TR 93/1 - Income tax and fringe benefits tax: private rulings

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This document has changed over time. This is a consolidated version of the ruling which was published on *25 March 1993*

Generated on: 30 November 2026, 05:27:27 AM

Australian Taxation Office

Taxation Ruling
Income tax and fringe benefits tax: private rulings

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*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.*

[Note: This is a consolidated version of this document in that it has added the content of an Addendum to the end of the document.]

What this Ruling is about

1. This Ruling :

   (i) outlines the system of binding and reviewable private rulings which came into force when the *Taxation Laws Amendment (Self Assessment) Act 1992* ('SAA') became law:

   (ii) deals with some questions that have arisen about the scope of the new provisions : and

   (iii) explains the continuing application of Taxation Ruling IT 2500 .

This Ruling considers:

(a) what constitutes a private ruling;

(b) arrangements in relation to which private rulings can be made;

(c) who may apply for a private ruling;

(d) the form of application and information to be provided;

(e) applications that do not have to be dealt with;

(f) withdrawal of a private ruling and the circumstances where a ruling will have no effect;

(g) meaning of binding effect of private rulings ;

(h) right to object against a private ruling;

(i) penalty for not complying with a private ruling;

(j) continuing application of IT 2500.

Ruling

What constitutes a private ruling?

2. A private ruling is :

(a) a written expression of opinion by the Commissioner

(b) about the way in which a tax law or tax laws would apply

(c) to a person (the rulee)

(d) in relation to an arrangement

(e) in respect of a specified year of income.

3. A ruling can either be one that has been applied for or it can be a 'related ruling'. Section 14 ZAP of the *Taxation Administration Act 1953* ('TAA') entitles the Commissioner to issue additional rulings, not sought by the applicant, on the way in which another tax law would apply in relation to the arrangement or on the way in which a tax law would apply to the rulee in relation to a different year of income or a related arrangement.

4. Where a private ruling request is very specific in its application to an arrangement and a particular tax law, the Commissioner may give a ruling which does no more than express an opinion on that particular tax law. For example a person might ask for a ruling on whether an amount derived from the sale of an asset is assessable under subsection 25(1) of the *Income Tax Assessment Act 1936* (ITAA). The Commissioner may give a ruling that the amount is not assessable under subsection 25(1). This may occur even though the Commissioner would consider that Part IIIA would apply to include some amount as a net capital gain if he applied his mind to the question. Alternatively, the Commissioner may also give a related ruling expressing the view that Part IIIA applies to include that amount as a net capital gain.

5. A 'tax law' on which a private ruling may be given is a section or provision of an Act, or a regulation under such an Act, 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). 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 private ruling provisions.

6. Private rulings will give opinions on specific questions. It is therefore important for applicants to take care in the formation of those questions. For example, a question which seeks confirmation

that an item of property sold during the year is an 'asset' for the purposes of section 160A may receive an affirmative ruling. That ruling does not represent confirmation that the capital gains tax provisions apply to the sale rather than, say, subsection 25(1).

Arrangements in relation to which private rulings can be made

7. A private ruling can apply to arrangements which are proposed, in course or completed (s14ZAI of the TAA) as long as those arrangements are begun to be carried out after 30 June 1992. 'Arrangement' is widely defined in section 14ZAAA of the TAA to include a 'scheme, plan, action, proposal, course of action, course of conduct, transaction, agreement, understanding, promise or undertaking; or part of an arrangement'.

8. For arrangements which began prior to 1 July 1992, subsection 169A(2) remains as a mechanism by which a taxpayer can obtain the Commissioner's opinion of the applicable tax law.

9. Assets acquired before 1 July 1992 may still be the subject of a request for private ruling. However, the arrangement which forms the basis of the request (e.g. the disposal of the asset) must have begun after that date.

10. Private rulings cannot be given if they would require the Commissioner to forecast a value, whether market value, fair and reasonable value or some other value.

11. Because a private ruling can only be given in relation to arrangements that began after 30 June 1992 there are constraints on the extent to which rulings can be given in relation to the incurring and recoupment of losses. Some examples of questions on which a private ruling can be given are:

(a) questions relating to the incurring of a loss under subsection 79E(1) of the ITAA if the question relates to an arrangement that began on or after 1 July 1992 and was about the application of the law in working out particular components of assessable income or particular deductions to be taken into account in calculating the loss;

(b) whether the tests of subsection 80E(1) are satisfied in a year of income commencing on or after 1 July 1992;

c) whether section 80G permits a loss to be transferred in a year of income commencing on or after 1 July 1992, to the extent that the question relates to the circumstances of the income company or the loss company in any period commencing on or after that date.

