Volume 14 | Issue 4 Article 8

1969

The Effect of Mathis on Right to Counsel in Tax Investigations

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THE EFFECT OF *MATHIS* ON RIGHT TO COUNSEL IN TAX INVESTIGATIONS

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ONE OF THE GUARANTEES granted to an individual by the sixth amendment to the United States Constitution is the right to the assistance of counsel in all criminal prosecutions. This right is not limited to the presence of counsel at the trial itself since the amendment provides that the accused shall have the assistance of counsel for his defense. Numerous cases have been decided with reference to the protective scope of this right and it is now well settled that there are many pretrial stages in the proceedings where an accused is entitled to counsel. In many instances these earlier steps in the legal process may be the time when the effective assistance of counsel is most desperately needed and will be of the greatest benefit.[1] This is due to the fact that "today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality."[2] Hence, an individual may have a right to counsel during an arraignment,[3] a preliminary hearing[4] or a post-indictment lineup.[5]

This right was extended in the landmark cases of *Escobedo v. Illinois*[6] and *Miranda v. Arizona*[7] to some pre-indictment confrontations. In *Escobedo* the Court held that when an investigation begins to focus on a particular suspect that has been taken into police custody and where incriminating statements may be elicited as a result of the interrogations, the individual is then entitled to the assistance of counsel and must be so informed. In other words, right to counsel attaches when the process ceases to be investigatory and becomes accusatory.

In *Miranda* the Court decided that the adversary system of criminal proceedings begin whenever an "individual is first subjected to

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1. Massiah v. United States, 377 U.S. 201 (1964).
2. United States v. Wade, 388 U.S. 218, 224 (1967).
3. Hamilton v. Alabama, 368 U.S. 52 (1961).
4. White v. Maryland, 373 U.S. 59 (1963).
5. Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967).
6. 378 U.S. 478 (1964).
7. 384 U.S. 436 (1966).

police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way."[8] At this juncture, a person being questioned must be informed of his rights by warning "him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him."[9] This safeguard was thought essential to protect the privilege against self-incrimination. Only by expressly and effectively explaining this right to an individual "can there be assurance that he was truly in a position to exercise it."[10] Therefore, a person may have to be informed of his right to counsel under the fifth amendment privilege against self-incrimination in addition to any rights under the sixth amendment.

I. APPLICABILITY TO TAX INVESTIGATIONS

While the right to counsel has been extended to many preliminary stages of a criminal investigation, an interesting and very important question arises as to the point in time of a tax investigation when a taxpayer must be informed of his right to counsel. This common form of governmental investigation may be somewhat unusual in the sense that it may at different dates be a civil or a criminal investigation or may combine some features of both. The revenue agent conducting the original audit may discover certain information which leads him to believe that there may be a possible criminal violation of the Code. As a result, the files may be transferred to and the investigation continued by a Special Agent from the Intelligence Division whose function is to investigate possible criminal infractions. The obvious fact is that various evidentiary matters might be uncovered during the course of either the civil or criminal investigation, or both, and these may lead to a recommendation that the taxpayer be indicted.

This problem is made even more acute by the fact that the overwhelming majority of taxpayers will undoubtedly have no appreciation of the role of the Intelligence Division. Even if the Special Agent should state that he is from the Intelligence Division, it would have little if any significance to the average taxpayer. This is in marked contrast to the more typical criminal investigation made by a police department where its function is usually well recognized by the person being questioned. Notwithstanding this lack of knowledge, or perhaps as a result of it in some instances, the taxpayer may make certain statements or produce records and documents which he would other-

8. *Id.* at 477.
9. *Id.* at 473.
10. *Id.*

wise refuse to do without consulting counsel if he realized his right to do so.

