SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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TAX ANALYSTS, ET AL, : Docket Number: 2020 CAB 001999

Plaintiffs,

vs.

DISTRICT OF COLUMBIA, ET AL,

Defendants. : Friday, May 17, 2024
- - - - - - - - - - - - - - - - - x Washington, D.C.

The above-entitled action came on for a Status hearing before the HONORABLE SHANA F. MATINI, Associate Judge, in Courtroom Number 517.

APPEARANCES:

On Behalf of the Government:

ZITA ORJI, Esquire
Washington, D.C.

On Behalf of the Plaintiff:

CORNISH F. HITCHCOCK, Esquire
AARON DAVIS, Esquire
Washington, D.C.

24-02781

P R O C E E D I N G S

THE DEPUTY CLERK Calling the matter of Tax Analysts, et al v. District of Columbia et al, 2020 CA 1999-B. Parties, please state your name for the record, starting with the plaintiff.

THE COURT: You're muted, Mr. Hitchcock.

MR. HITCHCOCK: Good morning, Your Honor. Cornish Hitchcock for plaintiff, Tax Analysts.

THE COURT: All right, Good morning.

MR. HITCHCOCK: And Aaron Davis.

MS. ORJI: Good morning, Your Honor. Zita Orji here on behalf of the District of Columbia.

THE COURT: All right. Good morning. So I've had the opportunity to review in camera the documents that were submitted by the District. And so just sort of by way of background here, in the Court of Appeals opinion, the Court of Appeals found the prior trial court erred in granting summary judgment to the District in this FOIA matter without first examining the Office of Tax and Revenue private letter rulings that were sought by plaintiffs. And the Court of Appeals determined that there should have been an in-camera examination.

I'm just going to ask that the parties mute themselves, because I'm getting some feedback, and I want to make sure we have a clear recording.

And so the Court of Appeals determined that the Court should have conducted an in-camera review to determine whether or not any nonexempt portions of the documents were reasonably severable from the exempt tax information, such that the private letter ruling should be disclosed in redacted form, rather than be exempt in their entirety.

Here, D.C. Code 474406 prohibits the disclosure of federal, state, or local tax information either submitted by the taxpayer or otherwise obtained. In its opinion, the Court of Appeals observed that the secrecy of returns provision of the D.C. Tax Code satisfies FOIA exemption six, and then went on to clarify what specific information 474406 protects, and the Court interpreted state or local tax information consistently with the definition of federal tax information to refer to a return or return information.

And, the Court also defined return information similar to that of the federal interpretation of 26 U.S.C. Section 6103(B) to mean a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies over assessments or tax payments, whether the taxpayer's return was, is, being, or will be examined or subject to other investigation or processing.

And then this other language, which is really, I think, where the tension in this case lies -- or any other data received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the termination of the existence or possible existence of liability, or the amount thereof of any person under this title for any tax penalty, interest, fine, forfeiture, or other imposition or offense.

And so the Court of Appeals further noted that return information, importantly, does not include data in a form which cannot be associated with or otherwise identify directly or indirectly, a particular taxpayer. The Court stated that this definition does not mean that all non-identifying data is outside of the definition of return information, or that the removal of such identifying data would necessarily suffice to make otherwise protected return information subject to disclosure.

And so while the terms written determination and background file document do encompass the PLRs here, and while information within the PLRs could include return information, as the Court of Appeals stated, it does not mean that everything within a PLR falls within the category of return information, or that even the ruling itself is tax information that may not be disclosed. And our appellate court noted that the federal Tax Analyst v. IRS case at 117 F.3d 607 has held that nontaxpayer specific legal analyses and IRS written determinations, including interpretations and conclusions with respect to statutes, rules, regulations and judicial opinions which are not unique to a particular taxpayer, are not return information.

And so here, there was of course an issue with the Vaughn Index that was previously provided and the lack of an affidavit and the conclusory assertion that the District had made in support of its summary judgment motion.

And so for purposes of this case, the interpretations and conclusions addressed by the federal tax analyst case would be applicable to the conclusion and summary sections in the PLRs that, in some instances, the District has sought to withhold in its entirety. As the Court of Appeals stated, the mere fact that the PLRs provided tax guidance based on the requesting taxpayer's particular circumstances does not answer the questions of whether the PLRs contained non-exempt legal analyses, and if so, whether those analyses are so inextricably intertwined with exempt material as to defeat any attempt at redaction.

