DLA CLIFFE DEKKER HOFMEYR

TAX ALERT

1 February 2013

IN THIS ISSUE

- **Legal professional privilege – prudential case confirmed**
- **Netherlands supports corporate tax planning**

LEGAL PROFESSIONAL PRIVILEGE – PRUDENTIAL CASE CONFIRMED

The issue of whether legal professional privilege (LPP) may be extended to apply in respect of communications between accountants (or other advisors) and their clients in the course of providing tax advice, and the different opinions in this regard, has been discussed in a number of our previous Tax Alerts.

In the case of *R (Prudential plc and another) v Special Commissioner of Income Tax and Another [2013] UKSC 1*, the Supreme Court of the United Kingdom gave judgment on the issue of whether LPP should be extended to non-lawyers. The case was on appeal from the Appeal Court where the extension of LPP had been denied.

In short, the taxpayer received a statutory notice from the revenue authorities, forcing it to produce documents in connection with its tax affairs. The matter concerned legal advice given by accountants in respect of a tax avoidance scheme. The taxpayer argued that it was entitled to refuse to comply with the notice on the grounds that the documents were covered by LPP.

The Supreme Court confirmed that LPP should not extend to communications in connection with advice given by professional people other than lawyers. In particular, the court observed that:

- As long as LPP is limited to advice from members of the legal profession, the strong, and justified, presumption will be that LPP does not apply in connection with any communications in that context, because lawyers normally only give legal advice. In other words, extending LPP to non-lawyers would likely lead to what is currently a clear and well understood principle becoming an unclear principle, involving uncertainty.
- If there are reasons of public policy to extend LPP to non-lawyers, the matter should be left to Parliament as the courts are not best placed to assess how profound such a change would be, whether there are good reasons of policy for making it, and what protections (if any) are needed to ensure that the ambit of the privilege is kept within limits.

In a South African context, there was an opportunity to extend LPP to non-lawyers with the enactment of the Tax Administration Act, No 28 of 2011, which came into operation with effect from 1 October 2012. However, despite submissions by certain tax practitioners when the legislation was before parliament, SARS has indicated that the matter would be revised in the coming months. For the time being, LPP may only be relied on where lawyers are involved and does not extend to communications between accountants (or other professionals) and their clients in the course of providing tax advice.

Andrew Lewis

NETHERLANDS SUPPORTS CORPORATE TAX PLANNING

It was recently reported ('Netherlands backs corporate tax-planning', *Society of Trusts and Estate Practitioners Journal (STEP)*, 24 January 2013, referencing Bloomberg and Ernst and Young) that the Dutch Finance Minister sent an open letter to the Dutch Parliament, explicitly setting out that the setting up or shifting of real economic activities to lower tax jurisdictions is a legitimate way of reducing taxes.

The Minister said that Dutch Tax Laws have sufficient safeguards to protect against profit shifting that has no real economic substance. He also indicated that allocating a group's profits between its operations in different jurisdictions, based on the transfer pricing rules and the arm's length principle, is perfectly legitimate. The Minister indicated that the fact that the rules can produce a range of outcomes was unavoidable.

The purpose of the letter was to reassure international investors that the Dutch Government remains welcoming to them. It further indicated that the Dutch Government would develop its tax policy only by international discussions with bodies such as the OECD, insinuating that it would not cave to economic pressure by the EU.

It is well-known, to the Netherlands government and numerous multinationals, that Dutch holding or intermediate companies may be used to reduce foreign withholding taxes. Companies such as Merck Dell, Yahoo and Google have taken advantage of this fact, channelling an estimated €10.2 trillion through Dutch companies and trust firms, before reaching its final destination in various low-tax jurisdictions.

Predictably, the rest of Europe does not look kindly on the Netherlands' lenient tax policies. Throughout Europe, retirement ages and taxes on the working class are rising and the European Commission, the EU's executive body, has as of January 2013, declared war on tax avoidance and evasion, citing such 'leniency' as costing the EU €1 trillion per year. This week, the United Kingdom Parliament is scheduled to hold its second hearing on the issue of corporate tax avoidance. The initial hearing in November 2012, saw executives from Google and Starbucks Corporation being grilled about their use of Netherlands subsidiaries to cut tax.

However, for those of us involved in tax planning in an increasingly uncertain global economic environment, at least for the time being, this reads like poetry.

Alastair Morphet and Danielle Botha

DLA CLIFFE DEKKER HOFMEYR

CONTACT US

For more information about our Tax practice and services, please contact:

Emil Brincker
Director
National Practice Head
T +27 (0)11 562 1063
E emil.brincker@dlacdh.com

Alastair Morphet
Director
T +27 (0)11 562 1391
E alastair.morphet@dlacdh.com

Ben Strauss
Director
T +27 (0)21 405 6063
E ben.strauss@dlacdh.co

Johan van der Walt
Director
T +27 (0)11 562 1177
E johan.vanderwalt@dlacdh.com

Ruaan van Eeden
Director
T +27 (0)11 562 1086
E ruaan.vaneeden@dlacdh.com

Andrew Lewis
Senior Associate
T +27 (0)11 562 1500
E andrew.lewis@dlacdh.com

Andrew Seaber
Senior Associate
T +27 (0)11 562 1768
E andrew.seaber@dlacdh.com

Danielle Botha
Associate
T +27 (0)11 562 1380
E danielle.botha@dlacdh.com

Heinrich Louw
Associate
T +27 (0)11 562 1085
E heinrich.louw@dlacdh.com

Tessmerica Moodley
Associate
T +27 (0)21 481 6397
E tessmerica.moodley@dlacdh.com

Carmen Moss-Holdstock
Associate
T + 27 (0)11 562 1614
E carmen.moss-holdstock@dlacdh.com

Nicole Paulsen
Associate
T + 27 (0)11 562 1386
E nicole.paulsen@dlacdh.com

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

BBBEE STATUS: LEVEL THREE CONTRIBUTOR

JOHANNESBURG

1 Protea Place Sandton Johannesburg 2196, Private Bag X40 Benmore 2010 South Africa
Dx 154 Randburg and Dx 42 Johannesburg
T +27 (0)11 562 1000 **F** +27 (0)11 562 1111 **E** jhb@dlacdh.com

CAPE TOWN

11 Buitengracht Street Cape Town 8001, PO Box 695 Cape Town 8000 South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300 **F** +27 (0)21 481 6388 **E** ctn@dlacdh.com

www.cliffedekkerhofmeyr.com

©2013

Cliffe Dekker Hofmeyr is a member of DLA Piper Group, an alliance of legal practices