Pilla Talks Taxes

DAN PILLA'S MONTHLY TAX AND FINANCIAL BULLETIN

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Commissioner Werfel Reacts to Racism Study

Chasing Ghosts in IRS Computers

In the March 2023 issue of *PTT*, I discussed a report issued by the Stanford Institute for Economic Policy Research, in conjunction with the U.S. Treasury, titled "Measuring and Mitigating Racial Disparities in Tax Audits." The report made the startling claim that "Black taxpayers are audited at between 2.9 to 4.7 times [greater than] the rate of non-Black taxpayers." See report at: siepr.stanford.edu, January 30, 2023.

Democrats in Washington, led by Senate Finance Committee Chairman Ron Wyden (D-Ore.) demanded an explanation – and action – from then soon-to-be commissioner, Danny Werfel. Werfel's term began with his confirmation by the Senate on March 9. One of the first things he did as commissioner was to address Wyden's concerns about the alleged systemic racism built into the IRS's audit selection programs. On May 15, 2023, Werfel wrote a letter to Sen. Wyden stating that the IRS is "deeply concerned by [the study's] findings and are deeply committed to doing the work to understand and address any disparate impact of the actions we take." Werfel's letter is reproduced in full below.

As I point out in my article, the study's findings are borderline absurd because the IRS: (a) does not collect data on race in any way, shape or form, and (b) the audit selection process is driven solely by the financial data within the return – and nothing else. As such, there is no way for the IRS to know the race of any person selected for audit. And because most IRS's audits are done

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through the correspondence process, there is no way to know a person's race once the audit is underway. Werfel confirms what I said in my article: "It is also important to reiterate that we do not and will not consider race as part of our case selection and audit processes."

The Stanford study itself acknowledged the fact that the IRS does not collect race data from taxpayers, and as a consequence, could not possibly use such data to select returns for audit. So how did Stanford researchers determine that Blacks are audited at a strikingly higher rate than that of others? The researchers "imputed" the race of audit targets based on the taxpayer's name and geographic location. That is, if a taxpayer had a Black-sounding name and lived in a predominately Black area, the researchers presumed that such person was Black. But even that is absurd, and not just for the obvious reason. It's absurd because there simply is no audit selection criterion that focuses on a taxpayer's name. As stated, selection criteria focus on substantive claims in the return, and nothing else. Such claims manifest in the form of entries on the various forms and schedules that make up the tax return.

The bottom line is that the researches who performed the Stanford "analysis" merely guessed at whether the audit targets were Black or not. Moreover, the guesses where fashioned through the lens of hindsight; that is, looking *back* at those who were audited. The study does not identify any specific IRS protocol or algorithm that used a taxpayer's name in the *pre-audit* selection process.

The IRS likewise acknowledges that the selection of taxpayers for audit cannot be based on race. As Werfel correctly points out in his letter, "IRS does not collect data on race and there is substantial uncertainty in any estimates of the audit rate by race or differences in audit rate by race."

Said other way, without definitive data on the race of *all taxpayers* – which the IRS does not collect and cannot know – it is impossible to tell whether Black taxpayers (or any other race of taxpayers) are more likely or not to be audited than those of other races. There's just no way to know that. And the only reasonable conclusion that one can draw from these facts is that the audit selection process is indeed colorblind.

As I point out in the final paragraph of my March article, unfortunately, there's little doubt that the IRS will spend millions of dollars and thousands of hours chasing racist ghosts in its computers that can't possibly exist. Apparently, that's exactly what Werfel intends to do. He states the following:

> We are dedicating significant resources to quickly evaluating the extent to which IRS's exam pri-

orities and automated processes, and the data available to the IRS for use in exam selection, contribute to this [racial] disparity.

* * *

We will work to identify any disparities across dimensions including age, gender, geography, race, and ethnicity as well as continually refining our approaches to compliance and enforcement to improve fairness in tax administration and maintain accountability to taxpayers as informed by our research.

The commissioner promises to "stay laser-focused on this to ensure that we identify and implement changes prior to next tax filing season." Now that the IRS has about $60 billion in supplemental funding (see the June 2023 issue of *PTT*) over the next ten years, I suppose it has the luxury of chasing ghosts.

