



THE TAX INSTITUTE

THE MARK OF EXPERTISE

3 November 2014

Mr Mark Tomlinson
Assistant Commissioner (Senior Tax Counsel)
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By email: mark.tomlinson@ato.gov.au
CC: consultationsteeringgroup@ato.gov.au

Dear Mark,

Review of ATO Public Advice and Guidance Products and Processes

The Tax Institute welcomes the opportunity to make a submission to the Australian Taxation Office (**ATO**) in relation to the *Review of ATO Public Advice and Guidance Products and Processes (Review)*.

Summary

Our submission below addresses a variety of issues in relation to the Review. Among other things, we have provided the following for the ATO's consideration:

- information stemming from members' experiences with the production of some rulings and guidance recently issued by the ATO;
- a suggested restructure to the structure of rulings; and
- a suggested change to the rulings withdrawal process.

We have also provided responses to some of the specific questions in the Questionnaire. We provide this information to assist the ATO with this Review.

Overview

The Tax Institute commends the ATO for taking on this necessary task of reviewing the public rulings and guidance it issues. Given the complexity of the Australian tax system and the self-assessment environment for taxpayers, the guiding role the ATO plays in the tax system is incredibly important and one on which taxpayers heavily depend.

Taxpayers and their advisers want the ATO to issue guidance to assist them to navigate our complex tax system. They recognise that whether the ATO issues guidance, and the form of that guidance, are ultimately at the discretion of the Commissioner, but it is vital that such guidance as the Commissioner provides is both clear and useful.

Issues for Consideration

Recent experience with Draft Tax Rulings and Tax Determinations

Members' recent experience indicates that the production process of certain draft tax rulings and determinations may well have benefitted from issuing a discussion paper at first instance for either confidential or public consultation with members of the tax profession and industry prior to the Commissioner formalising his views.

Early discussions (based on a discussion paper or in-person consultation) can help inform the Commissioner of the practical issues faced by taxpayers and their advisers in applying certain tax laws and can also serve to better inform the Commissioner of the broader context in which taxpayers operate. The product of this early consultation would be a better developed draft ruling or determination released into the public domain.

Some examples include:

- TR 2014/D2 *Income Tax: the application of the foreign income tax offset limit under section 770-75 of the Income Tax Assessment Act 1997 to foreign currency hedging transactions* and TD 2014/D8 *Income Tax: can the exemption in section 820-39 of the Income Tax Assessment Act 1997 apply to the special purpose finance entity established as part of the 'securitised licence structure' used in some social infrastructure Public Private Partnerships?*¹ - it became evident during the public consultation process that the ATO would have benefitted from gaining industry insight prior to issuing the drafts.
- TD 2014/D7² *Income Tax: are the capital support payments described in this Draft Determination deductible under section 8-1, section 40-880, subsection 230-15(2) or subsection 230-15(3) of the Income Tax Assessment Act 1997?* (originally issued as TD 2013/D3) - again the ATO would have benefitted from earlier confidential consultation, given that the ATO had to issue two public drafts prior to finalising the determination.

¹ External members of the former NTLG International Sub-Committee had advised the ATO not to issue this draft ruling publicly – see Action Item 8 Reference 4/16042012 https://www.ato.gov.au/Tax-professionals/Consultation--Tax-practitioners/In-detail/Other-forums/International-Tax/Internationals-Sub-group-minutes,-March-2013/?page=12#Attachment_1

² Finalised as TD 2014/14

- The publication of GSTR 2013/D2 *Goods and Services Tax: supplies made by an operator of a 'moveable home estate'* which caused much consternation in the relevant industry, which then caused the ATO to withdraw the draft ruling.
- TR 2012/D1 *Income Tax: meaning of 'income of the trust estate' in Division 6 of Part III of the Income Tax Assessment Act 1936 and related provisions* – this draft ruling remains outstanding since it was first made public in early 2012. It is currently on the work program for the Trust Consultation Limited Life Working Group 1 where the ruling will be revised. When first made available for public consultation, it was heavily critiqued.
- TR 2010/3 *Income Tax: Division 7A loans: Trust entitlements* – at the time this ruling was issued in draft as TR 2009/D8, it caused much controversy. There were concerns the views included in the draft ruling were not correct, new terminology was introduced into the ruling that was not contained in the legislation and it was not regarded as well-drafted. A multitude of issues arose with the draft ruling, which is reflected by the lengthy list of issues captured in the compendium (TR 2010/3EC).

