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RIGHT TO COUNSEL IN CRIMINAL TAX INVESTIGATIONS

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The sixth amendment to the United States Construction expressly guarantees that "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense." Irrespective of what the draftsmen of this amendment may have had in mind at the time of its promulgation and ratification, it now appears settled that every person accused of at least a serious crime is entitled to the services of an attorney during his trial regardless of his financial ability to engage legal counsel.[1] No longer does the right to such assistance depend upon any distinction between the accused being charged with a capital as opposed to a non-capital offense.[2] Neither is the right to counsel limited to the trial itself for the amendment speaks of the right of the accused to "the assistance of counsel for his defense." Realizing that this right might be meaningless if counsel were denied until the trial, the Supreme Court has held that there are other steps in the judicial process that are just as critical, if not more critical, to the defense of the accused as the trial itself. Hence, right to counsel may be a requisite to the validity of some pre-trial stages such as the arraignment[3] and the preliminary hearing.[4] The implication appears to be that unless a defendant is afforded the right to counsel at these pre-trial procedures, he might be denied effective representation by counsel at the only stage of the legal proceedings when legal services are of any material benefit.[5] It is at these earlier stages when legal assistance might help the accused the most.

Furthermore, the fifth amendment provides that no person "shall be compelled in a criminal case to be a witness against himself." It is possible that this guarantee should and does include the right to be informed specifically of the right to secure the services of counsel before the accused can validly waive his rights under this amendment. In short, how can an individual intelligently waive a right or privilege that he does not know he has?

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1. Gideon v. Wainwright, 372 U.S. 335 (1963).
2. For a discussion of this previously existing distinction with regard to the obligation of the state to furnish counsel, see Betts v. Brady, 316 U.S. 455 (1942) and Powell v. Alabama, 287 U.S. 45 (1932).
3. Hamilton v. Alabama, 368 U.S. 52 (1961).
4. White v. Maryland, 373 U.S. 59 (1963).
5. *Cf.* Massiah v. United States, 377 U.S. 201 (1964).

The purpose of this paper is to explore the applicability of the fifth and sixth amendments to criminal tax investigations, in order to ascertain when the investigation in fact becomes criminal in nature.

ESCOBEDO AND MIRANDA

The right to legal representation at each step of the proceedings *after* there has been a formal indictment or accusation is no longer sufficient. However thoroughly the landmark cases of *Escobedo v. Illinois*[6] and *Miranda v. Arizona*[7] have been treated, a reexamination may be fruitful in order to determine specifically the extent of their applicability to criminal tax investigations.

In *Escobedo* the defendant was arrested and taken to police headquarters where, although no formal charge had been lodged against him, he was interrogated in connection with a homicide. During the interrogation, throughout which the defendant repeatedly asked to talk with his lawyer but was denied the opportunity, he made damaging statements to the police which were subsequently admitted at the trial. In reversing the conviction, the United States Supreme Court held that where:

> . . . the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution . . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.[8]

In other words, "when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate"[9] and the accused is then entitled to consult with his attorney.

In *Miranda* the defendant was questioned while in police custody without being given, at the beginning of the interrogation, an adequate warning as to his Constitutional rights. Here again, admissions were

6. 378 U.S. 478 (1964).
7. 384 U.S. 436 (1966).
8. 378 U.S. 478, 490 (1964).
9. *Id.* 492.

extracted and were admitted into evidence at the trial. Unlike *Escobedo* there was no request for an attorney, but in overturning the conviction, the Court hastened to point out that such a request on the part of the defendant is not a prerequisite to his right to counsel. While a request would give him an affirmative right to legal assistance, his failure to do so will not be construed as a waiver. In fact, there can be no effective waiver unless made after the accused has been informed of his right to counsel: "the accused who does not know his rights and therefore does not make a request may be the person who most needs counsel."[10]

The Court held further "that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation. . . ."[11] Such a warning was deemed to be an absolute requirement to a valid interrogation. The Court then added:

> The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point.[12]

The Court, in reality, included the right to counsel, as well as the right to be so advised, as one of the safeguards against self-incrimination under the fifth amendment; it did not rely solely upon the sixth amendment. This factor may prove to be extremely significant when applied to tax investigations.

Applicability of Escobedo and Miranda to Criminal Tax Investigations

Court of Appeals Decisions

Kohatsu v. United States[13] was one of the first cases in which a defendant sought to apply the principles of *Escobedo* to a tax investiga-

10. 384 U.S. 436, 470 (1966).
11. *Id.* 471.
12. *Id.* 477.
13. 351 F.2d 898 (9th Cir. 1965), *cert. denied*, 384 U.S. 1011 (1966).

tion. The preliminary investigation began in 1960 when the taxpayer's income tax return for the taxable year 1958 was assigned to a revenue agent for audit. Periodic meetings were held between the agent and the taxpayer over the following year, and, during this period of time, the taxpayer turned over various bookkeeping records and other related material to the agent. In August of 1961, the investigation was referred to a special agent from the Intelligence Division of the Internal Revenue Service. The investigation was referred to another special agent in late 1961 and he continued the investigation without further meetings with the taxpayer until May of 1963. The special agent testified that he informed the taxpayer of his Constitutional rights at their meeting in May of 1963 and told him that he could refuse to say anything or refuse to produce any records which might tend to incriminate him. On the other hand, the taxpayer testified that it was in August of 1963 when he first discovered that he was being investigated with the possibility of criminal prosecution.

