

**Extending Legal Professional Privilege to Non-legal
Tax Practitioners in South Africa: A comparative and
constitutional perspective**

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ABSTRACT

This study explains the differing rights of taxpayers, based on the nature of the profession of the tax adviser they consult. Those who utilize the services of tax attorneys can rely on the protection afforded by legal professional privilege whereas those who obtain their advice from non-legal advisers, such as accountants and other tax advisers, cannot claim the same protection. Legal professional privilege is a substantive right which should be extended to cover clients of non-legal tax advisers. The continued denial of the privilege to clients of non-legal tax practitioners while it is availed to those who approach legal practitioners infringes the rights to privacy and equality contained in the South African Constitution. The object of this research is to show that the common law concept of legal professional privilege is amenable to extension so as to cover the clients of non-legal tax advisers. A qualitative approach was adopted which involved an in-depth analysis of the origins, rationale as well as the requirements for the operation of the doctrine. This also involved a constitutional as well as a comparative dimension. The constitutional dimension sought to show that the current distinction is untenable under the South African Constitution by virtue of the infringement of the rights to privacy and equality. The comparative dimension presented an analysis of the various jurisdictions that have extended the doctrine as well as those that are still to do so or have adamantly rejected the idea. The differential treatment of taxpayers based on the professional they engage contravenes the privacy and equality provisions and is thus unconstitutional. The study demonstrates that legal professional privilege is amenable to extension and there is need for legislative intervention as the courts are limited in the extent to which they may intervene in light of the separation of powers and judicial deference. Legal professional privilege should therefore be extended to protect the clients of non-legal tax advisers as opposed to partial protection which subsists at the moment.

Keywords: Constitutional principles and taxation; legal professional privilege; non-legal tax advisers

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List of Abbreviations

- ALRC— Australian law Reform Commission.
- SAJHR— South African Journal of Human Rights.
- SALJ— South African Law Journal.
- SARS— South African Revenue Service.

1 CHAPTER 1: INTRODUCTION

1.1 Motivation for the research

The motivation behind this research is best illustrated by way of an analogy. X Taxpayer would like to obtain some tax advice. He goes to a non-legal tax practitioner and tells the advisor all the details and also hands over all documents pertaining to his tax affairs for the purpose of obtaining tax advice. In the event that the South African Revenue Service (SARS) decides to investigate the tax affairs of Mr X for whatever reason they can obtain all the information they need from X's advisor and they can even call the advisor to testify as to X's transactions in terms of sections 74 to 74D (Appendix 1 attached) of the Income Tax Act¹ (the Act), which empowers the Commissioner to require a taxpayer or any other person, including a tax advisor, to furnish him with any information he may require relating to a taxpayer's tax affairs. Section 74D empowers the Commissioner to engage in more aggressive measures such as inquiries and searches and seizure of documents.² Sections 80M to 80T (Appendix 2 attached) of the Act also compel taxpayers and advisors to report 'reportable' transactions as part of the anti-avoidance regulations.

X has a second option which involves obtaining the very same tax advice from a tax attorney. In the event of the Commissioner seeking to obtain information about X's activities from his attorney he will not be able to compel the disclosure of the content of the communication between X and his advisor. The communication is protected by legal professional privilege and is therefore not subject to the coercive information gathering powers of the Commissioner. Should the attorney divulge the information without X's authority such information cannot be used by the Commissioner for any purpose whatsoever unless X waives his right to the privilege.

In terms of section 67A every natural person who provides professional advice or assistance with respect to the application of any Act administered by the Commissioner must register with the Commissioner as a tax practitioner. Failure to register attracts penalties in terms of

¹ Act 58 of 1962.

² R de Swardt "General Provisions" in M Stiglingh (ed) *Silke: South African Income Tax* (2009) 932.

section 75 which prescribes a fine or imprisonment for a period not exceeding 24 months. The registration provisions in the Draft Tax Administration Bill³ are similar to section 67A. In a sense therefore, registered tax practitioners are subject to a form of regulation. This may be relevant if privilege is to be extended to non-legal tax advisors. Registered tax practitioners comprise members of the legal profession, chartered accountants and other practitioners who are not members of a professional body.

Section 4 of the Act prohibits the Commissioner or any of his employees or agents from disclosing information pertaining to a particular taxpayer unless the information is relevant to an investigation or prosecution of serious criminal offences in which case disclosure will be made to the National Police Commissioner or the National Director of Public Prosecutions. The importance of the section was emphasised in *State Tender Board v Supersonic Tours (Pty) Ltd*⁴ in which the court admonished a firm of attorneys working for the Tender Board which had sought to circumvent the secrecy provisions by obtaining tax information regarding to Supersonic Tours ‘unofficially’. In so doing the court reiterated the stance taken in *Welz and Another v Hall and Others*,⁵ that, a court will not lightly direct an official of the Revenue to divulge information imparted to him by a taxpayer. The rationale behind the secrecy provision is to encourage full disclosure to SARS.

The secrecy provisions seek to protect information supplied by taxpayers from disclosure to other parties and prescribe instances and guidelines where such information may be shared with other government agencies. As a result it can be said that it is a quasi-privilege. However the section protects the taxpayer from disclosure by the Commissioner but does not protect the taxpayer from the coercive information gathering powers of the Commissioner. It must be noted that the prohibition against disclosure is not absolute⁶. It may be set aside by an order of court and may also be relaxed for example, to allow general disclosures to other agencies such as the Statistician-General as well as the Commissioner of the South African Police and the Director of National Public Prosecutions. This means that the provisions do

³ B 2010.

⁴ 2008 (6) SA 220 (SCA).

⁵ 59 SATC 49 at 54.

⁶ L Van Schalkwyk “Introduction and Interpretation” in M Stiglingh (ed) *Silke: South African Income Tax* (2009) 8.

not provide the required protection that would foster candour between a client and his advisor, thus it can be said taxpayers are likely to not be honest in their dealings with SARS. The protection provided by privilege on the other hand will increase compliance as it addresses the issue at the root, at the point of advice because by the time issues come before the Commissioner, an offence will already have been committed. The proposed Tax Administration Bill deals with privilege in section 64 but only refers to privilege as it currently stands and therefore does not extend privilege to non-legal tax practitioners. In the absence of an amendment of the Bill the status *quo* will remain and taxpayers' communications with their advisors will continue to be treated differently depending on the profession of the advisor they approach.

As can be seen from the above illustration this is an anomalous situation. As the law currently stands, the only reason why a tax practitioner who is not an attorney cannot claim legal professional privilege is based solely on the profession of the tax practitioner. This opens the door to the argument that the exclusion of tax practitioners other than legal professionals infringes upon the equality clause in the Constitution as well as the right to privacy.⁷

The research is motivated by a need to shed light on the inequality that is manifest in the system as it stands because the privacy of one group of taxpayers is protected whereas others are left at the mercy of the Commissioner's coercive information gathering powers. This thesis will explore ways in which legal professional privilege can be extended to non-legal tax practitioners, thus ensuring that regardless of from whom taxpayer X decides to obtain tax advice there will be equal protection of his privacy from the prying eyes of the revenue services, thus enabling candour between X and his tax advisor regardless of whether or not such advisor is an attorney. The promotion of candour between taxpayers and their advisors will ensure that the taxpayer is given appropriate advice and this professional advice may actually result in increased compliance with tax legislation.

⁷ L Olivier "Privilege and Tax Practitioners" (2008) 125 *SALJ* 504 at 513.

1.2 Theoretical framework

The law of evidence prescribes that where privilege applies a person is not obliged to answer a question or supply information that is relevant to an issue before the court and this should be distinguished from the non-competence or non-compellability of a witness.⁸ The concept can further be divided into state and private privilege and there are various forms of privilege that subsist in our law. Whereas state privilege is directed at preventing the disclosure or admission of information which is detrimental to state interests, private privilege is aimed at protecting the interests of individuals.⁹ According to Zeffert and Paizes¹⁰ when a court grants a claim of privilege –it does so not because such evidence is inadequate, rather it is because the protection of some higher value, sometimes lying outside the adjudicative process itself, has been given primacy even though this might have the effect of obstructing the search for the truth”. A further observation was made by these authors when they stated that –it is becoming increasingly apparent that some of the privileges are growing out of their original box which bore the restrictive label ‘evidentiary rule’ and are assuming the more considerable identity of ‘substantive right’”.¹¹

Legal professional privilege entails that communications between a legal advisor and his or her client are privileged provided the legal advisor was acting in a professional capacity at the time; he was consulted in confidence; for the purpose of obtaining legal advice; which does not facilitate the commission of a crime or fraud.¹² According to *S v Safatsa*¹³ the privilege extends –beyond communications made for the purpose of litigation to all communications made for the purpose of giving or receiving advice because confidentiality is necessary for the proper functioning of the legal system and not merely the proper conduct of litigation”. In another case it was held that the doctrine is –based on the basic or fundamental common law right of every person of access to the courts, a corollary of which is the right of access to a

⁸ PJ Schwikkard and SE Van der Merwe *Principles of Evidence* 3 ed (2009) 123.

⁹ Schwikkard and Van der Merwe *Evidence* 124.

¹⁰ DT Zeffert and AP Paizes *The South African Law of Evidence* 2 ed (2009) 573.

¹¹ Zeffert and Paizes *South African Law of Evidence* 573.

¹² Zeffert and Paizes *South African Law of Evidence* 625.

¹³ 1988 (1) SA 868 (A) 886E.

legal advisor which includes the right to consult such an advisor privately and confidentially”¹⁴.

As noted above legal professional privilege has evolved from being a mere evidentiary rule to a fundamental rule of process. The United States of America introduced section 7525 of the Internal Revenue Service Restructuring and Reform Act of 1998¹⁵ which effectively extended the doctrine of privilege to non-tax practitioners through the creation of a ‘tax privilege’ for communications made on or after 22 July 1998. This privilege has attracted judicial mention as well as debate as to its efficacy in achieving the goals that the American Congress set out to achieve.

The present research also discusses the situation in New Zealand where in 2005 the legislature promulgated the Taxation (Base Maintenance and Miscellaneous) Act¹⁶, which created a privilege independent of the common law legal professional privilege. This has also attracted its fair share of criticism, which will be explored in-depth later in the discussion. Not to be outdone the Australian Law Reform Commission in 2008 set in motion a process towards extending legal professional privilege to non-legal tax practitioners by recommending the creation of a statutory privilege applying to non-legal tax practitioners in its report on client legal privilege in federal investigations.¹⁷ The proposed privilege is similar to the one adopted by New Zealand, that is, a privilege separate and independent from the common law. Comment will also be made on the decision of the English Court of Appeal in the case of *Prudential v Special Commissioner of Taxes*¹⁸ in which the court held that privilege only applied in instances where a attorney had been approached for advice.

1.3 Research goals

One of the goals of the research is to show that privilege by its very nature is amenable to extension to cover communications made between taxpayers and non-legal tax advisors. The

¹⁴ *Mandela v Minister of Prisons* 1983 (1) SA 938 (A) 957D.

¹⁵ Pub. L. No. 105-206, 112 Stat. 685.

¹⁶ Act 79 of 2005.

¹⁷ Australian Law Reform Commission (ALRC) Report No. 107 (2007) “Privilege in Perspective: Client Legal Privilege in Federal Investigations”. <http://www.austlii.edu.au/au/other/alrc/publications/reports/107/> (accessed 03/09/09).

research also aims to explore how the *status quo*, that is, the non-availability of privilege to non-legal tax practitioners holds up when subjected to Constitutional muster, that is, whether it violates the Constitution¹⁹ by infringing the right to equality²⁰ as well as the legitimate expectation of privacy embodied in the right to privacy.²¹ An attempt will be made to expose the unfair discrimination manifest in the continued rejection by the legislature of the need to extend legal professional privilege to non-legal tax practitioners. The constitutionality of this differentiation appears not to have been tested before either before the courts or by the legislature. The research will endeavour to extend the body of knowledge on the Bill of Rights to cover taxation issues and prompt the legislature to investigate the issue and eventually extend the doctrine to cover tax advice given by non-legal practitioners by proposing a suitable approach to do so drawing on the jurisdictions mentioned above. In addition as many African countries draw on South African jurisprudence in fields including taxation reform, the research would be of assistance with regard to the question of extending the doctrine of privilege to cover non-legal tax practitioners in these jurisdictions.

1.4 **Research methodology**

A qualitative approach will be applied in which the first stage will be to explore the underlying tenets of the doctrine of privilege and this will involve an examination of the common law and case law on the doctrine. This stage will have a historical dimension to it. A descriptive approach will thereafter be adopted to highlight the application of the doctrine in the Republic through cases and publications.

Secondly a constitutional approach will be adopted so as to establish the constitutionality or otherwise of the position as it stands in the Republic. This will involve testing whether the failure to extend the concept infringes on the privacy of those taxpayers who are advised by non-legal tax practitioners as compared to those who obtain their advice from tax attorneys. This will also involve exploring whether the continued application of legal professional privilege to tax attorneys only, infringes the equality provision in the Bill of Rights.

¹⁸ [2010] EWCACiv 1094.

¹⁹ Constitution of the Republic of South Africa, 1996.

²⁰ Section 9.

²¹ Section 14.

Furthermore the differentiation will be tested against the limitation clause, that is, section 36 of the Bill of Rights.

The penultimate stage will be to explore the position in other jurisdictions, that is, the United States of America, New Zealand, Australia and England. Legislation and case law from these jurisdictions will be analysed to establish how these countries have been able to extend the concept of privilege and their motivation for doing so and in cases where extension has been rejected, the reasons for the rejection.

Having established the constitutionality or otherwise of the differentiation, recommendations will be made on how to extend the doctrine to non-legal tax practitioners drawing on the experiences of other jurisdictions, specifically the United States of America and New Zealand.

1.5 **Structure of the thesis**

The next chapter will explore the various justifications for the existence of privileges in general. An in depth analysis of the concept of legal professional privilege will follow in which the origins, nature, scope and conditions for the operation of the doctrine are analysed. This will involve discussion of literature, and due to the common law roots of the privilege, case law will be covered extensively so as to fully illustrate the judicial treatment of the doctrine. The chapter will conclude by examining whether the doctrine is amenable to extension to non-legal tax practitioners. To achieve this, the underlying tenets as well as the conditions for the operation of the privilege which will have been canvassed earlier in the chapter will be posited in the tax advisor context.

Chapter three (3) will focus on the constitutional dimension of this research and involves an exploration of the South African Constitution particularly the right to privacy contained in section 14 as well the right to equality in section 9. The differential treatment of taxpayers is tested against these two rights in order to determine if it is tenable in the South African constitutional context. This will also involve determining whether the infringement of the rights will be justified in terms of the section 36 limitations clause.

Having established that the current situation is untenable under the Constitution, chapter four (4) will explore the approaches that have been adopted by other jurisdictions. The section 7525 tax advisor privilege promulgated in the United States of America, the section 20B to 20G non-disclosure right in New Zealand, the proposals of the Australian law Reform Commission as well as the approach of the English courts will be explored. The approaches in the two countries mentioned in this study, the U.S.A and New Zealand, will be covered in depth and a critical analysis of each approach will be made.

Finally chapter five (5) will seek to bring the discussion to a conclusion by recapping the discussion as well as exploring the best way in which South Africa can address the issue. This is done by further analysing the strengths and weakness of the approaches mentioned above. A proposal for a draft tax advisor privilege for South Africa is also contained in the chapter.

2 CHAPTER 2: PRIVILEGE

2.1 Introduction

Central to the topic of the present research is the concept of privilege in general and legal professional privilege in particular. While also looking at the main umbrella concept of privilege this chapter constitutes an in depth analysis of legal professional privilege, its historical origins, its rationale and nature as well as the requirements that have to be met before one can successfully claim privilege in respect of particular communications. This chapter seeks to put the concept of legal professional privilege within context and by so doing illustrate that the historical origins, rationale and requirements of the privilege are amenable to extension beyond the realm of attorneys into the specific practice area of non-legal tax practitioners and therefore, ought to afford protection to taxpayers who seek tax advice from tax attorneys as well as those who seek the very same service from non-legal tax advisors.

2.2 Privilege

Privilege entails that a person in a curial or extra-curial process has a personal right to refuse to give evidence which is otherwise admissible evidence. According to Zeffert and Paizes²² the nature of this exclusionary rule is such that when a privilege is invoked the evidence in question is excluded not because of its lack of probative value, rather its exclusion is occasioned by the need to protect some other higher value. It must be noted that sometimes this higher value is something outside the curial system itself. This means that where any privilege applies, one cannot be compelled to produce the evidence or communications to which it applies, whether it is in the course of curial or extra-curial processes.

2.3 Private privilege and state privilege

In the main there are two types of privilege recognized by law, the first being private privilege which is aimed at protecting individuals and secondly state privilege which is aimed at protecting state interests. The invocation of the second category, state privilege, is usually premised on the idea that the information or communication will be detrimental to public

policy or harmful to public interest²³. Rather than being seen as a form of privilege this particular category has been viewed by some as more of an exclusion of certain categories of evidence on grounds of public policy rather than being a privilege in the proper sense. This was duly expressed in the case of *Duncan v Cammel Laird*²⁴ where it was stated by Viscount Simon LC that “the withholding of documents on the ground that their publication would be contrary to the public interest, is not properly to be regarded as a branch of the law of privilege....crown or state privilege for this reason is not a happy expression”.²⁵ It was the reasoning of the court in this case that privilege in its proper form can be waived by a litigant whereas in cases in which the interest of the state could be jeopardised it is incumbent upon a judicial officer to exercise the rule even if the litigants have no objection to the production of the information.

This distinction between private and state privilege is aimed at positioning the particular type of privilege, that is, legal professional privilege, in the wider context in which it operates and also that by its nature state privilege is rigid and not amenable to extension. Thus even government tax advisors would have to look at the concept of private privilege and ultimately legal professional privilege should they be in a position where they might be compelled to divulge the contents of advice given to their client, the government, represented by the South African Revenue Service (hereafter referred to as the SARS). In the event of litigation regarding such matters the state would therefore not be able to rely on state privilege but will have to seek the protection afforded by legal professional privilege. This is important because the extension of the concept will not only benefit individuals but the state as well, where there might be litigation or attempts to gain access to information in its possession, particularly in light of the constitutional right of access to information contained in section 32 of the Constitution. The particular subsection of this right is contained in section 32(1) (a) which states that “everyone has the right of access to any information held by the state”.

²²Zeffert and Paizes *South African Law of Evidence* 573.

²³Schwikkard and Van der Merwe *Evidence* 157.

²⁴[1942] 1 ALL ER 587.

²⁵at 595.

2.4 Various types of private privilege

There are various types of private privilege and the first of these is the privilege against self-incrimination and the right to remain silent. According to this privilege a person is protected from being compelled to give evidence that incriminates him or herself and the right to remain silent gives effect to the privilege against self-incrimination.²⁶ According to the aforementioned authors this privilege and the concomitant right to silence are a natural consequence of the presumption of innocence and apply in both criminal and civil proceedings. This means that an individual is under no obligation to incriminate himself. Thus the burden of proof remains on the prosecution to prove the accused's guilt beyond a reasonable doubt and this is aimed at preventing the admissibility of evidence obtained by compulsion, on one hand, as well as to encourage witnesses to give information freely without the fear of incriminating themselves. From its nature it is clear that this is clearly a curial privilege and cannot be invoked when dealing with extra-curial proceedings such as searches and seizure.

There also is marital privilege which entitles a spouse to refuse to disclose communications from the other spouse made during the marriage. This is due to the notion that public opinion would find it unacceptable if spouses could be forced to disclose communications received from each other.²⁷ As long as the communication was made during the subsistence of the marriage it is enough for a successful claim of the privilege. In addition, whereas there is scope for compulsion of parents to testify against their children and vice versa, there is possibility of a successful claim of privilege where the parent or guardian assists the child from the time of arrest, as the communications made in this context are privileged as would be communications with a legal advisor.

In relation to communications to a legal advisor, it is imperative to note that there are other professional situations which in any event would call for privilege, but do not. According to Schwikkard and Van der Merwe²⁸ there are two conflicting interests at play when deciding whether such other relationships should attract privilege. Firstly there is the interest of society

²⁶ Schwikkard and Van der Merwe *Evidence* 124.

²⁷ Schwikkard and Van der Merwe *Evidence* 154.

in preserving and promoting certain relationships and secondly the interest of the administration of justice in ensuring that all evidence is before the court and it seems that preference is afforded to the second interest, meaning that most other professionals are either protected in a limited way or are not protected at all. Amongst these will be found doctor-patient relationships but only in so far as this does not extend to statements made by patients referred for mental observation. Such statements will only be admissible when determining the patient's mental condition. Those with no recourse to privilege at all include priests, insurers, accountants and tax advisors, among others, and it is with the latter two categories that this research is concerned. It must be noted that these categories are not entirely bereft of protection as they can look to the protection of the Constitution in the form of the right to privacy contained in section 14 (d) which provides that everyone has the right not to have the privacy of their communications infringed. Schwikkard and Van der Merwe,²⁹ however state that this does not afford enough protection as a successful application of the limitations clause, section 36 of the Constitution, will result in the protection afforded by section 14 (d) being stripped away. As a result it is clear that it is only the legal profession which is afforded protection due to the paramountcy afforded to the second interest, namely the interest of the administration of justice in ensuring that all relevant evidence is before the court. It is therefore imperative to explore the concept of legal professional privilege in order to determine whether it can be extended to other categories of professional relationships, particularly to non-legal tax advisors.

2.5 **Rationale for the existence of privileges**

2.5.1 **Utilitarian arguments**

The place of privilege in jurisprudence has been contested widely with some arguing that the search for the truth should be promoted and thus should not be obstructed by legal professional privilege. It has been contended by some that privilege has accomplished little but the concealment of the truth.³⁰ Indeed it is proclaimed that Jeremy Bentham, the champion of utilitarianism, attacked privilege as ~~an~~ instrument of darkness, the enemy of

²⁸ Schwikkard and Van der Merwe *Evidence* 152.

²⁹ Schwikkard and Van der Merwe *Evidence* 153.

innocence and the truth and an expression of the... fox-hunter's justice, in which legal proceedings are geared towards ensuring that both parties have fair play rather than the discovery of the truth.³¹ Although this might sound like an exaggeration, there seems to be some substance to the claims by the opponents of the privilege because indeed the privilege does inhibit the search for the truth. However the question that has to be answered involves a weighing up of the public interest against the individual interest and one should ask whether the two are mutually exclusive when it comes to the issue of privilege. If one considers the matter further, one will infer that the privilege does in fact actually further the public interest in the proper administration of justice rather than just serve the individual interests as postulated by some opponents.

While some like Bentham were vehemently opposed to privilege, others, like Wigmore advocated a qualified application of privilege. Without abandoning the utilitarian cause, Wigmore argues that communications made within a given relationship should be privileged only if the benefit derived from protecting the relationship outweighs the detrimental effect of privilege on the search for truth.³² According to Wigmore in order for a privilege to be justified it had to conform to the following requirements:³³

- (i) the communications must originate in a confidence that they will not be disclosed;
- (ii) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between parties;
- (iii) the relation must be one that in the opinion of the community ought to be sedulously fostered;
- (iv) the injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

³⁰ DT Zeffert "Confidentiality and the Courts" (1974) 91 *SALJ* 432 at 440.

³¹ A Paizes "Towards a Broader Balancing of Interests: Exploring the Theoretical Foundations of Legal Professional Privilege" (1989) 106 *SALJ* 109 at 109.

