PS LA 2006/7 - Alternative assessments

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Practice Statement Law Administration

PS LA 2006/7

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This law administration 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. ATO personnel, including non ongoing staff and relevant contractors, must comply with this law administration practice statement, unless doing so creates unintended consequences or is considered incorrect. Where this occurs, ATO personnel must follow their business line's escalation process.

Taxpayers can rely on this law administration practice statement to provide them with protection from interest and penalties in the way explained below. 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 law administration 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.

SUBJECT: **Alternative assessments**

PURPOSE: **To outline the approach of the ATO when alternative assessments are made in respect of the same income, benefit or transaction for one or more taxpayers**

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BACKGROUND

1. The Commissioner may in certain circumstances be obliged to issue two or more assessments to one or more taxpayers in respect of the same taxable income, benefit or transaction but may collect the relevant amount of tax only once. Such assessments are collectively referred to as alternative assessments (being the term derived from relevant case law).

2. This practice statement employs the concept of a 'primary' assessment. A 'primary' assessment is an assessment that is made in accordance with the preferred ATO view of how the tax law applies to facts as understood at the time of issue of the assessment. A primary assessment is, strictly speaking, one of two (or more) alternative assessments. However, this practice statement generally refers to an assessment as being an 'alternative' assessment where it is an alternative to the primary assessment. That is, an 'alternative' assessment is an assessment that is made in accordance with an alternative ATO view of how the law applies to the facts as understood. Both the primary assessment and the alternative assessment/s necessarily relate to the same taxable income, benefit or transaction. The tax payable on the same taxable income, benefit or transaction is generally referred to in this practice statement as the 'relevant amount of tax'. As stated in paragraph 1 of this practice statement, the Commissioner may collect the relevant amount of tax only once – for example, under a primary assessment only.

SCOPE

3. This practice statement applies to income tax assessments made pursuant to the *Income Tax Assessment Act 1936* (ITAA 1936), fringe benefits tax assessments made pursuant to the *Fringe Benefits Tax Assessment Act 1986* (FBTAA), penalty assessments made pursuant to the *Taxation Administration Act 1953* (TAA), and to GST assessments made pursuant to the TAA.

4. This practice statement does not apply to compensating adjustments where income tax assessment/s are made as a result of a determination being made pursuant to subsection 177F(3) of ITAA 1936. For a discussion of when compensating adjustments should be made, refer to paragraphs 136 to 138 of PS LA 2005/24 which deals with the application of the general anti-avoidance rules.

5. The limited circumstances where alternative assessments may be made are described in paragraphs 6 and 13 to 18 of this practice statement. This practice statement does not authorise or sanction alternative assessments to the same taxpayer for the same income year or year of tax under the same tax Act: refer *FC of T v. Stokes* 97 ATC 4001; (1996) 34 ATR 478; *Darrell Lea Chocolate Shops Pty Ltd* 97 ATC 4040; (1996) 34 ATR 491.

STATEMENT

6. Alternative assessments are to be made only when good administration requires them. Alternative assessments are to be limited to situations where there is genuine doubt about which assessment is appropriate because we hold the view that each assessment could be correct. Alternative assessments are most usually required where the relevant uncertainty cannot be practicably resolved so as to ensure a single correct assessment be made within a time limit.

7. Both primary and alternative assessments are to be made on the basis of the information available to the Commissioner at the time. The Commissioner will recover the relevant amount of tax only once. The Commissioner will normally seek to recover the amount of tax payable on the 'primary' assessment only. However, where the Commissioner concludes that the amount of tax payable under the alternative assessment may be at risk because of actions taken by the taxpayer to prevent the collection of the tax payable under the alternative assessment (for example, the dissipation of assets) or for some other reason, the Commissioner may seek to recover the amount of tax payable under an alternative assessment or take action to secure the assets of the taxpayer.

