2-4-13 Chicago, IL Hearing JM

UNITED STATES TAX COURT

WASHINGTON, DC 20217

ESTATE OF BERNARD DORMAN, Deceased, DENNIS DORMAN, Executor, Petitioner,	)	Docket No. 11884-11
v.	)	
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

ORDER

This case is on the Court's February 4, 2013 trial calendar for Chicago, Illinois. It is a complex valuation case, and the parties have been cooperative in discovery, but have a genuine good-faith dispute on three of Respondent's document requests. Petitioner moved on October 31, 2012 for a protective order when they reached an impasse. Respondent moved on November 14 to compel the production of the documents that Petitioner wants protected. Each party then filed an objection to the other's motion. The Court spoke with the parties on December 4.

The Court assumes the parties' knowledge of the background facts of the case and motions. We are bound by the rules of evidence applicable in a trial without a jury in the United States District Court for the District of Columbia. Rule 143(a); sec. 7453. In light of that mandate, we have applied the law of the D.C. Circuit when it comes to issues concerning application of privilege. See Bernardo v. Commissioner, 104 T.C. 677, 682 (1995).

The clearly dominant view in federal common law--including the D.C. Circuit's, see United States v. Deloitte LLP, 610 F.3d 129, 136-37 (D.C. Cir. 2010)--is that the work-product privilege protects a document only if it is prepared "'because of' existing or expected litigation," United States v. Adlman, 134 F.3d

1194, 1198 (2d Cir. 1998) (collecting cases).[1] But a document could be prepared both because of litigation and because of some other reason, such as filing an estate-tax return.

There are, even within circuits that have adopted the predominant "because of" test, a variety of approaches to such dual-purpose documents. The Seventh Circuit seemed to have a bright-line test--"a document prepared for use in preparing tax returns *and* for use in litigation * * * is not privileged." United States v. Frederick, 182 F.3d 496, 501 (7th Cir. 1999). But the same Circuit, in In re Special September 1978 Grand Jury, 640 F.2d 49, 61 (7th Cir. 1980) had held that dual-purpose documents are protected by the privilege if *one* of the reasons they were prepared was "in anticipation of litigation." See id. ("[T]he materials subpoenaed * * * were indeed prepared in anticipation of litigation, even though they were prepared as well for the filing of the Board of Elections reports").

The Ninth Circuit, in trying to formulate its own rule in light of the Seventh Circuit's analyses, held that the dual-purpose documents it was looking at "are entitled to work product protection because, taking into account the facts surrounding their creation, their litigation purpose so permeates any non-litigation purpose that the two purposes cannot be discretely separated from the factual nexus as a whole." In re Grand Jury Subpoena, 357 F.3d 900, 909-10 (9th Cir. 2004).

The key case for us, however, is Deloitte, simply because it states the law in the D.C. Circuit. And in Deloitte, the D.C. Circuit opted to follow the Second Circuit in Adlman. The test we have to use in judging the extent of work-product protection for a dual-purpose document is whether "a document was created because of anticipated litigation, and would not have been prepared in substantially similar form but for the prospect of that litigation." See Deloitte, 610 F.3d at 138 (quoting Adlman, 134 F.3d at 1195). The D.C. Circuit held quite plainly that "a document can contain protected work-product material even though it serves multiple purposes, so long as the protected material was prepared because of the prospect of litigation." Id.

---

[1] The outlier seems to be the Fifth Circuit, which protects only documents prepared with the "primary motivating purpose" of existing or anticipated litigation. See United States v. El Paso Co., 682 F.2d 530, 542 (5th Cir. 1982).

With this discussion in mind, we turn to each of the document requests at issue here.

Document Request No. 1

This request seeks a copy of the engagement letter for Petitioner's expert witness, David Clarke (or for the corporation which employs or retains him). Clarke is the expert who wrote a report in which he valued the LLC and the CBOT Class A stock and that Petitioner then attached to the Dorman Estate's tax return. Clarke is also expected to be Petitioner's expert witness at trial next year. Respondent's document request is limited to the engagement letter for Clarke's work "in connection with the preparation of the valuations * * * for the preparation of the estate tax return."

