Taxpayers forced to allow production of Foreign Bank Account Records

The U.S. Supreme Court let stand a third circuit opinion allowing the IRS to compel foreign bank account records. The Taxpayer unsuccessfully argued that the IRS summons would violate his Fifth Amendment privilege against self-incrimination. The IRS successfully argued that an exception to the Fifth Amendment privilege applied to the compelled production of foreign bank account records.

The Fifth Amendment generally provides that no person may be compelled by the government in a criminal case to be a witness against himself. The Fifth Amendment privilege is commonly known as the privilege against self-incrimination. The self-incrimination privilege has been extended to the act of producing documents under circumstances where the produced documents are incriminating and are of a testimonial nature.

The U.S. Supreme Court has weighted in multiple times on the scope for the Fifth Amendment privilege when compelled document production has been involved. The Supreme Court held in Shapiro v. U.S. that requiring vendors to keep records of their sales did not violate the Fifth Amendment privilege. Shapiro v. U.S., 335 U.S. 1 (U.S. 1948). The Supreme Court reasoned that that there was a minimal amount of risk of violating the Fifth Amendment Privilege when Congress required the taxpayer to maintain the records at issue that were related to valid regulations that served and were directed towards a civil law purpose.

Subsequently, The U.S. Supreme Court provided three issues to analyze when deciding whether a particular law satisfied the *Shapiro* exception to the Fifth Amendment privilege in Grosso. Grosso v. U.S., 21 AFTR 2d 55421 (U.S. 1968). Under Grosso, sought after records will satisfy the Shapiro exception when:

1.) The reporting or recordkeeping scheme must have an essentially regulatory purpose;
2.) A person must customarily keep the records that the scheme requires him to keep; and,
3.) The records must have "public aspects."

Records satisfying *Grosso*, and hence that may be compelled to be produced by the government, have come to be known as satisfying the "required records" doctrine.

Title 31 of the U.S. Code generally contains the section of the U.S. Code that deal with money and banking issues. Among other issues, Title 31 requires U.S. persons to report their financial interests, or signature or other authority over, foreign financial accounts when the aggregate value of those accounts $10,000 during a calendar year. This report is known as the Foreign Bank Account Report ("FBAR"). Criminal prosecution and fines, along with significant civil penalties, may be applicable for violations for the FBAR reporting requirement.

Eli and Renee Chabot (the "Chabots") has their foreign bank account records summoned by the IRS after the IRS received information from the French movement that the Chabots maintained an account at HSBC. The Chabots sought to suppress the compelled production of their foreign bank account records through use of the Fifth Amendment privilege. The IRS won the case in

district court and the third circuit court of appeals by utilizing the "required records" exception to the Fifth Amendment privileged. The IRS has already won similar cases in the second, fourth, fifth, seventh, ninth and eleventh circuits and now had another victory at the Third Circuit. After the IRS won at the Third Circuit court of appeals, the U.S. person sought review of the case at the U.S. Supreme Court. The Supreme Court refused to review the decision of the Third Circuit Court of Appeals. Chabot v. U.S., 116 AFTR 2d 2015-5270 (3rd Cir. July 7, 2015), cert. denied 11/30/15. Accordingly, the decision of the Third Circuit is now final.

The clear trend in the U.S. appeal circuits is to allow the IRS access to foreign bank account records. Now the U.S. Supreme Court has weighed in by upholding the use of the "required records" doctrine in *Chabots'* case by denying review of the *Chabots'* case. Moreover, these cases originated prior to the Foreign Accounts Tax Compliance Act ("FATCA"), a recent law that gives the IRS a broader and more direct line of unprecedented access to foreign bank accounts than ever before.

The IRS for the time being continues to provide U.S. taxpayers with the ability to correct past errors. The IRS announced on October 16, 2015 that more than 54,000 taxpayers utilized its offshore voluntary disclosure program resulting on more than $8 billion in collections for the U.S. Treasury. However, the ability to come forward voluntary and correct past issues is not unlimited. A noncompliant taxpayer's ability to utilize the IRS' correction programs closes after the IRS the initiates contact with a potential noncompliant taxpayers or when the IRS terminates the correction programs, whichever comes first.

We live in a new world of international tax transparency, a world in which the U.S. Treasury has considerably new tools like the "required records" doctrine and FATCA to close in on noncompliant U.S. taxpayers. The risk of criminal prosecution and civil penalties are significant enhanced when the I.R.S. reaches a noncompliant U.S. taxpayer before the U.S. taxpayer reaches them.

DUGGAN BERTSCH has successfully assisted individuals and companies in their Foreign Bank and Financial Account compliance, including correcting violations of these draconian laws and rules. There are many options to correct these violations and which option to choose will require a customize analysis of your particular facts and circumstance. Please feel free to contact our office if you would like assistance in any of your tax and penalty controversy needs.

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