



THE TAX INSTITUTE
THE MARK OF EXPERTISE

30 November 2015

Mr Tim Dyce
Deputy Commissioner
Private Groups and High Wealth Individuals
Australian Taxation Office

By email: PrivateAdviceReview@ato.gov.au

Dear Mr Dyce,

Review of private advice

The Tax Institute (**Institute**) welcomes the opportunity to comment on the Australian Taxation Office (**ATO**) discussion paper on its review of private advice (**Discussion Paper**).

The Institute supports the ATO's vision of a system that provides certainty though tailored, useful and timely advice with a contemporary service. Our members and their clients regularly seek private advice from the ATO and are well placed to provide ideas and improvements to the current system to align with that vision.

We have focused on issues raised by the Discussion Paper which are of particular interest to our members, rather than responding to each question posed.

Overview

- Public advice is generally preferable to private advice. The outcomes of this review should contribute to the review of public advice so that need for private advice is limited to rare cases that cannot be dealt with by applying public advice.
- The most important factor in a successful private advice system is certainty. This factor should be given precedence over timeliness, except where the applicant for advice expressly consents to unavoidable de-emphasis on certainty in order to achieve the timeliness required in a particular case. There is a small subset of cases where timely non-binding advice is preferable to binding advice.
- The description of the scheme in a private ruling is critical and should, in the majority of cases, be as stated in the private ruling application. Where further information is required by the ATO beyond what is described in the application, there should be a process in place to agree the facts to be set out in the private ruling with the taxpayer concerned before the ruling is issued.

- There are opportunities for reforming the administration of the existing system in relation to expediting rulings, improving the Private Binding Rulings Register, and allowing joint ruling applications.
- If the ATO is minded to change the private advice system more significantly, we support the proposal for allowing taxpayers to draft their own private ruling. We suggest taking the proposal further and allowing tax agents to draft and endorse private advice within certain risk parameters.

Interaction with public advice

The Institute supports the ATO taking steps to reduce the need for clients to seek private advice for routine and well settled matters by improving the ATO's general advice products and other service offerings. A recent example in the large business segment is the approach in the ATO's 'Infrastructure – Australia's federal tax framework' document. The standing of such framework documents is defined as follows:

This framework does not bind us to a particular view of the law. Only taxation rulings, taxation determinations or private rulings can do that.

However, if you have transactions that are similar to the transactions outlined in this framework, our officers would be expected to follow the overall views set out here. This includes officers that issue rulings as well as those conducting compliance activities.

This framework will link to various binding publications that we have issued and consider relevant to the issue being discussed.¹

In respect of established market structures (for example, securitised license arrangements for Government infrastructure projects), the ATO could perhaps consider extending its current practice of preparing a letter to bidders identifying the issues that have been the subject of binding ruling or advance binding advice applications, and those incremental issues the ATO would like to engage with bidders on. Alternatively the ATO could consider the provision of tax clearance on well-settled positions in respect relevant tax issues, thereby reducing the effort required by the Government or bidders to seek specific private advice.

Smaller taxpayers with common issues should as far as possible be directed to clear public advice that is easily accessible on the website. This is preferable to the provision of "yes" or "no" private advice which we understand would only be issued in relation to straightforward matters where there is some public advice which the ATO is aware of. The aim should be to remove such matters from the private advice system altogether.

¹ <https://www.ato.gov.au/business/large-business/in-detail/key-products-and-resources/infrastructure--australian-federal-tax-framework/>

Certainty

In an environment of increased tax transparency and no less complexity in the self-assessment system, a private advice system should provide certainty over the application of the tax law in a timely manner. Seeking and obtaining private advice from the ATO can be costly and so protection against the imposition of penalties and interest is key. In terms of private advice, our members emphasize the importance of the binding nature of the advice. There are other mechanisms with the tax law for obtaining lower levels of protection, such as having a reasonably arguable position and obtain a reduction of penalties for voluntary disclosures. For example, in respect of self-managed superannuation fund (**SMSF**) matters, practitioners wish to obtain binding written statements from the ATO on the *Superannuation Industry Supervision Act* and regulations rather than non-binding SMSF-specific advice.

In a subset of cases where taxpayers seek private advice from the ATO, timeliness of the ATO response is paramount (for example, market transactions). A key issue encountered by our members is delay in the ATO being prepared to provide private advice in some instances because the ATO has yet to form an opinion on the issues at hand. Large business clients report a lack of access to timely pre-lodgement advice, and concerns that the lack of responsiveness lead to lodgement and then self-objections. Increased sharing of information between teams within the ATO about similar schemes that have been the subject of prior private rulings may address such issues.

