

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA

IN THE MATTER OF THE TAX)
LIABILITIES OF:)
)
JOHN DOE, Finnish taxpayer(s) who, at any)
time during the period January 1, 2013 through)
December 31, 2014, held a payment card with)
the account number ending 0924 issued by Bank) No. _____
of America, N.A.;)
) Honorable _____
JOHN DOE, Finnish taxpayer(s) who, at any)
time during the period January 1, 2013 through)
December 31, 2017, held a payment card with)
the account number ending 1123 issued by)
Charles Schwab & Co., Inc.;)
)
JOHN DOE, Finnish taxpayer(s) who, at any)
time during the period January 1, 2013 through)
December 31, 2017, held a payment card with)
the account number ending 3575 issued by TD)
Bank, N.A.;)

**MEMORANDUM IN SUPPORT OF *EX PARTE* PETITION
FOR LEAVE TO SERVE JOHN DOE SUMMONSES**

This is an *ex parte* proceeding brought by the United States of America, pursuant to sections 7609(f) and (h) of the Internal Revenue Code (Title 26), for leave to serve Internal Revenue Service “John Doe” summonses upon Bank of America, N.A.; Charles Schwab & Co., Inc.; and TD Bank, N.A. John Doe summonses are used where a tax authority has reason to believe certain taxpayers may not be complying with the law, but does not know their identity. Courts may grant leave *ex parte* to serve a John Doe summons if the United States establishes three factors: (i) the summons relates to a particular person or group of individuals; (ii) there is a reasonable basis to believe that the person or group may have not complied with the internal

revenue laws; and (iii) the information sought is not readily available from another source. See 26 U.S.C. § 7609(f).

The proposed John Doe summonses will gather information on behalf of the country of Finland. The United States has entered into a tax treaty with Finland that obligates the United States to gather information when issued a proper request from the Finnish Tax Authority (“FTA”) that is within the scope of the treaty.

Finland has made such a request here. It is investigating whether Finnish residents may owe tax in Finland, and part of that investigation involves identifying individuals who are consistently using payment cards in Finland that were issued by banks in the United States. Finnish taxpayers may use foreign payment cards in an attempt to avoid reporting income and paying Finnish income tax. Such Finnish residents divert income to a U.S. bank, maintain an account there, and use the account to make purchases in their home country through payment cards issued by the U.S. bank. The Internal Revenue Service has investigated similar transactions with respect to U.S. taxpayers. (See Declaration of Tu Le Santonil (attached as Ex. B) at ¶ 15.)

The Court’s determination whether to authorize the proposed John Doe summonses shall be made *ex parte* based solely on the petition and supporting affidavits. 26 U.S.C. § 7609(h)(2). The declarations submitted with this petition establish the three requirements for issuing John Doe summonses to Bank of America, N.A.; Charles Schwab & Co., Inc.; and TD Bank, N.A. Accordingly, the Court should enter an order granting the IRS leave to serve the John Doe summons.

JURISDICTION AND VENUE

This Court has jurisdiction because Bank of America, N.A. maintains its headquarters within this district, and Charles Schwab & Co., Inc. and TD Bank, N.A. maintain branch offices within the district. See 26 U.S.C. § 7609(h)(1) (the district court in which the person to be summoned “resides or is found” shall have jurisdiction to hear and determine proceedings brought under Section 7609(f)).

BACKGROUND

The treaty applicable to this case is the *Convention Between the Government of the United States of America and the Government of Finland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital*, as amended effective December 30, 1990 (“Convention”).¹ See Convention, available at 1990 WL 605090 (attached as Ex. 1 to Ex. A hereto). Article 26 of the Convention provides that, upon a proper request by one country for information necessary for carrying out its domestic tax laws, the other country “shall obtain the information to which the request relates in the same manner and to the same extent as if the tax of the [requesting] State were the tax of that other State and were being imposed by that other State.” Convention Art. 26(3).

