IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

CRIMINAL INVESTIGATION

RELATING TO AG COMPLAINT 17-22-1255 CA. No. N23M-10-104 CEB

Submitted: February 20, 2024
Decided: March 28, 2024

OPINION

Upon Consideration of DOJ's Motion to Enforce Attorney General's Subpoena,
DENIED.

Zoe Plerhoples, Deputy Attorney General, DEPARTMENT OF JUSTICE, Wilmington, Delaware. Attorney for the State of Delaware

Max B. Walton, Esquire, and Christina M. Thompson, Esquire, CONNOLLY GALLAGHER, LLP, Newark, Delaware. Attorneys for the Delaware Department of Finance.

BUTLER, R.J.

The Delaware Department of Justice ("DOJ") issued an Attorney General's ("AG's") subpoena to the Delaware Division of Revenue ("DOR") seeking personal income tax information concerning a certain taxpayer in whom the DOJ was interested.[1] The DOR has objected,[2] and the Court is called upon to sort out the rights and duties of the parties.

BACKGROUND

The investigation that underlies this dispute is under seal[3] and, fortunately, not particularly relevant. The Department of Justice is investigating a complaint in the nature of a theft or fraud.[4] In its motion to enforce the subpoena, the DOJ advises that the suspect has not been arrested, but its bank statements reflect unusual income activity. The DOJ theorizes the suspect's income tax records should reflect that income, or if not, the failure to attribute the income would be indicative of illegal behavior by the suspect.[5] In other words, this is not a tax investigation. Rather the DOJ seeks to rebut any possible claim that the money was not stolen.

The DOJ advised the Court that the DOR is resistant to disclose the tax returns absent a court order for enforcement.[6] The DOJ took the position that it did not need

[1] DOJ's Appl. for a Court Order to Enforce Subpoena Ex. A., Oct. 26, 2023.
[2] DOR's Response in Opp. to Enforce Subpoena, Nov. 16, 2023.
[3] Order, Oct. 26, 2023.
[4] DOJ's Appl. for a Court Order to Enforce Subpoena ¶ 1.
[5] *Id.* ¶ 19.
[6] *Id.* ¶¶ 11-12, 20.

a court order, that an AG's subpoena is self-executing and commands compliance without the need for a court order.[7] Nonetheless, the DOJ applied to the Court for an Order of enforcement of its subpoena. The DOJ's form of Order would require compliance by the DOR was mandated for "[g]ood cause being shown," and that the tax records are to be "solely for use in the above-referenced criminal investigation."[8] The DOJ did not, however, include any detail concerning what "good cause" had been shown. The DOR advised the Court that it wished to be heard on the application.

In the DOR's pleading, it framed the issue to be resolved as whether the Attorney General's subpoena power grants the DOJ the unfettered right to access tax returns from the DOR despite federal and state confidentiality and privacy restrictions making such returns presumptively off limits.[9] Obviously, the DOR felt the subpoena, standing alone, was insufficient.

There followed further briefing, requested by the Court, concerning the appropriate standard by which the Court should order enforcement of a subpoena for tax records. Those issues have now been briefed[10] and the matter is ripe for decision.

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[7] *Id.* ¶ 17.
[8] *Id.* at 8.
[9] DOR's Response in Opp. to Enforce Subpoena at 3-4.
[10] *See* DOR's Letter, Jan. 24, 2024; DOJ's Letter, Feb. 20, 2024.

ANALYSIS

A. The Attorney General's Subpoena Power

The historical basis for the AG's subpoena power is discussed in a 1956 Opinion of the Supreme Court, *In re Hawkins*[11]. There, the Court noted that:

> The statute was enacted in 1873, 14 Del.L. Ch. 378. In the year 1873 there were only two regular terms a year of the Court of General Sessions, 1852 Code, § 1911, and hence only two sessions of the grand jury in each county. The legislature may well have thought it desirable to clothe the Attorney General, in the exercise of his prosecuting function, with full investigatory powers during the long vacations. (The original act of 1873 used the phrase 'in vacation'.) Whether or not this surmise be correct, it is clear that the general investigatory powers of the grand jury are now shared, at least to a substantial extent, by the Attorney General. It is also clear that the grand jury may institute an investigation of suspected violations of law, and in pursuing the investigation may compel the appearance of witnesses and the production of documents.[12]

Thus, comparing the Attorney General's subpoena power to the subpoena power of a grand jury has long precedent in Delaware courts, and there is a historical basis for doing so. Correlating the two subpoenas has added benefits: (1) we can look to the practices in other jurisdictions as they relate to grand jury subpoenas for personal tax returns and (2) we need not presume that the legislature intended to imbue the Attorney General with some powers beyond those of the grand jury in requesting documents or testimony.

