

Can You Take The Fifth When The IRS Knocks?

By Robert W. Wood

Everyone knows something about Miranda warnings and “taking the Fifth.” Just about every cop TV show or episode of “Law & Order” reminds us of these basic principles. The police have to Mirandize you, and you are entitled to say nothing, even in court. If the prosecutor asks a question, you can say, “I refuse to answer on the grounds that I may incriminate myself.” There are limits of course, but most people think of these rights as fundamental, applying across just about every alleged crime. But does it work with taxes and the Internal Revenue Service?

Not usually. Many people find that a shock. After all, remember the case of IRS official Lois Lerner, who ran the IRS tax exempt organizations unit that was accused of targeting conservatives? She didn’t want to answer questions about the IRS targeting of conservative groups.

So she took the Fifth Amendment. And although Congress held her in contempt, the Obama administration declined to prosecute her. Private taxpayers aren’t usually so lucky when it comes to their own tax returns and investigations.

In fact, merely invoking the Fifth Amendment in a tax case can invite penalties and can be enough to get the IRS looking even more harshly at you. Let’s start with tax returns themselves. You have to file them and you have to report your income.

Way back in 1927, the U.S. Supreme Court considered a man with illegal source income. He refused to file a tax return, claiming that to do so would incriminate him. In *U.S. v. Sullivan*, 274 U.S. 259 (1927), the Supreme Court said that didn’t work. The court held that Sullivan had to file a tax return and pay his taxes.

It was too bad if disclosing illegal income opened himself up to prosecution. Even a criminal must file tax returns and pay taxes. And you have to do it accurately. It’s worth remembering that Al Capone was convicted of tax evasion, not of the many murders, bribes, and extortion he probably committed.

So you file your tax return and hope for the best. What if the IRS asks you questions you are afraid to answer? Answering IRS questions in an audit or investigation can be nerve-wracking. To be safe, you should almost always tell the IRS that you do not want to talk to them without your lawyer present.

Not speaking up without your lawyer present is generally a good policy. Ask your lawyer what is fair to discuss. But actually *claiming* Fifth Amendment protection in taxes cases is not easy. It can even be a big mistake.

One of the biggest issues involves books and records. You have to keep them in order to fulfill your tax filing obligations. You even have to keep bank account records for accounts outside the U.S.

Of course, keeping undisclosed offshore bank accounts is a tax crime and can even qualify as money laundering. So, if the IRS asks you if you have any foreign bank accounts, can you take the Fifth?

The good news is that yes, you can. Still, it probably won’t help you. In fact, even if you claim the Fifth, the IRS can hand you a document request. Often, it will be a generic IRS missive called an “information document request.”

You can refuse, but that will prompt the IRS to issue a summons. You can refuse to answer that too, but the IRS will take you to court. The courts almost always agree with the IRS on summons enforcement, so the court will probably order you to comply.

But, doesn’t your constitutional right to take the Fifth trump the IRS? Not always. Ironically, you can refuse to *talk*, but you *cannot* refuse to produce the documents. Sure, your own private papers are personal records, and if they might incriminate you, they are protected by the Fifth Amendment.

But there is an exception that eats up this protection. The “required records doctrine” operates as an exception to Fifth Amendment protections. In some cases, it says that you *must* hand over the documents no matter how incriminating they are.

The basic idea is that the government legally requires you to keep certain records if you want to engage in certain activities, so you have to keep them anyway. The government has a right to inspect the records to make sure you are complying with a government program. In that sense, these required records are not *fully* your records. That is the theory, anyway.

And the IRS and prosecutors have exploited it. You might *think* that you would be able to take the Fifth. But pleading the Fifth in response to a subpoena for foreign account records causes even more trouble than claiming it on your tax returns.

Required records are those where the reporting or record-keeping scheme has an essentially regulatory purpose, where a person must customarily keep the records the record-keeping scheme requires him to keep, and the records have “public aspects.” This sounds technical, but the courts routinely find these three conditions to be met. In the case of foreign bank records particularly, the courts uniformly deny Fifth Amendment protection.

Numerous district courts and seven circuit courts have *all* given the IRS a free pass. Taxpayers have argued that handing over records — or even admitting that these records *exist* — would provide the government with incriminating evidence shielded by the Fifth Amendment. But in each case, the courts have said that no Fifth Amendment protection applies.

Despite repeated requests, the U.S. Supreme Court has not been willing to hear this issue. So, is it likely that the Fifth Amendment will be much help on your taxes? Not really. In most cases, of course, a tax audit is only civil and there is relatively little risk that it will become otherwise.

Still, a majority of criminal tax cases come directly out of civil tax cases. The IRS civil auditors “refer” a case to the IRS Criminal Investigation Division. The IRS civil auditor will not tell you this is occurring, so the first time you hear about it, your case may have gone from bad to worse. Be careful out there.



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