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Randy Bruce Blaustein

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Constitutional Technicalities in Criminal Tax Cases

by Randy Bruce Blaustein

Because taxation is a division of accounting, it might seem at the outset, that the most basic of defenses available in a criminal tax case is to dispute the government's contention that the debits and credits were not reported correctly. As important as that defense might be, there are numerous cases in which, instead, constitutional defenses are heavily relied upon. This article focuses on a series of tax cases decided on constitutional issues.

The violation of a citizen's prescribed constitutional rights make invalid the introduction of specific evidence in court. Administration of tax law is no exception; it is not uncommon to find that violations of the Fifth and Sixth Amendments, among others, occur during the investigation of criminal tax matters. It is, of course, unrealistic to believe that consideration of these issues will at all times be found valid. However, if successful, these violations may decide the case.

One of the most basic of all tax questions is the fundamental legality of the tax system. In the case of *W. C. Douglas*, his objections to payment of income tax were two-fold: while contending that payment of tax may be used to anti-American advantages, his major objection was the unconstitutionality of income tax. This alleged unconstitutionality was his sole justification for failure to file a tax return.

In a 1973 decision by the 5th Circuit Court of Appeals. *U.S. v. W.C. Douglas*, 476 F.2nd 260, the court held that the fact that the taxpayer willfully failed to file a return as a means of political protest was not a defense. The appellant, a medical doctor, was a self-styled "super" patriot. Dr. Douglas's philosophy was that the federal government, because of

the influence of certain communists or communist sympathizers, had given monetary and other forms of aid to enemies of the United States. He felt that to contribute to this aid by paying taxes would be treason. The taxpayer advocated the repeal of the Sixteenth Amendment because the income tax itself is unconstitutional. He, also, thought the tax to be illegally administered because it is not levied equally on all citizens.

For the years 1966 and 1967 Dr. Douglas filed a form 1040 with only his name, address, signature and the words "UNDER PROTEST" written across the face of the return. Section 7203 of the Internal Revenue Code, which makes it a misdemeanor to willfully fail to file a tax return, supply information or pay tax, was found to be violated.

Double jeopardy provides that no person shall be subject to prosecution for the same offense more than once. This defense was used by Joseph Page in his federal tax case. Prior to a federal indictment being issued for tax evasion, Page entered a plea of guilty to New York State charges for making false and fraudulent tax returns. The same income tax data was used in the preparation of both returns. The taxpayer argued that the use of the same income tax data in the two sets of returns (federal and state) constituted a single offense.

The District Court, 65-2 USTC 9582, made the analogy that the offenses were as distinct as two hold-ups with the same pistol. The defendant was not placed in double jeopardy. He was indicted both by the State of New York and the federal government for tax evasion for the same years, having committed two distinct crimes. The crimes had nothing in common, except the use of the same income tax data.

The Sixth Amendment states in part that "[i]n all criminal prosecutions, the accused shall enjoy the right...to have the assistance of counsel for his defense." The 4th Circuit found in *U.S. v. Hefner*, 420 F.2nd 809 (1970), that the appellant was deprived of such constitutional guarantee. Hefner had furnished false and fraudulent statements of federal income tax withholding to his employer. When this situation was brought to the

attention of the Internal Revenue Service, special agents of the Intelligence Division made a preliminary investigation and subsequently arranged for an interview with Hefner on two occasions. At the first interview he was advised by the agents that he was not required to furnish any information which might tend to incriminate him, and that anything he said could be used against him. However, Hefner was not advised at either interview that he could retain counsel to assist him.

The court's attention was focused on a narrower issue than the violation of a constitutional right; that issue being the failure of a government agency to scrupulously observe rules or procedures which it has established. The procedure in question is contained in I.R.S. News Release #897, which stated in part that "[i]f the potential criminal aspects of the matter are not resolved by preliminary inquiries and further investigation becomes necessary, the special agent is required to advise the taxpayer of his Constitutional rights to remain silent and to retain counsel."

The court concluded that the admission of a special agent's testimony concerning incriminating statements made by a defendant at an interview without the agent having complied with prescribed procedures was not permissible. The fact that the procedures established by the I.R.S. for protecting Constitutional rights of persons suspected of tax fraud during investigations were more generous than the Constitution required, and that the instructions were not promulgated in a formally labeled regulation, was of no significance.

In a similar case, a woman who was engaged to the appellee informed the Intelligence Division that her fiancée might be guilty of income tax evasion. She then proceeded to detail certain information about business transactions, bank accounts, etc. As the information received was vague the case was referred to the Audit Division to determine the existence of any additional tax liability. The revenue agent concluded that over \$100,000 in income was not reported and that there were indications of fraud. The case was then routinely referred to the Intelligence Division which con-

ducted a criminal investigation.

The Court found, in *U.S. v. Robson*, 477 F.2d 13 (1973), that where a revenue agent made the same type of civil audit that he conducted in all cases, regardless of initial impetus from the Intelligence Division, and that he had no interim conferences with Intelligence representatives, and was under no obligation to report to them unless his audit uncovered an indication of fraud, no Miranda-type warnings were required. The fact that an informant's tip led to the audit originally and came from the Intelligence Division did not mean that the revenue agent was an agent of the Intelligence Division. Therefore, there was no violation of due process in the agent's failure to give warnings required to special agents of the Intelligence Division.

The lack of confidentiality between an accountant and his client was the issue in the case of *Lillian Couch*, since it eventually led to self-incrimination. In a recent Supreme Court case, *Couch v.*

U.S., No. 71-889, (Jan. 9, 1973), the petitioner claimed that her privilege against self-incrimination would be violated if an I.R.S. summons requiring certain of her books and records in the possession of her accountant was enforced. The court held that the summons should be enforced. The privilege against self-incrimination did not apply to a taxpayer's records that were in the possession of her accountant even though she retained ownership. The privilege is personal and protects possession rather than ownership. Personal compulsion against the taxpayer was lacking since the records were in the accountant's possession. In a related issue the court ruled that the taxpayer's claim that the confidential nature of the accountant-client relationship gave rise to an expectation of privacy, thus preventing production of the records under the Fourth and Fifth Amendments, was not recognized. No confidential accountant-client privilege exists under federal law.

Because there is no confidential accountant-client relationship, any attorney who retains an accountant during a fraud case should issue a formal retainer letter. Other factors to protect the client would be for the accountant to be paid directly by the attorney and for an agreement to be written which states that the accountant's workpapers were the property of the attorney. The accountant would then be protected from compulsory disclosure of subsequent worksheets, communications and taxpayer's records.

The examples cited above are only an indication of the realm from which defenses may be drawn. Constitutional defenses are basic even to tax cases and obviously should not be overlooked. Unfortunately, many of the decisions rendered in the U.S. Court of Appeals are not consistent among circuits; therefore, what might be considered unconstitutional in one circuit may be acceptable in another.

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