
 IN THE UNITED STATES DISTRICT COURT

 FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

 RAPOWER-3, LLC, INTERNATIONAL
 AUTOMATED SYSTEMS, INC, LTB1,
 LLC, R. GREGORY SHEPARD, NELDON
 JOHNSON, and ROGER FREEBORN,

Defendants.

**ORDER GRANTING THE UNITED
 STATES' MOTION TO COMPEL
 DEPOSITION TESTIMONY OF CODY
 BUCK, KEN OVESON, AND DAVID
 MANTYLA [ECF NO. 137]**

Case No. 2:15-CV-00828-DN-EJF

District Judge David Nuffer

Magistrate Judge Evelyn J. Furse

The United States (“the Government”) asks the Court to compel deposition testimony of Certified Public Accountants (“CPAs”) Cody Buck, Ken Oveson, and David Mantyla. (United States’ Mot. to Compel Dep. Test. of Cody Buck, Ken Oveson, & David Mantyla, ECF No. 137.) The Defendants RaPower-3, LLC, International Automated Systems, LLC, LTB1, LLC, and Neldon Johnson (collectively “RaPower-3 Defendants”) claim the Government seeks information protected by Internal Revenue Code, (“I.R.C.”), § 7525 (“tax advice privilege”). (Short Form Resp. to United States’ Mot. to Compel Dep. Test. of Cody Buck, Ken Oveson, & David Mantyla 2, ECF No. 148.) Counsel for R. Gregory Shepard and Roger Freeborn appeared at the hearing and orally opposed the Motion. Because the RaPower-3 Defendants have not met their burden of demonstrating that they communicated with the CPAs with an expectation of confidentiality and for the sole purpose of obtaining tax advice, the Court GRANTS the Government’s Motion.

Congress enacted the tax advice privilege to protect communications between a taxpayer and a federally authorized tax practitioner when the attorney-client privilege would protect the

same communication if made by a taxpayer to an attorney. I.R.C. § 7525(a)(1) (West 2017). Thus, in applying the tax advice privilege, courts consistently rely upon common law principles relating to the attorney-client privilege. *United States v. BDO Seidman*, 337 F.3d 802, 810 (7th Cir. 2003). The tax advice privilege does not exceed the scope of the attorney-client privilege, and courts view it as a “limited privilege.” *Id.*

The party asserting the tax advice privilege bears the burden of establishing the elements of the privilege. *Id.* at 810-11. First, a taxpayer must show that it made the communications to the tax practitioner with an expectation of confidentiality. *Id.* Second, a taxpayer must also show that it made the communication for the sole purpose of obtaining advice regarding tax law. *Schaeffler v. United States*, 806 F.3d 34, 40 (2d Cir. 2015). Blanket assertions of privilege will not suffice. *See Valero Energy Corp. v. United States*, 569 F.3d 626, 631 (7th Cir. 2009). The RaPower-3 Defendants fail to establish both elements required to assert the tax advice privilege.

The RaPower-3 Defendants fail to demonstrate that they intended their communications with the CPAs to remain confidential. A taxpayer cannot assert the confidentiality of a communication if it intended the disclosure of the information to outside parties. *Id.* Communications containing information for use in preparation of the client’s tax returns have no expectation of confidentiality because the client will eventually disclose the information in the tax return to the IRS. *See United States v. Frederick*, 182 F.3d 496, 500-01 (7th Cir. 1999).¹

The RaPower-3 Defendants’ communications with the CPAs contained information that they intended to disclose either to outside parties or for use in preparation of tax returns. The

¹ The court in *Frederick*, 182 F.3d at 502, did not apply § 7525 because the communications at issue occurred prior to its enactment. The Court did note, however, that applying § 7525 “would not change [its] analysis even if it were applicable.” *Id.* The professional in *Frederick*, as a lawyer and accountant, provided both legal services and tax preparation for his clients. *Id.* at 499.

Shepards engaged Mr. Oveson for the express purpose of researching tax issues and sharing that information with International Automated Systems, LLC customers and potential customers. (E-mail string between Olsen, Matthew Shepard, Greg Shepard, and others, dated 10/29/09, Pl. Ex. 136, Olsen_P&E-01339-01340, ECF No. 137-3.) Mr. Mantyla performed research relating to tax credits both in preparation of Mr. Greg Shepard's 2008 tax returns and amendments to Mr. Shepard's 2007 tax returns. (Invoice dated 12/31/2008 from Mantyla McReynolds to Bigger Faster Stronger, Pl. Ex. 376, MM004391, ECF No. 137-10; Invoice dated 3/31/2009 from Mantyla McReynolds to Bigger Faster Stronger, Pl. Ex. 377, MM004395, ECF No. 137-11.)

Mr. Buck worked primarily as an auditor at Mantyla McReynolds, where his responsibilities included reviewing and preparing financial statements that the clients would file with the SEC or make available to other interested parties. (Tr. Buck's Dep., Pl. Ex. 384, 12:4-13:21, ECF No. 137-14.) Services rendered as part of an independent financial audit lack any promise of confidentiality as an independent auditor's public responsibility "transcend[s] any employment relationship with the client." *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984). Because the CPAs used the information communicated by the RaPower-3 Defendants in conjunction with these services in disclosures to third parties or in preparing and amending tax returns, the RaPower-3 Defendants cannot establish any expectation of confidentiality.

