



THE TAX INSTITUTE

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Dear Mr Orme,

Annual Taxation Determinations

The Tax Institute welcomes the opportunity to make a submission to the Australian Taxation Office (**ATO**) in relation to the *Annual Taxation Determinations* Consultation Paper (**Consultation Paper**).

Summary

Our submission below addresses our main concerns in relation to the Consultation Paper. In particular, we have determined a 'rule of thumb' that could apply when determining which information should remain included in a Taxation Determination and which information could instead be published on the ATO website.

Discussion

1. Protections offered by Taxation Determinations and ATO website content

Taxation Determinations

A Taxation Determination is considered to be a 'public ruling' issued by the ATO¹. A public ruling is legally binding advice issued by the ATO which has the following effects:

- Taxpayers are protected from any shortfall tax that might arise if they have relied on a public ruling;

¹ Refer to the publication on the ATO website: <https://www.ato.gov.au/General/ATO-advice-and-guidance/How-our-advice-and-guidance-protects-you/>

- Taxpayers are protected from any interest arising on the shortfall tax that might arise if they have relied on a public ruling; and
- Taxpayers are protected from incurring a 'false or misleading statement penalty' in the event one arises and they have relied on a public ruling.

ATO Website content

Material published on the ATO website is considered to be 'guidance' by the ATO. It is not described as being 'binding' on the ATO. It has the following effects:

- Taxpayers are **not** protected from any shortfall tax that might arise if they have relied on website content;
- Taxpayers are protected from any interest arising on the shortfall tax that might arise if they have relied on website content; and
- Taxpayers are protected from incurring a 'false or misleading statement penalty' in the event one arises and they have relied on website content.

The two distinguishing features between a Taxation Determination and ATO website content are:

- The binding nature of a Taxation Determination on the ATO which website content does not afford;
- The protection from shortfall tax that might arise that is offered when a Taxation Determination is relied on and is not offered when website content is relied on.

Whether it is sufficient for any of the matters listed in the Consultation Paper to be contained in ATO website content and no longer be contained in a Taxation Determination will depend on the importance of the two distinguishing features noted above and the protections sought by taxpayers.

2. Other matters to consider

Another key factor to consider is whether the Taxation Determination in question contains information that the Commissioner is required to turn his/her mind to and is required by law to actively do something to determine the dollar amounts or threshold amounts published in the Taxation Determination or whether the Commissioner is simply re-publishing numbers that have been published elsewhere by another government organisation. A certain level of rigour will need to be applied to numbers published on the ATO website so that taxpayers can confidently rely on these figures.

As a general 'rule of thumb' where the Commissioner has been required by law to turn his/her mind to the matter and determine a figure, in the Institute's view, this information should be contained in a public binding document. The Taxation Determination is evidence of the Commissioner's decision and also contains an explanation for the source of the figure; it is a self-contained document. Where the Commissioner is simply re-publishing a number that has been published elsewhere or is simply updating a number by applying a relevant Consumer Price Index (**CPI**), this information could be published

on the ATO website. However, taxpayers would need to be satisfied that they would not be inadvertently penalised if they relied on an indexed figure published on the ATO website which had been calculated incorrectly by the ATO (for example, by an incorrect CPI being applied). It would also be helpful if source information was included on the website (eg the relevant legislative reference) in the same way as is currently done with Taxation Determinations so that equally taxpayers have guidance available to them about how the figure was arrived at.

Members are also concerned that an 'audit trail' needs to be retained of historic figures that applied to earlier income years which may be lost if just current year information is published on the ATO website or insufficient historic information from ATO sources is available. Taxpayers may need to be able to rely on this resource in the event of a dispute where there is disagreement between the taxpayer and the ATO about the correct indexed figure or amount that applies in a particular income year. Capturing information in an annual Taxation Determination formalises the information.

The numerical information currently contained in Taxation Determinations will also need to be able to be easily located. Taxation Determinations are easily located on the ATO Legal Database, including the relevant historical information and a publication date, and therefore the relevant information can easily be found. The search function on the ATO website will be heavily relied upon to bring up the correct results for the same information – the most current numerical information, historical numerical information and information regarding the date when the numerical information was updated.