Reliance on a private ruling

Section 357-60(1) of Schedule 1 of the *Taxation Administration Act* states that a ruling binds the Commissioner if the ruling applies to you and “*you rely on the ruling by acting (or omitting to act) in accordance with the ruling*”. The ATO should provide guidance as to what is meant by the italicised phrase. In particular, there is uncertainty as to whether this has a narrow meaning such that only the lodgment of a statement or return to the Commissioner constitutes reliance on the ruling, or whether it has a broader meaning and includes where a taxpayer has committed to certain commercial dealings on the basis of the ruling. It is our view that the latter definition should be adopted and is more consistent with what happens in practice.

When the Commissioner changes his view in relation to an approach taken in a private ruling, he is able to withdraw that private ruling. This can have significant consequences for taxpayers who have already relied on the ruling for the purpose of entering into long term commercial dealings, for example construction contracts where the pricing of payments under such contracts may have taken into account the availability of input taxed funding.

Indicative advice

Our members have at times received indicative advice from the ATO. In these situations, the indicative view is provided in writing by an ATO officer in an email in the interests of timeliness, with the ATO suggesting that it be attached to the private ruling application once formally lodged. It is appreciated that applicants may benefit from this process, and we commend the ATO for attentiveness to applicant's needs. However,

such advice has the potential to cause uncertainty as there is no guidance as to the extent to which it is binding. Taxpayers may operate under the mistaken belief that they can hold the ATO to the indicative advice. Accordingly, we suggest that indicative advice should be issued under the cover of clear public guidance as to the certainty provided by such advice and the effect of relying on that advice on penalties and interest charges. There is a need for there to be clear public guidance setting out all private advice options being considered by the ATO, who they are available to, and the level of protection they each offer.

Factual matters

Draft private rulings

In the 18 June 2015 meeting of the National Tax Liaison Group, the ATO stated that a summary of facts is presented to the taxpayer where the facts are considered to be complex, so as to minimise misunderstanding, but that it is not the ordinary practice to when facts are not controversial.² In relation to Class Rulings and Product Rulings, the ATO often provides the taxpayer with a copy of the draft ruling. However the ATO does not usually provide drafts private rulings.

Notwithstanding our view on indicative advice, it is our view that it is beneficial for the ATO to provide a copy of the draft private ruling to the client on their request so that facts as set out by the ATO can be reviewed. The implications that a misunderstanding as to the facts in a private ruling that can have is evident in *Public Servant v Commissioner of Taxation* [2014] AATA 247.

In that case, the description of the scheme was changed in the private ruling from the private ruling application and the Tribunal does not have jurisdiction to review the facts comprising the scheme. The ruling was correct on the facts as described by the Commissioner but the result could have been different on the facts as described by the taxpayer in the ruling application.

Similar issues arose in the recent Federal Court appeal in *Rosgoe Pty Ltd v FCT* [2015] FCA 1231. The Court overturned the Tribunal's decision on the basis that the Tribunal had made a finding of fact that the taxpayer was carrying on a business even though that was not a fact that was contained in the scheme set out in the private ruling. Both *Public Servant* and *Rosgoe* indicate that the taxpayer and Commissioner need to have the opportunity to agree on the 'scheme' on which the taxpayer requires a ruling.

Members have also reported cases where ATO officers independently research the client or obtain additional facts besides those provided by the client, without requesting those facts and without notifying the taxpayer that they had obtained those facts. Where on occasion the ATO does provide the draft description of the scheme in the private ruling, sometimes the actual ruling contains additional facts not flagged in the scheme description.

² <https://www.ato.gov.au/General/Consultation/In-detail/Stewardship-committees---minutes/National-Tax-Liaison-Group/NTLG-minutes---18-June-2015> (accessed on 24 November 2015)

In a related issue, the ATO sometimes rewrites the scheme set out in a private ruling application by inserting the words “you say”. In one such example, a taxpayer stated in the ruling application that they cease to hold an asset as trading stock and start to hold it as a capital asset. The ATO rewrote that part of the scheme as “you say you held the asset as a capital asset” which detracted from the ruling being based on a definite scheme. The reasons for the ATO changing the wording of the scheme in this way is unclear as they are only ruling on the scheme as set out by the taxpayer. If in fact the asset is not held as a capital asset, the taxpayer cannot rely on the ruling and the ATO is not exposed and has not made a concession. This may also mean that the taxpayer cannot object to the ruling or rely on it because the ruling is not based on facts.

The taxpayer will always be in the best position to describe the facts of a scheme. The taxpayer will also have an interest in ensuring that the facts are described correctly so that they are able to rely on a favorable ruling. Accordingly, the ATO might be too cautious on occasion as to how it drafts the scheme/facts part of the private ruling which causes unnecessary confusion. The ATO should comment on the scheme as set out by the taxpayer.

