

**ENTERED**

November 09, 2017

David J. Bradley, Clerk

**IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

ANADARKO PETROLEUM	§	
CORPORATION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CASE NO. 4-16-cv-2487
	§	
UNITED STATES OF AMERICA,	§	
	§	
Defendant.	§	

**Memorandum and Order**

Before the Magistrate Judge is Defendant’s Motion for Protective Order (Document No. 21). In that motion, Defendant seeks an Order requesting the Court to shield it from having to respond to certain discovery requests made by Plaintiff. Having considered the motion, Plaintiff’s response, Defendant’s reply to Plaintiff’s response, and the applicable law, the Magistrate Judge ORDERS, for the reasons set forth below, that Defendant’s Motion for Protective Order (Document No. 21) is DENIED.

Plaintiff (“Anadarko”) brings this suit against Defendant (“United States”) seeking a refund of federal income tax of \$25 million for the 2007 tax year. The refund sought is the result of an alleged capital loss of \$119 million from the liquidation of Anadarko’s interest in its subsidiary Anadarko Venezuela LLC (“AVLLC”), which was initially deferred, but which deferral should have ended and Anadarko’s loss realized in 2007. The parties agree that recognition of the loss was initially deferred pursuant to 26 U.S.C. § 267(f)(2) and the 2007 version of 26 C.F.R. § 1.267(f)-1(c)(1)(iv). Anadarko maintains that the deferral of the loss

should have ended in December 2007 when AVLLC liquidated in a taxable liquidation pursuant to 26 U.S.C. § 331. However, the United States argues that § 1.267(f)-1(c)(1)(iv) requires continued deferral of the loss because the liquidation should be treated for this purpose as a non-taxable liquidation under 26 U.S.C. § 332.

This case turns on the correct interpretation of § 1.267(f)-1(c)(1)(iv). Prior to 2012, the IRS had taken different approaches to the treatment of deferred losses similar to the one alleged here. The Department of Treasury amended § 1.267(f)-1(c)(1)(iv) in 2012 to explicitly provide for the result the United States asserts. The United States claims that this amendment only “clarified-existing rules.” (Document 25). Anadarko requests documents relating to the IRS’s interpretations regarding § 1.267(f)-1(c)(1)(iv). Specifically, Anadarko requests documents relating to: the 2008 private letter ruling where the IRS ruled in favor of recognition of deferred losses similar to Anadarko’s; the Chief Counsel Advice memorandum issued in 2009 wherein the IRS stated that recognition of a deferred loss was proper at the time of a deemed § 331 liquidation; the 2009 ABA presentation by Marie Milnes-Vasquez where she spoke about the IRS’s prior statements regarding § 1.267(f)-1(c)(1)(iv); and the purpose of the 2012 amendment to § 1.267(f)-1(c)(1)(iv). (Document 25).

The United States maintains that the documents Anadarko requests are protected from disclosure by the deliberative process privilege because these documents are pre-decisional deliberations of a government agency. The United States also argues that these documents are not relevant to Anadarko’s claims and are not proportional to the needs of the case pursuant to Rule 26(b)(1). Anadarko, in response, contends that the requested information is highly relevant because it will show how the IRS understands its own regulation, and this need outweighs any

deliberative process privilege. Anadarko also argues that the requests are reasonable and proportionate because they are important to the resolution of the dispositive issues in this case.

The deliberative process privilege allows the government to prevent the disclosure of discussions, recommendations and methods of reasoning of its officials which would temper candor during the decision-making process. *E.g., NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). Plaintiff's requested documents clearly fall into this category because the majority of these documents are types of pre-decisional documents the deliberative process privilege is meant to protect from disclosure; however, "the deliberative process privilege is qualified and can be overcome 'by a sufficient showing of need.'" *Harding v. County of Dallas*, No. 3:15-CV-01313-D, 2016 WL 7426127, at \*12 (N.D. Tex. Dec. 23, 2016). When determining if the deliberative process privilege protects the information requested, courts balance "the competing interests, taking into account factors such as the relevance of the evidence, the availability of other evidence, the seriousness of the litigation, the role of the government, and the possibility of future timidity by government employees." *Harding*, 2016 WL 7426127, at \*12-13.

Here, on balance, the competing interests in favor of the documents being produced outweigh granting the protective order. Anadarko has demonstrated that the requested information is relevant to the material dispute in this case. The IRS had taken multiple approaches to the treatment of deferred losses prior the 2012 amendment to § 1.267(f)-1(c)(1)(iv). When there are multiple interpretations of a statute, "evidence of [the agency's] contemporaneous construction will be relevant and necessary when [the court] faces the task of constructing those terms." *Standard Oil v. Dep't of Energy*, 596 F.2d 1029, 1056 (Em. App. 1978). Because the United States is asserting that the amendment only clarified existing rules, the evidence of contemporaneous construction is relevant to inform the court's own

interpretation of the statute or regulation. Because agency personnel have the responsibility to interpret regulations, significant and relevant materials to the interpretation of these regulations for courts to use include “not only opinions and directives in manuals and the like, but also explicit indicators such as the practice of auditors and the reactions of administrators to knowledge of industry practice in apply the regulations.” *United States v. Exxon Corp.*, 87 F.R.D. 624, 632 (D.D.C. 1980). The United States argues that these documents are not relevant because they are not precedential; however, just because they are not binding does not mean they are not relevant. The Fifth Circuit held that “[w]hile IRS private letter rulings are not binding with respect to parties other than the taxpayer to whom they were issued, ‘such rulings do reveal the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws.’” *Smith v. Regional Transit Auth.*, 827 F.3d 412, 420 n.3 (5th Cir. 2016). Moreover, in *Hanover Bank v. Commissioner*, the Supreme Court stated “[p]ersuasive evidence that we correct in our interpretation may be found in the respondent’s own prior construction of the statute” in private rulings before the IRS later changed its position. 369 U.S. 672, 685 (1962). The documents and interrogatories requested by Anadarko may provide persuasive evidence to determine the issues in this case.

Anadarko has also demonstrated that the requests are reasonable and proportionate to the controversy. In considering whether requested delivery is proportionate to the needs of the case, the court should “consider the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1). Here, the amount in controversy exceeds \$25 million, a substantial amount; Anadarko’s only method of obtaining the

information is from the United States; and the United States has the resources to locate and produce the requested documents. In addition, the documents requested by Anadarko relate to the reasons underlying the IRS's inconsistent interpretations of § 1.267(f)-1(c)(1)(iv)—the dispositive issue in this case, and while the United States may face a burden in producing the documents, such burden does not outweigh the potential benefit of production.

For the reasons discussed above, Defendant's Motion for Protective Order is DENIED.

Signed at Houston, Texas this 8th day of November, 2017.

  
FRANCES H. STACY  
UNITED STATES MAGISTRATE JUDGE