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ATO Enforcement Strategies – Getting the Best Result

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1. Imagine that you act for a corporatized medical practice (***practice***), with service entities respectively supplying labour and holding passive assets. It is one of many such practices in your locale. At the moment family budgets – and medical budgets – are tight.
2. You have significant non-wage inputs, many of which are subject to GST. For example, your leases of premises and equipment are at market prices reflective of GST. The labour hire entity on-charges for workers at market rates, including GST.
3. But the lion's share of the practice's outputs are GST-free.
4. As budgets are tight, you are reliant for continued cash flow on a couple of government sources: the Medicare bulk-bill amounts for those consultations undertaken on that basis; and refunds of net amounts under the GST system.
5. Now imagine that the practice has incorrectly been flagged as suspect, owing to consistent refunds of net amounts. The service entities are not grouped, and return substantial GST.
6. The Commissioner has raised protective assessments for the practice, going back a number of years, disallowing all input tax credits. Large amounts now show as owing by the practice, on the ATO's records. A garnishee notice issues against future Medicare amounts.
7. The November BAS is taking longer to process than expected, and the practice has just filed its December BAS. The tax agent queries the delay in processing the November BAS refund, and receives an email under a section of the *Taxation Administration Act* which the tax agent, frankly, has to look up: section 8AAZLGA.
8. The email simply says that the Commissioner has retained the amount of the claimed refund for the November BAS and December BAS under that section, pending verification.
9. Then the tax agent has to follow up why 100% of the Medicare amounts are being garnisheed; where the supposed GST assessments and amended assessments (for earlier

periods) might have been posted; and what information might assist the Commissioner in relation to the retained refunds (November and December).

10. The doctors consult their solicitor, who arranges an appointment with a registered liquidator, and they discuss putting the company into administration, or liquidating.

11. This kind of nightmare scenario, with Kafkaesque dead ends and administrative *lacunas*, has been played out here in recent times.

12. The *coup de grace* would be issue by a Deputy Commissioner to the company of a demand to post a bond for anticipated income tax. In that case, the doctors would probably tip the company into voluntary administration or a members' voluntary liquidation.

1 Arrangement of Paper

13. What happens in practice is that:

    (a) The tax agent has the demanding jobs of dealing with the relationships; and producing, reconciling and explaining every tax invoice for many GST periods, for a corporate group. That means that the tax agent has the day-to-day relationship with the ATO, and can gauge whether matters require escalation from time to time.

    (b) The matter gets serious, so that the lawyers are called in. Lawyers bring a different set of skills and instincts to bear, since ordinary negotiation occasionally requires some prodding by reference to legal rights.

14. For that reason, I have arranged this paper by looking at the legal rights and obligations concerning a few of the more important recovery tools available to the Commissioner. Tax recovery is a branch of administrative law no less demanding than any sub-set of substantive tax laws. And it is played hard, and played technically.

15. That will comprise the first part of this paper.

16. The second part of this paper will deal with developments in dispute resolution that the Commissioner has been promoting, and a few impressions about whether those changes are being implemented as intended.

2 Retaining refunds pending verification

17. Section 8AAZLGA was inserted after the Commissioner was unsuccessful in defending *Multiflex*, proceedings brought to compel a refund.[1]

18. The Commissioner contended in *Multiflex* that the then provisions for refunds should be read such that the positive duty, to give a refund, should allow "a reasonable period for performance with the circumstances of a particular case then giving content to the Commissioner's duty".[2]

19. Having exhausted its appeal rights,[3] the Revenue procured an amendment to the *Taxation Administration Act*, to insert section 8AAZLGA.[4]

20. In the Minister's second reading speech, Mr Shorten said on 1 March 2012:

> *Lastly, Schedule 7 provides the Commissioner with a legislative discretion to delay refunding an amount to a taxpayer, pending integrity checks of their claim.*
>
> *These amendments are in response to the Full Federal Court decision in Commissioner of Taxation v Multiflex Pty Ltd, that the Commissioner is required to pay a GST refund within the time taken to process a taxpayer's return, and the Commissioner has no additional time to check the validity of the claim, even in cases where the Commissioner suspects it might be incorrect, including due to carelessness, recklessness or fraud.*
>
> *The amendments seek to restore what had been the Commissioner's administrative practice, before the Multiflex decision, of retaining certain amounts whilst undertaking refund integrity checks of a taxpayer's claim.*
>
> *The changes seek to strike a balance between a taxpayer's right to receive a prompt refund and the Commissioner's obligation to protect the integrity of the tax refund system. Following public consultation on the draft legislation, a number of changes were made to ensure the right balance is struck.*
>
> *In particular, the amendments in Schedule 7 only allow the Commissioner to delay a refund claim* ***if it is reasonable,*** *and he must* ***tell the taxpayer of that decision***

1 *Commissioner of Taxation v Multiflex Pty Ltd* (2011) 197 FCR 580.

2 At para [13].

3 Special leave refused: [2011] HCATrans 344 (9 December 2011)

4 *Tax and Superannuation Laws Amendment (2012) Measures No. 1 Act* 2012, Schedule 7. In fact, on the special leave application, Batrouney SC mentions an exposure draft of this law, *in arguendo*, as having been issued by Treasury in August 2011.

