

1968

Taxation - Right to Counsel

Gerard M. Bigley

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Taxation-Federal Commons](#)

Recommended Citation

Gerard M. Bigley, *Taxation - Right to Counsel*, 7 Duq. L. Rev. 303 (1968).

Available at: <https://dsc.duq.edu/dlr/vol7/iss2/10>

This Recent Decision is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

Recent Decisions

TAXATION—RIGHT TO COUNSEL—*Miranda*-type warnings are not required in relation to noncustodial questioning during initial stages of a tax inquiry.

United States v. Squeri, 398 F.2d 785 (2d Cir. 1968).

The Internal Revenue Service (IRS) began an investigation of one Riordan, a former internal revenue agent, suspected of illegal activities with certain taxpayers, including preparation of tax returns. Internal revenue agents and special agents were assigned to investigate fifty to seventy-five taxpayers who may have dealt with Riordan, including Squeri, who owned and operated a restaurant which Riordan frequented. The revenue agents were to audit the various taxpayers' returns for the years 1959 to 1961. The special agents were then to see if Riordan had prepared any of the returns and, if he did, whether there were any false entries for which he would be responsible.

On October 8, 1963, the IRS contacted Squeri and requested him to come for an interview and to bring records he used in preparing his returns. On October 16, Squeri, with his accountant, appeared at the IRS office and was met by a revenue agent and a special agent. The special agent warned Squeri that he had a right not to answer any questions which would tend to incriminate him, but also informed Squeri that he was investigating Riordan's activities and wanted to question him about his dealings with Riordan. He added that a revenue agent would later conduct a civil audit of his records. As a result of the special agent's questioning, Squeri was cleared of any improper connection with Riordan. However, the revenue agent proceeded with the audit and examined thirteen savings passbooks which Squeri brought to the interview. These passbooks contained indications of income not included in his tax returns. The revenue agent concluded there was a possibility of fraud, and a special agent was then assigned to establish if criminal charges were warranted.

In October of 1964, a decision was made that there was sufficient evidence to consider recommending prosecution; Squeri was so informed, and was invited to confer on the subject. After Squeri's initial contact with the IRS agents on October 16, 1963, where he was informed that the criminal investigation related to Riordan and that his returns would be subject to a civil audit, and prior to the proposed conference, he was not informed of the changing nature of the investigation of his own returns. At this point he retained an attorney.

Subsequently, Squeri was convicted for wilfully attempting to evade over \$100,000 in taxes, and received a two year sentence, (suspended with probation for one year), and a fine of \$10,000.

Squeri's pre-trial motion to suppress certain records delivered to the IRS during the audit of his returns was denied. Squeri appealed, alleging that his constitutional rights were violated when certain records were obtained because agents misrepresented the nature and purpose of the investigation, and also because he was not informed of his right to counsel¹ at the first meeting on October 16, 1963. Squeri relied on *Miranda v. Arizona*,² as the basis of his constitutional argument. The instant court found no deceit or misrepresentation and in disposing of this facet of Squeri's argument, pointed out that the notice that his returns were being audited gave "him full and accurate information as to the extent of the IRS inquiry."³

As to Squeri's argument that he should have been given *Miranda* warnings⁴ at the first meeting with the agents, the court established that *Miranda* warnings are required "because of the compelling atmosphere inherent in the process of in custody questioning. . . . [and that the rationale of *Miranda* is] relevant only where the questioning is conducted in custody or in circumstances which are similarly inherently compelling."⁵ The *Miranda* rationale, the court stated, does not apply when the circumstances are such that "there are no inherently compulsive pressures to be overcome."⁶ The court also relied on *Mathis v. United States*⁷ to reinforce its conclusion that it is the questioning in custody which activates the need for warnings. The court looked at the circumstances surrounding Squeri's presence at the October 16 interview in the IRS office, and concluded that "[t]hese circumstances present none of the inherently compulsive aspects which the Supreme Court found to exist in the process of custodial inter-

1. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

2. 384 U.S. 436 (1966).

3. *United States v. Squeri*, 398 F.2d 785, 788 (2d Cir. 1968).

4. "He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." 384 U.S. at 479.

5. 398 F.2d at 788-89.

6. *Id.* at 789.

