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Civil Procedure - Discovery - Federal Income Tax Returns Not Priviledged

Pedar C. Wold

RECENT CASES

CIVIL PROCEDURE — DISCOVERY — FEDERAL INCOME TAX RETURNS NOT PRIVILEGED — Plaintiff in a negligence action claimed loss of earnings as an item of damages. Defendant, under Federal Rule 34, filed a motion for the production, inspection and photographing of copies of plaintiff's federal income tax returns for the five years preceding the accident, supporting the motion with an affidavit of the materiality of the returns. The United States District Court *held* that the returns were not privileged by section 6103 of the Internal Revenue Code of 1954 and ordered their production. *Bush v. Chicago, Burlington & Quincy R.R.*, 22 F.R.D. 188 (D. Neb. 1958).[1]

Under Federal Rule 34, which is identical with North Dakota's Rule 34, discovery of tangible things may be had from a party upon satisfaction of the following requirements: (1) The thing to be discovered must be properly designated;[2] (2) It must be "relevant to the subject matter" of the action;[3] (3) It must be in the "possession, custody, or control" of the party from whom discovery is sought;[4] (4) The party seeking discovery must make a showing of "good cause" or "necessity";[5] and (5) The thing

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1. For a general discussion see 2 Barron and Holtzoff, Federal Practice and Procedure § 798 (1950); 4 Moore, Federal Practice 1169 (2d ed. 1950); 6 Wigmore, Evidence § 1859 (3d ed. 1940); McTavish and Casey, *Moving for the Production of Income Tax Return Copies in Civil Litigation*, 41 Iowa L. Rev. 98 (1955); Miller, *Availability and Use of Non-Public Government Records and Reports in Civil Litigation*, 9 Syracuse L. Rev. 163 (1958); Webster, *Inspection and Publicity of Federal Tax Returns*, 22 Tenn. L. Rev. 451 (1952).

2. Olson Transp. Co. v. Socony-Vacuum Oil Co., 7 F.R.D. 134 (E.D. Wis. 1944). See Mullen v. Mullen, 14 F.R.D. 142 (D. Alaska 1953).

3. Nichols v. Philadelphia Tribune Co., 22 F.R.D. 89 (E.D. Pa. 1958); Merriman v. Cities Service Gas Co., 11 F.R.D. 584 (W.D. Mo. 1951); Michel v. Meier, 8 F.R.D. 464 (W.D. Pa. 1948); Wild v. Payson, 7 F.R.D. 495 (S.D.N.Y. 1946). The following cases hold that the movant need only establish a reasonable probability that the documents sought will lead to relevant evidence: Volk v. Paramount Pictures, Inc. 19 F.R.D. 103 (D. Minn. 1950); Olson Transp. Co. v. Socony-Vacuum Oil Co., 7 F.R.D. 134 (E.D. Wis. 1944). The documents themselves need not be admissable in evidence. Connecticut Mut. Life Ins. Co. v. Shields, 18 F.R.D. 448 (S.D.N.Y. 1955); Olson Transp. Co. v. Socony-Vacuum Oil Co., *Supra*, (dictum). For specific fact situations in which the document sought was held relevant, see June v. George C. Peterson Co., 155 F.2d 963 (7th Cir. 1946); Jensen v. Boston Ins. Co., 20 F.R.D. 619 (N.D. Cal. 1957); Kingsley v. Delaware, L. & W.R.R., 20 F.R.D. 156 (S.D.N.Y. 1957); Rubenstein v. Kleven, 21 F.R.D. 183 (D. Mass. 1957); Greene v. Lam Amusement Co., 19 F.R.D. 213 (N.D. Ga. 1956); State *ex rel.* Cummings v. Witthaus, 358 Mo. 1088, 219 S.W.2d 383 (1949). In Nichols v. Philadelphia Tribune Co., *supra*, and Isrel v. Shapiro, 3 F.R.D. 175 (S.D.N.Y. 1942), the tax returns requested were held irrelevant.

4. See, *e.g.*, Beegle v. Thomson, 2 F.R.D. 82 (N.D. Ill. 1941); Orange County Theatres, Inc. v. Levy, 26 F. Supp. 416 (S.D.N.Y. 1938). Inspection of documents in the possession or control of a non-party may be ordered as an adjunct to his deposition. Eastern States Petroleum Co. v. Asiatic Petroleum Corp., 27 F. Supp. 121 (S.D.N.Y. 1938). Ordinarily, production of documents will not be ordered in connection with interrogatories, but an order may be given where "good cause" is shown. Hesch v. Erie Ry., 14 F.R.D. 518 (N.D. Ohio 1952).

