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Accountant Work-Product Privilege Rejected: United States v. Arthur Young & (and) Co.

NOTES

ACCOUNTANT WORK-PRODUCT PRIVILEGE REJECTED: *UNITED STATES V. ARTHUR YOUNG & CO.*

IN 1975 the Internal Revenue Service began auditing Amerada Hess Corporation's[1] tax returns for the years 1972-1974. The following year, in response to publicity concerning the prevalence of corporations making illegal foreign payments, Amerada's board of directors engaged an attorney and Arthur Young & Company[2] to investigate whether Amerada had made any such payments. The investigation resulted in the discovery of $7,830 of payments of questionable legality that Amerada had deducted on its 1972-1974 tax returns.[3] After Amerada informed the IRS of those payments, the IRS initiated a criminal investigation. In April 1978, pursuant to civil and criminal investigations of Amerada's tax liability, the IRS issued an Internal Revenue Code section 7602 summons[4] to

1. Amerada Hess Corporation is an integrated petroleum company with operations worldwide. AMERADA HESS CORP., 1983 ANNUAL REPORT 31 (1984). During 1983 Amerada had total revenue of $8,422,076,000 and net income of $205,347,000. *Id.* at 24. Amerada's 1983 income tax expense totalled $541,801,000, including United States income taxes of $37,363,000. *Id.* at 30. On December 31, 1983, Amerada had current taxes payable of $416,017,000 and deferred income taxes payable of $217,519,000. *Id.* at 23.

2. Arthur Young & Company is the independent certified public accounting firm that audited Amerada's financial statements. An independent certified public accounting firm's primary function is to express an opinion as to whether its client's financial statements are fairly presented in accordance with generally accepted accounting principles. Ancillary to that function Arthur Young and many other independent certified public accounting firms also offer tax and management consulting services to their clients.

3. These illegal payments consisted primarily of gifts to foreign government officials and various political contributions.

4. I.R.C. § 7602(a) (1982) provides:

> (a) Authority to summon, etc.
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> For the purpose of ascertaining the correctness of any return, . . . the Secretary or his delegate is authorized—
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> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
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> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

Arthur Young to produce Arthur Young's tax accrual workpapers on Amerada's contingent tax liability reserve.[5] Upon Arthur Young's refusal to comply with the summons, the IRS initiated proceedings in federal district court to enforce it.[6] Amerada intervened in those proceedings to oppose enforcement of the summons.[7] The district court held the tax accrual

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(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Prior to 1982, § 7602 consisted solely of subsection (a) without the heading "Authority to summon, etc." In 1982 Congress amended § 7602 to add that heading and subsections (b), which allows the IRS to take action under subsection (a) in connection with the administration or enforcement of the tax laws, and (c), which prevents the IRS from issuing a § 7602 summons if the IRS has referred the case to the Justice Department for possible criminal prosecution for violation of the tax laws. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, tit. III, § 333(a), 96 Stat. 324, 621-23.

5. The accountant prepares tax accrual workpapers in the process of forming an opinion on whether the corporation's tax liability is fairly stated in its financial statements. A corporation includes both actual and contingent taxes payable in that liability amount. Caplin, *Government Access to Independent Accountants' Tax Accrual Workpapers*, 1 VA. TAX REV. 57, 59 (1981). Actual taxes payable include both taxes currently payable and taxes attributable to the recognition of income in a different financial accounting period than the tax reporting period (deferred or prepaid taxes). Potential taxes payable are a contingency and are the tax payments that the corporation's management expects the corporation to make after either negotiation or litigation with the IRS concerning the corporation's tax treatment of certain transactions. *Id.* at 58-61. In tax accrual workpapers the accountant, based on information the corporation's management has given him, analyzes whether that recorded contingent tax liability and the actual tax liability are reasonable. Note, *Government Access to Corporate Documents and Auditors' Workpapers: Shall We Include Auditors Among the Privileged Few?*, 2 J. CORP. L. 349, 357-58 (1977) (tax accrual workpapers consist of copies of corporate documents, memoranda of conversations with corporate management, and documentation of the corporation's negotiation and settlement strategy). Although they are used only in the process of determining whether the tax liability is fairly stated on the financial statements, the tax accrual workpapers document questionable tax positions the corporation has taken and thereby pinpoint vulnerable areas on its tax return. Caplin, *supra*, at 58-61.

6. United States v. Arthur Young & Co., 496 F. Supp. 1152 (S.D.N.Y. 1980). Arthur Young refused to comply with the summons, contending that the court should not enforce the summons of the tax accrual workpapers as a matter of policy. Arthur Young argued that the court's enforcement of the summons would impair communications from corporate management to the accountant, because corporate management would not disclose confidential information if the IRS could summon the accountant's workpapers that documented the information. Arthur Young believed these communications necessary for the accountant to perform an effective audit. Arthur Young also objected to enforcement of the summons on grounds that the summons was overbroad. In addition to asking for the tax accrual workpapers and various administrative files and reports, the summons requested Arthur Young's audit programs and audit workpapers for the years 1972-1974 and the joint work with the attorney investigating the illegal payments. Audit programs are the accountant's detailed plans on how to audit his client's financial statements, and audit workpapers are the documentation of how the accountant accomplished those plans. For a complete list of what the IRS summons requested, see United States v. Arthur Young & Co., 677 F.2d 211, 215 n.4 (2d Cir. 1982).

7. The taxpayer has the right to intervene in proceedings to enforce or to bring proceedings to quash a summons served on a third-party recordkeeper, which the statute defines to include accountants, to produce documents concerning the taxpayer's tax liability. I.R.C. § 7609(b) (1982). *See generally* Kenderdine, *The Internal Revenue Service Summons to Produce Documents: Powers, Procedures, and Taxpayer Defenses*, 64 MINN. L. REV. 73, 81-85 (1979) (Congress enacted § 7609 to give the taxpayer a mechanism to protect his privacy). The IRS had previously issued a § 7602 summons to Amerada for documents that Amerada possessed. The court enforced the summons over Amerada's objections. United States v. Amerada Hess Corp., 619 F.2d 980, 988 (3d Cir. 1980).

workpapers relevant to the IRS investigations and refused to recognize an accountant work-product privilege.[8] The court, therefore, ordered Arthur Young to produce the workpapers pursuant to the summons.[9] On appeal the Second Circuit agreed with the district court that the tax accrual workpapers were relevant to the IRS investigations,[10] but, by a two-to-one margin, recognized an accountant work-product privilege and refused to enforce the summons.[11] The Supreme Court granted certiorari.[12] *Held, affirmed in part and reversed in part*: Tax accrual workpapers are relevant to an IRS investigation of a corporation's tax return, and no accountant work-product privilege exists to prevent summons of such workpapers. *United States v. Arthur Young & Co.*, 104 S. Ct. 1495, 79 L. Ed. 2d 826 (1984).

