

Tax Journal/2020/Issue 1510, 20 November/Articles/Analysis — Litigation privilege and structuring advice — Tax Journal, Issue 1510, 15

TAX JOURNAL

Tax Journal
Thoughtful commentary - by tax experts, for tax experts.
Tax Journal, Issue 1510, 15

20 November 2020

Analysis — Litigation privilege and structuring advice

Insight and analysis

Dominic Stuttaford

Norton Rose Fulbright

is a partner at Norton Rose Fulbright LLP. He specialises in the tax aspects of corporate finance with a particular interest in the insurance and technology sectors. Dominic's experience includes mergers and acquisitions of public and private companies and group restructurings. Email: dominic.stuttaford@nortonrosefulbright.com; tel: 020 7444 3379.
© Reed Elsevier (UK) Ltd 2020

Speed read: In *Financial Reporting Council Ltd v Frasers Group plc*, the High Court held that the commission of VAT structuring reports in response to an anticipated challenge did not satisfy the 'sole or dominant purpose' test for conducting litigation. The court further noted that tax structuring reports are created for the purpose of achieving a particular tax result and not for the purpose of conducting litigation. The case illustrates the limited scope of litigation privilege; this is clearly important when legal advice privilege is not available.

In the evolving landscape of increased scrutiny and regulation of the audit profession, audit clients are being increasingly drawn into the crossfire between regulator and auditor. *Financial Reporting Council Ltd v Frasers Group plc* (formerly *Sports Direct International plc*) [2020] EWHC 2607 (CH) is the first of, what will likely be, many cases involving the disclosure of privileged documentation for an investigation by the Financial Reporting Council (FRC) into auditor conduct. As a result of the dispute, the taxpayer was forced to disclose certain tax planning advice the nature of which, but for the dispute, may not have become known publicly.

This case concerned the disclosure of three reports commissioned by Deloitte in respect of Sports Direct International plc's (SDI's) VAT structure for its international distance selling arrangements. In brief, SDI implemented a structure (the '2010 structure') to ensure that sales of products to non-UK resident entities within the EU were subject to VAT in the UK and not in the particular member states where the customers were located. Initially this structure was signed off by HMRC. However in early 2014, various EU tax authorities began making enquiries into SDI's arrangements and it became clear that the structure was susceptible to challenge. In response, SDI instructed its lawyers and tax advisers to provide advice in anticipation of such a challenge. Part of the advice SDI received was an amendment to the 2010 structure which was intended to make it more robust. This advice was provided by Deloitte and referred to as the '2015

structure'. It later became the subject of the disclosure request by FRC. FRC requested disclosure of these documents in order to establish whether SDI's auditors were aware of the connections between the parties to the VAT arrangements such that it should have been disclosed in the financial statements.

The issue

The issue before the court was whether litigation privilege applied to the 2015 structure documents as asserted by SDI. Litigation privilege was asserted on the basis that litigation was in contemplation at the time the advice was provided and that the documents were produced in relation to that litigation. Nugee LJ noted that there was significant discussion from both sides on the temporal point of whether the documentation had in fact been produced when the litigation was in contemplation. Notably, Nugee LJ was unconcerned with this point and was happy, for argument's sake, not to question the timing of the reports in relation to whether litigation was in anticipation. Rather, Nugee LJ focused on the second limb of the litigation privilege test as espoused by Lord Carswell in *Three Rivers DC v Bank of England (No. 6)* [2004] UKHL 48 which clearly states that '(b) the communications must have been made for the sole or dominant purpose of conducting that litigation'.

Nugee LJ went on to find that the purpose of the 2015 structure documents was to reinforce an arrangement that achieved a VAT planning purpose. The question was then whether the advice was produced for the sole or dominant purpose of litigation. The court concluded that even if the parties contemplated that a structure *could* be challenged, this was not enough. The purpose of the advice was to implement the structure (to achieve a particular purpose for tax purposes) as opposed to defending it against actual litigation or litigation actually in contemplation. This has to be more than a perceived threat. There is therefore a distinction between any documents prepared to implement or indeed improve a structure, as opposed to those prepared to defend it. Consequently, the court held that the 2015 Structure documents were not subject to litigation privilege and should be disclosed to the FRC.

Comment

This case has far-reaching implications for taxpayers as it confirms that tax structuring advice received and implemented, even where there is a perceived risk of challenge, will not benefit from litigation privilege, and so could be subject to disclosure, either in these circumstances or where there is a HMRC information notice. There will of course potentially be legal advice privilege, but this has its limitations — notably that the advice has to be provided by a lawyer, as opposed to other advisers and legal advice privilege can easily be lost. Litigation privilege would apply only where there is actual litigation in contemplation, as opposed to a perceived risk of litigation, and where the documents are prepared for that purposes. The circumstances in which this will apply will be limited.

* * * * *

For related reading visit www.taxjournal.com

- Cases: *Financial Reporting Council Ltd v Frasers Group plc (formerly Sports Direct International plc)* (28.10.20)
- *Bilta v RBS*: litigation privilege and tax investigations (K Ison & C Reeve, 7.3.18)
- *Three Rivers*: unfinished business? (C Passmore, 21.11.04)

* * * * *

See also www.taxjournal.com — our mobile ready website for print subscribers.