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

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| Tribune Media Company f.k.a. Tribune Company & Affiliates, et al., | ) | |
| Petitioners, | ) | |
| v. | ) | Docket No. 20940-16, 20941-16. |
| COMMISSIONER OF INTERNAL REVENUE, | ) | |
| Respondent | ) | |

**O R D E R**

These consolidated cases are set for trial at a special session of the Court in Washington, D.C., on October 28, 2019. The petitioners are Tribune Media Company (Tribune) and Chicago Baseball Holdings, LLC (CBH). The Commissioner asks us to compel Tribune to respond to two requests for the production of documents relating to the section 6664(c) reasonable cause and good faith defense. Tribune argues that we should limit the scope of one request and that it has already produced everything responsive to the other. We will grant the Commissioner's motion in part as to the first request and deny it as to the second.

I. Background

The Commissioner issued a notice of deficiency to Tribune and a notice of final partnership administrative adjustment with respect to CBH. In addition to the underlying tax adjustments, the Commissioner asserted a 40% gross valuation misstatement penalty under section 6662(a), (b)(3), (e), and (h), or in the alternative a 20% penalty for negligence, disregard of rules or regulations, a substantial understatement, or a substantial valuation misstatement under section 6662(a), (b)(1), (b)(2), (b)(3), (c), (d), or (e).

Tribune and the tax matters partner of CBH timely filed petitions disputing the Commissioner's determinations. In its petition, Tribune asserted that "[e]ven if there were an underpayment of tax," Tribune would not be liable for any of these additions to tax because it "had reasonable cause and acted in good faith under

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I.R.C. § 6664(c). [It] reasonably and in good faith relied on its tax law advisors, who communicated their advice in an opinion letter dated October 27, 2009, and a supporting memorandum dated March 26, 2010."

In 2018, the parties began engaging in informal discovery, as required by Rule 70(a)(1) and Branerton Corp. v. Commissioner, 61 T.C. 691 (1974). The Commissioner sent a Branerton request to petitioners requesting documents exchanged with or relied on by Tribune's counsel relating to the transaction at issue and documents that support Tribune's affirmative defense of reasonable cause and good faith. Petitioners responded to the Commissioner's Branerton letter, and dissatisfied with that response, the Commissioner initiated formal discovery.

The Commissioner served his first request for production of documents, which included the requests currently at issue:

> 1. Provide all Documents exchanged with or prepared by MWE and/or its lawyers * * * relating to the Tax Opinion or advice on the tax treatment of the Transaction * * *.
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> * * * * * * *
>
> 4. Provide all Documents that Petitioner relied upon as of the petition date to support its claim that it had reasonable cause and acted in good faith under section 6664(c) as alleged in the Petition, including that Petitioner reasonably and in good faith relied on its tax law advisors as described in paragraph 5.m.2 of the Petition.

The opinion letter itself had already been made available to the Commissioner. Tribune responded:

> 1. RESPONSE: Petitioners incorporate their general objections as though fully set forth herein. Petitioners further object that this request for production calls for the production of documents subject to privilege or protection or that were prepared in anticipation of litigation. See General Objections #3. For the reasons stated on Petitioners' privilege logs, Petitioners assert, without limitation, the attorney-client privilege, the work product doctrine, and the tax practitioner's privilege under Section 7525. Id.

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4. OBJECTIONS: Petitioners incorporate their general objections as though fully set forth herein. Petitioners further object to the request in that it seeks a list of documents that Petitioners may use at trial "in support of the allegations in" specific petition paragraphs. Such a request is improper. It impermissibly seeks to modify the pretrial order unilaterally by demanding the exchange of documents Petitioners intend to use at trial in advance of the Court's scheduled deadline for that exchange. See Order, Coca-Cola Co. v. Comm'r, T.C. Dkt. No. 31183-15 (June 29, 2017).

Furthermore, the Court may, by granting Tribune's motion for partial summary judgment filed December 21, 2018, determine that the penalties were impermissibly asserted and thus render unnecessary Tribune's defense under IRC § 6664(c).[1]

The Commissioner filed a motion to compel Tribune to produce documents responsive to requests 1 and 4, above, and the Court ordered it to respond. Tribune responded as follows:

Request 1. If penalties remain at issue in this case, the privilege waiver would extend to documents that "concern the same subject matter" as the tax advisors' opinion and "ought in fairness to be considered together" with it. Fed. R. Evid. 502(a). Those documents must be (i) related to the opinion, (ii) exchanged between Tribune and its tax advisors, and (iii) in existence before Tribune filed its 2009 tax return. The motion should be denied insofar as Request 1 seeks documents that do not fit those three criteria.

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[1]We acknowledge that the parties have filed cross motions for partial summary judgment on the issue of whether the Commissioner complied with section 6751(b) when he determined penalties. Those motions remain under consideration by the Court. If petitioners prevail in full, then no penalties will remain at issue. But if any of the asserted penalties remain at issue, then the reasonable cause and good faith defense will also remain at issue. Tribune suggests that the Court defer resolving this discovery dispute until after it has decided the motions for summary judgment. But unless and until petitioners' motion is granted in full, the reasonable cause and good faith defense is at issue.