Who may apply for a Ruling

12. Taxpayers can apply for a ruling about a matter that affects them or, with the written consent of another person, about a matter that affects the other person. The requirement in section 14ZAG of the TAA that the written consent of the taxpayer be obtained means that an adviser, such as an accountant, cannot rely on an oral agreement for the general provision of accounting or taxation services as being sufficient authority. Furthermore, if a written agreement exists between the adviser and the taxpayer it would need to contain the taxpayer's consent to the adviser's seeking private rulings. This consent does not need to be made available to the Tax Office unless requested.

13. In respect of discretionary and unit trusts it would generally be the trustee who would request a ruling about an arrangement entered into or carried out by the trust. The trustee has the choice of requesting the ruling on the trustee's behalf or on behalf of named beneficiaries from whom the trustee has obtained written consent. Where a trustee obtains a ruling on his own behalf and a beneficiary (who did not consent to the application but is presently entitled to trust income in the year to which the ruling relates) wishes to have that ruling apply to his own circumstances it will be necessary for the beneficiary to separately apply for a ruling. In the request for ruling the beneficiary should refer to the ruling received by the trustee.

Form of application and information to be provided

14. Paragraph 14ZAJ(b) of the TAA requires an application to 'give such information, and be accompanied by such documents, relating to the ruling as are required by the Commissioner.' Application forms are available from all branches of the Tax Office and the use of them, although not compulsory, will usually expedite the handling of an application. The forms detail the type of information required by the Commissioner when dealing with requests for rulings.

In summary, that information falls into 5 categories:

(i) the rulee: Name and file number

(ii) the facts: A full and complete description of the facts is required. A ruling will bind the Commissioner only in relation to the particular arrangement described. Any material difference between stated and actual facts or the omission of a material fact will mean that the actual arrangement differs from the arrangement described in the Ruling.

(iii) the questions: the request should refer to the specific sections of the Act on which a ruling is required.

(iv) the issues to be considered: Applicants who are professional advisers in the field of taxation are expected to provide a full description of the issues together with the results of research undertaken. That research might cover journal and textbook commentary on the relevant provisions and the application should detail case citations and references to public Rulings (where applicable). Other applicants should complete the application form to the best of their ability and in accordance with the complexity of the matter raised. As mentioned, applicants are required to identify the sections of the Act on which they are seeking an interpretation. Applicants would ordinarily state their own opinion on the question together with the reasons behind that opinion and may, if they wish, supply a draft of the ruling sought.

(v) certifying certain facts: These appear in a Yes/No format on the application form and basically ask for details of amount at issue, whether an audit is being carried out, whether the arrangement has commenced, whether the consent of the taxpayer has been obtained etc.

Applications that do not have to be dealt with

15. Sections 14ZAQ and 14ZAN of the TAA describe the circumstances in which applications do not have to be dealt with by the Commissioner. Section 14ZAQ allows the Commissioner to decline to make a ruling where the correctness of the ruling would depend on which assumptions were made about a future event or other matter. Alternatively, the Commissioner may make appropriate assumptions and issue a ruling. Section 14ZAN lists the following 10 circumstances where a ruling does not have to be given:

(a) the rulee already has a private ruling on the matter. Each Ruling applies to a particular person for a specified year of income; the existence of a ruling on the same matter in respect of a different year of income does not relieve the

Commissioner of the obligation to comply with the application;

(b) the matter sought to be ruled on has been decided for the purposes of a Commissioner assessment. A Commissioner assessment is defined as one made other than through the self assessment processes and includes an assessment made as the result of an audit;

(c) the Ruling would relate to withholding tax which has become due and payable;

(d) the rulee has been informed of a tax audit that is in course and, in the opinion of the Commissioner, the matter sought to be ruled on will be required to be decided by that audit. However, if a ruling request is not directed at forestalling the conclusion of an audit and we are satisfied the request discloses all relevant facts, a ruling will generally be given. There may be situations when a ruling will not be given during an audit because of revenue collection considerations, e.g., where the time limit for amendment of an assessment is about to expire. In relation to a 'pre-lodgment' audit of a current year of income, a monitoring or watching brief and a tax strategy review, we will respond to a request for a private ruling while these are in course unless any of the other circumstances outlined in sections 14ZAN or 14ZAQ apply.

(e) the matter sought to be ruled on is the subject of an objection against a self assessment;

(f) the application is made more than 4 years after the relevant return was due to be lodged.

(g) the application is frivolous or vexatious. Falling within this category are requests where the arrangement is only hypothetical or where requests are made to confirm, in respect of a tax return, that all the income returned is assessable and all deductions claimed are deductible and the correct amount of tax has been assessed;

(h) the arrangement to which the application relates has not been carried out, is not being carried out and is not seriously contemplated by the rulee;

(i) in the opinion of the Commissioner insufficient information has been provided despite a request by the Commissioner for additional information;

(j) in the opinion of the Commissioner it is unreasonable to comply with the application given the extent of resources available or other relevant matters. Generally this provision

would not apply as it is only in respect of very time consuming matters that the Commissioner cannot devote resources. An example would be the 'arm's length consideration' requirements in Division 13 of the ITAA.

