TR 2006/10 - Income tax, fringe benefits tax and product grants and benefits: Public Rulings

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Taxation Ruling

Income tax, fringe benefits tax and product grants and benefits: Public Rulings

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This publication provides you with the following level of protection:

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant 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.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (or in a way that is more favourable for you if we are satisfied that the ruling is incorrect and disadvantages you, and we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

What this Ruling is about

1. This Ruling outlines the system of public rulings following the enactment of the *Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005*. In respect of public rulings, that Act inserted new Divisions 357 (common rules) and 358 (public rulings) into Schedule 1 to the *Taxation Administration Act 1953* (TAA), the provisions of which are referred to in this Ruling.

2. The new Divisions implement the Government's response to the recommendations made in the *Report on Aspects of Income Tax Self Assessment* (ROSA Report). This Ruling considers:

(i) what constitutes a public ruling;

(ii) the types of public rulings the Tax Office publishes;

(iii) the status and binding effect of public rulings;

(iv) the status and binding effect of formal rulings which are not public rulings;

(v) the relevance of public rulings to whether a taxpayer has a reasonably arguable position for the purposes of certain penalty provisions;

(vi) the withdrawal of public rulings;

(vii) the status of public rulings following a rewrite of the law;

(viii) the effect of inconsistent rulings; and

(ix) the date of effect of public rulings.

Previous Rulings

3. Taxation Ruling TR 92/1, Taxation Ruling TR 92/20, Taxation Ruling TR 97/16 and Product Grants and Benefits Ruling PGBR 2003/1 were withdrawn on and from 5 April 2006. To the extent that the Commissioner's views in those Rulings apply in respect of the new provisions, they have been incorporated into this Ruling.

Ruling

What constitutes a public ruling?

4. A public ruling is written binding advice, published by the Commissioner for the information of entities generally, on the way in which, in the Commissioner's opinion, a relevant provision[1] applies or would apply to entities generally, or a class of entities. A public ruling will state that it is a public ruling.

5. Under subsection 358-5(2) of Schedule 1 to the TAA, a public ruling may deal with any matter involved in the application of a relevant provision. Such matters may include matters relating to ultimate conclusions of fact.

6. In addition to broad statements that anyone may rely on, the Commissioner may tailor public rulings to a particular class of entities or limit the scope of the ruling to a particular transaction entered into by a number of entities (such as class rulings or product rulings[2]). A class of entities may be defined by reference to certain characteristics (for example, being an employee or shareholder of a particular company, or being a member of a professional association). A class of entities can also be defined by reference to a particular behavioural characteristic of the members of that class, such as whether they are acting reasonably and in good faith. The following example (taken from the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005) demonstrates how a public ruling may apply only to certain entities who are acting reasonably and in good faith.

[1] See paragraph 11 of this Ruling for more information.
[2] See paragraph 22 of this Ruling for more information.

Example

7. The Commissioner issues an information booklet which is stated to be a public ruling and to apply to entities who are 'non-business individual self-preparers who have acted in good faith and reasonably relied on the ruling'. This public ruling is for an identifiable class of entities even though the booklet itself contains information relevant to a broader class. Kerry and Simon are non-business self-preparers. Kerry, in preparing her own tax return acts in good faith and reasonably relies on a statement in the public ruling which misstates the law (although she is unaware that it does so). However, Simon unreasonably attempts to exploit a typographical error in the booklet which is obvious to him. Kerry can rely on the ruling but Simon cannot, as Simon does not fall within the identifiable class of entities to which the ruling applies.[3]

8. Note that in the above example Simon had entered into the scheme[4] to which the public ruling applied before the correction of the typographical error was made. Therefore, if the ruling had applied to him, the uncorrected version of the booklet would have continued to apply to him (see paragraph 46 of this Ruling). However, because he acts unreasonably, Simon does not fall within the identifiable class of entities to which the ruling applies, and the fact that he had already entered into the scheme is irrelevant to his ability to rely on the ruling.

