

Global protections for tax advice

Vox Tax

This Dentons global tax report has been prepared with contributions from Arendt & Medernach, Lakshmikumaran & Sridharan, Lenz & Staehelin, Loyens & Loeff and Sanchez Devanny.

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Notes from the Editors

Dear Reader,

2014 has been a watershed year in the efforts of governments to curb what they perceive to be aggressive international tax planning. The OECD's Base Erosion and Profits Shifting ("BEPS") proposals, "corporate inversion" transactions in the US, and more recently the tax agreements in Luxembourg, have received widespread attention. When coupled with intergovernmental efforts to increase tax transparency and information sharing, many multinational companies are asking a basic question, "Is the tax advice that we receive protected from disclosure to governmental authorities?" Thus, it is increasingly important to understand the nature and scope of privileges and protections against disclosure of tax advice in various jurisdictions.

This edition of Vox Tax is dedicated to global protections for tax advice and provides a high-level overview of legal privileges and protections that may preclude the production of sensitive tax advice and analysis in administrative tax examinations and judicial proceedings.

Many countries recognize the need for tax advice to be protected from disclosure to the taxing authorities. Fundamentally, in most countries, taxpayers may in certain circumstances lawfully refuse to comply with demands for the production of documents or testimony. The most commonly asserted privileges are (1) the attorney-client privilege

or advocate secrecy privilege and (2) the work product doctrine or litigation privilege. However, the extent of such protections varies greatly by country. And most jurisdictions have not defined "tax advice."

To better understand the nature and scope of these privileges and protections in each country, we have answered the following 11 questions for 17 jurisdictions:

1. What discovery protections, if any, apply to the giving of tax advice in your respective country?
2. How, if at all, is "tax advice" defined in your respective country?
3. Are there any categories of information that are explicitly not subject to protection?
4. Is tax advice prepared in anticipation of a controversy with the taxing authorities protected from disclosure under a work product doctrine or litigation privilege?
5. Are tax accrual work papers afforded the same privileges?
6. Does the taxing authority in your respective country generally request tax advice and opinions from taxpayers during an audit or litigation?

7. Do the same privileges and protections apply in criminal proceedings?

8. Under what circumstances does the taxpayer waive a privilege or protection?

9. What types of penalty protections are available and how are those protections properly asserted or maintained?

10. Under what circumstances may a taxpayer rely on a qualified tax advisor or professional tax opinion?

11. What practices and trends are being observed with respect to the sharing or gathering of information by the taxing authorities of your country?

For your convenience, a comparative chart is found at page 4 herein. This chart demonstrates the various distinctions across borders and provides a general response to each question; however, the full narrative response should be referenced for more complete answers.

Please do not hesitate to contact our contributors for any further clarification needed.

This issue of Vox Tax does not constitute tax advice; readers should note that the laws of

each jurisdiction are regularly refined and/or revised, so the statements made in this report are not definitive. However, this guide does provide a summary overview of the current state of the law and will hopefully serve as a useful tool for taxpayers and multinationals to ensure they understand the unique provisions and distinctions in the various jurisdictions.

We want to express our gratitude to all contributors from Dentons' offices worldwide, to Arendt & Medernach, Lakshmikumaran & Sridharan, Lenz & Staehelin, Loyens & Loeff, and Sanchez Devanny, who prepared the analysis.

We hope you enjoy this edition of Vox Tax and look forward to doing business together soon!

Yours sincerely,

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Comparative Table

*For additional details and clarification, please view the full company report of each jurisdiction.

	Canada	China	France	Germany	India	Kazakhstan	Luxembourg	Mexico
Do discovery protections apply to the giving of tax advice by the following professionals?								
Attorneys	Yes	No	Yes	Yes	Yes	No	Yes	Yes
Certified accountants	No	No	Yes	Yes	No	No	No	Yes
Tax return preparers	No	No	No	Yes	No	No	No	Yes
In-house counsel	Yes	No	No	Unclear	No	No	No	Yes
Is "tax advice" defined in your respective country?								
	No	No	No	No	No	No	No	No
If not, have there been any legislative attempts to define it?	No	No	Yes	No	No	No	No	No
Any categories of information that are explicitly not subject to protection?								
	n/a	No	Yes	No	No	No	No	Yes
Does a litigation privilege protect tax advice prepared in anticipation of a controversy?								
	Yes	No	No	No	No	No	No	No
Do courts generally recognize anticipation of the controversy as early as the planning stage?	No	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Are tax accrual work papers afforded the same privileges?								
	No	n/a	Yes	Yes	Yes	n/a	Yes	Yes
Does the taxing authority generally request tax advice and opinions?								
	Yes	n/a	No	No	No	No	No	No
Can privileges be asserted in the course of all discovery requests?	Yes	n/a	Yes	n/a	Yes	n/a	Yes	Yes
Do the same privileges and protections apply in criminal proceedings?								
	Yes	n/a	Yes	Yes	Yes	n/a	Yes	No
Is tax advice afforded more protection in a criminal case?	No	n/a	No	Yes	No	n/a	Yes	Yes
Under what circumstances does a taxpayer waive a privilege or protection?								
Through voluntary disclosure to the authorities?	Yes	n/a	Yes	Yes	Yes	n/a	Yes	Yes
Disclosure to return preparer?	No	n/a	No	Yes	No	n/a	Yes	*
Disclosure to parties to a common commercial transaction?	No	n/a	Yes	Yes	No	n/a	Yes	No
Is tax advice shared only between attorneys afforded protection?	No	n/a	Yes	No	Yes	n/a	Yes	Yes
Can a taxpayer rely on tax advice for penalty protection?								
	Yes	No	Yes	Yes	Yes	No	No	No

The Netherlands	Poland	Romania	Russia	Slovakia	Spain	Switzerland	Ukraine	USA
Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Yes	No	Yes	No	No	Yes	No	No	Yes
Yes	No	Yes	No	No	*	No	No	No
No	Yes	Yes	No	No	Varies	No	No	Yes
No	Yes	Yes	No	No	No	No	No	Yes
No	n/a	n/a	Yes	n/a	Yes	No	No	Yes
Yes	Yes	No	Yes	No	Yes	No	Yes	Yes
Yes	Yes	*	Yes	No	No	Yes	No	Yes
Yes	Yes	*	*	No	n/a	Yes	n/a	Yes
Yes	No	Yes	No	*	No	No	No	Unsettled
No	No	No	No	No	No	No	No	No
No	Yes	Yes	Yes	n/a	Yes	Yes	n/a	Yes
No	Yes	Yes	Yes	No	No	Yes	Yes	Yes
No	No	Yes	No	No	No	No	n/a	No
Yes	Yes	*	Yes	n/a	No	Yes	n/a	Yes
No	Yes	*	No	n/a	No	Yes	n/a	Yes
Yes	Yes	No	No	n/a	No	Yes	n/a	No
Yes	Yes	Yes	Yes	n/a	Yes	Yes	n/a	Yes
Yes	Yes	No	No	Yes	No	*	No	Yes

Canada



Canada

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Question 1. What discovery protections, if any, apply to the giving of tax advice in your respective country?

In Canada, solicitor-client privilege generally protects the provision of legal advice from disclosure to the taxing authorities. Solicitor-client privilege encompasses all communications made with a view to obtaining legal advice from a lawyer, where the information is provided in confidence.¹ The purpose of solicitor-client privilege is to encourage full, free and frank communication between lawyers and their clients, and is seen as a necessary condition to the effective administration of justice.²

For privilege to arise, the communication must be made: 1) between a solicitor and client; 2) in confidence; and 3) in the course of seeking legal advice. As a result, privilege applies only to confidential communications between a client and solicitor made for the purposes of obtaining the solicitor's advice on legal matters. Where a solicitor is acting in a non-legal capacity, for example as a business counselor, privilege would not apply.

Privilege does not extend to tax accountants in Canada.³ However, as a general rule, privilege may extend to communications between lawyers and third parties, where the third party can be characterized as an "agent" of the solicitor or client.⁴ Therefore where an accountant is used to facilitate the giving of legal advice, or is somehow otherwise essential to the relationship, privilege would extend to his or her communication with the solicitor or the client.⁵ However, where the accountant is used merely to gather information which is then used by a lawyer to provide legal advice, no privilege will apply to the

communications between the lawyer and information collector.⁶

Communications with in-house counsel are privileged where legal advice is provided to a corporate client in confidence. Notably, privilege applies only where in-house lawyers are acting in their capacity as legal advisors and the purpose of the communication is to provide legal advice. As in-house counsel often serve both legal and business functions in a company, attempting to discern their different roles may be challenging. There is no clear test for determining whether privilege will apply in a corporate context, but the determination will depend "on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered."⁷ As a best practice, where an in-house lawyer provides both legal and non-legal advice, steps should be taken to segregate legal and non-legal work, to the extent possible.

A duty of confidentiality also exists in Canada, and is distinct from solicitor-client privilege. The duty of confidentiality applies to all information obtained by the lawyer about the client's affairs during the retainer, however obtained. This is in contrast to solicitor-client privilege, which would only apply to communications between a client and his or her lawyer, as described above. Therefore even where a lawyer obtains information about his or her client through third parties, or even independently, the duty of confidentiality would apply. Lawyers breaching their duty of confidentiality may be subject to professional discipline and potential civil liability.

Litigation privilege is also a distinct doctrine from solicitor-client privilege. Litigation privilege arises in the context of litigation and is concerned with the protection of privacy within the

adversarial system. This privilege applies to communications of a non-confidential nature between client and solicitor or client and third parties, and even includes material of a non-communicative nature. The dominant purpose of the communication must relate to litigation in order for the privilege to apply. Additionally, the privilege ceases to exist on the termination of a dispute.

Question 2. How, if at all, is "tax advice" defined in your respective country?

"Tax advice" is not specifically defined for the purpose of determining the applicability of solicitor-client privilege. Rather, tax advice will attract solicitor-client privilege to the extent the communication between solicitor and client meets the requirements noted above.

Where an individual is required to disclose privileged communications under sections 231.1 to 231.5 of the Income Tax Act (Act),⁸ section 232 of the Act preserves the protection afforded by solicitor-client privilege. For the purpose of these sections "solicitor-client privilege" is statutorily defined under section 232(1) of the Act.

Notably, this definition excludes from the privilege accounting records, including supporting vouchers and checks. Solicitor-client privilege is defined in the Act as follows: "the right, if any, that a person has in a superior court in the province where the matter arises to refuse to disclose an oral or documentary communication on the ground that the communication is one passing between the person and the person's lawyer in professional confidence, except for the purposes of this section an accounting record of a lawyer,



including any supporting voucher or check, shall be deemed not to be such a communication."

Question 3. Are there any categories of information that are explicitly not subject to protection?

There are very few exceptions to solicitor-client privilege in Canada and such exceptions are unlikely to arise in the context of tax litigation. Guidance sought in furtherance of the commission of a crime or fraud is not privileged, regardless of whether the lawyer is a willing participant. Similarly, a solicitor cannot invoke privilege in order to guard or suppress evidence of crime, although discussions about such evidence are privileged. There is also a public safety exception, which exists where there is a clear, serious and imminent threat of harm. The third exception is known as the "full answer and defense" limitation, which circumscribes privilege where the privileged communication is likely to raise a reasonable doubt as to the guilt of the accused and where there is a genuine risk of wrongful conviction if the document is not produced.

Question 4. Is tax advice prepared in anticipation of a controversy with the taxing authorities protected from

disclosure under a work product doctrine or litigation privilege?

Solicitor-client privilege includes documents prepared in contemplation of litigation. Such privilege encompasses not only communications between solicitor and client, but also communications with third parties when undertaken for the solicitor's information. Third-party communications are protected when undertaken specifically with a view to contemplated or pending litigation, but not when made for general professional advice. The policy rationale for litigation privilege is to allow a client to communicate privately and openly with counsel in determining what evidence to put before the court and how it ought to be presented, without an obligation to disclose their advocacy strategy. As the Supreme Court of Canada noted in *Blank v. Canada*, 2006 SCC 39:

Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

Litigation privilege is conceptually broad. It arises where 1) litigation is ongoing or reasonably contemplated when the

communication is made and 2) the dominant purpose of the communication is the furtherance of that litigation. The court was clear in *Blank* that such privilege arises even in the absence of a solicitor-client relationship. The ultimate test is whether "a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without [litigation]" (*Hamalainen v Sippola*, [1992] 2 WWR 132 (BCCA)). As the court wrote in *Crown Zellerbach Canada Ltd v Canada (Deputy Attorney General)*, [1981] BCJ No 118 (BCSC):

In the context of dealings between a taxpayer and Revenue Canada, it is clear that litigation may be definitely in prospect prior to any formal legal step such as a reassessment being taken. It may be when the Minister, by word or deeds (such as the implementation of a field audit), gives a definite indication of not accepting the position set out in the return. Or it may be at an earlier stage, at which there may have been no communication between the taxpayer and the department, but where the former recognizes the existence of a possible issue. The question is one as to what was in the mind of the person claiming privilege.

In the context of tax litigation, there is case law that suggests that the filing of a notice of objection or certain types

of contact with the tax authorities audit might trigger litigation privilege. However, the mere preparation of tax planning documents (where not prepared by a solicitor) may not attract the same protection.

Question 5. Are tax accrual work papers afforded the same privileges?

While the issue of access to tax accrual working papers has not yet appeared before Canadian courts, the production of such records by solicitors is subject to the same general framework of litigation and solicitor-client privilege which shields other communications with lawyers. Accrual work papers generated by lawyers in the course of advising on Canadian income tax law will be shielded by solicitor-client privilege where their purpose is the giving of legal advice. Litigation privilege will further protect communication with tax lawyers in contemplation of a tax dispute.

However, the law of privilege in Canada has not yet been extended to accountants, who are frequently the preparers of tax accrual working papers. Class privilege (which refers to certain types of relationships) and case-by-case privilege (which refers to certain specific communications) have been recognized by Canadian courts. The jurisprudence suggests that the tax accountant-client relationship is not yet one which has been found privileged on either a class or case-by-case basis. However, litigation privilege may apply to tax accrual working papers where prepared by accountants in contemplation of litigation. Additionally, communications between an accountant and a lawyer may be privileged where the accountant has been retained by a client to act as his or her agent in obtaining legal advice.

In 2010, the Canada Revenue Agency (CRA) published a policy statement indicating its administrative position on the requesting of working papers. In its statement, the CRA reaffirmed

its authority to examine the records of any person where they may relate to the liability of the taxpayer under investigation. However, because the exercise of such discretion affects the interests and privacy of third parties, the CRA indicated that it would require such documents only occasionally and would attempt to collect information from the investigated taxpayer wherever possible.

Question 6. Does the taxing authority in your respective country generally request tax advice and opinions from taxpayers during an audit or litigation?

- a. Can privileges be asserted in the course of all discovery requests by the taxing authorities, including audit queries, or only in court proceedings?

Audit or investigation

Canada's federal taxing authority, the CRA, will request tax advice and opinions from taxpayers, or any other document for that matter, in the course of what would be characterized as more thorough audits, aggressive tax planning audits, and, most notably, when avoidance transactions are suspected. However, the CRA does not typically request tax advice and opinions from taxpayers during routine audits, and during such routine audits, the CRA will often limit its review to the books and records of a particular taxpayer.

Under the provisions of the Income Tax Act (Canada) and other federal taxation statutes, CRA auditors have the authority to enter into any premises and ask any person on the premises all proper questions relating to the administration of the Income Tax Act, including questions about tax advice and opinions. The CRA may also, by notice served personally or by registered or certified mail, require that a taxpayer provide any information or any document for any purpose related to the administration or enforcement of the Income Tax Act.

In the course of an investigation concerning an offense committed under the Income Tax Act, a judge may also issue a search warrant to allow the CRA to search and seize any document.

The solicitor-client privilege may be claimed at any time by the taxpayer during the course of an audit or an investigation. The Income Tax Act provides extensive rules, which ensure that access to privileged documents, like tax advice and opinions, by the CRA is duly monitored by judicial authorities. Any document in respect of which solicitor-client privilege has been claimed by the taxpayer must be sealed off and delivered to a custodian, such as a court official. Application to a judge, who will decide if the document is solicitor-client privilege exists, is then necessary before the custodian can be ordered to deliver or make available the document to the CRA.

Litigation

In litigation matters, taxpayers may be requested to bring and produce any documents, including tax advice and opinions, during discovery or during their examination as subpoenaed witnesses. The solicitor-client privilege may be claimed at any time. Canadian courts recognize a quasi-constitutional status to the solicitor-client privilege, as discussed more fully in the preceding answers.

Question 7. Do the same privileges and protections apply in criminal proceedings?

Generally, the same privileges and protections identified earlier apply equally in criminal and civil cases. However, under the Income Tax Act and other Canadian tax legislation, taxpayer protections differ depending on whether work products are compelled for regulatory or criminal purposes.

Pursuant to section 7 of the Canadian Charter of Rights and Freedoms, (*Charter*), a person facing criminal sanctions is generally afforded a higher level of protection, as he or she may only

be imprisoned in accordance with the principles of fundamental justice.

The Income Tax Act is principally a regulatory statute based on self-assessment and self-reporting. Failure to comply with this regulatory framework can lead to criminal charges being laid, under section 239 of the Act. Due to the Act's quasi-criminal nature, the Supreme Court of Canada held in *R. v. Jarvis*, 2002 SCC 73, that courts must use the "predominant purpose test" to ascertain whether an inquiry involves the determination of penal liability. If an inquiry is for the determination of penal liability, the taxpayer is afforded the higher criminal law protections.

Under the Income Tax Act, the CRA may use subsections 231.1(1) and 231.2(1) of the Act to compel an individual to provide documents for any purpose related to its administration or enforcement, provided that it is not related to the Act's criminal offenses. Where the predominant inquiry is the determination of penal liability, the CRA must rely on the criminal investigatory procedures found in the Criminal Code (e.g., search warrants).

In addition, pursuant to section 8 of the Charter, "everyone has the right to be secure against unreasonable search or seizure." This protection may offer an additional basis to exclude unlawfully obtained privileged documents in criminal proceedings.

Where a taxpayer's Charter rights are breached with respect to privileged documents or advice, the taxpayer can apply to a court to exclude the questionable evidence under subsection 24(2) of the Charter.

Question 8. Under what circumstances does a taxpayer waive a privilege or protection?

A taxpayer may waive privilege through any voluntary or (in some cases) involuntary disclosure to a third party, subject to limited exceptions (some of which are briefly described below).

In addition, the law has recognized that privilege may be waived impliedly where it would be unfair to allow limited disclosure of privileged information. Nevertheless, recent tax jurisprudence has significantly limited the concept of "implied waiver" when a taxpayer needs to rely (in part) on privileged information to defend against a tax assessment (see *Richard A. Kanan Corporation v. The Queen*, 2011 TCC 211).

Generally, where an otherwise privileged communication is voluntarily given to a third party without any restriction on its use or further dissemination, privilege in that communication will be waived. This general rule, however, is subject to the principle of "limited waiver of privilege."

a. Does a taxpayer waive privilege by disclosing legal advice to their return preparer in order to justify a filing position?

Where privileged communications are given to an auditor to prepare financial statements of a company, that will not constitute an unlimited waiver of privilege in those documents (see *Philip Services Corp. (Receiver of) v. Ontario (Securities Commission)*, (2005), 77 O.R. (3d) 209 (Ont. Div. Ct.)).

A taxpayer wishing to rely on "limited waiver of privilege" should set forth in writing its intent regarding limited waiver of solicitor-client privileged information in the formal arrangement between the taxpayer and its auditors / return preparer (see *Interprovincial Pipe Line Inc. v. Minister of National Revenue*, 95 D.T.C. 5642 (F.C.T.D.)). In addition, even in the absence of a formal written agreement, communications between a taxpayer and a third party (such as a return preparer), in which the taxpayer and third party discuss privileged legal advice, will not necessarily result in a waiver of privilege if the third party's function is essential or integral to the operation of the solicitor-client relationship.

b. Does a taxpayer waive privilege by disclosing legal advice to parties to a common commercial transaction?

A taxpayer does not automatically waive privilege by disclosing legal advice to parties to a common commercial transaction or to common litigation. The doctrine of "common interest privilege" is well-established in Canadian law, and it applies where two or more parties, each having an interest in some "common" matter, jointly consult a solicitor. Although the communications among them to the solicitor are known to that particular group, such communications remain privileged against the outside world. Some parties may enter into a Common Interest Privilege Agreement (CIPA) to formalize the common interest privilege and any remedies for parties who waive such privilege. Nevertheless, CIPAs do not, in and of themselves, create common interest privilege where it does not already exist in the first place.

c. Is tax advice shared only between attorneys afforded greater or lesser protection than advice shared with the client?

Finally, privileged tax advice shared between attorneys is not necessarily afforded greater protection than privileged tax advice communicated to a non-attorney. Of course, from a practical perspective, advice shared with non-attorneys is more susceptible to being transmitted to third parties without limitations as to its further use or dissemination, as non-attorneys may not appreciate the limits of privilege.

Question 9. What types of penalty protection are available and how are those protections properly asserted or maintained?

Several penalty protections are available under the Income Tax Act. In general, the onus is on the revenue authorities to justify the imposition of penalties on the taxpayer. The taxpayer may demonstrate a "due diligence" defense or a defense demonstrating "reasonable efforts" were undertaken in an effort to comply with the Act.

Subsection 163(2) of the Act imposes a penalty on any taxpayer who has knowingly, or under circumstances amounting to gross negligence, made a false statement or omission in his or her tax return. The standard of proof is the civil standard of a balance of probabilities. Ordinary negligence is distinct from gross negligence. The distinction generally arises from various factors including the magnitude of tax owing as a result of the statement or omission, the extent to which the false statement or omission is obvious, and the education and level of sophistication of the taxpayer.

In addition to penalties for failure to file a return, subsection 163(1) of the Income Tax Act imposes a 10 percent penalty on amounts a taxpayer failed to report in a tax return if there has been a failure to report income in any three preceding taxation years.

As noted above, a due diligence defense is available for various penalty provisions under the Act, including penalties of gross negligence. A taxpayer can satisfy the due diligence defense by establishing that reasonable precautions were undertaken to avoid the event leading to the imposition of the penalty (such as, for example, relying on an the advice of a qualified tax advisor). Whether a due diligence defense is successful may depend on whether an independent and competent person would engage in similar conduct under similar circumstances.

Section 163.2 imposes penalties on any tax advisor who makes a false statement that could be used or relied upon by another person. With respect to tax advisors, an advisor who acts in good faith and has not demonstrated “culpable conduct” under the Act will be able to defend against the tax advisor penalty under section 163.2. The Supreme Court of Canada (SCC) recently heard submissions in *Guindon v. The Queen* (Docket No. 35519) as to whether this penalty is civil or criminal in nature. As of December 2014, the SCC has not yet released its decision in the case.

In the context of transfer pricing, pursuant to subsections 247(3) and (4) of the Income Tax Act, a penalty equal to 10-percent applies with respect to any transfer pricing adjustment made which exceeds the lesser of C\$5,000,000 or 10-percent of the company’s gross revenues. The penalty will not be imposed if the taxpayer demonstrates “reasonable efforts” were taken to determine arm’s-length transfer prices. Contemporaneous transfer pricing documentation demonstrates the taxpayer attempted to use arm’s-length transfer prices and should include complete and accurate records used by the taxpayer to determine the arm’s-length transfer prices. Such contemporaneous documentation must be provided within three months of a written request by the Canadian tax authorities.

Question 10. Under what circumstances may a taxpayer rely on a qualified tax advisor or professional tax opinion?

A tax opinion can be provided formally, in written form, or informally, in person, over the telephone or in a brief email to the taxpayer. A tax opinion expresses its conclusions after taking into consideration the administrative position of the tax authorities, the law and any relevant court decisions.

A taxpayer will generally rely on a professional tax opinion to seek relief from the imposition of penalties, particularly in situations where the relevant taxation statute affords a defense of due diligence. A tax opinion demonstrates that the taxpayer actively sought advice and acted in a reasonable and prudent manner. An honestly held filing position taken by the taxpayer with reasonable justification on the basis of a tax opinion is less likely to be viewed as a misrepresentation or, at the least, should not be viewed as a misrepresentation attributable to neglect, carelessness, or willful default. A formal written opinion, as opposed to an informal one, may be



more persuasive in demonstrating that the taxpayer exercised reasonable care.

