UNITED STATES TAX COURT
WASHINGTON, DC 20217

CAYLOR LAND & DEVELOPMENT, INC., ET AL.,		
Petitioner(s),		
v.	Docket No.	17204-13, 17205-13, 17223-13, 19238-13, 23921-13, 23922-13, 23931-13, 11348-14, 17919-14, 17920-14, 17921-14, 17922-14.
COMMISSIONER OF INTERNAL REVENUE,		
Respondent		

O R D E R

These cases were on the Court's September 22, 2014 trial calendar for Phoenix, Arizona, but are now set to be tried at a special session to begin on February 9, 2016. There was a recent flurry of motions, and the Court spoke with the parties and counsel for Artex Risk Solutions, Inc. on November 19, 2015. Four motions are still outstanding.

The first is respondent's October 28, 2015 motion for determination of privilege. This prompted a second motion, Artex's motion for return of documents under Fed. R. Civ. Proc. 26(b)(5)(B). Both of these motions turn on whether three documents that Artex produced to the IRS are privileged -- either as attorney-client or as work product.

This question was easy to answer once the Court reviewed the documents *in camera.* It turns out that the three documents were one page each out of a document production to the IRS in this and many other related cases of tens of millions of pages of documents. These documents are:

an email from an Artex employee to an inhouse litigation counsel about collecting documents that the IRS had subpoenaed;

a Word document (almost certainly written by that same employee) describing his progress and method for compiling documents responsive to the IRS's document-production requests in these cases; and

a short email chain between that employee and outside counsel to Artex.

Rule 70(c)(3)(A) (our version of Fed. R. Civ. Proc. 26(b)(3)(A)) protects from discovery "documents . . . that are prepared in anticipation of litigation or for trial by or for another party or its representative . . . ." We've already held that documents created *during* litigation are prepared *in anticipation of* litigation (or, more precisely, in anticipation of *further* litigation). *See Ratke v. Commissioner,* 129 T.C. 45, 51 (2007). We find them to be protected by the work-product privilege, because we can think of no reason for their preparation except the discovery going on in these and related cases.

The IRS argues that these documents weren't "prepared by an attorney in anticipation of litigation or trial," and so aren't protected work product. Resp. Mtn. at 9, quoting *Bernardo v. Commissioner,* 104 T.C. 677, 687 (1995). But this argument is misleading: There is nothing in *Bernardo* or any other authority that the IRS points us to that suggests *only* attorneys can create protected work product, and we note that many of the documents that we found to be protected by the work-product privilege in that case were created by a CPA. *See id.* at 688 n.14, (protecting documents from a Mr. Ryan), 684 (identifying Mr. Ryan as CPA). The plain language of Rule 70 and Federal Rule of Civil Procedure 26 -- with their reference to "consultants" and "agents" who produce work product) refutes this.

We therefore grant respondent's motion to determine the privilege, but rule against him and find that the documents are all protected work product. We needn't rule on Artex's related argument that they are also protected by attorney-client privilege.

This doesn't quite mean that we have to rule in favor of Artex in its motion to return the documents. There are exceptions to the general rule that privileged work product is protected from discovery. The IRS identifies one of these -- work product for which a party has a "substantial need . . . to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Rule

70(c)(3)(A)(ii). But the IRS makes no showing that it meets the requirements of this exception.[1]

Respondent also remarkably claims -- remarkably because he cites to authorities predating the amendments to the Civil Procedure and Evidence Rules to reflect the explosion of e-discovery -- that Artex's representative who testified about the firm's record keeping and its compliance with the IRS's discovery requests waived the privilege. And he argues that Artex's voluntary production of the documents by itself waives the privilege.

These arguments are completely misguided after the promulgation of Federal Rule of Evidence 502 in 2007. The changes to that Rule eliminated the subject-matter waiver in most cases and created specific rules for inadvertent disclosure. Federal Rule of Evidence 502(b) now states that production is not a waiver if the disclosure is

> inadvertent;
>
> the holder of the privilege took reasonable steps to prevent disclosure; and
>
> the holder of the privilege took reasonable steps to rectify the error.

And this is just what Artex has shown. Remember that Artex produced two of the documents in a massive production of millions of documents; the third was one page of thousands. That inadvertence, and not design, was the cause is confirmed by the inclusion of descriptions of two of the documents in a 1,400 page privilege log of documents that Artex stated it wasn't producing.

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[1] We also don't agree with respondent's position that only *parties* to a case before a court can invoke work-product privilege. *See, e.g., United States v. Paxson,* 861 F.2d 730, 735 (D.C. Cir. 1988); *U.S. v. Clemens,* 793 F. Supp. 2d 236, 244 (D.D.C. 2011).