In any event, Werfel promises full transparency to the Senate as the agency's research progresses. I myself will stay "laser-focused on this" to see whether they uncover the systemic racism some people believe is built into the IRS.

COMMISSIONER

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

May 15, 2023

The Honorable Ron Wyden
Chairman, Committee on Finance
United States Senate
Washington, DC 20510

Dear Senator Wyden:

This letter is in response to your request for information about the apparent racial disparity in the selection of tax returns for audit, along with our plan to address this issue.

Let me start by stressing that the IRS is committed to enforcing tax laws in a manner that is fair and impartial. When evidence of unfair treatment is presented, we must take immediate actions to address it. It is also important to reiterate that we do not and will not consider race as part of our case selection and audit processes. Nevertheless, a recent study estimated, using imputed race values, that Black taxpayers are audited at three to five times the rate of non-Black taxpayers.[1] The research further suggests that most of this disparity is driven by differences in correspondence audit rates among taxpayers claiming the Earned Income Tax Credit (EITC). We are deeply concerned by these findings and committed to doing the work to understand and address any disparate impact of the actions we take.

As soon as I was confirmed, I met with the IRS team that has been studying this issue. Their research is ongoing and additional time is needed to yield a robust understanding of the drivers of this disparity and to thoroughly evaluate the right potential programmatic changes to address it. In this letter, we provide our initial findings. I want to note that fairness in audit selection is a complex topic, and our initial findings will evolve as the work continues. IRS does not collect data on race and there is substantial

[1] Elzayn et al (2023). "Measuring and Mitigating Racial Disparities in Tax Audits." Stanford University, SIEPR WP 23-02 (January). The IRS does not collect data on taxpayer race. Elzayn et al (2023) estimated probabilities that filers belong to particular race/ethnicity groups by comparing taxpayers' names and addresses to public data on the racial composition of names and Census Block Groups. These probabilities have been used in retrospective analyses of audit outcomes, to help us understand the drivers of disparity. They have not been and will not be used in the operational selection of individual taxpayers for audit.

uncertainty in any estimates of the audit rate by race or differences in audit rate by race.

While there is a need for further research, our initial findings support the conclusion that Black taxpayers may be audited at higher rates than would be expected given their share of the population. We are dedicating significant resources to quickly evaluating the extent to which IRS's exam priorities and automated processes, and the data available to the IRS for use in exam selection, contribute to this disparity. As part of this work, we are evaluating the potential impact of methodological changes to case selection (e.g., optimizing on broader tax issues rather than focusing on EITC overclaims). As this work progresses, additional information will be shared externally regarding the research findings and the appropriate corrective actions IRS will take.

I will stay laser-focused on this to ensure that we identify and implement changes prior to next tax filing season.

As we continue to evaluate ways to address any bias that exists within our audit program, the IRS will take steps to advance our commitment to fair and equitable tax administration more broadly. In the Inflation Reduction Act (IRA) Strategic Operating Plan, the IRS committed to conducting research to understand any potential systemic bias in compliance strategies and treatments. We will work to identify any disparities across dimensions including age, gender, geography, race, and ethnicity as well as continually refining our approaches to compliance and enforcement to improve fairness in tax administration and maintain accountability to taxpayers as informed by our research. The ongoing evaluation of our EITC audit selection algorithms is the topmost priority within this larger body of work, and we are committed to transparency regarding our research findings as the work matures.

The Inflation Reduction Act funding will allow us to focus even more attention on reaching underserved communities to provide education and real-time assistance in claiming available credits and incentives. This will help to promote the uptake of credits and incentives and ensure that all taxpayers have a better understanding of eligibility and documentation requirements for such provisions. Legislative changes streamlining eligibility requirements could support our education efforts, reduce honest mistakes, and improve administrability.

