

Tax Advice As Work Product: The Scope of Work Product Protection in Tax Shelter Controversies

By
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Alex Sadler analyzes the work product doctrine as a source of discovery protection in tax shelter controversies, looking specifically at recent federal court cases that broadly interpret the phrase “in anticipation of litigation.”

In tax controversies involving a tax-advantaged transaction, the government routinely requests documents reflecting tax advice the taxpayer received from its attorneys, accountants and other professional advisors in connection with the challenged return position. The IRS now mandates that at the commencement of an audit the examining agent issue a standard Information Document Request (IDR) requesting broad categories of information regarding any listed transactions¹ in which the taxpayer participated, including “[a]ll legal, accounting, financial, and economic opinions and memoranda secured by or on behalf of [the taxpayer].”² If the taxpayer is claiming tax benefits generated by a listed transaction, the issuance of an IDR for the taxpayer’s audit and tax accrual workpapers relating to the transaction also is mandatory.³ When a tax controversy involving a tax-advantaged transaction

is not resolved in examination or appeals and proceeds to litigation, it is a virtual certainty that the IRS attorney (if the case is filed in Tax Court) or the Department of Justice attorney (if it is filed in a refund forum) will seek discovery of all tax advice regarding the transaction, both from the taxpayer and the third parties that rendered the advice.

A taxpayer presented with such discovery requests has three potential sources of discovery protection: the attorney-client privilege, the statutory tax practitioner privilege⁴ and the work product doctrine. While tax practitioners instinctively consider the potential applicability of the attorney-client and tax practitioner privileges to tax advice requested by the government, they

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sometimes overlook the additional, and oftentimes greater, protection afforded by the work product doctrine. Interestingly, while the majority of recent court decisions in tax controversies have narrowly interpreted both the attorney-client privilege⁵ and the tax practitioner privilege,⁶ the courts have at the same time liberally construed the work product doctrine to protect tax advice from discovery, even where that advice was rendered before the disputed return was filed, an examination commenced or a 90-day letter issued.

This article analyzes the work product doctrine as a source of discovery protection in tax shelter controversies. After reviewing the

work product protection is often a source of discovery protection even when the attorney-client and tax practitioner privileges are not available or have been waived.

The Basics of Work Product Protection

The work product doctrine, first established as a matter of common law in the Supreme Court's landmark decision in *Hickman v. Taylor*⁷ and subsequently codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, shields from disclosure documents "prepared in anticipation of litigation or for trial by or for [a] party or

by or for that ... party's representative, (including the ... party's attorney, consultant, surety, indemnitor, insurer, or agent)."⁸ By its terms, Rule 26(b)(3) applies only to

"documents and tangible things."⁹ Work product protection of oral advice and other intangible work product continues to be governed by the principles established in *Hickman*. The purpose of work product protection is "to establish a zone of privacy for strategic litigation planning and to prevent one party from piggybacking on the adversary's preparation."¹⁰ As the Supreme Court stated in *U.S. v. Nobles*: "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case."¹¹

In the federal district courts and the Court of Federal Claims, the level of protection afforded by the

work product doctrine turns on whether the materials in question represent "fact work product" or "opinion work product." For "fact work product," representing the results of factual investigation undertaken by a party to prepare its case for litigation, the protection is qualified, and another party may obtain discovery "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means."¹² For "opinion work product," representing "the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation,"¹³ the protection provided by the work product doctrine is greater, if not absolute.¹⁴ The Tax Court, which generally permits more limited discovery than other federal trial courts, has not adopted the "substantial need and undue hardship" exception of Rule 26(b)(3), and has stated that work product is "generally intended to be outside the scope of allowable discovery."¹⁵

Decisions Treating Tax Advice Rendered in Contemplation of a Tax-Advantaged Transaction As Protected Work Product

The principal limitation of the work product doctrine is that the document in question must have been prepared "in anticipation of

