



THE TAX INSTITUTE

7 June 2018

Ms Debbie Hastings
Deputy Commissioner – Review and Dispute Resolution
Australian Taxation Office
GPO Box 9977
SYDNEY NSW 2001

By email: deborah.hastings@ato.gov.au

Dear Ms Hastings,

Objections to Private Rulings – Inconsistency between GST and Income Tax

The Tax Institute would like to raise an issue with the Australian Taxation Office in relation to objections to GST related private rulings. The issue concerns the interpretation of section 359-60(3) of Schedule 1 to the *Taxation Administration Act 1953* (Cth) (**TAA**). Section 359-60 sets out the circumstances in which taxpayers can object to private rulings (for both income tax and GST related issues) and states:

“359-60 Objections, reviews and appeals relating to private rulings

- (1) You may object against a * private ruling that applies to you in the manner set out in Part IVC if you are dissatisfied with it.
- (2) The ruling is taken to be a taxation decision (within the meaning of that Part).
- (3) However, you cannot object against a * private ruling if:**
 - (a) there is an assessment for you for the income year or other accounting period to which the ruling relates; or**
 - (b) the ruling relates to * withholding tax or * mining withholding tax that has become due and payable; or
 - (c) all of the following subparagraphs apply:
 - (i) the ruling relates to * excise duty, or another amount, payable in relation to the goods under an * excise law;
 - (ii) the Commissioner has made a decision about the excise duty, or other amount, payable in relation to those goods;
 - (iii) the decision is reviewable under an excise law.” (Bolding added for emphasis.)

Members have had experience with some GST related private rulings where the Commissioner has treated an objection to a private ruling as invalid because an assessment has been issued to the taxpayer for a period that is covered by the private ruling, notwithstanding that the private ruling also applies to future periods in respect of which no assessments have issued. While a comprehensive explanation has not been

provided for this outcome, based on members' experiences, the Commissioner's interpretation appears to be premised on the following views:

- the words "income year or other accounting period" in section 359-60(3)(a) include tax periods for GST purposes (notwithstanding that the expression is typically used in an income tax context); and
- the words "there is an assessment for you for the income year or other accounting period to which the ruling relates" in section 359-60(3)(a) mean "there is an assessment for you for any income year or other accounting period to which the ruling relates".

The issue arising is that taxpayers who have received private rulings that cover both current and future GST tax periods have been prevented from objecting to the private ruling even though assessments have not been issued for the future tax periods.

The position is inconsistent with how the Commissioner applies section 359-60(3)(a) to income tax related private rulings. The Commissioner states the following in TR 2011/5 *Income tax: objections against income tax assessments* (TR 2011/5) at paragraphs 150 - 151:

"150. Where an assessment has issued to a taxpayer in respect of a year to which a private ruling relates, it is not possible to object against the private ruling (paragraph 359-60(3)(a) of Schedule 1). If this is the case, the taxpayer can only object against the assessment.

...

151. Where a private ruling covers a number of income years, the taxpayer is able to object against the ruling in respect of the income years for which the taxpayer has not yet been given an assessment." (Bolding added for emphasis.)

The position is also inconsistent with the analysis in Explanatory Memorandum (EM) to *Tax Laws Amendment (Improvements to Self-Assessment) Bill (No. 2) 2005* (i.e. the Bill which became *Tax Laws Amendment (Improvements to Self-Assessment Act No. 2) 2005* and inserted section 359-60). The EM states at paragraph 3.105:

3.105 Where a taxpayer receives a private ruling which covers a number of income years or accounting periods there is nothing to prevent the taxpayer relying on the ruling for certain income years or accounting periods, and objecting against the others. A taxpayer may choose not to rely on the ruling instead of objecting against it.

Example 3.6

Ian receives a private ruling which covers 3 income years. Ian relies on the ruling for the first 2 income years, and then decides to object against the ruling for the 3rd income year before lodging his return for that year.

Based on members' experiences, this seems to also be a departure from the Commissioner's previous practice. As an example, in one matter that a member was handling, the Commissioner did not express this view until well after the objection decision was issued, several months after an application for review had been made to the Administrative Appeals Tribunal. It was then argued that the Tribunal did not have jurisdiction to hear the matter because the Commissioner was not required to issue the objection decision.

The technical position adopted by the Commissioner has varied slightly from the above in the following two case examples. The following examples are provided for indicative purposes:

Example 1

- The private ruling applies to the monthly tax period ended 30 June 2016 and future tax periods.
- An income tax assessment has issued in relation to the **income year** ended 30 June 2016.
- The Commissioner takes the view that there is an assessment for the taxpayer for the income year to which the ruling relates and therefore section 359-60(3) applies (i.e. because of the temporal overlap between the tax period and the income year).

Example 2

- The private ruling applies to the monthly tax period ended 30 June 2016 and future tax periods.
- A GST assessment has issued in relation to the **monthly tax period** ended 30 June 2016.
- The Commissioner takes the view that there is an assessment for a tax period to which the ruling relates and tax periods fall within the category of "other accounting period", therefore section 359-60(3) applies.

It appears the divergence may reflect some uncertainty as to whether the words "income year or other accounting period" encompass "tax periods" for GST purposes.

In light of the above, we seek clarification from the Commissioner in relation to why the position in respect of income tax related rulings (as set out in TR 2011/5) differs from the position in respect of GST. We also seek clarification as to how, specifically, the Commissioner sees s. 359-60(3) applying to GST related private rulings, including as to whether "other accounting periods" includes tax periods and whether the issuing of income tax assessments is relevant in this context.

If you would like to discuss any of the above, please contact either myself or Tax Counsel, Stephanie Caredes, on 02 8223 0059.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Tracey Rens', with a stylized, cursive script.

Tracey Rens
President