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UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA
 WESTERN DIVISION

PEYMON MOTTAHEDEH; APRIL
 MOTTAHEDEH; and FREEDOM LAW
 SCHOOL,

Petitioners,

vs.

UNITED STATES; GOLDEN HOTELS
 LIMITED PARTNERSHIP, DBA ATRIUM
 HOTEL; KIRK TAMBORNINI, and
 UNKNOWN DOES 1-10,

Respondents.

Case No. CV 06-2356-SJO(R2x)

NOTICE OF MOTION AND MOTION TO
 DISMISS FIRST AMENDED PETITION
 TO QUASH IRS SUMMONS AND COM-
 PLAIN FOR INJUNCTIVE RELIEF,
 DECLARATORY RELIEF AND DAMAGES;
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT THEREOF

[Exempt From Local Rule 7.3;
 Local Rule 16.11(c) and (g)]

Date: October 16, 2006
 Time: 10:00 a.m.
 Ctrm: 1600

TO THE PETITIONERS:

PLEASE TAKE NOTICE that on October 16, 2006, at 10:00 a.m.,
 or as soon thereafter as counsel can be heard in the Courtroom of
 the Honorable S. James Otero, United States District Judge, in
 Courtroom 1600, United States Courthouse, 312 North Spring
 Street, Los Angeles, California, respondents United States and
 Kirk Tambornini ("Federal Respondents") will and do hereby move,

1 pursuant to Rules 12(b)(1) and 12(b)(2) of the Federal Rules of
2 Civil Procedure, to dismiss the "First Amended Petition
3 to Quash IRS Summons and Complaint for Injunctive Relief,
4 Declaratory Relief and Damages" for lack of subject matter and
5 personal jurisdiction.

6 The accompanying Memorandum of Points and Authorities more
7 fully sets forth the grounds for this motion.

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9 Respectfully submitted,

10 DEBRA W. YANG
11 United States Attorney
12 SANDRA R. BROWN
13 Assistant United States Attorney
14 Chief, Tax Division

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DATED: 9/15/06

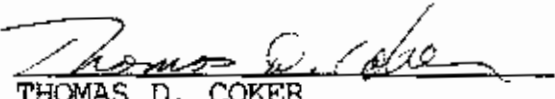

THOMAS D. COKER
Assistant United States Attorney
Attorneys for United States

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5 U.S.C. § 552 12

26 U.S.C. § 7421(a) 11

26 U.S.C. § 7603(b) (2) 10

26 U.S.C. § 7609(b) (2) 9, 10

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. STATEMENT OF FACTS

3 Petitioners Peymon Mottahedeh, April Mottahedeh, and
4 Freedom Law School ("Petitioners") brought their First
5 Amended Petition and Complaint ("FAP") to quash an Internal
6 Revenue Service ("IRS") summons issued to and served on The
7 Atrium Hotel in the matter of Peymon Mottahedeh, April
8 Beatty-Mottahedeh, Freedom Law School, and Live Free Now.
9 (FAP, ¶ 8). Petitioners also seek injunctive relief,
10 declaratory relief, damages and relief under the Freedom of
11 Information Act. (FAP, second, third, fourth and fifth
12 causes of action, respectively).

13 Respondent Kirk Tambornini ("Tambornini") is the IRS
14 Special Agent who issued the subject summons on behalf of
15 the United States. (Petition, ¶¶ 8, 12; summons attached to
16 FAP). Petitioners filed the FAP seeking: (1) to quash the
17 subject summons; (2) to enjoin Tambornini from seeking the
18 records which are the subject of the summons; (3) an order
19 declaring that Petitioners have a right to operate "free of
20 any interference by Defendants;" (4) damages for "mental
21 anguish and suffering;" and (5) an order compelling the
22 United States to furnish information under the Freedom of
23 Information Act ("FOIA").

24 By letter dated September 12, 2006, the subject
25 administrative summons was withdrawn. A copy of the
26 withdrawal letter is attached as Exhibit A. For the reasons
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28

discussed below, the FAP should be dismissed for lack of jurisdiction.

II. ARGUMENT

A. The Petition to Quash the Summons is Moot.

The petition to quash the subject IRS summons is moot because the summons has been withdrawn. As stated in IUFA v. Pan American World Airways, Inc., 966 F.2d 457, 459 (9th Cir. 1992), "[t]he basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted." The court held in Aguirre v. S.S. Sohio Intrepid, 801 F.2d 1185, 1189 (9th Cir. 1986), that "[w]here the question sought to be adjudicated has been mooted by developments subsequent to the filing of the complaint, no justiciable controversy is presented."

Accordingly, "[i]t has long been settled that a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot effect the matter in issue before it.'" Church of Scientology of California v. United States, 506 U.S. 9, 12, 113 S.Ct. 447, 449 (1992). The existence of an actual controversy is required "at all stages of federal court proceedings," Acosta v. Pacific Enterprises, 950 F.2d 611, 616 (9th Cir. 1991), and not "only at the time of the filing of the complaint." Koger v. United States, 755 F.2d 1094, 1097 (4th Cir. 1985).

