

UNITED STATES TAX COURT
WASHINGTON, DC 20217

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

ORDER

This matter is before the Court on Securitas’s Motion for Reconsideration of Order Granting Respondent’s Motion to Compel Production of Documents, filed June 6, 2013. The underlying issue before the Court is whether Securitas should be compelled to produce communications between it and PriceWaterhouseCoopers that relate to a captive insurance program, the tax treatment of which is at issue. Respondent moved to compel the production of these documents, and the Court assigned the disposition of that motion to Special Trial Judge Carluzzo. On May 29, 2013, Special Trial Judge Carluzzo held that a letter dated February 12, 2003, from Securitas’s outside counsel to the Illinois Department of Insurance, resulted in a waiver of the statutory privilege created by section 7525,¹ and further, that the waiver extended to the documents identified on the privilege log because those documents related to the same subject matter.² Shortly thereafter, Securitas sought

¹Unless otherwise noted, all section references are to the Internal Revenue Code of 1986, as amended, and all Rule references are to the Tax Court Rule of Practice and Procedure.

²Subject matter waiver occurs when a party discloses privileged information to its advantage, such that fairness dictates that other privileged information concerning the same subject matter should fairly be considered to place the disclosed information in context.

reconsideration raising, for the first time, Federal Rule of Evidence 502 (FRE 502) and the scope of the waiver.³

Securitas's motion for reconsideration will be denied. Securitas did not previously argue that FRE 502 would apply to prevent or limit a subject matter waiver, and a motion for reconsideration is not the time to raise an issue that could have been raised at the time the underlying motion was being considered. Moreover, even after taking into account FRE 502, the result would not change; the February 12, 2003 letter resulted in a waiver and the subject matter waiver extends to the documents contained on the privilege log.

Background

Respondent requested the production of various documents sent between Securitas and PriceWaterhouseCoopers. In response to this request, Securitas produced many responsive documents but withheld other documents, in whole or in part, relying alternatively on the attorney-client privilege or the federally authorized tax practitioner privilege created by section 7525, which is derivative of the attorney-client privilege. These documents were listed on a privilege log that was provided to respondent. Thereafter, respondent filed the Motion to Compel Production of Documents which was followed by a response, a reply, and a sur-reply. In short, both parties filed multiple memoranda on the issue of whether the documents were properly withheld. That motion was assigned to Special Trial Judge Carluzzo for disposition.

Special Trial Judge Carluzzo held a hearing during which he went through each document, and the parties discussed whether each document should or should not be withheld. The parties also discussed the waiver of the privilege. The majority of the waiver discussion centered around a letter dated February 12, 2003, from Securitas's outside counsel to the Illinois Department of Insurance. The purpose of the letter was to request an exemption from complying with a provision in the Illinois Insurance Code. That exemption was necessary to permit Centaur's stock to be transferred so that its tax-exempt status could be maintained. The letter states that "[t]he reason for the transfer of Centaur stock from BI-Insurance Holding to Securitas Group Re is tax related." The letter goes on to state that

³Trial in this matter is set for July 23, 2013. In the interest of efficiency, the motion for reconsideration is being acted upon by the trial judge.

Pinkerton's "is implementing a captive insurance program, which could jeopardize Centaur's federal tax exemption".

After considering the parties' submissions and the arguments at the hearing, Special Trial Judge Carluzzo found that the February 12, 2003 letter resulted in a waiver of the attorney client privilege, and by extension, the privilege under section 7525. As a result, Securitas was ordered to produce the documents.

Reconsideration

The Tax Court Rules of Practice and Procedure are, to some extent, based on the Federal Rules of Civil Procedure, and the Court may defer to the Federal Rules of Civil Procedure when they are "suitably adaptable to govern the matter at hand."⁴ Tax Court Rule 161 allows motions for reconsideration of findings or opinion. Although this rule is contained in the title addressing post-trial proceedings, such motions may be filed with regard to interlocutory orders. Rule 60(b) of the Federal Rules of Civil Procedure allows for relief from a judgment or order for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; or (6) any other reason that justifies relief.

The Court has the discretion to grant a motion for reconsideration.⁵ This discretion is typically not exercised in the absence of substantial error or unusual circumstances.⁶ Reconsideration is not the appropriate forum to reassert previously unsuccessful arguments or to present new legal theories.⁷ In the Ninth Circuit, the circuit to which this case would be appealable, reconsideration is appropriate if a court: "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in the controlling law."⁸

⁴Rule 1(b), Tax Court Rules of Practice and Procedure.

