

UNITED STATE DISTRICT COURT
For The
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

Robert C. MacElvain

Plaintiffs,

CIVIL CASE NO. 02-A-102-N

vs.

THE UNITED STATES OF AMERICA, and Fran Keith
Revenue Officers of the United States of America,
Personally and John Doe, Personally and
Jane Doe, Personally

Defendants,

JURY TRIAL DEMANDED

STATE OF COLORADO
COUNTY OF EL PASO

AFFIDAVIT OF VICTORIA OSBORN

I, VICTORIA OSBORN, being first duly sworn on oath, state the following:

I am a Forensic Accountant. As a Forensic Accountant I review and reconstruct accounting transactions to test whether they were performed properly according to the law and Generally Accepted Accounting Principles.

In 1999, Robert C. MacElvain, hired me to determine if the assessments made by the Internal Revenue Service, for the tax periods ending December 31, 1980, 1981, 1982, 1983, 1984, 1985 and 1986 were made according to the laws.

This affidavit is being provided in response to the Defendants' Opposition to the Plaintiff's Motion for Preliminary Injunction in the above described civil action.

The information contained in this affidavit describes the authority relied upon in the Internal Revenue Laws and supporting case law; the Internal Revenue Manuals,

Operating Manuals, Regulations and Procedures that the 1998 Restructuring and Reform Act required to be made public.

The following case law is relied upon to establish the necessary procedures required in making a valid assessment as determined by the Courts.

Howell v. U.S., [96-2] USTC
U.S. District Court, Dist. Utah, Cent. Div.; Civ 93-C-952J, 8/9/96

*“An assessment pursuant to **26 C.F.R. 301.6203-1**, by which the IRS records and demands payment of tax obligations, is a several step process:*

- 1. creation of a summary record of assessment,*
- 2. maintenance of supporting documents,*
- 3. notification of liable parties and,*
- 4. upon request by a targeted taxpayer, the production of pertinent information to liable parties.*

The first step of the assessment process is the creation of a summary record which summarizes all assessments made in a particular district on a particular date. The date on which an authorized official signs a summary record sheet becomes its “date of creation”. The summary record sheet must be augmented by supporting records which relate to the summary record.

*Supporting records must provide at least **four** pieces of information:*

- 1. identification of the taxpayer;*
- 2. the character of the liability assessed;*
- 3. the taxable period, if applicable; and*
- 4. the amount of the assessment. **26 C.F.R 301.6203-1.***

26 C.F.R. 301.6203-1 states that if the taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment which sets forth **five** pieces of information:

- 1. The name of the taxpayer*
- 2. The date of assessment*
- 3. The character of the liability assessed*
- 4. The taxable period*
- 5. The amounts assessed*

This differs from the supporting-records requirements in at least two ways: the pieces of information required and the purpose for the information.

*A Form 4340, Certificate of Assessments and Payments, typically contains two date columns titled “**Date**” and “**23C Date**”. In some cases, the validity of Certificates of Assessments and Payments to establish that summary records have been created has been questioned if the “**23C date**” is missing. The “**23C Date**” is significant for it*

provides the sufficient evidence—in the absence of a copy of a Summary Record—that a summary record was indeed created.

The significance of the lack of a “**23C Date**” has typically been coupled with the failure of the IRS to provide any additional information which indicates that a valid assessment was made, such as a signed summary record.

The copy of the computer equivalent of a **23C Form**, signed by an assessment officer-provides uncontroverted proof that an assessment occurred on a specific date. This, however, does not establish any of the additional required information. **Stallard v. U.S. [92-2 USTC 50,596]**, (a signed and dated **Form 23C** does not identify the taxpayer, identify the character of the liability assessed, identify the tax period, or state that amount of the assessment).

The remaining information, then, must be found on the nine pages of the taxpayer’s (Rogers) IMF, six of the nine pages display the taxpayers (Rogers) name, and all nine pages show his account number and name as “**ROGE.**” This suffices.

The remainder of the information on the IMF is presented in cryptic form with hundreds of codes, acronyms, numbers, and sundry enigmatic entries. The IRS offered neither Rogers nor the Court any guide to assist in deciphering the confusing forms. Indeed, the IRS did not attempt to refer to or rely on the encoded information in asserting its compliance with the statute and the regulations. Nonetheless, the Court has attempted to make sense of the IMF, relying on its own resources.

Characterization. The following two entries, by their resemblance to Defendant’s Exhibit C, appear to be pertinent portions of the IMF

240 120588 58,560.00 8847 29254-715-52122-8
PEN CODE-618 PRC

290 120588 0.00 8847 29254-715-52122-8
HC ARC INTD PC
CORRESPONDDT- CREDIT DT-
RCVD DT-

The duty imposed upon the IRS by the regulation is to supply the requisite information upon request. This is done for a purpose. It seems to this Court that in return for allowing a summary sheet with entries affecting hundreds or thousands of different taxpayers to be used, the IRS by regulation is required to furnish particularized information concerning the assessment to an assessed party upon the party’s request. This enables the party to evaluate the propriety of the assessment.

