

ENCOMPASSING NON-LEGAL TAX PRACTITIONERS IN SOUTH AFRICA WITHIN THE AMBIT OF LEGAL PROFESSIONAL PRIVILEGE

by

KUBASHNI MOODLEY
Student number 11297353

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Study leader:
Mr A.E. Klein

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ABSTRACT

ENCOMPASSING NON-LEGAL TAX PRACTITIONERS IN SOUTH AFRICA WITHIN THE AMBIT OF LEGAL PROFESSIONAL PRIVILEGE

by

MRS K. MOODLEY

STUDY LEADER: MR A.E. KLEIN

DEPARTMENT: TAXATION

DEGREE: MAGISTER COMMERCII IN TAXATION

South African taxpayers currently consult either accountants (i.e., non-legal tax practitioners) or attorneys (i.e., legal tax practitioners) in order to acquire tax advice. The qualitative approach adopted in carrying out this study entails the examination of the differing rights applicable to a taxpayer depending on which adviser he decides to approach for tax advice.

The concept of legal professional privilege is a common law right which has only ever been applicable to members of the legal profession. However, due to the recent regulation of tax practitioners and the modernisation of the way taxpayers conduct their financial affairs in approaching both attorneys and accountants for tax advice it seems appropriate that this privilege should be extended beyond the legal profession.

Upon consideration of the history and requirements of this privilege it is determined that this privilege is amenable to extension. Constitutional principles, with regard to the right to privacy and the right to equality in relation to the taxpayer obtaining the tax advice, are infringed as a result of the limitation imposed whereby only tax advice obtained from an attorney is protected.

Lastly, the current legislative stances adopted by foreign jurisdictions, that currently permit or are considering permitting legal professional privilege to apply to tax advice obtained from non-legal tax practitioners illustrate that there is a global movement toward removing the current restrictions on this principle. This has been accomplished by countries such as the United States of America and New Zealand by way of introduction of statutory

provisions that allow for tax advice issued by non-legal tax practitioners to be protected from disclosure to the revenue authorities in the respective countries. Based on the research conducted it is concluded that South Africa should therefore follow suit and create a separate statutory provision to protect tax advice obtained from non-legal tax practitioners.

KEY WORDS:

Taxation

Legal professional privilege

Non-legal tax practitioners

Constitutional issues

Regulation of tax practitioners

OPSOMMING

INSLUITING VAN NIE-REGSKUNDIGE BELASTINGPRAKTISYNS IN SUID-AFRIKA BINNE DIE OMVANG VAN REGSPROFESSIELE PRIVILEGIE

deur

MEV K. MOODLEY

STUDIE LEIER: MNR A.E. KLEIN

DEPARTEMENT: BELASTING

GRAAD: MAGISTER COMMERCII IN BELASTING

Suid-Afrikaanse belastingpligtiges konsulteer huidiglik òf rekenmeesters (d.i. nie-regskundige belastingpraktisyns) òf prokureurs (d.i. regskundige belastingpraktisyns) om belastingadvies in te win. Die kwalitatiewe benadering wat in die uitvoering van hierdie studie aangeneem is, het die ondersoek na die verskillende regte wat van toepassing is op 'n belastingpligtige, afhangende van watter adviseur hy of sy vir belastingadvies nader, tot gevolg.

Die konsep van regsprofessionele privilegie is 'n gemenerereg beginsel wat nog altyd net van toepassing was op regsgeleerdes. Die onlangse regulering van belastingpraktisyns en die modernisasie in die manier hoe belastingpligtiges hulle finansiële sake hanteer, deur beide prokureurs en rekenmeesters om belastingadvies te nader, laat dit egter lyk asof die voorreg wyer as net die regsprofessie uitgebrei behoort te word.

Na oorweging van die geskiedenis en vereistes van die voorreg is dit bevind dat die voorreg vatbaar is vir uitbreiding. Grondwetlike beginsels, met betrekking tot die reg op privaatheid en die reg op gelykheid in verband met die belastingpligtige se inwin van belastingadvies, word geskend deur die instelling van die beperking dat slegs advies wat van 'n prokureur verkry is, beskerm word.

Laastens, die huidige wetgewende standpunte wat deur buitelandse regsgebiede aangeneem word, wat huidiglik toelaat of oorweeg om regsprofessionele privilegie toe te pas op belastingadvies wat van nie-regskundige belastingpraktisyns verkry is, illustreer dat

daar 'n globale beweging is om die huidige beperkings van die beginsel te verwyder. Dit is bereik in lande soos die Verenigde State van Amerika en Nieuw Zeeland waar wetlike beginsels ingestel is wat toelaat dat belastingadvies wat deur 'n nie-regskundige belastingpraktisyn gegee is, beskerm word van openbaarmaking aan die belastingowerhede van die onderskeie lande. Gebaseer op die navorsing wat uitgevoer is, is die gevolgtrekking dat Suid-Afrika die lande se voorbeeld moet volg en aparte wetlike beginsels moet skep wat belastingadvies van nie-regskundige belastingpraktisyns sal beskerm.

SLEUTELWOORDE:

Belasting

Regsprofessionele privilegie

Nie-regskundige belastingpraktisyns

Grondwetlike sake

Regulering van belastingpraktisyns

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ENCOMPASSING NON-LEGAL TAX PRACTITIONERS IN SOUTH AFRICA WITHIN THE AMBIT OF LEGAL PROFESSIONAL PRIVILEGE

CHAPTER 1 INTRODUCTION

1.1 BACKGROUND

Tax is an ever-evolving and complex world which is generally only understood by qualified tax practitioners. According to Albert Einstein, “The hardest thing to understand in the world is income tax”. Many provisions of the legislation can be interpreted in different ways which requires a great deal of knowledge and understanding to make informed decisions. Taxpayers therefore seek advice from qualified tax practitioners in order to ensure that their tax affairs are planned in the most compliant and efficient manner. Advice can be sought from either an attorney (i.e., legal) or a qualified accountant (i.e., non-legal), both of whom specialise in taxation.

The choice of whom to consult with is left entirely to the taxpayer. However, the effect of this choice has dire consequences should one find oneself in court as a result of a dispute with the South African Revenue Service (herein-after referred to as “SARS”). This is due to all information provided to an accountant being easily accessible by SARS and subject to scrutiny whereas the attorney is able to safeguard this information in accordance with the common law principle of “legal professional privilege”. The request for legal professional privilege to be extended to accountants has been submitted to Parliament previously without any success.

According to a communication by Mr S. Klue (2013), “phase 1” of the regulation of tax practitioners occurred in 2004 in terms of section 67A of the Income Tax Act whereby tax practitioners were obliged to register with SARS. Furthermore, section 105A of the Income Tax Act allowed for complaints in respect of tax practitioners to be lodged with controlling bodies. Unfortunately due to the secrecy provisions contained in section 4 of

the Income Tax Act, upon reporting a tax practitioner SARS could not disclose any of the taxpayer information to the controlling body in making such complaint. Therefore these provisions were seen as “toothless” and it is assumed that no complaints were lodged against tax practitioners in terms of these provisions.

Section 240 of the Tax Administration Act, which became effective on 1 October 2012, stipulated 1 July 2013 as the deadline for the compulsory regulation of all tax practitioners. Therefore tax practitioners who were currently registered with SARS would have had to ensure that they are also registered with a recognised controlling body by the, above mentioned, deadline.

It is important to note that in addition to the compulsory registration with a controlling body, these provisions also extend SARS’ power, in terms of section 240A(4), whereby a panel of retired judges or similar persons will carry out the disciplinary action on the tax practitioner if “the Minister is satisfied that [the controlling] body’s disciplinary process is ineffective”. This will therefore constitute the regulation of accountants not only by “self-constituted regulatory bodies”, as referred to in the 2011 Standing Committee of Finance: report-back hearings, but also by law.

Therefore whilst both attorneys and accountants are now regulated by law no steps have yet been taken by Parliament to rectify the inconsistencies that exist between the application of legal professional privilege in relation to attorneys and accountants.

Previous research has addressed several aspects of the extension of legal professional privilege to accountants (Jani, 2010:1-114; South African Institute for Tax Practitioners, 2013; Ensor, 2012). However, these researchers’ studies were carried out prior to the regulation of accountants by statute. Furthermore, their research also omitted to properly differentiate within the pool of accountants as to whom specifically the privilege should apply. Suitably qualified accountants who do not render tax advice but simply provide tax compliance services should not be eligible for such privilege. This is discussed in detail later on in this chapter.

1.2 PROBLEM STATEMENT

Countries such as New Zealand and the United States of America (herein-after referred to as the “USA”) currently permit the use of legal professional privilege to non-legal tax practitioners rendering tax advice. This stance is also currently being considered by Australia and the United Kingdom (herein-after referred to as the “UK”) as evidenced by the Australian Law Reform Commission’s (herein-after referred to as the “ALRC”) report on the review of legal professional privilege and federal investigatory bodies in April 2011 and the *Prudential PLC and Another v Special Commissioner of Income Tax and Another* [2013] UKSC 1 on appeal from [2010] EWCA Civ 1094.

Unfortunately this right is currently not afforded to non-legal tax practitioners in South Africa. This raises the question as to why there is such a differing view between attorneys and accountants that render the same service to the public. Furthermore, does this differentiation infringe on certain constitutional issues such as the right to privacy and equality? Lastly would it not be in the best interest of South Africa to align our tax policies with the above mentioned countries that currently permit non-legal tax practitioners to enjoy legal professional privilege in an effort to conform to international norms?

1.3 PURPOSE STATEMENT

The main purpose of this study is to determine whether certain non-legal tax practitioners in South Africa, such as accountants, should be encompassed within the ambit of legal professional privilege as currently afforded to attorneys where that accountant renders tax advice that could have otherwise been obtained from an attorney.

1.4 RESEARCH OBJECTIVES

The study will be guided by the following specific research objectives:

- to investigate the history behind the principle of legal professional privilege by reviewing historical literature available in order to ascertain why such privilege was considered necessary;

- to identify and analyse any constitutional issues surrounding legal professional privilege. This analysis will include a comparison of the:
 - competency requirements of accountants and attorneys by reviewing available literature on this topic;
 - current regulations in relation to accountants and attorneys by reviewing available literature on this topic;
 - current disciplinary actions that may be taken against accountants and attorneys by reviewing available literature on this topic; and
 - the code of ethics which attorneys are required to adhere to in relation to the code of ethics that qualified accountants are required to adhere to.
- to investigate the application of legal professional privilege in relation to non-legal tax practitioners in other countries such as the USA, New Zealand, Australia and the UK by reviewing available literature including relevant case law on this topic. In reviewing this literature and case law a determination will also be made as to the similarity of the South African legislative frame work in comparison to the countries that permit or are considering permitting the application of legal professional privilege by accountants; and
- to carry out interviews with recognised accountants and attorneys that render tax advisory services in order to obtain their views on whether this privilege is amenable to extension and whether accountants should be encompassed within the ambit of legal professional privilege.

1.5 IMPORTANCE AND BENEFITS OF THE PROPOSED STUDY

From a theoretical perspective, the proposed study will make a valuable contribution to the extant body of knowledge on the extension of legal professional privilege to non-legal tax practitioners as new legislation regarding the regulation of tax practitioners has recently been introduced.

According to a communication with Mr P. Gering (2013), a Tax Partner at PKF Durban who is also the Chairman of the National Tax Practice of PKF and a member of the PKF International Tax Committee, upon personally attending the Parliamentary public hearings on 23 October 2012, the issue of extending legal professional privilege was raised by Price

Waterhouse Coopers and the South African Institute of Taxation (herein-after referred to as the “SAIT”). The response from the members of Parliament present at this public hearing was to the effect that additional research was required in order for proper consideration to be given to the extension of legal professional privilege to non-legal tax practitioners. It was indicated that only upon receipt and analysis of such research could a policy decision be reached.

It is contended that this study is intended to be such research as it could be utilised by Parliament to reach a decision on whether or not to encompass non-legal tax practitioners within the ambit of legal professional privilege.

Previous studies were conducted prior to such legislation being introduced due to the uneven playing field between attorneys and accountants. As far as could be determined this will be the first study in South Africa that will deal with this issue subsequent to the regulation of tax practitioners by law. This will make a unique contribution in making representations to Parliament to initiate a change in policy that will allow non-legal tax practitioners to be eligible for this privilege.

From a practical perspective, should Parliament make a policy decision to permit legal professional privilege to non-legal tax practitioners, subsequent to representations being made as a result of this study, certain registered non-legal tax practitioners will benefit from having the right to legal professional privilege.

This research proposal has four main parts. The next two sections will explain the delimitations and assumptions that apply to the proposed study. This is followed by a list of key terms and abbreviations used in the study. Next, the research design and methodology of this study is discussed. In addition a brief overview of the upcoming chapters is provided. Thereafter the literature on the principle of legal professional privilege, current legislation and its application in foreign countries is reviewed and finally followed by the list of references.

1.6 DELIMITATIONS

As stated in the introduction, previous studies simply made reference to all non-legal tax practitioners which could essentially include all accountants that may be eligible for the right to legal professional privilege. However, the potential pool of accountants needs to be narrowed so that only suitably qualified accountants with the required tax knowledge to render tax advice should be eligible for this right. Tax practitioners who merely render tax compliance services, such as the assistance with tax returns, will not qualify for such privilege (Croome, 2007:52).

Therefore the pool of possible accountants that will be eligible for legal professional privilege is refined to a very limited proportion in relation to the total population of accountants in South Africa. This will reduce the risk to the fiscus with regard to legal professional privilege being misused in practice.

For the purposes of this study SAICA is considered to be the most appropriate institute upon which reliance is placed to properly identify the possible pool of accountants that would qualify for the right to legal professional privilege. This notion is based on the compulsory taxation and law courses (i.e. incorporated into the Bachelor of Commerce (Accounting) and Bachelor of Commerce Honours (Accounting) degrees) which are prerequisites for students wishing to become SAICA members. The requirements for a person to become a SAICA member are further explained in Chapter Three.

It is further noted that members of SAIT and SAIPA, the other two main controlling bodies, may also have completed the appropriate tax courses and consequently have the relevant skills required to render tax advice to clients. As noted in terms of the assumptions to this study, these accountants will also be eligible to the right to legal professional privilege if afforded to a SAICA member. However, performing a comparison of members from three institutions in relation to attorneys is considered to be beyond the scope of this study

It should also be noted that many tax practitioners are primarily members of SAICA but also have an additional membership with SAIT as they specialise in taxation and may consider SAIT to be at the forefront of taxation in South Africa. Therefore to obtain

statistics from both institutes, SAICA and SAIT, may result in a duplication of potential members that may qualify for this privilege.

In order to illustrate the potential accountants that may qualify for this privilege, the following statistics have been adapted from the SAICA website in respect of the July 2013 period.

Table 1: SAICA Constituencies for July 2013

Category	Based in South Africa	Total absentees and based in the UK	Total	Percentage of CA (SA)s in public practice in South Africa per category in relation to total CA (SA)s based in SA
Employed in public practice – large	3672	1 251	4 923	13%
Employed in public practice – medium	1293	266	1 559	4%
Employed in public practice – small	615	76	691	2%
Partner in public practice – large	530	123	653	2%
Partner in public practice – medium	407	42	449	1%
Partner in public practice – small	1 096	62	1 158	4%
Total CA (SA)'s in public practice	7 613	1 820	9 433	26%
Total CA (SA)'s registered at February 2013	28 654	7 246	35 900	n/a

Source: South African Institute of Chartered Accountants (2013a)

As can be seen from the above table only 26 per cent of the total population of qualified chartered accountants renders services to the public in South Africa. This percentage can be reduced even further as the total number of 28 654 accountants situated in South Africa includes professionals in fields such as accounting, auditing, finance and tax compliance as well as tax advisory services.

Whilst it would have been beneficial to this study to obtain a break-down of this category into the various fields listed above, at present there is insufficient information available as this regulation has only been effective from 1 July 2013. Therefore these statistics are not yet available.

There are currently 21 463 qualified attorneys in South Africa who are registered with the Law Society of South Africa (herein-after referred to as the “LSSA”) (LSSA, 2013b.) Based on the statistics provided in the above table this amounts to almost triple the amount of potential accountants in South Africa that could qualify for the right to legal professional privilege.

For the purposes of this study, all future references to the term “accountant” or “non-legal tax practitioner” refers to a qualified accountant as categorised in the above listed fields per the above table and who renders tax advisory services. All other accountants that fall outside these categories will not be included in these terms.

1.7 ASSUMPTIONS

Several basic assumptions underlie this proposed study. As such, it is assumed that:

- this study is limited to the South African tax jurisdiction although reliance is placed on other countries that have currently extended this privilege to accountants and countries that are in the process of deciding whether to extend this privilege to accountants;
- all accountants in South Africa are in favour of acquiring the right to legal professional privilege;
- the current view of Parliament is that the right to legal professional privilege should remain limited to legal tax practitioners in order to avoid misuse in practice;
- this study seeks to encompass both external non-legal tax practitioners and “in-house” non-legal tax practitioners within the ambit of legal professional privilege. This is consistent with the principle demonstrated in the case of *Mohamed v President of the Republic of South Africa and Others* 2001 (2) SA 1145 (C) where it was held that in-house attorneys are also eligible to the right to legal professional privilege (Croome, 2012a:140);
- if a SAIPA or SAIT member (who is not also a member of SAICA) is able to prove that he/she has the relevant qualifications and training similar or equivalent to that of a SAICA member the privilege should also be extended to that tax practitioner. Failure to do so would result in unfair discrimination arising within the accounting fraternity;
- the South African government is constantly striving to align its tax policies with international norms;

- due to this privilege only being applicable to a limited number of qualifying accountants, as described in terms of the delimitations of this study, a qualitative approach will have to be adopted in order to carry out this study. This will entail a detailed review of available literature;
- the provisions of section 64 of the Tax Administration Act which deals with legal professional privilege currently only makes reference to attorneys therefore is not considered relevant for the purposes of this study;
- The draft uniform rules issued by the LSSA are utilised for the purposes of this study on the basis that there will not be any fundamental changes to these rules in the near future and due to these rules being subject to section 74 of the Attorneys' Act no. 53 of 1979;
- the first unit of analysis of this study refers to attorneys that provide tax advice and have the right to legal professional privilege as opposed to attorneys who provide, for example, conveyancing services which do not permit the right to legal professional privilege; and
- the second unit of analysis of this study refers to accountants as defined in the definition of key terms below and as determined in terms of the delimitations of this study.

1.8 KEY TERMS

“Accountant” - refers to a qualified chartered accountant that is duly registered with the South African Institute of Chartered Accountants and has an additional qualification in the field of taxation such as a Higher Diploma in Taxation or a Masters of Commerce in Taxation degree.

“Attorney”- refers to a qualified attorney that is duly registered with the Law Society of South Africa and the High Court of South Africa.

“Client” – refers to a person (including both natural and legal persons) that is required to pay tax in South Africa and seeks tax advice from either a qualified accountant or an attorney.

“External non-legal tax practitioner” – refers to a “non-legal tax practitioner” as defined below, who is in the employ of an independent practice or company in relation to a “client”, as defined above.

“In-house legal tax practitioner” – refers to an “attorney”, as defined above, that is in the employ of a “client”, as defined above, in order to render tax advisory services to that client.

“In-house non-legal tax practitioner” – refers to an “accountant”, as defined above, that is in the employ of a “client”, as defined above, in order to render tax compliance and advisory services to that client.

“Non-legal tax practitioner” – refers to an “accountant”, as defined above, who is duly registered with SARS as a tax practitioner.

“Legal tax practitioner” – refers to an “attorney”, as defined above, who is duly registered with SARS as a tax practitioner.

“Parliament” – refers to the National Assembly and the National Council of Provinces.

“National Assembly” – refers to those responsible for choosing the President, passing laws, ensuring that the members of the executive perform their work properly and providing a forum where the representatives of the people can publicly debate issues (Parliament, 2013).

“National Council of Provinces” – refers to those involved in the law-making process and who provide a forum for debate on issues affecting the provinces. Its main focus is to ensure that provincial interests are taken into account in the national sphere of government (Parliament, 2013).

“State” – refers to the South African National Government.

“**Taxpayer**” – refers to male and female persons who are required under the law to pay tax as well as to entities recognised under the taxing statutes, such as companies, close corporations and trusts (Croome, 2010: 15). This term is interchangeable with the term “client” as defined above.

