The draconian powers given to the South African Revenue Service (SARS) by the Tax Administration Act of 2011 have been discussed and criticised in great detail by various commentators.

However, the criticism of many influential academic commentators does not change the fact that, at least for now, SARS has been given more ammunition with which to target the mass of South African taxpayers that it so often unjustifiably distrusts.

One example of SARS' new ammunition is the power to conduct search and seizure operations without a warrant, under certain circumstances.

The fear caused by discussions regarding SARS' newfound powers have motivated many taxpayers to approach their professional advisors for tax advice to ensure that they do not fall foul of the provisions of the many tax acts in place and where they do, to limit the damage that they may suffer as a result thereof.

In this day and age, the majority of taxpayers approach their auditors to obtain tax advice. The tax advice received from auditors is often relied upon to give comfort to parties involved in large transactions and to ensure that each party safely navigates the labyrinth that is South African tax legislation.

However, when things go wrong and SARS officials come knocking on the taxpayer’s door to request information, will the taxpayer be able to claim privilege on the opinions received from its professional advisor?

Legal professional privilege (LPP) attaches to advice given by an advisor who acted in a professional capacity, who was consulted in confidence, where the communication between the taxpayer and the advisor was for the purpose of obtaining legal advice and the advice is not set out to be of a criminal or fraudulent nature. Where the aforementioned requirements are met, a taxpayer will be able to claim privilege.

Looking at the requirement of an advisor “acting in a professional capacity”, the question arises whether LPP will extend to accountants, tax advisors in auditing firms and other so-called
In the English matter of Alfred Compton Amusement Machines Limited v Customs and Excise Commissioner, it was held that LPP can in certain circumstances attach to the advice given by salaried in-house legal advisors to their “clients”, being their employers, as long as the advice was given by these advisors while acting in their professional capacity. The judgement in the aforementioned English matter has been applied in two South African cases, but only in high courts. Accordingly, there is no certainty as to what the Supreme Court of Appeal or the Constitutional Court’s views will be in this regard.

In the recent English matter of Prudential Plc v Special Commissioner of Income Tax, reported early in 2013, the court refused to extend the scope of LPP to tax advice given by accountants. The court stated that "on many if not most occasions on which a person seeks advice about fiscal liabilities, which often involves a consideration, and advice about the relevant law, that person does so by approaching accountants rather than lawyers".

The court acknowledged that LPP is in the public interest and that a person should be able to make full and free disclosure to his legal representative, even where such disclosure would be adverse to his interests were it made to a third party.

To this end, the court stated that "a client’s communications with his advisors 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/barrister".

Notwithstanding the aforementioned, the court confirmed the common law position that LPP only extends to communications with members of the legal profession (such as practising solicitors and barristers). The court’s reason for not extending LPP to accountants was not that the court felt accountants do not deserve this privilege, but rather that it was of the view that it did not have the power to do so and it would be inappropriate for the court to do so under the circumstances. The court stated that the decision to extend LPP to accountants falls under the jurisdiction of the legislator under the circumstances in question.

SARS will undoubtedly be aware of the judgement in the Prudential matter and will, for the time being, use it to its advantage.

It remains to be seen what the stance of the Supreme Court of Appeal and Constitutional Court will be when faced with a legal question of this nature, but in the meantime, SARS will be able to roam freely knowing that documents evidencing advice obtained from accountants and auditing firms in general are not protected by LPP.

Tax advice obtained from attorneys will be protected by LPP when all requirements are met. Furthermore, where an attorney instructs an accountant to provide certain advice or confirm certain views, such advice will generally also be protected by LPP. Taxpayers are advised to bear
this in mind when deciding whether to approach their accountants or their attorneys for tax advice.

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