The attached declarations by IRS Commissioner of the Large Business and International Division Douglas W. O’Donnell (attached as Ex. A) and IRS Revenue Agent Tu Le Santonil (Ex. B) describe how the IRS received a request from Finland for information pursuant to Article 26 of the Convention. The information is needed to determine the correct income tax

¹ A subsequent protocol to the Convention was signed at Helsinki, Finland on May 31, 2006. It is not directly relevant to this case.

liability of certain as-yet-unidentified taxpayers (“John Does”) under the laws of Finland. (O’Donnell Decl. ¶¶ 4, 16.) The request identifies three payment cards (*i.e.*, debit or credit cards) issued by U.S. financial institutions that were used in Finland. (Id. ¶ 4.) Because the cards were used consistently at ATMs in Finland, their use was spread over all months of the year, and they were used repeatedly in specific locations, they are likely held by Finnish taxpayers who have not properly reported income and assets. (Id. ¶ 12-13.)

Finland’s request for information stems from a foreign payment project conducted by the FTA, in which information on the use of payment cards issued by foreign financial institutions is used to identify non-compliant Finnish taxpayers. (Id. ¶ 6-7.) Finland has advised the IRS that, in circumstances where the payment cards are used only at ATMs or in other transactions where authorization is by PIN code, and the cardholder need not identify himself or herself to the merchant, the cardholders cannot be identified from sources in Finland. (Id. ¶ 10.)

As outlined above, Finnish taxpayers can use a foreign payment card in an attempt to avoid reporting income and paying Finnish tax. Of course, the fact that a taxpayer holds a payment card issued by a foreign bank does not alone mean that the taxpayer is necessarily using that card for illegal purposes. But based upon its investigation of approximately 120 to 150 Finnish taxpayers who used foreign payment cards in a manner similar to that described above, which yielded extremely high rates of tax non-compliance, it is likely that the John Does sought by the summons are Finnish residents who are failing to report the foreign accounts and associated income. (See Santonil Decl. ¶¶ 15-16; O’Donnell Decl. ¶¶ 12-13.)

The three payment cards referenced in the summonses were identified by Finland as part of its foreign payment card project whose volume and history of use in Finland make it likely

that the cards are held by Finnish taxpayers who failed to properly report the accounts and associated income. (See Santonil Decl. ¶ 16) Thus, Finland is seeking information from the cards' issuing banks. In accordance with the United States' treaty obligations, the IRS requests authorization to serve John Doe summonses upon Bank of America, N.A.; Charles Schwab & Co., Inc.; and TD Bank, N.A.²

DISCUSSION

The U.S. Supreme Court approved the use of John Doe summonses as an investigative technique for the IRS in United States v. Bisceglia, 420 U.S. 141 (1975). In that case, the Supreme Court held that Internal Revenue Code sections 7601 and 7602 empowered the IRS to issue a John Doe summons to a bank to discover the identity of a person who had engaged in certain bank transactions. Bisceglia, 420 U.S. at 150. That authority was later explicitly codified in Section 7609(f) of the Internal Revenue Code, as added by the Tax Reform Act of 1976. Section 7609(f) provides as follows:

Any summons . . . which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that –

(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

(3) the information sought to be obtained from the examination of the records or testimony (and the identity of the person or persons with

² Copies of the proposed summonses are attached to Agent Santonil's declaration as Exhibits 1-3.

respect to whose liability the summons is issued) is not readily available from other sources.

As discussed in more detail below, the John Doe summonses for which the United States seeks authorization in the instant case meet each of those three requirements.

I. The summonses describe a particular person or ascertainable class of persons.

The proposed summonses seek information regarding the account holders of three specific payment cards, identified by account number.³ (Santonil Decl. ¶ 10 and Ex. 1-3.) The proposed summonses therefore describe particular persons (or groups of persons, if the accounts are jointly held) who are easily ascertainable by account number.

II. There is reasonable basis to believe that the subjects have failed to comply with “any provision of any internal revenue law.”