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basics of work product protection, the article discusses recent federal court cases broadly interpreting the phrase "in anticipation of litigation," which is the principal requirement for a document to qualify for work product protection. The article synthesizes these cases and concludes that, in tax shelter controversies, the phrase "in anticipation of litigation" imposes a motivational rather than a temporal standard, and that this is not an especially difficult hurdle for taxpayers to overcome in controversies involving a tax-advantaged transaction. Finally, the article discusses the breadth of work product protection relative to the attorney-client and tax practitioner privileges, and explains that

litigation.”¹⁶ This requirement is easily satisfied if the document is prepared when a taxpayer is already embroiled in litigation with the IRS or the Department of Justice. However, until recently, the courts had not addressed to what extent, if any, the work product doctrine protected tax advice given to a taxpayer *before* litigation had commenced. In several recent cases involving tax-advantaged transactions, the courts have broadly interpreted the “in anticipation of litigation” requirement, holding that the work product doctrine can indeed apply to pre-litigation tax advice, even tax advice given contemporaneously with the disputed transaction and before the taxpayer reports the tax treatment on a return, so long as the prospect of litigation supplied part of the taxpayer’s motivation for obtaining the advice.

Adlman

The leading case is *M. Adlman*,¹⁷ in which the IRS issued a summons for a 58-page memorandum prepared by Arthur Andersen & Co. (“AA”) for the corporate taxpayer’s in-house counsel. The AA memorandum advised the taxpayer as to the tax implications of a proposed corporate reorganization that was expected to produce a substantial tax loss. The taxpayer resisted the summons on the ground that the AA memorandum was protected by the attorney-client privilege because it had been prepared to assist the in-house attorney in providing informed legal advice to management, and by the work product doctrine because it had been prepared in anticipation of litigation with the IRS. The government filed a summons enforcement proceeding, and the District Court rejected the taxpayers’ arguments and enforced the summons. On

appeal, the Second Circuit sustained the District Court’s finding that the taxpayer had consulted AA for tax advice, rather than to assist the in-house counsel in rendering legal advice, and concluded on that basis that the AA memorandum was not protected by the attorney-client privilege.¹⁸

However, the Second Circuit concluded that the AA memorandum might nevertheless qualify for work product protection. The District Court had determined that work product protection was unavailable because at the time the AA memorandum was created, neither the disputed corporate reorganization nor the ensuing litigation had yet to occur.¹⁹ In rejecting this reasoning, the Second Circuit held that all of the events resulting in litigation need not have occurred for a document to have been prepared “in anticipation of litigation” within the meaning of Rule 26(b)(3):

Although the non-occurrence of the events giving rise to the anticipated litigation is a factor that can argue against application of the work product doctrine, especially when the expected litigation is merely a vague abstract possibility without precise form, ... there is no rule that bars application of work product protection to documents created prior to the event giving rise to litigation. Nor do we see any reason for such a limitation. In many instances, the expected litigation is quite concrete, notwithstanding that the events giving rise to it have not yet occurred.²⁰

Because the District Court had applied an incorrect standard, the Second Circuit remanded the case

to the District Court to reconsider whether the work product doctrine was applicable.²¹

On remand, the taxpayer argued that the AA memorandum was prepared “in reasonable anticipation of litigation” because “[l]itigation was virtually certain to result from the reorganization and [the taxpayer’s] consequent claim of tax losses.”²² The District Court again rejected the taxpayer’s work product claim and ordered enforcement of the summons. On appeal, the Second Circuit vacated the enforcement order because it was unclear whether the District Court had applied the correct standard. The Second Circuit perceived a split between the Fifth Circuit, which accorded work product protection only to documents prepared “primarily or exclusively to assist in litigation,” and most other courts that accorded work product protection to materials prepared “because of” the prospect of litigation.²³ Between these competing interpretations, the Second Circuit concluded that the broader “because of the prospect of litigation” standard was more consistent with the text and policies of Rule 26(a)(3).