1 Here, because the summons has been withdrawn, the
2 petition to quash the summons should be dismissed as moot.

3 B. The Action Against the Individual Federal Defendant is
4 an Action Against the United States and Dismissal is
5 Required for Lack of Jurisdiction.

6 **Official Capacity**

7 It is well settled that a suit against an IRS employee
8 in his official capacity is essentially a suit against the
9 United States. Gilbert v. DaGrossa, 756 F.2d 1455, 1458
10 (9th Cir. 1985). Under the doctrine of sovereign immunity,
11 the United States, as sovereign, may not be sued without its
12 consent, and the terms of its consent define the court's
13 jurisdiction. United States v. Mitchell, 463 U.S. 206, 212
14 (1983).

15 Here, in an attempt to avoid the doctrine of sovereign
16 immunity, Petitioners named as a respondent IRS employee
17 Tambornini in his "individual" capacity. (Petition, ¶ 6) It
18 is clear, however, from the allegations contained in the
19 Petition that Tambornini acted in his official capacity as
20 an employee of the IRS in issuing the subject summons.
21 Consequently, Petitioner's action must be considered to be a
22 claim against the United States. DaGrossa, supra, 756 F.2d
23 at 1458. Therefore, the action against Tambornini should be
24 dismissed.

25 **Qualified Immunity**

26 Additionally, Tambornini as an individual is immune
27
28

1 from suit because of qualified immunity. Hutchinson v.
2 United States, 677 F.2d 1322 (9th Cir. 1982). In that case,
3 the court stated:

4 Thus, a government officer acting in the course of his
5 official duties is insulated from suit if (1) there
6 existed reasonable grounds for the belief that the
7 challenged action was appropriate, and (2) the officer
8 acted in good faith. Nothing in the taxpayer's
9 conclusory allegations properly alleges facts that
10 would suggest that the Commissioner or his employees
11 acted unreasonably or that they acted in bad faith.

12 Id. at 1328.

13 Here, Petitioner's conclusory allegations do not allege
14 any facts which suggest that Tambornini acted unreasonably
15 or in bad faith in issuing the subject summons. Accord-
16 ingly, Tambornini is immune from this suit. The proper
17 federal party, if any, is the United States.

18 **Lack of Personal Service**

19 Petitioner's suit against Tambornini should be dis-
20 missed on the further grounds that the Court lacks personal
21 jurisdiction over the individual federal respondent. It is
22 the established rule that "in order to bring a damage action
23 against a federal official in his individual capacity, and
24 thereby avoid the bar of sovereign immunity, the normal
25 rules for establishing *in personam* jurisdiction apply."
26 States. Gilbert v. DaGrossa, 756 F.2d 1455, 1459 (9th Cir.

1 1985) (italics in original).

2 Here, Tambornini was not served in accordance with Rule
3 4(e) or 4(i)(2) of the Federal Rules of Civil Procedure, as
4 is required by law. Absent effective service of process,
5 the court lacks in personam jurisdiction over the individual
6 federal respondent. Benny v. Pipes, 799 F.2d 489, 492 (9th
7 Cir. 1982), modified on other grounds, 807 F.2d 1514 (1987).

8 In Murphy Brothers, Inc. v. Michetti Pipe Stringing,
9 Inc., 526 U.S. 344, 347, 119 S.Ct. 1322, 1325 (1999), the
10 Supreme Court held that: "An individual or entity named as a
11 defendant is not obliged to engage in litigation unless
12 notified of the action, and brought under a court's
13 authority, by formal process." In that case, the court
14 upheld the "bed-rock principal" that formal service of
15 process, not mere notice, is required. At the outset, the
16 high court stated that service of process, under long-
17 standing tradition in our system of justice, is fundamental
18 to any procedural imposition on a named defendant. Id. at
19 350. Consequently, "[i]n the absence of service of process
20 (or waiver of service by the defendant), a court ordinarily
21 may not exercise power over a party the complaint names
22 as defendant." Id.

23 In this case, the individual federal respondent has not
24 been served with a summons or any other "authority asserting
25 measure" in accordance with law. Consequently, the case
26 should be dismissed for lack of personal jurisdiction as to
27

1 Tambornini.

2 C. Dismissal is Required for Lack of Jurisdiction Because
3 The United States has not Waived Sovereign Immunity.

4 Although the Petitioners named an individual federal
5 employee as a respondent, courts have held that "[a]n action
6 to quash an IRS summons is a suit against the United
7 States." Barnes v. United States, 199 F.3d 386, 388 (7th
8 Cir. 1999); Mississippi Gulf Coast Young Men's Christian
9 Association, Inc. v. United States, 2006 WL 1454756,*2
10 (S.D.Miss, 2006).

11 In any suit against the United States, there must be:
12 (1) a cause of action; (2) subject matter jurisdiction; and
13 (3) a waiver of sovereign immunity. Presidential Gardens
14 Associates v. United States of America, 175 F.3d 132, 139
15 (2d Cir. 1999). Under the long-standing doctrine of
16 sovereign immunity, it is well established that: (1) the
17 United States, as sovereign, may not be sued without its
18 prior consent; (2) the terms of its consent to be sued in
19 any court define that court's jurisdiction to entertain the
20 suit; (3) waivers of sovereign immunity must be
21 unequivocally expressed and are strictly construed in favor
22 of the government; and (4) if a plaintiff cannot fit a claim
23 against the United States within a waiver of sovereign
24 immunity, the court lacks jurisdiction and must dismiss the
25 action. United States v. Dalm, 494 U.S. 596, 608, 110 S.Ct.
26 1361, 1368 (1990); Holloman v. Watt, 708 F.2d 1399, 1401

1 (9th Cir. 1983).

