
 #IPANationalCongress


When the Taxman comes knocking;
effective answering

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Tax Controversy Stages

- **Pre-audit**
- **Post-audit Notification**
- **Receiving the Position Paper**
- **Assessment and Debt Management**
- **Appealing to AAT or Court**
- **Criminal Prosecution Risk**
- **Garnishee and Debt Collection**
- **Legal Professional Privilege**



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All powerful ATO can...

- Demand information from anyone about any tax thing or about the tax of another (section 264, ITAA 36)
- Issue default assessments based only on a reasonable belief (section 167, ITAA 36)
- Declare something to be something else if it finds a tax scheme and identifies a tax purpose (Part IVA, ITAA 36)



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All powerful ATO can...

- Recover a debt and secure a bankruptcy based on it assessing a tax to be due (PS LA 2011/14)
- Raise taxes without time limit if it believes there is fraud or evasion (Section 170 ITAA'36)
- Require a third party to pay money held for another to it (Section 260-5 of Schedule 1 to the TAA'53)
- Refuse a Taxpayer the right to depart Australia (Part IVA TAA'53)



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The Taxpayer's rights are limited...

- They are 'tax-guilty' until proven otherwise
- Proving the ATO is wrong is not enough, they must prove the counter-factual to displace the ATO belief
- Must tell the truth under a compulsion order
- There is no privilege based on potential self-incrimination
- Ignorance or lack of knowledge is no defence



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The Taxpayer's rights are limited...

- Must comply with the ATO debt recovery terms even if objecting or appealing the basis of a tax that is claimed to be due
- Can rely on a 2 or 4 year time limit for tax review (other than if fraud or evasion)
- Has the Taxpayer's Charter to fall back on, but highly variable application and respect for it within the ATO



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When the Taxman comes knocking

- Is too late to start a decent defence strategy?
- Structure, creation and structure management are all important
- But some case management will help **too**



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Comes knocking – at all times

- Keep the ATO away from the client
- Tell the client to admit and say nothing, no matter how innocent it appears
- Claim the Taxpayer's Charter right of representation
- Restrict all staff (yours and the client's) communication with the ATO



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Comes knocking – pre-audit

- No compulsion to answer an ATO question
- But foolish not to unless exceptionally unreasonable
- Always narrow the question, if in doubt ring the ATO and put the narrower interpretation to them and suggest you will answer that question
- Minimum answers, answer only the (narrow) question and nothing else. **Less is best**
- **Act early, act promptly but be slow and considered**



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Comes knocking – pre-audit

- Do not volunteer any information, view, opinion or belief
- Never give immediate answers, e.g. “Thank you, I’ll write that down (narrowly) and I’ll get back to you”
- Be attentative and timely in all responses
- Split responses into two, three or four, using each as our minimum reply – show the ATO you always have an answer
- **Concessions on tax penalties obtainable**



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Comes knocking – post-audit

Challenge the notice of audit – deny the ATO penalty tactic

They will be friendly, disarmingly friendly

Paperwork, paperwork, paperwork, they have an audit checklist they want to check-off

Do not create backdated documents; reducing today to writing what occurred before is ok

Never volunteer information



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Comes knocking – position paper

- Be realistic, can you really tell them something new and different that will change their mind?
- Even if the facts are different and the expressed tax law seems illogical, it is their position they believe in
- Still in the assessment process, the assessment decision is yet to be made



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Comes knocking – position paper

- Don't respond if you will be telling them of their weaknesses, you may be enabling them to strengthen the basis of their assessment
- If it will make no progress, politely deny making a response or put it in the barest of terms
- Treat the new ATO ADR (Assisted Dispute Resolution) offer in the same manner
- **Keep response "up the sleeve" until objection stage.**



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Comes knocking – assessment & objection

- Note the times to respond
- Use the ATO forms for objections
- Use the broadest and most fulsome of language but also respond to the specific issues
- **Objection reviewed by different ATO case officer, advance full and complete information**
- Time the objection with the debt case management



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Comes knocking – assessment & objection

- If the ATO appear to be fishing or are delaying the objection review, maybe force them on and gain a default rejection (section 14ZY TAA)



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Comes knocking – AAT or Court appeal

- Know and log the date for appeal lodgement
- To the AAT for re-trial on factual matters
- To the Federal Court on narrow legal issues and want to claim court costs
- Get the 'T-docs' to reveal the true ATO thinking and steps to an assessment decision
- Can help delay a debt recovery, provided something is being paid ongoing



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Comes knocking – AAT or Court appeal

- **Evidence and document gathering: the earlier the better.**
 - Assess strengths and weakness of client's case.
 - Facilitates recourse to ADR, formal or informal.
 - Impresses Court to resolve tax dispute in shortest possible time.
- **If appropriate, encourage ADR with ATO.**



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Comes knocking – criminal risk

- Tax fraud is a crime
- Helping to create paper that is not true is fraud
- Look for recommendations to refer the taxpayer in the 'T-docs'
- Admit accounting and journal mistakes, deny intentional acts
- The stronger the documented audit struggle, objection defence or appeal challenge the lower the risk of Commonwealth Director of Public Prosecution ("CDPP") acceptance.
- **The "accountant's concession" doesn't apply to CDPP activity. Advice subject to LPP critical.**
- **The Report of Audit may recommend CDPP referral, possible to FOI referrer.**



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Comes knocking – debt management

- Press the potential for the objection or appeal to succeed
- Keep informed but do not volunteer, especially the detail of where the money will come from
- Do not threaten bankruptcy, it will not work
- Compare various payment plans, show the ATO is better off
- Make and keep payment promises, keep these as low as possible so these are achievable



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Comes knocking – debt management

- **Tax debts can be negotiable!**
- Urge strong prospects of payment under your offered payment terms
- The ATO will have assessed the Taxpayer's own ability to pay, find out what they believe
- In exceptional cases consider a debt relief or hardship review



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Comes knocking – debt management

- Effective asset protection is essential
 - note that super is not safe prior to bankruptcy
 - is there trust 'leakage' through loans or alter ego control principles
- If bankruptcy is inevitable, bring it on



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Comes knocking – using LPP

- Use legal professional privilege to keep secret that which needs to be secured
- LPP belongs to people, not lawyers
- It dates from 1577 case of *Berd v Lovelace*
- Protects a person's access to justice system by enabling disclosure to legal advisers without risk of those communications being obtained by another



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Comes knocking – using LPP

(Buddy up and) help your client to instruct a lawyer to instruct you to collate or produce information for the lawyer to provide legal advice upon. Then mark your file and all correspondence;

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THANK YOU