“**Taxpayers**” – refers to the general taxpaying population of South Africa. However, where this term is used in the singular context (i.e., taxpayer) the term is interchangeable with the term “client” as defined above.

1.9 ABBREVIATIONS

Certain terms have been abbreviated in this study in order to ensure ease of reading and a better flow of information. These abbreviations are listed in the table below.

Table 2: Abbreviations used in this document

Abbreviation	Meaning
ALRC	Australian Law Reform Commission
ATO	Australian Taxation Office
CA (SA)	Chartered Accountant - South Africa
HMRC	Her Majesty's Revenue and Customs (UK)
IESBA	International Ethics Standards Board for Accountants
IFAC	International Federation of Accountants
IR	Inland Revenue (New Zealand)
IRBA	Independent Regulatory Board for Auditors
IRS	Internal Revenue Service (USA)
LSSA	Law Society of South Africa
OECD	Organisation for Economic Co-operation and Development
SAICA	South African Institute of Chartered Accountants
SAIPA	South African Institute of Professional Accountants
SAIT	South African Institute of Taxation
SARS	South African Revenue Service
UK	United Kingdom
USA	United States of America

1.10 RESEARCH DESIGN

A qualitative approach will be adopted in carrying out the research for this study. A thorough review of existing literature available on this topic will be carried out to investigate the history and importance of the principle of legal professional privilege as well as the current nature and scope of this right in South Africa.

Issues regarding the constitutionality of this privilege will also be explored in detail to ascertain whether it is fair and reasonable for this privilege to apply only to attorneys.

A comparison of competency levels, current regulations, current disciplinary actions and the code of ethics in relation to attorneys and qualified accountants will be carried out by reviewing existing literature available.

A review of available literature and relevant case law of other countries, such as the USA, and New Zealand, which currently allow the application of legal professional privilege in respect of accountants as well as countries that are currently considering whether to extend this privilege to accountants such as the UK and Australia.

This choice to adopt a qualitative approach is supported by the only other study that was conducted in South Africa on this topic (Jani, 2010:10-11).

1.10.1 Description of inquiry strategy and broad research design

The historical research method is considered to be the most appropriate method as, although South Africa has not seriously considered encompassing accountants within the ambit of legal professional privilege due to the non-regulation of accountants, several other countries have adopted this approach. Therefore it is assumed that there would be many publications on this topic such as other dissertations, journals, and newspapers or magazine articles.

Upon analysing all of these publications one would be able to gather sufficient information to reach a conclusion as to whether this privilege should be extended to accountants. These publications may also contain the views of many highly recognised tax practitioners with regard to whether they believe this privilege should be extended. This would prove valuable as it may provide better insight into the conclusions reached by highly skilled professionals in this field which may either support or contradict this study's findings.

As stated above, this topic has not been extensively explored in South Africa due to accountants previously not being regulated by law. It is only due to the recent introduction of the Tax Administration Act; effective from 1 October 2012, that accountants will become regulated, therefore both accountants and attorneys will be on an equal footing. This has resulted in many practicing accountants and the relevant accounting controlling bodies to raise the question as to the eligibility of accountants for the right to legal professional privilege.

Due to the lack of information, in the South African context, it would prove difficult to gather adequate information by using standard research instruments such as surveys or questionnaires. Due to the specialised nature for the application of this privilege it is considered more feasible for this study to be carried out by reviewing available literature on this topic and consulting with highly recognised tax practitioners within the accounting field as well as with those tax practitioners in the legal field.

As noted under the delimitations section of this study the total number of potential accountants that could be eligible for this right is a mere 7 613 of the total population of 28 654 qualified accountants in South Africa. It is also stated in that section that this figure of 7 613 could be reduced even further as the accountants in that category include professionals in fields such as accounting, auditing, finance, tax compliance and tax advisory services.

Based on the above statistics it is assumed that performing a survey or questionnaire will not result in sufficient information being gathered from the appropriate accountants with regard to their views on whether the privilege should be allowed or not.

Consequently only interviews will be carried out, either personally or via electronic email which is dependent on time permitting at the relevant stage of the study, with recognised qualified accountants and attorneys.

Attempts will be made to consult with tax practitioners who are currently employed by controlling bodies such as SAICA, SAIT and SAIPA. These recognised accountants would be in the best position to provide insight in to this study as some of these accountants

were involved in the previous submissions to Parliament to extend this privilege to accountants.

1.11 BRIEF OVERVIEW OF CHAPTERS

The next chapter will examine the fundamental principles upon which this privilege is based as it will focus on various areas such as the different types of privilege that currently exist, the history behind the existence of such privilege and the basic requirements for the right to legal professional privilege to apply. Chapter Two will also determine to whom the right to legal professional privilege belongs as well as the importance of the extension of such privilege to accountants. This chapter will conclude by investigating the safeguards in place to prevent the abuse of legal professional privilege and whether this privilege is amenable to extension.

Chapter Three will explore the current nature and scope of legal professional privilege in South Africa. This will involve a thorough examination of applicable case law as this is a common law principle. Previous requests to encompass accountants into the ambit of legal professional privilege will also be analysed as these may have a significant bearing on whether or not such privilege is amenable to extension. This chapter also investigates the constitutional law issues surrounding the application of legal professional privilege. In particular the right to privacy and the right to equality, in terms of section 14 and section 9 of the Constitution, respectively will be explored in detail.

Chapter Four will focus on the international approach with regard to legal professional privilege. Other jurisdictions such as the USA and New Zealand have already encompassed accountants into the ambit of legal professional privilege. The laws surrounding this privilege in these countries will be compared to South Africa in order to ascertain whether there are any fundamental differences that exist that would prohibit this privilege from being extended to accountants in South Africa. Australia and the UK are currently considering encompassing accountants within the ambit of legal professional privilege. An in-depth study will be conducted by reviewing the current discussion papers and other published documents available on these countries in order to identify similarities and/or differences with South African laws surrounding legal professional privilege.

Relevant case law from these four countries will also be analysed to support the basis upon which this privilege is or may be extended to accountants.

The final chapter will attempt to summarise the various issues raised and provide an overall view into the best approach for South Africa to deal with this matter. In order to determine the best approach Chapter Five will investigate the benefits and drawbacks of each of the approaches adopted by the different countries identified in Chapter Four

1.12 CONCLUSION

This chapter provides an overview on the principle of legal professional privilege, the various issues surrounding the extension of this privilege to accountants, the key research objectives as well as the importance of this study. In addition the underlying assumptions, delimitations, key terms, abbreviations and research design methods are provided to ensure a proper understanding of the basis for this dissertation.

The following chapter will extensively investigate the history of this principle along with the requirements and limitations that need to be complied with in order for this privilege to apply.

CHAPTER 2

UNDERSTANDING THE PRINCIPLE OF LEGAL PROFESSIONAL PRIVILEGE

2.1 INTRODUCTION

Whilst Chapter One provided a brief overview of the principle of legal professional privilege, this chapter aims to provide a more in-depth analysis of this principle in order to fully understand what this privilege entails.

The Constitution of South Africa does not expressly contain a right to consult an adviser privately and confidentially. However, other parts of this Constitution, when read in conjunction with one and other, do provide for this right. Firstly, section 34 provides for every person to have the right of access to the courts. Thereafter sections 35 (3) (f) and (j) provide for a person to have the right to be represented by a legal practitioner and the right “not to be compelled to give self-incriminating evidence” respectively.

Therefore the right to legal professional privilege is the personal right that a person has to refuse to provide evidence which would otherwise be admissible in a court of law (Dijkman, 2004:23; Zeffertt & Paizes, 2009:573). Such evidence is not excluded from court proceedings as a result of it being inadequate; instead it is excluded in order to protect something that is considered to be of higher value (Zeffertt & Paizes, 2009:573).

There are two main types of legal professional privilege, the first is “private privilege” which relates to the protection of an individual and the other is “state privilege” which relates to the protection of state interests (Schwikkard & Van der Merwe, 2009:157).

Although this study’s focus is on private privilege rather than state privilege it is important to note that state advisers cannot simply rely on state privilege as in the context of a state official rendering advice to a client (i.e. in this case the government which in this scenario would be represented by SARS) such advice would be subject to private privilege rather than state privilege. Therefore it is also in the best interest of non-legal SARS officials who

render tax advice to SARS to have this privilege extended beyond the scope of legal tax practitioners (Jani, 2010:14.)

Whilst it is important to consider the requirements that need to be met in order to apply this right, one must also consider the history and applicability of this right as well as the importance of having such right. It is also crucial that one determines the adequacy of safeguards that are currently in place to limit the misuse of this privilege and whether this privilege is amenable to extension. All of these aspects are detailed below to ensure that one has a proper understanding of this principle.

2.2 THE VARIOUS TYPES OF LEGAL PROFESSIONAL PRIVILEGE

As explained above, there are two types of legal professional privilege. Whilst the private privilege aims to protect the individual, state privilege aims to protect the interests of the state. It is important that such a right is available to individuals as there is a need to protect oneself from self-incrimination (i.e., the right to remain silent). On the other hand it is also important for certain information to remain confidential as disclosure in the public domain may be detrimental to public interest. (Schwikkard & Van der Merwe, 2009:159-160.)

Consideration must also be given to section 32 of the Constitution which provides for every person to have the right to access any information held by the state. Whilst a person does have a right to access this information, sections 40 and 67 of the Promotion of Access to Information Act 2 of 2000 restricts this access under certain circumstances.

Sections 40 and 67 of the Promotion of Access to Information Act state that the information officer of a public body or head of a private body "... must refuse a request for access to a record of the body if the record is privileged from [the] production in legal proceedings unless the person entitled to the privilege has waived the privilege."

This ensures that there is a balance maintained in the justice system so that a person has the ability to request information from the state but at the same time such a request is

subject to certain limitations to ensure that information which requires protection remains intact.

It is also important to note that within the ambit of *private privilege* exist different categories of private privilege such as the privilege against self-incrimination and marital privilege. As explained above, a person has the right to remain silent in order to protect oneself from self-incrimination.

In terms of section 198 of the Criminal Procedures Act, no 51 of 1977 a person is not compelled at a criminal proceeding, "... to disclose any communication" made between that person and their spouse during the course of their marriage

This study will only focus on the right to protect oneself against self-incrimination. Marital privilege is considered outside the scope of this study therefore will not be investigated further.

Whilst many circumstances or situations would appear to warrant the need for this privilege, this right is currently limited to attorneys. For example, communications, regardless whether such communications were made in confidence, between a person and any of the following professionals will not permit the right to legal professional privilege:

- priests;
- insurance brokers; and
- accountants, including tax advisers. (Schwikkard & Van der Merwe, 2009:152-153.)

This was confirmed in the case of *Baker v Campbell*, 1983 (153) CLR 52, (1983) 49 ALR 385 and 57 ALJR 749 where it was held that privilege is only applicable to legal professional services as the relationship between an attorney and a client is unique as "... it forms part of the function of the law itself which may ultimately result in a disadvantage to the client".

Whilst current case law and the statutory provisions of South Africa do not allow for legal professional privilege to apply to other confidential relationships, such as those noted

above, this study's objective is to determine whether the last category of professions, (i.e., accountants) can be encompassed within the ambit of legal professional privilege.

In order to achieve this objective consideration must first be given to background and history of this privilege.

2.3 THE HISTORY OF LEGAL PROFESSIONAL PRIVILEGE

In the case of *Prudential PLC and Another v Special Commissioner of Income Tax and Another*, paragraph 23 of the judgement states that legal professional privilege "is a common law principle which was developed by the judges in cases going back at least to the 16th century as evidenced by the case of *Berd v Lovelace* (1577) Cary 62.

There were initially two schools of thought with regard to the reasoning behind legal professional privilege coming into existence.

The first school of thought claimed that the fundamental reason behind such a privilege coming into existence was due to social inequality which resulted in the public having to consult with professionals such as attorneys and accountants for advice in carrying out their business (Portwood & Fielding, 1981:38).

Due to the complexity of the legal profession, a person's lack of knowledge of the law compels him to consult with an attorney. Therefore any communications with an attorney in obtaining such advice should be considered his own thus the disclosure of such information would amount to self-incrimination. (Faber & Mandy, 2013:36.)

The second school of thought claimed that the principle of legal professional privilege was initially recognised as a safeguard for attorneys whose reputation relied heavily on honour and integrity to closely guard the secrets of their clients and their operations. Therefore, it can be concluded that the principle was initially brought about to protect the honour of the attorney with little regard for the client or public interest. (Zeffert & Paizes, 2009:627.)

Based on the above it is evident that depending on which school of thought remained true today, the right to such privilege would, under the first school of thought, belong to the client and, under the second school of thought, belong to the attorney.

It is therefore imperative, for the purposes of this study, to ascertain who is entitled to this right.

2.4 TO WHOM DOES THE RIGHT TO LEGAL PROFESSIONAL PRIVILEGE BELONG?

As explained above, there were two schools of thought as to whom the right to legal professional privilege belong.

The second school of thought claimed that the right initially belonged to the attorney in upholding and protecting his honour. However, according to Zeffert and Paizes (2009:627), this right shifted onto the client in the eighteenth century as the need to “... provide a client with freedom from apprehension when consulting a legal advisor” was considered to be of greater importance.

Jani (2010:27) also points out that the interest of the client, in being able to freely disclose information without prejudice of it being used against him at a later stage, outweighs the interests of the attorney. Therefore the right to claim legal professional privilege remains with the client.

This change in view by the second school of thought created correlation with the first school of thought in that the right to legal professional privilege belongs to the client.

Determining who the right to legal professional privilege belongs is vital as only the person who holds that right is able to exercise such right. Therefore if the right belongs to the client, the attorney cannot claim legal professional privilege without having obtained permission from that client to make such claim.

This principle was confirmed in the case of *Kommissaris van Binnelandse Inkomste v Van der Heever*, 1999 (3) SA 1051 (SCA) and *S v Safatsa and others* 1988 (4) SA 239 (AD). However, it is noted that for practical purposes, most attorneys claim the right to legal professional privilege on behalf of a client.

Whilst it is confirmed that the right to legal professional privilege belongs to the client, this right can only be claimed if the requirements listed below are met.

2.5 THE REQUIREMENTS FOR THE RIGHT TO LEGAL PROFESSIONAL PRIVILEGE TO APPLY

In the case of *Heiman, H, Maasdorp and Barker v Secretary for Inland Revenue and Another* 1986 (4) SA 160 (W), 30 SARC 145 at 150 it was decided that legal professional privilege can only exist within certain defined legal limits (Croome, 2010a:138).

Legal professional privilege will not apply in a situation where the advice was sought from an accountant and then handed over to the attorney for safe keeping on account of the information being confidential (Croome, 2010a:140).

Therefore upon receiving a request to submit documentation to SARS that person cannot seek to claim legal professional privilege and refuse to hand over the information to SARS. There is a common misconception on the part of taxpayers in assuming that the right to legal professional privilege can be used as a safeguard to avoid submitting documents to SARS. (Croome, 2010a:138.)

The actual handing over of information to an attorney “does not *create* legal professional privilege” (own emphasis) as confirmed in the case of *R v Davies* 1956 (3) SA 52 (A). This is due to the taxpayer having obtained the advice from an accountant rather than an attorney (Croome, 2010a:140).

Croome (2010a:145); Dijkman (2004:23) and Zeffert and Paizes, (2009:257–662) explain that in order for the client to claim legal professional privilege the following requirements must be met:

- the attorney must be *acting in a professional capacity* ;
- the attorney must be *consulted in confidence*;
- the information provided to the attorney must be necessary for the *purpose of obtaining legal advice*;
- the advice rendered by the attorney must *not assist the client in committing any crime* or the undertaking of any *fraudulent activity*; and
- the client must not *waive his right to legal professional privilege* expressly, impliedly or imputably.

2.5.1 The attorney must be acting in a professional capacity

An attorney is still regarded as acting in a professional capacity regardless of whether the client pays a fee for such service. However, the payment of a fee may assist in proving that such advice was obtained from the attorney acting in a professional capacity. (Schwikkard & Van de Merwe, 2009:147.)

In the case of *Mohamed v President of the Republic of South Africa and Others* it was confirmed that “in-house” attorneys would also qualify for the right to legal professional privilege since to distinguish between “in-house” and independent attorneys would not be justifiable.

It should also be noted that where a person claims to be a professional attorney but is acting *mala fide* the client is still entitled to claim legal professional privilege. This is only applicable if upon consulting such attorney that client had a *bona fide* belief that such person was a professional attorney and that any communications made to that person was privileged. (Gewald in Jani, 2010:39.)

2.5.2 The attorney must be consulted in confidence

Several factors are considered in determining whether the attorney was consulted in confidence, such as, the venue of the consultation and the presence of any other persons during the consultation.

If one were to meet an attorney at, for example, a café or a book shop it would be more difficult to prove that such consultation was made in confidence as opposed to meeting the attorney at his office for a consultation. This is due to the café or book shop being a location that would be more susceptible to high volumes of patrons. Therefore it is easier for passers-by to overhear the communications between the client and attorney in that meeting which may be an indicator that the communications were not intended to be confidential. This is highly unlikely to occur in an office environment where the door to the meeting room could be shut to ensure that no passers-by are able to overhear any communications that occur during the meeting.

If during the consultation there were one or more parties present it may be difficult to prove that the attorney was consulted in confidence as it could be seen that the client has willingly abandoned his right to confidentiality (Gewald in Jani, 2010:40). This principle was demonstrated in the case of *Heiman, H, Maasdrop & Barker v Secretary for Inland Revenue and Another*

However it must be noted that having a third party present does not necessarily mean that the consultation was not intended to be treated as being confidential. One must still consider the facts and circumstances of the case to determine whether or not that consultation was intended to be confidential. For example, the client's accountant may be present in a meeting for the purposes of explaining a rather complex transaction to the attorney. This would not be considered an indicator that such communication was not made in confidence. (Croome, 2010a:142.)

This notion is explored further under Chapter 2.5.5 and Chapter 4.3.

2.5.3 The information provided to the attorney must be necessary for the purpose of obtaining legal advice.

One cannot apply a blanket approach in assuming that all information provided to an attorney is privileged. If information is provided to an attorney for reasons other than the purpose of obtaining legal advice, such information is not privileged. (Croome, 2010a:142; Schwikkard & Van Der Merwe, 2009:148.)

Whilst the advice obtained must for legal purposes, this does not need to be the primary objective for obtaining the advice. As long as the advice is sufficiently closely linked to the objective of obtaining legal advice, any communications made in that regard will be subject to legal professional privilege. (Zeffert & Paizes, 2009:659.)

Croome (2010a:142) along with Zeffert and Paizes (2009, 626), elaborate on this principle by noting that although previous case law suggested that legal professional privilege can only apply in the case of *legal advice* obtained in anticipation of litigation, current case law, such as *S v Safatsa and others* indicate that legal professional privilege is considered “... necessary for the functioning of the legal system as a whole”, therefore allows for this privilege to also be applicable where *general legal advice* is sought.

In considering whether services rendered by an accountant can constitute legal advice, Croome (2010a: 144-145) notes the following:

- The preparation of the tax return
 - In the case of highly complex tax returns which require a great deal of interpretation with regard to the various tax acts, it can be argued that such service constitutes the rendering of legal advice. However, it is very unlikely that such an argument can be made in the case of simplistic returns.
 - Several cases in the USA confirm the notion that the preparation of tax returns falls outside the scope of the rendering of legal advice.
 - There are currently no South African cases that deal with this issue.
- Tax Planning (i.e., the providing of tax opinions)
 - In order to assist a client with tax planning a great deal of research is required to be undertaken by the tax practitioner to ensure a proper interpretation of the various tax acts. Therefore such advice would constitute legal advice.
 - This was confirmed in several cases in the USA which are discussed below.
 - At present there are no cases in South Africa that deal with this issue.
- Dispute resolution
 - In the case of an attorney assisting a taxpayer with a tax dispute in or out of court such service is regarded as a legal service which was confirmed in the case of *Jeeva v Receiver of Revenue* 1995 (2) SA 433 (SE).

- An additional process (i.e., the Alternative Dispute Resolution process) was added to the dispute resolution procedures in terms of section 74 of the Revenue Laws Amendment Act 45 of 2003.
- Taxpayers are often represented by accountants rather than attorneys during the dispute resolution process.
- Furthermore, based on past practice, there is no restriction with regard to accountants representing taxpayers at Tax Court.
- Therefore it can be concluded that the accountant does provide a legal service to his client in making such representations.

