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TAX LAW

Tax Law § 697(e): Secrecy provision prohibits disclosure of income tax return to grand jury in non-tax-related matter

Section 697(e) of the Tax Law prohibits disclosure of individual tax return information by officers or employees of the Department of Taxation and Finance "[e]xcept in accordance with proper judicial order or as otherwise provided by law."²⁴⁰ The statute provides for exceptions to the nondisclosure rule where the information sought is directly involved in a tax collection proceeding or any other action or proceeding arising under the personal income tax law.²⁴¹ Interpreting similar provisions in other sections of the tax law,²⁴² lower courts consistently have held judicial orders and subpoenas for tax-related information improper if issued under circumstances which do not fall within an enumerated statutory excep-

²⁴⁰ N.Y. TAX LAW § 697(e) (McKinney Supp. 1978-1979). Section 697(e) provides in pertinent part:

Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the tax commission . . . to divulge or make known in any manner the amount of income or any particulars set forth or disclosed in any report or return required under this article.

Since its enactment in 1919, the state's tax law has contained confidentiality provisions almost identical to those set forth in § 697(e). *See* Ch. 627, § 384, [1919] N.Y. Laws 1656. These confidentiality provisions were designed to encourage the taxpayer to file a complete return without fear that his statements would be used adversely in any other connection. 1920 OP. N.Y. ATT'Y GEN. 219. Violation of the secrecy provision is punishable by fine, imprisonment, dismissal from state employment and exclusion from public office for up to 5 years. N.Y. TAX LAW § 697(e) (McKinney Supp. 1978-1979).

²⁴¹ Tax commission officers may not be required to reveal any information contained in tax returns or reports,

except on behalf of the tax commission in an action or proceeding under the provisions of the tax law or in any other action or proceeding involving the collection of a tax due under this chapter to which the state or the tax commission is a party or a claimant, or on behalf of any party to any action or proceeding under the provisions of this article when the reports, returns or facts shown thereby are directly involved in such action or proceeding, in any of which events the court may require the production of, and may admit in evidence, so much of said reports, returns or the facts shown thereby, as are pertinent to the action or proceeding and no more.

N.Y. TAX LAW § 697(e) (McKinney Supp. 1978-1979). Subdivision (e) also does not prohibit delivery of a copy of the income tax return to the taxpayer himself or to the attorney general when a tax-related court action has been instituted. *Id.* In addition, subdivision (f) permits disclosure of relevant tax return information to the federal government or other state governments whose taxing authorities allow reciprocal exchange privileges. N.Y. TAX LAW § 697(f) (McKinney 1975).

²⁴² *See, e.g.*, N.Y. TAX LAW §§ 202 (McKinney 1966 & Supp. 1978-1979) (corporation tax), 211(8) (McKinney Supp. 1978-1979) (business corporation franchise tax), 437 (McKinney 1975) (alcoholic beverages tax), 514 (McKinney 1975) (highway use tax), 1146 (McKinney 1975) (sales tax), 1467 (McKinney 1975) (banking franchise tax), 1518 (McKinney 1975) (insurance franchise tax).

