The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Petitioner,

v.

MICROSOFT CORPORATION, et al.,

Respondents.

No. CV 2:15-0102RSM

BRIEF OF *AMICI CURIAE* SOFTWARE FINANCE AND TAX EXECUTIVES COUNCIL, NATIONAL FOREIGN TRADE COUNCIL, FINANCIAL EXECUTIVES INTERNATIONAL, INFORMATION TECHNOLOGY INDUSTRY COUNCIL, AND NATIONAL ASSOCIATION OF MANUFACTURERS REGARDING PRIVILEGED DOCUMENTS

NOTED FOR: NOVEMBER 11, 2016

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Cases

Statutes

MICHELLE PETERSON LAW, PLLC
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Other Authorities

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STATEMENT OF IDENTITY AND INTEREST

The Software Finance and Tax Executives Council ("SoFTEC") is a trade association providing software industry-focused public policy advocacy in the areas of tax, finance, and accounting. The National Foreign Trade Council ("NFTC") is the oldest U.S. business association dedicated to international tax, trade, and human resource matters. NFTC's approximately 250 members, representing the largest U.S. companies, are advocates of free trade and a rules-based economy. NFTC encourages policies that will expand U.S. exports and enhance the competitiveness of U.S. companies by eliminating major tax inequities in the treatment of U.S. companies operating abroad. Many SoFTEC and NFTC members retain accounting firms upon which they rely for tax advice to best structure and conduct their businesses. Many SoFTEC and NFTC members use cost sharing agreements with foreign subsidiaries and other structures that make the conduct of their businesses overseas more tax efficient.

Financial Executives International ("FEI") is a professional association representing the interests of more than 10,000 chief financial officers and other senior financial executives from over 8,000 major companies in the United States and Canada. The Information Technology Industry Council ("ITI") represents the interests of the information and communications technology industry, including member companies that are among the global leaders in innovation from all areas in information and communications technology, including hardware, services, and software. The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

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For ease of reference, SoFTEC, NFTC, FEI, ITI, and NAM are collectively referred to as "Amici" in this brief. Amici members believe that their written communications with non-attorney outside tax advisors should be protected by the tax practitioner privilege of Internal Revenue Code Section 7525 (the "Tax Privilege"). Amici members are concerned because the U.S. Government challenges whether written communications with their non-attorney tax advisors are private and confidential. The Government's position would reduce the ability of Amici members to have frank discussions with their non-attorney tax advisors, and would jeopardize their ability to explore tax issues without fear of those conversations being open to discovery by the Government, as well as third parties. If the Court sustains the Government's position that cost sharing agreements and other methods of structuring overseas operations by multinational companies are "tax shelters" and the routine tax advice they receive from their non-attorney tax advisors is prohibited "promotion," then Amici members will need to reconsider whether they use non-attorney tax advisors for their routine tax advice.

SUMMARY OF ARGUMENT

This case involves the protection of confidential communications between taxpayers and their non-attorney tax advisors. The Tax Privilege is codified in Section 7525(a), and is essentially coterminous with the common law attorney-client privilege. *See Schaeffler v. United States*, 806 F.3d 34, 38 n.3 (2d Cir. 2015). Section 7525(b), however, provides that the Tax Privilege does not apply to otherwise confidential written communications between a taxpayer and a tax advisor that are "in connection with the promotion of the direct or indirect participation of the person in any tax shelter." The term "tax shelter" has an extremely broad definition and encompasses any transaction in which "a significant purpose" is the avoidance of tax. The term "promotion" in Section 7525(b)(2), however, is not defined.

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In this case, the Government offers an interpretation of "promotion" that is so broad and overreaching that, if accepted, it would remove routine tax advice and common tax planning from the protections of the Tax Privilege. This overly broad interpretation is contrary to Congress's intent that the privilege be co-terminus with the attorney-client privilege and the sound tax policy favoring the free flow of information between taxpayers and their advisors. Accordingly, the Government's interpretation should not be adopted.

