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Go West: How the IRS Should Foster Innovation in Its Agents

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2012]

GO WEST: HOW THE IRS SHOULD FOSTER
INNOVATION IN ITS AGENTS

T. KEITH FOGG*

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I. INTRODUCTION

“GO West, young man.”¹ This advice, given to a young man seeking advice from a wiser mentor and later popularized to encourage settlement in the American West, perhaps rings true for the Internal Revenue Service (IRS or the “Service”) as it seeks to improve its oversight of noncompliant taxpayers. More literally, the advice has roots in the work of its agent, Joe West, who exposed a path for tracking down taxpayers hiding their income offshore.² In showing that path, Mr. West set in motion an ongoing battle³ between promoters of offshore investment, work-

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1. See JOSIAH BUSHNELL GRINNELL, MEN AND EVENTS OF FORTY YEARS 87 (1891) (attributing quote to Horace Greeley).

2. Joe West still works for the IRS. The author did not speak with Joe West in preparing this Article because of his continued employment with the IRS. The author did speak with individuals familiar with the cases discussed who do not work for the IRS. The information presented in this paper has been gathered from other parties involved with the matters described and from source documents. The author met Joe West while the author was employed as an attorney with the Office of Chief Counsel, IRS. The author had no involvement with the Tax Court cases described herein and only a minor involvement with the “credit card project” that resulted from the efforts of Joe West.

3. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-823T, TAX COMPLIANCE: CHALLENGES IN ENSURING OFFSHORE TAX COMPLIANCE, (2007) (providing brief background of Service efforts to increase compliance); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-478T, TAX COMPLIANCE: OFFSHORE FINANCIAL ACTIVITY CREATES ENFORCEMENT ISSUES FOR IRS, (2009), (noting ongoing challenges of combating offshore tax evasion). This Article results from a panel on offshore tax compliance

ing together with their high-wealth individual clients seeking to avoid income detection, and the IRS, whose mission to enforce the law with “fairness to all” includes the responsibility of ensuring that individuals who are “unwilling to comply pay their fair share.”⁴ For the IRS to succeed in its battle with individuals hiding income and assets offshore, it must continue to adopt innovative techniques such as the one designed by Revenue Agent Joe West. This article seeks to describe the insights brought to the IRS by Mr. West and to suggest that the IRS must find a way to encourage its agents to approach their jobs with the same inventiveness he brought to the offshore project.⁵

which was part of the *Villanova Law Review* Symposium held on September 23, 2011. Two papers prepared by fellow panel members highlight different parts of this continuing struggle with offshore compliance. The first of these papers addresses the settlement offers made by the Service to convince individuals using tax havens to voluntarily report their unpaid taxes. Leandra Lederman, *The Use of Voluntary Disclosure Initiatives in the Battle Against Offshore Tax Evasion*, 57 VILL. L. REV. 499 (2012). The second of these papers discusses the passage of FATCA by Congress as a means of addressing the problem of offshore accounts through gaining information about those accounts in a manner similar to the transmission of information from banks within the United States. Susan Morse, *Ask for Help, Uncle Sam: The Future of Global Tax Reporting*, 57 VILL. L. REV. 529 (2012).

4. *The Agency, Its Mission and Statutory Authority*, INTERNAL REVENUE SERV., <http://www.irs.gov/uac/The-Agency-its-Mission-and-Statutory-Authority> (last updated Aug. 2, 2012) (stating mission is to “[p]rovide America’s taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.”).

5. The actions of Joe West and the others working on the matters described here have been mentioned by others; however, the details of the work have not been chronicled or analyzed. In his book, *Many Unhappy Returns*, describing his tenure as Commissioner of the IRS, Charles Rossotti devotes two pages to Joe West and the offshore project he spawned. CHARLES O. ROSSOTTI, *MANY UNHAPPY RETURNS: ONE MAN’S QUEST TO TURN AROUND THE MOST UNPOPULAR ORGANIZATION IN AMERICA* 258–60 (2005). Commissioner Rossotti created a subchapter in his book entitled “Finding Money in the Tropical Isles” in order to briefly describe the work of Joe West and to praise it. He stated that “[t]he IRS started to know because Joe West and Dan Reeves, two exceptionally resourceful agents in New Jersey, worked doggedly for years to find a way.” *Id.* at 259. This Article does not focus on Dan Reeves or several others at the IRS, at Chief Counsel, IRS, or at the Department of Justice Tax Division who were critical to the success of the IRS offshore actions. This Article focuses on Joe West because of his role as the person with the creative spark. Investigative reporter David Cay Johnston also discusses the actions of Joe West in his book *Perfectly Legal*. DAVID CAY JOHNSTON, *PERFECTLY LEGAL: THE COVERT CAMPAIGN TO RIG OUR TAX SYSTEM TO BENEFIT THE SUPER RICH—AND CHEAT EVERYBODY ELSE* (2003). Chapter 15 of his book focuses on John Mathewson, a taxpayer in Texas with significant offshore dealings, and points to the plan developed by Joe West after studying the activities of Mr. Mathewson.

Joe West, a veteran IRS criminal [sic] investigator, had a plan. He knew that if he could get the charge records in electronic form, he could look for patterns of spending and then he could go to restaurants, hotels and other businesses where repeat purchases were made to get reservations and registration records that would yield names.

Id. at 211.

To appreciate his innovation, a brief description of the situation Mr. West faced twenty-five years ago is necessary. The tax shelter wars of the 1980s and the changes to the tax code in 1986 cut off many domestic opportunities for reducing taxes to the newly wealthy. In the never-ending search for ways to minimize or eliminate the tax bite on income, offshore tax havens took on new popularity.⁶ The growing influence of the internet was making the world a much smaller place.⁷ It also allowed for the proliferation of information in a manner not previously possible. After a long period of relatively slow growth, the economy in the United States began taking off in the 1990s.⁸ The business opportunities brought about by the technological advances created significant new wealth.⁹ With the ease of air travel and the availability of information made possible by the internet, more and more individuals sought to place assets offshore where the assets, and the income they produced, would remain invisible to the IRS.¹⁰

While individual transactions might be invisible to the IRS, the expansion of the offshore industry to serve wealthy individuals did not escape the attention of the IRS.¹¹ Websites and other advertisements were everywhere, luring individuals to place their assets in offshore tax havens where the information would remain secret from the IRS.¹² Watching the growth of the offshore havens, the IRS needed to devise a strategy for piercing the veil of secrecy. Devising and implementing such a strategy is not a strong suit of the IRS. Fortunately, it had an enterprising agent who took on the task. While he did not work alone, Revenue Agent Joe West

6. See generally JOSEPH WEST & FRED K. CHIN, OFFSHORE CARDS—JOHN DOE REFERRAL REPORT (June 26, 1998) (on file with author) [hereinafter JOHN DOE REPORT].

7. Advertisements enticing individuals to invest offshore were not limited to the internet but proliferated in other places that might attract wealthy investors such as airline magazines. The principal point concerns the ease of transmission of information about offshore investing to the targeted audience and the quantity of such advertisements which could easily lead those with tendencies toward offshore investment to the conclusion that it was not only easy to accomplish, but also normal.

8. See Dale W. Jorgenson et al., *Industry Origins of the American Productivity Resurgence*, 19 ECON. SYS. RES. 229, 230 (2007) (“In 1995–2000, U.S. economic growth increased by nearly a percentage point relative to 1960–1995.”). The late 1980s brought about the fall of the Soviet Union and communism across Eastern Europe, opening doors to new opportunities for commerce. See *The 1990s and Beyond*, ABOUT.COM, http://economics.about.com/od/useconomicichistory/a/economy_1990s.htm (last visited Mar. 13, 2012). In the 1970s, the Dow Jones Industrial Average was a mere 1,000, and in 1999, grew to 11,000. In 1998, the United States also saw the first surplus in three decades. See *id.*

9. See Paula De Masi et al., *Who Has a New Economy?*, 38 FIN. & DEV., NO. 2, 2001, available at <http://www.imf.org/external/pubs/ft/fandd/2001/06/demasi.htm> (stating that “new economy” in 1990s was “linked to advances in information and communications technologies”).

10. See generally JOHN DOE REPORT, *supra* note 6.

11. See *id.*

12. See *id.*

spearheaded the quest to break down the veil of secrecy provided by offshore havens and reveal the financial transactions lurking behind that veil.¹³ This Article seeks to explore the genesis of Agent West's creativity, the work produced by his efforts, the impact of his creativity in this instance, and how the IRS could foster innovative agents in the future.

II. DORCHESTER INDUSTRIES AND FRANK WHEATON, JR.

In the mid-1980s, Revenue Agent West, an International Examiner, was assigned to examine the return of Wheaton Industries.¹⁴ Wheaton Industries was a glass manufacturing company located in New Jersey.¹⁵

13. Telephone Interview with Jack Blum, Former Special Counsel to the Senate Foreign Relations Comm. (Nov. 23, 2011). Jack Blum, discussed in detail below, provided the following insight about Joe West:

Joe got out there and got into the mechanics of how the credit card system worked. He figured out how to do it. He was brilliant and determined. The agents working with him were imaginative and the immediate supervisors supportive. The combination of these factors allowed the project to take off.

Id.

14. During the Tax Court case, the Service served a summons on Wheaton to obtain information to enable it to collect the liabilities it asserted were due. Collection activity ensued due to a jeopardy assessment made after the apparent settlement in the Tax Court case had failed. Wheaton filed a Motion for Protective Order requesting the Tax Court to order the Service to back away from enforcing the summons, arguing that collection action was premature while the Tax Court case continued. The Service filed a Memorandum of Law in Support of Respondent's Objection to Motion for Protective Order. Memorandum of Law in Support of Respondent's Objection to Motion for Protective Order at 1229, *Dorchester Indus., Inc. v. Comm'r*, 108 T.C. 320 (1997) (No. 20515-93), *aff'd without opinion*, 208 F.3d 205 (3d Cir. 2000). Attached to the Memorandum was an affidavit prepared by Patrick E. Whelan, Assistant District Counsel, Newark, Office of Chief Counsel, IRS. Whelan Aff. The affidavit contains the following statement concerning Joe West's involvement in the case:

Revenue Agent Joe West has been an integral member of the litigation team. He participated in all of the examinations which resulted in these cases from their inception. As a result of the many years he has been working on these cases, he has become the most knowledgeable employee of the Internal Revenue Service with respect to Frank Wheaton, Jr.'s complex offshore transactions and his offshore assets. He has examined thousands of documents and interviewed dozens of witnesses.