In general, a taxpayer may rely on a qualified tax advisor or professional tax opinion provided that: 1) the taxpayer provided complete and accurate information to the tax advisor; 2) the tax advisor was a competent professional with expertise in the specific area and was familiar (or became familiar) with the issue on which the taxpayer was seeking an opinion; and 3) the taxpayer relied on the advisor in good faith and with no intention to deceive the tax authorities.

First, it is important that the tax opinion is predicated on factual assumptions or assertions that are known to be true by the taxpayer. The facts, and any assumptions based on the facts, are crucial to a tax opinion. As such, a taxpayer should disclose all relevant facts and circumstances to his or her tax advisor.

Second, the tax opinion should be provided by a tax advisor who is independent from the taxpayer and familiar with any supporting documentation related to the advice sought in the opinion. The tax advisor's knowledge or expertise is important, particularly if the opinion covers a specialized industry or area of tax. A taxpayer may not be able to claim reliance on a tax opinion as a defense if the

taxpayer knew, or reasonably should have known, that the advisor lacked particular knowledge relevant to the tax opinion.

Third, the taxpayer should generally rely on the advisor in good faith and with no intention to deceive the tax authorities. As such, the taxpayer should not provide facts that he or she knows not to be true, and the advisor may not rely on unreasonable factual or legal assumptions. The intention of the taxpayer in undertaking certain tax steps or transactions is often taken into consideration by the tax authorities and the courts. Further, the extent to which the taxpayer may rely on the opinion may depend on the education, sophistication, and business experience of the taxpayer.

Question 11. What practices and trends are being observed with respect to the sharing or gathering of information (both domestically and internationally) by the taxing authorities of your country?

Due to Canada's strong privacy legislation, and a general climate in which the protection of taxpayer information is prioritized, Canada has historically offered broad protection to taxpayers regarding

information sharing. This legislative environment provided Canadian financial institutions in particular with significant worry with respect to the coming-into-force of the US Foreign Account Tax Compliance Act (FATCA), which potentially obligated such institutions to report personal information on individual Canadians to the US Internal Revenue Service (IRS), which would be contrary to those institutions' obligations under the domestic privacy law regime. To address these concerns, and to enable Canadians to avoid the potentially undue application of FATCA penalty withholding, the governments of Canada and the United States entered into an Intergovernmental Agreement (IGA), whereby the Canadian institutions report to the Canadian authorities only, who then send aggregate information to the IRS. Under the IGA, Canada is entitled to reciprocal information to be provided with respect to Canadians holding accounts in the US.

Domestically, Canada continues to assert a strong transfer pricing regime, with a particular emphasis on collecting penalties with respect to contemporaneous documentation requirements. There have been several assessments in recent years in which the CRA imposed penalties on taxpayers for failure to provide contemporaneous documentation.

¹*Descôteaux v. Mierzwinski*, [1982] 1 SCR 860, 141 DLR (3d) 590.

²*Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 SCR 319.

³*Tower v. Minister of National Revenue*, 2003 FCA 307, [2004] 1 FCR 183.

⁴*Susan Hosiery Ltd. v. MNR*, [1969] DTC 5278 (Ex Ct), [1969] CTC 353.

⁵*General Accident Assurance Co. v. Chrusz* (1999), 180 DLR (4th) 241, 45 OR (3d) 321 (CA).

⁶*Ibid.*

⁷*R v. Shirose*, [1999] 1 SCR 565 at para 50, 171 DLR (4th) 193.

⁸RSC 1985, c 1 (5th Supp).

China



China

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Question 1. What discovery protections, if any, apply to the giving of tax advice in your respective country?

The concept of attorney-client privilege does not exist under Chinese law.

According to the PRC Law of Lawyers, attorneys have an obligation to keep confidential their clients' confidential information, or information that is specifically requested by their clients to be kept confidential, even though such information would otherwise not be confidential by its nature. Exceptions to this confidentiality obligation include client requests involving criminal activities, compromises to national and public security or harm or damage to a third party's personal or property interests. Despite this confidentiality obligation, the PRC Law of Lawyers does not provide that lawyers may refuse to testify or provide such confidential information pursuant to attorney-client privilege. In fact, the PRC Law of Lawyers states that if an attorney conceals any fact, or threatens or solicits others to conceal a fact from the court, that attorney's PRC bar license may be revoked.

Further, the PRC Civil Procedure Law imposes a duty on anyone (companies or individuals) who has knowledge about any information relevant to a civil suit to testify or provide such information in court. The PRC Civil Procedure Law also empowers courts in China to investigate and collect evidence from any organization or individuals, and those organizations or individuals (which includes attorneys and other professional consultants) may not refuse to cooperate. The PRC Criminal Procedure Law has similar requirements.

a. Is tax advice protected from disclosure to the taxing authorities?

In China, tax advice is not protected from disclosure to taxing authorities. The Law on the Administration of Tax Levying specifically provides that taxing authorities have the power to investigate taxpayers and other relevant parties ("relevant parties" is not defined and may cover consultants) on issues relating to tax withholding and payments, and taxpayers and other relevant parties must faithfully provide the relevant information and materials to the authorities. Taxing authorities are also empowered to audit taxpayers' accounting books, accounting statements and any other "relevant materials" ("relevant materials" is not defined and may include tax advice). Furthermore, the Guiding Principles Regarding Certified Tax Agents' Taxation-related Services provide that the certified tax agents must provide tax-related information and materials if taxing authorities so require during any tax audits.

b. Is tax advice obtained from certified accountants or other qualified non-lawyers protected from disclosure to the taxing authorities? (Is there a distinction between the role of tax return preparers and tax advisors?)

As stated above, tax advice is not protected from disclosure to the taxing authorities, regardless of whether it is obtained from a lawyer, certified accountants or other qualified non-lawyers. Furthermore, certain certified professional consultants who provide taxation-related services in China, such as certified tax agents, have an obligation to report tax fraud and tax evasion misconduct to the taxing authorities in a timely manner.

c. Is there a distinction between the role of tax return preparers and tax advisors?

The concept of "tax return preparers" does not exist in China. Instead, according

to the Law on the Administration of Tax Collection and Interim Measures for the Administration of Certified Tax Agents, only "certified tax agents" with proper qualifications may advise on tax matters, such as tax declaration, taxation registration and preparing book of accounts. In addition, the Interim Provisions Regarding the Qualification System of Certified Tax Agents provide that certified tax agents must report their clients' noncompliance (such as tax fraud) to the taxing authorities.

d. Is advice from in-house counsel protected, or are protections, if any, limited to advice from outside professionals?

Chinese law does not differentiate between advice from in-house counsel and advice from outside professionals.

e. What are the consequences of an unlawful breach of the privileges and protections of tax advice? Are there certain technicalities that are more highly sanctioned by the courts?

As stated above, no protection or privilege is provided for any information or documentation related to taxation.

Question 2. How, if at all, is "tax advice" defined in your respective country?

In China, the concept of "tax advice" is not defined. The Guiding Principles Regarding Certified Tax Agents' Taxation-related Services nevertheless provide that written working reports issued by a certified tax agency to its clients may be requested by taxing authorities for taxation inspection purposes.

Question 3. Are there any categories of information that are explicitly not subject to protection?

No protection or privilege is provided with respect to any information or documentation related to taxation.

Question 4. Is tax advice prepared in anticipation of a controversy with the taxing authorities protected from disclosure under a work product doctrine or litigation privilege?

The principal of work product protection does not apply in China. As a result, tax advice is not protected from disclosure in litigation procedures.

Question 5. Are tax accrual work papers afforded the same privileges?

As stated above, no protection or privilege is provided with respect to any information or documentation related to taxation.

Question 6. Does the taxing authority in your respective country generally request tax advice and opinions from taxpayers during an audit or litigation?

As stated above, no protection or privilege is provided in the course

of discovery requests by the taxing authorities. Under Chinese law, any person who refuses to provide relevant information requested by taxing authorities may be subject to monetary fines of up to RMB 50,000 (approximately US\$8,200).

Question 7. Do the same privileges and protections apply in criminal proceedings?

There is no protection or privilege in criminal proceedings.

Question 8. Under what circumstances does a taxpayer waive a privilege or protection?

In China, taxpayers do not enjoy the protection or privilege provided against the disclosure of any information or documentation related to taxation.

Question 9. What types of penalty protection are available and how are those protections properly asserted or maintained?

Under Chinese law, a taxpayer proactively taking action to eliminate or mitigate the consequences of tax violations, or cooperating with taxing authorities in providing required information, typically mitigates penalty exposure.

Question 10. Under what circumstances may a taxpayer rely on a qualified tax advisor or professional tax opinion?

In China, the concept that a taxpayer may claim reliance on a qualified tax advisor or professional tax opinion does not exist. This is consistent with the fact that no protection or privilege is provided against any information or documentation related to taxation.

Question 11. What practices and trends are being observed with respect to the sharing or gathering of information (both domestically and internationally) by the taxing authorities of your country?

In terms of the sharing of information, China has entered into a comprehensive network of Double Taxation Conventions with more than 90 countries and tax information exchange agreements with ten jurisdictions, and the majority of China's conventions and agreements meet the international standard that incorporate wording in line with the Organization for Economic Cooperation and Development's (OECD) Model Tax Convention. In addition, China shares exchange information on spontaneous and automatic bases. According to the statistics from the Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews 2013, the State Administration of Taxation in China has sent out approximately 10,000 pieces of information through automatic exchange since 2004—including payments such as dividend, interest, royalty, salary and pension payments—and about thirty-five pieces of information through spontaneous exchange. Chinese taxing authorities actively provide tax information responses to contracting countries' requests, usually within 90 days

of request receipt, and have received positive feedback from peer countries.

Chinese taxing authorities have broad power to gather tax information domestically. As mentioned above, organizations and individuals must provide information related to taxation examinations. In particular, a taxpayer must report all account numbers to the taxing authorities, and there is no limit on the taxing authorities' ability to obtain information from banks and financial institutions.

The State Administration of Taxation released a translation of the G20/OECD Base Erosion and Profit Shifting (BEPS) 2014 Deliverables in September 2014, and commented that the State Administration of Taxation will strengthen its administrative access for international tax collection. It is expected that the State Administration of Taxation will demand and collect overseas information about multinational enterprises in the future, as the Report of Transfer Pricing Documentation and Country-by-Country

Reporting in the BEPS has provided guidance and basis for such action. It is a general trend that China and other nations will cooperate more closely to seek greater transparency of tax information in the data collection and analysis regarding the impact of the BEPS, not only with respect to targeted transfer pricing documentation but also taxpayers' tax planning strategies globally.



France



France

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Question 1. What discovery protections, if any, apply to the giving of tax advice in your respective country?

a. Is tax advice protected from disclosure to the taxing authorities?

There are no provisions applying specifically to tax advice. However, tax lawyers¹, like any other lawyers, are bound by professional privilege, which is a public policy, general and absolute principle unlimited in time (Art. 2 RIN). The tax administration cannot ask for details about the kind of services provided by a lawyer (Art. L13-O A LPF).

The scope of professional privilege encompasses all matters relating to advice or defense, whatever the medium used, whether material or intangible (paper, fax, electronic means, etc.), and particularly (i) consultations which a lawyer sends to or intends for a client; (ii) exchanges of correspondence between a client and his lawyer, or between a lawyer and other lawyers, except in the latter case when the correspondence bears the indication "official"; (iii) notes of discussions, and more generally, all documents in the file, all information and details imparted in confidence to the lawyer in the exercise of his profession; (iv) the names of clients and the lawyer's diary; and (v) information requested by statutory auditors or any third parties.

No distinction has to be made between a lawyer's advisory practice and his defense practice. Secrecy applies in all circumstances, irrespective of whether or not the documents involved pertain to the matter at hand.

The French Supreme Civil Court (Commercial Chamber May 3, 2012 No. 11-14008) noted that "in all matters,

whether relating to advice or defense, any consultations which a lawyer sends to or intends for his client, any exchanges of correspondence between a client and his lawyer, or between a lawyer and other lawyers, except in the latter case when the correspondence bears the indication 'official,' any notes of discussions and more generally all documents in the file are covered by professional privilege."

The European Court of Justice ruled that a lawyer's professional privilege was a fundamental principle in the Wouters decision of February 19, 2002, which upheld the judgment of the courts of the Netherlands prohibiting the incorporation of a company of lawyers and certified accountants. In the AM&SAFF judgment of May 18, 1982, the Court also held that "confidentiality serves the requirement that any person must be able, without constraint, to consult a lawyer."

b. Is tax advice obtained from certified accountants or other qualified non-lawyers protected from disclosure to the taxing authorities?

Public officers (notaries, court clerks, bailiffs, Supreme Court barristers) are bound by a general obligation of professional privilege, like many other professionals. However, the professional privilege of Public officers is not enforceable against the tax administration (Art. 100 of the CGI), which can demand the production of any document.

Certified accountants are also bound by a professional privilege (article 21 of Ordinance of 1945). Breach of professional privilege is a criminal offense (Article 226-13 of Penal Code). This professional privilege cannot be opposed to the Tax Authorities in the procedure of article L16B of Tax Code (CGI) (see question 11).

c. Is there a distinction between the role of tax return preparers and tax advisors?

There is no distinction in France between these two activities. It is the advice given by the lawyer, and only the lawyer, which is protected. If tax returns are prepared by a non-lawyer professional, the protection does not apply to the exchange of information between the preparer and its clients in the course of tax returns preparation. But, if the returns are prepared by a lawyer, the communications related thereto are protected.

However, in practice, in France, corporate tax returns are generally prepared in-house by the finance and accounting department or by external chartered accountants. The role of the tax advisor in general consists of (i) reviewing and advising in respect of specific issues and positions reflected in the tax returns or (ii) assessing levels of risk and compliance, rather than preparing the tax returns. As any communication between client and lawyer is protected, these tasks are protected as well.

d. Is advice from in-house counsel protected, or are protections, if any, limited to advice from outside professionals?

Confidentiality protection is not extended to the opinions of in-house counsel established in France. This is because they are not independent from the employer. In-house counsel are therefore accountable to the regulatory authorities, the law enforcement authorities, and also the examining magistrate, all of whom in the course of an investigation can seize and make use of the in-house counsel's working documents.

In-house counsel are, however, generally subject to a contractual confidentiality obligation to hold their employer's information in confidence. But, this does not create any protection against disclosure to the taxing authorities and their communication and advice is not specifically protected by any privilege.

Nevertheless, the regulated professions are currently undergoing reform that could create a specific status for in-house counsel or authorize the practice of in-house lawyers, and thus protect the confidentiality of their opinions.

e. What are the consequences of an unlawful breach of the privileges and protections of tax advice?

A lawyer's breach of professional privilege is a criminal offense (Articles 226-13 and 226-14) and a breach of the profession's ethical rules, which could result in disciplinary sanctions (warning, censure, temporary prohibition and striking off) in parallel with criminal proceedings. The lawyer could be also professionally liable in that case and be sentenced to compensate for the damage suffered by the client.

Similarly, if the tax administration breaches professional privilege during the course of a proceeding, the proceeding is invalidated and must be annulled (CAA Lyon May 16, 2013, No. 11LY01009).

Question 2. How, if at all, is "tax advice" defined in your respective country?

As a starting point, a tax lawyer is first and foremost a lawyer. Indeed, under French law, lawyers have a sole and exclusive right to assist and represent people and companies in the field of law, which includes tax law. The notion of

"tax advisor" is not defined directly. Every lawyer is authorized to practice tax law. To become a lawyer, the advisor needs a masters degree in law (which represents at least four years of study) and to be called to the Bar. He should then be registered in the Bar where he practices. To use the title "specialized in tax law," the lawyer has to obtain a "specialization" issued by his Law Society. To obtain the tax law specialization, the lawyer has to prove four years of professional practice and then take part in an interview to validate his knowledge. The possible certifications are "individual taxation," "business taxation," "international taxation," "estate taxation," and "real property taxation."

The notion of "lawyer's advice" is defined by the French Law Society and this concept can be extended to "tax advice": it is a "personalized intellectual delivery which consists in furnishing advice or counsel founded on the application of the law." Administrative guidelines also define advice and consultation as oral or written opinions given to a client in connection with a legal or judicial document or action with a view to avoiding a difficulty or conflict in the course of an imminent or pending legal proceeding. Tax advice is merely one component of a lawyer's advisory function, which has not been defined by the law or by case law.

It should be noted that the draft finance bill for 2014 attempted to define the notion of "tax optimization," which is a component of the notion of "tax advice." It was defined as encompassing "any combination of legal, tax, accounting or financial processes and instruments whose principal purpose is to reduce a taxpayer's tax burden, to postpone the date when a tax becomes due or is paid or to obtain a refund of taxes, charges or contributions." The intention of the draft finance bill was to compel persons



promoting tax optimization schemes to declare them to the tax administration before they were put in place. This obligation was supposed to apply not only to tax advisors but also to taxpayers themselves. This measure was rejected by the Constitutional Council at the end of the year, as it was considered a breach of the constitutional “freedom of entrepreneurship”, and therefore was never enacted.

The latest attempt to supersede the professional secrecy protection granted to tax was introduced as part of the finance bill for 2015 provisions, currently under vote. The amendment proposed on November 14, 2014, consists of charging a fine to advisors rendering tax advice resulting in an abusive tax scheme. The terms “tax advice” and “tax scheme” have not been defined thus far.

Question 3. Are there any categories of information that are explicitly not subject to protection?

In principle, professional privilege protecting information exchanged between an attorney and a client is absolute. Nevertheless, in recent years, due to the tax administration’s avowed intent to fight tax and financial fraud efficiently, the tax administration’s prerogatives have been extended and taxpayers have seen their tax compliance obligations increase.

In the initial draft of the anti-fraud law published on December 6, 2014, aimed at strengthening the fight against fraud and serious economic and financial crime, the tax administration would have been able to rely on unlawfully obtained information. The Constitutional Council, asked to verify the conformity of the law with the French Constitution, added a nuance to the measure: The system must not allow the tax authorities to rely on documents obtained by an administrative or judicial authority in conditions subsequently declared illegal by a judge. The Council censured the section of the

measure specific to house searches, held to be contrary to the principle of the inviolability of the domicile.

This law also extends to tax investigation procedures.

The initial draft of the law also broadened the notion of “abuse of law,” leaving behind the notion of an “exclusively” tax-related aim and moving to that of an “essentially” tax-related aim. This measure was not included in the final draft but is regularly reinserted in various draft finance bills.

Over the last two years, tax compliance obligations, which are not covered by professional secrecy, have increased considerably to include declaration particularly of trusts, transfer pricing policies and presentation of cost accounting at the time of a tax audit.

Question 4. Is tax advice prepared in anticipation of a controversy with the taxing authorities protected from disclosure under a work product doctrine or litigation privilege?

There are no particular measures in France for this situation. The controversy is led by the contradictory principle. The procedure should be fair and adversarial and should preserve a balance between the rights of the parties (taxpayer and tax authorities). Each party has the right to disclose its ideas for its defense. There is no work product privilege.

Question 5. Are tax accrual work papers afforded the same privileges?

The attorney-client privilege protects any document issued by lawyers, whatever their purposes. No distinction exists in that respect as regards tax accruals versus actual tax.

The tax liability contingency analysis that is usually requested by statutory auditors would typically be part of the working papers covered by the privilege if it is provided by a lawyer.

Question 6. Does the taxing authority in your respective country generally request tax advice and consultations from taxpayers during an audit or litigation?

The tax administration has a very broad right of communication. The tax administration assumes the right to look at all documents when, by definition, they relate to the company’s business activities and are necessary for the determination of its taxation; this includes not only the accounting and financial records but also documents of all kinds substantiating the amount of the revenues and expenditures.

a. Can privileges be asserted in the course of all discovery requests by the taxing authorities, including audit queries, or only in court proceedings?

As tax advisors’ consultations are covered by secrecy, the taxpayer does not have to disclose them when being audited. In the last draft finance bill, the public authorities attempted to enact that taxpayers and their advisors should declare “tax optimization schemes” before they were put in place, but this measure was not in the end enacted (see Question 2). We will be keeping a close eye on the implications of the latest attempt to penalize such schemes.

At the time of any tax audit, the adversarial principle guaranteeing the taxpayer’s right of defense must be respected.

Question 7. Do the same privileges and protections apply in criminal proceedings?

The lawyer's professional privilege can be overridden when the fight against tax fraud, including money laundering and terrorism, is involved. Lawyers in fact have a duty to declare a suspicion. This obligation concerns transactions which may derive from drug trafficking, fraud against the financial interests of the European Communities, bribery and corruption, terrorism or organized crime.

The lawyer must declare his suspicion to the President of his Law Society, who will forward the declaration to Tracfin, the service within the French Ministry of Finances in charge of fighting financial crime.

The declaration of suspicion against a taxpayer is a specific document produced by the lawyer that does not require the production of written advice between the lawyer and his client.

In the event where a criminal procedure was in fact launched against this client after the suspicion declaration, the client's exchanges with his defending attorney remain, however, covered by professional secrecy.

Dawn raids and house visits to a lawyer's office or domicile in the context of criminal procedures involving a client are in theory possible. However, case law based on the European Human Rights Convention (art. 8) secures the full secrecy of the exchanges between the lawyer and his client (consultations, all correspondence, drafts and working papers, hand written notes, etc.), which cannot be seized unless the lawyer is directly suspected of being a party to the criminal offense in question.

Question 8. Under what circumstances does a taxpayer waive a privilege or protection?

The protection applies to the information shared between a taxpayer and his lawyer. This protection is an obligation for the lawyer who is responsible for the secrecy.

Nevertheless, once the lawyer has delivered his advice to the taxpayer, the taxpayer is free to disclose it to anyone he wants, and can thus waive his privilege by using it for his defense against the Tax Administration.

a. Does a taxpayer waive privilege by disclosing legal advice to their return preparer in order to justify a filing position?

If the taxpayer communicated the lawyer's advice to a tax preparer, the advice should remain protected. According to FTPC art. L 86, b, tax authorities can only request limited information from tax accountants: the identity of the client, the amount of the payment made, date and form of payment and the supporting accounting documents of the payment.

b. Does a taxpayer waive privilege by disclosing legal advice to parties to a common commercial transaction?

The privilege is a unilateral obligation assumed by lawyers to the benefit of their clients. By disclosing legal advice to third parties, the taxpayer doesn't waive privilege towards her lawyer. Nevertheless, there is a risk that those third parties will be obliged to transmit these documents to tax administrations under the right of communication of the tax administration, because this information will not be protected as it does not concern legal advice from this third party's lawyer.

c. Is tax advice shared only between attorneys afforded greater or lesser protection than advice shared with the client?

Correspondence exchanged between lawyers is fully covered by professional privilege and cannot be revealed to the tax administration, like correspondence exchanged between attorney and client.

In addition, when lawyers communicate under the "lawyer confidential" header, those communications cannot be

disclosed to anyone other than the lawyers in question, including their respective clients.

Question 9. What types of penalty protection are available and how are those protections properly asserted or maintained?

A taxpayer who has made a mistake in his return or has not paid the actual amount of taxes due incurs sanctions, which are subdivided into two main categories:

- Fiscal sanctions, which are financial sanctions applied by the tax administration in accordance with the law and under the control of the courts; these consist principally of increased taxes and tax fines, to which may be added interest on arrears
- Criminal sanctions, ordered by the judicial courts for particularly serious offenses

Some offenses may be sanctioned simultaneously by both categories of penalties.

The fiscal penalties regime is characterized by the general application of interest on arrears of 40-percent per month, which is not in itself deemed to be a sanction but is added to the increases and fines calculated on the amount of the taxes the taxpayer has avoided paying.

The taxpayer protects herself by asking for advice from a lawyer. Regarding French law, the lawyer has an obligation of results. He should deliver the proper advice regarding the specific case of his client.

Regarding the specific case of transfer pricing, companies belonging to large economic groups are required to prepare specific documentation for transfer pricing (LPF Art. L 13 AA), a simplified version of which must also be sent to the tax administration in the six months

following the deadline for filing the income tax return.

