TR 92/1 - Income tax and fringe benefits tax: public rulings

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Australian Taxation Office

Taxation Ruling
Income tax and fringe benefits tax: public rulings

other Rulings on this topic

IT 1 IT 2500

*This Ruling, to the extent that it is capable of being a 'public ruling' in terms of Part IVAAA of the **Taxation Administration Act 1953**, is a public ruling for the purposes of that Part . Taxation Ruling TR 92/1 explains when a Ruling is a public ruling and how it is binding on the Commissioner.*

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What this Ruling is about

1. This Ruling outlines the system of binding public rulings under the income tax and fringe benefits tax law after the *Taxation Laws Amendment (Self Assessment) Act 1992* ('SAA') became law. In relation to public rulings, this Ruling considers:

(i) what constitutes a public ruling;

(ii) the types of ruling we publish;

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

(iv) the legal status of Taxation 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 date of effect of public rulings;

(viii) the application of the public rulings provisions; and

(ix) the grouping and numbering of Taxation Rulings.

2. We will issue a separate Ruling outlining the system of binding and reviewable private rulings.

Ruling

What constitutes a public ruling

3. Part IVAAA of the *Taxation Administration Act 1953* ('TAA') contains most of the public ruling provisions and sets out what is necessary for a published opinion of the Commissioner to be a public ruling. Under the public ruling provisions, a 'public ruling' sets out the Commissioner's opinion as to the way in which 'a tax law' applies to:

(i) any person in relation to a class of arrangements (section 14ZAAE of the TAA);

(ii) a class of persons in relation to an arrangement (section 14ZAAF of the TAA); or

(iii) a class of persons in relation to a class of arrangements (section 14ZAAG of the TAA).

4. A 'tax law' to which the public ruling provisions apply is a provision of an Act or a regulation under which the extent of liability to income tax, withholding taxes, franking deficit tax, Medicare levy, or fringe benefits tax is worked out (see definition of 'tax law' in section 14ZAAA of the TAA).

5. It is not, for instance, the *Income Tax Assessment Act 1936* ('ITAA') as a whole that is a 'tax law' as defined in Part IVAAA of the TAA. Rather, 'tax law' is more narrowly defined as a section or provision of the relevant Act or a regulation under the Act. If a provision of an Act or a regulation is not relevant to working out the extent of liability to one or more of those taxes (e.g. it deals exclusively with the lodging of returns or the Commissioner's access powers), it is not a tax law for the purpose of the public ruling provisions. A statement setting out the Commissioner's view on procedural, administrative, or collection aspects of the law (e.g. tax instalment deductions or the prescribed payments system) is not a 'public ruling' for the purposes of the public ruling provisions.

6. A public ruling on the way in which a tax law applies may be a ruling on the way in which a discretion of the Commissioner under that law would be exercised (section 14ZAAD of the TAA).

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

(i) the Commissioner publishes it on or after 1 July 1992 (subsection 14ZAAI(1) of the TAA and subsection 12(1) of the SAA); and

(ii) the ruling states that it is a public ruling for the purposes of Part IVAAA of the TAA (subsection 14ZAAI(2) of the TAA).

The types of ruling we publish

8. We make known our views about the application of the tax laws in a number of ways. For some years now, we have issued Taxation Rulings on the application of the tax laws generally (in the sense that they do not address any particular taxpayer's affairs).

9. As explained in Taxation Ruling IT 2500, Taxation Rulings provide guidance for both the public and our staff on matters of policy, procedural instruction and interpretation of tax law. Taxation Rulings in the TR series (see paragraph 40 below) will cover the interpretation of the income tax and fringe benefits tax law and, if appropriate, detail guidelines, precedents, practices or procedures that affect the taxation rights or liabilities of the general public. Taxation Rulings are also an appropriate way for us to clarify administrative developments arising from new or revised interpretations of the income tax and fringe benefits tax law.

10. More recently, we have issued Taxation Determinations which usually address one particular issue and are less comprehensive than Taxation Rulings.

