

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

Release Number: 20123901F

Release Date: 9/28/2012

CC:LB&I:RFPH:ATL:GBO:KBTyson
POSTF-132294-12
UILC: 7602.03-04

date: August 27, 2012

to: Stuart A. Karpel, Revenue Agent
Large Business & International
CTM Team 1021

from: Associate Area Counsel (Atlanta)
(Large Business & International)

subject: ("Taxpayer")
Application of the Attorney-Client Privilege to Corporate Minutes

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This document should not be used or cited as precedent.

ISSUE

Whether Taxpayer's privilege log provides a basis from which you can determine that the portion of Taxpayer's minutes that have been redacted are protected from disclosure by the attorney-client privilege?

CONCLUSION

As explained herein, some of the entries on Taxpayer's privilege log appear to provide a

sufficient showing that the communications are privileged. Other entries do not contain sufficient information from which the privilege can be determined. Because the proponent of the privilege bears the burden of proving the privilege applies, Taxpayer has not demonstrated that the privilege applies to those entries.

STATEMENT OF FACTS

You are examining Taxpayer's _____ and _____ tax years. Taxpayer is a corporation organized in _____ that is headquartered in _____. As part of your examination, you asked to review Taxpayer's minutes of its meetings. You received a copy of the minutes, but with portions redacted. Taxpayer's representative told you that the redacted portion was about a presentation that Taxpayer's general counsel made to Taxpayer's board of directors and therefore those portions of the minutes were redacted. Subsequently, Taxpayer's representative provided you with a privilege log regarding its claim of privilege.

Several of the entries in the privilege log refer to meetings at which individuals other than directors or officers of Taxpayer were present. Specifically, the first, second, and third unnumbered entries list three attendees at the meeting who are employees of _____. The eleventh, twelfth, and thirteenth unnumbered entries list an attendee from _____, an investment banker and "strategic advisor" to Taxpayer. The fourteenth and fifteenth unnumbered entries list attendees from _____, financial advisors to Taxpayer.

One entry, the fourth unnumbered entry, contains no communication by or to counsel, but the description is that the attendees "consider[ed] advice of counsel regarding legal compliance issues."

You asked for our comments and whether you should take further action.

LAW AND ANALYSIS

The attorney-client privilege protects confidential communications between attorneys and their clients made for the purpose of giving or receiving legal advice. See Upjohn Co. v. U.S., 449 U.S. 383, 389 (1981); Micosukee Tribe of Indians v. U.S., 516 F.3d 1235, 1262 (11th Cir. 2008). Note that the privilege applies only to legal advice (and not business advice) provided by an attorney. Energy Capital Corp. v. U.S., 45 Fed. Cl. 481, 485 (2000). Courts strictly construe the privilege within the narrowest possible limits, consistent with its purpose of encouraging full and frank communication between attorneys and clients. In re Grand Jury Subpoena, 204 F.3d 516, 519 (4th Cir. 2000). The proponent of the privilege bears the burden of showing that each element of the privilege applies, including that the party has not waived the privilege. In re Grand Jury Subpoena, 204 F.3d at 520; Hilson v. GEICO General Ins. Co., 2012 WL 3128953 at *1

(M.D. Fla. 2012); U.S. v. Bell, 1994 WL 665295 at *6 (N.D. Cal. 1994).

The attorney-client privilege applies to corporations. Upjohn Co. v. U.S., 448 U.S. at 389-390. The privilege extends beyond the control group, depending on factors including whether the communication concerned matters within the employee's scope of employment, and whether the communications were considered confidential. Upjohn Co. v. U.S., 448 U.S. at 394.

The privilege does not apply if the communication was made in the presence of strangers. In re Federal Grand Jury Proceedings, 89-10 (MIA), 938 F.2d 1578, 1581 (11th Cir. 1991). Courts, however, have applied the privilege to communications shared with consultants. See FTC v. GlaxoSmithKline, 294 F.3d 141, 148 (D.C. Cir. 2002) (holding that the attorney-client privileged applied, notwithstanding that the corporation shared the confidential communications with its public relations and government affairs consultants who were integral members of the team assigned to deal with those issues and completely intertwined with the corporation's litigation and legal strategies). The nonemployee must have a significant relationship to the corporation and the corporation's involvement in the transaction that is the subject of the legal services. Horton v. U.S., 204 F.R.D. 670, 672 (D. Colo. 2002); see also In re Bieter Co., 16 F.3d 929, 938 (8th Cir. 1994) (holding that, for purposes of the attorney-client privilege, a consultant was the functional equivalent of an employee because he was involved daily with the partners of the partnership; he was involved on the partnership's behalf in the unsuccessful development that was the basis of the litigation; and he, alone, possessed information about the development).

Taxpayer is the proponent of the privilege and bears the burden of proving that the privilege applies, including that it has not waived the privilege. Taxpayer provided no information for you to evaluate whether the outside advisors who attended the meetings had a sufficient relationship to Taxpayer and to the transactions that were the subject of the legal advice. Without such a showing, Taxpayer has not demonstrated that the communications were, in fact, confidential and has not demonstrated that if the communications were confidential, that it has not waived the privilege. Therefore, Taxpayer has not sufficiently demonstrated that the redacted minutes referred to in the first, second, third, eleventh, twelfth, thirteenth, fourteenth, and fifteenth unnumbered entries are privileged.

A court would likely uphold Taxpayer's claim that its internal deliberations (the fourth unnumbered paragraph) are privileged.

CASE DEVELOPMENT, HAZARDS, AND OTHER CONSIDERATIONS



Should you decide to ask Taxpayer to supplement its privilege log, Taxpayer should provide information about the extent of the consultants' relationship to Taxpayer. The following questions are designed to seek additional information in this regard:

- Please quantify the percentage of time spent on the transaction by consultants in relation to the total time spent on the transaction by both consultants and employees.
- Please state who (name, employer, title) provided the information to counsel upon which the advice was based.
- Please describe what, if any, capacity the consultants are authorized to act for Taxpayer.
- Please explain where the consultants are in Taxpayer's chain-of-command regarding the subject matter of the legal services.
- Please explain to what extent, if any, the consultants are personally responsible for or are involved in the activity that might lead to liability for Taxpayer.
- Please provide, to the extent not already provided, a detailed factual explanation showing that the consultant is the functional equivalent of one of Taxpayer's employees and include supporting documentation (for example but not limitation, consulting agreements, letters of engagement).

We coordinated our advice with the Associate office of Procedure and Administration.

If you have any questions, please contact the undersigned.

GWENDOLYN C. WALKER
Associate Area Counsel
(Large Business & International)

By: _____
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