



We have found in a publish *States*, No. 99-3175 (6th Cir. De quash a third-party summons th days after the IRS mails noti taxpayer must be dismissed for Fed. R. Civ. P. 6(e) does not ext for commencing the suit by three court is affirmed on this issue.

## **VI. Conc**

A taxpayer's motion to quash must be filed within twenty day summons is sent by certified ma comply with the requirements o Because petitioners in the prese to quash until the 22nd or 23rd d district court correctly dismissed for lack of jurisdiction. For thes district court is hereby **AFFIRM**

is no question that notice was sufficient and given in the manner prescribed by the statute.

Equitable tolling is available in suits only where notice is insufficient or “where the claimant has actively pursued his judicial remedies by filing a defective pleading [during the statutory period] or where he has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass.” *Irwin v. Dep’t of Veteran Affairs*, 498 U.S. 89, 90 (1990); *See also Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1346 (Fed. Cir. 1995). In the present case, petitioners did not argue before the district court that a defective pleading was filed or that the IRS somehow tricked or induced petitioners into missing the filing deadline. Thus, petitioners have stated no factual basis for application of the doctrine of equitable tolling. *See Flight Attendants*, 165 F.3d at 577 (court refuses to decide whether equitable tolling “may ever be invoked in a federal tax case,” because the plaintiff did not make a case for equitable tolling based on the facts). In the present case, as in *Flight Attendants*, petitioners have not made a case for equitable tolling based on the facts. Therefore, there is no reason for this court to decide whether the doctrine of equitable tolling applies to 26 U.S.C. § 7609, and we decline to address the issue.

#### V. Fed. R. Civ. P. 6(e)

Petitioners argue that the district court improperly dismissed the petition to quash because Fed. R. Civ. P. 6(e) should have been applied and gives them an additional three days beyond the twenty-day period of section 7609(b)(2)(A) in which to file their petition to quash. Petitioners argue that because the petition to quash was filed within twenty-two and twenty-three days, respectively, it was timely filed. The IRS argues that the twenty-day filing requirement of section 7609(b)(2)(A) is jurisdictional, and that in the present case, the district court lacked jurisdiction because the petition to quash the summonses was not timely filed within twenty days.

RECOMMENDED FOR FULL  
Pursuant to Sixth C

ELECTRONIC CITATION: 1999  
File Name: 99

**UNITED STATES CO**

FOR THE SIXT

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DOUGLAS R. SHISLER, MARY  
ANN SHISLER, LIBERA  
SERVICES COMPANY LTD.,  
SHISLER FAMILY  
IRREVOCABLE TRUST, MDS  
GLOBAL COMPANY, CYPRESS  
FUNDS, INC., MDS  
INTERNATIONAL,  
*Petitioners-Appellants,*

v.

UNITED STATES OF AMERICA,  
*Respondent-Appellee.*

Appeal from the United  
for the Northern District  
No. 98-01259—George W

Argued: Novem

Decided and Filed: D

Before: KEITH, CONTIE, and NORRIS, Circuit Judges.

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**COUNSEL**

**ARGUED:** Matthew Gilmartin, Rocky River, Ohio, for Appellants. John A. Dudeck, U.S. DEPARTMENT OF JUSTICE, APPELLATE SECTION TAX DIVISION, Washington, D.C., for Appellee. **ON BRIEF:** Matthew Gilmartin, Rocky River, Ohio, for Appellants. John A. Dudeck, Charles E. Brookhart, U.S. DEPARTMENT OF JUSTICE, APPELLATE SECTION TAX DIVISION, Washington, D.C., for Appellee.

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**OPINION**

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CONTIE, Circuit Judge. Petitioners-appellants, Douglas Shisler, et al., appeal the judgment of the district court, dismissing their petition to quash IRS summonses to third-party recordkeepers because the petition was untimely filed. For the following reasons, we affirm.

**I. Facts**

The Internal Revenue Service (“IRS”), pursuant to an income tax investigation of petitioner Shisler and several trusts of which he is the trustee (“petitioners”), served third-party recordkeeper summonses on Bank One and Key Bank on May 7, 1998, requesting various records pertaining to petitioners for the period January 1, 1995, through the date of the summonses. On May 8, 1998, the IRS served additional summonses on National City Bank and Chippewa Valley Bank pertaining to petitioners for the same tax periods. On the same dates that the summonses were served on the third-party banks (May 7, 1998 and May 8, 1998), the IRS mailed to petitioners by certified mail notices of these summonses

There is no authority on which such evidence is insufficient. We require the IRS to produce the petitioners allege is necessary-- actually mailed the notices and rather than a handwritten date. For these reasons, we find the concluding that the IRS compliance of sections 7609(a)(1) and (2) was given on May 7, 1998 and The district court is affirmed on

**IV. Equitab**

Petitioners argue that the doctrines of equitable tolling the twenty-day time period in which third-party summonses. The d permits a prospective plaintiff to statute of limitations if, despite is given insufficient notice o information he needs in order to claim on which a suit can be *Against UAL Offset (FAAUO) 572, 575 (7th Cir. 1999)*.

We find that it is not necessary whether the doctrine of equitable toll the statute of limitation § 7609(b)(2)(A), because petition why principles of equity should b The only argument petitioners tolling is that the dates of the cer However, as previously discussed mailing of notice to petitioners a on May 7, 1998 and May 8, 199

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<sup>1</sup> Petitioners did not discuss the issue in the district court and may not raise the issue here.

supports the district court's finding. The record contains copies of the Service of Summons, Notice, and Recordkeeper Certificates of the IRS, which specify that the dates of giving notice to petitioners were on May 7, 1998 and May 8, 1998, respectively. *See* Joint Appendix at 75-154. The record also contains the Postal Service receipts for certified mail, which were signed by petitioner Shisler, and which indicate by handwritten notation that the dates of certified mailing were on May 7, 1998, and May 8, 1998, respectively. *See* Joint Appendix at 242-43. In addition, the United States submitted a declaration of a revenue agent, verifying that notices of the summonses had been mailed to petitioners by certified mail on either May 7, 1998 or May 8, 1998.

