

THE 'AUDIT' POWER OF THE COMMISSIONER OF TAXATION: SECTIONS 263 AND 264 OF THE *INCOME TAX ASSESSMENT ACT 1936*

by

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1. Introduction

The introduction of self-assessment has sparked an increase in what is termed 'auditing' by the Australian Taxation Office. The emphasis is now on the voluntary compliance of taxpayers encouraged by increased contact with taxation officers. This can occur at the Australian Taxation Office (ATO) and/or at a taxpayer's home or business premises. As a consequence, not only are a taxpayer's professional advisers often required to be involved but their own business premises may be subject to a 'visit' by taxation officers.

It is therefore important that professional advisers have a good understanding of the extent and limitations of the Commissioner's investigative powers pursuant to the *Income Tax Assessment Act 1936* (the Act). This is reinforced by the provisions of the *Taxation Administration Act, 1953* (as amended) which provides for prosecution action upon failure to comply with a requirement under the Act¹.

2. Access pursuant to s.263 of the Act

Section 263 provides that the Commissioner, or any officer authorised by him shall:

1. have full and free access;
2. to all buildings, places, books, documents and other papers;
3. for any of the purposes of the Act; and
4. for that purpose may make extracts or copies.

(a) Entitlement to seek access

Section 263 confers the right of access on:

1. the Commissioner;
2. any delegate of the power of the Commissioner under s.263²;
3. any officer authorised by the Commissioner to exercise the Commissioner's right of access; and
4. any officer authorised by the delegate of the Commissioner to exercise the Commissioner's right of access³.

As a matter of practicality it will generally only be the last two categories of taxation officers who will be seeking access.

Although a taxation officer is entitled to enter any building pursuant to s.263 he or she must produce a written proof of authorisation if requested to do so by the occupier⁴. If it is not so produced the officer has no authority under s.263 to enter or remain on the premises⁵. In the absence of a request the officer is under no obligation to have such a written authority⁶.

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1. Refer ss.8C-8H of the *Taxation Administration Act*.

2. Refer to the power of the Commissioner to delegate pursuant to s.8 of the *Taxation Administration Act*.

3. *FCT v. Citibank Ltd* 89 ATC 4268; also refer to the discussion of authorisation at paragraph number 10.

4. Refer s.263(2).

5. *FCT v. Citibank Ltd* 89 ATC 4268.

6. *Ibid.*

It is therefore advisable to request production of a taxation officer's written authorisation before access is allowed as if he or she is unable to do so they must leave the premises immediately.

The Commissioner has no obligation to comply with the requirements of natural justice before issuing a s.263 authorisation. Nor is it necessary that the authorisation specify the premises to be searched or the documents which are the subject of the search⁷.

(b) Full and free access

In *FCT v. The ANZ Banking Group; Smorgon v. FCT*⁸ Gibbs ACJ held that access means "the right to enter the building and examine the documents"⁹.

The right of full and free access includes a power to take whatever steps are, in all the circumstances, reasonably necessary and appropriate to remove any physical obstruction to that access provided that the power is exercised in a bona fide manner and is not exercised excessively¹⁰.

If, for example, the owner of a safe deposit box refuses to open it or supply a key, a taxation officer seeking access pursuant to s.263 is entitled to open the box by force provided that the use of the force is necessary and not excessive¹¹.

Sub-section (3) of s.263 was added in 1987 to provide that an authorised taxation officer is entitled to be provided by the occupier with 'all reasonable facilities and assistance' for the effective exercise of his powers under s.263.

That explanatory memorandum accompanying this amendment states that ss. (3) will oblige the occupier of the place or possessor of the documents to provide the reasonable use of light and power facilities, photocopying and telephone, and facilities to extract information stored on computer. In addition, the explanatory memorandum states the taxation officer will be entitled to reasonable assistance in the form of advice as to where relevant documents are located and the provision of access to areas where the documents are located.

In *Perron Investments Pty Ltd v. FCT*¹² Hill J. concluded that when the authorised officer is seeking access pursuant to s.263 the occupier is obliged to render reasonable assistance. His Honour stated that whilst the officer may make copies of documents, books etc in the course of taking access it is doubtful that he could require the occupier to do so and provide him with the copies¹³.

As the section does not require the occupier to bear the expense for any facilities used by the taxation officer it would seem advisable for the occupier to keep a record of expenses and submit it to the taxation officer at the conclusion of the access.

An occupier who fails to provide the necessary facilities or assistance is liable to be fined up to \$1,000¹⁴.

(c) Buildings, places, books, documents and other papers

There does not seem to be any reason why the words "buildings, places" would not bear their ordinary meaning and in the context of s.263 extend to any structure or location where documents may be kept, stored, hidden or otherwise located¹⁵.

