



# Court Determines Requested ESI Was Not Tailored to Party's Own Articulated Need for Discovery

September 14, 2011

## United States v. Elsass, No. 2:10-CV-336 (S.D. Ohio, 2011)

This case surrounds a claim brought by the United States against two companies and an individual who were involved in a tax scheme. The defendant's misconduct involved the promotion of the theft-loss deduction to victims of investment-related schemes, which the plaintiffs argued caused a significant amount of tax revenue to be lost. During discovery, the defendants filed a motion to compel the plaintiffs to produce documents and electronically stored information that they believed was relevant to their defense of the action.

In order to show the "government's internal understanding of when there is reasonable cause to allow a theft loss deduction," the defendants requested various internal auditor's emails in native format and all "drafts, revisions, and reviewer comments concerning [tax return] documents prepared using a word processor" for the defendant's clients. The defendants believed that the ESI would likely produce evidence that was relevant to prove they had "reasonable cause" to believe the deductions were proper. Moreover, the defendants argued that the ESI would prove that even if the deductions were not proper the defendants "lack[ed] ... willfulness" in advising their clients improperly.

After finding that the facts in this case are analogous to those of *United States v. Kapp*, 564 F.3d 1103 (9th Cir. 2009), the court reasoned that because determinations of IRS employees are not relevant to the defendant's "reasonable cause" and "good faith" arguments, the defendant's "far-reaching discovery requests [were] not tailored to their own articulated need for the discovery." Therefore, compelling the plaintiff to divulge ESI that is beyond what is needed by the defendants to make their argument is "less convenient, more burdensome and more expensive than is otherwise warranted."

So, what does this mean for e-discovery practitioners? Make sure you understand what evidence is relevant to prove your argument, and do not make broad discovery requests that simply allow you "to go fishing" for information in which you can use to prove your argument. Otherwise, you may find yourself in a *dead zone* like the defendants here.