



4. Procedural agreement between the IRS and the BIR concerning taxpayers who claim benefits under the Virgin Islands Economic Development Program (EDP), executed by the BIR on September 29, 2004, and executed by the IRS on October 4, 2004;
5. Letter dated July 25, 2006, from the IRS to the BIR, executed by the BIR on August 18, 2006, transmitting and explaining implementation of procedural agreements between the IRS and BIR concerning taxpayers claiming benefits under the EDP;
6. Memorandum of understanding between the IRS and the BIR concerning technical support between the IRS and the BIR, executed by the BIR on September 29, 2004, and executed by the IRS on October 4th and 5th, 2004.

The Virgin Islands says that the MOUs are confidential tax convention information that are prohibited from disclosure under section 6105(a), and that disclosure of the MOUs could harm effective Federal tax administration. It believes that if the Court issues a protective order under Rule 103(a) and section 7461(b) restricting the use and further dissemination of the MOUs, then section 6105(b)(4) allows the MOUs to be used by the parties in this case.<sup>2</sup>

There is a general presumption of openness in judicial proceedings.<sup>3</sup> See Olympic Refining Co. v. Carter, 332 F.2d 260, 264 (9th Cir. 1964). Official records of all courts generally are open and available for public inspection. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978). But the public's right to inspect isn't absolute. See id. Courts have supervisory power over their own records, and can shroud them if justice so requires and the party seeking the relief demonstrates good cause. Sec. 7461(b)(1); Rule 103(a); Willie Nelson Music Co v. Commissioner, 85 T.C. 914, 920 (1985). Good cause to seal records and issue protective orders is common where patents, trade secrets, or confidential information are involved. Willie Nelson Music Co., 85 T.C. at 921. But courts have also found good cause in cases concerning government activities. See Alliance to End Repression v. Rochford, 75 F.R.D. 431 (N.D. Ill. 1976). In any such case, we must balance the valuable tradition of public access to public records against the possible harms of making the documents available. Nixon, 435 U.S. at 602; Willie Nelson Music Co., 85 T.C. at 919.

Section 6105(a) is where we begin. It says that “[t]ax convention information shall not be disclosed.” “Tax convention information” includes any:

- (A) agreement entered into with the competent authority of one or more foreign governments pursuant to a tax convention,
- (B) application for relief under a tax convention,

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<sup>2</sup> Tax convention information may be disclosed if it does not relate to any particular taxpayer and “the Secretary determines, after consultation with each other party to the tax convention, that such disclosure would not impair tax administration.” Sec. 6105(b)(4). Respondent objects to the intervenor’s motions here, but moved in another case before this Court for a protective order covering the same six MOUs and allowing their use to the same extent that the intervenor seeks in this case. See docket number 7717-10. Thus, we find that the requirements of section 6105(b)(4) are also satisfied here.

<sup>3</sup> Our Rule 103(a), which provides for protective orders, is derived from Rule 26(c), Federal Rules of Civil Procedure. We thus look to decisions interpreting that rule as well. See Willie Nelson Music Co. v. Commissioner, 85 T.C. 914, 917 (1985).

(C) background information related to such agreement or application,

(D) document implementing such agreement, and

(E) other information exchanged pursuant to a tax convention which is treated as confidential or secret under the tax convention. Sec. 6105(c)(1).

The term “tax convention” includes any agreement with a possession for the United States providing for the avoidance of double taxation, the prevention of fiscal evasion, nondiscrimination with respect to taxes, the exchange of tax relevant information with the United States, or mutual assistance in tax matters. Sec. 6105(c)(2)(B).

In order to prevent double taxation as well as tax evasion, section 932 coordinates United States and Virgin Islands income taxes. And to ensure the “fair implementation” of section 932, the United States and the Virgin Islands entered into an agreement. See Tax Implementation Agreement between the United States of America and the Virgin Islands, 1989-1 C.B. 347 (TIA). This makes the TIA a “tax convention” negotiated between the United States and a U.S. possession to resolve specific issues arising from the administration of section 932, within the definition of section 6105(c)(2)(B). The TIA authorizes the United States and the Virgin Islands to enter into further agreements and to further communicate to allow the two jurisdictions to carry on their responsibilities under the TIA. See id. at art. V(2), 1989-1 C.B. at 350. The MOUs are examples of such agreements and communications and have been treated as confidential, and thus they are “tax convention information” within the definition of section 6105(c)(1) that ordinarily “shall not be disclosed.” See sec. 6105(a).

