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Senate Standing C'ttee
for the Scrutiny of Bills

30 August 2004

Mr Richard Pye
Secretary
Senate Standing Committee for the Scrutiny of Bills
Suite SG-49
Parliament House
CANBERRA ACT 2600

Dear Mr Pye

In your letter of 8 April 2004, you advised that the Senate Standing Committee for the Scrutiny of Bills is to inquire and report on the Government's response to its previous report on entry and search provisions.

One of the recommendations of the previous report was that the Ombudsman's office should undertake a regular, random "sample audit" of the exercise by the Australian Taxation Office of its entry and search powers.

In accordance with the recommendation, the Commonwealth Ombudsman (who is also the Taxation Ombudsman) conducted an own motion investigation during the year ended 30 June 2004. Enclosed is a copy of the Ombudsman's findings.

I should be grateful if you would let me know whether, and if so when, the Standing Committee decides that the Ombudsman's findings may be made public. My email address is <philip.moss@ombudsman.gov.au>.

Yours sincerely

Philip Moss
Special Tax Adviser



Use of access powers by the Australian Taxation Office

**Findings of an own motion investigation conducted
by the Commonwealth Ombudsman
Prof. John McMillan
under the *Ombudsman Act 1976***

PART 1: INVESTIGATION

Background

The Senate Standing Committee for the Scrutiny of Bills delivered a report on Entry and Search Provisions in Commonwealth Legislation on 6 April 2000¹. In the report the Committee expressed some concern about the powers of the Australian Taxation Office (ATO):

...the ATO's powers are anomalous...Notwithstanding the procedural limitations which the ATO has imposed on itself, it is a matter of concern that there is no independent oversight of the use of a power which is expressed in such broad terms. There is no way in which the Parliament, or the public, can determine whether the ATO's access system is operating fairly...

The Committee recommended that the Commonwealth Ombudsman undertake a regular, random 'sample audit' of the exercise by the ATO of its entry and search powers² to ensure that those powers have been exercised appropriately.³

Following consideration, the Ombudsman decided to conduct an 'own motion' investigation of the ATO's use of its access powers, in keeping with the Committee's recommendation.

Scope

As a preliminary to the investigation it was decided to review the ATO's manuals and training materials relevant to its access powers.

For the year ended 30 June 2004, the initial year of the own motion investigation, it was decided to focus on cases undertaken by the areas of the ATO that deal with significant non compliance and aggressive tax planning. It was thought that these kinds of cases would be most likely to yield some that would be troublesome or contentious.

Details were sought of all cases from these areas where the ATO sought access without notice during the period July 2002 to December 2003. These were cases where ATO officers had arrived at the premises of taxpayers without prior notice and required access to premises and documents. There were 24 cases within the specified period. Rather than disrupt cases where audits were still underway, it was decided to examine five cases where audit work had been completed.

Additionally, there was one similar case during the year where a complaint had been made directly to the Ombudsman.

¹ Senate Standing Committee for the Scrutiny of Bills, Fourth report of 2000, "Entry and Search Provisions in Commonwealth Legislation" 6 April 2000.

² Section 263 of the Income Tax Assessment Act 1936 affords a typical example of those access powers. It is reproduced at appendix "A" hereunder.

³ *Ibid.*, at 108.

Methodology

In all five cases a review was carried out of the main documents that were produced in the course of the audit. Typically these included the submission setting out the reasons for seeking access, scope of proposed access visit, the approval and written authorization, preliminary enquiries, team briefing materials, records and notes of how the access visit unfolded, explanations given to taxpayers concerning their rights, the record of dealing with documents that might be subject to legal professional privilege, debriefing materials, and the summary of issues and outcomes.

In two of the cases the review was extended to cover all the audit working papers.

The occupiers of the various premises, which were the subject of access visits, were not interviewed.

One further case where a complaint was made to the Ombudsman was separately examined on its merits.

PART 2: ASSESSMENT OF ATO PERFORMANCE

Manuals and training materials

The ATO's access manual provides comprehensive guidance to officers, covering both law and likely practical issues. Training materials reviewed during the course of this investigation are considered to be entirely adequate and professional.

The examination of access cases did not reveal any problems that could be attributed to deficiencies in the guidelines and training materials.

Access cases examined

In the cases examined submissions to approve use of access powers were approved at a very senior level within the ATO. It was evident that approval was not routinely given, but involved a proper and careful exercise of discretion. It is considered that the use of access powers was justified in each of the cases having regard to identified risks to the revenue involving promotion of tax avoidance schemes, tax evasion or derivation of income from illegal activities.

The files evidence careful planning of access visits, including preparation of scripts for explaining key matters to occupants of premises, definition of the roles of participants and communication aspects. Debriefing sessions were usually held after the visits.

ATO officers alerted taxpayers to the need to consider whether legal professional privilege should be claimed, and appropriate procedures were adopted to secure the documents in the interim. Where necessary reasonable time was allowed for the taxpayers to obtain legal advice. Explanations were given concerning the rights of taxpayers (including the right to complain), and relevant Taxpayer Charter booklets were handed out. The access visits took place at a reasonable hour of the day.

There is no evidence that the officers were other than courteous and professional in their approach. Usually a reasonably co-operative professional relationship was quickly established with the taxpayers. In one case, a protest was made to the ATO about an access visit. The ATO carefully considered the issues raised and provided a written response; the complainant did not take the matter further.

The complaint to the Ombudsman's office

A complaint was made directly to the Ombudsman concerning an access visit in a case very similar to those discussed above. The matter was examined. The investigation officer concluded that the ATO had reasonable grounds to seek access and that the general conduct of the visit was professional and consistent with ATO guidelines. However, it was concluded that the ATO could have been clearer in explaining the scope of its investigation. It was also suggested that the ATO should give more attention to explaining avenues of complaint, and that it should consider the use of video cameras to provide a contemporaneous and relatively objective record of the visit.

The Ombudsman receives very few complaints about the ATO's use of access powers.

Conclusion

The initial audit of the ATO's use of access powers conducted during the year ended 30 June 2004 examined a sample of high profile cases from the serious non-compliance and aggressive tax planning areas of ATO operations. The audit did not bring to notice any significant difficulty with the ATO approach to use of these powers.

Future conduct of this own motion investigation

During the year ended 30 June 2005 it is proposed to audit the use of access powers in a different sphere of ATO operations. Attention will also be directed to any complaints made to the internal ATO complaint service.