

ACTION ON DECISION

SUBJECT: United States v. Roxworthy, 457 F.3d 590 (6th Cir. 2006),
rev'g No. 04-MC-18-C (W.D. Ky. Apr. 4, 2005)

Issue:

Whether a company should have been required to produce an accounting firm's opinion letters in response to an IRS summons.

Discussion:

An administrative summons seeking production of certain documents was served on Patrick J. Roxworthy in his capacity as Vice President of Tax at Yum! Brands, Inc. Roxworthy ultimately declined to produce two documents, which were described by Yum! as tax opinions prepared by KPMG LLP analyzing the tax consequences of certain transactions entered into by Yum! pertaining to the creation of a captive insurance company and the subsequent sale of the captive's stock at a substantial loss. The government filed a petition in the United States district court to enforce the summons as it related to the two opinion letters. Roxworthy filed a response to the petition and a petition to quash, alleging the KPMG opinion letters were protected from disclosure by the work product doctrine. In support of the motion to quash, affidavits were submitted by a Yum! in-house attorney and a KPMG partner alleging that the two KPMG opinion letters were prepared in anticipation of litigation. The case was referred to a magistrate judge.

The magistrate judge found that Roxworthy did not meet his burden of establishing that the KPMG opinion letters were protected by the work product doctrine, finding that Roxworthy's affidavit evidence contained bare, conclusory assertions. The magistrate judge concluded that the KPMG opinion letters were not created "because of" the prospect of actual litigation, but were intended to be used to assist Yum! in the preparation of its taxes and yearly audit and to avoid understatement penalties. Consistent with these findings and conclusions, the magistrate judge issued a Report and Recommendation that the summons be enforced.

Roxworthy filed objections to the Report and Recommendation in the district court, and moved to expand the record to include additional affidavits and deposition testimony. Over the government's objection, the district court granted the motion, and Roxworthy submitted additional affidavits that stated that the KPMG opinion letters were prepared because Yum! anticipated litigation in light of the size of the transaction, the Service's history of litigating captive insurance company cases, and the unsettled law in the area. The government challenged the conclusory nature of the affidavit evidence at the hearing. After hearing oral argument and reviewing the opinion letters *in camera*, the

district court adopted the magistrate judge's Report and Recommendation. Roxworthy appealed.

The circuit court reversed the district court. The circuit court analyzed the work product doctrine using the "because of" test and, based on the additional affidavits submitted on behalf of the taxpayer, and the fact that there was "no evidence in the record to controvert the [additional affidavits] supplied by Yum," the circuit court found that the KPMG opinion letters were prepared "in anticipation of litigation" for purposes of the work product doctrine.

The circuit court's decision is incorrect. Both the magistrate judge and the district court judge were in a better position than the circuit court to factually and legally evaluate the evidence regarding the opinion letters. The evaluation of the evidence at the trial court level should not have been disturbed by the circuit court. The evidence in the record available to the magistrate judge included evidence that Yum! anticipated a tax controversy with the Service, and that there was only the "potential" for litigation at the time the opinion letters were written. Even with the expanded record consisting of the additional after-the-fact, self-serving Yum! affidavits, the district court judge concluded "that any possibility of litigation was too far removed to be concrete or significant" and, therefore, could not be protected under the work product doctrine. A document prepared in anticipation of an audit, even if it focuses on a particular transaction or item, is not prepared in anticipation of litigation. If a document is prepared before even an audit has been initiated, the specter of litigation is, absent objective facts not present in this case, too insubstantial and attenuated to support a conclusion that the possibility of litigation is "concrete or significant." Therefore, the opinion letters should not be protected by the work-product doctrine. As a result, the circuit court erred in reversing the district court.

In evaluating the application of the work product doctrine to the opinion letters, there was additional evidence in the record that supported the finding that the opinion letters were not protected by the work product doctrine. The objective reading of the record establishes that KPMG, an accounting firm, issued the opinion letters because it was engaged by Yum! to provide advice "with respect to the tax implications of forming a captive insurance company" prior to the formation of that company and not to provide advice because Yum! anticipated that the formation of the company would precipitate litigation. Likewise, the timing of the issuance of the opinion letters to Yum!, *i.e.*, while Yum!'s federal income tax return was being prepared, strongly suggests that the opinion letters were requested and prepared for reasons other than anticipated litigation. As the district court found, the after-the-fact, self-serving statements of the Yum! personnel involved in planning and executing the transaction cannot overcome the absence of any objective evidence in the record that the accounting firm was, in fact, engaged to provide advice "because of" the anticipation of litigation under these circumstances.

