Wisconsin Criminal Tax Fraud Problems

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Since the establishment of the Intelligence Section by the Department of Taxation in 1961, representation in non-filing cases and those involving substantial understatements of income has taken on complexities that once were important only in federal tax investigations. Previously, the taxpayer's representative was concerned almost exclusively with the civil aspects of such cases. Criminal prosecution now is a real threat and the techniques of representation must be appraised accordingly.

As an introduction to this recently activated area of law, this article will review the Wisconsin criminal sanctions, the policies and procedures of the Intelligence Section, and the rights and privileges of the taxpayer under criminal investigation.

**Criminal Sanctions**

The principal criminal sanctions for income tax offenses are found in sections 71.11(42) and 71.11(43) of the Wisconsin statutes. The former provides that any person other than a corporation who fails or refuses to make a return at the time prescribed by law, or who renders a false or fraudulent return, may be fined not more than $500, imprisoned not more than one year, or both. The latter section imposes similar punishment upon any corporate officer who, with intent to defeat or evade assessment or collection of tax, makes a false or fraudulent return, statement, deposit report, or withholding report. These tax offenses constitute felonies.

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1 Ws. Stat. § 71.11(42) (1961): "Any person, other than a corporation, who fails or refuses to make a return at the time hereinbefore specified in each year or shall render a false or fraudulent return shall upon conviction be fined not to exceed $500, or be imprisoned not to exceed one year, or both, at the discretion of the court, together with the cost of prosecution."

2 Ws. Stat. § 71.11(43) (1961): "Any officer of a corporation required by law to make, render, sign or verify any return, statement, deposit report or withholding report who makes any false or fraudulent return, statement, deposit report or withholding report with intent to defeat or evade any assessment or collection required by this chapter to be made, shall upon conviction be fined not to exceed $500 or be imprisoned not to exceed one year, or both, at the discretion of the court, together with the cost of prosecution."

The statute of limitations bars prosecution after the lapse of six years from the time of commission of the offense. In non-filing cases, the statute undoubtedly runs from the last day prescribed by law for filing. With respect to rendering or making a false or fraudulent return, the statute presumably runs from the date the return is filed, even though the filing is earlier or later than required by law. Wisconsin law differs in this respect from the Internal Revenue Code, which provides that a return filed before the due date is deemed to have been filed on the last date prescribed by law for filing. The Wisconsin statutes do contain a similar provision for purposes of the civil assessment, but it is not applicable to criminal offenses.

Criminal Intent

Section 71.11(42) is silent with respect to the element of criminal intent. Nevertheless, proof of willful conduct undoubtedly is essential to conviction inasmuch as the offenses described therein are felonies.

In the case of failure to file a return, the state must establish that the taxpayer knew he had an obligation to file a tax return and that he failed to do so without justifiable excuse. Mere accidental, inadvertent, or negligent failure to file clearly would not justify application of the criminal sanction. The statute probably requires proof of an evil motive or bad purpose, but this may not encompass a showing that the taxpayer intended to evade payment of the tax.

Intent to evade payment of the tax unquestionably is essential to

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* Wis. Stat. § 939.74(1) (1961): “Except as provided in sub. (2), prosecution for a felony must be commenced within 6 years . . . after the commission thereof. Within the meaning of this section, a prosecution has commenced when a warrant or summons is issued, an indictment is found, or an information is filed.” The statute of limitations runs from the time of commission of these tax crimes, rather than from the time of discovery thereof. 25 Ops. Wis. Att’y Gen. 237 (1936).

5 Int. Rev. Code of 1954, § 6513(a), is made applicable to criminal prosecutions by § 6531. The validity of this provision is questionable, but it has been upheld thus far. See United States v. Scheetz, CCH 1964 Stand. Fed. Tax Rep. (64–1 U.S. Tax Cas.) 99280 (S.D. Ind. 1963).


7 See Morissette v. United States, 342 U.S. 246 (1952); 22 C.J.S. Criminal Law §§ 29, 30 (1961). In a prosecution for failure to file Wisconsin income tax returns, the trial judge declared that § 71.11(42) was applicable only to “flagrant situations where criminal intent is involved.” Brief for Defendant, p. 7, State v. Roggensack, 15 Wis. 2d 625, 113 N.W. 2d 389 (1962).