7. *Ibid.*

8. 79 ATC 4039.

9. 79 ATC 4039 at 4046.

10. *O'Reilly v. The Commissioners of the State Bank of Victoria* 153 CLR 39 at 48.

11. *J.J. Kerrison v. FCT* 86 ATC 4103.

12. 89 ATC 5038.

13. 89 ATC 5038 at 5051-5052.

14. Section 263(3).

15. David John Parry Williams, *Investigations by Administrative Agencies* Sydney Law Book Co 1987 at 313

In *Kerrison v. FCT*¹⁶ there was discussion regarding the question of whether or not safety deposit boxes held at the bank were “places” within the meaning of that word as used in s.263. Bollen J. was not prepared to give such a broad interpretation to the word “places” but was of the opinion that the requirement of full access to the building encompassed the boxes held in the building. The denial of access to the boxes was a denial of full and free access to the bank’s premises and those premises were clearly a building or a place¹⁷.

The meaning of the words “books, documents and other papers” is discussed at paragraph 3(c)(iii) of this paper.

(d) For any of the purposes of the Act

The Commissioner’s powers pursuant to s.263 are limited to being exercised ‘for the purposes of the Act’. In *Industrial Equity Ltd v. DFCT*¹⁸ the Full Court of the Federal Court held that an ‘audit’ by the taxation office was an exercise of the Commissioner’s powers pursuant to s.263 and consequently ‘for the purposes of the Act,’ provided that it was directed to the ascertainment of the taxable income of, and the amount of tax payable by, a taxpayer. It was further held that the Commissioner was entitled to select persons or corporations for investigations and audit at random or by reference to some criterion¹⁹. The High Court has since confirmed this decision²⁰.

Nor is the power in s.263 restricted to access to the premises of, or the documents of, the person actually under investigation. In *FCT v. Citibank Ltd*²¹ access was sought to documents at Citibank’s premises which related to taxpayers who were clients of the bank. The investigation of the Taxation Office was not of Citibank itself²².

There is no requirement that, before the Commissioner can utilise the power under s.263 there must be a deficiency in the information held. It follows from this that the power can be used merely for checking information already in the Commissioner’s possession²³. The fact that the Commissioner had already issued original or amended assessments to the taxpayer and its associated companies in the *Industrial Equity* case did not prevent him from exercising his powers under s. 263²⁴.

Furthermore, the power under s.263 is not limited to the investigation of the affairs of a ‘taxpayer’. In *Southwestern Indemnities Ltd v. Bank of New South Wales & FC of T*²⁵ Barwick C.J. stated that:

... section 263 is not limited in its application to the affairs of a person who in fact is in receipt of assessable income. It suffices that the exercise of the power given by the section is for the purposes of the Act, which of course include an investigation into whether or not a person is or has been in receipt of assessable income. Such an investigation cannot be limited to buildings, books, etc. of a person who is liable to taxation but must extend to any person²⁶.

16. 86 ATC 4103.

17. 86 ATC 4103 at 4112.

18. 89 ATC 5316.

19. 89 ATC 5316 at 5321.

20. 90 ATC 5008.

21. 89 ATC 4268.

22. Also refer *Clyne v. DFCT* 85 ATC 4597 wherein it was held that the Commissioner could validly seek access to a bankrupt’s files under s.263 whether to inspect possible tax liability of the bankrupt’s clients or to consider whether the files revealed information about the bankrupt’s own tax position.

23. *FCT v. The ANZ Banking Group Ltd; Smorgon v. FCT* 143 CLR 499.

24. 89 ATC 5316.

25. 73 ATC 4171.

26. *Ibid.* at 4174-4175.

The power must always be exercised bona fide. As Mason, Murphy, Brennan and Deane JJ said in *O'Reilly v. Commissioners of the State Bank of Victoria*²⁷:

Like all statutory powers, that power must be used bona fide for the purposes for which it was conferred and that involves that its exercise be not excessive in the circumstances of the case.²⁸

(e) Make extracts or copies

The Commissioner is entitled to make copies pursuant to s.263. There is no specification in the Act of the manner in which the copying may be carried out by the Commissioner. It would seem that authorised taxation officers would be entitled to use the occupier's photocopying facilities, however they would have to make the copies themselves and the occupier would be entitled to reimbursement for their expenses.²⁹

3. The gaining of information, evidence and documents pursuant to s.264 of the *Income Tax Assessment Act*

Section 264 (1) of the Act empowers the Commissioner by notice in writing to require any person to:

1. furnish him with such 'information' as he may require: s.264(1) (a);
2. attend and give evidence concerning his or any other person's income or assessment: s.264(1) (b); or
3. produce all books, documents and other papers whatever in his custody or control that relate to the income or assessment of any person: s.264(1) (b).