I. DEVELOPMENT OF THE SECTION 7602 SUMMONS AND THE DOCTRINE OF WORK-PRODUCT PRIVILEGE

A. The Section 7602 Summons

The Internal Revenue Code imposes a duty on the IRS to inquire whether the taxpayer has paid all taxes owed.[13] The section 7602 summons is the IRS's principal investigatory tool to make that inquiry.[14] Section 7602 empowers the IRS to summon any documents relevant to a determination of the validity of the tax paid by a taxpayer.[15] The statutory power extends beyond the taxpayer to any person in possession of such documents.[16] The Supreme Court has held the invasions of privacy sometimes fostered by the section 7602 summons unavoidable if the IRS is to

8. 496 F. Supp. 1152, 1157 (S.D.N.Y. 1980). The district court ordered Arthur Young to comply with the summons except as to the work performed under the direction of the attorney and the audit programs. The court found the former protected under the traditional attorney work-product privilege and the latter not relevant to Amerada's tax liability. *Id.* at 1160.

9. *Id.* at 1157.

10. 677 F.2d 211, 218-19 (1982).

11. *Id.* at 219-21. The court did, however, order Arthur Young to comply with the summons as to all other items that the district court ordered to be produced. *Id.* at 221. The IRS had not appealed the district court's decision refusing to order Arthur Young to produce its audit programs and the work it had done concerning the illegal payments. For commentaries on the Second Circuit's holding, see Note, *Tax Accrual Workpapers and IRS Summonses Under IRS § 7602: The Accountant Work-Product Privilege*, 48 MO. L. REV. 825 (1983); Note, *Auditor-Client Work-Product Privilege With Respect to Tax Accrual File: The* Arthur Young *Case*, 27 ST. LOUIS U.L.J. 437 (1983).

12. The IRS petitioned, and certiorari was granted, on the issue of whether the IRS could summon the tax accrual workpapers. The petitions and briefs submitted to the Supreme Court are reprinted in 16 LAW REPRINTS (BNA) No. 6 (1983/1984 Term). Arthur Young also petitioned the Supreme Court for certiorari. Arthur Young contested the Second Circuit's decision that ordered Arthur Young to produce its audit workpapers. That petition, however, was denied. 104 S. Ct. 1906, 80 L. Ed. 2d 456 (1984).

13. I.R.C. § 7601(a) (1982); *see also* Donaldson v. United States, 400 U.S. 517, 523 (1971) (Court enforced a § 7602 summons issued for former employer's financial records concerning taxpayer).

14. Brief for the United States at 16.

15. I.R.C. § 7602(a) (1982).

16. *Id.*

enforce the self-reporting tax system.[17]

The power of the section 7602 summons, however, is not unlimited.[18] Both Congress and the Supreme Court have recognized that such power is subject to abuse and must be kept within proper bounds.[19] Accordingly, the section 7602 summons is not self-executing. The summoned party may refuse to comply, thus compelling the IRS to petition a federal district court for enforcement.[20] The IRS petition results in an adversarial summons enforcement proceeding before the court.[21] The summoned party may challenge enforcement of the summons for any valid reason,[22] and the IRS has the burden of showing proper grounds for enforcement.[23] The Supreme Court, however, stated that a district court should enforce a section 7602 summons unless a traditional privilege protects the documents[24] or Congress intends that the IRS should not summon them.[25] Congressional intent may be inferred from either statutory prohibition or substantial countervailing policies.[26]

In *United States v. Powell*[27] the Supreme Court delineated the limits of section 7602 power. In *Powell* the IRS summoned the president of a corporation to produce certain records relating to that corporation's tax returns. He refused to comply on the ground that the IRS had already examined the requested records once and, absent fraud, the statute of limitations barred assessment of any additional deficiencies.[28] The Court held that the IRS did not need to show probable cause of fraud and ordered enforcement of the summons.[29] The Court enumerated the following cri-

17. United States v. Bisceglia, 420 U.S. 141, 146 (1975) (Court enforced summons issued to bank officer for records disclosing who had made a certain deposit).

18. United States v. Coopers & Lybrand, 550 F.2d 615, 619 (10th Cir. 1977) (§ 7602 does not give IRS carte blanche discovery).

19. I.R.C. § 7604(b) (1982); United States v. Bisceglia, 420 U.S. 141, 151 (1975) (Congress placed federal courts between taxpayer and IRS to prevent IRS from abusing § 7602 summons power).

20. I.R.C. § 7604(b) (1982); *see* Reisman v. Caplin, 375 U.S. 440, 445-46 (1964) (summoned party not subject to contempt until refusal to comply with order of judge).

21. Reisman v. Caplin, 375 U.S. 440, 446 (1964).

22. *Id.* at 449. The district court's order concerning enforcement of the summons is also appealable. *Id.*

23. *See* United States v. LaSalle Nat'l Bank, 437 U.S. 298, 318 (1978) (Court remanded to lower court to determine if IRS had met good faith standards).

24. United States v. Euge, 444 U.S. 707, 714 (1980) (Court enforced summons issued to taxpayer to appear and give handwriting samples for IRS comparison to handwriting on various bank signature cards).

25. United States v. Bisceglia, 420 U.S. 141, 150 (1975) (principles of statutory interpretation require broad IRS power of inquiry not be frustrated "absent unambiguous directions from Congress"); *cf.* Milwaukee v. Illinois, 451 U.S. 304, 315 (1981) (separation of powers requires courts to yield to congressional intent on issues Congress has addressed).

26. United States v. Euge, 444 U.S. 707, 711 (1980). Substantial countervailing policies are those legislative purposes that Congress has manifested that the courts should give deference to in situations involving conflicting policies. *See id.* at 715-16.

27. 379 U.S. 48 (1964).

