

UK Tax Advisers Are Beyond Legal Advice Privilege

Law360, New York (March 11, 2013, 5:09 PM ET) -- On Jan. 23, 2013, judgment was given by the U.K. Supreme Court in one of the most significant decisions on legal advice privilege for many years.[1] The ruling, which dealt a blow to tax advisers and other nonlegally qualified service providers who provide legal advice to their clients, confirmed that — consistent with the position in the U.S. — legal advice privilege only protects communications to or from a qualified lawyer.

It seems likely that the focus in the U.K. will now shift to the lobbying of Parliament to introduce legislation to address this issue, although the prospects of such a legislative response, at least in the near future, are highly uncertain. In the meantime, businesses who have operations in the U.K., or other common law jurisdictions where this judgment may be persuasive, and who are concerned about a potential need to protect communications from disclosure to regulators, or in future litigation, should think carefully about ensuring that such communications are only with qualified lawyers.

Background to the Proceedings

In 2007, the U.K. tax authorities began investigating the tax affairs of Prudential PLC, the international financial services group. As part of this investigation, the tax authorities served notices on Prudential requiring it to disclose a number of documents, including documents which contained tax advice which had been given to Prudential by PricewaterhouseCoopers. Prudential argued that it was not obliged to hand over those documents as they were subject to legal advice privilege.

The judgments of both the U.K. High Court[2] and Court of Appeal[3] confirmed, on the basis of existing authority, that legal advice privilege under English law is confined to communications with a qualified lawyer. Prudential appealed to the Supreme Court.

Decision of the Supreme Court

By a majority of 5:2, the Supreme Court panel dismissed the appeal after hearing arguments from Prudential and the tax authorities, as well as a number of intervening parties, including The Law Society of England and Wales (which was opposed to any extension of legal advice privilege) and The Institute of Chartered Accountants of England and Wales (ICAEW) (which was in favor of an extension).

One of the most striking aspects of the Supreme Court's decision is that even the majority agreed that, as a matter of principle and logic, there were strong arguments for allowing Prudential's appeal. Indeed, Lord David Neuberger (who delivered the leading majority judgment) went so far as to acknowledge that restricting legal advice privilege to advice from lawyers "can fairly be said to be illogical in the modern world." However, the majority felt that any extension of legal advice privilege to nonlawyers was a matter for Parliament, rather than the Supreme Court.

There were three connected reasons for this approach, namely that (1) the consequences of extending legal advice privilege would be difficult to assess and risked creating uncertainty in relation to what is currently a clear and well-defined principle, (2) the matter raised questions of policy which should be left to Parliament to determine, and (3) certain legislation enacted by Parliament suggests that it would be inappropriate for the court to extend the law in the way proposed by Prudential.

Comment

It has been said, not least by Lord Jonathan Sumption in his powerful dissenting opinion, that the Supreme Court missed a long-awaited opportunity to give a judgment which reflected the modern reality that people do not only go to lawyers to obtain legal advice. Lord Sumption's view was that the Supreme Court's refusal to extend legal advice privilege to communications from members of other professions which ordinarily give legal advice was "contrary to principle, discriminatory and out of date." And it is indeed difficult not to feel some sympathy with Prudential's argument that there is no proper justification for a doctrine of privilege which protects legal advice given by a junior lawyer, but does not protect precisely the same advice given by a senior specialist tax adviser.

However, wherever one's sympathies lie, the reality is that any hope of changing the current position now rests with the ability of interested stakeholders to persuade the U.K. Parliament to consider passing legislation. There were strong calls from the Supreme Court for Parliament to do exactly that (Lord Clarke, for example, expressed his hope that "the whole issue will be considered by Parliament as soon as reasonably possible"); and the first signs of the campaign moving to this next phase have already been seen in the U.K.

The ICAEW has sought to reassure its members that the Supreme Court's decision "doesn't mean our fight is over." ICAS, another U.K.-based professional body representing the interests of Chartered Accountants, has indicated that it, and other accountancy and tax bodies, "are likely to press the Government for statutory measures to ensure that all tax advisers can operate on a level playing field."

It will not however necessarily be easy to get the U.K. Parliament's attention and sympathy on this issue. Apart from anything else, various recommendations that privilege should be extended to protect tax advisers have been made to Parliament in recent times (including, in 2003, by the Director General of Fair Trading); but none of these recommendations have resulted in legislation. It is also notable that few if any other common law countries extend legal advice privilege to nonlawyers.

Practical Tips

As was acknowledged by the Supreme Court, tax advisers routinely provide legal advice which could equally easily be given by a lawyer. However, tax advisers are not the only other type of service providers who may give legal advice to clients. Other common examples would include compliance consultants and HR specialists.

For now, however, and consistent with the position in the U.S., the English law position remains that confidential communications with anyone other than a qualified lawyer will not attract legal advice privilege. The prudent approach would be to assume that the courts of many other common law countries (e.g. Hong Kong) will, if the issue arises for determination, follow the same approach as the U.K. Supreme Court. There is of course also no guarantee, even if the U.K. Parliament does choose to legislate on the issue, that similar laws will be passed in any other jurisdictions.

Accordingly, for now at least, where there are or may be concerns about future obligations to disclose legal advice received, businesses in the U.K., and other common law countries where this judgment may be persuasive, should continue to consider whether it is appropriate to seek that advice from a lawyer. It is worth noting in this regard that a lawyer for these purposes should include both barristers and solicitors (where the relevant jurisdiction has a split legal profession) as well as foreign qualified and in-house lawyers. It is, however, important to ensure that the legal adviser maintains a valid practicing certificate (or equivalent) in order to ensure there is no dispute about their status.

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[1] R (on the application of Prudential plc and another) (Appellants) v Special Commissioner of Income Tax and another (Respondents) [2013] UKSC 1. Under English law, legal advice privilege is the name given to the head of privilege which protects from disclosure confidential communications for the purpose of obtaining or giving legal advice. It is broadly equivalent to the doctrine of attorney-client privilege in the U.S.

[2] [2009] EWHC 2494 (Admin)

[3] [2010] EWCA Civ 1094

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