

Opinion No. 74-19

May 29, 1974

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. John Owens, Director Legal Division Bureau of Revenue Bataan Memorial Building Santa Fe, New Mexico 87501

QUESTIONS

FACTS

A taxpayer who is a member of the bar of this state disputed his liability for payment of New Mexico gross receipts taxes, which were assessed by the Bureau of Revenue after a routine audit. The Bureau of Revenue conducted an administrative hearing on the taxpayer's protest pursuant to § 72-13-38, NMSA, 1953 Comp., of the Tax Administration Act. Evidence presented by the taxpayer and by the Bureau during the hearing, at which attorneys employed by the Bureau acted as hearing officers and representatives of the State, disclosed possible violations of the Code of Professional Responsibility on the part of the taxpayer. The taxpayer appealed the decision and order which the Commissioner issued, and in accordance with § 72-13-39, NMSA, 1953 Comp., there was filed with the Court of Appeals a complete record of the proceedings, including the transcript of testimony and documentary evidence which disclosed the questionable professional conduct. Section 72-13-25, NMSA, 1953 Comp., of the Tax Administration Act declares it unlawful for Bureau employees to reveal any information about a taxpayer gained as a result of employment with the Bureau.

QUESTIONS

Is an attorney who acquires information in the course of his employment with the Bureau of Revenue about an attorney-taxpayer indicating possible violations of the Code of Professional Responsibility free to report it to a disciplinary body in the event the taxpayer files in the Court of Appeals, incident to this appeal, a transcript of the administrative hearing which sets forth the same information?

CONCLUSION

No.

OPINION

{*38} ANALYSIS

Subject to certain limited exceptions not here pertinent, § 72-13-25 provides:

"Confidentiality of returns and other information. -- It is unlawful for any employee of the bureau to reveal to any individual other than another employee of the bureau any information contained in the return of any taxpayer acquired as a result of his employment by the bureau . . ."

A violation of this obligation of confidentiality constitutes a misdemeanor punishable by fine of up to \$ 1,000 or imprisonment up to one year, or both, and incurs a prohibition from employment with the state for five years. Section 72-13-88, NMSA, 1953 Comp.

Many states have enacted legislation prohibiting the publishing or divulging of tax information by state employees, see Annot. 151 A.L.R. 1049 (1944) and supplemental decisions.

In construing a tax information confidentiality statute similar to New Mexico's, the Supreme Court of Oklahoma said, in language equally applicable to § 72-13-25:

"This act constitutes the state's compact and pledge to the taxpayer that his tax return shall be kept inviolate, confidential and privileged, and not disclosed to any one, nor in any manner, except as specifically authorized by the act itself, and will be used only for the purposes specifically provided. The Legislature is in complete control as to the wisdom of the act. Our duty is but to follow it and apply it. We are not at liberty to minimize the declared public policy evinced by these express provisions of the act making the information contained in said returns confidential and privileged. It was specifically intended by the Legislature that the approximately 200,000 annual income tax returns of taxpayers would be immune to indiscriminate inspections by officials of each of the seventy-seven counties of the state. The manifest purpose of the act was to collect the taxes accruing to the state, and to that end it sought to induce the taxpayer to make the fullest measure of disclosure of his income and the sources thereof, whether arising from honest toil and labor, or from sources of questionable legitimacy."

Oklahoma Tax Commission v. Clendinning, 193 Okla. 271, 143, P.2d 143, 146-47, 151 A.L.R. 1035 (1943).

Thus, except as specifically authorized by law, Bureau employees, including attorneys, are under a strict obligation not to divulge information concerning a taxpayer which they acquire in the scope of their work.

{*39} The Code of Professional Responsibility of the American Bar Association was adopted by the Supreme Court of New Mexico on February 24, 1974, and thus governs the conduct of attorneys in this state. The Code's Disciplinary Rule 1-103 reads:

"A lawyer possessing unprivileged knowledge of . . . [misconduct by another lawyer] shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."

Only if information of misconduct is "unprivileged" should an attorney report it. If, in the situation you pose, the confidentiality statute applies, the information is privileged and hence the attorney is under no obligation to report it.

We next turn to the specific question you raise, namely whether the confidentiality statute is still binding upon the Bureau attorney after the taxpayer has filed an appeal the record of which discloses the adverse information.

Since the Clerk of the Court of Appeals, a public official, is required to keep the transcript of the administrative hearing in question as part of the record on appeal, Supreme Court Rule 25, when filed with the Court it becomes a public record available for inspection by any citizen regardless of his or her motives. Opinion of the Attorney General No. 72-46, dated September 11, 1972; Opinion of the Attorney General No. 61-137, dated September 7, 1961.

The confidentiality statute, of course, is limited in its application to Bureau employees only. It does not prohibit persons other than Bureau employees from revealing information about a taxpayer which may have been acquired through inspection of public records. Bureau employees, however, are not free to disclose confidential information made accessible to the public as a result of an appeal, for the following reasons. First, there is no provision of the Tax Administration Act that lifts the stricture of confidentiality because a taxpayer has filed an appeal from what he believes to be an erroneous decision of the taxing authority and the record contains confidential information. Nor are we aware of any judicial authority for such a conclusion. On the contrary, we believe the opposite conclusion is warranted, for as was stated in **Oklahoma Tax Commission v. Clendinning, supra**, at 146-47:

"We are not at liberty to minimize the declared public policy evinced by these express provisions of the act making the information contained in said returns confidential and privileged."

Second, the purpose of the confidentiality statute to promote frankness and candor in the taxpayer's dealings with the Bureau. The taxpayer is also given the remedy of appeal to correct errors or injustices in appropriate cases. Section 72-13-39, **supra**. If the price for exercising the right of appeal would be a relinquishment of the existing benefit of confidentiality, not only would the taxpayer feel reluctant to come forth with necessary tax information, with the effect of significantly undercutting the very purpose of the confidentiality statute, but also the value of the taxpayer's statutory right of appeal would be diminished.

For these reasons we are of the opinion that an attorney-employee of the Bureau faced with the situation you describe could not divulge the information in question without thereby violating § 72-13-25, **supra**.