tion.²⁴³ Recently, in *New York State Department of Taxation and*

²⁴³ See, e.g., *Manufacturers Trust Co. v. Browne*, 269 App. Div. 108, 53 N.Y.S.2d 923 (1st Dep't), *aff'd per curiam*, 296 N.Y. 549, 68 N.E.2d 861 (1945); *People v. Isaac G. Johnson & Co.*, 213 App. Div. 402, 210 N.Y.S. 92 (1st Dep't 1925); *People v. Wedelstaedt*, 77 Misc. 2d 918, 356 N.Y.S.2d 411 (Sup. Ct. Bronx County 1974); *Thaler v. Murphy*, 42 Misc. 2d 1, 247 N.Y.S.2d 816 (Sup. Ct. Albany County 1964); *In re Fowlkes' Estate*, 16 Misc. 2d 1043, 185 N.Y.S.2d 373 (Sur. Ct. Nassau County 1959). The phrase "except in accordance with proper judicial order or as otherwise provided by law" uniformly has been interpreted in a restrictive manner. Such interpretations reflect the prevailing view that "it was the intent of the Legislature to make the returns and other information supplied under the Income Tax Law *privileged communications* between the taxpayer and the Comptroller, not to be used in collateral proceedings as evidence without the consent of the taxpayer." 1920 Op. N.Y. ATT'Y GEN. 219 (emphasis in original). Thus, in the early case of *People v. Isaac G. Johnson & Co.*, 213 App. Div. 402, 210 N.Y.S. 92 (1st Dep't 1925), the court held that the inviolability of the secrecy provisions precluded the release of the defendant's business corporation franchise tax returns to the state, which sought information concerning the value of the defendant's property for a condemnation proceeding. *Id.* at 403, 210 N.Y.S. at 93. Construing language identical to that contained in § 697(e), the court found that the secrecy mandate of the tax statute could not be overcome, absent an express statutory provision to the contrary. 213 App. Div. at 404, 210 N.Y.S. at 94. Furthermore, the court concluded that a "'proper judicial order'" may be issued only when it is necessary to effectuate one of the statutory exceptions to the nondisclosure rule or when the validity of the report itself is in question. *Id.* at 404-05, 210 N.Y.S. at 95. According to the *Johnson* court, permitting the release of tax return information when it is merely collateral to the main issue under investigation would "destroy the secrecy attaching to [such information] and [would] break down the protection which the statute gives to taxpayers in the disclosure of their most intimate business affairs to the taxing power." *Id.* at 405, 210 N.Y.S. at 95. Similar reasoning was applied in *Manufacturers Trust Co. v. Browne*, 269 App. Div. 108, 53 N.Y.S.2d 923 (1st Dep't), *aff'd per curiam*, 296 N.Y. 549, 68 N.E.2d 861 (1945), wherein the petitioner in a tax revision proceeding claimed that the State Tax Commission had unfairly assessed a franchise tax. 269 App. Div. at 109, 53 N.Y.S.2d at 924. Seeking to establish unlawful discrimination at an administrative hearing, the petitioner requested that the State Tax Commission be ordered to produce the franchise tax returns filed by 49 corporations for the year in question. *Id.*, 53 N.Y.S.2d at 925. The tax commission refused on the ground that the returns were subject to the nondisclosure provisions of §§ 202 and 211(8) of the Tax Law. 269 App. Div. at 109, 53 N.Y.S.2d at 925. The court refused to issue the order, holding that "[p]roper judicial order" refers to an order which becomes necessary or may become necessary to give effect to the exceptions contained in the statute itself." *Id.* at 112, 53 N.Y.S.2d at 927. *In re Fowlkes' Estate*, 16 Misc. 2d 1043, 185 N.Y.S.2d 373 (Sur. Ct. Nassau County 1959), involved § 384 of the Tax Law, the predecessor to the present § 697. Attempting to prove negligence on the part of an administrator in an account settlement of the deceased's tax liability, the objectant subpoenaed the tax commission for files relating to decedent's income tax returns. 16 Misc. 2d at 1044, 185 N.Y.S.2d at 375. The surrogate court sustained the tax commission's refusal to deliver the files, holding that the secrecy provision prohibited such disclosure. *Id.* at 1045, 185 N.Y.S.2d at 376-77. In *Thaler v. Murphy*, 42 Misc. 2d 1, 247 N.Y.S.2d 816 (Sup. Ct. Albany County 1964), a state senator brought a mandamus proceeding under article 78 of the CPLR to obtain a court order directing the tax commission to disclose all records and reports in its possession concerning the New York Racing Association. Although the court's dismissal of the petition was based on a determination that such reports were not "public records," the court indicated that "the various 'secrecy' provisions contained in the Tax Law . . . evidence a policy of prohibiting disclosure of information as to matters in which the State Tax Commission is charged with . . . responsibility." *Id.* at 3, 247 N.Y.S.2d at 818 (citations omitted). In one

Finance v. New York State Department of Law,²⁴⁴ the Court of Appeals endorsed the spirit of these decisions and held that the nondisclosure provisions of section 697(e) prohibit compliance with a grand jury subpoena *duces tecum* for the release of a tax return in a nontax investigation.²⁴⁵

