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The Commissioner's Right of Access to Records - Recent Cases on Sections 263 and 264 of the Income Tax Assessment Act

Abstract

The rights of the Commissioner of Taxation to investigate a taxpayer's affairs under the Income Tax Assessment Act are found in ss 263 and 264. On first reading, ss 263 and 264 are apparently without limitation. However, 1988 and 1989 have witnessed extensive judicial consideration of these provisions. These cases point out that the taxpayer still has some rights of protection.

Keywords

Income Tax Assessment Act, taxpayer's rights

Comments and Notes

THE COMMISSIONER'S RIGHT OF ACCESS TO RECORDS—RECENT CASES ON SECTIONS 263 AND 264 OF THE INCOME TAX ASSESSMENT ACT



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The rights of the Commissioner of Taxation to investigate a taxpayer's affairs under the Income Tax Assessment Act are found in ss 263 and 264. On first reading, ss 263 and 264 are apparently without limitation. However, 1988 and 1989 have witnessed extensive judicial consideration of these provisions. These cases point out that the taxpayer still has some rights of protection.

Introduction

Background

The rights of the Commissioner of Taxation to investigate a taxpayer's affairs under the Income Tax Assessment Act 1936 is found in ss 263 and 264. Section 263 allows the Commissioner or an officer authorised by him to have access to buildings, places, books, documents and papers. Section 263 gives the Commissioner power to obtain information from any person by requiring such person to furnish him with information, attend and give evidence before him and produce all documents, books or papers in his custody or under his control relating to his own or another's income or assessment. Although both ss 263 and 264 have been in the Income Tax Assessment Act since it was originally enacted in 1936, it was not until the growth of the tax avoidance industry that these provisions were carefully considered. Whilst no challenges were reported in the 1987 calendar year, 1988 saw a number of challenges to the powers of the Commissioner of Taxation under both sections.

The statutory powers

The powers of access under s 263 are exercised by the Australian Taxation Office on literally thousands of occasions each year, typically by the attendance of a single tax officer at a bank, financial institution, or commercial premises.

The Commissioner's power under s 263 is expressly stated to be for any of the purposes of the Income Tax Assessment Act only. Accordingly, where a s 263 request has been made, a taxpayer has a right, and in the case of a professional adviser, a duty, to request a statement of the purpose (or purposes) for which access is required in order to establish that the access requested is for a purpose of the Income Tax Assessment Act.¹

Section 263 grants the right of access in wide and unqualified terms. The question of what amounts to 'full and free access' pursuant to s 263 was considered by the High Court in *F C of T v ANZ Banking Group Limited*.² Whilst the court was not unanimous in its interpretation of the section, the acting Chief Justice said:

that section [s 263] creates problems of its own. It grants the Commissioner full and free access to, inter alia, buildings and documents. 'Access', in this context, must mean the right to enter the building and to examine documents. It has been held in a number of cases that a statute which confers on a public officer a right to enter premises prima facie authorises the use of reasonable force to effect the entry, since if the officer were entitled to enter only with the consent of the occupier no statutory authorisation would be required: *Grove v Eastern Gas Board* [1952] 1 KB 77 at 82; *Fowler v Taylor* [1952] VR 593 at 596; *Egg Marketing Board for the State of New South Wales v Cassar* [1978] 1 NSWLR 90. However, the words of s 263 are far too generally expressed to make such an interpretation possible; the right granted is to have access at all times, to all buildings and documents, and for any purposes of the act, and it is not expressed to be subject to the production of any warrant or authority or to be limited in any other way. If the section authorised the Commissioner to gain such access by force, it would bring about the most serious invasion of the ordinary rights of the subject, and the section would not be given that effect unless the clearest words required it. However, in the present case counsel for the plaintiffs did not contend that the section allows the Commissioner to use full force to obtain the access to which the section entitles him. It was submitted that s 263 declares the right of the Commissioner to access and s 264 provides a means by which the Commissioner can force that right.

This interpretation by Gibbs ACJ was not favoured by the majority in this case and the majority's view appearing at page 4058 suggests that:

it would seem that full and free access extends to the use of reasonable force in order to gain access for the same reason that a power of entry extends to the use of reasonable force to gain entry . . .

the Commissioner may invoke the assistance of the Courts to enforce his full and free access. Apart from acceptable circumstances, this course would be preferable to any use of reasonable force.