The taxpayer conceded that an agent has the right to interrogate a taxpayer and to examine his books and records for the purpose of ascertaining his correct civil liability. He then argued, however, that such an interrogation "undergoes a fundamental change when (1) a revenue agent discovers facts indicating substantial unreported income, and (2) the facts are such that the revenue agent suspects fraud."[14] When this occurs, the taxpayer asserted, the investigation has begun to focus on a particular suspect and as of that date the agents have a duty to tell the taxpayer, in specific and understandable terms, of his right to counsel.

The Government argued, however, that it was the agent's duty to examine the taxpayer's returns to determine his tax liability for civil purposes. Furthermore, it claimed that it was the duty of the special agent to investigate any alleged violations and to recommend some course of action as a result of this investigation. Under this view, both agents were merely involved in investigative activities with the consequent result that the accusatorial stage of the proceedings had not been reached during any of this investigation.

The court, feeling that the taxpayer had taken the phrase "focus on a particular suspect" out of context and that *Escobedo* was inapplicable, refused to accept the taxpayer's contentions. Whereas in *Escobedo* there was an unsolved crime and the accused had been arrested, in the case at bar "the essential question to be determined by the investigations of the revenue agents was whether in fact any

14. *Id.* 900.

crime had been committed."[15] The taxpayer had neither been indicted nor arrested. *Escobedo* was thus distinguished without any discussion as to when it might be appropriate to extend its guarantees to tax investigations.

On the precise facts before the court, one can hardly dispute the finding that this was not the exact factual pattern presented by *Escobedo* inasmuch as the taxpayer had neither specifically requested and been denied counsel nor was in custody during these investigations. However, the taxpayer's assertion that the emphasis shifted from a routine civil tax investigation and began to focus on a particular suspect when facts were discovered which led the agent to believe that some fraud had been committed deserves some attention. At what point in time does a tax investigation reach the accusatorial stage? Is it after the last record and document has been examined, the taxpayer has been thoroughly questioned, and an indictment has been returned? While the decision in *Kohatsu* does not go this far, such a result might logically be implied since the court did hold that none of the activities of the agents had moved the proceedings to the accusatory level. What then was left except the formal accusation or indictment? If the taxpayer has not been adequately advised of his right to counsel prior to the date the agents have finished their investigations, it may be entirely prior to the date the agents have finished their investigations, it may be entirely too late for legal assistance to be of any real value. By this time the taxpayer may have divulged much damaging information which he had a right to withhold and which any competent counsel would have advised him to withhold. If this is true, has he not been denied his right to counsel prior to the time any indictment is returned or a formal charge lodged?[16]

It would appear that when the revenue agent has discovered certain facts and has obtained information that lead him to infer that there is a possibility of a criminal violation and, acting upon this information, turns over the files to the Intelligence Division the whole process then begins to move toward the accusatorial stage. This does not mean that the entire proceeding then becomes accusatory nor that the accusatory stage has necessarily been reached. It merely shows the direction in which the investigation is moving. It does seem obvious, however, that the process becomes accusatory at some point prior to a formal accusation. Somewhere in the investigatory process the special agent secures additional facts which lead him to recommend a prosecution

15. *Id.* 901.
16. *See* Massiah v. United States, 377 U.S. 201 (1964).

for a criminal violation of the tax laws. Perhaps this comes only after he has completed his examination and investigation but this is immaterial since he is certainly making no general inquiry. He has some reason for suspecting the commission of a criminal offense or he would discontinue his investigation; he has a suspect in mind who must be the taxpayer under investigation. Therefore, unless a method is devised to measure the subjective intent of the special agent, the taxpayer's right to counsel should attach at the time the Intelligence Division begins its investigation or after a formal accusation has been made. The former is preferable. Otherwise, valuable rights may have been lost in the interim. But whatever the merits of such a rule, the Ninth Circuit did not so hold.

The Ninth Circuit subsequently reaffirmed its view in a per curiam opinion and ruled that statements made by a taxpayer to a special agent should be admissible, even though he had not been informed of his right to legal assistance.[17] In so holding, the court adhered to its decision in *Kohatsu* on the assumption that the proceedings had not moved to the accusatorial stage.

The Fifth Circuit recently had occasion to face the same issue in *Mathis v. United States*.[18] The taxpayer was incarcerated in the Florida State Penitentiary on a completely unrelated offense when he was first contacted by a revenue agent who sought to verify the correctness of the taxpayer's signature on a tax return. He admitted the signature as his own and signed the appropriate form extending the period of limitations thus giving the Government additional time to pursue their investigation. The same procedure was subsequently followed for the tax return for another year. After two or three interviews, the matter was referred to the Intelligence Division. Thereafter a special agent, accompanied by the original interviewing agent, called upon the taxpayer. At the outset of this interview, the taxpayer was informed of his Constitutional right to refrain from self-incrimination and, after having been so advised, he refused any further cooperation. Over the taxpayer's objection, the Government introduced the documents which he had executed during the first two interviews.