11. We also make known our views about the tax laws in other ATO publications such as Tax Pack, return form guides, information booklets, Australian Taxation Office (ATO) media releases and in speeches of senior officers.

12. A public ruling may be published in any of the forms mentioned in paragraphs 8 to 11 above. However, as mentioned in paragraph 7 above, to be a public ruling it must state that it is a public ruling for the purposes of the public ruling provisions.

13. In publishing a Taxation Ruling concerning the way in which 'a tax law' applies, we will include a statement along the following lines: 'this Ruling, to the extent that it is capable of being a public ruling in terms of Part IVAAA of the TAA, is a public ruling for the purposes of that Part'. We will include a similar statement in Taxation Determinations. Thus, if part of a Taxation Ruling or Taxation Determination containing a statement to that effect is capable of being a public ruling and part is not, the former part is a public ruling but the latter part is not.

14. For example, a Taxation Ruling could set out the ATO's views as to how subsection 25(1) of the ITAA applies to persons who issue a particular type of financial instrument and also outline the ATO's plans to audit some of the taxpayers who had issued those instruments. That part of the Taxation Ruling which states the ATO's views as to how subsection 25(1) applies to the relevant persons would be a public ruling but that part which explains our audit strategy would not be a public ruling.

15. If no part of a Taxation Ruling or Determination concerns the way in which 'a tax law' applies, no part of the Taxation Ruling or Taxation Determination is a public ruling.

Status and binding effect of favourable public rulings

16. A public ruling is binding if it can be said to be favourable to a person. A public ruling about an arrangement can be said to be favourable if:

(i) the way in which a tax law applies to a person in relation to that arrangement is different from the way the public ruling states that the law applies; and

(ii) the tax payable under an assessment or the amount of withholding tax payable would (apart from the binding public ruling provisions) be more than it would have been if the interpretation of the law stated in the public ruling had been applied (sections 170BA & 170BD of the ITAA, section 74A of the *Fringe Benefits Tax Assessment Act 1986* (FBTAA)).

17. A favourable public ruling concerning a tax other than withholding tax is binding in the sense that the assessment and the amount of tax payable must be what they would have been if the interpretation of the law stated in the public ruling applied (section

170BA of the ITAA; section 74A of the FBTAA). Accordingly, a taxpayer can, and we believe should, self assess in line with a favourable public ruling. If the Commissioner makes an assessment involving that matter, the law compels the Commissioner to act in accordance with the favourable public ruling.

18. A favourable public ruling concerning withholding tax is binding in the sense that:

(i) the Commissioner may not sue for the amount of the excess of withholding tax payable over what would have been payable if the law applied in the way stated in the public ruling; and

(ii) the Commissioner must not serve on a person a notice that the excess is payable; and

(iii) the excess is remitted (section 170BD of the ITAA).

19. Accordingly, persons should pay withholding tax in accordance with a favourable public ruling and the Commissioner is unable to act inconsistently with such a ruling.

20. A public ruling does not have a binding legal effect (in the sense explained in paragraphs 17 to 19) in relation to any arrangement begun to be carried out before 1 July 1992 (subsection 12(2) of the SAA). Nevertheless, if a Taxation Ruling is a public ruling and that Taxation Ruling applies to an arrangement begun to be carried out before 1 July 1992, the ATO will treat that Ruling as administratively binding in relation to the arrangement (except in certain circumstances set out in Taxation Ruling IT 2500). Paragraphs 21 to 24 explain in detail the ATO's administrative policy to stand by Taxation Rulings to the extent they are not binding under the public rulings provisions.

Status of Taxation Rulings which are not favourable public rulings

21. Taxation Ruling IT 2500 comprehensively deals with the status of Taxation Rulings published before the introduction of the public rulings provisions. We consider that the views expressed in IT 2500 continue to apply to Taxation Rulings to the extent, if any, they are not public rulings. Taxation Rulings issued before 1 July 1992 are not public rulings for the purposes of the public rulings provisions (subsection 12(1) of the SAA).

