New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 256—NO. 53
THURSDAY, SEPTEMBER 15, 2016

Tax Litigation Issues

Expert Analysis

'Greenfield': Act of Production Doctrine Is Alive and Well

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In their ongoing pursuit of taxpayers who use undisclosed offshore accounts to conceal assets and evade taxation, the Internal Revenue Service and the Department of Justice have relied on regulations adopted pursuant to the Bank Secrecy Act (BSA),[1] which require taxpayers to maintain certain records relating to their offshore accounts. Taxpayers in receipt of IRS summonses or grand jury subpoenas seeking such records must choose between either producing the documents and effectively conceding their violation of U.S. tax laws, or refusing to respond to the request and risking a finding of criminal contempt. Not surprisingly, many taxpayers facing this quandary have argued that the Fifth Amendment privilege against self-incrimination precludes the government from compelling them to produce the demanded records.

Over the past five years, all eight of the circuit courts of appeals to consider this issue have held that a taxpayer's reliance on the Fifth Amendment is barred by the "required records" doctrine.[2] The U.S. Supreme Court has twice declined to hear challenges to this conclusion and, in the absence of a circuit split, it seems unlikely that this widely accepted rule of law will be examined, let alone altered, in the near future.

This month, however, offshore accountholders in New York, Connecticut and Vermont received something of a consolation prize. In *United States v. Greenfield*,[3] the U.S. Court of Appeals for the Second Circuit upheld one taxpayer's attempt to avoid production of records beyond those that he was required to maintain under the BSA. Rather, the court held that the taxpayer could still resist production of such documents through the Fifth Amendment's act of production doctrine, and that the government could only compel disclosure of the demanded documents by establishing that their production would be nontestimonial or that it would be a foregone conclusion that the records existed, that the taxpayer possessed the records, and that the records were authentic. Given the current regulatory climate, *Greenfield* serves as a reminder that the required records doctrine is an exception, and that the Fifth Amendment still offers protection against compelled production of potentially incriminating documents.

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Background

The Fifth Amendment provides, inter alia, that "[n]o person…shall be compelled in any criminal case to be a witness against himself." While the application of the Fifth Amendment is straightforward in cases where the government seeks to question a person, the analysis is more complicated when applied to documents. In the late 19th century, the Supreme Court interpreted the Fifth Amendment as protecting against the compelled production of incriminating private papers.[4] Fifty years later, as the court considered regulatory systems that required participants in certain activities to create and maintain records, the "required records" doctrine started taking shape.

The Supreme Court laid the groundwork for the doctrine in *Shapiro v. United States*, where it held that "the

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privilege that exists as to private papers cannot be maintained in relation to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subject of governmental regulation, and the enforcement of restrictions validly established."[5] As the modern American administrative state flourished, so too did regulations that essentially required individuals to maintain records of their conduct and to produce those records upon demand.

In *Grosso v. United States*, the Supreme Court addressed the potential for overreaching by identifying three "premises" for the required records doctrine: (1) the purposes of the government's inquiry are essentially regulatory (as opposed to criminal); (2) information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and (3) the records themselves are quasi-public, having assumed "public aspects" that distinguish them from an individual's private papers.[6]

This understanding—that personal papers enjoyed the Fifth Amendment's protections unless they were kept pursuant to a regulatory scheme—remained the law until 1976, when the Supreme Court abandoned *Boyd* and held that documents were no longer intrinsically protected by the Fifth Amendment.[7] In departing from precedent, however, the court did not conclude that the Fifth Amendment could never protect against the compelled production of documents. Instead, it shifted the inquiry to the act of production itself, as "the act of producing evidence in response to a subpoena…has communicative aspects of its own, wholly aside from the contents of the papers produced."[8] If the production of a document "communicate[s] information about [the document's] existence, custody, and authenticity," that act of production is incriminatory—and the Fifth Amendment applies.[9]