Section 264 (2) provides that the Commissioner may require the information or evidence to be given on oath and either verbally or in writing.

(a) The importance of determining the validity of the notice

It is important to determine the validity of the notice as failure to comply with the requirements of the notice to the extent to which a recipient of the notice is capable renders the recipient liable to prosecution for an offence against the Act.³⁰

In this regard it should be remembered that the statutory duty overrides any contractual obligation which the recipient may have to another person³¹ and also any implied duty of confidentiality³². This is of particular importance to professional advisers.

(b) Authority to issue a notice under s.264

The majority of the High Court in *O'Reilly v. Commissioner of the State Bank of Victoria*³³ held that the powers under s.264 could be exercised on behalf of the Commissioner or his delegated officers by an authorised officer.

The situation is that when a delegate exercises his delegated power he exercises it in his own right and in his own name, however when an authorised officer does so he exercises the power for and on behalf of the holder of the power. Consequently a notice pursuant to s.264 which is issued by an authorised officer rather than the Commissioner, Deputy

27. 153 CLR 1.

28. *Ibid.* at 48.

29. Refer discussion at paragraph 2(b) of this paper.

30. Sections 8C, 8D, 8G and 8H of the *Taxation Administration Act*.

31. *FCT v. The ANZ Banking Group Ltd; Smorgon v. FCT* 79 ATC 4039 at 4045 where there was a contract between the Bank and its customer that the Bank would not use its duplicate key to the customer's safety deposit box without the written authorisation of the customer; *Smorgon v. FCT* 76 ATC 4364 at 4370-72.

32. *Smorgon v. FCT* 76 ATC 4364 at 4370-72 wherein Stephen J. held that the contractual duty of confidentiality arising from the relationship of banker and customer does not affect the powers of the Commissioner pursuant to s.264(1)(b). It seems implicit in the decision in *Allen Allen & Hemsley v. DCT* 86 ALR 597 that this would also apply to the duty of confidentiality between a solicitor and his/her client. As to legal professional privilege see paragraph number 3(d) post.

33. (1982-1983) 153 CLR 1 at 13.

Commissioner or other delegate of the Commissioner must be issued in the name of that person and not the authorised officer.

The usual practice is for the authorised officer to affix a facsimile of the delegate's signature to the notice³⁴.

The delegate in whose name the notice is issued is not required to be personally aware of the contents of the notice or any reason why the notice was issued as long as the officer who issues the notice is properly authorised³⁵.

The conclusion is that unless a notice is issued by the Commissioner, his delegate³⁶ or an authorised officer it will be invalid however once the Taxation Office is aware of any problem it would presumably act to withdraw the notice and issue a valid one.

(c) Construction of the Notice

Paragraphs (a) and (b) of s.264(1) contain three powers each of which are capable of independent exercise. If the Commissioner so wishes they may be exercised together in which case the one notice is sufficient. The contents of the notice should indicate which one or more powers the Commissioner desires to exercise³⁷.

(i) Sub-section (1)(a) — 'information'

Sub-section (1)(a) relates to the provision of information to the Commissioner. Unlike sub-section (1)(b) there seems to be no need to identify in the notice the person in respect of whom the information is being sought³⁸, although the power is restricted to being used for the purposes of the Act³⁹.

The result is that the Commissioner is able to use s.264(1)(a) to make inquiries that do not necessarily relate to the income or assessment of a particular taxpayer e.g. inquiries in relation to compliance of employees with the P.A.Y.E. provisions, the ability of taxpayers to pay outstanding tax and general information concerning the taxpaying community⁴⁰.

Sub-section (1)(a) does not enable the Commissioner to obtain information regarding the contents of a document which he was unable to have produced under sub-section (1)(b). It does however allow him to require information which will help him identify which books, documents and papers he can then require to be produced⁴¹.

A company can be required to furnish information although obviously it can only do this through its agents⁴².

A company cannot however be asked to furnish information regarding its awareness of a certain matter, such as whether it was aware of the transactions that were being entered into. This type of information would have to relate to the awareness of individuals such as its directors or employees. They will then bind the company by their answers⁴³.

The request for information should be "so framed as to be sufficiently clear to convey to the addressee what information is sought and a notice which was unintelligible would

34. Refer regulation 62(2) of the *Income Tax Regulations* which provides that "... a facsimile of the signature of . . . a delegate of the Commissioner. . . in lieu of that person's signature shall . . . be deemed to have been duly signed by that person."

35. *O'Reilly v. The Commissioner of the State Bank of Victoria* [1982-1983] 153 CLR 1.

