OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1007

TITLE TIFFANY FINE ARTS, INC., ET AL., Petitioners v. UNITED STATES, ET AL.

PLACE Washington, D. C.

DATE October 31, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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TIFFANY FINE ARTS, INC., ET AL. :

Petitioners : No. 83-1007

v. :

UNITED STATES, ET. AL. :

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Washington, D.C.

Wednesday, October 31, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:51 o'clock p.m.

APPEARANCES:

MICHAEL D. SAVAGE, ESQ., New York, New York; on behalf of Petitioners.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondents.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Savage, I think you may begin whenever you're ready.

ORAL AGUMENT OF MIACHEI D. SAVAGE, ESQ.

ON BEHALF OF THE PETITIONERS

MR. SAVAGE: Mr. Chief Justice, and may it please the Court, this case is about one small restriction on the power of the IRS to investigate people, the John Doe summons rules of Section 7609(f).

The power is enormous. And what Section 7609(f) says is that before the IRS can bring all of that power to bear on people whose identity it doesn't even know yet, first it has to show a court of law that it has a reasonable basis for wanting to investigate these people.

The question is: Do those John Doe summons rules apply when the person who can provide the IRS with the identities it seeks is also a taxpayer who is under audit.

QUESTION: Mr. Savage, does 7609(f), the John Doe summons procedure, apply only to summons to the people who are third party record keepers, as defined in 7609(a)?

MR. SAVAGE: No, Your Honor. In fact, Section 7609(a) does not apply when Section 7609(f) applies.

Section 7609(f) deals with summonses which are seeking identities or information about unknown taxpayers. Section 7609(a) applies when the IRS has the identities and is seeking information about those people from designated record keepers.

Now, whether Section 7609(f) applies in this case depends on how you read that statute, how you read Section 7609(f), and at first glance the statute does seem ambiguous -- but only at first glance.

The problem is that Congress used the word "person" in the singular in Section 7609(f). It said that a summons is a John Doe summons if it fails to identify the person with respect to whose tax liability the summons was issued.

I don't think there would be any doubt, though -- I don't think the government would contend that Congress didn't expect 7609(f) to be used to obtain identities of more than one person.

One of the examples Congress uses in the legislative history, one of the examples it uses of how the summons was to be applied was in the case of a corporation in which the IRS was trying to get the names of the shareholders of a corporation who had been advised that a corporate reorganization was a tax-free transaction.

Now, the government takes the position that as long as the summons identifies one person with respect to whose tax liability it was issued, it's not a John Doe summons. But that can't be a correct interpretation of the statute.

Suppose, in the example of the corporation that had advised taxpayers that the reorganization was tax-free, suppose that the IRS served a summons which said, "Furnish us with the letter that you gave to John Smith advising him the transaction was tax-free, and also furnish us with the names and addressesd and Social Security numbers of all the other shareholders in the corporation who received the letter."

I don't think the government would contend that that summons was not a John Doe summons simply because it identified one of the shareholders, John Smith, who the IRS said was under audit.

So the real problem with the statute is that the word "person" is used in the singular. If the statute said that a John Doe summons was a summons that did not identify a person or persons with respect to whose tax liability it was issued, then interpreting the statute in this case would be much easier.

But that is clearly what the statute means. Otherwise, the IRS could get around the John Doe summons

rules simply by identifying one of Tiffany's customers who was under investigation.

The statute itself confirms that the word "person," the term "person" must be read as "person" or "persons." The statute says that it applies to any summons described in subsection (c) of Section 7609.

One of the summonses described in subsection (c) of Section 7609 is a summons served under Section 7602. One of the summonses -- the summons served under Section 7602 is your standard, run-of-the mill summons, served on a taxpayer who's under audit, and who is obviously identified in the summons.

The summons served on Tiffany Fine Arts was a Section 7602 summons, and it seems to me that Section 7609(f) says quite clearly that it applies to that kind of a summons. So the language and the meaning of the statute is not so ambiguous after all.

Now, the Service contends that Section 7609(f) shouldn't be used to -- shouldn't be read to interfere with its ability to audit companies such as Tiffany, who are taxpayers, but who also have information on other taxpayers, which is concededly of interest to the Service.

I'm not so sure that Section 7609(f) can be read in any other way when a purpose of the summons is

to identify those other taxpayers, particularly if you read "person" to mean "person" or "persons," which you must.

But when the Service argues that Section 7609(f) shouldn't be read to interfere with its audit functions, it's really arguing, in effect, that it should be permitted to determine all by itself when Section 7609(f) applies. And this case shows exactly how that can happen.