⁵Vaughn v. Commissioner, 87 T.C. 164, 166 (1986).

⁶CWT Farms, Inc. v. Commissioner, 79 T.C. 1054, 1057 (1982).

⁷Stoody v. Commissioner, 67 T.C. 643, 644 (1977).

⁸Sch. Dist. No. 1J v. ACandS, Inc., 5 F.3d 1255, 1263 (1993).

In its motion for reconsideration, Securitas advances an argument under FRE 502 that neither party advanced previously. Respondent filed his Motion to Compel Production of Documents on January 22, 2013. Since that time Securitas filed a response and a sur-reply. In addition, the parties had a hearing on May 8, 2013. At no point in any of its submissions or at the hearing did Securitas mention FRE 502. As noted, a motion for reconsideration is not the proper time to address new legal theories. If Securitas wanted to argue that FRE 502 applied to limit the scope of any waiver, it had many opportunities to make such an argument. Securitas did not avail itself of these opportunities and may not attempt to raise a new legal theory now.

Securitas argues that it is not raising a new argument but rather that it is bringing a correct articulation of the law to the Court's attention. Thus, it argues that it is justified in arguing FRE 502 because the Court's Order cited a case which was subsequently rejected by FRE 502. Indeed, the Explanatory Note to FRE 502 states, "[t]he rule rejects the result in In re Sealed Case, 877 F.2d 976 (D.C. Cir. 1989), which held that inadvertent disclosure of documents during discovery automatically constituted a subject matter waiver."⁹

In re Sealed Case principally involved an inadvertent disclosure, that is, the party seeking to avoid the waiver argued that the disclosure was made in error.¹⁰ However, the issue before the Court does not involve an inadvertent disclosure. Here, the Court must address an intentional disclosure made to the Illinois Department of Insurance. Indeed, Securitas does not argue that the disclosure was unintentional or made in error. And FRE 502 did not reject In re Sealed Case insofar as the scope of waiver is concerned when there has been an intentional disclosure. Indeed, the United States Court of Appeals for the DC Circuit continues to cite In re Sealed Case approvingly on the issue of the scope of waiver.¹¹

⁹Fed. R. Evid. 502(a) advisory committee's note.

¹⁰In re Sealed Case, 877 F.2d 976, 977 (D.C. Cir. 1989).

¹¹See, e.g., Williams & Connolly v. SEC, 662 F.3d 1240, 1244 (D.C. Cir. 2011) ("It is true that if a party voluntarily discloses part of an attorney-client conversation, the party may have waived confidentiality — and thus the attorney client privilege — for the rest of that conversation and for any conversations

Applicability of FRE 502

Even if the Court were to accept Securitas's argument that FRE 502 should be considered, it would not change the result here. FRE 502(a) provides as follows:

Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver.

When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal and state proceeding only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.

FRE 502(c) extends 502(a) to disclosures made in a state proceeding.

FRE 502(c) requires that the disclosure be made in a state proceeding. At the time the February 12, 2003 letter was sent, Centaur was in a rehabilitation proceeding, much like a bankruptcy proceeding, in which the Director of the Illinois Department of Insurance was vested with the responsibility to oversee Centaur's business affairs. Securitas argues that the disclosures were "closely connected" to that proceeding.

In fact, the February 12, 2013 letter was independent of the rehabilitation proceeding. The letter states that "[t]he purpose of this letter is to request, pursuant to Illinois Insurance Department Rule 851.40(b), an exemption from complying with the provisions of Section 131.4 of the Illinois Insurance Code". Section 131.4 of the Illinois Insurance Code, 215 ILCS 5/131.4, applies to all domestic insurance companies, without regard to whether they are in rehabilitation proceedings, and provides that "no such acquisition of control or a merger with a domestic company may be consummated unless the Director has approved the transaction or granted an exemption." As a result, the disclosure was not made pursuant to the

related to the same subject matter.") citing In re Sealed Case, 877 F.2d 976, 980-81 (D.C. Cir. 1989) and In re Sealed Case, 676 F.2d 793, 809 (D.C. Cir. 1982).

rehabilitation proceeding. This letter in which the privileged information was disclosed would have been required if even Centaur were not in a rehabilitation proceeding. Therefore, the disclosure was not made in a state proceeding, and FRE 502(c) does not apply to prevent or limit waiver.¹²