Section 7525(a) states that the same common law protections of confidentiality under the attorney-client privilege are also available under the Tax Privilege. The intent of Congress in enacting the Tax Privilege was to allow taxpayers to consult with non-lawyer tax advisors in the same manner they consult with tax advisors who are licensed to practice law. As such, the principles of the Tax Privilege mirror the common law attorney-client privilege: "to encourage full and frank communication between advisors and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Microsoft decided to set up a cost-sharing arrangement in the Americas region with its Puerto Rican operations, and engaged KPMG to advise it. *See* Declaration of Michael P. Boyle at p. 8. This is precisely the kind of typical and routine tax planning for which Amici members engage non-attorney tax advisors.

Case law provides ample support for the position that a non-attorney tax advisor must do more than simply offer routine tax advice in order to be considered a "promoter" of a "tax shelter." In *Countryside Ltd. P'ship v. Comm'r*, 132 T.C. 347 (2009), the Tax Court held that routine tax advice given as part of an ongoing client-advisor relationship is not "promotion" within the meaning of Section 7525(b). Several cases following *Countryside* have held similarly, focusing on whether the non-attorney tax advisor has a financial interest in the

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advice given other than what he bills at his typical hourly rate. *See*, *e.g.*, *Rawls Trading, L.P. v. Comm'r*, T.C. Memo. 2012-340; *106 Ltd. v. Comm'r*, 136 T.C. 67 (2011), *aff'd*, 684 F.3d 84 (D.C. Cir. 2012); *Tigers Eye Trading, LLC v. Comm'r*, T.C. Memo. 2009-121.

The Government seeks to vitiate Section 7525 protection, relying solely on *Valero Energy Corp. v. United States*, No. 06 C 6730, 2008 WL 4104368 (N.D. Ill. Aug. 26, 2008), *aff'd*, 569 F.3d 626 (7th Cir. 2009), as support for its strained interpretation of "promotion." This reliance is misguided, as *Valero* did not place sufficient limits on the scope of the Section 7525(b) exception. *Valero* read promotion to mean "furtherance or encouragement," which, when coupled with a broad definition of "tax shelter," ensures that routine tax advice offered by non-attorney tax advisors will no longer be privileged. The Government's approach would result in the exception "swallowing the rule," which will impair the ability of tax advisors to assist their clients in complying with an exceedingly complex area of law.

ARGUMENT

I. A Narrow Interpretation of "Promotion" Furthers Both the Principles of the Tax Privilege and Congress's Intent in Enacting the Tax Privilege.

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. *See Upjohn*, 449 U.S. at 389; *United States v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997). Courts regularly emphasize that the preservation of the attorney-client privilege is "essential to the just and orderly operation of our legal system." *Id.* at 510. *See also Klein v. Nw. Mut. Life Ins. Co.*, 806 F. Supp. 2d 1120, 1128 (S.D. Cal. 2011); *North Dakota v. United States*, 64 F. Supp. 3d 1314, 1330 (D.N.D. 2014).

The Tax Privilege is no less important. Section 7525(a) plainly states that:

> With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also

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> apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.

Moreover, legislative history, H.R. Rep. No. 105-599, at 268 (1998), makes clear Congress's intent that the attorney-client privilege and the Tax Privilege be essentially coterminous:

> The provision allows taxpayers to consult with other qualified tax advisors in the same manner they currently may consult with tax advisors that are licensed to practice law. The provision does not modify the attorney-client privilege of confidentiality, other than to extend it to other authorized practitioners.

Indeed, sound public policy favors taxpayers being well advised with respect to their tax affairs. The more that can be done at the planning stage to ensure that taxpayers comply with the law, the fewer tax controversies will arise that needlessly expend public and private resources. The Tax Privilege furthers this public policy. Section 7525(b)(2) excepts from protection communications made "in connection with the promotion of the direct or indirect participation of the person in any tax shelter (as defined in section 6662(d)(2)(C)(ii))." "Tax shelter" is defined very broadly as any entity, plan or arrangement a significant purpose of which is the avoidance or evasion of federal income tax. The scope of what constitutes a "tax shelter" hinges on the meaning of "a significant purpose." This meaning is ambiguous, and could cover a broad range of transactions.

