

INCOME TAX: GRAND JURY: Income Tax Returns must be produced under subpoena duces tecum to a Grand Jury.

July 20, 1939

FILE
83

Mr. Forrest Smith
State Auditor
Jefferson City, Missouri

Dear Sir:

This is to acknowledge receipt of your letter of July 14th in which you request the opinion of this office on the questions therein submitted. Your letter is as follows:

"A representative of the State Income Tax Department has been served with a subpoena duces tecum to appear before the Grand Jury now in session in Jackson County, Missouri, to produce and submit, for its inspection, State Income Tax Returns which were filed by certain individuals with the County Assessor of Jackson County as provided by law.

It is our opinion, and we have been so advised, that under Section 10144, R. S. Missouri, 1929, that the State Auditor or any employee in the State Income Tax Department, the County or Township Assessor or any employee thereof, any County or Township Collector or any employee thereof, has no authority to divulge any information to any person, Grand Jury or court as to the contents of any State Income Tax Return, or any information pertaining thereto.

I would like to have your written opinion as to whether or not it is permissible for any of the above mentioned officers, or employees, to produce for

July 20, 1939

the inspection of any person, Grand Jury or court, or to disclose any information in connection with the contents of such Returns under the above statement of facts."

As we understand your question from your letter, it is whether or not you are required to produce under a subpoena duces tecum in court of competent jurisdiction, or to a grand jury, state income tax returns made by an individual so that the grand jury may determine whether there has been a violation of the law in connection with said individual's return.

In your request for an opinion you refer particularly to Section 10144, R. S. Mo. 1929. The portions thereof pertinent to the question involved are as follows:

"It shall be unlawful for any person, persons or officers to divulge, give out or impart to any other person, or persons, any information relative to, or the contents of any income tax return filed under this article, or to permit any other person, or persons not connected with his office to see, inspect or examine the same; and it shall be unlawful for any person or officer to use any income tax return filed under this article in any manner whatever in connection with, or for the purpose of assessing of property tax or determining the amount of assessment of any person or corporation or to use the same in any way in making up an assessment roll. It shall be unlawful for any board of equalization, or any member thereof, or any officer to in any way permit the inspection of any such return or to use the same in any way in making assessments other than the assessment of the tax provided for in this article, and any person violating the provisions of this section shall be deemed guilty of a felony and upon conviction thereof shall be fined a sum of not less than one hundred dollars (\$100) and not more than one thou-

sand dollars (\$1,000) or by imprisonment in the penitentiary for a term of not less than two years and not more than five years, or both such fine and imprisonment as the court may deem proper; and any officer convicted for the violation of this section, the judgment of conviction shall be construed and held to be a forfeiture of the office held by such convicted person: Provided, however, that this shall not apply to the state auditor, his agents or inspectors in the discharge of their official duties in the administration of the income tax laws. The state auditor, his agent or inspector, shall have power to and be permitted to examine any income tax return on file in the office of any county or township assessor, county collector, county treasurer or the assessor, auditor or comptroller of the city of St. Louis."

Section 10141, R. S. Mo. 1929, relating to criminal prosecutions under this act, provides as follows:

"Any individual who fails or refuses to make a return at the time hereinbefore specified in each year or shall render a false or fraudulent return, shall upon conviction be fined not to exceed five hundred dollars, or be imprisoned not to exceed one year, or both, at the discretion of the court, together with the costs of prosecution."
(Italics ours.)

Cardinal rules in the construction of statutes are that all the statutes on a given subject should be read together and they should be given a reasonable interpretation and read in a practical and sensible light. In construing statutes one should try to ascertain the legislative intent. It might be well to add that the modern trend of the cases is against constructions of statutes which permit tax avoidance.

July 20, 1939

With these preliminary remarks, we come now to the real question at hand; that is, whether the income tax returns of an individual are beyond the reach of the courts in the administration of the Income Tax Law. Does Section 10144, supra, which makes it unlawful for the officers administering the Income Tax Law to divulge the contents of an individual's income tax return, prevent those officials from divulging such information or delivering income tax returns to an inquisitorial body, such as a grand jury, who are investigating the returns of certain individuals, to determine whether or not they have made false and fraudulent returns?

It will be noted that the proviso in Section 10144 says that this shall not apply to the State Auditor, his agents or inspectors, in the discharge of their official duties in the administration of the income tax laws. The word "this" refers to the inhibition in the first part of this section which makes it unlawful for the tax officials to divulge information relating to tax returns. We think that the prosecution of those who make false and fraudulent tax returns comes within the term "administration of the income tax laws" and permits the tax officials to divulge such information to the legally constituted law enforcing agencies of the state when such individual's return is under investigation. If these returns are withheld from the grand jury or other agencies of the state in the prosecution of the criminal laws for the violation of same, we are at a loss to see how anyone could be successfully prosecuted under Section 10141, supra, for rendering a false or fraudulent return unless the law enforcing officers are permitted to examine the return of the individual to determine whether a false return has actually been made by an individual.

