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# ATO – Access Powers

Wednesdays With Redchip

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## 1. Introduction

There is an inherent professional conflict that needs to be managed by accountants when the ATO are seeking access to taxpayer information that is held and/or prepared by the accountant adviser:

- (a) In the first instance, there are the requirements of the Code of Professional Conduct (Division 30) provided by the Tax Agents Services Act 2009 ("TASA"), namely that the tax agent must adhere to the stipulation that they are to maintain confidentiality of the client's information:

*"Section 30-10(6) Unless you have a legal duty to do so, you must not disclose any information relating to a client's affairs to a third party without your client's permission."*

- (b) Secondly, the accountant needs to both understand what those statutory duties/obligations are and comply therewith.

It is trite to simply subrogate the client's expectations of confidentiality to the requirements to comply with the obligations imposed by the Taxation Administration Act 1953 ("TAA"). It is particularly important to ensure that the tax agents do not unnecessarily provide information to the taxation authorities beyond those statutory duties.

In addition to the ATO's power of access (discussed below), it is also necessary to consider the ATO's power to access advices and information prepared by tax agents (accountants) for their taxpayer clients. I have briefly discussed this issue in addition to the broader access powers provided by the TAA.

- (c) Understand the ATO's approach to search and access.

Notwithstanding the statutory powers, the Commissioner has issued various guidelines that represent the approach the Commissioner will apply in the administration processes:

- (i) "Our approach to information gathering"  
(ii) "Guidelines to accessing professional accounting advisers' papers"  
(iii) PS LA 2004/14 – Access to "corporate board documents on tax compliance risk"

These guidelines should be reviewed in conjunction with the general discussion provided below.

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## 2. Taxation Administration Act 1953

### 2.1 Statutory provisions endorsing the ATO's power of access

The present ATO powers that support their access to taxpayer's information and facilities are provided by section 353-10 & section 353-15 TAA. Previously, similar provisions were provided by section 263 & section 264 ITAA 1936. Notwithstanding the transition from the ITAA to the TAA, there have been no significant change to the nature and extent of application of the old vis a vis the new provisions.

Accordingly, if reviewing the application of the present provisions, previous legal authorities attributable to the former ITAA 1936 provisions are relevantly applicable to the TAA provisions.

## 2.2 Present law – provisions of the TAA

There are two specific provisions that stipulate the types and extent of access the ATO have:

- (a) provision of information for the purposes of the administration of taxation laws; and
- (b) powers of search and copy for the purposes of the administration of taxation laws.

In the first instance, it is critical to be properly informed of the statutory elements to ensure that the taxpayer's accountant can manage any ATO enquiry. As indicated above, if the ATO request for access is made, the contractual and TASA responsibility of the accountant is overridden by the statutory obligations. If, however, the accountant goes beyond the statutory obligations, the primary obligations to the client remain dominant.

### Provision of information

#### ***Section 353-10 Commissioner's power***

*(1) The Commissioner may by notice in writing require you to do all or any of the following:*

- (i) to give the Commissioner any information that the Commissioner requires for the purpose of the administration or operation of a \* taxation law;*
- (ii) to attend and give evidence before the Commissioner, or an individual authorised by the Commissioner, for the purpose of the administration or operation of a taxation law;*
- (iii) to produce to the Commissioner any documents in your custody or under your control for the purpose of the administration or operation of a taxation law.*

*Note: Failing to comply with a requirement can be an offence under section 8C or 8D.*

*(2) The Commissioner may require the information or evidence:*

- (a) to be given on oath or affirmation; and*
- (b) to be given orally or in writing.*

*For that purpose, the Commissioner or the officer may administer an oath or affirmation.*

*(3) The regulations may prescribe scales of expenses to be allowed to entities required to attend before the Commissioner or the officer.*

### Search & copy

#### ***Section 353-15 Access to premises, documents etc.***

*(1) For the purposes of a \* taxation law, the Commissioner, or an individual authorised by the Commissioner for the purposes of this section:*

- (iv) may at all reasonable times enter and remain on any land, premises or place; and*
- (v) is entitled to full and free access at all reasonable times to any documents, goods or other property; and*
- (vi) may inspect, examine, make copies of, or take extracts from, any documents; and*

(vii) *may inspect, examine, count, measure, weigh, gauge, test or analyse any goods or other property and, to that end, take samples.*