In appealing, the defendant, relying heavily upon the fact that throughout the entire investigation there was a possibility that criminal charges might later be instituted and that he was incarcerated at the time the interviews were conducted, placed his argument squarely

17. Rickey v. United States, 360 F.2d 32 (9th Cir.), *cert. denied*, 385 U.S. 835 (1966).

18. 369 F.2d 43 (5th Cir. 1967).

upon *Miranda*. Taking the taxpayer's first contention, the court held that the mere fact that there was a *possibility* that criminal actions might subsequently be brought was not sufficient to convert a routine civil tax investigation into a general inquiry concerning some unsolved crime. This is a valid point when it is remembered that any admissions by the taxpayer were made at a time antedating the referral of the case to the Intelligence Division. At this stage the agent was truly involved in a routine civil investigation. While his investigation might uncover additional facts that would lead to a referral to the Intelligence Division, he was still predominantly concerned with the civil aspects of the case. Hence, the inquiry had not begun to narrow at the time the taxpayer voluntarily admitted his signature and signed the documents. Notwithstanding this, the court did acknowledge that it was possible to look at the taxpayer, from the very outset of the investigation, as the only suspect and that this undoubtedly would confuse the distinction between the investigative and accusatorial steps of the proceedings; this sounds more like *Escobedo* than *Miranda*. While this may be true, it was still a civil investigation when the incriminating evidence was given.

With regard to the taxpayer's incarceration for an unconnected offense, the court held that this in and of itself was insufficient to bring the case under the *Miranda* decision. *Miranda* spoke in terms of custodial interrogation and defined it as questioning initiated by a law enforcement official after a person has been arrested or otherwise deprived of his freedom of action in some material way. The court construed this language to mean some form of incommunicado interrogation in a police-dominated atmosphere. While this may be a limitation that was never intended by *Miranda* the fact remains that any questioning done here was at a time when the issue was one of civil liability. As soon as the special agent was involved, the taxpayer was informed of his Constitutional rights although the case contains no statement with regard to the details of the warning.

Assuming that the statements and waivers had been given to the special agent and that the taxpayer had not been told of his rights, it would appear immaterial whether or not he was incarcerated on some other offense. He would still be in custody with a substantial deprivation of his freedom of action. He could not leave. Granted, he might ask the special agent to leave but there would be little reason to suppose that he knew that he possessed this right unless he was expressly advised of it by the agent. Even if he thought that it was in his power to make such a request, he might decline to take such a course of action, not because of any fear of physical harm but because of a

psychological fear that he would only be hurting his case. On the other hand, if he was fully informed of his right to counsel, he might not hesitate to refuse to disclose this information.

On the precise facts, this case seems to be somewhat easier to decide than *Kohatsu* since any statements made here were made to the agent conducting the civil investigation and the taxpayer was informed of least some of his Constitutional rights whereas in *Kohatsu* the giving of notice by the agent was a controverted fact.

One interesting sidelight of both *Mathis* and *Kohatsu* deserves further comment. In both cases the agent who had been conducting the civil investigation accompanied the special agent when he was first introduced to the taxpayer. It is extremely doubtful that the average taxpayer has even the vaguest conception of the structural hierarchy of the Internal Revenue Service. He has little if any reason to know that some criminal conduct is suspected and is about to be investigated further unless he is told in clear and unmistakable terms. He is far more likely to think that this is just another agent. Any introduction prefaced by the title special agent will probably be lost upon him unless he has been through the process before. It would also appear that the Service is trying to make such a distinction to the taxpayer since in both *Kohatsu* and *Mathis* the special agents testified that they informed the taxpayer of his Constitutional rights when they first met with him. If the distinction is to be given any real significance, why not be specific so that the taxpayer will understand? This possible confusion on the part of the taxpayer is even more reason to inform him fully of his right to counsel as soon as the Intelligence Division begins its investigation.

The First Circuit has agreed with the Fifth and Ninth that a taxpayer does not have to be warned of his right to counsel when he goes to the office of the Internal Revenue Service to discuss his income tax returns.[19] In a cursory opinion, the court held *Miranda* inapplicable because of the lack of custodial interrogation. The taxpayer was, according to the court, free to walk out at any time.

The exact nature of the investigation, *i.e.*, whether it was being conducted by the Intelligence Division or by the revenue agent, was not set forth. If it was at a time before a special agent became involved, the position of the court was correct because it was still a civil investigation. However, if it was no longer purely civil in nature, the opinion is subject to the same criticism as that expressed above with regard to the holdings of the other two circuits. Nevertheless, one comment by the

19. Morgan v. United States, 377 F.2d 507 (1st Cir. 1967).

court is particularly distressing. While not in response to an assertion by the taxpayer, the court theorized that if the Government had an obligation to inform the taxpayer that he was entitled to counsel, it would have to furnish one if he could not afford to hire an attorney. Thus, the court opened Pandora's box to some supposed horrors. It is unlikely that the average taxpayer would be so financially destitute that he could not afford counsel of his own choosing if he in fact wanted legal assistance after the warning. Even if such were the case, it is certainly no justification for denying him his Constitutional rights. The court concluded that to some extent individuals had to be prepared to look after themselves. This may be true but if it is a criminal tax investigation, then the taxpayer should be given the necessary admonition that he may in fact rationally "look after himself" by employing counsel. How can one begin to watch out for himself unless he reasonably appreciates the dangers that he is supposed to avoid.[20]

District Court Cases

As might be expected the United States district courts have had this question before them more frequently than have the courts of appeal. One of the first to be heard after *Escobedo* involved a factual situation somewhat different from the cases discussed above.[21] The taxpayer had engaged an attorney who was present at some of the conferences with the auditing agent. At no time did the agent raise the issue as to whether or not the lawyer had a power of attorney or a treasury card which was then required under certain circumstances to represent a taxpayer in the proceedings with the Internal Revenue Service. The case was subsequently referred to the Intelligence Division because the agent felt that there were indications of fraud. The special agent was told of the taxpayer's retention of counsel. Thereafter, both agents called upon the taxpayer at his studio (he was an artist) without notifying him in advance. They failed to offer any intelligent reason for failure to call in advance, and the reason given for failure to notify the lawyer was that he had no power of attorney. The taxpayer was told that the role of the special agent "was to investigate and determine whether certain of petitioner's returns were fraudulent and whether criminal prosecution appeared to be warranted."[22] He was

20. The First Circuit recently affirmed its holding in *Morgan* in Schlinsky v. United States, 379 F.2d 735 (1st Cir. 1967), and held that any statements made by the taxpayer after the special agent had informed him that he need not answer any questions nor produce any records that might tend to incriminate him were voluntary. Again the taxpayer had not specifically been told of his right to counsel.

