

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2004

(Argued: December 13, 2004

Decided: January 25, 2005)

Docket No. 04-0196-cv

ROBERT L. SCHULZ,

Plaintiff-Appellant,

—v.—

INTERNAL REVENUE SERVICE and ANTHONY ROUNDTREE,

Defendants-Appellees.

Before :

FEINBERG, STRAUB, and RAGGI, *Circuit Judges.*

Appeal from a judgment in the United States District Court for the Northern District of New York (David N. Hurd, *Judge*), dismissing for lack of subject matter jurisdiction appellant’s motions to quash administrative summonses served upon him by the Internal Revenue Service.

AFFIRMED.

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2 ROBERT L. SCHULZ, *pro se*, Queensbury, N.Y.

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4 ROBERT P. STORCH, Assistant United States Attorney for the Northern District of New York
5 (Glenn T. Suddaby, United States Attorney, on the brief), Albany, N.Y., *for Defendants-*
6 *Appellees.*

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10 PER CURIAM:

11 In May and June 2003 defendant-appellee, the Internal Revenue Service (“IRS”), served
12 plaintiff-appellant, Robert L. Schulz, with a series of administrative summonses seeking
13 testimony and documents in connection with an IRS investigation of Schulz. Schulz filed in the
14 United States District Court for the Northern District of New York motions to quash those
15 summonses. In an order dated October 16, 2003, Magistrate Judge David R. Homer dismissed
16 Schulz’s motions for lack of subject matter jurisdiction, finding that, because the IRS had not
17 commenced a proceeding to enforce the summonses, a procedure described in 26 U.S.C. §7604,
18 Schulz was under no threat of consequence for refusal to comply and, until such time as the IRS
19 chose to pursue compulsion in a United States district court, no case or controversy existed.
20 Magistrate Judge Homer further found that if the IRS did attempt to compel Schulz to produce
21 testimony and documents named in the summonses, the enforcement procedure described in
22 §7604 would provide Schulz with adequate opportunity to contest the requests.

23 Schulz filed an appeal and objection in the District Court. By order dated December 3,
24 2003, the District Court denied those objections and dismissed the appeal. Schulz now appeals
25 from that final decision of the District Court. We assert jurisdiction pursuant to 28 U.S.C. §1291
26 and affirm.

1 It is well-established that “Article III of the Constitution confines the jurisdiction of the
2 federal courts to actual ‘Cases’ and ‘Controversies.’” *Clinton v. City of New York*, 524 U.S. 417,
3 429 (1998) (citations omitted). To demonstrate the standing necessary to invoke the jurisdiction
4 of the federal courts Schulz must “allege personal injury fairly traceable to the defendant’s
5 allegedly unlawful conduct and likely to be redressed by the requested relief.” *Allen v. Wright*,
6 468 U.S. 737, 751 (1984). This injury may not be speculative or abstract, but must be distinct
7 and definite. *Id.*

8 In its present posture, Schulz’s motion does not satisfy this requirement. As the Supreme
9 Court pointed out in *United States v. Bisceglia*, IRS summonses have no force or effect unless
10 the Service seeks to enforce them through a §7604 proceeding. 420 U.S. 141, 146 (1975),
11 *partially superseded by* 26 U.S.C. §7609, as stated in *In re Does*, 688 F.2d 144, 148 (2d Cir.
12 1982). The IRS has not initiated any enforcement procedure against Schulz and, therefore, what
13 amount to requests do not threaten any injury to Schulz. Of course, if the IRS should, at a later
14 time, seek to enforce these summonses, then the procedures set forth in §7604(b) will afford
15 Schulz ample opportunity to seek protection from the federal courts. *See Bisceglia*, 420 U.S. at
16 146; *see also Reisman v. Caplin*, 375 U.S. 440, 447-50 (1964) (denying injunctive relief from
17 IRS summonses because §7604(b) “provides full opportunity for judicial review before any
18 coercive sanctions may be imposed”); *United States v. Tiffany Fine Arts, Inc.*, 718 F.2d 7, 11 (2d
19 Cir. 1983) (“[*Bisceglia*] reasoned that by creating the enforcement proceeding mechanism
20 Congress had intended to place the federal courts between the IRS and the person summoned,
21 and that the courts could contain [the threat of IRS overreaching] by narrowing the scope of or

1 refusing to enforce abusive summonses.”).

2 We realize that our holding today stands in direct contradiction to our previous decisions
3 in *Application of Colton*, 291 F.2d 487, 491 (2d Cir. 1961), and *In re Turner*, 309 F.2d 69, 71 (2d
4 Cir. 1962). While reversal of our prior precedent is never a matter we regard lightly, we take no
5 small solace in Judge Friendly’s discussion of *Colton* and *Turner* in *United States v. Kulukundis*,
6 329 F.2d 197 (2d Cir. 1964). There, Judge Friendly, who authored both *Colton* and *Turner*,
7 points out that *Reisman* “seems to destroy the basis underlying decisions of this court which
8 authorized applications to vacate [an IRS] summons (and appeals from their denial) in advance
9 of any judicial proceeding by the Government for their enforcement.” *Id.* at 199. In light of this,
10 we view ourselves today as completing a task begun forty years ago and hold that, absent an
11 effort to seek enforcement through a federal court, IRS summonses apply no force to taxpayers,
12 and no consequence whatever can befall a taxpayer who refuses, ignores, or otherwise does not
13 comply with an IRS summons until that summons is backed by a federal court order. In addition,
14 we hold that if the IRS seeks enforcement of a summons through the courts, those subject to the
15 proposed order must be given a reasonable opportunity to contest the government’s request. If a
16 court grants a government request for an order of enforcement then we hold, consistent with 26
17 U.S.C. §7604 and *Reisman*, that any individual subject to that order must be given a reasonable
18 opportunity to comply and cannot be held in contempt, arrested, detained, or otherwise punished
19 for refusing to comply with the original IRS summons, no matter the taxpayer’s reasons or lack
20 of reasons for so refusing. *See Reisman*, 375 U.S. at 446 (“[O]nly a refusal to comply with an
21 order of the district judge subjects the witness to contempt proceedings.”). Any lesser

1 protections would expose taxpayers to consequences derived directly from IRS summonses,
2 raising an immediate controversy upon their issuance. Holding as we have, however, allows us
3 to hold further that issuance of an IRS summons creates no Article III controversy and, therefore,
4 federal courts do not have jurisdiction over motions to quash IRS summonses in the absence of
5 some effort by the IRS to seek court enforcement of the summons.

6 Consistent with these holdings, we find that, on the facts before us, no force has been
7 applied to Schulz and his request for action is premature. The decision of the District Court
8 dismissing Schulz's motions for want of subject matter jurisdiction is AFFIRMED.¹

¹ This opinion has been circulated to the active members of this Court prior to filing.