PS LA 2001/8 - ATO Interpretative Decisions

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Practice Statement Law Administration

PS LA 2001/8

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FOI status: may be released

This practice statement is issued under the authority of the Commissioner of Taxation and must be read in conjunction with Law Administration Practice Statement PS LA 1998/1. It must be followed by ATO staff unless doing so creates unintended consequences or is considered incorrect. Where this occurs ATO staff must follow their business line's escalation process.

SUBJECT: **ATO Interpretative Decisions**

PURPOSE: **To advise:**

- **what is an ATO Interpretative Decision (ATO ID)**
- **when an ATO ID must be followed**
- **when an ATO ID must be prepared**
- **when an ATO ID need not be prepared**
- **the process for preparing an ATO ID**
- **when an ATO ID should be amended or withdrawn**

TABLE OF CONTENTS **Paragraph**

STATEMENT

What is an ATO Interpretative Decision

1. An ATO Interpretative Decision (ATO ID) is an edited and summarised version of a documented decision on an interpretative issue[1] about the application of law administered by the Commissioner. Law administered by the Commissioner includes law governing income tax, indirect taxes, fringe benefits tax, withholding taxes, resource rent taxes, superannuation and excise.
2. ATO IDs set out precedential ATO views that tax officers must apply in resolving interpretative issues. ATO IDs are precedents for tax officers about how a provision of the law applies to a particular factual situation. *PS LA 2003/3 Precedential ATO view* explains the meaning of 'precedential ATO view'.
3. ATO IDs are produced for the primary purpose of facilitating consistent interpretative decision-making by tax officers.
4. ATO IDs may be based on decisions on interpretative issues including those arising from private rulings, audits, correspondence, advices or disputes. Also a pre-emptive ATO ID[2] may be based on a scheme[3] or transaction that is known to exist, or to be in serious contemplation, even though the Commissioner has not been required to make an actual decision in relation to any interpretative issue which arises from that scheme or transaction.
5. ATO IDs are published to meet freedom of information requirements and are publications approved in writing by the Commissioner. The level of protection available to taxpayers who rely on an ATO ID is detailed in *PS LA 2008/3 Provision of advice and guidance by the ATO* – refer to paragraphs 224 to 228.

When an ATO ID must be followed

6. An ATO ID must be followed where:
   - there is **no material difference** between the facts of the issue upon which a decision is required and an existing ATO ID, and

[1] The meaning of 'interpretative issue' is explained in paragraph 2 of *PS LA 2003/3 Precedential ATO view.*
[2] For information concerning pre-emptive ATO IDs see paragraphs 24 to 27 of this practice statement.
[3] Scheme is defined in subsection 995-1(1) of the *Income Tax Assessment Act 1997* (ITAA 1997) to mean:
(a) any arrangement; or
(b) any scheme, plan, proposal, action, course of action or course of conduct, whether unilateral or otherwise.

- the tax officer considers that the application of the precedential ATO view set out in the ATO ID would result in a correct decision.

7. If a tax officer considers that there is a conflict between an ATO ID and another precedential ATO view document, or applying an ATO ID may lead to an incorrect or unintended result, assistance must be sought from technical leaders within the business line.[4] If the level of risk warrants it, tax technical officers in Law & Practice may also be engaged.[5]

When is there 'no material difference'?

8. Whether there is 'material difference' is a question of fact and degree depending on the issue being considered and will involve the exercise of judgment.

9. There is 'no material difference' where the facts underlying a particular issue and the facts outlined in an existing ATO ID or other precedential ATO view document are similar enough to enable the tax officer to be satisfied that applying the existing precedential ATO view will result in the law being applied correctly to the circumstances of the case. In order to be satisfied, tax officers may need to refer to the facts on which the ATO ID was based – through the case report and other documentation underlying the ATO ID.