9. The Commissioner may also declare that advice provided generally in documents such as *TaxPack* or *E-tax* is a public ruling for a specific class of taxpayers only, even though the information contained in the relevant publication may be relevant to a broader class.[5]

10. A single document labelled a public ruling may consist of a number of separate rulings (that is, a number of opinions on how relevant provisions apply). Generally a ruling will identify the relevant provisions. However, in certain publications declared to be public rulings (for example, *TaxPack*), this is not practical. If the relevant provision is not expressly identified, it is sufficient if it can be identified by necessary implication. Furthermore, the Commissioner has the ability to make only part of a document a public ruling. Therefore, for example, a 'TR series' ruling (see paragraph 22 of this Ruling) contains a section labelled as a public ruling, and usually also contains explanatory material which does not form part of the binding public ruling but contains information to help the reader understand how the Commissioner's view has been reached.[6]

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[3] This is based on Example 3.2 in paragraph 3.51 of the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005.
[4] See paragraph 46 of this Ruling for an explanation of what a 'scheme' is.
[5] See paragraph 3.51 of the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005.
[6] See paragraph 39 of this Ruling and the rewritten Law Administration Practice Statement PS LA 2001/4 for more information.

11. Provisions that are relevant to rulings are defined in section 357-55 of Schedule 1 to the TAA. Relevant provisions are provisions of Acts and regulations administered by the Commissioner that are about any of the following:

- income tax;
- Medicare levy;
- fringe benefits tax;
- franking tax (that is, franking deficit tax, over-franking tax and venture capital deficit tax);
- withholding taxes (including non-resident withholding taxes and mining withholding tax);
- petroleum resource rent tax;
- the administration or collection of the above taxes;
- product grants or benefits mentioned in section 8 of the *Product Grants and Benefits Administration Act 2000* (including energy grants, cleaner fuel grants and product stewardship (oil) benefits) or the administration or payment of the product grants and benefits, and
- net fuel amount, or the administration, collection or payment of a net fuel amount.

12. Only provisions of Acts and regulations administered by the Commissioner are directly covered by section 357-55 of Schedule 1 to the TAA. Therefore, for example, the Commissioner cannot directly rule on trust law or the common law relating to the creation of a new trust. Such matters are outside the scope of the relevant provisions on which the Commissioner can directly rule.[7] However, the Commissioner may issue a public ruling on, say, the capital gains tax consequences of the formation of a new trust. In making this ruling, the Commissioner might form a view that a new trust has or has not been created at common law for the purpose of coming to a view on the application of the capital gains tax provisions.[8] In such a case, that ruling would be binding in relation to the application of the capital gains tax provisions, even though it is premised on a particular view about whether a new trust has been formed at common law (which might even turn out to be incorrect). However, the view expressed about whether a new trust has been created at common law is not, by itself, a ruling. Therefore it would not be binding on the Commissioner in a context outside of the application of the capital gains tax provisions to the particular scheme addressed by the public ruling and the class of entities, if any, it is expressed to apply to.[9]

[7] Subsection 358-5(1) of Schedule 1 to the TAA.
[8] Subsection 358-5(2) of Schedule 1 to the TAA.
[9] Subsection 357-60(1) of Schedule 1 to the TAA.

13. The intention of the amendments implementing the ROSA Report is to enable the Commissioner to make rulings on all the matters and circumstances in which rulings have previously been made (for example, the extent of liability to income tax[10], or the way in which a discretion of the Commissioner would be exercised in determining that liability[11]). In addition, the Commissioner is authorised to make a public ruling to cover any aspect of the tax or entitlement covered by a relevant provision, including the collection and recovery of the tax, and its administration, or the administration or payment of a relevant grant or benefit.[12]

14. The intention to allow rulings to be given in a very wide range of circumstances has been reflected in the use of the word 'about' in section 357-55 of Schedule 1 to the TAA, which has a very broad meaning. The word 'about' is not defined in the ITAA 1936 or ITAA 1997 but takes its ordinary meaning of 'concerning', 'connected with', 'on the subject of' or 'relating to.'[13]

15. Therefore, a provision under which the extent of liability or entitlement to the listed taxes and entitlements is worked out is a provision 'about' them, as are provisions that are sufficiently relevant, or a necessary pre-requisite, to working out the liability or entitlement.

16. Provisions dealing with penalties for false or misleading statements, late payment of income tax, or late lodgment of income tax returns, are examples of provisions about the administration or collection of income tax. The same applies to provisions dealing with shortfall interest charge and general interest charge. Similarly, provisions dealing with, for example, franking credits and debits are about the administration or collection of franking tax.

