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Federal Tax Returns as Evidence in Non-Tax Cases

*Laurence Glazer**

MANY CASES deal with the use of Federal tax returns in non-tax cases. The inherent danger in subjecting tax returns to discovery at pre-trial and admission at trial, is the unnecessary disclosure of confidential information. Yet, when income tax returns are material and relevant to the claims of the parties litigant, a contention of privileged communication should not be used to defeat justice.

Although tax returns are public records,¹ they are generally kept confidential by the government.² The President is authorized to prescribe provision for public inspection of income tax returns.³ Regulations issued pursuant thereto provide in general, that a tax return of an individual is open to inspection by the individual for whom the return was made, or by his duly constituted attorney in fact.⁴ Similar provisions exist with reference to a joint return,⁵ the return of a partnership,⁶ or of an estate,⁷ trust,⁸ or corporation.⁹ Upon request, any person who is

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¹ Title 26, U. S. Code, Sec. 6103(a) (1) (1954) (hereinafter cited as I. R. C. (1954)).

² I. R. C. Sec. 7213(a) (1) (1954) in part provides:

It shall be unlawful for any officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof or source of income, profits, losses, or expenditures appearing in any income return;

³ I. R. C. Sec. 6103(a) (1) (1954).

⁴ Reg. Sec. 301.6103(a)-1(c) (1) (ii) (1961).

⁵ Reg. Sec. 301.6103(a)-1(c) (1) (iii) (1961).

⁶ Reg. Sec. 301.6103(a)-1(c) (1) (iv) (1961).

⁷ Reg. Sec. 301.6103(a)-1(c) (1) (v) (1961).

⁸ Reg. Sec. 301.6103(a)-1(c) (1) (vi) (1961).

⁹ Reg. Sec. 301.6103(a)-1(c) (1) (vii) (1961). A bona fide shareholder of record owning 1% or more of the outstanding stock of a corporation is entitled to examine the returns of such corporation and of its subsidiaries. See Reg. Sec. 301.6103(c)-1(a) (1961).

entitled to inspect a return, may secure a copy of such return.¹⁰

The use of *original* income tax returns in litigation is confined to those matters in which the United States has an interest.¹¹ However, *copies* may be used in other cases by anyone who would be entitled to obtain a copy of the return in question.¹² Thus, anyone who has a right to inspect a given tax return is entitled to use a copy of that return in any case in which he is a party.

Some cases hold that income tax returns are privileged communications between taxpayer and government, and therefore inadmissible in evidence.¹³ The purpose of the statutory provisions prohibiting disclosures of amounts of income or any particulars set forth in any tax return, is to facilitate tax enforcement; that is, taxpayers should be encouraged to make full and truthful declarations in their returns, without fear that such statements would be revealed or used against them for other purposes.¹⁴ In the cases of *Tollefsen v. Phillips*¹⁵ and *Constantine v. Constantine*,¹⁶ the courts stated that the purpose of the statute is to prevent wholesale revelations of confidential information. Under this view, the statute will not be circumvented by any indirect attack such as by resorting to inquiry of the individual who made the return with respect to its substance or contents.¹⁷

Today the great weight of authority holds tax returns to be admissible in evidence and not privileged.¹⁸ Income tax returns

¹⁰ Reg. Sec. 301.6103(a)-2 (1961).

¹¹ Reg. Sec. 301.6103(a)-1(h) (1961).

¹² *Ibid.*

¹³ *Peterson v. Peterson*, 70 S. D. 385, 17 N. W. 2d 920 (1945); *Aday v. Superior Court of Alameda*, 55 Cal. 2d 789, 362 P. 2d 47 (1961); *Maddox v. Wright*, 103 F. Supp. 400 (D. Col., 1952); *O'Connell v. Olsen Ugelstadt*, 10 F. R. D. 142 (N. D. Ohio, 1949).

¹⁴ *Webb v. Standard Oil Co.*, 49 Cal. 2d 509, 319 P. 2d 621 (1957), noted in 31 So. Cal. L. Rev. 211 (1958).

