

TEXTRON: U.S. SUPREME COURT DENIES CERTIORARI

On May 24, 2010, the U.S. Supreme Court declined to hear an appeal by Textron, Inc. (“Textron”) of a 2009 adverse decision at the U.S. Court of Appeals for the First Circuit involving the application of the work product privilege. The U.S. Supreme Court's refusal to hear this matter will likely embolden the IRS in its attempts to request and obtain tax accrual work papers (and other related documentation) which were previously considered protected by most tax professionals.

Specifically, on August 13, 2009, the U.S. Court of Appeals for the First Circuit held in *United States v. Textron, Inc.*, 577 F.3d 21 (1st Cir. 2009), that the work product doctrine does not protect tax accrual work papers from IRS discovery (i.e., documents which could identify weak positions in a company's tax return and, therefore, act as a convenient roadmap for IRS auditors). The First Circuit reached this holding by concluding that the papers were prepared to support financial statements rather than “for use in possible litigation.” In its petition for certiorari to the U.S. Supreme Court, Textron claimed that the First Circuit's interpretation of the work product privilege in Federal Rule of Civil Procedure 26(b)(3) was unprecedentedly narrow.

The U.S. Supreme Court's decision to deny certiorari means that the First Circuit's narrow interpretation of the work product privilege will remain as precedent for future cases – both for tax cases and for cases unrelated to tax matters. Accordingly, it appears that documents which are prepared in the course of business but which also analyze potential litigation risks will not be afforded protection under the work product privilege in the First Circuit. Attorneys, accountants, and related professionals must tread lightly in this new world of uncertainty as the reach of the IRS continues to expand.



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