10. While the decision in relation to an issue must be determined on its own particular facts, it may still be covered by the principles set out in a precedential ATO view document, even though the facts are not identical. Care should be taken to identify the key interpretative issue underlying the issue to ensure that an ATO ID can be applied as a precedent for schemes or transactions that have different factual contexts, but which turn on the same interpretative issue. Therefore, it is important to understand how the law administered by the Commissioner applies to an issue, particularly where the matter is complex. This will ensure that issues arising from a particular case are not treated as if there is no existing precedent dealing with those issues merely because of factual differences.

11. On the other hand, even small factual differences between the issue under consideration and the facts outlined in an existing ATO ID or other precedential ATO view document may be material. Consequently, this will require the preparation of an ATO ID or other precedential ATO view document. This is particularly important for provisions of general application[6] that may have been subject to a significant amount of litigation.

12. Tax officers who are unable to determine whether an ATO ID applies to the factual situation under consideration must follow procedures to seek assistance from technical leaders within the business line. Tax technical officers from Law & Practice can also be engaged if appropriate.[7]

13. The following examples provide some guidance on when there is no material difference.

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[4] See also PS LA 2003/3 <hp1>Precedential ATO view</hp1>.
[5] For details of engagement of tax technical officers in Law and Practice, see PS LA 2012/1 *Management of high risk technical issues and engagement of tax technical officers in Law and Practice.*
[6] Such as section 8-1 of the *Income Tax Assessment Act 1997* which is the general deduction provision.
[7] Refer to PS LA 2012/1 *Management of high risk technical issues and engagement of tax technical officers in Law and Practice*.

Examples of when there is 'no material difference'

14. ***Example 1***

There is an ATO ID on the reduction of deductions for the decline in value of a computer by an accountant who uses the computer partly for business purposes. A new private ruling request is received asking for advice on the reduction of deductions for decline in value of a mobile telephone (a different depreciating asset) used by a lawyer (someone in a different occupation) partly for business purposes. The differences in the facts are not material as the circumstances of the respective taxpayers and their use of the depreciating assets are sufficiently similar. As well, the legal principles involved are sufficiently broad to apply to the phone as well as the computer. The existing ATO ID should be followed as there is 'no material difference'.

15. ***Example 2***

Taxation Ruling TR 95/13 states that a deduction is allowable for expenses incurred in maintaining and training police dogs. A private ruling request is received on the deductibility of expenses incurred by a fire-fighter in maintaining and training a dog used in search and rescue work. The legal principles as explained in TR 95/13 will apply. The differences in the facts are not material, because the search and rescue dog performs similar functions to a police dog. Although the private ruling is not about a police dog, TR 95/13 provides the precedential ATO view in relation to the training costs and maintenance of animals used in the workplace in a similar manner to police dogs.

ATO ID guidelines

16. Detailed guidance on ATO IDs, including the processes for preparation, amendment and withdrawal of ATO IDs is contained in the ATO ID Guidelines (a link to these Guidelines is contained in the Other References section at the end of this document).

When an ATO ID must be prepared

17. Tax officers must search for, identify and apply relevant ATO IDs or other precedential ATO view documents in resolving interpretative issues. [8] An ATO ID must be prepared for each decision on an interpretative issue about the application of any of the laws administered by the Commissioner where:

- there is no precedential ATO view on the issue (unless paragraph 28 of this practice statement applies), or
- there is a precedential ATO view on the issue, but the ATO ID
  - will improve clarity and certainty in relation to the interpretation of the particular area of the law, or

[8] See PS LA 2003/3 *Precedential ATO View*.

- is of wide significance, application and interest, and the precedential ATO view has not been adequately covered previously, and

- where another form of ATO precedential view document, for example a public ruling or decision impact statement, is not more appropriate. Note: this decision requires consideration of other issues, including timing – refer to paragraphs 19 to 21 of this practice statement. Further, it should be noted that if a case involves multiple interpretative issues, each issue must be considered separately.