Croome (2010a:142) also states that it can be assumed that information obtained for the purposes of interpreting and researching a particular issue in order to provide a client with a tax opinion which may result in the attorney later defending the client, as part of the dispute resolution processes, would be protected by privilege.

It is further noted that the chairperson, Spilg (2004:45) in the Tax Board Decision No. 194 commented that in his experience in Tax Board proceedings, “usually the taxpayer is either unrepresented or is represented by his accountant. Most accountants do not have experience in presenting a case, nor are they expected to.

Spilg (2004:44) also stated that “the tax board is simply an intermediate decision-making forum established by the legislature to provide what is intended to be, a cheap and expeditious means of determining a dispute without the prejudice to either party’s right to approach a Tax Court *de novo*. The Tax Court therefore does not sit either as a court of review or of appeal from a Board decision but hears the matter effectively as a Court of first instance.

Tax Board Decision No. 183 contains a very important comment by Vorster (2002:77) whereby he states that “the *prescribed procedural informality does not, however, detract from the formal rules of evidence* when the facts are in dispute, the substantive principles of tax law and the direction in section 82 of the Act that the onus of proof in appeals such as these, will in most instances be on the appellant.” (own emphasis).

These comments indicate that the representations made by attorneys at Tax Board or Tax Court level are incredibly important and is ultimately seen to be part and parcel of the legal process which would constitute a legal service.

Upon conducting interviews with various tax professionals in South Africa the following was noted:

- according to a communication by Mr P. Nel (2013), Project Director of tax at SAICA:
 - tax opinions issued by accountants that specialise in taxation are similar to tax opinion issued by attorneys;
 - furthermore, he is of the belief that “tax opinions will constitute legal advice in a sense as it would interpret and apply the law.” He then goes on to express his concern with regard to the uncertainty as to how such tax advisory service fits into the “legal services” definition in terms of the Legal Practice Act; and
 - he is also in agreement that accountants currently represent taxpayers at Tax Board and Tax Court regardless of the fact that they have no legal qualifications or training;
- according to a communication by Dr B.J Croome (2013), Tax Executive at Edward Nathan Sonnenbergs Incorporated:
 - he also confirms that tax opinions issued by accountants and attorneys are similar. His reasoning thereof is due to the current “... laws regulating tax practitioners...”; and
 - he contends that representation by accountants at Tax Board and Tax Court does not occur as frequently as it used to previously.
- according to a communication with Mr P. Gering (2013), a Tax Partner at PKF Durban who is also the Chairman of the National Tax Practice of PKF and a member of the PKF International Tax Committee:
 - he firmly believes that tax opinions issued by accountants may in certain instances be superior to those issued by an attorney depending on the level of expertise of the accountant in the area of taxation and *vice versa*;
 - he also points out that “there is *no distinction* in the ability of a taxpayer to utilise an opinion issued by either an accountant or a legal practitioner in mitigating against an understatement penalty [in terms of section 223 of the Tax Administration Act], *both opinions are equally beneficial to the taxpayer* as long

as they can show that they are based on all the available facts and on a balance of probabilities are more likely to succeed than not” (own emphasis);

- Mr Gering goes on to state that he is “of the opinion that tax opinions issued by accountants constitute legal advice” and notes that in some “cases the tax accountant is the primary decision maker as to strategy and tactics of the legal process deferring only to legal practitioners for the appearance in Tax Court and usually only where there are issues of witnesses to be led as this is not where our training is”;
- he mentions that “in order to provide a correct tax opinion it is necessary that the opinion writer is provided with all the facts. There is an impediment to a tax accountant being provided with all the facts as he is not subject to the same legal professional privilege as the legal practitioner”; and
- with regard to accountants representing taxpayers at Tax Board and Tax Court, he notes the following:
 - I am in agreement that accountants currently present taxpayers at Tax Board and Tax Court and are prevalent in the ADR process. The ADR process is certainly part of the legal process, albeit, a without prejudice discussion with the South African Revenue Service. Tax Board may not set a binding ruling but is certainly a legal process that tax accountants are predominantly involved in. Tax accountants who have performed a HDip Tax or similar level of qualification would have been involved in mute court cases, the same or similar in manner to their counterparts in the legal fraternity.”
- according to communications by Mr M. Betts, Tax Director at PKF Cape Town, and Mr N. Wright, Financial Adviser at ABSA who is also the National Chairman of SAIT:
- both professionals are of the opinion that tax opinions issued by accountants and attorneys are similar;
- they also agree that tax opinions issued by accountants constitute legal advice; and
- finally, both professionals are also in agreement that accountants currently represent taxpayers at Tax Board and Tax Court regardless of the fact that they have no legal qualifications or training.

Based on the above comments made in the Tax Board Decisions No. 194 and 183, the findings of Croome and the comments made by the above listed professionals (i.e., which also includes the current opinions of Croome) it is contended that:

- tax opinions provided by tax accountants would constitute legal advice and therefore constitute a legal service; and
- accountants are often required to make representations at Tax Board therefore this could fall within the ambit of providing a legal service

Wingenter (2008:350-351) mentions a few USA cases that also confirm the above mentioned principles with regard to the distinction between accounting work and legal advice. These cases are detailed as follows:

- United States v Textron Inc. 507 F Supp 2d 138 (D.R.I. 2007)
 - the court held that where during the audit the attorney is consulted to provide certain services such as:
 - the verification of the accuracy of a return constitutes accounting work, not legal advice therefore would not qualify for legal professional privilege; and
 - dealing with issues regarding the interpretation of statute or application of case law that were raised upon review of the taxpayer's return, that service is considered legal advice. Therefore privilege will apply in this circumstance.
- United States v Abrahams, 905 F 2d 1276, 1284 (9th Cir. 1900)
 - this case cited the established principle that any communications which are *solely* made for the purposes of preparing a tax return are not eligible for legal professional privilege; and
 - however, any communications made in order to obtain legal advice with regard to certain amounts that can be claimed on a tax return is eligible for legal professional privilege.
- Canaday v United States, 354 F 2d 849, 857 (8th Cir. 1966)
 - in this case the court held that the preparer of the tax return acted in the capacity of a "scrivener" therefore the information provided did not qualify for legal professional privilege.
- United States v Willis, 565 F. Supp. 1186, 1189-90 (S.D. Iowa 1983)

- the judge in this case decided that the preparation of a tax return by answering questions with reference to “instructions or informal publications” issued by the revenue authority for public use does not constitute legal advice; and
- therefore this type of service does not fall within the ambit of legal professional privilege.
- United States v Chevron Texaco Corporation
 - the court held that where advice is rendered with regard to the “tax consequences of a particular transaction” and that advice involves the interpretation of law such advice is considered legal advice.

As can be noted from the above author’s views and principles established from the USA judgements, the type of services that fall within the ambit of legal professional privilege are very specific. Accounting work does not constitute legal advice and therefore will generally not be protected by legal professional privilege.

2.5.4 The advice rendered by the attorney must not assist the client in committing any crime or the undertaking of any fraudulent activity

Advice sought to facilitate a future crime is not protected under legal professional privilege (Schwikkard & Van der Merwe, 2009:148; Zeffert & Paizes, 2009:662).

It is important to note that this requirement refers to future crimes not past crimes. An attorney is prohibited from assisting or facilitating a client to commit a crime or fraudulent activity but should a client inform an attorney of a crime or fraudulent activity that he has already committed such information is still protected.

According to Zeffert and Paizes (2009, 662), an attorney cannot claim that legal professional privilege is still applicable as he was ignorant or unaware that there was an illegal purpose to the transaction.

Therefore, even in situations where clients try to carry out complicated transactions whereby the ultimate objective is illegal and the attorney is not aware of the illegal aspect of the transaction, any communications made to that attorney will be considered outside

the ambit of legal professional privilege. This ensures that the relation between an attorney and client is not abused.

2.5.5 The client must not waive his right to legal professional privilege expressly, impliedly or imputably

As explained in Chapter 2.4 above, the right to legal professional privilege belongs to the client therefore only that client is entitled to claim such privilege.

In the same way that only the client can claim this privilege, only the client is entitled to waive the right to legal professional privilege. If a client waives the right to legal professional privilege that attorney is bound by such waiver. (Schwikkard & Van der Merwe, 2009:149.)

Jani (2010:43) explains that the express waiver of the right is easy to determine. However, one may impliedly or imputably abandon this right without realising it by performing a certain act which indicates such abandonment. This has been confirmed in the following cases:

- *Harsken v Attorney General of the Province of Cape of Good Hope, 1998 (2) SACR 681 (C)*
 - the court firstly differentiated between an *implied* waiver and an *imputed* waiver of privilege;
 - implied waiver of privilege has two requirements that need to be met in order for it to constitute a waiver of privilege:
 - Firstly, the client must have been aware of his rights; and
 - Secondly the client must have acted in a certain way which would indicate that he had an intention to abandon his right to privilege.
 - imputed waiver results where the client demonstrates that he no longer relies on the privilege regardless of what his actual intention is with regard to the waiver of privilege. This inference must be reached “in fairness.”
- *S v Tandwa, 2008 (1) SACR 613 (SCA)*

- in this case the court held that an implied waiver “... entails an objective inference that the privilege was actually abandoned whereas imputed waiver proceeds from fairness, regardless of actual abandonment.”

Wingenter (2008:340,350) also provides examples of cases in the USA that demonstrate this principle. These cases are noted as follows:

- United States v El Paso Company 682 F 2d 545
 - the court held that the handing over of tax accrual work papers by a taxpayer to its independent auditors resulted in the waiver of its right to legal professional privilege.
 - therefore the taxpayer was not entitled to claim legal professional privilege in relation to those work papers.
- United States v Textron
 - in this case the court held that regardless of the taxpayer’s attorney having prepared its tax accrual work papers, the fact that the taxpayer handed over the work papers to its independent auditor constituted a waiver of the right to legal professional privilege.

Upon considering the findings of the above mentioned cases, it can be concluded that one must be very careful not to unintentionally waive one’s right to legal professional privilege.

2.5.6 Concluding thoughts on the requirements for the application of legal professional privilege

Based on the above detailed requirements, it can be concluded that legal professional privilege does not protect any and all information between a client and an attorney. *All of the above mentioned requirements* must be met to ensure that a person’s right to legal professional privilege remains intact.

Failure to meet *any one* of these requirements will have dire consequences for the client who assumes that he can freely disclose any and all information to his attorney on the basis that that information is privileged when in fact that information is not protected.

2.6 WHY IS THE EXTENSION OF LEGAL PROFESSIONAL PRIVILEGE SO IMPORTANT?

The promulgation of the Tax Administration Act brought about many new changes with regard to the powers available to SARS, taxpayers and tax practitioners. Apart from the regulation of tax practitioners, the information gathering powers of SARS have also been significantly widened.

According to Van der Walt (2012), prior to the Tax Administration Act, section 74A of the Income Tax Act stipulated certain powers that SARS had in obtaining taxpayer information. Many a time, disputes were raised in respect of whether SARS was entitled to request such information, in terms of section 74A, as this section set out two basic requirements that SARS had to meet in order to make such a request. These requirements are detailed as follows:

- that person had to be *a registered taxpayer*; and
- SARS could *specifically identify the taxpayer* in relation to whom the information was being requested.

Chapter Five of the Tax Administration Act permits SARS to gather information that it considers relevant for the purposes of the *proper administration of a Tax Act*. This purpose is very wide and includes the ability to gather information from third parties as well as in relation to a specific *class of taxpayers* rather than an individual taxpayer (Van der Walt, 2012).

Van der Walt goes on further to note the following in respect of SARS' extended information gathering powers under this new Act:

- there is *no requirement on SARS to specifically identify the taxpayer* in respect of whom the information is sought. All that is required is that such taxpayer is "otherwise objectively identifiable";
- the request for information could be *addressed to the taxpayer or any other person*. This other person could be, for example, the taxpayer's bank, insurance brokers or the credit bureau; and

- the definition of “relevant material” in section 1 of the Tax Administration Act, means any document or information that is foreseeably relevant for:
 - tax risk assessment;
 - assessing tax;
 - collecting tax;
 - showing non-compliance with an obligation under any tax act; or
 - revealing that a tax offence was committed.

Based on the above it may be assumed that this significant increase of information gathering powers conferred upon SARS will potentially increase the level of disputes with taxpayers and consequently the number of cases that go to court.

According to Retief, senior member of the SAIPA’s Technical and Standards Committee (quoted by the South African Press Association, 2013), the common notion in the field of accounting is that SARS has become much more aggressive in their approach to obtaining taxpayer information.

SAIT CEO, Klue (quoted by the South African Press Association, 2013) stated that SARS has increasingly made use of its e-filing system to gather information on taxpayers to “patch the holes in the tax net.”

These comments are further confirmed in terms of 2013 Draft Tax Administration Laws Amendment Bill which proposes an amendment to section 25 which widens the powers of the Commissioner to request any return of information from the taxpayer, not only the returns stipulated in the tax Acts. This gives SARS the power to request any information they deem fit. This could result in various infringements to taxpayers’ rights to privacy.

Whilst it is noted that this is not yet law and that commentary has been submitted to National Treasury and SARS in respect of these proposed amendments, this proposal is yet another indication of SARS’ intention to widen their information gathering powers.

Due to the above explained changes to legislation, current proposed changes to legislation and recent comments made by the senior members of the accounting and tax controlling

bodies there is a dire need for certain information gathered by SARS to be privileged in order to maintain a balance in terms of what information is accessible and what information is protected.

In practice many taxpayers rely on their accountants to attend to their tax affairs in addition to the maintenance or auditing of their financial records. Most accounting firms offer not just tax compliance services but also tax advisory services. Therefore upon the request for information or in the event of SARS performing a search and seizure of the taxpayer's documents, in terms of part D of Chapter Five of the Tax Administration Act, at the accountant's premises, such information will not be eligible for legal professional privilege.

Therefore all information gathered will be admissible in a court of law and can be used against a taxpayer. On the other hand if a taxpayer obtains tax advisory services from an attorney such information would be privileged and inadmissible in a court of law.

Due to the above reasons, it is evident that it is extremely necessary to extend this privilege to accountants who render tax advisory services to taxpayers. Policy makers are hesitant to extend this privilege as it may be misused by accountants trying to claim legal professional privilege in respect of information that should not be subject to such privilege or by attempting to utilise this privilege as a mechanism to delay the submission of information to SARS.

However, current safeguards must be considered to determine if this misuse can be limited. These safeguards are detailed below.

2.7 SAFEGUARDS IN PLACE TO PREVENT THE ABUSE OF LEGAL PROFESSIONAL PRIVILEGE

It is considered extremely important for clients to be able to disclose all relevant information to their tax adviser, albeit an attorney or an accountant, to ensure that proper advice is obtained. This will lead to proper compliance with the tax legislation and prohibit aggressive tax planning by taxpayers.

On the other hand scrupulous accountants may seek to abuse this privilege in carrying out “under-handed” deals or tax avoidance schemes. There is no doubt that where any privilege is granted there will always be the few “rotten apples” but this cannot be a basis upon which this right is denied. Surely, just as there is a probability that certain accountants may seek to abuse or misuse this privilege so too, it can be assumed, that there are certain attorneys that may also abuse or misuse this privilege yet the latter is still entitled to this right.

Furthermore, as explained under Chapter 2.5.4 above, communications made to facilitate illegal transactions, regardless of whether the adviser was aware of the illegal nature of such transaction, will not be protected by legal professional privilege.

According to Mahomed Kamdar (quoted by Hewitt-Martin in the South African Institute of Professional Accountants, 2013), a tax adviser at SAIPA, the regulation of tax practitioners will actually lead to those unscrupulous practitioners being eliminated as the consequences for tax practitioners who are found guilty of misconduct have become much more serious with the introduction of the Tax Administration Act. If a tax practitioner is found guilty of misconduct a similar approach to the disciplinary action imposed on attorneys may now be imposed on accountants. A comparison of the rules and regulations in relation to accountants and attorneys is detailed in Chapter Three.

As explained by Faith Ngwenya, the Technical and Standards Executive at SAIPA, “tax practitioners now find themselves in the same boat as attorneys, who can be “struck off” for negligence and illegal activities, and thus prevented from practising their trade”.

An additional and incredibly important safeguard is the inherent power that the courts possess in determining whether the documents upon which this privilege is claimed can in fact be applied. This principle was determined in the case of *Lenz Township Co (Pty) Ltd v Munnick and Others* 1959 (4) SA 567 (T) 574 and confirmed in *Van der Linde v Calitz* 1967 (2) SA 239 (A) 257 and 260. Although a taxpayer may make a claim of legal professional privilege applying to a specific document, only the courts can confirm whether such privilege is applicable. (Zeffert & Paizes, 2009:662.)

Furthermore, the court held in the case of the *South African Rugby Football Union and Others v President of the Republic of South Africa and Others* 1998 (4) SA 296 (T) that this inherent power did not "... impinge upon the freedom of communication between legal advisers and their clients, but was merely a procedural step to determine whether the party claiming the privilege was justified in raising the objection against discovery" (Zeffert & Paizes, 2009:662).

This inherent power was given to the courts to ensure that the abuse or misuse of this privilege is avoided. The courts may determine which documents are or are not subject to legal professional privilege, as demonstrated in the case of *Mohamed v President of the Republic of South Africa and Others*. This safeguard ensures that a legal professional does not claim this privilege on behalf of a client where it is inappropriate.

This begs the question, once again, as to why this privilege is only applicable to legal tax practitioners such as attorneys. Surely if such a safeguard exists then this privilege cannot be exploited or abused by accountants either as the courts will still have the inherent power to decide whether that information is privileged or not.

It is recommended that should this privilege be extended to accountants that these safeguards remain in place to ensure that the privilege is not abused by accountants.

Finally, if an accountant makes a claim to legal professional privilege purely as a dilatory tactic, recourse is available to SARS in terms of section 241 of the Tax Administration Act whereby a complaint can be lodged against that taxpayer to his controlling body. That controlling body will then institute disciplinary action against that person. This provision will surely deter accountants from any abuse or misuse of this privilege.

2.8 IS LEGAL PROFESSIONAL PRIVILEGE AMENABLE TO EXTENSION?

This privilege was initially required as the taxpayer often called on attorneys to provide advice in times of difficulty. Over the years taxpayers also often call on accountants to solve difficulties in relation to business situations. Therefore it would appear that there is

now “an increasing overlap between the functions of accountants and attorneys especially with regard to tax matters.” (Jani, 2010:45.)

As a result there are four possible choices available in alleviating the current differentiations that exist between attorneys and accountants (Jani, 2010:45):

- withdrawal of the privilege from attorneys when the same service is rendered to that of an accountant (i.e., rendering of tax advice);
- eliminate the doctrine of legal professional privilege altogether;
- encompass non-legal tax practitioners, such as accountants, within the ambit of legal professional privilege either partially or totally; or
- retain the *status quo*.

As explained above the need for this privilege is incredibly important in order to ensure that taxpayers are free to disclose all of the facts to a professional in obtaining advice. Without such freedom taxpayers may find themselves in a predicament whereby inappropriate advice is obtained as a result of partial disclosure of information to the tax practitioner due to the taxpayer’s fear of self-incrimination. Therefore it can be confirmed that the first two options detailed above would not serve any good purpose.

The last option to retain the *status quo* is also not tenable as the discrepancies that exist between attorneys and accountants would go unresolved.

The only viable option would be to pursue the encompassing of non-legal tax practitioners within the ambit of legal professional privilege.

2.9 CONCLUSION

This chapter has examined the deeply embedded history of the principle of legal professional privilege and how it has evolved to the right that currently exists under common law.

The reasoning behind the existence of legal professional privilege was previously thought to be an incentive to encourage clients to fully disclose all the relevant facts and

circumstances to their attorneys when seeking advice. However, in the case of *S v Safatsa and others*, 1988 (4) SA 239 (AD) it was decided that this privilege is vital for the “functioning of the legal system as a whole and not only for the proper conduct of litigation” (Croome, 2010a:139).

This chapter also discussed the various requirements and safeguards in place in order for this privilege to exist and consideration was given as to whether this privilege is amenable to extension. In deciding whether this privilege should be extended to accountants in totality or partially one must first consider the current nature and scope of legal professional privilege in South Africa along with the constitutional issues surrounding this right.

