UNITED STATES TAX COURT
WASHINGTON, DC 20217

ESTATE OF MARION LEVINE, DECEASED, ROBERT L. LARSON, PERSONAL REPRESENTATIVE AND TRUSTEE, ROBERT H. LEVINE, TRUSTEE AND NANCY S. SALITERMAN, TRUSTEE,	)	
Petitioner(s),	)	
v.	)	Docket No. 13370-13.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

O R D E R

This case was originally on the Court's June 15, 2015 St. Paul, Minnesota trial calendar. It is now scheduled for trial at a special session beginning on November 13, 2017 in Washington, D.C.

On October 18, 2017, petitioners moved for a protective order to limit the scope of a subpoena *duces tecum* that respondent served last month on one of petitioners' attorneys and his firm. That subpoena seeks all documents that attorney Shane M. Swanson or his firm, Stinson Leonard Street LLP, have in their files for Marion Levine and her estate for the period from January 1, 2007 until July 1, 2017. Petitioners say that anything from after April 19, 2013 -- the date respondent issued the notice of deficiency (NOD) that led to this case -- is work product, and it would be unduly burdensome to prepare a privilege log so close to trial for what would inevitably prove undiscoverable material. Petitioners want *in camera* review as an alternative to simple production if we deny the main part of their motion.

Swanson is a key player in the case. He created Levine's estate plan and prepared the estate-tax return at issue. But one gets some idea of the scope of what respondent seeks by looking at the dates: Swanson filed the return in April 2010.

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He then represented the estate during the audit that led to the NOD back in April 2013. Respondent seeks to dive through the files all the way through the middle of 2017.

Petitioners knew that they were likely to have to fight respondent once they looked at the NOD back in 2013, and they immediately engaged the Stinson firm to represent them in "pending litigation with the IRS." (The engagement letter specifically lists Swanson, but he hasn't entered a formal appearance.) Petitioners have also retained two other firms for this case, and say those firms have also communicated extensively with Swanson and his firm.

We also note that last month petitioners served their own subpoena on Swanson and his firm. In it they demanded production of the firm's files for Marion Levine and her estate, but only for the period between January 1, 2007 and April 22, 2010 -- the date that Swanson filed the estate-tax return. Petitioners say they need these documents to mount their reasonable-cause defense to penalties. Respondent argues that raising a reasonable-cause defense of reliance on a professional adviser means petitioners have waived any work-product privilege.

The work-product privilege exists to prevent "unwarranted inquiries into the files and the mental impressions of an attorney" because "it is essential that a lawyer work with a certain degree of privacy." *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). The privilege specifically limits discovery of documents prepared "in anticipation of litigation." *See* Rule 70(c)(3); Fed. R. Civ. P. 26(b)(3); *Bernardo v. Commissioner*, 104 T.C. 677, 687 (1995). "In anticipation of litigation" means "created 'with a specific claim supported by concrete facts which would likely lead to [the] litigation in mind,' not merely assembled in the ordinary course of business." *Bernardo*, 104 T.C. at 687 (quoting *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1515 (D.C. Cir. 1983)); *see also Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987). We've held that documents prepared during audit -- and so before the IRS issues an NOD -- can be created "in anticipation of litigation." *Bernardo*, 104 T.C. at 688. We've also held that documents prepared by a representative who isn't directly retained, or who isn't even a lawyer, can be work product. *Id.* at 687-88. Any documents that Swanson and his firm produced after petitioners retained them specifically for this litigation likely fit within the definition of work product.

We note with special interest that respondent doesn't argue that the post-notice files aren't work product. He argues instead that petitioners' invocation of the reasonable-reliance defense is a waiver of the work-product privilege.

Respondent admits there's no case directly supporting his position, but he does cite an opinion about attorney-client privilege and a recent order citing that case in a work-product context. In the opinion, *Ad Inv. 2000 Fund LLC v. Commissioner*, 142 T.C. 248 (2014), we held that raising a good-faith defense could waive attorney-client privilege. *Id.* at 255. But the only documents at issue there were the more-likely-than-not opinion letters written before the transaction; the IRS wasn't seeking anything from after the taxpayer filed its return. *See id.* at 250. The same is true of the order that respondent cites, which concerned documents related to a taxpayer's choice of transfer-pricing method -- a choice it necessarily made before filing its return. *See Eaton Corp. & Subsidiaries v. Commissioner*, Docket. No. 5576-12, Order, May 11, 2015 (discussing both good faith and reasonable reliance).

We certainly agree that a good-faith-and-reasonable-cause defense can waive work-product protection for more-likely-than not opinion letters and transfer-pricing decisions made *before* a return was filed. But respondent cites no authority saying that raising the defense waives the doctrine with respect to documents produced *after* litigation begins.

We therefore find that there was no waiver here.

That's not the end of our analysis. A party can get work product if he shows he has a "substantial need" for it. Fed. R. Civ. P. 26(b)(3)(A)(ii); *Simon*, 816 F.2d at 400; *see also Hickman*, 329 U.S. at 512 (burden on movant seeking discovery through court order or subpoena). Respondent says only that he has a "genuine need to review Mr. Swanson's files and communications" to rebut petitioners' reasonable-cause defense. That defense will require petitioners to show that they gave a competent professional all pertinent facts and relied in good faith on his advice when taking the disputed return position. *See Neonatology Assocs., P.A. v. Commissioner*, 115 T.C. 43, 99 (2000), *aff'd*, 299 F.3d 221 (3d Cir. 2002). Respondent doesn't explain why anything produced *after* petitioners took their return position, let alone after respondent mailed the notice of deficiency, could possibly lead to evidence that is relevant and admissible to this defense. The cliche is that subpoenas aren't for fishing expeditions, *see Wis. Psychiatric Servs., Ltd. v. Commissioner*, 76 T.C. 839, 846 (1981); *see also* Rule 70(b) (discovery limited to items "relevant to the subject matter involved in the pending case"), but that's not quite true. A well-placed baited hook or cast net may well be okay; this kind of large-scale drift-netting is not.

It is therefore

ORDERED that petitioners' October 18, 2017 motion for a protective order is granted, and the contested subpoena *duces tecum* served on Shane M. Swanson and Stinson Leonard Street LLP on September 26, 2017 is limited to the period beginning January 1, 2007 and ending April 19, 2013.

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
October 26, 2017