

**UNITED STATES TAX COURT
WASHINGTON, DC 20217**

SECURITAS HOLDINGS, INC. AND)	
SUBSIDIARIES,)	
)	
Petitioners,)	
)	
v.)	Docket No. 21206-10
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent.)	
)	
)	
)	
)	

ORDER

This case for the redetermination of a deficiency is before the Court on respondent’s Motion to Compel Production of Documents, filed January 22, 2013. Petitioners’ objections to respondent’s motion are set forth in their response, filed February 6, 2013. Respondent’s reply to petitioners’ response was filed February 15, 2013, in response to which petitioners’ Surreply was filed on March 14, 2013. By Order dated February 20, 2013, respondent’s motion was assigned for disposition to the undersigned. A hearing was conducted on respondent’s motion on May 8, 2013, in Washington, D.C. Respondent’s counsel appeared and argued in support of the motion; petitioners’ counsel appeared and opposed it. The rulings embodied in this Order take into account all of the positions and arguments advanced by the parties in their respective submissions even though the argument/position is not here specifically discussed.

The issue(s) remaining in dispute arise from the disallowance of what the parties refer to as the “premium insurance deduction” (disputed deduction). The disputed deduction involves transactions between entities involved in petitioners’ organizational structure as proposed to petitioners by their tax advisors at PriceWaterhouseCoopers (PWC).

In a Request for Production of Documents served upon petitioners on or about December 10, 2012, respondent requested various documents, or categories of documents, created or generated between petitioners and their tax advisors. Many documents were provided to respondent in response to the document request; others, or portions of others, were withheld and listed on a privilege log prepared by petitioners and provided to respondent. According to petitioners, all of the documents requested by respondent that are identified in petitioners’

SERVED May 29 2013

privilege log are protected by the attorney-client privilege and/or the privilege created by section 7525.¹

The section 7525 privilege applicable here is derivative from the attorney-client privilege (except a federally authorized tax practitioner, as defined in section 7525(a)(3)(A), need not be an attorney). Consequently, in resolving the dispute between the parties with respect to the disclosure of the documents, or portions of documents, listed on petitioners' privilege log, we apply the principles applicable to the attorney-client privilege, which principles are well-known to the parties and need not be discussed in detail in this order. Suffice it to note that the privilege is designed to protect communications made in confidence by a client to an attorney in order to obtain legal advice.² Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); Zaentz v. Commissioner, 73 T.C. 469, 475 (1979). The advice so given is likewise protected by the privilege to the extent that disclosing the advice would disclose the confidential communication. See Upjohn Co. v. United States, 449 U.S. at 390; Bernardo v. Commissioner, 104 T.C. 677, 682 (1995). A subsequent voluntary disclosure that reveals the confidential communication waives the privilege. See Bernardo v. Commissioner, 104 T.C. at 684. In applying the law of privileges we follow precedent established in the United States Court of Appeals for the District of Columbia. See Bernardo v. Commissioner, 104 T.C. at 682; Conti v. Commissioner, 99 T.C. 370, 373 (1992), aff'd, 39 F.3d 658 (6th Cir. 1994).

The documents identified in petitioners' privilege log consist of: (1) email communications between petitioners' officers, petitioners' tax advisors at PWC and/or petitioners' outside attorneys; and (2) memoranda prepared by petitioners' tax advisors discussing tax advice provided to petitioners in connection with the Federal income tax consequences flowing from the manner by which petitioners were to provide for insurance protection. Most of the documents contain advice or recommendations made to petitioners by their tax advisors or attorneys, rather than specific facts provided to the tax advisors/attorneys by petitioners' officers. According to petitioners, the tax advice included in the protected documents cannot be disclosed without revealing, if only by implication, the confidential communication(s) made to the tax advisors/attorneys for the purpose of receiving such advice. That being so, petitioners resist disclosure of the documents even though with few exceptions the particular document contains no specific or express disclosure of any facts provided in confidence to the tax advisors/attorneys by any one of petitioners' officers. After an in camera review of the documents, and with one or two exceptions as noted in the transcript of the proceedings, we tend to agree with petitioners. For the following reasons, however, we need not address petitioners' privilege claims on a document-by-document basis. We proceed as though the documents, or portions of documents, identified on petitioners' privilege log are protected from disclosure as claimed and turn our attention to respondent's argument that petitioners have waived any applicable privileges.

¹Section references are to the Internal Revenue Code of 1986, as amended.

²For purposes of sec. 7525, we apply the attorney-client privilege principles to confidential communications made by a client to a federally authorized tax practitioner in order to obtain tax advice.

By letter dated February 12, 2003, from petitioners' outside counsel to an official of the Illinois Department of Insurance, petitioners requested an exemption from certain State insurance regulation requirements. All of the entities referenced in the letter are within petitioners' "corporate group". After its purpose is stated, the letter goes on to reveal:

The reason for the transfer of the Centaur stock from BI-Insurance Holding to Securitas Group Re is tax related. At present, the rehabilitation estate of Centaur is exempt from federal income tax (including tax on its investment income) because it has no premium income. (See 26 U.S.C. §501(c)(15), exempting certain insurance companies with annual premium less than \$350,000.) However, the U.S. corporate group of which Pinkerton's is a member is implementing a captive insurance program, which could jeopardize Centaur's federal tax exemption if Centaur and the new captive insurer are in the same U.S. "controlled group" for tax purposes. (See 26 U.S.C. §501(c)(15)(all insurers and premiums in the same "controlled group" treated in the aggregate for purposes of the \$350,000 limitation.) If there were no sale of Centaur stock, and if Centaur were to lose federal tax exemption as a result, a federal income tax liability could arise on Centaur's investment income. The rehabilitation estate of Centaur, and the common parent of Pinkerton's U.S. corporate group, would be jointly liable to the federal government for such tax. The proposed sale is intended to prevent this from happening, preserving Centaur's federal tax exempt status by removing Centaur from the U.S. "controlled group" for federal income tax purposes.

According to respondent, the letter operates as a waiver of the attorney-client and/or section 7525 privileges asserted by petitioners. Petitioners characterize this letter as nothing more than a routine public filing that reveals neither a confidential communication made to petitioners' tax advisors by petitioners nor any tax advice given in return. According to petitioners, like any public filing the letter does not result in the waiver of any privilege. For the most part, we agree with petitioners with respect to the consequences of a public filing, but only in principle; we disagree with their characterization of the letter and its consequences. The letter reveals, at least in part, the Federal income tax planning and advice given to petitioners by their tax advisors in "implementing a captive insurance program", which program: (1) is the topic of all of the documents identified in petitioners' privilege log; and (2) presumably gave rise to the disputed deduction. That being so, by revealing the tax advice and, if only by implication, the facts on which the advice is based, the attorney-client privilege as well as the section 7525 privilege are waived. Although the letter reveals only a part of the tax advice given to petitioners in connection with its "captive insurance program" tax planning, the waiver applies to the entire topic and therefore to each document identified on petitioners' privilege log.³ See In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989); In re Sealed Case, 676 F.2d 793 (D.C. Cir. 1982).

³In his submissions respondent limits his waiver argument to specific documents. Our ruling goes beyond respondent's limitations, which obviously are attributable to the manner in which documents not available to respondent are described in petitioners' privilege log.

Premises considered, it is

ORDERED that respondent's motion is granted. It is further

ORDERED that on or before June 14, 2013, petitioners provide to respondent's counsel an unredacted copy of each of the documents identified on petitioners' privilege log.

(Signed) Lewis R. Carluzzo
Special Trial Judge

Dated: Washington, D.C.
May 29, 2013