



THE TAX INSTITUTE

THE MARK OF EXPERTISE

14 July 2016

Mr Andrew Mills
Second Commissioner – Law Design and Practice
Australian Taxation Office
PO Box 900
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By email: Andrew.mills@ato.gov.au
cc: PrivateAdviceReview@ato.gov.au

Dear Andrew,

Private Rulings and Tax Disputes

The Tax Institute wishes to make a submission on the tax disputes process in relation to private rulings. In this submission, we have outlined our concerns regarding the current process, as well as potential solutions.

Current process

A taxpayer can object against a private ruling in the manner set out in Part IVC of the *Taxation Administration Act 1953* (**TAA**), subject to certain exceptions: section 395-60(1) of the TAA. In deciding the objection, the Commissioner can only consider additional information that does not result in the scheme to which the objection relates being materially different to the scheme to which the ruling relates: section 359-65(3) of the TAA. If the Commissioner considers that the information would result in a materially different scheme, he must request the taxpayer to apply for another private ruling. If the Commissioner decides the objection and the taxpayer is dissatisfied with that decision, they can apply to the Administrative Appeals Tribunal (**AAT**) or appeal to the Federal Court under section 14ZZ of the TAA.

Materially different scheme

The practical application of the rule in section 359-65(3) of the TAA, and the constraints (identified in case law) on the rulee's rights of review, create problems. *Investa Properties v Federal Commissioner of Taxation* [2009] AATA 121 provides an example of the issues that arise where the AAT, in its review, is confined to the scheme outlined in the ruling. In the ruling, the taxpayer sought "*confirmation that fringe benefits tax will not be payable by [it], as employer, in entering into contracts with its employees to build houses on the employee's*

land". The arrangement outlined by the taxpayer stated that the costs paid by it would be reimbursed by the employee through a salary sacrifice arrangement. The taxpayer also specified that, should the relevant employee leave their employment, they will have a liability to pay the outstanding amount to the taxpayer. In the ruling, the Commissioner restated the arrangement ignoring most of the steps and framed the only issue as "*does the provision of a twenty five percent discount by the employer to its employees, in respect of the construction costs of a house, by way of a salary package arrangement, give rise to a taxable fringe benefit*".

In dismissing the taxpayer's application for review of the objection decision in relation to the private ruling for lack of jurisdiction, Senior Member Hunt noted:

"21. In persisting with the wrong question as the only issue for the ruling, the Commissioner has stymied the taxpayer's efforts to obtain a private binding ruling of any relevance to the scheme identified. However, in my view, the tribunal's powers do not extend to reframing the only issue arising under the scheme identified in the ruling. While a 25% discount may give rise to a taxable fringe benefit, this is not an accurate description of the proposed scheme identified. As the question asked by the Commissioner misstates or reframes the scheme identified, I am unable to review the opinion of the Commissioner in any meaningful way. The tribunal does not have power to consider facts other than those identified by the Commissioner in his private ruling as constituting the relevant arrangement..."

The matter of *Rosgoe Pty Ltd v Federal Commissioner of Taxation* [2015] FCA 1231 shows that the scope of the exact rule is controversial. The case is currently on appeal to the Full Federal Court. The taxpayer applied for a ruling in relation to the income tax and GST treatment of a gain made on the sale of two properties. The Commissioner ruled that the sale yielded assessable income from a commercial property development. The taxpayer objected to the private ruling, the Commissioner disallowed the objection, and the matter was reviewed by the Tribunal. The Tribunal affirmed the Commissioner's objection decision primarily on the basis of a finding of fact that the taxpayer was engaged in carrying on a business during the relevant period.

Justice Logan allowed the taxpayer's appeal from the AAT, and held that where the AAT is reviewing the disallowance of an objection to a private ruling made by the Commissioner, the Tribunal must take the facts on which the private ruling is based, as set out in the arrangement described in the ruling, as it finds them, and cannot draw inferences of fact contrary to those in the arrangement. The Tribunal cannot, in effect, redefine the arrangement. Accordingly, the AAT could not make a finding of fact that the taxpayer was carrying on a business.