Id. ¶ 3.

15. In an affidavit submitted in the Tax Court case, Wheaton described his business interests and these interests were further described in the answer to Tax Court case docket number 27121-93. Affidavit of Frank Wheaton, Jr. at 135, *Dorchester*, 108 T.C. 320 (No. 20515-93); Answer of Government at 1373, *Dorchester*, 108 T.C. 320 (No. 20515-93). The company that brought the family significant wealth was Wheaton Industries, a glass company started by his father, Frank Wheaton, in Millville, New Jersey. Frank Wheaton, Jr. stated that under his leadership, Wheaton Industries grew from a small regional glassmaker with \$450,000 annual sales to a major corporation with \$450,000,000 annual sales and over 10,000 employees.

The principal business of Wheaton Industries is the manufacture of bottles and other glass products for the pharmaceutical and cosmetic industries. Frank Wheaton, Jr. was a partial owner of Wheaton Industries. *See id.* The audit of Whea-

The audit began at a time when the IRS was organized by geographic districts, one of which was the district of New Jersey. Joe West was a Revenue Agent in the New Jersey district.

Wheaton Industries itself apparently presented a minor target for the IRS, and the audit of Dorchester also did not turn up significant liabilities;¹⁶ however, the audits of these companies led to the audit of their president, Frank Wheaton.¹⁷ Here a more fertile field for auditing existed.¹⁸ Mr. Wheaton apparently obtained significant income from Wheaton Industries and Dorchester, which he sought to conceal from the IRS both as it left the companies and as he held it.¹⁹ To accomplish the hiding of the assets, he created offshore bank accounts in at least three tax haven jurisdictions.²⁰

During the examination, the agents uncovered the offshore activity and pursued information about that activity. The investigation of that activity led the Service, or at least those involved in the Wheaton case, to a much greater understanding of the size and scope of the offshore problem that existed. The audit of Wheaton set Joe West on his quest to discover a means of gaining information about those placing their money

ton Industries resulted in adjustments relating to improper deductions and other relatively minor issues surrounding the improper movement of corporate assets from the corporation to Frank Wheaton, Jr. Wheaton Industries filed a Tax Court petition, Docket No. 19058-90, about three years before the Tax Court case cited above and Wheaton Industries settled its Tax Court case. Dorchester Industries was a boat building company in which Frank Wheaton, Jr. owned a 100% interest.

16. See Notice of Deficiency issued to Wheaton Industries, Docket No. 19058-90. Similarly, Dorchester Industries was a minor target. See Notices of Deficiency at 1272-1339, *Dorchester*, 108 T.C. 320 (No. 20515-93). A notice of deficiency was issued to Dorchester Industries on June 29, 1993, which led to Tax Court docket number 20515-93. The issues in the notices were primarily disallowance of expenses reclassified as dividends to Wheaton. *Id.*

17. Two notices of deficiency were issued to Wheaton covering the years 1979 through 1989. *Id.*

18. Wheaton was the sole shareholder of a number of foreign entities including Tartan Investments, Caribe Bahamas, International Glass Equipment, Vitron Electrometalurgia, an eighty-five percent owner of Wheaton Brasil, and the fifty percent direct owner and fifty percent indirect owner of Commonwealth Charities. He did not disclose his relationship with these companies on his tax returns for the years at issue according to the answer. Answer of the Government, *supra* note 17, at 1382.

19. Wheaton utilized numerous foreign entities owned and controlled by him to extract constructive dividends from Wheaton Industries without reporting those dividends on his return. See *id.* at 1460.

20. See *id.* at 1383. Wheaton controlled a Wheaton-Bormioli bank account at Charterhouse Japhet Bank and Trust International in the Bahamas. See *id.* The Government made a jeopardy assessment against Wheaton while the Tax Court cases were working their way through the appeals process in order to expedite collection because of concerns that the assets would dissipate or disappear. Details of the foreign assets are set forth in both the memorandum of law filed by the Government in response to Wheaton's motion for a protective order and in the affidavits of Assistant District Counsel Patrick Whelan and Revenue Officer Michael Rago attached to the memorandum. Mem. of Law, *supra* note 14.

offshore. Examining the timeline of the audit provides some insight into the scope of knowledge Joe West must have gained as he worked the case. He was apparently assigned to the audit by the mid-1980s.²¹ Yet, the notices of deficiency in the primary Tax Court cases were not issued until June 29, 1993.²² During that eight-year period, almost enough time for an undergraduate, master's, and doctorate degrees, Joe West received a lengthy education on offshore issues.²³ From his subsequent actions, he appears to have become an expert in this field.²⁴

One important aspect of the case that furthered the education of Joe West was the enforcement of three summonses which were issued to gain information about Mr. Wheaton's offshore activities.²⁵ On June 1, 1989, the Service issued summonses seeking records of three offshore entities from Mr. Wheaton. He appeared in response to the summons but brought no records.²⁶ After an extensive evidentiary hearing that included testimony from Mr. Wheaton's long time administrative assistant at

21. See Testimony of IRS Chief Counsel Special Litigation Assistant William Garofalo at 404, *Dorchester*, 108 T.C. 320 (No. 20515-93) (from Tax Court settlement discussion hearing); Interview with William Garofalo, Chief Counsel Special Litig. Assistant (Nov. 14, 2011). William Garofalo was the lead counsel for the Government in the Wheaton cases. See *Whelan Aff.* *supra* note 16, at 1244.

22. See Answer of the Government, *supra* note 17, at 1272-1339.

23. The case took an extraordinary amount of time to complete. Because of goals placed on case completion, Joe West and others working on this case would have felt significant pressure to close the case from executives within the IRS. On February 3, 2012, the author spoke with retired Revenue Agent Dennis Raible, who worked with Joe West on the examination of this case. Mr. Raible indicated that the examination was allowed to continue only because of the efforts of three individuals who fought hard within the organization. These individuals, Michael Bembridge (Case Coordinator), John Kaffenberg (International Manager who was also Joe West's manager) and Milford Theadford (Case Manager), deserve much credit for convincing their superiors to allow the case to continue to completion rather than to terminate early in order to meet artificial deadlines. Telephone Interview with Dennis Raible, Professor, Dep't of Accounting at St. Joseph's Univ. (Feb. 3, 2012). In particular, Kaffenberg and Theadford put their careers on the line by supporting West and allowing the Wheaton case to remain open. In spite of the lack of documentary evidence and the consumption of precious IRS resources, these individuals who were working with West both understood the significance of the offshore problem and were dedicated to West's efforts. Their "total support of West [and] Bembridge, given the down side to their own careers, was unprecedented." E-mail from Dennis Raible, Professor, Dep't of Accounting at St. Joseph's Univ. (Mar. 28, 2012, 9:42 AM) (on file with author).

24. This timeline does not take into account the additional three-plus years of trial preparation between the time of the issuance of the notices of deficiency and the October 30, 1995 date on which the special trial calendar with Judge Halpern was set. While the involvement of Joe West during this phase would have been subordinate to the trial attorney, he continued to have significant involvement in the case. At trial, the Government planned to call over sixty witnesses, many of whom were from foreign jurisdictions. Joe West was a key player in working with the attorneys to pull the case together for trial. See Interview with William Garofalo, *supra* note 23; see also *Whelan Affidavit*, *supra* note 16, at 1244.

25. *United States v. Wheaton, Jr.*, 791 F. Supp. 103 (D.N.J. 1992).

26. See *id.* at 103-04.

Wheaton Industries, the company pilot, and a company engineer, the court enforced the summons. The court found that Mr. Wheaton was the owner of the three entities from which records were sought and found that he had possession of the records of these entities. According to Dennis Raible, the information gained through the summons process was the key to successfully putting together support for the tax adjustments.²⁷

In working the case, the Service hired an expert witness on offshore activities, Jack Blum.²⁸ Mr. Blum spoke to me in order to assist me in understanding the significance of this case.²⁹ Essential to adequately understanding the Wheaton case's importance to cracking the offshore nut are the events surrounding a case involving offshore issues in the early 1970s.³⁰ Revenue Agents in Miami, Florida came into possession of records concerning U.S. citizens placing their funds in Castle Bank in the Bahamas. These agents began examining the returns of the individuals on the list. The list contained powerful individuals who were able to wield their influence—something not unusual in offshore account cases. The agents even received pressure from the highest levels of government to end the examinations. The cases were ultimately dropped, and, according to Mr. Blum, the careers of the Miami agents were negatively impacted. As a result, a pall was cast over the landscape of pursuing offshore investors that Mr. Blum felt lasted for two decades until the Wheaton case removed it. Mr. West's efforts were therefore able to open the eyes of the Service to the compliance needs and the inevitability of IRS action in this segment of the economy.³¹

In Mr. Blum's opinion, the Wheaton case crystallized for the Government the size and scope of the offshore problem.³² As they got into the case, the agents could see that whatever Mr. Wheaton wanted the trustees of his offshore trusts to do, they did.³³ The agents began to understand how the system operated, causing them to want to know who else was playing the same game as Mr. Wheaton.³⁴ The Wheaton case revealed the

27. See Telephone Interview with Dennis Raible, *supra* note 25.

28. Jack Blum currently acts as a Chairman at the Tax Justice Network—USA. Jack Blum was a partner with the law firm of Lobel, Novins, & Lamont in Washington, D.C. and former Special Counsel to the Senate Foreign Relations Committee. See Jack Blum, LINKEDIN, <http://www.linkedin.com/pub/jack-blum/8/2b1/929> (last visited Mar. 13, 2012) [hereinafter Jack Blum's Resume].

29. Telephone Interview with Jack Blum, *supra* note 13.

30. *United States v. Payner*, 447 U.S. 727, 729 (1980) (stating that focus of "Operation Trade Winds" was on Castle Bank in 1972, when "investigators learned that a suspected narcotics trafficker had an account there"). See generally ALAN A. BLOCK, *MASTERS OF PARADISE—ORGANIZED CRIME AND THE INTERNAL REVENUE SERVICE IN THE BAHAMAS* (1998) (containing detailed account of Castle Bank and Operation Tradewinds story.)

