Lawyer-Client Privilege

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Tax authorities have broad powers to demand information and documents potentially relevant to determining tax liability. Lawyer-client privilege is one of the few permissible reasons for refusing to provide documents. This privilege protects communications between the lawyer and client from disclosure. Taxpayers should establish and maintain privilege wherever possible.

There are two main types of privilege in Canada: solicitor-client and litigation.

Solicitor-client privilege

This generally protects confidential communications between a lawyer and client that relates to seeking, formulating or giving legal advice. In a tax context, this privilege is relevant in terms of protecting tax planning memoranda and opinions. Solicitor-client privilege allows clients to seek advice on tax laws without fear of disclosure of the communications.

Simply giving a document to a lawyer does not cause it to be privileged. In order for a communication to be protected, four conditions must be met:

1. A lawyer must be involved;
2. It must be confidential;
3. The purpose must be for the client to obtain the lawyer's advice on the law, not other matters; and
4. There must be a professional relationship between the lawyer and client. The lawyer must be acting for the client.

No privilege applies to communications between an accountant and client; a taxpayer should be prepared to see these materials disclosed to tax authorities. The Canada Revenue Agency's policy on demanding access to accountants' working papers is that they may ask to see these materials at any time.

If an accountant acts as agent for a client in obtaining legal advice from a lawyer, communications between a lawyer and the accountant, and communications between the accountant and the client regarding that advice, should be privileged. If a lawyer retains an accountant to assist in providing legal advice, communications between the lawyer and the accountant may be privileged.

Litigation privilege

Litigation privilege applies only when litigation is contemplated, anticipated or ongoing. It applies to communications between a lawyer and client, a lawyer and third parties, a client and third parties, and to materials such as expert opinion or analysis. For litigation privilege to attach to a communication or document, the communication must be made or the document must be created for the dominant purpose of preparing for actual or reasonably anticipated litigation. Unlike solicitor-client privilege, which exists until the client chooses to waive it, litigation privilege ends once the litigation is over and no related litigation is anticipated.

Waiver

Privilege that is successfully established can be lost when it has been waived, such as by deliberately disclosing information to a third party. Canadian courts have recognized a doctrine of limited waiver when a corporation is compelled to disclose otherwise privileged documents to its external auditor, finding that in such a situation, privilege generally is preserved against third parties. In some cases, different persons with a common interest can share legal advice they have obtained towards a common objective, such as completing a business transaction, without waiver being considered to have occurred.

Conclusion

Lawyer-client privilege is a powerful protection available for information and communications arising out of the lawyer-client relationship. It is particularly valuable in the tax planning context, as it allows a taxpayer the ability to obtain a full and candid assessment of the strengths and weaknesses of different planning alternatives without fear of that advice being disclosed. Persons involved in tax planning are well advised to structure their affairs to come within the scope of lawyer-client privilege wherever possible and to ensure that such privilege is preserved and not waived. **M**

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