> Request 4. Tribune has produced the only documents that it relied on as of the petition date to support its reasonable cause defense. So the motion should be denied as to Request 4 because it is moot.

We have not yet ruled on the parties' motions for partial summary judgment so the penalties remain in issue for purposes of our ruling on the Commissioner's motion to compel. Some of Tribune's arguments as to why the motion to compel should not be granted depend on our granting of petitioners' motion for partial summary judgment. Since we have not granted that motion, we will not address those arguments.

## II. Analysis

The scope of discovery includes all information and responses that concern any non-privileged matter that is relevant to the subject matter of the case. Rule 70(b). The burden is on the party opposing production to show that information is not discoverable. Branerton Corp. v. Commissioner, 64 T.C. 191, 193 (1975)).

### A. Relevant Information

If the information or response sought "appears reasonably calculated to lead to discovery of admissible evidence" then it is properly within the scope of discovery. Rule 70(b).

> For purposes of discovery, the standard of relevancy is liberal. Rule 70(b) permits discovery of information relevant not only to the issues of the pending case, but to the entire "subject matter" of the case. We have previously ruled that material which would aid the discovering party in understanding relevant material, or that would lead to admissible evidence, is within the scope of Rule 70(b).

Zaentz v. Commissioner, 73 T.C. 469, 471–472 (1979)(citation omitted).

Section 6664(c)(1) provides that penalties imposed by section 6662 will not be imposed with respect to any portion of an underpayment if the taxpayer had reasonable cause and acted in good faith. Whether a taxpayer acted with reasonable cause and in good faith is determined on a case-by-case basis taking into account all pertinent facts and circumstances. Sec. 1.6664-4(b)(1), Income Tax Regs.

Reliance on tax advisors may show reasonable cause and good faith, depending on the circumstances. Sec. 1.6664-4(b)(1), Income Tax Regs. The tax advisor must base the advice on all pertinent facts and circumstances, which will generally require that the taxpayer disclosed all of the relevant facts to the advisor. Sec. 1.6664-4(c)(1)(i), Income Tax Regs.

Because Tribune raised the defense of reasonable cause and good faith, any information or responses relevant to that defense is discoverable. This includes discovery regarding whether Tribune disclosed all relevant facts to its advisors and whether it acted in good faith by relying on those advisors. Anything that could help the Commissioner understand these facts and circumstances is potentially discoverable.

B. Privileged Information

Documents protected by a privilege are beyond the scope of discovery. Rule 70(b). We apply the Federal Rules of Evidence in resolving contested privilege claims. See sec. 7453; Rule 143(a). The Federal Rules of Evidence apply the federal common law rules of privilege. AD Inv. 2000 Fund LLC v. Commissioner, 142 T.C. 248, 254 (2014); Fed. R. Evid. 501.

Tribune objects to production of certain documents in response to Request 1 on the basis of "the attorney-client privilege, the work product doctrine, and the tax practitioner's privilege under Section 7525." The Commissioner does not dispute that the documents sought were privileged, but rather argues that any privileges were waived by production of the tax opinion and the assertion of the reasonable cause and good faith defense. Tribune does not dispute that there has been a waiver, but disputes the scope of that waiver.

1. The Attorney-Client and Tax Practitioner Privileges

The attorney-client privilege may protect documents from disclosure. The privilege "applies to communications 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." Hartz Mountain Indus., Inc. v. Commissioner, 93 T.C. 521, 525 (1989).[2] The attorney-client

[2]Section 7525 extends this privilege "[w]ith respect to tax advice," applying "the same common law protections of confidentiality which apply to a

privilege is designed to "encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

However, courts consistently recognize that, as "an obstacle to the investigation of the truth" the privilege has limits. Garner v. Wolfinbarger, 430 F.2d 1093, 1101 (5th Cir. 1970). An exception to attorney-client privilege arises when the party asserting the privilege puts into issue a claim or facts that in fairness require consideration of the otherwise protected material. See, e.g., AD Inv. 2000 Fund LLC v. Commissioner, 142 T.C. at 254-256. Raising an affirmative defense may waive the attorney-client privilege. Johnston v. Commissioner, 119 T.C. 27, 37 (2002).

We have previously granted a motion by the Commissioner to compel production of opinion letters, over the taxpayer's claim of attorney-client privilege, when the taxpayer asserted a defense of reasonable cause and good faith under section 6664(c)(1). AD Inv. 2000 Fund LLC v. Commissioner, 142 T.C. 248. Essentially, it would have been unfair to allow the taxpayer to rely on the opinion letters to defend against the penalties but not to allow the Commissioner to examine the contents of the opinions. Id., 142 T.C. at 258.

The parties here appear to agree that the privilege applied and was waived. The issue is the scope of that waiver.

2. The Work-Product Doctrine

Another privilege that may protect documents from production is the work product doctrine. "The work product doctrine is distinct from and broader than the attorney-client privilege, which protects only communications between the attorney and client." Hartz Mountain Indus., Inc. v. Commissioner, 93 T.C. at 526. In 2012 we amended our rules to "formalize the Court's application of the work product doctrine." Rule 70 Comments to the 2012 Amendments. Rule 70(c)(3) provides:

> (A) A party generally may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or

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communication between a taxpayer and an attorney" to any "communication between a taxpayer and any federally authorized tax practitioner." Sec. 7525(a)(1).

