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Criminal Procedure - Tax Fraud - Applicability of Miranda Safeguards to a Criminal Tax Suspect - Mathis v. United States, 391 U.S. 1 (1968)

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where there is "any . . . reason justifying relief from the operation of the [final] judgment" provided that the motion is made within a reasonable time or, in some cases, within 6 months after final judgment.[21] Since a writ of error must be issued within 3 months of final judgment,[22] it is apparent that, prior to *Coerber,* after 3 months had expired, the right to review was lost, even though relief in the trial court under 60(b) was not yet foreclosed. By adopting the federal interpretation concerning reviewability of an order denying relief from a default judgment, *Coerber* has extended the period within which litigation will terminate. However, by deciding that the lower court's order denying a rule 60(b) motion is a final reviewable judgment as defined by the Colorado rules,[23] the supreme court has afforded a party who has a meritorious defense the opportunity to obtain substantial justice when it is obvious that the trial court has abused its discretion in denying the motion to set aside the judgment.

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CRIMINAL PROCEDURE — TAX FRAUD — APPLICABILITY OF MIRANDA SAFEGUARDS TO A CRIMINAL TAX SUSPECT. — *Mathis v. United States,* 391 U.S. 1 (1968).

Defendant Mathis was serving a prison sentence in the Florida State Prison for a conviction unrelated to tax charges. While a prisoner, a regular agent[1] of the Internal Revenue Service elicited from Mathis documents and oral statements concerning tax returns previously made by Mathis. Mathis was not advised "that any evidence he gave the Government could be used against him, and that he had a right to remain silent if he desired as well as a right to the presence of counsel and that if he was unable to afford counsel one would be appointed for him."[2] Suspecting fraud, the regular agent referred the case to the Intelligence Division of the Internal Revenue Service. When agents of the Intelligence Division contacted Mathis, he was advised of his rights. At his trial, Mathis, relying solely on *Miranda v. Arizona,*[3] sought to suppress the documents and statements arguing (1) that throughout the investigation there was a possibility

[21] COLO. R. CIV. P. 60(b).

[22] *Id.* rule 111(b).

[23] *Id.* rule 111(a)(1).

[1] A regular agent is an Internal Revenue Service agent concerned with civil tax audits as opposed to a special agent of the Intelligence Division of the Internal Revenue Service concerned primarily with criminal investigations of tax fraud and evasion. *See* H. BALTER, TAX FRAUD AND EVASION §§ 3.3, 3.3-1, 3.3-2 (3d ed. 1963).

[2] Mathis v. United States, 391 U.S. 1, 2-3 (1968).

[3] 384 U.S. 436 (1966).

of subsequent criminal prosecution, and (2) that because he was incarcerated at the time, the protection of *Miranda* was required from the outset.[4] The government asserted the inapplicability of *Miranda* to *Mathis* in that "(1) . . . these questions were asked as a part of a routine tax investigation where no criminal proceedings might even be brought, and (2) that the petitioner had not been put in jail by the officers questioning him, but was there for an entirely separate offense."[5] The trial court rejected defendant's argument and the circuit court of appeals affirmed defendant's conviction. On certiorari, the United States Supreme Court, *held*, reversed and remanded. "[T]ax investigations frequently lead to criminal prosecutions . . . ."[6] The Court declared, "We find nothing in the *Miranda* opinion which calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody."[7] "We reject the contention that tax investigations are immune from the *Miranda* requirements for warnings to be given a person in custody."[8]

I. Developments: From *Escobedo* to *Mathis*

In examining this subject, it is essential to view the treatment the courts have accorded the issue since *Escobedo v. Illinois*.[9] Historically, the courts have been reluctant to apply the procedural protections of *Escobedo* and *Miranda* to criminal tax cases. In the period between *Escobedo* and *Miranda,* the courts were content to hold *Escobedo* inapplicable to such situations, predicated upon either a tenuous distinction as in *Kohatsu v. United States*, [10] or upon an obvious misapprehension of then applicable law, as in *United States v. Spomar*. [11]

It was the Ninth Circuit in *Kohatsu* that articulated the elements which they felt distinguished *Escobedo* from a criminal tax case. The appellant there argued that evidence was admitted in violation of the fourth, fifth, and sixth amendments because it was obtained after the investigation had reached the "accusatory stage" without his being warned or advised of his rights. He contended that a

> "routine civil tax investigation" 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. . . . [W]hen these events occur, the investiga-

[4] Mathis v. United States, 376 F.2d 595, 596 (5th Cir. 1967).
[5] 391 U.S. at 4.
[6] *Id.*
[7] *Id.* at 4-5.
[8] *Id.* at 4.
[9] 378 U.S. 478 (1964).
[10] 351 F.2d 898 (9th Cir. 1965), *cert. denied,* 384 U.S. 1011 (1966).
[11] 339 F.2d 941 (7th Cir. 1964), *cert. denied,* 380 U.S. 975 (1965).

