CAN I MAKE A CLEAN BREAST OF IT TO THE GENTLEMAN I CONSULT?

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Disclosure of documents subject to legal professional privilege under s.20 Taxes Management Act 1970

This article examines the extent to which the power to call for documents under s.20 Taxes Management Act 1970 ("TMA") can require the disclosure of communications for which a claim to legal professional privilege can be made and analyses the regulation of this power by Special and General Commissioners.

Section 20 Taxes Management Act 1970

Under s.20(1), an Inspector "may by notice in writing require a person (a) to deliver to him such documents as are in the person's possession or power and as (in the Inspector's reasonable opinion) contain, or may contain, information relevant to:

(i) tax liability to which the person is or may be subject, or

(ii) the amount of any such liability."

There is a similar power under s.20(3) which enables an Inspector to require the disclosure of documents relevant to another person's tax liability. Section 20(2) gives to the Board of Inland Revenue a power to require the production of documents relevant to a person's tax liability.

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There are a number of restrictions placed on the exercise of these powers. Notices under s.20(1) or s.20(3),TMA 1970 are not to be issued unless:

(i) an Inspector holds the opinion that the information contained in the documents requested is potentially relevant;

(ii) that opinion held by the Inspector is reasonable; and

(iii) a General or Special Commissioner is "satisfied that in all the circumstances the Inspector is justified in proceeding under this section" (TMA, s.20(7)).

A notice under s.20(2) does not require the consent of a General or Special Commissioner; the Board may only serve a notice under s.20(2) if it has reasonable grounds for believing that the recipient of the notice may have failed or may fail to comply with any provision of the Taxes Act and "any such failure is likely to have led or to lead to serious prejudice to the proper assessment or collection of tax" (s.20(7A)).

The provisions of s.20 are "to the extent specified in s.20B . . . subject to the restrictions of that section" (s.20(9) TMA) and the relevant restrictions are provided by section 20B (2) and (8). Section 20B(2) provides that "A notice under section 20(1) does not oblige a person to deliver documents or furnish particulars relating to the conduct of any pending appeal by him; a notice under section 20(3) or (8A) does not oblige a person to deliver or make available documents relating to the conduct of a pending appeal by the taxpayer". It is provided in s.20B(8) TMA that "A notice under section 20(3) or (8A) or section 20A(1) does not oblige a barrister, advocate or solicitor to deliver or make available, without his client's consent, any document with respect to which a claim to professional privilege could be maintained."

Legal Professional Privilege

Legal professional privilege is the principle that enables a litigant to withhold confidential communications, notwithstanding that such communications would otherwise be admissible, and often highly relevant, evidence. It has two heads that, although related, are dichotomous. The first head ("advice privilege") covers those communications between a lawyer and his client which are made for the purposes of seeking or giving legal advice. There is no requirement that such advice be in respect of pending litigation. The rationale of this head is that it allows a person to consult a lawyer without fear that the information that he reveals will be disclosed in court contrary to his wishes. It thus enables the client to have confidence in the

confidentiality of his legal advisors and so encourages him to "to make a clean breast of it to the gentleman whom he consults". [2]

The second head ("litigation privilege") covers communications which came into existence for the dominant purpose of being used in connection with or in contemplation of litigation.[3] It includes not only communications between the client and his lawyer, but also communications with third parties so that, for example, a communication between a client and an expert witness could attract privilege.

Under each head, the privilege belongs to the client and it is only the client who can waive or assert privilege. A claim by the lawyer that a document is legally privileged is simply an assertion of the privilege on behalf of his client. Thus, notwithstanding that the legal advisor is under a duty to respect and assert the client's privilege, the advisor has no entitlement to the privilege and has no right to assert the privilege for his own benefit.