7. 88 S. Ct. 1503 (1968). In *Mathis*, the Supreme Court held that *Miranda* warnings were required where the defendant had been questioned by IRS agents, as part of a routine tax inquiry, while he was in state custody on an unrelated charge.

rogation, and therefore the reasoning of *Miranda* and *Mathis* does not apply to the present case."⁸

The crime of tax evasion is strikingly dissimilar to other forms of crime. When a crime occurs in the ordinary situation an investigation is begun to discover the offender. Whereas, in a tax fraud case, the suspect is known and the investigation is centered on whether a crime has been committed.⁹ Basic to an understanding of how the tax case differs is an understanding of how a fraud investigation is initiated. A fraud investigation can result from a referral by the Audit Division of the IRS whose primary concern is to determine if there is a civil adjustment necessary, to the Intelligence Division, whose primary interest is whether there has been a criminal violation of the revenue laws. If a fraud investigation is initiated, civil aspects of the case are suspended, and a special agent of the Intelligence Division is assigned to determine whether the taxpayer has defrauded the government. The special agent is a criminal investigator and differs in no essential way from any other law enforcement officer. A fraud investigation can also be initiated where information of fraudulent activity is directly communicated to the Intelligence Division. In this situation an investigation is begun directly by the Intelligence Division, without the preliminaries of a civil audit.¹⁰

The taxpayer seemingly has never been in an enviable position in relation to the applicability of constitutional guarantees to fraud investigation. Prior to *Miranda* and *Escobedo v. Illinois*,¹¹ the question of whether or not constitutional guarantees applied to a fraud investigation was largely determined on fourth¹² and fifth¹³ amendment grounds. In *Turner v. United States*,¹⁴ the fourth circuit in ruling on the application of *Gouled v. United States*,¹⁵ to *Turner*, finding no

8. 398 F.2d at 789.

9. See *Kohatsu v. United States*, 351 F.2d 898 (9th Cir. 1965), cert. denied, 384 U.S. 1011 (1966).

10. Hewitt, *The Constitutional Rights of the Taxpayer in a Fraud Investigation*, 44 TAXES 660, 661-62 (1966).

11. 378 U.S. 478 (1964).

12. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

13. The fifth amendment provides in part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of . . . liberty, or property, without due process of law; . . ." U.S. CONST. amend. V.

14. 222 F.2d 926 (4th Cir. 1955), cert. denied, 350 U.S. 831 (1955).

15. In *Gouled* the Supreme Court held that defendants' fourth and fifth amendment rights had been violated when an agent of the United States obtained entrance to de-

coercion on the part of the special agent, nor any affirmative misrepresentation by him, held that the defendant's fourth and fifth amendment rights had not been violated. The question of misrepresentation or coercion had a basic relationship to the matter of whether or not the information had been voluntarily and understandingly given, which, in turn, bore directly on the issue of whether or not the taxpayer's fourth and fifth amendment rights had been violated. If the special agent had coerced or deceived a taxpayer into submitting the information desired this would be unreasonable and a prohibited search and seizure.¹⁶ In such case that taxpayer would be an "unwilling source of the evidence" and in effect would be compelled to testify against himself.¹⁷ At this point in the development of constitutional criminal procedure, it was held that a defendant need not be warned that anything he submitted might be used against him, provided that it was voluntarily and understandingly given.¹⁸

During this same period in the development of the law relating to constitutional privileges in fraud investigations there were, however, other cases which enunciated an awareness that IRS agents may engage in conduct which would vitiate the taxpayer's apparent consent in handing over his records, although the conduct might not technically be considered an affirmative misrepresentation. A special agent could not conceal his presence in the case and direct the revenue agent to obtain incriminating evidence.¹⁹ A special agent assigned to investigate criminal wrongdoing other than tax fraud, could not use evidence of the fraud obtained through deceiving the taxpayer into believing the investigation was merely a routine civil investigation.²⁰

This division in the cases existed until *United States v. Sclafani*.²¹ In *Sclafani* the taxpayer had been dealing with a revenue agent, who after discovering some evidence of fraud, referred the case to the Intelligence

defendants' office under the guise of friendship and later obtained by "stealth," certain incriminating documents used to convict defendants for conspiracy to defraud the United States Government. 255 U.S. 298 (1921), *rev'd on other grounds*, *Warden v. Maryland*, 387 U.S. 294 (1967).