31. Telephone Interview with Jack Blum, *supra* note 13.

32. *Id.*

33. *Id.*

34. *Id.* Mr. Blum described some undercover work he had done in 1994 when he visited an offshore banker and taped the conversation. The banker described

methods used by the taxpayer and his offshore banker to hide and transfer offshore money. This set the stage for West to uncover how individuals were using credit cards as a mechanism to access³⁵ and spend their hidden money.

III. USE OF THE WHEATON INFORMATION

With the understanding gained from the Wheaton audit and a determination to prevent such noncompliance activities from proliferating, Joe West set out to turn his newfound knowledge into a blueprint for gaining access to offshore account holders. His effort led to the creation of a document entitled “Offshore Cards—John Doe Referral Report” (the “John Doe Report”) by Joe West, International Examiner, New Jersey District and Fred K. Chin, Internal Revenue Agent, Northern California District.³⁶ The John Doe Report concludes that “[e]fforts to promote compliance concerning taxpayers engaged in offshore transactions have enjoyed limited success due to the challenges presented by financial secrecy jurisdictions. . . . Due to the characteristics of these transactions, new and creative approaches are needed to take advantage of opportunities to pierce the veil of secrecy surrounding offshore dealings.”³⁷ The John Doe Report gathered information about offshore activities from myriad sources in order to support the use of a John Doe summons or John Doe summonses to unearth the necessary information on offshore investors.³⁸

to Mr. Blum, inter alia, how he would provide Mr. Blum with a credit card and how that card would make it possible for Mr. Blum to spend his offshore money in the United States without it being traced. *Id.*

35. *Id.*

36. See generally JOHN DOE REPORT, *supra* note 6. One remarkable aspect of this report not discussed elsewhere concerns its timing within the greater scheme of tax administration. The report came out almost exactly one month before the passage of the Revenue Reform Act of 1998 (RRA 98), the greatest limiting legislation ever passed concerning the IRS. This was a time of great bashing of the IRS, yet these two agents were able to avoid the turmoil around them and produce this report. One aspect of the legislation is the way it limits and controls the selection of examination targets. Had they begun to work on this report much after the passage of RRA 98, the restrictions stemming from the legislation might have stopped the effort. *Id.*

37. *Id.* at 3.

38. John Doe summonses require some explanation in order to understand their usefulness for this purpose. In understanding John Doe summonses it is also important to understand that they had never before been used in this way. I.R.C. § 7609 provides that the Service can, with the permission of a district court judge, obtain ex parte permission to summons a party for information pertaining to unknown individuals where the Service can show that the information will likely produce information leading to incidences of tax noncompliance. I.R.C. § 7609(h)(2) (2006). In deciding whether to grant a John Doe summons request, the district court judge must weigh the burden and intrusiveness of the request against the potential gain in tax compliance. To convince the district court judge to allow the Joe Doe summons to issue, the Service must show with some reasonable likelihood that the information sought will lead to the promised result. For a

The John Doe Report explained how Revenue Agent West intended to meet the burden necessary to obtain a John Doe summons: “we have interviewed a number of knowledgeable persons within and outside the government, as well as reviewed numerous books, reports, publications, articles, investigative reports, Internet sites, and advertisement materials.”³⁹ The balance of the report essentially compiled the data obtained from all of those sources to produce a compelling case for the use of John Doe summonses on the three major credit card issuers in the United States—Visa, MasterCard, and American Express—for the purpose of discovering the identities and the transactional dates of the individuals using those cards to access their offshore accounts. The John Doe Report demonstrated why summonses to these three card issuers to obtain the names of the cardholders affiliated with banks in tax haven countries would produce a gold mine of data concerning tax evasion and pierce the veil of secrecy the cardholders thought existed. At last the government had a plan and a roadmap to shed sunlight on an area of darkness. The specific strategy focused on three countries thought to house the most convenient offshore banks for U.S. citizens: the Bahamas, Antigua, and the Cayman Islands.⁴⁰

The second portion of the John Doe Report’s introductory section explained how the three major credit card companies maintained data on account holders whose cards were issued by offshore banks. After interviewing the credit card companies in conjunction with the preparation of this report, Joe West learned the kind of information that each company keeps with respect to its cardholders.⁴¹ American Express had complete information about its cardholders because it directly issued cards and extended credit. The goals of the John Doe summons on American Express were to obtain:

1. Cardholder information on cards issued to entities organized in the Bahamas, Antigua and the Cayman Islands where a U.S. citizen or U.S. resident has signature authority over the card, and
2. Cardholder information on cards issued to U.S. citizen [sic] or U.S. resident [sic] where the payment of the related card expense comes from accounts located in the Bahamas, Antigua and the Cayman Islands.⁴²

The situation with Visa and MasterCard presented a greater challenge because they are associations of member banks and, as a result, do not maintain a direct relationship with the cardholders. Under the Visa and MasterCard business model, the member banks issue the cards and keep the customer account records while Visa and MasterCard process the

further description of John Doe summons requirements, see *infra* notes 83–87 and accompanying text.

39. JOHN DOE REPORT, *supra* note 6, at 4.

40. *Id.*

41. *Id.* at 5–6.

42. *Id.* at 5.

transactions and keep only transactional records. Therefore, most of the necessary identifying information of these cardholders resided with the issuing banks located in the bank secrecy countries. From the outset, a “subordinate strategy” developed in order to obtain more complete information on Visa and MasterCard cardholders who could not be identified from the transactional data.⁴³ That strategy involved a second set of John Doe summonses to U.S. automobile dealerships, car rental businesses, U.S. boat/watercraft dealerships, U.S. travel agents, U.S. airlines, and U.S. hotels and motels for business records identifying the customers who engaged in the transactions revealed in the data obtained from Visa and MasterCard. This merchant data would permit the agents to capture identifying information which was not in the databases of Visa and MasterCard but did exist within the United States because vendors of such purchases would have captured this data.⁴⁴ The understanding of the data available from the credit card companies and the subordinate strategy for supplementing that data in necessary situations demonstrated a deep knowledge of both the U.S.-based records on these transactions and the proof necessary to make a tax evasion case on the credit card holders.

Following this explanation of the data available from the credit card issuers, the John Doe Report then spent the next sixty pages providing detailed support for why the information available from these credit card issuers would identify individuals seeking to evade their U.S. tax obligations. This information essentially appears in the supporting affidavit of all of the John Doe summonses and forms the supporting basis for those summonses. In detailing the bases for concluding that holders of credit cards issued by banks in the Bahamas, Antigua, and the Cayman Islands almost certainly had tax evasion as a motive for doing so, Revenue Agent West found support from myriad sources. This section starts with a quote from Jack Blum:⁴⁵

Most of the World’s money laundering in offshore centers involves tax evasion. Although there are legitimate ways of using offshore entities to minimize taxes, most of the offshore arrangements are designed to avoid income and estate tax by the home country of the owner of the money. Tax evasion should become a predicate offense for the crime of money laundering. All too frequently the professionals who help serious criminals cover their actions by claiming that all they are doing is helping someone “avoid” taxes.⁴⁶

43. *Id.* at 6.

44. *Id.* at 6.

45. See Jack Blum’s Resume, *supra* note 30.

46. *Efforts to Combat Money Laundering: Hearing Before the H. Comm. on Banking & Fin. Servs.*, 105th Cong. (1998) (statement of Jack A. Blum, Spec. Counsel, S. Foreign Relations Comm.).

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The John Doe Report first took information from the United Nations Office on Drugs and Crime, which released a report on June 10, 1998 entitled “Financial Havens, Banking Secrecy and Money Laundering.”⁴⁷ The United Nations report, among other information useful to the purpose of the report by Revenue Agent West, stated:

[Offshore haven banks] also attract those trying to evade taxes through concealing much of their wealth by secreting it in jurisdictions that place a premium on confidentiality and do not regard tax evasion in another country a crime. In the early 1980s . . . the United States Senate conducted a series of hearings which not only highlighted criminal exploitation of offshore financial centers but also the extent of the illegal use of offshore banking “to facilitate tax fraud” by the “man next door.”⁴⁸

Use of the United Nations’s report provided a strong basis for showing a district court judge the problem’s nature and scope, and negated the suggestion that this was just an IRS issue or a witch hunt by a few IRS agents. Starting off with a global overview appropriately set the scene for convincing a judge that the problem deserved attention and the work required of the summonsed party to comply with the information-gathering request had merit in the result sought.

The John Doe Report next turned to a series of “old” reports on offshore activity that explained the connection of tax haven banks to tax evasion. First, it discussed the Gordon Report from January 1981.⁴⁹ The Gordon Report examined judicial decisions and published literature on offshore tax issues. The not-so-surprising conclusion of the Gordon Report found that “there are a large number of transactions involving illegally earned income and legally earned income which is diverted to or passed through havens for purposes of tax evasion.”⁵⁰ This report demonstrated that the problem had persisted for some time, laying the foundation for the groundbreaking suggestion to use the domestic card issuer information as a means of breaking the cycle of evasion. Complementing the Gordon Report was another somewhat self-serving report entitled the Caribbean Basin Report. This report, published by the Treasury Department (the “Department”) in 1984, also reached the expected conclusion that tax haven countries were using strategies to assist in tax evasion by hiding beneficial ownership of assets. The report assessed criminal cases involving offshore connections to the Caribbean, concluding that:

47. See JOHN DOE REPORT, *supra* note 6, at 6–10.

48. JACK A. BLUM ET AL., FINANCIAL HAVENS, BANKING SECRECY AND MONEY LAUNDERING 39 (1998) [hereinafter UNITED NATIONS REPORT].

49. RICHARD A. GORDON, TAX HAVENS AND THEIR USE BY UNITED STATES TAXPAYERS—AN OVERVIEW (1981) [hereinafter GORDON REPORT]. This was a formal study performed by the IRS.

50. *Id.* at 111.

[I]t is very difficult to measure the illegal use of tax havens because of the nature of the transactions and because of the difficulty of obtaining information from most tax havens. Nevertheless, it seems reasonable to assume that a great deal of activities designed to violate the tax and other laws of the United States takes place in the Caribbean Basin tax havens.⁵¹

While use of these two reports to support a John Doe summons request bootstrapped material created inside the Treasury Department as a means of convincing a court, these reports presented a picture consistent with other reports and supported the conclusion that a problem not only existed but the veil of secrecy had prevented a solution.

