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Supreme Court Zeros In on Plain Language of Tax Code in IRS Case

The Supreme Court nearly 50 years ago said that the US system of federal income taxation "depends upon the good faith and integrity of each potential taxpayer to disclose honestly all information relevant to tax liability" but that it "would be naive to ignore the reality that some persons attempt to outwit the system, and tax evaders are not readily identifiable." Congress thus granted the IRS broad investigatory powers, including the power to secure records and testimony by administrative summons under Section 7602.

Fast-forward to Wednesday's oral argument in *Polselli v. IRS*, a case dealing with the IRS' authority to summon records without notifying the individual or entity whose records are being sought. Generally, Section 7609 requires the IRS to provide notice to "any person" identified in a summons and provides that any person entitled to notice has the right to bring an action to quash the summons in federal district court. But Section 7609(c)(2)(D)(i) sets forth an exception—and effectively provides that no notice or opportunity to quash need be given—for summonses issued in aid of collection of "an assessment made or judgment rendered against the person with respect to whose liability the summons is issued."

The justices appeared keen to delineate how closely related summoned records must be to the taxpayer's assets to be "in aid of collection."

Procedural History

The parties in *Polselli* dispute whether this exception permits the IRS to issue a no-notice summons for account records belonging solely to a non-delinquent third party—that is, for accounts in which the taxpayer holds no recognizable legal interest.

The case arises from IRS efforts to collect assessments against Remo Polselli, whose liabilities totaled more than $2 million (at least when the case began). This included summonses for accounts in the name of his wife, Hanna Polselli, and two law firms that had represented Remo Polselli before the IRS.

The IRS agent who issued the summons didn't notify either Hanna Polselli or the law firms—but the banks did, and the account holders filed a petition to quash the summons. The district court dismissed the account holders' petition, and a divided US Court of Appeals for the Sixth Circuit affirmed, with the majority holding in effect that any summons issued "in aid of collection" was excepted from Section 7609's notice and opportunity-to-quash provisions.

Petitioners in *Polselli* have argued that the Sixth Circuit's ruling is contrary to the text, structure, and purpose of Section 7609, and they urged the Supreme Court to adopt the Ninth Circuit's recognizable-legal-interest test. Several amici, including the Center for Taxpayer Rights, the ACLU, and the US Chamber of Commerce, raised concerns about potential Fourth Amendment violations, as well as heightened compliance costs and damages to customer relations for businesses, if the Sixth Circuit's interpretation was upheld.

For its part, the government has argued that a recognizable-legal-interest limitation has no textual basis in Section 7609(c)(2)(D)(i) and cited Section 7610(b)(1) as evidence that Congress knew how to impose such a limit if it intended to.

Oral Argument

On Wednesday, the justices seemed most intent to question counsel about the plain language of Section 7609(c)(2)(D)(i). Fewer questions were asked about the broader statute that surrounds the exception, and even fewer about the legislative history that preceded it.

Multiple justices pressed counsel about where in the statute they could find language supporting the recognizable-legal-interest limitation. Petitioners' counsel explained that the limitation stems from the statute's requirement that the summons be issued "in

aid of collection,'' noting that the ''language has to be understood to require a direct connection between the summons and the act of collecting, which means getting the money into the federal fisc.''

Several justices questioned what limitations, if any, the IRS believed the statute imposed on no-notice summonses. Here, the government's counsel toed a delicate line but acknowledged that the statute's in-aid-of-collection language required ''some connection'' between the summoned information and the taxpayers' financial assets.

For instance, counsel accepted that there should be a causal link between the summons and the expected collection of assets and that it should be more than just a ''shot in the dark.'' Some questioning from the justices suggested they were concerned that the IRS' interpretation of the statute would permit it to summon—without notice—records pertaining to virtually any individual who interacted, or may have interacted, with a delinquent taxpayer. The government's counsel insisted that this was not its position regarding Section 7609(c)(2)(D)(i) and, as a practical matter, was not what happened in Polselli's case.

On rebuttal, petitioners' counsel attempted to refocus the court's attention on what they believed was the core issue: providing an avenue for judicial review of an over-broad and potentially abusive summons. The real question, they argued, was whether there was going to be a judicial review when the IRS determined that a particular summons was sufficiently helpful.

''As far as the standard that the IRS has to meet, we're not asking the IRS to be certain of the direct connection,'' petitioners' counsel told the justices. ''The IRS just has to have a reasonable basis that the information that it's seeking is going to lead directly to collection. And, again, there ought to be judicial review of that.''

Conclusion

Both sides in *Polselli* spent considerable time arguing in briefs about Section 7609's broader purpose and legislative history, but none of these arguments were the focus of questions at oral argument. Perhaps it's unsurprising that the non-textual positions advanced by the parties failed to gain traction with the court given its more recent history of tethering statutory interpretation to the precise words of the statute.

The recent decision entered in *Bittner v. United States* for example—examining the statutory provisions of the Bank Secrecy Act that authorize FBAR penalties—exemplifies the text-heavy approach that most members of the court have endorsed in recent years.

Wherever the court ultimately lands in *Polselli*, its interpretation of the text of Section 7609(c)(2)(D)(i) will have significant implications for the IRS' ability to gather information by administrative summons. The decision might also signal how newer justices Brett Kavanaugh, Amy Coney Barrett, and Ketanji Brown Jackson will approach future cases involving interpretation of tax statutes.

Among other things, the decision could signal how these justices would interpret and apply statutes such as Section 7609 that expressly waive the government's sovereign immunity (i.e., its ability to be sued) in tax enforcement matters while also limiting that waiver through exceptions.

Several important cases involving the interpretation of Internal Revenue Code provisions continue to percolate through the lower courts. *Polselli* undoubtedly will inform the analysis as these cases advance through the courts of appeals and, ultimately, one or more may find their way to the Supreme Court.

The case is: *Karcho Polselli v. US*, U.S., No. 21-1599, *arguments* 3/29/23

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