18. When making the decision on whether to prepare an ATO ID, business lines should duly consult with other business lines, including Law and Practice, which may be affected or impacted, or which may provide input into the decision..

19. If a number of ATO IDs are to be prepared on related issues, or where there are several existing ATO IDs already related to the same topic, and depending on the level of risk involved, consideration should be given to amalgamating them into one precedential ATO view document, such as a public ruling. A public ruling is the preferred means of expressing and communicating a precedential ATO view on multiple issues relating to the same topic.

20. Additionally, where the precedential ATO view to be expressed in an ATO ID represents a particular risk to the ATO, because of its significance or wide application, consideration should also be given to issuing a public ruling on the issue.

21. In certain instances, it may be decided that the preparation of another type of precedential ATO view document already in progress will remove the requirement for an ATO ID on an issue on which binding advice has issued to a taxpayer. The author of the other document should be consulted to determine the most practical way to promulgate the ATO view.

22. One of the key considerations in the situations outlined in paragraphs 20 and 21 above is timing. If the other precedential ATO view document dealing with the matter covered in the ATO ID would not issue within a reasonable period, it would normally be appropriate to publish the ATO ID or ATO IDs to enable interim guidance to be provided.

23. Where a tax officer is unable to decide whether to prepare an ATO ID, they must seek assistance from technical leaders within the business line. Tax technical officers from Law & Practice can also be engaged if appropriate.

Pre-emptive ATO IDs

24. A pre-emptive ATO ID may be prepared where there is a scheme or transaction that is known to exist, or to be in serious contemplation, even though the Commissioner has not been required to make a decision in relation to an actual case concerning that scheme or transaction. For example, a private ruling request may be withdrawn before a ruling has issued. Where significant work has been done on an interpretative issue and a decision is reached but is not reflected in any precedential ATO view document, tax officers must consider whether an ATO ID or some other precedential ATO view document should be prepared.

25. A pre-emptive ATO ID may also be prepared where:

- most aspects of a topic have been covered by precedential ATO view documents
- an important aspect of this topic has not been addressed, and
- taxpayers may be misled if this aspect were not to be addressed.

26. An ATO ID may be prepared on the application of legislation that is not yet in operation; for example, where the legislation is awaiting Royal Assent. However, publication of the ATO ID must be withheld until the legislation has received Royal Assent.

Example of when a pre-emptive ATO ID may be prepared

27. ***Example 3***

A taxpayer asks for a private ruling about whether a receipt from an asset sale is ordinary income. Whilst this aspect is contained in a precedential ATO view document, the capital gains tax (CGT) implications have not been considered. An ATO ID could be prepared and published on the CGT implications to ensure that tax officers and the community are aware of the CGT implications of such a transaction.

When an ATO ID need not be prepared

28. An ATO ID does not need to be prepared:

- If there is no material difference between the facts of the issue and those set out in a precedential ATO view document.
- If an ATO ID is already in the course of preparation on the same issue and there is no material difference between the facts of the issue and those in that ATO ID. Tax officers must search the Siebel database to identify any other relevant ATO IDs which are in the course of preparation.
- If the relevant legislative provisions are administered by another agency and the issue will be referred to them (for example issues in relation to whether Research and Development activities are eligible are referred to Innovation Australia).
- If the decision does **not** involve an interpretative issue, such as if a taxpayer asks for a ruling on a scheme or transaction where the decision is reached by a straightforward application of law to a particular set of facts (see *PS LA 2003/3 Precedential ATO view* for more information).
- If the decision solely involves the exercise of the Commissioner's discretion.
- If the decision involves an ultimate conclusion of fact. An ultimate conclusion of fact involves ascertaining the relevant primary facts and drawing a conclusion from those facts (see *PS LA 2003/3 Precedential ATO view* for more information).

- Where the decision is one which turns on the particular facts of the case rather than the interpretation of law. For example, the issue concerns:
  - the determination of the value of something
  - the pure calculation of amounts; for example, answering questions about how penalty and interest is calculated, or
  - a claim for compensation based on defective administration.

