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THE INQUISITORIAL POWERS OF THE FEDERAL GOVERNMENT IN THIRD PARTY TAX INVESTIGATIONS

One of the questions confronting every tax adviser whose client is involved in an income tax audit is the extent of inquisitorial power available to the Treasury Department during the course of its examination. The problem becomes especially vexatious when third parties such as banks, accountants, employers, or attorneys, whose own tax liability is not being investigated, become the subject of inquiry in regard to the tax liability of another party. Upon the commencement of such an examination several questions immediately arise: What information in the possession of third parties can the taxpayer prevent the examiner from obtaining? What information can the third party withhold as a matter of privilege or right, how far must the third party go in producing the requested information?

POWERS AND LIMITATIONS IN GENERAL

The inquisitorial or visitatorial powers of the Treasury Department are vested exclusively in the Secretary of the Treasury and his delegates. These powers are extensive, and reach not only the taxpayer and his books and records, but also “any officer or employee of [the taxpayer], or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or any other person the Secretary or his delegate may deem proper.” In addition to this broad class of persons subject to investigation there is a comprehensive scope of inquiry which extends to any relevant or material books, papers, records, data, and testimony of these persons. As under the Internal Revenue Code of 1939, any request for information which the revenue agent may properly make is enforceable through the federal district court if the request is refused. In addition, the Internal Revenue Code of 1954 gives the examining agents (the secretary’s delegates) authority previously granted only to the Collector—to issue summonses requiring parties to appear with requested information, and, through a United States District Court, have non-complying parties arrested and punished

1. Int. Rev. Code of 1954, § 7602. (The delegates are the Commissioner of Internal Revenue and his agents.)
for either civil or criminal contempt. Thus it is apparent that the inquisitorial power of the Treasury is extremely broad, but this power has long been recognized as a necessary aspect of our revenue laws, and sometimes analogized to the fact-finding powers of federal grand juries.

This investigative authority is not without confines, however. Within the statute there are limitations as to the scope of inquiry, limitations upon the time and place of the examination, and restrictions against unnecessary examinations and investigations.

Scope of Inquiry. The examination must bear upon matters required to be included in the return under investigation. If the agent identifies the document with sufficient particularity and shows that it is relevant to his examination, then his examination will not be condemned under the traditional cry that it is a "fishing expedition." It is merely the arbitrary inquiry that is prohibited. However, an examining agent cannot conduct an examination of a taxpayer or his records to obtain the names of unknown and unidentified parties who may have failed to report income. Thus, a corporation could not be compelled to produce its records which would reveal the

5. E.g., McCrone v. United States, 307 U.S. 61 (1939); Sauber v. Whetstone, 199 F.2d 520 (1952), cert. denied, 344 U.S. 928 (1953) (where the purpose of confinement was to compel compliance). This case arose under § 3615 of the 1939 Code which empowered only the Collector to issue a summons.

6. Int. Rev. Code of 1954, § 7210 provides for a fine of not more than $1,000, or imprisonment for one year, or both, for failure to respond to a summons issued pursuant to §§ 7602, and 7604(b).


9. Int. Rev. Code of 1954, § 7602 provides that the investigation is confined to relevant or material data and testimony.


11. Int. Rev. Code of 1954, § 7605(b). This section does not apply where the books are those of a third person, and not the books of the one whose tax liability is in question. Hubner v. Tucker, 56-2 U.S.T.C. ¶ 9937, reharing denied but earlier opinion withdrawn, 57-1 U.S.T.C. ¶ 9362 (9th Cir., Jan. 30, 1957), Schulman v. Dunlap, 103 F Supp. 104 (S.D.N.Y. 1952) (decided under § 3631 of the 1939 Code which is identical to § 7605(b) of the 1954 Code).

12. First Nat. Bank of Mobile v. United States, 160 F.2d 532 (5th Cir. 1947); Martin v. Chandis Securities Co., 33 F Supp. 478 (S.D. Cal. 1940), aff'd, 128 F.2d 731 (9th Cir. 1942) (required further that the agent must satisfy the court that what was sought "may be actually needed").


14. McDonough v. Lambert, 94 F.2d 838 (1st Cir. 1938) (an agent sought to determine who received payment of a $10,000 check drawn by the party under examination).
identity of persons to whom payments had been made, where the
tax liability of the corporation was not under investigation;¹⁵ nor
could a trustee be compelled to disclose the names and addresses of
the beneficiaries of certain trusts who were identified only by the type
of information sought.¹⁶ However, a corporation which sought to
withhold its records to prevent disclosure of the names of stock-
holders involved in an exchange of stock between corporations
was required to produce its records.¹⁷ Although these latter two
cases appear to reach opposite results, they are reconcilable in that
the request in the former case only vaguely identified the taxpayers
under investigation by the nature of the information sought. This
information in itself could be obtained only by a laborious analysis
of many wills, in the latter case the class of persons was clearly
identified and the information sought imposed no undue burden
upon the corporation to inspect voluminous records. These cases
demonstrate that the agent does not have to specifically identify tax-
payers under investigation, but must identify them with a reason-
able degree of particularity. The agent must indicate that he is
investigating a reasonably definite individual or group and is not
just performing the examination to see what he may uncover.