Both taxpayers and tax practitioners need to have confidence they will be able to easily find the information they need and they need to have confidence in the information that they find.

Appendix

The table in the Appendix sets out the Institute's views on whether the relevant information in a particular Taxation Determination should remain published in an annual Taxation Determination or could be published on the ATO website. In considering what we think is required, we have taken into account whether there is a responsibility on the Commissioner to actively make a determination, which should be included in a Taxation Determination, or not.

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,



Tim Neilson
President

Appendix - Annual Taxation Determinations

Fringe Benefits Tax		
Determination	Requirement under the law	Determination required?
For the purposes of section 28 of the <i>Fringe Benefits Tax Assessment Act 1986</i> what are the indexation factors for valuing non-remote housing for the fringe benefits tax year commencing on 1 April 20xx? (currently <u>TD 2018/1</u>)	The 'indexation factors' are numbers prepared by the Australian Bureau of Statistics. (TBC)	No – as this is just publishing information prepared by the ABS.
For the purposes of section 135C of the <i>Fringe Benefits Tax Assessment Act 1986</i> , what is the exemption threshold for the fringe benefits tax year commencing on 1 April 20xx? (currently <u>TD 2018/5</u>)	The 'exemption threshold' for the year is the 'All Groups Consumer Price Index for the eight capital cities indexation factor' applied to the previous year's threshold.	No – as this is just publishing a number based on applying a relevant CPI index to a dollar value in the legislation (refer to s135C(2)).
What are the rates to be applied on a 'cents per kilometre basis' for calculating the taxable value of a fringe benefit arising from the private use of a motor vehicle other than a car for the fringe benefits tax year commencing on 1 April 20xx? (currently <u>TD 2018/4</u>)	This is a rate for an 'acceptable method of valuation' for valuing the net benefit of the private use by multiplying the number of private kms by the rates set out – refer to MT 2034 <i>Fringe Benefits Tax: Private Use Of Motor Vehicles Other Than Cars</i> . The TD stems from this MT.	Yes – as this follows on from the Commissioner's MT ruling.
Reasonable amounts under section 31G of the <i>Fringe Benefits Tax Assessment Act 1986</i> for food and drink expenses incurred by employees receiving a living away from home allowance fringe benefit for the fringe benefits tax year commencing on 1 April 20xx (currently <u>TD 2018/3</u>)	The legislation refers to 'the total of those food or drink expenses for that period exceeds the amount <i>the Commissioner considers reasonable</i> '.	Yes – as the law requires the Commissioner to actively do something, being to consider what is a reasonable amount of food and drink allowance for the purposes of the LAFHA.

Fringe Benefits Tax		
Determination	Requirement under the law	Determination required?
What is the benchmark interest rate to be used for the fringe benefits tax year commencing on 1 April 20xx? (currently <u>TD 2018/2</u>)	<p>The TD applies to loan fringe benefits and applying the operating cost method to determine the taxable value of a car fringe benefit.</p> <p>a) Loan fringe benefit – s18(1) re taxable value refers to a notional amount of interest which is defined in s136(1) to include the ‘statutory interest rate’.</p> <p>b) Operating cost method for car fringe benefit – refer to s11(2) Item ‘B’ ‘statutory interest rate’.</p> <p>*The ‘statutory interest rate’ is defined in s136(1) as the benchmark interest rate. This rate is defined as the large bank housing lenders variable interest rate on loans for housing for owner occupation published by the Reserve Bank of Australia before the tax year commences.</p>	No – as the rate is published by the Reserve Bank of Australia and not something the Commissioner needs to determine.
For the purposes of section 39A of the <i>Fringe Benefits Tax Assessment Act 1986</i> what is the car parking threshold for the fringe benefits tax year commencing on 1 April 20xx (currently <u>TD 2018/7</u>)	The ‘car parking threshold’ for the year is the ‘All Groups Consumer Price Index for the eight capital cities indexation factor’ applied to the previous year’s threshold.	No – as this is just publishing a number based on applying a relevant CPI index to a dollar value in the legislation (refer to s39A(2)).