In *Department of Taxation*, the State Organized Crime Task Force (OCTF)²⁴⁶ served the Tax Commission with a subpoena *duces tecum*²⁴⁷ requiring production before a grand jury of an individual's income tax return.²⁴⁸ The Department of Taxation moved to quash the subpoena²⁴⁹ since there was no indication that the OCTF investi-

recent decision, the court considered the effect of the tax law's confidentiality requirement in a criminal prosecution. *People v. Wedelstaedt*, 77 Misc. 2d 918, 356 N.Y.S.2d 411 (Sup. Ct. Bronx County 1974). In *Wedelstaedt*, the Bronx District Attorney served a subpoena *duces tecum* on the Department of Taxation for the production of records relating to the defendant's payment of the automobile sales tax. The court granted a motion to vacate the subpoena, although a criminal case was pending against the defendant, since disclosure of the sales tax records was prohibited by § 1146 of the Tax Law. 77 Misc. 2d at 920, 356 N.Y.S.2d at 414. Significantly, the *Wedelstaedt* court expressly adopted the holdings and rationales utilized in *Johnson* and *Manufacturers Trust, Id.*

²⁴⁴ 44 N.Y.2d 575, 378 N.E.2d 110, 406 N.Y.S.2d 747 (1978), *aff'g* 58 App. Div. 2d 298, 396 N.Y.S.2d 744 (4th Dep't), *rev'g* 89 Misc. 2d 275, 391 N.Y.S.2d 329 (Monroe County Ct. 1977).

²⁴⁵ 44 N.Y.2d at 578, 378 N.E.2d at 112, 406 N.Y.S.2d at 749.

²⁴⁶ The Organized Crime Task Force (OCTF) is a specialized investigative body created by § 70-a of the Executive Law. Its purpose is to conduct intercounty or interstate investigations and prosecutions of organized crime activities. N.Y. EXEC. LAW § 70-a(1)(a) (McKinney 1972). The OCTF was established within the office of the Attorney General in 1970, pursuant to a legislative finding that the existing means for combating organized crime were ineffective. Ch. 1003, § 1, [1970] 2 N.Y. Laws 2648 (McKinney). While the task force concept is highly unusual and often criticized, it was felt that "[t]he State [could not] afford to ignore any avenue for rooting out criminal combines that seek to corrupt public office holders, invade legitimate businesses, thrive on the sale of narcotics, loansharking, extortion and gambling and often boast openly of immunity from the reach of the law." Memorandum of the State Executive Department, *reprinted in* [1970] N.Y. Laws 3024 (McKinney).

²⁴⁷ 44 N.Y.2d at 578, 378 N.E.2d at 112, 406 N.Y.S.2d at 749. "A subpoena *duces tecum* requires production of books, papers and other things." CPLR 2301 (1974). The subpoena in *Department of Taxation* was issued by the deputy attorney general in charge of the OCTF pursuant to CPL § 190.50 (2) (1971), which permits "[t]he people [to] call as a witness in a grand jury proceeding any person believed by the district attorney to possess relevant information or knowledge."

²⁴⁸ 44 N.Y.2d at 575, 378 N.E.2d at 110, 406 N.Y.S.2d at 748-49. The powers of the grand jury and its general function are defined in CPL §§ 190.05-.90 (1971 & Supp. 1978-1979). The grand jury is considered an arm of the court, which "functions . . . to hear and examine evidence concerning offenses and . . . misconduct, . . . whether criminal or otherwise." CPL § 190.05 (1971); *see Spector v. Allen*, 281 N.Y. 251, 260, 22 N.E.2d 360, 364 (1939); *People v. Aviles*, 89 Misc. 2d 1, 8, 391 N.Y.S.2d 303, 309 (Sup. Ct. N.Y. County 1977); *People v. Pisanti*, 179 Misc. 308, 309, 38 N.Y.S.2d 850, 852 (Kings County Ct. 1943).