> for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent), unless, subject to Rule 70(c)(4),
>
> (i) they are otherwise discoverable under Rule 70(b); and
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> (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.
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> (B) If the Court orders discovery of those materials, it must protect against disclosure of mental impressions, conclusions, opinions, or legal theories of a party's counsel or other representative concerning the litigation.

The work product doctrine may be waived. United States v. Nobles, 422 U.S. 225, 239 (1975). As with the attorney-client privilege, the parties agree that the work product doctrine applies but was waived. Again, the issue is the scope that waiver. The parties do not separately address the privileges waived and the scope of the waiver of each.

3. Scope of the Waiver.

Because Tribune has waived the applicable privileges, we must determine how far that waiver extends. In request 1, the Commissioner seeks all documents "relating to the Tax Opinion or advice on the tax treatment of the Transaction". Tribune asks us to limit its response to documents "related to the tax opinion".

When a taxpayer asserts that an underpayment was due to reasonable cause and that it acted in good faith, it forfeits the attorney-client privilege with respect to communications relevant to "the state of mind of those who acted for the * * * [taxpayer] and the * * * [taxpayer's] good-faith efforts to comply with the tax law." AD Inv. 2000 Fund LLC v. Commissioner, 142 T.C. at 258. And the Commissioner may "inquire into the bases of that person's knowledge, understanding, and beliefs". Id. at 257. The basis of Tribune's understanding that it acted in good faith and with reasonable cause is in issue. Any information underlying Tribune's knowledge of the appropriateness of its tax treatment at the time it filed its returns is relevant.

When a taxpayer choses to make a selective disclosure of work product to establish its intent, then "in fairness the related material must be disclosed even though it would otherwise be protected from disclosure." Ratke v. Commissioner, 129 T.C. 45, 56, 57 (2007), supplemented by T.C. Memo 2008-145.

Tribune admits that the privileges are waived, but seeks to limit the scope of that waiver. The Commissioner cites In re Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370 (Fed. Cir. 2001) for the proposition that "where a legal opinion was voluntarily disclosed, the privilege is also waived for the documents used contemporaneously to formulate the legal advice." Addressing the scope of waiver, after disclosure of legal advice, the Federal Circuit held that the attorney client privilege had been waived as to "all documents which formed the basis for the advice, all documents considered by counsel in rendering that advice, and all reasonably contemporaneous documents reflecting discussions by counsel or others concerning that advice." In re Pioneer Hi-Bred Int'l, Inc., 238 F.3d at 1374-1375.

Tribune's waiver of privilege extends to any information relating to whether Tribune acted reasonably and in good faith in its reliance on its tax advisors. This would necessarily include whether Tribune provided its advisors with all materially relevant facts.

C. The Requests at Issue

1. Request 1

The Commissioner seeks "all Documents exchanged with or prepared by MWE and/or its lawyers * * * relating to the Tax Opinion or advice on the tax treatment of the Transaction * * *". Tribune asks us to limit its required response to this request to documents: "(i) related to the opinion, (ii) exchanged between Tribune and its tax advisors, and (iii) in existence before Tribune filed its 2009 tax return."

Limiting Tribunes' production to documents "related to the opinion" would impermissibly narrow the discovery to which the Commissioner is entitled. The Commissioner is entitled to all documents and responses "relating to the Tax Opinion or advice on the tax treatment of the Transaction". Tribune's defense can only succeed if its reliance on the opinion was reasonable in light of all the facts and circumstances. The relevant facts and circumstances includes all of those facts

relating to the tax treatment of the transaction, not just those that made it into the tax opinion.

We agree with Tribune, however, that the information must have been known to Tribune for it to be relevant to its defense. Communications internal to Tribune's advisors but unknown to Tribune would not shed light on Tribune's knowledge at the time of filing its return. Thus, if the information was not exchanged between Tribune and its advisors, it is not relevant for establishing whether Tribune's reliance on their opinion was in good faith.

Further, the documents must have existed and known to Tribune before it filed its 2009 tax return. It is axiomatic that Tribune could not have had knowledge at the time it filed its return of documents that had not yet been created or communicated to it.

2. Request 4.

Request 4 is very narrowly tailored; it asks for documents "relied upon as of the petition date to support its claim that it had reasonable cause and acted in good faith". In its response to the Commissioner's motion to compel, Tribune asserts that it has produced the only documents it relied on in raising its affirmative defense to the penalties. We take Tribune's statement as true and thus there is nothing for us to compel.

For the reasons stated above it is,

ORDERED that the Commissioner's motion to compel filed May 1, 2019, is granted in part and denied in part. It is further

ORDERED that Tribune shall supplement its discovery responses consistent with this Order to be received by the Commissioner by August 2, 2019.

**(Signed) Ronald L. Buch**
**Judge**

Dated: Washington, D.C.
July 12, 2019