Income Tax		
Determination	Requirement under the law	Determination required?
Value of goods taken from stock for private use for the 20xx income year (currently <u>TD 2018/10</u>)	Goods taken out of trading stock for private purposes need to be valued to determine the amount to be included in assessable income (Subdiv 70-D1 1997 Act). <i>PSLA 2004/3 Trading stock: valuation of goods taken from trading stock for private use by sole traders or partners in a partnership</i> specifies the ATO's approach in this scenario. The TD sets out the values that are acceptable by the Commissioner.	Yes – as this sets out values that the Commissioner has determined are acceptable for the purpose of the trading stock rules.
Capital gains: What is the improvement threshold for the 20xx income year under section 108-85 of the <i>Income Tax Assessment Act 1997</i> ? (currently <u>TD 2018/8</u>)	Section 108-85(3) requires the Commissioner to publish the 'improvement threshold' before the beginning of each financial year. The threshold number is indexed annually based on a figure in the legislation.	No – except as there is also a requirement for the Commissioner to publish this threshold annually, query whether publishing on the ATO website is sufficient to satisfy this requirement.
What are the reasonable travel and overtime meal allowance expense amounts for the 20xx income year? (currently <u>TD 2018/11</u>)	<ul style="list-style-type: none"> • Section 900-50 is in relation to the exception for getting written evidence in relation to domestic travel allowance expenses where the Commissioner must make a decision as to what is reasonable for the total losses/outgoings claimed for travel covered by the allowance. • Section 900-55 is in relation to the exception for getting written evidence in relation to overseas travel allowance where similarly, the Commissioner must make a decision as to what is reasonable for the total losses/outgoings claimed 	Yes – as the law requires the Commissioner to actively do something and make a decision about what is a reasonable amount in each of these cases.

	<p>for travel covered by the allowance (except for accommodation costs where written evidence is required).</p> <ul style="list-style-type: none"> Section 900-60 is in relation to the exception for getting written evidence in relation to reasonable overtime meal allowance where the Commissioner must decide what the total amount of losses/outgoings claimed is reasonable. 	
What is the benchmark interest rate applicable for the year of income that commenced on 1 July 20xx for the purposes of Division 7A of Part III of the <i>Income Tax Assessment Act 1936</i> and how is it used? (currently <u>TD 2018/14</u>)	The 'benchmark interest rate' is defined in section 109N(2) as "the Indicator Lending Rates – Bank variable housing loans interest rate last published by the Reserve Bank of Australia before the start of the year of income."	No – as the rate is published by the Reserve Bank of Australia and not something the Commissioner needs to determine.
What is the car limit under section 40-230 of the <i>Income Tax Assessment Act 1997</i> for the 20xx financial year? (currently <u>TD 2018/6</u>)	Under section 40-230(3), the 'car limit' is an amount that is indexed annually based on an amount in the legislation.	No - as this is just publishing a number based on applying a relevant CPI index to a dollar value in the legislation.

Luxury Car Tax		
Determination	Requirement under the law	Determination required?
What is the luxury car tax threshold and the fuel-efficient car limit for the 20xx financial year? (currently <u>LCTD 2018/1</u>)	<p>The <i>luxury car tax threshold</i> is (s25-1(3) LCT Act):</p> <p>(a) the car depreciation limit that applied under the former Subdivision 42-B of the *ITAA 1997; or</p> <p>(b) the car limit that applies under section 40-230 of that Act [this is an amount indexed annually - see above].</p> <p>The figure is indexed by applying an indexation figure</p>	No - as this is just publishing numbers based on applying a relevant CPI index to the relevant dollar value in the legislation.

	<p>determined by Parliament or a CPI index method determined by Subdiv 960-M of the 1997 Act.</p> <p>The fuel-efficient car limit is based on a figure in the legislation indexed annually in accordance with Subdiv 960-M of the 1997 Act.</p> <p>Indexation under Subdiv 960-M is broadly based on the 'All Groups CPI' number published by the ABS.</p>	
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Rule of thumb: *If the Commissioner needs to actively determine the amount, the amount should be published in a Taxation Determination and not just on the ATO website. If the Taxation Determination is evidence of the Commissioner's decision. If the Commissioner just needs to advise of the indexed amount for the income year, the number can be published on the ATO website.*