> tion "has begun to focus on a particular suspect" and that from that point "government agents have a duty to inform the taxpayer of his right to counsel, and that they must not elicit further incriminating evidence from the taxpayer until he has been informed of his constitutional rights in specific, understandable terms."[12]

Kohatsu contended the investigation focused on him at least from the time the special agent was brought into the case. However, the court reasoned thus:

> The Supreme Court in *Escobedo* referred to an unsolved crime. The existence of the crime was apparent. The police were seeking to identify the offender. The accused had been taken into custody. In the instant case the essential question to be determined by the investigations of the revenue agents was whether in fact any crime had been committed. The accused had not been indicted or arrested.[13]

Subsequently, in a terse per curiam decision, the same court relied solely on *Kohatsu* to determine that investigation by a special agent did not constitute the accusatory stage.[14]

The misapprehension of law in avoidance of *Escobedo* was, as referred to above, the Seventh Circuit's decision in *United States v. Spomar*. [15] The appellant, Spomar, asserted that his constitutional rights under the fourth and fifth amendments were violated because the agents failed to inform him of his right to refuse to answer questions and produce records. The court's holding was that "Revenue Agents, during the course of an investigation, have no duty to apprise a taxpayer that he need not furnish requested information and that if he does . . . it may be used against him in criminal proceedings."[16] This holding came six months after the Court in *Escobedo* spoke of "his [the suspect's] absolute constitutional right to remain silent"[17] when "the investigation . . . has begun to focus on a particular suspect . . . ."[18]

With the advent of *Miranda*, replete with its well-known text and footnote 4 defining custody,[19] courts had much firmer ground on which to posit their stand of maintaining criminal tax cases

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[12] 351 F.2d at 900.

[13] *Id.* at 901. The court in *Kohatsu* cites Irwin v. United States, 338 F.2d 770 (9th Cir. 1964), in which similar reasoning was used to avoid application of Massiah v. United States, 377 U.S. 201 (1964), and *Escobedo* to a mail fraud case. *Kohatsu* was relying on *Massiah* as well as *Escobedo*.

[14] Rickey v. United States, 360 F.2d 32 (9th Cir. 1966).

[15] 399 F.2d 941 (7th Cir. 1964), *cert. denied,* 380 U.S. 975 (1965).

[16] 339 F.2d at 942.

[17] 380 U.S. at 491.

[18] *Id.* at 490.

[19] 384 U.S. at 444 & n.4. "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at n.4. For an excellent analysis of the *Miranda* requirements see Note, *Legal Limitations on Miranda,* 45 DENVER L.J. 427 (1968).

outside the ambit of otherwise expanding procedural safeguards. The overwhelming majority of courts that considered the issue took up a nearly uniform incantation.[20] Typical of these holdings is, "The language of *Miranda* makes it clear that there must be some form of detention, some type of in-custody situation . . . ."[21] The circuit courts in *Frohmann v. United States*[22] and *Spinney v. United States*[23] adopted the same rationale. In *Frohmann* the court stated that "in any event, internal revenue agents in the investigatory phase of a case, and prior to custody, have the right to make inquiry of a taxpayer without the formalities which *Escobedo* and *Miranda* may now require for custody situations."[24] Similarly, the court in *Spinney* found that the defendant in responding to a letter from the Internal Revenue Service for an interview "was not deprived of his freedom of action at all. He was not compelled to appear at the interview or answer questions. He did both voluntarily."[25]

The position of rendering *Miranda* inapplicable to criminal tax cases was not monolithic.[26] In *United States v. Kingry*,[27] *Miranda* was applied fully to a criminal tax prosecution. That court implied that it did not recognize any difference between a criminal tax case and any other criminal case.[28] In *Kingry* the defendant was not advised of his right to have an attorney.[29] A special agent had conducted the investigation from its inception. The defense moved to suppress the evidence based on *Miranda*, and the motion was granted. In argument, the government strenuously advanced the "custody" concept of *Miranda*, but the court avoided this point. The court urged three things: (1) Why advise the suspect of part of his rights

[20] *See* United States v. Bachman, 267 F. Supp. 593 (W.D. Pa. 1966); United States v. Gleason, 265 F. Supp. 880 (S.D.N.Y. 1967); Stern v. Robinson, 262 F. Supp. 13 (W.D. Tenn. 1966); United States v. Schlinsky, 261 F. Supp. 265 (D. Mass. 1966); United States v. Hill, 260 F. Supp. 139 (S.D. Cal. 1966).

