

# ***PS LA 1999/1 - Tax Consultants Register - using external expertise to assist in the resolution of significant interpretative issues***

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 This document has changed over time. This version was published on *8 March 1999*



# ATO Practice Statement

## Law Administration

**PS LA 1999/1**

*This practice statement is withdrawn from 6 December 2005.*

**FOI Status: may be released**

*This Practice Statement is issued under the authority of the Commissioner and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by ATO officers unless doing so creates unintended consequences. Where this occurs ATO officers must follow their Business Line's escalation process.*

**SUBJECT: Tax Consultants Register – using external expertise to assist in the resolution of significant interpretative issues**

### STATEMENT

1. The practice of engaging consultants, with high level technical skills, to **assist** in the resolution of many of the issues identified as significant, within the criteria set out in the Income Tax Advice Manual, is being formalised.
2. The role of the consultant is to assist staff in developing a view of the way in which the tax law applies to an arrangement that is considered by the ATO to involve an issue or issues of significance. The final ATO view or position is still to be determined by the ATO.
3. Issues considered to be significant must be referred to either the Tax Counsel Network (TCN) or, for international issues, the International Tax Division of LB&I (ITD), in accordance with rules promulgated for each Business Line and commonly referred to as the 'escalation' process.
4. The following guidelines are to form part of the escalation process and should be considered in the ordinary course of determining the most appropriate way of dealing with a significant issue.

### ENGAGING CONSULTANTS

5. When referring an issue to TCN or ITD, the Business Line's SES officer authorising the referral needs to consider whether the issue is one which would be suitable for enlisting the services of a consultant (refer paragraph 8). The reasons for the conclusion reached are to be set out in the referral, together with, where relevant, a recommendation for an appropriate consultant. The form of referral will continue to be as set out in the Business Line's escalation process. The Deputy Chief Tax Counsel or the Assistant Commissioner, ITD, will consider the suitability of the issue and confirm the choice of consultant. Should circumstances warrant, further discussion with the Business Line is to occur.
6. As a matter of courtesy, where the decision to engage has been taken, the taxpayer/adviser should be advised of the ATO's intention to engage and which consultant we propose to use. However, the decision to engage and the selection of the

consultant rests with the ATO. The latter is consistent with the *Guidelines for obtaining an opinion from Counsel or external legal adviser*.

7. Having decided to engage a consultant, it is important that the provisions of section 16 of the *Income Tax Assessment Act 1936* are observed. Once contracts have been exchanged, the consultant is deemed to be an “officer” and is consequently bound by the terms of this section. However, a prospective consultant may not be so bound. Therefore care needs to be exercised in preliminary discussions with a prospective consultant that the terms of this section are not breached.
8. Issues where the assistance of consultants may be useful include situations where:
  - cases have been proceeding for a protracted length of time;
  - interpretative principles are settled, but peculiar or novel facts exist;
  - recurrence is unlikely beyond tax reform;
  - legislation is the preferred option, but the ATO position is arguable;
  - litigation is the preferred option but enlisting a consultant may assist in confirming the ATO position or finalising the matter in a more appropriate way; or
  - an external view would be helpful in finalising a sensitive matter.
9. Counsel (and AGS) that are engaged in litigation matters, usually to assist in the preparation of the ATO’s case and to run its arguments, are outside the scope of this initiative.
10. Where it is decided to engage a consultant to work with the Business Line, it is not always necessary for TCN or ITD to be involved in resolving the issue. Subject to agreement by TCN or ITD, a Business Line’s SES officer may sign off the issue. However, if, in all the circumstances of the case, and having regard to escalation guidelines, it is considered that TCN or ITD ought to be involved, then the appropriate Deputy Chief Tax Counsel or Assistant Commissioner, ITD, should be informed and arrangements, where necessary, made to obtain TCN or ITD sign-off. Examples would include a difference of view with the consultant or the consultant disagreeing with an existing ATO position expressed in a public ruling.
11. As with all significant issues, SIGNUM (the significant issues’ database) must be updated to reflect the final ATO position. This ensures that both TCN and ITD keep abreast of developments, especially where they are not involved in the decision making process.
12. Consultants may be engaged by members of TCN/ITD to assist them in the resolution of some of the issues that have been referred to and accepted by them.
13. Consultants may be used on a case by case basis, or, for example, where a number of cases raise the same or similar issues. In the latter instance a panel may be set up involving senior ATO staff and one (or more) consultants, as appropriate.

## **EXPLANATION**

14. The responsibility for the administration of the tax laws rests with the Commissioner of Taxation. A major part of the Commissioner’s role involves forming a view about the way in which the tax law operates in relation to arrangements. In the more complex

cases this may be contentious. Determining the position at law is a process that requires an appreciation of the practical and commercial considerations that pertain to the arrangement. As an adjunct to ATO expertise, we sometimes engage high level expertise from outside the ATO to assist in forming the ATO position on selected interpretative matters.

### **Tax Consultants Register**

15. The Tax Consultants Register has been developed to formalise this practice and to assist the Business Line in choosing a consultant.

16. Benefits consultants bring to the process include:

- commercial experience;
- assistance in the more timely resolution of the ATO's most significant interpretative issues;
- development of technical knowledge, skills and commercial awareness among staff;
- assistance in the training and development of staff; and
- identification and provision of advice on systemic issues that become apparent in the resolution process.

### **Administration of the register**

17. OCTC maintains the register. The services OCTC provides include:

- details of consultants;
- addition or deletion of consultants' names to the register; and
- the method to be used in contracting consultants.

These services can be accessed via the contacts listed below. The list and rules for engagement of consultants can be accessed through the OCTC (Technical Library) site on *ATOconnect*.

18. Each Business Line is responsible for the processing and payment of accounts lodged by the consultant. Before payment, the relevant SES officer is to authorise the amount invoiced.

19. Details of the amounts incurred as well as the other information required by this Law Administration Practice Statement are to be referred by the Business Line owning the issue to the Assistant Commissioner, Taxation Rulings Unit, OCTC (the Administrator). A form for this purpose is available on the *ATOconnect* site mentioned previously.

20. Business Lines are not restricted to using consultants currently appearing on the register. If a more suitable consultant for the issue is available, the responsible Business Line's SES officer should contact the Administrator. Where appropriate, the consultant's name could be added to the register. All consultants engaged under this initiative should appear on the register.

### **Judging the effectiveness of consultants**

21. Once the issue has been resolved the following information is to be provided to the Administrator:

- whether the issue on which the consultant was engaged was resolved favourably (fully or partially) or unfavourably for the taxpayer;
- whether the consultant's input added value to the process of formulating the ATO position;
- the nature of the consultant's expertise and whether it will be useful for future work; and
- the consultant's view on systemic issues involving the law, staff skilling needs, etc.

22. It is expected that this information will be eventually captured through SIGNUM.

#### **Review of this initiative**

23. The practices and procedures surrounding this initiative are being closely monitored so that the most effective and economic use of consultants is obtained.

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*subject references:* Tax Consultants Register; significant issues; TCN; ITD

*file reference:* NO 99/5410

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FOI extraction number: **I 1018299**  
 Date issued: **8 March 1999**  
 Date of effect: **8 March 1999**

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