> ***within 14 days (or 30 days depending on the relevant tax)*** *or otherwise pay the refund. Taxpayers will also be able to* ***object where payment of the refund has been delayed for more than 60 days****. These features provide taxpayers with more rights than previously available under the Commissioner's administrative practice.*
>
> *[Emphasis added]*

21. In fact, the submissions at the time pointed out that the timelines proposed (and which have been enacted) can place serious stress on a business which is reliant upon expected refunds of net amounts.

22. The House of Representatives Standing Committee on Economics conducted an enquiry into the Bill. The Law Council of Australia's Taxation Committee's submission says:[5]

> *However, the [Taxation Committee of the Law Council of Australia] continues to have serious concerns that the proposed discretion … to retain funds has the potential to strain cash flows particularly for small businesses, compromise creditors, jeopardise the ability of businesses to secure continued finance, and will result in businesses struggling or failing to maintain solvency where the discretion is used inappropriately to withhold legitimate tax refunds. It will also create uncertainty for directors as to the status of entitlements and give rise to potential liabilities for insolvent trading.*
>
> …
>
> *[The] provisions are a statutory form of Mareva injunction or freezing order without the checks and balances that are ordinarily required to obtain such an order from the courts and with the costs of the litigation having been shifted from the Commissioner to the taxpayer.*
>
> …
>
> *In addition to the general comments above, the Committee wishes to make comments on some specific aspects of the Bill. These are:*
>
> *(a) There is no time limit within which the Commissioner must commence verification of the refund.*
>
> *(b) There is no deadline for the verification process at which point the Commissioner must either release the refund or issue an assessment.*
>
> *(c) There is an inordinate amount of time before the taxpayer can start proceedings under Part IVC of the Taxation Administration Act 1953.*
>
> *(d) The taxpayer's right to object to the Commissioner's decision (the taxpayer's only remedy) to withhold is ineffective.*
>
> *(e) There is no positive obligation on the Commissioner to refund the amount as soon as he is satisfied that the amount is payable by the entity.*
>
> *(f) The form of the decision to withhold will create uncertainty for taxpayers.*

[5] The submission is available at the Committee's web page: http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=economics/superannuationlawsbill/report.htm

23. The Bill contained superannuation measures, which attracted the balance of the submissions from professional bodies, industry organisations and one of the large insurance companies. Only the Taxation Committee of the Law Council of Australia addressed this, more mundane, collection aspect of the Bill.

24. The Economics Committee accepted evidence from the Commissioner's office and from Treasury that the balance sought to be struck by the Bill was appropriate. The Economics Committee pointed to evidence, which it had received, that the Commissioner would be obliged to act "reasonably"; and that imposing a particular time limit to decide about a withholding might incidentally make that period a default position. Simpler matters, it was said in evidence, might be able to be resolved in a matter of weeks; these simpler matters would be subject to delays up to a statutory cap if that otherwise became the default position.[6]

25. Despite the reassurance given by Treasury in its evidence before the Economics Committee, practitioners are experiencing cases where there are inexplicable delays, in the face of real efforts by a taxpayer to overcome initial wariness on the part of the Commissioner in relation to refunds. The problems are outlined under the following subheadings.

2.1 Timing Issues

26. To understand the submissions made about some of the defects with this provision, we have to work through how the timing works in practice.

[6] Refer paragraphs 2.67-2.69 of the *Advisory Report on the Tax and Superannuation Laws Amendment (2012 Measures No. 1) Bill 2012.*

2.1.1 Taxpayer gives notice of retention

27. First, the taxpayer must have given to the Commissioner some notification, such as a BAS, affecting the amount the Commissioner is to refund to the taxpayer.[7]

2.1.2 Commissioner gives notice of retention

28. The Commissioner then presumably has to decide to retain a refund. At the outside, the Commissioner is obliged to give the refund unless he gives a timely notice of retention under section 8AAZLGA(3). Calculation of that time is quite complicated. Essentially if an RBA surplus has arisen, and putting other complications to one side, the notice should be given by the fourteenth day after the day on which the RBA surplus has arisen. However, it will be necessary to study the RBA to determine if another rule applies.[8] If the right to refund has arisen in another way, then the Commissioner potentially has 30 days to give notice.

29. So potentially the first time period is the time up until the giving of the notice, perhaps 14-30 days. Note here that the taxpayer or agent may not realise that the notice required under subsection (3) has been given, because there is no requirement to give it in writing, and in my experience it is given relatively informally without referring to objection rights.

2.1.3 Cannot file objection immediately

30. The next stage is the commencement of the time within which an objection may be filed. An objection cannot be filed straight away. A taxation objection is only competent under section 14ZW(1)(aad) if filed in the period which only starts at the end of the 60 day period <u>after the end of the day before which the Commissioner was required to inform the taxpayer of the retention</u>.

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7 Subsection (1).

8 Unfortunately this has been defined by reference to the complicated definition of "RBA interest day" in terms of section 12AF *Taxation (Interest on Overpayments and Early Payments) Act* 1983.