[21] United States v. Hill, 260 F. Supp. 139, 142 (S.D. Cal. 1966).

[22] 380 F.2d 832 (8th Cir. 1967), *cert. denied*, 389 U.S. 976 (1968).

[23] 385 F.2d 908 (1st Cir. 1967), *cert. denied*, 390 U.S. 921 (1968).

[24] 380 F.2d. at 835.

[25] 385 F.2d at 910. The question of "voluntariness" will be discussed in Part III *infra*.

[26] Prior to *Miranda*, United States v. Schoenburg, 19 Am. Fed. Tax R.2d 348, 353 (D. Ariz. 1966), applied *Escobedo* to a tax situation. The court held the sixth amendment right attached "at the time of the Special Agent's physical entry into the case . . . ." The court based this opinion on the "critical stage" of the proceedings test of Hamilton v. Alabama, 368 U.S. 52 (1961), and White v. Maryland, 373 U.S. 59 (1963).

[27] 19 Am. Fed. Tax R.2d 762 (N.D. Fla. 1967).

[28] *Id.* at 769.

[29] In the voir dire of the government's witness — the special agent — defense counsel adduced:

> Q: "And did you, at that time, tell him that he had a right to consult with and have present prior to and during the interrogation an attorney, either retained or appointed?"
> A: "No sir."

Id. at 763.

(the right to remain silent) but not all of them? (2) The court will not except tax cases from other crimes; and, in referring to the waiving of rights, (3) "[I]t is not free and voluntary unless it was done with the proper information and knowledge and advisedly."[30]

In a memorandum opinion by Judge Will, deciding *United States v. Turzynski,*[31] the issues of "custody" and "accusatory stage" were thoroughly and ably discussed. Regarding "custody" as being that incident which gives rise to the right of procedural safeguards, the *Turzynski* court observed:

> That the Court did not intend the custody standard to be raised to constitutional significance seems clear from a reading of the total opinions in both *Escobedo* and *Miranda.* Both cases involved custodial interrogations. In both cases, as in others decided with *Miranda,* the detention of the suspect permitted the inference that the police suspected him of being the perpetrator of the crime under investigation. Detention constituted tangible evidence that the adversary process had begun.
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> The inception of the adversary process was the core of the Court's concern in *Escobedo* and *Miranda.*[32]

By thus dealing with "custody," the court had "leapfrogged" *Miranda* and found itself in the flexible, but nebulous, realm of *Escobedo.*[33] At this juncture the court criticized the *Kohatsu* distinction as "logically irrelevant for purposes of determining when the adversary process has begun . . . . What matter if the culprit be known before the crime or the crime before the culprit."[34]

The *Turzynski* court, free of its "custody" fetters, attached the protective safeguards of *Miranda* where it saw fit. It found that "[t]he administrative organization of the Internal Revenue Service offers at least one clear point at which the adversary process can be said to begin in criminal tax investigations. It is at this point when the case is turned over to the Intelligence Division . . . ."[35] It was at this point that the court held the *Miranda* advisement must be given. This holding was cited favorably and was adopted in substance in the memorandum opinion granting a motion to suppress in *United States v. Wainwright.*[36]

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[30] *Id.* at 768.

[31] 268 F. Supp. 847 (N.D. Ill. 1967).

[32] *Id.* at 853.

[33] For a better grasp and fuller appreciation of the custody issue, it is well to be aware of what has taken place in nontax cases. One criteria frequently employed by courts to determine whether the suspect is in custody is illustrated in Mares v. United States, 383 F.2d 811, 813 (10th Cir. 1967): "*Miranda* is inapplicable because the defendant was not under arrest and was free to continue the interviews or leave as he saw fit." (Armed robbery case).

[34] 268 F. Supp at 852-53. Speaking to this same point, Judge Arraj observed that it "is a distinction without a difference." United States v. Wainwright, 284 F. Supp. 129, 132 (D. Colo. 1968).

[35] 268 F. Supp. at 852.

[36] 284 F. Supp. 129 (1968).