21. Bohrod v. United States, 248 F. Supp. 559 (W.D. Wis. 1965).

22. *Id.* 561.

also told that he could take the fifth amendment if he felt that any of the questions tended to incriminate him.

The evidence concerning the absence of the taxpayer's attorney is in conflict. The taxpayer alleged that he told the agents that he felt his attorney should be present, whereupon the special agent said that it was not important to have an attorney present since he intended to ask questions of "historical" background and that the lawyer would be of no assistance. The taxpayer further alleged that he was told that his lawyer would be of no assistance. The taxpayer further alleged that he was told that his lawyer could not assist since he had neither a power of attorney nor a treasury card. The special agent testified that he told the taxpayer that, if he so desired, his attorney could be present, that petitioner said it was unnecessary, and the discussion about the lack of a treasury card and power of attorney did not take place until the session was completed.

The court refused the taxpayer's petition to enjoin, on the ground that his right to effective assistance of counsel had been violated, the use of the evidence obtained at the conference. While conceding that the investigation had begun to focus on a particular suspect, the court went on to add that at this stage it was still uncertain as to whether or not a crime had been committed. *Escobedo* was thus distinguished. Recognizing that *Escobedo* might be construed so as to fix the time at which the Constitutional right to counsel attaches at a point of arrest, the court felt that in order to do so "the circumstances must be far more compelling than these."[23] It went on to add that "[t]o fix that point, chronologically, at the moment when a criminal investigator joins a civil investigator in a tax case is too stringently to inhibit the search for the truth and too heavily to burden law enforcement."[24] This last statement is particularly strong and in one respect rather unfortunate. If the court means that legal assistance at this stage of the investigation would tend to obscure the truth, this would appear to be an indictment of the legal profession on the assumption that an attorney would deliberately conceal the truth or wilfully mislead the agents. The soundness of any such assumption is untenable. On the other hand, if the court intended to refer to the obvious fact that a taxpayer without legal counsel is far more likely to divulge damaging information which he had a Constitutional right to refuse to disclose, then is not this even more reason that right to counsel should be afforded at this stage of the proceedings. Let the truth be obtained but let it be disclosed or

23. *Id.* 565.
24. *Id.* 566.

uncovered with the safeguards and guarantees to which the individual is entitled.

The court then approached the problem from the standpoint of the taxpayer's rights under the fifth amendment which, unlike the sixth, was held to be operative during the interview at the studio. The court noted that the "presence or absence of counsel is a factor to be considered in determining whether waiver of the fifth amendment privilege against self-incrimination is voluntary and intelligent"[25] and that "[t]his overlapping of the concept of the right to counsel and the concept of the privilege against self-incrimination runs through the cases."[26] Even if the truth of the statements attributed to the special agent were to be assumed, the court held that the taxpayer had not proven that he had not voluntarily waived his rights under the fifth amendment. The reasoning was as follows: if the taxpayer refrained from calling his lawyer because the special agent had told him that the questions were of a historical nature, then he could reasonably be expected to refuse to answer or to have called his attorney when he was asked questions that he recognized as non-historical, and that even if the special agent had told him that his attorney could not be of any assistance if present, it might reasonably be inferred that he would have contacted his attorney to see if this statement were true. Is there any more reason to assume that the taxpayer would call his attorney to verify the agent's statements than that the special agent would suggest that the taxpayer engage an attorney who possessed a treasury card? Is there any more reason to infer that the taxpayer would refuse to answer non-historical questions than that he would probably recognize no distinction in the questions being asked?

Continuing, the court stated that even if it is assumed that the taxpayer did not call his attorney because of the agent's statements, it could not be assumed that the attorney would have advised him not to have talked or that the taxpayer would have followed the tactical advice that might have been offered by the attorney. These failures to make assumptions as to what the taxpayer or his attorney would have done are not germane. The question is not whether the attorney would have given any particular advice nor whether the client would have followed it. The issue is whether the failure to have his attorney present led the taxpayer to make statements without realizing their significance, *i.e.*, did the absence of his attorney prevent him from making an intelligent waiver of his Constitutional rights under the

25. *Id.* 567.

26. *Id.* This is very similar to the Supreme Court's subsequent holding in *Miranda.*

fifth amendment.

Furthermore, the failure to make these assumptions is conspicious when viewed in light of the court's willingness to assume that the taxpayer would refuse to answer any non-historical questions or that he would have refused to proceed without calling his attorney if the statements attributed to the special agent had in fact been made. Why make these assumptions if unwilling to assume that the taxpayer would have refused to answer additional questions if he had in fact had counsel?

Although the taxpayer was not refused an opportunity to see his attorney as was the defendant in *Escobedo*, the impact could very well be the same if the agent's statements reasonably led him to believe either that his attorney was not needed or that he would be unable to assist if present. The net result is the same, *i.e.*, benefit of counsel has been denied in both instances because of some conduct on the part of the investigating authorities.