Statutory abrogation of privilege

In *R v Derby Magistrates ex parte B* [1996] AC 487, the House of Lords reviewed both limbs of the law of privilege and held that the rule is much more than an ordinary rule of evidence. It is of an absolute nature and is a fundamental condition on which the administration of justice as a whole rests. Notwithstanding the strong public policy reasons for overriding privilege, as the claim deprived another of documents which may have enabled him to assert his innocence to a charge of murder, the House of Lords held that privilege could not be overridden. Lord Taylor CJ, delivering a speech with which all their Lordships concurred, rejected the argument that the court should be entitled to carry out a balancing exercise in order to determine whether or not to give effect to the privilege on the ground that the mere existence of the balancing exercise necessarily undermines the privilege:

> "The drawback to that approach is that if exception to the general rule is allowed, the client's confidence is necessarily lost. The solicitor, instead of being able to tell his client that anything which the client might say would never in any circumstances be revealed without his consent, would have to qualify his assurance. He would have to tell the client that his confidence might be broken if in some future case the court were to hold that he no longer had 'any recognisable interest' in asserting his privilege. One can see

2 Per Sir George Jessell MR, *Anderson v Bank of British Columbia* [1876] 2 ChD 644 at 649.

3 See s.10 Police and Criminal Evidence Act 1984 which echoes the common law position.

> that at once the purpose of the privilege would thereby be undermined." (at 507-508)

However, Lord Taylor acknowledged that the absolute nature of privilege could be "modified or even abrogated by statute, subject always to the objection that legal professional privilege is a fundamental human right protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969)". His Lordship's indication that "legal professional privilege is a field which Parliament has so far left untouched" (at 507) is certainly correct with regard to adversarial legal proceedings,[4] although it has been argued that Parliament has modified privilege in a number of areas outwith court proceedings.[5]

One area where it has been considered that Parliament may have implicitly authorised a restriction on the ambit of legal professional privilege is in respect of the investigation of serious commercial fraud. Section 39 of the Banking Act 1987 entitles the Bank of England to require an institution to produce specified documents and provides, in s.39(13), that "Nothing in this section shall compel the production by a barrister, advocate or solicitor of a document containing a privileged communication made by him or to him in that capacity."

The construction of s.39 Banking Act 1987 was considered in *Price Waterhouse v BCCI Holdings* [1992] BCLC 583. In this case, Price Waterhouse wished to co-operate with the non-statutory inquiry into the supervision of BCCI under the Banking Acts, but considered that it could not do so, because the relevant information in its possession was subject to legal professional privilege. It sought, *inter alia*, a declaration that it was not precluded from complying with a notice under s.39, Banking Act 1987 by reason of any claim to legal professional privilege. Millett J, as he then was, held that, as the requisite documents had not been produced for the dominant purpose of litigation, they were not privileged and so could be produced. However, he went on to consider whether s.39 Banking Act 1987 could have compelled their production if they had been privileged. He said that, as sub-section (13) was not merely inserted *ex abundanti cautela*, but deliberately widened the scope of the exception:

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4 In *Re L (A Minor), (Police Investigation: Privilege)* [1997] AC 16, the House of Lords held that advice privilege and litigation privilege are distinct and that litigation privilege is only an essential component of adversarial proceedings. Lord Jauncey held that in care proceedings under the Children Act 1989, which are non-adversarial, litigation privilege never arises, but went on to say, at 27, "This does not of course affect privilege arising between solicitor and client."

5 See, for example, C Passmore, *Privilege* (1st edn, 1998) at pp.13-16

> "it must be taken not only as making an exception to documents which may be required to be produced but also as marking the limits to that exception. It follows that, except to the extent they are excluded by sub-section (13), privileged documents must be produced." (at 593e)

It has been argued, on the basis of the decision in *R v Commissioners of Inland Revenue, ex parte Taylor (No.2)* [1990] STC 379, that the power under s.20 TMA is "a similar example of the legislature intervening in this way."[6] In *ex parte Taylor (No. 2)*, the Board issued a notice under s.20(2) TMA upon a solicitor claiming disclosure of documents in respect of his professional and business activities. The solicitor refused to comply with the notice and brought an application for judicial review contending, *inter alia*, that compliance with the notice would breach his duty of confidentiality to his professional clients. In the Court of Appeal, it was held that where disclosure is sought from a lawyer *qua* taxpayer, a claim to legal professional privilege will not preclude disclosure. Bingham LJ said at 593:

> "Parliament has expressly preserved the client's legal professional privilege where disclosure is sought from a lawyer or tax accountant in his capacity as professional adviser and not taxpayer. That is the position covered by s.20B(8). Parliaments has, moreover, provided a measure of protection where the notice is given under s.2(1) or s.20(3) concerning documents relating to the conduct of a pending appeal by the client. But there is no preservation of legal professional privilege and no limited protection where the notice relates to a lawyer in his capacity as taxpayer who is served with a notice under s.20(2). The clear inference is, in my judgment, that a client's ordinary right to legal professional privilege, binding in the ordinary way on a legal adviser, does not entitle such legal adviser as taxpayer to refuse disclosure. That is not, to my mind, a surprising intention to attribute to Parliament. In different circumstances the Court of Appeal has held that the Law Society is entitled to override a client's right to legal professional privilege when investigating a solicitor's accounts."[7]

It is considered that the ratio of this decision is merely an extension of the axiomatic rule that privilege belongs to the client and not to the adviser. As privilege can only be asserted by the adviser *qua* adviser, and not for his own benefit, in the instance where it is the adviser himself who is under investigation, he not only has no duty to assert privilege, but also has no right. Although, *stricto sensu*, it is the client's right to privilege that is overridden, the privilege is only overridden in respect of the

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6 *Ibid*, p.14.

7 See *Parry-Jones v Law Society* [1969] 1 Ch 1.

adviser *qua* taxpayer. The disclosed documents remain privileged in respect of the client and so an assertion of privilege for the benefit of the client, either by the client or the adviser, will preclude their disclosure as against the client.[8] Thus, the ratio of this decision does not support the contention that Parliament has implicitly authorised an incursion into legal professional privilege through s.20 TMA.

It is not clear whether the dicta of Bingham LJ that Parliament has "provided a measure of protection where the notice is given under s.20(1) or s.20(3) concerning documents relating to the conduct of a pending appeal by the client" indicates that his Lordship is of the opinion that this is the only measure of protection in respect of litigation privilege which subsists under s.20 TMA and thus, that the effect of s.20B(2) is to circumscribe litigation privilege in an analogous way to s.39(13) Banking Act 1987). However, in any event, it is considered that it is doubtful that s.20B (2) serves this purpose.

Section 20B(2) is clearly not coterminous with litigation privilege. It is wider in that it covers all documents "relating to the conduct of any pending appeal" and thus includes documents that would not qualify for litigation privilege, by reason of their being brought into existence for a dominant purpose other than that of being used in connection with or contemplation of litigation. Moreover, its scope is also narrower in that it only applies when there is an appeal "pending". Until an assessment is raised by the Inspector, no appeal can be entered and thus correspondence between the parties prior to this will not fall within the parameters of the exception provided by s.20B(2). Thus, if s.20B(2) delineates litigation privilege, then the Inspector can preclude the assertion of litigation privilege simply by delaying the raising of an assessment.

It is considered that if the intention of Parliament was to so modify and abrogate litigation privilege, then s.20B(8) would be in similar terms to s.20B(2). However, the parameters of s.20B(2) and (8) are not co-extensive. Section 20B(8) refers to "any document with respect to which a claim to professional privilege could be maintained" and provides that such documents can only be disclosed by the adviser with the client's consent. This section would be rendered otiose if the client can be forced to disclose those materials to which a claim to professional privilege could

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8 In the High Court ([1989] STC 600), Glidewell LJ said, at 607, that "documents obtained under a notice served under s.20(2) would be used only for the purpose specified in that subsection, that is to say in relation to any liability to tax of the taxpayer. A notice under s.20(2) does not permit such documents to be obtained or used for other purposes. . . . I have no doubt that if the Board, as a result of the service of a notice such as that in this case, obtains from a professional man documents which disclose a matter which may be relevant to the tax affairs of a client, then the Board cannot make use of that information as a result of obtaining it in that investigation."