In examining the three cases that have applied *Miranda* (excluding *Mathis*) as well as the one applying *Escobedo*, [37] one sees two common threads running through all four cases. They are (1) avoidance of a "traditional" construction of "custody,"[38] and (2) attachment of the procedural rights at the point of the special agent's entry into the case.

II. *Mathis v. United States:* Its Impact and Results

Under the *Mathis* rule, applying the safeguards of *Miranda* only upon "custody" as currently understood and defined, how much protection is extended the criminal tax suspect? The criminal tax prosecution system as it exists and the law at its present stage compels the answer — precious little!

The basic reason for the modicum of protection is that an extremely insignificant number of suspects are placed in custody for a tax crime. "[A] tax evader is usually well-rooted in his community . . . [a]nd [his] crime causes no alarm for anyone else's physical or moral safety."[39] Beyond this distinction it has been pointed out that other contrasts make the tax criminal unique.[40]

It is indeed regrettable that a case with a fact pattern as unique to the majority of cases as *Mathis* would be deemed the case on which to propound the law for tax fraud cases. The Court has certainly had numerous opportunities to hear cases in closer conformity to the norm of tax cases.[41]

In the wake of *Mathis,* an answer to a basic policy question must be sought. Will *Miranda* be applied in a manner designed to

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[37] United States v. Schoenburg, 19 Am. Fed. Tax R.2d 348 (D. Ariz. 1966).

[38] The custody issue is handled in *Turzynski* by meeting the question head-on, in *Wainwright* by substantially ignoring it, and in *Kingry* by totally neglecting it.

[39] Hewitt, *The Constitutional Rights of the Taxpayer in a Fraud Investigation,* 44 Taxes 660, 661 (1966).

[40] Hewitt states that:

> (1) In most instances, the crime occurs, and the investigation shifts to discovering the perpetrator. In tax fraud, the suspect is known; the investigation centers on whether or not a crime has been committed.
> (2) With most criminals, flight and further detrimental conduct are important considerations. In tax fraud, neither of these possibilities generally concerns the government.
> (3) Most criminals can recognize their situation through the visibility of a uniformed policeman. The tax evader cannot, because he never knows by the ordinary clothes and innocent title that a special agent is just like any other law enforcement official.
> (4) Many ordinary criminals are well aware of their constitutional rights, having participated in, or been close to, the criminal process previously. The ordinary tax evader, on the other hand, is experiencing his first, and usually last, contact with the criminal law.

Id. (footnote omitted).

[41] *See, e.g.,* Frohmann v. United States, 380 F.2d 832 (8th Cir. 1967), *cert. denied,* 389 U.S. 976 (1968); Thomas v. United States, 370 F.2d 96 (5th Cir. 1966), *cert. denied,* 386 U.S. 975 (1967); Kohatsu v. United States, 351 F.2d 898 (9th Cir. 1965), *cert. denied,* 384 U.S. 1011 (1966); United States v. Spomar, 339 F.2d 941 (7th Cir. 1964), *cert. denied,* 380 U.S. 975 (1965).

accomplish its original objectives — affording protection for the individual's constitutional rights — or is it to degenerate into a sterile, mechanical rule, programmed only to "custody"?

The use of custody in the milieu of its original application in *Miranda* has proved to be a viable objective standard by which to attach the right of procedural safeguards, but it should remain just that. As stated by the court in *Turzynski,* "That the Court did not intend the custody standard to be raised to constitutional significance,"[42] is as it should be. To rigidly adhere to the custody standard "would lead to the anomalous conclusion that a person suspected of bank robbery, sale of narcotics, murder, rape or other serious crime is entitled to greater protection of his constitutional rights than a person suspected of violating the internal revenue laws."[43] The validity of this remark rests on the fact that very few tax suspects are ever placed in custody as that term is now construed.

Since *Mathis* applies the *Miranda* safeguards at least at the point of custody, defendants undoubtedly will attempt to incorporate the issue of custody in tax cases. The questions expected to be raised frequently will be: (1) Is an interview of a suspect in his home or office by a special agent within the meaning of "custody"? and (2) Is a "question and answer" session in the Internal Revenue Service office, in response to a letter,[44] truly volitional?[45] These questions will have to be answered in future cases. Perhaps the ultimate issue has been broached by Justice Douglas in his dissent in *Thomas v. United States,*[46] where the Court denied certiorari: "I would grant this petition on the fourth question. . . . This is not an in-custody case, but it is coercive examination of a taxpayer at a critical preliminary hearing, so to speak, and the question presented apparently is a recurring one."[47] What is implied in the Douglas dissent may well be the answer to providing protection to the criminal tax suspect equal to that accorded a suspect of other crimes; that is, to

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[42] 268 F. Supp. at 853.

