



The Relevance of Taxpayers' Constitutional Rights in the Light of Revenues' Powers of Search and Seizure

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Introduction

- The Commissioner of Inland Revenue's powers of search and seizure of evidence, found in Sections 16 and 17 of the Tax Administration Act 1994 .

Introduction

- The operational scope of sections 16 and 17 under the TAA, with respect to width of the Commissioner’s power to request information and documents from all taxpayers for the purposes of collecting tax, is constrained by the Constitutional regime, section 21 of the Bill of Rights Act 1990 that prohibits “unreasonable searches”.

Section 21 of the BORA

- Section 21 of the BORA, the section most germane to this paper, provides:
“Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.”

Section 16 TAA 94

- Section 16 of the TAA provides a right of access to premises to the Commissioner and “any officer of the Department authorised by the Commissioner in that behalf.”

Section 16 TAA 94

- The words “full and free access” access to, inter alia, “books and documents” that the Commissioner considers “necessary or relevant” for collecting tax are preceded by the words “shall at all times”.
- These words indicate the potential for an unconstrained search (so long as the search is being conducted in good faith for the purposes of meeting the Commissioner’s duties).

Section 16 TAA 94

- “Necessary and relevant” does not mean “reasonable” and may condone overzealous behaviour on the part of the revenue. The revenue will however still have to meet the care and management duties of section 6A of the TAA.

Section 16 TAA 94

- It is unclear whether forcible entry is permitted without clear authority or is implied in the phrase “full and free access” under section 16(1) of the TAA.
- The factual circumstances surrounding each search would probably be determinative of whether entry is forcible or unreasonable timing.

BORA Section 21

Does section 21 of the BORA constrain the concept of “shall at all times” and “full and free access” and, if so, to what extent?

It is arguable that the words “shall at all times” and “full and free” would be read down in all but the most extreme cases.

Privacy is a core value being protected by section 21 of the BORA.

Exceptions to warrantless search

Under Section 16(4) for search of a dwelling house a warrant is required to permit access and under s 16C(2) a warrant is required for removal and retention of documents.

A judicial officer need only be satisfied under section 16(4) of the TAA that the Commissioner requires physical access to perform his function under the section.

- The Court of Appeal in *Tauber* held that s 16 (4) of TAA was to be read subject to overall test of reasonableness and could not be said to be inconsistent with s 21 right to be secure against unreasonable search and seizure. *Tauber v CIR* (2012) CA 564/11.

Tauber v CIR

- The Court of Appeal judgment in *Tauber* gives useful guidance on the standards to be applied in determining whether a warrant should issue, and the circumstances which are likely to be relevant in assessing whether that standard is met.

Section 16 TAA 94

The Search and Surveillance Act 2012 provides a set of safeguards against unjustified intrusions on “reasonable expectation of privacy” and will apply from sometime in 2013 to the exercise of the Commissioner’s powers under s 16(4) and s 16C(2) of the TAA.

Use of IR's search powers

Year	General s16 access	Warrant for access to private dwelling: s 16(4)	Section 16C removal warrant
2007	7	5	
2008	11	13	
2009	8	8	
2010	14	13	12
2011	41	16	8
2012	40		

Source : Graham Tubb , “Commissioner of Inland Revenue’s power of Search and Seizure: sections 16, 16B and 16C Tax Administration Act”, (Paper presented at the New Zealand Law Society, Taxation Conference, Auckland, 1 September 2011).

Audit and Investigation

- New Zealand courts draw no distinction between the audit function of the Inland Revenue and its investigating role”.
- The merged functions of audit and investigation in New Zealand reflect the lower status attached to individual rights and freedoms.
- Certain aspects of privacy ignored in the name of regulatory efficiency.

Section 17 TAA 94

Under s 17 of the TAA any person may be required to furnish information or produce books and documents requested by the Commissioner for the enforcement or administration of the Income Tax Act or for any other purpose lawfully conferred on the Commissioner.

Section 17 TAA 94

A New Zealand taxpayer can do little to resist the Commissioner seizing documents by claiming the documents are non-business related or that information or property was obtained by the police during an unreasonable and unlawful search under section 21 of the BORA. *Wojcik v Police* (1996) 17 NZTC 12,646 (DC).

Section 17 TAA 94

In *Avowal Venning J* found that in respect of the encrypted hard drives, cloning the hard drives prior to a relevance search being conducted did not render the access unlawful and such a process was reasonable.

The IRD officers had evidence that computer data would be relevant or necessary, use of key word searches of hard drives as a preliminary screening tool was not required. *Avowal Administrative Attorneys v District Court at North Shore* [2010] NZCA 183 per O' Regan J.

Section 17 TAA 94

- Less protective approach.
- Cases show that the documents authorised to be seized were not necessarily those that were strictly relevant to the offence under investigation.
- A broad broom and shovel was given to the New Zealand IRD to sweep and collect information. *New Zealand Stock Exchange* case.

Section 17 TAA 94

- Commissioner of Inland Revenue or his duly authorised agent must consider those books and documents to be “necessary and relevant” for the stated legislative purpose.
- The procedural process in NZ lacks transparency and individual rights and freedoms are not brought more sharply into focus.

Section 17 TAA 94

- The New Zealand approach is an example of the power retained by the State with regard to its citizens.
- A judicial assessment of “reasonable” under BORA in the context of a search or seizure, has to date been of little practical value to taxpayers as even an unlawful search may still be reasonable.

Remedies

- The exclusion of evidence obtained in breach of the s 21 of BORA is reflected in section 30 of the New Zealand Evidence Act 2006 and is determined on the basis of a “balancing approach.
- The justification for allowing evidence to be admitted despite a breach of section 21 is “that the overriding interests of justice require it.”

Remedies

- Courts have taken an inconsistent approach in balancing the impropriety of admitting the evidence with the public interest in admitting the evidence.
- Exclusion of evidence, while not automatic, is nevertheless a common result of abuse of process in taxation matters.

Conclusion

- The absence of constitutional rights in New Zealand increases the potential for the abuse of process in NZ .
- There should at least be a legal framework in the TAA which provides minimum protections for the taxpayers caught up in this process.
- An entrenched Bill of Rights will ensure that individual rights are being recognized as a part of supreme law.

Conclusion

- The development of a constitution protecting fundamental human rights and ensuring maximum legal protection of rights through judicial means would be a first positive step in providing a truly transparent and independent process of revenue assessment.