Complementing the two older reports from within the Treasury Department, Revenue Agent West found three reports from outside the Department that supported the same conclusion: a 1987 Organization for Economic Co-Operation and Development (OECD) Report;⁵² the 1987 Dorgan Report;⁵³ and a report released in August of 1985 by the Permanent Subcommittee on Investigations of the U.S. Senate Governmental Affairs Committee.⁵⁴ The Permanent Subcommittee's report not only found that offshore havens protect criminals but "are increasingly being used by otherwise law-abiding Americans to avoid paying taxes and to shield assets from creditors."⁵⁵ This report also contained extensive discussions of the

51. DEP'T OF THE TREASURY, TAX HAVENS IN THE CARIBBEAN BASIN 51-52 (1984) [hereinafter CARIBBEAN BASIN REPORT].

52. ORG. FOR ECON. COOPERATION & DEV. COMM. ON FISCAL AFFAIRS, INTERNATIONAL TAX AVOIDANCE AND EVASION: FOUR RELATED STUDIES (1987) [hereinafter OECD REPORT]. Like the United Nations's report, this report carries significant weight without the self-serving aspect of a report developed by the Treasury Department. OECD consists of the United States and the most industrialized countries of Western Europe. The organization, created in 1961 with roots going back to 1948 and the implementation of the Marshall Plan following World War II, seeks to provide a forum for countries committed to democracy and the market economy. In the past decade, OECD has become very involved in tax haven and financial transparency issues, but this report significantly predates the recent efforts.

53. See DORGAN TASK FORCE, THE DORGAN TASK FORCE ON NARROWING THE \$100 BILLION TAX GAP (1987) (led by Congressman Byron Dorgan, Democrat, North Dakota); see also H.R. Con. Res. 138, 100th Cong. (1987). This resolution stated:

[I]n the interest of decreasing the growing gap between taxes owed and taxes collected: (1) the administration and the Congress should substantially increase appropriate resources for the taxpayer assistance and enforcement divisions of the Internal Revenue Service (IRS); and (2) the IRS should implement specified recommendations to improve taxpayer services and to enhance enforcement efforts.

Id.; James P. Springer, *An Overview of International Evidence and Asset Gathering in Civil and Criminal Tax Cases*, 22 GEO. WASH. J. INT'L L. & ECON. 277 (1988).

54. PERMANENT SUBCOMM. ON INVESTIGATIONS OF THE COMM. ON GOVERNMENTAL AFFAIRS, CRIME AND SECRECY: THE USE OF OFFSHORE BANKS AND COMPANIES (1985).

55. *Id.* at 2.

principal tax haven countries including the Bahamas⁵⁶ and the Cayman Islands.⁵⁷ The OECD Report explored the problem of international tax evasion through the use of haven countries and specifically identified the Bahamas and the Cayman Islands.⁵⁸ The use of these reports further supported the conclusion not only that tax evasion—by using banks in haven countries—was rampant, but also that the three countries targeted by the John Doe summonses were clearly countries whose banks fostered tax evasion. The broad scope of the reports from different sources provided convincing evidence that the problem existed and deserved attention.

Revenue Agent West then focused the John Doe Report on more recent articles appearing in the popular press.⁵⁹ Articles from such major news sources as the *Washington Post*⁶⁰ and the *Wall Street Journal*⁶¹ provided indications that the offshore tax evasion problem persisted and that it impacted all wealthy nations. The second section of the John Doe Report, entitled “Overview on the Use of Offshore Financial Secrecy Jurisdictions,” concluded that a significant threat to the tax system of wealthy nations existed because of the growing use, and ease of use, of offshore banks in secrecy jurisdictions, that this problem had existed for at least two decades, and that the veil of secrecy was preventing enforcement against the perpetrators.⁶² The following section then explained the key to lifting this veil of secrecy.

As the John Doe Report shifted its focus to “The Use of Credit and Debit Cards in Offshore Schemes,” Revenue Agent West detailed his experience in studying offshore transactions.⁶³ This experience provided a critical basis for his affidavits, which would accompany the John Doe summonses. By gathering all of this background information, he made himself a valuable resource—a critical resource for the success of the summons—because the opinion of the judge is based almost entirely on the Government agent’s affidavit. The experiences listed take on greater importance because Revenue Agent West did not encounter the use of credit cards in the Wheaton case. Rather than finding the credit card so-

56. *Id.* at 45–46.

57. *Id.* at 52–54.

58. OECD REPORT, *supra* note 54, at 54 (information contained in Tables 3 and 4).

59. JOHN DOE REPORT, *supra* note 6, at 15–20.

60. See Douglas Farah, *Clinton Plan Targets World Crime Threat: Syndicates Said to Gain Strength*, WASH. POST, May 11, 1998, at A18.

61. See Michael Allen, *Tax Evaders Beware: Rich Countries Prepare for Crackdown on Havens*, WALL ST. J., May 21, 1998, at A12. Allen writes, “Among other things, industrialized countries are looking for ways to pierce the veil of bank secrecy in tax havens by, for instance, requiring offshore banks to divulge information on depositors under investigation for tax evasion at home.” *Id.*

62. JOHN DOE REPORT, *supra* note 6, at 6–20.

63. *Id.* at 20. He lists fourteen specific items of his experience studying offshore transactions, including interviewing offshore bankers, U.S. private bankers, offshore promoters, the credit card companies, attendance at offshore seminars, and the United Nations session on financial havens. *Id.*

lution during an audit, West came to the revelation that credit cards provided the window on tax havens as a result of his personal study of the offshore industry.

Use of credit cards in an offshore evasion scheme exists because of the fourth component of a successful offshore scheme's common pattern identified by Revenue Agent West:

- Devise an overall offshore plan and create a suitable offshore entity(s) in an advantageous financial secrecy jurisdiction,
- Create methods to effect the covert transfer of funds and assets to the offshore entity,
- Control the funds and assets transferred offshore, and
- Devise methods to access offshore funds either by repatriation or by accessing abroad.⁶⁴

By the time of the John Doe Report in 1998, credit and debit cards had become a clear mechanism of choice for repatriation of offshore funds.⁶⁵ The majority of the advertisements reviewed by Revenue Agent West promoted the use of credit cards as a safe and secure method for accessing money placed offshore and ostensibly away from the peering eyes of the government.⁶⁶ He examined the parties who would offer a credit or debit card as part of the financial package. Private bankers did it.⁶⁷ Offshore promoters did it.⁶⁸ The print media did it.⁶⁹ Everywhere Revenue Agent West looked at offshore activity, the use of credit and debit cards to bring the money home prevailed.

Numerous articles appeared in the popular press shortly before the issuance of the John Doe Report. Revenue Agent West documented these and quoted them extensively. One particular case that captured the attention of the press in many articles involved John Mathewson.⁷⁰ Mr. Mathewson started his own bank, Guardian Bank, in the Cayman Islands.⁷¹ He

64. *Id.* at 21-22.

65. See UNITED NATIONS OFFICE ON DRUGS AND CRIME, FINANCIAL HAVENS, BANKING SECRECY AND MONEY LAUNDERING (1998), available at <http://www.caerdydd.ac.uk/socsi/resources/levi-laundering.pdf>. The United Nations Report commented on the use of cards to repatriate funds:

Credit and debit cards are the way people who have laundered money draw ready cash without leaving a financial trail. As one advertisement for a bank put it, it is the best way to stay in touch with your offshore account. . . . The banks assure their clients that the card account information is protected by the same rules that protect the other account information.

Id. at 97.

66. JOHN DOE REPORT, *supra* note 6, at 22-23.

67. *Id.* at 23-28.

68. *Id.* at 27-29.

69. *Id.* at 31-36.

70. *Id.* at 34-35.

71. See Ronald Smothers, *In Plea Deal, a Banker Outlines Money Laundering in Caymans*, N.Y. TIMES, Aug. 3, 1999, at A1. John Mathewson was a wealthy American construction company owner in the Chicago area. In 1982 he moved to the Caymans, and in 1986 he set up the Guardian Bank and Trust Company with some

bargained information to prosecutors in order to avoid a lengthy sentence.⁷² Several instances were documented of credit card use through the Guardian Bank in order to repatriate funds while avoiding detection.⁷³

In addition to the print media, Revenue Agent West documented two reports on offshore abuse and use of credit cards in a *Frontline* documentary entitled “Hot Money” and an episode of *20/20*.⁷⁴ Excerpts from these two popular news shows supported the same type of reporting appearing elsewhere. As always with film media, however, the power of watching and hearing someone explain how to avoid taxes through offshore havens increases its effect on the audience. The undercover filming of offshore promoters in action combined with the playing of these images on a major news show on national television made the information more compelling.

Finally, the John Doe Report turned to the most direct evidence of all—the brochures and internet advertising produced by the promoters themselves.⁷⁵ The John Doe Report documents the language used by the promoters to describe the benefits of offshore accounts, which left nothing to the imagination of the purpose of the offshore accounts they promoted.⁷⁶ Brochure after brochure quoted in the John Doe Report and internet site after site referred to the use of credit cards to allow the flexi-

local business people. After his arrest, he admitted that although he believed Europeans would be the bulk of the depositors, 90% of the depositors were actually American citizens. Mathewson said that the bank eventually acquired deposits totaling \$350 million. In early 1995, he was approached by a Caymanian banking regulator who asked for a \$250,000 bribe. Mathewson refused and the Bank was later investigated for unspecified irregularities, then taken over by the government and liquidated. Mathewson left the Caymans temporarily and moved to San Antonio. He was arrested in June of 1996 by federal agents as they were closing in on the cable piracy scheme.

72. *See id.* Mathewson was charged with money laundering and gave federal prosecutors records from Guardian Bank and Trust Company as part of the plea bargain. Mathewson’s help to the prosecutors resulted in at least \$50 million in back taxes and penalties being recovered. While Mathewson faced a potential five-year prison term, Judge Lechner, Jr. of the United States District Court for the District of New Jersey sentenced Mathewson to five years’ probation, 500 hours of community services, and a \$30,000 fine.