Tiffany tried to show in this case that the whole thrust of the summons served on it, the whole purpose of the investigation was to audit its customers; that this was the kind of a summons which Congress intended to be covered by Section 7609(f).

Give me your client list, the --

QUESTION: Mr. Savage, is it not for us to determine what the purpose was? It seems to me that you and the government are at odds on that one. How are we going to determine that?

MR. SAVAGE: What the Second Circuit Court of Appeals did, Your Honor, was: It said if a purpose of this summons was to audit Tiffany Fine Arts, we don't care whether there were any other purposes. What we are suggesting is that is the wrong standard.

We are suggesting that if a purpose of the

summons was to identify Tiffany's clients and audit them, then even if a purpose of the summons was also to audit Tiffany Fine Arts, Section 7609(f) still applies only to the question of identifying the clients. The IRS is free to have all of the other information on Tiffany that it wants, but it wants -- and we're not saying that it can't have the client's identities either. But if it wants the identities, Section 7609(f) says it has to go through the John Doe summons procedure.

QUESTION: You are willing, I understand, to give the Service everything it wants except the identification of your clients.

MR. SAVAGE: That is correct.

QUESTION: May I ask, under your reading of the statute, I'm not sure you aren't suggesting it should read identify not just person or persons, but I think all of the persons is really the meaning you would read into it, I think, that proves identity -- I mean the summons issued.

And if you do that, and then you go over to subparagraph 2, which says there must be a reasonable basis for believing that such person or a group of persons -- there may be a tax deficiency of some kind.

How could they ever get the names of the

people on your list if they don't have any specific knowledge about, say, a particular John Doe? And they don't know who he is, so they really can't say whether there's any tax deficiency. How would they get it?

MR. SAVAGE: Our experience, Your Honor, is that they get it. Often.

QUESTION: Well, of course, under the Court of Appeals holding, they don't have any trouble. I understand that. But under your reading of the statute, how would they get it?

MR. SAVAGE: I'm sorry, Your Honor. Perhaps I didn't understand the question.

QUESTION: I understand that under the Court of Appeals interpretation of the statute, they will get these names if it's a secondary purpose. Under your reading of the statute, could they ever get the names of people that they just have kind of a hunch that maybe these franchisees, or whatever they are, ought to be looked at or ought to be audited, without first having some basis for believing there was a deficiency of some kind.

MR. SAVAGE: Under my interpretation of the statute, if all they had was a hunch, then no, they couldn't get the names of these people. That's -- in my view, that's exactly what Section 7609(f) is for: to

prevent the IRS from auditing lots of people based on a hunch.

You know, I am saying that if a purpose of the summons is to --

QUESTION: But, presumably, if they get the names, they would then go to those people and take -- examine their returns and see if there is any reason for going further.

But you say they shouldn't be permitted to do that.

MR. SAVAGE: I'm saying that what 7609(f) says is that if they don't have any basis for auditing these people, they may have not -- people who they don't know -- we are only talking about people whose identities are unknown to the Service. If they don't have any basis for auditing this group of people, if it's just a hunch, then that's right; Section 7609(f) says that they can't get their names.

Now, they might get into the audit of the record keeper and, as a result of auditing the record keeper, they might come up with a basis for auditing these people. And then they could go into court, on the ex parte proceeding.

Very easy to get the names of these people under the John Doe summons procedures. It's an ex parte

proceeding. They tell the court they've examined the record keeper; they've decided that everybody who has been doing business with this record keeper probably has underpaid his taxes, and we want a John Doe summons. And they would get it.

Getting back to the ease with which the Service can get around the John Doe summons rules if they don't apply, when a purpose of the summons is to audit the record keeper, as we saw in this case, Tiffany tried to show this was the kind of summons that was covered by Section 7609(f) and the IRS said so what? Tiffany's under audit.

We can't -- we don't deny that Tiffany was under audit. We can't contend that Tiffany wasn't under audit. The IRS is free to put Tiffany under audit whenever it wants to, for practically any revenue-related reason that it wants to.

It merely has to decide that Tiffany is under audit, and it's own power makes it so. So it would be easy to dispose of this case as the Second Circuit did -- by reading the statute to mean that as long as somebody who is identified in the summons is under audit, it doesn't matter how many other people the IRS is interested in finding out about and auditing.