(2) *An individual authorised by the Commissioner for the purposes of this section is not entitled to enter or remain on any land, premises or place if, after having been requested by the occupier to produce proof of his or her authority, the individual does not produce an authority signed by the Commissioner stating that the individual is authorised to exercise powers under this section.*

(3) *You commit an offence if:*

(a) *you are the occupier of land, premises or a place; and*

(b) *an individual enters, or proposes to enter, the land, premises or place under this section; and*

(c) *the individual is the Commissioner or authorised by the Commissioner for the purposes of this section; and*

(d) *you do not provide the individual with all reasonable facilities and assistance for the effective exercise of powers under this section.*

## 2.3 Comments – seeking access to information

### Broad access

The overarching requirement is that the purpose of seeking the information must be for the “administration of taxation laws”. This is an extremely broad parameter that justifies the underlying reason for the request. It is difficult to conceive of any factor that might not be for that requisite purpose. Other than the obvious requirement about financial information, it would also encompass to request to view: passport, marriage certificate, loan applications, state government documents and records et al.

The access power can be used for the gathering of any information, including “fishing expeditions” (*Smorgon v Australia & New Zealand Banking Group Ltd (1976) 134 CLR 475*), aimed at taxation administration of a particular taxpayer(s) and need not be directed to ascertaining the taxable income of a particular taxpayer (refer to *Simionato Holdings Pty Ltd v FCT (No 2) (1995) 32 ATR 298* – access to banking records concerning taxpayer's affairs sought in course of investigation as to assets of companies in liquidation owing large tax debts).

The access power is sufficient to be used for the purposes of identifying clients of a professional adviser for the purpose of considering their possible liability to tax (*Clyne v DCT (NSW) (1985) 8 FCR 130*).

### Elements of the section

The relevant **elements** of section 353-10(1) which need to be considered include:

(a) any request must be in writing by an authorised person;

(b) the notice must contain sufficient explanation to determine the purpose of the notice satisfies the primary requirement;

(c) the notice might either require:

(i) the attendance at a meeting to give evidence; or

(ii) produce any documents in your custody or under your control.

## Observations

Having regard to the above elements, there are some rudimentary observations:

- (a) Any attempt by the ATO to seek verbal response to either information or technical questions should be tempered by your understanding of the nature and context of the question.
  - (i) Invariably the ATO will not ask a question that they do not know the answer to!
  - (ii) A simple question might have some peripheral intent.
- (b) You should notify your client of any ATO request for information and seek their consent.
- (c) You are not required to provide any response to a technical question.

## Answering verbal questions

There are often situations where the information request by the ATO officer seems banal, consequently people often think that the provision of an immediate response is considered to be expedient and reasonable, however caution should be exercised.

For example, if the ATO suggests that providing an immediate answer saves time and the inconvenience of a meeting, it is preferable to request the ATO send a notice requiring attendance to allow time to discuss issues with the client to determine whether there are matters that might require some immediate attention or determination.

**Note:** Never attend a meeting with the ATO without some other support person whose function is to scribe the meeting discussion.

## What are the documents in your custody or control?

Prima facie there is no limit to the statutory obligation to provide documents, even though:

- (a) custody refers to situations where the recipient of a notice has direct physical possession of a document; and
- (b) control refers to situations where, even though the recipient of the notice might not have physical possession of a document, they have the right or power to require another person to produce it to them.

## 2.4 Access to premises

Pursuant to section 353-15, an individual authorised by the Commissioner can:

- (a) enter and remain in premises to undertake search for the purposes of administration of taxation laws;
- (b) enter and remain must be reasonable having regard to the context and nature of the search;
- (c) have “full and free” access to documents et al and provide the officer with reasonable facilities to undertake the search activities;
- (d) take copies or extracts from any documents; and
- (e) inspect any monitor the physical dimensions of goods.

## Features

In addition to the matters related to providing information pursuant to the requirements of subsection 353-15(1), there are some special **features**:

- (a) no need to give advance warning of intention;
- (b) full and free access to buildings, rooms, cabinets et al;
- (c) seeking of access must be reasonable having regard to timing; and
- (d) copies and extracts can be taken, but the officer cannot remove documents.

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### 3. Restricted Documents

As was illustrated just recently in *Glencore International AG v Commissioner of Taxation* [2019] HCA 26, there are situations where a request for the production of information and/or use of information by the ATO might be contentious.

