TAX RETURNS AND LOSS OF EARNINGS CLAIMS



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DISCOVERY OF TAX RETURNS -- LOSS OF EARNINGS CLAIMS

A PLAINTIFF MAY NOT ASSERT A PRIVILEGE TO TX RETURNS AND THUS PRECLUDE DEFENDANT FROM OBTAINING INFORMATION RELEVANT TO THE DEFENSE OF THE LAWSUIT:

In this instant case Plaintiff is making a rather large claim for loss of earnings based on a claim that due to the alleged incident or assault he was unable to engage in his occupation of a "paparazzi" and was forced to leave the State of California and lose various opportunities to photograph celebrities and sell the photographs.

There is no merit to a claim that Plaintiff's tax returns under these facts are relevant and vital to be disclosed to allowed the defense to defend against this claim and investigate the Plaintiff's claim of loss of earnings. Plaintiff cannot use the privilege as a "sword" and a "shield" – and attempt to thwart the defense's legitimate rights to investigate Plaintiff's loss of earnings claim.

Either Plaintiff must produce the tax returns – or dismiss the claim for loss of earnings. Plaintiff has waived the claim of a defense of privilege to these tax returns by making the claim for loss of earnings.

1. WHILE CALIFORNIA RECOGNIZES THE PRIVILEGE AS TO TAX RETURNS THIS PRIVILEGE IS NOT ABSOLUTE:

California case law has created a judicially recognized privilege against disclosure of tax returns and related financial records. *See Weingarten v. Superior Court* (2002) 102 Cal.App.4th 268: "The purpose of the privilege is to encourage voluntary filing of tax returns and truthful reporting of income, and thus to facilitate tax collection." *Id.* However, the privilege is not absolute, and may be lost where: (1) the circumstances indicate that a party intentionally relinquished the privilege; (2) the assertion of the privilege is so inconsistent with the gravamen of the action that the privilege is considered waived; or (3) public policy outweighs the confidentiality of the tax records involved in the case. *See Deary v. Superior Court*, (2001) 87 Cal.App.4th 1072, 1075...

A trial court has broad discretion in determining the applicability of a statutory privilege. (See *National Football League Properties, Inc. v. Superior Court* (1998) 65 Cal.App.4th 100, 106–107.)

See *Steiny & Co. v. California Elec. Supply Co.* (2000) 79 C.A.4th 285, 292 [where contractor sought indemnity from subcontractor for damages contractor was required to pay aircraft company, and contractor invoked trade secrets privilege, preventing subcontractor from examining basis of contractor's damages claim, contractor's damage evidence was properly excluded; when privileged information goes to heart of claim, fundamental fairness requires that it be disclosed for litigation to proceed. When a party asserting a claim invokes privilege to withhold crucial evidence, the policy favoring full disclosure of relevant evidence conflicts with the policy underlying the privilege. Courts have resolved this conflict by holding that the proponent of the claim must give up the privilege in order to pursue the claim. Where privileged information goes to the heart of

the claim, fundamental fairness requires that it be disclosed for the litigation to proceed. While a party has a right to stand on the privilege, it does not have the right to proceed with their claim while at the same time insisting on withholding key evidence from their adversary].

2. LOSS OF EARNINGS AND TAX RETURNS – TAX RETURNS ARE DISCOVERABLE AS THEY ARE REASONABLY CALCULATED TO LEAD TO RELEVANT EVIDENCE:

Young vs United States, 149 F.R.D. 199 (S.D.Cal.1993) is another instructive decision. Decided almost 10 years before **Weingarten**, it anticipates **Weingarten** and its progeny. In *Young*, the employee of a Navy contractor brought suit against the government under the Federal Court Claims Act. The plaintiff employee was injured; part of her damage claim included a claim for lost wages. In deciding her tax returns were relevant, the court said: "the Plaintiff tax returns ... are reasonably calculated to lead to the discovery of evidence relevant to the government's defense. The government must be entitled to obtain discovery regarding Ms. Young's income as reported to the Internal Revenue Service in order to evaluate and defend against a claim for lost wages. She claims that she has been unemployed since the injury occurred. Her tax returns are important evidence that may verify or contradict this assertion. This court, therefore, finds that the disclosure is reasonably necessary and an appropriate subject of discovery." *Id. at* 204-205.

