

# The Fifth Amendment's Essential Role in Offshore Audits

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# Defenses & Privileges

- Setting the stage: There is an inherent tension between the government and the taxpayer when it comes to information gathering. This is no more apparent than in the case of an offshore audit, where revenue agents are often armed with incomplete and potentially inaccurate information provided by foreign banks and need information that only the taxpayer or his accountant can provide in order to supply the missing link. If the government cannot get the requested documents, it often cannot make a case.



# Defenses & Privileges

- Make no mistake about it. Offshore audits, which are typically based on third-party information received under FATCA, tax information agreements, or as a result of the Swiss Bank Program are ripe for referral to Criminal Investigation. For better or for worse, the third-party information usually supports the conclusion that the taxpayer violated one or more federal criminal statutes.

# Defenses & Privileges

- For this reason, it should come as no surprise that few if any taxpayers are willing to assist the IRS in its “fishing expedition.”



# Defenses & Privileges

- Surrendering such information is the modern-day equivalent of an old-fashioned western duel where one cowboy, the taxpayer, gives the other cowboy, an IRS Revenue Agent, the bullets and ammunition needed to load his empty barrel. In a very real sense, it's the “silver bullet” that the government needs to successfully prosecute the taxpayer.



# Defenses & Privileges

- Because of how devastating the information could be to the client's liberty, great care should be taken to assert all applicable privileges, including the Fifth Amendment privilege against self-incrimination.

# Defenses & Privileges

- List of privileges
  - Fifth Amendment Privilege Against Self-incrimination
    - The Privilege and Testimony
    - The Privilege and Document Production
  - Immunity
  - Attorney-client privilege and work product privileges



# Fifth Amendment Privilege Against Self-incrimination

- Background

- Tax cases are document-intensive cases
- As previously discussed, if the government cannot get the requested documents, it often cannot make a case
- It is for this reason that the seminal issue in document-production cases is whether the taxpayer has a Fifth Amendment privilege with respect to the documents that he possesses

# Fifth Amendment Privilege Against Self-incrimination

- In General
  - Fifth Amendment: No person shall be compelled in any criminal case to be a witness against himself.



# Fifth Amendment Privilege Against Self-incrimination

- Ordinarily, the Fifth Amendment applies to the live testimony of a witness at a judicial proceeding in a criminal trial or during custodial interrogation of a suspect by law enforcement. It may also be asserted during a Congressional hearing before a House Oversight Committee such as that involving Mark McGwire during the Committee's open hearings on steroid use in major league baseball back in 2005.



# Fifth Amendment Privilege Against Self-incrimination

- But live testimony is not all that the Fifth Amendment protects. It also protects something just as sacrosanct: the compelled production of business records in certain situations and there is a trio of cases that flesh out this concept.



# The Fifth Amendment & Document Production

- The Fifth Amendment privilege is fairly straightforward in cases involving testimony, but has proven to be as confounding as the confucius curse was in “Harry Potter” when it comes to applying it in document production cases.

# The Fifth Amendment & Document Production

- During the government's *information gathering stage*, Fifth Amendment concerns arise when the taxpayer is asked to produce records or other documents.
- Question: Who bears the burden of proving that the privilege exists?
  - (a) The taxpayer.
  - (b) The court.

# The Fifth Amendment & Document Production

- Answer is (a): The taxpayer must make at least a prima facie showing that responding to the information request would criminally implicate him – either in *this* crime or *another* crime.
- Federal jurisprudence attempts to balance:
  - (1) the desire to protect individual citizens from excessive governmental intrusion against
  - (2) the government's need to properly enforce the laws by using evidence independently obtained through skillful investigation.

# The Fifth Amendment & Document Production

- In order for the privilege to apply, statements must be *compelled* at the time they are made. Thus, a witness who *voluntarily* testifies or willingly produces documents in response to a summons or subpoena cannot later claim the privilege.



# The Fifth Amendment & Document Production

- Act of *Producing* Documents in Response to a Subpoena *may* be subject to the Fifth Amendment privilege against self-incrimination (*Fisher v. U.S.*)

# The Fifth Amendment & Document Production

- Facts: In *Fisher*, the government issued summonses for the records of two taxpayers which were created by the taxpayers' accountant but later transferred to and held by attorneys for tax preparation.
- Held: Enforcement of the summonses did not violate the Fifth Amendment Privilege.