In ruling that the taxpayer's right to counsel under the sixth amendment had not attached at the time of the interview in question, the court stated that "to fix that point—geographically, psychologically, and sociologically—in the studio for a 55 year old, educated artist-in-residence and faculty member of a university is to fix it too far from the vital center of civil liability."[27] This implies that a well educated man has less need of legal counsel in the earlier stages of the proceedings than one of lesser education. This is irrelevant when the education of an individual is not even remotely connected with the legal process. The fact that the taxpayer was in familiar surroundings moves the case away from the *Escobedo* type of investigation or interrogation but there seems to be little justification for equating or drawing an analogy between a well educated individual and the right to counsel as guaranteed by the sixth amendment. If it had any relevance at all, it would be in determining whether or not the taxpayer had made an intelligent waiver of his rights under the fifth amendment but the court never mentioned his education in this connection.

In light of some of the court's statements concerning the fear that right to counsel at the time the Intelligence Division enters the investigation might inhibit the search for truth, perhaps it would be well to recall another portion of *Escobedo* where Mr. Justice Goldberg commented that:

> . . . no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the

27. *Id.* 566.

> citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the excercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.[28]

One of the first cases, involving the right to counsel in tax investigations, to be decided by a district court after the Supreme Court handed down its decision in *Miranda* was *United States v. Fiore.*[29] Again the facts are essentially the same as those discussed above: the taxpayer was first questioned by an agent at his home and then by a special agent in the office of his accountant. The taxpayer moved to suppress the evidence thus acquired on the grounds that the agents were guilty of deception when the investigation became an inquiry into a possible criminal violation and that they failed to warn him of his Constitutional rights at that time. The taxpayer was advised of his right to refuse to respond to any questions, make any statements, produce any documents or give any information which might tend to incriminate him under federal law. However, he was not told of his right to counsel.

The taxpayer contended that *Escobedo* was applciable because of the nature of the investigation and because he had not been told that the function of a special agent was to interview him for possible criminal infractions. The court started with the assumption that *Escobedo* could have no possible application prior to the meeting with the special agent "for it is plain that if the accusatorial stage was not reached when this inquiry became unquestionably an investigation solely directed to possible criminal conduct, then, *a fortiori*, it did not become accusatorial at any preceding stage."[30] Admitting that there may be certain aspects of a criminal tax investigation that make it similar to other criminal investigations, the court felt that there was one compelling difference: the ordinary criminal investigation begins with the independent fact that a crime has been committed and then begins to project "a ring of evidence large enough to bring the suspect within its circle."[31] The process of general inquiry then "gradually pulls the suspect toward the center of all evidence until investigation

28. Escobedo v. Illinois, 378 U.S., 478, 490 (1964).
29. 258 F. Supp. 435 (W.D. Pa. 1966).
30. *Id.* 439.
31. *Id.* 440.

ultimately begins to focus upon him."[32] This differs from a tax investigation since at the very outset the taxpayer stands in the middle of the inquiry as the only possible suspect while "as invetsigation proceeds, the ring of evidence expands and builds around him."[33] Hence, the court felt that any distinction between the investigative and accusatorial stages might not be entirely apposite in tax investigations. This seems unwarranted. If in fact the defendant is the only possible suspect and the revenue agents are investigating and interrogating him for the sole purpose of ascertaining whether he has committed a criminal offense, has not the entire process already reached the accusatory level albeit he has not yet been charged with a crime? Is the accusatorial stage of the proceedings negated by the mere fact that no specific crime has been pinpointed? While *Escobedo* may not be entirely applicable to this case, it is doubtful that it can be interpreted in such a fashion as to permit the denial of counsel until the investigating authorities have determined by independent sources that a crime has in fact been committed. Consider the situation in which a person has been missing for a considerable period of time and the police pick up an individual who apparently was the last one to see the missing person. At this stage can the individual be interrogated at will without benefit of counsel? Can it be said that no Constitutional rights exist until there is absolute proof that a crime has been committed? It is granted that this illustration may not be analogous to the investigation of a taxpayer, but it serves to show that the court was placing too narrow an interpretation on *Escobedo* by indicating that the accusatorial stage should not be presumed until a crime has in fact been perpetrated and the investigators have independent knowledge thereof.

The court went on to hold that any question as to the right to counsel that might have been left open by *Escobedo* was answered negatively in *Miranda* by the use of the words "custodial interrogation." The use "of this term throughout the opinion and the prefacing of the decision with a lengthy recital of police abuses leaves no doubt as to what situations the Court had in mind in reaching its decision."[34] While the Court was unwilling to characterize the agents' calls as being pleasant, they did not resemble custodial interrogation.

Two comments are in order at this point. First, it is hard to justify any interpretation which concludes that *Miranda* placed restrictions upon *Escobedo*. While the Court in *Miranda* did refer to "custodial interrogation" throughout the opinion, it should be kept in mind that

32. *Id.*
33. *Id.*
34. *Id.*

the defendant in *Escobedo* had been denied an opportunity to consult with his attorney after repeated requests to this effect, whereas in *Miranda* the defendant was not fully informed of his Constitutional right to counsel. To this writer *Miranda* was an extension of the safeguards set forth in *Escobedo* and not a restriction. Secondly, it is common practice for the Supreme Court to decide only the specific question before it without elaborating on all of the other factual situations in which the same or similar questions might be legitimately raised. Even if the court felt that this was not a proper case for the application of *Miranda*, it is still dubious to restrict *Miranda* to purely custodial interrogation cases.