³² Anonymous "Privileged Communications" (1985) 98 *Harvard Law Review* 1450 at 1472.

³³ Anonymous 1985 *Harvard Law Review* 1472.

This position therefore advocated a qualified application of privilege but was also criticized on the basis that “weighing-up entails uncertainty and the promotion of candour is only possible in an atmosphere of perfect trust”.³⁴ This approach, where the application of the privilege is limited, can be seen in the approach adopted in the Australian case of *Grant v Downs*³⁵ where the majority of the court felt that there were powerful considerations which suggest that the privilege should be confined within strict limits. Wigmore, himself a harsh critic of the way in which courts and legislatures tended to apply the doctrine of privilege, tried to restrict the privilege by setting out a justification which had to be flexible enough to rationalize the existence of traditional privileges, yet narrow enough to disfavour the creation of new ones.³⁶ Thus the ambit of the privilege was restricted to documents brought into existence for the sole purpose of submission to legal advisors for advice or use in legal proceedings.³⁷ This resulted in the application of the privilege being confined to curial or quasi-curial proceedings.

The intuitive appeal of the traditional justification lies in the fact that society would suffer greatly if the lack of a privilege discouraged clients from conferring with their attorneys.³⁸ As a result it is clear that the qualified utilitarian basis for privilege recognises the need for privileges and the harm suffered in their absence, although proponents of the approach are only concerned with systemic rather than individual harm when looking at the fourth requirement put forward by Wigmore. It has also been said that by considering only extrinsic social policy, the justification elevates the interest advanced by privileges to the same plane as the societal interest in ascertaining the truth.³⁹ It must, however, be noted that this particular obsession with the net happiness or rather utility of the approach as the proponents would like to call it has been one of the focal points of the attacks that have been launched time and time again against the traditional justification for the existence of privileges.

³⁴ Zeffert and Paizes *South African Law of Evidence* 631.

³⁵ 1976 (136) CLR 674 at 685.

³⁶ Anonymous 1985 *Harvard Law Review* 1473.

³⁷ Paizes 1989 *SALJ* 111.

³⁸ Anonymous 1985 *Harvard Law Review* 1473.

³⁹ Anonymous 1985 *Harvard Law Review* 1474.

In as much as Wigmore's criteria seeks to rigidify and restrict the concept of privilege it has been criticized as being ambiguous and in actual fact having the opposite effect to its intended goal of limiting the number of protected relations. This is so in light of the fact that the approach by Wigmore, which amounts to a cost benefit analysis, is aimed not at the search for truth *versus* confidentiality but the search for truth *versus* the general protection of relationships relying on confidentiality which the community believes should be protected.⁴⁰ Critics of the traditional approach have tended to attack the very premise that privileges actually encourage communications. It has been argued by some that people typically know little or nothing about their privilege and that, even if they did, the knowledge would rarely alter their communicative behaviour.⁴¹ The first part of the argument can easily be countered because, although the existence of a privilege might not readily encourage people to communicate, it is logical to argue that in its absence people will be less willing to communicate. This is so because even though the knowledge that communications are held in confidence might not readily induce candour, the knowledge that communications might be divulged under compulsion or voluntarily by the advisor will definitely deter people from communicating fully with their advisors.⁴² It must be stated that the deterrence of candour is too big a risk to take and therefore it is better to have a privilege, even though there is no empirical evidence to conclusively show that it encourages communication, than not to have any privilege at all. It is dangerous to assume that people know nothing or little about a privilege because in any case there is an obligation on professionals to inform their clients of the privileges that apply because a failure to do so might actually inhibit candour and consequently the provision of the service which the professional purports to provide.

One of the major shortcomings of the criteria is that it is of limited application in pluralistic societies like South Africa because there is much confusion as to whose injury and which injury is referred to in the fourth criterion and how it is to be measured.⁴³ Thus it can be said that the folly of the utilitarian approach is the focus on systemic harms and the ignoring of

⁴⁰ R Gewald *The Possibility of Psychotherapeutic Privilege in South Africa* (LLM Thesis, Rhodes 2008) 11.

⁴¹ Anonymous 1985 *Harvard Law Review* 1474.

⁴² Anonymous 1985 *Harvard Law Review* 1476.

specific injury to those actually before the court; the protection of any particular relationship or the protection of any particular confidence is not valued as an end in itself.⁴⁴ This is in light of the fact that there are many different societies with differing interests and ideas as to which relationships should be afforded protection. It has been argued that instead of limiting the privileges that apply it could actually be used to justify the creation of new privileges and thus we would be talking not only of the extension of legal professional privilege but the introduction of a totally new privilege for non-legal tax practitioners. This is so because according to Gewald⁴⁵ if one were to adopt a wide interpretation of the criteria, the creation of a new privilege would be justified. If one were to take the instance of taxpayers (all residents are) it can rightly be assumed they favour their individual right to privacy and the need to foster relations with their tax advisors based on trust and confidentiality and once it can be shown that the forced disclosure of their tax affairs would result in a betrayal of confidence so damaging to the relationships that it irreparably harms them, then the creation of such a new privilege would be justified.

One of the premises of Bentham's argument is that an act is right if it results in the best consequence. The folly of this premise lies in the fact that it can be conversely argued that an act is right if it is required by a rule, for example legal professional privilege, where the following of such rule will result in the best consequence.⁴⁶ The aim of rectitude, which is the drive behind the utilitarian philosophy, is not the only one purpose of a trial. There are some important social needs which are served by the trial and one of these is the moral imperative that it is better for the guilty to be acquitted than to establish guilt by rational means alone because the latter approach may sometimes violate human dignity and personal autonomy.⁴⁷ Various types of privilege serve this particular objective of the trial process because denial of privilege, for example legal professional privilege, will affect the personal autonomy of the defendant or witness in light of the coercive and overbearing powers of the

⁴³ Gewald *Psychotherapeutic Privilege* 11.

⁴⁴ Anonymous 1985 *Harvard Law Review* 1473.

⁴⁵ Gewald *Psychotherapeutic Privilege* 11.

⁴⁶ C Theophilopoulos "The Jurisprudential Classification, Evaluation and Reform of Evidentiary Processes" (2004) 121 *SALJ* 163 at 181.

⁴⁷ Theophilopoulos 2004 *SALJ* 181.

state. However, the general good and the utilitarian concern for a net increase in happiness are never adequate excuses for limiting human rights.⁴⁸

2.5.3 **Non-utilitarian approach**

2.5.3.1 **Individualistic/human rights approach**

It is only logical that those opposed to the traditional justification for the existence of privileges would try to propose a competing rationale to justify or explain the existence of the concept. This alternative has been the putting forward of a human rights or individualistic rationale centred mainly on the right to privacy and, in light of the South African constitutional dispensation could be said to find expression also in terms of the right of access to justice. According to some commentators this rationale focuses on the protection that privileges afford to individual privacy.⁴⁹ This was in response to the utilitarian disregard for the individuals affected by privilege and the fact that they relied on some dubious behavioural assumption of the public.⁵⁰ The privacy rationale is based on three questions, firstly whether there is a need to keep certain communications confidential, secondly whether such need is legally recognizable and thirdly whether this privacy interest outweighs the need for information.⁵¹ These are questions which can also be asked when looking at whether the relationship between a taxpayer and a non-legal tax advisor deserves to be protected by privilege. The answer to the first question in the context of non-legal tax practitioners would have to be in the affirmative because there is obviously a need for such communications to be confidential. The second aspect would also be satisfied because the right to privacy is constitutionally protected and the need to keep the communications with non-legal tax practitioners confidential is therefore legally enforceable by virtue of the justiciable nature of our Bill of Rights. It is when one comes to the third aspect that problems arise because just as the balancing act in the traditional approach is indeterminate so is the balancing act required by the human rights approach. The societal need for evidence is just as hard to measure under

⁴⁸ Theophilopoulos 2004 *SALJ* 182.

⁴⁹ Anonymous 1985 *Harvard Law Review* 1480.

⁵⁰ Gewald *Psychotherapeutic Privilege* 17.

⁵¹ Anonymous 1985 *Harvard Law Review* 1481.

either rationale and no objective criterion exists to determine the normative weight of the privacy interest.⁵²

According to the rationale, privacy is important for personal autonomy, necessary emotional release and promoting free self evaluation and the compelled disclosure of information is inherently wrong. This is so because it inflicts two kinds of harm, namely the embarrassment of having secrets revealed to the public and, secondly, the forced breach of an entrusted confidence.⁵³ The former offends the autonomy of the individual in that he is deprived of the right to control the distribution of personal information and the latter offends the right of the individual to form private loyalties.⁵⁴ Although in the present constitutional era it is easy to embrace this particular rationale as the true justification, it must be noted that although privacy helps to preserve liberty, that very liberty allows the invasion of that of others.⁵⁵

Another strand of the individualistic/human rights approach advocates an absolutist rationale for the privilege. A major proponent of this approach is Charles Fried⁵⁶ who saw the role of the attorney as that of a friend and as such he is morally right to favour the interest of his friend (client) in a way which is not maximally conducive to the greater good and which may even be harmful to another particular individual. To bolster his argument Fried argues that the individualised relations of friendship and love, as epitomised by the relationship of the client and his attorney, differ from and are more intense than the cooler more abstract relations of love and service to the community in general⁵⁷ and thus, it is acceptable for the attorney to refuse and not be compelled to disclose the communications that pass between him and his client. Accordingly it is argued that the fact that the relationship is cemented by pay does not derogate from the relationship because once it is created it is the client's needs and not economics that determine its content. In response to a question whether the privilege is justified in light of the harm that may be caused to the adversary who is deprived of material that is relevant and perhaps even vital to his case, Fried⁵⁸ argues that this is indeed

⁵² Anonymous 1985 *Harvard Law Review* 1483.

⁵³ Anonymous 1985 *Harvard Law Review* 1481.

⁵⁴ Anonymous 1985 *Harvard Law Review* 1481.

⁵⁵ Anonymous 1985 *Harvard Law Review* 1483.

⁵⁶ Zeffert and Paizes *South African Law of Evidence* 631.

⁵⁷ Zeffert and Paizes *South African Law of Evidence* 631.

⁵⁸ Paizes 1989 *SALJ* 120.

justified as long as the harm suffered is institutional and does not exist outside of the legal framework. To justify this he argues that it is only a lack of knowledge that prevents the client from actually instituting judicial or statutory authority to help him win an immoral case or reach an immoral result himself. However, one has to ask whether such an absolutist approach is warranted because there is a need to draw the line at some point with regard to information which may be covered by the privilege.

Since the utilitarians argue that the privilege is an instrument to obstruct the search for truth by achieving frank disclosure on the part of the client, Alschuler attacks this proposition by stating that if the privilege is justified purely on traditional instrumental grounds . . . it is only by specious reasoning that one may claim that the privilege ordinarily hinders the search for truth. For, if the privilege were abolished, the majority of solicitor-client communications would not be made in the first place.⁵⁹ The question that has to be addressed therefore is whether it is fair to compel one to divulge information transmitted in confidence. Thus people with legal problems should be entitled as of right, to the services of people who understand the system and whose function within the system is to be on their side.⁶⁰

2.5.3.2 **Criticism of human rights approach**

Theophilopoulos argues that the main problem with a human rights doctrine is that it aims at constructing a legal system embodying a supra scientific or divine truth which despite its apparent open ended nature has the potential to become absolute and inflexible in practice.⁶¹ This is so because by definition, in the opinion of thinkers such as Nozick a human right is an absolute force which can never be justifiably infringed.⁶² To put things into perspective, it must be noted that a rights based doctrine implicitly asserts the most extreme moral claim possible; it is not merely concerned with wrong acts but with the distinction between absolute righteousness and absolute wrongness.⁶³ It is this particular character of the rationale which is dangerous to the administration of justice because it may provide a justification for

⁵⁹ Paizes 1989 *SALJ* 121.

⁶⁰ Paizes 1989 *SALJ* 121.

⁶¹ Theophilopoulos 2004 *SALJ* 168.

⁶² Theophilopoulos 2004 *SALJ* 169.

⁶³ Theophilopoulos 2004 *SALJ* 168.

inflicting suffering in much the same way that claims of righteousness have justified the bloodiest acts of holy wars.⁶⁴

Another fault with the rationale is that it is an individualizing ideal, giving priority to specific basic interests of individuals without concerning itself with its effect on the system as a whole.⁶⁵ It can therefore be argued that proponents of the rationale make the same mistake as those who advocate the traditional approach because they think of the individual only while ignoring the fact that the individual is a part of the collective.

2.5.4 **Convergence of theories**

From the above it can be seen that the two rationales are divergent but are they really worlds apart? The traditional justification focuses solely on the societal interest whereas the human rights rationale focuses solely on the individual interest. Although the theories have been regarded as mutually exclusive they are in fact compatible and share remarkably similar ideologies.⁶⁶ According to Zeffert and Paizes the solution lies in “extracting what is good from each of the discarded models and combining them in a broader, more comprehensive vision of the values served by the privilege”.⁶⁷ Each of the theories points to a reason why there is legal professional privilege but none can claim to have the reason for the existence of the privilege. It can be seen that the problem lies in the conflict between rights (absolutist approach) and consequences (utilitarian approach). Zeffert and Paizes⁶⁸ argue that the two sides are reconcilable because:

“ . . . although each seems to concentrate solely on either one of individual rights or the good of society it assumes that the demands of the other have been satisfied. Thus the absolutists determine the moral worth of the privilege according to the degree to which it gives expression to rights, but accept implicitly that the unfettered exercise of these rights enhances optimally the common good. Utilitarians on the other hand measure the moral worth of the privilege by examining its consequences, but assume that the

⁶⁴ Theophilopoulos 2004 *SALJ* 168.

⁶⁵ Theophilopoulos 2004 *SALJ* 168.

⁶⁶ Anonymous 1985 *Harvard Law Review* 1484.

⁶⁷ Zeffert and Paizes *South African Law of Evidence* 634.

protection of individual rights is one of the most desirable end-products a utilitarian society can pursue. "

As a result one can therefore argue that full and frank disclosure results in more effective legal representation and closer adherence to the law to the benefit of the public interest in justice. This is a principle which also supports the argument which is the focus of this research that legal professional privilege should be extended to non-legal tax practitioners. After all, the basic justification for the privilege is the public interest in facilitating the rule of law and it is a practical guarantee of fundamental, constitutional or human rights.⁶⁹

It has also been argued that if one were to adopt a full utilitarian perspective rather than a rational utilitarian one, it will be easier to reconcile the two because in such an instance the human rights rationale will be regarded not as an alternative rationale but a supplementary one responding to the limitations of the traditional justification.⁷⁰ Thus instead of competing with the traditional approach, the human rights rationale actually plugs some loopholes in the traditional approach, namely the fact that the individual as an integral part of the collective is disregarded under the traditional approach.

It has been argued that those who are of the opinion that the two are mutually exclusive labour under two false dichotomies, firstly the dichotomy between justifications that advance collective interests and justifications that protect individual interests.⁷¹ This dichotomy is misleading because the whole idea of rules imposed by society as a collection of individuals is precisely so that individuals may enjoy the benefits thereof,⁷² whether they enjoy such benefits through the system or discretely is of no consequence. Therefore when people enjoy benefits emanating from rules, for example, privilege, the issue is not whether such benefits are being enjoyed systemically or discretely by individuals, rather, the important thing is that individuals by virtue of being part of the collective do have such benefits.

⁶⁸ Zeffert and Paizes *South African Law of Evidence* 635.

⁶⁹ Zeffert and Paizes *South African Law of Evidence* 639.

⁷⁰ Anonymous 1985 *Harvard Law Review* 1484.

⁷¹ Anonymous 1985 *Harvard Law Review* 1484.

⁷² Anonymous 1985 *Harvard Law Review* 1485.

The second dichotomy distinguishes between instrumental rationales, namely the traditional justification and non-instrumental rationales in the form of the human rights rationale. The traditional approach, due to its obsession with the societal evils that disclosure would cause, is classified as instrumental whereas the human rights approach is classified as non-instrumental because it justifies privileges primarily by concluding that disclosure itself is wrong rather than because of its adverse consequences of disclosure.⁷³ However if one were to look closely it will become apparent that the two are in actual fact both instrumental approaches because they only differ in their focus area, with the traditional approach focusing on the direct consequences of compelled disclosure and the human rights approach focusing on the indirect consequences of such compelled disclosure.⁷⁴

2.6 The origins of legal professional privilege

Before one can look at the origins of legal professional privilege it is necessary to explore what the privilege is. According to Zeffert and Paizes the privilege embodies the general rule that communications between a legal advisor and his or her client are privileged, provided the advisor is acting in a professional capacity at the time, he is consulted in confidence, the communication was made for the purpose of obtaining legal advice and the advice does not facilitate the commission of an offence.⁷⁵ These are the requirements of the privilege and will be discussed in detail later in this chapter.

According to the abovementioned authors the rule has its origins in the Anglo-American evidentiary system and has undergone significant philosophical changes since its early stages in Elizabethan England.⁷⁶ It has been said that the first duty of an attorney is to keep the secrets of his clients⁷⁷ and it seems that this was what motivated the need for the privilege and this is given testament to when one looks at the underlying rationale of the privilege in Elizabethan England. The privilege therefore stemmed from respect for the oath and honour of the attorney, duty-bound to guard closely the secrets of his client and its operation and was

⁷³ Anonymous 1985 *Harvard Law Review* 1485.

⁷⁴ Anonymous 1985 *Harvard Law Review* 1485.

⁷⁵ Zeffert and Paizes *South African Law of Evidence* 625.

⁷⁶ Zeffert and Paizes *South African Law of Evidence* 625.

⁷⁷ Zeffert 1974 *SALJ* 432.

restricted to an exemption from testimonial compulsion.⁷⁸ From the above justification one can see how the privilege in its later stages was to be restricted to the curial process even though in its present form it has assumed a more pronounced role as shall be seen from later discussion. Therefore, originally, the privilege was meant to protect the honour of the attorneys and had little to do with the interests of the public or clients.⁷⁹

It was not until the eighteenth century that the philosophy behind the privilege shifted from the attorney to the client and this was motivated by the emergence of a school of thought that stressed the need to provide the client with freedom from apprehension when consulting a legal advisor. According to Zeffert and Paizes this particular shift coincided with the rise of the ideology of individualism which sprouted from the political philosophy of John Locke and the economic theory of Adam Smith.⁸⁰ There was, therefore, a shift from giving ascendancy to the interests of the society to those of the individual and hence the focus was no longer on the protection and maintenance of the honour of the attorney but the interests of the client. This explains why even today the privilege belongs to the client and points to the fact that the concept is amenable to extension to non-legal tax practitioners as it is focused not on the profession but the person seeking advice. According to Unterhalter⁸¹ this shift was because, instead of honour, the privilege now rested on the principle of candour.

2.7 Extension to extrajudicial processes

The privilege came to be viewed as a necessary corollary of fundamental rights, as being necessary for the proper functioning of the legal system and not merely the proper conduct of particular litigation⁸² and this prompted the second shift in the functioning of the privilege. As a result the privilege was extended to communications made in contemplation of future litigation and ultimately to communications made for the purpose of obtaining legal advice.⁸³ This has also been motivated by a shift of emphasis towards the safeguarding of personal

⁷⁸ Zeffert and Paizes *South African Law of Evidence* 627.

⁷⁹ Zeffert 1974 *SALJ* 432.

⁸⁰ Zeffert and Paizes *South African Law of Evidence* 628.

⁸¹ D Unterhalter "Legal Professional Privilege: A Rule of Evidence or Procedural Right?" (1986) 2 *SAJHR* 312 at 316.

⁸² Zeffert and Paizes *South African Law of Evidence* 628.

⁸³ Unterhalter 1986 *SAJHR* 316.

rights and hence the privilege is no longer viewed as a procedural right but as a substantive right. It must also be noted that there were considerable socio-political influences at the time of this shift and the main influence of this metamorphosis of the doctrine was the increasing power of the leviathan in the form of the state. Whereas the common law does not recognize a general power of compelling the production of information or documents outside of legal proceedings, statutory powers to search and seize have become commonplace.⁸⁴ This has also been necessitated by a situation which Heydon⁸⁵ explained thus:

"...human affairs and the 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, attorneys are necessary, and privilege is required to encourage resort to them and to ensure that all the relevant information will be put before them, not merely those the client thinks favour him. If attorneys 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. Attorney-client relations would be full of reserve and dissimulation, uneasiness, and suspicion and fear', because without privilege, the confidant might at any time have to betray confidences..."

This explains why the privilege does not only apply to criminal matters but to civil matters as well. Justice in the courtroom will not be served if privilege can be disregarded during the process leading up to a curial hearing. This shift in approach is canvassed in more detail in the next section of this thesis.

2.8 Nature and scope of the privilege

As noted above, the common law does not recognize any power to compel the disclosure of information outside of the curial process, and as such privilege was a procedural right which could only be exercised in the event of commencement of the curial process. The increasing power of the state has meant that there have been statutory incarnations authorising the search

⁸⁴ Zeffert and Paizes *South African Law of Evidence* 628-9.

⁸⁵ JD Heydon and M Ockleton *Evidence: Cases and Materials* 4 ed (1997) 417.

and seizure of information which in most cases has been used in later litigation, thus putting paid to the role and power of privilege if invoked in the curial process. As a result this meant that legal professional privilege could be circumvented by way of search warrants as privilege only came into effect once the curial process had been commenced. There have been various cases in South Africa and other jurisdictions which started to question whether this position was tenable. One of the first cases was *Andresen v Minister of Justice*,⁸⁶ a case in which the applicant contested the search and seizure of privileged documents from his attorneys' office. It was the applicant's argument that if police officers were able under a search warrant to seize privileged documents from an attorney's office, "the whole basis of professional privilege would be destroyed since documents are only privileged whilst in the hands of the attorney or his client".⁸⁷ On the other hand, it was the argument of the respondent that "there is no such thing as a privileged document *in vacuo*"⁸⁸ meaning that a privileged document has no meaning save in relation to litigation. Sadly the court decided to follow the latter approach holding that "questions of privilege have always arisen only in connection with proceedings in courts of law".⁸⁹ It was also the court's finding that if the law of privilege were to be applied in cases of search and seizure it would make the execution of search warrants impossible in certain cases. As a result the court held that privileged documents are not exempt from search and seizure under a search warrant and the only recourse available to aggrieved parties was to object to their being used in any litigation which may follow.⁹⁰

The Witwatersrand Local Division was again presented with an opportunity to reform the law with regard to the issue of privilege in the case *H. Heiman Maasdorp & Barker v Sec. for Inland Revenue*⁹¹ a case which involved the request by the Secretary for Inland Revenue for documents in the possession of the applicants, a firm of attorneys representing a taxpayer. The attorneys sought to establish the position in law as failure to hand the documents over left them facing prosecution in terms of section 75 of the Income Tax Act while on the other

⁸⁶ 1954 (2) SA 473 (W).

⁸⁷ 474B.

⁸⁸ 475G.

⁸⁹ 478F-G.

⁹⁰ 481C-D.

⁹¹ 1968 (4) SA 161 (WLD).

hand doing as demanded by the Secretary would have meant a breach of their duty to their client the taxpayer. In this instance it was held that the ~~general~~ rule in regard to the attorney client privilege is a special one as against the general rights bestowed on the Secretary".⁹² The court thus held that the documents were privileged and thus could not be attached in terms of the general powers afforded to the Secretary for Internal Revenue.