We likewise have no reason to doubt the reasonableness of Artex's steps to prevent disclosure. According to its unconstested affidavit, the document production in these cases was according to modern standards: Sent out to contract lawyers specializing in massive discovery, but subject to quality and privilege review. *See, e.g., United States Ex rel. Bagley,* 204 F.R.D. 170, 179 (C.D. Cal. 2001) (even two-tier review -- pulling potentially privileged documents and then reviewing them -- reasonable). And, finally, seeking to recover the documents within a day or two of learning of their inadvertent production is also reasonable. *See, e.g., Coburn Group, LLC v. Whitecap Advisors, LLC,* 640 F. Supp. 2d 1032, 1041 (N.D. Ill. 2009).

We will grant Artex's motion for return of the documents.

Next is respondent's October 28, 2015 motion to compel another deposition of Artex. Respondent argues that he could tell from Artex's inadvertently produced documents that the company was hiding many other relevant emails that it should have turned over and whose existence was denied by an Artex employee in his deposition. This, respondent says, is newly discovered evidence and justifies a second nibble at the deposition apple.

The first problem for respondent is one of timing. The inadvertently disclosed documents were produced in July 2014, a week before the scheduled deposition of the Artex witness. It does appear from the disclosed documents that there were potentially relevant emails that Artex did not produce by that date.[2] Artex's attorney actually disclosed their possible existence in a July 9, 2014 letter in which (after describing how Artex had searched its archives) he wrote that Artex had run a search of its email system but that "[e]ach hit must be separately pulled and opened in a time-consuming process. Mr. Lantz [the nonlawyer employee mentioned in the inadvertently disclosed work product we've already analyzed] is doing so but only the limited number of non-privileged emails contained in the shared file have been retrieved to date." By the end of 2014, Artex had gone through its archive and produced these documents, apparently in response to the summons that led to the production of millions of documents in a related IRS investigation. Yet on July 6, 2015 the parties agreed that discovery was closed

[2] There's nothing nefarious here -- like many large organizations, Artex has e-archives which readily cough up indications that emails might exist, but whose recovery is difficult and time consuming.

except for some minor interrogatories. We can see no reason to grant respondent's late motion to reopen discovery based on documents that he has had since 2014.

And that would be the case even if we thought something shady had occurred. But we don't even think that. It's true that Artex's representative testified at his deposition about the document search and said that he wasn't aware of any additional documents that might be relevant but weren't yet produced. He then went on to testify, however, that

> [W]hile I instructed everybody to put every document on this J drive, what was our repository of all documents, not everybody did. And so as we are preparing for something like this, we start scouring all sorts of places.
>
> And I think in the presentation letter we explained what we had done. And we never said this is absolutely every document that ever did exist. We're trying.
>
> I can tell you this. We have not and will not destroy any documents. We have and will produce everything we find.

And so, by the end of that year, Artex did.

We will deny this motion.

That leaves only Artex's motion for a Rule 502(d) order. This kind of order ensures that someone who discloses privileged information in a case doesn't waive that privilege. It's aimed at cases where document production is very large and the probability of inadvertent disclosure is high. Such an order can reduce the costs of litigation by forestalling courts and litigants from scrambling into motions practice every time there is an inadvertent disclosure. That would seem to describe this case, in which not an enormous deficiency is at stake and yet one in which the Court has already described the parties as having "acted in ways that sometimes seem a parody of civil discovery." *Caylor Land & Development, Inc., et al. v. Commissioner*, T.C. Dkt. Nos. 17205-13 *et al.* (Aug. 13, 2014) (order denying petitioners' motions for judgment on the pleadings, *et al.*). The advisory committee notes, however, state that the purpose of such an order is to allow discovery to proceed expeditiously by eliminating the need for extensive

preproduction privilege review. FED. R. EVID. 502 advisory committee's notes. Discovery in this case is closed. The Court will deny this motion.

To sum up, it is

ORDERED that respondent's October 28, 2015 motion for determination of privilege claim is granted to the extent that the Court has reviewed the contested documents *in camera* but denied to the extent it seeks a determination that the documents were not privileged. It is also

ORDERED that Artex's November 9, 2015 motion for return of the privileged documents is granted, and respondent shall return the documents to Artex's counsel. (The Court shall destroy the copies that it reviewed *in camera.*). It is also

ORDERED that respondent's October 28, 2015 motion to compel deposition is denied. It is also

ORDERED that Artex's November 9, 2015 motion for a Rule 502(d) order is denied. It is also

ORDERED that the Clerk of the Court is to serve an additional copy of this order to Jay H. Zimbler, counsel for Artex Risk Solutions, Inc.

Jay H. Zimbler
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
November 30, 2015