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THE TAX LAWYER

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### Michael Cohen Takes Fifth, But Don't Try It On Your Taxes

President Trump's lawyer Michael Cohen is in hot water after his home and office were searched. The feds want details, and took the unusual step of searching a lawyer's office despite claims of privilege. Mr. Cohen says he will take the Fifth. If you have serious tax issues, can you take the Fifth on your taxes? In [Lee v. United States](#), Theodore Lee argued that he couldn't file his 2006 tax return because it would incriminate him. After all, he claimed, when his tax return was due, he was deep in an audit with the IRS over returns he had filed for 1999 through 2005. He was fearful that the IRS would prosecute him, so he took the Fifth. The court rejected his claim. The Fifth Amendment does grant a privilege against self-

incrimination.

However, that doesn't mean you can just refuse to file taxes.

The mere act of filing an annual income tax return has little real and appreciable tendency to incriminate the filer, said the court. In fact, merely invoking the Fifth in a tax case can invite penalties or get the IRS looking



more harshly at you. You have to file tax returns, and you have to report your income. Way back in 1927, the Supreme Court considered a man who refused to file a tax

return, claiming that to do so would incriminate him. In *U.S. v. Sullivan*, the Supreme Court said that it was too bad if disclosing illegal income opened him up to prosecution.

Even a criminal must file tax returns and pay taxes. And you have to do it accurately. What if the IRS asks you questions you are afraid to answer? Answering IRS questions in an audit or investigation can be nerve-wracking. Do not speak up without your lawyer present, and ask your lawyer what is fair to discuss. But *claiming* Fifth Amendment protection in taxes cases can be a mistake. The issue can also come up with books and records. You have to keep them to fulfill your tax filing obligations. You even have to keep bank account records for accounts outside the U.S. Undisclosed offshore bank accounts can qualify as money laundering.

So, if the IRS asks you if you have any foreign bank accounts, can you take the Fifth? You can, but it probably won't help. Even if you claim the Fifth, the IRS can hand you an "information document request" to produce your records. If you refuse, the IRS will issue a summons. Then, if you refuse to answer that, the IRS will take you to court, which will probably order you to comply. But, doesn't your constitutional right to take the Fifth trump the IRS? After all, even in court, you can say, "I refuse to answer on the grounds that I may incriminate myself."

Does this work with taxes and the IRS? Not always. Ironically, you can refuse to *talk*, but you *cannot* refuse to produce most documents. Your own private papers are personal records. If *they* might incriminate you, they are protected by the Fifth Amendment. But the Required Records doctrine says you *must* hand over some documents no matter how incriminating they are. The government requires you to keep certain records, and the government has a right to inspect them. The IRS and prosecutors have exploited this rule.

It can mean that pleading the Fifth in response to a subpoena for foreign account records can cause even more trouble than claiming it on your tax returns. Required records are those where the reporting has a regulatory purpose, where a person must customarily keep the records the record-keeping scheme requires him to keep, and the records have public aspects. In the case of foreign bank records, the courts uniformly deny Fifth Amendment protection. Numerous courts have *all* given the IRS a free pass, ruling that no Fifth Amendment protection applies.

Despite repeated requests, the U.S. Supreme Court has been unwilling to hear this issue. So, is it likely that the Fifth Amendment will be much help on your taxes? Not really. In most cases, a tax audit is civil and there is little risk that

it will become otherwise. Still, a majority of criminal tax cases come directly out of civil tax cases. The IRS civil auditors 'refer' a case to the IRS Criminal Investigation Division. The IRS civil auditor will not tell you this is occurring, so the first time you hear about it, your case may have gone from bad to worse.

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