PS LA 2006/7 - Alternative assessments

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PS LA 2006/7
Alternative Assessments

This Law Administration Practice Statement explains the use of alternative assessments in respect of the same income, benefit or transaction for one or more taxpayers.

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

If taxpayers rely on this practice statement, they will be protected 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.

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1. What this practice statement is about

We may issue multiple assessments in which the same underlying amount is assessed if there is genuine doubt about where the 'final' liability to tax rests. These assessments are referred to as alternative assessments. They are usually issued to different taxpayers but can be issued to the same taxpayer in some situations.

This practice statement sets out when we issue alternative assessments and our approach to collecting the tax payable under alternative assessments.

This practice statement does not apply to compensating adjustments pursuant to subsection 177F(3) *Income Tax Assessment Act 1936* (ITAA 1936) – instead refer to PS LA 2005/24.

2. What can alternative assessments be made for?

Alternative assessments can be made for:

- income tax assessments: ITAA 1936
- fringe benefits tax assessments: *Fringe Benefits Tax Assessment Act 1986* (FBTAA)
- penalty assessments: *Taxation Administration Act 1953* (TAA)
- GST assessments: TAA

You cannot issue more than one assessment of taxable income, fringe benefits taxable amount or a GST net amount to the same taxpayer for the same income year (or tax period).[1] There are some circumstances where alternative assessments can issue to the same taxpayer for the same income year under the same Act when different authorising provisions create the liability[2] – see section 5 of this practice statement.

3. When should an alternative assessment be made?

Alternative assessments are made only when good administration requires them. They are made on the basis of the information available to us at the time. There must be genuine doubt about which assessment is appropriate because we hold the view each assessment is capable of being correct.

Usually alternative assessments will be made where the uncertainty on the facts or operation of the law cannot be practicably resolved to ensure a single correct assessment is made within a time limit.

4. Making a valid alternative assessment

Any alternative assessment made must still meet the requirements of a valid assessment. Case law has established principles for a valid assessment which include:

- The assessment must be the result of an 'act or operation of the Commissioner'.[3]

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[1] *FC of T v. Stokes* 97 ATC 4001, (1996) 34 ATR 478.
[2] *Lever Bros Pty Ltd v. FC of T* [1948] HCA 25, (1948) 77 CLR 78, 22 ALJ 493, 8 ATD 388; *Cadbury-Fry-Pascall Pty Ltd v. Commissioner of Taxation* [1944] HCA 31, (1944) 70 CLR 362, [1944] ALR 401, (1944) 7 ATD 471.
[3] *R v. DFC of T, ex parte Hooper* (1926) 37 CLR 368, at 373 per Isaacs J.

- The assessment must lead to an ascertainment, on consideration of all relevant circumstances of the amount being assessed, for example, in the case of income tax, the taxpayer's taxable income and their tax payable[4]
- The assessment must be definitive in character, rather than tentative or provisional.[5]

In some cases, raising an alternative assessment relies on using section 167 of the ITAA 1936 (default assessments). You should refer to PS LA 2007/24 for more details on the use of this section.

5. Circumstances where the issue of alternative assessments is appropriate

Alternative assessments issued pursuant to separate tax Acts

You may issue alternative assessments 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 example, where there is 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 multiple taxpayers under the same tax Act

You may issue alternative assessments to different taxpayers in respect of the same income and the same income year.[6]

For example, you may issue an assessment to the trustee of a trust and also issue assessments to the trust beneficiaries where there is uncertainty as to whether the beneficiaries are presently entitled to income of the trust.

There may also 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.

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

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 the income has been derived.[7]

Alternative assessments issued pursuant to different authorising provisions of the same tax Act

There are some circumstances where you may issue alternative assessments to the same taxpayer for the same income year pursuant to more than one authorising provision of the same Act. For example, if we have assessed the taxable income of a taxpayer for an income year, an assessment of something other than taxable income can still be issued to the taxpayer.

6. Circumstances where the issue of alternative assessments is not appropriate

An alternative assessment is not made when any uncertainty of the facts or operation of the law gives rise to alternative views in respect of the one assessment for a taxpayer. For example, uncertainty as to whether an amount is ordinary income or statutory income of a taxpayer but either amount is assessable income and ultimately forms part of the taxpayer's taxable income for that income year.

