

TAX LITIGATION ISSUES

Expert Analysis

The Fifth Amendment And Civil Tax Enforcement

The Fifth Amendment to the U.S. Constitution provides that “[n]o person...shall be compelled in any criminal case to be a witness against himself.” This privilege against self-incrimination not only protects criminal defendants from being forced to testify at trial, but it also provides all individuals with the right to refuse to answer questions that may provide a “link in the chain of evidence needed to prosecute” them.¹ The ability to refuse to answer questions during an investigation is especially important in civil tax audits because responding to questions posed by an IRS revenue agent seeking additional taxes, interest and penalties may lead to a referral to a special agent who will attempt to brand the taxpayer a criminal and deprive him of his liberty. Indeed, attorneys representing taxpayers in high-risk, “eggshell” audits frequently struggle with the issue of whether (and when) the client should assert the privilege against self-incrimination.

The U.S. Supreme Court’s recent decision in *Salinas v. Texas*² complicates this equation. In *Salinas*, a plurality of the Supreme Court ruled that an individual must affirmatively assert his right to remain silent; merely refusing to answer a question is not sufficient to come within the ambit of the constitutional protection. Moreover, the court did not foreclose the possibility that the prosecution may be allowed to comment on a defendant’s assertion of the privilege against self-incrimination during a non-custodial interview. Although *Salinas* was decided in the context of a murder investigation, professionals representing taxpayers in audits need to consider its implications in deciding how to respond to questions posed by revenue agents.

Tax Enforcement

More than 30 percent of the nearly 90,000 IRS employees are either revenue agents assigned to

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conduct civil audits, revenue officers assigned to collect taxes that are due and owing, or tax examiners assigned to review tax returns for accuracy and completeness.³ However, the civil nature of an audit does not preclude a revenue agent examining a taxpayer’s returns from uncovering fraud and referring the matter for criminal investigation.

Revenue agents are barred from conducting criminal investigations under the guise of civil audits and once a revenue agent identifies a “firm indication of fraud,” she is obligated to suspend her civil audit and refer the case for criminal investigation.⁴ Moreover, while a revenue agent is not required to tell the taxpayer or his representatives that she is developing indicators of fraud or that the case may be referred for criminal investigation,⁵ she is also not allowed to mislead or deceive a taxpayer about the status of the investigation in hopes of eliciting incriminating statements or documents.

In the landmark case of *United States v. Tweel*,⁶ a revenue agent told the taxpayer’s accountant that there was no IRS special agent involved in the case, even though a criminal investigator had previously participated in the investigation. The revenue agent also did not disclose that the audit was being conducted at the request of the Department of Justice. The U.S. Court of Appeals for the Fifth Circuit suppressed the statements and documents provided by the taxpayer in *Tweel*, holding that the revenue agent’s conduct constituted a “deliberate deception,” a “silent

misrepresentation” and a “flagrant disregard” of the taxpayer’s rights.

Similarly, in *United States v. McKee*,⁷ the U.S. Court of Appeals for the Sixth Circuit held that the Internal Revenue Manual’s requirement that a revenue agent suspend an audit upon discovering a “firm indication of fraud” is “the type of rule that is designed to protect the taxpayer’s constitutional rights [and] [i]f a revenue agent continues the civil audit...then she is, in fact, making affirmative representations to the constitutional detriment of the taxpayer.”

After ‘Salinas,’ practitioners representing taxpayers face the additional risk that even the express invocation of the Fifth Amendment may be used against their clients at trial.

Despite the expansive language in *Tweel* and *McKee*, courts have applied these principles narrowly. First, courts have held that suppression is appropriate only if the taxpayer can demonstrate the agent acted in bad faith and was not merely negligent.⁸ Second, courts have held that the “[s]imple failure to inform defendant that he was the subject of the investigation, or that the investigation was criminal in nature, does not amount to affirmative deceit” unless the “agent’s failure to respond was intended to mislead.”⁹ Finally, in order to prevail on a motion to suppress based on a revenue agent’s misrepresentation, the taxpayer faces the high burden of demonstrating by “clear and convincing evidence that the agents misled him as to the true nature of their investigation” and that the “misinformation was material in his decision to speak with the agents.”¹⁰ Thus, absent egregious circumstances, a taxpayer’s statements to an examining revenue agent may be used to support a criminal referral and potentially offered in evidence at a subsequent criminal trial.

