SECTIONS 263 AND 264 OF THE INCOME TAX ASSESSMENT ACT AND THE INTERACTION OF LEGAL PROFESSIONAL PRIVILEGE

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As Peter Short said when he introduced me, I was involved, in our Appeals and Review group, in both the Citibank and the Allens litigation. I have also been involved in quite a number of other cases which have dealt with our information gathering powers.

The short synopsis that I provided raises Tax Office comments on what Brendan wrote in his synopsis. To the extent that he did not get through some of his material, I am going to be able to take a bit of a march on him.

Just a couple of comments about the initial matters that Brendan was discussing, particularly in relation to the obvious increase in information gathering that has been seen over the last 10-15 years. There is no doubt that the increase in our audit activities and the increase in use of our information gathering powers has a direct corollary to the increase in taxation activity by taxpayers and their advisers, particularly the increase in activity by taxation advisers. I include banks, lawyers, accountants, and financiers generally in that particular category. I do not think there is any doubt, and the Commissioner has made it pretty clear in his public statements, that that audit activity will be there and will increase. But I think you have to draw a distinction between the use of s.263 and s.264, and their equivalents in other tax Acts that the Commissioner administers, on taxpayers and the use of those powers on their advisers. I would suggest that in the vast majority of cases, we are looking at using the powers on taxpayers themselves. For instance, we go along to a manufacturing company and we want to have a look at their internal accounting records. Experience has generally been that in most cases that is handled very smoothly and there are not too many disputes about what goes on. It generally tends to be, and the cases the last couple of years have shown, that the real disputes are going to be between the ATO and professional taxation advisers in some form or other. Citibank, Allens, and the Freehill Greenwoods case have borne that out.

Turning to some of the matters that Brendan mentioned in his talk. In relation to the authorisation questions, as Brendan set out, the Full Federal Court in Citibank and Allens effectively

rejected Justice Lockhart's requirement that there be specific authorities. After Justice Lockhart's initial decision, particularly those of you who are working in banks would probably be aware, we did introduce, administratively, a practice whereby we drafted specific authorities for access to particular places at particular times. As a result of the Full Federal Court decisions all officers exercising access powers will carry an authorisation in general terms. In other words, what has become known as the "Wallet Authority", for want of a better term.

Although we are not required under s.263(2) to produce that authority until requested, the general practice of the Office is that all officers are instructed to produce to an occupier their written authority when seeking access. Obviously in a situation like Citibank where you are seeking access to about four or five different floors, the degree to which you are required to go or the degree to which we will go to produce that authority differs very much to where we are going to a local H & R Block office where there are just one or two people working there.

In relation to the confidentiality issue and what we have to take into account, we recognise that an officer must consider the effect of proposed access on anyone whose interests are or may be affected. Obviously the extent to which we have to consider the effect will differ in particular circumstances. The circumstances of the Citibank access exercise are very different to where we would be going into a local accountant's office who maybe only has one or two people working for him. We also recognise that we have to have regard to a bank's duty of confidentiality to its clients, but as has been pointed out in a number of court decisions, particularly in the <u>ANZ Bank</u> case in the High Court back in 1979 and in <u>Citibank</u>, a bank's duty of confidentiality is overridden by s.264 and s.263 and it does not stop us seeking access. It is just a matter that we have to take into account. When I say take into account that means we have to consider it, not just brush it aside.

The question then arises about what notice is going to be required to be given as a result of the Full Federal Court decision in <u>Citibank</u>. We certainly would not say that we are required to give any advance notice, because the rationale of the Full Federal Court decision was that people, particularly those in the situation of someone like Citibank, have to have the opportunity to either be able to make an adequate claim for legal professional privilege, or to obtain legal advice as to whether they can make any claim. And the court considered that the best way, practically, that the Tax Office could do that would be to provide an adequate warning as to the nature of the documents we were after. As far as we are concerned that adequate warning could be given when we arrive at a particular premises. We say to the occupier that we are after say the records of this particular taxpayer or even something more general like in Citibank, we are after records generally about an offshore redeemable preference share scheme to take the example in

Citibank. There is no reason why we cannot turn up and say that we are after these documents; if you want to seek advice or if you want to go away and look at it, tell us how long you want and we will arrange for another meeting. And we consider that that would be providing adequate warning consistent with the principle suggested.

Now that is not to suggest that in some circumstances particular auditors may not decide to give advance notice, particularly on one of our large case audits, which can run anything up to two years, to establish a good working relationship. It may well be that the auditor may decide to do that. But we certainly would not suggest that we are required to tell someone that we are coming in, in advance. And in fact the Full Federal Court recognised that there may be some exceptional circumstances where we do not even have to give adequate warning. Obviously those exceptional circumstances would be very few and far between.

