HONORABLE RICARDO S. MARTINEZ

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Petitioner, v. MICROSOFT CORPORATION, et al., Respondents.	NO. 2:15-cv-00102 RSM MICROSOFT'S REPLY BRIEF REGARDING PRIVILEGED DOCUMENTS STILL IN DISPUTE ORAL ARGUMENT REQUESTED **NOTED FOR:** **Thursday, October 27, 2016**

MICROSOFT'S REPLY BRIEF REGARDING PRIVILEGED DOCUMENTS STILL IN DISPUTE

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Introduction

The Government seeks to characterize Microsoft's Americas cost sharing arrangement as a tax shelter. The Government is wrong. Microsoft entered into its Americas cost sharing arrangement pursuant to IRS regulations adopted 50 years ago that have been repeatedly re-approved by the IRS, Treasury, and Congress.

Microsoft has produced to the Government 1.6 million pages of business and accounting documents. Only 174 documents over which the parties disagree about privilege and work product protection are before this Court. The Government's challenges threaten to render meaningless the special statutory privilege intended by Congress to shield from disclosure the tax advice companies regularly seek from their accountants, as well as to deprive Microsoft of protection for documents created in anticipation of litigation.

Argument

I. Microsoft Has Met its Prima Facie Burden.

The Government begins with a general challenge to Microsoft's privilege logs, making three arguments: (1) not all of the log entries identify lawyers; (2) the descriptions of why privilege attaches to each document are too generic; and (3) Microsoft may have over-claimed privilege on some emails in some unidentified email chains. Government Response ("Resp.") at 12.

The first challenge is easily disposed of. Microsoft has identified the lawyer or law firm for each of the 12 documents for which it has claimed attorney-client privilege. *See* Appendix A. No lawyer needs to be identified for work product claims or claims under Section 7525, which both explicitly apply to non-lawyer activity. Fed. R. Civ. P. 26(b)(3)(A); 26 U.S.C. § 7525. With respect to the Government's other two arguments, despite an extensive meet and confer process where the Government saw many of Microsoft's documents, the Government's record of its objections does not include any complaint about the level of detail in the logs or the fact that email strings correspond to a single log entry. *See* Second Declaration of Daniel A. Rosen, Exs. A and B. In any

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event, Microsoft's descriptions enable the Government to assess the basis for its privilege claims, as required by the Federal Rules of Civil Procedure, and the Boyle and Weaver Declarations (Dkt. 143 and 144) make plain the reasons Microsoft sought legal and tax advice. Adding more detail would threaten to disclose the privileged content at issue. As for email chains, while sometimes only part of any email chain (or any document, for that matter) may be privileged, this is certainly not always true. *Dawe v. Corr. USA*, 263 F.R.D. 613, 621 (E.D. Cal. 2009). During the extensive "quick peek" process in this case, in the relatively few instances that the IRS sought access to portions of privileged documents, Microsoft readily agreed and such documents are not at issue here. Individual logging of each email in a string is not required. *Muro v. Target Corp.*, 250 F.R.D. 350, 363 (N.D. Ill. 2007).

Microsoft contends that the Government has failed to make the showing required for *in camera* review, but does not object if the Court deems it necessary. However, that review process should include an opportunity for Microsoft to supply the court, *in camera* and *ex parte*, with additional evidence and argument supporting the privilege. *See In re Napster Inc.* 479 F.3d 1078, 1093, *abrogated on other grounds by Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009) ("[T]he party resisting an order to disclose materials allegedly protected by the attorney-client privilege must be given the opportunity to present evidence and argument in support of its claim of privilege."); *Mitcham v. Calderon*, No. C 94–2854 SBA, 1996 WL 33322268, at *6 (N.D. Cal. Dec. 20, 1996) ("[C]ourts often determine whether information must be protected from disclosure to a party's opponent in confidential proceedings without the opponent's participation").

II. Microsoft's Section 7525 Privilege Claims Are Valid.

Section 7525 essentially extends the attorney-client privilege to non-lawyers (accountants and other FATPs) who provide tax advice in order to allow their clients to comply with the complexities of the tax law. *Schaeffler v. United States*, 806 F.3d 34, 38 n.3 (2d Cir. 2015) (Section

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7525 is coterminous with attorney-client privilege). The Government makes two main arguments against the application of Section 7525.[1] First, the Government claims that KPMG, EY, and Arthur Anderson were providing only accounting or business operations consulting services rather than tax advice. Second, the Government asserts that all of the Section 7525 claims related to KPMG are vitiated by Section 7525(b)'s exception for written communications "promoting" a "tax shelter."

