

# The Singapore Court of Appeal clarifies that privilege extends to pre-2012 in-house counsel communications

The Singapore Court of Appeal has clarified in the recent case of *ARX v Comptroller of Income Tax* [2016] 5 SLR 590; [2016] SGCA 56 that legal professional privilege extends to communications with in-house counsel that existed prior to the enactment of the 2012 Amendment Act to the Evidence Act (Cap 97) (EA). While the 2012 Amendment Act expressly extended the provisions regarding legal professional privilege to in-house counsel, doubts remained as to whether such privilege also attached to in-house counsel communications created prior to the 2012 amendments.

These doubts have now been laid to rest by the Singapore Court of Appeal. This judgment also provides valuable guidance on the issue of when a reference to privileged material in the course of court proceedings will give rise to an implied waiver of privilege.

## The facts of the case

The case concerned an application to compel the Comptroller of Income Tax (Comptroller) to produce legal advice which he had received from his in-house legal department on 3 April 2008 and which had been referred to in an affidavit affirmed by an employee of the Comptroller (the Employee).

### Dispute over tax refunds paid to Appellant's subsidiary

In 2002, in light of changes to Singapore's tax regime, the Appellant, a company listed on the Kuala Lumpur Stock Exchange, took steps to restructure its Singapore operations. These steps included incorporating a new subsidiary in Singapore (Subsidiary), which acquired the Appellant's interests in most of its Singapore subsidiaries through a complex financing scheme.

Between 2005 and 2007, the Comptroller paid approximately S\$9.6m to the Subsidiary in tax refunds. Subsequently, however, the

Comptroller concluded that the Appellant's restructuring was a tax avoidance arrangement and issued additional notices of assessment to recover the tax refunds.

### Reference to legal advice in an affidavit filed by the Comptroller

The Subsidiary appealed against the Comptroller's assessment. The dispute eventually came before the Singapore Courts, where the Employee affirmed an affidavit in which she explained that an audit was commenced in July 2007 but that documents had been sought from the company until the end of March 2008. Importantly, the Employee also deposed that, in the course of the Comptroller's consideration of the information, "advice was sought from the Law Division [of Inland Revenue Authority of Singapore] on the matter, which advice was received on 3 April 2008" and that, following receipt and consideration of this advice, the Comptroller concluded that the restructuring was a tax avoidance arrangement which did not have *bona fide* commercial justifications.

## Key issues

- Legal professional privilege extends to communications with in-house counsel that existed prior to the enactment of the 2012 Amendment Act to the Evidence Act by virtue of the common law, subject to the requirements of independence and confidentiality.
- Even if a communication is privileged, an implied waiver of privilege will be found if, in all the circumstances of the case, fairness and consistency require disclosure. The test is objective; what is relevant is the objective role played by the legal advice and not the subjective intention of the party who is asserting privilege.
- For example, there would be a waiver of privilege if a party relied on the effect of the communication to advance his or her case.

The Appellant subsequently served a notice demanding production of the advice received by the Comptroller from his in-house legal department on 3 April 2008 (Advice). The Comptroller resisted on the ground of privilege, and the Appellant filed an application to seek production of the Advice for inspection.

The key issues to be decided were whether legal professional privilege attached to the Advice, being a communication exchanged with in-house counsel but created before the 2012 amendments to the EA, and whether privilege had been impliedly waived by reason of the references made to the Advice in the Employee's affidavit.

## The decision of the Singapore Court of Appeal

The Court of Appeal affirmed the High Court's findings that the Advice was privileged under the common law and that it had not been waived by the Comptroller in this case.

The holdings of the Court of Appeal are summarised below.<sup>1</sup>

### **Holding 1: Communications with in-house counsel prior to 2012 are privileged**

The Court of Appeal noted that, prior to 2012, the provisions relating to legal professional privilege in the EA only applied to advocates and solicitors and not to in-house counsel who were not in independent legal practice, whereas the common law had long protected confidential communications with in-house counsel.

<sup>1</sup> Please note that this briefing only highlights certain areas of the Court of Appeal's judgment, and is not intended to be a comprehensive summary or overview of all the matters dealt with by the Court of Appeal in its judgment.

The crux of the dispute was therefore whether the common law rule applied in Singapore *before* the enactment of the 2012 Amendment Act, given the existence of the EA.

On this question, the Court of Appeal concluded that the common law rule that privilege extends to in-house counsel *did* apply in Singapore before the 2012 Amendment Act. The Court of Appeal found that as the common law rule that privilege extends to in-house counsel was *not* inconsistent with the EA (and was in fact wholly consistent with the rationale of the doctrine of legal professional privilege), the rule continued to apply pursuant to section 3 of the Application of English Law Act (Cap 7A). Further, the 2012 Amendment Act to the EA did not detract from the position at common law, since the Parliamentary Debates on the subject were neutral and, in any event, it was for the judiciary and not Parliament to state the law.

### **Holding 2: Test for implied waiver of privilege is whether fairness and consistency require disclosure**

On the issue of the applicable test for an implied waiver of privilege arising out of a reference to privileged material because of a step taken in litigation, the Court of Appeal preferred the single inquiry of whether, taking into account all the circumstances of the case, fairness and consistency require disclosure.

The Court of Appeal emphasised that this test involved a fact-sensitive exercise of judgment and the inquiry was objective and not subjective, in that it is the objective role played by the legal advice that is relevant and not the subjective intention of the party who is asserting privilege. The Court of Appeal highlighted that even if an implied waiver of privilege is

found, the court will have to consider the extent of disclosure required.

Applying this test to the present case, the Court of Appeal concluded that there had not been any implied waiver of privilege, given that the affidavit had not referred to the Advice to advance any particular point.<sup>2</sup> If, on the other hand, the Comptroller had relied on the *effect* of the Advice, then disclosure should be ordered.

## Comments

The Court of Appeal's decision provides a welcome clarification that in-house counsel communications created even prior to the 2012 amendments to the EA will be protected by privilege, provided that the necessary requirements of independence and confidentiality are satisfied. It also provides a useful reminder for in-house counsel and their employers, if they wish to maintain legal professional privilege over a particular communication, to ensure that the communication is made by the in-house counsel in his or her capacity as independent legal adviser and is kept confidential.

The decision of the Court of Appeal also provides valuable guidance as to the applicable test for implied waiver of privilege, and clarifies that a waiver of privilege will generally not be found if a party merely relies on the *fact* that the legal advice in question was given and not its *effect*, in line with the principles of fairness and consistency.

<sup>2</sup> Note that, following the High Court's decision below, the Comptroller had filed a further affidavit confirming that it would only rely on the fact of the Advice having been obtained on that date, and not on the substance or content of that Advice.

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