

Trump Return Leak Shines Light on Tax Disclosure Laws

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With the recent disclosure by *The New York Times* of three pages of Republican presidential nominee Donald Trump's 1995 state tax returns, Americans have gotten a glimpse of the tricky knot of laws governing the disclosure of private taxpayer information and the First Amendment rights of the press.

The *Times* article, published October 2, was based on the first page of Trump's New York resident state income tax return from 1995, filed jointly with his then-wife Marla Maples, and the first page each of the couple's nonresident returns for Connecticut and New Jersey. The returns show that Trump had an almost \$1 billion loss that year, leading the newspaper to speculate that the real estate magnate could have used that loss to avoid paying federal income taxes for up to 18 years. (Prior coverage: *Tax Notes*, Oct. 10, 2016, p. 156; and *Tax Notes*, Oct. 10, 2016, p. 158.)

And while commentators largely agree that *The New York Times* is unlikely to face legal consequences for publishing and reporting on the leaked tax returns, the same can't be said for the tipster who mailed the returns to the newspaper, whose identity remains a mystery.

State and Federal Disclosure Laws

The Tax Foundation in an October 2 blog post outlined the punishment for unauthorized disclosure of tax return information in each of the states covered by the return information published by the *Times*. According to the Tax Foundation, punishment in all three states can include fines of \$1,000 or more and imprisonment, and state employees can be fired if found responsible for the disclosure.

However, the search for the leaker in this case may uncover unpleasant surprises. If, for example, Maples was responsible, because it was a joint return, there may be no prosecution, as she would be part owner of the tax information with her own right to disclose it, said Robert E. McKenzie, a tax controversy lawyer at Arnstein & Lehr LLP.

Or the leaker could be the proverbial disgruntled employee or business partner, McKenzie said. "Considering how many people [Trump] has attempted to screw over the years, there are probably people who would like to get revenge," he said.

But what if the leaked returns had been Trump's federal returns? Despite a long tradition of presidential candidates voluntarily making their tax

return information public, Trump has so far refused to do so, claiming he is under an ongoing IRS audit.

If someone were to get out ahead of Trump and make an unauthorized disclosure of his federal returns, several code provisions would apply. Section 6103 forbids unauthorized disclosures of taxpayer returns and information by IRS employees. It includes some carveouts to allow for disclosure to state tax officials and law enforcement agencies, the congressional taxwriting committees, the president, and some other federal agencies and employees.

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Section 7213(a) outlines the punishment for unauthorized disclosure, including by federal and state employees, threatening up to five years in prison and up to a \$5,000 fine.

Section 7216 imposes a penalty of up to \$1,000 and one year in prison on anyone engaged in preparing federal tax returns who "knowingly or recklessly" makes unauthorized disclosures or use of that information. Section 6713 similarly imposes monetary penalties for disclosure by return preparers.

The IRS on its website notes that the Federal Trade Commission, authorized by the Gramm-Leach-Bliley Act of 2002, established a federal privacy rule and a safeguards rule requiring all financial institutions, and the tax professionals and others who work with them, to secure and maintain the confidentiality of taxpayers' tax returns and information. The IRS specifies that any violations of the protections afforded under Gramm-Leach-Bliley or the implementing regulations, along with violations of sections 6713 and 7216, are considered violations of Rev. Proc. 2007-40, 2007-1 C.B. 1488, and subject to its sanctions.

Of course, tax attorneys, CPAs, enrolled agents, and accountants are also covered by Circular 230, which governs practice before the IRS. Those tax professionals could be subject to sanctions from their professional associations as well if sanctioned or disbarred by the IRS for unauthorized disclosure or other violations of Circular 230. The National Association of Enrolled Agents, the American Institute of CPAs, and other groups of tax professionals maintain ethical codes and standards of professional conduct that, if violated, could result in suspension or expulsion from the groups.

Press 'in a Different Position'

Although Trump has said he may sue the *Times* for publishing the state tax returns, commentators

suggested he may not get far. “If he does, I don’t think he’s going to find a lot of sympathy at the Justice Department to prosecute somebody,” McKenzie said.