Additionally, the RaPower-3 Defendants fail to show that they communicated with the CPAs for the sole purpose of obtaining advice regarding tax law. The RaPower-3 Defendants claim that the tax advice privilege covers "any information relating to their representation by their CPAs." (Defs.' Resp. 5, ECF No. 147.) The RaPower-3 Defendants argue that their communications with the CPAs are privileged because the research, auditing, and tax preparation

services provided by the CPAs “fall squarely within the realm of rendering tax advice.” (Defs.’ Resp. 7, ECF No. 147.)

Existing case law, however, does not support the RaPower-3 Defendant’s assertion of the scope of the tax advice privilege. In evaluating assertions of the tax advice privilege, courts typically evaluate communications along a spectrum, with general accounting advice on one end and legal tax advice on the other end. *Valero*, 569 F.3d at 630. Accounting advice and communications relating to accounting services do not receive the protection of the tax advice privilege. *Id.* On the other side of the spectrum, courts find tax advice given in preparation for or in anticipation of litigation privileged. *Id.* at 630; *Schaeffler*, 806 F.3d at 44.

Courts have identified several accounting services or communications that do not fall under the category of tax advice protected by the privilege. First, courts have consistently held that preparation of a client’s tax returns qualifies as an accounting service, and any information communicated to a tax practitioner for purposes of preparing tax returns is not privileged. *Valero*, 569 F.3d at 630. Second, absent communications addressing “issues of statutory interpretation or case law,” work done related to a tax audit constitutes an accounting service. *Frederick*, 182 F.3d at 502. Furthermore, communications that include both accounting and legal issues lack any protection from the privilege. *Frederick*, 182 F.3d at 501-02; *Valero*, 569 F.3d at 630-31. Simply raising legal federal tax topics in otherwise accounting communications fails to invoke application of the tax advice privilege. *Valero*, 569 F.3d at 631.

The RaPower-3 Defendants did not communicate with the CPAs for the sole purpose of obtaining legal tax advice. Mr. Buck testified that International Automated Systems, LLC retained Mantyla McReynolds to provide “purely auditing services.” (Tr. Buck’s Dep., Pl. Ex. 384, 18:10-13, ECF No. 137-14.) The Shepards retained Mr. Oveson to share information on a

conference call with customers and potential customers relating to solar tax credits they could claim on their tax returns. (E-mail string between Olsen, Matthew Shepard, Greg Shepard, and others, dated 10/29/09, Pl. Ex. 136, Olsen_P&E-01339-01340, ECF No. 137-3.) Again, Mr. Mantyla performed research relating to solar tax credits in preparation of Mr. Greg Shepard's 2007 and 2008 tax returns. (Invoice dated 12/31/2008 from Mantyla McReynolds to Bigger Faster Stronger, Pl. Ex. 376, MM004391, ECF No. 137-10; Invoice dated 3/31/2009 from Mantyla McReynolds to Bigger Faster Stronger, Pl. Ex. 377, MM004395, ECF No. 137-11.) Because these services are accounting services, the RaPower-3 Defendants have not shown that the sole purpose of their corresponding communications with the CPAs was to obtain tax law advice.

The Court finds that the RaPower-3 Defendants have not met their burden of demonstrating that they communicated confidential information to the CPAs for the sole purpose of obtaining tax advice. Counsel made blanket assertions of privilege that failed to demonstrate the basis for the assertion. For the reasons set forth above, the Court HEREBY GRANTS the Government's Motion to Compel Deposition Testimony of Cody Buck, Ken Oveson, and David Mantyla and ORDERS:


1. Mr. Buck to answer the questions he declined to answer at his deposition on February 15, 2017, if he declined to answer because of the RaPower-3 Defendants' tax advice privilege objections;
2. Mr. Buck to answer questions that arise out of his answers to the questions identified in paragraph 1;

3. The only time that shall be counted toward the 7-hour time limitation on Mr. Buck's deposition is that time during which he answered questions during his appearance on February 15, 2017;
4. The deposition of Mr. Buck shall resume at the U.S. Attorney's Office at 111 South Main Street, Ste. 1800, Salt Lake City, Utah 84111, as soon as possible;
5. Mr. Oveson to answer the questions he declined to answer at his deposition on February 16, 2017, if he declined to answer because of the RaPower-3 Defendants' tax advice privilege objections;
6. Mr. Oveson to answer questions that arise out of his answers to the questions identified in paragraph 5;
7. The only time that shall be counted toward the 7-hour time limitation on Mr. Oveson's deposition is that time during which he answered questions during his appearance on February 16, 2017;
8. The deposition of Mr. Oveson shall resume at the U.S. Attorney's Office at 111 South Main Street, Ste. 1800, Salt Lake City, Utah 84111, as soon as possible;
9. Mr. Mantyla to answer the questions he declined to answer at his deposition on February 16, 2017, if he declined to answer because of the RaPower-3 Defendants' tax advice privilege objections;
10. Mr. Mantyla to answer questions that arise out of his answers to the questions identified in paragraph 9;
11. The only time that shall be counted toward the 7-hour time limitation on Mr. Mantyla's deposition is that time during which he answered questions during his appearance on February 16, 2017;

12. The deposition of Mr. Mantyla shall resume at the U.S. Attorney's Office at 111 South Main Street, Ste. 1800, Salt Lake City, Utah 84111, as soon as possible; and
13. The parties to call the Court during the depositions if an issue related to this order arises and cannot be resolved among the parties.

DATED this 19th day of July 2017.

BY THE COURT:


EVELYN J. FORSE
United States Magistrate Judge