36. Pursuant to s.78(1) of the *Taxation Administration Act*.

37. *Perron Investments Pty Ltd v. DFCT* 89 ATC 5038.

38. *FCT v. ANZ Banking Group Ltd: Smorgon v. FCT* 79 ATC 4039 at 4052; *Geosam Investments Pty Ltd v. ANZ Banking Group Ltd* 79 ATC 4418 at 4419; *Walsh v. FCT* 81 ATC 4693 at 4697; *Scanlan v. Swan* 82 ATC 4112 at 4115; *Perron Investments Pty Ltd v. DFCT* 89 ATC 5038 at 5052.

39. *Perron Investments Pty Ltd v. FCT* 89 ATC 5038 at 5056.

40. *Investigations by Administrative Agencies* at 243.

41. *Geosam Investments Pty Ltd v. ANZ Banking Group* 79 ATC 4418 at 4419.

42. *Perron Investments Pty Ltd v. DFCT* 89 ATC 5038 at 5061.

43. *Riley McKay Pty Ltd v. Bannerman* (1977) 31 FLR 129 at 135-136.

obviously be bad"⁴⁴. This does not mean that each word should be carefully analysed for ambiguity, the test is whether the request is one that a reasonable man in the position of the addressee of the notice can fairly comply with.⁴⁵

The everyday meaning of 'information' implies that the use of the word in subs.(1)(a) refers to the imparting of knowledge and does not include documents.⁴⁶ This was confirmed by Hill J. in *Perron Investments Pty Ltd v. DFCT*.⁴⁷ Of course this does not mean that a recipient of a notice to furnish information could not satisfy the request by producing certain documents.

Mr David Williams in his book *Investigations by Administrative Agencies* considers it reasonable to expect that the term 'information' will be restricted to facts⁴⁸. Mr Justice Hill in *Perron Investments Pty Ltd*⁴⁹ conceded that the Commissioner could not ask the recipient of a notice an abstract question of law however his Honour stated that this was because such a request would not be for the purposes of the Act rather than that it would not be a request for information. It seems from this that the Commissioner may be able to request the recipient's opinion on, or inferences he has made from, certain facts, provided that the request is for the purposes of the Act.

(ii) The first limb of subs. (1)(b) — 'attend and give evidence'

The first limb of s.264(1)(b) empowers the Commissioner to require a person to attend before him or an authorised officer and give evidence concerning his or any other persons' income or assessment.

This provision only applies to natural persons, as corporations (as distinct from their officers) cannot give evidence⁵⁰.

To be valid the notice must name the authorised officer before whom the addressee is to attend and give evidence. In concluding that more than one officer can be authorised and named in a notice to give evidence Davies J. in *Holmes v. DCT*⁵¹ seems to have implicitly recognised this requirement⁵².

The specification in the notice issued of the name of the officer before whom the recipient is to attend constitutes authorisation of that person for the purposes of s.264(1)(b)⁵³.

The power conferred under s.264(1)(b) is restricted to requiring the giving of evidence relating to the 'income' and/or 'assessment' of a named or otherwise indicated person⁵⁴.

If this requirement is not complied with it will render the notice invalid⁵⁵.

It is arguable that if a notice is issued for the purpose of ascertaining whether or not a named person has ever had taxable income (although never having paid tax) this would be valid.

44. *Perron Investments Pty Ltd v. Bannerman* (1977) 31 FLR 129 at 135-136

45. *Ibid.*

46. "Information" is defined in the *Shorter Oxford Dictionary* to mean: "The action of informing, training, instruction; communication of instructive knowledge. An instruction. The action of telling or act of being told something. That of which one is appraised or told; intelligence, news." Also see *Walsh v. FCT* 81 ATC 4693 at 4695 where Leslie J. stated that the Commissioner could not validly request the supply of the documents in question because copies of the documents did not constitute "information".

47. 89 ATC 5038 at 5052.

48. *Investigations by Administrative Agencies* at 245.

49. 89 ATC 5038 at 5056.

50. *Smorgon v. FCT* 76 ATC 4364 at 4366; *Perron Investments Pty Ltd v. DFCT* 89 ATC 5038 at 5061.

51. 88 ATC 4328 at 4332.

52. M.J. Dirkis 'An Orwellian Spectre' (1989) *Adelaide Law Review* 63.

53. *O'Reilly v. Commissioner of the State Bank of Victoria* (1982-1983) 153 CLR 1 at 13-14.

54. *FCT v. Smorgon* 79 ATC 4039 at 4047.

55. *FCT v. Smorgon* 79 ATC 4039.

(iii) The second limb of s.264 (l)(b) — 'produce all books, documents and other papers'

The Commissioner is empowered under the second limb of s.264(1)(b) to require, by notice in writing, a person 'to produce all books, documents and other papers whatever in his custody or under his control relating thereto.'