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'Eggshell' Audits

In many cases, a professional representing a taxpayer in connection with an audit determines that the client has engaged in conduct that, if discovered by the revenue agent, could result in criminal exposure. In these "eggshell" audits, the practitioner's goal is to resolve the audit without a criminal referral.¹¹ This, of course, must be done without lying or otherwise improperly obstructing the civil audit process, which would create additional criminal exposure for the taxpayer and potentially the professional as well.¹²

During the course of an eggshell audit, the revenue agent may seek information regarding a problematic transaction. Faced with such a request, the taxpayer and her representatives must decide between providing complete and accurate information, and asserting the taxpayer's Fifth Amendment rights. Criminal defense lawyers have historically counseled their clients that while the latter course may increase the chance of a criminal referral, admitting the misconduct increases both the risk of a referral for criminal investigation and the likelihood of a conviction if the investigation results in an indictment. The Supreme Court's recent decision in *Salinas v. Texas* adds another consideration to this analysis.

'Salinas v. Texas'

In *Salinas*, police officers questioned the defendant in connection with an investigation into a double homicide. Genovevo Salinas came to the police station voluntarily and answered most of the police's questions during the hour-long interview. However, when an officer asked whether the shell casings recovered at the scene of the murders would match those in his gun, Salinas stopped talking, "[l]ooked down at the floor, shuffled his feet, bit his bottom lip, cl[e]nched his hands in his lap, [and] began to tighten up." The officer proceeded to ask other questions, which Salinas answered. At trial, the prosecutor remarked upon Salinas' silence during his summation, stating that an innocent person would have answered the officer's questions about the shell casings.

While it is well settled that prosecutors are not allowed to make negative comments about a defendant's decision to remain silent during custodial interrogations,¹³ courts are divided as to whether a prosecutor may comment on the defendant's decision to remain silent in a non-custodial setting, such as a voluntary interview.¹⁴ On appeal, *Salinas* argued that the prosecutor's comment on his silence during the non-custodial interview violated his Fifth Amendment right against self-incrimination.

In a 5-4 decision, the Supreme Court concluded that the prosecutor's comments did not violate *Salinas*' constitutional right to remain silent and affirmed the conviction. A plurality opinion—authored by Justice Samuel Alito and joined by

Chief Justice John Roberts and Justice Anthony Kennedy—noted that an individual can remain silent for a number of reasons unrelated to his fear of self-incrimination. The plurality found that *Salinas*' failure to invoke his right to remain silent expressly barred his claim that the prosecution should be precluded from commenting on his silence at trial. The plurality did not, however, resolve the question of whether a prosecutor can comment on the defendant's invocation of the Fifth Amendment during a noncustodial interview. Moreover, in his concurring opinion, Justice Clarence Thomas (joined by Justice Antonin Scalia) applied an even narrower reading of the Fifth Amendment, concluding that the privilege was inapplicable "because the prosecutor's comments regarding [the defendant's] precustodial silence did not compel him to give self-incriminating testimony."¹⁵

'*Salinas*' leaves open the possibility that a prosecutor will be allowed to argue that a jury should draw an adverse inference from the defendant's express invocation of the privilege against self-incrimination during the course of an audit.

Implications in Tax Cases

Although *Salinas* arose in the context of a murder investigation, its ruling has implications for Fifth Amendment protections in white collar cases generally, and criminal tax cases in particular. While the Supreme Court has ruled that IRS special agents must advise individuals held in "custody" of their right to remain silent,¹⁶ such warnings are not necessary during noncustodial interviews like those at issue in *Salinas*,¹⁷ let alone a civil audit conducted by a revenue agent. Thus, absent egregious conduct like that at issue in *Tweel*, statements made during the course of an audit interview will be admissible at trial. Moreover, after *Salinas*, a taxpayer who refuses to provide information—either during an interview or in response to an Information Document Request—runs the risk that his refusal to answer will be offered in evidence in a criminal trial. Indeed, *Salinas* leaves open the possibility that a prosecutor will be allowed to argue that a jury should draw an adverse inference from the defendant's express invocation of the privilege against self-incrimination during the course of an audit.