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[11] 123 A.2d 113 (Del. 1956).
[12] *Id.* at 115 (internal citations omitted).

Some amplification of the similarities between a grand jury subpoena and the Attorney General's statutory power to issue subpoenas is found in the case of *In re McGowen*.[13] This was a case befitting the turbulent early 1970's, in which the police wanted to obtain the identity of a person who had made profane remarks to a police officer at a demonstration.[14] Realizing a media reporter had taken photos of the incident, the police obtained an AG's subpoena and served it on the photographer with an order to turn over the photographs "forthwith" to the police investigating the disturbance.[15] The Supreme Court reversed the Superior Court's refusal to quash the subpoena, ruling that the Attorney General could not "transform its original grand jury function into a police instrumentality."[16] And with respect to the First Amendment implications of the subpoena, the Court deferred ruling on the question, but did "express the view that the standards and guidelines of the *Branzburg* case would be generally applicable to an Attorney General subpoena in a proper case, in view of the historic equality of his subpoena power with that of a grand jury." [17]

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[13] 303 A.2d 645 (Del. 1973).
[14] *Id.* at 646.
[15] *Id*. at 647.
[16] *Id.*
[17] *Id.* at 648. *Branzburg* is a reference to a 1972 U.S. Supreme Court decision dealing with a news reporter's asserted privilege to refuse to identify his sources to a grand jury, affirming the Supreme Court's belief that the grand jury "has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege." *Branzburg v. Hayes,* 408 U.S. 665, 688 (1972).

Thus, we can see that, like a grand jury subpoena, the Attorney General's right to access information via AG's subpoena is subject to constitutional, statutory, and common law privileges.

B. Access to Citizen's Tax Return Information

In addition to the details to be discussed presently, there are important policy considerations at stake when considering access to citizens' tax return information. Our system of income taxation relies to a great extent on the taxpayers' voluntary reporting and cooperation. In crafting federal exceptions to the general rule of confidentiality of tax returns in the U.S. Code, the congressional committee noted that it had "tried to balance the particular office or agency's need for the information involved with the citizen's right to privacy and the related impact of the disclosure upon the continuation of compliance with our country's voluntary assessment system."[18] Indeed, Congress provided specifically that states – like Delaware – that require attachment of federal returns to the state return *must* provide for the confidentiality of the federal return.[19] So the DOR correctly argues that automatic compliance with an AG's subpoena, with no judicial oversight, stands the very real risk of upsetting the federal/state relationship in Delaware's taxing structure.[20]

[18] S. Rep. No. 94-938, pt. 1, at 318 (1976).
[19] 26 U.S.C.A. § 6103(p)(8) (West 2024).
[20] *See* DOR's Letter, Jan. 24, 2024.

C. Specific Exceptions to Confidentiality of Delaware Taxpayer Information

The DOR directs the Court to two provisions governing the confidentiality of Delawarean's tax returns. The first is 30 *Del. C.* § 368(a). It provides that no employee of the Division of Revenue may reveal confidential personal tax information to another person "[e]xcept in accordance with [a] proper judicial order or as otherwise provided by law."[21] Unfortunately, section 368 does not define a proper judicial order, nor does it explain what "otherwise provided by law" means.

The second provision referenced by the DOR is 30 *Del. C.* § 581. It includes various provisions excepting some state actors from the confidentiality provisions of section 368.[22] Notably absent from the list in section 581 is the Attorney General in its capacity to investigate non-tax violations of the criminal law.[23] The DOR argues that by implication, the DOJ is not exempt from the confidentiality provisions because it is not included in the exceptions under section 581.[24]

The Court disagrees that section 581 necessarily limits the power of the DOJ to access tax information.[25] Rather, section 581 enables the DOR to enter into agreements with various state, interstate and federal agencies to share tax

