

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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UNITED STATES OF AMERICA

Petitioner,

OPINION AND ORDER

v.

02-C-0030-C

TELEPHONE AND DATA  
SYSTEMS, INC. and subsidiaries,

Respondent.  
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This is a civil action for injunctive relief brought pursuant to the Internal Revenue Code, 26 U.S.C. § 7401. Petitioner United States of America seeks an order directing respondent Telephone and Data Systems, Inc. to produce seven documents pursuant to two Internal Revenue Service summonses issued for the purpose of determining respondent's federal tax liability for the 1995 and 1996 tax years. Respondent alleges these documents are protected under the attorney-client privilege and the work product doctrine. Jurisdiction is present under 26 U.S.C. §§ 7402(b) and 7604(b).

Presently before the court is (1) petitioner's petition to enforce the IRS summonses and (2) respondent's motion to quash these summonses.

On June 27, 2002, this court ordered an ex parte, in camera review of the seven disputed documents. On July 21, 2002, respondent submitted the documents in question and the court has reviewed them. Because I find that three of the documents are protected by the attorney-client privilege and the work product doctrine is inapplicable, I will deny in part and grant in part both respondent's motion to quash and petitioner's petition to enforce.

## OPINION

### A. The Disputed Documents

Petitioner issued a summons and made the following request:

1. Provide a complete and unedited copy of the September 26, 1996 memorandum authored by Ross J. McVey and James C. Michaelson. The recipient was Murray L. Swanson. Greg Wilkinson and Ron Webster were copied. This document was identified in Response to IDR No. 100, Exhibit A, attached thereto, as the taxpayer's privilege log (dated August 3, 2001) (hereinafter "the log") as #1.
2. Provide all documents or memoranda received from Sidley & Austin and Arthur Andersen LLP relating to and/or referred to in the September 26, 1996 memorandum referenced above.
3. Provide a complete and unedited copy of the October 24, 1996 outline analysis, in which the author is apparently unknown. The recipients of the outline were James C. Michaelson, Ross J. McVey, P. Anthony Nissley, Sidley & Austin. This document was identified as document # 6 per the log.
4. Provide a complete and unedited copy of the November 8, 1996 letter to Arthur Andersen LLP. The letter was authored by James C. Michaelson. The recipient was

P. Anthony Nissley, LeRoy T. Carlson, LeRoy T. Carlson, Jr., Murray L. Swanson, Greg Wilkinson, Ross J. McVey, Steve Fortey, Tamara Witt, Joe Tapajna, Keith Kechik, Tom Scherer, Melissa Page, Michael Hron, and Robert Wootton were copied. This document was identified as document # 2 per the log.

5. Provide a complete and unedited copy of the January 10, 1997 letter to Jenner & Block. The letter was authored by James C. Michaelson. The recipient was James M. Lynch. LeRoy T. Carlson, LeRoy T. Carlson, Jr., Murray L. Swanson, Grey Wilkinson, Ross J. McVey, Steve Fortey, Tamara Witt, Michael Hron, Robert Wootton, P. Anthony Nissley, Phil Lorenzini and Mark Krohse were copied. This document was identified as document # 3 per the log.

6. Provide a complete and unedited copy of the November 10, 1997 opinion issued by Jenner & Block. The opinion was authored by Jenner & Block. The recipients were the taxpayer, Ross J. McVey, Sidley & Austin, and Kramer, Rayson, Leake, Rodgers & Morgan. Francis J. Wirtz, Andrea M. Desportes, James M. Lynch and Kenneth L. Harris were copied. This document was identified as document # 4 per the log.

7. Provide a complete and unedited copy of the December 2, 1997 opinion issued by Arthur Andersen LLP. The opinion was authored by Arthur Andersen LLP. The recipients were the taxpayer, Ross J. McVey, Sidley & Austin, Jenner & Block, and Kramer, Rayson, Leake, Rodgers & Morgan. Murray L. Swanson, Greg Wilkinson, Keith Kechik, Robert A. Kleczynski, Mark A. Masek and Joseph J. Tapajna were copied. This document was identified as document # 5 per the log.

#### B. Attorney-Client Privilege

It is well established that the IRS's summons power is "not absolute and is limited by the traditional privileges, including the attorney-client privilege." Upjohn Co. v. United States, 449 U.S. 383, 398 (1981). The Court of Appeals for the Seventh Circuit has adopted the general principles of the attorney-client privilege outlined by Professor Wigmore:

(1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

United States v. Evans, 113 F.3d 1457, 1461 (7th Cir. 1997) (quoting 8 Wigmore, Evidence §2292 (McNaughton rev. 1961); see also United States v. White, 970 F.2d 328, 334 (7th Cir. 1992) (quoting United States v. Lawless, 709 F.2d 485, 487 (7th Cir. 1983)). “The party seeking to invoke the privilege bears the burden of proving all of its essential elements.” Evans, 113 F.3d at 1461. Because the privilege is in derogation of the search for the truth, it must be strictly confined. See id. Claims of privilege must be made and adjudged on a communication by communication basis. See White, 970 F.2d at 334. Simply transmitting information to an attorney does not cloak it in the privilege: “a communication is not privileged simply because it is made by or to a person who happens to be a lawyer.” Evans, 113 F.3d at 1463 (citation omitted). “The attorney-client privilege shields only those communications by a client to an attorney that were intended to be confidential.” Id. at 1462. The attorney-client privilege applies to communications between corporate employees and counsel made at the direction of corporate superiors in order to secure legal advice. See Upjohn, 449 U.S. at 390-94.