A. *The phrase “Any provision of any internal revenue law” includes the internal revenue laws of a treaty partner.*

Section 7609(f)(2) requires the IRS to show a reasonable basis to believe that the subject of the summons “may have failed to comply with any provision of any internal revenue law.” As discussed below, courts have found that this phrase encompasses the internal revenue laws of a tax treaty partner such as Finland. In addition, many courts, including the Supreme Court, have held that a substantively identical phrase in a related summons statute encompasses the laws of a tax treaty partner.

³ The account numbers of the payment cards at issue contain sixteen digits. For privacy considerations, all but the last four digits have been withheld in this filing. The full number will be provided to the summoned parties.

The Convention requires the United States, when it receives a proper request from Finland, to obtain information as if the taxes of Finland were taxes of the United States.

Article 26 states:

If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall obtain the information to which the request relates in the same manner and to the same extent *as if the tax of the first-mentioned State were the tax of that other State and were being imposed by that other State*. If specifically requested by the competent authority of a Contracting State, the competent authority of the other Contracting State shall provide information under this Article in the form of depositions of witnesses and authenticated copies of unedited original documents (including books, papers, statements, records, accounts or writings), *to the same extent such depositions and documents can be obtained under the laws and administrative practices of such other State with respect to its own taxes*.

See Convention Art. 26(3) (emphases added).

The Convention became part of the law of the United States upon ratification by the Senate. U.S. Const. Art. VI, cl.2 (“This Constitution . . . and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”); Bacardi Corp. of America v. Domenech, 311 U.S. 150, 161 (1940).

All ten district courts to have considered the issue have authorized John Doe summonses under Section 7609(f) on behalf of a treaty partner. For example, in 2013, nine district courts authorized John Doe summonses pursuant to Section 7609(f) as requested by the IRS on behalf of Norway.⁴ Similarly, in March 2017, the United States District Court for the Western District

⁴ In the Matter of the Tax Liabilities of John Does, No. 13-cv-3393, 2013 WL 5503135, at *1 (N.D. Cal. Aug. 29, 2013) (sole reported order); No. 13-cv-01097 (C.D. Cal.); No. 13-mc-00056 (D. Minn.); No. 13-mc-00024 (E.D. Va.); No. 13-mc-00018 (N.D. Okla.); No. 13-cv-01066 (W.D. Pa.); Nos. 13-mc-00657 and 13-mc-00232 (W.D. Tex.); No. 13-cv-03393 (N.D. Cal.); No. 13-mc-00301 (S.D. Miss.); No. 13-mc-00038 (D.N.H.).

of Texas authorized a John Doe summons pursuant to Section 7609(f) as requested by the IRS on behalf of the Netherlands.⁵

In addition, it is well-established that the IRS may issue a summons to a specific person on behalf of a treaty partner under the similarly-phrased Section 7602, which authorizes summonses in determining the liability of any person for “any internal revenue tax.” See United States v. Stuart, 489 U.S. 353, 356 (1989) (a summons requested by IRS on behalf of treaty partner is valid “[s]o long as the summons meets statutory requirements and is issued in good faith” and, if directed to a third party, meets the requirements of Section 7609); United States v. A.L. Burbank Co., Ltd., 525 F.2d 9, 14-15 (2d Cir. 1975) (enforcing IRS summons issued pursuant to request from Canadian tax authorities); Lidas, Inc. v. United States, 238 F.3d 1076, 1081 (9th Cir. 2001) (denying subject’s petition to quash IRS summons issued on behalf of France). Both the Burbank and Lidas courts explicitly rejected the argument that summonses requested by treaty partners for use in enforcing foreign tax laws are not related to “any internal revenue tax.” Burbank, 525 F.2d at 14-15; Lidas, 238 F.3d at 1081; see also Mazurek v. United States, 271 F.3d 226, 230 (5th Cir. 2001) (finding that assistance to treaty partner is a proper purpose for the IRS to issue a summons pursuant to Section 7602). The basis for those rulings is that upon ratification, a treaty (and its accompanying obligations to use available legal process) becomes the law of the United States. Burbank, 525 F.2d at 14-15; Lidas, 238 F.3d at 1081. Because the reference in Section 7602 to “any internal revenue tax” encompasses these treaty obligations, so too should the phrase “any internal revenue law” in Section 7609(f)(2).