¹⁵ 16 F. R. D. 348 (D. Mass. 1954).

¹⁶ 274 Ala. 374, 149 So. 2d 262 (1963).

¹⁷ *Leave v. Boston Elevated Ry. Co.*, 306 Mass. 391, 28 N. E. 2d 483 (1940).

¹⁸ *Ex Parte Frye*, 155 Ohio St. 345, 98 N. E. 2d 798 (1951); *Hawkins v. Potter*, 44 Ill. App. 2d 314, 194 N. E. 2d 672 (1963); *Paramount Film Distributing Corp. v. Ram*, 91 F. Supp. 778 (E. D. S. C. 1950); *U. S. v. O'Mara*, 122 F. Supp. 399 (D. Col., 1954); *Kingsley v. Delaware Lackawanna and Western Ry. Co.*, 20 F. R. D. 156 (S. D. N. Y. 1957), noted in 1958 U. of Ill. L. F. 651; *Star v. Rogalny*, 22 F. R. D. 256 (E. D. Ill. 1958), noted in 1958 U. of Ill. L. F. 651.

are not privileged as a matter of law in civil litigation, where such returns are material evidence to claims of parties litigant.¹⁹ Secrecy imposed by state and federal statutes in respect to income tax returns only prohibits unauthorized disclosures by federal or state officers, and not disclosures by the taxpayer himself.²⁰

The question of the availability of tax returns as evidence, before the federal courts, usually has been raised at pre-trial under Rule 34 of the Federal Rules of Civil Procedure.²¹ While discovery under Rule 34 is more commonly used, a similar result applies to interrogatories under Rule 33.²²

Discovery provisions are to be liberally construed.²³ The court has wide discretion in determining if an income tax return shall be admitted into evidence;²⁴ and then only the portions relevant to the issues in question.²⁵ The party seeking admission into evidence must demonstrate good cause²⁶ and be prepared to show that the income tax returns are material and relevant to his claim.²⁷ The evidence to be produced need not, standing

¹⁹ *Currier v. Allied New Hampshire Gas Co.*, 101 N. H. 205, 137 A. 2d 405 (1957).

²⁰ *Application of the Second Grand Jury*, 234 N. Y. S. 2d 64 (Sup. Ct. 1962).

²¹ *Miller, Availability and Use of Non-Public Government Records and Reports in Civil Litigation*, 9 Syr. L. Rev. 163 (1958). Rule 34 of the Federal Rules of Civil Procedure, provides in part:

Upon motion of any party showing good cause therefor . . . the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged which are in his possession, custody, or control.

²² *Star v. Rogalny*, 22 F. R. D. 256 (E. D. Ill. 1958); *Tolson v. Foraker*, 192 A. 2d 919 (Del. 1963).

²³ *June v. George C. Peterson Co.*, 155 F. 2d 963 (7th Cir. 1946); *Reeves v. Pennsylvania Ry. Co.*, 8 F. R. D. 616 (D. Del. 1949); *Dulansky et al. v. Iowa-Illinois Gas and Electric Co. et al.*, 10 F. R. D. 146 (S. D. Iowa 1950).

²⁴ *Currier v. Allied New Hampshire Gas Co.*, *supra* n. 19 (granted); *Finance Commission of the City of Boston v. McGrath*, 343 Mass. 779, 180 N. E. 2d 808 (1962) (granted); *Smith v. Atco Co.*, 6 Wis. 2d 371, 94 N. W. 2d 697 (1959) (denied); *Hedges v. Neace*, 307 S. W. 2d 564 (Ky., 1957) (denied).

²⁵ *Tolson v. Foraker*, *supra* n. 22; *Maresca v. Marks*, 362 S. W. 2d 299 (Texas 1962).

²⁶ *Karlsson v. Wolfson*, 18 F. R. D. 474 (D. C. Minn., 1956); *Tolson v. Foraker*, *supra* n. 22.