Because the documents have been submitted ex parte for in camera inspection, I will determine whether the attorney-client privilege is applicable to each document in turn. (The

numbering sequence corresponds to the log.)

1. September 26, 1996 Memorandum

This document is a summary of the conclusions by tax advisers, including Sidley & Austin, Arthur Andersen and Skadden Arps, involving a high basis low value stock transaction. This is a business opinion by tax and transaction experts. The attorney-client privilege does not apply to this memorandum.

2. November 8, 1996 Letter

This document requests two tax opinions. The letter is from respondent's Tax Manager and to Arthur Andersen. Respondent alleges in its brief that this letter was written "on the advice of [in-house counsel]." This reference to counsel does not turn tax advice into legal advice. Thus, the attorney-client privilege does not apply to this letter.

3. January 10, 1997 Letter

This letter requests a tax opinion regarding whether the IRS would recognize the loss generated by the transactions at issue. The letter is from respondent's tax manager to Jenner & Block. Although this is a close call, I conclude that the attorney-client privilege applies to this letter.

4. November 10, 1997 Letter

This is an opinion from Jenner & Block to respondent examining the legal issues presented by the transactions in question. This is legal advice and the attorney-client privilege applies to this letter.

5. December 2, 1997 Letter

This is a letter from Arthur Anderson to respondent. It outlines the federal income tax consequences of the transactions at issue. Although it is somewhat similar to the November 10, 1997 letter from Jenner & Block, the law firm did not ask for it or incorporate it into their opinion. Thus, this is accounting advice from an accounting firm and not legal advice from a law firm. The attorney-client privilege does not apply to this letter.

6. October 24, 1996 Outline Analysis

Respondent contends that this outline analysis was prepared as a framework for addressing legal issues. The document was prepared by Arthur Andersen. This is tax advice and the attorney-client privilege does not apply to this outline analysis.

## 7. October 8, 1997 Letter and Attachments

This is a letter from Sidley & Austin to respondent in which a memorandum and a mark-up of an Arthur Andersen opinion had been enclosed. The attorney-client privilege applies to this letter and both attachments.

### B. Work Product Doctrine

Respondent argues that because it is audited regularly (as a large-case taxpayer in the Coordinated Examination Program), it “anticipated that, when audited, the Transaction would lead to federal income tax controversy proceedings, including litigation.” See Rspt.’s Reply, dkt. #19, at 10. Therefore, respondent argues, when it produced the disputed documents, it did so in anticipation of litigation. Although it seems logical for respondent to anticipate an audit, it is unclear from the briefs why respondent also anticipated that such an audit would not result in a ruling in its favor and, moreover, would lead to litigation. The problem with respondent’s assumptions is that they are too remote from litigation to invoke the work product doctrine.

The Court of Appeals for the Seventh Circuit has held that “[a]lthough litigation could ultimately have ensued in connection with the [taxpayer’s] tax filings, a remote prospect of future litigation is not sufficient to invoke the work product doctrine.” In re Special September 1978 Grand Jury (II), 640 F.2d 49, 65 (7th Cir. 1980) (citing Diversified

Industries, Inc. v. Meredith, 572 F.2d 596 (8th Cir. 1977)). “At most, the materials were prepared with an eye toward a possible administrative proceeding before the Internal Revenue Service.” Id.; see also Velsicol Chemical Corp. v. Parsons, 561 F.2d 671 (7th Cir. 1977) (court refused to apply work product doctrine to documents prepared for actual rather than potential administrative proceedings). Moreover, the “party seeking to assert the work product privilege has the burden of proving that ‘at the very least some articulable claim likely to lead to litigation [has] arisen.’” Binks Manufacturing Co. v. National Presto Industries, Inc., 709 F.2d 1109, 1119 (7th Cir. 1983) (quoting Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 865 (D.C. Cir. 1980)). Respondent has not articulated any such claim. Even if it were true that respondent prepared the documents in anticipation of an audit, “the purpose of the audit is not to prepare for or conduct litigation, but to assess the amount of tax liability through administrative channels.” United States v. Baggot, 463 U.S. 476, 480 (1983). Because the documents were not produced in anticipation of litigation, the work product doctrine does not attach to prevent disclosure.

## ORDER

IT IS ORDERED that

1. Respondent Telephone and Data Systems, Inc.’s motion to quash the Internal Revenue Summons is GRANTED in part and DENIED in part. It is GRANTED as to the

(a) January 10, 1997 letter to Jenner & Block; (b) November 10, 1997 letter from Jenner & Block; and (c) October 8, 1997 letter (and both attachments) from Sidley & Austin. It is DENIED as to the remaining four documents.

2. Petitioner United States of America's petition to enforce the Internal Revenue Summons is GRANTED in part and DENIED in part. It is GRANTED as to the (a) September 26, 1996 memorandum; (b) November 8, 1996 letter to Arthur Andersen; (c) December 2, 1997 letter from Arthur Andersen; and (d) November 24, 1996 outline analysis. It is DENIED at the remaining three documents.

3. The clerk of court is directed to close the file.

Entered this 16th day of July, 2002.

BY THE COURT:

BARBARA B. CRABB  
District Judge