



Redchip

Plan to succeed

WELCOME TO

Wednesdays With Redchip

ATO Audits & Review

Redchip
Plan to succeed



BRIAN RICHARDS
Tax@redchip.com.au



Introduction



- Balance contractual and professional responsibilities of client confidentiality vis a vis compliance with statutory obligations
- Statutory powers are very extensive
- ATO have published guidelines to assist with your understanding of the powers and it will apply them

Taxation Administration Act 1953

Redchip

Plan to succeed



- Section 353-10 (power to obtain information)
- Section 353-15 (power to enter and search)

Section 353-10:

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

- to give the Commissioner any information that the Commissioner requires for the **purpose** of the administration or operation of a * taxation law;*
- 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;*
- 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.*

Taxation Administration Act 1953

Section 353-15:

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

- (i) may at all **reasonable times enter and remain on any land, premises or place**; and*
- (ii) is entitled to **full and free access** at all reasonable times to any **documents, goods or other property**; and*
- (iii) may **inspect, examine**, make **copies** of, or take **extracts** from, any **documents**; and*
- (iv) may **inspect**, examine, count, measure, weigh, gauge, test or analyse any goods or other property and, to that end, take samples.*

Restricted Access



- **Legal Professional Privilege**
 - Only applies to documents prepared by lawyers

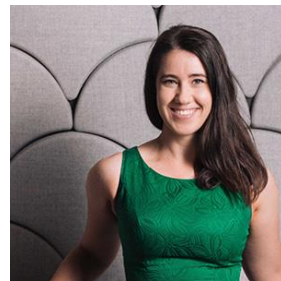
- **ATO Guidelines – access to documents/information prepared by accountants**
 - Source documents – accessible
 - Restricted source documents – restricted access but not an absolute outcome
 - Non-source documents - restricted access but not an absolute outcome
 - Documents for objections, appeals to AAT or Courts – restricted
 - Legal comment re application of the guidelines

ATO Debt Recovery Proceedings

Redchip
Plan to succeed



REBECCA FORSYTH
RebeccaF@redchip.com.au



What we're talking about



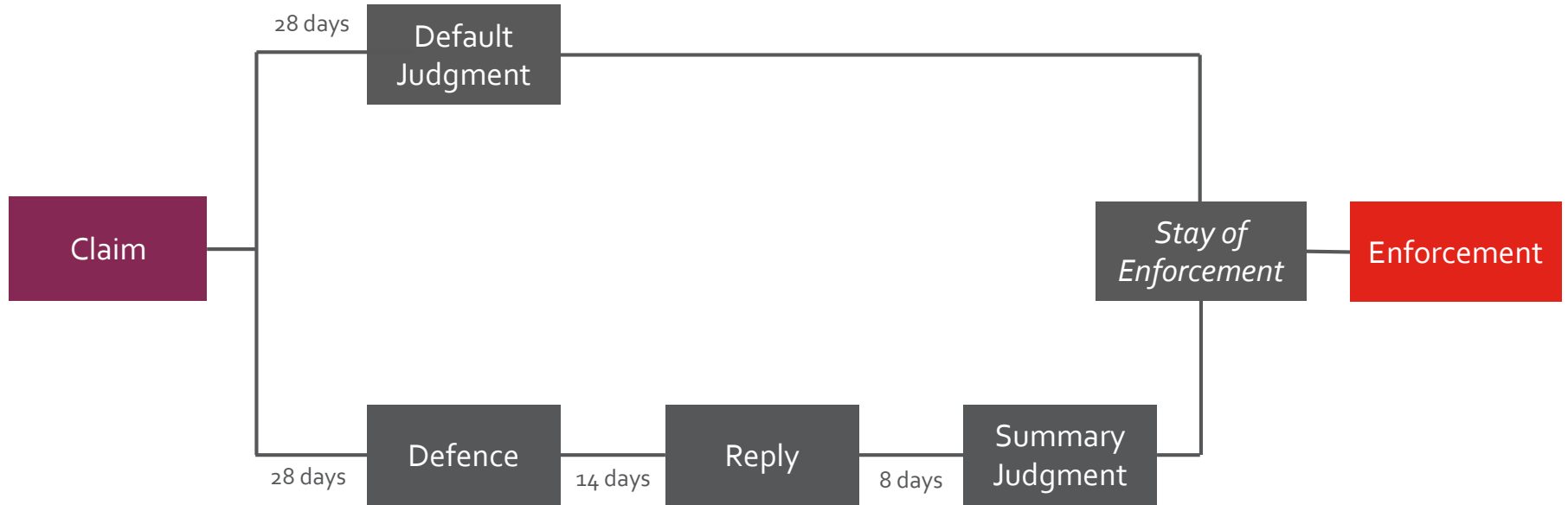
- ATO commencing debt recovery proceedings against a client for unpaid tax liabilities
- Focus on individual taxpayer – the ATO commonly uses other debt recovery mechanisms for corporate entities

What are ATO debt recovery proceedings?



