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for making wire scouring brushes which contained an improved device for supporting a pair of wires substantially parallel and adjacent to each other was not an old combination.[19]

To avoid overclaiming an invention where the novelty is situated in only one element of a combination but the improved element can merely be substituted for a corresponding old element without affecting the other elements in the combination, the following alternatives are available: (1) patenting the novel element per se[20] when such element is meaningful by itself, *i.e.*, without combining it with the other elements of the combination or (2) patenting the novel element only for use in a particular combination or environment,[21] where such a novel element is not meaningful by itself and is difficult to describe without reference to the other elements of the combination. However, this latter method of claiming an invention must be used with discretion, because the environmental elements constitute part of the claimed invention as they are limitations in the claim,[22] thus patenting the novel element per se may often be more appropriate.

Bernard Kleinke

[19] American Technical Machinery Corp. v. Caparotta, 229 F. Supp. 479, 141 U.S.P.Q. 386 (E.D.N.Y. 1964).

[20] *Supra* note 3.

[21] Ex parte Jepson, 1917 Dec. Com. Pat. 62, 243 O.G. Pat. Off. 525 (1917).

[22] Ex parte Belcher, 58 U.S.P.Q. 34 (Pat. Off. Bd. App., 1942).

TAXATION–PUBLIC RECORDS DOCTRINE AS LIMITED BY TAXPAYER'S CONSTITUTIONAL RIGHTS

Brewer, a special agent for the Secretary of the Treasury (engaged in a tax examination), served a summons[1] upon Wild, as president of a corporation, to produce certain records[2] regarding the tax liability of Wild as an individual. Wild appeared but refused to come forth with

[1] The authority to issue summons is provided in INT. REV. CODE OF 1954, § 7602:
"For the purpose of ascertaining correctness of any return . . . determining the liability of any person for any internal revenue tax . . . , the Secretary or his delegate is authorized–(1) to examine any books, papers, records, or other data which may be relevant or material to such inquiry . . ."
The agent's investigative authority is evidenced by his pocket commission, which is usually sufficient to obtain compliance with requests for records.

[2] Records required from the Air Conditioning Supply Co. were general ledger, books of original entry, subsidiary ledgers, sales invoices, bank statements with cancanelled checks, minute book, and stock ledger.

the records. He claimed that such production would tend to violate his constitutional rights against self-incrimination and unreasonable search and seizure, even though the records being summoned were those of the corporation rather than his personal records. Since he was the sole stockholder of that corporation, he contended that it was his alter-ego, and that use of the corporation's records would violate his constitutional right against self-incrimination. Brewer then made application to the district court which ordered Wild to produce the records. Wild's appeal to the court of appeals was sustained and the district court order was reversed. But upon rehearing, the court affirmed the order of the district court. *Wild v. Brewer,* 329 F. 2d 924 (9th Cir. 1964), *cert. denied* 379 U.S. 914 (1964).

When Wild appealed from the district court order,[3] the court of appeals determined the issue to be whether Wild, who might be incriminated by the records, could consequently refuse to turn over the documents to the government. Recognizing that, as a general rule, an officer of a corporation may not successfully refuse to produce records on grounds of self-incrimination, the court found an exception where the corporate officer was the sole owner of the corporation, and the company was believed to embody the personal interest of its only constituent.[4] Accordingly, under this theory, Wild could assert his personal privilege against self-incrimination and unreasonable search and seizure, and the court could justifiably set aside the order to produce the records.[5]

This position was reversed upon rehearing.[6] No opinion was written except for the listing of two cases, one of which established the doctrine requiring an officer of a corporation to produce corporate records[7] and the other applied this doctrine to the sole owner of a company.[8] In a vigorous dissent, Justice Madden, who wrote the original majority opinion, used that opinion verbatim and added his opinion that the courts should emphasize the individual's privileges and not simply make a mechanical determination of whether or not the papers are corporate. He suggested, in the light of recent Supreme Court cases which increased the right of individuals,[9] that the court's decision in the instant case is

[3] U.S. District Court for District of Arizona—(unreported decision). The district court has jurisdiction to enforce summons when it is not obeyed. INT. REV. CODE OF 1954, § 7604.

