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OFFICE OF THE ATTORNEY GENERAL
State of California

JOHN K. VAN DE KAMP
Attorney General

OPINION

of

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ANTHONY S. DA VIGO
Deputy Attorney General

No. 84-1104

JULY 30, 1985

THE HONORABLE JAMES B. LINDHOLM, JR., COUNTY COUNSEL, COUNTY OF SAN LUIS OBISPO, has requested an opinion on the following question:

Must the county assessor, pursuant to an administrative summons issued by the Internal Revenue Service under title 26 of the United States Code, section 7602, either (a) produce or (b) produce only in compliance with a specific court order, information contained in property tax records made confidential under sections 408, 451, and 481 of the Revenue and Taxation Code?

CONCLUSION

The county assessor is required, pursuant to an administrative summons issued by the Internal Revenue Service under title 26 of the United States Code, section 7602, to produce information contained in property tax records made confidential under sections 408, 451, or 481 of the Revenue and Taxation Code, where the federal interest in disclosure outweighs the state interest in confidentiality, but is prohibited from producing such information where the state interest prevails. Such information must be produced in any case in compliance with a specific court order.

ANALYSIS

Title 26, United States Code, section 7602, subdivision (a), provides as follows:

> "For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of

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ANALYSIS

Title 26, United States Code, section 7602, subdivision (a), provides as follows:

> "For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of

any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized--

"(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons, and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

"(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry." (Emphasis added.)

Such power granted to the Commissioner of Internal Revenue is inquisitorial in nature and has been analogized to that vested in a grand jury. (United States v. Cortese (3 Cir. 1976) 540 F.2d 640; Falsone v. United States (5 Cir. 1953) 205 F.2d 734, 737, cert. den. 346 U.S. 864.) Unlike the report of a grand jury, the tax investigation is reported to the commissioner rather than to a court (Falsone v. United States, supra), and may not be used for criminal purposes except where a parallel civil investigatory purpose exists (United States v. Civella (8 Cir. 1981) 666 F.2d 1122; United States v. First National Bank of Atlanta (5 Cir. 1980) 628 F.2d 871).

The initial inquiry is whether a county assessor must, pursuant to such an administrative summons, produce information contained in property tax records which are subject to the following provisions of the Revenue and Taxation Code:1/

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1. Hereinafter, unidentified section references are to said code.

"Sec. 408:

"(a) Except as otherwise provided in subdivisions (b) and (c) any information and records in the assessor's office which are not required by law to be kept or prepared by the assessor, and homeowners' exemption claims, are not public documents and shall not be open to public inspection. Property receiving the homeowners' exemption shall be clearly identified on the assessment roll. The assessor shall maintain records which shall be open to public inspection to identify those claimants who have been granted the homeowners' exemption.

". . . . . .

"(c) The assessor shall disclose information, furnish abstracts or permit access to all records in his office to law enforcement agencies, the county grand jury, the board of supervisors or their duly authorized agents, employees or representatives when conducting an investigation of the assessor's office pursuant to Section 25303 of the Government Code, the State Controller, inheritance tax referees, the State Board of Equalization and other duly authorized legislative or administrative bodies of the state pursuant to their authorization to examine such records.

". . . . . ."

"Sec. 451:

"All information requested by the assessor or furnished in the property statement shall be held secret by the assessor. The statement is not a public document and is not open to inspection, except as provided in Section 408."

"Sec. 481:

"All information requested by the assessor or the board pursuant to this article or furnished in the change in ownership statement shall be held secret by the assessor and the board. The statement is not a public document and is not open to inspection, except as provided in Section 408."2/

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2. Each of the quoted statutes expressly declares that the records referred to are not public documents. Hence, it

In our view, these confidentiality provisions constitute an integral aspect3/ of the state's sovereign power4/ to collect taxes.

No single clear line of authority is found in the federal cases. In related contexts, for example, state officers were not compelled to disclose official communications which were privileged under state law. In In re Reid (D.C. Mich. 1906) 155 F. 933, the court held that a city assessor could not be compelled in bankruptcy proceedings before a referee to disclose, in violation of a prohibitory Michigan statute, certain tax statements. The court noted that the purpose of the state statute was:

> ". . . plainly to promote the collection from each taxpayer of his just share of state, county, and municipal taxes, and to that end to require from each property owner the full disclosure of all his taxable property under the state's pledge that the statement shall be kept inviolate, save to the officials for whose information and guidance it was made. To permit that information to become public would defeat the plain purpose of the statute by deterring the taxpayer from revealing what frequently could not be learned from any other source." (Id., at 935.)

