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# *If Your Client Owes Back Taxes, the IRS Can Obtain Your Bank Records Without Your Knowledge and Without a Right to Challenge It in Court*

By [Stephen Turanchik](#)

*The U.S. Supreme Court rules that the IRS does not need to provide notice to innocent bank account holders when the summonses are issued in aid of collection of a delinquent taxpayer's tax assessment*

The U.S. Supreme Court, in a unanimous opinion in *Polselli v. Internal Revenue Service*, ruled that the IRS was not required under the Internal Revenue Code to provide notice when seeking the records of innocent third parties.

## **I. Factual Background**

The case involved a taxpayer, Remo Polselli, who owed the IRS more than \$2 million in back taxes. The IRS focused its collection efforts on financial accounts owned by his wife and lawyers to whom he had allegedly made payments. The IRS issued summonses to JP Morgan Chase and Bank of America for the wife's and the law firm's bank records looking for clues as to where Mr. Polselli's funds were coming from. The IRS did not inform either the wife or the law firm about the summonses; but the banks did. The wife and the law firm filed petitions to quash the summonses with the U.S. District Court.

## **II. Court Challenges**

The District Court dismissed the case for lack of subject-matter jurisdiction, reasoning that the IRS did not need to provide notice to either the wife or the law firm. *Polselli v. United States*, 2020 WL 12688176, \*4 (E.D. Mich., Nov. 16, 2020). The District Court accepted the IRS's assertions that "the purpose of [the] investigation [was] to locate assets to satisfy Mr. Polselli's existing assessed federal tax liability and that the IRS issued the summonses in question to aid in the collection of these assessed liabilities." *Id.* Because the Internal Revenue Code ("IRC") excluded petitioners from the required notice, there was no waiver of sovereign immunity, and the District Court therefore lacked jurisdiction to entertain the motions to quash. *Id.*, at \*5. This part is important. If the IRS is not required to provide notice to a party, the United States has not waived its sovereign immunity to be sued. This means that the parties whose records have been summonsed have no recourse to contest the summons. If those parties are lucky perhaps the banks will choose not to comply with the summonses, but parties cannot realistically expect financial institutions to ignore government instructions.

The Sixth Circuit affirmed in a divided opinion, reasoning that no notice was required because “the summonses at issue fall squarely within the exception listed in Internal Revenue Code § 7609(c)(2)(D)(i).” *PolSELLI v. Department of Treasury–IRS*, 23 F.4th 616, 623 (2022). The U.S. Supreme Court accepted the case because the Sixth Circuit’s ruling was in direct conflict with *Ip v. United States*, 205 F.3d 1168, 1175 (2000) where the Ninth Circuit found that the taxpayer must maintain a sufficient legal interest in the account including “whether there was an employment, agency, or ownership relationship between the taxpayer and third party.” *PolSELLI v. Department of Treasury–IRS*, 23 F.4th 616, 623 (2022).

### III. Requirements and Exceptions for Providing Notice

Before the IRS can obtain the records via a summons, the IRS must first serve notice of the summons—and a copy of the summons—on “any person (other than the person summoned) who is identified in the summons.” IRC § 7609(a). Thus, generally, notice must be given to everyone identified in the summons, whether or not they are the subject of the Service’s inquiry. However, there are a number of exceptions set forth in IRC § 7609(c)(2). Relevant to this case, there are three conditions the IRS must meet to avoid having to serve notice on the petitioners:

1. A summons must be “issued in aid of . . . collection.”
2. It must aid the collection of “an assessment made or judgment rendered.”
3. It must aid the collection of assessments or judgments “against the person with respect to whose liability the summons is issued.”

IRC § 7609(c)(2)(D)(i) – (iii). The Supreme Court cited the plain language of the statute:

None of the three components for excusing notice in § 7609(c)(2)(D)(i) mentions a taxpayer’s legal interest in records sought by the IRS, much less requires that a taxpayer maintain such an interest for the exception to apply.

Had Congress wanted to include a legal interest requirement, it certainly knew how to so do so.

The Supreme Court cited IRC § 7610 which requires the IRS to “establish the rates and conditions” for reimbursing costs “incurred in searching for, reproducing, or transporting” information sought by a summons. However, IRC § 7610(b)(1) prohibits reimbursement if “the person with respect to whose liability the summons is issued has a proprietary interest in” the records “to be produced.” In their view, Congress “acts intentionally and purposely” when it “includes particular language in one section of a statute but omits it in another section of the same Act.” In IRC § 7610, the IRS specifically mentioned “proprietary interest” in the records. The failure to include that same language in IRC § 7609(c)(2)(D) meant that Congress intended to exclude certain persons from receiving notice.

The Court did note, “We do not dismiss any apprehension about the scope of the IRS’s authority to issue summonses. As we have said, the authority vested in tax collectors may be abused, as all power is subject to abuse.” *PolSELLI v. Internal Revenue Serv.*, No. 21-1599, 2023 WL 3511532, at \*7 (U.S. May 18, 2023). However, the Court expressly declined to precisely define the boundaries of what it considers to be summons activity “in aid of the collection,” but gave it a broad reading based on dictionary definitions of the word “aid,” meaning to support, help, or assist.

#### IV. A Curious Concurrence

In a concurring opinion, Justice Ketanji Brown Jackson, joined by Justice Gorsuch, presented a hypothetical, where she thought notice would be required:

Imagine, for example, a delinquent taxpayer who routinely visits his local mom-and-pop dry cleaning business. Imagine also that the IRS suspects this delinquent taxpayer sometimes uses credit cards with different names. Under a broad reading of §7609(c)(2)(D)(i), I suppose the IRS could issue a summons to the dry cleaner's bank without notice to the dry cleaner, seeking years of the dry cleaner's financial records. The agency might believe that having the entirety of that business's financial information would aid its tax collection efforts—even though the taxpayer has no known financial interest in that business, or any special relationship with the business's owners—because knowing what methods of payment (or aliases) the taxpayer regularly uses could help the agency track down the taxpayer's assets. And it might intend to sift through the requested haystack of the business's bank records in order to find the needle of the taxpayer's transaction information.

For their part, the dry cleaner's owners would probably look askance at having all of their financial records requisitioned and reviewed in this manner. But, without notice, they cannot object to the summons's scope or work with the IRS (and the court) to provide the records that most likely involve the delinquent taxpayer or his aliases. The owners would have to rely on the recipient of the summons (the bank) to articulate their privacy concerns and negotiate with the agency. Yet there is no guarantee under the statute that the bank will do that, and even if it does, how is the bank supposed to identify which credit cards may have been used by the delinquent taxpayer over a multiyear period?

Her reading of IRC § 7609 to require notice—with the potential for judicial oversight—for tax collection activities is entirely consistent with the statutory scheme.

The problem is that the majority's opinion would allow the IRS to obtain Justice Jackson's dry cleaner records, without notice, so long as: (i) the summons was issued in aid of collection, (ii) the summons aids the collection of an assessment made or judgment rendered, and (iii) the summons aids collection of assessments or judgments against the person with respect to whose liability the summons is issued.

#### V. Takeaways

- The case was a clear win for the IRS as it will allow the IRS to more easily obtain information relating to delinquent taxpayers.
- Expect more innocent third parties to have their records obtained without their knowledge by the IRS.
- This is further evidence that the Court continues to apply the rules of strict construction: had Congress wanted to include a particular requirement, it would have done so.

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*If you have any questions concerning these developing issues, please do not hesitate to contact the following Paul Hastings Los Angeles lawyer:*

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