8 For the law in federal cases, see Yarborough v. United States, 230 F. 2d 56 (4th Cir. 1956); United States v. Cirillo, 251 F. 2d 638 (3d Cir. 1957); Abdul v. United States, 254 F. 2d 292 (9th Cir. 1958); Haner v. United States, 315 F. 2d 792 (5th Cir. 1963).

9 Under the federal cases, note 8 supra, the bad purpose required means only that the omissions were voluntary, purposeful, deliberate, and intentional, rather than accidental, inadvertent or negligent. Conceivably, the burden resting upon the state might be greater because the offense is a felony under Wisconsin law, but only a misdemeanor under federal law. Int. Rev. Code of 1954, § 7203.
conviction on a charge of filing a false individual or corporate return. Although section 71.11(42) does not explicitly impose any such requirement, the use of the word "fraudulent" necessarily implies an intent to evade the tax. Section 71.11(43), which punishes the filing of a false corporate return, does state specifically that the filing of a false or fraudulent corporate return must be accompanied by an intent to evade the tax.

The "Roggensack" Case

The supreme court recently upheld the validity of section 71.11(42) against an attack that it was in conflict with section 71.11(41). Both sections proscribe the same conduct, but the latter section provides only a monetary penalty not exceeding $5,000. The taxpayer had been convicted of failure to file income tax returns in violation of section 71.11(42). He contended that this section was unconstitutional because it permitted the state to choose which criminal sanction it would impose, thereby violating the constitutional requirements of due process and equal protection of the laws. The court held that section 71.11(41) prescribes merely a civil forfeiture, whereas section 71.11(42) constitutes a criminal sanction. The court found that there was no conflict between the sections and thereby avoided the constitutional questions.

Venue

Venue for purposes of a criminal prosecution lies in the county where the offense was committed. The supreme court has held that the offense of filing a false return is committed in the county where the return was required to be filed. The complaint in that case had been dismissed by the Circuit Court for Dane County on the ground that the offense had been committed in the county where the return was prepared.

Under federal law, venue in a tax evasion prosecution may lie where the return has been filed or in the district where the return was prepared. Perhaps the same rule should apply under Wisconsin law.

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10 The section prescribing the double-rate civil penalty specifies the element of "intent . . . to defeat or evade the income tax assessment." Wis. Stat. § 71.11(6) (1961). See Platon v. Department of Taxation, 264 Wis. 254, 58 N.W. 2d 712 (1953).

11 Wis. Stat. § 71.11(41) (1961): "If any person fails or refuses to make a return at the time or times hereinafter specified in each year . . . or renders a false or fraudulent return, statement, deposit report, withholding report or declaration of estimated income tax, such person shall be liable to a penalty of not less than $100 and not to exceed $5,000, at the discretion of the court."

12 15 Wis. 2d 625, 113 N.W. 2d 389 (1962).


15 See the discussion and cases cited in Balter, Tax Fraud and Evasion § 12.2 (3d ed. 1963).
law. The supreme court apparently did not recognize the possibility that venue might lie in more than one county, and need only have decided that the Circuit Court for Dane County had jurisdiction because the return had been filed there.

A prosecution for failure to file may be brought only in the county where the return should have been filed. The statute requires that corporations furnish the "department of taxation" with a true and correct statement of facts necessary to enforce the provisions of the income tax law. The Administrative Code expressly provides that corporate returns shall be filed at Madison in Dane County. In the case of individuals, however, the statute requires that income be reported "to the assessor of incomes, in the manner and form prescribed by the department of taxation." Contrary to prior procedure, the 1963 individual income tax blanks specify that returns are to be filed with the Department at Madison. Pending statutory clarification, there will be considerable uncertainty regarding venue in tax prosecutions, both in non-filing and evasion cases.

The Intelligence Section

The Intelligence Section was established by the Commissioner of Taxation in 1961 pursuant to the authority granted by section 73.02 (3). It was organized for the purpose of enforcing the criminal sanctions of the income and sales tax laws. The Section is staffed by trained special agents who work under the supervision of a Director.

