TD 2011/D4 - Tax administration: what is a general administrative practice for the purposes of protection from administrative penalties and interest charges?

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This document has been finalised by TD 2011/19.

There is a Compendium for this document: **TD 2011/19EC** .

Generated on: 26 November 2026, 02:47:54 AM

Draft Taxation Determination

Tax administration: what is a general administrative practice for the purposes of protection from administrative penalties and interest charges?

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This publication is a draft for public comment. It represents the Commissioner's preliminary view about the way in which a relevant taxation provision applies, or would apply to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

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Ruling

1. A general administrative practice is a practice which is applied by the Commissioner generally as a matter of administration. It consists of the habitual or customary, that is repeated, adoption of a view in multiple cases.

2. Documents published by the Commissioner and advice provided by the Commissioner may provide evidence of a general administrative practice. However, the documents and advice are not in and of themselves a general administrative practice.

3. It is the practice of the Commissioner, not taxpayers, that is relevant. Nevertheless, in the context of self-assessment, a general administrative practice would be established where:

- a widespread practice is adopted by taxpayers;
- the practice is identified and specifically considered by the Australian Taxation Office (ATO) at a senior level or in a co-ordinated fashion (as opposed to isolated decisions being made in separate cases); and
- the ATO habitually or customarily accepts the practice, such as by deciding not to contradict or challenge the practice.

4. A general administrative practice is not established by mere silence by the Commissioner, a failure to issue a ruling or provide other public advice or guidance in relation to an issue, or delay in providing such advice or guidance where a taxpayer practice is under review.

Example 1 – General administrative practice established

5. Over the course of 10 years, the Commissioner issued 15 private rulings to different large and medium sized businesses concerning the tax implications of broadly similar arrangements.

6. The conclusions reached in respect of the arrangements have been constant over the 10 years, although over time there has been a change in the underlying reasoning for the position reached.

7. The consistent adoption of the same position over time is sufficient to establish a general administrative practice. This is the case even though there has been some change in the underlying basis for the practice.

Example 2 – No general administrative practice established

8. The Commissioner became aware that some taxpayers were adopting a particular approach to the operation of a provision that was introduced into the tax law in a 2007 amendment. Many tax practitioners advised their clients to adopt an interpretation of this provision that was arguable, but apparently contrary to the intent of the amendment.

9. A senior tax officer during a presentation at a national tax conference in 2008 indicated that the issue was under review within the ATO. The officer conceded though that the ATO would face 'considerable difficulty' in supporting a position consistent with the apparent intent of the amendment.

10. During 2008 and 2009, the ATO did not specifically target its audit resources at the issue, and accordingly the matter was raised in very few audits. Nevertheless, in two cases, amended assessments were raised that were consistent with the intent of the provision. The relevant taxpayers objected and the ATO subsequently settled the cases on a basis that was mostly favourable to the taxpayers.

11. In 2009, the ATO advised taxpayers that it intended to prepare a public ruling on this issue.

12. A draft ruling was released in 2010 that took a position consistent with the apparent intent of the provision, but inconsistent with the approach recommended by many advisors. The ruling was finalised in late 2010 and the final view was consistent with the view expressed in the draft.

13. In these circumstances, a general administrative practice is not established. Although the practice may have become relatively common amongst advisors, the ATO had not settled its position on the issue until release of its ruling. The expression of doubt by the senior tax officer about the position in the 2008 conference, the decision not to target audit resources at the issue, and the settlement of two objection cases do not in this case establish a general administrative practice by the Commissioner.

Date of effect

14. When the final Determination is issued, it is proposed to apply both before and after its date of issue. However, the Determination will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Determination (see paragraphs 75 to 77 of Taxation Ruling TR 2006/10).

Commissioner of Taxation
6 April 2011

Appendix 1 – Explanation

This Appendix is provided as information to help you understand how the Commissioner's preliminary view has been reached. It does not form part of the proposed binding public ruling.

Explanation

Administrative context

15. The Commissioner has published for public comment draft Law Administration Practice Statement PS LA 3434 Matters the Commissioner considers when determining whether the Australian Taxation Office (ATO) view of the law should only be applied prospectively. Draft PS LA 3434 requires tax officers, before applying any view of the law, to determine whether there are circumstances which would make it appropriate to only take action to apply the ATO view of the law on a prospective basis. In doing so, tax officers must have regard to the extent to which the ATO has facilitated or contributed to taxpayers adopting a different view of the law. Draft PS LA 3434 also recognises that the existence of a general administrative practice supporting taxpayers' views or industry practices is relevant to such a consideration.

16. Taxpayers should rarely need to rely on the interest and penalty protection that a general administrative practice provides, because in most cases the Commissioner will only apply a view of the law that is contrary to an existing general administrative practice prospectively.