31. So potentially, the objection can only be filed after almost 74-90 days after the refund ought otherwise have been paid.

2.1.4 Section 14ZYA periods

32. Then the Commissioner can consider an objection unmolested for 60 days, at least, before there is a right to give a notice requiring the Commissioner to decide the objection. Once such a notice is given, the Commissioner has a further 60 days, at the end of which (failing decision) there is a deemed disallowance.[9]

33. So the objection process itself takes, potentially, about 120 days assuming there are no information requests along the way and assuming that the Commissioner does not decide it sooner (and that the taxpayer acts promptly to ensure its rights are protected). In practice, taxpayers are wary of giving a notice requiring a decision because they are concerned that this may prejudice information resolution of a dispute.

2.1.5 Summary of timing

34. The time periods then, in a situation where a taxpayer is being denied its normal cash flow, are:

    (a) Somewhere between 14-30 days, usually, before the Commissioner need have given the notice of retention.

    (b) A further 60 days after the day before the Commissioner must have given that notice, for the Commissioner to consider the retention in terms of the obligation to verify.

    (c) A further 60 days after that, for the Commissioner to consider an objection, assuming the objection was lodged on the very first day possible.

[9] Section 14ZYA *Taxation Administration Act*.

(d) Assuming a notice under section 14ZYA is given immediately is available – a further 60 days, before deemed disallowance.

35. The time, at minimum, is 194-210 days, if the Commissioner uses all his time and the taxpayer is beyond prompt and diligent.

36. It is only upon deemed disallowance that the taxpayer has access to the AAT, which would usually be the venue of choice given its ability to conduct merits review of the administrative decision making.

37. Little wonder that there is now interest in circumventing this whole process by bringing an application promptly to the Federal Court or Federal Circuit Court, in reliance on the *Administrative Decisions (Judicial Review) Act*.[10]

38. Hence the Law Council of Australia Taxation Committee's submissions complaining of the want of any time limit for the Commissioner to commence verification, the want of any deadline for that verification process, the "inordinate amount of time" before a taxpayer can start Part IVC proceedings, and the ineffectiveness of the right of objection.

2.2 Form of notice

39. When I became involved in one of these matters in 2014, I asked for the Commissioner's advice that he was indeed acting under section 8AAZLGA.

40. After some time, quite an informal email was produced, which nevertheless did refer to that section.

41. For all I knew, the Commissioner might have given earlier information to the taxpayer that he was acting under that section. No record of any such conversation or informal advice was produced. I was left with an informal email, and the email did not even advise the taxpayer's rights of objection and appeal.

[10] In the Federal Court, that might be brought in conjunction with an application under section 39B *Judiciary Act*. As those remedies are discretionary to some extent, this is not straightforward by any means. However it is a faster way of getting to court, albeit involving some known risks.

42. This was the very problem that the Taxation Committee of the Law Council of Australia had highlighted to the House of Representatives Committee in 2012 concerning what has become subsection (3)[11][emphasis added]:

> *The Commissioner must inform the entity (by serving a document on the entity or by other means) that he or she has retained the amount under this section …*

43. The Taxation Committee of the Law Council of Australia said in its submission that the ability to give verbal notification was unsatisfactory, particularly in light of the fact that failure to give such notice within the prescribed time limits would give rise to the requirement to pay the refund in accordance with section 8AAZLGA(5)(b).

44. The Taxation Committee of the LCA foresaw "a real practical issue in terms of the onus of proof placed onto the taxpayer in circumstances where the notification is provided verbally. … It is currently unclear how a taxpayer would establish that they have (or have not been) given verbal notification of the Commissioner's decision. For example, would the taxpayer need to lodge to a freedom of information request …".[12]

45. In the House of Representatives Committee's report, this is dealt with by referring to evidence that:

    (a) Written notification would take longer and be less efficient.

    (b) Written notification would discourage "effective communication between the ATO and taxpayers".

    (c) ATO staff "make contemporaneous notes of these conversations" – this does not deal with the problem that you potentially might need to apply under the freedom of information laws to obtain a copy of such transcript.[13]

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11 The balance of the subsection then sets out time periods, and I will come back to those time periods.

12 Note that, till advised of the decision, the taxpayer will simply not know what the Commissioner is doing and why there is delay.

13 Report paragraph 2.71.

46. From my personal experience, the problem highlighted by the Taxation Committee of the Law Council of Australia's submission has come to pass.

2.3 Can't we just sue the Commissioner in debt?

47. A sensible question, where monies are withheld improperly, is whether the Commissioner can simply be sued in debt for the retained refund.

48. Whilst a sensible suggestion, the short answer is that it has been tried before and is not the correct procedure. The obligation to refund, in relation to an RBA, is subject to administrative allocations by the Commissioner.[14] The allocations are to be made under Part IIB Division 3, and particularly using one of the two methods prescribed there. Although those are relatively new provisions, they have a history. Similar provisions were considered by the High Court of Australia in *Commissioner of Taxation v Official Receiver*[15] where it was said:

    (a) If the Commonwealth refused to make necessary provision for the Commissioner to refund money, the Commissioner would be under no personal liability to refund the money.

