

## LEGAL PROFESSIONAL PRIVILEGE – THE NEXT STEPS

Ian Young explains the arguments for extending LPP to chartered accountants

We reported in the August issue of *TAXline* that ICAEW had intervened in the Court of Appeal case involving Prudential which was heard by the Court on 14 and 15 July 2010.

The basic argument that ICAEW put forward to the Court, in support of Prudential, was that the principles underlying legal advice privilege should apply with equal force to the giving of tax advice by a member of the chartered accountancy profession.

Legal Professional Privilege (LPP) is a very important right and it has been held by the House of Lords, when it was the supreme appellate court in the UK, to be a fundamental human right.

LPP is designed to ensure that any person seeking advice about their legal rights and obligations, and in particular advice about litigation or potential litigation, can do so without worrying that the information they provide, in confidence, about their circumstances will be passed on to a third party without their express permission. The idea is that absolute frankness in providing information will benefit the legal system and the rule of law.

The principles underpinning LPP come into direct conflict with the tax system which needs information about taxpayers in order, for instance, to make sure that they are paying the right amount of tax. So the UK tax system provides powers to obtain information even from taxpayers who are reluctant to provide it while, at the same time, it respects LPP which underpins the proper working of the legal system itself.

As we reported last month the High Court stated in its judgment in the *Prudential* case (*R on the application of Prudential plc & Anor v Special Commissioners of Income Tax and Anor* [2009] EWHC 2494 (Admin)) that 'accountants do what lawyers are described as doing in the cases that establish Legal Professional Privilege' (paragraph 65 of the judgment).



**Ian Young**

But unless there is a change in the law citizens who seek tax advice from chartered accountants are not entitled to LPP and as a result are being denied their fundamental human rights.

The Courts are being asked in the *Prudential* case to decide whether there should be a change in the existing law and whether LPP should be extended to the clients of chartered accountants.

But it may well be that the Court of Appeal, however understanding it is of this problem, and however sympathetic it is to the argument that the law ought to be changed, may feel that it is not the appropriate forum to effect the change. If that is the case then the *Prudential* will have to apply for permission to argue its case before the Supreme Court.

Our intervention in the Court of Appeal consisted of a written submission, prepared by our barrister Charles Flint QC, setting out the legal grounds for believing that LPP should now extend to the clients of chartered accountants who receive tax advice. The submission was supported by a written statement from Frank Haskew which provided detailed background to the chartered accountancy profession, as well as the training, regulation and ethical duties of Chartered Accountants.

The ICAEW intervention was supported by the Chartered Institute of Taxation. The CIOT's letter of support included the following statement which sums up the need for a level playing field:

'[There] should be a common standard of privilege across all properly-qualified professionals able to advise on tax matters. Taxpayers should choose their advisers on the basis of those with the best expertise in the area in which they need to take advice, without any influence caused by a perception that one may be able to assert LPP.'

Charles Flint QC also gave oral evidence to the Court of Appeal backing up the information that had been submitted in writing.

We are likely to receive the judgment of the Court in October after the summer recess. We will report on the judgment once it is available.

But there may be other repercussions where the current unsatisfactory state of LPP will get in the way of the proper functioning of the legal system more generally.

Under the terms of the Legal Services Act 2007 there are provisions for the establishment of multi-disciplinary practices which could be permitted before the end of next year. At the moment they are not allowed. Once they are in place this would allow lawyers and accountants to practice in the same firm as partners in

that firm, which is not permitted at the present time. It is not at all clear at the moment what will be the LPP position of a client of such a firm who could be seeking legal advice from either an accountant or solicitor partner or indeed could be seeking advice from both simultaneously.

Another practical problem arises for chartered accountant firms involved in audit which may under the existing law have difficulty obtaining sufficient evidence of legal issues which could affect the accounts they are auditing because the relevant information is privileged. So the information as such cannot be disclosed to the auditors, who have to find ways round the problem and get sufficient understanding of the issues so they can judge whether the accounting treatment of these issues means that the accounts present a true and fair view – for instance, whether any issues should be reflected as contingent liabilities.

ICAEW will be pursuing all the various ramifications of the *Prudential* case once we have the judgment of the Court of Appeal in October. We will keep members updated via the main ICAEW website and also via the Tax Faculty's news site and *TAXline*.

**Ian Young is a technical manager at the Tax Faculty and is one of the team at ICAEW working on LPP issues. He recently gave an interview on LPP to Accountancy Age TV.**