Petitioners' argument that the district court erred in relying on this evidence has no merit. The statute at issue provides that notice to the taxpayer about the summonses served on third-party recordkeepers "shall be sufficient" if notice is mailed to the noticee by certified mail within three days of the day on which service of the original summons is made on the third-party recordkeeper. 26 U.S.C. §§ 7609(a)(1) and (2). In the present case, the evidence shows that notices of the summonses were mailed to petitioners (the taxpayer entitled to notice) by certified mail on the same days the summonses were served on the third-party recordkeepers--May 7, 1998 and May 8, 1998. The purpose of sections 7609(a) and (b)(2)(A) is to allow the noticee to bring a petition to quash within twenty days by giving him notice that his bank has been summoned to furnish the IRS with records and other documents relating to the noticee's financial affairs. In the present case, the purpose of the statute was clearly fulfilled as the evidence demonstrated that notice of the summonses and an explanation of petitioners' right to bring a motion to quash had been sent to petitioners by certified mail on May 7, 1998 and May 8, 1998.

Petitioners contend that the certified mail receipts were insufficient to prove the dates of mailing, because they did not have a valid postmark from the Postal Service, but merely contained handwritten notations of the dates of mailing.

and an explanation of their right summonses within twenty days.

On May 30, 1998, petitioners summonses in the United States Northern District of Ohio. The petition was filed five days after notice of the Bank On was sent to petitioners by certified mail. After notice of the National City Bank summonses was sent to th

The United States filed a motion to quash on the ground that the district court erred in granting the petition. The United States argued that the petition to quash within the twenty days notified, as specified in 26 U.S.C. Internal Revenue Code, and the petition was filed within the time specified with the terms of the United States Code regard to the summonses. The United States district court therefore lacked jurisdiction and the petition should be dismissed.

Petitioners filed a response to the motion and argued that equitable tolling applied because of the delay in which they were given notice of the motion. They also argued that under 26 U.S.C. 6(e), they were entitled to an additional ten days to file their petition to quash because the notices had been sent to them by United States certified mail five days after being notified, their petition was filed within the time specified.

On October 1, 1998, petitioners filed exhibits containing copies of the notices indicating the dates on which no notices had been mailed to them by the IRS. The exhibits showed that notices of the summonses had been sent to petitioners on May 7, 1998 and May 8, 1998. In addition, following a non-equitable tolling motion on October 8, 1998, the United States district court, upon request, submitted a declaration

that the notices had been mailed to petitioners by certified mail on either May 7, 1998 or May 8, 1998, as indicated by the certificate on the reverse side of each summons.

On November 9, 1998, the district court granted the United States' motion to dismiss the petition to quash. The court stated that the twenty-day limitation period of section 7609(b)(2)(A) was a jurisdictional limitation which served as a conditional waiver of the United States' sovereign immunity. The court held that a district court did not have jurisdiction over a petition to quash if the petitioner failed to comply with the twenty-day filing period of section 7609(b)(2)(A). Since petitioners had filed their petition on either the twenty-second or twenty-third day after the respective notices of summonses had been mailed to them, they did not meet the twenty-day filing requirement. Therefore, the district court concluded that it lacked jurisdiction to hear the petition to quash. Petitioners then filed this timely appeal.

## II. Legal Background Regarding Summons to Third-Party Recordkeepers

Section 7609 of the Internal Revenue Code provides a specific set of rules for IRS summons issued to "third-party recordkeepers," a term that is defined to include various third parties, such as banks and credit unions, which customarily maintain records of individual or business financial transactions. 26 U.S.C. § 7609(a)(3)(A). When the IRS serves a summons on a third-party recordkeeper, it must also give notice to the person to whom the records pertain. Such notice must be accompanied by a copy of the summons which has been served on the third-party recordkeeper and must contain an explanation of the taxpayer's right to bring a proceeding to quash the summons. 26 U.S.C. § 7609(a)(1). With regard to the timing of the notice, this subsection provides that "notice of the summons shall be given to . . . [such] person . . . within 3 days of the day on which such service is made [upon the third-party recordkeeper]." *Id.* The recipient of the notice of the summons may then file a petition

to quash the summons pursuant to section 7609(a)(1), which states in relevant part:

In general. Notwithstanding any other provision of law, any person who is entitled to receive a summons under subsection (a) shall have the right to quash such summons not later than the fifth day after the day such notice is given under subsection (a)(2).

Subsection (a)(2) specifies that notice is "sufficient" if it is mailed by certified mail to the last known address of the person to whom the summons is directed. Subsection (a)(2) also requires that notice be mailed by certified mail to the taxpayer under investigation. *Faber v. United States*, 92 F.3d 1190 (9th Cir. 1997); *Stringer v. United States*, 785 F.2d 1185 (9th Cir. 1985). Thus, according to the statute, notice must begin a proceeding to quash the summons within 5 days of the date on which notice of the summons is mailed by certified or registered mail to the IRS.

## III. No

Petitioners first argue that the district court erred in granting the IRS's motion to dismiss by competent evidence that notice of the summons was mailed to them by certified mail on the dates stated in the IRS's motion to dismiss--on May 7 and May 8, 1998. Without citing any authority, petitioners argue that the IRS's service date stamp and the date on which the notices were actually mailed to them is required to be the date on which the notices were mailed to the petitioners.

The district court found in favor of the IRS on May 7, 1998 and May 8, 1998, that the IRS's summonses to Petitioners via