1 *Kerrison v FCT* (1986) 86 ATC 4105, 4108.

2 (1979) 79 ATC 4039.

The question was again considered by the High Court in *O'Reilly v Commissioners of the State Bank of Victoria*.³ The majority of the High Court, who indicated that they were examining the question afresh 'uninhibited by the possible variance between the views we now hold and what was said in [the *ANZ Banking* case]', stated:

As a matter of ordinary language, access to buildings and places involves availability of entry to them; access to books and documents involves availability of examination of their contents. The express provision that the Commissioner or his authorised officer shall have 'full' access prima facie conveys, at the least, that the availability or entry or examination to which the Commissioner or an authorised officer is entitled extends to any part of the relevant place or building and to the whole of the relevant books, documents and other papers. The express provision that the access shall be 'free' conveys, at the least, that access is to be at least without physical obstruction. Implicit in the grant of full and free access which the section contains is a grant of power to the Commissioner or an authorised officer to take whatever steps are, in all the circumstances, reasonably necessary and appropriate to remove any physical obstruction to that access. 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.

Gibbs CJ, Wilson and Dawson JJ said:

The ordinary dictionary meaning of 'access' is 'a way or means of approach'. The words 'shall have' in the section obviously cannot indicate mere futurity; they are used to confer a right. The words of the section, considered as a whole, confer upon the Commissioner a right to enter buildings and look at documents for the purposes of the Act. The right is to be 'full and free', which means, in effect, that it is unrestricted, except, of course, by the requirement that it may only be exercised in good faith for the purposes of the Act.⁴

These comments would prima facie appear to authorise the Commissioner to use such force as is reasonable to enter into premises which are either locked or vacant, with or without the owner's or occupier's knowledge. Further, where the receptionist is the only person present on the premises, they would be entitled to insist on access there and then without the necessity of a person in authority being present. This interpretation is supported by statements in *Citibank v Commissioner of Taxation*.⁵ In *Citibank* it was submitted by Counsel for Citibank that, before entry, the taxation officers should have sought out a person in authority and given him or her a reasonable opportunity to inspect the various authorities held by the officers concerned. Lockhart J said:

In my view, the submission is erroneous . . . I do not think that either the history of the section or the terms of the section itself support the proposition that there is an obligation on the searcher to first find a person in authority within the hierarchy of the occupier and present on the premises before his right to enter arises. Not only is there nothing to be found in the terms of the section which supports this proposition, but in some circumstances it would obviously be impractical for this to be done; where, for example, premises are vacant or a person in authority is not present.⁶

3 (1983) 83 ATC 4156, 4162.

4 Ibid 4158.

5 (1988) 88 ATC 4714.

6 Ibid 4731.

The power which the Commissioner appears to have forcibly to enter premises that are vacant or unattended must, however, be exercised in circumstances that are reasonable, particularly in cases where it may be expected that there exist documents for which a claim for privilege can be made. In *Arno v Forsyth*⁷ in relation to the exercise of a search warrant, Fox J considered it improper for the officers to enter the chambers of a legal practitioner who might reasonably be expected to have many copies of opinions, some of which would not be related to the subject of the search warrant, without first consulting him or other persons having control of the premises for the time being.⁸ In *Citibank*, Lockhart J said:

Sometimes a privilege question will be raised at the stage of execution of a search warrant rather than at the time of its issue. A search must be conducted reasonably in order to be lawful and the requirement of reasonableness has infinitely variable application. In some cases the police officers conducting the search may, in order to conduct a reasonable search, be obliged to communicate with the person whose premises are to be searched or the person whose documents are expected to be found in the premises (whether they are his premises or not) either before or after entry and allow him the opportunity to obtain legal advice.⁹

Similar comments were made by the Full Court in *Crowley v Murphy*¹⁰ and *Allitt v Sullivan*.¹¹

The commissioner's decision to exercise the statutory powers

Decision can be challenged

The decision by the taxation officers to insist on access and any decision made as to the manner in which access is to be conducted can be challenged under the Administrative Decisions (Judicial Review) Act. Also challengeable is the decision to issue a s 263 authorisation. The most common ground of review of these decisions is that they are an improper exercise of the power conferred by s 263, ie, that the decision is so unreasonable that no reasonable person could have so exercised the power, or that it is exercised in such a way that it constitutes an abuse of the power, or that the decision took into account irrelevant considerations, or failed to take into account relevant considerations.