Bureaucratic ineptitude and indifference coupled with judicial admissions made as part of a confused litigation strategy-have combined to produce an untenable argument by the Government; that the assessment of penalty tax under **6672** need not refer to particular tax periods to be valid. We reject this argument as unsound, contrary to precedent, and contrary to the strictures of the IRS’s own regulations. Consequently, we conclude that the IRS’s failure here to assess taxes under **6672** for the proper tax period renders that assessment invalid.

LAST RET-91 M/E COND-E FLC-29 9227

TAX PERIOD 55 8803 REASON CD- MOD EXT CYC-9318

FS-0 CRINV- LIEN-4 29254-715-52122-8 CAF- FZ>VT-

*It appears that the "8803" entry in the starred-box may refer to the tax period March, 1988. However, without any guidance from the IRS and without any adequate explanation for the "55" – or the other codes which surround the entry – the March, 1988 period is nothing more than a guess. Furnishing, such enigmatic information without any explanation denies the taxpayer's rights under **26 C.F.R. 301.6203-1**. See **GCM 39392 (August 1, 1985)**. Accordingly, this Court concludes that the IRS has failed to provide Mr. Rogers with pertinent parts of the record of the assessment which set forth the taxable period in response to Rogers' section **6203** request.*

CONCLUSION

*The IRS failed to meet its burden of proof. The IRS was required to demonstrate that upon the taxpayers (Rogers) request, the taxpayer (Rogers) was sent pertinent parts of the assessment record containing the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, and the amounts assessed. While the record shows that the IRS did furnish the required name, date, and amount information to the taxpayer (Rogers) , the record fails to show that IRS furnished the requisite information concerning the characterization and taxable period of the assessment. Consequently, the Court must conclude that a valid and enforceable assessment was not made. **Stallard v. United States [94-1] USTC 50,056, 12F.3d 489 (5th Cir. 1994)**"*

It is well established that the assessment date and the 23C date are the same. It is also, well established that the assessment date is the date that the Summary Record of Assessment is signed by an authorized agent.

Since assessments are made via the master file system, the computer process of making an assessment must be examined closely with the transactions in the taxpayer's master file record. The only document available to examine this procedure and to determine the true assessment date is the taxpayer's non-sanitized version of his master file account, that includes the cycle post dates for the transactions.

The summary record of assessment must be created before an assessment officer can sign it. This becomes the legal assessment date or 23C date, but not until a taxpayer's assessment is included in a signed summary record of assessment, can there be a valid assessment.

When an assessment date has been backdated on an assessment transaction, in the taxpayer's master file record, it is impossible for that assessment to be included in a summary record of assessment that was created in the past. The true date of the assessment cannot be determined without the cycle post date of the assessment transaction.

The following section of the Internal Revenue Manual describes the process involved in making an assessment, which is made via the computer system.

"The BMF, IMF, and IRA assessment date (23-C date) and the first notice date is Monday of the second week following master file posting. All BMF and IMF settlement notices, taxpayer inquire letters (non-IDRS), and Sample Notices are to be scheduled within normal priorities to ensure complete printing, review, release, and mail-out of business on the Friday preceding the 23-C date." See Internal Revenue Manual Part 3, Chapter 30, Cycles, Criteria, Critical Dates, Print Priorities. A copy of this section of the manual is attached as Plaintiff's Exhibit # 11.

The Internal Revenue Manual relating to "Disclosure of Official Information", provides a clear explanation of the IRS' procedures and explanations to taxpayers, when asking for the pertinent information regarding proof of a valid assessment. This information proves that the summary record of assessment signed by an authorized assessment officer does not contain any information that would identify any individual taxpayer. This is why the only evidence that proves the true assessment date is found in the taxpayer's non-sanitized version of the master file, which is a version that includes the cycle post date for each transaction.

The only method in which to determine if a specific tax assessment for an individual taxpayer and for a particular date, can only be determined by taking the cycle post period, from the individual taxpayer's master file record and calculate the assessment date from the second Monday following the cycle post date of the transaction.

When a taxpayer request the pertinent information relating to an assessments, the Disclosure Office of the Internal Revenue Service provides the following procedure in the Manual. A copy of this section of the Internal Revenue Manual is attached as Plaintiff's Exhibit # 12.

"To ascertain assessment information, requests may be made for the documents used in Service Center processing of the taxpayer's accounts. These requests may contain language with one or more of the following phrases:

- A. *all my information in system of records 24.030*
- B. *my 23C document*
- C. *my summary record of assessment*
- D. *copies of the Form 4340 prepared on me*
- E. *my section 6203 information*
- F. *the Summary Record of Assessment and all supporting documentation*
- G. *my summary of account*

Occasionally, requesters submit FOIA requests for such material to be used in the context of IRS enforcement activities. Therefore, responses that merely advise the requester that "there is no Form 23C with your name on it" open the door for the requesters to make a claim that the IRS has not made a valid assessment when challenging a statutory notice of deficiency.

If in all contacts with the requester it appears that the requester does not understand the Service's procedures on assessments, disclosure personnel will provide additional information as suggested in the sample paragraphs in Exhibit 1.3.13-5.