5. Hickman v. Taylor, 329 U.S. 495 (1947); Tiedman v. American Pigment Corp., 253 F.2d 803 (4th Cir. 1958); Baim & Blank, Inc. v. Bruno — New York, Inc. 17 F.R.D. 346 (S.D.N.Y. 1955). There is no clear definition of "good cause" and the court has wide latitude. Relevancy and materiality, however, are important elements in the determination. Wild v. Payson, 7 F.R.D. 495 (S.D.N.Y. 1946). Rule 34 may be employed before depositions are used. Olson Transp. Co. v. Socony-Vacuum Oil Co., 7 F.R.D. 134 (E.D. Wis. 1944).

to be discovered must not be privileged.[6] It has been uniformly held that the deposition-discovery rules are to be liberally interpreted.[7]

Section 6103 of the Internal Revenue Code of 1954 classifies tax returns "public records," but provides that inspection may be had only upon order of the President and pursuant to rules approved by him, except in the case of certain state officers,[8] corporate stockholders[9] and congressional committees.[10] Section 7213 of the Internal Revenue Code of 1954 declares the unlawful disclosure of information on tax returns a misdemeanor. These statutes have formed the basis for claims that tax returns are privileged and are therefore not subject to discovery.[11]

The great weight of authority holds that tax returns are not privileged against discovery in a civil suit.[12] The courts have pointed out that the purpose of section 6103 is to prevent disclosure to those without a legitimate interest[13] and that the government has not declared that its best interests require the privilege of tax returns against discovery.[14] Several courts have held that one who raises an issue to which his tax returns are relevant has waived any privilege he might have.[15] Where the privilege is recognized,

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6. See, *e.g.*, Hickman v. Taylor, 329 U.S. 495 (1947); Michel v. Meier, 8 F.R.D. 464 (W.D. Pa. 1948). In addition to these limitations, a motion for discovery made at trial has been held too late. Hedges v. Neace, 307 S.W. 2d. 564 (Ky. 1957).

7. See, *e.g.*, Hickman v. Taylor, 329 U.S. 495 (1947). The courts allowing discovery of income tax returns almost invariably begin here in their reasoning.

8. Int. Rev. Code of 1954, § 6103(b).

9. Int. Rev. Code of 1954, § 6103(c).

10. Int. Rev. Code of 1954, § 6103(d).

11. Sometimes urged are the evidentiary privileges of government informers and of matters required by law to be reported to the government. See, *e.g.*, Nola Electric, Inc. v. Reilly, 11 F.R.D. 103 (S.D.N.Y. 1950), *cert. denied*, Reilly v. Goddard, 340 U. S. 951 (1951). It has been held, however, that the status of tax returns is a purely statutory question. United States v. Baltimore Post, 268 U.S. 388 (1925); United States v. Dickey, 268 U.S. 378 (1925); Hubbard v. Mellon, 5 F.2d 764 (D.C. Cir. 1925); Opinions of the Justices, 328 Mass. 663, 105 N.E.2d 225 (1952).

As a general rule, however, the term "not privileged" as used in Rules 26(b) and 34 is interpreted as it is in the law of evidence. United States v. Reynolds, 345 U.S. 1 (1953); Wild v. Payson, 7 F.R.D. 495 (S.D.N.Y. 1946).

12. See, *e.g.*, Konczakowski v. Paramount Pictures, Inc. 19 F.R.D. 361 (S.D.N.Y. 1946); Paramount Film Distributing Corp. v. Ram, 91 F. Supp. 778 (E.D.S.C. 1950); Connecticut Importing Co. v. Continental Distilling Corp., 1 F.R.D. 190 (D. Conn. 1940); Currier v. Allied New Hampshire Gas Co., 101 N.H. 205, 137 A.2d 405 (1957).

13. Star v. Rogalny, 22 F.R.D. 256 (E.D. Ill. 1958); Kingsley v. Delaware, L. & W. R. R., 20 F.R.D. 156 (S.D.N.Y. 1957); Karlsson v. Wolfson, 18 F.R.D. 474 (D. Minn. 1956).

14. Rubenstein v. Kleven, 21 F.R.D. 183 (D. Mass. 1957); Tollefson v. Phillips, 16 F.R.D. 348 (D. Mass. 1954).

15. Star v. Rogalny, 22 F.R.D. 256 (E.D. Ill. 1958); Rubenstein v. Kleven, 21 F.R.D. 183 (D. Mass. 1957); Kingsley v. Delaware, L. & W.R.R., 20 F.R.D. 156 (S.D.N.Y. 1957); Court Degraw Theatre, Inc. v. Loew's, Inc., 20 F.R.D. 85 (E.D.N.Y. 1957); Greene v. Lam Amusement Co., 19 F.R.D. 213 (N.D. Ga. 1956). In Nola Electric, Inc. v. Reilly, 11 F.R.D. 103 (S.D.N.Y. 1950), *cert. denied*, Reilly v. Goddard, 340 U.S. 951 (1951), the court, granting discovery of certain letters and memoranda written by defendant to the Bureau of Internal Revenue, pointed out that defendant had volunteered the information given therein and found no privilege. The court further opined that privileges against discovery should not be extended.

