

Analysis

Privilege considerations in tax investigations

Speed read

Recent experience suggests that HMRC are increasingly challenging taxpayers' claims to withhold privileged documents from disclosure during a tax enquiry or dispute. It is now more important than ever for taxpayers to consider the rules of privilege from the earliest stages of a transaction in order to avoid sensitive documents from being disclosed to HMRC. Questions continue to arise in particular over the status of documents created during internal fact-finding investigations, and care must be taken to mitigate against the risk of disclosure. Taxpayers should also be mindful not to indiscriminately forward or share email chains which contain legal advice.



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In the current climate, HMRC are increasingly challenging both individual and corporate taxpayers' positions and adopting a robust and, in some cases, sophisticated approach to the ensuing dispute. Some of the tactics employed by HMRC include: the issue of very broad requests for the production of documents both on an 'informal' basis and during an enquiry; requests for specific disclosure if the dispute reaches litigation; and more regular challenges to a taxpayer's assertions of privilege in response to such document requests.

Against this backdrop, this article considers the various potential stages of a dispute with HMRC and how the issue of legal professional privilege may arise in each. It sets out a reminder of the key principles underpinning legal professional privilege and provides practical points which all taxpayers should bear in mind to protect their position should any dispute with HMRC arise.

Legal professional privilege

Legal professional privilege should be a key consideration

for companies and individuals responding to HMRC information requests. Documents that are privileged can be withheld from disclosure to HMRC (and other regulatory or litigious proceedings).

Under English law, legal professional privilege is a fundamental right that permits individuals and companies to seek and receive legal advice and gather evidence, in confidence, and to do so without fear of having to share such information with anyone else.

There are two main forms of legal professional privilege: legal advice privilege and litigation privilege:

- Legal advice privilege protects confidential communications between a client and their legal adviser, made for the sole or dominant purpose of giving or seeking legal advice. Importantly, legal professional privilege will only attach to communications with members of the legal profession acting in their capacity as a lawyer: other professionals' communications, such as accountants or tax advisers, are not covered even if the communication purports to give advice on the law.
- Litigation privilege covers communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with the conduct of the litigation (or contemplated litigation), provided it is for the sole or dominant purpose of the conduct of the litigation and that litigation is adversarial and not investigative or inquisitorial.

Confidentiality is key to maintaining a claim of privilege

Confidentiality is key to maintaining a claim of privilege. If a taxpayer shares its legal advice or documents that would otherwise be protected by legal professional privilege (for example, as part of a transaction negotiation with a counter-party or with its accountants), it may find it very difficult to maintain a claim of privilege and withhold those same documents from HMRC.

What constitutes a waiver of privilege has been hotly debated in the High Court. It is possible, however, to share privileged material with third parties in certain circumstances without waiving or losing the right to assert privilege as against another, such as HMRC. English law recognises a limited waiver, which permits sharing privileged communications with a third party on a confidential basis for an express or implied limited and specific purpose. This is often recorded as a contractual undertaking or agreement between the sharing parties.

Given the important protection from disclosure which attaches to privileged documents, it is critical that taxpayers consider this from the earliest stages of seeking tax advice, long before any dispute with HMRC may arise, and take steps to minimise the risk of any inadvertent waiver.

Stage one: tax structuring and transactional advice

Sophisticated taxpayers regularly seek independent tax advice before entering into a transaction or when seeking to structure or restructure their assets or business affairs. This tax advice will likely include legal advice, in respect of which legal advice privilege should apply. However, if there are communications or documents that do not

constitute legal advice, there is a question whether, adopting a broad interpretation, litigation privilege could apply instead.

This question of fact will be determined on a case by case basis; however, the court has provided clear guidance that documents primarily concerned with the implementation of a corporate structure will not be protected from disclosure to HMRC by litigation privilege. This is because such documents do not meet the dominant purpose test: a taxpayer which takes advice as to how to structure its affairs does so because it wants to achieve a particular result for tax purposes and not primarily for the purpose of conducting existing or contemplated litigation.

The recent case of *Refinitiv UK Holdings Ltd and another v HMRC* [2023] UKFTT 222 concerned the disclosure of documents relating to the tax-focused design and structure of a business transformation project. These documents included presentations, briefing papers and other confidential documents that were said to betray the trend and reflect the legal advice of the taxpayer's internal and external lawyers. The appellant sought to withhold these documents from production on the basis of privilege, and HMRC challenged this.

Documents primarily concerned with the implementation of a corporate structure will not be protected from disclosure to HMRC by litigation privilege

Having reviewed the disputed documents, the tribunal held that:

- litigation privilege could not apply because the documents were primarily concerned with the implementation of an alternative corporate structure; *but*
- legal advice privilege did apply because the documents represented communications that were part of the continuum of communications with a dominant purpose of providing legal advice to the taxpayer.

Consequently, HMRC were not entitled to receive any part of the disputed documents.

