



# Developments in Work-Product Doctrine and Privilege Issues

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# Three Types of Protections

- Attorney-Client Privilege
- Federally Authorized Tax Practitioner Privilege (I.R.C. § 7525)
- Work Product Doctrine





# Attorney-Client Privilege

- Communication between client and counsel
  - Not underlying facts
  - May be summary, memorialization, or restatement of communication
- Intended to be and was in fact kept confidential
  - Possibility of waiver
- Made for the purpose of obtaining or providing legal advice
  - Not for business purpose



# Federally Authorized Tax Practitioner Privilege (I.R.C. § 7525)

- Codified at IRC § 7525
  - Modeled on Attorney-Client Privilege, but covers tax advice given by federally authorized tax practitioners
  - Can be waived just like Attorney-Client Privilege
- Only applies to noncriminal matters involving IRS and DOJ
  - No protection against other Federal agencies (SEC, etc.), state tax authorities, or other parties in civil litigation
- Exception for written tax shelter promotional materials
- No protection if also independent auditor
- Courts have applied in very narrow terms



# Privilege and Waiver

- Recent Cases
  - *AD Investment Fund LLC v. Commissioner*, 142 T.C. No. 13 (Apr. 16, 2014)
  - *Eaton Corp. v. Commissioner*, Dkt. No. 5576-2 (T.C. Apr. 6, 2015)
  - *Salem Financial, Inc. v. United States*, 102 Fed. Cl. 793 (2012)
  - *Schaeffler v. United States*, 113 A.F.T.R.2d 2246 (S.D.N.Y. May 28, 2014), *appeal filed*, 2d Cir. No. 14-1965
- IRS Policy of Restraint



# Work Product Doctrine

- Protects materials prepared “in anticipation of litigation”
  - Serious contemplation, but not certainty
  - Different legal standards: primary/principle purpose v. “because of” test
  - Opposing party can still obtain on showing of substantial need and inability to obtain information elsewhere
- Applies regardless of who prepared materials
  - Not limited to attorneys
- Permits disclosure to third parties provided disclosure not inconsistent with adversarial process
  - Disclosure to independent auditor generally does not waive



# Work Product Doctrine: Anticipation of Litigation

- *United States v. Textron*, 577 F.3d 21 (1st Cir. 2009)
  - Tax work papers not in anticipation of litigation
- *Wells Fargo & Co. v. United States*, 112 A.F.T.R.2d 2013-5380 (D. Minn. 2013)
  - FIN 48 analyses were protected work product
- *Schaeffler v. United States*, 113 A.F.T.R.2d 2246 (S.D.N.Y. May 28, 2014), *appeal filed*, 2d Cir. No. 14-1965
  - E&Y memo and analysis not in anticipation of litigation



## Work Product Doctrine: Waiver

- *United States v. Deloitte*, 610 F.3d 129 (D.C. Cir. 2010)
  - No waiver by disclosure to auditor
- *Salem Financial, Inc. v. United States*, 102 Fed. Cl. 793 (2012)
  - Broad waiver of tax reserve documents



# Questions

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