



REVENUE RULING

TAA 2.0

ADMINISTRATION PROCEDURES WHERE CLAIM IS MADE DURING THE COURSE OF INVESTIGATION OR AUDIT THAT DOCUMENTS, INFORMATION OR RELEVANT MATERIALS ARE PROTECTED BY LEGAL PROFESSIONAL PRIVILEGE

RULING HISTORY

Revenue Ruling	Issued	Dates of Effect	
		From	To
TAA 2.0	03 July 2009	3 July 2009	13 September 2015

INTRODUCTION

1. This revenue ruling concerns the effect of legal professional privilege on the Commissioner of State Revenue's (Commissioner) investigation powers under Part 8 of the *Taxation Administration Act 2003* ("TAA").
2. The purpose of this revenue ruling is to provide guidelines:
 - (a) on the procedures to be followed where a person claims during the course of an investigation or audit that documents, information or relevant materials in their possession are protected by legal professional privilege; and
 - (b) to give persons from whom documents, information or relevant materials are sought the opportunity to claim legal professional privilege.
3. This revenue ruling also draws attention to the consequences that may follow if a person makes a claim of legal professional privilege, knowing that the claim is false, misleading or without substance.

RELEVANT LEGISLATION

4. A copy of section 103 of the TAA and the relevant terms from the Glossary of the TAA are attached as an addendum to this revenue ruling.

LEGAL PROFESSIONAL PRIVILEGE

5. In general terms, legal professional privilege protects certain confidential communications from disclosure, and this includes written communication. Ordinarily, such a communication is between legal adviser and client.

For legal professional privilege to apply the communication must have been made for the dominant purpose of:

- (a) obtaining or giving legal advice; or
 - (b) use in existing or contemplated litigation.
6. The law relating to legal professional privilege is very complex. Accordingly, this revenue ruling is not intended to provide an outline of the principles relating to legal professional privilege.
 7. Any person who is subject to an investigation or audit by the Office of State Revenue (OSR) and who considers that legal professional privilege may apply to documents, information or relevant materials in their possession, should seek their own legal advice about whether the privilege applies.

RULING

8. Where officers of the OSR wish to obtain documents to which legal professional privilege may apply, they must inform the persons from whom such documents are to be obtained of that fact and provide such persons with a copy of this revenue ruling.

Where no claim is made for legal professional privilege, but it is apparent on examination by an OSR officer that a document, information or relevant material that has been provided to, obtained by or required by an OSR officer is, or is likely to be, protected by legal professional privilege, it becomes the duty of the officer to proceed as if legal professional privilege had been claimed in relation to that document, information or relevant material.

In this regard, if the Commissioner or officer accepts that legal professional privilege applies to the document, information or relevant material, then the document, information or relevant material should be placed in a sealed container and returned to the person from whom it was obtained.

9. Any document, information or relevant material that is provided to, obtained by or required by an OSR officer during the course of an investigation or audit and is claimed to be protected by legal professional privilege will, immediately after the claim is made, be separated from any document, information or relevant material for which no claim is made and will not be further viewed by any OSR officer.

If the Commissioner or officer does not accept that legal professional privilege applies to the document, information or relevant material then the procedures outlined below are to be followed.

If however, the Commissioner or officer accepts that legal professional privilege applies to the document, information or relevant material, then the document, information or relevant material should be handed back to the person from whom it was obtained. If the document, information or relevant material has been taken away from that person, then it is to be placed in a sealed container and returned to that person.

10. Once a claim of legal professional privilege is made an officer will prepare a schedule (acting on information from the claimant) or ask the claimant to prepare a schedule containing the following details in respect of each document, information or relevant material to which a claim applies:
 - (a) exact number of documents, information or relevant materials affected;
 - (b) nature and number of pages of each document, information or relevant material (e.g. a letter);
 - (c) physical description of each document, information or relevant material (e.g. typed or handwritten; number of pages etc);
 - (d) date each document, information or relevant material was prepared or executed;
 - (e) identity of the person(s) who prepared and/or signed each document, information or relevant material;
 - (f) whether the document, information or relevant material is an original, photocopy or carbon copy; and
 - (g) where the document information or relevant material in question is in an electronic form, such as an email, it is to be printed onto a paper format and certified by the claimant to be a true copy of the electronic document.

The schedule should be signed and dated by the officer and the claimant where possible. The original schedule should be held by the officer and two copies prepared, one for the claimant and one to be kept with the documents, information or relevant materials.