73. *See* David Marchant, “Stolen” Cayman Bank Records in Hands of the IRS, OFFSHORE ALERT (Oct. 31, 1997), <http://www.offshorealert.com/GetArticle.aspx?id=2382>.

74. JOHN DOE REPORT, *supra* note 6, at 36–42.

75. *Id.* at 42–51.

76. *Id.* Swiss American Banking Group Offshore Banking and Trust Management Services stated in their brochure:

[C]ustomers can use the VISA or Master Card to obtain instant cash advances at most financial institutions worldwide Charges are billed monthly and customers will typically maintain a separate current or savings account for which they will fax instructions to be debited to pay card charges. With our SwissAmericard programme, customers can enjoy unparalleled flexibility and confidentiality in accessing funds internationally, with discrete payment procedures.

Id. at 44.

bility to obtain money when and where needed.⁷⁷ The number of brochures and internet sites referenced made clear that the use of credit cards represented a business norm rather than an aberration.

IV. JOHN DOE SUMMONS—PIERCING THE VEIL OF SECRECY

A. *Contents of the Summons*

The John Doe Report laid out a plan for discovering the individuals placing their money offshore.⁷⁸ On October 18, 2000, more than two years after the John Doe Report, the Service and its lawyer in district court, the Department of Justice Tax Division, initiated action in accordance with the blueprint set out in the report by filing John Doe summonses seeking information from American Express and MasterCard.⁷⁹ The John Doe summonses seeking information from these two credit card issuers served as the opening public salvo in the effort to defeat the secrecy shrouding tax haven investments. This initial John Doe summons request sought information with respect to the years 1998 and 1999 regarding credit cards issued by banks from three countries—the Cayman Islands, the Bahamas, and Antigua.

Before going into specifics about the American Express and MasterCard John Doe summonses and the ones that followed it, some background on this form of summons will assist in understanding the device. The summons provisions of the Internal Revenue Code reside in the 7600s. The Code grants the Service broad power to seek information concerning tax liabilities including the power to canvass neighborhoods,⁸⁰ summons information directly from taxpayers,⁸¹ summons information from third parties holding information about specific taxpayers the Service has under investigation,⁸² and to summons information from third parties about unknown individuals the Service thinks might deserve investigation.⁸³ This last power travels under the name of John Doe summons,

77. *See id.*

78. *Id.* Even more specific than laying out a plan, two of the eighty-three attachments provide specific language for John Doe summonses. Attachment 75 provides the language for a John Doe summons to be issued to MasterCard and Visa while Attachment 76 provides the language for a John Doe summons to be issued to American Express. The optimism of the authors of the report shows these sample summonses sought information from 1996 to present. Comparing the samples with the real summonses demonstrates that a fair amount of work remained at the time the samples were created. Yet, the samples also demonstrate the thoroughness with which the report authors attacked the problem.

79. *See In re Tax Liabilities of John Does*, No. 00-3919-CIV:JORDAN (S.D. Fla. 2000). The petition for the John Doe summons was filed in the Southern District of Florida, Miami Division.

80. I.R.C. § 7601(a) (2006).

81. I.R.C. § 7602(a)(2) (2006).

82. I.R.C. § 7609 (2006).

83. *See* I.R.C. § 7609(f) (2006). Specifically, subsection (f) provides: (f) Additional requirement in the case of a John Doe summons.—Any summons described in subsection (c)(1) which does not identify the per-

so called because the Service does not know the identity of the individuals or entities it thinks it should consider investigating. The Service uses its John Doe summons power when it accumulates enough information to strongly suggest that a significant area of noncompliance exists among an identifiable group but the individual members of the group are unknown or substantially unknown to the Service.⁸⁴

Usually, the Service pursues a John Doe summons as a result of snaring some members of a group in its audit net through its general audit selection process and comes to the realization that many other similar taxpayers exist whose returns would likely contain significant adjustments.⁸⁵ In this instance, the path to the John Doe summonses followed a path not too far from the norm. Certainly, Joe West became interested in offshore avoidance schemes because of his work on the *Wheaton* case. He followed that work with a general investigation of offshore schemes, which lead him to credit cards as a means of ascertaining the identity of the participants. The John Doe Report discussed above, his affidavit which accompanied the John Doe summons in the initial American Express/MasterCard request, as well as many of the following summonses, detail his pathway to knowledge.

son with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that—

- (1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,
- (2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and
- (3) the information sought to be obtained from the examination of the records or testimony (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

Id.

84. See generally MICHAEL I. SALTZMAN, *IRS PRACTICE AND PROCEDURE* (2d ed. 1991). In the memorandum accompanying the petition to serve the John Doe summonses requested from American Express and MasterCard, the Service's description of the question presented before the Court does an excellent job of setting out the inquiry of the statute:

Whether, as required by Section 7609(f), the Petitioner has demonstrated (1) that the "John Doe" summonses which the Internal Revenue Service desires to serve upon AmericanExpress and MasterCard relate to the investigation of an ascertainable group or class of persons; (2) that there is a reasonable basis for believing that such group or class of persons may fail or may have failed to comply with any provisions of any internal revenue laws; and (3) that the information sought to be obtained from the examination of the records or testimony (and the identification of the persons with respect to whose liability the summonses are issued) are not readily available from other sources.

Memorandum in Support of John Doe Summons at 2, *In re Tax Liabilities of John Does*, No. 00-3919-CIV-JORDAN (S.D. Fla. 2000).

85. See generally *United States v. Brigham Young Univ.*, 679 F.2d 1345 (10th Cir. 1982), *vacated as moot*, 459 U.S. 1095 (1983); SALTZMAN, *supra* note 84.

An examination of the affidavits supporting the John Doe summonses aids in understanding how the work of Joe West plays directly into the credit card project and to the offshore compliance initiative that continues today. The affidavits in these cases now span more than a decade but the DNA still traces back to the Wheaton audit and the subsequent John Doe Report. Because John Doe summonses go to the deciding judge in an ex parte process, supporting affidavits play an important role in convincing the judge of the necessity of the request. Joe West's affidavit in the initial John Doe summons contains several sections which closely resemble his John Doe Report and which provided to the judge convincing information of the necessity for the Service to receive the requested information.

First, the affidavit detailed the background of Joe West in an effort to convince the judge of West's knowledge and ability in making a determination about the existence of a scheme to evade taxes and an information source from which to stop the scheme. This information was critical because it was the first John Doe summons of its kind. Convincing the judge on the first summons of its type provided a steeper challenge than the later summonses requested after some success in the project had been demonstrated. In addition to including his basic educational and work background, the affidavit spent the better part of two pages detailing West's experience in offshore matters including his attendance at a United Nations session on financial havens; his interviews of Mathewson, described as a former Cayman Island banker; his consultations with offshore experts; his interviews with credit card companies; his discussions with IRS employees experienced in offshore examinations; and, inter alia, his participation in the creation of an Offshore Audit Techniques Guide. The affidavit listed eleven different items in support of Joe West's expertise in offshore matters, strongly evidencing that he had sufficient knowledge of the offshore problem. The IRS could not point to success in a similar request for information.

After describing his credentials and providing a brief background on the goals of the summons, the affidavit moved to a brief introduction followed by an overview of the use of offshore tax havens. This latter section tracked the John Doe Report, provided a history of the growth of the offshore industry for tax avoidance, and summarized the reports detailing that history starting with the Gordon Report in 1981. The affidavit provided a brief description of each of the reports cited in West's 1998 John Doe Report tying these reports into the concerns giving rise to the requested summons.

Section III of the affidavit, which addressed the "Use of Credit and Debit Cards in Offshore Schemes," detailed the specifics of the use of credit cards to avoid detection of money placed in offshore accounts. West explained not only how the use of credit cards facilitated the scheme to avoid detection, but also how he came to understand the scheme. In this section, the information gained from John Mathewson served as a key-

stone because of the personal knowledge Mr. Mathewson had concerning credit card usage. Added to that personal knowledge, however, were discussions of the brochures used by the offshore promoters and the information from their web sites. The totality painted an unmistakable picture of the use of credit cards to get around the problem of secretly repatriating funds placed offshore.

Section IV detailed court cases and investigations involving offshore cards. Joe West described the recent cases of several individuals uncovered by the IRS through its audit process. These cases represented the typical types of cases that lead to the approval of a John Doe summons because they demonstrated that the IRS had found a problem that it was addressing on an individual basis that also likely involved a wider, as yet unknown, group.

Section V explained why the IRS had chosen to seek information concerning credit cards issued by banks located in specific countries. Section VI described the summonsed parties, explaining how American Express and MasterCard maintained their data and how that data would assist the IRS in identifying specific taxpayers using credit cards as a likely part of a scheme to under-report their federal income taxes. The final section of the report concluded that, based on the information described in the affidavit, a reasonable basis existed for obtaining the requested information in order to ascertain the identities of persons not paying the proper amount of taxes.⁸⁶

Many parallels exist between the report and the affidavit accompanying the John Doe summons request. Joe West did his homework before he went to Court. It showed in the detailed nature of the affidavit and the persuasiveness of the information provided. The Court took almost no time in approving the request;⁸⁷ however, the approval of a John Doe summons and the receipt of the information requested in the summons are not one and the same. Approval simply gives the IRS the right to serve the summons on the named parties, which it undoubtedly did shortly after approval.⁸⁸ Because Joe West had interviewed both American Express and MasterCard for his report, the service of the John Doe summons should

86. JOHN DOE REPORT, *supra* note 6. In addition to the supporting affidavit of Joe West, the John Doe summons package also contained a supporting affidavit from Jack Blum. Mr. Blum's affidavit focused on international business corporations, John Mathewson, credit cards, and the fact that setting up offshore corporations and credits cards was a costly endeavor likely undertaken only for the purpose of hiding income and assets.

87. *See In re John Does*, No. 1:00-cv-03919-AJ (S.D. Fla. 2000). The request was filed on October 18, 2000, and approved on October 30, 2000.

88. *See* David Cay Johnston, *Taking Aim at Tax Havens, I.R.S. Seeks Credit Card Slips*, N.Y. TIMES, Oct. 20, 2000, at A1 (reporting that "[t]he agency has asked a federal judge in Miami to issue summonses for two years' worth of records of MasterCard and American Express card transactions in the United States that were billed to bank accounts in Antigua and Barbuda, the Bahamas and the Cayman Islands"). The filing of the John Doe summons was immediately noticed.

not have come as a total shock. Still, the companies were not waiting to immediately hand over the data requested in the summonses, and a reasonable time to gather the data was needed.