In view of the broad definition of "tax shelter," a narrower interpretation of "promotion" is necessary to preserve the intended benefits of the Tax Privilege. The legislative history supports this construction and indicates that the exception was intended to target only the promotion of abusive transactions and not routine tax planning. As originally reported, the law excepted only criminal tax matters from the scope of the Tax Privilege. In conference, the committee unexpectedly added a blanket exception to the Tax Privilege for

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SEATTLE, WASHINGTON 98101
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"communications relating to corporate tax shelters." Sheryl Stratton, *Accountants' Tax Shelter Work Not Privileged Under New Privilege*, Tax Notes, June 29, 1998, p. 1666. Ultimately, a compromise was reached and the exception was narrowed to cover only communications relating to the "promotion" of corporate tax shelters. *Id*. The conference report, H.R. Rep.105-599, at 269, confirms the limited scope of the compromise exception:

> The Conferees do not understand the promotion of tax shelters to be part of the routine relationship between a tax practitioner and a client. Accordingly, the Conferees do not anticipate that the tax shelter limitation will adversely affect such routine relationships.

Use of the broad definition of "tax shelter" without the "promotion" limitation would have rendered the new Tax Privilege, intended to be coterminous with the attorney-client privilege, a near nullity. Most taxpayers seek tax advice to reduce their taxes. Consider the case of a homeowner who seeks the advice of a tax accountant with respect to the deduction for home mortgage interest. Such advice would have "tax avoidance" as a "significant purpose" such that, but for the "promotion" limitation, the Tax Privilege would not apply.

Congressional leaders foresaw problems with the conference committee's efforts to clarify the provision. Members of the Senate Committee on Finance, including its ranking member, raised concerns over potential government attempts to interpret the tax shelter exception broadly. For example, Senator Connie Mack (R-FL) examined the issue:

> I am concerned, though, about an amendment to this provision that was inserted at the 11th hour while the bill was in conference. The amendment was meant to target written promotional and solicitation materials used by the peddlers of corporate tax shelters, but appears to me to be vague and unfortunately employs an ambiguous definition of tax shelter that some argue could be read to include all tax planning. I discussed the problems inherent in this last-minute attempt to create an exception for the marketing of corporate tax shelters in meetings and discussion with the Majority Leader, Chairman Roth, their counterparts in the House, and the Speaker. It was agreed that the language would be clarified to alleviate these concerns and ensure that the amendment does not cover routine tax advice and normal tax

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> planning designed to minimize a corporation's federal tax liability. The language of the conference report, however, could be interpreted in a manner which does not fully reflect our understanding and thus undermines the intended benefit to taxpayers.

144 Cong. Rec. 14,735 (1998). Senator Daniel Moynihan (D-NY), ranking member of the Senate Committee on Finance, also commented that the provision was "certain to cause confusion and to lead to additional litigation with the IRS[.]" 144 Cong. Rec. 14,693 (1998).

In sum, a narrow interpretation of "promotion" is consistent with Congress's intent to extend the common law attorney-client privilege to tax advisors, subject to a narrow exception for abusive tax shelters. To interpret the provision otherwise would vitiate Congress's intent to encourage taxpayers to seek counsel from their non-attorney tax advisors without fear that those communications would be subject to disclosure.

II. Case Law Supports a Narrow Reading of "Promotion."

A limited number of cases have interpreted the meaning of "promotion" for purposes of Section 7525(b). On balance, these cases suggest that a narrow reading of "promotion" is appropriate. In *Countryside,* the Tax Court held that custom tax advice given in an ongoing relationship is not considered promotion. In *Countryside*, the court valued the fact that the non-attorney tax advisor had a "long, close relationship with [the client], preparing returns, assisting with tax planning when asked, answering questions when asked, and responding to notices and inquiries from Federal and State tax officials." *Countryside*, 132 T.C. at 354. The court concluded that this relationship was "routine," and that such a relationship was "precisely the kind of one-on-one tax advice and counseling that is the antithesis of a 'promotional' relationship." *Id*. at 351. In addition to the non-attorney tax advisor's on-going relationship with the taxpayer, his advice with regard to the transaction in question followed

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206.224.7618

the same course of procedure as did his prior tax advice, and neither the practitioner nor his accounting firm had a financial stake in the outcome of the transaction beyond the usual client-retention interest. Therefore, the Tax Court held that the accountant was not "promoting" a tax shelter within the meaning of Section 7525(b).