Any hope that the legal position relating to the treatment of privileged documents in the event of a search warrant was on the right track were dashed in the case of *Mandela v Minister of Prisons*,⁹³ where the Appellate Division upheld the *Andresen ratio*. The case involved the Nobel Laureate Nelson Mandela whilst he was still incarcerated in Robben Island Prison. The appeal concerned the rights of the appellant, during his incarceration, in respect of documents in his possession and also raised the question whether, whilst so incarcerated, he was entitled during an interview with his legal advisor to hand him written instructions relevant to the purpose of the legal interview that was taking place. One of the main issues in this case was whether the Commissioner of Prisons, by virtue of certain statutory powers, was entitled to take into safekeeping privileged documents containing communications between the appellant and his legal advisor. The court held that ~~the~~ attorney client privilege is a rule of evidence and only became operative in the course of legal proceedings".⁹⁴ The court therefore approved the *Andresen* judgment while criticizing the decision in *H. Heiman Maasdorp & Barker v Sec. for Inland Revenue* by stating that ~~it~~ appears as not having postulated a development of the privilege in our law, but to have assumed the common law privilege to have been wider than the authorities appear to justify... at this stage of our legal development it is not at all clear that the attorney-client privilege confers a general immunity against seizures in terms of general powers".⁹⁵ According to Zeffert and Paizes ~~although~~ the decision of the Appellate Division did not expressly commit itself to the view that the privilege is merely a rule of evidence which has application only in legal proceedings, this was clearly the tenor of its decision".⁹⁶ The appellate division therefore quashed any hopes

⁹² 163D.

⁹³ 1983 (1) SA 938 (A).

⁹⁴ 962C.

⁹⁵ 962H.

⁹⁶ Zeffert and Paizes *South African Law of Evidence* 640.

that professional privilege could be developed to encompass extra-curial searches and seizures.

At the same time it appears that it was not only our jurisprudence which was experiencing a crisis of identity with regard to the issue of professional privilege. The Australians were also undergoing a similar situation, as demonstrated by the case of *O'Reilly v Commissioners of the State Bank of Australia*⁹⁷ where the court followed the approach in *Crowley v Murphy*,⁹⁸ that ~~the~~ doctrine of legal professional privilege applies only in judicial or quasi-judicial proceedings and does not prevent, under the authority of a warrant, the search and seizure of documents even if such documents would be privileged from production in legal proceedings".⁹⁹ The court therefore held that a solicitor was ~~not~~ excused from producing to the commissioner of taxation evidence and documents received or created by him while acting for his clients...even if those documents would have been privileged from production in judicial or quasi judicial proceedings".¹⁰⁰ These two decisions were in actual fact informed by the decision in *Grant v Downs* where the court applied Diplock L.J.'s contention that ~~---~~privilege of course, is irrelevant when one is not concerned with judicial or quasi-judicial proceedings because strictly speaking, privilege refers to a right to withhold from a court or a tribunal exercising judicial functions, material which would otherwise be admissible".¹⁰¹

In the case *Andresen* it was contended by the applicant's counsel that allowing search warrants to apply to privileged documents and information would have a startling result and it is submitted that this is true. Although no empirical study has been carried out to show that such lack of protection would lead to the loss of confidence in the legal profession one can safely assume that it is a risk which is not worth taking. This is so because once the belief that clients have of the protection of their communications with their legal advisors ~~proves~~ illusory, the confidential relationship between client and attorney disappears for no client

⁹⁷ (1982) 57 A.L.J.R 130.

⁹⁸ (1981) 34 A.L.R 496.

⁹⁹ Referred to in *Baker v Campbell* (1983) 57 A.L.R 750 at 751D.

¹⁰⁰ 751E.

¹⁰¹ *Parry-Jones v Law Society* [1969] 1 Ch. 1 at 9.

could safely entrust to his attorney or counsel documents or statements prepared by him”.¹⁰² Thus this would be detrimental to the right of accused persons to put up a *virilis defencio* of their case and in the end justice will suffer.

Relief came soon after *O'Reilly* in the momentous decision in *Baker v Campbell*.¹⁰³ The facts of the case were that the plaintiff retained a member of a firm of solicitors Stone, James and Co. of Perth to advise him on certain aspects of a scheme he had devised for the purpose of minimising his liability for sales tax. The firm held a number of documents relating to the plaintiff some of which had been created for the sole purpose of tendering legal advice to the plaintiff, otherwise than in relation to then existing or contemplated civil or criminal litigation. The defendant, a member of the Australian Federal Police was granted a search warrant authorising him to seize documents held by the firm. The warrant had been issued by a magistrate on the basis that information placed before him on oath suggested that there were reasonable grounds for suspecting that there were, on the premises of the firm of solicitors, originals or copies of certain documents all of which had been created or held for or in respect of the plaintiff and certain other persons. It was the magistrate's view that there were reasonable grounds for suspecting that the documents would afford evidence as to the commission by the plaintiff and such other persons of offences against the Sales Tax Assessment Act and the Crimes Act. The plaintiff contended that the documents were covered by legal professional privilege whereas the defendant argued that even if the plaintiff's contention was correct the documents may lawfully be seized under the search warrant. The question that the court had to decide was therefore, whether ~~in~~ the event that legal professional privilege attached to and is maintained in respect of the documents held by the firm, can those documents be properly made the subject of a search warrant?”

Gibbs C.J.¹⁰⁴ observed that ~~at~~ common law there existed no power to compel a solicitor (or anyone else) to divulge information or produce documents, whether privileged or otherwise, except in legal proceedings and no power to obtain a search warrant except to search for stolen goods which in any event would not be privileged”. The increased power of the state

¹⁰² 474F.

¹⁰³ (1983) 57 A.L.R 750.

¹⁰⁴ 751F.

and the promulgation of statutes authorising searches and seizures meant that more inroads than ever before were being made into the private lives and affairs of citizens. The court in *Baker v Campbell* looked at various decisions including those referred to above. The court also referred to the Canadian decision in *Solosky v The Queen*¹⁰⁵ where, in deciding the matter, the court noted that —acent case law has taken the traditional doctrine of privilege and placed it on a new plane. Privilege is no longer regarded merely as a rule of evidence which acts as a shield to prevent privileged materials from being tendered in evidence in a courtroom. The courts, unwilling to so restrict the concept, have extended its application well beyond those limits”. This was in reference to earlier Canadian cases such as *In Re Director of investigation and Research and Shell Canada Ltd*¹⁰⁶ where it was stated by Jackett C.J. that —. . . privilege is a mere manifestation of a fundamental principle upon which our judicial system is based, which principle would be breached just as clearly and with equal injury to our judicial system by the compulsory form of discovery as it would be by evidence in court. . . .”¹⁰⁷ This fundamental principle is that —the protection . . . afforded to the individual by our law is dependent upon his having the aid and guidance of those skilled in the law untrammelled by any apprehension that the full and frank disclosure by him of all his facts and thoughts...might somehow become available to third persons so as to be used against him”.¹⁰⁸ It was the court’s opinion that the value of the privilege would be impaired if its operation were confined to judicial proceedings and if disclosure and confidential communications were permitted outside judicial proceedings.¹⁰⁹

The court¹¹⁰ also considered the opinion of the Canadian Supreme Court in *Descoteaux v Mierzwinski*¹¹¹ by inferring that the court in *Solosky v The Queen*

“ . . . implicitly recognized that the right to confidentiality, which had given rise to the rule of evidence that confidential communications passing between a client and his legal advisor may not be disclosed in a judicial proceeding without the client’s consent

¹⁰⁵ (1979) 105 D.L.R. (3d) 745 at 757.

¹⁰⁶ (1975) 55 D.L.R. (3d) 713.

¹⁰⁷ 722.

¹⁰⁸ 721-722.

¹⁰⁹ *Baker v Campbell* 759E.

¹¹⁰ 759G.

¹¹¹ (1982) 141 D.L.R (3d) 590 at 604-605.

had also given rise to a substantive rule which would apply in all circumstances where such communications were likely to be disclosed without the client's consent."

This approach of the Canadian Supreme Court indicates that in Canadian Law the privilege was starting to gain recognition as a substantive right rather than just a rule of evidence. Judicial notice was also taken of the approach in the United States of America where it was firmly established that the privilege is available in administrative proceedings and in investigatory procedures in the absence of legislation abrogating the privilege".¹¹² It was the majority (Murphy, Wilson, Deane and Dawson, JJ) decision that privilege was a substantive right rather than a mere rule of evidence and could thus be raised to ward off compulsion by way of a search warrant. The telling statement is to be found in the judgment of Dawson J¹¹³ where he stated that:

"... 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...makes it inappropriate to regard the doctrine as a mere rule of evidence. It is a doctrine based upon the view that confidentiality is necessary for proper functioning of the legal system and not merely the proper conduct of particular litigation...thus any claim to a relaxation of privilege...must be approached with the greatest circumspection."

The dissenting judgments of Gibbs CJ and Mason J refused to recognise any fundamental common law principle which justifies the extension of the concept of privilege.¹¹⁴

The developments with regard to legal professional privilege in other jurisprudences began to influence our own jurisprudence and the first case to question the approach in *Andresen* which was strengthened by the Appellate Division's decision in *Mandela* was the case of *Cheadle, Thompson and Haysom v Minister of Law and Order*.¹¹⁵ The facts of the case were

¹¹² 759G.

¹¹³ 886E-886G.

¹¹⁴ KM Lupton "Legal Professional Privilege in Administrative Proceedings" (1985) 7 *Sydney Law Review* 614 at 623.

¹¹⁵ 1986 (2) SA 279 (W).

that Andries Raditsela was arrested in terms of a provision of the Internal Security Act.¹¹⁶ Two days after his arrest he died as a result of injuries suffered in detention. His widow instructed a firm of attorneys, Cheadle, Thompson and Hayes, to act on behalf of the family in a civil action for damages against the Minister of Law and Order. Pursuant to the instructions a clerk employed by the firm interviewed a witness to the arrest of Mr Raditsela, Ms Anna Mnguni, and notes were made during the interview as preparation for the litigation but were not read to the witness nor were they signed by her. Thereafter senior police officers visited the premises of the firm armed with a search warrant and seized the aforementioned notes despite the protests of the attorneys that the documents were privileged. The police purported to seize the notes on the authority of a search warrant issued under section 20 of the Criminal Procedure Act¹¹⁷ authorizing the seizure of a written statement made by one Anna Mnguni. In relation to the use of privilege as a defence against search warrants it was the court's opinion that *—Andresen* (and consequently *Mandela*) should not be regarded as unassailable authority, at the very least, it is a decision which will carefully have to be reviewed in a suitable matter".¹¹⁸ This sentiment is shared by Unterhalter whose argument for the recognition of privilege as a substantive right is based on the main role of the courts. In his argument made to show the imperative of treating privilege as a substantive right rather than a rule of procedure, Unterhalter¹¹⁹ was of the opinion that:

"since the courts protect our substantive legal rights, the means of access to courts and the terms of engagement between the parties before and during legal proceedings provide for the substantial form for the protection of substantive rights . . . procedure is not value free: it enshrines rights . . . in so far as compulsory disclosure invades the confidentiality required to prepare for litigation and thus so violates the equality of the parties before the court, privilege should be considered a procedural right protecting equality . . ."

¹¹⁶ Act 74 of 1982.

¹¹⁷ Act 51 of 1977.

¹¹⁸ 283E.

¹¹⁹ Unterhalter 1986 *SAJHR* 324.

The calls from academia as well as the courts for a reform of the way privilege is regarded were answered in the case of *S v Safatsa*.¹²⁰ The facts of the matter were that the deputy mayor of the town of Lekoa was murdered outside his house by a mob of about 100 persons who had pelted his house with stones as well as hurling petrol bombs through the windows. When the deceased tried to flee towards a neighbouring house he was caught by some members of the mob who disarmed him and assaulted him. Stones were thrown at the deceased and some members went to him and battered his head with stones. Thereafter he was dragged into the street, where petrol was poured over him and he was set alight leading to his death. Eight persons, the applicants in the matter, were charged with the murder of the deceased as well as a second charge of subversion. Six of the accused were found guilty of murder and were sentenced to death whilst the other two were convicted of public violence and were sentenced to five years in jail each. In the hearing before the court *a quo* many witnesses were led, one of whom was a state witness Manete. During Manete's cross-examination counsel for the accused informed the trial Judge that he (counsel) was in possession of a statement made by Manete which was *prima facie* a privileged statement, having been made by the witness to an attorney for the purpose of obtaining legal advice. It was counsel's contention that he was nevertheless entitled to cross-examine Manete on the contents of the statement. The trial Judge held that he had no power to order Manete to be cross-examined about the statement. The attorney whom the witness had consulted in a matter concerning him in relation to the trial was the very same attorney who was the instructing attorney acting on behalf of the accused in the trial who then made the statement available to counsel.

In coming to a conclusion on the nature of privilege the court referred to numerous decisions one of which was *Euroshipping Corporation of Monrovia v Minister of Agricultural Economics and Marketing*¹²¹ where it was held that —.inroads should not be made into the right of a client to consult freely with his legal advisor, without fear that his confidential communications to the latter will not be kept secret...to impose qualifications upon the rule of once privileged always privileged would...create an unwarranted inroad upon this

¹²⁰ 1988 (1) SA 868 (A).

¹²¹ 1979 (1) SA 637 (C).

fundamental right”.¹²² From this one can infer that the court was against the idea of a qualified privilege which only applied to curial processes while being rendered powerless against a search warrant. It was the opinion of the court that once privilege applied to information such veil of privilege should not be pierced by any actions, judicial or otherwise, unless waived by the client. The court also considered the decision in *Baker v Campbell* where, according to Botha JA –the court (in *Baker*) recognised that...privilege is a mere manifestation of a fundamental principle upon which our judicial system is based...the same holds true for our own judicial system”.¹²³ Botha JA quoted extensively from *Baker* and in particular the aforementioned paragraph from Dawson J. According to Zeffert and Paizes *Safatsa* signalled –a new era in the history of legal professional privilege, one in which the privilege will be viewed as but one manifestation of a far broader principle”.¹²⁴ The decision in *Safatsa* meant that, in the interests of the legal system as a whole, legal professional privilege had to be extended to extrajudicial processes so as to be able to avoid circumvention *via* compulsion by way of such processes such as searches and seizures authorized by search warrants. According to Zeffert and Paizes¹²⁵ the challenge after *Safatsa* lies in giving substance to this fundamental principle while being cognisant of the background of the privilege so as to make sure that it is not overly extended.

It must be noted that the privilege extends to all employees of a law firm who might be privy to the case. In *S v Mushimba*¹²⁶ (1977 (2) SA 829 (A)) the court held that the privilege extended to interpreters, articled clerks, secretaries and other employees of the firm. In the case a member of the staff of the firm of attorneys who defended the accused had been forwarding copies of statements made by the appellants as well as defence witnesses and other confidential and privileged material to the Security Branch of the police of which the investigating officer who gave instructions State counsel in the matter was a member. The court held that there was breach of the privilege as a result and found such a breach to be a gross irregularity in the discharge of the case.

¹²² 643H-644B.

¹²³ *S v Safatsa* 885I.

¹²⁴ Zeffert and Paizes *South African Law of Evidence* 641.

¹²⁵ Zeffert and Paizes *South African Law of Evidence* 641.

¹²⁶ 1977 (2) 829 (A).

2.9 Conditions for the operation of legal professional privilege

According to Zeffert and Paizes¹²⁷ the principles governing the operation of the privilege were brought about when the privilege was still seen as a rule of evidence rather than as a right but it is likely that ~~the~~ courts will continue to seek guidance from and employ them...although they may be departed from in instances where they do not conform to the fundamental right nature of the privilege". As things stand one must be aware that the principles apply cumulatively, meaning that should one not be satisfied, the privilege falls away. It must be noted that the privilege belongs to the client who must claim it or authorise his/her advisor to claim the privilege on behalf of the client.¹²⁸

2.9.1 Legal advisor must have been acting in his or her professional capacity

According to Zeffert and Paizes, whether a legal advisor is acting professionally, is in each case a matter of fact.¹²⁹ An important indicator, though not conclusive, is the payment of a fee, but the lack of such a fee does not necessarily mean that an advisor was not acting in a professional capacity,¹³⁰ ~~an~~ attorney might well act in a professional capacity... without asking a fee".¹³¹ In deciding whether the advisor was acting in a professional capacity all the surrounding circumstances must be considered, for example, the place where the meeting took place and the underlying tenor of the conversation.¹³²

There was also a debate as to whether this particular requirement applied equally to attorneys in private practice and those who are salaried legal advisors, the so called in-house attorneys. In *Mohamed v President of the Republic of South Africa*¹³³ the issue that had to be decided was whether legal professional privilege attached to communications made to salaried (in-house) legal advisors when it amounts to an independent legal advisor's confidential advice. The court referred to English law where it was held that,

¹²⁷ Zeffert and Paizes *South African Law of Evidence* 657.

¹²⁸ Schwikkard and Van der Merwe *Evidence* 147.

¹²⁹ Zeffert and Paizes *South African Law of Evidence* 657.

¹³⁰ Schwikkard and Van der Merwe *Evidence* 147.

¹³¹ *R v Fouche* 1953 (1) SA 440 (W) 445A.

¹³² Zeffert and Paizes *South African Law of Evidence* 658.

¹³³ 2001 (2) SA 1145 (CC).

"...salaried legal advisors are regarded by the law as in every respect in the same position as those who practice on their own account...they must uphold the same standards of honour and etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges".¹³⁴

The court went on to hold that to limit the scope of legal professional privilege to clients and attorneys in private practice is not justified in law, noting that such a limitation would force governments and even private corporations with in-house legal advisors to reorganise, at great expense, their *modus operandi* so that all required advice is obtained from independent advisors.¹³⁵ As a result it can be argued that there is no closed list of factors which one must look at when deciding whether an advisor was acting in a professional capacity; rather one must look at all the surrounding circumstances in order to answer the question. However, according to Hoffman J in *Mohamed*, in-house legal advisors must be "scrupulously aware of the distinction between communications made in their capacity as legal advisor and other communications which would not be of a privileged nature".¹³⁶

Gewald¹³⁷ also mentions an interesting scenario where a client consults an individual professing to be knowledgeable in the field but unbeknown to the client is not admitted as a professional. Would such information be privileged? One would be inclined to hold that such should be privileged because the privilege belongs to the client and if such client consults an individual with the *bona fide* belief that such individual is a legal professional, there is a reasonable belief that such communications are privileged and the court should give effect to that belief. If it transpires that such a "legal advisor" is *mala fide* the original basis for the consultation would not have changed.¹³⁸

¹³⁴ 1152J-1153A.

¹³⁵ 1154F.

¹³⁶ 1154G-H.

¹³⁷ Gewald *Therapeutic Privilege* 30.

¹³⁸ Gewald *Therapeutic Privilege* 31.

The basis of privilege is ~~non~~confidentiality and when confidentiality ceases, the privilege ceases".¹³⁹ Whether the consultation was made in confidence is also a matter of fact and according to Zeffert and Paizes confidentiality is ~~not~~ normally inferred by compliance with other requirements of the privilege however such an inference may be rebutted by showing that the communication was not of a sort intended to be confidential".¹⁴⁰ If it can be proven that the legal advisor was acting in professional capacity, confidentiality is inferred as there is an implied agreement between legal advisors and clients that all communications are confidential.¹⁴¹ Again one will have to look at the surrounding circumstances to get an indication as to whether the consultation was made in confidence. It may be submitted that one needs to look at the venue of the consultation, although not conclusive, it can be argued that a consultation held in a place where there is a minimal chance of someone overhearing could be a factor. One of the circumstances by which it is commonly apparent that the communication is not confidential is the presence of a third person, not being either the agent of either client or attorney.¹⁴² The client will have willingly abandoned confidentiality and privilege if he or she chooses to disclose confidential information to the attorney in the presence of a third party. This will also apply in instances where the nature of the consultation reflects willingness that it be disclosed to a third party or where the attorney acts for two parties who share a common interest.¹⁴³ The court in the *Euroshipping Corporation of Monrovia* case was faced with such a problem, and after looking at all the surrounding circumstances, held that the presence of a third party did not in the circumstances negate the applicability of the privilege.¹⁴⁴ As a result one has to look at all the surrounding circumstances in order to determine if a consultation was made in confidence.

¹³⁹ *Bank of Lisbon and South Africa Ltd v Tandrien Beleggings (Pty) Ltd* 1983 (2) SA 626 (W) 629G.

¹⁴⁰ Zeffert and Paizes *South African Law of Evidence* 659.

¹⁴¹ *Gewald Therapeutic Privilege* 32.

¹⁴² *Gewald Therapeutic Privilege* 32.

¹⁴³ Zeffert and Paizes *South African law of Evidence* 659.

¹⁴⁴ 648C-H.

2.9.3 **The communication must have been obtained for the purpose of obtaining legal advice**

It is crucial that the communication be made for the purpose of obtaining legal advice as the obtaining of legal advice without fear of information being used against the client is the foundational principle on which the privilege is based. As a result, a communication made in confidence but not for the purpose of obtaining legal advice will not be privileged.¹⁴⁵ However, in cases where the primary purpose is not the procurement of legal advice, it will nevertheless be privileged if it was connected with this purpose.¹⁴⁶ A case in point is *Lane v Magistrate, Wynberg*¹⁴⁷ where it was held that “for a communication between a client and a legal advisor to be privileged it is not enough for the communication to be made in confidence, it must have been made for the purpose of obtaining legal advice and whether a particular communication is covered is a matter of fact”.¹⁴⁸

Due to the elevation of privilege from being a mere rule of evidence to a fundamental right this means that “for the purposes of obtaining legal advice” is not restricted to cases where litigation is in course or pending. Therefore all communications made for the purposes of obtaining legal advice are covered by the privilege regardless of whether litigation is pending, contemplated or not. According to Wigmore “the relation of client and legal advisor and the freedom of entering into it, are of at least equal importance for matters that are still in the non-litigious stage and the promotion of the relation in that stage tends to lessen its necessity in the further and less desirable stage”.¹⁴⁹

The aforementioned authors also point out the dilemma posed by section 201 of the Criminal Procedure Act¹⁵⁰ which limits the ambit of privilege in criminal matters. According to the section a legal advisor may be compelled to disclose any communications made by the client “before he was professionally employed or consulted with reference to the defence of the

¹⁴⁵ Shwikkard and Van der Merwe *Evidence* 148.

¹⁴⁶ Zeffert and Paizes *South African Law of Evidence* 659-660.

¹⁴⁷ 1997 (2) SA 869 (C).

¹⁴⁸ 885C.

¹⁴⁹ Zeffert and Paizes *South African Law of Evidence* 660.