A. The Section 7525 documents involve tax advice, not business advice.

The provision of tax advice in a complex international corporate setting requires a FATP to understand a client's existing business, understand the proposed transaction, and interpret and apply the tax law to the proposed transaction in order to advise the client of the tax law consequences. This range of tax advice is no different than the range of legal advice regularly provided by lawyers outside the tax context, such as when litigation lawyers advise on how to structure deals to minimize litigation risks. *See, e.g.*, *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996) ("The attorney-client privilege applies to communications between lawyers and their clients when the lawyers act in a counseling and planning role, as well as when lawyers represent their clients in litigation.").

In the context of the attorney-client privilege, courts have recognized that:

> [L]egal and business considerations may frequently be inextricably intertwined. This is inevitable when legal advice is rendered in the context of commercial transactions or in the operations of a business in a corporate setting. The mere fact that business considerations are weighed in the rendering of legal advice does not vitiate the attorney-client privilege.

Curtis v. Alcoa, Inc., No. 3:06-CV-448, 2009 WL 838232, at *2 (E.D. Tenn. Mar. 27, 2009) (citation and internal quotation marks omitted); *see also United States v. Chevron Texaco Corp.*,

[1] The Government also questions four documents on the ground that "[Section 7525] does not cover advice with respect to taxes imposed by foreign Governments." Resp. 14-15; *see* Rosen Decl. Ex. D, Nos. 19, 25, 167, and 496. Microsoft's Section 7525 privilege claims for three of these documents relate to United States "transfer pricing" tax advice (19 and 25) and "US-Japan tax treaty and US trade or business issues" (496). *See* Rosen Decl. ¶ 14. For the fourth document, Microsoft did not claim Section 7525 privilege.

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241 F. Supp. 2d 1065, 1076 (N.D. Cal. 2002) ("[C]ommunications offering tax advice or discussing tax planning or the tax consequences of alternate business strategies are 'legal' communications."). *See also* Br. at 13-15.

The uncontradicted Boyle and Weaver declarations show that Microsoft engaged KPMG to give tax advice. The Government nonetheless tries to make something of two KPMG acknowledgements that it is not practicing law.[2] Resp. at 14 (citing Exs. 13 & 27 to the Hoory Declaration (Dkt. 146-27)). But KPMG, an accounting firm, would not have been engaged in the unauthorized practice of law. The question under Section 7525 is instead whether the tax advice given by the FATP would have been covered by the attorney-client privilege *if it were* rendered by a lawyer engaged in the practice of law. The documents the Government cites show that KPMG gave just such tax advice. Exhibit 27 shows KPMG predicting IRS positions (tax advice), but appropriately suggesting that lawyers advise about a draft agreement. Exhibit 13, KPMG's retention letter, also appropriately defines its role as giving advice about "tax risks" and the tax consequences under the tax law (the "tax model"), not the law more generally.

As to whether KPMG's advice was accounting advice or tax advice, the Government's quote from the *Valero* case is instructive—the sort of accounting advice not protectable under Section 7525 is, generally, "the type of information [including computations of tax liability] generally gathered to facilitate the filing of a tax return." Resp. at 14 (quoting *Valero Energy Corp. v. United States*, 569 F.3d 631 (7th Cir. 2009)). Such documents of course do exist here, but Microsoft has not claimed privilege for them. With respect to the transfer pricing and buy-in matters at issue, the documents needed to prepare the return were the "Section 6662 Transfer Pricing Reports" that KPMG prepared for Microsoft to provide to the IRS, and which were not

[2] It cites to no such evidence regarding EY or Arthur Anderson.

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withheld as privileged. Boyle Decl. ¶ 26; Weaver Decl. ¶ 21.[3]

B. The exception in Section 7525(b) for written communications promoting a tax shelter is inapplicable.

The Government next asserts that Section 7525 does not apply because KPMG was "promoting" a "tax shelter." Resp. at 15-16. But the Government's broad interpretation would allow the narrow exception to swallow the rule.