[4] Compare U.S. v. White, 322 U.S. 694 (1944), wherein a similar test was used to determine that a labor union was an artificial entity.

[5] 64-1 U.S. Tax Cas. 9348 (9th Cir. 1964).

[6] Wild v. Brewer, 329 F.2d 924 (9th Cir. 1964), *cert. denied* 379 U.S. 914 (1964).

[7] Wilson v. U.S., 221 U.S. 361 (1911).

[8] Grant v. U.S., 227 U.S. 74 (1913), citing the *Wilson* case with approval.

[9] Gideon v. Wainwright, 372 U.S. 335 (1963); Mapp v. Ohio, 367 U.S. 643 (1961).

anachronistic. However, pursuant to the majority opinion, the order to produce the records was affirmed.[10]

In considering this decision, the essential question is to what extent the "public records doctrine" can be limited by the constitutional privileges against unreasonable search and seizure and against serving as a witness against oneself. The public records doctrine states that the privilege against self-incrimination does not protect individuals and corporations from being forced to produce records required by law. Specifically, this note will analyze the problem of whether Wild, because of his position as the sole owner of a corporation, can assert his privileges as an individual rather than as an officer of the company, and, in the light of the public records doctrine, what the privileges of either would be. The analysis of the problem can be divided into:

1) the application of the doctrine of "public records required by law" to federal income taxation; and
2) the manner in which these constitutional privileges have been applied to individuals and corporations in the field of federal income taxation.

Pertaining to federal income taxation, the public records doctrine can be explained as follows: the privilege against self incrimination which exists regarding private papers does not protect individuals and corporations against being forced to produce records required by law. The doctrine was established as dictum in the case of *Wilson v. U.S.*[11] This case recognized that a state has visitorial powers to inspect records of corporations which it has created. In a later decision when officers sought to inspect public documents, the court, relying on the *Wilson* precedent, forced the custodian to produce the records.[12] The Supreme Court of the United States extended the visitorial powers of governments to all records required by law. In the leading case, decided under emergency wartime price control legislation, the Court held that the records required under that act had to be produced despite constitutional guarantees.[13] However, the Court provided a limitation in that, for the doctrine to apply, the transactions must be appropriate subjects of government regulation of the enforcement of restrictions validly established. The doctrine is thus limited to circumstances where the activity sought to be regulated has a sufficient relation to public concern.[14]

[10] Wild v. Brewer, *supra* note 6.

[11] *Supra* note 7, at 380.

[12] Davis v. U.S., 328 U.S. 582 (1946), citing the *Wilson* case with approval.

[13] U.S. v. Shapiro, 335 U.S. 1 (1948).

[14] *Ibid.* Justice Jackson, in his dissent, cautioned that mere convenience of law enforcement should not be sufficient to justify invasion of privacy, and that the effect of the decision would be to diminish the right of privacy regarding records which become public per se if required by statute.

This public records doctrine finds application under the federal tax law. The Internal Revenue Code provides in section 6001[15] the requirement of records and in section 7602[16] the authority to examine them. Based on the public records doctrine, the constitutionality of these sections regarding self-incrimination and search and seizure has been upheld in cases involving the civil liability of the taxpayer.[17] However, the application of the doctrine to criminal cases has been limited. When a defendant has refused to produce the records, the court has instructed the jury to consider this refusal in determining intent.[18] Despite the constitutional guarantees recognized by the courts, this type of instruction has been construed as not impairing the privilege against self-incrimination. One court has said, by way of dictum, that the claim of self-incrimination would not prevail because of the statute which requires taxpayers to keep records.[19]

Therefore, in the instant case, under the public records doctrine neither the corporation nor one acting as custodian on behalf of the corporation would be able to protect the records from examination for federal income taxes. As an individual, Wild might be able to hold back personal records, but the jury could consider his refusal in determining his intent.[20]

The constitutional privileges of interest in the relationship between

[15] INT. REV. CODE OF 1954, § 6001: "Every person liable for any tax imposed by this title, . . . shall keep such records . . . as the Secretary or his delegate may . . . prescribe." INT. REV. CODE OF 1954, § 7203 provides that failure to keep records is a misdemeanor.