be maintained but which fall outwith s.20B(2). Consequently, s.20B(8), which enables the adviser to assert the privilege on behalf of the client when faced with a s.20(3) notice, must be seen as being for the purpose of protecting the client's privilege when the requisite documents are held by the adviser. Section 20B(8) is predicated on the assumption that the taxpayer is able to assert privilege to prevent the disclosure of documents in his own possession. Thus, the taxpayer's right to privilege in respect of documents in his own possession does not need to be expressly set out.[9]

The role of the Commissioner

Although there is a wealth of judicial consideration on the nature of the Inspector's duties and obligation, the role of the Commissioner has received less attention. It is clear that the roles of the Commissioner and the Inspector are distinct, with the Inspector making the decision and the Commissioner monitoring the decision to ensure its validity.[10] The role as "monitor" should be seen as involving more than simply "monitoring" the reasonableness of the decision by the Inspector but as being an onerous duty. Although the Commissioner must be satisfied that the Inspector does indeed hold and have reasonable grounds for so holding the opinion that he asserts, these are merely preconditions for the granting of approval. The wording of the section clearly encompasses the possibility that, notwithstanding the fact that

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9 This conclusion is reinforced by the statements made by the Chief Secretary to the Treasury in the course of the Finance Committee Debates concerning the intended ambit of s.20 notices. In reply to a question as to whether documents covered by advice privilege or litigation privilege would be immune from disclosure, the Chief Secretary to the Treasury (Mr Joel Barnett) gave the following assurance:

> "I should make it quite clear . . . that the purpose of this part of the schedule is not to require privileged and confidential documents to be handed over to the Inland Revenue. That is certainly not the intention. I am sure also that it would not be the intention of the hon and learned Gentleman or his hon Friend, if a document in the hands of a solicitor was directly relevant to some evasion, to say that simply because the taxpayer hands the document to the solicitor that then stops it and that document can never be obtained. Clearly, I assume, they would not wish to do that. What they wish to do, or what I would wish to do, is to safeguard confidential and privileged documents. I grant that as it stands that it is not covered. I gather that in much other legislation and indeed under the powers, there is no such protection, but as I am so keen on protection . . . I should certainly be happy to look at this to make sure that we do not infringe this particular type of confidentiality." (Hansard, 10th June 1976, pp.685-687)

10 This is recognised in the speech of Lord Lowry in *Regina v Inland Revenue Commissioners, ex parte T C Coombs & Co* (1991) 64 TC 124 at 169: "Parliament designated the Inspector as the decision maker and also designated the Commissioner as the monitor of that decision."

the Inspector has reasonable grounds, the Commissioner is not satisfied that the course is justified. The further step that the Commissioner must carry out is a balancing act between the reasonable requirements of the Revenue for information, in order to carry out the effective investigation of tax affairs, and the protection of the personal property rights of citizens against invasion. As this duty to give effect to the balancing act rests on the Commissioner alone, it is the Commissioner who has the role of acting as an important safeguard of the rights of citizens. The Commissioner is "the independent person entrusted by Parliament with the duty of supervising the exercise of the intrusive power conferred by section 20" *R v IRC, ex parte T C Coombs* at 167, per Lord Lowry).

It is considered that the role of the Commissioner should be seen as analogous to that of a circuit judge hearing an application for access to excluded material under s.9(1) and Schedule 1 Police and Criminal Evidence Act 1984.[11] The nature of this role was analysed by the Divisional Court, comprising Lloyd LJ and Macpherson J, in *Regina v Maidstone Crown Court, ex parte Waitt* [1988] Crim LR 384. It was said at 384:

> "The special procedure under section 9 and Schedule 1 is a serious inroad upon the liberty of the subject. The responsibility for ensuring that the procedure is not abused lies with the circuit judges. It is of cardinal importance that circuit judges should be scrupulous in discharging that responsibility."

