IT 2500 - Taxation Ruling System: policy governing issue of income tax rulings: status of rulings: advance opinions

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TAXATION RULING NO. IT 2500

TAXATION RULING SYSTEM : POLICY GOVERNING ISSUE OF INCOME TAX RULINGS : STATUS OF RULINGS : ADVANCE OPINIONS

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OTHER RULINGS ON TOPIC: IT 1, IT 2444

PREAMBLE Two basic types of taxation "rulings" are issued by or on behalf of the Commissioner of Taxation:-

(i) Taxation Rulings that provide guidelines for the public and Taxation Office staff in relation to the interpretation of income tax law and to the administration of that law by the Commissioner; and

(ii) Advance Opinions given in response to specific requests from taxpayers seeking advice as to the income taxation consequences of proposed transactions.

2. Although there is no statutory obligation to provide Taxation Rulings or Advance Opinions, the practice is widely recognised as a service provided to taxpayers in the best interests of sound tax administration. The purpose of this Ruling is to define the status of Taxation Rulings and to clarify the circumstances under which Taxation Rulings and Advance Opinions relating to the application of the income tax law are issued by the Australian Taxation Office.

RULING Taxation Rulings

3. These are issued on a regular basis and provide guidance for both the public and staff of the Australian Taxation Office on matters of policy, procedural instruction and interpretation of tax law. The majority of Taxation Rulings cover the interpretation of the income tax law and, where appropriate, detail guidelines, precedents, practices or procedures that affect the taxation rights or liabilities of the general public. Rulings are also an appropriate vehicle for the Australian Taxation Office to clarify administrative developments arising from new or revised interpretations of income tax law.

4. In most cases, a Taxation Ruling will represent the Taxation Office's view of what the law has always been. A Taxation Ruling may, however, provide details of transitional arrangements or indicate a specific date of effect on page 1 of the Ruling.

5. It is important to recognise that Taxation Rulings do not have the force of law and that each decision affecting the taxation liability of a taxpayer can only be made in the light of the established facts of particular transactions. Moreover, no conduct on the part of the Taxation Office can operate as an estoppel against the operation of taxation legislation (see F.C.T. v Wade (1951) 84 CLR 105 at pp116-117; 9 A.T.D. 337 at p344 per Kitto J.)

6. However, the basic administrative policy of the Australian Taxation Office 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. Any departure would be confined to situations where:

(i) there have been legislative changes;

(ii) an applicable 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 otherwise no longer considered appropriate.

7. In category (i) cases the timing of the change from previous practice would depend on the date of effect of the legislation. In so far as categories (ii) and (iii) are concerned any such departure would be announced by issuing a Taxation Ruling and would normally only be on a prospective basis and without retrospective effect. However, where a departure operates in favour of taxpayers there may be occasions where the advantages might be applied retrospectively. This must depend on the particular circumstances. For example, the change may be decided before an assessment has been made. Where an assessment has been made, the provisions of section 170 must be given effect.

8. In cases where the Taxation Office does not accept the correctness of a Tribunal or Court decision it would normally lodge an appeal, thereby indicating publicly its view that present Taxation Office practice is to be continued.

9. There will be some cases where, although the Taxation Office does not agree with a conclusion reached by a Tribunal or Court, appeal rights are not pursued, e.g., there is no question of law in issue. There will be other cases where a taxpayer who is successful at first instance concedes at the appeal stage. In both these types of case Taxation Rulings will be issued to advise taxpayers and Taxation Office staff that the relevant Tribunal or Court decision is not to be followed.

10. Without limiting the generality of category (iii) cases in paragraph 6, examples of situations where an approach adopted in a Taxation Ruling is no longer considered appropriate would be:

(a) cases where the commercial practice in respect of which the Taxation Ruling was provided no longer operates in the manner described in the Taxation Ruling;

(b) cases where an administrative practice outlined in a Taxation Ruling is being exploited by taxpayers as a means of tax avoidance; and

(c) cases where, on reconsideration, the Taxation Ruling is considered to be wrong in law.

