

TD 2004/D22 - Income tax: does paragraph 251L(1)(b) of the Income Tax Assessment Act 1936 prevent persons other than registered tax agents from giving advice about a taxation law?

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This document has been finalised by TD 2005/16.



Draft Taxation Determination

Income tax: does paragraph 251L(1)(b) of the *Income Tax Assessment Act 1936* prevent persons other than registered tax agents from giving advice about a taxation law?

Preamble

*This document is a draft for industry and professional comment. As such, it represents the preliminary, though considered views of the Australian Taxation Office. This draft may not be relied on by taxpayers and practitioners as it is not a ruling for the purposes of Part IVAAA of the **Taxation Administration Act 1953**. It is only final Taxation Determinations that represent authoritative statements by the Australian Taxation Office.*

1. Yes. Paragraph 251L(1)(b) of the *Income Tax Assessment Act 1936* (ITAA 1936) prohibits persons other than registered tax agents¹ from charging a fee for 'giving advice about a taxation law on behalf of a taxpayer'.
2. Paragraph 251L(1)(b) is concerned with regulating the giving of advice by any person who acts as a taxpayer's representative in the taxpayer's interactions with the Commissioner. This is not confined to advice given to a taxpayer in the context of a specific interaction with the Commissioner, such as the preparation of a return, but includes any situation where a taxpayer seeks advice about a taxation law to enable them to satisfy a tax obligation.
3. Paragraph 251L(1)(b) does not prevent a person in a non-representational capacity from giving tax advice that is part of, or incidental to, another service. For instance, a financial services provider can provide tax advice about a financial transaction, arrangement or plan in accordance with the relevant requirements of the *Corporations Act 2001*. See Examples 7 and 8.

Background

4. Section 251L was originally enacted to provide an assurance to both the taxpayer and the ATO that a person authorised to act on behalf of the taxpayer is reputable and competent in income tax matters. It was considered that restricting the provision of tax agent services would prevent exploitation of the taxpayer by unscrupulous persons. This exploitation may have had serious consequences for the taxpayer, including the imposition of penalties.

¹ For the registration of tax agents see Division 3 of Part VIIA of the ITAA 1936.

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5. Section 251L was developed in an era when a taxpayer was required to provide a full and true disclosure of information in their return. The move to self assessment gave the Commissioner the power to accept returns at face value and to amend assessments for mistakes of law. This placed an onus on the taxpayer to decide how the law applied to the facts so that they could properly complete a tax return. Taxpayers became increasingly reliant on registered tax agents to assist in this task, seeking an assurance that they were correctly meeting their taxation obligations.

6. Section 251L was amended in 2000 to extend the registration requirement to cover all taxation laws and to except certain persons from the application of subsection 251L(1), namely, those who provide services relating to business activity statements (BAS service providers)² and Barristers and Solicitors acting in the course of his or her profession.³ The amendments specify the type of work that is restricted to registered tax agents and other excepted persons. This work includes *'giving advice about a taxation law on behalf of a taxpayer'*.

7. The amendments did not change the intention of section 251L. They extended the assurance about the reputation and competency of tax practitioners to situations where taxpayers are given advice about the application of taxation laws to meet their tax obligations under the self assessment system.

Explanation

8. Paragraph 251L(1)(b) is focused on the capacity in which a person gives advice to, or on behalf of, a taxpayer. In particular, it focuses on whether advice is given by a person acting as a representative of the taxpayer in interactions with the Commissioner. It applies to restrict the provision of advice to registered agents who are authorised to act *'on behalf of a taxpayer'* in relation to a client's taxation affairs.

9. Paragraph 251L(1)(b) is not confined to advice given to a taxpayer by the taxpayer's representative in the context of a specific interaction with the Commissioner (for example, the preparation of a return or objection). It also includes advice given to a taxpayer by their representative as an incident, or in the course, of the relationship which exists between the taxpayer and the representative. For instance, a registered tax agent can charge a fee to provide capital gains tax advice about the sale of an asset to a client whom they represent in interactions with the Commissioner. Such advice may not involve interactions with the Commissioner but is able to be represented by the registered tax agent as advice which the taxpayer may rely upon to satisfy their tax obligations. See Example 3.

10. It is ultimately a question of degree, determined by reference to the circumstances of each case, as to whether or not a service provider acts in a representative capacity. That said, we do not think a service provider can avoid characterisation as a taxpayer's representative simply by refraining from performance of the final steps in a representational process, for example by refraining from attaching their identity to the documentation lodged with the ATO. Consistent with this, an unregistered person who continued to assist a taxpayer in substantially the same way as a registered tax agent (that is, by effectively advising in relation to, and preparing, a taxpayer's return) would be acting in a representational capacity. See Example 5.

² See subsection 251L(6).

³ See subsection 251L(8).