The documentation must be able to substantiate the transfer pricing policy applied to transactions of all kinds of a company with its affiliated legal entities established outside France. This documentation, which does not take the place of the documentary proofs relating to each transaction, includes general information about the group (particularly the transfer pricing policy at the group level) and specific information about the declaring entity (particularly the transactions carried out with the other affiliated entities). From January 1, 2014, it also includes the rulings issued by foreign tax administrations with regard to the affiliated companies. The entire documentation is available for consultation by the tax administration on the date when the audit of the accounts commences. A company's failure to comply with this obligation results in a fine for each audited fiscal year amounting to €10,000 or, in view of the seriousness of the breaches, five-percent of the transferred profits.

Having robust documentation, which validly substantiates the transfer pricing

policy and is well documented, protects the taxpayer from penalties.

In addition, we would mention an initiative of the tax administration last year, which aimed to anticipate the differences of interpretation made by the tax administration and by taxpayers. On July 1, 2013, the French tax administration launched a program called the "trust-based approach," which proposed that companies voluntarily draw up a complete and enforceable diagnostic of their tax situation.

The companies that elected to participate in this pilot program had to disclose numerous documents and extensive information which did not, in principle, fall within the scope of the information which the tax administration is allowed to obtain as part of its right of information and communication. The scope of information that must be provided is very broad, and the companies are expected to voluntarily provide this information at the tax administration's request, and frequently at random intervals.

The administration will provide taxpayers with upstream assistance on tax return processes. The dialogue begins before

the corporate income tax return is filed. The review process will be conducted based on a provisional draft document the taxpayer considers to be a reasonably fair and accurate version of the final tax return.

The taxpayer undertakes to disclose any uncertainty relating to the application of tax law that has been addressed in consultations with external advisors. It voluntarily provides the administration with the analyses in question so as to shed light on any subsequent discussions. So far this program has only been moderately successful with thirty companies having participated voluntarily.

With regard to transfer pricing, it is also possible to obtain a prior agreement on pricing that allows the taxpayer to be granted a ruling by the tax administration on the valuation of its transfer pricing. In return, the tax administration would not then be able to call into question the method used to establish the transfer pricing for the relevant fiscal years, provided the ruling was respected. It generally has a duration of five years.



Question 10. Under what circumstances may a taxpayer rely on a qualified tax advisor or professional tax consultation?

A taxpayer that seeks the tax advice of a lawyer can rely on that advice as a defense to penalties. The fact that the taxpayer consulted a lawyer raises a presumption that the taxpayer acted in good faith and the taxpayer can justify his position by the tax advice received. However, consulting a tax advisor does not automatically avert any tax or penalties in the event of an audit. The taxing administration can overcome the good faith presumption if, for example, it can demonstrate that the purpose of the transactions was principally tax-driven.

The taxpayer must rely on qualified advice from a competent lawyer. Further, the lawyer has an obligation of accurate results when delivering tax advice. The advice should be given knowing the state of the law and the case law. The lawyer is fully engaged by the advice delivered, without any reservation, so that a taxpayer can rely upon professional tax advice delivered by lawyers. If any damage results from an advisor's incompetent advice, the taxpayer can seek damages against the advisor and the advisor may be found liable to the taxpayer upon a judge's order.

Question 11. What practices and trends are being observed with respect to the sharing or gathering of information (both domestically and internationally) by the taxing authorities of your country?

From a domestic point of view, the tax administration has a right of entry, search and seizure in order to look for infringements in connection with income tax or corporate tax, value-added tax and all taxes on turnover (article L16B of

CGI). This right can be exercised in any location, even private, where the items and documents relating to the fraudulent acts are likely to be kept, whatever the medium used.

The search can take place on company premises or in an individual taxpayer's private home, but also on the business or private premises of the taxpayer's representative, which naturally includes his lawyer or accountant but also his notary, advisor, data center, etc.

Since the tax administration presumes the existence of fraud, it can seize not only accounting records but also all items which are connected with commercial accounting data, invoices, and anything related thereto, orders, contracts, and amendments relating to accounting, listings or correspondence. Email letterboxes can also be consulted. The tax administration has broad powers and the scope of the right of seizure is now very significant as the tax administration can seize data on any medium when it is identifiable.

In principle, this right of entry, search and seizure is strictly regulated. Each search must be authorized by an order of the Judge of Freedoms and Detention. The search is then conducted under the authority of that judge.

From an international point of view, France has signed many tax treaties with numerous countries. It invests strongly in the fight against tax fraud.

A new standard for the automatic exchange of information was adopted at the end of the October by all countries in the Organization for Cooperation and Economic Development (OECD) and the G20, and by the major financial centers participating in the annual meeting of the Global Forum on Transparency and Exchange of Information for Tax Purposes held in Berlin.

France played a significant role in this step forward. It was a driving force on this

question with its European partners of the G5 (Germany, Spain, Italy and the United Kingdom) and in the Ecofin Council, the European Union's Economic and Financial Affairs Council. At the Council meeting of October 14, 2014, the Member States agreed on the adoption of a directive instituting automatic exchanges in the European Union for 2017.

The new standard for the automatic exchange of financial account information was presented by the OECD to the Finance Ministers of the G20 countries at a gathering in Cairns in September 2014. The standards, which were approved by all the members of the Global Forum, require the following:

- The exchange on request of information "likely to be relevant" for the tax administration or the application of the co-signatory's domestic laws
- The possibility to have access to reliable information and the use of powers in order to obtain it
- Respect for taxpayers' rights
- Strict respect for the confidentiality of the information which is exchanged

Question 12. Please provide any other useful information not covered in the above questions.

We have observed that the taxing administration's investigative power has been expanding quickly and growing in scope. For example, a few months ago, the privilege of the attorney had been publicly breached by a judge in a famous case involving the phone-tap surveillance of the lawyer's conversation. This case is still pending before another justice. The tax field is not yet involved by this case, but it illustrates a trend in France toward strengthening the prerogatives of administrative and judicial authorities at the expense of taxpayers.

¹The term "lawyer" is employed herein to mean attorney, i.e., a regulated profession, which, in France, has a sole and exclusive right to assist and represent people and companies in the field of law.

Germany



Germany

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Question 1. What discovery protections, if any, apply to the giving of tax advice in your respective country?

Generally, under German law there is no formal discovery proceeding which would lead to the obligation of a party to give access to documents and communications, either pre-trial or during a trial. Only in civil law proceedings, the court may order a counterparty or third-party disclosure if only that party has access to documents to which the other party refers and such exclusive access is sufficiently proved by the referring party. This may also include tax-related documents.

Further German law does not have a unitary doctrine of privileges. There are legal doctrines having a similar effect as privileges, e.g., they constitute exclusionary rules. However, for the purpose of this document we will refer to those doctrines as "privileges."

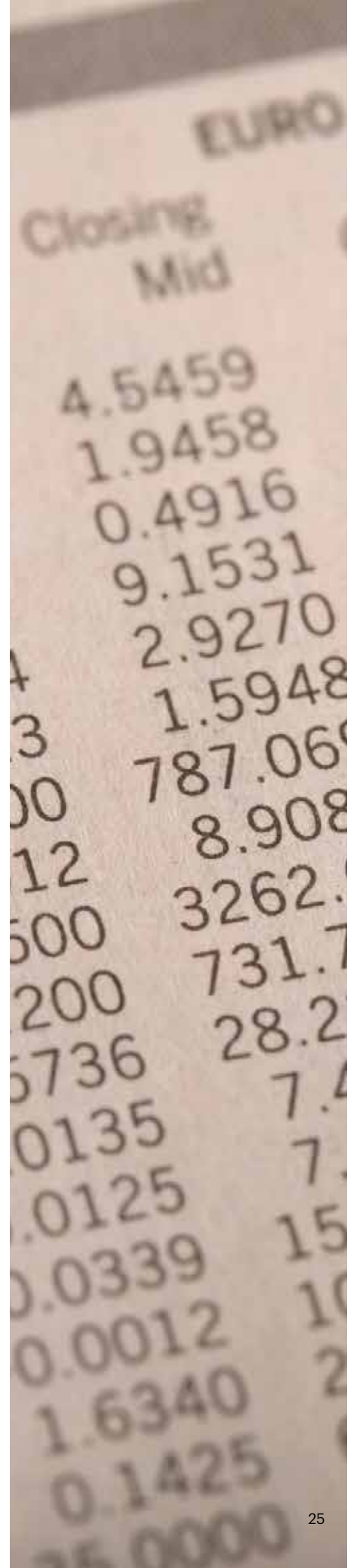
Tax advice is protected by the obligation of secrecy, like any other legal advice offered by German lawyers as well as German-admitted tax professionals, such as certified tax advisors or certified public accountants. This obligation applies to tax procedures as well as to civil or criminal procedures and government investigations. Under the obligation of secrecy, tax professionals are prohibited from disclosing any document or information obtained during their professional practice. Therefore, documents and communications as such are not privileged, but the tax professional is allowed to disclose confidential information or to give testimony only with the consent of the client. Correspondingly, related documents

and correspondence must not be seized if they are in the possession of the tax professional. However, documents or any written communication between the client and the tax professional are not protected at the client's end or if they are in the possession of a third party. Hence, oral communication may be preferable if there should be any concern about the lawful tax treatment in a matter, especially if it may also imply criminal law such as tax evasion.

On the other hand, in criminal proceedings, communications between the client and a defense lawyer are protected even if they are in the client's possession and cannot be seized, even from the client. However, such defense documents may be seized from a third party in cases where the client has handed them over.

Whether or not the confidential secrecy privilege also applies to in-house counsel with the same professional status (i.e., with an admission to a German bar) is currently not clear and the issue has been resolved inconsistently by the courts. There is case law finding that these privileges apply to in-house counsel if the communication or documents relate to legal or tax advice rather than to commercial services (e.g., in the field of management or controlling). However, there is also contradicting case law whereby the privilege does not apply because the in-house counsel is not sufficiently independent from his employer.

Lawyers as well as other eligible professional tax advisors breaching their duties of confidentiality may be subject to professional discipline and potential civil liability. Furthermore, a breach of this professional secrecy obligation constitutes a criminal offense. He who



is guilty of this offence shall be liable to imprisonment of up to two years or a fine.

Question 2. How, if at all, is "tax advice" defined in your respective country?

There is no explicit definition of "tax advice" in German law. However, the aforementioned privilege arises from the professional secrecy obligation of the admitted tax professional due to their rules of professional conduct and not from the term "tax advice."

Question 3. Are there any categories of information that are explicitly not subject to protection?

No. However, the protection applies only to information or documents in the possession of the lawyer or admitted tax professionals. Documents sent to the client or third parties are, generally, not privileged and may be seized.

Question 4. Is tax advice prepared in anticipation of a controversy with the taxing authorities protected from disclosure under a work product doctrine or litigation privilege?

There is no attorney work product doctrine in Germany. The protection arises as a general rule from the professional secrecy obligation of admitted tax professionals.

Question 5. Are tax accrual work papers afforded the same privileges?

The professional secrecy obligation and privilege apply to any information or document and, therefore, also to tax accrual work papers.

Question 6. Does the taxing authority in your respective country generally request tax advice and opinions from taxpayers during an audit or litigation?

No.

Question 7. Do the same privileges and protections apply in criminal proceedings?

Tax advice is afforded greater protection in criminal proceedings because communications between the client and a defense lawyer are protected even if they are in the client's possession and cannot be seized, even from the client. However, this is only true if the tax advice can be deemed to be correspondence between a defense lawyer and his client after the client has assigned the defense lawyer with his defense in the particular criminal proceedings. Another important exception to that rule applies if there are weighty indications that the defense lawyer aided and abetted or counselled or procured the offence committed by his client. In that case, the privilege does not apply.

Question 8. Under what circumstances does a taxpayer waive a privilege or protection?

The privilege only applies to documents or correspondence that are in the possession of the lawyer or admitted tax professional. Save for the correspondence with the defense

lawyer in charge in a criminal procedure, the privilege is, therefore, actually waived if the respective document or correspondence is transmitted to a client. Additionally, protection is waived if the originally privileged information is sent to third parties or their lawyers.

The professional secrecy obligation as such applies until the client explicitly waives it vis-à-vis his engaged lawyer or tax professional.

Question 9. What types of penalty protection are available and how are those protections properly asserted or maintained?

If the taxpayer has concerns or doubts regarding a certain lawful tax treatment, it is obliged to seek professional tax advice in this respect. Otherwise, acting with those doubts may constitute a criminal tax offense. Furthermore, where the tax treatment is legally unclear, there is the possibility to apply for a binding ruling with the German tax authorities. Or, where there are concerns about the underlying facts, a factual ruling may be obtained. As to transfer pricing issues, a particular advanced transfer pricing ruling is available. The taxpayer can rely on all of these rulings for penalty protection.

In turn, however, tax opinions may also lead to the confirmation that certain tax treatments previously reported were unlawful. In practice, this often applies in the context of the acquisition of companies or real estate where the new management or purchaser recognizes wrongful tax treatments it previously reported. If so, the taxpayer is generally obliged to disclose this without undue delay (within two weeks after gaining the knowledge, as a general rule), to avoid the accusation of a criminal tax offense.

Furthermore, a self-disclosure notice may retroactively protect the taxpayer in case of criminal tax offenses under certain circumstances.

Question 10. Under what circumstances may a taxpayer rely on a qualified tax advisor or professional tax opinion?

A taxpayer can rely on tax opinions of German-admitted tax professionals, such as certified tax advisors or certified public

accountants and/or lawyers. However, a taxpayer's success with reliance on a tax opinion depends on the truth of the facts made available to the tax professional and/or the assumptions made therein.

Question 11. What practices and trends are being observed with respect to the sharing or gathering of information (both domestically and internationally) by the taxing authorities of your country?

The Federal Republic of Germany is, generally, very committed to agreeing with other countries regarding the exchange of tax-relevant information. However, German authorities have also acquired information, such as bank data stolen from foreign financial institutions (e.g., in Switzerland or Luxembourg), to use as evidence of criminal tax offenses by German taxpayers. Even if this information in such cases may be based on criminal acts abroad, the data can be used in Germany in criminal procedures.



India



India

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Question 1. What discovery protections, if any, apply to the giving of tax advice in your respective country?

a. Is tax advice protected from disclosure to the taxing authorities?

The benefit of privilege for attorney-client communication is codified within the Indian Evidence Act of 1872. Under this Act, neither a lawyer nor a client can be compelled to disclose any communication between them during the course of an engagement. Additionally, communication between a lawyer and a client cannot be used as evidence against the client. This privilege extends to tax advice provided by a lawyer. However, it is not extended to other professionals and does not apply to public accountants.

In addition, the rules framed by the Bar Council of India and the rules framed by the Institute of Chartered Accountants prohibit professionals from disclosing any information entrusted to them, except with the prior permission of the client. These rules, however, do not create any privilege with respect to communication with consultants or other professionals.

b. Is tax advice obtained from certified accountants or other qualified non-lawyers protected from disclosure to the taxing authorities?

Only communications with lawyers are protected under Indian privilege laws. Communications with no other professional—including a certified accountant—are protected by confidentiality privilege. In other words, communications with consultants and accountants can be used as evidence against a taxpayer.

c. Is there a distinction between the role of tax return preparers and tax advisors?

The terms "tax return preparer" and "tax advisor" are not defined in India. However, a return preparer is generally understood to do the routine work of feeding data into a tax return, while a tax advisor would provide qualified advice on questions raised.

d. Is advice from in-house counsel protected, or are protections, if any, limited to advice from outside professionals?

Protection for communication is available only to communications with a practicing lawyer. In-house counsel would generally not be a practicing lawyer, but an employee of the company. For that reason, confidentiality of communication is not be extended to in-house counsel.

e. What are the consequences of an unlawful breach of the privileges and protections of tax advice? Are there certain technicalities that are more highly sanctioned by the courts?

When a professional breaches a client's trust, a complaint can be made to the relevant governing body: the Bar Council of India in the case of lawyers, and the Institute of Chartered Accounts of India in the case of registered chartered accountants. After considering the complaint, the governing bodies will determine the appropriate disciplinary action and can deregister the professional from practicing the profession where appropriate.

Question 2. How, if at all, is "tax advice" defined in your respective country?

"Tax advice" is not specifically defined in India. All advice provided by a lawyer is viewed at par.

The judiciary has not specifically defined "tax advice" either. Advice by a lawyer cannot be used by a court as evidence against the taxpayer, and hence the judiciary has not specifically examined its meaning or consequences. However, the courts have viewed tax advice provided by other persons as a step taken by the taxpayer for the reduction or evasion of taxes.

Question 3. Are there any categories of information that are explicitly not subject to protection?

Classification of privileges and confidentiality flows from the source of the document and not the type of document. Any communication from a lawyer is protected by law, while no other document enjoys the same protection.

Question 4. Is tax advice prepared in anticipation of a controversy with the taxing authorities protected from disclosure under a work product doctrine or litigation privilege?

Under the Evidence Act discussed above, tax advice presented by a lawyer is protected from disclosure, while advice from other professionals and consultants is not. There is no additional protection under Indian law for documents prepared in anticipation of litigation.

A lawyer's documents prepared in anticipation of litigation would remain

privileged under the Evidence Act. Similarly, documents prepared by the client for communication to the lawyer would be protected under the Evidence Act.

Advice provided by a lawyer enjoys protection at all stages, from a revenue authority to the highest court in the country.

Question 5. Are tax accrual work papers afforded the same privileges?

All communications with a lawyer, from working paper to final opinion, are privileged. However, no communication with other professionals or consultants enjoys privilege.

Question 6. Does the taxing authority in your respective country generally request tax advice and opinions from taxpayers during an audit or litigation?

Tax authorities in India generally do not request submission of the tax advice received by a taxpayer. They take an independent view, not influenced by the tax advice. However, in proceedings relating to the imposition of penalty, taxpayers can furnish the tax advice received from a lawyer or an accountant as a penalty defense .

a. Can privileges be asserted in the course of all discovery requests by the taxing authorities, including audit queries, or only in court proceedings?

Privileged communications with a lawyer are respected at all stages, whether an audit query or a court proceeding. .

Question 7. Do the same privileges and protections apply in criminal proceedings?

Tax advice from a lawyer enjoys the same level of protection under criminal proceedings. Advice from other professionals or consultants still does not enjoy any privilege.

Though tax authorities at lower levels may overlook the distinction between communication from a lawyer and from others, higher forums and courts appreciate the difference and provide adequate protection to communication from lawyers.

In practice, government attorneys may attempt to use protected documents to support their case.

Question 8. Under what circumstances does a taxpayer waive a privilege or protection?

Generally, taxpayers do not voluntarily disclose legal advice they have received. However, in a proceeding relating to the imposition of penalty or a proceeding for prosecuting a taxpayer, the taxpayer can produce the legal advice to establish that their action was based on professional advice and not with a mala fide intention. In such cases, the courts generally do not impose a penalty or prosecute the taxpayer. The taxpayer can selectively waive the privilege and disclose only the advice he chooses.



Privilege of communication between a lawyer and client is not lost by disclosing it to a third party. It would still be regarded as a privileged communication in relation to all other parties.

Tax advice is generally shared only between an attorney and a client. However, tax advice shared between attorneys is also eligible for same level of protection as communication between an attorney and a client.

Question 9. What types of penalty protection are available and how are those protections properly asserted or maintained?

Any action taken on the basis of tax advice would generally absolve the taxpayer of any penalty proceeding or prosecution, insofar as the taxpayer acts in accordance to the advice given. However, courts have imposed penalties on taxpayers in rare instances when a client acted (per their lawyer) on advice that even a layperson should have understood was incorrect.

Question 10. Under what circumstances may a taxpayer rely on a qualified tax advisor or professional tax opinion?

The taxpayer can rely on the advice of an attorney in all circumstances covered by that advice. There are no specific requirements that a tax opinion must satisfy so as to be followed. However, as discussed above, that advice must be reasonable and should not be blatantly incorrect.

Question 11. What practices and trends are being observed with respect to the sharing or gathering of information (both domestically and internationally) by the taxing authorities of your country?

Taxing authorities, in their meetings with their colleagues and their counterparts in foreign jurisdictions, tend to improve their means of increasing tax revenue. Any tax advice that comes to the

knowledge of a tax authority is likely to be shared during such gatherings. If the advice is found to be controversial, other taxpayers who have taken similar positions are scrutinized in detail.

Question 12. Please provide any other useful information not covered in the above questions.

Litigation on tax matters in India is growing rapidly. Taxpayers should be very cautious in taking debatable tax positions. It is always advisable to receive written opinions from lawyers who have a strong practice in the subject field.



Kazakhstan



Kazakhstan

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Question 1. What discovery protections, if any, apply to the giving of tax advice in your respective country?

The legal status of tax advice is not expressly regulated by specific legislation in Kazakhstan. Therefore, certain issues associated with the use of tax advice might be subject to provisions of applicable legislation.

a. Is tax advice protected from disclosure to the taxing authorities?

Kazakh legislation does not define the term "legal privilege." Certain attorneys-at-law having the status of "advocates" have the obligation to maintain "advocate's secrecy" with respect to information relating to legal assistance and consulting provided to their clients. Such advocate's secrecy may cover tax advice given by advocates to their clients. The advocate's secrecy protects a taxpayer from disclosure of information that became available to an advocate due to involvement in the case. However, if the court requests a taxpayer for disclosure of certain information, the advocate's secrecy does not relieve the taxpayer from such disclosure.

There is no specific provision in the legislation of Kazakhstan that expressly prevents disclosure of tax advice to the tax authorities. It is possible under Kazakh law to include tax advice in the scope of commercial secrets; however, it will not protect against disclosure of the tax advice to the state authorities under certain circumstances.

Under the Tax Code, taxpayers have the right not to disclose information that is not relevant to taxable objects, except for documents that should be provided under the legislation on transfer pricing and the legislation on production and

turnover of goods subject to excise tax. However, such restriction is not aimed at protecting tax advice from disclosure and may not be an adequate protection in practice.

b. Is tax advice obtained from certified accountants or other qualified non-lawyers protected from disclosure to the taxing authorities?

No.

c. Is there a distinction between the role of tax return preparers and tax advisors?

No

d. Is advice from in-house counsel protected, or are protections, if any, limited to advice from outside professionals?

No

e. What are the consequences of an unlawful breach of the privileges and protections of tax advice? Are there certain technicalities that are more highly sanctioned by the courts?

There are no specific sanctions for the disclosure of tax advice. However, the unlawful disclosure of information constituting a tax secret by the tax authority entails an administrative fine of approximately US\$400, at most. Disclosure of accounting data constituting a commercial secret entails an administrative fine of at least US\$1,500. Unlawful disclosure of commercial secrets may cause criminal liability. In addition to this, in the case where the tax authority abuses the taxpayer's rights, the latter may report such abuse using a help line set up by the tax authorities.

Question 2. How, if at all, is "tax advice" defined in your respective country?

There is no definition of tax advice.

Question 3. Are there any categories of information that are explicitly not subject to protection?

Under the Tax Code, taxpayers, are obliged to fulfill all lawful requirements of the tax authorities and provide the tax authorities with the documents envisaged by law, including transfer pricing documents. At the same time, taxpayers have the right not to disclose information that is not relevant to taxable objects, except for documents that should be provided under the legislation on transfer pricing and the legislation on production and turnover of goods subject to excise tax.

Question 4. Is tax advice prepared in anticipation of a controversy with the taxing authorities protected from disclosure under a work product doctrine or litigation privilege?

Under Kazakh law, the parties of a court dispute disclose only information they decide to disclose, unless certain documents or information are requested by the court. In certain cases the court might request documents based on the request of an adverse party. Therefore, if in a dispute between a taxpayer and the tax authority, the latter is aware of relevant written tax advice, and the government requests that such advice be presented to the court, the court might grant such



request and require the taxpayer to disclose the relevant documents.

Question 5. Are tax accrual work papers afforded the same privileges?

The Tax Code requires that, in addition to tax declarations, taxpayers should prepare tax registers that contain detailed calculations of tax liabilities. During a tax audit, corresponding tax registers should be provided by request of the tax authorities.