The power is self contained and independent of the exercise of the power in the first limb of s.264(1)(b)⁵⁶.

The Act does not define any of the terms 'books', 'documents' or 'other papers'. 'Books' and 'other papers' will presumably take their normal meanings⁵⁷.

With regard to 'documents' s.25 of the *Acts Interpretation Act* (the AIA) defines 'document' as including, inter alia: "(c) any article or material from which sounds, images or writings are capable of being reproduced with or without the aid of any other article or device".

The term 'writing' is defined in s.25 of the AIA to include, unless the contrary intention appears: "any mode of representing or reproducing words, figures, drawings or symbols in a visible form".

As there is no apparent contrary intention in the Act it seems that the term 'document' will bear a wide meaning and cover electronic storage mechanisms such as computers and dictaphones as well as paper based systems.

Furthermore, any argument that all that is required to be produced is the apparatus which displays the contents of the items in question has probably been overcome by the introduction of s.25A of the AIA which provides:

Where a person who keeps a record of information by means of a mechanical, electronic or other device is required by or under an Act to produce the information or a document containing the information to . . . a . . . (second) person then unless the . . . (second) person otherwise directs, the requirement shall be deemed to oblige the person to produce . . . a writing that reproduces the information in a form capable of being understood by the . . . (second) person . . .

Mr Williams concludes from this that:

. . . there is now an obligation upon the recipient of a notice (under s.264) to produce a document, being the information stored on a mechanical, electronic or other device, to supply a hard copy of the information contained in the document in a form capable of being understood⁵⁸.

The officer to whom the books, papers, documents and so on are to be produced must be named and authorised⁵⁹. As stated earlier it is sufficient if the authorisation is in the notice itself⁶⁰.

The place, date and time for production of the documents should be specified in the notice⁶¹.

Once the documents are produced the authorised officer has the right to inspect the documents and, by use of the power under s.263, a right to make copies of those documents. There is no express power to retain the documents either overnight or for a longer period although a person required to produce documents may consent to their retention for a reasonable period to overcome inconvenience to him or his staff⁶².

56. *FCT v. The ANZ Banking Group Ltd* 79 ATC 4039 at 4046.

57. *Investigations by Administrative Agencies* Chapter 6.

58. *Investigations by Administrative Agencies* at 277.

59. *O'Reilly v. Commissioner of the State Bank of Victoria* 153 CLR 1 at 13-14.

60. *Ibid.*

61. *Ganke v. DFCT* 75 ATC 4097 at 4100.

62. *Investigations by Administrative Agencies* at 279.

At general law, if a person objects to retention, the Commissioner has no power to retain the documents, not even for a reasonable time to enable a detailed examination of their contents⁶³ although he would have power to make copies pursuant to s.263. If the Commissioner retains the documents contrary to the express wishes of the recipient of the notice such retention would constitute the tort of detinue and enable the person to sue the Commissioner⁶⁴ or to seek a mandatory injunction requiring their return⁶⁵.

The requirement to produce is satisfied once the production has actually been carried out⁶⁶.

The only documents that the Commissioner may require to be produced are those that relate to the income or assessment of some person who is named or otherwise indicated in the notice⁶⁷.

If the notice is to the taxpayer then obviously the use of the word 'your' will sufficiently identify the person to whom the documents in question relate. If it is to a third party it must specifically name the taxpayer⁶⁸.

The notice must also contain a statement that the documents relate to the income or assessment of the taxpayer and it must be apparent from this that the Commissioner is entitled to require production of the documents⁶⁹.

The Commissioner or officer issuing the notice is not required to know whether the documents requested actually relate to the income or assessment of the taxpayer provided that the notice only requests documents relating to the taxpayer's income or assessment. For example, a notice requesting 'all books of account relating to Mr X's income or assessment' will suffice⁷⁰. It is then for the recipient to decide for himself which of the documents in his 'custody or under his control' answer the description⁷¹.

In *FCT v. The ANZ Banking Group Ltd; Smorgon v. FCT*⁷² Gibbs A.C.J. stated that the notice must "identify with sufficient clarity the documents which are required to be produced"⁷³. In that case notices were held to be valid which referred to all documents located inside certain safety deposit boxes relating to the income of named persons. Documents can therefore be identified with respect to their location. A class of documents may be specified rather than individual documents provided that sufficient characteristics of the class of documents are given in the notice to enable a reasonable decision whether or not a document falls within that class and is therefore required to be produced⁷⁴.

A further restriction on the request for 'books, papers, and other documents' is that the Commissioner is only entitled to the production of such items which are in the recipient's 'custody or under his control'. The phrase 'in his custody or under his control' has been held to mean physical control or legal possession⁷⁵. The effect of this is that at any one time documents may be in the physical control of one person and the legal possession of another person and both or either may be required to produce them⁷⁶.

