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**Supreme Court Denies Textron's Certiorari Petition in Workpapers Case
by Jeremiah Coder**

Summary by **taxanalysts®**

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In a loss for corporate taxpayers, the Supreme Court on May 24 denied a petition for certiorari to reconsider the First Circuit's ruling that allowed the IRS access to a company's tax accrual workpapers despite objections that the work product doctrine applied. (For the petition in *Textron Inc. et al. v. United States*, No. 09-750 (Dec. 26, 2009), see [Doc 2009-28371](#) or [2009 TNT 247-9](#).)

Many legal observers considered the appeal by Textron Inc. an ideal opportunity for the Supreme Court to resolve conflicting standards in the circuit courts for the application of work product protection to a company's legal analysis. Several notable advocacy groups filed amicus briefs with the Court urging the justices to grant the appeal, including the U.S. Chamber of Commerce, the Association of Corporate Counsel, and the American Bar Association. (For the ABA's brief, see [Doc 2010-2173](#) or [2010 TNT 21-15](#).)

The tussle over tax accrual workpapers between Textron and the IRS began when the government issued a summons to the company for documents related to deemed tax shelter transactions. Textron refused to turn over its tax accrual workpapers, citing work product privilege. The IRS sued in court to obtain the documents.

A federal district judge held that the workpapers were protected from disclosure because the documents had been prepared in anticipation of litigation. The IRS appealed to the First Circuit, which originally agreed with the lower court. But a later *en banc* ruling by the circuit court overturned the prior decisions in the case, holding that work product privilege only extends to documents prepared for use in litigation, rather than documents created to comply with financial reporting rules. (For prior analysis, see [Doc 2009-18379](#) or [2009 TNT 155-1](#). For the *en banc* opinion in *Textron*, No. 07-2631 (1st Cir. Aug. 13, 2009), see [Doc 2009-18383](#) or [2009 TNT 155-7](#).)

Eli Dicker, chief tax counsel for the Tax Executives Institute, said the denial of cert. was a "missed opportunity for the Court to clarify a muddy area of law." Dicker noted that TEI has been following the tax accrual workpapers issue since before the Supreme Court's 1984 decision in *Arthur Young* and has been arguing that by granting cert., the Supreme Court "would provide clarity on the appropriate interpretation of the legal protections applicable to a company's records." (For TEI's amicus brief, see [Doc 2010-1961](#) or [2010 TNT 18-12](#).)

Taxpayers will now have to ask what standard applies and will have to rely on legal advisers to "opine on what they believe the law is as applied to a particular taxpayer's situation," Dicker said.

Robin Greenhouse of McDermott Will & Emery said Textron's cert. petition asked the Court to consider whether

Federal Rules of Civil Procedure 26(b)(3), which protects documents that "are prepared in anticipation of litigation or for trial," is limited to documents that are prepared for use in litigation. "Given the clear conflict in the circuits on this question, I am surprised that the Supreme Court denied Textron's cert. petition," she said, adding that she expects the issue will be raised "in both nontax and tax cases" following the denial.

Douglas S. Stransky of Sullivan & Worcester LLP said *Textron* has implications beyond just application of privilege to tax workpapers "because work product potentially applies to all discovery." Post-*Textron*, it is possible that every party with an opponent using U.S. generally accepted accounting principles "will be able to discover the other's litigation hazards -- those are large, important implications," he said.

Stransky told Tax Analysts that he is shocked that "11 amicus briefs arguing the importance of this case and how the First Circuit's decision eviscerates the work product doctrine" could not persuade the Court to grant cert.

"Perhaps the Supreme Court doesn't think the 'prepared for' test articulated by the First Circuit is a new test," although the opinions by the original circuit panel and *en banc* dissent "clearly show that the *en banc* majority is just wrong," he said.

However, Stransky said, the Court's decision to forgo hearing the appeal may not have as big an impact as expected -- while the IRS recently decided to make taxpayers self-report uncertain tax positions, it is likely no privilege will apply to some of those disclosures.

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