



# **The Chartered Tax Adviser Examination**

November 2008

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## **PAPER IV**

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PROFESSIONAL RESPONSIBILITIES, ETHICS AND LAW

Suggested Answers (without marks)

## Question 1

### Complaints

#### Memorandum

**To:** The Partners  
**From:** Tax Manager  
**Subject:** Client Complaints

The purpose of this Memorandum is to set out CIOT guidelines in the event of the firm receiving a complaint from a client.

We should review our complaints procedure and ensure:

- All existing clients have been, and new clients are, made aware in writing of the name and status of the person to whom the complaint about the services provided should be made, and of the ability to complain to the Chartered Institute of Taxation ('the Institute').
- Any complaint received should be acknowledged promptly in writing.
- The complaint should be investigated thoroughly and without delay by a person of sufficient experience, seniority and competence and, preferably, by a person with no prior involvement in the act or omission giving rise to the complaint. The client should be told about the investigation.
- Appropriate action is taken in the event the complaint is found to be in any part justified.

The complaint must be treated seriously and immediate action taken. Our aim is to solve the problem and remedy any defective work as soon as is possible.

Speed is of the essence here as it is widely accepted that a prompt response can limit any damage done to our relationship with that particular client.

When in receipt of a complaint, we must consider whether or not it is likely to result in a claim against our Professional Indemnity Insurance.

Should a claim be likely, it is imperative that we inform our insurers immediately and are somewhat circumspect in our reply to the client. It may be appropriate in these circumstances to seek legal advice.

If the complaint (other than one with potential PII implications) is found to be valid, this should be acknowledged promptly and a suitable apology offered. This may be all that is required to resolve the matter.

It may be that we consider that the complaint is not valid, in which case we should advise the client accordingly. We should endeavour to see the complaint from the perspective of the client to and it is important that, when we inform the client, we do so in terms he is likely to understand.

We should bear in mind that the client has the option of making a complaint to the Institute. A complaint directed in the first instance to the firm, allows us to investigate the grounds of the complaint and give a full and satisfactory response which, in turn, can avoid any escalation in the nature of the complaint.

A careful written record should be maintained of each complaint made and the steps taken. This will be specifically important if the client does refer the matter to the Institute.

## Question 2

The Chartered Institute of Taxation provides guidance on the meaning and implications of legal professional privilege (LPP) for the tax advisor.

LPP is related to, albeit not the same as the general duty of confidentiality owed to a client. It was originally developed in the context of Court proceedings, and operated to exclude privileged material from having to be disclosed to the other party, or, if known to the other party, being brought into evidence by him.

Until the House of Lords decision in *R(on the application of Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax [2002]*, H M Revenue & Customs contended that TMA 1970 s 20(1) overrode the right to confidentiality conferred on LPP material. The House of Lords held that the right to communicate in confidence with a legal advisor was a fundamental constitutional right and, whilst it could be overridden by Parliament, this was only so if statute did so expressly or by implication. The House of Lords considered that the statutory language in this case was not sufficiently strong to justify such an inference. This was also felt to be the case in respect of other information powers.

Thus all H M Revenue & Customs investigatory powers take effect subject to the right to confidentiality in respect of LPP material.

It is, therefore, important to ascertain whether documents qualify as LPP material, and specialist legal advice may be necessary.

There are two situations in which LPP arises:

- **Litigation privilege** which covers documents prepared for the dominant purpose of litigation. This extends not only to documents prepared by a lawyer, but also to any document brought into existence by any person for the predominant purpose of litigation. If there is a significant secondary purpose, this will prevent the document from being privileged. Therefore, once litigation has been started or contemplated, documents prepared by non legal advisors (including tax advisors) may be privileged. Litigation for these purposes includes a tax appeal. Scots law provides for the privilege of communications post litem motem.
- Though there is doubt as to when the privilege begins to attach to a communication prepared in advance of litigation, which would include a tax appeal, there is a strong argument that the protection arises as soon as anything occurs to indicate that HMRC is querying the tax liability of the taxpayer; for example, where HMRC challenges the completeness of a return or the correctness, in fact or law, of the basis upon which a self assessment has proceeded.
- **Advice privilege** which covers documents passing between a client and his legal advisors for the purpose of obtaining or giving legal advice. Who is a legal advisor for these purposes is not entirely clear. The description is not restricted to lawyers in private practice and can include employed lawyers. At present, this type of privilege does not normally extend to communications to or from non-lawyers, even though such advisors may regularly advise on a particular area of the law and have professional qualifications to do so. Tax advice (when not obtained for the purposes of litigation) from a non lawyer advisor is, therefore, not privileged at common law. The same is true for commissioned reports or investigations of companies. If any member is in doubt, he should seek legal advice.

LPP is quite distinct from statutory protection given by TMA 1970 s 20B, which restrict HMRC's powers to require information from tax advisors in certain circumstances, as follows:

- S20B(2), - a person is not bound to deliver documents or furnish particulars which relate to the conduct of a pending appeal by him, nor is any other person bound to deliver or make available documents relating to the conduct of an appeal by the taxpayer;
- S20B(8) - a barrister, advocate or solicitor is not bound to deliver or make available documents for which LPP could be claimed;
- S20B(9) - a tax advisor is not bound to deliver or make available documents which are his property and which consist of communications for the purpose of giving or obtaining tax advice.

HMRC has, in Tax Bulletins 46 and 62, given guidance on its position with regard to its information powers and in particular the extent of protection given under these sections.

LPP is a common law matter and the privilege relates to the client not the advisor. The effect is that the client, unless he waives his privilege, cannot be required to produce documents or answer questions where the subject is privileged; neither can the lawyer do so without the client's permission.

There are occasions where LPP cannot be claimed, for example where the document came into existence as a step in criminal or illegal activity.

Practitioners should note that, even if material is not protected by LPP or a statutory exemption, there may be recourse to the HRA 1998, although the position is not clear.

If a member is consulted about, or himself receives, a request from the tax authorities, in the form of a statutory notice, which calls for disclosure of material which he believes to be privileged at common law and which the client does not agree to disclose, then he should consider taking legal advice. It is not uncommon to respond to the effect that, because the document or information is privileged, it is not being disclosed. Frequently, the tax authorities do not then pursue the matter. If they do, it may be appropriate for the member or the client to determine the status of the material in advance of any penalty proceedings for non compliance.

### Question 3

The CIOT's guidance on matters that need to be considered in the area of client service are set out in Professional Rules and Practice Guidelines (2006).

- **Duty of care**
  - The practitioner has a duty of care to the client, and must therefore exercise reasonable skill and care when acting. Failure to do so may result in a claim for professional negligence. The member must understand the duties and responsibilities in respect of the client, and must manage the risks of acting, including his ability to discharge his duty of care in respect of the particular issues on which advice is sought.
  - He must also be aware of the position of third parties and the limits to his duty of care.
- **Professional competence**
  - A member should only advise in situations where he has the professional competence to deal with the specific area under consideration.
  - He must ensure that he understands the client's personal and business circumstances and tax position, as well as the issues under consideration and the objectives of the advice.
- **Supervision and training**
  - If any of the work is delegated, the member should ensure that the staff to whom it is delegated are adequately trained and supervised.
  - This also applies to subcontractors and consultants.
  - Employee members who feel that they are not adequately trained or supervised should bring this to their employer's attention.
- **Subcontractors**
  - The client's consent, either expressly or as part of the general terms included in the engagement letter, is required if a subcontractor is used.
- **Consultation and second opinions**
  - If a member feels it necessary to consult with a fellow professional to ensure the relevant skill and judgement is applied, then he should do so. Evidence of consultation should be kept on file. Client confidentiality rules must be taken into account.
  - Members should consider taking a second opinion, either from a fellow professional or from tax counsel in the following cases:
    - (i) High risk cases, whether in terms of professional reputation or financial exposure.
    - (ii) Significant opinion cases ie whether either the tax at stake is significant for the client and there is a real risk that a contrary view could be reached, or the matters advised on are, for some other reason, significant to the client.

- **Form and content of advice**
  - The member should exercise professional judgement in deciding on the form and content of the advice, for example in the light of the enquiry and the client's tax sophistication.
  - The advice should normally set out:
    - (i) The purpose of the advice and the client's objectives;
    - (ii) Background facts and assumptions;
    - (iii) Possible alternatives;
    - (iv) Risks and relevant caveats and exclusions.
  - The advice should cover tax legislation and HMRC practice, and should make it clear that it is current and may be affected by future changes in the law. This exclusion may also covered in the engagement letter.
  - Advice should normally be in writing. The member should decide whether oral advice should be confirmed in writing. Even if this is not considered to be necessary, contemporaneous notes should be made and retained on file.
- **Professional records**
  - A member must ensure that records of all written communications, meetings, details of technical research, second opinions etc are kept and are organised and accessible.
  - This will mean that future client service is optimised, misunderstandings and complaints can be resolved, and the member can defend any allegations of negligence.
  - There should be a file retention policy, taking into account statutory limits and time limits for possible action against a member.
- **Time limits, due dates and interest**
  - Members should have a diary system to enable them to advise clients of relevant time limits for elections and claims, and to ensure that action is taken when necessary.
  - For compliance clients, members should advise on the due date for tax payments, including tax due and the interest position.
  - This is not necessary for non compliance clients, but in such cases, a specific exclusion should be incorporated in the engagement letter.
- **Representation before Commissioners and Tribunals**
  - Should a member be asked to represent his client at Commissioners and Tribunal hearings, he should be aware that specific guidance has been produced covering this situation

## Question 4

	Office address
	Date
Client name	
Client address	
Dear [name of client]	
I am writing concerning the recent repayment of income tax, which I understand you have received and banked.	
I have reviewed your file and it appears that HM Revenue & Customs (HMRC) have processed your tax return incorrectly. The repayment has therefore been issued in error and you are not properly entitled to it.	
This firm is bound by our Institute's guidelines as to best practice and, quoting from your engagement letter, I would draw your attention to the following:	

'We will observe the Professional Rules and Practice Guidelines of our professional Institute and accept instructions to act for you on the basis that we will act in accordance with those guidelines. In particular you give us authority to correct HMRC errors'.

The repayment is clearly an example of an HMRC error and I will therefore report it to HMRC on your behalf. You should make arrangements to repay it.

I am aware that you may prefer me not to do this, but you should be aware that, notwithstanding the terms of the engagement letter set out above, the retention of a repayment which you know is incorrect is a criminal offence under the Theft Act 1968 and renders you liable to prosecution.

Additionally, we need to consider the money laundering aspects of this situation. A person is deemed to be engaged in money laundering if they acquire, use or have possession of criminal property. Criminal property is any property which emanates from criminal conduct with criminal conduct being any conduct which constitutes an offence. Because the retention of an incorrect repayment is in contravention of the Theft Act, this constitutes an offence and the repayment consequently falls to be classed as criminal property with you being deemed to be guilty of money laundering.

We, as a firm, are legally obliged to disclose to the Serious Organised Crime Agency all instances of money laundering of which we are aware. Client confidentiality is no defence against any failure on the part of a professional to disclose any examples of money laundering; conversely, it cannot be deemed to be a breach of client confidentiality for a professional to disclose in this area.

In any event, we trust you agree that we disclose to HMRC that an incorrect repayment has been made. Should you not wish to make such disclosure, we would have no alternative but to cease to act for you with immediate effect.

Please feel free to call me to discuss.

Kind regards

Yours sincerely

[Partner].

## Question 5

1. Patents are monopoly rights over inventions. They are rights acquired by registration. A patent gives a monopoly right over the invention.
2. Registered trademarks. Registered trade marks are signs capable of distinguishing the goods or services of one undertaking from those of another. They can be used for goods or services being marketed under identical or confusingly similar marks to ones own.
3. Passing off and unregistered trademarks. The right to prevent passing off protects a business from misrepresentations by others that they are connected with or are part of the same business. One application of passing off is to protect against the misuse of an unregistered trademark provided that there is some goodwill established in that mark.
4. Copyright and neighbouring rights. Copyright protects literary, artistic, musical and some other works from being copied. Neighbouring rights include matters such as rights over databases, rental rights (giving the owner the right to control the rental market for his works) and rights in performances. Copyright and neighbouring rights arise automatically without registration. They do not prevent similar works from being created independently.
5. Registered designs. A registered design gives an exclusive right to use the design and any design which does not produce a different overall impression. The right can be infringed whether or not the design is copied.
6. Design rights. EU legislation has introduced an automatic right in unregistered Community designs. These rights only protect against copying.

7. Confidential information. If commercial or personal information is given to someone under conditions of confidence there may be a right to prevent the misuse or unauthorised disclosure of that information. The information must, in fact, be confidential before it can be protected.
8. Know how and show how. Know how is sometimes used as a synonym for confidential information (section 7 above) or for non-confidential information which the recipient none the less considers valuable. Non-confidential information is not a category of intellectual property rights at all, it is a service. Show how is a form of know how in which the information is conveyed by practical demonstration rather than, for instance in writing.

## Question 6

Tax Advisers Ltd  
1 The Street  
Sometown  
County

Mrs V Edge  
5 The Avenue  
Sometown  
County

XX November 2008

Dear Vera

I write to confirm the formal requirements that must be observed with drawing up a Will. No particular form of words is necessary. Wills may be typed, printed or written by hand. However, the Wills Act 1837 sets out a number of requirements that must be observed to draw up a valid Will.

A Will must be in writing.

A Will must be signed by the testator (the person making the Will) and the testator's signature must be witnessed by two persons, who are present together when the Will is signed by the testator.

Neither attesting witnesses nor the spouse of a witness can benefit under a Will unless there are two other independent witnesses. Therefore, an intended beneficiary should never witness a Will. If, however, an attesting witness marries a beneficiary after the date of the Will this does not invalidate a bequest.

The testator must be sui juris (of sound mind). Thus, a minor cannot make a valid Will. A person of unsound mind can make a Will during a lucid interval.

The testator must intend the Will to be operative as a testamentary disposition. Testamentary dispositions are instruments in writing by which persons dispose of their possessions after death.

Please do not hesitate to contact me if you have any further questions.

Yours sincerely

Tax Adviser

## Question 7

[FORMAT AS LETTER - ADDRESS & DATE]

Heads of Agreement are intended to set out the basic structure of a transaction. The Heads usually identify the parties involved, assets and liabilities and price. The Heads will also usually include an outline of the main terms and conditions of the contract, such as the scope of warranties, indemnities, restrictive covenants, pension rights etc. The Heads are drawn up prior to the final contract being drawn up, so that broad terms can be set out before incurring significant costs.

Heads will vary considerably in size and scope, depending on the transaction and the parties involved. Except for three particular clauses, the Heads should always be expressed to be “subject to contract” and drafted to make it clear that they are not intended to be legally binding.

The three clauses which are legally binding are:

- (a) confidentiality: Serial Acquisitions Inc is likely to be asked to agree not to make use of or disclose any information provided by Target Limited in the course of negotiations. This is likely to provide for a return of documents.
- (b) Exclusivity period: Target Limited should be asked to agree not to negotiate with other parties for a specified period, to allow Serial Acquisitions Inc time to investigate the business before concluding the deal.
- (c) costs: normally each party bears its own costs but, if one party is to pay the costs of the other, the paying party should require an agreement that they are not required to pay if the transaction does not complete.

## Question 8

- (1) English:

A tort is essentially a wrong done by one person to another. It is the breach of a legal duty or the infringement of a legal right arising independently of contract which gives rise to a claim for damages.

There is no liability in tort unless it is established that a legal duty or right exists and that it has been breached.

Scots:

The law of delict is largely based on negligence rather than specific categories of wrong.

- (2) Negligence is the breach of a legal duty to take care which results in often unintentional damage to another.
- (3) To establish negligence, the client must prove that the party giving the advice owed a duty of care. A duty of care is owed to take reasonable care not to cause foreseeable harm to others. A duty is owed to persons sufficiently close to the act or omission causing harm that it was reasonably foreseeable that such a person would or could be harmed by the act or omission.
- (4) Having established that a duty of care is owed, the client must prove that there was a breach of the duty to take adequate care. Professional advisers may be in breach of a duty of care if they fail to reach the standard reasonably to be expected of members of that profession.

Guidance on the standard can be obtained from other members of the profession and the profession's rules and guidelines. Where there is a written contract between the parties, the contract may expressly require a higher than usual level of care to be employed.

- (5) Having established both that a duty of care exists and that there was a breach of that duty of care, the client must prove that they suffered loss or damage as a result of the breach. There must be a causal link between the practitioner's conduct and the damage suffered.

The test used to determine liability is referred to as the “but for” test - if the loss would not have occurred “but for” the adviser's act or omission then the adviser has caused the loss. If the client would have suffered the loss regardless of the adviser's actions, then the adviser is not liable for the loss.