Three months after the decision in *Fiore*, the same question was presented to another district court.[35] With regard to the visit by the agent first assigned to the case, the court found that he "was not conducting a criminal investigation and did not made any determination as to whether or not a fraudulent or willful evasion had occurred."[36] He merely "followed customary Internal Revenue Service practice and referred the matter to the Intelligence Division for further investigation as to the cause of the understatement which he found."[37]

The case was thereafter assigned to a special agent who conducted the investigation that eventually led to the taxpayer's indictment. Here, as in most of the other cases, the taxpayer was informed that he need not produce any records or documents nor make any statements that might tend to incriminate him but he was not told of this right to counsel. He was also told that the agent would leave if asked. It was held that the defendant's rights had not been violated under either *Escobedo* or *Miranda* "it being clear that the defendant was at no time when interviewed at his own store in custody or otherwise deprived of his freedom in any significant way."[38] The taxpayer "was never interviewed by the agents except in the familiar surroundings of his own store, and I rule that he acted voluntarily in all of his dealings with the agents, free from any of the compulsive factors adverted to in the *Miranda* opinion."[39]

While the taxpayer was not in custody, was interviewed in his own store, and was told that the agent would leave if he were asked to, does it automatically follow that he was not deprived of his freedom in

35. United States v. Schlinsky, 261 F. Supp. 265 (D. Mass. 1966), *aff'd*, 379 F.2d 735 (1st Cir. 1967).
36. *Id.* 267.
37. *Id.*
38. *Id.* 268.
39. *Id.*

any signigicant way? What could he do? He could have asked the agent to leave but it is extremely doubtful that the average taxpayer would take this avenue of approach. He might fear that the agent would retaliate in some manner or that such conduct might lead the agent to suspect that he was attempting to hide something. Without being specifically advised of his right to counsel, the taxpayer might also fear that the placing of a call to an attorney might produce the same suspicions in the agent. Whether or not every taxpayer would have these thoughts cross his mind is clearly unknown. However, the possibilities are so obvious that they could very well induce him to produce various records and make certain statements which he would refuse to make if he had more time to reflect upon the possible consequences or if he had the assistance of counsel.

While the court stressed the familiarity of the taxpayer's surroundings during the interview and the fact that he could have asked the agent to leave and concluded that his freedom had not been significantly affected, it never mentioned another salient feature of *Miranda*; the Supreme Court also spoke in terms of psychologically as opposed to physically-oriented interrogation.[40] While it is granted that *Miranda* was concerned with in-custody interrogation, it is possible for the average taxpayer to feel psychologically as if he were actually in custody. If so, the effect would be the same irrespective of his actual freedom of movement. Hence, acting under these conditions, it might be impossible for him to appreciate the significance of his right to refuse to make incriminating statements. In other words, an intelligent waiver could not be made under this handicap. Advising him of his right to counsel would greatly alleviate the burden of establishing that the taxpayer knew the significance of his actions.

In any event, it was encouraging to see the court make the distinction between investigations made before and after the special agent became involved in the case. This certainly is a move away from the holding of the Ninth Circuit in *Kohatsu*[41] where it was held that none of the activities by either the original agent or the special agent had moved the proceedings from the investigative to the accusatory level. While not deciding that right to counsel attaches when the special agent becomes involved, the case at bar does not expressly rule it out in appropriate situations.[42]

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40. 384 U.S. 436, 448 (1966).

41. 351 F.2d 898 (9th Cir. 1965), *cert. denied*, 384 U.S. 1011 (1966).

42. At least one other district court has held that *Miranda* is inapplicable where it was not alleged that the taxpayer "was, or even approached being, in custody." Stern v. Robinson, 262 F. Supp. 13, 15 (W.D. Tenn. 1966). However, this case is not of the importance of those discussed above since there was no specific allegation that

One of the later cases to be decided in this area and one which may prove significant is *United States v. Kingry.*[43] The court granted the taxpayer's motion to suppress the evidence that was obtained by a special agent who did not advise the taxpayer of his right to counsel. The court quickly noted that there was no indication that anyone connected with the case had done anything other than what the law had required for several years. Nevertheless, the law had been affected by the decision of the Supreme Court in *Miranda* and the judge felt that the principles enunciated therein were applicable to the present controversy and that the district court was bound by the decision in *Miranda.*

It was brought out on examination of the special agent that he had told the taxpayer of his right to remain silent but not of his right to counsel nor that the function of a special agent is to determine whether or not a criminal offense has been committed. After eliciting this information, the taxpayer's attorney, basing his motion on *Miranda,* moved to suppress the statements given at the interview. In the ensuing discussion, counsel for the Government sought to distinguish *Miranda* on the basis that the special agent had no specific knowledge that a crime had been committed, but the court felt that the question was not so much what the agent had in mind but what warning he gave the taxpayer. In trying to resolve the issue as to when the point was reached when the taxpayer should be fully informed of his Constitutional rights, the Government conceded that by the time the agents had completed the investigation and had decided that there was fraud involved, the taxpayer must be advised if he is subsequently arrested or interviewed again. Here again, the crucial issue is raised. If the right attaches only after the agent has secured enough information to warrant an arrest, then undoubtedly the attorney will be of less assistance than if he had been present at the earlier stages. On the other hand, if he has a right to counsel when he is interviewed after the agent has concluded that a violation has been committed, then this right would be completely dependent upon the competence of the special agent and his subjective intent.