Advice to taxpayer when an alternative assessment is to issue

8. Where primary and alternative assessments are made, the Commissioner's ultimate intention is to collect the relevant amount of tax payable on either the primary or the alternative assessment/s to the extent that each proves to be correct to the exclusion of others. Consistent with making a primary assessment in accordance with the preferred ATO view of the law, a letter will be sent to the relevant taxpayer/s prior to the issue of the primary assessment and alternative assessment/s and will include the following information:

i. Primary assessment

- a statement that we will be issuing an assessment to the taxpayer and that it will be the primary assessment.
- advice that payments of tax need to be made in respect of the primary assessment
- an explanation that alternative assessments are being issued due to the uncertainty in the law and/or facts and having regard to the time limits for making the assessments, and of how much of the tax payable under the primary assessment is the subject of alternative assessments ('the relevant amount of tax').
- advice that the Commissioner intends to collect 'the relevant amount of tax' under the primary assessment, subject to the outcome of any dispute with the taxpayer. Once the taxation position is resolved by the appeal process or if the taxpayer enters into a settlement agreement with the ATO, the assessments will be amended accordingly and the Commissioner may require payments to be made in respect of the alternative assessments in accordance with the appeal or settlement outcomes, and
- advice that the taxpayer may object against the primary and/or alternative assessments (if relevant), having regard to the time limits allowed for lodging objections.

ii. Alternative assessment

- a statement that we will be issuing an assessment to the taxpayer and that it will be an alternative assessment, and of how much of the tax payable under the assessment is the subject of primary/alternative assessments ('the relevant amount of tax').
- advice that no payments of tax need to be made in respect of the 'relevant amount of tax' under the alternative assessments
- an explanation that an alternative assessment is being issued due to the uncertainty in the law and/or facts and having regard to the time limits for making the assessments

- advice that the Commissioner intends to collect the 'relevant amount of tax' under the primary assessment, subject to the outcome of any dispute with the taxpayer. Once the taxation position is resolved by the appeal process or if the taxpayer enters into a settlement agreement with the ATO, the assessments will be amended accordingly and the Commissioner may require payments to be made in respect of the alternative assessment in accordance with the appeal or settlement outcomes, and
- advice that the taxpayer may object against the alternative and/or primary assessments (if relevant), having regard to the time limits allowed for lodging objections.

Debt collection procedures

9. Debt collection procedures in accordance with ATO administrative policies should normally be undertaken in respect of the primary assessment only.

10. However, where the Commissioner concludes that the tax payable under the alternative assessment may be at risk because of actions taken by the taxpayer to prevent the collection of the tax payable under the alternative assessment (for example, the dissipation of assets) or for some other reason, the Commissioner may seek to recover the tax payable under an alternative assessment or take action to secure the assets of the taxpayer.

11. Where the Commissioner has issued more than one assessment in respect of the same taxable income, benefit or transaction, and at least 50% of the disputed liability on one of the assessments is paid, a remission of the general interest charge imposed on the unpaid tax on the other disputed assessment/s may be provided where all undisputed tax has been paid (refer to Law Administration Practice Statement PS LA 2011/4 Recovering disputed debts).

12. The Commissioner realises that the issue of alternative notices of assessment has the potential to impact on the solvency of businesses associated with the recipients of such notices. For example, the presence of multiple assessments might impact upon lending considerations by a credit provider. Accordingly, where information is received by the ATO which indicates that financial difficulties are being experienced by a taxpayer or taxpayers as a result of the making of alternative assessments, the Commissioner will, upon request, issue a letter to the affected parties confirming:

    - the status of the assessments issued (primary or alternative)
    - the amounts payable under each assessment either immediately or in the future; and
    - the potential exposure to the general interest charge which may accrue upon confirmation by an appellate tribunal of the correct assessment
    - advice that the Commissioner would ultimately collect tax under either the primary assessment, or under the alternative assessment, but not both.

EXPLANATION

Circumstances where alternative assessments may issue in respect of the same income, benefit or transaction

Alternative assessments issued pursuant to authorising provisions of separate tax Acts

13. Alternative assessments may be issued to the same taxpayer or to different taxpayers pursuant to more than one tax Act in respect of the same income, benefit or transaction. For instance, in respect of a complex tax avoidance arrangement, an income tax assessment may be made under the ITAA 1936 and a fringe benefits tax assessment may be made under the FBTAA in respect of the same income or benefit.

Alternative assessments issued to two or more taxpayers under the same tax Act

14. The High Court held in *DFC of T v. Richard Walter Pty Limited* (1995) 183 CLR 168; 95 ATC 4067; (1995) 29 ATR 644 (*Richard Walter*) that the Commissioner could issue assessments to two different taxpayers relating to the same income in respect of the same year of income. For example, the Commissioner may issue an assessment to the trustee of a trust and also issue assessments to the trust beneficiaries where there is uncertainty as to whom certain income should be assessed.

15. The Full Federal Court held in *Kordan Pty Ltd v. Federal Commissioner of Taxation* [2000] FCA 1807; 2000 ATC 4812; (2000) 46 ATR 191 that the issue of two or more assessments relating to the same income under the same tax Act in respect of the same year of income but issued to different taxpayers was authorised as, at the time the Commissioner made the assessments, he was able to form the view that each assessment could be correct.

16. There may be circumstances where the one transaction (or a series of transactions undertaken under an arrangement) gives rise to alternative GST assessments to different entities where it is unclear which entity should be assessed. For example, it may be unclear which entity has made a taxable supply or taxable importation.

17. A series of transactions undertaken as part of a scheme may give rise to alternative GST assessments where it is unclear which entity has obtained a GST benefit.

Alternative assessments issued to the same taxpayer for different years of income

18. Alternative assessments may be issued to the same taxpayer for different income years in respect of the same income or transaction where it is not clear in which income year income has been derived. For example, in *BHP Billiton Petroleum Pty Ltd & Anor v. FC of T* (2002) 126 FCR 119; 2002 ATC 5169; (2002) 51 ATR 520 the issue before the Full Federal Court was the assessment of income where the same income had been included in the taxpayer's assessments in two different years because the time when the income was derived was uncertain.

Authority to collect tax

19. Under the various tax Acts, the production of a notice of assessment is conclusive evidence of the due making of the assessment and, except in proceedings in relation to a review or appeal under Part IVC of the TAA relating to the assessment, that the amount and all the particulars of the assessment are correct.

20. When tax becomes due and payable under a notice of assessment served on a taxpayer, the debt is due to the Commonwealth and is payable to the Commissioner. Therefore, each alternative assessment is a legally binding debt of the taxpayer.

21. The High Court held in *Richardson v. FCT* (1932) 48 CLR 192; (1932) 2 ATD 19 that the Commissioner was not authorised to collect income tax twice in respect of the same source of income for the same period of time. Further, in *Richard Walter*, the Court noted that the Commissioner was only expected to collect tax from one taxpayer where two assessments have been issued to different taxpayers in respect of the same income.

22. Accordingly, and subject to paragraph 9 of this practice statement, the Commissioner would not normally institute proceedings to recover the aggregate amount of the tax owing in relation to both the primary and the alternative assessments.

Example of letter to be sent to taxpayer/s

23. Following an audit of various transactions undertaken by X trust, it is not entirely clear whether certain omitted income should be assessed to the trustee or whether the benficiary/ies were presently entitled to the income. However, the best available evidence points towards the income being correctly assessed to the trustee.

24. In these circumstances, it has been decided to issue the primary assessment to the trustee and alternative assessment/s to the beneficiary/ies.

25. In this case, the following paragraphs are to be included in a separate letter to the trustee to be sent immediately prior to the issue of the amended assessment (or an original assessment)

> As previously advised in the position paper sent to you on (*date*), we propose to issue an amended assessment (*or an original assessment*) to you for the 20XX income year to reflect our position regarding the X trust.
>
> Due to the uncertainty regarding the facts or law and taking into consideration the time limits for amending assessments, an amended assessment (*or an original assessment*) will be issued to you and alternative assessments will be issued to other taxpayers associated with the trust.
>
> The amount of tax included in your assessment, the subject of alternative assessments, is $x ('the relevant amount of tax').
>
> As advised in the position paper of (*date*), you will be required to make payments in respect of the assessment issued to you by the due date. However, as advised, you may object to the assessment, having regard to the time limits allowed for lodging objections.