Under the Second Circuit’s interpretation, the fact that a document was prepared primarily for another purpose, such as to assist a taxpayer in deciding whether to enter into a transaction, does not necessarily disqualify it from receiving work product protection: “We hold that a document created because of anticipated litigation, which tends to reveal mental impressions, conclusions, opinions or theories concerning the litigation, does not lose work-product protection merely because it is intended to assist in the making of a business decision influenced by the likely outcome

of litigation.”²⁴ The Second Circuit remanded with instructions that the District Court apply the “because of” standard.²⁵

Long-Term Capital Holdings and Black & Decker

In two tax shelter controversies litigated since *Adlman*, the district courts have been similarly receptive to taxpayers’ claims that tax advice can be rendered “in anticipation of litigation,” and thus qualify for work product protection, even if it is rendered before the return in question was filed or an examination commenced.

Long-Term Capital Holdings. This interpretation of the “in anticipation of litigation” requirement is illustrated by the District Court’s decision in *Long-Term Capital Holdings*,²⁶ a case involving a partnership taxpayer’s acquisition of preferred stock with a high built-in tax basis. Before acquiring the stock, the taxpayer obtained separate tax opinions addressing different aspects of the proposed transaction from the law firms Shearman & Sterling (“S&S”) and King & Spaulding (“K&S”).²⁷ During the audit, the taxpayer provided the S&S opinion to the IRS to explain the source of the basis in the preferred stock, but withheld the K&S opinion on grounds of attorney-client privilege and the work product doctrine.²⁸ In the ensuing refund litigation, the Department of Justice filed a motion to compel the production of the K&S opinion on the basis that the taxpayer had waived attorney-client privileges and was not entitled to work product protection. Among the reasons cited by the government was that the taxpayer had disclosed to the accountant charged with preparing the partnership’s tax return that K&S had written a favorable “more

likely than not” opinion supporting the tax loss generated by the preferred stock.²⁹

The District Court ultimately decided that by disclosing the “gist” of the K&S opinion to its accountant, the taxpayer had waived the attorney-client privilege as to portions of that opinion.³⁰ Despite this waiver, however, the District Court found that the K&S opinion was entitled to work product protection. Crediting the taxpayer’s assertion that it had solicited the K&S opinion “because of” the prospect of litigation with the IRS, the court concluded that “while the K&S opinion may have been prepared in part to assist in a business decision, it is nevertheless eligible for work product protection because it is a document that was prepared with an eye toward litigation.”³¹ On the government’s motion for reconsideration, the District Court examined the K&S opinion *in camera*, and re-affirmed its finding that the opinion was prepared in anticipation of litigation.³²

The District Court also concluded that, whereas the taxpayer had waived the attorney-client privilege by disclosing the “gist” of the K&S opinion to its accountant, the disclosure did not effect a similar waiver of work product protection. The court reasoned that because the K&S opinion was “opinion work product,” its protection as work product remained intact:

[B]ecause opinion work product is granted a greater protection than fact work product, even if [the taxpayer] waived the attorney-work product to the specific matters actually disclosed in the K&S opinion, the “protection over the pure opinion work-product” in this case, including the matters ac-

tually disclosed, “may remain intact,” thus precluding [the government] from access to the portion of the K&S opinion for which the attorney-client privilege was waived by [the taxpayer’s] disclosure.³³

Black & Decker. In *Black & Decker Corp.*,³⁴ the government conceded that tax advice rendered contemporaneously with a disputed transaction—and thus before the return was filed or the examination or litigation had commenced—was eligible for work product protection. *Black & Decker* is an ongoing refund suit involving a large capital loss claimed by the taxpayer based on a tax-advantaged contingent liability transaction.³⁵ Before entering into the disputed transaction, the taxpayer retained the accounting firm Deloitte & Touche (“D&T”) to advise it regarding the tax implications of the proposed transaction. D&T prepared both a “short opinion” and a “long opinion” supporting the taxpayer’s intended tax treatment of the transaction. The taxpayer ultimately produced both opinions to the government, but withheld numerous other documents containing communications between the taxpayer and D&T on grounds of both the attorney-client privilege and the work product doctrine.³⁶ The government moved to compel the production of these communications, and the District Court agreed with the government that the attorney-client privilege was inapplicable because D&T had been retained to provide tax advice, not to assist in the rendition of legal advice.³⁷ That did not resolve the matter, however, as the taxpayer had also claimed work product protection with respect to its communications with D&T.