2 The Ninth Circuit has clarified that both a waiver of
3 sovereign immunity and a grant subject matter jurisdiction
4 are required to sue the United States. Powelson v. United
5 States, 150 F.3d 1103, 1104 (9th Cir. 1998) ("We have
6 previously explained that '[i]n an action against the United
7 States, in addition to statutory authority granting subject
8 matter jurisdiction, there must be a waiver of sovereign
9 immunity.'"). Even if a statutory grant of subject matter
10 jurisdiction exists, sovereign immunity provides an
11 independent basis for dismissal of a case. Id. Thus, if a
12 suit has not been consented to by the United States,
13 dismissal of the action is required. Hutchinson v. United
14 States, 677 F.2d 1322, 1327 (9th Cir. 1982).

15 Here, the burden is on the Petitioners to demonstrate
16 that this suit is in compliance with the terms of a statute
17 in which the United States has unequivocally waived
18 sovereign immunity. United States v. Sherwood, 312 U.S.
19 584, 586, 61 S. Ct. 767, 769-70 (1941); Holloman v. Watt,
20 supra, 708 F.2d at 1401. The Petitioners cannot meet their
21 burden. There is no applicable waiver in this case and,
22 therefore, the case is barred by sovereign immunity.

23 **No Waiver of Immunity**

24 Pursuant to 26 U.S.C. § 7609(b)(2)(A), only a person
25 entitled to notice can petition a court to quash an
26 administrative summons. If a summons is issued by the IRS
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1 in connection with a criminal investigation and if the
2 summons is not issued to a third-party recordkeeper, then
3 the person to whom the records relate (the taxpayer) is not
4 entitled to notice. 26 U.S.C. § 7609(c)(2)(E). Here, both
5 statutory exceptions have been met.

6 First, the face of the summons, attached to the FAP as
7 Exhibit 1, reflects that it was issued by Tambornini,
8 "Special Agent, IRS-CID". CID is the Criminal Investigation
9 Division of the IRS. Thus, the initial requirement of 26
10 U.S.C. § 7609(c)(2)(E) has been met as the summons was
11 issued in connection with a criminal investigation. Second,
12 the summons was issued to The Atrium Hotel (the "Hotel").
13 The Hotel is not a third-party recordkeeper as defined by
14 statute. See, 26 U.S.C. § 7603(b)(2) (defining seven
15 different types of recordkeepers). Since the Hotel is not a
16 third-party recordkeeper, the second requirement of 26
17 U.S.C. § 7609(c)(2)(E) has been met.

18 Because the summons was issued in connection with a
19 criminal investigation and the summons was not issued to a
20 third-party recordkeeper, Petitioners are not persons who
21 were entitled to notice under 26 U.S.C. § 7609(a)(1).
22 Accordingly, they have no right to assert. In this case,
23 the waiver of sovereign immunity provided in 26 U.S.C. §
24 7609(b)(2) does not apply and, therefore, the Court lacks
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1 subject matter jurisdiction.¹

2 D. Petitioners' Other Claims for Relief Require Dismissal.

3 **Injunctive Relief Barred**

4 Petitioners have also asked this Court to issue an
5 injunction precluding the IRS (Tambornini) from obtaining
6 the records sought by the summons. (Petition, ¶ 22) Not
7 only is the issue moot, the Anti-Injunction Act, 26 U.S.C. §
8 7421(a), provides in pertinent part: "[n]o suit for the
9 purpose of restraining the assessment or collection of any
10 tax shall be maintained in any court by any person, whether
11 or not such person is the person against whom such tax was
12 assessed." Under § 7421, courts lack jurisdiction to enjoin
13 the government from collecting information that is intended
14 to or may culminate in the assessment or collection of
15 taxes. Linn v. Chivatero, 714 F.2d 1278, 1282 (5th Cir.
16 1983); Lowrie v. United States, 824 F.2d 827 (10th Cir.
17 1987) (action by taxpayer seeking return of business records
18 seized by government officials during allegedly
19 unconstitutional search and seizure was barred by Anti-
20 Injunction Act, where taxpayer's admitted purpose in seeking
21 return of records was to "head off" action against him by
22 IRS).

24 ¹ Stated otherwise, because the Petitioners were not
25 entitled to statutory notice, they lack standing to quash
26 the summons under section 7609(b)(2)(A). Whether viewed as
27 a sovereign immunity issue or a standing issue, in either
case the Court lacks jurisdiction to quash the summons
issued to the Hotel.