16. 255 U.S. at 305.

17. *Id.* at 306.

18. *Hanson v. United States*, 186 F.2d 61 (8th Cir. 1950); *Montgomery v. United States*, 203 F.2d 887 (5th Cir. 1953); *United States v. Burdick*, 214 F.2d 768 (3d Cir. 1954); and cases cited in *Turner v. United States*, 222 F.2d 926, 931 (4th Cir. 1955).

19. *United States v. Lipshitz*, 132 F. Supp. 519 (E.D.N.Y. 1955); *Matter of Bodkin*, 165 F. Supp. 25 (E.D.N.Y. 1958).

20. *United States v. Wheeler*, 149 F. Supp. 445 (W.D. Pa. 1957). *See also*, *United States v. Wolrich*, 119 F. Supp. 538 (S.D.N.Y. 1954); *United States v. Guerrina*, 112 F. Supp. 126 (E.D. Pa. 1953), *modified*, 126 F. Supp. 609 (E.D. Pa. 1955).

21. 265 F.2d 408 (2d Cir. 1959), *cert. denied*, 360 U.S. 918 (1959).

Recent Decisions

Division, and a special agent was assigned. Neither agent informed Sclafani of the latter's special duties. Subsequently, Sclafani was convicted of tax evasion and on appeal claimed that his consent to the searches (examination of records) incident to the investigation was limited to an investigation for civil purposes and when, without disclosing the altered purpose of the investigation, the revenue agent brought in a criminal investigator, the original consent was exceeded, and the resulting searches and seizures were in violation of his fourth amendment rights. The court in *Sclafani* stated that a failure to disclose the changing nature of the investigation was not deceitful, and the information that a taxpayer's returns are being audited gives sufficient notice that a criminal prosecution might result, regardless of whether the agents contemplate civil or criminal action when they interview him.²² *Squeri*, therefore seems to extend *Sclafani* as related to fourth and fifth amendment aspects of constitutional warnings in fraud investigation.

In addition to the fourth and fifth amendment arguments, as outlined previously, the taxpayer has not fared well in claiming a sixth amendment privilege during a fraud investigation, despite *Escobedo*²³ and *Miranda*.²⁴ The view that the *Escobedo* and *Miranda* requirements do not apply to noncustodial questioning by IRS agents has been adopted by every United States Circuit Court which has passed on the question,²⁵ and by a majority of the district courts which have done so.²⁶ There are however, a minority of district courts which hold *Escobedo* and *Miranda* requirements applicable to fraud investigations.²⁷ In rejecting an *Escobedo* argument that the taxpayer should be

22. *Id.* at 414-15.

23. 378 U.S. 478 (1964).

24. 384 U.S. 436 (1966).

25. *Morgan v. United States*, 377 F.2d 507 (1st Cir. 1967); *Schlinisky v. United States*, 379 F.2d 735 (1st Cir. 1967), *cert. denied*, 389 U.S. 920 (1967); *United States v. Maius*, 378 F.2d 716 (6th Cir. 1967), *cert. denied*, 389 U.S. 905 (1967); *Selinger v. Bigler*, 377 F.2d 542 (9th Cir. 1967), *cert. denied*, 389 U.S. 904 (1967); *Kohatsu v. United States*, 351 F.2d 898 (9th Cir. 1965), *cert. denied*, 384 U.S. 1011 (1966); and *Frohmann v. United States*, 380 F.2d 832 (8th Cir. 1967).

26. *United States v. Rabin*, 271 F. Supp. 190 (S.D.N.Y. 1967); *Stern v. Robinson*, 262 F. Supp. 13 (W.D. Tenn. 1966); *United States v. Spinney*, 264 F. Supp. 774 (D. Mass. 1966); *United States v. Carlson*, 260 F. Supp. 423 (E.D.N.Y. 1966); *United States v. Hill*, 260 F. Supp. 139 (S.D. Cal. 1966); *United States v. Fiore*, 258 F. Supp. 435 (W.D. Pa. 1966); *Smith v. United States*, 250 F. Supp. 803 (D.N.J. 1966); *Bohrod v. United States*, 248 F. Supp. 559 (W.D. Wis. 1965).