1. Cost sharing arrangements are not tax shelters.

The Government claims that the Americas cost sharing arrangement is "unquestionably" a "tax shelter," relying on the definition of "tax shelter" provided in Section 6662(d)(2)(C). Resp. at 15 (a "tax shelter" requires a "significant purpose" of the plan or arrangement to be the "avoidance or evasion of" Federal income tax). Although the IRS has failed to promulgate guidance on what is a significant purpose of avoiding Federal income tax, Congress was explicit that it intended the same definition of a tax shelter to be applied under Sections 6662(d)(2)(C) (to which Section 7525(b)(2) refers) and 6111. *See* H.R. Rep. No. 105-220, 542 (1997) (Conf. Rep.); S. Rep. No. 105-33, 149 (1997); H.R. Rep. No. 105-148, 471 (1997). The Section 6111 regulations provide that a transaction is not a "tax shelter" if: (1) participation in the transaction is in the ordinary course of business, and (2) there is a generally accepted understanding that anticipated tax benefits are properly allowable under the Code. Treas. Reg. § 301.6111-2(b)(3).

Cost sharing arrangements involve joint development of products in the ordinary course of business. *See* Treas. Reg. § 1.482-7. Cost sharing arrangements are not only properly allowable under the Code, but have been anointed by the IRS as an appropriate transfer pricing methodology since 1968, and have been repeatedly re-approved by the IRS, Treasury, and Congress ever since.

[3] Nor is any of the advice at issue the equivalent of mere "summaries of [already completed] business transactions" as were at issue in *Matter of Fischel*, 557 F.2d 209, 212 (9th Cir. 1977), *cited in* Resp. at 14, but rather evaluations of the likely impact of, and challenges to, transactions Microsoft was contemplating. *United States v. Gurtner*, 474 F.2d 297, 299 (9th Cir. 1977) is inapposite as it predated by 20 years Section 7525's extension of the attorney-client privilege to accountants and other FATPs.

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See Treas. Reg. § 1.482-1(b)(2); *see also VERITAS Software Corp. v. Comm'r*, 133 T.C. 297 (2009) (approving cost sharing arrangement and rejecting billions of dollars of IRS adjustments). After 50 years of approving cost sharing arrangements used in the ordinary course of business jointly to develop products, the Government cannot now claim they are "tax shelter[s]."[4]

2. KPMG did not engage in the promotion of a tax shelter.

The Government similarly advances a very broad interpretation of "promotion," suggesting that any time a FATP structures a transaction reducing Federal income taxes, the FATP is "promoting" a "tax shelter." Resp. Br. at 16 n.14. If the Government were to prevail, the routine tax planning advice that the Big Four accounting firms regularly supply to business taxpayers, and that taxpayers properly expect are confidential under Section 7525, would lose protection.

The United States Tax Court, the court with expertise in applying the tax laws, considered and rejected the same argument by the Government in *Countryside, Ltd., v. Comm'r*, 132 T.C. 347 (2009). Finding the term "promotion" to be ambiguous, the Tax Court consulted the legislative history: "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." *Countryside*, 132 T.C. at 353-54 (quoting H. Conf. Rept. 105–599, at 269 (1998), 1998–3 C.B. 747, 1023). The Tax Court analyzed the relationship and concluded that the FATP was not a promoter, because he "rendered advice when asked for it; he counseled within his field of expertise; his tenure as an

[4] The Government claims that the Americas cost sharing arrangement was a "pure tax play" by reference to the offhand statement of an operations manager in his evaluation. The operations manager was referring to the fact that Microsoft decided to locate the new, multi-million dollar facility in Puerto Rico because of incentives offered by Puerto Rico to locate the plant in that part of the United States rather than a different U.S. location or a foreign location. The fact remains that MOPR, the Puerto Rican affiliate, spent over a hundred million dollars in its plant facilities in order to produce and test Microsoft software, and also spent tens of billions of dollars on both acquiring software technology and completely funding all Microsoft software development for the Americas markets for its products. MOPR operated a real business and was completely exposed to the risks of the market: if the products jointly developed by MOPR and Microsoft had failed, MOPR would have lost rather than made money, and its losses would not have been deductible in the United States. MOPR was a real business with real risks and was not a tax shelter.

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adviser to the [client] was long; and he retained no stake in his advice beyond his employer's right to bill hourly for his time." *Id.* at 354-55; *see also 106 Ltd. v. Comm'r*, 136 T.C. 67, 80 (2011).