1 Courts have held that they are without jurisdiction to
2 enjoin IRS investigations or "harassment" allegedly
3 occurring in the course thereof. United States v. Dema, 544
4 F.2d 1373 (7th Cir. 1976) (plaintiff requested permanent
5 injunction against IRS issuing any subpoenas or requesting
6 his books and records); Black v. United States, 534 F.2d 524
7 (2d Cir. 1976) (plaintiff, who ran tax preparation service,
8 requested that IRS be enjoined from contacting his clients).
9 Barnes v. United States, 1990 WL 42385, 71A A.F.T.R.2d 93-
10 3483, 90-1 USTC ¶ 50,149 (W.D.Pa. 1990) (court lacked
11 jurisdiction to enjoin IRS from pursuing criminal
12 investigation of taxpayer, and to quash and suppress
13 information obtained through that investigation).

14 Here, the Anti-Injunction Act bars the court from
15 enjoining the Government from obtaining the information
16 sought by the subject summons.

17 **FOIA**

18 Petitioners include in their Petition a request that
19 the Court order the Government to produce documents under
20 the Freedom of Information Act. 5 U.S.C. § 552 contains
21 specific provisions for its enforcement, none of which
22 contemplate a proceeding in the context of quashing a
23 summons.

24 //

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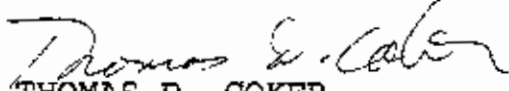
1 III. CONCLUSION

2 For the reasons discussed above, the FAP should be
3 dismissed.

4 Respectfully submitted,

5 DEBRA W. YANG
6 United States Attorney
7 SANDRA R. BROWN
8 Assistant United States
9 Attorney
10 Chief, Tax Division

11 DATED: 9/15/00


12 THOMAS D. COKER
13 Assistant United States
14 Attorney

15 Attorneys for Federal Respondents
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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

Criminal Investigation

09/12/2006

George Chuang
Attorney at Law
200 N Sepulveda Blvd, Suite 605
El Segundo, CA 90245

Dear Mr. Chuang:

Please be advised that the attached summons issued to your client, Atrium Hotel, on March 20, 2006 has been withdrawn. Please keep the documentation related to this summons in tact as it may be requested again in the future.

If you have any questions, please contact Kirk Tambornini, Special Agent at 909-388-8202.

Sincerely,

Kirk Tambornini

Enclosure
Summons Copy front page



Summons

In the matter of Peymon Mottahedeh, April Beatty-Mottahedeh, The Freedom Law School and Live Free Now

Internal Revenue Service (Division): Criminal Investigation Division

Industry/Area (name or number): CID:07

Periods: 2000 through 2006

The Commissioner of Internal Revenue

To: The Atrium Hotel Custodian of Records

At: 18700 MacArthur Blvd, Irvine, CA 92612

You are hereby summoned and required to appear before Kirk Tamborini, Special Agent, IRS-CID
an officer of the Internal Revenue Service, to give testimony and to bring with you and to produce for examination the following books, records, papers,
and other data relating to the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the
administration or enforcement of the Internal revenue laws concerning the person identified above for the periods shown.

See Attachment

Do not write in this space

Business address and telephone number of IRS officer before whom you are to appear:

Place and time for appearance at 290 North D Street, San Bernardino CA 92401



Department of the Treasury
Internal Revenue Service

www.irs.gov

Form 2039 (Rev. 12-2001)
Catalog Number 21405J

on the 30th day of March, 2006 at 9 o'clock a m.
Issued under authority of the Internal Revenue Code this 20th day of March, 2006

Signature of issuing officer

Special Agent

Title

Signature of approving officer (if applicable)

Not Applicable

Title

Part C — to be given to noticee

15

PROOF OF SERVICE BY FIRST CLASS MAIL

I am over the age of 18 and not a party to the within action.
I am employed by the Office of United States Attorney, Central District of California. My business address is 300 North Los Angeles Street, Suite 7211, Los Angeles, California 90012.

On September 15, 2006, I Served, NOTICE OF MOTION AND MOTION TO DISMISS FIRST AMENDED PETITION TO QUASH IRS SUMMONS AND COMPLAINT FOR INJUNCTIVE RELIEF, DECLARATORY RELIEF AND DAMAGES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF, on the person or entity named below by enclosing a copy in an envelope addressed as shown below and placing the envelope for collection and mailing on the date and at the place shown below following our ordinary office practices. I am readily familiar with the practice of this office for collection and processing correspondence for first class mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

Date of mailing: September 15, 2006, Place of mailing: Los Angeles, California.

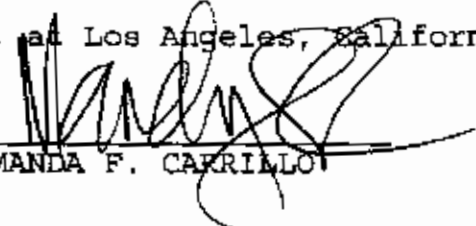
Person(s) and/or Entity(s) to Whom mailed:

PLEASE SEE ATTACHED

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on: September 15, 2006, at Los Angeles, California.