Conclusion

Asserting the Fifth Amendment during an eggshell audit is not a decision taken lightly. The failure to invoke the privilege can provide the

examining agents with additional evidence to shore up their criminal referral and evidence that may be used against the taxpayer in future criminal proceedings. However, after *Salinas*, practitioners representing taxpayers face the additional risk that even the express invocation of the Fifth Amendment may be used against their clients at trial. It remains for the Supreme Court to clarify the application of the Fifth Amendment in the noncustodial setting.

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1. *Hoffman v. United States*, 341 U.S. 479, 486 (1951).
2. 133 S. Ct.—, No. 12-246 (June 17, 2013).
3. IRS, Personnel Summary, FY 2011 and FY 2012, available at http://www.irs.gov/file_source/pub/irs-soi/12db30ps.xls. By contrast, less than 3 percent of the Service's employees are special agents of the Criminal Investigation division.
4. IRM 25.1.3.2(1). The IRS revised the Internal Revenue Manual in 2009 and 2010 to permit parallel criminal and civil investigations that are "conducted as separate investigations." IRM 5.1.5.1; IRS Policy Statement 4-26.
5. *Id.* See also I.R.M. 4.2.4.1(3).
6. 550 F.2d 297 (5th Cir. 1977).
7. 192 F.3d 535, 542 (6th Cir. 1999).
8. See *Groder v. United States*, 816 F.2d 139 (4th Cir. 1987).
9. *United States v. Okuwumabua*, 828 F.2d 950, 953 (2d Cir. 1987) (quoting *United States v. Serlin*, 707 F.2d 953, 956 (7th Cir. 1983)).
10. *United States v. Peters*, 153 F.3d 445, 441 (7th Cir. 1998).
11. See Larry A. Campagna, Eggshell Audits: Strategies for the Taxpayer's Counsel, ABA Section of Taxation Meeting (May 11, 2012), available at <https://meetings.abanet.org/meeting/tax/MAY12/media/joint-cb-cctp-egg-campagna-paper.pdf>.
12. See 26 U.S.C. §7212(a); see also *United States v. Singh*, 973 F.Supp. 7 (D.D.C. 1997) (prosecution of two accountants for "corruptly obstructing and impeding" ongoing IRS audits); *United States v. Shore*, 143 F.Supp.2d 74 (D.Mass. 2001) (prosecution of taxpayer for making false statements during a civil audit).
13. The Second Circuit has held that a "[c]ustodial interrogation exists when a law enforcement official questions an individual and that questioning was (1) conducted in custodial settings that have inherently coercive pressures that tend to undermine the individual's will to resist and to compel him to speak...and (2) when the inquiry is conducted by officers who are aware of the potentially incriminatory nature of the disclosures sought." *United States v. Rodriguez*, 356 F.2d 254 (2d Cir. 2004).
14. Of the eight federal Courts of Appeal to rule on this issue, four—the First, Sixth, Seventh and Tenth circuits—have held that a prosecutor may not comment on a defendant's decision to remain silent in a noncustodial interview. See *Coppola v. Powell*, 878 F.2d 1562, 1568 (1st Cir. 1989); *Combs v. Coyle*, 205 F.3d 269, 283 (6th Cir. 2000); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987); *United States v. Burson*, 952 F.2d 1196, 1201 (10th Cir. 1991). Four other circuit courts—the Fourth, Fifth, Eighth and Eleventh—have held that prosecutors may comment on a defendant's silence in a noncustodial interview, concluding that the Fifth Amendment does not protect silence during a noncustodial interview. See *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir. 1985); *United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996); *United States v. Frazier*, 408 F.3d 1102, 1109-11 (8th Cir. 2005); *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991). To date, the Second Circuit has not addressed this issue.
15. In a dissenting opinion joined by Justices Ruth Bader Ginsburg, Elena Kagan, and Sonia Sotomayor. Justice Stephen Breyer argued that courts should not require a "ritualistic formula...to invoke the privilege," but should rather examine the circumstances of an individual's encounter with police to decide whether silence was an invocation of the Fifth Amendment.
16. *Mathis v. United States*, 391 U.S. 1 (1968).
17. *Beckwith v. United States*, 425 U.S. 341 (1976).