

Baker Tilly Tax Alert

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United States v. Textron, **577 F.3d 21 (1st Cir. 2009)**, cert. denied, **U.S., No. 09-750 (May 24, 2010)**.

The United States Supreme Court denied a petition for certiorari to review whether the work product doctrine applies to tax accrual work papers.

Background

In *Textron*, the IRS sought workpapers that listed uncertain tax positions, the dollar amount potentially in dispute, and a percentage estimate of IRS success on the merits. Several of *Textron's* positions were identified by the IRS as listed transactions. The IRS generally will only request tax accrual workpapers when the taxpayer has not disclosed a listed transaction or has benefited from more than one listed transaction (the case in *Textron*).

Textron refused to turn over the workpapers because it held them to be protected by the work product doctrine. The work product doctrine prevents an opposing party—for taxpayers, the IRS—from seeking materials prepared in anticipation of litigation or preparation for trial, and those documents would not have been created but for the anticipation of the litigation.

Judicial history

The district court held that the workpapers were protected by the work product privilege. The First Circuit affirmed that the work product doctrine applied to the workpapers, but it remanded the case to the district court to determine whether the protection was waived. Before the case was reopened by the district court, the First Circuit withdrew the panel decision and agreed to hear the case again *en banc* (with the full panel of judges).

The court began by distinguishing documents prepared by an attorney to aid him or her in litigation versus those designed to assist the taxpayer to prepare documents in the ordinary course of business. The workpapers at issue were designed to prepare annual financial statements and, therefore, were prepared in the ordinary course of business, not for the purposes of litigation. The court also noted that the privilege does not cover a document simply because it contains a legal analysis or might someday assist with litigation. Only those documents created specifically for litigation that is anticipated or in process are eligible for protection.

Effect of denial of certiorari

There currently exists a split in the circuits over the treatment of the work product doctrine as it relates to tax accrual workpapers and other relevant documents prepared by tax practitioners for their clients. The Supreme Court's refusal to clarify the application of the doctrine leaves taxpayers to follow the rule governing their particular jurisdictions. It is unclear whether other circuits that have traditionally followed stricter rules might loosen them in light of the First Circuit's holding in *Textron*.

Recommended action

Taxpayers may not be able to avoid the potential disclosure of tax accrual workpapers after *Textron*. However, this issue may be rendered moot by the IRS's proposed Schedule UTP, Uncertain Tax Position Statement that requires taxpayers to report uncertain tax positions. The proposed schedule, which may be effective this year for taxpayers subject to FIN 48 financial statement reporting, essentially requires taxpayers to report their FIN 48 positions to the IRS with their annual tax returns. For more information on this new schedule, please see our previous Tax Alert "[IRS Releases Draft Schedule to Report Uncertain Tax Positions.](#)"

If you have questions or require further information, please contact your Baker Tilly tax advisor or send an e-mail to tax@bakertilly.com.

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