Notably, the government conceded that the tax advice provided by D&T was rendered “in anticipation of litigation,” and thus eligible for work product protection.³⁸ Instead, it argued that the taxpayer had waived work product protection by indicating during the audit to rely upon the D&T “short opinion” to defend against the imposition of accuracy-related penalties.³⁹ The District Court summarily rejected the government’s waiver argument, stating it had not found “any case law which would support the broad-based, subject matter waiver urged here by [the government], regardless of whether the work product is deemed opinion or fact work product.”⁴⁰ With respect to 53 D&T documents that the taxpayer had designated as opinion work product, the court stated that the government “has not offered any legal or factual support for the conclusion that the opinion work product ... should be subject to a wholesale, subject matter waiver.”⁴¹ The court found that 10 documents designated as fact work product were similarly protected because they did “not relate in any substantive way to the subject matter of the short opinion letter.”⁴²

Synthesis: “In Anticipation of Litigation” As a Motivational, Not Temporal, Limitation

Collectively, *Adlman*, *Long-Term* and *Black & Decker* demonstrate that in tax controversies involving a tax-advantaged transaction, courts will likely apply a motivational rather than temporal standard in determining whether tax advice was given “in anticipation of litigation” so as to qualify for work product protection under Rule 26(b)(3). This determination turns on whether the taxpayer

subjectively anticipated litigation with the IRS over a return position, and whether that prospect supplied at least part of the taxpayer’s motivation for soliciting the advice. As articulated by the Second Circuit in *Adlman*, tax advice obtained “because of” the prospect of litigation is eligible for work product protection.⁴³ So formulated, tax advice can qualify for work product protection even if rendered before the taxpayer engaged in the transactions leading to the disputed return position.

It is not necessary that the prospect of litigation be the taxpayer’s sole motivating factor for obtaining the tax advice. In *Adlman*, the taxpayer acknowledged that one of its reasons for obtaining the AA memorandum was to enable management to make an informed decision whether to go forward with the reorganization under consideration.⁴⁴ Similarly, the District Court observed in *Long-Term* that, even without the prospect of litigation, it was likely that the taxpayer would still have solicited the K&S opinion “in the ordinary course of business” to determine the tax benefits of the transaction.⁴⁵ Nevertheless, both courts held that the advice did not become ineligible for work product protection merely because it may have been prepared in part to assist in a business decision.⁴⁶

Construed as a motivational limitation, it should not be difficult for taxpayers in tax controversies involving a transaction projected to generate sizable tax benefits to establish that they obtained tax advice “in anticipation of litigation.” Most large and mid-size corporate taxpayers can reasonably anticipate that their returns will be audited. Examination is also reasonably likely for transactions that reported to the IRS under

Code Sec. 6011, registered under Code Sec. 6111 or for which list-maintenance is required under Code Sec. 6112. When a taxpayer is unsure whether the IRS will accept the return position, and secures tax advice to evaluate its chances in the event of litigation, the “in anticipation of litigation” requirement should be satisfied.

This is borne out in the recent work product decisions. In *Long-Term*, the District Court simply accepted the taxpayer’s representation, apparently made on brief, that it had obtained the K&S opinion because of the possibility of litigation with the IRS over the preferred stock transaction.⁴⁷ Such a showing could also be made by an affidavit or declaration of the taxpayer representative responsible for soliciting the advice. In *Black & Decker*, the government conceded that the taxpayer had obtained the pre-transaction tax advice from D&T in anticipation of litigation. The government’s concession can and should be seen as a tacit acknowledgment that tax advice obtained because the taxpayer believed a contemplated return position would likely attract the scrutiny of the IRS is *de facto* eligible for work product protection.