Immediately after *Escobedo* and *Miranda* taxpayers began to raise constitutional issues about the admission of various testimony into evidence alleging that it was secured during the investigation without their being informed of their right to the assistance of counsel.[11] For the most part, the arguments seem to center on the proposition that the taxpayer should have been specifically told, in clear and unmistakable terms, of his right to counsel, at least by the time the investigation was assigned to a Special Agent.[12] Most of the cases were decided adversely to the taxpayers' contentions. The decisions were usually premised upon the finding that the proceedings were still of the investigatory nature and were not yet accusatory[13] thus distinguishing *Escobedo,* or that there was a lack of custodial interrogation[14] which was present in *Miranda.*

There were some cases, however, where the right to counsel was upheld.[15] The reasoning for this type of holding was well expressed in *United States v. Turzynski*[16] where the taxpayer alleged that once the investigation became designed to secure evidence which could possibly be used against him in a future criminal prosecution, it was incumbent upon the agents to warn him of his constitutional rights. The court agreed stating that once "the silent transition from civil to criminal investigation takes place in a tax case, the taxpayer being interrogated and asked to furnish his books and records is just as surely a prime suspect and candidate for criminal prosecution as the individual under interrogation as a suspect for other crimes."[17] Therefore, when "a taxpayer becomes the subject of a criminal tax investigation, as evidenced by the referral of the investigation to the Intelligence Division or otherwise, our adversary process of criminal justice has become directed against him as a potential criminal defendant."[18]

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11. For a discussion of some of these cases, *see* Andrews, *The Right to Counsel in Criminal Tax Investigations under Escobedo and Miranda: The "Critical Stage,"* 53 IOWA L. REV. 1074 (1968); Lay, *Right to Counsel in Criminal Tax Investigations,* 43 IND. L.J. 69 (1967).

12. *See* Rickey v. United States, 360 F.2d 32 (9th Cir.), *cert. denied,* 385 U.S. 835 (1966); Kohatsu v. United States, 351 F.2d 898 (9th Cir. 1965), *cert. denied,* 384 U.S. 1011 (1966); Bohrod v. United States, 248 F. Supp. 559 (W.D. Wis. 1965), where this type of argument was advanced.

13. Rickey v. United States, 360 F.2d 32 (9th Cir.), *cert. denied,* 385 U.S. 835 (1966); United States v. Fiore, 258 F. Supp. 435 (W.D. Pa. 1966).

14. Stern v. Robinson, 262 F. Supp. 13 (W.D. Tenn. 1966); United States v. Schlinsky, 261 F. Supp. 265 (D. Mass. 1966), *rem'd on other grounds,* 379 F.2d 735 (1st Cir. 1967); United States v. Fiore, 258 F. Supp. 435 (W.D. Pa. 1966).

15. United States v. Turzynski, 268 F. Supp. 847 (N.D. Ill. 1967); United States v. Kingry, 67-1 U.S. Tax Cas. ¶ 9262, 19 Am. Fed. Tax R. 2d 762 (N.D. Fla. 1967).

16. 268 F. Supp. 847 (N.D. Ill. 1967).

17. *Id.* at 850-51.

18. *Id.* at 850.

Hence, a warning of the taxpayer's constitutional rights would be required when the case is transferred to the Intelligence Division.

The court was not influenced by the fact that the taxpayer was not in custody. It felt that when "the taxpayer is under suspicion of tax fraud, the investigatory power of the government is directed against him with the intent of developing evidence to convict him and his need to know his rights is quite as real and urgent as that of the suspect under custodial interrogation."[19]

Mathis v. United States

In *Mathis v. United States*[20] the taxpayer was incarcerated in prison for a completely unrelated activity when he was interviewed by an agent from the Internal Revenue Service concerning his signature on a tax return. The taxpayer identified the tax return as his and admitted the signature. The same process was repeated some four months later with regard to another taxable year. After these admissions had been obtained, the case was transferred to the Intelligence Division and the taxpayer was advised of his constitutional rights when the Special Agent sought to interview him. The taxpayer thereafter refused to cooperate and, over his objections, the documents executed by him during the two initial interviews, together with his admission of filing the returns bearing his signature, were admitted into evidence.

The taxpayer alleged that *Miranda* was applicable and that he had not been warned of his right to remain silent; that he had not been told that any statement he might make could be used against him; nor had he been informed of his right to counsel. Special emphasis was directed toward the fact that throughout the investigation there was a possibility that he might be charged with a criminal offense and that he was incarcerated during the time of the interviews in question.

