

TAX COUNSEL

A QUESTION OF PRIVILEGE PROTECTING ACCOUNTANT/CLIENT COMMUNICATIONS

We Canadians are entitled to plan our affairs in order to pay a minimum amount of tax. This concept was reaffirmed yet again by the Supreme Court of Canada in the recent *Neuman* decision.

Although tax plans are printed in black and white, the risks ascribed to certain planning actions are often not so clear. Prudent advisors discuss those risks in writing and describe to their clients the potential consequences both positive and negative.

It is not surprising then that Customs Canada and Revenue Agency considers such planning documents relevant to their investigations, particularly when the intention or knowledge of the taxpayer is in issue (ie: in the context of the possible application of anti-avoidance provisions of the *ITA*).

Recent changes to s. 248 of the *ITA* have broadened the definition of a "record" to include: "an account, an agreement, a book, chart or table, a diagram, a form, an image, an invoice, a letter, a map, a memorandum, a **plan**, a return, a statement, a telegram, a voucher and **any other thing containing information, whether in writing or in any other form**".

These changes certainly seem to contemplate the production of tax planning documents.

The real question to be asked is whether the documents requested by C.C.R.A. are:

- a) relevant to the tax liability of the taxpayer or
- b) necessary to verify compliance with the *ITA*.

Obviously, this must be addressed on a document by document basis.

Even when the answer to either question is 'yes' it is still possible to shield planning documents from the scrutiny of C.C.R.A. provided adequate steps are taken well in advance.

communications between taxpayers and accountants and the same advice between taxpayers and lawyers. Lawyer-client communications are considered privileged while accountant-client communications are not. One can argue whether this should be so but it is an undeniable fact.

Privilege can be extended to communications between a lawyer and an accountant as agent of a client or, alternatively, between the client and an accountant as agent of a lawyer.²

Under common law, the solicitor-client privilege extends to all confidential communications and work product provided such privilege has not been waived or lost.³

The right of privilege in respect of tax matters has been modified by statute. Section 232 of the *Act* precludes the claim of privilege over "accounting records of a lawyer". The true meaning of this phrase has been the subject of some conflicting case law.⁴ It is fairly safe to assume, however, that it refers to the trust accounting records respecting the taxpayer in question.⁵

Applying the same principles and assuming an accountant/agent does not hold funds in trust for the client, privilege will then extend to the communications, books, records and documents (regardless of their statutory definition) of an accountant acting as agent of a lawyer or his client so long as those communications, etc. are produced for the purpose of assisting counsel to provide advice to the client or in preparation for litigation.

However, privilege can be lost. Communications seen or heard by a third party are no longer confidential and thus no longer privileged. Although only the client may waive the privilege, the waiver can be express or implied. If a person such as a tax adviser authorized to act on behalf of a client discloses privileged information to C.C.R.A. in the course of voluntary disclosure, during negotiations with Appeals Division, or in the audit process, privilege will be waived.

MARCH 2000

"The right of privilege can be extended to an accountant acting as agent of a lawyer or his client."



A QUESTION OF PRIVILEGE

(CONTINUED)

“To maintain the privilege, scrupulous care must be taken not to publish or allow communications to be seen by outside parties.”

In order to maintain the privileged nature of communications scrupulous care must be taken not to publish or allow agency communication to be seen by outside parties.

- Privileged communications should be kept separate from non-privileged, preferably in a separate marked file to which access is restricted.
- Avoid photocopying of privileged documents. Avoid mixing privileged and non privileged matters in a document.
- Clearly address correspondence as “Privileged and Confidential”.
- Consider retaining sensitive materials with the client’s lawyer.

A final thought: The maintenance of the agency relationship and concurrent privileged status of communications obviously comes with a cost. The client and tax advisors must consider carefully whether the matters at hand warrant the extra effort.

1. *Neuman v. M.N.R.* 98 DTC 6297 (S.C.C.) see also *Duha Printers (Western) Ltd. v. Canada* 98 DTC 6334 and *Shell v. The Queen* 99 DTC 5669
2. *Susan Hosiery Ltd. v. M.N.R.* 69 DTC 5278 (Ex. Cheq)
3. *Cineplex Odeon Corporation v. A.G. of Canada* 94 DTC 6407 (Ont. Gen. Div.)
Inter provincial Pipeline Inc. et al. v. M.N.R. 95 DTC 5642 (F.C.T.D.)
4. *Organic Research v. M.N.R.*, [1991] 1 C.T.C. 417 (Alta. Q.B.)
5. *Southern Railway of British Columbia v. Deputy Minister of National Revenue*, 91 DTC 5081 (B.C.S.C.)
Paquette v. M.N.R. 92 DTC 6394 (F.C.T.D.)

DIRECTORS LIABILITY - STOPPING THE CLOCK

A client of mine was recently tagged by C.C.R.A. (Excise Tax Division) for unpaid GST remittances and the consequent interest and penalties by reason of his directorship in a corporation that had been mothballed a number of years ago. His advisors at the time decided to let the corporation die a natural death.

Corporate Registry will strike a corporation from the register in the event two successive annual returns are not filed. This corporate “euthanasia” is a common practice. What the advisors failed to recognize, however, was that without taking any active steps to remove the client as a director, they

were extending his liability until two years after the corporation was struck¹. Had they placed his resignation in the Minute Book and filed a notice of the change with Corporate Registry when the initial decision was made, the time period during which the client was liable as director would have expired prior to re-assessment of the corporation.

Those advisors are now filing different notices - to their E&O insurers.

The Moral? When allowing a corporation to die naturally always ensure its expiration is painless.

1. S. 323(5) *Excise Tax Act*



Suite 100 - 10328 - 81 Avenue
Edmonton, Alberta
Canada T6E 1X2

Tel (780) 439-7171
Fax (780) 439-0475

Prowse & Chowne, North America's first ISO 9002 certified law firm, provides sound business law advice and litigation counsel. Prowse & Chowne works closely with its clients and their professional advisors to ensure clients achieve their tax objectives in a manner that makes legal, financial and business sense.

To ensure you receive a monthly copy of Tax Counsel, please forward your contact information (including name, company, complete address, telephone and fax numbers, and e-mail address) to Donald Mallon by fax (780) 439-0475 or by e-mail taxcounsel@prowsechowne.com.

Donald P. Mallon, BSc LLB, a partner in Prowse & Chowne, is a seasoned litigator with over 20 years of experience. Focusing on administrative and tax litigation, he draws upon his courtroom and negotiation skills to effectively represent individual and business taxpayers in disputes with Revenue Canada.



ISO 9002 Registered Firm
QCB Certificate #96-328