

The First Circuit Decides In Favor of the IRS in the Textron Case

A full court review by the First Circuit in the case of *United States v. Textron Inc.*, reversed earlier decisions by the district court and circuit panel by holding that Textron's tax accrual workpapers are not subject to work product protection. (*United States v. Textron Inc. et al.*; No. 07-2631, 8/13/09) In the case, the majority of the court disagreed with the district court and circuit panel's determination that Textron's workpapers were protected by work product privilege because the documents were considered to have been prepared in anticipation of future litigation and thus were improper for the government to access. The court held that "there is no evidence in this case that the work papers were prepared for such a use or would in fact serve any useful purpose for Textron in conducting litigation if it arose." According to the court, the work product privilege is aimed at protecting work done for litigation, not in preparing financial statements, and IRS access to these workpapers serves the legitimate and important function of detecting and disallowing abusive tax shelters. Thus, the Textron workpapers, which are best described as tax documents rather than materials prepared in anticipation of litigation, are not protected by the privilege because they are created for the purpose of making book entries, preparing financial statements and obtaining a clean audit.

This decision impacts all businesses, including banks. Current rule allows the IRS to request all of a taxpayers tax accrual workpapers if it determines that the taxpayer has engaged in certain listed transactions, such as a sale-in lease-out (SILO) transaction. The earlier decision was a big win for taxpayers as it would prevent the IRS from obtaining information that is subject to the work product privilege. This full court decision now makes it possible for the IRS to obtain all information recorded in the tax accrual workpapers. Because of the importance of the issue involved in the case, it is very likely that this decision will be appealed to the Supreme Court.