11. Taxation Rulings are issued at regular intervals and copies are available for inspection and purchase by members of the public at all branches of the Australian Taxation Office. In compliance with the requirements of section 9 of the Freedom of Information Act 1982, an index of Taxation Rulings, consisting of both a numerical list and an alphabetical cross-reference to Rulings under subject headings is available for inspection and purchase from branches of the Taxation Office. In addition, a consolidated legislative reference index and a case listing index, as regularly updated and cross-referenced to Income Taxation Rulings, are also available at branch offices for inspection and purchase by members of the public.

Advance Opinions

12. Requests made by taxpayers or their representatives for Advance Opinions on the likely taxation consequences of a proposed course of action must be directed to the branch office of the Australian Taxation Office at which the taxpayer lodges returns of income. In the normal course of events, consideration of the requests will be undertaken in the branch office and a decision whether any request is to be referred to the National Office of the Taxation Office will be a matter for the branch office. Such referrals would generally be confined to significant matters where the law is not settled, National Office has not previously issued guidelines on the matter and the question to be decided is one that is seen as having a wide application beyond the particular case under consideration. Inconsistent interpretations of the law by different branch offices would be another situation where the matter might be referred by the branch office to National Office. Any request for a reconsideration of an Advance Opinion should be directed to the branch office, not National Office.

13. Advance Opinions by the Taxation Office will be provided (resources permitting) where the strict set of criteria referred to in paragraph 21 below is satisfied. It is also important to note that in some circumstances it may be necessary for the Taxation Office to provide an Advance Opinion subject to certain qualifications. Requests for Advance Opinions must be in

writing and will generally be dealt with in the order that they are received in the branch office. Urgent cases will be considered before earlier requests only in exceptional circumstances and when available resources are able to provide a considered opinion within the time frame sought.

14. Advance Opinions are subject to the necessary reservation that they are not binding on the Commissioner. As in the case of Taxation Rulings, when the time comes to assess liability to tax, the law as it then exists must be applied to the facts as established at that time (cf. Wade's Case). Accordingly, while it is the administrative policy of the Australian Taxation Office to adhere to the advice supplied to a taxpayer in an Advance Opinion, and then only in relation to the particular case to which it relates (see paragraph 17 below), it would generally be necessary to depart from the advice in circumstances similar to those warranting departure from Taxation Rulings as outlined in paragraph 6. Normally departure would be on a prospective basis only unless the particular circumstances warranted - see paragraph 7 above.

15. An example of circumstances where it would be necessary to depart from an Advance Opinion is where it is later decided that the Advance Opinion was incorrect and, as a result of the Opinion, the taxpayer is placed in a position of continuing competitive advantage. If, for example, one trust was incorrectly treated as carrying on an eligible investment business for the purposes of Division 6C of the Income Tax Assessment Act and other similar trusts were treated as public trading trusts the first trust would be in a continuing tax advantaged position vis a vis its competitors. In such a case the Advance Opinion would be reviewed so that as far as practicable all the trusts received the same tax treatment on a prospective basis.

16. How the prospective basis will operate in a given case will depend on the particular facts. For example, the date of effect of the changed decision could be:

(a) 1 July (or substitute date) of the year of income in which the previous decision is reversed;

(b) the actual date of notification of the revised decision to the taxpayer. (This may be on the basis that the previous decision will continue to be applied to certain transactions); or

(c) 1 July of the year of income following the year of income in which the previous decision is reversed.

Which of these is considered applicable in a particular case will depend on the whole of the circumstances of the case including:

(i) whether the taxpayer engaged in transactions which would not have been entered into but for the Advance Opinion;

(ii) the nature of the taxpayer's income earning activity and the accounting method by which assessable income is brought to account;

(iii) the duration of any contracts affected by the new decision; and

(iv) the impact (if any) on other taxpayers of different timing approaches with particular regard to whether a particular timing approach would result in a competitive advantage.

17. An Advance Opinion applies only to the taxpayer for whom it is given and cannot be taken as a precedent for other cases. It is also important to remember that where an Advance Opinion is given the views expressed will have application only in relation to the fact situation presented by the taxpayer from whom the request was received and only in respect of the transaction specified in the Advance Opinion. If the transactions are subsequently found to be part of a series of transactions not disclosed in the original request for an Advance Opinion - or the rights and obligations of all the parties to disclosed transactions are not fully stated in the request - the Opinion may have no application. Similarly, if a transaction is implemented differently from the proposal put to the Taxation Office the Opinion may have no application.

