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CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

MEMORANDUM FOR

FROM: DEBORAH A. BUTLER
ASSISTANT CHIEF COUNSEL (FIELD SERVICE)
CC:DOM:FS

SUBJECT: Derivative Use of Evidence From an Intercepted Wire
Communication by the Revenue Agent

This Field Service Advice responds to your memorandum dated January 4, 1999. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND:

A	=
B	=
C	=
D	=
E	=
Year 1	=
Year 2	=
Year 3	=
Year 4	=
Year 5	=
Year 6	=
Date 1	=
Date 2	=
Date 3	=

Date 4 =
Date 5 =
X =
Y =
Z =

ISSUE(S):

- 1) Whether the Service may use evidence that was obtained from an intercepted wire communication (wiretap) relating to an act not enumerated in 18 U.S.C. § 2516 without a derivative use order as required by 18 U.S.C. § 2517(5).
- 2) Whether the Service is permitted to request a *nunc pro tunc* derivative use order to be applied retroactively to the evidence obtained from the wiretap.
- 3) Whether the evidence obtained from a legally authorized intercepted wire communication would be suppressed if the Service fails to obtain a derivative use order.

CONCLUSION:


- 1) The Service's use of evidence obtained from a wiretap for a non-enumerated act is derivative evidence, and 18 U.S.C. § 2517 requires the Government to obtain a derivative use order before the evidence is permitted to be disclosed by testimony in a proceeding.
- 2) 18 U.S.C. § 2517(5) requires the Government to obtain a derivative use order as soon as practicable and prior to the use of derivative evidence in a judicial proceeding. It appears from the legislative history of 18 U.S.C. § 2517 and case law, that the Service will be able to obtain a *nunc pro tunc* derivative use order if the application for the derivative use order meets all the other requirements.
- 3) The suppression of evidence section of 18 U.S.C. § 2515 is generally only applied if the original interception of evidence by the wiretap was obtained illegally. Most courts have held that the suppression of evidence section should not apply to an improper disclosure if the original interception was valid. Instead, courts are more likely to provide a civil cause of action for damages as the appropriate remedy.

FACTS:

For Years 1 through Year 5, B was a director and employee of E. A was a X percent shareholder of E. A was also one of the directors of E, and the secretary and treasurer of E. D was a X percent shareholder of E. D was also one of the directors and the president of E. B and C are married, and A is the child of B and C. A, B, and D obtained illegal income for themselves and E, primarily through bribery to obtain jobs and creating false and fictitious invoices. Following a grand jury investigation of E, D pled guilty to violating 18 U.S.C. § 371 (conspiracy to commit offense or to defraud the United States), 18 U.S.C. § 1952(a) (interstate and foreign travel or transportation in aid of racketeering enterprises), and 26 U.S.C. § 7206(1) (fraud and false statements). A plead guilty to filing a false individual income tax return for Year 4. Criminal charges were dropped against B due to poor health and advanced age. C died on Date 1, and B died on Date 2.



A revenue agent was assigned to the civil tax cases against A, B, C, D, and E. D and E agreed to the civil tax liabilities. A statutory notice of deficiency was issued to A on Date 3 for Year 1, Year 2, Year 3, and Year 5 based upon the Service's determination that A received unreported income from A's illegal activities. A statutory notice of deficiency was issued to the estates of B and C on Date 4 for Year 1 through Year 5 based upon the Service's determination that B and C received unreported income from B's illegal activities.

In determining the amount of the adjustments, the revenue agent used both public information contained in the court file for the criminal case and grand jury information, including information obtained by wiretaps.¹ The grand jury information was obtained by the revenue agent from the special agent who handled the criminal matter. The special agent listened to the wiretaps and divulged some of the contents of the wiretaps to the revenue agent. The grand jury wiretap information was used to determine the cost of goods sold for E and the amount of unreported income for A, B, and D. The grand jury wiretap information was used by the Service to determine that the illegally obtained income was divided with A and D receiving Y% of the income and B receiving Z%. 

¹It is presumed in this Field Service Advice that the authorization for the original wiretap was properly gained pursuant to 18 U.S.C. § 2516.