Thus the scope of inquiry limitation requires the examining
agent to specify with reasonable particularity the documents or
records sought, and show that these documents or records are
relevant or material to the tax returns of a reasonably specific tax-
payer or group of taxpayers.

Time and place of examination. A corporate president has
been required to bring corporate records to the revenue agent’s
office twenty-five miles away and leave them there for an anticipated
investigation of four months’ duration.¹⁸ However, the examination
in that case had previously been attempted in the taxpayer’s office,
and after a great deal of interference by the corporate employees, the
agent resorted to the subpoena power to get the desired information.
Probably the court would not have imposed such a hardship on the
taxpayer had the corporate officers and employees not been un-
cooperative during the initial visit of the agent. Although the
retention of a taxpayer’s records for such an extended period of
time seems to be of doubtful propriety, the court indicated that the
rule as to a reasonable time and place will be elastic enough to permit
a thorough examination without undue hardship upon either the tax-

¹⁵. McDonough v. Lambert, 94 F.2d 838 (1st Cir. 1938).
¹⁸. United States v. United Distillers Products Corp., 156 F.2d 872 (2d Cir. 1946).
payer or the agent. Presumably the same rule applicable to taxpayers under investigation applies to third parties\textsuperscript{10} since section 7605(a)\textsuperscript{20} merely refers to examinations pursuant to section 7602, which does not distinguish between taxpayers and third parties.\textsuperscript{21}

Unnecessary examinations or investigations. The right to be protected against unnecessary examinations or investigations is personal to the taxpayer under investigation,\textsuperscript{22} and a third party cannot refuse to produce the requested documents on this basis. Similarly, a taxpayer whose records have been examined with respect to his own liability cannot refuse to give information from his records which is later sought with respect to another taxpayer.\textsuperscript{23} An opposite result here would virtually prevent inquiry into a taxpayer's records once the records had been examined with respect to the taxpayer's own tax liability.

Examinations barred by the statute of limitations. A restriction not set forth in the statute but implicit in the Treasury's investigative power is the rule that no examination may be made concerning tax liability for years which are barred by the statutes of limitation.\textsuperscript{24} Consequently, in order for the revenue agent to obtain information from either the taxpayer's or a third party's records after the statute of limitations has run, it is necessary that the agent allege fraud on the part of taxpayer whose tax liability is in question.\textsuperscript{25} This does not greatly burden the agent, however, since he

\textsuperscript{19} In re Wolrich, 84 F. Supp. 481 (D.C.N.Y. 1949) is a case where an accountant was required to bring his records relative to another taxpayer to an agent's office for examination. However, the reasonableness of the time and place of examination was not in issue.

\textsuperscript{20} Int. Rev. Code of 1954, § 7605(a).

\textsuperscript{21} See also In re Rivera, 79 F. Supp. 510 (S.D.N.Y. 1948), where a New York bank was required to produce records maintained by its branch in Puerto Rico relative to a resident of Puerto Rico. The court pointed out concerning the records that control and not actual possession was the important factor.

\textsuperscript{22} Schulman v. Dunlap, 105 F. Supp. 104 (S.D.N.Y. 1952) (The prohibition of "unnecessary examination" was intended to prevent harassment of the taxpayer by time-consuming repeated examinations).

\textsuperscript{23} Hubner v. Tucker, 56-2 U.S.T.C. ¶ 9937, rehearing denied but earlier opinion withdrawn, 57-1 U.S.T.C. ¶ 9362 (9th Cir., Jan. 30, 1957).

\textsuperscript{24} The general rule is that the amount of any tax imposed may be assessed within 3 years from the date of filing the return, except that a return filed early is considered as being filed on the due date. The tax may be assessed anytime in the case of fraud, a willful attempt to evade, or where no return has been filed. Int. Rev. Code of 1954, § 6501. E.g., Martin v. Chandis Securities Co., 33 F. Supp. 478 (S.D.Cal. 1940), aff'd, 128 F.2d 731 (9th Cir. 1942); In re Andrews, 18 F. Supp. 804 (D.C.Md. 1937), In re Brooklyn Pawnbrokers, Inc., 39 F. Supp. 304 (E.D.N.Y. 1941).