These examples demonstrate that, had the ATO consulted earlier in the development of these rulings, many of the issues that arose during the public consultation phase could have been resolved earlier and a better quality draft would have been produced.

Since revising its consultation framework, the ATO no longer has committees available to it in order to specifically focus on some specialist areas of tax law, such as fringe benefits tax. These committees were a very useful place for the ATO to 'road-test' draft guidance (if necessary on a confidential basis) prior to public release. The absence of these committees in some specialist areas presents a deficiency in the guidance formulation process.

However, the ATO has developed a stakeholder register that should contain a range of specialist tax experts. The ATO should regularly engage these experts when considering issuing a ruling that may potentially be contentious. This may to some extent address the deficiency identified above.

The ATO should also approach the professional associations, such as The Tax Institute, in instances where expert input is required in formulating its guidance, as the associations have specialist committees and expert members that are willing to assist the ATO in this way.

Timeliness

Another concern is the timeframe within which guidance is issued in draft and then finalised.

As an example, TR 2004/D25 *Income tax: capital gains tax: meaning of the words 'absolutely entitled to a CGT asset as against the trustee of a trust' as used in Parts 3-1 and 3-3 of the Income Tax Assessment Act* was issued in late 2004 and still remains in draft form some 10 years later. The reason provided for this is that the ATO is consulting with Treasury in relation to the issue of absolute entitlement and associated issues³. In the note included in the draft, the ATO indicates that it will not be finalising the ruling while consultation is continuing even though the draft contains the ATO's preliminary view of the law.

We question whether it is appropriate for a ruling to remain in draft for so long, leaving taxpayers in the position of knowing the ATO's preliminary views on this matter, but not having the associated protection of a binding ruling.

Limitations on Guidance

The Tax Institute recognises that there are cases where it is not always appropriate for the ATO to provide guidance on particular areas of the law, for example in relation to anti-avoidance provisions where facts specific to the transaction will always impact the application of such provisions. As such, it would be useful if the ATO could make clear to stakeholders where the limitations lie so that stakeholders can gain a better understanding of the areas where it simply may not be appropriate for the ATO to provide guidance.

This in turn would assist stakeholders to better identify areas of the law they should ask for guidance on and refrain from doing so in areas where it is near impossible for the ATO to provide a clear answer⁴.

Structure of Rulings

We raise for your consideration the need for a re-balancing of the information provided in the binding and non-binding parts of a ruling.

Taxpayers find it useful for the "Ruling" section of a ruling to be separate from the "Explanation" section. This is an appropriate layout for a ruling. However, the "Ruling" section is the only binding part of the ruling on the Commissioner and the "Explanation" section is not.

Often, some explanation is already included in the "Ruling" section which is then further extended in the "Explanation" section. This can potentially give rise to repetition and the potential for inconsistency between these two parts of the ruling. It can also

³ Refer to the note included in TR 2004/D25.

⁴ As an example, we note the difficulty experienced by both the ATO and external stakeholders in the production of the Section 100A factsheet recently issued by the ATO.

unnecessarily lengthen a ruling if the same points are repeated twice. We refer you to an extract below from the Joint Bodies' submission in relation to TR 2014/D1 *Income tax: employee remuneration trust arrangements* which highlights this confusion:

The Draft Ruling states that where any capital structure advantage gained by a company to be "very small or trifling" compared to the advantage expected to be secured by directly remunerating employees within a "relatively short period of time", apportionment is not required in determining the portion of the contribution that is deductible (i.e., the whole contribution should be deductible) at paragraph 20-21 [in the Ruling section] and discussed further at paragraphs 198-203 [in the Explanation section].

However, Paragraph 202 appears to indicate that a capital structure advantage will only be very small or trifling where shares acquired on behalf of employees will not be on-sold to third parties at the time the employee is allocated the shares, or shortly thereafter. But there is no basis for or explanation of why the timing of an employee's disposal of shares acquired under an Employee Remuneration Trust Arrangement (which will typically be driven by personal investment and tax considerations) should have any implication for the capital or revenue nature of the contribution used by the trust to acquire the shares.

Examples, which are very useful to taxpayers, are sometimes included in the "Ruling" section and in other cases included in the "Explanation" section. As examples are a practical demonstration of how the ruling the Commissioner is making will apply in practice, protection for taxpayers with circumstances similar to the examples in the ruling only arises if the examples are included in the binding section of the ruling.