17. This draft determination, in focussing on general administrative practice, is concerned with the **legal** protection provided to a taxpayer by the Commissioner's general practice. It should not be read as overriding the **administrative** considerations that tax officers must have regard to in determining whether the ATO view of the law should only be applied prospectively.

Statutory context

18. Unless otherwise stated, all legislative references in this ruling are to Schedule 1 to the *Taxation Administration Act 1953* (TAA).

19. The concept of a general administrative practice is relevant to the application of penalty provisions and interest charges. It is also relevant in determining when a public ruling comes into effect.

20. The protection a general administrative practice affords in relation to penalties is provided by subsection 284-224(1). This provision reduces a base penalty amount to the extent that it was caused by you or your agent treating a tax law as applying in a way that agreed with a general administrative practice under that law. There is also a reduction in a base penalty amount to the extent that the treatment of the tax law was agreed with advice given to the taxpayer or their agent by or on behalf of the Commissioner, or a statement in a publication approved in writing by the Commissioner. Accordingly, the law provides taxpayers protection for penalties where the taxpayer position accords with certain advice by the Commissioner or general administrative practices of the Commissioner.

21. The protection a general administrative practice affords in relation to general interest charge and shortfall interest charge is provided by subsection 361-5(1). This provides that you are not liable for the general interest charge or shortfall interest charge under a relevant provision to the extent that the charge would relate to a shortfall amount or a scheme shortfall amount that was caused by you reasonably relying in good faith on the Commissioner's general administrative practice. This rule does not apply to the general interest charge accruing more than 21 days after the Commissioner notifies you of the correct position.[1] As with penalties, there is also comparable protection afforded where a taxpayer reasonably relies in good faith on advice given to them or their agent by the Commissioner or relies in a statement in a publication approved in writing by the Commissioner unless the advice, or the statement is labelled as non-binding.

22. In addition, the existence of a general administrative practice may impact on the date of effect of a public ruling.[2] The Commissioner has outlined his approach to considering the prospective application of views, including in the context of public rulings, in draft PS LA 3434.

Meaning of 'general administrative practice'

23. The term 'general administrative practice' is not defined for the purposes of Schedule 1 of the TAA. Accordingly, it takes its ordinary meaning, as a practice adopted generally as a matter of administration.

24. Whether a general administrative practice exists is a question that must be determined on a case by case basis, having regard to all the facts and circumstances at the relevant time.

25. The Explanatory Memorandum to Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005 (the Explanatory Memorandum), which introduced sections 358-10 and 361-5, provides the following explanation:

> 3.130 General administrative practice will usually be established by the ATO having communicated consistently to a wide range of taxpayers on a particular issue. A general administrative practice is usually adopted for the efficient administration of the taxation system and will often be documented in a Law Administration Practice Statement, General Administration Law Administration Practice Statement, an ATO policy document (eg, the *ATO Receivables Policy*), or other precedential material (such as an ATO Interpretive Decision). An example is *Law Administration Practice Statement PS LA 2003/8* which sets out the rules developed to lessen the cost of accounting for low cost assets for taxpayers carrying on a business. Where a draft public ruling represents the Commissioner's only public statement on an issue, the draft ruling will usually represent the Commissioner's general administrative practice.
>
> 3.131 A general administrative practice is not established merely because there are several similar private rulings on a matter, although evidence of a significant number of uncontradicted private rulings on a matter over time will tend to support such a conclusion…

[1] Subsection 361-5(2).
[2] Section 358-10.

26. Accordingly, it is the Commissioner's course of conduct, rather than any particular document, that is relevant in determining whether there is a general administrative practice. Nevertheless, publications and other documents produced by the Commissioner may provide evidence of a general administrative practice. Similarly, frequent advice to different taxpayers which consistently adopts a particular practice will tend to support a conclusion of a general administrative practice. These matters are discussed in more detail at paragraphs 35 to 50 of this draft Determination.

Relevance of practices adopted by taxpayers

27. Sections 358-10 and 361-5 refer to the Commissioner's general administrative practice. Accordingly, it is clear that it is the practice of the Commissioner, rather than taxpayers that is relevant.

28. Section 284-224 of Schedule 1 of the TAA does not refer specifically to the Commissioner, but rather to a 'general administrative practice under that law.' Nevertheless, as the word 'administrative' indicates, it is the practice of the Commissioner as the administrator that is relevant to establishing a general administrative practice. This is consistent with *Prebble v. FCT* [2002] FCA 1434, where Cooper J considered a similarly worded provision in section 226V of the *Income Tax Assessment Act 1936*.[3] His Honour focussed on the prevailing practice of the Commissioner at the relevant point in time.

