



Briefing

Legal Advice Privilege following the Supreme Court's decision in *R (on the application of Prudential Plc) v Special Commissioner of Income Tax*

Legal advice privilege:

- Allows a lawyer's client to withhold documents or communications and refuse to produce them to a third party or to a court, even if relevant to particular court proceedings;
- Applies to documents or communications passing between a lawyer and client containing legal advice or description of the relevant legal context e.g. tax planning;
- Exists for the benefit of the client and to allow full and frank discussions to take place between lawyers and their clients;
- Is lost if the client chooses to waive privilege or the information ceases to be confidential (including internally).

Introduction

Accountants' advice, particularly in relation to tax planning and schemes, is often legal in nature. They can often be the real experts in these fields.

Accountants have argued that this advice should be subject to legal advice privilege, in the same way that the advice would be if given by a lawyer. Their clients could then rely upon the protection offered by privilege for their tax planning.

This was the issue at stake in the Supreme Court decision in *R (on the application of Prudential Plc) v Special Commissioner of Income Tax* which was handed down on 23 January 2013.

The issue in Prudential

PricewaterhouseCoopers (PwC) developed a tax avoidance scheme. This scheme was adapted for use by the Prudential Group.

The Prudential Group implemented the scheme, which involved entering into a series of transactions. HMRC investigated the transactions and served notices under (then) section 20B(1) of the Taxes Management Act 1970, giving Prudential an opportunity to disclose certain types of document relating to the scheme and transactions.

Prudential disclosed many of the documents requested, but refused to disclose documents which related to PwC's advice to Prudential on the basis that Prudential was entitled to claim legal advice privilege (LAP) in respect of those documents.

The High Court and the Court of Appeal held that the documents did not benefit from LAP, but that they would have done had the same advice been given by a member of the legal profession.

The issue in front of the Supreme Court on appeal was whether LAP already extended, or, if not, whether it should be extended, to apply to legal advice given to clients by non-lawyer advisors.

The decision

The Supreme Court decided by a majority of five judges to two that it would not extend LAP to accountants or other non-legal professionals giving legal advice.

The majority reasoning was based on:

- concerns that it was difficult to assess the consequences of extending LAP and consequently extension would make LAP unclear;
- extending LAP to non-lawyers' legal advice raises questions of policy which should be left to Parliament;

- legislation exists relating to LAP, and the point had been considered by Parliament which suggested that it would be inappropriate for the court to extend the law.

The minority reasoned that LAP is the client's privilege and is not dependant on the status of the advice giver; it is in the public interest to facilitate confidential access to legal advice, and therefore there is can be no principled reason for distinguishing between the advice of lawyers and accountants.

Unless litigation is contemplated, only legal advice given by lawyers (meaning solicitors, barristers and legal executives) will attract legal advice privilege.

Reconsideration by Parliament

The Supreme Court decided that any extension to LAP would need to be a Parliamentary rather than a judicial decision. Parliament has in the past made specific statutory provision for LAP to be extended, for example to trade mark agents and patent attorneys, which were extensions the judiciary had refused to make. Parliament has not chosen to do so for accountants, although Lord Clarke in this case hoped they would now reconsider this point.

If taking tax (or other) advice from an accountant it is important to be aware that, in contrast to the same advice given by a solicitor, the accountant's advice remains disclosable. This could lead to the eventual disclosure of all documents relating to the accountant's advice and consideration of them in court

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