But to dispose of that case in the manner, it

seems to me, reads Section 7609(f) right out of the law. If the Service is free to audit the record keeper whenever it wants to, and if the John Doe summons rules never apply when the record keeper is under audit, then at the option of the Service, John Doe summons rules never --

QUESTION: Well, is that quite right? Isn't one of the problems the statute deals with is subpoenas on banks? And they don't have to audit them. Of course, there they would have to follow the procedure, of course, if a subpoena --

MR. SAVAGE: Banks are covered by Section 7609(a). They are a designated record keeper. And the IRS is free to have the information under Section 7609(f), under Section 7609(a), but they have to notify the record keeper -- the taxpayer -- that they are seeking the information.

Now, the government argued in its brief that when the record keeper is under audit, there is no need for the John Doe summons rules to apply; that in the course of a normal enforcement proceedings, the courts will be able to scrutinize these summonses, just as they would have in the ex parte proceeding under Section 7609(h).

But that argument presupposes that there will

be normal enforcement proceeding. It presupposes that somebody like Tiffany has interest in defending its clients' identities. Tiffany's interest is solely in its own tax liability for tax purposes. Tiffany's interest is solely in its own tax liability, which has no bearing on --

QUESTION: Mr. Savage, if you were correct on your interpretation, and if the IRS went through the John Doe proceedings before the court and failed to prove that it harbored a reasonable suspicion, as provided by subsection (f), then what could the IRS review of Tiffany's own records thereafter to determine the questions that it might have concerning the proper reporting by Tiffany of its income from licensees -- what would it do to verify that?

MR. SAVAGE: For example, to take the case of Tiffany, Agent Lewis said that he wanted to review the underlying license agreement.

Well, we would have given Agent Lewis the underlying license agreements.

QUESTION: With the names of the licensees deleted? Is that what you're --

MR. SAVAGE: Well, the addresses and the Social Security numbers of the licensees deleted. I don't know that the IRS can do a lot just with names.

We wouldn't be concerned about giving names, but we would have deleted the addresses and the Social Security numbers.

Now --

QUESTION: You get into some curious questions about how the IRS might be able to follow up adequately on the liability of, for example, Tiffany itself, under your view.

MR. SAVAGE: It shouldn't -- I have to concede, Your Honor, that that problem may arise in a very limited number of cases. If it does, I think it's because that's what Congress has said.

But I'd like to point out to you that it shouldn't arise in a very large number of cases. We are only concerned with summonses -- with cases in which Tiffany has been able to demonstrate that a purpose of the summons was to audit its customers. If Tiffany is able to make that demonstration, then presumably the Service has some reason for wanting to audit these people.

If it has reasons for wanting to audit people, then it ought to be able to to into court and get its John Doe summons.

In cases where the government isn't interested in auditing these people, Tiffany shouldn't be able to

demcnstrate that a purpose of the summcns is tc audit them. And if it can't demonstrate that under the interpretation we're asking for, if Tiffany can't demcnstrate that a purpose of the audit is tc audit its customers, then the government is free to have the customers' identities withcut going thrcugh the Jchn Dce procedures.

Sc, theoretically, either way, if the government is doing its job right, either way the government gets what it wants in the end. It's just a questicn of which prccedure it has tc fcllcw.

Now, there may be some cases that fall thrcugh the cracks cf the thecry. But we're not arguing that that's the way it should be; we're arguing that that's what Ccngress has said in the statute.

Getting back to the government's argument that the John Doe procedures don't have to apply when the reccrd keeper is under audit. I just want to point cut to the Court that Tiffany really doesn't have any interest in defending the identities of its clients. And Tiffany doesn't have any particular objection to being audited.

But for the presence of the Jchn Doe issue in this case, there wouldn't have been an enforcement proceeding. And it would be a mistake, I think, tc

assume that most record keepers will go through what Tiffany has gone through in this case just to protect the identities of its clients.

So if the record keeper won't bring these summonses before the Court, and if the John Doe summons procedures don't apply, then summonses like these will never be subjected to the limited court scrutiny that Congress obviously wanted when it wrote Section 7609(f).

Now, the rule, the interpretation of Section 7609(f) that we are urging on the Court, we are not suggesting that the Court should rule that the IRS must comply with the John Doe summons procedures whenever it seeks identities of customers of a record keeper who is under audit.

The rule we are urging is that when the overt acts of the agent and the published institutional posture of the Internal Revenue Service demonstrate that a purpose of the summons is to investigate the customers, then the John Doe procedures must be complied with before the summons can be enforced.

The interpretation essentially is the rule set down in the Thompson case in the Sixth Circuit. And it's a good rule for a number of reasons. First, it squares with the language of the statute. It asks, was

this summons issued with respect to the tax liability of someone who is not identified in the summons? And if the answer to that question is yes, then the John Doe rule applies.

