PS LA 2000/4 (Withdrawn) - Provision of advice to taxpayers on the potential application of announced proposed changes to the tax system

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This Law Administration Practice Statement is withdrawn from 7 May 2004 and is replaced by PS LA 2004/6

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ATO Practice Statement Law Administration

PS LA 2000/4

This Law Administration Practice Statement is withdrawn from 7 May 2004 and is replaced by PS LA 2004/6

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: **Provision of advice to taxpayers on the potential application of announced proposed changes to the tax system**

PURPOSE: **This Law Administration Practice Statement outlines the arrangements whereby the Australian Taxation Office ('ATO') will provide written advice on the potential operation of either:**

(i) proposed changes to the business tax system that have been announced by the Government; or

(ii) changes to the tax system announced in the Government report 'Tax Reform: not a new tax – a new tax system' ('A New Tax System').

The purpose of the advice is to assist taxpayers to better understand the proposed new tax system.

STATEMENT

What constitutes an advice on the potential operation of the proposed changes to the tax system announced by the Government

1. For the purposes of this Statement, an advice is any written statement expressing the ATO's view on the potential effect of proposed legislation which is intended to implement the Government's announced:

   (i) responses to the Recommendations contained in the final report of the Review of Business Taxation entitled 'A Tax System Redesigned' ('The Ralph Report'); or

   (ii) changes to the taxation system announced in 'A New Tax System'.

2. The advice may be given in relation to:

   (i) draft legislation released by the Government for public consultation; or

   (ii) proposed legislation introduced into Parliament; or

(iii) legislation which has been passed by Parliament, but not yet received Royal Assent; or

(iv) a Recommendation contained in the 'The Ralph Report' or in the draft legislation which accompanied the Ralph Report, provided the Government has announced its intention to introduce legislation to give effect to the Recommendation or the draft legislation that accompanied the Report; or

(v) changes to the tax system announced in 'A New Tax System', as modified by later Government announcements.

3. A written statement on the operation of legislation that has received Royal Assent will not be an advice for the purposes of this statement. Such a statement may be either a public or private ruling within the terms of the *Taxation Administration Act 1953* (see also Taxation Ruling 92/1), or an Advance Opinion (see Taxation Ruling IT 2500).

4. Written advice on introduced legislation, published draft legislation or proposed legislation will not be binding on the ATO. By and large, advice will simply provide an indicative view on the potential effects of Recommendations, Government announcements, or draft legislation. 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. This type of non-binding indicative advice will be provided so that taxpayers can be better informed of the possible effects of Government announcements upon their taxation affairs. The provision of this kind of advice should be seen as part of the dialogue that needs to occur between the government sector and the community about prospective taxation changes. Taxpayer groups cannot effectively participate unless there is an appreciation of the intended effects of announced changes and draft legislation. That is why the ATO takes part in discussions on implementation issues that arise from proposed changes to the taxation system. Advice that is given in these circumstances, however, is subject to the necessary qualification that announced published legislation may change as policy is refined – sometimes in response to community input – or through parliamentary processes. Consequently, it is generally inappropriate to treat statements on the potential operation of proposed legislation as either legally or administratively binding.

5. However, the Commissioner will be prepared to exercise his statutory powers of administration consistent with advice on the potential application of legislation that has been introduced into the Commonwealth Parliament provided the conditions set out at paragraph 11 of this Law Administration Practice Statement are satisfied.

Type of advice provided

6. The ATO will provide:

- general advice on the potential meaning or application of draft or proposed legislation; and
- advice on the taxation consequences of actual or seriously contemplated transactions.

7. The advice may take a number of forms, including:

- general advice to the public and Taxation Office staff on matters of policy, and the possible interpretation of publicly available draft legislation; and

- answers to specific requests from taxpayers, or their advisers, on the potential effect of changes to the tax system announced by the Government.

8. The ATO will not provide advice on hypothetical transactions. Advice will also not be given in respect of requests that depend entirely on factual questions. Advice will not be given in relation to schemes that are designed to exploit perceived loopholes in proposed laws. Taxpayers should always consider their own position and seek professional advice on these matters.

Legal status of advice

General rule

9. Advice on the potential operation of proposed changes to the business tax system, or changes announced in 'A New Tax System', will not be a public or private ruling as defined in Parts IVAAA and IVAA of the *Taxation Administration Act 1953*. In order to be a public or private ruling, a ruling must be in respect of a 'tax law'. A 'law' for these purposes is defined in section 14ZAAA of the *Administration Act* as '… a section or other provision of an Act; or a regulation under an Act'. An Act for these purposes is one which has passed through both Houses of Parliament and received Royal Assent. Consequently, since advice will only be given in respect of:

(i) legislation which has not yet received Royal Assent; or

(ii) the draft legislation which accompanied the Ralph Report, in respect of which the Government has stated its intention to legislate; or

(iii) recommendations, not yet in legislative form, in respect of which the Government has stated its intention to legislate;

the advice cannot be a public or private ruling.