The nature and purpose of an investigation by the Intelligence Section have been described by the former Director as follows:

"[E]very audit that is being performed by a special agent is being performed for the purpose of ascertaining whether a crime has been committed as well as to determine the correct taxable

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16 Wis. Stat. § 956.01(10) (1961) provides that where "several acts are requisite to the commission of a crime, it may be prosecuted in any county in which any of such acts occurred."
17 For federal authority, see Yarborough v. United States, supra note 8, and cases cited therein.
20 Wis. Stat. § 71.10(2) (1961).
21 The Administrative Code provides that returns of individuals shall be filed in the office of the assessor of incomes for the district in which the individual resides. Wis. Adm. Code, Tax § 208 (1960). Neither this rule nor the statute has been amended to impose any requirement that tax returns be filed with the Department at Madison. The assessment districts and the location of the assessors' offices are set forth in Wis. Adm. Code, Tax § 101 (1956).
22 Wis. Stat. § 73.02(3) (1961): "The department of taxation shall consist of the following divisions:...
(i) Such other divisions as may be found necessary by the commissioner for the effective administration of the department.
(j) The commissioner may allocate and reallocate functions, powers and duties among the divisions within the department, except the division of beverage and cigarette taxes."
23 Corning, Procedures of the Intelligence Section of the Wisconsin Department of Taxation, 36 Wis. B. Bull. 15 (1963).
income. It is apparent, therefore, that when a special agent enters an audit the character of the audit changes from a routine audit to an investigation to obtain evidence of the commission of a crime.

Prosecution Policies

In the fifty years prior to the establishment of the Intelligence Section, the criminal sanctions of the Wisconsin income tax law were rarely invoked. Although no conclusive statistics are available, only a handful of cases were prosecuted. This was and is typical of the administration of the criminal provisions of the income tax laws of other states. Today, there are indications of concerted enforcement efforts only in Wisconsin and perhaps two other states.

Criminal prosecutions in non-filing cases have been limited to instances where the defendant has ignored one or more requests to file delinquent returns. The prosecution of truly recalcitrant individuals contrasts significantly with the policy of the Internal Revenue Service. The non-filing federal taxpayer is afforded no opportunity to avoid prosecution by filing late.

There have not been a sufficient number of criminal prosecutions, apart from non-filing cases, to provide any insight into the standards employed by the Department in selecting cases for criminal action. The only available enlightenment is the statement by the former Director that the majority of the cases investigated by the Intelligence Section are not prosecuted because the offense is not sufficiently flagrant or because the state would be unable to meet the burden of proof implicit in a criminal case.

The enforcement history prior to establishment of the Intelligence Section suggests that the Department initially should prosecute only the most flagrant cases, at least with respect to pre-1961 returns. When Wisconsin taxpayers have had fair warning that the criminal sanctions are being invoked, it might be appropriate to lower the standards somewhat. Criminal prosecution, however, should always be reserved for cases involving substantial evasion. Most taxpayers who resort to petty chiselling do not realize that their acts may constitute a criminal offense,

24 The Wisconsin income tax law, including the criminal sanctions, was enacted in 1911. Wis. Laws 1911, ch. 658.
25 Milwaukee Journal, Feb. 7, 1962, quoting the Commissioner of the Department to the effect that "only half a dozen cases had been tried." See, in this connection, State ex rel. Marachowsky v. Kerl, 258 Wis. 309, 45 N.W. 2d 668 (1951).
26 In the first thirteen months after the establishment of the Intelligence Section in 1961, fifty-nine court complaints were filed against persons for failure to file, and in one instance, for filing a fraudulent return. The maximum sentence imposed in these cases was sixty days in jail and the maximum fine was $500. Milwaukee Journal, April 25, 1962. In January, 1962, a seventy-four year old liquor jobber was found guilty of filing a false and fraudulent return for 1956 and was fined $500. Milwaukee Journal, Jan. 5, 1962.
27 California and New York, apparently.
28 Corning, supra note 23, at 17.
and few are motivated by the bad purpose essential to conviction of a felony. Since it will be impossible to detect all violations, the stigma of a felony charge should be imposed only where the offense is both clear-cut and substantial.\(^2\)

**Dual Prosecution**

The double jeopardy clause of the United States Constitution does not protect against prosecution by a state or by the federal government following conviction or acquittal on the same charge by the other jurisdiction.\(^3\) The Wisconsin statutes, however, specifically prohibit dual prosecutions.\(^4\) Section 939.71 provides that conviction or acquittal on the merits under the law of another jurisdiction will preclude subsequent prosecution by Wisconsin unless the law of either jurisdiction requires proof of a fact not required by the other jurisdiction.