Stage two: investigations

HMRC's information gathering powers

HMRC have extensive civil information powers through which it can demand production of certain documents and information.

Under FA 2008 Sch 36, HMRC can request information from taxpayers or third parties that is 'reasonably required' for the purpose of checking a person's tax position. Paragraph 23 of Sch 36, however, makes clear that a person is not required to provide privileged information or part of a document that is privileged.

When responding to an information request, the taxpayer must specify in a list each document required under the information notice which it maintains is privileged material and should not be disclosed to HMRC. The list must explain the nature and contents of each document disputed (although not where the

description itself would give rise to a dispute over privilege).

HMRC are obliged to notify the disclosing party within 20 working days if it disputes the claim of privilege in respect of any of the documents listed. In practice, whether HMRC accept a claim to privilege is often dependent, to a large extent, on the particular case officer with conduct of the case. Where a dispute is raised by HMRC, the taxpayer may make an application to the First-Tier Tribunal (FTT) to consider and resolve the dispute with reference to regs 5 and 8 of the Information Notice: Resolution of Disputes as to Privileged Communications Regulations, SI 2009/1916. The tribunal will carefully examine each document challenged and scrutinise its contents to determine whether privilege attaches.

Documents created in an internal investigation

Documents subject to legal advice privilege are generally straightforward to identify where a taxpayer has specifically instructed a member of the legal profession (most likely a solicitor or barrister) to provide written legal advice on a specific issue.

What can be more difficult to determine (and therefore lead to more disputes with HMRC) is whether a document created by a taxpayer, third party, or their legal advisers, in the context of an internal investigation further to an HMRC request, is privileged. This is typically because (i) the type of documents generated in an internal investigation often expand beyond communications of legal advice and will include documents such as interview transcripts, fact-finding notes, third-party expert reports and briefing papers; and (ii) the purpose of creating those documents may not be limited to one single purpose.

Guidance from case law indicates that litigation privilege will only apply to documents created after an HMRC investigation turns into a dispute. This is not always easy to determine. Factors such as the appointment of specialist external solicitors, and evidence from the taxpayer demonstrating that it genuinely believed the purpose of its investigation was to allow it to prepare for genuinely anticipated litigation, will strengthen a taxpayer's claim to privilege (see *Bilta (UK) Ltd (in liquidation) (Bilta) and others v Royal Bank of Scotland plc (RBS)* [2017] EWHC 3535). For example, in *Bilta*, a letter from HMRC stating that there might be ground to deny the taxpayer's right to recover the input VAT was found to demonstrate a change in the status of HMRC's position from undertaking an enquiry or investigation to a dispute with the taxpayer. The court, therefore held, taking into account other evidence submitted by the taxpayer, that documents created after the date of the HMRC letter were protected by litigation privilege.

Stage three: litigation

If litigation is commenced, and a dispute about the disclosure of documents arises, the tribunal or court will determine the issue with reference to established case law on the scope of legal professional privilege. In particular, if the disputed documents are not communications of legal advice from lawyers, the question of whether litigation privilege applies will be considered.

The test for litigation privilege remains as set out in *Three Rivers District Council v Bank of England (No.6)* [2005] 1 AC 610, as follows:

- the confidential communication must be between a lawyer (acting in a professional capacity) and client, or between either lawyer or client and a third party;
- the communication must be for the dominant purpose of use in litigation;
- the litigation must be reasonably contemplated, or existing; and
- the litigation must be adversarial, not investigative or inquisitorial.

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Practical tips

When communicating about a tax issue or an HMRC enquiry, taxpayers should keep the following in mind to maximise the protection of legal professional privilege.

- **Multi-addressee emails:** if the dominant purpose of an email is to obtain a view from a non-lawyer then it will not be protected by privilege, even if a subsidiary purpose is simultaneously to obtain legal advice from a lawyer who also receives the email. In addition, merely copying a lawyer to a multi-party email will not of itself cause the communication to be privileged, unless the lawyer is being asked to provide legal advice.
- **Attachments:** an attachment to a privileged email will not automatically be protected by privilege as well.
- **Sharing or referring to legal advice in communications with a third-party:** in some cases, the risk of losing privilege may outweigh the benefit of referring to the legal advice. Making any reference to legal advice in any communications with third parties should be approached with caution to avoid inadvertently losing the protection of privilege. This is a particular risk when sharing or forwarding emails indiscriminately to large groups of individuals, who may in turn forward on a chain which contains legal advice.
- **Board minutes:** where board minutes include a reference to the existence (but not the content) of legal advice, this should not cause privilege to be lost. Where the minutes refer to the content of legal advice, the relevant paragraphs should be redacted before disclosure in order to preserve privilege over the underlying advice.
- **Redaction:** take care that any redaction of privileged material is consistent across all relevant documents. Inconsistent redaction can result in HMRC raising queries or even waiving privilege. ■

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