²⁷ *Henry v. Baber*, 75 Nev. 59, 334 P. 2d 839 (1959); *Finance Comm. v. McGrath*, 343 Mass. 754, 180 N. E. 2d 808 (1962); *Mullins v. Baker*, 107 S. 2d

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alone, be competent or relevant.²⁸ It is sufficient if it forms a chain or link which, when connected with other evidence, will be relevant and material.²⁹ The test is whether the evidence sought tends to prove an issue.³⁰ If it so tends it cannot be excluded.³¹ Courts have refused admission of income tax returns where the moving party has failed to demonstrate either good cause³² or the materiality or relevancy³³ of the return to his claim. Where information sought is available from other reliable sources, the courts, in protecting the confidential character of income tax returns, refuse to admit a return.³⁴ While some courts have admitted returns for the purpose of contradicting testimony,³⁵ and as admissions against interest,³⁶ they have refused to admit others because they constituted self-serving declarations.³⁷ *Query*: Since tax returns are prepared under penalties of perjury,³⁸ can the court assume that such return is a self-serving declaration?

(Continued from preceding page)

57 (W. Va., 1959); *Mandell v. Yellow Cab Co. of Cleveland*, 170 N. E. 2d 301 (Ct. App. Ohio, 1958); *Hawkins v. Potter*, 44 Ill. App. 2d 314, 194 N. E. 2d 672 (1963); *American Manufacturing Co. of Texas v. Witter*, 343 S. W. 2d 943 (Tex. 1962); *Elmer v. Byrd*, 220 N. Y. S. 2d 985 (1961); *June v. George C. Peterson Co.*, 155 F. 2d 963 (7th Cir. 1946); *Connecticut Mutual Insurance Co. v. Shields*, 18 F. R. D. 448 (S. D. N. Y. 1955).

²⁸ *State ex rel. Boswell v. Curtis*, 334 S. W. 2d 757 (Ct. App. Mo., 1960).

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Wilkerson v. Newark Diner, Inc.*, 53 Del. 578, 173 A. 2d 883 (1961); *Garrett v. Faust*, 8 F. R. D. 556 (E. D. Pa. 1949).

³³ *Suffield v. State ex rel. Morrison*, 92 Ariz. 152, 375 P. 2d 263 (1962); *Smith v. Atco Co.*, 6 Wis. 2d 371, 94 N. W. 2d 697 (1959); *Cooper v. Hallgarten and Co.*, 34 F. R. D. 482 (S. D. N. Y. 1964); *Rosenkranze v. Fasano*, 202 N. Y. S. 2d 577 (1960).

³⁴ *Suffield v. State ex rel. Morrison*, 92 Ariz. 152, 375 P. 2d 263 (1962); *Di Biasso v. Gonsenhauser*, 232 N. Y. S. 2d 888 (1962); *Welty v. Clute*, 2 F. R. D. 429 (W. D. N. Y., 1939); *Garrett v. Faust*, *supra* n. 32; *Cooper v. Hallgarten and Co.*, 34 F. R. D. 482 (S. D. N. Y. 1964).

³⁵ *Davis v. Atlantic Coast Line Co.*, 227 N. C. 561, 42 S. E. 2d 905 (1947), noted in 26 N. Car. L. Rev. 73 (1947); *Wilkerson v. Newark Diner, Inc.*, *supra* n. 32; *Collins v. Farley*, 137 S. 2d; *Weikert v. Weikert*, 143 N. E. 2d 863 (Ct. App. Ohio 1956).

³⁶ *Heck v. Heck*, 63 Cal. App. 2d 470, 147 P. 2d 110 (1944); *Shenson v. Shenson*, 124 Cal. App. 2d 747, 269 P. 2d 170 (1954). See 5 Wigmore, Evidence Section 1455 (3d ed. 1940).

³⁷ *Farmer v. Associated Professors of Loyola College*, 166 Md. 455, 171 Atl. 361 (1934).

³⁸ I. R. C. Sec. 6065 (1954).

