TR 2011/5EC - Compendium

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Ruling Compendium – TR 2011/5

This is a compendium of responses to the substantive issues raised by parties to draft TR 2010/D10 – Income tax: objections against income tax assessments.

This compendium of comments has been edited to maintain the anonymity of entities that commented on the draft ruling.

Summary of issues raised and responses

Issue No.	Issue raised	ATO response/action taken (references to final ruling)
1	**Intended scope of the Ruling** To the extent this ruling deals with objections not specific to income tax, the ruling can be applied to objections against assessments for other taxes such as FBT and GST. Suggest including a footnote to this effect.	Change accommodated. A footnote has been included in the Explanation section (paragraph 53) to point out that, to the extent that the Ruling discusses the objection requirements under Part IVC of the *Taxation Administration Act 1953* (TAA), the Ruling may be used as a guide for other assessments which provide for objection rights under Part IVC of the TAA.
2	**Distinction between objection and amendment requests** The ruling correctly distinguishes between an objection and request for amended assessment, and that a request for amended assessment is the appropriate action where neither the facts nor the law are in dispute. However it is conceivable that such disputes could arise in relation to any matter raised with the ATO. To ensure that appropriate matters continue to be dealt with by request for amended assessment, there should be some safeguard provided to taxpayers that if the amendment request results in a dispute regarding the facts or law, that the ATO will accept an out of time objection or treat the request as an objection. Such a protection might be provided in a binding manner in the resulting tax ruling or in a practice statement which was referred to in the resulting tax ruling.	No change made. Paragraph 14 of Law Administration Practice Statement PS LA 2008/19 *Request for amendment of income tax assessments* provides guidance to ATO officers about when to treat an amendment request as an objection. If the amendment request has been lodged within the time limited for making an objection the question of late lodgment does not arise. It is the ATO policy to distinguish between an objection and a request for amendment of an assessment. This is evident in Law Administration Practice Statement PS LA 2008/19, which ATO officers are bound to follow. The Ruling is consistent with PS LA 2008/19. If an amendment request results in a dispute about the facts or the law, the ATO will consider a late objection in line with its policy stated in Law Administration Practice Statement PS LA 2003/7 *Taxation objections – late lodgment.* This is already covered in the Ruling.

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3	**Net income vs. taxable income** TR 2010/D10 notes that objections can be made to the calculation of net income (that is, net income of a trust) in certain circumstances. It should be made clear that this is only possible where tax is imposed on the trustee either because the relevant trust is treated as a company or the net income of the trust is otherwise taxable to the trustee such as where there is no beneficiary presently entitled. Where trust net income is assessed to a beneficiary, for example under section 97 of the *Income Tax Assessment Act 1936* (ITAA 1936), the objection rights reside with the beneficiary. On the current wording of the draft ruling, some readers will assume that objection rights are generally available to a trustee in relation to the calculation of net income in all circumstances.	Change accommodated. A footnote has been added to paragraph 56 to clarify that no right of objection arises for a trustee for net income which is distributed to beneficiaries under section 97 of the ITAA 1936.
4	**Validity of grounds** Can arguments about the application of the Commissioner's administrative policies, including the exercise of the Commissioner's powers of general administration in PS LA 2009/4 and PS LA 3434 (draft) amount to a valid ground of objection against an assessment?	Change accommodated. Additional explanation has been included under the heading 'Grounds relied on must be stated fully and in detail' to specify that a taxpayer's grounds of objection need to be directed at challenging the substantive liability imposed by the relevant provisions in the taxation Acts which give rise to an assessment. Arguments about the application of the Commissioner's administrative policies, including the exercise of the Commissioner's powers of general administration, which have a bearing on whether the taxpayer is ultimately liable to pay the full liability as notified in an assessment (for example, in the course of a settlement of a taxation dispute), do not amount to a valid ground of objection against that assessment.
5	**Multiple objections** TR 2010/D10 is essentially a rewrite of TR 96/12, updated for various legislative changes since the earlier ruling issued. However TR 2010/D10 appears to significantly differ from TR 96/12 with respect to the ability of a taxpayer to make multiple objections against an assessment.	Change accommodated in part. The position taken regarding multiple objections at Ruling paragraphs 31 to 33 and 175 to 189 is the ATO view. However this discussion has been modified to provide more detailed reasoning behind this view including why there has been a departure from