The court then asked counsel for the Government to explain the difference between an income tax case and a bank robbery case. Being unsatisfied with the explanation given, the court answered its own question by stating that in either of them the defendant could be incarcerated if found guilty. It then concluded that this was the

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any of the statements given were made after the fraud investigation began. This removes it from the realm of this discussion.

43. 67-1 U.S. Tax Cas. 83,604,——F. Supp.——(N.D. Fla. 1967).

philosophy of *Miranda* and whether or not the Government agreed was not material. The court felt bound by it. Thus for the first time an argument was successfully made that the philosophy of *Escobedo* and *Miranda* should be the determinative feature irrespective of whether or not the case at bar was identical in all respects to the factual situations in those two cases.

Apparently the decision in favor of the taxpayer was triggered by the belief that when the special agent began his investigation, he had a suspect in mind and the sole purpose of the investigation was to ascertain if in fact this individual had committed a criminal offense. Therefore, the right to counsel should attach at that time.

In light of the effect that this decision will have on the investigatory procedures now employed by the Internal Revenue Service, it seems probable that the Government will appeal the decision. The precise issue has not been before the Court of Appeals for the Fifth Circuit; the most similar case which this court has decided was *Mathis v. United States*,[44] discussed above, where the statements were made during the civil part of the investigation. Should the Fifth Circuit affirm, there would be a conflict with the holding of the Ninth Circuit in *Kohatsu*[45] and perhaps the Supreme Court would agree to hear the case in order to resolve the conflict.

Shortly after the Florida case, the same issue was raised again, this time before the United States District Court for the Northern District of Illinois.[46] The taxpayer was not told of the criminal nature of the investigation until some eighteen months after the case had been transferred to the Intelligence Division. During this interval, the defendant had made various statements to the special agent and had allowed the Service full access to all of his records even to the extent of permitting their removal to the Service offices for inspection and copying. At no time was the defendant told of his Constitutional rights.

In suppressing the use of certain evidence secured during the investigation by the Intelligence Division, the court held that once the taxpayer becomes the subject of a criminal tax investigation, the adversary process of criminal justice has been directed against him as a potential criminal defendant. At this juncture he is entitled to the services of counsel and must be informed of such right. The investigation became criminal in nature the instant the case was transferred to the Intelligence Division inasmuch as the jurisdiction of that Division

44. 369 F.2d 43 (5th Cir. 1967).
45. 351 F.2d 898 (9th Cir. 1965), *cert. denied*, 384 U.S. 1011 (1966).
46. United States v. Turzynski, 268 F. Supp. 847 (N.D. Ill. 1967).

is limited to criminal investigations. Thus, *Escobedo* would be applicable at that time.

The court based its decision partly upon *Miranda*; it held that the test as to whether or not a suspect has voluntarily waived his constitutional rights depends upon his knowledge of these rights. How can an individual waive something until he knows that he possesses it? Whether a suspect is induced to give incriminating evidence through a combination of ignorance of his Constitutional rights and the coercive atmosphere of custody or through ignorance of his rights coupled with the inference that the investigation is simply to ascertain the exact amount of tax liability, the result is the same. In both, the party under investigation may involuntarily incriminate himself. The court felt that in some respects the tax investigation may even be more misleading than custodial interrogation since the suspect who has been taken into custody knows that his interrogators are seeking evidence to convict him whereas the tax suspect is permitted or may even be encouraged to think that no criminal prosecution is anticipated.

Referring to *Miranda* and *Escobedo*, the court felt that the essence of these cases centers around the inception of the adversary process. *Miranda* should not be so narrowly construed as to limit its application to custodial interrogations. An entire reading of this case indicates otherwise. The right to refrain from self-incrimination should begin when the investigation becomes criminal in nature irrespective of whether or not the suspect is in custody or whether or not he knows that he is being investigated for possible criminal prosecution.

This case may have been somewhat easier to decide than some of the earlier cases since the taxpayer was not told of any of his Constitutional rights when the investigation was transferred to the Intelligence Division. Nevertheless, the court specifically took issue with the decision of the Ninth Circuit in *Kohatsu*[47] where it was held that the process had not become accusatory when the Intelligence Division became involved. It was deemed irrelevant whether the culprit is known before the crime or the crime before the individual who committed it. In either case, the investigator is trying to secure enough evidence to obtain a criminal prosecution and conviction. Hence *Escobedo*, as well as *Miranda*, is applicable when the Intelligence Division enters the picture.

The court did not specifically hold that its decision was based upon the fifth or sixth amendment but it dealt primarily with the question of whether or not the statements were voluntarily given, thus

47. 351 F.2d 898 (9th Cir. 1965), *cert. denied*, 384 U.S. 1011 (1966).

making the right to counsel one of the factors to be considered in ascertaining if the taxpayer voluntarily and knowledgeably made a waiver of his right to refuse self-incrimination under the fifth amendment.

The possibility of the Supreme Court resolving the issue is heightened by this case inasmuch as the Seventh Circuit has never decided the question and it would appear likely that the Service will appeal. Thus, it seems inevitable that another conflict will arise between circuits.

Conclusion

While the decisions in *Escobedo* and *Miranda* may not specifically apply to tax investigations because of the obvious factual differences, the rights sought to be protected in those cases and the general purpose of these rights indicate that the philosophy expressed should apply with equal weight to criminal tax matters. It is clear that they do not, nor were they intended to, cover routine civil tax investigations. It is equally as clear that they do apply to criminal investigations whenever the process becomes accusatory. When does this occur in a tax case? Undoubtedly, it has been reached by the time that the taxpayer has been indicted or formally charged. But the mere fact that the proceedings are then accusatory does not preclude the conclusion that they earlier reached the accusatorial stage. This would leave two alternatives: first, the date when the investigation is referred to and contact is made by the Intelligence Division and, second, the time when the special agent ascertains that he has enough evidence to recommend a criminal accusation.

