

1977 WL 37058 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

October 14, 1977

*1 The courts have adopted a theory of reasonableness concerning the taxing of costs involved in responding to summons and will not tax cost if the demands made of a person can be reasonably expected to be cost of doing business or do not constitute an unreasonable burden upon the person summoned.

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QUESTIONS

When the Tax Commission finds it necessary to obtain information from a third party, or more specifically a banking institution, under the provisions of Section 12-7-2280 of the South Carolina Code of Laws of 1976, is the Tax Commission required to pay for the information if: (1) The circumstances required the bank to produce all or part of its records, related to a specific taxpayer, for examination; (2) The circumstances required that the bank produce copies of its records related to a specific transaction(s) of a specified taxpayer; (3) the circumstances only required the bank to supply the Tax Commission with information concerning transactions with a specific taxpayer?

In the event that payment is to be made who or how would the charges be determined?

STATUTE

Section 12-7-2280 of the Code of Laws of South Carolina, 1976.

DISCUSSION

The applicable provision of the South Carolina Law is Section 12-7-2280 of the 1976 Code of Laws which provides: 'When any person who is required to make a return under this chapter (a) fails so to do at the time required, (b) delivers any return which, in the opinion of the Commission is erroneous or (c) refuses to allow any regularly authorized agent of the Commission to examine his books and records, the Commission may summons (a) such person, (b) any other person having possession, care or custody of books of account containing entries relating to the business of such person or (c) any other person it may deem proper, to appear before the Commission and produce such books at a time and place named in the summons and to give testimony and answer questions under oath respecting any item of income liable to tax on the return thereof. Such summons shall in all cases be served by an authorized agent of the Commission by delivering an attested copy to such person in hand or leaving such copy at such person's last or usual place of abode, allowing such person one day for each twenty-five miles he may be required to travel computed from the place of service to the place of examination. When the summons requires the production of books and returns it shall be sufficient if such books are described with reasonable certainty.

This is the only statutory authority specifically relating to the summoning of records for income tax audits and examinations. It is the only authority of the Commission to summons records of the taxpayer and records in the possession of third parties that may reflect upon the liability of a person for income taxes.

In preparing this opinion, this office is limiting its comments to the question of costs and will not take up the legality and reasonableness of the summons.

*2 Prior to the Tax Reform Act of 1976 (which now requires payment of cost by the Revenue Service for information produced under summons) the courts dealt with the question of costs. Two recent cases are [United States v. Friedman](#), 532 F.2d 928 (1976), and [United States v. Farmer and Merchants Bank](#), 397 F. Supp. 418 (1975). Both of these cases were decided from other decisions; the principal ones are [United States v. Dauphin Deposit Invest. Co.](#), 385 F. 2d 129 (1967), cert. denied, 390 U. S. 921, 88 S. Ct. 854, 19 L. Ed. 2d 981 (1968); [Hurtado v. United States](#), 410 U. S. 578, 93 S. Ct. 1157, 35 L. Ed. 2d 508 (1973); [United States v. Jones](#), 351 F. Supp. 132 (1972).

In both of the two specific cases referred to above, the matter of cost came up because of summonses, issued by the Revenue Service to banks and the constitutionality of compliance without payment of cost was put in issue. Discussions based upon statutory and non-statutory authority were also presented. It was held that a third party, including a bank, may be required to respond to a summons and produce the information required, however, held that if the demands cannot be contemplated as a part of the reasonable costs of doing business and constitute an unreasonable financial burden upon the summoned party, then the party may be entitled to reimbursement by the government. This rule appears to be the prevailing rule.

Our opinion and conclusion therefore must be reached under this rule. On the questions presented in your request, a decision based upon reasonableness becomes evident and the demands made upon the third party, whether it is a bank, private individual or business, will be dealt with in this manner. The lesser the demand the more likely it will be that reimbursement will not be required by the courts upon an order for enforcement. Where it may appear that a demand is onerous and heavy the courts may require reimbursement.

Again we state that the courts have not laid down a hard and fast, black and white rule, but instead have adopted the reasonableness test for taxation of cost in responding to a summons.

CONCLUSION

The courts have adopted a theory of reasonableness concerning the taxing of costs involved in responding to summons and will not tax cost if the demands made of a person can be reasonably expected to be cost of doing business or do not constitute an unreasonable burden upon the person summoned.

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