[16] *Supra* note 1.

[17] U.S. v. Bouschor, 200 F. Supp. 541 (D.C. Minn. 1961), (serving summons on attorney); Falsone v. U.S., 205 F.2d 734 (5th Cir. 1953), *cert. denied* 346 U.S. 864 (1953), (summons of CPA to produce work papers); Brownson v. U.S., 32 F.2d 844 (8th Cir. 1929) (summons of telegraph company as third party). See also U.S. v. United Distillers Products Corp., 156 F.2d 872 (2d Cir. 1948), holding that the Internal Revenue Service, while investigating tax deficiencies, should not be required to prove grounds of its belief; Eberhart v. Broadrock Development Corp., 296 F.2d 685 (6th Cir. 1961), *cert. denied*, 369 U.S. 871 (1961), where a special agent did not have to show reasonable grounds to believe tax returns were fraudulent.

[18] Beard v. U.S., 222 F.2d 84 (4th Cir. 1955), *cert. denied*, 350 U.S. 846 (1955), (whether the defendant willfully filed a false return); Smith v. U.S., 236 F.2d 260 (8th Cir. 1956), where in a net worth investigation only information that taxpayer would give as to how he had accumulated funds was "Lets [sic.] just say I dug it up in an old iron pot" and "I found it in an old mail bag." The second statement could have been true because the taxpayer had formerly been convicted of stealing mail.

[19] U.S. v. Willis, 145 F. Supp. 365 (D.C. Ga. 1955). An attorney raised the privilege of self-incrimination for his client. The court disposed of this assertion on two grounds: (1) the attorney could not make the claim for his client; and (2) the claim was not timely made. It is interesting to note that even though the claim was dismissed for the above reasons, the court still mentioned that the privilege of self-incrimination would not apply in such a case.

[20] *Supra* notes 17 and 18.

individuals and corporations in relation to federal income taxation are the fourth and fifth amendments to the Constitution. The fourth amendment guarantees that one shall not suffer unreasonable search and seizure, and the fifth amendment grants the privilege against self-incrimination to an individual. As to individuals, *Boyd v. U.S.*[21] developed the concept of an interplay between the two amendments by holding that production of private papers compelling an individual to be a witness against himself is equivalent to an unreasonable search and seizure. Thus, interaction between protection of an individual from self-incrimination and protection of his right to be left alone was established.

This interaction between the two amendments regarding individual privileges is not present when corporate privileges are determined. Because the protection against self-incrimination is personal, a corporation, not being a natural person, is unable to assert this privilege.[22] Since the corporation does not have the privilege, it follows that one cannot claim the privilege as an officer or employee acting on behalf of a corporation.[23]

However, the corporation does have the privilege against unreasonable search and seizure,[24] and if this privilege is violated, the corporation need not produce the documents. In all other situations, the corporation may be compelled to produce its records.[25] For example, in *Wilson v. U.S.*,[26] an officer of a corporation refused to produce corporate records which included his personal letters. The court held that he could withdraw the

[21] 116 U.S. 616 (1886).

[22] Wilson v. U.S., 221 U.S. 361 (1961). *Accord* U.S. v. Guterma, 272 F.2d 344 (2d Cir. 1959), *cert. denied*, 362 U.S. 949 (1959); Curcio v. U.S., 354 U.S. 118 (1957); Grant v. U.S., 227 U.S. 74 (1913); Hale v. Henkel, 201 U.S. 43 (1906).

[23] Hale v. Henkel, 201 U.S. 43 (1906). An officer, while he may be asked to identify and authenticate records, does not have to testify against himself orally. The reason for this rule is that oral statements are considered to be personal, while the records belong to the corporation.

