

It's a privilege!

Mark McLaughlin looks at the legal professional privilege exception from providing documents requested in HMRC information notices

Information notices have been a key weapon in HMRC's armoury of powers since their introduction in 2008. HMRC has powers to obtain information and documents, and can issue an information notice requiring the taxpayer to provide information or produce a document if it is reasonably required to check the taxpayer's tax position.

The information powers legislation (FA 2008, Sch 36) includes its own penalty regime for (among other things) non-compliance with an information notice.

Power restrictions

However, there are various restrictions on HMRC's information powers (FA 2008, Sch 36, Pt 4). For example, auditors are not required to provide information to HMRC in connection with the performance of that function for their clients, or to produce documents belonging to them and which they created in respect of their work as auditors. A similar restriction applies in relation to tax advisers, who are not required to provide information about 'relevant communications' or to produce documents belonging to the tax adviser and consisting of relevant communications.

However, these protections for auditors' and tax advisers' papers are subject to certain exceptions, such as where the auditor or tax adviser has helped the person in the preparation or delivery of accounts, tax returns, etc., sent to HMRC, and the papers explain those accounts, tax returns, etc. (see FA 2008, Sch 36, paras 24-27).

Privileged communications

Another important restriction on HMRC's information powers is for privileged communications between professional legal advisers and clients (FA 2008, Sch 36, para 23). An information notice cannot require the provision of privileged information or the production of any part of a privileged document.

Information or a document is 'privileged' in this context if a claim to legal professional privilege (or in Scotland, to confidentiality of communications) between client and professional legal adviser could be maintained in legal proceedings. The question of whether (or to what extent) information or a document is privileged can be the cause of disputes between HMRC and taxpayers or their advisers.

The Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009, SI 2009/1916 set out a procedure where there is a dispute between HMRC and the recipient of an information notice given in correspondence or during an inspection of premises under FA 2008, Sch 36.

HMRC's view

HMRC distinguishes between two types of legal professional privilege (see HMRC's Compliance Handbook manual at CH22244):

- Legal advice privilege – applying to documents or information containing confidential communications between a lawyer and their client for the purpose of obtaining or giving legal advice. However, this type of privilege does not extend to an accountant's legal advice (*R (oao Prudential plc) v Special Commissioner* (and related applications) [2013] UKSC 1).
- Legal litigation privilege – this applies to documents produced for the dominant purpose of contemplated or actual litigation and advice from lawyers for that purpose.

Items accepted by HMRC as being covered by legal professional privilege include all communications relating directly or indirectly to the advice, and advice on what the client should and should not do. By contrast, items not covered by legal professional privilege include advisers' engagement letters and third-party communications with (for example) banks or regulators (CH22252).

Dispute procedure

If a dispute has arisen about an information notice given by HMRC in correspondence, the regulations provide that on receipt of the notice, the taxpayer or their representative must (by the date given in the notice) provide HMRC with a list specifying each disputed document. The list must be served on HMRC within a reasonable time to be agreed with the taxpayer or representative, but in any event within 20 working days after the date given in the information notice for producing the documents. This should include a description of the nature and content of that document (unless the description would itself give rise to a dispute over privilege). HMRC must respond within 20 working days of receiving that list, identifying any items on the list which it considers are not privileged and therefore still need to be produced.

On receipt of HMRC's notice, the taxpayer or representative must apply to the First-tier Tribunal (FTT) to consider and resolve the dispute. The application must include copies of the documents which remain in dispute. The application must be made within a reasonable time to be agreed between the taxpayer or representative and HMRC, but in any event within 20 working days of HMRC's notification regarding the disputed document(s).

In the case of disputes during an HMRC inspection of premises over whether a document is privileged, on receipt of the information notice the taxpayer or representative must indicate to the HMRC officer carrying out the inspection each disputed document in the notice. The taxpayer or representative must then place the document(s) (or a copy) in an appropriate container which prevents the contents being visible. The container must then be sealed, labelled and signed, countersigned by the HMRC officer, and given into the officer's custody. The HMRC officer must then deliver the container to the FTT with the seal intact within 42 working days, together with an application for the tribunal to consider and resolve the dispute (SI 2009/1916, regs 5, 6).

Where the taxpayer or representative complies with the appropriate dispute procedure, they are treated as having complied with the information notice in relation to the disputed documents until the FTT decides the status of the document or until agreement has been reached (see below). The FTT will resolve the dispute by confirming whether the document is privileged, and if so, to what extent. If appropriate, the FTT will also direct which part(s) of a document must be disclosed.

However, disputes over privilege in documents requested in information notices may be resolved at any time by HMRC and the recipient of the notice (SI 2009/1916, reg 10).

Mostly privileged

An application by the taxpayer to the FTT under SI 2009/1916, reg 5 was made by the taxpayer in *Wiseman v Revenue and Customs* [2022] UKFTT 75 (TC), with a good deal of success. In that case, HMRC issued the taxpayer with an information notice, requiring disclosure of certain documents in order that HMRC could check the taxpayer's tax position for a tax year. The taxpayer's representative appealed against the notice and notified HMRC of its belief that some of the documents were legally privileged. Those documents related to communications between the taxpayer and an Edinburgh-based firm of solicitors (TC), which acted for the taxpayer. The taxpayer subsequently applied to the FTT for resolution of the dispute as to the scope of the privilege applying to the correspondence being sought under the above regulations.

The FTT stated that in respect of each document, it was necessary to consider whether the relevant communication was between a client and a lawyer in which 'legal advice' (i.e., the application of the law, a person's rights and responsibilities and what should prudently and sensibly be done in the legal context) was sought or given or was part of the solicitor and client relationship.

Applying the relevant principles to the 12 documents in question, the FTT was satisfied that each of seven letters recording communications from TC was privileged from disclosure. In addition, the FTT held that two telephone calls recorded communications from the taxpayer to TC, and that each telephone note was privileged from disclosure. The remaining material comprised three meeting documents, all of which were prepared by TC. The FTT considered that the first document was privileged from disclosure. However, the FTT decided that dominant purpose of the other two documents (which related to a meeting) was not the provision of legal advice. Therefore, no part of those documents should be withheld from disclosure.

Overall, the FTT concluded that 10 of the 12 documents were privileged and should not be disclosed. The other two documents were to be disclosed to HMRC (no later than 56 days after the date of release of the FTT's decision).

Waiving privilege

Finally, even if the taxpayer and HMRC agree that a document is subject to legal professional privilege (i.e., without recourse to the FTT), that does not mean the taxpayer is precluded from providing the document to HMRC. The taxpayer can choose to waive their right to privilege and provide the information to HMRC. However, the taxpayer's representative can only waive their client's right to privilege with their express consent.

Of course, waiving the right to privilege means giving up the right to keep the information or documents private. This should not be done without very careful thought and expert legal advice, where appropriate.

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