



Shearn Delamore & Co.

Tax & Revenue Law Update

CASE UPDATE:

**LEGAL PROFESSIONAL
PRIVILEGE AND THE POWERS
OF THE DIRECTOR GENERAL OF
INLAND REVENUE (“DGIR”)**

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The Malaysian Bar had challenged the DGIR's power to undertake tax audits on the clients' accounts of law firms on the basis that it contravened legal professional privilege.

The key prayers sought were as follows:

"1. a Declaration that Section 142(5) of the Income Tax Act 1967 ("ITA") does not entitle nor empower the DGIR to disregard the privilege under Malaysian law that protects all communications, books, objects, articles, materials, documents, things, matters or information passing between an Advocate and Solicitor and his/her client or advice given by an Advocate and Solicitor to his/her client, whether contained in any book, statement, account or other record of any description whatsoever (hereinafter collectively referred to as 'Client Communications'), and which privilege is referred to variously under Malaysian law as 'legal professional privilege', 'solicitor-client privilege' or 'legal privilege' (hereinafter referred to as 'Privilege') by requesting or demanding access to, or disclosure of, such Client Communications from any Advocate and Solicitor, unless Privilege is waived by the client;

2. a Declaration that Part V of the ITA generally, and Section 80 of the ITA in particular, do not entitle nor empower the DGIR to disregard the Privilege that protects all Client Communications by requesting or demanding access to, or disclosure of, any such Client Communications from any Advocate and Solicitor, unless Privilege is waived by the client;

3. a Declaration that Privilege under Malaysian law generally, and as referred to in Sections 126, 127, 128 and 129 of the Evidence Act 1950 in particular, require an Advocate and Solicitor to reject any request or demand of the DGIR for access to, or disclosure of, any Client Communications, unless Privilege is waived by the client".

High Court

In 2018, the High Court allowed the application of the Malaysian Bar with costs. In summary, the High Court held that:

- (i) Privilege is absolute unless it is waived by the privilege holder or falls within the proviso to section 126 of the Evidence Act 1950 ("EA") and it therefore affords protection to clients and not to lawyers;
- (ii) it is not open for the DGIR to have any access to the clients' account with a view to checking whether the law firms have understated their income without having any reasonable suspicion of any misconduct or criminal conduct on the part of the law firms;
- (iii) the DGIR cannot be allowed to use the ITA as an instrument of fraud purportedly to fish for information on the clients of the law firms;
- (iv) the non-obstante nature of section 142(5)(b) of the ITA ought to be read in accordance with the actual words of Parliament;
- (v) section 142(5)(b) of the ITA, at most, only has the effect of removing privilege in respect of any book, account, statement or other record prepared or kept by "practitioners" such as tax accountants and tax agents with a view to taxing their clients and it does not extend to "advocates and solicitors";

(vi) in section 142(5)(b) of the ITA, Parliament had clearly used different words as it recognised that “*practitioner*” and “*advocate and solicitor*” are different persons;

(vii) section 142(5)(b) of the ITA does not oust the common law on Privilege; and

(viii) based on the clear and express language in section 126 of the EA, it cannot be disputed that section 126 of the EA is the specific provision which governs matters pertaining to Privilege. The DGIR has misunderstood and misapplied the Latin maxim *Generalia Specialibus Non Derogant*.

Being dissatisfied with the decision of the High Court, the DGIR appealed to the Court of Appeal.

Court of Appeal

Via an open court paperless hearing on 3 March 2021, the Court of Appeal dismissed the DGIR’s appeal and affirmed the decision of the High Court. The Court of Appeal agreed with the reasoning of the learned High Court Judge and unanimously held that Privilege as envisaged by section 126 of the EA must be zealously guarded.

This is a landmark case on legal professional privilege in Malaysia. At this juncture, it is not known what the DGIR’s next steps will be in this matter.

The Malaysian Bar was represented in this matter by [Anand Raj](#) (Partner), [Foong Pui Chi](#) (Partner) and [Abhilaash Subramaniam](#) (Legal Associate) from our [Tax & Revenue Practice Group](#).

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