In the *Citibank* case, Lockhart J held:

- (a) Where the Commissioner or his delegate is called upon to authorise the exercise of s 263 powers he must apply his own mind to the question of the exercise of such power, must consider the relevant circumstances and must decide whether it is appropriate in all the circumstances to authorise the exercise of the power to enter a person's premises and search for and copy documents. He cannot enter premises without the requisite

7 (1985) 63 ALR 125.

8 Ibid 129.

9 Above n 5 at 4737.

10 (1959) 34 ALR 496.

11 [1988] VR 621.

purpose, for that would be an abuse of power which must be exercised reasonably having regard to the particular circumstances.

- (b) A decision-maker reaching a decision to conduct a search under s 263 and determining the scale of the search and the manner in which it is to be conducted must have regard to the effect of the search upon those whose interests are affected, and, as a corollary of that obligation, must have regard to the effect of a search upon the occupier's ability to comply with its duty of confidentiality owed to its clients. The wider the scope of the proposed search, and the larger the intrusion into the affairs of the clients other than those under investigation, the greater the relevance which this factor ought to be accorded in the decision-making process.
- (c) That it was unreasonable for the taxation officers to refuse the request to delay their search whilst the senior executives of Citibank obtained legal advice and to conduct the search so as to prevent Citibank from obtaining any practical benefit from its right to approach the Court for an injunction.

It will be seen from the above that Lockhart J considered that there were three different occasions which could result in decisions subject to review: (a) the decision to issue the s 263 authorisation; (b) the decision to seek access and; (c) any decisions as to the manner in which access is to be conducted.

The question whether there exists a right to challenge the actual issue of a s 263 authorisation had not arisen prior to the *Citibank* case. Before that case the Commissioner's officers relied on the wallet authorisations which were issued as a matter of practice to all taxation investigation officers without any particular consideration of the circumstances in which they were to be exercised. The necessity for a specific decision on the issue of authorisations only arose because of the decision that the authorisation will contain particulars of the premises and documents to which access is sought.

The wide range of matters which Lockhart J indicated should be taken into account in exercising the decision tends to place a heavy burden on the Commissioner to justify his actions.

Right not conditional on written authority

On appeal to the Full Federal Court in *FC of T v Citibank Limited*,¹² the Court indicated that the right of access pursuant to s 263(1) is not conditional upon the existence of a written authority. The written authority to be produced on demand pursuant to s 263(2) will constitute sufficient proof of a general authorisation if it contains a statement by the Commissioner that the officer is so authorised. There is no requirement that it show on its face the premises to be searched and the books, documents and other papers which are the subject of the search.

¹² (1989) 89 ATC 4268.

Conduct of a search

How far can the Commissioner go?

A useful guideline to what can or cannot be done in the conduct of a search can be found in the decision of *Crowley v Murphy*.¹³ In that case, a Federal policeman had obtained a search warrant pursuant to s 10 of the Crimes Act 1914 to search the premises of a firm of solicitors. They had been given access to certain files and shown the appellant's index of files from which they selected further files. However, the respondent claimed the right to conduct a 'negative' search of the appellant's office, that is, to examine every document in the appellant's office to determine whether or not it was in a class described in the warrant. The warrant authorised entry to the named premises at any time and, if necessary, by force. Franki J said:

Since the nature of the search is not dealt with by the words of the section but arises by implication, I am clearly of the opinion that the only search which could be made pursuant to the warrant in this case is a search which is reasonable in the circumstances. I regard this conclusion as the critical factor in the determination of this appeal.

The search authorised under the warrant, therefore, does not extend beyond that which is reasonably necessary to ascertain what books, records, cheque butts, deposit slips and other documents in relation to the said transaction... were upon the premises.

The respondent claimed the right to examine physically every document in the office to ensure whether or not it was a document within the class described in the warrant. In my opinion, this claim is not justified. It is impossible to lay down the limits of a reasonable search. They must depend upon many factors. The test of what is reasonable in the search for a weapon used in an alleged murder, or for a large quantity of drugs, is very different to that in a search of the office of a firm of solicitors where no member of the firm is suspected of being implicated in the offence for the proof of which evidence has been sought.

In my opinion, the warrant certainly authorised a full examination of the index of files. Nothing in the evidence pointed to the index which was kept being unreliable. If the index pointed to any documents within the terms of the warrant being in any file, the warrant certainly authorised an examination of that file so far as was necessary to ascertain whether any document in it was within the terms of the warrant; once it had been determined by the respondent that the file was not relevant, no further examination of it was justified.

In addition, the respondent at least was entitled to see and examine to the same extent any file or document, the existence of which he had learnt otherwise than from the index, and which he had reason to believe came within the terms of the warrant.¹⁴

Delay

In circumstances such as those outlined above, where the receptionist would have no idea whatever as to what documents the Commissioner's representatives might or might not be entitled to, it would be reasonable to delay the access to enable her to obtain instructions and legal advice

¹³ Above n 10.

¹⁴ Ibid 502.

on the matter. Further, there could not possibly, in those circumstances, be any real fear that the documents would be destroyed as no one in authority was on the premises.

If any person confronted with officers seeking a request for access is uncertain as to what documents the Commissioner is entitled to peruse or as to whether the request for access is validly made, he is entitled to request a delay of a sufficient time for him to obtain legal advice (*Citibank case*). As stated in *Scanlan v Swan*,¹⁵ a temporary denial of access on reasonable grounds is not an obstruction of the officers.

It should be noted, however, that in normal circumstances the request for a delay may not always be reasonable, such as in the case where the officer has previously contacted the taxpayer and advised the taxpayer what documents he wished to see and has made an appointment to conduct the search at a later date. If the time difference is sufficient to allow the taxpayer to obtain any necessary legal advice and the request for access is limited to the documents previously indicated, it is possible that a request for delay is not justified as the taxpayer could have obtained all necessary advice prior to the conduct of the search.

If the circumstances are such that the officers arrive unannounced but there is a person in authority to deal with the situation, before access is given the officer should be asked to give some details as to the purpose of the visit so that the person may satisfy himself that it is for the purposes of the Income Tax Assessment Act 1936. A very general answer such as 'for the purpose of an investigation of the affairs of Dishonest Taxpayer Pty Ltd or XYZ scheme' would, it is submitted, be sufficient.

Can the commissioner 'go fishing'

Powers not limited to a taxpayer's records

The decision in *Southwestern Indemnities Ltd v Bank of New South Wales*¹⁶ decided that s 263 was 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 includes 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 person. In the subsequent decision of *F C of T v ANZ Banking Group Ltd*,¹⁷ Murphy J stated that s 263 'enables the Commissioner to "fish" for information'.¹⁸

In *Sharp v Commissioner of Taxation*¹⁹ it was argued by the appellant that whilst it was not necessary for the Commissioner to specify the name of the taxpayer, the taxpayer must exist and must be identified by

¹⁵ (1982) 82 ATC 4402.

¹⁶ (1973) 73 ATC 4171, 4175.

¹⁷ Above n 2.

¹⁸ Ibid 4058.

¹⁹ (1988) 88 ATC 4559.

the Commissioner as being the subject of the assessment or investigation. It was also argued that the Commissioner was not vested with power to delve into the affairs of citizens in the speculative hope or expectation that he could find a name which he could identify as a taxpayer or possible taxpayer and then embark upon an investigation. The Commissioner argued that it was unnecessary to identify any person and that the words of the section are clear, and disclose that the power conferred was intended to be wide and comprehensive, the only limitation being that it was exercised bona fide and for the purposes of the Act. It was therefore submitted that the Commissioner could have a particular scheme in mind or have a particular purpose connected with the Act in looking at documents but need not have a particular person or persons in mind. The Federal Court did not express a final view on this point, but considered dicta in *South Western Indemnities Limited v The Bank of New South Wales*²⁰ and in *O'Reilly v Commissioners of the State Bank of Victoria*²¹ supported the Commissioner's view that s 263 is not in terms limited to the affairs of any named or identified persons.

