



TAX:

COURT OF APPEAL UPHELD DOCTRINE OF LEGAL PROFESSIONAL PRIVILEGE UNDER S. 126 OF THE EVIDENCE ACT 1950

The Court of Appeal in the recent case of [Ketua Pengarah Hasil Dalam Negeri v Bar Malaysia](#) maintained the decision of the High Court in upholding the doctrine of legal professional privilege in relation to any documents or information pertaining to Advocates & Solicitors' clients' accounts.

Legal professional privilege (“**Legal Privilege**”) refers to the principle under the common law that communications between a professional legal adviser and his clients should be kept confidential and protected from being disclosed. The said privilege is codified under s. 126 of the Malaysian Evidence Act (EA) 1950.

BACKGROUND FACTS

The Respondent, the Malaysian Bar (“**Respondent**”), had written to the Appellant, Ketua Pengarah Hasil Dalam Negeri (“**Appellant**”) to raise concerns by its members that the Appellant’s officers, as part of audits on law firms, had insisted on the sighting of clients’ accounts and records pertaining thereto. The Respondent argued that the documents and information sought by the Appellant were protected against disclosure to the Appellant by solicitor-client privilege.

In response, the Appellant cited s. 142(5) of Income Tax Act 1967¹ (“**ITA**”). The Appellant argued that the audits were necessary to ensure “tax compliance” by taxpayers and that it did not breach solicitor-client privilege. The Appellant further contended that s. 142(5) overrides the provisions of Chapter IX of Part III of the EA² and Legal Profession Act 1976 (“**LPA**”).

The Respondent then filed an Originating Summons at the High Court seeking declarations against the Appellant. The High Court ruled in favour of the Respondent and held that s. 142(5) of the ITA did not override s. 126 of the EA. As such, the privilege under s. 126 precluded the Appellant from insisting on documents or information in respect of or relating to advocate and solicitors’ clients accounts.

The Appellant then appealed to the Court of Appeal.

¹ S.142(5) of Income Tax Act 1967 provides for situations whereby the Inland Revenue Board of Malaysia may compel the production of certain documents belonging to the taxpayer.

² Chapter IX of Part III of the EA provides for provisions dealing with witnesses.

JUDGMENT OF THE COURT OF APPEAL

The Court of Appeal (“the Court”) considered the following issues:

(1) Whether s. 142(5) of the ITA 1967 overrides the solicitor-client privilege as provided under s. 126 of the EA 1950

In relation to s. 142(5)(a) of the ITA, the Court held that the legislature specifically singled out the part of the EA which includes s. 126 and expressed that its operation is not to be affected by the ITA. Thus s. 126 of the EA has **NOT** been overridden in its entirety by s. 142(5)(b) of the ITA such that an advocate and solicitor may not assert the privilege provided under s. 126 of the EA against the Appellant.

The proviso to s. 126 of the EA also makes it clear that the privilege does not apply to communications made in furtherance of any illegal purpose and to any fact observed by an advocate in the course of his employment as such showing that any crime or fraud has been committed. In light of the fact that the ITA contains a number of offences, if there is any legitimate basis for wanting to gain access to the advocate and solicitors’ clients’ accounts, the Appellant may do so by invoking the proviso to s. 126 of the EA. Unless the Appellant can establish that the proviso to s. 126 of the EA applies, the privilege provided remains.

(2) Whether an advocate and solicitor is included in the term “practitioner” in s. 142(5)(b) of the ITA

S. 142(5)(b) may be divided by the following parts:

- (i) notwithstanding any other written law,
- (ii) any document, thing, matter, information, communication or advice,
- (iii) consisting wholly or partly of or relating wholly or partly to, receipts, payments, income, expenditure, or financial transactions or dealings,
- (iv) of a person (whether an advocate and solicitor, his client or any other person),
- (v) shall not be privileged from disclosure to a Court, the Special Commissioners or any authorised officers,
- (vi) if it is contained in, or comprises the whole or part of, any book, account, statement or other record,
- (vii) prepared or kept by any practitioner or firm of practitioners in connection with any client or clients of the practitioner or firm of practitioners or any other person.

The Court of Appeal agreed with the High Court’s decision that s. 142(5)(b) of the ITA precludes the claim to any privilege from disclosure, information that are “prepared or kept by” any practitioner or firm of practitioners and that the terms “practitioner” or “firm of practitioners” does **NOT** include “advocate and solicitor” or “firm of advocates and solicitors”. The purpose or objective of s. 142(5)(b) was **NOT** to have the effect of repealing or abrogating s. 126 of the EA or to deny its applicability altogether.

It is settled law that Legal Privilege does not belong to an advocate and solicitor but that of the client of the advocate and solicitor (“**Client**”) which only the Client may waive. Thus, the rationale for excluding advocates and solicitors in favour of the term “practitioners” becomes apparent. If the objective is to investigate advocates and solicitors, the client’s account should logically be excluded as it is a trust account where the client’s monies are kept, not monies of the advocate and solicitor itself. Conversely, if the objective is to investigate the clients of advocates and solicitors, it would seem quite reasonable that the legislature should direct its attention to “practitioners” who would prepare or keep information or

communication, of a fiscal nature, of any person including those of advocates and solicitors and their clients.

(3) Whether a solicitor's client account enjoys the privilege under s. 126 of the EA

The Court held that s. 126 of the EA is not as narrowly crafted as is suggested by the Appellant. Legal advice given by an advocate to a client is but only one of the three classes of information protected by privilege. The term "communication", though not specifically defined in the EA, is linguistically interpreted very widely. Therefore, the Court held that financial information or data exchanged between an advocate and his client and any such data contained in any document and kept in respect of the client's account for the purpose of the advocate's employment, would all come within the ambit of s. 126 of the EA. The Court rejected the Appellant's argument that the client's account and information relating thereto do not come within the purview of s. 126 of the EA.

CONCLUSION

The decision in this case by the Court of Appeal appears to uphold the principle that the right of the Client to Legal Privilege is important and must always be protected. Even though the Appellant attempted to circumvent the principle of legal privilege under the banner of "tax compliance", the Court ruled that there are other, more proper, ways for the Appellant to legally carry out its duty (such as utilising the proviso to Section 126 of the EA) without compromising the Client's right to privilege.

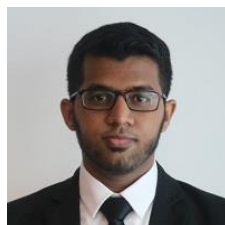
The judgment by the Court appears to also state that the provisions of the ITA cannot be simply used as a tool to bypass the legal professional privilege accorded to the Client under s. 126 of the EA. Legal professional privilege is an ancient and important right and, except in certain circumstances, the maxim '*once privileged, always privileged*' applies.

The case is now pending further appeal by the Appellant to the Federal Court and all legal practitioners' eyes and ears will be on the Federal Court to see whether it will concur and uphold the Court of Appeal's decision. The case will be a fundamental case which will go to the root of every advocate and solicitor's practice and we await the Federal Court's Judgment.

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17 December 2021