Withdrawal of private ruling and the circumstances where the ruling will have no effect

16. A ruling can be withdrawn at any time with the consent of the rulee. Without that consent the Commissioner is restricted in the circumstances in which he can withdraw. For example, if the arrangement has begun to be carried out, the Commissioner can only withdraw the ruling if he forms an opinion about the relative disadvantage that would be suffered by the rulee because of the withdrawal compared with the disadvantage suffered by another person by a failure to withdraw the ruling. In this context 'another person' will generally be a business competitor of the rulee. Generally the ruling can be withdrawn before the commencement of the arrangement .

17. A ruling cannot be withdrawn (whether or not the arrangement has begun) if the ruling is under review, that is if the Commissioner has decided an objection against the ruling and the rulee has either sought review of that decision or the period within which review may be sought has not ended.

18. A ruling is taken never to have been made if:

(a) the ruling has been withdrawn; or

(b) the applicant failed to tell the Commissioner at the time of the application that -

(i) where the applicant is not the rulee, the consent of the rulee was not genuine or was withdrawn before the application was made;

(ii) the rulee already had a ruling on the matter;

(iii) the matter sought to be ruled on had been decided for the purposes of a Commissioner assessment;

(iv) the ruling related to withholding tax which had become due and payable; or

(v) a tax audit was being carried out and the rulee had been informed.

Meaning of binding effect of private rulings

19. Section 170BB of the ITAA states the effect of a private ruling on tax other than withholding tax. It says that the amount of tax payable will not be more than it would have been had the law applied in the way described in the ruling. By this mechanism a ruling binds the Commissioner to apply the law in that way.

20. A binding private 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 private ruling; and

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

(iii) provided the ruling is not under review, the excess is to be remitted (Section 170BE of the ITAA).

Review of private rulings

21. A rulee may object against an unfavourable ruling in the same way as an objection can be lodged against an assessment. However there are two instances where an objection cannot be made:

(i) where an assessment has been made in respect of the arrangement and year of income covered by the ruling. In this situation the matter dealt with in the ruling may be reviewed by objection against the assessment;

(ii) where the ruling relates to withholding tax that has become due and payable.

22. Where an objection against a ruling is allowed to some extent the ruling is taken to have been altered in accordance with the objection decision. If the objection is disallowed to any extent the rulee may seek a review of the objection decision by the Federal Court or the Administrative Appeals Tribunal.

Penalty for not complying with a Ruling

23. A taxpayer who receives a private ruling and then prepares a return on a basis which is contrary to the ruling may be liable to a penalty tax equal to 25% of any shortfall in tax paid (section 226M of the ITAA). Where the ruling is sought after the return has been lodged the penalty will not apply.

Continuing application of Taxation Ruling IT 2500

24. Taxation Ruling IT 2500 refers to two types of 'rulings' given by the Commissioner:-

(i) Taxation Rulings; and

ii) Advance Opinions.

An addendum to IT 2500 dealt with the changes resulting from the SAA in respect of Taxation Rulings and Taxation Determinations. Private rulings will substantially replace Advance Opinions. However, there may be circumstances where a taxpayer is unable to request a private ruling and may, instead, request an Advance Opinion. An example of an occasion on which a private ruling cannot be requested is where a taxpayer company intends to launch a takeover of a 'target' company and the taxpayer wants advice on the tax consequences for the target company. As the taxpayer does not have the consent of the target company it would not be able to request a private ruling on the matter.

25. The taxpayer would be able to request an Advance Opinion if it satisfied the requirements of IT 2500. In particular, paragraph 21 of the IT lists the requirements to be satisfied before a request for opinion will be entertained. Notwithstanding the continued availability of these opinions it would generally be the case that they would not be given if any of the factors listed in paragraph 15 above were present.

Commissioner of Taxation

7 January 1993

ISSN 1039 - 0731

ATO references
NO
BO

Not previously released to the public in draft form

Price $0.90

FOI index detail
reference number
I 1013540

subject references
- binding private rulings
- private rulings
- status of private rulings
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- withdrawal of private rulings

legislative references
- TAA Part IVAA

ADDENDUM

TAXATION RULING TR 93/1

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Paragraph 16 of Taxation Ruling TR 93/1 needs to be read having regard to Taxation Determination TD 93/34. Briefly stated, TD 93/34 explains that there is no withdrawal of a legally binding private ruling by a later inconsistent legally binding public ruling if the year to which the private ruling has either (a) already ended or (b) commenced but not yet ended. In relation to (b), there is no withdrawal of the private ruling even if the taxpayer has not, at the time the public ruling is released, begun to carry out the relevant arrangement.

COMMISSIONER OF TAXATION

25 March 1993

ISSN 1039 - 0731