

Fu Investment Co. Ltd. v. Commissioner
104 T.C. 408

Facts: IRS determines Company is liable for withholding tax. Company files a petition in the Tax Court. IRS sends letters to three of Company's former employees requesting interviews regarding the matters in dispute. Company moves for a protective order to preclude the IRS from engaging in ex parte contacts with their former employees, and Company requests advance notice of the name of the EE, the time and place of the interview, and the opportunity to be present to object to questions that may elicit privileged information. IRS says it is not obligated to provide advanced notice and would attempt to avoid eliciting privileged information from the former employees.

IRS Attorney: (speaking to former employee) Hello. I understand you used to work for Company. I would like to take your interview in connection with a case currently pending at the Tax Court regarding Company's withholding tax obligations.

Company Attorney: (interjects and shields former employee from IRS attorney) Hey! You can't do that without giving us prior notice of the interview. We need the names of the former employees you want to interview, and the time and place so that we can be there to object to any questions that might elicit privileged information.

IRS Attorney: Yeah right. I don't have to give you advanced notice. I'll do my best not to ask questions that would lead to privileged information.

Company Attorney: No. It's against the rules.

IRS Attorney: The rules only preclude counsel from engaging in ex parte communications with the *present* employees of a corporate party. Former employees are fair game.

Discussion:

- Who's right?
- What should the court do in this scenario?
- What did the court actually do in this scenario?