No Fifth Amendment Privilege For Offshore Banking Records

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Under the Fifth Amendment to the U.S. Constitution, a taxpayer may refuse to answer specific questions or produce specific records if it would violate his or her privilege against self-incrimination. In a recent appellate case, the taxpayer was under a grand jury investigation as to whether he used undisclosed Swiss bank accounts to evade taxes. The taxpayer claimed that the Fifth Amendment protected him from having to provide his records relating to his foreign bank accounts. More specifically, a subpoena was issued for the taxpayer to produce "[a]ny and all records required to be maintained pursuant to 31 C.F.R. § 103.32 [subsequently relocated to 31 C.F.R. § 1010.420] relating to foreign financial accounts that you had/have a financial interest in, or signature authority over, including records reflecting the name in which each such account is maintained, the number or other designation of such account, the name and address of the foreign bank or other person with whom such account is maintained, the type of such account, and the maximum value of each such account during each specified year."

The information identified in the subpoena mirrors the banking information that 31 C.F.R. § 1010.420 2 requires taxpayers using offshore bank accounts to keep and maintain for government inspection. The information the subpoena seeks is also identical to information that anyone subject to § 1010.420 already reports to the IRS annually through Form TD F 90-22.1, known as a "Report of Foreign Bank and Financial Accounts," or "FBAR."

The taxpayer argued that the information he provided could be used to prosecute him criminally if it conflicts with other information he provided to the IRS. He also argued that if he had to deny he had such information, he could be guilty of a felony of not meeting legal requirements to maintain such records.

Notwithstanding the risk of criminal prosecution relating to responding to the record requests, the Ninth Circuit Court of Appeals held that the Fifth Amendment privilege did

not apply under the "Required Records Doctrine." This exception to the privilege applies under *Grosso v. U.S., 21 AFTR 2d 554 (S Ct 1968)* if:

a. The purpose of the government's inquiry is regulatory and not criminal prosecution. Here, the government's purpose under the Bank Secrecy Act was essentially regulatory. It was important to the Court that the activity being regulated (participation in offshore banking) is not inherently unlawful, and thus information reporting in regard to it is not essentially related to criminal prosecution.

b. And, the information requested is contained in documents of a kind the regulated party customarily keeps. In this situation, bank customers would generally keep basic account information both to comply with required reporting of offshore bank information and to be able to access their accounts.

c. And, the records have public aspects which render them at least analogous to public documents. The records here had public aspects because individuals had to retain them for five years and provide them to the government upon request. Further, such records were required to be kept to aid in the enforcement of a valid regulatory scheme.

Thus, taxpayers under investigation in regard to offshore bank accounts will not be able to rely on the Fifth Amendment to deny access to their banking records.

In re: M.H., 108 AFTR 2d Para. 2011-5203

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