CHAPTER 3

CURRENT NATURE AND SCOPE OF LEGAL PROFESSIONAL PRIVILEGE IN SOUTH AFRICA INCLUDING CONSTITUTIONAL ISSUES

3.1 INTRODUCTION

Thus far, this study has explored the mechanics surrounding the principle of legal professional privilege, the requirements to enforce this right as well as the safeguards in place to prohibit the abuse of this privilege. Consideration will now be given to the constitutional issues and current legal status of this privilege in South Africa.

3.2 THE COMMON LAW PRINCIPLE OF LEGAL PROFESSIONAL PRIVILEGE

Faber and Mandy (2013:36) point out that case law in South Africa, such as *Bogoshi v Van Vuuren NO and others*; *Bogoshi and another v Director, Office of Serious Economic Offences and others*, 1996 (1) SA 785 (A), dictate that legal professional privilege is a *fundamental legal right* that ensures the proper functioning of the legal system. This principle is also confirmed in the case of *S v Safatsa and others*.

The South African courts have consistently applied the principle of legal professional privilege in cases such as *Jeeva v Receiver of Revenue* and *Kommissaris van Binnelandse Inkomste v Van der Heever*. The judgements in these cases came to the conclusion that the privilege is not just applicable to attorneys in legal firms but also to in-house legal advisers and legal advisers employed at accounting firms (Mandy & Faber, 2013:37).

Based on the above it may be noted that whilst the statutory law does not make specific provision for the legal professional privilege this *concept has been affirmed repeatedly by case law in South Africa* which presently permits such privilege to apply solely to attorneys.

3.3 PREVIOUS REQUESTS TO MAKE LEGAL PROFESSIONAL PRIVILEGE A STATUTORY LAW WHICH IS ALSO APPLICABLE TO ACCOUNTANTS

The request for legal professional privilege to be extended to accountants has previously been submitted to Parliament. However, the response from the Standing Committee on Finance was that these comments will be held for consideration together with the future regulation of the Tax Practitioner Bill as this area is considered to be highly controversial internationally and domestically. Therefore, until such time as the accountants are regulated by law rather than self-constituted professional bodies this privilege is not available to accountants (Standing Committee on Finance, 2011:5-6; 2012:55-57).

The Tax Practitioners Bill was incorporated into the Tax Administration Act in terms of sections 239 to 243 which deals with the reporting of unprofessional conduct of tax practitioners and became effective on 1 October 2012. Section 240 of the Tax Administration Act stipulated a deadline of 1 July 2013 for the compulsory regulation of all tax practitioners.

In terms of section 240 (1) of the Tax Administration Act:

“Every natural person who –

- (a) *provides advice to another person with respect to the application of a tax Act; or*
- (b) completes or assists in completing a return by another person

must –

- (i) register with or fall under the jurisdiction of a recognised controlling body by the later of 1 July 2013 or 21 days after the date on which that person for the first time provides the advice or completes or assists in completing the return; and
- (ii) “register with SARS as a tax practitioner in the prescribed form and manner...”

For the purposes of this study the person to whom legal professional privilege should apply falls under the terms of subsection (a) in that he provides advice to another person with respect to the application of a tax act. This is explained in detail in Chapter One under the heading “delimitations”.

Regardless of this section, requiring the *compulsory registration* of tax practitioners *with both SARS and a controlling body, effective from 1 July 2013*, no steps have yet been taken by Parliament to rectify the inconsistencies that currently exist between the application of legal professional privilege in relation to attorneys and accountants.

At present taxpayers are required to disclose to SARS any tax advice obtained from an accountant and produce any documentation related to such advice (Pricewaterhouse Coopers, 2012). This was confirmed in the case of *Chantrey v Martin*, 1953 (2) SA 691.

Upon the previous requests being made by tax practitioners to have this privilege extended to tax practitioners, a SARS spokesperson indicated that this issue would be revisited in approximately 18 months when the model of regulation is evaluated (Pricewaterhouse Coopers, 2012:6).

In a recent UK case it was held that non-legal tax practitioners are not entitled to claim the right to legal professional privilege and that a decision to extend this privilege to accountants lay with the policy drafters (*Prudential PLC and Another v Special Commissioner of Income Tax and Another*). Although this UK judgement did not permit the extension of legal professional privilege to accountants the fact that *the judge could not “in principle” find any reason why this privilege should not be extended to accountants* will have a great bearing in terms of persuading the South African Government in permitting this extension (Pricewaterhouse Coopers, 2013:5).

Faber and Mandy (2013:37) state that such a right is a constitutional matter which is yet to be addressed by the Constitutional courts in South Africa. Furthermore, they contend that it is highly unlikely that the Constitutional courts will “limit the right of the taxpayer *based on the profession of the person from whom the professional advice is obtained* rather than measuring it against the purpose of such advice” (own emphasis).

This study aims to assist with further representations to the South African Parliament in making a policy decision to permit legal professional privilege to non-legal tax practitioners, thereby levelling the playing fields of the legal and accounting profession.

3.4 CONSTITUTIONAL ISSUES REGARDING LEGAL PROFESSIONAL PRIVILEGE

Whilst it is concluded in the previous paragraph that this privilege is merely a common law right that exists between attorneys and their clients, the constitutional issues surrounding this right must be explored.

Jani (2012:49) summarises section 1 (a) of the South African Constitution as follows:

“The South African Constitution through the Bill of Rights contains fundamental rights informed by the values of human dignity, the achievement of equality and the advancement of human rights and freedoms...”

Based on the current standing of the legislation a client who seeks tax advice from an attorney is eligible to claim legal professional privilege whereas a client who seeks the very same advice from an accountant is not eligible for this privilege.

This leads to serious inconsistencies with regard to the rights available to a person being purely dependent on his decision to consult with one type of professional instead of the other (i.e., the choice between an attorney and an accountant). This may infringe not only on the right to privacy of a client but also the right to equality as to whether such a differentiation is justifiable (Jani, 2010:49).

In addition to the fundamental rights contained in the Bill of Rights, consideration must also be given to section 36 of the Constitution which contains a limitation clause with regard to circumstances where such discrimination is considered just and reasonable. This limitation clause seeks to strike a balance between taxpayer rights and state interests.

3.4.1 The right to privacy

In order to obtain proper advice a taxpayer should be free to disclose all of the relevant information without being akin to self-incrimination (Faber & Mandy, 2013:36).

Section 14 of the Constitution, which deals with the right to privacy, states that “everyone has the right to privacy, which includes the right not to have :-

- (a) Their person or home searched;
- (b) Their property searched;
- (c) Their possessions seized; or
- (d) The privacy of their communications infringed”.

Based on the above it can be noted that a person's constitutional right to privacy is independent from the common law concept of privacy which places reliance on the right to dignity which is separately protected (Jani, 2011:50). The right to dignity is dealt with under section 10 of the Constitution which states that “everyone has inherent dignity and the right to have their dignity respected and *protected*” (own emphasis).

According to Woolan, Roux and Bishop (in Jani, 2010:51), the right to privacy is defined as the “...right to be free of intrusions or interferences by the state and others... and this requires that a citizen is free from unauthorised disclosures of information about his personal life.”

Whilst one may assume that the right to privacy only applies to natural persons it is important to note that this right also applies to non-natural persons such as corporate entities. In the case of *Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit*, 2001 (1) SA 545 (CC) the court held that although juristic persons do not bear any human dignity they are still entitled to the right to privacy. The exclusion of juristic persons from the right to privacy would lead to great violations of privacy with serious effects on the conduct of its affairs. This will result in the state having free reign to search and seize any information of the entity which would “... undermine the very fabric of our democratic state.”

Based on the above case law it is clear that the level of intensity of privacy is lessened as one moves from a natural person to a juristic person, however, it is important to note that both natural persons and juristic persons are entitled to this right.

This was also confirmed in the case of *National Media Limited v Jooste*, 1996 (3) SA 262 (A) where the court concluded that the right to privacy is considered to be part of the concept of *dignitas* and the breach of such right is an unlawful intrusion on one's personal privacy or the disclosure of private facts about oneself. There the unlawfulness is judged in light of the contemporary *boni mores* and general sense of justice of the public as perceived by the court.

The right to privacy is only claimable if there was a legitimate expectation of privacy. Therefore this right is only abandoned if a person commits an act which may impute or imply the waiver of the right as this indicates that the person intended for such information to be made public or communal (Jani, 2010:52).

Therefore upon consulting with a tax consultant, be it an attorney or an accountant, one would naturally expect that such sensitive information will be kept confidential and private. It is assumed that one would prefer for personal information such as the income and expenditure details not to be made known to the public. (Jani, 2010:58.)

Therefore the limitation on the right to legal professional privilege to apply only to consultations between a client and an attorney infringes on the client's right to privacy when consulting with an accountant in obtaining tax advice. The compulsion of an accountant to disclose personal information of a client *hinders the relationship between the client and accountant without due cause*. (Jani, 2010:58.)

The rights conveyed upon SARS to request certain information from a taxpayer is in line with international practices and constitutes a valid limitation of the taxpayer's right to privacy. However, where information is obtained by SARS for ulterior motives such as fishing expeditions rather than the proper administration of the Act, such request may amount to an infringement on the taxpayer's right to privacy. (Croome, 2010b:182.)

3.4.2 The right to equality

Section 9 of the Constitution focuses on the right to equality which ensures that all persons are treated alike. The actual distinction between accountants and attorneys does not

amount to discrimination in terms of section 9 (3) of the Constitution which reads as follows:

“the State may not *unfairly* discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth” (own emphasis).

It is therefore necessary to determine if the discrimination under consideration violates the general requirement that persons are equal before the law (Croome, 2010b:115). In order to make such a determination, consideration must be given to whether a taxpayer obtaining tax advice from an accountant is being treated fairly in comparison to a taxpayer obtaining the same tax advice from an attorney. The fact that the one taxpayer is eligible to the right to legal professional privilege and the other is not may give rise to discrimination as envisaged in terms of section 9.

As noted above, whilst such right may be infringed upon the limitation clause contained in section 36 of the Constitution must also be considered. This limitation clause permits discrimination if such discrimination is considered just and reasonable.

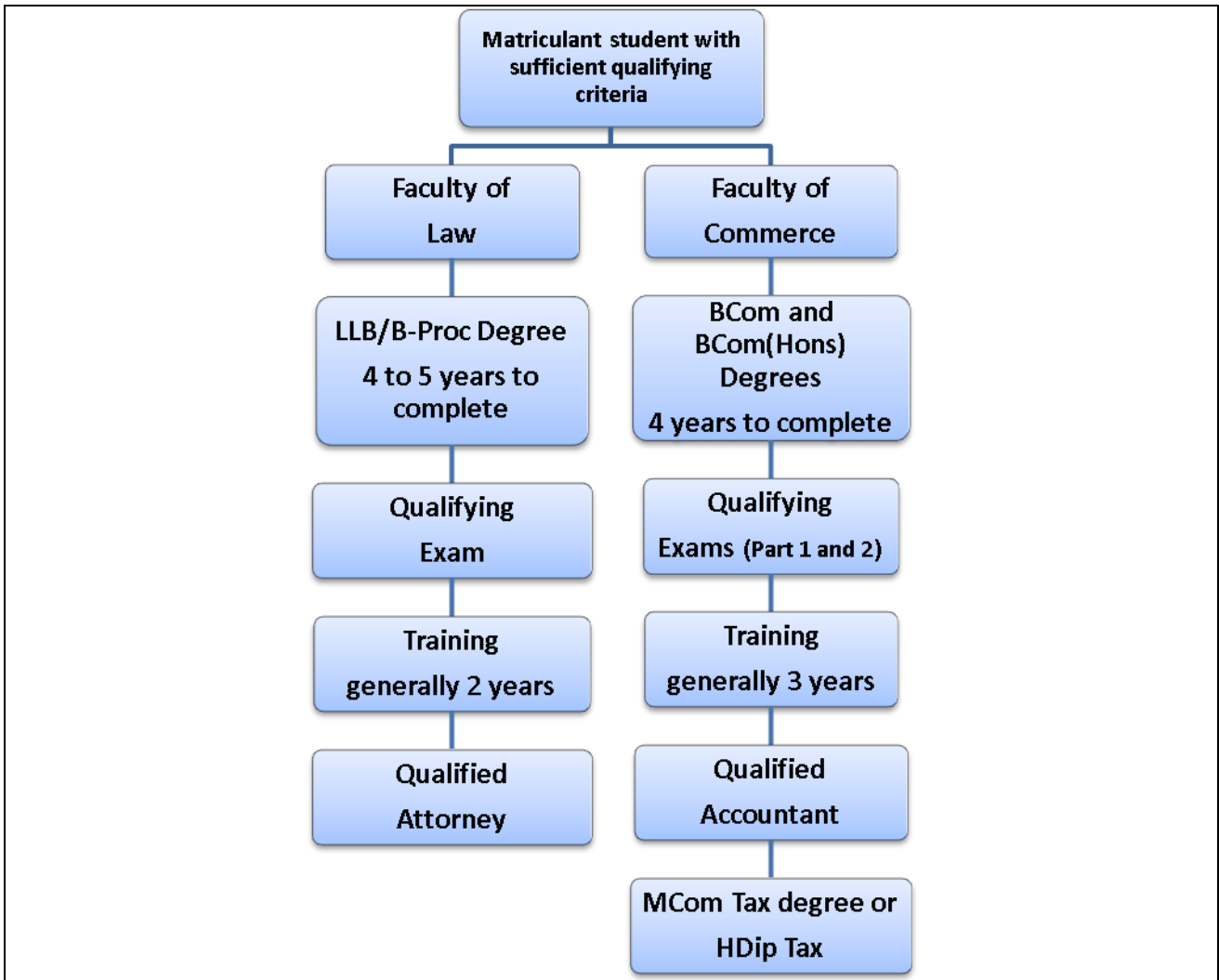
As the deciding factor in determining whether a taxpayer qualifies for the right to legal professional privilege is based on which type of professional the taxpayer engages in obtaining tax advice, a thorough analysis into the distinction between an accountant and an attorney must be carried out.

In looking at the various distinctions one must firstly consider the qualifications and training undertaken by attorneys and accountants in order to determine if the levels of competency are similar. Thereafter the rules and regulations that govern both professions must be considered in order to determine if the standards and ethics to which these professionals must abide are similar.

If it is determined that the level of competency and ethical standards of both professionals are similar then it would stand to reason that the advice rendered by both professionals, should be eligible to the same right to legal professional privilege.

As demonstrated in the figure below, the criteria in terms of the level of qualifications and training required in qualifying as an accountant or an attorney is nearly identical. Therefore, *prima facie*, it does appear to be unfair for attorneys to be eligible for the right to legal professional privilege whilst accountants are denied such right.

Figure 1: Comparison of qualifications and training between attorneys and accountants



As can be seen in the figure above, the qualifications and training required to be undertaken in both professions are fairly similar. However, accountants will require a further qualification such as a Master of Commerce in Taxation degree or a Higher Diploma in Taxation in order to qualify for the right to legal professional privilege. Therefore overall the accountant would appear to be more qualified than the attorney in that the accountant would require a minimum of three degrees or qualifications whereas

the attorney would only require one degree in order to be eligible for the right to legal professional privilege.

As highlighted in the above figure, in addition to the qualifications required, practical training or experience must also be obtained. This practical training or experience is governed by SAICA, in the case of an accountant, or the Law Society in conjunction with the Attorneys Act no. 53 of 1979, in the case of an attorney.

The table below provides a brief comparison of the qualifying examinations and practical training required by each fraternity.

Table 3: Summarised analysis of qualifications and training required in relation to accountants and attorneys

SAICA - Accountants	Attorneys Act and LSSA - Attorneys
<p>Clause 29 of the SAICA By-laws sets out the requirements for admission to membership. A person must pass the examinations and obtain the practical experience prescribed by the Board.</p> <p>The SAICA Code of Professional Conduct, Constitution, and By-laws do not detail the practical experience to be undertaken by the trainee accountant, the SAICA Training</p> <p>However, the SAICA Training Regulations contain detailed requirements to ensure the competency levels of accountants that complete this practical experience or training.</p> <p>The details of these Training Regulations are not discussed for the purposes of this study but must be noted when considering whether the accountants that become members of SAICA have the appropriate competency levels.</p>	<p>Section 1 of the Attorney’s Act (herein-after referred as the “Act” for the purposes of this table) states that in order to be admitted as an attorney a person is generally required serve articles of clerkship.</p> <p>Section 14 provides for practical examinations to be carried out in respect of any person to confirm competency as an attorney. These examinations are prescribed by the LSSA.</p> <p>Section 69 (g) of the Act provides for the council to decide the “form and contents” of one’s articles of clerkship.</p> <p>Part IV of the rules details the terms and conditions of the articles of clerkship. Similarly to the SAICA Training Regulations these provisions are quite detailed and have not been expanded on. However, it can be concluded that these detailed regulations ensure that the competency levels of articulated clerks are reached upon qualifying as an attorney.</p>
<p>There are currently no safeguards in place with regard to restricting newly qualified chartered accountants from opening their own accounting practices.</p>	<p>In terms of section 20 a person must be enrolled by the court in order to practice law.</p> <p>As an additional safeguard section 13A of the Act states that a person cannot practice as an attorney on his own account unless that person has at least three years of experience subsequent to being admitted as an attorney</p>
<p>Clause 130 of the SAICA Code of Professional Conduct dictates that a member must act with professional competence which requires “... a continuing awareness and an understanding of relevant technical, professional and business</p>	<p>Clauses 40.12 of the rules stipulate that the members must “remain reasonably abreast of developments in law and legal practice in the fields in which they practice.”</p>

<p>developments.</p> <p>Clause 130(3) specifically states that “continuing professional development enables a chartered accountant to develop and maintain the capabilities to perform competently within the professional environment.”</p>	
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Source: South African Institute of Chartered Accountants; Attorney’s Act

As can be seen in the above table, the qualifications and training of accountants and attorneys are nearly identical. Therefore it can be concluded that the competency levels of both professions would be the, more or less, same.

In addition to the above mentioned qualifications and training that are required, the current rules and regulations in respect of attorneys and accountants must also be considered.

3.4.2.1 Regulations governing attorneys

Attorneys are governed in terms of the Attorneys Act therefore have to abide by the regulatory and disciplinary jurisdiction of the relevant provincial law society where they practice law (LSSA, 2013a).

It is noted that the Legal Practice Bill was issued on 15 May 2012. The main purpose of the Bill is to “provide a legislative framework for the transformation and restructuring of the legal profession...”, and “... establish powers and functions for a single South African Legal Practice Council and Regional Councils in order regulate the affairs of legal practitioners and set norms and standards...” (Draft Legal Practice Bill, 2012.)

According to SC. Mtschaulana (2009:1) this Bill is intended to regulate both attorneys and advocates and fuse “the two branches of the legal profession.”

“The Justice Portfolio Committee has been debating the Legal Practice Bill throughout July and August [2013].” Comments and changes submitted are being discussed with the Department of Justice and Constitutional Development. As a result “... various working document drafts of the Bill...” have been tabled. (LSSA, 2013c.) Due to the uncertainty

surrounding the final changes to this bill it was considered inappropriate to utilise this bill for the purposes of this study.

It is further noted that the Law Society to which a member belongs is generally dependent on the geographical location of that member. South Africa currently has four statutory law societies (i.e., the first four listed law societies below are recognised in terms of section 56 of the Attorney's Act). Clause 6.6 of the LSSA Constitution indicates that each of these statutory law societies are responsible for the general functioning of that society such as attending to disciplinary matters, controlling contracts of articles of clerkship and co-ordinating the qualifying examinations in respect of members wishing to enter the profession.

In terms of clause 3.1 of the Constitution of the LSSA, the following institutes are its participating members:

- the Law Society of the Cape of Good Hope;
- the Law Society of the Orange Free State;
- the Law Society of Transvaal;
- the Natal Law Society;
- the Black Lawyers Association; and
- the National Association of Democratic Lawyers.

Based on the responsibilities set out in clause 6.6 of the LSSA Constitution it is confirmed that each of the law societies maintain its own rules and regulations in relation to their members. However, the LSSA released draft uniform rules on 21 July 2013 which will replace the individual rules and regulations maintained by each law society. This will ensure consistency with regard to the regulation of attorneys throughout South Africa.

