

OP. NO. 03-065

**TAXATION: GENERAL PROVISIONS OF TITLE 58.1 – IN
GENERAL (SECRECY OF INFORMATION) — TAXES
ADMINISTERED BY THE DEPARTMENT OF TAXATION.**

Local revenue officials may assert qualified privilege to disclose confidential tax information to federal government in response to federal grand jury subpoena or administrative subpoena or summons issued pursuant to I.R.C. § 7602. Once privilege is asserted, tax information may be forwarded to court in sealed envelope, with instructions not to open until there is review and judicial order consistent with federal law.

The Honorable Philip J. Kellam
Commissioner of the Revenue for the City of Virginia Beach
September 25, 2003

Issue Presented

You ask whether, in the absence of a court order, tax information obtained by the commissioner of the revenue lawfully may be disclosed in response to a federal grand jury subpoena or in response to an administrative subpoena or summons as authorized by § 7602 of the Internal Revenue Code¹ or other federal law.

Response

It is my opinion that local revenue officials may assert a qualified privilege to disclose confidential tax information to the federal government in response to a federal grand jury subpoena or an administrative subpoena or summons issued pursuant to § 7602 of the Internal Revenue Code. Once the privilege is asserted, the information may be forwarded to the court in a sealed envelope with instructions that it not be opened until there is a review and judicial order consistent with federal law.

Background

Your request does not describe the nature of the information that is sought by the federal government and in the possession of your office. For purposes of this opinion, I shall assume that the information qualifies as "confidential," as contemplated by § 58.1-3.

Applicable Law and Discussion

Section 58.1-3 establishes the general principle that state and local tax and revenue officials are prohibited from disclosing confidential information about the transactions, property, income or business of any taxpayer.² The 1926 Session of the General Assembly originally enacted this rule,³ and its application continues, "[e]xcept in accordance with a proper judicial order or as otherwise provided by law."⁴ The General Assembly has not defined the term "proper judicial order" in the context of § 58.1-3.

Your question is not directly addressed by existing state court precedent, nor is there federal precedent directly on point.⁵ A federal district court, however, has examined the interplay between federal law and conflicting state privacy laws.⁶ First, the court recognized that, pursuant to § 58.1-109,⁷ a state tax official may respond to a grand jury subpoena by sending the requested information in a sealed envelope to the clerk of court, with instructions that the envelope not be unsealed absent a judicial order.⁸ The court reasoned that the official's reliance on § 58.1-109 may be understood as an assertion of a "qualified privilege" not to disclose the state tax information.⁹

Next, the court determined that, under § 6103(i)(1)(A) of the Internal Revenue Code,¹⁰ "[d]isclosure of federal tax returns to federal officers for use in a grand jury proceeding are permitted only upon an order by a federal district court or magistrate judge."¹¹ Then the court found that, under Federal Rule of Evidence 501, "it is reasonable to extend the § 6103 qualified privilege of federal returns to state tax returns."¹²

Finally, the court recognized that "[t]here are multiple benefits of preserving federalism and comity by honoring the Commonwealth's qualified privilege."¹³ As a result of these considerations, the court ruled that, "when the [federal] government wants to subpoena state tax return information on individual taxpayers, the court shall follow the strictures that Congress has set forth in § 6103."¹⁴

Analyzing the reasoning of the federal precedent,¹⁵ the prohibitions in § 58.1-3 constitute a statutory basis to assert a "qualified privilege"¹⁶ not to disclose confidential information, except in strict compliance with the requirement in § 58.1-3(A) for a "judicial order." Section 58.1-109, which provides a procedure for complying with a summons or subpoena requiring production of confidential tax returns, flows directly from the requirement that the taxpayer information described in § 58.1-3(A) shall not be disclosed by the state and local officials listed therein. A "commissioner of the revenue" is one of the officials designated in § 58.1-3(A). In the

absence of disclosure provisions specifically applicable to commissioners of the revenue, the procedural protections afforded by § 58.1-109 evidence the intent of the General Assembly that confidential taxpayer information be disclosed in the manner and under the circumstances described in the statute.

Conclusion

Accordingly, it is my opinion that local revenue officials may assert a qualified privilege to disclose confidential tax information to the federal government in response to a federal grand jury subpoena or an administrative subpoena or summons issued pursuant to § 7602 of the Internal Revenue Code. Once the privilege is asserted, the information may be forwarded to the court in a sealed envelope with instructions that it not be opened until there is a review and judicial order consistent with federal law.

¹Section 7602 authorizes the Secretary of the Treasury to examine books and witnesses to ascertain the correctness of any federal tax return. See I.R.C. § 7602 (West 2002).

²1997 Op. Va. Att'y Gen. 167, 168.

³See 1926 Va. Acts ch. 147, § 6, at 252, 255.

⁴Va. Code Ann. § 58.1-3(A) (LexisNexis Supp. 2003). Sections 58.1-3 and 58.1-3.1 also specify certain *limited* instances in which taxpayer information may be shared.

⁵A prior opinion of the Attorney General concludes that a subpoena duces tecum in a civil action *between private litigants* does not constitute a "proper judicial order" authorizing the disclosure of confidential tax information pursuant to § 58.1-3. See 1998 Op. Va. Att'y Gen. 123. In this instance, the federal government, rather than private litigants, is seeking the information.

⁶See *In re Grand Jury Subpoena*, 144 F. Supp. 2d 540 (W.D. Va. 2001). While that decision concerns state tax returns in the possession of the State Tax Commissioner, the reasoning of the court may apply by analogy to local tax information under the control of a local tax official.

⁷Section 58.1-109 permits "[t]he Tax Commissioner and each employee of the Department [of Taxation]" to comply with "any summons, subpoena, subpoena duces tecum or order, directing him to produce any confidential tax returns kept by or in the

possession of the Department," by mailing a certified reproduction or enlargement of such returns "in a sealed envelope to the clerk of court. Such envelope shall not be opened unless and until a judge of such court determines that the information contained therein is of such importance that the ends of justice require that the secrecy and confidentiality of such returns be violated."

⁸*In re Grand Jury Subpoena*, 144 F. Supp. 2d at 541.

⁹*Id.*

¹⁰Section 6103(i)(1)(A) authorizes disclosure of tax information to federal officers and employees for use in criminal investigations pursuant to order by a federal district court or magistrate. Upon application, the court may grant such orders if there is reasonable cause to believe that (1) "a specific criminal act has been committed"; (2) "the return or return information is or may be relevant to a matter relating to the commission of such act"; and (3) "the information sought to be disclosed cannot reasonably be obtained, under the circumstances." I.R.C. § 6103(i)(1)(B) (West Supp. 2003).

¹¹*In re Grand Jury Subpoena*, 144 F. Supp. 2d at 541.

¹²*Id.* at 541. "Federal Rule of Evidence 501 requires asserted privileges to be governed by common law, as interpreted by the court in light of 'reason and experience.'" *Id.*

¹³*Id.* at 542.

¹⁴*Id.*

¹⁵The Supremacy Clause of the Constitution of the United States provides that federal laws and treaties "shall be the supreme law of the land." U.S. CONST. art. VI, cl. 2; see also 2001 Op. Va. Att'y Gen.143, 144.

¹⁶See *In re Grand Jury Empanelled January 21, 1981*, 535 F. Supp. 537 (1982) (discussing applicability of New Jersey confidentiality statute to Division of Taxation records).

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