DLA CLIFFE DEKKER HOFMEYR

TAX

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LEGAL PROFESSIONAL PRIVILEGE AND INVOICES FROM ATTORNEYS

On 17 March 2014 judgment was handed down in the Western Cape High Court in the case of *A Company v Commissioner of the South African Revenue Service* (case no 16360/2013 - as yet unreported).

The facts were briefly as follows.

The applicants were three companies in a group of companies. In the course of conducting an audit in the applicants' tax affairs, the South African Revenue Service (SARS) directed a request for relevant material at the applicants in terms of s46 of the Tax Administration Act, No 28 of 2011.

Specifically, SARS required the applicants to provide it with copies of certain invoices issued to the applicants by their attorneys in respect of legal services rendered. The invoices contained certain fee notes pertaining to the legal services.

The applicants were of the view that "all communications between attorneys and their clients are legally privileged, including invoices" and that SARS was therefore not entitled to copies.

Needless to say, SARS strongly disagreed. After various exchanges of correspondence, the applicants provided SARS with redacted copies in which some of the fee notes were censored.

SARS was not satisfied with the redacted copies and insisted that it be provided with full copies on the basis that "the detail provided [in the fee notes] does not in any way constitute advice given by an attorney to a client".

The applicants argued that "[t]he privilege does not only attach to the advice itself. Where the communication is so closely linked to the advice sought that by disclosing the communication the privilege would be undermined, the communication itself does not have to be disclosed".

As a result, the applicants approached the High Court for relief in the form of a declaratory order to the effect that "the redacted portions of the invoices ... are protected from disclosure by reason of legal professional privilege".

The court summarised the law relating to legal professional privilege as follows.

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Communications between a legal advisor and a client are protected from disclosure if:

- the legal advisor was acting in a professional capacity at the time;
- the advisor was consulted in confidence;
- the communication was made for the purpose of obtaining legal advice;
- the advice does not facilitate the commission of a crime or fraud; and
- the privilege is claimed.

The privilege extends to all communications directly related to the seeking or giving of the advice.

The court confirmed that the rationale for legal professional privilege is that the confidentiality that it bestows is necessary for the proper functioning of the legal system. A person must be able to freely turn to a legal adviser for advice as to what may or may not be done, and where they run risks, especially given the complexity of law and the fact that it reaches far into all aspects of business.

The court also stated that the rule regarding legal professional privilege is a substantive rule of law and not merely a rule preventing certain communications from being admitted as evidence.

The court further stated that, as a general rule, it is not possible to judge whether privilege is validly claimed if no legal context is provided by the party claiming such privilege. Details needed to be provided.

The court criticised the applicants for not having provided any context or sufficient details for the claim of privilege, other than stating that the fee notes were privileged. Specifically, the applicants did not "explain how mere references in the fee notes to work done or documents considered would 'undermine' the applicants' privilege in respect of the content of communications with their attorneys concerning the seeking and giving of advice".

SARS, on the other hand, did provide context as to why it required uncensored copies of the invoices. It appears that, *inter alia*, SARS was investigating a structured finance transaction relating to the applicants (allegedly one to which the general anti-avoidance rules apply), and the fee notes could reveal that the applicants or other group companies had knowledge of the flow of funds involved in the transaction.

The applicants did not pursue any argument that the fee notes would be irrelevant to SARS's investigation.

The court went on to say that the only way in which the applicants could succeed without providing context is if the invoices were, as a whole, by their very nature (by reason of the category of document) privileged.

The applicants abandoned any argument to the effect that the invoices as a whole were privileged by their nature, and only pursued the argument that the redacted portions of the invoices were privileged. The court nevertheless found it relevant to enquire whether invoices from attorneys were as such privileged.

After traversing various judgments handed down in the English courts (as well as in New Zealand), the court concluded that the position to be followed in South Africa is that attorneys' invoices or fee notes are not privileged as a whole by their nature because they:

- "are not created for the purpose of giving advice";
- "are not ordinarily of a character that would justify it being said of them that they were directly related to the performance of the attorney's professional duties as legal adviser to the client";
- "are rather communications by a lawyer to his or her client for the purpose of obtaining payment for professional services rendered";
- "relate to recoupment for the performance of professional mandates already completed, rather than to the execution of the mandates themselves"; and
- "do not form part of the 'continuum of communications'" relating to legal advice.

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Additionally the court held that:

- referring to advice sought or given is not the same as disclosing the substance of the advice;

- such a reference in a document which is not by its nature privileged to the fact that advice has been sought or given does not give rise to any privilege;

- "[i]t is the actual communications between the client and the lawyer involved in the seeking and giving of the advice - identifiable as such within the broad and generous parameters referred to … [in case law] … or references in other documents that would disclose their content or from which their content might be inferred that are the matter in respect of which legal advice privilege may be claimed";

- "[this] does not include the content of a document which merely records, without disclosing their substance, that such communications have occurred"; and

- "if the fee note refers to the advice only in terms that describe that it was given, without disclosing its substance, I do not consider that the mere reference would be sufficient to invest the relevant content of an otherwise unprivileged document or communication with legal advice privilege".

However, invoices and fee notes might contain parts in respect of which privilege can be claimed. This is particularly so "if the fee note set out the substance of the advice, or contained sufficient particularity of its substance to constitute secondary evidence of the substance of the advice".

The court noted that in such cases, the privilege must be claimed by redacting the parts of the document considered to be privileged, precisely as the applicants had done in the current matter.

