

Claims to legal professional privilege – procedure for resolving disputes with HMRC

July 2009

Role of the First-tier tribunal

The First-tier tribunal is now the arbiter of disputes between HMRC and the taxpayer, the taxpayer's advisor or a third party (in this article we confine our comments to the position of the taxpayer concerned) as to the validity of a claim to legal professional privilege. The power has been conferred on the First-tier tribunal by The Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009 (the 2009 Regulations) which come into effect on 7 August 2009.¹

The power to resolve disputes covers both the situation where: (a) correspondence has been entered into between HMRC and the taxpayer and an information notice to produce documents has been served under Schedule 36 Finance Act 2008² (FA 2008) and (b) where HMRC visit premises to inspect documents. The power to enter and inspect premises is contained in Schedule 36.

Information notices

Information notices may be issued where there is an existing enquiry into a return of a taxpayer and requires the taxpayer concerned to produce information and documents in the taxpayer's possession or control.³ An information notice may not require the production of a document or part thereof which attracts legal professional privilege.⁴

Dispute in correspondence

Where a notice has been issued and a dispute arises during correspondence as to whether a document is privileged the taxpayer is required to produce by the date specified in the notice a list of all documents in the taxpayer's possession answering the description of the documents and a description of the nature and content of the document. No description is however required where to do so would infringe legal professional privilege itself. The list must be served HMRC no later than 21 days after the date specified in the original information notice.⁵

HMRC have 21 days of receipt of the list to request copies of documents in the list that they require and consider not to be covered by legal professional privilege.⁶ Upon receipt of the request, if the taxpayer maintains the claim to privilege the taxpayer must apply to the First-tier tribunal for the matter to be resolved. The taxpayer must include with the application copies of the documents concerned and provide HMRC with proof that the application has been made.⁷ The application itself must be made within a reasonable time and in any event within 20 days of the request for copies being made by HMRC.⁸

Dispute pursuant to an inspection of premises

Where HMRC exercise rights to inspect premises and wish to remove copies of documents to which the taxpayer claims legal professional privilege the documents are to be placed in a sealed container and delivered into the custody of the officer making the inspection, pending an application to the first-tier tribunal to resolve the dispute as to privilege.

Power to enter business premises

HMRC have the power to enter business premises to inspect premises, business assets and documents without a warrant.⁹ The power does not extend to searching premises for which a warrant is required.

Business records of less than six years of age

The documents that may be inspected are confined to those which are business records and form part of the statutory records.¹⁰ Generally the documents must be of six years or less in age unless the request is approved by a specially designated officer of HMRC. The officer making the inspection must serve an information notice on the owner or person in charge of the premises upon arrival.¹¹ The officer may remove documents and retain them for a period.¹²

Application to the First-tier tribunal by HMRC

The taxpayer must indicate on the information notice the documents which are in dispute.¹³ The taxpayer must put the documents in dispute or copies into a container which prevents the contents being visible. The container must be sealed and labelled, signed by the taxpayer and countersigned by the officer carrying out the inspection and placed into the custody of the officer who has 42 days to deliver them to the First-tier tribunal together with an application for the dispute pertaining to legal professional privilege to be determined.

The scope of legal professional privilege

Legal professional privilege covers:

- Legal Advice Privilege, which protects confidential communications between a lawyer and his client for the purpose of obtaining legal advice;
- Litigation Privilege, which protects confidential communications between a lawyer, the client and third parties for the purpose of obtaining legal advice or collecting evidence for litigation;

- Common Interest Privilege, which protects the sharing of privileged documents between parties with a common interest in receiving them.

Privilege is an important protection for clients, and as recently as 2004 was recognised by the House of Lords in *Three Rivers District Council v Bank of England*¹⁴ as being an absolute right, which cannot be overridden by some other public interest, which exists to ensure that clients can consult lawyers in confidence knowing that they can give them the full and complete facts in order to obtain proper advice. The new procedure does not seek to override privilege, but merely to set in place a more cost effective method of determining claims to privilege in tax disputes. Interestingly, the initial suggestion of that there be a full list of documents subject to a claim for privilege (which is used in US litigation and is referred to as a privilege log) was toned down on the basis of comments that, in English litigation, full details of the existence of privileged documents are not provided as the date a client sought advice from a lawyer may itself be privileged. The Notice therefore provides that no description is required where to do so would infringe legal professional privilege itself.

1. SI 2009 No. 1916.
2. Schedule 36 FA 2008 replaces the provisions of the Taxes Management Act 1970 relating to the production of documents.
3. FA 2008, Sched.36, paras.18 and 21.
4. FA 2008, Sched.36, para.23.
5. SI 2009 No. 1916, reg. 5(7).
6. SI 2009 No. 1916, reg. 5(4).
7. SI 2009 No. 1916. regs. 5(5) and (6).
8. SI 2009 No. 1916, reg. 5(8).
9. FA 2008, Sched.36, para. 10.
10. FA 2008, Sched.36, para. 10(3).
11. FA 2008, Sched.36, para. 12(3).
12. FA 2008, Sched.36, para. 16.
13. SI 2009 No. 1916, reg. 6(2).
14. *Three Rivers District Council v The Governor & Company of the Bank of England* [2004] EWCA Civ 218.

Contacts

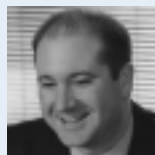


Heather Gething

Partner

T: +44 20 7466 2346

heather.getting@herbertsmith.com



Julian Copeman

Partner

Contact for queries on privilege issues

T: +44 20 7466 2168

julian.copeman@herbertsmith.com

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