    (b) The Commissioner cannot be sued in his official name to enable such refund.

    (c) The duty imposed on the Commissioner to refund is of an administrative character which "could be enforced by mandamus" if public funds were made available to the Commissioner to enable him to fulfil his duty.

49. This has large consequences in other fields, including insolvency.[16]

50. That said, I imagine that anyone bringing judicial review proceedings in relation to a failure to make a refund might wish to keep open the possibility that the High Court would

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14 Section 8AAZLF.

15 (1956) 95 CLR 300, 309-312 (Williams J).

16 Refer *Commissioner of Taxation v Dexcam Australia Pty Ltd (In Liq)* (2003) 129 FCR 582 (FC), special leave refused [2004] HCATrans 19.

ultimately allow special leave, and thus plead, as an alternative, a simple action in debt (knowing that it must fail at least at first instance and probably also at intermediate appellate level).

3 Posting a Bond

51. The innocuously entitled "Tax Laws Amendment (Transfer of Provisions) Bill 2010" contained something of a surprise.

52. The *Income Tax Assessment Act* 1922 had, since inception, contained section 54(5):

> *Whenever the Commissioner has reason to believe that any taxpayer establishing or carrying on business in Australia intends to carry on that business for a short time only, he may at any time and from time to time require the taxpayer to give security by way of bond or deposit or otherwise to the satisfaction of the Commissioner for the due return of, and payment of income tax on, the income derived from the business*

53. In accordance with section 67(1)(a), failure or neglect to give security was an offence punishable by a fine of no less than £2 and no more than £100.[17]

54. That provision, with few changes, became section 213 *Income Tax Assessment Act* 1936. The precise wording, of the required nature of the Commissioner's belief, changed a little:

> *… any person establishing or carrying on business in Australia intends to carry on that business for a limited period only, or where the Commissioner for any other reason thinks it proper so to do …*

55. So in the 1936 Act, the income tax power to require a person "to give security by bond or deposit or otherwise to the satisfaction of the Commissioner for the due return of, and payment of income tax on, the income derived by that person" was no longer confined to circumstances of a temporary Australian business.

56. These sleepy provisions, of which I find no trace in the law reports, suddenly became the subject of much excitement when we saw the 2010 Bill.

[17] Section 70 provided for circumstances of aggravation, in case of continued failure or neglect.

57. In the process of streamlining and unifying collection provisions, section 213 *Income Tax Assessment Act* 1936 was repealed, and an analogue applicable to all major tax lines was inserted in the *Taxation Administration Act*.

58. So now we have subdivision 255-D, "Security deposits" which spills over into two pages of the CCH reprint, as opposed to the 12 lines of the *Income Tax Assessment Bill* 1935.

59. Section 255-105(1) of Schedule 1 *Taxation Administration Act* does clarify the requirements of the written notice that the Commissioner must give to require security. The Commissioner must set out the amount of the security and the means by which it is to be provided. He must specify the time by which it must be provided.

60. It is an offence punishable by a penalty of 100 penalty units if you fail to give security as required.

61. At present, a penalty unit is $170.[18] Where a body corporate is convicted of an offence, the fine must, instead, not exceed an amount equal to five times the amount of the maximum pecuniary penalty that might have been imposed on a natural person. Thus, for a corporation, the maximum penalty for an offence under section 255-110, assuming no circumstances of aggravation, would be $85,000.

62. The 2010 Second Reading Speech particularly mentions that the expanded law is to assist in countering phoenix activities. The Explanatory Memorandum[19] also mentions protecting "the integrity of the tax system against schemes such as 'fraudulent phoenix activity', which broadly involves winding up a company (with significant unpaid debts) but continuing the same business through a newly 'risen' company".

63. The Explanatory Memorandum also points out that defences available under the Commonwealth *Criminal Code* may be relevant. One pointed out is the defence of "involuntariness" which is said to provide a taxpayer with a defence if the taxpayer "is

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18 Section 4AA *Crimes Act* 1914 (Cth).

19 Paragraph 2.42.

unable to provide security as requested … provided they are incapable of providing the security as required".[20]

64. The kinds of securities contemplated include:[21]

> *2.47 Security can be provided by way of bond or deposit or by any other means the Commissioner believes appropriate. Such other means include a mortgage over property (real or personal), floating charges, liens and guarantees. The Commissioner may be required to register his or her security interests where required by law.*

65. Finally, the Explanatory Memorandum points out that the Commissioner's decision to require security would be reviewable under the *Administrative Decisions (Judicial Review) Act* 1977.[22]

66. I have scoured the law reports for reference to these provisions under the 1922, 1936, and amended 2010 provisions. I know that they have been used recently. I simply cannot find anything reported as to their use.

67. In a sense, this is unsurprising since an offence of failure to comply would have been prosecuted summarily. Perhaps there have been numerous requirements for such securities over the last 90 years, and either willing compliance or quiet submission to imposition of summary penalty.

