

any manner or at any time to give testimony that may expose him/her to prosecution for a crime. It applies equally whether incrimination be under Federal or state law, and whether the privilege is invoked in the Federal or state courts. [*Murphy v. N.Y. Waterfront Commission*; see also *Malloy v. Hogan*.] If a witness has been compelled to testify in a state court under a grant of immunity, as to matters which could incriminate him/her under Federal law, a Federal court cannot later use that testimony or any fruits of it. [*Murphy v. N.Y. Waterfront Commission*] The grant of immunity applies only to the inability to prosecute the witness based on testimony supplied by him/her. This does not preclude a prosecution of the witness based on the presentation of independent evidence which did not result from his/her own testifying. [*Kastigar v. U.S.*]

(2) A defendant's refusal to testify at the trial for a Federal offense cannot raise any presumption against him/her or be the subject of comment by the prosecution. The right to refuse to answer incriminating questions applies not only to court trials, but to all kinds of criminal or civil proceedings, including administrative investigations. [*George Smith v. U.S.*; *McCarthy v. Arndstein*; *Counselman v. Hitchcock*; *U.S. v. Harold Gross*] The fear of self-incrimination may be with respect to any criminal offense. For example, in the case of Internal Revenue Agent v. Sullivan, a taxpayer was upheld in refusing to produce records in a tax matter on the ground that indictment was pending against him for defrauding the Government on certain contracts.

Smith v. U.S.; *Beard v. U.S.*; *Olson v. U.S.*;
Myres v. U.S.]

(2) The privilege against self-incrimination does not permit a taxpayer to refuse to obey a summons issued under IRC 7602 or a court order directing his/her appearance. He/she is required to appear and cannot use the Fifth Amendment as an excuse for failure to do so, although he/she may exercise it in connection with specific questions. [*Landy v. U.S.*] He/she cannot refuse to bring his/her records, but may decline to submit them for inspection on constitutional grounds. In the *Vadner* case, the government moved to hold a taxpayer in contempt of court for refusal to obey a court order to produce his/her books and records. He refused to submit them for inspection by the Government, basing his refusal on the Fifth Amendment. The court denied the motion to hold him in contempt, holding that disclosure of his assets would provide a starting point for a tax evasion case.

(3) Where records are required be kept as an aid to enforcement of certain regulatory functions enacted by Congress, such records have been held public records, whose production may be compelled without violating the Fifth Amendment. This reasoning has also been applied in some income tax evasion cases. [*Falson v. U.S.*; *Beard v. U.S.*] *Other income tax cases have stated that compulsory production of a taxpayer's books and records for use in a criminal prosecution would violate the constitutional protection against self-incrimination. There has not yet been any Supreme Court decision holding the public records doctrine applicable in income tax cases.*

342.12 (1-18-80)

9781

Books and Records of An Individual

(1) An individual taxpayer may refuse to exhibit his/her books and records for examination on the ground that compelling him/her to do so might violate his/her right against self-incrimination under the Fifth Amendment and constitute an illegal search and seizure under the Fourth Amendment. [*Boyd v. U.S.*; *U.S. v. Vadner*] However, in the absence of such claims, it is not error for a court to charge the jury that it may consider the refusal to produce books and records, in determining willfulness. [*Louis G.*

(4) The decision of the Supreme Court in *Andresen v. Maryland* appears to have resolved conflicting judicial precedents regarding the use of search warrants to seize books and records of financial transactions. In this case the Court held that the search of *Andresen's* office for business records, their seizure and subsequent introduction into evidence did not offend the Fifth Amendment. Although the seized records contained statements that the accused had committed to writing, he was never required to say anything. The search for and seizure of these records was conducted by law enforcement officers and introduced at trial by prosecution witnesses.

342.11

MT 9781-32