The "act of production" privilege applies when the "act of production itself [is] (1) compelled, (2) testimonial, and (3) incriminating, in that compliance [is] the equivalent of forced testimony as to the existence, unlawful possession, and/or authenticity of the documents, as well as a belief that the produced documents match[] those requested by [the government]."[10] If, however, "[t]he existence and location of the [documents] are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the [government's] information by conceding that he in fact has the [documents],"[11] and the government can "demonstrate with reasonable particularity that it knows of the existence and location of those documents,"[12] the act of production privilege does not apply. In such a case, production is not a matter of testimony; it is simply an act of surrender.[13]

> The U.S. Court of Appeals for the Second Circuit reversed the order requiring Greenfield to produce the records. At the outset, it made clear that none of the documents in question triggered the required records doctrine.

Under the BSA, taxpayers who elect to open offshore accounts are required to maintain for five years records reflecting:

> [1] the name in which each such account is maintained, [2] the number or other designation of such account, [3] the name and address of the foreign bank or other person with whom such account is maintained, [4] the type of such account, and [5] the maximum value of each such account during the reporting period.[14]

Over the past five years, eight circuit courts have considered and rejected attempts by taxpayers to invoke the Fifth Amendment and resist production of the records. Specifically, each court has held that the required records doctrine overrides the Fifth Amendment privilege against self-incrimination.[15] And each court depended, to a greater or lesser extent, on the Grosso factors—finding that the BSA required certain records to be kept for an essentially regulatory purpose (notwithstanding the fact that one of the BSA's primary purposes is to aid in criminal law enforcement)—and concluded that taxpayers who voluntarily decided to maintain offshore accounts could not rely on the Fifth Amendment to avoid production of the records mandated under the BSA.

'United States v. Greenfield'

This brings us to the Second Circuit's Aug. 1, 2016, decision in *United States v. Greenfield*, which addressed a 2013 summons issued to a taxpayer, a toy importer, whom the IRS identified as having had undisclosed offshore accounts as a result of a 2008 leak of documents from a Liechtenstein financial institution (Liechtenstein Global Trust, or LGT). The summons called for a wide array of financial and non-financial records including documents relating to every domestic and foreign bank account over which Steven Greenfield had signatory authority;

similar records for mutual funds, brokerage accounts and other securities accounts; Greenfield's contacts with LGT employees; legal entities owned or controlled by Greenfield; and Greenfield's personal travel (including his expired passport).[16] Greenfield refused to comply, citing his Fifth Amendment privilege against self-incrimination.

In its petition to compel compliance, filed in the U.S. District Court for the Southern District of New York, the IRS noted that it had previously obtained other documents that referenced the summoned documents and demonstrated that they existed and were in Greenfield's control in 2001. Relying on these documents, the government argued that the foregone conclusion exception applied and precluded Greenfield's reliance on the act of production doctrine. In opposing the petition, Greenfield argued that the foregone conclusion exception was inapplicable because the government could demonstrate neither his control of the purported documents, nor that the documents existed in the present day. Judge Alvin K. Hellerstein granted the IRS's petition in a brief order finding that the "existence of records relating to [the accounts at issue in *Greenfield*] is a foregone conclusion."[17]

On appeal, the U.S. Court of Appeals for the Second Circuit reversed the order requiring Greenfield to produce the records. At the outset, it made clear that none of the documents in question triggered the required records doctrine: Not only had the IRS requested records pre-dating the BSA's five-year recordkeeping requirement, but many of the demanded documents by the IRS were entirely outside the ambit of the limited set of records mandated under the BSA.[18] Because the recordkeeping requirement was inapplicable, the IRS bore the burden of proving, with reasonable particularity, that the existence, location, and control of the documents was a foregone conclusion.