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2. (Continued.)

is clear that they do not fall within the purview of the California Public Records Act. (Cf. Gov. Code, § 6252, subd. (d); Statewide Homeowners, Inc. v. Williams (1973) 30 Cal.App.3d 567, 569-570.)

3. All of the documents made confidential under sections 408, 451, and 481 are sources of information the accuracy of which is essential to the fair and efficient administration of the tax laws. (Cf. Roberts v. Gulf Oil Corp. (1983) 147 Cal.App.3d 770, 785, n. 9; Gallagher v. Boller (1964) 231 Cal.App.2d 482.) Such considerations are typical of numerous instances in which public policy and interest require the curtailing of an open and unrestricted inspection of documents. (Cf. 15 Ops.Cal.Atty.Gen. 242, 244 (1950).)

4. The collection of taxes is not the mere collection of a debt, but a sovereign act of the state to be exercised as prescribed by the Legislature. (People v. Central Pac. R.R. Co. (1895) 105 Cal. 576, 588-589, affd. 162 U.S. 91.)

(Similarly, In re Valecia (7th Cir. 1917) 240 F. 310 -- state tax commissioner; cf. Herman Brothers Pet Supply, Inc. v. N.L.R.B. (6th Cir. 1966) 360 F.2d 176 -- unemployment compensation claims.)

In a more recent case, however, United States v. Martin (D. Kan. 1982) 542 F.Supp. 22, the government brought an action to enforce a summons issued under section 7602 of the Internal Revenue Code on the Director of Property Valuation for the State of Kansas. Statutes of the State of Kansas directed that the information sought by the summons not be disclosed.

> "Defendant relies on K.S.A. § 58-2223b to satisfy its burden. Defendant cannot prevail with this argument. The United States Constitution provides that 'This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme law of the Land . . .' U.S. Const. art. VI, cl. 2. State laws which substantially interfere with the execution of federal laws are preempted by the operation of the Supremacy Clause. Aronson v. Quick Point Pencil Co. (1979) 440 U.S. 257, 262. In general, state laws in conflict with the execution of federal internal revenue statutes have been made to yield. U.S. v. Dallas National Bank, 152 F.2d 582 (5th Cir. 1946); U.S. v. City of Greenville, 118 F.2d 963 (4th Cir. 1941); U.S. v. Pettyjohn, 84 F.Supp. 423 (W.D. Mo. 1949). State laws impeding the enforcement of IRS summons have not been excepted from the operation of the Supremacy Clause. U.S. v. Gard, 76-1 U.S.T.C. § 9314 (E.D. Cal. 1976); U.S. v. Interstate Bank, 80-1 U.S.T.C. § 9272 (N.D. Ill. 1980)." (Id., at 23.)

In our view, however, and for the reasons hereinafter set forth, this ultra simplistic supremacy approach is analytically insufficient.

Rule 501 of title 28, United States Code, enacted in January 1975 (Pub. L. 93-595, 88 Stat. 1933) as part of the Federal Rules of Evidence5/, provides:

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5. It is assumed for purposes of this analysis that the conduct of investigations under the statute in question is subject to the same testimonial privileges as judicial proceedings. (See Falsone v. United States, supra, 205 F.2d at 73[illegible]; McMann v. Securities & Exchange Com. (2d cir. 1937) 87 F.2d 377, 378; 2 Am.Jur.2d Administrative Law, § 267.) It has been said that while administrative proceedings are

"Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." (Emphasis added.)6/

Thus, the issue in any case is whether the state nondisclosure statute should be recognized as a privilege "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."7/

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5. (Continued.)

not generally governed by the Federal Rules of Evidence, the ancient and widely recognized rules of privilege probably apply. (McMorrow v. Schweiker (1982) 561 F.Supp. 584, 586; see Wearly v. FTC (1978) 462 F.Supp. 589, vacated as not ripe, 616 F.2d 662 (3rd Cir. 1980), cert. den. 449 U.S. 822, after remand, 503 F.Supp. 174 (1980); and see rule 1101, subd. (c) - "The rule with respect to privileges applies at all stages of all actions, cases, and proceedings.")