⁵ In the Matter of the Tax Liabilities of John Does, No. 3:17-cv-00094-KC (W.D. Tex. Mar. 31, 2017).

- B. *There is reasonable basis to believe that the holders of the payment cards have failed to comply with the internal revenue laws of Finland.*

In analyzing whether a “reasonable basis” exists, the IRS need not prove violations of law. Congress did not intend Section 7609(f) to impose stringent restrictions on the ability of the IRS to issue a John Doe summons; instead, it intended only to prevent the “indiscriminate exercise” of the summons power. See In re Tax Liabilities of John Does, Members of the Columbus Trade Exch., 671 F.2d 977, 979 (6th Cir. 1982). For example, “reasonable basis” can be shown by a revenue agent’s affidavit that audits of similar transactions revealed a high incidence of improper reporting. Id. at 978. However, prior audit experience is not necessary. In United States v. Pittsburgh Trade Exch., Inc., 644 F.2d 302, 306 (3d Cir. 1981), the court found “reasonable basis” based upon a revenue agent’s testimony that barter transactions of the type arranged by the Pittsburgh Trade Exchange were “inherently susceptible to tax error.” And in United States v. Ritchie, 15 F.3d 592, 601 (6th Cir. 1994), the court held that the mere payment for legal services with large amounts of cash is a reasonable basis for the issuance of a John Doe summons.

In this case, all of the types of evidence discussed above are present. There is a reasonable basis to believe that the internal revenue laws of Finland have been violated based on (i) the cards’ usage patterns, which make a violation likely; (ii) the prior experience of the FTA in auditing holders of cards with similar usage patterns; and (iii) the IRS’s own experience investigating similar payment card usage by U.S. taxpayers.

Under the Finnish Income Tax Act, a resident of Finland is obliged to pay tax on income or wealth received from Finland and abroad. (Santonil Decl. ¶ 14.) They are required to report foreign income, assets, and accounts. (Id. at ¶ 14(b-c).) According to Finnish Income Tax Act

Section 11, an individual is deemed to be resident in Finland if he has his main place of abode in Finland or is continuously present in Finland for a period of more than six months. (Id. ¶ 12.) A presence is deemed continuous irrespective of temporary absence. (Id.) Finnish nationals are considered residents of Finland for three years after the end of the year in which they left the country, unless they can show that they have not maintained essential ties in Finland during the tax years concerned. (Id.)

The cards' usage makes it likely that the card holders are resident in Finland. Finland has provided the IRS with information that shows that the cards at issue were used in numerous transactions in Finland:

- With respect to the card ending in *0924, which was issued by Bank of America, the FTA determined that the card was used 239 times during 2013-2014, with usage spread over all months of the year. (O'Donnell Decl. ¶ 12(a).) The transaction data obtained by the FTA showed that the majority of transactions occurred at three locations in Helsinki. (Id.) The transaction volume was €90,319 (approximately \$102,450).⁶ (Id.)
- With respect to the card ending in *1123, which was issued by Charles Schwab, the FTA determined that the card was used for 183 ATM withdrawals during 2013-2014, with usage spread over all months of the year. (Id. ¶ 12(b)) The transaction data obtained by the FTA showed that the majority of transactions occurred at three locations in Helsinki. The transaction volume was €76,180 (approximately \$86,374). (Id.) The FTA was able to determine that this card was used continuously through 2017. (Id.)
- With respect to the card ending in *3575, which was issued by TD Bank, the FTA determined that the card was used for 297 ATM withdrawals during 2013-2014, with usage spread over all months of the year. (Id. ¶ 12(c).) The transaction data obtained by the FTA showed that the majority of transactions occurred at three locations in Helsinki. The transaction volume was €118,459 (approximately \$134,311). (Id.) The FTA was able to determine that this card was used continuously through 2017. (Id.)

⁶ All conversions from Euros to United States dollars utilize the prevailing exchange rate as of December 13, 2018.