28. The general rule is that the IRS must assess any additional tax within three years after the tax return is filed. I.R.C. § 6501(a) (1982). One of several exceptions to this general rule, however, is that the IRS may assess additional taxes at any time when the taxpayer has filed a false or fraudulent return with the intent of evading taxes. *Id.* § 6501(c).

29. 379 U.S. at 51.

teria as necessary before a court should enforce a section 7602 summons: (1) the IRS investigation must be pursuant to a legitimate purpose; (2) the documents summoned may be relevant to that purpose; (3) the IRS does not already possess the information sought; and (4) the IRS has followed the administrative steps required by the Internal Revenue Code.[30] If a summons satisfies these requirements, a court should enforce it unless privilege, statutory prohibition, or substantial countervailing policies can be shown.

B. Work-Product Privilege

The privilege afforded an attorney's work-product precludes enforcement of a section 7602 summons.[31] The Supreme Court recognized this privilege in *Hickman v. Taylor*.[32] *Hickman* involved a discovery request for an opposing attorney's reports concerning interviews conducted to aid in the defense of a lawsuit. While the Court stated that the documents were outside the scope of the traditional attorney-client testimonial privilege, it concluded that documents that an attorney prepares in anticipation of litigation are conditionally privileged.[33] The attorney work-product privilege assures each side's thorough preparation of his case.[34] The privilege is, therefore, grounded in the realities of the adversary system.[35] For example, an attorney preparing a case often uses nonattorneys to investigate and compile information. The panoply of the privilege necessarily extends to these documents as well.[36] Not all documents prepared by an attorney or his associates are privileged, however; only those prepared in anticipation of litigation receive privileged treatment.[37]

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30. *Id.* at 57-58. Several of the courts of appeals adopted the test of whether the documents sought "might throw light upon" the correctness of the tax return as the required standard of relevancy. *E.g., In re* Newton, 718 F.2d 1015, 1019 (11th Cir. 1983) (court enforced summons of accountant's tax accrual workpapers on closely held corporation), *cert. denied*, 104 S. Ct. 1678, 80 L. Ed. 2d 153 (1984); United States v. Southwestern Bank & Trust Co., 693 F.2d 994, 996 (10th Cir. 1982) (IRS issued summons to bank to produce bank records on three individuals); United States v. El Paso Co., 682 F.2d 530, 537 (5th Cir. 1982) (court enforced summons of corporation's tax account records), *cert. denied*, 104 S. Ct. 1927, 80 L. Ed. 2d 473 (1984); United States v. Kis, 658 F.2d 526, 537 (7th Cir. 1981) (four separate cases involving IRS summonses for financial records issued to closely held corporations and banks), *cert. denied*, 455 U.S. 1018 (1982); United States v. Richards, 631 F.2d 341, 345 (4th Cir. 1980) (court enforced summons issued to corporation's president to appear and answer questions concerning alleged illegal payments by the corporation); United States v. Freedom Church, 613 F.2d 316, 321 (1st Cir. 1979) (court enforced summons issued to pastor to produce church records pursuant to IRS investigation of church's tax-exempt status); United States v. Noall, 587 F.2d 123, 125 (2d Cir. 1978) (court enforced summons of corporate internal audit reports), *cert. denied*, 441 U.S. 923 (1979); United States v. Matras, 487 F.2d 1271, 1274 (8th Cir. 1973) (court refused to enforce summons of corporate budgets).

31. Upjohn Co. v. United States, 449 U.S. 383, 397 (1981).

32. 329 U.S. 495 (1947).

33. *Id.* at 511.

34. United States v. Nobles, 422 U.S. 225, 238 (1975).

35. *Id.*

36. *Id.* at 238-39.

37. Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 864 (D.C. Cir. 1980) (suit seeking disclosure of Department of Energy documents pursuant to the Freedom of Information Act); *cf.* United States v. Anderson, 34 F.R.D. 518, 521 (D. Colo. 1963)

The Supreme Court further defined the attorney work-product privilege in *Upjohn Co. v. United States*.[38] In *Upjohn* the corporate general counsel investigated questionable payments made by foreign subsidiaries to foreign government officials. During the investigation the attorney documented interviews conducted with various employees. The IRS later issued a section 7602 summons for the documents. The Court held that the documents were conditionally privileged because the general counsel had prepared them in anticipation of litigation.[39] The Court concluded that the necessity of guarding the corporate general counsel's mental processes precluded enforcement of the summons even though the IRS had a substantial need for the documents.[40] Although the Court admonished that such documents might not always be privileged, the Court did not exemplify a situation in which the IRS could summon them.[41] Since the IRS may not discover a witness's statements recorded by an attorney even when the IRS shows substantial need, it follows that the Court will never allow the IRS to discover an attorney's legal theories and strategies.[42]

In *Couch v. United States*,[43] however, the Supreme Court noted that no accountant-client testimonial privilege existed under federal law.[44] The actual issue in *Couch*, however, related to whether Couch's fifth amendment rights barred enforcement of a summons issued to her accountant.[45] Nevertheless, the Court's finding that no accountant-client testimonial privilege existed became a formidable obstacle in the quest to forge an accountant work-product privilege.[46] *Couch* involved a sole proprietor of a restaurant who gave her business records to an accountant for preparation of her tax returns. The IRS, while auditing those records in the accountant's office, found indications that Couch had understated her tax liability. The IRS consequently initiated a criminal investigation. After the accountant refused to allow the IRS further access to the records, the IRS issued a section 7602 summons to the accountant. When the accountant refused to comply with the summons, the IRS commenced enforce-

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(work-product privilege obtains only when professional relationship between lawyer and client exists). An attorney without a client cannot claim any work-product privilege. Missouri Pub. Serv. Co. v. Elliott, 434 S.W.2d 532, 535 (Mo. 1968). An attorney employed in the legal department of a corporation, however, may assert the work-product privilege so long as he is working in anticipation of litigation. Scourtes v. Fred W. Albert Grocery Co., 15 F.R.D. 55, 58 (N.D. Ohio 1953).

38. 449 U.S. 383 (1981).

39. *Id.* at 401-02.

40. *Id.* at 401. The Court remanded the case to the court of appeals to determine if the IRS could demonstrate something greater than substantial need in order to pierce the attorney work-product privilege. *Id.* at 402.

41. *Id.* at 401-02.

42. *Id.* at 400; *see* Hickman v. Taylor, 329 U.S. at 510-11; FED. R. CIV. P. 26(b)(3). For the development of the attorney work-product privilege since *Hickman*, see Annot., 35 A.L.R.3d 412 (1971).