Analyzing each category of documents requested by the IRS, the panel examined whether the government could demonstrate their existence, location, and control with reasonable particularity. While the court agreed that the government could show that certain of the documents demanded existed and were in Greenfield's control in 2001, it could not make the same showing with respect to 2013 when the summons was issued. Rather, following the test announced by the U.S. Court of Appeals for the Eighth Circuit in *United States v. Rue*,[19] the panel concluded that, while the government could reasonably infer Greenfield's continued possession of the records over a shorter time frame, a dozen years was simply too long a window to support such a claim. Thus, the Fifth Amendment protected Greenfield, and the summons was quashed.

Conclusion

Greenfield serves as an instructive reminder of the limits of the required records doctrine: The government is only entitled to those records explicitly required under the BSA, and even then can only mandate production of those records for the last five years. Thus, practitioners representing taxpayers in this and similar situations should be attentive to both the breadth of the IRS summons, and the calendar. If they determine either that the IRS has requested documents that are outside the scope of the BSA or that are no longer required to be maintained, the act of production doctrine may offer means of protecting clients from potentially damaging disclosures.

1. 31 C.F.R. 1010.420, promulgated under 31 U.S.C. 5314.

2. See *United States v. Chen*, 815 F.3d 72 (1st Cir. 2016); *United States v. Chabot*, 793 F.3d 338 (3d Cir. 2015); *In re Grand Jury Subpoena* Dated Feb. 2, 2012, 741 F.3d 339 (2d Cir. 2013); *United States v. Under Seal*, 737 F.3d 330 (4th Cir. 2013); *In re Grand Jury Proceedings*, No. 4-10, 707 F.3d 1262 (11th Cir. 2013); *In re Grand Jury Subpoena*, 696 F.3d 428 (5th Cir. 2012); *In re Special February 2011-1*, 691 F.3d 903 (7th Cir. 2012); *In re M.H.*, 648 F.3d 903 (9th Cir. 2011); see also Jeremy H. Temkin, "Second Circuit Tackles Required Records Exception," New York Law Journal (Jan. 15, 2014); Jeremy H. Temkin, "Fifth Amendment and Government's War on Offshore Records," New York Law Journal (Nov. 10, 2011). The Sixth, Eighth, and Tenth Circuit Courts of Appeals have yet to consider this question.

3. Docket No. 15-543, 2016 WL 4073250 (2d Cir. Aug. 1, 2016).

4. See *Boyd v. United States*, 116 U.S. 616 (1886).

5. 335 U.S. 1, 17 (1948).

6. 390 U.S. 62, 67-68 (1968).

7. *Fisher v. United States*, 425 U.S. 391 (1976).

8. Id. at 408-10.

9. *United States v. Hubbell*, 530 U.S. 27, 37 (2000).

10. *In re Three Grand Jury Subpoenas Duces Tecum Dated Jan. 29, 1999*, 191 F.3d 173, 176 (2d Cir. 1999).

11. *Fisher*, 425 U.S. at 411.

12. *In re Grand Jury Subpoena Duces Tecum Dated Oct. 29, 1992*, 1 F.3d 87, 93 (2d Cir. 1993).

13. Cf. *In re Harris*, 221 US. 274, 279 (1911) (applying an early form of required records exception to documents in a bankruptcy proceeding).

14. 31 C.F.R. 1010.420.

15. See, e.g., *In re Grand Jury Subpoena Dated February 2, 2012*, 741 F.3d at 352-353.

16. See *Greenfield*, 2016 WL 4073250 at *3-*4.

17. *United States v. Greenfield*, No. 14 Misc. 350, 2015 WL 11622481 at *3 (S.D.N.Y. Feb. 11, 2015).

18. See *Greenfield*, 2016 WL 4073250, at *6.

19. 819 F.2d 1488, 1493 (8th Cir. 1987). The test requires the balancing of four factors: (1) "the nature of the documents," (2) "the nature of the business to which the documents pertained," (3) "the absence of any indication the documents were transferred to someone else or were destroyed," and (4) "the relatively short time period…between the date as of which the possession was shown and the date of the ensuing IRS summons." Id.