\textsuperscript{25} E.g., United States v. Peoples Deposit Bank & Trust Co., 112 F Supp. 720 (E.D.Ky. 1953), aff'd per curiam, 212 F.2d 86 (6th Cir.), cert. denied, 348 U.S. 838 (1954); Compare Zimmerman v. Wilson, 105 F.2d 583 (3d Cir. 1939), with Zimmerman v. Wilson, 81 F.2d 847 (3d Cir. 1936) (on the first appeal the internal revenue agent did not allege fraud).
is not obliged to disclose in detail the facts relative to the investigation;\textsuperscript{26} nor is the district court obligated to require facts showing reasonable grounds to believe that the returns were false or fraudulent where the agent testifies that his investigation up to that point has raised a strong suspicion that the taxpayer filed a false or fraudulent return for years barred by the statute of limitation.\textsuperscript{27} In the case of a suspected omission of more than twenty-five per cent of gross income,\textsuperscript{28} it appears that the test as to whether an examination can be made after the expiration of the normal three-year statute of limitations, will be similar to the test in the case of suspected fraud. In \textit{United States v. United Distillers Products Corp} \textsuperscript{29} the court allowed the examination after the running of the three-year statute, stating

> Obviously, this provision [extending assessment time in the case of an omission of more than 25 per cent of gross income] would be of no practical effect if the Bureau were barred from making the investigation necessary to ascertain such a misstatement. Nor should it be required to prove the grounds of its belief prior to examination of the only records which provide the ultimate proof.\textsuperscript{30}

**Constitutional limitations.** Both the fourth amendment,\textsuperscript{31} prohibiting unreasonable searches and seizures, and the fifth amendment\textsuperscript{32} establishing the right against self-incrimination are applicable to the inquisitorial powers of the government. However, the application of these amendments in the case of third persons from whom information is sought in tax investigations is different both in scope and degree from their normal application.

The idea that the fourth amendment’s prohibition against unreasonable searches and seizures applies to judicially enforceable subpoenas \textit{duces tecum} was a somewhat unfortunate outgrowth of

\begin{itemize}
  \item \textsuperscript{26} United States \textit{v. United Distillers Products Corp.}, 156 F.2d 872 (2d Cir. 1946).
  \item \textsuperscript{27} United States \textit{v. Peoples Deposit Bank & Trust Co.}, 112 F. Supp. 720 (E.D.Ky. 1953), aff’d \textit{per curiam}, 212 F.2d 86 (6th Cir.), cert. denied, 348 U.S. 838 (1954).
  \item \textsuperscript{28} \textit{Int. Rev. Code of 1954, § 6501(e)(1)}. In the case of an omission from gross income in excess of 25 per cent of the amount included in the return, the statute of limitations is extended to six years from the date of filing the return.
  \item \textsuperscript{29} 156 F.2d 872 (2d Cir. 1946).
  \item \textsuperscript{30} \textit{Id.} at 874.
  \item \textsuperscript{31} U.S. Const. amend. IV “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”
  \item \textsuperscript{32} U.S. Const. amend. V “nor shall [any person] be compelled in any criminal case to be a witness against himself.”
\end{itemize}
a dictum in an 1886 decision.\textsuperscript{33} To escape this prohibition the government was required to show in subsequent cases that the demanded information was material to a specific matter under investigation; privacy was often deemed paramount to the public interest in obtaining requested information.\textsuperscript{34} The United States Supreme Court in recent times has tended to revert to a more literal interpretation of searches and seizures and subordinate privacy to the public interest. However, the fourth amendment will still be applied to administrative subpoenas \textit{duces tecum} where the demands are of undue breadth or include a demand for data irrelevant to any authorized subject of inquiry.\textsuperscript{35} The new attitude of the Supreme Court toward administrative investigations is readily apparent in one of its recent decisions: "nothing more than official curiosity" may justify the inquiry. But the court qualifies its position saying, "Of course a governmental investigation into corporate matters may be such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. . . . But it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant."\textsuperscript{36} Judge Learned Hand has added an even stronger tone in drawing a distinction between searches under the subpoena power and those not so conducted.

\begin{quote}
No doubt a subpoena may be so onerous as to constitute an unreasonable search. . . . Even then, the sanction is unobjectionable, unlike a descent upon one's dwelling or the seizure of one's papers; the search is "unreasonable" only because it is out of proportion to the end sought, as when the person served is required to fetch all his books at once to an exploratory investigation whose purposes and limits can be determined only as it proceeds.\textsuperscript{37}
\end{quote}

Although the specific application of the fourth amendment will not be dealt with at this point it should be noted that the taxpayer under investigation may not prohibit the production of a third party's records on the ground that it is an unreasonable search, since that is a privilege personal to the owner of the records.\textsuperscript{38}

\begin{footnotes}
\item[33.] Boyd v. United States, 116 U.S. 616, 630 (1886), see Davis, Administrative Law § 33 at 106 (1951).
\item[34.] E.g., Hale v. Henkel, 201 U.S. 43 (1906).
\item[35.] See Davis, Administrative Law § 33 at 106 (1951).
\item[37.] McMann v. SEC, 87 F.2d 377, 379 (2d Cir.), cert. denied, 301 U.S. 684 (1937) (Emphasis added).
\item[38.] Zimmerman v. Wilson, 105 F.2d 583 (3d Cir. 1939), In re Upham, 18 F. Supp. 737 (S.D.N.Y. 1937), (Note that control and ownership, not possession, are the important factors) Schwimmer v. United States, 232 F.2d 855, 860 (8th Cir. 1956).
\end{footnotes}
The fifth amendment privilege against self-incrimination also has a limited application to the inquisitorial powers of the Treasury as applied to third parties. A third party may not refuse to produce his records for examination in the determination of another's tax liability unless in so doing he would incriminate himself. An officer of a corporation is not protected from producing corporate records even though such evidence may incriminate the officer or the corporation. However, the corporate officer may claim his constitutional privilege against self-incrimination after production and identification of the corporate records, since the Treasury does not have an unbounded right of interrogation after the records have been produced and identified.