Question 6. Does the taxing authority in your respective country generally request tax advice and opinions from taxpayers during an audit or litigation?

Tax authorities do not request tax advice but may request taxpayers' comments during an audit.

Question 7. Do the same privileges and protections apply in criminal proceedings?

In a criminal case, tax advice may only be protected if it has been given by

advocates to their clients and is covered by advocate's secrecy, as explained above.

Question 8. Under what circumstances does a taxpayer waive a privilege or protection?

Not applicable.

Question 9. What types of penalty protection are available and how are those protections properly asserted or maintained?

Not applicable.

Question 10. Under what circumstances may a taxpayer rely on a qualified tax advisor or professional tax opinion?

The Civil Procedure Code of Kazakhstan allows for a possibility for referring certain issues for expert determination. In certain circumstances a professional tax advisor might act as an expert and provide the court with an independent assessment. However, under the Civil Procedure Code, the expert opinion is not compulsory for the court, whereas refusal of the court to accept an expert opinion should be well-grounded.

Question 11. What practices and trends are being observed with respect to the sharing or gathering of information (both domestically and internationally) by the taxing authorities of your country?

Under the Tax Code, the tax authorities are obliged to protect information received from a taxpayer that constitutes tax secrecy. Types of information that do not constitute tax secrecy include the amount of taxes paid to the state budget, the amount of value-added tax refunded from the state budget, the amount of tax debt, and non-confidential information, among other types. Disclosure of tax secrecy by the tax authorities is allowed without consent of a taxpayer if such information is requested by law enforcement authorities, a court, or a bailiff.

In our practice, we see that the tax authorities tend to apply their experience gained with certain taxpayers to other taxpayers operating in the same industry. For instance, if during a tax audit of a taxpayer an incompliance with the Tax Code was discovered, the tax authorities may request that other similar businesses provide relevant information that might help to identify similar incompliance.

Luxembourg



Luxembourg

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Question 1. What discovery protections, if any, apply to the giving of tax advice in your respective country?

a. Is tax advice protected from disclosure to the taxing authorities?

Tax advice, like all other types of advice provided by Luxembourg lawyers to their clients, is subject to legal professional privilege, the so-called "professional secrecy" enshrined in Article 35 of the law on legal profession dated 27 August 1991.

According to §177 General Tax Code (Abgabenordnung), lawyers are entitled to invoke professional secrecy rules when (i) assisting their client in criminal matters and (ii) advising or representing their clients in tax matters only when their assistance to the tax authorities could possibly expose their clients to criminal prosecution.

The privilege is also applicable in civil cases.

However, only the legal professional can invoke the privilege; the taxpayer-client is not entitled to invoke the privilege.

b. Is tax advice obtained from certified accountants or other qualified non-lawyers protected from disclosure to the taxing authorities?

No.

c. Is there a distinction between the role of tax return preparers and tax advisors?

No.

d. Is advice from in-house counsel protected, or are protections, if any, limited to advice from outside professionals?

Advice from in-house counsel is not legally privileged.

e. What are the consequences of an unlawful breach of the privileges and protections of tax advice? Are there certain technicalities that are more highly sanctioned by the courts?

Non-compliance with professional secrecy obligations is a criminal offence according to Article 458 Criminal Code. This is punishable by a jail term of between eight days to six months as well as a fine ranging between €500 and €5,000.

Question 2. How, if at all, is "tax advice" defined in your respective country?

There have been no legislative attempts to define "tax advice."

Question 3. Are there any categories of information that are explicitly not subject to protection?

There are no further distinctions other than those set forth in §177 General Tax Code.

Question 4. Is tax advice prepared in anticipation of a controversy with the taxing authorities protected from disclosure under a work product doctrine or litigation privilege?

There are no further distinctions other than those set forth in §177 General Tax Code.

Question 5. Are tax accrual work papers afforded the same privileges?

There are no further distinctions other than those set forth in §177 General Tax Code.

As a general rule, accrual work papers are also protected.

Question 6. Does the taxing authority in your respective country generally request tax advice and opinions from taxpayers during an audit or litigation?

No.

Question 7. Do the same privileges and protections apply in criminal proceedings?

Professional secrecy applies without restriction in criminal proceedings.

Question 8. Under what circumstances does a taxpayer waive a privilege or protection?

Taxpayers are required to justify their tax situation upon request from the tax authorities. As a consequence, the taxpayers may provide the tax authorities with the tax advice rendered by their tax advisor. However, only the taxpayer is responsible before the tax authorities

for the tax situation he declares. It should be noted that lawyers may also communicate information covered by professional secrecy if such declaration (i) is realized in the client's interest and (ii) authorized by the client.

The taxpayers may decide to disclose all relevant information they deem necessary to justify their tax position.

Question 9. What types of penalty protection are available and how are those protections properly asserted or maintained?

There is no penalty protection in Luxembourg.

Question 10. Under what circumstances may a taxpayer rely on a qualified tax advisor or professional tax opinion?

Not applicable.

Question 11. What practices and trends are being observed with respect to the sharing or gathering of information (both domestically and internationally) by the taxing authorities of your country?

Luxembourg tax authorities generally provide foreign tax authorities with information, to the greatest extent possible, on the grounds of an applicable double tax treaty, European Union Directives (e.g., Directive 2011/16/EU on administrative cooperation implemented by the Luxembourg law dated 31 March 2010) or the OECD convention on mutual administrative assistance in tax matters.

Luxembourg is also part of the "Early Adopters Group" of countries who have announced that they will automatically exchange information at a global level beginning in 2017.



Mexico



Mexico

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Question 1. What discovery protections, if any, apply to the giving of tax advice in your respective country?

Professionals in Mexico are obliged to maintain strict confidentiality on any matter conferred by a client, unless the law mandates disclosure¹. This duty of confidentiality, generally known in Mexico as the "professional secret", applies to all professionals and is not exclusive to the legal profession. Professionals that reveal confidential information obtained from their clients in the rendering of their services may be sentenced with one to five years in jail, a fine, and a suspension from their professional activities for a period ranging from two months to one year.²

Notwithstanding the above, tax professionals are obliged by law to reveal before the Mexican tax authorities the following information: (a) data, reports or any documents required to clarify the information established in the client's tax returns and tax notices; (b) accounting records of the client required to verify compliance of all tax obligations of the client; and (c) data, reports or documents used by the tax authorities to plan and program tax audits to the client.

Tax advice from professionals (i.e., legal opinions or memoranda concerning tax matters) is not expressly included among the documents that the tax authority can request as part of its audit capacities; notwithstanding, the tax authority could attempt to compel disclosure of this advice by arguing it contains information in connection with points (a), (b) or (c) above. It is worth noting that, in certain cases, Mexican courts have resolved that the tax authority has the burden of proof of demonstrating that the documents it requests are related to the specific tax items under audit review.

As a result, tax advice should be protected in a discovery or audit procedure unless the tax authority considers and demonstrates the same contains information essential to verify the taxpayer's due compliance. In practice, the tax authorities generally do not request the disclosure of tax advice issued to the taxpayer, but rather limit their auditing to those documents that comprise the taxpayer's accounting. The typical documents that make up the taxpayer's accounting are accounting records, invoices, financial statements, bank account statements and corporate ledgers, as well as those documents that are in direct relation with the accruable income and allowed deductions they report.

It is important to point out that, in sharp contrast to the absence of a specific provision protecting attorney work product, there is a specific provision that penalizes certain advice provided by tax professionals. Professionals rendering services in connection with a client's tax obligations are subject to fines if they engage in any of the following³:

- a) Advise, counsel or render services for the purpose of partially or totally omitting payment of taxes in breach of tax law. However, fines will not be imposed when a written opinion issued by the professional expressly establishes that its content is contrary to the administrative non-binding criteria published by the tax authority, or expressly establishes that its advice may be contrary to the interpretation of the tax authorities;
- b) Participate or cooperate in the alteration or preparation of false accounts, registries or dates in the client's accounting or any other tax documents;

- c) Participate as an accomplice in tax infringements by a client.

Fines range from US\$3,500 to US\$5,400, and may be increased by 10-percent to 20-percent when the advice is contrary to any of the administrative non-binding criteria published by the tax authority.

As a final note, there is no general distinction between the role of tax return preparers and tax advisors since they are both obliged to disclose, upon request from the tax authorities, any data, report or document in their possession that is required to verify tax compliance by the client. However, a difference does exist in respect to certified public accountants that prepare certified tax returns. The latter are subject to more stringent requirements, under the penalty of a suspension or cancellation of their certification upon breach⁴ (see item 4 for further information).

Likewise, it is worth noting that the Mexican Supreme Court has not yet ruled on a case that requires weighing the professional secret versus the tax authorities' power to require documents, or on a case that requires clearly identifying what type of attorney work product falls under the categories of tax documents that the authorities are entitled to request. We expect that, as the authorities increase their auditing activities in Mexico, we will likely see this issue brought to our Supreme Court in the near future.

Question 2. How, if at all, is "tax advice" defined in your respective country?

There is no specific definition of tax advice contained in Mexican law. However, tax advice is generally understood in a broad sense as any

advice or counsel issued by a third party in connection with the taxpayer's obligations, and only for purposes of regulating the fines that may be levied upon the issuance of tax advice that reverses the interpretation of the tax authorities as described in item 1 above.

There have been no legislative attempts to define "tax advice."

Furthermore, Mexican law does not give special legal relevance to tax advice, and thus the Mexican courts have not made any express statement on such note. The approach of the Mexican courts has been limited to obliging tax authorities to justify why the documents they request from taxpayers and professional advisors are necessary to verify specific items of taxation.

Question 3. Are there any categories of information that are explicitly not subject to protection?

As described in items 1 and 2 above, any document, data or report prepared by the client or by a third-party professional may be requested by the tax authorities in Mexico, provided it contains information that directly relates to a specific item of compliance by the taxpayer. However, certain documents are considered a part of the taxpayer's accounting and thus must be in the taxpayer's possession at all times. Tax advice (i.e., legal opinions and memoranda) is generally not considered a part of the taxpayer's accounting.

Question 4. Is tax advice prepared in anticipation of a controversy with the taxing authorities protected from disclosure under a work product doctrine or litigation privilege?

There is no special protection for tax advice prepared in anticipation of a controversy, and thus its disclosure to the tax authority is subject to the same requisites described in Question 1 above. Nonetheless, certified public accountants must point out any breach they find, from their review of the taxpayer's activity, in respect to the administrative non-binding criteria issued by the tax authority.

Question 5. Are tax accrual work papers afforded the same privileges?

There is no special protection for tax accrual work papers. Disclosure will depend on whether such work papers reflect information pertaining to the specific item subject to the tax audit and whether the professional secret protection applies, as described in Question 1 above. The determination of whether the work papers will benefit from the protection or be related to items under audit will be on a case-by-case basis.

To date, Mexican courts have resolved that the tax authorities must specify the tax year subject to review and can only request documentation that is directly relevant to such fiscal year. These precedents have been issued by different courts, including the Mexican Supreme Court, and for different fact patterns. Thus, it is very important each case is specifically analyzed to determine whether these precedents are applicable and whether they are binding or not. It is worth mentioning that we expect the number of tax audits to substantially increase in the next few years and, consequently, the courts will have to provide further guidance on this topic.

Question 6. Does the taxing authority in your respective country generally request tax advice and opinions from taxpayers during an audit or litigation?

No. The Mexican tax authority generally limits its auditing to those documents that comprise the taxpayer's accounting, as well as those documents that are in direct relation with the accruable income and allowed deductions they report. Likewise, the existence of tax advice or a tax opinion does not mitigate or affect the liability to which a taxpayer may be subject.

a. Can privileges be asserted in the course of all discovery requests by the taxing authorities, including audit queries, or only in court proceedings?

Other than the protections mentioned above, there are no specific privileges protecting the information generated by tax advisors. If the tax authority requests the disclosure of tax advice during an audit procedure, the taxpayer or the professional service provider that issued such advice must deliver it, or else be subject to fines ranging from US\$1,000 to US\$3,200. However, the affected party may challenge such fine in a court proceeding, generally arguing that the tax authority was not legally entitled to request such document since it was not directly related to a specific item of tax compliance. In addition, the taxpayer may challenge any tax credit resulting from the disclosure of the tax advice, arguing that the tax authority illegally obtained such information.

Question 7. Do the same privileges and protections apply in criminal proceedings?

There are special rules governing the protection of information entrusted by the legal representative or advisor in criminal procedures. According to the National Criminal Procedure Code, the testimony of legal advisors, psychiatrists and other professionals with ethical and professional nondisclosure obligations is not admissible on a criminal procedure against their respective clients. Notwithstanding, the testimony will be valid and obligatory if the mentioned professionals are relieved from their



nondisclosure obligations.⁵ Likewise, the Mexican Federal Constitution provides special protection to communications between an individual and his lawyer in criminal situations.

Question 8. Under what circumstances does a taxpayer waive a privilege or protection?

- a. Does a taxpayer waive privilege by disclosing legal advice to their return preparer in order to justify a filing position?

There is no provision that denies or limits the protection otherwise awarded to legal advice in the event the same is shared with non-attorneys. If the third-party recipient is also a professional governed by the professional secret obligations, the same restraints and protections should apply.

- b. Does a taxpayer waive privilege by disclosing legal advice to parties to a common commercial transaction?

If the third party to whom the legal advice was disclosed as part of a common commercial transaction is subject to audit, the tax authorities could validly use any information collected from said audit in procedures initiated against other parties.

- c. Is tax advice shared only between attorneys afforded greater or lesser protection than advice shared with the client?

The level of protection provided to tax advice shared only between attorneys is not different from that given to tax advice shared with a client.

Question 9. What types of penalty protection are available and how are those protections properly asserted or maintained?

As an alternative form of protection, taxpayers may consult the tax authority to confirm criteria on specific tax situations; in that case, the taxpayer protects itself from any possible penalty if it applies the criteria validated by the tax authorities. Tax authorities are expressly authorized to issue favorable resolutions that generate concrete rights in favor of the individual that made the consultation based on real and concrete situations.⁶

Question 10. Under what circumstances may a taxpayer rely on a qualified tax advisor or professional tax opinion?

Mexican tax legislation does not oblige taxpayers to consult a tax advisor on specific transactions or tax positions; likewise, Mexican tax legislation does not provide any safeguards or waivers for the taxpayer even where it has consulted a tax advisor on a specific position. Notwithstanding, in certain cases taxpayers must be audited by expert accountants to comply with formal obligations or in order to be subject to certain benefits. Unfortunately, as of today, Mexican tax legislation does not provide any safeguard or penalty relief for taxpayers that have relied on qualified tax advisors or professional tax opinions.

Question 11. What practices and trends are being observed with respect to the sharing or gathering of information (both domestically and internationally) by the taxing authorities of your country?

As of today, Mexican taxpayers have the obligation to submit on a monthly basis certain accounting information on the Tax Administration Service platforms. Recent tax reforms further introduced an electronic accounting system under which the tax authorities will be able to receive, in real time, the month-to-month accounting records of taxpayers. This new system complements the traditional information gathering methods used by the Mexican tax authorities, such as informative tax returns, electronic invoicing and information exchange treaties. It is expected that this new system will significantly enhance the tax review and audit capabilities of the tax authorities.

In the international arena, on October 29, 2014, the Mexican Tax Administration Service signed the Multilateral Convention of Administrative Assistance on Tax Matters. This convention will enter into force as of September 2017, providing the Mexican Tax Authorities access to information of their tax residents in multiple jurisdictions. This new treaty continues the trend of the

authorities entering into comprehensive and automatic exchange information agreements that will allow them to regularly receive executable information from foreign governments, the most important instrument being the bilateral information exchange agreement signed with the United States as a result of the FATCA (US Foreign Account Tax Compliance Act).

Question 12. Please provide any other useful information not covered in the above questions.

Unfortunately, Mexican legislation on this topic is very scarce and basic. Clients and attorneys accustomed to practicing in the US will be particularly surprised at how vague Mexican provisions are in this area; for example, there is no regulation in *Kovel* Letter type of arrangements, Circular 230 type of disclosures or the work product doctrine. It is unclear what effect, if any, these types of legal protections would have in Mexico in a cross-border scenario.

¹ Article 36 of the Federal Law that regulates Article 5 of the Constitution concerning the Provision of Professional Services in the Federal District.

² Article 243-Bis of the Federal Code for Criminal Procedures 211 of the Federal Criminal Code.

³ Articles 89 and 90 of the Federal Tax Code.

⁴ Article 91-A and 91-B of the Federal Tax Code.

⁵ Article 362 of the National Criminal Procedure Code

⁶ Article 34 of the Federal Tax Code

The Netherlands



The Netherlands

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Question 1. What discovery protections, if any, apply to the giving of tax advice in your respective country?

Although there is a general obligation under Dutch tax law to submit information to the Dutch tax authorities in relation to the tax position of third parties, the law provides a number of exceptions for specifically named professionals that can refuse to comply with this obligation: attorneys, civil notaries, clergy, physicians and pharmacists.

Tax advisors do not have a legal or formal right of nondisclosure, but do have an informal right of nondisclosure. In contrast to attorneys, tax advisors are not legally protected in the Netherlands; consequently, their profession is not governed by statutory regulations. The major professional associations of tax advisors in the Netherlands are aware of this, and their members are subject to codes of professional conduct and disciplinary proceedings. What these codes of professional conduct have in common is that they oblige tax advisors to observe confidentiality in the practice of their profession. As a rule, the general terms and conditions of a tax advisory firm also include a confidentiality obligation, whereby clients can assume that their tax advisor will not disclose any information they provide.

The legislator has acknowledged that taxpayers must have the opportunity to consult in a confidential manner with their tax advisors. For this reason, tax advisors are aware of the limitation of the obligation to provide information, also mentioned as the informal right of nondisclosure. The informal right of nondisclosure should relate to advice provided in the context of exercising one's profession. According to the legislative history, the scope of the

informal right of nondisclosure of tax advisors covers tax advice (including facts and analysis) and other tax reports (such as second opinions) issued in the context of the exercise of their profession, confidential consultations with the client and other correspondence with the client.

On the basis of a judgment of the Dutch Supreme Court, the informal right of nondisclosure also relates to "mixed documents," like a due diligence report. The Supreme Court referred to the principle as one of fair play; otherwise the taxing authorities would obtain an unfair advantage over the taxpayer, being familiar with the tax analyses and arguments compiled based on the facts. The informal right of nondisclosure also applies to accountants, unless it concerns documents and communications prepared for the purposes of preparing tax returns.

The tax advisor's informal right of nondisclosure is based on a relationship of trust with the client. This relationship does not exist for in-house counsel. Therefore, the Deputy Minister of Finance pointed out that in-house counsel do not have an informal right of nondisclosure.

According to the Dutch Supreme Court, information obtained by the Dutch Tax and Customs Administration in violation of the duties of confidentiality is illegally obtained and cannot be used in tax proceedings. Tax advisors breaching their duties of confidentiality may be subject to professional discipline.

Question 2. How, if at all, is "tax advice" defined in your respective country?

"Tax advice" is not statutorily defined in the Netherlands.

Question 3. Are there any categories of information that are explicitly not subject to protection?

Factual information prepared by tax advisors for the purposes of preparing tax returns is not subject to protection. Apart from that, tax advice and related correspondence are not subject to protection in the context of the detection of criminal or fraudulent offenses by the Fiscal Intelligence and Investigation Service & Economic Investigation Service (FIOD-ECD), the department of the tax authorities which investigates fiscal criminal offenses under the supervision of the public prosecutor. The legislator has chosen to give the public interest of combatting criminal or fraudulent offenses priority over the interest of the individual. The position of attorneys-at-law is different, because of their formal right of nondisclosure.

Question 4. Is tax advice prepared in anticipation of a controversy with the taxing authorities protected from disclosure under a work product doctrine or litigation privilege?

The fact that tax advice is prepared in anticipation of controversy with the taxing authorities makes no difference for the protection from disclosure; the same rules apply. Dutch law does not provide for a separate and distinct privilege like a work product doctrine. However, as noted above, neither the tax advisor nor the taxpayer can be obliged to submit tax advice and opinions to the authorities during a tax audit or tax procedures.

Apart from that, there is a limitation on the powers of the tax authorities to obtain documents once a case is filed in court. Before a case is filed in court, the tax inspector is allowed to demand factual information and documents that could be relevant to the taxation of the taxpayer involved (but no tax advice or opinions). The Dutch Supreme Court has ruled that, from the moment the case is filed in court, the dispute is governed by the general principles of procedural law. This implies that the taxpayer does not have the obligation to provide information that could be relevant to his own taxation during the procedure before the court. However, the tax authorities have the right to ask for information from third parties during the procedure in court.

Question 5. Are tax accrual work papers afforded the same privileges?

The starting point is that the privilege relates to tax advice and correspondence with the client provided in the context of exercising one's profession as tax advisor. If tax accrual work papers possess this kind of information, they fall within the scope of the privilege.

Question 6. Does the taxing authority in your respective country generally request tax advice and opinions from taxpayers during an audit or litigation?

As mentioned above, based on a judgment of the Dutch Supreme Court, neither the tax advisor nor the taxpayer can be obliged to submit tax advice and opinions to the authorities during a tax



audit or tax procedures. The tax inspector should be aware of this. Of course, in some situations the tax inspector requests tax advice and opinions, but the taxpayer can either refuse or submit the information voluntarily. In our opinion, the tax inspector should make clear to the taxpayer that he is not obliged to submit this kind of information.

Question 7. Do the same privileges and protections apply in criminal proceedings?

As mentioned above, in the case of criminal proceedings, the informal right of nondisclosure has no significance. A tax advisor or accountant cannot appeal to this right in order to prevent the tax authorities (including the FIOD-ECD) from taking possession of provided advice, correspondence conducted with the client or information relating to tax advice. However, the Dutch Supreme Court has determined that, given the nature and complexity of certain matters, an attorney-at-law may consider it necessary for the proper performance of his duties to empower an external expert. In such capacity, a tax advisor or accountant may have a derived right of nondisclosure.

With regard to the taxpayer, the principle applies that the suspect does not need to contribute to incriminating himself. The suspect has the right to remain silent, which derives from Article 6 of the European Convention on Human Rights.

A statement which has been made to comply with the obligation to provide information about the taxpayer cannot be used as evidence for the basis of a punishment. This is not possible even if, at the time statement was made, no criminal proceedings had yet been instituted. The Dutch Supreme Court has confirmed that the right to remain silent does not preclude the obligation to provide information for tax purposes (during a tax audit). When it concerns material which does not exist independent of the will of the suspect, the tax inspector may only use

his powers with the restriction that the material supplied will be used solely for the purposes of taxation (and not for imposing a fine).

Question 8. Under what circumstances does a taxpayer waive a privilege or protection?

β In the Netherlands, the informal right of nondisclosure rests with the tax advisor and also with the taxpayer. The codes of professional conduct of the major professional associations of tax advisors in the Netherlands have in common that they oblige tax advisors to observe confidentiality in the practice of their profession. Only if the taxpayer agrees may the tax advisor disclose information to other parties. Concerning the formal right of nondisclosure of attorneys-at-law arising under Dutch law, the same applies.

Question 9. What types of penalty protection are available and how are those protections properly asserted or maintained?

The Dutch Supreme Court has held that a taxpayer cannot be fined if it appears that he has not fulfilled his tax obligations as a result of intent or gross negligence of the tax advisor. Since this judgment, it is no longer possible to impute intent and gross negligence of the tax advisor to the taxpayer whose tax accounting thereby proved to be incorrect. The penalty is a punishment within the scope of Article 6 of the European Convention on Human Rights, and such punishment can only be imposed on the taxpayer if he is liable. The taxpayer is obligated to investigate that he is relying upon a qualified tax advisor to prevent liability (see also answer to Question 10 below).

Question 10. Under what circumstances may a taxpayer rely on a qualified tax advisor or professional tax opinion?