Second, it gives vitality to the statute. It recognizes that the Service does have the power to sidestep the John Doe summons rules.

QUESTION: I take it that, does the government -- do you understand the government to concede that if Tiffany had not been under audit, that it could not have summoned Tiffany to produce the names of its customers without going through the John Doe procedure?

MR. SAVAGE: I presume the government would concede that; yes. I don't see how it couldn't concede that.

QUESTION: But do you think that getting the names of the customers and investigating the customers would help the government determine Tiffany's obligation?

If the interest to the government is the fact that Tiffany allegedly was selling tax shelters, I suppose it might help -- if the government thought Tiffany was doing it illegally or contrary to the law or something, I suppose it would help to know who the customers are and what their affairs might show.

MR. SAVAGE: That would not really be a summons issued with respect to the tax liability of Tiffany.

QUESTION: It wouldn't?

MR. SAVAGE: That would be -- well, except to the extent that Tiffany --

QUESTION: Why, if they're under audit?

MR. SAVAGE: -- might be subject to it.

QUESTION: Would it help -- I'll put it this way. Would it help the government conclude its audit of Tiffany?

MR. SAVAGE: Certainly, the government, no doubt, would find it useful to have the identities of the clients in order to -- perhaps, in order to verify the correctness of the tax liability of Tiffany.

I've been through a lot of audits. I've never once seen the government go to a customer and say, well, did you really pay this person so much money, or did you really receive so much money? The government usually goes after -- the government usually inquires, makes inquiries of the taxpayer's customers when it suspects under-reporting.

QUESTION: Well, if it knows who they are.

MR. SAVAGE: Even when it knows who they are, in my experience -- in my experience, they verify the

income based on the records they have before them when they have to reconstruct income, for example, or when they think that there's fraud involved and they need witnesses. Then they start to inquire, make inquiries of the taxpayer's customers.

QUESTION: If they know who they are.

MR. SAVAGE: If they know who they are. And in a case in which the government had gone in and had merely started to audit the record keeper and hadn't showed any intention or any interest in its customers, then they're entitled to find out who they are without going through the John Doe procedures.

QUESTION: But I guess the Court of Appeals didn't proceed on this basis anyway. They assumed that there was a dual purpose, I suppose.

MR. SAVAGE: The Court of Appeals said we don't really care if there's a dual purpose.

QUESTION: And so that even if the IRS wanted the names of the customers, wholly aside from its audit of Tiffany, the Court of Appeals held they were entitled to get it.

MR. SAVAGE: That's correct. That's what the Court of Appeals did.

QUESTION: Mr. Savage, Tiffany raised the issue of relevance below, did it not? Whether this

information was relevant to the audit of Tiffany?

MR. SAVAGE: I don't -- we didn't intend to raise the issue.

QUESTION: I see.

MR. SAVAGE: We might have said, we argued below that the government didn't really need this information to complete its audit of Tiffany, but we didn't challenge the relevancy. We can't challenge the relevancy of what the customers' identifications -- or of the licensing agreements which contain the customers' identifications.

QUESTION: Excuse me for going back to the statutory language again, but I keep rereading this darn statute, and I just confess that even if you read it your way and say the person or persons, and assume there's a bunch of unidentified persons, and then you go around the one, two, and three, it still does relate to the investigation of a particular person, namely, your client, and there is reason perhaps for believing that person hasn't paid all his taxes and the information contained with him would relate to his liability.

So even if you read the introductory portion of the statute your way, they would do that in court, but it would have been perfunctory, because all they would have had to have shown in court was that Tiffany

was suspect -- was under audit. And then the subpoena would have been enforceable, if I read the one, two, and three correctly.

MR. SAVAGE: The one, two, and three goes to what the court was -- goes to what the IRS has to demonstrate to the court.

QUESTION: In court. But what I'm suggesting is that as long as you read "person" to mean "person or persons," one of those persons would have been Tiffany in any event, and the showing necessary to get enforcement of the subpoena would merely have required them to show that Tiffany was under audit.

So it would have, in the most perfunctory kind of proceeding.

MR. SAVAGE: I think if you read the statute that way, there is not much --

QUESTION: That's what it says. They've got to show the summons relates to the investigation of a particular person or ascertainable group. At least it relates to Tiffany. And there's a reasonable belief for believing that such person, Tiffany, is -- you know, is the -- and so forth.

So that it seems to me that as long as -- even reading the introductory portion your way, I don't see that -- you could require a court proceeding, I agree,

but --

QUESTION: But what if the IRS say to Tiffany, give us the names of your customers, and Tiffany says why? Will it help you with auditing us? And the IRS says no, but we just want them, because we want to maybe investigate them.

