

To: Our Clients and Friends

July 7, 2010

D.C. Circuit Rejects Argument that Work-Product Protection is Waived by Disclosure to Independent Auditors

On Tuesday, June 29, 2010, the U.S. Court of Appeals for the District of Columbia held, in United States v. Deloitte LLP, No. 1:08-mc-00411-RJL (D.C. Cir. June 29, 2010), that disclosure of attorney work product to an independent auditor does not waive work-product protection in certain circumstances.

The Facts of the Case

Dow Chemical Company (“Dow”) filed suit in 2005 challenging certain IRS adjustments to tax returns filed by partnerships owned by Dow and its subsidiaries. As part of the litigation, the IRS sought to compel the production of documents from Dow’s independent auditor, Deloitte and Touche USA, LLP (“Deloitte”). Dow claimed that, as attorney work product, three documents requested from Deloitte were protected from disclosure. One document was prepared by Dow’s outside counsel, one was prepared by Dow’s accountant and in-house counsel, and the last was prepared by Deloitte, summarizing a meeting with Dow employees and outside counsel. The first two documents had been disclosed to Deloitte so that the auditors could determine whether Dow’s contingency reserves were adequate for the transactions at issue in the case.

In filing a motion to compel disclosure, the IRS asserted that Dow had waived work-product protection for the requested documents when they were disclosed to Deloitte. In addition, while the IRS conceded that the first two documents were attorney work product, it asserted that the third document was not because (1) it was created by Deloitte rather than by a representative of Dow, and (2) it was created as part of the audit process, rather than “in anticipation of litigation”, as is required to assert work-product protection in the D.C. Circuit. The district court rejected each of these arguments, and on June 8, 2010, held that all three documents were protected from disclosure under the work product doctrine. The IRS appealed the decision.

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The Appellate Court's Ruling

On appeal, the D.C. Circuit Court rejected both arguments put forth by the IRS regarding whether the third document was attorney work product. The court stated that, under *Hickman v. Taylor*, 329 U.S. 495 (1947), the determination of whether a document is attorney work product is based on the information contained in the document rather than who prepared the document. The court also held that the document met the D.C. Circuit's test for materials prepared "in anticipation of litigation", and so would be attorney work product, should it contain the thoughts and opinions of counsel. The district court's decision on the issue was vacated and remanded, however, for an in camera review of the document to determine what portion, if any, contained such work product.

With respect to the IRS argument that Dow had waived work-product protection for all three documents by disclosing them to Deloitte, the court of appeals upheld the district court's decision. In its decision, the court found that the purpose of the work product doctrine is not to prevent the disclosure of confidential communications, but rather to promote the adversarial process by preventing the disclosure of an attorney's litigation preparation materials to opposing counsel. Because, in certain circumstances, disclosure of the work product to outside parties does not undercut this purpose, the court found that such disclosure does not constitute waiver of protection.

In making the determination of whether disclosure to Deloitte constituted a waiver of work-product protection, the court considered two factors: (1) whether Dow had engaged in selective disclosure to certain adversaries but not to others, and (2) whether Dow had a reasonable basis for believing that Deloitte would maintain the confidentiality of the disclosed documents. The court found that Deloitte was not an adversary, as Dow was preparing for litigation with the IRS and not Deloitte when it disclosed the documents in question. The court then found that Dow had a reasonable expectation of confidentiality because Deloitte has an obligation not to disclose confidential client information. As a result, the disclosure to Deloitte did not undercut the purpose behind the work-product doctrine, and as such, did not constitute a waiver of its protection.

The Impact of the Decision

At least in the D.C. Circuit, taxpayers generally can expect that their outside auditors will not be compelled to produce documents in their possession which were prepared by a taxpayer's in-house or outside counsel and are otherwise protected by the work-product doctrine. To enhance the chances of protecting such documents, taxpayers should ensure that the engagement letters they have with their outside auditors explicitly prohibit the disclosure of work product and other confidential information to others.

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If you would like to discuss how this matter may affect your business, please contact a member of Bryan Cave's [Tax Advice and Controversy Client Service Group](#).