The elements of the tax crimes and the proof required for conviction are essentially the same under both Wisconsin and federal law. The filing of a Wisconsin income tax return, however, is an act entirely independent of the filing of a federal return. Technically, therefore, separate offenses are involved. Nevertheless, it is not inconceivable that a liberal construction of section 939.71 would preclude a prosecution under Wisconsin law where the federal tax crime involves essentially the same items of omitted gross income or overstated deductions.\(^5\)

Conviction on a federal tax charge apparently will not deter Wisconsin from prosecuting a similar crime for the same year.\(^6\) It is believed that the announced policy should be reconsidered so as to give effect to the legislative purpose underlying the statutory prohibition.

The federal government does have an administrative policy designed to discourage dual prosecution, despite the absence of any constitutional or statutory prohibition. The Attorney General has cautioned United States Attorneys to exercise the right of dual prosecution "only for compelling reasons."\(^7\) Such prosecutions are to be instituted


\(^4\) Wis. Stat. § 939.71 (1961): "If an act forms the basis for a crime punishable under more than one statutory provision of this state or under a statutory provision of this state and the laws of another jurisdiction, a conviction or acquittal on the merits under one provision bars a subsequent prosecution under the other provision unless each provision requires proof of a fact for conviction which the other does not require."

\(^5\) See the comment by Mr. Justice Frankfurter in Bartkus v. Illinois, *supra* note 30, at 138.

\(^6\) Address by George Corning, former Director of the Intelligence Section, at the Marquette University Institute on Taxation, October 12, 1962. This comment was not reiterated in the printed proceedings. See Corning, *Functions and Procedures of the Intelligence Section of the Wisconsin Department of Taxation*, MARQ. UNIV. 13TH INST. ON TAX. 155 (1962).

\(^7\) See Balter, *supra* note 30, at 784, quoting press announcement by Attorney
only where the Assistant Attorney General in charge of the appropriate division and the Attorney General himself feel that federal prosecution following state prosecution is fully justified.\textsuperscript{35}

\textit{Investigative Procedure}

Most criminal investigations grow out of routine audits. If the Audit Division uncovers evidence of fraud, the case may be referred to the Intelligence Section for consideration of criminal prosecution. Some investigations are initiated by the Intelligence Section. The special agent normally will conduct a substantial investigation through third party sources before he contacts the taxpayer personally.

The taxpayer is notified by letter that a special agent is conducting an investigation before he is requested to furnish any records or information.\textsuperscript{36} This letter notifies the taxpayer of the reason for the investigation and advises him explicitly that the function of the Intelligence Section is to determine whether the facts warrant criminal prosecution. The initial notice will invite the taxpayer to appear for a conference with his books and records. If the taxpayer ignores this request, or advises the special agent that he will not produce his records, a subpoena will be issued.\textsuperscript{37} An enforcement action will be commenced if the taxpayer fails to appear in response to the subpoena.\textsuperscript{38} No attempt will be made to compel compliance with the subpoena if the taxpayer does appear but refuses to produce his records in reliance upon his privilege against self-incrimination.

The Intelligence Section will not make further contact with the taxpayer or his representative if there is no cooperation or if the taxpayer furnishes only information obtainable from third parties. At the conclusion of the investigation, the special agent files a report, without

\textsuperscript{35} General William P. Rogers, based on memorandum to U.S. Attorneys' meeting in Washington, D.C.

\textsuperscript{36} Ibid.

\textsuperscript{37} References in the text to the procedures of the Intelligence Section are based upon remarks by the former Director, George Corning, in articles cited notes 23 & 33 supra, amplified in one or two instances by oral remarks not incorporated in the text of the Marquette article.

\textsuperscript{38} The Intelligence Section purports to issue subpoenas under authority of Wis. Stat. §§ 73.04(3), 325.01(4) (1961). See also Wis. Stat. §§ 73.03(9), 71.11(20) (b) (1961).