In these instances we will generally issue an assessment to give effect to the highest amount we consider is correct following from these alternative views.

7. Recovering the tax payable to the ATO

The production of a notice of assessment is conclusive evidence of the due making of an assessment and, except in proceedings in relation to a review or appeal, that the assessment is valid and the amount and particulars of the assessment are correct.

When tax becomes due and payable under a notice of assessment, it becomes a legally binding debt of that taxpayer.

[4] *R v. DFC of T, ex parte Hooper* (1926) 37 CLR 368.
[5] *FC of T v. S Hoffnung & Co Ltd* (1928) 42 CLR 39; *FJ Bloemen Pty Ltd and Simons v. FC of T* (1981) 147 CLR 360.
[6] *DFC of T v. Richard Walter Pty Limited* (1995) 183 CLR 168; 95 ATC 4067; (1995) 29 ATR 644; *Kordan Pty Ltd v. Federal Commissioner of Taxation* [2000] FCA 1807; 2000 ATC 4812; (2000) 46 ATR 191.
[7] *BHP Billiton Petroleum (Bass Strait) Pty Ltd & Anor v. FC of T* (2002) 126 FCR 119; 2002 ATC 5169; (2002) 51 ATR 520.

Despite the standing of alternative assessments once issued and the binding debt created, we are not permitted nor intend to undertake double recovery of the tax.[8] Our intention is to ultimately collect the relevant amount of tax payable on the alternative assessments to the extent they prove correct to the exclusion of others.

You should commence the usual debt collection procedures for amounts owing under alternative assessments. We have discretion as to which assessment is collected on and as to the amounts collected under each assessment, but there is an obligation to ensure these actions are not oppressive.[9]

We do not normally commence proceedings to recover the aggregate amount of tax owing under all alternative assessments. However, we may seek to recover the amount of tax payable or take action to secure the assets of a taxpayer where the tax payable under any of the assessments is at risk because the taxpayer is dissipating assets or taking other action to stop us being able to collect.

When undertaking debt collection activity where alternative assessments have issued, you should also note our policy on remission of general interest charge where all undisputed tax is paid and at least 50% of the disputed liability is paid – see PS LA 2011/4 *Collection and recovery of disputed debts*

8. Advising the taxpayer when an alternative assessment is issued

You should ordinarily issue a letter to the relevant taxpayer or taxpayers prior to the issue of alternative assessments. However there may be circumstances which mean the letter issues at the same time as, or shortly after the issue of the alternative assessments.

The letter should advise each taxpayer that:

- Alternative assessments are being issued as on the available information there is uncertainty on the facts or operation of the law which indicates any of these assessments is capable of ultimately being correct.
- How much of the tax payable is the subject of an alternative assessment ('the relevant amount of tax').
- We only intend to collect 'the relevant amount of tax' and do not intend to recover the aggregate amount of all assessments.
- What payments of tax we require be made in respect of their assessment.
- The taxpayer may object against the assessment having regard to the time limits allowed for lodging objections.
- Once the 'final' liability has been determined, either by way of agreement with the taxpayer or resolved through an appeal process, the relevant assessments will be amended. We will not ultimately collect more than the final liability.

There may be instances where a taxpayer experiences financial difficulties as a result of alternative assessments, such as the ability to obtain credit. If we are advised of these situations, we will work with the taxpayer to help in dealing with these consequences.

9. More information

Other relevant Law Administration Practice Statements include:

- PS LA 2005/24 *Application of General Anti-Avoidance Rules*
- PS LA 2008/18 *Interaction between Subdivisions 284-B and 284-C of Schedule 1 to the Taxation Administration Act 1953*
- PS LA 2010/1 *Approach to cases involving Division 6 (trust income)*
- PS LA 2011/4 *Collection and recovery of disputed debts*
- PS LA 2015/2 *Trustee assessments*

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[8] *Richardson v. FCT* (1932) 48 CLR 192; (1932) 2 ATD 19
[9] *Winter v. Deputy commissioner of Taxation* 87 ATC 4655