Claimants should be permitted, under any necessary supervision, to take a copy of any of the documents, information or relevant materials before they are placed in the container, where that is appropriate.

11. The officer will then require the claimant to seal the documents, information and relevant materials in a container. The sealed container must have affixed the name, address and contact details of the person making the claim and of the person on whose behalf the claim is made and a statement that the contents are, or may be, subject to legal

professional privilege. The officer and the claimant should each sign their names and the date across the seal.

12. Subject to the claimant accepting the State Solicitor's storage terms, the OSR will then lodge the sealed container and a copy of the schedule with the State Solicitor for storage until the question of privilege is determined. If the container is not or cannot be lodged with or stored by the State Solicitor for any reason, it will be lodged with and stored by some other party agreed by the claimant and the officer and, in default of agreement, by an independent party nominated by the Commissioner.
13. Where the quantity of documents, information or relevant materials renders the process under paragraph 10 unmanageable at the time the claim is made, the officer will require the claimant to seal the documents, information and relevant materials in a container and the steps referred to in paragraph 10 will be undertaken at a later time after the documents, information and relevant materials have been lodged under paragraph 12 with the State Solicitor (or other party).
14. Following lodgement of the sealed container under paragraph 12, the officer will advise the claimant that the Commissioner will be applying to the Supreme Court or a Judge within 14 days to have the question of privilege determined as quickly as possible and that any person who claims the benefit of the privilege is also entitled to initiate such action.
15. During an investigation or audit, if a person wishes to obtain legal advice about whether legal professional privilege applies to a document, information or relevant material or if a person wishes to consult their client as to whether they wish to waive privilege, the officer will allow a reasonable time for the person to do so. During this time the documents, information and relevant materials in question will not be removed from the officer's control and must not be removed, or otherwise accessed, by the officer.
16. Where it appears that it may take some hours to obtain the legal advice or consult the client, then the documents, information and relevant materials will be placed in a sealed container and lodged under paragraph 12 with the State Solicitor (or other party) until such time as the advice can be obtained or person can be consulted.
17. Following lodgement of the sealed container under paragraph 12 with the State Solicitor (or other party) and prior to the question of privilege being determined, the Commissioner, the State Solicitor, any member of their respective offices or any person on their behalf shall not open the sealed container or view the documents, information or relevant materials in the container unless authorised to do so:
 - (a) by the person who claims the benefit of legal professional privilege in relation to the documents, information or relevant materials in question; or
 - (b) by an order of the Supreme Court or Judge.

18. Should the claimant require access to the documents, information or relevant materials once they have been lodged under paragraph 12 with the State Solicitor (or other party) and prior to the question of privilege being determined, they can only be accessed when both the claimant (or their representative) and an officer from the OSR are present.
19. Under the TAA it is an offence if a person makes a claim (either personally or on another's behalf) that legal professional privilege applies to a document, information or relevant material where the person knows, or ought to know at the time the claim is made, that it is false, misleading or without substance.
20. If a claim for legal professional privilege is made during the course of an investigation or audit and an OSR officer considers that the claim is false, misleading or without substance (e.g. a blanket claim made over all documents without consideration of their content), the officer will advise the claimant:
 - (a) the reason for forming that view; and
 - (b) that anyone who claims that legal professional privilege applies to documents, information or relevant materials and who knows, or ought to know at the time when the claim is made that it is false, misleading or without substance, commits an offence under section 103(9) of the TAA for which a maximum penalty of \$20,000 applies.

SUPERSEDED

Taxation Administration Act 2003

Part 8 Investigations

Division 4 General provisions

s. 103

103. Legal professional privilege

- (1) A person must provide an official document when so required by the Commissioner or an investigator whether or not that official document would otherwise be protected by legal professional privilege.
- (2) A document, information or relevant material that, at the time it is provided to, or acquired by the Commissioner or an investigator, is claimed to be protected by legal professional privilege —
 - (a) is to be separated from any document, information or relevant material for which no claim is made, retained under secure conditions in a sealed container to which must be affixed the name, address and contact details of the person making the claim and of the person on whose behalf the claim is made, and a statement that the contents are, or may be, subject to legal professional privilege;
 - (b) is not to be viewed, accessed, or otherwise dealt with by the Commissioner or an investigator for any purpose.
- (3) Where no claim is made under subsection (2), but it is apparent on examination by the Commissioner or an investigator that a document, information or relevant material that has been provided or acquired is, or is likely to be, protected by legal professional privilege, it becomes the duty of the Commissioner or an investigator to comply with subsection (2) in relation to that document, information or relevant material.
- (4) If a claim of legal professional privilege is made for a document, information or relevant material already in the possession of the Commissioner or an investigator, and at the time that the claim is made the document, information or relevant material —
 - (a) has not been examined, accessed, or dealt with for a purpose under a taxation Act, subsection (2) applies as if