6. The second sentence is designed to require the application of state privilege law in "diversity" cases (28 U.S.C. § 1332) governed by Erie R. Co. v. Tompkins (1938) 304 U.S. 64. (See, e.g., Credit Life Ins. Co. v. Uniworld Ins. Co. (S.D. Oh., W.D. 1982) 94 F.R.D. 113 - state law applied to discovery of tax returns.)

7. Proposed Federal Rules of Evidence, rule 502, not accepted by Congress, would have recognized a specific privilege for records required by local law not to be disclosed. Its rejection has no compelling significance since the courts remain free under the more general provisions of rule 501 to recognize a privilege in a proper case. (In re Hampers (1st Cir. 1981) 651 F.2d 19, 21, n. 2; United States v. King (E.D. N.Y. 1976) 73 F.R.D. 103, 104-105; In re Grand Jury Empanelled Jan. 21, 1981 (D. N.J. 1982) 535 F.Supp. 537, 540.)

In this regard, the court in Schafer v. Parkview Memorial Hosp. Inc. (N.D. Ind. 1984) 593 F.Supp. 61, 62-63, observed:

> "Because Rule 501 of the Federal Rules of Evidence speaks in terms of 'reason and experience,' most courts, even in federal question cases, look to state law to see if a privilege 'should be applied by analogy or as a matter of comity.' Ott v. St. Luke Hospital of Campbell County, 522 F.Supp. 706, 708 (E.D.Ky., 1981); Robinson, supra; United States v. King, 73 F.R.D. 103 (E.D.N.Y., 1976). Thus, where a 'state holds out the expectation of protection to its citizens, they should not be disappointed by a mechanical and unnecessary application of the federal rule,' Lora v. Board of Education, 74 F.R.D. 565 (E.D.N.Y., 1977) because 'comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy.' King, supra at 105."

In balancing the competing interests between the need for disclosure and the need to protect confidentiality, the Schafer court invoked the well established "four factor test" (Id., at 64):

> "Adopting the four factor test for recognition of a testimonial privilege recognized in cases such as American Civil Liberties Union of Mississippi, Inc. v. Finch, 638 F.2d 1336 (5th Cir. 1981) and In re Hampers, 651 F.2d 19 (1st Cir. 1981), other courts have applied those factors to a claimed privilege under peer review statutes. See, Ott v. St. Luke Hospital of Campbell County, 522 F.Supp. 706 (D. Ky. 1981). The four factors to be taken into consideration include:
>
> "1. The communications must originate in a confidence that they will not be disclosed.
>
> "2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> "3. The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> "4. The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of the litigation.

"Finch, supra, at 1344; Ott, supra, at 710."

Specifically, it remains to be determined whether Revenue and Taxation Code sections 408, 451, and 481 present a "proper case" for the recognition of a privilege under section 501 of the Federal Rules of Evidence.8/ In re Hampers, supra, 651 F.2d 19, involved the issuance by a federal special grand jury investigating an arson-insurance fraud scheme of a subpoena duces tecum directing the Commissioner of Revenue for Massachusetts to produce documents relating to the sales tax on meals and beverages owed to the commonwealth at the time of the fire which destroyed a restaurant. A motion to quash was predicated upon a state statute prohibiting the disclosure of tax return information.

Approaching the inquiry whether the state's asserted privilege was "intrinsically meritorious in our independent judgment" (American Civil Liberties Union of Miss. v. Finch (5th Cir. 1981) 638 F.2d 1336), the Hampers court adopted the four part test (id., at 23):

> ". . . The first is whether the communications originate in a confidence that they will not be disclosed. The answer is and for a long time has been 'Yes'. The second is whether this element of confidentiality is essential to 'the full and satisfactory maintenance of the relation between the parties.' Id. at 1344. On this issue each side overargues. The United States blithely asserts that criminal and other sanctions provide more than enough teeth to guarantee continued compliance with the tax laws. The Commonwealth invokes the specter of Doomsday if the slightest