B. *Getting and Using Data From the Credit Card Companies*

The docket sheet in the case indicates that on March 26, 2002 the judge entered an order requiring American Express to comply with the John Doe Summons as modified in the agreement. The docket sheet does not reveal exactly when American Express turned over the information to the IRS. There were several attempts to intervene to prevent compliance with the summons. The case was closed in January 2003, suggesting that by that point the IRS had received whatever records would be submitted. A Department of Justice Press Release on March 25, 2002, announcing the filing of the second John Doe summons for credit cards, stated that MasterCard had already produced over 1.7 million records involving over 230,000 accounts and went on to explain: "We are pleased with the information the IRS has received from MasterCard, and look forward to the information American Express has agreed to provide, and that which we expect VISA to provide in response to the summons we are now seeking to serve"⁸⁹ The docket sheet and the press release suggest that the receipt of the summonsed information for American Express arrived in late April of 2002⁹⁰ and that the information from MasterCard had not necessarily been received much in advance of the press release on March 25, 2002. So, almost eighteen months had passed since the issuance of the John Doe summons, and the IRS had little to show.

The timing of the receipt of the information from the first summons is important to the audit of the returns of the identified individuals and in the voluntary initiative offered. The summons concerned the years 1998 and 1999. By March of 2002, the normal statute of limitations for 1998

89. Press Release, U.S. Dep't of Justice, Department of Justice Seeks Offshore Credit Card Records (Mar. 25, 2002), *available at* http://www.justice.gov/opa/pr/2002/March/02_tax_176.htm.

90. *See id.* An order was entered on March 26, 2002 slightly modifying the summonsed information and reflecting an agreement by American Express to provide the information within thirty days of the order. *IRS Statement on Offshore Non-compliance*, AM. BAR. ASS'N, <http://www.americanbar.org/content/dam/aba/migrated/tax/irs/2002/offnon.authcheckdam.pdf> (last visited Aug. 11, 2012). Subsequent orders in the case further modified the summons issued to American Express to remove from the requested information the names of several interveners. *Id.* It appears that the IRS agreed to remove the interveners from the scope of the summons since they had graciously identified themselves and since the IRS did not want to delay the receipt of the information from those who had not self-identified. *Id.* On August 15, 2002, IRS Commissioner Charles O. Rossotti issued a statement providing that "[t]he Agency is taking aggressive action on this issue. The IRS is already moving forward on hundreds of credit card cases for civil audits or potential criminal investigation. The agency is committed to following up on this issue and pursuing individuals dodging their tax responsibilities." *Statement of IRS Commissioner Charles O. Rossotti on Offshore Noncompliance*, INTERNAL REVENUE SERVICE, 2002 WL 31914595 (Jan. 1, 2002).

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was about to expire and was only a year from expiring with respect to 1999. As described in the John Doe Report, the information contained in the files of MasterCard and Visa did not directly identify specific individuals because it contained insufficient identifying information.⁹¹ The summonsed data received from MasterCard, and to be received from Visa, was essentially a first step to identifying a taxpayer with an offshore credit card. As discussed in the report, additional summonses to vendors where the cards were used would be necessary to obtain sufficient identifying data for most taxpayers.⁹²

The IRS requested its second John Doe summons on the credit card project on March 25, 2002.⁹³ This summons requested information from

91. JOHN DOE REPORT, *supra* note 6, at 62. The John Doe Report states: With respect to VISA International and MasterCard International, we were able to identify that card transactional information exists in a manner that can be sorted by the specific bank that issued the card. We further determined that sufficient vendor information exists to specifically identify the vendor who was party to the card transaction. We were told that cardholder information is retained at the bank issuing the card.

.....

American Express admits to possessing cardholder information.

Id. at 62.

92. *Id.* at 63–65; *see also* United States v. John Does, No. 1:09-CV-00861-REB (D. Colo. 2009) (stating that summons related to investigation of ascertainable group of persons, there was reasonable basis for believing such group failed to comply with internal revenue law, and information could not be obtained elsewhere). Essentially, MasterCard and Visa had names of cardholders and some data about the cardholders but generally not social security numbers, addresses, and other data that would allow the IRS to move forward with an audit knowing the identity of the taxpayer with the offshore account. The MasterCard and Visa data might show that Robert Campbell (a name used here for illustration purposes) owned a credit card issued by a bank in the Cayman Islands. Because there might be 500 or 5,000 Robert Campbells in the United States, the IRS needed more data before it could effectively begin an audit. If the taxpayer had a unique name, the data from these entities might be sufficient in itself, but that situation was the exception, not the rule. So, the IRS was running out of time on the normal statute of limitations without knowing whom it needed to audit. The IRS would aggressively seek the data from the vendors in 141 John Doe summonses served between August 2002 and December 2003. *See IRS Statement on Offshore Noncompliance, supra* note 90. The IRS stated:

In this new round of John Doe summonses, the IRS is seeking limited information from companies to help identify people using offshore credit cards.

In our initial steps, we have received significant information from the MasterCard data. However, in some cases we need more information to precisely identify the specific people using these cards.

To obtain or verify the actual names of some of these individuals, the IRS needs to take this additional step of going to some of the merchants where the offshore credit card users made purchases.

Id.

93. *See* Mem. in Supp. of John Doe Summons, *In re* Tax Liabilities of John Does, No. 04-21986 CIV-UNGARO-BENAGES (S.D. Fla. 2004) (“On March 27, 2002, the Northern District of California . . . issued an order approving the service of a ‘John Doe’ summons upon VISA International.”).

Visa, and covered the years 1999, 2000, and 2001. The number of countries included in this request expanded from three to thirty. Just two days later, the court approved the summons, which was then served on Visa. On August 15, 2002, the IRS served another John Doe summons on MasterCard, expanding the scope to include additional jurisdictions and years, and the order authorizing service was issued on August 20, 2002.⁹⁴ On August 29, 2002, the IRS petitioned seven U.S. district courts across the country for vendor information relating to the MasterCard data received by the IRS in connection with its first John Doe summons.⁹⁵

By the time the IRS gathered enough data to place cases in the hands of revenue agents, the cases were much older than “normal” cases placed into the audit stream. This meant that agents were receiving cases that would almost certainly have the three-year statute of limitations on assessment expire before the agents could complete their audits. Revenue agents receive much training and instruction on the importance of not allowing a statute of limitations to expire. Receipt of cases that almost by definition required them to complete a blown statute report did not sit well with the agents as a group or their managers. Through the Offshore Voluntary Compliance Initiative (Revenue Procedure 2003-11), issued on January 27, 2003, the IRS offered taxpayers the chance to come out of the cold and volunteer that they had under-reported their taxes by using undeclared offshore accounts. Taxpayers who made “voluntary disclosures” prior to a deadline could avoid criminal prosecution and minimize their exposure to civil penalties. Taxpayers who did not participate in the voluntary initiative were unlikely to sign statute waivers agreeing to extend the statute of limitations on assessment. As a result, revenue agents with these cases generally needed to examine more recent years for which they did not have credit card data in addition to making a fraud case for the early years in order to keep the statute of limitations on assessment open.

The Department of Justice press release issued at the time of the filing of the John Doe summons to Visa indicated that the IRS had received information on 230,000 accounts from its summons to MasterCard involving just three tax haven countries.⁹⁶ The IRS was also receiving data from

94. See *In re Tax Liabilities of John Does*, No. 02-22404-CIV-UNGARO-BENAGES (S.D. Fla. 2002).

95. See Barbara Kallenberg Affidavit at 39, *In re Tax Liabilities of John Does*, No. 05-04167-JW (N.D. Cal. 2005) [hereinafter Kallenberg Affidavit]. The IRS filed a total of twenty-six petitions seeking summonses on 141 merchants. See *id.* at 39–40 (providing detailed list in chronological order of all credit card summonses). On February 21, 2006, the United States District Court for the Northern District of California, in case No. C 05-04167 JW, issued an order approving service of a “John Doe” summons on PayPal, Inc. See *In re Tax Liabilities of John Does*, No. 05-04167 JW (N.D. Cal. Feb. 21, 2006).

96. Press Release, U.S. Dep’t of Justice, *supra* note 89. On November 7, 2002, Sara M. Coe, the tax litigation examination manager for Chief Counsel, IRS (SBSE) stated in a meeting of the D.C. Bar tax section’s Tax audits and Litigation Committee that “[f]rom the information received, the IRS has sent the first 1,000 cases to the field; some of those have been referred to the Service’s Criminal Inves-

American Express and Visa, which it had to integrate with the information received from the 141 vendor summons that were ultimately served. This influx of data created a situation in which the IRS could not realistically pursue all of the individuals suspected of offshore credit card ownership. The individuals who did not accept the IRS offer of penalty relief through the procedure outlined in Revenue Procedure 2003-11 were not inclined to cooperate with the examination of their returns. These audits required the agents to dig through third party information and were time-consuming. The agents generally did not have significant training or experience in these types of audits or in tracking information by going through offshore accounts. Consequently, the IRS did not have the success it might have hoped for in the credit card project.⁹⁷

C. Moving Forward

The problem of having too many potential cases and not enough agents or time to pursue them all does not mean that the credit card project was a failure.⁹⁸ The project was a great success in getting the IRS moving against offshore tax evasion even if it did not gather the information on offshore credit card holders in time to pursue the earlier years.⁹⁹ The progression of John Doe summonses following the initial cases demonstrates the effectiveness of the project set in motion by Joe West, and that project is still going strong today. The subsequent John Doe cases and their relationship to the project envisioned by Joe West bear some analysis.

tigation Division By April [of 2003] the IRS will have trained 1,400 revenue agents to work on the offshore credit card cases" Sheryl Stratton, *Disclosure Initiative Sought for Offshore Credit Card Crackdown*, 97 TAX NOTES 745 (2002).