Then paragraph 1 isn't satisfied. The summons relates to the investigtion, because the IRS says -- and says no, this summons doesn't relate the investigation of Tiffany at all. And I asked you a minute ago -- you said that even if that happens, the Court of Appeals for the Second Circuit would say you don't have to follow the John Doe proceedings.

If you don't read it that way, I would think Justice Stevens is certainly right. So what about paragraph 1 on page 4?

MR. SAVAGE: Which says that the summons relates to the investigation. The IRS has to establish, in order to get its John Doe summons, assuming it has served a summons which doesn't identify the person with respect to whose tax liability it was issued. We're not even into a John Doe proceeding if we haven't gotten that far.

So if Section 7609(f) read a "person or persons," then I would argue, first, okay this summons

was served on Tiffany Fine Arts. That identified Tiffany. Give us an evidentiary hearing and we'll also show that it was issued not only with respect to Tiffany's tax liability, but with respect to the tax liabilities of its clients. Didn't identify the clients.

So far, I'm past the introductory language.

QUESTION: Right. And you're in court now.

MR. SAVAGE: Now the IRS is coming into --

QUESTION: And they say our summons is -- we want to investigate the tax liability of (a) Tiffany, whom we know; and (b) Mr. X, whom we do not know.

MR. SAVAGE: Ah ha, but then you look at paragraph 3 which says that the information sought to be obtained from the examination of the records is not readily available from other sources.

QUESTION: The information sought to be obtained is available.

MR. SAVAGE: And the identify of the person or persons with respect to whose liability the summons is issued is not readily available.

The three paragraphs, the three numbered paragraphs can't be referring to Tiffany once you're into the John Doe summons procedure; by definition, we are in the John Doe summons procedure because we can't

identify the people who we want to get information or.

QUESTION: Well, all the argument is then that the government could easily satisfy the John Doe proceedings, the John Doe summons. They could always get it. They could always say well, it's Tiffany.

MR. SAVAGE: Relates to the investigation of Tiffany.

QUESTION: So why have they got an objection to going through the procedure?

MR. SAVAGE: If the statute could be read that way, and then there wouldn't be any purpose for the statute at all, obviously.

I think that --

QUESTION: There would be if they weren't investigating Tiffany's tax liability. Then the statute would apply right on the nose. If they conceded that Tiffany paid all their taxes every year, but they still want to look at their customers' liability, then the statute would apply.

And there must be a lot of cases of that kind. You don't audit every record keeper whose records you want to look at, I don't suppose.

QUESTION: No. There are cases of that kind, and the statute clearly does apply in cases of that kind.

QUESTION: Wasn't that really what Congress was concerned in, in passing the statutue? The situation like California Bankers Association v. Schultz where the bank is subpoenaed to produce records of AB, a depositor. The bank says, sure, take a look. They don't have any real motive to protest. This was to give someone with an adverse interest a right to participate.

MR. SAVAGE: Or, not knowing who that person was, to have the court take a look at the summons. Sure. That is one thing, that is one reason why Congress wrote Section 7609(f).

I don't know that it realized, I don't know that it was aware at the time that it wrote Section 7609(f) that there would be dual purpose summonses. As far as I know, there were no dual purpose summonses back then. This a fairly new invention.

The question -- I think what Congress wanted to do when it wrote Section 7609(f) was to prevent, or was to cause court scrutiny of investigations of unknown taxpayers.

CHIEF JUSTICE BURGER: Your time has expired now, Mr. Savage.

MR. SAVAGE: I was just going to finish answering the question.

Thank you.

CHIEF JUSTICE BURGER: Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.

ON BEHALF OF THE RESPONDENT

MR. WALLACE: Mr. Chief Justice, and may it please the Court, our starting point in this case is to point out that this is not a third party summons in this case. It is what is known in tax practice as a taxpayer summons.

It was a summons issued to Tiffany and its subsidiaries, and it names Tiffany and its subsidiaries as the taxpayer whose liability is under examination in this summons.

A major focus of the proceedings below was to determine whether this was a summons legitimately issued for that purpose, and whether the records and information requested were properly producible for that purpose.

That phase of the case was litigated under the standards first articulated in United States v. Powell and reiterated many times by this Court, and was quite properly, that part of the case, litigated the same way it would have been litigated prior to 1976 when all of Section 7609 first came into the statute.

And there were affidavits submitted by the

agent on this question. The criteria of the Powell case are very succinctly stated in that case itself. They are something less than probable cause, the Court said.

