Privilege and Taxation Across the Common Law World

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Overview

• Introduction
• United Kingdom
  – Ineffective extension
• Canada
  – No extension
• New Zealand
  – Separate statutory privilege
• United States
  – Statutory common law extension
Introduction

• Taxation advice provided by various professionals
  – Lawyers
  – Accountants (increasing/majority)
  – Financial planners (including estate planners)
  – Actuaries

• Revenue authorities generally given wide powers of investigation
Introduction

- General principle – advice from lawyer privileged

- Tension 1: Reconciliation with investigation powers

- Tension 2: Privilege extend to non-lawyer advisers?
  - If so, how far?
United Kingdom

• Starting point for all common law systems
  – Includes United States

• 2 heads of privilege
  – Advice
  – Litigation
    • Focus on advice
      – Relevant for non-lawyers

• Advice privilege – must involve lawyer
United Kingdom

• Privilege is absolute
  – *Prudential* (Court of Appeal) (2010)

• Substantive right/not mere rule of evidence
  – Promotes administration of justice
  – Trust and confidence
    • *R v Derby Magistrates Court Ex p B* (1996)
  – Note overtones of *Grant v Downs*
United Kingdom

- HMRC information powers
  - Secs 19 to 20A *Taxes Management Act 1970*
  - (Now) Schedule 36 *Finance Act 2008*

- Overridden by LPP
  - *Morgan Grenfell (2002)*
  - See [23] Sch 36 FA

- No privilege for tax accountants
  - *Chantrey Martin (1953)*
United Kingdom

- Surface statutory extension to tax advisers
  - Sec 20B(9) TMA
  - [25] Sch 36 FA

- Substantially diluted
  - [26] Sch 36 FA

- Tends not to be raised in litigation

- *Chantrey Martin* being relitigated
  - *Prudential* (Supreme Court) – Nov 2012 (hearing)
United Kingdom

- Interaction with European Convention on Human Rights
  - Art 8 – advice privilege (respect for privacy)
    - Qualified right
      - Prudential (CoA)
    - Being consider by Supreme Court
Canada

• LPP = solicitor-client privilege (SCP)
  – Based on early UK authorities

• Primary principles
  – Solosky v R (1980)
  – Descôteaux v Mierzwinski (1982)

• Investigation powers
  – Secs 231.1 and 231.2 Income Tax Act 1985
Canada

• SCP override
  – Sec 232 ITA

• No extension for non-lawyers
  – Inc accountants
New Zealand

• LPP based on received English law
  – Involvement of lawyer critical

• Investigative powers
  – Primarily ss 16 to 19 Taxation Administration Act 1994

• Investigative powers subject to LPP
  – West-Walker (1954)
    • Seminal common law case
  – Now legislated in s 20 TAA 1994
New Zealand

- Non-disclosure right (NDR)
  - Secs 20B to 20G TAA 1994

- Separate statutory privilege
  - Independent of common law
    - *Blakeley* (NZHC)

- Adviser must be member of approved adviser group
  - ICANZ, TaxAgents’ Institute of New Zealand

- Applies to tax advice documents
New Zealand

- NDR more limited than common law
  - Procedure for assertion
  - Time limited (substitute for waiver)
  - No protection for tax contextual information
  - Applies only to books and documents
    - Not “information”
      - Term used elsewhere, inc ss 16-19
    - Doesn’t apply to tax debt collection provisions
United States

- LPP = attorney client privilege (ACP)/work product doctrine (WPD)
  - ACP = advice privilege
  - WPD = litigation privilege

- Same justifications as other common law jurisdictions
  - Early UK cases often cited

- Very similar structure
  - Irrelevant differences
  - Lawyer involvement critical
United States

- IRS investigatory powers – IRC s 7602

- Subject to ACP and WPD
  - *Upjohn* (ACP)
  - *Adlman* (WPD)

- No accountant-client privilege
  - *Couch*
United States

• Extension for Federally Authorized Tax Practitioners
  – IRC s 7525

• FATP includes
  – CPAs, agents, actuaries, retirement planners

• Applies only to tax advice

• Incorporates common law ACP
United States

- More limited than common law
  - Exclusion for tax shelters
  - Compulsory waiver
    - Compulsory disclosure to other agency = waiver
  - No application to criminal proceedings
  - Applies only to federal taxes in federal courts
    - Some states have some protection