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Dear Sir / Madam

## **PROPOSAL FOR A LIMITED STATUTORY PRIVILEGE FOR REGISTERED TAX PRACTITIONERS**

We set out below the SAICA National Tax Committee's proposal for a limited statutory privilege for registered tax practitioners.

### **Rationale and nature of legal professional privilege**

Legal professional privilege first appeared in English common law in the 16<sup>th</sup> century. In essence, the rule is that communications between a client and legal advisor may not be disclosed without the client's consent. The rationale for the rule has been concisely set out as follows:

*“The privilege is usually said to exist for the following reasons. Human affairs and the legal rules governing them are complex. Men are unequal in wealth, power, intelligence and capacity to handle their problems. To remove this inequality and to permit disputes to be resolved in accordance with the strength of the parties' cases, lawyers are necessary, and privilege is required to encourage resort to them, and to ensure that all the relevant facts will be put before them, not merely those the client thinks favour him. If lawyers are only told some of the facts, clients will be advised that their cases are better than they actually are, and will litigate instead of compromising and settling. Lawyer-client relations would be full of 'reserve and dissimulation, uneasiness and suspicion and fear' without the privilege; the confidant might at any time have to betray confidences.”*



Initially the concept of legal professional privilege applied to communications made for the purpose of litigation, but has since been extended to all communications for the purpose of giving or receiving legal advice as evidenced in the following extract from judgment of Botha AJ in the case of *S v Safatsa*:

“The conflict between the principle that all relevant evidence should be disclosed and the principle that communications between lawyer and client should be confidential has been resolved in favour of the confidentiality of those communications. It has been determined that in this way the public interest is better served because the operation of the adversary system, upon which we depend for the attainment of justice in our society, would otherwise be impaired: see *Waugh v British Railways Board* [1980] AC 521 at 535, 536

The privilege extends beyond communications made for the purpose of litigation to all communications made for the purpose of giving or receiving advice and this extension of the principle makes it inappropriate to regard the doctrine as a mere rule of evidence. It is a doctrine which is based upon the view that confidentiality is necessary for proper functioning of the legal system and not merely the proper conduct of particular litigation.”

Legal professional privilege has been established as a “basic or fundamental common law right”. However, it is not a right that applies to all communications with legal advisors. In order for a communication to be privileged it must meet the following requirements:

1. The communication must be with a legal advisor acting in a professional capacity;
2. It has to be made for the purpose of obtaining legal advice or litigation;
3. It must be made in confidence; and
4. It must not be for the purpose of committing a crime or fraud.

What is not clear in our common law is whether that right extends to communications only between clients and admitted attorneys or advocates or also to communications with other suitably qualified legal advisors.

The fact of the matter is that most tax advice (which is legal advice) is provided by persons who are not admitted attorneys or advocates. It is submitted that, in the modern world and



given the public interest purpose of legal privilege, legal privilege should be extended to communications between clients and suitably qualified tax advisors. It is in the public interest to encourage taxpayers to communicate with their tax advisors in the comfort that such communications will be confidential and protected. Tax practitioners fulfil a vital role in the South African tax system, not only in terms of providing tax advice to taxpayers to minimise their tax liabilities, but also advising taxpayers on the tax law, how to comply therewith and to pay taxes that are legally due.

A further reason as to why legal privilege should extend to tax advice provided by persons who are not admitted attorneys or advocates is that it creates an uneven playing field and a competitive advantage for law firms over other tax practitioners, an advantage that law firms have been quick to promote. Lawyers are no more qualified to advise on tax law than any other suitably qualified person and should not enjoy a competitive advantage in this regard.

The development of the common law has not kept pace with the modern world. Legal privilege should not be dependent on the nature of the legal qualification of the person giving the advice but on the nature of the advice. It is therefore submitted that it is appropriate that the draft Tax Administration Bill (“TAB”) amended in order to provide a statutory remedy to the shortcomings of the common law.

### **International precedent**

A number of jurisdictions have a statutory intervention to extend legal privilege to tax advisors.