[21] 30 *Del. C.* § 368(a).
[22] 30 *Del. C.* § 581(a)-(b); *see* 30 *Del. C.* § 368(a).
[23] 30 *Del. C.* § 581.
[24] DOR's Letter at 3-4.
[25] 30 *Del. C.* § 581.

information in pursuit of tax administration and enforcement.[26] Section 581 does not speak at all to the availability of tax information pursuant to a nontax law enforcement subpoena issued upon a "proper judicial order."[27]

Section 368 does address nontax disclosures.[28] Under section 368, tax returns may be disclosed to outsiders upon a "proper" judicial order or as "otherwise provided by law." The DOJ argues that the Attorney General's subpoena power is an "otherwise provided by law" exception that gets the DOJ the returns it seeks.[29] But if a mere subpoena by the Attorney General can mandate that DOR turn over state citizen's tax returns, without any judicial review, the delicate balance of confidentiality interests set forth in both state and federal law is undermined. Rather, "except as provided by law" must be read to mean except as provided by other provisions of the tax code. Those exceptions are spelled out in section 581, identifying the other agencies entitled to review parts or all of a tax return in carrying out that agencies' duties and functions.

If we read the AG's subpoena power as coextensive with that of a grand jury subpoena, there is no reason to believe that the legislature intended that the confidentiality applied by section 368 may be undone by a mere subpoena,

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[26] *Id*.
[27] *Id*.
[28] 30 *Del. C.* § 368.
[29] DOJ's Letter at 3-4; *see* 30 *Del. C.* § 368(a).

unaccompanied by a "proper judicial order" that has been reviewed by a judicial officer.

D. Federal Constraints on Disclosure of Tax Returns

The DOR points out that a holding that allows the DOJ access to any citizens' tax returns by the simple expedient of an Attorney General's subpoena interferes with Delaware's tax structure, which piggybacks off federal tax returns, which are themselves subject to federal statutes concerning confidentiality.[30]

The federal tax code does not guarantee the confidentiality of personal tax returns under all circumstances. 26 U.S.C. § 6103 sets forth several exceptions permitting disclosure of federal tax returns.[31] One such circumstance is entitled "[d]isclosure of returns and return information for use in criminal investigations."[32] That provision allows federal courts to order access to federal return information in support of a non-tax criminal investigation.[33] The statute spells out that an application for an Order from the Court must set forth that:

> (i) there is reasonable cause to believe, based upon information believed to be reliable, that a specific criminal act has been committed,
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> (ii) there is reasonable cause to believe that the return or return information is or may be relevant to a matter relating to the commission of such act, and

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[30] *See* DOR's Letter.
[31] 26 U.S.C.A. § 6103 (West 2024).
[32] 26 U.S.C.A. § 6103(i)(1) (West 2024).
[33] *Id*.

> (iii) the return or return information is sought exclusively for use in a Federal criminal investigation or proceeding concerning such act (or any criminal investigation or proceeding, in the case of a matter relating to a missing or exploited child), and the information sought to be disclosed cannot reasonably be obtained, under the circumstances, from another source.[34]

So, a federal grand jury may seek a court order for access to federal tax returns if it can show a federal court that the information "is or may be" relevant to commission of the crime being investigated and the information cannot reasonably be obtained from another source.

Alas, the parties have not directed the Court to any decisional law in federal court interpreting either "relevance" to the matter "relating to the commission of such act" or the "availability from other sources." This may be because so much of this litigation is likely undertaken *ex parte* by prosecutors or investigators and formal decisions are rare.

There is, however, substantial case law examining the intersection of federal and state tax return confidentiality laws when federal grand juries subpoena a state tax return from the state's taxing authority. The issue in such cases is whether the federal analysis under section 6103 applies to the enforcement of the grand jury subpoena or whether a state's broader, blanket confidentiality rules should prevail. In such cases, federal court's look to Evidence Rule 501, which provides that "[t]he

[34] 26 U.S.C.A. § 6103(i)(1)(B) (West 2024).

common law--as interpreted by United States courts in the light of reason and experience--governs a claim of privilege."[35]

To take but one example of this analysis, Massachusetts has a tax return confidentiality statute that has no exceptions, even for court orders.[36] A federal grand jury sought the tax returns of an arson suspect, as the grand jury believed the suspect committed the arson because he was seriously delinquent in his state meals and beverage taxes.[37] In *In re Hampers*,[38] the First Circuit recognized Massachusetts's privilege from disclosure of tax returns, but ruled that section 6103 adequately balanced the relative interests in criminal prosecution and tax return confidentiality. The Court then held:

