

PS LA 2004/14 - Access to 'corporate board documents on tax compliance risk'

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! Refer to end of document for amendment history. Prior versions can be requested by emailing TCNLawPublishingandPolicy@ato.gov.au if required.

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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: Access to 'corporate board documents on tax compliance risk'¹

PURPOSE: To set out Tax Office policy regarding access to corporate board documents on tax compliance risk

STATEMENT

1. While recognising that the Commissioner has the legislative power to request access to most documents, the Tax Office accepts there is a class of documents which should, in all but exceptional circumstances, remain within the confidence of company directors and their advisors on tax compliance risk. The Tax Office calls these documents 'corporate board documents on tax compliance risk'.
2. Corporate board documents on tax compliance risk are documents:
 - created by advisors (being suitably qualified in-house or independent advisors)
 - created for the sole purpose of providing advice or opinion to the board of directors (including properly constituted sub-committees) on tax compliance risks and their likelihood and impact, and
 - that address tax risks associated with major transactions and arrangements and/or tax risks arising from corporate systems and processes.

¹ See paragraph 2 of this practice statement for a definition of 'corporate board documents on tax compliance risk'.

3. Access to corporate board documents on tax compliance risk will not be sought by the Tax Office during a compliance risk review or an audit of a corporate taxpayer except in exceptional circumstances and the access will need to be approved by an appropriate Senior Executive Service officer, as described in the Tax Office's *Guidelines to Accessing Professional Accounting Advisors' Papers* (the *Accountants' Guidelines*).
4. Circumstances that may be taken to be exceptional and necessitate access to corporate board documents on tax compliance risk would include cases where:
 - the taxpayer has not cooperated with the Tax Office to furnish full and complete information in a timely manner
 - information important to the risk review or audit, including evidence as to purpose for entering into or carrying out a transaction or arrangement, cannot be sufficiently established from the taxpayer's source documents and other enquiries, or
 - the taxpayer has a history of serious non-compliance, for example involving fraud or evasion or persistent avoidance of their tax obligations, or is under investigation in that regard.
5. The process for dealing with taxpayers' claims that particular documents are corporate board documents on tax compliance risk is set out in this Practice Statement. This process is similar to the process for dealing with taxpayers' claims in relation to restricted source and non-source documents under the *Accountants' Guidelines*.

EXPLANATION

About this Practice Statement

6. The approach set out in this Practice Statement is intended to strike a balance between facilitating rigorous governance of tax compliance risk by companies, while ensuring the Tax Office can obtain the information it needs for its active compliance activities.
7. This Practice Statement is subject to existing laws and policies applicable to:
 - procedures for seeking access (including as set out in the Tax Office's *Access and Information Gathering Manual*)
 - claims for legal professional privilege, and
 - claims that a document is a restricted source document or a non-source document to which access is governed by the *Accountants' Guidelines*.

In this regard note that some corporate board documents on tax compliance risk may be subject to the *Accountants' Guidelines* or claims for legal professional privilege.

8. The practical application of this Practice Statement will be kept under regular review to ensure that its purpose is being achieved.

Corporate Governance & Tax Risks

9. As part of its compliance management strategy the Tax Office publishes its annual Compliance Program and companion publications such as *Large business and tax compliance* (June 2003). In publishing identified risks and how it intends to address them, the Tax Office aims to encourage taxpayers to undertake more rigorous tax risk assessments and to better manage their tax risks.
10. In January 2004 the Commissioner sent letters to the chairs of the boards of directors of Australian listed companies to provide practical guidance for boards in the management of the tax risks associated with major transactions or arrangements. Attached to the letter was a list of 10 questions that boards could consider putting to their tax advisers with a view to identifying and managing relevant tax risks.
11. The Tax Office recognises that those responsible for managing a company's tax compliance risks need to be able to undertake broad ranging and candid communications. Those persons would include the company's employees, its external advisors and its directors undertaking governance of tax compliance issues.
12. Documents may be prepared as part of those communications to provide advice and opinion to directors on the identification, assessment and management of tax compliance risks, whether or not they specifically address the Commissioner's 10 questions. Effective governance of tax compliance issues will depend to some extent on the quality of documentation about tax risks.

Access to Documentation & Other Information

13. The Tax Office conducts active compliance activities through a suite of products, including risk reviews and audits. Access to documents and other information is fundamental to the Tax Office being able to undertake its compliance activities and to perform its role as required by law. Many of the taxation Acts administered by the Commissioner have provisions granting access and notice powers to the Commissioner and officers authorised by him – e.g. sections 263, 264 and 264A of the *Income Tax Assessment Act 1936*; sections 353-10 and 353-15 of Schedule 1 of the *Taxation Administration Act 1953*.
14. During a compliance risk review or audit the Tax Office will, in the first instance, ordinarily seek information from documents prepared in connection with the conception, implementation and formal recording of a transaction or arrangement, and which explain the setting, context and purpose of the transaction or arrangement.