Whilst it is noted that at this stage these rules are only in draft form, it is contended that these rules are subject to the vigorous process detailed in terms section 74 of the Attorney's Act and therefore will be appropriate for the purposes of this study. This is also noted in terms of Chapter 1.3 of this study. In terms of section 74 of the Attorney's Act:

“a council shall not submit any draft rule to the Chief Justice unless-

- (a) if the draft rule is submitted by the council of –

- (i) the Law Society of the Cape of Good Hope;
 - (ii) the Law Society of the Orange Free State’
 - (iii) the Natal Law Society; or
 - (iv) deleted ...
 - (v) such draft rule has been approved by the majority of the members of the society concerned present or represented at a general meeting of that society; and
- (b) the council has consulted with the judge present of every provincial division in the province of its society and with the chief justice of every high court in such province.”

For the purposes of this study only the regulations in terms of the Attorney’s Act and the draft uniform rules issued by the LSSA are considered appropriate for the purposes of comparing the rules and regulations applicable in respect of attorneys.

3.4.2.2 Regulations governing accountants

Accountants, prior to the 1 October 2012, were not regulated by law. However, upon the Tax Administration Act becoming effective on 1 October 2012, accountants are now regulated by law in accordance with section 240 which requires the compulsory registration of accountants with a controlling body from 1 July 2013.

Section 240A (1) of the Tax Administration Act recognises the following controlling bodies:

- Independent Regulatory Board of Auditors (herein-after referred to as “IRBA”);
- The Law Society;
- The General Council of the Bar of South Africa, a Bar Council and Society of Advocates; and
- A statutory body that is approved by the Commissioner in term of a Gazette.

Section 240A (2) states that the following is also a recognised controlling body:

- A controlling body that has been recognised by the Commissioner upon meeting the requirements of:
 - “Maintaining relevant and effective –

- Minimum qualifications and experience requirements;
- Continuing professional education requirements;
- Codes of ethics and conduct; and
- Disciplinary codes and procedures.”
- Maintaining at least 1000 members.

The Commissioner informed the following controlling bodies, on 14 May 2013, that they were approved in terms of section 240A (2) of the Tax Administration Act as being a recognised controlling body:

- SAICA;
- SAIT;
- SAIPA;
- Chartered Institute of Management Accountants;
- Chartered Secretaries Southern Africa;
- Institute of Accounting and Commerce; and
- The Association of Chartered Certified Accountants.

Consequently if an accountant is a member of any one of these approved controlling bodies or IRBA, as detailed in section 240A, that person is regulated by law and as a result is subject to the disciplinary action detailed in terms of Chapter 18 of the Tax Administration Act.

Section 241 of the Tax Administration Act states:

“A senior SARS official may lodge a complaint with a controlling body if a registered tax practitioner or person who carries on a profession governed by the controlling body, did or omitted to do anything with respect to the affairs of a taxpayer, including that person’s affairs, that in the opinion of the official –

- (a) *Was intended to assist the taxpayer to avoid or unduly postpone the performance of an obligation* imposed on the taxpayer under a tax Act;
- (b) *By reason of negligence on the part of the person resulted in the avoidance or undue postponement of the performance of an obligation* imposed on the taxpayer under a tax Act; or

- (c) Constitutes *a contravention of a rule or code of conduct* for the profession which may result in disciplinary action being taken against the registered tax practitioner or person by the body” (own emphasis).

The above section sets out three occasions where SARS is entitled to report the tax practitioner for unprofessional conduct. These are basically any intentional or negligent conduct by the tax practitioner that results in the taxpayer not meeting or delaying his/her tax obligations or the contravention of the code of conduct on the part of the tax practitioner.

The first two defaults require a detailed analysis of the facts and circumstances in order to determine if the tax practitioner’s conduct was in fact deliberate or negligent in causing the taxpayer not to meet or delay his/her tax obligation. The last default is fairly straight forward in that any contravention of the code of conduct will give grounds to the tax practitioner being reported for unprofessional conduct.

Many of the above mentioned controlling bodies have their own codes of conduct to which its members are obliged to comply but, for the purposes of this study, we have chosen to analyse only the SAICA code of professional conduct. As detailed in Chapter One under the delimitations section, chartered accountants who are registered with SAICA are considered to be the most appropriate basis for comparison against attorneys therefore none of the other controlling bodies codes of conduct will be examined.

The SAICA code of professional conduct is also considered the most relevant as it conforms to the code released by the International Ethics Standards Board for Accountants (herein-after referred to as “IESBA”) and is consistent in all material aspects with the International Federation of Accountants (herein-after referred to as “IFAC”) and IRBA codes of conduct in respect of Parts A and B (SAICA code of professional conduct, 2010).

Part A of the SAICA code of professional conduct deals with the general application of the code and covers the fundamental principles governing the accounting profession which are detailed in the table below.

Part B of the SAICA code of professional conduct deals with chartered accountants in public practice which would include tax practitioners who render advice to clients therefore is important for the purposes of this study.

Part C of the SAICA code of professional conduct deals with chartered accountants in business which does not include tax practitioners who render advice to clients therefore is irrelevant for the purposes of this study and will not be explored further.

3.4.2.3 Comparison of regulations governing both professions

In order to determine whether the codes of conduct in respect of attorneys and accountants are similar the table below carefully analyses, not only the codes of conduct but also other documents which are similar or linked to these codes. This is done in order to ensure a proper understanding of the rules and regulations governing both professions. The documents utilised in the table below are listed as follows:

- SAICA code of professional conduct;
- SAICA Constitution;
- SAICA By-Laws;
- Attorney's Act; and
- LSSA's Draft Uniform Rules.

Table 4: Summarised analysis of rules and regulations applicable to accountants and attorneys

SAICA - Accountants	Attorneys Act and LSSA - Attorneys
Part A of this code sets out the fundamental principles, noted above, which chartered accountants are obliged to comply with.	Part VI of the rules deal with the conduct of members.
The abovementioned fundamental principles are explained in detail along the possible threats to each of these principles. Safeguards to eliminate such threats are also discussed in detail in both Part A and Part B of the code. Examples of such threats and safeguards are also contained in the code.	Clause 39 notes that non-adherence to the rules of professional conduct as set out in this part of the rules constitutes unprofessional, dishonourable or unworthy conduct'
Part A of the code notes the fundamental principles of the profession as follows: <ul style="list-style-type: none"> • integrity; • objectivity; • professional competence and due care; • confidentiality; and • professional behaviour. 	Clause 40 notes the fundamental principles which include: <ul style="list-style-type: none"> • honesty and integrity; • interest of client is paramount but subject to the members "... duty to court, interests of justice, observation of the law and the maintenance of

	<p>ethical standards”;</p> <ul style="list-style-type: none"> • refrain from any conflicts of interest; • maintain confidentiality; • act professionally and competently; • act with due care; and • retain independence from client.
<p>Clause 210 of the code stipulates Certain requirements with regard to the acceptance of a client or engagement, such as:</p> <ul style="list-style-type: none"> • identifying and evaluating potential threats; • determining whether adequate safeguards are in place to eliminate or reduce the risk to an acceptable level; • determining whether he has the adequate competency levels to service the client; and • enquiring of the previous accountant whether there are any reasons not to accept this client or engagement, subject to the client’s approval. <p>Whilst this is not an exhaustive list of requirements, should any of these requirements not be met, the accountant is prohibited from accepting such client or engagement.</p>	<p>Clause 40.8 states that the member must retain his independence in order to provide the client with unbiased advice.</p> <p>Clause 40.11 specifically states that a member cannot refuse to carry out or continue providing a service due to the non-payment if the demand for fees “... is made at an unreasonable time or in an unreasonable manner.”</p> <p>Clause 49 17 of the rules state that a member is not allowed to “tout” for professional work. Therefore cannot pay any referral fees or participate in any scheme which results in the “securing of professional work solicited by a third party”.</p>
<p>Clause 240 of this code permits the charging of contingent and referral fees but stipulates that this may give rise to a self-interest threat. Therefore adequate safeguards must be place to eliminate or reduce this threat to an acceptable level.</p> <p>Where fees from public interest entities exceed 15 per cent of a firm’s total fees, adequate safeguards must be in place to eliminate any self-interest threats.</p> <p>In addition clauses 290 and 291 of the code also reiterate the self-interest threats that arise if a particular client’s fees are a large proportion of the total fees of the firm. Adequate safeguards must be in place to reduce this threat to an acceptable level.</p> <p>This code does not make provision for recourse in respect of clients who are of the view that unreasonable fees have been charged. A client cannot report the charging of excessive fees to SAICA therefore there is no potential disciplinary action to be faced by the accountant in this regard.</p>	<p>Section 69 (d) of the Act states that the council has the power to prescribe the fees chargeable by a member in respect of professional services where “no tariff is prescribed by any other law.</p> <p>Clause 28.1 of the rules also state that the council is entitled to assess the reasonableness of a fee charged by a member except where:</p> <ul style="list-style-type: none"> • the member is a state official who is empowered to do so ; • the work is governed by a statutory tariff; or • the matter involved is litigious and the parties agree that the fees will be determined by the council or committed appointed to deal with that case. <p>Clause 32.2 of the rules note that where a fee is found to be excessive, the council may order the member to refund the excessive portion to the client regardless of whether that fee was agreed with the client. This is on condition that the client submits a request to the council to assess the reasonableness of the fee within a reasonable time.</p> <p>Section 69 (h) of the Act provides for the council to decide on the reasonableness of fees charged for non-litigious services.</p> <p>Furthermore, section 69 (l) permits the council to prescribe the fee chargeable between attorneys in respect of professional services.</p>

	<p>Clause 29.3 of the rules also makes provision for the charging of a fee in respect of a matter that has been set down for hearing but for some reason does not take place. This is only applicable where the client has agreed in writing to the charging of such fee and the fee is considered reasonable.</p>
<p>Taxation services are explicitly mentioned in clauses 290.181 to 290.183 of the code which includes the following:</p> <ul style="list-style-type: none"> - Tax return preparation - Tax calculations for accounting purposes - Tax planning and other tax advisory services - Assistance with tax dispute resolution <p>The first two services constitute tax compliance services and are outside the scope of this study as stated in terms of the delimitations stipulated in Chapter One. The assistance with tax dispute resolution may involve compliance issues and/or tax advisory matters, depending on the nature of the case, therefore is not considered important for the scope of this study.</p>	<p>Neither the Act nor the rules make specific reference to taxation services. However, based on the precedence laid down in common law the interpretation of tax legislation would constitute a legal service therefore it is confirmed that this legal service would be governed by the Act and the rules.</p>
<p>Clause 250 permits chartered accountants to advertise or market their services but also contains very strict rules with regard the scope of marketing that is permitted.</p> <p>All marketing must be honest and truthful and in line with the profession. False or misleading marketing is seen as bringing the profession into disrepute.</p> <p>Other restrictions are also applicable. For example a person cannot make exaggerated claim for services offered or qualifications possessed. Furthermore, a person cannot make unsubstantiated comparisons of his work to another professional.</p> <p>The Regulatory Board must be consulted if there is doubt as to whether the proposed advert is appropriate.</p>	<p>Clause 41 of the rules deals with any information that is made publicly available which would include advertising and marketing.</p> <p>This clause states that the published information must not:</p> <ul style="list-style-type: none"> • bring the profession into disrepute; • be offensive or inappropriate; • misrepresent the nature of services offered; • compare or criticise the work of another member, nor must it claim to be superior to the service provided by any other member regardless of whether that member is specifically identified; and • include client details unless written permission is obtained or the "... advertisement relates solely to the sale or letting of a client's property". <p>Where a member wishes to advertise his services as a specialist in a particular area he must ensure that such claim is justified as, in terms of clause 42, the council may request that member to prove that his claim is justified.</p>
<p>Clauses 260 and 291 permits the receipt of gifts from clients however, makes specific reference to the self-interest or familiarity threat that may arise.</p> <p>Depending on the nature and value of the gift along with the intention of client offering the gift, an accountant must use his discretion to determine if such a gift should be accepted. A gift should only be accepted if the accountant</p>	<p>Neither the Act nor rules make mention of the receipt of gifts from clients.</p> <p>However, it is noted that clause 40.8 of the rules states that "members shall at all times retain the independence necessary to enable them to give their clients unbiased advice". Therefore it is contended that in order to remain independent a member should not accept any extravagant gifts from clients as this would</p>

<p>can still ensure compliance with the fundamental principles.</p> <p>There is no requirement to report the gifts received to SAICA. However in practice some accounting firms, in terms of their of their internal policies and procedures, maintain a register of gifts from clients in order to consider whether such gifts give rise to any of the above mentioned threats (PKF South Africa, 2012:15).</p>	<p>threaten his independence.</p>
<p>Although this code does not provide for the lodging of complaints against a member clause 5.5 of the SAICA constitution, stipulates that its members must adhere to a “high standard of professional behaviour” and must “preserve and maintain the integrity and status of the profession.”</p> <p>This section also states that SAICA may take any action necessary in order to terminate or prevent dishonourable conduct by any member, associate or trainee accountant. Such action may include the termination of membership and “expulsion from the Institute”.</p> <p>Clause 9 of this SAICA constitution stipulates that a Disciplinary Panel or Committee must be formed. This Committee’s powers will be determined in accordance with the SAICA By-laws.</p>	<p>Clause 35.35 of the rules state that every member is obliged “to report to the society any dishonest or irregular conduct on the part of another member in relation to the handling or accounting of trust money on the part of that other member.” It is important to note that this obligation to report a member does not extend to other types of misconduct.</p> <p>Whilst there is no obligation for a person to report a case of misconduct on the part of an attorney, section 71 of the Act allows for inquiries to be made by the council in respect of any allegations of misconduct that may be reported to the relevant law society.</p>
<p>Clause 18 of the SAICA By-laws stipulates that both a Disciplinary Committee and Professional Conduct Committee must be formed. This section also lays down very strict requirements with regard to who can be part of these committees. A point of note is that the chairman of either committee must be either an advocate with between 5 to 10 years of experience, depending on the certain other factors, or a retired magistrate.</p> <p>Clause 19 of the SAICA By-Laws sets out the powers and duties of the Professional Conduct Committee. Where a person is found guilty of improper conduct, clause 19.3.9.1 states that the Committee has the following powers –</p> <ul style="list-style-type: none"> - to caution or reprimand the member - impose a fine on the member. This fine is capped at half of the maximum fine that could be issued by the Disciplinary Committee. - refer the matter to the Disciplinary Committee. <p>Clause 19.3.9.2 of the SAICA By-Laws also allows the member, accused of improper conduct, to request that the matter be referred to the Disciplinary Committee if cautioned, reprimanded or imposed with a fine by the Professional Conduct Committee.</p>	<p>Each Law Council must have its own “council” as determined in terms of section 60 of the Act. The powers and duties of the council are as determined in accordance with the Act.</p> <p>As stated above section 71 of the Act provides the council with the power to investigate any allegation of unprofessional conduct against a member. A member is then served with a summons to provide evidence against such claim. The detailed procedure regarding disciplinary proceedings is contained in Part VII of the rules.</p> <p>In terms of section 72 of the Act, the council’s disciplinary powers in respect of a member found guilty of unprofessional conduct are:</p> <ul style="list-style-type: none"> • to impose of fine up to R10 000 • reprimand the member • debar the member from engaging an article clerk for a specified period <p>Subsection (6) specifically states that –</p> <ul style="list-style-type: none"> • the council is not prohibited from making application for a member to be struck of the court roll; and • the court is not prohibited from suspending the attorney from practice or striking him off the court roll. <p>Where a member is found guilty, that member</p>

<p>Clause 20 of the SAICA By-Laws deal with the powers and duties of the Disciplinary Committee. This committee. In terms of clause 20.8 it has the same powers as afforded to the Professional Conduct Committee above in that it may caution or reprimand a member or impose a fine up to a maximum amount which is determined by the Board. The Committee also has the power to suspend the membership of the accused.</p> <p>Clause 20.10 of the SAICA By-laws also provides for the recovery of costs from the member in respect of the investigation or hearing undertaken by the Disciplinary Committee.</p> <p>Clause 21 of the SAICA By-laws stipulates that the findings and decisions of both the Committees must be reported to the Board and that the name of the member, found guilty of misconduct, may be published along with the name of that member's firm and a brief description of the offence and penalty imposed.</p>	<p>can appeal the council's decision with a competent court in terms of section 73 of the Act. The court has the power to either:</p> <ul style="list-style-type: none"> • confirm the council's decision; • set aside the council's decision and punishment; or • confirm the council's decision but set aside the council's punishment and replace it with an alternate punishment that could be have been imposed by the council. <p>Section 72 (4) allows for the council to recover the fine and costs of the inquiry by legal process in the magistrates court situated in the area of the relevant society.</p> <p>Section 72 (5) of the Act permits the council to publish information, in the prescribed manner, relating to any enquiry conducted in terms of section 71.</p>
<p>Clause 30 of the SAICA By-laws sets out grounds upon which a person's membership can be cancelled. Membership may be cancelled in the event that the person –</p> <ul style="list-style-type: none"> - is removed from an office of trust on account of misconduct - is convicted of theft, fraud, forgery or perjury and sentenced to prison with the option of a fine. <p>A person's membership can also be cancelled if that person's estate is sequestrated, unless that person can justify that there were exceptional circumstances that lead to the sequestration.</p> <p>In terms of clause 30.3 if a person's membership is cancelled the Board must remove his name from the register immediately and advise the Regional Councils.</p> <p>A person can reapply after 10 years from the date of cancellation of membership. The Board make a recommendation to the Disciplinary Committee that this period be reduced.</p> <p>A person may cease to be a member, in terms of clause 30.6, if he does not comply with the Continuing Professional Development policy or, in terms of clause 31.9, if he does not make payment in respect of their annual subscription fee to SAICA. In both these cases though it is much easier for a person to be reinstated as a member.</p>	<p>Section 22 of the Act states that a person may be struck of the roll for several reasons, these include instances where a person is no longer practicing law in the country or is deemed no longer fit to practice.</p> <p>Section 57 (4) of the Act states that if a member is suspended from a particular law society that member shall not enjoy any rights or privileges from any law society. Furthermore, if a member is struck of the roll of any court, that member will also cease to be a member of any law society in which he is a member.</p> <p>Sections 15 and 16 of the Act stipulates in order for a person to be admitted or readmitted as an attorney and become a member of the relevant law society he must prove that he is fit and proper person to be admitted or readmitted (for example, he must not have been struck off the roll previously or if his estate has been sequestrated he must be able to prove that regardless of such sequestration he is still fit and proper to be admitted).</p> <p>The ramifications in respect of a person being found guilty of an offence are detailed below in terms of section 70 and 83 of the Act. These include, in many instances, a fine or imprisonment along with either being suspended from practice or being struck of the roll.</p> <p>Lastly it is noted that clause 2.25 of the draft rules note recovery action may be instituted</p>

	<p>against a member in respect of the non-payment of annual subscriptions if not rectified within a month. If non-payment continues for a period exceeding two months clause 2.26 states that that member is not entitled to vote at any general or special meeting but is entitled to be present at such meetings.</p>
<p>Clause 34 of the SAICA By-Laws provides a list of punishable offences which include:</p> <ul style="list-style-type: none"> - gross negligence in conducting his work; - “improperly obtaining or attempting to obtain work”; - non-adherence to the SAICA Code of Professional Conduct or the SAICA By-laws; - conducting business in a dishonest, dishonourable or irregular manner as determined by the Disciplinary Committee; and - failing to comply within a reasonable time with any instruction from SAICA. <p>If a member is found guilty of any of these punishable offences the matter is referred to the Disciplinary Committee who will deal with the case in terms of clause 20 of the SAICA By-laws as noted above.</p>	<p>Section 70 of the Act states that upon the council receiving an allegation of misconduct in respect of a member it will submit a request to the member to provide evidence against such allegation. Failure by a member to submit such evidence will constitute unprofessional conduct.</p> <p>Section 83 (1) to (6) of the Act provides a list of offences which include –</p> <ul style="list-style-type: none"> • practising as an attorney without proper authority; • practising, directly or indirectly whether or not for your own account, as a practitioner during a period of suspension or after being struck of the roll; • employing a person that was suspended from practice or struck off the roll; and • the sharing of professional fees. Sharing of fees is only permitted in respect of partners in the partnership or in relation to a legal practitioner outside the country (i.e., also noted in clause 31.1 of the rules). <p>These offences will result in a person being found guilty of an offence and liable to a maximum fine of “R2 000 in respect of each offence.” Subsection (13) provides that if a person contravenes any of these subsections he will be found guilty of unprofessional conduct and may be struck off the roll or suspended from practice.</p> <p>Section 83 (8) states that only a practicing practitioner is entitled to compile certain documents, subject to certain exceptions, such as:</p> <ul style="list-style-type: none"> • sale agreements in respect of immovable property; • “any will or testamentary writing”; • “any memorandum or articles of association of a company...”; • partnership agreements; and • documents intended to be used in a law suit or other civil proceeding. <p>Any person found guilty in terms of section 83 (8) is liable to a fine of up to R2 000. If the fine is not paid by that person, he could be imprisoned for a maximum period of 6 months.</p> <p>Clause 38.3 of the rules also state that the abuse or mismanagement of trust funds by a</p>

member constitutes unprofessional conduct.
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Source: South African Institute of Chartered Accountants; Attorney's Act; LSSA's Draft Uniform Rules

As can be noted from the above table, the rules and regulations that govern accountants are very similar to the rules that govern attorneys. These rules and regulations ensure a high level of professional standards to which accountants and attorneys must abide.