²⁴⁹ The motion to quash was made pursuant to CPLR 2304 (1974). 44 N.Y.2d at 578, 378 N.E.2d at 112, 406 N.Y.S.2d at 749. A motion to quash generally is viewed as the proper

gation involved a tax violation.²⁵⁰ In denying this motion, the Monroe County Court found that the subpoena constituted a "proper judicial order" under section 697(e).²⁵¹ The Appellate Division, Fourth Department, unanimously reversed, concluding that the subpoena was not issued pursuant to any of the enumerated statutory exceptions and therefore was not a "proper judicial order" within the meaning of section 697(e).²⁵²

On appeal, the Court of Appeals affirmed, holding that both the statutory language and the policy underlying section 697(e) bar disclosure of tax return information to a grand jury.²⁵³ Judge Fuchsberg, writing for a unanimous Court, stated that the insulation of "tax return information from scrutiny in nontax related matters" reflects a legislative view that the protection of individual privacy²⁵⁴ is necessary to the effective operation of the state's tax enforcement

method for challenging the issuance of a subpoena *duces tecum*. *Carlisle v. Bennett*, 268 N.Y. 212, 218, 197 N.E. 220, 223 (1935); 2A WK&M ¶ 2304.03. Absent a specific privilege, a subpoena *duces tecum* will be enforced if the information sought is material and relevant to the investigation. See *In re Foster*, 139 App. Div. 769, 774, 124 N.Y.S. 667, 675 (2d Dep't 1910); 2A WK&M ¶ 2304.13.

²⁵⁰ 44 N.Y.2d at 578 n.1, 378 N.E.2d at 112 n.1, 406 N.Y.S.2d at 749 n.1.

²⁵¹ 89 Misc. 2d at 276-77, 391 N.Y.S.2d at 330-31. Emphasizing the policy considerations favoring the grand jury's investigative mission, the court stated that the statutory privilege must at times "yield to a Grand Jury's demand for evidence." *Id.* at 277, 391 N.Y.S.2d at 330 (citing *People v. Doe*, 35 App. Div. 2d 118, 315 N.Y.S.2d 5 (4th Dep't 1970)); *People v. Woodruff*, 26 App. Div. 2d 236, 272 N.Y.S.2d 786 (2d Dep't 1966), *aff'd*, 21 N.Y.2d 848, 236 N.E.2d 159, 288 N.Y.S.2d 1004 (1968)). Furthermore, the lower court found that the reasoning in *People v. Wedelstaedt*, 77 Misc. 2d 918, 356 N.Y.S.2d 411 (Sup. Ct. Bronx County 1974), see note 243 *supra*, was not controlling, since the *Wedelstaedt* court relied on *Manufacturers Trust Co. v. Browne*, 269 App. Div. 2d 108, 53 N.Y.S.2d 923 (1st Dep't), *aff'd per curiam*, 296 N.Y. 549, 68 N.E.2d 861 (1945), which involved a civil rather than a criminal proceeding. 89 Misc. 2d at 278, 391 N.Y.S.2d at 331.

²⁵² 58 App. Div. 2d at 300, 396 N.Y.S.2d at 745. The fourth department followed the holding in *Manufacturers Trust Co. v. Browne*, 269 App. Div. 2d 108, 53 N.Y.S.2d 923 (1st Dep't), *aff'd per curiam*, 296 N.Y. 549, 68 N.E.2d 861 (1945); see note 243 *supra*, reasoning that, although *Manufacturers Trust* involved a civil proceeding, any distinction between civil and criminal proceedings is irrelevant to the policy underlying the tax law's confidentiality provisions. 58 App. Div. 2d at 300, 396 N.Y.S.2d at 745.

²⁵³ 44 N.Y.2d at 578, 378 N.E.2d at 112, 406 N.Y.S. at 749.

²⁵⁴ *Id.* at 579, 378 N.E.2d at 112-13, 406 N.Y.S.2d at 749-50. Judge Fuchsberg stated that "concern for individual privacy and for protection from self incriminatory demands has long made us sensitive to the substantial and difficult constitutional questions [posed by obligatory reports which] touch upon intimate areas of an individual's personal affairs [and which] can reveal much about a person's activities, associations and beliefs.'" *Id.* (quoting *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 78-79 (1974) (Powell, J., concurring) (citations omitted)). In *Boske v. Comingore*, 177 U.S. 459 (1900), the Supreme Court recognized for the first time the need to protect individuals who are compelled by revenue laws to file financial reports. The *Boske* Court held that Treasury Department regulations, prohibiting an internal revenue collector from disclosing office records in state courts, justified a failure to respond to a subpoena *duces tecum* for the federal tax reports of a liquor manufacturer.

