

THE STATE OF SOUTH CAROLINA
OFFICE OF THE ATTORNEY GENERAL
COLUMBIA

OPINION NO. 83-125-1341

October 28, 1985

SUBJECT: Taxation and Revenue - Disclosure of
Information Made Privileged by State Law
Under a Subpoena From a Federal Grand Jury
or a Judge of the United States Courts.

SYLLABUS: Information made privileged by state law
under §§ 12-7-1680 and 12-35-1530 is
nonetheless subject to a disclosure under
subpoena of a Federal Grand Jury or by order
of a Federal Court.

TO: Honorable John T. Weeks, Chairman
South Carolina Tax Commission

FROM: Joe L. Allen, Jr. *JLA*
Chief Deputy Attorney General

QUESTION: Sections 12-7-1680 and 12-35-1530, inter alia,
prohibit the disclosure of the contents of an income, sales
or use tax return. Is this information privileged from
disclosure under an order of a judge of the U. S. District
Court or a subpoena of a Federal Grand Jury?

APPLICABLE LAW: Rule 26, Rules of Criminal Procedure, 18
U.S.C.A. 170.

DISCUSSION:

The records here involved were initially subpoenaed by the
Federal Grand Jury. At the request of the Commission, an ex
parte order was issued by the United States District Court.
Rule 26, Rules of Criminal Procedure, 18 U.S.C.A. 170, has
been interpreted by the Federal Courts to provide that the
requirement to produce the documents was one of Federal and
not State law. In The Matter of Grand Jury Impaneled
January 21, 1975, 541 F.2d 373. In that case, the Court
considered a motion to quash a subpoena on the grounds that
the information sought was privileged under a rule of the
State Courts of Pennsylvania. The Federal Court of Appeals,
after commenting on the purpose of the privilege statutes of
the various states, held that:

"The required reports privilege is in
general a statutory creation. We have

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not been directed to or in our research found any decision of this court that has recognized a state statutory required reports privilege as a matter of federal common law. Nor have we been cited to or found a decision of any federal court which has explicitly adopted such a state statute in a federal criminal proceeding as a matter of federal common law. * * *." 541 F.2d at page 380.

Sales tax records were disclosed under a Grand Jury subpoena in the case of In Re New York State Sales Tax Records, 382 F.Supp. 1205. There the Court was also confronted with a motion to quash the subpoena because of the state's privilege statute. The Court there held that:

"The powers of the federal grand jury, because of Article 6, Clause 2 of the United States Constitution (the supremacy clause), must prevail over the nondisclosure provision of Section 1146(a) of the New York State Tax Law. * * *."

The Court there further held that:

"No state employee can be prosecuted for honoring a federal grand jury subpoena."

In United States v. Blasi, 462 F.Supp. 373, the Alabama Director of Industrial Relations was required to disclose to the Federal Grand Jury information privileged under a state statute. The Court there held:

"This Court is further of the opinion that the Director must produce the documents in question despite the Alabama statutes that prohibit the disclosure thereof. Assuming arguendo that Code of Alabama § 25-2-22 and § 25-4-116 (1975), does create an absolute privilege, these statutes have no direct bearing on the controversy since the existence and extent of privilege in a Federal Grand Jury proceeding is a matter of federal common law. * * *."

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Whether the information is subject to disclosure under the subpoena of the Federal Grand Jury is a matter of Federal law. Obviously, whether the same is subject to disclosure by order of the Federal Courts is likewise a federal question. All of the cases found reflect that the disclosure is required.¹

CONCLUSION:

Information made privileged by state law under §§ 12-7-1680 and 12-35-1530 is nonetheless subject to a disclosure under subpoena of a Federal Grand Jury or by order of a Federal Court.

JLAJr:wcg

¹The Federal Court of Appeals also balanced the right of the state's privilege to the right of the Grand Jury for the information. If there is a compelling state reason not to disclose the information, the same should be reviewed and a motion to quash the subpoena filed upon such grounds. The confidentiality of the information or the fact that the confidentiality is to promote compliance is not sufficient. In The Matter of Grand Jury Impaneled January 21, 1975, supra.