The court in *Young vs. United States* held that Plaintiff's tax returns were reasonably calculated to lead to the discovery of evidence relevant to the government's defense. The court held that the disclosure is reasonably necessary and an appropriate subject of discovery. In addition, the tax returns sought to be discovered are those of a party. The court holds that the plaintiff's tax returns from the time of the accident to the present are not privileged and are discoverable. *Young v. U.S.* (S.D.Cal. 1993) 149 F.R.D. 199, 204 -205.

As to the issue of "waiver" the court held:

The government argues that, even if the tax returns are privileged, the privilege has been waived by the plaintiff's actions. First, the government argues that the privilege has been waived by the plaintiff making a claim for lost wages, thus placing her income in issue. The California Court of Appeal has held that the gravamen of a complaint may be so inconsistent with assertion of the tax return privilege as to constitute a waiver of the privilege. *Wilson v. Superior Ct.*, 63 Cal.App.3d 825 (1976). The plaintiff must choose whether he or she will assert the tax return privilege or pursue the lawsuit. The California Court of Appeal has also held that the privilege against self-incrimination, as related to the filing of income tax returns, was waived by pursuing a claim for loss of income in a personal injury lawsuit. *Newson v. City of Oakland*, 37 Cal.App.3d 1050 (1974). *Young v. U.S.* 149 F.R.D. 199, 205 (S.D.Cal.,1993)

See also: *Small v. Travelers Property Cas. Co. of America* 2010 WL 2523649, 2 (S.D.Cal.) (S.D.Cal.,2010) – Plaintiff's tax returns were discoverable to establish

plaintiff's claim of loss of income. Plaintiff's assertion of the privilege is "inconsistent with the gravamen of [his] lawsuit." See also: "Under the circumstances of this case [a wrongful death action], the Court finds that Plaintiffs' have waived their privilege against disclosing tax records as their assertion of the privilege is utterly inconsistent with the gravamen of their claim for damages based on loss of earnings and future earnings.

Salazar v. Basic 2006 WL 3802094, 3 (D.Ariz.) (D.Ariz.,2006)

3. FAILURE TO FILE TAX RETURNS ADMISSIBLE IN PERSONAL INJURY CASE:

In *Newson v. City of Oakland*, 37 Cal.App.3d 1050, the plaintiff motorcyclist who had collided with a newly constructed traffic island on an Oakland street sued the city on the theory that it maintained a dangerous condition of property under applicable sections of the Government Code. The jury verdict was in favor of the defendant city.

On appeal, one of the assignments of error was that the trial court had erred in forcing the plaintiff to disclose the fact that he had not filed federal or state income tax returns for periods referred to in his own testimony concerning the extent of his earnings which were later diminished because of his disabling personal injuries. The appellate court in *Newson* affirmed the judgment, and, of interest here, held that compelling plaintiff to disclose his failure to file income tax returns was perfectly proper.

In commenting on this phase of the trial, the opinion states, "The [trial] court carefully explained its ruling to the jury, pointing out that Newson had a choice of answering the question or withdrawing his claim for earnings and 'couldn't have his cake and eat it too.' The court's ruling and underlying rationale was proper and amply supported by the law of this state in the analogous physician-patient privilege. As stated by our Supreme Court in *City & County of S.F. v. Superior Court*, 37 Cal.2d 227 at page 232]: 'The whole purpose of the privilege is to preclude the humiliation of the patient that might follow disclosure of his ailments. When the patient himself discloses those ailments by bringing an action in which they are in issue, there is no longer any reason for the privilege. The patient-litigant exception precludes one who has placed in issue his physical condition from invoking the privilege on the ground that disclosure of his condition would cause him humiliation. He cannot have his cake and eat it too.'" (*Newson v. City of Oakland*, *supra*, 37 Cal.App.3d 1050, 1055).

"[a]pplying the principle just stated, it was held that a plaintiff suing to recover damages for income lost as a result of injury from defendant's negligence could not assert the privilege against self-incrimination as to questions pertaining to the filing of income tax returns (*Newson v. City of Oakland* (1974) 37 Cal.App.3d 1050, 1055–1057).

CONCLUSION:

Under the facts of this case, where Plaintiff is seeking a substantial claim for loss of earnings claiming Defendant caused him injuries and damages preventing him from engaging in his occupation of a "paparazzi" and selling his photographs of celebrities to tabloid publications, Defendant is entitled to discovery to include obtaining copies of Plaintiff's tax returns. Plaintiff can't have his cake and eat it too. Plaintiff must either waive his claim of loss of earnings – or produce his tax returns to the Defendant.