system.²⁵⁵ The Court noted that the existence of specific statutes permitting the release of tax return information does not suggest a contrary conclusion, since such deviations from the nondisclosure rule are derived in exceptional public interests.²⁵⁶ Moreover, the statutory provisions requiring that state agencies assist and cooperate with the OCTF, in the Court's view, did not override the restrictions imposed by section 697(e), but rather were intended only to mandate sharing of agency resources such as personnel.²⁵⁷ Finally,

177 U.S. at 469-70. The concept of maintaining the confidentiality of tax reports obtained under compulsion of law was first recognized by a New York court in *People v. Isaac G. Johnson & Co.*, 213 App. Div. 402, 405, 210 N.Y.S. 92, 95 (1st Dep't 1925). See note 243 *supra*. Nondisclosure requirements have been imposed in other areas where information is obtained under compulsion of law. See *In re Bakers Mut. Ins. Co.*, 301 N.Y. 21, 92 N.E.2d 49 (1950). Construing a section of the New York City Sanitary Code which required the filing of a confidential report as to the cause of death, the *Bakers Mutual* Court held that such reports were privileged communications and not subject to subpoena. *Id.* at 22, 92 N.E.2d at 50; see 2A WK&M ¶ 2304.13. See generally 8 J. WIGMORE, EVIDENCE § 2377(f) (McNaughton rev. 1961); Comment, *The Required Report Privileges*, 56 Nw. U. L. Rev. 283 (1962).

²⁵⁵ 44 N.Y.2d at 580, 378 N.E.2d at 113, 406 N.Y.S.2d at 750-51. The Court indicated that, while the tax laws ultimately must be enforced through the imposition of penalties for tax evasion, the importance of voluntary compliance cannot be minimized. *Id.*; see *Garner v. United States*, 424 U.S. 648, 652-53 (1976); *United States v. Bisceglia*, 420 U.S. 141, 145 (1975). Insuring the confidentiality of tax returns is expected to encourage the individual taxpayer to make complete and honest reports without fear of self incrimination in non-tax-related matters. 44 N.Y.2d at 580, 378 N.E.2d at 113, 406 N.Y.S.2d at 750-51.

²⁵⁶ 44 N.Y.2d at 581, 378 N.E.2d at 113-14, 406 N.Y.S.2d at 751. N.Y. EXEC. LAW § 49 (McKinney pam. 1972-1978), which permits officers of the social services department to obtain information from any state agency, specifically provides that § 697(e) of the Tax Law does not restrict access to the necessary information. Similarly, N.Y. EDUC. LAW § 663(8) (McKinney Supp. 1978-1979), while not addressed specifically to § 697, requires the tax commission to divulge income tax return information for comparison with the financial forms filed by students seeking state aid. The Court noted that these exceptions to the general rule of nondisclosure involved situations where taxpayers were seeking some form of public assistance and therefore could be deemed to have waived their right to privacy. 44 N.Y.2d at 581, 378 N.E.2d at 113-14, 406 N.Y.S.2d at 751; see *Gunty v. Division of Hous.*, 75 Misc. 2d 128, 347 N.Y.S.2d 608 (Sup. Ct. Kings County 1972), *aff'd*, 41 App. Div. 2d 604, 340 N.Y.S.2d 387 (2d Dep't 1973); *Strycker's Bay Apartments, Inc. v. Walsh*, 67 Misc. 2d 134, 323 N.Y.S.2d 563 (Sup. Ct. N.Y. County 1971). In *Gunty*, tenants of a limited-income housing project were required to sign authorizations allowing disclosure of income tax returns in order to verify their incomes. 75 Misc. 2d at 130, 347 N.Y.S.2d at 610. This requirement was held not to violate the tenants' right to privacy under § 384 of the Tax Law, since they had voluntarily elected to reside in the project. 75 Misc. 2d at 130, 347 N.Y.S.2d at 611. Similarly, in *Walsh*, residents of a housing cooperative subsidized by the State and the City of New York were presumed to have waived the nondisclosure privilege of § 384 by their voluntary choice of housing. Therefore, a city housing administrator was deemed authorized to seek verification of their claimed income from the tax commission. 67 Misc. 2d at 137, 323 N.Y.S.2d at 566-67.