A taxpayer may claim reliance on a qualified tax advisor to avoid penalties. However, the fact that the tax advisor can be liable for intent or gross negligence may indicate that the taxpayer can also possibly be liable for intent or gross negligence. In this context, it is important that the taxpayer can establish that (i) he has thoroughly researched the consulted advisor and the advisor is a competent professional that had sufficient expertise, and (ii) the taxpayer informed the tax advisor of all facts relevant to the tax treatment. Therefore, a taxpayer should disclose all facts and circumstances to its tax advisor. In this respect, what is requested of the taxpayer varies from case to case, for example, according to the capacity of the taxpayer and the knowledge and experience of the relevant tax issues.

The obligation to furnish the facts and the onus of proof falls on the inspector. According to case law, the taxpayer may be shown to have intent if he disregards a tax advisor's warnings or if he is aware of the fact that too little tax has been paid but did not take effective action to prevent it. If the taxpayer has met the conditions mentioned above, it can rely on the tax opinion of the tax advisor.

Question 11. What practices and trends are being observed with respect to the sharing or gathering of information (both domestically and internationally) by the taxing authorities of your country?

The exchange of information is governed by provisions in several bilateral treaties, multilateral treaties such as the Convention on Mutual Administrative Assistance in Tax Matters, and EU Directive 2011/16 on administrative cooperation in the field of taxation.

In the context of fiscal transparency and measures against international tax evasion, the sharing of information is becoming increasingly important.

The Netherlands is one of the leading countries in the fight against international tax evasion.

The Netherlands has concluded an agreement with the United States making possible an automatic exchange of data between the taxing authorities of both countries, implementing the US Foreign Account Tax Compliance Act (FATCA). From September 2015, the Dutch Tax and Customs Administration will automatically exchange data with the US Internal Revenue Service. The Tax and Customs Administration will also receive data about Dutch taxpayers from the US.

Moreover, the Netherlands has signed a declaration with fifty other countries committing the signatories to exchange tax information automatically. The Dutch taxing authorities will report information to the Tax and Customs Administration (just as they do for the

purpose of FATCA). The Tax and Customs Administration will then automatically pass this information on to the countries that have undertaken to comply with the Community Reporting Standard (CRS). As of September 2017, the Dutch taxing authorities will exchange financial information with tax administrations in the first group of countries to sign the declaration under the CRS. The information exchanged will concern 2016. From January 1, 2016, Dutch financial institutions must identify their customers under the CRS, and check where they are resident and where they may be liable to pay income tax. Both individuals and businesses must be identified and, if necessary, reported on.

A development affecting all thirty-four member countries of the Organization for Economic Cooperation and Development (OECD), including the Netherlands, is the

recently released Action Plan on Base Erosion and Profit Shifting (BEPS), which is spearheading the initiative toward greater cooperation and transparency among revenue agencies globally. Earlier this year, the OECD issued a discussion draft on transfer pricing documentation and country-by-country reporting, which identified the development of improved transfer pricing documentation standards. The discussion draft focused on the importance of standardized contemporaneous documentation requirements to support the taxpayer's transfer pricing return positions under the arm's-length principle. Practitioners and multinational business enterprises would be well-served to monitor these documentation developments as the movement towards a multijurisdictional approach for many international tax issues, including transfer pricing, continues.



Poland



Poland

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Question 1. What discovery protections, if any, apply to the giving of tax advice in your respective country?

In Poland, tax advice is generally privileged and protected from disclosure to the taxing authorities when rendered by a certified tax advisor, a legal counsel or an advocate.

In addition to the privileges described above, the professional rules of ethics governing Polish lawyers require strict confidentiality with respect to all information related to the client, even if it does not meet the four elements of attorney-client privileged communications. Confidential communications include non-legal communications, business advice and investment advice, which are not necessarily privileged.

a. Is tax advice protected from disclosure to the taxing authorities?

The attorney-client privilege protects confidential communications relating to legal advice between clients and their lawyers. The privilege covers communications that satisfy the following elements: (1) made between privileged parties; (2) in connection with legal services; (3) made in confidence; and (4) not waived through voluntary disclosure to a non-privileged third party. This privilege applies also to confidential communications between clients and their foreign-licensed lawyers from the European Union, as well as from third countries, that were registered on the list maintained by a district advocates' council (Okręgowa Rada Adwokacka) or regional chamber of legal counsel (Okręgowa Izba Radców Prawnych).

b. Is tax advice obtained from certified accountants or other qualified non-lawyers protected from disclosure to the taxing authorities?

The attorney-client privilege extends to communications with agents of the advisor or the client who facilitate the representation. However, the privilege generally does not extend to communications with certified accountants or other qualified non-lawyers (e.g., tax return preparers).

c. Is there a distinction between the role of tax return preparers and tax advisors?

The privilege generally does not protect the preparation of tax returns, since once the return is filed the preparer and taxpayer implicitly waive any call on confidentiality (other than, arguably, whatever may have been communicated between preparer and taxpayer on how to disclose the income in the return, e.g., source documents, information from meetings, business information and emails, notes, return drafts or written opinions/recommendations that were produced for the purpose of the return's preparation).

d. Is advice from in-house counsel protected, or are protections, if any, limited to advice from outside professionals?

Communications with in-house counsel are not privileged merely because the in-house counsel is an attorney. Instead, the privilege applies only to communications with in-house counsel that are (1) made for the specific purpose of securing legal advice for the corporation-client; (2) within the scope of the communicating employee's duties; and (3) intended to be, and were in fact, kept confidential.

e. What are the consequences of an unlawful breach of the privileges and protections of tax advice? Are there certain technicalities that are more highly sanctioned by the courts?

Certified tax advisors, legal counsel and advocates breaching their duties of confidentiality may be exposed to professional discipline and civil liability.

Question 2. How, if at all, is "tax advice" defined in your respective country?

"Tax advice" is statutorily defined in Poland by the Law on Tax Advisory Services (art. 2 ust. 1 pkt 1). Tax advice is given to taxpayers and tax remitters, and relates to the scope of their tax, excise duty and all other liabilities to public levies, and administrative enforcement matters related to these obligations. Tax return preparation is another form of tax advisory services and usually is not privileged as tax advice. However, tax advice is very often related to a tax return and the distinction between tax advice and tax return preparation materials is often intricate.

Question 3. Are there any categories of information that are explicitly not subject to protection?

The abovementioned privilege does not apply to information specified in the act on the prevention of money laundering and terrorist financing. Communication loses its privilege if it involves any of the 19 types of criminal offenses (e.g., fraud) enumerated by law. In such cases, the government has the right of access to attorney-client communications even if the lawyer is not aware of the reason or purpose.

Question 4. Is tax advice prepared in anticipation of a controversy with the taxing authorities protected from disclosure under a work product doctrine or litigation privilege?

Tax advice in Poland is protected from disclosure under a work product doctrine or litigation privilege only if being prepared or just collected in anticipation of a controversy by a privileged party (i.e., a certified tax advisor, legal counsel, or an advocate). It contains all materials prepared by the privileged party or only the collected materials also if prepared by a non-privileged party. A court has the power to override work product protection only if the materials are not in the possession of and not produced by a privileged party during a court trial or criminal investigation.

Question 5. Are tax accrual work papers afforded the same privileges?

The attorney-client privilege generally does not protect tax accrual work papers because they do not necessarily contain legal advice. Even if the attorney-client privilege applies, the tax authorities are

likely to argue that the taxpayer has waived that privilege by disclosure to an independent auditor, depending on the factual circumstances.

Question 6. Does the taxing authority in your respective country generally request tax advice and opinions from taxpayers during an audit or litigation?

Polish tax authorities generally do not request tax advice or opinions from taxpayers during audits or litigation.

a. Can privileges be asserted in the course of all discovery requests by the taxing authorities, including audit queries, or only in court proceedings?

Attorney-client privilege protection can be asserted at any time, including as early as in response to an informal request during an examination, and throughout an administrative appeal, litigation and a judicial appeal.

Question 7. Do the same privileges and protections apply in criminal proceedings?

The attorney-client privilege generally should apply in criminal cases without any exceptions and can be asserted at any time.

However, there is a criminal procedure regulation that is inconsistent with this rule and lowers the level of tax advice protection. That rule allows the court to waive the privilege and cross-examine certified tax advisors, legal counsel and advocates regarding facts protected by privilege under general conditions if: (1) it is deemed to be essential for the justice system's greater good, and (2) the circumstance cannot be established on the basis of any other evidence. This inconsistency is being solved on case-by-case basis.

Question 8. Under what circumstances does a taxpayer waive a privilege or protection?

The taxpayer may waive attorney-client privilege through any voluntary disclosure to a non-privileged third party. Such disclosure may result in a waiver of privilege as to all other communications on the same subject.

a. Does a taxpayer waive privilege by disclosing legal advice to their return preparer in order to justify a filing position?



Taxpayers may waive privilege by disclosing tax advice to their return preparers in order to enable them to arrange tax settlements correctly, but not for the purpose of justifying the tax position they may have adopted.

b. Does a taxpayer waive privilege by disclosing legal advice to parties to a common commercial transaction?

Taxpayers may also waive privilege by disclosing legal advice to parties to a common commercial transaction. For instance, that may occur when applying for external financing for projects. Financial institutions often require sight of such legal papers and, in some situations, demand the issuance of a reliance letter.

c. Is tax advice shared only between attorneys afforded greater or lesser protection than advice shared with the client?

In general, tax advice shared only between attorneys is afforded a greater degree of protection than advice shared with the client. As a rule, attorneys are not authorized to share tax or legal advice, unless otherwise instructed by the client. Consultations between attorneys representing the same party do not require the client's consent and the communications remain privileged despite the client's absence.

Question 9. What types of penalty protection are available and how are those protections properly asserted or maintained?

In the transfer-pricing sphere, maintaining contemporaneous transfer pricing documentation mitigates a taxpayer's penalty exposure. There are, however, certain procedural requirements that must be satisfied. For instance, the taxpayer must make the documentation available to the tax authorities within seven days of a request.

A written tax opinion might be essential evidence in a criminal tax proceeding. It usually demonstrates that the taxpayer acted in good faith, relying on the given professional legal or tax advice. Thus, in such cases it should mitigate criminal tax liability.

A common taxpayer practice to avoid criminal consequences of omissions and unlawful actions is voluntary disclosure. This takes the form of a written statement to the tax authorities, in which the taxpayer should explain (1) what type of activity she performed or neglected (e.g., failure to submit a tax return within the prescribed time); (2) the reasons for the default or negligence; and (3) an indication of the persons responsible. A voluntary disclosure should be effectively filed before the tax authorities discover the offense. The application allows the taxpayer to avoid criminal consequences, but the taxpayer must also rectify whatever culpable act she may have committed (e.g., by submitting a tax return and settling tax arrears).

Raising a defense of reliance may be deemed to be tantamount to a waiver of the applicable privilege and protection status of the tax advice.

Question 10. Under what circumstances may a taxpayer rely on a qualified tax advisor or professional tax opinion?

A taxpayer may claim reliance on a qualified tax advisor's opinion/information/memorandum to mitigate criminal penalties. There are no special requirements, but to use this defense, the taxpayer must establish that (1) the advisor was a qualified professional; (2) the taxpayer provided complete and accurate information to the advisor; and (3) the taxpayer actually relied in good faith on the advisor.

The advice may only be relied upon if it was based on all pertinent facts and circumstances, and on the law as it relates to those facts and circumstances. Thus, a taxpayer should disclose all

the facts and circumstances to his tax advisor. A tax advisor must also take into account the taxpayer's business purposes (and consider the relative weight of such purposes) for entering into a transaction and structuring a transaction in a particular manner. Further, the tax advisor may not base advice on unreasonable factual or legal assumptions, nor may the advisor unreasonably rely on information provided by the taxpayer or others.

Question 11. What practices and trends are being observed with respect to the sharing or gathering of information (both domestically and internationally) by the taxing authorities of your country?

With the increasing prevalence of complex, cross-border transactions with multijurisdictional tax consequences, the Polish tax authorities are increasingly obtaining information about taxpayers from foreign institutions under Double Tax Treaty regulations.

A draft of the amendment to the Polish Tax Code was recently released and provides for an even more simplified exchange of tax information with countries of the European Union. The current exchange, which requires an application from a government, will be supported by the automatic exchange of tax information.

Question 12. Please provide any other useful information not covered in the above questions.

The Polish government endorsed the new OECD/G20 standard on the automatic exchange of information on October 29, 2014, by signing a Multilateral Competent Authority Agreement. This new standard provides for the automatic exchange of all financial information on an annual basis. Poland is to undertake the first exchanges by 2017.

Romania



Romania

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Question 1. What discovery protections, if any, apply to the giving of tax advice in your respective country?

a. Is tax advice protected from disclosure to the taxing authorities?

Yes. Any legal advice, including tax advice, is protected from disclosure from tax authorities. Tax authorities must respect attorney-client privilege and professional secrecy, as tax advice is considered to be confidential information. However, the privilege benefits the client, who may decide to waive it.

b. Is tax advice obtained from certified accountants or other qualified non-lawyers protected from disclosure to the taxing authorities?

Tax advice from certified accountants is similarly protected from disclosure under Romanian secrecy laws. While advice from certified accountants or other qualified non-lawyers does benefit from a more or less similar degree of confidentiality, the same caveat should be made with regard to waiving such privilege.

c. Is there a distinction between the role of tax return preparers and tax advisors?

Tax return preparers do not necessarily offer tax advice. Instead, they generally prepare the tax return. The work of tax return preparers is also protected from disclosure under the same principles of secrecy, as stipulated in Article 1.d of the Code of Conduct of tax return preparers.

d. Is advice from in-house counsel protected, or are protections, if any, limited to advice from outside professionals?

Yes, advice from in-house counsel is also protected.

e. What are the consequences of an unlawful breach of the privileges and protections of tax advice? Are there certain technicalities that are more highly sanctioned by the courts?

Recent criminal legislation penalizes the use of evidence obtained unlawfully in the sense that it cannot be used in criminal cases. While the main standard may be argued to be applied in administrative procedures, it is arguable that the same sanction may be applied in civil proceedings. Furthermore, a tax professional may be liable to the client for any breach and a claim for damages can be brought against the professional.

Question 2. How, if at all, is "tax advice" defined in your respective country?

Government Ordinance 71/2001 is the principal norm defining "tax consultants." Article 3 of this norm defines "tax advice activities" as follows:

- (1) The tax advice consists of:
 - a) assistance and professional services in the field of taxation;
 - b) the provision of services and specialized assistance for the preparation of tax returns;
 - c) certification of tax returns according to the applicable legislation;

- d) assistance and services with regard to tax procedural issues;
- e) assistance in preparing the documentation for redress against debt securities and other administrative acts;
- f) assistance and representation before tax authorities, including specialized assistance during the course of the tax audit;
- g) drafting tax reports as court experts at the request of the judiciary, criminal investigation bodies or stakeholders. [...]
- h) comparing as tax expert at the request of tax authorities or any other person or entity concerned;
- i) support the general government debt with the legal provisions in force;
- j) tax assistance in proceedings before a judicial authority [...]

However, this norm does not preclude lawyers from providing tax advice.

There has not been any substantial analysis of the above definition by the judiciary in case law. The above definition of "tax consultants" has been used by the judiciary for the exclusive purpose of nominating tax experts in a proceeding involving tax matters. Prior to the ordinance, a chartered accountant could serve as an expert. Pursuant to the ordinance, experts nominated by the courts in tax proceedings must be certified tax consultants.

Question 3. Are there any categories of information that are explicitly not subject to protection?

No.



Question 4. Is tax advice prepared in anticipation of a controversy with the taxing authorities protected from disclosure under a work product doctrine or litigation privilege?

Please see our answer at 1.a above. Tax advice is considered to be a professional secret. Whether litigation is anticipated is irrelevant because the advice is protected regardless, and, as explained above, it is protected whether it is rendered by an attorney, non-lawyer certified accountant or tax return preparer. As such, there is no distinction under Romanian law when a client is preparing for litigation or controversy.

Question 5. Are tax accrual work papers afforded the same privileges?

Yes. Tax accrual work papers are considered to be part of the tax advice.

Question 6. Does the taxing authority in your respective country generally request tax advice and opinions from taxpayers during an audit or litigation?

No. Taxing authorities in Romania have in-house jurists who give tax advice and do all the work in respect to tax issues. The taxing authorities do not request or review the taxpayer's analysis when conducting their review. They simply issue tax decisions obliging the taxpayers to pay the amount determined.

a. Can privileges be asserted in the course of all discovery requests by the taxing authorities, including audit queries, or only in court proceedings?

Yes, privileges may be asserted in the course of discovery requests, in the event such requests are addressed to professionals. However, this hardly ever happens since tax authorities request documents from the audited entity itself

and since the taxing authorities do not request tax advice. Thus, documents reflecting tax advice are not disclosed to the authorities unless favorable to the taxpayer. In those cases, the privilege benefiting the taxpayer is waived.

Question 7. Do the same privileges and protections apply in criminal proceedings?

Arguably, tax advice is offered more protection in a criminal case. Please see our answer at 1.e.

No. Tax authorities do tend to adopt an abusive position, but this is not due to the above administrative/criminal distinction. Instead, it is due to the general and constant need of funds to the state budget, and hence, the taxpayer's position is often ignored, requiring the taxpayer to contest in court any decision issued by the tax authorities.



Question 8. Under what circumstances does a taxpayer waive a privilege or protection?

Taxpayers can waive privilege or protection by specifically disclosing information protected by professional secrecy to make claims in tort against the advisor. In practice this hardly ever happens.

In principle a taxpayer does not waive privilege by disclosing legal advice to parties to a common transaction, since, as said above, the privilege benefits the taxpayer. However, to the extent the disclosure becomes public (in the sense that it becomes widely spread), an argument can be made that privilege has been waived.

Tax advice shared between attorneys is afforded the same level of protection. When two attorneys represent a common client, the client need not be present. However, the communication must strictly refer to the client to maintain protection, and to the extent advice is exchanged for theoretical purposes, it does not benefit from protection.

Question 9. What types of penalty protection are available and how are those protections properly asserted or maintained?

A taxpayer cannot use the advice received from a tax advisor as an excuse to avoid penalties. However, a discussion can be made, with respect to the liability of the tax advisor, in the case of malpractice. In this situation, the taxpayer would still have the obligation to pay the penalties, but should be able to oblige the tax advisor to cover the created damages, in a separate malpractice case.

Question 10. Under what circumstances may a taxpayer rely on a qualified tax advisor or professional tax opinion?

A taxpayer relies on a qualified tax advisor or a professional tax opinion if he or she specifically seeks certain advice. Often, in order to avoid recourse, tax advisors provide a wide array of

disclaimers. It is difficult to assess to what extent, in practice, a claim for damages would be successful.

Question 11. What practices and trends are being observed with respect to the sharing or gathering of information (both domestically and internationally) by the taxing authorities of your country?

Taxing authorities in Romania apply the exchange of information (EOI) procedures by cooperating with taxing authorities from other countries, in order to obtain and supply information. Exchange of information has become more and more frequent.

Russia



Russia

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Question 1. What discovery protections, if any, apply to the giving of tax advice in your respective country?

There are no special statutory rules, case law or any other kind of protection rules with specific regard to tax advice and the relationships between tax advisors and their clients. Specific regulations about the legal status of and professional requirements for tax advisors are yet to be adopted in Russia. For this reason, tax advisors, on the one hand, do not suffer from any strict binding regulations (or, to put it bluntly, any regulations at all) or penalties, except for criminal liability for acting as an accomplice to creators of "tax schemes." However, on the other hand, they do not enjoy any special privileges, including protection from disclosure of their professional advice.

Protection available to taxpayers is, therefore, limited by general professional privileges conferred upon attorneys-at-law admitted to the Russian Bar, certified auditors, notary publics, medical doctors and clergymen. However, in Russia many tax advisors do not have the status of an attorney-at-law or a certified auditor, since there is no mandatory requirement that tax advisors or even law practitioners in general (save for some specific areas of legal work, such as criminal defense and trademarks) must obtain this status in order to render their services.

Likewise, in-house lawyers or tax advisors also do not enjoy any kind of protection. Trade secrecy is not a barrier to a tax authority demanding documentation or interrogating a company officer acting for his/her employer as a tax advisor.

In principle there is no distinction between tax advisors and tax return preparers

for the reason explained above, namely, the total absence of special regulations governing tax advisors' qualifications, activities and professional conduct.

It must be noted, however, that in practice tax authorities do not require taxpayers or tax advisors to disclose their tax advice and the problem with the absence of protection-from-disclosure rules is currently rather theoretical.

Question 2. How, if at all, is "tax advice" defined in your respective country?

At present, a legal definition of tax advice does not exist. There were some attempts by Russian MPs (members of parliament) to formalize a set of professional conduct rules for tax advisors, but they went no further than bringing a draft law before the State Duma.

Tax advice is regarded by courts as merely another type of consulting service. The question of privilege for tax advisors and tax advice has not been solved in court practice due to the practical nonexistence of such a question.

Question 3. Are there any categories of information that are explicitly not subject to protection?

There are indeed certain categories of information and documents that a taxpayer must demonstrate if requested by a tax authority to make use of tax benefits available to the taxpayer, but such documents and information are of an evidential nature (like value-added tax invoices, which are a must for VAT deductions).

There is no penalty for a failure to submit transfer pricing documentation to a tax authority in itself (save for a failure to submit general data on the controlled transactions and its parties), but in this case a taxpayer, firstly, runs the obvious risk that a tax authority will apply any transfer pricing method of its own choosing; and, secondly, is not exempt from liability for miscalculation of tax due under the application of transfer pricing rules.

Question 4. Is tax advice prepared in anticipation of a controversy with the taxing authorities protected from disclosure under a work product doctrine or litigation privilege?

The tax authorities are not entitled to demand the disclosure of tax advice given in anticipation of a controversy from a taxpayer, neither at an audit or pre-trial stage nor in court proceedings.

Under a court doctrine developed on the basis of a statutory rule, the powers of tax authorities are limited by the right to demand information about the facts of a taxpayer's business and financial life directly related to the accrual and calculation of taxes. For simplicity, this may be notionally called a "relevance doctrine."

It follows from this doctrine that, since tax advice given in anticipation of a controversy usually consists of an evaluation of the likely outcome of a controversy and a recommended strategy to be followed by a client as well as possible arguments in favor of the client's case, it does not represent a type of information a tax authority is entitled to request under the relevance doctrine.

In practice, tax authorities never demand that a taxpayer disclose the contents of tax advice provided in anticipation of a controversy.

Question 5. Are tax accrual work papers afforded the same privileges?

Tax accrual work papers are not subject to any regime different from that applied to other documentation in a taxpayer's possession, and are not afforded any extra protection.

A tax authority may ask a taxpayer for accrual work papers if the controversial matter is the manner of the tax calculation. In other cases, they are usually of no interest to the tax authority.

Question 6. Does the taxing authority in your respective country generally request tax advice and opinions from taxpayers during an audit or litigation?

The Russian taxing authority almost never requests tax advice and opinions from taxpayers during an audit or litigation. The tax authority may sometimes ask for opinions about a legal issue from widely recognized experts in other areas of law (for example, civil law) to support its opinion about some matters lying at the frontier of tax law and certain specific areas of law (for example, regarding the legal nature of a certain contract made by a taxpayer). But when it comes to pure matters of tax law, the tax authority would usually not venture so far as to pose questions related to the application of tax legislation to a taxpayer under audit, other taxpayers or highly reputed tax advisors. Such situations are very rare in Russian practice.

A more likely action of a tax authority in this respect would be a proposal

to a taxpayer during an audit to give explanations of facts or decisions connected with tax accrual.

a. Can privileges be asserted in the course of all discovery requests by the taxing authorities, including audit queries, or only in court proceedings?

If a tax authority request violates one of the professional privileges mentioned above, a taxpayer or another person who receives the request may immediately assert its privilege by refusing to answer the request with a reference to the relevant privilege.

Question 7. Do the same privileges and protections apply in criminal proceedings?

Tax advice is not eligible for any kind of specific privilege when discovered during a criminal investigation or considered as evidence in criminal proceedings. For instance, if a criminal investigator searched a taxpayer's office on the basis of a search warrant and found a tax memorandum revealing a tax scheme performed by a taxpayer, the investigator does not face any legal constraints preventing him from referring to it in court as proof of the taxpayer's guilt. Tax advice may thus be protected only if one of the general professional privileges mentioned above is present.