Scope of Work Product Protection Relative to the Attorney-Client and Tax Practitioner Privileges

Work product protection is both narrower and broader than the attorney-client and tax practitioner privileges. It is narrower in that qualified communications need

not have been made “in anticipation of litigation” to fall within the ambit of the attorney-client and tax practitioner privileges. But work product protection is often available to a taxpayer when the attorney-client and tax practitioner privileges are not. As the Second Circuit stated in *Adlman*: “The fact that a document does not come within the attorney-client privilege should not result in the deprivation of the protection accorded by Rule 26(b)(3).”⁴⁸ The same is true for the tax practitioner privilege, the scope of which is co-extensive with the attorney-client privilege.⁴⁹

As a general principle, the attorney-client privilege does not

party’s attorney, consultant, surety, indemnitor, insurer, or agent.”⁵² Thus, a taxpayer may avail itself of work product protection for tax advice provided by an accountant or other nonattorney, even if the attorney-client privilege (or tax practitioner privilege) is inapplicable. For example, the courts in *Adlman* and *Black & Decker* held that tax advice rendered by accountants were protected by the work product doctrine, even though they fell beyond the scope of the attorney-client privilege. The Tax Court has similarly accorded work product protection to materials prepared by the taxpayer’s accountant during the course of an examination.⁵³

The tax practitioner privilege applies to communications between a client and a “federally authorized tax practitioner,” defined as any individual qualified to practice before the IRS, including but

privilege as to not only the substance of the communication, but also to all other privileged communications bearing upon the same subject matter. For example, in *In re G-I Holdings*, the District Court found that a taxpayer had committed a wholesale waiver of the attorney-client privilege by stating in an interrogatory response that it had “consulted with outside legal counsel and other advisers regarding the tax treatment of the [transaction].”⁵⁷ Even though the taxpayer did not reveal the substance of any privileged communications, the court held that its interrogatory answer waived the privilege as to all attorney-client communications relating to the transaction.⁵⁸ Because the tax practitioner privilege is co-extensive with the attorney-client privilege, the same risks of waiver apply.

Work product protection is not so easily waived. As the District Court stated in *Black & Decker*, “The work product doctrine ... is both broader and more robust than the attorney-client privilege, as it does not appear that it can be waived by inadvertent disclosure in the same way that the attorney-client privilege can.”⁵⁹ Rather, work product protection can be waived only “by actions that are consistent with a ‘conscious disregard of the advantage that is otherwise protected by the work product rule.’”⁶⁰ The reason is that work product protection “does not exist to protect a confidential relationship, but rather to promote the adversary system ...”⁶¹ Accordingly, a litigant retains the protection of the work product doctrine even if he selectively discloses the work product to third parties, so long as he does not divulge it to his adversary.⁶² As illustrated by the District Courts’ decisions in both *Long-*

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protect communications between a client and a nonattorney, such as an accountant. The only exception is where the attorney retains a nonattorney whose assistance is required for the attorney to render sound legal advice to the client. This is the so-called “derivative privilege” recognized by the Second Circuit in *L. Kovel*.⁵⁰ However, the courts have uniformly declined to extend *Kovel*’s derivative privilege to tax advice provided by accountants to taxpayers in connection with tax-advantaged transactions.⁵¹ In contrast, work product protection is available for documents prepared “by or for [a] party or by or for that ...

not limited to attorneys.⁵⁴ However, Congress imposed certain limitations upon the tax practitioner privilege,⁵⁵ and the courts have interpreted the statute’s reach narrowly.⁵⁶ Thus, work product protection may be the only source of discovery protection available for tax advice rendered by a non-lawyer tax practitioner.