²⁵⁷ 44 N.Y.2d at 581-82, 378 N.E.2d at 114, 406 N.Y.S.2d at 751. N.Y. EXEC. LAW § 70-a(3) (McKinney 1972) provides in pertinent part:

The deputy attorney general in charge of the [OCTF] may request and shall

Judge Fuchsberg stated, the subpoena was not "a proper judicial order" since it neither implemented an enumerated exception to the nondisclosure rule of section 697(e) nor was issued in a case in which the tax return itself was in issue.²⁵⁸ The Court did intimate, however, that a grand jury subpoena might constitute a "proper order" under extraordinary circumstances that "plumb the very depths of judicial and Grand Jury power."²⁵⁹

The *Department of Taxation* Court's narrow interpretation of the enumerated exceptions to section 697(e)'s broad nondisclosure rule is in accord with both its legislative history and prior case law.²⁶⁰ When the Tax Law was enacted, the legislature clearly intended that the information provided in a tax return would be a privileged

receive from . . . the state department of taxation and finance, . . . and from every department, division, board, bureau, commission or other agency of the state, . . . cooperation and assistance in the performance of his duties.

Id. (emphasis added); see Memorandum of the State Executive Department, reprinted in [1970] N.Y. Laws 3024 (McKinney). The broad "cooperation and assistance" mandate in § 70-a(3) also is found in the language of the enabling statutes of other state agencies. See, e.g., N.Y. ENVIR. CONSERV. LAW § 3-0301(2)(d)(1) (McKinney 1973); N.Y. VEH. & TRAF. LAW § 210(4), (6) (McKinney 1970).

²⁵⁸ 44 N.Y.2d at 582, 378 N.E.2d at 114, 406 N.Y.S.2d at 751-52; see *Manufacturers Trust Co. v. Browne*, 269 App. Div. 108, 53 N.Y.S.2d 923 (1st Dep't), *aff'd per curiam*, 296 N.Y. 549, 68 N.E.2d 861 (1945); *People v. Isaac G. Johnson & Co.*, 213 App. Div. 402, 210 N.Y.S. 92 (1st Dep't 1925); *People v. Wedelstaedt*, 77 Misc. 2d 918, 356 N.Y.S.2d 411 (Sup. Ct. Bronx County 1974). Construing similar secrecy provisions in New York's tax law, however, some federal courts have considered subpoenas for tax records within the "proper judicial order" exception. See, e.g., *United States v. King*, 73 F.R.D. 103 (E.D.N.Y. 1976); *In re New York State Sales Tax Records*, 382 F. Supp. 1205 (W.D.N.Y. 1974). In *In re New York State Sales Tax Records*, the district court denied a motion to quash a federal grand jury subpoena and held it to be a "proper judicial order" within the ambit of § 1146 of the Tax Law, which is identical to § 697(e). 382 F.2d at 1206. The *Sales Tax* holding, however, is distinguishable from the holding in *Department of Taxation*, since the *Sales Tax* court relied heavily upon the supremacy clause of the Constitution in concluding that New York's nondisclosure provisions could not insulate state tax returns from federal subpoena powers. See 58 App. Div. 2d at 300, 396 N.Y.S.2d at 745. In *King*, the United States attorney issued a subpoena *duces tecum* to the Department of Finance of the City of New York for certain city income tax returns of the defendant, who had been indicted for federal tax evasion. 73 F.R.D. at 104. The city moved to quash on the ground that such information was protected by the tax nondisclosure provision of the city code. *Id.* The *King* court denied the motion to quash and held that local rules of privilege must yield to federal rules where important federal interests are at stake. *Id.* at 109. The *King* reasoning, however, is also distinguishable from the reasoning in *Department of Taxation*, since the provision construed in *King* was designed to encourage reciprocity of disclosure, while the purpose of § 697(e) was to insure the privacy of the individual taxpayer.