17. A ruling will only be a public ruling for the purposes of the public rulings provisions if it:

- is published;[14] and
- states that it is a public ruling.[15]

18. The Commissioner publishes public rulings by placing them on the Tax Office website (http://law.ato.gov.au).

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[10] Former section 14ZAAE of TAA.
[11] Former section 14ZAAD of TAA.
[12] Paragraph 3.22 of the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005.
[13] The Macquarie Dictionary, 2001, rev. 3rd edn, The Macquarie Library Pty Ltd, NSW and The Australian Oxford Dictionary, 1999, Oxford University Press, Melbourne.
[14] Paragraph 358-5(3)(a) of Schedule 1 to the TAA.
[15] Paragraph 358-5(3)(b) of Schedule 1 to the TAA.

19. The Commissioner must also publish a notice of the making of a public ruling in the *Gazette.*[16] However, if the Commissioner issues a public ruling but fails to publish a notice in the *Gazette*, an entity to whom it applies may nevertheless rely on the ruling and it will bind the Commissioner.[17]

20. The conclusion in paragraph 19 of this Ruling follows from section 357-90 of Schedule 1 to the TAA, which deals with formal defects. That section provides that the validity of a ruling is not affected merely by the fact that a provision relating to the form of the ruling or the procedure for making it has not been complied with. The purpose of section 357-90 is illustrated by the 'failure to gazette' example in paragraph 3.35 of the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005. It prevents the Commissioner asserting that a document clearly intended to be a public ruling is not in fact a public ruling merely because of a procedural or formal defect.

21. A public ruling in force immediately before 1 January 2006 under former Part IVAAA of the TAA is treated as if it were a public ruling under Division 358 of Schedule 1 to the TAA, with effect from the day it was originally made.[18] Therefore the level of protection applicable to a ruling under the former Part IVAAA of the TAA will continue to apply to that ruling through Division 358 of Schedule 1 to the TAA. Where inconsistencies arise between two rulings that were originally made before 1 January 2006, the rules set out in former sections 170BC to 170BDC and 170BF of the ITAA 1936 will apply. For more information about inconsistencies refer to paragraphs 52 to 58 of this Ruling.

The types of rulings the Tax Office publishes

Public rulings issued in the formal rulings series

22. The Tax Office makes known its views about the application of relevant provisions in a number of ways. For example, the Tax Office issues formal rulings, grouped in different series, on the application of relevant provisions at a general level, in the sense that they do not address particular entity's affairs. These formal rulings include the series which, for the most part, meet the criteria for binding public rulings, namely:

- Taxation Rulings series (TR series);
- Taxation Determination series (TD series);
- Class Rulings series (CR series);
- Product Rulings series (PR series); and
- Product Grants and Benefits Rulings series (PGBR series).

[16] Subsection 358-5(4) of Schedule 1 to the TAA.
[17] See paragraph 3.35 of the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005.
[18] Item 29, Part 3 of Schedule 2 to the *Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005.*

23. In addition, there are other formal rulings issued by the Tax Office which do not meet the criteria for binding public rulings. Principally, these are the Income Tax series (IT series) of rulings (that is, formal rulings issued before 1 July 1992) and most of the Miscellaneous Taxation series (MT series) issued prior to 1 January 2006. These formal rulings are not public rulings for the purposes of the public rulings provisions. However, the Commissioner considers them to be administratively binding on the Tax Office.

Other types of publications that may be made into public rulings

24. The Tax Office also expresses its view about relevant provisions through other publications. These include:

- *TaxPack* and *E-tax*;
- return form guides;
- information booklets;
- media releases;
- speeches of senior officers; and
- practice statements.[19]

25. To the extent that these publications express the Tax Office's view about how a relevant provision applies to entities generally or a group or class of entities, they can be given the status of a public ruling.

26. However, to be a public ruling, the relevant publication must state that it is a public ruling for the purposes of the public rulings provisions (see paragraph 17 of this Ruling for more information). Therefore, a Tax Office publication will not be a public ruling unless it is stated to be one.

27. Only those parts of the publication which express the Tax Office's view about how a relevant provision applies will be given the status of a public ruling. Any other part will not be a public ruling.