Of these possibilities, waiting until a formal charge has been lodged is unwise and is undoubtedly unconsititutional. By this time the investigation may have proceeded to a point where counsel can be of little assistance and it may have completely passed the point where the taxpayer needed it the most. Also, it is obvious that the entire process has become accusatory prior to the formal charge.

If the right attaches at the time when the special agent has accumulated enough evidence that he intends to recommend prosecution, valuable rights will again have been lost. Furthermore, such a construction is untenable since it would be impossible to determine what was the subjective intent of the agent, *i.e.*, when did he decide to recommend prosecution? This alternative would present an extra hazard when the special agent is unable to decide whether or not to recommend prosecution until he has secured *all* of the necessary information. Should this occur, the taxpayer would be in no better

position than he would if the right attached at the time of the formal accusation; the same objections expressed with regard to that result would again apply with equal force.

The only workable alternative would, therefore, be that the taxpayer should be informed of his right to legal assistance when the case is transferred to the Intelligence Division. By this time, the proceedings are clearly not of a civil nature inasmuch as the function of the Intelligence Division is to investigate possible criminal violations. Granted that there is no absolute knowledge that a crime has in fact been committed, but it is obvious that the revenue agent feels that it is reasonably possible or he would not have transferred the case to the Intelligence Division. It is also clear that the taxpayer is the only suspect and whether or not the nature of the inquiry is such that it seeks to bring the suspect into the middle of the ring of evidence is irrelevant.[48] By the very nature of the proceedings, he is already there. It merely begins to build around him. Any questions asked of the taxpayer would be for the express purpose of determining whether or not he committed the offense which the special agent has reasonable ground to suspect he has. It is at this stage of the investigation that legal counsel is most needed. It is here that counsel will enable the taxpayer to protect his Constitutional right against self-incrimination. It is here that the whole process begins to focus on one individual. It is here that the investigation in effect becomes accusatory.

Giving the taxpayer the right to counsel at this stage may at first seem unnecessary on the assumption that the dealings are with a sophisticated individual who should know that he could call an attorney if he so desired. Any such assumption would be totally unwarranted. The average taxpayer probably has little conception of his Constitutional rights. His lack of knowledge may in fact be increased when the special agent tells him of his right to refuse to answer any questions or produce any records but specifically refrains from mentioning counsel. This could easily cause him to infer that no such right exists. In reality, he probably has less knowledge of his rights than would the individual being questioned on a more serious charge since this may be the only contact that the taxpayer has had or ever will have with an investigative official.

Nor should this produce any great hardship on the Internal Revenue Service. Irrespective of an actual obligation, it seems to be a generally accepted pattern that the taxpayer is informed of his right to refuse to answer any question from or produce any documents for

48. *See* United States v. Fiore, 258 F. Supp. 435 (W.D. Pa. 1966).

the special agent. How much longer would it take to inform him of his right to counsel? If the taxpayer is so informed, he will have more information on which to base a waiver of his rights if he is so inclined. Legal assistance, if obtained, might make the work of the Service a little more difficult in some cases but this is certainly irrelevant. The Constitutional rights of the taxpayer should precede the desires of the Internal Revenue Service.

Therefore, it seems obvious that the sixth amendment right to counsel attaches at the time that the case is transferred to the Intelligence Division for further investigation. The whole process then begins to center around the accumulation of sufficient evidence to establish a criminal violation. That is the very reason that the Intelligence Division has the case. The investigation is no longer purely civil in nature but rather it has moved to the accusatory stage and, under *Escobedo*, the taxpayer should be specifically informed of his right to counsel at this time. Unless this is done, the sixth amendment will often afford little protection to the taxpayer. Furthermore, the failure to inform the party being investigated that he has a right to consult with an attorney if he so desires raises serious problems about his ability to understand what his consititutional rights are under the fifth amendment. Such lack of knowledge could obviously prevent his making an intelligent waiver of those rights and *Miranda* should be applicable notwithstanding the lack of custodial interrogation. The crucial element is present even without in-custody questioning. To the taxpayer, his freedom of movement may have been severely restricted by the investigation because of his utter confusion and total unfamiliarity with the entire process.

It may be prossible to find a few tax investigations where no rights have been lost because of the failure of the investigating authorities from the Intelligence Division to inform the taxpayer of his right to the assistance of counsel but this would not justify the witholding of the individual's Constitutional rights. Whether or not the right to counsel is permitted as a right under the fifth or under the sixth amendment is not nearly as important as the fact that it whould be allowed at the inception of the criminal investigation. This is particularly true where it appears that this is a right to which the taxpayer is entitled under both amendments.

COMMENTS

The *Indiana Law Journal* is pleased to announce that, beginning with a future issue of Volume 43, it will initiate a new section entitled "COMMENTS." The purpose of this section is to provide a forum for the expression of timely and thoughtful opinion concerning current legal and social problems, unfettered by the restrictions of the usual article format and the need for rigorous documentation. The essence of this unstructured section will be the presentation of new ideas and approaches with the emphasis on free and imaginative speculation. We welcome for our consideration the COMMENTS of all members of the bar and all members of law faculties.

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