97. See Lederman, *supra* note 3 (discussing generally programs with focus on offshore initiatives). The IRS hopes for a high volume of acceptance of an offer such as the one it made in Revenue Procedure 2003-11. To receive a high volume of acceptance, the IRS must convince the targeted audience that the consequence of failing to accept is worse than accepting. The inability to process all of the cases to audit or to get as many acceptances as it might have hoped for has more importance with respect to the voluntary compliance initiative and for future initiatives than for the success of the overall project. The need to follow up with people not agreeing to come forward serves as an important component of a successful compliance initiative.

98. For further discussion of the project by Commissioner Rossotti and Reporter David Cay Johnston suggesting the project's importance, see *supra* note 5 and accompanying text.

99. Telephone Interview with Jack Blum, *supra* note 13. The brief focus of the discussion here was the timing of the information and the unfortunate effect that had on the ability to audit the individuals who did not voluntarily disclose. Civil audits were only one aspect of the credit card case. Criminal prosecutions were another important component. On that score the IRS had reasonable success. A number of high profile individuals and promoters were identified through the initial phases of the credit card project, resulting in numerous successful prosecutions. Jack Blum especially noted the criminal prosecutions and the impact of those prosecutions in discussing the success of the credit card project.

The initial wave of credit card summonses occurred from October 2000 through December 2003.¹⁰⁰ Essentially, all of the summonses issued during this phase were built using the format adopted for the first summonses: (1) experience of the agent, (2) a brief description of the project, (3) a description of the reports detailing offshore noncompliance, (4) detail on taxpayer use of credit cards, (5) references to prosecuted cases, (6) the data sought via information held by the summonsed party, and (7) the anticipated use of the data to stop offshore evasion of taxes. Succeeding summonses cited to earlier ones and to more recent reports and prosecutions, but the format remained generally the same. The second wave of the project sought information from companies processing bank and credit card information.¹⁰¹ The first case of this second wave sought information from Credomatic, Inc., a third-party processor of bank information from tax haven countries.¹⁰² In 2004, the IRS filed three petitions to serve John Doe Summonses on such processors—one in Georgia, one in Colorado, and one in Florida.¹⁰³ The final John Doe summons in this second phase was issued to PayPal, a company used for making payments over the internet that is closely associated with eBay.¹⁰⁴

The affidavits used in the second phase continued to build on the original affidavit prepared by Joe West even though Joe West was no longer in charge of preparing the affidavits as he had departed from the offshore compliance project by the time these cases were brought. The last of the affidavits, Revenue Agent Barbara Kallenberg's PayPal case, provides the best example of how the original affidavit designed by Joe West continued to serve as a template through the second phase. Ms. Kallenberg's affidavit generally mirrored West's original affidavit, beginning with an introduction detailing Ms. Kallenberg's experience,¹⁰⁵ the goal of

100. See Kallenberg Affidavit, *supra* note 95, at 38–40. That wave included the first summons for credit card data from MasterCard and American Express, the first Visa summons, the second MasterCard summons in August 2002, and the 141 vendor summonses requested in twenty-six petitions from August 2002 through December 2003.

101. See *id.* at 40–42.

102. *In re* Tax Liabilities of John Does, No. 3-22-22177 CIV-MARTINEZ (S.D. Fla. 2004). This was filed on September 11, 2003, and approved on April 2, 2004.

103. *In re* Tax Liabilities of John Does, No. 4:04-CV-0094-CDL (M.D. Ga. 2004) (approving summons on August 16, 2004 seeking information from Total Systems Services, Inc.); *In re* Tax Liabilities of John Does, No. 1:04-CV-01548 (D. Colo. 2004) (approving summons seeking information from First Data Corp.); *In re* Tax Liabilities of John Does, No. 04-21986 CIV-UNGARO-BENAGES (S.D. 2004) (approving summons seeking information from TecniCard, Inc.).

104. *United States v. John Does*, No. 05-04167 JW (N.D. Cal. 2006). The petition was filed on October 14, 2005 and the order issued on February 21, 2006.

105. See *generally* Kallenberg Affidavit, *supra* note 95. Ms. Kallenberg's experience is much less detailed, and probably much less in general, than the experience of Joe West detailed in his affidavit. This mattered much less by 2005 because about 150 productive John Doe summonses cases stemming from the credit card program preceded the PayPal summons.

the summons,¹⁰⁶ and a brief description of PayPal. Because there was no need to change a winning formula, the format of the affidavit was not significantly altered. Kallenbeg's affidavit, however, discussed the information provided by Mathewson, the brochures dating back to the 1990s, and the use of credit cards by banks across the array of the thirty countries listed.¹⁰⁷ In addition to examining the court cases used in the original summons, this affidavit highlighted newer cases resulting from the credit card project. A history of the approved credit card summonses, a discussion of PayPal, and the value of the information in PayPal's possession concluded the affidavit.¹⁰⁸

While the IRS may not have been entirely ready to pursue all of the offshore credit card holders at the time of its penalty relief offer in 2003, it continued to work these cases and to expand its sources of information. The new sources resulted in part from leads as the IRS obtained information from investors caught by early activity or simply gained additional information not originally considered. The project continued primarily through the work of Revenue Agent Dan Reeves and by Special Trial Attorney John McDougal in Chief Counsel's office. With a knowledgeable team in place and an abundance of information gathered from the credit card summonses, the IRS was prepared when opportunity knocked in the form of an informant with insight about deposits by U.S. citizens with Swiss bank UBS. The informant's knowledge led to a deferred prosecution of UBS and an IRS John Doe summons for information from UBS for U.S. taxpayers who had signature authority to withdraw funds and make investment decisions on UBS accounts in Switzerland. The information request was limited to data on accounts for which no Form W-9 was signed by the account holder and no Form 1099¹⁰⁹ issued to the account

106. *Id.* After the first summons the IRS switched to 1999 as the opening year for its John Doe summonses. This summons requested information for the years 1999 through 2004.

107. *Id.* The expansion to thirty countries occurred in the second credit card John Doe summons, which was issued to Visa. The paragraphs from the second summons appear almost verbatim in the PayPal summons.

108. *See id.*

109. The absence of these forms strongly suggests a tax avoidance purpose since it means that the likelihood of information on the account being reported to the Service is extremely low. *See* Deferred Prosecution Agreement, *United States v. UBS AG*, No. 09-60033-CR-COHN (S.D. Fla. 2009). The Deferred Prosecution Agreement Information, at paragraph 4, states:

[UBS's] United States cross-border business provided private banking services to approximately 20,000 United States clients with assets worth approximately \$20 billion. Approximately 17,000 of the 20,000 cross-border clients concealed their identities and the existence of their UBS accounts from the IRS. . . . UBS assisted these United States clients conceal the income earned on UBS accounts by failing to report IRS Form 1099 information to the IRS. From 2002 through 2007, the United States cross-border business generated approximately \$200 million a year in revenue for UBS.

Id.

holder.¹¹⁰ Revenue Agent Dan Reeves prepared the affidavit submitted with the petition for the John Doe summons. The court approved the summons on July 1, 2008. With this summons and the attendant publicity, the IRS now had the attention of all taxpayers who ever considered hiding their money offshore to avoid U.S. taxes.¹¹¹

What began in the mid-1980s with Joe West's assignment to the audit of Wheaton Industries developed by 2012 into a situation where it is sufficiently difficult, as opposed to relatively easy, to hide assets overseas.¹¹² Few promoters advertise on the internet with the same brazen and unbridled contempt for the ability of the IRS to address their activities.¹¹³ Private bankers know their suggestions may not be completely private from the government.¹¹⁴ Finally, Congress began building on the IRS's administrative success by passing legislation that discourages banks from aiding

110. See *In re Tax Liabilities of John Does*, No. 08-21864-MC-LENARD/GARBER (S.D. Fla. 2008).

111. See *In re Tax Liabilities of John Does*, No. 1:09-cv-00861-REB (D. Colo. 2009); *In re Tax Liabilities of John Does*, No. 3:09-cv-02290-N (N.D. Tex. 2009); *In re Tax Liabilities of John Does*, No. 11-1686 (N.D. Cal. 2011). The UBS John Doe summons is not the last. The IRS continues to use the John Doe summons to gather information on offshore activities and continues to use the template developed in the first credit card John Doe summons. On April 13, 2009, in Case No. 1:09-cv-00861-REB, the District Court for the District of Colorado approved the issuance of a John Doe summons seeking information of U.S. merchants with merchant sales agreements with First Data Corporation to process credit cards involving software provided by First Atlantic Commerce from 2002 through the date of the petition. Dan Reeves prepared the accompanying affidavit. On December 12, 2009, in Case No. 3:09-cv-02290-N, the District Court for the Northern District of Texas approved the issuance of a John Doe summons to obtain information about the clients of Stanford Group Co. and Stanford Trust Co. Ltd. from 2002-2008 that had an interest in, or signature authority over, accounts at these institutions. Dan Reeves prepared the accompanying affidavit. On April 7, 2011, in Case No. 11-1686, the District Court for the Northern District of California approved the issuance of a John Doe summons to obtain information about customers with direct or indirect interests in, or signature authority over, accounts maintained by HSBC India from 2002-2010. Dan Reeves prepared the accompanying affidavit.

112. This does not mean, however, that the Service has won the war against evading taxes through offshore investment. On January 12, 2012, Stephanie Trilling reported that the Service is moving into new areas of inquiry. Stephanie Trilling, *Tax Evasion: Globalization, Tax Evasion Sharpen IRS Focus on International Issues, Agency Officials Say*, DAILY TAX REPORT (Bloomberg BNA), Jan. 12, 2012. "Experts estimate that the Americans now have \$1 trillion—trillion with a T— in assets offshore and illegally evade \$40 [billion] to \$70 billion in U.S. taxes each year [through] offshore tax dodges," said Monika A. Templeman, director of IRS employee plans examinations in Baltimore at a conference." *Id.*

113. See, e.g., *Quatlosers Hall of Shame*, QUATLOSERS, http://www.quatlosers.com/terry_neal.htm (last visited Jan. 11, 2012) (presenting examples of United States citizens arrested for tax fraud and tax evasion).