Furthermore, as clarified by the Supreme Court, a consultant who provides tax advice that may be considered to be suggesting a tax scheme or some elements of one, or in another manner promoting actions or deals that constitute tax evasion, the consultant may eventually face criminal liability as an accomplice to an actual perpetrator of tax evasion (i.e., the taxpayer that follows such advice).

Question 8. Under what circumstances does a taxpayer waive a privilege or protection?

a. Does a taxpayer waive privilege by disclosing legal advice to their return preparer in order to justify a filing position?

As no special protection from disclosure is provided by law to tax advice, there are no rules about what actions or decisions constitute a waiver of this protection.

b. Does a taxpayer waive privilege by disclosing legal advice to parties to a common commercial transaction?

For the same reason, there are no rules concerning the consequences of sharing tax advice with an actual or potential counterparty during commercial negotiations or discussions.

c. Is tax advice shared only between attorneys afforded greater or lesser protection than advice shared with the client?

Tax advice shared between an attorney-at-law and a colleague with the same legal status is still covered by general legal professional privilege. Tax advisors not admitted to the bar in that capacity do not enjoy this privilege, so sharing advice between them will neither improve nor worsen the safety of the client's data.

Question 9. What types of penalty protection are available and how are those protections properly asserted or maintained?

Save for transfer pricing documentation, there are no legally established penalty protections for taxpayers arising from obtaining a tax opinion or receiving tax advice. Therefore, from the viewpoint of purely legal consequences of obtaining tax advice, it does not matter whether such advice is provided by an internationally acclaimed tax advice law firm, a local attorney-at-law or just an

accountant familiar to a taxpayer. At any rate, demonstrating such an opinion to a tax authority will not result in release from liability for breaching the Russian Federation (RF) Tax Code.

The only way to obtain penalty protection is to refer a question on the application of an ambiguous provision of tax law to the Federal Tax Service or the Ministry of Finance. However, the latter authorities may, in practice, decline the request for advice on the ground that it is too specific or may give an ambiguous answer themselves. The taxpayer, therefore, has no guarantee of obtaining a suitable or certain answer regarding a taxation-related question.

It should be noted that, as the list of mitigating circumstances in tax cases is not exhaustive, a taxpayer may, in principle, bring a tax opinion before a court in an attempt to demonstrate that it acted in good faith and with due diligence in determining its tax liability

and the court may consider the opinion as a ground for lessening a fine for a tax offense. However, this would be totally at the court's discretion and the judge would also be free to completely disregard such a tax opinion as irrelevant.

By virtue of law, the preparation of transfer pricing documentation exempts a corporate taxpayer from a fine for a transfer pricing adjustment of its tax liability made by a tax authority. As new transfer pricing rules were adopted quite recently (January 1, 2012) and case law in relation to them is yet to be developed by courts, it is not presently clear to what extent transfer pricing documentation must be detailed and well-founded to serve as a legal safeguard from a tax fine.

Question 10. Under what circumstances may a taxpayer rely on a qualified tax advisor or professional tax opinion?

No special regulations are enacted which allow a taxpayer to rely on tax advice as a means of legal protection. As mentioned above, tax advisors are not subject to any binding regulations or a code of conduct and, consequently, there are no mandatory requirements concerning the form and substance of a tax opinion.

Question 11. What practices and trends are being observed with respect to the sharing or gathering of information (both domestically and internationally) by the taxing authorities of your country?

Tax authorities do not usually seek to discover tax advice provided to taxpayers and, therefore, do not utilize any special instruments to gain access to it, such as treaty requests.



Slovakia



Slovakia

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Question 1. What discovery protections, if any, apply to the giving of tax advice in your respective country?

a. Is tax advice protected from disclosure to the taxing authorities?

Generally, Slovak law does not address specific protection to tax advice. More specifically, in the course of a tax inspection, taxpayers are obliged to submit to tax authorities various documents such as income statements, balance sheets, accountancy notes and other documents showing economic and accountancy operations in a form required by tax authorities. This does not include tax advice. Furthermore, taxpayers are obliged to submit other documents which demonstrate their statements. Accordingly, if a document containing tax advice shows correctness and/or completeness of statements of a taxpayer, the taxpayer is obliged to submit this document to tax authorities. In addition, taxpayers are obliged to provide any required information to tax authorities upon their request. This can pertain to tax advice as well. As such, taxpayers may avoid the disclosure of tax advice by segregating files and documents so that those most likely subject to tax inspection do not contain tax advice.

b. Is tax advice obtained from certified accountants or other qualified non-lawyers protected from disclosure to the taxing authorities?

With respect to certified accountants or other qualified non-lawyers, the same as above applies herein.

c. Is there a distinction between the role of tax return preparers and tax advisors?

Yes. According to Slovak law, a distinction must be made between (i) an advocate, (ii) a consultant/accountant/tax return preparer and (iii) a tax advisor in connection with tax advisory services and disclosure requirements. An advocate is a person officially authorized to provide legal services in Slovakia, which includes also legal services relating to taxes. A consultant/accountant/tax return preparer provides consultancy services in the field of taxes (e.g., accountancy, tax return drafting, etc.) on the basis of a trade license only. Lastly, tax advisors are certified advisors who are officially authorized to provide tax advisory services, which also include tax planning and preparation of tax memoranda and tax opinions.

A person may be authorized to provide tax advisory services as a tax advisor if he fulfills various conditions including a requirement to have obtained a university degree in the field of law or economics or to be insured against professional misconduct. Tax advisors are administered by Slovak Act No. 78/1992 Coll. on Tax Advisors and Slovak Committee of Tax Advisors, as amended (Code on Tax Advisors) and are grouped in a Slovak committee of tax advisors that, namely, regulates their business conduct, provides for various educational events and imposes sanctions if unlawful conduct is performed by a tax advisor. Unlike tax return preparers, tax advisors are obliged not to disclose any information or circumstances they have come across in connection with the provision of tax advisory services unless approved by a client by written consent or instructed by a court. However,

this confidentiality obligation has no preference over the general obligation of individuals to prevent a criminal act and/or to report to relevant authorities that a criminal act has been committed.

In addition, Slovak law explicitly recognizes the term "tax secrecy," which refers to any information received in the course of the administration of taxes. Generally, any person (not only professionals) is obliged not to disclose such information except for reporting to, among other public authorities, the criminal office of the Slovak financial directory, procurator or police.

The Slovak Committee of Tax Advisors is authorized to impose sanctions of up to €33,000 to persons who provide tax advisory services without proper authorization. However, there is no clear-cut line between what can be considered tax advisory services on one hand and consultancy services relating to taxes on other hand. The latter is not regulated by the Code on Tax Advisors and can be simply provided by anyone who has obtained a relevant trade license.

d. Is advice from in-house counsel protected, or are protections, if any, limited to advice from outside professionals?

No. If in-house counsel provides tax advisory services to his employer, it is not regarded as tax advice given to a client and is therefore not regulated as tax advice under the Code on Tax Advisors.

e. What are the consequences of an unlawful breach of the privileges and protections of tax advice? Are there certain technicalities that are more highly sanctioned by the courts?

Generally, Slovak law does not address a specific protection to tax advice.

Question 2. How, if at all, is "tax advice" defined in your respective country?

According to the Code on Tax Advisors, tax advice should be regarded as advisory in the field of taxes, social security and charges. Tax advice includes tax planning and preparation of tax memoranda and tax opinions. There is no notable case in this respect.

Question 3. Are there any categories of information that are explicitly not subject to protection?

Slovak law does not specifically address any category of documentation that would be explicitly outside the scope of information to be mandatorily disclosed to tax authorities by taxpayers. With respect to tax advisors, the Code on Tax Advisors obligates them not to disclose any information or circumstances they have come across in connection with the provision of tax advisory services unless approved by a client in a written notice, or instructed by a court. However, this confidentiality obligation has no preference over the general obligation of individuals to prevent a criminal act and/or to report to relevant authorities that a criminal act has been committed.

Question 4. Is tax advice prepared in anticipation of a controversy with the taxing authorities protected from disclosure under a work product doctrine or litigation privilege?

Slovak law does not specifically address this. Please refer to our answer under Question 1, point (a) above.

Question 5. Are tax accrual work papers afforded the same privileges?

Slovak law does not specifically address this. Please refer to our answer under Question 1, point (a) above.

Question 6. Does the taxing authority in your respective country generally request tax advice and opinions from taxpayers during an audit or litigation?

Generally no.

Question 7. Do the same privileges and protections apply in criminal proceedings?

Generally, there is no protection in criminal proceedings under Slovak law.

Question 8. Under what circumstances does a taxpayer waive a privilege or protection?

Slovak law does not specifically address any protection or privilege to legal advice towards tax authorities other than as described above with respect to Question 1, point (a).

Question 9. What types of penalty protection are available and how are those protections properly asserted or maintained?

Generally, the system of penalty protection is not very extensive in Slovak tax law. There is a mechanism of protection against penalties in the case of criminal acts that allows a taxpayer, if certain conditions are fulfilled, to be exempted from criminal investigation.

In addition, if a taxpayer fails to file a tax return or to pay the correct amount to tax authorities, an administrative penalty may be avoided if the taxpayer establishes that he has applied a relevant legal provision incorrectly (i.e., reliance on a qualified tax advisor or reliance on written tax opinions) and that incorrect application was the cause for the failure. Of course, in such case, the failure cannot take place due to the willful neglect of the taxpayer. Slovak law also provides a mechanism for decreasing the amount of the penalty, or even refraining from imposing a sanction based on a motion of the taxpayer, if certain conditions are fulfilled.

Question 10. Under what circumstances may a taxpayer rely on a qualified tax advisor or professional tax opinion?

Slovak law does not regulate the reliance of taxpayers on a qualified tax advisor or a professional tax opinion, other than as mentioned under Question 9 above. In addition, when a qualified tax opinion is given by a certified tax advisor, the tax advisor is bound by law (namely, by the Code on Tax Advisors) to preserve the rights and just interests of his or her clients, act honestly and carefully, use all legal means consistently and apply everything that he may consider as useful in his opinion and according to his client's instruction. If he does not follow these instructions, he may be subject to professional discipline and potential civil liability.

Additionally, a taxpayer may rely on the fact that the certified tax advisor is obliged to be insured against professional misconduct. In case such event occurs, the tax advisor is liable to the client for any damage incurred to him according to the Code on Tax Advisors. This does not apply in the case of consultants, accountants or tax return preparers, since there is no regulation in this respect.



Question 11. What practices and trends are being observed with respect to the sharing or gathering of information (both domestically and internationally) by the taxing authorities of your country?

Recently, we have observed that Slovak tax authorities inspect compliance with value-added tax rules more often than with other taxes and social security charges. This is mainly because of the tremendous amount of tax evasion with respect to VAT that has occurred in the last five to ten years, resulting in deficits of public finance.

In addition, given the increasing importance of avoiding profit-shifting, which has also become a significant issue for Slovakia in recent years, Slovak regulators have put additional pressure on the monitoring of transfer pricing documentation. Legislation has been changed, and new civil servants have been hired and trained to work closely with the transfer pricing agenda.

Spain



Spain

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Question 1. What discovery protections, if any, apply to the giving of tax advice in your respective country?

In Spain, there is no specific regulation for discovery protections for tax advisors. This fact has led to the application of the regulations stipulated for lawyers or economists, since most tax advisors belong to those professions.

a. Is tax advice protected from disclosure to the taxing authorities?

The main regulation covering attorney-client privilege and professional secrecy in our jurisdiction is stipulated in the Spanish Ethical Code and the Spanish Statutes of the Bar Association. They are included in the general frame of the “right to privacy” provided by the Spanish Constitution.

The attorney-client privilege protects any spoken or written information (i.e., communications, documents or correspondence) that the client reveals to the tax advisor or an external lawyer, opposing parties and other attorneys. This privilege involves all information of the client, even when it is public or notorious.

The mentioned privileges seem to have no limits, but under certain circumstances—such as if the information is related to money laundering or terrorism financing—attorney-client privilege and professional secrecy would be limited. Furthermore, neither privilege generally applies when a “bigger damage” can be caused. According to the Spanish Constitutional Court, the balance between the “bigger damage” and the privilege must be (i) appropriate, (ii) necessary and (iii) proportionate. For instance, phone

conversations and communications with prisoners or potential criminals may be intervened by the decision of a judge, always in the frame of the investigation of a potential crime.

b. Is tax advice obtained from certified accountants or other qualified non-lawyers protected from disclosure to the taxing authorities?

Certified accountants are also covered by the professional secrecy which protects their tax advice. Besides lawyers and tax advisors, certified accountants are also mentioned in the Anti-Money Laundering and Terrorist Financing (AML) legislation, but they have certain major obligations when tax authorities ask for documentation. According to the Spanish Supreme Court (*judgment June 7, 2003*), certified accountants have the obligation to collaborate with the tax authorities by providing them every document that is closely related with the compliance of taxes. However, when the documentation affects constitutional rights such as privacy or honor, these professionals will not be obliged to provide information at all. How this obligation affects tax advisors will be deeply analyzed in Question 3.

c. Is there a distinction between the role of tax return preparers and tax advisors?

The absence of a regulation of the profession of tax advisor in Spain creates certain difficulties in order to distinguish what are and are not their competencies. Therefore, there are no legal grounds to distinguish between a “tax return preparer” and a “tax advisor.”

d. Is advice from in-house counsel protected, or are protections, if any, limited to advice from outside professionals?

The protection of in-house lawyers deserves special attention because it’s understood differently. According to the European Court of Justice (ECJ) (*Akzo Nobel Chemicals Ltd. and Akcros Chemicals*), in-house lawyers are protected to a lesser extent than independent lawyers because the in-house information is not necessarily included within the scope of attorney-client privilege; professional secrecy is closely related to the independence of lawyers, and an in-house lawyer is not independent. Spanish courts usually analyze the independence based on the relationship that the in-house lawyer has with the company; usually they have a labor relationship, which implies dependence. Nevertheless, according to the ECJ doctrine, privileges for in-house lawyers should be analyzed on a case-by-case basis.

Most scholars do not agree with the ECJ; they maintain that attorney-client privilege should be applicable to in-house lawyers as well. This topic continues to remain ambiguous.

e. What are the consequences of an unlawful breach of the privileges and protections of tax advice? Are there certain technicalities that are more highly sanctioned by the courts?

Finally, there is no specific regulation about an unlawful breach of the privileges and protections of tax advice. However, the Spanish Lawyers Statute establishes that the Bar Association will start a disciplinary procedure to those lawyers who may breach their strict duties of confidentiality when exercising their profession. It would imply disciplinary procedures with potential sanctions and also may lead to civil liability, if the client files a claim.

Question 2. How, if at all, is "tax advice" defined in your respective country?

Although historically there have been some attempts and proposals to enact a statute for tax advisors, these have not succeeded. Therefore, there is no official definition of either "tax advice" or of the liability which a tax advisor may incur.

Tax advice is usually understood as the professional activity that relates to the interpretation and application of tax law, and includes also the support to the client before tax authorities and the courts, when the tax advisor is a lawyer. Tax advice includes tax planning, tax support in M&A transactions and in other disciplines of law. It may also include tax compliance.

Question 3. Are there any categories of information that are explicitly not subject to protection?

There are no specific categories of information that are explicitly not subject to protection. On the contrary, the exceptions relate to the "environment" where the information is included; that is to say, under certain circumstances, when there is a crime or there are grounds to suspect it, the tax advisor may have to report to the respective authorities. This is the case with respect to anti-money laundering and terrorism financing. In a nutshell, it implies the obligation to communicate to the Spanish AML authorities (i.e., the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences, the "SEPBLAC") any transaction that may be related to these potential crimes. Obviously the exception is when the client is seeking defense in a court. The privilege would also remain if the client wants some advice in order to regulate his/her legal situation. For more information see Question 7.

Where a qualified criminal tax fraud is the subject of a case, a judge can have access to the documents of the

tax lawyer or tax advisor, even if the professional was not aware of the purpose of committing a crime.

It is important to note that there is a provision in the Spanish General Tax Law specifying that everybody is obliged to provide the tax authorities every document with tax relevance when required; this is stipulated in order to prevent tax offenses. The problem comes when the required documentation interferes with the protection of professional secrecy and/or the right to privacy. In this respect, the Spanish Constitutional Court has ruled that requiring information about the client's name and the amount paid on fees does not violate the privacy right. However, there is no obligation to deliver other documents containing information affecting the private sphere of an individual.

For example, a tax advisor would be protected from disclosing information when some confidential client data is known due to professional advice or defense, like marital status, religious beliefs, etc. (the tax advisor would not be obliged to reveal that kind of private information, even when it is required by the tax authorities, because it is specially protected).

Question 4. Is tax advice prepared in anticipation of a controversy with the taxing authorities protected from disclosure under a work product doctrine or litigation privilege?

Although there is no specific regulation on this matter, tax advice in anticipation of a controversy with tax authorities would be regarded, according the Spanish Ethical Code and the Spanish Lawyer Statute, as information revealed to the lawyer. Thus, there are solid arguments that it should be protected by the attorney-client privilege, obviously subject to the general limits otherwise described in this article.

Question 5. Are tax accrual work papers afforded the same privileges?

There are no specific regulations about this topic. Like all other taxpayers, professionals (e.g., tax advisors, lawyers, accountants, etc.) are obliged, according to the Spanish General Tax Law, to provide tax-relevant information to the tax authorities as stated in response to Question 3 above. Certified accountants may have to report also as stated in response to Question 1, with wider obligations than lawyers.

Likewise, according to the Spanish Supreme Court case law (among others, *judgment October 30, 1996*), the information that can be requested shall contain an economic aspect (e.g., an amount, the concept of a payment, online bank transfers, etc.). By any means, the underlying reason of such economic information can be requested. In addition, intellectual or industrial property, business plans or "know-how" information are also protected.

Finally, the aforementioned professionals are not allowed to invoke their professional secrecy privilege to prevent checking their own tax obligations. This has been reinforced by the main Spanish Administrative Court (i.e., the Central Economic-Administrative Court).

Question 6. Does the taxing authority in your respective country generally request tax advice and opinions from taxpayers during an audit or litigation?

Spanish tax authorities do not usually request tax advice or opinions from taxpayers. Nevertheless, they can ask for information (as explained in response to Questions 3 and 5) in order to contrast data. For example, during a tax audit, tax authorities can request information from other taxpayers or counterparties to analyze it and verify if the audited person

is declaring the correct amounts and concepts of a particular transaction.

In addition, in some litigation proceedings, tax authorities submit expert appraisals but usually are made by civil servants of the Tax Administration, not independent ones.

Question 7. Do the same privileges and protections apply in criminal proceedings?

In general terms, professional secrecy and attorney-client privilege apply in criminal and civil proceedings. Nevertheless, under the AML legislation—implementation of an EU directive—tax advisors, attorneys and other professionals are obliged to disclose information protected by the attorney-client privilege under certain circumstances.

After a “client due diligence” analysis has been made by the tax advisor, he or she must report to the Spanish AML authorities (i.e., the Executive Service of the Commission for the Prevention

of Money Laundering and Monetary Offences) any event or transaction, even the mere attempt, which by its nature is related to money laundering or terrorist financing. In particular, tax advisors are obliged to inform about any transaction which reveals an obvious incongruity with the nature, the turnover or transaction history the client provided. In fact, there is a “catalogue” of traits and behaviors that are categorized as suspicious, such as familial relation to politicians, high cash payments, originating from an ex-Soviet republic, etc.

However, lawyers (as opposed to tax advisors) will not be obliged to report information that they receive from any client when ascertaining the legal position of their client or performing their duty of representing the client in judicial proceedings, including advice on instituting or avoiding proceedings, irrespective of whether such information was obtained before, during, or after such proceedings.

It’s important to mention that in December 2012, the European Court of Human Rights (ECHR) issued a judgment

which analyzed if the obligation placed on lawyers to report money laundering or terrorist financing acts constituted an interference with their right to respect attorney-client privilege and professional secrecy. In a nutshell, the ECHR held that subjecting lawyers to an obligation to report this kind of suspicious activities did not constitute “disproportionate interference with the professional privilege of lawyers” in view of the public interest involved against money laundering and terrorist financing.

Finally, in criminal matters, a judge or a court can order warrants when there are reasonable grounds that a criminal offense has been committed. This may enable Spanish authorities to obtain documentation or any kind of objects through seizure which are relevant in the investigation. The warrant decision must be reasonable and motivated. The authorization to enter in the domicile of the professional must be formally expressed and detailed (i.e., the order must express the particular building to be checked, the time frame and also the authority or official who has to practice it.). When required, the Bar Association



dean must attend such actions in order to protect professional secrecy to monitor the entry and the seizure.

Question 8. Under what circumstances does a taxpayer waive a privilege or protection?

In Spain, a client cannot waive the attorney-client privilege, because it is understood that this privilege not only protects the client, but also protects the lawyer and the whole society which relies on said profession. Similarly, the Spanish Ethical Code stipulates that the lawyer shall respect professional secrecy in any case, despite any consent provided by the client to waive it.

Question 9. What types of penalty protection are available and how are those protections properly asserted or maintained?

Broadly, tax advice does not usually absolve criminal or civil responsibility. Willful misconduct, negligence or guilt are conditions required to deem that a tax infraction has been committed and that can be subject to a tax penalty. The General Tax Code provides certain cases in which tax penalties would not be imposed: (i) when an individual has not voted or had not attended a meeting where a collective decision has been taken (e.g., a board of directors decision); (ii) when the taxpayer has acted with proper diligence or their interpretation of the law seems reasonable (i.e., when there is no administrative doctrine on a specific issue, but the wording or complexity of the law may support the approach taken by the taxpayer, or when the

taxpayers follows administrative doctrine established by the tax authorities); (iii) when the error is attributable to the software provided by the tax authorities; and (iv) when a taxpayer voluntarily regularizes his or her situation.

The Corporate Income Tax law provides high penalties when the compulsory documents related to transfer pricing are not prepared by the conclusion of the voluntary period for filing the annual corporate income tax return. On the contrary, they will be reduced if such documentation exists, even when it is not correct. Regarding the transfer pricing penalties, it is important to mention that a judgment of the Constitutional Court, issued in 2013, considered that the Spanish transfer pricing penalty was against the certainty and proportionality principles and, therefore, is not applicable.

Question 10. Under what circumstances may a taxpayer rely on a qualified tax advisor or professional tax opinion?

Both legal scholars and the case law demonstrate that tax advice is not a defense to a charge that can be attributed to a taxpayer; the latter is liable regardless of the potential liability that may correspond to the tax advisor.

Lawyers may incur civil liability if their tax advice damages the client but this civil liability only applies in cases of willful misconduct or negligence.

Question 11. What practices and trends are being observed with respect to the sharing

or gathering of information (both domestically and internationally) by the taxing authorities of your country?

Several practices attempt to face and eliminate tax fraud. Spain has an Exchange of Information clause in every Double Taxation Treaty signed with other countries. Spain has also signed tax information exchange agreements with some countries that traditionally have been considered tax havens, such as the Bahamas and Aruba. A very recent Information Exchange Agreement has been signed with the United States to improve international tax compliance and implementation of the Foreign Account Tax Compliance Act.

The treatment of this information is confidential and should only be used by the tax authorities for tax purposes. This exchange of information can be given on its own initiative or at the request of the interested country. Nowadays, the exchange of information in the EU is regulated by Directive 2011/16/UE, and the Spanish law reflects it in the General Tax Code and the implementing regulations.

In certain cases the automatic exchange of information works very well. This is the case with value-added tax (VAT) harmonized intra-communitarian transactions, in which every taxpayer files telematically their tax returns and can be checked with the reported information of the counterparty of the transaction.

Furthermore, in Spain many domestic measures regulate the exchange of information between the different Spanish administrations (e.g., central, local and autonomous region administration).

Switzerland



Switzerland

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Question 1. What discovery protections, if any, apply to the giving of tax advice in your respective country?

a. Is tax advice protected from disclosure to the taxing authorities?

In Switzerland, there are various legal bases that apply to tax advice and related information.