We are also working to advance equitable tax administration by holding accountable unscrupulous return preparers who fail to exercise due diligence and disadvantage taxpayers through poor-quality advice. The proposal outlined in the Fiscal Year 2024 Treasury Greenbook includes expanded and increased penalties for unscrupulous preparers. In addition, the IRS is accelerating an existing research effort that aims to detect and ensure compliance among "ghost preparers," i.e., individuals who receive compensation to prepare returns for others but do not identify themselves to the IRS. Initial evidence confirms that unscrupulous and ghost preparers disproportionately prepare returns in minority communities.

In summary, we are making broad efforts to advance our commitment to fair and equitable tax administration and evaluating the best ways to address bias within our

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audit program. I expect to be able to update you and the committee on a regular basis on our progress on these initiatives. I hope this information is helpful and look forward to discussing any questions or concerns you may have regarding our plan to address this important and challenging problem.

Sincerely,

Daniel I. Werfel

Digitally signed by Daniel I. Werfel
Date: 2023.05.15 07:12:08 -04'00'

Daniel I. Werfel
Commissioner

Court Orders Enforcement of Summons for Crypto Data

Digital Currency Trading Information is NOT Private

In case you continue to believe that your digital currency trades are private, consider this. A United States District Court in California, on June 30, 2023, ordered the enforcement of an IRS summons that was issued against Payward Ventures, Inc., an online cryptocurrency exchange platform that does business as Kraken. See: *United States v. Payward Ventures, Inc.*, Case No. 23-mc-80029-JCS (Dist Ct. ND Cal. 2023). Note, we discuss summonses in more detail in the next article.

Kraken offers digital current exchange services to investors buying and selling cryptocurrency. Its clients are located in the U.S., as well as in over 190 countries across the world. To open an account, users must provide: (a) their name and identification documents to confirm their identity, (b) a physical address, (c) proof of residence, and (d) for U.S. clients, a taxpayer ID number. They may also be required to provide a photo and complete a "Know-Your-Customer Questionnaire" which, among other things, asks questions about the applicant's occupation, source of income, and intended use of the account.

Once established, secured login procedures involve a two-factor authentication for login that includes an email address, one's full name and date of birth, phone number, and physical address. Once established, one can trade in unlimited amounts through the Kraken account. In addition to buying and selling cryptocurrency, a client can trade on margin, earn additional cryptocurrency by participating in blockchain activity, trade in options, and engage in over-the-counter trading.

Cryptocurrency has been on the IRS's radar since 2014, when the agency issued IRS Notice 2014-21. That ruling deemed cryptocurrency to be "property,"

and thus it is to be treated no differently than, say, a share of stock or an automobile. Plus, the number of crypto investors has skyrocketed since 2010. Given that fact, along with the wealth of information held by Kraken regarding the identity and trading activities of its U.S. clients, it should come as no surprise that the company caught the attention of the IRS.

To learn the names, addresses and other identifying information of Kraken's U.S. clients, the IRS issued a "John Doe" summons on the company in 2021, under the authority of Code § 7609(f). That section allows the IRS to issue a summons to a third-party recordkeeper "which does not identify the person with respect to whose liability the summons is issued." Rather, such a summons can seek information from the third party that identifies individuals within an "ascertainable group or class of persons." See: Code § 7609(f)(1)-(3). In this case, the IRS sought the identity of U.S. citizens.

A "John Doe" summons is, in a very real sense, a broad dragnet the IRS casts. It was cast with the expectation of discovering the names of citizens who may have failed to pay taxes on their crypto activity. Indeed, in *Payward Ventures*, the IRS listed six specific ways that that trading in crypto can relate to tax compliance. They are:

- Wages, salary, or other income paid to an employee with virtual currency is reportable by the employee as ordinary income and subject to employment taxes paid by the employer.
- Virtual currency received by a self-employed individual in exchange for goods or services is reportable as ordinary income and is subject to self-employment tax. This would include a person who "mines" virtual currency as a trade or business.
- Virtual currency received in exchange for goods or services by a business is reportable as ordinary income.
- Gain on the exchange of virtual currency for other property is generally reportable. It is considered capital gain income if the virtual currency was held as a capital asset. It is considered ordinary income if the virtual currency was held for sale to customers in a trade or business (such as a broker's sales activities).
- Gain on the sale of property held as a capital asset in exchange for virtual currency is reportable as a capital gain.
- Payments made in virtual currency are subject to information reporting requirements to the same extent as payments made in fiat currency or instruments denominated in fiat currency. *Payward Ventures, Id*. Pg 6.