> appellant [The Tax Commissioner] in this case enjoys a qualified privilege under Rule 501 because of the state nondisclosure statute and that, in order to enforce a subpoena in federal criminal investigation, a federal grand jury must proffer reasonable cause to believe that a federal crime has been committed, that the information sought will be probative of a matter at issue in the prosecution of that crime, and that the same information or equally probative information can not be obtained elsewhere through reasonable efforts. While well-supported requests for subpoenas may occasionally be opposed by those in appellant's position, we would predict little success and would expect appeals to be infrequent. We also note that this is a criminal, and not a civil case.[39]

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[35] Fed. R. Evid. 501.
[36] *In re Hampers*, 651 F.2d 19, 20-21 (1st Cir. 1981).
[37] *Id.* at 20.
[38] *Id.* at 23-24.
[39] *Id.* at 23-24.

The rationale in *Hampers* was adopted to enforce a federal grand jury subpoena for state tax returns in the Fifth Circuit[40] and the in the district of Vermont.[41] Cases reaching a similar result can be found in Connecticut[42] and New Jersey.[43]

The point of this analysis is not to end the inquiry. This is not a federal case determining an issue of privilege under common law. It does demonstrate, however, how one might resolve the balancing of interests between the taxing authority and a nontax related law enforcement agency's interest in obtaining a copy of the return.

E. What is a "Proper Judicial Order" to Produce Confidential Tax Returns Under Delaware Law?

The question of what is needed for a "proper judicial order" under Delaware law is not answered in the language of 30 *Del. C.* § 368, where it is found. The Court is thus left in the rather uncomfortable position of being asked to enter a "proper judicial order" with no hint from the legislature what it believes should ground a proper judicial order. It may be that any signed order of the Court is "proper," but the Court doubts very much that the legislature would have devoted a separate code provision to the confidentiality of tax returns only to have it vitiated completely by

[40] *U.S. v. Brown*, No. 10-100-BAJ-DLD, 2011 WL 208424 (M.D. La. Jan. 21, 2011).
[41] *In re Grand Jury Subpoena,* 118 F.R.D. 558 (D. Vt. 1987).
[42] *In re Cruz,* 561 F.Supp. 1042 (D. Conn. 1983).
[43] In re Grand Jury Empaneled January 21, 1981, 535 F. Supp. 537 (D.N.J. 1982).

a document signed by a judge who didn't give the matter the slightest thought, or for that matter, by a subpoena filed by a prosecutor acting with no judicial oversight.

So, by what standard is a Court to determine what findings must be made for the "order" to be "proper?" The Court asked the parties for a separate round of briefing to provide whatever insights they could on this issue.

The DOR responded that the Court must find that there is a "compelling need" for the tax records.[44] But exactly where a "compelling need" standard comes from is not explained.[45]

The DOJ responded that, if prior judicial approval is a necessity, the appropriate analysis for a proper judicial order pursuant to an Attorney General's subpoena seeking a Delaware tax return is found in section 6103 – the legal standard adopted by Congress in the context of federal tax returns.[46] The Court agrees. This standard harmonizes the federal and state interests in maintaining the confidentiality of tax returns and provides a standard for the Court to consider whether it can issue a "proper judicial order."[47]

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[44] DOR's Letter at 1-2.

[45] *See id.* The cases cited by the DOR are inapposite. They are not grand jury subpoena cases involving tax returns held by the state's taxing authority. The DOR cites no authority that requires a showing of "compelling need" as a predicate to enforcement of a grand jury subpoena.

[46] 26 U.S.C.A. § 6103(i)(1)(B) (West 2024).

[47] *See* 30 *Del. C.* § 368(a).

But the DOJ argues that since section 6103 will permit disclosure of tax returns if there is "reasonable cause" to believe a crime has occurred and the tax return "may be relevant to that crime," then that should be the standard of review to be applied to the DOJ's motion to compel: "reasonable cause" and "may be relevant."[48] The discerning reader might call that "not much" judicial oversight.[49] That standard pays virtually no respect to the important governmental interest in protecting the confidentiality of tax returns and the voluntary income tax system. Moreover, the DOJ overlooks the federal caveat that "the information sought to be disclosed cannot reasonably be obtained, under the circumstances, from another source."[50] So, while the DOJ argues that it has met its burden under section 6103, it has not even addressed a critical question.