Furthermore, as noted in Chapter One, section 240A (4) allows for a disciplinary panel to be formed and utilised by the Minister where the Minister is satisfied that the disciplinary process of the controlling body is ineffective or where the controlling body makes a request for this panel to be utilised. Therefore accountants are regulated by self-constituted bodies and statutes similar to attorneys.

Whilst some of the comparisons noted in the above table do not have a direct bearing on this study, for example the comparisons regarding fees, advertising and gifts from clients, these were included in the above table to demonstrate the incredibly high level of ethics both accountants and attorneys must maintain.

Based on the above it is concluded that the levels of competency and ethical standards which attorneys and accountants must maintain are nearly identical. Therefore there is no justifiable reason as to why the advice rendered by an attorney is eligible to the right to legal professional privilege whilst the advice rendered by an accountant is not. This discrimination is not considered fair and reasonable therefore the limitation provisions of section 36 of the Constitution are not applicable.

Tax advice obtained from an accountant or attorney should be eligible to the right to legal professional privilege. To differentiate between whom the advice is sought from would amount to unfair discrimination on the part of the taxpayer obtaining such advice.

3.5 CONCLUSION

This chapter explored the current nature and scope of legal professional privilege in South Africa as well as the constitutional principles of privacy and equality. It was established

that the right to legal professional privilege is a fundamental right which has been supported by various instances of case law in South Africa.

The infringements on a person's right to privacy and equality was also analysed and determined that there is no clear reason as to why such a differentiation exists between obtaining tax advice from an attorney in comparison to obtaining the very same advice from an accountant.

Croome (2010b:178) argues that there is no basis for the discrimination that currently exists between accountants and attorneys. A person should have the right to appoint an adviser "... who is *treated equally by the law*" (own emphasis).

Whilst the State may argue that it is generally accepted in several open and democratic societies to limit the privilege to attorneys, some countries have already extended this privilege to non-legal tax practitioners (Croome, 2010b:115). In addition to this other countries are currently in the process of deciding whether to extend this privilege to non-legal tax practitioners.

Although South Africa currently follows the international convention of restricting the right to legal professional privilege to advice obtained from a legal tax practitioner, this does not justify the distinction made between the advice rendered by accountants and attorneys (Croome, 2010b:115).

Therefore in addition to these constitutional issues, raised above, cognisance of the international approach to the concept of legal professional privilege must be taken as South Africa is constantly striving to adhere to international norms.

CHAPTER 4

INTERNATIONAL APPROACH

4.1 INTRODUCTION

The previous chapters dealt with the principle of legal professional privilege and the differences in treatment of taxpayers who consult with legal tax practitioners as opposed to non-legal tax practitioners. This included an in-depth study into the constitutional issues surrounding legal professional privilege in South Africa.

As stated in the preceding chapter, the State may argue that the infringement of constitutional rights is acceptable as many other open democratic societies allow for this privilege to be restricted to attorneys (Croome, 2010b:115). However, it is not acceptable as other countries, such as those stated below, do not restrict or are currently considering the removal of the restriction of this right in relation to non-legal tax practitioners.

Legal professional privilege in respect of non-legal tax practitioners has been successfully adopted by only a few countries such as the USA and New Zealand. Other countries such as the UK and Australia are currently contemplating whether to encompass non-legal tax practitioners within the ambit of legal professional privilege.

Germany also has certain restrictions in place whereby the revenue authorities are not permitted to request information from a taxpayer's tax adviser. The only time such a request can be made is if that taxpayer is not in a position to provide such information. The tax adviser can only hand over information to the revenue authorities upon receiving approval from the taxpayer. (Croome, 2010a:146.)

Whilst these restrictions exist, the information is not completely protected as the taxpayer can eventually be compelled to submit the information or grant his tax adviser permission to submit the information. Germany has not been selected for this study as the restriction of access to taxpayer information is very limited and not considered appropriate in the context of this study.

4.2 COUNTRIES SELECTED FOR THE PURPOSE OF THIS STUDY

At present none of the African countries have extended or are currently considering extending this privilege to non-legal tax practitioners. Therefore it is rather unfortunate that this study will not be able to compare South Africa to any other African country with regard to the application of the principle of legal professional privilege in relation to non-legal tax practitioners.

South Africa could potentially become the first “Third World” country to extend this privilege to accountants. Furthermore, none of the BRICS countries have extended or are currently considering extending legal professional privilege to accountants.

It is anticipated that once South Africa makes a policy decision on whether it will encompass non-legal tax practitioners within the ambit of legal professional privilege, many other African countries will follow suit as these countries draw on South African jurisprudence in areas such as taxation (Jani, 2010:10).

There is also the possibility that other BRICS countries may also follow suit in an attempt to align their tax policies with other first world countries and South Africa being a key member of BRICS.

Due to the limited number of countries that have actually extended or are currently considering extending legal professional privilege to non-legal tax practitioners it is only possible at this stage to consider the four countries mentioned above. Whilst it may appear that we are forced to rely on countries such as the USA, the UK, New Zealand and Australia, these countries are still considered suitable for the following reasons:

- The USA:
 - It is common knowledge that this country is considered to be a world leader in all industries and its opinions in respect of tax reform and other legislation is held in high regard around the world.
- The UK:
 - South Africa has a long linked history to the UK as:

- South Africa is a former British colony which was under British domination for the period 1910 to 1934 (The British Empire, 2013);
- South Africa was also a member of the Commonwealth (The British Monarchy, 2013);
- the South African legal system is also based on Roman Dutch law (Glendon, Gordon & Osakwe, 1982:12);
- historically South Africa has relied quite significantly on the UK with regard to tax reform and in respect of principles established in case law. A high level of reliance is placed on the judgements carried out in the UK as cited in cases such as *Zwelibanzi Utilities v TP Electrical Contractors*, 2011 (10) SA 160 (SCA) and *The State v T Makwanyane and M Mchunu*, 1995 (3) SA 94;
- it should also be noted that the latest case law with regard to the extension of the right to legal professional privilege to accountants is in respect of the UK Supreme Court judgement of *Prudential PLC and Another v Special Commissioner of Income Tax and Another*; and
- from a world-wide perspective heavy reliance is currently placed on this case in determining whether to extend this privilege to accountants
- New Zealand and Australia
 - both these countries are also former British Colonies who were under dominion until 1947 and 1942 respectively (The British Empire, 2013);
 - both countries are currently members of the Commonwealth (The British Monarchy, 2013); and
 - these countries also have similar types of economies and have a close trading relationship with South Africa (Boland, 2012; New Zealand Embassy, 2011).

Based on the above reasoning, these countries are considered appropriate for the purposes of this study.

4.3 THE UNITED STATES OF AMERICA

As mentioned above, the USA permits the extension of legal professional privilege to accountants via a statutory provision. This extended privilege is commonly referred to in the USA as “tax-practitioner client privilege” and aptly named in order to differentiate it

from the normal legal professional privilege (i.e., which is commonly referred to in the USA as “attorney client privilege”).

However, prior to discussing the actual statutory provision and the application thereof, it is important to consider the evolution of this principle in the USA prior to its extension to accountants.

Prior to the introduction of tax-practitioner client privilege, only two types of privilege existed in the USA. The first being legal professional privilege and the other being “work product privilege”. Any one of these privileges could be utilised as basis upon which a taxpayer could refuse to submit information to the IRS. (Croome, 2010a:147.)

Whilst a proper understanding of legal professional privilege is obtained from Chapter Two, for the purposes of understanding the concept of “work-product privilege” a brief explanation is detailed as follows:

- information gathered and compiled by an attorney who is *anticipating litigation* or is in the *process of preparing for trial* is not accessible by the courts (Croome, 2010a:148).

This privilege cannot be utilised by non-legal advisers as it is purely for legal professionals who represent taxpayers at court. Therefore this type of privilege falls outside the scope of this study consequently no further research has been undertaken in this regard.

There are several cases that deal with the applicability of legal professional privilege in the USA, many of which are detailed in Chapter Two. Therefore only those that were considered most relevant have been chosen for the purposes of understanding the evolution of this principle in the USA have been detailed below.

According to Gruetzmacher (2001:977-978) a landmark case in the USA was the case of *United States v Kovel* 296 F. 2d 918 (2d Cir. 1961) where the court held that “the presence of an accountant ... while the client is relating a complicated tax story to the lawyer, ought not [to] destroy privilege...” However, despite this judgement there is no longer certainty as to whether communications among client, their attorneys and accountants are subject

to legal professional privilege as over the years the courts have significantly narrowed the applicability of this judgement.

Section 2.5.5 of Chapter two (2) of this study notes additional cases whereby it was ultimately held that the right to legal professional privilege was not appropriate, as the taxpayer had waived such right in making certain disclosures to their accountants.

Gruetzmacher (2001:977-978) indicates that there is currently very limited protection for taxpayers who communicate confidential information to accountants as a result of these subsequent cases. Furthermore, the limited "... protection remaining is often confusing and unpredictable."

A notable case where the taxpayer wished to utilise the judgement in *United States v Kovel* was the case of *United States v Ackert* 169 F. 3d at 1500 n.1. In this case, the court held that communications between the taxpayer and the third party were merely to obtain additional information "... about the proposed transaction and its tax consequences..." and not to translate or interpret information. Consequently reliance could not be placed on the *United States v Kovel* judgement. This notion was thereafter confirmed in the case of *Calvin Klein Trademark Trust v Wachner* 198 F.R.D. 53 (S.D.N.Y. 2000). (Gruetzmacher, 2001:985.)

Another important case to consider is the case of the *United States v Arthur Young & Company* 465 U.S. 805 (1984). This case involved the IRS querying several "questionable" payments identified during a routine income tax audit of Amerada Hess Corporation (a client of Arthur Young & Company). Upon the IRS instituting criminal action against the client, it issued a summons to Arthur Young in order to obtain the tax accrual work papers. The court held that in this case attorney-client privilege was not applicable as the information requested was not prepared by the taxpayer's attorneys. The *taxpayer argued that a policy decision should be made to create a new auditor-client privilege* however, failed in this argument and lost the case to the IRS. (Wingenter, 2008:340-341.)

Wingenter (2008:341) also notes that subsequent to this verdict the Internal Revenue Manual was refined as follows:

- the request for tax accrual work papers was only permitted in exceptional or unusual cases;
- the request must be limited to only those tax accrual work papers deemed necessary to address the issue at hand; and
- the request must be approved by a senior revenue official in writing.

It is important to note, however, that regardless of these restrictions imposed on the IRS, it still had the right to request the tax work papers as this precedent was laid down in the *United States v Arthur Young* case.

Whilst the current discussion is in respect of the USA, it is important to note that South Africa also had a similar agreement in place with SARS in terms of circular 5 which was issued in 1998. This circular laid down very similar procedures to be followed by SARS in the event of an investigation that called for submission of audit files (i.e. the equivalent of work papers in the USA). This circular has been recently been withdrawn however, the fact that South Africa had such a policy in place is considered important for the purposes of this study.

The main points of note in this circular are detailed as follows:

- audit working papers include the following:
 - “the client’s permanent file;
 - the working papers in respect of each financial year or year of assessment;
 - *the tax working papers file; and*
 - the correspondence file in respect of the client’s affairs.
- SARS undertook not to request audit files indiscriminately and first to request information from the taxpayer before reverting to the tax practitioner;
- written authorisation from the Chief Revenue Inspector, or relevant receiver of revenue, of “... one of the 11 branches of the Special Investigations Division “ must be obtained and given to the tax practitioner upon requesting the audit files;
- the authorised person can only issue the written authorisation once he has been provided with a written motivation as to why such files are required and is satisfied that the reasons provided are adequate;
- it is therefore implied that audit work papers were only requested in exceptional circumstances, similar to the policy adopted in the USA;

- clause 18 of this circular specifically deals with files and documents containing *opinions given on any aspect of law*. In terms of this section “SARS acknowledges that in the case of opinions being expressed on points of law, a need for candour between members and their clients is necessary”;
- clause 18 goes on to note that “should any of the audit files contain an opinion given on an aspect of law, the member must inform SARS, when such audit working paper file is called for, of the existence of the document or documents”;
- clause 19 specifically states that “should it be proved necessary for SARS to remove files, *such document or documents may be detached from the file and retained by the member.*” This clause served to protect this type of information from be scrutinised by SARS;
- with regard to matters in dispute SARS undertook not to request audit files where it was evident that the matter would proceed to court but reserved the right to request audit files in an attempt to the resolve the matter without going to court or where the taxpayer had not provided SARS with sufficient information to “... assess the validity of an objection”;

Based on the above it is noted that South Africa also had a proper procedure in place to deter unnecessary requests for information from the taxpayer and specifically safeguard information such as tax opinions. Whilst it is noted that this was not a statutory provision therefore was not binding on either party, it is contended that this circular provided some level of comfort to the taxpayer in ensuring that information was protected from potential fishing expeditions by SARS.

Upon consulting with the SAICA Technical Committee (2013b) in respect of the date of withdrawal of this circular, a written communication was provided in this regard which noted the following:

- SAICA revised the circular to align it with the Tax Administration Act – in particular the definition of “relevant material” and the provisions of section 46 and 48.”;
- A meeting was then held between SAICA and SARS to discuss the issuing of a revised circular;

- Whilst SARS agreed that some form of guidance was required in order for SARS officials to adhere to the information gathering provisions of the Tax Administration Act, they were not amicable to issuing such circular;
- Instead SARS indicated that they would prepare a similar document to circular 5 and make it publicly available so that it would be applicable to any person not just a tax practitioner who is a member of SAICA;
- SARS is of the view that reliance should be placed on section 46 (3) which reads as follows:
“a request for information by SARS for relevant material from a person other than a taxpayer is limited to *relevant information* related to the records maintained or that should reasonably be maintained by the person in relation to the taxpayer.”;
- SAICA then notes that “one will principally have to prove that the working papers are not relevant information that should be maintained by the SAICA member.” (own emphasis); and
- Finally, SAICA notes that they “will continue to pursue the matter.”

As this meeting between SARS and SAICA was rather recent, the document mentioned has not yet been released. Its release is much anticipated and will hopefully limit any potential abuse by SARS officials to gather information outside the scope of “relevant information”.

The USA extended the principle of legal professional privilege to non-legal tax practitioners in 1998 under the leadership of Bill Clinton. This change was incorporated in the Internal Revenue Service Restructuring and Reform Act 1998 in terms of section 7525. (Jani, 2010:76.)

Croome (2010a:147) indicates that this privilege was introduced in an effort to undo the decision in the case of the United States v Arthur Young where the court found that auditor working papers were not protected under the ambit of legal professional privilege.

Jani (2010:77) contends that this change was due to the need to provide equal protection of tax advice from being compelled to disclosure regardless of whether such advice was received from an attorney or an accountant.

According to Joyce (in Jani, 2010:77), there were three main reasons why the USA decided to extend this privilege to non-legal tax practitioners. These are detailed as follows:

- in order to respond to the aggressive behaviour of the Internal Revenue Service (herein-after referred to as the “IRS”) in the USA in respect of conducting lifestyle audits and determining one’s financial status;
- in order to level the playing fields between the accounting and legal professions as the Congress of the United States believed that attorneys had an unfair advantage in rendering tax advice in comparison to accountants due to this privilege only being available to attorneys; and
- in order to ensure that taxpayers were not penalised, with regard to the confidentiality of information, on the basis of which professional they chose to consult with.

All of the above stated reasons for the introduction of this tax-practitioner client privilege are sound and are indicative of similar problems that currently exist in South Africa.

In terms of the Internal Revenue Service Restructuring and Reform Act 1998, this provision came into effect on promulgation of this Act and applies to all communications made on or after 22 July 1998.

Section 7525 of the Internal Revenue Service Restructuring and Reform Act stipulates the following:

“with respect to tax advice, the same common-law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorised tax practitioner to the extent that the communications would be considered a privileged communication if it were between a taxpayer and an attorney.” (Croome, 2010a:148).

Based on the wording of this provision it is clear that tax-practitioner client privilege is only applicable to the extent that the information, if provided to an attorney, would be eligible to the right to legal professional privilege. Therefore the privilege does not extend to any

information supplied to the tax practitioner for the purposes of completing a client's tax return. (Croome, 2010a:148.)

Based on the wording of this provision it is noted that although this tax-practitioner client privilege is a statutory provision it is very closely linked to the common law doctrine of legal professional privilege. Therefore any developments in the common law doctrine of legal professional privilege will have an effect on the statutory provision detailed above. Whilst this may be considered appropriate to ensure that the privilege in relation to accountants and attorneys remains aligned, the scope of legal professional privilege is much wider than the scope of this tax-practitioner client privilege. Therefore there is a possibility that unintended consequences may arise in future which may require further statutory intervention.

Gruetzmacher (2001:981,994) analyses this section as follows:

- The privilege is only applicable to a “federally authorised tax practitioner” who is defined, in terms of section 7525 (a) (3) (A), as “any person authorised to practice before the IRS, including accountants”. This ensures that both accountants and attorneys are now on a level playing field;
- The privilege is not applicable to any communications between the taxpayer and tax practitioner “... in connection with the promotion of the direct or indirect participation...” of that taxpayer in any tax shelter. A tax shelter is defined, in terms of section 6662 (d) (2) (C) (iii), as “a partnership or other entity, any investment plan or arrangement, or any other plan or arrangement is the avoidance or evasion of Federal income tax.” This restriction with regard to communication carried out in respect of tax shelters is not subject to tax-practitioner privilege and is considered unnecessary as there is no such restriction in the case of an attorney. If the goal of this section was to ensure that accountants and attorneys were placed on an equal ground, there is no basis for this additional restriction; and
- The restriction to the communication being only between the taxpayer and tax practitioner causes some ambiguity. This is due to instances where, as demonstrated in the United States v Kovel, communications involve all three parties (i.e., the taxpayer, the accountant and the attorney). There is uncertainty whether that communication would be subject to tax-practitioner client privilege or not. Due to this

limitation it appears that the judgement in the case of *United States v Kovel* is still considered relevant.

Based on the above, it is concluded that South Africa could benefit immensely by introducing a similar provision in our tax acts to ensure that the current discrimination that exists in respect of taxpayers that consult with accountants and those that consult with attorneys are eliminated.

It is noted that the wording of section 7525 of Internal Revenue Service Restructuring and Reform Act is very clear and simple. Therefore it may be wise for South Africa to follow suit and not try to complicate the wording of this provision. However, consideration must be given to the current limitations and restrictions as noted above. It is recommended that the wording of the South African version of “tax-practitioner-client privilege” should be refined to ensure that these limitations and restrictions are addressed.

4.4 NEW ZEALAND

This is the only Commonwealth country that currently encompasses non-legal tax practitioners within the ambit of legal professional privilege.

According to Jani (2010:84), the principle of legal professional privilege initially came about in New Zealand following the Court of Appeal judgment in the case of the Commissioner for Inland Revenue v West Walker, 1954 NZLR 191. It was concluded in this case that the information gathering powers of the Commissioner for the Inland Revenue (herein-after referred to as the “IR”) was subject to legal professional privilege. This decision was then incorporated into section 16A of the Inland Revenue Department Act 1952 of 1958. However, this right was only applicable to legal advisers (i.e., attorneys).