10. The ATO must, at any particular point in time, apply the law as it understands it to operate, even if a different interpretation was adopted by the ATO previously. No conduct on the part of the Commissioner can operate as an estoppel against the operation of taxation legislation (see *FC of T v. Wade* (1951) 84 CLR 105 at 116-117; 9 ATD 337 at 344 per Kitto J; *AGC (Investments) Limited v. FC of T* 91 ATC 4180; (1991) 21 ATR 1379 and the authorities cited in that case).

Administering the law after enactment

11. While, as mentioned, advice about proposed laws will be given on an indicative, non-binding basis, taxpayers can expect the ATO to administer an enacted law in a manner that is consistent with advice given prior to enactment, provided that the following criteria are satisfied:

(i) the advice is given after the relevant proposed legislation on which the advice is based has been introduced into the Commonwealth Parliament; and

(ii) the relevant legislation that receives Royal Assent is not materially different from the relevant introduced legislation on which the advice was based; and

(iii) nothing that is said in the Parliament during the passage of the Bill containing the relevant provisions would alter the basis of the advice; and

(iv) the written advice given by the ATO expressly provides that the ATO would stand by the advice if the relevant conditions are satisfied; and

(v) the advice is given in respect of a specific request from a taxpayer, or the taxpayer's professional adviser, and:

- the request for advice is in writing signed by the taxpayer;
- relevant parties to the proposed transaction are identified by name and address;
- the transactions which are the subject of the request are in serious contemplation and not of a purely hypothetical nature, and a positive statement to that effect is provided;
- all material facts relating to the proposed transaction are made known to the ATO at the time the advice 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;
- the particular proposed legislative provisions on which advice is sought are specified and the request addresses arguments both in support of and against the taxpayer's contentions; and
- all other relevant documents (including draft documents) are made available for examination or are provided.

12. The ATO will administer an enacted law in a manner consistent with advice given in the circumstances described in the previous paragraph only in respect of the taxpayer for whom it is given and not as a precedent for other cases. The advice will only apply in relation to the fact situation described in the request for advice and only in respect of the transaction specified in the advice. If transactions are subsequently found to be part of a series of transactions not disclosed in the original request for advice - or the rights and obligations of all the parties to disclosed transactions are not fully stated in the request - the advice will have no application. There will be a similar outcome if a transaction is implemented differently from the proposal described in the request for advice.

Departures from advice

13. Where advice has been given under the conditions described in paragraph 11, it may be necessary nevertheless to depart from the advice in the situations discussed in

paragraphs 6 and 10 of IT 2500. For example, advice could be departed from where it is subsequently decided that the advice was incorrect and, as a result, a taxpayer is placed in a position of continuing competitive advantage, or where the approach adopted in the advice is otherwise no longer considered appropriate.

14. Normally a departure from an advice would be on a prospective basis only. The timing of the departure will take into account the same matters as those discussed in paragraphs 7 and 16 of IT 2500.

Application period of advice

15. Subject to paragraphs 17 and 18, ATO advice given under this Law Administration Practice Statement on the potential effect of proposed business tax review legislation, or changes announced in 'A New Tax System', will apply until the end of one year from the later of the date on which the legislation, in respect of which the advice was given, commenced to apply or the date the legislation received Royal Assent. The advice will be treated as having been withdrawn at the end of this period. After Royal Assent taxpayers have the opportunity to seek a private binding ruling on the relevant issues.

Advice on both the existing and proposed law

16. The ATO may be requested to provide, or may give, advice both on the operation of the existing law, and proposed changes announced by the Government. That part of any such advice which relates to the proposed law will be an advice subject to the rules discussed in this Law Administration Practice Statement. The part which relates to the operation of the existing law may be a public or private ruling.

Conflicting rulings and advice

17. Public or private binding rulings reflect the Commissioner's concluded view on how the legislative provisions covered by the rulings have applied, and continue to apply. Accordingly, if a public or private ruling is issued about a matter and there is an earlier indicative, non-binding, advice that is inconsistent with the later Ruling, the non-binding advice is taken to be withdrawn as from the time it was originally issued.

18. If an advice that has been given under the conditions described in paragraph 11 is inconsistent with a later public ruling, or private ruling on the same issue given to the relevant taxpayer, the date of effect rules discussed in paragraphs 7 and 16 of IT 2500, and in paragraphs 8 to 20 of TR 92/20, will be relevant in determining the time when the ATO would cease to act in accordance with the advice.

Date of effect

19. The procedures in relation to advice set out in this Law Administration Practice Statement apply regardless of whether the advice was provided before or after the date of release of this Statement.