Requests for source documents

Members are noticing different practices in relation to the processing of applications for private rulings. In some cases the ATO insists on seeing legal documents before proceeding where the taxpayer will not proceed to the stage of entering into those documents without a favorable ruling. This is undesirable for a taxpayer who, for example, may only be willing to commit to having a lease or deed prepared by a lawyer or the expert consultant’s report being obtained if the ruling eventuates. If the ATO has a concern that the transaction will not be implemented as described in the private ruling application, this should be addressed by including a statement that the ATO may subsequently check that the transaction happened as it was described in the private ruling.

Administrative issues

Expedition of private rulings

Recently, members have noticed that the ATO has been taking longer than 28 day service period to issue private rulings. The option for an expedited ruling application process should be explored. The private ruling application could have a section for the taxpayer to notify the ATO that this is an expedited ruling application and outline the reasons for expedition.

Members have also noted that it is difficult to discuss the progress of private ruling applications with the ATO over the telephone. Members report that they have to leave a voicemail message and wait for a call back from the relevant ATO officer. The ATO also rarely provide estimated timeframes for responding to questions the client has asked in relation to a private ruling. There should be great transparency as to the relevant ATO officer to contact for particular issues. For example, there should be details on the ATO website as to the subject matter experts within the ATO, the matters that they can be contacted about and their preferred method of contact.

The ATO should retain and expand its early engagement processes as this has proven an effective mechanism for assisting taxpayers manage complex issues and reducing the compliance around seeking private advice from the ATO. There should be a sharing of information between the early engagement team and the team that is responsible for drafting the ruling so that duplication of work is minimised and the taxpayer is not asked the same questions twice.

Private binding rulings register

The Private Binding Rulings Register is useful to taxpayers and should be retained and improved. The ATO appears to be reluctant to utilise past rulings when identified to them, contrary to common practice in other countries. Where possible, there should be greater collaboration between teams that work on rulings and those that have previously issued rulings on similar issues so that the ATO is not reinventing the wheel and is sharing ideas within the ATO on views on particular fact patterns. This would be also have a positive impact on the consistency of private advice.

The Private Bindings Rulings register should be retained and the ATO should be more vigilant in ensuring that sanitisation of the rulings is kept to a minimum. Sanitisation should only occur to the extent necessary to protect the identity of the parties involved. Members report that at times rulings are sanitised to an extent where differences between rulings is not determinable based on the sanitised versions and this gives the impression that the ATO is deciding differently on the same factual scenario.

Consistency of positions taken by the ATO is also a necessary element of the private advice system. Our members have experienced situations where the ATO has ruled differently against a similar set of facts, for example in respect of issues relating to expense deductibility and the taxation implications of employee share schemes and trusts. Where the ATO have ruled on an issue relevant to a transaction, and a similar transaction is proposed, then absent a change in the law the ATO should be able to leverage the experience that it has with the issue to provide timely private advice, rather than starting the analysis afresh. Where there is a change in the ATO view, private binding rulings that are withdrawn or inconsistent with the current view should be removed from the register.

Joint ruling applications

There should be a mechanism whereby parties to a transaction can apply jointly for a private ruling in relation to that transaction. The current process requires each party to a transaction to apply for their own private ruling which incurs unnecessary cost and delay.

A proposal for a future private advice system

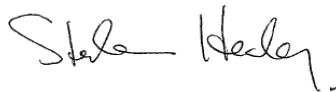
In the Discussion Paper, there is a proposal for taxpayers and their intermediaries to draft their own ruling for the ATO to consider, in order to expedite the turnaround time for private rulings. In our view, this proposal could go further. The ATO could seek the leverage the existing relationship of trust between taxpayers and their intermediaries by delegating both the drafting and endorsement of certain private rulings to tax agents. The ATO could accredit certain tax agents in a similar way to the Australian

Securities and Investments Commission's (**ASIC**) dealings with company auditors. A company auditor signs off on an audit report for a company and then ASIC only need to review the auditor's methodology. The ATO would have access to the private ruling prepared by the intermediary and the taxpayer could rely on that ruling. If the intermediary is negligent in providing the advice, the taxpayer could seek redress from the intermediary rather than the ATO. Any perceived risk in relation to the process could be minimised by placing a limit on the dollar value of the tax payable involved and the level of professional indemnity insurance cover maintained by the tax agent.

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If you would like to discuss any of the above, please contact either me or Tax Counsel, Thilini Wickramasuriya, on 02 8223 0044.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Steve Healey'.

Stephen Healey
President