The long-time, controlling precedent for determining whether courts will enforce an IRS summons seeking data, whether from an individual citizen or from third parties (including through the use of a "John Doe" summons), is the Supreme Court case of *United States v. Powell*, 379 U.S. 48 (1964). That case states that in order for the court to enforce an summons, the IRS must establish that the summons is issued "in good faith" by showing that the summons: (1) is issued for a legitimate purpose; (2) seeks information relevant to that purpose; (3) seeks information that is not already in the IRS's possession; and (4) satisfies all of the administrative steps set forth in the Internal Revenue Code." *United States v. Powell*, 379 U.S. 48, 57–58 (1964)). "[T]his showing need only be minimal . . . because the statute must be read broadly in order to ensure that the enforcement powers of the IRS are not unduly restricted." *Liberty Fin. Servs. v. United States*, 778 F.2d 1390, 1392 (9th Cir. 1985) (citing *United States v. Balanced Financial Management, Inc*., 769 F.2d 1440, 1443 (10th Cir.1985)). These same rules apply to "John Doe" summons. *United States v. Samuels, Kramer & Co*., 712 F.2d 1342, 1346 (9th Cir. 1983).

Once the IRS makes a prima facie case that the *Powell* factors are met, the taxpayer bears a "heavy" burden to show an abuse of process or lack of good faith on the part of the IRS. *United States v. LaSalle Nat'l Bank*, 437 U.S. 298, 316 (1978). "'The taxpayer must allege specific facts and evidence to support [their] allegations of bad faith or improper purpose.'" *Id*. (quoting *United States v. Jose*, 131 F.3d 1325, 1328 (9th Cir. 1997)). Where such evidence is presented, the court must then "scrutinize" the summons "to determine whether it seeks information relevant to a legitimate investigative purpose, and the court may choose either to refuse enforcement or narrow the scope of the

summons." *United States v. Goldman*, 637 F.2d 664, 668 (9th Cir. 1980) (citing *United States v. Bisceglia*, 420 U.S. 141, 146 (1975)).

Only in extremely rare cases do the courts deny enforcement of summonses. And such was *not* the case here. The court ordered the enforcement of the summons issued against *Payward Ventures* for the release of information on Kraken account holders "with any combination of accounts having at least the equivalent of $20,000 in value of transactions (regardless of type) in cryptocurrency in any one year, for the period January 1, 2016 through December 31, 2020." *Payward Ventures, Id,* pg 50.

Specifically, the following information was ordered to be released to the IRS:

1. Name (including full name, any pseudonym, or any user ID),
2. Date of birth,
3. Taxpayer Identification Number,
4. Physical address,
5. Telephone number,
6. Email address,
7. Detailed and specific transaction activity, and
8. All records showing deposits, withdrawals, and transfers in any manner.

Do not make the mistake of believing that cryptocurrency account information and trading activity is either, (a) tax-free, or (b) totally private and unavailable to the government. Indeed, *Payward Ventures* is not the first case in which the IRS was granted the keys to the private filing cabinets of crypto trading companies. In 2017, a U.S. District Court in California ordered the enforcement of a summons similar to that issued against Payward Ventures. That summons was issued against Coinbase, Inc., the pioneer in crypto trading. See: *United States v. Coinbase, Inc.*, No. 17-cv-01431-JSC, 2017 WL 5890052 (N.D. Cal. Nov. 28, 2017).

If you trade in crypto in any way, shape or form, you need to be aware of the tax consequences of your transactions. Seek competent counsel to accurately report those transactions and pay the correct tax on any gain or profit.

Supreme Court Rules on Summons Procedures

Enforced Exception to Summons Notification Rule

BY SCOTT MACPHERSON AND DAN PILLA

The IRS has very broad – indeed, one might say "sweeping" – powers to gather information regarding one's potential tax liability, and to collect such liability once assessed. This power grows from Internal Revenue Code § 7602. This statute gives the IRS its data-gathering authority which is unsurpassed by that of any other law enforcement agency.