# The Fifth Amendment & Document Production

- However, in a unanimous opinion, the Court refused to “cut the Fifth Amendment completely loose from the moorings of its language, and make it serve as a general protector of privacy.” The decision left the door open for future Fifth Amendment application in tax cases.

# The Fifth Amendment & Document Production

- Takeaways from *Fisher*:
  - Even if the documents themselves aren't privileged, the act of *producing* them in response to a subpoena nevertheless has communicative aspects of its own, wholly independent of the *contents* of the papers produced.
  - And if this testimony (an admission that the requested documents exist) is critical to the prosecutor's case and not merely "a foregone conclusion [that] adds little or nothing to the sum total of the Government's information," the privilege *may* attach.
  - But, if "[t]he existence and location of the papers 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 papers," then the act of production privilege does not apply.

# The Fifth Amendment & Document Production

- The plot thickens with *United State v. Hubbell*, the somewhat infamous Whitewater case. In 1996, independent prosecutor Kenneth Starr served a subpoena duces tecum on former Arkansas lawyer “Webb” Hubbell, ordering Mr. Hubbell to bring documents before a Little Rock grand jury. He subsequently refused to testify about the documents or even acknowledge whether or not they existed, citing his Fifth Amendment rights. The district court threw out the subpoena as a “quintessential fishing expedition,” but an appeals court later reinstated it

# The Fifth Amendment & Document Production

- Defendant's argument: The only way that the government was able to bring this prosecution was through the information that I produced.
- Held: Indictment should be dismissed.

# The Fifth Amendment & Document Production

- The Supreme Court of the United States held that where a document “communicate[s] information about [the document’s] existence, custody, and authenticity,” then the mere act of production is incriminatory and the Fifth Amendment privilege applies.

# The Fifth Amendment & Document Production

- In a near-unanimous opinion, Justice Stevens essentially extended *Fisher*. Once again, he focused on the production aspect as akin to testimony, likening it to a prisoner forced to try on a shirt in order to link him with a prior criminal act.



# The Fifth Amendment & Document Production

- “The ‘compelled testimony’ that is relevant in this case is not to be found in the contents of the documents produced in response to the subpoena. It is, rather, the testimony inherent in the act of producing those documents,” he explained.

# The Fifth Amendment & Document Production

- Further, unlike the facts in *Fisher*, Prosecutor Starr would have had absolutely no case against Mr. Hubbell unless he had access to the withheld documents.

# The Fifth Amendment & Document Production

- “In sum, we have no doubt that the constitutional privilege against self-incrimination protects the target of a grand jury investigation from being compelled to answer questions designed to elicit information about the existence of sources of potentially incriminating evidence,” he concluded.

# The Fifth Amendment & Document Production

- Analysis: The information was so voluminous that the prosecutor needed the defendant's assistance both to identify potential sources of information and to produce those sources. Given the breadth of the categories of documents called for by the subpoena, the *collection* and *production* of the materials demanded was tantamount to answering a series of detailed interrogatories or a series of deposition questions. Providing a catalog of existing documents fitting within any one of eleven broadly worded categories could surely provide a prosecutor with *leads* to incriminating evidence.

# The Fifth Amendment & Document Production

- What does the act of producing documents concede?
  - First, the *existence* of documents demanded,
  - Second, their *possession* or control by taxpayer, and
  - Third, the taxpayer's belief that the documents produced are those described in the subpoena, a fact that the government may use to authenticate them.

# The Fifth Amendment & Document Production

- Privilege applies only to *compelled* testimony (*U.S. v. Couch*)
  - Voluntarily prepared documents are *not* privileged because no compulsion is present.
  - Example: A taxpayer who *voluntarily* produces documents in response to a summons or subpoena cannot later claim the privilege.

# The Fifth Amendment & Document Production

- The privilege protects a person only against being incriminated by his *own* compelled testimonial communications. **Documents prepared by individuals *other* than the taxpayer are not protected** (*Fisher v. United States*).
  - Issue: Are the tax records of a taxpayer, created by the taxpayer's accountant but later transferred to and held by attorneys for tax preparation, subject to the Fifth Amendment privilege against self-incrimination?
  - The tax records in *Fisher* were the accountant's *own* work papers.
  - Held: The taxpayer's tax records, obtained through a summons on the taxpayer's attorney, are *not* protected by the Fifth Amendment privilege against self-incrimination.