Dealing with claims relating to corporate board documents on tax compliance risk

15. Corporate board documents on tax compliance risks are documents created by advisors for the sole purpose of providing tax risk advice or opinion to the board of directors. A document that records a transaction or arrangement is not a corporate board document on tax compliance risks. However, the Tax Office may accept that a document is a corporate board document on tax compliance risks where it merely summarises or reproduces information

sourced from other classes of documents to give context to the tax risk advice or opinion.

16. The process set out below should be followed where tax officers request access to taxpayer documents and the taxpayer claims that access to particular documents should be limited on the basis they are corporate board documents on tax compliance risks:
 - a) Ask the taxpayer to provide a list of the documents in question. The list should include the following details for each document:
 - the date of the document (or the date the document was created)
 - the title of the document and a general description of its nature
 - the names and roles of the authors
 - the names and roles of all addressees to whom documents have been circulated
 - the reasons why the document is categorised as a corporate board document on tax compliance risks, and
 - the date/s on which the document was provided to a director of the company, the board or a properly constituted sub-committee of the board.
 - b) Review the list within 3 working days of its receipt, or such other period as may be agreed, and decide whether or not to accept the taxpayer's claims.
 - c) Make arrangements for those documents the Tax Office has not accepted are corporate board documents on tax compliance risks and a copy of the list to be sealed in envelopes or other containers and lodged with a professional representative of the taxpayer or the Tax Office. The representative is to give written assurance that the envelopes or containers will be kept in secure storage on the representative's premises and will not be opened otherwise than with the consent of both the taxpayer and the Tax Office.
 - d) Arrange a joint cursory inspection by legal representatives of the taxpayer and the Tax Office of those documents the Tax Office has not accepted are corporate board documents on tax compliance risks. The inspection is to be for the limited purpose of enabling the representatives to determine which of the documents in question they agree are or are not corporate board documents on tax compliance risks and which of the documents remain in dispute.
 - e) To the extent that any of the taxpayer's claims remain in dispute following the joint inspection (referred to in paragraph d above), the Tax Office may engage a suitably qualified independent third party as its consultant to review the documents in question and advise the Tax Office on whether they should or should not be accepted as corporate board documents on tax compliance risks.
 - f) In the case where the classification of a document cannot be resolved for any reason following the above process, it will be open for the Tax Office to access the document in question without further regard to this Practice Statement.

17. Where, in accordance with this Practice Statement, the Tax Office does seek to access corporate board documents on tax compliance risk, consideration will be given to excluding material from the documents to the extent that it is advice or opinion that does not relate to the subject matter of the risk review or audit.
18. The acceptance by the Tax Office of the confidential status of corporate board documents on tax compliance risks as between the company directors and their advisors for the purposes of this Practice Statement will be maintained in circumstances where they are disclosed by company directors to third parties for the purpose of better management of tax risks and the disclosure is agreed to be on a confidential basis.
19. This Practice Statement does not restrict access to corporate board documents on tax risk to the extent that a taxpayer decides to make these documents available to the Tax Office. It is recognised that some corporate taxpayers are willing to make such documents available to assist in prompt and effective assessments of tax compliance risk by the Tax Office when risk reviews or audits are being undertaken. However, no adverse inference is to be drawn merely because a taxpayer does not make such documents available in accordance with this practice statement.

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| <i>subject references</i> | Corporate Governance Information gathering and access powers Power to obtain information and evidence Risk management |
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| <i>legislative references</i> | <i>Income Tax Assessment Act 1936</i> section 263 <i>Income Tax Assessment Act 1936</i> section 264 <i>Income Tax Assessment Act 1936</i> section 264A <i>Fringe Benefits Tax Assessment Act</i> section 127 <i>Fringe Benefits Tax Assessment Act</i> section 128 <i>Taxation Administration Act 1953</i> Schedule 1 section 353-10 <i>Taxation Administration Act 1953</i> Schedule 1 section 353-15 |
| | |
| <i>related public rulings</i> | |
| | |
| <i>related practice statements</i> | |
| | |
| <i>case references</i> | <i>ONE.TEL Ltd v Deputy Commissioner of Taxation</i> (2000) 101 FCR 548; 2000 ATC 4229. <i>Deloitte Touche Tohmatsu v Deputy Commissioner of Taxation</i> (1998) 98 ATC 5192; (1998) 40 ATR 435. <i>Pratt Holdings Pty Ltd v Commissioner of Taxation</i> (2004) 207 ALR 217; 2004 ATC 4526. <i>JMA Accounting Pty Ltd & Anor v Carmody & Ors</i> 2004 ATC 4916. |
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| <i>other references</i> | Access Manual Chapter 07 – Access to Professional Accounting Advisors' Papers Guidelines to Accessing Professional Accounting Advisors' Papers |
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| <i>file references</i> | 04/8281 |

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