The relationship between KPMG and Microsoft satisfies all of the factors identified in *Countryside*. The idea for the Americas cost sharing arrangement came from Microsoft, not KPMG. Boyle Decl. ¶¶ 18-23, 29; Weaver Decl. ¶ 10.[5] KPMG rendered its advice within the scope of its regular work and within its field of expertise. Weaver Decl. ¶ 16. The FATPs at KPMG had advised Microsoft for decades. *Id.* ¶¶ 7-9. Finally, and perhaps most importantly, KPMG had no stake in the adoption of the cost sharing arrangement, and was compensated according to its hourly rates. Boyle Decl. ¶¶ 28-29; Weaver Decl. ¶¶ 9, 17.

Completely ignoring rather than assessing the *Countryside* factors, the Government relies on the Seventh Circuit's *Valero* decision, which was decided within weeks of *Countryside*. The taxpayer in *Valero* argued that the exception was confined to "actively marketed tax shelters or prepackaged products," a restrictive view that Microsoft does not advance. 569 F.3d at 634. Even *Valero* stated that "[p]romotion, even under the broader reading, limits the exception to *written communications encouraging participation in a tax shelter*, rather than documents that merely inform a company about such schemes, assess such plans in a neutral fashion, or evaluate the soft spots in tax shelters that a company has used in the past." 569 F.3d at 632–33 (emphasis added). Even under *Valero*, KPMG's actions did not constitute promotion.

The Government also focuses on KPMG's role in evaluating different methods for the transaction Microsoft had proposed, including contributing ideas for how to structure the transaction to comport with the tax law. Resp. at 16. But providing advice about how a transaction can meet the requirements of the tax law is tax advice, not promotion. The very example the Government provides of KPMG structuring the transaction in fact demonstrates the point. In

[5] The Government's purported evidence that KPMG had the idea for the cost sharing arrangement, Resp. at 4 ("KPMG had a more ambitious plan in mind"), simply does not support the assertion, particularly in light of the declarants' clear statements to the contrary. All that evidence shows is KPMG offering its services to Microsoft to give tax advice on the idea Microsoft had presented. *Id.*

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Exhibit 57 to the Hoory Declaration, KMPG expresses concern that one aspect of the structure Microsoft has suggested might not comply with the arm's length standard—a requirement from the tax regulations. (Dkt. 146-57) (discussed in Resp. at 5-6). The fact that KPMG then had an idea of how to navigate these complex requirements (as all good lawyers and tax advisors do) does not instantly transform KPMG from a tax advisor to a tax shelter promoter.

3. Even under the Government's argument, the Section 7525(b) exception for promotion of a tax shelter only potentially applies to five of the documents at issue.

Even if the exception otherwise applied, it only applies to written communications between KPMG and Microsoft relating to the tax shelter (asserted by the Government to be the Americas cost sharing arrangement (Resp. at 3, 15)); *see also* 26 U.S.C. § 7525(b). In order for the exception to apply, therefore, any written communication must be external (not merely internal to KPMG or Microsoft), and must address the Americas cost sharing arrangement. Appendix A identifies the only five documents (out of 164) that meet the requirements necessary for the exception to apply.

III. Work Product Protects 170 Documents.

The Government makes three arguments against Microsoft's work product claims: (1) the documents were not created for use in anticipated litigation; (2) Microsoft's claims would protect "all business planning documents from disclosure" (Resp. at 17); and (3) the documents were not created "because of" litigation.

A. The documents were prepared in anticipation of litigation.

The Boyle and Weaver Declarations make plain that Microsoft and its advisors had both the requisite subjectively and objectively reasonable anticipation of litigation. Boyle Decl. ¶¶ 6-30; Weaver Decl. ¶ 20. This subjective belief was also objectively reasonable in light of Microsoft's ongoing disputes with the IRS over transfer pricing matters, its history of tax litigation with the IRS, and the IRS's stated intent to continue to litigate section 482 cases.

