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2013-04-30

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Delivery Details

Date: January 8, 2019 at 3:15 p.m.
Delivered By: VERN KRISHNA
Client File: GAAR

Vern Krishna discusses the U.K. Supreme Court recent confirmation that ruling not to extend legal advice privilege to accountants. Accounting is not as privileged, at least in the legal sense, as some other professions. The principle is founded on the rule of law and, therefore, should be secure against the police," the executive, business competitors and busybodies.

The Extent Of Privilege For Accountants

Date: April 30, 2013

The Extent Of Privilege For Accountants

Vern Krishna

Accounting is not as privileged, at least in the legal sense, as some other professions.

The U.K. Supreme Court recently confirmed this in *Prudential*, [2013] UKSC 1, ruling not to extend legal advice privilege a common law principle developed in the 16th century to promote uninhibited communications between clients and their lawyers so that they can obtain legal advice without fear of disclosure of the advice—to accountants.

The principle is founded on the rule of law and, therefore, should be secure against the police," the executive, business competitors and busybodies.

The term "legal professional privilege" is actually a misnomer. The privilege does not belong to the legal profession; it belongs exclusively to the client, who can breach it by divulging the information to third parties. This raises interesting issues when the client receives or divulges privileged communication to his or her accountants in connection with tax planning.

Prudential, for example, concerned a notice from an inspector of taxes to a company to produce documents in connection with advice that it received in relation to a tax avoidance scheme from its PricewaterhouseCoopers. The company refused to comply with the demand based on legal advice privilege (LAP).

The purpose of LAP is to ensure "full and frank communication between attorneys and their clients," which "promote[s] broader public interests in the observance of law and administration of justice" (per Justice Rehnquist in *Upjohn Co v. United States*, (1981) 449 US 383,389).

Privilege requires a carefully considered balancing of the community's interest in access to legal services and the proper administration of justice, a matter best addressed by the legislative branch of government

To be sure, communications between accountants and their clients are confidential, but that does not mean that they should not be available to the tax authorities or other law enforcement agencies. Clients should always carefully consider the nature of their correspondence with accountants and, more importantly, the storage of such communications on computer hard drives and cloud services.

Accountants have long argued that, in light of their special relationship with clients and the sensitivity of the advice that

flows between the parties in such relationships, their communications with clients should also be privileged. Their arguments are logical and well-reasoned.

However, the Supreme Court in *Prudential* preferred experience to logic: "While I accept that it would accord with its underlying logic to extend LAP as Prudential contend, '[t]he life of the [common] law has not been logic,' as Oliver Wendell Holmes, Jr. observed on the first page *of The Common Law* (1881). As he went on to say, the life of the common law 'has been experience'. The-common law has been created and developed by judges over more than eight centuries, and, as Holmes also observed, '[i]n order to know what it is, we must know what it has been …'"

Thus, courts categorically reject any class privilege for accountants akin to that between lawyers and clients. The policy reason for permitting privilege is to protect communications so that clients can obtain frank and candid advice from their lawyers. The price of privilege is that it acts as a shield from getting to the truth. Extending privilege, to other groups would widen the shield, which only Parliament should consider.

There are limited circumstances in which courts will protect confidential relationships on a case-by-case basis, even if there is no class privilege. For example, the courts sometimes protect doctor-patient, psychologist-patient, journalist informant and religious communications if they satisfy stringent criteria. These criteria concern the manner in which the information arises and a balancing of the need for confidentiality against the public interest of having full disclosure in litigation.

The burden is on the person claiming privilege to establish that the private interest outweighs the public interest of full disclosure in litigation. It is difficult for communications that arise in an accounting-client relationship to satisfy the criterion that the community considers such communications as warranting zealous protection.

The purpose of privilege is to ensure free and uninhibited communications between individuals so that lawyers can render services in an effective manner. Of course, all law is behavioural and considers community interests.

Given the crisis of confidence in the accounting and financial professions courts are hot willing to extend the circumstances in which the accounting profession would be privileged.

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