Accordingly, the letter operates as a waiver of the privilege. Because FRE 502 does not apply, the Court turns to the common law to decide whether there was a waiver.¹³ The waiver is not apparent on the face of the letter, but even a cursory review of the logged documents illustrates that the February 12, 2013 letter is a disclosure of confidential communications regarding the same subject matter

¹²Although Securitas attempts to link the February 12, 2003 letter to the rehabilitation proceeding, it does not argue that the written request, standing alone, is a state proceeding. To be clear, the letter, standing alone, is not a “proceeding”. The term proceeding is not defined in FRE 502 or in the accompanying advisory committee’s notes. Black’s Law Dictionary defines a proceeding in a variety of ways including, as “the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment”. Black’s Law Dictionary 1324 (9th ed. 2009). The Ninth Circuit, the circuit to which an appeal of this case would lie, has used this definition and has also looked to the American Heritage Dictionary which defines “proceeding as a ‘course of action’ or ‘a procedure’ or (in a legal context) ‘legal action’ or ‘litigation’”. Dumont v. Ford Motor Credit Co. (In re Dumont), 581 F.3d 1104, 1116 (2009) (citing American Heritage Dictionary of the English Language 1398 (4th ed. 2000), see American Heritage Dictionary of the English Language 1404 (5th ed. 2011)). The California Evidence Code, which is operative in the state where Securitas maintains its principal office, defines a proceeding as “any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by law) in which, pursuant to law, testimony can be compelled to be given.” Cal. Evid. Code § 901. None of these definitions reach a voluntarily submitted written request where the scope of the disclosure was fully in the control of the party making the disclosure.

¹³Notably, the Committee Note to the 2008 amendment to Rule 502 states: “The rule makes no attempt to alter federal or state law on whether a communication or information is protected under the attorney-client privilege or work product immunity as an initial matter. Moreover, while establishing some exceptions to waiver, the rule does not purport to supplant applicable waiver doctrine generally.” Fed. R. Evid. 502 advisory committee’s note.

as the documents withheld by Securitas. Special Trial Judge Carluzzo correctly stated in his Order that: “[t]he letter reveals, at least in part, the Federal income tax planning and advice given to [Securitas] by their tax advisors in ‘implementing a captive insurance program’, which program: (1) is the topic of all the documents identified in Securitas’s privilege log; and (2) presumably gave rise to the disputed deduction.” As a result, the intentional waiver caused by the letter applies to the entire topic and each document listed on the privilege log.

Review of the Special Trial Judge’s Order

As a final matter, the Court addresses Securitas’s argument regarding the review of an interlocutory order by a special trial judge. Securitas’s argument concerning the authority of a special trial judge is moot because, after considering the underlying privilege dispute, the Court would reach the same conclusion.

But in any event, Securitas is mistaken in its view of the authority of a special trial judge to resolve matters that have been specially assigned under section 7443A(b)(7). Securitas correctly observes that section 7443A(c) limits the authority of a special trial judge to make a decision of the court in matters assigned under section 7443A(b)(7); however, in this instance, Special Trial Judge Carluzzo did not make a “decision” as that term is used in section 7443A.

In the Tax Court, “decision” is a term of art. In a deficiency proceeding such as this, the “decision” is the document that is entered showing the amount of the deficiency (if any) that the Court has determined. Special Trial Judge Carluzzo issued an interlocutory order, not a decision.

Furthermore, an interlocutory order by a special trial judge is not subject to the procedures set forth in Tax Court Rule 183. Rule 183, by its very terms, is limited to “cases tried before a Special Trial Judge”. A hearing with regard to a discovery motion is not a trial; thus, Rule 183 does not apply.

Conclusion

Securitas has not raised any appropriate ground for reconsideration. Its arguments regarding FRE 502 are unavailing, and FRE 502(c) would not apply to prevent a waiver because the disclosure was not made in a state proceeding.

Accordingly, it is

ORDERED that Securitas's Motion for Reconsideration of Order Granting Respondent's Motion to Compel Production of Documents, filed June 6, 2013, is denied. It is further

ORDERED that on or before July 9, 2013, Securitas shall provide to respondent an unredacted copy of each of the documents identified on Securitas's privilege log.

(Signed) Ronald L. Buch
Judge

Dated: Washington, D.C.
July 2, 2013