AMANDA F. CARRILLO

CASE NO: CV 06-2356 SJO (Rzx)

SERVICE LIST

Peymon Mottahedeh
April Mottahedeh
Freedom Law School
9582 Buttemere Road
Phelan, California 92371

1 DEBRA W. YANG
 2 United States Attorney
 3 SANDRA R. BROWN
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14 Attorneys for the Federal Respondents

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11 United States Attorney
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DATED: 9/15/06


THOMAS D. COKER
Assistant United States Attorney

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<u>Gilbert v. DaGrossa,</u>	5, 6
756 F.2d 1455 (9th Cir. 1985)	
<u>Holloman v. Watt,</u>	8, 9
708 F.2d 1399 (9th Cir. 1983)	
<u>Hutchinson v. United States,</u>	6, 9
677 F.2d 1322 (9th Cir. 1982)	
<u>IUFA v. Pan American World Airways, Inc.,</u>	4
966 F.2d 457 (9th Cir. 1992)	
<u>Koger v. United States,</u>	4
755 F.2d 1094 (4th Cir. 1985)	
<u>Linn v. Chivetero,</u>	11
714 F.2d 1278 (5th Cir. 1983)	
<u>Lowrie v. United States,</u>	11
824 F.2d 827 (10th Cir. 1987)	
<u>Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.,</u>	7
526 U.S. 344, 119 S. Ct. 1322 (1999)	
<u>Powelson v. United States,</u>	9
150 F.3d 1103 (9th Cir. 1998)	
<u>Presidential Gardens Associates v. United States of America,</u>	8
175 F.3d 132 (2d Cir. 1999)	
<u>United States v. Dalm,</u>	8
494 U.S. 596, 110 S. Ct. 1361 (1990)	
<u>United States v. Dema,</u>	12
544 F.2d 1373 (7th Cir. 1976)	

United States v. Mitchell,

463 U.S. 206 5

United States v. Sherwood,

312 U.S. 584, 61 S. Ct. 767 (1941) 9

FEDERAL STATUTES

5 U.S.C. § 552 12

26 U.S.C. § 7421(a) 11

26 U.S.C. § 7603(b)(2) 10

26 U.S.C. § 7609(b)(2) 9, 10

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. STATEMENT OF FACTS

3 Petitioners Peymon Mottahedeh, April Mottahedeh, and
4 Freedom Law School ("Petitioners") brought their First
5 Amended Petition and Complaint ("FAP") to quash an Internal
6 Revenue Service ("IRS") summons issued to and served on The
7 Atrium Hotel in the matter of Peymon Mottahedeh, April
8 Beatty-Mottahedeh, Freedom Law School, and Live Free Now.
9 (FAP, ¶ 8). Petitioners also seek injunctive relief,
10 declaratory relief, damages and relief under the Freedom of
11 Information Act. (FAP, second, third, fourth and fifth
12 causes of action, respectively).

13 Respondent Kirk Tambornini ("Tambornini") is the IRS
14 Special Agent who issued the subject summons on behalf of
15 the United States. (Petition, ¶¶ 8, 12; summons attached to
16 FAP). Petitioners filed the FAP seeking: (1) to quash the
17 subject summons; (2) to enjoin Tambornini from seeking the
18 records which are the subject of the summons; (3) an order
19 declaring that Petitioners have a right to operate "free of
20 any interference by Defendants;" (4) damages for "mental
21 anguish and suffering;" and (5) an order compelling the
22 United States to furnish information under the Freedom of
23 Information Act ("FOIA").

24 By letter dated September 12, 2006, the subject
25 administrative summons was withdrawn. A copy of the
26 withdrawal letter is attached as Exhibit A. For the reasons
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1 discussed below, the FAP should be dismissed for lack of
2 jurisdiction.

3 II. ARGUMENT

4 A. The Petition to Quash the Summons is Moot.

5 The petition to quash the subject IRS summons is moot
6 because the summons has been withdrawn. As stated in IUEFA
7 v. Pan American World Airways, Inc., 966 F.2d 457, 459 (9th
8 Cir. 1992), "[t]he basic question in determining
9 mootness is whether there is a present controversy as to
10 which effective relief can be granted." The court held in
11 Aguirre v. S.S. Sohio Intrepid, 801 F.2d 1185, 1189 (9th
12 Cir. 1986), that "[w]here the question sought to be
13 adjudicated has been mooted by developments subsequent to
14 the filing of the complaint, no justiciable controversy is
15 presented."

16 Accordingly, "[i]t has long been settled that a federal
17 court has no authority 'to give opinions upon moot questions
18 or abstract propositions, or to declare principles or rules
19 of law which cannot effect the matter in issue before it.'"
20 Church of Scientology of California v. United States, 506
21 U.S. 9, 12, 113 S.Ct. 447, 449 (1992). The existence of an
22 actual controversy is required "at all stages of federal
23 court proceedings," Acosta v. Pacific Enterprises, 950 F.2d
24 611, 616 (9th Cir. 1991), and not "only at the time of the
25 filing of the complaint." Koger v. United States, 755 F.2d
26 1094, 1097 (4th Cir. 1985).

1 Here, because the summons has been withdrawn, the
2 petition to quash the summons should be dismissed as moot.

3 B. The Action Against the Individual Federal Defendant is
4 an Action Against the United States and Dismissal is
5 Required for Lack of Jurisdiction.

