Ratke v. Commissioner, 129 T. C. 45 (U. S. Tax Ct. 2007)

In Ratke v. Commissioner, the U. S. Tax Court upheld the work product doctrine privilege, denying petitioners' discovery of two internal IRS memoranda related to their tax litigation. The court ruled that the memoranda, prepared for the case, remained privileged even in post-trial motions for costs and sanctions, as they contained no compelling evidence to override the doctrine's protections. This decision reinforces the confidentiality of legal strategies in tax disputes, emphasizing the balance between litigation preparation and discovery rights.

Parties

Thomas J. and Bonnie F. Ratke, the petitioners, filed a case against the Commissioner of Internal Revenue, the respondent, in the U. S. Tax Court. The Ratkes were represented by Jack B. Schiffman, while the Commissioner was represented by Robert M. Fowler. The case was adjudicated by Judge Herbert L. Chabot.

Facts

Thomas J. and Bonnie F. Ratke resided in Glendale, Arizona, when they filed their petition. They timely filed their 1993 Federal income tax return, reporting a tax liability of $9,238. On January 9, 1996, the Commissioner sent a notice of deficiency, determining a deficiency of $20,710 and a penalty of $4,142 under section 6662(a). The Ratkes disputed these amounts in a petition filed on March 29, 1996 (docket No. 5931-96). They also submitted a second amended return on the same day, increasing their reported liability to $21,893, and the Commissioner assessed the additional $12,655 liability.

The parties settled the 1996 case, resulting in a decision on March 13, 1997, reflecting a deficiency of $2,931 with no penalty. Subsequently, the Commissioner issued a notice of intent to levy and notice of right to a hearing on September 20, 2000. The Ratkes requested a collection due process hearing, and on June 28, 2001, the Commissioner mailed a notice of determination. The Ratkes then filed their petition in the instant case on July 31, 2001, and filed an amended petition on August 7, 2001. The Commissioner filed an answer on September 6, 2001, prepared by Acting Associate Area Counsel Ann M. Welhaf.

Welhaf prepared a memorandum on September 5, 2001, requesting advice from the IRS's national office regarding proposed legal arguments for the litigation. Mitchell S. Hyman, from the national office, responded with a memorandum on January 16, 2002, analyzing the proposed arguments. The Ratkes sought discovery of these unredacted memoranda in connection with their post-decision motions for costs under section 7430 and sanctions under section 6673(a)(2).

Procedural History

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The Ratkes' case was initially filed in the U. S. Tax Court under docket No. 5931-96, challenging a deficiency and penalty for 1993. The case was settled, resulting in a decision on March 13, 1997, with a reduced deficiency. After subsequent collection actions by the Commissioner, the Ratkes filed another petition (docket No. 9641-01L) on July 31, 2001, which was followed by an amended petition on August 7, 2001. The Commissioner answered on September 6, 2001.

After a trial and subsequent briefs, the Tax Court issued T. C. Memo 2004-86, ruling for the Ratkes and limiting the Commissioner's collection to the $2,931 deficiency established in the 1997 decision. The Ratkes then moved for litigation costs under section 7430 and sanctions under section 6673(a)(2), seeking discovery of the Welhaf and Hyman memoranda. The Commissioner provided a redacted version of the Hyman memorandum but resisted full disclosure, claiming work product doctrine privilege. The court ordered an in camera inspection of the unredacted memoranda and issued its opinion on September 5, 2007.

Issue(s)

Whether the Welhaf and Hyman memoranda, prepared in anticipation of litigation, are privileged from discovery under the work product doctrine in the context of the Ratkes' post-decision motions for costs and sanctions?

Whether the Commissioner waived the work product doctrine privilege by referencing the memoranda in its motion papers?

Rule(s) of Law

The work product doctrine, as established in *Hickman v. Taylor*, 329 U. S. 495 (1947), and codified in Federal Rule of Civil Procedure 26(b)(3), protects materials prepared in anticipation of litigation from discovery. The doctrine is qualified, allowing discovery if a party demonstrates a substantial need for the materials and an inability to obtain the substantial equivalent without undue hardship. Opinion work product, which includes an attorney's mental impressions, conclusions, opinions, or legal theories, is subject to a higher standard of protection, requiring a compelling need for disclosure.

The Tax Court's Rules of Practice and Procedure, specifically Rule 70(b)(1), recognize the work product doctrine, and Rule 91(a)(1) requires stipulation of relevant non-privileged matters. The doctrine may be waived if a party makes a "testimonial use" of the privileged material, as seen in *Hartz Mountain Industries v. Commissioner*, 93 T. C. 521 (1989).

Holding

The Tax Court held that both the Welhaf and Hyman memoranda were privileged under the work product doctrine. The court concluded that the memoranda remained work product even in the context of the Ratkes' post-decision motions for

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costs and sanctions. Furthermore, the court found no compelling need to discover the memoranda, as they did not contain material that would impact the outcome of the Ratkes' motions. The court also held that the Commissioner did not waive the privilege by referencing the memoranda in its motion papers without using their contents as evidence.

Reasoning

The court's reasoning focused on the nature and purpose of the work product doctrine, emphasizing its role in protecting the confidentiality of legal strategies and mental impressions developed in anticipation of litigation. The court noted that the Welhaf memorandum was prepared to seek advice on legal arguments, and the Hyman memorandum responded to those inquiries, both clearly falling within the scope of work product.

The court rejected the Ratkes' argument that the memoranda were no longer work product in the context of their post-decision motions, citing the ongoing nature of the litigation and the lack of precedent for segmenting a lawsuit for work product analysis. The court also referenced *Ames v. Commissioner*, 112 T. C. 304 (1999), which supported the application of the work product doctrine to subsequent phases of the same litigation.

In evaluating the extent of the privilege, the court conducted an in camera review of the memoranda and found no substantial need for the fact-based work product or compelling need for the opinion work product. The court noted that the Ratkes already possessed the equivalent fact-based work product through the redacted Hyman memorandum and that the unredacted portions did not contain evidence that would impact their motions.

The court also addressed the issue of waiver, concluding that the Commissioner's references to the memoranda in its motion papers did not constitute a "testimonial use" or an attempt to use the memoranda as a "sword" to support its position, thus not waiving the privilege.

Disposition

The Tax Court denied the Ratkes' request to discover the unredacted Welhaf and Hyman memoranda, affirming the protection of the work product doctrine privilege.

Significance/Impact

The decision in *Ratke v. Commissioner* reinforces the scope and application of the work product doctrine in tax litigation, particularly in the context of post-decision motions. It underscores the doctrine's role in protecting the confidentiality of legal strategies and mental impressions, even after a case's primary issues have been resolved. The ruling may influence how parties approach discovery in tax disputes, emphasizing the need for a compelling reason to override the work product

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privilege. Subsequent courts have cited *Ratke* in affirming the work product doctrine's protections in similar contexts, highlighting its doctrinal importance in maintaining the balance between litigation preparation and discovery rights.

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