And so we now have the affidavit of Bazil Facchina, an Assistant General Counsel of the Office of the Chief Financial Officer, that provides in paragraphs 1 through 8 some basic background information, paragraphs 9 through 15, which contain information regarding the PLRs, most of which is just not relevant. For example, the fact that the OTR does not consider a PLR to have precedential effect is immaterial for purposes of the FOIA, and the Court also finds it paints too broad a brush.

It concludes that each PLR is necessarily taxpayer specific, which does not mean that the conclusions and opinions are unique to that particular taxpayer, and as such, the declaration is somewhat inconsistent with the Court of Appeals' ruling in this case.

The declaration also relies on other data received language that was cited by the Court of Appeals, which I previously noted is intention with the language of the federal tax analyst case. And so while the Assistant General Counsel states that he sought to identify the portions of the PLRs that constituted protected, taxpayer specific tax information and distinguished that information from nontaxpayer specific legal analyses, some of the conclusions that have been redacted appear to the Court to not be taxpayer specific conclusions.

In addition, plaintiff has challenged the Vaughn Index as bare bones and the Court tends to agree. While the Vaughn Index, for example, indicates repeatedly that each section of the PLR was redacted in part. In fact, most PLRs had some of the sections redacted in their entirety.

It also appears to the Court that some of the conclusion and summary sections could be redacted to permit the production of nontaxpayer specific legal analysis that is not unique to the particular taxpayer, while still protecting taxpayer specific information.

Some examples -- the July 11th, 2019 PLR, where some of the facts appear to the Court to be more generic and not necessarily taxpayer specific. The July 15, 2019 PLR -- while the facts may be taxpayer specific, it's unclear why the issuing conclusions are, especially when you compare it to the June 28, 2018 PLR, where the issue section only redacts the taxpayer name. Why cannot that this be done more frequently? The April 12th, 2019 PLR, which does appear taxpayer-specific also redacts footnotes which are legal in nature on some pages but not others.

The February 14, 2019 PLR -- it's unclear why the issue section is totally redacted and why the last paragraph of the analysis section could not be partially redacted. The May 10, 2018 PLR has a page missing, so the

Court could only -- could not thoroughly review it. But this one also appears to be an issue that is more generic to an industry rather than to a specific taxpayer. And even where an issue and facts appear unique to a taxpayer, it's unclear why the conclusion needs to be redacted in its entirety, such as with the May 9, 2017 PLR.

So in other words, if a taxpayer is a restaurant or hotel, for example, seeking legal advice that's germane to other restaurants or hotels, while the taxpayer is seeking information specific to the taxpayer, the advice given is not necessarily unique to that taxpayer. And so the OTR has an obligation to disclose nontaxpayer-specific legal analysis.

And here the plaintiff has asked the Court to provide -- to order the District to provide a new Vaughn Index. And the Court is not persuaded that all of the conclusion and summary sections that have been redacted in their entirety could not have been limited to nontaxpayer-specific legal analysis, which the Court of Appeals has indicated plaintiffs are entitled to.

And the declaration provided by the District does not adequately identify the specific reasons why any particular nonexempt portion is reasonably severable. So obviously, I have conducted an in-camera review. I've noted examples of some deficiencies that the District may want to address with a new Vaughn Index, for example. Or I can just order that specific PLRs be produced without redactions. So that's kind of where we are at this point.

MS. ORJI: Thank you, Your Honor. You did cite a number of PLRs where you believe that the redactions were inconsistent, so I guess my question to the Court is, are you are you asking the District to provide an amended Vaughn Index, basically explaining why those specific sections were redacted?

THE COURT: I am, because otherwise I'm just prepared to order that a number of these PLRs be produced in unredacted form or in lesser redacted form. So really, what I'm asking for is not only an amended Vaughn Index, but also for the District to look over what they've done, because there are some inconsistencies here, and I'm not convinced that the redactions are appropriate.

MS. ORJI: Okay. All right. We -- the District can provide an amended Vaughn Index, specifically explaining the redactions to the PLRs.

THE COURT: And when can you have that?

MS. ORJI: Well, Your Honor, I would like to address -- you did name several PLRs in your in your ruling and decision. I would like to specifically address those questions that the Court has. So, I don't know if -- I'm sure I can get a transcript of your ruling or if it's written --

THE COURT: It's not going to be written. But and just but those are just some examples. It's not, you know, when I'm going through and seeing sort of these issues, I'm just highlighting examples.

MS. ORJI: Okay.

THE COURT: That's why I'm saying I need more than just an amended Vaughn Index. I need you to actually go back and look and possibly consider -- reconsider these redactions.