\textsuperscript{39} Wis. Stat. §§ 73.04(1), 325.12 (1961). The Attorney General is authorized under § 73.04(1) to institute contempt proceedings. The witness may be brought into court by arrest pursuant to an attachment under § 325.12. Where there is substantial doubt as to the validity of the subpoena or its demands, the recalcitrant witness would be afforded a reasonable opportunity to be heard before a court would commit him for contempt. State \textit{ex rel.} St. Mary's Hosp. v. Industrial Comm'n, 250 Wis. 516, 27 N.W. 2d 478 (1947). In the absence of a court order enforcing compliance, an administrative agency has no power to punish for contempt. ICC v. Brimson, 154 U.S. 447 (1894); Shasta Minerals & Chem. Co. v. SEC, 328 F. 2d 285 (10th Cir. 1964). Enforcement procedures under the Internal Revenue Code were discussed and clarified by the Supreme Court in Reisman v. Caplin, 84 Sup. Ct. 505 (1964). See also Lipton, \textit{Procedural Aspects of the Subpoena Power}, N.Y.U. 16th \textbf{INST. ON} \textbf{FED. TAX.} 1087, 1092-1098 (1958).
recommendation, with the Director of the Intelligence Section. The Director will grant a conference only to taxpayers who have cooperated. He decides whether or not prosecution is warranted, but a recommendation in favor of prosecution must be approved by the Commissioner and Assistant Commissioner before a complaint is signed.

Exchange of Information

Wisconsin is one of twenty-eight states that have entered into agreements with the Internal Revenue Service for the mutual exchange of tax information.\(^{39}\) State tax returns and audit reports are open to examination by the Service to the extent that similar rights of examination are accorded by the federal government.\(^{40}\) Accordingly, an examination of the access rights granted by the Internal Revenue Service should indicate what inspection privileges are granted by the Department of Taxation.\(^{41}\)

The Internal Revenue Service has authorized inspection of examiner's reports which have been furnished to the taxpayer.\(^{42}\) Confidential reports for service use only and conference reports may not be inspected. Workpapers of examiners, cover letters of reports in which opinions are expressed, reports of special agents, and interoffice communications may not be inspected without specific authorization from the Commissioner of Internal Revenue.

The taxpayer's representative should assume that substantially all information furnished to either government eventually will be made available to the other. It is unlikely that a criminal prosecution could or would be attempted solely upon the basis of information obtained through the exchange program, but the task of building a criminal case will be greatly facilitated by the resulting clues, leads, and admissions.

Investigative Authority

The Department of Taxation and the Assessor of Incomes are authorized by statute to examine any books, papers, recordings, or memoranda bearing on the income of the person under investigation, to require the production of such records or the attendance of any person having knowledge, and to take testimony.\(^{43}\) Inasmuch as this authority is granted "for the purpose of ascertaining the correctness of any return or . . . making a determination of the taxable income," the statutory provision may authorize investigations only for the purpose of determining the civil tax liability.\(^{44}\)

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\(^{40}\) Wis. Stat. § 71.11(44) (c) (4) (1961).


\(^{43}\) Wis. Stat. § 71.11(20) (b) (1961).

\(^{44}\) See Lipton & Petrie, Subpoena Powers of the Internal Revenue Service,
There is no statutory provision which specifically authorizes or requires criminal investigations by the Department of Taxation. The Department maintains that such authority is granted implicitly by section 73.04(3), entitled "Special Investigations." That section provides that the Department may appoint any employee to investigate and report to it "upon any matter upon which the department is required to act." The appointed employee is authorized to hold hearings, administer oaths, take testimony, and perform all other necessary duties.

The subpoena power may be exercised only to the extent and in the manner clearly authorized by statute. The extent to which an administrative agency may utilize the subpoena power in conducting a criminal investigation has not been clearly established by the case law. In the absence of clear-cut statutory authorization, there is considerable support for the view that the administrative subpoena may not be used to gather evidence for a criminal prosecution.

Under the Internal Revenue Code, most cases hold that the existence of a criminal investigation will not preclude issuance of a subpoena if the civil tax liability is also under investigation. A very recent decision of the United States Supreme Court, however, suggests that enforcement of an IRS summons may be challenged on the ground that the "material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution.

Limitations on Investigative Authority

The right to investigate is not without limitations, even if the Department of Taxation may investigate and issue subpoenas for criminal purposes. The statute authorizes only the inspection of records bear-
ing on the income of the person under investigation.\textsuperscript{50} This provision undoubtedly limits inspection to evidence that is relevant and material.\textsuperscript{51} Other important restrictions are found in the traditional constitutional privileges against self-incrimination and unreasonable searches and seizures. The privileges attaching to confidential communications between parties to certain relationships also imposes significant limitations.

