

Defense Bar Questions Government Wins on Required Records Doctrine

By Jeremiah Coder — jcoder@tax.org

Despite having won in three federal courts of appeal, the government is misguided in its position that individuals cannot assert a Fifth Amendment privilege against producing records related to ownership of offshore bank accounts, and it is impinging on basic constitutional rights, practitioners said December 6.

At issue is the government's use of the required records doctrine to compel the production of records involving taxpayers' unreported foreign accounts. Taxpayers have argued that their Fifth Amendment right against self-incrimination shields them from having to turn over the records in response to a government subpoena, but three circuit courts have disagreed, holding in favor of the government. (For prior coverage, see *Tax Notes*, Mar. 12, 2012, p. 1359, *Doc 2012-4874*, or *2012 TNT 48-3*.)

At a criminal tax fraud and tax controversy conference in Las Vegas sponsored by the American Bar Association sections of Taxation and Criminal Justice, practitioners vigorously disputed the government's litigation rationale. Larry A. Campagna of Chamberlain, Hrdlicka, White, Williams & Aughtry said Congress cannot enact laws that abridge constitutional rights, so what the courts have essentially assumed is an implied waiver of the Fifth Amendment right. "Everyone has that right; it doesn't disappear into thin air just because Congress acts or there is a regulatory scheme," Campagna said.

Campagna said he doesn't think that opening a foreign bank account is a waiver of the right against self-incrimination, because there is no implied or knowing consent. The cases the circuit courts have relied on to uphold the required records exception to the Fifth Amendment have been misconstrued, because judges haven't adequately recognized that the precedent arose from wartime situations that predated other precedents regarding individuals' rights in the act of production, he said.

Mark E. Matthews of Caplin & Drysdale agreed that the defense bar is frustrated by a lack of attention to how production applies to foreign bank account reports. Although FBARs themselves may

not be privileged, the Supreme Court has said that producing them can be testimonial, compelled, and incriminating such that the Fifth Amendment can be relevant, he said.

There is not a regulated, auditable industry for secret bank accounts, Matthews said, adding that the government's "whole scheme is a criminal trap." And while the government may use criminal traps, the defense bar asks whether the government is then permitted to overwhelmingly convict taxpayers entirely by occasion of their own acts, he said. The circuit courts have failed to reconcile the two doctrines, he said.

Pamela J. Naughton of Sheppard Mullin Richter & Hampton LLP said the required records exception was a product of wartime necessity that the Supreme Court never really embraced again, noting that at least three Supreme Court justices have expressed reservations about the doctrine's current vitality. It is disturbing to have bureaucrats overwriting the Constitution simply by enacting a regulatory regime, she said.

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The circuit courts have essentially crammed the original three-part inquiry into a one-part test that allows the government to proceed by construing the underlying legislative act as having a regulatory purpose, not just a criminal purpose, Naughton said. There is no good analysis in the circuit courts' opinions of the public aspect or customarily kept prongs of *Shapiro v. United States*, 335 U.S. 1 (1948), she said. The legislative history of the Bank Secrecy Act clearly shows it was meant for criminal enforcement, she added.

Further, the government seems to be looking for more in its record request subpoenas than what was litigated in the courts, Naughton said. It is an open question whether taxpayers who must comply with a subpoena for FBARs can meet their production obligation by handing over only the records they kept, or if they can be required to obtain everything that the foreign bank generated regarding the account, she said. "That is well beyond what the

government argued to these circuits, and beyond what the law requires," she said.

Nanette Davis, assistant chief of the northern criminal enforcement section of the Justice Department Tax Division, said Title 31 subpoenas, apart from those related to pure FBAR violations, "are not going to change the landscape that much for an investigator or prosecutor who wants to build a case."

Naughton reiterated that there is no regulatory purpose behind the FBAR regime that actually serves to regulate for a public purpose, which is why the government's proffered examples — such as the dispensing of drugs by a pharmacist or the sale of used cars — are inapposite. "I can't imagine anything more private than someone's private personal bank account," she said.

Matthews said the Foreign Account Tax Compliance Act is the government's response to fill the gap where the FBAR regime seemed to fail. "There has been no third-party enforcer, so the FBAR regime to date has been on the criminal honor system," he said.

Ronald Cimino, deputy assistant attorney general in the DOJ Tax Division, acknowledged that the government has hundreds of ongoing investigations in which the required records exception is in play, but he said the issue is an important one for the government because it involves international boundaries. "We are using it where people have an obligation to file the FBAR, because there is nothing illegal by being a beneficiary or an account holder — that is a lawful activity. All the government asks is that [taxpayers] report it," he said.

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The government is applying the doctrine narrowly, Cimino said. "It's not being taken beyond that limited area where there is [judicial] history for its use," he said.

Davis noted that in the international area, the government doesn't have the ability to use grand jury summonses, so the required records exception helps round out its arsenal.

Nathan J. Hochman of Bingham McCutchen LLP said it is a slippery slope. "If the government can decide what needs to be done by its own regulations, and then have [a judge] say, 'OK, if it's regulated, it must be legal,' why not keep going and change the form?" he asked. Extending that theory would get the government completely out of any Fifth Amendment prohibitions, he said. ■