68. Nevertheless, I suspect that there has been little use of these provisions until inserted in the *Taxation Administration Act* in 2010, simply because they are unwieldy, they do not give the Commissioner any great jump on other creditors, and are only likely to generate insolvency litigation against the Commonwealth (such as for grant of a preference). The easy course for a trading company confronted with such a demand is to put the company into administration (with consequent loss of trade, reputation and employment).

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20 Explanatory Memorandum paragraph 2.45.

21 Explanatory Memorandum paragraph 2.47.

22 Explanatory Memorandum paragraph 2.44.

69. The reasons for attempting to invigorate, and to generalise the power to include GST, are perfectly understandable. Builders claiming input tax credits on the way through a project sometimes found themselves paying more pressing creditors than the Commissioner as the project drew toward an unprofitable completion.

70. If I had been giving this talk five years ago, we would have been discussing garnishee notices, which are still very much in use, but which are awkward. (I will deal briefly with them below.)

71. Looking at the scenario outlined at the beginning of the paper, receipt, by a limited liability medical company of a demand for security, in circumstances where Medicare receipts have been garnisheed and input tax credits retained (potentially for more than half a year at minimum) would be the final nail in the coffin. A director of such a company might, understandably, decide that there was little point attempting to make out a positive defence under the Commonwealth *Criminal Code* of inability to provide such security as demanded, and might instead see an insolvency practitioner immediately with a view to terminating a community business, and with it the livelihood of the employees.

4 Garnishee Notices

72. At present, the Commissioner's powers to collect from third parties are gathered together in subdivision 260-A of Schedule 1 *Taxation Administration Act*.

73. I am conscious that an awful lot has been written about such notices.

74. Challenge to such notices, if carefully drawn and modestly applied, is difficult.

75. Amateurs, playing in this field for the first time, tend to want to have a go at the basal assessment, where the notice is based on such an assessment.[23] The same rules apply in that field as apply in other collection matters. A competently drawn assessment cannot

[23] With assessment based taxes, it may be necessary for there to be an assessment before liability for tax accrues.

be challenged because of the privative provisions applicable to assessments for that class of tax.[24] An instance, in a State tax context, was *Lis-Con Concrete Constructions Pty Ltd v Commissioner of State Revenue* (2011) 85 ATR 769, paragraphs 8-11.

76. In the scenario outlined at the beginning of this paper, the garnishee of the whole of the Medicare receipts does sound vulnerable. Poor Dr Edelsten seemed to come across garnishee notices, and the first of the reported cases spoke of a garnishee notice of 100% of payments due from the Health Insurance Commission.[25] However, it seems that common sense prevailed and the garnishee notice was reduced to 45 cents in the dollar.[26]

77. Presumably something could be negotiated on that front, and, in the example discussed at the beginning of the paper, some holistic solution agreed.

78. What I do warn is that rights must be asserted quickly and seriously, because time is the enemy in the absence of cash flow.

5 Dispute Management

5.1 Managing Information Requests

5.1.1 Informal requests

79. ATO has said they prefer to obtain information informally. That is proper public administration.

80. Aside from what I say below concerning general management of information requests, an information request made informally does not excuse the taxpayer from considering whether the information is subject to an obligation of confidentiality.

81. Where the recipient of an informal request is genuinely concerned that compliance with the request will breach an obligation to others, it is understood by the ATO that the

[24] For example, in relation to income tax, refer sections 175 & 177 *Income Tax Assessment Act* 1936.

[25] *Edelsten's Trustee v Commissioner of Taxation* (1987) 16 FCR 386.

[26] *Edelsten v Wilcox* (1988) 19 ATR 1370.

recipient will require a compulsory notice before the recipient of the request safely can provide that information or document to ATO. I have drafted such correspondence to ATO before. Nobody even blinked, and the formal notice issued overcoming the citizen's concerns.

5.1.2 Formal requests

82. Of course a formal notice will not overcome a proper claim for client legal privilege. The ATO also recognise circumstances, in relation to accountants' advice and in relation to board papers, where ATO will not normally seek access.

83. Formal access and information gathering notices are a normal part of tax administration. They might be used, in the first instance, precisely for the kinds of reasons already outlined above, anticipating that the recipient of the notice might otherwise be bound by obligations of confidentiality. Thus, there is no point simply walking into a bank informally and asking for customer details. You require compulsory notices to deal with that kind of request, since there is confidentiality in the banker-customer relationship. That is easily anticipated and thus compulsory notices issue in those circumstances.

84. Most of the older cases concern exercise of powers under sections 263 & 264 *Income Tax Assessment Act* 1936. Where GST investigations run in parallel with income tax investigations, you will still see reference in compulsory notices to the income tax sections. However, the GST enquiries will be conducted under Division 353 of Schedule 1 *Taxation Administration Act*. Parallel notices will issue under the income tax and the tax administration statutes where there are dual investigations.

5.1.3 Access

85. The indirect tax equivalent of section 263 *Income Tax Assessment Act* is section 353-15. It provides for access to premises for the purposes of indirect tax laws.