¹⁵⁰ Act 51 of 1977.

client”. According to Zeffert and Paizes¹⁵¹ what this particular section means is not entirely clear because protection cannot be withheld until such a time as the client has been charged because this would hinder preparation for trial and will most definitely be unconstitutional. The authors propose two ways of dealing with this dilemma, the first of which entails interpreting the *proviso* as meaning that only communications made after the client contemplated the institution of criminal proceedings are protected.¹⁵² However, it can be argued that this is an untenable proposition as it limits the application of the privilege and consequently the right of access to legal advice without fear of compulsion to produce communications made. A more appropriate approach in light of our constitutional dispensation would be to “read the proviso down” under the Constitution and if this proves impossible, to regard it as unconstitutional and thus get rid of it on the basis that it amounts to an unreasonable and unjustifiable limitation of the right to legal advice.¹⁵³

2.9.4 **The advice must not facilitate the commission of a crime or fraud**

This requirement is important because a criminal or fraudulent enterprise does not fall within the scope of the relationship between client and attorney.¹⁵⁴ Public policy dictates that where the advice is such as to facilitate the commission of a crime or fraud then privilege will not apply. However it must be noted that only communications intended to further ongoing or future illegal activity are excepted from privilege, with consultations after a crime or fraud has taken place being protected.¹⁵⁵ It must be noted that this requirement should be interpreted in such a way as to protect those attorney client exchanges that serve the privilege’s purpose of allowing a client to secure information about laws he must follow and to pursue freely his right to effective legal representation. If the client seeks advice in order to further illegal activities...the privilege should be pierced”.¹⁵⁶ It must be noted further that the legal advisor need not have been aware that the object of his client was illegal. In the United States of America a test was established in *Clark v United States*¹⁵⁷ where it was held that the

¹⁵¹ Zeffert and Paizes *South African Law of Evidence* 660.

¹⁵² Zeffert and Paizes *South African Law of Evidence* 660.

¹⁵³ Zeffert and Paizes *South African Law of Evidence* 660.

¹⁵⁴ Zeffert and Paizes *South African Law of Evidence* 662.

¹⁵⁵ Anonymous 1985 *Harvard Law Review* 1510.

¹⁵⁶ Anonymous 1985 *Harvard Law Review* 1510.

¹⁵⁷ 289 U.S. 1 (1933) 15.

party seeking information purportedly protected by privilege ~~must~~ make a prima facie showing that the client sought the attorney's advice for the purpose of furthering wrongful conduct...the privilege takes flight if the relation is abused". There is a dearth of case law on this particular requirement in our jurisprudence. It is submitted that the test enunciated by Justice Cardozo in *Clark* should be followed should the issue come before the courts.

2.10 Waiver of the privilege

Waiver of legal professional privilege may be achieved in three different ways, namely, expressly, impliedly or imputedly. It must be noted however that since the privilege belongs to the client it follows that it is only the client who may waive privilege.¹⁵⁸ While express waiver is easy to determine the same cannot be said of the other two forms of waiver, that is, implied and imputed waiver. It is easy to consider the latter two forms of waiver as one and the same thing but the court, in *Harksen v Attorney-General of the Province of the Cape of Good Hope*,¹⁵⁹ held that the two are distinct and should not be confused. According to the court implied waiver had two requirements, ~~firstly~~ the privilege holder must have full knowledge of his rights and secondly he or she must have so conducted him or herself that, objectively speaking, it can be inferred that he or she intended to abandon those rights".¹⁶⁰ On the other hand imputed waiver is inferred where ~~the~~ privilege holder so conducts himself that, whatever his subjective intention might be, the inference must *in fairness* be drawn that he no longer relies on his privilege".¹⁶¹ The court in *S v Tandwa*¹⁶² held that ~~implied~~ waiver entails an objective inference that the privilege was actually abandoned whereas imputed waiver proceeds from fairness, regardless of actual abandonment".

The Supreme Court of Appeal, in *S v Tandwa* accepted and applied the *Harksen* approach. The appellants had been charged with the crime of robbery and pleaded not guilty at trial but declined to offer any plea explanations. They were duly convicted based on their lack of plea explanations and on appeal argued that they had been incorrectly advised by their legal

¹⁵⁸ Zeffert and Paizes *South African law of Evidence* 664.

¹⁵⁹ 1998 (2) SACR 681 (C).

¹⁶⁰ 694G.

¹⁶¹ 694H.

¹⁶² 2008 (1) SACR 613 (SCA) para 18.

advisor to remain silent and had instead wanted to adduce their own evidence in their defence. It was the appellants' argument that their conviction was largely due to their legal representative's incompetence. In rebuttal of the appellants' complaint the state wished to produce an affidavit by the appellants' legal advisor affirming that they had been properly advised. The issue before the court was whether the affidavit was admissible in light of the fact that communications between legal advisor and client are privileged. It was clear that the appellants had not expressly waived their claim to the privilege, thus the court had to decide whether waiver could be implied or imputed. The court applied the *Harksen ratio* and in addition relied on Wigmore's proposition that "it is a fair canon of decision that when a client alleges a breach of duty by the attorney, the privilege is waived as to all communications relevant to that issue",¹⁶³ this is so because it is only fair that the legal advisor be afforded the opportunity to rebut the client's accusations, thus waiver is imputed. As a result it was the court's finding that the affidavit was admissible on the basis that privilege with regard thereto had been waived. The same rationale is also applied where a client discloses a part of a privileged communication in evidence. Fairness and consistency require the whole of the statement to be disclosed, except where it deals with separate subject-matters.¹⁶⁴

2.11 Treatment of documents by the court

Once a claim of privilege has been made the court has an inherent power to examine any document in respect of which privilege has been claimed¹⁶⁵ as merely a procedural step to determine whether the claim of privilege is justified¹⁶⁶. The court also has power to excise from an otherwise privileged document portions which are not covered by privilege.¹⁶⁷ As such it can be seen that the court has an inherent power to avoid the abuse of privilege by inspecting documents where the application of privilege is in doubt and to make available for argument those aspects of a privileged document which are not protected.

¹⁶³ Para 19.

¹⁶⁴ *S v Nhlapo* 1988 (3) SA 481 (T) 484D.

¹⁶⁵ *Lenz Township Co. (Pty) Ltd v Munnick* 1959 (4) SA 567 (T) 574C-D.

¹⁶⁶ *Mohamed v President of the Republic of South Africa* 1151A-B.

¹⁶⁷ 1159J.

2.12 Is legal professional privilege therefore amenable to extension?

Traditionally the attorney has been the long time family and business friend whom clients turn to for advice and help with their problems and troubles, some of which have little to do with strict rules of law. In recent years this function of the attorney as the personal advisor, especially in business situations, is often paralleled by a similar function of the accountant.¹⁶⁸

The above statement rings true in today's world where there is an increasing overlap between the functions of attorneys and accountants especially when it comes to tax matters. As such four alternatives have been proposed for dealing with the supposed discrepancies between attorneys and non-legal tax practitioners:¹⁶⁹

- (i) withdrawal of the privilege from attorneys when they perform the same services as non-legal tax practitioners;
- (ii) eliminate the attorney client privilege altogether;
- (iii) extend the privilege, partially or totally to non-legal tax practitioners; or
- (iv) retain the *status quo*.

It can easily be argued that the first two would be undesirable as they would definitely hinder full and frank disclosure to both attorneys and non-legal tax practitioners. The fourth option of retaining the status quo is also not tenable because as things stand there is a discrepancy in the treatment of the information tendered by clients who approach tax attorneys as opposed to those who obtain advice from non-legal tax practitioners, as mentioned in the preceding chapter. As such the one viable option is the third option of extending legal professional privilege *in toto* or partially to cover non-legal tax practitioners as well. The question that has to be answered therefore is whether the foundational principles, scope and requirements of legal professional privilege are amenable to being extended to cover non-legal tax practitioners.

¹⁶⁸ Anonymous "Lawyers and Certified Public Accountants: A Study of Interprofessional Relations" (1970) 56 *American Bar Association Journal* 776 at 778.

¹⁶⁹ Anonymous "Functional Overlap Between the attorney and Other Professionals: Its Implications for the Privileged Communications Doctrine" (1962) 71 *Yale Law Journal* 1226 at 1234.

As noted above the Utilitarian rationale proposed by Wigmore, as well as the human rights rationale, are not mutually exclusive; rather they are complementary. Looking at the extension of legal professional privilege to non-legal tax practitioners on the basis of the traditional justification one can say that Wigmore's requirements are in fact satisfied by such an extension. First of all it is clear that communications of a tax nature originate in confidence because it is unfathomable that a client would want their tax affairs to be the matter of public knowledge. As such it is reasonable to assume that the communications with regard to one's tax matters originate in confidence and this is essential to the full and satisfactory maintenance of the relationship between the parties. Is this a relationship that the community feels ought to be fostered? The answer to this question has to be in the affirmative because the promotion of candour between the client and tax practitioner means that full disclosure is made to the tax practitioner, resulting in proper and lawful advice that can only be said to be to the advantage of the *fiscus* and as a consequence the community. Candour will help to increase lawful tax planning and as such compliance with the taxation legislation. The injury to the relationship will be greater than the benefit gained by disclosure because full disclosure will be hindered, meaning that tax practitioners cannot effectively advise their clients on lawful tax planning activities, as well as hindering the ability of the practitioner to discourage his or her client from illegal or overly aggressive tax planning. According to Zeffert ~~the~~ relationship...will be fostered by the protection of this confidence and it is in the public's interest to encourage *tax compliance* (own emphasis) and therefore to foster the relationship".¹⁷⁰

On the other hand when applying the human rights rationale one can safely argue that there is a need to keep communications of a tax nature confidential because compelled disclosure is inherently wrong in that it will offend the right of people to control the dissemination of personal as well as business information and offend the right of individuals to form private loyalties.¹⁷¹ Secondly, it can be said that this right is legally recognizable especially in light of the enshrining of the right to privacy in our Bill of Rights and the observance of the same when it comes to tax advice obtained from legal professionals. When one adopts the traditional as well as the human rights application one can see that they are complementary

¹⁷⁰ Zeffert 1974 *SALJ* 432.

and after considering both rationales credence is lent to the argument for the extension in one form or another of legal professional privilege to non-legal tax practitioners.

The nature and scope of legal professional privilege also make it amenable to non-legal tax practitioners. This is so because the privilege belongs to the client and not the professional concerned, and Murphy J in *Baker v Campbell* states that “it is unfortunate that the privilege is commonly referred to as legal professional privilege because it suggests that the privilege is that of the members of the legal profession, which it is not”.¹⁷² The privilege is now viewed as a fundamental right and as such should be made available to all clients seeking professional tax advice regardless of whether they go to a tax attorney or a non-legal tax practitioner because such a distinction, as will be shown in a later chapter, constitutes unfair discrimination, thus infringing on the equality provision in the Bill of Rights. The SARS has been afforded extensive powers, including searches and seizures, and it is only logical that confidential communications between non-legal tax practitioners and their clients be protected from these intrusive powers, just like the protection afforded when a client obtains advice from a tax attorney. The courts have found in the cases of *Heiman Maasdorp*¹⁷³ and *Jeeva v Receiver of Revenue, Port Elizabeth*¹⁷⁴ that tax information in the possession of legal representatives was protected by privilege. In the former case it was found that the general rights bestowed on the Secretary for Inland Revenue did not negate the operation of privilege and thus privilege could be raised against such. It would be anomalous to say privilege applies when the information is held by a attorney while denying the same protection with regard to the same information when in the hands of a non-legal tax practitioner. In the latter case the only differences were that the information was being sought by the taxpayer and was in the possession of the Receiver of Revenue.

One needs also to consider whether the requirements of legal professional privilege are amenable to extension to non-legal tax practitioners. The first requirement that the advisor must have been acting in a professional capacity will be easy to extend to non-legal tax practitioners because it is a question of fact, as such the surrounding circumstances will have

¹⁷¹ Anonymous 1985 *Harvard Law Review* 1481.

¹⁷² 762E.

¹⁷³ 1968 (4) SA 161 (WLD).

to be examined in order to determine if the tax practitioner was acting in his professional capacity as a tax practitioner. This will cover in-house tax advisors as well as SARS tax advisors. The second requirement that the advisor must have been consulted in confidence, being a matter of fact as well, should not pose difficulties in extending it to non-legal tax practitioners. The surrounding circumstances would have to be taken into account and from that it can be inferred whether confidence was an essential aspect of the consultation. With regard to the third requirement, it can be stipulated that the privilege will only apply where the consultation was made for the primary purpose of obtaining tax advice and it is submitted that this will not be difficult to determine. And the fourth requirement can be adapted so as to appease those who argue that extending the privilege will further tax avoidance, because the privilege will fall away if it can be shown that the consultation was aimed at facilitating the commission of a crime or fraud against the Income Tax Act. It can be argued that instead of hindering the collection of taxes the extension will actually increase tax compliance because clients will make informed decisions and are therefore less likely to engage in impermissible tax avoidance.

2.13 **Conclusion**

This chapter has explored the foundational values of professional privilege and discussed its development from being a mere rule of evidence to its status as a fundamental right. The chapter has also explored the foundations, nature and requirements of the privilege and demonstrated how all of these are amenable to an extension to cover non-legal tax practitioners. The following chapter will look at the constitutionality of the continued denial of privilege to those taxpayers who choose the services of non-legal tax practitioners as opposed to their counterparts who utilise the services of tax attorneys.

¹⁷⁴ 1995 (2) SA 433 (E).

3 CHAPTER 3: THE CONSTITUTION

3.1 Introduction

Having established the original tenets underlying the concept of privilege and the requirements thereof, and the differential treatment of clients based on their choice of tax advisor as applied in our jurisprudence, this chapter aims to explore the acceptability of the *status quo* in terms of the constitutional dispensation. The South African Constitution through the Bill of Rights contains fundamental rights informed by the values of human dignity, the achievement of equality and the advancement of human rights and freedoms as stated in Constitution.¹⁷⁵ The Bill of Rights binds all the branches of the state as well as all levels of government, organs of state, individuals and juristic persons alike. In light of the above the chapter will look at whether the particular rights of privacy and equality are infringed by the current differential application of privilege on the basis of the profession of the particular advisor that a taxpayer approaches for tax advice.

The analysis commences with a consideration of whether the right to privacy of those who approach non-legal tax advisors is infringed and thereafter attention will be shifted to the question of infringement of the equality clause and whether such differentiation is justifiable. This chapter is aimed at showing that the current approach is untenable in the current constitutional dispensation and does not pass constitutional muster.

3.2 The right to privacy

As noted in the previous chapter one of the rationales behind the concept of privilege is the human rights approach which is grounded in the right to privacy. It follows therefore that the first port of call when examining the constitutionality of the denial of privilege to clients of non-legal tax advisors is the right to privacy as contained in the Constitution. According to section 14 of the Constitution everyone has the right to privacy, which shall include the right not to have –

¹⁷⁵ Section 1 (a).

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed.

From the section above one can see that the constitutional right to privacy is a self-standing right as opposed to the common law where privacy is part of the right to dignity and is therefore protected under the *actio iniuriarum*.¹⁷⁶ Although in terms of the common law privacy is an independent personality right, the courts have tended to consider claims of privacy as infringements of dignity. The express recognition of the right to privacy in section 14, separate from the right to human dignity in section 10, confirms the independent existence of these two personality rights.¹⁷⁷ Unlike the common law concept of privacy, section 14's primary purpose is not to provide a basis for compensation. Instead, cases on the right have focused primarily on the validity of laws.¹⁷⁸ The main similarity between the common law and constitutional treatment of the right, as shall be seen later in the discussion, is that in both instances the right applies to a person's inner sanctum or personal realm, and as one moves away from this personal realm into communal relationships such as business and social interactions, the scope of personal space shrinks accordingly.¹⁷⁹

According to Currie and De Waal¹⁸⁰ section 14 has two parts, the first guaranteeing the general right to privacy and the second protecting against specific infringements of privacy, that is, searches and seizures and infringements of the privacy of communications. According to Gewald¹⁸¹ enquiries into the privacy provision have been confined to the context of intercepting communications and not the protection of confidential information but the inclusion of communicational privacy in the ambit of the provision has the potential to

¹⁷⁶ M Loubser *et al*, *The Law of Delict in South Africa* (2010) 316.

¹⁷⁷ J Neethling "The Concept of Privacy in South African Law", (2005) 122 *SALJ* 18 at 23.

¹⁷⁸ Loubser *et al Delict* 323.

¹⁷⁹ Loubser *et al Delict* 316-317.

¹⁸⁰ I Currie and J De Waal *The Bill of Rights Handbook* 5ed (2005) 315.

¹⁸¹ Gewald *Psychotherapeutic Privilege* 57.

influence the post-constitutional position on other professional privileges. Woolman *et al* define the right thus, –at the very least the right to privacy embraces the right to be free from intrusions and interference by the state and others...and this requires that a citizen be free from unauthorized disclosures of information about his or her personal life”.¹⁸² Harms JA in *National Media Limited v Jooste*¹⁸³ stated that

"...a right to privacy encompasses the competence to determine the destiny of private facts....The individual concerned is entitled to dictate the ambit of disclosure for example to a circle of friends, a professional advisor or the public..."

The right to privacy is considered by the courts as being part of the concept of *dignitas* and the breach of such right occurs when there is an unlawful intrusion on someone's personal privacy or the disclosure of private facts about that person and the unlawfulness thereof is judged in light of the contemporary *boni mores* and general sense of justice of the community as perceived by the court.¹⁸⁴

3.3 Application of the general right to privacy

It has been argued that privacy is difficult to define because it is exasperatingly vague and evanescent.¹⁸⁵ The first South African case to effectively and thoroughly explore the right to privacy is the Constitutional Court case, *Bernstein v Bester*.¹⁸⁶ The applicants were members of a firm which became the main auditors of the Tollgate Group. The firm had, without qualification, certified that the consolidated annual financial statements of Tollgate Holdings Limited and its subsidiary companies fairly presented the financial affairs of the group for the years 1990 and 1991. In 1993 Tollgate Holdings was placed under final liquidation leading to one of the largest corporate collapses in South African history. After investigations by the respondents, the joint liquidators, had been completed it was found that there had been large scale irregularities by directors and other officers of the Tollgate Group prior to the collapse and this had caused losses of a substantial nature. A commissioner was subsequently

¹⁸² D McQuoid-Mason "Privacy" in S Woolman *et al* (eds) *Constitutional Law of South Africa* 2ed (2006) 38-1.

¹⁸³ 1996 (3) SA 262 (A) 271G-272A.

¹⁸⁴ *Financial Mail v Sage Holdings* 1993 (2) SA 451 (A) 492G.

¹⁸⁵ D. Solove "Conceptualising Privacy" (2002) 90 *California Law Review* 1087 at 1088.

appointed to enquire into the affairs of certain companies in the group. Summonses were issued requiring applicants to appear before the commissioner and produce documentation in terms of sections 417 and 418 of the then Companies Act.¹⁸⁷ Prior to the commencement of the examination, the respondents' attorneys had sent applicants' attorneys a memorandum containing a list of issues which were to be canvassed at the enquiry. Respondents, however, failed to inform the applicants that they considered their firm civilly liable in consequence of the manner in which it had carried its professional duties as auditors for the companies in the group or that the examination would be aimed at gathering evidence to support such a claim. During the enquiry legal representatives of the applicants objected to the constitutionality of the proceedings. One of the bases for their objection to the constitutionality of the proceedings was the general right to privacy. The court pronounced on the application of the right namely that there has to be a legitimate expectation of privacy and also pronounced on the scope of the right.

3.3.1 **Legitimate expectation of privacy**

In order for the right to privacy to be invoked there must be a legitimate expectation of privacy. According to the court in *Bernstein* a 'legitimate expectation of privacy' has two components namely – a subjective expectation of privacy and secondly that the society has accepted such an expectation as reasonable".¹⁸⁸ Neethling¹⁸⁹ describes privacy as an individual condition of life characterized by seclusion from the public and publicity. The right to privacy is therefore designed to afford citizens the right to separate their personal life from their public or communal activities. This means that the right is only relinquished when one commits acts which may impute or imply waiver of the right, thus signalling an intention or implied intention to make the activities in question the subject of public or communal discourse and as such they cannot thereafter claim a legitimate expectation of privacy because they would have expressly, impliedly or imputedly given up the protection of the

¹⁸⁶ 1996 (4) BCLR 449 (CC).

¹⁸⁷ Act 61 of 1973.

¹⁸⁸ 488B.

¹⁸⁹ J Neethling "The Protection of the Right to Privacy Against Fixation of Private Facts" (2004) 121 *SALJ* 519 at 519.

right. As such it is argued by Devenish¹⁹⁰ that “persons cannot legitimately complain about an infringement of privacy if they have either explicitly or implicitly consented to waive their rights in this regard . . . for instance, a stripper or centrefold model cannot complain about his or her right to privacy”. According to Currie and De Waal “one’s subjective privacy intuitions must be reasonable to qualify for the protection of the right . . . what is reasonable . . . depends on the set of values to which one links the standard of reasonableness”.¹⁹¹ This has been the problematic part of the inquiry and the next section will look at the scope of the right.

3.3.2 Scope of the right.

Neethling is of the opinion that “the individual himself determines the scope of his interest in privacy and this . . . self determination is considered to be the essence of the individual’s interest in privacy and therefore . . . his right to privacy”.¹⁹² Some scholars have argued that “privacy is not simply the absence of information about us in the minds of others; rather it is the control we have over information about ourselves”.¹⁹³ Just how far this right extends has been the subject of immense debate and one is reminded of Miller’s contention that the concept of privacy is vague and evanescent. In an application of the legitimate expectation test the court in *Bernstein* per Ackerman J stated that “the scope of the privacy right was closely related to the concept of identity . . . the notion of what was necessary for one’s autonomous identity”.¹⁹⁴ This suggests that the right to privacy contributes to the realisation of other values.¹⁹⁵

The court in *Bernstein* proposed a continuum of privacy interests that would be of assistance when considering the scope of the right to privacy. The language of rights suggests absolute principles which are inalienable but in light of the fact that the exercise of one’s rights might

¹⁹⁰ GE Devenish *The South African Constitution* (2005) para 63.

¹⁹¹ Currie and De Waal *Bill of Rights Handbook* 318.

¹⁹² Neethling 2004 *SALJ* 519.

¹⁹³ Solove 2002 *California Law Review* 1110.

¹⁹⁴ 483F-G.

¹⁹⁵ Currie and De Waal *Bill of Rights Handbook* 320.

infringe on the rights of another it has come to be accepted that from the outset of interpretation each right is always already limited by every other right accruing to a citizen,¹⁹⁶

— . . . in the context of privacy . . . it is only the inner sanctum of a person . . . family life, sexual preference and home environment, which is shielded from erosion by conflicting community rights . . . Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly . . .”

As a result one can look at the context in which privacy is being claimed to determine whether such a claim is justified and the closer it is to the personal realm the more valid a claim of privacy is likely to be. Currie and De Waal remind that this is not a new test substituting the legitimate expectation test, rather, it gives effect to the earlier test because in the ‘truly personal realm’ an expectation of privacy is more likely to be considered as reasonable than a privacy expectation in the context of communal relations and activities.¹⁹⁷ In actual fact it gives substance to the second leg of the legitimate expectation test, that is, whether a claim to privacy is one that can be considered to be objectively reasonable. Currie and De Waal are of the opinion that although the approach in *Bernstein* goes a long way in the determination of the scope of the right to privacy, it does not fully add substance to the concept of reasonableness and is more of an *ad hoc* enquiry. Thus they suggest an additional step which entails looking at the value served by the protection of the ‘inner sanctum’ and the ‘truly personal realm’. Since privacy is based on a notion of what is necessary to have one’s own autonomous identity, the third step is therefore that an inner sanctum helps achieve a valuable good, one’s own autonomous identity.¹⁹⁸

¹⁹⁶ 484B-C.

¹⁹⁷ Currie and De Waal *Bill of Rights Handbook* 318.

¹⁹⁸ Currie and De Waal *Bill of Rights Handbook* 319.