28. For example, a publication declared to be a public ruling could set out the Tax Office's view as to how the debt and equity rules in Division 974 of the ITAA 1997 apply to companies that issue a particular type of financial instrument, and also outline the Tax Office's plans to audit some companies that have issued those instruments. The part of the publication which states the Tax Office's view as to how Division 974 of the ITAA 1997 applies would be a public ruling, but that part dealing with the Tax Office's audit strategy in selecting companies that will be subject to an audit would not be a public ruling because it does not set out the Commissioner's opinion on how a relevant provision applies or would apply to entities.

[19] See PSLA 1998/1 for information about the purpose and content of practice statements.

29. Where no part of the publication concerns the way in which a 'relevant provision' applies to entities generally or class of entities, no part of it can be a public ruling.

The status and binding effect of public rulings

30. A public ruling binds the Commissioner if the public ruling applies to the entity and the entity relies on it. An entity relies on a public ruling by acting (or omitting to act) in accordance with the public ruling. An example of demonstrating reliance by omitting to act is omitting to lodge a tax return in the circumstances in which a public ruling states that a return need not be lodged.[20]

31. An entity does not need to know of the existence of a public ruling in order to rely on it. An entity may rely on a public ruling at any time unless they are prevented by a time limit imposed by a taxation law, such as an entity's period of review of their assessment. Furthermore, an entity need not rely on a public ruling at the first opportunity; rather the opportunity must be taken before being prevented from doing so by a time limit imposed by a taxation law.[21]

32. A public ruling applies to an entity if the entity is a member of the class to whom the public ruling applies and the entity's circumstances come within the circumstances addressed in the public ruling. A public ruling applies for the specified period, so long as the law to which it relates remains in force. As discussed at paragraphs 49 to 51 of this Ruling, where the law is re-enacted or remade, the public ruling continues to apply. If the law is repealed or amended to have a different effect, the public ruling ceases to apply.[22]

33. The reason why a public ruling ceases to apply if the law is amended to have a different effect is because a public ruling on the way the Commissioner considers a relevant provision applies or would apply according to the state of the law as it then exists says nothing about how a materially altered version of that provision applies. This is the case irrespective of whether the amendment is to the provision itself or to another provision which effects a change to the operation of the original provision (see paragraph 35 of this Ruling for an example of this).

34. That is not to say that any amendment to (or affecting) a provision would render a ruling on that provision inoperative. It is only if the amendment produces an effect which is different from the effect of the provision prior to the amendment that the public ruling ceases to apply (and therefore ceases to bind the Commissioner). If the public ruling given under the original provision would have been the same if the amendment had been made before the public ruling is given then the public ruling is still applicable. If the public ruling ceases to apply because of the amendment then the public ruling cannot be relied on.

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[20] See subsection 357-60(1) of the ITAA 1997.
[21] See subsection 357-60(2) of the ITAA 1997.
[22] See note 2 in subsection 357-60(1) of Schedule 1 to the TAA.

35. This point can be illustrated by way of the following example. Subsection 8-1(1) of the ITAA 1997 provides a deduction for certain losses or outgoings. However, the operation of subsection 8-1(1) is directly affected by Division 26 of the ITAA 1997, which sets out some amounts which cannot be deducted. If a public ruling is made about how the Commissioner considers subsection 8-1(1) applies to a particular type of outgoing, and an amendment were later made to Division 26 denying a deduction for such outgoings, then the public ruling can no longer apply. This is the case even though the wording of subsection 8-1(1) has not itself been changed (rather, the effect of the provision has been changed or amended by the amendment to Division 26). However, if the amendment to Division 26 is irrelevant to the issues addressed by the ruling, the ruling would still apply and would still bind the Commissioner. This is the case even if the ruling were later shown to represent an incorrect interpretation of the words of subsection 8-1(1).

36. As mentioned in paragraph 30 of this Ruling, a public ruling will bind the Commissioner if an entity acts or omits to act in accordance with the public ruling. The effect of a public ruling binding the Commissioner is that the Commissioner will not apply the provision in a way that is inconsistent with the public ruling. Therefore if, for example, a ruling sets out the circumstances which would ordinarily lead to the exercise of the Commissioner's discretion in relation to a relevant provision, the Commissioner will exercise the discretion in a way that is consistent with the ruling (including by giving appropriate weight to the factors listed in the ruling as being relevant or significant). However, the ruling itself would not constitute the exercise of the discretion, because that requires a separate act by the Commissioner having regard to all the facts and circumstances of the particular case. A public ruling which applies in relation to a particular scheme will not bind the Commissioner if the scheme is not implemented in the way set out in the public ruling.