Even if documents contain the kind of information that courts will protect, we still have to balance the right of the public to access public records with the potential harm of releasing the documents. Nixon, 435 U.S. at 602; Willie Nelson Music Co., 85 T.C. at 919. The party seeking the protective order must show that the order is necessary to prevent specific harm. Gen. Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1212 (8th Cir. 1973). The Virgin Islands stated that the release of the MOUs would impair federal tax administration by disrupting confidence in the exchange of information between the United States and Virgin Islands, as well as between the United States and foreign countries with whom it has similar confidential exchange-of-information procedures. We thus find that the government’s need for confidentiality of the MOUs outweighs the general presumption that court records should be available to the public, and that the Virgin Islands has thus established that there is good cause for us to issue a protective order. It is therefore

ORDERED that intervenor’s motion for leave to file its reply in support of its motion for summary judgment and the accompanying declaration of Barry J. Hart under seal pursuant to Rule 27, filed October 3, 2012, is granted. The Clerk of the Court is directed to place the unredacted reply and declaration under seal, and the redacted and unredacted versions of the reply and declaration are filed as of the date of this order.

ORDERED that intervenor’s motion for protective order pursuant to Rule 103(a), filed October 3, 2012, is granted and:

1. As used in this Order, the term MOU documents refers to the following:
  - a. Memorandum of understanding between the IRS and the BIR pertaining to accounting issues, executed by the BIR on September 5, 2002, and executed by the IRS on September 12, 2002;
  - b. Addendum to that September 12, 2002 memorandum of understanding between the IRS and BIR pertaining to accounting issues, executed by the IRS on December 20, 2006, and by the BIR on December 27, 2006;

- c. Letter dated December 20, 2006, from the IRS to the BIR transmitting and describing the implementation of the Addendum to the September 12, 2002 memorandum of understanding between the IRS and BIR pertaining to accounting issues;
  - d. Procedural agreement between the IRS and the BIR concerning taxpayers who claim benefits under the Virgin Islands Economic Development Program (EDP), executed by the BIR on September 29, 2004, and executed by the IRS on October 4, 2004;
  - e. Letter dated July 25, 2006, from the IRS to the BIR, executed by the BIR on August 18, 2006, transmitting and explaining implementation of procedural agreements between the IRS and BIR concerning taxpayers claiming benefits under the EDP;
  - f. Memorandum of understanding between the IRS and the BIR concerning technical support between the IRS and the BIR, executed by the BIR on September 29, 2004, and executed by the IRS on October 4th and 5th, 2004.
2. Respondent shall provide a copy of each MOU document to counsel of record for petitioner. Counsel of record for the Virgin Islands shall obtain a copy of each MOU document directly from the BIR. Respondent shall mark each page of each MOU document given to petitioner's counsel of record, and the BIR shall mark each page of each MOU document given to counsel of record for the Virgin Islands, by placing the notation "I.R.C. § 6105 PROTECTED--TAX COURT DOCKET NO. 4720-10" before producing an MOU document to petitioner's and the Virgin Islands' respective counsel of record.
  3. If respondent or the BIR produce multiple copies of any MOU document, and if at least one copy of the particular MOU document is properly marked as "I.R.C. § 6105 PROTECTED--TAX COURT DOCKET NO. 4720-10", and if respondent or the BIR inadvertently fails to properly mark other copies of the particular MOU document, all copies shall be deemed protected under section 6105.
  4. No portion of the contents of any MOU document provided pursuant to this Order may be disclosed, discussed, summarized, revealed, related, quoted, given or otherwise communicated, in whole or in part, verbally or in writing, except to the following persons, and only to the extent reasonably necessary for the purposes listed in paragraph 5 of this Order:
    - a. Counsel of record for respondent (and any other employee of the IRS or of the IRS Office of Chief Counsel that counsel for respondent deems appropriate);
    - b. Counsel of record for petitioner (and those employees of the law firm Andreozzi, Bluestein, Fickess, Muhlbauer, Weber, Brown, LLP participating in the prosecution of this action);
    - c. Counsel of record for intervenor (and those employees of the law firm Winston & Strawn, LLP participating in the prosecution of this action, as well as any other employee of the BIR that Chief Counsel for the BIR deems appropriate);
    - d. The Court, its staff, and any court reporters; and

- e. Any other person upon written consent of respondent and subject to an executed Confidentiality Agreement acceptable to respondent.

Disclosure may not be made to the petitioner, Judith Coffey, or any of her agents not otherwise included in this paragraph 4. Disclosure may not be made to any other person not authorized by this Order to have access to MOU documents, including any employee of respondent and/or intervenor.