Exhibit [1.3] 13-5 (08-31-2000)

Response to Requests for 23C

It is unclear to us what documents you are seeking. Your request appears to be based on your understanding that a signed assessment document would contain data about your specific and identifiable assessment(s). Such is not the case.

During processing at the IRS Service Center, Summary Records of Assessment are automated listings of an entire day's or week's total amounts processed. They are listed by date, are signed by an authorized assessment officer, but do not contain data that would identify any individual taxpayer. This procedure is in accordance with Federal regulations and is effective in every IRS Service Center.

In the rare instances when our automated systems cannot be used (e.g., during power failures or in jeopardy assessments), we do prepare a paper Form 23C, strictly as a backup system. However, even in these instances, the Form 23C is a summary of assessment amounts and thus lacks data specific to any particular person."

Assessments are made via the master file system and the computer is programmed to comply with the laws and will not allow the creation of an assessment when the statute of limitations has expired.

An examination of the master file accounts, maintained by the IRS, for Robert C. MacElvain, dated March 26, 2002, provide proof that the assessments made for tax periods 1980 through 1986, were time-barred and the assessment dates were intentionally backdated to conceal the fact that the assessments were time-barred. A copy of the master file records, dated March 26, 2002, for Robert C. MacElvain are attached as follows:

1. Plaintiff's Exhibit # 13, is a copy of the IMF MCC TRANSCRIPT-SPECIFIC for tax period 1980.
2. Plaintiff's Exhibit # 14, is a copy of the IMF MCC TRANSCRIPT-SPECIFIC for tax period 1981.
3. Plaintiff's Exhibit # 15, is a copy of the IMF MCC TRANSCRIPT-SPECIFIC for tax period 1982.
4. Plaintiff's Exhibit # 16, is a copy of the IMF MCC TRANSCRIPT-SPECIFIC for tax period 1983.
5. Plaintiff's Exhibit # 17, is a copy of the IMF MCC TRANSCRIPT-SPECIFIC for tax period 1984.
6. Plaintiff's Exhibit # 18, is a copy of the IMF MCC TRANSCRIPT-SPECIFIC for tax period 1985.
7. Plaintiff's Exhibit # 19, is a copy of the IMF MCC TRANSCRIPT-SPECIFIC for tax period 1986.

The following information is contained in the master file records described in Plaintiff's Exhibit # 13 through 19:

1980

1. The assessment had to be made before April 15, 1986, due to the waiver in the closing agreement.
2. The assessment was given a 23C date of March 21, 1986. This date is backdated from the cycle post date.
3. The assessment was made in the master file record on cycle post date 198618. The 18th week of the year falls within the month of May. Applying the above information from the Internal Revenue Manual, it is impossible for this assessment to have been made on March 21, 1986.
4. There is a hold code on the master file record that prevented the issuance of the "Statutory 30 Day Notice".

1981

1. The assessment had to be made before December 17, 1989, based on the Tax Court decision. The restrictions in 6213(a) were not waived.

2. The assessment was given a 23C date of November 22, 1989. This date is backdated from the cycle post date.
3. The assessment was made in the master file record on cycle post date 199010. The 10th week of the year falls within the month of March of 1990. Applying the above information from the Internal Revenue Manual, it is impossible for this assessment to have been made on November 22, 1989.
4. There is a hold code on the master file record that prevented the issuance of the "Statutory 30 Day Notice".

1982

1. The assessment had to be made before July 16, 1991, based on the Tax Court decision. The restrictions in 6213(a) were waived.
2. The assessment was given a 23C date of July 29, 1991.
3. The assessment statute expiration date was intentionally extended on two separate occasion, both intentionally invalid.
4. There is a hold code on the master file record that prevented the issuance of the "Statutory 30 Day Notice".

1983

1. The assessment was given a 23C date of May 13, 1991.
2. The assessment was made in the master file record on cycle post date 199125. The 25th week in the year falls within the month of June. Applying the above information from the Internal Revenue Manual, it is impossible for this assessment to have been made on May 13, 1991.
3. The master file record does show that the entire amount wrongfully assessed has been abated in full, on May 21, 2001. See page 4 of Plaintiff's Exhibit # 16.

1984, 1985, 1986

1. All assessments were given a 23C date of 12, 1991.
2. All assessments made for 1984, 1985 and 1986 were made in the master file record on cycle post date 199215. The 15th week in the

year falls within the month of April. Applying the above information from the Internal Revenue Manual, it is impossible for these assessments to have been made on December 12, 1991.

3. The master file records show, that for all three years, the wrongful assessments have been abated in full, on December 24, 2002. See page 4 of Plaintiff's Exhibit # 17; page 4 of Plaintiff's Exhibit # 18 and page 4 of Plaintiff's Exhibit # 19.

In addition, all of these master file records reveal, that "hold codes" have been used, to prevent any notices from being issued to the Plaintiff.

Dated:

Victoria Osborn
1580 Oak Hills Drive
Colorado Springs, Colorado 80919
719-548-0663

Subscribed and sworn to before me on the _____ day of April 2002.

Notary Public

My Commission Expires: _____.