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As the Government admits (Resp. at 4), KPMG was engaged "to address 'tax risks associated with the overall strategy.'" These "tax risks" were precisely the expected challenge by the IRS to the proposed structure envisioned by both Microsoft and KPMG. Boyle Decl. ¶ 19; Weaver Decl. ¶ 20 (Dkt. 144). Not only did Microsoft expect litigation at the time it retained KPMG, it communicated that belief to KPMG. *Compare* Boyle Decl. at ¶¶ 9-20 and Weaver Decl. at ¶ 20 to Resp. at 18-19.[6] The Government nonetheless argues that the "engagement does not appear to contemplate litigation preparation or support services" (Resp. at 6), suggesting that work product is limited to documents prepared to be used in litigation. However, this is not the rule. Work product attaches to documents prepared by or for a party in anticipation of litigation even if those documents are not intended to be used in the litigation. Documents prepared in anticipation of litigation are work product, even when they are also intended to assist in business dealings." *Schaeffler v. United States*, 806 F.3d 34, 43 (2d Cir. 2015).

B. Microsoft Does Not Seek to Protect All Business Planning Documents from Disclosure.

Contrary to the Government's assertion that Microsoft's work product claims "have the practical effect of shielding all business planning documents from disclosure" (Resp. at 17), Microsoft has produced 1.6 million pages of business and accounting documents to the IRS and now seeks to protect only 170 documents under the work product doctrine.

C. The documents were created "because of" anticipated litigation.

Although not cited by the Government, the Second Circuit in *Schaeffler* considered and determined the very issues presented in this case under the "because of" standard. At issue in

[6] Although the Government asserts that none of the documents were contemporaneously marked as work product, in fact some of the documents were marked, if inartfully, as "prepared for counsel," "attorney-client work product," and with other similar language. Marking is also not essential to protection. *United States v. Roxworthy*, 457 F.3d 590, 597 (6th Cir. 2006). As for the Boyle documents, the Government neglects to mention that Microsoft produced over 320 documents in which Mr. Boyle was the author or recipient. In any event, taxpayers have a statutorily defined obligation to retain certain documents in order to avoid penalties if the IRS seeks them, 26 U.S.C. 6662(B)(i)(II), a practice Microsoft followed.

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Schaeffler was the tension after *United States v. Adlman*, 134 F.3d 1194 (2d Cir. 1998) (*Adlman II)*[7] between protection of work product and language in *Adlman II* suggesting that dual purpose documents that are prepared in the ordinary course of business and in "essentially similar form" cannot be work product. The lower court in *Schaeffler* held that an EY tax memo was not work product on the grounds that it was produced in the ordinary course of business and in essentially similar form. Relying on language in *Torf* taken from *Adlman II*, and without identifying any particular documents, the Government in Microsoft's case similarly asserts that the documents at issue were created in the ordinary course of business, would have been created "in substantially similar form" regardless of litigation, and, therefore, cannot be work product. Resp. at 20.

In *Schaeffler*, the Second Circuit revisited the "ordinary course of business" and "essentially similar form" language and rejected the district court's holding that the EY tax memo would have been created in essentially similar form even if the taxpayers had not anticipated litigation. 806 F.3d at 43-45. In vacating the district court's opinion and holding that the EY tax memo was work product protected, *Id.* at 45, the Second Circuit recognized that the district court's analysis would "virtually swallow" the work product protection as described in *Adlman II. Schaeffler*, 806 F.3d at 43. The court explained, "*Adlman* held that work-product protection would be withheld only from documents that were prepared in the ordinary course of business in a form that would not vary regardless of whether litigation was expected," such as "the supporting records and papers that appellants' external tax return preparers collected and created in the ordinary course of annually completing appellants' federal tax returns." *Id.* at 43-44. The court further explained:

> Finally, we address the district court's construct of a hypothetical scenario in which appellants faced exactly the same business and tax issues but did not anticipate litigation. This scenario appears to us to ignore reality. The size of a transaction and the complexity and ambiguity of the appropriate tax treatment are important variables that govern the probability of the IRS's heightened scrutiny and, therefore,

[7] The Ninth Circuit in *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)*, 357 F.3d 900, 907-08 (9th Cir. 2004)("*Torf*") followed *Adlman II* in adopting the "because of" standard.

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> the likelihood of litigation. To hypothesize the same size of the transaction and the same complexity and ambiguity of the tax issues but also a lack of any anticipation of litigation posits a factual situation at odds with reality. It posits an expectation of harmony with the IRS similar to that associated with the preparation of a W–2 form in writing memoranda needed for large transactions with no clear application of the tax laws.

Id. at 44. The court also noted that "the district court's holding appears to imply that tax analyses and opinions created to assist in large, complex transactions with uncertain tax consequences can never have work-product protection from IRS subpoenas. This is contrary to *Adlman* . . . ." *Id.* at 44-45.