The Commissioner only intends to collect the 'relevant amount of tax' under this assessment, subject to the outcome of any objection/appeal or if you enter into a settlement agreement with the Australian Taxation Office.

For instance, if the final outcome of the appeal process is that it is held by a Court or the Administrative Appeals Tribunal that the income should have been correctly assessed to the other taxpayers, then your assessment will be amended accordingly.

26. In this case, the following paragraphs are to be included in a separate letter to the beneficiary/ies to be sent immediately prior to the issue of the amended assessment.

> As previously advised in the position paper sent to you on (*date*), we propose to issue an amended assessment (*or an original assessment*) to you for the 20XX income year to reflect our position regarding the transactions undertaken by the X trust.
>
> Due to the uncertainty regarding the facts or law and taking into consideration the time limits for amending assessments, an alternative assessment (*or an original assessment*) will be issued to you and a primary assessment will be issued to another taxpayer associated with the trust.
>
> The primary assessment is the preferred Australian Taxation Office (ATO) view of how the tax law applies to facts as understood at this time.
>
> The amount of tax included in your assessment, the subject of primary/alternative assessments, is $x ('the relevant amount of tax').
>
> As advised in the position paper of (*date*), you are not required to make payments in respect of the 'relevant amount of tax' contained in the assessment issued to you. However, as advised, you may object to the assessment, having regard to the time limits allowed for lodging objections.
>
> The Commissioner only intends to collect the 'relevant amount of tax' under the primary assessment, subject to the outcome of the appeal process or if a settlement agreement is reached with the ATO.
>
> For instance, if the final outcome of the appeal process is that it is held by a Court or the Administrative Appeals Tribunal that the income should have been correctly assessed to you, then you will be required to pay the 'relevant amount of tax' and other amounts payable pursuant to your assessment.

Amendment history

Date of amendment	Part	Comment
27 June 2013	Contact details	Updated.
7 May 2012	Contact details	Updated
12 January 2012	Paragraph 1	Corrected typographical error
	Paragraph 9	Updated wording
	Paragraph 11	Updated wording to refer to PS LA 2011/4
15 November 2011	Contact Officer	Details updated
9 November 2010	Contact Officer	Details updated
13 August 2010	Generally	Updated wording to be consistent with current style
	Paragraphs 2 and 3	Replaced paragraphs with new paragraph 2
	Paragraphs 6 and 7	Insert new paragraphs
	Paragraphs 8, 25 and 26	Included statement 'the relevant amount of tax'
11 September 2008	Related practice statements	Reference to PS LA 2006/11 removed
	Other references	Link to the ATO Receivables Policy inserted
6 August 2008	Contact officer	Details updated
24 August 2007	Paragraph 11	Inserted new paragraph
	Related practice statements	Update references to PS LA 2006/11

Subject references	alternative assessments
Legislative references	ITAA 1936 177F(3) FBTAA 1986 TAA 1953 TAA 1953 Pt IVC
Related practice statements	PS LA 1998/1 PS LA 2005/24 PS LA 2011/4
Case references	BHP Billiton Petroleum Pty Ltd & Anor v. FC of T (2002) 126 FCR 119; 2002 ATC 5169; (2002) 51 ATR 520 Darrell Lea Chocolate Shops Pty Ltd 97 ATC 4040; (1996) 34 ATR 491 DFC of T v. Richard Walter Pty Limited (1995) 183 CLR 168; 95 ATC 4067; (1995) 29 ATR 644 FC of T v. Stokes 97 ATC 4001; (1996) 34 ATR 478 Kordan Pty Ltd v. Federal Commissioner of Taxation [2000] FCA 1807; 2000 ATC 4812; (2000) 46 ATR 191 Richardson v. FCT (1932) 48 CLR 192; (1932) 2 ATD 19
Other references	ATO Receivables Policy ATO Receivables Policy (link available internally only)
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