

**UNITED STATES TAX COURT  
WASHINGTON, DC 20217**

ANTOINE A. JOHNSON, )  
 )  
 Petitioner, )  
 )  
 v. ) Docket No. 17324-18.  
 )  
 COMMISSIONER OF INTERNAL REVENUE, )  
 )  
 Respondent )

**ORDER**

This case is scheduled to be tried at the Court’s session in Washington, D.C., beginning January 13, 2020. On December 16, 2019, the Commissioner filed a motion (Doc. 11), asking us to “permit Respondent to issue a subpoena duces tecum directing Bank of America ... to produce ... documents to respondent on a date prior to the January 13, 2020 calendar.” (Emphasis added.) Petitioner does not oppose the motion. For the reasons stated herein, we deny the motion.

**Background**

The petition in this case (Doc. 1) was filed September 4, 2018. It challenges a statutory notice of deficiency in which the IRS attributed to petitioner “cancellation of debt” income on the basis of reporting on Form 1099-C by Bank of America. The petition alleges that someone stole his bank card and fraudulently used it to incurred debt.

The Commissioner’s motion alleges that, after this case was set for trial (see Doc. 8), he served on Bank of America a subpoena duces tecum, using Form 14 from the Rules of the Tax Court, to obtain documents for use in the trial of this case. The Commissioner’s motion explains:

5. Personnel at Bank of America advised respondent that no documents will be released prior to the date specified on the face of the subpoena duces tecum (Form 14), which is January 13, 2020.

6. Given that the Form 14 subpoena duces tecum expressly directs the subpoenaed person to produce documents on the date of the calendar call, respondent is unable, without Court approval, to specify a date other than the calendar call date. Respondent's motion would ensure receipt of the subpoenaed documents with sufficient time to review them and pursue further inquiry in the event the documents produced are either not in full compliance with the subpoena or otherwise contain information that may lead to discovery of more relevant information.

7. Bank of America personnel advised that if the face of the subpoena duces tecum were to specify an earlier date, it would happily comply and release the documents earlier.

8. It would benefit the Court, the petitioner, Bank of America, and respondent to receive the documents before January 13, 2020. For Bank of America, it would likely obviate the need for any personal appearance. For both petitioner and respondent, it may lead to meaningful and productive settlement discussions that may eliminate the need for further judicial intervention or trial.

9. Petitioner does not object to the granting of this motion.

### Discussion

Rule 45 of the Federal Rules of Civil Procedure (not applicable here) permits a litigant to use a subpoena (or a subpoena duces tecum) to require a third party to appear at trial or pre-trial deposition to testify, and to produce documents at a trial or deposition. Rule 147 of the Rules of the U.S. Tax Court has equivalent provisions (though if the litigant's opponent does not consent to the deposition, then Tax Court Rule 74(c) imposes constraints).

However, Fed. R. Civ. P. 45(a)(1)(A) and (c)(2)(A) also permits a litigant to use "a separate subpoena" to require a third party to produce documents prior to a trial, apart from the scheduling of any hearing or deposition. This, in effect, is what the Commissioner's motion asks us to permit him to do. His justification for

the request is not unreasonable, and granting the request might well yield the benefits that he anticipates.

However, Rule 147 does not authorize such a procedure. More important, the Internal Revenue Code seems not to authorize it. Section 7456(a) provides:

(a) In general. For the efficient administration of the functions vested in the Tax Court ..., any judge ... of the Tax Court... may ... require, by subpoena ...—

(1) the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, documents, correspondence, and other evidence, from any place in the United States at any designated place of hearing ....

That is, Congress has authorized the Tax Court to order the production of documents “at any designated place of hearing”. (This authorization is different from and is apparently narrower than, for example, the authority given to the Court of Federal Claims in 28 U.S.C. sec. 2521(a).)

A Tax Court litigant may serve on a third party a subpoena to produce documents at a trial session and, at that session, may call on the Court to enforce the subpoena. A litigant who has served such a subpoena may ask the third party to voluntarily produce the documents in advance of the trial session and, if the third complies, excuse him from appearing at the trial session. A litigant who has served such a subpoena may also ask the Court to attempt a telephone conference with the parties and with counsel for the third party for the purpose of encouraging such voluntary production of documents. But given the wording of section 7456(a), we do not authorize the service of a subpoena of the sort that the Commissioner here requests. It is therefore

ORDERED that the Commissioner’s motion (Doc. 11) is denied.

**(Signed) David Gustafson**  
**Judge**

Dated: Washington, D.C.  
December 26, 2019