18. As stated above, Advance Opinions will normally be provided by the Taxation Office only in respect of proposed transactions. Consideration of questions concerning doubts as to the taxation consequences of a taxpayer's prior financial transactions would normally arise at the time the taxpayer's return of income is processed. Section 169A of the Income Tax Assessment Act requires the Commissioner to give attention to such questions raised by taxpayers as are relevant to the liability of the taxpayer to tax in respect of the year of income. Provided such questions are prominently placed in the taxpayer's return using separate pages showing full details and clearly headed "Request for Commissioner's Interpretation of the Law" and (for all return form types except the plain English public use Form S) the word "YES" is inserted in the request for rulings block on page 1 of the return form, the taxpayer will be given advice of any decision either by way of an advice accompanying the notice of assessment or a separate letter of explanation. In cases where the taxpayer is given advice by telephone, the advice accompanying the notice of assessment will confirm that the matter raised in the taxpayer's income tax return has been addressed by telephone.

19. While Advance Opinions will be given as to the likely taxation consequences of a proposed course of action, consideration will not be given to determining questions that solely concern the quantum of assessable income or allowable deductions. For example, where it is determined that the consideration on the disposal of an asset is the market value of the asset for capital gains tax purposes, an Advance Opinion will not be given as to that market value. It is the taxpayers'

responsibility to ensure the amount is properly calculated and correct figures are shown in tax returns.

20. Further, Advance Opinions will not be given on requests that depend entirely on factual questions, for example, whether property has been or will be acquired for the purpose of profit-making by sale or whether a taxpayer will be regarded as carrying on a business. Regard will be had to such issues after lodgment of the relevant tax return. The law as it then exists will be applied to the facts established at that time.

21. With regard to requests for Advance Opinions it must be recognised that, in the majority of cases, precise details of a proposed transaction are matters purely within the knowledge of the taxpayer. Consideration of a request for an Advance Opinion in respect of such transactions will therefore be given only where the following conditions are satisfied:

(i) relevant parties to a proposed transaction are identified by name and address. Where, for example, securities are intended to be offered for subscription it would be sufficient to identify the parties offering, underwriting and financing the issue of the securities and any parties known to be likely to accept the offer;

(ii) transactions as proposed are in fact in serious contemplation and not of a purely hypothetical nature and a positive statement to that affect is provided;

(iii) all material facts relating to a proposed transaction are made known at the time the Advance Opinion is requested. This would include details of the relationship between the various parties to the transaction, financing arrangements, the purpose of the transaction and the reasons why the particular method of implementation has been adopted;

(iv) the particular legislative provisions on which an Advance Opinion is sought are specified and the request addresses such questions as the reasons and authorities both in support of and against the taxpayer's contentions. In other words the Australian Taxation Office is not to be used as a free research or advisory bureau. A request for an Advance Opinion on Part IVA of the Income Tax Assessment Act must specifically and separately address all the matters listed in each of the subparagraphs of paragraph (b) of section 177D, where applicable;

(v) all relevant documents (including draft documents) are made available for examination; and

(vi) a statement is provided as to whether the interpretational issues raised by the case have been submitted to any other branch or section of the

Taxation Office, and if so, the name of the branch or section and the advice received.

22. Although not mandatory, the provision of any legal opinions received may assist the Taxation Office to promptly deal with the request.

23. The form of the response to a request for an Advisory Opinion will, of course, depend on each particular case. In some cases (e.g., those where tax avoidance exploitation appears to be involved), it may be appropriate for the reply to merely indicate that no guarantee can be given that the tax consequences sought will be achieved or that it should not be assumed that the arrangements will not be subject to challenge by the Taxation Office. What the Taxation Office will not do is to enter into any correspondence or discussion aimed to establish how schemes designed to exploit perceived loopholes in the law might be structured or altered to facilitate marketing of the scheme.

24. The procedures set out in this Ruling in relation to Advance Opinions apply to requests made after the date of this Ruling.

COMMISSIONER OF TAXATION
18 August 1988