The question of reasonable facilities and assistance was discussed, and Brendan raised the problem of whether we are entitled to ask questions, or how far can we go in asking questions, about where documents are kept or where information is. The Office considers that both information gathering powers are totally independent and that we can exercise s.263 or s.264 at any time depending upon the circumstances of any case. And certainly it is our view that "reasonable assistance" in s.263(2) does allow us to request information or advice as to where particular documents are located. Where, for instance, we walk into a bank and are after someone's banking records - I mean the vast majority of auditors would not have the faintest idea where they are kept - we consider it is quite reasonable to be able to ask for information as to where in the premises those documents are kept. They might say that they are up on the fifth floor in the storeroom, or something like that.

If anyone has ever read the Kerrison case, where we sought access to a safe deposit box which was locked, the question of removal of an obstruction to locked storage facilities was raised. Whether it be a safe deposit box in a bank, or whether it be a vault, or a wall safe, reasonable assistance means the removal of that obstruction. We also think that reasonable assistance could extend to an explanation of say indexing or code systems. Most large financial organisations or advising organisations (and we have it ourselves) have indexing and coding systems and we are sometimes not going to be in a position to understand what any of those systems mean, and a basic explanation of what those systems are, we think, is reasonable.

As far as "reasonable facilities", we recognise that when we exercise powers under s.263 we are in people's premises and we certainly do not expect that we are always going to be provided with the best facilities. But certainly, when we are looking at particular documents, a provision of adequate lighting, adequate heating or air conditioning equivalent to that provided to the

occupier's employees would be reasonable. I do not think it would be particularly reasonable to stick us in the cold storage room or something like that, to have a look at a set of documents. As to the provision of photocopying facilities, I think it would be our general practice that in the vast majority of cases where we want to copy large quantities of documents we certainly are prepared to pay for the use of photocopying facilities. But sometimes that is not always possible and it really will depend on the circumstances of any particular case.

Legal professional privilege - there is no doubt that there are a lot of matters that are still going to have to be determined about legal professional privilege and how that applies and how we give effect to legal professional privilege. The concept of waiver, I agree with Brendan, is going to be a very difficult one, particularly where we are looking at a bank where clients have provided copies of privileged material to the bank. As Brendan said, the courts may imply an intention that there is no waiver at large because documents have been provided to a bank and the bank has a duty of confidentiality to a client. I do not think that there is any doubt that that issue is going to come up.

As far as what we are going to be doing in relation to giving effect to legal professional privilege, I know personally of a number of cases at the moment where we are entering into administrative arrangements with people to give effect to the privilege. Very much, arrangements will be along the lines of:

1. we will go in and we will say we are after these particular documents;

2. the occupier will say I have to seek advice about this;

3. we will say that you can have sufficient time, depending on the circumstances, then come back to us and provide us with a list of documents that you are going to claim privilege in relation to;

4. we would like access to those that you are not going to claim privilege to;

5. those that you do claim privilege on, we would like a list of documents setting out the parties to the documents, a description of the document and the basis of what your claim for privilege is.

Then we will consider our position and decide about whether we are satisfied with that list - if we are, then we will not seek access further to the documents - if we are not or if we think that it is worth testing, we may well take the matter on to the courts and seek a declaration as to whether we are entitled to the documents or not.

The question about fishing is a rather thorny question, because when people talk about fishing they do not often talk about fishing in the same sense. We accept that when we go into any premises we have to have a specific purpose in mind in seeking access to documents. However, that purpose may be general, and an officer may not actually know whether particular documents do or do not exist at the premises. He may only have a vague belief that they do. And if fishing is considered in the sense of we do not know whether documents do or do not exist at particular premises, well then yes, we do consider that we can fish. If fishing is used in the sense of we are just going in and we do not have any purpose in mind whatsoever but we just want to generally look through someone's records, we recognise that that is not a proper exercise of power under s.263.

Earlier on this week I was talking to a solicitor in Sydney about what matters would actually be "for the purposes of the Act". We consider that "for the purposes of the Act" is something to be determined by the particular auditor when he is accessing. It is not something that can be objectively or subjectively determined by the occupier, and it is not limited to the assessment of particular named taxpayers. In other words, "for the purposes of the Act" relates to any matter that arises out of the Income Tax Assessment Act. For example, when we seek information from accountants about their tax agent lodgment programme, there is no particular taxpayer in mind when we do that. We are just seeking details about how he runs his programme. Now that matter is within the purposes of the Act and it is something that we consider we are entitled to seek access to.

Another example that came up recently - another person who was giving a talk was saying "would you be interested in personal letters between husbands and wives?" and the response was given "well, if it showed where particular husbands or wives had been at a particular time and that was relevant in some way to a taxation issue, well then yes it might be relevant for the purposes of the Act." I think the important point is that it just depends on the circumstances of the case.