In contrast to this impersonal treatment of corporate records for purposes of the fifth amendment, is the treatment of partnership books. Partnership books are considered to be of a personal character and a partner can properly refuse to produce them on the grounds that they may tend to incriminate him. Whether this rule will be given unlimited application regardless of the size of the partnership is questionable when viewed in the light of the Supreme Court's decision in United States v. White. There the court held that an officer of an unincorporated labor union had no right under the fourth and fifth amendments to refuse to produce union records in his possession on the ground that they might tend to incriminate either the union or himself. In so holding the court stated

The test is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only

It appears that the fifth amendment could be further limited in its applicability to administrative investigations by the so-called "quasi-public records" exception. In Shapiro v. United States, the Supreme Court held that records required to be kept by the

39. In re Friedman, 104 F Supp. 419 (S.D.N.Y. 1952)
40. Wilson v. United States, 221 U.S. 361 (1911), Hale v. Henkel, 201 U.S. 43 (1906), (Nor does the privilege extend to one who has records of a dissolved corporation in his possession) Wheeler v. United States, 226 U.S. 478 (1913)
41. See United States v. Lawn, 115 F Supp. 674 (S.D.N.Y 1953)
42. Ibid
43. 322 U.S. 694 (1944).
44. Id. at 701.
45. 335 U.S. 1 (1948)
Emergency Price Control Act became "public" and therefore could not be withheld from examination on the ground of self-incrimination. It has not been decided whether records required to be kept pursuant to the Internal Revenue Code and the applicable regulations are within this exception, but as one of the dissenters in the Shapiro case pointed out, there is no reason for not applying it to any law requiring records to be kept, including section 54(a) of the Internal Revenue Code of 1939. The "public records" doctrine, if followed in the tax field, would increase immensely the scope of the Treasury's investigative powers, especially in fraud investigations where the fifth amendment most often comes into play.

**Powers and Limitations As Applied to Specific Third Parties**

Having determined the extent of the inquisitorial powers available to the Treasury, the limitations on these powers, and the defenses available to parties upon whom the powers are exercised, the operation of these factors in regard to specific third persons may be examined.

**Accountants.** The accountant appears to be the most vulnerable of the third parties. Whether or not he is certified, the accountant like any other third person cannot refuse to turn over the taxpayer's books and records if he has them in his possession when he is served with a valid subpoena, and a refusal to comply with such a subpoena may result in liability for criminal contempt. It is also well established that the accountant like any other third party cannot claim the privilege against self-incrimination for the taxpayer. Only if he claims it for himself can the accountant assert the fifth amendment privilege, which even then will extend only to such papers and documents as belong to the accountant or are in his possession "in a purely personal capacity."

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48. Shapiro v. United States, 335 U.S. 1, 54 (1948) (dissent). Perhaps it is significant that Mr. Justice Jackson, who also dissented in the Shapiro case, later seemed to modify his opinion in favor of the quasi-public records doctrine. In his concurring opinion in United States v. Kahriger, 345 U.S. 22, 34 (1953), he stated that the privilege against self-incrimination should not be allowed to destroy the taxing power of the government.
50. Donnelly v. United States, 201 F.2d 826 (9th Cir. 1953).
52. See United States v. White, 322 U.S. 694, 699 (1944). As yet no case has defined the phrase "purely personal capacity."
Furthermore, the accountant does not have a privileged relationship with his client similar to the attorney-client privilege. In *Falsone v. United States*, the court quoted Wigmore in giving its reason for the denial of the privilege, saying

> The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of these privileges. They should be recognized only with the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice.

Even though the rules and regulations of the Treasury Department grant to an enrolled agent the same "rights, powers, and privileges as an enrolled attorney," this does not include the right to assert a privileged accountant-client relationship. Federal courts also disregard state law providing that communications between the accountant and his client shall be privileged, saying that such statutes are inapplicable to administrative proceedings between the taxpayer and the federal government. Nor will the fact that the accountant is hired by an attorney make the accountant's communications with the client or his records privileged. The two cases establishing this proposition are *Himmelfarb v. United States*, and *Gariepy v. United States*. In *Himmelfarb* a lawyer had engaged an accountant in connection with a tax fraud case against one of the lawyer's clients. The accountant had participated in several conferences with the attorney when the client was present. Later at the trial when the accountant was called as a Government witness, objection was made to the admission of his testimony because of the attorney-client relationship. However, the court held there was no privilege and analyzed the law as follows (1) If the taxpayer disclosed the information to the accountant there was no privilege. (2) If the disclosures were made by the taxpayer to the attorney in the presence of the accountant, the taxpayer impliedly authorized the attorney to make disclosures and thereby waived the privilege. (3) If the attorney made disclosures to the accountant without the taxpayer's consent the privilege would attach.

