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 petitioned this court to enforce two Internal Revenue Service summonses, encompassing seven documents. Respondent argued that the documents were protected from disclosure by the attorney-client privilege and the work product doctrine. On July 16, 2002, after an in camera inspection, this court denied in part respondent's motion to quash the IRS summonses (and thus granted in part petitioner's petition to enforce the IRS summonses) as to four of the seven documents on the basis of attorney-client privilege only. The four documents are as follows: (1) the September 26, 1996 memorandum; (2) the November 8, 1996 letter to Arthur

Andersen; (3) the December 2, 1997 letter from Arthur Andersen; and (4) the November 24, 1996 outline analysis. Because this determination concluded the proceedings, I directed the court of clerk to close the file. Judgment was entered on July 17, 2002.

Presently before the court is respondent's (1) motion for a stay of the judgment pending appeal pursuant to Fed. R. Civ. P. 62(c); and (2) respondent's motion for leave to file a reply to petitioner's response to its motion for a stay pending appeal.

Because respondent's brief in reply was received contemporaneously with its motion for leave to file the motion and does not affect the outcome, I will grant respondent's motion for leave to file a reply. However, because respondent fails to show that it meets the criteria necessary to issue a stay, I will deny its motion for stay of the judgment pending appeal.

OPINION

The factors regulating the issuance of a stay under Fed. R. Civ. P. 62(c) are "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Hilton v. Braunskill, 481 U.S. 770, 776 (1987). Petitioner contends that respondent must meet all four criteria. See In re Power Recovery Systems, Inc. v. Dodge Chemical Co., 950 F.2d 798, 804 n.31 (1st Cir. 1991) ("Failure to

meet even one of the criteria justifies denial."). Respondent contends that the four factors are not applied rigidly. See Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991) ("These factors are not prerequisites that must be met, but are interrelated considerations that must be balanced together."); Goldstein v. Miller, 488 F. Supp. 156, 172 (D. Md. 1980) ("The necessary 'level' or 'degree' of possibility of success will vary according to the court's assessment of the other factors."). Even assuming an interrelationship of factors, as respondent argues, the balance of factors does not weigh in favor of respondent.

1. Likelihood of success

Respondent argues that there is a substantial likelihood of succeeding on appeal because this court failed to address the holding in United States v. Kovel, 296 F.2d 918 (2d Cir. 1961). In Kovel, the Court of Appeals for the Second Circuit held that the attorney-client privilege extends to communications made by a client to an accountant incident to legal advice. Id. at 922 ("What is vital to the privilege is that the communication be made *in confidence* for the purpose of obtaining *legal* advice *from the lawyer*.") (emphasis in original). The court held explicitly that "[i]f what is sought is not legal advice but only accounting service . . . or if the advice sought is the accountant's rather than the lawyer's, no privilege exists." Id. However, in Kovel, the court applied the same eight-prong Wigmore test, id. at

921-22, that is used by the Court of Appeals for the Seventh Circuit, see United States v. Evans, 113 F.3d 1457, 1461 (7th Cir. 1997), and that I used in determining that no attorney-client privilege existed as to four of the documents, see Order dated July 16, 2002, dkt. #23, at 3-4. Contrary to respondent's contention, the decision not to cite Koval (a 1961 case from a non-binding jurisdiction) does not mean that I failed to apply the Wigmore test or the law enunciated in Evans (a 1997 case from a binding jurisdiction). Rather, I concluded after an in camera inspection that the attorney-client privilege was inapplicable to four documents because the documents did not constitute legal advice. For example, respondent argued that the November 8, 1996 letter sent from respondent's tax manager to Arthur Andersen was legal advice because it had been written on the advice of counsel. Simply put, the fact that an attorney advises a client to seek tax advice does not cloak unprivileged tax advice in the shroud of privileged legal advice.