37. Where an entity relies on a public ruling that applies to them, the Commissioner may nevertheless apply a relevant provision of the law as if the entity had not relied on the public ruling, if doing so would produce a more favourable result for the entity. The Commissioner has power to do this provided there is not a relevant time limit in the law which prevents it. However, the Commissioner is not obliged to consider whether a more favourable outcome is available for the entity.[23] Rather, the Commissioner may accept an entity's self-assessment without further investigation.

[23] Section 357-70 of Schedule 1 to the TAA.

38. Because the Commissioner may apply an interpretation of the law that is more favourable to the entity, a public ruling binds the Commissioner in the following ways if the entity chooses to rely on it:

- To the extent that a public ruling determines a tax liability, amount or an entitlement (or whether there is a tax liability, amount or an entitlement) under a relevant provision, the liability, amount or entitlement must be determined in accordance with the public ruling. However, if the Commissioner concludes that the public ruling was wrong, the Commissioner may adopt the correct position if it is more favourable than the public ruling.
- To the extent that a public ruling expresses the Commissioner's opinion on an ultimate conclusion of fact for the purposes of a relevant provision (such as whether the entity is a resident), the Commissioner is bound to follow his or her expressed opinion, or may adopt the correct conclusion if that is more favourable.
- To the extent that a public ruling deals with matters of administration, procedure, collection or any other matter involved in the application of a relevant provision, the Commissioner must not act inconsistently with the public ruling to the entity's detriment. However, the Commissioner may adopt an interpretation that is more favourable where that is the correct position.[24]

The status and binding effect of formal rulings which are not public rulings

39. To the extent that formal rulings or parts thereof are not public rulings,[25] they are not capable of legally binding the Commissioner as described in paragraphs 30 to 38 of this Ruling. However, the policy of the Tax Office is to stand by what is said in a formal ruling and to depart from a formal ruling only where there are good and substantial reasons to do so.[26]

[24] See paragraph 3.30 of the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005.
[25] See paragraphs 22 and 23 of this Ruling.
[26] See the rewritten Law Administration Practice Statement PS LA 2001/4 for more information.

The relevance of public rulings to whether a taxpayer has a reasonably arguable position for the purposes of certain penalty provisions

40. Under the penalty provisions in Division 284 of Schedule 1 to the TAA, a taxpayer may be liable to pay a shortfall penalty. The level of penalty depends, in part, on whether the taxpayer or their agent treats a relevant provision as applying to a matter or identical matters in a particular way that was not reasonably arguable.

41. Section 284-15 of Schedule 1 to the TAA provides that in determining whether a taxpayer has taken a reasonably arguable position, for the purposes of the penalty provisions, it is necessary to have regard to the 'relevant authorities'. A 'public ruling' is included as one of a number of relevant authorities for this purpose,[27] none of which alone is necessarily conclusive.

42. The TAA provides no guidance on the status of formal rulings which are not public rulings for the purposes of determining if a taxpayer has taken a reasonably arguable position. However, the Explanatory Memorandum to the Taxation Laws Amendment (Self Assessment) Bill 1992 states that 'Taxation Rulings issued by the Commissioner prior to the new arrangements introduced by this Bill may also be considered'.[28] The Tax Office has long accepted this approach and continues to do so.

Withdrawal of a public ruling

43. Where a public ruling does not specify the time at which it ceases to apply, the ruling will apply until it is withdrawn.[29]

44. The Commissioner may withdraw a public ruling, either wholly or to an extent, by publishing a notice of the withdrawal in the *Gazette.*[30] If the Commissioner fails to publish a notice of withdrawal in the *Gazette*, the public ruling continues to apply until it is effectively withdrawn. In other words, all formalities must be complied with in order for the withdrawal of a public ruling to be effective.

45. The withdrawal takes effect from the time specified in the notice. That time must not be before the time the notice is published.[31]

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[27] Paragraph 284-15(3)(d) of Schedule 1 to the TAA.
[28] This Explanatory Memorandum refers to the old provision of section 222C of the ITAA 1936. Section 222C of the ITAA 1936 was replaced with an equivalent provision in section 284-15 of Schedule 1 to the TAA.
[29] Section 358-15 of Schedule 1 to the TAA.
[30] Subsections 358-20(1) and 358-20(4) of Schedule 1 to the TAA.
[31] Subsection 358-20(2) of Schedule 1 to the TAA.