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54. *Id.* at 740, quoting Wigmore, Evidence § 2192 (3d ed. 1940).
55. 31 C.F.R. § 10.2(f) (1949) (practice of attorneys and agents before the Treasury Department)
57. *Id.* at 742.
58. 175 F.2d 924, 939 (9th Cir. 1949), cert. denied, 338 U.S. 860 (1949)
59. 189 F.2d 459 (6th Cir. 1951).
The court in applying the second rationale reasoned that since the accountant's presence was not indispensable in order for the communication to be made to the attorney, no privilege attached. In the Gariepy case an accountant was forced to testify in a tax fraud case as to the source of certain income to the taxpayer. Although the accountant was not hired by the attorney, the court reiterated the proposition that the privilege would not apply even if he had been so employed.

A rationale that has been successfully used to prevent pre-trial discovery of information relating to litigation between two private parties, is the "work product" doctrine. Under this doctrine the attorney-client privilege has been held to apply to the employment of various experts by the attorney. Since the accountant is an expert in the preparation and analysis of financial records it seems logical that the attorney-client privilege should apply when he is employed by the attorney and the work performed is turned over to the attorney. It was so held in Colonial Airlines, Inc. v. Janas, where suit was brought by the corporation against corporate officers for the improper expenditure of funds. A firm of public accountants had compiled an audit of the corporation's books. In holding that the report need not be produced for copying, the court found that it was prepared at the request of the corporation's counsel in preparation for defense of another suit and in prosecuting the suit in question, and that the regular books were available. The court reasoned that since the work was done in preparation for trial, the "work product" doctrine applied, and the report need not be produced. Whether this doctrine will be readily accepted by the courts when the problem involved is the collection of taxes rather than litigation between private parties is questionable. However, it appears to rest on firmer ground than the rationale of the Himmelfarb case.

As to the person who is both an accountant and a lawyer, the type of service performed for the client will determine the availability of the privilege. In Olender v. United States, the taxpayer employed a member of an accounting firm who was both a certified public accountant and an attorney to prepare a net worth statement.

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62. 210 F.2d 795, 806 (9th Cir. 1954).
and income tax returns for him. When the accountant-lawyer later claimed his communications with the client were privileged, the court held him to be engaged strictly in accounting work and denied him the privilege. In an earlier case it was held that an accountant who later became the firm's lawyer could not claim his communications at the time he was an accountant to be privileged although he later rendered legal advice based upon that data.63

Although the accountant's books and papers are actually transferred to an attorney such records are not privileged.64 As stated in American Jurisprudence,

The reason is obvious, the administration of justice could easily be defeated if a party and his counsel could, by transferring from the one to the other important papers required as evidence in a cause, thereby prevent the court from compelling the production of important papers on a trial.65

Nor is the accountant in a position to raise the objection that the examination or investigation is unnecessary, since this objection is available to the taxpayer alone. Thus it appears that the accountant is practically defenseless when served with a valid subpoena. However, in two situations privilege will apply. First, where information is communicated to the accountant by the attorney in the absence of the client and without the client's consent. Second, where the accountant is both an attorney and an accountant, and has obtained the information while performing legal services for his client.

Attorneys. The attorney is in a much better position to withhold information than any other third party, his best defense being the attorney-client privilege. However, the attorney cannot refuse to be sworn, but must assert the confidential privilege as the occasion arises.66 The privilege is not absolute, but extends only to documents and information received by the attorney while engaged in his

63. In re Fisher, 51 F.2d 424 (S.D.N.Y. 1931), But see Allen Sanford Gottlieb, P-H 1953 T.C. Mem. Dec. ¶ 53282 (where communications to attorney-accountant who prepared the tax returns were held privileged).
64. Palzone v. United States, 205 F.2d 734, 739 (5th Cir.), cert. denied, 346 U.S. 864 (1953). However, the fifth amendment may still be applicable. See Application of House, 144 F. Supp. 95 (N.D.Cal. 1956) (an attorney was allowed to invoke the fifth amendment for his client and withhold information in "work papers" owned by the client but prepared by the accountant and transferred to the attorney).
65. 58 Am. Jur. Witnesses, § 501 at 281 (1939)
professional capacity. For instance where the lawyer had performed clerical and bookkeeping services in the handling of a commercial bank account for his client, no confidential privilege attached. Nor does the privilege attach where the lawyer simply deposits funds in a bank for his client, or acts as a mere scrivener on transactions involving the transfer of title to real estate. Similarly, privileged communications cannot be made to the attorney in furtherance of a crime—such as tax evasion—since such advice would not be rendering a professional service but rather would be participation in a conspiracy.