²⁵⁹ 44 N.Y.2d at 582, 378 N.E.2d at 114, 406 N.Y.S.2d at 751. Although the Court did not enumerate the possible "extraordinary circumstances" which would allow grand jury access to privileged tax information, it indicated that "great public urgency" as well as the lack of other means to obtain the information would be required. *Id.*

²⁶⁰ See notes 240 & 243 *supra*.

communication between the taxpayer and the taxing authorities.²⁶¹ That such information was not meant to be made available in investigations not related to the tax laws is reinforced by the statutory language, which provides only for a limited class of exceptions to the mandate of secrecy.²⁶² Although earlier decisions which confined the exceptions to the nondisclosure rule to those enumerated in the statute involved civil proceedings,²⁶³ there would appear to be no justification for relaxing the rule when the information is sought in a criminal investigation. The grand jury's broad power to carry out its investigative function²⁶⁴ traditionally has been limited by the necessity of establishing that subpoenaed material "bear a reasonable relation to the subject matter under investigation and the public purpose to be served."²⁶⁵ The *Department of Taxation* holding simply places additional restrictions on the grand jury's authority when the subpoenaed material consists of tax return information.²⁶⁶

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²⁶¹ See 1920 Op. N.Y. ATT'Y GEN. 219.

²⁶² See note 241 *supra*. It is interesting to note that a recent amendment to the Internal Revenue Code provides for "[d]isclosure [of income tax returns] to Federal officers or employees for administration of Federal laws not relating to tax administration." I.R.C. § 6103(i) (as amended 1976). Subdivision (1) of § 6103(i) authorizes a district court judge to grant an *ex parte* order making available to federal officers, involved in a nontax criminal proceeding or investigation, the necessary information to further the investigation. I.R.C. § 6103(i)(1)(A). Recently, it was held that while the statute does not expressly provide for *in camera* inspection, such a procedure may be necessary to effectuate the purposes of the statute and to determine the probative value of the information. *United States v. Praetorius*, 451 F. Supp. 371 (E.D.N.Y. 1978). It is suggested that where "extraordinary circumstances" exist, as posited by Judge Fuchsberg in *Department of Taxation*, similar *in camera* inspections should be considered before any confidential information is released to the grand jury.

²⁶³ See note 243 *supra*.

²⁶⁴ See *People v. Stern*, 3 N.Y.2d 658, 148 N.E.2d 400, 171 N.Y.S.2d 265 (1958); *Manning v. Valenti*, 272 App. Div. 358, 72 N.Y.S.2d 88 (1st Dep't), *aff'd mem.*, 297 N.Y. 681, 77 N.E.2d 3 (1947).

²⁶⁵ *Myerson v. Lentini Bros. Moving & Storage*, 33 N.Y.2d 250, 256, 306 N.E.2d 804, 808, 351 N.Y.S.2d 687, 693 (1973); *accord*, *Carlisle v. Bennett*, 268 N.Y. 212, 197 N.E. 220 (1935). Although a grand jury's power is broad, it is not unlimited. *Heisler v. Hynes*, 42 N.Y.2d 250, 366 N.E.2d 817, 397 N.Y.S.2d 727 (1977); *cf.* *Sussman v. State Organized Crime Task Force*, 39 N.Y.2d 227, 347 N.E.2d 638, 383 N.Y.S. 2d 276 (1976) (office subpoenas issued under § 70-a(4) of Executive Law authorized only upon showing that investigation involves multi-county organized crime activities). In addition to being constrained by specific nondisclosure statutes, law enforcement agencies investigating organized crime are constrained by various constitutional and statutory safeguards which affect the information gathering process. See generally PACE & STYLES, ORGANIZED CRIME: CONCEPT AND CONTROL 67 (1975); see also NATIONAL ADVISORY COMMITTEE ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON ORGANIZED CRIME (1976).

²⁶⁶ See 44 N.Y.2d at 581, 378 N.E.2d at 113, 406 N.Y.S.2d at 752. The *Department of Taxation* Court stated that "the procedural and evidentiary rules laid down by the Criminal

DEVELOPMENTS IN NEW YORK LAW

Court of Appeals clarifies definition of "the same cause of action" for purposes of claim preclusion

Claim preclusion, an aspect of *res judicata*,²⁶⁷ forecloses relitigation of matters which have been or which could have been litigated in a prior adjudication when a subsequent suit is based on the same cause of action.²⁶⁸ What constitutes the same cause of action for claim preclusion purposes, however, is not always clear.²⁶⁹ Recently,

Procedure Law and other statutes [do not sanction] a general remission of the Tax Law's call for secrecy merely to accommodate a grand jury subpoena . . . where there is a total absence of any showing . . . that the investigation bears some relationship to tax matters." *Id.* (citation omitted).

