PS LA 2002/17 (Withdrawn) - Provision of non-binding oral technical advice by the Australian Taxation Office

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This practice statement has been replaced by PS LA 2008/3

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ATO Practice Statement Law Administration

PS LA 2002/17

This practice statement has been replaced by PS LA 2008/3

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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 non-binding oral technical advice by the Australian Taxation Office**

PURPOSE: **To clarify:**

- **the circumstances in which oral technical advice is to be provided**
- **the extent to which such advice can be relied on, and**
- **the general prohibition on providing indicative oral technical advice.**

CONTEXT

1. The Australian Taxation Office provides oral advice on interpretative matters to persons seeking advice about the application of the laws administered by the Commissioner. The Tax Office provides this oral advice by phone or in person. This practice statement refers to such advice as oral technical advice. Oral technical advice is to be contrasted with the non-technical (operational) advice provided to clients, for example, account details. The focus of this practice statement is on non-binding oral technical advice as opposed to the binding oral technical advice which can be expressly requested by taxpayers on certain matters under the Binding Oral Advice system (Division 360 of Schedule 1 to the *Taxation Administration Act 1953*).

2. Oral technical advice is an important type of advice provided by the Tax Office to assist taxpayers in a self-assessment system. This is because there are many situations which arise in the ordinary course of conducting the Tax Office's business where advice is orally requested and it is appropriate to respond orally. This practice statement sets out rules and provides guidelines on when it is appropriate to provide oral technical advice. These rules and guidelines are not prescribing a pulling back or withdrawal from staff undertaking discussions that necessarily arise in the normal course of dealing with Tax Office clients. Rather, they seek to assist staff in ascertaining when a person requesting oral advice should be advised to seek the advice in writing. This will ensure that any advice provided will be useful, consistent and accurate.

3. Attachment A contains a decision tree capturing the major rules contained in this practice statement. Attachment B contains practical guidance on how the rules contained in this practice statement apply to the Tax Office's various work types.

STATEMENT

4. Oral technical advice is to be provided only on matters of a general, straightforward or simple nature. Before an officer gives any oral technical advice, they must take all reasonable steps to ensure that all relevant information has been obtained from the person who is requesting the advice.

5. The Tax Office is required to take care in providing oral technical advice. Every effort must be made to ensure that our oral technical advice is accurate, complete and understood by the person requesting the advice. Any such advice, therefore, must be consistent with the ATO view and be provided by an appropriate technical officer.[1]

6. If a person follows advice provided by the Tax Office which turns out to be incorrect and, in doing so, makes an honest mistake, they will not be subject to a penalty or interest, although they will be required to pay any underpaid tax.

7. Where a matter is not of a general, straightforward or simple nature, the person is to be advised to request the advice in writing (see Law Administration Practice Statement PS LA 2001/4 to ascertain the type of written technical advice that should be requested and the information that should be provided with the request).

8. Subject to the limited exception described in paragraph 18 below, officers should not provide indicative oral technical advice.

EXPLANATION

9. Oral technical advice is to be provided only on matters of a general, straightforward or simple nature. The advice provided must be consistent with the ATO view in relation to that interpretative issue. Sources of the ATO view for the purposes of providing oral technical advice include formal documents such as public rulings and other documents that provide an indication of the ATO view, such as call centre scripts, ATO Interpretative Decisions and other interpretative products published by the Tax Office.[2] If there is any apparent inconsistency in source documents, no advice should be given and the issue should be escalated for resolution following appropriate escalation procedures.

10. It would be appropriate to provide advice about an unambiguous and clearly simple area of the law, even if its operation is only implicitly stated or briefly outlined in one of the above-mentioned documents. This is to be contrasted with the situation where there is ambiguity in the law and an ATO view is not clearly contained in one of the above-mentioned documents.

11. A matter is of a general nature if the person has asked about the general principles of the operation of the law (for example, how does section 8-1 of the ITAA 1997

[1] An appropriate technical officer is an officer who is able to provide the relevant oral technical advice in the normal course of duties by virtue of their position. For example, a Superannuation Helpline officer is the appropriate technical officer to provide oral technical advice on simple superannuation matters but not on, say, GST matters.

[2] Attachment B further identifies sources of ATO view for the purposes of providing oral technical advice.

generally operate in respect of self-education expenses). In these cases, the decision remains with the person how those principles apply to his or her circumstances.[3]

12. If, however, a person wants oral advice about the application of the law to their particular circumstances, the matter must be of a straightforward or simple nature (that is, not complex) before they will receive oral technical advice.[4] In most cases, this requirement will be presumed to be satisfied by the existence of a call centre script which can be clearly applied to the case. In other cases, this requirement will be presumed not to be satisfied where, at the relevant time, there is no ATO view for the purposes of providing oral technical advice.