Subsequently this provision was replaced by section 20 of the Tax Administration Act in 1994 which also limited the privilege to legal advisers (Jani, 2010:84).

The principle of legal professionals was then extended to non-legal tax practitioners in New Zealand in terms of the Taxation (Base Maintenance and Miscellaneous Provisions)

Act 2005. This effectively introduced sections 20B to 20G into the Tax Administration 1994 which created a statutory privilege which is independent of the common law principle of legal professional privilege which is only applicable to attorneys.

The actual wording of these provisions is quite lengthy as it aims to specify the exact circumstances within which this privilege is applicable. Therefore, for the purposes of this study, it was considered more appropriate to analyse the Standard Practice Statement which was published by the IR on 25 July 2005 as it provides guidance on the application of this privilege. Points of note are detailed as follows:

- General background of this privilege
 - the privilege is applicable in respect of requests for information from the IR after 21 June 2005 (i.e., the effective date of sections 20B to 20G) and in respect of communications between a tax adviser and client that was created on or before that date;
 - the right to non-disclosure belongs to the taxpayer not the tax advisor;
 - the privilege can only be exercised in terms of a request for information in terms of sections 16 to 19 of the Tax Administration Act;
 - the statutory right also applies to specific documents that are prepared by taxpayers in order to obtain advice from legal or non-legal tax practitioners;
 - the ability to request “tax contextual information” (i.e., a term that is detailed below) is restricted to officials “... at an appropriately high level of delegated authority.” This will ensure that compliance costs are minimised and the spirit in respect of the right to non-disclosure remains and is not undermined;
 - voluntary disclosure of information that constitutes tax advice documents results in a waiver of the right to the claim to privilege or non-disclosure;
 - the Commissioner may make application to the District Court in order to challenge a claim by a taxpayer that such information is privileged; and
 - the secrecy provisions allow for disclosure by the Commissioner of taxpayer information to an approved adviser group in order to institute disciplinary action against a tax adviser if the Commissioner believes that the tax adviser has breached his responsibilities in terms of the right to non-disclosure.
- The underlying principles of this privilege are :
 - The meaning of “tax advisor” and “approved adviser group”;

- In terms of section 20B (4) of the Tax Administration Act a tax adviser is a person who renders tax advice and is “subject to an approved adviser group’s code of conduct and disciplinary procedures”;
- It is further noted that the privilege *is also applicable to “tax advisers who are not [qualified] Chartered Accountants but subject to an approved adviser group’s code of conduct and disciplinary procedures”*;
- This Statement goes on further to note that “*generally, due to the professional standards imposed through the approved adviser group’s code of conduct in giving tax advice, a tax adviser will be someone who is technically qualified, experienced and competent to advise on the operation and effect of tax laws.*”;
- The definition of “tax advisor” includes both tax advisers in public practice and those who practice in-house; and
- Section 20B (5) of the Tax Administration Act defines an “approved adviser group” as a group of natural persons who have the following three basic criteria:
 - Mainly involved in the rendering of tax advice (i.e., interpretation of tax laws); and
 - “Subject to the professional code of conduct” and disciplinary processes of that group.
- The “approved adviser group” must be approved by the Commissioner before the privilege can be exercised on behalf of the taxpayer. A list of the approved groups is available on the IR’s website.
- Meaning of “tax advice document”:
 - There are three basic requirements for a document to be considered tax advice, these are:
 - Document must be considered “*eligible to be a tax advice document*”;
 - This implies that the taxpayer must have intended for the document to be *confidential*. It is important to note that communications with the taxpayer’s legal advisers, financial advisers, shareholders or employees will not result in a breach of confidentiality;
 - Document must be created by the taxpayer for the purposes of obtaining tax advice about the application of a tax law;

- Document must be created by the tax adviser for the main purpose of rendering advice to the taxpayer on the application of a tax law; and
- Document must not be created with the purpose of facilitating any illegal, fraudulent or wrongful act such as tax evasion.
- This statement also notes that “*documents which simply record decisions or transactions, set out calculations or summarise facts, whether or not they are part of the process of generating tax advice will not be eligible to be tax advice documents. Documents or forms completed for the main purpose of meeting tax compliance obligations will also not be eligible to be tax advice documents.*”; and
- This statement goes on to identify the specific types of documents which will not qualify as tax advice documents such as “tax calculations, “transfer pricing reports”, provisional tax workings, valuation reports, letters of engagement and so forth.
- The taxpayer or his authorised tax adviser must *make a claim* that the document is a tax advice document; and
 - This claim must be submitted within the stipulated time frame.
- the taxpayer must *meet the disclosure requirements* with regard to “tax contextual information”;
 - “Tax contextual information means information relating to a tax advice document...”... that falls into any of the following categories”:
 - “Facts or assumptions” in respect of the transaction;
 - “A description of steps involved in” carrying out the transaction;
 - Advice in respect of the application of *non-tax laws*; and
 - “Accounting and tax work papers which support the financial statements and tax return”.
- Application of the privilege:
 - A two-step process must be followed upon a request for information by the IR:
 - Firstly, the taxpayer or his authorised tax adviser must make a claim to the right to non-disclosure of information within the stipulated time frame; and
 - An extension of this time period is permitted at the discretion of the Commissioner.

- Secondly, the factual content of the information requested must be provided to the Commissioner. This is the tax contextual information as described above.

Upon analysis of this incredibly detailed provision it is clear that the requirements for the application of privilege to tax advice are very specific. Jani (2010:87) states that this provision sought to avoid some of the short comings of the privilege available to accountants in the USA as it was drafted subsequent to the promulgation of section 7525 of the Internal Revenue Service Restructuring and Reform Act in the USA. Section 20B to 20G of the Tax Administration Act is very precise in terms of the scope of information that is privileged and the time limit within which one can make a claim to such privilege.

The above noted fundamental requirements for the application of privilege to tax advice in New Zealand is very similar to the recently enacted legal requirements in South Africa in terms of the regulation of tax practitioners via the Tax Administration Act. For example:

- All tax practitioners, including accountants, are required to be registered with a “recognised controlling body” in terms of section 240A. This is the equivalent of an “approved adviser group” in New Zealand;
- Section 240A, apart from identifying certain institutes such as IRBA, the Law Society and the General Council of the Bar of South Africa, also makes provision for other controlling bodies to be approved by the Commissioner if they meet certain requirements such as having appropriate codes of conduct and disciplinary processes. These are detailed in full in Chapter Two along with the list of recognised controlling bodies as approved by the Commissioner;
- Section 242 also contains an overriding clause with regard to the secrecy provisions of section 69 as it gives SARS the power to disclose taxpayer information in order to lodge a complaint with a controlling body; and
- The South African courts also have the inherent power to determine if information that is claimed to be privileged is actually eligible to such privilege as detailed in terms of Chapter 2.6.

It can therefore be concluded that this privilege could easily be introduced in South Africa, now that tax practitioners are properly regulated in terms of the Tax Administration Act, as

we already have the majority of the underlying principles in place to effectively make use of this privilege.

4.5 AUSTRALIA

Australia currently only permits the right to legal professional privilege to legal tax practitioners in terms of common law. However, the Australian Tax authority currently permits an *administrative concession* to taxpayers of non-legal tax practitioners. (ATO, 2010.)

The details of this administrative concession is contained in Chapter 7 of the Access and Information Gathering Manual (March 2010 version) issued by the ATO. Chapter 7 of the Manual is summarised as follows:

- the objective of this concession is to allow taxpayers to consult freely with accountants to ensure a full understanding of their rights and obligation under tax laws and to ensure that tax advice sought is appropriately disclosed to the taxpayer;
- this concession is only available to external independent accounting advisers;
- the onus of proof lies with the claimant to substantiate the basis of the claim;
- the concession is waived if the taxpayer makes the information available to the ATO;
- the concession does not apply to "... documents that relate to non-tax purposes.";
- documents are classified in terms of the categories which are:
 - "source documents (records of transactions – not protected);
 - restricted source documents (advice documents shedding light on transactions - protected); and
 - non-source documents (other advice documents – protected)."
- the concession may be lifted in exceptional circumstances by the Commissioner where he is of the opinion that he does have adequate information "... to determine the tax consequences of particular transactions" based on the documentation provided by the taxpayer;
 - if this does occur the Commissioner will still seek only to obtain the *factual information* with regard to the tax advice rendered.

- two cases involving the accountants' concession are also detailed. The following is noted in this regard:
 - Deloitte Touche Tomhatsu v Deputy Commissioner of Taxation (1998) 98 ATC 5192 (1998) 40 ATR 435; and
 - in this case the taxpayer instituted a judicial review on the decision of the ATO to request information it considered to be protected in terms of this concession;
 - the taxpayer placed reliance on the fact that the ATO would have to follow the guidelines laid down in this manual in order to obtain its accountants records and proposed that the ATO had not adhered to these guidelines;
 - the court confirmed that non-adherence to the guidelines was just cause for a motion to institute a judicial review; and
 - ultimately the court concluded that the information sought by the ATO constituted "source documents" in accordance with these guidelines therefore was not protected. Furthermore, the court found that the office of the ATO had given adequate consideration to the guidelines and the manual.
- ONE.TEL Ltd v Deputy Commissioner of Taxation (2000) 101 FCR 548; 2000 ATC 4229.
 - the ATO issued a request to the taxpayer in respect of restricted source and non-source documents;
 - in response to this request the taxpayer issued a letter to the ATO which "... expressly recognised the issue of the possible application of the anti-avoidance provisions of the STAA and did not seek further particulars.";
 - the ATO regarded this as being an "exceptional circumstance" as there was a "...possible application of the anti-avoidance provisions.";
 - the taxpayer also brought about a review of the ATO's decision on the basis that they had a legitimate expectation that they would be able to defend any claim of exceptional circumstances in order to protect the information in question prior to any action being taken by the ATO;
 - the court held that the manual gives rise to two types of legitimate expectations which are:
 - a *general legitimate expectation* whereby the ATO is obliged to adhere to the guidelines set out in the manual without providing the taxpayer an opportunity to make any representations why this action should not be carried out;

- *a specific legitimate expectation* which obliges the ATO to allow the taxpayer to make representations, in the case where it considers there to be exceptional circumstances, prior to any action taken in accordance with the guidelines;
- an exception to these rules would be the case where there is a high possibility of the destruction of documents by the taxpayer;
- the judge also noted that whilst a taxpayer has the legitimate expectation of being informed of the reasons for the exceptional circumstance arising consideration must also be given as to whether such person should have anticipated this case as giving rise to exceptional circumstances based on the facts of the case; and
- in this matter the court held that the taxpayer ought to have known that the utilisation of an anti-avoidance provision would give rise to an exceptional circumstance therefore no further action was required by the ATO and its application for review of the ATO's action was rejected.
- documents prepared by a taxpayer's accountants predominantly for the purposes of obtaining legal advice or in respect of anticipated litigation may be subject to either legal professional privilege or the accountants' concession; and
- specific steps are set out in section 7.6 of this manual with regard to the process to be followed in the case where there is a dispute between the claimant and the ATO with regard to whether the documents requested are subject to the accountant's² concession. These steps are not considered to be relevant for the purposes of this study therefore have not been detailed further.

In addition to the accountant's concession that currently exists in Australia consideration is being given by policy makers as to whether a statutory provision should be introduced to extend legal professional privilege to accountants. This is confirmed by way of the ALRC's report on the review of legal professional privilege and federal investigatory bodies in which it recommends that this privilege be extended to accountants (Jani, 2010:76.)

The relevant details of this review report, issued by the ALRC, are noted as follows:

- rationale of legal professional privilege

- section 2.63 states that “... the doctrine of client legal professional privilege is a fundamental principle of the common law providing an essential protection to clients, enabling them to communicate fully and frankly with their lawyers and those who may lawfully provide legal advice. The protection of confidentiality of such communications facilitates compliance with the law and access to a fair hearing in the curia and non-curial contexts, thereby serving the *broad public interest in the effective administration of justice*” (own emphasis);
- section 2.64 goes on to state that comments and submissions in respect of this topic revolve around either supporting the continuation of this principle in order to ensure administrative justice is maintained, consideration as to whether the principle should be abolished in totality and identification of the real issues at hand; and
- thereafter section 2.65 confirms that there has been an overwhelming amount of submissions which are “... in favour of the continuation of legal professional privilege”. This is due to the fact that it ensures proper administrative justice and promotes complete disclosure by clients which effectively ensures greater tax compliance and encourages the settlement of disputes.
- comparison with other countries
 - sections 6.213 to 6.222 take into consideration the current status of legal professional privilege in other countries such as the USA, New Zealand and the UK.
- current issues with the status of legal professional privilege in Australia
 - section 6.231 notes that the accountants’ concession does not afford as much protection to the taxpayer as that afforded by legal professional privilege. Although a legitimate expectation is created due to the ATO being obliged to adhere to the guidelines, these guidelines are not supported by any statutory provision. The guidelines do not provide any “... additional legal rights to taxpayers.”; and
 - in terms of section 6.233 it is stated that many accountants have argued that it is only logical for legal advice rendered by a professional adviser should be protected regardless of the type of professional consulted.
- submissions by consultants regarding the extension of the privilege

- section 6.235 notes the comments made by the Institute of Chartered Accountants in Australia in its submission to the ALRC with regard to the extension of legal professional privilege to non-legal advisers;
- it stated that “... the fact that Australia has not yet adopted a formal legislative framework extending client legal privilege to tax advice or opinions tax law, suggests it is out of step with global concepts on tax administration and commercial reality.”;
- it also noted that a statutory provision would allow accountants and tax agents to “be on an equal footing to client professional privilege currently afforded to lawyers in respect of curial and pre-curial contexts.”;
- the Corporate Tax Association notes in section 6.236 that the principle of legal professional privilege came into being many years ago when only lawyers provided legal advice. This was due to the fairly simple tax laws that existed at that time as well as the simple business type transactions that occurred. Much has evolved since then with regard to the complexity of business transactions as well as the laws and regulations. Therefore it is considered necessary that this privilege be extended to accountants who are frequently consulted with regard to providing legal advice. A recommendation is made to “... follow the lead of countries such as... ” USA, New Zealand and the UK in this regard;
- similar submissions were made by the Australian, Financial Markets Association, Kendall, the Taxation Institute of Australia and the Australian Government Solicitor in terms of sections 6.237, 6.238, 6.241 and 6.424 respectively;
- the Law Council and Law Society submitted similar comments, highlighted in sections 6.239 and 6.240, in noting that the reason for legal professional privilege being limited to lawyers is due to lawyers being considered officers of the court who are subject to a great degree of regulation. This ensures that a significant amount of care is exercised when making a claim to privilege which may not be the case with other professionals. Regard must be given as to the regulation of other professionals in relation to lawyers to determine if it is adequate to permit such extension; and

- the Australian Crime Commission and the Insolvency and Trustee Service Australia, expressed concern, in terms of sections 6.262 and 6.263 respectively, that the restriction to access to information may hinder their ability to carry out their functions with regard to investigations involving tax complex matters. A similar view was shared by the Insolvency Practitioners Association in terms of section 6.264.
- ATO's views and recommendations
 - the ATO notes, in section 6.255, that as far as it is aware the current accountants' concession is functioning effectively therefore does not consider it necessary for this concession to be enshrined in legislation;
 - the ATO goes on further to note in section 6.256 that it agrees with the ALRC's proposal to follow the statutory framework of New Zealand should a decision be taken to extend this privilege to accountants via statute;
 - the ATO also recommends that the USA's restriction with regard to the privilege not being applicable to cases where the taxpayer seeks to utilise a tax shelter also be considered if this statutory right is enacted; and
 - Finally, consideration must be given as to whether the "... concession can be lifted where exceptional circumstances exist."
- ALRC's views and proposals
 - the ALRC takes into consideration the "compliance rationale" in ensuring administrative justice as a major aspect of the doctrine of legal professional privilege;
 - the Australian tax regime, which is basically a self-assessment system, is rather complex and requires a great deal of understanding by taxpayers of their rights and obligations prior to assessing their tax liability. Therefore the ATO has provided a concession to taxpayers who consult with accountants to obtain tax advice;
 - the ALRC also notes that it is influenced by the fact that tax advice is subject to privilege in other countries such as the USA and New Zealand;
 - the ALRC recommends that this privilege be legislated in relation to tax advice provided by accountants and "... supports the New Zealand model of creating separate tax advice privilege, rather than simply extending client legal privilege to accountants giving tax advice.";

- the ALRC also notes additional restrictions as follows:
 - a “dominant purpose” test is proposed which ensures that the information under protection was provided with the dominant purpose of providing tax advice;
 - an additional protection is proposed whereby an *attorney* must confirm that the information in question is dominantly for the purposes of obtaining tax advice;
 - advice that facilitates a crime or fraud should not be protected;
 - the differentiation with regard to source documents and advice documents, as currently provided for in terms of the accountants’ concession, must also be included in the statutory provision. This will ensure that documents provided to a tax adviser for the purpose of obtaining tax advice are not subject to protection in terms of this privilege;
 - the New Zealand stance on tax contextual information is also considered appropriate to ensure that any factual information is still disclosed to the ATO;
 - the ALRC also notes that the tax adviser must be a registered tax agent who is a qualified tax accountant;
 - the ALRC also proposes that similar to the USA and New Zealand, the application of this privilege is restricted to the information gathering powers of the ATO “... and will not affect the investigatory powers of other agencies.”; and
 - the ALRC notes that the USA’s reference to restriction of privilege in relation to advice linked to tax avoidance (i.e., tax shelters) is considered unnecessary in the Australian context as the fact that the privilege does not apply to criminal or fraudulent activities should inevitably cover this. Furthermore, most tax advice results in the minimisation of taxes therefore this restriction causes some confusion on the applicability of the privilege. For these reasons the ALRC do not consider it appropriate to include this provision.

Jani (2010:90) notes that this proposal has faced severe resistance from the Australian Law Council which claims that there is no historical or institutional basis for extending this privilege to non-legal tax advisers.

In addition to this report by the ALRC, the Australian Treasury also issued a discussion paper in April 2011 which basically summarises the findings of the ALRC as noted above and makes further recommendations for the introduction of a tax advice privilege (Australian Treasury, 2011:1-19).

Some of the additional points of note in this discussion paper are:

- Tax attorneys and tax accountants compete regularly for the same business therefore to ensure competitive neutrality the communications in respect of the tax advice obtained should be treated the same. “A tax advice privilege would mitigate this bias.” (Australian Treasury, 2011:12.);
- The proposed statutory provision indicated by the ALRC could be incorporated into the Tax Administration Act 1953 so as to differentiate it from the current common law principle of legal professional privilege which has much wider powers. However, in doing so an additional issue arises in terms of the exchange of information between the ATO and other agencies. For example if the Australian Crime Commission was in possession of privileged documents which were being sought by the ATO, would the ATO be able to gain access to those documents? Consideration must be given to the access of privileged information from third parties via independent means. Furthermore, does the tax advice privilege only apply to documents requested from the client or tax adviser at the investigation stage or does it still apply if that matter proceeds to court? (Australian Treasury, 2011:17.); and
- The discussion paper concludes with a series of questions aimed at obtaining the public’s views on whether the tax advice privilege should be introduced and the scope of this privilege (Australian Treasury, 2011:18-19).

Whether Australia will adopt the change recommended by the ALRC, remains to be seen. However, a significant amount of time has now passed since the issuance of this report by the ALRC. Therefore it is hoped that the proposals by the ALRC, as noted above, will be incorporated into statute soon. If South Africa does decide to extend legal professional privilege to accountants, it is recommended that certain of the additional safeguards proposed by the ALRC also be taken into account as the basis for each of the recommendations is sound and will ensure proper compliance with this administrative process.

4.6 THE UNITED KINGDOM

The UK also has not yet extended the right to legal professional privilege to accountants but, similar to Germany, there are certain restrictions in place whereby Her Majesty's Revenue and Customs (herein-after referred to as "HMRC") cannot request certain documentation from a tax practitioner. Furthermore, the tax practitioner cannot hand over documentation to the HMRC without approval from the client.