Anything the taxpayer himself can assert as being privileged can be withheld by the attorney if the information or books and records are in the attorney's possession. However, the attorney-client privilege does not attach to documents solely because they are transferred to an attorney's possession, whether the transfer is made by the taxpayer or some third party. If the question of privilege is in dispute undoubtedly the attorney will want to, or have to, turn over the documents to the district judge for a determination of whether the privilege is applicable. The decision of the court in this respect is usually held to be appealable.

Both the privilege and the right to waive the privilege are personal to the client. However, the attorney should keep in mind that the client will be deemed to have impliedly waived the privilege if a third person, not the attorney's clerk or secretary, is present when the communications between the client and attorney take place.

Closely allied to the attorney-client privilege is the need for privacy and freedom from interference in preparation of the client's case for trial: This concept, embodied in the "work product" doctrine, is designed to protect the effectiveness of the lawyer's prepa-

69. Pollock v. United States, 202 F.2d 281 (5th Cir. 1953), cert. denied, 345 U.S. 993 (1953).
72. 8 Wigmore, Evidence § 2307 (3d ed. 1940).
74. Chapman v. Goodman, 219 F.2d 802 (9th Cir. 1955) (dictum).
75. 8 Wigmore, Evidence § 2327 (3d ed. 1940); see Himmelfarb v. United States, 175 F.2d 924, 939 (9th Cir. 1949), cert. denied, 338 U.S. 860 (1949).
76. 8 Wigmore, Evidence § 2311 (3d ed. 1940).
ration for trial and is incorporated into the Federal Rules of Civil Procedure encompassing pre-trial discovery. Some of the ramifications of this doctrine were discussed earlier in the discussion relative to accountants and their employment by attorneys. Since we are dealing with disclosures in an administrative proceeding in which the applicability of the Rules is somewhat questionable, and since at this stage of the examination little, if any, work will have been performed in preparation for trial, the “work product” doctrine will not be dealt with further.

Although a refusal, based on the fifth amendment, to produce requested records applies to the attorney only when he actually owns or possesses records which might incriminate him, the fourth amendment has its usual breadth and relevancy limitations. Schwimmer v. United States is illustrative. The attorney’s files were sought in connection with a grand jury investigation of one of his clients for tax evasion. The attorney had stored his files and was out of the jurisdiction at the time two subpoenas duces tecum were served upon the storing warehouse. The first subpoena requested production of all the books, records, and correspondence held by the warehouse for the attorney. The second was more limited, requesting all of the books, records, and correspondence pertaining to three named taxpayers. The court quashed the first subpoena as being so broad as to constitute an unreasonable search and seizure, but modified the second to require the disclosure of all requested information to which the attorney-client privilege did not attach. Thus it is apparent that the breadth and relevancy limitations upon a subpoena duces tecum apply to the lawyer’s files as they do to other third parties.

Banks. Banks constitute one of the major groups upon which the Treasury makes continuous demands for information and records. They too cannot assert the privilege against self-incrimination on behalf of the taxpayer, since this is a personal defense of the taxpayer. The unreasonable search and seizure prohibition of the fourth amendment has been held to be inapplicable. However,

77. Fed. R. Civ. P. 26-37
78. Palone v. United States, 205 F.2d 734 (5th Cir.), cert. denied, 346 U.S. 864 (1953), see also In re Albert Lindley Lee Memorial Hospital, 209 F.2d 122 (2d Cir. 1953).
79. Schwimmer v. United States, 232 F.2d 866 (8th Cir. 1956). The attorney may refuse to produce records tending to incriminate the client on the basis of the attorney-client privilege in appropriate cases. See note 72 supra and related text.
80. 232 F.2d 855 (8th Cir. 1956)
courts in fact do impose limitations on breadth relevancy of subpoenaed information on the ground that the inquiry is "oppressive or unreasonable." 

In *United States ex rel. Sathre v. Third Northwestern Nat. Bank*, a special agent of the Intelligence Unit wanted:

All records of cashier's checks, bank money orders and certificates of deposit purchased by, endorsed by, or paid to or for [twelve or thirteen individuals] together with any and all such paid, cashed, or honored cashier's checks, bank money orders and certificates of deposit and supporting documents and records.

Although the agent attached a note offering to check the records himself if the bank desired, the bank refused the offer and failed to obey the summons. The court held that the bank need not examine voluminous records for the purpose of finding cashier's checks, etc., of a suspected evader, where there was no showing of reasonable grounds for belief that such items even existed. Likewise, a bank cannot be compelled to unfold voluminous records containing information concerning people whose tax liability is not under examination. In *First Nat. Bank of Mobile v. United States*, the court said:

[The agent] may first obtain information as to what papers or documents are within the Bank's possession relevant to the inquiry by interrogating, under oath, an appropriate officer of the Bank. Upon a satisfactory showing by the agent that certain pertinent records or documents have a bearing upon matters required to be included in the return under investigation, the Bank would be required to produce them for the inspection of the agent, whereupon the agent would determine for himself whether or not they were relevant to his needs and take copies thereof if he so desired.