114. See Press Release, U.S. Dep't of Justice, Manhattan U.S. Attorney Charges Three Swiss Bankers with Conspiring to Hide More than \$1.2 Billion in U.S. Taxpayer Accounts from the IRS (Jan. 3, 2012), available at <http://www.justice.gov/usao/nys/pressreleases/January12/berlinkafreiandkellerindictment.htm>.

and abetting in the hiding of money.¹¹⁵ By the time the IRS offered its voluntary compliance initiatives in connection with the information developed in the UBS case,¹¹⁶ the IRS had demonstrated a commitment for over a decade to pursuing information about offshore accounts. Declining to participate in the voluntary disclosure thus placed taxpayers at significant risk of civil and criminal penalties.

V. LESSONS LEARNED—APPLYING THE KNOWLEDGE GAINED
BY OBSERVING JOE WEST

The credit card project, which evolved into the offshore compliance initiative, resulted from the drive and vision of Joe West. West, in the course of auditing one taxpayer who engaged in extensive use of offshore accounts to hide income and assets, chose to look beyond this one case to see a path for pursuing all taxpayers engaged in similar offshore activity. How can the IRS learn from the success Joe West achieved and apply that learning to attain similar success in other areas of tax law in need of visionary thinking?

The length of the audit in such cases bears some mention. The Service prefers that taxpayer audits not span lengthy periods of time. Prolonged audits create significant burdens on taxpayers, as well as drain the IRS's limited resources. Yet, in some cases in which the information proves difficult to obtain, audits can take quite some time. Still, eight years pushes the limit. Because of the internal pressures to close this case, Joe West, Willie Garofalo—an attorney assigned to assist during the audit phase—and others close to the case managed to convince their superiors that continuing with the audit in the face of significant reporting requirements due to the age of the case was worthwhile.¹¹⁷

In managing cases that present steep fact-finding challenges, the IRS must balance issues of resources and timing against the productivity of continuing to pursue these cases. Where the Service can significantly learn from a matter or can significantly alter noncompliant behavior, investing resources in a case makes sense. In many ways, this model forms the basis for the Criminal Investigation Division where the average number of hours on a case and the average time frame for a case greatly exceeds the same averages in the Service's examination or collection functions. The extra time spent by the Criminal Investigation Division does not ordinarily result in an increased collection on the individual case worked but results, hopefully, in a benefit to the overall tax system. Because of the publicity of such criminal cases, taxpayers are instilled with

115. See generally U.S. SENATE PERMANENT SUBCOMM. ON INVESTIGATIONS, TAX HAVEN ABUSES: THE ENABLERS, THE TOOLS AND SECRECY (2006).

116. See Lederman, *supra* note 3 (discussing generally voluntary compliance programs with focus on offshore initiatives).

117. See Interview with William Garofalo, *supra* note 23. During the time he was working on the *Wheaton* case, William Garofalo was Special Litigation Assistant with the Newark District Counsel's Office within Chief Counsel, IRS.

the perception that noncompliant tax behavior may result in significant penalties. The Service must apply the same—or a similar—theory to certain examination and collection cases that do not warrant criminal referral.

In the collection area, the Service realized the need for special enforcement cases at about the same time the John Doe summonses against credit card companies took off. The creation of the Abusive Tax Avoidance Transactions (ATAT) unit allowed revenue officers to pursue difficult collection cases without the time pressure of normal collection case inventory. Special ATAT groups were formed where higher graded revenue officers were trained to use the more sophisticated techniques available under the Internal Revenue Code in order to pursue the more difficult collection cases.¹¹⁸

Allowing certain employees time to pursue cases is a necessary component of encouraging creative solutions. On the other hand, time spent on a case is a precious commodity at the IRS given the vast amount of cases that need attention in relation to the number of employees available to work those cases.¹¹⁹ The IRS should therefore consider other factors which have been identified as encouraging creativity: (1) matching individuals and domains; (2) education and training in cognitive skills; (3) certain clusters of personality traits; (4) innate ability in certain domains;

118. See Memorandum from the Director of Collection Policy for the Director, Advisory and Insolvency Directors, and Collection Area Operations (Dec. 15, 2011) (addressing aging of ATAT and suit development cases). In a memorandum dated December 15, 2011, Scott Reisher, IRS Director, Collection Policy, directed a change in the Internal Revenue Manual to allow the computer coding on ATAT cases and suits to collect flexibility to change so that it did not show these types of cases as overage. This small coding change reflects the importance not only of ATAT cases, but also of the label “overage.” Much of the management of examination and collection cases turns on the age of a case in the inventory of the assigned employee and the supervisor. With age being a primary driver of action, difficult cases that might lead to the type of revelations turned up by Joe West in the Wheaton audit get overlooked in the rush to meet the allowable time frames. The challenge is to strike a delicate balance between picking appropriate cases for turning off the overage switch as Collection Policy is doing in the ATAT cases and prodding a revenue agent or revenue officer to complete a case of minor significance. Case completion goals serve an important function in managing a large inventory within a large bureaucracy, but those goals must allow room for exceptional cases that can lead to exceptional results. The ATAT program recognizes this balance and has the potential to significantly serve overall enforcement goals.

119. See T. Keith Fogg, *Systemic Problems with Low-Dollar Lien Filing*, 133 TAX NOTES 88 (2011) (discussing ACS). The lack of employee resources led to the creation of programs such as Correspondence Examinations and Automated Collection Sites in order to process as many cases with as little time commitment as possible. Those units do not encourage creativity or reflection but promote productivity at the cost of individualism and observation. See *id.* at 4 (noting that “only the taxpayers ‘lucky’ enough to owe a large amount of federal taxes receive . . . individual service”). This does not mean high volume units are bad. They serve a useful purpose, but creativity and new approaches to problems are not among the purposes they serve because the employees in these units have no time to reflect. They receive little or no encouragement to engage in creativity.

and (5) intellectual playfulness and freedom from external constraints.¹²⁰ The spark of creativity need not come from a random process. Structure can serve a useful purpose in promoting creativity but it must be a structure that promotes and allows creative ideas to emerge.¹²¹ The IRS cannot simply identify and wall off a select group of individuals to find solutions to major problems. For individuals to identify such solutions, they need grounding in the underlying issues, but once a case leads to a new problem or a new approach to a problem, the IRS needs to foster, as it did with Joe West, space for creativity to emerge.¹²²

Just as the military has evolved from armies standing on opposite sides of a field in a huge battle to small strike forces using significant technological advances to stop the enemy, the IRS must also evolve. Having a revenue agent show up with a briefcase to look over accounts in an individual case from one or two years prior to the audit was never going to stop the movement of money offshore. The IRS needed to find strategies that exposed taxpayers, confronted them with real risks, and imposed appropriate sanctions. The tools necessary to meet the current needs may require more fact research skills than simply the audit skills needed in the past. Joe West used the knowledge gained from his experience with an audit as a springboard for fact investigation that led to an effective mechanism for exposing taxpayers moving money offshore and removing the expected veil of secrecy.¹²³ His creative spark, like so many before him, may have simply come from the diligence applied to the problem in front of him.

The IRS should study exactly what happened to allow Joe West to crack the nut of offshore secrecy. The IRS should also make case studies of this and similar matters a part of its training for executives and upper level managers, charging them to foster such creativity with other problems. In this way, the IRS will better face emerging challenges.

120. See Teresa M. Amabile, *The Social Psychology of Creativity: A Componential Conceptualization*, 45 J. PERSONALITY AND SOC. PSYCHOL. 357, 361-63 (1983).

121. See Jacob Goldenberg et al., *Creative Sparks*, 285 SCI. 1495, 1496-96 (1999); see also Mel Rhodes, *An Analysis of Creativity*, 42 PHI DELTA KAPPAN 305, 305-10 (1961).

122. See Malcolm Gladwell, *Creation Myth: Xerox PARC, Apple, and the Truth About Innovation*, NEW YORKER (May 16, 2011), http://www.newyorker.com/reporting/2011/05/16/110516fa_fact_gladwell.

123. See JOHN DOE REPORT, *supra* note 6. The detail of research demonstrated in his report and the type of research indicates he was not a typical accountant simply reviewing a taxpayer's books and records. In the mid-1990s he was significantly engaged in researching the internet and finding sources of information that would assist him in exposing offshore activities. He was using interview techniques with individuals like Mathewson, bankers, promoters, credit card companies, and others to gather his data. He was not simply reviewing what a particular taxpayer was presenting, but was actively seeking data from a wide variety of sources. This type of fact-finding zeal formed the basis for his creative ideas on how to approach the problem. The facts he gathered in the 1990s continue to find their way into affidavits supporting John Doe summonses issued fifteen years later. See *id.*

VI. CONCLUSION

Joe West set in motion a remarkable action plan which allowed the Service to make significant strides in attacking the tax evasion supported by the offshore banking industry in tax haven countries and the correspondent banks and financial services industries within the United States. His efforts continue to have a significant impact as the Service grapples with the Swiss¹²⁴ following the UBS revelations.¹²⁵ By identifying and promoting the type of creativity shown by Joe West, the Service could improve its ability to break down barriers to compliance in many areas. The difficulty in a large bureaucracy comes in identifying the right individuals and giving those individuals the tools needed to pursue innovative and necessary courses of action. While this Article focuses on Joe West and his remarkable achievements, the real heroes in this Article also include the supervisors who allowed Joe West to spend too long working one case, who motivated him to work hard to find an answer, and who supported him in that quest. Those heroes also include the individuals who picked up what Joe West started and continued it in the decade-long pursuit of information about offshore account holders. In the face of shrinking resources and increasing pressure to manage cases due to challenging time frames, can the managers and executives at the Service find a way to identify and foster more employees like Joe West who may have the creative spark to make a huge difference?

124. See Randall Jackson, *U.S. Offers 11 Swiss Banks Deal to End Tax Evasion Investigation*, 134 TAX NOTES 71 (2011).

125. See Kevin McCoy, *IRS to Seek Charges Against Some UBS Clients*, USA TODAY (Nov. 17, 2010), http://www.usatoday.com/money/perfi/taxes/2010-11-16-irs-ubs_N.htm. A 2009 settlement agreement allowed U.S. authorities to use the tax treaty information exchange provisions to obtain information regarding over 4,000 American clients of UBS who held secret accounts with the Swiss banking giant. As part of the settlement, the IRS withdrew a legal summons filed against UBS, but IRS Commissioner Douglas Shulman announced a crackdown on offshore tax evasion. The Service and the Department of Justice have been pursuing other banks in Switzerland and elsewhere.