The third step is also crucial in understanding why the right to privacy is extended to commercial entities which would not be able to rely on it had the right been anchored in the concept of human dignity. According to the *Hyundai Motor Distributors*¹⁹⁹ case,

— . . . juristic persons are not the bearers of human dignity. Their privacy rights, therefore, can not be as intense as those of human beings. However this does not mean that juristic persons are not protected by the right to privacy. Exclusion of juristic persons would lead to the possibility of grave violations of privacy, with serious implications for the conduct of affairs. The state might, for instance, have free license to search and seize material from any non-profit or corporate entity at will . . . something which would undermine the very fabric of our democratic state . . .”

As such it is evident that although the right to privacy becomes less intense as it moves away from the personal, juristic persons though devoid of human dignity are also protected by the right to privacy.

It must, however, be noted that the use of such metaphors as ‘inner sanctum’ and ‘personal sphere’ are misleading to the extent that they suggest that privacy is a space or a place.²⁰⁰ The fact that conduct takes place in someone’s home (or not) is not decisive of the question whether it merits the protection of the right to privacy.²⁰¹ One will therefore have to look at whether the conduct is dignity (or autonomy) affirming and that it therefore conforms to the principal purpose of the privacy right.

3.3.3 Informational privacy

An important aspect of the general right to privacy is the guaranteeing of informational privacy. It is aimed at protecting an individual’s interest in ‘informational self determination’,²⁰² which is, restricting the collection, use of and disclosure of private information regardless of whether it damages or has the potential to damage a person’s

¹⁹⁹ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC).

²⁰⁰ Currie and De Waal *Bill of Rights Handbook* 322.

²⁰¹ Currie and De Waal *Bill of Rights Handbook* 323.

²⁰² Currie and De Waal *Bill of Rights Handbook* 323.

dignity. The right to privacy guarantees control over all private information and it does not matter whether the information is potentially damaging to a person's dignity or not.²⁰³ It must be noted, however, that just as is the case with other aspects of the right to privacy there must be a reasonable expectation of privacy.

3.3.4 Searches and seizures

The privacy provision also includes the right not to have one's person or home searched, one's property searched or possessions seized. If such searches and seizures involve an invasion of privacy they must comply strictly with all legal and constitutional requirements²⁰⁴ and the law in question must be in pursuit of an objective that is sufficiently important to justify limiting individual constitutional rights.²⁰⁵ Just as in other aspects of the right to privacy the guiding principle should be whether the individual's subjective expectation of privacy must be recognised by society as being objectively reasonable.²⁰⁶ It has been stated that the wording of the search and seizure provisions raises many definitional issues with regard to terms such as 'property' and 'possessions'. Should these terms be given a wide or narrow definition? Sachs J²⁰⁷ in *Mistry v Interim National Medical and Dental Council of South Africa* addressing such issues stated that the object of the provision is to protect 'people' not 'places', personal privacy as opposed to private property. Searches and seizures must be conducted in terms of legislation that clearly defines the power to search and seize. Hence in *Mistry* the search and seizure provision challenged was found deficient because it gave inspectors acting on behalf of the respondent virtually unlimited licence to enter any place, including private abodes, where they suspected medicines to be, and subsequent to which, to inspect documents, including the most intimate of ones.²⁰⁸ Secondly there must be prior authorisation by an independent authority in the form of a search warrant unless the object of the search will be hampered by the delay occasioned by the process of obtaining a search warrant.²⁰⁹ Such prior authorisation is aimed at providing an opportunity, before the

²⁰³ Currie and De Waal *Bill of Rights Handbook* 323.

²⁰⁴ Devenish *South African Constitution* 85.

²⁰⁵ *Park-Ross v The Director, Office for Serious Economic Offences* 1995 (2) BCLR 198 (CC) 216I-J.

²⁰⁶ Currie and De Waal *Bill of Rights Handbook* 324.

²⁰⁷ 1998 (4) SA 1127 (CC) para 28.

²⁰⁸ Para 29.

²⁰⁹ Devenish *South African Constitution* 85.

event, for the conflicting interests of the State and the individual to be assessed, so that the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior, and such an enquiry must be made in an entirely neutral and impartial manner.²¹⁰ In the *Mistry* case the Director was empowered to authorise a search and seizure and the court accordingly held that the Director did not have the neutrality and detachment to assess whether the interests of the individual must give way to those of the state.

3.4 **Invasion of privacy**

The invasion of the right to privacy may take two forms firstly, by the unlawful intrusion upon the privacy of another,²¹¹ that is, where an outsider himself becomes acquainted with the individual or his personal affairs.²¹² Secondly invasion may take the form of the unlawful disclosure or publication of private facts,²¹³ in other words where a person acquaints outsiders with the individual or his personal affairs which although known to that person, remain private.²¹⁴ It is with the latter form of intrusion that this research is concerned with albeit in the form of forced disclosure.

3.5 **Does the lack of privilege infringe on the right to privacy of taxpayers utilising the services of non-legal tax advisors?**

Before looking at whether the restriction of privilege to taxpayers who utilise tax practitioners in the legal field infringes the right to privacy of those who utilise non-legal tax practitioners one ought to look at whether the latter group of taxpayers can lay a valid claim to the right. In order for one to make a valid claim to the protection of the privacy provisions, one must have a legitimate expectation of privacy, that is, a subjective expectation of privacy that is deemed objectively reasonable by society because it helps achieve a valuable good. It is therefore reasonable to expect privacy in the inner sanctum or truly personal realm. When consulting tax advisors, taxpayers have a subjective expectation that such information as shall

²¹⁰ 218E-F.

²¹¹ *Motor Industry Fund Administrators (Pty) Ltd v Janit* [1994] 4 All SA 428 (W) 431.

²¹² Neethling 2004 SALJ 520.

²¹³ 431.

pass between them shall be confidential and private. Information on one's tax affairs invariably contains details that people would like to keep private, for example, the sources of their income as well as how and on what they spend such income, because disclosure would mean that such details become the subject of public discourse. It can be argued that details such as tax planning memoranda, alternatives rejected in tax planning and tax opinions reside in the truly personal realm and as such society is inclined to deem such an expectation of privacy as objectively reasonable. No one would like to have information about their income and expenditure including the specific details to be the subject of public knowledge as this has the potential to affect the dignity or autonomy of the individual or corporate entity.

The restricted application of privilege means that the privacy right of taxpayers utilising the services of non-legal tax practitioners is at risk of being infringed in contrast to the position of those who use the services of tax attorneys. The forced disclosure of a client's tax information in the first instance damages the client's decision to enter into a confidential relationship²¹⁵ with a tax advisor of his or her choice because it offends the taxpayer's right to form private loyalties. Secondly such forced disclosure offends the client's right to control the distribution of personal information. As such privacy is important in order for taxpayers to have a meaningful relationship with their advisors and the lack of protection for such a relationship infringes on the client's right to privacy.

3.6 **The right to equality**

There have been numerous political documents proclaiming the equality of all and among them one will find the Universal Declaration of Human Rights. The question that has to be asked is "what exactly does equality mean?" The South African Constitution has, in its foundational values, the aspiration for a state founded on human dignity, the achievement of equality, and the advancement of human freedoms and rights.²¹⁶ According to Currie and De Waal, at its most basic and abstract, the formal idea of equality is that people who are

²¹⁴ Neethling 2004 *SALJ* 520.

²¹⁵ Gewald *Psychotherapeutic Privilege* 65.

²¹⁶ Section 1 (a).

similarly situated should be treated similarly.²¹⁷ In order to give effect to the foundational value of equality, section 9 of the Constitution states that:

- (i) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (ii) Equality includes full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (iii) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, religion, conscience, belief, culture, language and birth.
- (iv) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (v) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

As can be seen from the wording of the provision it binds both the state and individuals alike. While the first subsection deals with the principle of equality, the second deals with affirmative action, whereas the third contains a proscription of unfair discrimination on listed grounds and other analogous grounds. The fourth extends the proscription of unfair discrimination to the horizontal or private level and the fifth subsection is in the form of a presumption that state or private discrimination on listed grounds is unfair.²¹⁸ The concept of equality as contained in the Constitution will be dealt with in more detail later in this chapter.

²¹⁷ Currie and De Waal *Bill of Rights Handbook* 230.

²¹⁸ Devenish *South African Constitution* 49.

3.7 Context of the right

It has been said that “the perennial problem of human beings is their failure to treat others as fellow human beings with fairness and justice...from time immemorial people have used all sorts of attributes to justify why they should be entitled to more rights and privileges than others and why others should be discriminated against with impunity”.²¹⁹ In apartheid South Africa the political and legal system was based on inequality and discrimination on the basis of race,²²⁰ and black people were systematically discriminated against in all aspects of social life with separate and inferior facilities being provided for them.²²¹ The constitutional dispensation came about as a result of rebellion against such a system and the drafters of the Constitution and indeed the people of South Africa were driven by a desire never to go back to the days of apartheid and thus equality became a prominent theme in the Constitution. Post-1994, the government acting in accordance with the Constitution and in light of the ‘scars’ of the past, has been engaged in an attempt to overturn inequality in its many manifestations. It is in this light that formal equality on its own is inadequate hence there has been the need to have substantive equality and the state is obliged by the Constitution to promulgate legislation that will ensure that substantive equality is realised.

3.8 Formal versus substantive equality

Equality comes in the form of two guises, formal equality as well as substantive equality. Formal equality states that people in like circumstances should be treated alike, in other words there must be sameness of treatment. According to this approach, inequality can be eliminated by extending the same rights and entitlements to all in accordance with the same neutral norm and standard of measurement.²²² The problem with this approach is that it does not take into account the disparities, social and economic, which subsisted during the apartheid era. It can be said that this particular approach would only be feasible in a society which from the beginning has some form of strict egalitarianism, but then such a society is a

²¹⁹ CRM Dlamini “Equality or Justice? Section 9 of the Constitution Revisited— Part I” (2002) 27 *Journal of Juridical Science* 14 at 27-28.

²²⁰ Currie and De Waal *Bill of Rights Handbook* 231.

²²¹ *Brink v Kitchoff* 1996 (4) SA 197 (CC) para40

²²² Currie and De Waal *Bill of Rights Handbook* 233.

utopian figment seeing that people have always strived to put themselves above others socially and economically. A purely formalistic approach to equality would, in the South African context, risk neglecting the commitment of the Constitution to the creation of a society based on equality as it would only perpetuate the injustices of the past by glossing over them. This is so because the apartheid system created an unequal system, whose legacy still subsists to this day, thus making the pursuit of equality an ongoing process.

Equality does not mean that people should be treated as identical, eating the same food and observing the same cultures.²²³ Substantive equality, unlike formal equality, requires the law to ensure equality of outcome and is prepared to tolerate disparity to achieve this goal.²²⁴ Thus, unlike the former which is more concerned with form, substantive equality requires an examination of the actual social and economic conditions of groups and individuals in order to determine whether the Constitution's commitment to equality is being upheld.²²⁵ In light of the historical context of the Constitution one can safely say that it is the latter approach which should be paramount in the pursuit of an equal society and the Constitutional Court amplified this in *President of the Republic of South Africa v Hugo*.²²⁶ The President's decision to remit the prison sentences of among others, mothers of minor children under the age of twelve years was challenged by the respondent. The respondent was the father of a minor son under the age of twelve and would have qualified for remission, but for the fact that he was the father and not the mother of his son who was under the age of twelve years. The court *a quo* had found in favour of the respondent and the matter was taken on appeal. According to Goldstone J²²⁷

"There is need to develop a concept of unfair discrimination which recognises that, although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case therefore, will require a careful and thorough understanding of the impact of the

²²³ CRM Dlamini "Equality or justice? Section 9 of the Constitution revisited—Part II" (2002) 27 (2) *Journal for Juridical Science* 15 at 17.

²²⁴ Currie and De Waal *Bill of Rights Handbook* 233.

²²⁵ Currie and De Waal *Bill of Rights Handbook* 233.

²²⁶ 1997 (4) SA 1 (CC).

discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context."

This approach means that some form of disparity of treatment will have to be tolerated so as to further the greater goal of an egalitarian society and each case of discrimination will be determined in light of the actual social and economic conditions of groups and individuals.

Complementary to the pursuit of substantive equality the Constitution introduced an additional conception of equality, restitutionary equality. This can be inferred from section 9 (2) which obliges the state to enact "legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination". According to the Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice*²²⁸

"... It is insufficient merely to ensure that statutory provisions which have caused the unfair discrimination of the past are eliminated. Past unfair discrimination has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time to come and even indefinitely. Like justice equality delayed is equality denied..."

According to Currie and De Waal the concept of restitutionary equality has come to be associated with the political concept of transformation.²²⁹ As a result, the state is under a duty to ensure that equality is achieved even if it means enacting legislation which favours a particular group at the expense of another and this is evidenced by the promulgation of the Promotion of Equality and Prevention of Unfair Discrimination Act,²³⁰ as well as the Broad-

²²⁷ Para 41.

²²⁸ 1999 (1) SA 6 (CC) para 60-61.

²²⁹ Currie and De Waal *Bill of Rights Handbook* 234.

²³⁰ Act 4 of 2000.

Based Economic Empowerment Act²³¹ among a raft of legislation aimed at furthering transformation.

3.9 Interpretation of the right

According to *Harksen v Lane*,²³² an inquiry into the violation involves the following stages:

- (a) Does the challenged law or conduct differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 9 (1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- (b) Does the differentiation amount to unfair discrimination? This requires a two stage approach;
- (c) Does the differentiation amount to discrimination? If it is on a listed ground then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics that have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
 - (i) If the differentiation amounts to ‘discrimination’, does it amount to unfair discrimination? If it has been found to have been on a specified ground then unfairness will be presumed. If on an unspecified ground unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.
 - (ii) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause.

²³¹ Act 53 of 2003.

²³² 1998 (1) SA 300 (CC) para 53.

According to Currie and De Waal, the first stage concerns the right to equal treatment and equality before the law contained in section 9 (1), testing whether there is a rational connection between the differentiation in question and a legitimate governmental purpose that it is designed to further or achieve.²³³ If the answer is in the negative then the law or conduct violates section 9 (1) and therefore fails at the first stage. If the differentiation is shown to be rational then the second stage of the inquiry comes into consideration and where discrimination is found to be unfair one has to look at whether such unfair discrimination is justified under the limitation clause contained in section 36 of the Constitution. It has been said that section 9 identifies three ways in which differentiation might occur, that is, firstly mere differentiation, unfair discrimination and fair discrimination. It is therefore important that before looking at whether the limited application of professional privilege survives the equality inquiry one must first distinguish the concepts of differentiation and discrimination as contained in the provision.

3.10 **Mere differentiation *versus* discrimination**

The principle of equality does not require everyone to be treated the same but simply that people in the same position from a moral point of view should be treated the same.²³⁴ It is only logical that there will be some differentiation in the treatment of citizens for a variety of reasons, thus not every differentiation can amount to unequal treatment. As noted in the abovementioned inquiry there is differentiation which does not amount to unfair discrimination, that is, mere differentiation. The validity of this form of differentiation is tested by the less exacting standard of rationality.²³⁵ If such law or conduct denies equal protection or benefit of the law or amounts to unequal treatment under the law it will be invalid. A law or conduct will violate section 9 (1) if the differentiation does not have a legitimate purpose and if there is no rational connection between the differentiation and the purpose. The rationality requirement was illustrated in *Prinsloo v van der Linde*²³⁶ a case involving the implementation of the Forest Act²³⁷. Under the Act owners of land outside of

²³³ Currie and De Waal *Bill of Rights Handbook* 236.

²³⁴ Currie and De Waal *Bill of Rights Handbook* 239.

²³⁵ Currie and De Waal *Bill of Rights Handbook* 239.

²³⁶ 1997 (3) SA 1012 (CC).

²³⁷ Act 122 of 1984.

fire control areas were not obliged to institute fire control measures, but were encouraged to do so and one of the ways in which this was done was a presumption of negligence by the landowner in respect of fires occurring in ‘non-controlled’ areas, a presumption which did not apply in controlled areas. In coming to a finding the court stated that:

"in regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law ... the purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner...before it can be said that mere differentiation infringes section 9 it must be established that there is no rational relationship between the differentiation in question and the government purpose which is proffered to validate it. In the absence of such rational relationship the differentiation will infringe section 9".²³⁸

Currie and De Waal are of the opinion that the ‘rational connection’ test is far less exacting than the test for the justifiability of a limitation of a right.²³⁹

On the other hand, discrimination as a particular form of differentiation is one which is based on illegitimate grounds and the starting point is the list of grounds contained in section 9 (3) as well as analogous grounds, although this list is by no means exhaustive. Dlamini describes the attributes contained in the listed grounds and the analogous grounds as “irrelevant accidents in the face of our common humanity”²⁴⁰ and people should not be discriminated against based thereon. Analogous grounds are those attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them seriously in a comparably serious manner.²⁴¹ One must take note of a fundamental difference between the application of the listed grounds and the analogous grounds. Whereas differentiation on any one of the grounds is prima facie unfair discrimination in terms of section 9 (5), differentiation on an analogous ground will have to

²³⁸ Para 25.

²³⁹ Currie and De Waal *Bill of Rights Handbook* 241.

²⁴⁰ Dlamini 2002 *Journal for Juridical Science* 30.

²⁴¹ *Harksen v Lane* para 46.

be proved by the applicant to be unfair discrimination and this will be achieved by showing that it impairs the complainant's fundamental dignity.

Although the term 'discrimination' carries pejorative associations it must be noted that not all discrimination is unfair. In the case of *President of the Republic of South Africa v Hugo* it was held that a Presidential decree remitting the prison sentences of among others, mothers of children under the age of twelve while denying the same to fathers of like aged children, was fair. This was because mothers of young children were regarded as particularly vulnerable and had been victims of past discrimination in the past and the fathers had historically not been subjected to disadvantage. As a result this was deemed to be an instance of fair discrimination.

Unfair discrimination on the other hand is discrimination with an unfair impact on its victims.²⁴² According to the *Prinsloo v van der Linde* case unfair discrimination means "treating people differently in a way which impairs their fundamental human dignity as human beings who are inherently equal in dignity."²⁴³ The value of dignity is very central to understanding the issue of unfair discrimination. In *Harksen v Lane*²⁴⁴ the court pronounced on factors that need to be taken into account when determining whether discrimination is unfair. Firstly one must look at the position of the complainants in society and whether they have been victims of past patterns of discrimination. Differential treatment which burdens people in a disadvantaged position is more likely to be unfair than burdens placed on those who are relatively well-off.²⁴⁵ Secondly one must look at the nature of the discriminating law or action and the purpose sought to be achieved by it. The third factor entails looking at the extent to which the rights of the complainant have been impaired and whether there has been an impairment of his or her fundamental dignity. It must be noted that the list of factors, while assisting in giving precision and elaboration to the constitutional test of fairness, is by

²⁴² Currie and De Waal *Bill of Rights Handbook* 246.

²⁴³ Para 31.

²⁴⁴ Para 52.

²⁴⁵ Currie and De Waal *Bill of Rights Handbook* 244.

no means a closed list as more factors may emerge as the equality jurisprudence continues to develop.²⁴⁶

3.11 **Is the equality clause infringed by the *status quo*?**

In looking at whether the limited application of legal professional privilege to only those taxpayers approaching tax attorneys while excluding those that approach non-legal tax advisors is permissible in terms of the equality clause one has to apply the *Harksen* test. It has been established that there is differentiation of treatment between taxpayers in terms of the professional approached. It has also been established in this chapter that the purported purpose is to increase tax compliance and reduce incidents of impermissible tax planning. However it must be said that there is no rational link between the differentiation and the supposed purpose. Rather than achieving the stated purpose, the differentiation actually hinders that because without candour and the security of knowing that communications with their tax advisors are privileged; taxpayers are unlikely to disclose all their intentions and tax affairs thus making it difficult for the professional to give them proper and sufficient advice and where necessary discourage their clients from engaging in activities which might violate the Income Tax Act.

Extending the privilege will actually encourage compliance especially in light of the fraud exception rule. Thus, there actually is a rational connection between the purpose intended to be achieved and the extension of the privilege. As a result one can safely say that the differentiation between taxpayers on the basis of the professional they choose to consult will fail at the first stage of the inquiry. The differentiation is therefore in contravention of section 9 (1) which guarantees equality of treatment and protection of the law. The right to equality is central to the Constitution and the pursuit of an egalitarian society is one of the main commitments of the Constitution.

²⁴⁶ Currie and De Waal *Bill of Rights Handbook* 245.

3.12 **Justification of the *status quo* (non-protection) under the limitations clause**

Because the exercise of rights by one person has the potential of infringing on the rights of another it is only logical that rights are not absolute and the rights in the South African Constitution are not an exception. According to Currie and De Waal there are boundaries set by the rights of others and by important social considerations such as public order, safety, health and democratic values.²⁴⁷ In the South African context these boundaries find expression in section 36 of the Constitution, a general limitations clause which sets out the criteria for the justification of the limitation of rights contained in the Bill of Rights. According to the provision:

- (i) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
 - (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (ii) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

This section sets out the inquiry into whether a particular limitation of a right is a justifiable infringement. It must be noted however this does not mean that the rights can be limited for any reason, rather, there has to be exceptionally strong reason for the limitation, in other words, the limitation must serve a purpose that most people would regard as compellingly important.²⁴⁸ In addition to the purpose being important, there must be good reason for thinking that the restriction would achieve the purpose it is designed to achieve and that there

²⁴⁷ Currie and De Waal *Bill of Rights Handbook* 163.

is no other realistically available way in which the purpose can be achieved without restricting rights.²⁴⁹ The inquiry is part of the two-stage approach in Bill of Rights litigation, the first of which is to determine if a right has been infringed and the section 36 inquiry forms the second stage, that is, whether the infringement can be justified as a permissible limitation of the right. It must, however, be noted that the approach is not cast in stone and the court may in some instances depart from the two-stage approach to avoid having to decide whether a right has been infringed.²⁵⁰ However, this approach has been criticised as being tantamount to reducing the discussion of the justification of a limitation to a hypothetical exercise with no precedential value because, the balancing exercise required by the limitation cannot be accurately carried out with only a hypothetical violation of rights.²⁵¹ Having established in the preceding section that there is violation of the rights to privacy and equality by the failure to extend the common law concept of privilege to clients who seek the services of non-legal tax practitioners, the next section is aimed at determining whether such an infringement is justifiable in terms of section 36. As noted above, limitation of a right will only be legitimate if it is done by (a) a law of general application that is (b) reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The following section will apply the limitation clause to the subject matter of this research.

3.12.1 **Law of general application**

3.12.1.1 **Authorised by law**

The minimum requirement for the limitation of a right is that the infringement must be authorised by law and the law must be of general application. This requirement embodies the basic principle of liberal political philosophy and constitutional law, that is, the rule of law. An infringement must therefore be occasioned by law and in this context ‘law’ means all forms of legislation, whether delegated or original, the common law, private and public, as well as customary law.²⁵² As a result an infringement must be in terms of any of the

²⁴⁸ Currie and De Waal *Bill of Rights Handbook* 164.

²⁴⁹ *S v Manamela* 2000 (3) SA 1 (CC) para 32.

²⁵⁰ The Constitutional Court adopted this approach in *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).

²⁵¹ Currie and De Waal *Bill of Rights Handbook* 166.

²⁵² Currie and De Waal *Bill of Rights Handbook* 169.

abovementioned categories of law, if not, then such limitation will not be justified from the very first instance. Because the concept of privilege in its present form originates in the common law it is submitted that the infringement is authorised by law because the privilege is only availed to those seeking the services of legal professionals.