In so stating, the court modified the original order to produce, by confining it to records relevant to the taxpayer under investigation rather than allowing the original order which requested records "irrespective of whether such records also pertained to similar transactions [between the bank and] other persons or firms."

NOTES

83. 102 F. Supp. 879 (D. Minn. 1952), dismissed on stipulation of parties, 196 F.2d 501 (8th Cir. 1952).
84. Id. at 881.
85. 160 F.2d 532 (5th Cir. 1947).
86. Id. at 534.
87. Id. at 533.
As early as 1928 it was held in Cooley v. Bergin that the depositor had no proprietary interest in a bank’s books or records and, at most, could claim that such records should not be disclosed for the purpose of inflicting deliberate injury upon him. In that case the agent asked for records of deposits and withdrawals of a certain taxpayer for a period of two years. The court in upholding the agent reasoned that a proceeding to obtain the information invaded no rights of the depositor under the fourth amendment as to unreasonable searches and seizures. Nor could the bank refuse production of the records on the basis that some of the entries would relate to transactions of persons whose tax was not under investigation.

The books and papers of a foreign branch bank need not be produced, but if the branch is located in a dependency or possession of the United States the records will have to be brought forth. The case of In re Harris involved a trustee in bankruptcy who served a subpoena duces tecum upon the London office of a New York bank, requesting a transcript of the account of the bankrupt with the bank. The court refused to compel the bank to prepare the transcript on the basis that the foreign branch was not within the “control” of the main office in the United States so as to be subject to the subpoena. However, the Harris case is distinguished by the court which decided In re Rivera. There an internal revenue agent served a subpoena upon a New York bank for the production of records located in a Puerto Rico branch. In holding the subpoena valid the court said the term “foreign branches” does not include branches in the dependencies or possessions of the United States. Neither did the fact that the United States internal revenue laws were not applicable in Puerto Rico prevent the issuance and service of the summons in New York. Since the internal revenue laws were applicable to both the corporation upon whom the summons was served and the taxpayer being investigated, Puerto Rico law did not prohibit this request for information.

In summary, banks must generally obey the subpoena, but can refuse if they show:

a. that the request is unreasonably broad in scope,

b. that the records sought are not readily identifiable and conveniently obtainable,

88. 27 F.2d 930 (D. Mass. 1928)
89. 27 F. Supp. 480 (S.D.N.Y. 1939).
c. that they are not relevant to the inquiry;

d. that previous investigations of the same records have rendered further investigations unnecessary or oppressive;

e. or that the revenue agent has acted arbitrarily, capriciously, or with any motive other than to make a lawful examination.

One area of uncertainty relative to banks as third parties is the application of the inquisitorial powers to information contained in safe deposit boxes. However, since the normal contract between the bank and a safe deposit box renter places the renter in control, it would seem that a demand to produce the contents of a safe deposit box would have to be made upon the renter rather than the bank.

Employers. Most employers have a wealth of information concerning their officers and employees and therefore are frequently the subject of an internal revenue agent’s inquiry. In Local 174, International Brotherhood of Teamsters, AFL-CIO, the Internal Revenue Service suspected fraud in the tax return of one of the union’s employee-officers and was inspecting union records to verify its beliefs. However, the court of appeals held the district court’s order to produce any and all cash books, day books, bank deposit slips, cancelled checks, check stubs, loan ledger cards, individual payroll records, financial statements, and tax returns for a ten year period to be arbitrary and unreasonable. In denying the order the court said there was no showing that any specific item or document was relevant to the investigation, material to the inquiry, or that the documents were in the possession of the union. A vigorous dissent rejected the majority’s position except as to the unlimited time factor. Categorizing the majority as students of the old school of thought on the scope of administrative investigations, the dissent emphatically pointed to the more recent liberal treatment of such investigations. He suggested that the holding severely curtailed the administrative power of investigation and completely ignored the public interest. Since the order for the production of the records did not confine itself to records pertinent only to the official under investigation, the holding appears consistent with the recent cases. However, since the Internal Revenue Service sought to prove that the official had never repaid “loans” made to him, it is doubtful whether the order could have been drafted in any other form and still have obtained the necessary information. In this

92. 240 F.2d 387 (9th Cir. 1956). See also Beatty v. United States, 227 F.2d 350 (8th Cir. 1955) (an employer was required to produce his books and records for the determination of employee-independent contractor status for social security purposes).

93. Id. at 393.
respect the dissent seems to see the realities of the situation and
would appear to reach the more practical result.

In Boren v. Tucker, the request to the employer-corporation
was “to produce for examination, copying, photostating or photo-
graphing,” the general journal, cash journal, general ledger, and
payroll records and checks bearing certain signatures, all for a six
month period. The examination was being conducted in con-
nection with the income tax liability of the corporation’s president and
vice-president, who were husband and wife. In upholding the civil
contempt of the two officers and the corporation itself, the court
held that the examination was not a re-examination but a continua-
tion of a previous examination, that an examination included the
right to photostat the records, that the examination was not pre-
cluded by the possibility that a criminal prosecution might arise
from it, and that the facts showed that the records were reasonably
relevant and material. One of the major reasons the order was found
proper was the relatively short period covered by the requested
records.