It is well established that if a party has retained copies of his income tax returns, such retained copies can be required to be produced under discovery procedures.³⁹ However, where the party has retained no copies of the income tax returns, it has been held that the taxpayer retains constructive possession of the returns filed with the Internal Revenue Service, sufficient to require production of copies thereof.⁴⁰ The right to obtain certified copies of filed returns may be exercised at the option of the taxpayer, by requesting such certified copy from the Internal Revenue office in which it was filed.⁴¹ Such certified copy does not violate the best evidence rule.⁴²

Once admitted into evidence, income tax returns have important value in a variety of actions. In both personal injury⁴³ and wrongful death⁴⁴ actions, income tax returns have been used in order to determine loss of earnings. In condemnation proceedings⁴⁵ and in actions to recover for property damage,⁴⁶ income tax returns have been used for determining the worth of prop-

³⁹ *June v. George C. Peterson Co.*, 155 F. 2d 963 (7th Cir. 1946); *St. Regis Paper Co. v. U. S.*, 368 U. S. 208 (1962); *U. S. v. O'Mara*, 122 F. Supp. 399 (D. Col., 1954); *Mandell v. Yellow Cab Co. of Cleveland*, 170 N. E. 2d 296 (Ct. App. Ohio, 1958).

⁴⁰ *Connor v. Gilmore*, 45 Del. 184, 70 A. 2d 262 (1949); *Mandell v. Yellow Cab Co. of Cleveland*, 170 N. E. 2d 296 (Ct. App. Ohio, 1958); *Gould v. Sullivan*, 54 N. Y. S. 2d 430 (1945).

⁴¹ *Reeves v. Pennsylvania Ry. Co.*, 8 F. R. D. 616 (D. Del. 1949); see text *supra* at n. 10.

⁴² *Clayton v. Canida*, 223 S. W. 2d 264 (Tex. 1949); *Collins v. Farley*, 137 S. 2d 31 (Fla. 1962).

⁴³ *Currier v. Allied New Hampshire Gas Co.*, *supra* n. 19; *Henry v. Baber*, 75 Nev. 59, 334 P. 2d 839 (1959); *Hawkins v. Potter*, 44 Ill. App. 2d 314, 194 N. E. 2d 672 (1963); *Mandell v. Yellow Cab Co. of Cleveland*, 170 N. E. 2d 296 (Ct. App. Ohio, 1958); *Tollefsen v. Phillips*, *supra* n. 15; *Kingsley v. Delaware Lackawanna and Western Ry. Co.*, 20 F. R. D. 156 (S. D. N. Y., 1957); *Wornicke v. Scheuer*, 167 N. Y. S. 2d 532 (1957); *Elmer v. Byrd*, 220 N. Y. S. 2d 985 (1961). But see *contra*, *Wilkerson v. Newark Diner, Inc.*, *supra* n. 32; *Karwaski v. Rappa*, 25 Conn. Supp. 147, 198 A. 2d 226 (1964); *O'Connell v. Olsen Ugelstadt*, 10 F. R. D. 142 (N. D. Ohio E. D., 1949); *Di Biasso v. Gonsenhauser*, 232 N. Y. S. 2d 888 (1962).

⁴⁴ *Connor v. Gilmore*, 45 Del. 184, 70 A. 2d 262 (1949). See *contra*, *Ellner v. Draper*, 11 F. R. D. 333 (E. D. N. Y. 1951).

⁴⁵ *Graham Farm Land Co. v. Commonwealth*, 363 Pa. 571, 70 A. 2d 219 (1950); *Fitzgerald v. State*, 169 N. Y. S. 2d 71 (1957). *Contra*, *Brackett v. Commonwealth*, 223 Mass. 119, 111 N. E. 1036 (1916) (denied admission of state return); *Suffield v. State ex rel. Morrison*, 92 Ariz. 152, 375 P. 2d 263 (1962) (denied admission of both state and federal returns).