The process for preparing an ATO ID

29. Business line technical staff and technical leaders are responsible for:
    - determining when an ATO ID should be prepared (see paragraphs 17 to 22 of this practice statement), and
    - either:
      - preparing a draft ATO ID for clearance by the relevant officer, or
      - referring the matter to the relevant officer for the preparation of an ATO ID.
30. All ATO IDs are subject to a clearance process. This process involves checking of style, format, structure and compliance with this practice statement and the ATO ID Guidelines and technical clearance and authorisation by the relevant officers.
31. Only officers duly accredited to create precedent[9] are authorised to create and authorise the issue of ATO IDs.
32. Checking of style, format, structure and compliance with the ATO ID Guidelines is also carried out as part of the publishing process.

Format and content

33. ATO IDs should set out decisions in a summary form in a clear standard structure and format that includes:
    - the issue
    - the decision
    - the facts
    - the reasons for decision, and
    - references (keywords, legislation, case law, etc).

    The ATO ID template (a link to this template is contained in the Other References section at the end of this document) must be used to prepare an ATO ID.
34. In preparing an ATO ID, the officer should:
    - ensure that the focus of the ATO ID is on the technical issue
    - include only the material facts so that it is clear what situation is covered

[9] See PS LA 2004/8 *Professional accreditation*.

- set out the reasons for the decision based on the application of the relevant principles, and
- ensure that ATO IDs do not identify taxpayers, nor disclose confidential information. Ordinarily, it should be possible to summarise a decision in such a way that privacy and confidentiality requirements are met. The guidelines for preparing edited versions of written binding advice contained in *PS LA 2008/4 Publication of edited versions of written binding advice* should be applied when preparing ATO IDs. In particular:
  - there may be some cases where it is not possible to edit or draft an ATO ID so that it does not identify taxpayers or disclose confidential information, and
  - there may be instances where the specific facts are so integral to the decision that no useful precedent can be extracted without identifying the taxpayer. For example a decision on the application of a provision to a taxpayer who is one of only a very small number of taxpayers in a particular industry.

  In the two situations above, an ATO ID is still prepared but must not be published either internally or externally. An ATO ID must not be published internally or externally unless privacy and confidentiality requirements can be met.

Numbering

35. When being published, ATO IDs are allocated a unique reference number which begins with the prefix 'ATO ID' followed by the year and sequential numbering. These numbers are assigned in order of publication when an ATO ID is added to the Legal Database.

Publication

36. The *Freedom of Information Act 1982* requires that internal guidelines are available to the public. ATO IDs are produced for the primary purpose of facilitating consistent interpretative decision-making by tax officers and are on ATOlaw. They are also made publicly available through the Legal Database on the ATO website www.ato.gov.au***.***

37. Copies of any ATO ID provided to the public by tax officers should be produced only from the external Legal Database on www.ato.gov.au.

Amending and withdrawing ATO IDs

38. Responsibilities for maintaining the currency, accuracy and consistency of ATO IDs, as precedential ATO view documents, are set out in *PS LA 2003/3 Precedential ATO view.*

39. An ATO ID should be withdrawn where:
    - it is incorrect
    - a substantial change is required

- its application may lead to unintended consequences, or
- where the precedential ATO view is expressed in a later issued public ruling (consideration should be given to incorporating the ATO ID as an example in the public ruling).

40. However, where there are minor errors that do not affect the decision or the reasons for the decision, the ATO ID can be amended rather than being withdrawn. Minor errors include, for example:

- spelling, punctuation or grammatical errors, or
- a citation error which does not alter the decision or the reasons for decision.