- 5. No MOU document shall be used by persons listed in paragraph 4 of this Order for any purpose other than for:
  - a. the conduct of this litigation and solely for the purposes of motion practice, trial, trial preparation, depositions, briefing, and for any appeal; or
  - b. any alternative dispute resolution proceeding agreed to by the parties in this case. If alternative dispute resolution is used, the mediator will be subject to the same restrictions on the use and storage of the MOU documents as counsel for petitioner.
- 6. Depositions:
  - a. No MOU document may be used in any deposition of any person unless that person is an employee of the BIR or the IRS, which in that case, the court reporter recording a deposition in the case is permitted to have access to the MOU documents solely for the purposes of recording the deposition.
  - b. If during the course of any deposition, and not later than 30 days after the receipt of a written transcript of such deposition, respondent, intervenor, or their respective counsel, assert that the deposition transcript, or any specific inquiry, or any answer to a specific inquiry, is protected material because it involves one or more of the MOU documents, that transcript or pages shall be treated as provided by this Order for MOU documents.
  - c. Counsel in this case shall have the right to exclude from oral depositions, other than the deponent and the court reporter, any person who is not authorized by this Order to have access to the MOU documents. Such right of exclusion shall be applicable only during periods of examination or testimony directed to or comprising the MOU documents.
  - d. Any court reporter who records testimony shall be provided with a copy of this Order by the party noticing the deposition. That party shall advise the court reporter, before any testimony is taken, that all documents, information, or testimony related to any MOU document is and shall remain confidential and shall not be disclosed except as provided in this Order. The noticing party shall further advise the court reporter that copies of all transcripts, reporter's notes, and all other records of such testimony, must be treated in accordance with this Order, delivered to attorneys of record, or filed under seal with the Court. Any court reporter who transcribes testimony given in this action may only maintain protected material for the purpose of rendering his or her normal transcribing.
- 7. To the extent any MOU document is submitted to the Court, such document shall be filed under seal in double-sealed envelopes, each of the two envelopes shall be marked "TAX COURT DOCKET NO. 4720-10, TAX CONVENTION INFORMATION UNDER I.R.C. § 6105 ENCLOSED, SEALED PURSUANT TO COURT ORDER", or shall be

submitted to the Court in such other manner as petitioner's counsel, intervenor, and respondent agree.

8. To the extent that any document filed with the court discloses, discusses, summarizes, reveals, relates, quotes, gives or otherwise communicates the contents of any protected MOU document provided pursuant to this Order, that document shall be filed under seal in double-sealed envelopes, each of the two envelopes shall be marked "TAX COURT DOCKET NO. 4720-10, TAX CONVENTION INFORMATION UNDER I.R.C. § 6105 ENCLOSED, SEALED PURSUANT TO COURT ORDER", or shall be submitted to the Court in such other manner as petitioner's counsel, intervenor, and respondent agree. At the same time, the filing party shall also file and serve under seal a proposed redacted version of the sealed document which removes any discussion of the content of the protected MOUs.
  - a. Any party that objects to the proposed redactions must notify the court and the other parties of their specific objection within ten business days. Absent objection, the proposed redacted document shall be returned to the clerk's office and filed as part of the public record on the eleventh business day after it has been filed under seal.
  - b. The parties shall make a good faith effort to resolve any differences regarding the scope of the redactions as quickly as possible. If the parties cannot agree on the scope of the redactions, the dispute shall be submitted to the Court which shall review the parties' proposals and designate a redacted version of the document to be filed as part of the public record.
9. At any time that the contents of any MOU document is presented, quoted, or referenced in any hearing or trial in this litigation, the parties shall make arrangements (or file an appropriate motion with the Court) to ensure that only the persons listed in paragraph 4 of this Order are present during such presentation, quotation, or reference. Those portions of the transcript of any proceedings in this matter that contain or refer to any MOU document shall be sealed by the Court, and any publicly available opinion, decision, or order referencing any of the MOU documents shall be redacted so as not to disclose the MOU documents or their contents.
10. In the event that the contents of any MOU document are used in this litigation, such document shall not lose its status as an MOU document, and nothing in this Order or in respondent's disclosure of any MOU documents to persons listed in paragraph 4 of this Order shall act as a waiver by respondent of any protection with respect to the contents of any MOU document or with respect to any other information or material.
  11. Any person receiving any MOU document (in whole or in part) shall maintain such items in a manner that limits access only to those persons entitled to access under this Order.
12. Petitioner's counsel shall maintain a written index of all copies made of any and all MOU documents and shall provide such information to respondent's counsel upon request by respondent's counsel.
13. Within 30 days following the conclusion of this proceeding, including any appeal, petitioner's counsel shall return all MOU documents and all copies of such documents in the possession, custody, or control, of petitioner's counsel and his employees participating in the prosecution of this action, to respondent's counsel of record.

14. Any person referred to in paragraph 4 of this Order may move for relief from any provision of this Order on the grounds of burdensomeness or other good cause shown. Such a motion shall indicate whether petitioner's counsel, respondent, and intervenor consent to the relief requested.

**(Signed) Mark V. Holmes**  
**Judge**

Dated: Washington, D.C.  
October 22, 2012