27. *United States v. Turzynski*, 268 F. Supp. 847 (N.D. Ill. 1967); *United States v. Kingry*, 19 Am. Fed. Tax R. 2d 762 (N.D. Fla. 1967); *United States v. Schoenburg*, 19 Am. Fed. Tax R. 2d 348 (D. Ariz. 1966); *United States v. Wainright*, — F. Supp. — (D. Colo. 1968).

warned of his right to counsel after the investigation has shifted from the investigatory to the accusatory stage, that is, after it begins to "focus on a particular suspect"²⁸ (by virtue of the presence of a special agent in the case), the courts passing on the question have adopted the rationale expressed in *Kohatsu v. United States*.²⁹ In rejecting the *Miranda* requirements those courts deciding the issue appear to have based their rationale on the lack of custodial interrogation.³⁰

The holding in *United States v. Turzynski*³¹ reveals the attitude of courts which hold *Miranda* and *Escobedo* requirements applicable to fraud investigation:

We hold that once a taxpayer becomes the subject of a criminal tax investigation, as evidenced by the referral of the investigation to the Intelligence Division or otherwise, our adversary process of criminal justice has become directed against him as a potential criminal defendant. Any evidence obtained from him is admissible only if the taxpayer furnished it after knowingly and voluntarily waiving his constitutional rights and privileges.³²

The affirmative misrepresentation rationale enunciated in *Sclafani*,³³ has been criticized by tax practitioners as denying the taxpayer protection of his constitutional rights.³⁴ As relates to fraud investigation, courts adopting the *Sclafani* test evidently presume that because the agent has made no affirmative misrepresentation, and it is known by the taxpayer that a government agent is in the case, his subsequent cooperation is voluntary. However, it seems anomalous to hold cooperation voluntary and thus a waiver of fourth and fifth amendment privileges, when the taxpayer never really knowingly waives these rights because of his not being informed of those rights.

Tax practitioners have advanced arguments in support of the con-

28. 378 U.S. at 490.

29. 351 F.2d 898 (9th Cir. 1965), *cert. denied*, 384 U.S. 1011 (1966). In *Kohatsu* the court stated at 901: "The Supreme Court in *Escobedo* referred to an unsolved crime. The existence of the crime was apparent. The police were seeking to identify the offender. The accused had been taken into custody. In the instant case the essential question to be determined by the investigations of the revenue agents was whether in fact any crime had been committed." Other post-*Escobedo*, pre-*Miranda* cases holding *Escobedo* inapplicable to the instant situation are *United States v. Spomar*, 339 F.2d 941 (7th Cir. 1965), *cert. denied*, 380 U.S. 975 (1965); and *Rickey v. United States*, 360 F.2d 32 (9th Cir. 1966), which was a *per curiam* application of *Kohatsu*.

30. See cases cited in note 25, *supra*.

31. 268 F. Supp. 847 (N.D. Ill. 1967). See cases cited in note 27, *supra*.

32. 268 F. Supp. at 850.

33. 265 F.2d 408 (2d Cir. 1959). See text at note 22, *supra*.

34. Burns, *Searches and Seizures; The Suppression of Evidence*, New York University 20th Institution on Federal Taxation 1081 (1962).

Recent Decisions

tention that *Miranda* warnings should be required at the outset of a criminal tax investigation,³⁵ however, the greatest difficulty in applying *Miranda* to a fraud investigation lies in the fact that in the average criminal tax investigation the taxpayer is not in custody. The instant court, in rejecting appellant's argument for *Miranda* warnings, demonstrated reliance on the custody factor,³⁶ and has thus joined the majority of courts which have passed on the subject.³⁷ The court proceeded on the premise that custody has some independent constitutional significance. They took no special notice of the function of the special agent, a criminal investigator, assigned to the Intelligence Division whose jurisdiction is limited to criminal investigations. The average taxpayer is not aware of the special agent's criminal function because of the mere identity of him as a special agent.³⁸ The taxpayer cannot really discern the important difference between a revenue agent and a special agent,³⁹ or the significance of a routine audit as distinguished from a joint investigation.⁴⁰ Frequently, after dealing with a revenue agent over routine audit matters, the taxpayer finds the investigation augmented by a special agent whose presence and purpose as a criminal investigator is never disclosed to the taxpayer. Ignorant of the possible criminal consequences, the taxpayer continues to cooperate with the agents.⁴¹ The special agent often uses very subtle and disarming techniques in interviewing the taxpayer.⁴² At the transition of a civil to a criminal investigation, the special agent has a suspect for possible criminal prosecution; and the taxpayer is a suspect, no less than an individual under interrogation for other crimes. Although the taxpayer is

