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STATE CAPITOL  
PHOENIX, ARIZONA

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DEPARTMENT OF LAW OPINION NO. 74-7 (R-14)

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REQUESTED BY: THE HONORABLE JOHN M. HAZELETT  
Chairman  
Arizona State Tax Commission

QUESTION: Does A.R.S. § 42-1307 prohibit the disclosure by the State Tax Commission of information required to be included in tax returns filed under the transaction privilege tax code where the information is being sought pursuant to a subpoena duces tecum issued in a private civil suit not involving the taxes due to the State of Arizona under Title 42, Chapter 8, Articles 1, 1.1 and 1.2, Arizona Revised Statutes?

ANSWER: Yes.

A.R.S. § 42-1307 provides:

Unless required by judicial order or as provided by this article, the members of the commission, its agents, clerks or stenographers shall not divulge the gross income, gross proceeds of sales or the amount of tax paid by any person as shown by the reports filed as required by this article, except to members and employees of the commission for the purpose of checking, comparing and correcting returns, or to the governor, the attorney general or other authorized representative of the state, in any action pertaining to the tax due under this article. (Emphasis added.)

Although there have been no Arizona decisions on point, it was held in Happy Coal Co. v. Brashear, 263 Ky. 257, 92 S.W.2d 23 (1935), that there is a clear distinction between judicial orders and administrative orders. The court stated:

Some orders involve the exercise of a judicial discretion, for example, one requiring a pleading to be verified or to be made more specific, striking matter from a pleading, ruling on a demurrer, etc.

Such orders in some measure affect the final result of the litigation, though they do not of themselves finally fix the rights of the parties, and may be called judicial orders.

Other orders involve the exercise of an administrative discretion only, as orders setting a cause for hearing on a particular day, fixing a time for court to convene or adjourn, calling a special term, extending a term, etc. Such orders do not in any sense determine or adjudicate any issue or issues involved in the litigation and may be called administrative orders. . . .

92 S.W.2d at 27.

A subpoena duces tecum is in the nature of an ex parte administrative order which may be obtained from the Clerk of the Superior Court after an action has been filed. Consequently, a subpoena duces tecum is not a judicial order within the meaning of A.R.S. § 42-1307.

Although the primary benefit of the confidentiality provisions of A.R.S. § 42-1307 is to the individual taxpayers, the mandate of the statute is to ". . . the members of the commission, its agents, clerks or stenographers. . . ." Under these circumstances, it would be contrary to A.R.S. § 42-1307 to permit or require divulgence where there is no waiver of the confidentiality provisions by the taxpayer, since this would subject the custodian of the information sought to potential liability on an official bond in an action brought by the taxpayer for the violation of A.R.S. § 42-1307.

Furthermore, although there have been no appellate decisions as yet specifically construing A.R.S. § 42-1307, in Attorney General Opinion No. 72-10, we concluded that, although the State Auditor General had the power under A.R.S. § 41-1279.04 to examine the records of the Tax Commission generated by Tax Commission employees in the performance of their official duties, there was no authority to examine any records or tax returns which were confidential under the provisions of either A.R.S. § 42-1307 or § 43-145.

It is submitted that, if the State Auditor General cannot inspect the tax returns, then surely a private litigant cannot inspect them by obtaining an ex parte subpoena duces tecum.

As previously noted, Attorney General Opinion No. 72-10 considered both A.R.S. § 42-1307, the transaction privilege tax confidentiality statute, and § 43-145, the income tax confidentiality statute. It is hornbook law that all statutes are to be construed together, and that statutes dealing with the same or related matters are to be construed in pari materia. Arizona State Tax Commission v. Staggs Realty Corporation, 85 Ariz. 294, 337 P.2d 281 (1959); Shumway v. Fleishman, 66 Ariz. 290, 187 P.2d 636 (1947); Home Owners' Loan Corporation v. City of Phoenix, 51 Ariz. 455, 77 P.2d 818 (1938); Gietz v. Webster, 46 Ariz. 261, 50 P.2d 573 (1935).

With regard to the instant matter, it is clear that A.R.S. §§ 42-1307 and 43-145 are intimately related. A.R.S. § 43-145(b) (1) provides that:

. . . Such information [i.e., information contained in a taxpayer's income tax return] may be disclosed in accordance with proper judicial order in cases or actions instituted for the enforcement of this title or for the prosecution of violations of this title. (Emphasis added.)

Indeed, the Supreme Court of Arizona placed an extremely narrow construction on the provisions of A.R.S. § 43-145 in Wales v. Tax Commission, 100 Ariz. 181, 412 P.2d 472 (1966). The court noted that the policy of confidentiality facilitates tax enforcement by encouraging a taxpayer to make full and truthful declarations in his returns without fear that his statements will be revealed or used against him for other purposes, citing Webb v. Standard Oil Company of California, 49 Cal.2d 509, 319 P.2d 621, 624 (1957). This, in itself, is a substantial, albeit indirect, benefit to the State of Arizona under A.R.S. § 42-1307. The court in the Wales decision stated:

Undoubtedly, the Legislature of Arizona, in requiring that tax returns and reports be kept secret, was fully cognizant of the Fifth

Amendment to the Constitution of the United States providing that, "No person \* \* \* shall be compelled in any criminal case to be a witness against himself \* \* \*." The failure to protect the secrecy of tax returns and reports, except where necessary to institute or prosecute a tax violation, strikes at the heart of the Fifth Amendment for it makes possible a variety of criminal prosecutions from information obtained by reason of an inspection of a tax return extorted under compulsion of law. . . . (Emphasis added.)