In order to give meaningful effect to the statute of limitations, examination of years barred by the normal four year statute of limitations should not be permitted unless the state can show reasonable grounds for suspecting fraud or that less than 75\% of the taxable income was reported.\textsuperscript{52} There are no Wisconsin cases bearing on this point. Federal law has been conflicting with respect to both the existence and nature of any such special requirement,\textsuperscript{53} but should be highly persuasive when the issue has been resolved. Clarification will be forthcoming soon in a case pending before the United States Supreme Court.\textsuperscript{54}

\textit{The Privilege Against Self-Incrimination}

The federal and state constitutions both provide that no person “shall be compelled in any criminal case to be a witness against himself”\textsuperscript{55} In a very recent reversal of long-standing precedent, the Supreme Court of the United States has held that the privilege against self-incrimination granted by the fifth amendment to the federal constitution may be invoked in state proceedings.\textsuperscript{56} Equally important, in both federal and state proceedings, possible incrimination under the laws of either jurisdiction is now a proper basis for claiming the federal privilege.\textsuperscript{57}

It is well-settled under federal law that the privilege against self-incrimination protects both taxpayers and third parties.\textsuperscript{58} It may be

\textsuperscript{50} Wis. Stat. § 71.11(20) (b) (1961).
\textsuperscript{51} See Lipton & Petrie, \textit{supra} note 44, at 122-23, discussing interpretations under federal law.
\textsuperscript{52} Notice of additional assessment ordinarily must be served within four years of the date the tax return was filed. Wis. Stat. § 71.11(21) (bm) (1961). No statute of limitations applies if an incorrect return has been made with intent to defeat or evade the tax, or if no return has been filed. Wis. Stat. § 71.11(21) (c) (1961). The statute of limitations is extended to six years if less than 75\% of the correct net taxable income has been reported and the additional tax exceeds $100. Wis Stat. § 71.11(21) (g) (1961).
\textsuperscript{53} The divergent views are discussed in the following cases: DeMasters v. Arend, 313 F. 2d 79, 88 n. 28 (9th Cir. 1963); Application of United States (Carroll), 246 F. 2d 762 (2d Cir. 1957); McDermott v. John Baumgarth Co., 286 F. 2d 864 (7th Cir. 1961).
\textsuperscript{54} United States v. Ryan, 320 F. 2d 500 (6th Cir. 1963), cert. granted, 84 Sup. Ct. 658 (1964) (No. 590).
\textsuperscript{55} U.S. Const. amend. V; Wis. Const. art. 1, § 8.
\textsuperscript{57} Murphy v. Waterfront Comm'n, 32 U.S.L. Week 4518 (U.S. June 15, 1964).
\textsuperscript{58} The scope and application of the privilege against self-incrimination in federal tax investigations are discussed in \textit{Kostelanetz & Bender, Criminal Aspects}
claimed during any stage of the investigation and protects individuals from being compelled to give incriminating answers or to produce personal or private records. An individual who testifies or produces records on one occasion without claiming the privilege may subsequently claim his privilege when he is again asked to testify or produce. Of course, the privilege is waived with respect to any information that may have been garnered from the first disclosures.

Production of Records

Most cases arising under the Internal Revenue Code hold or assume that the records of an individual are protected by the privilege against self-incrimination. Nevertheless, concern has been expressed about possible application of the required-records doctrine, and there has been dicta in several court of appeals decisions to the effect that such records are not privileged because required by law. The Internal Revenue Service, however, has always respected the privileged character of income tax records. There is no indication that it will attempt to have the required-records doctrine applied.

To date, the policy of the Department of Taxation has been the same as that of the Internal Revenue Service. Moreover, there is a significant difference in the statutory provisions that reduces the possibility that the required-records doctrine might be applied in Wisconsin. The Wisconsin statutes, in contrast to the Internal Revenue Code, only require that income tax records be kept after notice is served on the taxpayer to keep such records.