6 **Official Capacity**

7 It is well settled that a suit against an IRS employee
8 in his official capacity is essentially a suit against the
9 United States. Gilbert v. DaGrossa, 756 F.2d 1455, 1458
10 (9th Cir. 1985). Under the doctrine of sovereign immunity,
11 the United States, as sovereign, may not be sued without its
12 consent, and the terms of its consent define the court's
13 jurisdiction. United States v. Mitchell, 463 U.S. 206, 212
14 (1983).

15 Here, in an attempt to avoid the doctrine of sovereign
16 immunity, Petitioners named as a respondent IRS employee
17 Tambornini in his "individual" capacity. (Petition, ¶ 6) It
18 is clear, however, from the allegations contained in the
19 Petition that Tambornini acted in his official capacity as
20 an employee of the IRS in issuing the subject summons.
21 Consequently, Petitioner's action must be considered to be a
22 claim against the United States. DaGrossa, supra, 756 F.2d
23 at 1458. Therefore, the action against Tambornini should be
24 dismissed.

25 **Qualified Immunity**

26 Additionally, Tambornini as an individual is immune
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1 from suit because of qualified immunity. Hutchinson v.
2 United States, 677 F.2d 1322 (9th Cir. 1982). In that case,
3 the court stated:

4 Thus, a government officer acting in the course of his
5 official duties is insulated from suit if (1) there
6 existed reasonable grounds for the belief that the
7 challenged action was appropriate, and (2) the officer
8 acted in good faith. Nothing in the taxpayer's
9 conclusory allegations properly alleges facts that
10 would suggest that the Commissioner or his employees
11 acted unreasonably or that they acted in bad faith.

12 Id. at 1328.

13 Here, Petitioner's conclusory allegations do not allege
14 any facts which suggest that Tambornini acted unreasonably
15 or in bad faith in issuing the subject summons. Accord-
16 ingly, Tambornini is immune from this suit. The proper
17 federal party, if any, is the United States.

18 **Lack of Personal Service**

19 Petitioner's suit against Tambornini should be dis-
20 missed on the further grounds that the Court lacks personal
21 jurisdiction over the individual federal respondent. It is
22 the established rule that "in order to bring a damage action
23 against a federal official in his individual capacity, and
24 thereby avoid the bar of sovereign immunity, the normal
25 rules for establishing *in personam* jurisdiction apply."
26 States. Gilbert v. DaGrossa, 756 F.2d 1455, 1459 (9th Cir.

1 1985) (italics in original).

2 Here, Tambornini was not served in accordance with Rule
3 4(e) or 4(i)(2) of the Federal Rules of Civil Procedure, as
4 is required by law. Absent effective service of process,
5 the court lacks in personam jurisdiction over the individual
6 federal respondent. Benny v. Pipes, 799 F.2d 489, 492 (9th
7 Cir. 1982), modified on other grounds, 807 F.2d 1514 (1987).

8 In Murphy Brothers, Inc. v. Michetti Pipe Stringing,
9 Inc., 526 U.S. 344, 347, 119 S.Ct. 1322, 1325 (1999), the
10 Supreme Court held that: "An individual or entity named as a
11 defendant is not obliged to engage in litigation unless
12 notified of the action, and brought under a court's
13 authority, by formal process." In that case, the court
14 upheld the "bed-rock principal" that formal service of
15 process, not mere notice, is required. At the outset, the
16 high court stated that service of process, under long-
17 standing tradition in our system of justice, is fundamental
18 to any procedural imposition on a named defendant. Id. at
19 350. Consequently, "[i]n the absence of service of process
20 (or waiver of service by the defendant), a court ordinarily
21 may not exercise power over a party the complaint names
22 as defendant." Id.

23 In this case, the individual federal respondent has not
24 been served with a summons or any other "authority asserting
25 measure" in accordance with law. Consequently, the case
26 should be dismissed for lack of personal jurisdiction as to
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1 Tambornini.

2 C. Dismissal is Required for Lack of Jurisdiction Because
3 The United States has not Waived Sovereign Immunity.

4 Although the Petitioners named an individual federal
5 employee as a respondent, courts have held that "[a]n action
6 to quash an IRS summons is a suit against the United
7 States." Barnes v. United States, 199 F.3d 386, 388 (7th
8 Cir. 1999); Mississippi Gulf Coast Young Men's Christian
9 Association, Inc. v. United States, 2006 WL 1454756,*2
10 (S.D.Miss, 2006).

11 In any suit against the United States, there must be:
12 (1) a cause of action; (2) subject matter jurisdiction; and
13 (3) a waiver of sovereign immunity. Presidential Gardens
14 Associates v. United States of America, 175 F.3d 132, 139
15 (2d Cir. 1999). Under the long-standing doctrine of
16 sovereign immunity, it is well established that: (1) the
17 United States, as sovereign, may not be sued without its
18 prior consent; (2) the terms of its consent to be sued in
19 any court define that court's jurisdiction to entertain the
20 suit; (3) waivers of sovereign immunity must be
21 unequivocally expressed and are strictly construed in favor
22 of the government; and (4) if a plaintiff cannot fit a claim
23 against the United States within a waiver of sovereign
24 immunity, the court lacks jurisdiction and must dismiss the
25 action. United States v. Dalm, 494 U.S. 596, 608, 110 S.Ct.
26 1361, 1368 (1990); Holloman v. Watt, 708 F.2d 1399, 1401
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1 (9th Cir. 1983).