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8. Inasmuch as the state's interest in confidentiality is presented in the context of the federal agency's interest in disclosure, it should be noted at the outset that the operative federal statute, 26 United States Code section 7602, does not "otherwise require" the disclosure of confidential information within the meaning of rule 501, but is silent with respect to rules of evidence and procedure. (Compare § 19254, subd. (c), infra: "The Franchise Tax Board may issue . . . subpoenas duces tecum, which . . . may be served on any person for any purpose.") While such statutory language is broad in form, it does not purport to supersede established rules of privilege. It has been held, for example, that rule 501 governs over the broad subpoena authority of a grand jury. (In re Grand Jury Empanelled Jan. 21, 1981, supra, 535 F.Supp. at 539-540; and see Branzburg v. Hayes (1972) 408 U.S. 665, 688.)

enforced breach of confidence occurs. Our view is that while selective disclosure in cases where rigorous criteria have been met would most probably have little or no effect on the state's reporting system, easy and automatic recourse to tax return information by federal grand juries or--if there were no privilege whatsoever--by competitors, creditors, prospective purchasers or other litigants in federal court might eventually have an adverse impact on the state-taxpayer relationship. That such a relationship, to address Wigmore's third test briefly, is a vital one, which 'ought to be sedulously fostered', id. at 1344, would seem to be beyond dispute.

"Wigmore's fourth inquiry is whether 'the injury that would inure to the relation by the disclosure of the communications [would be] greater than the benefit thereby gained for the correct disposal of litigation.' Id. at 1344 (emphasis in Finch). This is the query that drives us to seek a more particularistic answer than the macrocosmic one that effective federal criminal law enforcement is more important than state tax collection. We can easily see that if a state tax return contained the only key to resolving a serious federal crime, the balance would tilt in favor of the federal government. See In re Grand Jury Subpoena for N.Y. State Income Tax, 468 F.Supp. 575 (N.D.N.Y. 1979). But if a return contained information that would be easily obtained elsewhere and at best would constitute only cumulative evidence impeaching one of several witnesses, we might have second or third thoughts.

"Being charged as we are under Rule 501 to look to reason and experience in charting a federal evidentiary common law, we think the key has already been forged by the Congress in legislating in 26 U.S.C. § 6103(i)(1) the conditions under which federal tax information may be made available to federal officials for non-tax criminal purposes. The deliberate judgment of the legislature on the balancing of the societal interests in detecting, preventing, and punishing criminal activity, in safeguarding individuals' interests in privacy, and in fostering voluntary compliance with revenue reporting requirements, seems to us a legitimate if not compelling datum in the formation of federal common law in this area. See Moragne v. State Marine Lines (1970) 398 U.S. 375, 390-91, Landis, Statutes and the Source of Law, in Harvard Legal Essays 213, 226-27 (1934).

"We see no reason why, if federal prosecutions are not unduly hindered by the restraints of § 6103, they would be so hindered by applying the same rules to state tax returns. We see a positive virtue in avoiding either any circumvention of § 6103 or inconsistency in rules of access to federal and state tax information. And we see value in preserving in this small area the postures of comity and deference arising from federalism."

The court held that the Massachusetts Commissioner of Revenue enjoyed a qualified privilege under rule 501 because of the state nondisclosure statute, subject to an adequate showing by the federal grand jury of an overriding contravening interest.

In re Grand Jury Empanelled Jan. 21, 1981, supra, 535 F.Supp. 537, involved the issuance by a federal grand jury investigating racketeering of a subpoena duces tecum directing the New Jersey Division of Taxation to deliver copies of certain franchise tax returns of a named company. A motion to quash was predicated upon a state statute prohibiting disclosure by the division of its records and files.

The court observed (id., at 541) that the motivating factor underlying New Jersey's legislation was a desire to encourage accurate and complete reporting by providing a measure of qualified confidentiality for the information submitted, that this was a laudable legislative objective, and that the means chosen were reasonably calculated to achieve that goal. Moreover, "the principles of comity suggest generally that the federal courts should recognize state privileges 'where this can be accomplished at no substantial cost to federal substantive and procedural policy.' (Citation.)" (Id.) The court adopted, as a matter of federal common law under rule 501 a qualified privilege for the disclosure of state tax returns patterned on 26 United States Code section 6103(i)(1) respecting proceedings to enforce federal laws not relating to tax administration. (Id., at 542.)