The Government is raising the same arguments considered and rejected in *Schaeffler*. Microsoft meets the "because of" dual purpose document standard.

IV. Attorney-Client Privilege Protects 12 Documents.

Contrary to the Government's assertions (Resp. at 22-23), Microsoft has sufficiently proved the preliminary facts necessary to establish attorney-client privilege for these 12 documents. As set forth above at 1-2, Microsoft has met its *prima facie* burden. Microsoft's privilege logs provide the required document dates, authors/senders/recipients, and the nature of the documents necessary to assess Microsoft's privilege claims. *See In re Grand Jury Investigatio*n, 974 F.2d at 1070-71; Appendix B. [8]

V. Microsoft has not waived privilege.

Under Fed. R. Evid. 502 ("Rule 502"), subject matter waiver in Federal audits or proceedings has essentially been eliminated unless a party makes selective disclosures in order to obtain an unfair tactical advantage. The Advisory Committee Note explains that Rule 502(a) "provides that a voluntary disclosure in a federal proceeding or to a federal office or agency, if a waiver, generally results in a waiver only of the communication or information disclosed; a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in

[8] For ease of reference, the privilege log entries for the 12 attorney-client privileged documents are set forth in Appendix B, which shows the information provided, including the identification of the attorneys or law firms providing the legal advice.

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which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary." *See* Fed. R. Evid. 502 Advisory Committee Note (Subdivision (a)). The Advisory Committee explained that subject matter waiver "is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner." *Id*.

The Government has made no showing whatsoever that Microsoft has made selective waiver in order to obtain a tactical advantage. Rather, the Government merely claims that it needs the protected documents: "the fairness rationale here is that selective disclosure of documents will undermine the ability of the IRS to make an accurate determination of Microsoft's tax liability." (Resp. at 24). This is not the test. Microsoft has made no selective use of the privileged documents, and thus there can be no subject matter waiver under Rule 502.

VI. Conclusion.

For the reasons stated above and in Microsoft's opening brief, declarations, and privilege logs, the documents withheld by Microsoft are protected from disclosure by one or more of the Section 7525 tax advice privilege, the work product doctrine, or the attorney-client privilege.

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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 the following:

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APPENDIX A

CHRON ORDER	CHRON Tab #	Doc ID Beg	Document Type	Author	Recipient	cc:	Description	Date	Protection
285	TAB 194	ESI0071771	Email	Cogswell, Glenn	George, Gregory		Email associated with MSFT's request for tax advice on Puerto Rico	1/26/2005	7525, WPP
586	TAB 394	ESI0075853	Email with Attachment (1)	George, Gregory	Cogswell, Glenn		Email associated with MSFT's request for tax advice on Puerto Rico restructuring.	4/20/2005	7525, WPP
587	TAB 394	ESI0075854	Document	Weaver, Brett; George, Gregory; Corwin, Manal; Bates, Steven	Microsoft Project Files	Cogswell Glenn	Document prepared in connection with MSFT's request for tax advice on Puerto Rico restructuring.	4/20/2005	7525, WPP
746	TAB 492	ESI0075770	Email with Attachment (1)	George, Gregory	Weaver, Brett		Email associated with MSFT's request for tax advice on Puerto Rico restructuring.	5/25/2005	7525, WPP
747	TAB 492	ESI0075771	Memo	Weaver, Brett; George, Gregory; Corwin, Manal; Bates, Steven	Microsoft Project Files		Draft memo prepared in connection with MSFT's request for tax advice on Puerto Rico restructuring.	4/20/2005	7525, WPP

APPENDIX B

Rosen Declaration Exhibit (Dkt. 141)	Log Entry	Government Contention	Microsoft Response
A	13	Log entry does not address the primary purpose for the communication (Resp. at 23 n.16).	The log describes the document as an "[e]mail including prior email exchange regarding legal and tax advice on cost-sharing and Puerto Rico operations, the latter prepared under the direction of counsel (M. Boyle), for the purpose of rendering legal advice regarding cost-sharing and Puerto Rico operations." (emphasis added). The purpose of the communication was legal advice. Rosen Decl. ¶¶ 9-10.
A	25	Log entry does not address the primary purpose for the communication (Resp. at 23 n.16).	The log describes the document as an "[e]mail including prior email exchange regarding legal advice on cost-sharing and Puerto Rico operations." (emphasis added). The purpose of the communication was legal advice. Rosen Decl. ¶¶ 9-10.
D	43	Log entry does not address the primary purpose for the communication (Resp. at 23 n.16).	The log describes the document as an "[e]mail chain conveying legal advice from Margaret Adams (Microsoft) regarding transaction structure." (emphasis added). The purpose of the communication was legal advice. Rosen Decl. ¶¶ 9-10.