Respondent argues further that the work product doctrine is also supported by the principles enunciated in Koval. See Resp. Mot. for Stay, dkt. #25, at 3, ¶ 9. This is incorrect. Koval addressed the attorney-client privilege only and never mentioned the work product doctrine. See Koval, 296 F.2d at 918-24. Respondent's work product argument failed because the documents in question were not produced *in anticipation of litigation*. See Order dated July 16, 2002, dkt. #23, at 7-8. In addition, respondent argues that Hodges, Grant & Kaufmann v. United States, 768 F.2d 719, 722 (5th Cir. 1985), is applicable

because that court stated that the work product doctrine "may" apply to documents produced "in anticipation of an administrative dispute." Id. There are two obvious problems with Hodges. First, the court's comments are simply dicta. Second, even if the comments were not dicta, this court is not bound by Fifth Circuit rulings and, moreover, the Seventh Circuit has held to the contrary. Specifically, the Court of Appeals for the Seventh Circuit has held that "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) ("At most, the materials were prepared with an eye toward a possible administrative proceeding before the Internal Revenue Service."); 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* administrative proceedings).

Accordingly, I find that respondent has failed to make even a minimal showing of likelihood of success on the merits. Thus, this factor weighs heavily in favor of petitioner.

2. Irreparable harm

Respondent relies heavily on this prong, arguing that it will be harmed irreparably and its appeal would be rendered moot if the court required disclosure of the contested documents. However, as petitioner points out, the Supreme Court has held that courts are able to fashion effective relief for taxpayers whose records are produced pursuant to an

enforcement order that is later modified or reversed on appeal. See Church of Scientology of California v. United States, 506 U.S. 9, 12-13 (1992) (court may order records returned or destroyed). In its reply brief, respondent retreats from its mootness stance and instead focuses on the fact that the information will have been divulged to the IRS forever. In other words, respondent argues that if the stay is not issued the cat will be out of the bag forever. However, if the documents in this case were returned or destroyed, the IRS would not be able to use any information they may contain to determine respondent's federal tax liability, which appears to be the bottom line. This factor weighs slightly in favor of petitioner.

3. Harm to other interested persons

Respondent argues that a stay would not halt the IRS examination. Petitioner agrees. However, petitioner argues that if a stay were granted, it would be harmed because the statute of limitations would continue to run as to respondent's 1995 and 1996 tax years. Thus, petitioner argues, a stay would halt a complete and accurate examination of respondent's 1995 and 1996 tax liability. Respondent argues that it has "cooperated with the IRS since the audit began in 1999—including extending the statute of limitations by agreement" and that petitioner "has presented no basis for assuming that [respondent] will not continue such cooperation throughout the close of the examination." Resp. Reply, at 4. However, all congenial gestures aside, respondent has not agreed to extend the statute of

limitations pending appeal. Therefore, respondent's speculation as to its own continuing cooperation does not stop the statute of limitations clock from ticking.

In addition, petitioner argues that the statute of limitations can be tolled during judicial enforcement proceedings only if the IRS issues a "designated summons," 26 U.S.C. § 6503(j), or "third-party summons," 26 U.S.C. § 7609(e)(2), neither of which was issued in this case. Respondent argues (in its reply brief only) that if petitioner wanted to toll the statute of limitations, it could issue a designated summons. However, it is unclear whether the criteria necessary to issue a designated summons are present in this case at this juncture, see 26 U.S.C. § 6503(j)(2)(A)(i)-(iii). Other than this bald assertion, respondent fails to walk the court through each element. Moreover, after a cursory review of § 6503 of the tax code the answer to this question is not readily apparent. It is unreasonable for respondent to expect the court to cull through the tangled tax code on its own and determine whether the IRS could meet the applicable criteria to issue a designated summons. This factor weighs in petitioner's favor.

4. Public interest

Respondent argues that because there is a broad public interest in recognizing and preserving the role of the attorney-client privilege and work product doctrine, the public interest weighs in favor of issuing a stay. Petitioner argues that the public interest is not

served by expanding the privileges beyond their established scope. Because I agree with both of these arguments, this factor is in equipoise.

In sum, three of the four factors weigh in favor of petitioner and the remaining factor is in balance. Moreover, the likelihood of success on the merits weighs heavily in favor of petitioner. Even assuming an interrelationship of the factors as respondent argues, the balance of factors does not come close to weighing in favor of respondent. Accordingly, respondent's motion for a stay pending appeal will be denied.

ORDER

IT IS ORDERED that

1. Respondent Telephone and Data Systems, Inc.'s motion for leave to file a reply brief in support of its motion for a stay pending appeal is GRANTED; and

2. Respondent's motion for a stay of the judgment pending appeal is DENIED.

Entered this 21st day of August, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge