5255 Yonge Street Suite 800 Toronto, Canada M2N 6P4 Tel: 416-923-0809 Fax: 416-923-1549 www.alpertlawfirm.ca

SEARCH WARRANTS, DISCLOSURE & CLIENT PRIVILEGE

This issue of the Legal Business Report provides current information to the clients of Alpert Law Firm on Search Warrants, Disclosure and Client Privilege under the Income Tax Act (Canada) and the possible challenges to and ramifications of statutorily compelled production of information and disclosure. Alpert Law Firm is experienced in providing legal services to its clients in tax and estate planning matters, tax dispute resolution, tax litigation, corporate-commercial transactions and estate administration.

A. SECTION 231.3 SEARCH WARRANTS

The Minister may make an *ex parte* application to a judge for a warrant covering any building, receptacle or place to be searched. The powers conferred under sections 231.1 and 231.2 of the *Income Tax Act* ("the Act") to audit, examine or require information are separate from the power to seize the documents, which requires a warrant.

Before issuing the warrant, the judge must be satisfied pursuant to subsection 231.3(3) of the Act that there are reasonable grounds to believe that:

(i) an offence under the Act has been committed;

(ii) a document or thing that may afford evidence to the commission of the offence is likely to be found; and

(iii) the building, receptacle or place specified in the application is likely to contain such a document or thing.

Subsection 231.3(5) of the Act permits the person executing the warrant to seize documents in addition to those listed on the warrant, if the person reasonably believes that the documents afford evidence of an offence under the Act.

Documents seized must be brought before the judge, who may order the document or thing seized to be returned if it was not seize in accordance with the warrant or section 231.3 of the Act. Subsection 231.3(8) of the Act allows the person from whom the documents or things were seized to inspect them at reasonable times and to obtain one copy of the document at the Minister's expense. Subsection 490(15) of the *Criminal Code* allows a judge to grant permission for an interested person to examine detained or seized material. Failure to comply will result in the penalties pursuant to subsection 238(1) of the Act.

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1. ***R. v. Jarvis*, 2002 SCC 73**

In this Supreme Court of Canada case, the taxpayer's appeal raised the issue of whether the Court of Appeal of Alberta erred in admitting evidence collected by CRA auditors during an audit that became an investigation. The taxpayer was charged with tax evasion and making false or deceptive statements in his 1990 and 1991 tax returns. The taxpayer's wife was an artist, and was deceased. The taxpayer was able to continue selling her art after her death. The auditor attempted to contact the taxpayer but when she was unsuccessful she contacted third-party sources such as art galleries in order to obtain records pertaining to art sales. When the taxpayer's accountant contacted the CRA auditor, he notified her that the file was in disarray because of the taxpayer's poor record-keeping skills, and his general apathetic attitude towards financial and taxation matters since his wife's death.

After meeting with the taxpayer and obtaining many of his records in April 1994, the CRA auditor determined there was a discrepancy of approximately $700,000 between what was reported on the taxpayer's 1990 and 1991 tax returns and his actual income over the two years. The auditor referred the file to CRA Investigations in May 1994, but did not notify the taxpayer of the change in status, even after inquiries by the taxpayer's accountant. The CRA investigator was able to obtain a search warrant in November 1994 based on the information from the April 1994 meeting, and a search was conducted. Documents found in the search were seized and tendered as evidence during the taxpayer's first criminal trial in 1997.

This evidence was challenged by the taxpayer during his 1997 criminal trial in the Provincial Court of Alberta on the grounds that it had been unlawfully obtained. The trial judge excluded all the evidence from the time the audit had become an investigation forward and acquitted the taxpayer. The Crown appealed to the Court of Queen's Bench of Alberta and a new trial was ordered. The taxpayer appealed the order for a new trial to the Court of Appeal of Alberta. His appeal was dismissed but he was granted leave to appeal to the Supreme Court of Canada.

The Supreme Court of Canada dismissed the appeal and upheld the Alberta Court of Appeal's judgment order for a new trial. The Supreme Court of Canada held that the warrant had been validly issued since an investigation had not yet been started in April 1994. The evidence obtained from the search under this warrant was admissible at the new trial. The Supreme Court held that any evidence obtained pursuant to subsection 231.2(1) requirement letters once the investigation had started was to be excluded from the new trial, as the audit powers of this subsection were not to be used to further a criminal investigation. The Supreme Court concluded that when the predominant purpose of the inquiry is penal liability, the Minister must relinquish the powers under subsections 231.1(1) and 231.2(1).

At the taxpayer's new, second trial (***R. v. Jarvis***, 2006 DTC 6477) he was acquitted of tax evasion as he did not have the intent to willfully evade the payment of taxes and make false or deceptive statements on his 1990 and 1991 tax returns.

2. *In the matter of Synergy Group (2000) Inc. et al.*, Ontario Superior Court of Justice File No.: 10446

On August 30, 2012, the Ontario Superior Court of Justice ordered the CRA to return all of the records seized pursuant to a search warrant obtained during a criminal investigation against Synergy Group (2000) Inc., which was represented by Alpert Law Firm. Synergy Group (2000) Inc. and other taxpayers were alleged by the CRA to have participated in a tax scheme, marketed across Canada, to permit investors to deduct tax losses totaling nearly $200,000,000 during 2004, 2005 and 2006.