It is also much more difficult to commit an inadvertent waiver of work product protection, especially of opinion work product, than the attorney-client or tax practitioner privileges. A taxpayer’s disclosure of a privileged communication to a third party may vitiate the attorney-client

Term and *Black & Decker*, work product protection of tax advice is not vitiated by the disclosure, intentional or inadvertent, of that advice to a third party.

Conclusion

When the government demands the production of tax advice during an examination or in litigation, tax-

payers and their counsel should not overlook the work product doctrine as a potential source of discovery protection. While recent court decisions have construed both the attorney-client and statutory tax practitioner privileges narrowly, many of the same decisions have applied a liberal gloss to the work product doctrine as it applies to tax advice. In tax controversies

involving return positions that the taxpayer could reasonably foresee would attract the scrutiny of the IRS, it should not be difficult for the taxpayer to establish that it solicited tax advice “in anticipation of litigation.” Such advice should be eligible for work product protection, even if it was prepared by an accountant, and even if the advice was disclosed to a third party.

ENDNOTES

¹ A “listed transaction” is a transaction that is the same as or substantially similar to one of the types of transactions that the IRS has determined to be a tax avoidance transaction and identified by notice, regulation or other form of published guidance as a listed transaction. Reg. §1.6011-4(b)(2).

² IRS Form 4564 (Rev. Nov. 2003), Request No. 8.

³ Announcement 2002-63, IRB 2002-27, 72; see also IRM §4.10.20 (Requesting Audit, Tax Accrual, or Tax Reconciliation Workpapers) (July 12, 2004). In Announcement 2002-63, the IRS modified its longstanding position, as described in Announcement 84-46, IRB 1984-18, 18, that it would not request tax accrual workpapers as a standard examination technique.

⁴ Code Sec. 7525(a). All section references are to the Internal Revenue Code of 1986 as amended.

⁵ See, e.g., *M. Adlman*, CA-2, 95 USTC ¶50,579, 68 F3d 1495, 1499 (attorney-client privilege does not protect a tax opinion written by taxpayer’s outside accountant); *KPMG LLP*, DC D.C., 2004-1 USTC ¶50,281, 316 FSupp2d 30, 39–40 (attorney-client privilege does not protect tax opinions issued by a law firm that acts as a co-promoter of a tax-advantaged transaction); *Doe #1 v. Wachovia Corp.*, DC N.C., 2003-2 USTC ¶50,558, 268 FSupp2d 627, 633–35 (no attorney-client relationship exists between a tax shelter investor and a law firm acting as a promoter); *G-I Holdings, Inc.*, DC N.J., 2004-1 USTC ¶50,154, 218 FRD 428, 431–32 (taxpayer’s assertion of a “reliance on counsel” defense to the imposition of an accuracy-related penalty broadly waives the attorney-client privilege as to all matters relating to the tax treatment of the transaction at issue). It should be noted that, despite these recent limitations, the attorney-client privilege remains alive and well in tax controversies, provided that its core elements are satisfied. See, e.g., *BDO Seidman, LLP*, DC Ill., 2004-2 USTC ¶50,288 (tax advice rendered to accounting firm by outside and in-house counsel protected by the attorney-client privilege); *Long-Term Capital Hold-*

ings, *supra* note 26 (tax opinion provided by outside law firm to taxpayer in connection with tax-advantaged transaction protected by attorney-client privilege).

⁶ See, e.g., *BDO Seidman, LLP*, CA-7, 2003-2 USTC ¶50,288, 337 F3d 802, 812 (investors’ participation in tax shelter transactions not protected by tax practitioner privilege); *Wachovia*, *supra* note 5, 268 FSupp2d, at 637 (under Code Sec. 7525(b), tax practitioner privilege does not apply where a corporation participates in a tax shelter transaction); *KPMG LLP*, DC D.C., 2003-1 USTC ¶50,174, 237 FSupp2d 35, 39 (tax practitioner privilege does not protect communications between a tax practitioner and a client simply for the preparation of a tax return, such as a “more likely than not” opinion letter provided to a taxpayer).