[43] *Id.* at 850.

[44] *See* Spinney v. United States, 385 F.2d 908, 909 & n.3 (1st Cir. 1967), *cert. denied,* 390 U.S. 921 (1968). This case sets out the Internal Revenue Service letter that is substantially standardized and in common use.

[45] In this regard the court in United States v. Carlson, 260 F. Supp. 423, 427 (E.D.N.Y. 1966), said: "[E]very other case of interrogation by a government presents, if in diluted form, an underlying inequality of confrontation . . . ." *See* United States v. Gower, 271 F. Supp. 655 (M.D. Pa. 1967) (question and answer session in an IRS office where an inadequate advisement was given resulted in the suppression of evidence). "Deprivation of freedom of action . . . must be evaluated in the light of what influence the atmosphere and surroundings of governmental oriented facilities had on the free choice of the person being interrogated." *Id.* at 660. *But see* United States v. Spomar, 339 F.2d 941 (7th Cir. 1964), *cert denied,* 380 U.S. 975 (1965); Morgan v. United States, 377 F.2d 507 (1st Cir. 1967).

[46] 386 U.S. 975 (1967).

[47] *Id.*

attach the *Miranda* rights at a point prior to custody in recognition of the uniqueness of criminal tax cases vis-a-vis other criminal cases.

Another reason compelling the conclusion that *Mathis* provides an inadequate standard is that, for the critical period prior to custody (if in fact there is any custody), courts are accustomed to use the "voluntariness" rule. This rule is "whether appellant [taxpayer] freely gave his consent to have his records examined,"[48] and whether there was any "misrepresentation, fraud, deceit or misconduct on the part of the agents to gain . . . consent . . . ."[49] *Kohatsu* also applied this standard for admissibility.[50] This test is applied where no advisement of rights is given the suspect by the agent.

The concept of this test seems to fly in the face of *Johnson v. Zerbst* [51] which held, "The purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights . . . ."[52] The *Turzynski* decision stated that the Court in *Miranda* "logically pointed out that it is impossible voluntarily to waive a right or privilege you are unaware you possess."[53] *Miranda* itself required the waiver to be made voluntarily, "knowingly and intelligently."[54] The *Miranda* Court further asserted: "No amount of circumstantial evidence that the person may have been aware of this right will suffice . . . . Only through . . . a warning is there ascertainable assurance that the accused was aware of this right."[55] If this "voluntariness" rule persists in the wake of *Miranda,* the conflict cannot long be tolerated. The Court will have to resolve it, and in so doing, will either resolve the *Miranda* application vis-a-vis the tax case or further complicate the issue.[56]

III. Other Possibilities Beyond *Mathis*

In light of this analysis, What then are the possible alternatives for the stage at which procedural safeguards should attach? The de-

[48] United States v. Spomar, 339 F.2d 941, 943 (7th Cir. 1964), *cert. denied,* 380 U.S. 975 (1965).

[49] *Id.*

[50] Kohatsu v. United States, 351 F.2d 898 (9th Cir. 1965), *cert. denied,* 384 U.S. 1011 (1966). *See also* Greene v. United States, 296 F.2d 841 (2d Cir. 1961); United States v. Sclafani, 265 F.2d 408 (2d Cir. 1959), *cert denied,* 360 U.S. 918 (1959); Turner v. United States, 222 F.2d 926 (4th Cir. 1955).

[51] 304 U.S. 458 (1938).

[52] *Id.* at 465.

[53] 268 F. Supp. at 851.

[54] 384 U.S. at 479.

[55] *Id.* at 471-72.