The court disagreed with the taxpayer's contentions and pointed out that until the case was transferred to the Intelligence Division it was a routine civil tax investigation. Although there may always be a possibility that evidence of some fraud may be uncovered in any routine tax audit and even though any suspect would undoubtedly be the taxpayer under examination, the court did not consider that the presence of either factor was enough to equate a civil tax investigation with an inquiry into an unsolved crime.

The taxpayer's incarceration on an unconnected offense was deemed immaterial and it did not necessitate a *Miranda* type of warn-

19. *Id.* at 854.
20. 376 F.2d 595 (5th Cir. 1967).

ing. The court held that the use of the phrase "custodial interrogation" contemplated "the incommunicado interrogation of individuals in a police-dominated atmosphere — interrogation incident to the investigation of an unsolved crime."[21] Therefore, the court found that the fact that the taxpayer chanced to be in prison at the time of the interviews did not cause him to be subjected to the psychological pressures incident to the "custodial interrogation" referred to in *Miranda*.

While the lower court's decision might at first glance appear beyond reproach since the divulgence of the information occurred prior to the time the Intelligence Division entered the investigation, the Supreme Court granted certiorari[22] and reversed.[23]

In reference to the fact that these questions were asked during a routine tax investigation, the Court agreed that such examinations may be initiated for the purpose of a civil action and, to this extent, they might differ from investigations for other crimes. Nevertheless, these audits might lead to a criminal prosecution and, upon this basis, the Court rejected the argument that the *Miranda* requirements of a warning to be given a person in custody were inapplicable to tax investigations. Neither was the Court impressed by the fact that the questioning agents were not responsible for the taxpayer being in custody. It was not felt that *Miranda* applied only to any questioning of one who was in custody in connection with the identical case under investigation. To so hold would negate much of the protection *Miranda* intended to give.

While the Court's decision on the facts in *Mathis* are clear enough, it is difficult to ascertain its application to other factual situations. The somewhat unique factor in *Mathis* was that of the taxpayer's imprisonment, and the odds of a similar situation again arising are very remote in comparison with the total number of tax investigations. Did the Court intend to limit the *Miranda* type of warning to physical custody cases? There is no real inference in *Mathis* as to this point but it should be remembered that *Miranda* not only spoke of an individual who is taken into custody but also referred to one who is otherwise deprived of his freedom in any significant way while being questioned by the authorities.[24] This is some indication perhaps that *Miranda* was really attempting to safeguard the constitutional rights of an individual who, because of his deprivation of freedom, is not capable of exercising those rights unless he is informed thereof. If so, would not the necessary warning have to be

21. *Id.* at 597.
22. 389 U.S. 896 (1967).
23. Mathis v. United States, 391 U.S. 1 (1968).
24. 384 U.S. 436, 478 (1966).

given when there is a psychologically oriented interrogation which leads the taxpayer to feel that his freedom of movement or his alternative choice of action is being restricted in much the same fashion as if he were physically in custody?[25] This could even occur when the taxpayer is examined in familiar physical surroundings such as his home or office thus causing him to produce certain documents or make various statements which might later prove to be detrimental. This he might do simply because he was not told that he had a right to consult with an attorney. Even if this right was known by the taxpayer, he might be reluctant to exercise it for fear of antagonizing the agent thus leading to an ineffective waiver. Whatever the merits or demerits of this line of reasoning, the Court did not pass on it in *Mathis* since the taxpayer was actually in custody.

II. POST-*Mathis* DECISIONS

Imbued with the prospect of success as a result of *Mathis,* taxpayers continued to raise the issue of right to counsel in tax investigations with the obvious expectation that the rule there announced was of wide application. However, this possibility has not been realized.

A. *Decisions of the Courts of Appeal*

One of the first cases to be heard after *Mathis* was *United States v. Mackiewicz,*[26] decided by the Second Circuit. As is customary in tax investigations, the process began with an audit by an agent from the Audit Division. After discovering that the taxpayers' bank deposits exceeded their business income, the case was referred to a Special Agent from the Intelligence Division. The taxpayer was informed by the Special Agent that he could refuse to answer any questions and refuse to produce any documents that might tend to incriminate him but he was not told that he had a right to counsel. The taxpayer alleged that this failure on the part of the agent violated his constitutional rights.