Existing dispute unnecessary

It is also unnecessary for there to be a presently existing dispute between the Commissioner and the taxpayer being investigated. In *Clyne v Deputy Commissioner of Taxation*,²² the taxpayer argued that, as there was no present dispute as to the extent of the bankrupt taxpayer's past and present liability, access could not be for the purposes of the Act. The Court held that this did not preclude investigation, as it might be for the purpose of considering whether the documents contained information which would justify re-assessment of the bankrupt taxpayer.

General 'fishing expeditions'

Referring to s 264 in the *ANZ Banking Group Ltd* case, Mason J said:

It is the function of the Commissioner to ascertain the taxpayer's taxable income. To ascertain this he may need to make wide-ranging enquiries, and to make them long before any issues of fact arises between him and the taxpayer. Such an issue will in general, if not always, only arise after the process of assessment has been completed. It is to the process of investigation before assessment that the s 264 is principally, if not exclusively, directed.²³

Although these statements were directed at s 264, they would equally apply to s 263.

This view is also supported by the case of *Kerrison v Commissioner of Taxation*,²⁴ where the Commissioner had already issued asset betterment assessments in respect of the taxpayer. The search was conducted on 15 February, 1985 and asset betterment assessments had issued from 1979 to 1983. Therefore the appellant's submission was that as the asset betterment assessments had been completed prior to the date of search it could not be for purposes of the Act. The evidence was that the officers

²⁰ Above n 16.

²¹ Above n 3.

²² (1985) 85 ATC 4592.

²³ (1979) 79 ATC 4039.

²⁴ (1986) 86 ATC 4105.

had an intention to adjust the statements if the contents of the bank security box showed that a change was required, and the search was therefore held to be for the purposes of the Act.

Whether the search can be used for a general fishing expedition of persons' documents is open to argument. In the *ANZ Banking Group* case (at 4052), Mason J said:

The strong reasons which inhibit the use of curial processes for the purposes of a 'fishing expedition' have no application to the administrative process of assessing a taxpayer to income tax. It is the function of the Commissioner to ascertain the taxpayer's taxable income. To ascertain this, he may need to make wide-ranging enquiries, and to make them long before any issue of fact arises between him and the taxpayer.

These statements were made in the context of s 264. They appear to be equally applicable to s 263. In the same case, Murphy J specifically stated that: 'Section 263 enables the Commissioner to fish for information'.²⁵ Further, if, in the course of carrying out an inspection pursuant to a search conducted for a particular purpose, documents which are relevant to other matters associated with the Act and discovered, these documents are also able to be perused. Where, however, the material has no bearing on any question of taxation it is arguable that it is not for the purposes of the Act.²⁶ This view was also supported by the Full Federal Court in *F C of T v Citibank Limited*,²⁷ where the opinion was expressed that where documents exist, the examination and copying of which would serve no purpose contemplated by the legislation, the Commissioner's officers must take into account that limit on their rights to ensure that so far as is practicable it is complied with.

Conduct during the raid

Obligation to provide assistance

Amendments to s 263, effective since 5 June 1987 impose an obligation upon the occupier of the place entered pursuant to a relevant authorisation to provide reasonable facilities and assistance. The amendment makes it clear that there is a duty to assist, but it is not clear how far that duty extends.

For example, does s 263 allow a tax officer to demand assistance in locating documents? The answer simply is that s 263 gives access. It does not give to an officer the power to ask questions or demand answers, except perhaps questions reasonably incidental to the exercise of that power. It is suggested that s 263 does not go so far as to an obligation imposed on the occupier to assist in locating specific documents.

The decision of the Full High Court in *O'Reilly v Commissioner of the State Bank of Victoria*²⁸ examined the situation where information

²⁵ Above n 23 at 4052.

²⁶ *Deputy Commissioner of Taxation (Queensland) v Citibank Limited* (1988) 88 ATC 4941.

²⁷ (1989) 89 ATC 4268, 4293.