[24] Silverthorne Lumber Co. v. U.S., 251 U.S. 385 (1920).

[25] Oklahoma Press v. Wallings, 327 U.S. 186 (1946); Esgee Co. of China v. U.S. 262 U.S. 151 (1923); Wheeler v. U.S., 226 U.S. 478 (1913), (corporation had been dissolved); Wilson v. U.S., *supra* note 7; Lagow v. U.S., 159 F.2d 245 (2d Cir. 1946), *per curium, cert. denied*, 331 U.S. 858 (1946). It is interesting to note that in determining liabilities for tax, the authority to examine any records which are relevant is provided by INT. REV. CODE OF 1954, § 7602, *supra* note 1. Of course, this authority is limited by the above-mentioned constitutional rights. These privileges of the taxpayer may be violated through misrepresentation by the examining agent. If no misrepresentation has in fact occurred when the taxpayer voluntarily produces his records for examination, he has in effect waived such privileges, Legotas v. U.S., 222 F.2d 678 (9th Cir. 1955), because the evidence produced for the civil examination is not suppressed in the criminal prosecution. U.S. v. Cooper, 288 Fed. 604 (D.C. Iowa 1925), *aff'd* 9 F.2d 216 (1925).

[26] *Supra*, note 7.

personal letters, but that keeping said letters in the corporate books did not make the books themselves personal; thus, the officer had to produce the records for the grand jury. This is a case wherein the individual records were protected, while the corporate ones were not.[27]

Consequently, it appears in the instant case that since the special agent[28] had not misled Wild,[29] neither Wild as an officer of the corporation, nor the corporation itself could assert any violation of the privilege against unreasonable search and seizure.[30] For the same reason, Wild as an individual could assert this privilege only as it interacted with the privilege against self-incrimination.

In conclusion, it has been noted from the facts of the principal case that neither a corporation nor one acting for a corporation has any privilege against governmental authority to require the production of records under the public records doctrine. Consequently, the court's decision is consistent with the prevailing rules of law. Furthermore, even if the court had considered Wild's corporation to be his alter-ego, in view of the application of the public records doctrine to tax cases, the possibility exists that the individual privilege of self-incrimination would still not have been available, and even if it were, the jury would have been able to consider his refusal to produce the records. Thus, individual privileges do not necessarily prevail when pitted against the public records doctrine in the field of federal income taxation.

Robert Naiman

[27] *Supra* note 7. In a vigorous dissent, Justice McKenna said that the case should not be decided on the title of the books but on the grounds that the books were obtained to convict him. See 8 WIGMORE, EVIDENCE § 2259b (McNaughton Rev. 1961).

[28] A distinction must be made between a revenue agent and a special agent. The revenue agent is responsible for the routine audit which involves the civil liability of the taxpayer. When he discovers an indication of fraud, a special agent, who is responsible for the criminal aspects, will be called in, and the two will work together on a joint investigation. See U.S. v. Wolrich, 129 F. Supp. 528 (D.C. N.Y. 1955).

[29] A violation of a taxpayer's privileges occurs when the taxpayer believes that the is under a routine examination by a revenue agent, and is unaware that he is under a joint investigation. The violation results when the taxpayer is misled regarding the responsibilities and intentions of the agent. In such a case, a special agent supervised the revenue agent's work for over two years, and the taxpayer never knew the special agent was involved in the case. U.S. v. Lipshitz, 132 F. Supp. 519 (D.C. N.Y. 1955). In a similar situation, a revenue agent told the taxpayer he was making a routine investigation, when, in fact, there were indications of fraud, and he was examining for evidence of criminal prosecution. U.S. v. Wolrich, *supra* note 27. Thus, such misrepresentation by the agent nullified the prior consent of the taxpayer for the agent to examine his records. *Contra,* Frank v. U.S., 245 F.2d 284 (3rd Cir. 1957), in which the jury was told not to consider evidence obtained by fraud.

[30] *Accord* Lagow v. U.S., *supra* note 24; Wilson v. U.S., *supra* note 7; Grant v. U.S., *supra* note 8.