The constitutional protection against self-incrimination does not protect corporations or large unincorporated associations, and it may not protect certain limited partnerships. Normally, the custodian of...
corporate records held in an official capacity may not decline to produce them on the ground that their contents may tend to incriminate him personally.\textsuperscript{65} A recent court of appeals case, however, permitted the president and sole stockholder of a corporation to invoke his privilege with respect to corporate records. [Editor's note: As this article went to press, the court reversed itself on rehearing.\textsuperscript{66}] Earlier cases had held to the contrary.\textsuperscript{67}

Irrespective of the right to assert the constitutional privilege, both the officer having possession of records and the corporation may assert the defense that the state has no authority to issue subpoenas during an investigation for criminal purposes.\textsuperscript{68} Assuming that production of the records may be compelled, a corporate officer may not be forced to testify with respect to their contents.\textsuperscript{69}

\textbf{Unreasonable Searches and Seizures}

The Wisconsin constitution provides the same protection against unreasonable searches and seizures as is found in the fourth amendment to the United States Constitution.\textsuperscript{70} As a result of the holding in \textit{Mapp v. Ohio},\textsuperscript{71} moreover, it is now clear that evidence obtained in violation of the fourth amendment by either state or federal agents may not be used in a criminal prosecution by either government.\textsuperscript{72}

In contrast to the privilege against self-incrimination, the guarantee against unreasonable searches extends to corporations as well as individuals.\textsuperscript{73} In the absence of valid legal process, an examination of the taxpayer's records is not lawful unless made with the taxpayer's consent, freely and voluntarily given.\textsuperscript{74} An examination without the tax-
payers' consent constitutes an illegal search. Flagrant examples include a surreptitious inspection of records not specifically made available to the agent,\(^7\) and an examination of earlier years under the pretext that current years were being examined.\(^6\) A federal district court recently held that delivery of records to an agent by an accountant, without the owner's knowledge or consent, constituted an unlawful seizure.\(^7\)

Consent that is coerced or induced by misrepresentation, fraud, trickery, or promises is invalid, and evidence obtained under such circumstances is subject to suppression.\(^7\) The coercion that negatives consent may be of a subtle variety. In *Lord v. Kelley*,\(^7\) a district court held that the delivery of records was not voluntary where a special agent told an accountant that it would be prudent for him to cooperate unless he himself wished to get into trouble.

Examination of the taxpayer's records by a revenue agent who receives behind-the-scene directions from a special agent has been denounced as trickery in several federal cases.\(^8\) It is unlikely that Wisconsin agents will resort to this technique in view of the announced policy that the taxpayer will be given advance notice in writing that a criminal investigation is in process.\(^8\)

The prohibition against unreasonable searches and seizures also protects the taxpayer against unauthorized, arbitrary, unreasonable, or unduly burdensome investigative demands, including those formalized by a subpoena.\(^8\) A subpoena duces tecum may be constitutionally objectionable if it is too broad in scope, too burdensome in its demands, lacks particularity in description, or requests irrelevant items.\(^8\) These limitations have not been highly significant in federal investigations,\(^8\) and it is doubtful that the scope of state tax examinations will be restricted to any greater extent.

**Privileged Communications**

The Wisconsin statutes and the common law protect against com-

\(^6\) Application of Leonardo, 208 F. Supp. 124 (N.D. Cal. 1962); see also Reine-
\(^7\) man v. United States, 301 F. 2d 267 (7th Cir. 1962).
\(^7\) Gouled v. United States, *supra* note 74; see also cases cited in Lipton &
\(^7\) Note 77 *supra*.
\(^8\) United States v. Lipshitz, *supra* note 74; Matter of Bodkin, *supra* note 74;
\(^8\) United States v. Wolrich, *supra* note 74; United States v. Wheeler, 149 F.
\(^8\) Supp. 445 (W.D. Pa. 1957), rev'd on other grounds, 256 F. 2d 745 (3d Cir.
\(^8\) 1958).
\(^8\) Commissioner, *supra* note 23, at 15.
\(^8\) Oklahoma Press Publishing Co. v. Walling, *supra* note 73. Recent interpretations in non-tax cases include Adams v. FTC, 296 F. 2d 861 (8th Cir. 1961);
\(^8\) See Lipton & Petrie, *supra* note 44, at 132-35.
pulmonary disclosure of certain confidential communications.\textsuperscript{85} Confessions to a clergyman or minister, private communications between husband and wife, disclosures to a doctor for professional purposes, and communications by a client to an attorney in his professional capacity are all privileged. The privilege may be waived only by the party who made the confidential disclosure.

