

UK Supreme Court: Legal Advice Privilege Relates to Lawyers' Advice Only

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Summary

In an eagerly awaited decision of the U.K. Supreme Court in the case of *R (on the Application of Prudential plc and Another) v. Special Commissioner of Income Tax and Another*, [2013] UKSC 1, legal advice privilege (LAP) has been held (by a majority, with two of the seven law Lords dissenting) to apply only to communications connected with legal advice given to a client by lawyers acting in a professional capacity. LAP does not extend to communications connected with legal advice given to a client by professional people other than lawyers (e.g., tax advisers in accounting firms), even where the professional is qualified to give that legal advice.

Of particular note to practitioners in the United States is the fact that the decision confirms U.K. LAP does not embrace any concept equivalent to Section 7525 of the Internal Revenue Code. Of further interest is the fact that both the majority and the dissenting minority on the judicial bench made direct reference to the celebrated U.S. Supreme Court decision of Justice Rehnquist in *Upjohn Company v. United States*, 449 US 383 (1981), as one of the classic modern statements of the justification for LAP.

Comment

The scope of LAP was fiercely contested as this case rose through the U.K. courts, with both accountants' and lawyers' professional bodies intervening in the matter with arguments for and against the extension of LAP.

Although somewhat expected, the Supreme Court's decision generally has been welcomed by taxpayers and their lawyers. It does have the merit of restoring clarity and certainty to clients seeking genuine and clear advice on the scope and application of tax law. Provided that clients seek the advice from a lawyer (acting as such), they can obtain advice with the protection of LAP such that the content of that advice cannot prejudice their position with HM Revenue & Customs (HMRC) or otherwise before a U.K. court, assuming that LAP is not somehow waived. This will be especially important once taxpayers start to take tax advice on the applicability of the new U.K. General Anti-Abuse Rule that is being introduced in 2013 and which contains concepts that are hard to delineate.

However, while the Supreme Court is the highest court in the U.K., this may not be the last of this matter. It is open to Parliament to legislate for the extension of LAP to communications connected with legal advice given to a client by nonlawyers, although it is highly unlikely to do so in the field of tax, as that would only serve to fetter HMRC's wide information-gathering powers.

Alternatively, Parliament could legislate for the restriction of LAP in the field of tax-avoidance schemes. LAP is such a fundamental and entrenched right that to seek to do so would be greatly contested, both legally and politically, and may ultimately fail. That said, Parliament's Public Accounts Committee, fresh from interrogations of large multinationals such as Amazon and Starbucks, are thought to be inviting accountants and lawyers shortly for similar conversations about tax avoidance, and so

clearly the mood in the political arena is in favor of uncovering material about the processes of tax advisory work, rather than allowing it to continue under the protections of common law.

Finally, it remains to be seen whether Prudential plc and its advisers will seek to appeal the decision to a European Court, such as the European Court of Human Rights.

Background

The case arose in a tax context. As a general matter in the U.K., when responding to a statutory notice from HMRC to provide certain documents relating to its tax affairs, a taxpayer is entitled to refuse the provision of documents that are covered by legal professional privilege, which includes LAP.

In response to such notices, Prudential plc and one of its subsidiaries that was involved in the transaction in question (the Prudential parties) declined to disclose certain documents relating to the transaction on the grounds that the documents were subject to LAP — because they related to legal advice on tax given to the Prudential parties by a firm of accountants (PricewaterhouseCoopers).

The Prudential parties applied for judicial review challenging the validity of the notices. The High Court rejected this application on the grounds that LAP did not extend to communications connected with advice given by a professional person who was not a qualified lawyer, even if those communications would have been subject to LAP had the advice been given by a lawyer. The Court of Appeal upheld this decision. The decision was appealed to the Supreme Court.

Supreme Court Decision

By a five-to-two majority, the Supreme Court dismissed the appeal and found that LAP only applied to communications connected with legal advice given by lawyers acting in a professional capacity. The Court's decision was based on the following key reasons:

- Allowing the appeal would likely create uncertainty where the current principle of LAP is clear and understood;
- Extending LAP to communications connected with legal advice provided by professionals who are not qualified lawyers raised policy questions that should be left to Parliament; and
- It would be inappropriate to extend LAP in the manner being requested by Prudential, as certain legislation relating to LAP was enacted on the assumption that it applied only to communications connected with legal advice provided by lawyers.

Of note, one of the dissenting Lords, Lord Sumption, took the view that LAP depends on the character of the advice being sought by the client, and not on the status of the adviser (provided that the adviser is acting in a professional capacity), so that LAP does extend to legal advice given by members of a profession that has as an ordinary part of its function the giving of skilled legal advice.

Click [here](#) for a copy of the Court's ruling.