The Tax Court in *Countryside* laid out the spectrum of possible interpretations of the scope of the "promotion" limitation to the tax shelter exception. At one end of the spectrum, *United States v. Textron Inc.*, 507 F. Supp. 2d 138, 148 (D.R.I. 2007) held that "promotion" meant "the peddling of prepackaged tax shelters," a very narrow interpretation. At the other end of the spectrum, *Valero* held that "promotion" applied "to a person who organizes or assists in organizing a tax shelter," a very broad interpretation. *Valero,* 2008 WL 4104368 at *18. The Tax Court, based on its ruling in *Countryside*, instead of adopting an interpretation of "promotion" that adheres to either end of the spectrum, has charted a different course between the two ends of the spectrum. The Tax Court defines the term "promoter" as "an adviser who participated in structuring the transaction or is otherwise related to, has an interest in, or profits from the transaction." *Rawls*, T.C. Memo. 2012-340 at 12 (citations omitted). The Tax Court explained, however, that:

> One might need to be careful in applying the definition to some kinds of transactions—a tax lawyer asked by a businessman for advice on how to sell the family business through a tax-favored stock redemption might be said to have "participated in structuring the transaction"—but when the transaction involved is the same tax shelter offered to numerous parties, the definition is workable.

106 Ltd., 136 T.C. at 80. Indeed, in cases where the tax advisor "participated in structuring the transaction" but the transaction does not involve a tax shelter offered to numerous parties, a tax advisor is not a "promoter" when he:

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- has a long-term and continual relationship with his client;
- does not give unsolicited advice regarding the tax shelter;
- advises only within his field of expertise (and not because of his regular involvement in the transaction being scrutinized);
- follows his regular course of conduct in rendering his advice; and
- has no stake in the transaction besides what he bills at his regular hourly rate.

See Id.

Rawls distinguishes between a promoter and a non-attorney tax adviser offering the kind of one-on-one tax advice and counseling that is the antithesis of a "promotional" relationship. In *Rawls*, the taxpayer's attorneys were found to be promoters, while the taxpayer's accountant was not. *Rawls* distinguished *106 Ltd.* in finding that the accountant was not a promoter because he: (1) did not introduce, suggest, or coordinate the transaction; (2) advised within his field of expertise; and (3) his compensation did not depend on the outcome of the transactions, and he charged his normal hourly rate. *Rawls,* T.C. Memo. 2012-340 at 34; *see also Textron*, 507 F. Supp. 2d at 148 ("Section 7525(b) is aimed at communications by outside tax practitioners attempting to sell tax shelters to a corporate client"); *Tigers Eye Trading*, T.C. Memo. 2009-121 at 908 ("[A]n advisor who … has an interest in, or profits from the transaction … is considered a 'promoter' of the transaction.").[1]

The balance of case law supports a narrow interpretation of "promotion" that focuses on the nature of the advisor-client relationship and whether the advisor stands to benefit financially from the transaction at issue. Indeed, in those cases "promotion" was not typical and routine tax planning. Special scrutiny is exercised, however, when a tax adviser has a financial interest in the outcome of the transaction. Attorneys and accountants typically are

[1] Note also that "promotion" should not encompass communications in connection with the implementation of a tax shelter. *See*, *e.g.*, *Salem Fin., Inc. v. United States*, 102 Fed. Cl. 793, 796 (2012), *aff'd in part, rev'd in part on other grounds,* 786 F.3d 932 (Fed. Cir. 2015).

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compensated based on an hourly rate, not on the basis of a commission or some other basis unrelated to the amount of work performed. In some circumstances, flat fee provisions are used, but these arrangements are not generally linked to whether or not the transaction closes.

Providing tax advice when the adviser has a personal financial interest in the transaction should not be entitled to protection under Section 7525(b). An adviser should be permitted, however, to advise a client about the consequences of a transaction that qualifies as a "tax shelter" without having to worry that those communications are disclosable, as long as the adviser is not "promoting" the shelter. Tax advice that is routinely given by tax advisors to a client in an ongoing relationship cannot be prohibited "promotion" of a "tax shelter." *See, e.g. Countryside*, 132 T.C. at 354; *Rawls*, T.C. Memo. 2012-340 at 32-33. KPMG had an ongoing relationship with Microsoft and the tax advice provided by KPMG was billed at an hourly rate. *See* Declaration of Brett A. Weaver, Sept. 12, 2016, ¶¶ 8, 9, 16, 17.

