

UNITED STATES TAX COURT
WASHINGTON, DC 20217

EATON CORPORATION AND SUBSIDIARIES,)	
)	
Petitioner(s),)	
)	
v.)	Docket No. 5576-12.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

This case is presently calendared for trial at the Court’s special trial session in Chicago, Illinois, beginning August 5, 2015. On February 13, 2015 respondent filed a motion for determination of privilege claim pursuant to F.R.C.P. 26(B)(5)(B). On February 19, 2015, respondent filed first supplement to motion for determination of privilege claim pursuant to F.R.C.P. 26(B)(5)(B). On March 9, 2015, respondent filed a second supplement to motion for determination of privilege claim pursuant to F.R.C.P. 26(B)(5)(B). On March 18, 2015, petitioner filed a response to respondent’s motion. On April 20, 2015, respondent filed a reply to petitioner’s response.

Respondent’s motion seeks a determination whether a two-page document that has been provided to respondent in the informal consultation process is protected by the attorney-client privilege. Upon review of the document, respondent notified petitioner of the potential disclosure of privileged information. In response, petitioner requested that respondent destroy the document. Petitioner inadvertently sent the document without making redactions. Respondent contends that the document does not contain privileged information and even if the document included privileged information, petitioner waived its privileges by making the reasonable cause, good faith, and reasonable reliance allegations in its petition.

Petitioner contends the document contains legal advice regarding a filing deadline and that petitioner has not waived privilege and furthermore the legal advice contained in the document does not pertain to the advice that respondent asserts petitioner has put at issue.

Documents that are protected from disclosure by privilege are beyond the scope of discovery. Rule 70(b)¹. The Court applies relevant holding of the Court of appeals for the District of Columbia Circuit in resolving contested privilege claims. See Bernardo v. Commissioner, 104 T.C. 677, 682 (1995); see also sec. 7453.

¹Unless otherwise indicated, section reference are to section of the Internal Revenue Code, as amended, and Rule reference are to the Tax Court Rules of Practice and Procedure.

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Under Federal common law, the attorney-client privilege “applies to communication made in confidence by a client to an attorney for the purpose of obtaining legal advice, and also to confidential communications made by the attorney to the client if such communications contain legal advice or reveal confidential information on which the client seeks advice.” Bernardo v. Commissioner, 104 T.C. 677, 682 quoting Hartz Mountain Indus. v. Commissioner, 93 T.C. 521, 525 (1989). Section 7525(a) provides the general rule that “With respect to advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privilege communication if it were between a taxpayer and attorney.”

The communication at issue is between two employees of petitioner’s accounting firm. Petitioner has not shown why this document should be treated as a document subject to the attorney-client privilege.

Upon due consideration, it is

ORDERED that respondent’s motion for determination of privilege claim pursuant to F.R.C.P. 26(B)(5)(B), as supplemented, is granted and the document is not protected pursuant to attorney-client privilege.

**(Signed) Kathleen Kerrigan
Judge**

Dated: Washington, D.C.
May 14, 2015