Under the law, the IRS has the power to: (1) "examine books, papers, records, or other data" that might be relevant to any examination or investigation, (2) summons any person, whether it be the taxpayer in question or any other individual, to "produce such books, papers, records, or other data, and to give such testimony" as may be deemed necessary, and (3) "to take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry." IRC § 7602(a)(1)-(3).

The statute defines three areas in which the IRS may use this broad summons power. Section 7602(a) provides that such a summons may be issued

> [f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of

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> any person in respect of any internal revenue tax, or collecting any such liability, … IRC § 7602(a).

Perhaps the most remarkable aspect of this incredibly broad authority is that the IRS does *not need* the permission of any court to issue a summons. It is purely an administrative process. The investigating agent merely issues the summons and the person named in the summons must appear in response to, and provide the documents requested by, the summons.

That said IRS summonses are *not* self-enforcing. If a person fails or refuses to appear in response to a summons, or appears but refuses for any reason to provide the summonsed records, the IRS has no unilateral authority to enforce its own summons. It cannot put a person in jail, issue a fine, or otherwise in any way impose a penalty for failure to comply.

It can, however, apply to a federal court for an order seeking the enforcement of its summons. Such an action is known as a summons enforcement proceeding. In such a case, the United States District Court has the authority to "compel such attendance, testimony, or production of books, papers, records, or other data." IRC § 7604(a).

If the court issues an order of enforcement directing an individual to comply, it then has the power to enforce that order through its contempt powers. That is to say, if the summonsed person fails to obey the court's order to comply, he could be held in contempt of court. This could land the non-compliant individual in jail until he does comply. IRC § 7604(b).

When the IRS issues a summons to a third-party recordkeeper, special procedures apply. See generally, IRC § 7609. A third-party recordkeeper is a person, other than the person who is the subject of the investigation, in possession of records or testimony related to the subject. For example, banks, employers, credit card companies, mortgage companies, digital currency trading platforms, etc., are third-party recordkeepers. They are in possession of documents related to their transactions with the person who is the subject of the investigation. We saw this idea in action in the *Payward Ventures* case, discussed in the previous article.

When the IRS issues a summons to a third-party recordkeeper, generally, it must provide a copy of that summons to the subject of the investigation. That subject then has the right under § 7609(b) to either bring an action in federal court to quash the summons, or if the IRS has began a summons enforcement action, to intervene is such action. As an intervener, the subject then has standing to present to the court such arguments as are applicable in opposing enforcement of the summons.

The notice requirements of § 7609 are designed to provide due process rights to subjects of IRS investigations, and to afford such persons the opportunity to present to a federal judge any reasons the summons should not enforced. In this way, subjects have the ability to argue for the protection of their rights to privacy and to prevent any IRS overstepping with regard to data collection.

This notice process was the subject of the Supreme Court's recent decision in *Polselli v. Internal Revenue Service*, 143 S.Ct. 123, May 2023. In a unanimous decision, the Supreme Court clarified the terms of Code § 7609(c)(2)(D), which provides an exception to the general rule explained above, that the IRS must give notice to the subject of an investigation when it issues a summons for third-party records.

The exception generally provides that notice need not be given when the summons is issued "in aid of the collection of the assessment or judgment" for taxes owed by the subject. The summons in the *Polselli* case was issued, not to gather records to determine a tax liability, but to collect taxes already assessed. In that sense, the government argued that the exception applies, and thus, no notice was required.

Polselli argued that the exception applies only when the subject has a "legal interest" in the accounts or records summonsed by the IRS. The Court disagreed, saying, "The notice exception does not contain such a limitation." *Id*. at 1237. So long as a summons is "reasonably calculated to assist in collection," the exception applies. Said another way, as long as the records would help a revenue officer (as opposed to a tax auditor or criminal investigator) achieve collection the way forensic tests by a CSI lab help detectives solve a crime, the revenue officer does not have to give notice to the taxpayer who owes the money, nor does such person have the right to intervene in a summons

enforcement proceeding.