MS. ORJI: Okay. So on that --

THE COURT: In unique language.

MS. ORJI: I'm sorry?

THE COURT: Focusing on the unique language, unique to the taxpayer because that's the issue there that I'm seeing. And Mr. Hitchcock is nodding, so I think perhaps he agrees.

MS. ORJI: Okay. If we could have at least thirty days to get that information to the Court? I don't know if plaintiff would agree to thirty days, but I do have to take this back to OTR.

MR. HITCHCOCK: Thirty days would be would be fine, Your Honor. May I make a point just with respect to that?

THE COURT: Sure. Let me just quickly set June

17th as the deadline before I forget to do that. Go ahead.

MR. HITCHCOCK: Okay. Well, thank you. We provided in our response three forms of guidance that OTR has previously made public, with redactions of unique taxpayer information. Mr. Davis' affidavit, which is already in the record, shows all that we are asking is for the District to do what revenue departments in nearly 40 states do on a regular basis when they make these public. OTR knows how to do that. They've done that in the three exhibits, and that's why we cited them. And that's why we said what the OTR has done there should be the guidance for a future Vaughn Index.

To be perfectly honest, our concern is that this could be like peeling back the layer of an onion that could been with another Vaughn Index. We'll say that's not sufficient, and we could go through several more iterations.

THE COURT: Well, I don't intend to do that, Mr. Hitchcock.

MR. HITCHCOCK: Okay.

THE COURT: I'm giving the District one more option. And then if I'm not satisfied, I'm just going to order documents to be produced in a form that I believe is appropriate, because there hasn't been sufficient justification for the redactions.

MR. HITCHCOCK: Okay.

THE COURT: So that's why I spent the time sort of highlighting my analysis of the Court of Appeals case, despite the fact that I've been talking pretty much nonstop for an hour and twenty minutes now.

So in order to kind of give clarity on what I was focusing on, because I do think that there is some tension here, as I said, between what the Court of Appeals is saying in the statute and then the interpretation of the federal Tax Analyst case, I'll call it.

So with that light shed, I'm hoping that the District can again reassess the actual redactions. Because I'm not I am not convinced that another Vaughn Index justifying the redactions here would be persuasive to the Court. I'm thinking that -- but then again, it may be. That's why I'm giving the District this opportunity. But if I'm not convinced on this second go around, then I will just order documents to be produced. Because I don't intend to have this be an onion.

MR. HITCHCOCK: Okay. Thank you. I was just -- the documents, the exhibits we put in show that, generally speaking, redactions are usually portions of the line, words and phrases, not entire paragraphs, not entire blocks of text. So --

THE COURT: Understood. I mean, I'm just focusing on FOIA and not what the District has done in the past for whatever reason. I mean, I certainly see how it would make sense to put some of this information out there so that they're not getting 20 requests for PLRs on the exact same issue from various members of the same industry. That certainly makes sense.

But, that's not saying that FOIA requires the District to put stuff out there on all of these. I'm just focused on what FOIA requires here. So the District has indicated it will file a renewed Vaughn Index by June 17th. I want to give plaintiffs the opportunity to respond to that. They would generally have two weeks. So that takes us to the end of -- so I can set another status hearing if the parties are available for July 30th at 10:00 a.m. if that works.

MR. HITCHCOCK: Yep. We're available.

MS. ORJI: That works for me, Your Honor.

MR. HITCHCOCK: That's a Tuesday?

THE COURT: July 30th should be -- oh, you're right, that is -- I'm sorry. I meant July 26th.

MR. HITCHCOCK: That works.

MS. ORJI: That works, Your Honor.

THE COURT: Thank you for catching that. Okay. Thank you. I will see you then.

MS. ORJI: Thank you.

MR. HITCHCOCK: Thank you, Your Honor.

(Thereupon, the proceedings were concluded.)

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<u>CERTIFICATE OF TRANSCRIBER</u>

I, Patricia H. Musso, transcriber, do hereby certify that I have transcribed the proceedings had and the testimony adduced in the case of TAX ANALYSTS, ET AL v. DISTRICT OF COLUMBIA, ET AL, Docket Number: 2020 CAB 001999, in said Court, on the 17th day of May, 2024.

I further certify that the foregoing 14 pages constitute the official transcript of said proceedings as transcribed from audio recording to the best of my ability.

In witness whereof, I have hereto subscribed my name, this 21st day of June, 2024.

Patricia H Musso
____

TRANSCRIBER