13. The judgment whether a matter is general, straightforward or simple, and whether a relevant ATO view applies, may depend on the expertise and experience of the person providing the advice. In this regard, the ATO has procedures in place for escalating matters to technical experts. For example, call centre staff can seek the assistance of a mentor and, in appropriate cases, forward phone calls to technical experts such as Centres of Expertise (CoE) staff, who will consider whether oral technical advice can be provided.

14. Where a person seeks advice on a matter that is not of a general, straightforward or simple nature, the person is to be advised to request the advice in writing. This ensures that the person receives a properly considered opinion on the application of the law to their circumstances. It also means that the person obtains advice that is binding on the Commissioner (see PS LA 2001/4 on the provision of written technical advice).

Prohibition on indicative oral technical advice

15. Subject to the limited exception described in paragraph 18 below, officers are not to provide indicative oral technical advice - that is, advice based upon the possible or likely ATO view of the law in relation to an arrangement. For example, Tax Office staff must not provide a client who has been advised to request the advice in writing with what the officer anticipates will be the answer. As another example, a case officer is not to provide a client with the likely answer to a request for written advice before the case has been finalised. This prohibition on indicative oral advice is to ensure that no technical advice is provided unless the actual details of the proposed arrangement and its purpose have been firmly established and we have finalised our view about the tax consequences of the arrangement.

16. Providing indicative oral technical advice may create expectations that we will adopt a particular view in relation to a particular arrangement that may not subsequently be met. This has the potential to undermine confidence in the Tax Office's administration of the tax system.

17. This does not mean that officers cannot undertake discussions with a taxpayer about a particular arrangement, either prior to or following the receipt of a written request for advice. Indeed, such discussions may reveal the need for a written request for

[3] For further guidance on what is meant by a matter of a general nature, see ORCLA <http://connect/orcla/Content.asp?doc=/content/orcla/35048.htm&page=1>

[4] Staff should also give consideration as to whether a taxpayer's request is on a matter that is covered by the Binding Oral Advice regime. If so, the taxpayer can request binding rather than non-binding oral technical advice.

advice, and shed light on the information and material that should be provided with the request. For instance, general discussions around ambiguity in the law or its application are often a necessary part of ensuring that the right facts and matters are provided and considered in a private ruling. Such discussions may also highlight to taxpayers those areas where we have concerns. What is important is that staff do not go further and indicate a possible or likely ATO view of the law in relation to a specific arrangement. In some cases it might be necessary to explain this to the client.

Exceptional cases

18. It may be appropriate in exceptional cases, where we have not finalised our position on the interpretative issues, to provide indicative oral technical advice. However, the provision of indicative oral advice should occur only where there is:

- a substantial and time-dependent business need
- a very low risk of a different view being taken
- appropriate documentation and transparency, and
- involvement of appropriate Tax Office staff.

19. The provision of indicative oral technical advice which is positive (favourable) to the person is also subject to approval at the following SES levels: CoE manager or Senior Tax Counsel where there is no precedent; and Business Line SES where there is a precedent. Furthermore, the provision of such advice is subject to the clear notification and acknowledgment that the preliminary position is not binding and is subject to further consideration.

20. Where indicative oral technical advice is provided in connection with a request for written advice, a record of the indicative advice must be attached to the TDMS case record.