The ATO should consider what kind of information should be included in the binding part of a ruling. We consider that the binding section should include the Commissioner's position, a detailed explanation of his position and examples of how his ruling will apply. Should the ATO agree with this, we query whether there is an ongoing need for rulings to have a non-binding section.

Withdrawal of Rulings, Determinations and other public guidance

Withdrawal of published rulings, determinations and other guidance indicates that the ATO is regularly reviewing its published guidance and removing the guidance which no longer applies (eg because the law has changed, a case has overridden an ATO position, the Commissioner has had cause to change his public view on an issue etc). This is a positive measure as it indicates to taxpayers (and the public at large) that the ATO is acting to preserve the currency and relevance of its vast array of public guidance.

In circumstances where the ATO is changing its position as expressed in an existing ruling and replacing it with a new ruling, the ATO should consider leaving the existing ruling in place until the new draft ruling is finalised. Though this may give the impression that the Commissioner has two different views published at the same time

(on the same issue), this ensures taxpayers still have the protection of the current ruling while the draft is being finalised.

Specific Issues raised in Questionnaire

We have addressed some of the specific issues raised in the Questionnaire below.

Q6 What improvements could be made to ato.gov.au to help you find what you are looking for?

The “search” functionality on the ATO website does not yet operate at an optimal level. Though there has been significant improvement to the search function since the launch of the new ATO website in June 2013, members continue to report to us that using an external search engine gives a better result than searching directly on the ATO website. This is because the search function on the ATO website still delivers irrelevant results (together with relevant ones) which have to be sifted through to find the desired result (ie the most appropriate piece of guidance on point).

Members find they get a more streamlined result searching for the guidance they are after using an external search engine, such as Google, which brings up the desired piece of guidance at or near the top of the list of search results⁵.

There is an enormous amount of useful advice and guidance that the ATO makes available on its website, much of which taxpayers and their advisers may be overlooking due to search functionality issues. A possible solution to this may be to assign ‘key words’ to pieces of guidance to ensure they are located easily when a search of those terms is conducted⁶.

Q7 Is the level of protection (ie from an increase in primary tax, penalties and interest) that attaches to each type of ATO product easy to understand?

It would be very useful if there was information on the Legal Database page of the ATO website which summarised the level of protection offered for the range of guidance (as listed on page 1 of the Questionnaire) issued by the ATO (eg binding, non-binding, protection from penalties etc). This would clarify the level of protection offered by the different types of guidance issued by the ATO. A link to this summary page in each piece of guidance issued would also be very useful.

⁵ To demonstrate, a search of the term “UPE ATO” on Google (ATO is included to limit the search to ATO references) brings up the link (<https://www.ato.gov.au/Business/Division-7A/In-detail/Fact-sheets/Division-7A---unpaid-present-entitlement/>). A search of the term “UPE” on the ATO website brings up references to setting up superannuation for an employee, an irrelevant result.

⁶ As suggested by the NTLG members

Q9 Once you have found the information you are looking for, is it easy to understand and apply? If not, why not?

Members have indicated to us there are occasions where the information contained in a piece of guidance is too simplistic to be useful to a tax professional (for example the technical information is missing) though it may be appropriately pitched for a non-tax professional.

This Review is an opportune time for the ATO to (re)consider the level at which the different types of guidance should be pitched. For example, it would be appropriate for rulings (and determinations) to be pitched at a high technical level (including references/links to legislation and detailed examples of how the law applies), and other general advice (such as commentary on the ATO website) to be more simple (containing an easy to understand explanation of the law). It would also be useful to cross-reference all guidance (the technical and non-technical pieces) on the same topic so that a person seeking out guidance on a particular topic can find the guidance pitched at the right level for them.

Q12 What time frames do you think would be reasonable for producing:

- a) Rulings and determinations:* 3 to 6 months (will depend on the complexity of the issue)
- b) Decision impact statements:* 1-2 months
- c) ATO Interpretive Decisions:* 1-2 months as these are generally drawn from private binding rulings so the majority of the background (eg researching the legislation and cases) should have already been done.
- d) General guidance (such as fact sheets or decision tools):* 2 months

Guidance should also be issued in close proximity to any new or significant changes to the tax law.