2 The Ninth Circuit has clarified that both a waiver of
3 sovereign immunity and a grant subject matter jurisdiction
4 are required to sue the United States. Powelson v. United
5 States, 150 F.3d 1103, 1104 (9th Cir. 1998) ("We have
6 previously explained that '[i]n an action against the United
7 States, in addition to statutory authority granting subject
8 matter jurisdiction, there must be a waiver of sovereign
9 immunity.'"). Even if a statutory grant of subject matter
10 jurisdiction exists, sovereign immunity provides an
11 independent basis for dismissal of a case. . Id. Thus, if a
12 suit has not been consented to by the United States,
13 dismissal of the action is required. Hutchinson v. United
14 States, 677 F.2d 1322, 1327 (9th Cir. 1982).

15 Here, the burden is on the Petitioners to demonstrate
16 that this suit is in compliance with the terms of a statute
17 in which the United States has unequivocally waived
18 sovereign immunity. United States v. Sherwood, 312 U.S.
19 584, 586, 61 S. Ct. 767, 769-70 (1941); Holloman v. Watt,
20 supra, 708 F.2d at 1401. The Petitioners cannot meet their
21 burden. There is no applicable waiver in this case and,
22 therefore, the case is barred by sovereign immunity.

23 **No Waiver of Immunity**

24 Pursuant to 26 U.S.C. § 7609(b)(2)(A), only a person
25 entitled to notice can petition a court to quash an
26 administrative summons. If a summons is issued by the IRS
27

1 in connection with a criminal investigation and if the
2 summons is not issued to a third-party recordkeeper, then
3 the person to whom the records relate (the taxpayer) is not
4 entitled to notice. 26 U.S.C. § 7609(c)(2)(E). Here, both
5 statutory exceptions have been met.

6 First, the face of the summons, attached to the FAP as
7 Exhibit 1, reflects that it was issued by Tambornini,
8 "Special Agent, IRS-CID". CID is the Criminal Investigation
9 Division of the IRS. Thus, the initial requirement of 26
10 U.S.C. § 7609(c)(2)(E) has been met as the summons was
11 issued in connection with a criminal investigation. Second,
12 the summons was issued to The Atrium Hotel (the "Hotel").
13 The Hotel is not a third-party recordkeeper as defined by
14 statute. See, 26 U.S.C. § 7603(b)(2) (defining seven
15 different types of recordkeepers). Since the Hotel is not a
16 third-party recordkeeper, the second requirement of 26
17 U.S.C. § 7609(c)(2)(E) has been met.

18 Because the summons was issued in connection with a
19 criminal investigation and the summons was not issued to a
20 third-party recordkeeper, Petitioners are not persons who
21 were entitled to notice under 26 U.S.C. § 7609(a)(1).
22 Accordingly, they have no right to assert. In this case,
23 the waiver of sovereign immunity provided in 26 U.S.C. §
24 7609(b)(2) does not apply and, therefore, the Court lacks
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1 subject matter jurisdiction.¹

2 D. Petitioners' Other Claims for Relief Require Dismissal.

3 **Injunctive Relief Barred**

4 Petitioners have also asked this Court to issue an
5 injunction precluding the IRS (Tambornini) from obtaining
6 the records sought by the summons. (Petition, ¶ 22) Not
7 only is the issue moot, the Anti-Injunction Act, 26 U.S.C. §
8 7421(a), provides in pertinent part: "[n]o suit for the
9 purpose of restraining the assessment or collection of any
10 tax shall be maintained in any court by any person, whether
11 or not such person is the person against whom such tax was
12 assessed." Under § 7421, courts lack jurisdiction to enjoin
13 the government from collecting information that is intended
14 to or may culminate in the assessment or collection of
15 taxes. Linn v. Chivatero, 714 F.2d 1278, 1282 (5th Cir.
16 1983); Lowrie v. United States, 824 F.2d 827 (10th Cir.
17 1987) (action by taxpayer seeking return of business records
18 seized by government officials during allegedly
19 unconstitutional search and seizure was barred by Anti-
20 Injunction Act, where taxpayer's admitted purpose in seeking
21 return of records was to "head off" action against him by
22 IRS).

24 ¹ Stated otherwise, because the Petitioners were not
25 entitled to statutory notice, they lack standing to quash
26 the summons under section 7609(b)(2)(A). Whether viewed as
27 a sovereign immunity issue or a standing issue, in either
case the Court lacks jurisdiction to quash the summons
issued to the Hotel.

1 -Courts have held that they are without jurisdiction to
2 enjoin IRS investigations or "harassment" allegedly
3 occurring in the course thereof. United States v. Dema, 544
4 F.2d 1373 (7th Cir. 1976) (plaintiff requested permanent
5 injunction against IRS issuing any subpoenas or requesting
6 his books and records); Black v. United States, 534 F.2d 524
7 (2d Cir. 1976) (plaintiff, who ran tax preparation service,
8 requested that IRS be enjoined from contacting his clients).
9 Barnes v. United States, 1990 WL 42385, 71A A.F.T.R.2d 93-
10 3483, 90-1 USTC ¶ 50,149 (W.D.Pa. 1990) (court lacked
11 jurisdiction to enjoin IRS from pursuing criminal
12 investigation of taxpayer, and to quash and suppress
13 information obtained through that investigation).