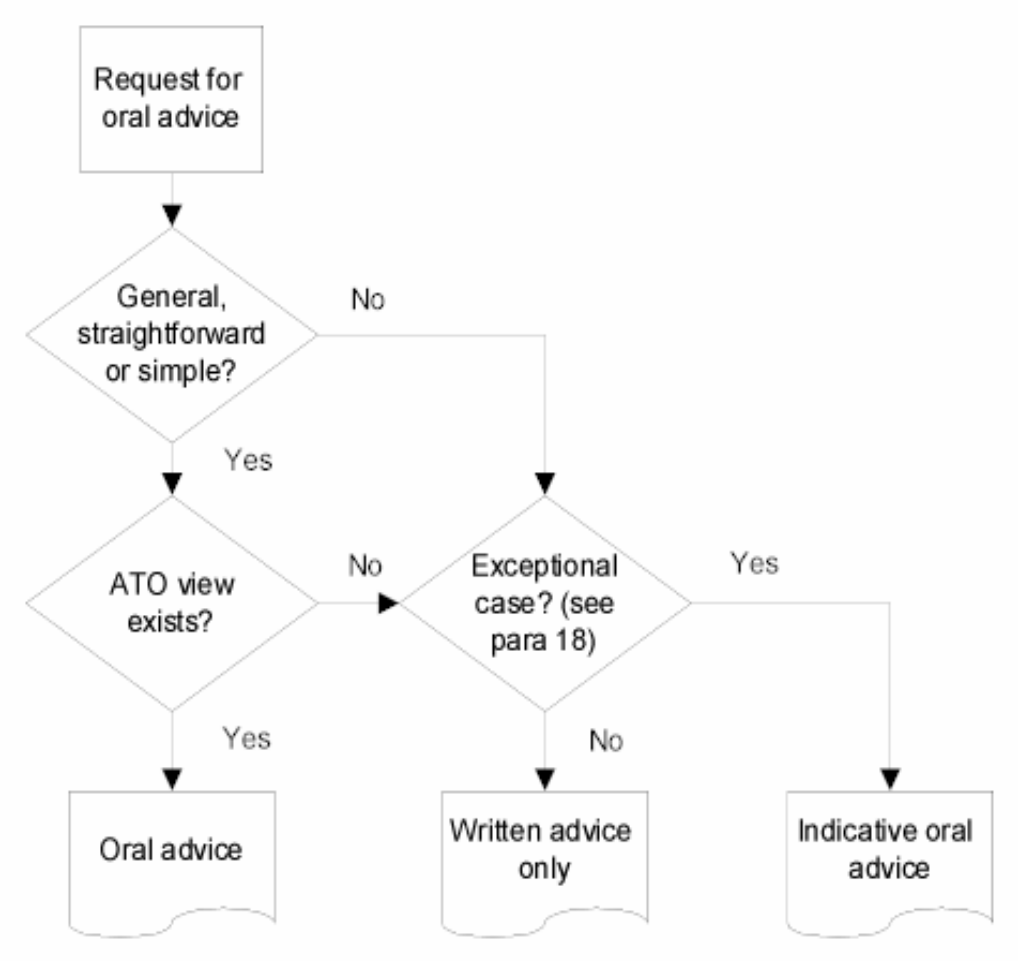
subject references:	non-binding oral technical advice oral advice provision of advice.
legislative references:	*Taxation Administration Act 1953* Div 360 of Sch 1 *Income Tax Assessment Act 1997* section 8-1.
related practice statements:	Law Administration Practice Statement PS LA 2001/4
other related documents:	ORCLA
file references:	2002/012752; 2002/012019

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ATTACHMENT A

Decision Tree - Oral Technical Advice

This decision tree provides a quick reference summary of the rules and guidelines contained in this practice statement.



ATTACHMENT B

Provision of Oral Technical Advice - Guidance by Work Type

The following provides guidance as to this practice statement's application by major work types. Essentially, it aims to assist staff in identifying whether oral technical advice can be provided on a matter and whether they are the appropriate officer to make that judgment or provide the advice. It also aims to provide parameters/guidelines to assist particular work areas (for example, SB Call Centres or GST Field) in designing their more detailed/customised procedures. Where a particular work area has additional guidance for their staff, this shall be contained in ORCLA. Any additional guidance must be consistent with the corporate rules contained in this practice statement.

Tax Office contact work (for example, all hotline, call centre and public assistance areas)

This work type covers those areas which are generally set up as the first point of call for client enquiries.

The following table sets out some corporate guidelines for Tax Office contact work. (Note, a particular work area may restrict staff use of these sources but is not to expand on them. Where restricted, this shall be captured in or linked to ORCLA.)

Source of information	**ATO view for oral technical advice purposes?**	**General, simple or straightforward (ie not complex)?**
Telephony reference materials (eg Scripts)	Yes	Yes
Public rulings	Yes	See comments below
Draft public rulings	Yes	See comments below
ATO IDs	Yes	See comments below
Tax Office publications (current)	Yes	Generally yes, but see below
Tax Office website material	Yes, but limited to the extent that it is created by the Tax Office. For instance, CCH or other external publisher's material is not ATO view.	See comments below

Legislation	Strictly no, however, to the extent that there is only one clear interpretation, oral advice can be given.	See comments below
Training materials	No	Not relevant

If contact staff[5] are unable to identify one of the above-mentioned sources, they should seek assistance from a mentor[6] or forward the call to the relevant technical expert.

If contact staff are uncertain as to whether one of the above-mentioned sources applies to a case, they should seek assistance from a mentor or forward the call to the relevant technical expert.

If contact staff are not confident to explain how the above-mentioned sources apply to a case, they should seek assistance from a mentor or forward the call to the relevant technical expert.

If contact staff consider the matter they are dealing with to be complex (or better dealt with otherwise) they should seek assistance from a mentor, forward the call to the relevant technical expert or advise the person to request the advice in writing (see PS LA 2001/4 on the provision of written technical advice). As a guide, contact staff should consider a matter to be complex if:

- it is not covered by a script
- the facts of the arrangement are such that they are not easily compiled or understood, or
- it is considered that the matter should, ideally, be given further consideration. For example, the query poses a significant risk to the revenue or is of much significance to the person/client.