Q14 If you think public ATO advice or guidance should be produced on a topic, how would you raise this matter and with whom?

Tax Institute members continue to approach the Institute to raise issues with the ATO that they have identified may warrant public advice or guidance. One member has reported to us their attempt to obtain guidance from the ATO directly (via the Hub) and in their view this did not achieve a particularly satisfactory result.

We note that the ATO has developed the Hub, which we would encourage it to use to facilitate submission of issues that may be suitable for public guidance (not just issues for consultation). The ATO has invested significant resources in establishing and operating the Hub facility. This portal could be used to further encourage tax professionals and others to raise issues with the ATO directly on topics they believe require ATO guidance. The ATO could also make use of its stakeholder register (if it is not doing so already) to find expert specialists with whom it could 'road-test' topics for guidance (and the position that may be taken).

Q17 Do you have any comments on the current consultation process for rulings, the resulting 'compendium' in response to submissions and the role and function of the Rulings Panel?

1) Current consultation process

The current process of preparing and finalising a ruling involves the Commissioner considering and determining his view on a particular issue, preparing the draft ruling and putting the draft out for public consultation prior to finalising the ruling. On occasion, the Commissioner's proposed position on an issue to become the subject of the ruling is discussed in confidence with particular stakeholders (eg members of a consultation group expert on the topic area) prior to releasing the draft for public consultation. In the rare instance, a discussion paper may be issued for consultation prior to the draft ruling being prepared.

Under the current process, the Commissioner has usually already formed his view by the time the public consultation stage is reached. As such, it is usually difficult for the Commissioner to change his established view as his thinking is well-advanced by this stage. Where the Commissioner's view in a draft ruling receives much public criticism, the Commissioner can be placed in the undesirable position of having to withdraw a draft ruling due to public pressure.

We would encourage the ATO to engage with relevant stakeholders (including The Tax Institute) at a much earlier stage in the rulings preparation/consultation process, particularly on contentious matters, or matters where there are a variety of divergent views on the interpretation of a particular aspect of tax law. Stakeholders are keen to work collaboratively with the ATO at the earliest possible stage of the formulation of rulings to ensure high quality and well-developed guidance products are produced. We believe earlier engagement with stakeholders would positively contribute to the quality of guidance produced by the ATO.

It is in the interests of both the ATO and tax professionals to achieve the ultimate goal of the production of high quality, clear and useful guidance for taxpayers and their advisers. A change to the rulings consultation process in this way also fits neatly within the ATO's 'Early Engagement' strategy.

2) Compendium

The Compendium is a useful piece of information that documents the issues raised during the consultation process of the draft ruling and records issues that were rejected by the ATO and why.

However, if the ATO were to alter its consultation process on rulings to engage earlier with external stakeholders (for example issue a discussion paper and consult on that to help the ATO formulate its position rather than consulting on a draft ruling after it has formed its position), many of the issues recorded in the compendium would likely be

raised and resolved at the earlier stage. This could then remove the need for the ATO to produce a compendium at all (and as a by-product potentially reducing 'red tape' for the ATO), and could contribute to ATO resources being used more efficiently at an earlier stage in the consultation process rather than spent later on producing the compendium.

This could also help both the ATO and external stakeholders involved in the consultation process focus on the main issues to be addressed in the ruling if all of the extraneous issues are raised and dealt with prior to reaching the draft ruling stage.

Q21 What do you do if you can't find the assistance that you are looking for? (eg do you see a tax practitioner or call the ATO?)

Members have reported a change in the assistance being provided when they contact the Tax Agent telephone line for assistance to help locate guidance. Members note that of late, when contacting the ATO via the Tax Agent telephone line for assistance, they have been advised that the officer cannot provide legal advice or refer the agent to particular rulings or cases. In the past, an officer was able to refer the agent to rulings and cases and could give some guidance (which would not be binding). The ATO should consider reintroducing this kind of assistance to agents.

Q22 In your view, which of these factors [referring to the factors listed in the questionnaire] is most important / least important?

All four factors are important. However, the most important is (b), that the guidance is able to be relied on by taxpayers in a range of different situations and is technically comprehensive (if the guidance is a technical piece).

If you would like to discuss any of the above, please contact either me or Senior Tax Counsel, Robert Jeremenko, on 02 8223 0011.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M. Flynn', followed by a long horizontal flourish line.

Michael Flynn
President