It appears that the employer, as well as other third parties, will
be better advised to base his refusal to produce the demanded in-
formation upon the ground that the scope of the examination was
unduly broad, rather than upon the possible tax or criminal con-
sequences that might arise from their production.

Business Associates. Those who engage in business transactions
with the taxpayer may also be compelled to produce their records
when information regarding the taxpayer is sought. This is so
even though the books and records of the associate may have been
examined with respect to his own tax liability on a previous occa-
sion. However, in Hubner v. Tucker, the contestant who had
various dealings with the taxpayer through a dissolved corporation
and partnership was not required to produce the requested records
because the agent failed to show that any particular documents were
either relevant or material. This extremely broad request demanded

Books of account of the partnership and the corporation
relating to transactions had by that partnership and corporation
with [the taxpayers] for the years stated, together with
paid checks, invoices, correspondence, and any and all miscel-
laneous transactions [with the taxpayers]

94. 239 F.2d 767 (9th Cir. 1956)
95. Id. at 768.
96. Hubner v. Tucker, 56-2 U.S.T.C. ¶ 9937, rehearing denied but earlier
    opinion withdrawn, 57-1 U.S.T.C. ¶ 9362 (9th Cir. Jan. 30, 1957), In re Ke-
97. Note 96 supra.
98. Hubner v. Tucker, note 96 supra at 56575.
In spite of its holding that this order requiring production was not enforceable, the court said that upon a showing of relevancy, materiality, and an absence of oppression to the contestant, and subject, of course, to her personal right to invoke the fifth amendment on specific documents, the evidence would have to be produced.

If a question arises as to the taxability of stock transfers or exchanges, the agent can compel production of the corporate books in order to determine the names of individuals stockholders so that their treatment of such a transaction might be ascertained.99

Similarly, brokers are subject to having their records examined, unless the demand is oppressive or unreasonable, even though a customer may attempt to prohibit a disclosure.100

Not only are business associates' records subject to production but relevant information that their employees may be compelled to be produced as well. In Stone v. Frandle,101 the stenographer of one party was compelled to produce her stenographic notes relative to an arbitration proceeding which bore on another party's tax liability.

Hospital records are another source of information which the Internal Revenue Service may obtain upon a proper request. In the case of In re Albert Lindley Lee Memorial Hospital,102 the agent was seeking information relative to a doctor's income tax liability. The court allowed examination of the hospital records to obtain the names and addresses of patients, although the court said the nature of the patients' illness should not be disclosed to the agent. The court went on to say that as to any subsequent interrogation of the patients, "The public interest in the collection of taxes owing by a taxpayer outweighs the private interest of the patient to avoid embarrassment resulting from being required to give the revenue agent information as to fees paid the attending physician."103 In Gretsky v. Basso,104 a hospital treasurer was also required to produce the records desired by an agent, although the agent was specifically instructed not to copy the nature of any illnesses from the record. The rationale of the courts in the hospital cases is that.

102. 209 F.2d 122 (2d Cir. 1953).
103. Id. at 124.
since the doctor-patient privilege does not prohibit the disclosure of the names of the doctor's patients, the hospital should also be required to disclose the names of its patients.

**CONCLUSION**

The courts have been vigilant in balancing the interests of private parties against those of the Treasury Department in its quest for tax dollars. However, as society grows in complexity, the processes of record keeping also become more complex. Information pertaining to a thorough tax examination of a single year may be scattered throughout numerous records for several years. This puts a greater burden on a party whenever he is asked to assemble his information in order that an examination may be conducted. But a greater burden is also put upon the Treasury to make a thorough examination because of the increased number of records which it must go through in making its audit. With this in mind it appears that the Treasury will have to be given even greater latitude in tax investigations than the courts have been willing to give it thus far. As said in *United States v. Morton Salt Co.*

The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. When investigative and accusatory duties are delegated by a statute to an administrative body, it, too, may take steps to inform itself as to whether there is probable violation of the law.

Thus in the absence of some breach of the fundamental liberties, and in the interest of fairness to all taxpayers, it would seem that such a law-enforcing agency as the Internal Revenue Service, should have the right to satisfy itself that behavior is consistent both with the law and the public interest. Remembering that the administrative process is a relative newcomer to the legal system and that it has taken and will continue to take experience and trial and error

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105. 338 U.S. 632 (1950)
106. Id. at 642-43.
to fit this process into the system, to unduly restrict administrative investigatory powers appears contrary to the public interest. "The suppression of truth is a grievous necessity at best justified, if at all, only when the opposed private interest is supreme."\footnote{McMann v. SEC, 87 F.2d 377, 378 (2d Cir.), \textit{cert. dened}, 301 U.S. 684 (1937).}