

PS LA 2004/14 - ATO access to advice for a corporate board on tax compliance risk

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ATO access to advice for a corporate board on tax compliance risk

This practice statement sets out ATO policy on how we will administer the concession that applies to advice provided to a corporate board on tax compliance risk.

This practice statement is an internal ATO document, and is an instruction to ATO staff.

Taxpayers can rely on this practice statement to provide them with protection from interest and penalties in the following way. If a statement turns out to be incorrect and taxpayers underpay their tax as a result, they will not have to pay a penalty. Nor will they have to pay interest on the underpayment provided they reasonably relied on this practice statement in good faith. However, even if they don't have to pay a penalty or interest, taxpayers will have to pay the correct amount of tax provided the time limits under the law allow it.

1. Principles

1A. Recognising the integral role of good corporate governance systems in ensuring companies can properly identify and manage tax compliance risks, the ATO understands that corporate boards need informed, independent advice to fully understand the implications of escalated risks.

1B. The ATO accepts that obtaining such advice benefits the revenue system by ensuring tax risk is recognised and managed effectively.

1C. While the Commissioner has the legislative power to access relevant information, we accept that advice prepared for a corporate board on tax compliance risk should, in all but exceptional circumstances, remain confidential to the board (including properly constituted sub committees) and their advisors.

1D. We aim to strike a balance between facilitating rigorous corporate governance of tax compliance risk and ensuring we can obtain the information we need for our active compliance activities.

1E. Accordingly, in gathering information for active compliance activities, the ATO provides an administrative concession to the effect that in certain circumstances we will not seek access to advice provided to a corporate board on tax compliance risk.

1F. While taxpayers may decide to make documents containing such advice available to the ATO, no adverse inference is to be drawn where taxpayers seek to withhold such documents on the basis that the advice should remain confidential in accordance with the concession.

2. ATO's approach to information gathering

2A. Access to documents and other information is fundamental to the ATO's ability to undertake compliance activities and to perform its role as required by law. This is reflected in extensive provisions in the tax law that empower the Commissioner to gather information.

2B. In our compliance work, we will, in the first instance, ordinarily seek information from documents prepared in connection with the conception, implementation, authorisation and formal recording of a transaction or arrangement and which explain the setting, context and purpose of the transaction or arrangement.

2C. We do not, in the first instance, aim to review documents that contain advice to a corporate board on tax compliance risk.

3. Conditions under which the concession will apply

3A. The concession applies only to companies that can demonstrate that they have in place risk management and governance frameworks that cover tax.

3B. In this context, compliance activities may include close scrutiny of the tax risk management processes that a board of directors has oversight of to determine if they are operating effectively. This information can help form the ATO's view of how well a taxpayer manages tax risk.

Who can provide advice?

3C. The concession extends to advice on tax compliance risk provided to a board by in-house or external advisors (including contractors) who are suitably qualified; that is:

- whose tax advice is bound by the standards of a third party professional association, for example a lawyer, accountant or tax agent, or
- who have academic qualifications in a relevant area that would qualify them to provide expert advice, for example law and accounting.

What qualifies as advice to a corporate board on tax compliance risk?

3D. Advice to a corporate board on tax compliance risk is confined to the information in a document that has been created by advisors for the sole purpose of providing advice or opinion to a corporate board (including properly constituted subcommittees) relating to a major transaction, arrangement, corporate system or process:

- on the likelihood and impact of the tax compliance risk
- as to whether the ATO or an administrative or judicial decision-making authority may take a contrary view or position to that of the taxpayer on the tax compliance issue, or
- on courses of action to effectively manage the tax compliance risk.

3E. Advice that doesn't have a sole purpose of advising a corporate board on tax compliance risk does not qualify for the concession. For example, tax compliance risk advice for a corporate board that is later used to advise on how to implement an arrangement would have a dual purpose, thereby losing the sole purpose characterisation necessary to claim the concession.

Commissioner's discretion applying to:-

Corporate board discussions

3F. Minutes directly relating to corporate board discussions on tax compliance risk advice and requests for advice relating to such risks by a corporate board do not qualify as advice for the purposes of this concession.

3G. However, in recognition of the need for candid discussions and communications concerning tax compliance risks, the Commissioner has determined that the concession can also apply to such information unless exceptional circumstances exist or a taxpayer is willing to forego a claim for the concession to assist in resolving an issue.

Tax risk registers

3H. Taxpayers may have formal processes in place to identify transactions, arrangements or systems that may have an element of associated tax risk for inclusion on a risk register that is overseen by the board.