3.12.1.2 **General application**

An infringement must not only be authorised by law, such a law must be of general application. At the level of form the law must be sufficiently clear, accessible and precise that those affected by it can ascertain the extent of their rights and obligations. At a substantial level, at a minimum, the law must apply impersonally, it must apply equally to all and it must not be arbitrary in its application.²⁵³ The application of this requirement can be seen in the case of *De Lille v Speaker of the National Assembly*²⁵⁴ where Parliamentary privilege had been utilised to suspend a Member of Parliament by an ad hoc committee of the National Assembly. This privilege allowed for the suspension of a member for contempt of Parliament. It was held that the suspension did not constitute a justifiable infringement on the rights to freedom of expression, just administrative action and access to courts because it was not authorised by law of general application.²⁵⁵ The privilege was not in accordance with equality and was arbitrary because it was not codified or capable of ascertainment. Nor is it based on a clear system of precedent. There is no guarantee of parity of treatment. It is essentially ad hoc jurisprudence which applies unequally to different parties”.²⁵⁶

Whereas on the level of form the concept of privilege is sufficiently clear, accessible and precise it is on the substantive level that it fails the test. Although it can be said that it applies impersonally one cannot say it does so in accordance with equality. As has been shown in this chapter, the application of the privilege is unequal because it differentiates between clients on the basis of which particular tax professional they choose to approach. Those who approach tax attorneys are availed of its protection whereas those who approach non-legal tax practitioners are devoid of its protection. In so far as the privilege belongs to the client rather

²⁵³ Currie and De Waal *Bill of Rights Handbook* 169.

²⁵⁴ 1998 (3) SA 430 (C).

²⁵⁵ Currie and De Waal *Bill of Rights Handbook* 174.

²⁵⁶ Para 37.

than the professional there is inequality of treatment and since the application of the privilege differs on the basis of the professional approached it is submitted that such differentiation of treatment is arbitrary and therefore the limitation of the right to privacy and equality is not legitimate. As such the limitation fails at the first leg of the limitation inquiry. However it is only prudent to explore whether the violation will survive the second leg of the test.

3.12.2 **Reasonableness and justifiability in an open and democratic society based on human dignity, equality and freedom**

In order for a limitation to pass this second stage of the inquiry it must be shown that the law in question serves a constitutionally acceptable purpose and that there is sufficient proportionality between the harm done by the law (infringement of fundamental rights) and the benefits it is designed to achieve (the purposes of the law).²⁵⁷ As such there is a need for a balancing of interests, that is, the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.²⁵⁸

3.12.2.1 **Nature of the rights to privacy and equality**

The nature of the rights to privacy and equality in the South African constitutional scheme cannot be overemphasised. They are crucial to the enjoyment of other rights especially the right to dignity which is also a foundational value of the Constitution. This is more so in light of South African history where privacy and equality and consequently human dignity were wantonly disregarded by the state. These rights are of particular importance to the Constitution's aim of creating an open and democratic society based on human dignity, equality and freedom. Thus it has to take some exceptional reason to justify their limitation.

²⁵⁷ Currie and De Waal *Bill of Rights Handbook* 176.

²⁵⁸ *S v Makwanyane* 1995 (3) SA 391 (CC) para 104.

3.12.2.2

The purpose of the limitation and importance to society

The purpose for the non-protection afforded to taxpayers who approach non-legal tax practitioners can only be explained as aimed at using compulsion as a means of regulating and enforcing compliance. It is beyond debate that tax compliance is important because it ensures that taxpayers accordingly contribute to the *fiscus* so that the State has revenue from which it can fund government activities as well as service delivery. As a result it is worthwhile and important in a constitutional democracy that tax legislation and regulations are complied with.

3.12.2.3

The extent of the limitation and its efficacy

The limitation in question is a serious infringement of the rights to privacy and equality of those taxpayers who approach non-legal tax practitioners because their information is at risk of being obtained by the state through compulsion of the client and his or her advisor. It can be submitted however that this limitation is not effective in achieving the required purpose because rather than encouraging compliance it actually pushes non-compliance underground and thus more resources are being expended to investigate cases of non-compliance. Should protection be afforded to all taxpayers regardless of the professional they approach, the purpose purportedly behind the limitation would actually be more achievable because it is only when all information is put before the practitioner that he can effectively advise his client and actually ensure that any tax planning activities are done within the law. In some instances the non-compliance occurs because the client is not given the appropriate advice because he or she does not disclose all particulars of their tax affairs for fear that such information will be disclosed through compulsion. It is submitted that tax practitioners like any other professionals have an obligation to advise their clients to conduct their affairs in a legal manner and privilege will enhance this because it encourages full and frank disclosure.

3.12.2.4

Less restrictive means of achieving the purpose

As shown above there is a less restrictive way of ensuring compliance with tax legislation and that involves encouraging candour between the taxpayer and the tax practitioner in much the same way disclosure between an attorney and his client is fostered. This ensures that the

taxpayer is given adequate and lawful advice thus ensuring that compliance actually increases. The purpose purportedly aimed at by the limitation will also be achieved due to the fraud exception contained in the privilege. As a result, where advice is obtained or given in furtherance of a fraud or contravention of the tax legislation the protection is stripped away and the information is available to be obtained by the taxation authorities. The fraud exception will actually act as a deterrent against non-compliance and impermissible tax planning because taxpayers and tax practitioners will be aware that in the event of such actions the protection afforded by the privilege will fall away. The fact that the privilege can be waived, expressly, impliedly and even imputedly will also act as a deterrence thus actually enhancing tax compliance. As a result there is another way in which the purpose may be achieved without necessarily involving the violation of fundamental rights.

3.12.3 **Is the infringement of the rights justified?**

As a result it can be said that not only is the infringement of the rights to privacy and equality in this instance not in terms of a law of general application, it also fails the second test because there is no proportionality between the infringement of the rights and the purpose which it aims to achieve. The rights violated are ones which are central to the enjoyment of other rights and whereas the purpose sought to be achieved is an important one, the relationship between the infringement and the purpose is tenuous and inefficient and there is another more efficient way which is proportionally linked to the purpose and does not necessarily involve the violation of fundamental rights. In actual fact the alternative approach furthers the purpose and has inbuilt safeguards aimed at achieving the desired end, tax compliance.

3.13 **How is the situation to be remedied?**

As has been shown above the status *quo*, that is, the denial of privilege to those taxpayers who utilise the services of non-legal tax practitioners while the same is afforded to those using the services of tax attorneys, will not pass constitutional muster as it violates both the privacy and equality rights of the Constitution. Since the current position is untenable in light of the Constitution, there are two possible ways in which the problem could be remedied. Firstly, the privilege can be abolished when attorneys deal with tax matters. The second

option entails having the privilege extended to non-legal tax practitioners in a qualified manner.

The first option entails withdrawing privilege from attorneys when they perform the same services as non-legal tax practitioners. This would be tantamount to delineating the application of the privilege on functional lines. This particular argument is based on the argument that privilege should only be restricted to those functions which are traditionally called legal. One of the problems with this approach however is that finding functions peculiarly within the province of the conscientious attorney would be frustrating if not impossible.²⁵⁹ It must also be noted that although resulting in equality of treatment this approach would not necessarily further the purpose of the information provisions in the Income Tax Act. Devoid of the protection afforded by privilege taxpayers are more likely to keep some information from their advisors, legal and non-legal, thus hindering the giving of sufficient and appropriate advice. In fact such an approach will work directly against tax compliance measures.

The alternative would be to extend the privilege to cover non-legal tax advisors. This seems to be the more tenable approach especially in light of the fact that the privilege belongs to the client, in this case the taxpayer, and not the professional being approached for advice. The privilege may be extended to non-legal tax practitioners with a slight adaptation of the requirements of privilege as proposed in chapter two of this discussion. This would mean restricting the application of the privilege to matters which are of a purely taxation nature when such information is obtained from a non-legal tax practitioners. As will be seen in the next chapter some jurisdictions have extended the concept of privilege to include non-legal tax practitioners and new concepts have been introduced, for example, the 'work product doctrine' in the United States of America. Other jurisdictions have stated that the preparation of tax returns does not amount to the obtaining of tax advice for the purposes of privilege thus restricting the ambit of the privilege to those instances where one obtains advice pertaining to tax and estate planning. This approach will actually have the effect of increasing candour and consequently tax compliance as advisors will be in a position to give proper and sufficient advice.

3.14 **Conclusion**

In this chapter, the constitutional principles of privacy and equality have been explored. It has been shown that these rights are fundamental to the South African constitutional dispensation and there has been a great deal of case law on the matter. It is clear that all taxpayers by virtue of being human beings are entitled to the protection of these rights and the denial of the privilege to taxpayers approaching non-legal tax advisors while affording the same to those obtaining advice from tax attorneys infringes these rights. Such infringements have been shown to be unjustifiable in an open and democratic society based on the values of freedom, equality and dignity. Having established that the differentiation of treatment is in contravention of the Constitution, possible alternatives, namely withdrawal of privilege from attorneys when dealing with tax matters as well as the extension of the doctrine have been discussed. While the former will result in a form of formal equality it is the latter which is more desirable as it not only results in equality and protection of the right to privacy, it also furthers the governmental purpose of regulating and enforcing tax compliance. The next chapter will explore how other jurisdictions, namely, the United States of America, Australia and New Zealand have extended the concept of privilege to non-legal tax advisors.

²⁵⁹ Anonymous 1962 *Yale Law Journal* 1235.

4 CHAPTER 4: COMPARATIVE ANALYSIS

4.1 Introduction

In preceding chapters the concept of legal professional privilege was explored and the differentiation in treatment between taxpayers who utilise tax attorneys and those utilising non-legal tax advisors was found to be unconstitutional. Having established that the current approach is untenable under the South African Constitution, this chapter will look at possible ways of extending legal professional privilege to non-legal tax practitioners thus bringing the situation into compliance with the Constitution. In 1998 the United States of America, under President Bill Clinton, introduced the Internal Revenue Service Restructuring and Reform Act which contained section 7525 which introduced a statutory privilege based on the common law privilege. In 2005 New Zealand followed suit when the legislature introduced sections 20B to 20D into the income tax legislation when they enacted the Taxation (Base Maintenance and Miscellaneous) Act. This created a statutory privilege independent of the common law. The Australian Law Reform Commission in its Report on Client Legal Privilege in Federal Investigations has recommended the extension of privilege to federal bodies which have coercive powers and the Australian Tax Office is one such body to which the recommendations apply. In the case of *Prudential v Special Commissioner of Taxes*²⁶⁰ the Court of Appeal in England refused to extend the privilege, thus leaving the exercise to the legislature. The present chapter of this thesis will discuss the American approach and the approach adopted by New Zealand, before discussing the recommendations of the Australian Law Reform Commission, as well as a brief consideration of the English position.

4.2 The American approach

Prior to the promulgation of section 7525, although only attorney client privilege applied, the Internal Revenue Service (hereafter referred to as the IRS) granted parity to attorneys, certified public accountants as well as enrolled agents in their dealings with the IRS. Accordingly it was argued that since the various groups of professionals represented taxpayers before the IRS in the same manner as attorneys, taxpayers should enjoy the same

²⁶⁰ [2010] EWCACiv 1094.

special status of privileged communications when dealing with their non-legal tax advisors.²⁶¹ As noted above, in 1998 the United States introduced a tax practitioner privilege through section 7525 of the Internal Revenue Code, better known as the Federally Approved Tax Practitioner Privilege (or FATP for short). The promulgation of section 7525 was motivated by a need to provide equal protection of tax advice from coerced disclosure regardless of whether it was rendered to a taxpayer by a attorney or accountant.²⁶² According to Joyce²⁶³ there were three primary reasons that were cited by the United States Congress for enacting the privilege. Firstly, there was a need to respond to aggressive behaviour by the IRS in engaging in “financial status or lifestyle auditing”, secondly Congress was concerned with the competitive atmosphere between the two primary tax practitioner groups, accounting and law firms, as well as the desire not to penalize taxpayers, pertaining to confidentiality of communications, simply because of the professional classification of the advisor.

4.2.1 **Federally approved tax practitioner privilege (section 7525)**

Section 7525 extends privilege thus:

(a). Uniform application to taxpayer communications with federally authorized practitioners.

(1) General rule

With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.

²⁶¹ D Mandelson “The need for CPA –client privilege in federal tax matters” (1999) *The Tax Advisor* (accessed at <http://www.thefreelibrary.com/The+need+for+CPA-client+privilege+in+federal+tax+matters-a018104144> on 07/10/10).

²⁶² SZ Kaplan “Privilege Meets Transparency: Can We Practice Safe Tax?” (2006) 58 *The Tax Executive* 206 at 208

²⁶³ TJ Joyce “Limitations of the Attorney-Client Privilege Under Section 7525 of the Internal Revenue Code” http://www.legalinfo-panama.com/php/pfp.php3?doc=/articulos/articulos_61a.htm (accessed 13/10/2010).

(2) Limitations

Paragraph (1) may only be asserted in:

- (a) any non-criminal tax matter before the Internal Revenue Service; and
- (b) any non-criminal tax proceeding in federal court brought by or against the United States.

(3) Definitions

For purposes of this subsection:

A Federally authorized tax practitioner.

The term ~~“federally authorized tax practitioner”~~ means any individual who is authorized under Federal law to practice before the Internal Revenue Service if such practice is subject to Federal regulation under section 330 of title 31, United States Code.

B. Tax advice

The term ~~“tax advice”~~ means advice given by an individual with respect to a matter which is within the scope of the individual’s authority to practice described in subparagraph (A)

(b) Section not to apply to communications regarding tax shelters

The privilege under subsection (a) shall not apply to any written communication which is:

(1) between a federally authorized tax practitioner and:

- (a) any person,
- (b) any other person holding a capital or profits interest in the person, and

- (c) any director, officer, employee, agent, or representative of the person, or
- (2) in connection with the promotion of the direct or indirect participation of the person in any tax shelter (as defined in section 6662 (d) (2) (C) (ii))

From the wording of subsection (a) (1) it is clear that any communication with a non-legal tax practitioner will only be protected in terms of section 7525 to the extent that such communication would have been protected had it been made with an attorney.²⁶⁴ The section 7525 privilege is therefore no greater than the attorney-client privilege. Other subsections of the provision are aimed at limiting the application of the privilege such that it is narrower than attorney-client privilege. Firstly subsection (a) (2) contains a list of limitations which state that the privilege may only be asserted in non-criminal matters before the IRS and the Federal court brought by or against the United States. This means that the privilege may not be asserted against any other federal or state agencies or to state tax litigation.²⁶⁵ In addition the privilege is only applicable where the professional concerned is a federally authorized tax practitioner and this restricts the ambit of the professionals to whom the privilege may apply. The section does not apply in instances where the communication is in regard to the promotion of tax shelters. The scope of the section is analysed in more detail below.

4.2.2 **Scope of the American approach**

As noted above the section only applies in instances where tax advice is rendered by a federally authorised tax advisor and may be asserted in non-criminal matters before the IRS and in proceedings before federal court brought by or against the United States. As a consequence this means that the privilege does not apply to any private litigation, criminal proceedings, civil proceedings where written communications relating to tax shelters are relevant, or in state tax proceedings.²⁶⁶ While the wording of the other subsections is clear, it is the last two subsections, that is, the definition of tax advice as well as the tax shelter exception to the privilege that have attracted comment in case law.

²⁶⁴ *United States v Frederick* 182 F.3d 496 para 16-17.

²⁶⁵ TJ Joyce "Limitations of the Attorney-Client Privilege Under Section 7525 of the Internal Revenue Code" 1.

²⁶⁶ AV Pearson and JE McFadden "Tax Advisor Privilege of Confidential Communication"
http://www.mpbf.com/articles/art_04.php (accessed 07/10/2010).

According to the statute “tax advice” is defined as advice given by an individual with respect to a matter which is within the scope of the individual’s authority to practice in terms of Federal authorisation. According to Joyce the problem with this definition is that it would include any tax aspect of any matter, even if the tax portion of any matter were very slight in comparison to the matter as a whole.²⁶⁷ It is not easy to distinguish “tax advice” from general business or accounting advice and it is not clear when tax advice becomes business advice that is not covered by the privilege.²⁶⁸ In *United States v Frederick*²⁶⁹ it was held that where a document or advice had been given for a dual purpose, one of which is subject to privilege such document or information as a whole is not privileged under section 7525. Such communication will violate subsection (a) (1) because if rendered to or by an attorney such information would not be privileged because it will fail the “*for the purpose of obtaining legal advice*” aspect of the common law concept of privilege and will thus be devoid of protection. As such, where it can be shown that a part of the advice does not fall under the ambit of the section, the whole communication is not privileged and this is unlike the common law approach where the privileged parts or aspects are excised thus leaving to discovery those aspects which do not qualify for protection. The court also pointed out that information furnished for the preparing of a tax return is not privileged because it is not furnished for the preparation of a brief or an opinion.²⁷⁰ A tax return is prepared for onward furnishing to the IRS in any case so it would be redundant to protect such information by way of privilege.

Another aspect of the section which has attracted judicial comment is the tax shelter exception contained in subsection (b). This provision is similar to the fraud exception rule of the common law attorney-client privilege. According to the provision, section 7525 privilege does not apply to any written communication which is between a federally authorized tax practitioner and any person, director, officer, employee, agent, or representative of the person or any other person holding a capital or profits interest in the person, in connection with the promotion of the direct or indirect participation of the person in any tax shelter. As such there

²⁶⁷ Joyce “Limitations of the attorney Client privilege under section 7525 of the Internal Revenue Code” 1

²⁶⁸ FJ Lipman and J.E. Williamson “The New Accountant-Client Privilege Provision: A Partial Step Forward for Non-Attorney Tax Practitioners” (1999) *National Public Accountant* 41 at 41.

²⁶⁹ Para 13.

²⁷⁰ Para 8-9.

must be a written communication and that communication must be in connection with the promotion of a corporations' participation in a tax shelter. A tax shelter is defined as a partnership, entity, plan or arrangement a significant purpose of which is the avoidance or evasion of federal income tax.²⁷¹ In *Countryside Ltd. Partnership et al. v Commissioner*²⁷² the court was called upon to decide whether the tax shelter exception applied and one of the main issues in contention was whether there had been a written communication. In the case the IRS had filed motions to compel the production of written minutes which memorialized communications between the partnership, its attorney and its Federally Authorized Tax Practitioner. During the meeting one of the partners made handwritten notes and it was these that the IRS sought to be produced. The IRS in order to invoke the exception had to prove that the abovementioned requirements were met. It was argued by counsel for the partnership that the term written communication requires some form of transmission of written material from one person to another.²⁷³ In coming to a conclusion that the exception did not apply the court referred to *United States v BDO Seidman*²⁷⁴ where it was held that "because the exception applies to written communications, oral communications between tax practitioner and the corporate agent remain within the general rule of privilege". Consequently the court came to the finding that the notes were the mere recording of an oral conversation and were not communicated to anyone,²⁷⁵ thus the "written communication" requirement of the exception was not met and the communication remained privileged.

Another aspect of the exception which attracted mention is the "promotion of a tax shelter" requirement. In order for the exception to be successfully invoked it must be shown that the communication was aimed at promoting the direct or indirect participation of a corporation in an arrangement or plan whose sole aim is the avoidance or evasion of income tax, essentially similar to the impermissible tax planning provisions of the South African Income Tax Act. The court was called upon in *United States v Textron*²⁷⁶ as well as *Countryside Partnership* to determine whether the actions of the respective tax advisors amounted to the promotion of a

²⁷¹ Lipman and Williamson 1999 *National Public Accountant* 42.

²⁷² (2009)132 T.C. No. 17.

²⁷³ 7.

²⁷⁴ (2007)492 F.3d 806 (7th Circuit) 827.

²⁷⁵ 8.

²⁷⁶ D.R.I US Tax Case No. 06-198T (2007).

tax shelter. In *Textron* the court stated that section 7525 was aimed at communications by outside tax practitioners attempting to sell tax shelters to a corporate client because the promotion of tax shelters does not fall within the routine relationship between a tax practitioner and a client.²⁷⁷ The court held that Textron's accountants were not outside promoters soliciting the client's participation in a tax shelter, rather they were acting as tax advisors and the communications in question were a reflection of their opinions regarding foreseeable tax consequences of transactions that had already taken place, not future transactions they were seeking to promote.²⁷⁸ In *Countryside Partnership*²⁷⁹ it was held that the advice given by the practitioner was furnished as part of a long-standing, ongoing and hence routine relationship between a Federally Authorised Tax Practitioner and his client and thus did not constitute the promotion of a tax shelter. It must be noted however that the court did concede that there may be a point at which a Federally Authorised Tax Practitioner's actions cross the line and will no longer be encompassed within the routine relationship between a tax practitioner and his client and will amount to tax shelter promotion.

It must be noted that the common law conditions under which the attorney-client privilege is waived apply with equal force to the section 7525 privilege.²⁸⁰ This means that only the client may waive the privilege, either expressly, impliedly or imputedly. As such communications contained in a tax return are not privileged as they are prepared for the IRS.

4.2.3 **Criticism of section 7525**

A glaring shortcoming of the section 7525 privilege is to be found in the fact that it only applies to matters at the federal level. This means that it does not apply to state tax issues or state tax proceedings. As a result the privilege may be easily circumvented in the event that state tax issues or proceedings become a matter of public record. The same also applies to private litigation as the privilege does not extend to civil matters between private litigants. This has the effect of rendering the privilege redundant when it comes to matters that would

²⁷⁷ 7.

²⁷⁸ 7.

²⁷⁹ 13.

²⁸⁰ TL Frantzen and J.W. May "The Effect of the IRS Restructuring and Reform Act of 1998 on Federal Income Tax Controversies" (1998) 50 *The Tax Executive* 358 at 358.

have been addressed at state level and brought on appeal to the federal level. Some states, such as California, promulgated their own legislation which extends the privilege to state proceedings in order to counter this.²⁸¹ The fact that the operation of the privilege is restricted to proceedings before the IRS means that communications between a tax advisor and a taxpayer made in preparation for proceedings before other statutory bodies such as the Franchise Tax Board of California and other like bodies in other states would be discoverable by the IRS through information sharing.²⁸² This has the potential of rendering the privilege redundant in the event that the IRS obtains such information.

According to Joyce²⁸³ the application of the privilege to non-criminal matters and proceedings only, can lead to great difficulties as many controversies often start out as civil matters before becoming criminal matters. As such the problem with subsection (a) (2) is not so much that it does not extend to criminal matters, rather that the problem is in determining at what point an ordinary matter becomes a criminal matter²⁸⁴ and what happens to information that would have passed between client and advisor before the matter became a criminal one. It has been stated that the information in the pre-criminal stage will not be privileged because the IRS may be able to strip away privilege retroactively back to the beginning of the matter before the parties discerned any possibility of a criminal inquiry.²⁸⁵ This particular aspect poses a serious risk to the taxpayer because clients may not be aware that communications relating to non-criminal matters made privileged and confidential pursuant to section 7525 lose protection once the matter converts to a criminal one.²⁸⁶ The section is aimed at giving taxpayers the same protection of privacy regardless of the tax advisor selected, but as the situation currently stands, a client who approaches an attorney does not have to worry about losing the protection of the privilege should the matter become a criminal one while this is a pitfall awaiting those who utilise the services of non-legal tax practitioners.