63. *Collier-Garland (Properties) Pty Ltd v. O'Hair* (1963) 63 SR (NSW) 500 at 506.

64. *Investigations by Administrative Agencies* at 279.

65. *Collier-Garland (Properties) Pty Ltd v. O'Hair* (1963) 63 SR (NSW) 500 at 507.

66. *Ibid.* at 506.

67. *FCT v. The ANZ Banking Group Ltd; Smorgon v. FCT* 79 ATC 4039 at 4047.

68. *FCT v. The ANZ Banking Group Ltd; Smorgon v. FCT* 79 ATC 4039 at 4047.

69. *Ibid.*

70. *FCT v. The ANZ Banking Group Ltd; Smorgon v. FCT* 79 ATC 4039 at 4053.

71. *Ibid.*

72. 79 ATC 4039

73. *Ibid.* at 4047.

74. *Investigations by Administrative Agencies* at 251.

75. *FCT v. The ANZ Banking Group Ltd; Smorgon v. FCT* 79 ATC 4039 at 4044.

76. *FCT v. The ANZ Banking Group Ltd; Smorgon v. FCT* 79 ATC 4039 at 4045.

In fact the provision has been held to extend to wrongful control. As Gibbs ACJ stated in *FCT v. The ANZ Banking Group Ltd; Smorgon v. FCT*⁷⁷:

I can see no reason why a notice cannot be given to a person who wrongfully has physical control of the documents, or to a person who has parted with possession but retains a right to legal possession . . .⁷⁸

What then is the effect of s.264(1)(b) if the notice is to a third party requiring production of documents relating to the income or assessment of the taxpayer which are inside a locked box to which the third party does not have a key? In *FCT v. The ANZ Banking Group Ltd; Smorgon v. FCT*⁷⁹ Gibbs ACJ suggested that the third party would have no power to force open the container but could produce the documents by producing the box containing them⁸⁰. The problem which arises from this is that if the third party produces the locked container and it is found that it does not contain documents which relate to the income or assessment of the taxpayer he or she may be liable to the taxpayer for breach of contract. On the other hand, if the third party fails to produce the contents of the container and they are found to be documents which do relate to the income or assessment of the taxpayer then he or she may be liable for a breach of the provisions of the *Taxation Administration Act*. This problem was recognised by Gibbs ACJ in *FCT v. The ANZ Banking Group Ltd; Smorgon v. FCT* wherein he considered that if the documents inside the container were proved in a prosecution by the Commissioner to be of a kind mentioned in s.264(1)(b) the third party would escape conviction if they established that they had an honest and reasonable belief that the documents were not of that kind⁸¹.

Such a defence is however no longer appropriate⁸².

Some examination of the documents by the third party if e.g. the legal owner is unable to be contacted, will therefore be required however this may result in a breach of contract situation. Perhaps the best alternative is to suggest to the taxation officer that he exercise his powers of access under s.263 to determine for himself whether or not the documents relate to the income or assessment of the taxpayer. This would certainly be the best recourse if the documents were inside an immovable wall safe. If the taxation officer refused such refusal may be grounds for mitigation in a prosecution action.

The power in s.264 may be exercised whether or not an issue or dispute of fact has arisen between a taxpayer and the Commissioner. The section empowers the Commissioner to 'fish' for information to enable him to determine the amount of taxable income of any person and the tax payable on it⁸³.

An important factor to be taken into consideration is the time for compliance. Section 264 does not itself specify the time allowed for compliance however it is established that the time must be reasonable and whether the time is reasonable is a matter of fact in each case⁸⁴.

Service of the notice may be effected in accordance with the regulations⁸⁵ or the Court may be satisfied that a notice has reached the addressee even though service does not comply with the regulations⁸⁶.

77. 79 ATC 4039.

78. *Ibid* at 4044.

79. 79 ATC 4039.

80. *Ibid.* at 4044.

81. 79 ATC 4039 at 4046.

82. Refer *Ambrose v. Edmonds-Wilson* 88 ATC 4173 where it was held that it is no defence that the taxpayer's failure was due to honest and reasonable mistake.

83. *FCT v. The ANZ Banking Group Ltd* 79 ATC 4039 at 4053.

84. *Ganke v. FCT* 75 ATC 4097.

85. Refer regulation 59 of the *Income Tax Regulations*.

86. *Holmes v. DFCT* 88 ATC 4906 at 4915.