All the Commissioner must show is that the investigation is conducted pursuant to a legitimate purpose; that the inquiry may be relevant -- he doesn't have to show that it is relevant, it may be relevant to that purpose -- and that the information sought is not already within the Commissioner's possession; that the adminnistrative steps required by the Code have been followed, and that it has not been issue for an improper purpose. And the examples given were to harass the taxpayer or put pressure on him to settle a collateral dispute.

And the combination of the agent's affidavits and the legal argument by the United States attorney showed that the agent felt that he had to be able to trace transactions from source documents to books of account, and he would need knowledge of the names of the licensees or the customers for this purpose, and also --

QUESTION: So the names, the bare names, as opposed to the transactions or licenses or agreements would be relevant? Is that your --

MR. WALLACE: Well, I haven't quite finished the reasons, if I may. And also to reconcile reported

income with deposits and receivables and to verify that the transactions reported by the Petitioners actually were the transactions that occurred.

And this was soundly based on based on principles that this Court established in Holland v. the United States back in 348 U.S., one of the leading tax cases, the net worth tax case in which the court pointed out that certainly Congress never intended in the provision there at issue, which was one that limited the government's authority to deviate from the taxpayer's method of accounting, certainly the government -- Congress never intended to make that provision a set of blinders which prevents the government from looking beyond the self-serving declarations in a taxpayer's books.

To protect the revenue from those who do not render true accounts, the government must be free to use all legal evidence available to it in determining whether the story told by the taxpayer's books accurately reflects his financial history.

And, in light of those legitimate purposes, showing of why these names be relevant to the audit of Tiffany and its subsidiaries, the courts enforced the summons, applying the Powell standard. The District Court, upheld by the Court of Appeals, under concurrent

factual findings, ruled that this would have been an enforceable summons prior to 1976.

And the legal question before this Court is whether anything in the Tax Reform Act of 1976, which added Section 7609, should change that result.

And we think the answer to that question emerges with the greatest clarity if we look at Section 7609 as a whole, as a package, because it was treated by Congress as a package and discussed in the committee reports as a package.

Before turning specifically to 7609(f), the first provisions in 7609 dealt with notice and rights to intervene for certain identified persons. And there are two aspects of Section 7609 that make it highly implausible that Congress would have wanted or would have intended that statute to change the result that you would have reached under the Powell standards prior to its enactment.

One is that the very title of Section 7609, which says "Special Procedure for Third Party Summonses," that is part of the statute. As I pointed out at the outset, we are not dealing here with a third party summons. There is no reason to think that special procedures that Congress adopted for third party summonses should change the result that would have been

reached with respect to a taxpayer's summons.

QUESTION: Mr. Wallace, let's just assume that the names of the customers were completely irrelevant to Tiffany's audit or Tiffany's liability, and that Tiffany said, well, why do you want these names? And the IRS said, well, we don't want them because we're investigating you; we just want them because you've got them. And we want to investigate them.

Now, why isn't that a third party summons?

MR. WALLACE: That would be a third party summons with respect to that request, but what I pointed out is that that -- the question whether the request for that information was properly producible as a taxpayer -- as part of the taxpayer summons -- is precisely what was litigated below and upheld by concurrent factual findings of both courts below in this case; that that information did fit the Powell criteria in this case.

QUESTION: Do you suggest -- do you say that -- judge this case on the basis that the names of the customers were relevant to the investigation of Tiffany?

MR. WALLACE: That's right. That's what we had to show. That was the theory on which we proceeded with the 7602 summons.

QUESTION: So you would say it would be a

third party summons, if in this case --

MR. WALLACE: That's another --

QUESTION: -- the names of the customers were wholly irrelevant to the investigation of Tiffany.

MR. WALLACE: That's another means by which we might try to get the same information for a different purpose.

QUESTION: Yes. All right.

MR. WALLACE: But we proceeded under Section 7602 and we had to make the Powell showing that it was -- that it may be relevant to Tiffany's liability, and that's what we made.

QUESTION: But it's also -- but we also judge the case on the assumption that the IRS may have been interested in the tax liabilities of the customers also.

MR. WALLACE: Well, the IRS should be interested in everybody's tax liabilities. Yes. But theeir right to compel production of this information was pursuant to an audit that was assigned to this agent, and his assignment was to audit Tiffany and its subsidiaries, and that's the purpose for which he asked for. And he made the proper showing in support of that purpose.

What the agent does is just copy onto the

summons form his assignment. He is assigned audit, their liability, and he copies that as the taxpayer that it's material to.