Thus, where an asserted state privilege is based on the confidentiality of tax returns, 26 United States Code section 6103(i)(1) sets the standard where information is sought in connection with non-tax criminal matters. It is assumed for purposes of this analysis, on the other hand, that the administrative summons issued by the Internal Revenue Service, which is the subject of the present inquiry, would be in connection with a civil or criminal tax related investigation.

United States v. King, supra, 73 F.R.D. 103, concerned an investigation of a taxpayer for failure to declare as income the proceeds of extortion from high-level narcotics dealers. The United States Attorney issued a subpoena duces tecum directing the Department of Finance of the City of New York to furnish city income tax returns reflecting filing records and payments. A motion to quash was predicated upon a provision of the New York City Administrative Code (having the force and effect of state law) prohibiting the disclosure of any report or return.

The court observed preliminarily that rule 501 "does not rigidly circumscribe the form or extent of the rules of privilege applicable in federal criminal cases. Courts may continue to develop accepted privileges, as well as to formulate new privileges on a case by case basis." Applying the four part test, the court described generally the federal interest:

> "Of the four factors to be weighed, the need for full revelation of pertinent evidence to the trier is the most powerful and least variable.
>
> '. . . . . .
>
> "Only recently the Supreme Court emphasized the strong policy in favor of full development of the facts in federal litigations to the end that justice be served. It observed in United States v. Nixon (1974) 418 U.S. 683, 709:
>
> "'We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.'"

With respect to the state interest the court observed:

> "The secrecy statute involved in this case is but one of several thousand enactments and regulations in the United States which 'make

confidential in varying degree sundry matters required by law to be recorded or to be reported orally or in writing to various administrative officials.' 8 Wigmore, Evidence § 2377 at 781 (McNaughton rev. 1951). These statutes, both state and federal, generally represent legislative policies of significant dimension. See Advisory Committee's Notes to Proposed Federal Rule of Evidence 502, 56 F.R.D. 183, 235 (1972)). In effect, the government promises secrecy as an inducement for the creation of the communication to the state on the assumption that the communicator will be motivated to make a more honest and candid revelation. As Wigmore points out:

"'Where the government needs information for the conduct of its functions and the persons possessing the information need the encouragement of anonymity in order to be induced to make full disclosure, the protection of a privilege will be accorded. . . . [Many] situations exist where . . . information can best be obtained only from the person himself whose affairs are desired to be known by the government. An attempt to get it by mere compulsion might be tedious and ineffective; and a concession of anonymity in this context would be meaningless. Thus where alternative methods of getting needed information are impracticable enough, it is expedient for government to promise to cloak the information in some special degree of secrecy in exchange for ready and truthful disclosure.'"

The court interrelated the respective interests in part as follows:

"A strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy. Cf. Apicella v. McNeil Laboratories, Inc. (E.D.N.Y. 1975) 66 F.R.D. 78. In this connection we recognize that the benefit of a state's promise of protection from divulgence is greatly attenuated when those who must choose whether to communicate or not in reliance on the local privilege know that the federal authorities may force public revelation at will. The imperative need of the states and their subdivisions to efficiently administer their own fiscal operations militate strongly against action by a district court that might interfere with a state tax program, in the absence of a showing of

genuine government need for subpoenaed material. Cf. Tully v. Griffin Inc. (1976) 429 U.S. 68, 73 (recognition of state procedures for challenging state tax decisions as reason for federal courts to abstain from granting injunction)."9/

It is apparent, in view of the necessary balancing of respective interests in each case, that a categorical answer may not be given abstractly without reference to specific facts and circumstances. Moreover, it is not clear whether a federal appeals court would analyze a case involving a tax related investigation without reference to the correlative standards of 26 United States Code section 6103; it is not immediately apparent why the corresponding federal criteria would be significant only in non-tax-related proceedings. Subdivision (h) of that section pertains to the disclosure of federal tax information for purposes of tax administration. Subparagraph (4) concerns disclosure in judicial and administrative proceedings:

> "--A return or return information may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration, but only--
>
> "(A) if the taxpayer is a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayers civil or criminal liability, or the collection of such civil liability, in respect of any tax imposed under this title;
>
> "(B) if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding;
>
> "(C) if such return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding; or

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9. Applying the pertinent tests to the particular facts of the case, the court ruled in favor of disclosure. Primary among the considerations was the indication that the principal objective of the New York nondisclosure provision was not to foster secrecy so as to encourage candor and cooperation by the taxpayers, but to induce other taxing authorities, including the United States, to furnish information upon the basis for selective reciprocity.