[REDACTED]

The Service recently learned that this evidence that was provided by the special agent was obtained without the benefit of a derivative use order pursuant to 18 U.S.C. § 2517. The only information that clearly came from the wiretaps was how much each of the participants received of the illegal income. The revenue agent used this information for the figures on the statutory notices of deficiency.

LAW AND ANALYSIS

In 1968, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968 (Act). Title III of the Act, 18 U.S.C. §§ 2510-2520, regulated wiretaps and other forms of electronic surveillance. 18 U.S.C. § 2511 generally prohibits the use of nonconsensual interceptions of wire communications by anyone other than duly authorized law enforcement officers engaged in the investigation or prevention of specific crimes enumerated in 18 U.S.C. § 2516. Title 26 offenses are not included in the enumerated offenses, and wiretap evidence will be suppressed if the wiretap order targeted Title 26 violations. See United States v. Ward, 808 F. Supp. 803 (S.D. Ga. 1992). While wiretaps will not be authorized for the purpose of obtaining evidence of Title 26 violations, relevant information or evidence which is developed during the course of a properly authorized wiretap for an enumerated offense may be used for tax purposes. Evidence concerning nonenumerated violations is referred to as derivative evidence, and it is controlled by 18 U.S.C. § 2517.

18 U.S.C. § 2517(1) permits a law enforcement officer who obtains wiretap evidence to turn over such evidence to another law enforcement officer for use by the receiving law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the law enforcement officer making or receiving the disclosure. 18 U.S.C. § 2517(2) permits the receiving law enforcement officer to use wiretap evidence and derivative evidence to the extent that such use is appropriate to the proper performance of the law enforcement officer's official duties. 18 U.S.C. § 2517(3) permits a person who has received wiretap evidence or derivative evidence in accordance with this chapter to disclose the contents of the communication or such derivative evidence while giving testimony under oath in any criminal proceeding. 18 U.S.C. § 2517(5) states that:

When an investigative or law enforcement officer, while engaged in intercepting wire, oral, or electronic communications in the manner authorized herein, intercepts wire, oral, or electronic communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and the evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Such contents and any

evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

In other words, a derivative use order must be obtained as soon as practicable in order for the derivative evidence to be used in a judicial proceeding.

CASE DEVELOPMENT, HAZARDS AND OTHER CONSIDERATIONS:

1) Whether the Service may use evidence that was obtained from a wiretap relating to an act not enumerated in 18 U.S.C. § 2516 without a derivative use order as required by 18 U.S.C. § 2517(5).

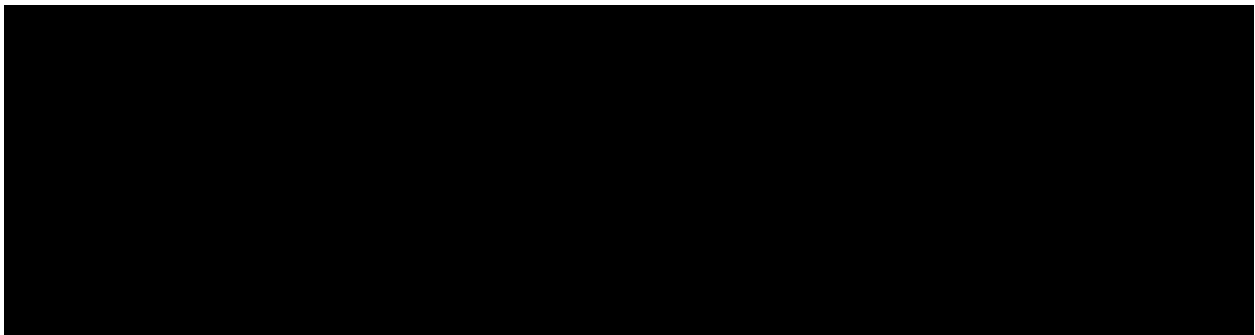
The first issue to be decided is whether 18 U.S.C. § 2517(5) applies to the case at issue. Most legal authority concerning the disclosure of evidence obtained through a wiretap are criminal cases. The legal authority for these criminal cases states that section 18 U.S.C. § 2517 authorizes the disclosure and use of such interceptions in evidence, except where the intercepted communication relates to offenses other than those specified in the original order. In the latter situations, a second application was required to be made to the judge for permission to disclose such evidence of other offenses. See United States v. Brodson, 528 F.2d 214 (7th Cir. 1976); United States v. Marion, 535 F.2d 697 (2nd Cir. 1976). However, other criminal cases narrowed this requirement. In the case United States v. Vento, 533 F.2d 838 (3rd Cir. 1976), the court stated that unrelated communications may be disclosed or used without judicial authorization if such use was in conformity with subsections 1 and 2 of 18 U.S.C. § 2517. On the other hand, subsections 3 and 5 of 18 U.S.C. § 2517 require judicial approval for the disclosure of unrelated communications in connection with giving testimony under oath or affirmation in any proceeding held under the authority of the United States. Id. at 854; See also, United States v. Arnold, 773 F.2d 823 (7th Cir. 1985) and United States v. Palma, 461 F. Supp. 800 (S.D.N.Y. 1978).