Now, the second aspect of 7609 that makes it highly implausible that Congress meant to change the result that would be reached under Powell with respect to a taxpayer summons is that Congress enacted in 7609 provisions directly dealing with summons enforcement proceedings and the legislative history with respect to those provisions, where they gave some additional taxpayer standing to contest summons enforcement proceedings, showed that Congress informed itself in detail of the substantive standards that this Court had developed, and explicitly said that they did not want to change them in any respect.

They did not want to expand any rights to resist the production of information. They just wanted to enable these additional people to raise the same issues that the party summoned could be able to raise.

QUESTION: May I interrupt you, Mr. Wallace, before you get too far into your argument.

I must confess I've been a little troubled by the affidavit that both briefs quote, in which the agent says one purpose of the audit was to check out Tiffany. It seems to me it's almost the equivalent of saying that

the investigation has at least two purposes, one of which was to investigate Tiffany, and the other of which was to investigate the tax liability of certain unidentified persons.

And if the subpoena, on its own face, had said the purpose of this subpoena is twofold -- to investigate and Tiffany and also to investigate another group of unidentified people whose names we don't know -- and they said that in so many words, so that you would know that you could read the statute as to them the way your opponent does, would the statute then have applied? Would that change the case any?

MR. WALLACE: I don't think it would change the case. The whole case is being litigated on a premise that somehow Congress implied by enacting this provision that there's something improper about the Service's using information that legitimately comes into its possession with respect to one taxpayer, if it shows something about another taxpayer; there's something improper about using it for purposes of pursuing or initiating an investigation about that other taxpayer.

The whole Code is built on the contrary premise; that it's up to the Service to pursue whatever information comes into its possession that shows that the tax laws are not being complied with.

I mean there is even a provision in the Code, Section 7623, which authorizes regulations which have been adopted that provide for rewards for information that comes to the Service showing that somebody has committed tax fraud.

I think it's a mistake to interpret the statute as if somehow the Service has its hands in the cookie jar if it's legitimately pursuing an audit and discovers that someone else also may not have paid the taxes that they were supposed to pay.

The Court --

QUESTION: Well -- but I'm not sure that's a complete answer, because Congress has said that when you're going after identified taxpayers, you want to follow a little different procedure, maybe not --

MR. WALLACE: Yes, they said -- but all of that was said in the context of a third party summons and against legislative history saying that this third party record keeper, who isn't himself under investigation, won't have the incentive to make the claims against enforceability of the summons that are available under the law, and therefore there should be a safeguard.

And the package of safeguards that they enacted was 7609. First, a provision, when you identify

the person really under investigation, the person or persons, you're supposed to notify them in certain circumstances and give them a chance to intervene and raise not some additional defense, but just the defenses that the summoned person could have raised if he had an interest in raising them.

And then in 7609(f), they said and if there's nobody that you can identify, that you can bring into court, then we'll substitute an ex parte hearing before the judge, and you have to be able to show that the criterion of (f) have been met in order to issue the summons.

This is not even in the enforcement proceeding. This is just issue. All other summonses can be issued administratively, and the question is what are the standards in the enforcement proceedings with respect to the others.

Now, both aspects of 7609 were responsive to decisions of this Court. The provisions in parts A and B were responsive to this Court's decision in Donaldson v. the United States, in which it held that a taxpayer under audit, under investigation, had no standing to intervene in, no right to intervene in a summons enforcement proceeding against his former employer, where the Service was seeking information about him from

the employer.

Congress did not overrule Donaldson in that factual context at all. Congress was not concerned with the Service's uncontested access to employer records. It was bank records and records in which there might be claims of privilege of similar sorts that Congress was concerned about. It was only the American Bankers Association that testified in favor of this legislation.

And so Congress limited the record keepers, the category of record keepers, as Justice O'Connor pointed out, to whom these provisions apply. It defined the third party record keepers here as -- various categories of banks, consumer reporting agencies, persons extending credit through credit cards, brokers under the Securities Exchange Act, attorneys, accountants, and then later added barter exchanges.

And it's only if the third party summons is issued to one of these kinds of record keepers that the notice provision goes out and that there's a right to intervene in the enforcement proceeding.

And both the House and Senate committee reports made it clear, very explicitly, that the standards to be applied, the defenses to be raised were not to be expanded at all. They said that the taxpayer

is allowed to intervene to assert the defenses which are available under present law, but would have standing to raise issues which could be asserted by the third party record keeper. And it specified: such as asserting that the summons is ambiguous, vague, or other deficient in describing the material requested; or that the material requested was not relevant to a lawful investigation.