⁴⁶ *Currier v. Allied New Hampshire Gas Co.*, *supra* n. 19; *Davis v. Atlantic Coast Line Co.*, 227 N. C. 561, 42 S. E. 2d 905 (1947); *Wilkerson v. Newark Diner, Inc.*, *supra* n. 32; *Hawkins v. Potter*, 44 Ill. App. 2d 314, 194 N. E. 2d 672 (1963). *Contra*, *Webb v. Standard Oil Co.*, *supra* n. 14.

erty condemned or damaged. Tax returns have been used effectively to establish that a husband and wife considered property to be owned separately, in divorce actions⁴⁷ and also in heirship proceedings.⁴⁸ Damages for breach of contract⁴⁹ have been determined by use of income tax returns. Other proceedings in which income tax returns have been effective include family status,⁵⁰ conspiracy,⁵¹ corporate affairs,⁵² and miscellaneous other actions.⁵³

The confidential character of an income tax return ordinarily should be preserved against unnecessary disclosures. But the theory of privileged communication should not be allowed to defeat justice by prohibiting production of necessary documents in judicial proceedings.⁵⁴ Where information contained in the returns is material and relevant to claims of the parties, the courts should require production of such returns.

⁴⁷ *Constantine v. Constantine*, *supra* n. 16; *Heck v. Heck*, 63 Cal. App. 2d 470, 147 P. 2d 110 (1944). *Contra*, *Peterson v. Peterson*, 70 S. D. 385, 17 N. W. 2d 920 (1945); *Weikert v. Weikert*, 143 N. E. 2d 863 (Ohio, 1956).

⁴⁸ *Estate of Neilson*, 57 Cal. 2d 733, 371 P. 2d 745 (1962).

⁴⁹ *Ex parte Frye*, 155 Ohio St. 345, 98 N. E. 2d 798 (1951); *American Manufacturing Co. of Texas v. Witter*, 343 S. W. 2d 943 (Texas, 1961); *Balkema v. Deiches*, 90 Cal. App. 2d 470 (1944); *Maresca v. Marks*, *supra* n. 25; *Jensen v. Boston Insurance Co.*, 20 F. R. D. 619 (N. D. Cal. 1957); *Rubenstein v. Kleven*, 21 F. R. D. 183 (D. Mass. 1957). *Contra*, *Smith v. Atco Co.*, 6 Wis. 2d 371, 94 N. W. 2d 697 (1959); *Garrett v. Faust*, *supra* n. 32; *Cooper v. Hallgarten and Co.*, 34 F. R. D. 482 (S. D. N. Y. 1964).

⁵⁰ *Clayton v. Canida*, *supra* n. 42.

⁵¹ *Paramount Film Distributing Corp. v. Ram*, 91 F. Supp. 778 (E. D. S. C. 1950); *Application of the Second Additional Grand Jury*, *supra* n. 20. *Contra*, *Aday v. Superior Court of Alameda*, 55 Cal. 2d 789, 362 P. 2d 47 (1961).

⁵² *Sill Properties, Inc. v. Cmag, Inc.*, 219 Cal. App. 2d 58 (1963).

⁵³ *Anti-Trust*: *Court Degraw Theatre v. Loew's Inc.*, 20 F. R. D. 85 (1957). *Partnership Accounting*: *Gould v. Sullivan*, 54 N. Y. S. 2d 430 (1945); *Shenson v. Shenson*, 124 Cal. App. 2d 747, 269 P. 2d 170 (1954). *Federal Trade Commission Proceeding*: *St. Regis Paper Co. v. U. S.*, 368 U. S. 208 (1962). *Fiduciary Relationship*: *June v. George C. Peterson Co.*, 155 F. 2d 963 (7th Cir. 1946); *contra*, *Welty v. Clute*, 2 F. R. D. 429 (W. D. N. Y., 1939). *Bankruptcy*: *In re Valecia Condensed Milk Co.*, 240 F. 310 (7th Cir. 1917); *In re Hines*, 69 F. 2d 52 (2d Cir. 1934).

⁵⁴ *Graham Farm Land Co. v. Commonwealth*, 363 Pa. 571, 70 A. 2d 219 (1950).