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the claim had been made at the time when it was provided or acquired;

- (b) is being, or is intended or likely to be, used for a purpose under a taxation Act, its further use is terminated or not to commence, as the case requires, and subsection (2)(a) applies.
- (5) The Commissioner may apply to the Supreme Court or a Judge —
- (a) for a declaration that legal professional privilege does, or does not apply, to a document, information or relevant material provided or acquired under this Part;
 - (b) for an order to extinguish legal professional privilege where it applies to a document, information or relevant material,
- and the Commissioner is to give effect to, and act in accordance with, any declaration or order, or other direction made by the Court or the Judge.
- (6) A person who claims the benefit of legal professional privilege in relation to a document, information or relevant material may apply for an order under subsection (5)(a).
- (7) A document, information or relevant material —
- (a) that is declared to be subject to legal professional privilege under subsection (5)(a); or
 - (b) for which an order under subsection (5)(b) is refused,
- must be returned to the person named under subsection (2)(a) from whom the document, information or relevant material was obtained without delay and remains subject to subsection (2)(b) in the period between publication of the decision of the Court or Judge and the return.
- (8) Nothing in this section prevents a person entitled to claim legal professional privilege from waiving its application to a

Taxation Administration Act 2003

Part 8 Investigations

Division 4 General provisions

s. 104

document, information or relevant material and a waiver once made cannot later be revoked.

- (9) A person, either personally or on another's behalf, who claims that legal professional privilege applies to a document, information or relevant material and who knows, or ought to know at the time that claim is made that it is false, misleading, or without substance, commits an offence.

Penalty: \$20 000.

104. Interaction with other Acts

This Part prevails over —

- (a) any law that would otherwise protect from disclosure information about the transfer or ownership of a statutory licence;
- (b) any law that would otherwise protect from disclosure information about payments made for the benefit of employees;
- (c) any law that would otherwise protect from disclosure information about the registration, transfer of registration or ownership of motor vehicles;
- (d) any law that would otherwise protect from disclosure information about the transfer or ownership of mining tenements or petroleum licences;
- (e) any law that would otherwise protect from disclosure information about the whereabouts of taxpayers; and
- (f) any other prescribed law that would otherwise protect information from disclosure.

Glossary

[s. 4]

Unless the contrary intention appears —

“address” of a person means —

- (a) the address of the person’s residence or place of business;
or
- (b) if the person has a post office box for receiving personal or business mail — the address of the post office box;

“appointed representative” means a person appointed under section 12 to represent the Commissioner in proceedings under a taxation Act;

“approved” means approved by the Commissioner;

“assessment” means a determination of a kind referred to in section 13(1), whether the determination is made by way of a self-assessment, an official assessment or a reassessment;

“assessment notice” means a notice under section 23;

“charge”, in relation to land, means a charge on the land created under section 76 or 77;

“Commissioner” means the Commissioner of State Revenue appointed in accordance with section 6;

“corresponding Commissioner”, in relation to a recognised jurisdiction in which a recognised revenue law is in force, means the person responsible for administering the recognised revenue law;

“decision” includes a direction;

“directly reviewable decision” means a decision under a taxation Act that is expressed by the Act to be directly reviewable;

“document” includes information stored or recorded by any means;

“due date” means —

- (a) in relation to the payment of tax — the date on which the tax is due for payment under section 45(1) or (2), as the case requires;

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- (b) in relation to lodging a return — the date by which the return is required to be lodged under a taxation Act;

“garnishee” has the definition given in section 65;

“group” means 2 or more persons who are grouped together for the purposes of a taxation Act;

“identity card” means an identity card issued to an investigator under section 11;

“instrument” means —

- (a) a statement, conveyance, transfer, lease, licence, policy of insurance or any other document of a kind referred to in the Second Schedule to the *Stamp Act 1921*;
- (b) a statement or return that is required under a taxation Act for the assessment of tax;
- (c) a memorandum created by the Commissioner under section 20;
- (d) a document or other record on which, or in relation to which, tax is payable under a taxation Act;
- (e) anything else that is to be regarded as an instrument under the provisions of another taxation Act;
- (f) a copy, duplicate or counterpart of an instrument or document referred to in another paragraph of this definition;