⁷ *Hickman v. Taylor*, 329 US 495, 67 S Ct 385 (1947).

⁸ Fed. R. Civ. P. 26(b)(3).

⁹ *Id.*

¹⁰ *Adlman*, *supra* note 5.

¹¹ *U.S. v. Nobles*, 422 US 225, 238, 95 S Ct 2160 (1975).

¹² Fed. R. Civ. P. 26(b)(3).

¹³ *Id.*

¹⁴ *Compare Duplan Corp. v. Moulinage et Retorderie de Chavanoz*, CA-4, 509 F2d 730, 734, 1974 TRADE CAS. ¶74,297 (opinion work product never discoverable), *cert. denied*, 420 US 997, 95 S Ct 1438 (1975), *with Holmgren v. State Farm Mut. Auto. Ins. Co.*, CA-9, 976 F2d 573, 577 (1992) (opinion work product discoverable upon a highly persuasive showing of need).

¹⁵ Tax Ct. R. 70 advisory committee note, 60 TC 1097, 1098 (1973); see also *S. Zaentz*, 73 TC 469, 478, Dec. 36,499 (1979): “[U]nder the Tax Court Rules, the work product of counsel is not discoverable.”

¹⁶ Fed. R. Civ. P. 26(b)(3).

¹⁷ The Second Circuit addressed the taxpayer’s work product argument in two separate decisions: *Adlman (Adlman I)*, *supra* note 5, and *M. Adlman (Adlman II)*, CA-2, 98 USTC ¶50,230, 134 F3d 1194.

¹⁸ *Adlman I*, *supra* note 5, 68 F3d, at 1499–1500.

¹⁹ *Id.*, at 1501.

²⁰ *Id.* (citation omitted).

²¹ *Id.*, at 1502.

²² *Adlman II*, 134 F3d, at 1196, *supra* note 17. In support of this contention, the taxpayer asserted that its returns had been audited annually for the previous 30 years, the size of the refund generated by the restructuring would require the approval of the Joint Congressional Committee on Taxation, and the treatment of the reorganization would be based on an interpretation of the Internal Revenue Code without a case or IRS ruling directly on point. *Id.*

²³ *Id.*, at 1197–98.

²⁴ *Id.*, at 1195.

²⁵ There were no further reported proceedings in *Adlman*, suggesting that the IRS relented, or the parties settled the issue.

²⁶ The District Court addressed the taxpayer’s work product argument in two separate decisions: *Long-Term Capital Holdings (Long-Term I)*, DC Conn., 2003-1 USTC ¶50,105, and *Long-Term Capital Holdings (Long-Term II)*, DC Conn., 2003-1 USTC ¶50,304. *Long-Term* was tried to the court in summer 2003. In August 2004, the District Court issued a lengthy opinion holding that the preferred stock transaction was an economic sham and sustaining the IRS’s imposition of a 40-percent understatement penalty. *Long-Term Capital Holdings*, DC Conn., 330 FSupp2d 122 (2004).

²⁷ *Long-Term I*, *supra* note 26. The S&S opinion addressed the tax basis of the preferred stock created by an earlier set of transactions, whereas the K&S opinion addressed partnership tax issues raised by the proposed acquisition. *Id.*

²⁸ *Id.*

²⁹ *Long-Term I*, *supra* note 26. The government also argued that the taxpayer had waived the privileges by divulging the S&S opinion to the IRS during the examination. *Id.* The District Court ultimately rejected this argument, finding that the S&S opinion was never intended to be privileged, and, in any event, addressed a different subject matter than the K&S opinion. *Long-Term II*, *supra* note 26.

³⁰ *Long-Term II*, *supra* note 26.

³¹ *Long-Term I*, *supra* note 26.

³² *Long-Term II*, *supra* note 26.

