



Fourth Circuit Court of Appeals Holds that Required Records Doctrine Trumps Fifth Amendment

12.18.2013

BY: THOMAS W. ALDOUS, JR.

On December 13, 2013, the Fourth Circuit Court of Appeals in *United States v. Under Seal*, 2013 U.S. App. LEXIS 24785 (4th Cir. Va. Dec. 13, 2013), held that the required records doctrine applies when the government subpoenas a taxpayer's foreign bank records. The Fifth Amendment privilege against self-incrimination is not applicable. This holding is consistent with decisions of the Second, Fifth, Seventh and Ninth Circuits.

Background. The unnamed taxpayers in the case have been under investigation for using Swiss bank accounts to conceal assets and income from the Internal Revenue Service and the Treasury Department. A grand jury subpoenaed the taxpayers' foreign bank account records, which the taxpayers were required to keep pursuant to Treasury Regulations promulgated under the Bank Secrecy Act, 31 U.S.C. §5311-25. The taxpayers moved to quash the subpoenas, citing their Fifth Amendment privilege against self-incrimination.

The Bank Secrecy Act regulates offshore banking and requires that records and reports be kept by United States citizens and residents when they enter into a transaction with a foreign financial agency. Under Treasury Regulations, U.S. citizens and residents must disclose their foreign bank accounts and must retain records for those accounts for five years. See 31 C.F.R. 1010.420. These records must contain (1) the name in which the account is maintained, (2) the number or other designation of the account, (3) the name and address of the foreign bank or other person with whom the account is maintained, (4) the type of the account, and (5) the maximum value of the account during the reporting period.

The Fifth Amendment of the United States Constitution states, "No person . . . shall be compelled in any criminal case to be a witness against himself." The Fifth Amendment bars the government from compelling a person to give self-incriminating testimony. The taxpayers argued that requiring that the offshore bank documents be kept and produced is compelled testimony when the documents were

subpoenaed in a criminal investigation.

The Supreme Court has previously held that if Congress requires persons to keep and maintain records as a means for enforcing a statute, the government can subpoena the records under the "required records doctrine" so long as three requirements are met: (1) the purposes of the United States' inquiry must be essentially regulatory; (2) information is to be obtained by requiring the preservation of records of a kind that the regulated party has customarily kept; and (3) the records themselves must have assumed public aspects that render them at least analogous to a public document. If these requirements are met, the forced production of the documents does not violate the Fifth Amendment protection against self-incrimination.

The question in this case was whether the three requirements of the "required records doctrine" had been met.

Holding. The Fourth Circuit concluded that the requirements of the Bank Secrecy Act were regulatory in nature. It did not matter that a stated purpose of the act was to further criminal investigations because the law also served a regulatory function. In addition, the subpoenaed records were of a type typically kept by a holder of any account, whether foreign or domestic.

The court also held that the records sought had public aspects. The taxpayers had argued that the bank records were private and personal documents, but the court said that the taxpayers confused the requirement that the documents assume "public aspects" with "public access." The court stated that the information obtained from the documents is shared with other government agencies and is used to form economic, monetary and regulatory policy.

The three requirements of the "required records doctrine" were met.

Implications. The Fourth Circuit's holding will further encourage taxpayers with foreign accounts to comply with their obligations. Taxpayers who believe that the United States Supreme Court will eventually reverse the trend of the circuit courts will continue to object to subpoenas of their foreign bank records, while still complying with the law. Some taxpayers may also redact provided documents to exclude information that is not required by law to be kept.

This case could affect anyone with an interest in a foreign account (whether held outright or through a business or trust), but the broader implications of this decision and those of the other circuits that have considered this issue are still being determined. A concern of some commentators is that these cases are eroding constitutional protections and providing a means for the government to obtain what was previously considered private information. Their uneasiness is reflected in Justice Frankfurter's dissent in *Shapiro v. United States*, 335 U.S. 1 (U.S. 1948), where the required records doctrine was first considered. Justice Frankfurter said, "If Congress by the easy device of requiring a man to keep the private papers that he has customarily kept can render such papers 'public' and non-privileged, there is little left to either the right of privacy or the constitutional privilege."

Related People

Related Services

- Private Client & Fiduciary Services