46. To the extent that a public ruling is withdrawn, it continues to apply to schemes to which it applied that had begun to be carried out before the withdrawal, but does not apply to schemes that begin to be carried out after the withdrawal.[32] A scheme is taken to have begun if a contract requiring the scheme has been entered into.[33] 'Scheme' is widely defined to mean 'any arrangement', or 'any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise'.[34] An 'arrangement' is defined to mean any arrangement, agreement, understanding, promise or undertaking, whether express or implied, and whether or not enforceable (or intended to be enforceable) by legal proceedings.[35]

47. The Commissioner has the flexibility to defer the withdrawal of a public ruling where it would be inappropriate for a public ruling to be withdrawn on short notice.[36]

48. As such, in appropriate circumstances, the Commissioner may leave a public ruling in force even though there are doubts about the correctness of the public ruling. When withdrawing a public ruling, the Commissioner is entitled to have regard to the consequences for entities of a withdrawal with immediate effect and may therefore delay the date of withdrawal to minimise the consequences. However, a delayed date for withdrawal would not generally be appropriate where rulings address tax avoidance arrangements, or in situations where the former public ruling is being exploited.

The status of public rulings following a rewrite of the law

49. If the Commissioner has made a public ruling about a relevant provision and that provision is re-enacted or remade, the public ruling is taken to be about the re-enacted or remade provision, insofar as the new law expresses the same ideas as the old law.[37] However, if the law is substantively changed, the part of the public ruling dealing with the changed law ceases to apply.

50. Therefore, for schemes commencing on or after the date of effect of the new law, entities can continue to rely on existing legally binding rulings which deal with the old law if the old law expresses the same ideas as the new law. If the old law has been replaced by a new law which does not express the same ideas, then the part of the public ruling on that old law does not apply in relation to the new law. That is, that part of the public ruling will not apply to schemes entered into on or after, or extending beyond, the date of effect of the new law.

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[32] Subsection 358-20(3) of Schedule 1 to the TAA.
[33] Subsection 357-80 of Schedule 1 to the TAA.
[34] See subsection 995-1(1) of the ITAA 1997.
[35] See Subsection 995-1(1) of the ITAA 1997.
[36] Section 358-20(2) of Schedule 1 to the TAA.
[37] Section 357-85 of Schedule 1 to the TAA.

51. In deciding whether the new law expresses the same ideas as the old law, entities can normally assume there has been no change in those ideas unless announced otherwise. Ways in which a change may be announced include:

- the explanatory memorandum, second reading speech or other relevant extrinsic material relating to a Bill which is re-enacting or remaking the particular provisions;
- a tribunal or court decision (not under appeal) which makes it clear that there has been a change in ideas;
- a public announcement by the Tax Office that there has been a change in ideas – for example, by way of a Taxation Ruling, Taxation Determination, press release or other Tax Office publication.

The effect of inconsistent rulings

52. Where there are inconsistent rulings that both apply to the entity, section 357-75 of Schedule 1 to the TAA sets out rules for determining which ruling may be relied upon, to the extent of the inconsistency. Rulings are not inconsistent to the extent to which they apply to different schemes or to different time periods (such as different income years).

53. As a general principle, an entity may always choose to rely on a public ruling that applies to them and may choose to rely on a private or oral ruling that specifically addresses their circumstances (assuming it still applies to them and has not, for example, been superseded by a later ruling: see paragraph 55 of this Ruling). So, if there is an inconsistency between a later applicable private or oral ruling and an earlier public ruling, the entity may choose which ruling they wish to rely on. Similarly if there is an inconsistency between two public rulings (including this Ruling and, say, one of those rulings mentioned in paragraph 3 of this Ruling), each of which applies to a particular entity, the entity may rely on either ruling.

54. However there are special rules which limit the ability to rely on a private or oral ruling if it is inconsistent in some respect with a later public ruling.

55. If the private or oral ruling is inconsistent with a later public ruling, the earlier private or oral ruling is taken not to have been made if, when the public ruling is made, the following two conditions are met:

- the income year or other period to which the rulings relate has not begun; and
- the scheme to which the rulings relate has not begun to be carried out.