[56] *See* United States v. Turzynski, 268 F. Supp. 847, 854 (N.D. Ill. 1967), stating that the voluntariness rule is based upon Wilson v. United States, 162 U.S. 613 (1896), and that this rule was "overruled by *Miranda.*" If this is so, the issue may not be very troublesome.

cisions in the *Kohatsu* line of cases, holding that *Miranda* has no application to criminal tax cases, has been rejected by *Mathis*. The approach of *Schoenburg, Kingry, Turzynski,* and *Wainwright* may provide an effective objective standard of when the right to procedural safeguards attaches. This approach, however, is not without its inherent weaknesses. The critical nature of the period surrounding the shift from a civil investigation to a criminal investigation cannot be doubted. "Although 'on paper' the division of responsibilities between the revenue agent and the special agent is clear, . . . in practice this division could not be ironclad and the agents must work together as a team."[57]

> Herein lies one of the most serious "traps" as far as the taxpayer is concerned, particularly where in his eyes a "routine audit" is being conducted, when as a matter of fact the revenue agent alone or in conjunction with a special agent may be laying further groundwork for a subsequent full-fledged criminal tax-evasion investigation.[58]

These factors plus the ability to manage and control "when the case is turned over to the Intelligence Division"[59] may not constitute such a "clear point at which the adversary process"[60] begins, as thought in *Turzynski.*

It may be realistically remote, but it is not inconceivable, that the right could attach at the time of initial contact by the revenue agents. The largest obstacle to this is the statutory authorization given to agents to investigate taxpayers.[61] Concededly, attaching the right at this early stage may not be desirable for any of the parties concerned for several reasons. One reason is that the audit frequently results in a refund to the taxpayer, and to alarm him and inconvenience him by his getting an attorney unnecessarily is not warranted. However, a case can be made for the rights to attach upon initial contact, because "tax investigations frequently lead to criminal prosecutions . . . ."[62]

In referring to the government's asserted distinction in *Mathis* between a routine tax investigation and one leading to criminal prosecution, Justice Black said, "These differences are too minor and shadowy to justify a departure from . . . *Miranda* . . . ."[63] It has also been said that "every other case of interrogation by a government presents, if in diluted form, an underlying inequality of confronta-

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[57] H. BALTER, *supra* note 1, § 3.32, at 16 (footnote omitted).

[58] *Id.* n. 29.

[59] United States v. Turzynski, 268 F. Supp. 847, 852 (N.D. Ill. 1967).

[60] *Id.*

[61] INT. REV. CODE of 1954, § 7602.

[62] Mathis v. United States, 391 U.S. 1, 4 (1968).

[63] *Id.* at 4.

tion,"[64] and given the cooperation between the regular agent and the special agent just discussed, the interview "is a coercive examination of a taxpayer at a critical preliminary hearing . . . ."[65] On this point, it was said, "I can see no difference between a search conducted after entrance has been gained by stealth or in the guise of a business call . . . [or] under the guise of an examination for purely civil purposes."[66] Also supportive of this critical observation: "If the revenue agent has done work on the case before the special agent enters the scene, he will make available to the special agent the data he has collected and 'worked-up' . . . ."[67] It should also be emphasized that the lack of advisement deemed violative in *Mathis* was by a regular agent in the course of a civil investigation; albeit, the suspect was in custody.

Still other alternatives may exist. Since the criminal tax case is unique, as we have seen, it may well demand devising an approach novel to contemporary procedural safeguards. It can be safely predicted that the law must move beyond the position of *Mathis*. It must, of necessity, because *Mathis* leaves essentially the entire field of criminal tax prosecutions untouched and much troubled.

Gerald P. McDermott

TORTS — SKIER LIABILITY — A SKIER WHO INJURES ANOTHER MAY BE LIABLE IN TORT UNDER THE "LOOK BUT DON'T SEE" RULE. — *Ninio v. Hight,* 385 F.2d 350 (10th Cir. 1967).

Plaintiff, Ida Ninio, was skiing at Aspen in a beginners' class. Defendant, Donald Hight, skiing from above the group, rammed into Mrs. Ninio, inflicting serious injury. Mrs. Ninio filed suit against Hight for damages caused by his alleged negligence. Testimony at the trial revealed that Hight had finished making a turn to the left and "saw, sort of out of my field, ski pants and boots, and I didn't have time to really look up."[1] On the basis of this evidence, plaintiff argued that Hight was concededly in control; that had he looked to his right he could have seen the group and avoided the collision; and that his failure to see and heed the group's presence was negligence as a matter of law. However, the trial court refused plaintiff's request for special jury instructions and instructed the jury only on

[64] United States v. Carlson, 260 F. Supp. 423, 427 (E.D.N.Y. 1966).

[65] Thomas v. United States, 386 U.S. 975 (1967).

[66] United States v. Guerrina, 112 F. Supp. 126, 129 (E.D. Pa. 1953).

[67] H. BALTER, *supra* note 1, § 3.3-2, at 14-15.

[1] Ninio v. Hight, 385 F.2d 350, 351-52 (10th Cir. 1967).