“investigation purposes” means any or all of the purposes for which an investigation may be carried out under section 92 or 93;

“investigator” means a person appointed to be an investigator under section 11;

“official assessment” has the definition given in section 15(1);

“official document” means an instrument and any other record or document that is —

- (a) kept under or for the purposes of a taxation Act;
- (b) required to be stamped under or for the purposes of a taxation Act; or
- (c) required to be lodged with the Commissioner under or for the purposes of a taxation Act;

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- (b) a law of the Commonwealth or another State declared by regulation to be a recognised revenue law;

“record” means any thing or process —

- (a) upon or by which information is recorded or stored; or
- (b) by means of which a meaning can be conveyed in a visible or recoverable form,

whether or not the use or assistance of some electronic, electrical, mechanical, chemical or other device or process is required to recover or convey the information or meaning;

“Registrar of Titles” means the Registrar of Titles or the Registrar of Deeds and Transfers;

“relevant material” means an instrument, record or anything else that is relevant to —

- (a) ascertaining whether a tax liability exists;
- (b) assessing the amount of a tax liability;
- (c) deciding an application for a rebate or refund of tax, or an exemption from tax, or any other application under a taxation Act;
- (d) auditing records relevant to the assessment of tax; or
- (e) ascertaining whether a contravention of a taxation Act has occurred;

“responsible party”, in relation to a special tax return arrangement, means the person with whom the arrangement is made as mentioned in section 49(1);

“review proceedings” means —

- (a) proceedings on an application under section 40;
- (b) proceedings on appeal under Part 5 of the *State Administrative Tribunal Act 2004* (as affected by section 43A) from a decision on an application under section 40; or
- (c) proceedings on appeal from a decision on an appeal referred to in paragraph (b) or this paragraph;

“self-assessment” has the meaning given in section 14;

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“original assessment”, in relation to a reassessment of tax payable under a taxation Act, means a self assessment (if any) made in relation to the tax, or the first official assessment made in relation to the tax if no self-assessment was made, but does not include a reassessment;

“penalty tax” means —

- (a) penalty tax payable under section 26;
- (b) penalty tax payable under section 27 for late payment of tax; or
- (c) penalty tax payable under sections 75JE, 75JF, 76I(2)(b), 76J(2)(b) or 112NA(2) of the *Stamp Act 1921*;

“person” includes a group;

“premises” means —

- (a) land (whether built on or not);
- (b) a building or structure on land; or
- (c) a vehicle,

and includes a part of premises;

“previous assessment”, in relation to a reassessment of tax, means the assessment that was or is to be reviewed by the reassessment whether the reviewed assessment was an original assessment or an earlier reassessment;

“primary liability” for tax means a liability for tax exclusive of any liability for penalty tax;

“publish”, for the purposes of sections 30 and 127, means —

- (a) arrange for a summary of a new policy or a change in policy to be advertised in the *Gazette*; and
- (b) arrange for the current policy to be made available, at no cost, on an appropriate internet site or from the Office of State Revenue;

“reassessment” does not include an original assessment;

“recognised jurisdiction” means the Commonwealth or another State;

“recognised revenue law” means —

- (a) a law of the Commonwealth or another State corresponding to a taxation Act; or

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“**special tax return arrangement**” means an arrangement approved under section 49;

“**State**” includes the Northern Territory and the Australian Capital Territory;

“**tax**” means —

- (a) tax, duty or another impost, or an instalment of tax, duty or other impost, that is payable under a taxation Act; or
- (b) penalty tax payable under a taxation Act;

“**tax liability**” means a liability to pay tax (including a liability that has not fallen due for payment);

“**taxation Act**” means an enactment specified as a taxation Act under section 3(1);

“**taxpayer**” means —

- (a) a person who is or may be liable to pay tax;
- (b) a responsible party who is required to pay tax on behalf of another taxpayer under a special tax return arrangement; or
- (c) a person of a prescribed class who is subject to statutory obligations relating to the assessment or payment of tax;

“**tax payment arrangement**” means an arrangement approved under section 47;

“**tax record**” means a record required to be kept under a taxation Act or under a special tax return arrangement;

“**Valuer-General**” means the Valuer-General appointed under section 6 of the *Valuation of Land Act 1978*;

“**vehicle**” includes a train, vessel or aircraft.

[Glossary amended by No. 66 of 2003 s. 108(3); No. 66 of 2003 s. 95(5); No. 12 of 2004 s. 12; No. 55 of 2004 s. 1183.]