

# Exploring legal professional privilege for tax practitioners

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## **APPROACH OF STUDY**

According to the North-West University (General Academic Rule A4.1), a dissertation could be submitted in the “traditional book format” or in the more contemporary “article format”. As the author of this study is of the opinion that the study has practical value for tax practitioners and other researchers, the last-mentioned format was selected.

Chapter 1 of the study is the introduction, Chapter 2 the article, and Chapter 3 provides a summary and conclusion to the study. In order to present the article in a logical manner, it was necessary to repeat certain information. That is also presented in Chapters 1 and 3.

This is a mini-dissertation in partial fulfilment of the requirements for this Masters’ Degree, which means that the scope is limited. There is therefore only one main focus, which justifies a single article.

## **ABSTRACT**

Tax is a complex subject that affects each and every taxpayer and, because of the complexity of certain tax issues, an increasing number of taxpayers are consulting tax practitioners to provide them with a professional opinion on what the correct tax treatments are, of certain transactions. If the South African Revenue Service (SARS) does not agree with the treatment of a transaction, SARS is allowed to request that the taxpayer provides all material relevant to the transaction, but if that material is subject to legal professional privilege (LPP), the taxpayer need not provide the material to SARS.

The current standing in South Africa (SA) is that only the tax advice provided by legal advisors qualifies for LPP, while tax advice provided by accountants does not. The question that this paper has undertaken to answer is whether there are sufficient grounds to possibly extend the privilege to accountants. The evaluation found that there are reasonable grounds to extend the privilege to cover tax advice provided by accountants.

As there are, however some practical obstacles to implement this policy, another form of privilege could rather be granted to tax advice provided by accountants, in the form of a statutory right to limit SARS's access to the tax advice provided by accountants to a taxpayer.

## **KEYWORDS**

- Legal professional privilege, Legal advisors, Tax practitioners, Tax advice, Tax documentation

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## **CHAPTER 1 - INTRODUCTION**

### **1.1 - Background**

Privilege is a term used by many professionals and is defined in the Oxford dictionary (2016) as any special right or advantage that is available to a person or group. One of the more commonly known forms of privilege is legal professional privilege (LPP) and as there is no definition for LPP in tax legislation other sources such as dictionaries or the common law principles, have to be consulted in order to determine the meaning of LPP. In the case of *A Company and Others v Commissioner for the South African Revenue Service (SARS)* (2014), LPP was defined as “...communications between lawyers and their clients whereby legal advice is sought or given...”

In South Africa (SA), there are various practitioners that are allowed and qualified to give a tax opinion with regard to tax problems and questions. According to Section 46 of the Tax Administration Act (28 of 2011) (TAA), when SARS does not agree with the treatment of a transaction for tax purposes, SARS is allowed to demand the taxpayer provide all relevant material with regards to the transaction, as well as copies of any of the communications between the taxpayer and the practitioner who provided the tax opinion. Tax opinions and work performed by the practitioners do not always have to be provided to SARS. If the work performed by the practitioner or the communications between the practitioner and the taxpayer qualify for LPP, the taxpayer need not provide the documentation to SARS (Taxtalk, 2009;TAA, s. 42A).

In cases heard by the Constitutional Court, in *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* (2008) it was stated that LPP is a general rule of our common law and, if certain requirements are met, that any communication between a legal advisor and his client is protected from disclosure. In the case of *South African Airways Soc v BDFM Publishers (Pty) Ltd and Others* (2015), it was further stated that “...it is a negative right to prevent admission into evidence of advice obtained from a legal advisor in confidence...”. The principle established in the above mentioned cases is that communications and documentation exchanged between a legal advisor and a taxpayer that qualify for LPP need not be supplied to SARS.



According to Section 42A of the TAA, a taxpayer is allowed to claim the right to LPP on communications and documentation between the taxpayer and their legal advisor. According to the Collins dictionary (2016) a legal advisor can be defined as any lawyer that gives legal advice. For LPP to be applicable, certain requirements need to be met. Schwikkard and Van der Merwe (2009:160-162) listed the requirements as follows: The advisor should have been acting in a professional capacity, the legal advice should have been sought in confidence, the purpose should have been to obtain legal advice, and the client must claim the privilege.

According to Els and Lourens (2016), currently the only professional practitioners who qualify for LPP (in terms of the TAA) are legal advisers like lawyers. Any other practitioners who give tax opinions in a professional capacity do not qualify for the privilege. The reason for this, according to PWC (as cited by SAIT, 2013), is that SARS is of the opinion that the other tax practitioners are largely regulated by their professional bodies and not by the law, thus they do not qualify for legal professional privilege (SAIT, 2013).

The proposed research will attempt to gain an understanding as to why only legal advisors qualify for LPP in tax matters, and not other tax practitioners. Furthermore, it will question whether current conditions in SA warrant extending the privilege to other practitioners for example, accountants.

## **1.2 - Motivation**

Tax is a complex subject that affects each and every taxpayer in SA, and legal advisers are not the only practitioners that deal with tax problems on behalf of their clients. According to the requirements imposed by SARS, the only practitioners that are allowed to provide a tax opinion are those that are registered with SARS as a tax practitioner (SARS, 2016).

Taxpayers should be able to consult with their tax practitioners without the fear of self-incrimination and for a practitioner to provide proper and accurate advice they need to know all the relevant facts and information before advice on a matter can be provided (Kamdar, M. 2015:14). Tax advice is however not just provided by legal advisors as certain other professions like accountants also provide tax advice to their clients.