The facts of the case are simple. Remo Polselli underpaid his federal taxes to the tune of about $2 million, including interest and penalties. The revenue officer issued summonses to: (1) a particular LLC, "surmis[ing] that [Remo] might have control over funds belonging to that company"; (2) Remo's lawyer; (3) the bank where his wife Hanna had a personal account; and (4) other banks where the revenue officer suspected either Remo or his lawyer or the law firm held accounts. *Id*. at 1235-36.

The revenue officer did not provide notice of the summonses to Remo or the others, but the banks did. Hanna, the lawyer, and the law firm filed a proceeding to quash the summonses in federal court under the provisions of Code § 7609(b)(2). The district court dismissed their case for lack of subject matter jurisdiction, saying that the IRS did not have to provide notice to them because these third-party summonses fell under the exception expressed in § 7609(c)(2)(D)(i).

On appeal to the Sixth Circuit, petitioners argued for application of the rule followed in the Ninth Circuit, which states that the exception to the notice requirement applies only when the taxpayer (Remo, in this case) has "some legal interest or title in the object of the summons." "To decide whether a taxpayer maintains a sufficient legal interest 'in the object of the summons,' the Ninth Circuit considers 'whether there was an employment, agency, or ownership relationship between the taxpayer and third party.'" *Id*. at 1236. Remo had no such legal interest.

The Sixth Circuit, on the other hand, rejected that test. Instead, it adopted the law as applied in the Seventh and Tenth circuits. The rule there is that "as long as the third-party summons is issued to aid in the *collection of any assessed tax* liability the notice exception applies." *Id*. at 1236; emphasis added.

As its starting point, the Supreme Court explained that the exception to the notice requirement is subject to three pre-requisite conditions:

> The statute sets forth three conditions to exempt the IRS from providing notice in circumstances like these. First, a summons must be "issued in aid of ... collection." § 7609(c)(2)(D). Second, it must aid the collection of "an assessment made or judgment rendered." … Third, a summons must aid the collection of assessments or judgments "against the person with respect to whose liability the summons is issued." § 7609(c)(2)(D)(i). This requirement links the subject of the assessment or judgment with the subject of the collection effort — they must concern the same delinquent taxpayer. *Id*. at 1237.

The petitioners agreed but argued for a narrow definition of the term "aid," such that their "legal interest" test became a necessary element to the statutory exception:

> In their view, the phrase refers only to inquiries that "directly advance" the IRS's collection efforts. Brief for Petitioners 21. A summons will not directly advance those efforts, they contend, unless it is targeted at an account containing assets that the IRS can collect to satisfy the taxpayer's liability. And, petitioners say, the only way that a summons issued to a third party will produce collectible assets is if the delinquent taxpayer has a legal interest in the targeted account. *Id*. at 1237.

The Supreme Court rejected that narrow definition, and instead adopted a definition of the term "aid" and would apply in ordinary usage and application:

> IRS investigations are much like any other: A detective might order forensic testing or speak to witnesses to help identify a culprit, even if those activities are unlikely—in and of themselves—to solve the crime. Similarly, documents in the accounts belonging to Mrs. Polselli or Dolce Hotel Management may be a step in a paper trail leading to assets owned by Mr. Polselli. Everyday tasks illustrate the same point: A recipe might help a chef shop for needed groceries, even though more steps are required before dinner will be ready. By conflating activities that help advance a goal with activities sure to accomplish it, petitioners ignore the typical meaning of "in aid of." *Id*. at 1238.