His first contention was based upon the idea that when the case was transferred to the Intelligence Division, the nature of the inquiry had shifted from the investigatory to the accusatory state. Citing *Mathis,* the court rejected this argument as attempting to create a formalistic reliance on who was doing the investigating, *i.e.,* civil if by the Audit Division and criminal if by the Intelligence Division.

25. Miranda did not ignore the psychological factor. *See, Id.* at 448.
26. 401 F.2d 219 (2d Cir.), *cert. denied,* 393 U.S. 923 (1968).

Such a decision "would discourage the Service from having any special investigators and it would encourage civil investigators to expand their inquiries."[27]

In so holding the court apparently overlooked the significance of the taxpayer's argument. He was not contending that the title of the investigator nor the division of the Service was material. The important fact was that the investigation had been transferred to an individual and a division whose function was to inquire into possible criminal infractions. This was the argument supporting a shift to the accusatory state. What conceivable difference does it make what title either investigator be given? If the civil investigators begin to expand their inquiry into the areas now reserved for the Special Agents, would it be any less of an inquiry into possible criminal conduct? It is difficult to see how it would. The taxpayer would still have to be informed of his constitutional rights when the nature of the criminal inquiry begins to focus on him in an accusatory manner. This is verified by the decision in *Mathis* where the Court held, under the circumstances of that case, that the taxpayer was entitled to the *Miranda* warnings even during the routine investigation by an agent. Nevertheless, the court rejected the taxpayer's argument stating that "regardless of the official title of the agent, it would be administratively impossible for the Service to forewarn a taxpayer every time its suspicions, based on changing evaluations of the changing evidence, shifted."[28] Again this does not serve as an answer to the taxpayer's assertion. Nothing indicates that he is asking for a warning of his right to counsel each time the circumstances change. He merely is claiming that he was entitled to be informed of his right to counsel when he was interviewed by the Special Agent, not as a result of the title of the agent, but rather as a consequence of his function and the fact that the inquiry was then no longer confined to the investigatory stage.

Secondly, the taxpayer alleged that the agents' actions created an impression of urgency and that they displayed their authority in such manner as to put him on the defensive. This argument was rejected. The court did not feel that the atmosphere created by the agents was equivalent to an in-custody investigation since the interview was conducted in the taxpayer's home, he was free to leave if he wished and he could ask the agents to leave. While the taxpayer might technically have this freedom of movement, it is extremely unlikely that the average taxpayer would even consider asking the agents to leave

27. *Id.* at 222.
28. *Id.*

for fear of placing himself in a more embarrassing position. Irrespective of whether these rights exist and irrespective of whether his fears are justified, if he refuses to exercise them through fear, has he not been deprived of his freedom of movement to the same extent as if he were in fact in custody? In both cases, his confinement, psychological though it may be in one instance, has caused him to make statements that might not otherwise be forthcoming.

The third contention was that the questions asked him were insidious and dishonest for he had no way of knowing which answers might tend to incriminate him. This was rejected because of the lack of any evidence of dishonesty on the part of the agents.

The taxpayer continued by asserting that even if the full *Miranda* warnings did not have to be given, he was misled by the agent's advising him that he could refuse to answer incriminating questions thus implying that he had to answer all other questions. The court disagreed and held that the warning given did not necessarily convey the impressions claimed by the taxpayer and it was not unfair to the taxpayer. While it may be true that such an implication does not automatically follow the type of warning given, it is just as true that it could follow in a number of instances. The average taxpayer has had very little contact with investigative agencies and there is little reason to suppose that he will be sophisticated enough to appreciate his constitutional rights relative to such an investigation. He may be far more likely to believe that such rights include only those mentioned by the agent. This is just as logical as any supposition that he will not be misled by such partial advice.

The court then concluded that the taxpayer, by cooperating with the agents, knowingly and intelligently waived whatever rights he had. While a taxpayer may certainly waive any rights, it is difficult to see how he can do so *knowingly* if he did not know the rights *existed.* Such knowledge is essential to an intelligent waiver.