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	At paragraphs 30 to 32 and 164 to 167 of TR 2010/D10, the Commissioner takes the view that once an objection decision has been made under section 14ZY of the TAA, the Commissioner is *functus officio* in relation to that particular in that assessment, resulting in the taxpayer being precluded from lodging a further objection in relation to that particular of the assessment. This differs from the position set out in paragraphs 12 and 41 of TR 96/12 which permits taxpayers to lodge multiple objections during the objection period provided the objection is not against a particular the subject of a decision by the AAT, Federal Court or High Court, which by operation of the law has become final. This change in approach, which prejudices taxpayers' rights, is incorrect at law. The explanation for the position adopted in TR 2010/D10 cites the High Court's decision in *Minister for Immigration and Ethnic Affairs v. Bhardwaj* (2002) 209 CLR 597 in stating that 'the *functus officio* doctrine provides that a person who is vested with decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter'. Paragraph 166 of TR 2010/D10 states, incorrectly, that 'the statutory scheme of Part IVC is such that the Commissioner is *functus officio* once he makes a decision under section 14ZY of the TAA. The draft Ruling does not contain any analysis of how this conclusion was reached. The draft Ruling has extended the *functus officio* doctrine from decisions on objections by the AAT or the Courts which have become final (being the position adopted in TR 96/12) to include decisions of the Commissioner on objections. The *functus officio* doctrine does not apply to limit a taxpayer's statutory right to object against an assessment. Support for this can be found in *Fabry v. Commissioner of Taxation* [2003] FCA 1043 where the court considered the application of the *functus officio* doctrine in relation to the Commissioner's powers of amendment in section 170 of the ITAA 1936. The court held that section 170 manifests	the preferred view in TR 96/12. The decision in *Fabry v. Commissioner of Taxation* [2003] FCA 1043 (*Fabry*) does not support the Commissioner's ability to re-decide an objection. *Fabry* was concerned with the Commissioner's power to amend an assessment under section 170 of the ITAA 1936 and not the Commissioner's power to decide an objection under section 14ZY of the TAA. The fact that the Commissioner can amend a taxpayer's assessment at any time as a result of an objection or pending a review or appeal (under item 6 of subsection 170(1) of the ITAA 1936) does not mean that the Commissioner can re-decide an objection decision under section 14ZY of the TAA unless the conditions identified in *Minister for Immigration and Ethnic Affairs v. Bhardwaj* (2002) 209 CLR 597; (2002) 187 ALR 117 (*Bhardwaj)* are satisfied. The Commissioner's powers of amendment in section 170 of the ITAA 1936 are discretionary and are distinct from the power to decide an objection under section 14ZY of the TAA. There is an observation in *Fabry* which appears to suggest a reconsideration of an objection decision. The Court in *Fabry* did note that subsection 170(1) of the ITAA 1936 is to be regarded as the leading provision *in relation to the Commissioner's power to alter an objection decision* and give effect to that alteration by issuing an amended assessment. However, this is a reference to the Commissioner's ability to alter an objection decision as a result of an appeal or review. Various court decisions have commented on the limitation of the courts or the AAT to actually effect an amendment of an assessment the subject of appeal or review. This is something that only the Commissioner can do, consistent with the orders on appeal or review: sections 14ZZL and 14ZZQ of the TAA. Further, the power to decide an objection only once is not inconsistent with the notion that taxpayers ought to be assessed for amounts that are lawfully due under the tax Acts: *FCT v. Ryan* 2000 ATC 4079. Insofar as the Commissioner's assessment powers are concerned, the law has provided the Commissioner with a discretion to revise or amend any

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	an intention to permit the Commissioner to reconsider the tax payable by a taxpayer in respect of a year of income. The court noted 'When regard is had to the fact that the central element of the statutory scheme is the process of assessment by which a taxpayer's true substantive tax liability is ascertained (see *Richard Walter* at 181) there is no basis for reading down s170(1).' The 'central element' of the statutory scheme relating to objections is also to ascertain the true substantive tax liability of a taxpayer and the correctness of the assessment the subject of the objection. So much is borne out by the onus of proof requirements in sections 14ZZK and 14ZZO of the TAA. Any suggestion of a policy of 'finality' in tax administrative functions needs to take into account the self-assessment system operating for income tax and the post-assessment audit program operated by the Commissioner. The judgment of Gleeson CJ, Gummow and Hayne JJ in *FCT v. Ryan* 2000 ATC 4079 at 4084 (at paragraphs 21 and 22) throws significant doubt on the correctness of the Commissioner's conclusion in TR 2010/D10 about the 'statutory scheme'. Their Honours said that policy underpinning the tax law is to 'pay amounts that are lawfully due under the statute'. The ruling should properly consider the decision in *Fabry* and the statutory scheme of the tax law and revert to the position previously adopted in TR 96/12.	incorrect assessments, often on his own volition, within the time limits provided for under the law: section 170 of the ITAA 1936. The power to decide an objection is a separate power, and encompasses a range of decisions ('taxation decisions') that the Commissioner is authorised to make in the course of administering the Acts. In the interests of certainty and finality the Commissioner should not be allowed to keep re-deciding a matter after he has conducted a thorough independent review of the matter and has come to a firm conclusion. This is the rationale behind the *functus officio* doctrine.