43. 409 U.S. 322 (1973).

44. *Id.* at 335.

45. *Id.* at 323.

46. United States v. Arthur Young & Co., 104 S. Ct. 1495, 1503, 79 L. Ed. 2d 826, 836 (1984).

ment proceedings in federal court.[47] Couch intervened, asserting that her fifth amendment rights barred enforcement of the summons.[48]

The Court reasoned that the fifth amendment provided only a personal privilege.[49] This privilege prevented the government from compelling a person to incriminate himself.[50] The summons, however, compelled the accountant, not Couch, to produce the records.[51] Couch's fifth amendment rights were, therefore, inapposite to the summons issued to the accountant.[52] Couch also argued that the confidential nature of the accountant-client relationship extended her fifth amendment privilege to the records that she gave her accountant. The Court summarily stated, however, that no accountant-client privilege existed under federal law.[53] Unlike in an attorney-client relationship, Couch had no expectation of privacy when she gave her records to the accountant, because she knew he would disclose much of that information in her tax return.[54] Her fifth amendment privilege, therefore, did not extend to the records given to her accountant.[55]

United States v. Arthur Young & Co. presented the question of whether the IRS could discover a taxpayer's legal theories and strategies as documented in his accountant's tax accrual workpapers. *Hickman v. Taylor* and its progeny mandated that a party can never discover the legal theories and strategies of its adversary. On this principle, a court would be required to refuse enforcement of the summons of workpapers. If a court refused to enforce the summons, however, it would implicitly recognize the accountant-client testimonial privilege that the Supreme Court had ex-

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47. The accountant gave the records to Couch's attorney. The Court stated, however, that Couch's constitutional rights became fixed when the IRS served the summons on the accountant. 409 U.S. at 329.

48. The fifth amendment provides that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V. If the IRS served Couch with the § 7602 summons to produce her business records, she would, by producing those records, implicitly testify that she had produced all the records requested. 409 U.S. at 347 (Marshall, J., dissenting). The IRS could not investigate her tax liability if she produced just some of the records. *Id.* In such instances the protections of the fourth and fifth amendments effectively merge. *Id.* at 348-49. The fourth amendment states: "[the] right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated . . . ." U.S. CONST. amend. IV.

In *United States v. Donaldson*, however, the Court held that the IRS may use the § 7602 summons to investigate what may later prove to be criminal conduct. 400 U.S. at 535-36. To hold otherwise would force the IRS to forgo either use of the summons or recommendations for criminal prosecution in cases of suspected fraud. *Id.* The IRS need only issue the summons in good faith prior to referral of the case to the Justice Department for criminal prosecution. *Id.* at 536; *see* I.R.C. § 7602(c) (1982).

49. 409 U.S. at 328.

50. *Id.*

51. *Id.* at 329.

52. *Id.*

53. *Id.* at 335.

54. *Id. But see* CODE OF PROFESSIONAL ETHICS § 301.01 (American Institute of Certified Public Accounts 1982) ("A member shall not disclose any confidential information obtained in the course of a professional engagement except with the consent of the client.") Couch's accountant was not a certified public accountant.

55. 409 U.S. at 335.

pressly rejected in *Couch*, because the workpapers were based upon accountant-client communications. The Supreme Court granted certiorari to decide which precedent should control.

II. *UNITED STATES V. ARTHUR YOUNG & CO.*

The Supreme Court addressed two issues in *United States v. Arthur Young & Co.* First, as measured against the relevancy standard the Court had enunciated in *United States v. Powell*, the question remained whether the tax accrual workpapers were relevant to the IRS audit of Amerada's tax returns. If the tax accrual workpapers were not relevant, the summons was not enforceable. Second, if the tax accrual workpapers were relevant, an accountant work-product privilege nevertheless might preclude enforcement of the summons. In a unanimous decision, the Court held the tax accrual workpapers relevant to the IRS investigations and that no accountant work-product privilege existed to preclude the enforcement of the summons.[56]

A. Section 7602 Standard of Relevancy

In considering whether the tax accrual workpapers were relevant to the IRS investigations,[57] the Court noted that the relevancy standard required to enforce the summons involved a lesser test than the standard used in deciding whether to admit evidence in court.[58] The statutory language "may be relevant"[59] reflected Congress's intent that the IRS might summon items of even potential relevance.[60] Congress, the Court noted, could not have expected the IRS to know whether the item was in fact relevant until after the IRS had procured and scrutinized it.[61] The Court stated that section 7602 summons power remains critical to the IRS's enforcement of the tax laws, and courts should not circumscribe the IRS's use of that power to only documents actually relevant.[62] The Court deemed any document that would "illuminate any aspect of the return" as relevant to an IRS investigation.[63] The Court found that the tax accrual workpapers

56. 104 S. Ct. at 1502-03, 79 L. Ed. 2d at 834, 836.

57. Courts that had considered the issue were divided on whether an accountant's tax accrual workpapers were relevant to an IRS tax investigation. *See In re* Newton, 718 F.2d 1015, 1020 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 1678, 80 L. Ed. 2d 153 (1984) (relevant); United States v. Coopers & Lybrand, 550 F.2d 615, 621 (10th Cir. 1977) (not relevant); United States v. Price Waterhouse & Co., 515 F. Supp. 996, 1000 (N.D. Ill. 1981) (relevant).

58. 104 S. Ct. at 1501, 79 L. Ed. 2d at 834. *Compare* United States v. Powell, 379 U.S. at 57 (IRS does not need to meet the standard of probable cause), *with* FED. R. EVID. 401 (relevant evidence is evidence that tends to make existence of fact more or less probable).

59. I.R.C. § 7602(a) (1982).

60. 104 S. Ct. at 1501, 79 L. Ed. 2d at 834.