100 Ariz. at 184-185.

It is clear from the foregoing that there exists a strong legislative and judicial abhorrence of disclosure of a taxpayer's confidential tax matters for any purpose other than to institute action to enforce tax laws or prosecute violations of tax laws. As was stated in the Webb case, supra:

. . . The effect of the statutory prohibition [on disclosure of tax information supplied by a taxpayer] is to render the returns privileged, and the privilege should not be nullified by permitting third parties to obtain the information by adopting the indirect procedure of demanding copies of the tax returns. (Emphasis added.)

319 P.2d at 624.

In point of fact, the Webb decision involved a situation where the tax returns were being sought from the taxpayer, rather than the taxing authorities.

It has frequently been stated that, in addition to the policy of confidentiality as it bears upon the promotion of full and truthful disclosures by taxpayers, another important purpose is to conserve the time of public employees, so that they may more fully devote themselves to the business of government. Accordingly, officers and employees of the Internal Revenue Service are forbidden from producing a taxpayer's tax return in court or to testify concerning them in actions in which the United States is not directly interested,

without the express consent of the Commissioner of Internal Revenue. See Rev. Proc. 57-24, CB 1957-2 at 1092. In this regard see Leonard v. Wargon, 55 N.Y.S.2d 626 (1945), wherein it was specifically held that, under the Internal Revenue Code, a civil judgment creditor has no right to examine or inspect returns on file with the Internal Revenue Service. The court held:

. . . [N]or may subpoena be issued requiring their production by any Federal agency or employee. That does not mean, however, that any privilege is conferred upon the judgment-debtor with respect to such tax returns other than the general constitutional privilege against self-incrimination. There is no sound public policy against such disclosure by the judgment-debtor; on the contrary, public policy seems to be the other way, to put no obstacle in the path of one seeking to secure the enforcement of a judgment of a court of competent jurisdiction. . . .  
[Numerous citations omitted.] (Emphasis added.)

55 N.Y.S.2d at 627.

Finally, it was held in In re Valecia Condensed Milk Co. v. Warner, 240 F. 310 (7th Cir. 1917), that a subpoena duces tecum issued against the secretary of the Wisconsin State Tax Commission to produce all tax reports and information relating to certain bankrupt corporations and to testify thereto before the referee in bankruptcy was erroneous. The court held that the secretary's reliance upon the Wisconsin confidentiality statute (W.R.S. § 1087 m 24) was in all respects proper and that he could not be found guilty of contempt for refusing to produce the same at the hearing. The court stated:

Without in any degree trenching upon the essential and full power of courts to compel the production of papers, we must recognize also the generally declared public policy against revealing such returns--made, as they are, under compulsion of law, for the particular purpose of taxation; a public policy repeatedly recognized by the courts.

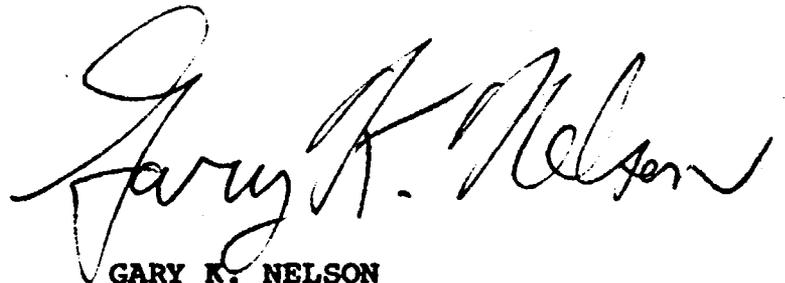
240 F. at 314.

For cases upholding this proposition, see, e.g., United States v. Ragen, 340 U.S. 462 (1951); Boske v. Comingore, 177 U.S. 459 (1900); Starr v. Commissioner of Internal Revenue, 226 F.2d 721 (7th Cir. 1955); Wales v. Tax Commission, supra; People v. Parham, 33 Cal.Rptr. 497, 384 P.2d 1001 (1963); Franchise Tax Board v. Superior Court, 36 Cal.2d 550, 225 P.2d 905 (1950).

The entire intent of the Legislature would not only be frustrated but contravened as well were a private litigant, plaintiff, defendant or other party permitted to use a subpoena duces tecum to compel the State Tax Commission to produce any and all tax returns or other confidential materials it might have from another taxpayer-party and turn it over to the litigant for his private perusal.

It is our conclusion, therefore, that a subpoena duces tecum issued in a lawsuit not involving the taxes due the State of Arizona under the transaction privilege and education excise tax codes does not constitute a "judicial order", as within the meaning of A.R.S. § 42-1307, and that the statute would be violated if the confidential information were divulged pursuant to such a subpoena duces tecum.

Respectfully submitted,



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The Attorney General

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