²⁸ (1983) 83 ATC 4156.

as to the whereabouts of a key to unlocked doors was withheld. In that case, taxation investigation officers seeking access to certain documents held by the bank on the bank's premises were told that although access to the bank would be allowed, no assistance would be provided. The bank manager therefore refused to unlock the bank's records room and did not volunteer information as to the whereabouts of the key. The Full High Court held that although s 263 as then enacted did empower the Commissioner to 'take whatever steps are, in all the circumstances, reasonably necessary and appropriate to remove any physical obstruction', provided that such an exercise of power was 'not excessive in all the circumstances of the case', it did not impose an obligation on anyone to take positive steps to assist the Commissioner in gaining access. It was held that, in that case, officers do not have full and free access as required by the section. In view of the positive duty to assist now included in the Act, it would appear that it would be an offence not to provide information as to the whereabouts of a key if requested.

The approach in *O'Reilly's case* was followed in *Kerrison v Federal Commissioner of Taxation*.²⁹ Although Bollen J held that the Commissioner had no power to order a bank or a taxpayer to open locked boxes held in a bank, he did not rule out the opening of those boxes by force.

It was considered that failing or refusing to provide copying facilities or even electricity for the officer's own copying equipment would not have been an offence. The amendment to the section now includes a positive duty to provide reasonable facilities, as well as assistance, and it would appear that reasonable facilities would include use of electricity and even use of photocopying equipment, especially if the officer reimburses the occupier for the use thereof.

'Documents' required to be produced

In the course of audit enquires, a taxation officer may ask for and is entitled to access to a number of different documents, including:

- | | |
|----------------|--|
| Bank Accounts | —of taxpayer, spouse, dependents, including |
| | —loan accounts |
| | —partnership accounts |
| | —trust accounts |
| | —other accounts for which taxpayer has authority to sign |
| | —fixed deposits |
| | —C/W and other bonds |
| | —safe custody boxes/sealed packages |
| Bank's records | —daily transaction sheet |
| | —periodic summary sheet |
| | —progressive summary sheet |
| | —vouchers—original cheques and pay-in vouchers |
| | —personal customer files |

²⁹ (1986) 86 ATC 4105.

	—manager's diary
	—loan applications
	—travellers cheque applications
	—letters of credit
	—overseas remittances
Taxpayer's records	—bank statements
	—pass books
	—cheque butts/deposit slips
	—invoices, bills, receipts, tapes
	—cash book
	—books of accounts
	—worksheets, tallies
	—minutes
	—contracts/agreements
	—note books and diaries
	—tax agents' work papers
	—share certificates and debentures
	—settlements—purchase/sale of property

The term 'documents', however, has a wider meaning than is at first apparent. Pursuant to s 25 of the Acts Interpretation Act 1901, the term 'document' includes:

- (a) Any paper or other material on which there is writing;
- (b) Any paper or other material on which there are marks, figures, symbols or perforations having a meaning for persons qualified to interpret them; and
- (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.

Section 25A of the Acts Interpretation Act 1901 provides that:

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, or make a document containing information available for inspection by, a court, tribunal or person, then unless the court, tribunal or person otherwise directs, the requirement shall be deemed to oblige the person to produce or make available for inspection, as the case may be, a writing that reproduces the information in a form capable of being understood by the court, tribunal or person, and the production of such a writing to the court, tribunal or person constitutes compliance with the requirement.

Consequently, if records are stored on a computer disc or on microfiche, then the duty to provide the officers with all reasonable facilities and assistance for the effective exercise of their powers means that the person holding records will be obliged to provide such assistance as is necessary to produce the information in writing and in a manner capable of being understood.

It should be remembered, however, that although the Commissioner is entitled to inspect and make copies of any books, documents or papers, he is not entitled to take those items from the premises,³⁰ and under no circumstances should he be allowed to remove the originals.

In *Kerrison v FCT* Bollen J also indicated that the Commissioner was entitled to take photographs of any articles contained in a security box, in this case bars of gold. This concession appears to go outside of what the Commissioner is in fact authorised to do under the section. The Commissioner is authorised to 'make extracts from or copies of any such books, documents or papers'. Photographing the contents of a safe deposit box where the items in it are not documents appears to be in excess of this power. In this respect, if the Commissioner was intending to make an assets betterment assessment he would not be entitled to access for the purpose of determining exactly what assets were owned or held on a particular person's premises, and he is not entitled to photograph what appear to be items of value for the purpose of obtaining a valuation, even if he has obtained access for the purpose of inspecting documents.