The FTA has audited Finnish taxpayers whose identities are known to the FTA and who engaged in foreign payment card usage similar to that described above. (Id. at ¶ 13.) The FTA has initiated investigations of approximately 120 to 150 Finnish taxpayers who used foreign payment cards. (Id.) Of these investigations, the FTA has finalized ten, with underreporting found in each case ranging from approximately €30,000 to €700,000. (Id.)

When considering these facts, it is likely the holders of the three cards listed above are Finnish taxpayers failing to report foreign accounts, as well as the income generated by those accounts. (Santonil Decl. ¶ 16.) This conclusion is consistent with the IRS's own experience in thousands of examinations involving offshore bank accounts, including specifically offshore accounts linked to payment cards issued by banks outside the United States. (Id. ¶ 15.) The Service has pursued numerous compliance initiatives directed at offshore tax evasion since 1999, and the cases developed from those initiatives consistently show a high level of tax non-compliance regarding offshore accounts. (Id.)

Based on the information provided by Finland, and the IRS's own experience in similar cases, it is reasonable to believe that the unidentified holders of the payment cards listed may have failed to comply with provisions of the internal revenue laws of Finland.

III. The requested materials are not readily available from other sources.

With respect to the third and final requirement set forth in Section 7609(f)(3), the information sought is not readily available from other sources. Finland has advised the IRS that when a card connected to a foreign financial institution is used only in ATM machines in Finland, or when the authorization of the payment is done by PIN-code without identification of the cardholder, the cardholder(s) cannot be identified from information sources in Finland.

(O'Donnell Decl. ¶ 14.) The three payment cards listed above were used in this manner. (Id. ¶¶ 10, 14.) The only sources for the information sought by the proposed summons that is available to the FTA or the IRS, other than the unidentified taxpayers themselves, are the issuing banks. (Santonil Decl. ¶¶ 17-18.)

In the similar cases brought by the IRS concerning United States taxpayers, courts have recognized that the identities of the United States taxpayers are not readily available from sources other than the financial institutions involved. See In re Tax Liabilities of John Does Who During the Years Ended December 31, 1998 and 1999, Had Signatory Authority Over American Express or MasterCard Credit, Charge or Debit Cards, Case No. 00-cv-3919, 2000 WL 34538137 (S.D. Fla. Oct. 30, 2000) (authorizing service of John Doe summonses upon American Express and MasterCard International seeking account records of United States taxpayers who held an interest in American Express or MasterCard payment cards issued by banks in Antigua, Barbuda, the Bahamas or the Cayman Islands); In re Tax Liabilities of John Does Who During the Years Ended December 31, 1999 through December 31, 2001, Had Signature Authority Over Visa Cards, No. 02-mc-00049 (N.D. Cal. Mar. 27, 2002) (authorizing service of John Doe summons upon Visa International seeking the identity of United States taxpayer who held certain credit card accounts with ties to foreign banks); In re Tax Liabilities of John Does Who During the Years Ended December 31, 1999 through December 31, 2001, Had Signature Authority Over MasterCard Payment Cards, No. 02-22404, 2002 WL 32879613 (S.D. Fla. Aug. 20, 2002) (authorizing service of John Doe summons upon MasterCard International seeking the identity of United States taxpayer who held certain credit card accounts with ties to foreign banks); In re HSBC India, No. 11-cv-1686 (N.D. Cal. Apr. 7, 2011)

(authorizing service of John Doe summons upon HSBC India seeking financial account records establishing the identities of United States taxpayers with Indian bank accounts).

As in those cases, the identities of the John Does here are not readily available from any source other than the financial institution that holds the payment-card-account relationship with him or her. Consequently, the only readily available way for the IRS to obtain this information is through the issuance of the John Doe summonses.

CONCLUSION

The proposed summonses meet the requirements of Section 7609(f). Accordingly, the Court should enter an order granting the IRS leave to serve the proposed John Doe summons upon Bank of America, N.A.; Charles Schwab & Co., Inc.; and TD Bank, N.A. in substantially the form as attached as Exhibits 1, 2, and 3 to the Declaration of Tu Le Santonil.

DATE: April 23, 2019

Respectfully submitted,

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