


Fifth Amendment Assertion on Schedule B Not Frivolous


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A taxpayer who redacted some interest information from a schedule of his tax return as an exercise of the Fifth Amendment privilege against self-incrimination did not file a frivolous return subject to a tax penalty, according to a Tax Court order.

The November 6 order in *Youssefzadeh v. Commissioner*, No. 14868-14 L (2015) , signed by Judge Mark V. Holmes, distinguished the taxpayer's invocation of the Fifth Amendment for portions of the information on Schedule B, "Interest and Ordinary Dividends," from "those tax protestors who [fill] out a return with zeroes on nearly every line." Instead, the taxpayer completed a normal return, but omitted some information concerning financial institution names and shares of the total interest income he reported. The order granted Youssefzadeh's motion for summary judgment in his appeal from a collection due process hearing and rejected the IRS's determination of a frivolous return penalty.

The IRS asserted that the omission justified a frivolous return penalty under [section 6702](#). The Tax Court stated that the penalty requires three elements: a document claiming to be a tax return, omission of so much information that the IRS cannot judge "the substantial correctness of the self-assessment," and a taxpayer position that must be frivolous or display a desire to impede tax administration.

According to the Tax Court, the IRS's penalty assertion failed the second and third tests. The court noted that the return had almost all of the information a return should provide, including "the *total amount* of interest on line 4" of Schedule B (emphasis in original). The court also rejected the IRS's claim that Notice 2010-33, 2010-17 IRB 609 , declared any assertion of the Fifth Amendment to omit information on a return to be frivolous; instead, the notice applies to a blanket assertion justifying a complete omission of information.

The Tax Court noted that while the Fifth Amendment does not justify a taxpayer's refusal to file a return, the Supreme Court has specifically allowed for some claims of the privilege on a return in *Garner v. United States*, 424 U.S. 648, 656 (1976). Youssefzadeh appropriately invoked the criminal implications of 31 U.S.C. sections 5314 and 5322 for willfully failing to file a foreign bank account report, according to the court. (Prior coverage )

Megan L. Brackney of Kostelanetz & Fink LLP welcomed the ruling, saying that it provides clarity "in a reasonable way that respects the constitutional right against self-incrimination but still requires the taxpayer to provide enough detail so that the IRS can judge the correctness of the return," she said.

Leigh Kessler of Rosenberg Martin Greenberg LLP said that the case shows that careful attention must be paid to protect the taxpayer's Fifth Amendment privilege and to assert the privilege in a way that ensures the IRS is provided enough information to properly compute the tax liability, which will also protect the taxpayer from criminal liability for failure to file a return. She noted the direct correlation between the information not disclosed -- origin and particular amount of interest received -- and a potential investigation of FBAR filing requirements.

"I think [this case] gives more guidance on the type of information that should be reported on a tax return that seeks to assert the Fifth Amendment and whether or not that is going to be successful," Kessler said. The Tax Court's description of the circumstances here, in which the taxpayer satisfied the return requirement while still claiming the Fifth Amendment, will also help practitioners who want to protect their clients from assertions of failure to file under [section 7203](#), she said.

Richard J. Sapinski of Sills Cummins & Gross PC cautioned that the holding is an order rather than a division opinion. He added that he has seen more expansive assertions of the Fifth Amendment privilege, including for all information on Schedule B other than total interest and for lines 7 through 21 on Form 1040. "In my opinion, both of those more expansive Fifth Amendment positions would have been non-frivolous although possibly harder to articulate as justified . . . absent an in camera explanation to a judge," he said.

Larry A. Campagna of Chamberlain, Hrdlicka, White, Williams & Aughtry noted that Youssefzadeh's return contained enough information to be "substantially correct," adding that a "substantially correct return cannot be subject to a frivolous return penalty."

Campagna said that the order did not address the required records doctrine, an exception to the Fifth Amendment privilege the IRS has been pushing recently regarding foreign bank records. "The IRS apparently could subpoena or summons the information about Mr. Youssefzadeh's foreign bank account, and according to the [circuit courts] that have addressed the issue so far, the taxpayer would have to cough up any documents relating to the account," he said, adding that while he disagrees with those holdings, the circuit courts have been unanimous. (Prior coverage [here](#).)

Kessler said that the case highlights the IRS's aggressive approach to foreign bank enforcement efforts.

Sapinski said the reasoning in the order showed how the IRS was overzealous in asserting the frivolous return penalty in this case. He said the penalty assertion suggests insufficient training of either service center personnel or within Exam and Appeals. "I think the order will be noticed within the IRS and hopefully it will lead to a review of how this happened and to more guidance to the field level," he said.