Legal professional privilege

Statement of the doctrine

A claim for legal professional privilege can be made where there exists a confidential communication between a client and his legal adviser for the sole purpose of either giving or receiving legal advice, or for use in existing or anticipated litigation.

Confidential communications

The communication, which may be oral or in writing, must have been made in circumstances where the intention that they be confidential can be inferred. Privilege will not apply where the solicitor is instructed to pass the information on to a third person.³¹

If the information contained in the communication is produced by mistake to a third party the privilege will be waived if the third party has obtained such a complete knowledge of the communication as to make it futile to attempt to preserve it.³²

The mere presence of third parties when the communication occurred will not always destroy the privilege. The fact of the presence of the third person should be examined in all the circumstances to see whether it indicates that the communication was not intended to be confidential or whether the presence was caused by some circumstance or necessity which did not effect the nature of the communication.³³

30 *FCT v ANZ Banking Group*, above n 2 at 4052 per Mason J.

31 *Conlon v Conlon Pty Ltd* [1952] 2 All ER 462.

32 *Kabwand Pty Ltd v National Australia Bank Ltd* 81 ALR 721.

33 *R v Brahaml Mason* [1976] VR 547.

Client and legal adviser

The communication must be made to the legal adviser in his professional capacity.³⁴ It would not apply to communications with the legal adviser on business or financial matters; the advice must be in the context of the professional solicitor—client relationship.

Communications with counsel, in-house legal advisers and communications through agents engaged by either the solicitors or the client for the purpose of obtaining the advice, are within the ambit of the privilege. It does not apply to communications between clients and their accountants, bankers, medical practitioners and priests, notwithstanding the fact that a duty of confidentiality exists in those circumstances.

Sole purpose

Privilege can be claimed only in respect of documents which came into existence for the sole purpose of obtaining legal advice or assistance. If the document is to be used for any other purposes, such as for internal reporting or management purposes in the case of a corporation, the privilege does not attach.³⁵

However, if the document came into existence for that sole purpose, it is immaterial that the document contains other material. Should the amount of the extraneous material be substantial this may tend to reflect adversely on the purpose of the document and should be severed.³⁶

Giving or receiving legal advice

Every communication between a solicitor and his client in the ordinary business of the solicitor will not be privileged. Communications which merely advise the client that a particular event has occurred or give advice on matters other than of a legal nature are not privileged.

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Existing or anticipated litigation

Litigation is anticipated where there is a reasonable apprehension that it will result. In tax cases it would apply to documents which came into existence after it was clear that the taxpayer intended to challenge the assessment by way of appeal, even though the proceedings have not yet been instituted.³⁷

The types of documents covered include documents prepared for submission to the solicitor but not required by him, documents otherwise

³⁴ *Minter v Priest* [1930] AC 558.

³⁵ *Grant v Downs* (1976) 135 CLR 674, 685.

³⁶ *Waterford v The Commonwealth* (1988) 163 CLR 54.

³⁷ *Alfred Crompton Amusement Machines Ltd v Customs & Excise Commission (No 2)* [1974] AC 405.

prepared for the litigation by not used in it, communications with the solicitor and other persons for the purpose of obtaining evidence for use in the litigation, or to enable the solicitor to advise on the matter, witness statements, briefs to counsel and counsels opinion and correspondence during the course of the litigation.

Who may claim privilege?

The privilege is that of the client and can only be waived by the client or on his instructions. Where the documents are held by a third party there is imposed upon that person an obligation to preserve and maintain the privileged status of the documents.³⁸ If the custodian of the document fails to make a claim for privilege in the case of documents sought pursuant to a tax audit, the privilege attaching to the document will be lost if it was perused or copied by the Commissioner. This may result in an action against the custodian for any loss resulting from the breach of this duty.

When does privilege attach?