61. *Id.*

62. *Id.*

63. *Id.* at 1501-02, 79 L. Ed. 2d at 834. The Court noted that several of the courts of appeals used "might have thrown light" upon the correctness of the tax return as the relevancy standard. *Id.* at 1501 n.11, 79 L. Ed. 2d at 833-34 n.11. The Court, nevertheless, adopted "illuminate any aspect of the return" as the standard. *Id.* at 1501-02, 79 L. Ed. 2d at 834. Illuminate means "to supply or brighten with light." WEBSTER'S NINTH NEW COL-

highlighted Amerada's questionable tax positions and thereby focused the IRS on areas of possible noncompliance with the tax laws.[64] The tax accrual workpapers were therefore highly relevant, even though not used to prepare the tax return.[65]

The Court's holding rejected the proposition that relevancy depended upon balancing the competing interests in a given situation.[66] The balancing approach employed a sliding standard of relevancy that depended upon the nature of the material sought, the party from whom it was sought, and the necessity of the information sought, to determine the correctness of the tax return.[67] The Court instead adopted the straightforward approach that relevancy involved the logical relationship between the material sought and the tax return.[68] Documents that illuminated any aspect of the tax return were relevant.[69] The Court adopted a clear and easily appliable standard as opposed to an amorphous and complex one.[70] Defining relevancy in terms of balancing competing interests would result in uncertainty in the summons enforcement process.[71]

The Court also rejected the argument that section 7602 did not allow summons of nonfactual material.[72] The bulk of the tax accrual workpapers contained judgmental material. To the extent that the tax accrual workpapers contained facts, Arthur Young argued that the IRS could otherwise obtain those facts.[73] By rejecting that argument, the Court avoided drawing a fine line between fact and judgment and the paradoxical result of the taxpayer's determining whether the IRS had obtained all of the relevant facts.

The Court adopted a very broad standard of relevancy necessary for enforcement of a section 7602 summons. Virtually any document tangen-

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LEGIATE DICTIONARY 599 (1984). Whether the Court meant to change the relevancy standard used by several of the courts of appeals when it adopted the different but very similiar language of "illuminate any aspect of the return" is unclear.

64. 104 S. Ct. at 1500, 79 L. Ed. 2d at 833.

65. *Id.* at 1502, 79 L. Ed. 2d at 834.

66. *See* Brief of American Institute of Certified Public Accountants as Amicus Curiae at 17.

67. *Id. See generally* Note, *Tax Accrual Workpapers and IRS Summonses Under IRC § 7602: The Accountant Work-Product Privilege*, 48 MO. L. REV. 825, 836 (1983) (advocating that courts limit summons to factual material only); Note, *A Balancing Approach to the Discoverability of Accountants' Tax Liability Workpapers Under Section 7602 of the Internal Revenue Code*, 60 WASH. U.L.Q. 185, 208 (1982) (accountants should divide tax accrual workpapers between factual and nonfactual material and court should not enforce summons of nonfactual material absent extraordinary need).

68. *See* Reply Brief for the United States at 15. The balancing approach incorporates policy decisions that are only significant in determining whether the court should recognize a privilege, not whether the documents are relevant. *Id.*

69. 104 S. Ct. at 1501-02, 79 L. Ed. 2d at 834.

70. *See* Reply Brief for the United States at 15.

71. *Id.*

72. *See* 104 S. Ct. at 1502, 79 L. Ed. 2d at 834. *Contra* P.T. & L. Constr. Co. v. Commissioner, 63 T.C. 404, 414 (1974) (judgmental information not relevant); Esson v. Commissioner, 34 T.C.M. (CCH) 586, 587 (1975) (taxpayer not permitted to discover judgmental material concerning how IRS valued stock for gift tax purposes).

73. Brief for Arthur Young & Co. at 2.

tially related to the taxpayer's business may focus the IRS on potential areas of noncompliance with the tax laws and, therefore, illuminate an aspect of the tax return.[74] The document does not need to be factually oriented or in the possession of the taxpayer. The Court sanctioned a broad intrusion into taxpayers' affairs to facilitate the IRS's tax compliance investigations.[75]

B. Accountant Work-Product Privilege Rejected

The Court then addressed whether an accountant work-product privilege should nevertheless preclude summons of the tax accrual workpapers. In noting that the section 7602 summons was central to Congress's design of the tax enforcement system, the Court deemed the summons power necessary to the adequate investigation of compliance with the tax laws by the IRS.[76] Inadequate investigations would, the Court concluded, lead to an inequitable distribution of the national tax burden.[77] The Court, therefore, would uphold IRS summons authority absent statutory prohibition or substantial countervailing policies.[78]

The Court found that in *Arthur Young* no statutory prohibition against enforcement of the summons existed.[79] Reading section 7602 literally, the Court discerned a congressional policy favoring disclosure.[80] The Court did not attempt to reconcile section 7602 with section 6661, which imposes a penalty on the taxpayer for any understatement of taxes attributable to tax positions of questionable validity.[81] The taxpayer avoids imposition of the penalty, however, upon disclosure of facts relevant to the questionable position.[82] Section 6661 therefore encourages, rather than requires, taxpayer disclosure of items on which the taxpayer might not have complied with the correct interpretation of the tax laws.[83] This section, however, appears pointless if the IRS already has the power to demand disclosure of

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74. *See generally* Stolenberg & Robinson, *Enforcement of Summonses in Requesting Accountants' Workpapers*, 60 TAXES 673, 682 (1982) (workpapers usually relevant, whereas audit programs usually not because of tenuous relationship to tax matters).

75. The Court noted that the alternatives to enforcement of the self-reporting tax system might involve even more egregious invasions of privacy. 104 S. Ct. at 1502, 79 L. Ed. 2d at 835 (quoting United States v. Bisceglia, 420 U.S. at 146).

76. 104 S. Ct. at 1502, 79 L. Ed. 2d at 835.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. I.R.C. § 6661 (1982). Section 6661 was enacted subsequent to the Second Circuit's decision in *Arthur Young*. Section 6661 is arguably an answer to the Second Circuit's invitation to Congress to enact a statute to summon tax accrual workpapers. 677 F.2d at 221; *see* Brief for Amerada Hess Corp. at 30; *cf.* Herman & MacLean v. Huddleston, 103 S. Ct. 683, 689, 74 L. Ed. 2d 548, 557-58 (1983) (Congress's failure to amend certain overlapping provisions when revising securities laws constituted ratification of established judicial interpretation of those provisions). *See generally* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 543 (1947) (when interpreting one statute, courts consider statutes subsequently enacted).