We note that the case Fleming v. United States, 547 F.2d 872 (5th Cir. 1977), provides some support for the proposition that a derivative use order would not be required. In the Fleming case, the court held that derivative evidence obtained from communications lawfully intercepted as part of a bona fide criminal investigation pursuant to 18 U.S.C. § 2516 that results in the taxpayer's conviction may properly be admitted in a civil tax proceeding, at least when the evidence is already part of the public record of the prior criminal prosecution. Id. This line of cases held that

“no statutory purpose would be served by a more restrictive interpretation of the government’s authority to allow inter-agency disclosures of wiretap information where 1) there is no showing that the original criminal investigation was a subterfuge for developing information for civil tax proceedings and 2) there is no infringement on any privacy interest caused by disclosure of the conversation from one agency to another.” Griffin v. United States, 588 F.2d 521, 524 (5th Cir. 1979). In other words, if the evidence was intercepted properly through a lawfully authorized wiretap and the evidence had already previously been disclosed in a criminal proceeding, then it is unnecessary for the government to obtain a derivative use order pursuant to 18 U.S.C. § 2517(5). Id. See also, Fleming v. United States, 547 F.2d 872 (5th Cir. 1977), Spatafore v. United States, 752 F.2d 415 (9th Cir. 1985), Resha v. United States, 767 F.2d 285 (6th Cir. 1985).

The recent case London v. Commissioner, T.C. Memo. 1998-346 applied an even more relaxed method to distinguish a civil proceeding from a criminal trial. This case was before the Tax Court for the court to redetermine the tax deficiency owed by the taxpayers. The issue in the Tax Court was whether respondent was required to obtain a derivative use order before the incidently intercepted contents of the wiretaps could be disclosed or used and if disclosure occurred without the derivative use order, whether 18 U.S.C. § 2515 would mandate a suppression of the derivative evidence.

In London the court stated that 18 U.S.C. § 2517(5) applies “when an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized herein, intercepts wire or oral communications relating to other **offenses...**”(emphasis added). The London court interpreted the word offenses to mean crimes or criminal conduct. Therefore, the London court determine that 18 U.S.C. § 2517(5) was not violated because the respondent was not using the derivative evidence in a criminal tax case, but was instead using the derivative evidence in a “civil tax case to satisfy the Commissioner’s burden of proof.” London v. Commissioner, T.C. Memo. 1998-346, 76 TCM (CCH) 539, 552 (1998). As in the other civil proceeding cases, in London, the interceptions by the wiretap were made a part of the public record in the criminal proceeding.






2) Whether the Service is permitted to request a *nunc pro tunc* derivative use order to be applied retroactively to the evidence obtained from the wiretap.

