

Privilege and the Disclosure Regime

In their article in *The Tax Journal*, 25 October 2004, Issue 762, Hartley Foster and Aileen Barry of DLA discussed the direct tax disclosure regime under the Finance Act 2004 (*the Act*) and related regulations (*the Disclosure Regime*). A further article by Richard Collier-Keywood on 1 November 2004, Issue 763, raised specific issues in relation to legal professional privilege (*LPP*).

Under s 314 of the Act no disclosure need be made that would breach the rules of LPP. Section 314(1) provides: 'Nothing in this Part requires any person to disclose to the Board any privileged information'. Section 314(2) provides: 'In this Part, "privileged information" means information with respect to which a claim for legal professional privilege, or, in Scotland, to confidentiality of communications, could be maintained in legal proceedings'.

As many readers will be aware, the impact of LPP on the Disclosure Regime has been the subject of much debate. To recap very briefly, the Revenue's position was that LPP would not prevent lawyers from providing the requisite information when they fell within the regime. However, the Law Society disagreed and published guidance to the effect that, in many cases, LPP would have this effect.

On 6 October the Revenue announced a change to the rules so as to shift the disclosure obligation from the lawyer to the client in any case where LPP prevented full disclosure by the lawyer, with this disclosure being required within a similar timescale to that which would have applied to the lawyer.

The five firms Allen & Overy, Clifford Chance, Freshfields Bruckhaus Deringer, Linklaters and Slaughter and May, concerned to ensure proper compliance with their legal and professional obligations in respect of the Disclosure Regime and LPP, have considered the application of LPP in the context of the Disclosure Regime in considerable detail. As part of that process, they sought the advice of Sir Sydney Kentridge QC. The

Sarah Falk, Tax Partner and Sean Jeffrey, Dispute Resolution Senior Associate, Freshfields Bruckhaus Deringer, set out the current thinking of the 'magic circle' law firms on LPP and the disclosure regime

firms' conclusions (confirmed by Counsel) are as follows.

The fundamental point is to be clear how LPP arises in the context of the Disclosure Regime. Once a lawyer is retained for the purpose of obtaining legal advice, all related confidential lawyer/client communications forming part of that 'continuum' will be privileged. This principle covers not just legal advice but also the client's communication to the lawyer of the facts and circumstances on which the advice is based. The authorities' rationale for the privilege is that it is impossible for a client to receive proper, informed legal advice unless the lawyer is made fully aware of all the relevant facts and circumstances. The public interest in the availability of such legal advice requires that relevant lawyer/client communications should not be disclosable save with the client's consent.

Thus, as a matter of law, the privilege belongs to the client and not to the lawyer. It is therefore the lawyer's professional obligation to assert the client's privilege in response to any question from a third party relating to the contents of a privileged lawyer/client communication (unless of course the client chooses to waive its privilege, whether in whole or in part).

LPP attaches to relevant lawyer/client communications and their contents. It does not attach to any particular underlying information or fact as such. It follows therefore that, under the Disclosure Regime, a client may be obliged to disclose to the Revenue certain facts or information, although the client's lawyer would not be obliged to disclose to the Revenue the same facts or information *if and to the extent that* the lawyer learned the facts or information in the course of privileged communications with the client.

Indeed, it will be part of the lawyer's professional obligation to the client not to disclose the contents of such communications.

One point that follows from this is that LPP would not attach to the unsolicited marketing by a lawyer of a tax avoidance scheme. The lawyer would not then have learned the relevant facts or information in the course of privileged communications.

The more normal situation for lawyers is to be asked for advice on a scheme, whether a scheme which the client proposes to market to third parties or which it intends to enter into as a 'user'. As mentioned above, in these circumstances as far as the lawyer is concerned LPP attaches not just to the legal advice given by the lawyer but also to the factual details of the scheme communicated by the client to the lawyer. Without the client's consent, the lawyer would generally be prevented by LPP from providing to the Revenue the information about the scheme that would otherwise be required by the Disclosure Regime. However, the underlying factual details of the scheme will not be privileged in the hands of the client, so the client cannot by asserting LPP avoid its obligation to make disclosure under the regime. The client may only assert a claim for LPP in response to a question relating to the contents of privileged lawyer/client communications.

A final point to make is that, where a lawyer would otherwise be a promoter under the Disclosure Regime, it is always open to the client to waive privilege to the extent necessary to enable the lawyer to provide all the required information. The effect of the amended rules would be that the lawyer would then be obliged to provide the information as a promoter.