3I. While reporting on recognised tax compliance risks to a corporate board does not qualify as advice for the purposes of the concession, the Commissioner will allow the concession to apply to those sections of a risk register that directly concern tax risks unless exceptional circumstances exist or a taxpayer is willing to forego a claim for the concession. This does not preclude the ATO from accessing information on a company's risk register about non-tax risks such as commercial or market risks.

3J. However, some ATO compliance products require taxpayers to disclose specific material tax risks for a defined period under review. A taxpayer can't use the concession for tax risk registers as a reason for not disclosing tax risks in such circumstances.

3K. Nor can the concession for tax risk registers be used as a reason for not meeting a legislative or regulatory requirement to report tax risks, such as the requirement to notify the ATO of a tax risk when completing a reportable tax position schedule.

Exceptional circumstance

3L. Circumstances that may be taken to be exceptional and require the ATO to seek access to advice or information subject to a claim for the concession include:

- The taxpayer has not been or is not cooperating with the ATO to provide full and complete information in a timely manner, and the advice or information subject to a claim for the concession is considered relevant to the compliance activity (relevance is a matter for the ATO to determine).
- Information important to the compliance activity, including evidence as to the purpose of entering into or carrying out a transaction or arrangement, can't be sufficiently established from the taxpayer's documents and other enquiries.
- The taxpayer has a history of serious non-compliance, involving, for example, fraud or evasion or persistent avoidance of their tax obligations, or is under investigation in that regard.
- The Commissioner has reasonable grounds to believe that an anti-avoidance provision may apply.
- The taxpayer has a demonstrated history of aggressive tax positions that the ATO has significant concerns with.

3M. Where exceptional circumstances exist and the related claim for the concession would otherwise be valid, the ATO officer should make a submission to a designated senior officer¹ to lift the concession.

¹ A Senior Executive Service (SES) officer who doesn't have leadership responsibility for the compliance team and hasn't been involved in any matter in relation to the compliance activity that is subject to a claim for the concession.

3N. The taxpayer will normally be given an opportunity to make their own submission to the designated senior officer as to why the concession should not be lifted.

3O. If the designated senior officer determines that exceptional circumstances exist and that the concession should be lifted, we will inform the taxpayer of the reason(s) for this decision and the details of the exceptional circumstance(s).

3P. In limited circumstances we may seek access to information without giving the taxpayer notice and the opportunity to claim the concession. In this situation we may copy documents that potentially contain advice or information that falls under the concession. If this occurs, and the taxpayer claims the concession, the documents will be quarantined and dealt with in accordance with the procedures outlined below.

Concession subject to existing laws and policies

3Q. This practice statement is subject to existing laws and policies applying to:

- ATO procedures for seeking access (including access procedures set out in *Our approach to information gathering*)
- claims for legal professional privilege, and
- claims that a document is a restricted source or non-source document to which access is governed by the guidelines for accessing professional accounting advisors' papers (accountants' concession).

4. How does the taxpayer make a claim under the concession?

4A. If the ATO is seeking access to documents and the taxpayer considers that such access should be limited on the basis that they wholly or partly contain advice or information subject to the concession, the taxpayer should take the following steps:

- (1) Advise the ATO, as soon as possible, that they intend making a claim under the concession.
- (2) By the due date to respond to a formal or informal request for information, provide the following details for each document they consider contains advice or information subject to the concession:
 - the date of the advice or information (or the date the document was created).
 - the title of the advice or information and a general description of its nature

- the name(s) and role(s) of the author(s)
- the names and roles of all addressees to whom the advice or information has been circulated
- the reason(s) for the distribution to each addressee
- the reason(s) why the document is categorised as containing advice or information subject to the concession
- the date(s) on which the advice or information was provided to a director of the company, the board or a properly constituted sub-committee of the board.

4B. Note that where a document is to be redacted before being provided to the ATO, the details listed above do not need to be provided to the extent they are evident in the redacted document.

4C. Once a claim for the concession has been received by the ATO it will be examined by the compliance team and the senior officer they report to.

4D. The taxpayer will be notified in writing within 28 days of the decision whether to accept, reject or set aside a claim. In limited circumstances, such as where there are a large number of claims, this period may be extended.

4E. If the taxpayer wants to dispute any aspect of the ATO's decision (referred to in paragraph 4D of this practice statement), it will be reviewed and either accepted, rejected or set aside by a designated senior officer (see footnote 1). This review may involve a cursory inspection by a representative for both the ATO and taxpayer who have had no prior involvement in the claim for the concession and are not a party to the audit or review being undertaken.

5. More information

5A. For more information, see:

- Our approach to information gathering, [Corporate board advice on tax compliance risk](#)

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