In other words, the committee intends that the noticee will be allowed to stand in the shoes of the third party record keeper and assert certain defenses to enforcement which witnesses are traditionally allowed to claim, but which may not be available to intervenors under many court decisions on ground of standing.

At the same time, it should be made clear that the purpose of this procedure is to facilitate the opportunity of the noticee to raise defenses which are already available under the law, and that these provisions are not intended to expand the substantive rights of these parties, the noticee or the third party witness.

And they even add that the noticee will not be permitted to assert defenses that affect only the interests of the third party record keeper, such as improper service on the third party record keeper, or

undue burdensomeness in complying with it.

So Congress informed itself, very carefully, of the standards this Court had developed in Powell and its progeny, and merely wanted to allow identified taxpayers to raise the same defenses in certain circumstances where they would be precluded by the rule of Donaldson from doing so.

Now, the fact that this was to apply only to third party summonses is made further clear by a provision we quote on page 20 of our brief, just above the middle of the page, subpart (4) of it, which says that this whole provision, the notice and the intervention provisions, shall not apply to any summons served on the person with respect to whose liability the summons is issued.

So it isn't only the title that says that these provisions have been put in solely for third party summonses. There is an explicit exception with respect to that aspect of it.

The significant thing here is that Section 7609(f), then, the John Doe provision, uses the same language reaffirming that it refers only to the third party summons situation, and that is the introductory language of 7609(f). And if it's read in conjunction with the heading and with the language used in that

exceptions provision in (a), it means the same thing.

I turn now to the bottom of 3A of our briefs Appendix, but it's also in some other materials, the introductory part of 7609(f). "Any summons described in subsection (c) which does not identify the person with respect to whose liability the summons is issued."

That doesn't mean persons that the Service might also have an interest in. It means whether the summons identifies the taxpayer whose liability is at issue and is being used to justify the request for the materials in the summons.

QUESTION: May I interrupt you again, Mr. Wallace, with -- supposing one paragraph of the subpoena plainly did not relate to Tiffany's liability, but somehow said also the name of the customer who bought a million dollar island in Jamaica or something, if you had some descriptor plainly seeking that person.

Would you agree that if there was a severable part, that should be treated as a separate subpoena for which 79 -- the separate procedure would apply?

MR. WALLACE: It may be that there would be a part of it that could not prevail under a 7602 proceeding on as meeting the Powell criteria with respect to our audit of Tiffany, and if so, we would have to follow the 7609(f) procedure.

Now, in interrelating these two different parts of 7609, it's significant in corroborating that this is the right reading of the statute to think as a practical matter that if we had, in fact, known of the names of some of these licensees and requested not their names, but rquested all records of transactions with licensee A and licensee B, those persons would not have had a right under 7609(a) to notice, nor would they have a right under 7609(b) to intervene, because this is not a third party summons.

And indeed there is also the other problem that Tiffany is not a record keeper within the meaning of 7609(a) and (b) either.

But the more significant point for our purposes is that this is not a third party summons, so those persons would be in no different position than manufacturer M who might be a supplier to Tiffany, and if we ask, as you often would in a summons, for all records of transactions with this particular supplier, that the supplier doesn't have any right to interfere with our securing those records from the taxpayer who is under audit, even though it's quite true that those records might tell us something about possibe tax liabilities of that supplier.

It's quite common in conducting these audits

for the Internal Revenue agent to verify the information received from one taxpayer against another taxpayer's files and to pull those files. It's part of what he needs to do.

If a taxpayer has reported a sales transaction in which a portion of the sales price is attributed to goodwill and another portion to other assets, he wants to see if the other party to the transaction has reported it the same way. It may be that that will ultimately lead to his asking his supervisor to authorize an audit of the second person because he, as he conducts his investigation, discovers that the second person may be the one who has not reported his income properly.

But that's what the job of the Service is. And there has never been any impediment to the use of other taxpayer files in conducting audits that are already underway.

Only last term, this Court in the Arthur Young case pointed out that to a large degree, the effectiveness of our self-reporting system of taxation depends on confidence of taxpayers that the Service can pursue persons who might not be paying their fair share of the tax. And there has never been a holding by this Court or any provision of the tax laws which tells the

Service that it has to turn a blind eye on information that has properly come into its possession, through legitimate investigation, that may show that some other taxpayer should also be investigated.

And there is no reason to read the provisions at issue in this case differently. They are entirely consistent with that principle.

Unless there are further questions, our case will be submitted.

CHIEF JUSTICE BURGER: Thank you gentlemen. The case is submitted.

(Whereupon, at 2:47 p.m. o'clock, the case in the above-entitled matter was submitted.)

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BY Paul A. Richardson

(REPORTER)