# The Fifth Amendment & Document Production

- Analysis: The summons and the order of the court enforcing it were directed against the *accountant*, not the taxpayer. The accountant's work papers are *not* the taxpayer's. They were not prepared by the taxpayer, nor did they contain any testimonial declarations by him. Therefore, the essential ingredient of personal *compulsion* against an accused is lacking.



# The Fifth Amendment & Document Production

- Question: What if the tax records were still in the taxpayer's possession? Would that alter the result?
  - (a) True
  - (b) False

# The Fifth Amendment & Document Production

- No. However, the Court acknowledged two important things:
  - First, that a subpoena served on a taxpayer requiring him to produce an *accountant's* work papers in his possession involves substantial compulsion, and
  - Second, that the contents of the accountant's work papers might very well be incriminating.

# The Fifth Amendment & Document Production

- But ...
  - The act of *producing* the work papers is all that the taxpayer is being compelled to do.
  - It does not compel *oral* testimony. In other words, it does not compel the taxpayer to *restate, repeat, or affirm the truth of the contents of the documents sought*.

# The Fifth Amendment & Document Production

- What *Fisher* stands for: The privilege against self-incrimination protects only the act of *producing* subpoenaed evidence and not the “tacit averments” within the documents themselves.

# The Fifth Amendment & Document Production

- Question: What if the taxpayer is a corporation? Does the privilege apply if the corporation receives a summons or subpoena for records?
  - (a) True
  - **(b) False**

# The Fifth Amendment & Document Production

- **Collective entity doctrine:** Corporations and entities have no fifth amendment privilege. Only the individual who responds on behalf of the corporation – i.e., the custodian of records – can potentially assert the privilege.

# The Fifth Amendment & Document Production

- Timeliness
  - If an objection exists, it must be asserted at the right time!
  - There are both legal and ethical questions.
  - First, it's a matter of professional responsibility. Defense counsel cannot instruct his client to disregard a summons unless there is at least a good faith basis to challenge it. If no such basis exists, defense counsel cannot instruct his client to ignore it.

# The Fifth Amendment & Document Production

- Question: If there is a good faith basis to challenge the summons, when should the privilege be asserted?
  - (a) At the earliest stage possible so that it is preserved (i.e., during the summons enforcement process)
  - (b) At a contempt proceeding, after the taxpayer defies a court order enforcing compliance of the summons and the court is considering imposing sanctions



# The Fifth Amendment & Document Production

- The prosecutor has the ability to confer act-of-production *immunity*
  - Setting the scene: The government really wants the stuff. But under *Fisher*, the very act of turning it over is incriminating. The government can grant the taxpayer immunity with respect to the act-of-production.
  - What does that mean?

# Act of Production Immunity

- Answer: The government cannot use the fact that the taxpayer turned the documents over in response to a subpoena or summons to authenticate them. In other words, the government can't use the defendant to vouch for the fact that the information is authentic and that it's responsive.

# Act of Production Immunity

- If the government grants the taxpayer act of production immunity, how will it *authenticate* the documents at trial?
- Authentication = Possession + Production
- Example: Suppose that the taxpayer owns a corporation and that the government wants to introduce documents that it obtained from the corporation in response to a subpoena. How will the government show that the corporation *possessed* the documents requested by the subpoena and *produced* them in response to the subpoena?

# Act of Production Immunity

- Think chain of custody!
- Question: How can the government establish chain of custody?

# Act of Production Immunity

- The government can call two essential witnesses into court to testify:
  - First, the **process server** who delivered the subpoena to the corporation, and
  - Second, the individual within the corporation who received the subpoena (i.e., the **custodian of records**)

# Act of Production Immunity

- The jury will have to infer from this testimony that the corporation possessed the records and that it produced them in response to the subpoena.