Brendan was not able to get to the question about what force, or what measures of force, we are entitled to take under s.263. Certainly from the O'Reilly case, we would say it is implied within s.263 that we are entitled to use reasonable force that is not excessive in the circumstances. But we are only talking about force against, for instance, locked boxes. Certainly all auditors are instructed that, wherever persons physically refuse access to a place or to a document, they are not entitled to use force against that particular person and that all we do is notify that person that they may be obstructing our access and liable to prosecution. But we certainly will not use force against any particular person nor in the vast majority of circumstances will we seek to break into unoccupied premises where we have not taken all possible steps to determine whether we can get in there without having to use force.

Another matter that I think Brendan may have been able to talk about was the question of whether we are entitled to access to information stored on a computer. Our general view is that we are. Section 25 of the Acts Interpretation Act defines documents to be something that we consider would encompass computer information. We do not consider that we are entitled to a hard copy, but that where a particular computer system is dependent on passwords or codes, that we are entitled to request those passwords to be, not necessarily given to us, but that an operator operate the computer to enable us to seek access to the information within the computer.

The question of guidelines is the final matter that I would like to cover. We are in the process at the moment of compiling guidelines to handle not only the issues that were raised in _Citibank_ and _Allens_ but about access and information gathering powers in general. If you have read the _Citibank_ case you will be aware (about the second last page I think of the Chief Justice and Justice Fisher's judgment) they were talking about guidelines that were agreed between the Law Council and the Australian Federal Police on the use of search warrants. We have had initial discussions with the Law Council along similar lines. And certainly the guidelines that we are going to do are intended to cover all of the matters that have been discussed here today in relation to s.263, s.264, and any of the other powers in the other Acts. (There are information gathering powers in relation to sales tax and fringe benefits tax). Thank you.

PAUL BRAY'S RESPONSE TO ISSUES RAISED BY BRENDAN SULLIVAN

Section 263

1. Citibank Ltd held that an officer is not required to hold a written authorisation before he can exercise powers of access under s.263 nor that any written authorisation under s.263(2) be specific as required by Lockhart J.

   In practice, all officers exercising access powers will carry a written authorisation in general terms and are instructed to produce such to an occupier when seeking access, even though the authorisation is only required when requested.

2. The ATO recognises that an officer must consider the effect of a proposed access exercise on those whose interests are, or may be, affected. A bank's duty of confidentiality to its clients is a matter to be considered, though not necessarily a matter which will prevent access.

3. The ATO recognises that such action is improper.

4. No advance notice is required of any access exercise. However, the ATO recognises that except in exceptional cases adequate warning must be given to a person as to the nature of documents to which access is sought, to give the person an opportunity to make claims for legal professional privilege or to seek legal advice as to whether any claims can be made. The extent of any such warning depends on the circumstances of each case.

5. The ATO recognises that a person is entitled to request a reasonable delay of an access exercise to obtain legal advice as to his rights and obligations under s.263.

6. The words "all reasonable facilities and assistance" imply that an occupier is required to provide assistance in the form of advice as to where particular documents are located, as well as reasonable facilities for the effective exercise of the right of access. Examples to be provided.

7. Legal Professional Privilege.

8. "The purposes of the Act" relate to any of the matters arising out of the ITAA. Those matters are not limited to the taxation affairs of a particular taxpayer. They extend to matters at a more general level, such as identifying persons engaged in a particular activity.

9.
10. An officer must have a specific purpose in mind when seeking access to documents. However, that purpose may have a general scope and the officer may not know whether the documents actually exist at the particular premises. The Citibank decision recognises that it is permissible for documents outside of the ambit of the specific purpose of the access to be inspected and copied.

11. Section 263 does enable an officer to search for documents relating to a specific purpose.

    Officers are encouraged to seek co-operation and assistance from occupiers. However, the right of full and free access implies a power for an authorised officer to take whatever steps are, in all circumstances, appropriate to remove any physical obstruction to that access, provided that those steps are not excessive. Officers are instructed never to use force of any kind against another person.

12. The ATO would maintain that an officer is entitled to seek access to information stored on a computer (see the definition of "document" in s.25 of the Acts Interpretation Act).

13. The general procedure of the ATO is for an officer to advise an occupier which documents he has copied.

14. The ATO is currently in the process of formulating extensive guidelines on the Commissioner's information gathering powers.

Section 264

The ATO recognises points 2 b) - e). In relation to point f), the ATO would maintain that a notice can be issued under s.264(1)(b) requesting the production of certain documents without the ATO knowing whether those documents are actually under the custody and control of the person to whom the notice is addressed.

General issues

3. The ATO would maintain that ss.263 and 264 are fully independent powers, and that there is no requirement in the Commissioner to use s.264 before s.263, or vice versa.