"(D) to the extent required by order of a court pursuant to section 3500 of title 18, United States Code, or rule 16 of the Federal Rules of Criminal Procedure, such court being authorized in the issuance of such order to give due consideration to congressional policy favoring the confidentiality of returns and return information as set forth in this title.

"However, such return or return information shall not be disclosed as provided in subparagraph (A), (B), or (C) if the Secretary determines that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation."

While we make no prediction as to the future federal judicial determinations in the premises, it is at least a reasoned hypothesis that if disclosure for tax related purposes of federal tax information is not, in the federal view, a significant impairment of the general policy of confidentiality (see § 6103, subd. (a)), a similar view would be adopted with respect to local nondisclosure provisions.

A corresponding variable lies in the state nondisclosure policy which is propounded as the basis for the asserted privilege. It is a reasonable inference that if such state policy itself contains an exception for tax related purposes, disclosures for concomitant federal purposes are less likely to be viewed as such an increased impairment of general state policy as to override a countervailing federal interest, especially where such interest is found to be substantial and sufficiently supported. It remains to be examined, therefore, the extent to which the nondisclosure policy of this state provides for tax related disclosures to outside agencies. In our view, such an exception would constitute a strong factor in the balance of the state-federal equation whether or not reference is made in the total analysis to the provisions of 26 United States Code section 6103.

Of the three statutes prescribing the nondisclosure policy of this state with respect to the county assessor, sections 408, 451, and 481 which are the subject of this discussion and set forth at the outset, each is expressly subject to the exceptions contained in section 408. Subdivision (c) of section 408 provides for disclosure to law enforcement agencies, the county grand jury, the board of supervisors, the State Controller, inheritance tax referees, staff appraisers of the Department of Transportation, the State Board of Equalization, and "other duly authorized . . . administrative bodies of the state

pursuant to their authorization to examine such records." With respect to the authority of the Franchise Tax Board to examine such records, section 19254 provides:

> "(a) The Franchise Tax Board, for the purpose of administering its duties under this part, including ascertaining the correctness of any return; making a return where none has been made; determining or collecting the liability of any person in respect of any liability imposed by this part (or the liability at law or in equity of any transferee in respect of such liability); shall have the power to examine any books, papers, records, or other data, which may be relevant to such purpose.
>
> "(b) The Franchise Tax Board may require the attendance of the taxpayer or of any other person having knowledge in the premises and may take testimony and require material proof for its information and administer oaths to carry out the provisions of this part.
>
> "(c) The Franchise Tax Board may issue subpoenas or subpoenas duces tecum, which subpoenas must be signed by any member of the Franchise Tax Board and may be served on any person for any purpose."

Thus, the state policy provides for disclosure to another state tax agency for tax related purposes. It is not significant that the state statute makes no provision for disclosure to a federal tax agency. The salient factor is rather that the state does not view its own policy to be so compelling as to preclude disclosure for that type of designated purpose for which disclosure is sought by the federal agency.

In any event it is clear that all of the four established factors should be weighed in the balance. In the absence of a complete recitation of all of the material averments of a particular case, whether actual or hypothetical, it must be concluded generally that the county assessor may or may not be required, pursuant to an administrative summons, to produce information contained in property tax records which are subject to the state nondisclosure statutes, depending upon the balance of respective state and federal interests in any given case. Such a determination may, of course, be made by a federal court pursuant to a motion to quash. But where the motion is simply denied, leaving the assessor with neither an express court order to comply with the summons nor a determination of an appellate court, or where the balance in

favor of disclosure is not within the realm of dispute and no such motion is made, the question remains whether the assessor is required, even without the issuance of an express court order pursuant to an enforcement action by the Internal Revenue Service,10/ to produce such information.