Polselli's team next argued that unless their "legal interest" requirement is adopted, clause (ii) of the statute is superfluous because clause (i) already exempts from notice every summons that helps the IRS collect

an "assessment" against a delinquent taxpayer. *Id*. at 1238-39. The Supreme Court disagreed, and the reason for its disagreement deserves note. The Court said that the two clauses under § 7609(c)(2)D) concern different stages of a tax controversy:

> First, clause (i) is applicable upon an *assessment*, while clause (ii) is applicable upon a finding of *liability*. Under the Code, a taxpayer's "liability" for unpaid taxes arises before the IRS makes an official "assessment" of what the delinquent taxpayer owes. See *§ 6203* ("The assessment shall be made by recording the liability of the taxpayer ...."); see also *United States v. Galletti*, 541 U.S. 114, 122, 124 S.Ct. 1548, 158 L.Ed.2d 279 (2004) (assessment refers to "the calculation or recording of a tax liability"). Although an assessment may "trigge[r] levy and collection efforts," *Hibbs*, 542 U.S. at 101, 124 S.Ct. 2276, the Code does not require in all cases that the IRS make a formal assessment before attempting to collect an outstanding tax liability. See *§§ 6501(c)(1)–(3)* (authorizing the IRS to bring "a proceeding in court for collection of [a] tax ... without assessment" in situations involving false returns, willful attempts to evade taxes, and failures to file a return). *Id*. at 1239.

On top of that difference, the two clauses concern different subjects:

> Clause (i) concerns assessments or judgments against a taxpayer—"the person with respect to whose liability the summons is issued." § 7609(c)(2)(D)(i). Clause (ii), in contrast, concerns the liability of a "transferee or fiduciary." *Id*. at 1239.

Either of those distinctions alone would negate the Polselli's argument that the second clause is superfluous, because "[t]hey show that the second notice exception found in clause (ii) applies in situations where clause (i) may not." *Id*. at 1239. But additionally, the Court said, clause (ii) alone applies in case where a taxpayer declared bankruptcy:

> In those situations, clause (i) may not apply, for a summons cannot be "issued in aid of " an impossible collection effort. § 7609(c)(2)(D). But clause (ii) may nevertheless permit the IRS to issue unnoticed summonses to collect the "liability" of the taxpayer's transferee or fiduciary. *Id*. at 12340.

The Justices closed by acknowledging that IRS abuse occurs, but declined to set clear boundaries to prevent future abuse. ("This is not, however, the case to try to define the precise bounds of the phrase 'in aid of the collection.'") *Id*. at 1240.

There was a tremendous amount of angst and outrage in the media over the idea that the Supreme Court killed taxpayers' privacy rights with its decision in *Polselli*. We do not see it that way. The Court merely applied an exception to the notice requirements that is plainly written in the law. Any target of a civil liability examination or criminal investigation remains fully entitled to the notice and intervention rights provided for by Code § 7609 generally. See more on this, see chapter 7 of Dan's book, ***How to Win Your Tax Audit***.

How You Can Ask Dan Pilla a Question

If you have questions or problems you'd like Dan Pilla to address, please write to Dan at:

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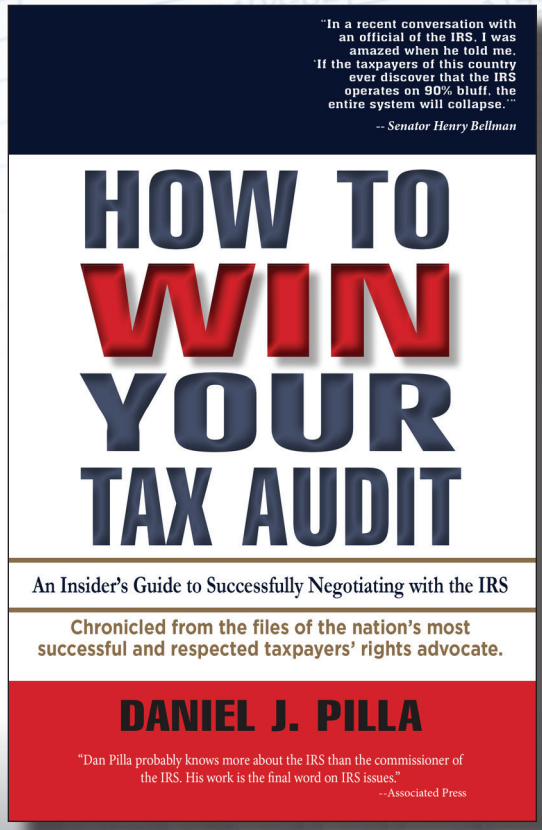

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