

**ILLINOIS INDEPENDENT
TAX TRIBUNAL**

MICHAEL ROTHMAN AND JENNIFER)	
ROTHMAN,)	
Petitioners,)	
)	
)	
v.)	18 TT 30
)	18 TT 132
)	Judge Brian F. Barov
ILLINOIS DEPARTMENT)	
OF REVENUE,)	
Respondent.)	

ORDER DENYING MOTION TO COMPEL

This matter comes before the court on the motion of the Petitioners to compel documents sought in production from and withheld by the Department as protected by the attorney-client privilege. The Department has submitted the documents for in camera review. The motion to compel is DENIED for the reasons stated below.

Analysis

This case involves a question of residency. The Petitioners are individual income tax joint-filers, who claimed that they were Florida residents for the 2014 and 2015 calendar tax years. The Department disagreed and issued Notices of Deficiency assessing Illinois income tax and penalties for those tax years as well as denying their refund request.

The regulation defining residency for Illinois income tax purposes and establishing various criteria for determining residency was last amended in early 2013. *See* 86 Ill. Adm. Code 100.3020 (codifying 37 Ill. Reg. 5283) (eff. Apr. 19, 2013)). The documents involved here are email strings related to a 2012 draft of proposed changes to section 100.3020. The Department provided the Petitioners

with some of the emails containing some of the discussions related to the 2012 draft but withheld others on the ground that the discussions were subject to attorney-client privilege. A copy of the privilege log identifying the withheld emails was attached as Exhibit C to the motion to compel.

The Department has provided the court with the email strings identified in Exhibit C. I have reviewed them in camera, and I agree that the communications in those emails are protected by attorney-client privilege. “The attorney-client privilege applies to confidential communications made with an attorney in connection with the provision of legal services and in the context of an attorney-client relationship.” *Ocampo v. Harrington*, No. 14-3134, 2015 U.S. Dist. LEXIS 108157 (C.D. Ill. Aug. 17, 2015). A state agency is entitled to invoke to the attorney-client privilege in the same manner as could a private citizen. *See id.*; accord *Illinois Education Ass’n v Illinois State Board of Education*, 204 Ill. 2d 456, 458-61 (2003) (applying attorney-client privilege to communications with the Illinois Attorney General in the course of requesting an Attorney General Opinion). The emails identified by Exhibit C contained legal advice and opinions regarding the 2012 draft residency regulation and thus the communications were privileged.

Because some portions of the discussion regarding the draft regulation were disclosed in discovery, the Petitioners argued that the withheld provisions should also be disclosed under Illinois Rule of Evidence 502(a), which provides:

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) *Disclosure Made in an Illinois Proceeding or to an Illinois Office or Agency; Scope of a Waiver.* When the disclosure is made in an Illinois proceeding or to an Illinois office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in any proceeding only if:

- (1) the waiver is intentional;
- (2) the disclosed and undisclosed communications or information concern the same subject matter; and
- (3) they ought in fairness to be considered together.

Ill. R. Evid. 502(a). The Petitioners contended that the withheld discussions “ought in fairness” be disclosed because they “may show the fickleness of the Department's rule making” and “provide the basis to withhold deference to its regulation in this case.” Pet’rs’ Motion to Compel at 10. However, because the relationship between the disclosed and withheld portions of the emails is so attenuated and because the process of Department rule making has no bearing on whether the Petitioners were residents of Illinois or acted reasonably to claim nonresidency during the tax years in issue, there is no basis to apply the “ought in fairness” exception to nondisclosure here.

The Petitioners have also argued that the Department improperly invoked the work-product privilege and the deliberative process privilege of the Freedom of Information Act in withholding the communications. Because the attorney-client privilege applies there is no need to discuss the application of these other privileges.

Conclusion

The Petitioners’ motion to compel is DENIED. The Department is not required to produce the privileged communications identified in Exhibit C of the Petitioner’s motion to compel.

s/ Brian Barov
BRIAN F. BAROV
Administrative Law Judge

Date: December 14, 2022