16. Austin v. Aluminum Co. of America, 15 F.R.D. 490 (E.D. Tenn. 1954) (Rule 34); Maddox v. Wright, 103 F. Supp. 400 (D.D.C. 1952) subpoena duces tecum-Rule 45); Loew's Inc. v. Martin, 10 F.R.D. 143 (N.D. Ohio 1949); O'Connell v. Olson & Ugelstadt, 10 F.R.D. 142 (N.D. Ohio 1949). The last two cases arose on motion under Rule 34 and were both decided by Chief Judge Jones.

Note that in Maddox v. Wright and O'Connell v. Olsen & Ugelstadt, *supra*, the courts observed that the desired information could be obtained through other discovery techniques.

In Garrett v. Faust, 8 F.R.D. 556 (E.D. Pa. 1949), *rev'd on other grounds*, 183

objection to the motion for discovery or deposition must be seasonably made[17] and carries with it the burden of proof.[18] The privilege, if recognized, relates to the communication.[19] But since copies of the return retained by the taxpayer have been held "communications,"[20] they are treated the same as returns in the government files.

Pursuant to section 6103 of the Internal Revenue Code of 1954, the Secretary of the Treasury has formulated regulations allowing inspection by an individual (or his "duly appointed attorney in fact") of his tax returns,[21] and provided for the furnishing of copies upon the payment of a reasonable fee.[22] In light of this, the majority of courts hold that a taxpayer who has not retained copies of his returns has such potential control of them that he may be ordered to get a copy and produce it for inspection and copying.[23] But after production, the courts will protect parties against unauthorized disclosure of the discovered information.[24]

What is the law in North Dakota? No case on this point has been decided by the North Dakota Supreme Court, the Eighth Circuit Court of Appeals or the Federal District Court in North Dakota. However, all three of the cases decided in the Federal District Courts in the other districts of the Eighth Circuit have held with the majority. [25]

PEDAR C. WOLD

CRIMINAL PROCEDURE — DISCOVERY — JUDICIAL DISCRETION IN TRIAL COURT — Defendant was charged with the murder of his wife. Defendant's counsel filed a motion for an order requiring the prosecuting attorney to produce the transcript of defendant's confession, taken shortly after his wife's death, so that a psychiatrist might examine it as a necessary preliminary to the psychiatric opinion he had been asked to render. The trial judge denied the motion on the grounds, "that there is no statute, case or rule in this state which in a criminal case provides for or authorizes any discovery such as defendant requests." On appeal, the Supreme Court of Michigan *held,* that an order to allow inspection of a written confession taken by a prosecuting attorney from an accused person rests within the sound discretion of the trial judge. *People v. Johnson,* 97 N.W.2d 739 (Mich. 1959).

The position many courts have taken is that the defense counsel in a

F. 2d 625 (3rd Cir. 1950), *cert. denied,* 340 U. S. 931 (1951), the court, while denying defendant's motion for discovery of tax returns under Rule 34 on the grounds that "good cause" was not shown, stated a reluctance to recognize the "no privilege" rule.

17. Wilson v. David, 21 F.R.D. 217 (W. D. Mich. 1957).

18. McNeice v. Oil Carriers Joint Venture, 22 F.R.D. 14 (E.D. Pa. 1958).

19. United States v. O'Mara, 122 F. Supp. 399 (D.D.C. 1954).

20. Connecticut Importing Co. v. Continental Distilling Corp., 1 F.R.D. 190 (D. Conn. 1940).

21. 26 C.F.R. § 458.50-.57 (1949).

22. 26 C.F.R. § 458.205 (Supp. 1957).

23. See, *e.g.,* Reeves v. Pennsylvania Ry., 80 F. Supp. 107 (D. Del. 1948), where it was also held that the movant must pay the expense involved. In Mullen v. Mullen, 14 F.R.D. 142 (D. Alaska 1953), defendant, on motion under Rule 34, was required to produce his wife's personal tax returns in the absence of denial of possession or control.

The proper form of the motion for production where there are no retained copies is to require the production of *copies;* a motion for the production of the returns is unenforceable since the Internal Revenue Service retains these in its files. See Reeves v. Pennsylvania Ry., *supra.*

24. Baim & Blank, Inc. v. Bruno-New York, Inc., 17 F.R.D. 346 (S.D.N.Y. 1955).

25. Karlsson v. Wolfson, 18 F.R.D. 474 (D. Minn. 1956); Merriman v. Cities Service Gas Co., 11 F.R.D. 584 (W.D. Mo. 1951); Volk v. Paramount Pictures, Inc., 19 F.R.D. 103 (D. Minn. 1950).