On March 16, 2010 the CRA seized records from Synergy's offices acting on a search warrant issued by the Superior Court of Justice pursuant to section 487 of the *Criminal Code*, in relation to an ongoing criminal investigation. Subsequently, the CRA made additional Court Applications and the Superior Court of Justice extended the record detention period by over two years until May 18, 2012. Synergy made allegations that the method used by the CRA to obtain the search warrant violated its Canadian Charter rights by contravening the Supreme Court of Canada decisions in ***Jarvis*** and ***Ling***.

The CRA did not institute any further proceedings to extend the period to detain the records. Pursuant to the provisions of subsection 490(9) of the *Criminal Code*, the Ontario Superior Court of Justice issued orders on consent, ordering the CRA to return all of the records that were seized from the taxpayers during the course of the criminal investigation. On September 27, 2012 the CRA returned the seized records to Synergy.

3. *R. v. Borg*, 2007 ONCJ 8480

In this Ontario Court of Justice case, the taxpayer was charged with income tax evasion during the period between December 31, 1990 and June 19, 1995, pursuant to paragraph 239(1)(d) of the Act. These charges were a result of an audit of the taxpayer's carpet installation business initiated by the CRA. In April 1995 a CRA auditor was assigned and on March 16, 1996, she referred the taxpayer's file to CRA Investigations. Eventually, search warrants were obtained on July 9, 1997 and they were executed on July 10, 1997. The taxpayer was eventually charged on August 20, 1998. Before trial, the taxpayer brought an application for exclusion of evidence on the basis that the auditor was engaged in a criminal investigation when using audit powers to demand information.

The Ontario Court of Justice granted the taxpayer's application. The Court found that from May 25, 1995 onwards, the CRA auditor must have subjectively concluded that

she had uncovered the necessary *mens rea* on the part of the taxpayer to commit tax fraud and tax evasion when she discovered the huge sums of business incomes that had been unreported in 1992 and 1993. The Court found that despite this evidence, the CRA Auditor failed to refer the taxpayer's file to CRA Investigations until almost ten months later and was engaging in a criminal investigation under the guise of an audit during the interim period.

As a result, the Ontario Court of Justice excluded all evidence obtained by the CRA Auditor from May 25, 1995 onwards. The Court also excluded all of the evidence obtained or derived by the execution of search warrants since the Court found that the search warrants would not have been issued in the absence of the information obtained by the CRA Auditor subsequent to May 25, 1995.

4. ***Singh v. Her Majesty the Queen*, 2007 DTC 1500**

A taxpayer represented by Alpert Law Firm, required copies of all of his business records in order to fully prepare his defence against a CRA reassessment. The CRA repeatedly refused the taxpayer's requests to provide him with copies of these documents. The CRA claimed that it was not in possession of these documents, since they had been previously seized by the RCMP from the taxpayer in an unrelated legal proceeding. However, the RCMP had granted the CRA full access to the seized documents in preparing its case against the taxpayer. Alpert Law Firm brought a Motion in the Tax Court of Canada on behalf of the taxpayer and was successful in obtaining orders compelling the RCMP to release the seized documents to the taxpayer and awarding costs against the CRA.

B. SOLICITOR-CLIENT PRIVILEGE

Subsection 232(1) of the Act defines "solicitor-client privilege" as the right of a person to refuse to disclose any oral or documentary communication between the person and the person's lawyer in professional confidence. However, the Courts have held that in certain circumstances "solicitor-client privilege" may not extend to the accounting information such as the trust account records of a solicitor.

There are two types of solicitor-client privilege: litigation privilege and legal advice privilege. The former protects all communications between the client, the solicitor and third parties involved in or contemplating litigation. Legal advice privilege protects communications between the client, the solicitor and third parties that relate to the seeking, formulation or giving of legal advice. The communication must be "professional communication in a professional capacity". This privilege extends also to communications with people with whom the solicitor interacts professionally, such as an articling student.

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In order to qualify for protection, the documents in question must be a communication between a solicitor and a client that involves legal advice, where it was intended to be confidential. Facts contained in those documents, which may be discoverable, are not protected. Privilege is not automatically given to documents because they are in the possession of a lawyer.

Solicitor-client privilege is seen as crucial for the administration of justice in an adversarial system. The goal of solicitor-client privilege is to assure open communication so that there can be effective legal assistance, to further proper administration of justice, and to adequately prepare prosecutions or defences. The Courts have stated that there is a fundamental rule of privilege that is to be interfered with as little as possible. For example, where there is some doubt as to the purpose of communication (i.e., whether it qualified as legal advice) then the benefit of the doubt should go towards maintaining privilege. Privilege can be waived; however, the waiver must be done by the client or a person with the authority to waive protection. Inadvertent or unknowing disclosure to a third party also does not automatically waive privilege.

C. NO ACCOUNTANT-CLIENT PRIVILEGE

While confidential information between an accountant and a client is not subject to privilege, there is an exception where the information was given to the accountant as an agent of the client for the purpose of obtaining legal advice for the client. The privilege here is not the creation of an accountant-client privilege but an extension of solicitor-client privilege through an agency relationship.

The lack of privilege stems from the lack of an express provision in the Act protecting communications between an accountant and a client. Privilege in this case is not seen as being a necessary part of ensuring the fair administration of justice, as in the case of the privilege between lawyers and their clients.

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This issue of the Legal Business Report is designed to provide information of a general nature only and is not intended to provide professional legal advice. The information contained in this Legal Business Report should not be acted upon without the further consultation with professional advisers.

Please contact Howard Alpert directly at (416) 923-0809 if you require assistance with tax and estate planning matters, tax dispute resolution, tax litigation, corporate-commercial transactions or estate administration.