(d) Legal Professional Privilege

The test of whether or not a document or information is subject to legal professional privilege was set out in the case of *Grant v. Downs*⁸⁷ and is confined to documents or communications which are *brought into existence for the sole purpose of*:

- (i) submission to legal advisers for advice; or
- (ii) use in legal proceedings⁸⁸.

Thus documents which merely evidence transactions such as loan agreements, mortgages, leases and so on would not be immune from production under s.264 on the basis of legal professional privilege⁸⁹. It has also been held that only in the most exceptional circumstances would entries in a solicitors trust account be subject to legal professional privilege⁹⁰.

A request for privileged documents or information does not invalidate the notice. The question as to whether privilege attaches to the document or information goes not to the validity of the s.264 notice but to whether the documents can validly be required to be produced or the information given⁹¹.

As Hill J. stated in *Perron Investments Pty Ltd v. DFCT*⁹²:

... it will be incumbent upon the recipient of the notice to make a claim for privilege and if that claim be rejected to maintain the claim if need be by an application made then to a court or as a defence to proceedings for prosecution⁹³.

Alternatively, it would be open to the recipient of a notice to seek a declaration from a court having jurisdiction that it was entitled not to produce the document or furnish the information upon the ground of legal professional privilege.

In the same manner the seeking of access pursuant to s.263 to privileged documents will not necessarily invalidate the access⁹⁴. In the case of access to the premises of a professional adviser he or she will often be responsible for claiming the privilege on behalf of their client. If the claim is rejected by the taxation officer seeking access an injunction may be sought to prevent access to the privileged documents⁹⁵.

An occupier is entitled to reasonable time to enable adequate claims of legal professional privilege to be made⁹⁶.

(e) The Commissioner's guidelines in relation to access to documents situated in a lawyer's office

On 26 July 1991 the Commissioner of Taxation and the Secretary-General of the Law Council of Australia released guidelines concerning the exercise of the access powers pursuant to s.263 of the Act where a claim of legal professional privilege is made.

The aim of the guidelines is to:

- ensure that lawyers are given the opportunity to make proper claims of legal professional privilege on behalf of their clients regarding privileged documents;
- ensure that the integrity of the documents is maintained whilst such a claim is made and determined;
- minimise the frequency and volume of disputes;

87. (1976) 135 CLR 674.

88. *Ibid.* at 688.

89. *O'Reilly v. The Commissioner of the State Bank of Victoria* 153 CLR 1 at 23.

90. *Allen, Allen & Hemsley v. DCT* 86 ALR 597.

91. *Perron Investments Pty Ltd v. DFCT* 89 ATC 5038.

92. 89 ATC 5038.

93. *Ibid.* at 5060.

94. Refer *C of T v. Citibank Limited* 89 ATC 4268; *Allen, Allen & Hemsley v. DCT* 89 ALR 597.

95. Refer *C of T v. Citibank Limited* 89 ATC 4268.

96. *Ibid.*

- resolve any disputes quickly and with the minimum of disruption to all parties; and
- assist taxation officers in obtaining access to documents which are not subject to the claim of privilege.

The guidelines point out that the access powers of the ATO do not cover documents to which legal professional privilege applies. The guidelines then go on to provide examples of typical documents to be found in a lawyer's office usually covered by the privilege and those that are not so covered.

The main thrust of the guidelines is to set out a step by step procedure to be followed where access to documents situated at a lawyer's premises is sought by a taxation officer and a claim for legal professional privilege is made.

The effect of the guidelines is that a taxation officer will not inspect any documents to which access is being sought and which is held by a lawyer, until the lawyer has been given the opportunity to claim legal professional privilege on behalf of the client in respect of any of those documents. Where a claim is made but is disputed by the taxation officer, the taxation officer will not inspect any document the subject of the claim until either:

- (i) the claim is abandoned or waived; or
- (ii) the claim is dismissed by a court.

Where the lawyer asserts legal professional privilege and the taxation officer does not concede or is not in a position to concede that the documents in question are privileged the guidelines provide that a list of the documents should be prepared by either the lawyer or the taxation officer acting on information from the lawyer. The guidelines set out the details to be included in the list (para. 22(j)). The list should then be endorsed to the effect that having regard to the claim of legal professional privilege made by the lawyer on behalf of his or her client access by the ATO has been sought but has not been obtained in respect of the listed documents and those documents have been sealed in an envelope/container. The procedure for sealing the documents in an envelope/container is set out in detail in the guidelines (para. 22(k)-(q)).

(f) The Commissioner's guidelines in relation to access to other documents

On 16 November 1989 the Commissioner of Taxation issued administrative guidelines which provide for the extent of the intended exercise of his powers of access under s.263. Although papers prepared by accountants are not able to be subject to a claim for legal professional privilege the Commissioner's guidelines provide that, except in certain circumstances, the Commissioner will not seek access to specific material prepared by accountants. This specific material is divided into two categories:

- (i) non-source documents — these include tax working papers, advice papers on arrangements which have not been put into effect and which do not relate to transactions which have been implemented and papers prepared during a statutory audit or a prudential audit; and
- (ii) restricted source documents — these include tax advice prepared by accountants on how to structure or present a transaction.