Therefore, as there are practitioners other than legal advisers that could provide tax advice in their professional capacities, it should be considered whether those practitioners should also qualify for LPP as they are also acting in a professional capacity to provide legal advice in tax matters for their clients, as well as acting in confidence.

### **1.3 - Problem statement and Research question**

If the current standing in South Africa on legal professional privilege in terms of the TAA is considered, it is evident that only the tax opinions of legal advisors are privileged and that other practitioners that also provide tax advice in their professional capacities do not qualify for the privilege.

The research question that this paper aims to answer is to consider what the current standing in South-Africa is, with regards to LPP, in terms of the TAA on tax advice provided and to determine whether there are grounds to possibly extend the privilege to other tax practitioners, specifically such as accountants.

### **1.4 - Research objectives**

The following research objectives have been formulated in order to answer the research question:

- i. To determine what legal professional privilege is, how it developed and what are the requirements to qualify for the privilege, to determine why only legal advisers were included in this privilege.
- ii. To consider the statutory right to legal professional privilege in terms of the TAA.
- iii. To compare New Zealand (NZ) with South Africa (SA) to determine what the differences or similarities are on legal professional privilege with regards to the tax Acts on tax advice.
- iv. To compare the United Kingdom (UK) with South Africa (SA) to determine what the differences or similarities are on legal professional privilege with regards to the tax Acts on tax advice.
- v. To reach a conclusion on whether legal professional privilege (in terms of the TAA) on tax advice should be extended to accountants.

## **1.5 - Research Design**

### **1.5.1 - Literature review:**

According to the Gutman library (2016), a literature review identifies what is already known on a specific area of study and it could make a case for why further study in a certain field is necessary. The purpose of the literature review will be to determine if the current standing on legal professional privilege in South Africa is correct not to extend the privilege to other tax practitioners, other than legal advisors.

Sources to be accessed during the review include (but are not limited to):

- South African legislation
- International legislation/regulations
- The law of evidence
- Taxation articles that were written by professional firms including  
(but are not limited to) Deloitte, Pricewaterhouse Coopers and  
Ernst & Young
- Published academic papers, Masters' and PhD studies
- Taxation articles

### **1.5.2 - Critical analysis methodology:**

The research tool that will be used is to analyse existing literature on the subject, as well as the requirements set out by common law or relevant court cases that addressed the issue of legal professional privilege.

### **1.5.3 - Paradigmatic assumptions and perspectives:**

#### **Ontological assumptions and epistemology**

The first fact to consider when deciding on the research methodology is to consider the ontology and epistemology. According to Raddon (2016), ontology can be defined as “what constitutes reality and how can we understand existence?” whereas epistemology can be defined as “what constitutes valid knowledge and how can we obtain it?”.

If the definition of ontology is applied to a tax environment, it can be seen that each country has its own set of taxation rules and regulations, and these regulations will probably differ from country to country. If epistemology is considered, it is found that valid knowledge could be seen as the different rules in the tax acts and the method to obtain this knowledge would be to analyse these sources.

From the above considerations on the ontological and the epistemology an interpretivist paradigm will be followed as this research will not try to establish a single truth but rather to gain a wider understanding on the phenomenon (Patel, 2015). The reason for this is that this study will try and understand why Legal Professional Privilege is only applicable on legal advisors and explore if there are grounds to possibly extend the privilege to other professions.

### **Methodological assumptions**

Form the above consideration on the ontology and epistemology a doctrinal methodology will be followed for this research. According to McKerchar (2008) doctrinal research can be seen as the systematic process of identifying and analysing. Thus, the reason why this methodology will be followed is because an analysis of the current standing of legal professional privilege will be undertaken and the possible extension of the privilege to other professions will be considered.

The research will be approached through an inductive approach. According to Gabriel (2013) an inductive approach considers previously researched phenomena from a different perspective. Thus it is applicable for this study as previous studies will be considered as well as previous case law. The research methods that will be used in this study are accessing the current standing of LPP through understanding the current requirements to qualify for the privilege in terms of the common law as well as the TAA, accessing the outcome of court cases that dealt with LPP to determine what needs to be present in a case for the requirements to be met and literature on the subject will be accessed to determine what is there that could possibly be grounds to extend the privilege to other professions.

## **1.6 - Overview of Chapters**

### **Chapter 1: Introduction**

This chapter will introduce the proposed research and outline the philosophical paradigm in which the research is conducted. The objectives of the research will be stated.

### **Chapter 2 (article): The applicability of legal professional privilege on legal advisors and accountants**

This chapter (article) evaluates the current standing of LPP in SA and considers whether LPP should be extended to accountants that provide legal advice in tax matters.

### **Chapter 3: Conclusion**

This chapter summarises the findings of the study and addresses the research question formulated in chapter 1.

## **CHAPTER 2 - RESEARCH ARTICLE**

## **LIST OF ABBREVIATIONS**

- LAP – Legal advice privilege
- LPP – Legal professional privilege
- NZTAA – New Zealand’s Tax Administration Act
- NZ – New Zealand
- SA – South Africa
- SARS – South African Revenue Service
- TAA – Tax Administration Act
- UK – United Kingdom
- PWC – PricewaterhouseCoopers

## **ABSTRACT**

Tax is a complex subject that affects each and every taxpayer and, because of the complexity of certain tax issues, an increasing number of taxpayers are consulting tax practitioners to provide them with a professional opinion on what the correct tax treatments are, of certain transactions. If the South African Revenue Service (SARS) does not agree with the treatment of a transaction, SARS is allowed to request that the taxpayer provides all material relevant to the transaction, but if that material is subject to legal professional privilege (LPP), the taxpayer need not provide the material to SARS.

The current standing in South Africa (SA) is that only the tax advice provided by legal advisors qualifies for LPP, while tax advice provided by accountants does not. The question that this paper has undertaken to answer is whether there are sufficient grounds to possibly extend the privilege to accountants. The evaluation found that there are reasonable grounds to extend the privilege to cover tax advice provided by accountants.

As there are, however some practical obstacles to implement this policy, another form of privilege could rather be granted to tax advice provided by accountants, in the form of a statutory right to limit SARS's access to the tax advice provided by accountants to a taxpayer.



## **KEYWORDS**

- Legal professional privilege, Legal advisors, Tax practitioners, Tax advice, Tax documentation

## 2.1 - INTRODUCTION

Privilege is a term that is often used by professionals and is defined in the Oxford dictionary (2016) as any special right or advantage that is available to a person or group. According to Schwikkard and Van der Merwe (2009:133) privilege exists when a witness is not forced to provide information on certain issues. One of the more commonly known forms of privilege is legal professional privilege (LPP) which is granted in terms of the common law. The purpose of LPP is to ensure that the client that is seeking legal advice is not inhibited from seeking the advice (Hughes, 2011:19) and to ensure that the advisor that provided the advice does not disclose the privileged information or use privileged material that was provided to them in error (Webley, 2016:173).

It was stated in the Constitutional Court case, *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* (2008) that LPP is a general rule of our common law and, if certain requirements are met, that any communication between a legal advisor and his client is protected from disclosure. This principle was further established in the case of *South African Airways Soc v BDFM Publishers (Pty)* (2015) which stated the following “... it is a negative right to prevent admission into evidence of advice obtained from a legal advisor in confidence...”.

As stated by (Milne, 2009:4) “Legal professional privilege requires the restriction of access to certain material in order to facilitate effective representation”. Legal professional privilege can be split into two components namely: legal advice privilege and litigation privilege (The Law Society, 2013). Legal advice privilege was defined in the case of *A Company and Others v Commissioner for the South African Revenue Services* (2014) as “...legal advice privilege covers communications between lawyers and their clients whereby legal advice is sought or given...” and according to Bester (2015) litigation privilege protects communications between a legal advisor and a client with regards to pending or contemplated litigation.

According to Section 46 of the Tax Administration Act (28 of 2011) (TAA), when the South African Revenue Service (SARS) does not agree with the tax treatment of a transaction, SARS is allowed to demand that the taxpayer provides all relevant material with regards to the transaction to SARS in order to determine if the transaction

is correct. Relevant material is defined in the TAA as “... any information, document or thing that is foreseeably relevant for tax risk assessment, assessing tax, collecting tax, showing non-compliance with an obligation under a tax Act or showing that a tax offence was committed”.

If the above-mentioned principle of LPP, in terms of the common law rules, is applied to Section 46 of the TAA it seems that if services rendered by a tax practitioner or the communications between the tax practitioner and the taxpayer qualify for legal professional privilege, the taxpayer need not provide the documentation to SARS. This principle is further supported in Section 42A of the TAA which states that a taxpayer that claims LPP in respect of relevant material required by SARS could provide certain information to SARS and the LPP could be obtained. Then the taxpayer need not provide the requested material to SARS. As LPP is not defined in the tax Acts, the meaning and definition thereof is determined in terms of the common law principles as established for the application of the TAA.

Unfortunately when tax opinions are provided by professionals in their professional capacity, the LPP is only applicable to legal advice provided to clients by legal advisors like lawyers (Els and Lourens, 2016). According to PricewaterhouseCoopers (PWC) (as cited by SAIT, 2013) tax advice provided by other professions does not qualify for the privilege as SARS is of the opinion that tax practitioners are largely regulated by their professional bodies and not by law, thus they do not qualify for legal professional privilege.

This is a problem as the sheer size and complexity of some businesses make it difficult for directors and employees to understand the relevant regulatory principles (de Villiers, 2011:51) and because of this it forces them to seek help and advice from professionals that include professions outside the legal profession.

## **2.2 - PROBLEM STATEMENT, RESEARCH QUESTION AND OBJECTIVES**

If the current standing in South Africa on legal professional privilege in terms of the TAA is considered, it is evident that only the tax opinions of legal advisors are privileged in terms of the TAA and that tax advice provided by practitioners other than legal advisors do not qualify for the privilege.

The research question that this paper aims to answer is to consider what the current standing in South-Africa is with regards to LPP (in terms of the TAA on tax advice given) and to determine whether there are grounds to possibly extend the privilege to other tax practitioners, specifically such as accountants.

The following research objectives have been formulated in order to answer the research question:

- i. To determine what legal professional privilege is, how it developed and what are the requirements to qualify for the privilege, to determine why only legal advisers were included in this privilege.
- ii. To consider the statutory right to legal professional privilege in terms of the TAA.
- iii. To compare New Zealand (NZ) with South Africa (SA) to determine what the differences or similarities on legal professional privilege are, with regards to the tax Acts on tax advice.
- iv. To compare the United Kingdom (UK) with South Africa (SA) to determine what the differences or similarities on legal professional privilege are, with regards to the tax Acts on tax advice.
- v. To reach a conclusion on whether legal professional privilege (in terms of the TAA) on tax advice should be extended to accountants.

## **2.3 - DEVELOPMENT OF LEGAL PROFESSIONAL PRIVILEGE**

### **2.3.1 - The development of legal professional privilege**

Legal professional privilege is an absolute fundamental human right that provides a person with the right to withhold any communications between him/herself and a legal advisor. This right is granted in terms of the rules of the common law as stated in the Constitutional Court case *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* (2008).

Legal professional privilege can be split into two components, namely legal advice privilege and litigation privilege (The Law Society, 2013). The difference between legal

advice privilege and litigation privilege is according to Bester (2015): legal advice privilege protects communications between legal advisors acting in their professional capacity and a client seeking legal advice; and litigation privilege protects communications between a legal advisor and a client with regards to pending or contemplated litigation.

According to Paizes and Zeffertt (2009:625-626), when legal professional privilege was first introduced in SA it could not be invoked against any confiscations of communications or extra-curial seizures. However, as the years progressed, the courts realised that the privilege needed to be extended because it formed part of the fundamental principles on which the SA judicial system is based. The following was stated in the Australian case of *Baker v Campbell* (1983) "...The privilege extends beyond communications made for the purpose of litigation to all communications made for the purpose of giving or receiving advice and this extension of the principle makes it inappropriate to regard the doctrine as a mere rule of evidence...". Thus, from this established principle, it could be accepted that LPP has evolved to the point where any communication between a legal advisor and their client is subject to LPP.

According to Ford and Odendaal (2013), the current standing in SA with regards to legal professional privilege is that only communications between a legal advisor or legal professional and their client is protected by the privilege. A legal advisor is defined in the Collins dictionary (2016) as any lawyer that gives legal advice. Legal advice also includes advice on tax matters as a tax liability is imposed by law (Anon., 2016). Palmer (2016) supports this view by stating that, with the current standing in SA, only tax advice given by lawyers can be protected by LPP and thus from this it seems that only lawyers are deemed to give legal advice that qualifies for LPP.

Section 42A of the TAA considered it correct to assume that if SARS requests documentation from a client in terms of Section 46 of the Tax Administration Act (28 of 2011) and that documentation is subject to LPP, the client need not provide it to SARS (Taxtalk, 2009; Tax Administration Act (28 of 2011, Section 42A).

Thus, by considering how LPP has developed over the years, it is clear that even though it has developed to a great extent, the fact that the privilege applies to legal

advice rendered by legal advisors only creates uncertainties on the application of LPP in certain circumstances, especially with regard to tax advice given by advisors that are not part of the legal profession. One of the reasons for these uncertainties is the fact that until recently the courts have not paid sufficient attention to the applying of rules on privilege designed for individuals to complex corporations and this caused uncertainties on the privilege (Higgins, 2014:268).

### **2.3.2 - The requirements to qualify for LPP**

According to the Constitutional Court case *Thint (Pty) Ltd, v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* (2008) certain requirements need to be met before LPP could be applicable. Schwikkard and Van der Merwe (2009:160-162) listed the general requirements to qualify for LPP in terms of the common law principles as follows:

- The advisor should have been acting in a professional capacity,
- The legal advice should have been sought in confidence,
- The purpose should have been to obtain legal advice,
- The client must claim the privilege.

These requirements will be considered below in order to determine what each requirement entails.

#### **2.3.2.1 - Acting in a professional capacity**

The first requirement is that the advisor should have been acting in a professional capacity. Professional capacity is a matter of fact and according to Perry (2008) there are different indicators to determine if an advisor is acting in a professional capacity. These indicators include: is the advisor qualified, where did the consultation take place, and was there payment of a fee? But because professional capacity is a matter of fact, the circumstances of each case and scenario will have to be considered on their own.

When the above requirement is applied to an accountant, it is found that an accountant does act in a professional capacity and therefore this requirement could be met by accountants providing legal advice.

### **2.3.2.2 - Advice sought in confidence**

The second requirement is that the advice should have been sought in confidence by the client. When considering the case of *R v Fouche* (1953) it seems that legal advice is sought in confidence when the legal adviser gave the advice in a professional capacity. From this it seems that advice that is not given in a professional capacity will not be seen as advice sought in confidence.

Accountants do provide advice in a professional capacity and their clients do seek the advice in confidence, therefore an accountant providing legal advice could also meet this requirement.

### **2.3.2.3 - Legal advice**

The third requirement is that the purpose of the advice should have been to obtain legal advice. Legal advice is defined in the Oxford dictionary (2016) as “professional advice given by a lawyer”. In terms of this definition it seems that legal advice can only be provided by a qualified lawyer acting in his/her professional capacity.

Technically, an accountant could provide legal advice, but they are not usually lawyers. Accountants providing this type of advice would therefore not meet this requirement.

### **2.3.2.4 - Client should claim the privilege**

The final requirement is that the client should claim the privilege before it can take effect. The following was stated in the case of *S v Nkata and Others* (1990) “...The privilege is the client's,...”, thus from this it is clear that the privilege belongs to the client and that in order for the privilege to take effect the client needs to claim the privilege.

A client that obtains legal advice from an accountant could also claim the privilege, which implies that accountants providing legal advice could meet this requirement.

If all of the above-mentioned requirements are met, LPP will be applicable in general and any communications between the client and the legal advisor will be privileged. However according to Jani (2010:42) even if all of the above-mentioned requirements are complied with if the advice that was obtained forms part of a crime the advice will not be protected by LPP.

Thus, from the above-mentioned, it seems that even though LPP has evolved to a great extent, tax advice provided by accountants will not qualify for LPP because the only profession that is acknowledged to provide legal advice are legal advisors.

## **2.4 STATUTORY RIGHT TO LEGAL PROFESSIONAL PRIVILEGE IN TERMS OF THE TAA**

According to Section 46 of the TAA, when SARS does not agree with the tax treatment of a transaction, SARS is allowed to demand the taxpayer provide all relevant material with regards to the transaction in order to determine if the transaction is correct. Relevant material is defined in the TAA as "... any information, document or thing that is foreseeably relevant for tax risk assessment, assessing tax, collecting tax, showing noncompliance with an obligation under a tax Act or showing that a tax offence was committed". From this it seems as if SARS has the right to all communications and documents between a taxpayer and his tax practitioner.

However, according to Section 42A of the TAA, even if SARS has the right to request relevant material the taxpayer need not provide the material if it is subject to LPP. But in order for a claim of LPP to be accepted by SARS, all of the requirements of Section 42A(1-2) of the TAA need to be complied with. According to Section 42A(1) of the TAA, for LPP to be accepted by SARS the following need to be provided to SARS:

- A description and purpose of each item on which the taxpayer is trying to claim LPP.
- The author of the material.
- The name of the person on whose behalf the author provided the material.
- Confirmation in writing that the person on whose behalf the author is acting is claiming privilege on the materials.



- If the material is not in the possession of the person claiming the privilege, from whom did the person obtain the material.
- If the person asserting the privilege is not the person claiming the privilege, under what circumstances and instructions did the person obtain the material.

Furthermore, for the person to claim LPP the documentation must be submitted at the place, time and in the format prescribed by SARS (Tax Administration Act (28 of 2011), Section 42A(2)).

There is no definition for LPP in the tax Acts and thus the common law and case law need to be considered in order to determine what LPP is and to whom it applies. It was stated in the Constitutional Court case, *Thint (Pty) Ltd v National Director of Public Prosecutions and Others, Zuma and Another v National Director of Public Prosecutions and Others* (2008) that LPP is a general rule of our common law and if certain requirements are met, that any communication between a legal advisor and his client is protected from disclosure.

Thus, if the current standing off LPP is considered with regards to tax advice, it seems that the advice provided by accountants does not qualify for LPP and any communication between them and their clients would thus not be privileged. But according to Els and Lourens (2016), if an accountant is requested by a lawyer to confirm certain views or to give advice, those communications will be protected by privilege. One of the reasons why accountants do not qualify for legal professional privilege, according to (PWC), (as cited by SARS, 2013) is because SARS is of the opinion that accountants are largely regulated by their professional bodies and not by law.

Furthermore, according to Moodley (2013:91), in the modern-day era the role of the accountant has become quite diverse, in that accountants provide tax advisory services in addition to financial or bookkeeping functions. Thus based on this change in the way that taxpayers now do business, and the fact that the tax legislation is evolving and moving more to the accounting profession it is necessary for information provided to accountants in their capacity as tax advisors to also be subject to LPP.

## **2.5 - COMPARISON BETWEEN SOUTH AFRICA, NEW ZEALAND AND THE UNITED KINGDOM**

The application of LPP with regards to tax advice provided to taxpayers is compared between NZ, the UK and SA in order to consider the similarities and differences in the respective treatments of LPP by these countries to determine if they could provide a possible solution for the SA situation.

### **2.5.1 New Zealand**

According to Section 16 of New Zealand's Tax Administration Act (NZTAA) (1994), the Commissioner has full and free access to inspect any documents deemed to be relevant for the purpose of collecting any tax or duty under any of the Inland Revenue Acts. In terms of Section 6A of the NZTAA, the Commissioner is responsible for administering the Inland Revenue Acts and, to enable the Commissioner to properly perform this function, the office has to have access to all required information but in such a manner that voluntary compliance is encouraged (IRD, 2008:3).

Furthermore, in New Zealand the Inland Revenue Department (IRD) has, according to Section 17 of the NZTAA, the right to request that the taxpayer provide the Commissioner with any relevant documentation if it is deemed necessary. Section 17 of the NZTAA is also applicable on audit working papers in respect of the taxpayer's business and, if the IRD deems the audit working papers to be relevant, it could request that the auditor provide the documents. In some cases these audit working papers will include tax working papers. In these, the audit working papers will have to be made available, but the tax working papers could possibly be protected by a statutory privilege (IRD, 2008:3).

From the above it seems that the IRD has full access to all the relevant documentation of the taxpayer and could also request information from third parties, such as the working papers of accountants and auditors. This is not the case, as the IRD's access powers to a taxpayer's information is limited by the following statutory provisions:

- Legal professional privilege in terms of Section 20 of the NZTAA

- The right of non-disclosure for a tax advice document in terms of Sections 20B to 20G in the NZTAA.

These statutory provisions will be considered below:

According to Section 20 of the NZTAA, any document or information will be privileged from disclosure if:

- It is confidential communication between a legal practitioner in his professional capacity and another legal practitioner in such capacity; or it is confidential communication between a legal practitioner in his professional capacity and the practitioner's client.
- The purpose of the communication was to obtain or give legal advice or assistance.
- The purpose of the communications was not for the committing or furthering of any illegal or wrongful act.

If all of these requirements are met, LPP will be applicable and the communications will be privileged from disclosure.

In Section 20(7) of the NZTAA a legal practitioner is defined as "... barrister or solicitor of the High Court, and references to a legal practitioner include a firm or an incorporated law firm (within the meaning of the Lawyers and Conveyancers Act 2006) in which he or she is, or is held out to be, a partner, director, or shareholder". From this it seems that LPP in NZ is only applicable on advice provided by practitioners in the legal practice and that LPP does not extend to the advice provided by accountants.

This does not mean that accountants do not receive any form of privilege. In NZ there is a separate statutory privilege set out in the NZTAA with reference to tax advice provided by accountants to clients. This statutory privilege is the non-disclosure right set out in Sections 20B - 20G in the NZTAA.

According to Section 20B(1) of the NZTAA, a person is not required to disclose any information to the IRD if the information is contained in a tax advice document.

A document is defined in the NZTAA as

- a) "...a thing that is used to hold, in or on the thing and in any form, items of information,
- b) an item of information held in or on a thing referred to in paragraph (a), or
- c) a device associated with a thing referred to in paragraph (a) and required for the expression, in any form, of an item of information held in or on the thing."

In Section 20B(2) of the NZTAA a document is eligible to be a tax advice document if it is a confidential document that was created by a tax advisor for the main purpose of providing a taxpayer with advice regarding any tax laws and where the purpose of the advice is not for the committing of any illegal or wrongful act.

Furthermore, according to Section 20B(3) of the NZTAA, for a document to be seen as a tax advice document the taxpayer or the tax advisor needs to make a claim that the document is a tax advice document and the requirements in Section 20E and 20F need to be satisfied. When considering the requirements in Section 20E and 20F of the NZTAA, it is clear that for a document to be seen as a tax advice document the tax advisor authorised to act on behalf of the taxpayer must make a statutory declaration to disclose any tax contextual information within the tax advice document to the IRD if so requested by the IRD.

Tax contextual information for a tax advice document is defined in Section 20F(3) of the NZTAA as any facts and assumptions relating to the transaction entered into by the tax advisor, any advice that is not seen as tax advice and advice that concerns the collection of bad debts payable to the IRD. Therefore any information that is not tax advice has to be declared to the IRD and would not be subject to the right of non-disclosure.

Section 20B(4) defines a tax advisor for the purpose of a tax advice document as a natural person of an approved advisor group who is subject to a code of conduct and disciplinary processes. An approved advisor group is defined in Section 20B(5) as a group of natural people who have a significant function of giving advice on tax laws and operations and is subject to a code of conduct and disciplinary processes. An

accountant that belongs to a professional body and is governed by a code of conduct would therefore qualify as a tax advisor in terms of these provisions.

According to the non-disclosure right for tax advice documents, a request to a taxpayer for a tax advice document should only be made when the information provided does not lead to the complete factual description of the transaction that is under review or when the tax advisor or third party refuses to answer questions in relation to the transaction that is currently under review (IRD, 2005)

Thus, from the above-mentioned it is clear that even though New Zealand does not grant LPP to legal advice provided to taxpayers by accountants, the advice that accountants provide is subject to a form of privilege, the right of non-disclosure, but this statutory privilege is only applicable to tax advice documents.

### **2.5.2 The United Kingdom**

According to Schedule 36 of the Finance Act (2008) an officer of Revenue and Customs may require a taxpayer by way of a written notice to provide any information or document to the officer if the information or document is reasonably required for the purpose of checking the taxpayer's tax position. According to Stone (2016) the information and documents need however not be provided if it is subject to LPP.

LPP is seen in the UK as an absolute fundamental right that protects certain documents and information provided to a lawyer from being disclosed (The Law Society (2013)). According to Stone (2016) the privilege can be split into two different types, namely legal advice privilege that protects confidential communications between a client and lawyer where the purpose of the communications was to obtain or give legal advice; and litigation privilege that protects communications between a lawyer and client that was for the dominant purpose of obtaining legal advice. From the above it seems clear that LPP is applicable on legal advice. Legal advice, as was discussed previously, is defined in the Oxford dictionary (2016) as “professional advice given by a lawyer”.

In order to determine the current standing of LPP for tax advice given by accountants in the UK, the case of R (on the application of Prudential plc and another) (Appellants)

v Special Commissioner of Income Tax and another (Respondents) (2013) needs to be considered. As this is a ground breaking case in this regard, the background of the case is considered to obtain a good understanding of the facts that led to the ruling.

In 2004, the Prudential group of companies implemented a series of transactions that formed part of a scheme advised by PWC. The main aim of this scheme was to create a large tax deduction in Prudential (Gibraltar) Ltd which is a subsidiary of Prudential plc, in order to set off the deduction against the profits of that company.

Mr Pandolfo, the inspector of taxes, thought it necessary to inspect the transactions that was implemented by the Prudential group and served a notice under Section 20B(1) of the Taxes Management Act 1970. Prudential disclosed some of the documents but refused to disclose certain documents because according to them the documents were subject to legal advice privilege (LAP) on the grounds that it related to the seeking and giving of legal advice.

Mr Pandolfo subsequently served a notice under Section 20(1) and 20(3) of the Tax Management Act 1970 for Prudential to disclose the disputed documents. Prudential lodged an application to challenge the review. The application was rejected by Charles J on the grounds that, although the advice would have attracted LAP if it was provided by a qualified lawyer, LAP does not extend to any other professional person who is not a qualified lawyer, even when the advice is identical in nature. Prudential then appealed to the Supreme Court to consider the case.

The Supreme Court dismissed Prudential's appeal by a majority of five to two. The leading judgement was provided by Lord Neuberger whose fundamental concern was that if LAP was extended, it would undermine the universally held belief that LAP is only applicable on advice provided by members of the legal profession. Lord Neuberger provided three connected reasons for his conclusion, as presented below:

- If LAP was extended to any person who is part of a profession giving legal advice, then it would become difficult to determine which occupations would be seen as professions that are able to provide legal advice and this could lead to an unacceptable risk of uncertainty and loss of clarity in sensitive areas of the law.

- Because of the significant consequences of extending LAP, extension should be left to legislative processes and not to the courts.
- Parliament had already extended LAP to patent attorneys, trade mark agents and licensed conveyancers - and if it was thought necessary to also extend LAP to accountants, Parliament would have extended it to accountants as well.

Lord Sumption, who voted in favour of the extension of LAP, stated that the privilege attaches to any communications between a client and his legal advisor where the purpose was to obtain or provide legal advice in a professional relationship and where the advisor is part of a profession that enables them to provide skilled legal advice. He further stated that the restriction of LAP to only legal advisors is based on historical views that professionals in the legal profession are the only source of skilled legal advice, but this has changed in modern times as accountants are also able to give skilled legal advice in tax matters.

From the above it seems clear that, in the UK, privilege is still only applicable to legal advice rendered by legal advisors and even though there are grounds to extend it to accountants it was decided that the decision should be left to Parliament and not to the courts. Thus currently only tax advice given by legal advisors will qualify for LAP in the UK, and there is no other form of limitation to the right of access of Her Majesty's Revenue and Customs (HMRC) to tax advice provided by an accountant to the taxpayer.

In Table 1 below the similarities and differences between SA, New-Zealand and the UK are presented with regards to the application of LPP as well as other limitations to the right of access to taxpayers' information from third parties by the respective revenue authorities. The criteria used to do the comparison is the key differences and similarities that were identified in the above study.

Table 1: Summary of similarities and differences between SA, NZ and the UK

|                                                      | <b>South Africa</b>                                  | <b>New Zealand</b>                                                     | <b>United Kingdom</b>                                                     |
|------------------------------------------------------|------------------------------------------------------|------------------------------------------------------------------------|---------------------------------------------------------------------------|
| <b>Information gathering powers of tax authority</b> | Allowed to demand that taxpayer provide all relevant | Right to request any relevant documentation if it is deemed necessary. | Right to request any information or document that is reasonably required. |

|                                                                 |                                                                                                                                     |                                                                                                                                     |                                                                                                                                     |
|-----------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------|
|                                                                 | material. Section 46 of TAA (2011).                                                                                                 | Section 16 and 17 of the NZTAA (1994).                                                                                              | Schedule 36 of the Finance Act (2008).                                                                                              |
| <b>Requirements of Legal Professional Privilege</b>             | <b>a)</b> Confidential communication<br><b>b)</b> Purpose was to obtain legal advice<br><b>c)</b> Does not form part of illegal act | <b>a)</b> Confidential communication<br><b>b)</b> Purpose was to obtain legal advice<br><b>c)</b> Does not form part of illegal act | <b>a)</b> Confidential communication<br><b>b)</b> Purpose was to obtain legal advice<br><b>c)</b> Does not form part of illegal act |
| <b>Is tax advice received from accountants subject to LPP?</b>  | No, only advice provided by legal advisors                                                                                          | No, only advice provided by legal advisors                                                                                          | No, only advice provided by legal advisors                                                                                          |
| <b>Is there a separate statutory privilege for accountants?</b> | No, tax advice from accountants is not privileged                                                                                   | Yes, statutory privilege on tax advice documents according to Section 20B - 20G in the NZTAA (1994).                                | No, tax advice from accountants is not privileged                                                                                   |

**Source: Author's compilation based on the findings in the study performed**

Thus, from the above-mentioned, it is clear that neither SA, NZ or the UK grants LPP on tax advice provided by an accountant and that communication between an accountant and a taxpayer will not be protected by LPP. NZ offers limited privilege; while LPP is not applicable to tax advice provided by accountants in NZ, the accountants can qualify for statutory privilege on tax advice documents prepared for the taxpayer client, by means of a right of non-disclosure for tax-advice documents.

## **2.6 - CONCLUSION**

If SARS does not agree with the handling of a specific transaction, SARS is allowed to request that the taxpayer provides all relevant material of the transaction in order to determine if the transaction was handled correctly. And due to the complexity of tax, an increasing number of taxpayers are consulting tax practitioners to provide them with a tax opinion. These practitioners include different types of professions like legal advisors and accountants. The advice that these practitioners provide need not be provided to SARS if the advice is protected by LPP.