29. In practical terms, it may not always be readily apparent to taxpayers and their advisors whether practices that they have developed have also been adopted by the Commissioner. Where there is any doubt, taxpayers are strongly encouraged to approach the ATO for clarification, for example by applying for a private ruling, class ruling or product ruling.

30. A general administrative practice may also be established through the considered acceptance by the Commissioner of a consistent approach by taxpayers in applying particular provisions of the tax law. However, this must be a practice which the Commissioner has knowingly accepted in the course of administering the tax law.

31. This is consistent with the Explanatory Memorandum, which states at paragraph 3.131:

> [A] bare failure by the Commissioner to take some action within his power does not establish a general administrative practice, but a repeated failure to exercise that power after the issue is drawn to the Commissioner's attention will tend to do so. Again, mere silence or failure to issue a public ruling on a matter does not constitute general administrative practice, but it will be established where, following identification of an issue, ATO officers have accepted it as the basis on which taxpayers should treat the issue in a range of situations

[3] *Prebble v FCT* [2002] FCA 1434 at [51].

32. In the context of self assessment, merely issuing assessments consistent with the information returned by taxpayers would not by itself amount to acceptance of any taxpayer practice. Nor would the failure to identify a matter in a particular audit or even in a few audits of different taxpayers establish a general administrative practice. Isolated decisions do not amount to a general administrative practice. In contrast, a general administrative practice may be established where there is evidence that the issue had been brought to the attention of senior ATO staff and of the ATO having decided to adopt a general approach of accepting the practice, or at least choosing not to challenge or otherwise disturb it. Similarly, a general administrative practice would be established if a project was conducted within the ATO that gave consideration to the practice, and a decision was made that the practice should be accepted.

33. The mere elapsing of time from the passage of legislation until the first expression of the Commissioner's view on that law will not itself amount to the acceptance of whatever business practices that might have developed in the interim. Similarly, delay in the ATO finalising its view of a particular provision, for example whilst preparing a public ruling or seeking external advice, does not in itself constitute acceptance of practices that may have developed in the interim.

34. Equally, however, the Commissioner could not simply avoid responding to relevant matters drawn to the ATO's attention and then argue that the practice is therefore not accepted. If, for example, a practice was drawn to the attention of the ATO's most senior employees on successive occasions with the purpose of eliciting a response from the Commissioner as to his/her acceptance of the practice, the Commissioner might be found to have accepted the practice if he/she failed to respond in any way but continued to administer the relevant tax laws consistently with the relevant taxpayer practice.

Evidence of a general administrative practice

35. Whilst the existence of a general administrative practice is not governed by the existence of a statement by the Commissioner in a document, documentation is likely to be important in establishing the existence of a general administrative practice.

36. For the purposes of one of the relevant provisions, it is necessary to establish the existence of a general administrative practice at a particular point in time. Establishing the existence of a practice at an earlier or later point is not determinative. For example, in determining whether a penalty for a false or misleading statement applies, the time at which the general administrative practice is relevant is the time the false or misleading statement is made. In *Prebble v. FCT* [2002] FCA 1434, Cooper J found that whilst a general administrative practice may have existed at some point, it had ceased by the time of the relevant statement.

37. There is no single factor which is uniformly determinative of the existence of a general administrative practice. What is required is a weighing of factors relevant to a particular case. Evidence of the following, whilst not necessarily decisive, may provide support for the existence of the relevant practice:

- Statements in ATO publications, including practice statements, draft rulings, and instructions for completing returns.
- Advice the Commissioner has provided to industry associations or professional bodies, either in the form or correspondence, or in the context of a relevant forum.
- A body of consistent private rulings.
- A body of consistent audit decisions or objection decisions.

38. On the other hand, where the documents, rulings and decisions referred to in paragraph 37 of this draft Determination contradict the practice, or are inconsistent in whether they adopt the practice, this may weigh against the conclusion that there is a general administrative practice in the particular case.

39. The relevance of some of the documents, rulings and decisions referred to in paragraph 37 of this draft Determination are considered in more detail in paragraphs 40 to 51 of this draft Determination.

Assessments

40. In a self-assessment system, the Commissioner's acceptance of a return which gives rise to an assessment does not provide any support for a general administrative practice. However, there may be cases in which the return form itself, or the instructions for completing the return, indicate the Commissioner's acceptance of a particular practice.

Practice statements

41. Publication of a Law Administration Practice Statement (LAPS) in itself will not constitute or establish a general administrative practice. However, it might normally be expected that subsequent conduct will be consistent with the practice described in the LAPS and it would then be this conduct which would establish the general administrative practice. LAPS are publications approved in writing by the Commissioner, so they may nonetheless provide comparable protection from interest and penalties, even where they do not establish a general administrative practice.