The guidelines provide that the Commissioner will only seek access to these documents in exceptional circumstances such as cases involving fraud or evasion, or where other avenues of access have been exhausted.

The guidelines provide for full and free access to be given to what are called 'source documents'. These documents include accounting records such as ledgers, journals, profit and loss statements and balance sheets, working papers of accountants in preparing trial balances and all formal documents such as the memorandum and articles of an association.

These guidelines are also to be followed by officers from the ATO when they are

conducting audits and when they are contemplating whether or not to request production of documents under s.264.

(g) Judicial Proceedings

Once judicial proceedings involving the Commissioner are commenced, the Commissioner is precluded from gaining access under s.263 or issuing a notice under s.264 in respect of information, evidence or documents relevant to the judicial proceedings⁹⁷. The Commissioner would need to follow the usual procedures of discovery and inspection⁹⁸.

It is arguable that this will also apply to a notice issued pursuant to s.264 to a third party where the notice is directed to obtaining information to assist in the conduct of litigation by the Commissioner⁹⁹.

This does not mean that the involvement of the addressee of a notice issued under s. 264 in other legal proceedings will affect the ability of the Commissioner to issue a notice concerning substantially the same subject matter¹⁰⁰. In *Commercial Bureau (Australia) Pty Ltd v. Allen*¹⁰¹ the Commissioner was allowed access to documents in the custody of the Registrar of the Federal Court, seized by the Federal Police in the execution of a search warrant, where the Commissioner was not a party to the relevant proceedings.

In *Saunders v. FCT*¹⁰² it was held that the Commissioner could have access under s. 263 to documents of a taxpayer which were the subject of proceedings pending between the Commissioner and the taxpayer in the Administrative Appeals Tribunal. This was because the Tribunal is an administrative body and not a court. It stands in the shoes of the Commissioner and may use any material put before it in reaching its decision¹⁰³.

Conclusion

Following the first instance decisions of the Federal Court in *Allen Allen & Hemsley v. DFC of T*¹⁰⁴ and *Citibank Limited v. FC of T*¹⁰⁵ the Commissioner issued guidelines to taxation officers to ensure that they understood the types of factors that should be considered in deciding to exercise the power of access under s.263. The Commissioner has also released guidelines dealing with the circumstances, and manner in which he will exercise his power to seek access to working papers and advice papers held by external accountants and their clients. These guidelines are of particular relevance to those professional advisers who may be subject to a request for access pursuant to s. 263 or a notice pursuant to s.264. More recently, the Commissioner, with the Secretary-General of the Law Council of Australia, has released guidelines concerning the exercise of the access powers provided under s.263 where a claim for legal professional privilege is made.

That the Commissioner has wide ranging powers under both s.263 and s.264 can be seen from the above discussion. However the Commissioner has recognised the somewhat "draconian" powers conferred on him by the legislature. In an address to a convention of accountants on 26 May 1989, second Commissioner Brian Nolan said that cognizance would be taken of recent Federal Court decisions (in particular, *Citibank* and *Allen Allen v. Hemsley*). Amongst other things, he said that the effect of proposed access on persons who would be disturbed by the exercise is now recognised, and it is accepted that a person is

97. *Brambles Holdings Ltd v. TPC (No 3)* (1980) 44 FLR182 at 195-196.

98. Geoffrey Lehmann and Cynthia Coleman *Taxation Law In Australia* Butterworths Sydney 1989 para.11.102.

99. *Investigations by Administrative Agencies* at 259.

100. *Pioneer Concrete (Vic) Pty Ltd v. TPC (No 3)* (1982) 43 ALR 449 at 553.

101. (1984) 15 ATR 468.

102. (1987) 19 ATR 1289.

103. 19 ATR 1289 at 1296.

104. 88 ATC 4734.

105. 88 ATC 4714.

generally entitled to request a reasonable delay of access while he or she obtains legal advice. In their ordinary dealings, auditors will attempt to be reasonably specific as to the information sought, although some cases will call for more wide-ranging enquiries. Advance notice will generally be given to those to whom wider enquiries are directed.

These statements bring some comfort to the professional tax adviser and both sets of guidelines provide a detailed mechanism for dealing with requests pursuant to ss.263 and 264 however with the advent of self-assessment the Commissioner will be utilising his powers pursuant to these sections more and more and it is important to be aware of the full extent of his investigative powers.

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