Article III, section 3.5, of the California Constitution provides that an administrative agency has no power to refuse to enforce a statute on the basis that federal law prohibits the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law.11/ Section 3.5 does not operate to preclude compliance with a direct order of a lower court. Thus, it has been held that when a superior court issues a writ directed to an administrative agency to not enforce a statute because it is unconstitutional, the administrative agency must obey that mandate with respect to the individual petitioner or specific class of petitioners to which it pertains. (Fenske v. Board of Administration (1980) 103 Cal.App.3d 590, 595.) We are now concerned, however, with the assessor's duty in the absence of such an order, where no privilege exists under rule 501.

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10. The assessor may elect to await such an order particularly where an independent determination by an assessor as to the balance of respective interests is practicably infeasible.

11. That section provides in its entirety:

> "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> "(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> "(b) To declare a statute unconstitutional;
>
> "(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

Where no such privilege against disclosure is available, sections 408, 451, and 481 would clearly conflict with title 26 United States Code section 7602. Article III, section 3.5, would operate to preclude the assessor from complying with an administrative summons issued pursuant to that federal statute, since no appellate court has determined that enforcement of the conflicting state restrictive statutes is prohibited by federal law.

Article VI, section 2, of the United States Constitution provides:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Similarly, article III, section 1, of the California Constitution provides that "[t]he State of California is an inseparable part of the United States of America, and the United States Constitution is the supreme law of the land."

Thus, the Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every state owes allegiance, whether in his individual or official capacity. (Ex parte Siebold (1879) 100 U.S. 371, 392.) The supremacy clause requires that every state provision, including those enacted by ballot and accorded state constitutional stature, conform to federal constitutional standards. (Mulkey v. Reitman (1966) 64 Cal.2d 529, 533, 542.) Consequently, both the constitution and laws of a state, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. (Chae Chan Ping v. United States (1889) 130 U.S. 581, 605; Ex parte Siebold, supra, at 376.)

To the extent, therefore, that the federal statute, title 26 United States Code section 7602, conflicts with sections 408, 451, and 481, it is the obligation of the county assessor to act in accordance with the federal law and to disregard conflicting state constitutional and statutory provisions. Such action provides no basis for state law sanction. (In re Hampers, supra, 651 F.2d at 21; In re Grand Jury Subpoena, May, 1978 at Baltimore (4th Cir. 1979) 596 F.2d 630, 632.) Article III, section 3.5 of the state constitution, on the contrary, would by its express terms interpose a material condition precedent to compliance with the supreme law, i.e., an appellate court determination

which may require years to transpire. The Constitution of the United States permits no such impediment. Hence, in our view, section 3.5 itself falls, to the extent of inconsistency, upon the bedrock of federal supremacy.

It is recognized that some state appellate courts have referred to section 3.5 in the context of a federal constitutional issue.12/ However, the matter of federal supremacy in connection with executive compliance with an unconstitutional state statute has not been examined in any supreme or appellate court decision, perhaps due to the relative insignificance of the issue once the statute has been declared unconstitutional by the appellate court deciding the case.

In any event, cases in which section 3.5 has been noted generally concerned a constitutional challenge to a state statute in the course of an administrative adjudicatory proceeding. (Regents etc. v. Public Employment Relations Board (1983) 139 Cal.App.3d 1037, 1042 - PERB properly declined to decide the question whether the claimed statutory right to use the internal mail system is unenforceable by reason of preemptive federal postal law; Lewis-Westco & Co. v. Alcoholic Bev. Cont. App. Bd. (1982) 136 Cal.App.3d 829, 840, n. 12 - assumed, arguendo, that section 3.5 would prohibit an adjudication by the board that a state statute violated the federal Sherman Act; Chev. Motor Div. v. New Motor Veh. Bd. (1983) 146 Cal.App.3d 533, 539 - the board could not have granted relief from a statute prescribing its composition in violation of procedural due process; see also Dep. Alc. Bev. Cont. v. Alcoholic Bev. Cont. App. Bd. (1981) 118 Cal.App.3d 720, 725; Leek v. Washington Unified Sch. Dist. (1981) 124 Cal.App.3d 43, 53.)