Rosen Declaration Exhibit (Dkt. 141)	Log Entry	Government Contention	Microsoft Response
D	167	Log entry does not address the primary purpose for the communication (Resp. at 23 n.16).	The log describes the document as an "[e]mail chain with attachment reflecting legal advice from Gary Thomas (White & Case) regarding Japanese tax audit." (emphasis added). Gary Thomas is a lawyer at White & Case, and is not Microsoft's in-house counsel. Rosen Decl. Ex. E. The purpose of the communication was legal advice. Rosen Decl. ¶¶ 9-10.
		Email chain and attachment at item 167 pertains to a Japanese tax audit. To the extent that Microsoft may have been discussing what to share with the Japanese tax authorities, then there is no intention of confidentiality and thus no privilege applies (Resp. at 23 n.16).	The email chain with attachment has been kept in confidence. Sample Decl. ¶ 3.
D	607	Log entry does not address the primary purpose for the communication (Resp. at 23 n.16).	The log describes the document as an "[e]mail with attachment reflecting legal advice rendered by Kevin Fay (Microsoft) regarding transaction structure." (emphasis added). The purpose of the communication was legal advice. Rosen Decl. ¶¶ 9-10.
D	736	Log entry does not address the primary purpose for the communication (Resp. at 23 n.16).	The log describes the document as an "[e]mail with attachment reflecting legal advice rendered by Kevin Fay (Microsoft) regarding transaction structure." (emphasis added). The purpose of the communication was legal advice. Rosen Decl. ¶¶ 9-10.

Rosen Declaration Exhibit (Dkt. 141)	Log Entry	Government Contention	Microsoft Response
D	792	Log does not identify the attorney rendering the claimed legal advice and none of the people listed are attorneys (Resp. at 23 n.16).	The logs describe the document as an "[e]mail chain reflecting legal advice from Baker & McKenzie regarding transfer pricing." (emphasis added). The document relates to the communication of legal advice from attorneys to Microsoft employees. Rosen Decl. ¶ 10.
D	794	Log does not identify the attorney rendering the claimed legal advice and none of the people listed are attorneys (Resp. at 23 n.16).	The logs describe the document as an "[e]mail chain reflecting legal advice from Baker & McKenzie regarding transfer pricing." (emphasis added). The document relates to the communication of legal advice from attorneys to Microsoft employees. Rosen Decl. ¶ 10.
D	795	Log does not identify the attorney rendering the claimed legal advice and none of the people listed are attorneys (Resp. at 23 n.16).	The logs describe the document as an "[e]mail chain reflecting legal advice from Baker & McKenzie regarding transfer pricing." (emphasis added). The document relates to the communication of legal advice from attorneys to Microsoft employees. Rosen Decl. ¶ 10.
D	870	Log entry does not address the primary purpose for the communication (Resp. at 23 n.16).	The log describes the document as an "[e]mail chain with attachments reflecting legal advice from Brad Del Matto (Microsoft) regarding Puerto Rico tax grant." (emphasis added). The purpose of the communication was legal advice. Rosen Decl. ¶¶ 9-10.

Rosen Declaration Exhibit (Dkt. 141)	Log Entry	Government Contention	Microsoft Response
D	881	Log entry does not address the primary purpose for the communication (Resp. at 23 n.16).	The log describes the document as an "[e]mail chain with attachments reflecting legal advice from Ben Orndorff and Brad Del Matto (Microsoft) regarding transaction structure." (emphasis added). The purpose of the communication was legal advice. Rosen Decl. ¶¶ 9-10.
D	882	Log entry does not address the primary purpose for the communication (Resp. at 23 n.16).	The log describes the document as an "[e]mail chain with attachments requesting legal advice from Brad Del Matto (Microsoft) and reflecting tax advice from Joseph Tyrell (PricewaterhouseCoopers) regarding transaction structure." (emphasis added). The purpose of the communication with Mr. Del Matto was legal advice. Rosen Decl. ¶¶ 9-10.