More broadly, the relevant circumstances which need to be considered, include:

- (a) the availability and scope of legal professional privilege in relation to advices prepared for a client; and
- (b) access to documents prepared by accountants, albeit advice or other documents relating to a client's taxation matters (including documents prepared for corporate Board discussion).

#### 3.1 Legal Professional Privilege

Whereas the circumstances before the High Court in *Glencore International AG v Commissioner of Taxation* [2019] HCA 26 were unusual, the central issue concerned the availability of legal professional privilege and whether those rules could apply to restrict the ATO's use of documents that were stolen from an electronic file management system of a law practice and disseminated and subsequently obtained by the ATO.

The High Court *inter alia* considered what constituted "legal professional privilege". The Court endorsed the explanation of the concept provided in *Baker v Campbell* [1983] HCA 39:

*6. The nature of legal professional privilege is described as follows in Halsbury's Laws of England (4th ed.), vol. 13, par. 71:*

*". . . communications made to and from a legal adviser for the purpose of obtaining legal advice and assistance are protected from disclosure in the course of legal proceedings, both during discovery and at the trial. . . . Any other communications as are reasonably necessary in order that the legal advice may be safely and sufficiently obtained are also protected, but in the case of communications to or from a non-professional agent or third party, such as a person who witnessed some event, the privilege only arises if litigation is threatened or contemplated."*

*For completeness it should be added that it was held in Grant v. Downs [1976] HCA 63; (1976) 135 CLR 674 that legal professional privilege is confined to documents which are brought into existence for the sole purpose of their being submitted to legal advisers for advice or for use in legal proceedings. The manner in which the rule is stated in Halsbury suggests that it is a rule which applies only in legal proceedings and in Minter v. Priest (1930) AC 558, at p 579, Lord Atkin said that "this protection is part of the law of evidence". In Parry-Jones v. Law Society (1969) 1 Ch 1, at p9, Diplock L.J. (as he then was) said:*

*" . . . privilege, of course, is irrelevant when one is not concerned with judicial or quasi-judicial proceedings because, strictly speaking, privilege refers to a right to withhold from a court, or a tribunal exercising judicial functions, material which would otherwise be admissible in evidence."*

Relevant to Glencorpe's seeking to injunct the ATO from using the papers, the High Court observed that:

*Legal professional privilege has been described as a right which is fundamental to persons and to our legal system[32]. It has also been described as "a practical guarantee of fundamental, constitutional or human rights"[33]. Such descriptions point up the importance of the privilege. They serve to show that it is not merely an aspect of curial procedure or a mere rule of evidence but a substantive right founded upon a matter of public interest[34]. The same distinction has been drawn in New Zealand[35] and the United Kingdom[36].*

*What cannot be discerned from these cases is that the "right" spoken of in connection with the privilege is an actionable right.*

Why does legal professional privilege exist?

*The rationale for the rule was stated in Grant v Downs[45]. It is that the rule promotes the public interest because it "assists and enhances the administration of justice by facilitating the representation of clients by legal advisers". By keeping secret their communications, the client is encouraged to retain a lawyer and to make full and frank disclosure of all relevant circumstances to the lawyer.*

...

*That public interest lies in the fair conduct of litigation, which requires that all relevant documentary evidence be available. But the public interest which supports the privilege is paramount to the more general public interest[51]. In the provision of the privilege the law has struck the balance between two competing public interests[52]. Consequently, once the privilege is found to exist, no more is required for effect to be given to it. In that sense it may be described as absolute*

The principle is only applicable to communication between lawyers and their clients.

In *One-Tel v DFCT* [2000] FCA 270, the question concerning the application of LPP and accountants was raised:

*Section 108 does not abrogate the principle of legal professional privilege: Fieldhouse at 119, 202-203, 213-218; Carmody v MacKellar (1997) 76 FCR 115 at 137-138.*

*But no corresponding privilege has ever been held to attach to the advice of accountants. Concerns have been expressed that the same type of advice in relation to the tax affairs of individuals and companies may be given by accountants as may be given by lawyers. It has been suggested that the same considerations which underpin the doctrine of legal professional privilege apply, at least to some extent, to justify, in the public interest, the according to advice furnished by professional accountants of a degree of protection from disclosure. The Commissioner of Taxation has acknowledged that this proposition has validity, and has issued a document entitled *Guidelines for the Exercise of Access Powers in relation to External Accountants' Papers*. The final question with which I must deal concerns the effect of the issue of these guidelines (which I shall call simply "the Guidelines").*



### 3.2 Accountant's documents

The ATO have published "Guidelines to accessing professional accounting advisers' papers" which details when and what reliance the ATO will employ when dealing with accounting practitioners. Importantly, the Court does not regard these guidelines as being a fetter on the Commissioner's statutory search and access powers.