22. To the extent Taxation Rulings are not favourable public rulings they do not have the force of law in the sense referred to in paragraphs 17 to 19 or in any other sense. If there is no favourable public or private ruling relevant to a particular arrangement, we make our decision on the basis of the facts of the particular case having regard to any relevant Taxation Rulings or Taxation Determinations. If the provisions concerning binding public and private rulings do not apply, no conduct on the part of the ATO can operate as an estoppel against the operation of taxation legislation (see *FC of T v. Wade* (1951) 84 CLR 105 at 116-117; 9 ATD 337 at 344 per Kitto J; *AGC (Investments) Limited v. FC of T* 91 ATC 4180 ; (1991) 21 ATR 1379 and the authorities cited in that case).

23. However, as stated in Taxation Ruling IT 2500 (issued well before the enactment of the public ruling provisions) in relation to Taxation Rulings, the basic administrative policy of the ATO is to stand by what is said in a Taxation Ruling and to depart from a Taxation Ruling only where there are good and substantial reasons to do so. To the extent a Taxation Ruling is not a favourable public ruling, the ATO will only depart from the Ruling in the following situations (explained in detail in IT 2500 at paragraphs 7-10):

(i) there is a legislative change;

(ii) a Tribunal or Court overturns or modifies an interpretation of the law on which a Taxation Ruling is predicated; or

(iii) the approach adopted in a Taxation Ruling is no longer considered appropriate.

24. In summary, to the extent that a Taxation Ruling is not legally 'binding' (in the sense explained above in paragraphs 17 to 19) under the public rulings provisions, the ATO will treat the Ruling as administratively binding (except in the circumstances set out in IT 2500).

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

25. Under the penalty provisions introduced by the SAA, a taxpayer may be liable to pay a penalty of 25% of a tax shortfall caused by the taxpayer taking a position as to the way in which a tax law applies to a matter that was not 'reasonably arguable' when the taxpayer took the position (sections 226K and 160ARZD of the ITAA). A taxpayer will

only be liable for this penalty if the shortfall exceeds the greater of $10,000 or 1% of the tax that would have been payable on the basis of the taxpayer's return (paragraphs 226K(c) and 160 ARZD(1)(c) of the ITAA).

26. In determining whether a taxpayer's tax treatment of an item is reasonably arguable for the purpose of the penalty provisions, it is necessary to have regard to 'the relevant authorities'. Subsections 222C(4) and 160ARZD(5) of the ITAA state that 'authority' includes a public ruling within the meaning of Part IVAAA of the TAA.

27. Subsections 222C(4) and 160ARZD(5) are silent about Taxation Rulings which are not public rulings. However, the Explanatory Memorandum to the Taxation Laws Amendment (Self Assessment) Bill 1992, which contained the public rulings provisions, said at page 84 that the list in subsections 222C(4)and 160ARZD(5) is not exhaustive. It continued 'Taxation Rulings issued by the Commissioner prior to the new arrangements introduced by this Bill may also be considered'. We accept that statement.

Withdrawal of public rulings

28. The Commissioner may withdraw either the whole or part of a public ruling by:

(i) publishing notice of the withdrawal (subsection 14ZAAK(1) of the TAA); or

(ii) publishing a new public ruling which is inconsistent with an existing public ruling (subsection 14ZAAK(2) of the TAA).

29. If a new public ruling is only partly inconsistent with an earlier public ruling, the earlier public ruling is only withdrawn to the extent of the inconsistency (subsection 14ZAAK(2) of the TAA).

30. To the extent that a public ruling is withdrawn, it does not apply to arrangements entered into after the withdrawal. However, a withdrawn public ruling continues to apply to arrangements begun to be carried out before the withdrawal (section 14ZAAL of the TAA).

Conflicting rulings

31. If a public ruling is issued about a matter and there is an earlier public ruling on the same matter, the earlier ruling continues to apply to arrangements commenced before the issue of the new ruling - even though it is withdrawn by the later ruling to the extent that it is inconsistent with the later ruling (section 14ZAAL of the TAA). If only one of those public rulings is favourable in the sense set out in paragraph 16, the favourable public ruling is binding in the manner set out in paragraphs 17 to 19 and the other has no effect.