Our recently amended Rule 70(c)(3)(A) protects from discovery documents "prepared in anticipation of litigation or for trial." The Estate argues that it knew its return--particularly its valuation of those two assets--would be audit bait for the IRS and that it attached Clarke's report to its return in anticipation of ending up in litigation, as in fact it has.

The Commissioner responds that a valuation report -- and presumably an engagement letter to produce that report -- that is attached to the Estate's return isn't prepared *just* for litigation, but is prepared for *both* litigation *and* compliance with the Tax Code. He specifically argues that there is no allegation in the Estate's motion papers that Clarke was acting under the direction of a lawyer at the time the Estate was preparing its return, which means that there could be no valid work-product claim. He also argues that documents produced to prepare a tax return don't become work product just because the IRS might later challenge the return.

We have to reject the Commissioner's first argument, because even communications between a party and an expert, if prepared in anticipation of litigation, are protected by the work-product privilege. See Rule 70(c)(3)(A) ("by or for another party *or* its representative") (emphasis added). Exhibit A to the Commissioner's motion also includes a cover letter from Clarke to the Estate's lawyer, which strongly suggests that and, one suspects, the engagement letter leading to it, were prepared under the lawyer's direction.

But the Commissioner's second argument may be more persuasive--the report from Clarke that the Estate attached to its return actually states that its purpose "was for estate tax reporting"--an assertion that it repeats on page 30 in its conclusion. The engagement letter that is the object of the Commissioner's document request may be likewise have been prepared for or include information about only return preparation.

As the D.C. Circuit emphasized in Deloitte, a trial judge needs a "sufficient evidentiary foundation" to rule on a motion in this situation, id. at 138, and to decide "whether a partial or redacted version of the document could [be] disclosed," id. at 139.

We will therefore order production of the engagement letter produced for *in camera* inspection.

Document Request No. 2

In this request, the Commissioner seeks any and all documents provided to Griffing [Clarke's company] by the Estate and its representatives, and all documents produced by Griffing in connection with his valuations attached to the estate-tax return.

This request, like the first, requires the Estate to produce any responsive documents for *in camera* review.

Document Request No. 3

In this request, the Commissioner seeks any and all documents other than draft reports sent between Griffing and the Estate in connection with Clarke's valuations in this case.

This request is obviously objectionable--Clarke is the Estate's expert witness for trial, and Rule 70(c)(4)(B) protects all communications between him and the Estate's counsel. In his motion papers, however, the Commissioner limits his request only to the categories of information excepted from this general rule:

- compensation paid to the expert;

- facts or data that the Estate's counsel provided and that Clarke considered; and

- any assumptions that the Estate's counsel provided and that Clarke relied on.

Fair enough as limited, but no further. It is therefore

ORDERED that petitioner submit authentic copies of any documents it has that are responsive to Document Requests 1 and 2 for *in camera* review on or before December 21, 2012. It is also

ORDERED that respondent's motion for an order compelling production of all documents responsive to Document Request 3 is granted to the extent described above and denied as to the remainder. Petitioner shall serve on counsel for respondent any such documents on or before December 21, 2012. It is also

ORDERED that petitioner's motion for a protective order protecting from disclosure all documents responsive to Document Request 3 is denied to the extent described above and granted as to the remainder. It is also

ORDERED that, since they both seemed unaware of the Code's somewhat obscure requirement that this Court follow D.C. Circuit evidence law, Petitioner may supplement his response with evidence and argument relating to Respondent's motion to compel production of document requests 1 and 2; and Respondent may supplement his response with evidence and argument relating to Petitioner's motion for a protective order relating to document requests 1 and 2. These supplemental responses, if any, must be filed on or before December 21, 2012.

(Signed) Mark V. Holmes
Judge

Dated: Washington, D.C.
December 12, 2012