



United States Tax Court

Washington, DC 20217

DESMOND MCGUIRE & CORY LYNNE
BRAME, ET AL.,

Petitioners

v.

COMMISSIONER OF INTERNAL
REVENUE,

Respondent

Docket No. 25461-16, 12178-17,
12179-17, 22725-17, 5729-18,
11882-18, 15581-18, 6898-19,
2373-23, 5689-23.

ORDER

Pending before the Court is petitioners' Motion in Limine filed February 20, 2025, regarding documents produced to the Commissioner that petitioners argue are privileged. The attorney-client privilege prevents disclosure of communications made in connection with seeking legal advice, and that privilege is extended by section 7525¹ to communications made by federally authorized tax practitioners who are giving federal tax advice. Generally, a privilege is waived if an otherwise privileged communication is disclosed to a third party. Because some of the documents contain communications seeking federal tax advice, we will grant petitioners' Motion in Limine in part. We will deny petitioners' Motion for communications relating to state tax advice or tax return preparation, and to the extent an otherwise privileged communication was disclosed to a third party.

Background

On November 8, 2024, the Commissioner issued a subpoena duces tecum to Spencer M. Reitz. Mr. Reitz is Frank and Jennifer Nastanski's certified public accountant, and the subpoena requested documents or communication related to the microcaptive insurance arrangement at issue in this consolidated case. Mr. Reitz provided a response to the subpoena on November 19, 2024.

As part of the stipulation process, the Commissioner provided petitioners with documents that were received in response to the subpoena issued to Mr. Reitz. Petitioners' counsel, upon review of the proposed stipulation, identified several

¹ Unless otherwise indicated, all statutory references are to the Internal Revenue Code, Title 26 U.S.C., in effect at all relevant times, and all Rule references are to the Tax Court Rules of Practice and Procedure.

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documents believed to be privileged. These documents were marked in the stipulation as Exhibits 128-J, 132-J, 133-J, 135-J, 136-J, 137a-J, 137b-J, 138a-J, 138b-J, 140-J, 141-J, and 142-J.²

On December 18, 2024, petitioners' counsel contacted the Commissioner and requested those documents be returned or destroyed because they were privileged under section 7525. The Commissioner informed petitioners that she sequestered the documents.

On February 20, 2025, petitioners filed a Motion in Limine requesting that the Court determine whether the documents inadvertently disclosed to the Commissioner are privileged communications. Petitioners argue that the documents contained communications that were privileged pursuant to section 7525 and **that petitioners did not waive attorney-client privilege by disclosing to an accountant because a "Kovel arrangement" was in place.** Additionally petitioners request that the Commissioner be required to return to petitioners and destroy all copies of the documents and be precluded from using any of the documents at trial. The Commissioner filed a response stating that petitioners' request was not in accordance with Federal Rule of Evidence 502.³

Discussion

I. Attorney-Client Privilege and Section 7525

The attorney-client privilege may protect documents from disclosure. The privilege "applies to communications made in confidence by a client to an attorney for the purpose of obtaining legal advice, and also to confidential communications made by the attorney to the client if such communications contain legal advice or reveal confidential information on which the client seeks advice." *Hartz Mountain Indus., Inc. v. Commissioner*, 93 T.C. 521, 525 (1989). Legal advice generally does not include return preparation.

One common exception to the attorney-client privilege is when an otherwise privileged communication is disclosed to a third party. *Bernardo v. Commissioner*, 104 T.C. 677, 682, 684 (1995). The party asserting the attorney-client privilege must establish that it has not waived the privilege. *Id.*

Section 7525 extends the attorney-client privilege "with respect to tax advice," applying "the same common law protections of confidentiality which apply to a

² Petitioners have since withdrawn their privilege assertions for Exhibits 132-J and 133-J.

³ The Commissioner additionally argued that because petitioners did not attach the documents at issue to their Motion in Limine, it would be more appropriate to address privilege with the Commissioner's Motion for In Camera Review. On March 12, 2025, the Commissioner filed a Motion for in Camera Review and a Motion to Seal the Motion for in Camera Review and its Exhibits. We have granted the Commissioner's Motions and refer to the exhibits accompanying her Motion for in Camera Review in our discussion that follows.

communication between a taxpayer and an attorney” to any “communication between a taxpayer and any federally authorized tax practitioner.” I.R.C. § 7525(a)(1). Tax advice includes advice that is within the scope of authority of a federally authorized tax practitioner. I.R.C. § 7525(a)(3)(B). A federally authorized tax practitioner is an “individual who is authorized under Federal law to practice before the Internal Revenue Service if such practice is subject to Federal Regulation.” I.R.C. § 7525(a)(3)(A).