86. In practice, it means that someone authorised by the Commissioner for the purposes of that section might, at all reasonable times, enter and remain on any land or premises for the purposes of an indirect tax law. For those purposes, that person is entitled to "full and free access" at all reasonable times to any documents, goods or other property. That person may, for that purpose, inspect, examine, make copies of, or take extracts from, any documents. The person also has powers to examine, and undertake tests and measurements in relation to, goods and other property, including taking samples.

87. Technically the person can be asked to leave if the person does not produce proof of authority.[27] In practice, except in case of great urgency, I should expect that proof of identity would be provided at the beginning of a visit. Whilst I understand you will not be allowed to make a photocopy of the proof of identity, I do suggest that a careful note be taken of all the details.[28]

88. Naturally, it is an offence to deny the authorised individual "all reasonable facilities and assistance for the effective exercise of powers" under the section. In other words, if the person needs to plug in a laptop computer, show them where the power point is.

5.1.4 Information and documents

89. The indirect tax equivalent of section 264 *Income Tax Assessment Act* is section 353-10 of Schedule 1 *Taxation Administration Act*.

90. As now drafted, that section separates three different types of powers:

    (a) a power by written notice to require a person to give the Commissioner information he requires for the purpose of the administration or operation of, relevantly, an indirect tax law;

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27 Section 353-15(2).

28 The reason why ATO is reluctant to allow photocopies is that they do not want falsified identification papers to go into circulation. There is nothing sinister in denial of a request to photocopy the identification.

(b) power to require by written notice attendance to give evidence before the Commissioner's authorised individual for the purpose of the administration or operation of such law; and

(c) power to require by written notice production to the Commissioner of a document, for the same purpose. The document must be within the custody or control of the recipient of the notice. Note that there is no power in section 353-10(1)(c) to require creation of a document. The Commissioner attempts to get around that by using section 353-10(1)(a), which is the power to require information to be provided to the Commissioner.

91. There are slight differences in wording between the provisions of the *Taxation Administration Act* and the provisions in the *Income Tax Assessment Act* 1936. I know that some points are taken about that from time to time. These coercive notices under the *Taxation Administration Act* overcome contractual and equitable obligations of confidence. It is also no excuse that compliance with the notice may tend to incriminate.[29] However client legal privilege can be maintained. A reasonable opportunity must be given to a person subject to such a notice to make a claim for client legal privilege.[30]

92. There is no particular form of words necessary to claim client legal privilege. The language used must be capable of reasonably being understood as invoking the privilege.[31]

93. I am often asked as to the privilege claim form insisted on by ATO, which tends to give away the content of the document. There is no particular reason why the ATO form must be used, other than pressure from ATO. A competent litigation lawyer of any seniority

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29 As to obligations of confidence, refer *Smorgon v Australia & New Zealand Banking Group Ltd* (1976) 134 CLR 475. As to self-incrimination, refer *Stergis v Boucher* (1989) 86 ALR 174.

30 *Citibank* 88 ATC 4714.

31 *Comptroller-General of Customs v Disciplinary Appeal Committee* (1992) 35 FCR 466, 480.8. There Gummow J was referring to the privilege against self-incrimination, but there is no reason why that statement of the principle should be any less valid in relation to a claim for client legal privilege.

will be able to draft a statutory declaration which sufficiently complies with legal requirements to claim client legal privilege, and you do not have to use the invasive form propounded by ATO.

94. A particular difficulty which faces the recipient of a notice, particularly under section 353-10, is that ATO may draft the notice broadly, or may not have enough information so as to draft the notice with sufficient precision.

95. The recipient of the notice may well know much more about the facts and documents than ATO, but be left wondering how to comply in the limited time provided.

96. Two general points emerge:

    (a) A reasonable time must be allowed for compliance with the notice.[32]

    (b) The notice must be sufficiently clear "to convey to the addressee what information is sought".[33] It is an objective test. You consider whether "a reasonable man in the position of the addressee of the notice can fairly comply with it and not be exposed to the possibility of penalty for non-compliance having regard to the manner in which the notice is formulated".[34]

97. The Court will not look at the notice "carpingly by engaging in a narrow analysis of each word in an attempt to find some latent ambiguity".[35]

98. If there truly is a problem complying with the notice, a litigation lawyer should be engaged immediately to frame setup correspondence to the Commissioner inviting him to deal with the specific issues highlighted in that letter, such as timing, access to documents stored offsite or in archive, difficulties in descriptions, or other practical difficulties in compliance. The Commissioner might be invited to withdraw the present

32 *Clarke v Deputy Federal Commissioner of Taxation* 89 ATC 4521 at 4528.

33 *Hart v Deputy Federal Commissioner of Taxation* (2005) 148 FCR 198, [22].

34 *Fieldhouse v Commissioner of Taxation* (1989) 25 FCR 187, 208.7.

35 *Fieldhouse* above.

notice and issue a new notice accommodating the practical problems highlighted by the letter. The letter will generally point to the costs consequences if the matter has to go to a Court, and would be drafted on an open basis to facilitate that.

99. People should be less hesitant in bringing proceedings under the *Administrative Decisions (Judicial Review) Act* if faced with hesitancy in any response to such plain set up correspondence. In practice, I imagine that ATO know how to play this game equally well.

5.2 Particular difficulties with computer records

100. Whatever the merits of the now famous searches that spawned the litigation in *JMA Accounting Pty Ltd v Carmody*,[36] a couple of things emerged:

(a) the power to have access to premises did not permit the Commissioner's representatives "to take control of JMA's offices and deny its staff access to the computer records"; and

(b) the decision by the Commissioner to copy substantially all the electronic documents was held, however, to be defensible in terms of providing an adequate opportunity to claim privilege, provided (as occurred) the discs were then delivered to independent solicitors, AGS, with a reasonable opportunity allowed to claim privilege after that;

(c) however – the search was unreasonable. Files were copied indiscriminately. No or little attempt was made to discern what files were of relevance. Famously, the office file "JMA Birthdays" was copied, a file presumably only used to know whose turn it was to buy everybody cakes in the office.

[36] (2004) 56 ATR 327; 57 ATR 365.

101. Whilst it is possible to have sympathy for those involved in this particular raid, which seemed to have its own difficulties, at least we can now say that there have been some important lessons learned.

5.3 Checklist

102. Some things can be done in advance. I suggest a manual for dealing with a visit.

103. But beforehand, I also suggest a corporate communications strategy be put in place, so that your flak has a permanent file immediately available and can provide an anodyne (but truthful) answer even if the flak has not heard of a visit. Corporate Australia is in constant dialogue with the Commissioner, and although the flak does not yet have any details of the visit a journalist has rung about, it is corporate policy to cooperate with all lawful enquiries by the Commissioner. (Doubtless your flak can put it even better than that.)

104. There should be a brief manual on the shelf, and also electronically available to all staff. However, having it physically on the shelf at a reception is absolutely essential, as the written word remains king when fast access to information is required.

105. You will have to consider what best suits the businesses you run or you advise, but the following brief steps might be mentioned:

    (a) Be cooperative and polite.

    (b) Ask to see the identity tag and authorisation of the visitor:

        (i) Read it. Does the authorisation actually authorise the visit?

        (ii) Make an immediate note of what you have read. (You will not be allowed to photocopy it.)

        (iii) As soon as possible, refer to a principal who will handle initial discussions and then delegate to a sole point of contact (see below).

    (c) Find out what the purpose of the visit is:

(i) Ask whether it is informal access, or exercise of coercive power of entry.

(ii) If possible, get a list of issues or a list of documents sought.

(iii) If the documents or files relate to a third party, consider whether they are secret. If so, only produce if not privileged and then only in answer to a formal exercise of coercive power.

(iv) Work through the list systematically, so the visit can be concluded as rapidly and efficiently as possible.

(d) As soon as possible, assign someone as the ***sole point of contact*** between the visitor and your organisation.

(i) Instruct other staff not to disturb the visitor.

(ii) Instruct other staff to refer all queries from the visitor to the sole point of contact.

(iii) Ask the visitor to refer all queries to the sole point of contact.

(iv) If the visitor insists on asking other members of staff questions, and will not desist from doing so, work sensibly with that so that queries asked of that other person are nevertheless funnelled through the sole point of contact.

(v) The sole point of contact should keep a list of queries made, and information and documents provided.

(e) Have the receptionist or other early points of contact make a note of their contact. The sole point of contact should make a contemporaneous note of all contacts.

(f) Provide a working area for the visitor where the visitor has facilities and will not be disturbed.

(g) The sole point of contact is to obtain the document or file, as requested by the visitor.

(h) Keep copies of all documents or files provided.

(i) Make proper claims for client legal privilege.

(i) You are entitled to a reasonable opportunity to assert privilege.

(ii) The claim for privilege should be over particular classes of documents or files.

(iii) You may be asked to complete a questionnaire. Do not divulge so much by its completion that you waive privilege. This is a legal issue. Refer to a litigation lawyer.

(j) Gain permission from the visitor, if possible, to contact any third party the subject of the enquiry, so that the third party can take the carriage of any challenge to the visit.

(k) Advise your PR people that there is a visit. Deploy your pre-set corporate communications strategy, with any nuances from the specific facts of this visit.

106. I understand that not all visits can be as carefully managed as this. But you owe it to yourself, and your clients or customers, to take some care to make sure the visitor is who the visitor asserts; has the powers claimed; it is a focused visit dealing with the issues of interest to the visitor; and is concluded quickly.

107. There are separate guidelines, including the LCA's negotiated guidelines with the Federal Police, for execution of search warrants on lawyers' premises. If you are a law firm, these guidelines should also be in your access manual.

6 Negotiating to Settlement

6.1 Interests

108. It helps to understand the interests of another party to negotiation. A regulator such as the Commissioner of Taxation is charged with enforcement of particular laws. The enforcement of those laws might be said to have two aspects:

(a) past conduct; and

(b) current and future compliance with those laws.

109. As with any negotiation with a regulator, one thing that should always be considered is: what can be offered to assure the regulator that laws will be complied with going forward? For example, on a recent difficult professional conduct matter I handled as counsel, one simple thing to offer was that the applicant would visit her tax agent every quarter to discuss her tax and financial matters. Similar undertakings can be offered to the ACCC as part of a compliance package there. So too should this be considered as part of negotiations with ATO.

