International Tax Review

Tax Disputes -

Supreme Court denies Textron's petition for review

The US Supreme Court denied Textron's petition for a writ of certiorari today.

In **its petition**, the aerospace and defence company sought review of the First Circuit's 3-2 *en banc* decision in *United States v Textron* that upheld the tax authorities' powers to demand legal work papers used by companies.

The *en banc* court overturned the district court's decision, concluding that "the work product privilege is aimed at protecting work done for litigation, not in preparing financial statements".

Since Textron prepared its work papers to support its audited financial statements, the court found no precedent for a case "in which a document is not in any way prepared 'for' litigation but relates to a subject that might or might not occasion litigation". The court then came up with a new test for determining if documents are entitled to work product protection by requiring an inquiry into whether the documents were "prepared for" use in possible litigation.

In the petition, Textron set forth three **reasons** why the Supreme Court should hear the case. First, it argued that the *en banc* decision widened the existing split in the circuits appeal courts around the US over the scope of the work product privilege. Textron also argued that the decision was wrong as a matter of law. And the petition to the Supreme Court emphasised that the question presented is one of paramount importance to all attorneys and their clients and so deserving of the court's attention.

There were 11 *amicus curiae* briefs in support of Textron's petition, including from industry organisations such as the **ABA**, the **US Chamber of Commerce**, **Association of Corporate Counsel**, **Tax Executives Institute** and the **Council on State Taxation**, reflecting the importance of this case.

The briefs urged the court to take the case and settle the split among the circuits on the scope of the work product doctrine. They argued that the standard articulated by the First Circuit undermined the doctrine and has a chilling effect on clients' use of counsel.

"Evidently, those briefs fell on deaf ears at the Supreme Court," said Douglas Stransky, a partner at Sullivan & Worcester in Boston.

With the denial of Textron's petition, the First Circuit's decision now stands.

"The First Circuit's new 'prepared for' test sets a troubling precedent that could hinder in-house counsel from preparing analyses that are of the greatest importance to corporations and their investors," said Stransky.

Under this 'prepared for' test every party in commercial litigation, not only the IRS or state tax authorities, whose opponent files GAAP financial statements that report contingent liabilities for litigation exposure will be able to obtain in discovery the litigation risk analysis of its opponent's lawyers.

"The First Circuit's decision has eviscerated the work product protection that exists to protect exactly the type of attorney analysis that was present in this case. It's surprising that the Supreme Court did not recognise this," said Stransky.

"Attorneys and their clients now know that the Supreme Court will not intervene and set the circuits straight on [the issue of work product protection] which is essential to the daily practice of litigators across the country," he added.

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