35. See, e.g., Lipton, *Constitutional Rights in Criminal Tax Investigations*, 53 A.B.A.J. 517 (1967); Hewitt, *The Constitutional Rights of the Taxpayer in a Fraud Investigation*, 44 TAXES 660 (1966).

36. 398 F.2d at 789.

37. See cases cited in notes 25 and 26, *supra*.

38. Lipton, *The Taxpayer's Rights: Investigation of Tax Fraud Cases*, 42 A.B.A.J. 325 (1965); Ludlam, *Tax Fraud Investigations: A Plea for Constitutional Procedures*, 43 A.B.A.J. 1009, 1010 (1957).

39. Burns, *supra* note 34, at 1087.

40. Note, *Constitutional Aspects of Federal Tax Investigations*, 57 COLUM. L. REV. 676, 687 (1957); Note, *The Privilege Against Self-Incrimination in Federal Tax Investigations*, 14 U. FLA. L. REV. 74, 81 (1961).

41. *United States v. Turzynski*, 268 F. Supp. 847, 851 (N.D. Ill. 1967). The court stated that "[i]n some respects the tax investigation is more insidious and dishonest than the custodial interrogation, for the suspect in custody well knows his interrogators are seeking evidence to convict him of a crime while the tax suspect is permitted and even encouraged to believe that no criminal prosecution is in contemplation."

42. See Avakian, *Rights and Remedies of Taxpayers Suspected of Fraud*, 33 TAXES 878, 879-80 (1955), for an interesting description of the agents approach.

not technically in custody, he is faced with a representative of the government who possesses an awesome array of coercive powers.⁴³

An adversary process is begun when a special agent has entered an investigation, and it is submitted that it is logically irrelevant to distinguish the situation in terms of having a crime and seeking an offender, as opposed to having a suspect and trying to ascertain if a crime has been committed. In either instance, the investigation is conducted with an ultimate view to criminal prosecution and conviction. It is at this point, in keeping with the fundamental concepts of constitutional safeguards, that the taxpayer should be fully apprised of his fifth and sixth amendment rights. Custody provides a concrete point at which it can be said that the adversary process has begun, however, this not the only situation in which the investigative machinery of government is directed at a particular individual.*

Gerard M. Bigley

CONTRACTS—RESERVATION OF POWER TO TERMINATE EXISTING CONTRACT
—The Pennsylvania Superior Court has held that a clause requiring written notice of termination within sixty days is satisfied by notice received two days beyond termination date.

Music, Inc. v. Henry B. Klein Co., 213 Pa. Super. 182, 245 A.2d 650 (1968).

Plaintiff contracted to provide defendant Klein programmed music service. The contract as quoted by the court provided:

The term of this agreement shall be for three (3) years and eight (8) months from the date of installation and shall continue there-

43. See, e.g., INT. REV. CODE of 1954, § 7602. (Statutory right to inspect books and records, etc.).

* During the writing of this casenote the IRS changed policy regarding constitutional warnings at the initial stages of a tax investigation. Now at an initial meeting with a taxpayer, an IRS special agent is required to identify himself, describe his function, and advise the taxpayer that anything he says may be used against him. The agent must also tell the taxpayer that he cannot be compelled to incriminate himself by answering any questions or producing any documents, and that he has the right to seek the assistance of an attorney before responding.

Previously, the special agent identified himself and described his function at the first meeting with a taxpayer, but was not required to give further advice unless the taxpayer was in custody or the investigation proceeded beyond the preliminary stage. See *Standard Federal Tax Reports*, 55 TAXES ON PARADE 54 (Nov. 1968).