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

UNITED STATES OF AMERICA, et al.	:	CIVIL ACTION
v.	:	
NEILSON M. CARLIN	:	NO. 06-1906

MEMORANDUM

Bartle, C.J. November 2, 2006

Before the court is the motion of defendant Neilson M. Carlin ("Carlin") pursuant to Rule 62(c) of the Federal Rules of Civil Procedure for a stay pending appeal of this court's September 11, 2006 Order.

The United States has filed a complaint against Carlin under 26 U.S.C. § 7604 to enforce an Internal Revenue Service ("IRS") summons. The summons directed Carlin to testify in person and to produce for examination all documents and records in his possession or control reflecting the receipt of taxable income for the years 2000 through 2004. After Carlin failed to comply with the summons, we issued an Order to Show Cause. Carlin then asserted his Fifth Amendment privilege against self-incrimination but at the court's direction submitted for in camera inspection all documents that he believed to be responsive to the summons. The court ultimately ordered Carlin to turn over any documents responsive to the summons that were created by third parties, as these documents were not testimonial, and thus, not within the protection of the privilege against self-

incrimination. At the same time, we held that unless the government offered him immunity, Carlin did not have to turn over documents that he himself created, as the act of producing those documents could be a testimonial communication protected by the privilege. United States v. Carlin, 2006 WL 2619800 (E.D. Pa. 2006) (slip opinion). Carlin has appealed the Court's September 11, 2006 Order and now requests that the court stay that Order pending appeal.

"Although not so labeled, the government's summons enforcement proceeding is in the nature of an injunction[. I]t prays for an order requiring the taxpayer[] ... to produce certain records." United States v. Manchel, Lundy and Lessin, 477 F. Supp. 326, 334 (E.D. Pa. 1979). Rule 62(c) permits a federal district court, in its discretion, to "suspend, modify, restore or grant an injunction during the pendency of [an] appeal." Fed. R. Civ. P. 62(c). In determining whether to grant a stay pending appeal under Rule 62(c), the court must consider four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Hilton v. Braunskill, 481 U.S. 770, 776 (1987). See also Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 658 (3d Cir. 1991); Manchel, 477 F. Supp. at 334-35. The court should analyze each of these factors "in light of the

individualized considerations relevant" to the case at hand. Republic of Philippines, 949 F.2d at 658.

Carlin, in our view, has little prospect of success on the merits of his appeal. It has long been recognized that a taxpayer makes no testimonial communications when he produces documents in his possession that were created by third parties, and hence, the production of such documents is not protected by the privilege against self-incrimination. See United States v. Doe, 465 U.S. 605, 611 (1984) (citing Fisher v. United States, 425 U.S. 391, 409-10 (1976)); accord United States v. Gippetti, 153 Fed. Appx. 865, 869 (3d Cir. 2005). Moreover, the distinction between the right not to be compelled to be a witness against oneself and the privilege against self-incrimination, which Carlin urges the court to draw, has no basis in the law.[1]

Nor is Carlin subject to irreparable injury if the stay is denied. Although Carlin's appeal may become moot if he is forced to turn over to the government documents created by third parties, the Third Circuit has held that the loss of an appellate right alone "does not justify pretermitting an examination of the nature of the irreparable injury alleged and particular harm that will befall the appellant should the stay not be granted." Republic of Philippines, 949 F.2d at 658. In this case, the content of the documents Carlin refuses to turn over is not

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1. See United States v. Hubbel for an explication of the relevant text of the Fifth Amendment. 530 U.S. 27, 34-38 (2000).

protected under the Fifth Amendment privilege. In fact, the government could obtain the content of those documents from the banks or other third parties that created the documents. This is similar to the situation in Republic of the Philippines. There, the defendant requested a stay of a district court's order to unseal certain of defendant's documents which had been filed pursuant to a protective order. The Court of Appeals concluded that the release of the documents would not constitute irreparable injury because their contents would be publicly available at a trial scheduled four months in the future.

In addition, the government may suffer some small injury if a stay is granted to Carlin. It has been attempting to determine whether and to what extent Carlin may have delinquent tax liabilities for over a year. Further delay is adverse to the government's interest in promptly assessing and collecting any tax revenue due.

Finally, the public interest weighs in favor of the immediate relinquishment of the documents to the government in order to determine Carlin's delinquent tax liabilities. Although upholding the guarantees of the Fifth Amendment is important to the public, Carlin's Fifth Amendment rights are not implicated here since he is being asked to turn over only those documents which were created by third parties. Instead, the public has a vital interest in the timely assessment of tax liabilities and enforcement of the tax laws.

The factors against a stay far outweigh the factors supporting a stay. Accordingly, the court will deny the defendant's motion for a stay pending appeal and order him to turn over forthwith to the government all documents in his possession that are responsive to this court's Order of September 11, 2006.

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ORDER

AND NOW, this 2nd day of November, 2006, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of defendant Neilson M. Carlin to stay enforcement Order pending appeal is DENIED; and

(2) defendant turn over forthwith to the government all documents responsive to this court's Order of September 11, 2006.

BY THE COURT:

/s/ Harvey Bartle III
C.J.