²⁶⁷ The term *res judicata* often is used broadly to include all instances in which a party is precluded from relitigating matters involved in prior adjudications. D. SIEGEL, *NEW YORK PRACTICE* § 442 (1978); *accord*, RESTATEMENT (SECOND) OF JUDGMENTS, Introductory Note ch. 3 (Tent. Draft No. 1, 1973). Used in this manner, the concept encompasses both "claim preclusion" and "issue preclusion." See SIEGEL, *supra*, §§ 442-443, 450.

Claim preclusion prevents relitigation of an entire cause of action if a final and binding judgment previously has been rendered on the same matter. This doctrine is comprised of two subcategories: merger and bar. Under the merger rule, when judgment is rendered in favor of the plaintiff, "his cause of action 'merges' in the judgment" and may not be relitigated. Conversely, if the defendant has judgment in an action, the plaintiff thereafter is "barred" from relitigating the same cause of action. SIEGEL, *supra*, § 450; *accord*, RESTATEMENT (SECOND) OF JUDGMENTS §§ 45, 47-48, 61 (Tent. Draft No. 1, 1973). For a discussion of special circumstances, such as "dismissal for lack of jurisdiction," when merger and bar will not operate to preclude a subsequent suit on the same cause of action, see *id.* §§ 48.1, 61.2.

In contrast, issue preclusion operates to foreclose relitigation of specific questions of fact or law that were actually or implicitly resolved in an earlier adjudication. *Statter v. Statter*, 2 N.Y.2d 668, 672-73, 143 N.E.2d 10, 12, 163 N.Y.S.2d 13, 16-17 (1957); *Schuykill Fuel Corp. v. Nieberg Realty Corp.*, 250 N.Y. 304, 306-07, 165 N.E. 456, 457 (1929); SIEGEL, *supra*, §§ 457, 460. This doctrine may not be raised, however, against a party who did not have a full and fair opportunity to litigate the issue in a prior action. See *Schwartz v. Public Adm'r*, 24 N.Y.2d 65, 71, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955, 960 (1969); RESTATEMENT (SECOND) OF JUDGMENTS § 68 (Tent. Draft No. 4, 1977). Like claim preclusion, issue preclusion has two aspects. One aspect, collateral estoppel, precludes relitigation in subsequent suits of issues that previously were determined in a suit based on a different cause of action. SIEGEL, *supra*, § 457; RESTATEMENT (SECOND) OF JUDGMENTS § 68, Comment b (Tent. Draft No. 4, 1977); see *In re American Ins. Co.*, 43 N.Y.2d 184, 189 n.2, 371 N.E.2d 798, 801 n.2, 401 N.Y.S.2d 36, 39 n.2 (1977); *Schuykill Fuel Corp. v. Nieberg Realty Corp.*, 250 N.Y. 304, 306-07, 165 N.E. 456, 457 (1929). Direct estoppel, on the other hand, precludes relitigation of issues determined in a proceeding which was dismissed on grounds other than the merits. SIEGEL, *supra*, § 443. For an excellent discussion of the distinctions between issue preclusion and claim preclusion, see *Rosenberg, Collateral Estoppel in New York*, 44 ST. JOHN'S L. REV. 165 (1969).

²⁶⁸ *Rosenberg, supra* note 267, at 166-67; SIEGEL, *supra* note 267, § 442, at 585, § 445 at 591-92; see *Cromwell v. County of Sac.*, 94 U.S. 351, 352 (1876); *Schuykill Fuel Corp. v. Nieberg Realty Corp.*, 250 N.Y. 304, 306-07, 165 N.E. 456, 457 (1929).

²⁶⁹ See *Smith v. Kirkpatrick*, 305 N.Y. 66, 70, 111 N.E.2d 209, 211 (1953); F. JAMES, *CIVIL PROCEDURE* § 11.10 at 554 (1965); A. VESTAL, *RES JUDICATA/PRECLUSION V-43* (1969); *Rosenberg, supra* note 267, at 168. According to one commentator: