



DAVEY'S Locker



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Tax and legal privilege

The forthcoming s 42A of the Tax Administration Act

by Tony Davey

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It is proposed, in the draft Tax Administration Amendment Bill, 2015, to insert a new s 42A into the Tax Administration Act.

In the context of information requests, interviews and field audits, legal professional privilege is often asserted over information required by SARS. The proposed section seeks to clarify the requirements to be satisfied in order to support such an assertion, and provides for a procedure to be followed when SARS disputes it.

Legal professional privilege

Legal professional privilege has its basis in a common-law, fundamental right to give and take legal advice with complete confidence that communications between a legal practitioner and a client are protected from disclosure to third parties. Without this right, our adversarial system of litigation could not operate properly.

Legal professional privilege applies to confidential communications passing between client and legal adviser (counsel, attorney or in-house, professionally qualified legal adviser) for the purpose of giving and receiving legal advice generally, or for the purpose of existing or contemplated litigation;

to communications between a client's legal adviser and third parties, whether oral or in the form of witness statements; and any other evidentiary material.

It applies not only to disclosure in judicial and quasi-judicial proceedings but to all forms of compulsory disclosure, such as occurs under search warrants and statutory notices to produce documents or provide information to some authority, except when clear language in a statute overrides the privilege.

In the context of tax, legal professional privilege extends only to legal practitioners. In the recent English case of *Prudential PLC v Special Commissioner of Income Tax*, the court held that legal professional privilege does not extend to accountants providing tax advice. Thus a tax practitioner registered under s 240 of the Tax Administration Act would not be able to claim legal privilege on behalf of a client, unless he or she was also a legal practitioner acting in that capacity.

This distinction between legal practitioners, accountants and other non-legal tax practitioners seems somewhat anomalous in the context of tax advice, but, as the Charles Dickens character in *Oliver Twist*, Mr Bumble, observed, 'the law is a ass—a idiot'.

Section 42A procedures

It is advisable to adhere to the provisions of the proposed new s 42A, since, in *Bogoshi v Director for Serious Economic Offences*, it was held that clear language in a statute can override the common-law legal professional privilege.

A taxpayer (or legal practitioner on the taxpayer's behalf) claiming professional privilege must provide SARS with, amongst other things:

- A description of each document.
- The author of each such document.
- The name and capacity of the legal practitioner.
- The specific purpose of the legal advice.
- The name of client to whom legal advice was furnished.
- Confirmation that the client claims privilege.

If SARS disputes the assertion of legal privilege, a legal practitioner appointed by the Minister of Finance must take custody of the disputed documents and make a determination within twenty-one days whether legal privilege applies. This decision may, upon application by either party, be reviewed by the High Court.