Details of the guidelines are provided below:

(a) **General ATO observations:**

Subject to legal professional privilege, which is dealt with in other guidelines, the right of access to books, documents and other papers is limited only by the requirement that the power must be exercised in good faith and for the purposes of the taxation laws. Also, where the taxpayer and Australian Taxation Office (ATO) are engaged in litigation, limits applicable to the courts and the AAT procedures in relation to documents apply.

...

These guidelines apply to requests for access to documents that are made in the course of all ATO income tax audits. They are equally applicable to any access request made for any other purposes of the Income Tax Assessment Act (ITAA) or any other Act administered by the Commissioner.

...

ATO officers will follow these guidelines in dealing with access to papers prepared by professional accounting advisers.

**PS LA 2004/14**

Access to corporate board documents on tax compliance risk will not be sought by the Tax Office during a compliance risk review or an audit of a corporate taxpayer except in exceptional circumstances and the access will need to be approved by an appropriate Senior Executive Service officer, as described in the Tax Office's Guidelines to Accessing Professional Accounting Advisers' Papers (the Accountants' Guidelines).

(b) **Categorisation of papers:**

Importantly for the purposes of the guidelines, the ATO categorise the types of papers that are generally held/prepared by accountants into three categories:

- (i) Source documents;
- (ii) Restricted source documents; and
- (iii) Non-source documents.

**Source documents**

These documents, ... , include papers prepared in connection with the conception, implementation and formal recording of a transaction or arrangement and which explain the setting, context and purpose of the transaction or arrangement. These documents are source documents because, in effect, they explain the basis and form part of the fabric of the transaction or arrangement and will be accessible for the ATO to undertake its administration obligations.

Traditional accounting records such as ledgers, journals, working papers for financial statements (including consolidated financial statements), profit and loss accounts, balance sheets are obvious source documents.

Documents comprising the permanent audit file held by a professional accounting adviser performing a statutory audit are source documents, as they either explain or lead to an understanding of the taxpayer's organisation and operations.

Tax working papers are also considered to be source documents because they are used in assembling and compiling information preparatory to the completion of tax returns.

Advice and advice papers prepared by an external professional accounting adviser solely for the purpose of advising a client on matters associated with taxation will be source documents where they are prepared in connection with the conception, implementation and completion of the transaction or arrangement.

Source documents will be accessible.

### **Restricted source documents**

Advice papers created prior to or contemporaneously with a relevant transaction or arrangement, because they shed light on the transaction or arrangement, may themselves represent a record of what has actually occurred. However, such advice is likely to canvass the issues in circumstances in which a need for candour is a necessary element.

Access to such documents will only be sought in exceptional circumstances. However, where access to documents is sought, a mutually agreed time will be allowed to enable the taxpayer and professional accounting adviser to consult and ascertain whether the taxpayer wishes to claim client confidentiality in relation to those documents.

### **Non-source documents**

These may include advice provided after a transaction has been completed where the advice did not affect the recording of the transaction or arrangement in the books of account or tax return.

Advice papers (that would otherwise be restricted source documents) which relate solely to transactions or arrangements which the taxpayer has not, and does not intend to, put into effect are non-source documents, provided they do not materially contribute to an understanding of the tax strategy or the specific courses of action actually implemented by the taxpayer.

#### **(c) Papers prepared for the purpose of appeal to the AAT or courts**

ATO officers will not seek access to any papers prepared by professional accounting advisers solely for the purpose of representing a taxpayer in legal proceedings (including an objection, appeal or review) under a taxation law.

#### **(d) Court's commentary on access guidelines**

##### **Deloitte Touche Tohmatsu & Ors v DFCT [1998] FCA 1439**

In this case the Commissioner, pursuant to section 264 ITAA 1936, notified Deloitte requiring them to furnish information in relation to "any New Zealand employer-sponsored non-complying superannuation fund or trust" similar to written advice the applicants had previously provided to a client.

