

The State of South Carolina



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January 23, 1986

Honorable John R. Tally
Commissioner
S.C. Industrial Commission
Post Office Box 1715
Columbia, South Carolina 29202

Dear Commissioner Tally:

You have asked on behalf of the Industrial Commission the opinion of this Office as to the procedure which should be followed by the Industrial Commission in order to obtain income tax records maintained by the South Carolina Tax Commission. In your requesting letter, you identify that the Tax Commission has rejected subpoenas directed to it by the Industrial Commission for production of income tax records in reliance upon § 12-7-1680, Code of Laws of South Carolina (1976, as amended).

At the outset, I advise that the Industrial Commission has explicit authority to issue subpoenas for the attendance of witnesses and production of records deemed necessary in connection with any proceeding before it. Section 42-3-150. This provision additionally prescribes the procedural mechanism for enforcement of the subpoenas by the Commission. While this authority vested in the Commission to subpoena documents necessary in connection with proceedings before it is exceptionally broad, it cannot serve as a basis for obtaining income tax records maintained by the State Tax Commission. Subpoenas directed to governmental officials for disclosure of income tax records have been uniformly denied. Peterson v. Peterson, 17 N.W.2d 920 (S.D. 1945); New York State Department of Taxation v. New York State Department of Law, 378 N.E.2d 110 (N.Y. 1978); Losavio v. Robb, 579 P.2d 1152 (Col. 1978); ANNO.; DISCOVERY-INCOME TAX RETURNS, 70 A.L.R.2d 242.

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South Carolina's particular statute that directs the confidentiality of income tax returns is explicit in its mandate that these returns, and the information contained therein, shall not be disclosed by Tax Commission employees. Section 12-7-1680. This provision provides in pertinent part:

Except in accordance with proper judicial order or as otherwise provided by law it shall be unlawful for the members of the Commission or any deputy, agent, clerk or other officer or employee thereof to divulge or make known in any manner the amount of income or any particulars set forth or disclosed in any report or return required under this Chapter.

Section 12-7-1680 further provides for criminal and civil sanctions for the unlawful production or disclosure of income tax records. Thus, as in other jurisdictions, there exists a strong public policy against disclosure of income tax records filed with the Tax Commission as evinced by the very strict language of § 12-7-1680 and the criminal sanction for unlawful disclosure. The basis for this strong preference for secrecy is that it serves the public good by encouraging voluntary and truthful reporting by the taxpayer, since the taxpayer is assured that disclosures in his return will remain confidential. See, Webb v. Standard Oil of California, 319 P.2d 621 (Cal. 1958); Garrett v. State, 253 S.E.2d 741 (Ga. 1979); New York State Department of Taxation v. New York State Department of Law, supra; Losavio v. Robb, supra.

The language chosen by the South Carolina General Assembly in providing for the confidentiality of income tax returns "except in accordance with proper judicial order or as otherwise provided by law" is similar to that found in other states' provisions. As earlier noted, this language does not permit disclosure pursuant to subpoena by Tax Commission employees. New York State Department of Taxation v. New York State Department of Law, supra; Garrett v. State, supra. The courts have analyzed the phrase "proper judicial order" in two ways. The majority of jurisdictions that have addressed this issue have concluded that a proper "judicial order" is one issued by the court in cases where publication of the return is an inevitable consequence of the judicial proceeding, and the judicial proceeding would be ineffective without the report. Garrett v. State, supra,

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New York State Department of Taxation v. New York State Department of Law, supra; Brackett v. Commonwealth, 111 N.E. 1036 (Mass. 1916); Bowman v. Montcalm, 89 N.W. 334 (Mich. 1902). One court has analyzed the requirement of a "proper judicial order" somewhat differently and has concluded that a court may issue a proper judicial order requiring disclosure by the public employee if there is "a compelling need" for the disclosure of the return by the public employee. Losavio v. Robb, supra, at 1157. As noted, however, this decision appears to stand alone.

Nonetheless, I advise that there are some certainties that appear to be without dispute. First, a subpoena does not constitute a "proper judicial order" as used in the secrecy statutes. Second, the order must be issued in a judicial proceeding, be of judicial character, and carry out the purposes of the statute. Op. of the Justices, 105 N.E.2d 225 (Mass. 1952); Garrett v. State, supra; New York State Department of Taxation v. New York State Department of Law, supra.

Section 12-7-1680 additionally provides for disclosure of income tax records in those situations where it "is otherwise provided by law." This phrase permits disclosure where our Legislature has otherwise directed. New York State Department of Taxation v. New York State Department of Law, supra; see, e.g., § 12-7-1690 (Disclosure may be made to the Commissioner of the Internal Revenue Service.); § 12-7-1695 (Disclosure of certain information may be made to the Secretary of State.); § 43-5-120 (Disclosure of certain information may be made to the Department of Social Services.). There exists no similar statutory authorization relative to disclosure to the Industrial Commission concerning matters pending before it.

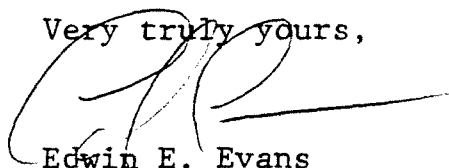
I advise that there is a reasonable avenue available for the litigants in an administrative proceeding before the Industrial Commission to obtain disclosure of income tax records of the parties. By the great weight of authority, it is held that a party in litigation may be compelled to produce a copy of his federal or state tax return since the statutes prohibiting disclosure by government employees do not create a privilege in favor of the taxpayer. ANNO.:

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DISCOVERY-INCOME TAX RETURNS, supra; Mullins v. Baker, 107 S.E.2d 57 (W.Va. 1959); Application of Umbach, 350 P.2d 299 (Ok. 1960); State ex rel Thesman v. Dooley, 526 P.2d 563 (Ore. 1974). The Industrial Commission has adequate authority to issue a subpoena directed to a party and requiring that he produce his income tax returns (§ 42-3-150), and to enforce the subpoena by appropriate administrative order; thus, this approach may best serve the needs of the Industrial Commission. Incidentally, state authorities will furnish a certified copy of an income tax return to the taxpayer or his agent upon payment of a nominal fee. ANNO.: DISCOVERY-INCOME TAX RETURNS, supra. Parenthetically, I have confirmed with Tax Commission officials that a taxpayer may receive copies of his tax returns filed in South Carolina. Accordingly, a subpoena directed by the Industrial Commission to a party in a proceeding before it pursuant to § 42-3-150 for production of the party's income tax returns should be effective, and cannot be avoided simply because the taxpayer does not possess a copy of his return. I assume in so advising that the Industrial Commission will make the requisite finding that the production of the returns is deemed necessary by the Commission in connection with a proceeding before it as is required in § 42-3-150.

If this Office may offer further advice or assistance, please call upon us.

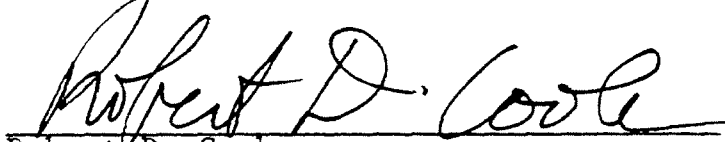
Very truly yours,



Edwin E. Evans
Deputy Attorney General

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REVIEWED AND APPROVED BY:



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