

## Accounting Firm Required to Release Names of Investors in Tax Shelter

By Roy Whitehead

**A** recent federal appellate court decision addresses whether accounting and law firms may protect the names of clients that participate in tax shelters. The Seventh Circuit case of *United States v. BDO Seidman and John and Jane Doe* [337 F.3d 802, certiorari denied February 23, 2004] indicates, for its facts and circumstances, that the IRS can successfully obtain the names of such clients.

In October 2000, the IRS received information that the accounting firm BDO Seidman (BDO) was promoting potentially abusive tax shelters without complying with the listing and registration requirements of IRC sections 6111(a) and 6112(a). Because the IRS suspected BDO had violated the registration requirements, it issued summonses ordering BDO to produce documents and the names of the investors in the transactions, the date each investor acquired an interest, all shelter registrations filed, and the investor lists prepared for each transaction. BDO refused to comply, claiming attorney-client privilege, the work-product doctrine, and the tax practitioner confidentiality privilege of IRC section 7525.

In October 2002, a federal district court ruled that the IRS had not abused its powers and ordered BDO to comply with the summonses. The clients who invested in the shelters quickly filed a motion to intervene, claiming the release of their names would violate the confidentiality provisions of IRC section 7525. The district court denied their motion to intervene, and both BDO and its clients appealed to the Seventh Circuit Court of Appeals.

### Disclosure Obligations vs. Client Confidentiality

The sole issue before the appellate court was whether the tax shelter investors had a legitimate claim of priv-

ilege that precluded the disclosure of their names to the IRS under IRC section 7525:

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

On appeal, the clients argued that disclosing their names would violate the confidential communications they expected in the tax shelter agreement with BDO. In response, the court looked

of an interest under IRC sections 6111 and 6112. This list-keeping requirement precluded BDO's clients from establishing an "expectation of confidentiality." At the time the clients communicated their interest in participating in the tax shelters organized by BDO, they knew that BDO was legally obligated to disclose the identity of clients engaging in such transactions. Finally, the appellate court concluded that BDO's affirmative duty to disclose its clients' participation in potentially abusive tax shelters indicates that there was no reasonable claim of privilege by the clients.

Many lawyers and accountants have relied on the theory that disclosing the identity of a tax shelter client violates IRC section 7525 because it will also reveal

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to the rules concerning attorney-client privilege. The court said that in asserting an enforceable attorney-client privilege the client must show that the communication was made to an attorney in confidence, and that the confidences constituted information not intended to be disclosed by the attorney. Applying the same rules to the communications between the clients and BDO, the court decided that there was no reasonable expectation of confidentiality on the part of the clients.

This decision reflects the special scrutiny directed toward deterring abusive tax shelters. A seller or organizer of an interest in a tax shelter is required by law to keep a list identifying each purchaser

of the nature of their communications with the client. The Seventh Circuit decision implies that there can be no reasonable expectation of confidentiality for tax shelters. This decision will surely have a nationwide impact on the tax shelter industry as the IRS issues summonses to other accounting and law firms that organize tax shelters. The decision also raises an ethical duty on the part of tax shelter practitioners to advise their clients of the lack of confidentiality in the case of IRS scrutiny. □

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