

Legal professional privilege and accountants

The Supreme Court has resolved the question of whether tax advice provided by advisers who are not solicitors or barristers can be withheld from HMRC. The Judgment given on 23 January 2013 in *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax and another* (“the Prudential Case”) means that in the absence of legislation only advice given by lawyers cannot be obtained by the Revenue investigating a tax payer’s affairs. The decision means that accountants may be compelled to disclose information in connection with tax planning or other advice.

Legal professional privilege (LPP) has long protected communications between lawyers and clients for the purpose of legal advice as well as documents created for the purpose of litigation. It has always been regarded as vital to the protection of individual rights and freedoms. A person should be able to consult a lawyer confidentially and share information without fear that honest communications or advice might later be used against him or her. This applies even if there is some counterbalancing public interest reason for disclosure. Tax advisers have been anxious to see the protection extended beyond lawyers for obvious reasons. They have pointed to fact that tax advice given by a lawyer would be privileged whereas tax advice by an accountant would not.

In 2002 it was established that the Revenue’s statutory power to compel the production of documents did not extend to privileged material (*R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax*).

The Prudential Case arose out of a tax avoidance scheme marketed by PricewaterhouseCoopers and implemented by Prudential. The aim of the scheme was to give rise to a substantial tax deduction in Prudential (Gibraltar) Ltd which could then be set off against profits that were ordinarily chargeable to corporation tax in this country.

The Court identified lawyers as being members of the Bar, the Law Society and the Chartered Institute of Legal Executives and by extension foreign lawyers. LPP had long been recognised by the courts to be restricted to lawyers. In more recent cases the courts had refused to extend LPP to trademark agents, patent agents or a personnel consultant. Legal texts had unsurprisingly confirmed this position. It had been endorsed in more than one significant official report. In 2003 ministers had rejected a proposal to extend LPP to accountants made by the Director of Fair Trading. Parliament has legislated in a way which plainly implies that the restriction is assumed.

Allowing the appeal would have meant that LPP might logically be required to be extended beyond accountants and tax advice. The most powerful formulation would be to restrict LPP to a professional person “whose profession ordinarily includes the provision of legal advice”.

The Court did accept that there was a strong case “in terms of logic” for allowing the appeal. In modern conditions clients benefitted from advice from a variety of professionals. Where a

principle was long established and recognised and had not led to problems it might be more appropriate for the courts to conclude that it was an issue for Parliament not judges. The consequences of allowing the appeal would be hard to assess and raised questions of policy that Parliament should decide. There may also be practical issues in the communications of professionals with a remit wider than legal advice as to which part of their work was legal advice and which was not.

The decision was by a majority with a cogent dissenting judgment but that for the moment is that. Clients can continue to obtain legal advice from lawyers safe in the knowledge that what they say or are advised won't be used against them. Advice from others may be extracted by those able to do so and used against them.

Perhaps given the current public view of tax avoidance, tax advice by accountants will become more like guidance on social responsibility and so the issue won't matter too much anyway.

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