Thus, if it is argued that privilege has been modified and abrogated by s.20 TMA, then it is considered that as part of the duty of the Commissioner to ensure that the intrusive power given to the Inland Revenue is not abused, the deterrent effect of allowing the disclosure of privileged material should be weighed against the

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11 By section 9(1), Police and Criminal Evidence Act 1984:

> "A constable may obtain access to excluded material or special procedure material for the purposes of a criminal investigation by making an application under Schedule 1 below and in accordance with that Schedule."

By Schedule 1:

> "1. If on an application made by a constable a circuit judge is satisfied that one or other of the sets of access conditions is fulfilled, he may make an order under paragraph 4 below.
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> 2. The first set of access conditions is fulfilled if (a) there are reasonable grounds for believing . . . (ii) that there is material which consists of special procedure material."

information that the Revenue already hold. Moreover, consideration also should be given to the issue of whether there exists an alternative method of providing the information that is sought.

The nature of the hearing

The issue of whether s.20 notice hearings could be *inter partes* or must be *ex parte* has received little judicial consideration and it has commonly been assumed that the hearing is always to be *ex parte*.[12] However, as the TMA is silent on this matter, and because the Commissioner has the power to grant an audience, it would seem that the possibility of an *inter partes* hearing is not necessarily precluded.

A contrary view was expressed by Special Commissioner Shirley in *Taxpayer v Inspector of Taxes* [1996] STC (SCD) 261. He held that the language in which the provisions of s.20 are couched meant that applications thereunder must be considered *ex parte* and could not sensibly be made *inter partes*. Special Commissioner Shirley said that as the provisions in Part III of the TMA are essentially devoted to administration, information-seeking, and fact gathering in order to enable the inspector to carry out his administrative duty of making a just assessment of a person's proper liability to tax, "one would not expect an application for leave to carry out an administrative act on the part of an inspector . . . to be heard *inter partes* when it is to be expected that the taxpayer would object to the inspector adopting the course he has in a sense been compelled to adopt" (at 263).

It is considered that this justification for why section 20 notice hearings must be *ex parte* cannot be supported for a number of reasons. First, Special Commissioner Shirley, is prejudging the very issue on which the Commissioners must decide, as it can only be argued that the inspector is "compelled" to take this course if it is accepted that the particular documents sought must be needed so as to fulfil his administrative duty. In no sense can it be said that an inspector is compelled to obtain documents through this route if he has no legitimate entitlement to them. Secondly, although the just assessment of tax is one of the duties of a tax inspector as, for example, the prevention of crime is an administrative duty of a police officer, it does not follow from this that any exercise of the powers conferred on tax inspectors or police officers that facilitates the obtaining of information that may help them fulfil their respective duties is simply an "administrative" act. As with the power to break in and bug under Part III of the Police Act 1997, the power to call for documents by the tax inspector is an intrusive power. It thus requires

12 See, *ex parte TC Coombs*. In *R v IRC, ex parte Mohammed* [1999] STC 129, Kay J said, at 131f, that the application, "is, by its very nature, made *ex parte*".

regulation by the Court so that it is not used in a burdensome or oppressive way.[13] Thirdly, it is not clear why the mere fact that a person may object to a course of action is sufficient reason to preclude him from explaining why he so objects.

Special Commissioner Shirley also said that a further justification for s.20 hearings being *ex parte* is the requirement that a notice given under s.20(8A) can be objected to within thirty days. He said that this indicates that s.20 hearings must be *ex parte*, because "if the application were *inter partes* the time for objecting to the notice being given would be at the hearing before the Special Commissioner".

However, the right of appeal within a thirty day period under s.2 (8B) TMA was introduced by s.126(3), Finance Act 1988 purely as a safeguard to the new powers under s.20(8A) TMA, which were inserted by the same section. Section 20(8A) enables an Inspector to require information to be provided in respect of a third party whose full identity is not known.[14] Section 20(8A) and (8B) are dealing only with the particular situation where a person is served with a notice in respect of unnamed taxpayers. The right of appeal under s.20 (8B) is only on the ground that it would be onerous to comply with the notice and it is thus implicit that an appeal under s.20(8B) cannot involve impugning the legitimacy of the notice. Thus, the right of appeal under s.20(8B) is distinct and has no bearing on the issue of whether a party can appear at an *inter partes* hearing to question the issue of the notice.