56. This allows the correction of an erroneous private or oral ruling by the issue of a later public ruling, but only where the entity has not already entered into the scheme and the relevant income year or accounting period has not commenced. If the entity has already entered into the scheme, or the relevant income year or accounting period has commenced, they may rely on either ruling (see paragraph 53 of this Ruling)

57. Where there are three or more inconsistent rulings, the rules in paragraphs 55 and 56 of this Ruling should be applied to each combination of two rulings in the order in which they are made, to determine whether any of the rulings are taken not to have been made, and then to determine which of the remaining rulings the entity can rely on.

58. These rules to resolve inconsistencies between rulings do not apply where both the inconsistent rulings were originally made before 1 January 2006. The rules set out in former sections 170BC to 170BDC and 170BF of the ITAA 1936 apply in such a situation.[38]

Date of effect of public rulings

59. A public ruling binds the Commissioner from the time the public ruling is published, or from the earlier or later time as specified in the ruling.[39]

General guidelines

60. The 'date of effect' guidelines provided in paragraphs 61 to 69 of this Ruling are not intended to be rigid rules that must be adhered to without due regard to the effect on the revenue or the extent to which entities might be disadvantaged. Rather, the guidelines provide a guide as to the appropriate date of effect provision that might generally be adopted to ensure consistency in the use of date of effect provisions in public rulings.

61. At all times these guidelines need to be administered in a commonsense manner in light of the particular issues dealt with in a public ruling.

62. It is recognised that there may be situations where, for the proper administration of the relevant provisions, it will be necessary to depart from the guidelines. For example, where giving a public ruling both a past and future application would, on an objective consideration of all the factors, produce an unfair, absurd, unjustifiable or impractical result.

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[38] Item 30, Schedule 2 of *Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005.*
[39] Subsection 358-10(1) of Schedule 1 to the TAA.

63. Generally however, public rulings will have both a past and future application because they represent the Commissioner's opinion as to what the correct interpretation of the law has always been.

64. The fact that the Tax Office has not previously publicly stated an interpretative or administrative policy does not mean a public ruling should not have a past application. Even if uncertainty existed previously in an industry, market or among taxation advisers and taxpayers, a public ruling that issued to clarify this uncertainty is to have both a past and future application (subject to the exceptions mentioned in paragraph 62 and 70 of this Ruling).

65. The existence of uncertainty in the interpretation or application of the taxation laws is a matter that may affect the amount of penalty imposed. However, the existence of uncertainty does not affect an entity's liability to pay the primary tax required by law.

66. Public rulings dealing with legislative amendments will usually apply from the application date of the amending legislation. As the Tax Office cannot provide interpretative advice on legislation prior to the legislation receiving Royal Assent, or on regulations prior to their registration, these public rulings will have both a past and future application.

67. Public rulings will usually have both a past and future application even if the issue dealt with in the public ruling is a timing issue, for example, an issue that relates to the time that certain income is derived.

68. A public ruling dealing with the criteria in respect of which, or the method by which, the Commissioner will exercise a discretionary power can only apply to an exercise of the particular discretion after the ruling is issued, but may relate to an earlier period.

69. Where a court or tribunal decision which is not subject to an appeal is more favourable to entities than a previous Tax Office practice, any new public ruling adopting that decision ordinarily will have both a past and future application.

Where prior general administrative practice exists

70. A public ruling that relates to a scheme and that changes the Commissioner's general administrative practice (or conflicts with a previous private ruling) cannot apply to a particular entity if:

- the change is less favourable to the entity than the practice or ruling; and
- the entity has started to carry out the scheme.[40]

This means that the interpretation of the relevant provision adopted in the public ruling does not apply retrospectively to that entity.

[40] Subsection 358-10(2) of Schedule 1 to the TAA.

71. For example, where a final public ruling takes a position contrary to that of the draft public ruling, and that draft public ruling represents the Commissioner's general administrative practice, the final public ruling cannot apply retrospectively to an entity if it is less favourable to the entity than the earlier draft public ruling and the entity has started to carry out the scheme. Paragraph 3.130 of the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005 notes that: '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'.