An initial consideration to take into account is the taxpayers' duty to collaborate in the taxing procedure. Therefore, it usually will not be possible to invoke bank secrecy or data protection to oppose the duty to provide information to the Tax Administration. One must indeed enable the administration to proceed on accurate and fair taxation. If the taxpayer breaches his duty to collaborate, he gives ground to the Tax Administration to apply taxation by estimation or even more serious action.

The administration's procedural capabilities vary depending on the type of tax at hand and on whether the facts of the case may constitute a criminal offense. For criminal procedures related to indirect taxes (value-added tax, withholding tax, stamp tax), the Tax Administration has access to a broad range of investigative tools. However, for direct taxes (income tax, wealth tax, capital taxes), the Cantonal Tax Administration's means to investigate a criminal offense are limited to those available to it in taxing procedures, and it cannot use any means of constraint (except in specific cases and subject to an ad hoc authorization of the government). In particular, it cannot access banking information. Cantonal Tax Administrations thus mostly rely on the taxpayer's obligation to collaborate, which does not apply in a criminal procedure.

In Switzerland, attorney-client privilege is much more restrictive than in most common law jurisdictions. As a result, the provision of tax advice may be privileged and protected from disclosure to the taxing authorities only when rendered by an attorney; in-house counsel, tax experts or other non-lawyer practitioners, however, do not benefit from this privilege.

The attorney-client privilege protects any potentially confidential communications between clients and their lawyers in the context of providing or receiving legal advice or representation. It extends to all work documents of the lawyer, including drafts and notes, as well as all facts regarding the lawyer's relationship with his clients, such as the existence of the mandate and relationship itself. The privilege does not, however, extend to written documents issued by third parties of which the attorney subsequently acquires possession.

The privilege covers legal advice which is given by a registered lawyer or an employee of the lawyer. Associates, secretaries, accountants, banks or other experts hired by the lawyer to assist him in the task are regarded as his auxiliaries, and therefore subject to the attorney-client privilege. The legal advice must however fall within the scope of the attorney's specific activities as a lawyer, usually described as legal representation and legal advice. Conversely, director or trustee mandates, as well as private asset or wealth administration services—such as the ones offered by banks or fiduciaries—are not covered by the attorney-client privilege.

As a result, a taxpayer can invoke attorney-client privilege for all documents or objects regarding contacts between an authorized attorney and the taxpayer. Similarly, attorneys can rightfully refuse to transfer documents, collaborate with an investigation or

testify against their clients in any type of proceeding. This is consistent with the attorney-client privilege's underlying purpose to encourage full and frank communications between attorneys and their clients and to thereby promote the broader public interest in guaranteeing access to and administration of justice.

Furthermore, attorneys are subject to the obligation of professional secrecy, meaning that, if an attorney were to breach her duty to keep some information secret, she would be liable to criminal sanction. The attorney is however allowed (but can never be obligated) to transfer privileged documents or information, if her client voluntarily waives his right to secrecy or if she has received authorization from the Bar Association.

b. Is tax advice obtained from certified accountants or other qualified non-lawyers protected from disclosure to the taxing authorities?

Usually, tax experts or any other qualified non-lawyer parties to a contract with a taxpayer are subject to a legal duty of confidentiality, due to their fiduciary position. They are also subject to the provisions relating to data protection.

However, they do not benefit from the same protection of the professional secrecy as attorneys. As a result, they must collaborate in any criminal law proceeding opened against one of their clients, and are required to make any document or information requested available to the competent authorities.

c. Is there a distinction between the role of tax return preparers and tax advisors?

The attorney's privilege extends to his auxiliaries, and should therefore apply equally to return preparation activities,

as long as it falls into the scope of an attorney's "typical activities." As of today, the notion of "typical activities of a lawyer" is not clearly defined under Swiss practice.

Be that as it may, no privilege applies for independent tax return preparers. They would nonetheless remain subject to a legal duty of confidentiality due to the fiduciary nature of the contract they entered into with their client.

d. Is advice from in-house counsel protected, or are protections, if any, limited to advice from outside professionals?

Communications between a corporation and its in-house counsel are not privileged, even if the in-house counsel is trained as an attorney. Although there was an attempt to enact legislation specifically affording attorney-client privilege to in-house counsel a few years ago, it never came to fruition. As of today, corporations seeking privileged advice should therefore turn to an independent attorney.

e. What are the consequences of an unlawful breach of the privileges and protections of tax advice? Are there certain technicalities that are more highly sanctioned by the courts?

In addition, professional rules of ethics, contract law, and data protection law governing Swiss lawyers and non-lawyer tax practitioners require strict confidentiality with respect to all information related to the relationship, even if it does not meet the conditions under which attorney-client privilege arises. Confidential communications include non-legal communications, business advice, and investment advice, which may not be privileged.

Lawyers breaching their duties may be subject to criminal and professional disciplinary sanctions, as well as potential civil liability.

Tax advisors in breach of their duty of confidentiality may be subject to professional discipline and potential civil liability.

Question 2. How, if at all, is "tax advice" defined in your respective country?

"Tax advice" is not statutorily defined in Switzerland.

Despite this, it is generally accepted that tax advice (involving interpretation of the law, application of the law to past events or to events to occur in the future, and structuring transactions to fulfill the tax objectives of the client), patrimonial advice and company structuring all fall within the definition of the typical activities of a lawyer, and are therefore privileged. Notwithstanding this broad definition, the scope of protection is largely unsettled, and will be examined based on the specific facts and circumstances of the case at hand.

Question 3. Are there any categories of information that are explicitly not subject to protection?

No category of tax-related information is explicitly excluded from the protection, as long as it falls within the definition of a lawyer's typical activity.

In particular, case law clearly shows that lawyers cannot use attorney-client privilege to avoid being investigated for



crimes they are suspected of themselves. Furthermore, a lawyer acting as a financial intermediary outside of his typical scope of activity has a duty to report suspicious transactions under domestic anti-money laundering legislation.

Question 4. Is tax advice prepared in anticipation of a controversy with the taxing authorities protected from disclosure under a work product doctrine or litigation privilege?

In Switzerland, neither legislation nor case-law provide for a distinct protection under a work product doctrine or litigation privilege. However, any tax advice prepared in anticipation of a controversy with the tax authorities would be privileged. As a result, most of the information that would be covered by work product doctrine or litigation privilege in other countries would fall under the scope of application of the attorney-client privilege.

Question 5. Are tax accrual work papers afforded the same privileges?

It is doubtful that such work would fall within the definition of a “typical activity” of the lawyer. Thus, such papers are likely not covered by privilege.

Question 6. Does the taxing authority in your respective country generally request tax advice and opinions from taxpayers during an audit or litigation?

As a matter of principle, the Tax Administration abstains from requesting privileged tax advice.

In Switzerland, the Cantonal Tax Administration’s means to investigate are usually limited, even for a criminal offense. In the case of tax evasion, for instance, the cantonal tax authorities lead the procedure, but cannot use any means of constraint. In particular, they cannot access privileged information (i.e., banking information or attorney-client privileged information). Cantonal Tax Administrations thus mostly rely on the taxpayer’s obligation to collaborate, which does not apply in a criminal procedure. Furthermore, where there is a well-founded suspicion of a serious tax crime (e.g., continued and serious tax evasion, forgeries and

misappropriation of withholding tax), the chief of the Federal Department of Finance (FDF) may authorize the Federal Tax Administration to lead an investigation with the collaboration of Cantonal Tax Administrations. In such cases, special investigative measures including search warrants, witness interrogation or even seizure may be taken.

For indirect taxes, the Tax Administration has numerous criminal law procedural tools at its disposal, such as search warrants, seizures or even arrests.

Nevertheless, even in the rare cases where the Tax Administration is allowed to issue a summons to taxpayers and third parties for the production of records relevant to taxation or an examination, such power to obtain information by summons must be exercised subject to the principle of proportionality and it is limited by attorney-client privilege and privacy protections.

a. Can privileges be asserted in the course of all discovery requests by the taxing authorities, including audit queries, or only in court proceedings?

Attorney-client privilege can be asserted at any time, including as early as the planning stage or in response to an informal request during an audit. The



privilege further applies throughout an administrative appeal, litigation and a judicial appeal.

Question 7. Do the same privileges and protections apply in criminal proceedings?

The attorney-client privilege applies equally in criminal, civil, and administrative cases.

Confidential communications between an attorney and client are nevertheless not protected if the lawyer is being prosecuted in the same case as his client. Furthermore, the lawyer cannot use attorney-client privilege in order to protect himself against prosecution for crimes he is suspected of having committed.

Search warrants may enable criminal or tax authorities to obtain taxpayers' records through seizure. In this connection, it is customary for lawyers to keep their files segregated depending on whether they are attorney-client privilege protected. In spite of this, documents seized may sometimes include records held by a taxpayer's attorney that would fall within the scope of his typical activities and thus be protected by attorney-client privilege. In such cases, law enforcement will be required—upon demand—to set up "taint team" procedures to segregate and protect attorney-client privileged information subject to a search warrant. If some documents are deemed necessary to the prosecution, they will usually be anonymized in order to protect the taxpayer's right to secrecy. To the extent that the authorities obtain incriminating information solely through improper access to a taxpayer's attorney-client privileged materials, the taxpayer may object that a prosecution or investigation is the "fruit of the poisonous tree," generally resulting in dismissal.

As a matter of principle, the Tax Administration does not use criminal proceedings to abusively try to obtain information or evidence against a taxpayer.

Question 8. Under what circumstances does a taxpayer waive a privilege or protection?

The attorney-client privilege extends to communications with external associates of the attorney. It also benefits third parties or the counterparty if the attorney acquires knowledge of confidential facts in relation with his mandate. However, if the information is transferred by another holder of the information (e.g., a bank, for instance in the context of an international exchange of information proceeding), attorney-client privilege does not apply.

The taxpayer may however waive the attorney-client privilege through any voluntary disclosure to a non-privileged third party or to the Tax Administration itself. The taxpayer may choose what documents/information he wishes to transfer to the administration, but once those documents have been transferred, any information they contain is no longer privileged.

Where documents have been disclosed to the Tax Administration, for instance in order to support a ruling request that would subsequently be rejected by the administration, disclosure of the documents is definitive. Nevertheless, tax officials are subject to a qualified official secrecy, which keeps them from disclosing any information received in their line of work. As a result, tax secrecy usually prevails within the Tax Administration as well.

a. Does a taxpayer waive privilege by disclosing legal advice to their return preparer in order to justify a filing position?

Disclosing privileged materials to a tax practitioner for tax return preparation purposes generally results in a waiver of the attorney-client privilege. For instance, if the taxpayer provides an independent tax return preparer with a legal opinion from his tax lawyer regarding the tax treatment of a transaction, such legal opinion will not be privileged in the hands of the return preparer, who may thus be

requested to provide the information to the tax administration.

On another hand, if the taxpayer only mentions some elements of the legal opinion to his return preparer, or if the taxpayer's lawyer himself hires and instructs the return preparer in the frame of his legal advice to his client, the privilege would apply and would not be waived.

b. Does a taxpayer waive privilege by disclosing legal advice to parties to a common commercial transaction?

The taxpayer must provide the Tax Administration with information relevant to establish taxation. Such information covers supporting evidence in relation with his business relationships and transactions. This includes in particular the names of the counterpart with whom the taxpayer has entered into business, the nature of the contractual relationship as well as the benefits and claims derived therefrom. Furthermore, pursuant to the case law, information provided by one taxpayer may also be used by the Tax Administration to implement taxation upon other taxpayers.

However, legal advice in this connection remains subject to attorney-client privilege, provided that the usual conditions are met. Conversely, if the taxpayer transfers a tax legal opinion directly to his business partner, then such document is deemed to have left the sphere of protection of the attorney-client privilege.

c. Is tax advice shared only between attorneys afforded greater or lesser protection than advice shared with the client?

In Switzerland, communications between lawyers are usually subject to secrecy under the customs of the bar, although it may vary depending on the canton. Thus, privileged and protected communications and documents shared between attorneys remain privileged.

Question 9. What types of penalty protection are available and how are those protections properly asserted or maintained?

Penalty protections are not codified under Swiss law. However the following considerations must be mentioned in this connection:

The Tax Administration has a practice of issuing “rulings,” usually providing the taxpayer with an established right, which can subsequently be opposed to the Tax Administration in order to implement the ruling.

Taxpayers can also oppose an estimated assessment procedure (automatic taxation) by arguing that they have complied with all procedural requirements (i.e., they provided the information necessary to their taxation), and if the taxable amount can therefore precisely be determined.

In criminal proceedings, the most common offense is tax evasion, which occurs most commonly when the taxpayer fails to submit a tax return or submits an incomplete one. When the Tax Administration intends to charge a taxpayer with tax evasion, it must demonstrate intent or negligence of the taxpayer. Naturally, a taxpayer can in turn establish good faith and due care by disclosing prior tax advice from a tax practitioner upon which the taxpayer could reasonably rely.

However, the Swiss approach to assessing the taxpayer’s responsibility in connection with tax evasion is quite severe. For instance, the Federal Court has decided that the mere fact that a taxpayer relied on a tax return preparer’s work is insufficient to avert liability. Furthermore, raising a defense of good faith by reliance on a tax lawyer’s advice will waive applicable privilege and protections for said tax advice.

Question 10. Under what circumstances may a taxpayer rely on a qualified tax advisor or professional tax opinion?

In Switzerland, a taxpayer may not avoid penalties merely by claiming reliance on a qualified tax advisor.

However, the fact that the taxpayer sought a tax opinion from a professional and followed his advice will help establish his good faith and therefore impair the authority’s ability to prove the taxpayer has intentionally committed a tax offense.

Although there are no specific requirements that a tax opinion must satisfy under Swiss law, specific knowledge of the area of expertise, as well as exercise of the degree of care and diligence required by the circumstances, are expected from professional tax advisors.

Furthermore, if the taxpayer were to incur damages in good faith due to poor advice from a tax advisor (whether a lawyer or a tax expert), the taxpayer would generally have a claim against his counsel to obtain reimbursement of such damages.

Question 11. What practices and trends are being observed with respect to the sharing or gathering of information (both domestically and internationally) by the taxing authorities of your country?

Historically, the Swiss Tax Administration has had a policy of restraint when it came to requesting tax information from its taxpayers. However, when foreign states apply under a treaty provision for a request of information regarding one of their taxpayers, the Tax Administration will typically undertake any necessary legal actions to gather and transfer the requested information.

In criminal procedures, a characteristic of Swiss law is that it makes a distinction between tax evasion and tax fraud. This distinction has direct consequences for international mutual legal assistance, as Switzerland only grants mutual legal assistance in criminal matters when the foreign procedure involves elements of a crime which are regarded as tax fraud in Switzerland (principle of dual criminality).

However, important changes in this area are in the process of being implemented in Switzerland, and it is expected that, within the next five years, major changes will occur in relation to the international exchange of information. In particular, it is expected that most revised Double Taxation Treaties will include a section providing for the automatic exchange of information. Furthermore, domestic revision of the criminal tax procedure laws (see § 12 below) will lead to an impressive extension of the scope of application of international mutual legal assistance in criminal procedures.

Under Swiss law, tax authorities in charge of direct taxation assist each other towards implementing accurate and fair taxation. As a result, they collaborate and exchange information that is available to them. The Tax Administration may also require other entities of the state to provide it with the necessary information to ensure accurate taxation of the taxpayers.

On another hand, the Tax Administration is subject to tax secrecy, and as such must keep the information received to allow taxation secret, even from other non-tax organizations of the state, subject to a few exceptions provided for by the law. As a result, the Tax Administration entities may transfer relevant information to each other in order to ensure accurate taxation of the taxpayer, and on rare occasions strictly provided for by the law, to other state entities.

In any case, exchange of information must occur with respect for official secrecy and data protection law. It



further must be provided for by a legal basis, be justified by a legitimate interest and comply with the proportionality principle. Even if all these conditions are fulfilled, only formal procedural acts can be disclosed, and internal notes or reports of the Tax Administration officials cannot be requested.

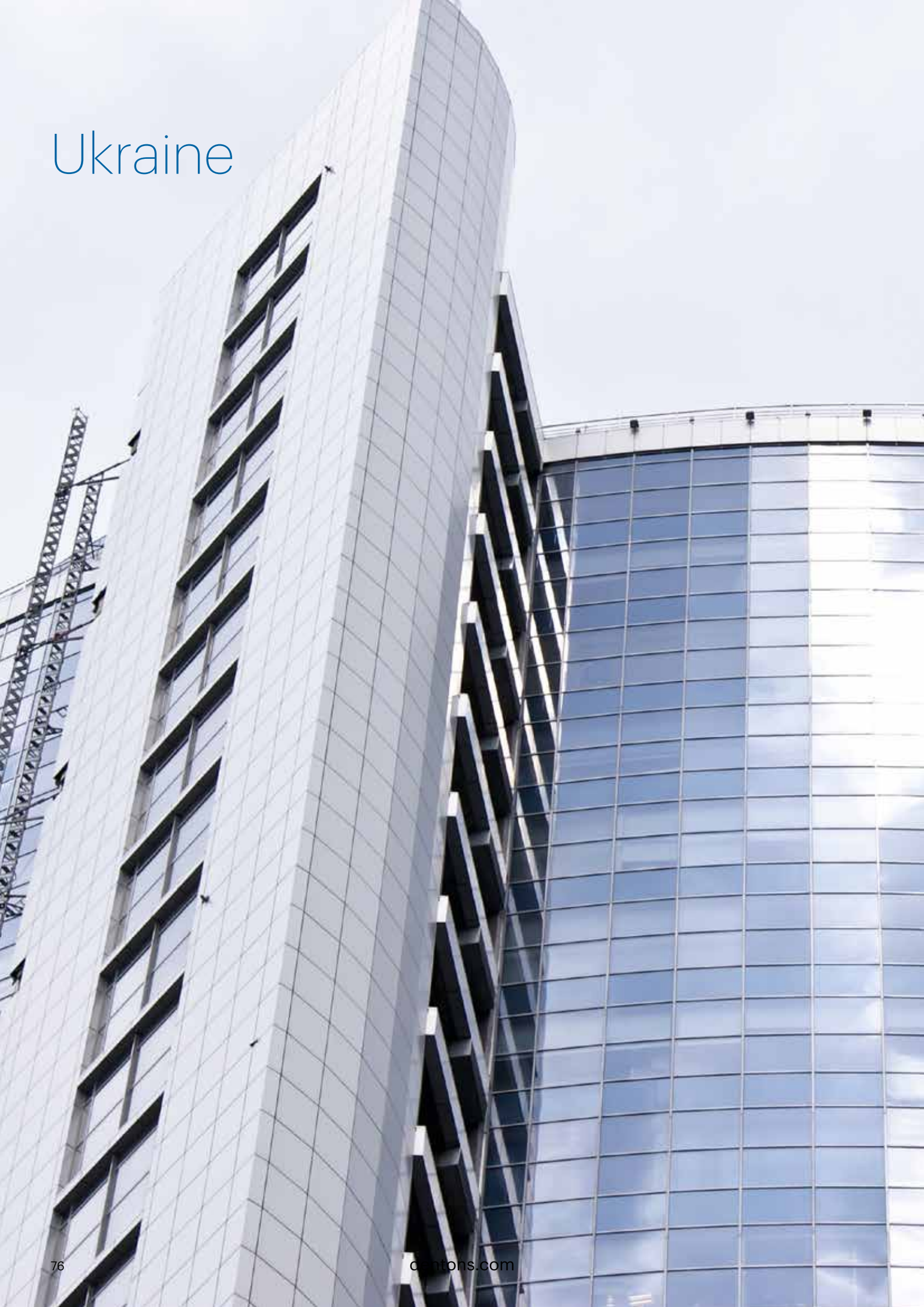
Question 12. Please provide any other useful information not covered in the above questions.

As mentioned above (see answer to Question 6), under current law and practice in Switzerland, the cantonal tax authorities are usually quite limited in their efforts to investigate a criminal offense, as they cannot use any means of constraint.

A modification of the law is henceforth being drafted, aiming at unifying tax procedures applied in criminal tax matters. If such reform is adopted, the procedure will be modified in a substantial way. Under this reform, the cantonal authorities should open criminal proceedings where an offense can reasonably be suspected; they would

then be able to question witnesses and request written information. The tax authorities may take coercive measures such as seizure, search warrants and, in exceptional cases, arrest. In this regard though, specifically trained professionals will decide whether such measures should be taken, and in any case, they must comply with the principle of proportionality. Tax authorities will also have access to banking information, subject to the approval of an independent service. Arrests will further be subject to the approval of an independent court of law. Finally, the procedure regarding taxation will not be changed.

Ukraine



Ukraine

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Question 1. What discovery protections, if any, apply to the giving of tax advice in your respective country?

a. Is tax advice protected from disclosure to the taxing authorities?

No specific legislation is in place in Ukraine that provides for legal professional privilege or privacy restrictions with respect to tax advice.

The Law of Ukraine "On audit activities" and the Law of Ukraine "On advocacy and advocate activities" provide for special treatment of information received by an advocate or auditor in the course of its relationships with the client. Additionally, the Law of Ukraine "On information" provides that information with limited access according to its legal status shall be split into three categories: confidential, secret, and official. Confidential information is defined as information about the physical person, access to which is limited by physical persons or legal entities. Ukrainian law provides that the measures of protection of the confidential information shall be established by the owner of such confidential information.

Thus, in Ukraine, the provision of tax advice is generally protected from disclosure to the tax authorities only in terms of the contractual arrangements between the client and the tax (legal) advisor. As such, the taxpayer and advisor can decide the scope of the privileged materials and essentially determine what will not be disclosed to the government, with the exception of information required to be disclosed under Ukrainian law, a court or official investigation.

b. Is tax advice obtained from certified accountants or other qualified non-lawyers protected from disclosure to the taxing authorities?

Accountants are not subject to certification in Ukraine, and therefore, communications with and advice received from accountant are not privileged or protected.

c. Is there a distinction between the role of tax return preparers and tax advisors?

Similarly, there is no protection with respect to the tax return preparer.

d. Is advice from in-house counsel protected, or are protections, if any, limited to advice from outside professionals?

Furthermore, communications and advice from in-house attorneys are not privileged or protected.

e. What are the consequences of an unlawful breach of the privileges and protections of tax advice? Are there certain technicalities that are more highly sanctioned by the courts?

Advocates and auditors breaching their confidentiality duties may be subject to professional discipline liability, annulment of their professional certificates and/or civil liability.

Question 2. How, if at all, is "tax advice" defined in your respective country?

"Tax advice" is not defined under Ukrainian tax legislation.

The Tax Code of Ukraine contains a definition of "tax consultation," which is an opinion on application of tax legislation with respect to a particular client situation and provided by the Ukrainian tax authorities. The tax consultation is issued by the same authority in charge of tax reporting and tax payment of the taxpayer (and in some cases, it can be the tax authority of the higher level). Special procedures for the provision of such tax consultations are prescribed by the Tax Code of Ukraine, which provides for two types of tax consultations: generalized (applies to all taxpayers affected by such tax consultation) and individual (applies to a taxpayer that requested such tax consultation from the Ukrainian tax authorities).

Question 3. Are there any categories of information that are explicitly not subject to protection?

The Resolution of the Cabinet of Ministers of Ukraine No.611, dated August 9, 1993, lists the types of information which cannot be treated as containing commercial secrets. These types include, among others:

- Information related to obligatory reporting;
- Data necessary to verify the calculation and payment of taxes and other obligatory payments; and
- Documents for the payment of taxes and duties.

Legal entities are required to file and present the abovementioned information to state authorities and other entities upon request.

Question 4. Is tax advice prepared in anticipation of a controversy with the taxing authorities protected from disclosure under a work product doctrine or litigation privilege?

The work product doctrine, or litigation privilege, does not exist under Ukrainian law. To the contrary, tax advice provided by a tax (legal) advisor does not give any privilege to the client in the course of a tax audit. Again, protections for tax advice exist only as provided for in the contractual arrangements between the client and the tax (legal) advisor.

Question 5. Are tax accrual work papers afforded the same privileges?