11. Tax advice given by a person acting in a capacity, other than that of a registered tax agent, falls outside the scope of paragraph 251L(1)(b). For instance, a financial services provider can give tax advice about a financial transaction, arrangement or plan in accordance with the relevant requirements of the *Corporations Act 2001*. This advice would not ordinarily be provided by the financial services provider in a representational capacity.

Examples

Example 1

12. *Matthias, an accountant, has been engaged for a fee to prepare and lodge income tax returns in respect of a small business entity and its principals' personal income tax returns. Matthias is a registered tax agent and prepares and lodges the returns. There is no breach of paragraph 251L(1)(b) as Matthias is both a registered tax agent and is representing taxpayers in their interactions with the Commissioner.*

Example 2

13. *Mark, a barrister, has been engaged to provide an opinion on the taxation outcome of a transaction by a taxpayer. The opinion forms part of a Private Binding Ruling request lodged by the taxpayer with the Commissioner. Mark charges the taxpayer a fee for the taxation advice. There is no breach of paragraph 251L(1)(b). Barristers are permitted to provide advice about a taxation law and charge a fee pursuant to subsection 251L(8).*

Example 3

14. *Juanita, an accountant, has been engaged for a fee to provide detailed capital gains tax advice to a taxpayer about the sale of an asset. Juanita is a registered tax agent and the taxpayer is her client. There is no breach of paragraph 251L(1)(b). Such advice may not involve interactions with the Commissioner but is able to be represented by Juanita as advice which a taxpayer may rely upon to satisfy their taxation obligations.*

Example 4

15. *John, a bookkeeper, is engaged to provide book-keeping services to a plumbing business. John's report forms the basis of a Business Activity Statement (BAS). The plumbing business then provides its business records to a firm of chartered accountants to prepare and lodge the BAS statements and its various income tax returns. John is not preparing or lodging an approved form or objection. Nor is John acting in a representational capacity on behalf of a taxpayer. Subsection 251L(1) therefore does not apply, nor is it necessary to consider the exception in subsection 251L(6). John may charge a fee for his book-keeping services.*

Example 5

16. *Carlo is an accountant but not a registered tax agent. He assists his clients to prepare their income tax returns for a fee but does not sign as an agent/preparer. Carlo has acted in representational capacity even though he has not signed the returns as an agent of the client. Carlo is in breach of paragraph 251L(1)(b).*

Example 6

17. *Peter, a bookkeeper, provides a range of services, including the preparation of Business Activity Statement (BAS) forms on behalf of clients. To perform this role, and to provide advice to clients, Peter would be acting in a representational capacity in giving of that advice, potentially attracting paragraph 251L(1)(b).*

18. *Peter will not attract paragraph 251L(1)(b) where he acts in accordance with one of the legislative exceptions. For example, under subsection 251L(6) Peter is permitted to charge for this service if he:*

- is a member of an recognised professional association;*
- is working under the direction of a registered tax agent; or*
- is a payroll services provider preparing a BAS for Pay As You Go purposes.*

Example 7

19. *Dudley, a financial adviser specialising in risk business, has been engaged on a fee paying basis to provide detailed advice to a doctor taxpayer on overall risk insurance including Income Protection and Trauma Insurance. While Dudley gives advice on the taxation treatment of this product as part of his overall financial advice, it is being provided by Dudley in a non-representational capacity. Therefore, there is no breach of section 251L(1)(b).*

Example 8

20. *Mary, a financial adviser in the course of recommending a financial product based savings plan, provides salary packaging advice to a taxpayer who is an employee for an up-front fee. Mary is not breaching section 251L(1)(b) because her advice is provided in a non-representational capacity; that is, the client (taxpayer) understands that they are still responsible for their tax return and that the responsibility for preparing the return rests with the taxpayer.*

Example 9

21. *James is a real estate agent. He is also studying accountancy. He arranges the sale of an investment property on behalf of a client and advises that capital gains tax is payable by the vendor. For an additional fee, James offers to calculate the capital gains tax liability and prepare the tax return of the vendor.*

22. *As James is charging a fee for this service, not a registered tax agent and acting in a representational capacity he is in breach of paragraph 251L(1)(b).*

Date of Effect

23. *When the final Determination is issued, it is proposed to apply both before and after its date of issue.*

Your comments

24. We invite you to comment on this draft Taxation Determination. Please forward your comments to the contact officer by the due date.

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Previous draft:

Not previously issued in draft form

Related Rulings/Determinations:

TR 92/20

Subject references:

- registered tax agents
- taxation advice

Legislative references:

- ITAA 1936 Pt VIIA Div 3
- ITAA 1936 251L
- ITAA 1936 251L(1)
- ITAA 1936 251L(1)(b)
- ITAA 1936 251L(6)
- ITAA 1936 251L(8)
- TAA 1953 Pt IVA
- Corporations Act 2001

ATO references

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