Private rulings

42. As a general principle, a private ruling cannot give rise to a general administrative practice as it is provided to a specific taxpayer to deal with their particular facts and circumstances. If a different taxpayer is seeking some certainty regarding the tax consequences in their case, the best course of action would be to seek a private ruling dealing with their own circumstances.

43. The same principle applies to the ATO's Register of Private Binding Rulings which consists of edited versions of private rulings, especially as the editing may result in an incomplete or ambiguous representation of material facts in the circumstances being ruled on. The Register carries a disclaimer to the effect that the contents of the Register cannot be relied on and the reasons why this is the case.

44. However, evidence of a significant number of uncontradicted private rulings on a matter over an extended period may tend to support a conclusion that a general administrative practice exists. In this context, the following points should be noted:

- What amounts to a significant number will depend on the nature of the issue, for example, how many people are affected by it, and the nature of the industry, for example, how many participants there are.
- A body of private rulings will be more likely to establish a general administrative practice if they have been issued over an extended period of time, as this will tend to show that the practice is general, in that the ATO as a whole, rather than an individual officer, has considered the issue and accepted the approach taken.

- A private ruling can only be regarded as dealing with a particular technical issue where that matter has been considered and ruled upon in the private ruling. Thus, if the factual circumstances considered might also give rise to another question which was not asked and not ruled upon, then the private ruling says nothing about the ATO's view on that other question.

Audit decisions, objection decisions and settlements

45. The principles described in paragraphs 42 to 44 of this draft Determination in respect of private rulings also apply to other decisions such as in respect of audit cases and objections by taxpayers, including settlements. That is, a decision in a particular case would not give rise to a general administrative practice. Each case is based on its specific circumstances. Nevertheless, a number of decisions which take a consistent approach may evidence a general administrative practice.

46. When considering the issues to be examined in the course of an audit, some matters may be left out of consideration as a result of a risk assessment so that the ATO can focus its resources on the highest risk issues. Leaving such issues out of an audit would not give rise to a general administrative practice in respect of those issues.

47. A settlement involves an agreement or arrangement between parties to finalise matters in dispute. Settlements usually involve the need to balance competing considerations. As such, it would not be possible to infer a general administrative practice merely from the details of a particular settlement.

Speeches, comments at forums by tax officers and correspondence with industry associations or professional bodies

48. Speeches and comments made at forums (including the minutes of these forums) cannot in themselves amount to a practice, and therefore a general administrative practice, any more than a published document can. However, such comments and speeches might provide some evidence of a general administrative practice. For example, where an issue has been clearly raised at an external forum, comments by tax officers might indicate an acceptance of the practice.

49. The extent to which such comments and speeches might reflect a general administrative practice will depend on the specific facts. For example, where the Commissioner or a Second Commissioner makes a statement in a speech or forum minutes that a particular way of dealing with an issue is accepted by the Commissioner, this would tend to show that a general administrative practice exists. On the other hand, 'off the cuff' comments or impromptu answers to questions without notice at such forums or following a speech would merely represent passing observations rather than an underlying general administrative practice.

50. Correspondence with industry associations or professional bodies in which the ATO supports a particular practice may provide evidence of a general administrative practice. To the extent that the correspondence expressly indicates how members of the relevant organisation should deal with a particular matter, it may be more likely to indicate a general practice than an individual private ruling.

51. On the other hand, preliminary views expressed in the course of consultation on a matter, for example, prior to publishing a draft ruling, will often reflect potential views under consideration rather than an existing practice. The expression by the ATO of a preliminary view about an issue does not in itself indicate a general administrative practice.

Appendix 3 – Your comments

52. You are invited to comment on this draft Determination. Please forward your comments to the contact officer by the due date.

53. A compendium of comments is also prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- publish on the ATO website at www.ato.gov.au

Please advise if you do not want your comments included in the edited version of the compendium.

Due date:	**6 May 2011**
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References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Subject references:

- general interest charge
- penalties
- private rulings
- public rulings
- shortfall interest charge

Legislative references:

- ITAA 1936 226V
- TAA 1953 Sch 1
- TAA 1953 Sch 1 284-224
- TAA 1953 Sch 1 284-224(1)
- TAA 1953 Sch 1 358-10
- TAA 1953 Sch 1 361-5
- TAA 1953 .Sch 1 361-5(1)
- TAA 1953 Sch 1 361-5(2)

Case references:

- Prebble v. FCT [2002] FCA 1434

Other references:

- Explanatory Memorandum to Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005
- Draft Law Administration Practice Statement PS LA 3434

ATO references

NO:	1-2MZY28F
ISSN:	1038-8982
ATOlaw topic:	Income Tax ~~ Administration ~~ penalty tax and general interest charge Income Tax ~~ Administration ~~ private binding rulings Income Tax ~~ Administration ~~ public rulings