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6	**Multiple objections – practical considerations** By allowing multiple objections to be made during the relevant objection period (provided the objection is not against a particular that has been the subject of a decision of the AAT, the Federal Court or the High Court of Australia) the ATO will have a 'second chance' to consider the matter before the ATO and the taxpayer pursue/defend that matter in the AAT/Federal Court. By forcing taxpayers who are dissatisfied with objection decisions to seek review in the AAT/appeal to the Federal Court, the ATO risks creating a 'rod for its own back' in terms of the extra time and resources that are required to defend a matter in the AAT/Federal Court compared to an internal review of an objection. A review in the AAT/appeal to the Federal Court should be regarded as remedies of last resort (see Justice Logan's paper titled 'A trip down memory lane: Why we have judges determining tax controversies', *The Tax Specialist*, February 2011).	No change made. See response to Issue 5 of this compendium.

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7	**Objections against private rulings** The ruling could be improved by further clarifying when it is possible to make an objection to a private ruling. Paragraph 84 of TR 2010/D10 indicates that a person is not 'dissatisfied' if their motivation for objecting to an objection decision is merely abstract or hypothetical. The paragraph refers to the judgment in *CTC Resources NL v. FCT (1994)* 48 FCR 397 (*CTC Resources*) and indicates that applications for private rulings may not result in a person being relevantly dissatisfied. This statement may lead some taxpayers to conclude that they are unable to object against a private ruling unless they have committed to the transaction or other matter that is the subject of the ruling request. In many cases, a taxpayer will not wish to enter into a transaction unless a positive ruling is obtained. The ATO does not appear to question the right of such a taxpayer to object to an adverse private ruling provided the transaction is in serious contemplation. This should be made clear in the ruling.	Change accommodated. A footnote has been included at Ruling paragraph 92 to clarify that objections against private rulings about proposed schemes in serious contemplation fall within the meaning of the term 'dissatisfied' as discussed in *CTC Resources*. Further, readers have been directed to TR 2006/11 *Income tax, fringe benefits tax and product grants and benefits: Private Rulings* for an explanation of taxpayers' right to object against a private ruling.
8	**Objections against private rulings** Pursuant to section 14ZVA of the TAA, an objection against an assessment cannot cover ground that is covered in an objection to a private ruling. It should be made clear at paragraph 162 of TR 2010/D10 that taxpayers who choose not to object to an adverse private ruling are unaffected by section 14ZVA, that is, they can later object to an amended assessment on grounds that could have been raised if an objection had been made to the private ruling.	No change made. Ruling paragraph 173 (paragraph162 of TR 2010/D10) discusses the limitation on an objection against an assessment where the taxpayer has objected against a private ruling that is reflected in the assessment. It is clear that section 14ZVA would have no application where a taxpayer has not objected against the private ruling that is reflected in the assessment.