41. If it is proposed to replace an ATO ID that is to be withdrawn, the replacement precedential ATO view document must be prepared and published as soon as possible after withdrawal. If the new precedential ATO view is to change an existing precedential ATO view this must be brought to the attention of the relevant Deputy Chief Tax Counsel.[10]

Amendment history

Date of amendment	Part	Comment
3 May 2013	Paragraphs 19-21	Revised to clarify that a public ruling should be considered when issue represents a significant risk.
	Paragraph 28	Remove reference to general written advice, following integration of GST rulings system into general rulings provisions
	Paragraph 34	Update to provide link to ATO ID template in Other References.
28 March 2013	Paragraph 17	Corrected dot point reference to para 27 to para 28
	Other References	Updated link to ATO ID Guidelines
21 May 2012	Throughout	Updated to - reflect the replacement of the priority technical issues system, and the requirement to escalate precedential issues to Centres of Expertise with the new rules for engagement of tax technical officers in Law and Practice set out in PS LA 2012/1. - delete material which was merely a replication of policy stated

[10] See PS LA 2011/27 *Matters the Commissioner considers when determining whether the Australian Taxation Office (ATO) view of the law should only be applied prospectively* and *PS LA 2003/3 Precedential ATO view*

Date of amendment	Part	Comment
		elsewhere, ie • the protection afforded by ATO IDs, which is set out now in PS LA 2008/3 • responsibilities for reviewing and maintaining ATO IDs, which is set out in PS LA 2003/3 - improve clarity about when an ATO ID should be prepared - particularly around the interplay of ATO IDs with other precedential ATO view documents (paragraphs 17-22) - clarify requirements for accreditation to issue ATO IDs - remove lower level detail in the preparation and publishing process - more logically reorder material and remove duplication
1 December 2011	Paragraphs 46 – 48 Throughout	Content updated as a result of the publication of TD 2011/19 which explains general administrative practice. References to PMU changed to PTI&PRU References to Tax Office changed to ATO Correction of citation of references to related law administration practice statements
9 November 2009	Paragraphs 14, 28, 31 and 29 Paragraph 25 Paragraph 28 Paragraph 30 Paragraph 32 Footnote 12	References to the Technical Decision Making System (TDMS) updated to refer to Siebel. Updated reference to CGT Instance of when an ATO ID does not need to be prepared deleted Updated reference to TCN Updated a reference to a related practice statement from PS LA 2001/7 to PS LA 2008/4 Further clarification on publication and preparation of an ATO ID added BSL references updated from OCTC to L&P Updated a reference to a related practice statement from PS LA 2001/4 to PS LA 2008/3
2 September 2009		Contact officer details updated
23 July 2009		Updated a related practice statement from PS LA 2001/4 to PS LA 2008/3

Date of amendment	Part	Comment
11 August 2008		Contact officer details updated
26 November 2007	Paragraph 45	Corrected paragraph reference of PS LA 2003/3 (from para 33 to 35 of that practice statement)
8 June 2007		To clarify the issue of what 'no material difference' means, and to detail new exceptions to the requirement that ATO IDs are to be published

Subject references	ATO Interpretative Decisions Precedential ATO views
Legislative references	ITAA 1936 177A(1) ITAA 1936 177D ITAA 1997 8-1 ITAA 1997 Div 721 ITAA 1997 995-1(1) ANTS(GST)A 1999 Sch 1 cl 1 TAA 1953 8(1) TAA 1953 Sch 1 284-224(1) TAA 1953 Sch 1 357-55 TAA 1953 Sch 1 361-5(1) FOI Act 1982
Related public rulings	TR 95/13; TD 2011/19
Related practice statements	PS LA 1998/1; PS LA 2001/7; PS LA 2002/16; PS LA 2003/3; PS LA 2005/24; PS LA 2008/3 ;PS LA 2008/4 ; PS LA 2011/27 ; PS LA 2012/1
Case references	
Other references	***ATO ID Guidelines*** (link available only within the Tax Office) Explanatory Memorandum to the Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005 ***Public Rulings Manual***
File references	2001/7447
Date issued	8 June 2007
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Other Business Lines consulted	All