Further, outside of the protections of section 7525, the attorney-client privilege can extend to third parties when the communication is made to assist the attorney in rendering advice to the client. “The attorney-client privilege may extend to communications with third parties who have been engaged to assist the attorney in providing legal advice. If the advice sought is not legal advice, but, for example, accounting advice from an accountant, then the privilege does not exist.” *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011). Further, unless the accountant’s services were engaged to assist the attorneys in providing legal advice, the attorney-client privilege will not attach to the communications between the accountant and the attorneys. *Bernardo*, 104 T.C. at 685 citing *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961).

Tax Court proceedings are conducted in accordance with the Federal Rules of Evidence. See I.R.C. § 7453; Rule 143(a). Federal Rule of Evidence 502(b) governs the inadvertent disclosure of information or communication protected by attorney-client privilege. When made part of a federal proceeding, an inadvertent disclosure of privileged information does not operate as a waiver of privilege if: (1) the disclosure was inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B). See Fed. R. Evid. 502(b). We have adopted rules corresponding to Federal Rule of Civil Procedure 26(b)(5)(B), which require that once a party is notified that information provided in discovery or in response to a subpoena is subject to a claim of privilege, the notified party must “promptly return, sequester, or destroy the specified information and copies it has” and must “promptly present the information to the Court under seal for a determination of the claim.” Rule 70(d)(2); Rule 147(e)(2)(B).

All parties acted properly. Petitioners took the proper steps after an inadvertent disclosure. Upon discovery, petitioners’ counsel promptly notified the Commissioner of the inadvertent disclosure and instructed the Commissioner to return or destroy the documents in accordance with Federal Rule of Evidence 502(b). The Commissioner properly sequestered the documents and filed the information in a Motion for in Camera Review with the Court in accordance with Federal Rule of Civil Procedure 26(b)(5)(B).

II. *The Subpoena Documents*

A. *Exhibit 128-J*

Exhibit 128-J is an email chain that contains communications between petitioners and their accountant for assistance regarding tax return preparation. Communications seeking assistance with tax return preparation is not tax advice protected under section 7525. Accordingly, Exhibit 128-J is not protected from disclosure by attorney-client privilege or section 7525.

B. *Exhibits 135-J, 136-J, and 142-J*

Exhibits 135-J, 136-J, and 142-J are emails containing communications from petitioners requesting federal tax advice from their accountant. Under section 7525, the attorney-client privilege is extended to federally authorized tax practitioners giving federal tax advice. As such, Exhibits 135-J, 136-J, and 142-J are protected from disclosure by attorney-client privilege pursuant to section 7525.

C. *Exhibits 137a-J, 137b-J, 138a-J, 138b-J, and 141-J*

Exhibits 137a-J, 137b-J, 138a-J, 138b-J, and 141-J are emails containing communications from petitioners to their accountant requesting state tax advice. Section 7525 does not extend to state tax advice. As such, Exhibits 137a-J, 137b-J, 138a-J, 138b-J, and 141-J are not protected from disclosure by attorney-client privilege or section 7525.

D. *Exhibit 140-J*

Exhibit 140-J is an email chain containing attorney-client privileged legal advice that was forwarded to an accountant by petitioners for the purposes of tax return preparation. Attorney-client privilege is waived if privileged communications are disclosed to a third party. Petitioners received communications from their attorney that was privileged legal advice. However, the disclosure of the advice to a third party, their accountant, for purpose of return preparation, which is not subject to privilege, is a waiver of the attorney-client privilege that previously attached to the communication. Petitioners argue that the disclosure of the legal advice to their accountant does not constitute a waiver of attorney-client privilege because it was pursuant to a *Kovel* arrangement. See *Kovel*, 296 F.2d at 922. The disclosure to the accountant was not in furtherance of the legal advice, rather it was disclosed to assist in tax return preparation. *Kovel* does not apply in this circumstance, and petitioners waived attorney-client privilege with their disclosure of Exhibit 140-J.

Accordingly, it is

ORDERED that petitioners' Motion in Limine filed February 20, 2025, is granted in part and denied in part, to the extent set forth above. It is further

ORDERED that the Commissioner, pursuant to Rule 147(e)(2)(B), shall return

or destroy all copies (including electronic copies) of privileged documents Exhibits 135-J, 136-J, and 142-J, as identified on Exhibit 5 to the Commissioner's Motion of In Camera Review.

(Signed) Ronald L. Buch
Judge