The Law of Ukraine "On accounting and financial reporting in Ukraine" establishes that the basis for accounting is the primary documents that record the fact of business operations of the legal entity. Only documents executed with all legal requirements gain legal force. The main regulations that determine the order of creation, adoption, and reflection of primary documents in the accounting are the Law of Ukraine "On accounting and financial reporting in Ukraine" and the regulation on documentary support in the accounting records, approved by the Order No. 88 of the Ministry of Finance of Ukraine dated May 24, 1995, which set forth the following requirements as to information the primary documents shall contain:

- Name of the company on whose behalf the document is drawn up;
- Content and scope of business operations, the unit of economic activity;
- Post of persons who are responsible for the economic operation and its form; and
- Signature or other data enabling the identification of the person who was involved in carrying out business operations.

In addition, depending on the type of economic operation, the primary documents may include the following information: identification code of the company, institutions of the state register, document number, base for operations, data of document that verifies the recipient and more.

- Document title (form);
- Date and place of issue;



The primary documents must be signed and sealed. None of these documents could be withheld on privilege grounds.

Question 6. Does the taxing authority in your respective country generally request tax advice and opinions from taxpayers during an audit or litigation?

No, taxpayers are requested to present only the primary documents that record the fact of business operations of the legal entity.

The tax advice may be further used by the taxpayer as a basis for arguing its position before the tax authorities with respect to any dispute arising as a result of the tax audit.

Question 7. Do the same privileges and protections apply in criminal proceedings?

Tax advice received by an advocate in the course of its relationship with the taxpayer-client is treated by the advocate as confidential "advocate secret." Such treatment of information applies in both civil and criminal engagements and not only covers litigation but applies in all contexts.

Additionally, the tax advisor which is certified as advocate has a right to keep information received in the cause of its relationships with the client as "advocate secret," which is the case also in case of criminal proceeding. The tax (legal) advisor may be authorized by the taxpayer to represent the taxpayer before the administrative court. Only a certified advocate can represent the taxpayer in the cause of the criminal proceedings.

Question 8. Under what circumstances does a taxpayer waive a privilege or protection?

In Ukraine, the provision of tax advice is generally protected from disclosure to the tax authorities only in terms of the contractual arrangements between the client and the tax (legal) advisor. If the contract between the tax (legal) advisor and the client does not limit the disclosure of the tax advice to third parties, the taxpayer has a right to use tax advice at his own discretion.

Question 9. What types of penalty protection are available and how are those protections properly asserted or maintained?

Protection of the client from any damages caused by reliance on written tax advice is available in terms of the contractual arrangements between the client and the tax (legal) advisor. However, the tax advice will not protect the client from tax and penalties asserted by the tax authorities and the tax authorities will not initiate suit against the tax advisor concerning the advice. Instead, the taxpayer must file a claim for breach of contract and any damages caused by the tax advisor pursuant to the contractual arrangements they made.

On the other hand, an individual tax consultation provided by the Ukrainian tax authorities gives protection to a taxpayer from fines and penalties charged by the tax authorities for underpayment of tax obligations.

Question 10. Under what circumstances may a taxpayer rely on a qualified tax advisor or professional tax opinion?

In Ukraine, a taxpayer may rely on a qualified tax advisor or professional tax opinion in terms of the contractual arrangements between the client and the tax (legal) advisor.

Question 11. What practices and trends are being observed with respect to the sharing or gathering of information (both domestically and internationally) by the taxing authorities of your country?

In accordance with the Convention on Mutual Administrative Assistance in Tax Matters, ratified by Ukraine on December 17, 2008, and effective in Ukraine from July 1, 2009, Ukraine shall exchange any information that is foreseeably relevant to (a) the assessment and collection of tax, and the recovery and enforcement of tax claims; or (b) the prosecution before an administrative authority or the initiation of a prosecution before a judicial body.

Under the convention, the administrative assistance in tax matters shall comprise:

- Exchange of information, including simultaneous tax examinations and participation in tax examinations abroad;
- Assistance in recovery, including measures of conservancy; and
- Service of documents.

United States



United States

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Question 1. What discovery protections, if any, apply to the giving of tax advice in your respective country?

In the United States, the provision of tax advice is generally privileged and protected from disclosure to the taxing authorities when rendered by an attorney or a federally authorized tax practitioner (a category that includes certified public accountants). Ethical standards, evidentiary rules and case law precedent vary by state and by federal circuit, sometimes with frustrating inconsistency; however, below is an overview of the federal rules and majority law.

As discussed below, the work product doctrine also provides significant protection for tax advice given by attorneys and federally authorized tax practitioners. The protections of the work product doctrine are broader than that of the attorney-client privilege in many cases, although the work product doctrine generally requires that the taxpayer anticipate litigation when making the confidential communication to his or her advisor. While the formulations of the work product doctrine vary across the US, many taxpayers may be able to demonstrate anticipation of litigation even prior to filing a return, given the adversarial nature of the US tax examination system.

In addition to the privileges described below, professional rules of ethics governing US lawyers and tax practitioners require strict confidentiality with respect to all information related to the relationship, even if it does not meet the four elements of attorney-client privileged communications. Confidential communications include non-legal communications, business advice

and investment advice, which are not necessarily privileged.

a. Is tax advice protected from disclosure to the taxing authorities?

The attorney-client privilege protects confidential communications between clients and their lawyers made in furtherance of providing or receiving legal advice. Its underlying purpose is to encourage full and frank communications between attorneys and their clients and to thereby promote the broader public interest in the observance of the law and administration of justice. The privilege covers communications that satisfy the following elements: (1) made between privileged parties; (2) in connection with legal services; (3) made in confidence; and (4) not waived through voluntary disclosure to a non-privileged third party.

b. Is tax advice obtained from certified accountants or other qualified non-lawyers protected from disclosure to the taxing authorities?

The attorney-client privilege extends, by federal statute, to tax practitioners or non-lawyers authorized to practice before the Internal Revenue Service (IRS). Under the "federally authorized tax practitioner privilege," confidential tax advice is privileged, as long as it satisfies the four elements described above. I.R.C. § 7525.

c. Is there a distinction between the role of tax return preparers and tax advisors?

The privilege generally does not protect return preparation activities once a taxpayer files a federal tax return, since the filing of the return generally waives confidentiality between the preparer and taxpayer for return preparation materials.

The tax practitioner privilege is limited to noncriminal and non-tax-shelter matters.

The attorney-client and tax practitioner privileges extend to communications with agents of the advisor or the client who facilitate the representation. Thus, for example, communications with accountants hired to assist attorneys in providing advice may be privileged under the *Kovel* doctrine. *Kovel v. United States*, 296 F.2d 918 (2d Cir. 1961). The privilege also may protect communications and reports by third parties (for example, valuation consultants) made to the tax advisor in connection with rendering advice, if kept confidential and made to enable the advice. Additionally, most federal courts recognize that communications with a non-US-licensed lawyer in another jurisdiction are privileged under US law.

d. Is advice from in-house counsel protected, or are protections, if any, limited to advice from outside professionals?

Communications with in-house counsel are not privileged merely because the in-house counsel is an attorney. Instead, the privilege applies only to communications with in-house counsel that are made for the specific purpose of securing legal advice for the corporation-client, that are within the scope of the communicating employee's duties and that are intended to be, and were in fact, kept confidential. Attorney-client privilege claims involving corporations are complex, and US courts evaluate these claims on a case-by-case basis to determine whether application of the privilege furthers its underlying purpose. Because in-house counsel often serve both a legal and business function for the corporation, it is important to note that communications related solely to the business function are not privileged.

e. What are the consequences of an unlawful breach of the privileges and protections of tax advice? Are there certain technicalities that are more highly sanctioned by the courts?

Tax advisors breaching their duties of confidentiality may be subject to professional discipline and potential civil liability.

Question 2. How, if at all, is "tax advice" defined in your respective country?

"Tax advice" is statutorily defined in the US as "advice given by an individual with respect to a matter which is within the scope of the individual's authority to practice [as a federally authorized tax practitioner]." I.R.C. § 7525(a)(3)(B). What is clearly not tax advice are documents and communications prepared for purposes of preparing tax returns. However, because taxpayers rarely seek tax advice in a vacuum and it is typically related, in some fashion, to a tax return, the distinction between tax advice and tax return preparation materials is often intricate. Most courts recognize this complication and the issue has not been uniformly resolved by the judiciary.

US courts accept that tax planning, involving interpretation of the law, application of the law to events to occur in the future and structuring transactions to fulfill the tax objectives of the client, all fall within the definition of tax advice and are thereby privileged. Additionally, recognized characteristics of privileged tax advice identified by several courts include communications and documents that: (1) are intended to remain confidential; (2) contain legal thoughts or judgment; (3) are not traditional accounting work; (4) contain statutory construction or interpretation, or application of cases or rulings; (5) are not incorporated into the return; (6) are not required to be kept; and (7) are within the scope of an advisory engagement.

Question 3. Are there any categories of information that are explicitly not subject to protection?

An otherwise privileged communication made in furtherance of a criminal or fraudulent scheme by the taxpayer or lawyer loses privilege. Under the "crime-fraud" exception, the government can gain access to attorney-client communications that were made for the purpose of receiving advice for the commission of a crime or fraud even if the lawyer is not aware of that purpose.

Question 4. Is tax advice prepared in anticipation of a controversy with the taxing authorities protected from disclosure under a work product doctrine or litigation privilege?

In addition to the attorney-client privilege, US law provides for the distinct and broader protection of work product. The "work product doctrine" is an evidentiary rule that protects documents and tangible things prepared in anticipation of litigation by or for a party or its representative. See Federal Rule of Civil Procedure 26(b)(3). An opposing party, including the IRS and other US government agencies, cannot obtain this information unless it shows substantial need and an inability to obtain the substantial equivalent to the documents without undue hardship. But mental impressions, conclusions, opinions and legal theories are afforded a higher level of protection and are generally not discoverable by an opposing party. Unlike the attorney-client privilege, the work product doctrine is not limited to attorneys or communications.

As the US Supreme Court recognized, the doctrine's purpose is to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and

strategy "with an eye toward litigation... free from unnecessary intrusion by [his adversaries]." *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). Courts acknowledge that were such materials open to opposing counsel, "much of what is now put down in writing would remain unwritten," the practice of law would be susceptible to inefficiencies, unfairness and ineffectiveness, and the "interests of the clients and the cause of justice would be poorly served." *Id.* at 511.

Although the legal standards vary by jurisdiction, in the tax controversy context, most courts recognize that taxpayers can anticipate litigation as early as the tax planning stages. Under the majority rule, a dual-purpose document created "because of" anticipation of litigation does not lose protection merely because it was created to assist with a business decision. By contrast, documents prepared solely in the ordinary course of business are not protected. A minority of courts require that the document was created with a "primary motivating purpose" of assisting with possible future litigation, a more difficult standard to satisfy. One circuit court applies an even more restrictive "prepared for use in litigation" test. These conflicting standards have produced divergent results across jurisdictions and an uncertainty that will remain until the Supreme Court weighs in on the proper test and the scope of its application.

Work product protection ultimately depends on the nature of the document and the factual situation in the particular case. The taxpayer bears the burden of presenting adequate factual support for the claim.

Question 5. Are tax accrual work papers afforded the same privileges?

US courts have inconsistently protected tax accrual work papers under the above doctrines, and the contours of their protected status remain unsettled.

Litigation over the protection of these documents will undoubtedly continue. Tax accrual work papers generally analyze the tax consequences of a company's operations, assess litigation hazards and account for contingent tax liabilities. They often contain the mental impressions, thoughts and opinions of the company's accountants, attorneys, auditors and management.

The attorney-client privilege generally does not protect tax accrual work papers because they do not necessarily contain legal advice. Even if the attorney-client privilege applies, the IRS is likely to argue that the taxpayer has waived that

privilege by disclosure to an independent auditor, depending on the factual circumstances.

However, some courts recognize that the work product doctrine can protect tax accrual work papers if the taxpayer's advisors created the work papers in anticipation of litigation, as described above, and not in the ordinary course of business. The US Supreme Court established that work product protections will not extend to tax accrual work papers created without an anticipation of litigation and prepared by an outside auditor in the course of a

routine review of a corporate financial statement. However, the scope of protection to tax accrual work papers is largely unsettled. Depending on the jurisdiction, work product protections may apply if the work papers were created for purposes other than satisfying a securities or other routine regulatory reporting obligation. Taxpayers argue the protection of these documents is consistent with the doctrine's purpose because allowing the IRS full access to them compromises the integrity of the company's internal audit procedures, tax analysis and financial statements.



Historically, the IRS has had a "policy of restraint" whereby it refrains from requesting the tax accrual work papers during an examination due to, among others, concerns about needless intrusion upon taxpayers' privileged communications with their advisors. However, the IRS has recently created exceptions to this policy related to certain transactions that suggest possible tax-shelter activity. Newly heightened reporting requirements such as the Schedule UTP have further eroded this policy of restraint.

Question 6. Does the taxing authority in your respective country generally request tax advice and opinions from taxpayers during an audit or litigation?

The IRS has the authority to issue a summons to taxpayers and third parties for the production of records relevant to an examination. Although the IRS' power to obtain information by summons is broad, it is not absolute. Instead, it is expressly limited by privilege and work product protections, including those discussed above.

The IRS traditionally abstained from requesting privileged tax advice, except in circumstances where the advice may be at issue, as discussed more fully below. Recently, however, the IRS has taken a much more aggressive approach to requesting the production of tax advice and analysis, forcing taxpayers to defend these claims in what is often long and protracted privilege litigation.

a. Can privileges be asserted in the course of all discovery requests by the taxing authorities, including audit queries, or only in court proceedings?

Attorney-client privilege and work product protections can be asserted at any time, including as early as in response to an informal request during an examination, and throughout an administrative appeal, litigation and a judicial appeal.

Question 7. Do the same privileges and protections apply in criminal proceedings?

The attorney-client privilege and work product protections apply equally in criminal cases as in civil cases. However, the tax practitioner privilege of I.R.C. § 7525 is not respected in criminal matters. Also, to gain access to attorney-client privileged materials in both criminal and civil matters, US taxing authorities may argue that the advice a taxpayer received was in furtherance of fraud. Under the "crime-fraud" exception to attorney-client privilege, confidential communications between an attorney and client are not protected if the taxpayer seeks a lawyer's advice in furtherance of his or her own tax fraud. In recent years, US courts have taken a broad view of this exception in finding waivers of privilege, and the exception has been held to apply even in cases in which the attorney was unaware of and not complicit in the taxpayer's fraud.

In criminal matters, search warrants may enable US taxing authorities to obtain taxpayer records through seizure. These documents can include records held by a taxpayer's attorneys or other confidential advisors. US law enforcement may be required to set up "taint team" procedures to segregate and protect attorney-client privileged information subject to a search warrant, and, to the extent the authorities obtain incriminating information solely through improper access to a taxpayer's attorney-client privileged materials, the taxpayer may object that a prosecution or investigation is the "fruit of the poisonous tree," possibly resulting in dismissal.

Question 8. Under what circumstances does a taxpayer waive a privilege or protection?

The taxpayer may waive the attorney-client privilege through any voluntary disclosure to a non-privileged third party. Such disclosure may result in a waiver of privilege as to all other communications on the same subject (a "subject-matter

waiver"). In contrast, a taxpayer and his or her advisor may waive work product protection only if the disclosure is to an adversary, and any waiver is generally limited to the document actually disclosed.

A common waiver issue in tax controversies involves the reasonable cause defense for penalties. Where a taxpayer has reasonably relied on the advice of counsel, he or she has a defense to certain penalties assessed by the IRS. But when a taxpayer cites tax advice as an affirmative defense or (depending on the jurisdiction) raises an affirmative defense of good faith, the IRS is likely to argue that the taxpayer has placed that advice directly "at issue" and waived the privilege with respect to the advice. This puts the IRS at a significant advantage in privilege disputes because it has the power to assert penalties and effectively force a waiver, even where arguably unwarranted. If successful, the IRS gains access to all the tax advice and opinions, which by their nature contain the advisors' analysis of the weaknesses of the taxpayer's positions.

Where documents have been inadvertently disclosed to the IRS, a waiver can be avoided if the taxpayer did not intend to disclose the documents and, despite the actual disclosure, took adequate steps to prevent it.

a. Does a taxpayer waive privilege by disclosing legal advice to their return preparer in order to justify a filing position?

Disclosing privileged materials to a tax practitioner for tax return preparation purposes generally results in a waiver of the attorney-client privilege and work product protections.

b. Does a taxpayer waive privilege by disclosing legal advice to parties to a common commercial transaction?

In many tax investigations, more than one party is under investigation and counsel for the various parties may share privileged and protected communications and documents with one another and their clients without

the risk of waiver, provided the parties sharing the information have a common legal interest, undertake a common effort or strategy to further that interest and agree to keep the communications confidential. Parties to a common commercial transaction can share privileged communications under the same circumstances but must establish a common legal, not just economic, interest. Because the parties are likely not adversarial, sharing work-product-protected materials likely will not result in a waiver. However, the breadth of the common legal interest exception also differs by jurisdiction. Therefore, the extent of the protection may vary based on the presiding court.

c. Is tax advice shared only between attorneys afforded greater or lesser protection than advice shared with the client?

Similarly, privileged and protected communications and documents shared between attorneys and/or tax advisors that share a common client remain privileged.

Question 9. What types of penalty protection are available and how are those protections properly asserted or maintained?

The US has well-defined penalty protections.

In the transfer pricing sphere, maintaining contemporaneous transfer pricing documentation mitigates a taxpayer's penalty exposure. There are however certain procedural requirements that must be satisfied. To be considered contemporaneous, the documentation must generally be in existence at the time the tax return is filed. The taxpayer must also make the documentation available to the IRS within 30 days of a request made in connection with an IRS examination. The IRS regulations provide a detailed list of necessary components for transfer pricing documentation, including (1) an overview of the



taxpayer's business; (2) a description of the taxpayer's organizational structure; (3) an explanation of why a particular transfer pricing method was chosen and why another method was not chosen; (4) a description of the controlled transactions; (5) a description of the comparables; (6) an explanation of the economic analysis used to develop the chosen method; (7) a description of any relevant data that the taxpayer obtains after the relevant tax year that may impact the analysis; and (8) an index of the documents used to develop the method. See Treas. Reg. § 1.6662-6(d)(2)(iii)(B) and (C). Note that there is no requirement to provide this documentation along with a tax return.

The US civil tax penalty structure provides a widely applicable exception to penalties if the taxpayer's act or omission is the result of "reasonable cause." For example, a civil penalty may be imposed if a taxpayer understates the taxpayer's tax liability. See I.R.C. § 6662(a). The Internal Revenue Code generally precludes the imposition of this penalty if the taxpayer can establish that there was reasonable cause for the understatement and that the taxpayer acted in good faith. See I.R.C. § 6664(c)(1). Often, a taxpayer establishes good faith and reasonable cause by reasonably relying upon a qualified tax advisor; however, as discussed above and below, raising a defense of reliance may waive applicable privileges and protections for the tax advice.

In addition, if a taxpayer fails to file a tax return or pay the amount shown on the return, a civil penalty may be avoided if the taxpayer establishes that there was reasonable cause for the failures and shows that the failures were not due to willful neglect. See I.R.C. § 6651(a)(1), (2). With respect to some civil penalties, reasonable cause exists if the taxpayer establishes that the taxpayer exercised ordinary care and prudence in determining his tax obligations, but nevertheless was unable to comply with those obligations. See Treas. Reg. § 301.6651-1(c)(1).

Question 10. Under what circumstances may a taxpayer rely on a qualified tax advisor or professional tax opinion?

A taxpayer may also claim reliance on a qualified tax advisor to avoid penalties. To use this defense, the taxpayer must establish that (1) the advisor was a competent professional who had sufficient expertise to justify reliance; (2) the taxpayer provided complete and accurate information to the advisor; and (3) the taxpayer actually relied in good faith on the advisor. A taxpayer's education, sophistication and business experience are relevant in determining whether the taxpayer's reliance on the advisor was in good faith. The advisor's knowledge of the relevant aspects of US tax law are also relevant. A taxpayer will generally not be able to claim a reliance defense if the taxpayer knew, or reasonably should have known, that the advisor lacked knowledge of the relevant aspects of US tax law.

The advice may only be relied upon if it was based on all pertinent facts and circumstances and the law as it relates to those facts and circumstances. Thus, a taxpayer should disclose all facts and circumstances to their tax advisor. A tax advisor must also take into account the taxpayer's business purposes (and relative weight of such purposes) for entering into a transaction and structuring a transaction in a particular manner. Further, the tax advisor may not base advice on unreasonable factual or legal assumptions, nor may the advisor unreasonably rely on information provided by the taxpayer or others. Lastly, in the course of advising a taxpayer to take a tax position, if a tax advisor counsels a taxpayer that a tax regulation is invalid, the taxpayer may only claim reliance (i.e., for penalty defense purposes) if the tax position is disclosed on the taxpayer's tax return.

Although these rules apply both to tax opinions and more informal forms of tax advice, a taxpayer may still prefer to

obtain a formal tax opinion. Obtaining a formal tax opinion may help establish that a taxpayer exercised the appropriate level of due diligence to establish reasonable cause. Also, understatement penalties are minimized when the weight of authorities supports the taxpayer's position. These authorities may be contained in a formal tax opinion.

Question 11. What practices and trends are being observed with respect to the sharing or gathering of information (both domestically and internationally) by the taxing authorities of your country?

Treaty requests:

With the increasing prevalence of complex, cross-border transactions having multijurisdictional tax consequences, there is often a paper trail of tax analysis strewn around the world. This provides the IRS with a new temptation to quietly make a treaty request in an attempt to circumvent US privilege protections and obtain the materials without having to litigate the privilege issues in the US. Indeed, the IRS has used treaty requests in lieu of the administrative summons process (as well as its own internal directives) in order to bypass procedural safeguards for the taxpayer to attempt to obtain privileged and protected documents that would otherwise be unavailable under US law.

This premature and improper use of treaty requests violates two core principles contained in most bilateral tax treaties, articles 18-26 of the Convention on Mutual Administrative Assistance in Tax Matters, and article 26 of the OECD Model Tax Convention and its Commentary. First, the issuance of a treaty request to circumvent domestic law is improper and objectionable because the requested nation is not obligated to employ procedures or obtain information that is at variance with or not obtainable under the laws of either country. Second,



the issuance of a treaty request before exhausting domestic measures is a clear violation of the international authorities and is grounds for rejection of a request. Moreover, the premature and improper issuance of a treaty request merely shifts the burden of potentially protracted and costly disputes to a foreign nation, unfairly forcing the foreign nation to interpret and decide US law. In addition to the potentially resulting prejudice against the rights of the taxpayer, this shifting aspect is itself clearly an inappropriate imposition on a treaty partner. Treaty partners are usually quite receptive to these arguments by the objecting taxpayer in intervention proceedings.

Another recent trend with respect to treaty requests is the US government's *quid pro quo* approach. In short, the US government has increasingly refused to respond to treaty requests made by

foreign authorities while a US request remains outstanding, even if unrelated. In other words, the US often will not respond to a treaty request until the foreign authorities produce documents previously requested by the US government.

Transfer pricing documentation:

In September, the OECD published "Guidance on Transfer Pricing Documentation and Country-by-Country Reporting." This document, which revises the documentation chapter of the OECD Transfer Pricing Guidelines, requires transfer pricing documentation to meet a three-tiered approach: (1) a "master" file containing standardized information reflecting the entire multinational group, (2) a "local" file containing detailed information on material intercompany transactions relevant to the jurisdiction at issue, and (3) a "country-by-country" report that sets forth the multinational

group's global allocation of income, taxes paid, and other information relating to assets, personnel, and activity among the tax jurisdictions in which the multinational group operates.

Nonetheless, significant questions remain regarding how information is to be collected and disseminated among tax administrations. More importantly, the United States and the other 43 countries participating in the OECD/G20 Base Erosion and Profit Shifting Project must still determine how to implement the new reporting standards and reporting rules. Practitioners and multinational groups should keep a close eye on these developments and provide input as appropriate as the process moves from the OECD/G20 to specific country tax administrations.

Visit www.ustaxdisputes.com for additional information.

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