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9	**Objections against private rulings** Include a brief discussion about who can object where a private ruling is issued to a partnership in its own right.	Change accommodated. A reference to Logan J's observations about the meaning of the term 'person' in section 14ZL of the TAA in *Russell v. FC of T* 2008 ATC 20-010 (at paragraph 44 of the judgment) has been included at Ruling paragraphs 89 and 149 of the Ruling. A detailed consideration of whether partnerships can be issued a private ruling in their own right is outside the scope of this Ruling but could be included in TR 2006/11 *Income tax, fringe benefits tax and product grants and benefits: Private Rulings*.
10	**Decision on objection about a 'particular'** There is an example at paragraph 168 of TR 2010/D10 which discusses when an issue is finally dealt with by the ATO and therefore the Commissioner is 'functus officio' in relation to the issue. The example concerns a taxpayer who objects to her assessment, which does not allow certain home office expenses, and states in her objection that she should be allowed an outright deduction for the cost of a computer. The ATO allows depreciation but disallows the objection so far as it relates to the outright deductibility of the cost of the computer. The ATO notes that, once this objection decision has been made, the taxpayer can no longer object to the assessment in relation to her home office expenses. In particular, she could not object on the basis that she should be allowed a deduction for depreciation of the computer (and presumably she could not request an amendment of her assessment to allow a claim for depreciation). Her only option is to refer the objection decision to the AAT or Federal Court. It appears that the claim for depreciation is a new 'particular' and therefore could be the subject of a fresh objection. The ATO discusses what is meant by 'particular' at paragraph 144 and following of TR 2010/D10. At paragraph 148 of TR 2010/D10, the ATO describes a particular as a constituent element in the assessment of taxable income. A claim for depreciation is such a constituent element and a different one to a claim	Change accommodated. A deduction for the entire cost of the computer and a deduction for depreciation are two different particulars of the assessment. The example has been improved by not using a deduction for home office expenses as an omnibus deduction. Home office expenses may comprise a number of separately deductible expenses: see Taxation Ruling TR 93/30 *Income tax: deductions for home office expenses*.

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	for the entire cost of the computer. In addition, there would be risks for the taxpayer if she referred the objection decision to the AAT or Federal Court in order to pursue her claim for depreciation. She would be limited to the grounds set out in her objection. If those grounds were limited to a claim for the entire cost of the computer, she would need the leave of the AAT or Federal Court to amend her grounds. Though it seems likely that such leave would be forthcoming, the success of her claim should not be made contingent on such leave being granted. We believe the correct approach should she wish to claim depreciation of the computer is for her to lodge a fresh objection in relation to this claim. We do not believe it is correct to treat the entire claim for home office expenses as one particular. The claim would include a number of different deduction items that would be separate constituent elements in the assessment of taxable income for the year.	
11	**Notice of a deemed decision** Suggest including a paragraph that the Commissioner is required to give notice of a deemed decision under section 14ZYA of the TAA: see the Explanatory Memorandum for section 14ZYA.	Change accommodated. An extra sentence has been added to Ruling paragraphs 38 and 201 specifying that the Commissioner is required to serve a written notice of a deemed decision on the taxpayer under subsection 14ZY(3) of the TAA.
12	**Scope of the objection decision** Can the objection decision include additional grounds that were not raised by the taxpayer but are nevertheless relevant for the purposes of deciding the taxpayer's objection against a particular?	Change accommodated. An objection decision can take into account other matters that were not directly raised by the taxpayer but are relevant for the purposes of arriving at the correct tax position in the relevant assessment the subject of the taxpayer's objection. Authority for this is found in *Lighthouse Philatelics Pty Ltd v. FC of T* 91 ATC 4942, *Fletcher & Ors v. FC of T* 88 ATC 4834 and *FC of T v. ANZ Savings Bank Ltd* 94 ATC 4844. A new section titled 'Matters the Commissioner considers when deciding an objection' has been included in the Ruling at paragraphs 39 and 202 to 206.

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13	**Amending an assessment before an objection decision** At paragraph 189 of TR 2010/10, could refer to *Fabry* where the Court held that the Commissioner's power to amend assessments under section 170 of the ITAA 1936 overrode section 26 of the *Administrative Appeals Tribunal Act 1975*.	Change accommodated. A footnote has been added to Ruling paragraph 215 to refer to the decision in *Fabry*.
14	**Amending an assessment as a result of an objection** There appears to be some uncertainty about the scope of the Commissioner's power to amend an assessment under item 6 of the table in subsection 170(1) of the ITAA 1936 where the objection decision is broadened to include grounds not directly raised by the taxpayer.	Change accommodated. Ruling paragraphs 46 and 218 have been added to clarify that where the Commissioner has broadened the scope of the objection to consider grounds not raised by the taxpayer, but are nonetheless relevant for the purpose of arriving at the correct objection decision, the Commissioner may amend the relevant assessment to give effect to the entire objection decision provided this amendment is related to the Commissioner's acceptance of at least one of the grounds of the taxpayer's objection.
15	**Review of, or appeal against an objection** For completeness mention the Commissioner is not limited to grounds raised in objection decision if decision is appealed. See *FCT v Australia and New Zealand Savings Bank Limited* 94 ATC 4844 (*ANZ Savings Bank*) where the High Court held the Commissioner may support an amount of the assessment on a ground other than that taken into account at the time the assessment was made.	Change accommodated. Ruling paragraph 228 has been inserted to briefly discuss the outcome of the *ANZ Savings Bank* case.