III. The Government's Interpretation of "Promotion" Does Not Sufficiently Limit the Tax Shelter Exception to Ensure that Routine Tax Planning Is Privileged.

The formulation of "promotion" in *Valero* fails to ensure that routine tax advice offered by non-attorney tax advisors will be protected from disclosure. *Valero* involved the merger of Valero Energy Corporation with a Canadian oil company. Valero retained Arthur Andersen, LLP, to provide tax and accounting advice with regard to the merger. The series of transactions involved in the merger included "the creation of spin-off entities, several same-day wire transfers of cash, a large distribution from one of the Canadian subsidiaries to a United-States-based parent, re-classification of a separate foreign subsidiary as a branch of Valero for tax purposes, and the extinguishment of debt." *Valero*, 569 F.3d at 628.

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In *Valero*, the court construed "promotion" to mean "furtherance or encouragement." *Id*. at 632. The court noted that nothing in the broad definition of "tax shelter" limits tax shelters to "cookie-cutter products peddled by shady practitioners or distinguishes tax shelters from individualized tax advice." *Id*. In view of this "unambiguous definition," the court found that a narrow interpretation of "promotion" would, "through the back door, [result in] a definition of tax shelters at odds with the text of the statute." *Id.* The court found this "contradiction" so powerful that it rendered the statutory text "unambiguous" in its meaning. The court dismissed the legislative history, holding that it "stands by itself." *Id.* at 634.

Nothing compels either this reading of the statute or an expansion of *Valero*. A narrower interpretation of "promotion" does not inherently contradict the broad definition of "tax shelter." Instead, such a reading harmonizes the statute with Congressional intent and restores meaning to the Tax Privilege. Multiple courts have reached opposite conclusions from *Valero*, and the legislative history indicates Congress's concern that an overbroad interpretation of Section 7525(b) would undermine the Tax Privilege.[2]

Further, the *Valero* court believed that the "significant purpose" language of Section 6662(d)(2)(C)(ii) ensures that the definition of "tax shelter" is not "boundless," as "only plans or arrangements with a significant – as opposed to an ancillary – goal of avoiding or evading taxes count." *Id*. at 632. As discussed above, requiring a transaction to have "a significant purpose" of tax avoidance does not meaningfully limit the definition of "tax shelter," as ordinary business transactions that also present "significant" tax savings are arguably within

[2] Note also that certain national accounting firms may be subject to deferred prosecution agreements that restrict their ability to engage in certain activities. A finding that routine tax advice is tantamount to the "promotion of tax shelters" could jeopardize the status of these deferred prosecution agreements.

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that scope. Instead, a more plausible reading of the statute would find that "promotion" effectively limits the potentially "boundless" scope of the tax shelter definition.

The Government's attempted expansion of the *Valero* court's reading of "promotion" results in the exception "swallowing the rule," contrary to both the intent of Congress and the purpose of the Tax Privilege. If adopted, non-attorney tax advisors would not be able to effectively serve their clients, and clients would be discouraged from seeking the advice of their tax advisors. There is no case from the Ninth Circuit Court of Appeals touching on the proper interpretation of the term "promotion" as it is used in Section 7525. The Seventh Circuit has used a very broad interpretation in a case not involving a tax shelter offered to numerous parties. The Tax Court's formulation for interpreting the term "promotion" in cases involving tax shelters offered to numerous parties, but providing guidance for cases that do not involve such tax shelters, has been approved by the Court of Appeals for the D.C. Circuit. *See, e.g., 106 Ltd. v. Comm'r*, 684 F.3d at 90-91.

CONCLUSION

Amici respectfully suggest that the Court interpret the term "promotion," for purposes of Section 7525, consistent with the Tax Court's approach, which is the better approach because it relies on the legislative history of the statute, adheres to Congress's intent that the Tax Privilege be coterminous with the attorney-client privilege, and properly focuses the analysis of when a tax advisor is engaged in "promotion" on the appropriate factors.

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DATED this 27th day of October, 2016.

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[3] Pursuant to LCR 83.2(a) and Section III(L) of the Electornic Filing Procedures, the attorneys from the McDermott Will & Emery LLP firm are not currently eligible to appear before this Court and are not entering an appearance at this time.

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

Dated this 27th day of October, 2016.

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