Disclaimer

Indicative non-binding advice

20. The following disclaimer should be included in indicative, non-binding, advice that is not covered by paragraph 11.

> 'Disclaimer
>
> The views contained in this advice are indicative only. They do not constitute a public or private ruling within the meaning of the *Taxation Administration Act 1953*, nor are they an advance opinion. The advice is not legally or administratively binding on the Australian Taxation Office (ATO). The advice simply provides a view on the potential application of proposed legislation. The law as enacted by the Commonwealth Parliament may be different, and may result in a different view of the application of the law. 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.
>
> Notwithstanding any advice from the ATO on its view of the potential application of proposed legislation, taxpayers should always independently consider their own position before embarking on any course of action and should also seek independent professional advice. The Commonwealth of Australia and the Commissioner of Taxation are not legally or administratively liable to make good any loss that any person may suffer as a consequence of actions taken as a result of advice from the ATO on its view of the potential application of proposed legislation.
>
> This advice will apply until the end of one year from the later of the date on which the legislation, in respect of which the advice was given, commenced to apply or the date the legislation received Royal Assent. However, the advice will be treated as withdrawn from the time it was originally given if the Commissioner issues a public ruling, or provides you with a private binding ruling, that is inconsistent with the advice. A binding private ruling may be sought once the relevant legislation has been enacted.
>
> You should also have regard to the Commissioner's Law Administration Practice Statement PS LA 2000/4 with respect to the giving of advice by the ATO on its view of the potential application of proposed legislation.'

Advice on specific transactions

21. The following disclaimer must be included in any advice about specific transactions that is provided under the conditions set out in paragraph 11.

> 'Disclaimer
>
> This advice does not have the force of law. Each decision made by the Commissioner of Taxation is made on the merits of each individual's factual circumstances. The advice has been given on the basis of proposed legislation introduced into the Commonwealth Parliament. However, the Commissioner will exercise his statutory powers of administration consistent

with this advice provided the following conditions are satisfied (see also paragraph 11 of Law Administration Practice Statement PS LA 2000/4):

(i) the relevant legislation that receives Royal Assent is not materially different from the relevant introduced legislation on which the advice was based;

(ii) nothing that is said in the Commonwealth Parliament during the passage of the legislation would alter the basis of the advice; and

(iii) the advice is given in respect of a specific request from a taxpayer, or the taxpayer's professional adviser, and:

- the request for advice is in writing signed by the taxpayer;
- relevant parties to the proposed transaction are identified by name and address;
- the transactions which are the subject of the request are in serious contemplation and not of a purely hypothetical nature, and a positive statement to that effect is provided;
- all material facts relating to the proposed transaction are made known to the ATO at the time the advice 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;
- the particular proposed legislative provisions on which advice is sought are specified and the request addresses arguments both in support of and against the taxpayer's contentions; and
- all other relevant documents (including draft documents) are made available for examination or are provided.

Where these conditions are satisfied the advice applies only in respect of the taxpayer for whom it is given and is not a precedent for other cases. The advice will apply only in relation to the fact situation described in the request for advice and only in respect of the transaction specified in the advice. Notwithstanding any advice from the ATO on its views of the potential application of proposed legislation, taxpayers should always independently consider their own position before embarking on any course of action and should also seek independent professional advice. The Commonwealth of Australia and the Commissioner of Taxation are not legally or administratively liable to make good any loss that any person may suffer as a consequence of actions taken as a result of advice from the ATO on its view of the potential application of proposed legislation.

This advice will apply until the end of one year from the later of the date on which the legislation, in respect of which the advice was given, commenced to apply or the date on which the legislation receives Royal Assent. The

advice will be treated as having been withdrawn at the end of this period. The advice may also be withdrawn if the Commissioner issues a public ruling, or provides you with a private binding ruling, that is inconsistent with the advice. It also may be necessary to depart from advice in certain other circumstances, for example, advice could be departed from where it is subsequently decided that the advice was incorrect and, as a result, a taxpayer is placed in a position of continuing competitive advantage, or where the approach adopted in the advice is otherwise no longer considered appropriate. Any withdrawal of an advice is generally on a prospective basis (see paragraphs 14 and 18 of Law Administration Practice Statement PS LA2000/4). A binding private ruling may be sought once the relevant legislation has been enacted.

You should also have regard to the Commissioner's Law Administration Practice Statement PS LA 2000/4 with respect to the giving of advice by the ATO on its view of the potential application of proposed legislation.'

subject references:	A New Tax System; Business Tax Reform; binding advice; non-binding advice; public and private rulings
legislative references:	TAA 1953 Part IVAA TAA 1953 Part IVAAA TAA 1953 14ZAAA
related public rulings:	IT 2500; TR 92/1; TR 92/20
case references:	*FC of T v. Wade* (1951) 84 CLR 105 at 116-117*;* 9 ATD 337 at 344*; AGC (Investments) Limited v. FC of T* 91 ATC 4180; (1991) 21 ATR 1379
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