18 U.S.C. § 2517(5) states that the application for a derivative use order “shall be made as soon as practicable.” Congress intended that judicial approval of the interception of derivative evidence might retroactively be granted pursuant to 18 U.S.C. § 2517(5). United States v. Masciarelli, 558 F.2d 1064, 1068 (2nd Cir. 1977); See also, United States v. McKinnon, 721 F.2d 19, 22 (1st Cir. 1983). The legislative history of 18 U.S.C. § 2517(5) states that the application for a derivative use order might be retroactively granted upon a showing that “the original order was lawfully obtained, that it was sought in good faith and not as a subterfuge search, and that the communication was in fact incidently intercepted during the course of a lawfully executed wiretap order.” S. Rept. No. 90-1097 (1968), reprinted in, 1998 U.S.C.C.A.N. 2112, 2189. In the case United States v. Arnold, 773 F.2d 823 (7th Cir. 1985), the court held that:

...the mere passage of time between the time of interception and the time of testimonial use does not allow the Government to avoid or to evade these factors [required to obtain a derivative use order]. Because we fail to understand how the passage of time between the time of interception and the time of testimonial use allows the Government to alter these factors, we hold that requiring the Government to submit a judicial application immediately upon intercepting new crimes evidence is unnecessary to satisfy § 2517.

Id. at 829.



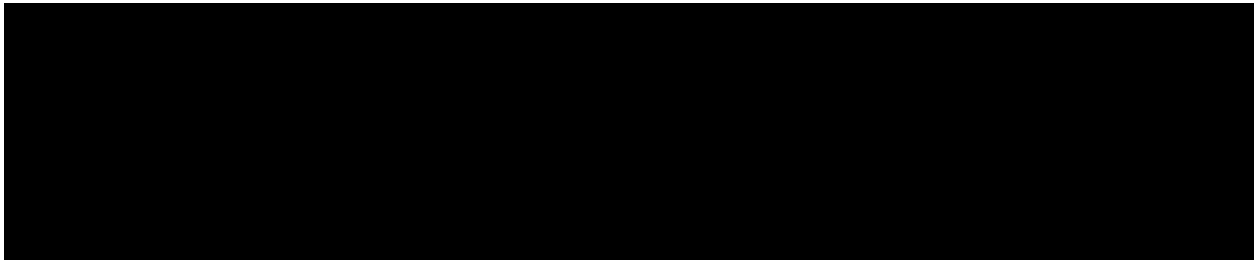
3) Whether the evidence obtained from a legally authorized wiretap would be suppressed if the Service failed to obtain a derivative use order.

In determining the appropriate sanction to be applied to an improper disclosure and use of derivative evidence without a derivative use order pursuant to 18 U.S.C. § 2517(5), the legislative history of 18 U.S.C. § 2515 notes that 18 U.S.C. § 2515 must be read in light of 18 U.S.C. § 2518. S. Rept. No. 90-1097 (1968), reprinted in, 1998 U.S.C.C.A.N. 2112, 2188. 18 U.S.C. § 2518(10)(a) defines the class of persons entitled to make a motion to suppress and enumerates the circumstances that trigger suppression under 18 U.S.C. § 2515. 18 U.S.C. § 2518(10)(a) provides three grounds for a motion to suppress:

- 1) the communication was unlawfully intercepted;
- 2) the order of authorization or approval under which it was intercepted is insufficient on its face; or
- 3) the interception was not made in conformity with the order of authorization or approval.

18 U.S.C. § 2517 addresses the use and disclosure of lawfully authorized intercepted wire, oral, or electronic communications in specified circumstances. Therefore, a violation of section 2517 does not appear to implicate the grounds for suppression specified in 18 U.S.C. § 2518(10)(a). London v. Commissioner, T.C. Memo. 1998-346. Based upon the legislative history, many courts have decided that the remedy for a violation of 18 U.S.C. § 2517 is not the suppression of evidence pursuant to 18 U.S.C. § 2515. As the court stated in Resha v. United States, 767 F.2d 285, 287-288 (6th Cir. 1985),

We conclude that the Act does not authorize suppression of the evidence in this action, regardless of whether the disclosure violated section 2517. We construe section 2515 to permit suppression of evidence only if that evidence was derived from unlawful, improper, or unauthorized interceptions of wire or oral communications. It does not authorize suppression for disclosure of such information, even if they violate section 2517. This determination is based upon the legislative history of the Act and court decisions that require section 2515 to be read in light of 18 U.S.C. § 2518(10)(a).





If you have any further questions, please call.

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