- Generally commenced after ATO has issued a Notice of Assessment
- Claim and Statement of Claim filed and served on the taxpayer claiming the amount of the assessment + penalties and interest
- Taxpayer has 28 days to file a Defence, or the ATO can immediately obtain judgment

Steps in debt recovery proceeding



Effect of the Notice of Assessment

- **The TAA provides that a Notice of Assessment is conclusive evidence that:**
 - Assessment was properly made
 - Amounts and particulars of Assessment are correct
- **Limited exceptions:**
 - For the purpose of proceedings under Part IVC of the TAA
 - Assessment is tentative or provisional
 - Conscious maladministration by the ATO
- **Once Notice of Assessment issued, no defence – even if Part IVC proceedings underway**

Summary Judgment



- Application brought by the ATO
- Court may give judgment against taxpayer if satisfied that:
 - Taxpayer has no real prospect of successfully defending the Claim
 - There is no need for a trial of the Claim
- **Courts have readily found taxpayers have no real prospect of successfully defending a Claim**
- **The ATO will move quickly to enforce any judgment**

What can the taxpayer do?



Before the ATO applies for summary judgment



- Taxpayer must address underlying tax debt by taking steps separately to any court proceeding
- **Act urgently**
- Waiting until the ATO applies for summary judgment is almost always too late

Objection under Part IVC



- Taxpayer can commence proceedings under Part IVC of the TAA, objecting to the assessment which resulted in the tax debt
- The later the objection is filed, the less weight it will be given
- **Must be done properly from the start:**
 - Substance of the objection & evidence put forward by the taxpayer may end up before a Tribunal (AAT) or the Court (Federal Court)

Hardship Application under Div 340, Sched 1 TAA



- Taxpayer can apply to Commissioner to release them from liability on basis that they would suffer serious hardship if have to pay tax debt
- Requires the taxpayer to accept liability
- Discretion exercised by the Commissioner
- Once the ATO obtains judgment, the Commissioner loses discretion to release the taxpayer
 - *Schweitzer and Commissioner of Taxation* [2019] AATA 1100 (29 May 2019)

Once the ATO applies for summary judgment



- Commonly, taxpayer won't be able to resist the summary judgment application
- If Part IVC proceedings underway, the taxpayer may be better served by consenting to judgment but asking Court to stay the enforcement of that judgment

Stay of enforcement where objection on foot

- If stay is granted, ATO can't enforce the judgment until a particular time (e.g. the conclusion of the Part IVC proceeding)
- If taxpayer succeeds in Part IVC proceeding, the judgment will be set aside or reduced
- Discretionary relief, no hard and fast rules, granted sparingly

Stay of enforcement – relevant factors

- **Existence, merits and progress of the objection**
- **However:**
 - Just the fact that the Notice of Assessment is under review does not stop the ATO recovering the tax debt
 - The Court won't hear the substantive arguments for and against the taxpayer – more about whether the objection is plainly doomed to fail
- **Was the taxpayer “party to a contrivance to avoid liability”?**
- **Is the objection just a last ditch effort to avoid bankruptcy, or has it been genuinely lodged?**

Stay of enforcement – relevant factors

- **Will the taxpayer suffer hardship if judgement is enforced before objection concluded?**
 - Mere fact of having to pay tax debt \neq hardship
 - Hardship can be the taxpayer's likely bankruptcy, and the impact this will have on the Part IVC proceeding, the family home, or the taxpayer's business
- **If the outcome of the Part IVC proceeding could save the taxpayer from bankruptcy, could be hardship**
- **If taxpayer will go bankrupt regardless of the outcome, no hardship**

Summary judgment where hardship application to be made



- **Consenting to judgment but seeking a stay of enforcement won't work**
 - Once ATO obtains judgment, no discretion to waive debt on hardship grounds
- **Left to negotiate with the ATO, trying to delay summary judgment while progressing hardship application**
 - Dealing with two different teams (plus external lawyer) - each with different objectives, who are not necessarily communicating with each other

Time to act



- **When Notice of Assessment issued**
- Taxpayer needs to get advice as soon as aware of the assessment
- The decision to commence Part IVC proceedings or seek relief from hardship is strategic - must be based on a substantive assessment of prospects
- If nothing is done until after court proceedings commence:
 - taxpayer will spend substantially more in legal fees
 - it may be too late to change outcome

Questions?

Redchip
Plan to succeed





Redchip

Plan to succeed

THANKS FOR ATTENDING

Wednesdays With Redchip