Jonathan B. Bruno, partner in the professional liability practice group at Rivkin Radler LLP, agreed. “The [Internal Revenue Code] is clear that information furnished to a tax preparer, information used for the purposes of preparing a tax return, is confidential, just as [is] the return itself,” Bruno said. But he added, “The press is in a different position than most of us.”

The main tax code provision that could apply to media disclosure of tax information is section 7213(a)(3), which states that it is unlawful for unauthorized persons to “print or publish” private taxpayer information. However, McKenzie said it’s an open question whether section 7213(a)(3) could come into play if someone released, and a media outlet published, Trump’s federal tax returns. “I would hope the First Amendment would supersede this . . . but I don’t know,” he said, noting that he does not handle First Amendment cases.

Section 7213(a)(3) does not distinguish between information published by established media organizations such as the *Times* and that published by bloggers or posters to a community-based website, McKenzie noted. “It seems to me that [the law is] a lot broader than you might think,” he said. “If I had Trump’s information and posted it to Facebook or LinkedIn instead of sending it to the *Times*, that would still be publication.”

That the *Times* was provided the returns by an anonymous source could also work in its favor. Because the *Times* did not actively seek out Trump’s state tax return information, the newspaper is probably legally in the clear, Bruno said. However, had the newspaper solicited the tax return information, it could be in legal hot water, he noted.

‘There’s definitely a public interest in Mr. Trump’s tax returns that probably outweighs any privacy concerns he might have,’ Bruno said.

The Supreme Court has held repeatedly that the First Amendment protects news organizations that reveal — but don’t prospect for — otherwise private information, Bruno said. “I can’t imagine that *The New York Times* would face any liability for violating any type of privacy laws,” he added.

McKenzie said, “It would take a constitutional scholar to probably figure out whether the right to publish anything you didn’t seek out supersedes [the right] to willfully offer any item of [that] material.”

“The funny thing about the First Amendment is that it is a very strong shield for the media, because right now there’s definitely a public interest in Mr. Trump’s tax returns that probably outweighs any privacy concerns he might have,” Bruno said. “And that’s really how the courts are going to look at it.”

Presidential Tax Transparency Act

In the wake of media and growing public clamor to see Trump’s federal tax returns, newly proposed legislation offers a way to thread the needle between a taxpayer’s right to maintain the confidentiality of his private federal tax return information and the public’s right to know how and where a presidential candidate’s income is earned.

The Presidential Tax Transparency Act, introduced as S. 3348 by Senate Finance Committee ranking minority member Ron Wyden, D-Ore., and as H.R. 5386 by Rep. Anna G. Eshoo, D-Calif., would modify section 6103 to require major party presidential candidates to file copies of their latest three federal income tax returns with the Federal Election Commission no later than 15 days after receiving their party’s nomination. After appropriate redactions, the FEC would make the information available to the public.

“Those who seek the highest office in the land should be open and transparent with the American people about how they manage their personal finances, which is why nearly every candidate for president over the last 40 years has publicly disclosed their returns,” Eshoo told Tax Analysts October 7. “Tax returns are highly instructive and answer important questions about a candidate’s priorities, including whether that individual gave to charity, took advantage of tax loopholes, or kept money in offshore havens.”

What Wyden’s bill does is add the FEC to the list of authorized individuals and agencies under section 6103 to which otherwise confidential taxpayer information may be disclosed. It does not address the First Amendment issues raised by the unauthorized publication of tax information.

“My bill says nothing about what the press can or cannot publish,” Eshoo said. “I’ll defer to our nation’s judicial system on those matters.”

As of October 7, S. 3348 had eight cosponsors, all Democrats, and H.R. 5386 had 33 cosponsors, including two Republicans. And although the bill was inspired by Trump’s refusal to release his returns, because Congress is in recess until after this November’s election, potential passage of the legislation would affect only future nominees. ■