# Act of Production Immunity

- *Braswell v. United States*
  - Issue: Can the custodian of records claim the privilege under the act of production doctrine on the grounds that his act of production would be *personally* incriminating?
  - Example: What if the taxpayer is the sole shareholder of the corporation and that he wears all of the “hats” in the company, from marketing to product development to public relations to “custodian of records.”
  - Argument: “Any production by the corporation would surely be viewed by the jury as having been done by me, the company’s alter ego.”

# Act of Production Immunity

- Answer: No.



# The Bank Secrecy Act

- How does all this apply to foreign bank account records?

# Required Records Under the BSA

- What is the Bank Secrecy Act (“BSA”)? BSA requires taxpayers to annually report to the IRS foreign financial accounts in which the taxpayer had a financial interest or signatory authority.
- This information is reported to the IRS on FinCEN Form 114, Report of Foreign Bank Accounts and Financial Accounts.

# Required Records Under the BSA

- In addition to the reporting requirement, the BSA also requires taxpayers to maintain for a period of *five years* records for each foreign account including:
  - The name in which each account is maintained;
  - The number or other designation of such account;
  - The name and address of the foreign bank or other person with whom such account is maintained;
  - The type of such account; and
  - The maximum value of such account during the reporting period.

# Required Records Under the BSA

- The regulations do not articulate how to compute the five-year retention period, but it is generally agreed that the five-year period is calculated by reference to the current year, not by reference to the year under audit.
- Example: If the IRS issued a summons back on November 1, 2016, the BSA requires the taxpayer to only maintain records concerning the foreign bank accounts retroactively from November 1, 2011.

# Required Records Doctrine

- The required records doctrine, as informed by *Fisher* and *Hubbell*, has been extended to documents required to be maintained under the BSA.

# Required Records Exception

- But hold on a minute. The Fifth Amendment only protects individuals from *compelled* testimony, so there's a required records exception.

# Required Records Exception

- The Court of Appeals for the Ninth Circuit was the first appellate court to weigh in. It decided that the Fifth Amendment privilege against self-incrimination could be raised in response to a subpoena demanding the production of offshore bank account records.

# Required Records Exception

- In 2011, in *In re M.H.*, the Ninth Circuit Court of Appeals held that the records sought through the subpoena fell under the required records exception and the Fifth Amendment privilege did *not* apply.
- In other words, the Ninth Circuit held that the required records exception rendered the Fifth Amendment defense *useless in BSA cases*.



# Required Records Exception

- So far, the Courts of Appeals for the First, Second, Third, Fourth, Fifth, Seventh, Ninth, and Eleventh Circuits have agreed that the required records exception requires taxpayers to produce foreign financial account information required to be kept under the BSA.

# The Required Records Doctrine & the BSA

- The IRS and the U.S. Department of Justice-Tax have issued summonses and grand jury subpoenas seeking information required to be kept under the BSA.
- There has been an inordinate amount of litigation surrounding whether, and the extent to which, these documents must be produced.

# The Limits of the Required Records Exception After Greenfield

- In *United States v. Greenfield*, the Court of Appeals for the Second Circuit narrowed the scope of the required records exception as it applies to alleged BSA violations.
- In *Greenfield*, the IRS learned that Steven Greenfield was involved with certain nefarious offshore entities used to evade U.S. tax (ouch!).

# The Limits of the Required Records Exception After Greenfield

- 2005 was an unlucky year for Greenfield. The IRS selected Greenfield's 2005 federal income tax return for audit. In 2013, the IRS issued an IDR and a summons directing him to produce documents relating to both his domestic and foreign bank accounts, including "every account over which Steven Greenfield had signature authority ... and/or over which Steven Greenfield exercised control during the years 2001 through 2011."

# The Limits of the Required Records Exception After Greenfield

- Even mathematically and linguistically challenged readers can surmise that such a request goes well beyond the five-year foreign account BSA records requirement.

# The Limits of the Required Records Exception After Greenfield

- To add insult to injury, the summons further requested Greenfield to produce “all documents” in his possession for each bank account.
- Incensed, Greenfield refused to comply with the summons, objecting on the grounds that the summons was *overbroad*.

# The Limits of the Required Records Exception After Greenfield

- The Government brought an enforcement action in 2014.
- Greenfield responded with a motion to quash, arguing that the compelled production of the documents sought would violate his Fifth Amendment privilege against self-incrimination.