In *R v City of London Magistrates, ex parte Asif* [1996] STC 611,[15] the provisions in paragraph 11 of Schedule 11 Value Added Tax Act 1994, which enable access to documents where there are reasonable grounds for believing that an offence in connection with VAT has been committed, were considered by the Divisional Court. These provisions are also silent as to whether an application is to be made *inter partes* or *ex parte*. Kennedy LJ said, at 617e:

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13 See Megarry J, as he then was, in *Royal Bank of Scotland v IRC* [1972] Ch 665 at 677.

14 In the course of the Finance Committee Debates, Mr Gerald Howarth asked the following question: "I was worried about the distinction between named individual taxpayers and unnamed groups of taxpayers. In the case of the former, there is identifiable work involved. . . . The difficulty arises when the Revenue seeks information on unnamed individuals . . . I tried to give an example of the difficulty when transactions may have taken place over a long period. That would involved (sic) immense work in going through ledger after ledger or computer printout after computer printout to seek the information." (Hansard 28th June 1988, p.676). The Economic Secretary (Mr Lilley) explained that giving a right of appeal to the Commissioners, in the event of requests for information placing an onerous burden on a third party, protected banks and others in such a situation.

15 In *Taxpayer v Inspector of Taxes*, Special Commissioner Shirley said that he had given *ex parte Asif* careful consideration, but offered no comments on its application.

> "Mr Elvin was unable to point to any provision in any statute which in the absence of express words has been interpreted as requiring applications to be made *ex parte* and never *inter partes*."

He continued, at 618d:

> "My conclusion therefore is that although para 11 of Sch 11 enables the Commissioners to seek orders *ex parte* they must also in each case consider, and any magistrate to whom they apply must also consider, whether it is appropriate to proceed in that way, bearing in mind that the balance is always in favour of proceeding *inter partes* unless there is real reason to believe that something of value to the investigation may be lost if that course is adopted."

The need to proceed *ex parte* under s.20 TMA is not self-evidently greater than the need under paragraph 11 of Schedule 11 Value Added Tax Act 1994. It is considered that the absence of express words in s.20 should be seen simply as enabling such hearings to be *ex parte*, and should not be interpreted as requiring that they must be. As the Special Commissioner has the power to grant an audience, it is considered that where there is a legitimate concern, such as, in particular, a claim to legal professional privilege in respect of the documents sought, this should be resolved by the Commissioner at an *inter partes* hearing.

This conclusion is reinforced by the fact that the Taxes Acts confer no straightforward right of appeal to Commissioners against section 20 notices; it is merely provided that in the event of the imposition of a penalty subsequent to the non-compliance with a notice, then an appeal may be brought against the imposition of the penalty. The purpose of the penalty proceedings is thus to allow an appeal against the penalty determination, not the original notice; notwithstanding that the

validity of the notice could be raised as an issue in the penalty proceedings.[16] It is far better and more convenient to decide, before any notice is issued, whether or not such a notice should be issued. This would preclude the costs of having to follow the circuitous route of only being able to raise the relevant issues after the imposition of a penalty subsequent to the non-compliance with the notice and would avoid the stigma that necessarily attaches to a person who wishes to raise a legitimate concern but is compelled to follow such a route. Such matters should be seen as justification for why the consent of the Commissioner is required by statute before a notice can be given under section 20 and indicate that such consent should not be given lightly. The strength of the powers given under s.20 places a corresponding responsibility on those monitoring the exercise of those powers and it is considered that the Commissioner should grant a right of audience to the taxpayer in appropriate s.20 hearings in order to fulfil his supervisory duty.

