

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5616
Summary Calendar

UNITED STATES OF AMERICA
and
BRIAN L. BESFER, Internal Revenue Agent,
Plaintiffs,

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

VERSUS

GEORGE FAHEY, JR.,
Individually and as Officer of Inverworld Ltd.
and as President of Inverworld Holdings, Inc.,
and Its Subsidiaries,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(SA 91 CV 1026)

(November 24, 1992)

Before POLITZ, Chief Judge, SMITH and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:*

The United States appeals the district court's denial of a petition to enforce an Internal Revenue Service ("IRS") summons

* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

requested pursuant to 26 U.S.C. § 7602. Concluding that the district court utilized the appropriate standard in evaluating the evidence, we affirm.

I.

The IRS was conducting an investigation into the federal tax liabilities of Inverworld Ltd. for calendar years 1987, 1988, and 1989, and into such liabilities of Inverworld Ltd.'s subsidiaries, which are Inverworld Holdings, Inverworld, Inc., and Inverworld Securities, Inc. Inverworld Ltd. is a Cayman Islands business that is a financial services firm and investment advisor for investors who are not citizens of, nor reside in, the United States.

The IRS issued the summons in question to George Fahey, Jr., an officer of the subject companies. He provided some of the information but failed to tender a list of clients, including their addresses, telephone numbers, and other such basic information.

Fahey initially opposed enforcement of the summons on several grounds but dropped all grounds except that of the relevance of the requested information. Following a full bench trial on the merits, the district court denied enforcement.

II.

The government presents only one issue on appeal which, importantly, it states as follows:

The District Court refused to enforce an Internal Revenue Service summons because the information sought was not "necessary" to the withholding tax investigation of Inverworld Ltd. (since an alternative tax could be imposed) and because it was not "necessary" to consider the source of the funds invested by Inverworld Ltd. for the income tax investigation. The Supreme Court's well-established criteria, however, requires a court to enforce a summons if the information sought "may be relevant" to the determination of a tax. The issue presented is whether the District Court erred in refusing to enforce the summons on the basis of "necessity" rather than "relevance" to the IRS's tax investigation.

The government is correct in asserting that the proper test is whether the requested information is "relevant." See United States v. Powell, 379 U.S. 48, 57-58 (1965). The government is, at best, sadly in error, and at worst, disingenuous, however, in representing to this court that the district court applied the wrong standard and asked whether the called-for data was "necessary" to the tax investigation.

The district court issued its opinion from the bench. In that opinion, the court made it plain, numerous times, that relevance, not necessity, was the test it was applying. The court states, inter alia, the following:

. . . [T]he Court is going to rule that the names and addresses of the clients of Inverworld are not relevant to the investigation to establish the tax liability of Inverworld.

The Section 7602 . . . gives the [IRS] authority to examine any books, papers, records or other data which might be relevant or material to determine the tax liability [T]he IRS must show . . . that the inquiry [may] be relevant to that purpose

. . . The only requirement at issue here today is the issue of the relevancy of the client identity in the form of the names and addresses of the clients that do business with Inverworld.

The Court finds that this information is not relevant because it has no bearing on the withholding tax liability of Inverworld for the years that are in question. . . . Under these circumstances the information that's sought is not relevant to determining the tax liability of the taxpayer in this case.

Accordingly, the Court finds that the respondent has met his burden to show that Items E and F are not relevant to the [IRS] investigation of Inverworld's tax liability. Petition to enforce the summons is denied and the case is dismissed, I guess. [Emphasis added.]

Government counsel then pressed the court to make further findings regarding what the government called the "source issue." In the course of the colloquy that follows, government counsel acknowledged that he knew the court had applied the relevancy standard: The attorney stated, "I do ask the Court to reconsider its determination that it's not relevant on the withholding issue, also." (Emphasis added.) The court then made its final statement, as follows:

Well, the Court's ruling will remain as I said. I'm not going to address the source issue. I don't think it's necessary. I don't think that the name of the clients of Inverworld is necessary for the audit for tax purposes of Inverworld and the request by the [IRS] for that information will be denied and I won't be making any further findings with regard to the source issue. [Emphasis added.]

The court then issued a written order stating that it had "determined that the client names and addresses are not relevant to the investigation of the tax liability of Respondents." (Emphasis added.)

From the foregoing, which includes a sole use of the word "necessary," the government argues that the district court applied a standard of "necessity" rather than "relevance." No

reasonable interpretation of the court's statements could possibly reach that conclusion. It is misleading and improper for the government so to represent the record before this court.

Accordingly, as to the only issue listed in the government's brief on appeal, i.e., "whether the District Court erred in refusing to enforce the summons on the basis of "necessity" rather than "relevance" to the IRS's tax investigation," the answer is in the negative, as the district court plainly and unequivocally employed the "relevance" standard. Applying that standard, the court found that, based upon the limited evidence presented through the government's only witness, relevance was not shown. Based upon the record in this case, we find no error, and accordingly the judgment of the district court is AFFIRMED.¹

¹ Our affirmance is based upon the limited question presented by this appeal and upon the specific record in this case. We intimate no view, as a matter of law, as to whether client information may be obtained through the use of summonses in regard to other entities and business activities similar to those involved in this case.