The current standing in SA is that only the tax advice provided by legal advisors qualifies for LPP. Tax advice provided by accountants does not qualify for LPP, as accountants meet only three out of the four criteria to qualify for LPP, as they are not legal professionals. This matter was directly addressed in the UK, as indicated above, where some judges were in favour of extending legal privilege to accountants. The practical problems associated with this decision are however a big obstacle and it is not expected that Parliament would take such a step soon.

The question that this paper has undertaken to answer is whether there are sufficient grounds to possibly extend the privilege to accountants. It was found that there are sufficient grounds to extend the privilege to accountants but there are certain obstacles that first need to be overcome before the extension of the privilege can be made for example in the UK, Parliament has to make a decision to extend the privilege.

This does not mean that accountants should not receive any form of privilege. In NZ, as was found in this study, there is a separate statutory privilege available for accountants that limits the IRD's power to access the tax advice provided by an accountant to a taxpayer. It is recommended that SA consider incorporating a similar form of privilege on tax advice provided to taxpayers by accountants in SA.

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## **CHAPTER 3 - CONCLUSION**

### **3.1 - OBJECTIVE OF THIS CHAPTER**

The objective of this chapter is to provide a summary of key findings of the study and how these findings address the research question formulated in Chapter 1.

### **3.2 - RESEARCH FINDINGS**

#### **3.2.1 - Research objective 1**

The first objective was to determine how LPP developed over the years and why the advice from accountants is not included in the privilege. The research found that LPP is a well-established form of privilege that has undergone many changes from its original form. It has developed to the point where any communications between a legal advisor and their client could possibly be protected from disclosure if all of the requirements are met. Unfortunately, even with all of the developments, the advice provided by accountants to a client on tax matters does not qualify for the privilege, even though the accountants providing legal advice will comply with three of the four requirements to qualify for LPP.

The reason for this is because the one requirement for LPP that accountants do not meet is that legal advice should have been obtained. Currently in SA the only profession that is seen to be able to provide legal advice is professionals in the legal profession. Thus, even with all of the developments in LPP currently in SA, the tax advice provided by accountants still does not qualify for the privilege.

#### **3.2.2 - Research objective 2**

The second objective was to analyse what the statutory right to LPP in terms of the TAA is. According to Section 46 of TAA SARS is allowed to demand a taxpayer to provide any relevant material if SARS does not agree with the treatment of a transaction. If the material is protected by LPP the taxpayer need not provide the material as long as the taxpayer also complies with all of the requirements in Section 42A of the TAA. But currently this privilege is not extended to accountants and this

causes a problem because in the modern day era more and more taxpayers are consulting with accountants to provide them with advice on their tax matters.

Thus if the tax advice provided by accountants is not extended to accountants this might cause accountants to lose clients as the client would rather obtain advice from a lawyer if the advice would be privileged than from an accountant where the advice is not subject to LPP.

### **3.2.3 - Research objective 3**

The third objective was to compare SA and NZ in order to determine what the similarities and differences with regards to LPP are. The research found that in NZ LPP is also not extended to accountants and thus the tax advice provided by accountants in NZ does not qualify for the privilege. But this does not mean that the advice provided by accountants does not qualify for some form of protection. In NZ there is a separate statutory privilege known as the non-disclosure right which protects any tax advice documents provided by an accountant to their client.

Thus, even though LPP is not applicable to the advice received from accountants there still is a type of privilege in the form of the non-disclosure right of tax advice documents.

### **3.2.4 - Research objective 4**

The fourth objective was to compare SA and the UK in order to determine what the similarities and differences with regards to LPP are. The research found that in the UK there was a ground breaking case where the matter of LPP for the tax advice provided by accountants was considered. The final verdict of the case was that even though there are grounds to extend LPP to the advice from accountants the decision should be left to Parliament and not to the courts.

Thus currently in the UK the advice that accountants provide on tax matters is not protected by LPP and there is also no additional statutory right available to limit the HRMC access to tax advice provided by accountants to taxpayers. From the above it is clear that the advice provided by accountants in the UK will not be protected from disclosure.



### **3.2.5 - Research objective 5**

The final research objective was to reach a conclusion on whether LPP should be extended to the advice provided by accountants. The research found that because of the complexity of certain tax matters, an increasing number of taxpayers are appointing tax practitioners to provide them with a tax opinion on what is the correct treatment of a transaction. Today these practitioners include accountants and there are reasonable grounds to extend the privilege to accountants, as the only obstacle between the privilege and the accountant is the fact that they are not legal professionals. As was found in the UK, there are some judges that are in favour of extending legal privilege to tax advice provided by accountants but there still are obstacles to adopting such a policy. It was found that such a decision should however be left to Parliament and not to the courts. Parliament has to date not taken any steps to address the issue.

This does not mean that in the meantime that is, until the decision is made that accountants should not receive any form of privilege. It is highly recommended that SA should consider following a similar approach to that followed by NZ, as was found in this study, by implementing a separate statutory privilege to protect the tax advice provided by accountants to taxpayers from disclosure to SARS.

### **3.2.6 - Possible future studies**

From the study it is found that privilege is an important factor in any legal proceeding, a possible future study could be to determine what tax documents would exactly be privileged and how far does this privilege extend in a legal proceeding concerning a tax matter

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