Conclusion

In conclusion, it is considered that the provisions of s.20 TMA have not abrogated or modified legal professional privilege. However, the system whereby the taxpayer is only permitted to make written representations that are subsequently drawn to the attention of the Special Commissioner does not permit due consideration of such an issue, and is unsatisfactory. Absent Commissioners exercising their power to grant an audience and hearing oral submissions from parties served with s.20 notices, the only solution may be reliance on the Human Rights Act 1998 ("HRA") when it comes into force. It is provided in s.22(4) HRA that in relation to proceedings instigated by any person whose functions are of a public nature, a victim may rely on the Convention right whenever the act in question took place and, if the issue of

16 Although it was said by Special Commissioner Shirley in *Taxpayer v Inspector of Taxes* (see also Ferris J in *Regina v O'Kane, ex parte Northern Bank Ltd* [1996] STC 1249), ostensibly on the authority of the decision of the Court of Appeal in *Regina v IRC, ex parte Taylor (No.2)* [1990] STC 379, that the "penalty proceedings for failure to comply with a notice provide the taxpayer with the opportunity to question the validity of the notice" (at 264), it is submitted that, to the extent that Special Commissioner Shirley is saying that such proceedings provide the only opportunity to question the validity of the notice, and thus that the purpose of the Commissioner at the notice hearing is simply as a filter through which "unreasonable" decisions of Inspectors may not pass, this is not supported by authority. In *ex parte Taylor*, Bingham LJ said at 384 "Strictly, however, the taxpayer's remedy is, in the event of non-compliance followed by penalty proceedings to resist the penalty proceedings and then attack the giving of the notice." Bingham LJ described the route that the taxpayer must take after his non-compliance with the notice; he offered no guidance on matters prior to non-compliance.

17 See *W v UK* 10 EHHR 29.

the Commissioner's consent is determined without the benefit of an *inter partes* hearing, then it may be argued that this amounts to a breach of Article 6.[17]

Moreover, the issue of the purported abrogation of legal professional privilege by s.20 TMA may also be resolved by the HRA. As Lord Taylor acknowledged, "legal professional privilege is a fundamental human right protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969)", and, consequently, if s.20 TMA has abrogated privilege so as to permit the compulsory disclosure of documents that attract legal professional privilege, then there may be a remedy in respect of this under the HRA.[18]

Addendum

This article was written prior to the case of *An Applicant v An Inspector of Taxes* (SpC 00189). In this case, the applicant was served with a "precursor notice" under s.20B(1), TMA and applied to Special Commissioner Oliver QC, as the Presiding Special Commissioner, to allow an *inter partes* hearing if and when the Inspector applied for consent under s.20(7). Special Commissioner Oliver QC held (on the authority of *Taxpayer v Inspector of Taxes* [1996] STC (SCD) 261 at 261-262, and *Regina v O'Kane & Clarke, ex parte Northern Bank Ltd* [1996] STC 1249 at 1265) that the applicant has no right to attend a s.20(7) hearing and that the Special Commissioner has no discretion to admit either the applicant or his lawyer. It is considered that this decision is incorrect, as, although the authorities cited show reasons for why s.20 hearings may be *ex parte*, they do not, as outlined in this article, justify such hearings never being on an *inter partes* basis.

Although Special Commissioner Oliver QC suggested that a taxpayer's ordinary right to legal professional privilege does not entitle him to refuse to comply with a section 20(1) notice, he said that, if he had had a discretion to allow the applicant or his lawyers to attend a section 20 hearing, then such privilege would have been a relevant consideration in exercising such a discretion. However, as Special Commissioner Oliver QC is of the opinion that legal professional privilege offers no protection to a s.20 application, it is not clear how it can be a relevant consideration as, for this purpose, it is rendered nugatory. It would thus appear that Special

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18 In *Niemitz v Germany* 16 EHRR 97, a lawyer's offices were searched by the police pursuant to a criminal investigation. The Court of Human Rights held that the search was an interference with his right to respect for private life and correspondence under Article 8.

Commissioner Oliver QC favours precisely the type of balancing exercise that was criticised in strong terms by Lord Taylor CJ in *Derby Magistrates*. For these reasons, it is considered that the obiter dicta of Special Commissioner Oliver QC do not support the view espoused by daily newspapers that "the Inland Revenue has been granted wide-ranging powers to force companies to disclose confidential correspondence with their legal advisors." (*Financial Times*, 7th May 1999).