

TAX

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THE LATEST ON ACCOUNTANTS' RIGHT OF NON-DISCLOSURE



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As you may be aware, legislation was introduced in 2005 granting accountants a right to non-disclosure of tax advice documents. The extent of that right has been the subject of at least two legal disputes to date.

In this update, we summarise the Courts' approach to the accountants' right to non-disclosure under existing law and outline proposed legislative amendments to the non-disclosure right.

Summary of accountants' right of non-disclosure

The accountants' right of non-disclosure was granted by statute to provide accountants' clients with some of the protection afforded to correspondence between a lawyer and their client.

In summary, the accountants' right allows for non-disclosure of a book or document, that is confidential and created for the main purpose of seeking or giving tax advice from a tax adviser. The tax adviser must be a member of an adviser group or organisation approved by the IRD. Currently, the New Zealand Institute of Chartered Accountants is the only approved adviser group.

The right does not extend to information that is "tax contextual information", such as

factual information, accounting and tax work papers, non-tax advice such as valuation and investment advice, and matters relating to debt recovery.

The Courts' approach so far

Non-disclosure under IRD's request for information

In the Blakeley case, in the course of a tax investigation, the IRD was given opinions issued by an accountant tax adviser. The IRD asked the accountant for information identifying other clients who may have been given similar advice. The accountant refused to comply claiming protection under the accountants' right of non-disclosure and relied on case law principles under legal privilege.

The Court noted that the accountants' right of non-disclosure applies only in response to the exercise by the Crown of powers under the Act and, unlike legal privilege, it provides no basis for resisting discovery or production of documents in Court proceedings. The Court said:

"the protection afforded by s20B [the accountants' right of non-disclosure] is much more confined than legal professional privilege. It is not...a new substantive right of equivalent utility to legal professional privilege."

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The Court held that as the accountants' right of non-disclosure is much narrower than legal privilege and case law principles for legal privilege cannot be applied.

Ultimately, the Court found that the information requested by the Commissioner did not fall within the ambit of accountants' right of non-disclosure as it was not a book or document.

Non-disclosure during discovery

In the ANZ National Bank Ltd case, the IRD sought to discover tax advice provided to the taxpayer by its accountant. The taxpayer refused to disclose and claimed the accountants' right of non-disclosure. The Court found that the documents in question may be relevant to assessing objectively the issue (of tax avoidance) in one or more respects, including the scope of the arrangement, the steps within the arrangement, the accounting treatment, cash flow information, the structuring of transactions and the management of the taxpayer's tax shelter. The Court held that as the documents were relevant, they were discoverable.

Upcoming changes

A Tax Bill introduced on 2 July 2008 proposes to amend the accountants' right of non-disclosure so that when enacted the right will extend to documents that the Commissioner has sought to be disclosed during discovery and litigation processes.

However, while the amendments will achieve some alignment between the accountants' right of non-disclosure and legal privilege, the accountants' right of non-disclosure will not extend to tax contextual information (facts and work papers for example). This will continue to be a major advantage of legal privilege which generally extends to the entire contents of a document to which it attaches.