

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

CLIFFORD T. BURGESS, III,
Defendant.

Civil Action No.
98-CV-2465

Gawthrop, J.

December , 1998

M E M O R A N D U M

This case arises from Clifford Burgess's refusal to turn over tax records requested by the Internal Revenue Service ("IRS") as part of a civil investigation. Because the government could hypothetically use these records to criminally prosecute him, Mr. Burgess complains that the demand for documents violates his Constitutional protection against compelled self-incrimination.

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V.¹ A Fifth Amendment objection is only sustained, however, when a taxpayer provides "more than mere

¹ Because of potential uses of testimony in ancillary criminal proceedings, the Fifth Amendment privilege against self-incrimination "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." Kastigar v. United States, 406 U.S. 441, 445 (1972).

speculative, generalized allegations of possible tax-related prosecution. The taxpayer must be faced with substantial and real hazards of self-incrimination." United States v. Argomaniz, 925 F.2d 1349, 1353 (11th Cir. 1991) (citation omitted).

In his attempt to demonstrate potential criminal jeopardy, Mr. Burgess points only to the government's statement, at oral argument, that he is not facing criminal investigation "right now." I do not find that this statement demonstrates that Mr. Burgess is faced with a substantial or real hazard of imminent criminal prosecution. All citizens face a remote prospect of federal criminal investigation and Mr. Burgess must demonstrate something more than speculation before his Fifth Amendment rights are implicated in a civil investigation. See United States v. Raniere, 895 F. Supp. 699, 704-05 (D.N.J.).

Even assuming that Mr. Burgess could satisfactorily demonstrate potential jeopardy, he may not, as he has done here, simply make a blanket assertion of his Fifth Amendment rights. United States v. Allshouse, 622 F.2d 53, 57 (3d Cir. 1980). To properly claim the privilege, Mr. Burgess must appear before the revenue agent with all requested documents and assert his privilege on a document-by-document or question-by-question basis. Id. at 56.²

² This requirement serves a dual purpose: "First, it helps the court in making an assessment of whether the privilege is justified with respect to the particular question being asked.

Further, some of the documents Mr. Burgess seeks to shield will not be privileged in any circumstance. The IRS seeks, inter alia, bank statements, records, and other documents prepared by people other than Mr. Burgess. These documents do not become privileged solely because Mr. Burgess possesses them. United States v. Schlansky, 709 F.2d 1079, 1082-83 (6th Cir. 1983). The Fifth Amendment privilege is a personal one which adheres to the person, not to information which might incriminate him. Couch v. United States, 409 U.S. 322, 328 (1973). As such, even when the taxpayer has possession of documents prepared by another, a summons to produce such papers is not subject to a Fifth Amendment objection unless the act of producing the documents is actually testimonial. Fisher v. United States, 425 U.S. 391, 408 (1976); see also Braswell v. United States, 487 U.S. 99 (1988). And the testimonial threshold is not crossed simply by turning over, and thereby acknowledging the existence of, papers that a defendant would like to keep from revenue agents. Fisher, 425 U.S. at 409-11.

I shall thus order Mr. Burgess to comply with the summons he received on June 6, 1997, and turn over all documents requested by the IRS. He may still exercise his Fifth Amendment privilege, but must do so on a document-by-document or question-by-question

Additionally, it prevents the taxpayer from using a blanket claim of privilege as a shield for unprivileged evidence of wrongdoing." Allshouse, 622 F.2d at 56.

basis, and those individual claims of privilege are, of course, subject to review. Before a Fifth Amendment privilege claim will be sustained, Mr. Burgess will have to demonstrate that he faces a substantial risk of criminal jeopardy and that the records he seeks to protect are testimonial.

An order follows.

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O R D E R

AND NOW, this day of December, 1998, upon
consideration of the Government's Complaint to Enforce Internal
Revenue Summons and Defendant's Motion to Dismiss, and after oral
argument and further briefing, the summons served upon defendant
on June 6, 1997 shall be enforced. At such time and place as
fixed by the Internal Revenue Service, the defendant shall
produce the books, records, and other information required by the
summons.

BY THE COURT:

Robert S. Gawthrop, III

J.