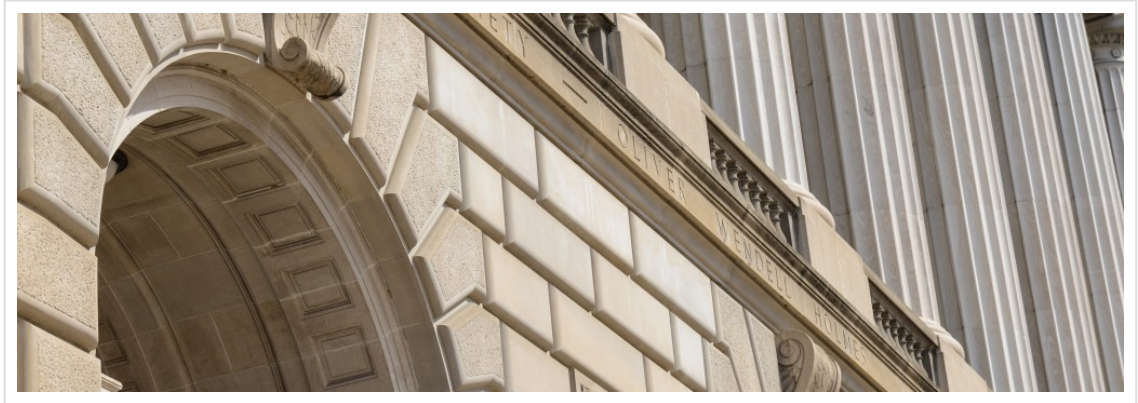


# TAX PROCEDURE: A LOOK AT SUMMONS ENFORCEMENT PROCEEDINGS

Posted on [March 30, 2016](#) by [Jim Malone](#)



Congress has directed the Internal Revenue Service “to make the inquiries, determinations, and assessments of all taxes . . . imposed by this title.” I.R.C. § 6201(a). To make these “inquiries, determinations, and assessments,” the IRS has the authority to issue a summons for testimony or for relevant books and records. See I.R.C. § 7602(a). If the taxpayer fails to comply, the IRS can then bring a summons enforcement proceeding in district court. See I.R.C. § 7402(b) (granting jurisdiction over summons enforcement proceedings).

A summons will be enforced if the IRS can show “that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner’s possession, and that the administrative steps required by the Code have been followed.” *United States v. Powell*, 379 U.S. 48, 57-58 (1964). Known as the “*Powell* factors,” these requirements create a fairly low bar for the government to clear. Consequently, summons enforcement cases can be fairly perfunctory affairs: absent a claim of privilege, an IRS agent attests that the *Powell* factors are satisfied, and the summons is routinely enforced.

On March 15, 2016, a fairly involved summons enforcement case came to its apparent end with a decision by the Eleventh Circuit that affirmed a district court order enforcing a series of summonses. *United States v. Clarke*, Nos. 15-11663 & 15-11996, 2016 U.S. App. LEXIS 4728 (11th Cir. Mar. 15, 2016), *aff’g*, No. 11-80456-MC-Ryskamp/Hopkins, 2015 U.S. Dist. LEXIS 33312 (S.D. Fla. Feb. 18, 2015). This was the second time the Court of Appeals addressed the merits of the relevant summonses; its initial decision was reversed by the Supreme Court. *United States v. Clarke*, 134 S. Ct. 2361 (2014).

This lengthy controversy focused on two basic contentions: the taxpayers argued that the IRS had

partnership had twice agreed to extend the assessment limitations period for a year, but it refused to grant the IRS a third extension. The government then issued a series of summonses to four individuals associated with the partnership in September and October of 2010. *Id.* In December of 2010, the IRS issued a final partnership administrative adjustment to the partnership that provided for increased tax liability for its partners, and the partnership filed a Tax Court petition challenging the adjustments in February of 2011. *Id.* at 2366.

In April of 2011, the IRS brought summons enforcement proceedings, and it submitted an affidavit from the investigating agent indicating that the *Powell* factors were satisfied. *Id.* In response, the taxpayers submitted declarations challenging the good faith of the IRS. They noted that when the partnership declined to grant the third extension, the government issued the summonses, even though it had not requested additional information, and they asserted that this demonstrated a retaliatory motive. *Id.* The taxpayers also argued that the summons enforcement action was intended to evade Tax Court limitations on discovery, a claim they supported with an affidavit from an attorney representing another summons target, who stated that his client's interview was conducted by the lawyers representing the IRS in Tax Court, not the investigating agents. *Id.*

The Supreme Court ruled that a bare allegation of bad faith was not sufficient to warrant an examination of the investigating IRS agent as part of the summons enforcement proceeding. Instead, it held that "the taxpayer must offer some credible evidence supporting his charge," which could include circumstantial evidence. *Id.* at 2367. Because the Eleventh Circuit had not applied that standard, the Supreme Court reversed and remanded for further proceedings. *Id.* at 2368. The Eleventh Circuit, in turn, remanded the case to the district court. *Clarke*, 2016 U.S. App. LEXIS 4728 at \*7.

The district court permitted the individuals who had been summoned to re-brief their motions to quash in light of the Supreme Court ruling, but it refused to permit them to submit additional evidence. 2015 U.S. Dist. LEXIS 33312 at \*2. On the merits, the district court held that none of the taxpayers had demonstrated that the summonses were improper as a matter of law; it also held that they had offered no facts that would support a reasonable inference of an improper motive. *Id.* at \*3-\*7.

On appeal, the Eleventh Circuit first examined the issue of retaliation. While the district court had rejected the argument that a retaliatory motive would invalidate a summons because the relevant information remained necessary, the Eleventh Circuit disagreed, reasoning that use "of the summons power to retaliate against a taxpayer is akin to improper harassment." 2016 U.S. App. LEXIS 4728 at \*13. Turning to the taxpayers' argument that the IRS used its summons authority to avoid Tax Court discovery limits, the Court of Appeals noted that the legitimacy of a summons was tested as of the time it was issued and that a judicial proceeding does not eliminate the power of the IRS to investigate. *Id.* at \*14-\*15. The court did, however, indicate that a summons issued after judicial proceedings were commenced could be viewed differently. *Id.* at \*15 (citing *United States v. PAA Mgmt. Ltd.*, 962 F.2d 212, 219 (2d Cir. 1992)).

“in light of the summary nature of a summary enforcement proceeding.” *Id.* at \*16. While a summons enforcement proceeding generally should not devolve into a search-and-depose mission, it would have been appropriate to permit the taxpayers to supplement their existing affidavits in an effort to meet the standard set by the Supreme Court. Moreover, the district court’s decision to refuse to receive additional evidence may well have been influenced by its view that retaliation was not an improper motive, which the Eleventh Circuit held was wrong.

*Clarke* offers two lessons:

1. A summons may be quashed if the taxpayer can assemble a sufficient factual record to raise a plausible inference that it was issued for a retaliatory purpose;
2. An argument that a summons is designed to evade discovery limits in a judicial proceeding probably will not prevail unless the summons is issued *after* the court case is filed.

While both of these situations are likely to be rare, practitioners should recognize that the summons authority of the IRS is not limitless.



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