#### ***United States***

In the United States legal privilege is extended to communications between a taxpayer and a federally authorised tax practitioner for tax advice to the extent the communication would be considered a privileged communication between a taxpayer and an attorney. However, the statutory privilege is limited to non-criminal matters and does not apply to communications in connection with the promotion of tax shelters. Tax practitioners in the US are fully regulated.

#### ***United Kingdom***

In the United Kingdom the revenue authority is statutorily restricted from obtaining communications between a tax advisor and taxpayer the purpose of which is the giving of tax advice. The restriction only applies to obtaining such information from the tax advisor and not from the taxpayer. Tax advisors in the UK are not regulated. The issue of whether legal privilege should extend to tax advice provided by accountants is currently the subject of judicial consideration in the United Kingdom in the case of *Prudential Plc v Special*



*Commissioner of Income Tax.* Prudential Plc is arguing that the common law legal privilege should extend to tax advice provided by an accountant. The matter was decided in favour of the respondent in the High Court and the Court of Appeal as these courts considered themselves bound by precedent of the latter court in this regard. The matter is to be heard on appeal by the Supreme Court.

### ***New Zealand***

In New Zealand a statutory privilege applies to ‘tax advice documents’ in terms of the Tax Administration Act. In terms of these provisions a person who is called upon to disclose information is not required to disclose a book or document that is a tax advice document. A ‘tax advice document’ is a book or document that is:

1. confidential;
2. created by:
  - a. the person for the purpose of instructing a tax advisor to give advice about the operation and effect of tax laws;
  - b. a tax advisor or employee of a tax advisor for the purpose of recording research and analysis to give advice about the operation and effect of tax laws;
  - c. a tax advisor or employee of a tax advisor for the purpose of giving advice about the operation and effect of tax laws; and
3. is not created for purposes of committing, promoting or assisting the committing of an illegal or wrongful act.

A tax advisor is defined as a person who is subject to the code of conduct and disciplinary process of an approved advisor group. An approved advisor group is a group that is approved by the Commissioner and includes persons who have a significant function of giving advice on tax laws, are subject to a professional code of conduct and a disciplinary process enforcing compliance with the code of conduct. Tax advisors are not regulated in New Zealand.

Any ‘tax contextual information’ included in a tax advice document must be disclosed. Tax contextual information includes facts or assumptions, descriptions of steps in transactions, advice not relating to tax laws, and advice relating to the collection of tax debts.

### ***Australia***



Australia does not currently have a statutory privilege for tax advice provided by accountants. However, the Australian Tax Office has a formal policy in place to the effect that certain documents relating to advice provided by professional accounting advisors should be confidential. Australia is in the process of considering a statutory privilege for tax advisors. The rationale for the concession is embodied in the following extract from the guidelines, *“While recognising that the Commissioner has the legislative power to request access to most documents, it is accepted that there is a class of documents which should, in all but exceptional circumstances, remain within the confidence of taxpayers and their professional accounting advisors. In respect of such documents the ATO acknowledges that taxpayers should be able to consult with their professional accounting advisors on a confidential basis in respect of their rights and obligations under taxation laws to enable full and frank discussion to take place and for advice to be communicated on that basis.”*

### **Germany**

The German Fiscal Code provides that, *inter alia*, tax consultants, auditors, tax representatives and certified accountants may refuse to provide information entrusted to them or which became known to them in their professional capacities.

### **Proposal**

It is proposed that a limited statutory privilege be introduced for registered tax practitioners along similar lines to that adopted in New Zealand and subject to similar requirements and restrictions.

We propose amending the definition of “information” contained in clause 1 of the draft TAB, such that that definition excludes specifically opinions prepared on tax matters. It is, therefore, suggested that the definition of “information” contained in clause 1 of the TAB contains an exclusion along the following lines:

*“Excludes opinions prepared by any person who is registered with a professional body which is entitled to institute disciplinary action against its members for violating its rules of ethics, or a professional body which is regulated by statute, on any tax Act.”*

Please do not hesitate to contact us, should you have any questions regarding the above.

Yours faithfully



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