

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

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to: Halvor N. Adams, Senior Counsel
Large & Mid-Size Business, CC:LM:F:LI

from: Peter J. Devlin, Chief, Branch 3
Collection, Bankruptcy & Summonses CC:PA:CBS:Br3

subject: Leasing ISP

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUES

May the Service properly serve an administrative summons on a corporation by serving the individual or entity that the corporation has designated as its agent for service of process or by serving a state official if state law designates that official as the corporation's agent for service of process?

CONCLUSIONS

There may be a basis in law for this type of process under Rule 4(h)(1) and Rule 81(a)(3) of the Federal Rules of Civil Procedure (FRCP), but it is not developed by case law and is subject to the district court's discretion. Moreover, a corporation's registered agent (whether designated by the corporation or by state law) will not have the knowledge or records sought by the summons. Therefore, unless the Service has no other way to identify and locate a corporate officer, the Service should not employ this method for serving a summons. If the Service cannot locate or identify a corporate officer, it may be appropriate to summon the registered or state agent to learn from that

agent the names and locations of persons the agent would contact to communicate with the corporation.

FACTS

When examining certain shelters, revenue agents have encountered corporations that are difficult to serve with a summons because they may not have a regular place of business. You have asked whether under these circumstances the agent can validly serve a summons under I.R.C. § 7603 by hand delivering it to the individual or entity the corporation has designed as its agent for service of process or to the official that is designated by state law as the corporation's agent for service of process.

LAW AND ANALYSIS

I.R.C. § 7603(a) provides the general rule for serving a summons – a summons may be delivered in hand to the person to whom it is directed, or left at his last and usual place of abode. The rule provides no direct guidance for serving a summons on a corporation, but the case law is well developed that such a summons may be served on a corporate officer. United States v. Payne, 648 F.2d 361 (5th Cir. 1981); and see, e.g., United States v. Grable and Sons Metal Products, Inc., No. 1:91:MC:67, 1992 U.S. Dist. LEXIS , at *2 (W.D. Mich. Mar. 4, 1992). For this reason, the Service's general practice is to serve a summons directed to a corporation on a corporate officer.

There is some legal authority to support serving a summons directed to a corporation on any person authorized by state law to accept service of process for the corporation. That authority is derived by analogy from Rule 4(h)(1) and Rule 81(a)(3) of the FRCP. Rule 4 sets for the procedures for serving a summons and complaint when beginning a law suit in federal court. In pertinent part, Rule 4(h)(1) provides:

Unless otherwise provided by federal law, service upon a domestic ... corporation ... that is subject to suit under a common name ... shall be effected:

(1) [B]y delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant (Emphasis added).

By itself, Rule 4 does not apply to summons enforcement cases, insomuch as it specifically applies to the procedures for beginning a federal law suit; but it is tied to summons proceedings by Rule 81(a)(3), which states in pertinent part:

(a) To what Proceedings Applicable.

(3) These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

In Donaldson v. United States, 400 U.S. 517, 527-528 (1971), the Supreme Court specifically ruled that Rule 81(a)(3) applies the FRCP to summons enforcement proceedings. But the Supreme Court hastened to add that the rules “are not inflexible in this application. Rule 81(a)(3) goes on specifically to recognize that a district court, by local rule or by order, may limit the application of the rules in a summons proceeding.” Donaldson v. United States, 400 U.S. at 528-529 (1971) (declining to apply Rule 24(a)(2) as guaranteeing the taxpayer a right to intervene in a summons enforcement hearing and reasoning that the application of the FRCP was not intended to impair the summary nature of the summons enforcement proceeding so long as the rights of the party summoned are protected). Thus, the courts have considerable discretion in deciding whether to apply a specific rule of civil procedure in a summons enforcement case. This discretion is particularly illustrated in cases in which the court has refused to permit a taxpayer or summoned person to conduct discovery under the FRCP in order to challenge a summons. See e.g., United States v. Interstate Tool & Engineering Corp., 75-1 U.S.T.C 9412 (E.D. Wis. 1975). Notably, the district court’s discretion in modifying the FRCP is not limited to the discovery provisions. See United States v. McCoy, 954 F.2d 1000, 1004 (5th Cir. 1992) (the court modified the 3-day provision of Rule 55(b)(2) concerning default judgments by entering a show cause order for the enforcement of a summons and later entering a default judgment; modification upheld under Rule 81(a)(3), and the Government was not required to give 3 days notice of its application of a default judgment).

There is a virtual dearth of case law dealing with the precise issue for which you seek guidance. You offered one case, United States v. Toyota Motor Corporation, 561 F. Supp. 354 (C.D. Calif. 1983), that supports the proposition that the Service may follow the methods for service described in Rule 4 when serving a corporation. In that case, the Service served a summons on the managing agent of a foreign corporation, and the court referred to the text of what was at the time codified at Rule 4(d)(3), which allowed for service on a foreign corporation by delivering process to an “officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process” In Toyota Motor Corporation, the court indicated that where no procedure is otherwise specified by statute, it is appropriate to look to the FRCP for guidance on the proper method for serving an administrative

summons on a foreign corporation.¹ Our research disclosed an additional case, Bishop v. United States, 99-1 U.S.T.C. 50,433 (N.D. Fla. 1999), which states in dicta that a summons may be served properly under I.R.C. § 7603 on a corporation by serving it “on an officer, director, managing agent or other person authorized to accept service.” Thus, the case law support for serving a summons on a corporation’s registered agent or anyone authorized under state law to accept service of process on behalf of the corporation is not well developed.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS

We think that a case can be made for serving a corporation by personally handing the summons to the corporation’s registered agent or other person, such as the state’s secretary of state, who may be authorized under state law to accept service of process. Nevertheless, we cannot recommend that the Service routinely serve summonses on corporations by this method given the dearth of interpretative case law on this subject and the discretion vested in the district court to determine which rules in the FRCP will and will not apply to a summons enforcement matter. Moreover, there may be little to be gained by serving such a person. A registered agent or a state official certainly will not possess the knowledge or the records that the Service would seek in a summons. Additionally, if the Service cannot locate a corporation or its officials with the computerized research capacity available to revenue agents and revenue officers, a registered agent or state official may be equally unable to do so. However, in cases where the Service has utterly exhausted its ability to locate a corporate officer or other appropriate manager, then a summons may be served on a registered agent or other authorized person. Before doing this, the Service should contact the registered agent or state official and ask that he or she provide the Service with the name and address of the person they would contact as the corporate representative. If the agent or state official is unwilling to provide that information informally, the Service should consider summoning that information directly from the agent or state official.

As stated above, we do not recommend that the Service employ this method of service routinely or as a matter of convenience because service of a summons is always best effected if it is made on a corporate officer or other person who clearly has possession or control of the desired records and the authority to turn them over to the Service.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

¹ The court in Toyota Motor Corporation apparently viewed I.R.C. § 7603 as providing no guidance on how to serve a summons on a corporation. It is possible that another court could take the opposite view and reason that section 7603 provides for “service in hand to the person to whom it is directed,” and therefore, given that corporations can only act through individual representatives, section 7603 provides for serving these individuals in hand. We also note that it is possible for a court to take a different view of Rule 81(a)(3). It is possible that a court could reason that Rule 81(a)(3) only applies to procedural issues that arise after a summons enforcement case is commenced, not to issues that arise before the suit is brought, such as those involving the proper method of serving a summons.

Please call (202) 622-3630 if you have any further questions.