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THE TAX LAWYER

Aug. 14 2012 – 10:30 pm

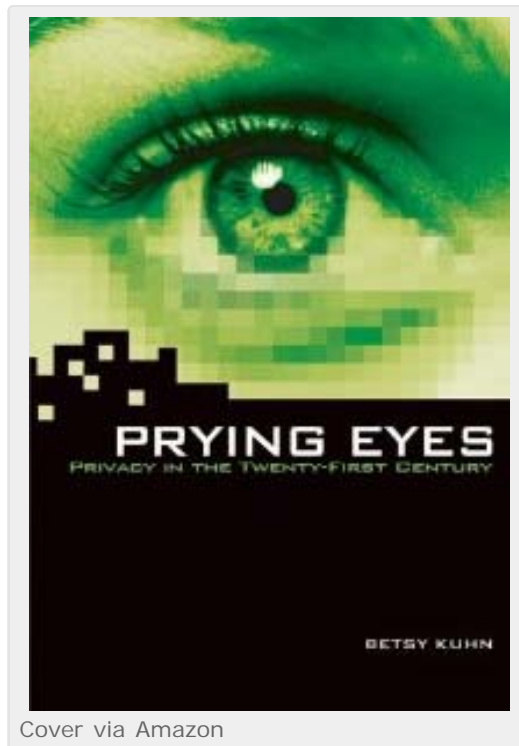
Keeping Prying IRS Eyes From Documents

Calling something a **tax shelter** is a little like asking someone when he stopped beating his wife. The tax shelter moniker tends to color the debate. It's true in audits, tax litigation and even document fights. Nevertheless, if you participated in a tax shelter and filed your tax return, can you refuse to divulge work-papers about the shelter?

Cooperating with the IRS is often the best policy, but it can be appropriate to take a stand where you have grounds and where the documents would be damaging. Sometimes a judge must decide, as occurred in

[*Santander Holdings USA, Inc. v. U.S.*](#) The IRS went to court to get shelter documents after Santander participated in a Structured Trust Advantaged Repackaged Securities (“STARS”) shelter.

The IRS wanted tax reserve work papers, post-closing advice about changes in the law, unwinding the transaction and audit advice. Ernst & Young was Santander's auditor and KPMG was its tax adviser. The court ruled the work product doctrine did not protect many documents and the tax advice privilege was waived.



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However, the court found the attorney-client, tax practitioner, and work product privileges were not waived for other documents. What seems most important about this case? Attorney-client privilege is virtually absolute, so where possible, rely on it rather than on less bullet-proof privileges.

Attorney-client privilege protects communications between clients and their lawyers whether or not the communications deal with anticipated litigation. Discussions with lawyers are privileged, while discussions with accountants are not. However, having **lawyers hire accountants** can extend attorney-client privilege to accountant communications. See [Can IRS Force Your Accountant To Talk?](#)

That makes sense where tax litigation is imminent or might involve a criminal tax matter. Work product protection is weaker and generally protects items prepared by an attorney in anticipation of litigation (documents, interviews, memoranda, correspondence, etc). There's a "federally authorized tax practitioner" privilege too but it's narrow and does not protect written communications "in connection with the promotion of the direct or indirect participation of the person in any tax shelter." See [Code Section 7525\(b\)\(2\)](#).

Under [U.S. v. Textron, Inc.](#), the court said tax reserve work-papers weren't protected. Besides, the disclosure was a waiver of work product protection. In *Textron*, the First Circuit cut back on work-product protection, giving the IRS access to all documents not protected by attorney-client privilege.

Bottom line? Be careful with privileges and with waivers. Sometimes a case can be won or lost based on privilege issues.

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