82. I.R.C. § 6661 (1982).

83. *Id.*

these items through summons of the tax accrual workpapers.[84] The Court's narrow focus on section 7602, without analysis of its interrelationship with section 6661, reflects a staunch unwillingness to circumscribe IRS summons power.[85]

The Court also found no substantial countervailing policies precluding enforcement of the summons.[86] The Court, therefore, rejected the accountant work-product privilege recognized by the court of appeals.[87] Recognition of that privilege conflicted with the clear intent of Congress that taxpayers disclose all relevant information to the IRS.[88] In reaching this conclusion, the Court analyzed and rejected three policy arguments favoring recognition of an accountant work-product privilege for tax accrual workpapers.

First, the Court rejected the proposition that the accountant work-product privilege was analogous to the attorney work-product privilege recognized in *Hickman v. Taylor*.[89] In agreeing with the IRS, the Court found that the putative work-product privilege was in essence an accountant-client testimonial privilege.[90] Except for the accountant's judgment on the sufficiency of the tax reserve, the accountant received all information documented in the tax accrual workpapers from the taxpayer. Quoting *Couch*,[91] the Court noted that no accountant-client testimonial privilege existed under federal law.[92] The Court also noted the differences between the roles of the attorney and the accountant, stating that the attorney is his client's confidential advisor and advocate and is thereby charged with the duty to present the client's case in the most favorable light.[93] The accountant, however, is a "public watchdog" who has a public responsibility transcending his relationship with the taxpayer.[94] The accountant's responsibilities to creditors, stockholders, and the investing public demand that he remain totally independent from his client.[95]

Analysis of the rationale behind the attorney work-product privilege supports the Court's rejection of this analogy.[96] The Court recognized an attorney-client privilege that allows the attorney to prepare his case in privacy.[97] Such privacy is necessary to ensure each adversary's thorough

84. Brief for the El Paso Co. as Amicus Curiae at 29.
85. The Court stated that any choice that circumscribed § 7602 power was for Congress, not the courts, to make. 104 S. Ct. at 1502, 79 L. Ed. 2d at 835.
86. *Id.* at 1503-05, 79 L. Ed. 2d at 836-38.
87. *Id.* at 1503, 79 L. Ed. 2d at 836.
88. *Id.*
89. *Id.*
90. *Id.*
91. 409 U.S. at 335.
92. 104 S. Ct. at 1503, 79 L. Ed. 2d at 836.
93. *Id.*
94. *Id.*
95. *Id.*; *cf.* United States v. Natelli, 527 F.2d 311, 319 (2d Cir. 1975) (criminal case against accountants for not disclosing inaccuracies discovered in financial statements previously audited); CODE OF PROFESSIONAL ETHICS § 52 (American Institute of Certified Public Accountants 1982) (an accountant should be independent from his clients).
96. Brief for the United States at 35.
97. Hickman v. Taylor, 329 U.S. at 510-11.

preparation of his case, with consequential discovery of the truth and protection of the wronged party's rights.[98] The accountant, however, expresses an opinion to the public on the fairness of the taxpayer's financial statements. Protection of the taxpayer's substantive rights does not require the accountant to perform this function privately.[99] The Court's inability to reconcile the proposed accountant work-product privilege with the attorney work-product privilege, however, does not preclude its recognition.[100] Recognition of a privilege should result whenever the interest needing protection is so important that it justifies suppression of the privileged information.[101]

The Court rejected Arthur Young's second argument that nonrecognition of an accountant work-product privilege would adversely affect the securities markets.[102] Arthur Young argued that without the privilege the candid communications from the taxpayer to the accountant concerning the taxpayer's financial matters, vital to the accountant's performance of an effective audit, would not exist.[103] The taxpayer, knowing that the IRS could summon any information given to the accountant, would not communicate candidly and would prepare a less thorough analysis of the corporation's contingent tax liabilities for the accountant to evaluate.[104] If provided with less and possibly insufficient information, the likelihood

98. *See id.*

99. The Court noted that insulating the accountant from disclosure would ignore the importance of his public obligations. 104 S. Ct. at 1503, 79 L. Ed. 2d at 836.

100. Brief Amicus Curiae of the Comm. on Corporate Law Dep'ts of the Ass'n of the Bar of the City of New York at 8-9.

101. *See* Trammel v. United States, 445 U.S. 40, 47 (1980) (law of privilege not frozen, but expands as need for particular privilege manifests); FED. R. EVID. 501; C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 152 (E. Cleary 2d ed. 1972); *see, e.g.*, United States v. Green, 670 F.2d 1148, 1155 (D.C. Cir. 1981) (police surveillance locations qualifiedly privileged); Riley v. City of Chester, 612 F.2d 708, 715-17 (3d Cir. 1979) (journalist's sources qualifiedly privileged); Mullen v. United States, 263 F.2d 275, 277 (D.C. Cir. 1958) (penitent-minister privilege).

102. 104 S. Ct. at 1503, 79 L. Ed. 2d at 836.

103. Brief for Arthur Young & Co. at 19-20; *see* Brief for Amerada Hess Corp. at 18-20; Brief of American Institute of Certified Public Accountants as Amicus Curiae at 26-30; Brief Amicus Curiae of the Chamber of Commerce of the United States at 5-8; Brief for the El Paso Co. as Amicus Curiae at 26-28; Brief of Tax Executives Institute, Inc. as Amicus Curiae at 22-23; *see also* United States v. Coopers & Lybrand, 413 F. Supp. 942, 953-54 (D. Colo. 1975) (accountant's testimony of how audit would be hampered if IRS could summon tax accrual workpapers), *aff'd*, 550 F.2d 615 (10th Cir. 1977).

104. Brief of American Institute of Certified Public Accountants as Amicus Curiae at 28. The tax department of a major corporation, under the direction of in-house counsel, usually prepares the analysis of contingent taxes that is given to the accountant for evaluation. Brief for the El Paso Co. as Amicus Curiae at 5.

