

## CPLR 3101(a): Income Tax Returns Deemed "Material and Necessary"

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conditional upon payment of costs avoids the severe remedy of preclusion while assuring that a request for a bill of particulars is not lightly regarded.

*CPLR 3101(a): Income tax returns deemed "material and necessary."*

Guided by the test of usefulness and reason,<sup>83</sup> courts continue to implement the Court of Appeals decision<sup>84</sup> which equated the phrase "material and necessary" found in CPLR 3101 with the relevancy standards utilized by the federal courts.<sup>85</sup> And, the criterion for what is disclosable remains the same irrespective of the disclosure device employed.<sup>86</sup> For example, in *J.R. Miller Co. v. Drew*,<sup>87</sup> the production of income tax returns pursuant to CPLR 3120<sup>88</sup> was required on the ground that they were material and necessary to the preparation of a defense.

In *Miller*, the plaintiff alleged that it sustained a \$100,000 loss as a result of the defendant's negligence while painting plaintiff's clothing store. Originally, defendant sought a copy of bills, vouchers, and statements which would indicate the purchase and resale price of the clothing, but plaintiff had destroyed these items pursuant to corporate policy. Defendant thereupon sought, successfully, production of plaintiff's tax return, reasoning that it would reflect the extent of plaintiff's uninsured loss.

Previous cases ordering the production of income tax returns have involved the issue of lost earnings.<sup>89</sup> Thus, the *Miller* court reasoned that the same approach should be used in lost profits cases. Undoubtedly, the tax returns were material and necessary to the preparation of a defense, especially since the plaintiff had destroyed the best evidence.

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<sup>83</sup> See, e.g., *Peretz v. Blekicki*, 31 App. Div. 2d 934, 298 N.Y.S.2d 805 (2d Dep't 1969); *Beyer v. New York Tel. Co.*, 61 Misc. 2d 222, 305 N.Y.S.2d 265 (N.Y.C. Civ. Ct. Queens County 1969).

<sup>84</sup> *Allen v. Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 235 N.E.2d 430, 288 N.Y.S. 2d 449 (1968).

<sup>85</sup> See FED. R. Civ. P. 26(b): "the deponent may be examined regarding any matter, not privileged, which is *relevant* to the subject matter involved in the pending action. . . ." (Emphasis added.)

<sup>86</sup> 7B MCKINNEY'S CPLR 3101, commentary 9, at 14 (1970).

The converse is also true; a protective order under CPLR 3103 is not affected by the device utilized. 7B MCKINNEY'S CPLR 3103, commentary 2, at 299 (1970).

<sup>87</sup> 61 Misc. 2d 638, 306 N.Y.S.2d 244 (Sup. Ct. Jefferson County 1969).

<sup>88</sup> CPLR 3120(a)(1)(i) provides that a party may demand the opportunity to "inspect, copy, test or photograph any specifically designated documents or any things which are in the possession, custody, or control of the party served. . . ."

<sup>89</sup> *Yocum v. Gordon A. Davies, Inc.*, 10 App. Div. 2d 597, 195 N.Y.S.2d 401 (4th Dep't 1960); *Elmer v. Byrd*, 32 Misc. 2d 408, 220 N.Y.S.2d 985 (Sup. Ct. Monroe County 1961).