



GRAY REED®

PROTECTING CONFIDENTIALITY:
Intersection of Attorney-Client Privilege and CPA Practice

Presented by Joshua Smeltzer



PROTECTING PRIVILEGE AT ALL STAGES

Pre-Controversy Tax Positions

Administrative Audit and Appeals

Litigation in Tax Court and District Court



PRE-CONTROVERSY TAX POSITIONS

- CPAs are the First Responders of Tax Disputes
 - *Couch v. US*, 409 U.S. 322 (1973) (“no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases.”)
- Privilege under Internal Revenue Code Section 7525 (a)(1)

“With respect to tax 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 federal authorized tax practitioner to the extent the communication would be considered a privilege communication if it were between a taxpayer and an attorney.”



PRE-CONTROVERSY TAX POSITIONS

- Basics of the Attorney Client Privilege
 - Communications “necessary to obtain informed legal advice which might not have been made absent the privilege.” *Fisher v. US*, 425 US 391 (1976).
- Dual Purpose Communications (i.e. legal and non-legal)
 - *In re Grand Jury*, 23 F.4th 1088 (9th Cir. 2022).
 - Primary Purpose (Second, Fifth, Sixth, and Ninth Circuits)
 - Significant Purpose (D.C. Circuit).

PRE-CONTROVERSY TAX POSITIONS

- 26 U.S.C. 7525(2) LIMITATIONS
 - Only civil proceedings
NOT criminal proceedings
 - Only matters before the
IRS or in Federal court
brought by or against the
United States
 - Only “tax advice” and NOT
other advice (e.g.
business, investment, etc.)



PRE-CONTROVERSY TAX POSITIONS

- 26 U.S.C. 7525(b)
 - Privilege Doesn't Apply to any written communications "in connection with the promotion of the direct or indirect participation of the person in any tax shelter."
- 26 U.S.C. 6662(d)(2)(C)(ii)

(ii) Tax shelter

For purposes of clause (i), the term "tax shelter" means—

- (I) a partnership or other entity,
- (II) any investment plan or arrangement, or
- (III) any other plan or arrangement,

if a significant purpose of such partnership, entity, plan, or arrangement is the avoidance or evasion of Federal income tax.

PRE-CONTROVERSY TAX POSITIONS

- Quasi-public Work of the CPA
 - Audit, Tax Return Preparation, Financial Reporting
 - *U.S. v. Arthur Young & Co.*, 465 U.S. 805(1984).
- Tax Return Preparation NOT Privileged
 - *United States v. Frederick*, 182 F.3d 496 (7th Cir. 1999)
- Common Interest Doctrine
 - *Schaeffler v. United States*, 806 F.3d 34 (2d Cir. 2015).



IRS ADMINISTRATIVE AUDITS AND IRS APPEALS

- 26 U.S.C. 7803(e)(7) – Taxpayer First Act (Access to Files)
 - “In any case in which a conference with the Internal Revenue Service Independent Office of Appeals has been scheduled upon the request of a ***specified taxpayer***...the Chief of Appeals shall ensure that such taxpayer is provided access to the nonprivileged portions of the case file on record regarding the disputed issues...not later than 10 days before the date of such conference.”
 - “Specified Taxpayer” is a taxpayer “whose adjusted gross income does not exceed \$400,000” or “whose gross receipts do not exceed \$5 million.”
 - Alternative – Freedom of Information Act (FOIA)



IRS ADMINISTRATIVE AUDITS AND IRS APPEALS

- Governmental Privileges
 - Deliberative Process Privilege
 - Pre-decisional and deliberative
 - Facts are NOT privileged
 - Attorney Client Privilege (i.e. the role of IRS Counsel)
 - 26 U.S.C. 6103 Protections
 - FOIA Exemptions to Disclosure

IRS ADMINISTRATIVE AUDITS AND IRS APPEALS

- Broad Investigatory Powers of the Internal Revenue Service
 - 26 U.S.C. 7602 (Examination of Books and Witnesses)
 - Informal Requests vs. Summons Power
 - Subject Matter Waiver Considerations
- Protections for Taxpayers
 - Taxpayer Bill of Rights
 - Taxpayer Interviews or other communications
 - Fifth Amendment Privileges (Testimonial Questions)
 - Kovel Agreements

LITIGATION IN US TAX COURT AND DISTRICT COURT

- Where are Tax Cases Heard?
 - U.S. Tax Court
 - Federal District Court
 - Court of Federal Claims
 - U.S. Bankruptcy Court
- The Role of the CPA in Litigation
 - Return Preparation and Potential Other Advice
 - Historical Information on Audit Procedure and Disclosures
 - Communications with IRS and/or Client

LITIGATION IN US TAX COURT AND DISTRICT COURT

- Discovery Procedures (Tax Court vs. District Court)
 - Informal vs. Formal Discovery
 - Deposition Procedures
 - Proportionality and Relevance Objections
 - Privilege Logs and other Claims of Privilege
- Trial Procedures (Tax Court vs. District Court)
 - Scheduling Orders
 - Availability of Witnesses and Testimony
 - Use of Expert Witnesses
 - Timing of Trial and Subsequent Decisions

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Board Certified in Tax Law by the Texas Board of Legal Specialization, Joshua Smeltzer focuses his practice on defending taxpayers in all stages of civil and criminal tax proceedings, including sensitive audits and examinations. Joshua frequently represents corporations, complex partnerships, family offices, estates and trusts, and high-net worth individuals. His practice encompasses a variety of industries, with special expertise in real estate, energy, insurance, private equity, digital assets and blockchain technology.

FORMER EXPERIENCE:

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TAX LAW



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