

Action on Decision

SUBJECT: *Snider v. United States; Turley v. United States*, 468 F.3d 500 (8th Cir. 2006), *petition for reh'g en banc denied*, No. 05-3636 (8th Cir. Feb. 1, 2007)

Issues:

1. Whether a special agent's disclosure of the identity of a taxpayer under investigation to a third-party witness is not authorized by section 6103(k)(6).
2. Whether, even if the disclosure was not authorized, the good faith defense provided by section 7431(b) does not apply.
3. Whether section 7431(c)(1), in providing for statutory damages of \$1,000 per "act of . . . disclosure," provides for statutory damages of \$1,000 based on each item of return information disclosed during a single interview and for each person who heard the disclosure.

Discussion:

During a criminal investigation of two taxpayers, a special agent disclosed to third-party witnesses various items of return information about the taxpayers, including their identities. The taxpayers filed suit for damages under section 7431. The trial court found that (a) the IRS special agent violated section 6103 by disclosing return information of the taxpayers, including their identities, (b) the good faith defense of section 7431(b) did not apply to those disclosures, and (c) that under section 7431, damages are awarded based on each item of return information disclosed and each person who heard the disclosure. A split panel of the Eighth Circuit affirmed the trial court.

Issue 1. Although the circuit court correctly stated the general rule of confidentiality established by section 6103(a) and the exception, found in section 6103(k)(6), permitting investigative disclosures necessary to obtain or verify information, the court erroneously affirmed the trial court's factual finding that the Government in this case failed to establish the evidentiary foundation required by section 6103(k)(6) to justify the disclosure of the taxpayers' identities to the third parties.

In order to conduct an effective interview with a third-party witness in a tax investigation, it is certainly appropriate and, therefore, necessary to disclose the identity of the taxpayer under investigation to the third-party witness to obtain information from the witness. See Treas. Reg. § 301.6103(k)(6)-1(c)(1) Example 1 and § 301.6103(k)(6)-1(c)(3). The disclosure of the identity of a taxpayer under investigation will avoid

confusing a third-party witness about the nature and scope of the investigation and help to ensure the accuracy and reliability of the information provided by the third-party witness.

Moreover, an agent is not required to seek information from a taxpayer or his attorney before contacting a third-party witness. See Treas. Reg. § 301.6103(k)(6)-1(c)(3).

Issue 2. The circuit court also erroneously affirmed the trial court's factual finding that the Government in this case failed to establish the good faith defense of section 7431(b). Treas. Reg. § 301.6103(k)(6)-1 (which was adopted after most of the disclosures were made in this case) provides guidance regarding disclosures that are objectively reasonable. The IRS also has procedures and policies that authorize disclosing a taxpayer's identity when investigative disclosures are made to third parties. An IRS employee may continue to follow IRS procedures and policies that provide, pursuant to section 6103(k)(6), for the disclosure of the identity of the subject of an investigation to a third-party witness. If an IRS employee makes a disclosure that follows IRS procedures and policies, the section 7431(b) good faith defense will apply to that disclosure.

Issue 3. The Eighth Circuit's holding that section 7431(c)(1) provides for statutory damages of \$1,000 for each piece of return information disclosed during a single interview and for each person who heard the disclosure is contrary to the plain language of the statute. The holding also conflicts with decisions such as *Siddiqui v. United States*, 359 F.3d 1200 (9th Cir. 2004), and *Marré v. United States*, 1992 WL 240527, *2 (S.D. Tex. 1992), *aff'd in part and vacated in part on other grounds*, 38 F.3d 823 (5th Cir. 1994). Under the plain language of section 7431, disclosure of an entire tax return, which consists of numerous individual items of return information, constitutes a single "act" of disclosure. The Eighth Circuit's holding creates the anomalous result that mentioning two items of return information in a conversation constitutes two acts of disclosure, but disclosing an entire tax return only constitutes a single act of disclosure. The IRS strongly disagrees with the court's analysis and holding and will continue to litigate the position that neither the number of items of return information nor the number of people witnessing a disclosure is a legally significant factor for determining the number of acts of disclosure for purposes of assessing statutory damages.

Conclusion:

The IRS will continue to litigate Issues 1, 2 and 3 in all circuits.

Recommendations:

Issue 1. Nonacquiescence.

Issue 2. Nonacquiescence.

Issue 3. Nonacquiescence.

Reviewers:

MLS
TJK

/s/

M. E. Keys
Attorney

Approved:

/s/

Deborah A. Butler
Associate Chief Counsel
(Procedure & Administration)