There is no common law or statutory privilege attaching to communications between accountant and client.\textsuperscript{86} As a result, legal representation is imperative in criminal tax investigations. The taxpayer may confide in his attorney with confidence, whereas an accountant may be compelled to disclose incriminating admissions made by his client. If the services of an accountant are essential, he should be engaged for the express purpose of aiding the attorney or assisting the taxpayer in communicating with his attorney. Recent case law promises protection under these circumstances, though the question is still shadowed with some doubt.\textsuperscript{87}

The attorney-client privilege is not as broad as generally believed, and numerous questions still require judicial clarification in the tax field.\textsuperscript{88}

\textit{The Cooperation Dilemma}

No attempt will be made to discuss fully the arguments for and against cooperation in tax investigations. The decision with respect to cooperation can be made only in the context of the particular factual situation presented. In the federal tax field, experience has demonstrated the ironic truth that the cooperative taxpayer generally fares much worse than the individual who relies upon his constitutional rights.\textsuperscript{89} The State Intelligence Section will take cooperation into account in evaluating intent and determining whether to recommend prosecution, but cooperation in itself will not preclude prosecution.\textsuperscript{90}

Unlike most other crimes, it seldom is possible for the government to support a prosecution for tax evasion unless the taxpayer has cooperated during the investigation. The government may be unable to

\textsuperscript{85} Wis. Stat. §§ 325.18 (husband and wife), .20 (clergyman and confessor), .21 (doctor and patient), .22 (attorney and client) (1961). The statute provides that the privilege does not apply to communications made to the attorney for the purpose of being communicated to another or being made public.


\textsuperscript{87} See United States v. Judson, 322 F. 2d 460 (9th Cir. 1963); United States v. Kovel, 296 F. 2d 918 (2d Cir. 1961).

\textsuperscript{88} For a general discussion of the subject, see Lipton, supra note 96; Orkin, \textit{The Attorney Client Privilege in Tax Matters}, 49 A.B.A.J. 794 (1963); Lipton & Petrie, supra note 44, at 141; Note, \textit{Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine}, 71 Yale L. J. 1226 (1962).


\textsuperscript{90} Corning, supra note 23, at 16.
establish understatements of income without access to the taxpayer's books and records. Resort to the net worth method may be equally unsuccessful without the taxpayer's cooperation. Even if net income can be reconstructed independently, the government may be unable to prove that the understatements were due to fraud, rather than to neglect, mistake, bookkeeping inadequacies, or similar causes.\(^9\)

In federal investigations, the taxpayer can refuse all cooperation and still utilize many conference opportunities to present defensive evidence or to argue the weaknesses in the Government's case. The State Intelligence Section, however, will not grant a conference unless the taxpayer cooperates fully.\(^9\) This undoubtedly means that he must submit not only all of his books and records relating to income and deductions, but also that he will be required to submit everything pertinent to a net worth determination. The taxpayer probably will also be required to submit to questioning under oath.

Realistically, cooperation may benefit the taxpayer only if he can prove his innocence. It may supply the Department with the proof necessary to make a case. If by chance the taxpayer should gain some advantage with the state through cooperation, he may seriously jeopardize his position in any subsequent federal investigation.

Notwithstanding the inherent dangers in cooperation, it is unlikely that most representatives will be willing to forego conference opportunities. The inclination to cooperate probably will be reinforced by the belief that willingness to settle the civil liability will prevent a prosecution. The Internal Revenue Service has a strict policy which forecloses any discussion of the civil liability while criminal prosecution is under consideration. The clear-cut separation of the criminal and civil functions may not exist under Wisconsin procedures. The former Director has stated that a conference may be utilized to "make settlement offers, discuss pleas, ask for reduction in the number of proposed counts, ask for a reduction to a lesser charge, etc."\(^9\)

The greatest danger in the state's policy with respect to lack of cooperation is that it may be allowed to raise an unjustifiable implication of guilt. Regardless of the suspicion that may be engendered by lack of cooperation in federal tax investigations, criminal prosecutions are never based upon suspicion. Both the Internal Revenue Service and the Justice Department give great weight to any presentation in behalf of the taxpayer even though there has been a complete lack of cooperation.

The Department of Taxation presumably will exercise requisite restraint, whether or not the taxpayer cooperates. It is doubtful, however,

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that the Department will be able to appraise adequately the weaknesses in its cases without giving the taxpayer's representative an opportunity to state his position. Assuming that the Department prosecutes only flagrant and clear-cut cases and does not attach undue significance to lack of cooperation, the taxpayer may benefit greatly by the present conference policy. It simplifies the problem of representation and gives the taxpayer's representative a clear choice. He need not subject his client to the risks of partial cooperation or even the danger of admissions during conferences.