

Subpoena for tax documents enforced despite protections

By Robert W. Wood

In taxes, there's a difference between lawyers and accountants. Because of attorney-client privilege, the Internal Revenue Service generally cannot make your lawyer testify or produce documents. Attorney-client privilege is strong. That way clients (in both civil and criminal cases) will be forthcoming with their lawyers.

Accountants, however, don't have this privilege. If you make statements or provide documents to your accountant, he or she can be compelled to divulge them. Accountants do have a limited tax preparation privilege contained in Section 7525(a)(1) of the tax code. However, it is inapplicable to criminal tax cases.

In sensitive tax matters, the answer to this quandary is the *Kovel* letter, from *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961). Your tax lawyer hires an accountant importing attorney-client privilege to the accountant's work and communications. However, recent IRS lawsuits are eroding the *Kovel* arrangement or applying it more strictly.

For example, in *United States v. Richey*, No. 09-35462 (9th Cir. Jan. 21, 2011), the 9th U.S. Circuit Court of Appeals refused to protect an appraisal that a taxpayer, lawyer and accountant were trying to keep from the IRS. In *United States v. Hatfield*, 2010 WL 1423103 (E.D.N.Y. April 7, 2010), the court forced disclosure of discussions between the lawyer and accountant. Fortunately, attorney-client privilege is rarely tested in this context.

Yet in a new twist on privilege in the tax arena, a divorce lawyer facing federal tax evasion charges was ordered to turn over her tax records to the government. The divorce lawyer delivered the records to her tax lawyers and doubtless assumed they would be protected from the IRS's prying eyes in the hands of her lawyers. However, even her tax lawyers were ordered to turn over the records.

In *United States v. Sideman & Bancroft*, No. 11-15930 (9th Cir. Jan. 8, 2013), the 9th Circuit ruled that Mary Nolan's 2007 and 2008 tax records are not shielded by attorney-client privilege. Moreover, although producing the documents may well incriminate her, the court found that they come within a recognized exception to the Fifth Amendment: Her tax preparer can describe them with particularity, rendering their existence a foregone conclusion.

The *Sideman & Bancroft* case is about key documents and who can get them. Nolan was indicted in September for tax evasion and for allegedly conspiring with a private investigator to eavesdrop on her clients' spouses. The government issued a subpoena for the documents several years ago, and that triggered a fight over the tax records.

The subpoena covered four banker's boxes and three accordion files containing check ledgers, client billings, credit card statements, day planners and more. Nolan had originally supplied the records to her accountant to prepare her tax return. The same day the IRS executed a search of Nolan's home and office, the accountant gave the documents to Nolan's civil tax attorney, who in turn provided them to her criminal tax lawyer at Sideman & Bancroft.

The Fifth Amendment protects your right against self-incrimination. That includes providing incriminating documents. But there are exceptions, and one of them is for documents whose existence was a foregone conclusion. A district court ordered the enforcement of the summons, finding that the foregone conclusion exception to the Fifth Amendment applied.

After all, before the IRS issued the subpoena, it knew with reasonable particularity of the existence of the documents and who had possession of them. The IRS could also independently establish their authenticity based on the tax preparer's familiarity with them. For the foregone conclusion exception to apply, the government must establish its independent knowledge of the existence of the documents, their authenticity and the possession or control of the documents.

The district court found that the IRS had met these conditions, so it ordered the enforcement of the subpoena. The 9th Circuit affirmed. Although it arguably has a very narrow scope, it is possible that the government will be emboldened by this decision.

Indeed, on a very basic level, it suggests that sometimes there is no shield on documents even in the hands of tax lawyers. Some clients may assume that merely placing tax records in the hands of their tax lawyers instead of accountants serves to automatically shield them. This new decision says that where these tax records were already used for return preparation and already provided to an accountant, merely transferring them to a lawyer will not be enough to shield them.

It is also worth noting a larger pattern here. The government is having other successes on tax records as well. In *In re Grand Jury Investigation M.H.*, 648 F.3d 1067 (9th Cir. 2011), the 9th Circuit allowed prosecutors to compel someone to produce his own offshore account records even though they were self-incriminating. The 7th Circuit held to the same effect in *In Re Special February 2011-1 Grand Jury Subpoena*, No. 11-3799 (7th Cir. Aug. 27, 2012).

These decisions involve another exception to the Fifth Amendment. Under the Required Records Doctrine, it doesn't violate your right against self-incrimination if: (1) the government's inquiry is essentially regulatory; (2) the information is a preserved record of a kind customarily retained; and (3) the records have taken on public aspects making them analogous to a public document.

These matters unfold like this. The IRS and Department of Justice are investigating, trying to determine if you used offshore bank accounts to evade taxes. The grand jury issues a subpoena demanding records you are required to keep under the Bank Secrecy Act of 1970 — that's the law requiring annual FBAR filings to disclose your foreign bank accounts. You try to quash the subpoena based on your Constitutional privilege against self-incrimination, since handing over the records clearly would incriminate you.

But the courts are saying the Required Records Doctrine trumps your Fifth Amendment privilege. Sure, the government has to establish the three elements of the Required Records Doctrine. Once they do, however, you have to hand over the documents no matter how incriminating they are. The Fifth Amendment doesn't allow you to refuse to produce them.

If there's a bottom line to all of this it is probably simply to be aware of these developments and to get professional help early.



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