Of course, section 3.5 does not affect the powers of the California courts to consider constitutional claims. (Dash, Inc. v. Alcoholic Bev. Cont. App. Bd. (9th Cir. 1982) 683 F.2d 1229, 1234.) It has been universally held that while a constitutional issue as to the validity of a state statute may not be cognizable under section 3.5 in an administrative proceeding, it may either be raised for the first time on judicial review (Westminster Mobile Home Park Owners' Assn. v. City of Westminster (1985) 167 Cal.App.3d

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12. In Valdes v. Cory (1983) 139 Cal.App.3d 773, 780, the court noted summarily, as a supplemental basis for its determination that an action was properly initiated in the appellate court, that the named respondents were under a duty imposed by section 3.5 to comply with a constitutionally contested statute until an appellate court had declared it invalid.

610, 619-620; Chev. Motor Div. v. New Motor Veh. Bd., supra, 146 Cal.App.3d at 539; Capitol Industries-EMI, Inc. v. Bennett (9th Cir. 1982) 681 F.2d 1107, 1116-1117) or nevertheless presented and preserved for judicial review (Southern Pac. Trans. v. Pub. Util. Com. etc. (9th Cir. 1983) 716 F.2d 1285, 1291; Leek v. Washington Unified Sch. Dist., supra, 124 Cal.App.3d at 53). Thus, in the context of administrative adjudication, the application of section 3.5 would not require the agency to act unconstitutionally; its sole effect is to refer the parties to the superior court for judicial disposition. We are not concerned here with an interim decision in an extended adjudicatory process, but with the effect of section 3.5 upon the purely executive act of a county assessor13/ seeking to comply with a statutorily authorized valid federal summons in the absence of any privilege or other objection which would warrant judicial intervention or delay. In such a case, and for the reasons hereinabove set forth, section 3.5 would be "absolutely void" and of no force or effect.

It follows that, pursuant to a valid federal summons, a county assessor is required to produce information contained in property tax records which are subject to the state nondisclosure statutes, where the federal interest in disclosure outweighs the state interest in confidentiality. Considerations which would weigh in favor of disclosure would include, but are not limited to, the following:

1) the importance of the federal proceeding;

2) the information would directly affect the resolution of a primary issue;

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13. Inasmuch as section 3.5 would not apply in any event, it is not necessary to engage in a detailed analysis as to whether the county assessor is an "administrative agency" within the meaning of that section. (Cf. 62 Ops.Cal.Atty.Gen. 809, 811 (1979); 62 Ops.Cal.Atty.Gen. 788, 790-791 (1979).) Section 3.5 has been considered in connection with local agencies (Schmid v. Lovette (1984) 154 Cal.App.3d 466, 473-474 -- local school district; Westminster Mobile Home Park Owners' Assn. v. City of Westminster, supra, 167 Cal.App.3d at 619 -- city arbitrator; 64 Ops.Cal.Atty..Gen. 690, 694-695 (1981) --county board of equalization) and with agencies headed by an officer as distinguished from a commission (Valdes v. Cory, supra, 139 Cal.App.3d at 780 -- State Controller, Director of Finance; cf. 62 Ops.Cal.Atty.Gen. 365, 367 (1979) --Secretary of State). We do not, however, reach the question for purposes of this analysis.

3) under similar circumstances, disclosure by the federal government of federal tax information would be permitted;

4) under similar circumstances, disclosure by the state to another state taxing agency would be permitted by state law;

5) the taxpayer whose records are sought to be disclosed is a party or is directly interested in the investigative proceeding.

However, the county assessor is prohibited from producing such information where the state interest in confidentiality outweighs the federal interest in disclosure. Considerations which would weigh in favor of nondisclosure would include, but are not limited to, the following:

1) the information sought may be readily acquired from another source;

2) the information sought would be cumulative of other competent evidence acquired or available;

3) the disclosure of information not otherwise a matter of public record or knowledge would constitute a substantial invasion of privacy or impairment of competitive advantage:

4) disclosure of information would have a substantial adverse effect upon voluntary compliance with revenue reporting requirements:

5) disclosure of information would identify a confidential informant or impair a state investigation in progress.

Such information must be produced in any case in compliance with a specific court order. It is, of course, the responsibility of the assessor to proffer in connection with any such judicial proceeding any state interest in nondisclosure which may outweigh the federal interest in disclosure.

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