Perhaps indicative of the court's feeling are some statements made before responding to the taxpayer's contentions in a more specific manner. The court noted that if the *Miranda* warning had to be injected at this stage of the proceedings, it would merely clutter an already difficult administrative task. This might be true of the *Miranda* warning being required at all, but this is immaterial. The deprivation of constitutional rights cannot be justified by the fact that their protection might prove to be somewhat time-consuming nor that such protection would disrupt the habits of administrative agencies.

The court went on to add that if such warnings are required, "the Service might have to supply financially indigent taxpayers with

attorneys to assist and advise them"[29] and that this would obviously "hinder the efficient collection of our taxes."[30] Again, such reasoning appears irrelevant. The convenience and efficiency of the Internal Revenue Service does not outweigh the constitutional rights of a taxpayer and such reasoning should have absolutely no bearing upon whether these constitutional rights actually exist.

The same issue was before the court again within two weeks of the above-discussed decision.[31] In that case the taxpayer, accompanied by his accountant, met with a revenue agent and a Special Agent at the IRS office where he was told that the Service was investigating another individual and wanted to question him with regard to his relationship with the other individual. The answers furnished by the taxpayer indicated no connection with the individual under investigation but an examination of the taxpayer's records reflected income that had not been reported. The taxpayer apparently engaged a lawyer when he was informed that the Service was giving serious consideration to a prosecution, but he claimed that he should have been informed of his right to counsel at his first meeting with the agents. The court disagreed.

The facts of this case are not nearly as favorable to the taxpayer as the previous one since he was not under investigation at the time of the first meeting and he knew the nature and scope of the inquiry. There is far more evidence here that the taxpayer wilfully cooperated than existed in *Mackiewicz.*

The important factor from the standpoint of this discussion is the court's interpretation of *Mathis.* The court felt that the rationale of *Mathis* "is relevant only where the questioning is conducted in custody or in circumstances which are similarly inherently compelling; it does not apply to questioning under other circumstances in which there are no inherently compulsive pressures to be overcome."[32] This language suggests that the warning of the right to counsel is required not only if the person being questioned is in custody but also, if he is otherwise deprived of his freedom of action in any significant way. However, the court went on to reject the view "that IRS agents must give the *Miranda* warnings, even though there is no custodial interrogation, if the investigation has reached the accusatory stage."[33] Thus, physical custody would appear to be a requirement for the warnings in virtually every case although there could conceivably be such com-

29. *Id.*
30. *Id.*
31. United States v. Squeri, 398 F.2d 785 (2d Cir. 1968).
32. *Id.* at 789.
33. *Id.* at 790.

pelling psychological pressures in some factual settings as to make the *Miranda* warning mandatory.

On at least two occasions, the Second Circuit has had occasion to review its decisions relative to the right to counsel in tax investigations.[34] In neither case does the court appear to waver in its strict interpretation of custodial interrogation since it pointed out that the taxpayer was not "in custody nor restrained of his freedom of action in any significant way."[35] This is not unlike the previous holding in *Mackiewicz.*

Joining the Second Circuit, the Court of Appeals for the First Circuit summarily pointed out that it had on several occasions expressed its view as to the applicability of *Miranda* to office interviews. The court continued by noting that the conclusion had been and still was that the requirements of *Miranda* do not extend to that type of activity.[36] This is not really a revelation but the interesting aspect is the lack of any discussion of *Mathis.* The only reference thereto was in a footnote[37] where it was stated that the Supreme Court had extended *Miranda* to taxpayers already in jail who are then interviewed by the agents.

It is difficult to correctly assess the court's interpretation of *Mathis* but it would appear that it was being construed rather strictly. There was no effort to distinguish it from the case at bar which would indicate that some form of in-custody interrogation was deemed essential to the extension of *Miranda* to tax investigations.