Privilege attaches to the particular document and exists until it is waived by the client. In order to constitute a waiver of the privilege, the client must be given an opportunity to make a claim before the privilege is lost. Given that the privilege can be lost as a result of the inspection of the documents by a third party, the claim should be made prior to inspection. The Commissioner's officers in conducting a search or inspection of documents are required to ensure that the occupier has sufficient opportunity to make the claim. He is not entitled to proceed to inspect documents merely because a claim has not been made, if the circumstances are such that the occupier has been denied the capacity to make the claim. In all cases, where it is possible that documents subject to a claim for privilege exist, the occupier should be given an opportunity to segregate these documents for which a claim is to be made, prior to the access being carried out.³⁹

Procedure to make a claim

- 1 The taxation officers should be asked to which documents they require access.
- 2 These documents should be obtained and, if necessary, a delay of the access be sought whilst the documents are examined.
- 3 Those documents for which a claim for legal professional privilege can be made should be segregated and placed in a sealed container, in the presence of the taxation officers, if so required.
- 4 A list of the documents should be prepared, with sufficient description to identify the nature of the documents. A copy of the list should be given to the taxation officers.
- 5 The sealed container should be placed in the custody of either an independent solicitor or other third party or, if the parties are agreeable, in the custody of the solicitor for the party.

³⁸ Above n 12.

³⁹ Ibid.

- 6 The solicitor should examine the documents to ascertain which ones would support a valid claim for privilege.
- 7 If the parties are satisfied with the determination this will resolve the matter. However if one party disagrees then a specified period should be agreed upon during which time on application should be made to the appropriate court to decide the issue.
- 8 If proceedings are not commenced within the prescribed time, then both parties agree to follow the original determination.

Particular documents

Some types of documents to which the Commissioner is likely to seek access attract privilege:

- 1 Primary documents—the privilege does not attach to accounting, financial or banking records, contracts, conveyances, receipts, invoices, offers, company minutes, declarations of trust or other similar documents which constitute or evidence a transaction entered into.⁴⁰
- 2 Trust account ledgers of solicitors are not privileged unless the entries are capable of disclosing the nature of the advice given.⁴¹
- 3 A bill of costs or memorandum of fees is privileged as it tends to indicate the nature of the advice given.⁴²
- 4 Correspondence between solicitor and client, if their aim is the obtaining of appropriate legal advice, is privileged. This will include all communications which respect to the handling of the whole transaction, irrespective of whether the particular document does or does not incorporate advice.⁴³
- 5 Communications and advice from accountants are not covered by the doctrine. The Commissioner has indicated that he will not seek access to accountants' advice files, without the decision being referred to a Senior Taxation Auditor.
- 6 The Commissioner has indicated that he will not seek access to audit working papers except in special cases.
- 7 The question of whether a copy of a document, which itself is not privileged, produced for the sole purpose of use by a legal adviser is privileged is uncertain.
- 8 Legal Advice given by in-house legal advisers to their employers is privileged if:
 - (a) in giving the advice they are acting in their capacity as legal advisers.
 - (b) the lawyer has been admitted to practice and is therefore subject to the duty to observe professional standards and liable to professional discipline.⁴⁴

⁴⁰ *Baker v Campbell* (1983) 153 CLR 52.

⁴¹ *Packer v DFCT* (1984) 84 ATC 4666; *Allen Allen & Hemsley v DFCT* (1988) 88 ATC 4734; (1989) 89 ATC 4296.

⁴² *Ibid.*

⁴³ *Balabel v Air-India* [1988] 2 All ER 246.

⁴⁴ *Attorney-General Northern Territory v Kearney* (1985) 61 ALR 55.

- 9 Solicitors' file notes and diary notes are privileged.
- 10 Drafts or copies of documents created for the purpose of submitting a report to, or seeking the advice of, a solicitor fall within the doctrine.⁴⁵
- 11 Where the purpose of the communication is to facilitate the commission of a crime or fraud, privilege does not prevent the disclosure of the information. It is possible that documents relating to tax avoidance schemes would in some circumstances fall within this exception.

Conclusion

The Commissioner's powers contained in ss 263 and 264 are extremely wide. The only real grounds to deny access to documents are legal professional privilege and irrelevance. In all circumstances, the pragmatic rule is to co-operate as much as possible with the taxation officers to avoid counterproductive confrontation. The Commissioner should be given all of the files and records which he requests, with those documents for which privilege is claimed being removed and identified.

45 *Brambles Holdings v Trade Practices Commission (No 8)* (1981) 58 FLR 452.