These restrictions are contained in paragraphs 24 to 26 of Schedule 36, contained in section 113 of the Finance Act 2008. Upon analysing the wording of these provisions it is also noted that these restrictions are only applicable to tax advice held by tax accountants. Any information pertaining to a tax return or other compliance documents are not subject to these restrictions.

Whilst the UK has not extended this privilege to accountants, consideration must be given to the recent Supreme Court case of *Prudential PLC and Another v Special Commissioner of Income Tax and Another* as this case deals with the issue of the extension of legal professional privilege to accountants.

Prior to analysing the detailed judgement issued on 23 January 2013 by the Supreme Court of Appeal, it is important to note the underlying dispute of this case as well as the reasons for the rejection of this case in the High court and the Court of Appeal.

Croome (2010c:2) summarises the facts and underlying dispute of this case as follows:

- the HMRC requested documents from the taxpayer which led to the dispute arising as the taxpayer claimed that the documentation was privileged;
- however, certain of the documents were prepared by the taxpayer's accountant therefore under common law was not subject to legal professional privilege; and
- the taxpayer sought to extend the doctrine of legal professional privilege in order to protect the documents from being disclosed to the HMRC.

The issue addressed by the court is set out by Lord Justice Lloyd in paragraph 2 of the judgement issued by the Court of Appeal on 13 October 2010, reads as follows:

“In the present case, the Claimants and Appellants (whom I will call *Prudential*) seek to establish that the principle extends further than has yet been recognised. They assert (and it is not really in dispute) that, nowadays, on many if not most occasions on which a person seeks advice about fiscal liabilities, which often involves a consideration of, and advice about, the relevant law, that person does so by approaching accountants rather than lawyers. They contend that the rationale which lies behind the LPP rule requires that a client’s communications with his advisers should be just as much protected from disclosure if the advice, being legal advice is sought from and given by an accountant as if the advice given is sought from and given by a solicitor or barrister.”;

In the High court, it was held by Charles, J that he was not in a position to rule against a precedent that was set by a higher court which had previously determined that legal professional privilege was only applicable in relation to legal advice provided by barristers and solicitors in the professional capacity (Croome, 2010c: 2).

The taxpayer, dissatisfied with this judgement, lodged an appeal to this decision to the Court of Appeal which was concluded on 13 October 2010. Upon this matter being referred to the Court of Appeal several institutes were granted permission to intervene in the court proceedings. As noted in paragraph 9 of this judgement this intervention was due to “the importance of the issues.” These institutes are listed as follows:

- the Institute of Chartered Accountants in England and Wales;
- the General Council of the Bar;
- the Law Society of England and Wales;
- the Legal Services Board; and
- the Association Internationale Pour La Protection De La Propriete Intellectuelle UK Group.

In this case the court confirmed that the extension of legal professional privilege to non-legal tax practitioners was the duty of the policy makers and not the courts. Although this judgement did not allow for legal professional privilege to be extended to accountants the fact that the court could not “in principle” find any reason why this privilege should not be

extended to accountants may have a great bearing in terms of persuading the South African Government in permitting this extension. (Pricewaterhouse Coopers, 2013:5.)

The taxpayer, still dissatisfied with this decision noted an appeal with the Supreme Court, the judgement of which was delivered on 23 January 2013 as noted above.

In analysing the lead judgement, as set out by Lord Neuberger, from the Supreme Court of Appeal the following is noted:

- paragraph 24 sets out the issue on appeal as follows:
 - “the particular issue on this appeal is whether LAP should attach to communications passing between chartered accountants and their client in connection with expert tax advice given by the accountants to their client, in circumstances where there is no doubt that LAP would attach to those communications if the same advice was being given to the same client by a member of the legal profession.”;
- paragraph 25 noted that both the taxpayer and the Institute for Chartered Accountants for England and Wales submitted that due to legal professional privilege being a common law right which was created by the courts it is up to the courts to make a decision as to when the privilege is applicable and whether it is necessary to grant an extension to the privilege;
- paragraph 27 notes the counter argument by the HMRC, together with the Law Society, Bar Council and the Association Internationale Pour La Protection De La Propriete Intellectuelle UK Group, whereby it was submitted that “... it has been universally assumed that LAP is restricted to advice given by lawyers, and the court should not extend it to accountants in connection with tax advice for a number of reasons.” These reasons are detailed in paragraph 28 as follows:
 - the effect of such extension may cause “... unpredictable and potentially wide-ranging public and forensic consequences” therefore is “...best left up to Parliament.”; and
 - Parliament has rejected previous proposals to extend legal professional privilege to tax advisers. This is also confirmed in paragraph 34 of this judgement which notes that a proposal was made to Parliament in 2001 to

extend the privilege to legal advice given by accountants but this proposal was rejected in 2003.

- paragraphs 29 to 36 set out reasons, based mainly on prior case law, why the ambit of legal profession privilege is currently assumed to be limited to attorneys;
- in providing the basis for why this appeal was allowed, the following is noted:
 - in terms of paragraph 42, “the principal arguments for restricting LAP to communications with professional lawyers which have been put forward appear to me to be weak, but not wholly devoid of force.”;
 - in terms of paragraph 43, “at any rate, to modern eyes it is hard to see why the connection between lawyers and the courts, and in particular the reliance which judges place upon lawyers to act properly, is a good reason in principle for limiting LAP to the legal profession.” Lord Neuberger goes on to note that this may have “...carried real weight 150 years ago ...” but nowadays clients obtain the majority of their legal advice from professionals other than attorneys; and
 - paragraph 44 notes that the disciplinary processes of the legal profession *prima facie* do not appear to be stricter than those applicable to other professions. Whilst it is true that the attorney owes “... a formal duty to the court” such duty only becomes “... relevant in connection with litigation”. Therefore the principle of legal professional privilege goes much wider as “... every professional person involved in litigation can fairly be said to have a duty to the court.”
- paragraph 49 raises a very important point as it is noted that “where a common law rule is valid in the modern world, but it has an aspect or limitation which appears to be outmoded, it is by no means always right for the courts to modify the aspect or remove the limitation. In any such case, the court must consider whether the implications of the proposed modification or removal are such that it would be more appropriate to leave the matter to Parliament. The court must also consider whether the aspect or limitation in question has led to problems, and whether it has been assumed, approved or disapproved implied or expressly by Parliament. And if Parliament has unequivocally endorsed the aspect or limitation then the courts should not, of course, alter it.”
- Lord Newberger then concludes in terms of paragraph 51 as follows:
 - “... despite the powerful arguments advanced to the contrary, and in agreement with the clear and careful judgements..., I consider that we should *not extend*

LAP to communications in connection with advice given by professional people other than lawyers, even where that advice is legal advice which that professional person is qualified to give” (own emphasis).

- the reasons for this judgement are set out in paragraph 52 as:
 - the consequences of extending the privilege are difficult to assess and may lead to uncertainty in respect of “... what is currently a clear and well-understood principle.”;
 - the extension of legal professional privilege gives rise to “... questions of policy which should be left to Parliament.”; and
 - finally, legislation has been enacted in respect of legal professional privilege and this legislation only makes reference to legal advisers therefore it would be “... inappropriate for the court to extend the law” in this regard.

It is also important to note that whilst the final decision in this case went against the taxpayer. Two of the seven lord justices presiding in this case dissented to the decision which is indicative that this area still remains highly controversial and is sure to be explored further in the UK.

4.7 CONCLUSION

As stated in Chapter 4.2, the above listed countries are all closely linked to South Africa therefore the policy decisions taken in these countries will impact on the decisions to be made by the South African policy makers. It is highly probably that should the extension of legal professional privilege become an international norm, South Africa will follow suit.

This assumption is made due to South Africa having a close relationship with Organisation for Economic Co-operation and Development (herein-after referred to as the “OECD”), regardless of it only having an observer status with the OECD. Furthermore, “South African policy makers have benefited from participation in OECD forums” (Ministry of Finance: South Africa, 2008). Therefore it can be anticipated that if all or the majority of the OECD member countries such as the USA, New Zealand, the UK and Australia, decide to make a policy decision to extend this privilege to non-legal tax practitioners that South Africa will do so too.

As noted above, the USA and New Zealand permit the application of legal professional privilege in relation to accountants in terms of statute. The wording of the New Zealand statute is preferable, as evidenced by the ALRC report on the review of legal professional privilege and federal Investigatory bodies. This is due to the New Zealand statute being rather specific with regard to the type of information that is privileged as opposed to the USA's generally worded statute which could give rise to many uncertainties.

As stated above, Australia currently has an accountants concession (i.e., not a statutory provision) therefore the information requested is still subject to the Commissioner's discretion with regard to whether exceptional circumstances exist to override the concession. Australia and the UK, are currently still considering whether to introduce a statutory provision to allow the application of legal professional privilege to accountants. Based on the above mentioned commentary in relation to the discussion papers and case law applicable to each of these countries, there does not appear to be any valid justification for the differentiation between attorneys and accountants. Therefore it can be assumed that these countries will not introduce a similar statutory provision to New Zealand in the near future.

Upon applying the findings of the above mentioned countries to the South African context it appears that South Africa currently has the relevant legislative framework in place to also introduce a statutory provision to permit the application of legal professional privilege to legal advice obtained from accountants.

The next chapter aims to conclude this discussion and provide recommendations in respect of the approach to be adopted by South Africa.

CHAPTER 5

CONCLUSION

5.1 INTRODUCTION

The main goal of this study was to determine whether non-legal tax practitioners in South Africa should be encompassed within the ambit of legal professional privilege.

In order to achieve this goal the research objectives, as noted in terms of Chapter 1.4 had to be met. This involved a detailed study of the history and requirements of this privilege along with determination as to whether this privilege was amenable to extension.

Thereafter the constitutional issues surrounding this privilege were considered which included a detailed comparison of the qualifications, training, regulations and disciplinary processes currently applicable to accountants and attorneys.

Finally, an investigation into the legislative stances adopted by other foreign jurisdictions, which currently permit or are considering permitting non-legal tax practitioners the right to legal professional privilege were considered.

5.2 SUMMARY OF FINDINGS AND ANSWERS TO RESEARCH OBJECTIVES

The summary of findings and answers to the research objectives set out in Chapter One is detailed below.

5.2.1 Rationale for the creation of legal professional privilege

Historically it was common occurrence that a person would consult an attorney in respect of legal advice which would generally require the interpretation of the law which included the taxing provisions. That very same person would also consult an accountant for financial or book keeping advice which would in all likelihood not require any interpretation of the law. Therefore only advice obtained from an attorney would be privy to legal

professional privilege. Based on the relationship described above, it is understandable why only legal advice would qualify for such privilege.

However, in the modern day era, the role of the accountant has become quite diverse as in addition to offering financial or book-keeping advice, other services such as tax advisory services are also often rendered to clients. This advisory service generally involves the interpretation of the law, as would be the case if an attorney was consulted.

As a matter of fact, the tax legislation is constantly evolving and recent amendments are evident to the fact that these laws are moving more towards the accounting profession. For example, sections 50, 56 and 59 of the 2011 Taxation Laws Amendment Act provide for refinements to various sections of the Income Tax Act to bring the tax treatment of certain transactions in line with the International Financial Reporting Standards.

This evolution in the tax profession tends to persuade taxpayers to consult with accountants who are in the best position to provide advice on the tax treatment and accounting effects of proposed transactions.

Therefore in order for a client to obtain proper tax advice he would have to disclose all relevant information to the accountant as he would have if such advice was being sought from an attorney.

Based on the change in the way clients now do business (i.e., obtain tax advice), it is considered necessary for information provided to accountants in their capacity as tax advisers to also be subject to legal professional privilege.

5.2.2 Constitutional issues surrounding legal professional privilege

The right to privacy and equality was considered. The compulsion of accountants to disclose information in respect of their clients to whom tax advice (i.e., legal advice) is rendered constitutes an infringement on the right to privacy of that client. This is due to the client, upon approaching the accountant, having the legitimate expectation that such advice would be protected. Furthermore, the infringement on the right to equality in

relation to the taxpayer was determined by comparing the competency requirements and regulations of accountants and attorneys.

In comparing the competency requirements of both professions it is noted that accountants would be required to obtain even more qualifications in comparison to attorneys in order to qualify for the right to legal professional privilege. With regard to the current regulations placed on accountants and attorneys it was concluded that the regulations and disciplinary processes were nearly identical therefore there is no justifiable basis for the discrimination that arises when a client chooses to consult an accountant rather than an attorney. This discrimination is not considered just and reasonable and therefore does not promote Constitutional muster in South Africa.

As explained in terms of the assumptions of this study, although the above mentioned comparison was based only on SAICA members in South Africa, members of other institutes such as SAIPA and SAIT should not be excluded from being eligible to the right of legal professional privilege provided that that member can prove that he has the equivalent qualifications and training as that of a SAICA member and is subject to similar disciplinary processes. This will ensure that, should this privilege be extended to accountants, no unfair discrimination will arise within the accounting fraternity.

5.2.3 International perspective

The analysis of the treatment of legal professional privilege in relation to accountants in countries such as the USA, New Zealand, Australia and the UK, provided great insight into the views of policy makers in other jurisdictions.

Based on the findings of Chapter Four it was reiterated by many jurisdictions that the extension of legal professional privilege to accountants via the common law would result in too many uncertainties arising therefore if such extension were to be considered it would have to be done via statute and not common law.

This was specifically noted in the *Prudential PLC and Another v Special Commissioner of Income Tax and Another* case where the Court of Appeal and the Supreme Court held that

“the question whether LAP should be extended to cases where legal advice is given from professional people who are not qualified lawyers raises questions of policy which should be left to Parliament.”.

This notion was also echoed in the ALRC’s report on the review of legal professional privilege and federal investigatory bodies.

5.2.4 Views of recognised tax professionals in South Africa with regard to whether legal professional privilege should be extended to accountants

According to a communication by Mr P. Gering (2013), his views on whether accountants should be encompassed within the ambit of legal professional privilege are as follows:

“I am of the opinion that certain accountants, based upon their level of qualification should be encompassed with[in] the ambit of legal professional privilege, to level the professional playing field between tax accountants and legal tax practitioners. The nature of the opinion work, the nature of their representations at the ADR, Tax Board and Tax Court are similar in nature requiring their professional playing fields to be of a similar nature. It is currently to the prejudice of the taxpayer seeking the advice from a tax accountant as opposed to legal tax practitioner should the area of legal professional privilege be a requirement. This is, I believe, an unintended and unrequired hurdle for the taxpayer to navigate.”

This sentiment was also shared in a communication by Mr P. Nel (2013), who stated that accountants should be encompassed within the ambit of legal professional privilege based on the “arguments [set out] in the *Prudential* case.”

According to a communication by Dr B. Croome (2013), accountants should be encompassed within the ambit of legal professional privilege based on the judgement contained in “... *S v Safatsa and Others* and the Bill of Rights contained in the Constitution of South Africa, Act 108 of 1996. The privilege should apply to those persons registered as tax practitioners – not only registered CA (SA).”

Mr M. Betts (2013), also agreed in a communication that accountants should be encompassed within the ambit of legal professional privilege as “... existing and prospective clients would tend to favour approaching legal practitioners on sensitive matters because of the legal protection afforded to them and there is no reason why they should not enjoy the same level of comfort when approaching an accounting practitioner for the same purpose, particularly where they enjoy an existing relationship for other professional services.”

According to a communication by Mr N. Wright, “client confidentiality is a common thread in both professions” therefore he agrees that accountants should be encompassed within the ambit of legal professional privilege.

As can be noted from the above interviews, all of these tax professionals believe that legal professional privilege should be extended to accountants in South Africa and raise valid points as to why they support this extension.

5.3 CONCLUSIONS

Baker (in Croome, 2010b:178) states:

“Two points might be made in this context. First, there is no reason why tax should be a special case if there are good arguments protecting professional privilege in ordinary civil cases, those arguments are equally good where tax is at issue. Secondly, tax is an area where professionals other than lawyers are commonly involved. If a client would enjoy privilege for communications with a lawyer, it seems logical that that privilege should apply equally in communications with another professional whom the taxpayer chooses to utilise in place of a lawyer.”

According to the comments submitted to the Standing Committee on Finance (2011:5) “most tax advice (which is legal advice on a specialist area of law) is provided by persons who are not admitted attorneys or advocates, such as chartered accountants.” Therefore it is recommended that this privilege is extended “...to keep pace with the modern world and to give effect to the public interest purpose of legal professional privilege.” Finally an uneven playing field exists between the legal and accounting profession as attorneys are

entitled to this privilege when rendering tax advice whilst accountants are not entitled to this privilege. This advantage could be exploited by some legal firms.

Based on the findings of this study it can be concluded that South Africa now has all of the relevant regulatory framework in place in respect of non-legal tax practitioners therefore there is no basis to restrict these practitioners from being encompassed within the ambit of legal professional privilege in South Africa.

5.4 RECOMMENDATIONS AND FUTURE RESEARCH

The recommendations and future research in respect of this study are detailed below.

5.4.1 Encompassing non-legal tax practitioners within the ambit of legal professional privilege

According to Croome (2010b:184) the South African legislation should be amended to permit legal professional privilege to all tax advisers as this will ensure complete disclosure between clients and their advisers which will result in proper advice being rendered and a higher level of tax compliance South Africa. Croome goes on to state that there is no basis for the distinction that currently exists between accountants and attorneys that render tax advisory services in South Africa when compared to other countries that do permit the extension of this privilege to non-legal tax practitioners.

Based on the research conducted in this study it is concluded that there is no justification for the differentiation between accountants and attorneys. Therefore in an attempt to uphold the Constitution of South Africa and align our tax regime with first world countries such as the United States and New Zealand it is recommended that South Africa also encompass non legal tax practitioners within the ambit of legal professional privilege.

5.4.2 Introduction of a statutory provision

To simply extend the common law principle of legal professional privilege may have unintended consequences as noted in the case of *Prudential PLC and Another v Special*

Commissioner of Income Tax and Another. Therefore it is recommended that South Africa rather follow the approach of New Zealand and the USA by creating a separate statutory provision with the Tax Administration Act to specifically allow for legal professional privilege to apply to tax advice rendered by a registered tax practitioner.

It is further recommended that the wording of the legislation closely resemble that of the New Zealand legislation as it is rather specific and restricts any ambiguity or uncertainty unlike those noted in respect of the USA legislation in Chapter Four.

Furthermore, the USA model links the tax practitioner-client privilege to attorney-client privilege therefore if there are any "... developments in common law..." these developments will inevitably affect the application of the tax practitioner-client privilege which could give rise to further unintended consequences (ALRC, 2007:290).

The approach adopted by New Zealand has also been endorsed by the ALRC in their report on the review of legal professional privilege and federal Investigatory bodies (ALRC, 2007:303).

5.4.3 Additional considerations

Some of the proposals made by the ALRC should also be considered for inclusion in the proposed legislation to be adopted in South Africa. For example, the categorisation of information in order to determine which information is protected under this privilege is important to ensure that there is no uncertainty.

Furthermore, there should not be any restrictions on the application of this privilege with regard to the promotion of "tax shelters". As noted by the ALRC (2007:305) tax advice is often rendered in an attempt to minimise taxes therefore the restriction with regard to tax shelters, as currently imposed by the USA, is considered unnecessary. Any case of potential tax evasion would be covered in the provision with regard to the privilege not being applicable where the tax advice rendered facilitates a crime or fraud.

It is further recommended that no discretionary powers should be afforded to SARS as it should not be possible for SARS to lift the protection afforded by this provision without any court intervention. The courts should maintain the inherent power to determine whether information is in fact privileged.

5.4.4 Future research

For the purposes of this study it is assumed that if non-legal tax practitioners are encompassed within the ambit of legal professional privilege that the statutory provision would be introduced into the Tax Administration Act, as adopted by New Zealand and the USA in terms of their equivalent statutory tax provision. However, it is recommended that further research needs to be conducted in order to ascertain whether this privilege should be introduced at a much higher level such as in terms of the Promotion to Administrative Justice Act as this will have a much wider reach than the Tax Administration Act.

It is anticipated that if South Africa does encompass non-legal tax practitioners within the ambit of legal professional privilege that other African and BRICS countries that draw on South Africa's jurisprudence in areas such as taxation will also follow suit therefore it is imperative that this statutory provision be introduced at the appropriate level. It is assumed that the encompassment of non-legal tax practitioners within the ambit of legal professional privilege will eventually become an international norm which is properly aligned with the modern day way of doing business.

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