32. However, there are special rules to resolve a conflict between 2 favourable public rulings in relation to the period before the issue of the later ruling. There is only one application of the binding rulings provisions and that is the one which provides the taxpayer with the greatest benefit (subsections 170BC(3) and 170BF(3) of the ITAA; subsection 74C(3) of the FBTAA).

33. Similarly, if there is a conflict between a favourable public ruling and a favourable private ruling under Part IVAA of the TAA, there is only one application of the binding ruling provisions and that is the one which provides the taxpayer with the greatest benefit (subsections 170BC(3) and 170BF(3) of the ITAA; subsection 74C(3) of the FBTAA).

Date of effect of public rulings

34. Public rulings generally apply to past, present and future arrangements (subsection 14ZAAH(1) of the TAA), although they cannot apply to any arrangement begun to be carried out before 1 July 1992 (subsection 12(2) of the SAA). However, if a public ruling states that it applies only to arrangements begun to be carried out after a specified date, it only applies to those arrangements (subsection 14ZAAH(2) of the TAA). This may occur if the public ruling applies to a new provision in the law or if the Commissioner considers that it would be unfair to apply a public ruling to arrangements commenced before the ruling is made, even though there has not been an earlier public ruling on the matter.

35. We will soon issue guidelines on the use and interpretation of date of effect paragraphs in Taxation Rulings.

Application of public rulings provisions

36. The Commissioner has only been able to make public rulings since 1 July 1992 (subsection 12(1) of the 'SAA'). Therefore, a Taxation Ruling or Taxation Determination published before 1 July 1992 is not a public ruling for the purposes of the public rulings provisions.

37. A public ruling does not apply to any arrangement begun to be carried out before 1 July 1992 (subsection 12(2) of the SAA).

Application of Taxation Ruling IT 2500

38. Those parts of IT 2500 concerning Taxation Rulings still apply to Taxation Rulings to the extent they are not favourable public rulings - which includes all Taxation Rulings issued before 1 July 1992. In essence, we will still apply to these Taxation Rulings the basic administrative policy of the ATO stated in IT 2500. That is, we will stand by what is said in these Taxation Rulings and depart from them only in the situations stated in IT 2500.

39. However, paragraphs 5, 6, 7 & 10 of IT 2500 do not apply to Taxation Rulings to the extent they are favourable public rulings. These paragraphs deal with the basic administrative policy of the ATO to stand by what is said in a Taxation Ruling and spell out the limited circumstances in which we would depart from a Taxation Ruling.

Grouping and numbering of Taxation Rulings

40. We have decided to change the grouping and numbering of Taxation Rulings on income tax and fringe benefits tax issues. Before 1 July 1992 we issued Taxation Rulings on income tax issues in an IT (Income Tax) series and Taxation Rulings on fringe benefits tax issues in an MT (Miscellaneous Taxes) series. From 1 July 1992 there will be a TR series which will include Taxation Rulings on both income tax and fringe benefits tax issues. We will retain the MT series and use it for Rulings relating to other taxes (e.g. petroleum resource rent tax) and non-tax issues (e.g. issues arising under the *Freedom of Information Act 1982*).

41. Each Taxation Ruling in the TR series will have a prefix for the particular calendar year in which the Ruling issued. For example, Rulings issued in 1993 will have the prefix TR 93/.

42. Generally, the Rulings will be numbered in the order they are issued. Thus, the first Ruling issued in 1993 will be TR 93/1, the second will be TR 93/2 and so on.

43. As this is the first Ruling in the TR series, it is numbered TR 92/1 even though we have issued other Taxation Rulings on income tax and fringe benefits tax issues during this year. The last Ruling in the IT series was Taxation Ruling IT 2686.

44. The last Taxation Ruling issued in a calendar year will contain a statement that it is the last of that year and that the next Ruling will appear with a new prefix.

45. Taxation Determination 92/100 outlines the numbering system for Taxation Determinations.

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