²⁸¹ The Revenue and Tax Code section 7099.1 originally added by Chapter 438 of 2000 which expired in December of 2008 and reinstated through aB 129 (Ma) in October 2009.

²⁸² Pearson and McFadden "Tax Advisor Privilege of Confidential Communication" 3.

²⁸³ Joyce "Limitations of the Attorney-Client Privilege under Section 7525 of the Internal revenue Code" 2.

²⁸⁴ Lipman and Williamson 1999 *National Public Accountant* 42.

²⁸⁵ Lipman and Williamson 1999 *National Public Accountant* 42.

²⁸⁶ Joyce "Limitations of the Attorney-Client Privilege under Section 7525 of the Internal revenue Code" 2.

The definition of tax advice in the provision is also problematic. As noted in the *Frederick* case any dual purpose documents, where one purpose was the obtaining of tax advice while the other is for another purpose such as legal advice, are not protected by privilege.²⁸⁷ This contradicts the assertion that the privilege is aimed at putting taxpayers at parity regardless of who they approach for professional advice because such communications when made to a attorney, especially when the other purpose is for legal advice, are privileged. From the *Frederick* case it seems that the moment a part of communications is deemed to be not tax-related then privilege falls away. According to Kaplan,²⁸⁸ however, the *Frederick* finding may not apply if the taxpayer can show that the communication is severable in whole or in part between its privileged and non-privileged subject matters. The above deficiencies in the privilege have tempted some to argue that the current limitations and inherent pitfalls found within section 7525 may lead one to eventually question whether the taxpayer is better off without the privilege than with it.²⁸⁹

4.3 The New Zealand approach

In June 2005 the New Zealand legislature brought to fruition a process set in motion by the 1954 Court of Appeal's judgment in *Commissioner for Inland Revenue v West-Walker*²⁹⁰. It was the court's finding that the information gathering powers of the Commissioner for Inland Revenue operated subject to legal professional privilege. The decision was incorporated into section 16A of the Inland Revenue Department Act 1952 of 1958. In 1994 this provision was replaced by section 20 of the Tax Administration Act of 1994. However these particular provisions only applied to information rendered by legal advisors with regard to tax law. To remedy the situation and ensure that tax advice rendered by non-legal tax practitioners was also protected, consultations were held and the central recommendation emerging from the process was for the replacement of section 20 of the Tax Administration Act of 1994 with a new and complete code for tax and privilege²⁹¹. This culminated in the creation of a

²⁸⁷ Frantzen and May 1998 *Tax Executive* 359.

²⁸⁸ Kaplan 2006 *Tax Executive* 209.

²⁸⁹ Joyce "Limitations of the Attorney-Client Privilege under Section 7525 of the Internal revenue Code" 3.

²⁹⁰ [1954] N.Z.L.R. 191.

²⁹¹ K Kendall "Designing Privilege for the Tax Profession: Comparing IRC Section 7525 with New Zealand's Non-Disclosure Right" 15 http://works.bepress.com/cgi/viewcontent.cgi?article=1002&context=keith_kendall (accessed 26/10/10).

statutory non-disclosure right for tax advisors in terms of section 20B, which although similar to legal professional privilege, is not governed by identical rules.²⁹² The nature of the non-disclosure right was explored in *Blakeley v Commissioner of Inland Revenue*²⁹³ and the court confirmed that the right is completely separate from the common law privilege, as opposed to section 7525 of the Internal Revenue Code referred to above which is in effect an extension, albeit limited, of the common law legal professional privilege. The nature of the privilege is in accordance with the purpose of the legislature which was to provide a degree of consistency rather than equality of treatment in par with legal professional privilege.²⁹⁴ According to the provision,²⁹⁵ a book or document is eligible to be tax advice and thereby potentially eligible for protection from disclosure if:

- (a) it is confidential; and
- (b) it is created:
 - (i) by the taxpayer for the main purpose of instructing a tax advisor so that the tax advisor can provide advice about the operation and effect of tax laws; or
 - (ii) by the tax advisor for the main purpose of recording research or analysis that is to be used in providing advice to the taxpayer about the operation and effect of tax laws; or
 - (iii) by the tax advisor for the main purpose of giving advice or recording advice given to the taxpayer where the advice is about the operation and effect of tax laws; and

²⁹² A Maples “The Non-Disclosure Right In New Zealand— Lessons for Australia?” (2008) 1 *Journal of The Australasian Law Teachers Association* 351 at 351.

²⁹³ [2008] N.Z.H.C. 223.

²⁹⁴ Kendall “Designing Privilege” 18.

²⁹⁵ Section 20B (2).

- (c) the purpose for which the book or document were created do not include committing or promoting the commission of an illegal or wrongful act.

Section 20D goes on to set out the procedure for claiming the right once eligibility for protection under section 20B has been established. The prescribed procedure differs depending on whether the book or document has been prepared by the tax advisor or by the taxpayer. Where the tax advice document has been prepared or created by the tax advisor section 20D prescribes that the claim must set out the following information:

- (a) a brief description of the form and contents of the document;
- (b) the name of the tax advisor who created the document;
- (c) the approved advisor group to which the tax advisor belonged when creating the document;
- (d) the areas of law about which the tax advisor was intending to give advice when creating the document; and
- (e) the date on which the document was created.

When dealing with documents created by the taxpayer, items (c) and (d) do not apply. Regardless of eligibility, the right will only be available if claimed within the time limit applicable to the context in which the claim arises, failing which the right falls away permanently and the taxpayer cannot later assert the non-disclosure right with regard to the document even if it is the subject of a different subsequent request for information.²⁹⁶ Section 20E and 20F set out information or documents that must, despite non-disclosure right protection, be disclosed and in this ambit is included “~~tax~~ contextual information” which is defined as:

- (a) a fact or assumption relating to a transaction;
- (b) a description of a step involved in a transaction;
- (c) advice that does not deal with the operation and effect of tax laws on the taxpayer (other than those tax laws relating to the collection of tax debts);

- (d) a fact or assumption relating to advice referred to in (c); or,
- (e) a fact or assumption relating to the preparation of the taxpayer's financial statements or a document that the taxpayer is required to disclose to the commissioner under a tax statute.

Just as in all jurisdictions the Commissioner has the right to challenge a claim for non-disclosure by applying for a ruling from the District Court and this may include a request for more specific tax contextual information.²⁹⁷

4.3.1 **Scope of the New Zealand approach**

As the particular provision was drafted after the promulgation of section 7525, it is evident that the legislature sought to avoid some of the apparent shortcomings of the American formulation of tax advisor privilege. However it must be noted that the privilege is very limited in scope. In the first instance, unlike section 7525, section 20B is precise as to what advice is sought to be protected, that is by expressly stating that for a document to be a tax advice document it must satisfy the requirements of section 20B (2). This is evidence of the limited scope of the non-disclosure right because legal professional privilege covers all documents which might be claimed by the revenue authorities, whereas the right only protects books and documents. Secondly a claim for non-disclosure protection must be made within stipulated time limits and thirdly the person claiming protection must disclose tax contextual information from the tax document as well as any attachments.²⁹⁸ Just like the common law formulation of privilege the non-disclosure right excludes documents created for the purpose of committing or promoting or assisting the commission of an illegal or wrongful act. This is the equivalent of the fraud exception rule of the legal professional privilege. This means therefore that documents created in the furtherance of tax evasion or some other illegal or *quasi* illegal act such as fraud will not qualify for protection.²⁹⁹ The express exclusion of documents created for the purpose of furthering “wrongful acts” means

²⁹⁶ Kendall “Designing Privilege” 17.

²⁹⁷ Kendall “Designing Privilege” 17.

²⁹⁸ Maples 2008 *Journal of the Australasian Law Teachers Association* 355.

²⁹⁹ Maples 2008 *Journal of the Australasian Law Teachers Association* 356.

that documents aimed at or that promote tax avoidance are also excluded from the ambit of the protection. Unlike tax evasion, tax avoidance is not illegal; although it is often within the letter of the law it is against the spirit of the law.³⁰⁰ As noted above the legislature sought to avoid the potential pitfalls of section 7525 so they did not include the limitations found in the former. As a result the right applies even to criminal proceedings and according to Kendall³⁰¹ this can be explained in part by the fact that the majority of offences under New Zealand income tax law are civil offences whereas in the American context criminal offences are more common. Another important difference from section 7525 is that, whereas section 7525 only applies against the IRS, the New Zealand non-disclosure right applies generally and not only to the Inland Revenue Department.³⁰² This means that once a document is protected by the non-disclosure right, the right operates against anyone seeking the disclosure of the document and thus there is no compulsory waiver occasioned by limitations such as those contained in section 7525. However, it must be noted, that failure to claim the right within the stipulated time limits will result in the compulsory permanent waiver of any claim to the right whatsoever.

4.3.2 Criticism of the New Zealand approach

In its drafting of the non-disclosure right the New Zealand legislature managed to avoid a number of the problems associated with the United States' section 7525 privilege but, by creating a privilege completely separate from its common law counterpart, they created a number of potential issues³⁰³ that might militate against such a move for other jurisdictions seeking to extend privilege to non-legal tax advisors. Looking at the positive aspects to be derived from the non-disclosure right, firstly the statute is clear as to what "tax advisor" means in the context. A tax advisor is defined as a natural person who is subject to the code of conduct and disciplinary processes of an approved advisor group. This is an indication that the rules may be imputed with public protection in purpose, that is, taxpayers may receive the benefit of the protection of their communications with their advisors only if they deal with an

³⁰⁰ Maples 2008 *Journal of the Australasian Law Teachers Association* 356.

³⁰¹ Kendall "Designing Privilege" 21.

³⁰² Kendall "Designing Privilege" 21.

³⁰³ K Kendall "Prospects for A Tax Advisor's Privilege in Australia" (2005) 3 *Journal of the Australasian Law Teachers Association* 46 at 69.

advisor who is appropriately qualified and there is no requirement that such groups be limited to professional accounting bodies.³⁰⁴ Another important aspect is the fact that there is no exclusion of communications in criminal matters, as well as the fact that the privilege, once claimed, subsists against any counterparty and not just the Internal Revenue Department. As a result, in terms of the aspects stated above, the statute is an improvement on section 7525.

As noted above, despite the avoidance of many of the potential problems of section 7525, the New Zealand non-disclosure right creates even more potential problems than are bound to arise in the former. The creation of a statutory privilege separate from the common law is problematic in that attempting to replicate the effect of the common law through language adopted by statute, leaves room for the interpretation of the statute in a manner which the legislature would not have contemplated, thus creating differences between the common law privilege and the statutory privilege.³⁰⁵ Moreover, whereas developments in the common law attorney-client privilege will automatically be incorporated into a privilege based in common law privilege, such developments are bound not to affect the statutory privilege thus resulting in disparity.³⁰⁶ In order to keep up with the developments in the common law the non-disclosure right will therefore need to be updated by way of regular specific statutory amendment, a situation which is tenuous taking into account the slow nature of legislative processes. In order to avoid such a situation the creation of a statutory provision broader than the common law privilege might be necessary but it must be submitted that the common law privilege is sufficient in its coverage of the communications it protects.

The creation of a statutory privilege separate from the common law privilege means that the legislature is in control of the content of the statute and this presents problems of interpretation. A privilege grounded in the common law privilege will have the benefit of decades-long precedent and tax advisors can anticipate a court's interpretation of the new privilege whereas any uncertainties emanating from an independent rule will be much more difficult to resolve in the absence of judicial interpretation.³⁰⁷

³⁰⁴ Kendall "Designing Privilege" 20.

³⁰⁵ Kendall 2005 *Journal of the Australasian Law Teachers Association* 66.

³⁰⁶ Kendall "Designing Privilege" 20.

³⁰⁷ Kendall 2005 *Journal of the Australasian Law Teachers Association* 68.

It must also be noted that when it comes to the non-disclosure right it must be claimed in accordance with a prescribed procedure the equivalent of which is non-existent when it comes to legal professional privilege. This process imposes additional compliance costs on the taxpayer as well as the tax advisor, especially in cases where a number of documents are subject to demand by the revenue authorities.³⁰⁸ In terms of the common law, privilege attaches as soon as the requirements are met and subsists until waived by the client.³⁰⁹ In addition, whereas tax contextual information is not protected and must be availed to the revenue authorities, such information would be protected under legal professional privilege.

Furthermore the New Zealand approach does not achieve parity. In all fairness to the legislature, parity with legal advice was not an intended goal in creating the statute, their goal was the establishment of some level of consistency rather than putting clients of non-legal tax advisors at par with their counterparts who utilise the services of tax attorneys.

4.4 **The proposed Australian approach**

In December of 2007 the Australian Law Reform Commission released its report on client-legal privilege in federal investigations. It recommended the creation of a statute of general application to cover various aspects of the law and procedure governing client legal privilege claims in federal investigations and among the bodies targeted is the Australian Commissioner of Taxes.³¹⁰ In terms of recommendation 6-6 the Commission proposed the extension of the privilege to tax agents, a proposal met by fierce resistance from the Australian Law Council³¹¹ which claims that there is no historical or institutional basis for extending privilege to tax advisors. In terms of recommendation 6-6 the privilege should provide that a person who is required to disclose information under a coercive gathering power of the Commissioner of Taxation is not required to disclose a document that is a tax advice document prepared for that person. A ‘tax advice document’ is defined as a

³⁰⁸ Maples 2008 *Journal of the Australasian Law Teachers Association* 363.

³⁰⁹ Kendall “Designing Privilege” 19.

³¹⁰ ALRC Report No. 107 at 9.

³¹¹ Response to the Australian Law Reform Commission Report No. 107 – ‘Privilege in Perspective: Client Legal Privilege in Federal Investigations’ 10
http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=E7D241E0-1E4F-17FA-D24E-0ED762E75F62&siteName=lca (accessed 03/09/2009).

confidential document created by an independent professional accounting advisor for the dominant purpose of providing that person with advice about the operation and effect of tax laws.³¹² This definition is problematic because it postulates that the advice must be rendered by an accounting advisor who is registered as a tax agent. It is not clear therefore whether it is a prerequisite that one must be admitted as an accountant before the privilege can apply.

According to Maples³¹³ the statutory right proposed by the Law Reform Commission is not dissimilar to the statutory right promulgated in New Zealand. Up to the present, the Australian legislature has not acted on the recommendations and it remains to be seen which route will be taken, whether the legislation will be grounded in the common law or will be separate from and independent of the common law. The approach to be taken will most likely be influenced by the problems encountered by the two jurisdictions which have adopted two divergent approaches in extending the privilege, the United States of America and New Zealand.

4.5 **The position in England**

England has also had to look into the question whether it will be prudent to extend legal professional privilege to clients of non-legal tax practitioners. Up until recently, not much attention was paid to the question until the case of *Prudential v HM Revenue and Customs*³¹⁴ came before the High Court. Prudential had claimed that tax advice it had received from a firm of chartered accountants was protected by legal professional privilege. The High Court held that when seeking tax advice, privilege only covered the clients of attorneys and not the clients of accountants. The matter was taken up on appeal but the Court of Appeal upheld the finding of the High Court in a decision which has been labelled by accounting bodies as being contrary to the public interest.³¹⁵ It was the court's reasoning that it was bound by precedent to find that the privilege was only available to attorneys and not accountants. The decision was welcomed by the Law Society which was of the opinion that

³¹² ALRC Report No. 107 at 11.

³¹³ Maples 2008 *Journal of the Australasian Law Teachers Association* 351.

³¹⁴ [2009] EWHC 2494.

³¹⁵ K Reed "ICAEW: Legal privilege rules "unsustainable""

<http://www.accountancyage.com/articles/print/2271437> (accessed 02/11/2010).

~~the~~ decision was reassuring for clients and solicitors . . . if the privilege is to be extended beyond the advice of the legal professionals it must be done *via* a statute that clearly defines the limits and conditions of any extension both as to the areas of law or the professional advisor to ensure certainty as to the scope of its application.”³¹⁶

While the decision is understandably disheartening from the point of view of non-legal tax advisors in England, it must be noted that all the jurisdictions that have extended the privilege to non-legal tax practitioners have done so through legislative intervention and not judicial activism. While the courts have powers to develop the common law, the far reaching consequences of the extension to non-legal tax advisors demand that this be done by the legislature rather than the courts.

4.6 Conclusion

This chapter sought to explore how other jurisdictions have approached the question of extending legal professional privilege to non-legal tax practitioners. As has been shown the approaches taken by the various jurisdictions differ. The United States of America created a statutory privilege through section 7525 of the Internal Revenue Service Restructuring and Reform Act. The privilege is grounded in the common law, with the result that any developments in the common law will also be reflected in the statutory privilege. As has been shown, however, there are shortcomings to section 7525, particularly the limitations which militate against the effective operation of the privilege. The second approach is that which is embodied in section 20B to 20G of the Taxation (Base Maintenance and Miscellaneous Provisions) Act promulgated in New Zealand. This approach is independent of the common law and the main problem with this is that it is arduous to amend because any developments in the common law will not automatically apply to the statute, rather the Act will have to be amended by parliament whenever there is a need to develop it. Another fault is that there is scope for the misinterpretation of the Act as there is no precedent to rely on. The statute, however, manages to avoid some of the problems associated with section 7525 particularly when it comes to definitions of ~~tax~~ advice” as well as ~~tax~~ advisor”. It was also noted that the proposed Australian approach is more or less along the lines of section 20B to 20G and

³¹⁶ K Reed “ICAEW: Legal privilege rules “unsustainable””.

since the recommendations of the Australian Law Reform Commission are yet to be implemented one can only wait and see which route the legislature will take. The English courts have tended to follow precedent and thus the privilege has been held not to apply to non-legal tax practitioners and, in keeping with the Westminster tradition have deferred to parliament which is sovereign.

The following chapter will seek to conclude this discussion and make recommendations with regard to the approach to be followed by the South African legislature.

5 CHAPTER 5: CONCLUSION

5.1 Goals of the research

The research was aimed at showing firstly that the rationale, nature and the requirements of legal professional privilege are amenable to extension to non-legal tax practitioners. Secondly, the research aimed to show that the current situation where taxpayers who obtain advice from non-legal practitioners are not covered by privilege while those who approach tax attorneys are, does not pass constitutional muster. The third goal was to explore ways in which this can be corrected by drawing from the experiences of those jurisdictions which have extended legal professional privilege to cover non-legal tax practitioners, namely, the United States of America and New Zealand. The following sections will show how each of the abovementioned goals has been achieved.

5.2 Constitutionality of the current position

As has been shown in the discussion the privacy and equality rights of taxpayers who utilise the services of non-legal tax practitioners are infringed by the denial of privilege as opposed to those who obtain advice from attorneys. The right to privacy is infringed because there is a legitimate expectation that confidential information such as tax planning memoranda, alternatives rejected in planning and tax opinions should be protected.

The right to equality is also infringed by the continued denial of legal privilege. Although this does not constitute unfair discrimination on the listed or analogous grounds, it constitutes differentiation and in order for such differentiation to be legitimate there must be a rational connection between the differentiation and a legitimate governmental purpose. The stated purpose of the income tax legislation and provisions compelling disclosure is to enhance tax compliance. However, as has been shown, rather than hindering the attainment of this purpose the extension of legal privilege to all taxpayers regardless of the type of tax advisor they approach could actually enhance compliance. The privilege, it is argued, promotes candour thus enabling the tax advisor to be given all the necessary information about the client's tax affairs and will therefore be in a better position to give appropriate advice and where necessary dissuade clients from engaging in impermissible tax planning, which in

many cases may be attributed to ignorance. Tax advisors will be in a position to advise clients on permissible tax planning opportunities. As such there is no rational connection between the differential treatment and tax compliance, with the result that it can be concluded that the equality clause is infringed.

As has been shown, the infringement of the rights to privacy and equality in this instance is not justifiable under section 36 of the Constitution. Although the differentiation is authorised by the common law, the differentiation is arbitrary hence one cannot say that it is in terms of a law of general application. The infringements are not reasonable and justifiable in an open and democratic society based on the values of human dignity, equality and freedom. The rights in question are fundamental and any reason for their infringement must be exceptional. The importance of tax compliance is beyond doubt but the extent of the limitation in relation to its efficacy is debatable. The purpose is indeed achieved by the extension of privilege to communications with non-legal tax practitioners and thus this is a less restrictive means of achieving the stated purpose. The fraud exception rule, as one of the conditions for the operation of the privilege, will ensure that the privilege is not abused. The extension of the privilege is made easier by the fact that it is amenable to extension.

5.3 Legal professional privilege is amenable to extension

As noted earlier in the discussion the rationale for the existence of legal professional privilege is the promotion of candour between an attorney and his client so that he can advise his client sufficiently with all the facts before him. It has been stated that this is aimed at ensuring that the justice system functions efficiently. This rationale can be applied to tax affairs as well. The promotion of candour between a tax advisor and his client ensures that the client is advised accordingly and although tax compliance cannot be placed on the same pedestal as the justice system on a moral plane, it is nevertheless very important to the functioning of the state. If taxpayers avail all necessary information before their advisors, they are provided with adequate advice and are thus able to plan their tax affairs within the letter and spirit of the law, thus enhancing tax compliance.

Legal professional privilege has evolved from being a gentleman's oath to being a substantive right belonging to the client. The privilege vests in the client and not the

professional hence some have been prompted to state that the term ‘legal professional privilege’ is a misnomer. The client should be able to claim the privilege regardless of the professional title attached to the advisor. The nature of the privilege as a right means that its abrogation should only be in exceptional circumstances and this does not qualify as one. The conditions for the operation of the privilege are also amenable and can be adapted to suit the intentions of the legislature.

5.4 **Whither South Africa?**

In the event that South Africa decides to extend legal professional privilege to non-legal tax practitioners the formal regulation of all tax practitioners regardless of profession is a prerequisite. Formal regulation is a dominant motivation behind the proposed Tax Administration Bill and will serve to ensure that the privilege if promulgated will not be abused.

The extension of the privilege to non-legal tax advisors in other jurisdictions has been by way of legislative intervention. Although the judiciary in South Africa has an obligation in terms of the Constitution to develop the common law one must remember the principle of judicial deference which governs the separation of powers. Due to the complexities which may be encountered in extending the privilege to non-legal tax advisors the legislature is better placed to do so in a way in which safeguards are put in place so as to avoid abuse of the privilege.

The best way to approach this problem would be to adopt a hybrid approach which extracts the best from the American section 7525 as well as from the New Zealand approach. First of all, in order for the privilege to be effective, the statute must be grounded in the common law. This will ensure that the statutory privilege will develop in tandem with the common law as any judicial pronouncements on the common law privilege will automatically be read into the statute and thus there is no need for constant amendment of the statute. This will also mean that the application of the statute will be certain as it will be informed by precedent, making the application of the privilege less problematic as there is less chance of the statute being interpreted in a way the drafters may not have contemplated.

Secondly, the wording of the statute must be clear and unambiguous as to the advisors to whom the privilege is to apply. In order to address the concerns of attorneys with regard to the ethical obligations of the tax advisors it will be prudent to have a statutory body to which advisors will be accountable for unethical conduct and this might involve creating a formal regulatory body for all tax practitioners or increasing the jurisdiction of regulatory bodies such as the South African Institute of Chartered Accountants to cover those tax practitioners who are neither accountants nor attorneys. This body should have the powers to regulate the industry in much the same way as the Law Society regulates the legal profession.