In an even more dogmatic fashion the Fifth Circuit refused to accept the taxpayer's argument that his sixth amendment right to counsel had been violated by a failure of the Special Agent to inform him of this right at the time of the interview.[38] There could be no objection to the court's decision since there was no evidence that the agent knew that this taxpayer was being investigated. He was being questioned in connection with the affairs of another individual whom the Service was investigating. The court went on to add, however, that even if the introduction of the evidence secured during the interview prejudiced the taxpayer, "the short answer is that appellant was

34. United States v. Marcus, 401 F.2d 563 (2d Cir. 1968), *cert. denied,* 393 U.S. 1023 (1969); United States v. Dawson, 400 F.2d 194 (2d Cir. 1968), *cert. denied,* 393 U.S. 1023 (1969).

35. United States v. Dawson, 400 F.2d 194, 206. *See also* United States v. Marcus, 401 F.2d 563, 566 (1968), where the court held that such warning was not required where the taxpayer "was not in custody and he was fully aware that his activities were the subject of a tax investigation."

36. Taglianetti v. United States, 398 F.2d 558 (1st Cir. 1968).

37. *Id.* at 566 n.8.

38. Agoranos v. United States, ___ F.2d ___, 69-1 U.S. Tax Cas. ¶ 9316 (5th Cir. 1969).

not in custody and the *Miranda* doctrine applies only to in-custody interrogation."[39] The court cited *Mathis* but did not elaborate in any fashion.

Two cases have been decided by the Eighth Circuit and, in both, the decisions were adverse to the taxpayer.[40] In *Cohen v. United States,*[41] the court carefully examined the holdings of the various circuits along with some district court cases and concluded "that the Internal Revenue Service Agents, Revenue or Special, are not required to warn taxpayers who are not in custody of their Fifth or Sixth Amendment rights."[42] There was no effort to differentiate the nature of the investigations conducted by the revenue agent from those of the Special Agent. Neither was there any attempt to establish when the investigation moved from the investigatory to the accusatory stage. The basis of the decision was the in-custody factor and the court did not define nor elaborate upon this term.

Lastly, the Ninth Circuit, in a recent case, followed the logic of the other circuits and limited the duty of the Service to inform the taxpayer of his right to counsel to those situations where the individual has been taken into custody or has otherwise been deprived of his freedom in some significant manner.[43] Again, there was no effort to define the type of custody or freedom deprivation that would necessitate the *Miranda* type of warning.

Throughout all of the cases decided by the Courts of Appeal, there is a virtual absence of the *Mathis* decision. When it has been mentioned it has been done with the purpose of establishing the necessity of in-custody interrogation. Granted that said taxpayer was incarcerated at the time of the questioning, it would appear that another factual part of the case is germane; *i.e.,* the right to counsel was extended to the in-custody interrogation notwithstanding the fact that the investigation was in its earliest stages and was clearly of a civil nature. The Courts of Appeal have focused upon the custody aspect while relegating the nature and purpose of the investigation to a very minor role, if given a role at all. The imprisonment was obviously important to the holding in *Mathis* and it is extremely unlikely that a like result would have been reached under those facts in the absence thereof. However, it does not automatically follow that no *Miranda* warning should be given when the case is being worked by the In-

39. *Id.* at 835.
40. Muse v. United States, 405 F.2d 40 (8th Cir. 1968); Cohen v. United States, 405 F.2d 34 (8th Cir. 1968).
41. 405 F.2d 34 (8th Cir. 1968).
42. *Id.* at 40.
43. Spahr v. United States, 409 F.2d 1303, 69-1 U.S. Tax Cas. ¶ 9315 (9th Cir. 1969).

telligence Division and is clearly criminal in nature. When this occurs the investigation has definitely begun to move toward the accusatory stage and some consideration should have been given relative to the point in time when such warnings are mandatory. If complete reliance is placed upon the issue of custody, a taxpayer could easily and unknowingly make damaging statements and produce harmful documents in the absence of counsel until he has been charged with a specific criminal violation. If this be true, he will, in many instances, have been deprived of the use of counsel when it would have been of the greatest benefit to him, and, in some cases, this earlier point will be the only time that counsel could have been of any real benefit. To place such complete reliance upon custodial interrogation could effectively deny the taxpayer his right to counsel. Nevertheless, this is the tenor of the above-discussed cases. The courts did not use any language indicating that such right existed in the absence of a serious deprivation of freedom.