# The Limits of the Required Records Exception After Greenfield

- The United States District Court for the Southern District of New York sided with the government. In doing so, it enforced the summons and ordered Greenfield to produce the requested foreign bank account information.
- Greenfield, in turn, appealed that decision to the Second Circuit.



# The Limits of the Required Records Exception After Greenfield

- The Second Circuit reversed the District Court's order requiring Greenfield to produce the records.
- In a sweeping decision, the court of appeals held that turning over anything *other* than the narrow set of documents covered by the required records exception violated Mr. Greenfield's Fifth Amendment rights. Thus, the documents requested were outside the scope of the required records exception to the Fifth Amendment's act-of-production privilege.

# The Limits of the Required Records Exception After Greenfield

- The Court reasoned that it was *not* reasonable to infer that a taxpayer was in possession of certain documents pertaining to foreign bank accounts that preceded the BSA's five-year recordkeeping requirement.
- Specifically, it noted that more than a *decade* had passed since Greenfield was known to be in possession of certain documents.

## Objecting to Summonses Under the Fifth Amendment in a post-Greenfield World

- *Greenfield* is essentially paydirt. Suppose that your client receives an IDR (Information Document Request) or a summons from the IRS sealed with a kiss seeking foreign bank account information. In addition to being incredibly broad, the subpoena language is also very vague as to what the IRS does and does not already have.
- Your gut tells you that something isn't right.

## Objecting to Summonses Under the Fifth Amendment in a post-Greenfield World

- Should you object to the IDR or summons citing *Greenfield*? Absolutely.
- The *Greenfield* decision has rippling effects for offshore audits. IDRs and summonses in many offshore audits have finally met their match.

## Objecting to Summonses Under the Fifth Amendment in a post-Greenfield World

- To put it bluntly, IDRs and summonses are often nothing more than a “fishing expedition” in which the revenue agent, armed with often incomplete and potentially inaccurate information provided by foreign banks, asks the taxpayer to provide the missing link to a shoddy investigation in order to “solve the crime.”

## Objecting to Summonses Under the Fifth Amendment in a post-Greenfield World

- The existence and whereabouts of the documents requested are usually unknown to the IRS. It is a rare situation in which any good can come out of assisting the IRS in its fishing expedition.
- When in doubt, always err on the side of caution and invoke the Fifth Amendment privilege.

# Scenarios Ripe for Assertion of Privilege

- There are three situations that are ripe for raising the the Fifth Amendment act-of-production privilege as a defense to producing foreign bank account records:
  - As previously discussed, in response to an IDR or a summons seeking information about offshore bank accounts;

# Scenarios Ripe for Assertion of Privilege

- During an IRS interview, when the agent asserts that they have third-party information that allegedly links your client to a violation of the tax code but when the rubber meets the road, categorically refuses to disclose anything about the purported documents in their possession.
- In response to a revenue agent's request to file past-due international information returns to toll the meter from continuing to run on penalties.



# Conclusion

- This is serious business. Audits of taxpayers who made quiet disclosures, who inappropriately entered into the Streamlined Program, or who threw caution to the wind and made no effort whatsoever to come into voluntary compliance with respect to offshore accounts are *ticking time-bombs*.

# Conclusion

- The stakes could not be higher. One false step and your client could be doomed to spend the next decade of his life confined to a five-by-five jail cell.
- Even in the wake of *Greenfield*, the law is incredibly unsettled and the IRS is doggedly determined to catch “tax cheats.”

# Conclusion

- For these reasons, tax practitioners are encouraged to reach out for and speak to a tax attorney who possesses the training and expertise needed to provide practical and sound advice to an individual on invoking his Fifth Amendment privilege against incrimination.

# Conclusion

- The IRS usually possesses incomplete and potentially inaccurate information to demonstrate that the taxpayer violated U.S. tax laws, and is desperate to obtain even a morsel of information in the hope that it will yield a more bountiful harvest.
- The travesty in this is that the taxpayer may legally be under no obligation to maintain or produce such information.

# Closing

- Practitioners must remain vigilant at all times and not be timid when it comes to asserting all available privileges to protect their clients' rights.
- You do not want your client to be the next “cooked goose” to grace the IRS's Thanksgiving Day table and the Fifth Amendment privilege may be the only thing keeping him out of prison.



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