The current rule can result in unnecessary costs for taxpayers and the ATO, as seen in *Case 2/2016* [2016] AATA 264. The applicant was represented by their financial planner who may have been unaware of the current rule. The matter concerned a private ruling by the Commissioner that the payment to the taxpayers from a life insurance policy on the death of their son was assessable because they were not death benefits dependents of their son under section 302-60 of the *Income Tax Assessment Act 1997*. Deputy President McDermott held that the Commissioner's ruling was correct on the facts in the ruling. The taxpayers

adduced additional material in the Tribunal relevant to whether an interdependency relationship existed which the Tribunal could not consider due to section 359-65(3) of the TAA. The Tribunal had to remit the matter to the Commissioner to ask the taxpayers to apply for another ruling.

At a minimum, a taxpayer ought to be able to challenge a description of the scheme in a ruling that is plainly incorrect, though this would require a legislative change to the rule. In the interim, if the Commissioner has concerns as to the facts as stated by the taxpayer in the ruling application, the Commissioner should more regularly exercise his powers to ask for more information under section 357-105 of the TAA or to decline to rule under section 357-220 of the TAA, rather than making assumptions that the rulee may subsequently wish to challenge, thus raising the problems described above.

We also reiterate our comments under “Factual matters” in our **attached** submission dated 30 November 2015 in relation to the ATO Review of Private Advice. In that submission we recommended that the ATO should 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.

Timing

In a live transaction, where documents are being developed even during an appeal, the current rule causes issues, which might otherwise be accommodated by adjournments and costs orders. In *Bellinz Pty Limited v Federal Commissioner of Taxation* 98 ATC 4399, Merkel J found that the arrangement had not shifted so far that it had changed, but his Honour voiced concern about the issue of changing documents at 4405:

“...one of the problems which arose was that the Lessor Partners from time to time sought to comply with objections raised by the Commissioner by making amendments, or agreeing to make amendments, to their transaction documents. As a consequence the documents recording the arrangements did not necessarily accord with the agreed description of the arrangements or the applicant’s submissions as to the arrangements... As pointed out above I have endeavoured to accommodate these matters as they do not affect the final outcome but they do emphasise the importance of the Commissioner stating the arrangement on which he has ruled (in any binding ruling, whether private or public) with clarity and precision in the ruling itself.”

The parties ought to be able to extend the year in which the arrangement is supposed to occur, if the matter takes time to resolve through the objection and appeal process, thus delaying the implementation of the arrangement. Currently, the only alternative is to start the process again. In *CTC Resources NL v Federal Commissioner of Taxation* 94 ATC 4072, part of the dispute related to an application for a private ruling lodged in January 1993 which related to the year ended 30 June 1993. The Commissioner issued the ruling on 1 April 1993 and the taxpayer objected to it on 16 April 1993. The objection was disallowed by the Commissioner in August 1993 and the arrangement was not ultimately implemented by 30 June 1993. The taxpayer appealed to the Federal Court and the appeal in relation to that ruling was dismissed as incompetent. The Court comprised of Gummow, Hill and Jenkinson JJ held that, if the ruling relates to a year of income which has passed before the appeal is

instituted so that the ruling does not affect the taxation liability of the taxpayer, then the taxpayer is not a “person dissatisfied” as required by section 14ZZ of the TAA.

Federal Court appeals

Under section 77 in Chapter III of the Commonwealth Constitution, the Federal Court is conferred with a jurisdiction to determine a “matter”. There is a question of whether section 14ZZ of the TAA goes beyond this limitation because it requires the Court to determine issues in relation to private rulings which are merely hypothetical in the context of determining the tax outcome of conduct which might never be entered into. In *CTC Resources*, the parties did not contend that section 14ZZ of the TAA had any operation which was invalid by reason of Chapter III. Justice Gummow stated that in the absence of any submission by a party or intervener to that litigation that the law was invalid, the constitution question was not itself a “matter” which could be determined by the Court. Justice Hill instead expressed a view on the issue that the scheme of the TAA contemplates both that as at the time the ruling is given and as at the time the appeal to the Court is instituted there will be a transaction proposed to be entered into that is capable of having taxation consequences. His Honour went on to refer to the requirement in section 14ZZ of TAA that the person seeking to appeal has to be “dissatisfied” with the decision. The issue of validity could arise again in Chapter III courts.

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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 blue ink, appearing to read 'Arthur Athanasiou', with a stylized flourish at the end.

Arthur Athanasiou
President

Attachment – The Tax Institute’s submission to the ATO’s Review of Private Advice dated 30 November 2015