B. *District Court Cases*

With one exception, the district courts, in post-*Mathis* cases, have also adhered to the custodial interrogation approach in denying that the *Miranda* type of warning was applicable to non-custody tax investigations.[44] The lone standout is *United States v. Dickerson*,[45] decided by the District Court for the Northern District of Illinois. The court held that:

> [T]he average citizen, faced with repeated questioning by two government agents is an ominous situation to say the least. The Government suggests that the defendant was in no way physically restrained, but we doubt that he really felt free to walk out on the investigators from the Internal Revenue Service. In the absence of sufficient warnings and the assistance of counsel, there are innumerable factors which act on the taxpayer's mind compelling him to 'co-operate' with the federal authorities.[46]

This type of questioning was considered to have curtailed the taxpayer's freedom of action in a significant manner with the result that the failure to inform him of the right to counsel amounted to a deprivation of his constitutional rights. This right to be informed would apparently date from the time the criminal investigation had

44. United States v. Cymbala, 69-2 U.S. Tax Cas. ¶ 9457 (E.D.N.Y. 1969); United States v. White, 69-1 U.S. Tax Cas. ¶ 9262 (E.D. Pa. 1968); United States v. Charamella, 69-1 U.S. Tax Cas. ¶ 9304 (D. Del. 1968); United States v. Reing, 22 Am. Fed. Tax R. 2d 5316 (E.D.N.Y. 1968).
45. 69-1 U.S. Tax Cas. ¶ 9174 (N.D. Ill. 1968).
46. *Id.*

begun which, in the instant case, was when the Special Agent first interviewed the taxpayer.

C. *Action of the Supreme Court*

On at least three occasions the Supreme Court has been requested to grant certiorari in connection with right to counsel in non-custodial tax investigations and it has been denied in each.[47] This is certainly indicative that the Court intended to limit its decision in *Mathis* to custodial interrogations or to situations where the circumstances of the case would establish that the taxpayer's freedom of movement had otherwise been seriously impaired. This could be done by the agents through their conduct, but in the usual tax investigation, *Mathis* may be of little consequence as long as the Courts of Appeal continue to take the custody approach and the Supreme Court continues to deny certiorari.

D. *Present Position of the Service*

In November of 1968, the Service announced that it was revising its procedure with regard to advising a taxpayer of his rights when interviewed by a Special Agent. The Special Agent is "required to identify himself, describe his function, and advise the taxpayer that anything he says may be used against him."[48] He must "also tell the taxpayer that he cannot be compelled to incriminate himself by answering any questions or producing any documents, and that he has the right to seek the assistance of an attorney before responding."[49] No change was made in the instructions for interviewing a person in custody where he is also told that an attorney will be appointed if he cannot afford counsel.[50]

This gives some indication of the Service's concept of its investigative functions. By requiring the Special Agent to inform the taxpayer of his rights at their initial contact, the Service apparently considers that the process has taken on the character of a criminal investigation and can no longer be treated as a routine civil audit. While all Intelligence Division investigations do not culminate in a prosecution of the taxpayer, it is clear that the thrust of such investigations is for the purpose of establishing whether a criminal infraction has occurred. As such, they are criminal in nature.

47. United States v. Marcus, 393 U.S. 1023 (1969); United States v. Dawson, 393 U.S. 1023 (1969); United States v. Mackiewicz, 393 U.S. 923 (1968).
48. IRS News Release IR-949, November 26, 1968.
49. *Id.*
50. *Id.*

III. CONCLUSION

While the issue of the right to counsel should not arise as frequently in the future as a result of the warning to be given by the Special Agent, it is inevitable that it will be forgotten or omitted in some instances. Nor is there any reason why the Service could not delete the right to counsel advice from its warning. In either event it is unlikely that the taxpayer can expect much assistance from *Mathis* unless the investigation or interrogation is conducted in such a fashion as to substantially deprive him of his freedom of movement. Such in-custody questioning appears essential under the post-*Mathis* decisions notwithstanding the fact that the investigation may really be criminal in nature. Therefore, *Mathis* may actually cause some courts to hold against the taxpayer in situations where they would otherwise have been more prone to examine all aspects of the investigation to see if it had moved to the accusatory level. Such a result would be unfortunate but it is possible.