
SECTIONS 263 AND 264 OF THE INCOME TAX ASSESSMENT ACT AND
THE INTERACTION OF LEGAL PROFESSIONAL PRIVILEGE

QUESTIONS AND ANSWERS

Question - Peter Short (Chairman):

Paul, you said on the question of the "bank's duty of confidence" that is not something you brush aside lightly. The duty is something you taken into account, and you "consider" it. Could you give me some examples of when you consider it and in fact observe it?

Response - Paul Bray:

Nice question. I think when we are talking about what we have to consider we have to be aware of the fact that a bank does have a duty of confidentiality to its clients and that to seek access to a whole range of information about a bank's clients, while we are probably entitled to that information, it may well be that when we take into account that matter, we have to give a lot of time to a bank to get instructions from its client, and from the clients' legal advisers, particularly in relation to things like legal professional privilege. A bank will not always be able to determine whether a document is privileged or not, and will have to get information, or have to get advice from the particular client, and will also have to get advice from perhaps the client's legal adviser. So when I say "take it into account", we have to be aware that because of the duty of confidentiality we may have to give more time to a large bank, particularly if we are accessing the central office of a bank as distinct from a small country branch, when all we are after is just one particular client's accounting records. If we are after a large range of records which could possibly apply across a lot of clients, taking into account the duty of confidentiality means that we are going to have to give more time than we probably otherwise would have. In some circumstances that may last up to weeks depending upon the range of potential clients that we could be after.

Question - From the floor:

Paul, you mentioned in relation to privilege where the bank concerned does not know whether it is privileged or not but you will require a list of documents and a description of them. I just query whether you have any power to require it. If the bank says no, sorry, we are not going to give you a list, I suggest to you that probably is the correct response.

Response - Paul Bray:

Well I guess the kind of thing that I was suggesting is really an informal arrangement. I agree there could be some doubt as to whether we actually have power under s.263 to require that. I do not know whether that would necessarily come within reasonable assistance. But most of the kind of arrangements that I am talking about are sort of informal arrangements between us and the bank. I mean obviously the easiest and the most convenient way to be able to do these things, where you just agree between yourselves, is the best way to do it without having to resort to any powers under the Act. And certainly if it got to the stage where the bank was refusing to do something like that, or perhaps refused to agree to something like that, well then we would have to consider whether we go to the court. But I guess the whole point of this is that it is going to be hopefully built into the sort of practical guidelines between us and the community. I would agree though that there perhaps is some question about whether we could require it.

Response - Brendan Sullivan:

I can comment briefly on that. I think the question is easy to answer. There is no requirement. But I think a matter that should be of concern to anybody who receives such a request is whether in preparing the list, as I understand it the sorts of lists which have been requested have been a list plus a description. Now it may be that in listing the documents and describing them one is disclosing privileged matters which one should not be disclosing. And if you are in particular a bank holding documents in respect of which privilege might be claimed by a customer, you may be breaching the customer's privilege and your own duties to the customer, in providing the list. So it is a matter which has to be considered very carefully as to what type of material is provided.

Response - Paul Bray:

If I could just add to what Brendan is saying. I had a personal experience this week when we were trying to reach an arrangement with some people in Sydney along those lines and that was exactly the point that was raised, that in some ways providing the kind of material that we are after may in some circumstances show what the actual privileged information is. So obviously it is going to be a matter that will have to be worked out as we go along. We are only just beginning to have to take these matters into account, so it is obviously going to be a bit of to-ing and fro-ing between us and particular people.

Question - John Walter (Clayton Utz):

One of the matters which I would be interested in is the question of the extent of legal professional privilege in this situation. In particular I had in mind the question of internal legal advice

and I also have in mind the question of documentary policy papers attempt to create some form of legal professional privilege in respect of a wide range of documents.

Response - Paul Bray:

I think in relation to the interesting question of in-house legal advice certainly Justice Williams in the Queensland Supreme Court Citibank decision suggested that there was no difficulty in applying privilege to in-house legal advice. I certainly do not know that both the Attorney-General and Cohen case and the Waterford and Commonwealth case have set out any definite principles saying that all in-house legal advice will be covered but then the Waterford decision was limited to advice which had been given by Attorney-Generals to Treasury. Certainly Justices Mason and Wilson seem to be suggesting that it applied across the board. But Justice Brennan was far more limiting in his comments. And of course the other point too is that if it does apply and we would probably like to have it apply to our own in-house advice as well. I am a lawyer, I have been admitted, and I provide advice on certain legal things within the office. We probably would like to have it apply to our own advice as well. Now whether it can is another question and I think that is a matter that is yet to be determined.

Response - Brendan Sullivan:

It raises the question as to whether you have provided the advice in the capacity of the practising solicitor or in the capacity of just discharging other functions.

Response - Paul Bray:

It comes very much back to when you are looking to particularly a question of mixed policy and legal advice. I think strictly speaking advice provided on matters of policy is not covered I would think by legal professional privilege. And I guess that applies as much to us in the ATO as it does to anyone else. And basically because I do not think it would satisfy the sole purpose test in Grant and Downs. But as to how you would practically go about differentiating the circumstances between something that is pure policy advice and nothing more to something that is legal advice, I think there is going to be more litigation on that. I do not think it is clear-cut yet.

Comment - Peter Short:

Well if that is all you want it remains only for me to thank the speakers on your behalf for an entertaining morning. Thank you very much.