



HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

August 13, 1974

To: Honorable Patrick A. Gleason, Chairman, Select Committee on State Contract Practices of the Pennsylvania House of Representatives

From: David Richman, Special Counsel

Re: Legal Opinion as to Validity of Legislative Subpoena for Personal Income Tax Returns

Under the present state of the law, a legislative committee may subpoena and inspect copies of a taxpayer's federal income tax returns provided only that (a) the contents of the returns are relevant to the authorized subject of committee inquiry, and (b) the taxpayer does not assert his Fifth Amendment privilege against self-incrimination in refusing to produce the returns.

My research discloses one case directly in point. In United States v. O'Mara, 122 F. Supp. 399 (D.D.C. 1954), a Senate investigating subcommittee issued a subpoena calling for copies of the defendant's income tax returns for several specified years. On the defendant's refusal to comply, he was charged with contempt of Congress and brought to trial in federal district court where he argued in defense that the Internal Revenue Act immunized tax returns against compulsory production or disclosure. Rejecting this contention, the court stated succinctly that "the statutory privilege does not apply to the taxpayer's own copies." Id. at 400.

The holding in O'Mara that copies of income tax returns are not inherently privileged against compulsory process represents what is distinctly the majority view. O'Mara itself was cited with apparent approval by the United States Supreme Court in St. Regis Paper Co. v. United States, 368 U.S. 208 (1961), a case in which the FTC issued a statutory demand for copies of certain reports filed by the defendant with the Census Bureau. In refusing to turn over the requested copies (sought in connection with an investigation of antitrust violations), the defendant claimed that the reports were confidential. The Supreme Court sustained the Commission's entitlement to the copies and said in dictum:

"Moreover, although tax returns, like these census reports, are made confidential within the government bureau, Internal Revenue Code of 1954, §§ 6103, 7213 (a), copies in the hands of the taxpayer are held subject to discovery." (Footnote omitted) Id. at 218-19.

O'Mara is only unique in the respect that the issue of the privileged character of income tax returns arises there in the context of a legislative demand. Generally, the issue has been litigated in civil damage actions as in the leading Pennsylvania authority, Kine v. Foreman, 205 Pa. Superior Ct. 305 (1965). In that case, a judgment debtor refused to comply with a subpoena for copies of his income tax returns pursuant to an action to enforce an outstanding judgment. The trial court imposed sanctions for non-compliance, defendant appealed, and the Superior Court affirmed holding that the federal statutory prohibition against disclosure by government officials of income tax returns "in no way extends to the person making the returns when requested to do so by a court of competent jurisdiction," Id. at 312. Accord, 5A Anderson, Pennsylvania Civil Practice, § 4011.226, p. 167 ("Income tax returns are not privileged communication but, if relevant, are subject to production in evidence in civil actions. Copies of the Federal income tax returns in the possession of a party are not privileged,"); Currier v. Allied New Hampshire Gas Co., 101 N.H. 205, 137 F. 2d 405 (1957) (Personal injury action; held, in private litigation, litigant may be ordered to produce copies of his tax returns where material); Connecticut Importing Co. v. Continental Distilling Co., 1 F.R.D. 190, 192 (D. Conn. 1940).

Although O'Mara represents the only decision involving a legislative subpoena for tax returns, the legality of a grand jury subpoena for such records was sustained in United States ex rel. Carthan v. Sheriff, City of New York, 330 F. 2d 100 (2d Cir. 1964), cert. denied, 379 U.S. 929. Reviewing a conviction for contempt for non-compliance with a subpoena duces tecum, the Court of Appeals turned aside as "without substance" the claimed statutory privilege said to shelter federal income tax returns. Citing O'Mara, the court said (Id. at 100):

The disclosure of tax returns which is forbidden by both federal and state law to protect the integrity of the tax reporting and collecting system is an unauthorized disclosure of the filed returns, directed primarily against employees of government in the taxing departments. Disclosure by the taxpayer himself of his copies of returns is not an unauthorized disclosure, even though it be made by reason of legal compulsion.

It should also be noted that a taxpayer whose income tax returns are properly demanded may be required to obtain copies of same from the Internal Revenue Service if he denies their possession. Reeves v. Pennsylvania R. Co., 80 F. Supp. 107 (D. Del. 1948); 4 Moore's Federal Practice § 26.61 /5 - .2/.

That a witness may avoid production of copies of his tax returns by asserting his privilege against self-incrimination was recently reaffirmed in dictum by the United States Supreme Court in Couch v. United States, _____ U.S. _____, 93 S.Ct. 611 (1973). While the theoretical bases for this position are, in my estimation, not wholly sound, no court is likely to reconsider and reject the applicability of the Fifth Amendment to compulsory production of income tax returns.

David Richman