The Court did not address the possibility that the tax accrual workpapers prepared by in-house counsel were privileged under the traditional attorney work-product privilege. An IRS tax investigation, however, is an adversary process. Walter, *Changes in Strategic Positions Between the IRS and Tax Practitioners: Impact of the Disclosure of Information*, 58 TAXES 815, 816 (1980). The corporation's tax department arguably prepared the tax accrual analysis with an eye towards this adversary process and the resultant privilege. Brief for the El Paso Co. as Amicus Curiae at 8. *Contra* United States v. El Paso Co., 682 F.2d 530, 542-44 (5th Cir. 1982) (tax accrual analysis corporation prepared not protected under attorney work-product privilege), *cert. denied*, 104 S. Ct. 1927, 80 L. Ed. 2d 473 (1984).

that an accountant will issue an unqualified opinion increases.[105] The amount of false financial information supplied to securities investors also increases.[106]

Arthur Young recognized a conflict between unhindered investigation of tax law compliance and full disclosure of financial information to securities investors. The accounting firm argued that summons of the tax accrual workpapers was convenient, but unnecessary for IRS investigation of tax law compliance. The need for frank communications from the taxpayer to the accountant, however, was essential if securities investors were to receive the financial information the securities laws mandated.[107] Arthur Young, therefore, proposed to resolve this conflict in favor of the necessity of the securities laws, rather than the convenience of the tax laws. The Court reasoned, however, that the accountant could not issue an unqualified opinion based upon insufficient information.[108] Anything other than an unqualified opinion sends negative vibrations about the corporation's financial health to the securities markets, detrimental to the value of the corporation's stock.[109] Corporate management would not risk this.[110] Fear of receiving other than an unqualified opinion from the accountant would compel management to confer candidly with the accountant, even without an accountant work-product privilege.[111] The Court, therefore, found no conflict between the tax and securities laws, reasoning that a corporate taxpayer would not risk the possibly deleterious consequences of withholding information from the accountant.[112]

The Court's analysis of the alleged conflict between the securities and

105. An accountant will issue one of four possible opinions on his client's financial statements. An unqualified opinion states that the accountant believes the client's financial statements to be fairly presented in all material respects. STATEMENTS ON AUDITING STANDARDS § 509.28 (American Institute of Certified Public Accountants 1982). A qualified opinion states that the accountant believes the client's financial statements to be fairly presented in all material respects except for enumerated departures from generally accepted accounting principles or subject to the resolution of an uncertainty. *Id.* § 509.29. An adverse opinion states that the accountant believes that the client's financial statements do not fairly present the client's financial condition and the results of its operations. *Id.* § 509.41. Finally, a disclaimer of opinion states that the accountant does not have sufficient information from which to form an opinion on the fairness of the client's financial statements. *Id.* § 509.45.

106. *See* Brief of American Institute of Certified Public Accountants at 30.

107. *See* 677 F.2d at 220-21.

108. 104 S. Ct. at 1503, 79 L. Ed. 2d at 836-37. When an accountant has insufficient information from which to render an opinion, he must issue a disclaimer of opinion. STATEMENTS ON AUDITING STANDARDS § 509.45 (American Institute of Certified Public Accountants 1982).

109. 104 S. Ct. at 1503, 79 L. Ed. 2d at 837.

110. *Id.* at 1504, 79 L. Ed. 2d at 837.

111. *Id.* A public corporation has a statutory duty to make all necessary disclosures to its accountants. *See* Securities Exchange Act of 1934, § 13(a)(2), 15 U.S.C. § 78m(a)(2) (1982); 17 C.F.R. §§ 210.1-01 to .2-02 (1983). The Court recognized in *Upjohn*, however, that a legal duty alone would not ensure candid communications. 449 U.S. at 393 n.2.

112. 104 S. Ct. at 1504, 79 L. Ed. 2d at 837. The Court noted that the recognition of an accountant work-product privilege might diminish the accountant's appearance of independence and thereby reduce the value of the audit function. *Id.* at 1504 n.15, 79 L. Ed. 2d at 837 n.15. *See generally* Note, *supra* note 11, at 836 (arguing against recognition of accountant work-product privilege as undermining public's confidence in audit process).

tax laws rested on two pillars of questionable strength. First, the Court assumed the accountant to be an uncanny judge of veracity. The Court failed to consider the possibility that the accountant might not realize management was withholding information. Relying somewhat pragmatically on management's business sense, the Court reasoned that management will disclose all to the accountant, rather than risk something less than an unqualified opinion.[113] Second, the Court's rationale implied that the accountant will unhesitatingly bite the hand that feeds him.[114] The corporation, however, and not the public pays the accountant. Thus, the Court's analysis appears to center on management's acute business sense and the accountant's lack thereof.

The Court then addressed the third argument for the recognition of an accountant work-product privilege, that fundamental fairness precluded IRS access to the tax accrual workpapers.[115] The Court observed that either the Securities and Exchange Commission in an investigation or a private plaintiff involved in litigation would have access to those

113. Former IRS Commissioners Mortimer Caplin and Roscoe Egger do not agree with the Court that IRS access to the accountant's tax accrual workpapers will not impair the integrity of the financial reporting process. Caplin, *supra* note 5, at 81-82 (IRS access to the accountant's tax accrual workpapers should be limited as such access impairs integrity of financial audit process, thereby harming public's interest in full financial statement disclosure); Address by Comm'r Egger, Joint Meeting of San Francisco CPA Soc'y and San Francisco Bar Ass'n (May 5, 1981), *text reprinted in* 86 DAILY TAX REP. (BNA) J-1 (May 5, 1981) (IRS revised guidelines on summoning tax accrual workpapers because of negative effects IRS access has on quality of financial reporting); *see also* Hanson & Brown, *CPA's Workpapers: The IRS Zeros In*, 152 J. ACCT. 68, 76 (1981) (IRS summons of tax accrual workpapers will destroy valuable accountant-client dialogue concerning tax reserve); Horvitz & Hainkel, *The IRS Summons Power and Its Effect on the Independent Auditor*, 4 J. ACCT. AUDITING & FIN. 114, 127 (1981) (IRS summons of tax accrual workpapers may adversely affect disclosure); Note, *IRS Access to Tax Accrual Workpapers: Legal Considerations and Policy Concerns*, 51 FORDHAM L. REV. 468, 488 (1982) (courts should recognize accountant work-product privilege analogous to attorney work-product privilege to protect integrity of financial reporting process); Note, *Government Access to Corporate Documents and Auditors' Workpapers: Shall We Include Auditors Among the Privileged Few?*, 2 J. CORP. L. 349, 388 (1977) (proposing Congress enact legislation recognizing accountant-client testimonial privilege); Note, *A Balancing Approach to the Discoverability of Accountants' Tax Liability Workpapers Under Section 7602 of the Internal Revenue Code*, 60 WASH. U.L.Q. 185, 208 (1982) (courts should not enforce summons of accountant's tax accrual workpapers absent extraordinary need); *cf.* Caplin, *Reflections on IRS Criminal Tax Investigations of Corporations*, 12 CUM. L. REV. 233, 260 (1982) (because tax system is based on voluntary compliance, the IRS must treat taxpayers fairly); Caplin, *Should the Service be Permitted to Reach Accountants' Tax Accrual Workpapers?*, 51 J. TAX'N 194, 200 (1979) (IRS should use restraint in summoning tax accrual workpapers).