³³ *Id.* (citations omitted).

³⁴ *Black & Decker Corp.*, DC Md., 2003-2 USTC ¶ 50,659, 219 FRD 87.

³⁵ The IRS designated contingent liability transactions as a “listed transaction” in Notice 2001-17, 2001-1 CB 730. In a typical contingent liability transaction, the taxpayer transfers contingent liabilities and assets approximately equal to the liabilities to a subsidiary in exchange for stock. Relying on Code Sec. 351, taxpayers have taken the position that the contingent liability was not a tax liability, and claimed a basis in the stock equal to the contributed assets. In *Black & Decker Corp.*, the taxpayer transferred contingent employee medical benefit liabilities and assets to a special purpose subsidiary in exchange for stock. 219 FRD at 89.

³⁶ *Black & Decker*, *supra* note 34, 219 FRD at 89–90.

³⁷ *Id.*, at 91. In so holding, the District Court concluded that the “derivative” first recognized in the seminal case of *L. Kovel*, CA-2, 62-1 USTC ¶ 9111, 296 F2d 918 did not apply because D&T had not been retained to translate otherwise indecipherable documents.

³⁸ *Id.* (“Defendant concedes the documents were prepared in anticipation of litigation and that, therefore, the work product doctrine applies.”)

³⁹ *Id.*

⁴⁰ *Id.*, at 92.

⁴¹ *Id.*

⁴² *Id.*, at 93.

⁴³ *Adlman II*, *supra* note 17, 134 F3d, at 1202–03.

⁴⁴ *Adlman I*, *supra* note 5, 68 F3d, at 1498.

⁴⁵ *Long-Term I*, *supra* note 26.

⁴⁶ *Id.*; *accord Adlman II*, *supra* note 17, 134 F3d, at 1202–03.

⁴⁷ *Long-Term I*, *supra* note 26.

⁴⁸ *Adlman II*, *supra* note 17, 134 F3d, at 1200, note 4.

⁴⁹ Code Sec. 7525(a)(1); *KPMG LLP*, *supra* note 6, 237 FSupp2d 35, 38.

⁵⁰ *L. Kovel*, *supra* note 37, 296 F2d, at 922. (“[I]f the lawyer has directed the client, either in the specific case or generally, to tell his story in the first instance to an accountant engaged by the lawyer, who is then to interpret it so that the lawyer may better give legal advice, communications by the client reasonably related to that purpose out fall within the privilege”)

⁵¹ See *Adlman I*, *supra* note 5, 68 F3d, at 1499–1500; *Black & Decker*, *supra* note 34, 219 FRD at 90–91; *In re G-I Holdings, Inc.*, *supra* note 5, 218 FRD, at 434-37, see also Kim J. Gruetzmacher, *Comment: Privileged Communications with Accountants: The Demise of United States v. Kovel*, 86 MARQ. L. REV. 977 (Summer 2003).

⁵² Fed. R. Civ. P. 26(b)(3).

⁵³ *B.C. Bernardo*, 104 TC 677, 689, Dec. 50,705 (1995).

⁵⁴ Code Sec. 7525(a)(3)(A).

⁵⁵ Code Sec. §7525(a)(2), (b).

⁵⁶ See note 5, *supra*.

⁵⁷ *G-I Holdings, Inc.*, *supra* note 5, 218 FRD at 433.

⁵⁸ *Id.*

⁵⁹ *Supra* note 34, 219 FRD, at 92 (citations omitted).

⁶⁰ *Id.* (citation omitted).

⁶¹ *United States v. American Tel. & Tel. Co.*, CA-DC, 642 F2d 1285, 1299, 1980-2 TRADE CAS. ¶ 63,533 (1980) (emphasis in original).

⁶² See, e.g., *United States v. Gangi*, DC N.Y., 1 FSupp2d 256, 266 (1998) (prosecutor’s filing of draft indictment and prosecution memorandum waived work product protection).

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