

that is assigned to this investigation. See Declaration of Amy Jelinek in Support of United States' Motion to Dismiss (hereinafter "Jelinek Declaration"), filed concurrently, ¶ 3. In that capacity, Jelinek issued an administrative summons to Wells Fargo Bank on July 28, 2003. See Jelinek Declaration, ¶ 5. The summons sought information to assist in the collection of Roger Meyer's tax liabilities for the tax years 1989, 1991, 1992 and 1993. *Id.* at ¶ 4. On July 28, 2003, Meyer filed a petition to quash the summons.

ARGUMENT

I. The Complaint Should Be Dismissed Against Amy Jelinek Because the United States Is The Proper Defendant.

The petition named defendant Amy Jelinek as a defendant in this matter. It appears that Jelinek was named as a party merely because she issued an IRS summons in an attempt to collect the assessments made against the petitioner.

It is well established that when a government employee is sued for actions taken in his or her official capacity, the United States is the proper defendant and the individual federal employee named in the caption of the petition should be dismissed. *Dugan v. Rank*, 372 U.S. 609 (1962); *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985). Because the United States is the only proper defendant for all claims alleged, the petition should be dismissed as to Jelinek and the

United States substituted as a defendant.

II. Meyer's Petition Should Be Dismissed Because the Court Lacks Subject Matter Jurisdiction.

As explained above, the United States is the only proper federal defendant in this matter. It is well settled that the United States, as a sovereign, may be sued only to the extent that it has consented to suit by statute. *United States v. Dalm*, 494 U.S. 596, 608 (1990); *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981). Such a waiver must be explicit and must be strictly construed in favor of the sovereign. *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992); *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986). All doubts concerning any possible waiver of the sovereign immunity of the United States must be resolved in favor of the Government. *Palmer v. General Services Administration*, 787 F.2d 300, 301 (8th Cir. 1986). Where there is a lack of consent to suit by the United States, dismissal of the action for lack of subject-matter jurisdiction is required. *Broudy v. United States*, 661 F.2d 125, 128 n. 5 (9th Cir. 1981).

The petitioner bears the burden of asserting specific provisions waiving the sovereign immunity of the United States. *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983), cert. denied, 466 U.S. 958 (1984).

Section 7602 of the Internal Revenue Code (Title 26, U.S.C.)

authorizes the IRS to summon testimony and documents for the purpose of collecting a federal tax liability. Section 7609 creates certain notice requirements and rights to bring a proceeding to quash an IRS summons in certain circumstances. Part (c) of Section 7609, however, excepts some summonses from the notice requirements and petition rights created under the Section. Included in these exceptions is a summons "issued in aid of the collection of . . . an assessment made or judgment rendered against the person with respect to whose liability the summons is issued." 26 U.S.C. § 7602(c)(2)(D); see also *Ip v. United States*, 205 F.3d 1168, 1173-1174 (9th Cir. 2000); *Barnes v. United States*, 199 F.3d 386, 388-90 (7th Cir. 1999).

As set forth in the Statement, above, the summons in question in this case was issued in aid of collection of the assessments made against the petitioner. Therefore, there is no jurisdictional basis for this suit. Thus, the Court should dismiss the suit.

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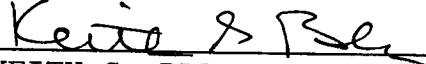
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CONCLUSION

For the foregoing reasons, the Court should grant the United States' motion and dismiss the petition to quash.

Respectfully submitted,

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