110. Past conduct can be sweetened by making such offers in relation to future conduct. There is no need to make any admissions about past conduct, but only that assurance processes are in place or will be put in place in a concrete way so that misunderstandings can be avoided in future.

111. This is a fundamental building block of negotiation, as it tends to build trust with the regulator, probably is going to be cost effective by avoiding future misunderstandings, and probably will offer real value for the client in any case.

112. Turning to past conduct, you may be able to gauge quickly whether opportunities remain to make proper disclosures of doubtful issues, to take advantage of any penalty concessions.[37]

113. I would like to talk more about the soft aspects of the negotiation process. To be begin, each negotiation will be different. You may have to spend some time listening, more than talking, to discover the respective participants' interests.

114. But observation over a period indicates that interests can be expressed in different ways by different people from the ATO:

[37] There is something of a literature about this. For example, see Blakelock "Effectively managing tax disputes – managing the outcome from the beginning", The Tax Institute Queensland 2014 Convention papers, pages 41-72.

(a) The person with carriage of the investigation at ATO may become quite knowledgeable about the facts, including issues such as the level of record keeping compliance, the personalities involved, and strong and weak factual points on both sides. Nevertheless, that person may not be the subject-matter custodian for the purposes of any legal points of doubt. A complaint often heard, though in my experience rarely established, is that such a person can come to lose objectivity, requiring escalation. That is now a simpler process than it was before.[38]

(b) There may be one or more persons who are thought to be the internal custodians of knowledge about particular technical points. You will rarely encounter these people until a formal meeting (or alternative dispute resolution). Even then, they may not be present, though in my experience they do tend to turn up). The difficulty they face is that a settled position, which might be a position which they settled themselves after considerable thought, really cannot be selectively applied. It cannot be applied to one taxpayer, but not applied to another. This is a basic principle of public administration, sometimes referred to as "horizontal equity". And it is an important and valid principle. The key here is to know how to get your view on a technical issue escalated other than going to the Tribunal or the Court. Ultimately you do need to be able to say that the point will be tested if the matter cannot be solved in another way.

(c) Lawyers: ATO has in-house legal staff. It appears that in-house lawyers are tasked with a great amount of ATO work, though ATO has a substantial external legal spend, as we know. In my experience, most lawyers acting on the instructions of the Commissioner do take seriously their obligations, which include a requirement independently to think through matters so that propositions are most

[38] I have some suggestions about that, but frankly you simply need to be fairly blunt about escalation, knowing that it is likely to trash the relationship with the person primarily tasked to investigate.

advantageously, but ethically and lawfully, put in any negotiation. The lawyers are not ultimately the decision makers, though in form they may have delegations to settle matters at ADR.[39]

115. In recent times, I have found the involvement of lawyers acting on behalf of ATO to have advanced resolution of matters, as the new Commissioner is attempting to remove the distractions of a heavy litigation caseload.

116. The rationalisation of the settlement guidelines recently is one symptom, and a positive one, of the determination by the new Commissioner to avoid litigation unless necessary, negotiate early, and (it is suspected) get the money in more certainly and earlier than would otherwise be the case. This is simply good public administration.

6.2 Dealing with particular substantive issues during negotiation

117. As noted above, horizontal equity is an important guiding principle in public administration. This means that the Commissioner should avoid administering the Act inconsistently. One symptom of inconsistent administration is to settle with one taxpayer in a way which is inconsistent with the administration of laws as against a similarly situated other taxpayer.

118. The interpretation of laws, where the Commissioner has a view can be a stumbling block to negotiation. In practice, I have found little traction in pointing to the possibility that the ATO may be incorrect in its interpretation of a law. Similarly, there is little point in referring to the litigation risk to the Commissioner, if the litigation risk is related mostly to interpretation of a legal point. The fact of the matter is that the Commissioner is likely administering the law consistently, albeit you say wrongly, but that many people could be affected if the Commissioner were to change view.

[39] This form, whereby delegations to settle matters were spread more thinly, does not overcome the fact that the delegation is to settle matters within a particular range, and to go beyond that range requires discussion with the effective client, quite often the business line.

119. You are much better off identifying how the facts support the case you will put, regardless of how the law might be said to operate. To do that, the Commissioner will commonly require oodles of further information, documents and analysis. This may only assist the Commissioner in preparation of his court case, but it is realistically the only way to have a battle concerning facts before the parties are forced to consider legal action.

120. Compromise is possible. The redrafted settlement guidelines issued in 2015 positively encourage proper settlement. But it is essential that the taxpayer's representative identify those areas where the Commissioner has some room to move, and provide the Commissioner with material upon which to act in favour of the taxpayer. Usually, as I have said, it is around the litigation risk for the Commissioner concerning likely findings by a Court or Tribunal about the facts.

121. A recent example in which I was involved had us provide comprehensive documentation concerning disputed creditable acquisitions, properly reconciled and cross-referenced, to make it easy for the ATO auditor.

122. And that settled

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30 January 2015