One of the first steps in the prosecution of an individual under the statutes would be the introduction of such person's income tax return in evidence and the proving by the state that said return is false and fraudulent, and this could not be done without the tax return being introduced in evidence. On the other hand, one might be prosecuted for making a false and fraudulent return, and the individual so charged might prove his innocence by the introduction in evidence of the tax return so made by him. So what may be the sword in the hands of the prosecuting officers might be a shield for the protection of the individual himself.

There are cases in Missouri which, in our opinion, point the way to the above construction of this law. We quote from the case of Ex Parte French, decided by the Missouri Supreme Court in 1926, reported in 315 Mo. 75, 47 A. L. R. 688,

285 S. W. 513, l. c. 515, construing Section 11679, R. S. Mo. 1919, now Section 5291, R. S. Mo. 1929, relating to the question of whether the State Finance Commissioner is required to divulge certain alleged confidential matters pertaining to banks, as follows:

"We may say that the provision of the act which prevents the court in a civil case from procuring evidence, in the conduct of the trial is an unwarranted interference with the functions of the court. A leading case on this subject is *Brown v. Circuit Judge of Kalamazoo County*, 75 Mich. 274, 283, 42 N. W. 827, 830, 5 L. R. A. 226, loc. cit. 230 (13 Am. St. Rep. 438) where it is said:

'It is within the power of a legislature to change the formalities of legal procedure, but it is not competent to make such changes as to impair the enforcement of rights.'

If a litigant in a civil case is forbidden by statute to obtain evidence, otherwise available, then the power of the court to enforce his rights is impaired and a 'certain remedy' is not 'afforded'.

This is not an attempt by the Legislature to enact a rule of evidence, nor to define the effect of a certain character of evidence in making out a prima facie case.

It is an attempt to say the courts shall not have or use certain evidence, however pertinent or necessary for the proper determination of a case. It is an unconstitutional encroachment upon the proper functions of the courts. 10 R. C. L., pp. 863-867."

In the case of *In re. Millspaugh*, 307 Mo. 186, l. c. 193, 270 S. W. 110, l. c. 112, the court said:

July 20, 1939

"Taking the whole act of which this particular section forms a part, it must be concluded that the secrecy imposed was for the protection of banking interests and their patrons. This petitioner has in his possession books and papers belonging to a defunct bank, the assets of which were absorbed by the plaintiff bank in the circuit court case. The purpose of the law was not to hide legitimate evidence when the same is required by the courts in the disposition of even and exact justice as between litigants. We do not believe that it was the intent of the lawmakers, by the language used, to preclude the use of such facts as the commissioner of finance might possess in the disposition of justice in a court having on trial a civil case. We think the intent was to except both criminal proceedings and trials in the courts of civil actions from the general bar of secrecy first imposed by the law."

Also in the case of State ex rel. Ross, Commissioner of Securities v. Sevier, 69 S. W. (2d) 662, l. c. 665, wherein the court had before it for construction Section 7739, R. S. Mo. 1929, which is a statute giving the State Commissioner of Securities the right to treat certain information in his office as confidential and not subject to inspection by the public, the court said:

"The purpose of the proviso seems to be to empower the commissioner, in his discretion, to keep from the prying eyes and hands of the general public 'any information which he deems in justice to the person filing the same should not be made public.' * * * * However, it is a far different thing to say that such information shall be deemed beyond the reach of an order of a court acting within its jurisdiction. It does not appear that such is a necessary intendment of section 7739, as was apparent on the face of the statute involved in the French Case, and we do not think it should be brought in by construction."

July 20, 1939

And further, at l. c. 666, the court said:

"And as said in Wigmore on Evidence (2d E.) p. 176: 'Even where the privilege is strictly applicable, the trial Court may compel disclosure, if it appears necessary in order to avoid the risk of false testimony or to secure useful testimony."

"A person's own statement of his own taxable property * * * * to the proper official is not a privileged communication at common law." 4 Wigmore, Section 2374, Subsection 4, Page 33-34.

From the above and foregoing, and after reading many cases from other jurisdictions, it is our opinion that the individual's income tax return does not fall within the classification of privileged communications so that they may be beyond the reach of the courts in the administration of even and exact justice by litigants and in the administration of the Income Tax Law, whether it be in the prosecution of one for making false and fraudulent statements or in exacting other penalties as provided in the Income Tax Law.

CONCLUSION

It is therefore our opinion that the State Auditor, or other tax officials having the care, custody and control of the income tax returns, must, under a subpoena duces tecum issued by a court of competent jurisdiction, produce said returns for the inspection of the grand jury so that it may be determined whether there has been a violation of the law.

Respectfully submitted,

COVELL R. HEWITT
Assistant Attorney General

APPROVED:

(Acting) Attorney General