

## **Why the Work of In-House Accountants is NEVER Subject to the Tax-Practitioner Privilege of Section 7525.**

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Washington (DC): When an accountant is an employee of a company – a so called “in-house accountant” – as opposed to an employee of an accounting firm hired by the company to consult on an issue, a question may arise as to whether the tax-practitioner privilege of 26 U.S.C. §7525 applies to protect communications between the in-house accountant and her employer. The question can be raised when determining the extent of documents to be provided to the IRS by a potential tax whistleblower. As shown below, the tax-practitioner privilege of section 7525 should never apply to an in-house accountant.

To reach this conclusion, one must first examine the requirements of section 7525. Section 7525 states:

With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.

26 U.S.C. §7525(a)(1). One key element of the tax-practitioner privilege is therefore the rules protecting attorney-client communications. If a communication would not be privileged under those rules, then section 7525 would provide no protection.

Another important aspect is an exception that some have described as “the exception that swallows the rule.” Section 7525 explicitly removes the protection of subsection (a)(1) for any written communication regarding a tax shelter:

The privilege under subsection (a) shall not apply to any written communication which is . . . (2) in connection with the promotion of the direct or indirect participation of the person in any tax shelter (as defined in section 6662(d)(2)(C)(ii)).

26 U.S.C. §7525(b). Section 6663(d) defines tax shelter so broadly that it includes any plan or arrangement that has as a significant purpose the avoidance of Federal income tax. See 26 U.S.C. §6662(d)(2)(C)(ii). In other words, all tax planning. Promotion is equally broad. Under Temp. Treas. Reg. § 301.611-1T(A-25 through A-30), nearly any activity engaged in by an accountant can be seen as organization or management of a tax shelter, and thus promotion.

It is at this point that the inquiry into the section 7525 privilege with respect to in-house accountants could end. In-house accountants working in the tax department of a company providing any type of tax advice would be doing so to reduce (read avoid) Federal income taxes. As such, the tax-practitioner privilege would not apply. If by some stretch there was any circumstance left in which an in-house accountant could be providing otherwise protected communications, a look at the requirements of the attorney-client privilege quickly eliminates that possibility.

The attorney-client privilege is a common-law doctrine that protects confidential communications between a client and the attorney.

To invoke the attorney-client privilege, a party must demonstrate that there was: (1) a communication between client and counsel, which (2) was intended to be and was in fact kept confidential, and (3) made for the purpose of obtaining legal advice.

United States v. Const. Prod. Research, Inc., 73 F.3d 464, 473 (2<sup>nd</sup> Cir. 1996), citing Fisher v. United States, 425 U.S. 391 (1976). It is under the first element of the privilege that in-house accountants fail. For lawyers, it is possible to have your employer be your client. See Upjohn Co. v. United States, 449 U.S. 383 (1981). The American Institute of Certified Public Accountants Code of Professional Conduct makes it clear that it is not possible for that to be the case for in-house accountants. Under AICPA section 92 – Definitions .03, a client is defined as “any person or entity, **other than the member’s employer**, that engages a member or a member’s firm to perform professional services or a person or entity with respect to which professional services are performed.” (emphasis added).

Under the common law the only way a taxpayer could protect a communication with an attorney would be if there was a client relationship. The AICPA rules make it clear that an in-house accountant cannot establish a client relationship with her employer. Therefore, the section 7525 privilege should never attach to in-house accountant communications.

Furthermore, communications with an in-house accountant would likely also fail the second and third parts of the test. Much of an in-house accountants work is for items not directly related to the provision of legal tax advice. Often, the in-house accountant is performing a different role such as preparing information for financial accounting purposes or describing transactions to effected business units. None of these aspects would fall within the scope of the privilege. Additionally, providing any communication to the financial auditors would destroy the privilege as it violates the second part of the test; maintaining confidentiality.

A tax attorney specializing in tax whistleblower law can help you determine your ability to make a submission to the IRS Whistleblower Office. If you are interested in more information about this and other topics involving tax whistleblower law please call The Ferraro Law Firm, P.A. at 1-800-275-3332 or visit [www.tax-whistleblower.com](http://www.tax-whistleblower.com).