The statute should also be clear with regard to the type of advice that will be protected. In this regard it is essential to combine the definitions of “tax advice” found in the American section 7525 as well as the New Zealand section 20B. A communication should qualify for protection if it is created or prepared for the purpose of providing and obtaining advice about the operation and effect of tax laws, to the extent that such a communication would be considered a privileged communication if it were between a taxpayer and an attorney. This would mean that information used for documents such as tax returns would not be protected as they would constitute factual matters which would not in any case be protected even if they were communicated between a taxpayer and attorney.

The privilege should not be limited in operation to criminal matters. As has been shown above such a limitation would result in confusion as to when a tax matter becomes a criminal matter, thus, leading to the privilege being rendered redundant. Rather it is imperative that the privilege be applicable in both civil and criminal matters because when it comes to the attorney-client privilege there is no such demarcation. This is in keeping with the above recommendation that communications prepared for the purpose of providing or obtaining advice about the operation and effect of tax laws should be protected to the extent that such a communication would be privileged if it were between a taxpayer and an attorney. In terms of limitations with regard to instances of impermissible tax planning it will be prudent to incorporate such limitations within the reportable arrangements provisions of the Income Tax Act, that is, sections 80M to 80T. Because of the uncertainty as to what constitutes impermissible tax avoidance it will be problematic to cover such arrangements within the ambit of the fraud exception rule. Although tax avoidance is not illegal and thus within the

letter of the law it goes against the spirit of the law. Tax evasion as a form of fraud is already covered by the exception.

Unlike the New Zealand approach, there should be no special procedure for claiming the protection of the privilege. As shown above the process in section 20D is arduous and results in unnecessary delays and costs for the taxpayer. One must claim the privilege against any coercive information gathering power of the Commissioner by asserting that such communications are privileged and in instances where the Commissioner contests this the courts should have the power, in much the same way as they do in the common law, to analyse such information and where possible to excise privileged parts, leaving those sections to which privilege does not apply. This approach is in direct contrast to the section 7525 approach where an unprivileged part of the communication renders the whole communication devoid of protection. The proposed approach will ensure that there is no automatic waiver of the privilege. In the same vein it is submitted that the privilege must be capable of waiver in the same way as the common law privilege, that is, expressly, impliedly as well as imputedly.

5.5 Proposal for extending legal professional privilege to non-legal tax practitioners

A proposed provision for the extension of statutory privilege for non-legal tax advisors is set out below. Following the approach of the other jurisdictions to do so, such a privilege should be in the form of a separate Act grounded in the common law. The formulation of the provision must be such that the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and a registered tax practitioner to the extent that such communication would be considered a privileged communication it were between a taxpayer and an attorney.

There must also be a limitation on the applicability of the privilege in cases where it can be shown that the communication in question was made in furtherance of tax evasion. This should also apply where a communication is made in connection with an impermissible avoidance arrangement as defined in section 80A of the Income Tax Act. Such a limitation will definitely be bolstered by section 104 read with section 105A which set out offences and

penalties as well as reporting of unprofessional conduct in instances where an advisor assists a taxpayer to evade assessment or taxation.

There should be no ambiguity with regard to the definitions of the essential terms in the Act. It is proposed that the definition of “tax advisor” be wide enough to cover any individual duly registered with the South African Institute of Chartered Accountants, the South African Institute of Tax Practitioners as well as those practitioners registered in terms of section 67A of the Income Tax Act as a tax advisor. The term “tax advice” should mean any communication prepared or made for the purpose of providing or obtaining an opinion about the operation and effect of tax laws, excluding factual information such as that used in the preparation of tax returns.

5.6 **Conclusion**

It is recommended that the application of legal professional privilege to communications made with non-legal tax practitioners should be reviewed. This will not only be in keeping with other jurisdictions from which we draw some of our tax jurisprudence but will stop the continued infringement of the rights of the taxpayers who choose that avenue for tax advice. This will give effect to South Africa’s commitment to a state founded on the values of human dignity, equality and freedom.

Appendices

Appendix 1

74. General provisions with regard to information, documents or things.—(1) For the purposes of this section and sections 74A, 74B, 74C, 74D and 75—

“**administration of this Act**” means the—

- (a) obtaining of full information in relation to any—
 - (i). amount received by or accrued to any person;
 - (ii). property disposed of for no consideration; and
 - (iii). payment made or liability incurred by any person;

[Para. (a) substituted by s. 6 of Act No. 61 of 2008.]

Wording of Sections

- (b) ascertaining the correctness of any return, financial statement, document, declaration of facts, valuation or other information in the Commissioner’s possession;

[Para. (b) substituted by s. 6 of Act No. 61 of 2008.]

Wording of Sections

- (c) determination of the liability of any person for any tax, duty or levy and any interest or penalty in relation thereto leviable under this Act;
- (d) collecting of any such liability;
- (e) ascertaining whether an offence in terms of this Act has been committed;
- (f) ascertaining whether a person has, other than in relation to a matter contemplated in paragraphs (a), (b), (c), (d) and (e) of this definition, complied with the provisions of this Act;
- (g) enforcement of any of the Commissioner’s remedies under this Act to ensure that any obligation imposed upon any person by or under this Act, is complied with; and

- (h) performance of any other administrative function which is necessary for the carrying out of the provisions of this Act;

“**authorisation letter**” means a written authorisation granted by the Commissioner, or by any person designated by the Commissioner for this purpose or occupying a post designated by the Commissioner for this purpose, to an officer to inspect, audit, examine or obtain, as contemplated in section 74B, any information, documents or things;

[Definition of ~~authorisation letter~~” substituted by s. 51 of Act No. 60 of 2001.]

74A Furnishing of information, documents or things by any person.—The Commissioner or any officer may, for the purposes of the administration of this Act in relation to any taxpayer, require such taxpayer or any other person to furnish such information (whether orally or in writing) documents or things as the Commissioner or such officer may require.

[S. 74A inserted by s. 14 of Act No. 46 of 1996.]

74B. Obtaining of information, documents or things at certain premises.—

- (1) The Commissioner, or an officer named in an authorisation letter, may, for the purposes of the administration of this Act in relation to any taxpayer, require such taxpayer or any other person, with reasonable prior notice, to furnish, produce or make available any such information, documents or things as the Commissioner or such officer may require to inspect, audit, examine or obtain.
- (2) For the purposes of the inspection, audit, examination or obtaining of any such information, documents or things, the Commissioner or an officer contemplated in subsection (1), may call on any person—
 - (a) at any premises; and
 - (b) at any time during such person’s normal business hours.
- (3) For the purposes of subsection (2), the Commissioner or any officer contemplated in subsection (1), shall not enter any dwelling-house or domestic premises (except any part thereof as may be occupied or used for the purposes of trade) without the consent of the occupant.
- (4) Any officer exercising any power under this section, shall on demand produce the authorisation letter issued to him.

[S. 74B inserted by s. 14 of Act No. 46 of 1996.]

74C Inquiry.—

- (1) The Commissioner or an officer contemplated in section 74 (4) may authorise any person to conduct an inquiry for the purposes of the administration of this Act.
- (2) Where the Commissioner, or any officer contemplated in section 74 (4), authorises a person to conduct an inquiry, the Commissioner or such officer shall apply to a judge for an order designating a presiding officer before whom the inquiry is to be held.
- (3) A judge may, on application by the Commissioner or any officer contemplated in section 74 (4), grant an order in terms of which a person contemplated in subsection (7) is designated to act as presiding officer at the inquiry contemplated in this section.

[Sub-s. (3) substituted by s. 28 of Act No. 28 of 1997.]

Wording of Sections

- (4) An application under subsection (2) shall be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based.
- (5) A judge may grant the order referred to in subsection (3) if he is satisfied that there are reasonable grounds to believe that—
 - (a)
 - (i) there has been non-compliance by any person with his obligations in terms of this Act; or
 - (ii) an offence in terms of this Act has been committed by any person;
 - (b) information, documents or things are likely to be revealed which may afford proof of—
 - (i) such non-compliance; or
 - (ii) the committing of such offence; and
 - (c) the inquiry referred to in the application is likely to reveal such information, documents or things.
- (6) An order under subsection (3) shall, *inter alia*—
 - (a) name the presiding officer;

- (b) refer to the alleged non-compliance or offence to be inquired into;
 - (c) identify the person alleged to have failed to comply with the provisions of the Act or to have committed the offence; and
 - (d) be reasonably specific as to the ambit of the inquiry.
- (7) Any presiding officer shall be a person appointed by the Minister of Finance in terms of section 83A (4).
- (8) For the purposes of an inquiry contemplated in this section, a presiding officer designated under subsection (3) shall—
- (a) determine the proceedings as he may think fit;
 - (b) have the same powers—
 - (i) to enforce the attendance of witnesses and to compel them to give evidence or to produce evidential material; and
 - (ii) relating to contempt committed during the proceedings as are vested in a President of the Special Court contemplated in section 83, and for those purposes section 84 and 85 shall apply *mutatis mutandis*; and

[Para. (b) substituted by s. 43 (a) of Act No. 30 of 2000.]

Wording of Sections

- (c) record the proceedings and evidence at an inquiry in such manner as he may think fit.
- (9) Any person may, by written notice issued by the presiding officer, be required to appear before him in order to be questioned under oath or solemn declaration for the purposes of an inquiry contemplated in this section.
- (10) The notice contemplated in subsection (9) shall specify the—
- (a) place where such inquiry will be conducted;
 - (b) date and time of such inquiry; and
 - (c) reasons for such inquiry.

- (11) Any person whose affairs are investigated in the course of an inquiry contemplated in this section, shall be entitled to be present at the inquiry during such time as his affairs are investigated, unless on application by the person contemplated in subsection (1), the presiding officer directs otherwise on the ground that the presence of the person and his representative, or either of them, would be prejudicial to the effective conduct of the inquiry.

[Sub-s. (11) substituted by s. 43 (b) of Act No. 30 of 2000.]

Wording of Sections

- (12) Any person contemplated in subsection (9) has the right to have a legal representative present during the time that he appears before the presiding officer.

[Sub-s. (12) substituted by s. 43 (b) of Act No. 30 of 2000.]

Wording of Sections

- (13) An inquiry contemplated in this section shall be private and confidential and the presiding officer shall at any time on application by the person whose affairs are investigated or any other person giving evidence or the person contemplated in subsection (1), exclude from such inquiry or require to withdraw therefrom, all or any persons whose attendance is not necessary for the inquiry.

[Sub-s. (13) substituted by s. 43 (b) of Act No. 30 of 2000.]

Wording of Sections

- (14) Any person may, at the discretion of the presiding officer, be compensated for his reasonable expenditure related to the attendance of an inquiry, by way of witness fees in accordance with the tariffs prescribed in terms of section 51*bis* of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944).

- (15) The provisions with regard to the preservation of secrecy contained in section 4 shall *mutatis mutandis* apply to any person present at the questioning of any person contemplated in subsection (9), including the person being questioned.

[Sub-s. (15) substituted by s. 43 (c) of Act No. 30 of 2000.]

Wording of Sections

- (16) Subject to subsection (17), the evidence given under oath or solemn declaration at an inquiry may be used by the Commissioner in any subsequent proceedings to which the person whose affairs are investigated is a party or to which a person who had dealings with such person is a party.

[Sub-s. (16) added by s. 43 (d) of Act No. 30 of 2000.]

- (17) (a) No person may refuse to answer any question during an inquiry on the grounds that it may incriminate him.
- (b) No incriminating evidence so obtained shall be admissible in any criminal proceedings against the person giving such evidence, other than in proceedings where that person stands trial on a charge relating to the administering or taking of an oath or the administering or making of an affirmation or the giving of false evidence or the making of a false statement in connection with such questions and answers, or a failure to answer questions lawfully put to him, fully and satisfactorily.

[Sub-s. (17) added by s. 43 (d) of Act No. 30 of 2000.]

- (18) An inquiry in terms of this section shall proceed notwithstanding the fact that any civil or criminal proceedings are pending or contemplated against or involving any person contemplated in subsection (6) (c) or any witness or potential witness or any person whose affairs may be investigated in the course of such inquiry.

[S. 74C inserted by s. 14 of Act No. 46 of 1996. Sub-s. (18) added by s. 43 (d) of Act No. 30 of 2000.]

74D. Search and seizure.

- (1) For the purposes of the administration of this Act, a judge may, on application by the Commissioner or any officer contemplated in section 74 (4), issue a warrant, authorising the officer named therein to, without prior notice and at any time—
- (a) (i) enter and search any premises; and
- (ii) search any person present on the premises, provided that such search is conducted by an officer of the same gender as the person being searched,
- for any information, documents or things, that may afford evidence as to the non-compliance by any taxpayer with his obligations in terms of this Act;
- (b) seize any such information, documents or things; and
- (c) in carrying out any such search, open or cause to be opened or removed and opened, anything in which such officer suspects any information, documents or things to be contained.

[Sub-s. (1) amended by s. 29 of Act No. 28 of 1997.]

Wording of Sections

- (2) An application under subsection (1) shall be supported by information supplied under oath or solemn declaration, establishing the facts on which the application is based.
- (3) A judge may issue the warrant referred to in subsection (1) if he is satisfied that there are reasonable grounds to believe that—
 - (a) (i) there has been non-compliance by any person with his obligations in terms of this Act; or
 - (ii) an offence in terms of this Act has been committed by any person;
 - (b) information, documents or things are likely to be found which may afford evidence of—
 - (i) such non-compliance; or
 - (ii) the committing of such offence; and
 - (c) the premises specified in the application are likely to contain such information, documents or things.
- (4) A warrant issued under subsection (1) shall—
 - (a) refer to the alleged non-compliance or offence in relation to which it is issued;
 - (b) identify the premises to be searched;
 - (c) identify the person alleged to have failed to comply with the provisions of the Act or to have committed the offence; and
 - (d) be reasonably specific as to any information, documents or things to be searched for and seized.
- (5) Where the officer named in the warrant has reasonable grounds to believe that—
 - (a) such information, documents or things are—
 - (i) at any premises not identified in such warrant; and
 - (ii) about to be removed or destroyed; and

- (b) a warrant cannot be obtained timeously to prevent such removal or destruction,

such officer may search such premises and further exercise all the powers granted by this section, as if such premises had been identified in a warrant.

- (6) Any officer who executes a warrant may seize, in addition to the information, documents or things referred to in the warrant, any other information, documents or things that such officer believes on reasonable grounds afford evidence of the non-compliance with the relevant obligations or the committing of an offence in terms of this Act.
- (7) The officer exercising any power under this section shall on demand produce the relevant warrant (if any).
- (8) The Commissioner, who shall take reasonable care to ensure that the information, documents or things are preserved, may retain them until the conclusion of any investigation into the non-compliance or offence in relation to which the information, documents or things were seized or until they are required to be used for the purposes of any legal proceedings under this Act, whichever event occurs last.
- (9) (a) Any person may apply to the relevant division of the High Court for the return of any information, documents or things seized under this section.

[Para. (a) amended by s. 38 of Act No. 53 of 1999.]

Wording of Sections

- (b) The court hearing such application may, on good cause shown, make such order as it deems fit.
- (10) The person to whose affairs any information, documents or things seized under this section relate, may examine and make extracts therefrom and obtain one copy thereof at the expense of the State during normal business hours under such supervision as the Commissioner may determine.

[S. 74D inserted by s. 14 of Act No. 46 of 1996.]

Appendix 2

80M. Reportable arrangements.—

- (1) An arrangement is a reportable arrangement if it is listed in subsection (2) or if any tax benefit is or will be derived or is assumed to be derived by any participant by virtue of that arrangement and the arrangement—
 - (a) contains provisions in terms of which the calculation of ~~“interest”~~ as defined in section 24J, finance costs, fees or any other charges is wholly or partly dependent on the assumptions relating to the tax treatment of that arrangement (otherwise than by reason of any change in the provisions of this Act or any other law administered by the Commissioner);
 - (b) has any of the characteristics or characteristics which are substantially similar to those contemplated in section 80C (2) (b);
 - (c) is or will be disclosed by any participant as giving rise to a financial liability for purposes of Generally Accepted Accounting Practice but not for purposes of this Act;
 - (d) does not result in a reasonable expectation of a pre-tax profit for any participant; or
 - (e) results in a reasonable expectation of a pre-tax profit for any participant that is less than the value of that tax benefit to that participant if both are discounted to a present value at the end of the first year of assessment when that tax benefit is or will be derived or is assumed to be derived on a consistent basis and using a reasonable discount rate for that participant.
- (2) The following arrangements are reportable arrangements:
 - (a) Any arrangement which would have qualified as a ~~“hybrid equity instrument”~~ as defined in section 8E, if the prescribed period had been 10 years;
 - (b) any arrangement which would have qualified as a ~~“hybrid debt instrument”~~ as defined in section 8F, if the prescribed period in that section had been 10 years, but does not include any instrument listed on an exchange regulated in terms of the Securities Services Act, 2004 (Act No. 36 of 2004); or
 - (c) any arrangement identified by the Minister by notice in the *Gazette* as an arrangement which is likely to result in any undue tax benefit.

- (3) This section does not apply to any excluded arrangement contemplated in section 80N.

[S. 80M inserted by s. 6 (1) of Act No. 21 of 2006 with effect from 1 April, 2008: Proclamation No. 13 in *Government Gazette* 30941 of 1 April, 2008.]

80N. Excluded arrangements.—

- (1) An arrangement is an excluded arrangement if it is—
- (a) a loan, advance or debt in terms of which—
 - (i) the borrower receives or will receive an amount of cash and agrees to repay at least the same amount of cash to the lender at a determinable future date; or
 - (ii) the borrower receives or will receive a fungible asset and agrees to return an asset of the same kind and of the same or equivalent quantity and quality to the lender at a determinable future date;
 - (b) a lease;
 - (c) a transaction undertaken through an exchange regulated in terms of the Securities Services Act, 2004 (Act No. 36 of 2004); or
 - (d) a transaction in participatory interests in a scheme regulated in terms of the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002).
- (2) Subsection (1) applies only to an arrangement that—
- (a) is undertaken on a stand-alone basis and is not directly or indirectly connected to, or directly or indirectly dependent upon, any other arrangement (whether entered into between the same or different parties); or
 - (b) would have qualified as having been undertaken on a stand-alone basis as required by paragraph (a), were it not for a connected arrangement that is entered into for the sole purpose of providing security and where no tax benefit is obtained or enhanced by virtue of that security arrangement.
- (3) Subsection (1) does not apply to any arrangement that is entered into—
- (a) with the main purpose of obtaining or enhancing a tax benefit; or

- (b) in a specific manner or form that enhances or will enhance a tax benefit.
- (4) The Minister may determine an arrangement to be an excluded arrangement by notice in the *Gazette*, if he or she is satisfied that the arrangement is not likely to lead to an undue tax benefit.

[S. 80N inserted by s. 6 (1) of Act No. 21 of 2006 with effect from 1 April, 2008: Proclamation No. 13 in *Government Gazette* 30941 of 1 April, 2008.]

80O. Disclosure obligation.—

- (1) The promoter must disclose such information in respect of a reportable arrangement as is contemplated in section 80P.
- (2) If there is no promoter in relation to an arrangement or if the promoter is not a resident, all other participants must disclose the information contemplated in section 80P in respect of the reportable arrangement.
- (3) A participant need not disclose the information in respect of a reportable arrangement if that participant obtains a written statement from—
- (a) the promoter that the promoter has disclosed that reportable arrangement as required by this Part; or
- (b) any other participant, if subsection (2) applies, that the other participant has disclosed that reportable arrangement as required by this Part.
- (4) The reportable arrangement must be disclosed within 60 days after any amount is first received by or accrued to any participant or is first paid or actually incurred by any participant in terms of the arrangement.

[Sub-s. (4) substituted by s. 6 (1) of Act No. 9 of 2007 with effect from the date that s. 80O of this Act comes into operation: 1 April, 2008.]

Wording of Sections

- (5) The Commissioner may grant extension for disclosure for a further 60 days, if reasonable grounds exist for that extension.

[S. 80O inserted by s. 6 (1) of Act No. 21 of 2006 with effect from 1 April, 2008: Proclamation No. 13 in *Government Gazette* 30941 of 1 April, 2008.]

80P. Information to be submitted.—The promoter or participant, as the case may be, must submit, in relation to the reportable arrangement, in the form and manner (including electronically) and at such place as may be prescribed by the Commissioner—

- (a) a detailed description of all its steps and key features;
- (b) a detailed description of the assumed tax benefits for all participants, including, but not limited to, tax deductions and deferred income;

[Para. (b) substituted by s. 7 (1) of Act No. 9 of 2007 with effect from the date that s. 80P of this Act comes into operation: 1 April, 2008.]

Wording of Sections

- (c) the names, registration numbers and registered addresses of all participants;
- (d) a list of all its agreements; and
- (e) any financial model that embodies its projected tax treatment.

[S. 80P inserted by s. 6 (1) of Act No. 21 of 2006 with effect from 1 April, 2008: Proclamation No. 13 in *Government Gazette* 30941 of 1 April, 2008.]

80Q Reportable arrangement reference number.—

- (1) The Commissioner must, after receipt of the information contemplated in section 80P, issue a reportable arrangement reference number to each participant.
- (2) The issuing of a reportable arrangement reference number is for administrative purposes only.

[S. 80Q inserted by s. 6 (1) of Act No. 21 of 2006 with effect from 1 April, 2008: Proclamation No. 13 in *Government Gazette* 30941 of 1 April, 2008.]

80R. Request for information.—

- (1) The Commissioner may, in relation to any arrangement, require a participant or any other person to furnish such information (whether orally or in writing), documents or things as the Commissioner may require.
- (2) The information, documents or things must be submitted to the Commissioner in such form and manner (including electronically) and at such place as may be prescribed by the Commissioner.

80S. Penalties.—

- (1) Any participant who fails to disclose the information in respect of a reportable arrangement as required by section 80O or section 80R shall be liable to a penalty of R1 million.

- (2) The Commissioner may reduce the penalty contemplated in subsection (1), if—
- (a) there are extenuating circumstances and the participant remedies the non-disclosure within a reasonable time; or
 - (b) if the penalty is disproportionate to the assumed tax benefit.

[S. 80S inserted by s. 6 (1) of Act No. 21 of 2006 with effect from 1 April, 2008: Proclamation No. 13 in *Government Gazette* 30941 of 1 April, 2008.]

80T. Definitions.—For the purposes of this Part—

“arrangement” means any transaction, operation or scheme;

“financial benefit” means any reduction in the cost of finance, including interest, finance charges, costs, fees, and discounts in the redemption amount;

“participant” in relation to a reportable arrangement means—

- (a) any promoter; or
- (b) any company or trust which directly or indirectly derives or assumes that it derives a tax benefit or financial benefit by virtue of a reportable arrangement;

“pre-tax profit” in relation to an arrangement, means the profit of a participant resulting from that arrangement before deducting any normal tax, which profit must be determined in accordance with Generally Accepted Accounting Practice after taking into account all costs and expenditure incurred by that participant in connection with the arrangement and after deducting any foreign taxes paid or payable by that participant;

“promoter” in relation to a reportable arrangement means any person who is principally responsible for organising, designing, selling, financing or managing that reportable arrangement;

“reportable arrangement” means any arrangement as contemplated in section 80M;

“tax” includes any tax, levy, duty or other liability imposed by this Act or any other Act administered by the Commissioner;

“tax benefit” includes any avoidance, postponement or reduction of any liability for tax.

[S. 80T inserted by s. 6 (1) of Act No. 21 of 2006 with effect from 1 April, 2008: Proclamation No. 13 in *Government Gazette* 30941 of 1 April, 2008.]

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