14 Here, the Anti-Injunction Act bars the court from
15 enjoining the Government from obtaining the information
16 sought by the subject summons.

17 **FOIA**

18 Petitioners include in their Petition a request that
19 the Court order the Government to produce documents under
20 the Freedom of Information Act. 5 U.S.C. § 552 contains
21 specific provisions for its enforcement, none of which
22 contemplate a proceeding in the context of quashing a
23 summons.

24 //

25 //

26 //


1 III. CONCLUSION

2 For the reasons discussed above, the FAP should be
3 dismissed.

4 Respectfully submitted,

5 DEBRA W. YANG
6 United States Attorney
7 SANDRA R. BROWN
8 Assistant United States
9 Attorney
10 Chief, Tax Division

11 DATED: 9/15/06


12 THOMAS D. COKER
13 Assistant United States
14 Attorney

15 Attorneys for Federal Respondents
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DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

Criminal Investigation

09/12/2006

George Chuang
Attorney at Law
200 N Sepulveda Blvd, Suite 605
El Segundo, CA 90245

Dear Mr. Chuang:

Please be advised that the attached summons issued to your client, Atrium Hotel, on March 20, 2006 has been withdrawn. Please keep the documentation related to this summons in tact as it may be requested again in the future.

If you have any questions, please contact Kirk Tamborini, Special Agent at 909-388-8202.

Sincerely,

Kirk Tamborini

Enclosure
Summons Copy front page



Summons

In the matter of Peymon Mottahedeh, April Beatty-Mottahedeh, The Freedom Law School and Live Free Now

Internal Revenue Service (Division): Criminal Investigation Division

Industry/Area (name or number): CID:07

Periods: 2000 through 2006

The Commissioner of Internal Revenue

To: The Arthur Hotel Custodian of Records

At: 18700 MacArthur Blvd, Irvine, CA 92612

You are hereby summoned and required to appear before Kirk Tamborini, Special Agent, IRS-CID
an officer of the Internal Revenue Service, to give testimony and to bring with you and to produce for examination the following books, records, papers,
and other data relating to the tax liability or the collection of the tax liability or for the purpose of inquiring into any offense connected with the
administration or enforcement of the internal revenue laws concerning the person identified above for the periods shown.

See Attachment

Do not write in this space

Business address and telephone number of IRS officer before whom you are to appear:

Place and time for appearance at 290 North D Street, San Bernardino CA 92401



Department of the Treasury
Internal Revenue Service

www.irs.gov

Form 2039 (Rev. 12-2001)
Catalog Number 21405J

on the 30th day of March, 2006 at 9 o'clock a m.
issued under authority of the Internal Revenue Code this 20th day of March, 2006

Signature of issuing officer

Special Agent

Title

Signature of approving officer (if applicable)

Not Applicable

Title

Part C — to be given to noticee

15

PROOF OF SERVICE BY FIRST CLASS MAIL

1 I am over the age of 18 and not a party to the within action.
2 I am employed by the Office of United States Attorney, Central
3 District of California. My business address is 300 North Los
4 Angeles Street, Suite 7211, Los Angeles, California 90012.

5 On September 15, 2006, I Served, NOTICE OF MOTION AND MOTION
6 TO DISMISS FIRST AMENDED PETITION TO QUASH IRS SUMMONS AND
7 COMPLAINT FOR INJUNCTIVE RELIEF, DECLARATORY RELIEF AND DAMAGES;
8 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF, on the
9 person or entity named below by enclosing a copy in an envelope
10 addressed as shown below and placing the envelope for collection
11 and mailing on the date and at the place shown below following our
12 ordinary office practices. I am readily familiar with the
13 practice of this office for collection and processing
14 correspondence for first class mailing. On the same day that
15 correspondence is placed for collection and mailing, it is
16 deposited in the ordinary course of business with the United
17 States Postal Service in a sealed envelope with postage fully
18 prepaid.

19 Date of mailing: September 15, 2006, Place of mailing: Los
20 Angeles, California.

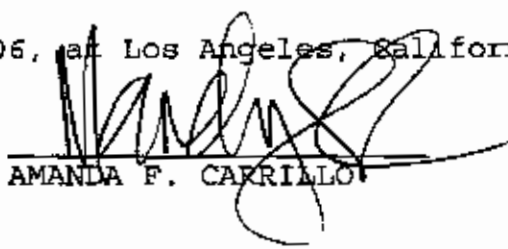
21 Person(s) and/or Entity(s) to Whom mailed:

22 **PLEASE SEE ATTACHED**

23 I declare under penalty of perjury under the laws of the
24 United States of America that the foregoing is true and correct.

25 I declare that I am employed in the office of a member of
26 the bar of this court at whose direction the service was made.

27 Executed on: September 15, 2006, at Los Angeles, California.

28 
AMANDA F. CARRILLO

CASE NO: CV 06-2356 SJO (Rzx)

SERVICE LIST

Peymon Mottahedeh
April Mottahedeh
Freedom Law School
9582 Buttemere Road
Phelan, California 92371