114. A public company must inform both the Securities and Exchange Commission and the company's shareholders of the reason why its accountant was discharged or resigned. 17 C.F.R. §§ 229.304, 240.14a-3 (1983). The company then must request the accountant to inform the Securities and Exchange Commission if that reason is correct. 4 FED. SEC. L. REP. (CCH) ¶ 31,003, Item 4(d), at 21,995 (May 23, 1984). From a pragmatic viewpoint, however, the management of other corporations will probably think twice before engaging an accountant who has made trouble for another corporation with the Securities and Exchange Commission, a fact not lost upon accountants.

115. 104 S. Ct. at 1504, 79 L. Ed. 2d at 837. In United States v. Sells Eng'g, Inc., 103 S. Ct. 3133, 3143, 77 L. Ed. 2d 743, 758 (1983), the Court recognized fundamental fairness as a reason to impose limits on investigation and discovery in denying the government automatic access to grand jury materials.

workpapers.[116] The Court reasoned that the IRS should not be more limited in its investigatory power.[117] The Court also noted the IRS's revised and more stringent guidelines for issuing summonses to accountants.[118] Although not effective as to the *Arthur Young* summons, the Court interpreted the new guidelines to reflect the IRS's sensitivity to the intrusiveness of the summons and to indicate that the IRS would not abuse its summons power.[119]

In a self-assessment tax system the taxpayer possesses all the facts. The IRS must have access to those facts to ensure compliance with the tax laws. Summons of tax accrual workpapers may reveal some of the facts. A summons also reveals, however, the taxpayer's theories and strategies for negotiation and litigation of questionable tax positions. The IRS, therefore, discovers the taxpayer's game plan, but the courts cannot allow the taxpayer to discover the IRS's theories and strategies in order to even the score. To do so would not only fly in the face of *Hickman v. Taylor*, but would also disrupt and overburden our federal courts with hoards of taxpayers seeking to discover the IRS's theories and strategies on deficiency assessments. The IRS, it appears, has discovered the elusive single-edged sword.[120]

Arthur Young and Amerada made sound arguments for recognition of an accountant work-product privilege. Without that privilege the taxpayer's only recourse to prevent the IRS from discovering theories and strategies is to withhold that information from the accountant. Withholding the information may result in an unqualified opinion based on insufficient information. On the other hand, if the taxpayer chooses to disclose those theories and strategies, the result might be the same result that the Court admonished in *Hickman v. Taylor*. The taxpayer might choose not to rationalize the tax positions he takes because he knows that the IRS can obtain them through the tax accrual workpapers. Instead the taxpayer might choose to take a tax position now and rationalize it later when the IRS contests it, with the attorney work-product privilege protection of theories and strategies developed in anticipation of that tax litigation.[121] Again the accountant would base his opinion on insufficient information, in this instance because the taxpayer has yet to develop the information, rather than because the taxpayer has withheld it.

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116. 104 S. Ct. at 1504, 79 L. Ed. 2d at 837-38; Securities Exchange Act of 1934, § 21(b), 15 U.S.C. § 78u(b) (1982) (Securities and Exchange Commission may summon documents relevant to inquiry); FED. R. CIV. P. 26(b)(1) (parties to civil litigation may discover relevant documents not privileged).

117. 104 S. Ct. at 1504, 79 L. Ed. 2d at 838.

118. *Id.*; *see* 1 INTERNAL REVENUE MANUAL (CCH) § 4024.4 (May 14, 1981) (IRS agent may summon accountant's tax accrual workpapers in unusual circumstance that IRS cannot obtain certain factual data from taxpayer's records). *But see* United States v. I.C. Indus., Inc., 555 F. Supp. 219, 222 (N.D. Ill. 1983) (IRS not required to comply with own guidelines).

119. 104 S. Ct. at 1505, 79 L. Ed. 2d at 838.

120. *Contra* Hickman v. Taylor, 329 U.S. at 515 (Jackson, J., concurring) ("[d]iscovery is a two-edged sword").

121. The emphasis in tax law might shift from tax planning to tax litigation.

Rejection of the accountant work-product privilege, however, appears necessary.[122] Privileges exist because the interests protected are more important than the rights denied because those privileges shroud the truth.[123] The government's right to enforce the tax laws is paramount.[124] The government must collect tax revenue to function. To justify an accountant work-product privilege, therefore, the interest of certain taxpayers in keeping their tax theories and strategies from the IRS must outweigh the right of all individuals to an effective government. Few, if any, privileges could pass such a test; the accountant work-product privilege certainly cannot.

III. CONCLUSION

In *United States v. Arthur Young & Co.* the Supreme Court decided two issues concerning the section 7602 summons. First, the Court determined tax workpapers relevant to IRS tax compliance investigation. The relevancy standard necessary to enforce the summons is the logical relationship between the document sought and the investigation. Anything that might illuminate an aspect of the tax return is relevant. The definition of relevant, therefore, encompasses a very broad spectrum. The Court determined this latitude necessary for IRS enforcement of compliance with the self-assessment tax system. Second, the Court refused to recognize an accountant work-product privilege. Although the Court was not convinced, lack of such a privilege will probably adversely affect some financial audits. Some companies will receive unwarranted audit opinions vouching for nonexistent financial strength. A securities investor, however, must assume this risk, since the government must collect tax revenue to function. Any privilege that directly impairs the IRS's enforcement of the tax laws and the consequent collection of such tax revenues must, therefore, overcome the right of all individuals to an effective government. The interest Arthur Young sought to protect and the consequent privilege it sought to forge could not overcome this right.

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122. *Contra* Note, *Auditor-Client Work-Product Privilege With Respect to Tax Accrual File: The* Arthur Young *Case*, 27 ST. LOUIS U.L.J. 437, 459 (1983) (Second Circuit's recognition of accountant work-product privilege was necessary).

123. C. MCCORMICK, *supra* note 101, at 152.

124. *See* Couch v. United States, 409 U.S. at 336 (society has legitimate interest in enforcement of tax laws).