Section 6103 requires that the "reasonable cause" that must be articulated is a reasonable cause to believe the tax return may be relevant "to a matter relating to the commission of such act." If the Court reads the DOJ's application for enforcement correctly, it only explains that, should the occasion arise, it would like to be able to impeach the suspect's possible testimony that there was a non-criminal basis for the unusual activity in the suspect's bank account. But the suspect hasn't actually said that: s/he hasn't said anything. The DOJ has no idea whether the putative defendant

[48] DOJ's Letter at 3 (internal citations omitted).
[49] *Id.* at 3-4.
[50] 26 U.S.C.A. § 6103(i)(1)(B)(iii) (West 2024).

will raise the specter of legitimate sources of the gains. The returns will not reveal direct evidence of the suspect's theft, which is the crime under investigation. While belts and suspenders will keep one's pants up, it is difficult to justify one when you have the other and the legal hurdle is to explain why you need either.

F. Has the DOJ Made a "Proper" Showing for an Order?

The Court understands that both the DOJ and the DOR have sought the Court's ruling on the criteria that DOJ must meet in order to enforce an Attorney General's subpoena on the DOR. The Court holds that the DOJ must meet the criteria set out in section 6103(i)(1) of Title 26 of the United States Code[51] in order to obtain a "proper judicial order" as required by section 368 of Title 30 of the Delaware Code.[52]

The rest of the DOJ's argument is less well articulated. Apparently, the DOJ speculates that the suspect may claim the stolen money was from a job or other proper source. If the suspect does so, the DOJ wants to impeach that claim by seeing if the funds were properly accounted for in the suspect's tax returns.[53] The problem with this position is that it does not differentiate this particular case from any other case of theft. The DOJ's position would make an Attorney General's subpoena for

[51] 26 U.S.C.A. § 6103(i)(1)(B) (West 2024).
[52] 30 *Del. C.* § 368(a).
[53] DOJ's Letter at 4.

tax returns a routine part of any theft investigation. There are hundreds, if not thousands of such cases every year in our court system. If the DOJ can obtain tax returns on every theft suspect – and that seems to be its position – it makes shambles of the carefully constructed safeguards of the confidentiality of tax returns envisioned by state and federal legislators.[54]

Finally, the Court notes that the DOR has agreed that it has the specific tax return information the DOJ seeks, packaged and ready to deliver upon a "proper court order."[55] It seems to the Court that at least on this bare record, the suspect has not been arrested or confronted about these alleged thefts, witnesses have not been questioned about the suspect's employment, income sources, etc. and the defendant has not proffered any defense that the money wasn't stolen but actually earned. If and when all that happens, perhaps the case for overriding the confidentiality of tax returns would be more compelling. The Court is disinclined to rule that the DOJ can never obtain a state tax return in a theft investigation or prosecution, but neither can

[54] DOJ's motion suggests that it seeks these returns for their impeachment value should the Defendant claim that the funds were legitimately derived. Section 6103 permits disclosure to law enforcement if the return is reasonably likely to produce evidence relevant to the commission of the crime. The Court has doubts whether "mere impeachment" evidence is sufficient to satisfy the requirement that the evidence be "relevant to the commission of the crime" itself. That issue has not been fully briefed by the parties and will have to wait for a more focused argument.

[55] DOJ's Appl. for a Court Order to Enforce Subpoena Ex. B at 3.

the Court find that the DOJ has made out a case for overcoming the confidentiality of tax returns on these thin pleadings.

CONCLUSION

Perhaps there is more to this than is revealed by the pleadings before the Court. If so, the Court will surely hear about it. It is also possible that the facts compelling a copy of the tax returns will change as the case proceeds and what is not reasonable now will become reasonable later. But for now, the Court holds that the DOJ has not set forth a case for securing a proper judicial order, sufficiently tailored to respect the confidentiality of the state tax returns as required by Delaware law.

The DOJ's Motion to Enforce the Attorney General's Subpoena is therefore **DENIED**.

IT IS SO ORDERED.

/s/ Charles E. Butler
Charles E. Butler, Resident Judge