To determine whether a specific part of a document is subject to privilege, keeping in mind the general rules noted above, the test is whether "upon an objective assessment…the references disclose the content, and not just the existence, of the privileged material".

However, as mentioned, the problem facing the applicants was that they failed to provide any legal context or details for purposes of placing the court in a position to make a finding.

The applicants were however willing to make uncensored copies of the invoices available to the court for purposes of inspection. The court was therefore invited to take a 'judicial peek' at the uncensored fee notes to make a finding.

The court was reluctant to do so, because this generally places the one party (in this case SARS) at a disadvantage, as it is kept in the dark. The applicants should have provided the necessary legal context in their papers. However, SARS agreed to a judicial examination of the invoices.

After taking a look at the invoices, and given the fact that no legal context had been provided by the applicants to assist the court, the court found that most of the references in the fee notes did not –

- "set out the substance of any request for legal advice or the content of any advice given"; and

- "afford any material that [the court] could identify as providing secondary evidence by which the content of the privileged communications that occurred in the course of the work being billed for could be inferred".

Legal professional privilege could therefore not be extended to these references.

The court found only three references in the fee notes from which "the character of the advice sought by the client may be inferred, in the sense of conveying not only that advice was sought, but also the substance of the client's evident concern in an identifiable legal context". Accordingly, these references attracted legal professional privilege.

The applicants therefore only enjoyed a minimal measure of success.

One should be mindful of the information that might be contained in invoices and fee notes from attorneys. These documents are not by their nature subject to legal professional privilege. Even though some references could potentially be subject to privilege, references that do not attract privilege could still reveal otherwise confidential information to SARS, which they might seek to use against taxpayers.

Heinrich Louw

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WITHDRAWAL OF ASSESSMENTS UNDER THE TAX ADMINISTRATION ACT

Section 98 of the Tax Administration Act, No 28 of 2011 (TAA) makes provision for the withdrawal of an assessment by the South African Revenue Service (SARS) in certain circumstances. Prior to its amendment, s98 allowed for the withdrawal of an assessment (despite no appeal having been noted or objection lodged), that was:

a) issued to the incorrect taxpayer;

b) issued in respect of the incorrect tax period; or

c) issued as a result of an incorrect payment allocation.

In terms of s98(2) of the TAA, an assessment withdrawn under this section is regarded as not having been issued in the first place.

The Tax Administration Laws Amendment Act 2013 has extended the ambit of s98 of the TAA by introducing further circumstances in which SARS may withdraw an assessment. S98(1)(d) provides SARS may withdraw an assessment in respect of which it is satisfied that it was based on:

- an undisputed factual error by the taxpayer in a return; or
- a processing error by SARS; or
- a return fraudulently submitted by a person not authorised by the taxpayer.

However, such an assessment may only be withdrawn if the following additional requirements are met:

- the assessment must impose an unintended tax debt in respect of an amount that the taxpayer should not have been taxed on;
- the recovery of the tax debt under the assessment would produce an anomalous or inequitable result;
- there must be no other remedy available to the taxpayer; and
- it must be in the interest of the good management of the tax system.

Essentially, the new provisions contained in s98(1)(d) can only find application in situations where, firstly, there is an undisputed factual error by the taxpayer in a return, a processing error by SARS or a fraudulent submission of a return. Secondly, four additional requirements must be met. The third requirement, being that there must be no other remedy available to the taxpayer, appears to be the most problematic.

The explanatory memorandum issued by SARS on the objects of the Tax Administration Laws Amendment Bill 2013 provides that the reason for the amendment to s98 relates mainly to the situation where erroneous assessments are discovered after the expiry of all prescription periods and remedies available to the taxpayer. This may result in a situation which may be unreasonable or inequitable. S98(1)(d) aims to remedy this situation by allowing for the withdrawal of assessments in specified narrow circumstances.

In light of the rationale for the amendment, it may be argued that the 'no other remedy' requirement in s98(1)(d)(iv) is understandable given that this is precisely the situation the provision aims to address. On the other hand, one may be disappointed should one wish to utilise s98(1)(d) as a means of dispensing with an erroneous assessment. This is so because circumstances under which there is no other remedy available to a taxpayer are very rare.

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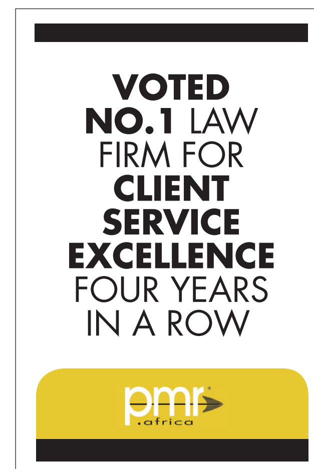
One would have to consider the interpretation of the words 'no other remedy available'. Given the rationale behind the provision in creating a remedy for a taxpayer who would suffer inequitable treatment should all prescription periods and remedies have expired, it appears that 'no other remedy' should include a situation where the time period for lodging an objection or appeal has expired or where a claim has prescribed.

The amendments further provide, in s98(2) of the TAA, that in the alternative to regarding the erroneous assessment as never having been issued, a senior SARS official may agree with the taxpayer as to the amount of tax properly chargeable for the relevant tax period and subsequently issue a revised original, additional or reduced assessment, pursuant to such agreement. Such an 'agreed assessment' would not be subject to objection and appeal.

Whilst some may be disappointed that s98(1)(d) does not necessarily provide a simpler mechanism for doing away with an assessment, others who have discovered that they have suffered loss due to administrative errors or fraud, may breathe a sigh of relief.

Danielle Botha



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