



Atty. Irwin C. Nidea Jr.

TAX LAW FOR BUSINESS

*BDB Law's "Tax Law for Business" appears in the opinion section of **Business Mirror** every Thursday.*

Lawyers must kiss and tell

Imagine a world with no lawyers. Some will be elated, considering how lawyers are maligned mercilessly by our society. But many will also cringe at the idea, since for them, lawyers are the bastion of justice and the protector of their rights.

In order for lawyers to fulfill their role, they need to enjoy the trust and confidence of their clients. This trust is protected by what is called attorney-client privilege. This privilege is held by the client and not by the lawyer. It is used by the client for his protection so he can freely communicate his secrets without fear of disclosure.

In a bold move, the Bureau of Internal Revenue (BIR) is challenging this legal tenet that traces its roots way back in the Roman era. Revenue Memorandum Circular (RMC) 12-2018 mandates that the Commissioner of Internal Revenue is empowered by Section 5 of the Tax Code to obtain on a regular basis from any person other than the person whose internal revenue-tax liability is subject to audit or investigation any information. According to the CIR, this provision of the Tax Code should be taken as an additional exception to the attorney-client privilege because of the following reasons:

1. The Lawyer's Code of Professional Responsibility ("Lawyer's Code") provides that a lawyer shall not reveal the confidence or secrets of his client except, among others, when required by law;
2. The Supreme Court has stressed that the privilege against disclosure of confidential communication or information does not extend to those made in contemplation of a crime or perpetration of fraud.

In the same RMC, the CIR warned that a lawyer must submit all privilege information upon his request. Failure to do so is tantamount to one year to 10 years of imprisonment.

I cannot blame the CIR for trying to find ways, to obtain information so that he can achieve his mandate. But will RMC 12-2018 fly, if questioned in the Supreme Court?

As to the first reason laid down in the RMC, the Lawyer's Code states that the privilege cannot be invoked if a law provides for an exception. What this contemplates is a categorical provision of law saying that the privilege must be waived. This is not present in Section 5 of the Tax Code. Although the Tax Code states that the CIR can obtain information from "any person," there is no specific provision calling for an exception to the attorney-client privilege. A mere inference will not do. Thus, the exception must remain.

As to the second ground, an important distinction must be made between a case where a client takes on the services of an attorney for illicit purposes, seeking advice about how to go around the law for the purpose of evading tax and a case where a client thinks he might have previously committed something illegal and consults his attorney about it. The first case clearly does not fall within the privilege because the same cannot be invoked for purposes illegal. The second case falls within the exception because, whether the act for which the advice turns out to be illegal, the privilege cannot be waived if the disclosure leads to evidence, not yet in the hands of the BIR, which might lead to possible action against him. These cases may be readily distinguished, because the privilege cannot be invoked or used as a shield for an illegal act, as in the first example; while the BIR may not have a case against the client in the second example and cannot use the attorney client relationship to build up a case against the latter [G.R. 105938, September 20, 1996]. Thus, unless a lawyer is engaged for the purpose of committing or furthering tax evasion, the attorney-client privilege cannot be waived.

According to the Supreme Court, the fiduciary duty of a lawyer is what makes the law profession a unique position of trust and confidence, which distinguishes it from any other calling. Imagine a world where lawyers are free to reveal your secrets to the BIR. It will be a world full of insecurities and it will be an environment that ultimately undermines the constitutionally guaranteed right to counsel.

The author is a partner of Du-Baladad and Associates Law Offices (BDB Law), a member-firm of WTS Global.

The article is for general information only and is not intended, nor should be construed as a substitute, for tax, legal or financial advice on any specific matter. Applicability of this article to any actual or particular tax or legal issue should be supported, therefore, by a professional study or advice. If you have any comments or questions concerning the article, you may e-mail the author at irwin.nidea@bdblaw.com.ph or call 403-2001 local 330.