Calculations should generally only be performed where a calculation tool is provided so that mistakes are kept to a minimum.

Technical expert work (eg CoEs and BSL Interpretation/Advisings (+1) areas)

This work type covers those areas which are generally set up to deal with the more complex interpretative work.

The following table sets out some corporate guidelines for technical expert work. (Note, a particular work area may restrict staff use of these sources but is not to expand on them. Where restricted, this shall be captured in or linked to ORCLA.)

[5] This term is used to refer to all contact area staff, for example, client service representatives.
[6] This term is used to refer to the more senior contact area staff, for example, floorwalkers/specialists/ team coaches.

Source of information	ATO view for oral technical advice purposes?	General, simple or straightforward (ie not complex)?
Telephony reference materials (eg Scripts)	Yes	Yes
Public rulings	Yes	See comments below
Draft public rulings	Yes	See comments below
ATO IDs	Yes	See comments below
Tax Office publications (current)	Yes	Generally yes, but see below
Tax Office website material	Yes, but limited to the extent that it is created by the Tax Office. For instance, external publisher's material is not ATO view.	See comments below
Legislation	Strictly no, however, to the extent that there is only one clear interpretation, oral advice can be given.	See comments below
Training materials	No	Not relevant

If the relevant technical expert[7] is unable to identify the existence of one of the above-mentioned materials, the person seeking the advice is to be advised to request the advice in writing (see PS LA 2001/4 on the provision of written technical advice).

If the relevant technical expert is uncertain as to whether one of the above-mentioned materials applies to a case, the person seeking the advice is to be advised to request the advice in writing (see PS LA 2001/4 on the provision of written technical advice).

If the relevant technical expert considers the matter they are dealing with to be complex, the person seeking the advice is to be advised to request the advice in writing (see PS LA 2001/4 on the provision of written technical advice). As a guide, staff should consider a matter to be complex if:

- the facts of the arrangement are such that they are not easily compiled or understood;
- the relevant law is either lengthy, or otherwise not readily understood or interpreted;
- the document containing the ATO view is not readily understood or applied; or

[7] This term is used to refer to all technical expert area staff, for example, CoE staff.

- it is considered that the matter should, ideally, be given further consideration. For example, the query poses a significant risk to the revenue or is of much significance to the person/client.

Field Work (including advisory and investigative)

This work type covers those areas and staff who generally work out in the field. To the extent that staff also perform advisory or investigative type work in the office and they are requested to provide oral technical advice, they should follow the rules set out above.

Some field staff are provided with remote access to Tax Office information, while other field staff are not. For instance, GST field staff have laptops that enable them to access ATOFieldPRISm, whereas LB&I field staff generally can only access ATOField or ATOconnect when in the office.[8] The following table provides guidance to field staff and is to be read in light of what source documents are actually available and able to be used by them at the relevant time. (Note, a particular work area may restrict staff use of these sources but is not to expand on them. Where restricted, this shall be captured in or linked to ORCLA.)

Source of information	**ATO view for oral technical advice purposes?**	**General, simple or straightforward (ie not complex)?**
Telephony reference materials (eg Scripts)	Yes	Yes
Public rulings	Yes	See comments below
Draft public rulings	Yes	See comments below
ATO IDs	Yes	See comments below
Tax Office publications (current)	Yes	Generally yes, but see below
Tax Office website material (including ATOFieldPRISm and ATOField)	Yes, but limited to the extent that it is created by the Tax Office. For instance, CCH or other external publisher's material is not ATO view.	See comments below
Legislation	Strictly no, however, to the extent that there is only one clear interpretation, yes.	See comments below
Training materials	No	Not relevant

[8] In practice, this is not a major impediment to providing oral technical advice because LB&I clients usually ask questions which are not expected to be answered on the spot.

If field staff are asked for advice on an area of the law that they do not ordinarily deal with, the person/client is to be advised to either call the appropriate hotline or request the advice in writing.

If field staff are unable to identify, access or readily apply one of the above-mentioned materials, they should either advise the person to call the relevant hotline or note the person's query and later provide a timely response.

If field staff are asked for advice on a complex matter, the person seeking the advice is to be advised to request the advice in writing (see PS LA 2001/4 on the provision of written technical advice). As a guide, staff should consider a matter to be complex if:

- the facts of the arrangement are such that they are not easily compiled or understood;
- the relevant law is either lengthy, or otherwise not readily understood or interpreted;
- the document containing the ATO view is not readily understood or applied; or
- it is considered that the matter should, ideally, be given further consideration. For example, the query poses a significant risk to the revenue or is of much significance to the person/client.