72. General administrative practice will usually be established by the Tax Office having consistently communicated to a wide range of entities on a particular issue. A general administrative practice is usually adopted for the efficient administration of the taxation system and would generally be documented in products such as:

- Law Administration Practice Statements;
- General Administration Law Administration Practice Statements;
- a Tax Office policy document (such as the ATO Receivables Policy); and
- other precedential material.[41]

73. Importantly though, not all precedential material (such as ATO Interpretative Decisions (ATO IDs)) indicate a general administrative practice. An ATO ID will only be accepted by the Tax Office as representing general administrative practice where the view contained therein is supported by other evidence of a pattern of Tax Office treatment of the issue consistent with the view expressed in the ATO ID (for example, a significant number of private rulings on the same matter which reach the same conclusion).

74. Other situations where a general administrative practice is not necessarily established include:

- Where there are merely several private rulings on a matter. However, a significant number of uncontradicted private rulings on a matter over time will tend to support the establishment of a general administrative practice.
- A bare failure by the Commissioner to take some action within his or her power. However, a repeated failure to exercise that power after the issue is drawn to the Commissioner's attention will tend to support the establishment of a general administrative practice.

[41] Paragraph 3.130 of the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005.

- Mere silence or failure to issue a public ruling on a matter. However, a general administrative practice may be established where, following the identification of an issue, the Tax Office has accepted the practice as a basis on which entities should treat the issue in a range of situations.[42]

Inter-relationship between rulings, settlements and audits

75. A public ruling that covers an issue which was part of a settlement between an entity and the Tax Office will not apply to the entity in relation to that issue for the taxation years which were the subject of the settlement. The Tax Office general policy is to state in each public ruling the extent to which the public ruling will apply to entities who have agreed to a settlement on the issue with the Tax Office.

76. If after a settlement with an entity a basis of assessment is followed for future income years, and a new public ruling is issued which is:

- less favourable to the entity than the settlement terms: the public ruling will apply to the entity for all transactions, arrangements, agreements, acts or events entered into, commenced or occurring after the date the public ruling is issued or any later date specified in the public ruling; or
- more favourable to the entity than the settlement terms: the public ruling will generally have both a past application (other than in respect of taxation years the subject of the settlement) and a future application.

77. The date of effect of a public ruling will not be any different for those entities who are subject to a taxation audit at the time the public ruling is issued.

Date of effect

78. This Ruling applies from 1 January 2006. However, this Ruling does 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 this Ruling.

Commissioner of Taxation
4 October 2006

[42] Paragraph 3.131 of the Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005.

Appendix 1 – Detailed contents list

79. The following is a detailed contents list for this Ruling:

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References

Previous draft:

TR 2006/D6

Related Rulings/Determinations:

TR 2006/11

Previous Rulings/Determinations:

PGBR 2003/1; TR 92/1;
TR 92/20; TR 97/16

Subject references:

- binding public rulings
- conflicting rulings
- date of effect of public rulings
- fringe benefits tax
- income tax
- income tax rulings
- product rulings
- public rulings
- status of Taxation Rulings
- status of public rulings
- taxation determinations
- taxation rulings
- withdrawal of public rulings

Legislative references:

- TAA 1953
- TAA 1953 Pt IVAAA
- TAA 1953 Sch 1 Div 284
- TAA 1953 Sch 1 284-15
- TAA 1953 Sch 1 284-15(3)(d)
- TAA 1953 Sch 1 Div 357
- TAA 1953 Sch 1 357-55
- TAA 1953 Sch 1 357-60(1)
- TAA 1953 Sch 1 357-60(2)
- TAA 1953 Sch 1 357-70
- TAA 1953 Sch 1 357-75
- TAA 1953 Sch 1 357-85
- TAA 1953 Sch 1 357-90
- TAA 1953 Sch 1 Div 358
- TAA 1953 Sch 1 358-5(1)
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- TAA 1953 Sch 1 358-5(3)(a)
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- TAA 1953 Sch 1 358-10(1)
- TAA 1953 Sch 1 358-10(2)
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- TAA 1953 Sch 1 358-20(1)
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- ITAA 1997 8-1(1)
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- ITAA 1997 995-1(1)
- Product Grants and Benefits Administration Act 2000 8
- Tax Laws Amendment (Improvements to Self Assessment) Act (No. 2) 2005 Sch 2 Pt 3

Other references:

- Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005
- Explanatory Memorandum to the Taxation Laws Amendment (Self Assessment) Bill 1992
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