Deloitte sought to rely in the Commissioner's guidelines.

The Court made the following observations in relation to the guidelines:

*It is important to understand the significance of the guidelines for they do not have the status of a legislative enactment but are rather the creation of the Commissioner and the Australian Taxation Office. It is submitted by the respondent that they do not constitute a source of rights.*

*In my opinion, the manner in which they have been promulgated and their contents make it clear that they are, at the least, a relevant consideration to which the respondent and officers of the Australian Taxation Office must have regard and at the most (without deciding the issue) they are matter which create a legitimate expectation in taxpayers and their professional accounting advisors that they will be complied with according to their terms: see generally Minister for Immigration & Ethnic Affairs v Conyngham (1986) 11 FCR 528 at 540-541; Broadbridge v Stammers (1987) 16 FCR 296, 300-301; Apthorpe v Repatriation Commission (1987) 77 ALR 42, 51-52; Gerah Imports Pty Ltd v Minister for Industry, Technology and Commerce (1987) 17 FCR 1, 10-13. The respondent submitted that the guidelines were simply guidelines and are not to be construed and applied "over critically" relying upon May (supra) at 13-14. However, the statement relied upon and the authorities referred to in May (supra) were more concerned with the construction of an administrative instrument rather than the circumstances in which regard should be had to it by an administrative decision-maker.*

*...The applicability of the guidelines is not in issue. What is in issue is whether the respondent had proper regard to the relevant guidelines in deciding to issue the 31 July notices.*

#### **One-Tel v DFCT [2000] FCA 270**

In relation to the expectation of the taxpayer that the ATO would abide by the terms of the guidelines, the Court stated:

*It seems to me that the formality and detail with which the Guidelines are framed and the nature of their subject matter point strongly in favour of the view that they give rise to a legitimate expectation that the Commissioner will conduct himself in the manner he has so carefully set out. I do not think he could depart from the Guidelines, except in such an urgent case as might arise if there were grounds for fearing the destruction of the documents in question, without giving the person concerned an opportunity to make out a case why he should not do so.*

*...a situation calling for the application of the general anti-avoidance provisions could have been seen as exceptional.*

#### **White Industries Aust Ltd v FCT [2007] FCA 511**

In this case, it was claimed by the applicant that various documents were advice from accountants and privileged pursuant to guidelines issued by the Commissioner. Relevantly, a senior officer of the ATO sought that the applicants make submissions in relation to the question of approval of access to the documents.

Relevantly, the grounds under the Judiciary Act as stated in the amended application were that by reason of the above, the officer's decision was an improper exercise of the power to make the decision to grant access under the Guidelines and involved an error or errors of law. No particulars of the error or errors of law are given.

It was submitted by the ATO that:

*While the Guidelines may be a source of "legitimate expectations" or "relevant considerations" that could have a bearing in judicial review of the purported exercise of a statutory power, they are not themselves a source of, or an enforceable limit on, any power of the Commissioner to require documents to be produced. The Guidelines are "merely an aspect of the procedures which have been put in place within the ATO" and are not "a prerequisite, in any legal sense, to the issue of the notice to produce by the solicitors acting for the Commissioner." Nor is the notice to produce an exercise of any statutory power conferred on the Commissioner.*

The Court noted that:

*The Guidelines are not "an enactment" as defined in s 3(1) of the AD(JR) Act, because they are not an instrument made under an Act: the most that can be said is that they were issued by the Commissioner to ATO officers as part of his general administration of the Income Tax Assessment Act 1936 (Cth) ("the ITAA"), s 8 of which provides: "The Commissioner shall have the general administration of this Act".*

The taxpayers argued that:

*The Guidelines are intended to create legally enforceable rights and obligations and to be an enforceable fetter upon the Commissioner's powers. This is evident from the language of the Guidelines. For example, the Guidelines state: "They [the Guidelines] are an administrative concession and will be adhered to by ATO officers ..."*

The Court concluded that:

*What is important, however, is that the Guidelines are not an "enactment", and the decision does not, by reason of them or of any enactment, immediately affect legal rights and obligations.*

*Mr O'Neill's decision would be reviewable as "a decision of an administrative character made ... under an enactment"*

...

*They are calculated to create an expectation that they will be adhered to by the Commissioner. However, that expectation does not convert a non-reviewable decision into a reviewable one.*